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THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-1807

TITLE EASTERN AIR LINES, INC., Petitioner v. ROBERT F. MAHFOUD

PLACE Washington, D. C.

DATE January 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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EASTERN AIR LINES, INC., :

Petitioner :

v. : No. 83-1807

ROBERT F. MAHFOUD, :

Respondent :

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Washington, D.C.

Tuesday, January 15, 1985

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:06 a.m.

APPEARANCES:

RICHARD M. SHARP, ESQ., Washington, D.C.;

on behalf of Petitioner

GEORGE E. FARRELL, ESQ., Washington, D.C.

on behalf of Respondent.

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1                   P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: Mr. Sharp, you may  
3 proceed whenever you're ready.

4                   ORAL ARGUMENT OF RICHARD M. SHARP, ESQ.,  
5                   ON BEHALF OF PETITIONER

6                   MR. SHARP: Mr. Chief Justice and may it  
7 please the Court:

8                   This case, like the preceding case, also is  
9 governed by the Warsaw Convention as that convention is  
10 supplemented by the Montreal Agreement. Now, the  
11 question here is whether pre-judgment interest may be  
12 awarded in excess of the limitation of liability that is  
13 set forth in those agreements.

14                   In this case, we unfortunately do have an  
15 accident. In June of 1975, Eastern Flight 66 crashed  
16 short of the runway at Kennedy International Airport in  
17 New York City. As a result of that crash, approximately  
18 91 cases were brought in the federal courts. These  
19 cases were consolidated in the Eastern District of New  
20 York. They were consolidated for the purposes of  
21 pre-trial discovery and then a liability trial was  
22 held.

23                   Now, among these 91 cases were a number of  
24 cases involving passengers who were engaged in  
25 international carriage when the plane crashed. Now, as



1 to these passengers -- that is, those passengers who  
2 were engaged in international carriage -- both the  
3 witness and the Montreal Agreement apply.

4 Under those agreements, a carrier's liability  
5 is limited to \$75,000 per passenger. In these  
6 international cases, Eastern moved for partial summary  
7 judgment. The basis of its motion was that partial  
8 summary judgment should be given in the form of an order  
9 that would limit Eastern's liability to \$75,000 in the  
10 international passenger cases.

11 In this particular case, the case involving  
12 Bernard and Odile Mahfoud, Eastern's motion was  
13 ultimately granted by the judge sitting in the Western  
14 District of Louisiana. The judge sustained Eastern's  
15 position, but he also sustained Respondent Mahfoud's  
16 position, which was that, even though the limitation of  
17 liability amounts to \$75,000 pre-judgment interest may  
18 be awarded on top of that amount.

19 QUESTION: What would you say about  
20 post-judgment interest?

21 MR. SHARP: Your Honor, we think that  
22 post-judgment interest is not presented to the Court.  
23 It is a different type of award. Post-judgment interest  
24 reflects interest that is to be earned on a debt that  
25 has been liquidated.

1 QUESTION: Post-judgment interest is simply  
2 interest on a debt, is it not?

3 MR. SHARP: That's right. Pre-judgment  
4 interest is an element of the Plaintiff's compensatory  
5 damages. It's an effort to bring the Plaintiff's  
6 damages up to the date of judgment. Pre-judgment  
7 interest, for example, is often awarded by juries, if  
8 not by judges sitting as the tryer of fact.

9 In this case, we contend that the courts below  
10 failed to give the full intended purpose and effect to  
11 the limitation of liability found in the Warsaw  
12 Convention and the Montreal Agreement. Now, at the  
13 outset I want to make clear that the limit of liability  
14 that must be applied by the Court to this case is the  
15 limitation of liability that is contained in the  
16 Montreal Agreement, but the Montreal Agreement must be  
17 interpreted in light of its historical context as a  
18 highly specific amendment to the Warsaw Convention.

19 QUESTION: Mr. Sharp, would you help me by  
20 telling me where in the papers the language you rely on  
21 is found?

22 MR. SHARP: Yes, Your Honor. On page 3 of our  
23 brief are the provisions of the Warsaw Convention. At  
24 page 4 is -- sorry, 3 and 4 are the provisions of the  
25 Montreal Agreement. We have attached as an appendix to

1 this brief a more fuller statement of the Montreal  
2 Agreement. It's sometimes more difficult to locate in  
3 the library than the Warsaw Convention.

4 The Warsaw Convention here is the basic  
5 document. It governs international air carriage among  
6 120 signatory nations. The Montreal Agreement, when  
7 it's applicable, is applicable because it simply makes  
8 two changes in the Warsaw Convention system. The  
9 changes are that the Montreal Agreement raises the level  
10 or the limit of liability; and the second change is that  
11 the Montreal Agreement waives one of the carriers'  
12 primary defenses. It's the Article 20 defense.

13 Now, because the Montreal Agreement and the  
14 limit of liability in that agreement is an extension of  
15 the limit of liability found in the Warsaw Convention,  
16 it's appropriate to look first at the language of the  
17 Warsaw Convention, and the special language of  
18 limitation in that convention is found at page -- or at  
19 Article 22.1, and that is at page 3 of our opening  
20 brief.

21 Now, Article 22.1 contains three sentences,  
22 and the first sentence limits the carrier's liability to  
23 a fixed sum. The second sentence then goes on to create  
24 a narrow exception to that limit. The exception is for  
25 those nations that require defendants to make periodic

1 payments to the plaintiff rather than making a lump sum  
2 payment to the plaintiff.

3 And then the third sentence provides a means  
4 for raising the level of the limit, and that means is by  
5 special contract between the carrier and the passenger.

6 QUESTION: But suppose, Mr. Sharp, the  
7 Defendant used excessive delaying tactics before and  
8 during the trial and the judge decided to penalize him  
9 \$5,000?

