

A I R C A R R I E R S ' _ L I A B I L I T Y

I N _ A U S T R A L I A

M.A. Bradley, LL.B.,
Barrister & Solicitor.

AIR CARRIERS' LIABILITY IN AUSTRALIA

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P A R T O N E

PRELIMINARY.

CHAPTER I

INTRODUCTION

In April, 1959, the Commonwealth Parliament enacted an Act, the Civil Aviation (Carriers' Liability) Act 1959.⁽¹⁾ This Act deals with international carriage by air and carriage by air within Australia. It made far reaching and perhaps revolutionary changes to the law of carriage by air within Australia. This thesis was written for the purpose of describing those changes and their effect and to describe the law applying to carriage by air which is not covered by the Act.

The effect of the Act is as follows :-

1. It approves the ratification by Australia of the Hague Protocol to the Warsaw Convention⁽²⁾ and makes provision for giving effect to the Warsaw Convention as affected by the Protocol once the Protocol comes into force.⁽³⁾
1. No. 2 of 1959. Royal Assent was granted on 21st April, 1959. Parts I, III and V entered into force on the date of the Royal Assent (see section 2(1)). Part IV was proclaimed to come into effect on 1st July, 1959 (the Commonwealth Gazette of 28th May, 1959). Part II will not be proclaimed until the Hague Protocol enters into force.
2. Section 8. The Instrument of ratification was deposited with the Polish Government on 23rd June, 1959.
3. See Part II of the Act.

2. It repeals the Carriage by Air Act 1935⁽⁴⁾ which gave effect to the Warsaw Convention and continues the application of the Warsaw Convention⁽⁵⁾ until a date to be proclaimed.
3. It applies the principles of the Warsaw Convention as affected by the Hague Protocol, with a number of modifications which alter the basis of liability, to⁽⁶⁾ carriage by air within Australia.

The last is the subject around which this thesis is written.

Part IV of the Act applies the principles of the Convention as amended by the Hague Protocol to domestic carriage within Australia. It also applies to international carriage which is not subject to the Warsaw Convention. It does not apply to international carriage within the meaning of the Warsaw Convention performed within Australia. These are the primary limitations on the scope of application of Part IV. There are, however, other important limitations on its application. It applies to the carriage of a passenger for reward between places in different States, between places within the Commonwealth

4. Section 4 of the Civil Aviation (Carriers' Liability) Act 1959 and see Appendix D for Text of The Carriage by Air Act 1935.
5. See Part III. As a number of amendments were necessary to the Carriage by Air Act 1935, the opportunity was taken to incorporate the Convention, the Protocol and the provisions relating to domestic carriage in the one Act.
6. Part IV of the Act.

Territories and between a place within a Territory and a place outside. The carriage must be in an aircraft operated by the holder of an airline licence i.e. a licence which authorizes the holder to engage in regular transport operations for the carriage of passengers and cargo for reward. Furthermore the Part does not apply to the carriage of cargo, but provision is made to apply the Convention principles by means of regulations to cargo. Consequently a quite important segment of carriage by air is not subjected to the regime of liability created by Part IV of the Act. Thus, all carriage of cargo is governed by the common law. Similarly carriage of passengers between places in the one State is governed by the common law, except to the extent described in the next paragraph. All carriage by an air transport enterprise which is not the holder of an airline licence is subject to the common law. The common law principles applicable to carriage by air therefor form part of the subject matter of this thesis.

That part of carriage by air governed by the common law will contract. All the States have agreed to enact uniform legislation applying the provisions of Part IV of the Act with certain exceptions and modifications to intra-State carriage of passengers and baggage in aircraft operated by the holders of airline licences. (7) A model bill has been prepared by the

7. The State Ministers for Transport at the 18th Meeting of the Australian Transport Advisory Council resolved :-

"That the Council confirms its approval of the principles of uniform Commonwealth and State legislation covering the liability of air carriers and recommends that the draft Model Bill prepared by the Commonwealth Parliamentary Draftsman be now forwarded to the State Crown Law authorities for consideration and consultation with the Commonwealth Attorney-General where considered necessary before enactment in the several States."

Commonwealth Parliamentary Draftsman and, at the time that this chapter was written, two States, Victoria and Western Australia,⁽⁸⁾ had enacted legislation in the identical terms to the model bill. The model bill appears in Appendix B of this thesis and a commentary on it appears at Appendix C.

The rule of liability in Part IV of the Act is the revolutionary aspect of the Act. The carrier is liable for damage sustained by reason of the death or injury of a passenger resulting from an accident which took place on board an aircraft or during the operations of embarking or disembarking. There is only one defence and according to the circumstances it may or may not be a complete defence. If the passenger's negligence caused or contributed to the damage, the damages are to be reduced to the extent that the passenger was responsible for the damage. The liability of the carrier is limited to £7,500 or such a higher sum as is specified in the contract of carriage. The defence in Article 20(1) of the Warsaw Convention of "all necessary measures" is not to be found in the Act. In the result, the carrier insures the passenger (and those entitled to claim in respect of his death) against damage up to an amount not exceeding £7,500 or such a higher sum as is specified in the contract of carriage sustained by reason of death or injury resulting from an accident which inter alia took place on board the aircraft. In short the passenger and his dependants are insured by the carrier against the risk of injury or death resulting from an accident

8. Victoria: Civil Aviation(Carriers' Liability) Act 1961.
Western Australia: Civil Aviation (Carriers' Liability)Act
1961; entered into effect on 12th December, 1961.

taking place on board the aircraft. This is a new principle in the law relating to the carriage of passengers.

In the case of baggage the regime of liability is in substance the same as that in the Warsaw Convention as affected by the Hague Protocol. However the limit is lower being £100.

The system of liability is completed by the provision that any condition in a contract of carriage or arrangement relieving or tending to relieve the carrier of the liability is null and void. Thus the carrier cannot contract out of the liability imposed by the Act. There are of course ancilliary provisions relating to the carriers' liability for hand-baggage, the procedure for making claims, substituting the liability under the Part for liability arising under any other law, preserving certain liabilities of third persons, limiting the liability of servants and agents of the carrier in certain circumstances to the amount of the limit and making provision for claims in respect of death.

A few words are in order about the reasons for enacting Part IV. In 1958, 2,148,554 passengers were carried on regular public transport operations. The carriers were free to contract of liability to these passengers. This meant that a substantial portion of the population were deprived of their common law "rights" in circumstances where they felt, wrongly perhaps, that occasions might arise frequently in which it would be necessary for them or their dependants to invoke those rights.

That feeling runs through the Parliamentary debates on Part IV. The marked contrast between the debate on the Carriage by Air Bill in 1935 and the debate on the Civil Aviation (Carriers'

Liability) Bill in 1959 demonstrates this. In 1934 only 54,119 passengers were carried in regular public transport operations. Only about one hundred words were spoken in the debate all of no relevance to the bill. This notwithstanding that provision existed in the bill to extend the principles of the Warsaw Convention to domestic carriage by air.⁽⁹⁾ On the other hand over fifteen thousand words were spoken on the Civil Aviation (Carriers' Liability) Bill.

Two other matters influenced the Government. The fact that the passenger was without remedy if he was injured by the negligence of the carrier was underlined by the then recent decision of the Supreme Court of Queensland in Martin v. Queensland Airlines⁽¹⁰⁾ upholding a condition in the contract of carriage exempting the carrier from liability for negligence, one which⁽¹¹⁾ then appeared on all airline tickets issued in Australia. The Government intended to ratify and implement the Hague Protocol. It would have been difficult for it to justify a state of affairs

9. Section 5 of the Carriage by Air Act 1935. No regulations were made before the War, because it was felt that economic burden imposed by the Convention would be too great for carriers to bear. After the War it became clear that section 5 was ultra vires the Constitution, because it purported to authorize regulations applying to intra-State as well as interstate commerce.
10. [1956] St. R. Qd. 362.
11. Such a provision did not appear on tickets issued by the Australian National Airlines Commission but, as its liability was limited by section 66 of the Australian National Airlines Act 1945 to £2,000, the passenger was not much better off. It should be mentioned that all carriers following pressure from the Department of Civil Aviation provided free insurance for their passengers with a maximum of £2,000.

in which special legislation was brought down to protect international passengers while domestic passengers were left without any remedy.

CHAPTER II

CARRIAGE BY AIR GOVERNED BY PART IV OF THE CIVIL AVIATION (CARRIERS' LIABILITY) ACT 1959

The provisions of Part IV of the Act govern, speaking generally, the carriage of passengers and their baggage between places within the Federal Territories, in different States of the Commonwealth, in the Federal Territories and places outside those Territories, and in Australia and places outside of Australia provided that carriage is not governed by the provisions of the Warsaw Convention or the Warsaw Convention as affected by the Hague Protocol. The refinements to the position stated above are discussed in this chapter.

The scope of application of Part IV is important not only for ascertaining the situations to which it applies but also for ascertaining the area of carriage by air which remains subject to the common law as varied by the legislation of the States. Approximately twenty percent of the passengers carried on airlines travel under contracts of carriage controlled by the common law. Furthermore the carriage of cargo lies outside of the scope of Part IV and will remain so until regulations are made under section 41 of the Act. Carriage by those who are wholly charter, aerial work or private operators is not governed by the Act.

Another matter to be kept in mind is that some persons carried on domestic journeys will be subject to the Warsaw

Convention or that Convention as affected by the Hague Protocol when the carriage of those persons is in part performance of a contract for international carriage. As a consequence upon a given aircraft in the course of a domestic journey there may be carried passengers who are subject to -

- (a) Part IV of the Act;
- (b) the common law;
- (c) the Warsaw Convention; or
- (d) the Warsaw Convention as affected by the Protocol (after the Protocol and Part II of the Act giving effect to the Protocol in Australia have entered into force).

Part IV of the Act - I refer to Part IV for brevity in this chapter as the Act - applies to the carriage of a passenger in an aircraft operated by the holder of an airline licence for hire and reward under a contract for the carriage of the passenger between two States, between a State and a Territory, between two Territories, between points within the same Territory, between points in a State when the passenger is carried on aircraft operated by the Australian National Airlines Commission and between a point in Australia or its Territories and a point outside not being carriage to which the Warsaw Convention applies. The main factors which determine the application of the Act are the geographical areas to which the Act is expressed to apply, the status of the persons who are carried by air, the status of the person who performs the carriage by air, the class of operations in which the aircraft performing the carriage is engaged and the places between which the passengers are carried.

1.

GEOGRAPHICAL APPLICATION.

The Act applies to the Commonwealth and all its Territories by virtue of section 6. The Territories of the Commonwealth are the Northern Territory, the Australian Antarctic Territory, the Australian Capital Territory, Cocos (Keeling) Islands, Norfolk Island, Christmas Island, the Territories of Papua and New Guinea and the Territory of Heard Island and McDonald Island and any Territories subsequently acquired by the Commonwealth.

2.

PASSENGERS TO WHOM THE ACT APPLIES.

The act applies to the carriage of a passenger. The word "passenger" occurs several times in the section. The Part applies to the carriage of a passenger where the passenger is or is to be carried in an aircraft...under a contract for the carriage of the passenger between the places enumerated. The scope of that word is of decisive importance. It defines the class of persons to whom the duty created by the Act is owed and in respect of whom liability is limited. Persons who do not fall within the class are carried subject to the common law duty of care.

DEFINITION OF PASSENGER.

The word is not defined in the Act. Its scope however

is deducible from the provisions of the section. In the first place the status is not dependent upon entry into an aircraft. The words "is to be carried" indicate that. The payment of a fare is not a necessary element to the existence of the status in contrast to the position under the United Kingdom Merchant Shipping Acts. ⁽¹⁾ Section 26(1) defines contract as including an arrangement without consideration.

For a person to be a passenger he must be carried under a contract or an arrangement without consideration for his carriage. While "arrangement" suggests that the most informal transaction will suffice to stamp the character, it implies too that the person must be on board with the consent of the carrier. Section 42 supports this conclusion, as it makes special provision with regard to persons travelling in an aircraft without the consent of the carrier. Thus consent of the carrier is one element vital to establishing the status.

The second vital element is the correct characterisation of the contract or arrangement under which the person travels on the aircraft. All persons on board an aircraft travel on it. But section 27 requires that the contract or arrangement shall be a contract or arrangement for the carriage of the person. Obviously persons travelling under contracts of employment are not travelling under a contract of carriage.

1. The Hanna, (1866) L.R. 1 A. & E. 283; Hedges v. Hooker, (1889) 60 L.T. 822; The Clymene [1897] P.295,300.

The conclusion is that the status of passenger is impressed if the person passes the following tests :-

- (i) he is carried with the consent of the carrier;
- (ii) the contract or arrangement under which he travels is one for carriage and not primarily for some other purpose.

As the Act in effect defines the class of persons who are passengers it follows that the carrier may not impress that character upon persons who cannot within the meaning of the Act be passengers, for example, it cannot unilaterally or by contract impose the status on members of the crew.

APPLICATION OF DEFINITION

The application of these tests is illustrated by a series of examples. The crew are not passengers. While the carrier consents to their presence on the aircraft, the contract under which they are there is not one for carriage but a contract⁽²⁾ of employment.

Airline employees who travel gratuitously on board the aircraft but who are not members of the aircraft's crew give some difficulty. United States Courts have made a distinction that is appropriate to the Act. They have distinguished between those whose travel is incidental to their employment and those

-
2. The driver of a motor vehicle is not a passenger within the meaning of a policy of insurance; Digby v. General Accident Fire & Life Corporation Ltd., [1943] A.C. 121, 123. Members of the crew of a ship are not passengers for purposes of section 41 of the Customs Act 1901-1959: Donohue v. Afalee, (1905) 22 W.N. (N.S.W.) 23.

whose travel is not incidental to their employment. Those in the former class are not passengers while those in the latter are passengers. The travel is incidental to the employment if it is for the purpose of facilitating the performance of the servant's duties. Thus, if the carriage is for the purpose of moving the servant from one airport to another to perform certain duties he would not be a passenger. If on the other hand he is being posted from one place to another, it is probable that he would be a passenger. In the United States it has been held that a servant who was carried on a pass authorising travel for (3) pleasure as well as for purposes of work, was a passenger. This distinction is appropriate to the Act as the second of the tests to which I have referred is whether the arrangement is one for carriage or for some other purpose. A journey under an arrangement for purpose of facilitating the performance of a servant's duties is not an arrangement for carriage except in a secondary and incidental sense.

The carrier may be compelled to carry certain persons. Thus under consensual arrangements he may be required to carry a person, for example, to protect valuable cargo. Such a person is probably a passenger, although it may be argued that, although he is there with the consent of the carrier, the arrangement under which he is carried is not one for carriage, but for another purpose, namely to protect valuable cargo. The person may have to be carried under an obligation imposed by law, such as prohibited

3. Shearman & Redfield on Negligence (Revised Edition), section 497.

immigrants under section 21 of the Migration Act 1958 or examiners under regulation 253 of the Air Navigation Regulations. Those persons are carried without the consent of the carrier. In fact his consent is irrelevant. They are therefore not passengers. Furthermore in the case of examiners they are not upon the aircraft for carriage, their purpose is to check the aircraft or the crew in the performance of their functions. In contrast, at common law, persons that a carrier is by law required to carry have been held to be passengers.⁽⁴⁾ This is distinguishable and illustrates the danger of applying uncritically what appear to be relevant common law analogies. The carrier's duty of care at common law is owed to passengers. The concept of that term has been set by the tests of foresight, i.e. who is my neighbour and by the particular principles adopted for ascertaining and classifying the persons to whom the duties of occupiers of premises are owed. The concepts controlling the application of the Act are totally dissimilar.

Persons who hold tourist class tickets and travel first class are passengers. They are carried with the consent of the carrier pursuant to a contract for carriage.⁽⁵⁾ Probably persons who get on board fraudulently are not passengers, as it cannot be contended that the carrier has consented to their carriage. However, at common law, it appears that such persons

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4. Collet v. London & North Western Ry.Co.,(1851), 16 Q.B.984, in which it was held the company was under a duty to use proper care and skill in conveying the plaintiff, a postal officer, whom it was compelled to carry by statute.
 5. The position at common law is discussed in Vosper v. G.W. Ry., [1928] 1 K.B.340.

would probably be regarded as passengers.

POSITION OF PERSONS NOT "PASSENGERS".

Of course merely because the Act does not apply to a particular person does not mean that the person is without remedy. The carrier is under the common law duty of care varying in degree with whether the person is a passenger, in the extended sense the Courts have given to that word, or a trespasser.⁽⁷⁾ But the carrier's liability in respect of those persons and their baggage is, by virtue of section 42 of the Act, limited to the amounts provided in the Act in respect of passengers. But that section relates only to persons travelling on the aircraft without the consent of the carrier. In the case of persons who travel with the consent of the carrier such as the crew, company employees or those with duties or functions which are inconsistent with the status of passenger, the carrier's liability is unlimited. As section 32 of the Act rendering null or void provisions in an agreement tending to relieve the carrier of liability or to fix a lower limit, applies only in relation to the liability imposed by the Act, the carrier is free to contract out of the liability owed to those persons.

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6. Charlesworth on Negligence, 3rd Edition, at page 115, suggests that persons who get aboard not intending to pay the fare would be regarded as passengers for they have been accepted by the carrier as such.
 7. See the discussion of the common law duty of care to passengers and trespasser in Chapter IV.

3.

" CARRIAGE. "

The Act applies to "the carriage of a passenger." As the words "is or is to be carried" immediately follow, carriage includes more than merely the act of carrying. Section 28 of the Act which creates the liability defines the scope of this word in relation to passengers. Carriage embraces not only the act of carrying but also the operations of embarking and disembarking. In the case of baggage in the possession of the passenger, section 29 (2) provides, in effect, that carriage has the same meaning. For registered baggage carriage has a more extended meaning. Section 29(2) and 29(3) provide that the period of carriage is the period during which the baggage is in the charge of the carrier, but the period expires within twelve hours after the arrival of the aircraft at the place to which the baggage was to be carried in the aircraft, provided the carrier proves the baggage was made available for collection by the passenger within that period.

4.

CARRIED IN "AN AIRCRAFT".

Of course the carriage must be in an aircraft or associated with it. "Aircraft" is not defined in the Act. However it is defined in the Air Navigation Regulations as "any machine which can derive support in the atmosphere from the reactions of the air."⁽⁸⁾ Of course this definition is of

8. Regulation 5(1) of the Air Navigation Regulations.

persuasive authority only, but it is accepted throughout the World as the meaning of the term. It was originally adopted in Annex "A" of the Convention relating to the Regulation of Aerial Navigation.⁽⁹⁾ The same definition of aircraft is to be found in Annexes to the Convention on International Civil Aviation.⁽¹⁰⁾ It is submitted that the word "aircraft" will be construed as in the light of this definition. It will include, therefore, not only aeroplanes per se but also helicopters, autogyroes, balloons, air ships and gliders.

5.

AIRCRAFT OPERATED BY THE HOLDER OF AN AIRLINE LICENCE

The aircraft in which the carriage takes place must be operated by the holder of an airline licence. "Airline licence" is defined in section 26(1) as an airline licence in force under the Air Navigation Regulations. The Air Navigation Regulations divides air transport into four classes of operations : private operations, aerial work operations, charter operations and regular public transport operations.⁽¹¹⁾ Only the last is relevant.

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9. Usually called the Paris Convention it was prepared at the Paris Peace Conference in 1919 and was adopted by most European and Asiatic countries and all the members of the British Commonwealth. It prescribed, inter alia, international standards for the operation and safety of aircraft. It has been superseded by the Chicago Convention.
 10. Usually called the Chicago Convention as it was prepared and opened for signature in Chicago in 1944. It covers much the same ground as the Paris Convention. Most countries other than the U.S.S.R. are parties to it.
 11. Regulation 191 of the Air Navigation Regulations.

An airline licence is a licence which authorizes the holder to engage in regular public transport operations.⁽¹²⁾

Regular public transport operations are all air service operations in which aircraft are available for the transport of members of the public, or for use by members of the public for the transport of cargo, for hire or reward and which are conducted in accordance with fixed schedules to and from fixed terminals over specific routes with or without intermediate stopping places between terminals. In short it is a licence authorizing an airline to engage in scheduled airline services.

The safety standards imposed upon the holders of airline licences, classified as airlines for purposes of the Air Navigation Regulations,⁽¹³⁾ are higher than those imposed upon the other classes of operations.⁽¹⁴⁾ No reason was given why the Act was confined to the airlines. It may be thought surprising that it was not applied also to holders of charter licences. The Warsaw Convention applied to international carriage by air by non-scheduled operators. It may be that it was thought that the financial burden flowing from imposition of absolute liability in the form of insurance premiums would be onerous for small charter operators.

The result is that the Act is limited in the scope of its application to carriage by airlines. There are only ten airlines in Australia and its Territories. These carry almost the whole of the air traffic in Australia. But some of the carriage

12. Regulation 198 of the Air Navigation Regulations.

13. Regulation 5(1) of the Air Navigation Regulations.

14. See for examples regulations 213 and 218 of the Air Navigation Regulations, and also page 136 of this thesis.

by five of these airlines being intra-state carriage does not
(15)
fall within the Act.

Two other matters remain to be canvassed. The Director-General of Civil Aviation is empowered by regulation 203 of the Air Navigation Regulations to exempt a person who holds a charter licence and who proposes to operate a regular public transport service from the necessity of obtaining an airline licence. In effect the Director-General has the power to exempt operators of aircraft from the application of the Act, notwithstanding that they engage in the class of operations which an airline engages in. As the licensing provisions are mainly for the purpose of ensuring safety of operations, it is unlikely that the power to exempt will be used solely for the purpose of escaping the Act. In any case an exercise of the power of exempting solely for that purpose would probably be bad as not being exercised bona fide for the purposes for which the power is granted.

Lastly there is the question of what is the position of an airline if its licence is terminated or expires through an oversight on the part of the airline e.g. failure to renew within the proper time. A person whose airline licence has expired would not be "the holder of an airline licence", for airline licence is defined in Section 26(1) to be an air licence in force under the Air Navigation Regulations. The Act would not apply and the carrier's liability would be governed by the common

15. About 20% of the passengers carried by air in Australia and the Territories by airlines during 1959 travelled on purely intra-State journeys.

law or the provisions of the contract of carriage. An airline
licence may be in force for a period not exceeding one year.⁽¹⁶⁾
The administrative practice is to issue one licence to each
airline with a period of validity of one year applying to all
services operated by the airline. There is the possibility
that there may be a period between the time of the expiration of
the term of the licence and its renewal, when an airline is not
the holder of an airline licence.

6.

"OPERATED"

The aircraft must be one being operated by the holder
of an airline licence in the course of commercial transport
operations. When is an aircraft "operated" by the airline?
This becomes a vital question where the airline is operating an
aircraft which it has chartered from some other person or which
has been chartered from it by some other person. Section 26(2)
at first sight seems to provide a definitive test but upon
examination of that section it becomes clear that the question
still remains to be answered by a course of authoritative
decisions on particular sets of circumstances. That sub-section
provides :-

"For the purposes of this Part, where, by reason of a
contract of charter or other contract between the holder
of an airline licence and another person, persons or
baggage are or is carried, or are or is to be carried, in
an aircraft while it is being operated by the holder of an
airline licence, that contract shall be deemed to be a
contract of carriage providing for that carriage."

16. Regulation 200 of the Air Navigation Regulations.

The criterion of application of the Act where the aircraft is under charter whether to another airline or to some other person, is operation by the holder of an airline licence.

IMPORTANCE OF ASCERTAINING THE OPERATOR

One important consequence of this is that an airline may find that it is liable at common law for death or injury to passengers carried on an aircraft chartered from it by another airline, (I use airline here to mean the holder of an airline licence). This may occur where one airline charts an aircraft to another airline. If the charterer is the operator within the meaning of the Act, the owner may be liable at common law to persons injured by his failure to properly maintain the aircraft or, it is submitted, for the negligence of the crew, if they were provided by the owner. Furthermore the charterer may be liable at common law, if it is not the operator, for failing "to supply a competent pilot and a safe plane".⁽¹⁷⁾ Finally, where two airlines are respectively the owner and the charterer, one or the other will be the operator and the Act will apply with the consequence that the claimant will have a right of action under the Act.

Where the parties to the charter are an airline and another organisation or person not an airline, the Act will not necessarily apply. If the airline is operator, whether it be the charterer or the owner of the aircraft, the Act will apply.

17. Per Goddard J. (as he then was), *Fosbrooke-Hobbs v. Airwork Ltd. & British American Air Services Ltd.*, [1937] 1 All E.R. 108, 111.

On the other hand, if it is not the operator, the Act will not apply and the liabilities of both will be determined by the common law, the contracts between them and their contracts with the persons they carry. Speaking generally those liabilities are of the kind mentioned in the preceding paragraph depending of course upon whether they stand in the position of the charterer or the owner. Another question that arises in this connection is discussed later. The passenger may recover judgment against the airline under the Act without proving fault. The same passenger obtains judgment against the other person for breach of the common law duty of care. The other person may then sue the airline perhaps on the terms of the contract between it and the airline. Thus the airline may find that ultimately it pays out in damages directly and indirectly in excess of the amount of the limit.

Quite clearly it is of the utmost importance to determine what person is the operator.

Any vagueness in this area can re-act to the detriment of the claimant. If he sues a person on the assumption that the person is the operator and in the proceedings it emerges that the person is not the operator he may have to bear his own costs and those of the person against whom he proceeded and those costs may not be recoverable from the person who is ultimately held to be operator.

In the majority of cases the question of who is the operator will not afford any difficulty for the person selling the ticket will be the person who carries the ticket holder.

Charter arrangements are however becoming more common place either through travel organisations or clubs chartering aircraft⁽¹⁸⁾ or interchange agreements between airlines. Furthermore transactions in which some other person other than the operator hold the title such as under a hire purchase agreement are common. Wherever title to the aircraft is vested in some other person other than the airline or organization which contracts to provide the carriage, the question immediately arises is that airline or person operating the aircraft.

MEANING OF "OPERATE"

Operate is one of the class of words the meaning of which varies with the words in relation to which they are used and which must be construed in the light of the fact situations to which they are directed. Its meanings vary from the figurative to the actual. The Act illustrates how those considerations can colour the meaning of a word. When associated with the phrase "in the course of commercial transport operations" it means used. When related to "by the holder of an airline licence" it means more than actually flown by the holder of an airline licence personally although it includes that. It includes flying by the servants or agents of the holder of an airline licence. That view finds support in the dicta of Hodgkin J.A.⁽¹⁹⁾ in O'Reilly v. Canadian Accident and Fire Association Co. as

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18. For example the Agreement between the Australian National Airlines Commission and Ansett Transport Industries under which inter alia each airline leased aircraft to the other for a period of three years to obtain parity in equipment.
19. [1929] 2 D.L.R. 70.

follows :-

"A man may operate a fleet of motors by organizing a system in which he himself never personally drives or operates a single motor."

In the Concise Oxford Dictionary two of the meanings assigned to operate are conduct or manage. For an organization in particular or indeed a person, where that person actually does not fly the aircraft, to conduct or manage an aircraft, it must act through other persons. Conduct or manage introduce the element of control. In the case of a company, the only way in which it can perform an act or conduct operations is through those who are employed by it or through those who are its agents. It is the relationship then between those who man the aircraft and a Company or person which determines whether that company or person operates the aircraft, for the company or the person cannot be liable for acts unconnected with them. For the Company or the person to operate an aircraft, the crew must be the servants or agents of the Company or that person. The Act itself recognises the relevance of this relationship, for in section 33 the liability of the servants and agents of the carrier is limited provided that they are acting within the scope of their employment or authority.

MASTER OF THE CAPTAIN IS THE OPERATOR.

It may be that rather than looking at the relationship of each member of the crew to the person whom it is sought to establish as operator that only the relationship of the captain of the aircraft need be examined. The common law analogy of charterparties supports this approach. Further support for this approach is derived from the decisive role of the captain in relation to the aircraft. Under the Air Navigation Regulations

an operator is required to designate one pilot to act as pilot-in-command.⁽²⁰⁾ That person is under those Regulations responsible during flight time (being the time from the moment at which an aircraft first moves under its own power for the purpose of taking off until the moment at which it comes to rest at the end of the flight) for the operation and safety of the aircraft, for the safety of persons and cargo carried and for the conduct and safety of the members of the crew.⁽²¹⁾ He has final authority as to the disposition of the aircraft and for the maintenance of discipline by all persons on board.⁽²²⁾ He has the power to take such action as he considers reasonably necessary to ensure compliance with the Regulations and the safety of the aircraft, crew, passengers or cargo and to detain the passengers, crew or cargo for such period as he considers reasonably necessary.⁽²³⁾ Having regard to the decisive role the captain performs in relation to the aircraft it must follow that it is his employer that is the operator of the aircraft.

RELATIONSHIP OF MASTER AND SERVANT

There are many matters which bear on the question of whether the relationship of master and servant exists between persons. These include :-

- (i) Has anyone the power of selection?
- (ii) Were wages or other remuneration paid?

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- 20. Regulation 219(1).
 - 21. Regulations 5(1) and 219(2).
 - 22. Regulation 219(3)
 - 23. Regulation 330.

(iii) Has anyone the right to control the person in the way in which he carries out his work?

(iv) Has anyone the power of dismissal?

The most fundamental of these seems to be who has the right to control the manner in which the servant performs his duties:-

"...the test of the existence of the relationship of master and servant is still whether the contract placed the supposed servant subject to the command of the employer in the course of executing the work not only as to what he shall do but as to how he shall do it ...

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's orders and directions." (24)

The fact that the pilot-in-command of an aircraft by virtue of his profession and the provisions of the Air Navigation Regulations has a large measure of autonomy and independent authority does not prevent him being the servant of the airline which pays him. This is so even though in the manipulation of the aircraft he is bound by the directions of the Director-General in the flight manual and, if he fails to obey those directions, (25) he is in breach of the Regulations. In other words the right of control as to the manipulation of the aircraft lies not in the operator but in the Director-General.

24. Per Dixon J., *Humberstone v. Northern Timber Mills*, (1949) 79 C.L.R. 370, 404.

25. Regulation 112A.

"The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." (26)

The House of Lords has moreover indicated that the tests of the existence of the status of servant may have to be reviewed to take into account the effect of statutory intrusions into the relationship on the traditional tests. Lord Thankerton in (27)

Short v. Henderson, after mentioning the four indicia of a contract of service as -

- (a) the master's power of selection;
 - (b) the payment of wages or other remuneration;
 - (c) the master's right to control the method of doing the work; and
 - (d) the master's right of suspension or dismissal,
- said :-

"Modern industrial conditions have so much affected the freedom of the master in cases in which no one could reasonably suggest that the employee was thereby converted into an independent contractor that, if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and restate those indicia. For example (a), (b), and (d), and probably also (c), are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureaux, or directed to him, under the Essential Work provisions, and his power of suspension or dismissal is similarly affected." (28).

26. Per Dixon C.J., Williams Webb & Taylor J.J., *Zuijis v. Wirth's Bros. Pty.Ltd.*, (1955) 93 C.L.R. 561,571.

27. (1946) 62 T.L.R. 427.

28. Note 27 *supra*, 429.

That reconsideration has yet to take place, but it is clear that the effect of that review will not be to narrow the description of persons classed as employees by reason of the effect of statutory provisions on the duties of the employee.

APPLICATION OF "MASTER OF CAPTAIN" TEST TO DOUBTFUL CASES

The test of who is the master of the pilot-in-command will give the answer to the question who is the operator in some of the more common of the doubtful cases. The following are the most common cases:-

- (1) the aircraft is being purchased by the airline under a hire purchase agreement;
- (2) the aircraft is hired without a crew;
- (3) a block of seats or capacity for cargo is hired in another airline's aircraft;
- (4) an aircraft with crew is hired for a period (a time charter) or for series of journeys (a voyage charter). In practice most aircraft (29) charters are a combination of both.

In cases (1), (2) and (3) the master of the pilot-in-command is easily ascertained. In the case of an aircraft under a hire purchase agreement or one that is under a bare hull charter the hirer will in the absence of exceptional circumstances

29. Kurt Grontfors, Air Charter & the Warsaw Convention, p.17 et ff. The variations in charter operations and in operations where a person other than the owner is using the aircraft are infinite. See Chapter V. of Grontfors' book and Report of the Working Group on the Operators I.C.A.O. Document 7031, A4-LE/1.

be the master of the pilot-in-command and therefore the aircraft will be being operated for the purposes of the Act by the hirer. Where space is hired in an aircraft quite clearly the airline from which that space is hired will be the master of the pilot-in-command and will be operating the aircraft for the purposes of the Act. It is the fourth case which may give rise to difficulty in ascertaining who is the master of the pilot-in-command and therefore whether the charterer or the charteree is operating the aircraft for purposes of the Act.

In the case of a charter of an aircraft with crew, there are three situations where the charterer could become the operator of the aircraft namely :-

- (i) where the contract of charter is not a contract for services but rather a contract of service or of agency in other words the charteree is the servant or the agent of the charterer;
- (ii) where the charterer controls the pilot-in-command in his navigation of the aircraft;
- (iii) where the pilot-in-command is pro hac service the servant of the charterer.

(i) CONTRACT OF CHARTER IS CONTRACT OF EMPLOYMENT OR AGENCY

The possibility of what is a contract of charter being construed as a contract of employment is extremely remote. The question of who is the operator where the charter contract is between two incorporated bodies will rather be resolved by reference to tests (ii) and (iii). There is one possible exception. It may be that an owner pilot either trading under his own name or a firm's name could become a servant of the

(30)
charterer. To some extent whether such a person did or did not would depend not only on degree of control but also on the profession of the charterer whether it is an enterprise engaging in airline operations. If it is, it would be more likely that the requisite degree of control would be exercised to constitute the relationship of master and servant. But even this possibility is so remote as to be unworthy of consideration.

(31)
Questions of whether a person is an agent and if so whether the principal is the operator for the purposes of the Act give rise to difficulty. The simplest approach would be that any person who is authorised by an airline to perform services on its behalf is an agent. If this proposition is correct, then, when the airline entrusts a portion of its service to a third person, the airline will for purposes of the Act be the operator of the portion of the service entrusted to the third person. This, it is submitted, subject to certain qualifications, states correctly the position under the Act.

Where a person, in the course of entering into legal relations on behalf of another, the principal, with a third person, tortiously injures that person, upon relatively well settled legal principles, the principal is normally liable for the tort so long as the agent acted within the scope of his authority. Where however a person performs services on behalf of another, if that person is an independent contractor, the employer normally is not liable for the tortious acts of the

30. The type of situation discussed in *Wright v. Attorney-General of Tasmania*, (1955-56) 94 C.L.R. 409.

31. The question of agency is discussed in more detail at pages 227 et seq.

person performing the service. Of course, if the person is a servant, the employer is normally liable, unless the person acts outside the scope of the employment.

To the principle that the employer is not liable for the tortious acts of his independent contractor there are a number of exceptions, so many that it has been suggested, prematurely it seems, that the principle is an exception and the general rule is that the employer is liable. Only one of these exceptions is relevant to this matter. Whenever the law exacts a personal obligation of care, whether imposed by common law statute or contract, under which that person is under a duty to do something, he cannot avoid that obligation by delegating it to an independent contractor.⁽³²⁾ "Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual or non-contractual ... In the former case there is a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of breach of the obligation cannot escape liability because he employed another person, whether servant or agent, to discharge it on his behalf

32. Fleming, The Law of Torts, p.p. 380-381.

and this is equally true whether or not the obligation involves the use of skill."⁽³³⁾ Under the contract of carriage the carrier assumes the obligation to carry the passenger to his destination without negligence. In short the contract imposes upon the carrier a duty to carry safely and it is submitted that duty is non-delegable. That the carrier is liable for the negligence of a second carrier if he contracts with the passenger for the carriage over the negligent carrier's system⁽³⁴⁾ supports this view. And the carrier causing the damage is the agent of the contracting carrier. Equally it must follow that, where an airline charters an aircraft with a crew, it will be liable at common law for damage caused to its passengers through the negligent acts of the owner of the aircraft. The important point is that the acts of the owner of the aircraft are imputed to the airline on the basis of agency, the owner having been authorised to perform a service which the airline has undertaken to provide.

33. Per Lord Green M.R., *Gold v. Essex County Council*, [1942] 2 K.B. 293, 301. See also *Cassidy v. The Minister of Health*, [1951] 2 K.B. 343, 363; *Roe v. Minister of Health*, [1954] 2 Q.B. 66, 82. The principle is not confined to hospitals. In *Beckingham v. P.J. & M. Steamship Co. & Anor.*, (1957) S.R. (N.S.W.) 403, the principle was applied to render the defendant company, a wharf-owner, liable for damage due to the negligence of an independent contractor whom it had employed to remove the plaintiff's submarine without consulting him from the wharf to another place for the purpose of safeguarding it.

34. See discussion of agency at p.

A further principle which seems to be an extended application of the principle just mentioned is stated in the Re-statement of the Law of Torts as follows :-

"An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity." (35)

Notwithstanding the words "unreasonable risk of harm" the principle has applied to the situation where an omnibus operator holds a franchise and sub-contracts a route with the result that the franchise holder has been held liable for the negligent injury by the sub-contractor of a passenger. (36) The principle seems particularly appropriate, where the person selling the ticket is an airline or an agent of an airline and the carriage is over a route which the airline is licensed to serve but has sub-contracted it or a part of it to another. It seems that the act of the sub-contractor is imputed to the franchise holder on the basis that the sub-contractor is the agent of the franchise holder. In short the sub-contractor provides a service which the franchise holder is under an obligation, in this case imposed by the franchise, to provide.

If my initial submission is correct, then, provided the person entering into the contract of carriage is the holder of an airline licence for the route over which the carriage is sold, he is the operator for the purposes of the Act, if the aircraft that perform the carriage are owned by him and manned by his

35. Re-statement of the Law of Torts, Volume II, Negligence, section 428.

36. See notation 34 A.L.R. 2nd. 1124.

servants or, if they are owned by another and manned by the servants of that other. Notice to the passenger would also be of importance, although I doubt whether it would affect the conclusion suggested in the situation outlined in the preceding sentence. It could influence the question where a person charters an aircraft from an airline. If the airline in the course of the negotiations says that it has no aircraft available, but that it can arrange for another airline to perform the charter, clearly the performing airline is not the agent of the booking airline. The booking airline is the agent of either the charterer or the performing airline or both..

This approach, if it is the correct one, would render unnecessary analysis of the relationship between the crew of the aircraft and the airline which hires the aircraft. For completeness, however, in the succeeding paragraphs that question is discussed with a number of other alternative approaches.

(ii) CHARTERER CONTROLS CAPTAIN IN NAVIGATION OF AIRCRAFT.

The analogy of the law relating to charterparties suggests (ii) (mentioned on page 29). Under that law the charterer under a charterparty by demise is liable to the shippers for damage to goods and indeed is treated as if he were the owner. The effect of the charterparty by demise is to let the ship to the charterer. In contrast the ordinary time charter or voyage charter is a contract of carriage the owner agreeing to provide a vessel to carry the goods of the charterer. Where the charter party is in respect of a bare hull it is a charterparty by way of demise. There may however

be a charterparty by demise where a crew is super added (to use the maritime law terminology). The answer to whether a charterparty of a vessel with crew is a charterparty by demise depends upon whether the master is the servant of the charterer or not. The determining factor as to the existence of the relationship of master and servant in this context is who has upon the true construction of the charterparty the right to control the master in the navigation of the ship. If the charterer has that right, the charterparty is one by way of demise and the charterer assumes the duties and rights of the owner of the vessel. There is a presumption against construing a charterparty as a charterparty by demise. (37) The distinction between matters directed to the control of the navigation of the vessel and to the employment of the vessel, the former determining who is the master of the captain and the latter irrelevant to that question, is an easy one to define as a principle but in practice the distinctions may be fine. Thus an order specifying the voyage is an order as to the employment of the ship, but an order specifying the date of sailing is an order as to the (38) navigation of the vessel.

37. 30 Halsbury's Laws of England, 2nd edition, p. 276; but also see Carver's Carriage of Goods by Sea, 10th Edit., p.p. 218 et seq; Scrutton on Charterparties, 16th Edit., pp. 4 et seq; Oswald v. Australian Steamship Ltd. [1914] V.L.R. 329; Scanlan's New Neon Ltd. v. Tobhey's Ltd., (1943) 67 C.L.R. 169, 224 and Australasian United Steam Navigation Co. Ltd. v. The Shipping Control Board, (1945) 71 C.L.R. 508, 521-522.

38. Per Lord Porter, Larrinaga Steamship Co. Ltd. v. the King, [1945] A.C. 246, 261.

(iii) CAPTAIN PRO HAC VICE SERVANT OF CHARTERER.

The third situation is suggested by the circumstances where a servant or servants with or without equipment are lent to or hired by one person, the hirer by or from another, the general employer. In those circumstances, at common law, the hirer may become pro hac vice the master of the servant and be liable on the doctrine of respondeat superior for his tortious acts and indeed liable to the servant for breach of the duty of care that rests on him as master :-⁽³⁹⁾

"...but it is well established that the master in whose general service a man is is not responsible for the tortious act of the man if the control of the master has been for the time being, displaced by the power of control of another master into whose temporary service the worker has passed by being lent (even gratuitously) or sub-contracted. In such a case, it is the 'patron momentaire' and not the 'patron habituel' who is responsible." (40)

It is perhaps labours the obvious to say that "the power of control of the new superior must be present in connexion with the doing of the particular act which proves to be tortious and so gives the injured party a right of action." (41)

The test that governs the question of whether a servant has been transferred or not is centred around the right to control the servant in the method of performing his work.

39. O'Reilly v. I.C.I. Ltd., [1955] 3 All E.R. 382, in which it was held the hirer was not under a duty to the servant to provide a safe system of work, for the relationship of master and servant did not exist between them as the servant had failed to show that he was the servant pro hac vice of the hirer.

40. Per Cross J., Bain v. Central Vermont Ry. Co., (1918), 28 Que. K.B. 45, 48; approved by the Privy Council on appeal, [1921] 2 A.C. 412, 414, 415.

41. Nicholas v. F.J. Sparks and Sons, (1943) 61 T.L.R. 311.

In the leading case Mersey Docks and Harbour Board v. Coggins

Lord Porter stated the position to be as follows :-

"Many factors have a bearing on the result. Who is the paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed - all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders were given, but who is entitled to give the orders as to how the work should be done".(43)

The test was accepted by other members of the House of Lords as the controlling one. The other indicia mentioned by Lord Porter in the earlier part of this statement have been rejected as not being controlling in earlier decisions.⁽⁴⁴⁾

The contract between the general employer and the hirer is not controlling. Thus, if there is general declaration that the worker is to be the servant of the hirer or the general employer, that will not conclude the question. The Court will look at the facts and, if these show that,

42. [1946] 2 All E.R. 345.

43. Note 42 supra, 351.

44. The hirer pays the servant, the hirer chooses the servant; both rejected Quarman v. Burnett, (1840) 6 M.&W. 499. The hirer has the right to dismiss the servant; rejected Hobbit v. L. & N.W. Ry.Co., (1849) 4 Exch. 244. The contract between the general employer and the hirer controls; rejected Mersey Docks and Harbour Board v. Coggins, note 42 supra.

despite the declaration in the contract, there is truly a legal relationship of master and servant between the worker and a person other than the person declared to be the master in the contract, that person will be held to be master.⁽⁴⁵⁾

However, in the absence of concrete facts, the declaration in the contract will be decisive.⁽⁴⁶⁾ The declaration will be important as between the general employer and the hirer, for it may be the basis for implying an indemnity or, if an indemnity is expressed, that will remain operative to the benefit of the party in whose interest it is expressed.⁽⁴⁷⁾

The burden of proving that a transference of the servant has taken place lies upon the general employer or upon the person whose claim such a finding would advance. It is a heavy burden that may be discharged only in exceptional circumstances.⁽⁴⁸⁾ The presumption against the transfer is greater and the burden of proof therefore is higher where the servant is called upon to use technical skill and judgment in the operation of machinery hired:-

"Such a transfer rarely takes place when a man is lent with a machine, such as a crane or a lorry; or when a skilled man is lent so as to exercise his skill for the temporary employer. In such case the parties do not contemplate that the temporary employee shall tell the man how to manipulate his machine or to exercise his skill."⁽⁴⁹⁾

45. Mersey Docks and Harbour Board v. Coggins, note 42 supra.

46. Lindsay v. Union Steamship Co. of New Zealand Ltd., [1960] N.Z.L.R. 486.

47. Herd v. Walker (Tooting Ltd.) and others, [1956] 1 All E.R. 429.

48. Per Viscount Simon, Mersey Docks and Harbour Board v. Coggins, note 42 supra, 348.

49. Per Denning L.J., Denham v. Midland Employees Mutual Assurance Ltd., [1955] 2 All E.R. 560, 564.

Having regard to the professional status of the pilot-in-command the high degree of technical skill and the qualifications required of him it would seem that only in most exceptional circumstances in the absence of a term in the contract of charter would he become the servant pro hac vice of the charterer. Indeed in O'Reilly v. Imperial Chemical Industries Ltd. Jenkins L.J. said that the range of cases in which liability is held to have shifted (50) to the hirer ought not be extended.

It is however unsafe to rely on the observations of Jenkins L.J. for the courts by resorting to the circumstances and drawing inferences therefrom to determine whether a transference has taken place have allowed themselves a wide measure of freedom to determine in particular circumstances what is the decision that is equitable and reasonable :-

"From certain facts, if accepted as proved, it would follow as a matter of law that the liability remained with the general employers. From others, that it had shifted to the particular employer. Between the two extremes there is a wide field in which a finding of liability on the part of either by a tribunal of fact would not be disturbed."(51)

The special position of the pilot-in-command flowing from the independent position he enjoys by virtue of the Air Navigation Regulations and the fact that in the control of the aircraft he is governed by the Regulations, does not preclude a transference of services so that he becomes the servant of the hirer. It may be that in relation to the collateral or the (52) peripheral matters referred to by Dixon C.J. he has been placed under the control of the hirer.

50. Note 49 supra, 388.

51. Per Jordan C.J., McDonald v. Commonwealth, (1945) 46 S.R. (N.S.W.) 129, 132.

52. Reference is at note 26 supra.

COMPARISON OF (ii) and (iii)

The charterer's liability, in the case of a charter-party with crew super added and in the case where the pilot-in-command of an aircraft is lent with the aircraft, depends upon whether he controls the pilot-in-command in the way in which he performs his function of navigating the aircraft. But in applying this test there is a significant difference. In the case of the charterparty the provisions of the contract determine whether the requisite degree of control is exercised. In the case of the loan of a servant not only is the contract relevant but also the surrounding circumstances and these may give rise to an inference which will override the intention of the parties as expressed in the contract. From the point of view of the charterer, the charteree and probably the claimant, the maritime analogy is the superior one as offering a more definite way of determining who is the operator of the aircraft. However the possibility cannot be dismissed that the Courts may apply the principles governing the transference of servants to the analogous situation of the charterparty. (53)

FURTHER APPROACH SUGGESTED.

One aspect of the pilot-in-command's area of discretion in relation to the aircraft is limited by the obligation upon him to comply with the directions contained in the flight manual. He is in addition required under the Air Navigation Regulations to comply with all the instructions relating to his duties

53. Already the test is applied in one area of maritime law, see the *Panther*, [1957] 1 All E.R. 641; also relevance of the test to existence of duty to provide safe system of work suggests the courts will be prepared to extend the test beyond the area of vicarious liability of the master for the servant's torts (*Reilly v. I.C.I.* note 39 supra).

contained in the operations manual prepared and issued by his employer, the operator, under the supervision of the Director-⁽⁵⁴⁾ General of Civil Aviation. The operations manual too limits the area of his discretion for it contains "complete instructions" as to emergency flight procedures, minimum safety heights for each route to be flown, the circumstances in which a radio listening watch is to be maintained, and the computation of the quantities of fuel and oil to be carried. The significance of the operations manual is that it is a detailed set of instructions emanating from a person, the operator, directed to his employees and that it goes to the manner in which the pilot-in-command performs his duties. It should therefore be of decisive importance in answering the question who is the master of the pilot-in-command. In short the question of who is operating an aircraft for purposes of the Act may be answered simply by ascertaining whose operations manual the pilot-in-command is required to comply with. That may involve the question of in whose employ is the pilot-in-command, thus returning to the original difficulties outlined in the preceding paragraphs. Although it is not free from doubt, the pilot-in-command is an employee for the purposes of the Regulations of the person who appoints him to that position. Even if this is not correct it would be cogent evidence that the pilot is the servant of an airline if he, in fact, complies with the operations manual prepared and provided by that airline.

