Institute of Air and Space Law,
McGill University, Montreal, Que.

Degree sought: Ll.M. March, 1968.

Eliahu Margalioth, M.Jur.

A New Liability System for the International Air Carrier

ABSTRACT

The subject of this thesis is the rationale which underlies the passenger liability regime of the international air carrier, as constructed in the Warsaw Convention of 1929 and as hitherto developed. The aim was to put this regime on a contemporary legal, economic and social basis, and to align it with the modern phase of the air carrier industry.

Consequently, an analysis was made of the liability rule in the Convention, as interpreted by courts and jurists, and of the discussions which took place in the international legal committees and diplomatic conferences where the Convention was constructed and later revised. The next step was the examination of the social expectations of our age in the light of the evolution of theory in the field of enterprise liability, and the advent of air transport. The two studies were then compared and a conclusion reached. It is maintained that the uniform rule of the Warsaw Convention should be transposed from that of 'presumption' of fault' to that of absolute liability, objectively confined within the limits of the carrier's ability to bear losses.

Eliahu Margalioth, M. Jur.

'A NEW LIABILITY SYSTEM FOR THE INTERNATIONAL AIR CARRIER'

A New Liability System for the International Air Carrier

March, 1968.

Eliahu Margalioth, M.Jur.

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

Institute of Air and Space Law,
McGill University, Montreal, Que.

"Ce que les ingénieurs construisent
pour les moteurs, nous, juristes,
nous devons le faire pour le code."

De Vos#

#Reporter for the draft convention presented to the 1929 Warsaw Conference. Introductory remarks.

On the last day of writing this thesis in manuscript form - yesterday - on Sunday, the 24th of March, 1968, my beloved father, Professor Mordecai Margalioth, Ph.D., returned his life to his Creator. He died after a painful illness at the age of 58 in Jerusalem, Israel, to which he had asked to be carried only a week earlier from New York, where he had spent the last years of his life teaching at the Jewish Theological Seminary.

To the thousands of former students of my father, in New York and in the Hebrew University at Jerusalem, he was a gentle, stimulating, splendid teacher; to the readers

of the scores of books, encyclopedias and scientific articles which he published, he still is a foremost knowledgeable and acknowledged authority; to my dearest mother and to us, his children, he was a tender, dedicated and loving husband and father with a wonderful, balanced sense of duty and humour. To me, his eldest, he was all that and more. He was the light which I always tried to follow in the standards of personal life - love of God and fellow men - and in the attitude towards the acquisition of knowledge, scientific research, and work. Though he alone excelled in them all.

I dedicate this thesis to the beloved memory of my father.

לזכר נשמת אבי מורי אהובי הרב

ברוך מרדכי מרגליות עליו השלום

שהנחני בדרך התורה והידע,

והגיעני עד הלום.

Montreal,
March 25, 1968.

Eliahu Margalioth

Table of Contents

Chapter One: Article 17 Inside the Framework of the Warsaw Convention page 1

A. History and Evolution of the Warsaw Convention 1

a) towards the Warsaw Conference 1

b) attempts at revision and the Hague Protocol 4

c) further reaction and the Interim Agreement 10

B. Framework and Rules of the Warsaw Convention 18

a) carriage of goods, documentation, scope and realization of rights of action 18

b) the systems of liability and limitation of liability 20

C. The Nature of the Liability of the Air Carrier in the Warsaw Convention 24

a) a piecemeal construction of presumption of fault 24

b) Sir Alfred Dennis and the Common Law 30

c) empty revisions 32

d) the Hague Protocol 35

e) the Interim Agreement; touchstone of change 37

Chapter Two: Article 17 and the 'Presumption of Fault' as a Common Law Concept page 45

A. Source and Circumstance of Negligence in Common Law 46

B. The Impact of Time 50

a) incentives for change 51

b) towards a modern policy for enterprise liability 54

C. The Emerging Policy and Air Carrier Liability 56

a) the initial impact 56

b) distortion of the fault principle 57

Chapter Three: Application of the Evolution of Policy and Law to the Convention's Liability System 62

A. A New Test for Air Carrier Liability 62

a) foolproof absolute liability 62

b) calculation of limitation of liability 64

c) refutation of alleged problems 65

B. Other Changes in the Convention 68

C. The American Role and the International Rule 73

a) the American dilemma page 73

b) a supplementary plan for additional compensation in the U.S.A. 77

Chapter Four: Evaluation 81

A. Due Haste, Purpose and Determination 81

B. Conclusion 83

Footnotes 85

Table of Books and Articles Cited 133

Table of International Documents Cited 142

Table of Cases Cited 145

Chapter One: Article 17 Inside the Framework of the Warsaw Convention

A. History and Evolution of the Warsaw Convention

a) towards the Warsaw Conference

Although in 1923 international air transport was still in its early stages of development, it was even then apparent that the conflicting rules of different states pertaining to the passenger liability of air carriers might one day greatly harm both the industry and the passenger community.[1] Thus, four years after the commencement of scheduled international air services,[2] France, a codified-law State situated in the midst of Europe and even then linking England with Africa by air,[3] was the first to take a stand. In August 1923 the French Premier, M. Poincaré, formally invited all nations to Paris to attend a conference at which "a convention relating to

the international air carrier's liability" should be drawn up "in the field of Private Law, entirely unrelated to Public Air Law Conventions."[4] Following this, in June 1925, the French Foreign Minister, M. Briand, circulated among the states of the world, a letter, containing both a draft convention and a call for an immediate diplomatic conference on Private International Air Law. The letter also emphasized the urgent need for a unified international solution in the field of air transport so as to acquaint passengers with their rights and to enable carriers to calculate their liability and insure themselves against it.[5]

The first International Conference on Private Air Law met in Paris between October 27, and November 6, 1925, with forty-four accredited delegations and three observers[6] participating. The Conference prepared a draft treaty on the liability of the international air carrier which was submitted to participating governments for their comments, and re-examined at a subsequent Conference.[7] It also established CITEJA,[8] a standing International Technical Committee of Aviation Legal Experts, directed to study a

number of Private International Air Law subjects including the new draft convention.[9]

At its first session in Paris, on May 1926,[10] CITEJA was divided into four commissions, each designed to study a separate range of topics; the second of these Commissions was, inter alia, to deal with the liability of air carriers towards passengers and shippers.[11] On April 1927, the draft convention relating to air carrier liability was consolidated along with an agreement concerning aerial documentation.[12] The combined draft[13] was approved by the CITEJA in its third Session,[14] October 1928,[15] and was immediately sent by the French Governments to all states for study and suggestions.

A year later, on the 4th of October 1929, at the invitation of the Polish Government, on the initiative of France, the celebrated Second International Conference on Private Air Law was opened in Warsaw with the purpose of considering CITEJA's consolidated draft convention.[16] The Conference, attended by thirty-two accredited delegations (but only one observer from the United States

of America) deliberated for one week.[17] On October 12, 1929, the Convention for the Unification of Certain Rules Relating to International Transport by Air,[18] and an Additional Protocol were opened for signature. On February 13, 1933,[19] 90 days after the deposition of its Fifth Instrument of Ratification,[20] this Convention, commonly known as the "Warsaw Convention", came into force among its seven first members.[21] Ratifications and adherences[22] followed rapidly until there are today almost a hundred States which are High Contracting Parties to the Warsaw Convention.[23]

b) attempts at revision and the Hague Protocol

Within two years of coming into force, in 1935, the CITEJA representatives formally began to consider the revision of the Warsaw Convention.[24] Shortly afterwards, the Second World War began and the post-war expansion of civil aviation made a proper uniform air carrier liability rule more important than ever.[25] Yet, in the aftermath, when CITEJA resumed its activities in January 1946 in Paris, the general uncertainty about

the wisdom of changing any surviving international institution, induced the Committee to propose only a very narrow change. Only an amendment in the Documentation System of the Warsaw Convention was prepared[26] and sent to the Provisional International Civil Aviation Organization (PICAO)[27] for consideration. But in 1947, when the matter came before PICAO,[28] world affairs seemed to have already returned to normal, and the hesitations about the revision of the Warsaw Convention disappeared.

Though the universal acceptance of the Warsaw Convention was, by 1947, well established, the shortcomings of its rules had already been demonstrated to the point of frustration.[29] For one, scores of major and minor defects filled the Treaty, obstructing the path to uniform interpretation. The lack of specific definitions,[30] clumsy terminology[31] and then awkward translation,[32] want of some crucially necessary provisions,[33] whether omitted by apparent forgetfulness[34] or overlooked in order to avoid arguements;[35] and the existence of too many Conflict of Law Rules obviously inserted to by-pass

altercations,[36] all combined to discredit the value of the Warsaw Convention. Worse than anything was the lack of clarity in the central motive and in the rationales behind the Convention's liability regime which hindered the proper application of this Treaty to air transport transactions in national courts.[37] At the same time the incessant changes which international civil aviation had undergone since 1929 disclosed that the principles which may have been appropriate in the relatively simple environment at the time of the drafting of the Convention had become invalid in the emerging sophisticated air transport industry. The fantastic burgeoning growth in civil aviation before, during, and after the Second World War could not but upset the equilibrium of a Convention originally set for different circumstances.[38] Furthermore, modern concepts of the welfare state, new economic theories, and novel rationales related to enterprise liability in general, began (as we shall see in a later Chapter of this thesis) to have an effect on the Convention's system of carrier liability which was based on a presumption of fault.[39]

Consequently CITEJA's 1946 Draft was returned by PICAO in 1947, accompanied by a resolution recommending a more extensive revision of the Convention "in view of the rapid development of air transport".[40] And CITEJA immediately responded.[41] Within a short time, further amendments of the Warsaw Convention were again submitted to PICAO for consideration.[42]

At Geneva, in June 1947, at its Second Meeting, the Legal Committee of ICAO [43]resolved that a full revision of the Warsaw Convention was imperative, and appointed a Subcommittee to that effect. Still, though the Subcommittee's Report did come before the Legal Committee as early as Sept. 1948 in Lisbon, no action was taken until 1951 when finally, at its Eighth Session in Madrid, another Subcommittee was instituted with a mandate to draft a new Convention to replace the Warsaw Convention.[44] Such a draft was then prepared in the Subcommittee's meeting in Paris,[45] circulated among States, and became the main item on the agenda of the Ninth Session of the Legal Committee, in Rio de Janeiro, August to September, 1953.[46] Fearing that the replacement of the Warsaw Convention might affect the number of its

Contracting States,[47] the Rio de Janeiro meeting rejected the Paris draft and decided instead to adopt the procedure of amending different articles in the existing Convention. A triple language[48] Draft revision was then prepared[49] and submitted to the Council of ICAO which, in 1954, following a favourable reaction by the participating governments, decided that it should be finalized. A diplomatic Conference was called at The Hague for this purpose.[50]

The Conference, in which one hundred and nineteen accredited delegates from forty-four countries and nineteen observors from eight international organizations participated,[51] began on September 6, 1955; during twenty-three days of extensive deliberation, under the presidency of Dr. Goedhuis of the Netherlands, the Conference vigorously attempted to carry out its desired goals. However, as might have been expected in the atmosphere of such a diplomatic and legal assembly, the participants showed mixed feelings. All realized, of course, how vitally necessary a change in the rules of the Convention was, but the Convention's tremendous

importance had an intimidating effect on the delegates.[52] At the end of the deliberations all that remained was a conviction that the Convention was better ill than dead. Disturbing questions were avoided, and controversial issues were tackled only if an important power too bluntly threatened to upset everything;[53] the wishes of the obstinate nation would be gratified so as to lure its ratification of the Protocol at a later time.

The result was, unavoidably, not a thorough revision but only a correction of certain defects in the Convention; the liability system was not touched at its roots though one or two of its branches were trimmed.[54]

On September 28, 1955, The Hague Protocol to Amend the Warsaw Convention and the Final Act of the Conference were signed by twenty-six States. Of the 27 Articles in the three Chapters in the Hague Protocol, the last 10 refer to the particular relationship between the Protocol and the Convention itself, and answer questions pertaining to the Protocol Instrument. The 17

other Articles replace, add to, and delete from, fifteen specific Articles of the Convention, adding two to their numbers,[55] and all have their main impact (as we shall see later in this Chapter)[56] in the field of documentation. In spite of the unusual number of ratifications needed to bring this Protocol into force,[57] it was binding its first thirty members by August 1, 1963. More than fifty States[58] are today Parties to the Warsaw Convention as amended by the Hague Protocol.[59]

c) further reaction and the Interim Agreement

Yet the Hague Protocol was not the end of the process of revision; in fact, it was only its beginning. A major benefit which the Hague Conference rendered was in unearthing the conviction that something far greater than mere uniformity was crucially needed in the field of air carrier liability, a realization upon which we shall elaborate in due course. It was subsequent to this conviction in the following years that the United States' Government took a decisive and firm stand which entailed a rudimentary change in the Convention's liability regime; to this process the

British Government contributed by waiting a dozen years before ratifying The Hague Protocol.[60] However, that is already part of the latest chapter of the Warsaw Convention's developments. In chronologically continuing the story of the Warsaw Convention after the Hague Conference, we note that another Conference was called by ICAO[61] in 1961 in which a Convention bearing directly upon our subject of air carrier liability[62] was adopted and signed. It supplemented the Warsaw Convention by clarifying the application of its rules to the question of hire, charter and interchange of aircrafts.[63] Of the eighteen Articles in this 1961 Guadalajara Convention, the last eight concern aspects of the Instrument itself, and its relationship to the Warsaw Convention. The first ten Articles regulating the "international carriage by air performed by a person who is not a party to the agreement for carriage", deal with the whole regime of the Warsaw Convention, in adding to and clarifying the identity of its subject, the "air carrier". The Convention came into force on May 1, 1964[64] and today binds twenty-two High Contracting Parties to the Warsaw Convention.[65] As for the Warsaw Convention

itself, the introduction of the Hague Protocol triggered a chain of negative reaction in the U.S.A. which, in 1966, culminated in a profound change in the basic liability rule of the Convention; this was achieved, however, in such a roundabout way that it almost cost the world the entire benefit of a uniform rule.

At The Hague, the main efforts of the United States' delegation concentrated on raising the limit of liability in the Convention,[66] leading to a compromise which seemed to have pacified both the American delegation and later the United States' Administration.[67] But when the Treaty was to come before the United States Senate for ratification the negative reaction in many circles to this compromise made it apparent that the Protocol would not be ratified by the Senate.[68] For a full decade the Administration tried to mitigate the consequences of the limit of liability in The Hague Protocol so as to render it palatable to the Senate, but to no avail.[69] At last the Administration

gave way to the pressure for higher liability limits, and blinded to the possible implications of such an act upon both American citizens and international air transport, the American Government on November 15, 1965 denounced the Warsaw Convention.[70] Thus, commencing on May 15, 1966,[71] the United States of America was to have ceased participation in this international Convention.[72]

Fortunately, the rest of the world showed much greater understanding and maturity, contrary to the reckless haste exhibited by the United States which chose to upset the entire Convention instead of at least invoking Article 41 and again convening the world community to amend the Convention. Realizing the Convention's crucial importance, the remaining States bowed to the United States' demands and saved the uniform rule through a "private" agreement among the majority of the world's airlines,[73] endorsed by their respective governments. Thus, the Interim Agreement[74] was reached under the auspices of IATA, in which pursuant to Article 22(1) of the Warsaw Convention the limit of liability in the Convention for cases defined in the

Agreement (a definition which encompassed all who fly to or from the U.S.A.) was, for all intents and purposes raised to a sum many times higher than the original limit.[75] Also, as we shall later observe in detail, the provision in the Convention which pronounces the air carrier as not liable in certain cases was actually eradicated by the Agreement.[76] These provisions were agreed upon, on May 13, 1966, only a day before the deadline for the American recession from the Warsaw Convention, leaving it literally to the last day for the United States' Government to withdraw its formal denunciation.[77]

In between the time which the U.S.A. had denounced the Warsaw Convention and the withdrawal of the Denunciation Note, the International Civil Aviation Organization held a vivid, though abortive, meeting in Montreal especially directed to solve the problem caused by the American move.[78] Even after the Interim Agreement was reached, thanks to the good offices of IATA, a Panel of Experts, established for that purpose by ICAO's Council, discussed, in camera, the revision of the Warsaw

Convention. Indeed, in its Second Session, July 1967, the panel ultimately reached two alternative proposals for solution;[79] both were immediately submitted by ICAO to one hundred States for their reflections. As of March 10, 1968, 57 States have already responded.[80] On the strength of the Panel's proposals and the answers of the various States, the Legal Committe is due to decide upon further revision work when it assembles in the fall of this year, 1968.[81]

Meanwhile, this is where the Warsaw Convention stands today; it has multiplied like a living cell over the years and became four different systems, and perhaps even more. First, there is the original Convention itself, functioning among the High Contracting Parties which haven't yet ratified the Hague Protocol. Then there is the Warsaw Convention as amended by the Hague Protocol, binding among the States which ratified or adhered to the 1955 Instrument. Then again there is the Warsaw Convention as "amended" by the Interim Agreement in force among all airlines which are parties to the Agreement and whose governments are Members of the

original Convention. And there is the Warsaw Convention as amended by the Hague Protocol as further amended by the Interim Agreement, binding those airlines, parties to the Agreement whose governments have ratified the 1955 Instrument. To this picture one should even add all sorts of privately amended Warsaw Conventions - or Warsaw Conventions as amended by the Hague Protocol - governing the liability of airlines which have contracted with their passengers (on the tickets), under Article 23 to the Convention, special limits higher than those set in the Convention itself or the Convention as amended by The Hague Protocol. How uniform, indeed, can a "unified rule" be![82]

It is thus no wonder that all concerned with the air carrier industry, men of business, government and of the Law are today very much absorbed with the shakey Warsaw Convention. A solution which will set the liability system of the Warsaw Convention upon a solid contemporary rationale, stated in terms capable of uniform interpretation is needed now more than ever. And, this paper is dedicated to the definition of this rationale and the

construction of such a system of liability. In order to arrive at it, we shall, in the following, briefly review the Warsaw Convention rule as a whole, quickly dissecting the nucleus which contains both the Convention's liability and limitation of liability systems. We shall examine these systems in order both to find their substance, source, and meaning, and to discover their relation to prevailing legal theories in the field of tort liability (especially in the United States of America) the country which since the Denunciation episode seems to have a crucial say in international aviation matters). As we shall find the core of the Convention's liability system to be in disagreement with modern rationales in the field of tort, our next step will be to adapt the former to the latter. Ultimately, we shall present a new rule of air carrier liability to replace the existing rule in Article 17 of the Warsaw Convention; it shall answer present day demands in the Western world in the field of tort liability in a manner most profitable to the world community and to international civil aviation.

B. Framework and Rules of the Warsaw Convention

The rules laid down in the Warsaw Convention may be classified into four major Categories, according to their relation to our particular subject of Article 17 and air carrier's liability towards passengers.

a) carriage of goods, documentation, scope and realization of rights of action

In the First Category one may include those provisions which least concern our subject. These include primarily the provisions dealing with the carriage of goods and baggage, i.e. Articles 2(2),4-16,18,20(2),22(3)(concerning hand baggage, 24(1) (relevant also to liability for Delay),26 as interpreted by 35, 30(3),31(1), and the second part of Article 32. In addition, this Category includes the Convention's rule concerning liability towards passengers and shippers for delay as set in Article 19(and Article 24(1) which also applies to liability for damaged goods and baggage). The bulk of the changes in the Hague Protocol occured in this Category and relate to the carriage of baggage and goods. Replaced then were Articles 2(2),4(1)(2)(3),6(3),8,9,10(2),22(2), 26(2). Article 15 was enlarged, and Article 20(2) was deleted. Article 23, which originally applied to both baggage, goods, and

passengers (classified in the group related to limitation of liability) was enlarged by a paragraph (2) dealing with contractual stipulations in some specific cases of carriage of goods. No change was made in the particular Article concerned with air carrier's liability for delay.

