Chapter VII

Judicial Decisions on Air and Space Laws

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'Space' being a very wide and extensive term, it can never be said that the laws related to it are complete and cover every possible aspect. With regard to air laws, the concept of liability of an air carrier is covered by the Warsaw Convention. In space law there are two treaties containing the rules of liability, the Outer Space Treaty, 1967 and the Liability Convention, 1972.

When these laws were formulated, full-fledged commercial air services were in operation, though not on a large scale, but commercial space operations were just taking their first cautious step. Even today, about forty years after the first man went into space, private operators are still hesitant to invest in this prohibitively exorbitant field of activity. Owing to the fledgling operations by the state, the rules of liability dealt with the liability of the state for its space activities, but the liability of manufacturers and users was not given much consideration. Even regarding air services, it cannot be said that the law is perfect or all-encompassing.

The gaps prevailing at any time in legislation are filled by judicial decisions of various courts. These decisions have become the precedents for lower courts to deal with those issues, the solution to which may not have been provided by existing laws. Some of the landmark judgments involving space, both air space and outer space are mentioned below –

7.1 Cases Relating to Air Laws

1. Passenger carrying restricted articles in baggage

The carrier may refuse to transport any of the articles mentioned below as baggage, and he may refuse onward carriage of any baggage on discovering that the passenger's baggage does contain such articles.

In Article IX, the International Air Transport Association (IATA) provides that the following shall not be included in his baggage by a passenger –

i) Articles which do not constitute baggage as defined in Article I hereof

ii) Articles which are likely to endanger the aircraft or persons or property on board the aircraft

iii) Articles the carriage of which is prohibited by the applicable laws, regulations or orders of any state to be flown from, to or over

iv) Articles which in the opinion of the carrier are unsuitable for carriage by reason of their weight, size or character

v) Live animals

The consequences of the crew discovering during the flight that a passenger has brought an unacceptably dangerous article on board are illustrated in this German decision of 3rd February 1961, in the case of Amtsgericht Frankfurt-am-Main[1]. In this case a passenger was carrying a bottle of ether along with him. When it was discovered, the flight had to make an emergency landing to remove the bottle and the passenger had to pay all the costs involved in the emergency landing that was made to remove the article from the aircraft.

In the absence of any specific provision in the Act, the judgment seems to be erroneous on the ground of the judgment delivered in the case of Hadley v. Baxendale wherein the court held that remote or indirect damages cannot be awarded, particularly when the same was not communicated on or before the formation of the contract. There is no express provision in the Act to pay the cost involved for emergency landing if the prohibited goods are carried on board by a passenger. If a passenger is carrying prohibited goods which are hazardous or inflammable in nature on board, it may amount to a criminal offence for which claiming damages is not a legal remedy.

2. Carrying live animals as baggage

Article IX (v) of the IATA states that live animals shall not be included in the baggage of passengers travelling by air. But there are certain exceptions. In the case of Gluckmann v. American Airlines[2], the US District Court, Southern District of New York, held a dog to be luggage.

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[1] *[1961] ZLW 205*
[2] *24 Avi, 17,947*

3. Liability of carrier in case of non-issuance of ticket

Under the Warsaw convention, the liability of a carrier of air passengers is limited under certain circumstances. If an air carrier accepts a passenger without issuing a ticket, he will not be able to invoke the clause that limits his liability, and hence he will be under limitless liability. The New York State Supreme Court, Appellate Division held in its judgment in the case of Manion v. Pan American World Airways[3] on 12th May, 1981 that when no ticket is issued or when it gets lost or contains an inaccuracy the contract of carriage stands and the convention remains applicable. Hence the carrier will be fully liable for the loss.

4. Liability of carrier if ticket issued to employer

In the case of Ross (Jane Froman) v. Pan-American Airways[4], a theatrical director had been holding all the tickets of his employees. It was ruled by the Court of Appeals, New York State, on 14th April, 1949, that it was not necessary that the ticket should be issued to the passenger personally. Hence the passenger was bound by the limitation clause, which limits the carrier's liability if a ticket has been issued to the passenger. Though the ticket was held by the employer, the employee was bound by its terms and conditions.

5. Ticket delivered after boarding the aircraft

A very different attitude prevails now regarding the issue of ticket to the passenger in the US courts. In the case of Ross (Jane Froman) v.