54. Regulation 212 of the Air Navigation Regulations.

From this discussion I submit that one conclusion emerges, Where an aircraft with crew is hired from an airline save in exceptional circumstances that airline will for the purposes of the Act be regarded as operating the aircraft. Thus the claimant should sue the airline from which the aircraft was chartered. That this is so seems to be just and reasonable for the airline is "the person who has created the risk from which the accident and the damage flowed"⁽⁵⁵⁾ The airline is free to secure indemnities from the charterer to protect itself against those claims and so if it is without fault or indeed even if it is at fault it may nevertheless not suffer any loss.

7.

IN THE COURSE OF COMMERCIAL TRANSPORT OPERATIONS

The aircraft must at the time the event occurred giving rise to the claim be operated in the course of commercial transport operations. Commercial transport operations are defined in section 26(1) of the Act as operations in which an aircraft is used, for hire or reward, for the carriage of passengers or cargo.

The words "is used" suggest that the purpose of the operation is irrelevant. The test is rather whether in fact passengers or baggage are being carried for reward on the aircraft. Thus, if a paying passenger or passengers are embarked on an aircraft that is on a positioning flight, the Act will apply to the carriage of those passengers.

55. Professor Cooper speaking at the meeting of the Legal Committee at the 4th Assembly of I.C.A.O. Montreal 1950 Doc. 7031 L.E.1 (the tense of the verb has been altered).

Both of the words "hire" and "reward" have been used frequently in Statutes as being descriptive of a quality necessary to the application of laws. The decisions on the interpretation of those statutes while not controlling are of persuasive authority.

What elements are necessary for a carriage to be one for hire or reward? In the first place it is not essential that a profit be made for the carriage.⁽⁵⁶⁾ There is a carriage for reward if only voluntary contributions are made for the carriage.⁽⁵⁷⁾ On the other hand it has been held that hire "necessarily imports an obligation to pay."⁽⁵⁸⁾ There is no need to resolve this conflict. Reward is used in the alternative to hire. It is not merely for the purpose of giving an alternative word meaning the same thing, but brings in a subject matter which is not included in hire and certainly includes the case where there is no obligation to pay.⁽⁵⁹⁾ But it imports more than lack of obligation to pay. It refers to and includes any valuable consideration which embraces any payment for the service of carriage, although it embraces payment for other services, or on some other account, and indicates that the carriage may be included in a contract

56. Per Hoskings J., *Ross v. Walker*, [1921] N.Z.L.R. 965, 972; also *East Midland Traffic Area v Tyler*, [1938] 3 All .E.R. 39.

57. *Cocks v. Mayne*, (1893) 70 T.L.R. 403.

58. Per Uthwatt J., *Bonham v. Zurich General Accident and Liability Insurance Co.Ltd.*, [1945] K.B. 292, 300.

59. Note 56 supra.

concerning other matters. Thus it has been held that there has been a carriage for hire or reward, where without payment a company carried the employees of companies owning shares in it, the cash from those shares having been used to purchase aircraft for the purpose of extending the company's operations and the shareholding companies having undertaken to give the company all their business. (61) But there are limits. In (62) Mariott v. Archer a contractor undertook to build the approaches to a bridge and to carry the gravel necessary for the work to the site. The gravel was on Crown land a short distance away. It was held that the carrying of the gravel in the contractor's trucks from the gravel pits to the construction site was not a carriage for hire and reward, on the basis that the contract was one not for carriage but for construction.

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60. Per Poole A.C.J., In re the Corporation of the City of Adelaide, Ex parte Mitchell., [1925] S.A. S.R.179, 187; per Smith J., Gill v. Laird [1940] N.Z. L.R.540, 543. In Crouch v. Sullivan, [1956] S.A. S.R.146, applying these decisions Ross J. held that the South Australian Road and Railway Transport Act which provided that no person shall drive on any controlled route any vehicle on which passengers or goods or both are being carried for hire (defined to include reward and any valuable consideration whatever - he relied only on reward) prohibited a person, who had entered into a share cropping contract under which for half of the profits from the wheat crop he undertook to do heavy work, carting wood and other jobs, from carting the wood of the other contracting party for, the half share in the wheat crop was a reward for the purposes of the Act. Also see Transport Regulation Board v. Australian National Airways Pty.Ltd., [1952] V.L.R. 68.
61. R. v. Uscan Engineering Corporation Ltd., [1949] 1 W.W.R.870.
62. [1955] N.Z. L.R.180. It is difficult to reconcile this decision with the decisions mentioned in the note 60. Probably they are reconcilable on the basis that a question of degree is involved and that in this case the consideration for the carriage was too remote from the carriage for it to constitute a reward for the carriage.

These principles were laid down in relation to the words "carriage for hire and reward". In the Act the phrase is "used, for hire or reward, for the carriage of passengers or cargo." The phrase "for hire or reward" is separated from the rest of the clause by commas. It would seem that a use for hire and reward implies that the hire or reward need not be as closely related to the operation of carrying as a carriage for hire or reward. Having regard to the punctuation, the hire or reward need not flow from the carriage of the passengers or cargo but from some other source. Thus where an airline licensee is carrying out aerial work operations, such as photographic survey, the consideration payable in respect of that would be the reward necessary to apply the Act. If under the contract between it and the charterer the airline licensee agreed to carry employees of the charterer, that carriage would be subject to the Act.

As I have said whenever paying passengers are carried or cargo in respect of which the carrier has received consideration is carried there is a carriage for hire or reward and the aircraft is being operated in the course of commercial transport operations. The question of the presence of hire or reward becomes important where non-paying passengers are carried. If only non-paying passengers are carried in the aircraft generally speaking the Act will not apply. In the case of a positioning flight, if only non-paying passengers were aboard, the respective liabilities of the carrier and the non-paying passengers would not be governed by the Act. If the aircraft is on a scheduled flight but in fact

non-paying passengers or cargo are carried due to lack of traffic, it is submitted the Act will apply to any non-paying passengers carried notwithstanding that it is difficult to say it is being used for hire or reward for the carriage of passengers and cargo. To cover that situation the definition of commercial transport operations should have included in it the words "for the purposes of". However it is a not untenable construction of the definition that it includes such an aircraft, for it would seem logical that an aircraft available for the carriage of passengers for hire or reward is an aircraft being used for hire or reward for the carriage of passengers.

It is submitted that as the fact of carriage is the decisive factor, provided hire or reward is received in respect of the flight, non-paying passengers carried on say an aircraft operated by the holder of an airline licence in aerial work operations such as photographic survey will be entitled to the benefit of the Act. Of course their carriage must satisfy the other requirements of the section. The elements of the definition in such a case will be present. The aircraft is being used for hire or reward. The aircraft is being used for the carriage of passengers, for a passenger or passengers are being carried.

What is the position where a charitable organization obtains under charter without paying any consideration an aircraft and proceeds to use it to give say orphans a free trip? On one construction the Act would apply at least as between the orphans

63. As in *Hedges v. Hooker*, (1889) 60 T.L.R. 822.

and airline which, I am assuming, would be the operator for the purposes of the Act. Section 26(2) provides in substance that where by reason of a contract of charter between an airline and another person persons or baggage are carried on an aircraft operated by the holder of an airline licence the contract of charter shall be deemed to be a contract of carriage providing for that carriage. In section 26(1) contract is defined to include an arrangement without consideration. Transposing that definition into section 26(2) contract of charter would include an arrangement for charter without consideration. It is submitted that this construction is incorrect. The better view of section 26(2) is that all it does is to assimilate a contract of charter to a contract for the carriage of a passenger or of cargo. The result of this is that for the Act to apply to the carriage of persons in an aircraft under charter the other requirement of the section 27(1) relative to hire or reward must be satisfied. That requirement would be satisfied, in the example of the orphans mentioned above, if the charitable organization made some payment. If it did not, the Act would not apply.

8.

PLACES BETWEEN WHICH CARRIAGE MUST TAKE PLACE

The contract for the carriage of the passenger must be one for his carriage :-

- (a) between a place in a State and a place in another State;
- (b) between a place in a Territory of the Commonwealth and a place in Australia outside that Territory;
- (c) between a place in a Territory of the Commonwealth

and another place in that Territory even though in the course of the carriage a landing is made outside the Territory; or

(d) between a place in a State and another place in that State provided -

(i) the carrier is the Australian National
(64)
Airlines Commission;

(ii) a landing is to take place outside the State,
(65)
in the course of the carriage; or

(iii) (a) the carriage is a successive stage in a carriage to which the Act would apply if the whole carriage were performed by a single carrier; and

(b) the whole carriage has been regarded by the parties as a single operation whether it has been agreed upon by a single contract or by two or more
(66)
contracts.

But the Part does not apply to carriage to which the Warsaw Convention or that Convention as amended by the Hague Protocol applies.

The limitation by reference to places is dictated by the power of the Commonwealth Parliament to legislate. Its legislative power is limited by the Constitution to matters

64. Section 27 (2)

65. Section 27 (3)

66. Section 27 (4) which quite obviously is modelled on article 1(3) of the Warsaw Convention.

(67)

enumerated therein. Under the power to make laws with respect to trade and commerce among the States and with foreign countries the Parliament has applied the Act to carriage between the States and between Australia and other countries. That legislative power does not extend to intra-State carriage. The power to apply the Act to carriage within the Territories and to and from the Territories flows from section 122 of the Constitution. (68) The power to legislate with respect to trade and commerce amongst the States is limited by the Constitutional prohibition in section 92 that "trade, commerce and intercourse amongst the States shall be absolutely free." The problems that this inhibition on power raises are numerous, but their discussion lies outside the scope of this paper. However the freedom protected by section 92 has not been held to guarantee freedom (in the widest sense) of contract and the Courts have consistently held that some degree

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67. Section 51(1) of the Constitution. The power has been held to support legislation of a similar type, the Seamen's Compensation Act, which imposes upon shipowners an absolute liability, subject to limits, for death or injury to seamen employed on ships engaged in interstate trade and commerce (Australian Steamships Limited v. Malcolm, (1914) 19 C.L.R. 298) and the Sea Carriage of Goods Act which abridges the right of a carrier by sea, to contract out of liability limits his liability and applies to interstate carriage of goods, (James v. the Commonwealth, [1936] A.C. 578).
68. Section 122 provides : "The Parliament may make laws for the government of any Territory surrendered by a State...or any Territory placed by the Queen under the authority of and accepted by the Commonwealth or otherwise acquired by the Commonwealth...". This power is a plenary one as wide as the power of the States to legislate as if there was no Commonwealth Parliament existing with paramount power (A.N.A. v. the Commonwealth, (1945) 71 C.L.R. 29, 62 and 79) and includes the power to legislate with respect to carriage between a territory and the States and to overrule inconsistent State Laws made in relation thereto. (Lamshed v. Lake, (1958-59) 32 A.L.J.R.75).

of regulation is consistent with the freedom.

Normally it will be easy to determine if the Act in its application by reference to places applies for these are specified on the contract of carriage. The test is an objective one i.e. whether, according to the contract, the carriage is a carriage to which the Act applies.

INTRA-STATE CARRIAGE.

There are several matters that require comment. The Act applies to a carriage that is wholly intra-State, provided that it is a successive stage in a carriage to which the Act applies, notwithstanding that it is performed by a carrier other than the carrier performing the sector of the carriage which attracts the application of the Act, and notwithstanding that a separate contract has been made for the intra-State carriage, if the parties have regarded the whole carriage as a single operation. Quite clearly where a single ticket is issued covering the intra-State part of the carriage by another airline or the issuing airline whether at the commencement of the transportation, at an intermediate stage in the transportation or at the end of the transportation, the presumption will be that the carriage has been regarded as a single transportation. The situation which may

69. The Commonwealth v. Bank of New South Wales, [1950] A.C. 235; Hughes & Vale Pty.Ltd. v. The State of New South Wales, [1955] A.C.241; Hughes & Vale Pty.Ltd. v. State of New South Wales (No. 2), (1955) 93 C.L.R. 127. A recent illustration is Greutner v. Everard, (1960-61) 34 A.L.J.R. 71. And see James v. the Commonwealth, note 67 *supra*, where the Privy Council instanced the Sea Carriage of Goods Act as a regulation of interstate trade and commerce consistent with section 92.

give rise to difficulty is the one where the intra-State carriage is performed in pursuance of a separate contract yet is a successive stage in the whole transportation. The difficulty flows from the question being determined by reference to the intention to the parties. That difficulty was discussed in relation to article 1(3) of the Warsaw Convention by George R. Sullivan in The Codification of Air Carriers Liability by International Convention. (70) He wrote :-

"A drawback in its use to determine the scope of the Convention is the difficulty in proving what the parties intended. Insofar as in a particular case extrinsic evidence is available to prove what the parties contemplated, well and good; but in the absence of such tests, what must be done? Furthermore, what should be the result where one party intended one thing and the other party the opposite? To what extent will printed stipulations on the tickets and waybills be accepted as proof of intention? Perhaps these difficulties are unavoidable. Their existence, however, must be recognised?" (71).

Maurice Lemoine in Traite de Droit Aerien also discusses the problem -

"L'intention des parties doit seule être prise en consideration. Mais de quelle façon sera-t-il démontré que le transport a été envisagé comme une opération unique, en l'absence d'une manifestation expresse de volonté? La délivrance d'un unique titre de transport en constituera la preuve. En cas de pluralité de contrats, la question est plus délicate et il appartiendra éventuellement aux juges de rechercher l'intention des parties en s'attachant à tel ou tel indice. C'est ainsi que nous sommes d'avis définir, sauf déclaration contraire, l'opération comme unique lorsque le premier transporteur agissant soit comme commissionnaire, soit comme représentant de différents

70. (1936) 7 J.A.L. & Com. 1.

71. Note 70 supra, 11.

transporteurs successifs, remettra au voyageur tous les titres du transport qui sera effectue. Somme toute, la question sera une question de fait, mais il n'y a pas lieu d'exiger une affirmation expresse des parties." (72)

Both agree that in the absence of express intention the question is one of fact to be determined by reference to extrinsic evidence. Lemoine suggests, and it is submitted correctly, that, if the first carrier hands the documents of carriage to the passenger covering the whole journey, it will be assumed the parties intend the carriage to be regarded as a single operation. There is of course no room for that inference to be drawn where the passenger purchases a ticket to cover the successive stage in the carriage at the point where that carriage over that successive stage is to commence. This is probably the case too where he produces a warrant issued by the first carrier entitling him to be issued with a ticket to be carried on the successive stage. Where the passenger purchases the tickets from a ticket agent it may be that the intention inferred will be that the operation is not to be regarded as a single operation, for the agent in selling the tickets will be acting in two capacities, as the agent of the first carrier and as the agent of the second carrier. In principle, this situation resembles the case where the passenger purchases the tickets from each carrier.

Lemoine states that the terms of the contract of carriage may determine the intention. There is no doubt that he is correct.

Thus, if the tickets or one of them contain terms to the effect that if sold in circumstances where the Act might apply by virtue of the carriage covered by ticket being regarded as part of a single operation, the parties agree that it was their intention that the carriage should not be regarded as a single operation, the Act will not apply. Such a term is not a condition contracting out of the liability imposed by the Act to be rendered of no effect by section 32, for in this class of carriage the intention of the parties controls the application of the Act, unlike the other classes of carriage, where intention is irrelevant, the application depending upon the objective test of "is the carriage between certain places? if so, the Act applies."

As the Warsaw Convention applies in somewhat similar circumstances to internal carriage by air, there may be cases where it is ~~first~~ necessary to determine whether the carriage is covered by the Warsaw Convention by applying identical tests. If that Convention applies Part IV will not apply. In most cases a single ticket is issued to cover the whole journey both domestic and international. As a result there will be no difficulty. The case which may occur which could raise the difficulty is where a domestic carrier sells two tickets one covering the domestic stage of the journey on his own airline and the other covering the international section of the journey. It is possible to envisage a three section carriage the issuing carrier sells three tickets to a person one covering intra-State carriage by it, one covering interstate carriage by a second

airline and a third covering international carriage by a third airline. It is probable the whole of the carriage would be subject to the Warsaw Convention. From the carrier's point of view the application of the Convention has its advantages and its risks. On the one hand the limit on his liability is lower but on the other hand his liability may be unlimited because he failed to include the required particulars on his ticket or because the damage suffered by the claimant is due to wilful misconduct on his part.

The Act applies to the intra-State carriage by the Australian National Airline Commission. The Commission is established by the Australian National Airlines Act 1945-1959, an Act of the Commonwealth Parliament. As it is a creature of the Commonwealth Parliament, the Commission may engage only in carriage that is referable to one of the express powers of the Constitution.⁽⁷³⁾ Speaking generally, the result is that the Commission may not engage in the intra-State carriage of passengers unless that carriage can be shown to be incidental to a carriage that is authorized, such as a carriage in trade and commerce between the States. Whether the intra-State

73. Section 19 of the Australian National Airlines Act provides that the Commission may do all that is necessary to be done or incidental to the establishment maintenance and operation by the Commission of airline services for the transport, for reward, of passengers and goods by air between places in different States, between places in a Territory, between a place in a Territory and any place in Australia outside that Territory and, subject to the approval of the Minister, between a place in Australia and a place outside Australia, or for the transport of mails by air between any places in Australia.

carriage is incidental to the interstate carriage is in each case a question of fact. However it seems that where a service between States includes two stopping places in one State traffic may be picked up at these points for solely intra-State carriage provided the bulk of the traffic carried on the service is of an interstate character.⁽⁷⁴⁾ This is only one illustration of the circumstances in which the carriage of intra-State passengers may be incidental to a carriage that is authorized by an express power. It may occur where the service is between two Territories. In addition intra-State traffic may be carried in two States, Queensland and Tasmania by virtue of a reference to the Commonwealth of the power to do this by those States⁽⁷⁵⁾ and the adoption of that reference in the Australian National Airlines Act.⁽⁷⁶⁾ Intra-State carriage by the Commission in Queensland and Tasmania and in the other States to the extent that it is incidental to the other classes of carriage which the Commission is empowered to engage in is subject to the Act. It would seem that, if the Commission carries passengers on intra-State

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74. In view of the decision in *Pioneer Express Pty.Ltd. v. Hotchkiss*, (1958) 101 C.L.R. 536, that the carriage of traffic between a State and a Territory on a bus service between two States, the bulk of the traffic carried being indisputably of an interstate character, was not incidental to that interstate carriage and to hold otherwise would be to confuse business notions of incidental with legal notions of incidental, it may be that purely intra-State carriage may never legally be incidental to interstate trade and commerce or inter-territorial operations.
75. Queensland; The Commonwealth Powers (Air Transport) Act of 1950. Tasmania; Commonwealth Powers (Air Transport) Act 1952.
76. Section 19A of the Australian National Airlines Act.

operations which do not fall within these, the Act will not
(77) apply, and the relations of the Commission and the passengers
will be governed by the terms of the contract between them and
the common law.

9.

SUMMARY.

The Act applies to :-

- (1) the carriage of passengers being persons in the aircraft with the consent of the carrier (whether consideration has been received in respect of their carriage or not), other than members of the crew and the carrier's employees whose carriage is incidental to their duties, being carried primarily for purposes of carriage;
- (2) carriage on an aircraft operated by the holder of an airline licence the aircraft being so operated when the holder has the right to control the crew in the performance of their duties or the owner of the aircraft is the agent of the holder;
- (3) carriage on an aircraft which is being used for hire or reward, whether the reward is received in respect of carriage or for some other purpose, and which is in fact being used to carry passengers or cargo; and

77. As constitutionally the Commission is incapable of engaging in the carriage, the Commonwealth Parliament too is constitutionally incapable of legislating with respect to that carriage. The Act therefor cannot apply.

(4) the carriage (on an aircraft) which is between the places enumerated.

10.

BAGGAGE.

The Act applies to the carriage of baggage where the circumstances necessary for its application to passengers are present.⁽⁷⁸⁾ This is discussed in the chapter on liability for baggage.

11.

CARGO

Section 41 of the Act authorizes regulations providing for applying with such adaptations and modifications as are prescribed the provisions of the Warsaw Convention and the Hague Protocol and any of the provisions of the Act to the carriage of cargo in circumstances where the Act applies to the carriage of passengers. This is a reserve power and it is not proposed to exercise it, at least in the immediate future, for the practice of insuring is general in relation to the carriage of goods and as a result most consignors receive adequate compensation for loss or damage to cargo. There is therefore, no real need for extension of the Warsaw principles to the internal carriage of cargo.

12.

CONCLUSION.

The discussion in this chapter may have misled the reader into the false conclusion that a person in determining whether the Act applies to a particular case will be beset with difficulties and doubts. Nothing could be further from the truth in the great majority of cases and to have left this conclusion unmentioned would have done less than justice to the architects of the Act. Of necessity, in discussing the boundaries of the application of the Act, the discussion has been focussed on the doubtful cases, for it is these that define the margins.

The complex nature of section 27 was dictated primarily by constitutional limitations and economic considerations. I have already discussed why the constitutional limitations required the application by reference to places between which the carriage is performed. When the States enact legislation extending the provisions of Part IV to intra-State carriage the difficulty posed by this will disappear.

The limitation by reference to carriage for hire or reward performed by the holder of an airline licence flows from the lack of data on the impact of the application of the rule of liability to charter operators, most of whom operate only light single^{engine}/aircraft. It may be found that the rule of liability can be imposed upon that class of operations without undue financial hardship. It may however be desirable in order to ensure that claimants will not only have a right of action, but that their

judgments will be satisfied, to supplement the Act by requiring charter operators to carry adequate insurance and by establishing a fund to which all will be required to contribute to meet claims against operators who have not insured in accordance with the tenor of the provision.

If these steps are taken it becomes possible to bring private operators within the scheme of the Act. Whether that is desirable or not depends primarily upon questions of public policy which lie outside the scope of this thesis and cannot be separated from the question of insurance against liability to third parties other than passengers.

P A R T T W O

LIABILITY OF AIR CARRIERS AT COMMON LAW

CHAPTER III

CLASSIFICATION OF CARRIERS AT COMMON LAW

1.

CLASSIFICATION

The accepted classification of carriers for reward at common law is into common carriers and private carriers.
(1)
However Leslie suggests that there is a third class of carrier. In his view there is a class of carrier who is under the same liability as a common carrier except that he is not answerable for refusing to carry goods or persons. Such a carrier under the normal classification would be classed as a private carrier and be subject to the liabilities of a private carrier. This new class is distinguished from private carriers by the fact that they are habitually engaged in the profession of carriage whereas private carriers in, his view, are those who engage in it either only casually or for the purpose of carrying their own property. Other than certain dicta in some mid nineteenth century decisions there is no authority to support Leslie's view. Consequently the accepted classification has been adopted in this thesis.

The liability of the common carrier differs from the private carrier's liability in two important respects. The common carrier is under an obligation to carry the persons and goods who or which lie within the ambit of his profession and,

1. Leslie, Law of Transport by Railway, 2nd Edit., page 9.

in relation to goods, he is under what is inaccurately but generally described as an insurer's liability. The normal approach to classifying a carrier, indeed the only logical approach, is first to ascertain whether he answers the description of a common carrier. If he does not, then he is a private carrier. It follows that the test of a common carrier must first be discussed. A primary issue in that discussion is whether a carrier by air may ever be a common carrier.

2.

WHETHER A CARRIER BY AIR MAY BE A COMMON CARRIER.

Some doubt has been expressed whether in the Commonwealth countries a carrier by air can be a common carrier. There is no decision of a superior court holding an air carrier to be a common carrier. In the United States the Courts have consistently held that an air carrier may
(2)
be a common carrier.

There are several reasons for the scarcity of authority in the Commonwealth countries. The volume of air carriage by air is far lower in the Commonwealth than in the United States. The vast extent of air carrier operations in the United States is reflected in the wealth of reported cases on air carrier's liability. In the United

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2. Allison v. Standard Airlines Inc., 1930 U.S. Av.R.292; Law v. T.A.T., 1931 U.S. Av.R. 205; Conklin v. Canadian Colonial Airways, 1934 U.S.AV.R.21; Alaska Air Transport Inc. et al v. Alaska Airplane Charter Company, 1947 U.S. Av.R. 548 and Arrow Aviation Inc. v. Harry H.Moore, 6 CCH Aviation Law Reports 17387 (1959).

States stipulation against negligence by a common carrier of passengers is contrary to public policy.⁽³⁾ This and the fact that a higher duty of care is imposed upon carriers⁽⁴⁾ of passengers for reward than in the Commonwealth countries has lead to pressure from claimants on the courts for the imposition of the status. In the Commonwealth countries, as the common carrier is free to stipulate against all his liabilities,⁽⁵⁾ there is no real advantage for the litigant to establish the status in the face of carefully drawn conditions in the contract of carriage. No doubt because of the pressure upon them, the courts in the United States have adopted a different technique to establish whether a carrier is a common carrier or not. They look not at what the carrier professes to be but at what he does, so that, as long as the service is rendered on a public basis, lack of authority, subterfuges or disclaimer do not absolve the carrier from the

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3. "In most of the United States it is held unreasonable for a common carrier to stipulate against liability for injury or losses caused by the negligence of itself or its servants ...Attempts by common carriers, and especially general carriers for hire by aeroplane, to limit by contract their liability for injury to passengers, whether arising from the carrier's negligence or not, to a stated sum as a base rate, had...generally failed in the United States as contrary to public policy" (Willison on Contracts (revised edition) sections 1109 and 1110). An example of a stipulation against negligence appears in *Curtiss Wright Flying Service Inc.v. Glose*, 1933 U.S. Av.R.26.
 4. "The majority of courts uphold an instruction to the jury which exacts of a common carrier of passengers for hire, toward the passenger, the highest degree of care and forethought consistent with the practical operations of the business." (Harper and James, *The Law of Tort*, Section 1614).
 5. *Ludditt v. Ginger Coote Airways*, [1947] A.C.233.

(6)
status. In Commonwealth countries the courts look at not only what the carrier does but what he professes to be. If in the contract of carriage the carrier proclaims he is not a common carrier, notwithstanding that all his actions are otherwise consistent with him being a common carrier, the courts will decline to impose the status.⁽⁷⁾ Carriers by air have taken full advantage of this and in their documents of carriage take care to insert the appropriate notices and conditions.⁽⁸⁾

The reasons enumerated in the preceding paragraph for the lack of Commonwealth authority on this question suggest that a study of the rules of common law relating to common carriage is no longer necessary. This is not so. An understanding of those rules is essential to place in their true

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6. 4Williston on Contracts (revised edition) page 2983. Examples are *Curtiss Wright v. Glose*, supra note 3, and *Nelson v. Colonial Air Transport Inc.*, 1934 U.S. Av.R.139. Even where the carrier's evidence was accepted by the Court that he had stopped advertising in order that the status would not be impressed upon him the court held in *Alaska Air Transport Inc. et al. v. Alaska Airplane Charter Company*, 1947 U.S.Av.R.548, that he was common carrier.
7. The test that has been adopted is - "Did the defendant while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage...", (*Belfast Ropework Co. v. Bushell*, [1918] 1 K.B.210 at 214). It was held in *Aslan v. Imperial Airways Ltd.*, 49 T.L.R.415, that a notice "the companies are not common carriers, and reserve the right to refuse to carry any passengers or goods without assigning reason therefore" satisfied the test and was therefore sufficient to prevent the impressment of the status.
8. For example in the *Ansett-A.N.A.* ticket there appears a notice identical with that approved in *Aslan v. Imperial Airways Ltd.*, supra note 7.

perspective the statutory provisions, for, as McNair has said, the common law liability of the carrier in relation to persons and goods is a palimpsest upon which the carrier's liability by special contract is written.

To return to the question of whether in Australia an air carrier can be a common carrier E.G.M. Fletcher⁽⁹⁾ has suggested the answer is in the negative. He considered that the economic burden, the consequence of the common carrier's liability, was too great. The early U.S. decisions made prior to Fletcher's article suggest that even when written this argument was ill-founded.⁽¹⁰⁾ He felt at the time he was writing the tendency was to restrict the scope of the rule. United States decisions certainly did not support that view, while the paucity of authority in the Commonwealth countries could be explained then as new by the care with which carriers take to prevent the status being impressed upon them.⁽¹¹⁾ Recent Canadian decisions are inconsistent with this view. Thirdly he said that the widespread usage of written contracts throughout the airline industry had given rise to a commercial custom inconsistent with the principle. It could be said that the written contracts were in fact evidence of commercial acceptance that the status could apply as they specifically sought to exclude the status. Moreover the status can arise notwithstanding that the contract of carriage is committed in writing. Fourthly he stated that there was no a priori principle justifying application of the liability. While this might be correct the U.S. courts took the view that in substance carriage by air was identical to carriage by any other means as it involved the acts of transport and should

9. Note in (1934) 50 L.Q. Rev. 329.

10. See note 2 supra

11. See notes 15, 16, 17, 18, 19 and 20 below.

therefore be subject to the same principles of liability.⁽¹²⁾ Lastly he asserted that the liability was confined to carriers by land. It is true that the equivalent of a common carrier in sea carriage is described as a public carrier,⁽¹³⁾ but a public carrier is under the same liability as a common carrier and has been,⁽¹⁴⁾ at least since Coggs v. Bernard, except that the carrier by sea is not answerable for refusing to carry goods. It would seem then that the assertion that common carrier's liability is confined to carriage by land is not accurate. Moreover the courts in the nineteenth century felt no difficulty in expanding the scope of the principle to embrace not only carriage by road but also carriage by rail.

The strongest argument against Fletcher's view however lies in developments since he wrote. A line of Canadian cases, of persuasive authority in Australia, apply the principle to carriage by air. The way in which the Privy Council dealt with an appeal supports the Canadian approach. Dicta in a Scottish case support the same conclusion and McNair, Moller and Shawcross⁽¹⁵⁾ and Beaumont take the same view.

⁽¹⁶⁾ In the earliest of the Canadian cases Galer v. Wings Limited, a decision of the Court of King's Bench of Manitoba, Montague J. said :

12. See page 69.

13. Carvers 'Carriage of Goods by Sea', Ninth Edition, edited by Raoul P. Colinvaux, at page 5.

14. (1703) 2 Ld.Raym.909.

15. McNair, The Law of the Air, 2nd Edit., p.p.154-160;
N.H.Moller, Law of Civil Aviation, p.265;
Shawcross & Beaumont on Air Law, 2nd Edit., para.341.

16. [1939] 1 D.L.R.13,14.

"Passenger transport started with "Shank's mare". There have been many stages in its development and flying is simply the latest. There are, however, as Mr. Freeman pointed out in his little pioneer work in 1931, no new basic principles involved in it such as have not arisen in regard to other incidents of human life and commerce. Negligence and all other questions of common law were certain to arise out of aviation and our caselaw automatically applies. Reference to the many decided cases on the varying means of transport teaches that the principles underlying the law of carriage over differing elements are the same and that they should be applied to transport by air. As in other means of transport divergences of detail will appear in their practical applications. Unless and until, therefore, statutory provision is made to the contrary in Canada, the common law principles must guide the courts in dealing with cases which arise in transport by air. So the contract of carriage existing in this action is governed by the common law of carriage."

He held that the defendant was a common carrier. However it was not argued on behalf of the defendant that a carrier by air could not be a common carrier.

(17)
In Nysted and Anson v. Wings Limited, an action arising out of the same accident that gave rise to Caler v. Wings Limited, it was argued that a carrier by air could not be a common carrier. Dysart J. of the Court of King's Bench of Manitoba rejected the argument saying :

"The law which governs carriers by air is the same as that which governs carriers by land or sea. This has been assumed or held in many cases".(18)

He held that the defendant was a common carrier.

The Supreme Court of Appeals of British Columbia in (19)
Ludditt v. Ginger Coote Airways assumed that the defendant was a common carrier. The questions at issue were whether the defendant was free to contract out of his liability and, if so, whether the exemption clause was wide enough to exempt the defendant

17. [1942] 3 D.L.R. 336.

18. Note 17 supra at 338.

19. [1942] 2 D.L.R. 29.

from both his liability as a private carrier and a common
(20)
carrier. On appeal to the Canadian Supreme Court the majority
found it unnecessary to decide this point. The minority, who
dissented on other grounds, held that the defendant was a
(21)
common carrier. In the Privy Council on appeal again the
assumption was made that a carrier by air was capable of being
a common carrier, although the point was not decided specifically,
as it was unnecessary to the decision.

The most recent Canadian decision, Walrod v. Severn
(22)
Enterprises, a single justice of the Supreme Court of Ontario
had no difficulty in holding that a small charter enterprise
had assumed the status of a common carrier.

(23)
Dicta in Aslan v. Imperial Airways support this view,
MacKinnon J. said :

"I see no reason why a man who carries goods by a machine
which travels through the air should not be a common
carrier if he acts in a certain way If a man who
owned an aeroplane or seaplane chose to engage in the
trade of carrying goods as a regular business and to
hold himself out ready to carry for any who wished to
employ so far as he had room in his airship or aeroplane
for goods, very likely he would become a common carrier
or be under the liabilities of a common carrier."

These dicta were obiter as the exemption provisions in the
contract protected the defendant irrespective of whether it
was a common carrier or not.

Fundamentally there is no reason why a carrier by air
should not be a common carrier. The attitude of the Courts

20. [1942] 4 D.L.R. 353.

21. [1947] A.C. 233.

22. 1956 U.S. & Can. Av.R. 302

23. (1933) 45 Ll.L.Rep.322, 322.

has been that, as basically this new method of transport in the eyes of the law is little different from other means of transport posing similar problems requiring identical solutions, the principles of liability applicable to those other means should apply to the new method. Perhaps their attitude is best expressed in two cases. The Supreme Court of the State of New York said in Anderson v. Fidelity & Casualty Co. (24)

"The term, common carrier, is not of statutory origin. Its meaning is to be found in the history of the law of the early days when means of travel and communication were slow and uncertain and innkeepers and carriers were restrained from the robbery and at times murder of those to whom they offered their hospitality or service, only by the imposition of heavy penalties and responsibility for the safekeeping of their patron's goods and persons... With development in travelling facilities from the post horse to the chaise, the stage coach to the modern railroad train or steamboat, the term, common carrier, has been applied to each new development catering to the public generally, and the strict rules of the old law have been relaxed but little, for with the development came new changes of a mechanical sort inherent to swiftly moving machines."

There was no sufficient reason why air carriers should be preferred to other classes of carriers. As Buffington J. said in Curtiss Wright Flying Service Inc. v. Glose (25) :

"What reason is there why the same principles applicable to land and water should not also be applied to air transportation. All alike perform the same service viz. transportation. They are competing for the same class of business. Every passenger carried by aircraft means a passenger less for the rail road or steamship. Transportation, as its derivation denotes, is a carrying across, and the carrying be it by rail, by water or by air, the purpose in view and the thing done are identical in result."

24. (1920) 228 N.Y. 475,480.

25. 1933 U.S. Av.R. 26,30.

There seems little doubt that upon the weight of authority the Courts of Australia would conclude that a carrier by air may assume the status of a common carrier even though the authorities as they stand are only persuasive.

3.

DEFINITION OF COMMON CARRIER.

Leslie defines a common carrier as follows:-

"A common carrier is one who holds himself out either expressly or by a course of conduct as willing to carry for reward without special conditions and between fixed termini, if he elects to fix them, the goods generally, or any particular class or classes of goods, of all such persons as desire to employ him."(26)

The basic element in this definition is the carrier must be prepared to carry the goods of any person:-

"The test is not whether he is carrying as a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried."(27)

This being the basic element the carrier may prevent the status being impressed upon him merely by reserving the right to select his customers. After a careful examination of authority Bailhache J. in Belfast Ropework Co. v. Bushell formulated a test which is generally accepted as correct and which supports this conclusion:-

"Did the defendant, while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements."(28)

26. Law of Transport by Railway, 2nd Edition, at p.7.

27. Per Brett L.J., Nugent v. Smith, (1875-1876) L.R.1.C.P.D.19,27.

28. [1918] 1 K.B. 210,214.

As a result in particular cases what is material is whether the carrier has reserved the right to refuse any person and not the number of times the right has in fact been exercised. As I have already mentioned air carriers in the Commonwealth have taken advantage of this to prevent the status being impressed upon their operation.⁽²⁹⁾

The definitions quoted above are limited to goods. However there is strong authority that a carrier may be a common carrier of persons. This was held by the English Court of Appeal in Clarke v. West Ham Corporation.⁽³⁰⁾ It was clearly accepted by the Privy Council in Ludditt v. Ginger Coote Airways Limited when Lord Wright said that common carriers of both goods and passengers "are subject to the obligations which arise from their exercising a public profession which requires them to carry for all and sundry, subject to the obvious limiting conditions."⁽³¹⁾ There are also High Court decisions which proceed upon the assumption.⁽³²⁾

The acts or the course of conduct by reason of which the status of common carrier is imposed upon a carrier is described as his profession. His profession defines the extent to which his acts of carriage are common carriage and the class or classes of goods or persons in respect of which he is a common carrier. Profession is in a sense a misleading word for this

29. See page 64.

30. [1909] 2 K.B. 859, particularly per Farwell J. at 877. Also Dickson v. Great Northern Ry. Co., (1886) 18 Q.B.D. 176; Baker v. Ellison, [1914] 2 K.B. 762, and Readhead v. Midland Ry. Co., (1869) L.R. 4 Q.B. 379.

31. [1947] A.C. 233, 241.

32. Roeder v. Commissioner of Railways (N.S.W.), (1938) 60 C.L.R. 305, per Dixon J. at 328; Gregory v. Commonwealth Railway Commissioner, (1941) 66 C.L.R. 60, per Starke J. at 62, and Henwood v. Municipal Tramways Trust (S.A.), (1938) 60 C.L.R. 438, per Latham C.J., 444, per Dixon and McTiernan J.J., 456.

purpose as it indicates some element of intention which, as has already indicated, is in most cases of little relevance. How that profession is made and how its limits are to be ascertained and its effect were discussed at some length by Dixon J. (as he then was) in *James v. The Commonwealth*. He said :

"The foundation of the obligation is the carrier's public profession of the business which he exercises. He is not bound to assume the character of a common carrier, but, if he does, he must not refuse the functions which belong to that occupation. It is left to him to define, by his own public profession, or assumption of function, the extent of his business, that is, upon what journeys and by what means he undertakes the carriage of goods and what class or classes of goods he is prepared to carry.....The holding out or profession of the character of a common carrier may be expressed, or it may be, and usually is, implied by a course of business or other conduct. It is in every case a question of fact whether the character of a common carrier has been assumed. In considering that question an important matter is whether the carrier holds himself out as ready without discrimination to carry the goods of all persons who may choose to employ him or send him goods to be carried. If, instead of inviting all persons without discrimination to use his ships or vehicles, he reserves the right of choosing among them independently of the suitability of their goods for his means of transportation and without regard to the room or space he has available, then he is not a common carrier." (33)

It follows that a carrier may be a common carrier with respect to one class of goods or persons which or whom he carries and a private carrier in respect of other classes of goods or persons. He may be a common carrier only in respect of certain routes or parts of a route or in respect of a carriage from one termini of a route to the other termini but not in respect of

33. James v. The Commonwealth, (1939) 62 C.L.R. 339

34. Note 33 Supra at 368.

carriage between intermediate points and any of the termini,⁽³⁵⁾
It seems too that a private carrier may undertake the liabilities
of a common carrier for a particular journey.⁽³⁶⁾

There is another important quality attaching to the profession. It is more than an offer which can be accepted by anyone and, if accepted, a contract of carriage comes into being. By the profession the carrier assumes a legal duty for breach of which he is liable not only in the contract but also in tort.⁽³⁷⁾

This has been important in a number of cases. In Canadian National Railways v. Canadian Industries Limited goods were shipped on a through bill of lading from England to a point in Canada. In the course of carriage on the appellant's Railway they were damaged when the train in which they were being carried was derailed. It was held that, as there was no privity of contract between the appellant and the respondent, the exemption provisions of the bill of lading did not accrue to the appellant's advantage and that the appellant was liable to the respondent in tort.⁽³⁸⁾ In another case⁽³⁹⁾ it was held that a servant whose fare was paid by his master could sue in his own name for loss of his luggage.

In conclusion the effect of the profession is to impose the liability and define the persons to whom the liability is owed. However the law prescribed the measure of the liability. This is considered in the next two chapters.

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35. Per Parke J., Johnson v. Midland Ry. Co., (1849) 1 Ex. 367, 373.
36. Robinson v. Dunmore, (1801) 2 Bos. & P. 416; Tamvaco v. Timothy, & Green, (1882) Cab. El. 1.
37. Pozzi v. Shipton, (1838) 8 A. & E. 963; Marshall v. The York, Newcastle & Berwick Ry., (1851) 11 C.B. 655.
38. [1941] 4 D.L.R. 561, particularly Sir Lyman P. Duff C.J.C. at 562.
39. Marshall v. York, Newcastle & Berwick Ry. Co., (1851) 11 C.B. 655.

CHAPTER IV.

THE DUTIES AND LIABILITIES OF COMMON CARRIERS
AND PRIVATE CARRIERS OF CARGO AND BAGGAGE

A.

COMMON CARRIERS

The most important duty of a common carrier and also the only real test of whether a carrier is a common carrier is his duty to carry the goods of all persons which lie within the ambit of his profession. This and the principle of liability, described as "an isolated phenomenon", ⁽¹⁾ that the common carrier is in the nature of an insurer of the goods entrusted to him are the qualities that render the common carrier unlike any other class of carrier. There are other duties and liabilities incidental to these.

1.

DUTY TO CARRY

A common carrier is bound to accept and carry goods which come within the classes of things which he professes to carry for anyone who chooses to employ him -

"The defendants are common carriers, and as such are bound, unless a lawful excuse exists, to carry the goods of any person tendering them for carriage, who offers to pay a reasonable charge therefor, under the common law liability of carriers ... " (2)

The severity of this duty is illustrated by White v. the Canadian Pacific Railway Co. ⁽³⁾ In that case it was held that the fact that

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1. Rolland Paper Co. v. C.N.R. & National Cartage & Storage Ltd., [1958] 11 D.L.R. (2d) 754,758.
 2. Per Beck J, Rise v. Canadian Pacific Railways [1930], 14 W.L.R. 635.
 3. (1889) 6 Man. L.R. 169.

goods prior to delivery to the carrier had been forfeited to the Crown for non-payment of customs duty was not a valid excuse for refusing to carry them.

A common carrier who refuses to carry may be prosecuted⁽⁴⁾ by indictment. Although there are no reported cases, innkeepers who are under a similar duty in relation to persons have been prosecuted by indictment.⁽⁵⁾ Mandamus does not lie to compel a carrier to carry⁽⁶⁾ but the person refused may sue and recover the damages suffered as a result of the refusal.⁽⁷⁾

In certain circumstances the common carrier is excused from carrying goods in accordance with his profession. He is not obliged to accept and carry goods when there is no room available⁽⁸⁾ in his vehicle. The word "room" should not be construed too narrowly. He would not be compelled to carry even though there is capacity available in the vehicle if overloading would result from filling up the unused capacity. He cannot be compelled to carry goods which he cannot carry in safety,⁽⁹⁾ e.g. valuables which due to the nature of his operations cannot be protected adequately.⁽¹⁰⁾ He may refuse if the goods are tendered too early before departure or where due to civil disturbance the goods cannot safely be carried

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4. Halsbury's Laws of England, 3rd Edition, 137.
 5. G.W. Paton, Bailment in the Common Law, at p.210.
 6. Ex Parte Robins, (1839) 7 Dowl. 566.
 7. Crouch v. London & North Western Ry. Co., (1854) 14 C.B. 255.
 8. Macklin v. Waterhouse, (1828) 5 Bing. 212; per Best C.J., Riley v. Horne, (1828) 5 Bing. 217, 224.
 9. Per Cozens-Hardy M.R., Spillers and Bakers Ltd. v. Great Western Railway Co., [1911] 1 K.B. 386, 392.
 10. Lane v. Cotton, (1701) 1 Com. 100.

(11)
through an area on his normal route or if the parcel in which
(12)
the goods are enclosed is improperly packed.

The carrier's obligation to carry does not commence until the consignee either tenders the charge or indicates his readiness to pay and it is accepted by the carrier. The carrier
(13)
is not obliged to give credit. However, if he omits to request the charge, the carrier is not entitled to demand payment until
(14)
the carriage is complete.

The charges which the carrier prescribes must be
(15)
reasonable. A carrier is therefore only entitled to reasonable compensation, where no charge is fixed by agreement or declared
(16)
by statute. Although the charge must be reasonable, the fact that some customers are charged more than others is evidence only that the higher charges are unreasonable, but those higher charges
(17)
will be valid if they too are reasonable.

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11. Edwards v. Sherratt, (1801) 1 East 604.
 12. Crouch v. London & North Western Railway Co., (1854) 14 C.B.255.
 13. Wyld v. Pickford, (1841) 8 M. & W. 443; Pickford v. Grand Junction Rly., (1841) 8 M. & W. 372; Batson v. Donovan, (1820) 4 B. & Ald.21.
 14. Per Compton J., Barnes v. Marshall, (1852) 18 Q.B.785, 789.
 15. Harris v. Packwood, (1810) 3 TAUNT 264.
 16. Green v. St. John & Main Ry. Co., (1882) 22 N.B.R. 252.
 17. Per Blackburn J., Great Western Ry. Co. v. Sutton, (1869) L.R. 4 H.L.226,237.

The carrier is under a duty to follow the route specified in the contract of carriage or, if none is specified, the normal route which he follows. This duty is discussed later (18) when the effect of deviation from the accepted route is considered.

2.

DUTY TO DELIVER WITHIN A REASONABLE TIME.

In addition to his duty to follow the route specified or the customary one, the carrier is under a duty in the absence of any express term in the contract to deliver the goods within a reasonable time:

"In the absence of an express contract to deliver the goods at the stipulated destination at a specified time, it is his duty to deliver them at the time by which, with the exercise of due diligence, it is possible to deliver them, having regard to all relevant circumstances, including inevitable delays caused by matters beyond his control." (19)

As these dicta indicate, where the occurrence which delays delivery is something outside the carrier's control, he will be held to have delivered within a reasonable time. (20) And, as the duty is only to carry in a reasonable time under ordinary circumstances, he is not bound to use extraordinary efforts or incur extra expense in order to surmount obstructions outside his control such as a fall of (21) snow (22) or a strike (23) but an unauthorised or unnecessary deviation (24) will not be allowed.

18. See page 96.

19. Per Jordan C.J., *Quinn v. Commissioner of Railways*, (1945) 46 S.R. (N.S.W.) 163, 169.

20. Per Byles J., *Taylor v. Great Northern Railway Co.*, (1866) L.R.1 C.P. 385, 388.

21. *Briddon v. Great Northern Railway Co.*, (1859) 28 L.J. Ex. 51.

22. *Hick v. Raymond & Reid*, [1893] A.C.22.

23. See page 96 of this chapter.

24. *Mallett v. Great Eastern Railway Co.* [1899] 12 B. 309.

AGENT OF NECESSITY.

The carrier owes certain duties to the owner of the goods, should an emergency arise which endangers the goods while they are in the carrier's custody. A complete explanation of the nature and extent of and the circumstances in which this duty was made by Jordan C.J. in Barker v. Burns Philp & Co. (25) He said :-

"There are, however, exceptional cases in which, where goods are bailed to a person in order that he may render services with respect to them, he is both entitled and bound to take special steps to ensure their protection and preservation in case of emergency, and is entitled to be indemnified by the owner in respect of his services or expenditure. These include, if indeed they are not restricted to, the cases of goods entrusted to a common carrier to be carried for reward by land or sea. In these cases, if an emergency occurs during the carriage which makes it impossible for the goods to be carried to their destination, or impossible unless they are dealt with out of the ordinary course of the contract of carriage, or necessary to dispose of them short of their destination in order to prevent their arrival in an incurably unmerchantable condition, and the terms of the contract of carriage make no provisions for the event, and it is not reasonably possible to communicate with the owner of the goods and obtain his instructions, the carrier is entitled and bound, so far as it is reasonably possible for him to do so, to deal with the goods in whatever manner is both reasonable (Cargo ex Argos (1873) L.R.5 P.C.134, 165-5) and necessary to meet the emergency; and is entitled to be indemnified by the owner of the goods for any expenses to which he may be put or any services which he renders in so doing: Ibid: G.N. Ry. v. Swaffield (1874) L.R.9 Ex.132/138. But it is essential, in order to justify a dealing with the goods out of the ordinary course of the performance of the contract of carriage, not only that a case of necessity should have arisen (Atlantic Mutual Insurance Co. v. Hall (1880) 16 Ch.D.474 481-482) but that there should have been no opportunity of communicating with the owner and obtaining his instructions (Australasian Steam Navigation Co. v. Morse (1872) L.R.4 P.C.222, Acatos v. Burns (1873) 3 Ex.D.282, Springer v. G.W.Ry. Co. [1921] 1 K.B. 257)". (26)

25. (1945) 45 S.R. (N.S.W.) 1.

