PASSENGER LIABILITY OF INTERNATIONAL AIR CARRIERS

by

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ABSTRACT

The civil liability of an air carrier for the death or injury of a passenger in international flight is limited in most cases by international agreement. This maximum limitation is contained in the Warsaw Convention, drafted in 1929 to meet the needs of the carriers of that period. The inertia of the status quo has allowed the continued existence of the limitation, assisting to some degree the development of the industry but at a serious cost to the legitimate rights of the passengers or their survivors.

Discussions of the role of limited liability are carried on by national governments who must each balance the conflicting interests of their country's carriers and passengers. Disagreement has resulted from the fact that each state views an equitable balance in different terms.

This has lead to a partial breakdown of uniform private air law as contained in the Convention; the critical party, the U.S., operating outside its ambit. Although all countries, aware of the benefit of uniform law in these situations, are committed to agreement they have been unable to reach consensus on the terms of that agreement. The U.S. left the Convention, then established an ancillary instrument in 1966, yet in the intervening period the countries have failed to formulate a new plan for uniform law in this area.

The thesis of this paper is that lack of consensus resulted from the manner of negotiation. The discussion revolved around the absolute level of liability limitation and the parties reached an impasse typical of single-issue deliberations. A point is reached beyond which the parties cannot concede and still protect their basic interests. In this case that point was reached before a consensus.

The object of the thesis, therefore, is to propose a multipoint "package" which is directed at gaining agreement from all parties. The ultimate agreement in this situation is a function of the positions and negotiating strength of the
parties so the proposal is heavily weighted towards the U.S. stand. At the same time, the multipoint aspect allows the negative effects of this concession on the other nations to be counterbalanced by ancillary conditions in the proposal. By broadening the field of negotiation, it becomes possible to encompass the needs and means of all parties involved.

The result is a nine-point proposal which is not held out as being necessarily just or even reasonable - these are relative virtues and the prime requirement of any proposal here must be acceptance by the nations.

The data from which the proposal was developed is assembled in a chronological framework, tracing the course of limited liability from 1929 to date. The discussions, agreements, and disagreements revealed in this evidence provide the source of the two points of the proposal. The first being the criticism of single-issue negotiation and the second, a package seen to be an acceptable solution to the problem.

It is against this data that the thesis must be tested; since it is a subjective decision the test must be the consistency with the evidence and the reasonableness of the proposal in light of the facts.
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ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey to, from, or with an agreed stopping place in the United States of America, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain carriers, parties to such special contracts, for death or personal injury to passengers is limited in most cases to proven damages not to exceed U.S. $75,000 per passenger, and that this liability up to such limit shall not depend on negligence on the part of the carrier. The limit of liability of U.S. $75,000 above is inclusive of legal fees and costs except that in case of a claim brought in a state where provision is made for separate award of legal fees and costs, the limit shall be the sum of U.S. $58,000 exclusive of legal fees and costs. For such passengers travelling by a carrier not a party to such special contracts or on a journey not to, from, or having an agreed stopping place in the United States of America, liability of the carrier for death or personal injury to passengers is limited in most cases to approximately U.S. $10,000 or U.S. $20,000.

The names of carriers, parties to such special contracts, are available at all ticket offices of such carriers and may be examined on request.

Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the carrier’s liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative.
CHAPTER ONE

INTRODUCTION

SITUATION

The year was 1929 - Lindbergh had just flown the Atlantic, the six-passenger 150 mph Lockheed Vega was the most popular aircraft and the leading issue was whether the future of aviation lay with lighter or heavier than air vehicles. This was also the year that nations engaged in air transport gathered in Warsaw, Poland to sign an instrument that would define relations between passengers and air carriers in the 1970s.

Air carriers as a participant in society are liable for the effects of their actions upon those with which they come in contact. One of their most important "contacts" are the passengers and a duty exists in reference to this group - to carry them safely to their agreed destination. The carrier sometimes fails to fulfill this duty and a liability arises. The instrument signed in 1929 and this paper deal with that liability which regrettably remains an important issue in air transportation. The liability spoken of relates to civil liability to the passenger or his survivors for death or injury suffered in international flight. It deals with the rights of parties inter se and not with criminal responsibility which protects the rights of society as a whole.

The instrument was entitled "The Warsaw Convention", it applied only to international flight and its central provision was a maximum limitation on the carriers' liability for the death or injury of a passenger. The Convention was in response to the needs of that period but in continues in force today because of the inertia of the status quo. An industry has grown up with limited liability as an integral element and its removal is viewed to varying extents as harmful and disruptive; countering this is the continuing impairment
of the legitimate rights of the passenger.

The key participants in the debate of the role of the Warsaw Convention in the present industry, are the national governments of each state charged with balancing the conflicting interests of the carrier and passengers. The position taken by each nation on limited liability is based on their view of the particular needs of their passengers and carriers. This position is then converted into a degree of influence in the negotiations based on power within the international community and more importantly on the ability of that country to elect the alternative (i.e. operate outside an international agreement to the detriment of the other nations).

The central figure, on the basis of these two factors is the United States. Not only have they the ability to unilaterally determine the future of any international agreement, including the Warsaw Convention, but they hold the most unacceptable views on limited liability in the eyes of the other nations.

The Convention has been adapted on the basis of experience and changing needs but a very critical impasse has been developing over the past decade. It is a classic trade-off situation where the satisfaction of carrier needs is at the expense of the passenger and vice versa. Adding to the complexity is the developed/lesser-developed country relationship which is growing rapidly in significance.

The U.S. on the basis of its perceived needs has partially withdrawn from the Convention and the point is approaching when a decision will have to be made regarding its complete withdrawal or participation. Withdrawal would spell certain defeat of international agreement on passenger liability and a serious loss to both passenger and carrier. Despite whatever inequities either party sees in the present agreement, it is totally accepted that all concerned
would be in a worse position without it. The nature of the industry and passenger liability both rule out their proper functioning in the absence of international agreement. This problem will be set out in detail in the paper as will a proposal designed to bring the parties together in the negotiations.

**THESIS**

The formulation of this solution is the object of this thesis. It is derived from identifying the basic needs of the passenger and carrier as perceived by individual states and then translating these many views into one agreement on the basis of negotiation strength. The effect of this latter factor is that the proposal is not held out as one that is necessarily just to the parties or reasonable to the author. It is, however, what is required in the situation - a pragmatic solution, one that aims solely at acceptance and having the nations once again function within an international agreement. Using acceptability as a yardstick, many plans were rejected despite whatever qualities they may have possessed. Strong arguments could be made for unlimited liability or no liability at all, but they failed the test of acceptability. Moreover, to propose a "just" or "reasonable" solution is impossible - they are relative attributes which vary from country to country and situation to situation.

Coincident with acceptability, however, the proposal can and does seek to incorporate sufficient flexibility to approximate the basic needs of the parties involved. The thesis of the paper is that agreement is presently blocked by the nature of the negotiations. To date, they have largely revolved around the absolute level of limitation and as can be expected of single point discussions, the stronger party will achieve the desired result at the expense of the weaker, if in fact, any agreement can be reached. Therefore, the solution is characterized as a "package" - a multipoint proposal with the primary goal of acceptability in that it is weighted heavily towards the views of the
critical party, the U.S. The multipoint aspect, however, corrects the flaw which exists in current negotiations, it allows ancillary fields of discussion and compromise so that acceptance is encouraged as agreement is not at the total expense of the weaker party as it has been in the past. The thesis holds that a concession to the U.S. on the major point of liability limit can be combined with other elements of a package to counter the negative effects of this concession on the other nations. This encourages both the U.S. and the array of other nations to move towards the middle, and agreement, from the extreme positions they now hold.

METHODOLOGY

The data for the thesis is presented in a chronological development of limited liability for passengers in international flight. Negotiations, discussions and agreements beginning with the Warsaw Convention in 1929 and moving to the present date reveal a mass of evidence used in the thesis. Three important aspects are established in this survey - (i) the position of each party as shaped by its beliefs, needs and means, (ii) the intricate calculus of the trade-off situation and the interdependent influence of an action by any one party, and (iii) most importantly, the power of each party to influence the ultimate conclusion.

The chronological framework was selected as it most clearly displays the development of these three points, thereby adding a third dimension to an understanding of present positions.

The thesis is to be tested against this evidence as presented. It was proposed as a corrective to the present course of negotiations and it aims solely at acceptability. In the course of designing an acceptable proposal other qualities or characteristics were included such as a consideration of the positions and needs of lesser developed countries yet these are means and not ends in themselves.
The data is qualitative and not quantitative - testing of the thesis must therefore be its consistency with the evidence presented. Assessment can not be accomplished by the use of a formula; a subjective evaluation is all that is possible. This data is gathered from minutes of meetings of organizations involved in this field, court decisions and legal articles by jurists.

OUTLINE

Chapter Two deals with passenger liability in Canada, that is, domestic carriage outside the operation of the Convention. The concept of liability and other points of law are expanded upon and a system is displayed against which international liability can be contrasted and better appreciated.

Chapter Three is the first step in the chronological development of the limited liability of international air carriers. It deals with the Warsaw Convention, the reasons and events leading to its creation and the massive changes it brought about in international law. The Warsaw Convention is the basis of the present liability regime and a thorough knowledge of it is necessary to examine the current problem.

Chapter Four is the next step in the time framework, the Hague Protocol. This occurred in 1955 and marked not only a change in liability limits but signalled a change in the course of national views on limited liability, notably those of the U.S. While national positions develop continually, the change only becomes evident at each round of negotiations. Conditions in the U.S. and the air transport industry account for the change of U.S. policy over time, but changes in the liability regime are not continual but intermittent. It is this fact that renders each new round of negotiations and agreement very instructive.

Chapter Five relates the events surrounding the filing by the U.S. in 1965 of a Notice of Denunciation of the Warsaw Convention. This episode reveals
the modern-day U.S. stand on limited liability and the manoeuvering that occurred on both sides to maintain the agreement.

**Chapter Six** discusses the Montreal Agreement of 1966. This is a very important event in that it saw the withdrawal of the Notice of Denunciation and an amendment made to the Convention to accommodate U.S. demands. The Agreement is in force today and governs any flights touching U.S. territory. It provides another rich source of evidence and facts on positions and strengths of the various parties.

**Chapter Seven** is the first chapter in a series of three which deals with topics relevent to a liability proposal. It covers absolute liability which is an old concept in law but one which did not enter the negotiations until 1966. It is necessary to consider this element in drafting an acceptable solution, its effects are massive and, therefore, represents a major point of negotiation.

**Chapter Eight** is on the subject of insurance. This practice is the mortar which holds the present and any future liability scheme together; in converting a potential disaster for the carrier into a certain operating cost, it completely changes the nature of the problem. Insurance costs provide the "currency" for relating proposals, positions and the interdependency of the acts of the carrier and the passenger.

**Chapter Nine** discusses the concept of dual limits. This means that there are alternative limits of liability depending on the person, country or situation. It is a solution of despiration and is presented, despite the fact that the proposal rejects it, because, of its demonstration of the futility of a single-point discussion of liability. Valuable insight is provided into the party's positions.

**Chapter Ten** contains the chief source of data for the thesis. The 1966 ICAO Montreal meeting marked the beginning of the current stage of liability
negotiations. The U.S. threat of withdrawal preceded the meeting and there were serious attempts by the national governments to work out a compromise. The meeting failed to reach a consensus but the current positions of the parties and their propensities to compromise are set out clearly.

Chapter Eleven deals with the last step in the negotiations - The Guatemala City Protocol. Some useful evidence is provided here but its significance is due to the fact that the Protocol represents the best efforts of the nations to reach agreement pursuant to their discussions. It is dealt with to demonstrate the reasons for its ultimate defeat and to lend support to the changes recommended in the thesis. It represents the ultimate result of single-point negotiations.

Chapters Twelve and Thirteen set out the thesis proposal. It is a nine-point package based on the underlying rationale of the thesis. Each point is discussed in terms of the effect it has on the acceptability and the overall reasonableness of the package. The influence of the points are discussed in qualitative terms but in a manner whereby the total proposal can be appreciated.
CHAPTER TWO

PASSENGER LIABILITY IN CANADA

A brief outline of the law applied to cases arising out of domestic air accidents will create a better appreciation of liability in international flight.

In Canada there are two alternative systems of law regulating rights between individuals; Civil Law in Quebec and Common Law in all the other provinces and territories. The BNA Act assigned the provinces the responsibility of establishing courts of civil jurisdiction to hear cases such as those arising out of aviation accidents. Depending on the province where the suit is brought one of the two systems apply.

COMMON LAW

This body of law is a product of England and came to Canada with the early settlers. It is judge-made law in that previous decisions of other courts in the system, if relevant, are applied to the case at hand. This doctrine of judicial precedent is combined with the rule of stare decisis* to produce a cumulative body of decisions subject to refinement or redirection by a superior court.

The rules applicable to air transport are not an independent body of law but rather an application of general principles to specific situations, therefore considerable weight is given to cases involving the other modes of transport.

In Common Law jurisdictions passenger liability falls under tort law - specifically negligence. This is an act or omission in breach of a duty of care which the defendant owes the plaintiff. This duty is fixed by law and *stare decisis - The policy of the court to stand by precedent and not disturb a settled point.
is fixed by law and is owed to persons generally.

The plaintiff in a general negligence action must establish several points:

(i) **That the defendant was negligent** - The general rule is that the burden of proof is on the plaintiff although under certain circumstances this may be reversed to varying degrees.

The duty of an air carrier is to use all reasonable care and forethought to carry the passenger safely to his agreed destination. This does not extend to cover more than the provision which human foresight and scientific knowledge could ensure. The standard of care is based on the knowledge which the carrier had or should have had at the time of the accident. The standard applied to the pilot is that of a careful, reasonable, and competent pilot. The carrier in Canada is not an insurer for the passengers' safety, unlike the position of a common carrier in the U.S.

(ii) **That such negligence caused the accident** - The court must consider if the act or omission was the proximate or legal cause of the incident; it need not be the sole factor, only a significant one.

(iii) **That the act was unjustified** - The defendant has several potential defences available. Those usually relevant to aviation are:

   (a) **Inevitable Accident** - The accident which occurred was one which no reasonable man could possibly be expected to foresee and guard against.

   (b) **Necessity** - The defendant may claim the particular act which caused the injury was calculated to afford protection for the plane and the passengers.

   (c) **Contributory Negligence** - This arises when there is an act or
omission amounting to want of care on the part of the person
complaining of the injury, which concurred with the defendant's
negligence to form the proximate cause of injury.\textsuperscript{5} The con­
cept of comparative negligence is used to reduce the award
commensurate with the degree of contributed negligence, but is
applicable only in minor accidents. (e.g. a passenger disregarding
a seat-belt warning in turbulence)

(iv) That the plaintiff suffered a loss - This may be either economic or
on the basis of pain and suffering. The suit may be brought by the
passenger for injuries received or by anyone suffering a pecuniary
loss as a result of wrongful death.

The grim reality of air accident litigation is that the majority
of cases are for death rather than injury. World statistics show
that between 1961-1968 in all accidents involving some loss of life
only 20\% of the passengers survived the crash.\textsuperscript{6}

CIVIL LAW

This system, used in Quebec, represents another approach to the analy­
sis and solution of legal problems. The prime difference in the two systems
is that rather than being based on case-law, the Civil Law jurisdictions
have as a central source a codified body of law derived from the Roman and
Napoleonic Codes.

In these jurisdictions passenger liability is treated as an aspect of
the law of obligations. The action has its roots in contract which is an
agreement which creates or intends to create legal obligations between the
parties to it. The contract of carriage between the passenger and the car­
rier implies that the latter will carry the passenger from origin to destina­
tion safely.\textsuperscript{7} The obligation is one of result. The relevant provisions of
the Quebec Civil Code are Articles 1024, 1053, 1054 and 1056.

This obligation relates to the contracting parties as compared to Common Law where the duty is fixed by law and owed generally to those around you. Contractual elements exist in Common Law cases because of the contract of carriage but they modify rather than found the action.

The obligation of the carrier is very heavy - to exculpate himself, the defendant must establish that the accident was caused by vis majeur or some cause entirely beyond his control. Although this appears more onerous than Common Law, changes in evidentiary procedure in air transport cases have placed a similar burden on the carrier defendant under the latter system.*

DAMAGES

Under these two systems the normal situation is proof of fault and full compensation. Compensation is in the form of unliquidated damages, a sum which the court chooses to award having regard to the facts. This fulfills two distinct functions:

(i) Most importantly, that of compensating the party suffering the damage.

(ii) To varying degrees, a punitive element. This sanction is imposed on the person liable, constituting a dissuasive element aimed at avoiding the repetition of the acts which lead to the damage.

Damages are assessed under two heads:

(i) General - Compensates for loss not capable of accurate pecuniary assessment but which is felt to result from the wrong. e.g. pain and suffering, loss of life or earning possibilities

(ii) Special - Those damages which can be accurately assessed as compensation for a definite financial loss.8 e.g. medical fees and lost wages

*Specifically res ipsa locquitur, to be dealt with later in this paper.
Public policy in Canada has not favored an upper limit on recovery from a defendant carrier. Section 352 of The Railway Act prohibits inclusion in any contract of carriage, conditions impairing, restricting, or limiting the liability of a railway without approval of the Canadian Transport Commission. Railways in Canada have made a practice of accepting full responsibility for the death or injury of a passenger. Highway carriers are also subject to unlimited liability.