The Second Category in the classification of the rules of the Warsaw Convention consists of Articles which outline the Convention's scope and explain its overall application (other than Articles 36-41 which merely relate to the Instrument of the Convention itself). In this connection, Articles 1(2) and 1(3), refer to the "international" definition of the Convention's scope; Articles 1(1), 2(read with the Additional Protocol), 30(1) and 34 connect the application of the Convention's rules with both the nature of the air carrier and the relevant air carriage transaction; and Articles 31(2), 32 and 33 explain the contractual stipulation of the law applicable to the international carriage which falls within the Convention's scope. In this category the Hague Protocol replaced Article 1(2)(3) and 34, adding Article 40A which contains two definitions relating to the scope of the Convention.

The Third Category in our classification of the Warsaw rules includes the Articles of the Convention which pertain to the

realization in courts of the rights and obligations which the Convention entails. These include Article 28(1)concerning Jurisdiction; Articles 28(2) and 29(2) relating to Procedure; Article 29(1) which deals with limitation of actions; and Articles 24(2),27, and 30(2) which govern questions related to rights of action. No change was made by the Hague Protocol in this Category; the realization of the Warsaw Convention's regimes in court remained as before.

b) the systems of liability and limitation of liability

The Fourth Category in our classification of the Warsaw Convention's rules is the one most pertinent to our thesis. It includes the Articles in the Convention which directly regulate the liability of air carriers towards passengers, reproduced in the following under two headings:

(1) Articles 17, 20(1) and 21 of the Convention create its particular passenger liability regime:

> Article 17:"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[83]
>
> Article 20(1):"The carrier shall not be liable if he

proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 21: "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

(2) Articles 22(1), 22(4) and 23 establish the Convention's system of limitation of liability, once liability was established according to the foreoing rule.

Article 22(1): "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs.[84] Where, in accordance with the law of the Court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Article 22(4):"The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of finess of nine hundred thousandths.[85] These sums may be converted into any national currency in round figures."

Article 23:"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract which shall remain subject to the provisions of this Convention."

The foregoing Articles in this group were supplemented by Articles 3 and 25 representing a punitive measure which renders the limitation on the liability inapplicable in some cases:

> Article 3(2):"The absence, irregularity or loss of the passenger ticket shall not affect the existance or the validity of the contract of transportation, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability."
>
> Article 25:"(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.
>
> (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

The Hague Protocol didn't touch upon the first group of Articles which only relate to the system of passenger liability. However, it altered the limitation

of liability system. Article 3 was replaced with a new Article requiring fewer details inserted in the passenger's ticket, and specifying the cases in which the punitive measure of this Article applies.[86] Article 25 was replaced by a new article which limited its own application to proof of damage resulting from an act or omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result".[87] In Article 22 paragraphs were replaced and added, altogether increasing the limit to 250,000 Poincaré francs[88] - twice the original sum - and allowing Courts but in certain cases to award plaintiff costs beyond the limit.[89] And a new Article 25A was adopted, applying the limitation of liability to the employees of the carrier.

The Montreal Interim Agreement of 1966 which is concerned exclusively with this category varied both the rules of liability and of limitation of liability in the Convention; Article 20(1) was in effect deleted, and Article 22(1) was curbed and circumvented:

> "The undersigned Carriers hereby agree as follows: ... as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage,

includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place.

i) The limit of liability for each passenger for death, wounding, or other bodily injury shall be the sum of US $75,000 inclusive of legal fees and costs, except in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US $58,000 exclusive of legal fees and costs.

ii) The Carrier shall not, with respect to any claim arising out of death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol."[90]

C. The Nature of the Liability of the Air Carrier in the Warsaw Convention

The substance of the liability of the air carrier as embodied in Articles 17 and 20(1) of the Warsaw Convention is "presumption of fault"; the basis of the liability is negligence, but instead of having the plaintiff prove it, the onus is on the defendant to prove the lack of negligence.

a) a piecemeal construction of presumption of fault:

When the original French Draft was submitted to the 1925 Conference of International Air Law in Paris, the Reporter, M. Pittard, a strong Civil Law exponent of the fault principle as a basis for tort liability in the Warsaw Convention, explained the necessity of retaining this principle by comparing it to the alternative of absolute liability, thus:

> "It is certainly necessary to recognize that he who uses an aircraft is not unaware of the risks inherent in this mode of travel which has not yet attained the point of perfection which a hundred years have given to the railroads. It is therefore fair not to impose on the carrier an absolute liability but to relieve him of all liability whenever he has taken reasonable and moral measures to avoid damage."[91]

In other words, because of the inherent danger in air travel which the passenger had supposedly assumed(which was not an extraordinary presumption two score years ago,[92])the drafters of the Warsaw Convention adopted the fault principle as the basis for the Convention's liability system. But even this theory of assumption of risk didn't prevent some of the participants in the Meetings of CITEJA's Second Commission (who considered the Draft Convention during the years 1925 - 1928) from

advocating the adoption of the absolute liability rule for the proposed Convention if only in order to promote uniformity and thus to facilitate the insurability of air carriers' liability.[93] Yet, when the Draft Convention was presented to CITEJA in its Third Meeting in Madrid, it embodied the concept of fault.

The fault principle in the draft introduced in Madrid was different from the principle as adopted a year later at the Warsaw Conference in at least two ways. Article 22(a) of the draft didn't vary much from Article 17 of the subsequent 1929 Convention. But Article 23 of the Draft, in which the system of liability was based upon the presumption of fault, and Article 24 which regulated the air carrier's vicarious liability called for a rule dissimilar to the one which was ultimately inserted in Article 20(1) of the Warsaw Convention. In Article 23 of the draft the carrier's defences were curtailed as his liability became absolute when the damage was shown to have arisen from "a latent defect in the aircraft", notwithstanding whether "reasonable" measures had been taken.[94] On the

other hand, in Article 24 of the Draft, a defence was added to the carrier's advantage, so that errors in the piloting, handling, and navigating of the aircraft were not to be considered against him when other "reasonable measures" had been taken.[95]

However, the additional defence which Article 24 of the draft gave to the carrier was erased by CITEJA in its 1928 Madrid Session after the Committee decided that such a defence would tip the balance in the liability system too much against the passengers.[96] On the other hand, the absolute liability which Article 23 of the draft imposed on the carrier in cases of latent defect in the aircraft, was retained by the Committee, which took cognizance of the fact that "in several countries air carriers liability is absolute".[97] Even M. Pittard agreed on the appropriateness of absolute liability in cases of a latent defect in the aircraft, basing his consent upon a potential fairness to passengers who were not usually in a position to sue the manufacturer by themselves.[98] But, at the Warsaw

Conference in 1929 the presumption of fault of the drafted Convention was further strengthened as the delegates erased the "latent defect" exception and even introduced one of the typical resorts opened to defendants in negligence actions: contributory negligence.

The reasons for adopting negligence as the basis for the Convention's liability system were hardly abstract or philosophical. A short-lived Conference of one week which had to, and managed to, produce such a major Convention as the Warsaw could hardly be expected to give deep consideration to the rationale behind the liability. There was only enough time for the practical give and take in the bargaining between States, each of which aspired both to insert its own legal attitude into the Convention, and to help in obtaining a compromise between its contemporary air transport interests and the needs of the air passengers community. General questions about a proper theory upon which to construct the Convention's regime of liability were as a whole ignored by the participants in the Conference; they thus allowed themselves to follow

without much further scrutiny Professor Georges Ripert's convictions in regard to the sanctity of the fault system.[99] And as the records show, the refinement of the fault principle in the Convention, through the deletion of the absolute liability rule and the addition of the contributory negligence concept, can be most readily traced to the efforts of one particular delegation, the delegation of Great Britain.[100]

The rule of absolute liability which the Madrid draft established in a case of latent defect in the aircraft was removed by the 1929 Conference in a quid pro quo game in which Britain was pacified, in spite of strong opposition, for the fact that the Conference on the insistence of the USSR didn't accept Britain's (and France's) proposal to revive the air carrier's defence in the pre-1928 draft relevant to error in piloting.[101] The defence of contributory negligence was brought into the Convention as a result of a direct British proposal during the second reading of the draft, in the 1929 Conference.[102] Originally, the British had proposed to have contributory negligence

as a complete deterent to a plaintiff's suit. The Conference however adopted the concept but left its method of application to the lex fori.[103]

b) Sir Alfred Dennis and the Common Law

The only delegation representing a Common Law country at the Warsaw Conference was the delegation of Great Britain headed by Sir Alfred Dennis.[104] And it was Sir Alfred who doggedly pursued the purification of the fault element in the Convention, purporting to put the legal basis of the Convention on the same foundation as the Common Law was at the time the Conference took place.[105] As a result, as we shall see later, frustrating obstacles were put in the path of subsequent uniform interpretation of the Warsaw Convention.[106] Worse still, because of the attitude of the British delegation, the liability regime in the convention is today out of step with contemporary social conditions and legal policies.[107]

An example of the lack of vision on the part

of the British delegation could already be found in the way Sir Alfred introduced the concept of contributory negligence to the Conference. According to the contemporary Common Law in Britain, contributory negligence indeed totally barred compensation in actions in negligence.[108] Yet, Sir Alfred who asked that Article 21 too shall bar the plaintiff action, was already in 1929 representing a view unlike that of the Civil Law and American Common Law systems, and about which a confusion as to application existed in his own country.[109] Moreover, only a dozen years after the Convention came into force, the English Law itself was statutorily altered and contributory negligence ceased to bar actions in negligence in England, becoming a factor only in the assessment of damage in tort cases.[110]

Then there was Article 25 and Sir Alfred Dennis' insistence in the name of the British Common Law upon a "wilful misconduct" terminology thus causing the insertion of the impossible phrase "wilful misconduct or its equivalent" which was to haunt the Common Law Courts and judges for many years.[111] And it was following

these same sentiments that Sir Alfred, as we saw, unsuccessfully sought to preserve for the carrier the defence of error in piloting and led the rest in erasing from the Convention the absolute liability of the carrier in cases of latent defect in the aircraft. We submit, however, that even if the Common Law in 1929 still seemed to afford some legal basis for Sir Alfred Dennis' aspirations, this is not the case today. As we shall endeavour to show in another Chapter, if the Warsaw Convention was conceived today, the delegates of Great Britain or any other Common Law Country should not have been able to assist in the creation of a liability system based on the concept of fault.

c) empty revisions

If the position taken by Sir Alfred Dennis and the creators of the Warsaw Convention, in freezing the law of air carrier liability according to the circumstances of the air transport industry and the national Laws and policies of their times, could mainly be attributed to shortsightedness, this is not the case, however, with

the revision work on the Convention in the following decades. The delegates to the 1929 Conference may at least be excused for their lack of foresight but those who later revised the Convention should have minimally taken cognizance of two germinating phenomena planted even before the Warsaw Conference was convened. The first of these phenomena is that the air transport industry is not merely growing quickly but its prospects for development are unlimited. It is obvious that we are only on the threshold of the expansion of civil air transport and can look ahead to infinite potentials for progress in modes, means, speed and volume of air carriage. This must entail a realization that legal rules regarding international air carriage enacted today may very easily be anachronistic tomorrow.[112]

The second phenomenon which those intending to revise the Warsaw Convention didn't appreciate is that our present age is one of social reforms, boundless and of unparallelled intensity when compared with any other era prior to the closing decades of the nineteenth century. In our modern times the impact of changing

social conditions has found its way directly into the realm of law as it had never done before. New policies and social expectations are everywhere constructed, forming a basis for novel laws far divorced from the social, economic and legal rationales of the past.

Further in this thesis we shall discern and analyze actual public expectations which, we submit, pertain to our particular field, and which consequently should have been incorporated into the Law of air carrier liability. Such assertions and their desired impact upon Law, may of course be argumentative, and jurists and economists may take exception to them. But the two phenomena described in the foregoing paragraphs cannot be disputed. In their light the drafters of any revised Warsaw Convention should have at least been alert to the possibility that relevant new rationales underlining novel policies exist. Guided both by the unbelievably rapid and constant changes in the air transport industry and by the knowledge of that particular tightly interwoven relationship between Law and social expectations in our times, those revising the Convention should have

at any rate investigated its liability system.

This was, however, not done. The revision work on the Warsaw Convention both in ICAO's Legal Committee and in international diplomatic Conferences did not produce any significant changes in the Convention's liability system. Yet more important, no search for a contemporary social value with which to examine the liability regime was even carried out.

d) the Hague Protocol

Both in Rio de Janeiro in 1953 where the Protocol to amend the Warsaw Convention was conceived and in the Hague in 1955 where it was finally formed and presented, the Convention's liability and limitation of liability systems were approached in a piecemeal and diffident manner. In fact, the revision of Article 22 at the Hague Conference hinged on the phraseology of Article 25;[113] the objective question of an adequate economic[114] limit within the Convention's general scope was tied to punitive action measured by the strictly subjective

standard of personal culpability which in some particular cases removes the carrier's defences and advantages. The two problems were put on an equal footing in the Conference in an "open or closed doors" equation[115] in which delegates agreed to raise the limit of liability in direct proportion to the degree to which the door would be closed in the face of a plaintiff seeking the punishment of one carrier or another. Hence general statistical reasoning and personal notions of adequate punishment were mingled; the Conference decided upon the economic adequacy of compensation in all cases of air carrier liability according to the delegates' own outrage at acts and omissions of pilots and crew, in fortunately very few cases.

In consequence, there was no change whatsoever at The Hague in the passenger liability system of the Warsaw Convention.[116] In fact even the changes inserted in the limitation of liability system were not of great importance. What was primarily a semantic change was made in Article 25 relating to "wilful misconduct" which still seems to mean what it meant before according to its interpretation in the American courts.[117] Article 3 though simplified for the

carrier's convenience received through the Protocol a meaning actually similar to its interpretation hitherto in the U.S. Courts[118] (though these courts recent treatment of the "notice" requirement seems designed to undermine the whole uniform system of the Convention.)[119] The sum of the "limitation of liability" in Article 22(1) was changed after much heated controversy to equal, in fact, the same purchasing power in 1955 which the original sum in the Warsaw Convention had represented in 1934,[120] when the U.S.A. had adhered to the Convention.[121]

Yet, as we have already mentioned,[122] though indirectly, the Hague Protocol did eventually bring a change in the Convention's liability system in the light of contemporary rationales. For it caused an avalanche, which culminated in the Montreal Interim Agreement[123] and in a new modern approach to both the questions of liability and of the limitation of liability of the international air carrier.

e) the Interim Agreement; touchstone of change

By almost quitting the Warsaw Convention the U.S.A.

was on the verge of creating a great impediment not only to the progress of international air transport and to the international community but also to its own citizens. For if the U.S.A. had left the Warsaw Convention, other States would have found no alternative but to follow suit[124] and the uniform law would have been replaced by internal Choice of Law rules coupled with a multitude of domestic laws relating to the liability of air carriers.[125] It is true that the big American air carriers, who proved themselves able to cope with the problem of the diversity of laws in domestic flights over the fifty American States,[126] would not have felt the pressure too strongly. But the fate of many a small airline in poorer countries would have been jeopardized[127] at the expense of the international image of the U.S.A.[128] More important from the American point of view, the rights of citizens of the U.S.A. using international transportation would also have been curtailed. For despite the different beliefs in some quarters of the American legislature,[129] and notwithstanding the handful of recent judgments in the U.S. courts - whether they relate to new trends in the Choice of Law problems[130] or to jurisdiction questions[131] many an international American passenger on

flights over foreign countries would have found himself with less recourse to remedy than he has under the Warsaw Convention.[132]

The Interim Agreement turned the pending disaster into a blessing. And beyond its specific advantages, it also benefited Americans and the rest of the world in other respects.

First, the Agreement and all which preceded it put the issue of the revision of the Warsaw Convention into clear perspective: it pointed out the importance and urgency of the problem. It is true that since 1929 many sessions in CITEJA and in the ICAO Legal Committee were devoted to the examination of the Warsaw Convention, illuminating its many deficiencies and proposing changes. Many books and articles related to the Convention were published.[133] Nevertheless, until the Americans took their step, laxity prevailed.[134] Apparent reluctance to prejudice the universal success of the Convention by tackling it seemed, as we indicated,[135] to slow down any will to promote a change in it.

Since the drastic American move to denounce the Warsaw Convention in 1965, delay gave way to haste. Today the question of the international air carrier's liability is considered by all to be crucial. The symposia gathered to deal with the revision of the Convention - the large number of lawyers, government officials, and representatives of industry in attendance, and the sincerity of the discussions is one evidence of the new approach.[136] Another proof is the constant work done in ICAO[137] particularly subsequent to the meetings of its specially formed "Panel of Experts" all bent upon a permanent solution to the air carrier liability problem.

However, the major benefit rendered by the Interim Agreement is that for the first time an official stamp of approval was given to the concept of liability without fault in the context of the relations between international air carriers and passengers. At last euphemisms were thrown away; a spade was called a spade.

For the American airline's opposition to the voluntary waiving of the benefit of Article 20(1)[138] seems

to have been based on a biased interpretation of the basic facts. As drafted in 1929 Article 20(1) was never actually of any real advantage to the American airlines.[139] The article was in essence paradoxical because it exonerated the carrier from liability on the proof that "all necessary measures" had been taken to avoid an accident, the very occurance of which testifies to the fact that something was amiss.[140] And, though as long ago as 1933 the baffled English Court construed "necessary" to mean "reasonable",[141] nevertheless, the American carriers, wisely,[142] hardly ever put Article 20(1) to the test in American courts.[143] The airlines realized that the Article could only be a bluff with a minor effect in some cases of settlement. They understood that almost no American jury would have barred from compensation the injured passengers of aviation accidents, or their next of kin, because of proof that all "necessary measures" had been taken.[144] That is why to our mind the concept of liability without fault when it was included in the air carrier's liability scheme by the Interim Agreement, it occupied the place it had formerly held in a disguised form.

But if the deletion of Article 20(1) was only of

nominal consequence in the relationship between carriers and passengers, its impact upon legal theory in general and the rudiments of the Convention's liability regime in particular was tremendous. The constructors of the Interim Agreement inadvertently named the true social value which should underly an adequate rule of air carrier liability; they placed the whole subject on the new footing of objective economic reasoning, thus undermining the old foundation of the concept of fault. Through the very examination of the Convention's liability regime in the light of contemporary policies, the creators of the Interim Agreement put an end to the hitherto sanctity of "fault". And the time was ripe for such a development.

On the international scene the interference in the fault basis of the Warsaw Convention found its echo in the answers of the majority of States to the latest ICAO questionaire in our field, which contains the two alternative solutions proposed by the Board of Experts.[145] Faced with the alternative of 50,000 dollars and 100,000 dollars as two levels of limit[146] on liability coupled with the Convention's existing liability system[147] on the one side, or 43,000 dollars

and 75,000 dollars as limits[148] but affixed to a system of absolute liability,[149] most states chose the second solution.[150] As of March 5, 1968, out of fifty-two states, eleven "could accept" the first solution and an additional six could accept it if modified; twenty-eight states "could accept" the second suggestion and an additional nine could accept it "if modified" (which in no case meant the deletion of the absolute liability).[151] It seems, thus, that once the absolute liability concept was identified with passenger liability in air transport in the Interim Agreement, it was here to stay. And the U.S.A. which started the avalanche[152] should, to our mind, take the lead in making this principle the basis of a revised Warsaw Convention.

The insistence of the American Administration on the deletion of Article 20(1) from the body of liability rules set in the Warsaw Convention may have come as a surprise to many.[153] For it was the same Administration that emphasized only a few years before that the 1952 Rome Convention[154] could not be ratified,[155] because of the absolute liability principle embodied in it.[156] At face value the new American move seemed to have been out of line with America's social and economic ideas

relating to the liability of the air carrier. So it seemed, but to find the truth of the matter we must trace the evolution of social expectations in Britain and the U.S.A. within the boundaries of our subject, and to shed light upon the relationship between the Common Law and both concepts of fault and absolute liability.

