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Maximizing Passenger Recovery Under The Warsaw Convention: Articles 17 And 22

MAXIMIZING PASSENGER RECOVERY UNDER THE WARSAW CONVENTION: ARTICLES 17 AND 22

The Warsaw Convention[1] was promulgated in 1929 to alleviate the greatest problem confronting the emerging airline industry, the accumulation of capital in the face of what were considered to be enormous risks.[2] To prevent air accidents from financially destroying the young industry, the Convention limited both the circumstances which could give rise to airline liability and the monetary amount of such liability.[3] Article 17,[4] for example, provided that international air carriers were liable for damages only when a passenger was killed or injured as a result of an accident in an airplane or during the process of embarking or disembarking. The carrier could avoid liabil-

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[1] The Warsaw Convention is officially known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air. 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11; *reprinted in* A. LOWENFELD, AVIATION LAW CASES AND MATERIALS: DOCUMENTS SUPPLEMENT 412-24 (1972) [hereinafter cited as LOWENFELD, DOCUMENTS SUPPLEMENT]; III AIR LAWS AND TREATIES OF THE WORLD, 89th Cong., 1st Sess. 3103 (Comm. Print 1965). The Convention was the product of two international conferences, one held in Paris in 1925 and the other in Warsaw in 1929. The actual drafting of the treaty was accomplished by the Comite International Technique d'Experts Juridiques Aeriens. *See* Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27 (1932). The United States did not participate in the work of the C.I.T.E.J.A. or in the Warsaw Conference, but proclaimed adherence to the Convention in 1934 after the Senate ratification required by the Constitution. U.S. CONST. art. II, § 2. For a general discussion of the Warsaw Convention, see L. KREINDLER, 1 AVIATION ACCIDENT LAW, Ch. 11-12A (1974) [hereinafter cited as KREINDLER]; A. LOWENFELD, AVIATION LAW, CASES AND MATERIALS, VI-26-28 (1972) [hereinafter cited as LOWENFELD]; Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967) [hereinafter cited as Lowenfeld & Mendelsohn].

[2] KREINDLER, *supra* note 1, § 11.01[2] at 11-2.

[3] SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING A CONVENTION FOR THE UNIFICATION OF CERTAIN RULES, SEN. EXEC. DOC. NO. G., 73d Cong., 2d Sess. at 3-4 (1934), *reprinted in* Lowenfeld & Mendelsohn, *supra* note 1, at 499-500. The statement emphasized that a limitation of liability would aid international aviation by lowering carriers' insurance rates, with the probable result that the operating costs of the carrier and the transportation charges to passengers would be reduced. *Id.*

[4] Article 17 provides that:

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

See note 1 *supra.*

ity entirely under Article 20(1)[5] by proving that the airline and its agents used all due care in attempting to avoid the accident. Article 22[6] of the Covention placed a ceiling on the potential liability of the carrier at approximately $8,300 per passenger. Since the signing of the original treaty, however, the focus of air accident compensation has shifted from the protection of the airline industry itself through liability limitation, to the protection of airline passengers.[7] One manifestation of this change, the Montreal Agreement,[8] raised the Warsaw liability limitation to $75,000 per passenger[9] and waived the Article 20(1) defense of due care up to the new liability ceiling[10] on inter-

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[5] Article 20(1) provides in part that "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." *See* note 1 *supra.*

[6] Article 22 provides in pertinent part that "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs." *See* note 1 *supra.* That sum was equal to approximately $8,300. Lowenfeld & Mendelsohn, *supra* note 1, at 499. The Montreal Agreement of 1966 raised this monetary limitation to the sum of $75,000. *See* text accompanying notes 7-8 *infra.*

[7] The most obvious change in air accident compensation involved the substantial increase in the average amount recovered by airline accident victims. Civil Aeronautics Board (CAB) statistics show that the average recovery between 1950 and 1964 for a fatality in a Warsaw case was $6,489 as compared to $38,499 in a non-Warsaw case. During the period of 1958 to 1964 the average recovery for a fatality in a non-Warsaw case rose to $52,000. *See* Lowenfeld & Mendelsohn, *supra* note 1, at 553-55. A more subtle change occurred in the threshold determination of liability as a result of the decline in importance of traditional concepts of negligence, and the concurrent rise of various theories of liability without fault. *See* W. PROSSER, LAW OF TORTS, § 75 (4th ed. 1971); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs,* 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* 70 YALE L.J. 499 (1961). *Cf.* R. KEETON & J. O'CONNELL, BASIC PROTECTION OF THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966).

[8] The Montreal Agreement is officially known as the Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol. Agreement CAB 18900, approved by Exec. Order No. 23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), *reprinted in* LOWENFELD, DOCUMENTS SUPPLEMENT *supra* note 1, at 434-35. The Montreal Agreement was reached between the CAB and most of the major international airlines after the State Department filed a notice of denunciation of the Warsaw Convention on November 15, 1965, to take effect six months later unless the airlines agreed to raise the liability limitations. The Agreement did not in any way alter the language of the Warsaw Convention, but only waived certain provisions of the treaty. *See* Lowenfeld & Mendelsohn, *supra* note 1, at 551-52.

[9] Agreement CAB 18900, approved by Exec. Order No. 23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), *reprinted in* LOWENFELD, DOCUMENTS SUPPLEMENT, *supra* note 1 at 434-35.

[10] *Id.*

national flights which include the United States as a point of arrival, departure or stopover.[11] Thus, the Montreal Agreement created a system of strict liability up to $75,000 under the Warsaw Convention.[12] The purpose of the Agreement was to provide increased protection to the international airline passenger within the framework of the original Warsaw treaty.[13]

The safety of airline passengers has become increasingly tenuous as the hazards of international air travel have grown to include political terrorism, a danger not specifically addressed in the original treaty.[14] The recent rise of terrorism in conjunction with international

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[11] *Id.*

[12] KREINDLER, *supra* note 1, § 12B.02[3] at 12B-7.

[13] Shortly after the Montreal Agreement was reached the CAB indicated that the primary objective of the agreement was to give more realistic compensation to international airline passengers. This CAB statement evidenced the transition from the original Warsaw goal of airline protection to a new objective of increased passenger protection. *See* CAB Press Release 66-61, 382-6031 May 13, 1966; *reprinted in* KREINDLER, *supra* note 1, § 12A.07[3], at 12A-13.

[14] Although airline liability for acts of terrorism is not specifically mentioned in the Warsaw Convention, Article 21 provides that "if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability." *See* note 1 *supra*. Thus, a terrorist or saboteur could not recover under the Convention.

