Liability Limitations of Warsaw Convention Applicable to the Carrier's Employees (Reed v. Wiser)

Christopher Manno

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AIR LAW

LIABILITY LIMITATIONS OF WARSAW CONVENTION APPLICABLE TO THE CARRIER'S EMPLOYEES

Reed v. Wiser

The Warsaw Convention\(^1\) (the Convention), adopted in 1929,\(^2\) was designed to provide a uniform body of law to govern certain aspects of international air transportation.\(^3\) Perhaps the most important objective of the Warsaw signatories, however, was to limit the potential liability of an air carrier and thereby minimize the crippling effects of large accident-claim recoveries upon the infant commercial aviation industry.\(^4\) Accordingly, Article 22(1) of the


\(^4\) See SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW, WARSAW, OCTOBER 4-12, 1929, MINUTES 205 (R. Horner & D. Legrez trans. 1975) (remarks of Mr. Giannini) [hereinafter cited as WARSAW MINUTES]. Protection of the emerging airline industry was clearly the primary reason underlying United States ratification of the Convention. See SENATE COMM. ON FOREIGN RELATIONS, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES
Convention provides that "the liability of the carrier for each passenger shall be limited to" a fixed monetary sum. Aggrieved parties customarily seek redress only from the airline corporation in whose favor the Convention's liability limitation clearly operates. The Second Circuit, in Reed v. Wiser, however, was recently confronted with the question whether this limitation inures to the benefit of corporate officials sued in a personal capacity. In a case of first impression at the federal appellate level, the court held that the term "carrier," as used in Article 22(1) of the Convention, includes the employees of the carrier corporation and that the recovery obtainable against those individuals is therefore governed by the strictures of the Convention.

Dan Reed was killed while aboard a Trans World Airlines (TWA) jet which crashed into the Ionian Sea. Reed's representatives thereupon commenced an action, alleging that a bomb negligently had been allowed to pass through the airline's security system and had exploded on board the aircraft, causing it to crash.

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5 49 Stat. 3019, T.S. No. 876 (1934) (unofficial translation). The original text of the Convention provided for a maximum recovery of 125,000 francs. The commonly used dollar equivalent is $8,300, a figure derived from 1933 currency exchange rates. See Clare, Evaluation of Proposals to Increase the "Warsaw Convention" Limit of Passenger Liability, 16 J. Air L. & Com. 53, 57 (1949); Lowenfeld & Mendelsohn, supra note 4, at 499. The Warsaw Convention recovery limit has been augmented by the Montreal Convention, a private agreement between numerous international airline corporations. See note 16 infra. For an excellent discussion of the problems inherent in the calculation of liability limitations, see H. Drion, Limitation of Liabilities in International Air Law nos. 141-67 (1954) [hereinafter cited as Drion].

6 See notes 40-55 and accompanying text infra.


8 555 F.2d at 1081-82.

9 Id. at 1082. The precise issue in Reed had been previously addressed by only the District Court for the District of New Jersey in Pierre v. Eastern Airlines, Inc., 152 F. Supp. 486 (D.N.J. 1957), wherein it was held that Article 22(1) protects only the carrier corporation. See notes 40-44 and accompanying text infra.

10 Article 1, the Convention's definitional section, defines only the term "international transportation." See 49 Stat. 3014-15, T.S. No. 876 (1934) (unofficial translation). Soon after the Warsaw Conference, commentators identified certain difficulties that might arise as a result of the Convention's failure to define its terms. One author was particularly concerned with the vagueness of the term carrier, questioning whether classification as such requires privity of contract. Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. 1, 13-19 (1936).

11 555 F.2d at 1084-85.

12 414 F. Supp. at 863.

13 Id. at 864. Pursuant to 28 U.S.C. § 1407 (1970), all federal court litigation stemming
Rather than suing TWA directly, the Reed plaintiffs attempted to recover damages from the corporation's President and Vice-President for Audit and Security. The defendants denied any negligence on their part and also sought to invoke as a defense the Convention's limitation of liability, as modified by the Montreal Agreement. Holding that the liability limitations benefit only the corporation, the district court granted the plaintiffs' motion to strike this defense, but subsequently certified the issue for interlocutory appeal.

