

Liability and Compensation in International Aviation Disasters

By :
Dr. Omar Hassan Ads
LL. B., M.C.L., LL.M., Ph.D.

Lecturer in Law
At The Egyptian Police Academy and the Police College
of Kuwait.

Introduction :

In the Twentieth Century a new branch of law came into existence known as "Air Law"(1). It concerns itself with the legal problems of the use of airspace and the problems that may arise from operation of aircraft. "Aircraft" are said in Annex of **The Paris International Convention Relating to the Regulation of Aerial Navigation of 1919** to "Comprise all machines which can derive support in the atmosphere from reactions of the air". The same definition is included in **The Convention on International Civil Aviation** signed at Chicago in 1944, which superceded the Paris Conention of 1919, and which is almost universally accepted(2). Notwithstanding the scientific progress in the building and operation of aircraft, they still give rise to a considerable risk of international di-

-
- (1) For the development of Air Law see Cooper, "Air Law a Field for International Thinking", *Explorations in Aerospace Law*, 3 (1968).
 - (2) See, "The Chicago Convention - After Twenty Years," *Ibid* P. 439.

sasters which in turn raises the question of civil liability and claims for compensation from the victims.

Two different kinds of claims for compensation may arise from an aviation disaster, apart from that based on workman's compensation which is outside the scope of this study. The first are claims for damage suffered by persons on the surface. These include claims for loss of life, personal injury, or property damage. The second are claims for damage suffered by passengers. These include claims for death, personal injury and damage to goods and luggage. Although both kinds of damage may result from one single aviation disaster, the rules governing the two kinds of claims vary to some extent because the relation between the person liable and the injured person is not the same in both cases. There may be no relation whatsoever between the operator of an aircraft, and the injured persons. For instance, a crash over a residential area in a foreign country. On the other hand, there is a contractual relationship between the passengers who may suffer injury as a result of such disaster and the air carrier. This difference in relationship has been considered in formulating the law governing the question of liability and compensation in air law at both the national and international level.

It is a principle of international air law that every state has complete and exclusive sovereignty over the airspace above its territory. It is, therefore, at liberty to exclude or admit such foreign aircraft as it may determine,(3) to regulate by its national legislation the question of liability in both cases and to subject any foreign aircraft allowed to overfly its territory to its regulations, laws and jurisdiction. However, it was felt that air transportation and operation of aircraft is international by its nature and possesses a great economic importance for every state, and that the liability question in this field should be governed by uniform rules of international law that guarantee adequate compensation to potential victims of an aviation disaster, achieve equality in treatment of the actions for compensation in the courts of different countries, yet at the same time do not hinder the development of transnational transportation by air. As a result of the considerable efforts in this field, the two

(3) See, "Air Transport and World Organization", Ibid P. 357.

kinds of damage that may occur from an aviation disaster became subject to international conventions which will be subject to our discussion in this study.

The Rome Conventions :

The first international effort to provide for uniform rules of liability for damage suffered by third parties on the surface as a result of aircraft flights was manifested in the **"Convention For The Unification of Certain Rules Relating To Damage Caused By Aircraft To Third Parties On The Surface"**, opened for signature at Rome on 29th May, 1933(4). It was ratified by five states, Belgium, Brazil, Guatemala, Romania and Spain which was enough to bring it into force between these states. Although it was not ratified by any of the Big Powers, it contains important principles that were the cornerstone for all the subsequent international conventions regulating civil liability for activities that may cause disasters in foreign territories. It provided for: limitation of liability, compulsory insurance, and strict liability (absolute liability) channelled to the operator of the aircraft to govern claims for compensation arising from damage caused by aircraft in flight to persons or property on the surface.

On October 7, 1952 a more detailed convention, that took into account the development in air transportation and the factors that limited the ratification of Rome Convention of 1933, was open for ratification in Rome to supersede the former. This became known as the **"Rome Convention On Damage Caused By Foreign Aircraft To The Third Parties On The Surface"**. It came into force on February 4, 1958 after it was ratified by seven States.

This Convention is applicable in case of damage caused on the surface of the territory of a contracting party, or to a ship or aircraft on the high seas registered in the territory of a Contracting Party,(5) by an

(4) For text see Hudson, "International Legislation", Vol. 6, P. 334.

(5) Article. 23(2) reads, "For the purpose of this Convention a ship or aircraft on the high seas shall be regarded as part of the territory of the State in which it is registered.

aircraft registered in the territory of another Contracting Party or anything falling from it. It excludes cases having no international aspect by making no provision for damage caused by an aircraft within the state in which it is registered. It does not apply to damage caused by military, customs or Police aircraft, but applies to any other aircraft operated by natural or legal person including a state(6). At the same time it excludes the application of its provisions from damage caused to an aircraft in flight, or to persons or goods on board such aircraft. There raise separate issues and as will be seen fall within the realm of Warsaw Convention.

The Convention also contains a provision by which the application of the Convention can be limited by a contract between the persons suffering the damage and the person liable under the terms of the Convention. Such contract will be subject to the national law, of the state in whose territory the damage occurred, to decide its validity, Article 25 reads;

“This Convention shall not apply to damage on the surface if liability for such damage is regulated either by a Contract between the person who suffers such damage and the operator or the person entitled to use the aircraft at the time the damage occurred, or by the law relating to workmen's compensation applicable to a contract of employment between such persons.”

In brief this Convention imposes absolute liability upon the operator of the foreign aircraft causing the damage, limits his liability in amount and in time, provides for compulsory insurance or guarantee and makes provision for a single forum.

The Warsaw Convention :

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of October 12, 1929 concerns itself with the second aspect of liability arising from an aviation disaster, that

(6) Article. 30.

is the liability of the carrier for damage sustained by passengers in air transportation. The object of this Convention is to provide uniform rules with regard to matters concerning jurisdiction, applicable law, basis of liability, and the limitation of liability in cases involving the relation of the air carrier and passengers and their goods. It is the outcome of two international conferences held in Paris in 1925 and Warsaw in 1929, and the work done by the interim **Comite Internationale Technique d'Experts Juridique Aeriens** (CITEJA) created by the Paris Conference(7). The Convention is limited in application to Contracts of international carriage by air of passengers, luggage or goods, it does not apply in the event of injury to or death of persons other than passengers. These international contracts are those made with an air carrier of any nationality, in which the place of departure and destination are within countries who are High Contracting Parties, or in which those places are both within the territory of the same High Contracting Party and there is an agreed stopping place in some other state, even though that state is not a party to this Convention (Art. 1). It applies to International Carriage performed by aircraft for reward or performed gratuitously by an air transport undertaking.

Under the Convention the carrier is liable for loss of life, or bodily injury of a passenger if the accident which caused such damage took place actually on board of the aircraft or in the course of embarking or disembarking. But his liability with regard to loss or damage of registered luggage and goods covers all the period in which the goods and luggage are in his charge whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever (Art. 18). If the journey is performed by air but through the medium of different air carriers, it will be considered for the purposes of the Convention as an undivided carriage, providing that it has been regarded by

(7) See Kennelly, J., "A Novel Rule of Liability : Its Implication", 37 J. Air L., 344 (1971). For the Background of the Convention see also, Calkins, G. N., "The Cause of Action Under The Warsaw Convention", 26 J. Air L. and Comm., 218 (1959).

the parties as a single operation, "whether it had been agreed upon under the form of a single Contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of a contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party".(8). Where carriage by air is performed by various successive carriers, however, each carrier accepting passengers, baggage and cargo is subject to the rules of the Warsaw Convention, and is treated as if he were a party to the Contract in so far as that contract deals with the part of the carriage performed by him. "It should be clearly understood, however, that a carrier who issues a ticket for carriage by the services of another is acting only as an agent of the actual carrier and the Contract is, therefore, with the carrying airline, not with the issuing airline"(9). In other words the right of action for compensation will be only against the carrier who was performing the carriage when the disaster or event giving rise to the action occurred.

As the air carriage sometimes forms only a stage of the journey, Article 31 limits the application of the Convention to that part of the carriage performed by air which falls within the terms of the Convention.

The Convention applies to carriage performed by the state itself or by other legal persons "regardless of the nationalities of the litigants, provided the carrier has issued a ticket giving adequate notice that the Convention might apply"(10).

