

AVIATION LAW — WARSAW CONVENTION LIABILITY PRINCIPLES EXTEND TO DAMAGE FROM TERRORIST ATTACK

On August 5, 1973, plaintiff and other passengers had formed a line in the transit lounge of Hellenikon Airport in Athens, Greece, to allow the local police to conduct a baggage check and physical search. Before plaintiff could complete the required processing and begin her flight to New York on defendant TransWorld Airlines, two Jordanian terrorists entered the terminal and launched a grenade and gunfire attack that left three TransWorld Airlines passengers dead and forty wounded. The terrorists held 32 persons hostage before their surrender to police some two hours later. Plaintiff, suing in tort for personal injuries received in the attack, moved for summary judgment on the ground that, under the liability provisions of the Warsaw Convention¹ as modified in accordance with the Montreal Agreement,² defendant was liable without fault. Defendant, a signatory to the Montreal Agreement, moved for summary judgment on the ground that the Warsaw system was not applicable to the facts of the present case.³ Held, plaintiff's motion for summary judgment granted. The absolute liability provisions of the Warsaw system extend, as a matter of law, to the time when passengers have begun to perform the uninterrupted sequence of activities that are prerequisites to the boarding of the aircraft. *Day v. TransWorld Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975).

An examination of the historical context indicates that one of the two fundamental policies that led to the drafting of the Warsaw Convention in 1929 was the belief that airlines engaged in international transportation should be provided some measure of protection to assist them in coping with the known and unknown perils that threatened their existence as a viable industry.⁴ In particular there was a belief that if an airline were held

¹ Convention for Unification of Certain Rules Relating to International Transportation by Air, *done*, Oct. 12, 1929, 49 Stat. 3000 (1935), T.S. No. 876, 137 L.N.T.S. 11 (effective for United States Oct. 29, 1934) [hereinafter cited as Warsaw Convention].

² Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, [1971] 24 U.S.T. 564, T.I.A.S. No. 3570 (effective for United States Jan. 26, 1973) [hereinafter cited as Montreal Agreement]. Greece is also a party to the Montreal Agreement. The Warsaw Convention, as modified in accordance with the Montreal Agreement, will be hereinafter referred to as the Warsaw system. The contract provisions dealing with the increases in liability are set out at 31 FED. REG. 7302.

³ *Day v. TransWorld Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd* 528 F.2d 31 (2d Cir. 1975). It was not disputed that plaintiff was a passenger in "international transportation" as defined in Article (1) paragraph (2) of the Warsaw Convention. Under these provisions the ticket-holder on a flight beginning and terminating within the borders of two countries that adhere to the Convention is a passenger in "international transportation." Warsaw Convention, *supra* note 1, art. 1.

⁴ *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) [hereinafter cited as *Husserl*]; Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967) [hereinafter cited as *Lowenfeld*].

to the same measure of liability as were other common carriers, then several major air crashes generating vast numbers of plaintiffs, would soon deplete the assets of the enterprise and discourage the capital investment necessary for the growth of the industry.⁵ This concern resulted in several provisions that have become the essence of the Warsaw Convention. Under these provisions the liability of the carrier for the death or bodily injury of a passenger was limited to a sum certain,⁶ and several defenses were established whereby the carrier might escape liability altogether.⁷

The other fundamental policy underlying the Warsaw Convention was the desire to effectuate a speedy, inexpensive, and relatively simple recovery by the plaintiff injured in international air travel.⁸ The injured passenger faced the very real prospects of great expense, delay, and inconvenience, possibly resulting in inadequate compensation or no recovery at all. To avoid such injustice, the Warsaw Convention contains provisions enabling the plaintiff to bring suit in any one of several forums,⁹ and it relieves him of the necessity of showing negligence.¹⁰

Subsequent proposals for revision of the Warsaw provisions were based upon the growing realization that air travel was becoming much safer and that the maximum allowable recovery was woefully inadequate to compensate the victim of an air crash.¹¹ These proposals resulted in the signing of the Hague Protocol in 1955,¹² which doubled the permissible amount of

⁵ See Lowenfeld, *supra* note 4, at 499.

⁶ Warsaw Convention, *supra* note 1, art. 22, para. 1. This provides that the liability of the carrier is limited to approximately \$8,300.