26. Note 25 supra at 16.

STRICT LIABILITY.

A common carrier of goods is liable for all loss or damage to the goods which he carries for reward with the exception of loss of or damage due to the act of God, the Queen's enemies, the default of the consignor, defect in the goods or inherent

(27) vice. The first authoritative statement of that liability was (28) made by Lord Holt in Coggs v. Bernard. He said -

"As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, these causes are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, the common hoyman, master of a ship, etc.; which case of master of a ship was first adjudged, 26 Car.II, in the case Morse v. Slue. The law charges this person thus entrusted to carry goods, against all events but the act of God and the enemies of the King." (29)

This principle has been reaffirmed time and time again. In (30) Paterson Steamships v. Canadian Co-operative Wheat Producers Ltd.

Lord Wright said -

"At common law, he was called an insurer, that is he was absolutely responsible for delivery in like order and condition at the destination the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to an act of God or the King's enemies." (31)

27. Morse v. Slue, (1672) 1 Vent. 190, 238; Coggs v. Bernard, (1703) 2 Ld. Raym. 909, 917; Paterson Steamships v. Canadian Co-operative Wheat Producers Ltd., [1934] A.C. 538, 544, 545; Gregory v. Commonwealth Railway Commissioner, (1941) 66 C.L.R. 50, 62, 69; Commissioner of Railways (N.S.W.) v. Quinn, (1946) 72 C.L.R. 345, 360, 371.

28. Note 27 *supra*.

29. Note 28 *supra*.

30. Note 28 *supra*.

31. Note 28 *supra*.

Thus a common carrier is liable for loss or injury to the goods committed to his care which is caused wholly by the negligence of persons over whom he has no control, where, for example, the carrier's barge runs against an anchor wrongfully left in the water by a stranger or the goods are destroyed by an accidental fire and even where the goods are stolen from him by force. (32) Where they are wrongfully seized by the Crown he is liable unless (33) he can prove that the seizure or stoppage is by a duly authorised officer of the Crown. (34) It follows from the nature of the rule that in the event of loss or injury to the goods the carrier is presumed to be responsible and it lies upon him to rebut this presumption by showing that the loss or injury was due to one of the excepted perils. (35)

The reasons why the law imposes this liability are relevant to ascertaining whether it is appropriate to modern conditions. (36) Holt C.J. and Lord Mansfield (37) both thought the reason was that the consignor was completely dependent upon the honesty of the carrier and the strict form of liability was necessary in order to make it unprofitable for him to conspire with thieves. Undoubtedly this reason was valid for the period when these illustrious judges spoke, as police forces were either non-existent or hopelessly inefficient. In addition to enumerating

32. 4 Halsbury, 3rd Edition, page 142.

33. Gosling v. Higgins, (1808) 1 Camp. 451.

34. Robson v. Buffalo & Lake Huron Ry. Co., (1859) 9 C.P. 183.

35. Hawkes v. Smith, (1842) CAR. & M. 72; Nugent v. Smith, (1876) 1 C.P.D. 423.

36. Coggs v. Bernard, (1703) 2 Ld. Raym. 909, 917.

37. Forward v. Pittard, (1785) 5 Bing. 217, 220.

(38)
these reasons Best C.J. considered that another reason was that, as the goods were in the custody of the carrier, the consignor would not be able to prove the reasons for the loss notwithstanding that the loss was due to the gross negligence of the carrier or his servants. Only the additional reason advanced by Best C.J. remains valid today. However a further reason has been advanced by the Supreme Court of New York State in Anderson v. Fidelity and Casualty Co. (39) namely that the increasing mechanical complexity of modern means of transport requires the imposition on the carrier of a higher standard of care in order to ensure that he maintains high standards of maintenance and that the mechanical complexity has brought with it greater difficulties for the consignor to prove his case. While the first of these, in view of the close regulation exercised by Governments over the air transport industry and the fact that a carrier may insure himself, is probably of little importance, the second, I think, is still a substantial one, although the application of res ipsa loquitur detracts from the force of that reason. Of course the principle of res ipsa loquitur clearly does not place the claimant in as strong a position as he is in relation to a carrier who is under an insurer's liability.

5.

DURATION OF STRICT LIABILITY

The common carrier is under the strict liability from the time he or his servants accept the goods for carriage to the time when he delivers or constructively delivers the goods.

38. Riley v. Horne, (1828) 5 Bing. 217, 220.

39. (1920) 228 N.Y. 475, 480.

Generally he remains under that liability when in the course of the movement he stores the goods for his own convenience and when he sub-contracts part of the carriage over his own route or when, having contracted to deliver the goods to a point not normally served by him, he sends the goods to that point by another carrier.

Cockburn J. pointed out: "The contract of the carrier being not only to carry, but also to deliver, it follows that, to a certain extent, the custody of the goods as carrier must extend beyond, as well as precede, the period of their transit from the place of consignment to that of the destination. First there is in most instances an interval between the receipt of the goods and their departure...Next there is the time which in most instances must necessarily intervene between their arrival at the place of destination and the delivery to the consignee... In these cases...the obligation of the carrier not having been fulfilled by the delivery of the goods, the goods remain in his hands as carrier and subject him to all the liabilities which attach to the contract of carrier."⁽⁴⁰⁾ The liability then extends from a time prior to actual transit to a time after the completion of the carriage. In fact the liability extends from the time the carrier accepts the goods for carriage to the moment he 'delivers'".

Acceptance of the goods may be either by the carrier or the meanest of his servants, but not if the latter are carrying it for their own profit;⁽⁴¹⁾ unless the servant has not been authorised

40. Chapman v. Great Western Railway Co., (1880) 5 Q.B.D.278, 281

41. Butler v. Basing, (1827) 2 C. & P. 613, N.P.

by the carrier to accept goods. In the case the carrier is not bound by the servant's acts, unless he acted in such a way as to hold out the servant as being authorised or the plaintiff has no notice of such lack of authority. If at any time he stores the goods, he may remain a common carrier of the goods notwithstanding that the goods are not in movement. When the goods are kept in the warehouse for the convenience of the carrier, his liability remains that of a common carrier, but, if the storage is for the convenience of the customer, the carrier's liability is that of a warehouseman.

The carrier's liability as a carrier determines upon delivery or constructive delivery. What completes delivery is a question determined by the terms of the agreement or the usual course of business. The following are the rules governing delivery:-

- (a) if the goods are addressed to the consignee, delivery at his home is sufficient and delivery elsewhere exposes the carrier to liability.

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- 42. Slim v. Great Northern Ry. Co., (1854) 14 C.B. 647.
 - 43. Soanes v. London & South Western Rail. Co., (1919) 88 L.J.K.B. 524.
 - 44. Streets v. Morrison, (1862) 5 All. 296.
 - 45. Garside v. Trent & Mersey Navig. Co., (1792) 4 Term Rep. 581.
 - 46. Golden v. Manning, (1773) 2 Win. B1. 916.
 - 47. "But if the carrier delivers at the place indicated or does what is equivalent to a delivery there, he does all he is bound to do." Per Martin B., McKean v. McIvor, (1870) L.R. 6 Ex. 36, 41.
 - 48. Stephenson v. Hart & Waterhouse, (1828) 4 Bing. 476 but the judges differed in their reasons.

(b) if the cargo is to be delivered at the terminal or office or station, "his lesser liability of a warehouseman begins, when he has brought the goods to their destination, given the consignee notice of arrival unless circumstances as the address being too vague preclude such notice and allowed him a reasonable time within which to remove the goods." (49)

Thereafter the carrier is a warehouseman. (50) A warehouseman is not an insurer of the goods. His duty is to take reasonable care of the goods. (51) The carrier is entitled to recover reasonable expenses which he has incurred in warehousing the goods. (52)

6.

SUCCESSIVE CARRIERS

The contracting carrier's liability is not necessarily limited to the period when the goods are in his charge. In certain circumstances it extends to the period of on carriage of the goods, i.e. from the point to which he carried them to the point of delivery. "It became an established rule of law of carriers that the acceptance of goods by a railway for conveyance to points off its own line imposed (in the absence of special circumstances) the obligation of a common carrier on such railway

49. Per Jordan C.J., *Quinn v. Commissioner of Railways*, (1945) 46 S.R.(N.S.W.) 163, 169.

50. *Chapman v. Great Western Railway*, (1880) L.R.5 Q.B.278, 281-282; *Mitchell v. Lancashire & Yorkshire Railway Co.*, (1875) L.R.10 Q.B. 256, 260.

51. *Mitchell v. Lancashire & Yorkshire Railway Co.*, Note 50 supra.

52. *Gr. Northern Railway Co. v. Swaffield*, (1874) L.R.9 Exch.132.

until the goods were delivered at their destination." (53) The contracting carrier will be liable notwithstanding that the carriage by the subsequent carriers is by means other than the means by which a contracting carrier normally carries. (54)

The circumstances may however give rise to the inference that the contracting carrier arranges the on carriage as the agent of the consignor. Where such an inference is drawn the contracting carrier will be liable only in respect of the portion of the carriage which he performed. Any conditions in the contract of carriage limiting the liability of the first carrier will not necessarily be implied into the contract between the second carrier and the consignor. (55)

A related question is the liability of the second and subsequent carriers. It is of course necessary to show that the goods were lost or damaged while in the custody of the carrier sued i.e. of the carrier other than the contracting carrier. (56) The early decisions proceeded upon the assumption that the second and subsequent carriers could not be liable unless privity of contract was established between the consignor and them either (57)

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53. Per Rose C.J., *Canadian Industries Ltd. v. C.N.R.*, [1940] 3 D.L.R. 627. See also *Hyde v. Trent & Mersey Navigation Company*, (1793) 5 Term Rep. 390 where in obiter dicta Butler J. at 397 and Grosse J. at 394 suggested this to be principle.
54. *E.G. Wilby v. The West Cornwall Railway Co.*, (1858) 2 H. & N. 703.
55. E.g. view of Byles & Crompton J.J. took of facts in *Bristol & Exeter Railway Co. v. Collins*, (1859) 7 H.L. Cas. 194; rejected so far as applicable to the facts by House of Lords (3:2) in the same report. See also *Adler v. Dickson*, [1954] 3 W.L.R. 696, 718.
56. Per McKay J., *Rose & Laflamme Ltd. v. Campbell Wilson & Strathdee Ltd. & G.T. P.R.Co.*, [1923] 1 D.L.R. 397, 400; *White v. The South Eastern Rail. Co.*, (1884) 1 T.L.R. 319.
57. *Coxon v. Great Western Railway Co.*, (1860) 5 H.&N. 273; *Mytton v.* (contd)

by reason of the contracting carrier acting as the second
carrier's agent when accepting delivery of the goods or the
contracting carrier acting as the agent of the consignor or
the carriers being treated as partners in which case the
consignor could sue any of the carriers. In general these
cases disregarded the circumstance that the liability of a
common carrier arises not only in contract but also in tort
and that therefore it is unnecessary to establish a contract
between the actual carrier and the consignor. It may be that
this is due to the fact that the actions were all founded on
implied contract.

In subsequent cases the Courts have departed from the
notion that a contract must exist between carrier and consignor
and it is submitted correctly. In White v. The South Eastern

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- 57.(contd) The Midland Railway Co.,(1859) 4 H.& N.615; Bristol & Exeter Railway Co. v. Collins,(1859) 7 H.L. Cas.194. Also Welbur v. Great Western Railway,(1866) 4 H. & C. 582, in which a forwarding agent intervened between the carrier and the consignor and in which it was held that to make the carrier liable a contractual relationship had to exist between the consignor and the carrier and that existed as the forwarding agent was agent of the carrier.
58. E.g. Gill v. Manchester Sheffield & Lincolnshire Railway Co., (1873) L.R. 8 Q.B. 186. In these circumstances a contract is implied between the consignor and the second carrier identical in terms to that between the consignor and the contracting carrier.
59. E.g. Bristol & Exeter Railway Co. v. Collins,(1859) 7 H.L. Cas. 194, per Byles & Crompton J.J. Also Lake Erie & District Railway Co. v. Sales,(1896) 26 S.C.R. 663, in which an express term in the Bill of Lading designed for the purpose achieved this.
60. Coxon v. Great Western Railway Co.,(1860) 5 H. & N. 273.
61. See page 105 for discussion of this point.

(62)
Railway Co. the Court said :-

"If a person books through by one railway company for a journey over more than one line of railways, he may in case of damage to the goods at any part of the journey sue, the company that booked the goods and he may also sue the other company if the damage occurs upon their line and by their negligence and not otherwise."

This view was taken by Rose C.J. of Ontario Supreme Court in
(63)
Canadian Industries Ltd. v. C.N.R. and his view on appeal to the
(64)
Supreme Court of Canada, on a procedural point as to whether the pleading could be amended during the trial to permit an allegation of negligence, was upheld. Furthermore, Rose C.J. took the view that negligence had to be proved against the second carrier thus in effect adopting the view of the law expressed in White v. The South Eastern Railway Co., but in C.N.R. v. Canadian Industries Ltd. (65) Sir Lyman P. Duff suggested, it is submitted correctly, that the connecting carrier's liability was that of
(66)
common carrier.

62. (1884) 1 T.L.R. 319.

63. [1940] 3 D.L.R. 627

64. [1941] 4 D.L.R. 561

65. Note 64 supra at 562.

66. The insurer's liability of the common carrier does not arise ex contractu it arises from the public profession of the carrier. The second carrier has received consideration. These decisions are reconcilable with Bristol & Exeter Railway Co. v. Collins a House of Lords decision. In that case the point of whether an action lay in tort was not raised, and in any case, Lord Chelmsford's judgment suggested as an alternative reason for his conclusion that, even if he was wrong that there was only one contract, the second carrier had contracted with the consignor on terms identical with those in the contract between the consignor and the first carrier including those exempting from liability.

THE DEFENCES OF THE COMMON CARRIER

The common carrier may discharge his insurer's liability if he establishes that without negligence on his part, the loss or damage to the goods was due to the act of God, the Queen's enemies, the fault of the consignor, or inherent vice in or natural deterioration of the goods. In addition he may discharge his liability, if he shows that the goods were accompanied by the consignor or his agent at the time of the loss or damage or if he can show that the goods were destroyed or jettisoned in order to save all the other goods. Each of these defences is subject to the proviso that the loss or destruction must not be caused by or contributed to by his acts of negligence.

The Act of God.

The Act of God is a defence which the common law adopted when it absorbed the part of the jurisdiction of Courts of Admiralty relating to carriage by sea. Originally the defence had a wider scope, but, due to judicial interpretation, its scope was narrowed. "If loss occurs and the carrier seeks to escape liability on the plea of act of God, he must bring himself within the exception" (67) The carrier must prove that the loss of the goods was due directly and exclusively to the forces of nature which no reasonable amount of precaution or care would have enabled him to avoid or guard against. (68)

67. Per Ferguson J.A., Fleet v. Canadian Northern Quebec Railway Co., [1922] D.L.R. 316,322.

68. Nugent v. Smith, (1876) 1 C.P.D. 423,444.

For a cause of damage to qualify an act of God it must possess two qualities. It must be natural i.e. from nature and not created by the act of man. Thus fire unless caused by lightning is not an act of God.⁽⁶⁹⁾ The second quality which renders an event an act of God is that at the time when it occurred it was not one of the dangers which the carrier ought reasonably have foreseen and have used proper precautions to avoid. The act of God must directly cause the damage. So where it was sought to excuse failure to deliver the goods because the vessel alone had been damaged by an act of God the court held this did not excuse.⁽⁷⁰⁾

The Queen's Enemies.

The defence of Queen's enemies like that of act of God is borrowed from the law of the Admiralty and is as authoritatively established as that defence.⁽⁷¹⁾ It seems that the acts of rioters or rebels do not come within the scope of the defence.⁽⁷²⁾ The reason^{for}/this defence seems to be that the law thought that it would be unjust to make the carrier liable for a loss which he could not recover from the person responsible.⁽⁷³⁾

69. Forward v. Pittard, (1785) 1 Term Rep. 27.

70. Connor v. Spencer, (1870) V.L.R. (L.) 243.

71. Dale v. Hall, (1750) 1 Wils.281; Forward v. Pittard, (1785) 1 Term Rep. 27.

72. Notwithstanding Secretary of State for War v. Midland Great Western Railway Co. of Ireland, [1923] 2 I.R. 102. See II Chitty on Contracts, 21st Edition, p.212, which regards the Irish case of no authority as the Irish Bench considered that at the time of the Sinn Fein a state of war existed in Ireland.

73. Southcotes case, (1601) 4 Coke Rep. 83b.

Inherent Vice

Where the goods have due to their nature deteriorated or in the case of animals they have suffered injury or death by reason of some vice inherent in them the common carrier will not be held liable :-

"The question as to their liability may turn on the distinction between accidents which happen by reason of some vice inherent in the animals themselves, or disposition producing unruliness or phrenzy, and accidents which are not the result of inherent vice or unruliness of the animals themselves ...By the expression 'vice' I do not, of course, mean moral vice in the thing itself or its owner, but only that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties." (74)

The carrier must however take such care of the goods as their nature demands. (75) He must for example, make reasonable provision against the ordinary and natural unruliness of animals carried. And he will be liable if he worsens by a breach of contract on his part the damage caused by the inherent vice. (76)

Consignor's Fault

The common carrier is not liable when the loss or damage is due to the consignor's fault. Thus the consignee is under a duty to take reasonable precautions to ensure safe delivery of the goods to the consignee by, inter alia, clearly addressing them. (77) Where the goods are of a fragile kind, the consignor must deliver them properly wrapped and packed. (78) Most of the cases on this point also fall within the defence of inherent vice.

74. Per Willes J., Blower v. Great Western Railway Co., (1872) L.R. 7. C.P. 655, 662.

75. Note 74 supra.

76. International Guano v. Macandrew, [1909] 2 K.B. 360.

77. Examples are Pointin v. Porrier, (1885) 49 J.P. 199 and Conley v. C.P.R. Co., (1900) 32 O.R. 258.

78. Examples are Baldwin v. London Chatham & Dover Ry. Co., (1882) 9 Q.B.D. 582 & Hudson v. Bexandale, (1857) 157 E.R. 237.

There is a difference of opinion as to whether the carrier has the defence when he has had notice of the defects upon receipt of the goods. One view is that his knowledge does not preclude him setting up the defence,⁽⁷⁹⁾ but he may be liable, if he was in a position to rectify these defects and failed to do so.⁽⁸⁰⁾ The other view is that, if he was aware of the defect and took the goods without objecting,⁽⁸¹⁾ he cannot be excused.

The consignor is under more duties than merely addressing the parcel and wrapping it properly. Breach of these duties not only discharges the carrier from his insurer's liability, but may entitle him to the damages flowing from the breach. "Every consignor who tenders goods to a common carrier, to be carried by him in performance of his common law obligation to carry, thereby impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way and are not dangerous"⁽⁸²⁾ and "the consignor is liable for the consequences which are likely to ensue from the omission to give notice,"⁽⁸³⁾ and he is liable notwithstanding that he was unaware that the goods were dangerous.⁽⁸⁴⁾ The carrier

79. Gould v. South Easterly & Chatham Ry. Co., [1920] 2 K.B. 186.

80. Notara v. Henderson, (1872) L.R. 5 Q.B. 346.

81. Per Lord Atkinson in obiter dicta., L.N.W.R. v. Hudson, [1920] A.C. 324, 340.

82. Per Farwell L.J., Bamfield v. Goole Transport Co., [1910] 2 K.B. 94, 113.

83. Per Wills J., Farrant v. Barnes, (1862) 11 C.B.N.S. 553, approved Hoey v. Hardie, (1912) S.R.(N.S.W.) 268.

84. Per Lord Campbell, Brass v. Maitland, (1856) 6 E. & B. 470, 483.

however will be liable, even if he was not advised by the consignor of the danger, if he is aware of the dangerous nature of goods of that kind and fails to take the proper precautions (85) or if his negligence contributed to the destruction of the goods. (86)

The consignor will be liable to the carrier for damages where the goods are of such a kind that they are likely to delay and do delay the carriage. "Whatever may be the full extent of the shipper's obligations, it appears to me that it amounts at least to this, that he undertakes that he will not ship goods likely to involve unusual danger or delay to the ship without communicating to the owner facts which are within his knowledge indicating that there is such risk, if the owner does not and could not reasonably know those facts." (87)

Although the consignor is not under a duty to state the value of the goods, if he is required by the carrier to do so, he must state their value accurately. (88) An incorrect statement of value does not vitiate the contract, if the carrier was not induced by it to accept goods which he would otherwise not have carried, or if the risk of loss or damage was not increased or the carrier's diligence was not relaxed because of the declaration. (89)

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85. Bamfield v. Goole Transport Co., note 82 supra; approved G.N.Rly.Co. v. L.E.P. Transport and Depositary Ltd., [1922] 2 K.B. 743, by Bankes L.J., 756.
86. Per Willes J., Tatley v. G.W.Ry. Co., (1870) L.R. 6 C.P.44,52.
87. Mitchell, Cotts & Co. v. Steele Brothers & Co. Limited, [1916] 2 K.B. 610,614.
88. Per Best C.J., Macklin v. Waterhouse, (1828) 5 Bing.212,222.
89. Spanier Bros. v. Central Canada Express Co.,[1918] 43 D.L.R.400.

The carrier is not under his insurer's liability if he establishes that the goods were accompanied by the consignor or his servants. (90) The authorities for this are old and in view of the decisions relating to baggage in the custody of a passenger would probably not now be followed.

Jettison.

The defence of jettison is on present authority only available to carriers by sea. In certain circumstances the carrier by sea is not answerable for deliberately destroying or damaging part of his cargo. If, in order to save the vessel and its contents from total loss due to an unexpected emergency arising or of minimising or preventing the loss which is threatened, part of the cargo is deliberately and reasonably sacrificed e.g. by jettisoning it, the owner of the vessel is not liable for the loss, but under the law of general average the owner of the goods which are sacrificed is entitled to contribution from all those for whose benefit the sacrifice is made rateably in proportion to the saved values. (91)

There are persuasive reasons for favouring the adoption of this defence for common carriers by air. The defence is appropriate to carriage by air as perils, in quality of the kind encountered at sea, arise and must in some circumstances be dealt with in the same manner as perils at sea namely by jettisoning a

90. Brind v. Dale, (1837) 8 C. & P. 207.

91. Carver's Carriage of Goods by Sea (9th Edition) by R.P. Colinaux, at 17; Monograph published in pamphlet form by U.S. Aviation Reports Inc. on application of this defence to carriage by air by Arnold Knauth.

(92) portion of the cargo. The purposes for which the sacrifice is made would normally be the same, namely to save the vessel. The legal principles relating to common carriage by sea are in substance identical to those applying to other forms of common carriage. If the defence is a just one for carriage by sea it should therefore be just in relation to those other forms of carriage. The common law of carriers was applied by way of analogy to carriage by air. There is no reason why the principles so applied should be limited to those applying to carriers by land when the law of carriers by sea in certain respects may provide superior analogies because sea carriage more closely resembles air carriage than land carriage does. Lastly it has the practical advantage that the man in the air is not tortured by the devil's dilemma that he will be ruined financially by sacrificing some cargo and carrying alive to shore or dying if he does not act. This situation does not make for balanced judgment and may make conditions worse and losses greater.

There is no authority directly in point on this question. Writers deal with the defence as part of the wider question of whether general average as a whole will be transferred to the realm of air law. One writer⁽⁹³⁾ maintains it is still an open question⁽⁹⁴⁾ whether the plea of general average will succeed or not. McNair

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92. In re Californian Eastern Airways in Bankruptcy, 1951 U.S. Av.R.227, a cargo plane, caught in a downdraft over the mountains, jettisoned cargo weighing 777 pounds and worth \$12,000 with the result that the aircraft worth \$200,000 and the rest of the cargo worth \$100,000 arrived in safety. Thus circumstances do arise to which the defence is appropriate. The question of general average was not raised in this case.
93. Arnold Knauth in the monograph referred to in note 91 supra.
94. Second edition, at 257-260.

says that English courts would not apply it, as it is confined to sea adventures, relying on several judgments of the last century confining the principle to carriage by sea. My argument has been confined to only one general average sacrifice, jettison, which I believe to be appropriate to air carriage. When decisions to which McNair refers were made, the only alternative means of transport was by land and quite clearly jettison is not appropriate to that form of carriage and it is this surely that the judges had in mind, unless we are prepared to attribute to them prophetic powers.

8.

NEGLIGENCE & FUNDAMENTAL BREACH OF CONTRACT.

The carrier, to escape his insurer's liability, must, in addition to proving the loss destruction or damage was caused by the excepted perils, prove that no negligence on the part of himself or his servants contributed to the casualty. ⁽⁹⁵⁾ The negligence relates not only to the operation of the vehicle but also to its condition i.e. whether it is airworthy or not. ⁽⁹⁶⁾ However the carrier's duty in this regard is that he "is bound to use due care and skill in obtaining and maintaining a fit vehicle but he does not warrant that it is free from latent defects which cannot be discovered." ⁽⁹⁷⁾ Chitty ⁽⁹⁸⁾ suggests however that the carrier

95. Act of God; Blower v. G.W.Ry., (1872) L.R. 7 C.P.655,633; Queen's Enemies; Phillips v. Clark, (1857) 2 C.B.(N.S.)156, 164; Inherent Vice; Gill v. Manchester Ry., (1873)L.R.8 Q.B.186,196.

96. Per Cockburn J., Nugent v. Smith, (1876) L.R.1 C.P.D.423,436.

97. Leslie, Law of Transport by Railway, 2nd Edition, at 32.

98. II Chitty on Contracts, 21st Edition, at 213.

will not be responsible for the loss caused by the excepted peril in excess of what was reasonably foreseeable as likely to result from the carrier's own negligence and, in the case of consignors default, notwithstanding authority to the contrary, damages will be shared in accordance with the respective degrees of fault of the carrier and the consignor.

It is a fundamental principle of the law of bailment that "if a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself."⁽⁹⁹⁾ Deviation is a part of that general principle. If the carrier deviates from the normal route he is not protected in respect of that deviation by other express terms of the contract nor will the defences of the excepted perils (otherwise than inherent vice or dangerous goods) be available should the goods be lost. Nor will the defences be available when the carriage has returned to its normal route if it appears likely that the carriage would not have met the peril if the deviation had not been made.⁽¹⁰⁰⁾

The carrier is under an obligation to follow the route which he customarily follows or professes to follow or specifies in the contract of carriage.⁽¹⁰¹⁾ If he deviates from that route he commits a fundamental breach of contract resulting in the possessory title in the goods revesting in the bailor and entitling the bailor to avoid the contract and maintain an action

99. *Lilley v. Doubleday*, (1881) 7 Q.B.D. 510, 511.

100. *Dunne v. Australasian Steam Navigation Co.*, (1876) 14 S.C.R. (N.S.W.) 131.

101. *Hales v. London & North Western Ry. Co.*, (1863) 4B.&S. 66, 72.
Davis v. Garrett, (1830) 6 Bing. 716, 725.

in trover against the carrier. Furthermore the carrier loses the benefit of clauses in the contract of carriage exempting him from liability.⁽¹⁰³⁾

9.

BAGGAGE.

The common carrier is not obliged to carry the baggage of his passengers nor is he under an obligation to carry it without charge,⁽¹⁰⁴⁾ but for commercial reasons carriers do so.⁽¹⁰⁵⁾ They are common carriers of the baggage, unless they succeed by suitable notices in preventing the impressment of the status upon them,⁽¹⁰⁶⁾ and are, therefore, under the strict liability of common carriers for goods.

What constitutes baggage is important, for, if an article is carried as baggage but does not answer that description,⁽¹⁰⁷⁾ the carrier is under no liability in respect of it, unless he was aware of its nature when he accepted it as baggage in which case he may be estopped from contending that the article was not baggage.⁽¹⁰⁸⁾

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102. North General Wagon & Finance Co.Ltd. v. Graham, [1950] 2 K.B.7 per Cohen L.J., 15.
103. Per Pilcher J., The Albion, [1953] 2 All E.R. 670,682.
104. Leslie, The Law of Rail Transport (2nd Edition), at 295.
105. Per Lord Watson; Great Western Rail Co. v. Bunch, (1888) 13 App. Cas. 31,46.
106. See page 70.
107. Great Northern Ry. v. Shepherd, (1852) 8 Ex.30.
108. Macrow v. Great Western Railway, (1871) L.R.6 Q.B.612,617.

The authorities suggest that baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities (109) or the ultimate purposes of the journey. The application of the rule has given the following results. A history of Ireland, articles of household linen, furniture, an invalid chair, a typewriter, title deeds, a children's toy horse, theatrical clothing and props, a bicycle (unless in the baggage of a commercial traveller engaging in selling bicycles) or a sewing machine (unless the passenger is a seamstress) are not baggage. On the other hand a plain cake, a family Bible, the Union Jack (sic), rifles, revolvers, binoculars, silver pencils, a flash lamp and (110) ear defenders are baggage.

The carrier remains strictly liable even if the baggage accompanies the passenger i.e. if it is in the cabin with the passenger, in the rack over his head, under his seat or in the cupboard at the cabin entrance. (111) The onus lies on the carrier to prove that the loss or damage was due to negligence on the part of the passenger and the passenger is not necessarily negligent if he leaves the baggage at all events while in the course of the (112) journey.

109. Stretton v. Union S.S.Co.Ltd., (1881) 1 E.D. C.315; Macrow v. Great Western Railway, note 108 supra, 622.

110. 8 English & Empire Digest (replacement volume), p.129.

111. Great Western Rail. v. Bunch, note 105 supra, per Lord Halsbury, 42 & per Lord Watson, 48.

112. Per Atkin L.J., Vosper v. Great Western Ry. Co., [1927] All E.R. Rep. 702, 705-706.

Despite dicta suggesting otherwise, it is not a condition precedent to the liability that the baggage should be delivered to the carrier through for example a porter.⁽¹¹³⁾

The carrier's liability in respect of articles which the passenger carries about his person, is the same as that which he owes to the passenger, namely, he is liable in negligence only.⁽¹¹⁴⁾

The insurer's liability commences when the baggage is placed in the hands of the carrier's servants (which may be a reasonable and proper time before departure) and, in the case of baggage carried aboard by the passenger, probably immediately before the carriage is scheduled to depart.⁽¹¹⁵⁾ It continues, in the case of baggage in the passenger's control, until the end of the journey and, in the case of baggage carried in the hold of the aircraft, until it has been collected by the passenger from the place where the carrier usually makes it available, or until a reasonable time has expired after the baggage has been made available at the usual place of collection.⁽¹¹⁶⁾ Thereafter the carrier's liability is that of a warehouseman for reward. Where porters are provided by the carrier the carrier remains under the strict liability until the porter has disposed of the baggage either in accordance with the passenger's direction or by surrendering it into the custody of the passenger provided that

113. Great Northern Ry. Co. v. Shepherd, (1852) 8 Exch.30.; Gamble v. Great Western Ry. Co., (1865) 24 U.C.R.407.

114. Le Conteur v. L. & S.W. Ry., (1865) L.R.1 Q.B.54.

115. Per Lord Macnaghten, Great Western Ry. Co. v. Bunch, note 105 supra, 56; Steers v. Midland Ry., (1920) 36 T.L.R.703; Kerr v. Grand Trunk Ry. Co., (1874) 24 C.P. 209.

116. Patscheider v. G.W.Ry. Co., (1878) 3 Ex.D.153; Penton v. G.T.Ry.Co. (1869) 28 U.C.R.367; Vineberg v. G.T.Ry.Co., (1886) 13 A.R.93; Brown v. C.P.R.Co., (1886) 3 Man. L.R. 496.

it is within a reasonable time. Where successive carriers are involved the same principles apply as to successive carriers of goods.
(118)

10.

STATUTORY MODIFICATION

Every State of the Commonwealth other than Queensland has legislation limiting the liability of a common carrier in respect of certain classes of goods. These Acts with one exception do not apply to common carriers by air as they are limited in their application to common carriers by land.
(119) Certain provisions of the Common Carriers' Act 1874 of the State of Tasmania may apply to common carriers by air. These are section 6 which provides that a common carrier may not by his profession limit his liability as a common carrier, and section 8 which provides a common carrier may by contract limit or destroy his liability. Both are however declaratory of the common law.

B.

PRIVATE CARRIERS

A private carrier is one who carries the goods of other persons for reward but is not a common carrier. His liability is that of a bailee for reward. He must use such care as a

117. Richards v. London Brighton & South Coast Ry. Co., (1849) 7 C.B. 839; Butcher v. L. & S.W. Ry. Co., (1855) 16 C.B. 13.

118. See page 84 et seq.

119. New South Wales: Common Carriers Act 1902, section 3.
South Australia: Carriers Act 1891, section 2. Victoria:
Carriers and Innkeepers Act 1958, section 3. Western
Australia: Carriers Act 1920, section 2.

reasonable man takes of his own goods. In other words he is not an insurer. He is merely liable when through his negligence the goods are lost damaged or destroyed. The law was laid down in this fashion by Lord Aginger in Brind v. Dale (120) in which he said: "I take that if a man agrees to carry goods for hire, although not a common carrier, he thereby agrees to make good losses arising from the negligence of his own servants, although he would not be liable for losses by thieves or by any taking by force." (121)

In a modern formulation of that rule, the full High Court in Davis v. Pearce Parking Station Pty.Ltd. (122) said -

"His duty is to exercise reasonable care in and about the custody of the goods placed in his hands. In particular, he is bound to take reasonable care to safeguard the property against theft. Moreover, if the property is stolen, he is bound, as soon as he becomes aware of that fact, to notify the bank or the police, that immediate steps may be taken towards its recovery." (123)

The bailee is under an obligation to deliver the article bailed to the bailor but he is excused from this obligation if the article is lost damaged or destroyed without negligence on his part -

"The position appears to me to be this - that the law imposes an obligation upon the bailee to restore the article bailed to the bailor, subject to this, that the bailee is excused from restoring it if his inability to do so is due to no want of reasonable care on his part." (124)

120. (1837) 8 C. & P. 207.

121, At 211.

122. (1954) 91 C.L.R. 642.

123. At 648.

124. Per McArthur J., Paterson v. Miller, [1923] V.L.R. 37, 45.

The burden of proof lies upon the bailee, if the property is lost stolen damaged or destroyed, to show that the loss theft damage or destruction was not due to the failure by him to exercise reasonable care. (125) The judicial explanation for the transference of the onus of proof is: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged." (126)

The onus of proof which rests on the bailee is the legal onus i.e. the risk of non-persuasion and not merely the shifting onus, or onus of going forward with the evidence. If at the end of the case there is doubt whether or not the damage is due to lack of care on the part of the bailee, the onus on the bailee is not discharged and the bailor is entitled to judgment. In contrast, with *res ipsa loquitor*, if at the close of all the evidence it is in doubt whether or not the negligence of the defendant was the cause of the damage, notwithstanding the factual inference which initially the presumption expressed by the maxim warranted, the plaintiff (127) may fail.

As in other contracts of carriage there are implied terms that the carrier will carry the goods with reasonable despatch to their destination and not deviate from the agreed route.

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125. *Paterson v. Miller*, note 124 supra; *Davis v. Pearce Parking Station Pty.Ltd.*, note 122 supra; *Tozer, Kemsley & Milbourn (Australasia) Pty.Ltd. v. Colliers Interstate Transport Service Ltd.*, (1956) 94 C.L.R. 384; *Bennett & Bennett v. Fraser Valley Builders Ltd.*, [1952] 4 D.L.R.834; *Delicatessen Supply Co.Inc. v. Tulloch Fisheries Ltd. et al.*, [1956] 4 D.L.R. (2d) 644,648; *Tri-City Drilling Co. v. Velie*, [1960] 22 D.L.R. (2d) 341.
126. Per Whittaker J., *Bennett & Bennett v. Fraser Valley Builders Ltd.*, note 126 supra, 837.
127. Per Sholl J., *Fankhauser v. Mark Dykes Pty. Ltd.*, [1960] V.R. 376, 377-378.

CHAPTER V.

LIABILITY OF COMMON AND PRIVATE CARRIERS OF PERSONS.

In substance the liabilities of common and private carriers towards the persons they carry are identical. Their liability is founded on fault in contrast to the liability of the common carrier of goods upon whom the law imposes liability without fault.

A.

APPLICATION OF COMMON LAW PRINCIPLES

It is common place that the principles of liability developed in relation to carriers by other media apply to carriers by air. In Martin v. Queensland Airlines Proprietary Limited ⁽¹⁾ MacRossan C.J. observed:

"The common law imposes upon persons operating aeroplanes the same obligations to use care in the management and control of the aeroplanes as it imposes upon those who bring vehicles upon the highway."⁽²⁾

Thus the Queensland Supreme Court equated aeroplanes to vehicles on the highway. In Fosbroke-Hobbes v. Airwork Ltd. & British American Air Services Limited ⁽³⁾ Goddard J. did not feel the need to justify applying the common law principles of carriers' liability to carriage by air. Again in Nysted & Anson v. Wings Ltd. ⁽⁴⁾ Dysart J. of Court of King's Bench of Manitoba pointed out that "the law

1. [1956] St. R. Qd. 362.

2. At 373, also at 378.

3. [1937] 1 All E.R. 108

4. [1942] 3 D.L.R. 336.

which governs carriers by air is the same as that which governs carriers by land or sea."⁽⁵⁾ Lastly the Privy Council in Ludditt v. Ginger Coote Airways⁽⁶⁾ assumed that the principles of law applicable to common carriers by land applied to common carriers by air. There can therefore be no doubt that the common law principles of liability of carriers by land and to a limited extent by sea apply to carriers by air.

B.

COMMON CARRIERS UNDER SAME LIABILITY AS PRIVATE CARRIERS.

The common carrier of passengers is of course under a duty to carry all persons belonging to the classes of persons⁽⁷⁾ whom he professes to carry.

His liability to those whom he carries is that of a private carrier. He is not an insurer of their safety.

"It has long been settled that a carrier of passengers incurs no higher responsibility than that of exercising reasonable skill and care for the purpose of carrying them safely and securely. The high degree of precaution is necessary before, in such a matter, the standard of reasonable skill and prudence is attained. But carriers of passengers, even if by statute they be common carriers, do not insure safety, and their duty in respect of the transportation of passengers is measured by no exceptional rule."⁽⁸⁾

One explanation for this lesser duty to passengers is that it is lower not because "he is not a common carrier but because although

5. At 338.

6. [1947] A.C. 233.

7. Clarke v. West Ham Corporation, [1909] 2 K.B. 858; Ludditt v. Ginger Coote Airways, note 6 supra.

8. Per Dixon & McTiernan J.J., Henwood v. Municipal Tramway Trust (S.A.), (1938) 60 C.L.R. 438, 455-456, also per Latham C.J. at 444, & per Starke J. at 251; Reeder v. Commissioner of Railways (N.S.W.), (1938) 60 C.L.R. 305, 328, and Kelly v.

a common carrier he is not a bailee of his passengers"⁽⁹⁾

C.

LIABILITY OF CARRIERS TO PASSENGERS AND STOWAWAYS

1.

DUTY ARISES IN BOTH CONTRACT AND TORT.

The foundation of the carrier's liability is fault. His duty to his passengers is "to carry them safely as far as
(10)
reasonable care can do it. The duty is both a contractual duty and a tortious one:

"The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract, does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying them." (11)

This duality of liability can be significant in certain circumstances.

A foreign tort must be justifiable by the lex loci
actionis in addition to being a tort by the law of the forum.⁽¹²⁾
The range of situations in which the Courts will take jurisdiction over foreign torts is narrower than for breaches of contract where the court will exercise jurisdiction if the contract has been made

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- 8.(contd) Australasian Steam Navigation Co., (1885), 6 L.R. N.S.W.233.
 9. Per Farwell L.J., Clarke v. West Ham Corporation, Note 7 supra, 877
 10. Per Blackburn J., McCauley v. Furness Ry. Co., (1873) L.R. 8 Q.B. 52, 59; also Henwood v. Municipal Tramways Trust (S.A.), note 8 supra.
 11. Per Lord MacMillan, McAlister (or Donoghue) v. Stevenson, [1932] A.C. 562, 610.
 12. Machado v. Fontes, [1897] 2 Q.B. 231.

in or through someone residing in or if the foreign principal carries on business within the jurisdiction.⁽¹³⁾ Taking this factor into account together with the fact that the plaintiff faces the danger that by the lex loci the tort might be justifiable it is probably safer to sue for breach of contract.

On the other hand if the action is brought in tort higher damages may be claimed. In the first place exemplary damages may be awarded for a tort but not for breach of contract. Secondly while in tort damages which are a direct and proximate consequence of the tort can be claimed, that rule is subject, in the case of breach of contract, to two qualifications :-

- (i) the damages must be such as may reasonably be supposed to have been in the contemplation of both parties when the contract was made; and
- (ii) damages solely due to special circumstances under which the contract was made unknown to the party in breach cannot be claimed.⁽¹⁴⁾

It is the second which "marks a sharp difference between tort and contract, for in tort a man is many a time held liable for damages arising from special circumstances of which he had no knowledge."⁽¹⁵⁾.

13. E.g. see and compare in the High Court Rules Order 10 rules 1 (1)(e) and (f) with Order 10 rule 1(1)(g).

14. Winfield on Tort, Sixth Edition, section 191.

15. Winfield, note 14 supra, at 811.

2.

SCOPE OF DUTY OF CARE

The carrier's duty to his passengers is to exercise reasonable care and skill for the purpose of carrying them safely and securely. Obviously where the servants of the carrier fail to use proper care in the management of the aircraft the carrier will be in breach of the duty. Thus if the pilot fails to take proper precautions to maintain height⁽¹⁶⁾ after one of the engines has failed, or if having a choice he takes the course which would result in the aircraft not being able to get out of trouble if it arose,⁽¹⁷⁾ or if he manoeuvres the aircraft violently without giving the passengers adequate⁽¹⁸⁾ warning, or fails to warn the passengers of dangers which he knows or he ought to reasonably foresee so that they may take⁽¹⁹⁾ precautions e.g. air pockets or rough weather, the carrier will be in breach of his duty of care.

He may be liable for failing to provide safety devices⁽²⁰⁾ which it is customary to provide, such as seat belts. He will be liable if he provides navigational devices on the ground and the aircraft is lost through lack of proper care on his part in⁽²¹⁾ maintaining or operating them.

16. Bailey v. Taylor, [1936] N.Z.L.R. 805; Zerka v. Lau-Goma Airways, (1960) O.W.N. 166.

17. McLean v. Lutz, [1952] 1 D.L.R. 770.

18. Fromant v. Edmonton (City) and MacDonald, [1953] 9 W.W.R. (N.S.) 114.

19. Dudley v. Smith, (1808) 1 Camp. 167; Jarvie v. Caledonian Ry. Co., (1875) 12 Sc. L.R. 434.

20. De Courcey v. London Street Ry. Co., [1932] 2 D.L.R. 319.

21. Pym v. Great Northern Ry. Co., (1861) 2 F. F. 616.

Acts of Strangers:

In certain circumstances he will be held liable for the acts of strangers. Thus there may be a breach of his duty if the passenger suffers damage in the course of an on-⁽²²⁾ carriage arranged by the carrier, or if a dangerous substance is introduced into the cabin by a passenger and the carrier ought to have known or by the use of reasonable precautions prevented⁽²³⁾ it, or if a passenger is injured through being assaulted by another passenger and if a servant of the carrier knew of it or⁽²⁴⁾ had the opportunity of knowing of it and does nothing, or a⁽²⁵⁾ passenger is injured by an obviously drunken passenger, or by an operation being carried out by a stranger which according to previous knowledge and experience was however carefully performed likely to lead to damage and the carrier has failed to take⁽²⁶⁾ reasonable precautions against it.

Duty in relation to Soundness of Aircraft.

The carrier's duty in relation to the soundness of his aircraft has been the subject of dispute. At one time it appeared that the common law warranty of seaworthiness would be adopted as the measure of the care required of the air carrier

22. See p. 148

23. East India Ry. Co. v. Kalidos Murkerjee, [1901] A.C. 396.

24. Canadian Pacific Ry. Co. v. Blair, (1903) 34 S.C.R. 74, 36 S.C.R. 159.

25. Booth v. Canadian Pacific Ry. Co., [1938] 1 W.W.R. 753.

26. Daniel v. Metropolitan Ry. Co., (1871) L.R. 5 H.L. 45.

in preference to the duty for land vehicles. It now appears certain that the lower duty for land vehicles has been accepted as appropriate to aircraft.

The common law implied into the contract for the carriage of goods between a consignor and shipper an undertaking on the part of the shipowner that the vessel was seaworthy. Carver describes this duty :-

"The shipowner was liable at common law for failure to make the ship seaworthy in fact, although he may have taken all reasonable pains and precautions to do so. He undertakes absolutely that she shall be fit, on sailing upon the voyage, to carry the cargo which she has on board and with it to encounter safely whatever perils a ship of that kind may fairly be expected to be exposed to in the course of that voyage at that time of the year... .."

It appears, then, that the shipowner undertakes responsibility for any defects on the ship or her machinery or equipment; even for defects not discoverable by careful examination." (27)

The warranty embraces the provision of a competent crew and master, safe cargo and proper storage of the cargo. As the carrier is liable in respect of latent defects i.e. defects not discoverable by careful examination, his liability for the soundness of the vehicle is extremely onerous.

There are strong reasons for believing this rule will not be applied to carriage of passengers by air. It is a rule peculiar to carriage of goods by sea in that it originated in an express term included in the early days in contracts of carriage of goods by sea. (28) Even in sea carriage it has never been applied (29) for the benefit of passengers. With the exception of one decision, all recent authority either rejects it or is inconsistent with its

27. Carver's, Carriage of Goods by Sea, 10th Edit, p.80.

28. McNair, The Law of the Air, 1st Edit., p.120.

29. Bowen on Negligence, 4th Edition, p.1278.

application to carriage by air. In Dominion Airlines v. Strand (30) Reed J., sitting alone, held that there was implied into a contract of carriage by air of a passenger warranty that the aircraft was airworthy. Although the appeal (31) turned on a different point, Ostler J. referred to and rejected this expressing preference for the duty of care imposed upon a carrier by land. (32) MacKinnon J. in Aslan v. Imperial Airways, (33) a case involving carriage of goods by air, in relation to which the warranty is more likely to be apposite, rejected the argument that a warranty of airworthiness was implied in the contract of carriage by air. (34)

The duty of care of carriers by land in relation to the soundness of their vehicles was settled in Hyman v. Nye & Sons (35) by the Court of Queen's Bench. In that case the Court heard an application for a new trial on the grounds that a jury had been incorrectly charged. The application was successful.

30. [1933] N.Z. L.R. 1, 15-16.

31. [1933] N.Z. L.R. 17

32. At 57.

33. (1933) 45 Ll.L. Rep. 316.

34. At 323-324.

35. (1881) 6 Q.B.D. 685. The duty was finally settled in this case. Actually it was a restatement of the law as laid down in Readhead v. Midland Ry. Co., (1869) L.R. 4 Q.B. 379, in which it was held that there was no rule applicable to vehicles equivalent to the warranty of seaworthiness (see Beven on Negligence, 4th Edition, p.1143). In Francis v. Cockrell, (1879) L.R. 5 Q.B. 501, the duty was stated in terms indicating that it was of a lower order. Hyman v. Nye & Sons, restored the duty to the level stated in Readhead's case.

Lindley L.J. expressed the duty of care in these terms:

"His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventable by any care or skill. If he can prove this, as the defendant did in *Christie v. Griggs* and as the railway company did in *Readhead v. Midland Ry. Co.*, he will not be liable; but no proof short of this will exonerate him." (36)

Thus the carrier is liable in respect of all defects other than latent defects i.e. a defect which no examination that a prudent carrier would make could possibly reveal. The duty has been discussed in its application to aircraft in *Nysted and Anson v. Wings Ltd.* (37) In that case Dysart J. probably stated the duty too highly. Once the plaintiff shows the carriage has broken down the onus is on the carrier to show that the breakdown was due to latent defect. (38) Usually however in the case of aircraft accidents the total disaster makes it impossible to prove that the cause of the accident was fault of the crew or fault in the aircraft. As a result the plaintiff often has to rely on the principle of *res ipsa loquitur* to get his case to the jury.

The duty is a very high one. It is not much lower in degree than that imposed as a result of the warranty of seaworthiness. This point was made by Lindley L.J. in *Hyman v. Nye* when

36. At 687-688.

37. [1942] 3 D.L.R. 336.