The first amendment of the Warsaw Convention is **The Hague Protocol** of 29th September 1955 which came into force on August 3, 1963

(8) Article. 7 (3).

(9) Seabrooke G.A., "Air Law", 248 (1964).

(10) Keiner, R. "The 1966 Carrier Agreements : The United States Retains the Warsaw Convention", 7 Va. J. Int. L., 142-143 (1966).

after it was ratified by thirty states.(11). In general the Hague Protocol did not affect the basic aims of the Warsaw Convention or the main principles adopted therein. It increased the limit of liability of international air carriers by 100 percent, and modified the circumstances under which the carrier would not enjoy limitation of his liability(12). It was signed by the United States but was never ratified by it on the ground that the upper limit of liability was too low(13).

Another Supplementary Convention was signed on September 18, 1961 in Guadalajara, Mexico entitled a **“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”**(14). It came into force on May 1, 1964 after it was ratified by five states. The object of the Supplementary Convention is to remove the confusion in the interpretation of the words of the Warsaw Convention and to give a clear definition of who is to be regarded as carrier for the application of the convention(15). This problem was

-
- (11) See, Mc Nair, “The Law of The Air”, 240 (1964); see also Lowerfeld and Mendelsohn, “The United States and the Warsaw Convention”, 80 Harv. L. Rev., 504 (1967).
 - (12) For the Changes made by the Hague Protocol see Report on the Warsaw Convention as amended by the Hague Protocol, prepared by the Association of the Bar of the City of New York, Committee on Aeronautics and presented to the States Meeting of the Association on March 10, 1959, 26 J. Air L. and Comm., 263 - 265 (1959).
 - (13) For discussion of the United States views with regard to the Hague Amendment see, Lowerfeld, op. cit. note 11, P. 511.
 - (14) For text see ICAO Doc. 8181 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.
 - (15) For the reason for the Supplementary Convention, see, Mc Nair, op. Cit., Note. 11, PP. 227 - 229.

subject to two different opinions : (a)The carrier is he who has concluded in his own name a Contract for the carriage of passengers or goods; (b) the carrier is he who actually performs the carriage governed by the Convention,(16).

If the international carriage is performed in part by an actual carrier who is not a successive carrier, or wholly performed by a carrier or carries other than the contracting carrier, according to the first opinion the convention does not apply. It does apply according to the second opinion. The Guadalajara Convention settled this problem and provided clearly for the application of the rules of the Warsaw Convention in cases in which the whole or part of the international carriage by air is affected by an actual carrier other than the contracting carrier. McNair states that, "the Convention provides, in effect, that where a contract for international carriage, made between the passenger, or consignor, and the contracting carrier, is performed, either in whole or in part, by another carrier (the actual carrier), both the contracting carrier and the actual carrier are subject to the rules of Warsaw Convention"(17).

Although **The Hague Protocol 1955** raised the amount available for compensating the victims of an aviation disaster, the United States was not satisfied with this limit but failed in attempts to increase the upper limit of the carriers liability in the Hague Protocol. On November 15, 1965 the United States gave notice of denunciation of the Warsaw Convention effective from May 15, 1966(18). Pursuant to Article 22 (1) of the Warsaw Convention which gives the carrier and the passenger the right to increase the limit of liability by special agreement, an agree-

(16) See Drion, "Limitation of Liabilities in International Air Law", 133 (1954).

(17) Mc Nair, op. cit. note 11, P. 227.

(18) 53 U.S. Dep't State Bull., 923 (1965). See Lowenfeld, op. cit., note. 11, P. 497.

ment was reached under the auspices of the International Air Transport Association by the operators of flights to and from the United States. Under this "**Montreal Agreement**", passengers on participating carriers going to, from, or stopping in, the United States are subject to a limit of liability of 58,000 Dollars or 75,000 Dollars inclusive of legal fees, per passenger, regardless of fault on the part of the air carrier. In other words this agreement imposed the principle of absolute liability on the carrier in addition to increasing the limit of liability(19). As a result of the Montreal Agreement the United States withdrew its denunciation of the Warsaw Convention on May 14, 1966 just before it came into effect(20), when the agreement was signed by over 30 airlines, the United States pressed for an even higher liability limit to be included in an international amendment to the Warsaw Convention and it regarded the Montreal Agreement as a provisional until further amendment could be made(21).

The most important amendment which has in fact greatly revised the legal rules of the Warsaw Convention was adopted in 1971. Its importance is derived from the fact that in its present form the amendment is likely to be acceptable to the vast majority of States. Of central significance is its acceptability to the United States. This amendment now restores the possibility of international uniformity and equal treatment of all air passengers which had been the hope of the drafters of the original Convention. Tompkins in his evaluation of the Warsaw Convention in 1970 stated that "today, we have anything but uniformity in the application of the limitation of liability rule contained in the Convention. There are now several limitations of liability which can apply in an accident arising on the same domestic or international flight. The appli-

(19) For a Complete discussion of this agreement see, Keiner, op. cit. note. 10, p. 140; and for text see. P. 155.

(20) 54 U.S. Dep't State Bull., 955 - 957 (1966).

(21) For the efforts to amend the Warsaw Convention system of liability see, Tompkins, G., "Limitation of Liability by Treaty and Statute", 36 J. Air L. and Comm., 427 (1970).

cation of the Convention to any case depends solely upon the routing set forth in the passenger ticket. For example, you can be flying from Dallas to New York and be subject to the Warsaw Convention if your ticket includes a stop in another Warsaw Convention country or, if it is a round trip ticket with Dallas as the originating point, so long as it includes a stop in any other country, whether or not a party to the Warsaw Convention. A journey Dallas/New York/London would be Warsaw transportation since the United States and Great Britain are both parties to the Convention. However, a ticket providing for transportation Dallas/New York/London/Istanbul would not be subject to the Warsaw Convention since Turkey is not a party. On the other hand, if the ticket read Dallas/New York/London/Istanbul/Dallas, the transportation would be subject to the Warsaw Convention since it would originate and end in a Warsaw Country, the United States, and would involve stops in other countries even though one of them is not a party. Finally, if the journey were reversed and the ticket provided for transportation Istanbul/London/New York/Istanbul, the transportation would not be subject to the Warsaw Convention, since neither the origin nor the destination is in a Warsaw Country”(22). Under the auspices of the International Civil Aviation Organization, the Legal Committee of ICAO at its session in 1970, prepared a draft amendment to the Warsaw Convention which was the basis for the Diplomatic Conference held at Guatemala City in March 1971 which resulted in **The Guatemala City Protocol** to Amend the Warsaw Convention(23). The principles adopted in this Protocol will be discussed under the relevant headings in the following sections(24).

(22) Ibid P. 425.

(23) For text see, 10 International Legal Materials, 613 (1971).

(24) In general see, Fitzgerald, G., “The Guatemala City Protocol to Amend The Warsaw Convention”, 9 Can. Yearbook Int. L., 217 (1971); Man-
kiewicz, R., “Warsaw Convention, The 1971 Protocol of Guatemala
City”, 20 Am. J. Comp. L., 335 (1972); and Note, “The Guatemala City
Protocol to the Warsaw Convention and the Supplemental Plan Under
Article 35 A : A Protocol to Increase Liability and establish A No -
Fault System For Personal Injuries and Wrongful Death in Inter-
national Aviation”, 5 N. Y. U. J. Int. L and Politics, 313 (1972).

1. Nature of Liability

The Nature of Liability with regard to damage suffered by third parties on the surface is different from that regulated by the Warsaw Convention, as it is not based on a contractual relationship but is a liability which is created and limited by law irrespective of the will of the parties. The Rome Convention of 1952 in line with the earlier Rome Convention of 1933 adopted the principle of absolute or strict liability. It provides for compensation without proof other than that the damage was caused by an aircraft in flight or persons or things falling therefrom. In other words liability is imposed regardless of negligence or fault for the risks involved and the operator is liable for the acts of his servants or agents when performing the activity. Article 1 reads,

"Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention".

The Convention relieves the victims of an aviation disaster who come within the scope of the Convention from the burden of proving fault or negligence on the part of the persons liable or his servant's or agents, but to get the compensation they still have to prove causation between the injury suffered and the aviation disaster, governed in this respect by the law of the competent court.

