LIABILITY FOR BREACHES OF AVIATION SECURITY OBLIGATIONS

A CANADIAN PERSPECTIVE

by

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RÉSUMÉ

L'industrie de l'aviation, à la fois nationale et internationale, estime que les interventions illégales dans le domaine de l'aviation civile sont parmi les problèmes les plus urgents et inquiétants de notre époque. Ces dernières décennies ont été marquées par de nombreuses violations aux règles de sécurité en matière aérienne. Ces violations comprennent, entre autres, les actes de sabotage, la détonation d'explosifs ou des menaces de détonation, les détournements d'avions et la destruction totale des appareils en vol. De grands efforts ont été faits dans le but d'améliorer et de standardiser les moyens et les dispositifs de sécurité mis en place dans les aéroports du monde. Cependant, la situation est telle qu'elle nous indique que même les exigences les plus rigoureuses n'ont pas réussi à complètement éliminer la possibilité de telles attaques.

Ce mémoire a pour but d'analyser certaines questions de responsabilité civile se rattachant à des transgressions du devoir de promouvoir et de maintenir la sécurité dans les aéroports et les aéronefs. Essentiellement, ce mémoire fournit un aperçu global des principes régissant toutes poursuites délictuelles à l'encontre des parties les plus susceptibles de se faire actionner, soit le transporteur aérien, soit l'État. En outre, l'auteur a conscrit ses conclusions aux actes terroristes impliquant des aéroports et des transporteurs aériens canadiens.
ABSTRACT

Unlawful interference with civil aviation is one of the most pressing and worrisome problems facing the international aviation community today. In the last few decades, violations of aviation security have included acts of sabotage, bombings and bomb threats and the unlawful seizure and total destruction of aircraft in flight. Great efforts have been taken at the national and international levels to increase and standardize security measures at airports throughout the world. The fact remains, however, that even the most stringent security requirements have not been able to guard against all possible attacks.

This thesis explores the private law liability issues that may arise from breaches of the duty to secure airports and aircraft. The focus is on providing a global view of the principles governing suits against the two most likely defendants -- the air carrier and the government -- and on the policy options which could underpin civil liability. The perspective is Canadian in that it presumes that either a Canadian airport or Canadian airline has been involved in the terrorist attack.
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INTRODUCTION

On June 22, 1985, two 747 jumbo jets took off from Vancouver International Airport in British Columbia. One was Canadian Pacific Airlines Flight 003, bound for Narita Airport in Japan, connecting with an Air India Flight to Bangkok. The other was Canadian Pacific Airlines Flight 060 which flew to Toronto to connect with an Air India Flight bound for Bombay via London. Both aircraft left Vancouver with a missing passenger: an M. Singh, who was connecting with Air India Flight 182 in Toronto and an L. Singh who was to connect with Air India Flight 301 for the flight to Bangkok from Tokyo. Both tickets had been paid for in cash and issued to the same person on the same day in consecutively numbered tickets. In both cases the Singhs did not board their flights in Vancouver but managed to get their luggage on board and interlined to the corresponding Air India flights. At 0620 G.M.T. CP Flight 003 exploded on the ground killing two baggage handlers in Narita, Japan. Almost one hour later, at 0715 G.M.T., Air India Flight 182 exploded over the Atlantic Ocean off the South Coast of Ireland, killing all 329 people on board. For the first time in history, Canadian aircraft and airports had been involved in an international aviation terrorist attack.  

1 It was never conclusively determined that the two missing passengers played a role in the twin disasters or even that the destruction of Air India 182 was caused by a bomb. The Canadian Aviation Safety Board report, made public on January 27, 1986 indicated that there was a "considerable amount of circumstantial evidence and other evidence that an explosive device caused the occurrence...This evidence is not conclusive," See S. Jhi, The Death of Air India Flight 182 (London: W.H. Allen & Co., 1986) for a journalistic account of the Air India tragedy.
The sabotage of these two flights is only one recent example of unlawful interference with civil aviation that has led to injury and loss of life and the destruction of aircraft and property. In the last few decades violations of aviation security have included acts of sabotage, bombings and bomb threats and the unlawful seizure and total destruction of aircraft in flight. From 1980 to 1988, there were 152 seizures, 86 attempted seizures and 70 acts of sabotage: 1228 people have been killed and more than 1100 have been injured. Much has been done by the International Civil Aviation Organization, on both the legal and technical sides, to increase and standardize the security measures taken by carriers and airport operators throughout the world. The fact remains, however, that even the most stringent security requirements have not been able to guard against all possible attacks.

The purpose of this thesis is to explore where the victims of these criminal attacks can obtain compensation by examining the private law liability issues that arise in cases of unlawful interference with civil aviation. The focus is on providing a global view of the liability principles governing suits against the two principal actors responsible for the planning and implementation of security procedures -- the air

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2 Since the Air India tragedy, two other notable disasters, where the use of explosive devices resulted in the total destruction of aircraft in flight, were the destruction of KAL 858 on November 29, 1987 which resulted in 115 deaths and Pan Am 103 on December 21, 1988 which resulted in 270 deaths.
carries and the government -- and on the policy options which could underpin civil liability. The underlying theme is to determine whether the principles of common law which apply in an action against the Crown operate to achieve the same result as the application of the rules of the Warsaw system which apply with respect to the carrier. In concluding, it is submitted that a more effective system of compensation would be brought about through the ratification of the Guatemala City Protocol and the implementation of a domestic supplementary insurance scheme.
SECTION 1: INTERNATIONAL OBLIGATIONS

At the international level, aviation security programmes are organized and developed by the International Civil Aviation Organization (ICAO).\(^1\) The issue of unlawful interference with civil aviation has been included on the agenda of the ICAO Assembly since 1968 and has been mandated as a matter of top priority by the ICAO Council and its Standing Committee on Unlawful Interference, in addition to the Air Navigation Commission, Air Traffic Committee and ICAO Legal Committee.\(^2\) The security instruments developed by ICAO may broadly be divided into two categories: those which deal with the legal aspects of unlawful interference with civil aviation and those concerned with technical standards and recommendations.\(^3\)

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1 ICAO is a specialized agency of the United Nations created pursuant to Part II of the Convention on International Civil Aviation (Chicago Convention, 1944) ICAO Doc. 7300/6, 15 UNTS 6605 (entered into force 4 April 1947) and today has 160 Member States. On ICAO's history and accomplishments see G.F. Fitzgerald, "The International Civil Aviation Organization and the Development of Conventions on International Air Law" (1978) Vol. III Annals of Air and Space Law 51.

2 From March 29 to April 12, 1990, the 27th Session of the Legal Committee was held and devoted to the subject of marking of plastic explosives.

In the legal field, Canada is party to four multilateral treaties which have been developed in ICAO: the Tokyo Convention, 1963\textsuperscript{4} the Hague Convention, 1970\textsuperscript{5} the Montreal Convention, 1971\textsuperscript{6} and the Airport Security Protocol, 1988\textsuperscript{7}. All relate to the criminal aspects of unlawful interference. The Tokyo Convention vests criminal jurisdiction over offenses committed on board aircraft in the state of registry, irrespective of where the aircraft is flying when the criminal act takes place. The Hague ("hijacking") Convention defines the offense of unlawfully seizing aircraft and creates a duty on the part of contracting states to establish jurisdiction over the offense, so that the state of registration, or the state where the aircraft lands, or the state of the operator of the aircraft, all have jurisdiction to try the offenders. The Montreal ("sabotage") Convention is similar in substance to the Hague Convention but creates wider offenses so as to include all forms of sabotage. Finally, the


new Airport Security Protocol of 1988, a protocol to the 1971 Montreal Convention, adds as an offense acts committed against persons at airports and establishes jurisdiction in the state where the offender is present, in addition to the state in which the act is committed.

More important for civil liability purposes is Annex 17 of the Chicago Convention,8 entitled "Safeguarding International Civil Aviation Against Acts of Unlawful Interference", which provides a guide of technical standards and recommended security practices. Detailed procedures and guidance on how to implement these practices are further provided in the "Security Manual for Prevention of Unlawful Acts Against Civil Aviation", adopted by ICAO in 1971.9 All contracting states must require operators in their territory to adopt and apply a security program in proportion to the threat to civil aviation known to the state (No.5.1.1). The obligation is therefore on the state to ensure that operators are complying with Annex 17.10

8 Convention on International Civil Aviation (Chicago Convention, 1944) ICAO Doc. 7300/6; 15 UNTS 6605 (entered into force 4 April 1947). Annex 17 derives from articles 37, 54(1) and 90.


10 Following the Air India disaster in June 1985 new standards were introduced into Annex 17, including an obligation on the state to keep the level of threats within its territory under review (3.1.6) and an obligation to ensure that baggage is not placed on board aircraft unless the passenger is also on board (5.1.4) See generally, G. Richard, "Air Transport Safety: Prevention and Sanctions" (1985) Vol. X Annals of Air and Space Law 209.
where a state is unable to comply with a standard, it must give "immediate notification to ICAO of the difference between its own practice and that established by the international standard".  

SECTION 2: DOMESTIC LEGISLATION

Subsection i: Overview of Federal Powers

Almost the whole field of civil aviation is within the exclusive jurisdiction of Parliament. This authority is grounded in section 91 of the Constitution Act, 1867 which confers the peace, order and good government power on the federal Parliament. The leading case establishing federal competency is Johanneson v. West St. Paul, where the Supreme Court of Canada held that legislation authorizing a municipality to pass by-laws for licensing airports was ultra vires:

...the true test must be found in the real subject matter of the legislation: if it be such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of

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11 There is some debate, however, on the legal implications of article 38. See, for example, Alexandrowicz, "The Convention on Facilitation of International Maritime Traffic and International Regulations: A Comparative Study" (1966) 15 I.C.L.Q. 261 at 264, who asserts that departures from ICAO standards are in essence treaty reservations irrespective of whether they are filed or not; and B. Cheng, "Centrifugal Tendencies in Air Law" (1957) 10 Current Legal Problems 200 at 205-206, who maintains that failure to give notification of a non-compliance is a breach of the Convention.

12 British North America Act, 1867 (U.K.), c.3 (renamed by the Canada Act 1982) (U.K.), c.11 as the Constitution Act, 1867).

the Dominion as a whole (as for example in the Aeronautics case\textsuperscript{14}...) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures.

(per Kerwin, J.)

Kellock, J. concurred, stating "once the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive.\textsuperscript{15}

Under this broad constitutional jurisdiction, section 4.2 of the Aeronautics Act\textsuperscript{16} charges the Minister of Transport with the responsibility of developing and regulating all matters with respect to Aeronautics. His regulation of aeronautics may broadly be divided into two categories: the regulation of technical or safety aspects on the one hand, and the regulation of economic aspects on the other.

With respect to economic regulation, the National Transportation Act, 1987\textsuperscript{17} replaces the Canadian Transport Commission with a "National Transportation Agency" as the

\textsuperscript{14} Re Regulation and Control of Aeronautics in Canada, (1932) A.C. 54, 1 D.L.R. 58.