On appeal, Judge Mansfield, writing for a unanimous Second Circuit panel, reversed the decision of the district court and held that airline corporation employees fall within the scope of the protective limitations embodied in Article 22(1). Beginning its analysis with a comparison of the tort rules of various nations, the Reed court acknowledged the common law principle that an aggrieved party may maintain a cause of action against a wrongdoing em-

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414 F. Supp. at 863-64.
15 Id.; see notes 4-5 and accompanying text supra.
14 The Montreal Agreement is formally known as the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol. Agreement CAB 18990, approved by order E-23680, May 13, 1966 (docket 17325), Fed. Reg. 7302 (1966), reprinted in DOCUMENTS SUPPLEMENT, supra note 1, at 434-36. A private pact which has been adopted by more than 100 international airline corporations, the Agreement does not supersede either the Warsaw Convention or the Hague Protocol, done Sept. 28, 1955, 478 U.N.T.S. 371 (1955), reprinted in DOCUMENTS SUPPLEMENT, supra note 1, at 425-33. See Lowenfeld & Mendelsohn, supra note 4, at 446-52. It does, however, increase to $75,000 the maximum liability established at Warsaw and Hague, for which amount the carriers are absolutely liable. The Agreement came about in part, as a result of a threat by the United States to withdraw from the Convention, due to the overly restrictive nature of its liability limitation provision. See generally id. at 586-96.
17 414 F. Supp. at 870.
18 Judge Mansfield was joined in his opinion by Judge Meskill and Judge Van Graafeiland.
20 Judge Mansfield was joined in his opinion by Judge Meskill and Judge Van Graafeiland.
21 555 F.2d at 1093.
ployee, separate and distinct from any suit against the latter’s employer. In light of this principle, limitation of the definition of the term carrier to the corporate entity would have the effect of exposing airline employees to unlimited liability. Judge Mansfield noted, however, that such an interpretation would not have similar effects under certain civil law systems which do not permit direct recovery from individual corporate employees. Emphasizing that “the Convention was intended to act as an international uniform law,” the Second Circuit therefore found it necessary to construe broadly the term carrier as inclusive of employees, thereby equalizing the maximum liabilities of all persons affected by the Convention. The Reed panel was of the opinion that this interpretation would preclude the choice of law difficulties and ensuant “judicial nightmare” that would be caused by a less expansive reading of Article 22(1). The Second Circuit found support for its construction in Article 24 of the Convention, which provides that “any action for damages, however founded, can only be brought subject to the conditions and limitations set out in this convention.” Construing the phrase “however founded” as pertaining to every suit arising from flights governed by the Convention, irrespective of the defendant’s legal status as a corporate entity or employee, Judge Mansfield reasoned that Article 24 indicates that the drafters envisioned actions against airline employees. It was concluded that this language represents an attempt “to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage.”

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22 555 F.2d at 1083, 1087-88.

23 Id. at 1083 (citation omitted).

24 Id. at 1087-88.

25 Id. at 1091 (quoting Forsyth v. Cessna Aircraft Co., 520 F.2d 608 (9th Cir. 1975)).

26 555 F.2d at 1091-92 & n.18 (citing In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1976)). The Paris Air Crash court was called upon to resolve complex choice of law problems in a case involving 203 suits brought on behalf of 337 decedents from 36 jurisdictions. The court was confronted with five different recovery limitations, four choice of law theories, and five methods of measuring tort damages. See 399 F. Supp. at 741-42.


28 555 F.2d at 1084-85; see note 29 infra.

29 555 F.2d at 1085 (quoting DRION, supra note 5, at no. 136). With particular reference
by virtue of the indemnification clauses which exist in a majority of the employment contracts between airline corporations and their employees, an unlimited recovery in tort against a negligent employee would be tantamount to an unlimited recovery against the airline.\(^\text{30}\) Such a result, the Reed panel stated, would be inconsistent with the purpose of Article 24 as well as the framers' intent to limit airline liability under Article 22.\(^\text{31}\)

Judge Mansfield pointed out that the district court, in concluding that the liability of an airline employee is not limited by the Convention, had relied heavily upon the language of the Hague Protocol (the Protocol) and the absence of United States acquiescence thereto.\(^\text{32}\) Promulgated as an amendment to the original Convention,\(^\text{33}\) Article XIV of the Protocol specifically brings employees of a carrier within the ambit of the liability limitation.\(^\text{34}\) Focusing upon this provision, the district court had reasoned "that [the] careful treaty drafters had omitted in Warsaw, then added at the Hague... what defendants claim was always there."\(^\text{35}\) More-
over, the lower courts had viewed United States opposition to the Protocol as a factor supporting narrow construction of the term carrier. Rejecting this reasoning, the Second Circuit noted that nonratification of the Protocol by the United States was prompted only by that agreement's failure to increase sufficiently maximum liability under the Convention. Judge Mansfield discerned no indication of legislative or executive dissatisfaction with the Protocol's express application of the liability limitation to the carrier's employees.