The concept of absolute liability can be justified in the cases contemplated by the convention on many grounds. First, on economic grounds the damage caused by the activity should be considered as a general cost of the activity not to be borne by the victims but by airlines which are in the best position to absorb the costs of aviation disasters and which can pass them to the general public. Drion states that, "in fact it is a sound principle of economics that the cost arising from any industry be borne by that industry. If it is felt desirable to support an industry, the way to do so is by subsidizing it, not by burdening incidental victims with the damages caused by it. This serves to gauge the economic value of the activity and at the same time to keep the entire loss from falling on one unprepared to meet it"(25). Second, since

(25) Drion; *op. cit.*, note 16, P. 12.

potential victims of an aviation disaster on the ground have no relationship with or control over the operation of the aircraft(26), they are handicapped in protecting themselves against the hazard or risk involved, have no opportunity to avoid an aircraft falling or things falling therefrom. At the same time it is exceedingly unlikely that they will have contributed in any way to the disaster. It is therefore reasonable to relieve them, from proving fault or negligence. Third, the operator for whose immediate benefit the flight, causing the aviation disaster, has been undertaken has the opportunity to insure himself against the risk involved, whereas it is hardly reasonable to expect the potential victims of an aviation disaster on the ground to insure themselves against the risks involved in such activities. Fourth, in this supersonic age in which technology became more complex any other principle of liability except absolute liability will involve very difficult questions of proof and may result in leaving the victims without any compensation. Fifth, as a deterrent absolute liability is more effective than fault liability. "Under a fault system, a person is presumed to be aware that if he exercises a certain level of due care he is reducing, if not eliminating, the risk of liability. Under the no-fault system, the only way to avoid liability is to in fact avoid accidents, no matter how high the level of care required"(27). It may be argued that absolute liability may hinder the development of international air transportation. Such an argument may be sound when the activity was in its developing stage but not at the present time in which airlines are prospering.

The relation between the air carrier and the air passenger is a contractual relation which incorporates the consent of the latter to participate in the adventure or the activity including the risk of an aviation disaster that may cause damage to him. It was necessary to take into consideration the nature of the relation in regulating the liability of the carrier in an international convention. The Warsaw Convention based the liability of the air carrier on the fault theory and makes him liable for the acts of his servants or agents and their negligence in performing the activity whether or not he can in any way be blamed for such negli-

(26) See Mc Dougal, "Law and Public Order in Space", 606 - 607 (1963).

(27) Note, op. cit. note 24, P. 336.

gence. This amounts to strict liability of the carrier for the acts of his servants. Considering the fact that the passenger does not participate in the control of the activity, that he does not know all about the hazards involved and that it would be unfair to shift the risk complete to him and relieve the carrier from the civil liability for the damage suffered by the passenger in an airation disaster, the convention shifted the burden of proof to the carrier. In other words the convention adopted fault liability with a presumption of the carrier's fault. The carrier can therefore, avoid liability if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him to take such measures. This is in fact the principle of *res ipsa loquitur* which would aid victims to establish their cases. The basis for adopting *res ipsa loquitur* in this case is that the activity is under the exclusive control of the carrier and he had full knowledge of it, and this activity is so technical that it is not expected that the average passenger will be able to establish negligence or fault. Jenks states that, "In this respect the position of the passenger or consigner is comparable to that of the workman under employment injury schemes; their participation in the activity does not shift the risk from the activity as much to themselves as participants; the decisive consideration is that it is more equitable that the risk would be borne by the activity as a whole rather than by the unfortunate upon whom it chances to fall"(28)

With regard to personal injury to passengers the carrier bears the burden of disproving negligence or in other words, of proving that he cessary measures to avoid the injury or that it was impossible for him and his agents have exercised all reasonable care and taken all the ne- and them to take such measures(29). This heavy burden is considerably lightened in the case of claims arising from carriage of goods and luggage. The carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the steering of the aircraft or in nagivation and that in all other aspects, he and his agents have taken all necessary measures to avoid the damage.

(28) Jenks, W., "Liability For Ultra-Hazardous Activities in International Law", 117 *Recueil Des Cours*, 111. - 112 (1966).

(29) Article. 20 (1).

"By the 1960's however, aviation was considered sufficiently safe for the application of the doctrine of *res ipsa loquitur* and claimants seldom encountered insurmountable difficulty in proving their cases. As a practical matter, therefore, the presumption granted by the Convention was of virtually no additional help to claimants in the United States"(30). As a consequence in addition to increasing the limit of liability of signatory airlines absolute liability was imposed on the air carrier and by the Montreal Agreement they agreed to waive their defence of due care provided by Article 20, Paragraph 1 of the Warsaw Convention with respect to any claim arising out of the death, wounding or other bodily injury of a passenger. However, the agreement did not affect the defence of the air carrier in case of a person wilfully causing the damage that resulted in death, wounding or other bodily injury of a passenger. Fitzgerald states that this "Specific defence is intended to exclude claims arising out of bomb incidents on the ground that there should be no profit from wrongdoing"(31).

Under the Guatemala City Protocol of 1971 absolute liability is imposed upon international air carriers relieving the injured passenger from establishing his case according to the doctrine of *res ipsa loquitur* and depriving the carrier of his right to avoid liability, if he disproves negligence from his side or his agents, which was possible under the original Warsaw Convention and its first amendment, The Hague Protocol of 1955(32). Thus the only condition for liability of the carrier is that the aviation disaster which caused the death or injury occurs on board the aircraft or in the course of embarking or disembarking. The new Protocol has made the necessary modifications to that effect in Art. 17 of the Warsaw Convention in Article IV which reads;

"The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the

(30) Note, *op. cit.* note 24, P. 318.

(31) Fitzgerald, "Current Development in the Revision of Rules Governing the Liability of the Aircraft in the Respect of the International Carriage of Passengers by Air", 6 *Can. Yearbook Int. L.*, 191 (1968).

(32) See Mankiewicz, *op. cit.* note 24, pp. 336 - 338.

event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking ...”

In addition to its clear advantage to potential passenger victims, absolute liability will lead to quick settlement and a consequent reduction in the legal costs. Moreover, insurance premiums will not markedly increase with the introduction of the principle since, even before that when insurers calculated premiums, they had to take into account the fact that carriers were seldom exonerated(33).

Channelling of Liability.

The Rome Convention attaches exclusive liability to the operator of the aircraft. In other words only the operator may be sued by the victims of an aviation disaster on the surface for compensation. The operator is defined as the person making use of the aircraft or controlling the navigation of the aircraft by a person whom he has authorized to use it. The registered owner of the aircraft shall be presumed to be the operator and shall be liable as such unless in the proceedings for the determination of his liability, he proves that some other person was the operator and, in so far as legal procedures permit, takes appropriate measures to make that other person a party in the proceedings. The use by an agent or servant in the course of employment, whether or not within the scope of his authority, is regarded as use by the principle, (Art. 2).

This rule is known now as the principle of Channelling of Liability. It is advantageous to the potential victims and to the persons who might otherwise be liable. It facilitates the location of the defendant, consolidates all claims for compensation arising from an aviation disaster on one person who will be ready for it, relieves other persons such as manufacturers of the aircraft, the supplier of fuel etc, who would

-
- (33) See Fitzgerald, "Liability Rules in the International Carriage of Passengers by Air and the Notice of Denunciation of the Warsaw Convention by the United States of America", 4 Can. Yearbook Int. L., 208 (1966). However the adoption of absolute liability on International Carriage by air is not safe from criticism, see Tompkins op. cit., note 21, p. 429.

otherwise be liable, from liability to the victim and avoids multi-insurance for the same possible disaster.

On the other hand and for the sake of justice the right of recourse is not prejudiced by the Rome Convention. Thus the operator who is in almost every case liable, except in case of deliberate act or omission done with intent to cause damage of a person, has the right of recourse against any person who is in fact liable according to the general rule of law, but no direct action can be started by the victim against such person (Art. 10).

The Warsaw Convention has imposed absolute liability upon the carrier for the acts and negligence of his servants, or agents in addition to his direct responsibility for his own negligence. This in fact amounts to a channelling of liability to the air carrier alone.

