What damage limitations apply to an accident on an international flight that originated, connected or terminated in the United States?

I.

INTRODUCTION AND SHORT ANSWER

When clients ask how much money can be recovered for their injuries on an international flight or for the death of a loved one killed in an accident involving a foreign air carrier on an international flight, it is not always easy to give a simple answer. First, before considering the limitations imposed on damages for death or injury on an international flight, it is important to note the kinds of damages that typically can be recovered in America.

In a typical personal injury case in the United States, a person who is injured (but not killed) can anticipate recovering damages that he/she suffers as a breach of a duty to the person by the responsible party or entity. These damages would include **general damages** which are presumed to flow from the injury such as pain and suffering, and **special damages** that must be proven by competent evidence such as medical bills, doctor bills, and both past and future lost wages.

In the American legal system, if due to the fault of another party your loved one is killed, a wrongful death action may be pursued for the income the loved one would have earned during his or her lifetime. In some jurisdictions, the income is reduced by the expenses your loved one would have incurred during his or her lifetime in supporting himself/herself. This would be a "net accumulation statute." In other jurisdictions, the responsible party is not allowed to deduct from any damage award the expenses your loved on would have had supporting himself during his lifetime. In the State of Georgia, the recovery is for the full value of the life, without any deduction for the expenses your loved one would have incurred in supporting himself during his lifetime. The full value of the life of the decedent has two components, an economic component, and a non-economic component. While the economic component recognizes the earnings your loved one would have realized during the course of his life, the non-economic component recognizes the value simply of being alive. In some jurisdictions, this is called hedonic damages, which are damages for the loss of enjoyment of life.

Now consider what happens if your loved one is injured or killed on an international flight involving a foreign air carrier. A number of limitations may come into play. A very short answer to the question (an answer which may not be correct upon further examination) is that the limitation on damages for the death or injury of a loved one on an international flight may be $75,000. However, if the airline is proven to have engaged in willful misconduct, this limitation on damages will not apply. Having given a simple (and perhaps incomplete) response to the question, let us know consider a more advance discussion about the law that applies if a passenger is injured or killed on an international flight that originated terminated or connected in the United States.

II.

A MORE ADVANCED AND COMPLETE ANSWER

A. IN 1929, THE WARSAW CONVENTION WAS ADOPTED TO IMPOSE LIMITS FOR THE DEATH OR INJURY OF PASSENGERS SUSTAINED ON INTERNATIONAL FLIGHTS.

Under the Warsaw Convention, an air carrier on an international flight is liable for "damage sustained" as the result of "bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any operations of embarking or disembarking." The Supreme Court of the United States has defined an "accident" under the Warsaw Convention as "an unexpected or unusual event or happening that is external to the passenger."

The limitations on damages in the Warsaw Convention were placed at 125,000 francs or about $8,300. Additionally, the airline is afforded a defense in actions for death or bodily injury if it can prove it took "all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

B. THE MONTREAL AGREEMENT

There was an unsuccessful attempt to raise the limitations of liability in the Hague Protocol in 1955. Following that unsuccessful effort, international air carriers agreed to enter into a "special contract" with passengers affording them higher limitations of liability on international flights originating, terminating or having a connection point in the United States. As a consequence of the Montreal Agreement, the limitation on damages for international flights that originated, terminated or had a connecting point in the United States was raised to $75,000. Additionally, the carriers agreed not to invoke the defense of having taken "all necessary measures" provided in Article 20(1) of the Warsaw Convention. Finally, the limitation on damages of $75,000 would not apply if the airline engaged in willful misconduct under Article 25 of the Warsaw Convention.

C. THE IATA AGREEMENT

Approximately 30 years after the Montreal Agreement, the air carriers considered whether the liability limits were too low. Many international air carriers, through the International Air Transport Association ("IATA"), executed a series of agreements intended to change the limits of liability for injured or killed passengers that were established by the Warsaw Convention and then modified by the Montreal Agreement. Initially, the air carriers executed the IATA Intercarrier Agreement on Passenger Liability ("IIA"). In the IIA, the carriers characterized the limitations on liability that have been in effect since 1955 as "grossly inadequate in most countries." Further, the air carriers agreed: "[t]o take action to waive the limitation of liability on recoverable compensatory damages under Article 22(1) of the

Warsaw Convention . . . so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger." However, with reference to the waiver of the "all necessary measures" defense that had been implemented in the Montreal Agreement, the air carriers reversed course and declared their intention "[t]o reserve all available defenses pursuant to the provisions of the Convention: nevertheless, any carrier may waive any defense, including the waiver of any defense up to a specified monetary amount of the recoverable compensatory damages, as circumstances may warrant... In an Explanatory Note accompanying IIA, the carriers indicated they were undertaking "to waive such limitations of liability as are set out in the Warsaw Convention (1929), the Hague Protocol (1955) and the Montreal Agreement of 1966 and/or limits they may have previously agreed to implement or were required by Governments to implement..."

