CIVIL AVIATION LIABILITIES: AUSTRALIAN DEVELOPMENTS IN A GLOBAL CONTEXT

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AVIATION LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND

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The Hon Justice Michael Kirby AC CMG*
Australia

LAMENTS FROM MONTREAL

Montreal. Autumn 1991. Trees dressed in startling leaves of gold, purple and scarlet. Sad, like fading now neglected maidens. The wind picking up the leaves and swirling them around. How long does it take to empty a tree of its golden leaves? How many cold blasts of Arctic wind will do that job?

A city divided by constitutional debates. Will Canada hold together? A city divided by language, culture and law. A city divided by the main street severing the French east from the Anglophone west. The economically poor, but numerous, from the economically prosperous, but few. The McGill University campus reflecting the sombre Scot whose

benefaction established it, finds itself placed resolutely in the western part of town. The steep hills lead to the University's Institute of Air and Space Law. The occasion: a colloquium to mark the fortieth anniversary of the Institute in the city of civil aviation institutions. To coincide with the anniversary, a new Advisory Committee appointed to chart the way ahead for the Institute and to predict the developments in air and space law for the forty years to follow. At the back of the meeting hall the Royal Coat of Arms of England remind the participants that, even in this Province of the civil law in Canada, the pervasive influence of the common law of England, its institutions and its professional servants have left their mark.

My appointment to the Advisory Committee afforded me a timely opportunity to review the current debates about the successes and melancholy failures of efforts to achieve a common international approach to the liabilities of air carriers for death and injury to passengers and loss to property which arise out of civil aviation accidents, both domestic and international. The very substantial, even exponential, growth in the international carriage of persons and goods by air has demonstrated the desirability of achieving at least a minimal international régime to cover such cases of liability. Yet the components of such an international régime, acceptable to the many poorer countries involved in international aviation, immediately repel the richer countries which seek to ensure the attainment of a system more just for their passengers and consignors of cargo. This is the controversy which has been played out for thirty years and more in the institutions of the

international civil aviation industry. Those institutions are mainly found in Montreal. The headquarters of the International Civil Aviation Organisation (ICAO) and of the International Air Transport Association (IATA) are there. It is the presence in Montreal of these institutions which stimulated the establishment in the distinguished Law Faculty of McGill University of the Institute of Air and Space Law to which I had come.

The names of the members of the Advisory Committee read like a *Who's Who* of air and space law and policy. The Chairman is Mr Knut Hammarskjöld, former Director General of IATA. The members include Professor Karl-Heinz Böckstiegel, Director of the Institute of Air and Space Law at Cologne University; Professor Stephen Gorove, Director of Space Law, University of Mississippi; Judge Gilbert Guillaume of the International Court of Justice; Mr Warner Guldiman, former Director of Civil Aviation of Switzerland and a member of the ICAO Legal Committee; Mr N Jasentuliyana, Director of the Division of Outer Space Affairs of the United Nations; Mr Arnold Kean, Member and former President of the United Nations Administrative Tribunal and past Chairman of the ICAO Legal Committee; Mr James Landry, Senior Vice President and General Counsel of the Air Transport Association of America (ATA); Mr Hughette Larose, General Counsel to IATA; Mr Claude Taylor, Chief Executive of Air Canada and M. Antoine Veil, former President of UTA); Professor Jacob Sundberg of the University of Stockholm and several others. McGill's Dean of Law Morissette and Professor Michael Milde, Director of the Institute were also there.

After the work of the Advisory Committee was

accomplished, we participated in the colloquium which provided the occasion for reflections and predictions about the past and future, respectively, of air and space law. Of course, there was a natural component of self-satisfaction about the work of the Montreal Institute. Sited in Montreal, it was predictable enough that many of its graduates should go on to attain positions of responsibility in the global institutions of air and space law. Many of them were there to bask in the glow of forty years of achievements. But had the achievements of their discipline been as notable?

Mr Arnold Kean had attended at the Chicago conference convened in November 1944 on the initiative of the United States government to chart the arrangements which would govern civil aviation in the post-war world. That conference came together to hear a message from President Roosevelt urging the representatives to accept the principle of the freedom of the skies to international civil aviation. Dean Acheson, later United States Secretary of State, wrote a book *Present at the Creation*. In it he described the establishment of the post-War political order. Mr Kean could have called his contribution by the same title. He described the hesitation and great caution of the delegates of the sovereign states collecting at the hotel in Chicago at the end of 1944. The plea by the United States President for a bold vision of internationalism in civil aviation fell on mainly deaf ears. The Chicago Convention was concluded and opened for signature in a remarkably short time, on 7 December 1944. But like so many other efforts in the field of international civil aviation (and later in the field of space regulation) the imagination of the bureaucrats and the

lawyers has not kept pace with the remarkable technology presented for their regulation. So it has proved in the organisation of the air transport industry. So it has proved in the regulation of freedom of movement through air both of scheduled and non-scheduled services. So it has also proved in the regulation of the liability of air carriers.