\textsuperscript{15} Federal jurisdiction over liability for injury or death, however, gives rise to the division of powers question. See \textit{infra}, chapter 3, note 62 and accompanying text.


federal agency responsible for the economic regulation of transportation. The Agency is organized into three program branches -- Transportation Subsidies, Market Entry and Analysis, and Dispute Resolutions -- and may make rules, orders or regulations respecting any matter within its jurisdiction.\textsuperscript{18}

With respect to the technical or safety aspects, the controlling legislation is the Aeronautics Act and the Air Regulations and Air Navigation Orders enacted pursuant to it.\textsuperscript{19} The Act is designed to regulate domestic air transport and to enable the government to carry out Canada's obligations under the 1944 Chicago Convention.\textsuperscript{20} It is administered by the Canadian Air Transport Administration and a second body, the Canadian Aviation Safety Board (CASB), is specifically mandated to investigate accidents and make recommendations.\textsuperscript{21}

\begin{footnotesize}
\textsuperscript{18} s.27(1), R.S.C. 1985, c.28 (3rd Supp.). Following the 1978 American lead to deregulate, the 1987 Act also liberalized economic aspects of air transport, particularly tariffs, exit and entry controls and individual route entry. The National Transportation Agency continues to regulate international air routes and domestic air routes in the North of Canada.

\textsuperscript{19} The Act was revised significantly in 1985 to incorporate proposals of the Aeronautics Task Force (created in 1978) and the Commission of Inquiry on Aviation Safety headed by Justice C. Dubin. See Transport Canada The Aeronautics Act Amendments: An Overview, (Minister of Supply and Services Canada, 1986).

\textsuperscript{20} supra, note 1. See generally, M. Vary, Sources and Problems of Air Law in Canada (Faculty of Graduate Studies and Research, McGill University, 1961) [unpublished] at 18-21.

\textsuperscript{21} Canadian Aviation Safety Board Act, R.S.C. 1985, c.C-12 as am. R.S.C. 1985, c.28 (3rd Supp.) ss.279 & 359 (sch., item 3). CASB will soon be integrated into a new "Transportation Accident Investigation Board" with the coming into force of the Canadian Transportation Accident Investigation Board Act, S.C. 1989, c.3. The Act received royal assent on June 29, 1989 and will likely be proclaimed in force in 1990 (Bill C-2, 1989).
\end{footnotesize}
Subsection ii: Security Legislation

Prior to 1973 there were no regulations dealing with airport or air carrier security. In 1973, the Aeronautics Act was amended\(^\text{22}\) to provide for the making of security regulations:

5.1(1) For the protection of passengers, crews and aircraft, the Governor in Council may make regulations requiring the owners or operators of aircraft registered in Canada to establish, maintain and carry out, at aerodromes and on aircraft, such security measures as may be prescribed by the regulations for the observation, inspection and search of persons, personal belongings, baggage, goods and cargo.

Section 5.1(2) further allowed the Minister to establish and maintain security measures in lieu of or in addition to the measures required by the Governor in Council (i.e., Cabinet) under subsection (1). The intent of Parliament, therefore, was to impose a duty on aircraft owners and operators to establish and maintain their own security procedures, with an additional empowerment to the Minister to carry out the proper security procedures himself in case the operators did not comply or in case their measures proved to be unsatisfactory.\(^\text{23}\) These measures were originally adopted to authorize the search of persons and baggage before boarding the aircraft. In 1976, a

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\(^{22}\) An Act to Amend the Aeronautics Act, S.C. 1973-74, c.20.

\(^{23}\) The fifth report of the Commons Standing Committee on Transport and Communications contains the report of the study of Bill C-128 which amended the Aeronautics Act in 1973 and indicates that the Committee members, greatly concerned with the costs of security measures, intended that aircraft owners and operators be forced to establish and maintain security procedures at their own expense.
further amendment to the Aeronautics Act was made and subsections 5.1(1) and (2) were repealed and replaced with provisions placing obligations on operators and owners of aircraft registered outside of Canada (presently 3.7(2)(b)).

Subsequent to the 1973 and 1976 amendments, the provisions concerning security measures remained intact until the Air India disaster in 1985. At that time the present section 3.7 was adopted. The changes broadened the scope of obligations so that airport operators and persons working at airports could be required to implement security measures. In addition, the qualification limiting those measures to "the observation, inspection and search of persons, personal belongings, baggage, goods and cargo" was removed so that any measures necessary for security purposes could be implemented. The Act also stipulates that members of the public must submit to a required security search or be denied boarding (Subsections 3.7(5) & (6)). Foreign aircraft are prohibited from landing in Canada unless the aircraft and all persons and goods on board have been subjected to security measures equivalent to those established by Canadian regulations (Subs. 3.7(3)).

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24 It is notable, however, that the Canadian Aviation Safety Board found that the Canadian security arrangements in place at the time of the disaster "met or exceeded the international requirements for civil air transportation".

25 For security regulations enacted pursuant to the Aeronautics Act see the Civil Aviation Security Measures Regulations SOR/74-225 as am. SOR/89-1165; the Foreign Air Security Measures Regulations, SOR/78-593; and the Aerodrome Security Regulations, SOR/87-452.
SECTION 3: BREACH OF A STATUTORY DUTY

For civil liability purposes, the aviation security legislation in place at the time of a terrorist attack is relevant for determining standards of conduct and finding evidence of a private law duty of care. Since R. v. Saskatchewan Wheat Pool,\(^26\) the approach taken in Canada is that proof of a breach of a statutory duty may be admissible as evidence of negligence: It does not create a separate nominate tort.\(^27\) Quoting from J.G. Fleming's textbook, Dickson, J. noted:

Any recovery of damages for injury due to [a] violation [of statute] must...rest on common law principles. But though the penal statute does not create civil liability the court may think it proper to adopt the legislative formulation of a specific standard in place of the unformulated standard of reasonable conduct...\(^28\)

The Court summarized the law as follows:

1. Civil consequences of breach of statute should be subsumed in the law of negligence.

2. The notion of a nominate tort of breach of statutory duty giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes


\(^{27}\) This is a departure from the law as developed in England where the courts analyze the statute in question to determine whether the Legislature intended to create a civil cause of action. See Cutler v. Wandsworth Stadium Ltd., [1949] A.C. 398 (H.L.); London Passenger Transport Board v. Upson, [1949] A.C. 155 (H.L.).

\(^{28}\) supra, note 26 at 218.
negligence per se giving rise to absolute liability.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

4. The statutory formulation of the duty may afford a specific and useful standard of reasonable conduct. 29

In short, the violation of an international standard or domestic security regulation or order does not necessarily give rise to liability or provide prima facie evidence of negligence. It is merely admissible as evidence of a specific statutory standard of care upon which the court may rely. 30

29 supra, note 26 at 227.

CHAPTER 2
OVERVIEW OF LIABILITY

SECTION 1: SELECTION OF DEFENDANTS

The victim of a terrorist attack may decide to proceed against a number of possible defendants. The most obvious recourse is an action in assault and battery against the actual perpetrator of the crime. Such actions, however, often prove to be futile, either because the criminals cannot be found or because they cannot be extradited for trial.\(^1\)

Other targets of litigation may be private security organizations, air traffic controllers or the manufacturers of the aircraft, security equipment, or aviation charts.\(^2\)

Victims of terrorist attacks have even attempted to recover from their travel agents for their alleged failure to warn of impending danger.\(^3\) The most likely defendants, however, are those responsible for the planning and implementation of security procedures, principally the air carrier and branches of the federal government such as the Ministry of Transport,

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1 The Iranian government, for example, refused to extradite the persons responsible for the hijacking of Kuwait Airways Airbus A-310 on December 4, 1984. See R.I.R. Abeyratne, "Hijacking and the Teheran Incident - A World in Crisis?" (1985) Vol. X, No. 3 Air Law 120.


3 Semmelroth v. American Airlines, 448 F. Supp. 130 (E.D.Ill. 1978); Rockard v. Mexicoico, 680 F.2d 1257 (9th Cir. 1982); and United Airlines v. Larner, 410 N.E. 2d 225, 1980 (all holding that there is no duty to warn).
Canadian Security Intelligence Service or the Royal Canadian Mounted Police. The following provides an overview of the principles governing liability of these defendants by examining the elements of the cause of action and the amounts which are recoverable against them.4

SECTION 2: ELEMENTS OF THE CAUSE OF ACTION

Subsection i: The Crown

With respect to the Crown, the facts of a personal injury or death claim are funnelled through a common law tort analysis. The elements of the cause of action may be summarized as follows:5

1) **Cause in fact**: There must be a causal (factual) relation between the defendant's conduct and the plaintiff's injury.

2) **Duty Issue**: The defendant must have owed a duty of care to the plaintiff.

3) **Negligence**: The risk must be reasonably foreseeable in that the average man would consider that the risk is sufficiently great to demand precaution.

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4 The scope of this discussion is limited to the injury or death of passengers. Claims brought against the air carrier for damage done to third persons on the surface are governed by the Convention Relating to Damage Caused to Third Parties on the Surface by Foreign Aircraft (Rome Convention, 1952) ICAO Doc. 7364 (entered into force 4 February 1958). The principles of liability with respect to the Crown remain the same.

4) **Material Injury**: There must be material injury resulting to the interest of the Plaintiff.

The onus is on the plaintiff to prove all the elements of the cause of action. However, where a reasonable inference as to the cause of action can be drawn, the evidentiary rule of *res ipsa loquitur* may be relied upon to effectively shift the burden of disproving negligence upon the Crown. Compensation, aiming to put the victim in the position he would have been in had the attack not occurred, is, in theory, unlimited. The Crown may be partially or wholly exonerated from liability through the defence of contributory negligence. More importantly, the Crown will be immune from suit if it can show that it's action or inaction was the result of a policy or discretionary decision.

**Subsection ii: The Air Carrier**

In Canada, there are two different liability systems which an air carrier may be subject to: one is for international air transport and the other for domestic air transport. With respect to international air transport, Canada is a party to the *Warsaw Convention, 1929* and *Hague Protocol, 1955* which govern international flights. In addition, Canada's major airline companies are party to the *Montreal Agreement*.

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6 see *infra*, ch.3.
1966. In comparison, there is no counterpart to the international regime for domestic air transport: No special legislation has been enacted to cover passenger liability for domestic flights. Instead, recourse is had to general principles of common law or, in the case of Quebec, to the Civil Code.

Combining the two systems, then, there are no less than four categories of carriage by air which a Canadian carrier may be engaged in. The result is that different rules of liability are imposed, depending on which category the flight fits into. Consider the following scenario:

Four passengers are flying Canadian Airlines en route to their holiday destinations. All board at Vancouver International Airport in British Columbia. On one Boeing 747 is Ann, bound for Barbados, and Brian who will continue on the same flight to Rio de Janeiro. On another 747, flying Vancouver to Hawaii via Edmonton, are Connie and Don: Connie is destined for Hawaii, but Don, eager to see an Oilers game, is only going as far as Edmonton. Due to the faulty security procedures of Canadian Airlines, a terrorist was able to place explosive devices on board both aircraft. Both 747's explode just prior to take-off. Luckily, no one is killed but the passengers have all sustained serious injuries. All decide to sue Canadian Airlines and the government,
alleging negligence in the performance of security operations.

In an action against the Crown, all the passengers will be subject to the same legal regime -- a common law tort action based upon the negligent act or omission of the Crown servant for which the government may be held directly or vicariously liable. As against the carrier, the passengers will be shocked to learn that although they were on the same flights with the same airline, each is subject to a different legal regime.\(^7\) Ann is entitled to recover only a maximum of $U.S. 10,000 (Vancouver - Barbados; Warsaw Convention, 1929) whereas Brian will be able to recover up to $U.S. 20,000 (Vancouver - Brazil; Hague Protocol, 1955). If the airline is able to show that it has taken all reasonable measures, Ann and Brian will bear the burden of proving that it was at fault. Connie is not required to assume this burden of proof at all as in her case the carrier's liability is absolute (Vancouver - Hawaii; Montreal Agreement, 1966). Moreover, she may recover up to $U.S. 75,000. Don, who decided to holiday in Canada, is entitled to full compensation for damage but also bears the full burden of establishing negligence (Vancouver - Edmonton; domestic transport). The evidentiary rule of res ipsa loquitur may be applied to help him establish

\(^7\) Grey v. American Airlines 95 F.Supp. 756 (D.C.N.Y. 1951) (flight international for some of its passengers and domestic for others).
a prima facie case.

