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## RECENT DEVELOPMENTS IN AERIAL HIJACKING: THE ISSUE OF LIABILITY

LEE S. KREINDLER\*

I THINK THE RECORD of our international representatives, such as Mr. Boyle, and his associates, in the area of hijacking has been exemplary. I would like to say also that, in my opinion, the record of the airlines in dealing with the hijacking menace, as indeed their record in running their business generally, has been exemplary. I think it is just a terrible pity that with this kind of record, both in the business of running airlines and preventing hijackings, these fine people have to waste their time with the kind of nonsense we were talking about with reference to the Guatemala Protocol. I mean that sincerely. I think the Guatemala-Warsaw-Montreal business is an embarrassment to the airline industry, and the sooner they let go of it the better off they will be.

My part of the program insofar as hijacking is concerned is, as you might expect, the liability part of the program. I have been asked to discuss who is liable, if anybody, in hijacking incidents. Mr. Boyle is right, when he says that we have been living through an evolutionary phenomenon. I think what we have today is something different from what we had in September of 1970 when we had the Dawson Field-Jordanian hijackings.

At the inception we have to distinguish between liability on the part of an airline in domestic transportation and the Warsaw Convention-Montreal Agreement regime of liability.

With respect to tort liability, negligence is still the rule in the United States in domestic airline transportation. Two years ago at the time of the hijackings to the Jordanian desert, I think it could fairly be said that an airline which was the victim of a hijacking incident was normally not negligent. Oddly enough, the Jordanian incidents themselves may have been situations of negligence because, as some of you may remember, there was some notice to at least one airline of a possible problem. Ground Control had warned Pan-American that El Al had refused passage to "two swarthy men" who were next seen boarding the Pan Am flight.<sup>1</sup> Thus, they may have been negligent in that particular instance.

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<sup>1</sup>N.Y. Times, Sept. 13, 1970, § 4 at 1, col. 8.

However, by and large an airline that did not have a magnetometer and did not search luggage and did not have X-ray machines would not have been considered negligent in 1970. An airline that fails to properly and sufficiently search luggage or passengers through magnetometers, despite regulations today, could be held to have been negligent by an American court. As of right now, there are no such cases. There have been no recoveries in domestic airline transportation against an airline based on its negligence in failing to inspect passengers or potential passengers.

The first such case that was brought that I know of was a case, that I brought about a year and a half ago, involving the Howard Franks incident in Chicago. You may remember that Mr. Franks was the first man killed in a hijacking incident. That case involved domestic transportation from Albuquerque to La Guardia Field in New York. Mr. Franks was a passenger on an airplane that stopped in Chicago when a hijacker or potential hijacker boarded the plane with a gun, forced his way on the airplane, and apparently thought that Mr. Franks was trying to grab him, at which point the hijacker shot and killed him.

That case was brought about a year and a half ago but there have been no motions for summary judgment, and there has been no test of liability. There is no legal determination. In any event, there are no decided cases of airline liability in domestic transportation in hijacking incidents.

The situation is different when we leave the *domestic* front for the *international*. The system of law is earmarked by the Warsaw Convention of 1929,<sup>2</sup> which establishes presumptive liability. This was affected by the Montreal Agreement of 1966.<sup>3</sup> In the Montreal Agreement, in order to induce the United States Government to withdraw the denunciation of the Warsaw Convention which had been done in 1965, the airlines agreed to a system of absolute liability, that is to say, no-fault liability. Article 17 of the Warsaw Convention provides that the airlines shall be liable. There are other articles which limit or exclude liability.<sup>4</sup> In the Montreal Agreement the airlines waived Article 20(1) which was the exculpation clause. The airlines affirmatively consented to a system of absolute liability in order to preserve the system of limited liability with the then \$75,000 limitation.

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<sup>2</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) [hereinafter references to specific provisions of the Convention shall be: The Warsaw Convention, Art. ....].

<sup>3</sup> CAB Order No. E-23680 (May 13, 1966), 31 Fed. Reg. 7302 (1966).

<sup>4</sup> The Warsaw Convention, Arts. 20 and 21.

That was in 1966. When the Jordanian desert hijackings occurred and a young lady by the name of Mona Friedman came to my office having been on a Swiss airplane for several days and having suffered emotional trauma and some relatively minor physical injuries, I accepted the case. I accepted the Friedman case, largely because I was not quite sure the airlines understood what they had done when they agreed to absolute liability, and it seemed to be an opportunity to show them.

You remember that was the weekend when, to start with, the hijackers grabbed a Pan-American 747 and flew it to Lebanon, picked up some friends of theirs with explosives, and then flew it to the airport at Cairo where they blew it up. The airplane was blown up virtually before it came to a halt on the runway and the hijackers told the passengers you have 20 seconds to get out, so people were jumping off the airplane as fast as they could even before the airplane stopped and there were a lot of broken legs. That was the first of four hijacking incidents that weekend. There were Swiss Air, TWA, and BOAC planes lost all that same weekend.

It just seemed to be adding insult to injury to go ahead and sue the poor airlines which had lost these aircraft (particularly a great big brand new Boeing 747) and ask them to pay all of the passengers' damages for emotional fright and other injuries. So, to be quite candid about it, the reason we took the initial hijacking cases was to demonstrate to the airlines what absolute liability really meant.

I thought it was appalling to ask an airline to pay in a hijacking incident where it was, itself, the victim of the malfeasance, but that was what the airlines wanted, and what they had asked for to preserve the limitation of liability. So we sued them.

The Mona Friedman case was settled. The amount of the settlement, at her request, has been kept confidential and never revealed because after she started the lawsuit she got threatening letters and telephone calls from everybody under the sun.