Remarkably enough, the cornerstone of that last-mentioned liability is still found in the Warsaw Convention, being the Convention for the Unification of Certain Rules Relating to International Carriage by Air opened for signature at Warsaw on 12 October 1929. In Australia, it is that Convention, as amended by the Hague Protocol of 1955 and the supplementary Guadalajara Convention 1961 which Federal legislation prescribes as applicable and having the force of law in Australia in relation to any carriage by air to which the statute applies.[1] Much of the time of the Montreal meeting was devoted to a review of the still substantially unsuccessful efforts to bring up to date the Warsaw Convention and to provide for the international and national communities which rely so heavily upon the carriage of persons and goods by air, a legal régime which would at once, be:

(a) *Uniform*, although susceptible to supplementation by provision of additional benefits;

(b) *Certain*, in the provision of minimal just compensation for loss of life, injury and loss of property without the necessity to prove fault;

(c) *Swift*, in the provision of speedy compensation; and

(d) *Renewable*, in the sense of entailing an

international régime which is constantly being revised both as to its provision for recoverable compensation and as to its basic assumptions and procedures.

Fresh from a judicial consideration of some of the features of the Warsaw Convention, as amended and applied in Australia[2], I attended this McGill Colloquium with a sense of profound pessimism. I came away with no sure conviction that the future looks brighter. But there is a glimmer of hope on the horizon. Before addressing the particular developments of Australian law and policy on this issue, therefore, it is timely to record some of the points about international developments against the background of which our domestic concerns in Australia and New Zealand must be judged and will themselves unfold.

THE UNITED STATES CONGRESS AND REFORM OF WARSAW

One of the principal speakers in Montreal was Mr Landry. He will also participate in Christchurch. As I have said, he a member of the Advisory Committee of the McGill Institute and an alumnus of the Institute. He accepted that the régime imposed by the Warsaw Convention is properly now described as a "shambles". He outlined the steps which the French government had set in train in 1923 which ultimately led to the signature of the Warsaw Convention. He recounted the subsequent, more recent, steps to bring up to date the system of the Convention whilst retaining its fundamental idea of a minimal uniform international code. Under seven successive United States Presidents, starting with President Eisenhower, attempts have been made to secure the advice and consent of the Senate of

that country to proposals that the United States should participate in the various Protocols negotiated in the past quarter century, to bring the Warsaw Convention up to date. The United States has actually signed various of these Protocols. But it has not ratified any of them. The Senate has declined to give its advice and consent. The United States is not even one of the 109 parties to the Hague Protocol. It has not ratified any of the Montreal Protocols.

But now there is a proposal before the United States Senate Committee on Foreign Relations that the Senate should, at last, support the ratification by the United States of Montreal Protocols Numbers 3 and 4 at the price of securing, for the protection of the perceived interests of the United States and its citizens, a supplemental compensation plan (the S-Plan). This is the "package" which, it is now hoped, will set in train the steps necessary for United States' ratification of the international reform measures. It could be expected that if the United States took the step of ratification, subscription to the Protocols by other states, including Australia, would shortly follow. Despite the relatively small number of ratifications necessary to bring the Montreal Protocols into effect (a mere 30 ratifications) so far, the necessary ratifications have not been deposited.

The result of this well known and melancholy saga has been:

1. The persistence of a now scandalously low provision for no fault recovery in the case of death, injury and loss of or damage to goods by air accident;
2. A hotch-potch of differing arrangements in relation to different states which, in differing combinations, have

ratified, or failed to ratify, the Hague Protocol, the Guadalajara Convention supplementary to the Warsaw Convention and the various later Protocols, notably those of Montreal being numbered 3 and 4;

3. The provision of supplementary entitlements (either voluntarily or pursuant to the applicable national laws) in certain member countries or by contractual obligations accepted by certain international airlines; and

4. Domestic judicial reactions to the inequity and absurdity of the resulting position, which have been questioned by some commentators. Judges have taken comparatively "generous" approaches to the interpretation in Article 25 of the Warsaw Convention of what constitutes "recklessness with knowledge that damage would probably result" to permit the claimant against an air carrier to "break" the confinement of damages to the small amount provided by the Warsaw Convention and the not much larger amounts provided by such of the subsequent Protocols and Conventions as have come into force, been accepted or applied by contract, by local law or international agreement.