The Montreal Agreement did not alter the effect of Article 21. *See* Approval of CAB Agreement 18900, Exec. Order No. 23680, May 13, 1966, 31 Fed. Reg. 7302 (1966), *reprinted in* KREINDLER, *supra* note 1, § 12A.06, at 12A-9, stating that nothing in the Agreement affected the rights and liabilities of the carrier with regard to any claim brought by or on behalf of one who has wilfully caused injury to passengers. The reason for this is that "those guilty of sabotage and those persons claiming on their behalf will not be able to recover any damages." 54 DEPT. STATE BULL. 955, 956 (1966). Since sabotage has been equated with terrorism, *see* 70 AM. JUR. 2d *Sedition* § 6 (1973), presumably all terrorists are also unable to recover under the Convention. The specific exclusion from recovery of those wilfully causing injury to passengers raises the inference that the victims of such conduct are able to recover under the treaty. *See* Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973). *See* note 62 *infra*. *But cf.* Hernandez v. Air France, No. 7631146 (1st Cir. Nov. 19, 1976). The court denied recovery to the victims of a terrorist attack which occurred in an airport baggage claim area. The First Circuit stated that the attack in the airport, unlike an airplane hijacking, could have taken place in any public building and therefore was not covered by the Warsaw Convention which permits recovery only for injuries resulting from the characteristic risks of air travel. *Id.* slip op. at 8-9. This distinction is questionable in light of the Convention's failure to limit recoverable injuries to those incurred as a result of aviation-related risks. *See* note 4 *supra*. The concurring opinion in *Hernandez* pointed out that a terrorist attack in an airport should be subjected to the same analysis under the Convention as an airplane hijacking. Such an attack is a hazard of modern air travel if it occurs "in the course of any of the operations of embarking or disembarking" under the terms of Article 17.

flight[15] illustrates the necessity of liberal treaty construction to allow passengers to recover for injuries resulting from acts of terrorism. Such construction allows the Convention to remain sufficiently pliable to encompass all of the modern risks of aviation.[16] This needed flexibility can be attained only by interpreting the Warsaw Convention in view of its modern purposes, rather than acceding to the outdated goals of another era.[17] Two cases involving terrorist activity, *Day v. Trans World Airlines, Inc.*[18] and *Reed v. Wiser,*[19] illuminated

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Hernandez v. Air France, slip op. at 11 n. 2 (1st Cir. Nov. 19, 1976) (McEntee, J. concurring).

[15] Until a few years ago unlawful interference with aircraft was not a common occurrence, Recently, however, such activity has ranged from the temporary seizure of an aircraft and its passengers to the murder of passengers and complete destruction of aircraft. *See* Abramovsky, *Compensation for Passengers of Hijacked Aircraft,* 21 BUFFALO L. REV. 339, 340 (1971).

[16] *See* Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 706-07 (S.D.N.Y. 1972), *aff'd,* 485 F.2d 1240 (2d Cir. 1973), (hijacking was an "accident" under Article 17 of the Convention). *See also* note 62 *infra.*

[17] A basic tenet of treaty interpretation is that the conduct of the parties after the conclusion of a treaty (often called practical construction) should be analyzed in determining the proper construction to be given an international agreement. L. MCNAIR, THE LAW OF TREATIES 424 (1961) [hereinafter cited as MCNAIR]; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608 (2d ed. 1973) [hereinafter cited as BROWNLIE]. *See* Vienna Convention on the Law of Treaties, Art. 32, U.N. Doc. A/Conf. 39/27 May 23, 1969, *reprinted in* 63 AM. J. INT. L. 875, 885 (1969); 8 INT. LEGAL MATERIALS 679 (1969) [hereinafter cited as the Vienna Convention]. (The Vienna Convention was signed on behalf of the United States on April 24, 1970, but it has not been ratified by the Senate. For a history of the Convention, see S. ROSENNE, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION (1970).) BROWNLIE, *supra,* at 608 states that the subsequent practice of the individual parties is of probative value in treaty construction. Thus, the Montreal Agreement, even though involving only one party to the original treaty (the United States), may nonetheless illuminate the modern purposes of the Warsaw Convention.

[18] 393 F. Supp. 217 (S.D.N.Y.), *aff'd,* 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3280 (U.S. Oct. 4, 1976) Jurisdiction was asserted under 28 U.S.C. § 1331 (1970) (federal question jurisdiction arising under a treaty of the United States when amount in controversy exceeds the sum of $10,000) and 28 U.S.C. § 1332 (1970) (diversity of citizenship jurisdiction when amount in controversy exceeds the sum of $10,000). In addition, Article 28(1) of the Warsaw Convention provides in part for jurisdiction in the courts of the carrier's domicile, principal place of business, or place of business where the parties entered into the contract of carriage. *See* note 1 *supra.*

[19] 414 F. Supp. 863 (S.D.N.Y.), *appeal docketed,* No. 76-7247 (2d Cir. May 27, 1976) Jurisdiction was asserted under 28 U.S.C. § 1332 (1970) (diversity of citizenship jurisdiction when amount in controversy exceeds the sum of $10,000), 28 U.S.C. § 1333 (1970) (admiralty jurisdiction), and 46 U.S.C. § 761 (1970) (Death on the High Seas Act). The Death on the High Seas Act provides for admiralty jurisdiction where the death of a person is caused by negligence occurring on the high seas more than a marine league (three miles) from the United States or its territories. The incident on which

respectively the modern meaning of Article 17,[20] which generally defines the circumstances which may give rise to airline liability, and Article 22,[21] which provides for a monetary limitation of air carrier liability. The cornerstone of both decisions is the premise that the Warsaw Convention must be construed so as to accomplish its modern function of passenger protection.

Day v. Trans World Airlines, Inc.[22] arose from a terrorist attack in an airport in Athens, Greece. Two Palestinian guerrillas threw hand grenades and fired machine guns into a line of passengers waiting to board a Trans World Airlines (T.W.A.) flight to New York.[23] At the time of the attack, the plaintiffs and plaintiffs' decedents were standing in a line at the airline departure gate to which a T.W.A. representative had summoned them. Prior to being directed to the departure gate, the passengers had been required to sit in the transit lounge, an area reserved for passengers on international flights, until instructed to proceed to the departure gate to be searched by Greek policemen. During the search the terrorists attacked those passengers still standing in line.[24] The plaintiffs alleged that the defendant airline was liable under Article 17[25] of the Warsaw Convention because the passengers sustained their injuries in the course of the operations of embarking.[26] T.W.A., however, contended that the operations of embarking could not include any passenger activity within the terminal building.[27] The Second Circuit explicitly rejected the airline's

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Reed was based led to a number of suits in various federal courts, all of which were consolidated in the District Court for the Southern District of New York for pretrial proceedings pursuant to an order of the Multidistrict Litigation Panel. *In re* Air Crash In the Ionian Sea, 407 F. Supp. 238 (J.P.M.L. 1974). Under 28 U.S.C. § 1407 (1970), a Multidistrict Litigation Panel, consisting of seven circuit and district judges, no two of whom may be from the same circuit, has the power to transfer civil actions in different districts, involving common questions of fact, to any district for consolidated pretrial proceedings. Such a transfer is made for the convenience of the parties and the facilitation of the proceedings. *Id.* The transfer occurs most often in private antitrust actions and air catastrophe suits. McDermott, *The Judicial Panel on Multidistrict Litigation,* 57 F.R.D. 215, 219 n.19 (1973). For a critical analysis of multidistrict litigation in aviation disaster cases, see Martin, *Multidistrict Litigation—A Panacea or a Blight,* 18 TRIAL LAW GUIDE 409 (1975). For recommended improvements of the transfer process, see Farrell, *Multidistrict Litigation in Aviation Accident Cases,* 38 J. AIR L. & COM. 159 (1972).

[20] *See* note 4 *supra.*

[21] *See* note 6 *supra.*

[22] 528 F.2d 31 (2d Cir. 1975).

[23] *Id.* at 32.

[24] *Id.*

[25] *See* note 4 *supra.*

[26] 528 F.2d at 33.

[27] *Id.*

argument, and affirmed the decision of the District Court for the Southern District of New York[28] in holding that since the passengers were under the control of the airline at the time of the assault, they were in the course of embarking within the meaning of Article 17.[29]

To reach this controlled activity test, the *Day* court first examined the language of the treaty to determine the scope of the phrase "operations of embarking" in Article 17.[30] The court observed that the French word "operation", contained in the official text of the Covention, is defined as a process composed of many acts.[31] As the court noted, this definition focuses on an activity without any reference to geographical limitation, and therefore in a determination of the scope of "operations of embarking" the actions of the passenger rather than his location should be analyzed.[32] Although this textual search for the meaning of "operations of embarking" indicated that the applicability of the phrase depended on the passenger's activity at the time of the accident,[33] the definition of the phrase at issue failed to delineate precisely which of the many acts of the departing passenger were within the process of embarking.[34]

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[28] Day v. Trans World Airlines, Inc., 393 F. Supp. 217 (S.D.N.Y. 1975).