This principle in addition to the above mentioned advantages is justified by the fact that the carrier is in the best position to take appropriate measures against the guilty employee and he has a financial interest in taking all necessary measures to prevent accidents.

The Guatemala Amendment in line with all international conventions regulating Civil liability for activities that may cause damage in other states or to their nationals, imposed liability on the international air carrier for any physical or property, damage suffered by passengers in an aviation disaster. With regard to the right of recourse, in view of the fact that under the principle of absolute liability the carrier could be liable for acts or omissions of third parties., this Protocol reserves this right against any other person in identical wording to that of the Rome Convention of 1952. It provides in Article XIII that,

“Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person”.

2 — Limitation of Liability in Amount.

To balance the harshness of the principle of absolute liability imposed upon the operator of aircraft, the Rome Convention limits the

aggregate amount of their liability so that the total damages for which an operator should be made to pay per incident should not be so exorbitant as to discourage investment in aviation. McDougal states that, "Limitation in amount of liability often operates as a corollary to the imposition of absolute liability. Thus, whenever, absolute liability for loss arising out of a specific incident is imposed on a particular participant, a limit may also be established with respect to the aggregate amount of financial compensation which that participant will be required to pay for any and all claims arising out of such incident.

Of course, limits on liability are not likely to be established if the activity giving rise to damage is not socially desirable. The function of such limits is to prevent the absolute liability from discouraging further participation in an activity which, although hazardous, certain promise of great production of values for the entire community"(34).

The Rome Convention provides that the total liability of an aircraft operator for each aircraft and incident shall not exceed a sum which is calculated in accordance with the weight of the aircraft. This limited liability ranges from a minimum for aircraft weighing a thousand kilogrammes or less, of a half a million gold francs to a maximum for aircraft weighing more than fifty thousand kilogrammes, of ten and a half million gold francs plus a hundred gold francs per kilogramme over fifty thousand kilogrammes(35). In addition it also adopted a form of limitation with respect to death or personal injuries limiting it to half a million francs per person killed or injured(36).

The principles governing the apportionment of the available amount of compensation among different claimants are provided for by the Convention. Article. 14 gives those who have suffered personal injury a preferential claim to half the amount available for compensation. If the aggregate amount of established claims exceeds the limit of the ope-

(34) Mc Dougal, op. cit. note. 26 p. 618.

(35) Article. 11. See Ibid p. 607; See also Seabrook, op. cit., note 9. p. 122.

(36) Article 11. 2 reads, "The liability in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured".

rators' liability and all the claims are exclusively for loss of life or personal injury the claims are reduced proportionately. If the claims are exclusively in respect of damage to property, such claims shall be reduced in proportion to their respective amounts. But if the claims are for both loss of life or personal injury and damage to property, one half of the total sum distributable shall be appropriated preferentially to meet claims in respect of loss of life and personal injury and, if insufficient, shall be distributed proportionately between the claims concerned. The remainder of the total sum distributable shall be distributed proportionately among the claims in respect of damage to property and the portion not already covered of the claims in respect of loss of life and personal injury(37).

However, the operator's liability is unlimited if it is proved by the person suffering the injury or the damage that the aviation disaster causing the damage was due to the deliberate act or omission of the operator or that of his agent or servant acting in the course of his employment and within the scope of his authority, so long as there was intent to cause the damage. Another exception to the limitation of liability is when a person wrongfully takes and makes use of an aircraft without the consent of the person entitled to use it and as a result of that use causes damage on the surface to any one. Here unlawful user's liability is unlimited.(38).

Liability falling within the scope of Warsaw Convention is different as it is based on a Contractual relationship between the carrier and the passenger. The Warsaw Convention adopted the form of limitation of liability per person killed, injured or delayed, or per object damaged, lost or delayed. The maximum liability of the air carrier is fixed up to 125,000 francs per passenger and 250 francs per kilogramme for registered luggage and goods (Art. 22), which was regarded as fair and reasonable compensation for the victims of air disaster at the time when the Convention was drawn. Based on the nature of the relation between the air carrier and the passenger, they are given the right to raise the maximum of the liability by special agreement which is valid when it is

(37) Article. 14. See Seabrooke, op. cit. note. 9, p. 123, and Drion, op. cit., note. 16, p. 331.

(38) Article. 12 (a), See Ibid P. 322.

accepted by both parties. However, as the Convention was seeking to protect the interests of air passengers by ensuring adequate compensation to those who may suffer damage in an aviation disaster, it provided that any provision in the carriage that may tend to relieve the carrier of liability or to fix a lower limit than that laid down in the convention is null and void.

In other words the convention protects the air passenger from the so called standard form contract in which the air carrier can impose any provisions in the carriage contract, through which the passenger may find himself without any compensation in case of an aviation disaster causing him a damage. The Convention also provides in Art. 3 (1)C, that the carrier must give to the passenger a ticket which states that the carriage is subject to the rules of liability established by the Convention, in order to give the passenger a reasonable time to insure himself for an amount in excess of the limited liability of the air carrier(39). If the carrier did not include such information as provided in the Convention, in the documents, or if he did not give the passengers any document to that effect at all, he cannot depend on the Convention to limit his liability. With regard to goods not in charge of the passenger himself the sum of 250 gold francs per kilogramme will always constitute the upper limit of the carrier's liability unless the consigner made at the time when the goods were handed over to the carrier, a special declaration of the value of delivery and has paid supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consigner at delivery (40). But the liability of the carrier, with regard to objects in charge of the passenger, is limited to 5,000 francs per passenger(41).

(39) See Fitzgerald, *op. cit.* note. 31, p. 203.

(40) Article. 22 (2), See Drion, *op. cit.* note. 16, p. 314.

(41) "The sums mentioned above shall be deemed to refer to the French francs consisting of 65½ milligrammes gold of millesimal fineness 900. These sums may be converted into any national currency in round figures", Art. 22. (4).

Wilful misconduct or fault equivalent thereto under the law of the competent court, by the carrier disentitles him from availing himself of the provisions of the convention excluding or limiting his liability. Moreover, the carrier is burdened with unlimited liability without it being necessary that he is in any way to blame for the occurrence, if only his servants or agents has been guilty of wilful misconduct.

"It is even of no importance how much care he has used in choosing and supervising his servants"(42). However, in this case it must be proved by the plaintiff that the servant or agent was acting within the scope of his employment. Fault or wilful misconduct of persons who do not come under the carrier's supervision such as aircraft manufacturers, or airport operators(43), are not covered by the Warsaw Convention.

The definition of the term wilful misconduct is the most troublesome task for the court seized of the case,(44). Especially as it was subject to different views in the preparation for this Convention(45). However, almost all the definitions given by the courts and writers agree that wilful misconduct denotes two things : doing the act in question, with intention to do the act with knowledge of what the probable consequence could be(46). In providing an interpretation of the term McNair states that, "before an English Court will hold that there has been 'wilful misconduct' the court must be satisfied that the damage was not merely the result of an accident, or even of negligence alone. The probable consequences of the wrongful act must have been in the mind of the person in question. Clearly, if he does the act knowing it to be wrongful, and intending the harmful consequences which result, he is

(42) Drion, op. cit. note. 16, P. 48.

(43) See Larsen, "Air Traffic Control : A Recommendation for a Proof of Fault System Without A Limitation on Liability", 32 J. Air L and Comm., 17 - 18 (1966).

(44) For the different opinions given by the courts see, Note, op. cit, note., 24, p. 319.

(45) See Drion, op. cit, note. 16, pp. 197 - 232.

(46) See, Note, "Warsaw Convention - Article 25 - Wilful Misconduct", 32 J. Air L. and Comm., 291 (1966).

guilty of wilful misconduct. But his behavior will also fall under this rubric, even if he does not deliberately desire the consequences, but is merely recklessly indifferent as to whether or not they ensue. Only if the act or omission was due to complete inadvertence on his part will the court refuse to hold that there has been wilful misconduct. The burden of proof is on the plaintiff”(47).

The air carrier also cannot invoke the application of the convention with regard to the limitation of liability if he accepts a passenger without a ticket or failed to include in the ticket certain particulars prescribed by the convention.