The last attempt to bring the United States to the barrier of ratification of the international efforts to reform of civil aviation liability under the uniform minimal scheme of the Warsaw Convention occurred in April 1983. It was then that the same Senate Committee voted on President Ford's request to that end. Although the Committee agreed by 50 votes to 42 to the President's request for consent to ratify the Guadalajara Convention, the endeavour failed because the vote

did not reach the two-thirds affirmative vote required under the United States Constitution.[3]

This failure was clearly explained by the dissenting senators as resting upon their conviction that any international convention which purported to fix a "cap" of (at the time $US317,000) for the death of a passenger in an airline mishap was unacceptably low by the standards of United States court awards for losses occasioned to United States citizens in other non-airline mishaps involving proof of fault. It was this disharmony between the amounts recoverable under the Warsaw Convention and the amounts typically recovered in United States courts in other cases of civil accident which occasioned the threat in 1966 that the United States would denounce the Warsaw Convention. That threat eventually produced the Montreal Agreement of 1966. Under that agreement, airlines operating to and from the United States voluntarily accepted, outside the Warsaw System, an increase of their liability limits for passenger death and injury. Under the Agreement, airlines consented to lift their limits to $US75,000 (with legal fees) or $US58,000 (without legal fees). But this Agreement, whilst postponing withdrawal of the United States from the Warsaw System merely delayed a more fundamental attack on the artificialities of the international régime then remaining. Recognition of this fact led to the negotiation of the Guatemala City Protocol of 1971. This Protocol increased the passenger limit to 1.5 million gold francs. The Guatemala City Protocol also introduced the concept of an unbreakable or strict liability limit with the object of minimising litigation and increasing the speed of the provision of compensation to the families of

those killed or to persons injured. The Guatemala Protocol was effectively later superseded by Montreal Protocol No 3. But it has not yet entered into force.

In a sense the United States Senate, whilst apparently obstructing sensible, if modest, attempts to reform one of the most universal of international civil conventions, has had the effect of protecting consumers of the huge and still growing international civil aviation market. It has defended them from the cheese-paring, penny-pinching attitudes to compensation for accidents adopted by states, their politicians and their civil aviation bureaucrats. Article 22 of the Warsaw Convention permits special contracts between airlines and their passengers increasing liability limits beyond those provided by the Convention (ie as amended by any applicable subsequent Protocol). A number of airlines serving Australia and New Zealand have acted in accordance with this provision. Thus QANTAS, British Airways and Japan Airlines have voluntarily increased their passenger limits to the amount provided under Montreal Protocol No 3, viz a limit of 100,000 Special Drawing Rights (SDRs) as provided by the International Monetary Fund (IMF). This amount approximates a limit of $AUD180,000. Yet for the United States senators and other commentators 100,000 SDRs is still woefully inadequate. When damages verdicts at the hands of jurors average $US1 million for cases of death (and much more for personal injury) this sum (apparently large in the eyes of the representatives of developing countries) seems paltry and totally unacceptable to the elected representatives of the travelling public of the United States.

This, then, was the debate which was laid out once again for the participants in the conference in Montreal. Two of them, whilst highly critical of the unacceptable "shambles" of the Warsaw System, were nonetheless hopeful that the United States would at last in 1991 ratify the Montreal Protocols, stimulate a flock of like ratifications and set the international aviation industry upon the more fundamental task of renegotiating an international régime appropriate to the circumstances of the huge increases in international air traffic both of persons and cargo which are such a feature of the world today.

Mr Landry acknowledged fully the defects of the Warsaw "no fault" system. But he pointed out that an adequate and up-to-date "no fault" scheme could provide, for most passengers and their families travelling by air and for many consignors of goods, a scheme of recovery which had the qualities of certainty of operation, speed of payout and adequacy of compensation which were only too plainly missing from the present problematic system. That system inevitably propelled lawyers and courts (in the understandable endeavour to avoid the gross injustice of limiting passengers and shippers to the Warsaw (or Warsaw-Hague) limitations) to seek to break the limitation and to find the degree of wilful recklessness necessary to permit the recovery of unlimited compensation against the air carrier. The result of these endeavours to "break" the Warsaw limitations in the United States courts were, in Mr Landry's expressed view, often "tragic". Fifteen years after the Pan-Am accident at Bali (in 1974) no recovery had been achieved by the families of those seeking to circumvent the Warsaw limitation. Eight

years after the Korean Airlines disaster over the Soviet Union, not a penny had been paid to the families of United States passengers who had been likewise seeking to break the limitation. Three years after the Lockerbie disaster in Scotland involving a Pan-Am 747, the families are still waiting. Not a penny has been recovered. Meanwhile, mortgages have had to be paid and childrens' college education accounted for.

