NAVIGATING *PEGGY'S COVE:*
Is it a Safe Harbor for Manufacturers, Maintainers and Overhaulers?

By
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On September 6, 2000, President Bill Clinton presented the U.S. Senate with the *Montreal Convention* of 1999 for ratification.[2] The letter of transmittal urged early and favorable consideration of the Montreal Convention, commenting that it is a "vast improvement" over the *Warsaw Convention* of 1929.[3] In an attached report, the State Department noted that the M*ontreal Convention* represented a modern, uniform system that incorporated all key United States policy objectives, including providing adequate compensation for victims of international aircraft disasters. The report suggested that ratification by the United States would encourage ratification by a number of other signatory States.[4]

However, with a long history of failure to ratify amendments to the *Warsaw Convention*, such as the *Guatemala Protocol* and *Hague Protocol*, it may be years before United States ratification comes to fruition.[5] In June of 2002, Kevin McDermott, of the Office of Senator Joseph Biden, Chairperson of the Foreign Relations Committee, stated:

> "There has been no action on the *Montreal Convention* since President Clinton presented it to the Senate for ratification in 2000. It is up to the discretion of the

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[1]Many thanks go out to one of our Los Angeles office summer associates, Amy Gantvoort of Pepperdine University School of Law, for her work on this article.

[2] The Convention for the Unification of Certain Rules for International Carriage by Air, commonly known as the *Montreal Convention*, is intended to supersede the *Warsaw Convention* of 1929 and the various amendments to the *Warsaw Convention*.

[3] See 146 Cong. Rec. S 8125 (September 6, 2000).

[4] Seventy-one (71) States and one (1) regional Economic Integration Organization, have signatory status on the *Montreal Convention*. At the present time, the *Montreal Convention* is only an "agreement" between the signing nations. In order to have legal effect, thirty (30) States must ratify the Convention and deposit an instrument of ratification with the International Civil Aviation organization ("ICAO"). The Convention will come into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval, or accession. As of June 3, 2002, ICAO reports that the Convention has 18 contracting states. If the United States does indeed ratify the Convention, the remaining necessary 11 States might quickly fall in line.

[5] A detailed history of *The Warsaw Convention* in the United States may be found in the article found in the ABC Law Report of Fall, 1997, *The New Warsaw and Its Impact on Aviation Manufacturers.*

Foreign Relations Committee Chair to bring the matter up for a hearing. Depending on other pressing matters, it could sit for years."

As the *Montreal Convention* inches toward ratification, a perhaps more consequential legal issue has jumped to the forefront of aviation litigation and could have a great impact on the liability of aircraft manufacturers, maintainers, and overhaulers. At present, U.S. courts are making landmark decisions regarding how the *Warsaw Convention's* provisions are interpreted. New developments, such as the recent federal decision in *Peggy's Cove*,[6] are breaking ground in determining the breadth of entities entitled to the protection of the *Warsaw Convention*. The question is: are these recent developments opening Pandora's Box, or are they building a safe harbor for aviation manufacturers, maintainers and overhaulers? Secondly, how will the ratification of the *Montreal Convention* impact the recent developments in defining the limits of Warsaw protection?

This article will seek to provide (1) a brief overview of the governing law and an outline of the key provisions of the *Montreal Convention* that affect the breadth of Warsaw protection; (2) the recent developments in United States courts in interpreting who is a "carrier" or its "agent" so as to obtain Warsaw protection; (3) an analysis of the recent decision in *Peggy's Cove*, and (4) the probable impact of these new developments on aviation manufacturers, maintainers, and overhaulers.

THE CURRENT GOVERNING LAW

Intercarrier Agreements

For the present and foreseeable future, United States law will be governed by the IATA[7]-sponsored *Intercarrier Agreements*, as published in an international carrier's U.S. Department of Transportation Tariff, and the amendments to the *Warsaw Convention* made under *Montreal Protocol No. 4*.[8] On January 8, 1997, the Department of Transportation approved the implementation of the *Intercarrier Agreements*, effectively supplanting the *Warsaw Convention* with a series of formal agreements entered into by many of the world's airlines. These *Intercarrier Agreements* provide for "special contracts" drafted under the auspices of, and in accordance with, Article 22(1) of the *Warsaw Convention*, which states that "by special contract, the carrier and the passenger may agree to a higher limit of liability." The *IATA Intercarrier Agreement on Passenger Liability* ("IIA") states that the signatory carriers agree "[t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22,

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[6] *In Re Aircrash Disaster Near Peggy's Cove, Nova Scotia on September 2, 1998*, 2002 U.S. Dist. LEXIS 3308 (2002).