Existing authority furnishes little guidance in ascertaining the intended scope of the term carrier. The issue whether an employee's liability is limited under the Convention was first confronted in *Pierre v. Eastern Airlines, Inc.*, wherein the District Court for the District of New Jersey held that Article 22(1) operates to protect only the carrier corporation. Reasoning that Article XIV of the Hague Protocol, which specifically shields employees from unlimited liability, was an addition to rather than a clarification of the convention, the *Pierre* court concluded that the liability of employees of the carrier is "unaffected by the terms of the Warsaw Convention." The precise issue decided in *Pierre* was subsequently ad-

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infra. Whether Article XIV of the Hague Protocol supplemented or merely clarified Article 22(1) of the Warsaw Convention was a point of some dispute among the Hague delegates. See notes 57-61 and accompanying text infra.

34 See note 38 infra.

35 414 F. Supp. at 868 (citing *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975), cert. denied, 425 U.S. 989 (1976)). In *Day*, the Second Circuit stated that "the conduct of the parties subsequent to ratification of a treaty may be relevant in ascertaining the proper construction to be accorded the treaty's various provisions." 528 F.2d at 35.

36 555 F.2d at 1086. The Administrator of the Federal Aviation Agency, Najeeb Halaby, stated that while his agency generally favored the Hague Protocol, the Agency was displeased with its failure to remedy the inadequate financial protection afforded to international air passengers under the Warsaw Convention. *Hague Protocol to Warsaw Convention: Hearings Before the Comm. on Foreign Relations on Exec. H., 86th Cong., 1st Sess., 89th Cong., 1st Sess. 15, 19 (1965).*

37 555 F.2d at 1087.


39 Id. at 489.

40 See notes 31-39 and accompanying text supra.

41 152 F. Supp. at 489; see notes 57-61 infra.

42 152 F. Supp. at 489. The court recognized the various attempts that had unsuccessfully been made to extend the protection of the Convention to the carrier's employees. *Id.* Apparently, the *Pierre* court was of the opinion that these efforts reflected a realization by international authorities that Article 22(1) limits the liability of only the carrier corporation. As noted in *Reed*, the ultimate disposition of *Pierre* remains unclear. 555 F.2d at 1087 n.11. While it appears that the case was settled by the parties before appeal, it is uncertain whether the employee agreed to pay an amount greater than $8,300.

There seems to be no reported case in which a plaintiff has been awarded a judgment against an employee exceeding the limit of liability applicable to the carrier in a Convention-governed controversy. *See id.* One commentator has attributed the absence of such judgments
dressed in only three judicial opinions. One district court, by way of dictum, and one circuit court, sub silentio, have suggested that the liability limitation of Article 22(1) is applicable to a carrier's agents. In contrast, a Canadian court has cited Pierre with approval, stating that "nothing in the [Convention] . . . even remotely suggests that the word 'carrier' is to be interpreted as including employees of carrier." The analogous question whether other articles of the Convention are applicable to the carrier corporation's employees was presented to the Supreme Court, New York County, in Wanderer v. Sabena. There, the court held that the agent of an airline corporation could raise as a defense the statute of limitations provision contained in Article 29. In its opinion, however, the Wanderer court cited no cases to support its conclusion. A federal district court, in Chutter v. KLM Royal Dutch Airlines, agreed with the Wanderer result, reasoning that "it is impractical to distinguish the carrier from the community of persons whose joint activity is the carrier's activity." The underpinnings of this position, however,
have been severely undermined by the Supreme Court's rejection of the case upon which the Chutter court primarily relied. In contrast to Chutter and Wanderer, the notion that the Convention's scope is restricted to the corporate entity may be gleaned from the French case of Ministre Public c. Billet. Billet involved an action civile in which an airline pilot was the original defendant and the carrier corporation was subsequently named as an additional defendant. Although the court held that the venue provisions of Article 28 precluded the exercise of jurisdiction over the carrier, nowhere was it suggested that this defense might be available to the pilot-employee. Taken together, the foregoing cases seem to offer little

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Canyon, Warsaw, and the Hague Protocol, 23 J. Air L. & Com. 253, 267 n.7 (1956). In support of this position he reasoned that the minutes of the Convention reveal an intent on the part of the delegates to govern only the legal relationship created by the contract of carriage, i.e., the relationship between the passengers and the carrier corporation. Id.