38. *Christie v. Griggs*, (1809) 2 Camp. 79; *Lyon v. Lamb*, (1838) 16 Sh. (Ct. of Sess.) 1188; *Holston v. London & South Western Ry. Co.*, (1885) Cab. & El. 542.

he said :

"In many of the cases bearing on this subject, the expression 'reasonably fit and proper' is used. This is a little ambiguous, and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, i.e., as fit and proper as skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and vice versa. The expression 'reasonably fit' denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great." (39)

There is therefore no pressing public interest for applying the principle of the warranty of seaworthiness to carriage by air. The present duty probably satisfies the public interest.

The defendant does not discharge the onus by showing that he relied on the high reputation of the manufacturer who
(40)
supplied the aircraft and he is responsible for the negligence of the manufacturer in the construction of the aircraft to the
(41)
same extent as the manufacturer would be. But provided he has adopted the best known apparatus kept it in perfect order and worked it without negligence he will not be liable for the

39. Hyman v. Nye, note 35 supra, 688.

40. Larsen v. Prince Albert & Northern Bus Lines Ltd., [1952] 3 D.L.R. 756.

41. Burns v. Cork & Bandon Ry. Co., (1863) 13 I. C.L.R. 543; Ryan v. Clarkin, [1935] Ir. Rep. 1, 17; Nysted et al v. Wings et al, [1942] 3 D.L.R. 336, and the Re-statement of the Law of Torts, section 412. It is doubtful if this line of authority will be followed. The House of Lords in Davie v. New Merton Board Mills, [1959] 1 All E.R. 346, held in the analogous case of whether an employer was liable to his servant for injury resulting from a defect in a machine supplied by a manufacturer that the employer was not liable and would not be liable unless (per Lord Tucker at 347), the injury was suffered by reason of a faulty specification prepared by the employer for the manufacturer or the manufactured article requir

consequence of an extraordinary rare and obscure accident which
cannot in a business sense be prevented by any known means. Where
an aircraft is being operated under an interchange agreement it
seems that the operator's duty is a lower one merely to ascertain
whether the aircraft is safe to fly and it does not become the
duty of the operator to make a minute examination merely because
he discovers a defect. (43)

Persons to whom Duty is owed. (Passengers).

The duties outlined above are owed to passengers. No satisfactory definition of a passenger can be given because of the complicated circumstances of the cases in which the Courts have held persons to be passengers. The status does not depend upon payment of the fare, although, of course, if a fare has been paid by or on behalf of the person that will conclude the question of whether that person is a passenger.

Probably the closest that can be reached in accurately defining a passenger is to say that all persons on board the aircraft other than members of the crew and trespassers are passengers. Even this statement is subject to qualification. Thus certain classes of the carrier's employees namely employees whose carriage is an incident of their employment are not passengers. (44)

- 41. (contd.) some inspection and test after delivery.
- 42. Newberry v. Bristol Tramways Co., (1912) 107 L.T. 801, 803.
- 43. Richardson v. Great Eastern Ry. Co., (1876) 1 C.P.D. 342.
- 44. See page 12 et seq.

It has been held that a post office official travelling
(45)
free with the mails, a child in a train whose parent, without
(46)
fraud, had omitted to pay the fare, a person on a train chartered
(47)
by a society who had bought his ticket from the society, a
(48)
person on an aeroplane as a guest of the hirer, a person
(49)
travelling in the first class on a third class ticket, a person
(50)
attempting to board a vehicle and being thrown off, and a reporter
for a newspaper with a free ticket issued in the name of another
(51) (52)
reporter, (but not a child ventre en sa mere), have all been
held to be passengers.

The liability of a person who does not carry for hire
or reward is of lesser degree than a carrier for hire and reward.

- 45. Collett v. London & Northern Western Ry. Co., (1851) 16 Q.B. 984; Kenny v. Canadian Pacific Ry. Co., (1902) 5 Terr.L.R.420.
- 46. Austin v. Great Western Ry. Co., (1867) L.R. 2 Q.B. 442.
- 47. Skinner v. London, Brighton & South Coast Ry. Co., (1850) 5 Exch. 787.
- 48. Fosbroke-Hobbes v. Airwork Ltd., [1937] 1 All E.R. 108.
- 49. Vosper v. Great Western Ry. Co., [1928] 1 K.B. 340, 349.
- 50. Wilkie v. L.P.T.B., [1947] 1 All E.R. 258.
- 51. Great Northern Ry. v. Harrison, (1854) 10 Ex. 376.
- 52. Walker v. Great Northern Ry. Co. of Ireland, [1891], 28 L.R. Ir.69. The existence of the duty depended upon the existence of a contract, so the court held, and as the infant was not a party to the contract the duty was not owed to it. As in fact the duty arises in tort it is submitted that the Court was wrong provided it could be demonstrated that the defendant could foresee that his acts of negligence might cause damage to a person in the situation of the infant.

Napier C.J., in Keane v. Knowles pointed out :-

"I have no doubt that there is a sense in which it can be said that the passenger who is carried gratuitously must take the vehicle and the driver as he finds them. If he knows that the vehicle has no brake, or that the driver is a 'learner' and nevertheless accepts the invitation, it may well be that he has no right to complain if the driver does the best he can in the circumstances." (54)

While it has been suggested that the duty of the driver in relation to the vehicle is higher than that owed by an occupier of land to a licensee, (55) more recent authority has assimilated the duty to that arising out of that relationship and makes the driver answerable only for defects of which he has knowledge (56) and has failed to warn the passenger of.

There is another gloss on the rule concerning the persons who are entitled to the benefit of the duty of care. When the aircraft is stationary it appears that the duty of the carrier to non-contractual passengers is the lower duty of (57) an invitor, namely to use reasonable care to prevent damage (58) from unusual danger which he knows or ought to know. This strange state of affairs is due to a too consistent application of principle. Once the aircraft starts to move the higher duty comes into play. In the case of contractual passengers in a stationary aircraft it seems the duty is to see that the premises (59) are reasonably safe for the contemplated purpose.

53. [1942] S.A.S.R. 13.

54. At 16.

55. Per Collins M.R., Harris v. Perry & Co., [1903] 2 K.B. 219, 226.

56. Haseldine v. Daw & Son Ltd., [1941] 2 K.B. 347, 373.

57. Warren v. Railway Executive, (1950) 94 S.J. 457.

58. Per Willes J., Indermaur v. Dames, (1866) L.R. 1 C.P. 274, 288.

59. See following page.

3.

STOWAWAYS.

Related questions are the duty of care that the carrier owes to :-

- (a) persons who travel on his aircraft without his or his servant's consent;
- (b) persons who travel on his aircraft with the consent of his servants but contrary to his orders.

For a carrier the first question can be sub-divided into two parts :-

- (a) his duty to the trespasser before he has been discovered;
- (b) his duty to the trespasser after he has been discovered.

The second is of practical importance as a carrier by air cannot for obvious reasons put a trespasser off his aircraft if it is in the course of a journey.

(60)

In several recent decisions on the duty of care owed to unauthorised entrants, the High Court has qualified, to an extent which is not yet clear, the rule that the duty of an

59. Protheroe v. Ry. Executive, [1951] 1 K.B. 376; Bell v. Travco Hotels Ltd., [1953] 1 Q.B. 473; McCardie J. in MacLennan v. Segar, [1917] 2 K.B. 325, suggested that the liability arose under an implied warranty that the premises are as safe as reasonable care and skill can make them. This was confined to its particular facts in Bell v. Travco Hotels Ltd. the court saying that McCardie J. may have been right in applying that standard of care to the interior of a hotel but it was not appropriate to the gardens and drive of a property. It may well be that McCardie J's formulation of the duty is the correct one for a stationary aircraft rather than the one given in the text by me.

60. Thompson v. Municipality of Bankstown, (1953) 87 C.L.R. 619; Rich v. Commissioner for Railways (N.S.W.), (1959) 101 C.L.R. 135;

occupier of premises in relation to active as well as passive conduct to an unauthorized entrant is not "to wilfully injure him" or "unnecessarily and knowingly to increase the normal risk by deliberately placing unexpected dangers in his (the trespasser's) way."⁽⁶¹⁾

Two main approaches have been made by the Court towards restating the law. Fullagar J. with qualified support from Windeyer J. has taken the view that the occupier in addition to owing the traditional duty of an occupier to a trespasser also may owe the general duty of care in negligence laid down by Lord Atkin in McAlister (or Donoghue) v. Stevenson.⁽⁶²⁾ He considered that the questions of duty and breach would probably only arise where the occupier or his servants know that a trespasser is on the land, or that trespassers are in the habit of entering upon the land.⁽⁶³⁾ Of the measure of the duty he said : "The fact that the plaintiff is a trespasser is, of course, always itself a relevant factor, and among the most important of other factors will commonly be the comparative slightness or seriousness of the risk and the comparative slightness or difficulty of taking effective precautions."⁽⁶⁴⁾

On the other hand Dixon C.J. has approached the subject quite differently. He did not adopt the view that the occupier

60 (contd.) Commissioner for Railways (N.S.W.) v. Cardy, (1960) 34 A.L.J.R. 134.

61. Per Lord Robson, Grand Trunk Ry. v. Barnett, [1911] A.C. 361, 369.

62. [1932] A.C. 562, 580.

63. Commissioner of Railways (N.S.W.) v. Cardy, note 60 supra, 143.

64. Ibid note 63 supra.

owes a general duty of care in certain circumstances to trespassers. He seems to prefer to establish specific categories of duty independent of one another and undertake judicially a degree of measurement of the care appropriate to each category. ⁽⁶⁵⁾ Thus in Commissioner of Railways (N.S.W.) v. Cardy, he stated the measure applicable to the circumstances of that case and like circumstances as follows - "In principle a duty of care should rest on a man to safeguard others from a grave danger of serious harm if knowingly he has created the danger or is responsible for its continuing existence and is aware of the likelihood of others coming into proximity of the danger and has the means of preventing it or averting the danger or of bringing it to their knowledge." ⁽⁶⁶⁾

At this stage it is impossible to predict which approach will ultimately be adopted. The implications of the approach of Fullager J. in relation to stowaways are startling. After the trespasser is discovered or if to the knowledge of the operator persons trespass frequently on aircraft the operator will owe to them a duty of care similar in measure to that which he owes to passengers. On the other hand the approach of Dixon J. leaves the way open for the formulation of a duty of care appropriate to the special circumstances of carriage by air.

65. Thus in Thompson v. Municipality of Bankstown, note 60 supra, the measure of duty laid down is higher than that owed by an invitee; on the other hand the measure of the duty laid down in Commissioner of Railways (N.S.W.) v. Cardy is lower than that owed by an invitee.

66. Note 60 supra, 137.

It is submitted that, irrespective of what approach is followed, the Court will be reluctant to confer upon a stowaway after discovery the privileges of a passenger. In the first place, it seems strange that his position in point of law should be improved merely because he has been discovered. It is of course a quite different situation where the carrier is aware that persons are habitually stowing away on his aircraft and he fails to take reasonable precautions to prevent the practice. Secondly, the aircraft operator unlike the occupier of land cannot put the stowaway off the premises immediately after discovery if the aircraft is in flight. Thirdly, in many cases the stowaway would be in a better position than passengers who almost certainly would have contracted out of their common law right of action. Like considerations have influenced the courts in other circumstances. In Fosbroke-Hobbes v. Airwork Ltd. & British American Services Limited it was held that guests of the hirer of an aircraft notwithstanding that their relationship to the operator was that of invitee cannot be in a better position than their host, so that, if he had contracted out of liability in respect of the carriage, the guests will be bound by the contracting out notwithstanding that they are not parties to the contract and whether or not the operator knew guests were to be carried.⁽⁶⁷⁾ Where a passenger is carried on a train without having contracted for the carriage, he will not be in any better position than if he had taken the cheapest ticket available to the ordinary public on that particular train.⁽⁶⁸⁾

67. [1937] 1 All E.R. 108, 112.

68. Charlesworth on Negligence (3rd edition) at 115.

In the case where a person is carried against the carrier's orders but with the consent of a servant of the company the carrier is not under a duty of care to him as his relationship to the carrier is that of a trespasser but the servant will be (69) liable to him for his acts of negligence.

4.

PROOF OF NEGLIGENCE AND BREACH OF STATUTORY DUTY

I have already referred to the difficulty which the claimant who suffered damage from an aircraft accident will often face of proving that the accident was due to negligence on the part of the carrier. Two principles of law offer the claimant some relief. Breach of a statutory duty or a regulation imposing a duty on the carrier may be evidence of negligence. Perhaps more important, in certain cases, the circumstances of the accident will either operate to transfer the onus of proof to the defendant or will give rise to an inference of negligence on his part depending upon the effect given by the Court to the rule *res ipsa loquitur*. Furthermore in the case of breach of a duty imposed by statute or regulations that breach may give rise to a cause of action distinct from and additional to that arising from the breach of any common law rule by the defendant. These matters are discussed hereafter under the titles *res ipsa loquitur* and duties imposed by Statute and Regulations.

69. *Lygo v. Newbold*, (1854) 9 Ex. 302; *Twine v. Beans Express Ltd.*, [1946] 1 All E.R. 650, affd. 175 L.T.131; *Conway v. George Wimpey & Co.Ltd.*, [1951] 2 K.B. 266.

Res Ipsa Loquitur.

The literal translation is the thing speaks for itself. It applies in cases where the circumstances are such that it is more likely than not that the damage could not have occurred without negligence on the part of the defendant or his servants and the event causing the damage remains unexplained. (70)
In Scott v. London and St. Katherine's Docks Erle C.J. speaking on behalf of the Court of Exchequer Chamber said :

"There must be reasonable evidence of negligence.

But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."(71)

The application of the principle depends upon lack of explanation of the accident:

"The doctrine is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."(72)

For the maxim to operate three elements must be present: An unexplained accident, an accident which was more likely to have happened through negligence than otherwise and that which caused the damage must have been in the control and management of the defendant at the time of the accident.

70. (1865) 3 H. & C. 596.

71. Note 70 supra, 667.

72. Per Lord Porter, Barkway v. South Wales Transport Co.Ltd., [1950] 1 All E.R. 392, 394-395.

Subject to the reservation that the application of the principle to a case must turn on the particular facts, it is clear that this principle is peculiarly germane to aircraft crashes. Two of the elements necessary, namely lack of explanation and the instrument which caused the damage being under the control and management of the defendant are often present in aircraft accidents. In 1936 it was argued that the doctrine should not be applied to an aeroplane as it was a comparatively new means of locomotion necessarily exposed to the many risks which must be encountered in flying through the air. Goddard J. in Fosbrooke-Hobbes v. Airwork Ltd. (73) rejected that argument. A series of (74) Canadian cases have adopted the same view.

The principle does not apply to aeroplane accidents generally. In Arnold v. Evans (75) Virtue J. said that, insofar as Fosbrooke-Hobbes v. Airwork Ltd. justified the inference that the doctrine applies to aeroplane accidents generally, he disagreed with it. The claimant was killed in an aircraft which was overloaded and tail heavy but this could have been trimmed out. There was evidence that the aircraft was making a right turn at low altitude which in overload conditions could lead to a spin. Virtue J. found that the pilot was negligent. Of the application of *res ipsa loquitur* he said:

73. Note⁶⁷ supra, 109-110.

74. McInnerney et al v. McDougall, [1938] 1 D.L.R. 22; Galer v. Wings Ltd., [1939] 1 D.L.R. 13; Nysted v. Wings Ltd., [1942] 3 D.L.R. 336; Malone v. Trans Canada Airlines, [1942] 3 D.L.R. 369.

75. (1952) 54 W.A.L.R. 15.

"Now, in a case where an aircraft simply obeys the law of gravity and crashes, I do not consider that there is any justification for saying that such an occurrence is one which in the ordinary course of things only happens through the negligence of the pilot or his servants. Structural and mechanical faults due to defects in manufacture or resulting from imperfect servicing and maintenance of an aircraft would, I should imagine, be quite a patent cause of an air disaster and these in many, if not, in most cases, would not be attributable necessarily to the neglect of the pilot." (76)

Again, where an aircraft was fitted with dual controls and the claim is in respect of death or injury to a student pilot res ipsa loquitur will probably not apply. (77)

There is one other matter to be canvassed. After the principle has successfully been invoked, what is the position of the defendant? On the view of High Court in Mummery v. Irvings Pty. Ltd. (78) the effect of the application is only to raise an inference of negligence against the defendant and does not move on to him the ultimate burden of disproving negligence. On this view the defendant need not advance any explanation or he may merely suggest a reasonable explanation "which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs." (79) On the other hand dicta in Woods v. Duncan, (80) Barkway v. South Wales Transport Co. Ltd. (81) Southport Corporation v. Esso Petroleum Ltd. (82) and, most clearly of all,

76. Note 75 supra, 19.

77. McWilliam v. Thunder Bay Flying Club, [1951] 1 D.L.R. 128.

78. (1956) 96 C.L.R. 99.

79. Per Langton J., The Kite, [1933] P. 154, 168.

80. [1946] A.C. 400, per Viscount Simon at 419 and Lord Simonds at 439.

81. [1950] 1 All.E.R. 392.

82. [1955] 3 All E.R. 864.

(83)

in Moore v. R. Fox & Sons indicate that the effect of the application of the principle is to shift to the defendant the onus of proving that he was not negligent. It is impossible to predict what view will ultimately prevail in Australia. It should be noted that in New Zealand and Canada the English view (84) has been accepted.

Duties Imposed by Statute or Regulation.

In an action for negligence violation by the defendant of a legislative provision requiring a specific precaution is (85) evidence of lack of reasonable care. Such a failure to observe the requirements of the law will in appropriate cases be cogent (86) evidence of negligence. Where two aircraft are approaching head-on and one of them in contravention of regulation 138(2) of the Air Navigation Regulations alters its heading to the left instead of the right while the other alters its heading to the right in conformity with that regulation and a collision follows the breach of the regulation will be evidence of negligence on the part of the first aircraft. There are many other examples of this kind in the Regulations.

83. [1956] 1 Q.B. 597.

84. New Zealand: Voice v. Union Steamship Co. of New Zealand, [1953] N.Z. L.R. 176; Heywood v. The Attorney-General [1956] N.Z. L.R. 668. Canada: Zerka, Romley & Alex v. Lau-Goma Airways 7C.C.H. Aviation Law Report's 17720 (1961) (Ontario Court of Appeals).

85. Heywood v. The Municipal Tramways Trust (.S.A.), (1938) 60 C.L.R. 438, 461.

86. Lopresto v. Golding, (1958) 31 A.L.J. 851, 852.

The breach however does not raise a presumption that
(87)
the accident was due to the breach. It is only one factor in
establishing whether the accident ~~was~~ due to lack of proper care
on the part of the defendant and the question of liability has
therefore to be resolved by reference to all of the relevant
(88)
evidence. The mere fact of violation of a regulation does not
make it relevant to the question of negligence. Thus an aircraft
may become for the purposes of the Regulations unairworthy through
failure on the part of the owner of the aircraft to conform with
a requirement of the Regulations or through him having had the
aircraft modified or repaired otherwise than in accordance with the
Regulations. Clearly the fact that the aircraft is operating in
contravention of the Regulations in that it has no certificate
of airworthiness may have no relation to the events which caused
the accident.

It is no longer open to doubt that breach of a duty
imposed by Statute or by Regulations even if a penal sanction is
provided for its non-performance may give the person injured by
that breach a cause of action against the person who failed to
perform that duty. I have confined my examination of the law on
this subject to penal statutes, as my purpose is to determine
whether non-performance of the duties imposed by the Air Navigation
Act and the Air Navigation Regulations give a correlative civil
right of action to the person suffering damage by reason of that

87. *Englis v. N.S.W. Fresh Food and Ice Co. Ltd.*, (1944)
44 S.R. (N.S.W.) 87,96.

88. *Lopresto v. Golding*, note 86 *supra*, 852.

non-performance. Both of these laws are penal laws.

The creation of the cause of action does not depend upon an expression of intention on the part of the legislature in the provisions giving rise to the cause of action.⁽⁸⁹⁾ In most cases its existence is justified on the basis of an implied intention on the part of the legislature, an implication made from "a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted."⁽⁹⁰⁾ This test is hardly a satisfactory one for deciding whether a particular section of an Act or a regulation gives a cause of action. Glanville Williams pointed out in this regard: "the failure of the judges to develop a governing attitude means that it is almost impossible to predict outside the decided authorities when the courts will regard a civil duty as impliedly created. In effect the judge can do what he likes, and select one of the conflicting principles stated by his predecessors in order to justify his decision."⁽⁹¹⁾ This position is hardly a satisfactory one. It is contrary to one of the fundamental elements of justice namely certainty of the law or at least reasonable degree of certainty. It leaves to the arbitrary whim of the court whether a particular statute will or will not give rise to a civil right of action.

89. Per Kitto J., *Australian Iron & Steel Ltd. v. Ryan*, (1956-7) 97 C.L.R. 89, 98.

90. Per Lord Simonds, *Cutler v. Wandsworth Stadium Ltd.*, [1949] A.C. 398, 407.

91. *The Effect of Penal Legislation on the Law of Tort*, 23 Mod. L.R. 233.

A negative proposition is that a penalty provided for breach of the law does not conclude the question against the person contending that a civil action lies for breach of the particular law; it is prima facie evidence of the intention of the legislature that the penalty is to be the only remedy, but it is only one of the circumstances to be taken into account. (92)

One part of the circumstances test is whether the duty is one owed to the public generally or to a special class or a designated individual. If the first, there was no cause of action for breach of it. This test too has been questioned and is no longer conclusive of the question -

"The duty too may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot".(93)

This test remains, however, as one of the considerations to be taken into account in deciding whether the duty is enforceable by a civil action.

Just as the provisions of a statute may give rise to a correlative civil right of action so too a regulation may give rise to a correlative civil right of action. William J., after pointing out that where a statute is passed requiring an employer to take specific precautions for the protection of his employees, although the statute only provides for a prosecution for breach,

92. Per Atkin L.J., *Phillips v. Britannia Hygienic Laundry Company Limited*, [1923] 2 K.B. 832, 841, and per Lord Simonds, *Cutler v. Wandsworth Stadium Ltd.*, note 90 supra, 407.

93. Per Atkin L.J., *Phillips v. Britannia Hygienic Laundry Company Limited*, note 92 supra, 841.

the statute creates an individual civil right of action in the class of persons for whose protection it is passed, said in (94)
Darling Island Stevedoring & Lighterage Co. Limited v. Long:-

"It is impossible to limit this principle to duties created by statutes. It must apply equally to regulations made under the authority of statutes where the delegate is authorised to make regulations relating to such a subject matter. The regulation if valid must create the same correlative civil right as the same provision in the statute would create unless the delegate is expressly confined by the statute to making regulations which can only be enforced in a particular manner. The duty could then be enforced in that manner and no other manner." (95)

Ultimately the question whether a regulation gives rise to a correlative civil right of action depends upon whether the statute under which it is made permits an implication of that type in relation to the regulations made under it. (96)

Returning to negative propositions, where the regulation-making power which authorizes the regulation confers an express but limited power to the regulation-making authority to attach a penal sanction to a breach of any of the provisions of the regulations, that does not prevent the implication by the Court of a civil sanction for its breach. (97)

It seems that where the common law provides adequate alternate remedies so that there is no need for a statutory standard of care to be prescribed, the Courts will be reluctant to hold that breach of the statutory standard of care will give the person injured a cause of action. (98)

94. (1956-57) 97 C.L.R. 36.

95. Note 94 supra, 49.

96. Per Kitto J., Australian Iron and Steel Ltd. v. Ryan, note 89 supra, 98-99.

97. Darling Island Stevedoring & Lighterage Co. Limited v. Long, note 94 supra.

98. Phillip v. Britannia Hydraulic Laundry Company Limited, note 92 supra. (841)

This appears to be the reason why the Courts have consistently refused to recognise that a civil action lies for breach of motor traffic laws.

One other negative proposition is in point. The fact that the provision is one of a large number many of which clearly do not create any private rights does not prevent the implication being made in respect of it,⁽⁹⁹⁾ although no doubt this would, where the Court was disinclined to make the implication, be used as part of its reasoning to show the legislature did not intend the implication to be made. The inadequacy of a penalty provided has been held to support the existence of an intention that the implication was to be made.⁽¹⁰⁰⁾

All the propositions which I have enumerated including the test of looking at the surrounding circumstances are of little assistance in deciding whether the Court will hold a given provision in a Statute or regulations is supported by a civil sanction. Indeed the Courts appeared to have evaded laying down principles of construction and "sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of law or the application of any definite rule of construction."⁽¹⁰¹⁾ John G. Fleming in The Law of Torts states that "the traditional formulation of a court's conclusion in the language of presumed legislative intent is clearly

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99. O'Connor v. S.P. Bray Limited, (1936-1937) 56 C.L.R. 465, 479
100. Cofield v. Waterloo Case Co. Ltd. [1924] 34 C.L.R. 367, 371., Bourke v. Butterfield & Lewis Ltd., (1926) 38 C.L.R. 345, 362, 363.
- 101 Per Dixon J. (as he then was), O'Connor v. S.P. Bray Limited, note 99 supra, 370.

disingenuous and barely screens the fact that it represents an act of judicial legislation."⁽¹⁰²⁾ Later discussing one of the tests he says : "But, like most verbal tests concealing a value judgment based on policy or intuition, this formulation is at best, question begging"⁽¹⁰³⁾ It is difficult not to agree with him.

This situation is relieved to some extent by the existence of a test propounded by Dixon J. in O'Connor v. S.P. Bray Ltd.⁽¹⁰⁴⁾ and accepted by the majority of the High Court in Darling Island Stevedoring and Lighterage Co. Ltd. v. Long⁽¹⁰⁵⁾ and Australian Iron and Steel Ltd. v. Ryan.⁽¹⁰⁶⁾ He pointed out that the Courts were readier to imply the correlative right of action if the standard of conduct created by the provision of the Statute or Regulations imposed a duty upon a person who at common law was in relation to the matter, the subject of the standard of conduct, under a general duty of care so that the standard of conduct is no more in substance than a precise definition of the general duty in its application in a particular situation. He said :

102. First edition, 138.

103. First Edition, 139.

104. Note 99 supra.

105. Note 94 supra.

106. Note 89 supra. This seems to be the prevailing and only test used in the majority of United States (Thayer, Public Wrongs and Private Act, (1914) 27 Harvard L.R. 317, and James Fleming, Statutory Standards and Negligence in Accident Cases, 11 Lou. L. Rev. 95), and Glanville Williams in The Effect of Penal Legislation on the law of Tort., 23 M.L.R. 233, suggests that it should be adopted in the other common law jurisdictions.

"Perhaps in the end, a principle of law will be acknowledged as the foundation of the cases. In the absence of a contrary legislative expression, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law... Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on." (107)

But this test is not a conclusive one. The Court will still look at the nature of the provision or the scope of the legislation (108) to ascertain if there is a contrary intention. As a result the Courts still are left with a ground which can give a verbal justification to them for refusing to make the implication, notwithstanding that the test of Dixon J. justifies the implication.

Quite obviously an action will lie only in respect of the kind of harm which the statute or regulations were intended to prevent. Thus, where the purpose of the provisions requiring sheep carried in ships to be in pens is to prevent the spread of disease amongst animals, no action lay for neglect of that duty (109) where the sheep were swept overboard. It follows too that it must be intended for the protection of the person suing for breach of it. The damage complained of must of course be due to breach

107. O'Connor v. Bray, note 99 supra, 478.

108. Darling Island Stevedoring & Lighterage Co. Limited v. Long, note 94 supra, 49.

109. Gorris v. Scott, (1874) L.R. 9 Ex. 125.

of the obligation.

The matters discussed in the preceding pages which bear on the question whether or not infringement of a provision in an act or regulations will give rise to a correlative civil right are as follows:-

- (i) The fact that there is a penalty for breach of the provision does not prevent implication of a correlative right.
- (ii) That the duty is owed to persons generally does not prevent the correlative right arising.
- (iii) It is not inconsistent with the existence of a correlative right of action in the case of regulations if the Statute pursuant to which they are made gives an express but limited power to impose penalties.
- (iv) The existence of alternative remedies, which are adequate at common law, is a matter weighing against the implication.
- (v) That the provision is one amongst many for breach of which, it is obvious, no correlative right is available does not prevent the correlative right being implied.
- (vi) An important matter pointing to the existence of the correlative right is that the provision defines specifically what must be done in furtherance of a general duty arising at common law.
- (vii) The intention of the legislature deduced from amongst other matters the points enumerated in sub-paragraphs (i) to (vi) and the scope of

the legislation may override an implication arising by virtue of the test expressed in sub-paragraph (vi).

- (viii) The action must be in respect of the kind of harm which the provision was intended to prevent.
- (ix) The provision must be intended for the protection of the person suing.

I have referred to these matters at length as I believe that breach of certain provisions of the Air Navigation Regulations may give a passenger injured by that breach a civil right of action. However a formidable obstacle to this contention is the decision of the Queensland Supreme Court in Martin v. Queensland Airlines (110) that "the duties imposed by the Air Navigation Regulations are not duties enforceable by individuals injured through breach of them, but public duties only, the sole remedy for which is the remedy provided by the regulations themselves by way of fine or imprisonment." (111) As I believe that this is wrong I now examine the reasons which led the court to reach that conclusion.

It is unnecessary to examine the particular regulations upon which the plaintiff passenger relied as the Court's conclusion was not confined to those regulations but related to the Regulations as a whole. The Court first reviewed the provisions of the Commonwealth Air Navigation Act 1920-1950 and the penal provisions of the Regulations. The difficulty that I have in

110. [1956] St. R. Qd. 362.

111. Note 110 supra, 378.

attempting to assess the ratio decidendi is that the Court quoted dicta from a number of English cases mainly on the provisions of the English Motor Traffic Legislation without in most instances stating what it regarded as controlling factors. The reasons which I attribute to the Court are deduced from these dicta and I refer to the points in those emphasised by the Court. These appear to be as follows:-

- (1) As the Regulations provide for enforcement in a specific manner by a penalty, then unless their scope and language and considerations of policy and convenience dictate otherwise, they cannot be enforced in any other manner.
- (2) The Regulations are not for the benefit of a class of the public but for the benefit of the public generally.
- (3) The Court thought it significant that the liability of the carrier to his passengers was already well provided for and regulated by the common law.
- (4) There was no indication that the intention of the legislators was to protect passengers.
- (5) The Court distinguished the New Zealand Supreme Court decision of Dominion Airlines Ltd. in liquidation (112) v. Strand in which it was held breach of a regulation gave a correlative civil right on the ground that, unlike the New Zealand Civil Aviation Act under which the regulation was made, there was nothing in the provisions of the Commonwealth Air Navigation Act 1920-

1950 conferring power on the Governor-General to make regulations which made any specific reference to the carriage of passenger or goods and there was nothing in the Air Navigation Regulations which would lead to the conclusion that they were made for the special protection of any class of the public.

In effect the Court reasoning was that there was nothing in the Act or Regulations to rebut the primary premiss that the penalties are as a general rule the only means of enforcing them.

With the primary premiss I have no quarrel except to observe that plenty of exceptions have been allowed, a fact which the reasoning of the Court shows it was aware of. Undoubtedly it was strongly influenced by the analogy of motor traffic legislation. I think that analogy is a misleading one and in any case as Morris L.J., observed in Clarke and Wife v. Brims,⁽¹¹³⁾ quoted by the Court, after stating the test was whether the intention of the Act was to make the duty a public duty only or to make it one owed as well to the party aggrieved "as this is so largely a question of construction and of the circumstances concerning the making of the Act and of the circumstances to which it relates, it follows that authorities concerning different Acts can only assist insofar as guidance on principle is given..."⁽¹¹⁴⁾ Moreover in L.P.T.B. v. Upson the House of Lords held that breach of certain traffic rules gave a civil sanction so that it is

113. [1947] 1 K.B. 407, 505.

114. [1949] A.C. 155.

unsafe to infer from the cases that all traffic control regulations cannot give rise to a civil right of action. Another matter that should be mentioned is the Court's reference to Cutler v. Wandsworth Stadium Ltd. (115) In that case the plaintiff would have failed in Australia because the obligation on breach of which he founded his action does not satisfy the test of Dixon C.J., that the obligation is laid upon a person who is under a duty at common law in relation to that matter. That this was at least relevant to the decision of the House of Lords is hinted at in the underlined words in the following extract which was quoted in the Supreme Court's judgment from Lord Atkin's judgment that the existence of the right of action "must depend on a consideration of ^{the} whole Act and the circumstances, including the pre-existing law, in which it was enacted." (116)

Two of the reasons, the second and the fourth, and the reasons for the distinguishing of Dominion Airlines, in liquidation (117) v. Strand are related, for all bear on the question whether the Air Navigation Act and Regulations, at least in part, were directed to benefiting and protecting a class. The Court concluded that the Act and Regulations were not made for the special protection of any class of the public.

I discuss the Air Navigation Regulations first. Higher standards are imposed on a carrier of passengers and cargo for reward than on persons engaged in private operations. The

115. [1949] A.C. 398.

116. Note 115 supra, 407.

117. Note 112 supra.

Regulations classify air transport into private operations, aerial work operations, charter operations and regular public transport operations. Licences are required under the Regulations to engage in the last three. The first class of operations are operations in which the owner of the aircraft does not receive any reward either directly or indirectly. The second broadly speaking covers operations for reward but does not include the carriage of passengers for reward and the licence is described as an aerial work licence. The third involves the non-scheduled carriage of passengers and cargo for reward and the licence is called a charter licence. The last involves the carriage of passengers and cargo for hire or reward on scheduled services and the appropriate licence is called an
(118) airline licence. Higher operational standards are imposed
(119) on all three classes of licensees than on private operators. Furthermore regular transport operations are subject to more stringent requirements, the pilot have to be more highly qualified
(120) than for other classes of operations, a training and checking
(121) organisation must be provided, and the crew is required to have
(122) special route qualifications, to mention only some of the special provisions which are clearly intended to protect at least persons carried for hire or reward. The distinction is made also

118. Part XIII, Division 1 of the Regulations.

119. See Part XIII Division 2 of the Regulations entitled Requirements to Ensure the Safety of Commercial Operators.

120. Regulations 51 (1)(a) and 52.

121. Regulation 214.

122. Regulation 215.

in Air Navigation Orders, directions issued by the Director-General under authority of the Air Navigation Regulations. I would not limit the special protection to passengers or cargo carried for hire or reward. Quite clearly it is intended to protect all persons carried in aircraft. Thus regulation 219(2) provides that, in addition to being responsible for the operation and safety of the aircraft during flight time, the pilot in command shall be responsible for the safety of persons and cargo carried and for the conduct and safety of the members of the crew, and regulations 242 and 244 prohibiting the carriage of passengers on certain flights and requiring the fitting of safety belts are directed to passengers generally. The irresistible inference is that one of the purposes of the Regulations is to protect a class of persons, namely passengers, and that other requirements notwithstanding they do not mention passengers (such as those relating to maintenance of aircraft and the conduct of operations) too are directed to the protection, inter alia, of that class.

I now turn to the Commonwealth Air Navigation Act, for, in the last analysis, it is upon the true construction of the statutory provision, which authorises the Regulations and gives them the force of law, that "the conclusion that a private right to compliance with the Regulations exists."⁽¹²³⁾ It is true as the Court said that passengers are not mentioned in that Act. The Act vests in the Governor-General in Council wide powers to make regulations for the purpose of carrying out and giving effect to the Chicago Convention and the Annexes and in relation to air

123. Per Kitto J., *Australian Iron & Steel Ltd. v. Ryan*, note 89 supra, 98-99.

(124)
navigation. The description "air navigation" embraces transport by air and the Act therefore authorises regulations for the protection of passengers. In other words in vesting that power in the Governor-General in Council the Parliament authorised them to make regulations for the protection of passengers. There can be no doubt about the scope of the expression "air navigation" for Dixon J. said in The King v. Burgess ex parte Henry:-(125)

"It makes no distinction between air carriage of goods and passengers and all matters preparatory to flying by air, incidental thereto or consequent thereon, which are comprehended in the expression "air navigation".(126)

But the inquiry cannot end at this point.

The power of the Commonwealth Parliament to legislate on air navigation is limited by the Constitution broadly to matters lying within the scope of the power to legislate with respect to trade and commerce amongst the States and with other countries, to defence, to posts and telegraphs, to external affairs, to matters incidental to the execution of those powers

124. Section 5 (1) of the Air Navigation Act 1920-1950; but see new section 26 (1) of the Air Navigation Act 1920-1960.

125. (1936) 55 C.L.R. 608.

126. Note 125 supra, 670.

127. The Commonwealth of Australia Constitution Act (63 and 64 Vict. Chapter 12).

128. Section 51 pl. (1).

129. Section 51 pl. (vi)

130. Section 51 pl.(v)

131. Section 51 pl. (xxix).

132. Section 51 pl. (xxxix).

(133)
and to the Commonwealth Territories . Generally, therefore,
the Regulations apply as Commonwealth law to aircraft engaged
in air navigation in interstate and foreign trade and commerce
or in the Territories or between a Territory and any other part
of Australia. The Regulations, as Commonwealth law, do not
apply to air navigation wholly within the limits of a State
unless they can (and few can) be supported by reference to the
external affairs power. To fill this gap each State of the
Commonwealth has enacted an Air Navigation Act⁽¹³⁴⁾ that adopts
as State law such of the Air Navigation Regulations in force
from time to time as apply to and in relation to air navigation
within the Commonwealth Territories. Now the passenger in
respect of whose death the action was brought in Martin v.
Queensland Airlines was being carried on a wholly intra-State
journey. The Regulations therefore applied by virtue of being
State law. The Court, then, should have referred also to the
Queensland Air Navigation Acts for guidance on the legislative
intention. Those Acts have limited the wide power mentioned above
by reference to purposes defined in section 9 of the Acts.
Section 9 of those Acts so far as it is material provides -

133. Section 122.

134. New South Wales: Air Navigation Act 1938-1947.
Queensland: The Air Navigation Acts 1937 to 1947.
South Australia: The Air Navigation Act 1937.
Tasmania : The Air Navigation Act 1937-1945.
Victoria: Air Navigation Act 1958.
Western Australia: Air Navigation Act 1937-1945.

"The purpose of this Act is to make in Queensland such provision for and in relation to, and to so regulate and control, air navigation, aircraft, their operation whether in the air or on the ground, the carriage on aircraft of persons or goods, aerodromes, and all other matters and things connected with air navigation, aircraft, their operations, whether in the air or on the ground, the carriage on aircraft of persons or goods, and aerodromes as may be necessary or expedient to secure and maintain at all times the safety of aircraft and of persons or goods carried on aircraft, and in particular for the purpose of securing and maintaining safety as aforesaid, to apply to and in relation to air navigation within Queensland by virtue of this Act, the Regulations to the extent...to which the Regulations provide for, prescribe, regulate and control....

(i) - (iv)

(v) The safety of services for the carriage by air of persons, or goods, or both for hire or reward.

(vi) - (x)".

This section is important for two reasons. It is an authoritative statement by a legislature that the power to make regulations with respect to air navigation includes the power to make regulations for the safety of passengers i.e. for the protection of a particular class. It means too that Commonwealth regulations made for the protection of the particular class, passengers and cargo, at least those carried for hire or reward, are applied in Queensland as State law and it must follow that the intention of the Queensland legislature, using that intention in the fictional sense it is used in relation to implication of civil rights of action, was to adopt correlative civil rights of action which would have been implied for breach of the Regulations had they applied as Commonwealth law. This very important matter was not referred to by the Court in the Queensland Airlines case.

Having regard to the scope which I have suggested should be given to the expression "air navigation" in the Commonwealth Act I submit that the position in the other States is the same as that in Queensland.

There is only one other point in the Court's reasons to be considered namely whether the common law duty is adequate. In the case of breach of industrial laws the Courts have never favoured this argument. There is no reason to believe that the case of the Air Navigation Regulations is different. I have already referred to the difficulties of proof that may face the claimant in the case of a total disaster. In many cases non-performance of a statutory duty will more easily be proved than proving that the general duty has been broken. Moreover the substitution of precise standards of care for the vague standard of care surely represents a real gain for, they remove, amongst other matters, the necessity for the Court deciding whether the defendant could have reasonably foreseen the danger. These surely are cogent reasons for doubting whether the general duty is sufficient or adequate.

The Regulations meet all the tests both affirmative and negative to which I referred prior to reviewing Martin v. Queensland Airlines. I submit that I have shown either that Martin v. Queensland Airlines was wrongly decided or that it was equally open to the Court to find that it was the intention of the legislature to allow civil sanction for non-performance of the duties imposed by the Regulations.

There are a few other matters that should be referred to. Many of the Regulations satisfy the requirements of the

test in O'Connor v. S.P. Bray Ltd.⁽¹³⁵⁾ In fact those relied on in Martin v. Queensland Airlines Ltd. However many of the obligations are imposed upon the pilot-in-command. The High Court has held in Darling Island Stevedoring and Lighterage Company Limited v. Long⁽¹³⁶⁾ that, where the obligation is one imposed by statute upon **an employee personally**, the doctrine of respondent superior does not apply; consequently the **correlative** right of action will lie only against the person upon whom the obligation is laid by the statute, namely the pilot-in-command.⁽¹³⁷⁾ Other obligations are expressed to apply to the aircraft. Where this is so and there is a breach the owner, the operator, the hirer, the pilot and the pilot-incommand are guilty of that breach.⁽¹³⁸⁾ But it is provided that it is a defence for any of them if they show that the offence occurred without their fault or privity.⁽¹³⁹⁾ At first sight it would seem that if the non-performance occurred without the fault or privity of, for example, the owner then he would not be civilly liable for that non-performance. It seems however that a defence of this kind available in criminal prosecution does not apply to a civil action for breach of an obligation.⁽¹⁴⁰⁾ It should be noted

135. Note 125 supra, 670.

136. Note 94 supra; but see National Coal Board v. England, [1954] 1 All E.R. 546, in which the House of Lords found it unnecessary to decide the point. Lord Oaksey thought respondent superior applied, while Lord Porter reserved his opinion saying that it was a problem of some complexity.

137. This may not be of great practical importance as in the contract of service between the pilot and the airline, the airline may indemnify the pilot against this kind of situation.

138. Regulation 312(2) of the Air Navigation Regulations.

139. Regulation 312 (8).

140. Harrison v. N.C.B., [1951] A.C. 639, 657-58 and 664.

too that the hirer of aircraft may be subjected to the same duties as the owner and attract his civil liability for non-performance of the Regulations if under the contract of hire or charter agreement the control, maintenance and operation of the aircraft is vested in the hirer. (141)

The statutory duties do not displace the common law duty of care. Thus the common law duty of care may impose a duty in addition to that imposed by the statute. (142) It follows that, even though a person has complied with the statutory duties, he may be liable at common law, although in certain circumstances it may be difficult to prove negligence in the absence of a breach of the statutory duties. (143) In Nova Mink Ltd. v. T.C.A. (144) it was argued that the existence of statutory regulations which established a duty of observance thereof excluded any duty of care which the common law may provide in relation to the circumstances they made provision for. MacDonald J. rejected this argument in the following words:-

"In my view the Courts should not this early in the history of aircraft be party to the exclusion of the law of negligence from their operation in the face of piecemeal public regulations of their operations; but should hold that law applicable except where specifically excluded by statute." (145)

This is the position too where violation of the regulations is

141. Regulation 5(6).

142. See for example Kimpton v. The Steel Company of Wales Ltd., [1960] 2 All E.R. 274.

143. Franklin v. The Gramophone Co. Ltd., [1948] 1 K.B. 542; N.C.B. v. England, [1954] 1 All E.R. 546.

144. 1951 U.S. Av. R. 40

145. Note 144 supra, 49.

(146)
no more than evidence of negligence, i.e. that compliance with the regulations will not necessarily absolve the person upon whom the duties are imposed from liability for negligence.

5.

SURFACE DAMAGE LEGISLATION

(147) The Commonwealth Civil Aviation (Damage by Aircraft) Act gives effect to the ratification by Australia of the Rome Convention and extends the main provisions of that Convention to, inter alia, aircraft registered in Australia used for the purpose of or moved in the course of trade and commerce between Australia and another country, while in flight in Australia -

- (a) in the course of a journey between a place within Australia and place outside of Australia (with or without intermediate stopping places in Australia); and
- (b) in the course of a journey between two places in Australia if passengers and goods are being carried in it in part performance of contract for their carriage by a single carrier between a place in Australia and a place outside Australia. (148)

Thus the provisions of the Convention apply to an Australian aircraft in flight in Australia if it is in the course of an

146. Croston v. Vaughan, [1938] 1 K.B. 540 551 and 563,564.

147. No. 81 of 1958.

148. Section 16 (1).

international journey or, if being used for the purposes of foreign commerce, it is flying solely between points in Australia and is carrying passengers in part performance of a contract for their carriage on an international journey by one carrier.

The material provisions of that Convention make the operator ⁽¹⁴⁹⁾ who is presumed to be the registered owner ⁽¹⁵⁰⁾ liable to any person who suffers damage on surface upon proof only that the damage was caused by the operator's aircraft while in flight or by any person or thing falling therefrom. ⁽¹⁵¹⁾ The operator's liability is limited ⁽¹⁵²⁾ unless, amongst other things, it is proved he has been guilty of deliberate act or omission ⁽¹⁵³⁾ done with intent to cause the damage.

Part VI of the Wrongs Act 1958 of Victoria and the Damage by Aircraft Act 1953 of New South Wales impose a similar rule of liability upon operators of aircraft by providing that where material damage or loss is caused by aircraft in flight, taking off, or landing, or by any such aircraft or by an article or person falling therefrom, to any persons or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such loss or damage, without proof of negligence or intention or other cause of action, as though the

149. Article 2 (1).

150. Article 2 (3).

151. Article 1(1)

152. Article 11.

153. Article 12.

same had been caused by his wilful act, neglect or default. The owner's liability is not limited under these Acts.

Under these Acts it is submitted that an airline may be absolutely liable to passengers in the course of carriage by him, while they are in the course of entering or leaving his aircraft, sitting in the aircraft while it is stationary or in the course of take off or landing but is still on the ground, if they suffer damage through something falling from or through impact with one of the airline's other aircraft in flight within the meaning of those Acts.

6.

DEVIATION AND DELAY.

Delay.

The passenger is entitled to damages suffered by him through the failure of the carrier to carry him within a reasonable time to his destination for the law attaches to a contract of carriage the obligation that "it is to be performed (154) within a reasonable time"

Where the carriage is conducted in accordance with timetables, withdrawal of a train without notice may amount to breach of contract in regard to persons who have acted on faith of the representation. By issuing timetables the carrier does not give an absolute warranty that his vehicles will arrive and depart at the times specified therein, he assumes the duty

154. Per Willes J., *Hurst v. The Great Western Railway Company*, (1865) 19 C.B. (N.S.) 311, 319.

"to use reasonable efforts that trains should both start and
(155)
arrive at the stated time."

Of course the carrier is free to stipulate against
those duties and in fact the airlines do so in their tickets -
Deviation.

Although there is no authority on the subject there
seems no reason why deviation in the course of the carriage
of a passenger should not have the same consequence in respect
of the contract as it has for a contract for the carriage of
(156)
goods.

7.

SUCCESSIVE CARRIERS.

Where the carrier enters into a contract of carriage
with a passenger involving carriage to a place beyond his normal
system there is a presumption that it has contracted for the
(157)
whole carriage and the carrier is liable for the negligence
of those who carry the passenger over the sector outside his
(158)
system. But this does not operate in the reverse direction.

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155. Denton v. G.N. Rlway Co., (1856) 5 E. & B. 860; Le Blanche
v. London & North Western Ry. Co., (1876) 1 C.P.D. 284, 301.
156. Chitty on Contracts - Specific Contracts, 21st Edition, p.223
and see page 95 et seq. of this thesis.
157. Muschamp v. Lancaster & Preston Junction Rlway Co., (1841)
10 L.J. Ex. 460; Kent v. Midland Rlway Co., (1874) L.R. 10
Q.B.1; Northern Pacific Rlway, Co. v. Grant, (1895) 24
S.C.R. 546; Belbin v. S.M.T. (Eastern) Ltd., [1958] 1 D.L.R.
414.
158. Great Western Ry. v. Blake, (1862) 7 H. & N. 987. Buxton v.
N.E. Ry., (1868) L.R. 3 Q.B. 549. Belbin v. S.M.T. (Eastern)
Ltd., note 157 supra.

