CORRESPONDENCE

EDITOR'S NOTE: *All correspondence should be addressed to the editor, McGill Law Journal, 3044 Peel St., Montreal 2, Quebec.*

TO THE EDITOR:

The article in volume six number four of the McGill Law Journal by Giuseppe Guerreri on "Wilful Misconduct in the Warsaw Convention" is a useful contribution to the now vast literature on air law.

Giuseppe Guerreri was the Research Assistant at the Institute of Air and Space Law during its 1959-60 session. Prior to coming to McGill he was admitted to the Bar of Rome in Italy; he was also an Assistant at the Institute of International Air Law at Rome University and a pupil of Professor Ambrosini, a professor who is well-known and respected in the air law field. Guerreri is, therefore, well qualified to write an article on an air law subject.

The article is an interesting discussion of the leading American cases on "*wilful misconduct*", as that expression is used in the English translation of the Warsaw Convention. It should be noted that the only authentic text of the Convention, for which the Polish Government, by agreement between the original contracting states, acts as a depository, is in the French language. In that text, article 25 contains these words:

> ". . . si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol."

The English translation reads:

> ". . . if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct."

Under the provisions of the Convention, if an air carrier is found guilty of "*wilful misconduct*" that carrier is deprived of the protection of the limitation of liability contained in the Convention. In passenger injury cases this limit is approximately $8,300.

The Common Law courts in the United States, in actions under the Warsaw Convention involving passenger injuries, including those resulting in death, in which "*wilful misconduct*" is alleged, are faced with the necessity of giving a juridical meaning to that expression. In the Common Law concept of negligence, an act of a defendant can be negligent. It can also be wilful. In cases involving an allegation of "*wilful misconduct*" as that term is used in the Warsaw Convention, the Courts must look beyond the usual concept of negligence to the intentional violation of a safety rule or to some wilfully careless act of a carrier's servant involving at the same time reckless disregard of its probable consequences. In addition, the intentional act must be the cause of the injuries suffered by a plaintiff. This concept of "*wilful misconduct*" places a heavy onus of proof on any plaintiff who makes such an allegation.

The expression "*wilful misconduct*" does not convey to jurists exactly the same meaning as "*dol ou faute équivalente au dol*". In spite of this difficulty, however, the American

and French Courts are in surprising agreement respecting the evidence which a plaintiff must lead to succeed in an action alleging against an air carrier "*wilful misconduct*" or "*dol ou faute équivalente au dol*". Guerreri states that

> "judges have been most cautious in finding the carrier guilty of '*wilful misconduct*' as claimed by one party to the suit '*pour faire sauter les limites*'".

If and when the Hague Protocol to the Warsaw Convention is ratified by thirty States, which is the required number to bring it into force, there will be substituted for Article 25 a new Article reading as follows:

> "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment".

As Guerreri points out, it is hoped that this revision will enable the Courts of the various States to reach even greater uniformity in the interpretation and intent of Article 25. Time alone will determine whether or not this hope is to be realized but the prospect seems to be favourable.

It will be recalled that Guerreri's article is part of a slightly larger pamphlet issued by the Institute of Air and Space Law as publication No. 6. This pamphlet is the subject of a short review by Professor O. J. Lissitzyn in the *American Journal of International Law* for October 1960. Professor Lissitzyn refers to the pamphlet as reading more like a student exercise than as a finished monograph. He also makes the comment that the important question of whether the Warsaw Convention creates a cause of action is omitted. While it is admitted that Guerreri's article is an elementary treatise it is, nevertheless, a useful tool in the teaching of air law.

I should add that, in my opinion, the inclusion in Guerreri's pamphlet of a discussion of the difficult problem of whether the Warsaw Convention creates a cause of action would have been a digression from the main theme. While the courts of France have decided that liability in Warsaw cases arises out of a breach of the contract referred to in the Convention and the courts of the United States have decided that liability in such cases should be founded in tort, which necessitates a search for a law creating a cause of action, this conflict of opinion has not caused these courts to differ materially in their interpretations of the expression "*wilful misconduct*". It is conceded, however, that cases relating to the problem of whether the Warsaw Convention creates a cause of action could have been included in the digest of cases.

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To THE EDITOR:

In a recent article (*Tort Liability for Strikes: Some Problems of Judicial Workmanship*, Canadian Bar Review, September, 1960) Mr. H. W. Arthurs traces the developments and reasoning adopted in the Courts to establish Union tort liability for "illegal" strikes and notes the latter-day tendency to rely on contraventions of the procedural stipulations in the various industrial relations statutes as justification for attributing liability to Unions and assessing damages against them and their officers. The weakness of this justification is admirably examined by Mr. Arthurs in his thoroughly documented article, but it may safely be assumed that it will continue to be used and Unions will continue to be penalized in damages (perhaps in growing measure) for such "illegal" action, regardless of the nature of the provocation and regardless of the penalties stipulated in the various Acts which should have, apparently, excluded recourses to the Civil Courts. I wish to call attention to some implications inherent in this situation.