The Chutter court extended the statute of limitations defense of the Warsaw Convention to employees by drawing an analogy between the Convention and the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 (1970), as interpreted by the Fifth Circuit in A.M. Collins & Co. v. Panama R.R., 197 F.2d 893 (5th Cir.), cert. denied, 344 U.S. 875 (1952). 132 F. Supp. at 613. Collins held that the COGSA liability limitation provision pertaining to carriers applied to an independent stevedoring concern acting as an agent for the corporate carrier. The Supreme Court, however, in Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297 (1959), expressly rejected the Collins decision, holding that the term carrier as used in COGSA embraces only the shipowner. It was noted by the Supreme Court that an employee, not a party to the contract between his employer and the aggrieved third party, cannot seek the benefit of any exemption clauses contained in the agreement. Id. at 305.

Although the Herd case was viewed by the district court in Reed as a "highly persuasive analogy," 414 F. Supp. at 866, the Second Circuit distinguished Herd by stating that "COGSA unlike the Convention, explicitly defines the term 'carrier,' and its definition does not include independent stevedoring companies." 555 F.2d at 1092-93.

The general principle espoused by the Herd Court is, nonetheless, internationally recognized. In Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446 (P.C. 1961), the House of Lords refused to allow a shipping carrier's agent the benefits of an exemption clause contained in the carrier's contract with its client. Accord, Wilson v. Darling Island Stevedoring and Lighterage Co., 95 C.L.R. 43 (Austl. High Ct. 1955). In a French case, it was held that a provision limiting the airlines carrier's liability, contained only the shipowner. It was noted by the Supreme Court that an employee, not a party to the contract between his employer and the aggrieved third party, cannot seek the benefit of any exemption clauses contained in the agreement. Id. at 305.

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to support the holdings of either the district court or the Second Circuit in Reed.

Relevant legislative materials appear equally uninstructive with respect to the intended import of Article 22(1). Reflecting this paucity of historical materials, several noted authorities have reached differing conclusions as to the status of an employee under the Convention. Professor Ambrosini, a leading air law expert who was a delegate at both the Warsaw and Hague Conferences, was of the opinion that the Warsaw Convention regulates the liability of the carrier, as well as that of its employees and agents. He supported this position by reasoning that "the carrier and his servants"...
or agents [are], from the legal point of view, the same person.\textsuperscript{58}

The only other delegate who was present at both conferences, however, Professor Riese, has stated that the Convention unequivocally governs only the liability of the air carrier and not that of its employees.\textsuperscript{59} According to this commentator, a broader interpretation of the term carrier is untenable in view of the specific references to servants and agents in other articles of the Convention.\textsuperscript{60} Similarly, the majority of Hague Conference delegates who considered the issue of employee liability believed that the term carrier in Article 22(1) embraces only the corporate carrier.\textsuperscript{61} The conflict concerning the scope of Article 22(1) is not confined to the views of air law conference delegates. The International Civil Aviation Organizaton has recommended the adoption of a clause specifically limiting the liability of the carriers’ employees, believing that the absence of such a provision would render employees liable in tort for unlimited damages.\textsuperscript{62} Moreover, most, but not all, authorities in this area have concluded that the framers of the Convention never meant to address the issue of employee liability limitations.\textsuperscript{63} These ambiguities

\textsuperscript{58} Id. Professor Ambrosini reiterated his view of Article 22(1) of the Convention at subsequent air law conferences. See, e.g., 1 INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, GUADALAJARA, AUGUST-SEPTEMBER, 1961, MINUTES 134, ICAO Doc. 8301-LC/149-1 (1963) [hereinafter cited as GUADALAJARA MINUTES].