The successive carriers are not liable for the acts of negligence of the preceding carriers nor of the succeeding carriers.
(159)

If the first carrier stipulated against negligence in the contract of carriage that stipulation will protect the subsequent carriers. Blackburn J. said in Hall v. North Eastern Ry. Co.
(160)
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"When the plaintiff went to the North British Company and took a ticket, under which he was to be carried from Augusta to Newcastle, he, in effect, agreed that the North British Company should secure that the North Eastern Company should carry him on from Norfolk to Newcastle; and when he engaged to travel at his own risk, he engaged with the North British Company that they should agree with the North Eastern Company that he should be carried on to Newcastle on the same terms as if the North British Line extended to Newcastle and it seems to me that the plaintiff did authorise the North British Company to contract for him with the North Eastern Company, and what he authorised was that he should travel at his own risk." (161)

However the first carrier is not entitled to the benefit of any stipulation against negligence made by the second or subsequent carrier.
(162)

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159. McReady v. G.T.R., (1912) 43 Que S.C. 160; Duchesneau v. Can. Nor. Ry., (1913) 23 Que K.B. 19 (both cases of goods)
160. (1875) L.R, 10 Q.B. 437.
161. Note 160 supra, 441-442.
162. Per Hughes J., Belbin v. S.M.T., note 158 supra, 429.

P A R T T H R E E

LIABILITY OF AIR CARRIERS UNDER PART IV
OF THE CIVIL AVIATION (CARRIERS' LIABILITY)
ACT 1959

CHAPTER VI.

PARLIAMENTARY DEBATES ON THE PRINCIPLES OF LIABILITY

The heart of the Act is the principle of liability upon which it is founded. It is of course misleading to speak of one principle of liability. The Act in fact creates three systems of liability. In respect of the death or injury of a passenger the liability is an absolute liability. For loss or damage to baggage there is a presumption of liability on the carrier's part rebuttable upon him proving either that he has taken all necessary measures to avoid the accident or that it was impossible for him to take such measures. The carrier is presumed not to be liable for damage to hand-baggage the presumption being that the passenger is at fault. Thus the Act incorporates liability without fault for passengers, liability based on fault for baggage with the presumption that the carrier is at fault for registered baggage, and in the case of hand-baggage a liability based on fault with a presumption the passenger is at fault.

If the Parliament had been logically consistent one would have expected that it would have incorporated a single principle of liability for both passengers and baggage, although it must be admitted that the common law itself could not be accused of being consistent in this field - contrast the common carrier's liability to passengers with that for cargo. The question of why Parliament did this and other related questions are posed and answered in this chapter.

Why were those rules adopted? Why did not the Parliament simply make contracting out of liability unlawful? Why is there not one single standard of liability? Why was the air carrier selected for special attention while the other classes of transport lying within the reach of the Commonwealth Parliament have been ignored. These are some of the questions that will be considered though not necessarily in that order in this chapter before turning in subsequent chapters to review in detail the provisions of the Act imposing the liabilities. The source of the material for this chapter is the report of the Debates in the Commonwealth Parliament. The Act was debated at length and considered in considerable detail, about fifteen thousand words being spoken on it. As a result of the debate a number of detailed amendments were made, but none of these affected the broad principles incorporated in the Act when it was first presented as a bill.

The primary reason for creating the rule of liability for domestic carriage was to remedy what the Minister for Civil Aviation described as "a most unsatisfactory situation", ⁽¹⁾ namely to remove the right of carriers to contract out of liability for death or injury to passengers. This was the only reason stated in Parliament. However there is no doubt an inarticulate premise which must have strongly influenced the Government to introduce the measure. The Commonwealth was under an obligation

1. Parliamentary Debates (Hansard) Twenty Third Parliament, First Session, 1959, Senate, page 189 (hereafter referred to as Hansard (Senate) or (Representatives) according to whether the statement quoted was made in the Senate or the House of Representatives) and page 480.

to give effect to the Hague Convention. If it had done so without introducing a like measure for domestic carriage, it would have been perpetrating a situation involving injustice, for the international passenger would have been better off than the domestic passenger. Surely a most inequitable state of affairs! In one sense it did no more than anticipate the criticism that this course would have given rise to. But I am not questioning its motives. Here it was to give effect to an international Convention prohibiting contracting out of liability. It was logical to look at the domestic situation at the same time and, having perceived the necessity for reform, to carry through a reform. Another factor perhaps was that the Australian Delegate to the I.C.A.O. Legal Committee Meetings and the Hague Conference had become Assistant Director-General (Policy), Department of Civil Aviation, and was therefore in a key position to persuade his Permanent and Political Heads to intervene.

No reason was given for selecting air carriers for special attention. Other classes of transport enjoy freedom of contract and are subject to the customary rules of civil liability. Past history supported intervention. In the Carriage by Air Act 1935, the Act originally giving effect to the ratification by Australia of the Warsaw Convention, provision was made for the extension of the Warsaw principles by regulation to domestic carriage by air. The power was never exercised. In the Australian National Airlines Act 1945, the Australian National Airlines Commission was declared to be a common carrier and its liability was limited to £2,000. The liability imposed was the common law liability and as a result the Commission

(2)
could contract out of liability. The Government of the day intended that the Commission should have a monopoly of air services within Australia. Consequently to all intents and purposes the regime of liability imposed upon the Commission by the Act would have applied to all scheduled airline operations.

(3)
As one member observed this was the first step and what followed represented an evolution in thinking influenced to a very great degree by the principles of the Warsaw Convention. Another reason perhaps was the greater chances of total disaster in air carriage than in the more customary forms of transportation.

Why was the solution adopted? The Government's view was that it was fair balancing of the interests of the passenger and the carrier. The passenger obtained a right of recovery and certainty of recovery, but his right of recovery was limited. The carrier on the other hand lost the right to contract out of liability and had imposed upon him an insurer's liability, but, as a quid pro quo, his liability is limited. It is described (4)
in the debate as a careful balancing of interests and a compromise of rights. (5)

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2. By virtue of Section 24 of the Australian National Airlines Act 1945-1958 the Commission was deemed to be a common carrier of passengers and goods and (except as otherwise provided in the Act) was subjected to the obligations and entitled to the privileges of a common carrier of passengers and goods. By Section 66 its liability was limited to £2,000. As one of the privileges of a common carrier of passengers is that he is free to contract out of liability (see Ludditt v. Ginger Coote Airways, [1947] A.C.233) and, as there was no provision to the contrary, the Commission was free to contract out of liability. The Act has been amended by the Australian National Airlines Act 1959 to make it consistent with Part IV of the Civil Aviation (Carriers' Liability) Act 1959 which of course applies to the Commission.
 3. Senator Vincent, Hansard (Senate), 336.
 4. The Minister for Civil Aviation, Hansard (Senate), pages 191, 401 and 480 and the Minister introducing the Bill in the House of Representatives, Hansard (Representatives), 908.

Why were the Warsaw principles adopted? As the preceding paragraph suggests, the Government felt that subject to the modifications made the Warsaw principles were just and equitable securing a fair balance of the interests of carrier and passengers. No doubt the Government was influenced too by the success internationally of the Convention. The Minister for Civil Aviation certainly had this in mind when he said :-

"It is thought that the best solution is to establish a system based as closely as practicable on the international rules....".(6)

Other reasons, perhaps less compelling, were to give effect to I.C.A.O'S desire that the international rules should be applied when possible to domestic operators and that the States would be more likely to adopt Commonwealth legislation if its principles ensure the fair balance of interests as between passengers and operators that the Convention did.⁽⁷⁾

The rule of liability for passengers created by the Act differs in two respects from that provided in the Convention. The defence of all "necessary measures" contained in Article 20(1) and the provision relating to wilful conduct contained in Article 25 or its equivalent in Article XXIII of the Hague Protocol are omitted. The Article 20 defence was omitted, for although regarded as a very narrow defence, nevertheless it introduced an element of uncertainty with respect to which the⁽⁸⁾

5. The Attorney-General, Hansard (Representatives), 919.

6. Hansard (Senate), 189.

7. Hansard (Senate), 401.

8. Minister for Civil Aviation, Hansard (Senate), 189.
Minister introducing Bill in House of Representatives, 904.

Attorney-General said :-

"All that it would do would be to give to the carrier an advantage over the passenger or his representatives, because the carrier could threaten a defence along those lines and might face a favourable compromise, because the plaintiff would have to face all the resources of the airline, the representatives of which might say 'We are going to prove that we did everything reasonably possible.' The plaintiff would have a very costly and difficult piece of litigation on his hands, because all the experts would be in the other camp." (9)

No equivalent provision lifting the limits of liability if the carrier is found guilty of wilful misconduct was included. General reasons were given. The Minister for Civil Aviation believed that there was no need for it in Australia. He said :-

"I ask the Committee to consider the scope of the international convention. It covers a number of nations. In point of fact, we in Australia do not know intimately the kind of airline that is operating in many of these other countries. We do not know the standards they adopt or even the standard or morality of the people those airlines employ ...

Here in Australia aircraft operations is restricted to three or four large corporations, which all of us know intimately. I use the term 'intimately' in the sense that all three corporations have almost become part of the fabric of Australian way of life. I think it is reasonable to suggest, knowing these corporations, there would be no warrant to apply to them the form that we have applied to the many airlines which operate in the countries that are parties to the Convention." (10)

While other reasons are given for its exclusion this seems to have been the fundamental one. Another view expressed was that the defence of all necessary measures and the provision with regard to wilful misconduct did not harmonize with the principle of strict liability and was included in the Convention as a compromise to satisfy those who believed in the principle of no

9. Hansard (Representatives), 920, a view to be treated with respect coming from the foremost Barrister in Australia.

10. Hansard (Senate), 488.

liability without fault. Thus the Minister introducing the Bill in the House of Representatives stated:-

"As the Convention is based on a system of strict limited liability it is rather surprising to find a provision of this nature so clearly out of harmony with the general policy of the Convention. However, it will be appreciated that an international convention on this sort of subject matter necessarily makes compromises between many different legal systems. The history of this provision shows that it is a concession to States which were reluctant to depart entirely from a system based on fault ...when adapting the convention rules to domestic carriage, we are fortunately free to discard provisions based on this type of compromise between different legal systems...".(11)

It was strongly pressed that a provision along the lines of Article XIII of the Protocol should be included as it would be a stimulus to safety, it was in line with the Convention and it is in the public interest to penalise recklessness. (12) The Government reply was that the criminal law provided the necessary sanctions and they explained its inclusion in the Convention at least in part on the grounds that, as there was no certainty that such acts would be penalised in every State, the draftsmen of the Convention considered it desirable to include a sanction in the Convention to deter 'possible malefactors' and that it was based on the principle unknown in English law that a criminal could not be allowed to obtain any benefit from his criminality. (13) As the Attorney-General said :-

"The Convention solution was dictated very largely ... by the notion that you can never let a man profit by his crime. The exclusion in the convention is limited to an intentional creating of damage, a reckless or intended act with knowledge

11. Hansard (Representatives), 905.

12. Senator Wright, Hansard (Senate), 482 et seq.

13. Senators Vincent and O'Sullivan and Minister for Civil Aviation, Hansard (Senate), 486-487.

that the damage may ensure. Well, that involves a form of criminality, and the continentals felt that they could not allow any benefit to be obtained by a person who was guilty of criminality. We have not that notion in our law at all."(14)

He continued to point out that its inclusion would -

"only tantalize or lure plaintiff to their destruction by endeavouring to prove remote cases against very well-equipped and financial defendants."(15)

The Minister of Civil Aviation explained the retention of the defence for baggage on the ground it was needed to protect the carrier from a flood of small and perhaps spurious claims. (16)

No doubt that is the reason why the onus of proof for hand baggage was reversed. That of course does not represent a deviation from the Warsaw Convention rule, for the Convention only limits the liability of the carrier leaving it to the national law to determine the law applicable to hand baggage. (17)

It is, however, a departure from the common law position.

Other than provision to extend the principles of the Convention as amended by regulation to cargo, no provision is made in Part IV with respect to cargo. The view expressed by the Government was that there was no present necessity for it, but that, in the event that circumstances should change, appropriate corrective action could be taken by regulation. The Government considered that the matter was adequately regulated by the contracts between the carriers and consignors. No doubt (18)

14. Hansard (Representatives), 920.

15. Hansard (Representatives), 946.

16. Hansard (Senate), 454.

17. Article 22(4) of the Convention & Drion, Limitation of Liabilities in International Air Law, paragraph 150.

18. Minister for Civil Aviation, Hansard (Senate), 500, the Minister in charge of the Bill, Hansard (Representatives), p.501.

the Government was influenced by the customary practice in Australia of consignors insuring their cargo against loss or damage.

In the course of the debate the Opposition supported in the Senate by one member of the Government parties sought to have included in the bill a provision giving the passenger an alternative right of recovery in negligence for the full amount of loss suffered. This was firmly rejected by the Government. The fundamental reason was that the Part established a fair balance between the passenger and the carrier. To allow the passenger a right of action in negligence for damages would weigh the scales in favour of the passenger. In other words it would be an injustice to carriers to accept the proposal.⁽¹⁹⁾ The other reason for rejection given some prominence was to make such provision would be to lay a trap for the claimant. The difficulty of proving negligence in aircraft accident cases was the basis for this view. The Attorney-General summed up the Government's view in the following words:-

"What I am putting is that in the ordinary case it is difficult, costly and uncertain. One of the worst things we could do would be to leave people in a position in which they could sue for negligence in unlimited sums because we would be luring them into a most expensive and uncertain area of the law. So the compromise is made, and it is, like any other compromise, the best that can be devised by one group of minds."⁽²⁰⁾

19. Senator Vincent, Hansard (Senate), 334; Minister for Civil Aviation 401; the Attorney-General, Hansard (Representatives), 919, 934.

20. Hansard (Representatives), 919.

CHAPTER VII

LIABILITY OF THE CARRIER AND THE CREW FOR PASSENGERS.

Part IV of the Act contains provisions which control the liability of -

- (a) the carrier by air for death of or injury to -
 - (i) the passenger and other persons^{who}/by virtue of the Act are entitled to claim in respect of his death or injury;
 - (ii) other persons who by law, whether the common law or statute, are required to pay compensation in respect of the death or injury of the passenger.
 - (iii) trespassers.
- (b) the servants and agents of the carrier in respect of death or injury of persons carried in the aircraft.

The degree of control varies. Part IV codifies the liability of the carrier towards the passenger and those entitled to claim under him. With respect to the other persons and trespassers it simply limits the liability of the carrier leaving to the appropriate law the question whether these persons have a right of action against the carrier. Similarly, in the case of the servants and agents, it simply limits their liability providing the conditions specified for the application of the limit are met and leaves it to the appropriate law to determine whether or not a cause of action exists against the crew.

This subject is divided into the following headings:-

- A. The liability of the Carrier to the Passenger and to those claiming under him.

- B. The Liability of the Carrier to Other Persons.
- C. The Liability of the Crew.
- D. Limitation of Liability and Prohibition of Contracting Out.

A.

THE LIABILITY OF THE CARRIER TO THE PASSENGER AND TO
THOSE CLAIMING UNDER HIM.

Act creates new cause of Action.

The Act creates a new cause of action for the benefit of the persons carried by the carrier and those persons who are by virtue of sub-section 3 of section 35 entitled to claim. It makes the carrier liable without fault for death or injury of a passenger in the course of a carriage by air, but limits his liability to £7,500 subject to reduction in the event that default of the passenger contributed to his death or injury. Plainly this is a new cause of action. That conclusion flows not only from the words of section 28 but also from sub-section (2) of section 35 and section 36 which provide that the liability created by the Act is in substitution for any civil liability of the carrier under any other law. If it were otherwise, these sections would destroy any right of action which a passenger might have without giving him an alternative right of action.

The Part in so providing follows the Convention. It is quite clear from the travaux preparatoires of the Convention that this was the intention of the draftsmen.⁽¹⁾ Notwithstanding

1. See the discussion of the travaux preparatoires in The Cause of Action under the Warsaw Convention Part I by G. Nathan Calkins, (1959) J. Air L. & Com. 217.

this, certain of the courts of the United States have held that it does not create a separate cause of action.⁽²⁾ This construction is certainly not valid for Part IV, in view of the clear expression of intention manifested in the sections referred to and equally would not be accepted in relation to Parts II and III of the Act having regard to the provisions of sections 12, 13 and 24.

Preliminary matters that require discussion are the juridical basis of the liability and the nature of the cause of action. In other words upon what theory of liability is the liability predicated.

Juridical Basis of the Liability.

The liability created by the Act is a strict one. It is not an absolute one for the carrier has the defence of contributory negligence. It illustrates the truth of Glanville Williams' statement that "it is a misnomer to speak of 'absolute' liability, for legal liability is never - or hardly ever - wholly unqualified."⁽³⁾

The Act imposes upon the carrier liability without fault, notwithstanding that the contributory negligence of the passenger will reduce the amount of damages payable. In the absence of contributory negligence the question of whether the carrier was at fault or not is irrelevant. His duty to his passengers can, in a truer sense than the term is used when applied in relation to a common carrier of goods, be described as that of an insurer. His obligation is unqualified by the common carriers defences of act of God or the Queen's enemies.

2. Wyman v. P.A.A., 1942 U.S.Av.R.89; Komlos v. Compagnie National Air France, 1953 U.S. & C.Av.R.471; and Noel v. L.A.V. 1957, U.S. & C.Av.R. 274.

3. The Effect of Penal Legislation on the Law of Tort, 23 Mod.L.R.233, 240.

The basis of the carrier's liability is risk. The carrier in return for the reward he receives from engaging in air transportation assumes the risk that in the course of the transportation those whom he carries will be injured. Glanville Williams has expressed in a more felicitous way that thought as follows:-

"Nothing can be undertaken without some risk of damage to others, and if the risk eventuates it must be shouldered by the undertaker in the same way as the cost of his raw materials."⁴(4).

The doctrinal basis of the Act is a major departure from the Convention. The theory of liability underlying the Convention is fault. The provisions of the Convention and the travaux preparatoires bear witness to this. The Convention creates a presumption of fault on the part of the carrier. Article 17 provides that he shall be liable for death or wounding of a passenger in the course of the carriage. That presumption of fault may be rebutted by the carrier by proving, as provided in article 20(1), that he took all necessary measures to avoid the damage or it was impossible for him to take such measures. By omitting the defence contained in article 20(1) the Parliament made a fundamental change in the basis of liability. Although there is argument about the extent of the burden of proof to be discharged by the carrier under article 20(1), there can be no denying the implication of article 20(1) is that the regime upon which the Convention is based is one of fault.

4. The Aims of the Law of Tort, Current Legal Problems, 1951, 137, 152.

That it was the intention of the draftsmen that this was to be basic principle underlying the Convention is plain from the travaux preparatoires. In his report to the First International Conference on Private Air Law held at Paris from 27th October to 6th November, 1925, M. Pittard, Rapporteur, said as to the principle of liability underlying the Convention:-

"La Commission s'est demandee quel regime de responsabilite il fallait adopter: risque ou faute. L'opinion generale est que...il faut admettre la theorie de la faute.

Il est donc juste de ne pas imposer au transporteur un responsabilite absolue et de le degager de toute responsabilite lorsqu'il a pris les mesures raisonnables et normales pour eviter le dommage; c'est la diligence que l'on peut exiger du bon pere de famille."(5)

This remained an object of the draftsmen throughout the preparation of the Convention. In his report to the Second International Conference on Private Air Law held at Warsaw, 4th to 12th October, 1929, M. de Vos, Rapporteur, dealing with Chapter 3 of the Convention said :-

"Les regles portaient de la theorie de la faute dans la responsabilite du transporteur a l'egard des passagers, et des marchandises, et de l'obligation pour le transporteur d'assumer le fardeau de la preuve. La presumption de faute a le charge du transporteur etait cependant limitee par la nature meme du transport dont il s'agit, transport dont les risques sont connus du passager et de l'expediteur. La Conference avait admis que le transporteur pouvait etre degage de toute responsabilite lorsqu'il avait pris les mesures raisonnables et normales pour eviter le damage."(6)

The decision of the Conference to remove the provision making the carrier liable for damage due to a latent defect in the aircraft underlines the correctness of this interpretation.⁽⁷⁾

5. The Paris Conference, 1925, 55-56

6. The Warsaw Conference, 1929, 15.

7. The Warsaw Conference, 1929, 29-37.

When the Parliament altered the basis of liability from fault to risk it undoubtedly was following a trend that has in recent years become apparent, as Denning L.J., has pointed out:-

"Recent legislative and judicial developments show that the criteria of liability in tort is not so much culpability, but upon whom the risk should fall. Notable examples occur in the liability of a master for or to his servants, and in the escape of dangerous things." (8)

To take this discussion to a higher plane, ultimately the principle, upon which the Act is based may be found in Dean Pounds third postulate "that men must be able to assume that others who keep things or maintain conditions, or employ agencies that are likely to get out of hand or escape and do damage, will restrain them or keep them within proper bounds." (9) The principle underlying this postulate is that the social interest in the general security is threatened or is prejudiced by inter alia "failure to restrain potentially dangerous things which one maintains or (10) potentially dangerous agencies which one employs."

That the principle underlying the Act is liability without fault does not in Dean Pound's view disqualify it from falling within the third postulate. After pointing out that the Workers Compensation Acts by making the employer liable for injuries by accident in the course of the employment occurring without fault of anyone made inroads into the proposition both of the Roman law and the common law that, where injuries resulted without anyone's fault and by an occurrence beyond the power of

8. White v. White, [1950] P.39, 59.

9. The Philosophy of Law, Yale Paperbound Edition, 1959, 89.

10. Ibid note 9 supra, 90.

anyone other than the person injured to control, each of us must bear the risks which are inevitable to human existence, he said:-

"At least it could be said with reason that the basic purpose was the same as that behind the third postulate. By making one who conducts an enterprise liable absolutely to repair injuries received by his employees in the course of the employment, pressure is put on the employer to do diligently all that is possible to prevent accidents from occurring."(11)

If the wide interpretation of the Act is accepted and the carrier is held to be liable for death or injury to a passenger which is unrelated to aircraft except in point of time, then the premise underlying the liability is what Dean Pound described as the humanitarian idea of requiring "reparation at someone's expense of all loss to everyone, no matter how caused... by imposing liability upon someone more able to bear the burden, who could then pass it on to all of us in charges for services rendered to the public" (12) He points out that this theory of liability cannot be connected with his third postulate, for it goes "beyond cases where the conditions of accidents are under the control of the person held liable" (13), and therefore it cannot be rested on the maintenance of the general security, for it cannot be justified as a spur to the highest measure of vigilance and diligence to prevent accidents. The idea that the person must be able to pay, "the convenient victim", coupled with the idea of doing away with the requirement of causation as an element of liability rested, in his view, on the following postulate -

11. Ibid note 9 supra, 96.

12. Ibid note 9 supra, 97.

13. Ibid note 9 supra, 102.

"In civilized society men are entitled to assume that they will be secured by the state against all loss or injury, even though the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on someone deemed better able to bear it."(14)

If the wide interpretation is accepted, the liability, or at least the extreme consequences of it, must be assigned to this postulate. Of course the liability does not fall wholly within the postulate, for, if the passenger is at fault, the carrier's liability is diminished to the extent that the passenger's default contributed to his own death or injury. But on the other hand the carrier may be liable notwithstanding that the only relationship between the carriage and the death or injury is a temporal one.

From the debates on the Bill it is impossible to reach any firm conclusion on the unexpressed premises which led Parliament to adopt the measure. The statements of members of both Houses support reference of the liability to either the third or fourth postulates.

The Nature of the Cause of Action.

May the liability be placed in one of the traditional classifications of the law as contract or tort? I do not think so. It is a liability created by statute. It exists independently of culpability on the part of the carrier. The liability is not owed to persons generally but to those who enter into a relationship with the carrier, the persons entering into that relationship being described as passengers. That relationship is not conditioned on the existence of a contract but merely on the act of carriage or the intention to be carried and the consent of the

14. Ibid note 9 supra, 103.

carrier to that carriage. These matters, it is submitted, must lead to the conclusion that the liability created is neither tortious nor contractual.

The true view is that the liability cannot be classified by reference to the traditional divisions of the law. It is sui generis. It is possible to point to features of it which resemble aspects of common law liabilities such as bailment. But probably in the closest analogy is the Workers' Compensation legislation. Dicey's analysis of that legislation is germane for it emphasizes and points to and assists in the analysis of the relationship upon which the liability is conditioned. He said -

"In 1897....legislation took a completely new turn. The Workers' Compensation Act of that year (60 & 61 Vict., Ch. 37) introduced in the law a new principle that an employer must, subject to certain limitations, insure his workmen against the risks of their employment....The law, lastly, secured for one class of the community an advantage, as regards insurance against accidents, which other classes can obtain only at their own expense ...the rights of workmen in regard to compensation for accidents has become a matter not of contract but of status". (15)

Substitute "passenger" for "employee", "Carrier" for "employer" and "carriage by air" for "employment" and the relevance of this statement becomes obvious. The Act imposes upon certain persons the status of passenger, on others the status of carrier and creates as between these persons a particular rule of liability, liability without fault, for the benefit of one of those classes. It guarantees compensation to the members of one of those classes provided they can prove damage. It limits the liability for

15. Law and Opinion in England, 2nd Edition, p.283.

damages of the other class and prohibits that class from contracting out of the liability imposed for the benefit of the other class.⁽¹⁶⁾

1.

ANALYSIS OF SECTION 28.

The marginal note to section 28 is "liability of the carrier for death or injury". This section creates the cause of action. It provides that subject to this Part, where this Part applies to the carriage of a passenger, the carrier is liable for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

(1)

"SUBJECT TO THIS PART"

The words "Subject to this Part" are words of limitation. They import other provisions of the Act which limit the scope of the liability or define more precisely some of the consequences of its application. Thus the carrier's liability for damages is limited by section 31(1); by section 32 (1) he may not contract out of the liability; section 34 extinguishes his liability if

16. Graveson, in Status in the Common Law at p.2, defines status as "a special condition of a continuous and institutional nature differing from the legal position of the normal person, which is conferred by law and not purely by the act of the parties, whenever a person occupies a position of which the creation, continuance or relinquishment and the incidents are a matter of sufficient social or public concern". Also A.Endrey's, Contract and Status, (1955) 29 A.L.J.333, in which he says status means "the individuals subservience to pre-determined legal categories which he cannot alter and from which he cannot free himself" and he concludes that a situation in which the fundamental aspects of the obligation are fixed by a law to which both parties have to adhere is a special category not of contract but of status.

an action is not brought against him within the time specified in that section; sections 35 (in part) and 38 deal with the assessment of damages and section 39 confers upon him the defence of contributory negligence.

(ii)

"PART APPLIES TO THE CARRIAGE OF A PASSENGER."

"Where this Part applies to the carriage of a passenger" has the effect inter alia of defining the content of the expressions "carrier" and "passenger" by reference to section 27. That section is discussed in chapter 2 of Part 1 and the content of those words is fully considered there.

(iii)

"DAMAGE BY REASON OF"

The carrier is liable for damage by reason of the death of the passenger or any personal injury suffered by him. The question of damages and the particular provision of the Act relating to the death of the passenger are discussed later. The carrier's liability is for damage sustained by reason of the death of or any personal injury to the passenger. The Convention words are "for damage sustained in the event of the death or wounding of a passenger." It seems that the inclusion of the words "by reason of" may have the effect of narrowing the damages to which a claimant is entitled, for "by reason of" seems to import a closer causal connection between the damage and the death or injury. It may be that there might be damage in respect of which the claimant would be entitled to damages under the Convention, of which the death or injury was causa sine qua non, but which

legally, if those words were not used, did not result from the death or injury.

(iv)

"PERSONAL INJURY"

The substitution in section 28 of "personal injury" for the words "wounding or any other bodily injury" used in the Convention has probably not effected a change in the meaning. The body must be damaged in some way. It includes not only traumatic injuries and the pain and suffering accompanying traumatic injury but also, as an independent head of damage, even if there has been no traumatic injury, mental shock which is accompanied by some physical disturbance in the sufferer's system. (17) The word "bodily" excludes recovery for mental anguish and fear or grief unaccompanied by physical consequences. It may be thought that "personal" would admit of claims for damages for this type of injury, for personal connotes more than the body. (18) It includes the being in all its attributes, the mind, and those characteristics which make one human being different from his fellows. Nevertheless it is unlikely that the Courts would allow damages for this under the Act, for they have consistently in the law of torts refused to do so. (19)

17. Per Lord McMillan, *Bourhill v. Young*, [1943] A.C. 92, 103 and *The Codification of Air Carrier's Liability by International Convention* by George R. Sullivan, (1936) 7*Air L.* 1, 19.

18. But see *Storey v. McCawley*, (1948) 48 S.R. N.S.W. 474, 475, where Jordan C.J. said: "Personal injury means, in my opinion, injury to his person, that is, to some part of his body."

19. Fleming, *The Law of Torts*, p. 169, where he says:- "Mere fright or anguish not resulting from or leading to some kind of physical injury is regarded as too trivial or too easily faked to merit legal protection in actions for negligence."

(v)

"DEATH OR INJURY RESULTING FROM AN ACCIDENT."

The death or injury to be compensable must be the result of an accident which took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The words of the Act are "death...or injury...resulting from an accident which took place on an aircraft....". This part of the section is expressed quite differently from Article 17 of the Convention. That article provides that the carrier is liable for damage sustained"...if the accident which caused the damage so sustained took place on board the aircraft....".

Article 17 speaks of damage caused by the accident i.e. damage brought about by the accident. Section 28 speaks of the death or injury resulting from an accident i.e. death or injury which is the actual consequence of an accident. The change from "cause" to "result" is it is submitted of no significance. But the change in the words that "result" qualifies, namely "death or injury", has given section 28 a wider meaning, or at least made it capable of being given a wider meaning, than article 17. It will presently be shown that the effect of the alteration has been to allow the word "accident" a far wider scope. That wider scope is not only due to this alteration, but also to the omission of the Article 20(1) defence. I will consider first the construction to be placed upon the words "injury resulting from an accident" without referring to the construction of the not dissimilar words in the Convention.

(vi)

RESEMBLES WORKERS' COMPENSATION ACTS.

The most striking feature of the words is that they resemble the phrases used in the Workers' Compensation Acts for the same purpose, namely, to delimit the scope of the liability. A typical Act, the Commonwealth Employees' Compensation Act 1930-1959, section 9(1), provides :-

"If personal injury by accident arising out of or in the course of his employment by the Commonwealth is caused to an employee, the Commonwealth shall, subject to this Act, be liable to pay compensation in accordance with the First Schedule to this Act."

The similarity does not end at this point. The Workers' Compensation Act imposes a strict liability, perhaps stricter than that imposed by Part IV, upon the employer. Furthermore, the reasons underlying both are to some extent common to both, namely, the inadequacy of the common law principle of negligence and the unfairness of the common law doctrine of freedom of contract. They belong in Australia to the same privileged class of statutes imposing strict liability. So far as I am aware, the Workers' Compensation Acts, the Surface Damage by Aircraft Acts⁽²⁰⁾ and Civil Aviation (Carriers' Liability) Acts are the only statutes imposing strict liability upon a class of persons. It would not be surprising, therefore, if the Courts turned to the Workers' Compensation Acts for assistance in construing the Act and in particular section 28 of the Act.

20. Discussed briefly at p.p. 145-147.

(21)

If they turned to the Parliamentary debates, they would find many references to the Workers' Compensation Acts as providing a relevant analogy. In particular, one member asked whether the words under consideration here were intended to have a meaning as wide as that given by the Courts to the same words in those Acts. (22)

Accident:

What is the meaning of accident? Or more to the point what is an accident? An accident is an event without apparent cause, an unexpected event, something happening by chance, undesignedly or unexpectedly. (23) It "is not a technical legal

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21. The conditional clause is justified. The general rule is that the Courts never resort to Parliamentary proceedings for assistance in interpreting a statute, (Maxwell on the Interpretation of Statutes, 10th Edition, at p.27). In certain Australian courts there is tendency to ignore this rule. In *T.M.Burke Pty.Ltd. v. City of Horsham*, (1958) A.L.R. 632, the full court of Supreme Court of Victoria (Sholl J. delivering judgment, Lowe & Martin J.J. concurring) referred to the Minister's second reading speech for a statement of the problem intended to be dealt with by the Statute. In *Langhorne v. Langhorne*, [1958], V.R. 500, Barry J. of the Victorian Supreme Court referred to Parliamentary debates to ascertain the purposes of the Act under consideration. In *Namatjira v. Roake* (unreported), Kriewaldt J. of the Northern Territory Supreme Court referred to the proceedings in the Legislative Council to explain the inclusion of a proviso.
 22. Senator Vincent, Hansard (Senate), at p.335. Unfortunately the Minister who introduced the bill did not reply. The Attorney-General said (Hansard, House of Representatives p.920) speaking on the scope of the section "It covers anything in the way of an accident that might happen in aircraft". He then gave as examples of persons who could recover under the section, those injured through being tripped by a hostess or by a glass becoming detached from a container passed around the aircraft. The examples are clearly intended to be illustrative and not comprehensive. The words he used do not give any guidance as to the scope of the section.
 23. The Concise Oxford Dictionary, Fourth Edition.

term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrences which produces hurt or loss. But it is often used to denote an unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate⁽²⁴⁾ between them". Having regard to the words "death or injury resulting from an accident" the conclusion seems inescapable that it means any unintended and unexpected occurrence which produces hurt or loss.

The word "accident" analysed apart from its context is meaningless. Its meaning must be derived from the context in which it appears and from its common usage viewed against the background of the context of the circumstances to which it relates:-

"Etymologically, the words means something which happens - a rendering which is not very helpful. We are to construe it in the popular sense, as plain people would understand it, but we are also to construe it in its setting, in the context, and in the light of the purpose which appears from the Act (the U.K. Workmen's Compensation Act 1906) itself. Now, there is no single rigid meaning in the common use of the word, Mankind has taken the liberty of using it, as they use so many other words, not in any exact sense but in a somewhat confused way, or rather in a variety of ways. We say that someone met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he is disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to research or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected, but it is not so always, for you might say of a person that he is foolish as a rule and wise only by accident. Again the same thing, when occurring to a man in one kind of employment, would not be called an accident, but would be so described if it occurred to another not similarly employed.

24. Per Lord Lindley, Fenton v. Thorley & Co.Ltd., [1903] A.C.443,453

A soldier shot in battle is not killed by accident, in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short, the common meaning of this word is ruled neither by logic nor by etymology, but by custom and no formula will precisely express its usage for all cases. (25)

The meaning customarily given to accident in relation to aviation and aircraft operations is some occurrence to aircraft with unexpected or undesigned consequences which damages the aircraft. The definition of the word "accident" in the Air Navigation Regulations is wider than this. It must however be disregarded as its function is merely to designate those happenings to aircraft which the Director-General of Civil Aviation is empowered to investigate and to distinguish one group of occurrences to aircraft from another group called "incidents" in relation to which his powers are not as wide. (26) The customary meaning suggested is too narrow. There is nothing in section 28 or part IV of the Act to support such a narrow interpretation. On the contrary the provisions of the Act point to a wide interpretation. The accident must be one which took place on board an aircraft or in the course of the operations of embarking or disembarking. The omission to relate accident to the aircraft other than by reference to locale and time is inconsistent with the narrow meaning.

Of fundamental importance is the answer to the question what must the accident be in relation to. There are three possible interpretations:-

25. Per Lord Loreburn, Trim Joint District School Board of Management v. Kelly, [1914] A.C. 667, 680, 681.

26. See Part XVI of the Air Navigation Regulations.

- (a) the event must be one unexpected and unintended by persons generally to be an accident;
- (b) the event must be one unexpected and unintended by the carrier and his servants; or
- (c) the event must be one unexpected and unintended by the passenger.

If the accident is an event unexpected and unintended by persons generally then deliberate injury of the passenger by anyone in the course of the carriage would not be compensable. At common law, the carrier could be held liable for the deliberate injury of a passenger by a stranger, if it could be shown that he could have reasonably foreseen that the stranger when admitted to the carriage might inflict such injury.⁽²⁷⁾ It would be a strange construction to place on the Act that it imposes a duty of lower order than that imposed by the law which the Act is intended to reform. This too is inconsistent with the philosophy underlying the Act of insurance at the expense of the carrier. In marine insurance cases, even though the policies are construed strictly, so narrow an interpretation of the word "accident" has been⁽²⁹⁾ rejected.

27. See page 108.

29. Per Viscount Haldane L.C., *Trim Joint District School Board of Management v. Kelly*, note 25 supra, 674. Also "accidental" has been construed in this fashion in non-marine insurance policies; see, for example, *Grant v. Southern Cross Assurance Co. Ltd.*, (1927) 30 W.A.L.R. 65, *Midland Insurance Co. v. Smith*, (1881) 6 Q.B.D. 561, and *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520, 544.

If the criterion of whether an event is an accident is that the event was one unexpected or unintended by the carrier and his servants, we reach the strange conclusion that under the Act the carrier is not liable for injuries to passengers deliberately inflicted by him or his servants (that is, where there is intentional fault on his part) yet the same carrier is liable when there is no fault on his part. Obviously Parliament could not intend such an absurd result.⁽³⁰⁾ It is clear from the Parliamentary proceedings that intentional injury by the carrier was intended to be compensable. The discussion of whether a provisions similar to article 25 of the Convention should be included illustrates this. The Government attitude was that the criminal law was designed to deal with intentional injury, that it was a principle of the common law, that punitive damages should not be awarded for criminally inflicted injury, and that it would be contrary to these principles to make provision for the award of punitive damages or to provide for the lifting of the limit in the event of the intentional infliction of injury.⁽³¹⁾ Lastly it should be mentioned that, if Parliament had intended that this should be the criterion, it could by the addition of a few words have limited the meaning of accident. This becomes significant when we consider that the courts would probably consider the statute to be a remedial one and would therefore

30. The results of a possible construction are material in determining what construction ought to prevail; *Brunton v. Acting Commissioner of Stamp Duties*, [1913] A.C. 847, 759, and *Sharman Realities v. St. Michel*, [1924] A.C. 185, 192.

31. See page 157.

construe the Act broadly and tend to reject constructions depending upon the implication of words which would give it
(32)
a restricted scope.

The process of elimination dictates that the third definition of "accident" is the correct one. An accident for purposes of the Act is an event unforeseen or unexpected by the passenger. The words of the Act are not inconsistent with this construction, indeed their cumulative effect seems to point to this view. The parliamentary proceedings support the interpretation. One result is that deliberate injury by any person is compensable. Another is that self-inflicted injuries are not compensable. It would seem that where the infliction of the injury was provoked by the passenger injured, for instance where he assaulted another passenger and in the course of the assault he was injured, he would not be entitled to compensation:-

"Where the insured brings about an assault upon himself, by his own wrongful act, or where he, under such circumstances that he would naturally be presumed to know that the injury is likely to be inflicted, voluntarily incurs an obvious hazard of this character, or places himself in a position that may be reasonably expected to bring about an assault upon him, an injury so received is not effected by accidental means." (33)

In cases of this class, of course, the carrier would have the defence of contributory negligence.

32. See, for example, *Proprietors of the Daily News Ltd. v. Australian Journalists Association*, (1920) 27 C.L.R. 532, 543.

33. *Per Hall J., Travellers Insurance Co. v. Elder*, [1940] 2 D.L.R. 444, 448, 449.

A narrower interpretation is placed by writers on accident in article 17. While there is no reported decision on the scope of the word, it seems a necessary implication from the reasoning of one reported case (35) that the restrictive interpretation

34. H. Drion, Limitation of Liabilities in International Air Law, para. 63; M. Lemoine, Traite de Droit Aerien, para. 812 and George R. Sullivan, Codification of Air Carrier's Liability in International Law, (1936) *Air L.* 1 at p. 2, would appear to take a similar view. The same restricted view is taken in the Reports of the Legal Committee of I.C.A.O. See report of Sub-Committee on Revision of the Warsaw Convention, Doc. 6027-LC/124, at p. 270 and the Minutes of the Ninth Session of the Legal Committee Doc., 7450-LC/136, p.p. 71-72. On the other hand R. Coquoz, *Le Droit Prive International Aerien*, at p. 123, takes a different view to some extent supporting that I have taken. He wrote:- "It is necessary to understand this word (accident) in a restricted sense by reference to the carrying on of the activity of air transport or in a wider sense by reference to the victim? We favour the second meaning. In taking this view we do not deny the necessity of causal relationship between the damage and the flight." He quotes with approval the following definition :-

"Accident means the circumstances in which either the aircraft or the load have been damaged or the passengers, the members of the crew or some other persons have been injured. An aircraft is damaged if it cannot quickly be repaired by a simple change of a spare part."

35. *Paltroni v. S.A. di Navigazione Aerea (Corte di Cassazione)*, A.L.R. 1938, 155-158. On the other hand in *Philios v. Transcontinental and Western Air Inc.*, 1953 U.S. Av. R. 479, it was held that a passenger could recover for a ruptured eardrum - the rupture being due to the descent of the unpressurized aircraft from altitude to land. This is not reconcilable with the restricted meaning assigned to accident but suggests Coquoz's approach to be the correct one. Furthermore, the Court considered that even if the passenger had an acute respiratory infection (contended by the defendant) he would still have been entitled to recover. On the narrower view she should not have recovered for the mere rupture and certainly she could not have recovered if her own condition contributed materially to the damage. It is submitted that the Court was wrong, if not as to the first point it decided as to the second for it implies that to discharge the necessary measures defence, the carrier must examine each passenger's physical condition for defects.

given by most writers will be adopted should the question arise. This implication is that an accident is an unintended event, external to the passenger, involving a failure of a part of the aircraft (e.g. engine failure or aircraft crash) or resulting from an act of the carrier his servants or agents. Thus the act by one passenger injuring another passenger is not an accident. Where the injury is due to failure to provide a service, for example cabin pressurisation, there cannot be said to be an accident.

Must the Accident occur outside of the Passenger's Body.

Has the event constituting the accident to be an event external to the passenger's body? In the very early cases of accident under the Workers' Compensation Acts the view taken was that the event must be one outside of the claimant's body to be an accident.⁽³⁶⁾ This interpretation was rejected by the House of Lords in Fenton (Pauper) v. Thorley & Co. Ltd.⁽³⁷⁾ in which it was held that a rupture of the abdomen, an internal injury, was an injury by accident. The House took the view that this was an accident within the popular meaning given by that word. On a similar basis the rupture of an aneurism⁽³⁸⁾ and of the oesophagus⁽³⁹⁾ have been held to be injury by accident.

36. *Trimms v. Leeds Forge Co. Ltd.*, (1900) 2 W.C.C. 10;
Roper v. Greenwood & Sons, (1900) 3 W.C.C. 23, and
Boardman v. Scott & Whitworth, (1902) 4 W.C.C. 1.

37. (1903) 5 W.C.C. 1.

38. *Clover Clayton & Co. v. Hughes*, [1910] A.C. 242.

39. *Kavanagh v. the Commonwealth*, (1960-1961) 34 A.L.J.R. 36.

Furthermore it has been held that the entry of disease during (40)
the course of the employment constitutes an injury by accident.
In certain circumstances where death or injury results from the
development or culmination of a pre-existing and progressive
morbid physical condition the terminal event, described as a (41)
sudden physiological change, may be held to be injury by accident.
Dixon C.J. stated the law to be on this class of case as follows:-

"If...the arterial disease and the thrombosis or other occlusion in which it culminated were autogenous, and no particular incident or activity of the worker accelerated or contributed to the occlusion, it cannot be said that there was any personal injury by accident. If, on the other hand, as in Hetherington's Case (1939) 62 C.L.R. 317, where the worker had just walked up a steep slope, it can be found, and is found, that some particular incident or activity of the worker did contribute to or accelerate the occlusion, then the worker must be held to have suffered personal injury by accident. When this position is reached, a further question may or may not arise as to whether the particular incident or activity was in the course of the worker's employment." (42)

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40. *Brintons Ltd. v. Turvey*, [1905] A.C. 230 the facts of which were that a worker contracted anthrax in the eye while employed to open and sort bales of Persian wool. The strong reasoned dissent in the judgment of Lord Robertson would be a basis for a Court holding that this class of injury by accident does not come within the purview of section 28. In any case proof would be difficult, unless the disease could be shown to be one peculiar to carriage by air or at least movement at high altitude. It is doubted if the Courts would give the passenger the benefit of the decision of the House of Lords in *Grant v. Kynoch*, (1919) 12 B. 78. In that case it was held that that it is not essential to prove that the disease germs attacked the worker at a particular time, a particular place, and by a particular "accident", and that it is necessary merely to show that the infection was the result of attack at some one particular time, and that this one particular time was during the course of the employment.
41. *Hetherington v. Amalgamated Collieries of W.A.Ltd.*, (1939) 62 C.L.R. 317, (a coronary occlusion).
42. *The Commonwealth v. Hornsby*, (1960-61) 34 A.L.J.R. 27, 30-31.

In short "a physiological change which is solely the result of disease is neither 'injury by accident' nor injury by accident⁽⁴³⁾ in the course of the employment...."

Are the courts likely to give the same wide interpretations to injury resulting from an accident in section 28? My answer to that question is governed by the attitude which I believe the present High Court of Australia will take to the matters discussed in the following paragraphs. As the words of the statute are vague, judicial attitudes will control the scope of the section. To ascertain judicial attitudes one looks to earlier decisions. There are none on this Act. In the absence of earlier decisions those attitudes are a matter of conjecture, conjecture from decisions on analogous provisions in other Acts. In examining the scope of injury resulting from an accident I have referred extensively to decisions on the Workers' Compensation Acts. It is to decisions under those Acts that I will refer in an endeavour to discover what may be the attitude of the present High Court to section 28.

43. Per Taylor J., *The Commonwealth v. Hornsby*, note 42 supra, 32; or as Dixon C.J. said in *Kavanagh v. The Commonwealth*, note 39 supra, at p.37; "In such cases the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment. Indeed to hold otherwise would be to strip the word "accident" of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease. Such changes, even if they can be called accidents, occur not in the course of the employment, but, it may perhaps be said, in the course of the disease."

The accident must be one "which took place on board the aircraft or in the course of the operations of embarking or disembarking." On a purely literal interpretation the only connexion between the accident and the carriage expressed by these words is a temporal and a spatial one. The passenger must be in point of time on board an aircraft and spatially in an aircraft. Other than this there is no need to establish any association between the carriage and the accident.

An important source of guidance upon judicial attitudes to these questions are recent decisions of the High Court on the Commonwealth Employees Compensation Act 1930-1960. Notwithstanding the long history of liberal interpretation of acts of this kind, it is possible to discern conservative tendencies towards the construction of these Acts, and, perhaps, regret by some members of the Court that they are compelled by past decisions to accept a wide construction of the provisions, and, certainly, resistance to giving them even wider scope.

In the early Workers' Compensation Acts injury by accident arising out of and in the course of the employment was compensable. In their analysis of the words "arising out of and in the course of the employment" the Courts have taken the view that arising out of the employment implied that there must be a casual connection between the employment and the injury by accident, and that arising in the course of the employment required a temporal connection between the injury by accident and the

(44)
employment. Most of the Australian States and the Commonwealth amended the Acts by substituting "or" for "and". Plainly the purpose of the amendment was that the injury by accident was to be compensable, if there was either a causal or a temporal connection with the employment, for by the time the amendment was made the interpretation placed by the Courts on the phrases was well known and accepted. Notwithstanding this the High Court comprising Dixon C.J., Fullagar and Taylor J.J. in a unanimous judgment in the Commonwealth v. Ockenden (45) said :-

"But the decision (James Patrick & Co. Pty. Ltd. v. Sharpe, (1955)) A.C.1 a decision by the Privy Council that auricular fibrillation was injury by accident within the meaning of the Victorian Workers' Compensation Act which defines injury by accident to include physiological change in the course of a disease) does not justify acceptance of the same view in cases where it must be established; that the so-called injury by accident arose in the course of the worker's employment. In such cases the traditional view must still prevail that a physiological change, sudden or otherwise, is not an injury by accident arising in the course of the employment unless it is associated with some incident of the employment. Indeed to hold otherwise would be to strip the word "accident" of all meaning by treating as such any distinct physiological change which is nothing more than the sole and inevitable result of the ravages of a disease. Such changes, even if they can be called accidents, occur not in the course of the employment, but, it may perhaps be said, in the course of the disease. Accordingly, for the purposes of the Commonwealth Employees' Compensation Act it is still true that a worker does not suffer personal injury by accident arising in the course of his employment when he suffers, at his place of employment, a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which he is suffering and where such change can in no way be attributable to or associated with some incident of his employment." (46).

44. For example, per Viscount Haldane, Charles & Davidson & Co. v. McRobb, [1918] A.C. 304, 317; per Lord Wright, Dover Navigation Co. v. Craig, [1940] A.C. 190, 199; and per Scott L.J., Wilson v. Chatterton, [1946] K.B. 360, 366.

45. (1958) 99 C.L.R. 215.

46. Note 45 supra, 224-225.

This passage implied that for an injury by accident simpliciter to be compensable it must be associated with some incident of the employment.