The disparities among the four cases are the result of the mosaic of laws regulating air transport in Canada: "the Warsaw system is now a complicated patchwork of the underlying Convention of 1929 amended by a Protocol, thereafter amended by a Protocol to Protocol and eventually amended by a Protocol to Protocol to Protocol".8

For comparative purposes, the elements of the cause of action for a carrier engaged in domestic air transport will be the same as listed above for the Crown. For carriers engaged in international air transport the corresponding, analysis may be stated in the language of the Warsaw system as follows:

1) **Cause in fact**: There must have been an "accident" (art.17 Warsaw Convention).

2) **Duty Issue**: The damage must have taken place while the passenger was on board the aircraft or in the course of "embarking or disembarking" (art.17 Warsaw Convention).

3) **Negligence**: The carrier must have failed to take "all necessary measures" which were possible to take in order to avoid the damage (art.20, Warsaw Convention).

4) **Material Injury**: The passenger must have suffered "bodily injury" (art.17, Warsaw Convention).

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The onus is on the plaintiff to prove all the elements of the cause of action except number 3, where the defendant has the burden of showing that he and his employees have taken all possible necessary measures. The defendant may also be wholly or partially exonerated from liability through the defence of contributory negligence (art.21 Warsaw Convention). Compensation is limited to the equivalent of U.S. $10,000 and U.S. $20,000 in the Warsaw Convention (art.22, para.1) and Hague Protocol (art.XI), respectively. However, there are three cases where liability will be unlimited:

1) if the carrier is proven guilty of wilful misconduct (art.25 Warsaw Convention; art III Hague Protocol).
2) if a ticket was not delivered to the passenger.
3) if a ticket was delivered to the passenger but did not contain proper warning of the limitations (art.3 Warsaw Convention; art.III Hague Protocol).

The cause of action for carriage governed by the Montreal Agreement varies from the above analysis in two respects. First, since liability is strictly imposed, there is no defence of "necessary measure" (thus eliminating altogether element number 3. Secondly, the limitation of recoverable damages is set at U.S. $75,000. It is still open to the carrier to plead that the passenger wholly or partially contributed to his own injury, although this is unlikely in the case of a terrorist attack.
CHAPTER 3
THE LIABILITY OF THE CARRIER

SECTION 1: SOURCES OF LIABILITY

The liability of an air carrier for passenger injury or death on Canadian international flights is governed by a patchwork of treaties and amendments referred to as the "Warsaw system". The basis of the system derives from the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air [hereafter the Warsaw Convention]. The Warsaw Convention was the result of two international conferences, held in Paris in 1925 and Warsaw in 1929, which adopted the proposals of the Interim Comité International Technique d'Experts Juridique Aériens (CITEJA), created by the Paris Conference. As its name suggests, the objective of the Convention was to unify the rules relating to international air transport and carrier liability.

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3 Aviation, while still in its infancy, was recognized as an expanding industry that would link many different countries with many different legal systems. The need for immediate systematic regulation was thus crucial to the growth of air travel. Leaving the laws of international transport in the hands of independent nations would have discouraged both passengers and carriers who, unsure of their rights, would have been reluctant to engage in an unknown risk.
The effect of the Convention is to regulate both the international air carrier's liability and the documents of international air transport for the carriage of passengers, baggage and goods. As regards passengers, the Convention provides for presumed liability of the carrier for injury or death (article 20, para.1) and a set limit of 125,000 Poincaré francs (U.S. $10,000)\textsuperscript{4} on recoverable damages (article 22, para.1). In cases of wilful misconduct or inadequate notice of the limitation, the limit will not apply.

On February 13, 1933 the Warsaw Convention entered into force for the first five states which had ratified it. For the purpose of giving effect to the Warsaw Convention the federal Parliament of Canada enacted the Carriage by Air Act\textsuperscript{5}, which was proclaimed in force on July 1, 1947. On June 10, 1947 Canada registered its accession to the Convention with the government of Poland and it became effective in Canada on September 8th of the same year.

Wide-scale expansion of the aviation sector since 1929 has necessitated that the Warsaw Convention be added to and amended on a number of occasions. The problem is that in the attempt to keep the Convention up to date, these amendments have had the effect of dis-unifying air transport law whenever they are not uniformly adhered to -- some

\textsuperscript{4} See infra, note 56 and ff. for an explanation of the Poincaré franc and its conversion into national currencies.

countries being party to only some of the agreements. Including those which have not yet entered into force, there are an additional eight agreements which may be superimposed on the original Convention:

1) Hague Protocol:

The Hague Protocol was added to the Warsaw system in 1955 with the aim of modernizing the then existing rules. The presumption of liability of the carrier was left intact but the limit of recoverable damages for passenger injury or death was doubled to 250,000 Poincaré francs (U.S. $20,000) (art. XI) subject to adequate notice of the limitation of liability (art. III). A further significant change was the inclusion of a new formula for determining conduct amounting to "wilful misconduct".7 The Protocol entered into force on August 1, 1963, ninety days following ratification by thirty states (article 22, para. 1). It has never been accepted nor ratified by the United States. In spite of its participation in the preliminary work at the Hague Conference, Canada was

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6 In addition to the treaty series and ICAO Document citations provided, texts of the Warsaw system instruments are reprinted in the appendices of N.M. Matte, Treatise on Aeronautical Law (Institute and Centre of Air and Space Law, McGill University and the Carswell Co., 1981).

7 See infra, note 79 and accompanying text.
also not an original signatory. It was, however, ratified on April 18, 1964 and the Protocol entered into force in Canada on July 17, 1964.8

2. Guadalajara Supplementary Convention

Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier (Guadalajara Supplementary Convention, 1961) ICAO Doc. 8181 (entered into force 1 May 1964).

The Guadalajara Supplementary Convention deals with the particular problems arising from charter flights and leased aircraft, subject matters not dealt with in the Warsaw Convention, by extending the same protection and limited liability to the actual carrier as the Warsaw Convention extends to the contracting carrier. It has been in force since May 1, 1964 but neither the United States nor Canada have signed or ratified it.

3. Montreal Agreement


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8 See the Carriage by Air Act, supra, note 5 which gives the provisions of the Warsaw Convention (incorporated into the Act as Schedule I) and the Hague Protocol (incorporated into the Act as Schedule III) the "force of law in Canada in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage" (s.2(1)).

On November 15, 1965, the United States announced that it was denouncing the Warsaw Convention effective May 15, 1966 (article 39, para.2), because of the low $10,000 U.S. liability limit granted to passengers in cases of injury or death.9 The interim Montreal Agreement arose as a response to this action and successfully secured the withdrawal of the U.S. denunciation. The Agreement is not a multilateral convention but a private inter-carrier agreement, drafted with the approval of the Civil Aeronautics Board. Each carrier agrees to undertake strict liability limited to $U.S. $75,000 per passenger including costs (U.S. $58,000 costs excluded). Termination of the Montreal Agreement is only possible upon the adoption of a new act replacing the Warsaw Convention.

4. Guatemala City Protocol


The Guatemala City Protocol, if brought into force, will significantly amend the Warsaw Convention by making the

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9 See Generally Lowenfeld & Mendelsohn, "The United States and the Warsaw Convention" (1967) 80 Harv. L. Rev. 497.
carrier strictly liable for the injury or death of a passenger engaged in international flights. The liability limits are raised to 1,500,000 Poincaré francs (U.S. $120 000) which is set as an absolutely unbreakable limit, even in the case of gross negligence or wilful misconduct (article IX). The limit is automatically adjusted to take into account inflationary trends. Provision is also made allowing states to establish domestic supplementary compensation schemes (article XIV, introducing a new article 35A) so long as the burden of extra compensation does not fall upon the carrier. Canada was an original signatory to the Protocol in 1971 but has not yet ratified or adhered to it. The Protocol cannot enter into force without the ratification of the U.S. (article XX).\(^\text{10}\)

5. Montreal Additional Protocol No. 1


6. Montreal Additional Protocol No. 2

Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended

\(^{10}\) See also **infra**, chapter 5 on the Guatemala City Protocol.
by the Protocol Done at the Hague on September 1955 (Montreal Additional Protocol No. 2, 1975) ICAO Doc. 9146 (not yet in force).

7. Montreal Additional Protocol No. 3

Additional Protocol No. 3 To Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocols Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971 (Montreal Additional Protocol No. 3, 1975) ICAO Doc. 9147 (not yet in force).

The sole purpose of Montreal Additional Protocols No's 1, 2 and 3 was to remove the uncertainty which existed in converting the liability limits in the Warsaw Convention, Hague Protocol, and Guatemala City Protocol respectively, into national currencies. After the free market for gold was established in 1968, it became far too volatile and speculative to be a reliable yardstick of value. As a result, the Montreal Protocols replace the Poincaré gold franc with the "Special Drawing Right" (SDR), a unit of account of the International Monetary Fund which consists of a basket or

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blend of five major currencies.\textsuperscript{12} Protocol No. 3 (amending the Convention as amended at the Hague and Guatemala City) incorporates, with some exclusions, the Guatemala City Protocol but does not repeat article XX and can therefore come into force without ratification by the United States.

8. Montreal Protocol No. 4

Montreal Protocol No. 4 includes amendments to cargo and mail provisions and also provides for the SDR unit for the carriage of cargo. The government of Canada signed Protocols No.'s 3 and 4 on December 31st and December 30th, respectively but none of the Montreal Protocols have entered into force.

9. The Common Law

The liability of an air carrier for passenger injury or death on Canadian domestic flights is governed by the common law. Although there is no specific legislation applicable to carrier liability, The Air Regulations and Air Navigation Orders enacted pursuant to the Aeronautics Act\textsuperscript{13} are generally the starting point for establishing the duty and standard of care.\textsuperscript{14}

\textsuperscript{13} supra, ch.1 note 16.

SECTION 2: DETERMINING THE APPROPRIATE REGIME

Summarizing the many conventions and laws applicable to domestic and international passenger transport, the range of possible regimes that a Canadian carrier may presently be engaged in is as follows:

1) Domestic Carriage

2) International Carriage

   a) Warsaw carriage: ie. Warsaw Convention, 1929, unamended
   c) Montreal Agreement Carriage: ie. Warsaw Convention 1929 as affected by the Montreal Agreement, 1966.\(^{15}\)

In order to determine the type of carriage the carrier is engaged in, reference must be made to the passenger ticket which represents the contract between the passenger and the carrier.\(^{16}\) Whether the flight is domestic, Warsaw, Hague or affected by the Montreal Agreement depends upon the place of departure and place of destination as originally contracted

\(^{15}\) A fifth category, which rarely arises is Non-Convention international Carriage which encompasses flights from Canada to states not party to either the Warsaw Convention or the Hague Protocol -- Engel v. Cie. Swiss Air, 1955 R.F.D.A. 335 (T.G.I. Geneva, 8 March 1955). In determining liability, the general rules of private international law relating to conflict of laws applies.