10 MR. SHARP: Your Honor, if the penalty were in  
11 the form of a sanction for a violation of court orders  
12 or court rules, we believe that that would not come  
13 within the --

14 QUESTION: Well, weren't there some delays  
15 charged in this?

16 MR. SHARP: Well, Your Honor, I don't believe  
17 there were delays charged. The courts in Louisiana,  
18 particularly the Fifth Circuit -- I'm sorry, the  
19 district court in Louisiana -- noted that there had been  
20 considerable passage of time.

21 The point that the court said that we had been  
22 dilatory about was that we had raised an objection to a  
23 motion for summary judgment, but our objection was  
24 sustained in the Court of Appeals, the Second Circuit  
25 sitting, to determine that our position was in fact the



1 correct one.

2 I think the fundamental point to grasp here in  
3 terms of the delay is that Eastern answered this  
4 complaint approximately six weeks after it was filed.  
5 At that time we said that the Warsaw Convention and the  
6 Montreal Agreement limit our liability. At any time  
7 from that point on, had the Plaintiff chosen, he could  
8 have moved for a complete summary judgment asking the  
9 carrier to pay the sum of \$75,000, and that would have  
10 extinguished the liability that Eastern had to that  
11 Plaintiff.

12 That motion for complete summary judgment was  
13 never made in this case. The Warsaw Convention, its  
14 limitations on liability, were pressed by the carrier,  
15 not by the Plaintiffs.

16 I wanted to return now to the first sentence  
17 in Article 21. Now, that sentence states that in the  
18 transportation of passengers the liability of the  
19 carrier for each passenger shall be limited to the sum  
20 of 125,000 francs. Now, it's important to consider here  
21 what the drafters of this sentence did.

22 First of all, they did not place the limit on  
23 a certain part of the Plaintiff's recovery. Rather,  
24 they wrapped the limit around the concept of the  
25 carrier's liability. Now, I want to reach now beyond

1 this first sentence a bit to discuss this idea of  
2 liability in terms of the convention as a whole.

3 The concept of liability that is referred to  
4 in the first sentence is a liability that is to be  
5 determined by a court. It's the liability of the  
6 carrier at the time the Plaintiff's claim is reduced to  
7 a liquidated sum. That is normally when the Plaintiff's  
8 claim is reduced to judgment.

9 The Warsaw Convention in its many parts, first  
10 of all it creates forums for the Plaintiff, jurisdiction  
11 in certain national courts. Second, it creates  
12 liability for the carrier. Third, it creates defenses  
13 for the carrier. Fourth, it incorporates national law  
14 to determine the amount of damages that may be due to  
15 the Plaintiff.

16 The upshot is that this convention, the basic  
17 purpose of the convention, the basic effect of the  
18 convention, is to create liability and to bring that  
19 liability to judgment. And it's that liability that is  
20 covered by the limit found in Article 22.1, the first  
21 sentence.

22 Now, we get confirmation of that position from  
23 the second sentence in Article 22.1. The second  
24 sentence we believe again confirms that the liability  
25 that must be limited is the carrier's liability at the

1 time of the judgment.

2 I would like to read the second sentence. Its  
3 text is that: "Where, in accordance with the law of the  
4 court to which the case is submitted, damages may be  
5 awarded in the form of periodical payments, in that  
6 event, the equivalent capital value of said payments  
7 shall not exceed 125,000 francs" -- 125,000 francs, of  
8 course, being the limit fixed in sentence one.

9 Now, this second sentence is the only sentence  
10 in the convention that speaks to the time value of money  
11 and also of the limitation on liability. Now, what the  
12 second sentence does is it expressly authorizes national  
13 courts to order carriers to pay out more than 125,000  
14 francs if they do it over a period of years.

15 But the sentence makes plain that the limit --  
16 that is, the limit contained in the first sentence --  
17 requires that these payments not exceed the capital  
18 value of 125,000 at the date of the award.

19 QUESTION: At what rates?

20 MR. SHARP: There is no specification of the  
21 rate. I take it at the date of judgment one would use  
22 an annuity table or the like to determine the  
23 appropriate rate for the period.

24 QUESTION: Is that what has been done?

25 MR. SHARP: Your Honor, this is principally a

1 procedure followed in Germany, and the minutes of the  
2 Warsaw Convention, the German delegates submit a paper  
3 that they would purchase an annuity or require the  
4 payment of an annuity under the German system. I gather  
5 that the civil code today of Germany also provides  
6 that.

7 QUESTION: I thought you meant on the date of  
8 closing they would buy an annuity, whatever annuity  
9 could be provided for \$75,000.

10 MR. SHARP: Yes, yes. I think in modern court  
11 terminology this would resemble what we call a  
12 structured settlement today. It would be an annuity  
13 purchased at the date of judgment or provided for by the  
14 Defendant at the date of judgment.

15 Now, I want to direct the Court's attention  
16 then to another article of the convention, and that is  
17 Article 24.2. This article appears at page 4 of the  
18 reply brief, and in this article the drafters of the  
19 convention have undertaken to remind national courts  
20 that they may not apply their local laws regarding  
21 damages in a way that places some of the recovery  
22 outside of the limit.

23 Article 24.2 states -- and I'm going to  
24 interpolate here because the cross-referencing is very  
25 cumbersome. But Article 24.2 states that in the cases



1 covered by Article 17 -- that is, cases involving death  
2 or bodily injury -- any action for damages, however  
3 founded, can only be brought subject to the conditions  
4 and limits set out in this convention.

5 In other words, this is the gentle reminder  
6 back to the national courts: Don't rework your damage  
7 concepts, your damage laws, in a way that attempts to  
8 circumvent the limit of liability.

9 QUESTION: Mr. Sharp, may I just ask on the  
10 periodic payments sentence. You refer to the fact that  
11 the amount shall not exceed the 125,000 francs as of the  
12 date of judgment.

