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Reed u. Wiser: Aviation - Warsaw Convention - Liability of Carrier's Employees

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C. Transport

AVIATION — WARSAW CONVENTION — LIMITATION OF AIR CARRIER'S LIABILITY — WHETHER EMPLOYEES OF CARRIER ALSO PROTECTED

Reed v. Wiser, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

The Warsaw Convention[1] limits the liability of an air carrier for damages sustained in the event of the death or injury of a passaneger during an international flight. The question of whether the employees of an airline are entitled to assert as a defense, the liability provisions of the Convention, as modified by the Montreal Agreement of 1966,[2] was decided in the recent case of *Reed v. Wiser*.[3]

On September 8, 1974, a Trans-World Airlines flight from Tel Aviv to New York crashed into the Ionian Sea west of Greece, killing all seventy-nine passengers and nine crew members aboard. Instead of suing TWA, whose liability would have been limited under the Convention, as modified by the Montreal Agreement, to $75,000 per passenger,[4] the administrators and executors of one victim's estate sued TWA's President and its Vice-President of Audit and Security. The plaintiffs alleged that these two persons were responsible for security on TWA flights and had negligently failed to prevent the placing of a bomb on board. The bomb was then alleged to have exploded resulting in the crash and the death of the passengers. Pursuant to a Multidistrict Litigation Panel ruling,[5] this suit and all other actions arising out of the crash were transferred to the Southern District of New York for consolidated pretrial purposes. There, the plaintiffs — personal representatives, heirs and next of kin of Dan

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1. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of United States proclaimed Oct. 29, 1934). The Convention was the result of two international conferences — one held in Paris in 1925 and the second in Warsaw in 1929 — and of the work done by the Interim Comité International Technique d'Experts Juridique Aeriens (CITEJA)[hereinafter referred to and cited as the Convention].

2. Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, Approved, CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966), *reprinted in* 49 U.S.C.A. § 1502 note. The effect of the Montreal Agreement was to raise the limit of liability from $8,300 to $75,000, including costs of litigation, without regard to fault on the part of the carrier.

3. 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977).

4. The Convention, *supra* note 1, at art. 25, para. 2. This limit applies unless the plaintiff can show that the defendant engaged in wilful misconduct. *Id.*

5. 407 F. Supp. 238 (J.P.M.D.L. 1976).

William Reed — moved to strike the defense of limited liability provided by the Convention. This motion was granted by the U.S. District Court for the Southern District of New York,[6] thus certifying to the Circuit Court of Appeals the question of whether defendant employees, Forwood Cloud Wiser, Jr., and Richard E. Neuman, were entitled to the protection provided by the monetary limits of the Convention as modified by the Montreal Agreement.

The Court of Appeals held that the plaintiffs could not recover from either the airline's employees or the airline and its employees together, an amount greater than that able to be recovered in a suit against the airline itself. The import of the appellate decision in *Reed v. Wiser* is significant in light of the spate of conflicting decisions and opinions which have clouded this area over the years.

In *Wanderer v. Sabena*,[7] the plaintiff, while a passenger on an aircraft owned and operated by Sabena, was injured in an accident near Gander, Newfoundland, enroute from Brussels to New York. Two years after instituting suit against Sabena, the plaintiff served a supplemental summons and amended complaint on Pan-American Airways, Inc., naming that corporation as an additional defendant in the action. The complaint alleged that Pan-American controlled the operations of the defendant Sabena at Gander Airport and that when the airplane crashed, it was being controlled by both defendants. Furthermore, the complaint charged Pan-American with negligence in failing to instruct the pilot to proceed to another airfield where weather conditions were more favorable than those in Gander at the time of the accident. Pan-American Airways moved to dismiss the complaint against itself on the ground that the cause of action did not accrue within the time for commencement of suit as provided in article 29 of the Warsaw Convention. The plaintiff, on the other hand, contended that this two year limitation was inapplicable because Pan-American was *not* the carrier under the contract of transportation. The court held that the plaintiff's cause of action was governed by the Warsaw Convention, reasoning that the provisions of the Convention, where applicable, apply to the agencies employed to perform the carriage as well as the carrier itself. Therefore, failure to institute an action against Pan-American Airways within the time prescribed by the Convention extinguished plaintiff's claim against Pan-American. This case has been criticized on

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6. 414 F. Supp. 863 (S.D.N.Y. 1976).
7. [1949] U.S. Aviation Rep. 25 (N.Y. Super. Ct. 1949).

many occasions but generally for the reason that Pan-American Airways should not have been regarded as Sabena's agent.[8]