Sometimes, in life, the perfect is the enemy of the good. It was in this context that Mr Landry expressed the hope (and the conviction) that the United States "must and will ratify" Montreal Protocols numbers 3 and 4 but in concert with an appropriate S-Plan and as a prelude to a more concerted international endeavour to establish a compensation régime for passengers and consignors of goods which will be as up to date as the international aviation market which it serves.

Much the same viewpoint was propounded in Montreal by Dr Roderick van Dam, Senior Legal Officer in the Legal Bureau of ICAO. He acknowledged the force of the arguments of those who called for a more fundamental reconsideration of the system embedded in the Warsaw Convention. But he suggested that radical reform was more likely to follow from the ratification of the Montreal Protocols from which the then amended Warsaw Scheme could be taken further - even to the point of a complete overhaul.

Needless to say these viewpoints contrasted starkly with those expressed to the Montreal conference by trial lawyers from the United States. Mr Francisco Troncoso, a member of the US Trial Lawyers' Association condemned the

whole Warsaw system. He stated that it was anachronistic; that it had been established long ago to protect an infant industry now grown to full maturity; that it conflicted with the basic ideas of just tort compensation; that it provided totally inadequate damage limitations; that it did not, in fact, stop litigation aimed at breaking the limit; and that it had totally failed to keep pace with the growth of air traffic both in passengers and in cargo.

Mr Troncoso's remarks were picked up by another trial lawyer involved in litigating air mishap cases, Mr Timothy Champion. He lamented the extent to which the appallingly low limits fixed by the Warsaw-Hague Convention had forced United States courts to explore what he called "novel theories of law" which distorted the plain language of the Conventions for the sake of those suffering loss. It had led to "unsound principles of law" in an effort to provide minimal just compensation. Whilst trial lawyers might be biassed and self-interested, they were (no more than judges) impervious to the wildly inadequate limitations now imposed by the Warsaw-Hague Convention. Mr Champion suggested that whilst ever it was left to the bureaucrats of nation states to fix the maximum compensation recoverable under the Warsaw "no fault" system, or to review those maxima from time to time, there would always be a serious failure to provide the necessary updating of the quantum provided and, still more, a lack of interest or will to provide any fundamental restructuring of the System.

Some of Mr Champion's comments about this suggested basic flaw of the Warsaw System were reminiscent of criticisms which have been addressed from time to time at the

failure of the Australasian political and legal systems to keep up to date the amounts recoverable under the New Zealand Accident Compensation Scheme and the more limited "no fault" accident schemes in Australia. In part, the political inattention derives from a lack of political pressure. But in part, it also derives from the disinclination of government officials to take steps which, directly or indirectly, add costs to their national budgets. For Mr Landry, this was an unpersuasive argument. A levy on each passenger ticket or document of carriage to provide standards of compensation acceptable to the United States Senate and others of like mind would amount to no more than $2 or $3 per passenger ticket, possibly less.

However, that may be, the world seems to have pressed forward with a vast increase in passenger and cargo carriage by civil aviation. The leaps of imagination which have accompanied the development of each new generation of aircraft and the further expansion of scheduled air traffic has clearly not been accompanied by leaps of legal and bureaucratic imagination:

> What seems to the United States senators to be minimal just compensation appears dazzlingly excessive to the representatives of the poorer nations with their struggling national airlines;
>
> What seems to be a just system of compensation for the occasional mishaps affecting passengers and cargo in the huge industry of international civil aviation from the perspective of a United States trial lawyers appears wholly inappropriate to the circumstances of a representative of a developing country seeking to

provide a minimal scheme of no fault compensation for its nationals if they are injured; and

What seems to be the appropriate criterion for "breaking" the limitation on recovery, when viewed from the perspective of a country of multi-million dollar jury verdicts appears wholly unacceptable to the representatives of the vast majority of states who face the problem of obtaining insurance in an international market which increasingly lays down significant conditions and may in some circumstances not even be available.

It is against these well worn and well known international controversies that the provisions of Australian (New Zealand and other) domestic laws on civil liability of air carriers must be understood and evaluated today. In the great drama of international civil aviation, we may be long established players; but we are not in the major league. We watch, as the world does, the doings of the United States' Senate Committee on Foreign Relations. It is possible that, by the time of this conference, that committee will have resolved the long-standing international stalemate and broken the log jam. But if (as is expected) it gives the advice and consent of the Senate of the United States of America to the ratification by the President of Montreal Protocols numbers 2 and 3, it may confidently be expected that this will not be the end of the road of reform. It will simply be a step in the determined pursuit by the United States' of its well known position on this subject. That position has, for a quarter of a century and more, been one of trying to inject into the beneficial basic scheme of the Warsaw Convention on

Civil Aviation appropriate measures for supplementation in the case of countries requiring them and the need to review the circumstances which are appropriate for the "no fault" recovery and those which warrant recovery of full unlimited compensation.