⁷ *Id.* art. 20, para. 1. This section provides that the carrier is not liable if he proves that he and his agents have taken all the necessary measures to avoid the damage or that it was impossible for him to take such measures. Art. 21 relieves the carrier of liability if he can prove contributory negligence on the part of the passenger.

⁸ See Lowenfeld, *supra* note 4, at 519-22. Prior to the Convention the plaintiff was faced with formidable obstacles to recovery. He might be forced to bring suit in another nation; or if able to bring suit in his own state, foreign law might still be determinative due to the traditional conflict of laws principle which states that recovery is to be governed by the law of the place where the tort occurred. *Masci v. Young*, 289 U.S. 253 (1933); Calkins, *The Cause of Action Under the Warsaw Convention*, 26 J. AIR L. & COMM. 217 (1959). But in any forum there could be insuperable problems of proof. It would be difficult indeed for the plaintiff to prove negligence on the part of the carrier in an era when the cause of many air accidents was unknown. See generally, W. PROSSER, *LAW OF TORTS*, 39 (4th ed. 1971) [hereinafter cited as PROSSER].

⁹ Warsaw Convention, *supra* note 1, art. 26, para. 1. The plaintiff may bring his action in any one of four possible forums, provided that the forum is in a country which adheres to the Convention: (1) the domicile of the carrier; (2) its principal place of business; (3) the place of business through which the contract was made; (4) the place of destination.

¹⁰ *Id.*, art. 17. This 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. . . if the accident which caused the damage. . . took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

¹¹ See Lowenfeld, *supra* note 4, at 546-52.

¹² CIVIL AERONAUTICS BOARD, *AERONAUTICAL STATUTES AND RELATED MATERIAL* 324-66 (1963).

recovery.¹³ The United States did not sign the Hague Protocol, presumably believing that the proposed increase in the amount of recovery, although helpful in a small way, was still insufficient.¹⁴ In November of 1965 the United States formally denounced the Warsaw Convention;¹⁵ before the denunciation became effective, however, the United States withdrew the notice and announced approval of the Montreal Agreement.¹⁶ This was an interim agreement¹⁷ requiring airlines to file with the Civil Aeronautics Board tariffs which raised the limit of liability and waived the defenses allowed by article (20) paragraph (1) of the Convention.¹⁸ Further, it incorporated all the other provisions of the Convention, including those provisions which imposed liability without fault on the carrier.¹⁹

It seems to be settled in New York that the Warsaw system does not create a cause of action. Rather, it merely furnishes a presumption of liability and places a limit on that liability, leaving it to the otherwise applicable substantive law to provide the cause of action.²⁰ The preamble to the Convention states, however, that its purpose is to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ."²¹ The Convention, in order to achieve this objective, states that "any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention."²² Thus, the Convention has been held not to limit the *kind* of cause of action on which relief may be granted, but only to subject such action to its provisions.²³

Assuming that principles of tort law can supply the cause of action upon which the Convention's presumptions of liability operate, the extent to which air carriers are liable for injury to passengers under the common law should be examined. As is the case with common carriers generally,²⁴ the air carrier has a duty to exercise a high degree of care for passenger safety.²⁵

¹³ Lowenfeld, *supra* note 4, at 504-09.

¹⁴ *Id.* at 509-16.

¹⁵ Husserl, *supra* note 4, at 1241 n.2; *see* Lowenfeld, *supra* note 4, at 546-52.

¹⁶ Lowenfeld, *supra* note 4, at 596.

¹⁷ *See* note 2 *supra*.

¹⁸ *See* note 7 *supra*.

¹⁹ The Montreal Agreement was expressly stated to be a special contract under article 22(1) of the Warsaw Convention to incorporate these other provisions. Husserl, *supra* note 4, at 1241 n.2; Lowenfeld, *supra* note 4, at 597.

²⁰ *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. denied*, 355 U.S. 907 (1957); *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds* 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 820 (1954); Husserl, *supra* note 14, at 1243.

²¹ Warsaw Convention, *supra* note 1, preamble.

²² *Id.* art. 24 (emphasis added).

²³ Husserl, *supra* note 4, at 1245.

²⁴ *Reuter v. Eastern Airlines, Inc.*, 226 F.2d 443 (5th Cir. 1955); *see* cases collected in Annot., 73 A.L.R.2d 346, 358-59 (1960).

²⁵ *Nieves v. Manhattan & Bronx Surface Transit Operating Authority*, 31 App. Div. 2d 359, 297 N.Y.S.2d 743 (1st Dept. 1969); *see* cases cited in note 26 *infra*.