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[3] *16 Avi, 17,473*
[4] *(1949) USAvR 168; 2 Avi 14,911*

Pan-American Airways[5], the court held that it was not necessary that the ticket should be issued to the passenger personally. He was still bound by it if the ticket was given to his employer, and the carrier's liability was limited by the Warsaw convention. But in the case of Mertens v. Flying Tiger Line[6], the ticket has not been delivered until after Mertens had boarded the aeroplane. The US Court of Appeals held on 16th February, 1965, that the ticket should be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of the liability. Such self-protecting measures could consist of deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance for the flight.

6. Liability in case of unreadable ticket

In the case of Lisi v. Alitalia Linee Aeree Italiane[7], the relevant clauses in the conditions of carriage printed on the ticket had been rendered 'unnoticeable and unreadable' due to 'Lilliputian typography', hence the passenger's attention had not been properly drawn to the liability limitations, and as a result of this he had not really been able to protect himself by taking out additional insurance. The US District Court, Southern District of New York, on 1st April, 1966, ruled that no adequate notice had been given to the passenger and that no proper issuing of the ticket had taken place. This was affirmed by the US Court of Appeals and by the US Supreme Court.

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[5] *(1949) USAvR 168; 2 Avi 14,911*
[6] *9 Avi 17,475*
[7] *9 Avi, 18,120*

7. Lisi doctrine overruled

Twenty three years after the Lisi v. Alitalia case, the US Supreme Court overruled the Lisi Doctrine as it had come to be known. In the case of Chan v. Korean Air Lines,[8] It was held unanimously that the lower courts had misinterpreted the Warsaw convention by applying the second sentence of Article 3(2) instead of the first sentence. The rule 'a defective ticket is no ticket' was deemed to be incompatible with the language of the convention and would produce absurd results.

8. Notice printed in foreign language

The question that arose in the case of X and Y v. Olympic Airways[9], was that if the passenger is unable to understand the foreign language in which the notice is printed, would the Warsaw Convention still be applicable? Was it sufficient notice of the restricted liability of the airline? Here the High Court of Greece held that the fact that the passenger did not know English and so was unable to understand the notice regarding the applicability of the Warsaw convention was not relevant. He would be bound by it no matter in what language it was printed.

9. Jurisdiction in case of air ticket purchased on website

In the case of Polanski v. KLM Royal Dutch Airlines[10], Mr. Polanski had purchased a ticket for a KLM flight from Los Angeles to Warsaw on the KLM website through his home computer, while he resided in

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[8] *21 Avi 18,229*
[9] *IATA ACLR, no.475*
[10] *2005 WL 2461*

the USA. The actual ticket was issued by Northwest Airlines, the US partner of KLM. In this case, KLM requested either Poland (the destination of the passenger) or the Netherlands (the place where the KLM website was created and maintained) as the place where the case should be heard. But the US District Court held that an electronic ticket is normally issued where it is purchased. "A contract is 'made' in the place where the last act was done that was essential to a meeting of the minds of the parties". Mr. Polanski accepted KLM's offer and performed the final act of redeeming his frequent flyer miles and paying taxes for the flight, either at his home or at the Los Angeles airport. Therefore the contract was made in California and USA was the proper place for the litigation.

10. Damages for delivery to wrong consignee by carrier

According to the provisions of the Warsaw convention, loss of goods or baggage must be assumed if the carrier cannot put the passenger of consignee into possession again, even though he knows where the goods or the baggage are. Thus, the Oberlandesgericht Frankfurt assumed loss in the case of UTA v. Societe d' Equipement d' Avions[11], when a carrier had delivered cargo to the wrong consignee and there was no way of recovering it. But the Cour d' Appel de Paris held that the consignor may claim damages for breach of contract instead of damages for loss in this case. In Dalton v. Delta Airlines the US Court of Appeals has defined the term 'loss' as follows – 'loss means that the location or even the existence of the goods is not known or reasonably ascertainable'.

[11] *RFDA 127*

11. Liability for robbery of goods from airport

Some expensive furs were stolen from a KLM hangar at the airport in the case of Rugani v KLM Royal Dutch Airlines[12]. They had been placed in storage prior to shipment. The New York City Court ruled that all necessary and possible measures had not been taken, because although there was a guard on duty, he was not armed. Hence he was not able to protect the goods as it was an armed robbery.

12. Negligence of injured person

A carrier will be exempted from liability either wholly or partly if he proves that the damage was caused by or contributed to by the negligence of the injured person. Here, in the case of Chutter v KLM Royal Dutch Airlines & Allied Aviation Services International Corporation[13], a passenger wanted to say good-bye to her family. She ignored the 'fasten seat belts' sign, and going to the door of the aircraft, did not notice that the stairs leading to the aircraft had already been removed. She fell out of the aircraft and injured her leg. The US District Court, Southern District of New York, on 27th June, 1955, held that the carrier was not liable in this case.