[7] IATA stands for International Air Transport Association.

[8] An in-depth analysis of the IATA Intercarrier Agreements and the Montreal Protocol No. 4 may be found in an article in the ABC Law Report of Fall 1999, *The Road to Montreal: Recent Developments in Airline Liability for International Flights & the Impact on Aviation Manufacturers in the U.S.*

paragraph 1, of the *Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the domicile of the passenger."

The IIA was simply an agreement to take action to remove the Warsaw liability cap, which was universally accepted as being too low. Action was taken through the *Measures to Implement the Intercarrier Agreement* ("MIA") and the *Intercarrier Agreement of Passenger Liability* ("IPA"). Under the MIA and IPA, each carrier agreed to waive any cap on compensatory damages, pursuant to a special contract under Article 22(1). The air carrier also agreed to waive any defenses under Article 20(1) on passenger liability claims up to 100,000 Special Drawing Rights (SDR).[9] Under the *Intercarrier Agreements*, the carrier is, therefore, absolutely liable for an amount up to 100,000 SDR's. Beyond the absolute liability limits, the only available defense is the Article 20(1) "all necessary measures" defense. Under the *Warsaw Convention* as modified by the IIA and MIA, the carrier is liable for a passenger's full compensatory damages, subject to the aforementioned defenses. However, punitive damages remain unavailable to plaintiffs under the current scheme.

The New Convention

The *Montreal Convention* incorporates several key changes in the Warsaw system, including inserting the substance of the IATA accords. At Article 21, the *Montreal Convention* provides for absolute liability up to 100,000 SDR's per passenger and for provable damages in excess of the limit. The carrier may avoid liability only if it proves that the injury or death was not due to its negligence or its other wrongful acts or omissions, or if the injury was due only to the negligence or wrongful act of a third party. Article 17 remains, in substance, unchanged in setting forth the conditions under which liability will attach to the carrier.

Additionally, the *Montreal Convention* provides for periodic review of the limits of liability at five year intervals, reviewed against inflation, based on the Consumer Price Index (CPI). Adherents to the Convention must agree to a future increase in liability limits based on the CPI change. Finally, the *Montreal Convention* provides for a ground breaking Fifth Venue, the plaintiff's domicile, if the carrier also does business in the state either directly or through commercial agreements, in which plaintiffs may bring suit.

As the *Montreal Convention* awaits its hearing in the Senate Foreign Relations Committee, U.S. judges are interpreting the *Warsaw Convention* and leaving many unanswered questions about the direction of *Warsaw Convention* litigation. In making decisions that drive litigation, aviation manufacturers, maintainers, and overhaulers must look to the recent developments in case law as well as how the ratification of the *Montreal Convention* may change their position for better or worse.

[9] Special Drawing Rights are rates of currency exchange set by the International Monetary Fund based upon U.S., German, British, French, and Japanese currency. Currently, 100,000 SDR equals approximately 135,000-140,000 U.S. dollars.

AN HISTORICAL LOOK AT THE BREADTH OF WARSAW COVERAGE

Defining the "Carrier" and its "Agents"

The most dramatic recent changes to Warsaw Convention law involve who or what may be deemed a "carrier" or an "agent of the carrier" and thus protected by the provisions of the *Warsaw Convention*. The *Warsaw Convention* applies to carriers involved in international transportation, as that term is defined in Article 1. Article 17 provides that "[t]he carrier will 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 accident so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Convention also provides for limitations on the carrier's liability.[10] Any action for damages brought under Article 17 is subject to the limitations set forth in the Convention, including limiting the plaintiff to compensatory damages.[11]

However, the *Warsaw Convention* fails to define the term "carrier" and gives little clue as to how broadly the drafters intended to interpret the term. The term "carrier" is singular in quantity, suggesting that there can only be one carrier for a flight. But, Article 20 refers to the carrier's "agents" and provides that the carrier shall not be liable if it and "its agents" have taken "all necessary measures" to avoid the damage. Additionally, Article 25 provides that the carrier will not be entitled to avail itself of the Article 22 limitation on damages if it or "any agent" has caused damage by "willful misconduct."

These provisions follow traditional agency law principles. If the agent is acting outside the scope of agency, the independent liability of the agent is separate from the liability of the principal. The agent, however, is not afforded the defenses of the principal, such as limits on liability.[12] The *Warsaw Convention* drafters gave no indication in the text of the Treaty of an intent to digress from traditional rules on agent liability for their own torts. In its plain language, the *Warsaw Convention* would appear to govern only the actual carrier who contracts with the passenger or shipper.