Wanderer v. Sabena was cited approvingly in *Chutter v. KLM Royal Dutch Airlines*.[9] In that case, the plaintiff, after boarding the plane but while the plane was still stationary, decided to return to the airport terminal. She stepped through the open airplane door expecting to descend from the plane on the same boarding ramp she had used to enter the plane. Unfortunately the ground service company had already removed the ramp and the plaintiff fell to the ground. More than two years after the accident a suit was filed against both the airline and the ground service company. The court in *Chutter* held that the service company, which was acting as an agent for KLM at the time of the accident, could claim the benefit of the time limitation set out in the Convention. The court supported its decision by drawing a favorable analogy to two U.S. Circuit Court cases[10] which involved the related industry of water transportation and were governed by the Carriage of Goods by Sea Act.[11]

In these cases the limitation provisions of the Act were held to inure to the benefit of a stevedore, independently contracted for by the carrier. The reasoning of the courts is captured in one statement wherein it was posited, "[T]he stevedore is engaged by the carrier to perform a part of the contract of carriage from the group of persons whose joint activity is the carrier's activity."[12] The court in *Chutter* thought that the analogy of the Carriage of Goods by Sea Act was made even more persuasive by the fact that the "Carriage of Goods by Sea Act merely refers to the liability of the carrier while the Warsaw Convention, in Article 24, refers to an action for damages (for passenger bodily injury) 'however founded.' "[13]

Four years after the *Chutter* decision was handed down, the U.S. Supreme Court reviewed the treatment and status of agents under the Act in the case of *Robert C. Herd & Co. v. Krawill Machinery Corp.*[14] The Court held in part that the absence from the language, legislative history, or environment of the Carriage of Goods by Sea Act of anything expressly or impliedly indicating any intention of Congress to regulate

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8. Lacombe, *Jurisprudence, Court Supreme de l'Etat de New York*, 12 REV. GEN. DE L'AIR 821 (1949); LeGoff, *La Jurisprudence des Etats Unis sur l'application de la Convention de Varsovie*, 20 REV. GEN. DE L'AIR 352, 354 (1957).

9. 132 F. Supp 611 (S.D.N.Y. 1955).

10. A.M. Collins & Co. v. Panama R. Co., 197 F.2d 893 (5th Cir. 1952); United States v. The South Star, 210 F.2d 44 (2d Cir. 1954).

11. 46 U.S.C. §§ 1300-1315 (1976) [hereinafter referred to as the Act].

12. 132 F. Supp. at 613.

13. *Id.*

14. 359 U.S. 297 (1959).

stevedores or other agents of a carrier or to limit their liability, established that such agents are not "carriers" whose liability to the shipper is limited.[15] *Herd* specifically overruled one of the cases relied upon in *Chutter* and implicitly overruled the other.[16] In so doing the Court stated, "We can only conclude that if Congress had intended to make such an inroad on the rights of the claimants (against negligent agents) it would have said so in unambiguous terms, and in the absence of a clear Congressional policy to that end, we cannot go so far."[17]

Following the High Court's interpretation of the Act, one district court reached a similar result in a case involving an air carrier.[18] The extent to which the court relied on the Supreme Court's decision is unclear. It appears that the district court opinion rested primarily upon the fact that the United States had failed to ratify the 1955 Hague Protocol which would have, among other things, amended the Convention so as to extend the liability limitations to airline employees and agents.[19]

In deciding to extend the Convention's liability limitations to employees of air carriers, the court in *Reed v. Wiser* began by recognizing that the purpose of the Warsaw Convention's article 22 liability limitation was to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damage. In a 1934 letter to the President setting forth the terms of the Convention, former Secretary of State Cordell Hull wrote:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite

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15. 46 U.S.C. § 1304(5) sets the limit at $500 per package.

16. 197 F.2d at 893.

17. 359 U.S. at 302.

18. Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486 (D.N.J. 1957).

19. International Conference on Private Air Law, the Hague, September, 1955, Minutes 216 (ICAO Doc. 7686-LC/140 1956). Art. 25A provides:

> 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Art. 22.
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> 2. The aggregate of the amounts recoverable from the carrier, his servants and agents in that case, shall not exceed the said limits.
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> 3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act of omission of the servant or agent done with intent to cause damages or recklessly and with knowledge that damage would probably result.

> basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of air transportation, as such limitation will afford the carrier a more definite basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.[20]

The *Reed* court rejected the argument that limits were no longer needed to protect air travel as an infant industry and instead reiterated that although an increase in the amount of the limit has been required as the airline industry has matured, safety records have improved, and worldwide inflation has increased. "[A]t no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters."[21] It is evident that if a claimant is allowed to sue a carrier's employees for an unlimited amount of damages the express purpose of article 22 would be frustrated and plaintiffs would be able to recover from the carrier, damages in excess of Convention limits.