This duty not only includes the protection of passengers from foreseeable hazards while they are on board the craft,²⁶ but also extends to passengers in the act of boarding or alighting from the craft,²⁷ or passengers who are merely "on the premises" of the airport.²⁸

The absolute liability furnished by the Warsaw system, once a cause of action in tort or contract is found upon which to base the claim, is applicable in suits for death or bodily injury sustained "on board the aircraft or in the course of any of the operations of embarking or disembarking."²⁹ Resolution of the present case depends upon the meaning of the phrase "in the course of any of the operations of embarking."³⁰

The Warsaw system has become a part of the federal law of the United States,³¹ and as such, its precise meaning is a question of law.³² The initial focus in the construction of a treaty is on the text of the treaty itself,³³ but the analysis is then sharpened by reference to the historical background and purposes underlying the document.³⁴ These principles of construction

²⁶ See cases collected in Annot., 73 A.L.R.2d 379 (1960) (liability for injuries caused by air turbulence); 75 A.L.R.2d 848 (1961) (liability for injuries caused by change in air pressure); and Annot., 30 A.L.R.2d 1172 (1953) (liability for injuries caused by improper maintenance).

²⁷ *Weller v. Northwest Airlines, Inc.*, 239 Minn. 298, 58 N.W.2d 739 (1953); see cases collected in Annot., 61 A.L.R.2d 1113 (1958).

²⁸ See cases collected in Annot., 3 A.L.R.3d 1938. In *Delta Air Lines v. Millirons*, 87 Ga. App. 334, 73 S.E.2d 598 (1952), defendant airline was held liable for the injuries sustained by plaintiff from a fall in a poorly lit parking lot of the airport. This quote is representative of the cases examined: "A carrier is not an insurer of the safety of its passengers but it owes to its passengers only the duty of exercising ordinary care for their protection while on their premises and while the relationship of carrier and passenger exists." *Id.* at 337.

²⁹ Warsaw Convention, *supra* note 1, art. 17. See note 12 *supra* for the text of this article.

³⁰ There are no cases dealing with the applicability of the Warsaw system to injuries suffered while "embarking," but there are two cases concerned with "disembarking." *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971); *Felismina v. TransWorld Airlines, Inc.*, 13 Av. Cas. 17,145 (S.D.N.Y. 1974) held that the operation of disembarking had ended when the passenger had exited the plane and reached a position of safety within the terminal.

In the *MacDonald* case the focus was primarily upon the meaning of the word "accident." In fact the plaintiff in that case did not succeed in her suit for injuries sustained when she tripped and fell over a small zipper bag in the floor because of her failure to show an accident—"the first requirement for invocation of the Convention." *Id.* at 1404. Any bag in front of her must have been clearly evident, the court reasoned, so there was no reason to say the bag caused the fall. This writer believes that the crux of the somewhat confusing language is that the suit failed because of plaintiff's failure to show the requisite proximate cause.

The *MacDonald* court adds that even though the passenger has disembarked, ". . . he may remain in the status of a passenger of a carrier while inside the building." *Id.* at 1405. This seems to imply that the passenger might maintain a suit in tort independently of the Warsaw remedies.

³¹ *Husserl, supra* note 4, at 1249.

³² See generally *Rosman v. TransWorld Airlines, Inc.*, 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848, 852 (1974) [hereinafter cited as *Rosman*].

³³ Vienna Convention on the Law of Treaties, *open for signature*, May 23, 1969, U.N. Doc. A/Cont. 39/27, art. 31.

³⁴ *Choctaw Nation v. U.S.*, 318 U.S. 423, 431-32 (1943), *MacDonald, supra* note 30, at 1402.

are demonstrated in those hijacking cases which dealt with the question of recovery for psychosomatic injury and concluded that such injury was, as a matter of law, within the intention of the Convention.³⁵

One factual circumstance common to both the hijacking cases and the present case is that the injury complained of was caused by the violent actions of third parties. This fact, however, does not present a significant issue in either group of cases.³⁶ Instead, the important element in these two groupings is that each of them presents a novel question: whether the Warsaw system applies to a certain *type* of harm (in the hijacking cases) and whether it applies to injuries occurring at a certain *point in time* (in the instant case). The hijacking cases are relevant as an analogy; they show how one novel issue has been resolved by the courts.

