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WRONGFUL DEATH ACTIONS UNDER THE WARSAW CONVENTION

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ARTICLE 17 of the Warsaw Convention which applies to international air transportation provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[1]

This provision appears to impose absolute liability, although when read in conjunction with Article 20,[2] it will be seen to create merely a rebuttable presumption of liability.[3] Nevertheless the effects of Article 17 and the convention as a whole in the case of wrongful death have left American courts in a quandary.

The problem with which the courts are faced arises from the fact that the common law provides no action for wrongful death,[4] and that therefore in common law countries such actions must be based on statute.[5] Most common law jurisdictions have passed such statutes,[6] but these are not thought to be extraterritorial.[7] Interrelated with the abovementioned is the American conflict rule that the right of action must be based on the law of the place in which the force impinged which caused the injury.[8] When that place is a foreign jurisdiction, it is often difficult and expensive to ascertain the law. Even if finally established, it may well not agree with American ideas of propriety. In this context the American courts have been called upon to determine whether Article 17 not only creates a presumption of liability but also

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1. Article 17, 49 Stat. 3000, T.S. No. 876.

2. 1. 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.

2. In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in the navigation and that, in all respects, he and his agents have taken all necessary measures to avoid the damage.

3. See, e.g., Shawcross & Beaumont, Air Law 343, 362 (2d ed. 1951).

4. See, e.g., Baker v. Bolton, 1 Comp. 493, 170 Eng. Rep. 1033 (1808); Prosser, Torts 709 (2d ed. 1955); Winfield, Death as Affecting Liability in Tort, 29 Colum. L. Rev. 239 (1929).

5. See Prosser, op. cit. supra note 4 at 710; Ford v. Monroe, 20 Wend. 210 (Sup. Ct. 1838).

6. Prosser, op. cit. supra note 4 at 710; Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

7. See, e.g., Weiner v. Specific Pharmaceuticals Inc., 298 N.Y. 346, 83 N.E.2d 673 (1949); Orr, The Rio Revision of the Warsaw Convention, Part II, 21 J. Air L. & Com. 181 (1955).

8. See Prosser, op. cit. note 4 at 710; Loucks v. Standard Oil, 224 N.Y. 99, 120 N.E. 198 (1918). Although the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 966-68 (1958), enacts a wrongful death action when the place of the wrong is the no-man's land of the high seas, our law enacts no right of action for wrongful death in foreign jurisdiction. See Orr, supra note 7 at 183.

a cause of action for wrongful death.[9] They have provided three different answers to this question.

In *Wyman v. Pan American Airlines*[10] the plaintiff's testator lost his life while a passenger enroute from Guam to Manila on one of defendant's airplanes which never arrived at any known destination. The plaintiff asserted a cause of action for wrongful death under Article 17 of the Warsaw Convention, which was denied on the ground that the right to bring a death action at common law is purely statutory and since all of the rules laid down in the convention were "well within the framework of existing legal rights and remedies,"[11] no new substantive rights were created.[12] In short, the court held that the convention merely establishes a presumption which may modify the application of what must be independently operative legal norms.

The opposite conclusion was reached in *Salamon v. Koninklijke Lucht-Vaart Maatschappij*.[13] A passenger in defendant's airplane became ill during the passage from Amsterdam to New York and died a month later in New York. The court, being of the opinion that Article 17 clearly purported to create a cause of action and observing that the "convention overrides and supplants any contrary local law,"[14] held that the passenger's executrix could base a wrongful death action on the convention itself. The court concluded with the statement that, "if the Convention did not create a cause of action in Art. 17, it is difficult to understand what Art. 17 did do."[15] Of course *Wyman* suggests that this is not as difficult as the court in *Salamon* might have supposed.[16]

Komlos v. Air Force[17] appears to lie in the middle ground between *Wyman* and *Salamon*. Komlos lost his life when defendant's airplane enroute from Paris to New York crashed on the island of San Miguel. Rejecting the notion that under the convention the contract of carriage can become the gravamen

9. In American courts under the existing rules, when a plaintiff claims damage for wrongful death occurring in a foreign jurisdiction as a result of an airplane mishap, he must establish the law of such jurisdiction governing wrongful death. If Article 17 was able to enact a wrongful death cause of action, there would be no need to undertake the expensive and frustrating task of ascertaining and establishing the law of the foreign jurisdiction.