(47)
In Kavanagh v. The Commonwealth the employee while performing his duties died as a result of a rupture of the oesophagus, the rupture being caused by sudden vomiting, the cause of which could not be explained. At first instance the Judge on authority of the passage quoted from The Commonwealth v. Ockenden held that the injury by accident did not arise out of or in the course of the employment, as it could not be associated with any incident of the employment. The High Court (Dixon C.J. and Fullagar and Menzies J.J., Taylor and Windeyer J.J. dissenting) held that the injury was one by accident arising in the course of the employment. The relevance of the decision to the questions raised here are the attitudes of the Chief Justice and the two dissenting judges. Thus Dixon C.J. said:-

"Possibly if the history of the provisions were unknown or the provision had been enacted for the first time in its present form as an original piece of legislation attempts might have been made to read the words "or in the course of the employment" as epexegetical or explanatory in some way. But it is impossible to disregard the course of the legislation. (48)

Fullagar J. said that the Commonwealth v. Ockenden really dealt with the meaning of injury by accident, but he did concede that the passage quoted "is perhaps misleading" and said that it should not be read "as meaning or implying that an accident does not occur in the course of the employment unless some causal connexion can be found."⁽⁴⁹⁾

47. (1960-1961) 34 A.L.J.R. 336.

48. Note 47 supra, 38.

49. Note 47 supra, 39.

Taylor J. distinguished Ockenden's case on the same ground as Fullagar J., but by reference to authority reached the conclusion expressed in the passage quoted from that case. He said:-

"As will be seen from an examination of the cases to which we referred everyone was concerned with an injury associated with, though not necessarily caused by some external incident and the incident, in turn, was associated with the duties which the employee was required to perform or with an activity thought to be incidental to his employment." (He continued after giving some examples of injury by accident not associated with the employment). "Nor would such a conclusion be open under the Act now in question for, notwithstanding the disjunctive form in which the critical expression stands in that Act, it is still true, in the language of Scott L.J., that 'the general purpose of the legislation was, beyond all doubt to put upon the employer an obligation to pay his workman or the workman's representatives compensation for the result of personal injuries incidental to his employment'." (50)

Windeyer J. who was not a member of the Court in Ockenden's case examined the cases independently of that case and arrived at the same conclusion as Taylor J. The most significant point in his judgment is his appeal to the general policy of the Act and his opinion that anything but Taylor J's view would be inconsistent with that policy and lead to absurd consequences. He said:-

"To construe them (the words "accident arising in the course of the employment") as entitling a worker or his dependants to receive a payment in every case where he falls sick, or suffers any mishap or dies at work, would be contrary to the fundamental purpose and policy of this law. It would not be compensation for injuries that befall them because they are workers in industries, but rather an incomplete and erratic form of general health, accident and life insurance. To construe this Act (to apply to the particular facts of the cases) gives it a capricious effect. I do not think Parliament intended the Act to have an operation so irrational." (51)

50. Note 47 supra, 43.

51. Note 47 supra, 51.

Menzies J. reached the same conclusion as Dixon C.J. and Fullagar J. He distinguished Ockenden's case without attempting to explain the passage quoted. In view of his dissent in the ⁽⁵²⁾Commonwealth v. Hornsby he may be disposed to give the wider construction to Part IV.

From Kavanagh's case it is clear, I think, that three of the Justices of the present High Court would, notwithstanding the literal meaning of section 28, be unwilling to allow a claim for injury by accident unconnected with the carriage. They would, at the very least, demand that the injury by accident be associated with some incident of the carriage. Their statements suggest too that they would be against construing injury resulting from an accident to include cases of injury from a heart disease in the course of the carriage, unless it could be shown that the injury resulted say from a change in the altitude of the aircraft. However where there is a breakage of the body tissue as a ruptured oesophagus it would appear that it will be compensable so long as it is associated with the carriage by air. No answer can be given to whether a disease contracted during the carriage by air would be compensable. The real difficulty, in any case, that a claimant would face would be to prove that he contracted the disease during the period of carriage.

These are questions which can only be answered by a course of judicial decisions. The questions arise because the Legislature felt that the definition of the boundaries of the liability was one which the Courts by experience were amply qualified to perform.

52. (1960-1961) 34 A.L.J.R. 27, 32-34.

In section 28 the Legislature has failed to give a clear expression of its intention. By omitting the defence of necessary measures it plainly intended to change the basis of liability from one of fault to one of risk, but having done that the Parliament left it to the Courts to define the scope of the risk assumed by the carrier.

(vii)

TAKE PLACE ON AIRCRAFT OR IN COURSE OF EMBARKATION.

The death or injury to be compensable must take place on board the aircraft or in the course of the operations of embarking or disembarking. The words "on board the aircraft" are free of ambiguity but those that follow require consideration.

(53)
Goedhuis has suggested that four constructions are possible of the same words in the Convention. These are :-

- (a) The operation of embarking begins at the moment when the passenger steps in the car of the carrier which conveys him to the aerodrome of departure; the operation of disembarking ends at the moment when the passenger leaves the car which has taken him to the town of destination.
- (b) The operation of embarking begins at the moment when the passenger enters the aerodrome of departure; the operation ends at the moment when the passenger leaves the aerodrome of destination.
- (c) The operation of embarking begins at the moment when the passenger goes from the airport buildings to the aircraft on the tarmac; the operation of disembarking ends at the moment when the passenger enters the buildings at the airport of destination.
- (d) The operation of embarking begins when the passenger has placed his first foot on the steps of the aircraft; the operation of disembarking ends at the moment when

the passenger, leaving the aircraft, places both feet on the ground.

(54)
Goedhuis favoured (c) i.e. operation of embarking commences when the passenger leaves the airport terminal building to board the aircraft and the operation of disembarking terminates when he arrives at the airport terminal of the airport of destination.
(55) Lemoine agrees and Sullivan in substances agrees. (56) This interpretation for purposes of the Convention is not necessarily the correct one and in any case is based upon assumptions not necessarily relevant to Part IV. Moreover it is directed to one situation, namely that where the carrier has an airport terminal or at least uses an airport terminal.

I think that Goedhuis' interpretation (d) will be preferred. It has the merit of simplicity and clarity. Furthermore, if a wide interpretation is given to section 28, the Courts may feel that it would be undesirable to include in the period of carriage matters that at the most are only incidental to the carriage. An alternative approach would be to say that the operation of embarking commences when the passenger indicates to the carrier that he is waiting to embark on the aircraft; normally that occurs when he presents his ticket at the airport terminal for checking against the aircraft passenger list, and that the operation of disembarking ends when the passenger indicates by words or by a course of conduct that the carriage is complete, e.g. taking

54. Note 53 supra, 192.

55. Maurice Lemoine, *Traite de Droit Aerien*, p. 540.

56. George R. Sullivan, *The Codification of Air Carrier's Liability by International Convention*, (1936) 7 *Air L.* 1 at p.p. 20-21.

delivery of his baggage at the airport terminal, leaving the aircraft and going straight to a car or boarding the airline bus. Of course both periods would be subject to the qualification that only a reasonable time should be allowed. This principle is open to the same and in fact greater difficulties of application than that adopted by Goedhuis and it is submitted the first view I have suggested is better; it is consistent with the words of the Act and on its merits should prevail.

By concentrating on the meaning of the words used in the section I have failed to refer to some of the obvious consequences of the rule of liability. The carrier is of course liable for death or injury of a passenger where the death or injury is wholly due to the negligence of another party, e.g. of a fellow passenger, of the manufacturer of the aircraft, of the air traffic control authority, of another carrier where aircraft collides with that of the carrier, or of an aerodrome authority in failing to give a warning of a hidden danger on the aerodrome. It seems that the carrier will be liable if the passenger is deliberately killed or injured by another provided of course that the occurrence is an accident within the meaning of the Act. He will be liable where the aircraft is overwhelmed by natural forces which no reasonable person could foresee or where it is shot down whether accidentally or deliberately by military aircraft either friendly or hostile. In short he insures his passenger against death or injury resulting from an accident which takes place on board the aircraft.

2.

THE DEFENCES

The carrier has two defences under the Act. He may in accordance with section 34 escape liability by pleading

that the claimant's right to damages is barred by failure to bring the action within two years of the date of the arrival of the aircraft or he may in accordance with section 39 prove that the accident was caused by or contributed to by the negligence of the passenger. Unlike the first defence this defence is not necessarily a total defence. Provision is made for the apportionment of damages. The method by which apportionment is made is such that even if the passenger is contributorily negligent the carrier may nevertheless have to pay an amount equal to the limit.

(1)

EXTINCTION OF RIGHT TO DAMAGES

Section 34 provides :-

"The right of a person to damages under this Part is extinguished if an action is not brought by him or for his benefit within two years after the date of arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination -

- (a) the date on which the aircraft ought to have arrived at the destination; or
 - (b) the date on which the carriage stopped,
- whichever is the later."

Statutes of Limitations have one of two effects. They may
(57)
extinguish the liability or may only take away the right
(58)
to bring an action. It would seem that section 35 belongs to the first class, for it speaks in terms of extinction of the right to damages, rather than taking away the right to bring an

57. E.g. sections 11 and 18 of the Victorian Limitation of Actions Act 1958.

58. E.g. section 5 of the Victorian Limitation of Actions Act 1958.

action. Consequently a promise not to plead the section⁽⁵⁹⁾ or conduct amounting to an estoppel, such as, a representation by the defendant that he desires the plaintiff to delay proceedings and that the plaintiff will not be prejudiced by that delay and⁽⁶⁰⁾ the plaintiff acts on the representation will not operate to extend time. It would follow too that the carrier may not waive the defence. The right being extinguished by the Act there is nothing for a court to adjudicate except, perhaps, whether the right has been extinguished by operation of the section.

By operation of the section the right to damages of all persons/^{entitled} to bring an action under the Part against the carrier is extinguished. By section 33(3) the right to damages against the servants or agents of the carrier is also extinguished, provided the damage in respect of which the action is being brought would give rise to a cause of action against the carrier under the Part. As only rights of action to damages arising under the Part are extinguished, it follows that the claims of persons arising under some other law relating to the death or injury of the passenger should not be barred by the section. Section 37 of the Act saves from the operation of sections 35(2) and 36 (which provide that the liability created by the Act is in substitution for any civil liability under any other law) the right to contribution of a tort-feasor who is liable in respect of the damage to the passenger and the right to an

59. Buenos Ayres Municipality v. Baring Bros.(1924), 59 L.Jo.167, where it was held that a promise may be sufficient to prevent the defence relying on the Statute of Limitations.

60. E.G. Paterson v. Glasgow Corporation, (1908) 46 S.L.R. 10.

indemnity of an employer of the passenger under the Workers' Compensation Act.

Although the section does not extinguish such claims, for the right to contribution of a tort-feasor arises not under the Act but under the joint tort-feasors Contribution Laws of the States and Territories of the Commonwealth, that section read in conjunction with the provisions of those laws may have the effect of barring a claim for contribution by a joint tort-feasor,

Because of the way in which the State legislation is expressed (it is discussed in the next chapter) the joint tort-feasor's claim would be barred:-

- (i) If the person injured had sued the carrier and the joint tort-feasor jointly and the carrier was adjudged not liable on the ground the right of action was extinguished by virtue of section 34;⁽⁶¹⁾ and
- (ii) if the person injured sues the joint tort-feasor after his (i.e. the person injured) claim against the carrier has been extinguished by operation of section 34.⁽⁶²⁾

On the other hand time would not run against the joint tort-feasor, if the action is brought against him by the person injured before the period of limitation specified in section 34 has expired, until after judgment has been entered against

61. George Conway & Co. v. B.O.A.C., [1955] A.C. 169.

62. Seagrim v. Brown, (1955) 56 S.R. (N.S.W.) 127.

(63) him and the period of limitation would not be that specified in section 34 but that prescribed by the laws of the State in which the action for contribution against the carrier was brought. (64)

It seems that an employer's right to an indemnity under the Workers' Compensation Acts from the carrier in respect of an employee injured or killed in the course of the carriage by the carrier will not be affected by section 34, notwithstanding that the action to enforce the indemnity is brought after the carrier's liability under Part IV to the passenger has been extinguished. As in the case of joint tort-feasors the question primarily depends upon the provisions of the State Acts. These are expressed in terms quite different from the provisions of the joint tort-feasor's contribution Acts.

A typical provision conferring the right to an indemnity is as follows:-

"Where the injury for which compensation is payable under this Act...was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof -

(a)

(b) if the worker has received compensation under this Act... the person by whom the compensation was paid....shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.....". (65)

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63. Nickels v. Park, (1948) 49 S.R. (N.S.W.) 124. In Victoria and Tasmania express provision is made from time to time to run from the service of the writ on the joint tortfeasor the period of limitation being twelve months.
64. This follows from S.34 which operates to extinguish claims only by those suing under the Act.
65. Workers' Compensation Act 1958 of Victoria, section 62; also New South Wales Workers' Compensation Act 1926-1960, section 64.

The only reported case on the question, Tuckwood v. The Mayor, etc.⁽⁶⁶⁾ of Rotherham, is not relevant as the provision prescribing the period of limitation was to the effect that no action in respect of any act neglect or default in the execution of a duty could be brought after the expiration of 12 months from the date of the accrual of the action. The Court of Appeal held that the statutory right of indemnity did not fall within the description of actions barred.

The words "was carried under circumstances creating a legal liability in some person other than the employer" postulate the existence of a liability not a remedy nor the continued existence of the liability.⁽⁶⁷⁾ Thus, where an employee died and the right of action in respect of his death came to an end, for the persons who were paid compensation were not entitled to sue in respect of the death under Lord Campbell's Act, it was held that for purposes of the section all that is necessary is that a right of action should arise in the deceased and it did not matter that it should soon after come to an end by his death.⁽⁶⁸⁾

66. [1921] 1 K.B. 526; see also Hall v. Bonnett, [1956] S.A.S.R. 10, where the South Australian Supreme Court held that a prescription provisions in similar terms did not operate a bar to claim to contribution under the S.A. tortfeasors contribution legislation.

67. Tooth & Co. Ltd. v. Tillyer, (1956) 95 C.L.R. 605, 612.

68. Smith's Dock Co. v. John Readhead & Sons, [1912] 2 K.B. 323.

It would follow that it does not matter that the right to damages is extinguished by the effluxion of time.

Where the carrier is liable in respect of a matter lying outside the scope of the legislation, e.g: for delay or for death or injury occurring in the course of on-carriage on another airline's aircraft, the period prescribed in section 34 will not apply to that liability. Section 34 does not apply to the right of action of a stowaway, for section 42(1) of the Act only applies the provisions of the Act relating to the limitation of the carriers' liability.

The action by the passenger or by those claiming in respect of his death or injury must be initiated within the period of two years. An action is commenced by issuing a writ of summons out of one of the Courts vested with jurisdiction over claims under the Part. The Courts vested with jurisdiction over claims under the Act are the Supreme Court, the County Courts and the Courts of Petty Sessions of the States and Territories. The appropriate court will depend upon where the damage occurred, the amount claimed, and whether the particular court is by the law of the State in which the action is brought empowered to adjudicate on claims similar to that contemplated by Part IV. (69)

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69. By virtue of section 76 (ii) of the Constitution, Parliament may confer original jurisdiction on the High Court in any matter arising under any laws made by the Parliament. By section 77, it may invest State courts with that jurisdiction. By section 39(2), of the Judiciary Act 1903-1959 it is provided that the several Courts of the States shall within the limits of their several jurisdictions whether such limits are as to locality, subject matter or otherwise, be invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it. This invests State Courts with jurisdiction over actions under that Act. The Supreme Courts of the Territories are invested with jurisdiction over claims arising under Part IV,

(ii)

CONTRIBUTORY NEGLIGENCE

Section 34(1) provides that where the carrier proves that the damage was caused or contributed to by the negligence of the passenger the damages recoverable shall be assessed in accordance with the section. Sub-section 2 provides that the Court shall first determine the damages that would have been recoverable if there was no limit and no negligence on the part of the passenger. By sub-section 3 the damages so assessed are to be reduced to such extent as the Court thinks just and equitable having regard to the share of the passenger in the responsibility for the damage. Sub-section 4 completes the plan by providing that, if the damages as reduced exceed the limit, the Court shall reduce the damages to the limit.

Principles of Common Law of Contributory Negligence apply

Following their usual practice when construing statutes which contain terms and concepts familiar to and used in the common law the courts will apply, except to the extent that the provisions of the section are inconsistent with them, the rules of the common law of contributory negligence. At common law contributory

69.(contd). e.g. the Supreme Court of Papua and New Guinea is vested with jurisdiction by virtue of section 9 of the Supreme Court Ordinance 1949 which invests the Court with the jurisdiction previously enjoyed by the separate Supreme Courts of those Territories by virtue of section 10 of the Papuan Courts & Law Adopting Ordinance 1888 and section 11 of the New Guinea Judiciary Ordinance 1921-1938 which provided that the jurisdiction of the Courts should be that of the Supreme Court of Queensland. As by virtue of the section 39(2) of the Commonwealth Judiciary Act the Queensland Supreme Court has jurisdiction over claims under the Act, that jurisdiction is adopted by the provisions of the Territorial Ordinances and vested in the Territorial Supreme Court.

negligence is a defence to torts of strict liability for, contributory negligence does not mean negligence which is contributory along with the negligence of the other party, it means negligence which causes or contributes to the injury or damage which has happened.⁽⁷⁰⁾

Burden of Proof of Contributory Negligence.

The burden of proving the defence lies upon the carrier. The passenger has to prove those matters which entitle him to damages in accordance with section 28, the carrier then has the opportunity of proving the passenger's negligence. This is the position at common law.⁽⁷¹⁾ If the passenger's evidence shows contributory negligence, the burden of proof will not lie in the defendant⁽⁷²⁾ and it is submitted that, notwithstanding that it is a defence, it will not have to be specially pleaded.⁽⁷³⁾

Nature of Contributory Negligence.

Negligence as used in the section is not the tort of negligence. The question of whether the passenger has been negligent or not does not depend upon whether he has acted in breach of the duty of care which he owes to his neighbour. It is submitted that, on the analogy of contributory negligence, a person is negligent within the meaning of the section if his conduct falls short of the standard of care for his own safety that may be expected of a reasonable man in the circumstances.⁽⁷⁴⁾

70. Per Greer L.J., *Craze v. Meyers-Dunmore Ltd.*, [1936] 2 All E.R. 1150, 1151.

71. *Williams v. Commissioner for Road Transport*, (1935) 50 C.L.R. 259; *Hercules Textiles Mills v. K. & H. Textile Engineers*, [1955] V.L.R. 310.

72. *The Insurance Commissioner v. Joyce*, (1948) 77 C.L.R. 39.

73. *Jones v. McCarthy*, [1959] Q.W.N. 32; *contra*, Glanville Williams, *Joint Tortfeasors and Contributory Negligence*, 386.
(see next page for Note 74)

It would also include, as at common law, the passenger's
(75) tortious negligence. Like tortious negligence a necessary
element of contributory negligence is foreseeability of harm.
The passenger ought reasonably have foreseen that, if he did
not act as a reasonably prudent man would in the circumstances,
(76) he might hurt himself or be hurt.

Must be a Causal Connection between Damage and Passenger's Negligence

The negligence of the passenger must cause or contribute
to the damage. The Courts have abandoned all attempts to lay down
principles to determine whether the degree of causation is
sufficient. Instead, they have substituted a subjective approach
for determining what conduct amounts to contributory negligence
and whether the conduct contributed to the damage. "Upon the
whole I think that the question of contributory negligence must
be dealt with somewhat broadly and upon commonsense principles as
(77) a jury would probably deal with it." Dixon C.J. pointed out
(78) in Mitchell v. Clancy that this is a vague standard and calls
for judgments of a subjective nature. He said :

74. Nance v. Br. Columbia Electric Ry. Co., [1951] A.C. 601,611;
Winter v. Bennett, (1957) A.L.R. 15,26.

75. Edwards v. Joyce, [1954] V.L.R. 216; Mitchell v. Clancy,
(1960-1961) 34 A.L.J.R. 276.

76. Jones v. Livox Quarries Ltd., [1952] 2 Q.B. 608, 615.

77. Per Lord Birkenhead, The Volute, [1922] 1 A.C. 129,144; also
per Lord Reid, Stapley v. Gypsum Mines Ltd., [1953] A.C.663,
681.

78. (1960-1961) 34 A.L.J.R. 276.

"The question however is...whether in the circumstances the plaintiff was guilty of negligence contributing to the accident. The negligence is want of due care for his own safety. It is a vague standard, I repeat, but it is a familiar one. Perhaps it must be decided instinctively and the instinct must be the product of day to day experience. But the instinct of the cyclist and of the pedestrian must be somewhat different from the instinct of the motor driver; and the instinct of the judge habituated to the trial of collision cases cannot but be a little cloyed; it must tend to become almost a proleptic recognition of the rival explanations that he will inevitably hear of any given collision."(79)

When a question depends upon the instinctive decision of a tribunal certainty that is one of the ends of justice has been abandoned, hardly a satisfactory state of affairs.

It is a question of fact whether the passenger has been negligent and whether his negligence contributed to or caused the damage. It will be rare that the facts will be so conclusive that contributory negligence will follow as a conclusion of law so that the trier of fact should be directed to return a verdict of negligence. On the other hand it seems that breach of a law intended to safeguard the passenger, provided the violation is connected with the damage, will be negligence per se. The Court appears to have adopted this view because contributory negligence (80) is defined in the apportionment acts to include negligence, breach

79. Note 78 supra, 278.

80. "The apportionment acts" is used to describe the legislation of the States which extinguished the old rule that negligence on the part of the plaintiff is a bar to recovery from the defendant. They provide :- "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Victoria: Wrongs Act 1958, Part V.; Qld.: Law Reform (Tortfeasors Contribution, Contributory

of a statutory duty or other act or omission which would, apart from the legislation, give rise to the defence of contributory negligence. In Henwood v. Municipal Tramways Trust ⁽⁸³⁾ (.S.A.) Dixon J., as he then was, said that, for breach of a statutory duty to be negligence per se, the law imposing the duty must disclose an intention to confer a private right of action on the person injured correlative to the duty imposed by it upon that person. This was decided before the apportionment legislation was introduced. However, even before the legislation was ⁽⁸⁴⁾ passed, in Foxcroft v. Duncan the Court appeared to abandon this position without expressly rejecting it holding that breaches of the traffic regulations, which did not give the plaintiff a correlative right of action, must be treated as contributory negligence as they were important regulations.

Where the passenger's negligence is tortious negligence and the accident causing the damage would not have happened without the negligence of both parties it is only in a clear case that it should be decided that the damage was due to the negligence of one party to the exclusion of the other, But, if the damage was entirely due to the fault of the defendant, the plaintiff's ⁽⁸⁵⁾ negligence should be disregarded when apportioning damages.

80(contd): Negligence and Division of Chattels) Act 1952. S.A.: Wrongs Act 1936-51, s. 27a. W.A.: Law Reform (Contributory Negligence & Tortfeasors' Contribution) Act 1947. Tasmania: Tortfeasors and Contributory Negligence Act, 1954, s.4., A.C.T.: Law Reform (M.P.) Ordinance 1955, s.15.

83. (1938) 60 C.L.R. 438, 463-464.

84. [1956] St.R. Qd. 146.

85. Mitchell v. Clancy, note 78 supra, 282.

Children and physically or mentally infirm adults are treated differently from other persons. There is no general rule (86) that children are incapable of contributory negligence. They are under the same duty of care. However, in applying the (87) standard the age of the child is to be taken into consideration. The younger the child is, the less care for its own safety will (88) for be expected of it, /reasonable care means that degree of care which may reasonably be expected from a person in the plaintiff's (89) situation and this would be very small for a very young child. (90) In Benjamin v. Currie, the Supreme Court of Victoria held that the question of whether the plaintiff, a child of three years, had been contributarily negligent should not have been allowed to go to the jury in the absence of evidence that the child was more intelligent than a normal child of that age. On the other hand, (91) in Griffiths v. Doolan the Supreme Court of Queensland held that a plaintiff, a child of five and a half years, who was bright and intelligent and had been instructed in the rules of the road, was (92) ten percent to blame. The Courts have not adopted a standard of accountability for children. The decisions oscillate between an

86. Benjamin v. Currie, [1958] V.R. 259.

87. Glasgow Corporation v. Taylor, [1922] 1 A.C. 44, 67.

88. Benjamin v. Currie, note 86 supra.

89. Harold v. Walney, [1898] 2 Q.B. 320, 322.

90. Note 86 supra.

91. [1959] St. R. Qd. 304.

92. But Dixon J. (as he then was) in Joseph v. Swallow & Ariell Ltd., (1933) 49 C.L.R. 578, 586-587, seems to have taken the view that a child of this age could not be contributarily negligent.

objective standard i.e. is the degree of care to be that expected (93)
from a child of like age and experience and a subjective standard, (94)
i.e. what degree of care is to be expected from this child.

A similar measure of latitude is permitted to physically or mentally infirm adults. They must take such reasonable care for (95)
their own safety as their capabilities permit.

Certain classes of Conduct not Contributory Negligence.

In certain circumstances conduct which would otherwise be regarded as being contributorily negligent will be treated as not being negligent and conduct that in essence amounts to contributory negligence will be regarded as being too remote in point of time or in terms of comparative causation.

(96)
The well known case of Clayards v. Dethick is source of the first member of this class. "The fact that the plaintiff has to take a risk does not amount to contributory negligence on his part if the risk is one created by the negligence or breach of statutory duty of the defendant, and it is one which a reasonably (97)
prudent man in the plaintiff's position would take." This principle was affirmed recently by the House of Lords in Billings & Son.Ltd. (98)
v. Riden. It is submitted that this principle will apply to the

93. Benjamin v. Currie, note 86 supra.

94. Griffiths v. Doolan, note 91 supra.

95. Callen v. Commissioner of Road Transport, (1942) 43 S.R.(N.S.W.) 66, 68-69; Wells v. Cosgrove Motor Services, [1941] S.A.S.R.191, 194.

96. (1848) 12 Q.B. 439.

97. Charlesworth on Negligence, 3rd Edition, p.511.

98. [1958] A.C. 240.

Act, irrespective of whether the carrier has been at fault or not, for the reasons discussed under apportionment of damages, and, therefore, whether the risk has been created by a third party or some other force or event outside the control of the carrier.

A like principle underlies the rescue cases. Where the plaintiff deliberately exposes himself to damage in order to assist a person who has been put in a dangerous situation by a third party the plaintiff will not be contributorily negligent so long as his conduct under the circumstances was reasonable.⁽⁹⁹⁾ "Reasonable in the circumstances" is construed liberally in favour of the plaintiff.⁽¹⁰⁰⁾ Again it is submitted that, irrespective of whether there was fault on the part of the carrier or not, the plaintiff would be entitled to the benefit of this principle. It is submitted that a passenger injured or killed endeavouring to rescue another person while in the course of the carriage would be entitled to damages under the Act for, while he has deliberately exposed himself to injury, his injury would in common parlance be described as resulting from an accident. It could not be said to have been deliberately inflicted by him and his act could have the effect of mitigating the carrier's damages to the person rescued, if that person were a passenger.

The second group of cases that lie within this class are appropriately described as "the agony of the moment" cases.⁽¹⁰¹⁾ Although a prudent man is expected to guard against the possible negligence of others when experience shows such negligence to be common,⁽¹⁰²⁾ it is settled law that, where a sudden emergency arises

99. Haynes v. Harwood, [1935] 1 K.B. 146.

100. Baker V.T.E. Hopkins, [1959] 1 W.L.R. 966.

101. Also known as the Bywell Castle rule, (1879) 4 P.D. 219.

102. Grant v. Sun Shipping Co.Ltd.,[1949] A.C.549,567.

through the defendant's fault, the plaintiff who acts reasonably in an attempt to extricate himself is not guilty of contributory negligence merely because he unintentionally aggravates the situation. Also, where the plaintiff is compelled to make a quick decision in the agony of the moment, he is not expected to take into account all the considerations that a calmer approach of the situation might present to the mind. (103) This rule does not apply (104) when the plaintiff's negligence contributed to the emergency.

There are situations where the plaintiff is entitled to take less than his usual care in reliance on the conduct of the defendant, so that a passenger in a car is not contributorily negligent in failing to pay attention to the road, or a passenger in a train in leaning against a carriage door, as he is entitled (105) to assume the door has a proper catch. It seems too that the principle applies where the plaintiff has been led to suppose that there is no danger as for example if the defendant has expressly (106) or impliedly represented that a certain course of conduct is safe.

At common law there was what described as a qualification to the stalemate rule, i.e. the rule that, if both parties were negligent, neither could recover from the other. The qualification, known as the last opportunity rule, was that even if the accident could not have happened without the negligence of the plaintiff,

103. Glanville Williams, Joint Torts and Contributory Negligence, at p.p. 360-361; and see James v. Boyce, (1816) 1 Stark 493, and Tree v. Cronin, (1913) 15 W.A.L.R. 47.

104. Municipal Tramways v. Ashby, [1951] S.A.S.R. 61.

105. Smith v. C.P.R., [1922] 70 D.L.R. 409; Gee v. Metropolitan Ry. Co., (1873) L.R. 8 Q.B. 161.

106. Glanville Williams, Joint Torts and Contributory Negligence, para. 96.

his negligence was not a defence, if the defendant could have by the exercise of ordinary care avoided the consequence of the plaintiff's negligence. (107) The history of the waxing and waning of the rule lies outside the scope of this paper. There is some doubt whether in England, immediately prior to the passing (108) of the apportionment legislation, the qualification still was law. At the most in England, the position of the qualification now seems to be "as a principle of law the rule of the last opportunity if it ever existed is now dead, but it may sometimes be a useful test to apply in deciding, as a matter of fact, whether an (109) accident was caused by the fault of one or both of the parties."

In Australia there is no doubt that in States and Territories where there is no apportionment legislation (New South Wales and the Territory of Papua and New Guinea are the only places where there is no apportionment legislation) the (110) qualification is law. In Alford v. McGee the High Court stated that the qualification of the last opportunity cannot be expressed adequately in a general formula. It is impossible to lay down a class of cases in which it is proper to put the qualification. The last opportunity to be considered is that of the defendant and it can only be relevant, if the failure of the defendant to

107. Williams, note 106 supra, at p.224, suggests that the rule received three main applications-

- (a) where one party had the last opportunity of avoiding the accident;
- (b) where he would have had it but for his contemporaneous negligence; and
- (c) where he would have had it but for his prior negligence.

108. Williams, note 106 supra, at p.p.223-236; Winfield on Torts, 6th Edition, p.513.

109. Charlesworth on Negligence, 3rd Edition, p.521.

110. (1951-1952) 85 C.L.R. 437.

take advantage of an opportunity, amounts to a failure to exercise reasonable care. The Court concluded:-

"Apart from the new statutes, it is not, of course, legitimate to enter upon any comparison in point of degree. But most probably the fundamental idea behind all the cases from *Davies v. Mann* ((1842) 10 M. & W. 546) and *Tuff v. Warman* ((1858) 5 C.B.N.S. 573) onwards is that there are cases in which there is so substantial a difference between the position of the plaintiff and the position of the defendant at the material time that (although the accident could not have happened if the plaintiff's conduct had not been negligent) it would not be fair or reasonable to regard the plaintiff as in any real sense the author of his own harm. This position may arise because the defendant had and the plaintiff had not (underlined words in italics in the judgment) a real opportunity, of which a reasonable man would have availed himself, of 'avoiding the mischief' (as in *Radleys Case* (1876) 1 App.Cas. 754). It may arise because the defendant's negligent conduct is substantially later in point of time than the plaintiff's negligent conduct, and a reasonably behaving defendant would have seen its effect and avoided its 'consequences' (as in *Davies v. Mann*...). It may arise because the defendant had an advantage over the plaintiff, in that he was the 'master of the situation', but chose to run a risk (the view which was, in effect, held to be open to the jury in *Williams v. Commissioner for Road Transport and Tramways (N.S.W.)* (1933) 50 C.L.R. 258) and the view, which was open in *Tuff v. Warman* itself, a case of a collision between a steamship and a sailing barge). It may arise because the defendant had such an advantage over the plaintiff that he ought to have been 'master of the situation' but unreasonably failed to take advantage of his superior position (as in *Municipal Tramways Trust v. Buckley* (1912) 14 C.L.R. 731)". (111)

Quite clearly the qualification is still law in Australia. However, the Court qualified the above passage in such a way as to reserve for future consideration the question whether the apportionment legislation has abolished the qualification.

Whether the qualification survives the apportionment legislation or not is relevant, as section 39 provides for apportionment. In England the prevailing view is that the last

111. Note 110 supra, 460.

(112)

opportunity principle has been abolished by the legislation.

In Australia there is a conflict of opinion among the States.

(113)

In Victoria the full Supreme Court in Winter v. Bennet has held that the principle was abolished by the apportionment legislation saying: "But the qualification was never more than a "qualification" upon a general rule, so that its existence depends upon the existence of the general rule. If that general rule has been abolished by the Statute, it follows that the qualifications upon it must have been abolished at the same time." On the other hand, in South Australia, a justice of the Supreme Court sitting alone, in Tucker v. Tucker, and, in Queensland, a justice of the Supreme Court sitting alone, in Eichstadt v. Lahra, in obiter dicta, both reached the conclusion that the qualification was unaffected by the apportionment legislation. The High Court, although it has been invited to do so in two cases, has so far found it unnecessary to express an opinion. In Western Australia the apportionment act specifically abolishes the rule.

It is submitted that the qualification does not apply to section 39 for the reasons stated by the Victorian Supreme Court. Furthermore it is quite inappropriate to a law which imposes an insurer's liability on the defendant. Moreover, it is submitted that it will not apply where the plaintiff has been injured by the negligent act of another passenger, the injured passenger has sued the carrier and the carrier sets up the passengers' contributory

112. Winfield on Torts, 6th Edition, p.513.

113. (1957) A.L.R. 15.

114. Note 113 supra, 24.

115. [1956] S.A.S.R. 297.

116. [1960] St. R. Qd. 487, 505.

117. Tucker v. Tucker (unreported) and Pennington v. Norris, (1956) 96 C.L.R. 10.

negligence as a defence. It might be argued that, because as between the passengers the law of the State, where the damage occurred, applies, therefore the law of contributory negligence of that State applies as between the passenger and the carrier. That argument is clearly erroneous. It is the Act that creates the defence and defines its content. If it were otherwise, the carrier would, in the places where there is no apportionment legislation, have a complete defence, if the plaintiff passenger was found to be contributorily negligent. But that runs counter to the clear expression of section 39 requiring reduction of damages in proportion to the passenger's responsibility for the damage.

The last observation on the cases where the plaintiff's fault is held not to be contributory negligence is that, having regard to the provision for apportionment, I submit that, except for the rescue cases, it is likely that there will be a tendency to treat these as negligence which should be taken into account, assuming of course there is the necessary nexus between the damage and the negligence, in reduction of the damages, for the reason for their evolution, the inequity of the stalemate rule, has gone.

Damages and the Passenger's Share in Responsibility.

Sub-section (3) provides that the damages determined in accordance with sub-section (2) "shall be reduced to such extent as the Court thinks just and equitable having regard to the share of the passenger in the responsibility for the damage." The Court looks only to the responsibility of the passenger for

the damage. Under the Part the carrier is liable irrespective of fault on his part. It follows that, where the damage was partly due to the fault of passenger and partly due to natural or unexplained causes, the carrier will be liable for that part of the damage attributable to natural or unexplained causes. As the focal point is the passenger's responsibility, the carrier will be entitled to the defence of contributory negligence, if that was available to a third party, such as another passenger or the person who provides the steps for purposes of embarking or disembarking and who negligently injured the plaintiff passenger. Naturally the carrier would, as the insurer of the plaintiff, be liable for the negligent party's share (reduced to the limit). Furthermore it would be liable for that part of the damage due to the acts of its servants and third parties, even though they had not been negligent.

It seems that where the damage is wholly due to his negligence the passenger should recover nothing. Sub-section(1) envisages that the passenger's negligence may be the sole cause of the damage. The clause commencing "having regard to" in sub-section (3) becomes significant. In the circumstances postulated it cannot be said that the passenger had a share of the responsibility. The fact of the matter is that he is responsible for the damage. "Share" implies a division between two. There is none in those circumstances. "Justice and equity" are of no assistance in this regard, for on the expressio unius principle of statutory construction the Court may have regard only to the share, if any, of the passenger. The discretion conferred upon the court by the adjectives "just and equitable"

may only be exercised if circumstances exist which satisfy the clause "having regard to the share of the passenger in the responsibility for the damage."

The effect of section 39 on section 35 involves some problems. Section 35 confers on the persons specified in sub-section (5) of that section a right of action against the carrier in respect of the death of a passenger. It gives a right of action analagous to that under Lord Campbell's Act (the wrongful death legislation). The amount of damages of a claimant under this section, it is submitted, would be reduced in the manner provided in section 39, if the passenger's negligence caused or contributed to the damage. Sub-section (1) of section 35 provides that the section applies in relation to liability imposed by the Part on a carrier in respect of the death of a passenger. Sub-section (3) provides that the liability is enforceable for the benefit of the members of the passenger's family (defined in sub-section (5)) who sustained damage by reason of the death. It could be argued that liability refers to the liability imposed by section 28, and that, therefore, it does not include the defence of contributory negligence. This construction is erroneous. In common parlance, when we say A is liable to B, we are saying that A inter alia, has no defence. On the other hand, when we say A is not liable to B, we may be saying that, although B has all the necessary evidence, A has a complete defence. In short, liability of the carrier includes not only the duty imposed upon him, but includes the defence which he may invoke against the passenger had he not died. This construction is consistent with that taken of Lord Campbell's

(118)
Act. In the case of Lord Campbell's Act it has been held that,
where the claimant's negligence contributed to the death, the
damages should be proportionately reduced.⁽¹¹⁹⁾ This will not apply
to an action under section 35, because section 39 confines the
defence to negligence on the part of the passenger.

The section does not apply to stowaways. Questions of
contributory negligence and apportionment in claims by stowaways
will therefore be governed by the law of the State where the
damage occurred.

118. Littlely v. Brock & C.N.R., (1932) S.C.R.462.

119. Skelton v. Virgo, (1958) 31 A.L.J. 907, 910; Benjamin v.
Currie, [1958] V.R. 259.

CHAPTER VIII

THE LIABILITY OF THE CARRIER AND THE CREW FOR PASSENGERS
(CONTINUED)

In the preceding chapter, the statutory liability which the carrier owes to the passenger and to those claiming in respect of the passenger's death was discussed at length.

In this chapter the following subjects are discussed:-

- (i) The liability of the Carrier Apart from the Act and to Third Parties (others than those entitled to claim by virtue of section 35).
- (ii) The Liability of the Crew in respect of Passengers.
- (iii) Limitation of Liability and Prohibition of Contracting Out.

B.

LIABILITY OF THE CARRIER APART FROM THE ACT AND TO THIRD PARTIES (OTHER THAN THOSE ENTITLED TO CLAIM BY VIRTUE OF SECTION 35(3)).

Sub-section (2) of section 35 and section 36 provide that the liability under the Act for the death of or personal injury to a passenger is in substitution for any civil liabilities of the carrier under any other law for death or injury. As the exclusion is limited to death or injury of the passenger, it follows that the passenger's right at common law for damages for breach of the implied undertaking that he will be carried to his destination within a reasonable time remains

(1)
unaffected.

1.

LIABILITY FOR INJURY DURING ON-CARRIAGE.

Where the carrier enters into a contract of carriage involving carriage to a place beyond his system, there is a presumption that he has contracted for the whole of the carriage, and he is liable for the negligence of those who perform that part of the carriage for which he contracted which lies outside of his system. (2) The word "liability", in sections 35(2) and 36 must clearly be limited by reference to section 28. Section 28, in conjunction with section 27, make the carrier liable for death or injury of a passenger on board an aircraft being operated by him or in the course of the operations of embarking or disembarking therefrom. Thus "liability" means liability for death or injury on the aircraft operated by the carrier, and, therefore, it is only the liability under any other law for death or injury which takes place on board or in the course of the operations of embarking or disembarking from an aircraft being operated by the carrier sued that is excluded by the operation of these provisions. Consequently the carrier may be liable at common law for death or injury of the passenger in the course of carriage beyond his system.

2.

LIABILITY TO EMPLOYERS AND HUSBANDS FOR LOSS OF SERVICES.

At common law, as a general rule, where a person is injured by the negligence of another "the mere fact that the

1. For discussion of that undertaking see page 147.

2. For discussion see page 148.

injury prevents a third party from getting a benefit from the person injured which, but for the injury, he would have obtained does not invest the third party with a right of action against the wrong doer"⁽³⁾. There are two exceptions to this rule relevant to the matter. The employer of the person injured may have a cause of action for damages for the loss of service which he suffered and,⁽⁴⁾ if the person injured is a married woman, the husband may have an action for loss of consortium.⁽⁵⁾

It is submitted that the Act confers an analogous right of action on those persons. Consequently the sections 35 and 36 abolish the actions for loss of services and consortium at common law.

The Part is silent on the persons who may sue in respect of the injury of a passenger. From the manner in which section 28 is expressed it would appear that it is open for anyone who has suffered damage by reason of the injury of the passenger to bring an action. In the absence of an express intention it is submitted that an intention will be implied that persons who at common law would have had a cause of action in respect of the injury of a passenger will have a cause of action under the Part.⁽⁶⁾ This is the position under the Warsaw Convention.

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3. Per Rich J., *The Commonwealth v. Quince*, (1943) 68 C.L.R. 227, 238.
 4. *Martinez v. Gerber*, (1841) 3 Man. & G. 91; *The Commonwealth v. Quince*, note 3 supra, and *Commissioner for Railways (N.S.W.) v. Scott*, (1959-1960) 33 A.L.J.R. 126.
 5. *Toohy v. Hollier*, (1955) 92 C.L.R. 618.
 6. H. Drion, *Limitation of Liabilities in International Law*, p.292; Shawcross & Beaumont on Air Law, 2nd Edition, paragraph 407.

Where the passenger is killed or dies as a result of the injury inflicted, the persons who may claim are defined in the Act in Section 35 (3) and the employer is not included in that definition. At common law, too, the employer does not have a right of action for loss of services where the servant is killed.⁽⁷⁾ The provision in respect of death is not inconsistent with the implication of an intention that for injury the persons who may claim are those who at common law would be entitled to claim. At common law there was no right of action for death. The Wrongful Death Statutes created an exception by permitting certain persons, in general terms relatives and dependants of the deceased, to recover for death tortiously inflicted. If the Part had been silent upon who could recover, there would not have been any appropriate analogy at common law for the Courts to turn to determine the persons who may claim in respect of the damage. In turning to the common law for an appropriate analogy the court would be following a familiar practice. No similar practice exists to justify a reference to Statutes for appropriate analogies, as these are construed only as speaking in relation to the matters to which they are addressed. Therefore, in the Part, the Parliament was compelled to provide what persons could claim in respect of death. The provision therefore cannot be said to be intended to show Parliament intended to limit the persons who may claim for injury to passengers, for clearly its purpose is to fill a hiatus due to there being a similar hiatus in the common law.

7. Admiralty Commissioners v. S.S. Amerika, [1917] A.C.38.

At common law loss of consortium could be claimed only up to the time of death.⁽⁸⁾ It would seem that under the Act the Court may take into account loss of consortium after the date of death, for by virtue of sub-section (8) of section 35, in awarding damages it is not 'limited to the financial loss resulting from the death of the passenger.'

There has been a tendency to limit the scope of the employer's right of action for loss of services. In England the action has been confined to cases of domestic or menial servants.⁽⁹⁾ This trend had developed so far that one writer has concluded that the Courts, because they regard the action as anomalous, have confined it within the narrowest limits of imperative precedent and that it should be abolished by legislation.⁽¹⁰⁾ This conclusion was somewhat premature. In the Commissioner for Railways (N.S.W.) v. Scott⁽¹¹⁾ the High Court refused to follow the English precedents and held the action lies in any case where the relationship between the plaintiff and the person injured is that of master and servant and is not confined to cases of domestic or manual servants. The action, however, does not lie in respect of the injury of members of the police force⁽¹²⁾ or the armed forces,⁽¹³⁾ for the relation of master and servant does not exist between those persons and the Crown.

In England there is authority for the view that, while the husband could recover for that portion of consortium comprised in servitium i.e. his wife's domestic assistance and care, he could

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8. Baker v. Bolton, (1808) 1 Camp. 493.
 9. Inland Revenue Commissioners v. Hambrook, [1956] 2 Q.B.641.
 10. J.G.Fleming, The Law of Torts, p.p. 707-709.
 11. (1959-1960) 33 A.L.J.R. 126.
 12. The Attorney-General for N.S.W. v. Perpetual Trustee Co.Ltd., [1955] A.C. 457.
 13. The Commonwealth v. Quince, note 3 supra.

not recover for the loss of her comfort and society where that
(14) was merely impaired. The High Court, in Toohy v. Hollier,⁽¹⁵⁾ has
rejected this, allowing compensation for all practical domestic
disadvantages suffered by a husband in consequence of his wife's
impaired health or bodily condition.

At common law the contributory negligence of the
injured person was not a defence to the actions for loss of
(16) services or for loss of consortium.⁽¹⁷⁾ In view of the express
provision in the Act making contributory negligence a defence and
providing for reduction of damages in accordance with the passenger's
share of the responsibility for the damage, it is probable that the
passenger's contributory negligence will be imputed to those making
relational claims for his injury and the damages, therefore, will
be reduced.

3.

STATUTORY EXCEPTIONS TO EXCLUSIVENESS OF THE LIABILITY

There are other exceptions to the principle that the
liability created by the act is an exclusive one. Section 37 saves
two liabilities that may arise under other laws in respect of the
passenger, but provides that all the amounts recoverable under
this section or otherwise shall not exceed the amount of the limit.

(1).

INDEMNITY UNDER WORKERS' COMPENSATION ACTS.

The first exception is the liability of a carrier
to indemnify an employer under Workers' Compensation legislation

14. Best v. Fox, [1951] 2 K.B. 639. The House of Lords ([1952] A.C. 716)
was equally divided on the question.

15. Note 5 supra.

16. Williams, Joint Torts and Contributory Negligence, p.454.

17. Mallet v. Dunn, [1949] 2 K.B. 180.

of a State, Territory or the Commonwealth. An indemnity or lien under the workers' compensation laws of any other country e.g. under section 29 of the Workers Compensation Law of New York (18) mentioned in Williams v. Usher could not be enforced. I have already quoted a typical provision from a workers compensation (19) act giving a right of indemnity. The employee's right to indemnity depends upon the existence of a legal liability in the carrier. Section 28 does, it is submitted, create a "legal liability in the carrier" within the meaning of the Workers' Compensation legislation. If the carrier is liable under the Act, the employer will have a right to indemnity from the carrier under the Workers' Compensation Legislation, provided the employer has paid compensation to his employee.

In James S. Adams & Co. Pty. Ltd. v. State Rivers and (20) Water Supply Commission it was suggested that, if the worker had been contributorily negligent, his contributory negligence would be a total bar to the employer's claim notwithstanding the existence of the apportionment legislation, for that legislation does not extend to the statutory right of indemnity. It is submitted that this position will not obtain for claims for an indemnity against the carrier, because the liability of the carrier to the passenger is not based upon negligence and by virtue of the Act, contributory negligence is not a total defence. It is submitted that the contributory negligence of the passenger should be imputed to his employer, for the liability of the carrier,

18. (1955) 94 C.L.R. 450.

19. See p. 195.

20. [1960] V.R. 542.

as I have already suggested, includes such defences as the Act confers upon him, and consequently the amount claimed will be reduced in proportion to the passenger's contributory negligence.

(11)

CARRIER'S LIABILITY TO JOINT TORT-FEASORS.

The second exception is the liability of the carrier to pay contribution to a tort-feasor who is liable in respect of the death of, or injury to, the passenger. Thus the right of a tort-feasor to contribution falls to be determined by reference to the laws of the State or Territory in which the damage occurred and, indeed, the carrier's right (if any) to contribution is determined by the same laws.

(21)

All the States and most of the Territories have legislation in substantially similar terms abolishing the rule in (22) Merryweather v. Nixon that a joint tort-feasor who has been adjudged liable cannot get either an indemnity for the whole of what he has paid nor contribution of an aliquot part of it. The material provision in those Acts is as follows:-

"Where damage is suffered by any person as a result of a tort (whether a crime or not) -

(a) judgment recovered against any tort-feasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damages;

(b)

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is,

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21. N.S.W., Law Reform (M.P.) Act 1946: Vic., Wrongs Act 1958, Part IV: S.A., Wrongs Act 1936-51, S.25: W.A., Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947, s.7: Qld., Law Reform Act of 1952, Part II: Tas., Tortfeasors & Contributory Negligence Act 1954, s.3: A.C.T., Law Reform (M.P.) Ordinance, s.11
22. (1799) 8.T.R.186; see also *Sadler v. Cresco Fertilizers Ltd.*, [1939] V.L.R.438.

or would if sued have been, liable in respect of the same damage (whether as a joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

Other provisions limit the amount that the plaintiff may recover so as not to exceed in the aggregate the amount awarded by the judgment against the tort-feasor first sued and provide for contributions to be paid in proportion to the shares of responsibility of the joint tort-feasors for the damage.