[29] 528 F.2d at 33-34.

[30] *Id.* In looking first to the language of the treaty, the *Day* court complied with the most fundamental principle of treaty construction, that international agreements should be interpreted primarily on the basis of the plain meaning of their texts. Only if language of the treaty is obscure or ambiguous should supplementary methods of interpretation be used. BROWNLIE, *supra* note 17, at 607; I. TAMMELO, TREATY INTERPRETATION AND PRACTICAL REASON 14-15 (1967) [hereinafter cited as TAMMELO]; The Vienna Convention, *supra* note 17, Art. 31. But this rule of interpretation is merely a starting point and should not be allowed to obscure the ultimate goal of treaty interpretation, which is to determine the intention of the contracting parties as reflected in the language used in the treaty. MCNAIR, *supra* note 17, at 366.

[31] 528 F.2d at 33 n.7. The appellee passengers also noted that "embarking" has been defined as causing to go aboard a vessel. Brief for Appellee Kersen at 9, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975); Brief for Appellee Day at 15, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975).

[32] 528 F.2d at 33.

[33] *Id.*

[34] As T.W.A. argued, reliance on the plain meaning of "operations of embarking" is probably inappropriate in *Day* since there is no single interpretation which may be given to the phrase. The crucial language of Article 17 is so vague as to be subject to both broad and narrow construction and hence has no plain meaning. *See* Brief for Appellant at 36, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975). One commentator has noted that the "operations of embarking" phrase in Article 17 illustrates an inherent difficulty in freezing into words the exact limits of a law. He argued that the airline should be liable only for injuries resulting from dangers peculiar to aviation, and therefore should not be liable under the Convention in its capacity as a waiting-room proprietor. *See* Hernandez v. Air France, No. 76-1146 (1st Cir. Nov. 19,

Since the "operations of embarking" language of Article 17 is sufficiently broad to be subject to a variety of interpretations,[35] the *Day* court reviewed the legislative history of the article for evidence of the intended scope of "operations of embarking."[36] The court noted that the original draft[37] of Article 17 provided for airline liability from the time passengers entered the departure airport until they left the arrival airport.[38] After much debate at the Warsaw Conference, this proposal was rejected and the present language of Article 17 was adopted.[39] There are two possible interpretations of this rejection which would lead to opposite results in *Day*. First, as T.W.A. argued, the dissatisfaction with the proposed language might be indicative of the Warsaw delegates' intent that the airlines be free from liability for any accidents occurring in the terminal building.[40] Thus, airline

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1976). (In *Hernandez*, the First Circuit stated that recovery under the Warsaw Convention should depend on a close logical nexus between the passenger's injury and the characteristic risks of air travel. *Id.* slip op. at 10.) The same commentator did, however, recognize the need for broad language in Article 17 which would allow for application of the treaty to widely varying fact situations. Sullivan, *The Codification of Air Carrier Liability by International Convention*, 7 J. AIR L. & COM. 1, 20-21 (1936). *But cf.* Heller, *Notes on the Proposed Revision of Article 17 of the Warsaw Convention*, 20 INT'L & COMP. L.Q. 142, 146-48 (1971). (The author argued that a clear definition of "operations of embarking" is needed in Article 17 to insure uniform judicial interpretation.)

[35] *See* note 34 *supra.*

[36] Where the language employed in a treaty is unclear, recourse may be had to other means of interpretation, such as the preparatory work of the treaty and the circumstances surrounding its conclusion. BROWNLIE, *supra* note 17, at 608; TAMMELO, *supra* note 30, at 15; Vienna Convention, *supra* note 17, Art. 32. International and national tribunals have freely used evidence of preliminary negotiations to determine the meaning of terms used by contracting parties in treaties. Y-T CHANG, THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS 140 (2d ed. 1968).

[37] The original proposal for Article 17 was made by a committee of experts in aviation law (C.I.T.E.J.A.) appointed to submit a draft for consideration by the delegates at the Warsaw Conference. *See* note 1 *supra.*

[38] II *Conference Internationale de Droit Prive Aerien* 171 (1930) [hereinafter cited as the *Warsaw Minutes*], *translated in* Brief for Appellant at 13, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975).

[39] *Warsaw Minutes· supra* note 38, at 57.

[40] To support the argument that the rejection of the original draft of Article 17 indicated that terminal building accidents were excluded, T.W.A. pointed out that Article 18 which relates to airline liability for damage to goods and baggage, specifically provides for liability during the period in which "the goods or baggage are in charge of the carrier, whether in an airport or on board an aircraft." *See* note 1 *supra.* T.W.A. contended that this express reference to carrier liability in the airport and the absence of such language in Article 17 signified the intent of the drafters of the Convention that there be no liability for accidents which occur in the air terminal building. Brief for Appellant at 16-18, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir.

liability would depend entirely on the location of the passenger at the time of the accident, and since the plaintiffs in *Day* were still in the terminal building at the time of the terrorist attack, T.W.A. would be free from liability. Conversely, the rejection of the original proposal might indicate the delegates' intent to avoid a test of liability based strictly on passenger location, and to allow for application of the treaty to widely dissimilar circumstances through the use of broad language.[41] Thus, airline liability under this analysis would depend primarily upon the activity of the passenger, rather than solely upon his location. The Second Circuit adopted this second interpretation of the Convention's legislative history, and inferred from the delegates' rejection of blanket airline liability in the terminal building only that there are some airport accidents for which the airline should not be held liable.[42] The general determination by the *Day* court that some accidents in the air terminal building may result in airline liability,[43] did not resolve the question of precisely which airport accidents are within the ambit of the Convention. However, the court's conclusion from the legislative history of Article 17 that there may be airline liability for some accidents in the airport,[44] did support its conclusion from the treaty's text that the proper test of coverage under "operations of embarking" should not be based simply on whether the passenger was injured inside or outside the terminal building.[45]

1975). No reference, however, was made to this difference in language in the briefs of the appellees or the opinion of the Second Circuit. One reply to T.W.A.'s argument is that the language of Article 18 makes the airline liable only when the goods or baggage are damaged while "in [the] charge of the carrier," and that the "operations of embarking" language of Article 17 has the similar effect of imposing liability on the carrier only when passengers are injured while in the charge of the airline. The difference in the terminology of Articles 17 and 18 may be explained by the fact that the air carrier is typically in complete physical control of goods and baggage while it customarily exerts a lesser degree of control over passengers through the use of verbal directions in the process of embarking and disembarking.

[41] 528 F.2d at 35.

[42] *Id.* at 35 n.12. For a discussion of the problems inherent in attempting to discern legislative intent based only on the rejection of a past practice or proposal by a law-making body, see note 87 *infra*.

[43] 528 F.2d at 35.