Domestic air travel is subject to The Aeronautics Act which contains no reference to limited liability. Therefore, the CTC has set a minimum liability of $40,000.00 per seat. Airlines in Canada have as a practice accepted full liability.

Having sketched the rules applicable to domestic flight, the paper next deals with the radically different liability of international carriers.
CHAPTER THREE

THE CREATION OF THE WARSAW CONVENTION

In order to fully understand the present state of passenger liability the creation of the instrument which forms the basis of the liability must be dealt with.

In 1923 the French National Assembly began consideration of a bill regulating the liability of the air carrier. Realizing that this question could only be properly dealt with on an international basis the government of France invited a number of states engaged in air transport to take part in a conference, the aim of which would be to draft an agreement relating to carrier liability.

The First International Conference on Private Air Law convened in Paris in 1925 and at its conclusion the groundwork had been laid for a draft convention.* The conference established an influential group to shape the discussions into a draft convention to be submitted to the states at the next conference. The group was called CITEJA (La Comite Internationale Technique d'Experts Juridiques Aeriens).

The Second International Conference on Private Air Law was set for Warsaw, Poland; October 4 - 12th, 1929. CITEJA presented a convention designed "to regulate in a uniform manner the conditions of international transportation of the air carrier." The delegates were aware of the need to develop the industry within a framework of solid legal principles. The

*Convention - "A multilateral agreement which a number of states have concluded for future conduct or for creating some international constitution. Any nation is at liberty to join and it does not become operative until a specified number of countries have ratified."
Rapporteur of the Preparatory Committee in introducing the draft said, "What the engineers are doing for the machines we must do for the law."³

At the conclusion of the conference the instrument was opened for signature and in 1933 it became operative when ratified by five states; becoming the basis of present-day international carrier liability.

The Warsaw Convention arose to meet very pressing needs of the period; both passenger and carrier were adversely affected by the operation of the existing rules of law relating to air accident litigation. Changes brought about in the Convention reveal the character of the conference and all subsequent developments in passenger liability. Any change which benefited one of the parties to the relationship represented a cost to the other party. The trade-offs which occurred appear equally distributed between passenger and carrier. This aspect of quid pro quo permeates the entire course of negotiations regarding liability. The changes can be characterized on the basis of the recipient of the benefit.

**CARRIER**

The air transport industry in its infancy was unable to attract adequate capital to finance its growth. The speculative nature of the investment was aggravated by the considerable risk of having the entire capital structure of a small firm being dissipated by large judgments as a result of one of the very frequent accidents.* The industry felt an upper limit on liability, set at the average recovery level would induce additional capital investment.

*The exposure of the carrier to suit is apparent from the safety record of the period. In the years 1925-1929 the fatality rate was 45 per 100 million passenger miles. In 1970 it had dropped to .29 per 100 million passenger miles.*
Governments, anxious to have a viable air transport industry, had to varying extents stepped in to fill this capital shortfall by means of subsidization or direct operation. This accounts for the fact that the primary concern of the national delegations was for the carrier and not the passenger. In deference to the expressed needs of the carrier, the Convention set a maximum limit on recovery for death or injury of 125,000 French gold francs, then valued at approximately $5,000.00.

This protective attitude towards the carrier has marked the discussions of private air law since 1929. As late as 1952, the Rome Convention on Liability to Third Parties and Surface Damage contained in the Preamble the statement that the limits on carrier liability contained therein were adopted "in order not to hinder the development of air transport".

The prevailing view on equitable risk distribution is displayed in this judicial quote from an Arkansas court in 1935. "It would seem that in applying such a rule of evidence to travel by air, consideration should be given to the extent of development and resultant safety of this mode of travel as compared to other modes of travel. While it has been judicially recognized that aviation is no longer an experiment, it is still in its formative stages and liability of the carrier should hardly be measured by the same rules of law governing transportation by land or water. Many new devices increasing safety of flight will doubtless be discovered and that share of the present damage due to the mode of travel still being in its infancy should not in all fairness be borne by the carrier."

**PASSENGER**

In return for the loss of right to full damages, the passenger receives three substantial compensating benefits:

(i) **Uniformity in Private Air Law** - "International air law is a mixture
of public and private international law. The former is a body of rules which states regard as binding on one another. An example of this is the Chicago Convention. The latter is that part of a country's domestic law which courts apply to cases where there is some connection with a foreign country. It deals with individual rather than national rights with a view to choosing the appropriate system of law to be applied to the case.  

Air transport generates contacts with different legal jurisdictions at an unprecedented rate which makes it a frequent user of private international law. The classical means of dealing with these situations is by choice of law. When a case involving foreign elements comes before a court the judge must first decide if the court possesses jurisdiction; the general rule is that the court has jurisdiction over disputes in respect of which it can give an effective judgment. If this is decided in the affirmative, it is then necessary to decide which of the various legal systems, either foreign or domestic, should be applied.

In a case where the facts indicate that foreign law applies, it governs the substantive aspects of the case. The court seised of the case always applies the *lex fori* to the procedural aspects regardless of the choice of substantive law.

Substantive law defines the acts, relations, status and dealings which create or bring into play rights and remedies. In a tort action, this covers points such as whether the plaintiff has sustained a legal injury, the standard of care to which the defendant

*lex fori* - Law of the jurisdiction containing the court seised of the case.
Procedural law governs the procedure to enforce rights which arise under substantive law and is always based on the *lex fori*. In 1929 the hard and fast rule in tort cases was that the *lex locus delecti* determined the substantive aspects of the case. The jurisprudential basis for this choice of law was that the *obligatio* of the tortfeasor arose at the place of the wrong and followed him to be enforced in any court which could offer jurisdiction over him.

This choice of law rule created severe problems for the plaintiff in a liability suit. The fortuitous nature of the crash site subjected the plaintiff to rules and jurisdictions he never contemplated. Faced with a complex and uncertain legal environment, the passenger or his survivors would be assisted if the claim procedure could be determined beforehand.

The Warsaw Convention removed the need for the *lex locus delecti* referral by substituting a universal system of substantive law. With rules established prior to an accident and independent of the accident location, the passenger can calculate his risks with some degree of certainty.

The substantive areas governed by the Convention are; the establishment of a cause of action; limits set on liability and time for suit; and burden of proof. The scope of the instrument is limited to "certain rules" and therefore many areas are relinquished intentionally or by

---

*lex locus delecti* - Law of the jurisdiction where the wrong occurred.
mere omission to be settled by the *lex fori*. An example of this is the determination of the persons having a right to bring an action and their rights *inter se*.

The legislatures of each of the ratifying nations passed an act introducing the terms of the agreement into their domestic law, creating a new wrongful death statute or cause of action for injuries. The Convention depends upon the provisions of the domestic law for its complete enforcement. In Canada, the incorporating act is The Carriage by Air Act.

(ii) **Assurance of Limited Recovery** - The Convention assisted the passenger by prohibiting the making of a less favorable contract by the carrier. Airline tickets are essentially a contract of adhesion and in 1929, one of the common conditions in a contract was an exculpatory clause shielding the carrier from all liability. The practice was legal in Canada[^10] and continued on domestic flights until the Air Transport Board set restrictions.[^11]

(iii) **Burden of Proof** - The third major benefit granted the passenger was a shifted burden of proof. The burden is "the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties."[^12] In 1929 the plaintiff in an air accident suit was severely handicapped in proving negligence. The plane was not in his control prior to the crash, the evidence was often destroyed and investigative procedures were primitive yet expensive.

The Convention created a presumption of carrier negligence and it became that party's responsibility to disprove it. This was of greater assistance in the Common Law jurisdictions because a similar presumption already existed in Civil Law.
In view of the changes brought about by the Warsaw Convention this first stage of development is seen as an attempt to balance conflicting interests in air carrier liability.

(Appendix A examines in detail the structure and operation of the Warsaw Convention)
CHAPTER FOUR

THE HAGUE PROTOCOL

The direction and nature of liability negotiations are revealed by the events leading up to and resulting in the next major agreement in this area.

The period between Warsaw (1929) and the meeting at the Hague (1955) was one of uneven development for the industry. The depression of the 1930's nearly crippled it, the sole benefit being an encouragement for states to sign the Convention during this period when venture capital disappeared for the airlines. World War II followed and while it produced advances in air transport technology, growth forces for the industry were diverted. Development proceeded rapidly after the War.

During this period the liability regime created in Warsaw was generally acceptable to member nations but a force was building that would eventually threaten the existence of international agreement on carrier liability. Adjustments to be made at the Hague would only delay the collision course of the limitation level and the needs of one country's citizens.

A common limit on recovery will effect various countries in different manners. The U.S., experiencing the twin influences of inflation and a rising standard of living, felt the limit had to be raised to offer even minimum protection for her citizens. If an American was killed in Warsaw flight, his family could recover a maximum of $8,300.00, a large figure in terms of the incomes of a lesser developed country (LDC) but only slightly more than the cost of supporting an average U.S. family for a year in 1955.

Incidents such as the 1943 crash which seriously injured a popular U.S. entertainer, Jane Froman, and subjected her to the Warsaw limit increased public
pressure on the U.S. government to seek upward revision. After 1945, the U.S. became the main protagonist in the discussions. It is interesting to note that the U.S. is the only country where the limitation became a popular issue.

Revision in fact had been under consideration by CITEJA since 1935, this group being concerned with the level of limitation and the effect it would have on continuing international cooperation. In May of 1947 when the new ICAC (International Civil Aviation Organization) replaced CITEJA, it discussed in Cairo (1946), Madrid (1951), Paris (1952) and Rio De Janeiro (1953). Not until 1955 was a draft agreement ready and a diplomatic conference called for at the Hague. The U.S. opened with their demand for a $25,000.00 limit and were vigorously opposed by Japan, the Latin American countries, the Communist Bloc countries, and all the other states displaying varying degrees of disapproval.

The reasons behind this confrontation are complex but are central to an understanding of the current problems. The following is a background to the respective positions.

UNITED STATES

Damage awards in the U.S. are the highest in the world and it is this fact that caused that country to be the one most affected by a limitation. It is this which combines with their massive international traffic generation to produce both the impetus and ability to bring about changes in the liability regime.

Why are American awards so high while a country such as Canada, which is similarly situated is content with the existing limits and would eventually oppose U.S. demands in 1966?

(i) Standard of Living - High in the U.S. but not in relation to Canada.
(ii) **Underdeveloped Social Security System** - Death and injury creates severe economic consequences for those involved or their dependents while socialized schemes in other countries tend to alleviate these consequences.

(iii) **Disregard of Collateral Compensation** - While circumstances such as personal accident insurance would reduce the plaintiff's need for damages, they are not generally considered. For example, in California in a trial for damages for wrongful death of a husband, the fact that the widow has remarried and is presumably supported is inadmissable.

(iv) **Peculiar U.S. Court System**

(a) **Juries** - The jury system is still used to determine damages in many U.S. courts. Composed of persons described by one English judge as "unaccustomed to protracted thought", they are prone to be sentimental, allowing punitive rather than compensatory motives to prevail. In personal injury cases, they are susceptible to manipulation by an experienced plaintiff lawyer as he hammers away at extraneous details calculated to incite the jury. The wide-spread use of liability insurance causes a jury to view the compensation as a limitless resource while judges could discern a long-range social policy and the effects of high awards on insurance costs.

(b) **Attorneys' Fees** - The standard practice of U.S. trial lawyers in air accident cases is to charge a contingent fee (i.e. one based on recovery, if any). The average is 33% ranging as high as 50%. To adequately provide for the plaintiff after payment of legal fees, the court must give a gross award 50 – 100% higher than the desired net award. This fact prompted Sir William Hildred, past Director General of IATA (International Air Transport Association)
to remark, "I impute no motives but it is the American trial lawyers who are at the forefront of the battle for increased or unlimited liability."¹ This system is shocking to lawyers trained in the English tradition where this practice is termed champerty and is illegal.

(c) **Obsolete Conception of the Function of Tort Law** - This produces a propensity to allow moral or punitive damages rather than attempting as far as money can to place the injured party in the position he enjoyed before the wrong of which he complains.²

(d) **Ability to Express Intangibles in Money Terms** - The most prominent U.S. plaintiff lawyer in air litigation, Lee S. Kreindler, praises the U.S. system for its ability to "so tangibly recognize the value of a human life".³ The compensatory segment of a U.S. award is based on capitalized earnings. For example in Tuller v KLM, the court used:

\[
\text{Damages} = \frac{\text{Income} \times \text{Earning Life Expectancy}}{2}
\]

² to produce a $350,000.00 award.⁴ Income is the dynamic variable.

This is contrasted to the English view of damages - "Damages are in respect of a predominantly happy life, not of loss of future pecuniary possessions, hence social position or prospects of worldly possessions cannot be taken into account since happiness does not depend on them."⁵

**OTHER NATIONS**

Discussions of this group's position centers around the role of insurance in passenger liability. It is standard procedure for airlines to purchase passenger legal liability insurance, converting a risk into an operating cost. Whereas the objective of the law of negligence is to shift the loss from
the injured party to the tortfeasor, insurance shifts the loss to a group similarly situated, i.e. the airlines and ultimately the passengers. Any compensation that is paid under this scheme is reflected in the cost to the passenger of transportation.

Two factors associated with insurance produce what the other nations and in particular the LDCs regard as an inequity.

Firstly, the rating of passenger liability by the insurers is based on revenue passenger miles flown by the insured during a specific period, the operating record of the carrier and the estimated risk of accident. This bears heavily on the flag carriers of the LDCs which have light traffic and a relatively poor safety record. Additionally, a small airline is faced with a massive rise in premiums after an accident while those of a large carrier move up incrementally. These circumstances cause the cost of insurance in relation to revenues to be much higher for carriers of an LDC, often in excess of 2% of revenues. Thus, any rise in liability limitations and its influence on premium levels are of proportionately greater concern to those governments which heavily subsidize a flag carrier for reasons of national stature. The governments in underdeveloped nations are aware that development of air transport in their geographic area depends on bringing costs down to a range that the general population can afford.

Secondly, the distribution of compensation following an accident is not uniform. Those whose economic value is high, i.e. the citizens of a developed nation, receive the highest settlement.* Despite the fact that the cost of insurance is spread equally over the tickets, there is a differential allocation of benefits. The U.S. government insists that this is a justified

*The limit does not define the recovery but only the maximum possibly recovery. Damages for death or injury depend upon the individual, the socio-economic level of the country and the practice of the courts in that jurisdiction.
cost of access to the lucrative American market. The other nations view this cross-subsidization as an inequity and point out that if limits are raised, the variance in compensation will increase. That briefly is the peasant/king argument which states that the "peasants" of an LDC subsidize the "kings" of the U.S.

It is a weak argument:

(i) "Peasant" airlines do not carry "peasants". In most LDCs, air travel on international routes is available only to the elite, a situation similar to the North Atlantic in the 1950's. This group of travellers is very much affected by a limit.

(ii) Plaintiffs in the developed nations, particularly the U.S., do not regard these high settlements as windfalls but rather as a sincerely perceived need. The important point is not that the peasant/king argument is invalid but that nations other than the U.S. firmly believe it. This, combined with the U.S. stance provide the framework for a very difficult situation.

In reality, the limit will affect recoveries in most countries, some to a larger extent than others. Each government has assessed its conflicting interests in adequate settlements and lower air fares and determined the liability level that best balances these interests. All nations except the U.S. have decided that a level in the area of the present limitation best reflects the overall interests of her citizens.

Concurrent with their opening demand of a $25,000.00 limit, the U.S. introduced an attack on limited liability. While the main concern at Warsaw and the Hague was for the carrier, the U.S. adopted a counter-position supporting passenger interests.

A partial explanation for these views lies in the ownership of international carriers. In the U.S., they are privately owned while other governments
own directly or heavily subsidize their carriers, ultimately leading to varying biases. U.S. delegations claim with some justification that European delegates are in conflict of interest because of the fact that many of them are from the management of the state airlines. European delegations are equally displeased that the most influential, certainly the most vociferous group on the U.S. side, is the plaintiff trial bar.

The Chairman of the U.S. delegation later said, "Our line of argument was that the general rule required complete restitution for personal injuries and death or failing that, compensation in damages for any injury done to persons or property." 7

The other countries responded with an offer of $13,300.00 and when the U.S. sensed defeat, they asked for a three-day delay on the vote to piece together a compromise. This resulted in a $16,600.00 (two x Warsaw) coupled with a settlement inducement clause. This allowed a court to award the plaintiff costs if the carrier did not within six months of the incident offer a settlement equal to or in excess of the court award. This was proposed as a means to curtail the serious litigation that followed an accident. The U.S. in this clause achieved the same result as that envisioned by their original $25,000.00 proposal. Under either scheme, the U.S. plaintiff would receive $16,600.00 because the attorneys' fees were to be paid out of the $25,000.00.

By injecting this provision, the U.S. won a clear victory over the protests of many countries. The U.S. had long urged that legal costs be recognized as a head of damages but this would not apply in countries where (a) courts did not award separate costs, or (b) legal fees were more reasonable. The limit for a U.S. court was $25,000.00 while all others were distributed above $16,600.00.