10. 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943), aff'd, 267 App. Div. 947, 48 N.Y.S.2d 459 (1st Dep't 1944), aff'd, 293 N.Y. 878, 59 N.E.2d 785 (1944).

11. Id. at 966, 43 N.Y.S.2d at 423.

12. Accord, Finne v. Koninklijke LuchtVaart Maatschappij, 11 F.R.D. 336 (S.D.N.Y. 1951); Supine v. Air France, 100 F. Supp. 214 (E.D.N.Y. 1951); cf. Garcia v. Pan American Airways, 269 App. Div. 287, 55 N.Y.S.2d 317 (2d Dep't 1945), aff'd, 295 N.Y. 852, 67 N.E.2d 257 (1945).

13. — Misc. —, 107 N.Y.S.2d 768 (Sup. Ct. 1951), aff'd, 281 App. Div. 965, 120 N.Y.S.2d 917 (1st Dep't 1953).

14. Id. at 771.

15. Id. at 773. Accord, Glenn v. Cubana, 102 F. Supp. 631 (S.D. Fla. 1952); cf. Ross v. Pan American Airways, — Misc. —, 123 N.Y.S.2d 263 (Sup. Ct. 1953), aff'd, 299 N.Y. 88, 85 N.E.2d 880 (1953).

16. See also, Drion, Limitation of Liabilities in International Air Law 87, 173 (1954). Drion suggests that what Article 17 did do was delineate the bounds within which there is a presumption of liability against the air carrier.

17. 111 F. Supp. 393 (S.D.N.Y. 1952), aff'd, 209 F.2d 463 (2d Cir. 1953).

of an action for wrongful death, the court concluded that the plaintiff's claim had to be based on the laws of Portugal. Had the court contented itself with deciding the case before it, the opinion would not have been significantly different than that in *Wyman*. However, the court added that since the convention admittedly creates at least a presumption of liability, then if the place of the accident does not provide a cause of action on which the presumption can operate, the presumption would be meaningless unless in such cases the convention also provides a cause of action. The unarticulated major premise adopted by the court seems to be that Article 17 was intended to be meaningful in all cases of wrongful death.[18]

These conflicting decisions indicate the scope of the interpretative difficulties encountered in an attempt to apply the Warsaw Convention to wrongful death. Of course, the prime rule of treaty interpretation is to give effect to the intent of the parties,[19] but neither the senatorial debates[20] nor Secretary of State Hull's report to President Roosevelt,[21] recommending adherence to the convention, are especially helpful in determining whether Article 17 independently creates a cause of action for wrongful death. Thus, it would seem,

18. Accord, Fernandez v. Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957); Noel v. Venezolana, 247 F.2d 677 (2d Cir. 1956); cf. Goepp v. American Overseas Airlines, 117 N.Y.S.2d 276, 281 App. Div. 105 (1st Dep't 1952), aff'd, 305 N.Y. 830, 114 N.E.2d 37 (1952). It has been suggested that the plaintiff must demonstrate that he has no other cause of action in order to claim a cause of action under Article 17. See Fernandez v. Venezolana, supra. It would be more in keeping with the pattern set up in the convention, however, to allow the plaintiff to claim under the Warsaw Convention and to place the burden on the defendant to rebut this by proving that a cause of action should be obtained under the lex loci deliciti. One should note that throughout the convention the burden is placed on the defendant to rebut the presumption of liability. See, e.g., Article 17 and Article 20. Secondly, it would seem that the difficulty of proving a negative would place an unreasonable burden on the plaintiff, something that the convention appears designed to alleviate.

