FLIGHT-WATCH

VOLUME 133 By: Alan Armstrong, Esq. JUNE 2003

DEATH OF ASTHMATIC PASSENGER DUE TO FLIGHT ATTENDANT'S REFUSAL TO MOVE HIM FROM THE SMOKING SECTION RESULTED IN A VERDICT AGAINST THE AIR CARRIER IN EXCESS OF THE $75,000 CAP CUSTOMARILY APPLIED ON INTERNATIONAL FLIGHTS.

Volume 109 of the June, 2001 issue of *Flightwatch* contains a brief overview of the Warsaw Convention. Also, you will find at our website: www.alanarmstronglaw.com under the caption of "Frequently Asked Questions" a discussion of the Warsaw Convention and the limitations of damages available under the Convention. In the matter at issue, there was an asthmatic passenger flying aboard an Olympic Airways flight who was sitting in close proximity to the smoking section. The passenger and his wife requested on several occasions that the flight attendant move the passenger from the area within three rows of the smoking section. The flight attendant refused. The passenger then had a fatal asthmatic attack.

An action was brought against the airline under the Warsaw Convention, the contention being that the refusal to move the asthmatic passenger who was sitting within three rows of a non-partitioned smoking section was an "accident" under Article 17 of the Convention. The trial court found in the affirmative, with the result that the case would proceed to trial. The second contention by the airline was that the $75,000 cap under the Warsaw Convention's Article 22 should be applied. However, the trial court found that the refusal to move the passenger from the proximity was willful misconduct under Article 25 of the Warsaw Convention. Accordingly, the damages were not limited to $75,000. The trial court found that the flight attendant had knowledge of the standard of care in the industry and refused to move the asthmatic passenger from the vicinity of smokers.

At the time this article is prepared, the United States Supreme Court has stayed enforcement of the judgment.

Husain v. Olympic Airways, 316 F.3d. 30, 829 (9th Circuit 2002); *Judgment Stayed* Husain v. Olympic Airways, Case No. 02-3751 (U.S. March 11, 2003).

AIRLINE'S DECISION TO REFUSE BOARDING TO THREE BROWN-SKINNED MEN RESULTS IN CIVIL RIGHTS LAWSUIT

The case arose out of the attempt of three brown-skinned men to board a flight of Continental Airlines. A passenger on the flight said that she felt very uncomfortable in the presence of those three men. The passenger also claimed the "three brown-skinned men"

were behaving suspiciously. The airline checked the identification of the gentlemen and determined they presented no security [1]risk. However, the airline refused the "three brown-skinned men" to reboard the flight.

The three brown skinned men sued the airline seeking injunctive relief. They claimed intentional race discrimination under the Equal Protection Clause of the United States Constitution *See* 42 U.S.C. § 1981; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d; and New Jersey's statutes prohibiting discrimination. The airline contended that it was immune from litigation based upon the provisions of 49 U.S.C. §44902 in that the actions of the would-be passengers "might be inimical to safety." The airline moved to dismiss, but the trial court denied the motion. At the pleading stage of the litigation the trial court decided that the three brown-skinned men had met their burden in going forward with the action.

Dasrath v. Continental Airlines, Inc., 228 F.Supp.2d 531 (D.N.J. 2002).

AIRLINE CAN BE SUED FOR AGE DISCRIMINATION AGAINST PASSENGERS

The case arose out of the attempt by Mrs. Aquino and her husband (both 90 years of age) to board a flight to the Philippines. The gate agent asked for their age. When told they were 90 years of age, the gate agent told the Aquinos that they would need a certificate from the airport's medical clinic certifying they were healthy enough to board the flight. Mr. and Mrs. Aquino were evaluated by the medical staff who[2] said they were healthy, but a certificate was not provided enabling them to board the flight. The airline refused to allow them to board the flight to the Philippines. Later they traveled to the Philippines on another airline.

Mrs. Acquino sued on her own behalf and as successor in interest to her husband. She alleged the airline was guilty of discrimination. The airline moved for summary judgment claiming that the claims of the plaintiffs were preempted by the Warsaw Convention and the Airline Deregulation Act of 1978. The trial court granted summary judgment to the airline finding that the claims of the Acquinos were preempted.

The California Court of Appeals reversed the decision of the trial court in part, finding that neither the Warsaw Convention

P-38 Lockheed Lightning

Porky II at the 2003 Columbus Air Show

nor the Airline Deregulation Act of 1978 preempted the claims of the plaintiffs. With regard to the theory of the airline that the Warsaw Convention preempted the claims of the plaintiffs, the California Court of Appeals noted that the Warsaw Convention does not take effect unless the passenger is "on board the aircraft or in the course of any of the operations of embarking or disembarking." The thrust of the plaintiffs' claims were that they were not allowed to board the aircraft. Accordingly, the Warsaw Convention would not afford the airline a defense. With regard to the Airline Deregulation Act, the Court of Appeals noted that it was designed to deregulate airline services that were contractual in nature such as ticketing and baggage handling. The Court of Appeals held that the Airline Deregulation Act would not preempt state law tort claims with only a peripheral effect on deregulation.

Acquino vs. Asiana Airlines, Inc., 130 Cal. Rptr.2d, 223 (Court of Appeals, 2003).

P-40N Warhawk

P-40N Warhawk

North American SNJ Texan

Consolidated PBY Catalina

North American P-51B Mustang

Alan Armstrong is engaged in the general
practice of law with an emphasis in the following areas:

Aviation Matters, Personal Injury,
Professional Negligence (Malpractice),
Products Liability

Phone: (770) 451-0313 Fax: (770) 451-0317
Email: alan@alanarmstronglaw.com

Please contact us at
flightwatch@alanarmstronglaw.com
with any questions, comments, or if you no longer wish to receive Flight-watch via email.