\textsuperscript{59} O. RIESE, LUFTRECHT 431 (1949). Professor Riese was the German delegate to a number of air law conferences and a member of C.I.T.E.J.A. See note 1 supra.

\textsuperscript{60} O. RIESE, LUFTRECHT 431-32 (1949). Professor Riese has reemphasized his understanding of the term carrier at more recent air law conferences. See GUADALAJARA MINUTES, supra note 58, at 134.

\textsuperscript{61} Mr. Iuul, the delegate from Denmark, noted that the Convention dealt only with contractual relationships; hence, employees could not invoke any of its terms since they are not parties to the air carriage contract. HAGUE MINUTES, supra note 57, at 217. The United States representative, Mr. Calkins, was of the opinion that “no case of an action in tort against a servant or agent was governed by the Convention, which related to the liability of the carrier towards passengers and shippers.” Id. at 351. Similarly, Mr. Alten of Norway reasoned that a servant’s or agent’s liability “could only be extracontractual and could be judged only according to some applicable law of tort.” Id. at 214.


\textsuperscript{63} See P. BUCHER, LE STATUT JURIDIQUE DU PERSONNEL NAVIGANT DE L’AÉRONAUTIQUE CIVILE 36 (1949); KAMMINGA, supra note 52, at 90-92; O. KOFFKA, M. BODENSTEIN & E. KOFFKA, LUFTVERKEHRSGESETZ UND WARSCHAUER ABKOMMEN 269 (1937); M. MASCHINO, LA CONDITION JURIDIQUE DU PERSONNEL AÉRIEN 125 (1930); N. MATTE, TRAITÉ DE DROIT AÉRIEN-AÉRONAUTIQUE 422-23 (2d ed. 1964); O. RIESE, LUFTRECHT 440-41 (1949); Beaumont, Need for Revision and Amplification of the Warsaw Convention, 16 J. AIR L. & COM. 395, 401 (1949); Calkins, Grand Canyon, Warsaw, and the Hague Protocol, 23 J. AIR L. & COM. 253, 267 (1956); Pratt, Carriage by Air Act, 1952—Limitation of Air Carrier’s Liability—Whether Servants of Carrier Also Protected, 41 CAN. B. REV. 124, 134 (1963) [hereinafter cited as Pratt]. But see DRION,
surrounding the intended meaning of Article 22(1) would appear to weaken the Reed court’s position that its holding “reflects the plain meaning and purpose of the French Text.”

Basic tenets of statutory construction mandate that “a treaty, whether strictly or liberally construed, should be interpreted to effectuate its evident purposes.” Although the declared intent of the Convention’s framers was to establish uniformity in laws pertaining to international aviation, there are indications that the scope of the conditions established therein was to be restricted to the legal relationship between the passenger and the carrier corporation. While noting that “the legal status of the captain of the aircraft and of the personnel” are of obvious concern, the President of the Warsaw Conference indicated to the delegates that “subsequent diplomatic conferences will deal with these questions.” He went on to issue a caveat to the Conference, directing the delegates to disregard the employee question and focus upon the liability of the carrier. A more tangible indication that the Convention was not meant to control all aspects of Warsaw-covered litigation is found in five articles pursuant to which the law of the forum is to be applied in resolving certain issues that might arise in actions involving passengers and carrier corporations. The existence of these provisions tends to draw into question the notion, relied upon by the Second Circuit, that the Convention’s stated purpose of making uniform international air law is to be heavily weighted in deciding the interpretational issue presented in Reed.

The dangers of extrapolation from an agreement’s general design are highlighted by the Supreme Court’s statement that


555 F.2d at 1092.

Id. at 1088 (citing Bacardi Corp. v. Domenech, 311 U.S. 150, 163 (1940)). See Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); United States v. A.L. Burbank & Co., 525 F.2d 9, 12-14 (2d Cir. 1975); Board of County Comm’rs v. Aerolineas Peruanas, S.A., 307 F.2d 802, 806-07 (5th Cir. 1962).

See note 3 and accompanying text supra.

WARSzaw MINUTES, supra note 4, at 14 (remarks of Karol Lutostanski of Poland).

Id.