13. Duration of period of liability of carrier

Article 17 of the Warsaw Convention states :

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered

[12] *[1954], USAvR 74; 4 Avi 17,257*
[13] *[1955] USA vR 250*

by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

In the case of Air-inter v. Sage et al[14]., a passenger slipped and fell in an airport entrance hall, while he was in front of the check-in counter before proceeding to the departure lounge. The reason for the fall was the passenger slipping over a pool of whisky spilt on the floor by a previous traveller. Here the Cour d' Appel de Lyon (France) held on 10th February, 1976 that the fall could not be blamed on the carrier, because the airport entrance hall is a public place and not subject to the carrier's control and management. Hence the preparatory stage of air transport could not be considered as having commenced.

14. Claiming damages for accident or terrorist attack at airport

Passengers who are leaving the aircraft by descending the steps, or who are walking or riding on a bus to the terminal, or who are going through passport control and into the main baggage area, are not in the course of any of the operations of embarking or disembarking in terms of the Warsaw convention, when terrorists attack the baggage area.[15] But when passengers are assembled in an airport transit lounge to undergo the physical and handbag search at the time of a terrorist attack on the lounge, they are in the course of the operation of embarking. The passengers are under the air carrier's control at that moment. This was held in the case of Evangelinos et al. v. TWA [16]

[14] *[1976] RFDA 266*
[15] *Re Tel Aviv, 13 Avi 18,166*
[16] *14 Avi 17,101*

16. Claim for delayed baggage

The case of Opera Select v. KLM Royal Dutch Airlines[17] deals with a claim for delayed baggage. A society of opera enthusiasts regularly travelled abroad to attend performances by renowned artists, taking formal and evening dresses with them. But their suitcases often arrived with great delay, which caused them embarrassment as they had to visit the opera in casual attire. When the carrier was sued, it took the defence that there was only an obligation to try to transport the baggage on the same flight as the passengers. But the court found a firm promise to carry the passengers' baggage on the same flight, in the carrier's conditions of carriage. Hence it was held liable and directed to pay for each suitcase not arriving in time. Immediately after this judgment, the conditions of carriage were amended so that the carrier now declares that it will make an effort to carry the luggage on the passengers' flight.

17. Airline fined for serving beef to a Hindu person

G. L. Aggarwal, a resident of Palam Colony, had booked tickets on Japan Airlines for a flight to San Fransisco, in September 2004, through a travel agent[18]. He had requested either Asian vegetarian meal or food for diabetics to be served to him and his wife. However, when dinner was served to them he found that it contained beef. When the matter was brought to the notice of the airline staff, they failed to replace the food, saying that vegetarian meals were over. Believing that the airline had hurt his religious sentiment, he filed a

[17] *District Court of Haarlem (The Netherlands), 1 August, 2000*
[18] *The Indian Express, New Delhi edition, dt. 22nd October, 2008*

claim with the Consumer Disputes Redressal Forum. The forum decided on Rs.55,000/- as compensation to be paid by the airline.

The carrier then approached the Delhi Consumer Commission and argued that the available computer records pointed out that the travel agent had not specified any meal preference. Later, the complainant had simply requested for the meal option for diabetics, which, as served by the airlines, comprised non-vegetarian ingredients also for their high-protein content.

The Commission decided in favour of the airline. "In our view, a deficiency in service is different from hurting religious feelings. Religious feelings are hurt with malicious intention. Negligence in serving non-vegetarian instead of vegetarian meals, particularly when the perception of diabetic and vegetarian meals differs among international airlines, cannot be regarded as hurting religious sentiments," said Justice Kapoor. The Commission then lowered the damages to Rs.10,000/- for deficiency in service to be paid to the complainant.

7.2 Cases Relating to Space Laws

1. Damages to real property by a rocket firing test

In the case of Raymond Phil Smith and Thelma Sue Smith v. Lockheed Propulsion Company[19], the plaintiffs filed an appeal after losing an action to recover damages to their real property. This damage was allegedly caused by seismic vibrations that were activated by a static

[19] *Court of Appeal, Fourth District, Div. 2, Jan. 17, 1967*

firing rocket motor test conducted by the defendant on the adjoining lands pursuant to a contract with the United States. The complaint was based on theories of negligence and strict liability.