The drafting history of the 1955 *Hague Protocol* suggests that the drafters did not consider the *Warsaw Convention* to apply to agents and servants and only applied to the carrier.[13]

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[10] Convention, Article 22 (1).

[11] Convention, Article 24.

[12] *See Herd v. Krawill Mach. Corp.* 359 U.S. 297 (1959). Third party contractors who are not parties to a contract of carriage are liable for their own negligence and are not governed by provisions that limit the carrier's liability.

[13] *See* Comments of reporter Henri DeVos given at the Second Annual Conference on Private Aeronautical Law, p. 246 (Hornberg & Ligres transl. 1975), noting that the Treaty text applies only to legal relationship which arises between the passenger and the carrier.

In an effort to remedy this, the drafters proposed the addition of Article 25A which would specifically extend liability limitations to agents and servants.[14] The *Hague Protocol* has never been ratified in the United States, and the amendment only applies to cases involving a flight between countries where ratification has occurred.

In actions governed by the *Warsaw Convention*, courts have addressed the issue of who is the carrier, and, specifically, whether the carrier may be defined to include agents and servants. Since 1977, a line of cases has developed which greatly expands the definition of carrier.

In 1977, the Second Circuit Court of Appeals decided *Reed v. Wiser*.[15] In this case, a TWA plane crashed into the high seas some 50 nautical miles west of Cephalonia, Greece, killing all 79 passengers and 9 crew members on board. Under the *Warsaw Convention*, TWA was liable for deaths in amounts up to $75,000 per passenger unless plaintiffs could prove willful misconduct.[16] Attempting to bypass the limitations of the Convention, the plaintiffs sued the President of the Company and the Vice President of Audit and Security in the United States, arguing that the defendants were responsible for security on TWA flights. Plaintiffs alleged that the defendants were negligent in preventing a bomb, which allegedly caused the crash, from being placed on board. For the first time, the issue of whether an airline employee may invoke the protections of the *Warsaw Convention's* liability limitations was brought to the Appellate level.

Although the court acknowledged it had not done an exhaustive study of civil law, the court looked to civil law principles on the rules of liability for an employee or agent of a carrier. The court determined that the employees were indeed entitled to the protections of the *Warsaw Convention*. The court concluded that, in at least some civil law jurisdictions, Article 22 limited the liability of the carrier's employees as well as the carrier itself. Including the carrier's employees who perform corporate functions in the definition of carrier, the court reasoned that inclusion promoted the *Warsaw Convention's* purpose of limiting liability. The court further reasoned that, if the court excluded employees from the definition, indemnification agreements between the carrier and the employees would lead to the carrier paying full compensation regardless of the Convention's liability limits. Finally, the court noted that a carrier must necessarily include the employees within the interpretation of carrier because a carrier can only exist and function through the actions of its employees.

The method of treaty construction using civil law principles has since been roundly rejected by the Supreme Court. *In Chan v. Korean Air Lines,*[17] the Supreme Court ruled that the

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[14]While the Hague Protocol delegates specifically extended liability limitations to agents and servants, they also agreed that otherwise, the liability of servants or agents was to be governed by national law.

[15] *Reed v. Wiser*, 555 F. 2d 1079 (2nd Cir. 1977).

[16] $75,000 was the liability limit agreed to pursuant to the Article 22(1) special contracts. *The Montreal Agreement of 1966.*

[17] *Chan v. Korean Airlines*, 490 U.S. 122 (1989).

text of the Convention governs its interpretation. Thus, where the text is clear, no amendment may be inserted. The Court held that to insert amendments would be to rewrite the Convention as opposed to interpreting the Convention. In *Eastern Airlines v. Floyd,*[18] the Supreme Court also criticized the method of interpretation used in *Reed* and added that the court may look to the drafting history or subsequent conventions to interpret meaning only when a passage or text is difficult to understand. The *Reed* decision has faced further criticism for concluding that the *Hague Protocol* was a clarification of the *Warsaw Convention.*[19]

Expanding the Carrier to Include Independent Agents and Contractors

Despite their criticism of *Reed*, several federal and state courts have followed the case and extended the limited liability provisions of the *Warsaw Convention* to include a carrier's independent agents and contractors, if the agent or contractor is performing a service that is flight related and in furtherance of the contract of carriage.[20] Moreover, the courts have included agents and contractors as carriers when the agent is performing a service which is required by law or would otherwise be performed by the carrier.[21]

Courts have also extended the *Warsaw Convention's* other provisions to protect a carrier's agents. In *Johnson v. Allied Eastern State Maintenance Corp.,*[22] the court reasoned that a skycap service was performing a function in furtherance of the contract of carriage. The court held that the passenger's claim was subject to the limitations of the *Warsaw Convention*, specifically its two year Statute of Limitations. The court, consequently, held that the plaintiff's action was barred because it was not brought within two years of arrival at the passenger's destination. Thus, an agent may apply the Warsaw limitations to defeat a claim altogether.