\(^{16}\) A ticket, however, is not necessary for the application of the Convention -- Domange v. Eastern 531 F. Supp. 334 (D.C.La. 1981). The contract may be oral or in a different written form or the ticket may be used as evidence of only part of the contract -- Stratis v. Eastern Airlines 682 F.2d 406 (2d Cir. 1982). In the absence of a ticket, however, the carrier cannot avail itself of the limitations of liability. See generally, I.H. Ph. Diederiks-Verschoor, An Introduction to Air Law, 2nd ed., (Netherlands: Kluwer Law and Taxation Publishers, 1985) at 45-51; N.M. Matte, supra, note 6 at 381-384.
for (article 1, para.2). If the ticket, for example, provides for a flight from Montreal to London to Paris to Athens, and the accident occurs on the London - Paris leg, the place of departure and destination continue to be Montreal and Athens, not London and Paris. Furthermore, it does not matter whether the passenger's or carrier's own country is a party to the Convention.\textsuperscript{17}

A flight is domestic and regulated by the laws of the provinces when the place of departure and place of destination are within Canada and there is no agreed stopping place outside of Canada.\textsuperscript{18} It is international when the place of departure and destination are situated within the territories of two High Contracting Parties or within the territory of the same contracting party, provided that there is an agreed stopping place outside that territory (irrespective of whether the other state stopped in is a High Contracting Party)\textsuperscript{19} (Article 1, para.2). An "agreed stopping place" has been interpreted to mean:

\ldots a place where according to the contract the machine by which the contract is performed will stop in the course of performing the contractual carriage, whatever the purpose of the descent may be and whatever rights the passenger may have to

\begin{itemize}
\item \textsuperscript{17} Glenn v. Compania Cubana de Aviaciön 102 F.Supp. 631 (D.C.Fla. 1952).
\item \textsuperscript{18} Stratton v. T.C.A. (1962), 37 W.W.R. 577 (B.C.C.A.).
\item \textsuperscript{19} Grein v. Imperial Airways, [1936] 1 K.B. 50, 55 Lloyd's L. Rep. 318 (C.A.). (a flight from Florida - Cuba - Florida was held to be international carriage even though Cuba is not a High Contracting Party).
\end{itemize}
break his journey at that place.\textsuperscript{20}

Thus, a flight beyond the territory of Canada but finishing in Canada may be considered a domestic flight, if there was no stopping place in foreign territory, and a flight performed solely in Canada may be considered international if the point of destination contracted for was situated in a foreign state. For example, in \textit{Wyman v. PAA}\textsuperscript{21}, a ticket issued for Los Angeles - London was considered international even though the flight ended in New York due to mechanical problems.

If a ticket is for a round trip flight (for example, Ottawa - Paris - Athens - Ottawa), the point of departure and destination are the same and the flight is international because there is an agreed stopping place in another country with the ultimate end of the journey back at the point of departure. However, where the return flight is left open, so that the actual reservation remains to be made, the journey's end may be considered the half-way point. For example, in \textit{Aanestad v. Air Canada}\textsuperscript{22}, the Court held that Los Angeles was the destination in a Montreal - Los Angeles - Montreal flight, because the return to Montreal was left open. But in \textit{Rinck v. Lufthansa}\textsuperscript{23}, Nuremberg was held to be the destination of a


\textsuperscript{21} USAvR 1 (1943).

\textsuperscript{22} F. Supp. 1165 (D.C.Cal. 1975).

Nuremberg - New York - Nuremberg ticket, even though the reservation for the New York - Nuremberg leg had not yet been made.

If it is determined that the carrier is engaged in international air transport, then the further step of ascertaining the applicable international agreement must be taken. This is done simply by reference to the countries which are parties to each agreement. In order to be a "High Contracting Party" under the Warsaw Convention, the House of Lords has held, in Philippson v. Imperial Airways\(^{24}\), that a state need merely sign, and not ratify the Convention. This interpretation has been highly criticized\(^{25}\) and was rejected in the Hague Protocol, 1955 which defines the term as including only those states whose ratification or adherence to the Convention has become effective (art.XVIII).

While Canada has ratified both the Hague Protocol, 1955 and Warsaw Convention, 1929, complexities arise since carriage will not always be to states who are also High Contracting Parties. Where carriage is between two states who have accepted the Protocol or between two points within the territory of a single party, with an agreed stopping place in a foreign state, the Hague Protocol, 1955 will apply (art.XVIII). If carriage is between a state which is party to the Protocol and one that is party to the Convention alone,

\(^{24}\) USAWR 421 (1938).

\(^{25}\) Matte, supra, note 6 at 388; Corcoran v. Pan American, [1969] 1 All E.R. 82 (C.A.).
then the original unamended *Warsaw Convention* will apply.\textsuperscript{26} Finally, the *Montreal Agreement* will be applicable if the United States is an agreed stopping place, point of departure or destination. Most Canadian carriers operating a scheduled flight through the United States are parties to the interim agreement.

SECTIOm 3: ELEMENTS OF THE CAUSE OF ACTION

Articles 17 and 20 of the Warsaw Convention are the cornerstones of liability for passenger injury or death. They provide:

**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. [emphasis added]

**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. [Emphasis added]

Neither the Hague Protocol nor Montreal Agreement make any change in the wording of article 17 but the Montreal Agreement removes the defence of absence of fault in article 20, para.1.

**Subsection i: There must be an Accident**

The first requirement for finding a carrier liable under the Warsaw system is that an accident must have occurred. The term "accident" is not defined in any of the international agreements but has been interpreted to mean "an unexpected and sudden event that takes place without

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27 MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971); Lantore v. United Airlines, 16 Av. Cas. 17,944 (S.D.N.Y. 1981). For domestic flights, this is analogous to the causal relation requirement: "but for" the carrier's act or omission, no harm would have resulted to the plaintiff.
foresight". It "refers to an accident which caused the passenger's injury rather than to an accident which is the passenger's injury." In other words, the simple fact that an injury or death occurs on board the aircraft does not suffice to make the carrier liable. Rather, there must be some causal relation to the air transport itself.

While the Montreal Agreement leaves article 17 and the requirement of an accident intact, the issue of whether an event constitutes an "accident" seems to be subverted into the overriding principle of strict liability. As stated in the leading case of Husserl v. Swiss Air Transport:

...the Montreal Agreement seems to resolve whatever doubt might have existed over the construction of the word "accidentally". It is significant that press releases of the State Department and the Order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of absolute liability upon the carrier.

It is notable that the Guatemala Protocol, if brought into force, will replace the term "accident" with the term "event" but will exclude liability for injury resulting "solely from

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28 DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193 (3d Cir. 1978).


30 See, for example, Air France v. Saks, 18 COH Avi. 18,538 (S.Ct. 1985), where the U.S. Supreme Court denied recovery to a passenger who was rendered permanently deaf during the descent of the aircraft, because it was an injury resulting from her own internal reaction to the normal operation of the aircraft. See also Warshaw v. Trans World Airlines 442 F.Supp. 400 (E.D.Pa. 1977) and DeMarines v. KLM Royal Dutch Airlines, supra, note 28, reaching the same conclusion on similar facts.

31 12 Avi. 17,637 (S.D.N.Y. 1972) at 17,461.
the state of health of the passenger" (article IV).

With respect to terrorist attacks, the U.S. courts have consistently refused to deny compensation on the grounds that no accident has occurred. Compensation has been awarded, for terrorist attacks on passengers waiting to board the aircraft in addition to the unlawful seizure of the aircraft during flight. Even a bomb scare has been held to be compensable as an accident under the Convention. The issue has never been litigated in Canada, but it seems likely that the Canadian courts would follow the American lead.

Subsection ii: On Board, Embarking and Disembarking

The second precondition for carrier liability under article 17 of the Warsaw Convention is that the accident must occur while the passenger is on board the aircraft or in the process of embarking or disembarking. The terms "embarkation" and "disembarkation" are not defined in any of the

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32 Evangelinos v. Trans World Airlines, 550 F.2d 152 (3d Cir. 1977); Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975); but see In Re. Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975) aff'd sub nom. Martinez Hernandez v. Air France, 545 F.2d 280 (1st Cir. 1976) (terrorist attack occurring in a baggage claim area not an accident).


35 For domestic flights this is the equivalent to the common law duty a carrier owes to its passengers while taking off, flying and landing.
international agreements and have given rise to various interpretations. Some authors consider that the carrier's duty begins "when the passenger leaves the airport administration building in order to go to the runway," others consider that the period extends only so long as the passengers are actually exposed to the risk of the air. The most accepted view, however, is that the duty of care is owed from the time that the passenger is in the hands of the carrier for the purpose of being led to the aircraft, to the time he is led by the personnel to the terminal building at the point of destination.

The cases of Day v. Trans World Airlines and Evangelinos v. Trans World Airlines, for example, arose out of the terrorist attack at Helenikon Airport in Athens on August 5, 1973. The passengers had checked in and were standing in line at the departure gate, waiting to board their Trans World Airlines flight to New York, when Palestinian terrorists opened fire. The Court in Evangelinos held that there were primarily three factors to be taken into account:

1) the location of the accident;
2) the activity in which the injured person was engaged;

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36 D. Lureau, La Responsabilité du Transporteur Aérien (Paris: Librairie Générale de Droit et Jurisprudence, 1961) at 91 as cited in Matte, supra, note 6 at 405.


38 supra, note 32.

39 supra, note 32.
3) and the degree of control exercised by the carrier over the injured person.

...the fact the airline exercised strict control of passengers at the time of checking their baggage near the entrance to the airport terminal building might be irrelevant to the location and activity factors where such control was relinquished and only reassumed after entry into the line formed for going through the gate leading to the walkway or passenger bus transportation to the aircraft.\(^{40}\)

The Courts in both cases concluded that TWA had in fact assumed control over the passengers after they had announced the flight and directed them to the departure gate lounge. The passengers were therefore in the process of embarkation and thus covered by the provisions of the Warsaw Convention.\(^{41}\)

In *Martinez Hernandez v. Air France*,\(^{42}\) however, the passengers had disembarked from the airplane and were about to pick up their luggage when terrorists attacked. The Court applied the tripartite Evangelinos test but relieved the carrier from liability on the ground that the passengers were not in the carrier's control.

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\(^{40}\) *supra*, note 32 at 155.

\(^{41}\) The decision seems to be based more on policy considerations -- on finding some compensation for the passengers -- than on any strict definitions of "control". See the dissent by Seitz, C.J. who reviews the legislative history of the Convention and concludes that embarkation includes only the actual boarding of the aircraft.

\(^{42}\) 545 F.2d 279 (1st Cir. 1976).
Subsection iii: All Necessary Measures

Under the Warsaw Convention as Amended by the Hague Protocol, the carrier may exonerate itself from liability by proving 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". The Montreal Agreement, imposing a strict liability regime, removes this defence of absence of fault. 43

In interpreting the expression "all necessary measures" the prevalent view is that the carrier must show due diligence -- that he took all reasonable measures that an average prudent carrier would have taken to avoid the damage:

...in order to exonerate himself, the carrier has not to prove that he and his servants or agents have committed no fault, it being sufficient for him to show...that he has exercised the diligence of a bonus pater familias and has taken all reasonable and normal measures...

This view endorses the original intention behind the wording of article 17, as evidenced by the Warsaw Conference preparatory works, 45 and is supported by the majority of

43 For domestic flights the applicable common law test is that of reasonableness: the plaintiff must prove, on a balance of probabilities that the conduct of the carrier involved an unreasonable risk of harm. In other words, that it was reasonably foreseeable that the act or omission would cause injury.

44 Csillag v. Air France (1938) [unreported], reproduced in M. Lemoine, Traité de Droit Aérien (Paris, 1947) at 819-821; Grein, supra, note 19.