SS PHARMACEUTICAL v QANTAS AIRWAYS

As I have already stated, Australia has ratified the first three of the international instruments making up the "Warsaw System", viz the Warsaw Convention of 1929, the Hague Protocol of 1955 and the Guadalajara Convention of 1961. It has not ratified the Guatemala City Protocol of 1971 or the Montreal Protocols numbers 1, 2, 3 and 4 of 1975.

The Hague Protocol doubled the passenger death and injury limit of the Warsaw Convention to 250,000 gold francs. The Guatemala City Protocol increased the Hague Protocol limits six-fold to 1.5 million gold francs. Montreal Protocols numbers 1 to 4 converted the gold franc limits of the earlier instruments to SDR limits as provided by the IMF. They use for this purpose as the medium of conversion the last official price of gold designated in the United States.

The most recent case to come before the courts of Australia concerning the limitation of liability provided in respect of carriage of air is *SS Pharmaceutical Co Limited & Anor v QANTAS Airways Limited.*[4] In that case, which involved damage to cargo carried on a QANTAS flight from Australia to Japan, a number of interesting points arose at first instance before Rogers CJ Comm D.[5]

His Honour decided that, on the evidence, QANTAS' conduct had been reckless with clear knowledge of the

likelihood of damage to a specially vulnerable cargo left on the tarmac at Sydney Airport in the weather conditions in which the cargo was handled. Accordingly, he held that the shipper had satisfied the test propounded by Article 25 to break the limitation otherwise provided by the Warsaw Convention as amended and as applicable to such a flight out of Australia. He therefore determined that the shipper was entitled to recover the full loss suffered. QANTAS was not entitled, pursuant to the Convention as applied to the carriage by the *Civil Aviation (Carriers' Liability) Act* 1959, to limit its liability to the meagre sum there specified.

In case that decision was disturbed, Rogers CJ Comm D went on to consider the applicable rule in Australia having regard to the definition of the Convention limitation in terms of gold francs. He decided that the only gold price which could be used was the price currently in existence, ie the free market price to gold. He expressed the opinion that the uncertainties occasioned by the necessity to determine (if the Convention applied) the limitation sum by reference to an obsolete gold standard called out for urgent reform by the appropriate legislature, ie the Australian Federal Parliament.

This decision was appealed to the New South Wales Court of Appeal. The Court hearing the appeal comprised Gleeson CJ, Handley JA and myself. The majority of the Court (Gleeson CJ and Handley JA) upheld the primary conclusion of Rogers CJ Comm D on the facts. It decided that the question for the Court was whether any error had been shown in his Honour's determination that the case fell within Article 25,

such that the damage suffered by the consignor of goods was the result of reckless acts or omissions with knowledge on the part of QANTAS that damage would probably result therefrom. The majority determined that no error on the trial judge's part had been made out. Their Honours acknowledged that a distinction had to be drawn between recklessness with knowledge that damage would probably result (on the one hand) and either recklessness without such knowledge or mere gross negligence (on the other). However, based upon the evidence called at the trial and significantly influenced by the failure of QANTAS to call apparently available and relevant evidence from its officers, it was held that the requisite proof by evidence and inference was available to sustain the conclusion that the Convention limitation could be broken and full compensation allowed for the consignor's loss.

The appeal by QANTAS was accordingly dismissed. An application for special leave to appeal to the High Court of Australia from the Court of Appeal decision was refused by the High Court. That Court disposed of the application apparently contenting itself with the view (shared by the majority in the Court of Appeal) that the case was one involving no important new principle of law but simply a decision on its own peculiar facts.

As will be obvious from the report of the decision, I reached a different view. It was once said that, in England, the *Law Quarterly Review* was the ultimate Court of Appeal, hovering with its brooding observations even over their Lordships' House. I certainly have no intention of following Lord Denning's precedent and rearguing interminably

in books or papers the errors of my colleagues and my own unique command of true legal doctrine. I do not subscribe to the view (supported in some judicial circles) that a judge, having dissented, must thereafter fall into tongue-tied silence, retreating to the wings of the judicial drama, leaving it to jurisprudential history to determine whether or not he, or she, got it right.[6] On the contrary, honesty in the expression of judicial opinions necessitates (even on the path to dutiful observance of authority) the criticism of opinions considered to be erroneous.[7] But what it is appropriate to say in reasons for judgment may not be appropriate on the cold page of a conference paper. In the *SS Pharmaceutical case* mine was a sole dissenting voice. The facts were peculiar. History may consign the case to where the majority put it: in the realm of facts.