The U.S. had achieved substantially all they came to the Hague to do, but it was not without costs in terms of strained relations with other member
states. The Chairman of the U.S. delegation said in retrospect, "It is
difficult to put one's finger directly on the true reason for the split.
Undoubtedly the standards of living and the per capita GNP of the various
countries concerned, in comparison to our own, form some part of the ex-
planation. Possibly a more doctrinaire approach to legal matters on the
part of European lawmakers is responsible. In any event, one thing is
certain, the foreign lawyers felt distrust, dismay and disdain for the death
claim compensation in force in the U.S. I have never been able to determine
just how tangible this legal bogey man was, whether it was grounded in a
real fear of economic consequences of insurance costs which greatly increased
verdicts might entail or whether it was a dislocation of the system they
were used to or perhaps, a philosophical insistense that human life could
not be measured in money." 8

Despite the provisions that the Protocol would not become effective
until ratified by 30 countries, the uniformity of the Warsaw Convention
throughout the world was destroyed. 9 Canada adhered to the instrument as
have seventy-five other states.

(Appendix B contains a detailed examination of the structure of the Hague
Protocol)
### TABLE ONE

**Passenger Recoveries from U.S. Carriers***

<table>
<thead>
<tr>
<th>Year</th>
<th>Average per Passenger (Warsaw)</th>
<th>Average per Passenger (Non-Warsaw)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>$8,061.00</td>
<td>$11,852.00</td>
</tr>
<tr>
<td>1951</td>
<td>3,154.00</td>
<td>14,350.00</td>
</tr>
<tr>
<td>1952</td>
<td>6,433.00</td>
<td>23,301.00</td>
</tr>
<tr>
<td>1953</td>
<td>8,696.00</td>
<td>38,111.00</td>
</tr>
<tr>
<td>1954</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1955</td>
<td>10,576.00</td>
<td>19,945.00</td>
</tr>
<tr>
<td>1956</td>
<td>5,828.00</td>
<td>29,035.00</td>
</tr>
<tr>
<td>1957</td>
<td>4,726.00</td>
<td>30,118.00</td>
</tr>
<tr>
<td>1958</td>
<td>4,812.00</td>
<td>57,601.00</td>
</tr>
<tr>
<td>1959</td>
<td>7,654.00</td>
<td>79,857.00</td>
</tr>
<tr>
<td>1960</td>
<td>7,470.00</td>
<td>48,378.00</td>
</tr>
<tr>
<td>1961</td>
<td>4,653.00</td>
<td>14,880.00</td>
</tr>
<tr>
<td>1962</td>
<td>6,000.00</td>
<td>63,434.00</td>
</tr>
<tr>
<td>1963</td>
<td>8,300.00</td>
<td>26,816.00</td>
</tr>
<tr>
<td>1964</td>
<td>8,142.00</td>
<td>76,652.00</td>
</tr>
</tbody>
</table>

*Lowenfeld, Liability of Carriers for Accidents in International Flights - The Warsaw Convention, 1972, p. 106*
## TABLE TWO

**Distribution of Compensation Settlements (Death and Injury) following Air Transport Accidents - 1965**

<table>
<thead>
<tr>
<th>State</th>
<th>Less than $17,000</th>
<th>$17-33,000</th>
<th>$33-50,000</th>
<th>$50-75,000</th>
<th>$75-100,000</th>
<th>$100,000+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>100.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Finland</td>
<td>100.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>France</td>
<td>90.3%</td>
<td>.2%</td>
<td>7.8%</td>
<td>1.5%</td>
<td>nil</td>
<td>.1%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>77.0%</td>
<td>6.9%</td>
<td>1.6%</td>
<td>2.5%</td>
<td>1.6%</td>
<td>10.4%</td>
</tr>
<tr>
<td>United States:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Warsaw, Death</td>
<td>80.9%</td>
<td>4.8%</td>
<td>6.8%</td>
<td>3.1%</td>
<td>4.4%</td>
<td>nil</td>
</tr>
<tr>
<td>Non-Warsaw, Death</td>
<td>42.1%</td>
<td>17.2%</td>
<td>8.6%</td>
<td>7.1%</td>
<td>5.4%</td>
<td>19.6%</td>
</tr>
<tr>
<td>Warsaw, Serious Injury</td>
<td>97.5%</td>
<td>2.0%</td>
<td>.7%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Non-Warsaw, Serious Injury</td>
<td>71.5%</td>
<td>12.5%</td>
<td>7.5%</td>
<td>2.8%</td>
<td>1.6%</td>
<td>4.1</td>
</tr>
<tr>
<td>Sweden</td>
<td>93.0%</td>
<td>7.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Poland</td>
<td>90.0%</td>
<td>6.0%</td>
<td>2.0%</td>
<td>1.0%</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Jordan</td>
<td>100.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Japan</td>
<td>100.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>98.0%</td>
<td>2.0%</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Canada (Non Air Transport) Death</td>
<td>60.8%</td>
<td>16.0%</td>
<td>15.2%</td>
<td>4.8%</td>
<td>2.4%</td>
<td>.8</td>
</tr>
</tbody>
</table>

*Lowenfeld, Liability of Carriers for Accidents in International Flight - The Warsaw Convention, 1972, p. 48*
Having achieved their objective at the Hague, the U.S. moved very slowly towards ratification. Being a treaty, it required the approval of the President with the "advice and consent" of a two-thirds majority of the Senate. Both the Eisenhower and Kennedy administrations failed to act on the instrument the U.S. had engineered.

This was due to widespread opposition that had arisen among the American populace against participation in any limited liability scheme. Leading newspapers such as The New York Times urged denunciation of the Convention.

Most importantly, the U.S. courts began their attack on the instrument. A New York court said, "The Warsaw Convention was a device to subsidize the then infant industry of international air transport ---- it is a strange concept to us in the U.S. that the subsidy should be taken out of the widows and orphans of the passengers."¹

The attack took the form of finding, at severe cost to the facts of the case, grounds for unlimited liability. The Lisi case provides a good example.² The "ratio" of the lower court was that the print size of the notice constituted inadequate warning. However, one of the dissenting judges said, "The majority do not approve of the terms of the treaty and therefore by judicial fiat, they rewrite it."³ Another judge said, "The question far transcends the question of the type used in the airplane ticket. The real issue is whether the courts of a member state should be allowed to rewrite the Convention because of their disapproval of a particular provision."⁴

This case sent shock waves of dismay throughout the other member nations. Canada and a number of other states interviewing as amicus curiae when the case was on appeal to the U.S. Supreme Court, took the stand that the terms should
be changed by multilateral negotiations not by the courts. The case was sustained by a divided court (4 to 4).

This propensity of the U.S. courts to find exclusions of the limit was termed by Rene Mankiewicz of Canada, "the judicial disunification of international law."

In 1965, a U.S. federal body, the IGIA (Interagency Group on International Aviation) composed of representatives of the FAA, CAB, State, Defence, Commerce and Labor departments developed a proposal which they felt would assist the Protocol in gaining Senate approval. They were aware that in the current public opinion climate, the Protocol by itself could never gain acceptance in the Senate.

In addition to the $16,600.00 available under the Hague rules, the scheme provided for an automatic $50,000.00 insurance payment to victims or survivors of an accident. The policy was in the form of accident rather than liability insurance and applied only to U.S. flag-carriers, but the IGIA felt competitive pressures would force other carriers operating into the U.S. to join.

The Air Transport Association of America opposed the scheme as did the insurance industry, the latter fearing government entry into the insurance field. This was a complete reversal from 1961 when a number of U.S. carriers initiated a "voluntary guest settlement" policy and were opposed by IATA and the CAB who claimed it was an unlawful rebate.

Hearings on the proposal were to be held before the Senate Foreign Relations Committee which would then recommend to the Senate whether or not to approve the instrument. The Committee held 16 to 1 in favor of ratification, provided it was combined with the insurance scheme. The one negative vote

* $25,000.00 for minors.
was that of Senator Homer Capehart whose son and daughter-in-law were killed on a flight subject to Warsaw rules. Although the U.S. courts found wilful misconduct and awarded $270,000.00, the regime of limited liability had gained a powerful enemy in Senator Capehart.

The insurance scheme however floundered in the Commerce committee due to vigorous interventions from many interests. It quickly became apparent that the supplementary insurance provision would not survive and the Protocol would be left to face a Senate vote alone.

The State Department knew that the Senate vote was imminent and that the Protocol stripped of the insurance scheme was certain to be defeated. The department did not want to risk defeat of a major treaty nor did it want to urge advice and consent of an inadequate measure.

The State Department then recommended through the IGIA to the carriers that in order to avoid the imminent denunciation of the Warsaw Convention, they should form a solution among themselves in the nature of a commitment to assist the U.S. government in bringing about an early diplomatic conference to increase the Warsaw limit to $100,000.00* and in the interim to voluntarily accept a limit of $100,000.00 rather than $8,300.00.

This was to be accomplished under Article 22 (i) of the Convention which permits the air carrier and the passenger to agree on a higher limit of liability. Legal credulity was stretched to utilize that article. It originally envisioned an express agreement being reached between a particular passenger and the carrier, not a unilateral waiving by the latter. The State Department justified it by stating that in giving the passenger a ticket with notice of a special agreement, it is assumed that the passenger in accepting delivery and

*The $100,000.00 figure was obtained by totalling the $16,600.00 available under the Hague rules, plus the $50,000.00 insurance clause, plus a one-third attorneys' fee.
boarding the aircraft, consents to the terms of the contract of carriage.  

This has not been tested in a court but under the common law, it is a question of fact not of law as to whether a certain notice to passengers of special conditions in the contract of carriage limiting a carrier's liability is sufficient to make it binding on the passenger.

The U.S. carriers discussed this overture and replied that they would only waive the limit to $50,000.00 and even that was dependent on the foreign carriers agreeing to a similar limit.

Having been defeated in this attempt, the State Department officials met with the Senate Foreign Relations Committee; the latter, now taking a hard line, agreed to table the Protocol indefinitely giving the State Department carte blanche to denounce the Warsaw Convention, if it saw fit and to choose the date if it so decided.

The U.S. government decided that the most appropriate course of action was to withdraw from the Warsaw Convention, an instrument with limits only half as high as the rejected Protocol, and to rely on the common law to protect travelling Americans.

The denunciation was filed with the Polish government on November 15th, 1965 so that the 1966 summer tourist market would not be covered by the Convention, the notice becoming effective on May 15th, 1966.

In a press release dated November 15th, 1965, the U.S. State Department said, "The U.S. would be prepared to withdraw the notice of denunciation deposited today if prior to its effective date of May 15th, 1966, there is a reasonable prospect of an international agreement on limits of liability in international air transport, in the area of $100,000.00 per passenger or on uniform rules but without any limit of liability and if pending the effectiveness of such international agreement there is a provisional agreement among
the principal international airlines waiving the limits of liability up to $75,000.00 per passenger.\textsuperscript{8}

The reasoning behind the U.S. decision to withdraw and rely on the common law is central to any analysis of the current situation. The U.S. is the key figure in any international agreement in this area and any proposal aimed at acceptance must accurately assess the costs and benefits of participation in view of each state, particularly the U.S.

Several aspects of the law relating to international air accidents had changed since 1929 which convinced the U.S. that on the balance their citizens' interests were better served outside the agreement.

(i) \textit{LEX LOCUS DELECTI RULE}

Transportation cases with their fortuitous \textit{locus delecti} had long bothered jurists as they saw the rule was not conducive to justice in these instances. Then an American court in Kilberg v Northeast Airlines applied the \textit{lex fori} to a case involving foreign elements, not because it was the law of the forum but because "on a grouping of contacts", the court felt the New York (forum) laws should apply to a case whose major contacts were with that state.\textsuperscript{9} Contacts considered in precedence to the \textit{locus delecti} were the domicile of the victim or the survivors and the place of contracting.

U.S. courts since then have used the "contacts" theory because they feel states other than the \textit{locus delecti} have a higher interest in the disposition of the case.\textsuperscript{10} This is in line with the practice of the courts in any country to refuse to enforce a foreign law that was contrary to public policy.\textsuperscript{11} This homeward trend of the courts to the \textit{lex fori} is a desire to apply, if possible, the law of the plaintiffs' domicile, the jurisdiction which is most concerned with the rights in the area of tort compensation.
The English courts adopted similar reasoning in *Chaplin v Boys* when they rejected the absolute rule of the *lex locus delicti* and indications are that this case will be followed in Canada.\(^{12}\)

Although not all U.S. states have adopted the grouping of contacts rule, in most cases an American plaintiff could gain jurisdiction in a U.S. court which had done so.

Even if the case of the American was tried under the substantive rules of a foreign jurisdiction, the laws of these states had radically improved since 1929 although they remained less favorable to a plaintiff than American laws. In Brazil, for example, a plaintiff was once limited to a recovery of less than $200.00\(^{13}\) but in 1963, the limit was raised to 150 times the minimum monthly wage currently in effect in that country.\(^{14}\) If an American was affected by a limit in a local wrongful death statute, it would in many cases exceed the limit contained in the Convention.

(ii) **RES IPSA LOCQUITUR**

In providing for the presumed negligence of the carrier, the Convention had greatly assisted the plaintiff under the procedure applicable in 1929. However, Civil Law courts used a similar presumption prior to 1929 and by 1965, the Common Law had developed an equivalent rule.

Common Law courts, including the U.S., now applied the concept of *res ipsa locquitor* - "the thing speaks for itself" - in air accident litigation. In a general negligence trial, the plaintiff must prove breach of a legal duty to take care which is very difficult in air accidents despite the fact it seemed clear negligence must have been involved. The rule of *res ipsa locquitor* reverses the burden of proof making it insufficient for the defendant to show that there were several hypothetical causes of an accident consistent with the absence of negligence. He must go further and either show that there was no
negligence or give an explanation of the cause of the accident which did not connote negligence. Should the defendant discharge the burden, it is again for the plaintiff to prove that the injury was caused by the defendant's negligence.

Res ipsa loquitur had long been applied to other forms of human activity and air transport became one of those activities when its level of safety and certainty attracted the application.

(iii) JURISDICTION

The central position of the U.S. in terms of air traffic generation and patterns reduced substantially the necessity of participation in a Convention, the terms of which were unsuited to its needs. Fifty per cent of international revenue passenger miles are of U.S. origin or destination. One half of this market is serviced by foreign carriers which places the U.S. in an excellent position to exercise jurisdiction over most airlines of the world.

In international law, the general rule is that a court has jurisdiction:

(a) Over disputes in respect of which it can give an effective judgment;
(b) Over disputes which the parties thereto voluntarily submit to its jurisdiction;
(c) Over persons outside the ordinary jurisdiction in cases where Order II, Rule I of the Rules of Court would apply making service abroad permissible. Cases under this head include torts committed or contracts originating in the jurisdiction.

Protection for U.S. citizens from the application of less favorable foreign law, now that the rule of lex locus delecti was broken, varied directly with the ability of the U.S. courts to obtain jurisdiction in their cases. Whereas under the terms of the Convention jurisdiction was severely limited, the U.S.
operating outside the Convention would utilize their central traffic position to assume jurisdiction. Operating under the rules of international law, the U.S. courts could guarantee in most cases that a U.S. plaintiff would receive a trial in a U.S. court. The benefit received by American victims and survivors was at a high cost to all international carriers. Since jurisdiction related solely to control over the defendant, not only would Americans seek a U.S. trial but so would plaintiffs from all over the world "forum shopping" to take advantage of the high U.S. settlements. Participation in an international agreement such as the Convention cost the U.S. a right of access for its citizens to their national courts.

It was apparent to the other nations that the U.S. would assume jurisdiction:

(a) Over airlines in respect of any flight from or destined to terminate in the U.S. as shown on the ticket;
(b) Over airlines for any flight where the ticket had been purchased in the U.S. from a ticket office or agency;
(c) Over airlines doing substantial business in the U.S. either through flight operations or by maintaining a ticket or advertising office even if none of the origin, destination or ticket purchases occurred in the U.S.;
(d) In any state where the defendant is doing business and, therefore, subjecting itself to jurisdiction, even an interline booking agency, and even if all flights took place outside the U.S.;
(e) Under "long arm statutes" which specify that the defendant is "transacting business" in the jurisdiction, defined in a wider sense than "doing business". This would cover an airline which writes a ticket for a continuing flight with the defendant airline. The journey would have to originate in
the forum but the defendant may be any one of the successive carriers.

Denunciation of the Convention promised these benefits and costs to the respective parties and this fact must be integrated into any proposed solution to current problems.

(iv) INTERNATIONAL COOPERATION

Countering the benefits perceived by the U.S. in their actions was the element of international cooperation. In a transnational activity such as air transport, it is self-evident that practicalities demand a uniform law based on reasoned legal relations.²⁰

There are two main elements in cooperation in this context: (a) the value of uniform law, and (b) a spirit of international good-will between states.

The U.S. government does not place a high value on the former but attaches massive significance to the latter. A State Department witness in the 1965 Senate hearings said, "Perhaps the most serious effect of denunciation would be the damage that such action would have upon the position and prestige of the U.S. as a world leader in the promotion of international cooperation in important aviation matters."²¹

The thinking behind that statement holds the key to any future agreement on a worldwide basis. When the tangible advantages the U.S. derives from a universal liability arrangement are added up, the aggregate is strikingly small. U.S. citizens do not need the protection of the agreement, at least not at the cost of limited judgments, and the U.S. carriers, as will be demonstrated later, are not heavily burdened with liability premiums. It is this intangible factor of cooperation or world standing that comprised the majority of U.S. motivation to participate in the Convention and it is this same motivation that continues to attract them towards a resolution of the current problem.
When the U.S. filed its denunciation with the Polish government the reaction throughout international civil aviation was sharp. If conditions had changed since 1929 to reduce the potential benefits for a U.S. passenger, they had worked in the opposite direction for the other member states.