45 For a detailed account, see F. Hjalstad, "Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law" (1960) 27 J.A.L.C. 1.
doctrinal writers and courts.\textsuperscript{46} 

The requirements to satisfy the burden of proof imposed on the carrier are extremely onerous:

The carrier must furnish meticulous, coherent and complete proof... He must prove that he has satisfied all the rules imposed for the operation of the aircraft, for the qualifications of the navigation personnel and other agents, for the maintenance of a recommended itinerary, and for the maintenance of contact with the aircraft from the ground, and during the flight. The carrier must show that [all agents] have acted with care, and also that the defects inherent in the aircraft were unknown to them at the time of the accident.\textsuperscript{47}

The evidence required, then, is general proof of the carrier's due diligence and not specific proof of the exact cause of the accident. Inevitably, this still means a heavy reliance on expert witnesses if the carrier hopes to be exonerated from liability.

\textbf{Subsection iv: Bodily Injury}

The Warsaw Convention, Hague Protocol, and Montreal Agreement allow for "death or wounding... or any other bodily injury suffered by a passenger" as grounds of compensable damage. The issue which arises with respect to terrorist attacks is whether "bodily injury" extends to nervous shock


\textsuperscript{47} Matte, supra, note 6 citing Lemoine at 411.
The problem has been particularly acute since the introduction of the increased limits of liability in the Montreal Agreement, 1966, which make it worthwhile for a plaintiff to argue non-pecuniary damages. There is no dispute that mental anguish may be compensated for if the result of, or accompanied by, actual physical injury. The question is whether mental injury alone qualifies as a type of recoverable damage.

The issue, dealt with primarily in the U.S. courts, has not been uniformly resolved. In Husserl v. Swiss Air Transport Co., the court was willing to award damages for mental anxiety irrespective of any actual physical injury. The Court allowed the award of damages based on three grounds: the connection between physiology and psychology (compelling the conclusion that mental injury is a subset of bodily injury); the fact that New York domestic law recognized such damages; and on an interpretation of the basic intent of the Warsaw system (namely, to limit liability and facilitate recovery).

Yet in another New York case, Rosman v. Trans World Airlines, which arose out of the exact same incident as Husserl, the federal court denied recovery stating:

In our view, therefore, the ordinary natural meaning of "bodily injury" as used in article 17 connotes palpable conspicuous physical injury and excludes mental injury with no observable "bodily" as


supra, note 31.
distinguished from "behavioural" manifestations...The claim must therefore be predicated upon some objective identifiable injury to the body.\textsuperscript{30}

The cases denying recovery for mental anxiety base their decisions on the premise that the expression "bodily injury" is a correct interpretation of the authentic French text which reads "lésion corporelle". In a sharp criticism of this interpretation, R.H. Mankiewicz points our that while "lésion" may be translated to "injury" the addition of the adjective "corporelle" does not necessarily specify physical injury. Summarizing the argument, the author states:

It is therefore quite evident that the use of the adjective "corporelle" was to specify, and was understood to specify, that recovery was available for all kinds of damage suffered by the person himself as a human being, but not for damage inflicted to his patrimoine, i.e., mere pecuniary damages, damages or infringements on rights, etc...In other words, "lésion corporelle" is the equivalent of "personal injury" and comprises, like the latter any moral suffering or disturbance whenever such damage is recoverable under a national law.

A number of cases can be found advocating views from both camps.\textsuperscript{52}

\textsuperscript{30} 13 Avi. 17,231 (N.Y.C.A. 1974) at 17,235. A third case which arose out of the same incident as Husserl and Rosman was Herman v. Trans World Airlines 34 N.Y.2d 385 (1974) in which recovery was permitted for physical symptoms caused by the mental anguish.

\textsuperscript{51} Mankiewicz, supra, note 45 at 200.

\textsuperscript{52} Allowing recovery: Husserl, supra, note 31; Herman, supra, note 50; Krystal v. British Overseas Airways Corp., supra, note 33; Palagonia v. Trans World Airlines, Air Law 102 (1979); Kalish v. Trans World Airlines, 14 Avi. 17,936 (1977).

In the Canadian context, the issue of recovery for nervous shock and mental anxiety in aviation accidents has been litigated only once. In Suprenant v. Air Canada, the Quebec Court of Appeal denied recovery for solatium doloris (trauma and pain) to the parents of a girl killed in an aviation accident, on the grounds that such a loss was too subjective in nature and therefore could not be the object of an action. This case is inconsistent with the general trend in the common law provinces where, following the English lead, courts have progressively allowed compensation for mental distress in its own right.


54 The first Commonwealth case rejecting the requirement of physical impact was Dulieu v. White, [1901] 2 K.B. 669.

SECTION 4: LIMITATIONS OF LIABILITY

In all of the international agreements presently in force in Canada, there are mandatory limits of liability. The maximum recovery is 125,000 Poincaré francs (about U.S. $10,000)\(^5\) under the Warsaw Convention (article 20, para.1); 250,000 Poincaré francs (about U.S. $20,000)\(^6\) under the Hague Protocol (article XI) and U.S. $75,000 including legal costs under the Montreal Agreement. The liability of the carrier engaged in domestic air transport is, in theory, unlimited.\(^7\)

Any attempt to contract out of liability under the Convention is null and void. The carrier and passenger can, however, agree to increase the limits of liability through a "special contract", provided for in article 22(1).\(^8\)

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5. The Poincaré franc is a coin consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths and can be converted into any national currency in round figures. This conversion is based on the last official price of gold. The conversion of the liability limits to Canadian dollars is regulated by the Carriage by Air Act Gold Franc Conversion Regulations, 117 Can. Gaz. part II, No. 2 at 431.

6. The calculation is as follows: Last official (1978) price per troy ounce (= 31,103g) gold is U.S. $42.22: 125,000 x 0.0655 x 900/1000 x 42.22/31,103 = U.S. $10,002.60. Note the difference when the free market price of gold is used: Free market price of one troy ounce of gold on 12 January 1990 was U.S. $418.00: 125,000 x 0.0655 x 900/1000 x 418/31,103 = U.S. $99,030.30. Montreal Protocol No. 1, article II replaces the Poincaré franc with Special Drawing Rights: 6,300; On January 13, 1990 U.S. $1.00 x 1,320.67 SDR's: 6,300/1,320.67 U.S. $4,284.60.

7. The calculation using last official gold price: 250,000 x 0.0655 x 900/1000 x 42.22/31,103 = U.S. $20,005.06. Montreal Protocol No. 2, article II replaces the Poincaré franc with 16,600 SDR's: 6,300/16,600 = U.S. $249.49.


essence, this is what the 1966 Montreal Agreement is -- a voluntary agreement on the part of carriers to increase the limits to U.S. $75,000 for flights going to, from or via the United States. The contract, however, must be between the passenger and the carrier. An agreement between the carrier and a charter, for example, will not be enforceable by the passenger. 61

Subsection i: Constitutional Challenges

As previously discussed, almost the whole field of civil aviation is within the exclusive jurisdiction of Parliament. 62 With regard to liability for injury or death, however, exclusive federal competency over aeronautics becomes problematic: the law of contracts and common law recourse have long been recognized as within property and civil rights in the provinces (s.92(13)) as part of the body of private law which governs the relationship between persons. The case-law dealing with contractual and liability matters in civil aviation is not wholly consistent 63.

62 supra, ch.1 note 12 and accompanying text.
It was long ago recognized, in *Grand Trunk Railway Company of Canada v. A.G. Canada*, that it was within the competence of Parliament to limit the freedom of railway companies to contract out of liability with their servants; the court admitted that the issue of damages for personal injury was a civil right but held that such rights were so related to the railway legislation as to bring them naturally within the domain of Parliament. This principle was expressly reaffirmed by the Supreme Court of Canada in *Tropwood A.G. v. Sivaco Wire and Nail Co.* where it was held that the federal Parliament was entitled to legislate on the liability for carriage of goods by sea "just as it is entitled to and has legislated on liability in respect of carriage by rail or aircraft". Similarly, in *Ocean Accident and Guarantee Corp. v. Air Canada*, the Court of Appeal held that a liability limitation prescribed by the federal government for inter-provincial carriage was inter virens:

Il faut reconnaître qu'en conséquence la juridiction de l'autorité fédérale sur le transport interprovincial par air ne peut être discutée...la commission des transports aérien, a le droit de faire des règlements et de contrôler les conditions du transport par voie aérienne et des passagers et des bagages ou biens personnels.

The courts have also recognized federal competency to enact laws respecting tortious liability arising from

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aviation. In Schwella v. R.\textsuperscript{67}, for example, the Exchequer court, in determining whether it had jurisdiction to hear a claim for personal injuries sustained in an airplane crash, held that:

...it lies well within the legislative competence of Parliament in relation to aeronautics to enact laws respecting liability in tort in connection with or arising from aeronautical operations and to provide as well in such cases for both apportionment of fault and liability of one tort-feasor to another. It would also be open to Parliament, if it saw fit, to change or abolish in such cases the right of contribution or indemnity between tortfeasors which, but for the legislation, would attach in such situations under the general law of the province.

Similarly, in Northern Helicopters Ltd. v. Vancouver Soaring Association\textsuperscript{68}, Thurlow, J., in apportioning fault in a mid-air collision between a glider and a helicopter, held that Parliament had the power to enact such rules but since it had not yet done so the provincial legislation regarding contributory negligence could be applied.

In spite of these precedents, provincial courts have remained reluctant to exclude the laws of the provinces. Much of the debate is centred on subsection 2(5) of the federal Carriage by Air Act which substitutes, for the purposes of international flights, the liability provisions of the international Warsaw Convention for any Canadian law relating

\textsuperscript{67} [1957] Ex.C.R. 226.

to wrongful death.\(^69\) In the Quebec case *Marier v. Air Canada*\(^70\),
a passenger was killed while on route from Montreal to Los Angeles, due to the negligence of Air Canada. The Superior Court awarded damages to his ex-wife stating that any attempt by Parliament to circumscribe common law recourses was an encroachment on provincial authority and was thus ultra vires and unconstitutional:

L'exercice par la demanderesse d'un recours de droit commun devant cette Cour constitue l'exercice d'un droit civil dans cette province et, à ce titre, toute tentative par le Parlement du Canada de légiférer sur un sujet qui est du domaine provincial, depuis 1867, semble être ultra vires et inconstitutionnel.

The Court of Appeal reversed the decision but did so on different grounds, with no reference to the constitutional issue.\(^71\) In *Frederick v. Ottawa Aero Services Ltd.*,\(^72\) the Court noted, in reference to subsection 2(5): "the question of validity of this section...was not raised by counsel and I am therefore proceeding on the basis of its being valid Dominion legislation without, of course, making any decision on that point". The same hesitation is seen with Dèschênes, J.A. in the case of *Suprenant v. Air Canada*\(^73\) where he states: "La

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\(^{69}\) supra, note 5.


\(^{71}\) [1980] C.A. 40. Recovery was precluded on the grounds that the plaintiff was not a contracting party and, as an ex-consort, did not come within article 1056 of the Civil Code.

\(^{72}\) (1963), 42 D.L.R. (2d) 122 (Ont.H.C.) at 190.

\(^{73}\) Supra, note 53 at 114.
constitutionalité de cette disposition [subsec. 2(5)] pourrait donner lieu à un débat intéressant... mais comme les appelants n'ont pas soulevé la question devant nous, il faut donner son plein effet à la législation". 74

Even if the liability limitations are held to be within the competence of the federal parliament, a second challenge which the liability limits face is that they violate sections 7 and 15(1) of the Canadian Charter of Rights and Freedoms 75 (hereinafter the Charter). These sections provide:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical capacity.

