Unlimited Liability

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The greater proportion of the travelling public are totally unaware of the limitations of liability printed in the flight coupon or passenger ticket, which often only becomes an issue or focus of attention in the event of death or injury resulting in a claim against the carrier.

This subject and the issues can be complex and extremely emotional given the very nature of aircraft accidents. They are all too familiar to those practising Aviation Law, in the area of case work that insurance claims generate.

Let us first briefly look at the historical position of International Agreements and the reason for change, then review the current position and look at the issue of unlimited liability which is the title of this paper.

I could start by asking why am I here talking about unlimited liability at all? In any other field of commerce it is an accepted fact that the wrongdoer is liable without the comfort or protection of maximum limits. **Not so in aviation relative to the carriage of passengers, baggage and cargo.**

Why is aviation in this unique position?

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For the answer we need to go back some 70 years to the early 1920's. The International Air **Traffic** Association (now IATA) was founded in 1919 to produce uniform conditions of carriage which they hoped would result in a 'level playing field' for an embryonic transport industry on an international basis. It was soon realised that this would not work and what was needed was a set of rules with the force of international law. A specialist committee was established in 1925 at a meeting in Paris and this committee's first major task was the formulation of what eventually became the WARSAW CONVENTION.

The Warsaw Convention of 1929 was considered the foundation stone of the principal governing the air carriers liability. Convention was drawn up to eliminate doubt over : -

* whether there is any liability in that particular case,
* what is the proper law governing the liability,
* whether it is possible to exclude liability.

In the liability area the notable feature of the convention was the reversal of the burden of proof - under Article 20

"THE CARRIER IS NOT LIABLE IF HE PROVES THAT HE AND HIS SERVANTS OR AGENTS HAVE TAKEN ALL NECESSARY MEASURES TO AVOID THE DAMAGE OR THAT IT WAS IMPOSSIBLE FOR HIM OR THEM TO TAKE SUCH MEASURES."

Whether or not as a counterbalance to this reversal I am not sure but in any event, the liability of the carrier in terms of amount of damages was capped.

Some people argue that this limitation was set to protect this important infant industry.

The Convention only applies to international carriage performed by airc-

raft for reward and to other commercial undertakings where, according to the agreement between the air carrier and the passenger, the place of departure and the place of destination are situated either within the territories of the two contracting parties or within the territory of a single contracting party provided there is an agreed stopping place within the territory of another State, even if that State is not a party to the Convention.

Therefore international carriage has a defined meaning and it is not all carriage which might be automatically regarded as international in the usual sense of the word.

The limit of the carriers liability to passengers killed or injured in carriage by air was originally fixed at an amount equivalent to US $ 5,000 at the Rate of Exchange prevailing in 1929. In return for the Warsaw Convention limitation, virtually strict liability up to the limit was imposed on the carriage for the benefit of passengers. This was deemed appropriate because of the difficulties which passengers might be expected to encounter in proving negligence on the part of the carrier.

This, as referred to previously, was the **reversal of the burden of proof** under Article 20.

Few carriers have ever attempted, and fewer again have succeeded in discharging that burden of proof.

The original limit was subsequently doubled by the Hague protocol in 1955, and is today equivalent to US $ 10,000 and US $ 20,000 respectively, and then came the Montreal Agreement of 1966.

This Montreal Agreement is now known as CAB 18900, the background to which is important.

The United States never ratified the Hague Protocol due to their disatisfaction with the limits and eventually in the Autumn of 1965, they gave notice that they would denounce Warsaw unless higher limits were brought in.

After much debate and indeed the failure resulting from a breakdown in discussions, the airlines (NOT THE CONTRACTING STATES) in May 1966, agreed that for flights to and from, or with a stopping place in the USA, would adopt a special contract limit of US $ 75,000 inclusive of costs or US $ 58,000, plus costs WITH ABSOLUTE LIABILITY - NO DEFENCE.

This "special contract" limit was achieved under that part of Article 22 of the Warsaw Convention which states "NEVERTHELESS BY SPECIAL CONTRACT Leaving intact all of the other provisions of the Convention.

Whilst there has hardly ever, if indeed ever, been an agreement between an individual passenger and an airline to this effect, that Clause has been the means by which over the years airlines have "voluntarily" assumed increased limits. 'Voluntarily' is used advisedly because in many instances the Civil Aviation Authorities of certain countries have had persuasive effect in moving airlines towards adopting higher limits than the US $ 10,000 (Warsaw) or US $ 20,000 (Hague Protocol) standard. Today the voluntary special contract limit varies up to a maximum of SDR 100,000.

Associated with these special contracts is (usually) a waiver by the airlines of the defence under Article 20.

The SDR 100,000 limit has its origins in the Guatemala City Protocol (1971), which satisfied the U.S. desires for a higher limit, but never came into force due to a lack of sufficient ratifications (30).

