

AVIATION LAW AND POLICY SERIES

KLUWER LAW INTERNATIONAL

# **Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States**

From Warsaw 1929 to Montreal 1999

**GEORGE N. TOMPKINS, JR.**



**Wolters Kluwer**  
Law & Business

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## Aviation Law and Policy Series

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Volume 7

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### Series Editor

Pablo Mendes de Leon

*International Institute of Air and Space Law, Leiden University*

The global liberalization regime of the past two decades has fundamentally affected the operation of international air transport services.

This process calls for reflection and analysis across a wide range of legal and policy areas, including but not limited to public international air law and policy, with special reference to safety, security and environmental concerns, liability, competition law regimes, company law, and the complex relationship between European Community law and public international law.

The *Aviation Law and Policy Series* critically examines developments around liberalization of air services internationally resulting in the establishment of Open Aviation Areas; institutional questions such as the external powers of the European Community and the relationship between international organizations such as ICAO and EUROCONTROL; the coming into force of unlimited liability regimes and related case law; the granting of antitrust immunity to international airline alliances; and cooperation between competition authorities. Attention will also be paid to topical safety and security issues, and the growing impact of aviation in relation to the environment, dictating the design of emission trade systems. Last but not least, commercially oriented subjects such as aircraft financing and leasing will be addressed, both from the perspective of national and international legal regimes, taking into account practical cases and case law.

The objective of the *series* is to make a contribution to legal thinking on the multifaceted aspects of this important field of law. The publications are designed to document and anticipate the evolution of aviation law and policy in the twenty-first century.

*The titles published in this series are listed in the back of this volume.*

## Dedication

This book is dedicated to the memory of my Father, the original George N. Tompkins, who encouraged me to go to Law School rather than to pursue my dream of being a professional ice hockey player in Canada, where I was born and educated through University. My Father always counseled me to strive for perfection in whatever I do, but with the realization that perfection cannot be achieved by us mere mortals. But if you do not strive for perfection, he said to me throughout my youth and later, you will never be good at what you do. So, 53 years after becoming a lawyer, I am still striving to achieve his goal for me and to be the lawyer that Dean O'Meara of the Notre Dame Law School would expect of "one of his boys."

## About the Author

Mr. George N. Tompkins, Jr., is one of the most prominent private air lawyers worldwide as he has made major contributions to this field of law as a practicing lawyer in numerous major aviation accident cases, as a special advisor to the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA), governments in all parts of the world and individual airlines. Amongst others he has contributed to the establishment of the 1992 Japanese Initiative, the 1995/1996 IATA Inter-carrier Agreements and the Montreal Convention, 1999, on air carrier liability which is extensively discussed in this book. Mr. Tompkins is a frequent speaker at the most professional conferences and seminars. Also, he teaches private air law in the LL.M. programme of the International Institute of Air and Space Law of Leiden University, the Netherlands, in which Institute he serves as a member of the International Advisory Board. He is also a member of the Editorial Board of *Air & Space Law*, which is published by Kluwer Law International.

# List of Abbreviations

## EXPLANATORY NOTE

All authoritative court decisions in the United States, interpreting and applying the rules of the Warsaw Convention Liability System, are rendered by United States Federal trial and appellate courts, as opposed to the trial or appellate courts of any one of the individual fifty States of the United States. As a treaty, such as the Warsaw Convention or the Montreal Convention, is made by the United States and thereby is a part of the Supreme law of the Land pursuant to the United States Constitution, only a Federal Court can render an authoritative interpretation of the liability rules of the Warsaw Convention or the Montreal Convention.

In the Federal Court system of the United States, there are three levels of courts. The *first level* comprises the trial courts, that is, courts of first instance, known as United States District Courts. Decisions on the law are rendered in these courts by a single United States District Judge. The decisions of a District Judge do not have binding precedential status. For example, a decision of a District Judge is not binding upon other District Judges in the same District Court or in any other District Court. Even the District Judge who renders the decision is not legally bound in future cases by his own prior decision and he can reverse his decision in subsequent proceedings in the same case or in a future and different case than the one in which he had rendered the prior decision. Although the law decisions of a District Judge are not binding, they are persuasive on other District Judges when addressing the same legal issue.

There are ninety-four federal judicial districts in the United States, including at least one district in each State, the District of Columbia, Puerto Rico, the Virgin Islands, Guam and the Northern Mariana Islands.