Chapter Two: Article 17 and 'Presumption of Fault' as a Common Law Concept

Sir Alfred Dennis when he alone represented the Common Law System in the Warsaw Conference took the stand that negligence should be the basis of the Convention's liability system, even if only presumed negligence. In the wake of the 1955 Hague Conference several American lawyers and legislators strongly opposed the participation of the U.S.A. in the Warsaw Convention, arguing that the Convention curtails the plaintiff's rights to compensation when compared with a "free" fault liability.[157] Even today, in the name of "social justice" there are American jurists who call for the retention of the concept of fault in air carrier liability cases because of the existance of a social 'duty' which supposedly demands it.[158] Fault liability, it is said, is an integral part of the American way of life and the structure of the Common Law. The next pages will

show why to our mind such assertions and the advocacy of the fault principle in air carrier liability cases are based upon a mistake. Fault is not a concept inherent in the Common Law, nor in the American society. Even less is fault liability connected with contemporary ideas of social justice. Moreover, historically, fault liability and social justice are contradictory concepts.

A. Source and Circumstance of Negligence in Common Law

Whichever side one takes in the scholastic argument as to whether the Common Law of Tort was initially based upon a notion of 'moral fault' from which it has been constantly moving away,[159] or whether a man initially acted at his peril and only later did the concept of moral fault enter the Common Law,[160] it is evident that though rare mentions of deaths attributed to negligence may be found in a handful of earlier cases,[161] the notion of negligence as part of the test for liability is not to be found in any Year Book or Digest of the English Law before the second half of the eighteenth century.[162] Moreover, when negligence

was at last entered into the Common Law,[163] it arrived tightly bound to the social and economic conceptions of its age of birth, with the purpose of answering its needs.

For personal fault is an organic part of the teaching of the Age of Reason, set in the structure of that period's policy of individualism, equality, and laissez-faire. Like these concepts, fault liability was also coated by its advocates with a thick layer of moral semantics in order to add force to it and to put into practice the Liberal dream of "a domain in which the individual is referred to his own will, and upon which government shall neither encroach, nor permit encroachment from any quarter."[164] Under the name of morality, the principle of personal subjective fault "equal(ed) legal liability to the culpability of the individual participant in (in tortious actions)."[165] For the test of liability due to fault may be explained only on the basis of the liberal teaching of equality, according to which all potential injurers and victims stand on an equal footing. In cases of enterprise liability, further support was given by "pure" economic reasoning[166] to the 'fault' liability test which let the losses lie where they had fallen when no party was to blame. It

makes no difference who actually bears the loss, the liberal economists explained, for its pecuniary equivalent will ultimately be reflected in the price of the enterprise product or service and thus be rightly allocated to the customer. For both consumers of enterprise products and users of enterprise services[167] take upon themselves, as groups through choice between higher or lower priced products or services, the risk of purchasing a product or using a service with inherent defects. Damage to customers would entail a cut in demand for a similar product or service and would in the long run be reflected in reduced prices. Thus the mass of consumers would be compensated as a group for the loss which any individual among them suffered, while the sacred 'no liability without personal fault' doctrine remained intact.

The rub was, of course, that such eighteenth century economic reasoning left no room for looking at the individual as a separate entity with human values. Moreover, the moralists of the Age of Reason ignored the inherent inequality among men in their stations, their opportunities, and their natural abilities for combating life's vicissitudes.

Thus indeed the very use of moral semantics by the theoreticians of individualism in order to sanctify the contemporary social and economic interests led the Common Law courts to pronounce judgments which are in fact "revolting to any moral sense"[168] today. The screen of morality of that age was "helping industry to profit by the misfortunes which it caused"[169] by clinging to the "common employment" doctrine.[170] Also, the fault test in its pure form could not include nonfeasance but only commissions. Accordingly, the Common Law judge in the nineteenth century, arming himself with the 'personal fault' liability test, managed to exonerate from civil liability a manufacturer who would not give a warning when he saw a trespassing child approaching the mouth of his machinery;[171] a railway company whose servant refused to help a person injured by a train but not through negligence;[172] a carrier who would not call a doctor to help a trespasser who was hurt while trying to steal a ride:[173] and well inside the twentieth century, an owner of a boat-renting enterprise who sat at the dock, with a boat at hand, leisurely watching the man to whom he had rented a boat drown.[174] Despite mounting exceptions, even today an ordinary bystander is under no obligation to attempt the rescue of a

child from drowning in what he knows to be shallow water.[175]

Such examples as these show the source and the real nature of the morality behind pure fault liability in the Common Law. This is the morality which even today leads well-wishing people to confuse fault liability with social justice. It was a morality of one social creed at a certain age. It was a morality under which the American judge, until not long ago, condemned social legislation as unconstitutional, using the principle of liberal equality to claim that "theoretically there is among our citizens no inferior class,"[176] and thus no legislature could presume the need to protect anybody.[177] One labour law after another was discarded for putting workers "under guardship,"[178] creating a "class of statutory labourers,"[179] "stamping industrial labourers as imbeciles,"[180] or for "being an insult to the workmen's manhood."[181] It was only in 1911 that the U.S. Supreme Court[182] overcame the principle of "equality," although even in 1936[183] this court found a Minimum Wages Act to be unconstitutional because it interfered with the freedom of the individual.[184]

B. The Impact of Time

a) incentives for change

Towards the twentieth century, with the transition in the interests and values of Western society, the concept of morality was also bound to undergo a complete change:[185] it has received a social content very different from its former individualistic one. The Industrial Revolution which raged during the last two centuries has taken too great a toll in human life and misery not to promote a quest for a better social order, including a different moral definition of right and wrong. And as, of course, "the (tort) branch of Law must reflect changing social conditions,"[186] the consequences of the Industrial Revolution also left their mark on the field of private redress and in particular on the sphere of enterprise activities. For it was here that the clash between subjective fault liability and the problems of industry at the end of the eighteenth century revealed the main social sore which was to leave gaping abcesses in Anglo-American society and Law. It was also in the field of enterprise activities that the growing predominance of big shareholders' companies and the phenomenon of insurance had their principal impact. The big impersonal companies

emphasized the "human failure in a machine age."[187] On the other hand, the insurance phenomenon enabled "the shift of civil liability from the immediate tortfeasor to a third party better fitted to absorb the risk of compensation."[188] Together, they helped to reshape the nature of the defendant enterprise in accident cases impersonalizing industrial and service enterprises both small and large. For monetary bodies, with codes running in their veins and a balance sheet for their heart, took the place of the individual who formerly could, either as owner or employee be reasonably responsible, directly or vicariously, as injurer. And this transition greatly affected tort liability cases. The plaintiff, the sufferer of the injury, remained in most tort cases, the human being, either a cripple, an orphan, or a widow, who "can ill afford" his losses.[189] On the defendant's bench, on the other hand, was seated a well oiled incorporated machine, whether it was an industrial establishment, a sale or service agency, or an insurance company. Sometimes, the plaintiff's risk might have been insured too, even further confining the whole dilemma of enterprise liability to a dry affair between two or more monetary organizations. Though, even then, the actual suffering involved and the hardship

caused by any delay and uncertainty still remained with the injured or the next of kin of the dead victim.[190]

In consequence, the Liberal teachings which might have been justified in a pre-industrial society ceased entirely to be so in regard to modern enterprise liability. And fault liability was bound to lose ground in enterprise accident cases. For, in spite of the teaching of '<u>laissez-faire</u>' and no matter who carried the losses in the aftermath of the enterprise accident, such losses "usually fall upon the community as a whole,"[191] in the long run. Even if in terms of the national economy the 'pure' economic reason for non-interference with the allocation of losses may prove correct,[192] it does not do so in relation to the members of the community themselves. Among them, different rules of Tort may increase or decrease losses by shifting their pecuniary costs between the parties:[193] the same pecuniary loss may have a different value for each of them.[194] "In this mechanical age the victim of accidents can, as a class, ill afford to bear the loss"[195] of enterprise accidents. On the other hand, the enterprise usually is the party to whom the losses would mean the least, and the enterprise is also the one who is better able, initially to allocate potential losses, through insurance, to costs, and pass them

on to the customers in the form of higher prices.

Thus it is no wonder that a clear realization that society has a stake in the relationship between the enterprise and whoever is injured by its activities began to overule the dying dogma of equality and non-intervention. It was realized that the interference of the Law, whether through its political or legislative arm, was decidedly needed in order to lighten the burden of the potential victims of enterprise activities both before and after their misfortune has occured, by preventing accidents with compulsory safety regulations, and after, by promptly redressing injuries arising from accidents. Neither personal blame, nor mere individual deterrents, nor punishments are relevant to the question of compensation. A new, socially just and economically expedient test of liability was urgently required, which by way of "social engineering"[196] could swing the balance for or against the plaintiff, according to the emerging social needs.

b) towards a modern policy for enterprise liability

With the decline of the relevance of the concepts of laissez-faire, equality, and pure economic reasoning, the conviction of the immortality of the notion of personal fault in the context of tort Law also ended, even in liberal quarters. We find such stout Victorians as Lord Bramwell stating, though hesitantly, in an 1891 case concerning a workman's injury, that

> "I am not certain it would not be a good thing to give a person a right to compensation, perhaps from the state even where there was no blame in the master, even where there was blame in the servant. Men would not wilfully injure themselves, and the compensation would be part of the cost of the work."[197]

Thus new legal goals demanding that "society as a whole (will) know that those who are injured will not be left destitute"[198] began to be formulated in response to a new concept of social justice in the light of which it was urged that without delay, added grief, or frustration, the Law should guarantee the victim of enterprise activity, "the assurance of compensation where there is liability."[199]

In short, instead of individual apprehension, "other

and broader moral considerations call(ed) for an entirely different system of liability, namely, a wise distribution of accident losses over society, without regard to personal fault."[200]

These new moral considerations and the idea of the distribution of risk are best met in courts in the enterprise liability context by a test of liability divorced from any aspect of personal fault.[201] The enterprise shall always be liable to injured customers to the extent that it is better able to bear the risk which initiated the losses, and to spread these losses in the form of prices to the public. Only in circumstances in which a clearly recognized "limitation upon the power of the defendant to shift the loss to the public"[202] exists, or where according to the ascertained practice of insurance and other relevant economic conditions, the potential plaintiff is in a better position to distribute the risk, should the enterprise not be expected to be liable.[203]

C. The Emerging Policy and Air Carrier Liability

a) the initial impact

Quite naturally the realization that a new attitude must replace the former individualistic morality, and that a new test must replace the test of fault, first arose in the area of enterprise - employee relationships. For the notion that "the blood of the workman was a cost of production"[204] was more easily understood than that the losses suffered by a third party or the ultimate consumers of enterprise activities should also be reflected in the price of products. Hence, when the new social interests in risk distribution began to cause changes in the Law, they did so first in the field of workmen's compensation. Starting in Maryland in 1902,[205] Workmen's Compensation Acts mushroomed in a short time all over the U.S.A. in state and federal jurisdictions. And as in the long run, "the criterion of judgment must adjust itself to the circumstances of life,"[206] the Common Law Court ceased to judge such Acts as unconstitutional.

b) distortion of the fault principle

The courts, inherently conservative and based upon the stare decisis doctrine, were only partly able to undertake by themselves a full change of attitudes and of the liability test in cases of enterprise liability. They would not completely

remove the fault principle, but instead tried to mitigate, curtail, and distort it in order to align it as much as possible with the new needs. Only in some areas of enterprise liability did the courts succeed in introducing some kinds of absolute liability, though still within conceptual restrictions belonging to the notion of fault.[207] In other cases, for example in the field of omission (from which we drew the foregoing examples about the immorality of the moral basis of fault), the concept of fault was extended beyond its natural meaning in order to accord with modern public expectations. Thus the question whether the defendant exercised control over the dangerous machinery became relevant in a case of omission:[208] a carrier was judged responsible when he would not aid a helpless passenger in his charge:[209] and a motorist had to compensate a man whom he had injured without fault on his side, for not helping him after the accident.[210] In the relationship of employer and employee, or host and invitee, there is little doubt that omission would be regarded today as culpable when referring to fault liability in private redress cases: in fact, this will probably be the case whenever the relations between the parties indicate some actual or potential economic advantage to the defendant.[213]

The day is near when courts will recognize that compensation should be paid for omissions in the same way as for commissions.[214] But though it still will probably be related in terms of fault, fault can no longer mean what it meant before. In fact, even the rules of evidence in Court when applied in the context of enterprise activities further undermine the basis of fault liability. For such rules render the plaintiff an advantage which is more meaningful when an enterprise sits on the defendant's bench than when an individual does, thus destroying the equality notion upon which fault is based. Such a rule is the res ipsa loquitur rule.[215] An individual being sued for negligence may prove his lack of personal fault, negatively, but the modern enterprise, with its multitude of servants and agents who use the most intricate machinery is in a much less favourable position. And when a full gallery of defendant enterprises, air carriers, air traffic control, and aircraft manufacturers, for example, as well as others added to the defendant's list,[216] must exonerate itself from liability by proving an absolute lack of fault on the part of each of them, the plaintiff can hardly lose.[217]

In general the edge of fault has been dulled, and the new concept of social justice, which has nothing to do with the morality which initiated fault liability, has made at least some inroads even in Court. It should be noted that during the transition from the morality of the last centuries to the teachings relevant to social needs of today, the Legislature often came to the rescue when the Common Law Courts had hesitated for too long. Thus the last remnants of the common employment doctrine was cast off by the Legislature. Also, Wrongful Death Acts in many forms erased another tort doctrine tightly bound to fault in its original form.[218] Indeed, it seems that it is the task of the Legislature to align the Law with modern social expectations in the field of enterprise liability.

Thus, it seems that what the advocates of 'free fault' for air carrier liability mean cannot but be the retention of fault as curtailed and distorted during the years in which this concept followed the image of modern enterprise in our society. For it is only because the fault principle was so radically altered that a plaintiff in internal air accident cases in the United States can usually be certain

about collecting compensation in Court if he has not yet done so in a settlement.[219] And because that is the face of 'fault' today, the Warsaw Convention is abused in the American Courts[220] and consequently in settlements involving accidents on international flights; Articles 3 and 25 have become a sword over the head of airlines, beyond the intention of the drafters of the Convention.[221]

The distortion of the fault principle in the American Courts, which led to the realization that a new rule of liability is needed to govern enterprise accidents, was behind the American move to erase Article 20(1) from the regime of the Warsaw Convention. It should also be the reason for squarely facing the problem today of formulating the new liability rule in international air carriage. Instead of referring to "presumption of fault" and defining degrees in fault and culpability, absolute liability should be officially adopted and efforts should be directed toward its implementation in the Warsaw Convention.

Chapter Three: Application of the Evolution of Policy and Law to the Convention's Liability System

A. New Test for Air Carrier Liability

The implementation of modern ideas in regard to air carrier liability within a uniform international rule can be discussed separately in regard to each of the independent questions of liability and limitation of liability.

a) foolproof absolute liability

The liability of the international air carrier towards its passengers must be an absolute liability in the true sense of the word. Articles 3 and 25 of the Warsaw Convention as well as Article 20(1)[222] have no place in a system based on the allocation of costs of accidents according to ability to bear the accident losses. At the same time the rule of the

Convention should expressly encompass all potential defendants, together with the air carrier, in the same civil liability case. An article should be inserted into the Convention ensuring that no plaintiff would be able to recover compensation beyond thetlimit prescribed, whether or not he had also sued others involved, such as manufacturers, air traffic control, airport authorities or crew members. In another article in the Convention the immediate payment of compensation[223] should be safeguarded by appropriate details.

After the orphan, widow or injured is compensated, whatever action is taken among the enterprises concerned or their insurance companies would not concern him. He would be able to go on living with dignity, while the insurance companies of the manufacturer, carrier, and others settle losses among themselves by whatever means they please. The economists in the service of the insurance companies will surely find a certain set of rules and tables according to which they can solve such problems: this is not a question with which either the international drafters of the Convention or the passenger community should trouble themselves.

b) calculation of limitation of liability

Under the same principle which warrants the rule of absolute liability must be settled the question of limitation of liability. The limit should be decided as a compromise between the sums of money stated in the replies given by the major civil aviation powers as to the ability of the international air carrier to bear accident risks. Even after a superficial examination it must be acknowledged that any such sum of money in a convention in which absolute liability is the rule will be higher than any which could have been written into the Warsaw Convention, in which Articles 3 and 25 constitute a menace to certainty and thus to insurability.[224] It must be added, however, that in the U.S.A. any such sum in an absolute liability Convention will even represent a higher amount of money than in the rest of the world. For in the U.S.A. the average passenger or his next of kin may be expected, in the usual course of things, to pay lawyers a contingent fee which will devour from 33% to 50% of whatever he may collect.[225] The Convention will in fact dispense with the lawyer as the middleman in air accident cases by having the compensation paid automatically[226] and by eliminating the

temptation of breaking the limit with the lawyer's help, through Articles 3 and 25.[227] Moreover litigation takes time, while money in the hand can bring more money to its owner. With an average investment rate of 7% the injured passenger who would, for example, get, under the Convention, $60,000 with no share to lawyers, could seven years[228] after the accident have the same amount of money as the plaintiff, in the same accident, who sued to break this limit, may collect after seven years under a verdict of more than double this amount after paying 40% of it to his lawyers.[229]

c) refutation of alleged problems

Since in such a system the limit of liability is attached to a foolproof absolute liability system, the sum of money it represents will have to be substantial, as today, the ability of the air carrier to bear the risks of aviation accidents helped by the modern insurance system, is considerable.[230] Consequently the"free fault"proponents express the apprehension of the air carriers about the possibility that a high limit of liability might present problems from which they were free under the meagre sum of money quoted in the Warsaw Convention.

One such problem, it was said, was that the high limit of liability would prove of no use in promoting certainty and stopping litigation in cases in which the losses involved are smaller than the limit. Critics even attributed to airlines the fear that in small injuries victims "would have nothing to lose in insisting on the limit:" for only in the absence of the Convention, plaintiff's "would have to prove negligence."[231] But surely this last fear is imaginary: even in an absolute liability system, damages must of course be proven.[232] The apprehension concerning certainty and litigation is a problem which in the particular field of aviation accidents seems to be academic. Too many aviation accidents unfortunately result in either death or severe injury.[233] In such circumstances any probable difference between actual losses and the limit of liability would be too negligible to provoke hair splitting. Obviously smaller losses, like a baggage rack's falling on a passenger and causing him a temporary pain, could be solved by including an article in the convention like Article XI(4) in the Hague Protocol.[234] Also, tables prepared according to precedents in like cases in other sorts of enterprise activities could be useful.[235]

Another fear connected with the probable high limit of liability created in 1965 in the U.S. Senate and in some Administrative Bodies strong objections to any plan concerned with automatic compensation in aviation cases. It was said that any such plan coupled with high limits would open the door to sabotage.[236] This argument is at least as old as liability insurance. Many critics feared that such insurance would cause people to inflict harm upon each other, and lamented the "deterrent" element which will be taken away by the "immorality" of insurance.[237] Even though some have indulged in recklessness because of insurance, do we believe that this is a valid reason to prohibit liability insurance altogether? The good which has come from insurance has immeasurably outweighed the ill effects. This is even more true in aviation cases, for there the 'danger' in automatic compensation is the slightest. The Interim Agreement is now over a year old, and no such mishap has been registered despite its $75,000 limit. Also, many insurance plans exist in which any passenger may insure himself years before boarding the aircraft, thus making the saboteurs hard to trace; such plans could lure a dependent to engage in sabotage. Would we prohibit owners of life insurance from boarding commercial aircrafts?. The only seemingly valid

objection relating to sabotage may be the added difficulty in tracing the saboteur under the automatic compensation rule;[238] but this objection should be met by improving police methods, but not by attacking all plans for an adequate international liability system.