The maximum liability of an international air carrier as fixed in Warsaw Convention in 1929 became inadequate to compensate passengers for damage, sustained in an aviation disaster, which is in most cases loss of life. Change in the value of money, cost of living, value of goods and resources of airlines are factors that made states think about raising the amount of the limited compensation of Warsaw Convention. The considerable efforts in this realm resulted in the Hague Amendment of 1955 which increased the amount of the maximum liability of air carriers which is available to passengers, unless a higher figure is agreed by special contract, to 250,000 gold francs.

The Hague Amendment also redrafted Article 25 of the Warsaw Convention which disentitles the carrier from limiting his liability in case of wilful misconduct from his side or that of his servants or agents as mentioned above. Due to the difference of interpretation given to the term of wilful misconduct(48), The Hague Amendment provided that the limitation of liability 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 the 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

(47) Mc Nair, op., cit., note 11, P. 190.

(48) For list of cases that have given liberal or restricted interpretation of the term wilful misconduct see, Fitzgerald, op. cit. note. 31, P. 205.

within the scope of his employment". Thus Article 25 in its redrafted form in The Hague Protocol gives clear definition to the circumstances in which the limitation of liability may not apply, and in addition to that it strictly places the burden of proof of such circumstances upon the person seeking to deprive the carrier of his right to limit his liability.

With regard to the loss of the right of limitation if the ticket does not include certain information to give notice to the passenger of the limited liability, The Hague Protocol provides for more specified notice(49).

One of the most important changes provided by the Hague Protocol is that it extends to servants and agents of the air carrier the limitation of liability available to the carrier himself. This closes the loophole in the Warsaw Convention through which suits were brought against servants and agents of the carrier because of the obvious possibility of recovering unlimited damages(50).

The amount available for compensation to the victim passengers of an aviation disaster under the Warsaw Convention as amended by the Hague Protocol of 1955 was inadequate by the American standard and thus not satisfactory to the United States(51). The Hague Protocol although it was signed by the United States was not submitted to the senate for ratification due to the fact that it would not have achieved the necessary vote because it deprived American Passengers of a high compensation they would otherwise enjoy under domestic law. "If for example, a passenger en route to Tokyo purchases a round trip ticket for flights from New York to Tokyo, returning Via Chicago to New York and is injured in a crash during the Chicago-New York leg of the journey, his injury is deemed to have occurred during international trans-

(49) See Ibid pp. 201 - 204.

(50) See Ravage and Others, "Report on the Warsaw Convention As Amended by the Hague Protocol", 26 J. Air L. and Comm., 264 (1959).

(51) For the argument for and against the preservation of the Warsaw / Hague limit of liability in case of passenger's injury that were raised during the Special ICAO Meeting held in Montreal Feb. 1-15, (1966), See Fitzgerald, op. cit., note. 33, pp. 201 - 204.

portation, and his recovery will be governed by the Convention, while others on the same flight will be subject to no limit of liability, the passenger engaged in international transportation will be able to recover no more than 8,300 Dollars"(52). Thus in view of the serious inequity that may occur between American passengers(53), The United States gave note of denunciation of the Warsaw Convention.

Under the **Montreal Agreement** that was concluded between the operators of flights to and from the United States the amount of compensation available for each passenger for death, wounding or other bodily injury was raised to 75,000 Dollars inclusive of legal fees and costs or 58,000 Dollars exclusive of legal fees and costs(54).

This agreement is only applicable to international air carriage that includes a point in the United States as a point of origin, point of destination, or agreed stopping place. The United States which was not completely satisfied with this upper limit of liability withdrew its denuncia-

(52) Note, op. cit. note 24, P. 315.

(53) In its report on the Warsaw Convention as Amended by the Hague Protocol, the Committee on Aeronautics of the Association of the Bar of the City of New York in 1959 stated in part that, "The Convention, with or without the Hague Amendment, creates a serious inequity among passengers on purely domestic flights. There have been numerous instances of grossly disparate recoveries by passengers on the same plane who suffered similar injuries or by the estates of deceased passengers which sustained similar losses, and these instances will undoubtedly continue. As indicated above, this is due to the fact that the probability of the Convention depends on the passenger's ticket, which may show connecting flights to foreign countries. Very often, passengers who have heard of the Warsaw Convention's damage limitation are completely unaware of its possible applicability to a crash on a domestic flight. These Passengers (or their estates) are shocked to find their damages limited. They simply cannot understand the disparity between themselves and passengers (or estates of passengers) who occupied adjoining seats", 26 J. Air L. and Comm., 268 (1959).

(54) See Keiner, op. cit., note 10. P. 151.

tion of the Warsaw Convention and pressed for a higher limit to be provided in a new Convention. Its dissatisfaction with the Montreal Agreement derived from the fact that this agreement did not give the desired protection to all American passengers, because of its limited scope of application. That meant, for example, that the limitation of liability provided by the Hague Protocol which had not been ratified by the United States might apply to an American citizen engaged in an international flight covered by the Hague Protocol. "Such a flight would be one in which the origin and destination on the contract of carriage consist of signatories to the Hague Protocol. Thus, the determination of which limitation applies has no connection with the citizenship of the passenger"(55).

In the preparation for the new amendment of the Warsaw Convention many factors have been influential. "By the 1960's circumstances had changed so vastly that protection of airlines by a limit of liability seemed unnecessary, and the more definite basis recovery had actually become severely detrimental to passengers. Commercial aviation had burgeoned into a billion dollar industry, average judgements in non-Warsaw cases has increased to seven times the Convention's limit, aviation safety had greatly improved, and developments in domestic law had rendered largely superfluous the benefits to passengers supposedly derived from the Convention"(56). However, the situation was not the same in the under-developed Countries that were against the idea of unlimited liability or a high limit of liability that may hinder the development of their airlines. A compromise was reached and the Guatemala City Protocol provided for a maximum limit of liability of 100,000 dollars in case of passenger's death or bodily injury(57). And in Article IX provides that this limit is undertakable, it reads,

"Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability".

(55) Kinnelly, op. cit. note, 7, P. 345.

(56) Note, op. cit. note, 24, P. 314.

(57) See Mankiewicz, op. cit. note 24, pp. 338 - 340.

The effect of this provision is that in any case the liability of the carrier may not exceed this limit and the conditions cited in the Warsaw Convention under which the carrier cannot avail himself of the limited liability such as wilful misconduct, failure to give notice to the passenger of the limited liability, are no longer available to the claimant. Also any special agreement between the passenger and the carrier to raise the upper limit of liability which was available under Warsaw Convention is not valid under the new Protocol(58).

Under the Warsaw Convention as amended by the Hague Protocol the air carrier loses his right to limit his liability if he fails to issue documents to the passenger that constitute special information as explained earlier. This matter was subject to broad interpretation by some national courts to avoid limitation of liability, and it became the duty of the claimant party to convince the court that there was any defect or uncertainty of such information, and the court decide accordingly that the carrier loses the benefit of the limited liability. For example, in *Lisi V. Alitalia Linee Aeree Italiane* the district court held the Warsaw limitation inapplicable because the "Microscopic type" and the "Lilliputian print" could not, as a matter of law, give adequate notice of the liability limitations as required by Article 3 of the Convention (59). The Guatemala City Protocol by virtue of the principle of unbreakable liability adopted revised Article 3 of the Warsaw Convention to the effect that non-compliance with the provisions concerning the document of carriage of passengers will not affect the existence or the validity of the contract of carriage, which shall, nonetheless be subject to the rules of the Convention including those relating to limitation of liability (Article 11.3).

Although the available compensation for the injury suffered by air passengers established by the Guatemala Protocol is the same as that agreed upon in the Montreal Agreement of 1966, experience since 1966 has shown an increase in the level of individual recoveries in non-Warsaw cases(60). Taking into account the possibility that the new Protocol may suffer the same fate as the previous Hague Protocol and not to be

(58) Ibid.