Ever since 1971, the U.S. has in one form or another been working on a Supplemental Compensation Plan (SCP) to provide for payments to U.S.

passengers over and above amounts payable by airlines. The SCP was to accompany ratification of Montreal Additional Protocols 3 and 4. In 1983, an attempt to introduce an SCP providing up to US $ 200,000 additional compensation and unlimited medical expenses per passenger failed to get through the Senate. The present day SCP attempts to provide for a limit of US $ 500 Million per accident with a passenger (or his Executors) being paid simply by proving his damages.

In recent years many carriers have adopted by special contract provided for under Article 22, the limit of 100,000 special drawing rights (SDR's), which represents approximately US $ 139,000 **and** have waived the Article 21 defence.

The possibility exists that if the US Senate ratifies MAP 3 and 4 and the SCP, the Government will denounce the Warsaw Convention. If that were to happen the Convention would not govern claims brought in the US until the countries who are parties to the Convention ratified MAP 3 and 4. Consequently based upon applicable state law, an airlines liability would be unlimited in amount and based upon proof of negligence.

The level of criticism and failure to achieve progress in changes to the Warsaw Convention have led other contracting States to consider possible alternative steps, in some case unilaterally.

One of these, the Transport Directorate of the European Community, has published a report for discussion which recommends amongst other things, a mandatory increase in the limit to 250,000 European currency units. A working group of member airlines requested their legal experts to review this proposal. It has been suggested that a voluntary inter-carrier Agreement adopting the proposed increase was a possible alternative. Provided this increase could be agreed, advisers commented that they remained committed to the Warsaw system.

Against the background of failure by member States to reach a unilateral agreement, Japanese Airlines have acted to amend their conditions of carriage and waive the limitation of liability for passenger, death or injury for international passengers on aircraft operated by them. Such amendments were approved by the Japanese Minister of Transport and became effective on the 20th November 1992, for Japanese airlines.

In practical terms, what does this actually mean ? In other words, Japanese airlines retain the Convention system of strict liability up to SDR100, 000 and must 'prove' the Article 21 defence in respect of claims in excess of that sum if they are not to be liable on an unlimited basis.

Bearing in mind how difficult, not to say impossible, it is for airlines to prove that they have taken all necessary measures to avoid accidents, the notional right of self-defence does not mean much except in relation to issues of contribution and subrogation. For most practical purposes, therefore, full damages will be subject to proof of negligence or wilful misconduct and the local legal interpretation of applicable wording. The meaning of "wilful misconduct" in the Warsaw Convention and of "recklessness with knowledge" in the Hague Protocol have almost as many different meanings as there have been Courts applying it !

The Japanese response to the problems posed by Warsaw was prompted by the Japanese social and legal system. In that country, individuals injured as a consequence of the activities of a corporation, WHETHER NEGLIGENT OR NOT, can expect to be taken care of by that corporation. There has been no apparent Japanese court decision on the meaning of wilful misconduct in the context of a passenger claim. As I understand it, the Japanese system has mandated settlement of claims by passengers against airlines by negotiations in which the starting point is the Warsaw limit (the minimum compensation).

This philosophy varies considerably to that in the West. It is expected that a person injured by the negligent acts of a corporation will, so far as money permits it, be returned to the position enjoyed before that injury was sustained by means of compensation paid by the corporation. In that context the greatest difficulty that air carriers in the West encounter in terms of public relations is seeking to explain to passenters injured in an aircraft accident that they must prove wilful misconduct in order to obtain full compensation even where it is clear the accident was caused by the carriers negligence.

When considering the position adopted by Japanese airlines and other Member States frustration, this is fuelled by the lack of movement within the US Senate and no unilateral agreement to implement the Montreal additional protocols and the proposal for a supplementary compensation plan.

When considering the failure of the above, the question is "WILL OTHER AIRLINES NOW MOVE AS JAPAN'S HAVE" ?

There are clearly a number of very important legal aspects concerning the above and ideas for change. Where claims exceed 100,000 special Drawing Rights in value, passengers it would seem, should be given an alternative to their existing option of establishing wilful misconduct, to obtain full and unlimited compensation.

When looking at the insurance exposure for Underwriters in unlimited liability, the fact is that insurance cover is available.

Many airlines, when looking at unlimited liability, may consider that if any further additional insurance cost was to be charged by Underwriters, then this would be an impediment to what most agree is a simple and effective solution to their liability exposure and future needs. With rising

costs of hull and current agreed liability cover in the insurance market, in addition to fuel, maintenance and other areas of airline expenditure in difficult economic trading times, any additional cost must be fully evaluated. It is unclear how a wide scale move by airlines to unlimited liability cover, will affect premiums. It is for each airline to decide it's own approach.