[44] *Id.*

[45] The court's conclusion, based on the legislative history of Article 17, that a "strict location" test of airline liability is inappropriate accords with its analysis of the Article's text. *See* text accompanying note 33, *supra*. On the basis of the court's textual and historical analysis, T.W.A. arguably erred in relying on the overbroad assertion that the airline may not be held liable for any passenger injury which occurs within the limits of the air terminal. *See* Brief for Appellant at 22-34, Day v. Trans World

In an attempt to determine which passenger activities are covered by Article 17, the Second Circuit turned to the Montreal Agreement as evidence of the goals currently shared by the parties to the Convention.[46] The court noted that the Montreal provisions for strict airline liability and their substantially increased liability limitation indicate that the present function of the Convention is to protect passengers from the hazards of international air travel.[47] The court further emphasized that the strict liability provisions of the Agreement accord with modern concepts of accident cost allocation.[48] This rationale of extensive passenger protection, as manifested in the strict liability provisions of the Montreal Agreement, supports the liberal construction of Article 17 in *Day*.[49] Since the passengers were in the transit lounge and standing in line at the departure gate at the specific direction of T.W.A.,[50] the airline, by exercising this control, created certain risks for the passengers.[51] The costs of accidents resulting from such risks arguably should be allocated to the airline so that it bears the full cost of its economic activity.[52] Hence, the Second Circuit, in

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Airlines, Inc., 528 F.2d 31 (2d Cir. 1975). T.W.A. could have made the narrower argument that even under a controlled activity test, the control of T.W.A. over the passengers in the transit lounge was not sufficient for coverage under Article 17 since the lounge was used by all departing passengers scheduled for the international flights of some forty airlines, not just those of T.W.A. Brief for Appellant at 5, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975).

[46] *See* note 17 *supra*.

[47] 528 F.2d at 36-37. *See* note 9 *supra*.

[48] 528 F.2d at 34. Since accidents and injuries are characteristics of every business activity, if an enterprise is forced to pay for its accidents as it pays for its other expenses, it will experience market pressure to reduce accident costs through the implementation of safety measures. Under traditional negligence theory, however, an activity is largely relieved of this market pressure because it pays for its accidents only to the extent that the standard of due care has not been met. Forcing the enterprise to bear the accident costs of its operation discourages all accidents, not just those in which due care was not exercised. Onek, *The Montreal Agreement and Enterprise Liability, Symposium on the Warsaw Convention*, 33 J. AIR L. & COM. 603, 605 (1967).

[49] *See* Sand, *Risk in the Air and the Myth of Fault, Symposium on the Warsaw Convention*, 33 J. AIR L. & COM. 594, 600-02 (1967).

[50] 528 F.2d at 31-32.

[51] Such risks are recognized at common law, where the carrier owes its passengers a duty to exercise reasonable care to keep the station facilities at the airport safe. *See, e.g.*, Federal Ins. Co. v. Bonilla Colon, 392 F.2d 662 (1st Cir. 1968); Polera v. Trans World Airlines, Inc., 284 F.2d 34 (2d Cir. 1960); City of Knoxville v. Bailey, 222 F.2d 520 (6th Cir. 1955). *Cf.* Garrett v. American Airlines, Inc., 332 F.2d 939 (5th Cir. 1964), (airline was held to a standard of the highest degree of care during the entire passenger-carrier relationship including the time that the passenger spent on station premises.)

The district court in *Day* placed considerable emphasis on the common law rule concerning airline liability for accidents in the terminal building. *See* 393 F. Supp. at

determining which passenger activities were within the scope of "operations of embarking," included those activities of the passenger which were controlled by the carrier and therefore were subject to the risks engendered by the airline's business activity.[53]

Similarly, the Third Circuit in *Evangelinos v. Trans World Airlines, Inc.*[54] held on the basis of *Day* that accidents occurring within the terminal building are not excluded from Article 17 coverage.[55] *Evangelinos* is particularly important in any consideration of *Day* because the two cases were based on the same terrorist attack. The Third Circuit in *Evangelinos* compared the "controlled activity" test of the Second Circuit in *Day* with the "strict location" test employed in *Evangelinos* by the District Court for the Western District of Pennsylvania,[56] and found the "controlled activity" test superior due to its flexibility in application to the modern hazards of air travel.[57] Based on this test, the Third Circuit in *Evangelinos* determined that by confining the passengers to the transit lounge, announcing the departing flight, and directing the passengers to stand near the departure gate, the airline had assumed responsibility for the passengers, and therefore the passengers were engaged in the "operations of embarking."[58] The court buttressed its broad construction of Article 17 by citing the discussion in *Day* of the modern function of the Warsaw Convention to provide increased protection to international airline passengers.[59]

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223. Likewise, on appeal, the plaintiffs urged this common law analogy to the Warsaw Convention. *See* Brief for Appellee Kersen at 16-17, Day v. Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975). Nevertheless the Second Circuit in *Day* made no reference to the common law of air carrier liability, presumably because the case was governed by an international treaty which should be interpreted primarily on the basis of its text, not on the basis of other bodies of law. *See generally* note 30 *supra*.

[52] *See* note 48 *supra*.

[53] 528 F.2d at 33.

[54] 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, [1976] Av. L. Rep. (CCH) (14 Av. Cas.) ¶ 17,101 (3d Cir. May 4, 1976), *petition for rehearing en banc granted*, June 3, 1976.

[55] [1976] Av. L. Rep. (CCH) (14 Av. Cas.) ¶ 17,101 (3d Cir. May 4, 1976).

[56] 396 F. Supp. 95 (W.D. Pa. 1975).

[57] *See* [1976] Av. L. Rep. (CCH) (14 Av. Cas.) ¶ 17,102-03 (3d Cir. May 4, 1976).

[58] *Id.* at ¶ 17,102. The result in *Evangelinos* and *Day* is supported by Blumenfeld v. British European Airways, Inc., 11 Z.L.W. 78 (Ct. App. Berlin 1962) *cited at* 528 F.2d at 37 n.17. In *Blumenfeld*, the court found the air carrier liable for the injury of a passenger who fell down a staircase on his way from the airline waiting hall to the airplane. The German court held that the Convention applied because the air carrier had committed the passengers to its care when they were directed by an airline representative to go from the waiting room to the aircraft.

[59] The analysis by the *Evangelinos* court of the current expectations of the parties to the Warsaw Convention as modified by the Montreal Agreement was the crucial

Throughout the United States there has been a similar tendency to construe the Warsaw Convention broadly to allow recovery where it might be denied under a narrower interpretation.[60] The courts of the Second Circuit initiated the trend of liberal construction to prevent inadequate recoveries, particularly in cases involving the

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difference between the rationale of the Third Circuit and that of the district court. In holding that Article 17 does not apply to passengers inside the terminal building, the district court in *Evangelinos* seemingly neglected any analysis of the modern purposes of the Warsaw Convention. *See* 396 F. Supp. 95. By ignoring the changes made in the Convention since 1929 that greatly increased the protection of international airline passengers, the district court ignored one of the most basic cannons of treaty construction. That principle dictates that the conduct of the contracting parties subsequent to the conclusion of a treaty should be considered as evidence of the mutual goals of the parties with respect to the agreement. *See* note 17 *supra.* Consideration of the emphasis on passenger protection in the Montreal Agreement as conduct subsequent to the original treaty is therefore necessary in any complete analysis of the Warsaw Convention. As the district court in *Evangelinos* noted, the Montreal Agreement did not amend any of the Convention's original terms, but only waived the Article 20(1) due care defense and the Article 22 recovery ceiling of $75,000. 396 F. Supp. at 100. However, the fact that the Agreement failed to change the actual text of the Convention does not mean that it is without interpretative value. The Montreal Agreement was the result of changing attitudes toward both air accident compensation, *see* note 7 *supra,* and the airline industry itself. LOWENFELD, *supra* note 1, at VI-88-89, 95-96. In the interim between Warsaw and Montreal, the airline industry had enjoyed phenomenal growth and was no longer in need of special protection from extensive liability. *Id.* As a result of these changes, the parties to the Montreal Agreement stressed protection of the passenger rather than the airline. *See* note 13 *supra.* The general shift in emphasis from airline protection to passenger protection exhibited in the Montreal Agreement is valuable in analyzing the Warsaw Convention, even if the language of the original treaty remained intact.