The *second level* consists of Circuit Courts of Appeal, to which judgments of United States District Courts may be appealed. The ninety-four federal judicial districts are organized into twelve Regional judicial circuits, each of which judicial

## List of Abbreviations

circuit has a United States Circuit Court of Appeals. The final judgment of a District Court may be appealed to the Circuit Court of Appeals in which the particular District Court is located. For example, the State of New York has four federal judicial districts, the Eastern, Southern, Northern and Western Districts of New York; appeals from the final judgments of District Judges in these districts are taken to and heard by a panel of three Circuit Judges of the United States Court of Appeals for the Second Circuit, which comprises the States of New York, Connecticut and Vermont. The decisions of a Circuit Court of Appeals are binding precedent on all District Courts located within the Circuit rendering the decision. But the decision may be reviewed in a future case by another panel of the same Circuit Court of Appeals, or by the same panel as the one rendering the prior decision and, upon review, the prior decision may be set aside or reversed.<sup>1</sup>

The *third and final level* is the Supreme Court of the United States, which, in its discretion, may review the final judgment of a Circuit Court of Appeals. The procedure for seeking review in the Supreme Court is known as the filing of a “Petition for a Writ of Certiorari” by the party seeking review by the Supreme Court of the final judgment of a Circuit Court of Appeals. The case will be heard by the Supreme Court if four of the Justices of the Court agree that the case presents a question of law which should be addressed by the Court and reaffirmed or resolved. The decisions of the Supreme Court are binding on all courts in the United States, Federal and State.

The reported decisions of the United States District Courts are published in the West Publishing reporter series designated as Federal Supplement, or as abbreviated, F. Supp. or F. Supp. 2d, preceded by the volume number and then by the page number in the volume where the reported decision can be found; for example, 977 F. Supp. 1191 (S.D. Fla. 1977).

The reported decisions of the United States Circuit Courts of Appeals are published in the West Publishing reporter series designated as Federal, Federal 2d or Federal 3d, or as abbreviated, F., F.2d or F.3d, preceded by the volume number and then by the page number in the volume where the reported decision can be found; for example, 739 F.2d 130 (3d Cir. 1984).

The decisions of the Supreme Court of the United States are found in the official reporter series designated United States Reports, or as abbreviated, U.S., preceded by the volume and then by the page number in the volume where the reported decision can be found; for example 470 U.S. 392 (1985).

When the Supreme Court declines to review the decision of a Circuit Court of Appeals, by denying the issuance of a writ of certiorari to the Court of Appeals, the Order of the Supreme Court will appear in the United States Reports and will be cited after the citation to the Court of Appeals decision, thusly: 350 F.3d 916 (9th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The denial of a writ of

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1. See, e.g., the discussion of the decisions of the Court of Appeals for the Second Circuit in *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert denied*, 355 U.S. 907 (1957) and *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979), in s. 8.6.3. of Ch. 8.

certiorari carries no precedential weight; it means only that four Justices of the Supreme Court did not consider the decision of the Court of Appeals as raising a question worthy of review by the Supreme Court.

## ABBREVIATIONS

### A

ATA	Air Transport Association of America (USA)
A&SL	Air and Space Law (Netherlands)
Avi.	CCH Aviation Law Reports (USA)
aff'd	affirmed
aff'd sub nom	affirmed under the name

### C

<i>cert. denied</i>	certiorari denied
Cir.	Federal Circuit Court of Appeals (USA)
Civ. Ct.	Civil Court of New York
Cong. Rec.	Congressional Record (USA)
CAB	Civil Aeronautics Board

### D

DOT	Department of Transportation (USA)
Doc.	Document

### F

F. Supp.	United States District Court Reports, First Series
F. Supp. 2d	United States District Court Reports, Second Series
F.	United States Court of Appeals Reports, First Series
F.2d	United States Court of Appeals Reports, Second Series
F.3d	United States Court of Appeals Reports, Third Series
Fed. Appx.	United States Court of Appeals Appendix Reports
F.R.D.	Federal Rules Decisions Reports

### G

Guadalajara Convention/GSC	Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier. Done at Guadalajara, September 18, 1961. Entered into force, May 1, 1964. Not in force for the United States. 500 U.N.T.S. 31. ICAO Doc. 8181.
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## *List of Abbreviations*

### H

Hague Protocol/HP55	Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929, Concluded at The Hague, Netherlands on 28 September 1955.
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### I

ICAO	International Civil Aviation Organization
IATA	International Air Transport Association
IIA	IATA Inter-carrier Agreement on Passenger Liability (1995)
IPA	ATA Provisions Implementing the IATA Inter-carrier Agreement (IIA) on Passenger Liability to be Included in Conditions of Carriage and Tariffs (USA air carriers), signed May 16, 1996.