We also started cases in other incidents. Two of these cases, both of which involve the same principles, are *Herman v. TWA* in the Supreme Court in New York, and *Rosman v. TWA*, also in the Supreme Court but in a different county. In both of these cases, we moved for summary judgment on the issue of liability, arguing that the airlines had agreed to absolute liability. In those cases, the airline took the position that there could be no recovery for emotional injury, *i.e.*, that emotional injury was not a bodily injury, and it took the further position that the time spent on the aircraft in the Jordanian desert was not compensable, both questions of first impression.

Both of those cases involve ladies and children, and we say that they suffered emotional stress, which they really did, in spades, just by virtues

of being on that desert for seven days, subject to the hijackers wandering through with guns and the fear of not seeing their mothers again.

In both cases our motions for summary judgment were granted.<sup>5</sup> Both cases then went up on appeal, *Herman* to the Appellate Division, Second Department, and *Rosman* to the Appellate Division, First Department. The Second Department reversed the order granting summary judgment on the ground that there was a triable issue of fact with respect to the meaning of the French words in Article 17 of Warsaw.<sup>6</sup> Thereafter, the First Department, following the lead of the Second Department, reached the same result.<sup>7</sup>

We moved for reargument in both cases on the ground that the construction of Warsaw was an issue of law for a court to decide and that the issue should be resolved in plaintiffs' favor. We also moved for leave to appeal to the New York Court of Appeals.

The Second Department, the first Court to reach a decision on our motions, denied the motion for reargument, but granted the motion for leave to appeal to the Court of Appeals.<sup>8</sup> Shortly thereafter, the First Department again followed the lead of the Second Department.<sup>9</sup>

At the present time, we are in the process of consolidating the appeals in *Herman* and *Rosman* and preparing our brief to the Court of Appeals.

Another case which is of interest, and is also our case, is the *Salmon* case.<sup>10</sup> That involved three passengers, a lady by the name of Mrs. Salmon, her mother, and her son. Both Mrs. Salmon and her mother suffered physical injury. They both had broken legs because they had jumped out of the Pan Am 747 as it came screechingly to a halt on the Cairo runway. They had broken legs and emotional disturbance. Mrs. Salmon's son who was 6 or 7 years old, had not had any physical injury whatsoever, but he had suffered emotional distress.

After we brought that action, we made a motion for summary judgment, again arguing that the airlines had agreed to absolute liability. Pan American, through its insurers, USAIG (United States Aviation Insurance Group), decided not to contest the motion for summary judgment and it consented to liability, leaving open only the question of damages.

Although Pan American had consented to liability, they claimed at the trial to assess damages that there would be no liability for emotional

<sup>5</sup> *Herman v. Trans World Airlines, Inc.*, 69 Misc.2d 642, 330 N.Y.S.2d 829 (Sup. Ct. 1972); *Rosman v. Trans World Airlines, Inc.*, 168 N.Y.L.J. No. 28 at 10 (1972).

<sup>6</sup> *Herman v. Trans World Airlines, Inc.*, 168 N.Y.L.J. No. 97 at 19 (1972).

<sup>7</sup> *Rosman v. Trans World Airlines, Inc.*, 168 N.Y.L.J. No. 109 at 2 (1972).

<sup>8</sup> *Herman v. Trans World Airlines, Inc.*, 169 N.Y.L.J. No. 7 at 20 (1973).

<sup>9</sup> *Rosman v. Trans World Airlines, Inc.*, 169 N.Y.L.J. No. 29 at 2 (1973).

<sup>10</sup> *Salmon v. Pan American World Airways, Inc.*, 165 N.Y.L.J. No. 21 at 2 (1972).

distress or mental anguish, because emotional distress and mental anguish was not the wounding of a passenger or any other bodily injury.

The case went to trial with respect to both Mrs. Salmon and her mother. One of my partners, Milt Sincoff, tried it. We did not try the case of the little boy because he was still sufficiently upset and disturbed and we did not want to subject him to the trial procedure. The Court permitted us severance of his claim. We did go to trial in the other two cases.

The Judge decided at trial that emotional distress was bodily injury under Article 17 and he so charged the jury. The jury returned a verdict for the plaintiffs in the sum of \$10,000 to Mrs. Salmon who had sustained a broken ankle; \$1,750 for her husband, who, of course, paid medical expenses on her behalf; and \$60,000 for Mrs. DeAsan, who is Mrs. Salmon's mother. The Judge then reduced the award to Mrs. DeAsan to \$40,000.<sup>11</sup>

At this point the airline agreed to pay \$40,000 for Mrs. DeAsan, plus the amounts awarded to Mrs. Salmon, provided it could also settle the child's case—the child not having any physical injuries, the airline nevertheless offered \$5,000. I can talk about this because it is a matter of public record. We took the position that we would not recommend the settlement. That is an odd situation. It is the only time in my experience where I have not been able to recommend a settlement that our client wanted; but, as an officer of the court in an infant's case, we have to testify to the fact that a settlement which the client wants is insufficient. The mother had said that she would like to settle and be done with the litigation for \$5,000 for her son and we had to take the position in our papers that \$5,000 was not enough for the emotional distress that this boy suffered. Subsequent to the submission of the papers to the Court, the airline offered \$7,500 in settlement, and the Court approved that amount.

The last case in this area is *Husserl v. Swiss Air*,<sup>12</sup> also arising out of the same series of hijackings. This is not one of our cases, but in this case, Swiss Air took another position. It said that a hijacking was not an accident. Remember, the language of Article 17 refers to an accident. Judge Tyler in the United States District Court in the Southern District of New York held that a hijacking was an accident within the meaning of Article 17. So that is where we are on liability of airlines in hijacking incidents.

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<sup>11</sup> *Id.*

<sup>12</sup> 168 N.Y.L.J. No. 89 at 1 (1972).