A case presently before the courts which will have significant implications for the Carriage by Air Act is Energy Probe v. Canada (Attorney General). 76 The plaintiffs are seeking declaratory relief that the limited liability provisions of

74 See also the recent Supreme Court of Canada decision of Canadian National Railway Co. v. Courtois, [1988] 1 S.C.R. 868, where the inspection provisions of Quebec's provincial Act Respecting Occupational Health and Safety were held to be inapplicable to the railway works declared to be works for the general advantage of Canada.


76 Motion to dismiss the application on the grounds that the applicants lacked standing and that no reasonable cause of action existed dismissed in (1989), 58 D.L.R. (4th) 513 (C.A.), leave to appeal to S.C.C. refused.
the Nuclear Liability Act\textsuperscript{77} is unconstitutional on the grounds that they are \textit{ultra vires} the federal Parliament as legislation with respect to property and civil rights and on the grounds that they violate sections 7 and 15 of the Charter.\textsuperscript{78} The liability of nuclear facility operators is limited under the Act to an absolute maximum of $75 million for all claims arising from a particular nuclear incident. The analogy to the Warsaw liability limitations is clear. The constitutionality argument is perhaps even stronger in the case of aviation since victims of aviation crashes are not only treated differently from tort victims generally but are also treated differently depending on whether they are international or domestic passengers.

The constitutionality issue can best be concluded by stating that, with respect to the division of powers question, federal legislative jurisdiction clearly exists over aeronautics but some question remains as to the degree to which provincial laws regarding loss of life or personal injury will be precluded. Although the parameters are not always clear, the main theme throughout the cases is that the courts are generally willing to recognize and give effect to Parliamentary authority in aviation even in the face of a direct incursion into property and civil rights. The case for


\textsuperscript{78} The plaintiffs also claim that the limitation periods are unreasonably short, violating ss. 7 and 15 of the Charter.
the Charter violations is even stronger, and may soon be determined by the courts in the context of limited liability for nuclear accidents. The validity of subsection 2(5) of the Carriage by Air Act, however, remains to be challenged.

Subsection ii: Unlimited Liability

There are two situations where the carrier will be unable to rely on the Warsaw limitations: first, when he is guilty of wilful misconduct (article 25); and secondly, where the passenger does not receive adequate notice of the limitation.

With respect to wilful misconduct, article 25 stipulates that the carrier cannot have recourse to article 20, para.1 if the damage "results from 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 wilful misconduct". Controversy has arisen over the definition of "wilful misconduct" as a translation of the authentic French text which reads "dol": 79 Dol in French essentially means gross negligence but wilful misconduct in English is interpreted as including reckless behaviour with the knowledge that damage might ensue. This led to a clarifying definition

in the Hague Protocol, including elements of both dol and wilful misconduct. A carrier under this regime will be held to unlimited liability for an act or omission done with intent to cause damage, or done recklessly with the knowledge that damage would likely result. A recent English case, Goldman v. Thai Airways,\(^8\) sets out a detailed analysis of what the plaintiff must prove to show 'recklessness' under the Hague Protocol:

1. that the damage resulted from an act or omission
2. that it was done with intent to cause damage
3. that it was done when the doer was aware that damage would probably result, but did so regardless of that probability.
4. that damage complained of is the kind of damage known to be the probable result.

There are no U.S, Canadian or English cases where lax security measures resulting in an aviation accident has been found to be a basis of wilful misconduct for purposes of exceeding the Warsaw limitations of liability. The issue has been considered in two French cases. In Bornier v. Air Inter,\(^8\)\(^1\) the Cour de Cassation held that the carrier was liable, but able to rely on the liability limits, when one of its domestic flights from Paris to Lyon was hijacked: there was no wilful misconduct even though there were no pre-flight security checks established for that route. Similarly, in Haddad v. Air

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\(^8\)1983 R.F.D.A. 47 (Cass. 5 May 1982).

\(^8\)3 1983 All E.R. 693.
France,\textsuperscript{82} the court found that the carrier's failure to search armed terrorists who were supposed to be searched prior to boarding by local police did not give rise to wilful misconduct.\textsuperscript{83}

The second ground upon which unlimited liability may be based is where the passenger has not received adequate notice of the limitation (article 31, para.2). This could arise, for example, where the ticket is not delivered to the passenger or where it is delivered but the passenger's attention is not drawn to the limiting clause. As was stated in Martens v. Flying Tiger Line, "the ticket must be delivered to the passenger in such a manner as to afford him reasonable opportunity to take measures to protect himself against the limitation of liability."\textsuperscript{84} It has been held in a number of American cases that the notice requirement was not met because the warning clause was too small --"ineffectively positioned, diminutively sized and unemphasized by fact type, not containing contrasting colour or anything else".\textsuperscript{85} However, in the Canadian case, Ludecke v. Canadian Pacific Airlines Ltd.,\textsuperscript{86} the Supreme Court of Canada would not adopt the American view


\textsuperscript{83} Unlike in Bormier, however, the carrier was held not liable for damages at all, since the hijackers had boarded the aircraft during an intermediate stop in Greece, where it was impossible for the airline to have taken all necessary measures.

\textsuperscript{84} Avi. 17,475 (C.A.N.Y. 1965).


and held that delivery of the ticket was in itself sufficient to invoke the limiting provision: the Warsaw Convention simply requires a "statement" relating to the rules of liability.

The Hague Protocol amends this situation by simplifying the particulars to be included and by requiring that "notice" be given. In Montreal Trust Co. v. Canadian Pacific Airlines Ltd., the Supreme Court of Canada held that the carrier could not limit its liability for notice printed in 4 1/2 point type, "Lisi-type" as it was not a notice within the meaning of the Hague Protocol.

CHAPTER 4
LIABILITY OF THE CROWN

SECTION 1: CROWN LIABILITY ACT

At common law, the Crown was immune from liability in tort on the rationale that "the king could do no wrong". However, through a series of statutory enactments which has resulted in the present day Crown Liability Act, the government may now be liable in tort on two grounds:

3. The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable,

(a) in respect of a tort committed by a servant of the Crown; or

(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Under s.3(a) liability is vicarious and proceedings are limited to situations where the claim gives rise to a tort action against a Crown servant. Section 10 provides:

10. No proceedings lie against the Crown by virtue of paragraph 3(a) in respect of any act or omission of a servant of the Crown unless the act or omission

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1 S.C. 1887, c.16 (claims allowed so long as negligence occurring on a "public work"; S.C. 1938, c.28 (limitation removed). See generally, P.W. Hogg, Liability of the Crown, 2nd ed. (Toronto: Carswell Co. Ltd., 1989) at 80-84.


3 Nadeau v. The Queen, [1980] 1 F.C. 808 (FCA) (collective liability on the part of a number of servants possible); Warwick Shipping v. The Queen [1982] 2 F.C. 147. The Crown, of course, will not be liable for the acts of servants acting in their personal capacity, outside the scope of their duties -- Keystone Camera Corp. of Canada v. The Queen, [1982] 1 F.C. 487.
would apart from the provisions of this Act have
given rise to a cause of action in tort against that
servant or the servant's personal representative.

Conversely, liability under s.3(b) need not be vicarious but
may be direct. It is notable that the Act has been
interpreted as incorporating by reference the tort laws of the
particular province.

SECTION 2: ANN'S METHODOLOGY

The modern approach to Crown liability in tort
derives from the leading House of Lords decision of Anns v.
The Merton London Borough Council. The issue before the
court was whether local authorities were liable in negligence
for allowing a building to be constructed on faulty
foundations, contrary to standards set out in the Council's
bylaws. In deciding whether the municipality owed a common law
duty of care, Lord Wilberforce advocated a two stage approach:
first, the court must determine whether the relationship
between the parties is sufficiently proximate that the
defendant would have contemplated or reasonably foreseen that

   distinction between direct and vicarious liability, see Hogg, supra, note 1 at 86-87.

5 Schwella v. R; Gaetz v. The Queen [1955] Ex.C.R. 133; See Gibson, "Interjurisdictional

   see Donoghue v. Stevenson, [1932] A.C. 562 (H.L.); Hedley, Byrne and Co. v. Heller and Partners, [1963]
generally, M.G. Bridge, "Governmental Liability, The Tort of Negligence and House of Lords Decision
carelessness on his part might cause damage to the plaintiff. If the relationship is sufficiently close a prima facie duty of care arises. The second stage involves considering whether there are any over-riding policy reasons which would justify the denial or limitation of liability:

The problem which this type of action creates is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court.

(Per Lord Wilberforce)7

The court concluded that the Council could be subject to a normal private law duty of care and therefore liable in negligence if it caused harm to a person in the course of carrying out an "operational" as opposed to a "planning" or "policy" function.8 Four criteria to be considered in deciding whether a decision is of a policy nature were later outlined by MacLaughlin, J. of the British Columbia Court of Appeal:

One hallmark of a policy, as opposed to an operational, decision is that it involves planning. A second characteristic of a policy decision is that it involves allocating resources and balancing factors such as efficiency and thrift. The third criterion is that the greater the discretion conferred on the decision-making body, the more likely the resultant decision is to be a matter of policy. Fourthly, where there are standards against which conduct can be evaluated, a decision may move

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7 Ibid, at 755-56.

8 The same types of distinctions were made 6 years earlier by Laskin, J. in Wellbridge Holdings Ltd. v. Greater Winnipeg, [1971] S.C.R. 957, where, relying in the American approach in Dalehite v. U.S. (1953), 346 U.S. 15, he found that a municipality could incur liability in tort while exercising "administrative", "ministerial" or "business powers" but not when exercising its "legislative capacity" or its "quasi-judicial duty".
into the operational area.\(^9\)

This two stage approach and classification test was adopted by the Supreme Court of Canada in City of Kamloops v. Nielsen\(^10\) and has recently been affirmed by the Court in Just v. British Columbia\(^11\) and City of Vernon v. Manolokas.\(^12\) In Kamloops, the court held that the city was liable for failing to follow up on a building work order which had been issued to stop the construction of a house with defective foundations. Madame Justice Wilson found that the city owed a private law duty of care to the purchasers to protect against the builder's negligence: The city had made a policy decision to regulate construction and in so doing had imposed an operational duty to enforce compliance with the governing bylaws. The court concluded that the distinction between misfeasance and non-feasance (failure to act) was irrelevant so long as it could be determined that the authority failed to live up to an established duty of care: "inaction for no reason or inaction for an improper reason cannot be a policy decision taken in the *bona fide* exercise of discretion".\(^13\)

\(^9\) (1986), 10 B.C.L.R. (2d) 223.


\(^12\) (December 7, 1989) Doc. No. 20740; see also Laurentide Motels Ltd. v. Beauport (City of), (1989) 1 S.C.R. 705.

\(^13\) supra, note 10 at 673. Prior to Kamloops, the government could not be liable for non-feasance. For example, see Montreal (City of) v. Mulcair, [1998] 20 S.C.R. 458; Miller & Brown Ltd. v. Vancouver (City of) (1966), 59 D.L.R. (2d) 640 (B.C.C.A.).
In recent years, the House of Lords has expressed reservations as to the strict adherence to a two-stage liability test. For example, in Yeun Kun-yeu v. Hong Kong (A.G.), Lord Keith stated that Lord Wilberforce's test ought not to be thought of as one of general applicability:

This passage has been treated with some reservation in subsequent cases in the House of Lords...

Their Lordships venture to think that the two-stage test...for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and perhaps greater than its author intended.

In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognized that the two-stage test in Anns is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

In the Canadian context, however, these reservations were put to rest in City of Vernon and Just. In City of Vernon, Cory, J., while dissenting on the narrow issue before the court, agreed with the majority when he wrote:

I recognize that some critical comments have been made with regards to the Anns case... Nevertheless the approach set forward in the Anns case which has been confirmed and approved by this Court in the City of Kamloops v. Nielsen, is sound. It can be

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applied effectively and should be applied in any case where negligence or misconduct has been alleged against a government agency.