Article 21 of the Convention provides that the law of the forum is to be applied in determining the effect of contributory negligence. Article 24(2) states that the Convention does not govern the issues of standing to bring suit or the allocation of judgments recovered. Article 28 provides that cases are to be adjudicated according to the procedure of the forum’s courts. Article 29, while providing a uniform statute of limitations period nevertheless leaves to the forum court the power to determine the method of calculating the period. 49 Stat. 3006-07, T.S. No. 876 (1934).

See notes 21-24 and accompanying text supra.
treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties. In accordance with this line of reasoning, many leading authorities have limited their interpretation of the term carrier to the corporation. In part, these analyses rely on the specific references to the carrier's employees that are contained in Articles 20 and 25 of the Convention. Article 25(1), for example, deprives the carrier of the Convention's liability limitations in the event of "his" willful misconduct; Article 25(2) imposes the same penalty on the carrier in the event of his servant's or agent's willful misconduct. It would seem paradoxical to disregard the importance of this choice of words in the Convention while coincidently acknowledging the expertise of the drafters. This

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2 See authorities cited in note 63 supra.
3 Article 20(1) of the Convention provides that "[t]he carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 49 Stat. 3019, T.S. No. 876 (1934) (unofficial translation).

Article 25 provides in pertinent part:
(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct . . . . (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Id. at 3020; T.S. No. 876 (1934) (unofficial translation).

The unofficial translation's use of the word "agents" may be somewhat misleading. The official French text employs the word "préposés," a term which is widely recognized to encompass both servants and agents. Larousse Modern French-English Dictionary 584 (1960); see Darion, supra note 5, at nos. 118, 135, 195; Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. 1, 36 (1936).

4 See note 73 supra.

5 If the term carrier is not limited to the corporate entity, then Article 25(2) seems to become superfluous. Specifically, it has been stated that the mere existence of the term "préposés" (servants or agents) in that article "contradicts the assertion that servants and agents are covered by the word 'carrier' elsewhere in the Convention." Pratt, supra note 63, at 128. Accord, Kamminga, supra note 52, at 91. Nevertheless, the French jurist, Lemoine, has stated that the presence of the term "préposé" does not inexorably lead to the conclusion that the Convention's framers meant to include only the corporate entity within the definition of the word "carrier." He noted that Article 20(2) exempts the carriers from liability for damaged goods and baggage if it is shown that negligent pilotage caused the damage. As Article 20(2) applies even where the carrier is also the pilot, Lemoine reasons that a narrow interpretation of the term "carrier," excluding employees from its operation, would give rise to an anomalous situation: the carrier would be shielded from liability for baggage and goods when he is the negligent pilot, while a servant is exposed to liability under the identical circumstances. M. Lemoine, Traité de Droit Aérien nos. 840-41 (1947); accord, M. Litvine, Précisélémentaire de Droit Aérien nos. 234-35 (1953).
anomaly is nonetheless inherent in the Reed court's analysis.

It is apparent that the prevalence of indemnification clauses in contracts entered into by carriers and their employees greatly influenced the Second Circuit's decision in Reed. In these clauses the carriers agreed to indemnify their employees against all employment-related liability. Cognizant of the convention's commitment to limiting the airline corporation's liability, the court deemed it necessary similarly to limit the liability of the employees by bringing them within the operation of Article 22(1) and thereby preclude the unlimited carrier liability that would otherwise flow from indemnification clauses. Unfortunately, the Second Circuit seems to have prejudiced its analysis by relying on these agreements as a relevant factor in the interpretation of the term carrier. A prerequisite to the adjudication of a corporate carrier's liability for acts of its employees is the joining of the corporation as a party to the action. Once it is named as a defendant, the corporate carrier is protected by the Convention's liability limitation, irrespective of whether an unlimited judgment is rendered against its employee. In the absence of indemnification clauses, therefore, the limited nature of the carrier's liability would be unaffected by resolution of the question whether an employee's liability is restricted under Article 22(1). With the advent of indemnification clauses, however, the failure to extend the protection of Article 22(1) to employees could subject carriers to liability in excess of that contemplated by the Convention's framers. Viewed in this fashion, private indemnification agreements clearly have altered the legal principles that were prevalent at the time of the Warsaw Conference, and, as voluntary