B. Other Changes in the Convention

Once a liability without fault regime is coupled to an adequate limit on liability for the international air carrier and the rule inserted into Article 17 of the Warsaw Convention (and Article 20 deleted), it will be necessary to adapt the rest of the Convention's provisions to the new rationale. The need to delete Articles 3 and 25 to achieve our purpose is of course obvious. A national criminal law may deal with the pilot who intentionally wrecks his plane and a relevant governmental department may sanction its carrier which is found guilty of not issuing tickets or notifying passengers about the limitation of liability in spite of specific regulations;[239] plaintiffs will not be able to wreck the economic basis of the whole liability regime in collecting compensation beyond the Convention's limit. There are however in the

existing Convention some provisions which less obviously than Articles 3 and 25 are not consistent with the uniform liability rule and with the theory of liability based upon risk distribution. These Articles, too, must be dealt with.

Article 21[240] does not have a place in a revised Convention. Even if it is only applied in assessing the damage, contributory negligence should not mean anything in a system of liability based upon an objective standard of insurability up to a prescribed sum. Whether the plaintiff's father, for example, was intoxicated or not when he fell through the airplane door before the ramp was attached shouldn't affect the plaintiff's right[241] to the money coming from the insurance policy, in which the carrier, being the better risk bearer, had insured its passengers.

Now, to Article 17 itself lucid definitions must be attached which would solve any existing ambiguity, thus helping to prevent litigation, to promote uniformity, and to adhere to the basic objective rationale. What, for example, does "damage" in Article 17 as it now stands, represent? Does it include mental suffering?[242] What is accident?[243] Does it

include the killing of one passenger by another?[244] Does it cover the death by heart attack of a passenger on an otherwise eventless flight?[245] These are disturbing questions which should be answered according to a compromise between national systems in such situations[246] and in the light of the new liability rule - but once inserted into the Convention they should be treated uniformly.[247] The same should apply to any of the other ambiguous aspects of the Convention,[248] as, for example, to when the "embarking" starts[249] and the disembarking ends;[250] or who are "High Contracting Parties".[251]. Also, the Convention's rules which refer certain aspects of the liability case to the lex-loci,[252] should be aired and re-examined. Such questions as 'jurisdiction' should be revised.[253] For the sake of the United States, the Convention must also provide unequivocally an independent cause of action.[254]

We do not intend here to solve any of the foregoing problematic points of the Warsaw Convention. In order to define only one of the original ambiguities, the meaning of the "air carrier", the international community needed years of study and research before it assembled and agreed upon a uniform answer in a separate international Convention.[255]

All we want to emphasize here is that the solution to these problems must accord with the nature of absolute liability and be given to only one interpretation. Yet, to illuminate some of the novel peculiarities which must be considered when seeking to align the Warsaw Convention with the new liability rule, we offer the following note concerning the definition of one existing ambiguity:"the passenger".

A Warsaw passenger is one who uses the service of carriage after having entered into a contract to that end.[256] Now, even if we had disposed of the requirements of a ticket, and a passenger could have boarded the "air-bus" of the future and be under the Convention's regime even before being approached by the conductor for his fare,[257] still, the very concept of contract originally within the Warsaw Convention would not concur with the new liability regime. For a stowaway who never intended to buy his fare would always be exempt from the existing Convention's rule.[258] Neither will the airline company's employee who hitched a ride on one of its planes be under the liability regime of the Convention;[259] like the stowaway, he would jeopardize the certainty which had allowed the carrier to insure its liability exactly up

to the level within which it had been the better risk bearer.[260]

Consequently, it seems that the"passenger"in a revised Convention must include whoever is on the plane when the accident occured. All must be compensated, for damage suffered, up to the Convention's limit; hence, in accordance with the social expectations which have produced the need for the new liability rule, also when the victim is the airline employee[261] the insurance companies involved will be left to settle matters among themselves only after his next of kin received their compensation.[262] The agreements between the insurance companies may find an echo in the carrier's Employer Liability Policies or employment contracts, but the dependants will be first compensated through the carrier's regular Passenger Liability Insurance Policy, up to the Convention's limit.[263]The altercation which may occur later between the Passenger Liability Insurance Company and the Employer Liability Insurance Company, for example, should not be the concern of the bereaved,(or for that matter, the injured). For, in short, no reason exists for a discriminating treatment of a dead airline employee according to whether he had acquired a formal "pass" before boarding the company's airplane, or

boarded the airplane with a smile only to the stewardess, or, finding no connection in his company's timetable, boarded as a farepaying passenger another airline's airplane.

C. The American Role and the International Rule

a) the American dilemma

The process which led to the creation of the Interim Agreement taught us all that the role of the U.S.A. in international air transport is crucial. Not always do nations retreat so rapidly and agree so completely to the demands of one of them which otherwise threatened to denounce an international Treaty. Such a high position, however, should be regarded by a powerful nation more as a responsibility than as a prerogative. On the other hand, as the U.S.A.'s participation is so vital to the perpetuation of the Warsaw Convention, anyone bent upon the revision of this Convention must investigate whether the U.S.A. has a legitimate claim to differential treatment; where exactly does the distinction lie between this great nation and the rest of the world; and how could the dissimilarity be eradicated with

the least harm to the uniform international rule.

Now it seems to us that only in one meaningful aspect does the American circumstance in the area of air carrier liability not resemble that of the remainder of the international community. Like the U.S.A. many nations have not thus far realized the adequacy of absolute liability in the relationship between the air carriers and passengers.[264] And like the U.S.A. these nations, too, circumvent the pure negligence rule either by distorting its meanings or by inserting some kind of "presumption of fault" into their laws.[265] Yet, no difference exists between the U.S.A. and the rest of the world in regard to the adequacy of a modern, objective, yardstick of risk distribution and insurability, in air transport liability cases. The only factor differentiating the U.S.A. from the rest, with a meaning in our context, is the higher American standard of living, it being a source of altercations as to the monetary significance of aviation risk, hence as to who is the better risk bearer. It results in a higher pecuniary equivalent for human losses in the U.S.A. than in most of the world. But that does not mean that the whole concept of international uniformity of liability rules

and all the advantages it entails should be thrown away. The U.S.A. should do all it can[266] to aid in the construction of the uniform rule upon the basis of the modern attitude to enterprise liability, and when the question of determining the limitation of liability in the Convention arises, to fix the amount of money for the limit according to the concensus among the great civil aviation powers as to the ability of the international air carriers to bear risks and losses. This sum should be written into the article relevant to the limitation of liability in any Convention intended to revise the Warsaw Convention. Beyond this sum, for the U.S. passengers in the circumstances of American life, a special solution independent of the Convention should be adopted, whether it be the solution submitted in the following pages or another which may be judged to be better; however, it should be an elastic solution adaptable to changes in attitude towards compensation in enterprise accidents in general.

Indeed, the developments in the United States of America from the time that the Hague Protocol was brought up for ratification to the introduction of the Interim Agreement make it apparent that somehow the international

regime relevant to the liability of the air carrier must also accomodate a rule which would allow for supplementary local plans in exceptional cases. In fact, it is not only the United States which is an exception to the rest of the world because of the high standard of living it enjoys and the high pecuniary value which its citizens put on human life. Several other States seem to have reached the American level in this regard,[267] constituting with the United States the exception in regard to the majority of the world's communities. In all such exceptional States, and wherever the uniform limit seems flagrantly inadequate, as the Warsaw Convention's or the Hague Protocol's limits are thought of today in the United States, a specific independent local scheme which would not encroach upon the uniformity and the basic character of the liability and the limitation rules of the international convention, should be devised.[268] In the following we shall sketch such a plan, designed to compensate American victims[269] in some particular air accident cases beyond the Convention's limit, and which, without breaking the uniformity of the international rule, is, we think, in accordance with American society's expectations.

b) a supplementary plan for additional compensation in the U.S.A.

According to this plan a central Compensatory Authority should be organized under the auspices of the American Transport Association in conjunction with the representatives of foreign air carriers[270] bringing passengers to and from the U.S.A. (or the body representing most of them, the International Air Transport Association.) This Authority would keep and handle a special Fund. Into this Fund, each airline would annually contribute a specific sum of money which would differ according to variety of specifications, such as the number of passenger miles flown, passenger capacity of planes, density of flights, number of planes, or even safety records. The specifications need not become public. They, and the exact sum of the contribution of each airline would be decided by the economists of the airline associations with the help of their insurance specialists, and would be negotiated among them. The administration would only watch to check that the minimum amount set by Law for the air carriers to contribute as a group would be annually deposited with the Compensatory Authority.

Accident victims who would fall inside specific categories set by the Federal Legislature would receive from this fund over and beyond any sum they already would have received under the limit of liability in the International Convention additional compensation, according to well defined tables which the Legislature would provide.

Many details of course need to be singled out, thought of, negotiated, and decided upon, before such a plan can even come to the drawing board. These details, however, must all be considered in the light of the American way of life, especially in two specific points. First the plan takes note of the abhorrence of the business community in the U.S.A., in particular in the field of insurance, of government interference and regulation. This attitude had much to do with the U.S. Legislature's objections to the "compulsory accident insurance" proposed legislation, which prevented the U.S.A. from ratifying the Hague Protocol.[271] Secondly we recognize that any plan according to which a public fund would dispense special compensation money from the taxpayer's money would hardly have any follower in the Legislative Body.[272] Accordingly, our suggestion names the airlines themselves as responsible for almost anything

connected with this scheme, with the smallest possible control by the Administration. On the other hand, and though no taxpayer's money is involved, the question as to who may benefit under the plan and the minimum amount of money which must at any time be in the Fund of that Authority will have to be determined by Law.

The Federal Legislature will decide who should be included in such a plan after noting the interests of whoever is involved and according to certain factors. Such a relevant factor may be the habit of people in higher income brackets to participate in life and accident insurance programs. Another factor which should be remembered is that the sum of compensation set up in the international convention is to be received by the victim without delay and without the need for a lawyer to take forty percent of it for his trouble.[273] On the other hand it will be important to notice that some cases of serious personal injury, especially among the young, may warrant the need of a sum of money higher than that in cases of dependents of a dead victim. In fact, thought should be given to the question of whether compensation additional to the limit prescribed in the convention should only be rendered to cover actual, proven medical expenses. In addition, of course,

the Legislature, adopting this local plan, must define who is "American" for its purposes, by using either citizenship or domicile as a yardstick.

To the Law which would list the categories of potential victims included in the plan, tables should be annexed in which characteristics relating to ages of dependents, ages of victims, fortunes in lifetimes, or even existing evidence of insurance benefit to next of kin, would minutely define the beneficiaries. Also, for cases of body injury, such tables would contain definitions of losses or figures relating to percentages in ability to function - all which should state who is entitled to the additional monies and to how much each is entitled. These particulars are for the Legislature to decide, though within the Law, the administration of the plan should be in the hands of the airlines. In no way, however, should the plan, the legislative activity or the Compensatory Authority function outside the permission of the international convention and its uniform air carrier liability Law.

Chapter Four: Evaluation

A. Due Haste, Purpose and Determination

Replying to a question at a symposium on the Warsaw Convention in Dallas, Texas,[274] the representative of the Office of the Legal Adviser to the U.S. State Department, Mr. Alan Mendelsohn,[275] maintained that seven years is not too long a period for studying the implications of the American social experience during the Interim Agreement and preparing an adequate uniform Law to be followed internationally. We believe that such an attitude should not be adopted by the U.S.A. or by any other High Contracting Party to the Warsaw Convention. The progress of air transportation, the whole pace of our century and the accelerating economic interdependence of the international community are proceeding much too rapidly to allow such a langour. How much longer can the unhealthy situation exist in which the five members of a passenger

group (to borrow the excellent example of Prof. Cheng)[275] would be judged according to different rules of liability and for similar injuries in the same accident would collect vastly different sums of compensation as provided separately in the Warsaw Convention, the Hague Protocol, the Interim Agreement and the tariff of one or another air carrier, all relating to the uniformity in international air transportation? An immediate step should be taken by the U.S.A., the country which alone shares more than half of the international air carriage, in order to remedy the situation forthwith.

At the aforementioned Dallas symposium, the Chairman of the Aviation Law Section of the American Trial Lawyers Association, Mr. Kreindler,[277] "promised" the participants that the Senate of the U.S.A. will never again ratify a convention embracing a limitation of liability.[278] Such a promise need not prevent the American Administration from endeavouring to lead the world to an agreement over a new international convention based on the principle of absolute liability. Such a promise need not come true because the limitation of liability, if coupled with absolute liability, without exceptions, will provide compensation of about twice the

average amount given in domestic air accident cases in the U.S.A.[279] Moreover the Administration need not fear to ratify such a convention as proposed here because American society seems today to expect absolute liability to govern enterprise liability cases, and the American Legislature is bound in the long run, as it did in such fields as Workmen's Compensation, to follow suit.

B. Conclusions

The Warsaw Convention has been the most important and the most widely accepted among all Private Law conventions. This is not without reason. Without a uniform Law the multitude of legal systems involved in air accidents would create havoc in the whole field of air carrier liability. The policy which we should adopt in initiating a convention to replace the Warsaw Convention is one that keeps pace with modern times. The liability of the international air carrier should be absolute and the provisions of the Convention should be designed so as to support the main rationale underlying the system: to facilitate in a uniform way the flow of compensation to the victims of air accidents and to promote

the certainty needed by the carrier in order to insure all potential losses through liability for a minimum premium, thereby passing on losses as industrial costs in the form of higher prices to the passengers. The international limitation of liability should be decided according to the consensus among states about the maximum sum which the carrier is in a better position to bear as a risk of aviation. In addition the convention should allow local plans with which to solve the problems of countries with an especially high standard of living, like the U.S.A.

Only a few years from now airliners will carry up to five hundred passengers on one trip. We must prepare ourselves for this eventuality by allowing the air carriers to insure themselves within economic reason and exactly up to the sum within which they are truely the better risk bearers. An international Convention based upon absolute liability up to such a sum is the only answer which will satisfy the world and the Common Law community.

FOOTNOTES

1. Indeed urgent resolutions in that field were passed by 1922 by the Advisory and Technical Committee on Communication and Transport of the League of Nations as well as by the International Chamber of Commerce in 1923, and the International Aeronautic Federation in 1924. For an account of the diverse principles of air carrier liability around the world in 1929 see Goedhuis, National Air Legislation and the Warsaw Convention(the Hague 1937).

2. On March 22, 1919, regular international air services by air balloon between Paris and Brussels began; on August 25, 1919 (the same day as IATA was inaugurated) the first commercial flight between London and Paris took off. Also in the same year the British Air Transport Travel Limited, KLM and Air France were born.

   On the domestic scene, the first scheduled dirigible air service anywhere was inaugurated in 1910. See generally Speas, Technical Aspects of Air Transport Management, (New York, 1955) p.1.

3. by regular flights of Air France.

4. Report of the International Conference of Private Air Law, Paris 1925 (issued by the French Ministry of Foreign Affairs, 1936) p.9.

5. Report of 1925 Conference id. pp. 12-13.

6. the United States of America, Japan, and Hungary.

7. for the text of the Draft see Report of Conference 1925 op. cit. n.4 pp. 77-82.

8. Comite International Technique d'Experts Juridiques Aeriens. See Ide, the History and Accomplishments of the CITEJA, 3 J. Air L.(1932)27; Latchford, the Warsaw Convention and the CITEJA 6 J. Air L.(1935) 79 at pp. 84 seq. For later developments see Knauth, Some Notes of the Warsaw Convention of 1929, 14 J. Air L. J Com.(1947) 44, 51 seq.

9. Report of Conference 1925 op. cit. n.4, pp. 82-83.

10. with 28 nations participating (and a U.S. observer).

11. CITEJA, Minutes and Documents 1st Session Paris, May 1926.

12. CITEJA, Minutes and Documents, 2nd Session, Paris, April 1927, p. 40.

13. Reproduced in ICAO Doc. 7838 p. 167. Its English translation may be found in Calkins, The Cause of Action under the Warsaw Convention, 26 J. Air L. & Com. (1959) 217, 221 seq.

14. CITEJA, Minutes and Documents, 3rd Session, Madrid, October 1928.

15. after which, CITEJA held only one more meeting before the 1929 Conference, in May 1929 in Paris, but in which it dealt only with the question of 3rd party liability, preparing the basis for the 1933 Rome Convention.

16. Its Minutes and Documents, originally issued by the Polish Government in 1930 were reproduced by ICAO in 1961, ICAO, Doc. 7838 (in French).

17. It must be noted, however, that most of the delegates were CITEJA members who had together worked upon the draft convention.prior to the Conference, and were thus quite well versed in it.

18. ICAO Doc. 7838 p. 220. The Convention's text was reproduced in numerous publications both in the original French and in translation. Officially in Britain it is found in both French and English in the First Schedule to the Carriage by Air Act, 1932 (22 and 23 Geo.V c. 36). The British translation was reproduced side by side with a somewhat different official American translation in ICAO Doc. 7686-LC/140.

19. 137 L.N.T.S. 11, no. 3145.

20. cf. Article 37 of the Warsaw Convention.

21. Spain (March 31, 1931); Brazil (May 2, 1931); Yugoslavia (May 27, 1931); Rumania (July 8, 1931); Poland, France and Latvia (all on November 15, 1932).

22. U.S. adherence advised by the U.S. Senate on June 15, 1934; declared on June 27, 1934; proclaimed on October 29, 1934. 49 Stat.3000, T.S. No.876, 1934, USAvR (1934)245.

23. As of March 11, 1968 there are ninety Member States and 34 Territories administered by Britain. List supplied by ICAO. cf. as of a year ago, in ICAO Doc.8584-LC/154-2, Doc.LLM-7 Attach. 1.

The following are not members of the Warsaw Convention: Albania, Afghanistan, Bolivia, Chile, Costa-Rica, Dominican Republic, Ecuador, Guatamala, Iran, Iraq, Nicaragua, Panama, Paraguay, Peru, Saudi Arabia, Thailand, Turkey, Uruguay and Yemen (12 Latin American and 7 Asian States with only one country of the Eastern Block).

24. In 1935, IATA, which by then had established its worth in the field of commercial international air transport, had also started a research program in the same direction.

25. cf. Wassenbergh, Post-War International Civil Aviation Policy and the Law of the Air (The Hague, 1957).

26. Resolution no. 143, 14th Session of CITEJA, January 1946.

27. First of the 5 Organizations of the United Nations to function after the war. Established under the Interim Agreement in the Final Act of the Chicago Convention 1944 (see Proceedings of the International Civil Aviation Conference, Dept. of State, Washington (Gov. Printing Office 1948)) on June 6, 1945.

28. The first Assembly of PICAO, in Montreal, May 1946, dealt with the CITEJA draft (see PICAO Doc. 1561 A-11, of April 20, 1946) and then referred it to a Legal Commission (No. 4) which it had set up. The Commission again brought the matter to the Assembly's attention in 1947.

29. cf. among many other papers dealing with amendments required in the Warsaw Convention, Beaumont, Some Anomalies Requiring Amendment in the Warsaw Convention of 1929, 14 J. of Air L. & Com. (1947)30; Wetter, Possible Simplication of the Warsaw Convention Liability Rules, 15 J. of Air L. & Com. (1948)1; Beaumont, Some problems Involved in Revision of the Warsaw Convention, 16 J. Air L. & Com. (1949)14.

30. as to e.g. what is "accident, "carrier", "damage" (mental ?) etc., cf. infra p. 70.

31. e.g. "necessary measures" in Article 20. Obviously if all necessary (not merely 'reasonable') measures had indeed been taken an accident wouldn't have occurred.