While Canadian corporations have not had occasion in the recent past to resort in large measure to lockouts or mass firings, one wonders whether the present state of the Law is not such as to offer great temptations to management to resume this practice because of the favorable balance to be expected in the judicial assessment of damages. Assuming that a Company is willing to weather the temporary storm of bad publicity that might possibly result from what would be declared an intemperate action, the difficulty of proof of damages on the part of the aggrieved Union is such that, taking all factors into account, it may well seem to be one of the better calculated risks in the coming era of intensified resistance to Union demands.

With the jurisprudence becoming crystallized in the assessment of damages against Unions, and the facility with which company damages may be calculated in the modern era of cost accounting, the likelihood of Companies recovering substantial sums from the now solvent, and often wealthy, Unions is encouraging. Elaborate accounting techniques can establish the losses on an hourly basis for interruptions of production, and seasonal comparisons with previous years, juxtaposed with general economic indices, can fix profit losses within a very few points of percentage error for any given lost day or days in the year. The Courts which might be inclined to penalize Unions in disputes of this sort (and Mr. Arthurs indicates that they have not been rare, despite the tortuous reasoning often required to reach the desired conclusion) are in a better position than ever to have their assessments of *quantum* unchallenged.

The Unions, on the other hand, are virtually unable to assess the true extent of the intangible damages suffered by them because of illegal firings amounting to partial or complete lockouts and resulting in lost contests and destruction of their bargaining power.

For in what would such damages consist? The first practical effect that comes to mind in the event of firings successful enough to break the power of the Union in the plant concerned is that the remaining members would become disillusioned because of the inability of their Union to have done anything constructive for them. That the Law is such that the Union could not do anything for them is hardly a satisfactory explanation to the members.

One can imagine the meeting of the Locals where the workers, deprived of their pay cheques, in mounting insecurity and fear, are obliged to listen to Union counsel or officials explain at length that the cases for reinstatement will not be instituted: that it is the considered opinion of the officials concerned that such cases could not have been won, because the Union was obliged to prove beyond reasonable doubt that the *one* motive among the many available that prompted the Company officials to dispense with the services of X, Y or Z was that the unfortunates were members of a trade union; that there were a dozen good reasons justifying dismissal that could have been chosen by management, and two dozen bad ones that could not be disproven; that, failing an outright admission by any one of the Company officials, the pure discrimination motive charged was only speculative and not sufficiently compelling for the Judge to order reinstatement; that, of course, the Judge could not really be blamed in finding that the Union had not discharged its burden of proof because after all, the circumstances behind the crisis were not completely one-sided and uncomplicated (they never are), etc., etc. The overall impression of the few facts that would penetrate the haze of doubt and suspicion would be the confirmation of the gnawing fear that the Union was, in fact, impotent and that their loss of confidence was justified.

The only translatable financial effect of this demoralization on the Union affected is that the remaining plant workers (if they remained with the Union altogether) would moderate their demands at the next wage negotiations to such a point as not even to incur the risk of exciting the possible displeasure of the Company and minimal wage increases would mean minimal increases in dues payments — in those very few cases where dues are a percentage of wages. The difference between dues expected and dues achieved would be the extent of the damages — a very vulnerable, if not impossible, claim.

Where the dues are fixed, there would be no loss whatever that the Union could claim.

If the Union was ousted from the plant altogether, it might conceivably (after thousands in law costs had been spent) be able to claim a loss of revenue equivalent to the dues that would otherwise have been received, but the chances of success are so remote and the amount so insignificant compared to lessened wage increases that any previously aggrieved or determined management might consider it an extraordinarily

worthwhile expenditure. Furthermore, the management might prefer to deal with a thus chastened and weakened Union group that harboured the personal memory of the setback rather than a new, militant organization, and there would not be even the loss mentioned if the Union continued to represent the workers in the plant.

The other practical effect, that the organizing ability of the Union in other industries or plants was impaired, can hardly be estimated. There is no guarantee that the Union would have been able, due to a successful outcome of the negotiations, to have advanced with unabated prestige to greater organizing activities and hence greater income. This is altogether too speculative to be calculated with any accuracy and should be dismissed.

The civil risk then, is virtually one of being ordered to reinstate the fired workers and paying them back salaries — a pittance compared to the possible financial advantages to be gained in breaking the bargaining power of the Union and its hold over its members in the plant.

In the likely absence of severe civil consequences, we are left with the penalties spelled out in the Acts themselves as deterrents and the statutory penalties are so minimal, and the chances of their imposition so remote (even if processed with the necessary prior consent of the Minister, which consent is usually most reluctantly forthcoming) that some managements may well take a long second look at the advisability, from a long-range policy point of view, of breaking the letter of the law as it presently exists.