13 MR. SHARP: Yes.

14 QUESTION: It doesn't say date of judgment  
15 here. Are there cases that refer to that date?

16 MR. SHARP: Your Honor, I take it from the  
17 language of the text, and this is how I do it. First,  
18 you have to determine the law that is to be applied, and  
19 it's the law of the court to which the case is  
20 submitted. You can have as many as four different  
21 international fora in the Montreal system. So you have  
22 to have the suit on file before you know which national  
23 law is going to apply.

24 But then, more particularly in response to  
25 your question, it refers to damages being awarded in the

1 forum of periodic payments. And it's the fact of the  
2 award, the awarding of damages.

3 QUESTION: But if the law in this certain  
4 place were settled the damage issue should always be  
5 computed as of the date of injury -- I'm not suggesting  
6 that's the law in any state -- then one could read it  
7 differently. I kind of thing that's the issue in the  
8 case, whether or not it's correct to insert the words  
9 "from the date of judgment."

10 MR. SHARP: We have no indication, in either  
11 the history drawn from the minutes of the Warsaw  
12 Convention or our own research, that there is any  
13 computing done prior to the date of judgment.

14 QUESTION: But is there any indication that  
15 that is the date from which computing should be done?

16 MR. SHARP: Well, yes. I looked into the rest  
17 of the convention. It conceives of a claim that is  
18 being brought to judgment. The idea of liability itself  
19 must be liquidated, it must be reduced to a sum  
20 certain.

21 When you have a limit such as they designed  
22 here, a limit of 125,000 francs, the limit is not  
23 applicable -- that is, it's not able to be applied --  
24 until you know the amount of the Plaintiff's claim or  
25 the amount of the carrier's liability, that is, since

1 it's the limit on liability.

2 And this convention then provides the means  
3 for determining the liability in a judicial proceeding.  
4 So it's reading a number of provisions together, plus  
5 the specific language in the second sentence that speaks  
6 of awards or awarding damages, that leads me to believe  
7 that the critical point for determining the value of the  
8 limit is the time of judgment.

9 Now, what we conclude from the text of the  
10 Warsaw Convention is that it -- first of all, it covers  
11 all elements. That is, the limitation on liability  
12 covers all elements of the Plaintiff's recovery against  
13 the carrier. And second, as I mentioned to Justice  
14 Stevens, the limit fixes the carrier's maximum liability  
15 as of the date of the judgment.

16 Now, the lower court in its ruling that  
17 pre-judgment interest can be awarded over and above the  
18 limitation of liability is inconsistent with this  
19 reading of the Warsaw Convention that I have tried to  
20 give to the Court.

21 I want to turn now to the text of the Montreal  
22 Agreement. We think the text of the Montreal Agreement  
23 confirms the fact that pre-judgment interest cannot be  
24 awarded over and above the limit of liability. The  
25 relevant provision in the Montreal Agreement appears at

1 page 4 of our brief, and that provision states in part  
2 that the limit of liability for each carrier for death,  
3 wounding, or other bodily injury shall be the sum of  
4 \$75,000 inclusive of legal fees and costs.

5 Now, once again, the limit is wrapped around  
6 the concept of liability, the concept of the carrier's  
7 liability. And again, it's liability as determined  
8 after litigation. There is this reference to fees and  
9 legal costs. The limit is not by its terms restricted  
10 to certain items in a Plaintiff's recovery.

11 The second point I want to make with respect  
12 to the text of the Montreal Agreement is by way of  
13 rebuttal to my opponent, and that is that Montreal's --  
14 Warsaw's limit -- the limit contained in the Montreal  
15 Agreement, rather, is, like the limit contained in the  
16 Warsaw Convention, simply a limit. It's a ceiling. It  
17 is not a guarantee of recovery in the amount of  
18 \$75,000.

19 Now, the way to prove this point textually, I  
20 think, is by looking at the model notice that is  
21 contained in the Montreal Agreement, and that is at page  
22 A-3. It's the appendix to our brief. There the  
23 drafters of the Montreal Agreement set down the notice  
24 that carriers will give to passengers, that is, the  
25 notice of limitation of liability.



1           And that notice is to provide that the  
2           liability of the carrier "is limited in most cases to  
3           proven damages, not to exceed \$75,000." The notice  
4           makes clear that the Plaintiff must prove their  
5           damages. The fact that the Plaintiffs must prove their  
6           damages shows that the Montreal limit is a ceiling on  
7           liability as of the date of judgment.

8           QUESTION: Well, is there any question about  
9           that?

10          MR. SHARP: My opponent argues that what the  
11          Montreal Agreement has done is effectively created a  
12          liquidation of damages provision, and it's liquidated  
13          damages in the amount of \$75,000 that are due at the  
14          time of the accident.

15          I think there's a practical answer to that.  
16          I've tried now to give you the textual reading as to why  
17          that is not so. The practical answer to that is that  
18          nobody would have agreed to that provision because this  
19          limit, the \$75,000 limit, not only reaches liability for  
20          wrongful death, but it reaches liability for personal  
21          injury and other bodily damage.

22          The examples that the Court was working with  
23          in the preceding argument of minor, important injuries  
24          but minor injuries to a human being, would be  
25          recompensed at \$75,000 per injury if one were to

1 conclude that the limit in effect develops a liquidated  
2 damage for injuries at the time of the accident.

3 QUESTION: Suppose we went to trial and came  
4 up with a verdict of \$60,000. Would you be making the  
5 same argument about pre-judgment interest?

6 MR. SHARP: No, Your Honor. You could recover  
7 pre-judgment interest. You could recover \$15,000 worth  
8 of pre-judgment interest.