It is enough for my present purposes to call attention to the path by which I reached the opposite conclusion. It was a path which led through an understanding not simply of the text of the Warsaw Convention but of how that text had been devised and revised. By reference to the *travaux prparatiores*[8] and to the history of the amendments to Article 25[9] I came to a view that the words:

> *"...recklessly and with knowledge that damage would probably result..."*

had a very strict and stringent meaning. It was a meaning which should not be undermined to repair the shocking failure of the parties to the Warsaw Convention and its successors to bring up to date the quantum of money provided by the limitation, if that limitation could not be broken. This is what I said:[10]

"Article 25 is part of an international instrument. This Court should give it a construction and an application which accords with the general approach taken to it by other municipal courts. Its much litigated form provides the only way by which passengers and consignors of cargo can escape the general rgime laid down by the Warsaw-Hague Convention. That rgime provides a form of minimal covering to passengers and consignors of cargo. Generally speaking, if consignors wish to secure full protection they must either make a special declaration of interest and pay a supplementary charge or obtain private insurance.

Against this background, the language of art 25 as amended by the Hague Protocol, itself suggests a rigorous standard in order to qualify for full recovery from the air carrier. One of two criteria established is intentional damage. That will be rare indeed, particularly in flight, where the lives of many crew and passengers are inevitably at stake. That extreme exception gives a clue, without more, to the high stringency involved also in the alternative ground of exception (recklessly etc). So too does the context. For this is an exception from a compensation rgime which is obviously meant to be one of general application. Any ambiguity remaining is removed by reflection on the alteration from the phrase used in the Warsaw Convention ("wilful misconduct") to that adopted by the Hague Protocol. And a study of the minutes of the Working Group which developed that Protocol shows conclusively that its purpose was to limit even more rigorously the circumstances of escape from the general rgime of limited entitlement, when compared to the already strict rgime which had obtained under the Warsaw Convention itself. The phrase "recklessly and with knowledge that damage would probably result", therefore, involves one composite concept. It requires proof by the claimant seeking the exemption which art 25 allows that the damage complained of was caused by something significantly more than negligence and carelessness. Even proof of reckless conduct is itself, and alone, not enough. It must be shown that, at the time of the reckless conduct, the servants or agents of the carrier concerned knew that such conduct would cause damage but went ahead regardless."

On the facts, whilst concluding (as QANTAS in a tendered memorandum had acknowledged) that the handling of cargo in

rainy conditions was "deplorably bad", I could not reach the conclusion that QANTAS' servants or agents (or any of them) actually knew that its conduct would cause damage to the consignor but went ahead regardless.

I nevertheless concluded my remarks with an endorsement of the call of Rogers CJ Comm D for remedial national and international reformatory action[11]:

> *"This action may be needed both at an international and at a national level. The average passenger and consignor using international air transport is almost certainly ignorant of the limitations on recovery that are imposed and the uncertainties and possible injustices involved in the limitations provided by the Warsaw-Hague Convention. It would be preferable that these difficulties and injustices should be looked at in advance of, and not after, any major incident affecting large Australian interests. ... The appellant, itself, as the major air carrier serving Australia and as the national airline, should bring these repeated remarks of the Court to the attention of the Executive Government of the Commonwealth."*

AN AUSTRALIAN DISCUSSION PAPER

The judicial remarks about the unsatisfactory state of the law governing liability of civil aviation carriers in and out of Australia and initiatives already commenced within the relevant federal authorities, produced moves for the reform of the applicable law in Australia.

A Discussion Paper, detailing the background and history of the relevant Australian law, was prepared by the Australian Federal Department of Transport and Communications. It was circulated for comment to the airline industry, Federal departments, the legal profession and the insurance industry.

The Discussion Paper[12] explained the particular

difficulties which had arisen from the provision upon limits of recovery (art 25 cases aside) as measured in terms of gold francs. These difficulties were exacerbated following the abandonment of the official price of gold in 1973. That development led to differences of judicial view expressed (including at first instance in *SS Pharmaceutical*) concerning the determination, in Australian dollar terms of the equivalent of the "gold franc" as referred to in the Warsaw Convention and Hague Protocol. After describing the "Warsaw System" and the arguments in favour of an international minimum régime, the Discussion Paper listed the three "key objectives" which the Australian government accepted in defining any moves to "upgrade Australia's air carriers' liability régime". I support those objectives. As expressed, in order of importance, they were:

(a) To provide a liability régime which was more equitable for Australian consumers;

(b) To provide clear guidance for Australian courts in regard to the conversion of the gold franc or to remove the need for such conversion; and

(c) To try to assist international consensus on the stability and uniformity of the liability régime established by the Warsaw System.