Combined Single Limit Liability Policies offer as much as US $ 1.5 Billion of cover, and are currently being underwritten. It could well be argued that US $ 1 Billion would be more than enough to cover unlimited liability damages in even the worst cases. When Japan Airlines adopted unlimited liability at the end of 1992, insurers had agreed to provide this coverage without additional premium charge. Clearly since the end of 1992, the insurance market continues in it's resolve to increase levels of insurance premiums substantially for all airlines. In the hardening market scenario, it would therefore be a good time for Underwriters to attempt rate increases for cover such as unlimited liability.

Since the introduction of Unlimited Liability adopted by Japan Airlines and the approval of the Japanese Industry of Transport, the Association of european Airlines and IATA have been working with the European Economic Community to consider a change in the level of ticket limitation. IATA and the EEC have contacted the principal London & International Aviation Underwriting Associations to ask them for a view on such a proposal.

Their response we understand, is to confirm the insurance markets willingness to take on the increased risks of such a proposal, but to reserve judgement as to premium cost implications.

The conversations are on-going, but they have heightened insurers awareness that there could be a general move to adopt a change in ticketing limits or an adoption of an unlimited regime sometime in the future. Such dialogue may help to strengthen any market resolve to charge an additional

premium for any such change in ticket conditions. The only other carriers to have been discussing the concept of unlimited liability have been located in Europe to our knowledge. One of these has included a special contractual provision within their policy, to enable them to take up this option if they so decide. Others have deferred their decisions, but we understand conversations are on-going.

It is our view that any wholesale attempt to introduce the concept of unlimited liability for a large block of airlines will attract additional premium from Insurers since they are almost certainly to produce a collective response to such a challenge.

To date, Insurers have responded only to a few individual airline enquiries and have remained somewhat relaxed on the question of premium price.

We would caution the airline industry and its governing bodies not to raise the profile of this subject too high if future insurance costs are to be kept within reasonable commercial bounds.

American carriers have enjoyed some of the lowest liability rates amongst the world's airlines, considering that there is no limit of liability for domestic carriage under their legal system and the size of claims.

Whatever the limits, Plaintiffs have in a large number of cases recovered amounts well in excess of the applicable ticket limits. This has certainly happened in Japan and the United States to name just two geographical areas. Clearly social and political issues vary enormously in defending liability claims, and result in a considerable amount of pressure for change in the future.

In your own country it is now the normal practice to pay compensation

in excess of the ticket limits which I believe is sometimes described as a social payment and is a reflection on practices expected of Korean Corporations. History has demonstrated that it is customary in Korea, after an accident of a significant nature involving loss of life for the airline to negotiate settlements of claims promptly and for a substantial payment extensively from the carrier over and above the ticket legal liability figure. Assessments clearly vary depending on the age and monthly earnings of deceased passengers, but would average around US $ 172,000. This figure is clearly in excess of the SDR Liability Limit under the conditions of carriage which equals approximately US $ 138,000 as an average for wrongful death compensation, and there is the further additional compensation paid over and above this figure.

There is clearly commercial pressure on airlines to provide enhanced cover. Without international agreement amongst airlines, the possibility remains that passengers sitting side by side on an aircraft can be subject to different contractual terms of carriage. Unlimited Liability can be covered in the insurance market, but undoubtedly there may be a price to pay for this new risk in the future.

However, a factor in insurers consideration is the possibility of removing Undoubtedly change will occur, but it appears like[1-7] in the short-term that this will not overcome the many differences Internationally between the legal systems and the social and political pressures on corporations who are to pay proper compensation for their faults.

[Summary]

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Clearly there are many legal arguments and criticisms surrounding the proposals for change in the Warsaw Convention and the need for a radical review. The question remains is unlimited liability the answer or should there be some other form of supplemental compensation and if so, what limits should be applicable.

It does seem that the adopted limits of the Convention are seen by many as the first line of defence, which, dependent on political and cultural differences, the legal interpretation of contractual wording and the legal system globally have resulted in enormous differences in compensation paid whether or not the Convention limits were imposed. An example of this is in the United States, which highlights the significance of the problem in that domestic travellers without Convention Limits can, through the American legal system, obtain compensation in the multi-million dollar area for a death claim, whereas a passenger flying internationally would in the first instance be subject to Convention Limits.
expensive legal action through litigation. To date, we can advise that insurers have **not** charged additional premium for unlimited liability coverage.

Insurance rates as we have stated are hardening considerably. To date, average rate increases have been plus 56% for aircraft hull and plus 45% for liabilities. Insurers last year suffered global losses of around US$ 1.1 Billion against a premium income of US$ 800,000. The target premium income for 1993 is believed to be in the region of US$ 1.4 Billion.