Apart from the loss of uniformity and international cooperation, a more pragmatic problem faced the foreign states and their carriers. Aware that jurisdiction would now relate to control over the carrier, the carriers knew their operations into the U.S. would expose them to execution of U.S. judgments - the ultimate test of jurisdiction. Easy access to U.S. courts, not only by U.S. nationals but also foreign nationals "forum shopping", in conjunction with the use of the lex fori, promised a litigation free-for-all at the serious cost to carriers most of which could ill-afford it. If the U.S. courts declined to apply the law of the forum in the case of a non-resident plaintiff, they would play the role of a disinterested third state, guided, of course, by their own concept of justice. Damages for a non-resident plaintiff would not be as high as that recovered by an American due to differences in socio-economic backgrounds but they would be much higher than those available in the plaintiff's domicile.

Faced with this serious economic threat by the U.S., the member nations of ICAO met together in Montreal in February of 1966, three months before the denunciation would become effective, to attempt to formulate a plan acceptable both to themselves and the U.S. The meeting, to be dealt with in a later chapter was inconclusive. The nations were now aware of the consequences of a U.S. withdrawal but this was not adequate incentive for an agreement on a plan similar
to that set out in the State Department press release.

IATA, the world association of air carriers, had been active in the interim, in the person of Sir William Hildred, its Director-General. In the fall of 1965, Sir William had by means of a mail vote obtained agreement of most IATA members to a $50,000.00 limit, but the CAB rejected that proposal as being contrary to the U.S. public interest.

Both IATA and ICAO having tried and failed, it seemed certain that the U.S. denunciation would go into effect. This fate appeared to be sealed when on March 7th, 1966, the U.S. government announced that in addition to their demands for a raised limit, they required that liability up to that limit be absolute. Article 20 (1) of the Convention which allows the carrier to escape liability if he proves that all necessary measures were taken or that it was impossible to take such measures, would not be available to the carrier below the limit required in the proposal. Without Article 20 (1), Article 17 stands alone - "the carrier shall be liable."* The states which had once believed the U.S. was not serious in its denunciation tactic now believed the U.S. was setting impossible demands to lend justification to a unilateral action.  

Sir William was not to be deterred. He spoke to U.S. Secretary of State Mann and asked, if he was able to gain agreement of the major international carriers (including all those that flew into the U.S. or carried substantial U.S. originating passenger loads) to a limit of $75,000.00 and absolute liability, would the U.S. withdraw their notice? Mann assured him that if this occurred he would do all possible, even at this late date, to withdraw.

Sir William then began a furious campaign, asking the carriers to weigh

*In only 10 out of 212 international air accidents (1951 - 1967) was Article 20 (1) used by the carrier.
the cost of denunciation against the higher limit and then to consider his proposal. Not only did carrier approval have to be obtained but the U.S. required that the national government of each carrier countersign to ensure that the governments would not counterdemand the consent once the notice was withdrawn. He managed to gain consent, in the last days before May 15th, of all but five of the carriers required by the U.S. to agree to the proposal. Three of the objections were limited the absolute liability provision while the other two were non-IATA members and they soon fell in line and consented.

With only the three qualified acceptances destroying the unanimity, Sir William presented his work to the IGIA. On Friday, May 13th, the IGIA realized it could not postpone its decision any longer. Either the proposal would be rejected at the cost of justified resentment on the part of the 23 countries that had agreed, essentially on the ground that Congressional and public opposition was too great, or it could accept it on the basis of its judgment that, on the balance, the arrangement offered the best protection for the public.

The decision was made at the last minute to accept the proposal and withdraw the notice of denunciation. In a State Department press release of May 13th, 1966, the U.S. government concluded "that the interests of the U.S. travelling public and of international civil aviation would be best served by continuing within the framework of the Warsaw Convention under a plan the essential features of which are ...."4

The "carrier" solution was called the Montreal Agreement because of its close connection with IATA and its Montreal headquarters.* It contained the following Provisions:
(a) the agreement was to apply to all international traffic of the signatory airlines which according to the ticket included a point in the U.S. as

*Sir William Hildred called it "the shotgun wedding".
the point of origin, destination or agreed stopping place;
(b) the limit of liability is $75,000.00 inclusive of costs unless it is issued by a court where provision is made for separate costs, in which case the limit is $58,000.00.

Several aspects of the agreement should be noted.

The scheme is termed "interim" which implied that the U.S. viewed it as a temporary solution until agreement was reached on a new Convention. It has no termination date, its useful life is measured by how long it meets U.S. needs.

The agreement applies only to signatory carriers. An originating or successive carrier which has not signed and carries a passenger whose flight comes under the terms of the agreement is liable only to the Warsaw or Hague limits.

The questioned legal basis for a "special" agreement between the passenger and carrier is at least tacitly sanctioned in Canada by the CTC which approved the tariffs of the Canadian carriers containing the provisions of the Montreal Agreement.

The lack of worldwide uniformity which arose after the Hague Conference was compounded by the superimposing of the Montreal Agreement on the Warsaw base. For a passenger this creates an international lottery. Four passengers on a cross-country flight could each be subject to a different liability regime.

Passenger A - (Vancouver - Montreal) Air carrier liability is unlimited as the agreements do not apply to domestic carriage; subject to defences and liability allowed in Canada including res ipsa locquitur.

Passenger B - (Vancouver - Montreal - Vienna) Passenger is limited to $9,000.00 recovery as Austria signed the Warsaw Convention but not the Protocol. Liability
is presumed but may be rebutted.

Passenger C - (Vancouver - Montreal - London) Passenger limited in recovery to $18,000.00. Both England and Canada ratified the Hague Protocol. Liability is presumed but may be rebutted.

Passenger D - (Vancouver - Montreal - New York) The Montreal Agreement applies giving him a $58/75,000.00 limit depending on the forum. Absolute liability except for contributory negligence and sabotage.

These four limits are not related to risk or passenger characteristics, merely with contacts, which displays the fragmentation of air law which now exists.

The example of BEA (British European Airways) points out the extent of this. The CAB required that BEA be a member of the Montreal Agreement, despite the fact that the airline does not operate into the U.S.; because of the many U.S. origin or destination passengers that it carries. This would mean that on BEA flights serious differences between passengers in terms of recovery would exist. In view of this, BEA voluntarily waived its limit to $75,000.00 for all passengers whether or not they are covered by the Montreal Agreement.5

This balkanization of international air law detracts from the progressive nature of the international air transport industry. The Montreal Agreement fulfills the requirement of having the U.S. function within an international liability system but it clearly does not work towards the long run interests of the passengers or the industry.

(A more technical analysis of the Montreal Agreement is contained in Appendix C)
CHAPTER SEVEN

ABSOLUTE LIABILITY

Absolute liability is an irrebuttable presumption of responsibility without reference to fault, intent or knowledge. Thus, when the U.S. government announced on March 7th, 1966, the addition of absolute liability to its demands, this represented a departure, particularly for the U.S., from historic concepts of both Common and Civil Law countries which require proof of fault or wrongdoing as a condition of liability.

This move surprised the other nations because of the position the U.S. had always taken on no-fault liability. In 1952 at the Rome Conference on Injury to Third Parties and Surface Damage, they opposed the Convention and its absolute liability provisions "since the theory is unjust to the air carrier in requiring it to respond to damages regardless of fault." Again in 1964 the U.S. reiterated this stand when asked by ICAO to ratify the Convention.

If fault is assigned a role in determining legal consequences of accidents, what is the underlying rationale? Deterrence, retribution, morality?

Liability based on individual fault is derived from the Lex Aquilia of Roman jurisprudence, drafted over 2,000 years ago. The faulty behaviour of the author of damages was the moral and legal justification for his obligation to compensate and the victim's right to indemnity. If not caused by the fault of an alleged tortfeasor the loss laid with the injured party.

It is believed that at the root of all liability lies the idea of prevention, combined with the principal which is not necessarily limited to liability for negligence, that if one of two or more parties has to bear the consequences of an accident, it is reasonable that it should be the person whose negligence caused the injury.

As long as the aim of prevention was generally emphasized, anything which
would reduce this preventive effect of liability was frowned upon as contrary to public interest. Thus, it was not surprising to see that when liability insurance was introduced it met with strong opposition from all those who feared that the most important incentive would be removed. When the practical need for insured liability appeared to be such that its introduction could no longer be stopped and it became a general feature of a modern liability system, it seemed a logical consequence that the rationale of prevention belonged to the dogma of an earlier era.²

Two trends are responsible for the acceptance of no-fault liability, not only in air but in law generally.

(i) **TECHNOLOGICAL CHANGES** have transformed life in modern society. The entire concept of fault becomes inappropriate as technology increases in complexity, making it difficult to tell who, if anyone, was at fault.³

Increased uses of machines, automatic controls and feed-back devices create situations where the act which caused the injury cannot be identified as the conscious act of an individual. In air transport with its multiple automotive guiding and fail-safe devices, accidents are an accumulation of various events in which people play an incidental role and cannot be considered a principal cause. Many accident reports refer to "pilot-error" but in light of the mechanics of flight of current aircraft, it is inequitable to equate error with fault. In the event of a malfunction in an engine or guiding equipment, the speed at which events occur leaves the pilot little time to think and produce reasoned decisions. His training is aimed at having him react automatically to instrument signals; the pilot is filling in for a not-yet-developed feedback mechanism. In the final analysis, self-preservation plays a greater role than concern about liability which may be attributed to an employer.
TABLE THREE


- Pilot Error with Weather Contributing: 36%
- Weather as Primary Cause: 25%
- Vehicle Subsystem Failure: 27%
- Other: 9%
- Unknown: 3%

(ii) SOCIOLOGICAL APPROACH TO LIABILITY AND COMPENSATION

Both the Warsaw and Hague instruments were grounded in the traditional system of liability but by the time the Protocol was being implemented changes were occurring in the theories of tort and insurance.

Called no-fault, manufacturers or enterprise liability, the movement was relevant to aviation litigation because as the proponents of Warsaw were running out of reasons why passengers should be denied the benefits of common law, that body of law was becoming unattractive in many respects. The criticisms related to the role of fault in determining liability and the value of spending large amounts of time and money on the determination of that issue.

Why are accidents litigated at all? To provide compensation and spread economic loss that otherwise would be too sharply concentrated. Society is increasingly sensitive to a desire to minimize serious social disturbance which is created or extended by an accident. In many transport accidents, there is no moral fault, however, costs remain to be paid. The risk theory of law would spread the losses, therefore, among those who benefit by the provision of the activity which lead to the injury; producing distributive rather than retaliatory justice. This is the rationale behind absolute liability.
As a matter of social economics, the damage caused by such activity should be considered as general costs of the activity and they should be taken into account as such when evaluating their role in society. This spreading of losses serves to gauge the economic value of the activity, and at the same time, prevents the entire loss from falling on one unprepared to meet it.\(^5\)

This theory is supported by the concept of rational allocation of resources and consumer preference. The accident costs must be reflected in the market price of the activity which engenders them if the consumer is to make meaningful market decisions.

This conversion of catastrophic loss into an operating cost is done by insurance, which fulfills the social function of guaranteeing compensation to the injured party even in the case of a non-culpable accident and independently of the necessity of applying a sanction for faulty conduct. This role of insurance in enterprise liability requires that the one who is in the best position to utilize it, be the *locus* of responsibility. The air carrier is singled out, not because it is in a central position to estimate risks and allocate both costs and benefits. Enterprise liability is not a totally modern concept. *Respondeat superior* was based on the belief that costs should be shifted from employees whose care has been wanting to large employers for which an accident is a cost of doing business.

Several benefits, primarily for the passenger, result from a regime of absolute liability.

(i) **Certainty of Compensation** - Under a fault regime, there is no compensation if there is no fault. In cases where the tortfeasor is a party other than the carrier e.g. a subsystem manufacturer, it is sometimes found that the judgment is worthless due to lack of insurance or assets. Absolute liability is not contingent upon finding (a) a tortfeasor which (b) is capable of satisfying a judgment.
(ii) **Litigation Costs** - "When the lawyers are finished, no ricefield remains to divide amongst the litigants." (Ancient Chinese Proverb)

The cost of litigation measures the inefficiency of any compensation scheme and the potential of a reduction is offered by absolute liability. Trial will not be directed towards issues of fault but only quantum of damages.

Out of court settlements would be encouraged as with most defences removed the carrier has little reason to go to trial, and since the "asking value" of a claim under absolute liability is close to the potential court award the plaintiff is not induced to incur legal fees to increase it marginally in court.

Absolute liability, it was hoped, would reduce the U.S. lawyers "one-third" rule as their role is greatly diminished. That group naturally opposes this form of liability as it represents a threat to their livelihood. The ground they utilize to attack the system is the necessary role of fault in raising airline safety. However absolute liability is the strongest deterrent of all - carriers must use more than a reasonable standard of care, they must avoid accidents at all costs.

The carriers were upset with the introduction of absolute liability on more substantial grounds than the lawyers. The objections included:

(a) The effect of the rule on insurance costs.

(b) No-fault insurance encourages small and inflated claims which previously would have been deterred by the barrier of a negligence suit.

(c) Absolute liability for passengers during embarkation and disembarkation is serious in a period of airport violence.

(d) The pilots protested that this type of liability encourages foul play. An undetected saboteur would benefit from a liability which the carrier could have previously escaped by using Article 20 (1). The high level of compensation ($75,000.00) reduced the necessity of buying
flight insurance which previously was used by investigators to identify the saboteur.

While this was a radical step for many nations, numerous countries already had absolute carrier liability as part of their domestic law, including Australia, India, Mexico, Spain, Venezuela and Russia. 8

The Warsaw Conference, in which the U.S. did not officially participate, came very close to incorporating absolute liability in the 1929 Convention. It was only out of deference to the very influential French delegation that it was not incorporated in an apparent form.

Since the Industrial Revolution and its mechanized transport, European lawyers saw a need for a new basis of liability; absolute or strict liability had long been urged but French jurisprudence was strongly rooted in fault. The Napoleonic Code of 1804 contained in S. 1382, "Every act whatever of man which causes damage to another, obliges him by whose fault it happened to repair it." The Chairman of the Warsaw Conference, M. Ripert of France, wrote a book in 1927 proposing a method by which absolute liability could be injected into the rigid French system of fault. He urged a presumption of fault for things under one's care e.g. an airplane, in effect a presumption of liability. This is how strict liability entered French jurisprudence and two years later the Warsaw Convention.

Absolute liability has demonstrated its value in other fields and in the Montreal Agreement since 1966 and must be considered a prime element in any liability proposal.
CHAPTER EIGHT

INSURANCE

When discussing limitation of recovery or liability basis, consideration must be had of the role of insurance. "When the insured is so situated that the happening of the event on which the insurance money is to be paid, would as a proximate result involve the insured in the loss or decrease of any right or in any legal liability there is an insurable interest in the happening of the event."\(^1\)

Risks to passengers may be covered from either side; passenger legal liability insurance is available to the carrier; and personal policies can be obtained by the passenger.

Circumstances and opinion favor it being done from the carrier side. The Chairman of the U.S. delegation said at the Montreal meeting in 1966, "In short, it seems to us that whether the carriers absorb the cost or pass it on indirectly in the fare or make a special charge, they as a group are the best locus of responsibility. It is the airlines therefore who ought to have the primary burden of taking out insurance for accidents."\(^2\) Regardless of where the cost is initially laid, it will be distributed on the basis of the elasticity of air transport supply and demand.

Several reasons justify the locus of responsibility being the carrier:

(i) The more accurately an insurance company can calculate the risks the lower the premium. Uncertainty represents a disutility to the insurer as it does the insured. Because the risk of an incident relates not to passenger characteristics but to the operations of a specific carrier, the exposure to loss can be more accurately assessed from the carrier side. Since personal accident policies are not adjusted to reflect the risk inherent in a particular mode or carrier the premium rate is set high to protect the insurer.
(ii) The carrier with its massive bargaining power can obtain the lowest possible rate from a competitive market.

(iii) Passengers underestimate their chance of accident involvement and the consequent loss. Those who have accident policies or life insurance often maintain them at inadequate levels. Additionally, as air travel becomes available to lower levels of the socio-economic structure, a group of people become passengers who are neither concerned with nor in a position to purchase coverage. Any loss consequent on their death or injury must be borne by society, which creates an externalization of costs in the absence of passenger liability insurance.

(iv) The deterrent effect of fault is not removed by insurance, it merely converts specific deterrence into general deterrence. Because the cost of accidents appears as insurance premiums, the carrier will be under market pressure to conduct a safe operation. In addition, under passenger legal liability insurance, the insurer has a direct interest in the safe operation of the airline and will use the threat of raised premiums or withdrawn coverage to correct any hazardous practice.³

The two types of insurance in more detail are:

(i) **PASSENGER LEGAL LIABILITY INSURANCE** - The insurer in this policy indemnifies the insured against all sums he might be liable to pay, whether according to international or local legislation, subject to a maximum limit of liability agreed upon from the outset between the parties to the insurance contract.⁴ This limit is fixed for each aircraft in respect of any one passenger and any one accident. While the sum insured is fixed to correspond to the Warsaw Hague and Montreal limits, the actual level of coverage exceeds these limits to give satisfactory protection to the carrier.

The premiums reflect past operating record, revenue passenger miles flown
by the insured during a specified period, the applicable limit on liability and consideration of particular operating conditions such as climate in the area served, average stage length* and technical standards of the equipment and facilities used by the carrier.

(ii) PERSONAL INSURANCE - This differs from other types of insurance in that it is not an indemnity. The insured is not placed in the same financial position after a loss as that which he occupied before the occurrence of the insured event. The amount of insurance is limited normally by his ability to pay premiums.