32. e.g. the notorious "wilful misconduct or its equivalent" phrase. cf. also in regard to Article 34: Block v. Air France (US Court of App., 5th Circ. Nov. 8, 1957) 10 Avi 17,518 n. 9.

33. e.g. the weighing method, in cases of damage to goods, in deciding the limitation of the liability. Should the whole baggage of which a part was damaged be weighed, or only the relevant package, or even only the actual part in the package which was damaged or lost?

34. e.g. the weighing method mentioned in the previous note.

35. e.g. carrier's agents personal liability; insurance; validity of carrier's additional regulations and for some specific though doubtful reasons, liability for hand baggage.

36. e.g. the method of deciding contributory negligence; periodical payment; calculation of limitation; the next of kin having the right of action.

37. introducing altercation about whether the nature of the convention's liability system is in Tort or in Contract, and whether the Convention creates an independent right of action. cf. generally material and cases cited in Calkins, op. cit. n. 13.

38. cf. the argument advanced by M. Pittard in the paragraph cited infra p. 25.

39. see infra p. 62 seq.

40. PICAO Assembly Resolution no. XXX, PICAO Doc. 1843, A-47 of June 13, 1946.

41. abandoning its already prepared agenda in recognition of the required urgency. CITEJA Doc. 438,439(1947).

42. CITEJA Plenary Resolutions no. 157-9, Nov. 17, 1946. The text submitted is reproduced in 14 J. Air L. & Com. (1947)87.

43. established that year, taking over CITEJA's work and responsibilities in the Private International Air Law field.

44. ICAO Doc. 7229-LC/133.

45. ICAO Doc. 7450-LC/136 Vol. II p. 29.

46. for Documents and Minutes see ICAO Doc. 7450-LC/136 Vol. I, II. cf. Beaumont, The Proposed Protocol to the Warsaw Convention of 1929, 20 J. of Air L. & Com. (1953)264.

47. see generally ICAO Doc. 7450-LC/136 Vol. I p. 7-13, and especially the Resolution "Concerning the Revision of the Warsaw Convention" adopted on Sept. 12, 1953, at p. 314.

48. The original Warsaw Convention was drafted in French which was the only authoritative language for interpreting the text (Article 36). The triple language draft was thus a novelty, which also made the Spanish and English texts authoritative, though in case of inconsistency the French version was to prevail.

49. reproduced in ICAO Doc. 7686-LC/140(1955) Vol. II, p. 76 seq.

50. see generally, the relevant report on the happenings previous to the Hague Conference, in ICAO Doc. 7686-LC/140(1955) Vol. II p. 93 seq.

51. ICAO Doc. 7686-LC/140 Vol. I, II.

52. cf. e.g. The Hungarian delegate's speech, ICAO Doc. 7686-LC/140(1955) Vol. I, p. 292 (in which document also see generally pp. 250, 290-293, 302-310).

53. The docile reaction to the curt last minute intervention of the United States delegation in the Vote on Article 22 with a speech not much short of blackmail is illuminating. (ibid. p. 207). cf. Calkins, Hiking the Limits of Liability at The Hague, Proceedings of the American Society of International Law(1962)120,124, where the author who was heading the U.S. Delegation at The Hague described how this Delegation "banged its fist on the table" to achieve their desired results.

54. through changes in Article 3 and 25 and the added Article 25A see infra pp. 36, 37.

55. Articles 25A (infra n. 121) and 40A containing definitions in regard to the Convention's scope.

56. infra pp. 18, 19.

57. thirty, according to Article XXII of the Protocol, in order to, as much as possible, limit the period in which both the Warsaw Convention and the new Warsaw Convention as amended by the Hague Protocol would, side by side, decide upon the air carrier's liability.

58. as of March 11, 1968 fifty-seven States (but not including most of the British administered Territories). List supplied by ICAO.

59. see Protocol's Articles XIX, XXI(2), XXIII(2). For the danger in not yet having the Protocol ratified by all the Members of the Warsaw Convention, see Reiber, Ratification of the Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention, 23 J. of Air L. & Com. (1956)279.

60. Obviously waiting for the United States' next step, in fear - at least until recently - that ratifying the Protocol must mean the denunciation of the Warsaw Convention as a whole and remaining in treaty relations in our field with only the participants in the Hague Protocol. See Cheng, The Law of"International"and "Non-international" Carriage by Air, 60 Law Society Society Gazette(1963)450;750. The Protocol was incorporated into British Law, (though its coming into force was suspended) already in 1961, Carriage by Air Act (9 & 10 Eliz. II c. 27). On Britain's ratification of the Hague Protocol this Act came into Force by the Carriage by Air Acts (Application of Provisions) Order 1967 (June 1st, 1967) finally replacing the original Carriage by Air Act 1932 (22 & 23 Geo. V c. 36).

61. following the Hague Conference Resolution D in the Final Act (ICAO Doc. 7686-LC/140 p. 19.)

62. ICAO Doc. 8181.

63. The Guadalajara Conference followed much research into the question of air charter. cf. Georgiades, Quelques reflexions sur L'affretement des aeronefs et le projet de Convention de Tokio, 13,Rev. Fr. de Dr. Aerien (1959)113; Lissitzyn, Change of Aircraft on International Air Transport Routes, 14 J. Air L. & Com. (1947)57; Serraz, de L'affretement aerien, 12 Rev. Gen de L'Air (1949)349; Keefer, Airline Interchange Agreements, 25 J. Air L. & Com. (1958)55; Gronfors, Air Charter and the Warsaw Convention (The Hague 1956); Dutoit, La Collaboration entre Compagnies Aeriennes, ses Formes Juridiques (Lousanne 1957) 23 seq.

The Convention was based upon a draft drawn by the Legal Committee in Tokyo in 1957, ICAO Doc. 8101 LC/145 (Sept. 26, 1960) see Riese, Le Projet de la Commission Juridique de L'OACI (Tokyo 1957) sur L'Affrement etc., Rev. Fr. de Dr. Aerien (1959)1.

64. after 5 ratifications were deposited, those of France, Mexico, Switzerland, Ireland, and Australia, according to Article XIII of the Convention.

65. as of March 11, 1968. List supplied by ICAO. The U.S.A. did not sign that Treaty; Britain ratified it on Sept. 4, 1962.

66. cf. Calkins, Grand Canyon, Warsaw and the Hague Protocol, 23 J. Air L. & Com.(1956)253,262.

67. though never with much enthusiasm. Still, on June 28, 1956 the U.S. did sign the Protocol through its Ambassador to Poland.

68. For a general account of reaction to the Protocol and proceedings see Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. (1967) 497.

69. Especially of interest were the proposals for Insurance Legislation based on the suggestions rendered by Sand, Air Carrier's Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention, 28 J. Air L. & Com. (1961-62)260.

70. Dept. of State Press Release No. 268, Nov. 15, 1965; see N.Y. Times Nov. 16, 1965, p. 82, Col. I and Kreindler, The Denunciation of the Warsaw Convention, 31 J. Air L. & Com. (1965)291.

71 see Article 39(2) of the Warsaw Convention.

72. For the text of Denunciation Note annexed to a paper applauding the move, see Kreindler, op. cit. n. 70.

73. as of January 8, 1968, 45 U.S. carriers and 52 foreign carriers signed the Agreement (10 Avi 24,065-3).

74. or the Montreal Agreement or the Washington Compromise, under whatever name, see CAB approval of the Agreement (CAB 18900) in Press Release 66-61, May 13, 1966; 31 Fed. Reg. 7302(1966). See also Report of the Legal Committee of IATA 33 J. Air L. & Com. (1967).

75. Partial text of the Agreement is reproduced infra pp. 23, 24

76. for explanation of the absolute liability aspect of the Agreement see Dept. of State, United States Action Concerning the Warsaw Convention (May 5, 1966) 32 J. Air L. & Com. (1966) 243, 245.

77. Dept. of State Press Release No. 110,13 May 1966, 32 J. Air L. & Com. (1966)247.

78. Minutes and Documents (including lots of statistical data) ICAO Doc. 8584-LC/154 Vols. I and II.

79. PE-Warsaw Report-2 18/7/67 attached to ICAO's Council Working Papers /4648 21/8/67.

80. Information supplied by ICAO. The answers of 52 of them (as of 5/3/68) are analyzed in Addendem No. 5 to ICAO's C-WP/4648 21/8/67. see infra pp. 42,43. (as of March 26, 1968, the number of answers was still 57).

81. While this thesis is in the process of being typed, the Council of ICAO decided in Montreal, on the 3rd day of its 63rd Session, March 22, 1968, upon the revision of the Warsaw Convention. The Council resolved that the revision work should be taken up "as a matter of priority" by the Subcommittee which ICAO's Legal Committee had established for that purpose in its last Session, the 16th, in Paris. The Council's decision specified that the Subcommittee will meet in Montreal in November of this year, which is just after the ICAO Assembly Session scheduled for this Fall in Buenos Aires. Yet unpublished ICAO Doc. 8731, C/977).

82. cf. the thought-provoking address made by Prof. Bing Cheng in the London Symposium on Compensation for Airline Passenger Death and Injury. The Future of the Warsaw Convention (June 1, 1967) called by the Air Law Group of the Royal Aeronautical Society, reprinted in 71 J. of the Royal Aeronautical Society (1967)501. In his address Prof. Cheng illuminated the problem of so many Warsaw Conventions by an example in which the five different members of a group of passengers on one aircraft would be treated differently in British Courts according to the ticket of each. Taking into account that Schedule I of the 1967 Carriage by Air Act (Application

82. Cont'd
of Provisions) Order adopted 75,000 dollars as a limit also for domestic and 'non-Warsaw' International Carriage in the U.K., then if the first member of the group bought a single ticket to Finland (a Member only of the Warsaw Convention) the 8,300 dollar limit applies; if the second bought a single ticket to Norway (a Member of the Hague Protocol) the 16,600 limit applies; if the third had a single or return ticket to Glasgow (which is a domestic carriage under the 1967 Order) the limit is 75,000; if the fourth started his journey on a single ticket from Honduras (a non-Convention State to which the 1967 Order applies) then 75,000 dollars is the limit; and if the fifth one was on a single journey to the U.S.A. (the Montreal Agreement applies here) the limit is either 58,000 dollars or 75,000 dollars. Moreover if the five passengers had been carried by BEA - which extended the Montreal Agreement to all Warsaw and Hague Passengers, the limit of the three first passengers would also be 58,000 dollars or 75,000 dollars.

83. This and the following Articles of the Warsaw Convention were reproduced from the American translation, cf. supra n. 18.

84. approximately 8,300 American dollars. in 1929 they were worth approximately 4,898 dollars. see Claire, Evaluation of Proposals to Increase the Warsaw Convention Limit of Passenger Liability, 16 J. Air L. & Com. (1949)53,54.

85. commonly referred to as "Poincaré Francs".

86. see infra p. 37.

87. but see infra p. 36.

88. approximately 16,600 American dollars.

89. the addition of costs and attorney's fees beyond the limit came at the insistance of the U.S. delegate in a compromise bid. Its effect was however more misleading than useful, Lowenfeld & Mendelsohn, op. cit. n. 68 at p. 507 seq.

90. CAB 18900

91. Translation supplied by Calkins, The Cause of Action under the Warsaw Convention, 26 J. Air L. & Com. (1959)217,220.

92. Compare indeed the leading 1932 case of Wilson v. Colonial Air Transport, 278 Mass. 420,180 N.E. 212 (Supreme Court, Massachusetts) and 1935 case of Herndon v. Gregory, 190 Ark 702, 81 S.W. 2d 849 (Supreme Court, Arkansas) which would not apply the doctrine of res ipsa loquitur to aviation cases because of the "operation care and characteristics or aircraft" of their time (278 Mass. 420,426; 180 N.E. 212,214), with the U.S. Court of Appeal, 7th Circ. decision in Cox v. Northwest Airlines (May 16, 1967) which despite proof of the exercise of due care by an air carrier and no countervailing evidence of specific negligence or even of unusual circumstances, the doctrine of res ipsa loquitur was applied to resolve the air carrier's liability for the unexplained crash at sea of one of its aircraft. (10 Avi 17,250). Also compare Prosser's, Torts, 1st ed.(St. Paul, Minn.)1941)at p. 296, with his 3rd. ed.(1964)at p. 220-21(nn. 28-30).

93. cf. the Italian, Mr. Ambrosini's statement when arguing for adoption of the same principle of liability in both cases of damage to passengers and damage to third parties. CITEJA, Minutes and Documents, 2nd Session, Paris, April 1927, p. 40,41. Also see the Hungarian, Mr. de Szent Istvany's statement when seconding the German proposal to confine the defence of 'error in piloting' (Article 20(2)) to cases of damage to goods only, CITEJA, Minutes and Documents, third session, Madrid 1928, p. 49.

94. "the carrier shall not be liable if he proves that he and his employees took reasonable measures to avoid the damage, or, that he found it impossible to take such measures, unless the damage arises from a latent defect in the aircraft." (translation supplied).

95. "The carrier shall not be liable for the errors and the ommissions of his servants and agents. Nevertheless, in the case of an error in piloting, in the handling of the aircraft, or in the navigation, the carrier shall not be liable if he proves what is required in the preceding Article." (translation supplied).

96. CITEJA, Minutes and Documents, 3rd Session, Madrid 1928, p. 49.

97. id, in the Hungarian delegate's statement, to which n. 93 supra refers.

98. CITEJA, Minutes and Documents, 3rd Session, Madrid, 1928, p. 51 (in the Rapporteur's final speech).

99. See the thorough examination of Ripert's part in the 1929 Conference's adoption of fault liability, in Prof. Sand's address to the Dallas Symposium on the Warsaw Convention, August 1967, to be reported in the next issue of the Journal of Air Law and Commerce, (Vol. 33, No. 4; Autumn, 1967.) to be published April 1968.).

100. Contrast the following British attitude of 1929 with the British position lately in extending the Interim Agreement's provisions even to non-Warsaw flights (supra n.82) and allowing the new BEA contracts (id.).

101. see the debate in the Warsaw Minutes and Documents, ICAO Doc. 7838 p.25-37. Also the relevant British proposal, id. p.192; the French one, id. p.188, the Russian's id. p.210.

102. ICAO Doc. 7838 p.112.

103. "... the Court may, in accordance with the provisions of its own Law exonerate the carrier wholly or partly for his liability." One may note that if the American Court would strictly follow the 1934 precedent of Jerrell v. N.Y. Central R. Co.(68 F.2nd 856, cert. denied 292 U.S. 646; 54 S. Ct. 780) according to which contributory negligence is a matter of substance,it may apply the Law of the place where the contributory negligence took effect.

104. The U.S.A. only sent Messrs. John Ide (observer to CITEJA) and McCeney Werlich as observers.

105. cf. per example his speech in ICAO Doc.7838 p.29 concerning the carrier's exoneration in case of error in piloting; also id. p.41 concerning wilful misconduct.

106. A noted example is "wilful misconduct" to which n.111 infra refers.

107. ch. 11 infra

108. the case commonly cited as the source of this doctrine is Butterfield v. Forrester (1809) 11 East 60. Also, Lord Blackburn in Cayzer, Irvine & Co. v. Carron & Co. (1884) 9 App. Cas.873 at 881.

109. especially following the much criticized and debated rule of "last opportunity" designed by Salmond in his third ed. of Torts,(1912) pp. 39-43 (cf. 13th ed. 1961 pp. 458-462). As Salmond himself wrote concerning the doctrine as a whole, "no more baffling and elusive problem exists in the Law of Torts" (Preface to 6th ed. p. viii, 1923).

110. Law Reform (Contributory Negligence) Act, 1945 (9 & 10 Geo.VI c. 28) sec. 1(1).

111. cf. generally material and references in Ch. VI of Drion, Limitation of Liabilities in International Air Law (The Hague 1954) dealing with the "much litigated and most unhappily phrased Article 25" (id. p. 44).

112. Significantly in the 1929 Conference itself several of the participants felt this way. Poland even agreed to include a provision establishing a schedule for its periodic revision in the Convention. See also in the 1929 context, the address made by the Rapporteur De Vos in ICAO Doc. 7838 p. 17. If the Hague Protocol had followed these sentiments the need for a full scale revision and a thorough examination of the liability regime would have been apparent.

113. some delegations (including the U.S.A.) went so far as to be disinclined to propose the exact limit they wished for in Article 22(1) until the language of Article 25 was settled. See generally ICAO Doc. (L.C. Minutes 1953) 7450-LC/136; ICAO Doc. (The Hague) 7686-LC/140 Vol. 1, pp. 164-190; 270-282.

114. See the lucid differentiation between the iner and outer "scope" of the Convention in regard to limitation in Drion op. cit. n. 111 p. 51 seq.

115. put forward first by the French Garnault (ICAO Doc. 7686-LC/140 p. 175) and then followed by most delegates.

116. It did make changes in regard to shipment of goods where Article 20(2) (defence in case of error in piloting) was deleted.

117. At least the new Article 25 is not different from the charge to the jury in Froman v. Pan American Airways, 284 App. Div. 935,135 N.Y.S. 2d 619 (1954), leave to appeal denied, 308 N.Y. 1050, cert. den. 349 U.S. 947 (cf. Calkins, op. cit. n. 66 at p. 266). and see, indeed, also Berner v. British Commonwealth Pacific Airlines, 346 F. 2d 532, 536-37(1965) cert. den. 382 U.S.A. 943 (1966). cf. also the statement of the Polish delegate at the Hague, ICAO Doc. 7686-LC/ 140 Vol. I p. 277 and in England, Horabin v. BOAC [1952] 2 All E.R. 1016. Still a somewhat different definition of wilful misconduct demanding less "knowledge" on the part of the pilot that the damage will result, appears in Tuller v. KLM 292 F 2d 775, cert. denied 386 U.S. 921(1961); Pekelis v. Transcontinental and Western Air, 187 F. 2d 122, cert. denied 341 U.S. 951(1951); American Airlines v. Ulen, 186 F. 2d 529(1949). Also, the Committe on Aeronautics of the Association of the Bar of the City of New York wouldn't agree with the statement in the text judging by their Report (22 J. Air L. & Com. (1955)358) which rejected the Rio Proposal to amend Article 25 (id. at p. 361). cf. Also the Report of the same Committee concerning the Hague Protocol in 26 J. Air L. & Com. (1959)255 at p. 264.

118. Article 3 in the original Warsaw Convention was not only cumbersome but its sanction was indefinite. Unlike Articles 4 and 9 relevant to the air waybill, Article 3 mentioned the absence of the ticket as the only reason for exclusion of Article 22(1). cf. in England, Preston v. Hunting Air Transport Ltd. (Q.B.D.) in US&CAvR (1956)1; in Belgium, Ficher v. Sabena (Tribunal de lere Instance de Bruxelles) in USAvR (1950) 367. And in the USA, Grey v. American Airlines (U.S.D.C. New York) U.S.&CAvR(1950)507;(1960)626. However, lately in the U.S.A. the Article's requirement of notice was interpreted to imply that the same sanction would apply for absence of notice as for absence of ticket. Eck v. United Arab Airlines, 9 Avi 17,365, 15. N.Y. 2d 53; Lisi v. Alitalia - Line Aereo Italiana 9 Avi 18,120, 253 F. Supp. 237; 9 Avi 18,374; 370 F. 2d 508, cert. granted 36 USLW 3189; Mertens v. Flying Tiger Lines, 9 Avi 17,475, 341 F 2d 851; Warren v. Flying Tiger Lines 9 Avi. 17,848; Egan v. American Airlines (Dec. 28, 1967) 10 Avi 17,651. But see Seth v. BOAC 8 Avi 18,183, 329 F. 2d 302; and Beguido v. Eastern Air Lines, 10 Avi 17,311 especially in the light of the dissenting opinion there.