### J

JI	Japanese Initiative
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### L

LAL	Lloyds Aviation Law
LEXIS	LEXIS law reports

### M

MIA	Agreement on Measures to Implement the IATA Inter-carrier Agreement (IIA) (1996)
MP3	1975 Montreal Additional Protocol No. 3. ICAO Doc. 9147 (not in force).
MP4	Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955.
Montreal Convention/ MC99	Convention for the Unification of Certain Rules for International Carriage by Air. Done at Montreal, May 28, 1999.
MA66	The Montreal Inter-carrier Agreement 1966 “Agreement CAB 18900”

### R

rev'd	reversed
rev	review

S

sub nom	under the name of
Stat.	United States Statutes at Large
Sup. Ct.	Supreme Court

T

T.S.	Treaty Series (USA)
TAQ	The Aviation Quarterly

U

U.S.	United States Supreme Court Reports
U.N.T.S.	United Nations Treaty Series
U.S.Av.R.	United States Aviation Reports

W

WL	Westlaw Reports
Warsaw Convention/ WC29	Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, October 12, 1929.

## Foreword

This book has been written to assist international private air law practitioners in dealing with claims governed by one or more of the international law instruments and intercarrier agreements that comprise the Warsaw Liability System, which consists of: (1) the 1929 Warsaw Convention, (2) the 1955 Hague Protocol, (3) the 1961 Guadalajara Supplementary Convention, (4) the 1975 Montreal Protocol No. 4 and (5) various intercarrier agreements applicable only to claims involving passenger death or bodily injury governed by the Warsaw Convention. The Warsaw Liability System has now been consolidated and modernized in the 1999 Montreal Convention (MC99), which entered into force on November 4, 2003. To date – December 1, 2009 – there are ninety-one (91) State Parties to MC99.

This book also is intended for the use and benefit of everyone and anyone involved in the study or practice of international private air law, including students, teachers, practicing lawyers, airline in house counsel, government organizations, whether international such as the International Civil Aviation Organization (ICAO) or aviation related departments of national government bodies, judges and law clerks.

The purpose of the book has been to compile in one publication the seventy-year(70) body of Warsaw Convention 1929 jurisprudence as developed by the Courts of the United States, which will serve as the basis for the development of a body of MC99 jurisprudence, as intended by the drafters of MC99 (of which the author of this book was fortunate to be one).

This First Edition contains primarily only the body of jurisprudence prevalent in the United States, as the vast majority of Warsaw Convention 1929 court decisions have been rendered in the courts of the United States. Warsaw Convention 1929 court decisions rendered in other States eventually will find their way into this book by updated inserts, pocket parts, and eventually subsequent editions.

## *Foreword*

It is significant that many decisions rendered by the courts in other Warsaw Convention States have relied upon the developed jurisprudence in the United States. This is in keeping with the objective of the original drafters of the Warsaw Convention who, in 1925–1929, sought to establish a uniform set of rules relating to liability in the international transportation by air of passengers, baggage and cargo, an objective, which time has proven, has been achieved.

MC99 perpetuates that achieved objective as the drafters of MC99 were determined not to erode in any way the established body of jurisprudence interpreting and applying the uniform liability rules of the 1929 instrument. The early court decisions,<sup>1</sup> involving the interpretation and application of the MC99 liability rules, evidence that the expressed intent of the drafters of MC99 in this regard is being recognized, respected and judicially effected.

Hopefully, the book will serve its purpose of being a practical and educational tool for all persons dealing with legal issues involved in the international transportation by air of passengers, baggage and cargo.

George N. Tompkins, Jr.  
New York  
December, 2009

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1. See Ch. 4 for a summary of the early MC99 decisions rendered by the courts in the United States, Australia, Italy, Spain and the United Kingdom.

## Acknowledgements

As this book has been a “work in process” for some 50 years, there are a great number of people who have contributed in varying ways to the development of the end product. I shall mention and express my thanks and gratitude to the key players.

First and foremost, to the memory of Cyril Hyde Condon and Austin P. Magner, two of the original aviation law lawyers in the United States, both of whom, in 1958, provided me with the opportunity to embark upon the practice of aviation law “from the ground up.” It has been an exciting and intellectually rewarding journey from 1958 to 2009. I could never imagine having successfully “made the trip” if Cy and Austin had not issued to me the “necessary ticket” with appropriate “notice” of what lay ahead and how to deal with legal “air turbulence” along the way. I am eternally grateful to them and I have tried to pass on to those who have “boarded my aircraft” the same enthusiasm for the practice of aviation law that Cy and Austin instilled in me and the same desire to “educate” those who follow as they did for me. Thus, this book on “Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States – From Warsaw 1929 to Montreal 1999”.