9 QUESTION: You would go along with that?

10 MR. SHARP: That's right.

11 QUESTION: It isn't pre-judgment interest per  
12 se that you're concerned about?

13 MR. SHARP: No, no, it's not. It's anything.  
14 This could be -- this could be pain and suffering. It  
15 could be any item of the Plaintiff's injury. It could  
16 be lost future earnings.

17 QUESTION: Is that because pre-judgment  
18 interest is really part of compensatory damages?

19 MR. SHARP: That's right, that's right, Your  
20 Honor. In this case it's awarded by Louisiana statute.

21 QUESTION: And the only issue in this case  
22 does relate to pre-judgment interest?

23 MR. SHARP: Yes, Your Honor. The fact is --

24 QUESTION: Your deposit took care of  
25 post-judgment.

1 MR. SHARP: Right. We deposited the full  
2 amount four months prior to the rendering of the  
3 judgment in this case.

4 QUESTION: How long has this case been in  
5 litigation? Something like ten years?

6 MR. SHARP: I believe the complaint was filed  
7 in December of 1975.

8 QUESTION: The rule you want us to adopt  
9 certainly wouldn't encourage early settlement of airline  
10 accident claims, would it?

11 MR. SHARP: Well, Your Honor, my own position  
12 is that pre-judgment interest is not really likely to be  
13 much of an inducement to settlement on behalf of the  
14 Plaintiff or the Defendant. There is a case cited, the  
15 Bond case from West Virginia that is cited in our brief,  
16 where the court faces up to, how useful is pre-judgment  
17 interest as a real means for inducing settlement, and  
18 concludes that where the Defendant has a substantial  
19 defense and the Plaintiff has a substantial claim, it's  
20 likely they would take account of pre-judgment interest  
21 in settling the case, in valuing the case, but it's not  
22 likely that one or the other would take down the flag  
23 because pre-judgment interest was available.

24 I think that is probably in my judgment the  
25 most realistic analysis of pre-judgment interest.

1 QUESTION: In this case it's a very  
2 significant percentage of the recovery, isn't it?

3 MR. SHARP: Yes, it is a very significant  
4 percentage of the recovery against Eastern. It's only a  
5 pittance of the recovery against the United States.

6 QUESTION: Well, I understand, but we're  
7 talking about the \$75,000 recovery.

8 MR. SHARP: That's right.

9 QUESTION: And it was several years after the  
10 complaint was filed that you made the deposit?

11 MR. SHARP: It was just several days after the  
12 district court granted our motion limiting our liability  
13 to \$75,000. I would say to you that our motion was  
14 opposed, and that one of the grounds that the motion was  
15 opposed on was that the limit was unenforceable in light  
16 of the Second Circuit's decision in TWA.

17 QUESTION: But it is true that the deposit was  
18 made several years after the claim was filed?

19 MR. SHARP: That's right, that's right. I  
20 want to rebut that point, Your Honor, with the fact that  
21 at any time, if the Plaintiff had chosen to move for  
22 complete summary judgment, I think it's likely that he  
23 would have prevailed on this record, and he never did.

24 Mr. Chief Justice, if there are no further  
25 questions by the Court, I think I would like to reserve



1 the balance of my time.

2 CHIEF JUSTICE BURGER: Very well.

3 Mr. Farrell.

4 ORAL ARGUMENT OF GEORGE E. FARRELL, ESQ.,  
5 ON BEHALF OF RESPONDENT

6 MR. FARRELL: Mr. Chief Justice and may it  
7 please the Court:

8 The provisions of the Warsaw Convention, as  
9 well as the intent of the signatories to it and to the  
10 Montreal Agreement, clearly show that there never was a  
11 prohibition to exceeding the limits of liability, for  
12 the payment of interest or otherwise. As pointed out a  
13 moment ago --

14 QUESTION: Just what do you incorporate in the  
15 "or otherwise"?

16 MR. FARRELL: The "otherwise" would be the  
17 payment of attorneys' fees and expenses in addition to  
18 the Warsaw limit, the initial Warsaw limit, Your Honor.

19 As pointed out, the first paragraph of Article  
20 22 does establish a liability limit of \$8300. That  
21 second sentence of that same paragraph, however, which  
22 refers to periodical payments, does provide for  
23 interest. As Petitioner admits in his brief at page 14  
24 and his reply brief at page 6, these words mean that the  
25 award for proven damages cannot exceed the Warsaw limit,

1 but if the damages are paid over a period after they  
2 accrue an additional sum may be paid to the claimant,  
3 which the Petitioner says is time value of money, the  
4 basis for interest.

5 QUESTION: That's the annuity arrangement that  
6 you're speaking of, that we were speaking of before.

7 MR. FARRELL: Right.

8 QUESTION: But on the ordinary rules of  
9 construction, since they expressly talk about interest  
10 there but omit it in the previous discussion, what's the  
11 consequence of that rule of construction?

12 MR. FARRELL: The consequence is, Your Honor,  
13 that no matter what you call it, interest is interest.  
14 And that rule provided for pre-judgment interest, or  
15 that provision.

16 QUESTION: If they're paid over a period of  
17 installments.

18 MR. FARRELL: It would be, Your Honor --

19 QUESTION: As under the German arrangement.

20 MR. FARRELL: I'm not sure that was the German  
21 arrangement. But as we allege, Your Honor, and as we  
22 urge the Court to rule, the damages accrue at the time  
23 of death in a death case, and if you don't pay them for  
24 seven years, as was this instance, in this case, you pay  
25 interest. Interest is for the use of money.

1 QUESTION: Well, that's the issue in this  
2 case, isn't it?

3 MR. FARRELL: It is, Your Honor.

4 Now, the signatories of Warsaw and Montreal  
5 never considered that the liability limitation was  
6 absolute. The Warsaw limitation was never strictly  
7 applied by the signatories other than the United  
8 States.