As for the interpretation of "delivery" in Article 3 see Ross v. PAA, USAvR(1948)47;(1948)51; (1949)168; US&CAvR(1953)1;(1954)400;(1955)396; Garcia v. PAA, USAvR(1945)39; Indemnity Insurance v. PAA. USAvR(1945)52; and lately, Demanes v. The Flying Tiger Lines (U.S. District Court, California, August 1967) 10 Avi 17,611.

The Hague Conference, after much deliberation as to whether there should be a sanction in Article 3, and what it should encompass (ICAO Doc. 7686-LC/140 Vol. I. pp. 125-134, 331, 336) though facilitated the contents of the ticket, unequivocally stated that the absence of 'notice' in the ticket will bar the carrier from availing himself of Article 22's limitation.

119. Starting the trend was the Lisi case (see previous note) which lifted the carrier's limitation of liability because the notice on it was written in "lilliputian" letters and not in a contrasting colour. The reason for it was as J. Kaufman put it, "the quid pro quo for the one-sided advantage (of the air carrier) is delivery to the passenger of a ticket... which give(s) him notice". Certiorary was granted in this case, 36 USLW 3189, hence it is hoped its holding will not be permanent. But meanwhile other decisions repeated it (Mertens, etc. see previous note) and the confusion and dismay it has provoked could well be found in the writing and speeches of many who refer to it. cf. for example the papers delivered and discussion in the two Conferences referred to supra in nn. 82 and 99.

It may be added that in 1963 the Civil Aviation Board regulated that the Warsaw notice (written in the phraseology of the Hague Protocol) should"be printed in type at least as large as ten point modern type (as contrasted with the $4\frac{1}{2}$ point type in Egan in previous note) and in ink contrasting with the stock", 14 Code Fed. Reg. 221,175 (and see CAB Order No. E-395. Aviation Daily, Nov. 5, 1963 reproduced in Note, 30 J. Air L. & Com. (1964)395). This is also followed today by the airlines who are members of the Montreal Interim Agreement.

120. See in ICAO Doc. 7686-LC/140 Vol. II, p. 249 the table of statistics according to which the ratio between the index of American dollars in the U.S.A. equivalent to 125,000 poincare francs in 1934 and between the index of the cost of living in 1935 was 100 to 198, i.e. an almost 50% loss of purchasing power of the amount of the limitation of liability in the Warsaw Convention.

121. Article XIV of the Protocol also added to the limitation of liability system in the Convention an Article (25A) extending the limit in Article 22 to actions against the carrier's servants or agents, notwithstanding under whatever cause of action (but not if wilful misconduct was proven). See discussion in ICAO Doc. 7686-LC/140 Vol. I, pp. 214-224, 294-300, 351-354, 358-361, and study of the problem of carrier's servants and agents under the original Convention in Drion, op. cit. n. 111 at 152 seq. Another change in the limitation system, proposed by Greece (ICAO Doc. id. p. 173) that of having a higher limit for bodily injury than death was not voted upon. This same suggestion was embodied in the Report of the Association of the Bar of the City of New York (Recommendation 3) reproduced in 17 J. Air L. & Com. (1950)474 at p. 478.

122. supra p. 10 seq.

123. For detailed accounts, from different points of view, of the process (both on American and International levels) which preceeded the signing of the Agreement, see Lowenfeld and Mendelsohn, op. cit. n. 68; Stephen, The Adequate Award in International Aviation Accidents, Ins. Law Jur.(1966)711.

124. cf. Stephen id. at p. 732 n. 75 as to the Canadian attitude and Lowenfeld and Mendelsohn op. cit. n. 68 at 590.

125. For an account of the diverse principles of air carrier liability around the world today see ICAO Doc. 8584-LC/154-2 (Montreal Proceedings 1966) Doc. LIM - 6(rep to 21/12/65) Table I. cf. appreciation of general problems arising from diversity of Laws and their application in international transportation in A.W. Knauth, Aviation Law and Maritime Law 5 Chi B. Rec. (1954)199. Also see U.S. Supreme Court comment in a 1913 case Adam Exp. Co. v. Croninger, 226 U.S. 491,57 L. ed. 314,319 and Judge Steuer affirming necessity of uniformity in Supreme Court of N.Y. County,

125. Cont'd
Froman v. Pan American 1953 USAvR 1,4. For a condensed study of the Diversity of Air Law problems which will befall Americans without the benefit of the Convention, see Sand, op. cit. n. 69, at p. 262 seq.

126. Indeed the problems involved due to the lack of a uniform rule in the U.S.A. are formidable, and "the rules presently applicable to airline passenger injury and death claims promote injustice, foster unnecessary litigations, and increase costs of making reparation when accidents arise." N. Calkins, op. cit. n. 66 at p. 271.

127. "national airlines of some less developed countries could literally become bankrupt by a single major award by a U.S. jury" Stephen, op. cit. n. 123 at p. 372.

128. The bitterness of many countries in regard to the U.S. "ultimatum" was amply expressed during the Montreal Proceedings all through ICAO Doc. 8584-LC/154-1.

129. cf. Lowenfeld and Mendelsohn op. cit. n. 68 at p. 544 seq. especially when referring to Senators Yarborough, Ervin, Gore and Robert Kennedy. Also Stephen, op. cit. n. 123 at p. 718 seq. referring in particular to the 'leader' of the legislators who aimed for the denunciation of the Warsaw Convention, Senator Homer Capehart of Indiana. cf. Mr. Kreindler's "promise" infra p. 82.

130. Since 1961 a new rule attaching the law of accidents to the concepts of "public policy" or sometimes "significant contact" or "centre of gravity"(see infra n. 132) rule seems to have replaced the old 'Lex Loci delicti' rule in foreign tort cases (as once stated e.g. in the Restatement c. 370 (1934)). The change started with the inter-American States cases decided in New York, Kilberg v. Northeast Airlines 9 N.Y. 2d 34,127 N.E. 2d 526,211 N.Y.S. 2d 133(1961); Pearson v. Northeast Airlines 309 F. 2d 553,557 cert. denied 372 U.S. 912(1963); Then Babcock v. Jackson 12 N.Y. 2d 473,191 N.E. 2d 279. 240 N.Y.S. 2d 743 (1963) already involved an injury in a foreign country, Canada. The new trend was followed in Pennsylvania in Griffith v. United Airlines, 416 Pa. 1,203 A 2d 796(1964). Then came the new propositions of the Restatement (Second) of Conflict of Laws c. 379(1) in Tent. Draft No. 8 1963 and c. 379a in Tent. Draft No. 9,1964 (quoted Seguror Tepeyac, S.A. v. Bostrom (347 F. 2d 175,176 (1965) Col 2 and footnote 4a). The Wisconsin Court followed in Wilcox v. Wilcox, Wis. 1965, 133 N.W. 2d 408 and the New Hampshire Court in Johnson v. Johnson N.H. 1966, 216 A. 2d 781. Recently the U.S. Court of Appeal, 2nd Circuit, again reaffirmed in N.Y. the rejection of the lex loci delicti in a case stemming from the same Kilberg and Pearson accident, Gore v. Northeast Airlines 373 F. 2d 717 10 Avi 17,146 (Feb. 23, 1967) where the foreign Wrongful Death Statute was applied but without its limits (reason: public policy). See also Zousmer v. CAR (N.Y. Sup. Ct. June 1967) 10 Avi 17, 346; Paris v. General Electric Company (July, 1967) 10 Avi 17,369. All in all, seven American states have by now rejected the old doctrine. See for comments about the new one, Note, 77 Harv. L. Rev. (1963)355; Comments, 63 Colum. L. Rev. (1963) 1212. Note, Wisc. L. Rev. (1966)913; Note, Va. L. Rev. (1966)302.

131. e.g. Fisher v. Ethiopian Airlines, 9 Av. Cas. 18,255 (1964) according to which an American Court jurisdiction over airlines which maintain any sort of business in the U.S. cannot be contested notwithstanding whether the carriage involved was between two foreign airports. Also see Bryant v. Finnish National Airlines 15 N.Y. 2d 462,208 N.E. 2d 439,260 N.Y.S. 2d 625(1965); Scott v. Middle East Airlines, 240 F. Supp. 1(1965); Berner v. United Airlines 3 App. Div. 2d 9.157 N.Y.S. 2d 884 (1956) affirmed, 3 N.Y. 2d 1003, 147 N.E. 2d 732,170 N.Y.S. 2d 340(1957) and cf. KLM v. Superior Court, 107 Cal. App. 2d 495,237 p. 2d 297(1951).

132. Without the Convention, whenever the Law which will govern the case under the Court's Choice of Law rules is a foreign Law, it can jeopardize the rights of the plaintiff, or apply to his case even a smaller limitation than in the Warsaw Convention (see ICAO Doc. 8584-LC/154-2 Doc. LIM-6 Table 1 list of countries with respective limitations of liability). The new trend which started with Kilberg (supra n. 130) doesn't solve all problems. First, the reasonings advanced in the cases following this trend seem to have moved from "significant contact" to "public policy" (Davenport v. Webb, 11 N.Y. 2d 392,183 N.E. 2d 902(1962) to "centre of gravity". This last may not preclude the application of the lex loci delicti (and limit there) when the case had several foreign aspects in addition to loci delicti (foreign carrier, foreign destination) and it should be remembered that more than half of the international travelers who are citizens of the U.S.A. use foreign air carriers (Stephen op. cit. n. 123 at p. 715 n. 14).

Indeed lately the lex loci delicti and the limitation of liability in the foreign Law were applied in the U.S. courts in several cases, despite the new trend. See Tramentana v. S.A. Empresa de Viacao Aerea Rio Grandense, 350 F. 2d 468(1965) cert. den. 383 U.S. 943(1966) 9 Avi 17,661 and the decision which followed the last case in Armiger v. Real S.A. Transport Aereos (U.S. Ct. of Appeals, Dist. of Columbia,

132. Cont'd
1967) 10 avi 17,209. Also see, within the U.S.A., the Cherokee Laboratories v. Rosers, 9 Avi 17,392, 398 p. 2d 520(1965). In Hopkins v. Lockheed Aircraft Co. 10 Avi 17,420 (July 1967) the Florida Supreme Court, on appeal, reversed its own decision, which previously (Feb. 1967, 9 Avi 18,099) rejected the lex-loci delicti because of "policy consideration and judicial comity", and applied the lex loci delicti nevertheless. On May 1967, the Taxes Court of Civil Appeals in an elaborate decision, Mormon v. Mustang Aviation Inc., 10 Avi 17,300 dealt with the development and extensively reviewed the new trend only to decide to stand fast and hold to the lex loci delicti doctrine.

133. Scores of them in the J.of Air L. and Com.(cf. supra n.29) Also e.g. bibliography lists in H.Drion, op.cit. n.111, at p.xxii seq.

134. cf. PICAO Resolution no.xxx,PICAO Doc. 1843 A/47 to send CITEJA's 1946 draft of the revised Warsaw Convention back to the Committee, stating that further revision was desirable "even at the expense of further delay". It took eight years, until the Hague Conference convened in 1955.

135. supra p.9.

136. cf. supra nn.82 and 99 and infra nn.274 and 277.

137. see supra p.14,15.

138. See A.F. Lowenfeld, The Warsaw Convention and the Washington Compromise, 70 J.of the Royal Aeronautical Society(1966)1061,1063 (explaining this refusal primarily because of a fear that absolute liability might spread to domestic air transportation and perhaps other forms of travel as well.)

139. "(T)he effect is, under the Warsaw Convention, that if there is an accident on an international airplane flight, a passenger recovers his damages up to 8,300 dollars practically automatically just because of the happening of the accident." - the Court's instruction to the jury in Rashap v. American Airlines (U.S. Dist. Ct. New York) US&CAvR (1955)593 at p.603. Even the General Counsel of the Air Transport Association of America, admits that "practically speaking the presumption of carrier fault can seldom if ever be overcome" under the Warsaw Convention, Stephen, op.cit. n.123 at p.711.

140. cf."... so it still rests with the courts to endeavour to make sense out of a paragraph which, if read literally, makes nonsense" K.M.Beaumont, The Warsaw Convention of 1929, as Amended by the Protocol signed at The Hague, on Sept. 28, 1955, 22 J.Air L. and Com. (1955)414.

Generally in countries in which the Warsaw Convention was also applied to domestic air transport, "necessary" was replaced either by "reasonable" (e.g. the British Carrier by Air (Non-International Carriage) (U.K.) Order 1952, S.I.1952 No.158.) or by other adjectives such as "without fault". An exhaustive list of such laws as well as the manner of interpretation of "necessary" by authors, jurists, and courts in the various countries is given in Hjalsted, The Air Carrier Liability in Cases of Unknown Cause of Damage in International Air Law, 27 J. Air L. & Com. (1960) 1, 6 seq.

141. "(T)he onus being on the carrier to prove that the accident could not have been avoided by exercise of reasonable care", Green L.J. in Grein v. Imperial Airways [1937] 1 K.B. 50; 1936 All E.R.1258; USAvR(1936) 184 at p.230.

142. "(I)n most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable.- Grey v. American Airlines US&CAvR (1955)626, at p.628, cert. denied US&CAvR (1956)140; "...that (Article 20(1)) is a most difficult thing to prove and would apply only in unusual circumstances", Rashap v. American Airlines (US&CAvR (1955)593 at p.604). Indeed, in cases where the cause of the damage was not known, "most if not all of the court decisions, and a number of authors, have constructed Article 20(1) to mean that the carrier bears the risk of the cause", Drion, op. cit. n.111 at s.33 n.3. (with a list of cases and authors' publications).

Not only Article 20(1) is interpreted in American courts against the carrier's interests but it is also used in a confusing and baffling way. In Ritts v. American Overseas Airlines, USAvR (1949)65, the judge after instructing the jury that "a very high degree of care is required of an air carrier", asked whether "all reasonable and necessary measures to avoid the damage" were taken. In American Smelting and Refining Co. v. Philippine Airlines US&CAvR (1954)221 (carriage of goods) "necessary measures" were interpreted as "all possible precautions". Yet in Pierre v. Eastern Airlines US&CAvR (1957)431 "necessary measures" were so defined as to demand a proof that the carrier and its servants were "free from all fault". cf. Also the rejection of the defence in Article 20(1) in Philios v. TWA, US&CAvR (1953)479.

143. but as an additional defence when sued for wilful misconduct (and cf. Belgian case of Favre v. Sabena, US&CAvR (1950)242), though usually the carrier would

143. Cont'd
have been only too happy to pay the Warsaw Limit and avoid the litigation (cf. the recording of such offers in the Belgian and two French cases Pauwel v. Sabena (Rev. Fr. Dr. Aer. (1950)411; US&CAvR (1950)367); Hennessy v. Air France (Rev. Fr. Dr. Aer. (1952)199; (1954)45) Del Vina v. Air France (Rev. Fr. Dr. Aer. (1954)191). The disuse of Article 20(1) by the American air carriers is taken so much as a matter of course that Hjalsted (op. cit. n. at p.124) remarks that "(i)n the United States the main interest in connection with the liability has been transposed from the problem: liability or non-liability, to the question of limited - unlimited liability."

It should be noted that the defence of article 20(1) was accepted in a case of sabotage, Winsor v. United Airlines, (U.S. Dist. Court, Colorado) US&CAvR (1960)39.

144. In one case the jury in the lower court returned a verdict for the defendant on the ground that necessary measures were taken. Ritts v. American Overseas Airlines, USAvR (1949)65. This case, however, was not only reversed in appeal because the facts didn't support the verdict, but all in all was extremely peculiar considering that in another case based on the same accident, a jury returned a verdict of $65,000 finding the defendant guilty of wilful misconduct. Goepp v. American Overseas Airlines, US&CAvR (1951)527,529. Illuminating in this context is also Berguido v. Eastern Airlines 10 Av.17,311 (rehearing denied), a case which after 5 trials and mistrials, after years of litigation, ended with the application of the Warsaw Convention's limit (June 1967. see previous decisions in 8 Avi 17,537; 8 Avi 17,651; 9 Avi 18,319; 9 Avi 17,207).

145. supra p.15.

146. The gist of the Panel's suggestion is that each State on becoming a party to the revised Convention would have a choice between two levels of limits (and be free to change the limit chosen). How exactly such a system is supposed to work in a flight between countries which adopted different limits is hard to envisage. The Panel tried to fix some fast rules to this effect in its Report (ICAO PE-Warsaw Report -2 18/7/67, at p.4).

147. With only additional proposed changes in Articles 3, according to which it should be amended so as to eliminate any possibility that non-delivery of ticket or absence of notice would cause the carrier to lose the limit upon his liability.

148. inclusive of legal costs. Otherwise 33,000 dollars and 58,000 dollars.

149. With the exception of "war or comparable situation" (Report, ibid., p.5). Article 21 shall however continue to apply. A specific provision will be added that if the damage resulted from the act or omission of a third party, the carrier's right of recourse against that party shall not be prejudiced. Article 25 shall be phrased as in the Hague Protocol. Article 3 shall be revised so as not to deprive the carrier of the limit of liability because of failure to deliver a ticket or notice.

150. which accords with the Panel's own recommendation (Report, ibid., p.6). It should however be noted that the replies do by no means bind the replying States. Also, when evaluating the wide agreement with the concept of absolute liability, the lure of the lower limits which came with it must be kept in mind.

151. See ICAO's Council (63rd Session) WP/4648 21/8/67 addendum No 5 5/3/63 relevant to subjects 12.5; 16.

152. In its reply, however, the U.S.A. opposed both solutions, maintaining that (1) revision work should not be carried until all relevant economic data were gathered (especially as to insurance) (2) two levels won't work (3) "notice" is a must unless limits are very high.

153. cf. Lowenfeld and Mendelsohn op. cit. n. 68 at p.557. Still there were jurists in the USA who seemed to recommend such a move almost one score years earlier. cf. Resolution of the Section of International and Comparative Law of the American Bar Association (Chicago, February 26, 1950. Report reproduced in 17 J. Air L. & Com. (1940)225) favouring stricter liability (with an increase of the limit).

154. regulating the liability of foreign aircrafts for surface damages to third persons. Text reproduced in 19 J. Air L. and Com. (1952)447.

155. The Administration's attitude is reported in Nunnely, Report of the Chairman of the U.S. Delegation, 20 J. Air L. and Com. (1953)89,91. cf. also U.S. position in ICAO /LC 4th session's Minutes and Document (1949)14,175,224. The same attitude was still officially maintained in June 1964 in answer to an ICAO questionnaire, ICAO/LC Working Draft no.708 Append.3.

156. On the other hand domestic air carriage liability for ground damages in most countries, as well as in some states in the U.S. is absolute since the

156. Cont'd
early years of aviation: Rinck, Damage Caused by Foreign Aircraft to Third Parties, 28 J. Air L. and Com. (1962)405; Harper and James, Torts (2nd ed.1956)851. The U.S. proposal to base the liability in the Convention on presumption of fault was indeed not even seconded, thus never was put to a vote. ICAO Doc. 7379-LC/134 (Rome 1952 Conference).

157. cf. Lowenfeld & Mendelsohn op. cit. n.68 at p.534

158. headed by the chairman of the Aviation Law Section of the American Trial Lawyers Association (ATLA), Mr. Lee S. Kreindler. His arguments are exhibited in Kreindler, The Denunciation of the Warsaw Convention, 31 J.Air L. & Com. (1965)291; and in his addresses to the London Symposium op. cit. n.82 and the Dallas Symposium op. cit. n.99 in which he spoke of "social justice" and "communal responsibility" respectively.

159. O.W. Holmes, The Common Law (Boston 1881) ch. III, IV

160. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L.Rev. (1894)315 reprinted in Selected Essays on the Law of Torts (Cambridge, Mass.1924) in Ch. 1; cf. also J. Smith, Sequel to Workmen's Compensation Acts, 27 Harv. L.Rev. (1914)235,244; Holdsworth, A History of English Law (London, 3rd ed.1922) Vol.3 pp.875-877; 8 Holdsworth, id pp. 446-459; Seavey, Speculations as to 'Respondent Superior' in Harvard Legal Essays (Cambridge, Mass.1934)433.