After disclosing the astonishing information that there are:

> *"... said to be 81 possible permutations of the liability limits of the Warsaw System..."*

a number of options were described and evaluated. These were:

(A) Australia could set a $AUD equivalent of the Warsaw and Hague gold franc liability limits by either:

(i) fixing the $AUD equivalents of the gold franc limits of Warsaw and Hague using the last official price of gold and the SDR; or

(ii) fixing the $AUD equivalent of the gold franc limits by reference to the free market price of gold; or

(B) Australia could take steps to ensure that the passenger limits of the Montreal Protocol No 3 applied to as many international routes as possible by either:

(iii)(a) ratifying Montreal Protocols Nos 1 to 4 and applying them to QANTAS;

(b) fixing the $AUD equivalent of the gold franc limits of Warsaw and Hague using the last official price of gold and the SDR

(c) Applying the Montreal Protocol limits to all Protocol routes, by negotiating bilateral agreements with countries party to the Protocol; and/or

(d) seeking informal arrangements with other countries/airlines for the introduction of voluntary higher limits; or

(iv) (a) Ratifying Montreal Protocols Nos 3 and 4;

(b) Denouncing the Warsaw and Hague Instruments when Montreal Protocol No 3 entered into force internationally; and

(c) Legislating to apply Montreal Protocol Nos 3 and 4 limits to Warsaw and Hague routes since these would now become non-Convention

routes so far as Australia was concerned; or

(c) Australia could take steps to ensure that airline passengers received damages more in keeping with those which could be obtained in the case of non-airline accident by either

(v) (a) Implementing option (iii) above; and

(b) Establishing a supplementary compensation plan similar to that being developed in the United States of America; or

(vi) Denouncing the Warsaw and Hague Instruments and unilaterally applying higher liability limits; or

(vii) Denouncing the Warsaw and Hague Instruments but not setting new liability limits and leaving it to the market or private insurance to ensure that more appropriate compensation was recovered outside a no fault régime.

A PROMISE OF AUSTRALIAN GOVERNMENT ACTION

On 12 November 1990 the Minister for Transport and Communications (Mr K Beazley MP) announced the intention of the Australian Government to review Australian law on the subject following consideration of the responses received to the foregoing Discussion Paper.[13] In his statement, Mr Beazley acknowledged that the passenger limits specified in the Warsaw-Hague Convention were:

"Unrealistically low for today's circumstances."

He also acknowledged the confusion which had been caused by the doubts concerning the value of the gold franc in terms of

which liability under the Warsaw-Hague Convention was fixed. His announcement went on:

> *"The government has agreed that Australia should ratify the Montreal Protocols Nos 3 and 4 which will increase the passenger limit and introduce modern cargo practices. Montreal Protocol No 3 increases the liability limit for passenger death and injury to 100,000 SDR or about $AUD180,000. This is appreciably higher than the often quoted Warsaw Convention limit of $US10,000 (about AUD14,000) or the Hague limit of $US20,000. Since the Warsaw Convention and the Hague Protocol will remain in force after the Montreal Protocols have been ratified, it has also been agreed to fix a conversion for the Poincare gold franc to Australian dollars, thereby establishing a more certain liability limit for travel covered by those agreements."*

At the same time, the Minister agreed to seek voluntary acceptance by international airlines of the Montreal Protocol 100,000 SDR passenger death and injury limit and that an examination should be undertaken of options to give passengers access to higher compensation, without affecting the carriers' minimum liability limits.

In the field of domestic carriers' liability, where the impediments of seeking international agreement do not obtain, legislative amendments took effect in Australia in February 1991 to increase to $180,000 the amount recoverable, without proof of fault, for passenger death and injury, $1,600 for registered baggage and $160 for unregistered baggage. The previous limit has been severely criticised in the courts and the recent increase is unlikely to dent that criticism.[15]

A Bill to amend the *Civil Aviation (Carriers' Liability) Act* 1959 to cover international liability has been drafted. According to information supplied to me by the Australian Department of Transport and Communications, it is

expected that the Bill will go before the Australian Parliament later in 1991.[14] More recent information suggests that the Bill may not have a high priority with the government. It is obvious that the Australian Government is watching closely the developments in the United States' Senate Committee referred to above. Those developments by the major player in global civil aviation are clearly considered to be matters relevant to Australia's decisions and future actions.