Life insurance is the most common form of personal insurance and often contains multiple indemnity clauses for accidental death.

Personal travel insurance is the other common form. It became popular in the 1920s when it appeared that there was to be no demand for air carriers to insure their legal liability to passengers. It is effected from many sources:

(a) Many travel agents sell policies which cover the insured for a specified period of time from accidents suffered on a trip.

(b) Coupon insurance dispensed by airport slot machines dates from the end of the nineteenth century when it covered railway accidents. It differs from the usual method of obtaining insurance in that it gives an automatic cover without having to fill in a proposal for submission to the insurer for consideration. The insurer makes an offer and anyone who accepts it is covered immediately. The conditions are set out on the coupon, the main one being a time limit on coverage, usually 24 hours.

*Figures indicate 50% of accidents occur on landing and 25% on take-off. This makes an airline with short stage length a greater risk.
A slot machine is a very expensive source of coverage when related to the risk involved. A typical $37,500.00 policy costs $1.25 - on a 1,000 mile trip the insurer is exposed to certainty-costs of 10¢ based on accident statistics. The number of passengers using this service is relatively minor.

(c) Some carriers have introduced "free" personal accident coverage as an extension of their passenger legal liability. In Canada many private carriers who are faced with the liability arising from transport of top management personnel and interested in coverage with or without liability adopt this approach to compensation.

(d) Under the domestic laws of some countries the air carrier must give an automatic cover to their passengers up to a limit specified by statute. This is not liability insurance as it does not relate to fault, rather it is personal accident insurance financed through airline ticket sales. It was this type of insurance that was unsuccessful before the Senate in 1965.

Two variations of this policy are found when it is combined with the carrier's liability policy. The first allows a limited recovery based on proved damages regardless of fault up to a limit while above the limit the plaintiff is free to resort to an ordinary liability action based on fault. The second approach requires the plaintiff to elect between a liability action or accepting the automatic recovery and waiving all claims against the carrier.

Under an absolute liability regime the practical differences between liability insurance and personal insurance disappear as fault is no longer an issue.

The insurance industry has developed greatly since 1910 when the first
aviation policy was written. The following coverage was offered - "accidental damage sustained whilst attempting to rise, in the course of flight, and when alighting." The large number of revenue passenger miles over which to spread the risk, improved operating records, and improved actuarial techniques have produced greatly reduced premiums.

In market specialization, particularly in London, limits are divided between policies. The first is a primary policy and as such takes care of the first loss relating to each person or accident. An excess policy pays any amount over the primary cover up to a maximum contained therein plus legal costs.

Most carriers self-insure to moderate amounts by establishing a reserve fund to be used to meet liabilities arising from an accident.

The carriers in the late 1960s became dissatisfied with rates which they felt were to high and were concerned with the possible saturation of the insurance market as a result of higher limits and wide-bodied jets, so IATA and ATA of A jointly organized an insurance pool to counter these effects. A non-profit carrier-controlled insurance company would underwrite up to 40% of both primary and excess policies purchased by member airlines. The scheme never became operational as the carriers could not finance the necessary reserves and the insurance industry reacted favorably to the threat.

The cost of passenger liability insurance is considerable and when viewed in the context of the highly-levered position of the airlines any rise in costs is very significant. The following figures indicate both (i) the expense of insurance and (ii) the sharp rise in costs for foreign carriers after the 1966 Montreal Agreement.

The figures in these tables include cost of injuries and insurance overhead; the latter covers brokerage, administration, reinsurance, provision for reserves, and in some cases, legal defence.
### TABLE FOUR

Liability Insurance in Relation to Passenger Fatalities for U.S. Scheduled Airlines

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<th>1960</th>
<th>1965</th>
<th>1967</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liability Premiums</td>
<td>$20 million</td>
<td>$30 million</td>
<td>$38 million</td>
</tr>
<tr>
<td>Number of Fatalities</td>
<td>336</td>
<td>226</td>
<td>228</td>
</tr>
<tr>
<td>Premiums Received per Fatality</td>
<td>$60,000.00</td>
<td>$130,000.00</td>
<td>$170,000.00</td>
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### TABLE FIVE

Liability Insurance in Relation to Passenger Fatalities for Scheduled Airlines Outside of the U.S.

<table>
<thead>
<tr>
<th></th>
<th>1960</th>
<th>1965</th>
<th>1967</th>
</tr>
</thead>
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<tr>
<td>Estimated Insurance Premiums</td>
<td>$11 million</td>
<td>$21 million</td>
<td>$43 million</td>
</tr>
<tr>
<td>Number of Fatalities</td>
<td>537</td>
<td>462</td>
<td>448</td>
</tr>
<tr>
<td>Premiums Received per Fatality</td>
<td>$20,000.00</td>
<td>$45,000.00</td>
<td>$100,000.00</td>
</tr>
</tbody>
</table>
The level of insurance costs before and after the Montreal Agreement gives an indication of the effect of a changed basis of liability and recovery limits.

In examining the data several points should be noted:

(i) Non-U.S. carriers affected by the Agreement absorbed increased costs. The average, based on RPMs flown shows a hike from 1965 to 1967 of 39¢ to 61¢/1,000 RPM, representing a rise from .6 to .9% of operating costs and .75 to 1.10% of passenger revenues.

(ii) The U.S. carriers have shown a falling trend since 1961 and there appears to be no difference between domestic and international rates.

(iii) The erratic development of rates of individual carriers. Even among the 14 major U.S. carriers which operate under similar conditions, a wide variation in costs exists.¹⁵

(iv) Countries such as China and Pakistan with no affected traffic received high increases while the United Kingdom carriers although substantially affected by the Agreement remained steady.

A general observation on the development of liability insurance costs is that the great differences between individual airlines and the erratic pattern over time for each carrier precludes any precise conclusion on the effects of the Montreal Agreement on costs. It appears certain that while the overall impact of liability insurance on air transport economics remained relatively constant from 1960 to 1965, most non-U.S. carriers affected by the Agreement had to accept substantially higher premiums when the Agreement became effective. There is no clear evidence that the Agreement affected carriers who were not subject to the new regime.¹⁶ The differing characteristics of each carrier make it difficult to extract the precise influence of a higher liability limit.¹⁷

Further analysis of the long-run effect of the Montreal Agreement on insurance costs is impossible due to the fact that the countries refuse to divulge
TABLE SIX

Passenger Liability Insurance Costs for Airlines in Different Countries\textsuperscript{13, 14}

(Domestic and International Flights Combined)

<table>
<thead>
<tr>
<th>State</th>
<th>% of Traffic Affected by Montreal Agreement</th>
<th>Cost/1,000 RPM 1960</th>
<th>Cost/1,000 RPM 1965</th>
<th>Cost/1,000 RPM 1967</th>
<th>% of Operating Cost 1960</th>
<th>% of Operating Cost 1965</th>
<th>% of Operating Cost 1967</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>30</td>
<td>12\textcent{}</td>
<td>14\textcent{}</td>
<td>73\textcent{}</td>
<td>.2</td>
<td>.2</td>
<td>1.1</td>
</tr>
<tr>
<td>Canada</td>
<td>17</td>
<td>40</td>
<td>35</td>
<td>58</td>
<td>.5</td>
<td>.6</td>
<td>1.0</td>
</tr>
<tr>
<td>Japan</td>
<td>43</td>
<td>23</td>
<td>26</td>
<td>52</td>
<td>.3</td>
<td>.4</td>
<td>.9</td>
</tr>
<tr>
<td>Switzerland</td>
<td>38</td>
<td>46</td>
<td>43</td>
<td>74</td>
<td>.5</td>
<td>.6</td>
<td>1.0</td>
</tr>
<tr>
<td>Ireland</td>
<td>63</td>
<td>19</td>
<td>21</td>
<td>67</td>
<td>.3</td>
<td>.3</td>
<td>1.1</td>
</tr>
<tr>
<td>India</td>
<td>34</td>
<td>13</td>
<td>15</td>
<td>67</td>
<td>.2</td>
<td>.3</td>
<td>1.0</td>
</tr>
<tr>
<td>Pakistan</td>
<td>1</td>
<td>37</td>
<td>45</td>
<td>90</td>
<td>.5</td>
<td>.5</td>
<td>1.2</td>
</tr>
<tr>
<td>United States</td>
<td>25</td>
<td>53</td>
<td>43</td>
<td>37</td>
<td>.8</td>
<td>.8</td>
<td>.7</td>
</tr>
<tr>
<td>United Kingdom (BEA)</td>
<td>100</td>
<td>29</td>
<td>29</td>
<td>29</td>
<td>.3</td>
<td>.3</td>
<td>.3</td>
</tr>
<tr>
<td>Ceylon</td>
<td>0</td>
<td>59</td>
<td>131</td>
<td>80</td>
<td>.9</td>
<td>2.0</td>
<td>1.3</td>
</tr>
<tr>
<td>United Arab Republic</td>
<td>0</td>
<td>53</td>
<td>55</td>
<td>34</td>
<td>.5</td>
<td>.6</td>
<td>.5</td>
</tr>
</tbody>
</table>
data on insurance costs. Between 1966 and 1970, ICAO tried on five separate occasions to obtain figures from the member states and received very little cooperation.

Although the reason for secrecy is unclear, the result is that ICAO "could not express satisfaction with the data as affording a certain basis for establishing new levels of liability."\(^8\) To estimate the present effect of the Agreement interpolation must be carried out with the multiple influences upon costs, such as average recovery and safety levels.

Insurance is a central point in any liability proposal, with its ability to convert potential loss into a certain operating cost. Insurance data provides a measurement or "currency" when nations discuss proposals. If, for example, an increase in limits from $75,000.00 to $100,000.00 is being studied, the negotiators can better relate to the suggestion if they are aware the insurance costs of their country's airline would rise from .8 to 1.2% of operating costs. It enables tangible analysis to take place in an area of many intangibles.
CHAPTER NINE

DUAL LIMITS

In his 1952 book on liability limitations, Drion termed world-wide uni­fication of a damage limit "the borderland of feasible international law." At the ICAO meeting in Montreal there was some discussion of dual limits, the "solution of desperation", and in the period following this meeting the possibi­lity was studied by the Legal Subcommittee of ICAO assigned the task of Warsaw revision.

The Subcommittee noted that the economic disparity between different countries, particularly in the standard and cost of living would be reflected in the size of claims brought by persons living in these countries, thus im­peding any consensus on a single limit figure. In a case such as this dual limits should be considered.

Three types of limit duality are possible:

(i) PASSENGER OPTION - Prima facie this appears to be the ideal solution. It involves the passenger selecting a higher limit of liability if he desires it and having the appropriate surcharge added to the ticket cost, giving protection superior to coupon insurance at lower rates. It has the dis­tinct advantage of giving an equitable distribution of costs and benefits. The British proposed this scheme at the Montreal meeting and it is instructive to observe the treatment this patently satisfactory plan re­ceived.

The U.S. opposed any plan such as this which involved "opting in", stating that in view of inadequate knowledge on the part of the passenger, there should be a conscious choice of the lower limit rather than a low limit by default. It would only back an "opting out" proposal.

Canada would support an "opting-in" plan.
A British delegate entered a reservation when he queried what value most people prospectively placed on their lives. He was certain that his maid on her annual visit to the continent would choose a lower limit-flying "coach" so to speak, to save a half a pound.

The carriers opposed it because of the difficulty in keeping records, congestion at ticket counters and their desire not to discuss death and injury with a passenger just prior to boarding.

Lawyers at the meeting pointed out that since this would be a liability different from either carrier liability or coupon insurance, it would be difficult to clarify it for the ticket agents and impossible for the passengers.

In the end the British proposal was abandoned by practically everyone though with tribute to its originator for the most imaginative attempt to bridge the gap.¹

The plan was disinterred in 1969 by the Subcommittee and again presented to the parties, comprising Solution Three of the post-Montreal discussions. Canada rejected it completely, the United Kingdom felt that with airline administration costs the surcharge would exceed the cost of an equivalent amount of personal accident insurance², IATA termed it impractical for the carriers, India said it would be difficult to implement, and the IVAI opposed it.³ The scheme was rejected by 68% of the parties involved.

(ii) GOVERNMENT OPTION - Here the government of each country would choose a limit and the lower of the limits at origin or destination would govern. The problem with this plan is that recovery depends entirely on origin or destination. The U.S. flatly rejected this scheme, realizing how it would work against U.S. citizens travelling outside of the U.S. "We fail to perceive any sound reason why any passenger should be subject to a lower
level of recovery merely because of the fortuitous circumstance that his journey originated or terminated in countries which elected a lower limit.4

The same objections were raised to basing the limit not on origin/destination but on:

(a) Flag of the carrier - serious competition between carriers
(b) Lex locus delecti - fortuitous
(c) Lex locus contractus - fortuitous
(d) Lex fori - forum shopping a problem
(e) Nationality of passenger - passenger is "rich" or "poor" by citizenship

The reasons put forward to support duality are:

(a) A single high limit involves insurance costs which cannot be borne to an equal extent by all the carriers operating in different countries.
(b) The high levels are required only in the developed countries.
(c) Cross-subsidization would be reduced.

The reasons which went against dual limits are:

(a) The fortuitous action of the limits.
(b) A disregard of passenger interests in that LDC flag-carriers do carry passengers who require a high limit.
(c) A legal system is involved which is difficult to apply to successive carriers or circular trips. The problem lies in determining the liaison for the purposes of applying a higher or lower limit to the passenger.
(d) Destroys uniformity. The norm which determines the limit of liability would no longer have any value as a rule of uniform international law, now reduced to a rule which requires reference to legal systems of various countries to seek out the applicable limit.
In the end the government option proposal which formed an aspect of Solution One and Two of post-Montreal discussions was rejected by IATA and an overwhelming number of countries at all levels of economic development.5

(iii) **DUALITY IN THE SAME STATE** - This third scheme presently exists in the domestic liability framework of some countries. After an incident the plaintiff can elect between:

(a) Limited but automatic payment of compensation; or

(b) A negligence action for unlimited damages.

While this is an excellent system for any one country to choose, the nations as a group do not consider that unification lies in this direction. Dual limits are recognized by all parties as a solution of desperation and it does not appear that they will ever receive serious consideration.
唧唧床 LN THE 1966 ICAO MONTREAL MEETING

When the ICAO member states met in Montreal in February 1966, it was under the massive influence of the notice of dunciation filed by the U.S. on November 15th and to become effective three months later. Various attempts to resolve the crisis had failed and it was with a sense of urgency that the delegates gathered. This meeting, attended by states now fully aware of the U.S. position and ability to operate to the detriment of other nations, outside the Convention, marked the beginning of the current stage of passenger liability negotiations.

The discussions related essentially to the limit of possible recovery. Absolute liability was not an issue as the U.S. did not announce it until after this meeting adjourned. Of the 15 proposals put before the meeting in an effort to reach a consensus acceptable to the U.S., only two contained an absolute liability provision and they were both eliminated in the early stages of the meeting.

The President of ICAO in opening the meeting set the tone of the proceedings that followed. "The Warsaw Convention is the most widely accepted international instrument in the field of private air law. The Warsaw Convention of 1929 has proved itself as an excellent compromise between different legal systems and has been a success for 30 years. The Hague Protocol has known similar success. Therefore, it is logical that when there is a risk of losing most or all of the advantages of uniformity sanctioned by the Convention, states want to find a solution that will maintain those advantages."\(^1\)

The U.S. Chairman replied, "For the U.S. to question comes down essentially to a balance of interests. Among those interests a heavy one is the cooperation and understanding around the world in the international aviation and law fields."\(^2\)
The three identifiably active groups at the meeting were:

(i) The U.S., whose delegation was looking for a consensus but was not prepared to reduce their demands. For the U.S. the primary objective was to assure adequate protection for all American accident victims - if possible within the context of an international agreement.

(ii) Belgium, West Germany, Sweden, Jamaica, New Zealand and Great Britain who worked hard for a compromise.

(iii) The African countries, Latin America, France, Poland and Czechoslovakia who would not consent to any limit over $50,000.00 regardless of the proposal. These countries felt that the U.S. would concede rather than the array of other foreign states.³

In light of the fact that discussions centered around the limit level, the justification for the concept of limited liability should be examined. Between 1929 and the present, many of the previously existing reasons have been reduced or eliminated by changes in the law. The following points are used by proponents:

(i) The example of limitations in other modes figured prominently at Warsaw and remains today. The Convention was seen to be analogous to the global limitation on shipowner liability. Ships and aircraft are peculiarly susceptible to total loss involving extensive life and property claims under circumstances where the owners have only remote control. Shipping limitations like air carrier limitations were introduced to protect an industry which states had a close interest in. This is a valid argument but it must be recognized as a subsidy paid by passengers and their families.

(ii) The severe regulation of the air carrier by governments in reference to routes, earnings, and fares make it deserving of special consideration in
terms of liability. If this is the case, governmental control is forcing the costs of the industry on incidental victims rather than spreading the loss over all the beneficiaries.

(iii) The fact that passengers have an opportunity to self-insure against risk of death or injury. This ignores the realities of the air transport market and passenger.

(iv) Limited liability is conducive to quick settlements rather than long legal battles. If this is true, why not eliminate settlements to ensure immediate conclusion?

(v) Unification of law with respect to amount to be paid. Monetary valuation is relative to the socio-economic environment of the plaintiff's domicile. Measurement of loss is local in nature and to apply a uniform figure is to run the certain risk of windfalls and insufficient recovery.