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[18] *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991).

[19] The *Hague Protocol* was an amendment that was never ratified by the United States.

[20] See for example, *Julius Young Jewelry Mfg. Co. V. Delta Airlines*, 67 A.D. 2d 148 (N.Y.S.2d 1979) (holding an agent providing maintenance services is afforded liability limitations); *Baker v. Lansdell Protective Agency, Inc.*, 590 F. Supp. 165 (S.D.N.Y. 1984) (holding a security company is afforded protection as an agent of the carrier because security service is required by law); *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 776 F. Supp. 710 (E.D.N.Y 1991) (holding an independent subsidiary security company was deemed to be the carrier for purposes of Warsaw limits on damages because it was providing security services as required by law); *Lear v. New York Helicopter*, 190 A.D.2d 7 (N.Y. 2nd Dep't. 1993) (holding liability limitations extended to company involved in maintenance, manufacture and operation of a commercial helicopter that crashed); *In Re Aircrash Near Roselawn, Indiana on October 31, 1994*, 1997 U.S. Dist. LEXIS 13696 (1997) (holding that Convention applied to all agents and airlines involved in crash that were part of an affiliated whole).

[21] *See Baker; In Re Air Disaster at Lockerbie; Julius Young.*

[22] *Johnson v. Allied Eastern State Maintenance Corp.*, 488 A.2d 1341 (D.C. 1985).

In 1998, the federal district court for the Southern District of New York expanded the definition of carrier even further by ruling that the Convention's limitations extended to subcontractors who perform services for the carrier. In *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*,[23] the court held that a subcontractor cleaning service was an agent for purposes of Warsaw limitations. In this case, a passenger was stuck by a needle that was protruding from the seat in front of him. The passenger sued the airline and the cleaning service. The court recognized that the Convention had not been stretched to include subcontractors in earlier decisions. However, the court reasoned that failing to extend the protections to subcontractors would work against the Convention's goal of limiting liability. The court further reasoned that the cleaning company performed a service that was flight related and in furtherance of the carriage contract. Additionally, the court reasoned that the *carrier* had a duty to clean the plane, and the cleaning company was performing the duty in the carrier's stead. The court held that extending the *Warsaw Convention* provisions to subcontractors was necessary to fix and predict the carrier's liability.

In the most recent decision involving an agent of the carrier, the United States Court of Appeals for the 9th Circuit overruled a lower court decision, and held that a security company working for three airlines was not protected by the *Warsaw Convention* liability limitations.[24] When Dazo, the plaintiff passenger, went through a checkpoint serviced by Globe Airport Security Services ("Globe"), her carry-on baggage was stolen. Globe was the common agent of three carriers in the terminal, Transworld Airlines ("TWA"), America West Airlines, and Continental Airlines. Dazo was intending to board a TWA flight from San Jose to Toronto connecting through St. Louis. At the time of the incident, both ticketed passengers and the general public were allowed to enter the secured area.[25] Dazo asserted claims against all three airlines and Globe for negligence and breach of the implied contract of bailment. Dazo also sought punitive damages.

Globe, joined by the airlines, filed a motion to dismiss. Globe argued that *Dazo*'s state law claims were preempted by the *Warsaw Convention*. The district court granted defendant's motion to dismiss *Dazo*, finding *Dazo* an agent of TWA, the carrier.

The 9th Circuit held that the facts of the case did not support a finding that Globe was an agent of the carrier for *Warsaw Convention* purposes. The court reasoned that the services rendered by Globe were not in furtherance of the contract of carriage of an international flight, but were basic airport security services required of all airports by domestic federal law, regardless of whether the person being screened was even a passenger.[26] The court further

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[23] *Waxman v. C.I.S. Mexicana De Aviacion, S.A. De C.V.*, 13 F. Supp.2d 508 (S.D.N.Y 1998)

[24] *Dazo v. Globe Airport Security Services*, 2002 U.S. App. LEXIS 13035 (9th Cir. 2002). This decision was filed on July 1, 2002.

[25] The incident occurred on May 12, 1999. After September 11, 2001, security measures were tightened and only ticketed passengers were allowed into the secured area.

[26] In the wake of September 11, 2002, Congress enacted the Aviation and Transportation

reasoned that *Dazo* was distinguishable from those cases extending *Warsaw Convention* "carrier" status to agents of the airline providing the international carriage. The court found that none of those cases involved extending carrier status to a company that was a dual agent--the agent of more than one airline.