9 Both Drion in his treatise on "Limitation on  
10 Liabilities in International Air Law" at page 114 and  
11 Lowenfeld in 80 Harvard Law Review at 508 point out that  
12 the constant practice of the courts when applying the  
13 limitation provision of Warsaw was to exceed the  
14 limitation by awarding attorneys' fees and legal  
15 expenses against the airline.

16 In addition, at least Belgium and France  
17 awarded interest on top of the Warsaw limit. No one  
18 outside the United States had previously thought that  
19 the Warsaw Convention limitation could not be exceeded  
20 by the application of domestic law.

21 Now, this procedure had been going on for 25  
22 years before the United States became aware of it at The  
23 Hague Conference in 1955. When the delegates did become  
24 aware of it, by their own volition they changed or had  
25 it changed so that The Hague Protocol permitted the

1 payment of attorneys' fees and expenses on top of the  
2 limit.

3 Now, this was done by the insistence of the  
4 United States that maximum recoveries were desired and  
5 that the expenses of litigation oftentimes ate up the  
6 amount of the award. There could be little doubt that  
7 if the issue of interest because of delay had been  
8 considered, that it would have been approved also. In  
9 other words, the delegates neglected to deal with the  
10 problem; they would wish to have it relieved --  
11 resolved, rather -- if they had been aware of it.

12 QUESTION: Are you suggesting we should go  
13 ahead and finish their task for them?

14 MR. FARRELL: No, I think that we don't have  
15 to do that, Your Honor. We are permitted by the  
16 articles of the Warsaw Convention to use domestic law,  
17 and our domestic law provides for interest on a damages  
18 award. We're not trying to change the Warsaw Convention  
19 in any way.

20 QUESTION: Well, I understood your opponent as  
21 agreeing that pre-judgment interest is awardable up to  
22 the overall limit on damages provided for under the  
23 Montreal Agreement.

24 MR. FARRELL: Well, that is his position.  
25 It's not very consistent, however.



1 QUESTION: Well, I suppose that depends in  
2 part on whether you think pre-judgment interest is part  
3 of damages for compensation.

4 MR. FARRELL: Under the law of the United  
5 States, Justice O'Connor, and particularly under the law  
6 of the court where this case was tried, in Louisiana,  
7 pre-judgment interest is not a part of damages.

8 QUESTION: What law do you think we look to  
9 for determining pre-judgment interest, the state law, or  
10 is that a matter of federal law, or what is it?

11 MR. FARRELL: We look to the law of the  
12 court. Under the articles --

13 QUESTION: The law of the court?

14 MR. FARRELL: The law of the court which has  
15 the case, Your Honor.

16 QUESTION: What do you mean, state law if it's  
17 a state case?

18 MR. FARRELL: If it is a case, in this case in  
19 Louisiana in a federal court, you would look to the  
20 federal court to apply Louisiana law. And Louisiana law  
21 in this instance provided for pre-judgment interest.

22 QUESTION: How would that result in uniformity  
23 of liability, which was a primary goal of the Warsaw  
24 Convention and the Montreal Agreement?

25 MR. FARRELL: Liability would accrue at the

1 time of the death in this case, and that's pursuant to  
2 the law of the United States and all jurisdictions that  
3 I know of. At that time damages would be established.  
4 If the case were worth X number of dollars, then no  
5 matter whether it took ten years to resolve it, it was  
6 still worth X number of dollars at the time of death.

7 The delay in between is the period that we're  
8 actually talking about in this case, whether or not you  
9 can delay a case for seven years and still not pay  
10 anything in addition to the actual damages which accrued  
11 at the time of death.

12 Does that answer your question?

13 QUESTION: Your opponent says that you could  
14 have had a summary judgment much earlier if you just  
15 asked for it.

16 MR. FARRELL: Well, I think maybe he forgot  
17 that we did move for summary judgment, and Eastern  
18 opposed it. Now, the motion for summary judgment was  
19 made when the cases were in New York. This was a  
20 multi-district litigation case and it was in the Eastern  
21 District of New York.

22 Both the Government and the United States --  
23 the Government here, the United States, and Eastern Air  
24 Lines were Defendants. Just before trial was to  
25 commence on liability the United States, pursuant to an

1 agreement which it had made with Eastern Air Lines,  
2 decided not to contest liability.

3 Now, the agreement was that Eastern would pay  
4 60 percent of all the losses and the Government would  
5 pay 40 percent. But for that agreement, Eastern would  
6 get entire control over all aspects of the litigation,  
7 including settlements, trials, damages trials,  
8 whatever.

9 When the Government decided not to contest  
10 liability, there obviously now was a solvent party.  
11 There was no reason to continue with Eastern, and the  
12 Plaintiff in the case, Respondent here, moved for  
13 summary judgment. Eastern opposed it, saying that, on a  
14 technical ground, saying that the Plaintiff did not have  
15 capacity to sue.

16 There were several -- two more appeals on  
17 this, and two years later -- two years, in fact, after a  
18 judgment was rendered by the jury finding Eastern both  
19 negligent and liable -- the Second Circuit agreed that  
20 there was a technical deficiency and sent the case back,  
21 said that you must give them notice so that they can  
22 decide whether or not they want to put in written papers  
23 and so forth.

24 QUESTION: But you didn't file in New Orleans  
25 -- I mean, in Louisiana?

1 MR. FARRELL: Later on, Justice Marshall, the  
2 case was remanded to Louisiana for trial on damages.

3 QUESTION: Did you make any summary motions  
4 there?

5 MR. FARRELL: No, Your Honor, because the  
6 damages trial then was imminent. After Eastern had been  
7 found negligent by jury trial and the United States was  
8 in the case, there was no reason. We still did not have  
9 the decision on whether or not the Plaintiff had  
10 capacity.