In short, the approach to be taken in negligence actions against the government is, first, to establish a duty of care and secondly, to determine whether the government will be immune from liability because of the nature of the activity in question. This involves reviewing the applicable legislation to see what obligations are imposed and applying a classification of functions test. If, for example, the Minister of Transport made a policy decision to adopt a new airport security programme, with the result that there were not enough funds to provide lighthouse beacons for ships, this would constitute a bona fide exercise of discretion: 16 The Minister could not be held liable if an accident resulted due to the lack of lighting on the water.

SECTION 3: THE DUTY OF CARE

The first element, then, of an action against the Crown in a case of unlawful interference with civil aviation, is to establish that a private law duty of care existed between the government and the victims -- either the passengers or the public in the air terminal building. This requires that there be a "special relationship" such that "in the reasonable contemplation of the authority, carelessness

16 See Just, supra, note 11 at 15.
on its part might cause damage to that person".17 Such proximity arises only where the defendant knows that others are relying on his skill or judgement -- mere foreseeability of actual or potential harm is not sufficient to create a duty.18 Moreover, there can be no duty of care to members of the general public.19 In Air India Flight 182 Disaster Claimants v. Air India,20 the Ontario High Court of Justice, without conclusively determining the issue, held that the Crown may have owed a duty of care to the passengers killed in the Air India disaster:

...a servant of the Crown who is placed in charge of checking passengers for weapons on a particular flight would clearly owe a duty of care to passengers on board that flight. Each person must be considered individually when deciding whether or not, based on foreseeability and proximity, a duty of care will arise.

One of the problems with Anns was that there emerged two possible interpretations of the duty part of the test.21 Some judges had said that it meant that proximity was to be determined by foreseeability, while others said it was to be

17 Kamloops, supra, note 10 at 664, per Wilson, J.
20 (1987) 62 O.R.(2d) 130, a motion brought on behalf of the government defendants (Department of Transport, C.S.I.S., the Solicitor-General of Canada and a number of named individuals) for an order striking out part of the claim as disclosing no reasonable cause of action.
21 See, for example, the April 1990 decision of the British Columbia Court of Appeal in London Drugs v. Kuehne and Nagel International (unreported but see Lawyer's Weekly, "B.C.A. Ruling Signals Attempt to Limit Duty of Care in Negligence Tort" by Brad Daisley, p.1.). The Court ruled that an employee cannot be found personally liable for negligence committed in the course of his duties.
determined by the principle in *Donoghue v. Stevenson*. The result is that the courts are endeavouring to limit the scope of the duty of care, but are struggling to come up with a universal formula.

**SECTION 4: THE POLICY / PLANNING DEFENCE**

*Subsection 1: Development of case-law*

The second prong of the Ann's negligence test requires a consideration of factors which ought to "negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise". The policy reasons for limiting liability may be summarized as follows:

The public body should not be liable when the alleged negligence attacks a conscious choice as to the use of scarce resources, or a deliberate balancing of thrift and efficiency or when it results from a risk consciously taken by that body to achieve a policy pursuant to a discretionary power in a statute. These are planning or planning determinations because the court cannot or should not reassess or "second guess" the authority's choice.

The recent trend of Canadian jurisprudence has been to move the policy/operational line so as to find the

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22 *supra*, note 6.

23 *Nielsen*, *supra*, note 10, per Wilson, J.

government increasingly liable. This is evidenced by two Supreme Court of Canada decisions, rendered on December 7, 1989. In the first of these decisions, *Just v. British Columbia*, the majority of the court overturned the decisions of the two lower courts in holding that the maintenance of roads was an operational function of the province and therefore subject to liability if negligence was to be shown. Speaking for the majority, Cory, J. elaborated on the Ann's test:

"Even with the duty of care established, it is necessary to explore two aspects in order to determine whether liability may be imposed upon the respondent. First the applicable legislation must be reviewed to see if it imposes any obligation upon the respondent to maintain its highways or alternatively if it provides an exemption from liability for failure to so maintain them. Secondly, it must be determined whether the province is exempted from liability on the grounds that the system of inspections, including their quantity and quality, constituted a "policy" decision of a government agency and was thus exempt from liability. [emphasis added]"

The court appears to add an additional criteria of examining the legislation for a statutory exemption. This consideration will undoubtedly create an incentive for public authorities to enact exemption clauses specifically denying liability for their undertakings.

The second recent decision of the Supreme Court in this area is *City of Vernon v. Manolakos*. In this case, the

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25 *supra*, note 11.

26 *supra*, note 12.
plaintiff owners sued the builders and the municipality when a retaining wall built on their property collapsed. The Court held that once the city had made the policy decision to inspect building plans and construction, it owed a duty of care to all who it would be reasonable to conclude might be injured by the negligent exercise of those powers.

The trend, therefore, in recent years is to find the government increasingly engaged in operational as opposed to policy functions. In a sharp dissent in Just, Sopinka, J. noted:

In stating that the authority "must specifically consider whether to inspect and if so the system must be a reasonable one in all the circumstances", my colleague is extending liability beyond what was decided in Anns v. Merton London Borough Council, Barratt v. District of North Vancouver, and City of Kamloops v. Nielsen, supra. On this analysis it is difficult to determine what aspect of a policy decision would be immune from review. All that is left is the decision to inspect. It can hardly be suggested that all the learning that has been expended on the difference between policy and operational was expended to immunize the decision of a public body that something will be done but not the content of what will be done.

The message that these cases send to the government is to either expressly limit liability by including exemption clauses in the relevant legislation or to confer such a broad discretion on delegates that duties will be interpreted as policy choices where no liability can attach.

Subsection ii: Discretionary Function in the United States
In the United States, immunity from decisions of a "policy nature" differs somewhat from the common law foundations which prevail in the Commonwealth. In U.S. jurisdictions, the immunity is often statutory. The key statute in the federal jurisdiction is the Federal Tort Claims Act, 27 1346(b), which authorizes proceedings for damages:

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The breadth of s.1346(b) is restricted by s.2680, which sets out the exceptions to the Federal Tort Claims Act for which the government is not liable:

(a) any claim...based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

Cases decided pursuant to the U.S. statute have been influential in the formulation of the Canadian common law. The Supreme Court's first application of the discretionary function exception was in 1953 in the case of Dalehite v. United States. 28 The court held that the exception included


not only the decision to institute a program but also the
decisions of administrators running the program, wherever
there was room for policy judgements. Two years later, in the
case of Indian Towing v. United States\(^2^9\), the Supreme Court
narrowed the governmental immunity exception by holding the
government liable for failing to repair a lighthouse or warn
that it was inoperative. These two cases are together cited
as authority for the distinction between activities at the
planning as opposed to the operational stage.

Yet while the test is virtually identical to its
Canadian counterpart, the scope of the exception, at least
with respect to the Federal Aviation Authority, varies
considerably. In Varig Airlines,\(^3^0\) the U.S. government was
sued as a result of its certification of a Boeing 707 aircraft
which did not comply with federal fire protection standards.
A fire in a trash receptacle in a lavatory resulted in an
aviation disaster. The Federal Aviation Authority had adopted
a system of very limited spot checks to determine compliance
of reputable manufacturers with safety requirements. Both the
general decision to adopt a "spot check" system and the low-
level decisions of the individual inspectors not to perform
detailed checks on the towel disposal area of the Boeing 707
were challenged. The U.S. Supreme Court rejected the

\(^2^9\) 350 U.S. 61 (1953).

contention that the decisions of the inspectors themselves should not be considered as within the class of "discretionary functions" immune from tort liability and held that the failure to protect certain components of the aircraft was protected from liability. This is a marked departure from the approach being taken in the Canadian courts. Some courts have even taken the view that Varig effectively insulates the entire FAA aircraft certification process.\(^{31}\)

**Subsection iii: Blurring of Functions**

The problem with the policy/operational distinction is that it is not always clear when a delegate is engaged in "operations" or "administration" and when he is engaged in "planning" or "policy" (a point which alone signals that a finding of liability should probably not hinge upon the distinction) \(^{32}\) In *Barratt v. North Vancouver* \(^{33}\), for example, the Supreme Court of Canada dismissed a claim for injuries incurred as a result of the municipality's failure to repair


a pothole because it was a policy choice as to how to handle road maintenance. But in Malat v. Bjornson\textsuperscript{34}, the province was found negligent for failing to replace a defective road median on the grounds that the failure to act within a reasonable time was an operational failure. Kamloops, itself, was a close decision (three to two) with the conflict between the majority and minority centring on the policy/operational distinction. The majority found that the municipality's "failure to prevent the construction of a house with defective foundations" was an operational function thereby subjecting the government to liability. The minority framed the issue more narrowly and found that the decision to "enforce building bylaws by proceedings in court after inspection has revealed breaches of the bylaw" was a policy decision exempting the municipality from liability. As can be see, it is easy to reach opposite conclusions by simply recasting the issue in broader or narrower terms.

Much of the uncertainty surrounding the classification of functions stems from the fact that many activities, even at the operational level, involve the exercise of some discretion: statutory discretion is often intended to be delegated to relatively low levels within a government hierarchy. Lord Wilberforce in Anns admitted:

\begin{quote}
Although this distinction between the policy area and operational area is convenient, and illuminating, it is probably a distinction of
\end{quote}

\textsuperscript{34} (1980), 114 D.L.R. (3d) 612 (B.C.C.A.).
degree; many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care.

Lord Romer had noted years earlier in *East Suffolk Rivers Catchment Board v. Kent*:

If in the exercise of discretion [the authorities] embark upon an execution of the power the only duty they owe to any member of the public is not thereby to add to the damage which he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which the power shall be exercised and they cannot be made liable except to the extent which I have just mentioned for any damage which would have been avoided had they exercised their discretion in a more reasonable way.

This type of analysis has led some commentators to conclude that the policy/operational distinction actually consists of three possible classifications:

1) pure policy or planning functions, for which no liability attaches (*Wellbridge*).

2) operational functions involving the exercise of discretion (such as the organization of a scheme) for which no liability attaches (*East Suffolk*).

3) pure operational functions which involve no discretion (merely carrying out the scheme) for which liability attaches

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35 [1940] 4 All E R. 527 at 543.

36 Hogg, supra, note 1; Craig, supra, note 24.

37 supra, note 8.

38 supra, note 35.
if negligence can be proved (Kamloops on the majority view). The injection of the additional, second category makes the policy/operational dichotomy conceptually clearer, particularly if the rationale behind government immunity is to prevent the reassessment of decisions which allocate resources. Put another way, at all discretionary stages, the government should enjoy immunity from liability. At all purely operational stages, the negligence principle operates.