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78 Clauses indemnifying employees for claims arising from their own negligent acts in the course of employment were virtually non-existent when the Warsaw Convention was adopted in 1929. During the late 1940's, however, labor organizations called for employee protection in the form of indemnification agreements with carrier corporations. See Resolution of the International Federation of Air Line Pilots Association, 5th Conf., Brussels, 1950, ICAO Doc. No. A4-WP/154 (1950) [hereinafter cited as IFALPA Resolution]; DRION, supra note 5, at no. 134; KAMMINGA, supra note 52, at 92; 1 L. KREINDLER, AVIATION ACCIDENT LAW § 12.02 [3] (1974); The International Federation of Air Line Pilots Association is a private interest group whose major objective is to advance the interests of international pilots in the world community. See 1 SHAWCROSS & BEAUMONT, supra note 2, at 76-77. In this regard, Switzerland has required carriers to indemnify their employees for all liabilities incurred in the course of their employment. Loi Fédérale sur la Navigation Aérienne, 1 ROLF art. 70(2) (1950).

79 See 555 F.2d at 1090, 1092-93.

78 Id.

agreements freely entered into by airline carriers, constitute an extraneous factor which should not have been weighed in evaluating the language of and the intent behind Article 22(1).

Rather than construing the term carrier in a manner consistent with the circumstances and legal principles existing at the time of the Warsaw Conference, it appears that the Second Circuit has implemented the goals of the Conference's framers in a mechanical manner. In so doing, the court relied upon voluntary actions between private parties which have altered the considerations and factual bases that prompted international ratification of the Convention. It is not untenable to conclude that the drafters of the Warsaw Convention intended to protect only the corporation when referring to the "carrier's" limited liability. Construed in this manner, Article 22(1) would effectuate the ultimate purpose of the Convention by minimizing the amount recoverable from the corpora-

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80 Since it appears that subsequent to the Warsaw Conference the airlines were aware of the divergent interpretations given to Article 22(1), see, e.g., IFALPA Resolution, supra note 76, it cannot be said that carrier corporations were unable to foresee the possibility that indemnification agreements would effectively eliminate the liability limitations of the Convention.

81 On a policy level, the Reed court noted that to allow unlimited recovery from an airline's employees would result in higher travel costs for passengers. 555 F.2d at 1082. The socialization of risk, however, is a widely sanctioned and preferred alternative to the denial of just compensation for injury. See, e.g., Allstate Ins. Co. v. Door, 411 F.2d 198 (9th Cir. 1969), wherein the Ninth Circuit upheld an Arizona statute which fixed the absolute liability of the insurer upon the occurrence of an accident, notwithstanding material misrepresentations made by the insured which induced the issuance of the policy. It was noted by the court that "[i]nsurance companies can alleviate their situation by . . . increasing their insurance rates to spread the cost over larger numbers of the . . . public." Id. at 201.

The concept of providing adequate injury compensation by assessing a general class of persons is inherent in the "assigned risk" insurance plans which are in effect in every state. See W. Young, CASES AND MATERIALS ON THE LAW OF INSURANCE 68-69 (1971). Pursuant to these plans, each company doing business in a state is required to insure a certain percentage of undesirable risks. Consequently, the likelihood of being injured by a financially irresponsible citizen is decreased at the expense of the public at large. Id. at 71-75. These statutory schemes have been sustained despite due process arguments advanced by preferred-risk insurers. See, e.g., California State Auto. Ass'n Inter-Ins. Bureau v. Maloney, 341 U.S. 105 (1951).
tion, while still allowing an aggrieved party to seek just recompense from a negligent employee.\textsuperscript{2}

Christopher Manno

\textsuperscript{2} The most recent attempt to achieve a realistic recovery limitation is found in Article VIII of the Guatemala City Protocol which proposes a liability limitation of approximately $450,000. This proposed treaty, the purpose of which is to supersede the Warsaw Convention, is officially known as the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955. International Civil Aviation Organization Doc. No. 8932 (1971), \textit{reprinted in Documents Supplement, supra} note 1, at 437-46. Although this protocol was approved by the President of the United States in 1971, it has yet to be ratified by the Senate and therefore has no effect as law. U.S. Const. art. II, § 2. \textit{See Note, The Guatemala City Protocol to the Warsaw Convention and the Supplemental Plan Under Article 35-A: A Proposal to Increase Liability and Establish a No-Fault System for Personal Injuries and Wrongful Death in International Aviation, 5 N.Y.U.J. Int'l. L. \\& Pol. 312 (1972).}