The opinions of the Second Circuit in *Day* and the Third Circuit in *Evangelinos,* with their careful examination of the modern purposes of the Convention as modified by the Montreal Agreement, clarified the scope of "operations of embarking" while the defective treaty interpretation in the opinion of the district court in *Evangelinos* only obscured the meaning of the phrase at issue.

[60] Under Article 25 of the Convention, proof of wilful misconduct on the part of the airline or its employees allows a plaintiff to recover unlimited damages against the airline. *See* note 75 *infra.* There is evidence of a trend toward liberal treatment of Article 25. *Compare* Grey v. American Airlines, Inc., 227 F.2d 282 (2d Cir. 1955), *cert. denied,* 350 U.S. 989 (1956) (affirming judgment in favor of airline on issue of wilful misconduct in unexplained accident case) *with* Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) *and* LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965) (both refusing to overturn jury determinations of wilful misconduct on part of airlines or employees in similar cases in which the cause of the air crashes was not known). *See also* Eck v. United Arab Airlines, Inc., 360 F.2d 804 (2d Cir. 1966), broadly construing Article 28(1), which provides for jurisdiction where the carrier has a place of business at which the parties entered into the contract of carriage, so that the plaintiff could bring suit in the United States.

interpretation of Article 17. In *Husserl v. Swiss Air Transport Co.*,[61] which involved the hijacking by an Arabian terrorist group of a Zurich-to-New York flight, the District Court for the Southern District of New York held that the hijacking was an "accident" within the ambit of Article 17.[62] Consideration of the Montreal Agreement and its strict liability provisions was central to the *Husserl* decision as evidence of the current expectations of the parties to the original Convention that international airline passengers receive increased protection through allocation of air travel costs to the airlines.[63] The court also concluded, on the basis of the modern purpose of the treaty, that mental and psychosomatic injuries are colorably within the scope of Article 17.[64] *Husserl* illustrates the willingness of the

[61] 351 F. Supp. 702 (S.D.N.Y. 1952), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) [hereinafter cited as *Husserl I*]. For a discussion of *Husserl I*, *see* Note, 39 J. AIR L. & COM. 445 (1973).

[62] 351 F. Supp. at 707. The *Husserl I* court conceded that hijacking was probably not considered by the drafters of the Convention, but noted that under Article 21 the only passengers excluded from recovery by the treaty were those guilty of wilful misconduct. From this express exclusion the court inferred that innocent passengers injured by the wilful misconduct of another would be able to recover. *Id.* at 706-07. *See* note 14 *supra*. Presumably in order to alleviate the need for such an inference, the Guatemala City Protocol, a treaty drafted to replace the Warsaw Convention and its progeny, substituted the word "event" for the word "accident" in Article 17. The Guatemala City Protocol was signed by the United States in 1971, but has not been approved by the Senate, and therefore is not law in the United States. U.S. CONST. art. II, § 2. The Guatemala City Protocol is officially known as the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955. International Civil Aviation Organization (ICAO) Doc. No. 8932 (1971), *reprinted in* 64 DEP'T STATE BULL. 555 (1971); LOWENFELD, DOCUMENTS SUPPLEMENT, *supra* note 1, at 437. For a full discussion of the Guatemala City Protocol see KREINDLER, *supra* note 1, at Ch. 12B; Note, *The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan Under Article 35-A: A Proposal to Increase Liability and Establish a No-Fault System for Personal Injuries and Wrongful Death in International Aviation*, 5 N.Y.U. J. INT. L. & POL. 312 (1972).

[63] 351 F. Supp. at 707.

[64] 388 F. Supp. 1238, 1248-51 (S.D.N.Y. 1975) [hereinafter cited as *Husserl II*]. *Husserl I*, in denying the airline's first motion for summary judgment, reached only the issue of whether a hijacking is an "accident" under Article 17. In *Husserl II*, the court considered the airline's second motion for summary judgment based primarily on the contention that the plaintiff's mental injuries were not covered by the Warsaw Convention. The court denied the motion and held that mental anguish is within the ambit of "bodily injury" in Article 17. The court stated that "bodily injury" should be construed expansively to encompass as many kinds of injuries as are colorably within the scope of Article 17, although the draftsmen of the Convention probably did not consider the coverage of mental injuries. *Id.* at 1250. The court further stated that mental suffering, absent any physical manifestation of such injury, is compensable if

Second Circuit and the Southern District of New York to interpret the articles of the Warsaw Convention to allow recovery to injured airline passengers.[65]

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the otherwise applicable substantive law provides a cause of action for mental anguish alone. *Id.* at 1251. *But cf.* Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.M. 1973) (only emotional distress directly resulting from some physical injury is compensable). *Id.* at 1158; Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974) (physical injury resulting from the mental anguish caused by an accident is compensable, but mental suffering alone is not recoverable). 34 N.Y.2d at 397-99, 358 N.Y.S.2d at 107-09, 314 N.E.2d 855-56.

For a consideration of the interrelationship of *Husserl II, Burnett,* and *Rosman,* see Note, *Air Law—Warsaw Convention—Mental Anguish Alone is a Compensable Injury under Article 17—Husserl v. Swiss Air Transport Co.,* 388 F. Supp. 1238 (S.D.N.Y. 1975), 7 SETON HALL L. REV. 108 (1975). The Guatemala City Protocol substituted the term "personal injuries" for "bodily injuries," presumably to insure that mental anguish would be compensable. *See* note 62 *supra.*

[65] In a case involving airline liability for injuries suffered by disembarking passengers, however, the District Court for the Southern District of New York refused to extend its usually broad interpretation of Article 17. The court in Felismina v. Trans World Airlines, Inc., [1974] AV. L. REP. (CCH) [13 Av. Cas.] ¶ 17,145 (S.D.N.Y. June 24, 1974), refused to apply Article 17 coverage to a passenger who had fallen down an escalator in the terminal building on her way to the baggage claim area. This narrow interpretation of the scope of Article 17 allowed the plaintiff to avoid the Article 29 two-year limitation for actions brought under the Convention. The court in a very brief opinion stated only that the passenger had completed the process of disembarking by the time she had reached the escalator in the air terminal building. *Id.* By referring in its holding to the escalator as a specific point within the airport, the court appeared to be employing a strict location test in the determination of liability. Likewise, the First Circuit in MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971), held that a passenger injured while waiting in the baggage pickup area could not recover under Article 17 since she had reached a safe point inside the terminal. *See* Klein v. KLM Royal Dutch Airlines, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (1974), holding that a passenger who had arrived safely within the terminal building had disembarked under the terms of Article 17 before he was injured by a baggage conveyor belt. *Id.* The *MacDonald* court refused to state at what point the disembarkation process was completed, but indicated that the Warsaw Convention does not apply to passengers far removed from the operation of the aircraft. 439 F.2d at 1405. *MacDonald,* like *Felismina,* placed little emphasis on the activity of the passenger at the time of the accident, but rather stressed only the plaintiff's location when he was injured. *Id.* at 1402, 1405. Why a location test is used in the disembarkation cases of *Felismina* and *MacDonald* while a controlled activity test is employed in decisions involving embarkation is not clear. Under a controlled activity test the results in *Felismina* and *MacDonald* would not be changed, since in neither case were the plaintiffs acting under the specific instructions of airline personnel as were the passengers in *Day. See* Hernandez v. Air France, No. 76-1146 (1st Cir. Nov. 19, 1976). *Hernandez* involved a terrorist attack on newly arrived passengers waiting to pick up their luggage in the baggage claim area of the terminal building. The First Circuit employed a controlled activity test and held that the injured passengers were not disembarking within the scope of Article 17. The court distinguished *Hernandez* from *Day* and *Evangelinos* on