The court held that the defendant's activity was ultra-hazardous. The fact that the defendant found it necessary to acquire 9100 acres for its purposes, and had also earlier told the plaintiffs that it needed their property in order to conduct the test, is evidence that it recognized that there is an inherent risk in the undertaking despite the exercise of due care. In these circumstances, public policy calls for strict liability. The question whether rocket motor testing constitutes an ultra-hazardous activity was also answered in the affirmative in an earlier case of Berg v. Reaction Motors Div.[20]

2. Death of pilot of space shuttle 'Challenger'

Navy Captain Michael J. Smith died in January 1986 aboard the space shuttle Challenger, to which he was assigned as a pilot. The petitioner, as executrix of Captain Smith's estate, instituted this action on behalf of the estate and Captain Smith's survivors against three defendants: the United States; Lawrence B. Mulloy (the manager of the National Aeronautics and Space Administration's (NASA) Solid Rocket Booster Program at the Marshall Space Flight Centre); and Morton Thiokol, Inc. (the manufacturer of the shuttle's solid rocket motors). The petitioner sought damages for the wrongful death of Captain Smith, and also sought to compel NASA to debar Morton Thiokol from further work on the space shuttle program.

[20] *(1962) 37 N.J. 396*

The district court held that because Captain Smith's death occurred during activity incident to his military service, the wrongful death claim against the United States was barred[21]. The Court had earlier held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service[22]. The District Court noted that Captain Smith was on active military duty at the time of the accident and that his dependents were receiving death benefits under the Veterans' Benefits Act.

It held that when a suit against the United States is barred by the Feres doctrine, a Plaintiff may not bring the same action against a civilian government employee.

The court further held that the petitioner lacked the standing to seek to compel the government to debar Morton Thiokol. The Court of Appeals recognized that state law tort claims against individual civilian government employees are barred if they are based on an injury suffered as an incident to military service. Although the petitioner alleges injuries resulting from the manufacturer's contractual relationship with the United States, the debarment remedy would not redress those injuries. In any event, the petitioner does not come within the zone of interest protected by the debarment process. Debarment is a regulatory function performed in the public interest "for the Government's protection".

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[21] *Jane J. Smith v. United States of America, et al., (Pet. App. A12-A70)*
[22] *Feres v. United States, 340 U.S. 135 (1950)*

3. Stolen space material

United States v. One Lucite Ball[23] was a case involving actual space material, a moon rock, with a million dollar value. In 1973 a plaque was presented to Honduras by President Nixon which contained a moon rock retrieved by astronauts during one of the Apollo moon landings. In 1994, the moon rock was stolen from the Honduran President and was later sold to an American by a retired Honduran colonel. Undercover US agents were able to set up a sting and recover the moon rock. Under the Honduran Civil code, the 'innocent owner' defence was not available and the moon rock and the plaque were forfeited to the United States.

4. Asteroid ownership

Mr. Nemitz asserted private property rights on Asteroid 433, named Eros. When a NASA spacecraft landed on Eros on 12th February, 2001, he claimed compensation for parking and storage fees. Not succeeding in his attempt, he filed a complaint on 6th November, 2003 in the US District Court of Nevada[24]. His claims were based on some amendments to the US Constitution, which he believed would allow him to create private property rights in outer space. The District Court did not agree with this, nor did it consider relevant the Plaintiff's contention that the US had not signed and ratified the Moon Agreement. This decision was based on the determination that the Plaintiff could not claim creation of property rights only by registration of his claim on the Archimedes registry, or by the filing of UCC forms.

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[23] *2003 U.S. Dist Lexis 467*

[24] *Prof. Dr. I. H. Ph. Diederiks-Verschoor & Prof. Dr. Vladimir Kopal, 'An introduction to space law', 2008, Nemitz v. United States, p.155*

Mr. Nemitz then appealed to the Ninth Circuit Court of Appeals. He also asserted here that in any area where the government had not affirmatively acted, private persons could fill this vacuum. Thus he would be able to appropriate Eros in this case. The real question in this case was whether Mr. Nemitz or any person has the capacity to possess a property right in an asteroid; whether it would be a violation of the non-appropriation clause of Article II of the Outer Space Treaty. This Article is addressed to states, but the treaty as a whole indicates that natural or legal entities are also covered by it. Besides, Article VI makes the state responsible for the acts of its nationals, and they may also act only if authorized to do so by their government. The Appeal Court consequently dismissed the appeal and affirmed the decision of the District Court.