If the predictions voiced in Montreal last week prove accurate, it may be anticipated that the United States will indeed ratify the Montreal Protocols. Especially if that occurs (but possibly even if it does not occur) Australia is likely to proceed with its legislation to authorise ratification of the Protocols. Although such ratification may, under the Australian Constitution, be achieved by the action of the Executive Government representing the Crown, and although the Australian Ambassador to Poland has already signed the Montreal Protocols as a pre-requisite to ratification, the view has been taken that final ratification of the Montreal Protocols cannot be effected until the Australian Federal legislation is amended by Parliament.

Even if Australia ratifies the Montreal Protocols, they still fall short of having collected the requisite 30 ratifications necessary for their entry into force in international law. As of 24 June 1991, 19 countries had ratified Montreal Protocol No 3 and 21 had ratified Montreal Protocol No 4. However, it may be anticipated that, if the United States Senate approves ratification of those Protocols by that country, the requisite number of Protocol

ratifications would seen be gathered to bring each of the Protocols into effect. That is the way of the world.

CONCLUSIONS: ON THE BRINK OF REAL REFORM?

In a decision of 23 March 1991, the United States Court of Appeals for the Second Circuit in *In re Air Disaster at Lockerbie* said:

> *"So much has been written concerning the [Warsaw] Convention since its adoption that we must take care not to be lost in the wilderness of words."*

Why must this lament be voiced? Why can lawyers and statesmen not reflect the vision and imagination of scientists, technologists, airline entrepreneurs and business people whose enterprise in civil aviation has so revolutionised our planet in this century?

It should not be difficult to devise, and regularly to revise, a just international system for the recovery of compensation in cases of civil aviation accidents affecting the loss of life and bodily injury to passengers and the loss of or damage to cargo. Such an enormous and still growing industry with an increasing economic potential and an improving record of safety and efficiency deserves better treatment by the international legal community.

Defining liability by reference to a convention 63 years old says more about history, bureaucratic lethargy and lack of political will than it does about the merits of the Warsaw System. The basic idea of the System still appears sound. There is surely a need for a general "no fault" recovery which is just by amount, certain in payment and swift in settlement. There is also a need for

supplementation of that System both by private insurance arrangements and where the law of particular countries considers it to be necessary for its passengers and consignors. There is also clearly a need to get rid of the ambiguous determination of liability by reference to a gold franc which memorializes the otherwise long forgotten Poincare.

It may be hoped that if Australia, New Zealand, the United States and other countries proceed to take the steps necessary for the achievement of reform of international civil aviation carriers' liability, such steps will act as a prelude and a stimulus to a more rational international renewal of the international system of civil aviation liability. The problem presented by this paper is but one species of a wider *genus*. Our international institutions (and the parochial cast of mind of most national politicians, bureaucrats and lawyers) stand as a constant and formidable barrier to the achievement of truly rational reform of the law where global technology calls out urgently for global approaches. Perhaps in the field of civil aviation a breakthrough will shortly occur. But it would be a bold observer who expressed such a view with truly firm conviction. Some commentators in Montreal went so far as to predict that we would still be talking of this subject when the centenary of the Warsaw Convention came up for "celebration". Let us hope that they prove wrong.

FOOTNOTES

* President of the New South Wales Court of Appeal, Australia. Member of the Advisory Committee of the Institute of Air and Space Law, McGill University, Montreal, Quebec, Canada. Chairman of the OECD Expert Group on Security of Information Systems. Personal views.

1. *Civil Aviation (Carriers' Liability) Act* 1959 (Aust).
2. The reference is to *SS Pharmaceutical Co Limited & Anor v QANTAS Airways Limited* [1991] 1 Ll L Rep 288 (NSWCA). See below.
3. *United States Constitution*, Art II, s 2, para 2.
4. See n 2.
5. [1989] 1 Ll L Rep 319 (NSWSC).
6. See *CSR Limited & Anor v Jan Bouwhuis*, Court of Appeal, NSW, unreported, 19 August 1991.
7. *Ibid*, 12.
8. *SS Pharmaceutical Co Case* above n 2, 298.
9. See also *Goldman v Thai Airways Limited* [1983] 1 WLR 1186, 1995 (Eng CA).
10. *SS Pharmaceutical Co Case* above n 2, 302.
11. *Ibid*, 306, 307.
12. Australia, Department of Transport and Communications, Discussion Paper, *International Air Carriers' Liability*, 1990, *mimeo*.

13. News Release, 12 November 1990, *International Air Carriers' Liability Amended*, ref 30/90 (K C Beazley MP).

14. Copy of a letter addressed to the author by the Department of Transport and Communications, 23 August 1991.

15. See *Mackay v Lloyd Helicopters Pty Ltd* [1989] *Aust Tort Reports* ¶80-270, p 68, 875 (SCQ).