(vi) *Quid pro quo* for absolute or aggravated liability. This was a valid point in 1929 but as rules of evidence changed under domestic jurisdiction, it lost a great deal of its validity. The degree of benefit received by the passenger which would call for a trade-off on limits is measured by the difference between the liability burden under any international agreement and that applicable to domestic air cases.

(vii) A high-income individual should not be able to impose on the rest of society the extra burden of risk involved in his entering into a situation where there is an increased chance of his death or injury. Those who argue for a limit say that a high award is a subsidy paid by the other passengers for that person's (a) windfall or (b) negligence in not providing personal insurance for his high economic value. This perceived inequity is compounded by the fact that cross-subsidization occurs not only between passengers but between nationals of different countries. Limit proponents say it is a choice of discriminating against a few "wealthy"
passengers or many "average" passengers. Any attack on this point must be based on the recognition of those high awards as compensation for a real loss of that magnitude. To argue the equity of the situation is pointless, the issue will be resolved on the basis of each country's bargaining strength.

(viii) Despite the fact that since 1929 the safety level of the industry has risen rapidly, accidents still occur with some frequency. Consequently, insurance costs remain a significant item in costs of operation. The economics of many LDC flag-carriers are not unlike those of the airlines sought to be protected in 1929; with premiums representing up to 4% of operating costs these carriers feel they cannot handle an additional liability burden.

(ix) Since air transport benefits society as a whole by facilitating the interchange of people and goods, the carriers feel that the risk of aviation should not lay wholly on the industry. They point as an example to private nuclear energy operators in the U.S. who have a liability limit of $60 million, with Congress providing payment for any excess liability. On the grounds that these enterprises benefit society as a whole and therefore society should bear some of the potential costs. 5

(x) The insurance market is felt by some to be incapable of handling the coverage required by the wide-bodied jets with passenger loads of 400 - 500. The example of a fully-loaded B-747 crashing is repeatedly brought up as proof that an incident like this has the same relative effect as the loss of a small plane in 1929. The fallacy in this argument is apparent when it is realized that (a) wide-bodied jets have obtained coverage for operation on domestic routes in Canada and the U.S. with consequent unlimited liability and (b) in the example of the B-747, assuming a value on this aircraft of $30 million, recovery for each of the 400 passengers would have
to be $75,000.00 before passenger loss exceeded hull loss. In reality, an accident of this nature would move world-wide rates up marginally, shown recently in the case of the Turkish DC-10 loss outside of Paris.

Any discussion of limitation, which 1952 was termed by Drion, the governing principle of air transportation, is placed in perspective by IATA's statement at the ICAO meeting - "We recognize that our industry has reached the age of majority and it may have lost the privileges of its youth." 6

The meeting in Montreal did not focus on the justification for limited or unlimited liability, however, it was essentially a trade-off negotiation where consensus was sought not on the basis of justness but rather on the negotiating power and skill of the parties.

The U.S. position at Montreal was outlined by the Chairman; after acknowledging the need for international cooperation in a world-wide regime of aviation accident liability, he said, "The principal concern of my government now is to safeguard and protect our citizens." 7 The U.S. sincerely felt that they were the only country in the world which was seeking to ensure adequate compensation for passengers. One observer at the meeting compared the U.S. to a proud mother who was watching her son march in a parade and remarked that all the regiment was out of step except her son.

While average incomes in the U.S. had risen 500% since 1929, their demands regarding a limit had risen 1,300% over Warsaw. The U.S. felt that a raised limit was justified in view of the costs which they estimated it would entail. 8,9 One U.S. adviser was later to say of the potential hike in cost relative to the protection it would offer American travellers - "Allowing for a reasonable margin of error in what were conceded to be only estimates, the incremental insurance
costs at various levels taken as a proportion of operating costs were clearly somewhere between the cost of the olive and the cost of the gin in the martini and nowhere near the cost of an inflight movie."\textsuperscript{10}

There was a fair consensus among the other nations but they were well aware of the ability of the U.S. to impose a liability scheme upon them, in effect any multilateral agreement could be replaced by a unilateral one. The LDCs were in a particularly difficult position; the delegate from Senegal urged in a very eloquent statement that the meeting look for a correct balance between the obligations of the carrier and the rights of the passenger, and the needs and means of all states participating in international civil aviation. The main complaint of this group which comprises two-thirds of ICAO membership was stated by the Trinidad and Tobago delegate. The proposal "would impose a high level of insurance protection and cost on the passenger regardless of the passenger's needs or wishes."\textsuperscript{11}

The carriers foresaw the following problem areas connected with higher limits:

(i) U.S. citizens would receive higher awards in U.S. courts. The other states viewed this as unjustified but nevertheless the cost of access to the U.S. market.

(ii) Citizens of the LDCs would "forum-shop", gaining venue in the U.S. courts and recovering large awards against non-U.S. carriers.

(iii) The higher limit of liability would influence settlements in other fields of domestic transportation. They felt high awards would drive up the overall level of compensation in their country.

(iv) Not only did they realize they would be subjected to large increases in insurance costs but they feared any general fare increase to cover the added costs by IATA, would be blocked for the U.S. carriers by the CAB.
Despite these problems the other countries knew they would have to satisfy the U.S. demands, accepting what they considered to be adverse effects on their laws, practices and procedures, both of their courts and administrations.\textsuperscript{12} However, this willingness to flex varied greatly between nations; Portugal would not agree to the $75,000.00 limit, Trinidad would agree, Sweden proposed $100,000. and Cuba objected to every U.S. motion, proposal, statement and comment. It was this lack of uniformity which destined the meeting to failure.

Canada was continually referred to by the U.S. delegation as another country which needed the higher limit, in an attempt to lend strength to a position which they alone occupied.\textsuperscript{13} Canada's delegation declined this suggestion - "As citizens of a North American country reputedly enjoying a high standard of living, members of the Canadian delegation are unable to find any substantial justification for fixing the maximum limit at approximately $100,000.00 as a means of providing adequate protection for Canadian air travellers. The Canadian experience shows that the figure of $35,000.00 as an upward limit of liability would go well beyond all but a very few of the claims which had been settled in the past six years. But in order to go some way towards meeting the U.S. position, the Canadian delegation would be prepared to consider the possibility of going upwards to a maximum of $50,000.00 which as the United Kingdom delegate has rightly said is beyond average recovery. The cost of an increased liability limit whether great or small should be for the establishment of limits that would at the same time eliminate lengthy and costly litigation. The Canadian delegation hoped that somewhere in the area between $35,000.00 and $50,000.00 the true balance between the interests of the travelling public and the airline industry could be found."\textsuperscript{14}

The Canadian delegate also pointed out the serious effect on Canada of a U.S. withdrawal due to the intensive air relations between the two countries. He stated that if the U.S. withdrew and a serious accident occurred on a U.S.-Canada
flight, Canada as well would be forced to withdraw unless higher limits could be agreed on, replacing those of the Convention and Protocol. \(^{15}\) If Canada withdrew the delegate felt all carriers operating into North America would have to waive any limit for competitive reasons.

The proposals placed before the meeting should be viewed in light of the following facts. In 1966 to cover 90% of U.S. air judgments fully, the limit would have to be $150,000.00, in Canada it would only have to be $60,000.00 and the world average for non-Warsaw cases was $15,000.00. \(^{16,17}\)

The four proposals selected from the initial fifteen were put forward by:

(i) **Congo** - $33,200.00 - passenger can buy more coverage up to a reasonable limit set by each government - approval by 50% of states when presented.

(ii) **France** - $50,000.00 without costs - Article 22 (4) of the Hague regarding settlement inducement retained - 66% approved including Canada.

(iii) **Germany, Jamaica, Sweden, New Zealand** - Warsaw/Hague basis retained but each government could choose between $58,000.00 exclusive of costs or $75,000.00 inclusive - 44% approval.

(iv) **Ireland** - same as (iii) but with limits of $50,000.00 and $64,000.00 - 55% approval.

The conference then reached a point where each delegation had indicated whether it approved in principle to each proposal. Since none of the plans had received overall support it was then necessary for the meeting to select by elimination the most acceptable plan. France, backed by a large number of countries, blocked this move on the grounds that it would force a delegation eventually to vote for a plan it did not approve of. Unable to select what the majority considered the "least-worst" plan, the meeting broke up without reaching any agreement. The ICAO nations had resigned themselves to U.S. withdrawal in May of 1966 because
they could not arrive at a consensus.
CHAPTER ELEVEN

THE GUATEMALA CITY PROTOCOL

Immediately after the Montreal Agreement became effective, negotiations began to once again bring the U.S. into a uniform liability regime. This was done in the context of the meetings of the Warsaw Subcommittee of the ICAO Legal Committee. The U.S. negotiating base was now $108,000.00 inclusive of costs but the other nations, still upset over the events of 1965 - 1966 were not receptive. The non-partisan IUAI said of the 1967 ICAO meeting - "the committee appears to have failed, for the time being at any rate, owing to the attitude of the U.S."\(^1\)

The currency of negotiations moved from dollar amounts for a limit to the per cent of claims which would be fully satisfied. The U.S. selected a coverage level of 80% of U.S. claims, the 20% with partially covered judgments was the price the U.S. was willing to pay for participation in an agreement. The limit would not affect recovery in most non-U.S. cases so the critical variable became the level which 80% of U.S. awards fell under. This move gave the discussions a firmer grounding in the facts of the situation. Witness the U.S. State Department official appearing before the Senate Committee in 1965 who said of the proposed limit, "The figure of $50,000.00 is of course arbitrary as any such figure must be. But it does represent a substantial amount of money and if an arbitrary figure is to be chosen it certainly seems far more in keeping with the economic realities in the U.S. than $8,300.00 or $16,600.00."\(^2\)

The situation was complicated by the fact that insurance costs for U.S. carriers declined after 1966 while those of other countries rose. It was estimated by countries replying to an ICAO inquiry that a rise of limitations to $75,000.00 on a world-wide basis would move insurance costs for those carriers
to over 2% of operating costs.\textsuperscript{3}

Despite this general lack of agreement between the U.S. and the other parties the Assembly of ICAO adopted a resolution at its 1968 meeting calling on the Legal Committee to have a draft convention ready by the end of 1969 to submit to the states. Countries were desirous of putting passenger liability on a more secure and uniform basis; the Montreal Agreement was the work of carriers and not of nations. As the Hon. Paul Martin, then Canada's Secretary of State for External Affairs, told the McGill Conference on the Law of the Air in 1967, "It would seem advisable that a matter of this nature which is really one of government responsibility, should not continue to function for too long as an agreement between carriers."\textsuperscript{4} There still remained also a widespread resentment of the Montreal Agreement which nations felt was forced upon them by the extortion of the U.S.\textsuperscript{5}

With the conference called, negotiation became more intense. In 1969, the U.S. submitted to the ICAO Subcommittee a plan calling for a limit of $125,000, with a provision to automatically revise the limits to reflect changing economic conditions such as inflation and a raised standard of living. Liability was to be absolute but the wilful misconduct clause was to be dropped. IATA countered with an $83,000.00 proposal.

New Zealand entered to mediate and convinced the U.S. to reduce its limit to $100,000.00. The package, now called the New Zealand proposal, contained the following points:

(i) Absolute liability except for contributory negligence.
(ii) $100,000.00 limit.
(iii) Limit was unbreakable.
(iv) Settlement inducement clause on top of $100,000.00.
(v) A new forum was added to Article 28 at U.S. instigation - "Court of plaintiff's domicile if the carrier has a business establishment in the
same contracting state." This would allow any U.S. citizen to sue in U.S. courts but would prevent forum shopping in the U.S. by non-residents. (vi) Automatic limit revision of $2,500.00 per year for 12 years.

ICAO in early 1970 approved the proposal by a very narrow margin (19-13-6). IATA refused to agree on the ground that it did not take into account the average income of passengers in the majority of the world's nations but IATA reversed this stand in 1970 when it stated that air transport was now an adult industry and no longer needed the protection afforded it in previous years by low limits. Based on the New Zealand package the ICAO Subcommittee adopted the final text of the new liability agreement which they felt balanced the views of the U.S. and the other nations. More importantly, it reflected the relative strengths of the parties that would debate the scheme. A diplomatic conference was scheduled for Guatemala City to consider the draft.

The U.S. had long since rejected the concept of a limit set at average recovery. "When we speak of limits we do not think of average recovery --- we mean by an acceptable limit of liability a figure that will permit most people in many countries to establish in accordance with the legal system of the country where they and their families reside, a monetary value for the loss they have suffered as a result of the injury." Their expressed goal was for 80% of U.S. victims to obtain full recovery and predicated on this they had negotiated the $100,000.00 limit. In preparation for the conference the CAB did a study of recovery levels in the U.S. and the result was a bombshell - the figures for average domestic settlements in aviation accidents were:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
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<tr>
<td>1950 - 1958</td>
<td>$38,500.00</td>
</tr>
<tr>
<td>1958 - 1964</td>
<td>$52,000.00</td>
</tr>
<tr>
<td>1964 - 1968</td>
<td>$90,000.00</td>
</tr>
<tr>
<td>1970 (first half)</td>
<td>$200,000.00^7</td>
</tr>
</tbody>
</table>
A $100,000.00 limit would have deprived 27.9% of full recovery in 1966 but in 1970 that figure rose to 63.2%. To cover 80% of U.S. awards the limit would have to be $300,000.00+ and for a 90% cover in excess of $400,000.00.

The U.S. was now trapped by its earlier inaccurate figures and the rapidly escalating judgment level. They could not discard the progress made in the past five years but neither could they recommend to Congress a treaty they knew was inadequate.

There were two options open to the U.S.

(i) A Convention without limits.
(ii) An international limit combined with a domestic supplemental plan separately funded.

The other nations at Guatemala City were prepared to go to a $100,000.00 limit only if it was completely unbreakable. The U.S. met them on the $100,000.00 figure if the U.S. was permitted a domestic supplement package. The supplement issue became the main point of contention at the conference. This represented the first step away from the push-pull situation over limit level and towards a package that would more accurately satisfy the means and needs of each country. Realizing the supplement was the price of U.S. participation the other nations consented.

Article 35A of the Protocol set out the following guidelines:

(i) The rules should not prevent a state from adopting any system of domestic supplement in accordance with its underlying legal system as long as it protects the valid interests of the other states and international air carriers.

(ii) It should guarantee the right of the carrier to be free of any liability in excess of the Convention limit.
(iii) The financial burden of the plan will be placed on the ultimate beneficiaries.
(iv) Applies to all citizens and permanent residents of the state concerned on all international flights subject to the Convention.
(v) Ensures that the economic cost falls evenly on those eligible.
(vi) The competitive advantage of airlines is to be maintained.
(vii) Permits no recourse against the airline in the event of a non-collection of premium from a passenger.

The U.S. was vague at the conference regarding the proposed supplement but is presently developing a plan which covers any U.S. citizen, resident or non-resident, or resident alien at the time of the incident giving rise to the claim. The scheme requires the collection of a surcharge from every passenger departing the U.S. whether or not they are one of the persons listed above. The money collected is paid to a "contractor" who is liable for any settlement in excess of the applicable limit. The limit on the plan has been suggested as $200,000.00 of excess recovery. Any passenger contributing on a U.S. originating flight will be covered by the plan. In addition, any U.S. citizen or resident will be covered on any international flight even if he has not contributed and the flight takes place totally outside the U.S.

Three points appear to entail defeat for this plan:

(i) The surcharge is an added cost for any U.S. originating flight. The entire cost of a $300,000.00 limit not only for passengers on those flights but also any U.S. resident or citizen travelling anywhere in the world is imposed on U.S. originating flights. By concentrating the burden on these flights, the scheme offends the guideline that the competitive relationships of carriers will be altered. The fears of the carriers that would be saddled with the surcharge are heightened by the prospect of
raising the plan limit past the $100,000.00 and $200,000.00 proposed.\(^9\)

(ii) The fact that all passengers departing the U.S. contribute equally to a plan which favors a U.S. citizen or resident by the extended coverage they receive goes against the guideline of Article 35A which deals with discrimination against passengers.

(iii) The Protocol requires a two-thirds majority vote of the U.S. Senate. It is improbable that any treaty limiting recovery by American citizens and imposing a surcharge for that limited liability could gain that degree of support. Realizing the futility of any agreement which the U.S. does not participate in, the Protocol contains a clause which indirectly provides that it will not be effective until the U.S. ratifies it.

The Guatemala City Protocol represents the most recent effort to bring all of international civil aviation together under one passenger liability agreement. It appears to be headed for defeat so the nations must once again examine the situation and piece together a plan which will be acceptable.
CHAPTER TWELVE

PROPOSAL

What is needed is an entirely new system based not upon the framework which remains of the Warsaw Convention but rather upon the principles which motivated the original instrument and the knowledge gained over the past 45 years in trying to apply those principles in a constantly changing environment.

The proposal is to be drawn from the preceding data presented in a chronological framework. In an area the nature of which is qualitative, the validity of this proposal must be tested by its consistency with those facts. By tracing the course of passenger liability forward to the present, the object was to assemble a mass of evidence against which the proposal can be measured and appreciated.

Three general observations must preface any proposal:

(i) The gap which now exists between the positions of the U.S. and the other nations can be bridged by a scheme based not on traditional notions of fault and liability but on a concept of compensation and insurance.

(ii) An optimum solution is sought to the need for modernizing the liability regime, striking an equitable balance between the interests of the carriers and their passengers within a framework acceptable to the governments who are responsible for the welfare of both groups.