11 QUESTION: Well, we realize that Louisiana law  
12 is civil law, don't we?

13 MR. FARRELL: Yes, Your Honor.

14 QUESTION: So it's impossible to get any --  
15 the 49 states to adopt civil law, so this is going to be  
16 different from the other states.

17 MR. FARRELL: No, I don't think so, Your  
18 Honor. The law of Louisiana in regard to, in this case,  
19 damages is very similar to every other jurisdiction.

20 QUESTION: That it's not damages?

21 MR. FARRELL: I beg your pardon?

22 QUESTION: That pre-trial interest is not  
23 damages?

24 MR. FARRELL: Pre-trial interest in Louisiana  
25 is not damages, that's correct.



1 QUESTION: Mr. Farrell, let me ask a foolish  
2 question, because I've missed something here. In  
3 effect, the Government has conceded liability?

4 MR. FARRELL: Correct.

5 QUESTION: Why don't you collect against the  
6 Government?

7 MR. FARRELL: The problem was that we could  
8 not do it because the district court in New York had, in  
9 one of its decisions, had stated that it was not going  
10 to decide capacity to sue and was going to remand the  
11 Louisiana cases back to Louisiana and let the Louisiana  
12 court make that decision.

13 When Eastern appealed the case -- knowing very  
14 well, incidentally, that the Plaintiff did have capacity  
15 to sue either in Louisiana or in New York -- the case  
16 then was in the hands of the Second Circuit and didn't  
17 come back for two years.

18 QUESTION: May I ask another bad question --

19 QUESTION: Don't you still have a claim  
20 against the Government?

21 MR. FARRELL: We had the claim, Your Honor,  
22 but we had no -- we could not go to trial because the  
23 capacity to sue issue was never decided, and the case  
24 was in the hands of the Second Circuit, which didn't  
25 decide it for two years.

1 QUESTION: Then the Government has not  
2 conceded liability?

3 MR. FARRELL: If the Government had not  
4 conceded?

5 QUESTION: No, I'm asking has it?

6 MR. FARRELL: The Government did concede --  
7 well, it didn't concede liability. It agreed not to  
8 contest liability; for all practical purposes, the same  
9 thing. Eventually damages were tried against the United  
10 States.

11 QUESTION: I guess when you say "for all  
12 practical purposes" I fall off and don't follow.

13 MR. FARRELL: I meant that a concession of  
14 liability and an agreement not to contest it as far as  
15 the Plaintiff is concerned is not a lot different,  
16 although it has some different aspects, we agree.

17 QUESTION: I was going to ask you, I notice  
18 you said that Eastern knew that there was no issue about  
19 capacity, and I'm puzzled that Eastern would know it  
20 when the judge didn't know it.

21 But that's not really the question I had, and  
22 that is, you talked about Eastern's negligence. Is that  
23 because a large number of the passengers were just  
24 domestic passengers and they were relevant to that?  
25 Because negligence I wouldn't understand would be

1 relevant to your case.

2 MR. FARRELL: The majority of the passengers  
3 here were domestic passengers, although there were quite  
4 a few Warsaw passengers involved.

5 QUESTION: And their negligence really didn't  
6 have anything to do with your client's claim, who was an  
7 international passenger?

8 MR. FARRELL: Well, at that time, since the  
9 motion for summary judgment -- the district court found  
10 that our motion was proper, so we had -- we were not in  
11 the trial on damages against Eastern -- or on liability  
12 against Eastern. Our case was out of it because we had  
13 -- under Warsaw, Montreal, the district court gave us  
14 judgment.

15 You were asking how Eastern knew about the  
16 capacity and the Government did not.

17 QUESTION: Not the Government, the court.

18 MR. FARRELL: Or the court, I'm sorry, the  
19 court. Eastern had in its hands for two years prior to  
20 this motion certified copies of tutorship, which is the  
21 procedure in Louisiana, and letters of administration,  
22 which are the procedure in New York. And in addition,  
23 just two or three days before the Plaintiff's motion in  
24 the case, before Respondent's motion, Eastern had served  
25 upon him an offer of settlement, and it was served three

1 days before.

2 And in the offer of settlement, Eastern had to  
3 know that he had -- or it's an admission, an admission  
4 that he was -- or did have capacity to sue. So Eastern  
5 knew it very well. It had never come before the court  
6 because the court had never wanted to decide that  
7 issue. It was going to send it back to Louisiana.

8 Now, the Petitioner states that he agrees that  
9 you can have pre-judgment interest, just so it doesn't  
10 exceed the limitation. I'd like to just give you an  
11 example of what the result would be if this were  
12 correct. If you had, for instance, a \$25,000 judgment  
13 or if the damages were worth \$25,000, and the airline  
14 didn't pay it for say a year and the interest rate was  
15 ten percent, he would permit the \$2500 of pre-judgment  
16 interest to be added onto the amount that the airline  
17 owed the claimant.

18 Now, if it were say \$74,000 and the judgment  
19 was not paid until the year after and the interest was  
20 the same ten percent, the Petitioner would permit  
21 payment of interest in the amount of \$1,000, but no  
22 more. The remaining \$6,400 earned on a \$74,000 damages  
23 award would remain in the pocket of the insurance  
24 company.

25 Now, in the subject case, where the judgment



1 was for \$75,000 for decedent and the airline kept the  
2 money made on the investment of that amount for its own  
3 use for over seven years, the Petitioner's position  
4 would not permit any interest, even though the damages  
5 award, because of the delay, was only worth about  
6 \$31,000, permitting the airline's insurers to pocket  
7 approximately \$44,000 per decedent for its own account  
8 or, under its own figures, a total of \$87,000.

9 QUESTION: Well, that analysis would support  
10 an argument that this was not a very good treaty.

11 MR. FARRELL: No, Your Honor, we're not trying  
12 to change the treaty. We're merely saying that the  
13 provisions of the treaty permit domestic law to be  
14 applied, but the treaty could not operate without  
15 domestic law. It really provides guidelines and, as  
16 this Court held in the Franklin Mint case, it's a  
17 flexible treaty. It wasn't meant to be narrowly  
18 construed.