(59) 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

(60) 63 U. S. Dep't State Bull., 751 (1970).

accepted for ratification by the United States on the ground that the upper limit of liability is low according to the standard of living of the American citizen, the United States proposed a scheme compromising between the United States view and the other nations' views. The essence of this scheme is to provide adequate compensation to American citizens and at the same time not to increase the liability of the air carrier⁽⁶¹⁾. After a considerable discussion in the Guatemala Conference of the U.S. supplementary system of compensation it was agreed to insert the following Article after Article 35 of the Warsaw Convention :

"Article 35A. No provision contained in this convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death or personal injury of passengers. Such a system shall fulfil the following conditions :

(a) It shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under the Convention;

(b). It shall not impose upon the carrier any financial or administrative burden other than collecting in that States contributions from passengers if required to do so;

(c). It shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

(b). If a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefit of the system".

The Protocol provides also for a periodic review, during the fifth

(61) See Fitzgerald, "The Guatemala City Protocol to Amend the Warsaw Convention", 9 Can. Yearbook Int. L., 226-233 (1971).

and tenth years after the coming into force of the limit of liability established which shall not be increased by an amount exceeding one hundred and eighty seven thousand five hundred every review conference; increase by this amount will be automatic on December 31st of the Fifth and Tenth years respectively unless the review Conferences decide otherwise by a two-thirds majority(62).

The principle of limiting the liability of the operator and carrier in international air transportation necessarily means that some victims will be inadequately compensated(63). But it has great advantages(64). The First advantage is not to hinder the activity and to encourage people to put their activity and capital in the service of air transportation which is beneficial to the whole of international society. This was expressed in the preamble of the Rome Convention of 1952 which provides that the extent of the liabilities should be limited in order not to hinder the development of international civil air transport. Drion questioned this advantage with regard to the limitation of the carrier liability. He states that "It is of little sense to protect the industry at the expense of its users, i.e., of those for whose sake the protection presumably would be chiefly extended. The question as to what extent limitation of liability can be defended to avoid having the passenger with relatively small claim risks pay higher fares in order that the damages of the passenger with big claim risks may be fully compensated, is something different from protection of aviation business"(65). The second is to give the operator and the carrier the opportunity to ensure against his liability because no insurer will agree to insure against unlimited risk either in amount or in time, and it will enable the person liable to spread the amount of the exceptional losses over a long period of time. It is also for the benefit of the potential victims of an aviation disaster to be sure of indemnity within the available and insured compensation rather than an unlimited and unguaranteed one.

(62) Article. XV.

(63) See Kriendler, Lee, "Limitations on Liability in Aircraft Crash Cases :
* Some Reflections on Aviation Litigation Trends and inequality", 36
J. Air L. and Comm., 467 (1970).

(64) See Drion, op. cit. note. 16., p. 12.

(65) Ibid P. 17.

Drion states that "it is better for the victim to have a limited claim which he can be sure will be paid, than to have an unlimited claim on an insolvent person"(66). In the case of the passenger, it gives him in advance the maximum limit of compensation that he can get from the air carrier if he suffers injury in an aviation disaster, so he can cover himself against additional loss by taking out supplementary insurance. Third is that the principle of limitation of liability is a balance to the harshness of the absolute liability adopted in the Rome and Warsaw as amended by the Guatemala, Conventions. Fourth, it facilitates quick settlement of claims of limited compensation rather than subjecting the victims to long litigation for unlimited compensation which may in the end result in not payment, after paying the expenses of lawyers and courts, of a sum which is no more than and may be less than the limited compensation provided for in the Convention.

Compulsory Guarantee of the Maximum Liability.

It is a well established principle of international law that each sovereign state has an exclusive right and control, over the air space above its territory which includes its territorial waters, that give it the power to allow or prevent foreign aircraft from overflying its territory. In giving such permission to a foreign aircraft it may subject them to any procedure and regulation that the state may think necessary and it may require the operators to give security by way of insurance, guarantee or deposits to cover their potential liability for possible aviation disaster that may cause damage to its territory. For the sake of uniformity and equality and to ensure that aircraft operators would have sufficient assets to compensate those who may fall victim to aviation disasters in foreign territories, the Rome Convention of 1933 obliged the operator to furnish evidence of his financial responsibility up to the limits provided by the Convention. In other words, it required a compulsory guarantee of the operator's liability. Under the Rome Convention of 1952, this compulsory insurance became only permissive. The Convention provides that security for operator's liability may be required by the overflown States and may take the form of insurance, cash deposit, a guarantee

(66) Ibid P. 21.

given by a bank, or a guarantee given by the Contracting State where the aircraft is registered, if that state undertakes that it will not claim immunity from suit in respect of that guarantee. The states overflown may also require that the aircraft shall carry a certificate issued by the insurers certifying that insurance has been effected in accordance with the provisions of the Convention and specifying the person or persons whose liability is secured thereby, together with a Certificate or endorsement issued by the appropriate authority in the States where the aircraft is registered or in the State where the insurer has his residence or principal place of business certifying the financial responsibility of the insurer. When other security is given a certificate to that effect shall be issued by the appropriate authority in the State where the aircraft is registered. Where the State overflown has reasonable grounds for doubting the financial responsibility of the insurer, or of a bank issuing a guarantee, it may request additional evidence of financial responsibility. The Convention provides for arbitration between the States concerned if any question arises as to the adequacy of the evidence (Article, 15. 7 (a)).

The insurer or other person providing security or guarantee for the liability of the operator may, in addition to the defences available to the operator and the defence of forgery, set up two defences against claims based on the Convention. The first is that the damage occurred after the security ceased to be effective (Art. 16). The second is that the damage occurred outside the territorial limits provided by the security, unless flight outside of such limits was caused by force majeure, assistance justified by the circumstances, or an error in piloting, operation or navigation. Security other than insurance must be specifically and preferentially assigned to payment of claims under the Convention and must on notice of a claim to the operator be immediately increased by the amount of the claim not exceeding the limit of the operator's liability and the increased security should be maintained until every claim has been disposed of.

The Convention by its Article 18 exempts any sums due to the aircraft operator from an insurer from seizure and execution by creditors of the operator until the claims of third parties under the Convention have been satisfied.

No such provisions were included in the Warsaw Convention and its amendments that provide for compulsory insurance or guarantee for the liability, however, in practice there has developed an insurance market for the air carrier liabilities.

Several Persons Liable :

When two or more aircraft contribute to an aviation disaster that results in damage on the surface for which compensation is sought, the operator of each aircraft is liable within the limits prescribed by the Rome Convention, the person suffering the damage being entitled to compensation up to the aggregate of the limits applicable with respect to each aircraft involved. But no operator is to be liable for a sum in excess of that applicable to his aircraft, unless his liability is unlimited under the terms of the Convention.

The question of liability between two colliding aircraft is not within the scope of the Rome Convention and is still governed by the Municipal laws and mainly based on the fault theory of liability as there is no international convention in force covering this subject although there has been considerable effort to reach one. The Sub-Committee of the ICAO Legal Committee has prepared a draft Convention on Aerial Collisions which provides that if the cause of collision is unknown the damage rests where it lies; if the collision is attributable to the negligence of one of the parties, this party will bear all the damage; where all concerned were negligent, the damage will be apportioned amongst them according to the degree in which the negligence of each party contributed to the damage sustained(67).

The fault theory under which equitable apportionment of the loss will be based on the degree of negligence or fault of the two colliding aircraft is justified by the fact that both have participated in such activity knowing of the risk involved and can be presumed to have accepted the risk which is different from the case of the surface impact(68).

(67) (ICAO) LC/SC Aerial Collision Nos. 69, 71 and 72.

(68) See Mc Dougal, op. cit. note. 26, pp. 622 - 624.

Another case of joint liability is where the aircraft is being operated by a person not having the exclusive right to use it for more than fourteen days, the person from whom he derived that right is jointly and severally liable with him for the damage caused. Even if the person using the aircraft was using it without the operator's consent, the operator will be jointly and severally liable with him for the damage caused, unless the operator can show that he exercised due care to prevent such use(69).

Exoneration From Liability :

The Rome Convention provides for some exceptions to the operator's liability so that in case of damage not directly attributable to the airflight the operator can be exonerated from the harshness of the absolute liability rules. Under Article. 5, the operator is exonerated from liability if the aviation disaster causing the damage on the surface was the direct consequence of armed conflict or civil disturbance, or if he has been deprived of the use of the aircraft by act of public authority such as customs or police. In such cases the loss will in general lie where it falls. However, the responsibility to render help and relief or indemnity to victims will be the responsibility of the whole Country through the public authorities, as a case of natural disaster.