Two related questions arise, the answers to which depend upon the construction of paragraph (c) of the joint tort-feasors legislation :-

(i) has the carrier a right to contribution from a tort-feasor;

(ii) has a tort-feasor a right to contribution from a carrier.

Carrier's Right to Contribution.

The statutory right to contribution is limited to those liable in tort. It is confined to claims by one concurrent tort-feasor from another. ⁽²³⁾ "Tort-feasor is used to describe the character of the legal liability... It is used, in other words, to confine the operation of the provisions to cases where a tort has been committed on the side of the person making contribution as well as on the side of the person seeking it." ⁽²⁴⁾ Furthermore, the opening words have been construed to mean "any tort-feasor

23. Williams, Joint Torts and Contributory Negligence, p. 126.

24. Per Dixon C.J., McTiernan, Taylor and Windeyer J.J., Genders v. Government Insurance Office of New South Wales, (1959) 33 A.L.J.R. 117, 121.

adjudged liable in respect of damage suffered by any person as a result of a tort."⁽²⁵⁾ Lastly the word "otherwise" in the expression "whether as a joint tort-feasor or otherwise" covers separate and distinct pieces of negligent conduct which cannot be considered joint, although as a matter of causation they contribute to the same damage."⁽²⁶⁾ Thus paragraph (c) is construed as though it were expressed as follows:-

"Any tort-feasor adjudged liable in respect of damage suffered by any person as a result of a tort may recover contribution from any other tort-feasor who is or would if sued have been liable in tort in respect of the same damage (whether as a joint tort-feasor or a several tort-feasor)".

In order to ascertain the liability of the carrier the Courts in applying paragraph (c) must turn to the Act. The rule of liability in the Act is, as I have already mentioned, not delictual. It is in substitution for any other civil liability of the carrier for death or injury of a passenger, so that it replaces and therefore abolishes the common law of tort to the extent that the common law applies to the injury or death of a passenger. The carrier, when he violates the act, is not thereby under a delictual liability; he is submitted to the statutory liability. He is, therefore, when judgment is entered, not adjudged liable in tort and he is not a joint tort-feasor. It follows

25. The Full High Court, Bitumen Oil Refineries(Aust)Ltd. v. Commissioner for Government Transport, (1954) 92 C.L.R.200,212.

26. Note 24, supra.

therefore that he has no right to contribution.

Joint Tort-Feasors Right to Contribution from the Carrier.

The tort-feasor's right to contribution from the carrier must also be determined by reference to the nature of the liability imposed by Part IV. The carrier is not a tort-feasor for the reasons stated in the preceding paragraph. He is not a person who is or would if sued have been held liable in tort in respect of the same damage, because by force of the Act he cannot be sued in tort, therefore, he cannot be liable in tort, and he cannot be a tort-feasor, Section 37 does not assist the tort-feasor. It does not confer a right to contribution; it merely preserves the right, if any, which the tort-feasor may have under another law. The exceptions to the rule in Merryweather v. Nixon do not assist the tort-feasor.⁽²⁷⁾ This argument while superficially attractive fails to give full weight to the opening words of section 37 "Nothing in this Part shall be deemed to exclude any liability of a carrier" and the conclusion of the argument is manifestly inconsistent with the intention. The words "Nothing in this Part...." must, it is submitted, mean that a carrier may, for the purposes of the exception be liable in tort, notwithstanding the provisions of the Act excluding the liability of the carrier in tort. It is submitted, therefore, that the tort-feasor has a right to contribution against the carrier, provided he can prove that the carrier, if sued, would have been liable in tort in respect of the damage. This conclusion does not affect the conclusion reached in the preceding paragraph that the carrier has no right to contribution from a joint tort-feasor, for there is no like provision in the Act

27. Williams, note 23 supra, at p.p. 80-84.

exempting his notional right to contribution from those provisions of the State laws which have been construed not to confer upon the carrier a right to contribution.

Before a tort-feasor may sue for contribution, he must be adjudged liable or his liability must have been ascertained by judgment. It would seem that it is sufficient if the tort-feasor's liability is ascertained by an arbitral award or by an agreement amounting to accord executory followed by satisfaction. (28) Section 37 provides that the section will not operate so as to increase the limit of liability of a carrier in respect of a passenger beyond the amount fixed by or in accordance with the Part. Consequently the tort-feasor will not be entitled to more than the amount of the limit (29) and he may have to compete against other claimants for a share. In assessing the shares of responsibility the Courts will first decide the carrier's share of the responsibility and the amount of contribution which he would pay, as if there were no limit, and, if the amount of contribution exceeds the limit, it will reduce the amount of contribution to the limit. The words "fixed in accordance with this part" mean that the tort-feasor will be entitled to the benefit of the higher limit than that prescribed in the Part fixed in the contract of carriage in pursuance of section 31 (1).

28. Bitumen Oil Refineries(Aust.)Ltd. v. Commissioner for Government Transport, note 25 supra, 212.

29. Unsworth v. The Commissioner for Railways (Q.), (1958) 101 C.L.R. 73 and Marks v. Victorian Railways Commissioners, [1955] V.L.R. 1.

Real problems may arise under the Part from the right of various persons to claim against the amount of the limit. A passenger employed by B is killed by reason of the negligence of the carrier and the negligence of a third party referred to respectively as D_1 and D_2 and three persons referred to as P_1 and P_2 and P_3 have rights of action under the Act and the Wrongful Death Legislation. B pays out Workers Compensation to P_3 only. P_1 sues D_1 under the Act. P_2 sues D_2 under the Wrongful Death Legislation. P_3 does not bring an action. B has a right of action for loss of services against D_1 and for contribution under paragraph (a) of section 37 against D_1 . D_2 if adjudged liable has a right to contribution against D_1 . Four actions would lie against the carrier and therefore against the amount of the limit. The problem is how should it be divided amongst the claimants. The Act is silent. There is however authority in the Court, by virtue of sub-section (10) of section 35, to make at any stage of the proceedings any such order as appears to it to be just and equitable in view of the provision of the Part limiting the liability of the carrier and of any proceedings which have been, or are likely to be, commenced against the carrier. Presumably using this power the Court may make such distribution of the amount between the respective claimants as it considers to be just and equitable.

It is strange that the Act does not give a right to contribution against a person whose negligence contributed to the damage and yet it allows the carrier the defence of negligence of the passenger, very often morally at all events something of a lower order than the negligence of a third party. The passenger's negligence only endangers his own person whereas the negligence of the third party may endanger the lives of those on board the aircraft.

C.

SERVANTS AND AGENTS OF THE CARRIER.

Clearly one purpose of the Act is that the carrier should not be obliged to pay an amount in damages higher than the limit (or such amount as he has specified in the contract of carriage) in respect of the death or injury of a passenger. That purpose could be defeated. It is customary in the contracts of employment between the carrier and his flying personnel for the carrier to indemnify them against claims made against them personally for their negligent acts in the course of their employment. The carrier may also indemnify agents against the same type of claim. As a result the carrier in addition to being liable up to the amount of the limit might have to pay out additional amounts under the contracts of indemnity for the death or injury of the one passenger in the course of the carriage by air.

The Warsaw Convention did not make any provision for this situation. As a result it is still open to doubt whether the limit on liability extends to claims against the servants or agents of the carrier. The better view is that it does not. Article XIV of the Hague Protocol corrects this omission and it is the provisions of that article that are, in substance, repeated in Section 33 of the Act.

30. Servants and agents not entitled to limit : Drion, Limitation of Liabilities in International Air Law, para. 136; *Pierre v. E.A.L.*, 1957 U.S. & C. Av. R. 436; *Stratton v. Trans Canada Airlines et al*, 1961 U.S. & C. Av. R. 246, 250. Servants and agents entitled to the limit: *Wanderer v. Sabena and Pan American Airways*, 1949 1955 U.S. & C. Av. R. 250; per Denning L.J. in dicta, *Adler v. Dickson*, [1955] 1 Q.B. 158, 184.

Section 33 provides that, if an action in respect of any damage for which the carrier under the Act would be entitled to invoke the limit is brought against one of his servants or agents, the servant or agent, provided that he proves that he acted within the scope of his employment or authority, is entitled to avail himself of the limit whether it be that specified in the Act or such higher amount as is specified in the contract of carriage. The aggregate of the amounts recoverable from the carrier his servants and agents may not exceed the amount of the limit. The right to bring an action is extinguished after the expiration of two years, the date from which time commences to run being established by reference to section 34.

As section 33 does not deal with the basis of liability of the servants or agents, source of the cause of action of persons injured is the general law. The claimant will have to prove the existence of fault on the part of the servants and agents and, even if he does so, he will at the most obtain damages to the extent of the limit which he would have obtained from the carrier without running the risks that attend an action at common law. Plainly it is to the claimant's advantage to proceed under the Act against the carrier and not proceed against the servants and agents. Only when provable damages exceed the amount of the limit and the servants or agents were acting outside the scope of their employment or authority, is there any advantage in suing them either in preference to the carrier or in addition to the carrier. A vital consideration in this circumstance would be whether the servant has sufficient means to satisfy the judgment.

As the liability of the servants or agents arises from the general law they may, if it is possible, contract out of their liability. It is difficult to perceive a practical way of doing this. The contract of carriage is not the appropriate instrument as it is only effective inter partes.⁽³¹⁾ In the contract of employment they could authorize the carrier to contract out of liability on their behalf but it is doubtful if such an exemption would be effective, as no consideration flows from the crew to the passenger.⁽³²⁾ The services provided by them to the passenger, arise not from an arrangement between them and the passenger, but from the contract between the passenger and the carrier, and they are compelled to provide those services by their contracts of employment with the carrier. It seems that nothing short of a release under seal would be effective.

The limit is, of course, not confined to claims by passengers. The servant or agent is entitled to avail himself of it, if the claim is one in respect of the death of the passenger or is made by a joint tort-feasor or by an employer for loss of services or for an indemnity under the Workers' Compensation Acts.

A person to be entitled to the benefit of the section must :-

- (a) be a servant or agent of the carrier;
- (b) prove that he was acting within the scope of his employment or authority; and

31. *Cosgrove v. Horsfall*, (1945) 62 T.L.R. 140; *Adler v. Dickson*, note 30 supra.

32. See *Midland Silicones v. Scuttons*, [1959] 2 Q.B. 171 in which Diplock J., at p. 193, pointed out that "the defendants cannot limit their liability to the plaintiff in tort by relying upon a contract between the plaintiff and a third party to which they were not parties."

(c) show that as a matter of law the carrier was entitled to avail himself of the limits for the damage in respect of which the action is brought.

It is reasonable to assume that "servants" "agents", "with the scope of the employment" and "within the scope of the authority" will be construed by reference to the scope given to those words and expressions in the law of torts. The liability of the servants or agents will arise directly or indirectly from the tort, directly when the servant or agent is sued in negligence, trespass to the person or battery or assault and indirectly where a wrongful death action or an action for contribution by a joint tort-feasor or a claim for indemnity under the Workers' Compensation Acts is brought against him.

1.

SERVANT AND SCOPE OF THE EMPLOYMENT.

(1.)

SERVANT.

The Restatement of the Law, Agency, defines a servant as " a person employed to perform service for another, and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control."⁽³³⁾ There are other indicia of the existence of the master and servant relationship, the existence of the power of selection, payment of wages or other remuneration, the right of suspension or dismissal,⁽³⁴⁾

33. P.483. Approved for Australia by Latham C.J. in Federal Commissioner of Taxation v. J.Walter Thompson(Aust.) Pty.Ltd., (1944) 69 C.L.R. 227, 233 and by Kitto J. in Attorney-General for N.S.W. v. Perpetual Trustee Co.(Ltd)., (1951-1952) 85 C.L.R. 237, 299.

34. Short v. J.W. Henderson Ltd., (1946) 62 T.L.R.472.

but the decisive factor is whether the person alleged to be master has the control or the right to control a person in the performance of the service. (35) Kitto J. in the following passage analyses the right to control:-

"It will be seen that three elements are involved: first, obedience to orders; secondly, the obedience to orders that is required in obedience to order in doing work; and thirdly, the doing of the work must be for the benefit of the master, that is, it must relate to his own affairs. As to the first, no more need be said than this, that the obligation of obedience exists while the relationship continues. The relationship may be voluntary; and whether voluntary or not, it may be determinable at the will of either party; but without the obligation to obey orders there can be nothing in the relationship, and it therefore cannot subsist. As to the second element, that the obedience entailed must be obedience to orders in doing work, the point which is vital is that the master's authority must extend both to ordering that the work shall be done and to directing how it shall be done. Bramwell L.J. said, in Yewens v. Noakes [1880] 1 Q.B.D. 536 at p.p. 532, 533):- 'A servant is a person subject to the command of his master as to the manner in which he shall do his work'; and in Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd. [1947] A.C. 1 at p.17 Lord Porter said '...it is not enough that the task to be performed should be under his (the master's) control, he must also control the method of performing it'. Citations to the like effect might be multiplied. As to the third element, the statement that the doing of the work must be for the benefit of the master does not mean, of course, that the direct benefit from the work itself must necessarily accrue to the master; he may, without altering the relationship, direct his servant to do work which will benefit another But the doing of this work by one person must be required by another as a means whereby that other may attain ends of his own. A foreman, a head of a government department, or an army officer may have full power to give the most detailed orders to a subordinate as to the manner in which the latter shall do work, and yet no one would suppose that the relation of master and servant exists between them". (36)

The principles of law determining the relationship of master and servant have been settled, although their application gives rise

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35. Short v. J.W.Henderson Ltd., note 34 supra, 429, and per Dixon J., Humberstone v. Northern Timber Mills, (1949) 79 C.L.R. 389, 404.
36. Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.), note 33 supra, 299, 300.

to real difficulties. Under the strain of changing social conditions and of the interference of the legislature in the relationship there have been judicial suggestions that in the appropriate case the legal principles should be formulated afresh to meet changing conditions.

One suggested alternative is the organization test. "Was the alleged servant part of his employer's organization? Was his work subject to co-ordinated control as to where and when rather than how."⁽³⁷⁾ This test has received some support in recent Court of Appeal decisions⁽³⁸⁾ but it is unlikely that it will be adopted by the High Court, as in Zuijls v. Wirth Bros.,⁽³⁹⁾ a case in which the review could have been made, the Full High Court reaffirmed the control test saying that what matters is lawful authority to command so far as there is scope for it, and there must always be some room for it if only in incidental or collateral⁽⁴⁰⁾ matters.

(11)

SCOPE OF THE EMPLOYMENT.

To qualify for the benefit of the limit the servant must prove that he was acting within the scope of his employment. The burden of proving this lies upon him. In contrast, at common law, the burden of proving this lay upon the claimant. The reversal

37. John G. Fleming, *The Law of Torts*, 360.

38. *Stevenson Jordan & Hanson Ltd. v. MacDonald & Evans*, (1952) 1 T.L.R. 110; *Bank voor Handel v. Slatford*, [1953] 1 Q.B. 248, 295; and *Roe v. Minister of Health*, [1954] 2 Q.B. 66, 91.

39. (1955) 93 C.L.R. 561.

40. Note 39 supra, 571.

is logical. At common law the claimant is endeavouring to render the master liable for the tort of the servant. In the Act the role of the scope of the employment is quite different. The purpose is not for ascertaining whether the master is liable or not but for ascertaining if the servant is entitled to what is in the nature of a defence.

The scope of the employment is equivalent to the course of the employment;⁽⁴¹⁾ accordingly decisions on the scope of both phrases are relevant. Within the scope of the employment is used to define the boundary of the master's liability for the torts of his servants. Once having ascertained that the master would have been liable for the tort of the servant, because the servant was acting within the scope of his employment, the servant becomes entitled to the protection accorded by the section. The expression is to be construed liberally and in fact the Courts have done so.⁽⁴²⁾ Within the scope of his employment does not mean in the exercise of his authority. The decisive element is rather the acts, functions or operations which the servant is employed to perform or do, and whether the damage flowed from the negligent performance or doing of those functions or acts or operations. Thus, if the act belongs to a class of acts which the servant is employed to do, notwithstanding that he performs them in a manner or at a place forbidden by his master, he will be said to be acting within the scope of his employment.⁽⁴³⁾

41. Buggs v. Brown, (1919) 26 C.L.R. 110, 117. Charlesworth on Negligence, 3rd Edition, 66.

42. Lloyd v. Grace Smith & Co., [1912] A.C. 716, 736; Navarro v. Moregrand Ltd., (1951) 2 T.L.R. 674, 680-681.

43. Buggs v. Brown, note 41 supra, 118 & 132.

The master is not liable, if what the servant did, was a thing so remote from his duty as to be altogether outside of, and unconnected with, his employment.⁽⁴⁴⁾ Thus, if he is employed to perform one function and in absence of the appropriate servant he takes it upon himself to perform another which he is unqualified to perform, he is doing something unconnected with his employment.⁽⁴⁵⁾ If in the absence of pilots a flight engineer took it upon himself to take the aeroplane off, he could not be said to be acting within the scope of his employment.⁽⁴⁶⁾ It would be otherwise, if the pilot permitted him to take the aircraft off.

The mere fact that the act causing the damage, or in the course of which the damage occurs, is forbidden does not take it out of the scope of the employment. "To have that effect it must be such that its violation makes the servant's conduct complained of so distinctly remote and disconnected from his employment as to put him qua that conduct virtually in the position of a stranger."⁽⁴⁷⁾ Where the servant flies the aircraft at a speed which he is forbidden to fly and, as a result, a passenger is injured, he is acting in the scope of his employment.⁽⁴⁸⁾ But where the master prohibits the carriage of unauthorized persons and there are notices to that effect and the person carried knew of the prohibition, the servant in carrying that person is not acting within the scope of his employment.⁽⁴⁹⁾ The distinction that seems

44. Bugge v. Brown, note 41 supra, 118.

45. Beard v. London G.O. Co., [1900] 2 Q.B. 530.

46. Ricketts v. Tilling, [1915] 1 K.B. 644.

47. Bugge v. Brown, note 41 supra, 119.

48. Limpus v. London General Omnibus Co., (1862) 1 H. & C. 526.

49. Twine v. Bean's Express Ltd., (1946) 62 T.L.R. 155, but see strong argument to the contrary in Hamilton v. Farmers Ltd., [1953] 3 D.L.R. 382, which it is submitted is more consistent with principle. Perhaps Twine v. Bean's Express Ltd. is explicable in terms of agency. The prohibition limited the scope of the servant's (qua agent) authority and that limitation was known

to be made is between prohibitions which delimit the boundaries of what the servant is employed to do and those that relate to the mode of performing the duties entrusted to the servant. Acts in disobedience to the first class of prohibition lie outside the scope of the employment. Acts in disobedience of the second class of prohibition lie within the scope of the employment. (50)

Another class of case which should be mentioned is the case of the servant on a frolic of his own. The ordinary illustration of this class is where a servant driver deviates from his normal route for purposes of his own and in the course of the deviation injures some person. It seems that, for the wrongful act to lie outside the scope of the employment, the deviation must be of such a substantial degree and so much for the purposes of the servant that it cannot be said that the deviation is incidental to the employment. (51) Lastly there are circumstances in which the servant deliberately commits a wrongful act. In certain cases the master is vicariously liable

49 contd. to the person injured so that the doctrine of ostensible authority could not be relied upon. This reasoning is not valid for *Conway v. George Wimpey & Co. Ltd.*, [1951] 2 K.B. 266, as the person carried did not have notice that the carriage was unauthorised. Quaere whether these two Court of Appeal decisions will be followed in view of *Commissioner for Railways (N.S.W.) v. Cardy*, (1960) 34 A.L.J.R. 134, where some, at least, of the Court abandoned the dichotomy of trespasser in favour of applying the general principles of negligence, the test applied being whether the land owner could have reasonably foreseen that persons would trespass.

50. Winfield on Tort, 6th Edition, p.152; Fleming, The Law of Torts, p.366.

51. *Whatman v. Pearson*, (1868) L.R. 3 C.P. 422; *Storey v. Ashton*, (1869) L.R. 4 Q.B. 476; *Chaplin v. Dunstan Ltd.*, [1938] S.A.S.R. 245; *Christmas v. Nicol Bros.*, (1941) 41 S.R. (N.S.W.) 317.

for that wrongful act. The master is liable, if the act was done to advance his interests. He is liable, if the servant unlawfully assaults a passenger in the mistaken belief that the passenger is wrongfully in the vehicle, ⁽⁵²⁾ but he would not be liable if the assault was made for personal vengeance. ⁽⁵³⁾ The distinction can be a fine one. In Petterson v. Royal Oak Hotel Ltd. ⁽⁵⁴⁾ the New Zealand Court of Appeal held that a barman, who threw a glass at a customer as he was leaving and injured him, although the act was an expression of personal resentment, was not performing an independent act but was doing his work in an improper way.

Whether a servant is acting within the scope of his employment is a question of fact to be decided in the light of the general principles. ⁽⁵⁵⁾ It must be admitted that these principles are exceedingly general, but, perhaps, this is due in part to the complex fact situations often involved and the desire of the Courts to leave themselves plenty of room for the exercise of a discretion based on their notions of justice and social expediency.

2.

AGENTS AND SCOPE OF AUTHORITY.

(i.)

A G E N T S

One of the major difficulties of the Part is to ascertain the persons who are agents and who are entitled to the protection of the section. This is due to the language of the

52. Bayley v. Manchester Ry., (1873) L.R. 8 C.P. 148.

53. Warren v. Henlys, [1948] 2 All E.R. 935.

54. [1948] N.Z. L.R. 136.

55. Marsh v. Moores, [1949] 2 K.B. 208, 215.

section and to the circumstances that the part of the law of agency to which the section refers is still in the formative stage of development.

Agency Primarily Relevant to Law of Contracts.

Agency is primarily related to the law of contract. Commonly an agent is one who is authorized to enter into contracts on behalf of another, the principal, or at least to commence negotiations on his behalf. Indeed at the end of the last century Street wrote that agent is used to indicate the representative in the field of contract.⁽⁵⁶⁾ This is reflected in language used in the leading text book to define an agent and the authority of an agent. Bowstead defines an agent as a person who has the privilege or right to act on behalf of another so as to affect his legal relations with third parties.⁽⁵⁷⁾ Authority is defined as the agent's privilege or right to act for the principal so as to affect his legal relations with third parties.⁽⁵⁸⁾ This becomes more apparent when the section on the liability of the principal for the agent's tort is examined. The principal is liable for loss or injury caused by the wrongful act of his agent, whether or not his servant, if the act be one of the class of acts within the actual or apparent authority of the agent and for such an act the principal may be liable notwithstanding that it be done for the benefit of the agent alone and not for that of the principal.⁽⁵⁹⁾ The editors point out

56. Street, The Foundations of Legal Liability, Vol. II, p.430.

57. Bowstead, on Agency, 12th Edition, p.1.

58. Bowstead, note 57 supra, p.2.

59. Bowstead note 57, supra, p.224.

in the general comment that the language must be treated with caution that agents are of many kinds and torts vary greatly in both history and nature so that words that are appropriate to one kind of tort may not be wholly appropriate to another. They state the language used is derived from leading cases on fraud and conversion. Clearly the language is appropriate to wrongful acts of agents in the course of contractual dealings. (60)

Agency in the Act not limited to Contractual Relations.

The liability of the principal for wrongful acts of his agents amounting to a breach by him (the principal) of a duty personal to himself is treated by Bowstead as a separate head of liability. (61) Similarly the principle of casual delegation is regarded with distaste and is treated separately. (62) But it is submitted that the first at all events and perhaps the second are the cases to which the section is directed. The liability of the principal in cases of this kind is not defined by reference to the language of authority. It follows that the language of the section is misleading and could be construed to so limit the scope of the section as to render it in its application to agents virtually ineffective by limiting it to agents authorized to enter into contractual relations. There are compelling reasons for rejecting this construction.

60. Bowstead, note 57 supra, p.p. 225-226.

61. Bowstead, note 57 supra, p.225.

62. Bowstead note 57 supra, p.p. 227 & 228 where he says:- "One may cavill at the notion of agency in this context, but the cases involved form a reasonably distinct group and do not appear to have implications wide enough to effect more general principles."

The fact is that language appropriate to an agent who is authorized to contract on behalf of another is not appropriate to the circumstance where a person is authorized to perform an operational function on behalf of another, such as, driving a motor vehicle for another or where a person has contracted to perform an operational function on behalf of another, such as, providing the stairways for the carrier's passengers to descend from his aircraft. In these cases, although sometimes the language of agency and authority are used, liability for the wrongful acts of the agent is imposed upon the principal, not because the agent is the principal's agent, but because the principal either controls the manner in which the agent performs the work, as in the casual delegation cases, or because the wrongful act of the independent contractor amounts to a breach by the principal of a duty personal to the principal, liability for non-performance or non-observance of which cannot be avoided by delegation to another.

This matter is illustrated by the servant who acts in two capacities as a servant simplicitor and as the agent of his employer. Operational functions such as driving vehicles fall within his duties as a servant and the master is liable for negligent acts of the servant in performing these functions. On the other hand the power of the servant to contract or to deal with the master's property e.g. by permitting another to travel upon a vehicle or drive a vehicle or permitting another on the master's land is referable to his capacity as an agent. The liability of the master in the case of the operational function depends upon whether the servant was when performing the wrongful act acting within the scope of his employment. The master's

liability where the servant is dealing on his behalf with others depends upon whether the servant was acting within the scope of his authority (real or ostensible).⁽⁶³⁾

Meaning of Agent.

The word "agent" presents difficulties. Writers on the subject of agency have expressed conflicting opinions. One view is that an agent is either a servant or an independent contractor.⁽⁶⁴⁾ Another is that an agent is either a servant, an independent contractor or a person who is neither a servant nor an agent but who performs a function on behalf of some other person, e.g. the person driving a car on the business of the owner.⁽⁶⁵⁾ Furthermore one writer maintains that all servants are agents;⁽⁶⁶⁾ but the majority of writers agree that a servant may or may not be an agent,⁽⁶⁷⁾ and all agree that an independent contractor may be an agent.

The section treats servants and agents as if they were distinct categories which, it is clear, on the weight of authority they are not. As the Act has made the distinction, the category of "agents" for the purposes of the section is therefore narrower than it is at law. It is limited to those

63. See Ferson, The Law of Agency, Chapter 1.

64. Restatement of the Law, Agency, p.p. 7-13; Bowstead, note 57 supra, p.2; C.A. Wright, (1937) 15 Can. Bar. Rev. 285. In substance this is Street's view (note 56 supra), although he rejects the view that a servant is or can be an agent.

65. Powell, The Law of Agency, p.25; Halsbury, 3rd Edition, Agency, p.p.145-146.

66. C.A. Wright, note 62 supra.

67. Powell, note 65 supra, p.p.6-25; Ferson, note 63 supra, chapter 1; de Villiers & Macintosh, The Law of Agency in South Africa, 2nd edition, p.p.264-268.

persons to whom the carrier has delegated functions, but who are not controlled by the carrier as to the manner in which they perform the function delegated to them. The distinction made in the section should not lead to confusion as the Courts themselves have failed to recognise at times the distinct capacities in which a servant may
(68)
act.

Furthermore, as I have pointed out, the section deals with operational functions, not powers to create legal relations, and operation functions are in the sphere of master and servant the functions of a servant qua a servant rather than of servant qua an agent.

There are two material cases in which the negligence of a person who is not a servant may be attributed to the principal. These are the cases in which an independent contractor's act of negligence is attributed to his employer and the owner of a car is answerable for the negligence of a driver to whom he has entrusted the driving of his car.

Liability for Negligence of Independent Contractors.

An independent contractor is a person who undertakes to produce a given result, but so that in the execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. The general rule is that the employer is not liable

68. As for example *Twine v. Bean's Express Ltd.* (1946) 62 T.L.R.458. The servant was forbidden to carry any one other than his employer's servants. A notice to that effect appeared in the vehicle. The plaintiff was permitted to ride in the vehicle by the employee and was aware of the prohibition. The facts were similar in *Conway v. George Wimpey & Co.* (1951) 2 K.B.266. In both cases the employer was held not to be liable as the driver was acting outside the scope of his employment and the defendant was a trespasser. Each is explicable on principles of agency. The driver as an agent dealing on behalf of the master acted outside the scope of his authority.

for the acts of negligence of an independent contractor but there are many important exceptions so many in fact that it has been said - "Indeed it would be proper to say that the rule is primarily (69) important as a preamble to the catalogue of exceptions." The only exception which seems directly material is that stated by Pollock C.B. in Hole v. Sittingbourne & etc. Ry. - "A person authorized by statute or bound by contract to do a particular work cannot avoid responsibility by contracting with another person to do the work." (70)

This principle is applied in the hospital cases to impute liability to the hospital for the acts of doctors or nurses who are not servants. In Gold v. Essex County Council Lord Greene restated the principle in the following terms -

"Apart from any express term governing the relationship of the parties, the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is a remedy in contract while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person whether, servant or agent, to discharge it on his behalf and this is equally true whether or not the obligation involves the use of skill." (71)

69. Pacific Fire Insurance Co. v. Kenny Boiler & Manufacturing Co., 201 Minn. 500, 503.

70. (1861) 6 H. & N. 488, 497.

71. [1942] 2 K.B. 293, 301. Other cases on the same subject are: Cassidy v. Minister of Health, [1951] 2 K.B. 343; Roe v. Minister of Health, [1954] 2 Q.B. 66; Bolam v. Friern Hospital Management, [1957] 1 W.L.R. 589.

It has been applied to render a wharf owner liable for damage caused to a vessel anchored at his wharf by the negligence of an independent contractor whom he employs to remove it when it was in danger.⁽⁷²⁾ Other illustrations of the principle could be given,⁽⁷³⁾ but perhaps the most important are those relating to onward carriage on another carrier's vehicle. Where the first carrier contracts with the passenger for a journey to be performed partly on his own vehicle and partly on vehicles supplied by another, the contracting carrier is liable not only for the negligence of himself, but also for the negligence of those responsible for the other vehicle.⁽⁷⁴⁾

Thus it seems that the contracting carrier cannot free himself from the duty of care which he assumes when he enters into a contract of carriage merely by delegating to an independent contractor part or all the functions to which the duty of care relate and which under the contract he undertakes to perform. Under the contract of carriage and in some cases in tort he is under a duty to provide a competent crew, an aircraft that is as safe as reasonable care and skill can make it and that is therefore in good repair and to provide reasonably safe means of entry and egress from the aircraft.⁽⁷⁵⁾ It follows from the principle just stated that, should he delegate the performance of any of the functions referred to an independent contractor, e.g. maintenance to an outside

72. *Beckingham v. P.J.M. Steamship Co. and Anor.*, (1957)S.R.(N.S.W.) 403.

73. See *Chapman, Liability for Negligence of Independent Contractors*, (1934) 50 L.Q.R. 71-81.

74. *Great Western Railway v. Blake*, (1862) 7 H. & N.987, and *Thomas v. Rhymney Ry.*, (1871) L.R. 6 Q.B. 266.

75. Discussed in chapter IV.

organization or provision of stairways to an independent contractor, he will be liable at common law for the negligent acts of those contractors which injure the passengers whom he carries. It seems that at common law he may be liable for the negligence of the manufacturer of the aircraft.⁽⁷⁶⁾

Is the Function Customarily Delegated?

At this point it is necessary to refer to another matter for the purpose of limiting the class of persons who may be agents for the purposes of the section. To describe the manufacturer of the carrier's aircraft as an agent seems a complete misuse of the word, agent. If the manufacturer of aircraft is an agent, then so is the butcher who supplies tainted meat to the owner of a restaurant. The dividing line is suggested in the following passage from Harper and James on the Law of Torts -

"Business enterprises, too, commonly farm out many tasks which may well be regarded as normal incidents to their enterprises. The case of the broker and the telegram or that of the lawyer going to court in a taxi will illustrate this. Where the entrepreneur uses a familiar existing pattern questions seldom arise. Probably no one would ever think of suing the broker for the Western Union messenger boy's negligence in killing the pedestrian, or the lawyer for the negligence of the taxi driver. Questions arise mainly where an enterprise makes use, regular use, of an individual (e.g. salesmen or newsboys) or units that would ordinarily be regarded as subordinate to it (such as filling stations of the great oil companies), in order to get something done which would ordinarily be regarded as a part of its enterprise. It is in this type of situation that the courts will carefully scrutinise the question of control. It is here that the bulk of litigation occurs." (77)

The question to be asked then is whether the function being performed by the independent contractor is one which would ordinarily be regarded as part of the carrier's enterprise and the persons performing it would be normally regarded as being subordinate to the carrier.

76. But see p 112 where doubt is expressed about the correctness of this proposition.
77. 8.11.05

Agent Deals with Others on Behalf of Principal.

An agent represents another person. He represents him by virtue of the authority granted to him to deal with persons on behalf of the principal. This, at least, is the basis of agency in the law of contract. The transposition of the conception of agency to the situation where a person is authorized to perform operational functions on behalf of another does not mean the abandonment of one of the fundamentals of the contractual rule, that the agent deals on behalf of the principal with other persons, for otherwise the concept is meaningless. Furthermore, it is submitted that the agent must deal directly with the persons with whom he is authorised to deal. If the principal intervenes between the agent and the person, it is the principal that is dealing with the person and not the agent. Where the independent contractor supplies the service directly to his employer, but a third party thereby benefits by virtue of arrangements between him and the employer, the independent contractor cannot be said to be an agent, for he is not dealing with the third party, he is dealing with his employer. Thus, when the employer is an intermediary between, say, the supplier of the service and the user, it cannot be said that the supplier is the agent of the employer. But to hold that in circumstances just mentioned the independent contractor is the agent of the employer in supplying the service to the user is to do violence to the fundamental conceptions of agency, namely that the agent acting on behalf of the principal deals with another person. In short, it is submitted that the independent contractor must supply the service directly to the passengers.

Tests of Whether Independent Contractor is an Agent.

Thus three questions have to be answered in the affirmative before an independent contractor can be regarded as an agent for the purposes of the section -

- (i) whether the function which he is performing is one which would ordinarily be regarded as part of the carrier's enterprise and he would normally be regarded as being subordinate to the carrier;
- (ii) whether the wrongful act of the independent contractor would be imputed to the carrier on the basis that the carrier is in breach of a duty personal to himself which he cannot escape by delegation to another; and
- (iii) whether the service provided by the independent contractor is supplied directly to the carrier's passengers.

Quite clearly the manufacturer of aircraft would be excluded, for, in his case, the answer to the first question would be in the negative. Furthermore, Davie v. New Merton Board Mills (78) supports this view. In this case the House of Lords held that, where a master buys from a supplier tools made by a well-known manufacturer, he does not thereby delegate performance of his duty to take reasonable care to provide proper tools for his servant's use, for in no sense is the manufacturer the delegate or agent of the master. The operator of navigation, meteorological and air traffic services fails to meet the test. But probably the owner of an aircraft chartered with crew to operate a portion of the carrier's route would be protected by this test. The independent contractor providing passenger handling services

78. [1959] 1 All E.R. 346, particularly Lord Tucker at p.369.

would be entitled to the benefit of the section. On the other hand the independent contractor who maintains the aircraft of the carrier would not fall within the section, as he does not deal directly with the passengers.

Owner of Car Responsible for Negligence of Driver.

An accepted principle, at least in the case of motor cars, is that the owner or bailee of a vehicle may be liable for the negligence of the actual driver of the motor car notwithstanding that the driver is not the servant of the owner or a contractor. The principle applies where "the owner or bailee being in possession of the vehicle and with full legal authority to direct what is done with it appoints another to do the manual work of managing it and to do this on his behalf in circumstances where he can always assert his power of control."⁽⁷⁹⁾ The vehicle must be "being used wholly or partly on the owner's business, or for the owner's purposes" and he escapes liability only "when he lends it or hires it to be used for purposes in which the owner has no interest or concern."⁽⁸⁰⁾ The driver is the agent of the owner, for, in point of law, the owner is driving by his agent and the principle is "simply that the management of the vehicle is done by the hands of another and is in fact and law subject to direction and control."⁽⁸¹⁾ The owner does not have to be present in person in the vehicle, so long as it is being driven wholly or partly on the owner's business or for the owner's purposes.⁽⁸²⁾

79. Soblusky v. Egan and Behrendorff, (1959-1960) 33 A.L.J.R. 463, 467, (unanimous judgment of the full High Court).

80. Per Denning L.J., Ormrod v. Grosville Motor Services, [1953] 1 W.L.R. 1120, 1122.

81. Soblusky v. Egan and Behrendorff, note 79 supra.

82. Ormrod v. Grosville Motor Services, note 80 supra.

The principle is an old one but it has not yet been extended beyond motor cars and other land vehicles. (83) It is doubtful if it would be extended to aircraft and, furthermore, it is difficult to envisage the circumstances in which the principle applies arising in commercial air transport operations.

Scope of the Authority.

Perhaps the principle that is material to the scope of authority in the section is the principle that the employer is not liable for the collateral negligence of the independent contractor. It is submitted that the contractor is entitled to the benefit of the section so long as he is performing the function delegated to him, so long as the person injured is a passenger and the damage is subject to the Act and so long as his negligence is not collateral negligence. It is "settled law that one employing another is not liable for his collateral negligence, (84) unless the relation of master and servant exists between them." It has been said that collateral negligence is "negligence in the manner of conducting the operation as distinct from the character of the operation itself." (85) These distinctions are not very helpful. One suggested criterion is the dissociation of the act in question from any inherent risk created by the work

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83. Chandler v. Broughton, (1832) 1 Cr. & Mee 29; Booth v. Mister, (1825) 2 C. & P. 66; Wheatley v. Patrick, (1837) 2 M. & W. 650; Samson v. Aitchison, [1912] A.C. 844; Parker v. Miller, (1926) 42 T.L.R. 408; Pratt v. Patrick, [1924] 1 K.B. 488; Hewitt v. Bonvin, [1940] 1 K.B. 188; Norton V. Canadian Steamship Ltd., [1961] 2 All E.R. 785.
84. Per Lord Blackburn, Dalton v. Angus, (1881) 6 App. Cas. 740, 829.
85. Per Latham C.J., Torette House Ltd. v. Berkman, (1940) 62 C.L.R. 637, 648.

(86) itself. This is hardly more helpful than the other formulations of the rule. It is submitted, however, that it would be collateral negligence, if one of the vehicles of the independent contractor (who provided the steps), while taking staff across the movement area of the airport to assist in handling passengers, struck the aircraft which was to be serviced and injured some passengers, for this would be "negligence in the manner of conducting the operation."

D.

LIMITATION OF LIABILITY AND PROHIBITION AGAINST CONTRACTING OUT.

The scheme finding legislative expression in the Act is completed by two provisions - Section 31 which limits the liability of the carrier in respect of the death or injury of each passenger to £7,500 or such higher amount as is specified in the contract of carriage and Section 32 which renders null and void any provision in an agreement tending to relieve the carrier of liability or fixing a lower limit.

Section 31(1) which limits the liability of the carrier for death or injury to a passenger provides:-

"Subject to the regulations relating to passenger tickets, the liability of the carrier under this Part in respect of each passenger, by reason of his death or injury, is limited to the sum of Seven thousand five hundred pounds or such higher sum as is specified in the contract of carriage."

The regulations referred to have not yet been made. The power to make regulations is conferred by Section 40. It includes power to make regulations making provision for the non-application of section 31, where specified provisions of the regulations relating

to the issue, form and contents of the passenger ticket have not been complied with. This provision is derived from Article III of the Hague Protocol which provides for non-application of the limit of liability in the event that a ticket has not been delivered or if the ticket delivered does not contain a notice that the carriage may be governed by the Warsaw Convention and the carriers' liability is in most cases limited by that Convention. However the section authorizes regulations of wider scope covering such matters as the form of the ticket and could, for example, require specification of the route and make non-application of the limit the penalty for failure to comply.

The power to make provision for non-application of the limit does not extend to the case where the carrier specifies a higher amount in the contract of carriage. Thus merely by specifying a limit of £7,510 the carrier can avoid the provisions of the regulations.

The liability of the carrier for each passenger in respect of death or injury is limited to £7,500 or such higher sum as is specified in the contract of carriage. Section 37 complements this by providing with respect to the relational claims of a joint-tortfeasor and an employer under the Workers' Compensation Acts that the carrier's liability is limited to those sums.

As the limit only applies in relation to liability by reason of the death or injury of a passenger, the carriers' liability for non-performance of the contract of carriage, for incomplete performance of the contract of carriage and for delay is not limited. His liability is limited notwithstanding that the passenger was injured or killed by reason of the negligent

operation of another one of his aircraft, for his liability is for death or injury occurring in the course of a carriage by any one of his aircraft. Quite clearly unlimited liability in the circumstances mentioned is inconsistent with those words and could only be supported if there were an express exception.

Likewise it is submitted deviation will not affect the application of the limit. Deviation is a principle applicable to contracts of carriage, the principle being that a deviation from the route contracted is a fundamental breach of the contract of carriage and no court can allow a fundamental breach "to pass (87) unnoticed under the cloak of a general exemption clause."

Fundamentally it is a principle of the law of contracts and as such can have no relevance to a system of liability that is solely a creature of statute and does not depend for its existence upon the existence of contractual relations between the persons to whom the system applies. To apply the principle would be to introduce an exception not expressed in the statute.

Section 31(1) provides :-

"Any provision of an agreement tending to relieve the carrier of liability in accordance with this Part or to fix a lower limit than the appropriate limit of liability provided by this Part is null and void, but the nullity of such a provision does not involve the nullity of the whole contract of carriage."

The source of this sub-section is article 23 of the Convention.

No doubt "agreement" was used in an attempt to cover every possible way by which an exemption could be secured. Thus

87. Sze Hai Tong Bank Ltd. v. Ramble Cycle Co. Ltd., [1959]
3 All E.R. 182, 185 and see p.96 as to deviation in relation
to contracts of carriage for goods.

it would cover a release in a separate instrument such as a deed. It includes the case where the passenger travels not under a contract of carriage but under an arrangement for an arrangement in essence is an agreement and at least involves an agreement to carry and an agreement to be carried.

Does the section strike down an indemnity given by a third party? Obviously it will render null and void a provision in the contract of carriage couched in terms of indemnity, if, in substance, it is no more than a release by the passenger of the carrier from his liability under the Act. There is no such thing as liability in the air. For there to be liability it must be owed to some one. The liability imposed by the Act is owed to passengers, to their dependents, in the case of death, and to their employers in the case of death or injury. Any provision which tends to relieve the carrier of liability to those persons is null and void even if it is expressed in language appropriate to an indemnity. If however the indemnity is a genuine indemnity i.e. it indemnifies the carrier against liability to a third party, it will be valid, for the grantor of the indemnity, is not the person to whom the liability imposed by the Act is owed. Thus a provision in a contract of charter whereby the charterer indemnifies the carrier against liability for damages payable to the passengers is valid. Similarly, if a parent or an employer indemnified the carrier against liability to the infant or the employee as the case may be, the indemnity would be valid. But, if the indemnity extended to indemnify the carrier against liability to the employer or the parent, it would be null and void to that extent at least.

Section 37(1) renders null and void the provision tending to relieve the carrier from liability. Where the provision

releases the carrier from liability not only under the Act but arising under another law, such as his liability for delay, it may be that the entire provision would fall. The same result might occur in relation to the extended indemnity contemplated in the last sentence of the preceding paragraph. The better view is, I think, only so much of the provision as relates to release from liability under the Act would be rendered null and void. (88)

It is possible that the carrier may secure a release in respect of the costs of an action brought under the Act. Costs are normally regarded as an item apart from damages. Indeed there is some support for that view in the Act. Section 35(9) provides for division of the amount recovered (after deduction of the costs not recovered from the defendant) among the dependants.

Plainly a provision in the contract that the carrier is the sole judge of whether the facts are sufficient to render him liable under the Act is a provision tending to relieve him of liability for it gives him the discretion to assume liability or not to assume it.

Lastly a provision in the contract that the claimant must bring in an action in say six months or give notice within that period that he intends to bring an action would be contrary to the section, for it would render of no force and effect a liability which by section 34 of the Act is to have a life of two years from the date of the events specified in that section.

88. Raphael Coquoz, *Le Droit Prive International Aerien*, p.142.

CHAPTER IX

ACTIONS FOR DEATH OF PASSENGERS AND DAMAGES FOR DEATH OR INJURY OF PASSENGERS.

The Act creates a cause of action for death. This cause of action is in substitution for any civil liability of the carrier under any other law. It defines the class of persons who may bring actions under the Act in respect of the death. On the other hand a less revolutionary approach has been taken to damages, although, as will appear, a substantial reform has been made in this area. In the main the Act leaves the question of assessment of damages to be governed by the common law. However it makes piece-meal but substantial changes to that law particularly with regard to what matters may be taken into account in assessing damages. These changes favour the claimants.

1.

ACTIONS FOR DEATH

At common law the infliction of death is not, as such, a tort against the person killed ⁽¹⁾ and the loss resulting to third parties by the infliction of death is not a tort. ⁽²⁾ Furthermore the personal representatives of the deceased could not sue or be sued for any tort committed against or by the deceased in his lifetime. ⁽³⁾

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1. Winfield on Tort, 6th Edition, at p.230
 2. Baker v. Bolton, (1808) 1 Camp. 493.
 3. Winfield, note 1 supra, at p.221.

In 1846 by a statute of the United Kingdom, Lord Campbell's Act, a right of action was given to the dependents of the deceased for his death. This statutory right of action for wrongful death has been adopted throughout Australia.⁽⁴⁾ Under the legislation certain specified persons may bring an action in respect of the death of a person against the person whose wrongful act, neglect, or default caused the death, provided such wrongful act, neglect, or default would have been actionable at the suit of the deceased if he had survived.

In 1934 the United Kingdom Law Reform (Miscellaneous Provisions) Act, usually called the Survival of Actions Act, was passed. Analogous legislation has been adopted throughout Australia.⁽⁵⁾ The Australian legislation differs in detail. This legislation provided that, on the death of any person, all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate. The classes of damages recoverable by the estate are limited.

Neither Lord Campbell's Act nor the Survival of Actions Acts apply to causes of action under the Act. They are excluded by section 35(2) which provides that the liability under this Part is in substitution for any civil liability of the carrier under any other law in respect of the death of the passenger

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4. A.C.T.: Compensation (Fatal Injuries) Ordinance, 1935; N.S.W.: Compensation to Relatives Act, 1897-1953; Queensland: Common Law Practice Acts of 1867 to 1940; South Australia: Wrongs Act, 1936 - 1959; Tasmania: Fatal Accidents Act, 1934; Victoria: Wrongs Act, 1958, Part III; Western Australia: Fatal Accidents Act, 1959.
 5. A.C.T.: Law Reform (Miscellaneous Provisions) Ordinance, 1955; N.S.W.: Law Reform (Miscellaneous Provisions) Act, 1944; Queensland: Common Law Practice Amendment Act, 1940; South Australia: Survival of Actions Act, 1940; Victoria: Administration and Probate Act 1958, s.29; Western Australia: Law Reform (Miscellaneous Provisions) Act, 1941.

or in respect of the injury that has resulted in the death of the passenger. However, they were extensively drawn upon to settle the form and effect of sections 35 and 38 of the Act and the decisions by the Courts on those Acts undoubtedly influenced the drafting and will influence the interpretation of the provisions of the Act.

Section 28 creates the liability for death by providing that "the carrier is liable for damage sustained by reason of the death of the passenger..." The persons who may sue in respect of the death are enumerated in section 35. Section 35(1) provides that the provisions of section 35 apply in relation to the liability imposed by the Part on a carrier in respect of the death of a passenger (including the injury that resulted in death). Section 35(2), the effect of which has been summarized in the preceding paragraph, makes the cause of action created by the Act for death or injury that has resulted in death an exclusive one.

The liability in respect of death is enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of the passenger's death.⁽⁶⁾ Sub-section (5) defines the members of the passenger's family as the wife or husband, parents, step-parents, grandparents, brothers, sisters, half-brothers, half-sisters, children, step-children and grand-children of the passenger. Furthermore, an illegitimate person or an adopted person is to be treated as being, or having been, the legitimate child of his mother and reputed father or, as the case may be, of his adoptors. This provision is taken

6. Section 35(3) of the Act.

from the State Wrongful death legislation.