As in *Husserl* and *Day,* the District Court for the Southern District of New York in *Reed v. Wiser,*[66] construing Article 22, relied on an analysis of the policy considerations supporting the modern Convention.[67] In 1974, a T.W.A. flight from Athens, Greece crashed in the Ionian Sea. All passengers aboard the aircraft were killed. The heirs, next of kin, and personal representatives of nine of the decedents brought suit against the president and security vice president of T.W.A. The complaint alleged that the crash was due to a bomb explosion on board the aircraft, and that the two defendants, in their respective capacities at T.W.A., were responsible for the installation and maintenance of a security system designed to prevent the placing of explosives on company aircraft.[68] The complaint further alleged that the defendants' failure to install or maintain a satisfactory security system was the proximate cause of the accident.[69] The defendants

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the basis that the baggage retrieval process in *Hernandez* was not characterized by airline control of a segregated group of passengers. Unlike the *Day* plaintiffs, the injured passengers in *Hernandez* appeared to be free agents acting of their own volition without interference from airline employees. *Id.* slip op. at 6. *But see* Mache v. Air France [1967] Revue Francaise de Droit Aerien 343, (Cour d'appel, Rouen 1967), *aff'd* [1970], Revue Francaise de Droit Aerien 311 (Cass. 1970). In *Mache,* a passenger was injued while being helped to the terminal building by two stewardesses. The passenger was directed off the main walkway to the airport due to construction and fell into a manhole. The court held that the Convention would apply only if the passenger had been injured on the designated pathway to the terminal building, [1967] Revue Francaise de Droit Aerien 343, 345 (Cour d'appel Rouen 1967). *Mache* represents the strict location test taken to its extreme. The opposite result would follow from a control test, since the passenger was being physically assisted by two airline representatives at the time of the accident. *See* text accompanying notes 50-53 *supra.* The *Mache* result also seems incorrect under the location test of *MacDonald* and *Felismina* since the passenger had not yet reached the safety of the terminal building. Unlike the injured passenger in *Mache,* most disembarking passengers typically are not under the physical control of airline representatives. The process of retrieving luggage from the baggage claim area, during which the plaintiffs in *MacDonald, Felismina,* and *Hernandez* were injured, is not a requirement imposed by the airline on disembarking passengers. 393 F. Supp. at 223-24. The procedure for boarding aircraft, on the other hand, involves a series of steps which are very carefully controlled by the airline. *Id.* at 221. This element of airline supervision in the boarding process distinguishes *Day* from the disembarkation cases, but does not explain why the courts in *Felismina* and *MacDonald* used a location test when a controlled activity test would have yielded the same result. *See* Hernandez v. Air France, No. 76-1146 (1st Cir. Nov. 19, 1976). Since operations of embarking and disembarking are both provided for in Article 17, the same test should be applied to determine which passenger activities fall within the language of the Article.

[66] 414 F. Supp. 863 (S.D.N.Y. 1976).

[67] *Id.* at 865-66.

[68] *Id.* at 864.

[69] *Id.*

asserted that their potential liability was limited to $75,000 per passenger by the terms of Article 22 of the Warsaw Convention as modified by the Montreal Agreement.[70] In *Reed,* the issue addressed was whether the Convention's liability limitation applies only to the corporate air carrier or also serves to protect employees of the carrier from liability for unlimited damages.[71] The *Reed* court held that the liability limitation provision of the treaty[72] does not limit the liability of employees of the carrier.[73]

The analysis in *Reed,* as in *Day,* focused on the text, legislative history, and purposes of the modern Warsaw Convention. To determine whether Article 22 limited the liability of airline employees, the court first searched the text of the Convention for a workable definition of "carrier."[74] The *Reed* court noted that there was evidence of a distinction between the corporate carrier and its employees in Article 25[75] and Article 20(1).[76] Article 25 specifically deals with the wilful misconduct of both the airline and its agents while Article 20(1)

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[70] *Id. See* text accompanying note 9 *supra.*

[71] *Id.* Generally, an agent is not relieved of liability for his torts because he was acting on behalf of a principal. RESTATEMENT (SECOND) OF AGENCY § 343 (1957). An agent who undertakes some action for his principal to protect third parties is subject to liability to third parties for physical harm caused by the reliance of the principal or third party on the agent's undertaking and his subsequent failure to act, if such failure creates an unreasonable risk of harm. *Id.* § 354.

[72] *See* note 6 *supra.*

[73] The *Reed* court refused to rule on the issue raised by the defendants as to whether they could be held liable for nonfeasance as well as malfeasance until it was determined whether New York law would govern the liability of the defendants as officers of T.W.A. New York maintains a distinction between the nonfeasance and malfeasance of corporate agents, a distinction which has disappeared in New Jersey, the plaintiffs' state of residence. 414 F. Supp. at 869-70.

[74] *Id.* at 864-65. For a discussion of textual analysis in treaty construction, see note 30 *supra.*

[75] 414 F. Supp. at 864-65. Article 25 of the Warsaw Convention provides in pertinent part:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct. . . .
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

See note 1 *supra. See also* Pratt, *Carriage by Air Act—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected,* 41 CAN. B. REV. 124, 128 (1963).

[76] *See* note 5 *supra.* Both the airline and its agents must use due care in avoiding injury to the passenger. This defense of due care is waived under the Montreal Agreement. *See* text accompanying note 10 *supra.*

concerns the defenses of both the carrier and its agents. An inference might be drawn from these provisions specifically dealing with carrier employees that the absence of such language in Article 22 indicates that the drafters of the Convention did not intend to extend liability limitation to agents of the airlines. The *Reed* court, however, refused to apply this inference to support its result, and stated only that there was no conclusive evidence that the scope of the word "carrier" in Article 22 was addressed at the Warsaw Conference.[77]

The court did recognize that one aspect of the treaty's history bears directly on the issue of employee coverage.[78] The Hague Protocol,[79] a 1955 amendment to the Warsaw Convention never adopted by the United States,[80] specifically provides in Article 14[81] that servants and agents of the carrier are entitled to the liability limitation of the Convention. The Reed court recognized that this amendment was

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[77] The defendants argued against an interpretation based solely on the text of Article 22, citing *Day* as an example of liberal treaty construction. *See* Brief for Appellants Wiser and Neuman at 15-19, Reed v. Wiser, 414 F. Supp. 863 (S.D.N.Y. 1976). In *Day*, however, the treaty was liberally construed in light of its modern purposes to allow injured passengers to recover, not to deny recovery as the defendants desired in *Reed*. Contrary to the defendants' argument against treaty interpretation based strictly on the text of the treaty, it is generally agreed that the plain language of the text is the primary means of treaty construction. *See* note 30 *supra*. Since the goal of interpretation is the determination of the drafters' intent as expressed in the text, *see* note 30 *supra*, arguably the *Reed* court should have placed more emphasis on the conspicuous absence of any reference to agents of the carrier in Article 22 and the distinction between the corporate carrier and its agents in other articles of the Convention.

[78] 414 F. Supp. at 867. For a discussion of the uses of preparatory materials in treaty interpretation, see note 36 *supra*.