A treaty is to be construed liberally so as to give effect to its underlying purposes.³⁷ To construe the liability provisions of the Warsaw system³⁸ so broadly as to include the liability of the carrier for psychosomatic injuries would be to facilitate both of the basic objectives of the Convention.³⁹ If such injuries were held to be nonactionable under the Warsaw system, then, in an independent tort suit, not only would the passenger be denied the benefits of absolute liability, but the carrier might be subject to unlimited liability. The Warsaw system evidences an intent to include all the possible causes of action that might be brought against a carrier.⁴⁰ If the drafters simply did not foresee a cause of action for mental harm, then the Warsaw System should be construed to include such causes of action.⁴¹ Based on these considerations and enabled by New York case precedent to recognize a cause of action for mental trauma, at least when accompanied by physical manifestations,⁴² the hijacking cases held that such trauma gave rise to a cause of action in tort that was actionable under the provisions of the Warsaw system.⁴³

³⁵ Husserl, *supra* note 4, at 1243; Rosman, *supra* note 32, at 857; 6 GA. J. INT'L & COMP. L. 339 (1976).

³⁶ The carrier is liable under the common law for those third party attacks upon its passengers that it could have prevented by the exercise of reasonable care. See PROSSER, *supra* note 8, at 348-49 and cases cited therein.

This principle is stated in N.Y. JUR. *Carriers* 332, at 291 (1959).

It is important to note, once again, that lack of reasonable care would not have to be shown for recovery under the Warsaw system.

³⁷ De Tenorio v. McGowan, 364 F. Supp. 1051 (S.D. Miss. 1973).

³⁸ The principal concern in the hijacking cases was the meaning of the phrase "bodily injury," as used in art. 17, note 10 *supra*.

³⁹ See Husserl, *supra* note 4, at 1247.

⁴⁰ The causes of action are categorized according to injury to person (art. 17), damage to baggage (art. 18), or damages to either person or baggage if caused by the carrier's delay (art. 19).

⁴¹ Husserl, *supra* note 4, at 1248.

⁴² Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729, (1961); Rosman, *supra* note 32. The Husserl court went so far as to hold that mental injury alone was sufficient for recovery.

⁴³ Husserl, *supra* note 4, Rosman, *supra* note 32. Rosman and Herman v. TransWorld

In concluding that the provisions of the Warsaw Convention and Montreal Agreement were applicable to the particular facts of the case before it, the court did not attempt to establish an inflexible rule that would control carrier liability in all subsequent cases of this nature. The court restricted itself "to the totality of the circumstances affecting these plaintiffs, viewed against the background of the plain meaning of the Convention, coupled with a consideration of its historical purposes."⁴⁴

Since the Convention does not expressly define article 17 liability provisions,⁴⁵ the court looked to the ordinary meaning of the phrase "in the course of any of the operations of embarking." Of crucial importance was the fact that these ticket-holding passengers had completed five steps of the eleven step procedure established by the defendant airline as a prerequisite to boarding and were lined up to perform the rest of the requirements at the time of the attack.⁴⁶ Since plaintiffs were locked into a procedure required by the defendant, they were engaged, within the plain meaning of the phrase, "in the course of embarking."⁴⁷

Noting that treaties are to be liberally construed so as to carry out the intention of the parties, the court attempted to bolster its interpretation of the plain meaning of the provision in question by looking to the historical background of the Convention.⁴⁸ The court found that the drafters meant to put *narrower* limits on the liability of the carrier for injury to passengers than for injury to baggage. Since the passenger's exercise of volition could lead to some dangerous situations that would not occur with inanimate articles, it would be unfair to tax the carrier with responsibility for the passenger's safety, as opposed to that of the baggage, from the time of his entry into the airport to the time he boarded the aircraft. Therefore, the phrase in question was adopted to limit the carrier's liability "to those times when a passenger is exposed to the dangers of aviation."⁴⁹ Because these passengers were engaged in a "purposeful activity" getting ready to embark, they had exposed themselves to dangers falling within the protection of the Convention.

The court also believed that the air carrier was the most efficient risk bearer and risk distributor in situations such as the instant case. It is the

Airlines, Inc., were consolidated and the Court of Appeals heard the two together.

⁴⁴ 393 F. Supp. 217, 222.

⁴⁵ See note 10 *supra*.