My journey could not have continued or been successful without the steady hand, foresight, guidance and wisdom of my long time “navigator,” Marie Manning. She always made sure that I stayed on course, even when the legal turbulence encountered seemed insurmountable. When I was considering going to law school in 1953, a retiring lawyer friend told me that the most important person in any lawyer’s career is his secretary; he was absolutely right and I was fortunate to have Marie as my right hand for many memorable years. Marie is the one that always encouraged me to write this book one day. Well, Marie, here it is, and although you are “retired” and we have not been flying together for the past 10 years, you remain my steady course director as I continue on the course charted for me some 50 years ago.

## *Acknowledgements*

Many people played a hand in pulling together my seemingly endless pile of reference materials and case notes. Their patience, perseverance and persistence inspired me to try to make something meaningful of their work for me. They include my two daughters, Elizabeth Tompkins Landy and Genevieve Tompkins Zimmerman, or, as she refers to herself in our communications, “number 7”; Irina Vitan Rada, who volunteered to help with the typing in the early stages in her “off” time from her “day job” as New York City’s most popular Restaurant Manager; Liz Gianni-Turner and her colleagues in the Word Processing Department at Wilson Elser Moskowitz Edelman & Dicker LLP, who started pulling everything together chapter-wise; the incomparable Robin Doyle who, despite her very heavy work load as a legal assistant supreme to my son, George III, still found time to help me put the finishing touches on the manuscript, even to the extent of teaching me how to become a reasonably reliable two finger typist as a graduate of the “hunt, peck, miss and curse” school of typing. Thank you, Robin. However, you are probably not finished with this project, as I expect that George III will need your assistance when he edits future editions and supplements of this work.

Professor Pablo Mendes de Leon, Director of the Institute of Air and Space Law of Leiden University College of Law, Leiden, Netherlands, was kind enough to invite me to be a guest lecturer at the Institute on the subject of Private Air Law which forced me to prepare course materials for his LLM candidate students and also gave me the opportunity to learn from the students what it was that they expected to learn from me. As I have never been a professor of the law, but only a student and a practitioner, I could teach the students only the practicalities of the law as applied in real cases and controversies involving the Warsaw System based upon my personal experiences in handling such cases and controversies in the Courts of the United States. My first year of lecturing at the Institute – 2000 – became the beginning of the gestation period for this work. Thank you, Pablo, and also for your constructive guidance in bringing this work to fruition.

My Publisher extraordinaire, Ewa Szkatula of Kluwer Law International, to whom I casually addressed a question in June 2006 as to whether she would be interested in my doing a “book” on international private air law, which in turn caused her to “request” that I do so and do so as quickly as possible. Well, Ewa, it has taken longer than you anticipated or that I imagined, but your patient perseverance prevailed over my procrastination.

Finally, a personal note. When I entered Notre Dame University Law School in Indiana in 1953, I did so to become an FBI<sup>1</sup> Agent. To be eligible to become an FBI Agent in those days, one had to be a lawyer or a CPA. I chose the law course as I never was very good with numbers. Over the course of three years under the tutelage of Dean Joseph O’Meara and his staff at Notre Dame Law School, I learned to love the law. As a result, by the end of my second of three years in law school, I abandoned my goal of becoming an FBI Agent and decided that I wanted to be a trial lawyer.

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1. United States Federal Bureau of Investigation.

## Acknowledgements

I still recall my first day in law school, first class, first hour, when Dean O'Meara told our class that if you want to be a good lawyer, and in particular a good trial lawyer you must accept, remember and follow two cardinal principles : *First*, never believe anything that you read, see or hear in the press or via the media; to emphasize the point, he said that if you see your picture in a newspaper, call your parents and ask them who you are. *Second*, the law is a jealous mistress and so, if you marry, make sure that your wife understands that your "mistress" has first call on your time. I have strived to follow Dean O'Meara's sound and sage advice and, to my good fortune, my wife of 52 years is still with me even though my "mistress" still has first call on my time. However, it may soon be time to leave my "mistress" behind and take on new challenges. But then, I really would not know what I would do with my "spare time." And so I plan to continue the trip that Cy Condon and Austin Magner invited me to join them on in 1958.

Thank you one and all.  
George N. Tompkins, Jr.  
New York  
December, 2009