19. See, e.g., Nielsen v. Johnson, 279 U.S. 47 (1928); Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936).

20. 78 Cong. Rec. Part II 11577–79 (1934). The only items referred to in the Congressional Record were a reservation and a change in wording. The reservation provided that the convention shall not apply to international transportation that may be performed by the United States or any territory or possession under its jurisdiction. Secondly, the French text was amended to correct an error in translation.

21. Letter from Secretary of State Hull to President Roosevelt in 1934:

> The effect of article 17 (Ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has the burden of proving negligence in the operation of the aircraft, before the carrier would be held liable for damages; the principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

U.S. Aviation Reports 243.

in the search for the intent of the parties,[22] other sources must be utilized. Certainly the preparatory documents and debates of the convention are a fruitful source of evidence of that intent, and a recent analysis of these materials tends to establish the proposition that Article 17 was intended to give a cause of action for wrongful death.[23] Another source of perhaps more circumstantial evidence of intent may lie in the legal suppositions which the representatives of the foremost drafting states[24] may reasonably be presumed to have entertained at the conference and the more or less predictable impact that Article 17 has had on their legal systems. It is with this latter source that the remainder of this discussion will be concerned.

Drafting States' Solutions of the Problem of Wrongful Death in Passenger-Carrier Relationship

The rule in a majority of the states present at the Warsaw Conference,[25] which one might call the "civil law" participants, is that one who wrongfully causes the death of another is liable to those whom the deceased may legally be bound to support.[26] Therefore, the words, "The carrier shall be liable for damage sustained in the event of the death . . . of a passenger,"[27] imply a form of liability generally accepted by the civilians, as opposed to the unique nature of the wrongful death liability in the common law.[28] Considering this, it would not be unreasonable to find that the drafters of the Warsaw Convention intended Article 17 to be a statement of the liability of the air carrier in cases of wrongful death.

The French view appears to be that a public carrier is liable to the representatives of a deceased passenger on an implied provision in the contract of carriage to carry safely.[29] When the carrier has not succeeded in carrying a passenger safe and sound to his destination, it is liable.[30] Illustratively, the

22. The drafting parties of the Convention were: Austria, Belgium, Brazil, Bulgaria, China, Czechoslovakia, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, Netherlands, Poland, Rumania, Spain, Sweden, Switzerland, Union of South Africa, United Kingdom and Northern Ireland, U.S.S.R., Venezuela, and Yugoslavia.

23. See, e.g., Calkins, The Cause of Action Under the Warsaw Convention, Part I, 26 J. Air. L. & Com. 217 (1960). This article presents a complete analysis of the preparatory documents and debates of the Warsaw Convention. It clearly demonstrates from the basic convention materials that Article 17 was intended to give an ex contractu cause of action for wrongful death.

24. This comment will not attempt to make an exhaustive analysis of the drafting states, but only examine a few of the more prominent ones.

25. Supra note 22.

26. See, e.g., Mazeaud, Traité Theorique et Pratique de La Responsabilité Civile 321 (4th ed. 1947); de Juglart, Traité Elementaire de Droit Aérien 240 (1952); Kaftal, La Reparation Des Dommages Causés Aux Voyageurs Dans Les Transports Aériens 3, 4 (1930); Gardner, Comparative Air Law, 20 J. Air. L. & Com. 34 (1953).