With a little judicious manipulation, the most prosaic of managements can manoeuver themselves into a position where they cannot even be accused of excessive measures. Well-disguised provocation by unwarranted delays in negotiation, assignment of Company committees unauthorized to conclude agreements, even a single firing calculated to provoke the ire of the employee group and to lead them to a protest demonstration which will justify firing for disloyalty on a mass scale, can all be used most effectively with little fear of significant retaliatory possibilities.

The temptation of constructive results worth hundreds of thousands or millions of dollars is such that the long drawn out procedures virtually condemned to futility, but if successful, resulting in five, fifty, one hundred or even the rare maximum one thousand dollar fines would, to the less moral of managements, appear overwhelming. Hiring replacement workers with no accrued seniority and therefore less privileges (in benefits and wages) is not only *not* a crime, but is approved procedure even after a strike is legally called. At the very worst, it seems, a Company stands to come out at least as well as it went in to such a situation, and the chances in the vast majority of cases are that it will come out infinitely better, particularly in a period of slack employment.

That managements in the post-war era have not had to resort to such possibly unpopular measures (if the Press could be convinced that it were in its best interests to make them unpopular by publicly condemning its advertisers) is not due to the law as much as it is due to the fact that collective bargaining has well served the purposes of the corporations who would not have otherwise been able to exact with approbation and apparent justification the price increases that the public has experienced. (See "*The Subversion of Collective Bargaining*", Daniel Bell, Commentary, March, 1960). That battle lines are being more firmly drawn in the 1960s than they were in the forties and fifties is also quite apparent, and that more extreme measures will be resorted to is more than likely.

It is unfortunate that the present state of the law is such that it seems to offer such rewards and virtual immunity to one party alone for its contravention. Without discussing the respective merits of Union or Company arguments or justifications, it is apparent that the law as drafted and interpreted is not going to be able to cope equitably with the true damage claims of the protagonists or to maintain the balance which was originally sought by legislation.

While there may be a marginal beneficial effect in employing the one-edged sword of massive civil damages to diminish the stature and strength of the few Unions of unsavoury backgrounds and policies, any large-scale use of this recourse will undoubtedly cripple the trade union movement as a whole which has had such a beneficial effect in promoting the vitality and health of democracy in the past generation.

If new legislation to protect Unions is not forthcoming (and it seems quite unlikely that it will be) the existing balance of power in favour of the corporations will have to be used quite sparingly and with great discretion by management if permanent damage is to be avoided. The larger and more responsible companies are going to have to manifest their sense of social responsibility in controlling the more impulsive managements at large now that it has become apparent that Unions can quite easily be destroyed by being lured into suicidal strikes after legal formalities have been observed, or sued out of existence if contravening them.

Union counter-measures through the law are quite illusory, and the strike as a weapon in this technologically improved age is vastly reduced in its effectiveness. U.S. Steel operating at a break-even point of 45% can obviously withstand a strike or strikes for three or four months without suffering any direct financial loss or outlay if it operates at capacity for several months prior to the expected work stoppage, and most industries, operating at a 50% or 60% break-even point, are obliged to lay off workers at one time or another during the year if there is not a strike to justify the suspension of operations.

To many observers, the spectre of Big Labour is a fiction of the thirties

that no longer has the relevance that it may have had; witness the thrashing administered to the once-fearsome Electrical Workers by General Electric Ltd. last month.

The law designed to accommodate the trade union movement in the days of its growth, when organizational problems were primary, perhaps poses very real dangers in the sixties when expansion has been virtually arrested for several years now and the problem is one of arriving at balance, harmony and co-existence.

There is a new social situation requiring changes for both management and labour, and lawyers or future lawyers called upon to act for either party under the shaky framework of the existing law are going to have to search their consciences as well as satisfy their sense of professional duty to their clients in advancing positions that can have such far-reaching effects as striking to the very roots of our democratic existence.

ARTHUR F. GARMAISE
of the Bar of Quebec

A L'ÉDITEUR:

Je suis heureux que vous ayiez bien voulu publier l'article de M. le professeur Germain Brière de la Faculté de droit de l'université d'Ottawa, sur le mariage putatif.

Cet article est intéressant à bien des égards et c'est pourquoi je regrette que sur certains points l'auteur n'ait pas cru devoir nous faire une démonstration plus complète alors que le corps de son texte le laissait espérer.

Deux points en effet méritaient de plus amples développements, à savoir: la question de la preuve de la bonne foi et celle de la nécessité d'une célébration du mariage. Ces deux questions prêtent à controverse et une analyse des motifs des décisions judiciaires relevées par M. Brière eût été bienvenue.

Mais je reste persuadé qu'en écrivant cet article l'auteur aura su éveiller la curiosité de ses lecteurs et spécialement celle des étudiants de notre faculté, notamment sur toute la partie concernant les effets du mariage putatif.

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