(iii) Any proposal should be in keeping with the move of law towards a greater social orientation; in the future it will be less of a tool for imposing solutions of the powerful on the weak and more a vehicle for reconciling a broad range of conflicting interests.

On a more practical level the proposal must meet the following requirements:
(i) Aim at universal acceptance, necessarily including the U.S.
(ii) Provide certain recovery for loss.
(iii) Promote uniformity in the law through a clear and simple system.
(iv) Be conducive to the settlement of claims quickly and at minimum legal cost.
(v) Provide for full compensation to a high percentage of claims at the same time protecting the carrier.
(vi) Be adaptable to developments in air transportation e.g. larger aircraft and automated on-board ticketing.

The parties have been overly concerned with the level set on the liability limitation, leading to impasses which the U.S. can and will resolve by leaving the Agreement and relying on her massive traffic generation to protect citizens. While discussion remains stalled on this narrow question, there is no possibility of conciliation - a point is inevitably reached beyond which the parties will not compromise. The failure of the 1966 ICAO meeting in Montreal can be attributed to this. The delegates were not prepared and probably not authorized to discuss other than limits. The delegates felt "the only possibility is to agree on a limit of liability high enough to satisfy the U.S. yet not so high as to frighten away the developing countries."

The central point of this thesis is that agreement lies in the area of "packages" - multipoint negotiations. The aspect of quid pro quo is seen to be pervasive throughout the entire development of passenger liability - by identifying areas where the potential of trade-off exists the distance between the parties can be narrowed.

There are numerous areas where a concession is possible at lesser cost to one party in relation to the magnitude of benefit gained by the other. Repeated reciprocations in cases like this holds the promise of agreement in which
both parties are reasonably satisfied with the outcome.

An example of the compromises inherent in multipoint negotiations:

(i) **IATA** - "It should be stressed that the IATA plan is a package. The acceptance of the principle of absolute liability with revised limits of liability cannot be divorced from the proposed elimination of the articles in the Convention relating to documentation and wilful misconduct. The retention of either of these two last-mentioned features, however worded, would invalidate the entire IATA plan."\(^2\)

(ii) **U.S.** - "We have reviewed all of the comments made in the past ten days in an effort to propose a package which combines both the minimum requirements of the U.S. with provisions we hope are acceptable to others. As part of this revised package we will propose a figure significantly lower than our original $125,000.00 limit but which is also the minimum level acceptable to the U.S. This level leaves us no room for bargaining on the other key features in the package."\(^3\)

If these statements are stripped of the obvious tactics of negotiation, what is left is a willingness to trade-off to reach an agreement. Both statements contain provisions counter to the interest of the party speaking.

The primary requirement of the proposal is acceptability and, therefore, the package must satisfy the basic needs of each party fully.

The U.S. has long urged recognition of full costs - that is, compensation for all losses resulting from an incident. The industry can no longer receive subsidization from the families of incidental victims.

On the other hand, the scheme must not go beyond recognition of costs, giving compensation where no economic loss exists. Satisfaction of U.S. demands will force insurance costs upward but the proposal balances this by identifying means to increase the "accuracy" of compensation and exerting a downward influence.
on rates, possibly below present levels. If the error in the present liability
regime could be described in one word it would be "inaccurate". It fails to
compensate fully most of the victims yet provides for awards in cases where the
loss does not warrant it. The interests of both parties could be met in a pro-
posal which was directed towards accurate compensation.

Based on the preceding guidelines, the proposal contains the following
aspects:

(i) **ABSOLUTE LIABILITY** - The concept of fault is alien to a system which has
compensation as a goal. The passenger receives a swift and certain re-
covery and the carrier concedes little as under the common law he is
treated in a similar fashion. The U.S. has shown that concession by the
carrier on this point would be met with a lower limit demand. "A solu-
tion providing for liability without fault would be acceptable at a level
somewhat lower than a regime continuing with a provision that merely
shifted the burden of proof. It reduces the time and cost of presenting
a claim yielding a higher net benefit." ⁴

The carrier would benefit if absolute liability were required as it
would cure a defect that exists in the Montreal Agreement. In the case of
an act or omission of a third party causing the injury, the carrier is
initially liable but a right of recourse exists against the third party
by the carrier. However, if the carrier voluntarily waives his defence
under Article 20 (1), the third party may defeat the recourse action because
the carrier can recover only if he was legally obliged to pay. The third
party may now allege that the carrier was not obliged to compensate to
that level but did so voluntarily.

(ii) **VERY HIGH LIMIT** - Recognition of the central role of the U.S. in any
future agreement dictates that the proposal incorporate the essence of
their demands. Acceptance by the U.S. is contingent on the removal of serious constraints on recovery by victims and their families. A proposed limit of $300,000.00 would be a probable range - viewed by the U.S. as adequate but short of a windfall. For the rest of the world, it is equivalent to unlimited liability; its sole effect would be to protect the plan from extraordinary U.S. awards such as the 1963 Chicago jury trial which awarded $2 million for the death of a young girl without dependents. The proposed figure approximates the 80% coverage that the U.S. spoke of - the 20% of cases which are not fully satisfied represents the price the U.S. is willing to pay for a new agreement. A figure above 20% would not be acceptable to the U.S. in light of the benefits the U.S. would receive.

The proposal is based on the fact that the central nation in the negotiations views $300,000.00 just compensation. It is not put forward as a figure which is seen to be high or low, just or unjust, but rather as a figure which is a necessary part of a workable proposal. If the nations yield to the U.S. on this point, they will be in a position to negotiate other points which would lead to a "sharpening" of the compensation scheme and lower insurance costs.

(iii) **UNBREAKABLE LIMITS** - Countries other than the U.S. have indicated that they would accept a high limit if it is unbreakable in view of the treatment previous agreements have received in U.S. courts. The IUAI has stated that the lack of certainty caused by breakable limits has been reflected in higher insurance premiums. Protracted trials also result from these provisions, the automatic payment is used as a war-chest to finance an attempt at full damages by means of the limit-voiding clauses.

The two areas of concern are:

(a) **Wilful Misconduct** - Nations are faced with a difficult choice -
they are philosophically opposed to limits in the case of genuine misconduct but the abuses of U.S. courts of this provision more than offset this feeling.

(b) Notice - The multiple regimes and serious differences between domestic and international liability make notice necessary. The disagreement arises when the inducement to give notice is discussed; the U.S. insists that it is a *quid pro quo* for limitation and if there is no notice there should be no limitation. To avoid notice requirements and the consequent penalty for failure to issue, the other countries have urged constructive notice but on this point it must be observed that the limitations are not so much national law but part of a contract which the passenger must voluntarily enter into.

The proposal on this point sets out:

(a) Wilful misconduct or any other cause will not justify or permit unlimited liability.

(b) Failure to give notice is not cause for unlimited liability. Responsibility for notice should be shared between the carrier (without penalty) and the government; providing notice on tickets, at air terminals and ticket offices. A general notice in passports that recovery for death or injury may be limited in transport accidents outside the country would be useful. Apart from the Warsaw Convention agreements such as the Berne Railway Union Convention and the CIV Rules limit the carrier's liability abroad.

Discussion of notice is put in perspective by a British survey carried out in 1967 at Heathrow Airport. 512 U.S. passengers were randomly selected and interviewed, after being shown a sample of the Warsaw notice, three questions were asked of them:
"Is this notice in your airline ticket?"
Yes - 35% (181) No - 31% (160) Don't Know - 34% (171)

Those answering "yes" to the first question were asked, "Did you read the notice before boarding the aircraft?"
Yes - 19% (95) No - 17% (86)

Those answering "yes" to the second question were asked, "Did you take out additional insurance as a result of reading the notice?"
Yes - 4% (20) No - 15% (75)

(iv) **RESTRICTED RIGHT TO SUE** - This provision would act to cut insurance costs, in part, offsetting the effect of a high liability limit. The proposal is directed towards compensation and the accuracy of it is improved by narrowing the group of people entitled to sue for damages. This would be a family member economically dependent on the victim including a wife, children, and in some cases a husband or dependent parent. All others are excluded from suit as the proposal does not attempt to place a value on human tragedy but only on economic loss of survivors.

Restricting the category of claimants is consistent with the trend of social welfare schemes e.g. pensions and workman's compensation. It has long been an accepted practice in civil law countries to restrict suit. The Netherlands Civil Code of 1835 in S.1406 limits an action for wrongful death to a wife, child or supported parents.

Eliminating windfall awards reduces the burden placed on a compensatory plan; since the U.S. is concerned with recognition of legitimate costs, they would yield on this point to benefit economically dependent survivors.

(v) **COLLATERAL BENEFITS** - The traditional argument against consideration of
collateral benefits was that the tortfeasor should not be relieved of his liability because of provisions made by the plaintiff. Collateral benefits would include pensions, insurance and assets; related to this are mitigating circumstances e.g. the wife has remarried.

When the concept of fault is replaced by an interest in compensation, this objection is removed. However, in contrast to most other countries which are categorically committed to the compensatory and opposed to the punitive theory of damages, American courts continue to entertain an ambiguous and uneasy tolerance of double recovery. But, if the U.S. concedes on this point, to which they attach no reasoned significance, insurance costs would take another drop.

The proposal therefore calls for a judge without jury sitting in an administrative capacity to calculate the plaintiffs' loss subtracting from it the collateral benefits available to the claimant. While this externalizes some industry cost, it achieves adequate compensation at minimum cost to the carrier and ultimately the passenger.

(vi) **CONTRIBUTORY NEGLIGENCE** - Comparative negligence is theoretically not a part of an absolute liability system but there must be some provision to reduce the award where any plaintiff or victim has by his behavior contributed to the damaging event or increased the damage caused. This issue does not arise in any serious incident but the plan should not have to bear a cost of this nature.

(vii) **WAR RISKS AND SABOTAGE** - Despite the use of the term "absolute" in reference to previous liability arrangements, these risks were excepted. In that the proposal is concerned with compensation and not fault or causation the system will include these risks.

Airlines do not want responsibility for loss by sabotage but this rein-
roduces the element of fault, the widow of an innocent victim is no more responsible for the loss than the carrier. The latter can best assume war risks as they can avoid the area or pay higher insurance premiums to obtain coverage. Private insurance against war and armed conflict is not available in any form to a passenger. Trip insurance excludes it as does annual travel insurance and no additional premium will obtain it.

This has a considerable effect on insurance costs in a world where aircraft are often the target of armed conflicts which occur continually. The proposal therefore tempers the coverage in light of insurance costs by allowing the carrier in the case of flights proximate to an area currently subject to hostilities to:

(a) Contract expressly with the passenger that war risks are excluded, or
(b) Unilaterally suspend without notice the war risk coverage after a set time has elapsed since the outbreak.

(viii) REVISION - The proposal contains an automatic limit revision to ensure that compensation paid following an accident maintains its purchasing power. Revision is necessitated by inflation and the rising income of air transport passengers. The Guatemala City Protocol contained a simple annual addition of 2.5% to the limit with a conference every five years to decide on its continuation. Two problems are evident here:

(a) Any proposal that requires conference approval during its operation is certain to fail. Discussions of this nature have been going on since 1929.
(b) The 2.5% limit is too low - in the period 1960-70 the median rate of inflation in ICAO countries was 4.25%, the average was 7% and rates were as high as 53.5% annually. Currently, double digit inflation exists in all countries.
The revision clause in the proposal calls for a limit raise based on a Consumer Price Index. The International Monetary Fund maintains a CPI for the vast majority of ICAO states. The annual revision would equal the rise in aggregate CPI, the rise in each state being multiplied by that country's air traffic to gain a weighted average. This will assure the U.S., the only country affected by the limit, that revision will be higher than the 2.5% they themselves proposed and based to a large extent on their own rate of inflation, due to their traffic generation. At the same time the other countries will be assured of a rate of increase that is less than the rise in magnitude of U.S. awards.

(ix) **DAMAGE JURISDICTION** - This is the main element in a plan to accurately compensate loss; it is a uniform and exclusive choice of law regarding damages based on the domicile of the plaintiff. The primary justification is the fact that foreign states have their own laws and practices for calculating damages and the system used at the forum should not be allowed to influence or interfere with the application of those laws and practices.

Persons are connected to a state by domicile and nationality. Domicile is based on the fact of residence coupled with an intention to permanently reside in that place, whereas nationality operates regardless of intention or residence. Of these two, domicile yields the most just economic result for the surviving family. Selection of law should be on the basis of providing for the survivors a standard of living similar to the one they would have enjoyed had the passenger not been killed, in the economic environment in which they would most likely continue to live. Loss is best determined, therefore, by the economic standards of the plaintiff's domicile.

Inherent in a choice of law provision regarding damages is the necessity of denoting **fora** which will further the fulfillment of the proposal. Currently
jurisdiction is based in the Convention on the ability of that court to exercise control over the defendant carrier. In a time when there was little or no cooperation between nations regarding enforcement of foreign judgments this was necessary. However, now that enforcement procedures are blocked only slightly by national borders, it is possible to have a court which has no control over the carrier issue the judgment and have a court in a country such as the U.S. who can control the carrier, back and enforce the judgment. The cooperation of the countries within an international liability agreement can be extended to enforcing judgments issued under the authority of that agreement.

This clears the way to select fora not on the basis of carrier control but on interest in the plaintiff's welfare. Two possible options are open here:

(i) Add a fora to the present four listed; the court of the domicile of the plaintiff. This would open the possibility of the domicile court hearing the case but there are still four opportunities for forum-shopping with all its contingent harm. These courts would hear the case and apply foreign law to the assessment of damages. This, however, raises the question as to whether a court such as in the U.S. would or could apply a foreign law on damages which the judges did not support or quite possibly understand. A judge in assessing damages is allowed a wide latitude and this would allow defeat of the requisite choice of law.

(ii) The second option is to make the domicile court the only possible forum. This immediately raises the objection of forum non conveniens for one or both parties; in the vast majority of cases it would be the carrier who is forced to defend in a foreign court, the element of residence generally assumes that the plaintiff will not be inconvenienced. On the balance, the tendency of this second option to require suit in inconvenient jurisdictions is more than compensated by the potential of creating a system which recognizes full cost with the greatest accuracy and therefore least cost.
The U.S. would be in full agreement as it would be guaranteed a hearing in U.S. courts and the other countries would be relieved of the practice of forum-shopping which is a heavy strain on the scheme of compensation.
The issue of passenger liability of international air carriers presents in microcosm all the fundamental problems of international law as a whole including the questions of sovereignty, jurisdiction, territory, the relationships between states and other international entities, unification of private law and the many problems of conflicts of law.¹

It is in this light that the following package is proposed:

1. Absolute Liability
2. High Limit - approximately $300,000.00
3. Unbreakable - No Notice or Willful Misconduct Clause
4. Restricted Right to Sue
5. Collateral Benefits Considered
6. Contributory Negligence Clause
7. War Risks and Sabotage Covered
8. Domicile of Plaintiff is Required Forum
9. Automatic Revision Based on Consumer Price Index

The proposal is not held out as one which is just to passenger, carrier or any one state. It is based on the data revealed as the development of passenger liability was traced forward chronologically. The object was to develop a pragmatic plan - one that stood the best chance of acceptance by the states involved, particularly the U.S. The guiding principle was that recognition of costs as perceived by the U.S. must be placed within a framework which will compensate those losses at minimum possible cost.

Any solution will of necessity require compromise by each party on many points, many of them significant - the test which must be applied is that of the
least-worst acceptable scheme. The question which must accompany this proposal is that asked of each group at the 1966 ICAO meeting in reference to the plans then put forward - "Does your delegation think that it is willing to recommend acceptance of this proposal to its government as a scheme which it could live with?"
APPENDIX A

THE WARSAW CONVENTION

The instrument signed at Warsaw in 1929 contained many provisions to implement the basic objectives of the conference. The Convention should be examined not only to understand its mechanics but to gain an insight into the basis of international air carrier liability.

The document is entitled "A Convention for the Unification of Certain Rules Relating to International Transportation by Air" having been drawn by states which according to the Preamble have "recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier."

Article One - The Convention applies to all international transportation of persons, baggage and goods performed by an aircraft for hire or gratuitously by an air transport enterprise. This excludes only gratuitous flights by private persons.

"International transportation" is defined as being any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there is a break in the transportation, are situated either:

(i) Within the territory of two High Contracting Parties (member nations), or
(ii) Within the territory of a single High Contracting Party if there is an agreed stopping place outside of that country's territory, even if that territory is not a party to the Convention.*

An "agreed stopping place" means a place where according to the contract, the plane by which the contract is to be performed will stop in the course of

*Return, open jaw, and circular routings are regarded as two trips.
performing the carriage. It is not influenced by the purpose of the descent or the rights the passenger may have to break his journey at that point.²

All other transportation even if international in the usual sense is not covered by the Convention.

If transportation is to be performed by several successive carriers, the Convention treats it as one individual carriage if it has been so regarded by the parties. This presumption is made regardless of whether the carriage has agreed upon under the form of a single or multiple ticket. If part of the journey involves international flight, the international character and, therefore, the Convention applies to the entire journey. Despite clear wording in the Convention a U.S. court has held that this effect could be defeated by purchasing separate tickets for each leg of the journey.³ The effect of the Convention being applied to the domestic leg is adverse to the interests of Canadian passengers. For example, a passenger flying Calgary-Vancouver on a regional airline and Vancouver-Tokyo with CP Air is held to limited liability if injured or killed on the flight from Calgary to Vancouver. The Convention would be regulating the rights between a Canadian passenger and a Canadian carrier during domestic flight, circumstances which are not appropriate for the intervention of an international agreement.