27. Warsaw Convention Article 17.

28. Prosser, op. cit. supra note 4 at 710.

29. See, e.g., de Juglart, op. cit. supra note 25 at 240; Kaftal, op. cit. supra note 25 at 4.

30. Lambert v. la Compagnie des Messageries Aériennes, Cour d' Appel de Paris,

Cour d' Appel de Paris[31] faced the question of the liability of a carrier to the representatives of a passenger and held that contractual obligation principles obligate the company to carry the passenger safely to his destination and that the carrier is liable to the representatives of the deceased for nonperformance of that obligation, if he cannot establish the presence of force majeure or an outside force not under his control.[32] In *Lambert v. la Compagnie des Messageries Aérienne*,[33] the Tribunal Civil de la Seine held that there could be no exception to the general rule that the liability was contractual. The Cour d' Appel de Paris affirmed the judgment of the trial court, holding that the company owed a contractual obligation to the passenger and his representatives by virtue of Article 1147[34] of the Code and that this obligation was to carry the passenger safe and sound to his destination. The nonperformance of that obligation therefore gave rise to liability. Significantly we may find a similarity in wording and legal effect between Article 17 and Article 20 of the Warsaw Convention and Article 1147 of the French Civil Code.[35] Furthermore, this doctrine of contractual liability was held to be implied in the French Air Navigation Law of 1924, which declares the air carrier a guarantor of the safety of passengers and goods.[36]

The German solution to this problem varied slightly from that of the French. The German Air Traffic Act of August 1, 1922,[37] imposed liability on the owner or operator[38] for the injury or death of any persons or the injury to any property in the aircraft, in any other aircraft or on the surface caused by the use or operation[39] of the aircraft. Further, Article 844 of the German Civil Code explicitly places on the wrongdoer the obligation to pay for the decedent's funeral expenses and to provide for the support of those third

Nov. 28, 1925, (1926) Revue Juridique Internationale de la Locomotion Aérienne 116; see, e.g., authorities cited supra note 29.

31. Veuve Percy James Evans, Petchett et Derry v. Compagnie Franco-Roumaine de Navigation Aérienne, Cour d' Appel Paris, June 10, 1926, (1926) Revue Juridique Internationale de la Locomotion Aérienne 379.

32. Accord, Veuve de Courson de la Villeneuve v. Société aéronautique Latécoère, Cour d' Appel de Paris, Feb. 7, 1927, (1927) Revue Juridique Internationale de la Locomotion Aérienne 239.

33. Tribunal Civil de la Seine, Dec. 18, 1922, (1923) Revue Juridique Internationale de la Locomotion Aérienne 75.

34. Article 1147 provides:

> A debtor shall be ordered to pay damages if there is occasion therefor, either on account of non-performance of the obligation or on account of delay in performing it, whenever he does not establish that non-performance is due to an outside cause which cannot be charged to him provided there is no bad faith on his part.

The French Civil Code 322 (rev. ed. Cochard transl. 1930).

35. Air Navigation Law of May 31, 1924, (1924) Journal Officiel 5048 (Fr.). See, e.g., authorities cited supra note 30.

36. Both Articles 17 and 20 of the Warsaw Convention and Article 1147 of the French Civil Code create a presumption of liability on the part of the air carrier. The carrier may rebut this presumption in both cases by proof of an outside cause or the absence of negligence on his or his agent's part.

37. Air Traffic Act of Aug. 1, 1922, (1922) Reichsgesetzblatt 681 (Ger.). Air Traffic Act of Aug. 21, 1936, (1936) Reichsgesetzblatt 653 (Ger.).

38. Halter.

39. Benutz.

parties to whom the decedent was bound by law to furnish maintenance.[40] On the basis of these two provisions it is apparent, although no case has been found which definitely holds this, that those who have a cause of action by reason of Article 844 either for funeral expenses or maintenance may enforce the liability of the owner or operator created by the Air Traffic Act. We may again note the similarity in effect and wording of Article 17 of the convention and Section 19 of the Air Traffic Act.[41]

The Italian Air Navigation Act of 1924[42] imposes responsibility on the airline for the death or injury of any of its passengers and explicitly provides a lien for damages resulting to the representatives of a mortally injured passenger.[43] This special legislation presumably does not limit Article 1218 of the Italian Civil Code, which is interpreted in the same manner as Article 1147 of the French Civil Code, to place on the carrier the obligation to carry the passenger safely to his destination and if the carrier fails to fulfill this obligation, and the passenger is killed, the representatives of the deceased are given a contractual cause of action against the carrier.[44] It would appear that generally civil law jurisdictions reach the same result as noted in France, Germany and Italy.[45]