⁴⁶ Plaintiffs had already obtained boarding passes, baggage checks, seat assignments, and had already passed through passport and currency clearance at the time of the attack. The final steps involved submitting to a search, walking out the gate, riding a bus to the aircraft, and going aboard.

⁴⁷ The *Felismina* case, *supra* note 30, was distinguished. The Warsaw system was not applicable to that plaintiff because she had left the aircraft and was not required to perform any further activities as a condition of ending her journey.

⁴⁸ 393 F. Supp. at 222; Sullivan, *Codification of Air Carrier Liability by International Convention* 7 J. AIR LAW 1, 18-22 (1936) [hereinafter cited as Sullivan].

⁴⁹ *Id.* Apparently the court thought that being bombed by criminals in the transit lounge of an airport was one of the "dangers of aviation."

carrier who is best able to acquire insurance and raise its tariffs accordingly. It is the carrier, also, who is in a position to press the airport owner to install safety devices to prevent the entry of armed terrorists into the airport terminal.⁵⁰

Finally, the court looked to principles of common law as a point of comparison with liability under the Warsaw system. In particular, it noted that under the New York common law the responsibility of the carrier extends to proper maintenance of the areas of the terminal expected to be used by embarking passengers, even if such terminal does not belong to the airline.⁵¹

The instant decision is not a surprising one, in view of the *Husserl*⁵² opinion rendered by the same court some two months earlier. However, it appears that the *Day* decision does not extend its substantive reach quite as far as does *Husserl*. *Husserl* held that mental anguish sustained on board an aircraft while parked in a desert is compensable under the Warsaw system. The instant case, although it also involves injury caused by third party criminals, at least involves a type of injury—physical—that was clearly and expressly within the contemplation of the Convention drafters.⁵³ The only really novel fact presented by this case is that the injury occurred at a point in time and procedure rather far removed from the actual boarding of the plane. This presents a question of first impression, and it must be conceded that, on the basis of analogous reasoning, the court's resolution of the question seems technically to be in good order.

The holding necessitates no extreme convolution of the "operations of embarking" provisions⁵⁴ in order to fit the plaintiffs within the purview of such provisions. But in order to sustain its "plain meaning" analysis, the court examines the legislative history surrounding the convention and determines that the carrier should be liable only for injuries sustained from "dangers of aviation."⁵⁵

However, the court made no attempt to specify the "dangers of aviation." Instead the court attempted to define such dangers by marking off the perimeters of the phrase "in the course of any of the operations of embarking or disembarking."⁵⁶ Should the passenger's injury arise while he was engaged in such operations, then that passenger's injuries arose out of a "danger of aviation."⁵⁷ In equating "dangers of aviation" with those

⁵⁰ *Id.* at 220.

⁵¹ *Id.* at 223.

⁵² See note 4 *supra*.

⁵³ 393 F. Supp. at 220.

⁵⁴ See note 10 *supra*.

⁵⁵ 393 F. Supp. at 222. For an analysis of the history of the Convention, see Sullivan, note 48 *supra*.

⁵⁶ 393 F. Supp. at 220.

⁵⁷ The dangers would be those that arise during the period which begins sometime after the passenger enters the terminal. These would be those confronting a passenger while per-

risks which arise in the "operations of embarking," the analysis overlooks the argument that the danger of terrorist attack is not a danger that is unique to or inherent in travel by air, and a danger which could not be expected to arise, for example, in the depot of a railway or the terminal of a busline. It is true that one motivation underlying the recent rash of terrorism is the desire for international publicity,⁵⁸ and this desire can perhaps be readily realized at the expense of the air carrier. But to say that political terrorism is a problem most often directed toward the air carrier is not to say that it is a problem which is expected in travel by air and one which the Warsaw drafters would readily have embraced.

The realization that a major air crash could severely impair the financial integrity of the airline was one of the fundamental motivations underlying the drafting of the Convention.⁵⁹ To the extent that an accident giving rise to innumerable plaintiffs with unlimited claims was mainly the concern of carriers by air, as opposed to other common carriers, perhaps the airline industry was entitled to this special protection. However, it must be recognized that whatever remains of the justification for giving special treatment to carriers by air, the fact is that they *are* given such treatment. Thus, the *Day* court was not faced with justifying such favoritism, which is embodied in a document having the force of federal law, but only with the essentially equitable issue of whether to include within such document one more class of injury-causing activities. In addition, application of the Warsaw system may very well benefit the passenger more than the airline in many cases, especially where, as here, it would be extremely difficult for plaintiff to prove negligence.⁶⁰