Article Two - The Convention applies to transportation by the State, although the country may at the time of ratification declare that this Article not apply to that state. Canada has so elected.

Article Three - The carrier must deliver to the passenger a ticket containing the following data:

(i) Place and date of issue
(ii) Place of departure and of destination
(iii) Agreed stopping places, but the carrier may reserve the right to alter
the stopping places in case of necessity and if it does so it will not have the effect of depriving the transportation of its international character.

(iv) Name and address of the carrier or carriers.
(v) A statement that the transportation is subject to rules relating to liability established by the Convention.

The absence, irregularity or loss of the passenger ticket will not affect the validity of the contract and it will still be subject to the rules of the Convention. But, if the carrier accepts a passenger without a ticket having been delivered, he is not entitled to avail himself of the provision in the Convention which limits his liability. This is seen as a *quid pro quo* for the limitation.

The roots of the requirement lie in the common law of contract. A contract of carriage is normally evidenced by the acceptance of an offer contained in the ticket and it will set out in the document or by reference the precise terms upon which the passengers are accepted for transport. The rule is that an offeree (the passenger) is bound by all the terms of an offer but only to the extent that the terms of the offer are communicated to him before he accepts the offer. The terms of the contract must be communicated in the sense that knowledge of them is brought to the notice of the offeree. If the contract is not signed, as with a passenger ticket, the court has to decide whether the ticket provided is intended to form an important part of the contract and then as a question of fact, whether reasonable steps have been taken to draw the notice of the offeree to the terms of the offer. The terms of the limitation are not set out in full in the document but there is an indication where the terms can be seen.

This is a very critical article in that it represents one of the few avenues to escape limited liability. American courts view the limit as inequitable and have seized on this article, using it as a means to circumvent the
Convention.

The leading American case on this point \( (\text{Lisi v Alitalia}) \) held that not only had there to be delivery of the notice but it had to be an effective notice. The lower court judge in awarding unlimited damages to the plaintiff criticized the size of the print - "Camouflaged in Lilliputian print in a thicket of conditions of contract .... Indeed the exculpatory statements on which the defendant relies are virtually invisible." After \( \text{Lisi} \) the size of the print was increased to 10 point from 4.5 point. This case was later followed in Canada.

American courts have also insisted that the delivery of notice take place sufficiently ahead of flight time to allow the passenger to make alternate provisions e.g. purchase flight insurance or decline passage. In a case where the ticket was delivered at the foot of the boarding ramp the limits were held not to apply.

Group travel either on a single or multiple ticket creates situations where each passenger does not receive individual notice but attacks on the limit from this angle have not been very successful.

Article Seventeen - The carrier will 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 took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

This article has three important aspects:

(i) \textbf{A course of action is created} - At common law there was no right of action for wrongful death. In an early English case a man sued a stagecoach company for damages when his wife was killed in an overturning stagecoach. Lord Ellenborough in his decision said, "In a civil suit, the death of a human being could not be complained of as an injury." The only losses found recompensable were those which arose prior to death. This pointed out a glaring deficiency in the common law so in 1846, the English Parliament
passed the Fatal Accidents Act, better known as Lord Campbell's Act which stated that an action could be maintained on behalf of a husband, wife, parent or child of a person whose death was caused by a wrongful act, for loss of economic benefits.

The act was copied widely in the Common Law jurisdictions including Canada and the U.S., forming the basis of provincial and state wrongful death statutes.

The Civil Law jurisdictions had a wrongful death action within their code, in Quebec, it is Article 1056.

However, in 1929, not all nations had developed adequate wrongful death statutes, others had no provisions at all. This fact must be viewed in light of the operation of the lex locus delicti rule which at that point in time determined if the death was a legal injury compensable in damages. Thus, if an airplane crashed in a country which had no wrongful death action, the survivors would not be able to bring suit in any court in the world. Obligatio did not arise.

The Convention remedied this deficiency by granting a course of action. English and Canadian courts have interpreted the phrase "shall be liable" in this manner but some American courts have held that the article only limits any cause of action arising under choice of law rules. Civil Law courts treat the article in another fashion because of the basic differences in the two systems of law. There it is regarded as creating a rule of contractual liability and reference is made to the law of the contract.

(ii) Embarking and Disembarking - The second aspect of Article 17 is that the carrier is liable for death or injury not only in flight but also in the course of these ancilliary operations. "The operation of embarkation might be said to begin when the passenger reaches the terminal or when he
is summoned by an official to proceed to customs or other authority prior to departure or when he is requested to proceed to the embarkation area or into the apparatus leading to the aircraft or when he actually enters the aircraft. The only criteria is whether they have reached the status of passengers in international air travel as defined by the Warsaw Convention."14 The converse reasoning may be applied to disembarkation - as long as they retain the character of passengers, the airline is responsible for their safety.

While in 1929 the drafters felt this would cover the "slip,trip and fall" cases; in the 1970s with the pandemic of airport violence, this places a heavy liability on the airline.

(iii) **Absolute Liability** - The third aspect is the creation of an absolute liability of the carrier for the safety of the passengers. The article states in part, "the carrier shall be liable" - this non-negligent legal responsibility arises simply by the occurrence of injury. This is reduced to a presumed liability by the operation of Article 20.

**Article Twenty** - The carrier will 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 to take such measures. This reduced the absolute liability of Article 17 to presumed negligence but in view of the difficulty involved in satisfying this article the qualification is not extensive.

**Article Twenty-One** - If the carrier proves that the damage was caused or contributed to by the negligence of the injured party, the court may in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability. In 1929, contributory negligence varied in its operation between jurisdictions from a bar to mitigation of damages, so the Convention was loosely worded on this point to encompass local practice.
Article Twenty-Two - The liability of the carrier for each passenger is limited to 125,000 French gold francs, which may be awarded in a lump sum or periodic payments. The franc mentioned is commonly referred to as the Poincare franc consisting of 65 1/2 mg. of gold at the standard fineness of 900/1000 and may be converted into any national currency in round figures. The value of the award is fixed not by the gold content but by official prices in the world monetary market. Valued at $5,000.00 in 1929, it is worth approximately $10,000.00 today because of revaluations.

This limitation is the central provision of the Convention and the focal point of contention between the parties since 1929.

The article also provided that the carrier and passenger may agree to a higher limit. Designed in 1929 to allow a passenger to pay a premium for additional coverage, it later played a basic role in the Montreal Agreement of 1966.

Article Twenty-Three - Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention will be null and void.

Article Twenty-Four - In the case of a suit brought for death or injury, the action can only be brought subject to the conditions and limits set out in the Convention.

Article Twenty-Five - The carrier will not be entitled to avail himself of the provisions in the Convention which limit or exclude liability if the damage was caused by wilful misconduct or by such default on his part which is considered in accordance with the lex fori to be equivalent to wilful misconduct. This article was included because of the strong feeling, particularly in civil law countries that one must not be able to limit his liability for intentionally inflicted harm.
The term used in the official text, in French, was *dol* which was translated into the common law concept of "wilful misconduct". It occurs when (a) the actor knew that he was acting wrongfully or wrongfully omitting to act regardless of the consequences, or (b) the actor acted or omitted to act with reckless indifference as to what the result might be. The element of intent should be noted in (a).

The article extends to cover damage caused by any agent of the carrier acting within the scope of his employment. This is in accordance with the concept of vicarious liability, imposed by law upon a principal (carrier) as a result of:

(i) A tortious act or omission by the agent (e.g. pilot)
(ii) A relationship between the actual tortfeasor and the principal, and
(iii) Some connection between the tortious act or omission and that relationship.

In the period after 1929, the terms *dol* and "wilful misconduct" received very uneven treatment in the courts of the member nations. Representing one of the few means to escape the limitation, the concept was introduced frequently by plaintiffs. Assessing fault of this nature is very subjective and can be biased by judicial distaste for the limitation. The limit was regularly broken by plaintiffs who alleged wilful misconduct before American courts.

Article Twenty-Eight - An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before:

(i) The court of the domicile of the plaintiff.*
(ii) The court of the carrier's principal place of business.
(iii) The court of the place of business through which the contract was made, or

*The official text, in French, used the word *domicile*. The Americans translated it as "domicile" while the English changed it to "place of ordinary residence" which is a broader and more correct translation.
(iv) The court at the place of destination.

This article precluded some fora that might otherwise have been available to the plaintiff, the most obvious one being the domicile of the plaintiff if the court can exercise jurisdiction over the carrier.

Article Twenty-Nine - The right to damages will be extinguished if an action is not brought within two years from the date of the accident. This is similar to other Fatal Accidents Acts which have a termination date on the right created.

Article Thirty - In the case of transportation to be performed by successive carriers each carrier who accepts the passenger will be subject to the rules set out in the Convention and is deemed by the instrument to be one of the contracting parties insofar as the contract deals with that part of the transportation which is performed by that carrier. The right of action in a case like this lied only against the carrier who performed the transportation during which the incident occurred except in the case where the first carrier has by express agreement assumed liability for the entire journey. This provision was clarified and extended by an amendment to the Convention signed at Guadalajara in 1961 which dealt with "certain rules relating to international carriage by air performed by persons other than the contracting carrier". It applied the Warsaw Convention to the hire, charter and interchange of aircraft.

Article Thirty-One - In the case of combined transportation performed partly by air and partly by any other mode of transport, the provisions of the Convention apply only to the air segment.

Article Thirty-Seven - The Convention may be ratified by states wishing to become High Contracting Parties by depositing an instrument of ratification with the Ministry of Foreign Affairs in Poland.
Article Thirty-Nine - Any of the High Contracting Parties may denounce the Convention by a notice sent to the Polish government which will become effective in six months.

The articles not dealt with here relate for the most part to transportation of baggage and freight which are also subject to limited liability.

The Warsaw Convention is in force in Canada by virtue of The Carriage by Air Act 3 Geo. VI 1939 C.12 and by virtue of a proclamation of the Governor-in-Council, dated June 13th, 1947 and January 30th, 1948; declaring the Act in force on July 1st, 1947 and the Convention in force on September 8th, 1947. The Canadian government had delayed until 1947 because until then Trans-Canada Airlines was essentially a domestic carrier and could not benefit from its provisions.

Over 100 nations have ratified the Convention. Those not having done so include Albania, Afghanistan, Bolivia, Chile, Costa Rica, the Dominican Republic, Ecuador, Iran, Iraq, Nicaragua, Panama, Paraguay, Peru, Saudi Arabia, South Korea, Thailand, Turkey, Yemen and Uruguay.
APPENDIX B

THE HAGUE PROTOCOL

The instrument signed at the Hague was titled "A Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on October 12th, 1929". There was no agreement on the nature and scope of the amendments which should be made or even the necessity of amending at all, so the amendment was done by way of protocol so that the Convention would continue in those states which did not accept the Protocol.

To implement the changes, the Protocol contained the following provisions:

Article Three - The ICAO Legal Committee had fostered the Conference not only to discuss limit revision but to re-define certain terms and reduce the detail required in tickets thereby reducing the possibility of the limit being broken.

The ticket now required:

(i) An indication of the places of departure and destination
(ii) If these points are in the same High Contracting Party's territory, one or more agreed stopping places outside that territory
(iii) A notice to the effect that if the passenger's journey involves an ultimate stop in a country other than that of departure the Warsaw Convention may be applicable and that the Convention governs and in most cases limits liability of the carrier for death or personal injury. If the carrier consents to a passenger embarking without a ticket having been delivered containing the notice required, the carrier cannot avail himself of the limiting provisions.

The Rio de Janeiro meeting discussed the possibility of having the ticket warn that the Convention did apply and have it inserted only in Warsaw tickets. However, several court cases lasting long periods of time had been concerned
solely with the question of whether or not a specific journey was Warsaw flight. Under these conditions a ticket agent could not be presumed to make a correct decision in a matter of seconds. Computer ticketing holds the possibility of each ticket having Warsaw applicability determined for it automatically and a notice attached stating Warsaw did apply.

Article Eleven - The deleted Article 22 of the Warsaw Convention was replaced by "The liability of the carrier for each passenger is limited to the sum of $250,000 francs."

Article Thirteen - As a quid pro quo for raised limits, the airlines received a partial reprieve from the "wilful misconduct" provision. Two approaches were open to the conference:

(i) To tighten the definition of "wilful misconduct", or
(ii) To put an upper limit on recovery (e.g. two times the limit).

The delegates chose (i), deleting the French term dol and replacing it with the Anglo-Saxon concept of "wilful misconduct". The wording of the clause came from the charge to the jury in the Jane Froman case where the plaintiff unsuccessfully pleaded misconduct. It read in part, "that damage resulted from an act or omission of the carrier, his servants, or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result". The 1953 Rio de Janeiro draft excluded "recklessly" leaving only intentional acts but this very narrow definition was excluded. This definition, however, was used in the 1952 Rome Convention on Injury to Third Parties and Surface Damage.

The "wilful misconduct" clause had received a very uneven application in the courts of member states and it was anticipated that a redefinition of circumstances where the limit was broken would remedy this.

Article Fourteen - If an action is brought against a servant or agent of the
carrier, out of damage to which the Convention applies, such servant or agent, if he proved he acted within the scope of his employment will be entitled to avail himself of the limit on liability which the carrier is entitled to invoke. Common law had always allowed a servant or agent of a carrier to use the protection of limited liability which the carrier had by virtue of a contract of carriage despite lack of privity.

By providing that the aggregate of amounts recoverable from the carrier and his servant or agent will not exceed the limits, a serious loophole in the Warsaw Convention was remedied. By suing the employees of the carrier, a plaintiff could recover a judgment above the limit and the employee would be "saved harmless" by the carrier under the terms of the contract of employment, in effect extracting unlimited judgments from the carrier. Suit of the employee was a reversal of the concept of respondeat superior and the "deep-pocket" theory of defendant selection.

Article Eighteen - The amended Convention will apply to international carriage as defined in the unamended text provided that the places of departure and destination are situated either:

(i) In the territories of two parties to the Protocol, or

(ii) Within the territory of a single party to the Protocol with an agreed stopping place within the territory of another state.

In the case of flight between two countries where both are parties to the Warsaw Convention and only one is a party to the Protocol (e.g. Austria-Canada), the unamended Convention applies with its lower limit.

Article Nineteen - The Convention and the Protocol as between parties to the Protocol will be read and interpreted together as one instrument, known as the Warsaw Convention as amended at the Hague, 1955.
Article Twenty-Two - The limits prescribed by this Protocol will not prevent the court from awarding, in accordance with its own law, in addition the whole or part of the court costs incurred by the litigation. This does not apply if the amount of damages awarded excluding court costs and other expenses of the litigation does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage or before the commencement of the action if that is the later.

The Hague Protocol is in force in Canada by virtue of An Act to Amend the Carriage by Air Act 12 Eliz. II S.C. 1963 C.33 and by a proclamation by the Governor-in-Council issued pursuant thereto declaring the effective date as July 18th, 1964.
THE MONTREAL AGREEMENT

Entitled "An agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol", the instrument was an agreement signed by the carriers and an order of the CAB (#18900) prospectively accepting the terms. The carriers agreed to:

(i) Include the specified terms in its conditions of carriage, including tariffs filed by the carrier with any government body which must now also be filed with the CAB.

(ii) Apply the revised terms to all flights with a point of U.S. contact.

(iii) Not withdraw the filed tariffs for a period of one year following notice to the CAB that they are to be withdrawn.

(iv) Not avail itself of the defence under Article 20 (1) with respect to any claim arising out of death or injury to a passenger below the $75,000.00 limit. Since the limits are inapplicable in the case of wilful misconduct, this gives a two-level recovery/liability scheme:

(a) automatic but limited compensation to all victims.

(b) unlimited compensation for those who can establish an aggravated fault (wilful misconduct) basis for recovery.

(v) The defences of contributory negligence and sabotage remain.

(vi) Provide requisite notice to passengers of the applicability of the new regime in at least 10 point type either on the ticket envelope or a separate piece of paper given to the passenger which notifies him of the limits and informs him that separate insurance may be purchased which will supplement the limit in case of accident.

Throughout the negotiations the U.S. did not reveal if their $75,000.00 demand was inclusive or exclusive of costs. Their last minute statement that it
was inclusive is an indication that the U.S. was and is willing to compromise to ensure an agreement. The 58/75 option is satisfactory in that it matches the limit to national court procedures but the $58,000.00 figure applies to most states including Canada. Again the limit for the U.S. courts is $75,000.00 but for other nations it is $58,000.00 plus costs that would rarely reach $17,000.00.¹

Since Canada awards separate costs, a plaintiff should sue if possible in Canada if he expected costs to exceed $17,000.00 in the U.S.
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2. Seabrooke, Air Law, 1964, p. 103


4. Drion, Limitation of Liabilities in International Air Law, 1954, p. 16


6. Lowenfeld, Supra Note 3, p. 97

7. Seabrooke, Supra Note 2, p. 100

8. Keenan, Supra Note 1, p. 89


10. Ludditt v Ginger Coote Airways Ltd. (1942) SCR 406

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3Fitzgerald, "Current Developments in the Revision of Rules Governing the Liability of the Air Carrier in Respect of the International Carriage of Passengers by Air", 6 Canadian Yearbook of International Law 188, 1968, p. 194


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4. El Din, Supra Note 1, p. 17


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11. ICAO, Supra Note 5, p. 51

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14 Lowenfeld, Liability of Carriers for Accidents in International Flight – The Warsaw Convention, 1972, p. 45

15 ICAO, Supra Note 5, p. 46

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