In England as in America wrongful death damages were considered a remedy not given by the common law; one who sought to recover for the wrongful death of another must find his cause of action in statutory form.[46] However, unlike the majority of American jurisdictions at the time of the convention,[47] an English carrier was regarded as the insurer of the safe arrival

40. See, e.g., Von Mehren, The Civil Law System 345 (1957).

41. Section 19 of the Air Traffic Act of Aug. 21, 1936 provides:
if in the operation of an aircraft, a person by accident is killed or his body or health injured or damage caused to a thing the owner or operator of the aircraft is obliged to compensate for such injury or damage.

42. Italian Air Navigation Act of 1924, (1924) Revue Juridique Internationale de la Locomotion Aériennes 51.

43. Italian Air Navigation Act of 1924, art. 39, § 2.

44. Article 1218 of the Italian Civil Code provides that:
a debtor who does not perform his obligation exactly is liable for damages unless he can establish that non-performance or delay in performing is due to a cause which can not be charged to him.
Translation from U.S. Army Service Forces, Civil Affairs Handbook, Italy M 353—3D 11 (1944). See, e.g., Cipioni v. Société pour la developpement de l' Aviation, Corte di Cassazione, Jan. 16, 1926, (1932) Revue Générale Droit Aérien 912.

45. See, e.g., Cha, The Air Carrier's Liability in Anglo-American and French Law, 7 Air L. Rev. 1954 (1936); Gardner, Comparative Air Law, 20 J. Air L. & Com. 34 (1953); Leroy, Observations on Comparative Air Law, 8 Air L. Rev. 259 (1937); Knauth, Air Carrier's Liability in Comparative Law, 7 Air L. Rev. 261 (1936); Cosentini, Air Law and Comparative Law, 7 Tul. L. Rev. 292 (1932). In the several Central and South American countries which were parties to the convention the liability of an air carrier to a non-passenger for the death or injury of a passenger arises from an implied contractual obligation to transport the passenger safely to his destination. See, e.g., Rigalt, Principios de Derecho Aero (1939); Hamilton, Manual de Derecho Aereo (1950); Josephson, Empire of the Air (1944); Marchant, Aviation in Brazil, 10 Air L. Rev. 44 (1939); Grant, Air Carrier's Liability: Latin America, 7 Air L. Rev. 292 (1936).

46. Baker v. Bolton, 1 Comp. 493, 170 Eng. Rep. 1033 (1808); Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93; Prosser, Torts 709, 710 (2d ed. 1955).

47. See, e.g., Sec. of State Hull's Letter, supra note 21; Schneider, Negligence in the Law of Aviation, 12 B.U.L. Rev. 17 (1932).

of goods and passengers subject to the defenses of an act of God, inherent vice of the goods, or fault of the shipper-passenger.[48] Therefore, the English presumably had no difficulty accepting the presumption of liability placed on the air carrier by Article 17.

On the other hand, it should be noted that the English approach to the nature of the wrongful death remedy differed from that of the drafting parties examined above. Significantly though, the English in their application of the Warsaw Convention[49] appear to have adopted a view of the effect of Article 17 in wrongful death situations quite similar to that employed by the civil law nations.[50]

It would seem reasonable to assume that the delegations from the various civil law nations, in helping to draft a provision reminiscent of their own local legislation, intended to achieve a result with which they were familiar. This assumption, in addition to the English adoption of a result like that reached in the civil law states, tends to support the view that this was the result intended by the drafting parties.