Issacs found the two views supplementing each other, and that the Law of Torts records lapses from a fault basis and returns to it, N. Issacs, Fault and Liability, 31 Harv. L.Rev. (1918)954; reprinted in Selected Essays in the Law of Torts (Cambridge,Mass. 1924)255

161. P.H. Winfield, History of Negligence, 42 L.Q.Rev.(1924)184

162. not before Comyms' (1762-1767) H.Street, Foundation of Legal Liability (1906) Vol.1, p.187. Generally as to the recent origin of 'negligence' see W.S. Holdsworth, A History of English Law (London 2nd ed. 1937) Vol.8 p.449 seq.

163. with defendants pursuing public callings, J.B. Ames, History of the Assumpsit, 2 Harv.L.Rev.(1888); Arterburn, The Origin and the First Test of Public Callings, 75 U.Pa.L.Rev.(1927) 411. Early cases in 1 Street op. cit. n.162 at p. 183-184. See also Wigmore, op. cit. n.160 at p.441 seq.; Jenks, A Short History of English Law (1924)319.

Negligence as an independent tort still wasn't recognized by Salmond in his own edition of his book cf. Salmond, Torts (6th ed. 1924) s.5.

164. Burgess, Political Science and Constitutional Law, Vol.I p.174

165. Harper and James, op. cit. n.156 at p.753

166. See exposition and criticism of such reasoning in G.Calabresi, Risk Distribution, 70 Yale L.J. (1961)499.

167. As for workmen, they, according to liberal economists, may demand and receive adequate wages to balance possible future misfortunes. The ensuing rise in cost it was said would fall on the public as higher prices while the workers as a group would not suffer.

168. J.B. Ames Law and Morals 22 H.L.R (1908)97,112. F.H.Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U.Pa.L.Rev.(1908) 217,316. B.N. Cardozo, The Paradoxes of Legal Science, (New York 1928)25.

169. Seavey, op. cit. n.160 at p.439 n.15. cf. W.L.Prosser, Torts (2nd ed. 1955)167

170. Generally Salmond, Torts (13th ed.1961)134 seq; 146 seq.

171. Buch. v. Amory Mfg. Co.(1897) 69 N.It. 257, UU AEL 809; cf. also (with similar facts) Gautret v. Egerton 1887 L.R. 2c p.381 and see Salmond, previous note, at p.24.

172. Union Pacific R.R. v. Cappier (1903) 66 Kan. 649,72 Pac.281; Griswold v. Boston and M.R.R. (1903) 183 Mass.434,67 N.E. 354.

173. Riley v. Gulf C. and S.F.R.R.(1913) 160S.W. 595

174. Osterlind v. Hill (1928) 263 Mass.73,160 N.E. 301

175. P.H.Winfield, Cases on the Law of Torts (4th ed. 1948)404. cf. also Quinn v. Hill [1957] V.L.R. 439; also Salmond, Torts (13th ed. 1961) at p.425

176. Frozer v. People 141 111 171,186.

177. cf. State v. Haun, 61 Kan.146,162.

178. Braceville Coal v. People 147,III.66,74.

179. People v. Beck, 10 Misc(N.Y.)77.

180. State v. Goodwill, 33 W.Va. 179,186.

181. Godcharles v. Wigeman, 113 Pa. St. 431,437. cf. also cases in which the employers and employees were put on an equal footing, Lochner v. N.Y. 198 U.S. 45,57; State v. Fire Creek Coal Co. 33 W.Va. 188,190, and still in 1908 Harden J. in Adair v. U.S. 208 U.S. 161,175.

182. Aclean v. Arkansas, 211 U.S. 539.

183. Morehead v. Tipaldo (1936) 298 U.S.587.

184. Of course, such moral attitudes as expressed in the foregoing examples were not confined to courts. In vetoing a Bill providing for seed distribution in draught stricken Texas, President Cleveland stated in 1887: "I do not believe that the power and duty of the general government ought to be extended to the relief of the individual suffering, which is in no manner properly related to the public service or benefit." 8 Richardson, Messages and Papers of the Presidents, 1789-1897 (1898)557.

185. Numerous books were of course written on the subject of the impact of the Industrial Revolution. For special interest in our subject here is among others, A.V.Dicey, Law and Opinion in England during the Nineteenth Century (London 2nd ed.1914).

186. W.G. Friedman, Law in a Changing Society (London 1959)126.

187. Harper and James, op. cit. n.156 at p.762.

188. Friedman, op. cit. n.186 at p.128.

189. Harper and James, op. cit. n.156 at p.762.

190. "everything after all comes down to a settlement between underwriters," wrote Ripert in 1926 in the context of transportation, only the passengers, he added, are generally without recourse to insurance. Cited by Drion, op. cit. n.111 at p.22.

191. Seavey, op. cit. n.160 at p.450.

192. Calabresi, op. cit. n.166.

193. Columbia University, Council for Research in the Social Sciences, Report by the Committee to Study Compensation For Automobile Accidents (1932)56,66,219; Corstvet, The Uncompensated Accident and Its Consequences, 3 Law and Contemp. Prob. (1936)466; W.O. Douglas, Wage Earner Bankruptcies - State v. Federal Control, 42 Yale L. J. (1933)591,607.

194. cf. explanation of theory of "marginal utility of money" in Wicksell, Lectures in Political Economy (1934)29 seq.

195. Harper and James, op. cit. n.156 at p.794.

196. A phrase coined by R. Pound, Theory of Social Interests, 4 Pub. Am. Soc. Society (1920)15.

197. Smith v. Charles Baker and Sons [1891] A.C. 325,340.

198. Salmond, op. cit. n.170 at p.27 enumerating the advantages of "insurance liability."

199. Harper and James, op. cit. n.156 at p.763, adding: "this is an integral part of the new concept, formerly it was considered quite outside the scope of tort law."

200. Harper and James, op. cit. n.156 at p.753.

201. For the development of risk distribution as a tort test to replace personal fault, see among the rich body of American Literature (referring mostly to road traffic accidents). A.A. Ballantine, Compensation Plan for Railway Accident Claims, 29 Harv.L.Rev.(1916)705; Marx, The Curse of the Personal Injury Suit and a Remedy, 10 A.B.A.J. (1924)493; Marx, Compulsory Compensation Insurance, 25 Colum.L.Rev. (1925)164, also in 59 Am. L. Rev.(1925)200. Hulvey and Wandel, Workmen's Compensation and Automobile Liability Insurance in Virginia(1931). Columbia Report (1932)op.cit. n.193. F.James, Accident Liability Reconsidered: The Impact of Liability Insurance 57 Yale L.J. (1948)549; P. Ehrenzweig, Negligence Without Fault, (Berkley 1951); P.Ehrenzweig, "Full Aid" Insurance for the Traffic Victim 43 Cal. L. Rev. (1955)1; McNiece & Thornton, Automobile Accident Prevention and Compensation, 27 N.Y.U.L. Rev. (1952)585; L.Green, The Individual's Protection Under Negligence Law Risk Sharing, 47 N.W.V.L.Rev.(1953)751; Keeton, Conditional Fault in the Law of Torts, 72 Harv.L.Rev.(1959)401; Calabresi, 1961, op. cit. n.166.

202. W.O. Douglas, Vicarious Liability and the Administration of Risk, 38 Yale L.J.(1929)584,720.

203. cf. situation in Ryan v. N.Y. Central R. Co.(1866) 35 N.Y. 210, 91 Am. Dec. 49.

204. Bausman J. in Stertz v. Industrial Insurance Commission, 91 Wash. 588,590,258 Ann. Cas. 1918 B,375(1916). cf. Roosevelt, Message of Dec. 3rd. 1906. 41 Cong. Rec. Pt. 1,22,26(1906) and in England Chamberlin in Parliamentary Debates 4th Session 1462(1897).

205. Md. Laws, 1902 c. 139 (which was still judged unconstitutional in Franklin v. United Ry. and Electric Company of Baltimore, 2 Baltimore City Reports 309(1904). On the Federal Arena the first Employer Liability Act, initiated by President Roosevelt (34 Stat. 232 c.3073(1906)) was judged unconstitutional (Employer liability cases 207 U.S. 463,28 Sup. Ct. 141, 52 L. Ed. 297(1908), but the one which came to replace it remained valid (Federal Compensation Act 35 Stat. 56(1908).

206. Lord McMillan in Donoghue V. Stevenson [1932] AC562,619.

207. Absolute liability rules of the varieties of Ryland v. Fletcher; or in certain cases for animals; dangerous land and cattle; food; varrany; hazardous activities solowly fill all tort text books. Still the usual defences attached to them, such as acts of God, act stranger or default of plaintiff render the "absolute" title improbable and wanting.

208. L.S. Ayres and Co. V. Hicks (1942) 220 Ind. 86, 40 N.E. 2d. 334; and 2 Restatement on Tort c. 314 comment c. cf. also Van Valkenburg v. Northern Navigation Co. [1913] 19 D.L.R. 649.

209. Note 52 Colum. L. Rev. (1952) 631, 632. But see Note 8 Mo. L. Rev. (1943) 205,209.

210. See Note 6 Notre Dame Law (1931)372: 8 Mo. L. Rev.(1943) 205,210.

211. e.g. Anderson v. Atchison, T. & S.F.R.R. (1948)333 U.S. 821. See also Kapasis v. Laimos Bros. [1959] 2 Lloyd's Rep. 378,381.

212. e.g. L.S. Ayers and Co. v. Hicks (1942) 220 Ind. 86, 40 N.E. 2d 334, and cf. Salmond, op. cit. n. 170 at p. 425.

213. McNiece and Thornton, Affirmative Duties in Tort, 58 Yale L.J. (1949) 1272. W.L. Prosser, Business Visitors and Invitees, 26 Minn. L. Rev.(1942)573,574 referring to F.H. Bohlen, The Basis of Affirmative Obligations in the Law of Tort, 53 U. Pa. L. Rev. (1905)209 and cf. Salmond, op. cit. n. 170 at p. 425 n. 7 and text.

214. Prosser, op. cit. n. 169 at p. 185. cf. Iyer, The Law of Torts (Calcutta, 5th ed. 1957)430.

215. Though not long ago this doctrine wasn't readily applied to aviation cases (Herndon v. Gregory, 190 Ark, 702, 81 S.W. 2d. 849 (1935)) but by a minority of courts (e.g. Smith v. O'Donnell, 215 Cal. 714, 12 R 2d. 933 (1932)), today the general rule is that the res ipsa loquitur rule, applies to air carrier liability (Prosser, Torts (3d. ed. 1964) 221). And see supra n. 92. Still however, the application of the doctrine is far from easy as there are at least three different ways in which it is used in different states; it is not even uniformly decided everywhere whether it is a rule of evidence or a rule of substance (Calkins, op. cit. n. 66 at p. 254). In addition, the use of the doctrine at least until recently didn't arouse much sympathy in jury verdicts (Hardman, Aircraft Passenger Accident Law: A Reappraisal, Ins. L.J. (1961) 688, 691).

216. In aviation accidents see possibilities concerning other defendents in addition to the defendent air carrier, and their rights vis-a-vis the Convention, in Drion, op. cit. n. 111 at p. 146 seq.

217. cf. statement by Kreindler as to the fact that in the U.S.A., "the tort system does compensate virtually all victims of airline accidents", in the London Conference under the auspices of the Royal Aeronautical Society op. cit. n. 82 at p. 506.

218. for detailed differences and characteristics of the various State and the Federal Wrongful Death Acts, see L.S. Kreindler, Aviation Accident Law (New York 1963) ch. 3.

219. See also n. 217 supra. And cf. n. 139 supra.

220. The jury surely is impressed by the fact that an insured enterprise sits on the defendent bench and not an individual at least in regard to the sum of compensation. cf. Drion, op. cit. n. 111 at p. 22. This fact can be also realized from a comparison between general awards by juries in personal injury cases and what the legislator found adequate in the famous Froman case, and in other circumstances enumerated by Stephen op. cit. n. 123 at p. 72

221. The Lisi case supra n. 119 is one such example of an astonishing use of Article 3 in order to jump the limit. As for Article 25, its vagueness left more than ample room for lawyers to use it in order to circumvent the limit in the Warsaw Convention, especially in the U.S.A. cf. the following French and American cases arising from the same accidents in which the French Court applied the Warsaw limit and the American Court found wilful misconduct: Emery v. Sabena Belgian World Airlines, 23 Rev. Gen. de L'air et de L'esp. (1960) reaffirmed 28 Rev. Gen. de L'air et de L'esp. (1965)331; Leroy v. Sabena Belgian World Airlines, 8 Av. Cas. 18,142(1964): 344 F. 2d 266(2d Cir.) cert. denied, 383 U.S. 878 (1965).

222. See in this context Stephen, op. cit. n. 123, at p. 733 n. 83 and text.

223. at least up to the indisputable damage or up to actual medical expenses in case of body injury.

224. J. Lowenfeld & Mendelsohn op. cit. n. 68 maintaining that "costs of insurance at a level of 75,000 dollars with absolute liability would probably be lower than for insurance against unlimited liability. Also see Drion, op. cit. n. 111 at p. 25

The menace of Articles 3 and 25, and the haphazardous way which they serve to avoid the limitation in the convention (especially in settlements) are well illustrated in the paper written by Mr. Kreindler advocating their use for this very reason. Kreindler op. cit. n. 70 pp. 294, 297.

225. Sand, op. cit. n. 69 p. 261 n. 8 citing several sources.

226. when the amount of damages is not in dispute, and cf. supra n. 223.

227. cf. Rosenberg & Sovern, Delay and Dynamics of Personal Injury Litigation, 59 Colum. L. Rev. (1959) 1115,1122.

228. Lisi v. Alitalia Linee Aeree Italiane, 9 Av. Cas. 18 120, 253 F. Supp. 237(1966).

229. The accumulating interest which $60,000 will render in seven years is roughly $36,000. The verdict must be for $135,000, to be divided into $39,000 for the lawyer and $96,000 for the victim.

230. Already in the Montreal Proceedings in 1966 the majority of nations were prepared for a $50,000 limit, or even $75,000. See ICAO Doc. 8584-LC/154 Vol. 1 and 2, and cf. Stephen, op. cit. n. 123 at p. 728. It is also noteworthy that in the United Kingdom the limit of $75,000 was extended to both domestic carriage, and, for passengers of BEA, also to international transportation, even outside the scope of the Warsaw Convention or the Hague Protocol. supra n. 82.

231. Kreindler, op. cit. n. 70 at 292.

232. Though proof of amount of damages might not have been needed under plans for insurance legislation proposed in the U.S.A. See Lowenfeld & Mendelsohn op. cit. n. 68 at p. 592.

233. ICAO Doc. 8584-LC/154-2, Doc. LIM-8 Appendix 2.

234. cf. Goodfellow, "personal point"(i) in London Meeting of Royal Aeronautical Society op. cit. n. 82 at p. 503.

235. at least on a local scale.

236. Lowenfeld & Mendelsohn, op. cit. n. 68 p. 592 seq. cf. also in the Montreal Proceedings (ICAO Doc. 8584-LC/154) the arguments which compromised the Swedish Proposal. (LIM-25) until it was forged into the "joint" proposal. (LIM-32)

237. M.C. McNeely, Illegality as a Factor in Liability Insurance. 41 Colum. L. Rev. (1941)26.

238. cf. letter written by Director of FBI referred to in Lowenfeld & Mendelsohn op. cit. n. 68 at p. 539.

239. such as the CAB regulation in 14 Code Fed. Reg. 221, 175, referred to in supra n. 119.

240. reproduced supra p. 21.

241. Unlike Chutter v. KLM, U.S.&CAvR(1955)250, where the lady victim who too enthusiastically waved good-bye and fell out of the plane's door, didn't recover because of 'contributory negligence'.

242. cf. the proposal of the Greek delegate, Hadjidimoulas, at the Hague Conference. ICAO Doc. 7686-LC/140 Vol. I at p. 261.

243. Accidents are not merely crashes. A passenger, for example, can die because of susceptibility to the fact that the airplane is not pressurized (as promised); Salmon v. KLM, US&CAvR(1955)80.

244. cf. in this regard the reservation in the waiving of the benefit of Article 22(1) of the Convention in the Montreal Agreement (CAB18900); it is not waived when the claimant wilfully caused damage which resulted in death or bodily injury of a passenger. Surely, also, the Convention must state that in such a case the carrier's right to sue the third party is not jeopardized.

245. and what about acts of "war or comparable situation" (cf. ICAO PE-Warsaw Report-2 18/7/67 at p. 5; supra n. 149) by another nation, as in the Case concerning the Aerial Incident of July 27, 1955(Preliminary Objection) ICJ Reports(1959)2, to which Israel and Bulgaria were parties?

246. the problems put forward by nations answering the ICAO questionnaire which included the Panel of Expert's suggestions in the Report mentioned in the previous note shed some light in this regard. An analysis of 52 of these answers is provided in Addendum No. 5 5/3/68 to ICAO's C-WP/4648 21/8/67).

247. And of course all efforts should be made to safeguard the interpretation of these definitions and the whole Convention in a unifform way. It is a problem which needs much study and attention, cf. Resolution E in the Final Act to the Hague Protocol, and Margalioth, A Unified System for the Interpretation of Private Air Law Conventions, 3 IL Dirritto Aereo (1964)3,8 seq.

248. The CITEJA draft of revision of 1946 to which Major Beaumont was Rapporteur (Reproduced 14 J Air L & Com. (1947)87) and which was submitted to PICAO on December 1946, (PICAO Doc. 2617, LG/8,20/1/47 supplement to Doc. 2359, LG/5,29/11/46; and cf. supra n. 28) included a long Article of definitions defining, inter alia, Carrier, Cargo, Charter, Contract of carriage, Contracting State, International Carriage, Last carrier, Passenger, Period of Carriage, Place of Departure, Place of Destination and Servants. cf. also the "summary of the discussion" on this draft in CITEJA's November 1946 Meeting in Cairo in CITEJA Doc. 472/C, Nov. 12, 1946.

At the Hague, Beaumont's suggestion to include an Article of definitions in the Protocol was disposed of summarily by "forwarding this matter to the Drafting Committee", ICAO Doc. 7686-LC/140 Vol. I p. 326.

249. Does "embarking" start from the time the passengers are invited to proceed from the airport's waiting room as decided in Blumenfeld v. BEA (Kammergericht Berlin 10 U 61/60) Zeitschrit fur Luftrecht und Weltzaumrechtsfragen (1962)78.

250. Does "disembarkation", for example, include the passenger's walk from the airplane to the air terminal as decided in Mache v. Air France (Tribunal de Grande Instance de la Seine) Rev. Fr. Dr. Aer.(1961)283?

251. a problem created by the English Court decision in Philippson v. Imperial Airways, USAvR(1939)63.

252. cf. supra n. 36.

253. Under Article 28 as drafted in the Convention, for example, if a passenger who bought his round trip ticket in his country was injured aboard a foreign airline on a leg of a journey between two foreign points, he would sometimes not be able to sue the foreign carrier. Such is the case in the U.S.A. if the carrier is not "doing business here". cf. Berner v. United Airlines, 3 App. Div. 2d 9,157 N.Y.S. 2d 884 (1956) affirmed, 2 N.Y. 2d 1003, 147 N.E. 2d 732, 170 N.Y.S. 2d 340 (1957) (in which the plaintiff was compensated, however as the injury was sustained aboard a British Commonwealth Pacific Airlines' airplane which had a sales agency agreement with BOAC who does business in the U.S.A.) See also Rotterdamsche Bank v. BOAC [1953] 1 All E.R. 675, and generally C.E.B. McKenry, Judicial Jurisdiction Under the Warsaw Convention, 29 J. Air L. & Com. (1963) 205.