In addition to executing IIA, the carriers also agreed to take certain steps to implement IIA in the form of The Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA"). In MIA, the carriers agreed that they would ". . . not invoke the limitation of liability under Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention." Secondly, each carrier signing MIA agreed that it would ". . . not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs. . ." SDRs are "special drawing rights." 100,000 SDRs is approximately $146,000.

The clear intention of IIA and MIA was to afford injured passengers or survivors of deceased passengers compensation on a "strict liability" standard of up to $146,000. Only if the claim exceeded $146,000 would the air carrier be able to invoke the "all necessary measures" defense in Article 20(1) of the Warsaw Convention. Finally, the $75,000 cap that had been implemented with the Montreal Agreement would be abandoned, and the victims or survivors of the deceased would be allowed to recover in excess of $146,000 with the proviso that the air carrier could invoke the "all necessary measures" defense under Article 20(1) of the Warsaw Convention.

One would think that with the implementation by the air carriers of IIA and MIA, that passengers injured or killed in international air transportation where the flight originated, connected or terminated in the United States would not confront a defense that the limitations of liability would be only $75,000 under the Montreal Agreement. However, that is precisely what has taken place. The air carriers have argued that even though they **agreed to implement** these changes in their liability, that **they did not**, in fact, **implement** these changes by filing appropriate tariffs with the United States Department of Transportation. The foreign air carriers had argued that their liability can only be increased by "special contract" under Article 22(1) of the Warsaw Convention. They have further argued that until and unless they **actually file the tariffs** with the United States Department of Transportation increasing their liability, victims of foreign air carrier negligence are limited to the damages recoverable under the Montreal Agreement. This means that victims are limited to $75,000 unless they can prove willful misconduct on the part of the foreign air carrier. The foreign air carriers have taken the position that IIA and MIA do not constitute "special contracts" under Article 22(1) of

the Warsaw Convention.

D. THE POSITION OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION ON THE MECHANICAL NECESSITY OF FILING A TARIFF TO WAIVE REDUCED LIMITS OF LIABILITY

While the foreign air carriers who have executed IIA and MIA argue that the filing of a tariff with the United States Department of Transportation is the only way the "special contract requirements of the Warsaw Convention can be satisfied, the United States Department of Transportation declared there was ". . . no basis for the carriers to withhold immediate implementation of the Agreements. . ." The DOT further declared:

> We do not consider that a tariff is necessary to implement the waiver of all numerical passenger limits of liability under the Convention. The Agreements speak for themselves, and are thus self-executing under the exemption we are providing."

On January 8, 1997, the DOT decided to accept tariffs filed by foreign air carriers implementing the MIA and said the following about the relationship between the MIA and the Montreal Agreement:

> IATA also requests that we permit the MIA Agreement, conforming to the revised conditions, to be implemented through tariff filings, and that carriers so adhering to that Agreement be permitted to have it replace the 1966 Montreal Interim Agreement, and be exempted from regulations mandating adherence to the 1966 Agreement. IATA argues that implementation through tariffs provides all parties or litigants with certainty as to the content of the applicable waivers, and would prevent needless litigation over the lack of such clarity.
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> We have decided to accept tariffs for the implementation of the MIA Agreement provided that those tariffs contain only the so called mandatory provisions of MIA (i.e., waiver of the limits in their entirety, strict liability up to 100,000 SDRs – Section I of the MIA Agreement), in the precise language of the MIA.

In the Second DOT Order, it was confirmed that with the implementation of IIA through MIA, that the foreign air carriers would be liable on a strict liability standard for up to 100,000 SDRs, and the $75,000 cap on damages under the 1966 Montreal Agreement would be abandoned.

On August 28, 1998, the Department of Transportation in still a third Order related it was anticipating the implementation of higher limits of liability "in accordance with tariffs filed

with the Department . . ."

E. CONFUSION IN THE COURTS ABOUT LIMITATIONS OF LIABILITY AND APPLICABLE LEGAL STANDARDS THAT APPLY IN INTERNATIONAL AIR CRASH DISASTERS INVOLVING FOREIGN AIR CARRIERS

In a case involving a Korean Airlines Jet (KAL) that crashed in Guam, Judge Hupp declared that KAL had waived its Warsaw Convention defenses and liability limits. Judge Hupp decided that the IATA Agreements (IIA and MIA) became effective upon approval by the United States and the European Commission. On the other hand, Judge Story of the United States District Court for the Northern District of Georgia declared that the Montreal Convention limitations of liability were still valid with respect to an accident involving a passenger struck by a food service cart on KLM-Royal Dutch Airlines Flight No. 572 from Amsterdam to Atlanta with an intermediate stop in Detroit. Judge Story reasoned that until the tariffs were actually filed by the foreign air carriers with the Department of Transportation, the provisions of the Montreal Agreement still applied including limitations of $75,000 that could only be overcome if the plaintiff proved willful misconduct on the part of the foreign air carrier.

III. CONCLUSION

The Guam Decision and the KLM Decision reveal that the status of the law in terms damages recoverable by passengers of foreign carriers on international flights that originate, terminate or connect with the United States is a matter of debate. While the Guam Decision indicates it is not necessary for the foreign carriers to file their tariffs with the Department of Transportation, the KLM Decision indicates otherwise.