19 QUESTION: Well, I suppose your opponents  
20 would argue that you're the one that's trying to  
21 narrowly construe it. I suppose the treaty, like any  
22 other treaty, is supposed to be construed in accordance  
23 with its terms, not either "narrowly" nor "broadly."

24 MR. FARRELL: Your Honor, pre-judgment  
25 interest was never mentioned in the treaty, so we have

1 to look to the background to see if we can interpret it  
2 properly. As I tried to point out in the beginning, the  
3 signatories never thought that exceeding the limitation  
4 of Warsaw was any problem. They all did it.

5 QUESTION: For attorneys' fees and costs.

6 MR. FARRELL: Yes, Your Honor. Well, expenses  
7 is what they said. I'm not sure what "expenses" were.  
8 But the principle is the same.

9 QUESTION: When did the courts of the United  
10 States first begin awarding pre-judgment interest in  
11 tort cases?

12 MR. FARRELL: I don't know, Your Honor, but  
13 it's been for a long time, and even today some courts do  
14 not.

15 QUESTION: When it's a jury verdict you can't  
16 really find it out, can you, if the jury takes it into  
17 account?

18 MR. FARRELL: Well, Your Honor, in a case like  
19 this, in a death case, as I'm pointing out, the damages  
20 accrue at the time of death. So if you don't pay it,  
21 it's not in the jury's hands. It's a ministerial  
22 procedure that the clerk of the court says you have to  
23 pay so much interest on it until you pay it.

24 It doesn't change the treaty, it doesn't  
25 change the law of damages. It just is a fairness, a way

1 of proceeding.

2 Now, the signatory United States never  
3 considered pre-judgment interest as an integral part of  
4 proven damages, as Petitioner would have the Court  
5 believe. The United States chairman --

6 QUESTION: Mr. Farrell, suppose the State of  
7 Louisiana passed a law and said that in all wrongful  
8 death statutes, if they involve the Warsaw Pact they  
9 shall include judgment on interest, pre-judgment  
10 interest. Would that be good?

11 MR. FARRELL: I would think so. Under the  
12 local law, it shouldn't be any problem. That wouldn't  
13 affect the treaty any.

14 QUESTION: Well, if they say that in all cases  
15 under the Warsaw Pact the state may, at its will, add  
16 \$15,000 to the \$75,000?

17 MR. FARRELL: Well, I think now you're getting  
18 into a different problem. You're changing now the  
19 limitation.

20 QUESTION: Well, put down the same amount of  
21 money; would that be a different problem?

22 MR. FARRELL: If you change -- you cannot  
23 change the limitation, Justice Marshall, because only  
24 the Congress can do that, or perhaps this Court. But  
25 awarding interest on a judgment does not change anything

1 in Warsaw or does not change anything in Montreal.

2 QUESTION: But it adds money.

3 MR. FARRELL: No, it doesn't add money. It  
4 merely makes the award --

5 QUESTION: More money.

6 MR. FARRELL: Yes, it -- it makes it  
7 adequate.

8 QUESTION: But this isn't the wording,  
9 interest on a judgment. We're talking about  
10 pre-judgment interest. So doesn't it really turn on how  
11 we characterize it, whether it's a part of compensation  
12 to the victim or not?

13 MR. FARRELL: Well, as I was going to point  
14 out, Your Honor, the United States' position at  
15 Montreal, as stated by Chairman Lowenfeld, was that  
16 recovery for death or injury would presumably be based  
17 on some combination of earning power, life expectancy,  
18 and, in the case of death, degree of dependence of the  
19 survivors.

20 He didn't say anything about interest,  
21 interest being a part of damages. There's no express  
22 language in Warsaw or Montreal either permitting  
23 pre-judgment interest or excluding it.

24 Miller in her treatise on "Liability in  
25 International Air Transport," in discussing delay



1 damages under Article 19, gives some insight. She  
2 states that: "Where the convention is silent, the lex  
3 fora will determine the conditions under which the  
4 damages allegedly due may be compensated."

5 QUESTION: But there's no silence here.  
6 There's a very fixed \$75,000 statement.

7 MR. FARRELL: I meant, Your Honor, that it's  
8 silent as to interest. We're not saying that you exceed  
9 the limitation. The limitation was the damages which  
10 were awarded for the death, the damages which accrued at  
11 the time of death. The interest merely is for  
12 reimbursement for the use of that money by the insurance  
13 company when it didn't pay for seven years.

14 QUESTION: If you had an ordinary domestic  
15 negligence case where the Defendant was insured by  
16 public liability insurance in the usual way, but the  
17 limit of the policy was \$75,000 -- now, it is often  
18 suggested, whether true or not, that insurance companies  
19 who take over the defense of these cases delay as long  
20 as possible so they can keep getting the interest on  
21 their own money in their own bank or portfolio.

22 Do you think any pre-judgment interest would  
23 be added to the \$75,000 limit on liability of the  
24 insurer?

25 MR. FARRELL: I would say, Your Honor, that if

1 it was in a jurisdiction that permitted pre-judgment  
2 interest, it always would be added.

3 QUESTION: In other words, the limit of the  
4 policy would go up?

5 MR. FARRELL: No, the limit of the policy  
6 would stay the same. But the fact that they didn't pay  
7 it on time would -- the interest would be awarded on top  
8 of it.

9 QUESTION: Now you're talking about  
10 post-judgment interest.

11 MR. FARRELL: Well, it would --

12 QUESTION: Could the insurer, the insurer, be  
13 liable for any more than \$75,000 on any theory at all?

14 MR. FARRELL: The insurer would only be liable  
15 for damages up to the extent of the policy. Again, but  
16 if he didn't pay it, if it's a death case, he was liable  
17 at the time of death for \$75,000.