Additionally, the court reasoned that the Convention did not shield those carrier-principals of Globe who did not provide Dazo's international carriage.[27] The court reasoned that under agency principles, America West Airlines and Continental Airlines were liable for Dazo's acts and granting them "carrier" status would be a windfall in the form of *Warsaw Convention* limitation of liability benefits. Therefore, the court held that, at most, only the carrier who provided the international carriage was entitled to the Convention's limitation of liability. The court reversed the district court's dismissal of Dazo's claims and held that Globe, America West Airlines and Continental Airlines were not entitled to *Warsaw Convention* liability limits.

This issue will be further tested in the 9th Circuit in the litigation arising out of the SQ006 accident at Chiang Kai-Shek International Airport in Taipei. At the time of the writing of this article, motions are pending before the U.S. District Court in Los Angeles filed by Eva Airways (who was responsible for the dispatching of the accident flight). Eva Airways, alleging that it should be covered by the protection of the *Warsaw Convention* due to its status as an "agent" of Singapore Airlines, seeks to strike all claims for punitive damages, as well as the dismissal of those cases in which there is no Article 28 treaty jurisdiction in the United States[28] This will be an interesting follow-up to *Dazo* as Eva Airways performs its dispatching and ground control services for numerous airlines at the airport in Taipei.

EXTENDING WARSAW PROTECTION TO AIRCRAFT MANUFACTURERS, MAINTAINERS, AND OVERHAULERS

Precedent has been set that courts are willing to stretch the limits of the Convention for agents and employees of the carrier performing delegable duties. On the other hand, courts have traditionally excluded manufacturers, maintainers, overhaulers, airports, and air traffic controllers from the protection of the Warsaw Convention. Thus, plaintiffs will commonly seek damages from these entities, each of which generally face liability for full compensatory and punitive damages in international aviation disasters.

Security Act, Pub. L. No. 107-71, 2002 U.S.C.C.A.N. (115 Stat.) 597 (2001), enhancing screening measures at the nations' airports, including eventual federalization of the passenger screening function performed by Globe in this case. The court found that this development served to emphasize the fact that airport security and passenger screening are part of a national program wholly independent of the *Warsaw Convention.*

[27] The court held that TWA was the only defendant that could be protected by the *Warsaw Convention*.

[28]That is, where the domicile of the carrier, principal place of business of the carrier, place were the ticket was issued where the carrier has a place of business, or the place of destination are not in the U.S.

The *Peggy's Cove* Decision

Recently, courts have continued to expand the scope of the carrier suggesting that a maintainer/overhauler may be entitled to Warsaw protection. The ruling, *In re Air Crash Disaster Near Peggy's Cove, Nova Scotia on September 3, 1998*,[29] extends the Warsaw liability limitations to service providers, such as overhaulers and maintainers of commercial aircraft, and suggests that it may be appropriate to also protect manufacturers in some instances. The case arose from the crash of Swissair Flight No. 111, near Peggy's Cove, Nova Scotia. Due to an electrical fire which started one hour after take-off, the aircraft crashed off the coast of Canada. It was alleged that the wiring associated with the in-flight entertainment system started an electrical fire which ultimately caused the crash.

Defendants in the litigation included, among others, Swissair, the operator of the flight, Interactive Flight Technologies, which developed and designed the in-flight entertainment system (the IFEN), and SR Technics, formerly the Swissair maintenance department, which provided the facilities and oversight for the installation of the IFEN system and which certified the aircraft as airworthy following the installation of the IFEN system. SR Technics, pursuant to a contract with Swissair was responsible for maintenance, inspection, overhaul, and repair of all Swissair aircraft, their engines and components.

The interesting question in this case was whether SR Technics, which performed the maintenance and certification services on the aircraft, was entitled to protection as an agent of the carrier. The leading case on point was *Reed v. Wiser,* in which the court extended the *Warsaw Convention* to an airline's employees. The court then looked to numerous other decisions determining "agents of the carrier" to be those persons or companies who performed services in furtherance of the contract for transportation, such as cleaning, maintenance, ground handling, and security.[30]

The Court found that the provisions of the *Warsaw Convention* extended beyond the carrier to include "those independent agents, who pursuant to either contracts or subcontracts with the carrier, performed services in furtherance of the contract of carriage that the carrier would be bound to perform, either by law or in the interest of providing the best, safest, and most thorough carriage services, in furtherance of the performance of its contract with its customers."[31] The court reasoned that maintenance, repair, and inspection services, are fundamental to, or in furtherance of the carriage enterprise, and were services that the carrier itself would be bound to perform. The court further reasoned that Swissair was obligated to perform these services to provide passengers the best and safest carriage. Additionally, the court reasoned that SR Technics, performing the services pursuant to a contract with Swissair, became an agent of Swissair and was entitled to the protections of the Convention. The court noted that,

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[29] *In Re Air Crash near Peggy's Cove, Nova Scotia on September 2, 1998*, 2002 U.S. Dist. LEXIS 3308 (E.D. PA 2002).