Intervening acts of the person who suffers the damage, if proved by the operator to be the sole cause of damage will exonerate him wholly from liability. These intervening acts may be negligence or wrongful act or omission of the injured person himself or his servants or agents. However, if such acts were not the sole cause of damage but contributed in part to it, the compensation shall be reduced to the extent of which such acts contributed to the damage. Nevertheless there is no exoneration or reduction if, in the case of the negligence or other wrongful act or omission of a servant or agent, the person who suffers the damage proves that his servant or agent was acting outside the scope of his authority(70).

(69) Article 4., Rome Convention.

(70) Art. 6.

The Warsaw Convention adopted the principle of fault with a presumption of the carrier's fault and rests the burden of proof on the carrier. This will seldom amount to a complete exoneration from liability in practice. The Convention makes the contributory negligence of the claimant an available defence to the carrier and provides that if the carrier proves that the damages was caused by or contributed to by the negligence of the person suffering the damage, the court may in accordance with the provisions of its own law,exonerate the carrier wholly or partly from his liability(71). "This means that, where the damage was merely contributed to by the negligence of the person injured, he will not be debarred from recovering appropriate damages. These damages will be calculated in a manner which takes into account the proportion of negligence on the part of the injured person and of the air carrier respectively"(72). However, leaving this matter to be decided with by the Municipal law of the court seized of the case will result in injustice between claimants who are travelling in the same aircraft but sue the air carrier in different courts because some courts according to their local law "Would apply a rule of contributing negligence under which the slightest degree of contributory negligence on the part of the plaintiff would bar recovery - while other courts would apply a rule of comparative negligence, under which damages collectable by the plaintiff would be reduced in proportion to the plaintiff's fault"(73).

The Guatemala City Protocol which amended the Warsaw convention and imposed the rule of absolute liability on the air carrier retained the defence of contributory negligence provided in the Warsaw Convention, and established a uniform rule to be applied to all cases regardless of the local law. It provides in Article. 21 as amended that,

"If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent

(71) Art. 21.

(72) Mc Nair, op. cit. note 11, pp. 187 - 188.

(73) Note, op. cit., note 24, p. 325.

that such negligence or wrongful act or omission caused or contributed to the damage....."(74).

During the discussion leading to the Guatemala Protocol it was proposed to include in the exoneration provision hijacking, sabotage, and war but such proposals were rejected on the ground that it is not possible for the passenger to insure himself against such risks(75).

3. JURISDICTION.

Under Article 16 of the Rome Convention of 1933 victims were given the choice of suing the operator for compensation either in the courts of the operator's ordinary place of residence, or in the court of the place where the damage was caused. But the Rome Convention of 1952 adopted the more desirable solution of one single forum. It forbids claimants to sue the operator in another country than the country where the damage occurred (Article 20). This solution is advantageous to both victims and operators. With regard to the victims it achieves uniformity in procedure and equality in respect to the applicable law concerning causation and evaluation of damage. It is fair to the victims because in an aviation disaster causing damage on the surface, it is hard to imagine that it will cause damage in more than one state, but all the victims will be domiciled in that state and will prefer to bring their suit in the courts of that state. If the Convention had provided a choice of more than one jurisdiction there would have been the danger of encouraging forum shopping. On the other hand, had the Convention required that the victim sue in the courts of a country other than the one in which the accident occurred, this would have caused hardship to the Victims : indeed, no state would have agreed that its citizens suffering as a result of an aviation disaster caused by a foreign aircraft on its territory would be required to seek compensation in the courts other than its own courts.

(74) Art. VII Guatemala City Protocol.

(75) See Summary of the Work of the Legal Committee during its seventeenth Session. International Civil Aviation Organization (ICAO), 17th Sess., held at Montreal 9th February, 11th March, 1970, Paragraph 6.1, at 23.

With regard to the operator whom the Convention has made absolutely liable, the rule of single forum avoids the hardship on him if various claimants sue him in different courts. Also it has the advantage of the possibility of consolidating all claims in one court especially because in view of the fact that under the system of global limitation of liability of the Rome Convention no relationship has to exist between the different people suffering damages⁽⁷⁶⁾. Article 20 (3) of the Convention provides that : "each contracting state shall so far as possible ensure that all actions arising from a single incident and brought in accordance with Paragraph 1 of this Article are consolidated for disposal in a single proceeding before the same court". On the other hand a single forum will avoid the danger of holding the operator liable towards various claimants by different courts to an amount in excess of the limit of liability provided in the Convention. It may even be argued that this rule is more in favour of the operator than the victims since apart from the Convention the victims would normally be allowed to elect the court of a country where the defendant would have sufficient assets⁽⁷⁷⁾. This argument may be sound if the judgement rendered by the competent court may not be recognized in the courts of other contracting state for execution which in fact is provided for by the Convention.

The Convention after stating the rule of the single forum provided for an exception in Article 20(1). "By agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other Contracting State".

However, the Convention provides for a stipulation or reservation to enhance the rule of the single forum and states that no such proceedings in the courts of another Contracting State shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred.

The final sentence of Paragraph 1 of Article 20 of the Convention provides that "The parties may also agree to submit disputes to arbitration in any Contracting States". The purpose of this provision is not

(76) See Drion, *op. cit.*, note. 16, p. 335.

(77) See *Ibid* P. 338.

clear. It may be for deciding disputes that may arise before the claims of compensation such as deciding the place of occurrence of the accident if it occurs on the borders of two States. Drion States, "The second exception, to the effect that the parties may also agree to submit disputes to arbitration in any Contracting State, actually is not an exception at all. The addition of this rather meaningless sentence is the final result of a more ambitious proposal by the Brazilian Delegation, which would have obliged the Contracting States to ensure execution, in accordance with the provisions of their national laws, of arbitral awards given in any Contracting States. As there is nothing in the Convention which prevents parties from submitting their disputes to arbitration they are even free to settle their disputes without arbitration - the sentence must probably be considered as the meaningless remnant of the projected but not adopted provision on arbitration. Certainly no special significance should be attached to the limitation to arbitration in any Contracting State"(78).

The Problem under the Warsaw Convention is different from that of the Rome Convention. Passengers killed or injured in an aviation disaster will not have any interest in bringing their claims in the courts of the place of accident. At the same time they are often of different nationalities and to allow every one to sue in the courts of his own country, although in the interest of every victim, will inflict hardship on the air carrier causing him to be sued in the courts of a country with which he has no ties at all. The Convention provides for a compromise solution and gives the plaintiff the option of bringing his action either before the court having jurisdiction where the carrier has his domicile or has his principal place of business, or has an establishment by which the Contract has been made, or before the court having jurisdiction at the place of destination (Article. 28). "The original rationale for limiting the forums available under the Convention was apparently to protect carriers in the early days of air travel from numerous suits in remote places"(79). The

(78) Ibid p. 341.

(79) Sims, A. "Civil Procedure - Warsaw Convention - Suit for Damages Suffered in International Flight Requires establishment of Treaty Jurisdiction - Guatemala City Protocol Creates New Article 28 Forum", 13 Harv. Int. L.J., 525 - 526., (1972).

Convention also provides that questions of procedure shall be governed by the law of the court seized of the case.

Under the **Guadalajara Convention** the plaintiff has an option whether to sue the contracting carrier, or the actual carrier who performed the relevant part of the carriage, or both, either together or separately⁽⁸⁰⁾. But an action must be brought either in a court where the contracting carrier may be sued in accordance with the rules of the Warsaw Convention mentioned above, or before a court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business. "Thus it would appear that the contracting carrier can be sued in the courts of a place with which he has no connection save that the actual carrier whom he had authorized to perform the carriage in part or in whole is ordinarily resident or has his principal place of business there. However, it is always open to either carrier, if sued alone, to require that the other shall be joined to the proceedings"⁽⁸¹⁾

The Guatemala City Protocol of 1971 provides for a new rule of jurisdiction to make it easier for victims to obtain judgements and impose liability on the carrier. It enlarges the jurisdictional possibilities by allowing suit in the country of the claimant's domicile or permanent residence, if the defendant carrier has an establishment within that country.