18 QUESTION: Well, your opponent has conceded,  
19 as I understand it, that if they didn't pay the judgment  
20 they would be liable for interest on the judgment. I'm  
21 sure he --

22 MR. FARRELL: Well, he didn't get the judgment  
23 until seven years after the accident, Your Honor. We're  
24 saying that the amount accrues at the time of the death,  
25 and if you pay it seven years later you pay interest on

1 it. If it were only an injury amounting to \$5,000 and  
2 you didn't pay it for seven years, you would pay  
3 interest on the seven years, over that period of time.

4 I might say that the Respondent here never did  
5 oppose the Warsaw limit, as intimated by Petitioner.  
6 Franklin Mint was mentioned to the district court after  
7 it was handed down in a slip opinion, to show that this  
8 was another case.

9 Franklin Mint could never have been used in  
10 this case by the court. It was prospective. It had no  
11 bearing whatsoever here. And I might say that, on the  
12 other side of the coin, Eastern Air Line depended upon  
13 the Domangue case, which is the basis for this decision  
14 in the Mahfoud case.

15 I might conclude by saying that denying  
16 pre-judgment interest in this case would fail to effect  
17 any purpose of the convention's framers or signatories.  
18 The decision of the district court, as affirmed by the  
19 Court of Appeals, ensures that a Warsaw-Montreal  
20 recovery is not diminished by the simple strategy of  
21 delaying payment until the award diminishes in value.

22 The judgment should be affirmed.

23 CHIEF JUSTICE BURGER: Do you have anything  
24 further, Mr. Sharp?

25 REBUTTAL ARGUMENT OF

1 RICHARD M. SHARP, ESQ.,

2 ON BEHALF OF PETITIONER

3 MR. SHARP: I wanted to try briefly to clarify  
4 some of the facts relating to how this litigation was  
5 handled. There were 92 cases at the high water mark in  
6 the litigation. When the case was fixed for liability  
7 trial on September the 18th, that number had been  
8 reduced to 54.

9 On September the 18th, 1978, 18 of the 54  
10 cases were international cases of the Warsaw-Montreal  
11 variety. 36 were domestic cases that were going to be  
12 tried on the ordinary issues of damages and negligence  
13 outside the Warsaw Convention.

14 The trial counsel for Eastern was prepared for  
15 a six weeks liability trial on issues of whether the air  
16 traffic controllers and the like had caused the crash,  
17 when the Plaintiffs on the day of trial -- that is, the  
18 Warsaw Plaintiffs -- and in some cases on the preceding  
19 day to trial orally moved for summary judgment, for  
20 partial summary judgment in the sum -- I'm sorry. They  
21 did not ask for \$75,000. They just asked orally that  
22 Eastern be declared liable to them.

23 Eastern did not say it was not liable for the  
24 accident under Warsaw, but it said that it was not  
25 liable to them, to the Plaintiffs; that there was an



1 individual -- there was a dispute of fact over who  
2 should be the Plaintiff.

3 The reason for that was that in almost half of  
4 the international cases there were more than two human  
5 beings that were contesting for the position of  
6 representing the estate or of bringing the wrongful  
7 death claim against the estate. Eastern was reserving  
8 its position so that it would be liable to the proper  
9 Plaintiff and not also be liable to the improper  
10 Plaintiff.

11 In the Mahfoud case there was not a contest,  
12 but the papers did not show that. Counsel is faced with  
13 15 different oral motions for summary judgment. He  
14 takes the position, I would like to have that in  
15 writing, as Rule 56 entitles me to have it in writing.  
16 I would like to have ten days notice. In ten days he  
17 can pull together the facts and determine whether there  
18 is in fact a dispute with Mahfoud. That was never  
19 done.

20 Now, the issue of summary judgment was  
21 revisited. It was revisited approximately a year later  
22 in proceedings to amend the summary judgment, and at  
23 that point -- at that point the Plaintiffs moved to  
24 amend the summary judgment.

25 Eastern urged the trial judge to decide the

1 issue of capacity now. The trial judge did not do  
2 that. The Plaintiff's counsel for Mahfoud at page 41  
3 proffered an affidavit -- this is 41 of the joint  
4 appendix -- proffered an affidavit, and in the affidavit  
5 they suggested that any summary judgment against Eastern  
6 make clear that Eastern is not precluded by the judgment  
7 from raising its defense of lack of capacity. In other  
8 words, we're trying to get the legal issues solved and  
9 they are making clear that the legal issues are reserved  
10 for another day.

11 Now, I disagree with Mr. Farrell on the point  
12 concerning whether Mahfoud ever contested the  
13 application of the limit. There is a four-page brief in  
14 the record at pages 902 to 906 -- it's in the unprinted  
15 portion of the record before the Court -- in which  
16 Mahfoud urges the district court to declare that the  
17 limit is unenforceable.

18 I want to make two other points, and that is  
19 that counsel for the Plaintiff quite properly mentioned,  
20 after the Warsaw Convention it became evident, at least  
21 to some of the drafters at Hague and Montreal, it became  
22 evident that some courts were applying legal fees and  
23 costs above the limit, and in that event --

24 CHIEF JUSTICE BURGER: Your time has expired,  
25 counsel.

1 MR. SHARP: Thank you, Mr. Chief Justice.

2 CHIEF JUSTICE BURGER: Thank you, gentlemen.

3 The case is submitted.

4 (Whereupon, at 12:03 p.m., argument in the  
5 above-entitled case was submitted.)

6 \* \* \*

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the  
ached pages represents an accurate transcription of  
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#83-1807 - EASTERN AIR LINES, INC., Petitioner v. ROBERT F. MAHFOUD

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that these attached pages constitutes the original  
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)



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