[30] See footnotes 13-15.

[31] *See Peggy's Cove.*

had Swissair performed the services itself, Swissair would have been protected. The court reasoned that it would be illogical not to similarly protect SR Technics.

The court also found that SR Technics' oversight of the installation of the IFEN was related to and furthered the contract of carriage. The court noted that the entertainment system was designed to enhance the passenger's enjoyment of the flight and therefore, furthered Swissair's efforts to provide the safest, best and most thorough carriage services. SR Technics had stepped into the shoes of Swissair in overseeing the installation. The court held that SR Technics necessarily came within the scope of the protections afforded Swissair under the Warsaw Convention. As a result of this decision, all claims for punitive damages against Swissair and SR Technics were dismissed as a matter of law.

The Impact of *Peggy's Cove*

Most of the Flight 111 passenger claims have already been resolved, so the importance of the *Peggy's Cove* decision lies in setting precedent. The court's extension of the definition of carrier to include all companies performing flight related services in furtherance of the contract of carriage could provide a safe haven for those entities who have contracted with the airlines for performance of aviation related services. If the courts continue down the path forged by *Peggy's Cove*, and further expand the scope of the carrier, manufacturers and maintainers/overhaulers may have the opportunity to limit their potential liability and the jurisdictions in which a plaintiff may bring suit.

Plaintiffs Attempt to Benefit From Expansion of the Warsaw Protection

Defendants are not the only ones using the common law broadening of Warsaw creatively. Plaintiffs' counsel are also searching for ways to use the expansion of the carrier to their advantage. Due to the fact that the term "carrier" is undefined in the *Warsaw Convention*, plaintiffs are arguing that the term can be used to describe who or what entity is providing the transportation. The carrier need not be one airline, they argue, but can be multiple airlines.

On October 31, 2000, Singapore Airlines ("SIA") Flight SQ006 was scheduled to fly from Singapore to Los Angeles through Taipei, Taiwan. Before the aircraft could become airborne, it collided with construction equipment on the runway which resulted in the death of a number of passengers and injury to many others. In all cases, the plaintiffs named SIA as a defendant, but a subset of plaintiffs, whose claims could not otherwise be pursued in the United States under *Warsaw Convention* jurisdiction, named United Airlines ("United") and the Star Alliance ("Star")[32] as defendants. This tactic was used because both United and Star are domiciled in the United States and therefore meet the jurisdictional requirements of Article 28.

[32] The Star Alliance is an "airline network" entered into by various airlines that allows the airlines to expand their business bases into new countries. The alliance also provides passengers with priority reservations and baggage handling, combined frequent flyer miles in some circumstances, and a wide array of itinerary options. United participates with the Star Alliance in order to gain indirect access to markets it cannot reach either because of economics or governmental restrictions.

If SIA was deemed to be the sole carrier, the court would not have Warsaw treaty jurisdiction over this flight. In order to meet the Warsaw jurisdiction requirements, plaintiffs claimed that United and the Star formed a carrier within the meaning of the *Warsaw Convention*. Plaintiffs claimed that the Star Alliance created not just a "network" but an altogether new "carrier."

This issue was considered by the court in its ruling on the plaintiffs' request for jurisdictional discovery seeking to delve into the makeup of the Star Alliance and the benefits to its members such as UAL. While the court held that the "carrier" must include the airline that operated the aircraft involved in the accident, the real issue was who, beyond the operator of the aircraft, may properly be included within the meaning of the term "carrier" for purposes of Warsaw jurisdiction.

Plaintiffs based their argument on the fact that the term "carrier" is undefined in the *Warsaw Convention*. Judge Gary Allen Feess reasoned that "[t]hough true, careful study of the applicable provisions of the treaty and interpretive case law, and the employment of a modicum of reason and common sense, demonstrate that the term means what it appears to mean--the operator of the aircraft involved in an accident."[33] Based on the language of the Convention and the applicable case law, the court reasoned that the "carrier" is only the airline that actually performs the contract of carriage.

Judge Feess stated that only two conditions would support a finding that United or the Star Alliance should be included within the scope of protection: (1) Flight SQ006 was undertaken by a general partnership, which included SIA and United as general partners; or (2) United acted as the agent of SIA in connection with the flight and performed some act, within the scope of that agency, which bore some causal connection to the Taipei disaster.