[79] The Hague Protocol is officially known as the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, 478 U.N.T.S. 371, *reprinted in* LOWENFELD: DOCUMENTS SUPPLEMENT *supra* note 1, at 425.

[80] The Protocol was never ratified by the Senate due to rising dissatisfaction with the liability limitation of the Warsaw Convention. *See* note 79 *supra*. The Hague Protocol raised the liability limitation to approximately $16,000, but this figure was still far below average recoveries in comparable non-Warsaw cases. *See* note 6 *supra*. *See* Lowenfeld & Mendelson, *supra* note 1, at 504-62, for a discussion of the Hague Protocol and the refusal of the United States to adopt it.

[81] Article 14 of the Hague Protocol provides in pertinent part:

> (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 the carrier himself is entitled to invoke under Article 22. . . .

See note 79 *supra*. This express limitation of the liability of servants and agents is also present in Article 11 of the Guatemala City Protocol. *See* note 62 *supra*.

subject to more than one interpretation.[82] Article 14 of the Hague Protocol could be construed merely as a clarification of the scope of liability limitation as provided for in the original Convention.[83] A better interpretation, according to the *Reed* court, is that Article 14 of the Hague Protocol represents an express extension of liability limitation to protect the airline's servants and agents who were subject to unlimited liability under the Warsaw Convention.[84]

Having accepted the premise that the original Convention did not provide for limited liability of employees, the *Reed* court implied that the extension of liability limitation to airline employees was a reason for the United States' rejection of the Protocol.[85] In fact, however, the debate in the United States over the Hague Protocol did not focus on the status of air carrier employees, but rather on the general undesirability of liability limitation for the growing airline industry.[86] By suggesting reasons for the American rejection of the Protocol unrelated to those reasons which in fact resulted in the rejection, the *Reed* court gave the impression that it was molding the history of the Warsaw Convention to conform with the result it was trying to achieve. To infer the purposes of a treaty simply from an analysis of subsequent amendments which were rejected, as did the court in

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[82] 414 F. Supp. at 867-68.

[83] *Id.* at 867.

[84] *Id.* at 867-68. Several delegates to the Hague Conference indicated that the liability limitation provision of the original Convention did apply to servants and agents of the air carrier. *Id.* at 867-68, n.17. Some delegates to the Hague Conference stated their belief that the liability limitation provision of the Warsaw Convention did not apply to employees of the air carrier. *Id.* at 868 n.18. However, an analysis of the opinions of individual Convention delegates concerning the scope of the treaty forms no part of the treaty interpretation process. *See* BROWNLIE, *supra* note 17, at 604-11; Vienna Convention, *supra* note 17, Art. 31-32. The goal of treaty interpretation is a determination of the collective intent of the drafters and not their individual motives. *See* note 30 *supra.* Arguably, the *Reed* court over-emphasized the statements of individual delegates to the Warsaw and Hague Conferences concerning the scope of the original Article 22. However, the court's conclusion that Article 22 of the Warsaw Convention does not limit the liability of airline employees is supported by the recommendation of the International Civil Aviation Organization (ICAO) made to the Hague Conference concerning the revision of the original treaty. Documents of the International Conference on Private Air Law 2 ICAO Doc. No. 1686-LC/140, *reprinted in* Brief for Appellee at 21, Reed v. Wiser, 414 F. Supp. 863 (S.D.N.Y. 1976). The ICAO specifically recommended the extension of liability limitation to airline employees because without such express limitation, under the original Convention suits could be brought against employees indemnified by the carrier to hold the airline liable for unlimited damages. *Id. See* text accompanying notes 96-99 *infra.*

[85] 414 F. Supp. at 868.

[86] Lowenfeld & Mendelsohn, *supra* note 1, at 510.

Reed, may well be misleading.[87]

The *Reed* court also drew an analogy between the Warsaw Convention and the Carriage of Goods by Sea Act[88] when discerning the scope of Article 22.[89] The Supreme Court, in *Robert C. Herd & Co. v. Krawill Machinery Corp.,*[90] construed the Carriage of Goods by Sea Act to exclude a negligent stevedore company acting as an agent of the carrier from the Act's provisions of limited liability.[91] The Court in *Herd* held that since Congress knew of the common law liability

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[87] The interpretation of legislative intent from the rejection of past practices is susceptible to a fallacy analogous to *post hoc ergo propter hoc* ("after this therefore because of this"). The fact that a legislative body was familiar and displeased with certain events is not necessarily an indication that particular legislation was designed to eliminate those events. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS 121 (1975).

[88] 414 F. Supp. at 866. Section 1304(5) of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1970), provides for the limited liability of sea-going carriers of goods in the event of loss or damage to the goods. The Act makes no specific mention of the carrier's employees.

[89] *See* note 51 *supra* for a discussion of a similar common law analogy asserted by the plaintiffs in *Day* which was rejected by the Second Circuit.

[90] 359 U.S. 297 (1959).

[91] *Id.* at 302. The *Reed* defendants attempted to distinguish *Herd* on the basis that it dealt with the liability of a non-servant agent stevedore, while the facts of *Reed* concerned the liability of employee-servants of the carrier. Reply Brief for Appellants Wiser and Neuman, at 4-6, Reed v. Wiser, 414 F. Supp. 863 (S.D.N.Y. 1976). The distinction between a servant and a non-servant agent is that the physical conduct of a servant is subject to the control of the principal. RESTATEMENT (SECOND) OF AGENCY, Introductory Note §§ 129-249 (1957). Although not clear in appellants' brief, presumably this asserted distinction between servants and non-servant agents was an attempt to show that the references to "agents" in Articles 20(1) and 25(2), *see* notes 75-76 *supra,* were limited to non-servant agents and that no distinction was made between the carrier and its servants anywhere in the Convention. Yet, by definition, all servants are also agents. RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957). Thus, the references to "agents" in Articles 20(1) and 25(2) could include servants as well as non-servant agents of the carrier. The broad term "agents" in these articles indicates that the corporate carrier was expressly distinguished from both its servants and non-servant agents in at least some articles of the Convention. *See* text accompanying notes 75-76 *supra.* The *Reed* court also cited Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357, 384 (1873), and United States v. Atlantic Mut. Ins. Co., 343 U.S. 236, 242 (1952) for the proposition that common carriers cannot stipulate against their own negligence or that of their agents in the absence of specific congressional authority, 414 F. Supp. at 866. The Warsaw Convention, however, is not merely a stipulation of liability limitation by the carriers, but rather a treaty which has been adopted as law in the United States and therefore has the same effect as a congressional act limiting liability. *See* U.S. CONST. art. VI. *See also* Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne, 242 F. Supp. 129 (E.D.N.Y. 1965), which held that the Warsaw Convention is the law of the land notwithstanding a strong public policy against the limitation of liability. *Id.* at 145.

of agents for all damages caused by their negligence, specific language including employees within the liability limitation provisions of the Act would have been used if an exception to the common law rule had been intended.[92] While such an analogy to a body of law outside the Warsaw Convention is not a part of the treaty interpretation process,[93] and therefore sheds no direct light on the meaning of Article 22,[94] it does illustrate the hostility of courts toward limitations of liability.