The court's examination of the extent of carrier liability in common law tort furnished a better basis for its decision than did its classification of terrorism as a "danger of aviation." The Convention drafters wanted so much to facilitate the compensation of the injured plaintiff to the extent that they were willing to remove the requirement of a showing of fault from the proceeding.⁶¹ Looking at this aspect of the Warsaw system, one is compelled to conclude that its remedial procedures go even further than does the common law in consoling the plaintiff. This is an important policy expression because once a court has met its initial burden of stretching,

forming those activities that the carrier requires him to perform as a condition of beginning or completing his journey.

⁵⁸ *Id.* at 219.

⁵⁹ It was foreseeable in 1929, the airline industry being in its technological infancy, that serious accidents, many unexplainable, were certain to occur. Accidents killing and wounding scores of plaintiffs could be said to inhere in this novel enterprise. It was with this in mind that the drafters provided the enterprise the special protection of limited liability for injuries arising out of the "dangers of aviation." *Id.* at 220.

⁶⁰ The court acknowledged the plaintiff's difficulty in its first footnote, by saying that plaintiff's independent claims grounded on negligence had little factual basis, since the air terminal was not owned by the defendant, but by the Greek government. *Id.* at 218.

⁶¹ *Id.* at 221.

pushing, or pulling a class of injuries into the letter of the Warsaw provisions, it can step back and find support for its decision by pointing out some vague notions of policy. This seems to be the procedure followed in the *Day* decision.

But the fundamental purposes of the Warsaw system do seem persuasive in a case such as this which involves the question of whether or not to fit a group of actions into a remedial system when such actions are already poised on the very perimeter of that system. Clearly the plaintiff in the instant case had a cause of action in common law tort and theoretically could have recovered independently of the Warsaw remedies upon a showing of negligence. The court, then, merely drew upon the Convention's "underlying purposes" to relieve plaintiff of that burden.⁶² This seems a radical maneuver in view of the fact that it took plaintiff all the way from a possible nonsuit to a summary judgment in her favor. But this idea is, after all, no more radical than the Warsaw system itself.

The notion that the Warsaw system functions to redistribute the risks of air travel was an important basis of the *Day* decision.⁶³ Perhaps it is true that the airlines are the better risk bearers. Perhaps, too, the airline can successfully negotiate with the airport owner, persuading him to install security devices to keep the terrorists out, as he has had to do to keep the hijackers off the planes. But it is interesting to surmise what the courts will do when the installation of such devices force the terrorists to bring their attacks in the parking lot, or at the entrance gate to the parking lot, or in the streets outside. Will the court still insist that this is a "danger of aviation" as contemplated by the Warsaw system? Or will it decide that fault must again become the basis of liability?

Whatever the decision, a court can find support for it by emphasizing one or the other of the twin purposes of the Warsaw system. In fact, it could be argued that the courts should attempt to protect the airline industry by not taxing it with responsibility for terrorist attacks at all. But there is the additional objective of facilitating recovery. The importance of the instant decision is that it underscores the shift of emphasis from the early equality of these two principles to the modern desire to compensate the injured plaintiff at the expense of the more efficient risk bearer.⁶⁴ In a ruling that reflects the tension inherent in a system that seeks uniformity

⁶² *Id.* at 222.

⁶³ *Id.* at 220.

⁶⁴ The *Day* decision and the hijacking cases perhaps are based on a recognition that the airline industry has grown out of its infancy, both technologically and financially. If air carriers are superior risk-bearers, and the modern plaintiff does have a much better chance of showing that negligence and not an act of God caused an accident, then it might be argued that their relationship no longer needs the special protection furnished it by the Warsaw system. But this ignores the other beneficial aspects of the system—quicker, more convenient and less expensive litigation—that would be lost in a total denunciation of the Convention. See Lowenfeld, *supra* note 4 at 519-22.

The alternative to total denunciation is amply demonstrated by the instant decision.

on the one hand and flexibility on the other, the *Day* court has shown how the changing focus of policy can result in subtle shifts in the responsibility for loss. The underlying theme of the decision is stated by Justice Cardozo in another context: "The principle . . . does not change, but the things subject to the principle do change. They are whatever the needs of life in a changing civilization require them to be."⁶⁵

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⁶⁵ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).