The court held that neither condition was present in the case. The court reasoned that the Star Alliance agreement executed by SIA, which Plaintiffs argued created a partnership that acted as the carrier in the litigation, expressly stated the intention of the parties not to create a general partnership between and among its members.

Additionally, neither United nor the Star Alliance engaged in any conduct that would make them an agent of SIA within the meaning of *Warsaw Convention* jurisprudence. The court noted that the liability of the agent is predicated on the agent's role in performing a task for which the carrier is responsible either under statute or contract, and where the agent's performance of that role is alleged to have a causal connection to the accident. Because neither United nor the Star Alliance had any control over the operation of Flight SQ006, and performed no services that bore any possible causal relationship to the injuries suffered in the accident, controlling case law precluded suit against them under the *Warsaw Convention*. The court concluded that there was no basis for permitting plaintiffs to pursue a claim against SIA or United. Therefore, the court held that the plaintiffs were not entitled to conduct further jurisdictional discovery in order to find support for their claims. While at the time of the writing of this article, this issue has not been formally resolved by the court, the definitive language from

[33] Further Order Denying Plaintiff's Motion for Jurisdictional Discovery, page 7, lines 19-23 (filed May 13, 2002).

Judge Feess in his ruling on jurisdictional discovery indicates that this issue is destined for the 9th Circuit.

The actions in SQ006 are noteworthy because the plaintiffs are attempting to create a sweeping expansion of *Warsaw Convention* jurisdiction, which is contrary to the purpose furthered by the holdings of prior decisions. The court reasoned that, in cases where a party is deemed an agent, the courts included the agent within the scope of the term "carrier" under Article 17 to *preserve* the liability limits established by the *Warsaw Convention*. Here, the plaintiffs are trying to circumvent Warsaw jurisdictional limits by *expanding*, rather than *preserving*, the scope of *Warsaw Convention* liability limits. Judge Feess' comments clearly illustrates the court's willingness to expand the scope of the agent of the carrier, but not the scope of the carrier itself.

This aggressive use of the expansion of "carriers" by the plaintiffs' bar raises an intriguing issue, namely, how far can this argument flow. Could a plaintiff having difficulty proving up a liability case against a manufacturer, maintainer or overhauler in the appropriate case, argue that an agent of the carrier cannot take advantage of the protections of Warsaw, while avoiding the advantages provided to plaintiffs in exchange: namely, the ease in proving liability. While this issue has not yet been tested in the courts, it appears to logically flow from the common law broadening of Warsaw seen in the United States.

Opening the Door for Maintainers/Overhaulers

Peggy's Cove has arguably opened the door for maintainers and overhaulers to assert their status as an agent of the carrier for Warsaw Convention purposes. Maintainers/overhaulers perform functions that are in furtherance of the contract of carriage because these companies are responsible for certifying that an aircraft is airworthy. These maintenance and oversight functions are fundamental to providing the safest and best possible carriage for the passenger. Additionally, maintainers/overhaulers perform functions that the airline would otherwise be required to perform itself. *Peggy's Cove* holds that, if the carrier performed a necessary function itself, the carrier would undoubtably be protected under the Warsaw Convention. When a maintainer/overhauler performs services that further the contract of carriage, it becomes an agent of the carrier. As such, the maintainer/overhauler necessarily comes within the scope of the *Warsaw Convention* because it is stepping into the shoes of the carrier in performing maintenance and overhaul services. Based upon the current trend, it appears logical to extend Warsaw protection to all levels of maintenance operations up to and including overhaul of commercial aircraft.

Extending Protection to Manufacturers

There is greater uncertainty as to whether the courts would extend *Peggy's Cove* and its progeny to a manufacturer. Historically, the courts have been unwilling to expand the definition of carrier to include agents performing non-delegable duties. The manufacture of component parts on a commercial aircraft is generally not a duty that the airline could perform itself. Therefore, unlike an entity performing maintenance, oversight, inspection, and overhaul, in

furtherance of airworthiness requirements, a manufacturer is not performing a delegable duty for the airline.

Additionally, the courts will consider the dual purpose of the *Warsaw Convention* in determining if a manufacturer will be an agent of the carrier. The goals of the Convention rest in fixing liability at a definite, certain, and predictable level and establishing a uniform body of worldwide liability rules. Placing manufacturers under the protections of the Convention does not necessarily promote either of these goals. In light of provisions of the IIA and *Montreal Convention* provisions, the carrier is already responsible for full compensation. The manufacturer cannot use the *Reed* argument that agent protection is necessary to protect the carrier from further expense and liability.