Decisions of the Drafting States Involving Article 17 of the Warsaw Convention

E. Georgiades,[51] Secretary General of the French Society of Air Law, has stated that the "Warsaw Convention established whether one might wish it or not the rule of contractual liability of the carrier,"[52] and the Tribunal de Commerce de Marseille has held that, "in the case of carriage which is international within the meaning of the Warsaw Convention, no other action for damages however founded may be brought against the carrier than *the action provided in the Convention*:"[53] (Emphasis added.) Further, in *Hennessey v. Air France*,[54] where the representative of the deceased brought an action for damages on the basis of Article 1382 of the French Civil Code,[55] the Cour d' Appel de Paris held this theory improper and that the cause of action must be based on Article 17 of the convention. It reasoned that Article 17, as incorporated in the contract of carriage,[56] made the carrier liable to the representatives of the deceased, and that delictual liability could not be asserted

48. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703).

49. As embedded in Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36; Air Navigation Act, 1936, 1 Edw. 8, c. 44.

50. See, discussion of English application of Warsaw Convention on p. 373 of text.

51. Editor of the Review Francaise de Droit Aérien.

52. Georgiades, Quelques Réflexions sur L'Affretement de Aéronefs et le Project Convention Tokio, (1959) Revue Francaise de Droit Aérien 113. But see, Drion, Limitation of Liabilities in International Air Law 83, 173 (1954).

53. Della Roma v. Air France, Tribunal de Commerce de Marseille, Nov. 3, 1955, (1955) Revue Francaise de Droit Aérien 94.

54. Cour d' Appel de Paris, Feb. 25, 1954, (1954) Revue Francaise de Droit Aérien 45.

55. Every act whatever of an individual which causes injury to another obliges the one owing to whom it has occurred to make reparation for it.
The French Civil Code 381 (rev. ed. Cochard transl. 1930).

56. By reason of the airplane being engaged in an international flight.

since "the aim of the Convention was to unify as far as possible the legislation of the various countries dealing with international air transport, and to establish for such transport common liability rules which would exclude all other causes of action."[57] It would appear there is judicial authority in France for considering Article 17 as creating wrongful death liability on the part of the carrier.[58]

Illustrative of the German interpretation is the 1939 decision of the Frankfurt Landgericht, which held that, "under the circumstances [being engaged in an international flight] the action based on Articles 17 and 22 paragraph (1) of the Warsaw Convention is well-founded."[59] The Reichsgericht,[60] in a situation similar to that faced by the Court of Appeals of the Second Circuit in *Komlos v. Air France*,[61] affirmed a decision by the Berlin Kammergericht which held that "the right to compensation for damage [resulting from the death of a passenger in international carriage] is based on contract and not on delictual liability."[62] The Reichsgericht considered that since the Warsaw Convention is always incorporated in a contract of international carriage, Article 17 would provide a contractual right to recover damages for the wrongful death of a passenger.[63]

Although the authorities are not as clear as one might wish, as far as can be determined, the Italian,[64] Belgian,[65] and Swiss[66] courts appear to allow a plaintiff to predicate a wrongful death action against a carrier on Article 17 of the Warsaw Convention. Again, as in the case of France and Germany, the rationale seems to be that of contractual liability resulting from the incorporation of Article 17 in the contract of carriage. In Italy, however, the Corte di Cassazione[67] concluded that the Warsaw Convention does not exclude the

57. Hennessy v. Air France, supra note 54 at 226. The court appeared to be of the view that if the plaintiff were allowed to bring any other cause of action than that given herein by virtue of Article 17, such a result would deviate from the unifying aim of the convention.

58. See authorities cited supra notes 53 & 54. But see, Drion, Limitation of Liabilities in International Air Law 83, 173 (1954); Munier v. Drvy, Tribunal Civil de la Seine, Nov. 27, 1953, (1953) Revue Francaise de Droit Aérien 76.

59. See A v. B, Landgericht, Frankfurt, March 8, 1939, (1939) Archiv für Luftrecht 180; X v. Y, Kammergericht Berlin, June 28, 1938, (1938) Revue Générale Droit Aérien 301, aff'd, Reichsgericht, June 5, 1939, (1939) Archiv für Luftrecht 172.