Ultimately, the court in *Reed,* like the *Day* court, rested its decision on an analysis of the modern function of the Warsaw Convention. The *Reed* court acknowledged that the primary purpose of the original treaty was to limit the liability of airlines.[95] In addition the court noted the possibility of airline liability insurance which extends coverage to the employees of the airline.[96] Many airlines, in fact, have indemnification agreements with their employees, which provide that the airline will satisfy any judgments rendered against the employees.[97] In such cases, if the liability of airline employees was not limited, an injured passenger could effectively avoid the liability limitation provisions of the Convention by suing the servants and agents of the air carrier.[98] Article 22 of the original treaty sought to prevent such unlimited liability.[99] Yet, the *Reed* court repeatedly cited the discussion in *Day* for the proposition that the original objectives of the Convention have become obsolete and have been replaced by the goal of increased protection for the airline passenger.[100]

If the welfare of the passenger is truly to be considered, then the damages recovered for his injuries should come as close as possible

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[93] *See* BROWNLIE, *supra* note 17, at 605-09; Vienna Convention, *supra* note 17, Art. 31-2.

[94] The *Reed* court conceded that the analogy to American law was not controlling in the interpretation of an international treaty. 414 F. Supp. at 866.

[95] *Id.* at 865.

[96] *Id. See* KREINDLER, *supra* note 1, § 12.02[3] at 12-4.

[97] KREINDLER, *supra* note 1, § 12.02[3] at 12-4.

[98] The *Reed* court noted that the liability of the employee in suits brought by injured passengers would be determined under the traditional rules of negligence, as opposed to the provisions of absolute liability under the Montreal Agreement. 414 F. Supp. at 867. Because of the difficulty of proving fault in many aircraft accident cases, the traditional negligence standard would benefit the airline employees and the airlines which idemnify them. Hence the carriers are not completely stripped of protection by the result in *Reed. Id.* at 865.

[99] *See* note 6 *supra.*

[100] The *Reed* court cited *Day* for the premise that the original policy of the Warsaw Convention has lost most of its persuasive force with the rise of modern international airlines. 414 F. Supp. at 865.

to full compensation.[101] A passenger with very serious injuries should be afforded the same opportunity for complete compensation as a passenger with relatively minor injuries.[102] An effective liability limitation provision, however, must by definition interfere with realistic compensatory damages.[103] Airlines want limited liability only when the limit is lower than average actual damages.[104] Thus, in the interests of realistic compensation to injured plaintiffs, the provisions of liability limitation in Article 22 of the Convention should be narrowly construed, as in *Reed,* to exclude from its protection the servants and agents of the air carrier.

The result in *Reed* is directly supported by *Pierre v. Eastern Airlines, Inc.*[105] In *Pierre,* the plaintiff sued to recover damages for injuries sustained when the aircraft crashed on takeoff. The plaintiff brought action against both the airline and the pilot of the aircraft. The District Court for the District of New Jersey held that the liability limitation of Article 22 does not extend to the servants and agents of the air carrier.[106] The court stated that this construction was indicated by the United States' rejection of the Hague Protocol, which specifically includes servants and agents of the carrier within the ambit of its liability limitations provision.[107]

The *Reed* court, in stating that there is a judicial division concerning the scope of the Article 22 liability limitation provision, cited *Chutter v. KLM Royal Dutch Airlines*[108] as contrary to the result in

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[101] The imposition of a maximum limit on damages is a departure from the traditional American tort law principle that a tortfeasor should bear the full cost of the damages which he causes. KREINDLER, *supra* note 1, § 11.01[4], at 11-7. Thus, in the traditional personal injury or wrongful death case, courts strive to measure the monetary equivalent of the injury suffered so that the plaintiff may be made whole. *Id.*

[102] Kreindler, *A Plaintiff's View of Montreal, Symposium on the Warsaw Convention,* 33 J. AIR L. & COM. 528, 530 (1967).

[103] *Id.* at 531.

[104] *Id.*

[105] 152 F. Supp. 486 (D.N.J. 1957).

[106] *Id.* at 488.

[107] *Id.* at 489. *See* text accompanying note 93 *supra.* For a similar conclusion drawn from the American rejection of the Hague Protocol by the *Reed* court, see 414 F. Supp. at 868. *But see* note 87 *supra.* Similarly, a Canadian decision, Stratton v. Trans Canada Air Lines, 27 D.L.R.2d 670 (B.C. Sup. Ct. 1961), *aff'd on other grounds,* 32 D.L.R.2d 736 (B.C. Ct. App. 1962), held that the precise equivalent of Article 22 in the Carriage by Air Act, CAN. REV. STAT. c.45 (1952) which ratified the Convention on behalf of Canada, does not limit the liability of the pilot of the crashed airplane in which plaintiff's decedent was killed. 27 D.L.R.2d at 674. The *Stratton* court stated only that there was no reason to believe that Article 22 applies to employees of the air carrier. *Id.*

[108] 132 F. Supp. 611, 612-13 (S.D.N.Y. 1955).

Pierre.[109] *Chutter* involved injury to a passenger who, after boarding the aircraft stepped out of the open rear door as the loading ramp was being removed by the aviation service company. The injured passenger brought suit against both the airline and the service company.[110] Both defendants asserted that the suit was barred under Article 29(1)[111] of the Warsaw Convention, which provides for a two-year statute of limitations on all actions brought under the treaty. The District Court for the Southern District of New York held that the time limitation of Article 29(1) applies to agents of the carrier, as well as to the corporate carrier itself.[112] The rationale of the *Chutter* decision was that the carrier, in delegating the function of ramp handling to the service company, made the service company an agent which performed a part of the contract of carriage.[113] The *Chutter* court indicated that to distinguish the corporate entity from its many employees whose joint activities constitute the activity of the carrier was impractical, and therefore the provisions of the Convention were held to apply to agents of the carrier.[114]

The *Chutter* court relied on *A. M. Collins & Co. v. Panama R.R.*,[115] decided under the Carriage of Goods by Sea Act,[116] wherein the Fifth Circuit held that the liability of a stevedore, as an agent of the carrier, was limited by the Act.[117] The court based its holding on the theory that the activity of the corporate carrier could not be separated from the activities of its agents.[118] The rationale of *Collins*, however, was specifically rejected by the Supreme Court in *Robert C. Herd & Co. v. Krawill Machinery Corp.*[119] The Court stated in *Herd* that the liability of an agent for his own negligence is so fundamental to the law of torts that the limitation of such liability should not be inferred in the absence of specific statutory language to that

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[109] 414 F. Supp. at 865.

[110] 132 F. Supp. at 612-13.

[111] Article 29(1) of the Warsaw Convention provides:

> The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

See note 1 *supra.*

[112] 132 F. Supp. at 613.

[113] *Id.*

[114] *Id.*

[115] 197 F.2d 893 (5th Cir. 1952).

[116] *See* note 88 *supra.*

[117] 197 F.2d at 897.

[118] *Id.*

[119] 359 U.S. 297, 303-05 (1959).

effect.[120] Hence, the practical effect of *Herd* was to weaken substantially the authority of *Chutter,* thereby leaving *Pierre*[121] as solid precedent for *Reed.* The Second Circuit in *Reed,* like the Supreme Court in *Herd,* based its decision on the fundamental premise that tort victims should be allowed to recover fully for their injuries whenever possible.[122]

This concern with the protection of the airline passenger links the decisions in *Day* and *Reed.* The two cases illustrate the general trend, especially evident in the Second Circuit, toward construction of the Warsaw Convention in such a manner as to maximize the recovery of injured passengers. In order to permit recovery, courts must sometimes interpret the Convention liberally, as did the Second Circuit in *Day.* In other cases such as *Reed,* courts must construe the language of the treaty narrowly in order for an injured passenger to receive full compensation. The Second Circuit heard oral arguments in *Reed* on November 22, 1976. The court should continue to construe the Convention in favor of passengers by affirming the decision of the lower court.

W. FAIN RUTHERFORD, JR.

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[120] *Id.*

[121] 152 F. Supp. 486 (D.N.J. 1957).

[122] 414 F. Supp. at 865.