254. For though some courts interpreted Article 17 of the Convention as creating a cause of action e.g. the Supreme Court of the State of New York in Salamon v. KLM N.V. 107 N.Y.S. 2d 768,773(1951), USAvR(1951)378, affirmed 281 App. Div. 965,120 N.Y.S. 2d 917(1953), lately Federal courts denied it, Komlos v. Air France 111 F. Supp. 393(1952), US&CAvR (1952)310 Noel v. Linea Aeropostal Venezolana, 247 F. 2d 677, US&CAvR (1956)314, cert. denied 355 U.S. 907(1957); Fernandez v. Linea Aeropostal Venezolana, US&CAvR (1957)369. Scott v. Middle East Air Lines, 240 F. Supp. I (1965). cf. also Winsor v. United Airlines, US&CAvR (1960)33; Spencer v. Northwest, US&CAvR (1962)24.

255. at Guadalajara; supra n. 63

256. not necessarily for remuneration when on scheduled air transport (Article 1), neither have the passengers to contract directly with the carrier (Block v. Air France (U.S. Ct. of App. 5th Circ. Nov. 8, 1957) 10 Avi. 17,518) but the contract is the only basis for the right of action under the Warsaw Convention (id.).

257. The abandoning of the 'notice' can't be envisaged as long as the U.S.A. holds to its rigid stand in that regard; cf. supra n. 152. Neither will a decision as in the Lisi case (supra n. 119) lessen the importance of the notice; such circumvention can be achieved, though, in following the spirit of the decision in the Block case (previous note).

258. Indeed in some cases, when negligence can be proven, the lot of the stowaway would be better than that of the fare-paying passengers for the limit in the Convention would not apply to the stowaway's action. See Drion, op. cit. n. 111 at p. 55.

259. unless he received a "free pass"(which includes 'notice', etc.). For the Convention applies to gratuitous carriage in scheduled air transport (Article 1).

260. and which enabled the carrier to pay the lowest premium possible when insuring the aviation's risk. This last premium which would be later passed on to the passenger as costs, and would certainly be lower than the premium the passenger would have to pay if he had to insure himself against the same risk up to the same limit.

261. actually even crew members. On the other hand cf. proposed narrow definitions of "passenger" in the Beaumont Draft Revision, supra n. 248.

262. supra Ch. 2 sec. B.

263. id. Above this sum moneys may of course be due to the dependents from Employer Liability Policies and the like, and be paid under these policies; this however is not of concern here.

264. Though, see supra pp. 42,43, in regard to States' recent replies to ICAO questionnaire. Also cf. the general trend of discussion in the special ICAO Meeting, February 1966, Montreal, in ICAO Doc. 8584-LC/154, especially when dealing with the Swedish proposal to "substitute the principal of absolute liability for the present principle of presumption of fault".

265. cf. supra pp. 57 seq.

266. cf. "The U.S.... proposes that its future activities be consistent with the following objectives..... D. The adoption of Conventions in international air law needed in connection with international air operation" - Statement on Civil Air Policy by the Presidential Air Coordinating Committee (Government Printing Office, May 1954, p. 37). Also cf. inter alia Recommendation No. 2 in the Report to the Association of the Bar of the City of New York, op. cit. n. 121 at p. 474.

267. cf. in ICAO Doc. 8584-LC/154-2, Doc. LIM-3, LIM-8 and Addenda 1-6 statistical data and tables in replies of States to relevant ICAO questionnaires. Several Western powers, like the United Kingdom, Australia, New Zealand, France, Germany, Switzerland, Canada, the Scandanavian countries and others, seem to be, in their standard of living, not very far behind the U.S.A.

268. In a special Article allowing local plans within prescribed general definitions. This way misunderstanding in regard to what might and what might not constitute a breach of the Convention's uniform rule, would not arise.

269. And can of course be adopted locally with different specifications by any State in which the standard of living will rise to the American level cf. supra n. 267.

270. As to the effect of competition and CAB insistance on foreign air carriers who hesitate in abiding to the U.S. Administration's regulations see Stephen, op. cit. n. 123 at p. 714 n. 13 cf. however Sand op. cit. n. 69 at p. 275 n. 146 as to the situation in Spain, Italy, and Germany.

271. Lowenfeld & Mendelsohn op. cit. n. 68 at p. 539. In this aspect lies a main difference between the plan and the alternatives suggested in Prof. Sand's paper which initiated the abortive insurance legislation, Sand, op. cit. n. 69.

272. In fact when the Legislature already dispenses compensation money to aviation accidents victims, the amount involved is surely smaller than any which a Convention replacing the Warsaw Convention would adopt as a limit. Stephen, op. cit. n. 123 p. 723 seq., especially in reference to the Froman case.

273. cf. supra. n. 229.

274. supra n. 99.

275. Member, U.S. Delegation 6th Montreal Conference, 1966.

276. supra n. 82.

277. supra n. 158.

278. cf. also Stephen, op. cit. n. 123 at p. 736 n. 94.

279. ICAO Doc. 8584-LC/154-2 Doc. LIM-8, Appendix 2, Table 1.

Table of Books and Articles Cited

(references are to footnotes)

I. Books

Cardozo, 'The Paradoxes of Legal Science' (New York, 1928) 168

Dicey, 'Law and Opinion in England During the Nineteenth Century' (London, 2nd ed. 1914) 185

Drion, 'Limitation of Liabilities in International Air Law' (The Hague, 1954) 111,114,121,133, 142 190,216,220,224, 258

Dutois, 'La Collaboration entre Compagnies Aeriennes ses Formes Juridiques' (Loussanne, 1957) 63

Ehrenzweig, 'Negligence Without Fault' (Berkeley, 1951) 201

Friedmann, 'Law in a Changing Society' (London, 1959) 186,88

Goedhuis, 'National Air Legislation and the Warsaw Convention' (The Hague, 1937) 1

Gronfors, 'Air Charter and the Warsaw Convention' (The Hague, 1956) 63

Harper and James, 'The Law of Torts' (Boston, 2nd ed. 1956) 156,165,187 189,195,199,200

Holdsworth, 'A History of English Law (London, 3rd ed. 1922) 160,162

Holmes, 'The Common Law' (Boston, 1881) 159

Hulvey and Wandel, 'Workmen's Compensation and Automobile Liability Insurance in Virginia' (Richmond, 1931) 201

Iyer, 'The Law of Torts' (Calcutta, 5th ed. 1957) 214

Jenks, 'A Short History of English Law' (London, 3rd ed. 1924) 163

Kreindler, Aviation Accident Law (New York, 1963) 218

Prosser, 'The Law of Torts' (St. Paul, Minn. 1st ed. 1941; 2nd ed. 1955; 3rd ed. 1964) 92,169 214,215

Richardson, 'Messages and Papers of the Presidents' (Boston, 1898) 184

Salmond, 'The Law of Torts' (London, 3rd ed. 1912; 6th ed. 1924; 13th ed. 1961) 109,163,170,171 175,198,212,213

Speas, 'Technical Aspects of Air Transport Management' (New York, 1955) 2

Street, 'Foundation of Legal Liability'(1906) 162,163

Wassenbergh, 'Post War International Civil Aviation Policy and the Law of the Air' (The Hague,1957) 25

Wicksell, ' Lectures in Political Economy'(London,1934) 194

Winfield, 'Cases on the Law of Torts' (London,4th ed. 1948) 195

II. Articles

Ames, 'History of the Assumpsit'(1888) 163

---, 'Law and Morals'(1908) 168

Arterburn, 'The Origin and the First Test of Public Callings' (1927) 163

Ballantine, 'Compensation Plan for Railway Accident Claims' (1916) 201

Beaumont, ' Some Anomalies Requiring Amendment in the Warsaw Convention of 1929'(1947) 29

--- , ' Some Problems Involved in the Revision of the Warsaw Convention'(1949) 29

--- , ' The Proposed Protocol to the Warsaw Convention of 1929'(1953) 46

Beaumont, ' The Warsaw Convention of 1929 as Amended by the Protocol Signed at the Hague on September 28,1955 ' (1955) 140

Bohlen, 'The Basis of Affirmative Obligations in the Law of Tort' (1905) 213

--- , 'The Moral Duty to Aid Others as a Basis of Tort Liability' (1908) 168

Calabresi, 'Risk Distribution' (1961) 166,192,201

Calkins, 'Grand Canyon, Warsaw and the Hague Protocol' (1956) 66,117,126,215

--- , 'The Cause of Action under the Warsaw Convention' (1959) 13,37,91

--- , 'Hiking the Limits of Liability at The Hague' (1962) 53

Cheng, 'The Law of "International" and "Non-international" Carriage by Air' (1963) 60

Claire, 'Evaluation of Proposals to Increase the Warsaw Convention Limit of Passenger Liability' (1949) 84

Corstvet, 'The Uncompensated Accident and Its Consequences' (1936) 193

Douglas, 'Vicarious Liability and the Administration of Risk' (1929) 202

Douglas,'Wage Earner Bankrupties - State v. Federal Control'(1933) 193

Ehrenzweig,'"Full Aid" Insurance for the Traffic Victim' (1955) 201

Georgiades, 'Quelques reflexions sur l'affretement des aeronefs et le projet de convention de Tokio' (1959) 63

Green, 'The Individual's Protection under Negligence Law Risk Sharing' (1953) 201

Hardman, 'Aircraft Passenger Accident Law: A Reappraisal' (1961) 215

Hjalsted,'The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law'(1960) 140

Ide, 'The History and Accomplishments of CITEJA' (1932) 8

Issacs, 'Fault and Liability' (1918) 160

James, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 63,201

Keefer, 'Air Line Interchange Agreements' (1958) 63

Keeton, ' Conditional Fault in the Law of Torts' (1959) 201

Knauth, 'Some Notes on the Warsaw Convention of 1929' (1947) 8

--- , 'Aviation Law and Maritime Law' (1954) 125

Kreindler, 'The Denunciation of the Warsaw Convention' (1965) 70,72,224,231 158

Latchford, 'The Warsaw Convention and the CITEJA' (1935) 8

Lissitzyn, 'Change of Aircraft on International Air Transport Routes' (1947) 63

Lowenfeld, 'The Warsaw Convention and the Washington Compromise' (1966) 138

Lowenfeld and Mendelsohn, 'The United States and the Warsaw Convention' (1967) 68,89,123,124,129,153, 157,224,232,236,238,271

Margalioth, 'A Unified System for the Interpretation of Private Air Law Conventions' (1964) 247

Marx, 'The Curse of the Personal Injury Suit and a Remedy' (1924) 201

--, 'Compulsory Compensation Insurance' (1925) 201

McKenry, 'Judicial Jurisdiction under the Warsaw Convention' (1963) 253

McNeely, 'Illegality as a Factor in Liability Insurance' (1941) 237

McNiece & Thornton, 'Affirmative Duties in Tort' (1949) 213

---------- , 'Automobile Accident Prevention and Compensation' (1952) 201

Nunnely, 'Report of the Chairman of the U.S. Delegation' (1953) 155

Pound, 'Theory of Social Interests' (1920) 196

Prosser, 'Business Visitors and Invitees' (1942) 213

Reiber, 'Ratification of The Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention' (1956) 59

Riese, 'Le Projet de la Commission Juridique de L'OACI (Tokyo 1957) sur L'Aftrement etc.' (1959) 63

Rinck, 'Damage Caused by Foreign Aircraft to Third Parties' (1962) 156

Rosenberg & Sovern, 'Delay & Dynamics of Personal Injury Litigation' (1959) 227

Sand, 'Air Carrier's Limitation of Liability & Air Passenger's Accident Compensation under the Warsaw Convention' (1961) 69,125,225,270,271

Seavey, 'Speculation as to Respondent Superior" (1934) 160,169,191

Serraz, 'de L'affretement aerien'(1949) 63

Smith, 'Sequel to Workmen's Compensation Acts' (1914) 160

Stephen, 'The Adequate Award in International Aviation Accidents' (1966) 123,124,127,129,132,139 220,222,230,270,272,278

Wetter, 'Possible Simplication of the Warsaw Convention Liability Rules' (1948) 29

Wigmore, 'Responsibility for Tortious Acts: Its History' (1894) 160,163

Winfield, 'History of Negligence' (1924) 161

III. Notes and Comments

6 Notre Dame Law (1931) 210

8 Mo. L. Rev. (1943) 209,210

52 Colum. L. Rev. (1952) 209

63 Colum. L. Rev. (1963) 130

77 Harv. L. Rev. (1963) 130

Note, 30 J. Air L. & Com. (1964) 119

Wisc. L. Rev. (1966) 130

Va. L. Rev. (1966) 130

IV. Symposia and Reports

Symposium on the Warsaw Convention (Royal Aeronautical Society) London, 1967 82,136,158,217 230,234,276,277

Symposium on the Warsaw Convention (Journal of Air Law and Commerce(not yet published) Dallas, Texas 1967 99,136,158,274,277

IATA Legal Committee Report on the Warsaw Convention, 1967 74

American Bar Association Report on the Warsaw Convention, 1950 153

Association of the Bar of the City of New York - Reports on the Warsaw Convention, 1950 121,266
1952 117
1955 117

Columbia University Report on Compensation for Automobile Accident Victims, 1932 193,201

Table of International Documents Cited

(references are to footnotes)

I. CITEJA Documents

Minutes and Documents 1st Session, Paris 1926	11
Minutes and Documents 2nd Session, Paris 1927	12,93
Minutes and Documents 3rd Session, Madrid 1928	14,93,96 97,98
Minutes and Documents, 14th Session, Paris 1946	26
Plenary Resolutions, No. 157-9, Nov. 17, 1946	42
Doc. 472/c (1946)	248
Doc. 438 (1947)	41
Doc. 439 (1947)	41

II. International Conferences

International Conference on Private Air Law, Paris 1925 (issued by French Foreign Ministry, 1936) 4,5,7,9,149,150

ICAO Doc. 7838 (Warsaw Conference 1929, reproduced 1961) 13,16,18,101,102,105,112

International Civil Aviation Conference, Chicago, 1944 (issued by U.S. State Department, 1945) 27

ICAO Doc. 7379-LC/134 (Rome Conference, 1952) 156

ICAO Doc. 7686-LC/140 (Hague Conference, 1955) 18,49,51,52,61,113 115,117,118,120,121,242,248

ICAO Doc. 8301-LC/149 (Document 8181) (Guadalajara Conference, 1961) 62

ICAO Doc. 8584-LC/154 (Special ICAO Conference, Montreal, 1966) 23,78,125,128,132,230,233 236,264,267,269,279

III. ICAO Legal Committee Sessions

ICAO Doc. 7229-LC/133 (8th Session, Madrid, 1951) 44

ICAO Doc. 7450-LC/136 (9th Session, Rio de Janeiro, 1953) 45,46,47,113

IV. Other PICAO and ICAO Documents

PICAO Doc. 1561/A-11 (April 20, 1946)	28
PICAO Doc. 1843/A-47 (June 13, 1946)	40,134
PICAO Doc. 2359, LG/5, 29/11/46	248
PICAO Doc. 2617, LG/8, 20/1/47	248
ICAO Doc. C-WP/4648 (21/8/67)	80,151,246
ICAO Doc. 8731-C/977 (22/3/68)	81
ICAO Doc. 8101-LC/145 (1960)	63
ICAO Doc. LC/W.D.-708 (1964)	155
ICAO Doc. PE-WARSAW REPORT (18/7/67)	146,245,246

Tables of Cases Cited

(references are to footnotes)

Aclean v. Arkansas	182
Adair v. U.S.	181
Adam Exp. Co. v. Croninger	125
American v. Ulen	117
American Smelting & Refining Co. v. Philippine Airline	142,143,144
Anderson v. Atchison T. & S.F.R.R.	211
Areniger v. Real S.A. Transport Aereos	132
Ayres & Co. v. Hicks	208,212
Babcock v. Jackson	130
Beguido v. Eastern Airlines	118,144
Berner v. British Commonwealth Pacific Airlines	117
Berner v. United Airlines	131,253
Block v. Air France	32,256,257
Blumenfeld v. BEA	249
Braceville Coal v. People	178

Bryant v. Finnish National Airlines 131

Buch v. Amory Mfg. Co. 171

Butterfield v. Forrester 108

Case Concerning the Aerial Incident of July 27, 1955(ICJ) 245

Cayzer, Irvine & Co. v. Carron & Co. 108

Cherokee Laboratories v. Rosers 132

Chutter v. KLM, Royal Dutch Airlines 241

Cox. v. Northwest Airlines 92

Devanport v. Webb 132

Del Vina v. Air France 143

Demanes v. Flying Tiger Lines 118

Donoghue v. Stevenson 206

Eck v. United Arab Airlines 118

Egan v. American Airlines 118

Emery v. Sabena Belgian World Airlines 221

Employer Liability Cases 207 US 463 (1908) 205

Favre v. Sabena Belgian World Airlines 143

Fernandez v. Linea Aeropostal Venezolana 254

Ficher v. Sabena Belgian World Airlines 118

Fischer v. Ethiopian Airlines 131

Franklin v. United Ry. & Electric Co. of Baltimore 205

Froman v. Pan American Airways 117,125,220,272

Frozer v. People	176
Garcia v. PAA	118
Gautzet v. Egerton	171
Godcharles v. Wigeman	181
Goepp v. Am. Overseas Airlines	144
Gore v. Northeast Airlines	130
Grein v. Imperial Airways	141
Grey v. American Airlines	142,118
Griffith v. United Airlines	130
Griswold v. Boston & M.R.R.	172
Hennesy v. Air France	143
Herndon v. Gregory	92,215
Hopkins v. Lockheed Aircraft Co.	132
Horabiz v. BOAC	117
Indemnity Insurance v. PAA	118
Jerrell v. N.Y. Central R. Co.	103
Johnson v. Johnson	130
Kapsis v. Laimos Bros.	211
Kilberg v. Northeast Airlines	130,132
KLM, Royal Dutch Airlines v. Superior Court	131
Komlos v. Air France	254
Leroy v. Sabena, Belgian World Airlines	221

Lisi v. Alitalia - Linee Aeree Italiane	118,119,228,257
Lochner v. N.Y.	181
Mache v. Air France	250
Mertens v. Flying Tiger Lines	119,118
Morehead v. Tipaldo	183
Mormen v. Mustang Aviation Co.	132
Noel v. Linea Aeropostal Venezolana	254
Osterlind v. Hill	174
Paris v. General Electric Company	130
Panwel v. Sabena, Belgian World Airlines	143
Pearson v. Northeast Airlines	130
Pekelis v. Transcontinental & Western Air	17
People v. Beck	179
Philios v. TWA	142
Philippson v. Imperial Airways	251
Pierre v. Eastern Airlines	142,143,
Preston v. Hunting Air Transport Ltd.	118
Quinn v. Hill	175
Rashap v. American Airlines	142,139
Riley v. Guff C. & S.F.R.R.	173
Ritts v. American Overseas Airlines	142,144
Ross v. PAA	118

Rotterdamsche Bank v. BOAC 253

Ryan v. N.Y. Central R. Co. 203

Rylands v. Fletcher 207

Salmon v. KLM, Royal Dutch Airlines 243,254

Scott v. Middle East Airlines 131,254

Seguror Tepeyac S.A. v. Bostrom 130

Seth v. BOAC 118

Smith v. Charles Baker and Sons 197

Smith v. O'Donnell 215

Spencer v. Northwest 254

State v. Fire Creek Coal Co. 181

State v. Goodwill 180

State v. Haun 177

Stertz v. Industrial Insurance Commission 204

Tramentana v. S.A. - Empresa de Viacao Area Rio Grandense 132

Tuller v. KLM, Royal Dutch Airlines 117

Union Pacific R.R. v. Cappier 172

Van Valkenburg v. Northern Navigation Company 208

Warren v. Flying Tiger Lines 118

Wilcox v. Wilcox 130

Wilson v. Colonial Air Transport 92

Winsor v. United Airlines 143,254

Zousmer v. CAR 130