As a result of such a conclusion, the carrier would be forced to insure against his servant's unlimited liability and the cost of operating an airline would be adversely affected. Not only would insurance premiums increase directly with the size of potential damage awards, but increased and more complex litigation would also ensue, pushing insurance rates even higher. These increases would be passed on in the form of substantially higher transportation charges. This result is the very thing which the signatories of the Convention sought to guard against in the first instance.

The court did not, however, rely solely upon the argument that the provisions of the Warsaw Convention should be interpreted "so as to effectuate their purposes."[22] It stated that in the absence of any definition of the term "transporteur" (carrier), the Convention was intended to act as a uniform international aviation law, in the manner espoused in *Block*

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20. S. EXEC. DOC. No. G, 73d Cong., 2d Sess. 3 (1934), *quoted in* Reed v. Wiser, 555 F.2d at 1089.

21. 555 F.2d at 1089.

22. Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1966), where the court laid down general guidelines for interpretation of the Convention. *See also*, Day v. Trans World Airlines, Inc., 528 F.2d 31, 36-37 (2d Cir. 1975) and Block v. Compagnie Nationale Air France, 386 F.2d 323, 336-57 (5th Cir. 1967).

v. Compagnie Nationale Air France,[23] and should be read in the context of the national legal systems of all its members, not just under the U.S. common law, where liability of the wrongdoing agent is a separate source of redress from that of the principal.

As an illustration, the French jurist Lemoine based his interpretation of the Convention on the principle of identification of the carrier with his servants.[24] Throughout the text of the Convention acts of the carrier and his servant are considered in a unified context. The French Air Navigation Act of 1925 does not allow the carrier to avoid liability for his own acts but does enable him to shut off vicarious liability. How then, argues Lemoine, can it be that under the Convention, a carrier's liability is limited but his servants are exposed to unlimited liability, when unlike the French Act, there has been no attempt to draw a distinction between a carrier's acts and those of his servants.

As a further justification for its decision the court indicated that the "however founded clause" in article 24 should be read expansively so as to prevent circumvention of the Convention's provisions. This position was suggested by Lemoine and later more fully articulated by Professor H. Drion.[25] Article 24 reads in pertinent part, "In the cases covered by articles 18 and 19 any action for damages, *however founded,* can only be brought subject to the conditions and limits set out in this Convention." [emphasis added] The clause was interpreted by the court to mean that regardless of whether the action is founded in tort or contract, whether in domestic or foreign law, the limitations and conditions of the Convention apply. The court specifically noted that an interpretation which allowed actions to be brought against airline employees for amounts greater than would be recoverable from the airline itself would defeat the Convention's fundamental objective of creating a uniform system of liability and litigation rules for international air disasters.

The court dismissed the plaintiff's argument that the case should be governed by the refusal of the United States to ratify the Hague Protocol, which expressly extended the Convention's liability limits to a carrier's employees and agents acting within the scope of their employment. With reference to the Hearings before the Committee on Foreign Relations,[26] the court indicated that the United States' refusal to ratify the Protocol was caused by the Protocol's failure to provide a sufficient increase in the

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23. 386 F.2d 323 (5th Cir. 1967).

24. M. LEMOINE, TRAITÉ DE DROIT AÉRIEN 558 (1947).

25. H. DRION, LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW 152-58 (1954).

26. Hague Protocol to Warsaw Convention: Hearings Before the Comm. on Foreign Relations, 89th Cong., 1st Sess. on Exec. H, 86th Cong., 1st Sess. (1965).

liability limits, rather than by its express application of these limits to a carrier's employees.[27]

The court disposed of the Supreme Court's refusal in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, [28] to extend similar liability limitation provisions of the Carriage of Goods by Sea Act to stevedores or other agents by distinguishing *Herd* on the grounds that the Act explicitly defines the term "carrier" and thereby excludes independent stevedoring companies.[29] In addition, the court stated that "the COGSA, unlike the Convention, must be read against the common law and contains no requirement that 'any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.' "[30] Moreover, the court felt there was no evidence to show that the carriers governed by the Act (unlike the carriers under the Convention) ever need reimburse independent stevedoring companies for the negligence of a company's employees.

Reed v. Wiser is a significant decision. It is the first definitive pronouncement on the question of an air carrier's vicarious liability to be handed down by a United States circuit court of appeals. Moreover, that particular circuit, the second, has historically been a key battleground for such lawsuits. A conflict still remains among the circuits of the United States, and until the Convention is formally amended and ratified by the United States, such conflicts can be expected to continue. This is particularly unfortunate in light of the high stakes which are frequently involved in suits against air carriers. The court's opinion in the instant case does, however, contain a good analysis of the relevant considerations and is a well suppported decision.

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27. 555 F.2d at 1086.
28. 359 U.S. 297 (1959).
29. 46 U.S.C. § 1301(a).
30. 555 F.2d at 1093.