60. The Reichsgericht was Germany's highest court at this time.

61. 111 F. Supp. 393 (S.D.N.Y. 1952), aff'd, 209 F.2d 463 (2d Cir. 1953). If the plaintiff's cause of action were based on the German Civil Code Article 823 or Section 19 of the Air Traffic Act, it would be considered as delictual and by law pass to the social insurance authorities. However, if it were based on Article 17, it would be contractual and not pass. It was found to be contractual.

62. Supra note 59.

63. X v. Y, supra note 59.

64. See Football Team Torino v. S. A. Aviolinee Italiane, Corte di Cassazione, March 9, 1953, (1955) Zeitschrift für Luftrecht 70.

65. See Fisher et al. v. C.I.E. S.A.B.E.N.A., Tribunal de première instance de Bruxelles, May 6, 1950, (1950) Revue Francaise, de Droit Aérien 411.

66. See Jaquet v. Club Neuchâtelois d' Aviation, Tribunal fédéral, Ire Cour, Dec. 3, 1957, (1958) Zeitschrift für Luftrecht 259.

67. This is the highest Italian court, roughly equivalent to the United States Supreme Court.

possibility of basing an action for compensation on the delictual provisions of the civil code,[68] but this too will be subject to the same limitations as an action based on the convention.[69] Both the Swiss and the Belgian courts appear to require that the cause of action be based on the convention.[70]

An important factor in this analysis is the English approach.[71] The English, for whom treaties are not self-executing, enacted the Warsaw Convention as part of their Carriage by Air Act of 1932.[72] Schedule I of the act divides carriage by air into: A—International Carriage giving effect to the Warsaw Convention, and B—Non-international Carriage. Schedule II of the act establishes a uniform rule within the United Kingdom in respect to causes of action arising from the death of a passenger during the course of international carriage by air.[73] Under the system of law introduced by the Carriage by Air Act, the cause of action arises in contract, not in tort.[74] In the event of a passenger's death those persons who sustain damage by reason of the death are entitled to recover because the deceased's contract of carriage incorporates Article 17 which provides for the liability of the carrier.[75]

The English courts first adopted this analysis in *Grein v. Imperial Airways*.[76] Grein purchased a roundtrip ticket from London to Antwerp, with an agreed stopping place at Brussels. On the journey back from Antwerp the airplane went down in Belgium killing Grein. The action was brought by his widow, who claimed damages for his death under Lord Campbell's Act.[77] The defendant contended that there was no action under Lord Campbell's Act because the action prescribed by the Warsaw Convention was in contract. In upholding this defense, the judges agreed that the action lay in contract. Two of the judges thought that Lord Campbell's Act could be expanded to cover this cause of action.[78] However, the majority felt that the effect of the Carriage by Air Act of 1932 was "to make Lord Campbell's Act inapplicable

68. The conclusion reached in France on this point is that the Warsaw Convention precludes any action except that provided by Article 17. See, Hennessy v. Air France supra note 54.

69. Football Team Torino v. S.A. Aviolinee Italiane, supra note 64.

70. See cases cited supra notes 64 and 66. Reported Central or South American cases dealing with the application of Article 17 in cases of wrongful death could not be found.

71. English law, unlike the American Constitution, U.S. Const. Art. VI, § 2, does not regard treaties as the law of the land, until enacted by Parliament. See, e.g., Indemnity Insurance v. Pan American Airlines, 58 F. Supp. 388 (S.D.N.Y. 1954); cf. Kuhn, The Treaty Making Power and the Reserved Sovereignty of the States, in 3 Selected Essays on Constitutional Law 397 (1938).

72. Carriage by Air Act, 1932, 22 & 23 Geo. 5, c. 36; Air Navigation Act, 1936, 1 Edw. 8, c. 44.

73. See, e.g., Aaronson, International Carriage by Air—Uniformity in United Kingdom Law, 106 L.J. 755 (1956).

74. See, e.g., Grein v. Imperial Airways, [1937] 1 K.B. 50; Preston v. Hunting Air Transport, [1956] 2 Q.B. 454; Aaronson, supra note 73.