A cause of action analogous to the cause of action arising under the survival of actions legislation is created. Both sub-sections (1) and (2) of section 35, discussed in the paragraph preceding the last, refer to liability in respect of injury that has resulted in the death of the passenger. Sub-section (4) confers upon the personal representative a right of action against the carrier for loss of earnings or profits up to the date of death and for funeral, medical and hospital expenses paid or incurred by the passenger before his death or by his personal representative. However, unlike the position under the survival of actions legislation, ⁽⁸⁾ the personal representative cannot recover property damage suffered by the passenger, e.g. for the loss of the passenger's baggage.

As mentioned earlier in this chapter the purpose of the survival of actions legislation was twofold. It saved from extinction not only the deceased plaintiff's cause of action but also the liability imposed upon a deceased defendant arising from his default. There is no corresponding provision in Part IV preserving the liability of a deceased carrier. It is possible that a carrier may be a single person, for example the owner pilot may be killed in the accident in which the passenger is killed. It is submitted that death of the carrier will not extinguish his liability. His liability is a statutory liability the scope and incidents of which are defined in the Act. The Act

7. See, for example, sections 15 and 17 of the Wrongs Act 1958 of Victoria.

8. The Survival of Actions legislation specifies the damages which are not recoverable by the estate (see for example section 29(2) of the Administration and Probate Act 1958 of Victoria). They do not exclude property damage suffered by the deceased.

provides for extinction of the liability upon the expiration of two years after the accident occurred. ⁽⁹⁾ It is a reasonable inference from this provision that this is the only way in which the liability may be extinguished other than by judgment or accord followed by satisfaction.

The question of the effect of the defence of contributory negligence on claims under this section and of this ⁽¹⁰⁾ section on claims under section 37 have been discussed elsewhere.

Sub-section (6) of section 35 provides that an action to enforce the liability may be brought by the personal representative of the passenger, or by one of the persons enumerated in sub-section (5). As all claims must compete against the limit, the sub-section further provides that only one action shall be brought in respect of the death of any one passenger and that the action shall be for the benefit of all persons for whose benefit the liability is enforceable who are resident in Australia or, not being resident in Australia, express the desire to take the benefit of the action. As the liability referred to is the liability arising under the section, actions for indemnity or contribution referred to in section 37 are not included. These therefore may be brought separately and, of course, those entitled to bring actions for contribution or indemnity are not entitled to the benefit of the single action.

Sub-section (6) provides that "only one action shall be brought in respect of the death of anyone passenger." It would seem that, if any person's claim is overlooked and judgment entered,

9. Section 34 of the Act.

10. See pages 212 and 226.

that person will have no right to bring an action against the carrier to enforce his claim. It is true that under sub-section (10) the Court may at any stage of the proceedings make such order as appears to it to be just and equitable in view of the provisions of the Part limiting the liability of the carrier and any proceedings which have been, or are likely to be, commenced against the carrier, whether in or outside of Australia. But that those orders may be made only at any stage of the proceedings. It would seem that the proceedings have concluded once judgment has been entered. This power however can be used to aid the person suing the carrier for indemnity or contribution provided the aid of the Court is sought before judgment is entered.

In conclusion the effect of the provisions of the Act for the death of the passenger or for injury that has resulted in the death of the passenger is as follows:-

- (a) An action may be brought for the death of the passenger or for **injury** that has resulted in death (sections 28 and 35(1)).
- (b) The liability of the carrier for these is in substitution for any liability under any other law (section 35(2)).
- (c) An action for death may be brought only by persons who have suffered damage by reason of the death (sections 35(3) and 28).
- (d) An action for **injury** that has resulted in the death may be brought only by the personal representative (section 35(4)).
- (e) The action for death may be brought only by the persons enumerated in section 35(5) or by the personal representative on their behalf (section 35(6)).

- (f) Only one action may be brought for death or for injury resulting in the death, except that relational claims under section 37 may be brought separately (section 35(6)).

2.

DAMAGES.

For what damages is the carrier liable. He is liable in accordance with section 28 for damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger resulting from an accident which took place inter alia on board the aircraft. Thus, if there is to be liability, there must be damage. The damage must be damage sustained by reason of the death of the passenger or any personal injury suffered by the passenger; the death or personal injury (as the case may be) must be the result of an accident (i.e. caused by the accident) and the accident must have inter alia taken place on board the aircraft. Sustained seems to mean suffered. "By reason of" introduces the element of causation. The damage must be damage which is suffered by someone and which is the effect of or a consequence of the death or injury of a passenger. "Damage" itself calls for comment. It probably means loss or harm and "damage sustained" means the loss or harm suffered by the claimant. "Damage" therefore does not mean the damages that will be awarded; it means, rather, those matters which are a result of the injury and which will form the basis for assessing the award of damages. Thus damage refers to, in the case of a passenger who is suing, such matters as the pain or suffering that has resulted from the injury, the wages lost as a result of the injury and the hospital and medical expenses incurred in treating the injury.

In the case of a claim for death the damage would refer to, at the very least, the financial loss suffered by the claimant.

What damage is sustained by reason of the death of injury? As I have observed, I believe that these words mean that damage caused by the death or the injury is recoverable. Consequently there is no room for the application of the principle of the law of negligence that the defendant is liable for only such damage as a reasonable man could foresee would be the consequences of his wrongful act.⁽¹¹⁾

The test of causation has its problems, for instance, after suffering injury as the result of an accident on board the aircraft the passenger may be further injured in the course of the journey to the hospital by the negligent driving of the ambulance in which he is carried or by the negligence of the medical staff at the hospital where the passenger received medical treatment.

In the law of torts, as a general rule, if the wrongful act of the defendant is the substantial cause of the damage sustained the plaintiff, the defendants will be responsible for the whole loss even although it may have been increased by the introduction of the wrongful conduct of a third person as an outcome of the original wrongful act,⁽¹²⁾ "for the defendant's liability is not contingent on the question whether the whole damage or any part of the damage suffered is recoverable from some other party."⁽¹³⁾

11. Overseas Tankships(U.K.)Ltd. v Morts Dock and Engineering Co. Ltd., (1961) 34 A.L.J.R. 451.

12. Per Lord Haldane, Canadian Pacific Railway v Kelvin Shipping Co., (1927) 130 L.T. 369, 370.

13. Per Mayo J., Fishlock v. Plummer, [1950] S.A.S.R.176,181.

However an intervening or extraneous event may be so principal a cause that the injury by accident on board the aircraft ceases to be a cause at all and becomes only part of the circumstances in or on which the cause operates so that the damage, in the main at all events, is the result of the intervening cause. Thus, where a woman with a minor concussion suffered neurosis and other disabilities as the result of inexcusably bad medical advice that her skull was fractured, it was held that the further damage, i.e. the neurosis, was too remote.⁽¹⁴⁾ Where the plaintiff suffered a fractured leg in a collision and later in hospital injured the leg and finally he broke it again before it was healed, it was held that he could recover against the other driver damages consequential to the injury in the hospital, but, as to the third injury, he could only recover such extra damage as was due to his previously injured state.⁽¹⁵⁾ On the other hand, if the injury was aggravated by reason of a later natural infection, the damage due to that intervening event was attributed to the original injury.⁽¹⁶⁾

The question whether damage includes damage resulting in the death of the passenger following complications or damage resulting from a supervening illness depends upon whether the passenger would or would not had died in the way he did if the injury by accident had not happened, or would or would not have contracted the supervening illness.⁽¹⁷⁾

14. *Martin v Isbard*, (1946) 48 W.A.L.R. 52.

15. *Fishlock v. Plummer*, note 13 supra.

16. *Adelaide Chemical and Fertilizer Co.Ltd. v Carlyle*, (1940) 67 C.L.R. 514.

17. *Kerry v England*, [1898] A.C.742; *Lawrence v Accidental Insurance Co.*, (1881) 7 Q.B.D. 216; *Isitt v Railway Passengers Assurance Co.*, (1889) 22 Q.B.D. 504; *Rea v Balmain New Ferry Co.*, (1896) L.R. (N.S.W.) 92.

Generally speaking damage due to suicide of the passenger following the injury will not be recoverable, unless the deceased committed suicide whilst insane and his insanity was directly caused by the injury he received rather than by brooding over the accident and its consequences.

ASSESSMENT OF DAMAGES FOR INJURY NOT RESULTING IN DEATH

In personal injury claims damages are divided into two parts, special damages and general damages. Special damages consist of out-of-pocket expenses, medical and hospital expenses and loss of earnings incurred to the date of the trial. General damages comprise such matters as loss of future earnings, compensation for pain and suffering, loss of expectation of life and future medical expenses. The first category is by its very nature capable of substantially accurate calculation. So far as these are concerned "the basic principle of assessment is to place the victim in the same financial position, so far as this can be done by an award of money, in which he would have been had the accident not happened."

General damages because of their nature are incapable of precise calculation. The principle here is one of compensation not restitution. The person injured is entitled to a fair consolation for the suffering he has undergone and is likely to bear in the future and for the heavy loss which he will suffer in

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18. Grime v Fletcher, [1915] 1 K.B. 734; Withers v London Brighton & South Coast Ry., [1916] 2 K.B. 772.
19. Coulter v. Colness Iron Co. Ltd., [1938] S.C. 720; Murdock v British Israel Foundation, [1942] N.S.L.R. 600; Cowan v National Coal Board, [1958] S.L.T. (Notes) 19.
20. John G. Fleming, The Law of Torts, 2nd Edition, p. 206.

the future by reason of his injured condition, and in assessing the injured person's entitlement regard should be had to the constant and multiform contingencies which affect human life and the fact that a present sum of money means a great deal more in proportion than the earnings which, for some indefinite period, (21) a man may be able to acquire.

No allowance will be made by way of deduction, because -

- (i) the plaintiff has a private income; (22)
- (ii) the plaintiff has received sick pay; (23)
- (iii) the plaintiff is entitled to a disablement (24) pension entirely by virtue of his employment;
- (iv) the plaintiff is entitled to payment under an (25) accident policy; and
- (v) the plaintiff has received voluntary payment (26) or gifts.

At common law, however, it appears that deduction of invalid pensions payable under State or Commonwealth legislation (27) up to the date of trial is allowed although this is by no means (28) settled. The probability of future payments is not taken into

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- 21. *Ritchie v. Victorian Railways Commissioners*, (1899) 25 V.L.R. 272; *McDade v Hoskins*, (1892) 18 V.L.R. 417; *McGregor v Rowley*, [1928] S.A.S.R. 67; *Clarke v Wilson*, [1926] S.A.S.R. 342.
 - 22. *Philipps v London and South Western Ry. Co.*, (1879) 5 Q.B.D. 78.
 - 23. *Baker v Graham*, (1959) 77 W.N. (N.S.W.) 42.
 - 24. *Salvennissi v Australian Barley Board*, [1950] S.A.S.R. 174.
 - 25. *Bradburn v G.W. Ry. Co.*, (1874) L.R. 10 Ex 1.
 - 26. *Cusack v Health*, (1950) Q.W.N. 16; *Francis v Brackstone*, [1955] S.A.S.R. 20; *Johns v Prunell*, [1960] V.R. 208.
 - 27. *Shuter v Crosby*, [1956] V.L.R. 47.
 - 28. *In Fraser v Maxwell*, [1959] Q.R. 322, & *Cook v Marshall Saw*

account. However under Part IV, by virtue of section 38, pensions,, social service benefits and repatriation benefits paid or payable consequent upon the death or injury are not to be taken into account by way of reduction of the damages. In assessing loss of earnings the damages are not to be reduced by the amount of (29) taxation even if the plaintiff is not liable to pay the tax.

If medical treatment is given free of charge the defendant is not (30) liable for its cost, but, if at the time of the trial the plaintiff was legally liable to pay the cost of the medical treatment, and even though the proper authority may forgive the whole or part of the charges if the plaintiff failed, the plaintiff is entitled to (31) recover the cost of that medical treatment.

Damages for Death and for Injury Resulting in Death.

As I have already mentioned no action lay at common law for wrongful death. Lord Campbell's Act which created a right of action for the benefit of the dependants of the deceased was silent on the question of the measure of damages. The Courts filled this hiatus establishing as the basis of estimating damages the material loss suffered by the claimant:-

"The general nature of the measure of damages under Lord Campbell's Act has often been stated. It is compensation for material loss. The compensation should represent the balance of the loss reduced to terms of money, which the deceased's relatives incur in consequence of his death after deducting the pecuniary gains which on the other hand

28.(contd) Milling Co., (1959) 77 W.N. (N.S.W.) 40, it was held that the invalid pension was not to be taken into account in reduction of the damages.

29. British Transport Commission v Gourley, [1956] A.C.185.

30. Attorney-General v Valle Jones, [1935] 2 K.B. 209, 215.

31. Blundell v Musgrave, (1956) 96 C.L.R.73.

"accrue to them from that event. The loss is usually a prospective one and all reasonable expectations of material advantage are to be taken into account."(32)

Under Lord Campbell's Act therefore the Court first measures the pecuniary loss suffered by the claimants. It then measures the pecuniary gain that the claimants have received by virtue of the death and it subtracts this amount from the amount of the pecuniary loss suffered to obtain the sum to be awarded as damages. The Act is based on the assumption that the Courts will apply the same principles for ascertaining damages in the case of the death of a passenger. However it substantially modifies those principles by extending the loss suffered by the claimant beyond considerations of a purely pecuniary nature and by reducing the matters that may be taken into account in assessing the pecuniary gain resulting from the death. Consequently a claimant under the Act is in a far better position than a claimant under Lord Campbell's Act.

Pecuniary Loss Suffered by Claimant.

I turn now to the question of the loss suffered by the claimant. In the first place the wounded feelings of the claimant⁽³³⁾ are not relevant to the question. Damages are not⁽³⁴⁾ allowed for funeral or medical expenses. Damages are limited to the loss of a purely financial character sustained by reason of the death. What the claimant is entitled to is the pecuniary loss actual or expected or the loss flowing from the destruction

32. The High Court in *Horton v Byrne*, (1956) 30 A.L.J. 583, 585.

33. *Blake v The Midland Ry.*, (1852) 18 Q.B. 93.

34. *Clarke v L.G.O.*, [1906] 2 K.B. 648.

of a reasonable expectation of pecuniary benefit.⁽³⁵⁾ Thus a reasonable expectation of pecuniary benefit may suffice. The deceased need not have been contributing to the support of the claimant at or before the date of the death, provided that the claimant had a reasonable expectation of a pecuniary benefit from the continuance of life.⁽³⁶⁾ The damages recoverable are not therefore limited to the value of the money lost, but include the monetary loss incurred by replacing services gratuitously rendered by the deceased, provided that there was a reasonable prospect of their being rendered freely in the future but for the death.⁽³⁷⁾ So to the loss of educational prospects and personal comfort may amount to loss by the claimant.⁽³⁸⁾ But the loss must arise from the relationship (by virtue of which under the Wrongful Death legislation the Plaintiff was entitled to sue) between the plaintiff and the deceased. A loss which is suffered by the plaintiff as a result of the deceased's death, but which did not arise out of the relationship will not be allowed. Where a husband and wife were professional dancing partners and the plaintiff, the husband, claimed pecuniary loss as a result of being deprived of his wife in her capacity as a dancing partner, it was held that this loss could not be allowed, since the benefit arising to the husband from the dancing partnership could not properly be

35. Partridge v Chick, (1951) 84 C.L.R. 611, 620.

36. Taff Railway Co. v. Jenkins, [1913] A.C.1.

37. Berry v Humm & Co., [1915] 1 K.B. 627.

38. Pym v Great Northern Railway Co., (1862) 2 B. & S. 759.

(39)
attributed to the relationship of husband and wife.

Where the deceased is a breadwinner the first step in calculating the financial loss suffered is to estimate what was the deceased man's expectation of life if he had not been killed when he was, having regard to his age and bodily health, and the possibility of a premature determination of his life by a later accident, and then to estimate what it seems, during those years, he would probably have applied to the support of his family. In estimating these sums the possibility of his means expanding or shrinking and of his liberality growing or contracting must be taken into account. The products of these figures gives the total amount which the deceased would probably have applied to the maintenance of his family, but it must be discounted so as to arrive at its equivalent in the form of a lump sum payable at his death as damages. (40)

If the deceased is an infant, the question whether the parents are entitled to damages depends upon whether the loss of pecuniary benefit is a mere speculative possibility or a reasonable expectation. (41) The younger the infant is, the more likely it is (42) that the pecuniary benefit is a mere speculative possibility. (43) Conversely, the older the child is, and particularly if it was contributing to the household, (44) the more likely it is that there is a reasonable expectation of a loss of pecuniary benefit or that

39. Burgess v Florence Nightingale Hospital for Gentlewomen and Anor., [1955] 1 Q.B. 349.

40. Lewis v Christie, (1955) 55 S.R. (N.S.W.) 425.

41. Barnett v Cohen, [1921] 2 K.B. 461

42. Barnett v Cohen, note 41 supra.

43. [E.g. Taff Vale Ry v Jenkins, [1913] 1 A.C. 1. Buckland v Guilford Gas Light & Coke Co., [1949] 1 K.B. 410. See next page for Note 44.]

pecuniary benefit has in fact been lost.

In the case of the death of a wife who is a mother, the husband is entitled to have the following matters taken into account, namely the loss of service to the husband caused by his wife's death, the probable length of service of a woman of the wife's age, the chances which are inherent in the kind of life she lived, the cost of supplying like services in the husband's household, the age of the children, the fact that the husband will get a present payment sum awarded representing service to be rendered from time to time in the future, and the amount of the earnings which the wife contributed either to the household purse or in relief of it. Clear evidence that a child suffers a special pecuniary loss from the mother's death is necessary in order to entitle it to share in the award of damages.

(45)

(46)

In Preston v Hunting Air Transport Ltd., an action was brought under the United Kingdom Carriage by Air Act, 1932, (which gives effect to the Warsaw Convention) on behalf of two infant children in respect of the death of their mother. Ormerod J. after reciting the provisions of article 17 of the Convention (from which section 28 of the Act is derived) said :-

"It does not refer particularly to financial loss, it refers to damage, and the question does arise - and it is a very important question in this case - whether that damage should be calculated purely on what may be estimated as the financial loss which these infants have sustained, or whether it should be calculated on the broader basis of the loss which they inevitably must have sustained beyond the actual financial loss by the fact that they lost their mother as young children aged, I think, at the time of their mother's death, some three or four years who were, at the time of her death already deprived of a father. As I interpret the words of article 17 it does

44. E.g. Dolbey v. Goodwin, [1955] 1 W.L.R. 553; Appleby v Cunard White Star Co. Ltd., [1950] P.240.

45. Tong v. Purdy (No.2), [1941] V.L.R. 147

46. [1956] 1 Q.B. 454.

"seem to me that is an item of damage for which the plaintiffs are entitled to be compensated. I must take into account, in calculating any sum which should be awarded to them, something more than the purely financial loss and award some sum - a sum extremely difficult to calculate and arrive at - for the loss which they have sustained by reason of the fact that they have lost the care of their mother at an age when probably they needed it most."(47)

Apart from the wider implications of this decision, it is clear that under the Convention, and therefore under the Act, that children are entitled to more than damages for mere pecuniary loss, they are at least entitled where the mother is dead to an amount for the loss of her care.

Effect of Section 35 (8) of the Act.

The wider principle in the decision that under the Convention the claimant is not necessarily limited to damages for the actual pecuniary loss suffered finds legislative expression in the Act. There is no doubt that it was because of this decision (48) that section 35(8) was inserted in the Act. Section 35 (8) provides:-

"In awarding damages, the court or jury is not limited to the financial loss resulting from the death of the passenger."

Plainly this provision makes a revolutionary addition to the principles applicable to estimating loss; the principle of financial loss will remain an important element, but it is no longer the only element (apart from the pecuniary benefits gained) in assessing loss.

There are two preliminary points. The sub-section speaks of financial loss. It refers therefore to the first factor of the calculation to which I refer, namely the pecuniary loss suffered before subtraction of the material benefits resulting from the death. Such additional heads of damage as are permitted

47. Note 46 supra, 459.

48. Hansard (Senate), p.p.418-419.

by the sub-section must answer the description of damage sustained by the claimant by reason of the death.⁽⁴⁹⁾ Consequently damage suffered by the deceased, e.g. loss of expectation of life, cannot be taken into account.

What additional heads of damages may be brought into account by virtue of the operation of section 35(8). Preston v. Hunting Air Transport Ltd.⁽⁵⁰⁾ does seem to support the view that the loss of the comfort companionship and enjoyment of the deceased is one. It seems possible that an amount would be awarded for the grief and suffering of the claimants i.e., an award in the nature of a solatium could be made. This head of damages is recognised in Scottish law and is recognised in the wrongful death statute of South Australia.⁽⁵¹⁾ In Scotland the amount recoverable is limited to £200. In South Australia a solatium is recoverable only by the husband or wife of the deceased; in the case of the wife claiming, it is limited to £700 and, in the case of a husband claiming, it is limited to £500. The South Australian provisions which were introduced by an amendment to the South Australian Wrongs Act in 1940 were inspired by dicta of Cleland J. of the South Australian Supreme Court in Matthew v. Flood.⁽⁵²⁾ He said speaking of the South Australian Act before it was amended -

"The damages are limited to the pecuniary loss which arises in consequence of the death, and it follows that neither the gravity of the injury preceding the death of the deceased, nor a solatium for the mental anguish or loss of society due to the death, nor the cost of mourning, nor the medical, nor funeral expenses occasioned by the injury, are to be included in the assessment of damages. These items of

49. Sections 28 and 35 (3) of the Act.

50. Note 46 supra.

51. Sections 23B & C of the Wrongs Act 1936-1959

52. [1939] S.A.S.R. 389.

real damage must, in the light of the authorities, be disregarded unless and until the legislature has altered that position if it should think fit to do so."(53)

It is significant that a justice should feel that mental anguish and loss of society are items of real damage. It is evidence of judicial attitudes to be expected in the event that the limitation imposed by the Wrongful deaths Acts are removed and that is what sub-section 8 has done. Financial loss is now not the only interest to be taken into account in assessing the damage suffered by the claimant. It permits the court to take into account other interests and in my view there is a strong likelihood that the Courts will take into account the interest of the claimant founded on affection and feelings. All those entitled to claim may claim for grief and suffering.

Could the claimants recover for nervous shock particularly if it resulted in injury. It seems likely that they could. Thus nervous shock suffered by a wife in consequence of hearing that her daughter has been killed in a collision supported an action for loss of services by the husband for expenses incurred during her incapacitation.⁽⁵⁴⁾

Earlier I mentioned that in a claim under Lord Campbell's Act the loss had to arise from the relationship between the deceased and the claimant. Thus a loss flowing from the dissolution of a business partnership between husband and wife by the death of the wife was not recoverable.⁽⁵⁵⁾ That view was founded on the ground that Lord Campbell's Act must be interpreted

53. Note 52 supra, 391.

54. *Smee v. Tibbetts*, (1953) 53 S.R. (N.S.W.) 391

55. See page 267.

in the light of the general principle of the common law that an injury to one person will not give a right of action to another even though it may cause him damage. This reasoning has no relevance to a statutory liability which supersedes the common law liabilities in the field of its operation. Moreover, the argument that a claim of this kind cannot be allowed, because logically any partner whose prospects were similarly affected by the death of the other whatever their relation ⁽⁵⁶⁾ could sue has no validity, because, in fact, the Act restricts the class of persons who may claim. There is in the writer's view no doubt that damage of this kind is damage sustained by reason of the death of the passenger and should therefore be damage to be taken into account.

Pecuniary Gains of Claimant .

Substantial changes to the benefit of the claimant have been made with respect to the benefits that can be taken into account in reduction of the damages. Section 38 provides:-

"38. In assessing damages in respect of liability under this Part there shall not be taken into account by way of reduction of the damages -

- (a) a sum paid or payable on the death of, or injury to, a passenger under a contract of insurance;
- (b) a sum paid or payable out of a superannuation provident or like fund, or by way of benefit from a friendly society, benefit society or trade union;
- (c) any sum in respect of a pension, social service benefit or repatriation benefit paid or payable, consequent upon the death or injury, by any: government or person;
- (d) in the case of death, any sum in respect of the acquisition by a spouse or child of the deceased,

consequent upon the death, of, or of an interest in, a dwelling used at any time as the home of that spouse or child, or of, or of an interest in, the household contents of any such dwelling; or

- (e) a premium that would have become payable under a contract of insurance in respect of the life of a deceased passenger if he had lived beyond the time at which he died."

Thus sums received from insurance policies pensions and social service benefits are not taken into account, so that the whole body of difficult case law on these subjects can now be ignored. So too, the value of the deceased's home and its contents, provided it was used as the home at any time by the spouse or child, cannot be taken into account in reduction of the damages payable to his widow or child.

The benefit which the claimants received under a will or settlement will be taken into account.⁽⁵⁷⁾ Voluntary payments such as gifts received by the claimant will be taken into account provided they were paid in consequence of the death.⁽⁵⁸⁾ However, if the voluntary gift was one which there was no reasonable expectation of at the time of the death, such as a payment from a charitable fund raised to assist victims of disaster,⁽⁵⁹⁾ it will not be taken into account. On the other hand, a payment by an employer, even though he is only under a moral obligation to pay it,⁽⁶⁰⁾ may be taken into account.

In the case of injury resulting in death earnings or profits up to the date of the death and the reasonable expenses

57. Pym v. Great Northern Ry., (1863) 4 B. & S. 396.

58. Nolan v. Martin, [1946] S.A.S.R. 210

59. Redpath v. Belfast and County Down Ry., [1947] N.I. 167.

60. Jenner v. West, [1959] 1 W.L.R. 554.

(61)
of the funeral of the passenger and medical and hospital expenses reasonably incurred in relation to the injury that resulted in the death are recoverable by the personal representative of the passenger.
(62)

3.

DOUBLE SATISFACTION

(63)

Earlier in this thesis I suggested that there was a possibility that the passenger or relational claimants might have two independent causes of action - one against the carrier and one against another person in circumstances where the carrier and the other person were not joint tort-feasors. Thus the passenger obtains judgment against the charterer for breach of his obligation to supply a competent pilot and a safe aeroplane. He could then sue the carrier under the Act. Would the passenger be entitled to judgment against the carrier for items of damages already satisfied by the first judgment?

It is submitted that he would not be so entitled. The Courts have always refused to permit double satisfaction. In Kohnke v Karger Lyngskey J. stated the principle of law applying as follows:-

"If a person suffers damage as a result of the independent wrongs of two others and recovers, whether as a result of judgment or otherwise, in respect of the whole of his damage from one of them, then, apart from any question of subrogation, he could not claim in respect of any of that damage a second time from the other of the wrongdoers

61. These do not include the cost of the tombstone, Hart v. Griffith Jones, [1948] 2 All E.R. 729, & Key v. Commissioner of Ry., [1941] 41 S.R. (N.S.W.) 60,

62. Sub sections 4 and 9 of section 35 of the Act.

63. See page 22 to 23.

He cannot obtain double satisfaction. Where the judgment which is satisfied is that of a court of competent jurisdiction in this country and is in respect of the same damage, although resulting from different wrongs, the old courts of equity, and now the High Court exercising its equitable jurisdiction, would interfere to prevent such double satisfaction." (64)

This view is consistent with the approach of the common law to damages which, except in exceptional cases when punitive damages may be awarded, is to restore the plaintiff so far as possible to the position in which he was in prior to the injury and to compensate him so far as possible for future loss. Any principle which permitted double satisfaction would be completely inconsistent with these principles.

The passenger or relational claimants may, however, be entitled to classes of damages in an action under the Act to which they would not be entitled in the action at common law or under the wrongful death legislation. Thus under the Act the plaintiff in certain circumstances is entitled to a solatium and his position in respect of social benefits is clear. It is submitted that the first judgment would not be a bar to judgment for damages not claimable in the first proceeding. Kohnke v. Karger (65) supports this proposition. The plaintiff had sued one of the defendants in France and obtained a judgment which was satisfied. She then sued the other defendant in England. The defendant set up the defence of double satisfaction contending that the satisfaction of the French judgment barred the claim against him. Lynskey J. considered that the amount received under the French judgment was insufficient to compensate her for the injuries which she had received. He found

64. [1951] 2 All. E.R. 179, 181.

65. Note 64 supra.

that there were heads of damages available under English law which were not available in France. He awarded the plaintiff damages pointing out that these were for matters not taken into account by the French award. In other words an action lay for damages against the second defendant, damages which could not be claimed from the first defendant. This is the sort of situation postulated in this paragraph and I believe the Courts will take the view that Lynskey J. did in analogous circumstances and award damages.

CHAPTER X.

LIABILITY OF THE CARRIER FOR BAGGAGE.

By virtue of section 29 the carrier is liable for injury loss or destruction of the baggage of a passenger to the carriage of whom the Part applies. The liability is made by that section an exclusive one. The carrier therefore is not liable at common law or under statute for damage giving rise to liability under the Act.

Classification of Baggage.

The Part classifies baggage into registered baggage and other baggage. The classification is of some importance. The period for which the carrier is liable for one is longer than for the other. The defences of the carrier are weighed more heavily in his favour for one than the other. The limits are different and the procedure for making claims is different.

Baggage is defined in section 26 as -

- (a) registered baggage being baggage, personal effects or other articles registered with the carrier as baggage intended to be carried under a contract for carriage of the passenger to which the Part applies;
- (b) baggage, personal effects or other articles, not being registered baggage, in the possession of the passenger, or in the possession of another person (being a person accompanying the passenger or a servant or agent of the carrier) on behalf of the passenger, while the passenger is on board the aircraft for the purposes of carriage to which the Part applies or during the

course of any of the operations of
embarking or disembarking.

What is Baggage.

In the case of baggage, personal effects and other articles the mere fact that they have been registered as baggage classifies them as registered baggage regardless of their nature. Thus the line of authority, on the meaning of baggage discussed in chapter IV is irrelevant. (1) If the carrier refuses to register the articles as baggage but agrees to carry them as cargo, they will be classified, not as baggage, but as cargo. On the other hand, if baggage over and above the free allowance is carried, notwithstanding an extra charge is made for it, it will, if accepted and registered, be registered baggage to be carried under a contract for carriage of the passenger. The contracts of carriage used make it clear that additional baggage is carried in pursuance of the contract of carriage and not in pursuance of any other contract.

While registered baggage has to be registered with the airline to be registered baggage, an article to qualify for the application of the rule of liability for baggage other than registered baggage must be :-

(a) baggage, personal effects or other articles; and

(b) be in the possession of the passenger or of a person accompanying him or a servant or agent of the airline while in the course of the carriage of the passenger.

"Baggage" would appear to refer things carried in bags or cases.

"Personal effects" implies movable chattels which are carried on

1. See page 98.

passenger's person, e.g. fountain pens and watches.

"Other articles" seem to embrace everything the passenger has with him other than baggage, personal effects and his own body. Thus if his clothing is damaged, he loses his denture, breaks his glasses or his overcoat is lost from the aircraft's cloakroom, the carrier is liable for that destruction or loss.

The Liability.

There is a presumption that the damage, loss or destruction was due to the carrier's fault ⁽²⁾ and, where the carriage is performed by two or more carriers, the liability is joint and several, unless one or some can prove that the damage was not in his or their charge at the time of the ⁽³⁾ destruction, loss or injury.

The Defences.

The carrier is not liable if he can show that he and his servants and agents took all necessary measures to avoid the destruction, loss or injury or that it was impossible ⁽⁴⁾ for him or them to take such measures. The origin of this defence is article 20(1) of the Convention. There is a difference of opinion as to the scope of this defence. One interpretation gives it a very restricted meaning. It is argued that, as "all necessary measures" means all measures necessary to avoid the damage, the damage could not have occurred unless the carrier had not taken all the measures necessary. "Necessary measures ⁽⁵⁾ connotes everything required to prevent the accident."

2. Section 29(1) of the Act.

3. Section 29(5) of the Act.

4. Section 29(1) of the Act.

5. O'Sullivan, Codification of Air Carriers Liability, 1936 *Air L.* at p.20; also statement of Brazilian Delegation at Ninth Session of the Legal Committee, I.C.A.O. Doc.7450-LC/136, p.89.

This interpretation which was accepted in the Parliamentary
(6) Debates would mean that the carrier would be liable for all damage other than damage caused by the act of God or force majeure. In the result the carrier would be under a strict liability which (7) we know was not intended by the draftsmen of the Convention.

The second interpretation is that "necessary" really means "reasonable". On this view the effect of the defence in conjunction with article 17 of the Convention is to create a presumption of negligence on the part of the carrier rebuttable by him proving that he has taken all reasonable measures to avoid (8) the damage. In Grein v. Imperial Airways Ltd. Grein L.J., discussing a defence in identical terms embodied as a condition in a contract of carriage, said :-

"The contract seems to me to mean that the carrier promises to be liable for damage due to accident provided that he is not to be liable if he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger or proves that it was impossible to take such measures." (9)

He concluded discussing the effect of the contract and, in particular, the provision equivalent to article 20(1):-

"The result is this, in my judgment, that the appellants undertook liability for what are described in the contract as accidents unless they were able to establish that they could not by reasonable means have avoided causing the damage. The effect of this is to put upon them the obligation

6. For instance the Minister in charge of the Bill in the House of Representatives said (p.904 of Hansard (House of Representatives))-

"The onus of proof is on the carrier and it is a very narrow defence since, in most foreseeable cases, if the carrier 'takes all necessary measures to avoid the damage', the accident would not have occurred."

7. See pages 4 et sq.

8. [1937] 1 K.B. 50

9. Note 8 supra 69.

of disproving negligence, leaving them liable for damages for negligence if they failed to prove it." (10)

(11) (12)
All reported decisions, except perhaps two, and most writers (13) agree that this is the correct interpretation of the defence.

This construction, it is submitted, must on the weight of authority be regarded as the one that will be accepted by the Courts.

The right to damages for destruction, loss or injury to baggage is extinguished, if an action is not brought within two years after the date of the arrival of the aircraft at the destination, or, where the aircraft did not arrive at the destination, the date on which the aircraft ought to have arrived at the destination or the date on which the carriage stopped, (14) which ever of these events is the later.

The carrier has the defence that the passenger's negligence caused or contributed to the damage. (15) The same principles apply as apply to the death or injury of a passenger (16) discussed earlier except that, in the case of baggage other than

10. Note 8 supra, 71.

11. Ritts v. American Overseas Airlines, 1949 U.S. Av.R.65, Rugani v. K.L.M., 1954 U.S. Av.R.74; American Smelting & Refinery Co. et al v. Philippine Airlines, 1954 U.S. & C. Av.R.221; Pierre v. Eastern Airlines, 1957 U.S. & C. Av.R.431; Cillag v. Air France (Incorporated); Patteroni v. S.A. di Navigazione Aerea, 1938 A.L.R. 155.
12. Primatesta v. Ala Littoria, 1938 Revista di Diretto Aeronautica 52, and H.G. Philios v. Transcontinental & Western Inc., 1953 U.S. Av.R.479, in which so high a duty was placed upon the carrier that it must be concluded that the restricted view of article 20 was taken by the Court.
13. For example see Coquoz, Le Droit Prive International Aerien at p. 136-137; Lemoine, Traite de Droit Aerien, nos. 819 and 820; Shawcross & Beaumont on Air Law 2nd edition, paras. 390 and 411; McNair, The Law of the Air, 2nd edition p.p.268 and 222; Finn Hjalsted, The Air Carriers Liability in Cases of Unknown Cause of Damage in International Air Law, Part 1, (1960) 27, Air L. & Com.p.1.
14. Section 34 of the Act.
15. Section 39 of the Act.
16. See pages 198 et seq.

registered baggage, sub-section (4) of section 29 creates a presumption of contributory negligence on the part of the passenger, providing that in the application of section 39 the carrier shall be deemed to have proved that the damage was caused by the negligence of the passenger, except so far as the passenger proves that he was not responsible for the damage. It shifts the onus of proof from the carrier to the passenger. The reason for this shift is clear. As the personal baggage is normally in the control of the passenger, the opportunities for successful fraudulent claims would be great if the burden of proof lay on the carrier and in fact such a system of liability would be an invitation to make fraudulent claims.

The Period of Carriage by Air (Duration of Liability).

The period of carriage for baggage other than registered baggage is the period during which the passenger is on board the aircraft or is in the course of the operations of
(17)
embarking or disembarking.

In respect of registered baggage, the period of carriage is the period during which the baggage is in the charge
(18)
of the carrier, whether on board the aircraft or elsewhere, but that period expires twelve hours after the arrival of the aircraft at the place to which the baggage was to be carried in the aircraft. Provided the carrier proves that within that time the baggage was made available for collection by the passenger at a place at which under the contract of carriage the baggage was to or could be made
(19)
available, to the passenger. Thereafter his liability will be that
(20)
of a warehouseman.

17. Section 29(2) of the Act. See p.189/^{et seq.}for discussion of the meaning of operations of embarking or disembarking.

18. Section 29(2) of the Act.

19. Section 29(3) of the Act.

See next page for Note 20.

Contracting Out.

Section 32(1) provides that any provision of an agreement tending to relieve the carrier of liability in accordance with the Part or to fix a lower limit than that prescribed is null and void. Any condition, therefore, exempting the carrier from the liability imposed by section 29 is null and void. But it is only the liability created by section 29 that cannot be contracted out of. The carrier's liability as a warehouseman which arises when the period for which the carrier is liable under the Act terminates and his liability for delay are not protected. The carrier may, therefore, by an appropriate exculpatory provision in the contract of carriage free himself from those liabilities.

Sub-section (2) of section 32 is a curiously expressed provision. It provides that the sub-section rendering null and void any provision of an agreement purporting to exempt the carrier from liability does not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of goods carried. In short the carrier may contract out of liability for loss or damage, presumably to goods, resulting from the inherent defect, quality or vice of goods carried by him.

The sub-section may be criticized for two reasons. In the first place it speaks of goods whereas the Part recognizes only two classes of things that can be conveyed by air, namely
(21)
baggage and cargo. The only time the word "goods" is used is in this sub-section. Substantially goods are, I suppose, both cargo and baggage and goods would therefore be construed as a word

20. See page 84.

21. See definitions of "baggage" and "commercial transport operator" in Section 26(1), section 29, 30, 31(2) and (3) and section 41.

intended to comprehend both. Even this is not a completely satisfactory explanation, as Part IV does not apply to the carriage of cargo.

A second criticism, and perhaps a more important one, is that on a purely literal construction the sub-section gives a carrier the right to contract out of liability for damage not only to baggage but also to passengers, if the damage resulted from the inherent defect, quality or vice of goods carried. Clearly this was not the intention of Parliament, although it is difficult to see reasons for so limiting it. Loss in the sub-section could mean either the baggage was lost in the carriage or it could mean loss in the monetary sense. Consequently the use of the word "loss" cannot be an argument for limiting the sub-section to damage to goods.

The drafting of sub-section (2) is defective in another respect. Section 29 refers to three occurrences to baggage which are compensable, namely destruction loss or injury. Sub-section (2) refers to loss or damage. However, loss or damage may be used in the sense of financial loss or financial damages resulting from the inherent defect and not as a description of what has occurred to the baggage. If on the other hand the words do describe the condition of the baggage after the happening of the event, it may be argued that the carrier may exempt himself from liability for loss of the article or damage resulting from inherent vice to it but not for its destruction.

The words "defect" and "quality" are used epegetically as they are comprehended in the expression "vice". The area of the exemption is coterminous with the defence of the common carrier

(22)
of inherent vice. It is submitted that the carrier may only contract out of loss or damage which is due solely to the operation of inherent vice. Where by his negligence, such as faulty storage, he has aggravated the damages, he cannot contract out of liability in respect of that portion of the damage due to his negligence, for sub-section (2) speaks in terms of damage from one class of cause namely damage resulting from inherent vice of goods carried.

Limitation of Liability.

The liability of the carrier for damage to the baggage of any one passenger is limited to one hundred pounds or such higher sum as is specified in the contract of carriage. There is a sub-limit for baggage, other than registered baggage, of ten pounds or such higher sum as is specified in the contract of carriage. Consequently the passenger will never receive more than one hundred pounds for both registered and unregistered baggage unless the contract of carriage specifies a higher amount. As the amount is in respect of the baggage of each passenger, where a group, say a family, is travelling together with their baggage intermingled, each member will be entitled to damaged up to the amount of the limit. The carrier's servants or agents responsible for the damage, provided that they prove that they were acting within the scope of their employment or of their authority, are entitled to the benefit of the limit.

22. See Carver's Carriage of Goods by Sea, Tenth Edition, and p. 90 of this thesis.

23. Section 31(2) of the Act.

24. Section 31(3) of the Act.

25. Section 33 of the Act which is discussed at p.227 et seq.

Provision is made in section 40 for the making of regulations relating to the circumstances in which baggage checks, must be issued, the matters to be included in such checks and the non-application of section 31 where specified provisions of the regulations relating to the form, issue and contents of the checks have not been complied with. However, if a higher amount is specified as the limit in the contract of carriage, the regulations cannot provide for the non-application of that limit. At the time of writing no regulations have been made in pursuance of section 40.

Complaints in respect of Baggage,

Evidence proving receipt of registered baggage, without complaint, by the person entitled to delivery is evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage. ⁽²⁶⁾ This is another device to give the carrier a measure of protection against fraudulent claims. It is an attempt to throw the onus of proof which, by virtue of section 29(1), lies on the carrier back onto the passenger, at least in the case of injury to the baggage. It is submitted that its effectiveness will depend upon the particular circumstances. If the injury is readily apparent, the provision will be more effective than if the damage can only be discovered by a careful scrutiny or by opening the bags in which the baggage is enclosed.

No action may be brought against the carrier unless notice in writing is delivered to the carrier or served on him by

post or in such other manner as is prescribed by regulations,

- (a) in the case of injury to registered baggage or of loss or destruction of part only of an item of registered baggage, within three days after the date of receipt by or on behalf of the passenger of the baggage or of the remainder of that item of baggage;
- (b) in the case of loss or destruction of the whole of an item of registered baggage, within the period of twenty-one days from the date on which the baggage should have been placed at the disposal of the passenger; or
- (c) in the case of injury to, or loss or destruction of, baggage other than registered baggage, within the period of three days from the date on which the carriage of the passenger ended.⁽²⁷⁾

The days specified are clear days, e.g. the claimant has three full days in the case of (a) in which to bring his claim, as the day on which the baggage should have been placed at his disposal does not count against the passenger.

Failure to complain will not bar the passenger:-⁽²⁸⁾

- (a) if fraud has been proved on the part of the carrier, e.g. a deliberate attempt to conceal the damage or deliberately misinforming the passenger as to his rights under the Act in order that the passenger would be too late in making a written complaint; or
- (b) if the court is satisfied that it is just and equitable by reason of special circumstances to allow the institution of an action or to continue an action

27. Section 30(2) of the Act.---

28. Section 30 (2) of the Act.

already instituted e.g. where through injury the passenger is unable to make a claim.

Cargo.

No specific provision is made in Part IV in relation to cargo except in section 41 which empowers the Governor-General in Council to make regulations to and in relation to the carriage of cargo. The regulations may provide for applying with such modifications, adaptations and exceptions as are prescribed the provisions of the Warsaw Convention and the Hague Protocol and any of the provisions of the Act to and in relation to the carriage of cargo being carriage in relation to which, if it were the carriage of passengers, the Act would apply. However the power to make adaptations, modifications and exceptions may not be exercised to limit the liability of a carrier to a sum less than the sum prescribed in Article XI of the Hague Protocol.

29. Section 30(3) of the Act.

APPENDICES

APPENDIX "A"

THE CIVIL AVIATION (CARRIERS' LIABILITY)

ACT 1959

APPENDIX B

CIVIL AVIATION (CARRIERS' LIABILITY) ACT

Draft of Model State Bill Prepared by the Commonwealth Parliamentary
Draftsman.

A BILL

for

AN ACT

Relating to the Carriage of Passengers by Air.

BE it enacted, &c.

1 This Act may be cited as the Civil Aviation (Carriers' Liability) Act 1961.	Short title.

2 This Act shall come into operation on a date to be fixed by Proclamation	Commencement

3- (1) In this Act -	Interpret-

"the Commonwealth Act" means the Civil Aviation
(Carriers' Liability) Act 1959 of the
Commonwealth of Australia, and, if that Act is
amended, includes that Act as amended from
time to time;

"the Commonwealth Regulations" mean the regulations
from time to time in force under the Commonwealth
Act for the purposes of Part IV, of the
Commonwealth Act, other than regulations made
for the purposes of section forty-one of the
Commonwealth Act.

(2) The provisions of sections five and twenty-six
of the Commonwealth Act apply, by virtue of this Act, to the
interpretation of section five of this Act in like manner
as they apply to the interpretation of section twenty-seven
of the Commonwealth Act.

4 This Act binds the Crown in right of the State	Act to bind Crown.

5 The carriage to which this Act applies is the carriage of a passenger where the passenger is or is to be carried in an aircraft being operated by the holder of an airline licence in the course of commercial	Carriage to which Act applies.

transport operations under a contract for the carriage of the passenger between a place in the State and another place in the State, not being carriage to which Part IV. of the Commonwealth Act applies or to which the Warsaw Convention, or the Warsaw Convention as affected by the Hague Protocol, applies.

6 The provisions of Part IV. of the Commonwealth Act (other than sections twenty-seven and forty-one) and the provisions of the Commonwealth Regulations apply to and in relation to carriage to which this Act applies, and matters connected with such carriage, as if those provisions were incorporated in this Act and as if, in these provisions as so incorporated -

Application of provisions of Part IV of Commonwealth Act.

- (a) general references to Part IV. of the Commonwealth Act were references to this Act;
- (b) a reference in one of those provisions to another of those provisions were a reference to that other provision as applying by virtue of this Act;
- (c) the reference in sub-section (5) of section twenty-nine of the Commonwealth Act to carriage referred to in sub-section (4) of section twenty-seven of the Commonwealth Act were a reference to the carriage of a passenger where -
 - (i) the carriage of the passenger between two places was to be performed by two or more carriers in successive stages;
 - (ii) the carriage has been regarded by the parties as a single operation, whether it has been agreed upon by a single contract or by two or more contracts; and
 - (iii) this act would have applied to that carriage under a single contract; and
- (d) the references in section thirty-one of the Commonwealth Act to the regulations relating to certain matters were references to the provisions of the Commonwealth regulations relating to those matters as applying by virtue of the Act.

7 The provisions of section forty-two of the Commonwealth Act apply in relation to a person who, within the State, travels in an aircraft without the consent of the carrier, as if those provisions were incorporated in this Act, and as if, in those provisions as so incorporated, a reference to a Part or Parts of the Commonwealth Act were a reference to this Act.

Stopaways.

APPENDIX "C"

COMMENTS ON THE MODEL STATE CIVIL AVIATION
(CARRIERS' LIABILITY) ACT.

Carriage to which the Act applies.

The Act applies to the carriage of a passenger between a place in a State and another place in that State in an aircraft being operated by the holder of an airline licence not being carriage to which Part IV of the Commonwealth Act, the Warsaw Convention, or the Warsaw Convention as affected by the Hague Protocol⁽¹⁾ applies.

Act applies Part IV of the Commonwealth Act.

The provisions of Part IV of the Commonwealth Act with the exception of section 27, 40 and 41 and the provisions of the Commonwealth Regulations made under sections 40 and 41 of the Commonwealth Act apply to the carriage to which the Act applies, i.e. to intra-State carriage, as if those provisions were incorporated⁽²⁾ in the Act. Section 27 of the Commonwealth Act defines the scope of application of Part IV and is clearly inappropriate to this Act. Sections 40 and 41 of the Commonwealth Act authorize regulations relating to the form and effect of tickets and baggage checks and applying the Warsaw principles to the carriage of cargo. If the Act had incorporated these provisions, then regulations could have been made under it by each State inconsistent with those made under the Commonwealth Act thus defeating the main purpose of the model Act, namely to achieve uniformity of liabilities in the field of carriage by air.

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1. Section 5 of the model Act.
 2. Section 6 of the model Act.

In the main the rest of the provisions in the model Act are consequential provisions designed to insure that the terms used in the Act shall have the same meanings as the similar terms used in the Commonwealth Act. Two other matters of interest remain to be mentioned. The Act binds the Crown in right of a State ⁽³⁾. If a State engages in airline operations, it will have to be licensed under the Commonwealth Air Navigation Regulations. Consequently the provisions of the model Act will apply to carriage by the State. If the carriage is conducted across State borders, the provisions of Part IV of the Commonwealth Act will apply, for section 7 of that Act provides that the Act binds the Crown in right of the Commonwealth or a State. The provisions of section 42 of the Commonwealth Act relating to stowaways are applied to stowaways carried intra-State.

3. Section 4 of the model Act.

APPENDIX "D"

THE CARRIAGE BY AIR ACT 1935