In the Montreal Draft that was prepared by the ICAO Legal Committee in 1970⁽⁸²⁾, this new jurisdiction was available to the claimant in case of death, injury or delay of passenger. After adopting the original Article. 28 of the Warsaw Convention it inserted a second paragraph that reads;

"2. In respect of damage resulting from the death, injury or delay of a passenger, the action may also be brought in the territory on one of the High Contracting Parties before the Court where the carrier has an establishment if the passenger has his

(80) Art. VII.

(81) Mc Nair, *op. cit.* note 11, p. 230.

(82) For this draft see Fitzgerald, "The Revision of The Warsaw Convention," 8 *Cam. Yearbook Int. L.*, 284 (1970).

domicile or permanent residence in the territory of the same High Contracting Party”.

During the Diplomatic Conference of 1971 this Article was subject to lengthy discussion, debate and amendment. One of the successfully amendments was submitted by Ireland and the Netherlands to the effect that the new available jurisdiction also became available for actions concerning baggage on the ground that it would be undesirable that the action for personal injuries should be separated from the action for loss or damage to baggage, where both were caused in the same aviation disaster. The second successful proposal was that of Norway to substitute the word “where” with “Within the jurisdiction of which”. The final text of additional paragraph to Article 28 of the Warsaw Convention as adopted by the Conference reads,

“In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the courts mentioned in Paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party”(83).

ENFORCEMENT OF FINAL JUDGEMENTS.

Under the Rome Convention of 1952 which adopted a single forum to deal with all claims for compensation, all judgements rendered by the competent courts of a Contracting Party with regard to the civil liability of operators of aircraft will be recognized in other Contracting States and will not be subject to further examination, and will have executory effect(84). Thus if the available assets of the operator liable in the country where the damage occurred, are insufficient to cover the judgement rendered, any other Contracting State where the operator has assets is

(83) Art. XII Guatemala City Protocol - See Fitzgerald, *op. cit.* note 61, pp. 241 - 244. See also Sims, *op. cit.* note 79, pp. 524 - 527.

(84) Art. 20 - 4.

obliged by the Convention to grant execution of the final judgement rendered by the courts of that state unless of course the judgement debt was satisfied. However, the court of the Contracting Party to which application is made for execution may refuse to issue execution in five cases stated in Article 20 - 5 : —

- (i) If the judgement was given by default the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;
- (ii) if the defendant was not given a fair and adequate opportunity to defend his interests;
- (iii) if the judgement is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgement or an arbitral award which, under the law of the State where execution is sought, is recognized as final and conclusive;
- (iv) if the judgement has been obtained by fraud of any of the parties;
- (v) if the right to enforce the judgement is not vested in the person by whom the application for execution is made.

In addition to these cases the convention provides that execution may also be refused if the judgement concerned is contrary to the public policy of the State in which execution is requested. However, the criteria of public policy differs from one country to another and may defeat the desired uniformity aimed by the Rome Convention.

In case of refusal to give effect to the judgement in a Contracting State, the claimant has the right to bring a new action before the courts of that state. The judgement rendered in the new action should not result in the total compensation awarded exceeding the limit liability of the operator. In this new action the previous judgement shall be a defence only to the extent which it has been satisfied. The previous judgement shall cease to be enforceable as soon as the new action has been started. The right to bring the new action will be subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgement.

The Court to which application for execution is made shall refuse execution of any judgement rendered by a court of a state other than that in which the damage occurred until all the judgements rendered in that state have been satisfied. The Court applied to, shall also refuse to issue execution until final judgement has been given on all actions filed in the State where the damage occurred by those persons who have brought their actions within the period of limitation, provided by the Convention.

PERIOD OF LIMITATION.

Actions for compensation under the Rome Convention of 1952 are subject to a period of limitation of two years from the date of the incident which caused the damage. The grounds for suspension or interruption of the period of limitation shall be determined by the law of the court trying the action. However, to achieve quick settlement of claims and not to subject the operator to a long period of uncertainty about his gross liability, the Convention provides in Article. 21 that in any case the right to institute an action shall be extinguished on the expiration of three years from the date of the incident which caused the damage. This amounts to a limit on the freedom of the Contracting Parties to give by their national law a long period of limitation for the benefit of their potential victims which may be contrary to the aim of uniformity in the law in this field. Claimants are required by the Convention to proceed to enforce their claims by bringing an action or by notifying the operator within six months from the date of the incident. Persons claiming after six months will only be entitled to compensation out of the amount for which the operator remains liable after all claims made within the period of six months have been met in full.

Article. 29 of the Warsaw Convention which remained unaltered in the Hague Amendment and the Guatemala Protocol establishes a period of limitation of two years, within which claims for compensation must be brought, starting from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. This period of two years is a period of limi-

tation for the institution of proceedings and not merely to the making of complaint. However the Convention does not provide for the method of calculating this period and left it to be decided by the law of the court seized of the case like other procedural matters. It provides that, "The method of calculating the period of limitation shall be determined by the law of the court seized of the case"(85).

CONCLUSION

In the field of aviation disasters a dual system of liability has been in operation to deal with the two aspects of an aviation disaster. The Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface, like its predecessor of the 1930's imposed the principle of absolute liability upon the operators for damage suffered by third parties on the ground in a foreign State. The Rome Convention was the first Convention in the field of disasters to channel exclusive liability to one person : the operator. This facilitates the location of the person liable, consolidates all claims for compensation arising from one aviation disaster on one person who will be ready for it, relieves other persons who would otherwise be liable, from the liability to the victims avoiding multiplicity of actions and avoids multi-insurance for the same possible disaster. The Warsaw Convention for the Unification of Certain Rules Regarding International Air Transport of 1929 adopted the common law principle of *res ipsa loquitur* to govern the contractual relationship between the international air carrier and air passengers suffering damage in an aviation disaster. To save the potential passenger victims from the possibility of losing their claims for damage when the airlines with complete control and knowledge of the complicated technology of the adventure, are better able to bear the cost of an aviation disaster, the Guatemala City Protocol of 1971 to amend the Warsaw Convention has replaced the principle of *res ipsa loquitur* by an absolute liability system.

(85) Art. 29 (2).

As regards the question of a ceiling on liability, a provision on this is included in both the conventions concerned to provide fair and reasonable compensation to the victims of aviation disasters, counterbalance the hardship of absolute liability on the operator and the air carrier and encourage the insurance market in the field. Under the Rome Convention the maximum liability is severely limited to a basic sum of about 36,850 Dollars plus certain increases based on the weight of the aircraft involved. Though the Rome Convention applies only to civil aircraft and regulates only the liability of operators, as between states an insurance principle was adopted to guarantee the payment of compensation. A State may require that aircraft be insured before permitting them to operate over its territory. The Warsaw Convention limited the liability to 8,291.87 dollars per passenger. This amount was increased by 100 per cent, by the Hague Protocol of 1955. Noting the very low limit of available compensation and the dissatisfaction of some states with this limit which may put the international air passenger in unequal and unfair position with the local passengers in some States, the Guatemala City Protocol in an effort to save the Warsaw Convention from being denounced, increased the maximum limit of compensation up to 100,000 dollars. In addition to providing speedy and sufficient recovery at the present time, this limit would also satisfy a great majority of the members of the world community and thus achieve international uniformity.

Under the Rome Convention actions for damage are brought before the courts of the State where the damage was occasioned. Indeed no state would have agreed that its citizens suffering as a result of an aviation disaster caused by a foreign aircraft on its territory should be required to seek compensation in the courts other than its own courts. Different forums at the option of the victims are available under the Warsaw Convention and its subsequent amendments. This gives the victim the opportunity to select the forum most likely to afford him the greatest opportunity to receive just compensation. While this system is advantageous to the victims, it tends to promote forum shopping and may subject air carriers to numerous suits in remote places.

The main objective of aviation conventions is to establish a certain degree of uniformity in the field of international transportation, and to protect the potential victims from being subject to national systems that may not give them adequate compensation. The principles adopted are not intended to extend to an inter-state relationship or dispute. They do not have any effect on the liability of the state itself for activities causing damage to foreign territories.