It will require a creative approach to convince a court that a manufacturer is an agent of the carrier. One possible approach to circumvent the non-delegable duty restriction is that some products function like a service. In the litigation of the air crash near Cali, Columbia, on December 20, 1995, two of the parties were the manufacturer of the aircraft's flight management computer (FMC) and the manufacturer which provided the navigational database programmed into the FMC.[34] In defending against a claim brought by a passenger estate directly, an argument could be made that these manufacturers should be protected as agents of the carrier.[35]

The manufacturers could make an argument that the FMC and database provided the service of navigation for the aircraft. The FMC replaced a third person in the cockpit and performed the function of navigation. The FMC was flight-related because the airline must provide for navigation of the aircraft either by human navigator or the use of a computer. Applying *Peggy's Cove*, if the airline had provided for navigation itself by hiring a third pilot for the cockpit, the airline would not lose its *Warsaw Convention* carrier protection. Therefore, a manufacturer providing the service of navigation through the use of a product should likewise be protected.

In determining whether to pursue status as an agent of the carrier, manufacturers should focus on why the plaintiff is pursuing the manufacturer. If the plaintiff is making a claim based solely on the malfunction of the product itself, then the logic of *Peggy's Cove* likely would not extend to the manufacturer. But, if the plaintiff is pursuing claims against a manufacturer for a product that functions like a service, *Peggy's Cove* could be applicable.

Do Maintainer/Overhaulers and Aircraft Manufacturers Want Warsaw Protection ?

The recent line of cases does not alter the fact that an airline can file third party claims for contribution and indemnity against manufacturers, maintainers, or overhaulers to gain back what

[34] *In re Aircrash Near Cali, Columbia on December 20, 1995*, 24 F. Supp. 2d 1340 (S.D. FLA. 1998).

[35] This argument is only possible in defending against a claim brought by a plaintiff passenger directly. This issue never arose in the Cali litigation as the ultimate litigation became a contribution action between American Airlines and the product manufacturers.

was lost due to the liability provisions of Warsaw. The argument for carrier status comes into play when the plaintiff brings claims directly against the third party. Assuming, for argument's sake, that a court would indeed hold a maintainer/overhauler, or in some cases a manufacturer, to be an agent of the carrier, third parties should decide if it is in their best interest to pursue the option of classification as an agent of the carrier.

The most obvious benefit of being deemed an agent lies in the protection from punitive damages and liability limitations provided in the *Warsaw Convention.* If a manufacturer or maintainer/overhauler is an agent of the carrier, liability will be limited to compensatory damages. Further, the plaintiff would be limited by other provisions of the Warsaw Convention, including statute of limitations and jurisdictional requirements. For example, when a maintainer/overhauler or manufacturer is faced with a high punitive damages potential, has a chance to defeat jurisdiction, or a lawsuit is filed against it after two years, it would be beneficial to be deemed an agent of the carrier.

On the other hand, pleading the *Warsaw Convention* could potentially open Pandora's Box. First of all, were a manufacturer, maintainer or overhauler to choose to argue for some facet of Warsaw protection in a distinct case in which it is of benefit to them, it will be hard pressed to argue against Warsaw application in a future case when such application may be a detriment. If not faced with a strong potential for a large punitive damages award, or an ability to completely walk away from a large case, manufacturers, maintainers and overhaulers, should, therefore, think twice before stepping up in line as an agent of the carrier. Although untested in U.S. courts, it is definitely something to think about.

As the ability of agents to broaden the breadth of protection under Warsaw increases, so does the risk that courts will impose the problematic portions of Warsaw. The liability of manufacturers, maintainers and overhaulers in a complex international aviation disaster is often difficult to prove, so attaining carrier status, and facing a possibility that the plaintiff will be entitled to the liability proof relief found in Warsaw, may be a heavy burden that is not worth bearing unless there is a strong upside.

Under the current governing law, maintainers, overhaulers, and manufacturers, have an advantage in litigation, and this advantage should continue if the Montreal Convention is ratified. Plaintiffs will continue to look to the airline for full compensation in an effort to avoid multi-party litigation and to avoid the difficulty and expense involved in proving the liability of third parties. Unlike the state of the law before the *Intercarrier Agreements* took effect, plaintiffs are less likely to automatically name a non-airline defendant as a safety net in a *Warsaw Convention* case.

Consequently, although *Peggy's Cove* opens the door to some very intriguing arguments for commercial aircraft maintainers, overhaulers and even manufacturers in an international aviation disaster where there is an opportunity to walk away from, or limit the damages in, a case with a value in the 100's of millions, the downside risk of such an endeavor should not be taken lightly.