75. See, e.g., authorities cited supra note 74.

76. [1937] 1 K.B. 50.

77. Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.

78. Grein v. Imperial Airways, supra note 76 at 71, 80.

to the disaster which is the subject of this action, and to substitute for its provisions for this purpose those of article 17 of Schedule I [creating in this situation the liability of the carrier] and those of Schedule II [designating the parties who may enforce this liability]."[79] In 1956, a unanimous court in *Preston v. Hunting Air Transport*[80] followed the majority holding in the *Grein* case. It would seem clear that the English authorities regard Article 17 of the Warsaw Convention (as implemented in the Carriage by Air Act) as creating liability on the part of the air carrier in cases of wrongful death.[81]

CONCLUSION

The judicial interpretation and application of a treaty is governed to a large extent by the intent of the drafting parties.[82] The judicial interpretation and application of the Warsaw Convention and Article 17 should therefore be governed by the intent of the drafting parties. One source of this intent may lie in the legal suppositions which the representatives of the foremost drafting states may reasonably be presumed to have entertained at the conference. As to this factor, one might note that the drafting parties, examined above, with the exception of the English, thought of wrongful death liability as the result of the carrier's failure to transport the passenger safely to his destination. Also, there is a pronounced similarity in the effect and wording of Articles 17 and 20 of the convention and those provisions of the civil codes and legislative enactments of many of the drafting states which have been interpreted to impose liability upon the carrier for the wrongful death of a passenger.

Certainly, the preparatory documents and debates of the convention are a fruitful source of evidence of that intent, and a recent analysis reaches the conclusion that the drafting parties intended Article 17 to impose contractual liability upon the air carrier for wrongful death.[83] Lastly, the impact of the Warsaw Convention on the legal systems of the drafting states may provide a source of perhaps more circumstantial evidence of intent. Here one should note that the courts of the drafting states generally appear to employ Article 17 as the basis for imposing wrongful death liability upon the air carrier; significantly, the English have adopted this view. Therefore, it might be reasonably concluded that the drafting parties of the Warsaw Convention intended that Article 17 create liability on the part of the air carrier for the wrongful death of a passenger. However, it must be mentioned that there is

79. Id. at 91.
80. [1956] 2 Q.B. 454.
81. See, e.g., authorities cited supra note 74. But see, Orr, The Revision of the Warsaw Convention, Part II, 21 J. Air L. & Com. 181 (1955).
82. See, e.g., Nielen v. Johnson, 279 U.S. 47 (1928); Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936); 4 Hackworth, Digest of International Law 39 (1942).
83. Calkins, The Cause of Action Under the Warsaw Convention Part I, 26 J. Air L. & Com. 217 (1960).

opposition to this view among legal theorists and courts on both sides of the Atlantic.[84]

This result may be reached in the American courts by reasoning that in an international carriage governed by the Warsaw Convention, Article 17 becomes one of the terms of the contract of carriage. As a result, the carrier contractually assumes the liability for the wrongful death of a passenger. Local law may be employed to determine who can enforce this liability. Although unprecedented, this result would bring the American judicial interpretation and application of the Warsaw Convention into conformity with that of the civil law states described above[85] and would serve to foster the unity of legislation and result which the Warsaw Convention foresaw.[86]

84. See, e.g., the American authorities examined in the first section of this comment and Drion, Limitation of Liabilities, supra note 58.

85. See, e.g., Grein v. Imperial Airways, supra note 76; Preston v. Hunting Air Transport, supra note 83; Hennessy v. Air France, supra note 54; A v. B, supra note 62; Fischer et al. v. C.I.E. S.A.B.E.N.A., supra note 65; Georgiades, supra note 52; cf. Football Team Torino v. S.A., Aviolinee Italiane, supra note 64.

86. See Hennessy v. Air France, supra note 54.