SECTION 5: PROOF OF NEGLIGENCE

An important distinction to make in an action against the carrier for breach of the duty to secure and an action against the Canadian government revolves around the burden of proof: in an action against the Crown, it is incumbent upon the victim to establish the Crown's fault whereas under the Warsaw and Hague regimes the onus is on the carrier to disprove fault.39

This gaping difference is somewhat tempered by the possible reliance in domestic law on the evidentiary rule of res ipsa loquitur -- "the thing speaks for itself": where it is impossible for the passenger to establish the exact cause of the accident, but a reasonable inference as to the cause can be drawn, the court may apply the doctrine of res ipsa loquitur to infer the defendant's negligence. The fact of the

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39 Unless the carriage is domestic, in which case the common law and not the instruments of the Warsaw system applies. The standard is the civil standard of balance of probabilities.
accident by itself may "justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury".\textsuperscript{40}

The question, then, is whether the application of \textit{res ipsa loquitur} at common law operates to achieve the same result as the presumption of fault in the Warsaw system. It is submitted that it does not. First, unlike the presumption of fault, \textit{res ipsa loquitur}, although often applied is not automatic. It was, for example, invoked in \textit{Galer v. Wings}\textsuperscript{41} where a propeller broke in mid-air, but was not applied in \textit{McCoy v. Stinson Aircraft Corp.}\textsuperscript{42} where a wing broke in mid-air. Secondly, even if the doctrine is relied upon, it remains an evidentiary rule and is not, like presumed fault, a principle of liability. The consequences of this are seen in the context of proving negligence or the absence of it when the cause of the accident is unknown -- a not infrequent occurrence in air crashes where all the evidence may be destroyed and witnesses killed.\textsuperscript{43} \textit{Res ipsa loquitur} is merely a permissive inference of fact and does not shift the legal burden of proof. The ultimate burden of proving all the elements of the cause of action remains with the plaintiff.

\textsuperscript{40} Flaming, \textit{supra}, ch.2 note 5 at 288; S. Schiff, "A Res Ipsa Loquitur Nutshell" (1976) 26 U. of Toronto L.J. 451.

\textsuperscript{41} [1938] 3 W.W.R. 481 (Man.K.B.).

\textsuperscript{42} (1939), 5 Dominion Report Service 41.

\textsuperscript{43} See F. Hjalstad, "Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law" (1960) 27 J.A.L.C. 1.
Thus, if the accident is wholly unexplained or the Crown can produce an equally good explanation, the plaintiff's claim must fail. Presumed fault, on the other hand, involves an actual reversal of the burden of proof: "the carrier bears the risk of impossibility of producing the required proof".44 Thus, in a case of unknown cause of damage, where the carrier can find no evidence to discharge the onus, the plaintiff's case must necessarily succeed. The end result is that the Crown may be granted an advantage over the carrier, if the cause of the accident cannot be determined.

44 Ibid., at 125.
CHAPTER 5
POLICY OPTIONS

SECTION 1: LIABILITY REGIMES

Having examined the liability rules governing the liability of the carrier and the Crown in cases of unlawful interference with civil aviation, it appears that the overriding features of the liability systems are complexity and inconsistency. Despite similarities in the cause of action, there remain major differences with respect to the proving and disproving of negligence and with respect to compensation awarded for damages -- not only as between the carrier and the Crown but also as between carriers engaged in different types of flight. It is submitted that the unequal treatment of victims stems from the choices made to two different policy options: first, whether liability should be based on fault or strictly imposed; and secondly, whether liability should be limited or unlimited. The options are complicated by the fact that one is not necessarily a quid pro quo for the other: for example, the choice of a strict liability regime does not necessarily dictate the adoption of a limited liability system over one of unlimited liability. There are thus four policy options which could underpin civil liability, whether it is the Crown or the carrier which is ultimately held liable:
1) A fault-based system with limited damages (Warsaw Convention and Hague Protocol)
2) A strict liability system with limited damages (Montreal Agreement and Guatemala City Protocol)
3) A fault-based system with unlimited damages (Crown and carrier engaged in domestic transport)
4) A strict liability system with unlimited damages

Subsection i: Fault versus Strict Liability

As previously discussed, the liability systems of the Crown and of the carrier engaged in domestic, Warsaw or Hague flights, while in theory based on fault, actually create de facto strict liability regimes: the Crown and domestic carrier through the use of res ipsa loquitur and internationally through the rebuttable factual presumption of fault. The Montreal Agreement incorporates outright the strict liability regime. Which of these regimes best protects the interests of the victim as well as the government and carrier? Are the utility and efficiency aspects of strict liability sufficient to justify the fact that wholly innocent parties will sometimes be paying for faultless conduct?

Professor Fleming suggests that strict liability is suitable for industries involved in dangerous activities where the function of the industry is so desirable that it justifies incurring the risk: "Permission to conduct such an activity
is in effect made conditional on it absorbing the cost of the accidents it causes as an appropriate item of its overhead".¹ To determine whether or not this is appropriate for a particular industry, he suggests a consideration of:

1) the magnitude of the disaster potential.
2) its uncontrollability, in the sense that even if all safety precautions are taken there still remains a degree of risk.
3) whether the potential victims are ill-equipped to safeguard themselves against the danger and are therefore at the mercy of the enterprise.²

These factors are the basis of the arguments in favour of strict liability for passenger injury or death in air transport. One of the principal criticisms of the fault-based system is centred on the practical difficulties of proving negligence or the absence of it. With technology expanding exponentially it becomes increasingly difficult for either the victim or the carrier or the government to establish the exact cause of the accident and it may be impossible where the aircraft is destroyed in flight. Even if the cause can be ascertained the complexities of the aircraft and modern security equipment, combined with the confidential nature of much of the evidence, means that a great deal of costs and delays will be involved when litigating the issue. Moreover, since the standard of care

¹ Fleming, supra, note at 302.
changes with developments in technology, it becomes necessary to have a host of expert witnesses to establish what security measures it was reasonable to have in place and what a reasonable carrier or government official would have done in the circumstances. It is submitted that a strict liability regime would alleviate these problems by shortening litigation periods and reducing the cost of proof. More importantly, it would encourage out-of-court settlements since the defendants could no longer hope to be exonerated through a no-fault defence.

A second, and perhaps stronger, argument for a strict liability system is that no victim will be left without compensation so long as he does not contribute to his own injury: an award is automatic based only on the causal link between the accident and the injury. Franklin refers to the fault-based system as a "negligence lottery":

The most that can be said for the fault system is that sometimes it deter and sometimes it furthers good resource allocation, not from any general philosophy but rather because it is incapable of operating beyond the individual case.\(^3\)

Take, for example, the case of Ritts v. American Overseas Airlines\(^4\) where an aircraft leaving Newfoundland on a night flight crashed into an unmarked hill. Despite the fact that it was established that the pilot was aware of the existence

\(^3\) M.A. Franklin, "Replacing the Negligence Lottery: Compensation and Selective Reimbursement" (1967) 53 Va. L. Rev. at 774.

\(^4\) USAvR 65 (D.C.N.Y. 1949).
of the hills and despite the fact that he did not attain a proper climb rate on take-off, the carrier was absolved from liability: the carrier "proved" that it had taken necessary measures by establishing that when A.T.C. requested a ceiling check the pilot had responded "wait for ceiling check", presumably taking precautionary measures. The family of the victim was left uncompensated.

Yet from the very same accident another case arose, Goepp v. American Overseas Airlines, where compensation was awarded. Not only did the court come to the opposite conclusion in holding that there had been negligence, but even held that there had been wilful misconduct on the part of the pilot due to the breach of an air regulation. Damages of U.S. $65,000 were awarded. On appeal, the charge of wilful misconduct was changed to ordinary negligence and the amount of recovery reduced to U.S. $8,300. Thus, on identical facts arising from the same accident on the same flight one court found gross negligence, one court found ordinary negligence and one court found no negligence at all. This is the negligence lottery.

The usual argument advance in favour of a fault-based system is that it deters negligent conduct which consequently increases air safety: since the carrier and government must bear the costs of faulty conduct there is an

5 USAvR 527 (S.C.N.Y. 1951).
6 USAvR 486 (A.D.N.Y. 1952).
incentive to implement tightened security measures and to act in a careful and responsible manner. The argument, however, is based on the premise that the cost of a liability suit will always be greater than the cost of safety and security measures. This, of course, is not true, particularly in view of the limited liability provisions which the carrier and its servants enjoy. The incentive to carry on operations in a safe manner comes, not from the threat that liability might be incurred, but from the concern for monetary losses resulting from accidents and the disruption of services, as well as the concern for issues such as reputation and public confidence, human welfare and employee morale. It is even argued that the net effect of strict liability would increase safety and security standards by taking away the cloak of secrecy that surrounds aviation accidents: parties are more likely to reveal information if no judgment is being made on their conduct.

The deterrence argument is thus very weak. As Franklin points out:

There is no reason to think that separating liability from fault would in any way undermine the deterrent goals of society...I doubt that a prospective defendant would be more effectively deterred [from implementing poor security measures] by telling him "you are liable for your unreasonable conduct" than by saying "you are liable all the time".

7 Franklin, supra, note 3 at 778.
Moreover, the deterrence argument is effectively undermined by the fact that all carriers in practice carry liability insurance.

In concluding this policy issue, it is submitted that the present fault-based carrier liability system is outdated and insufficient to provide a solid basis for the compensation of victims of aviation terrorist attacks. There is a noticeable trend in air law towards a no-fault regime, as evidenced in international law by the present de facto strict liability regimes of the Warsaw and Hague systems, by the 1966 Montreal Agreement and by the 1971 Guatemala Protocol and as evidenced in domestic law through the use of res ipsa loquitur for domestic carriage and the liability of the Crown. Such trends should be encouraged and the Government of Canada should take steps toward the ratification of the Guatemala Protocol.

Subsection ii: Limited versus Unlimited Liability

Irrespective of whether a fault or strict liability regime is adopted to compensate victims of aviation terrorist attacks, a second policy issue which must be addressed is whether liability should be limited or unlimited. As discussed, a passenger under the present system may be entitled to recover U.S. $10,000, $20,000, $75,000 or full compensation under the Warsaw Convention, Hague Protocol, Montreal Agreement or domestic laws (the Crown or a carrier
engaged in domestic air transport), respectively. The need for unification in this area is clear: there is simply no justification for rules which differentiate between victims who have sustained similar injuries in similar accidents solely on the basis of the fortuitousness of their destinations. Furthermore, the incredibly low amounts that serve as maximum limits lead to increased litigation as they encourage plaintiffs to claim wilful misconduct or insufficient notice in an attempt to invalidate the limitation clause.

A discussion of the amount at which the limit should be set is somewhat superfluous: the real question that begs to be answered in why any limit should be imposed at all. It is often felt that the quid pro quo of strict liability is limited liability and, similarly, that unlimited liability is the necessary corollary to fault. In a sense it is a trade-off where, in the case of strict liability, the carrier or Crown need not be at fault to incur liability but expects in return that the maximum amount of this liability will be fixed. The issue, then, is whether strict liability improves the position of the victim so substantially as to justify not awarding full compensation for the injury suffered. Put on its flip side, the question becomes whether the carrier or Crown foregoes so much in being liable "all the time" as to justify a limited costs arrangement.
The traditional arguments put forth in favour of establishing monetary limits for the recovery of damages focuses on two general considerations: insurance factors and the avoidance of litigation through rapid settlements. With respect to insurance, limited liability is said to be advantageous to passengers by giving them the option to decide for themselves whether or not to incur the extra cost of private insurance. If liability is, in theory, unlimited then effectively it amounts to compulsory insurance for the extra cost to the carrier will be passed on to the passengers in the price of their tickets. Moreover, the smaller carriers argue that unlimited liability insurance premiums are too costly, making it difficult for them to be competitive.

Limited liability is also said to have the effect of avoiding litigation by encouraging out-of-court settlements: passengers are discouraged from bringing suits when the disputed amount is only the difference between the carrier's offer during negotiations and the maximum ceiling. The problem with this argument is that in practice the limits the carrier and its servants enjoy are so low that they have actually led to an increase in litigation, where victims argue wilful misconduct or inadequate notice in an attempt to

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8 The classic work on limited liability in air law is H. Orton, Limitation of Liabilities in International Law (The Hague, 1954). For a critique of his proposal see A. Tobolewski, Monetary Limitations of Liability in International Private Law (Faculty of Graduate Studies and Research, McGill University, 1981) [unpublished] at chapter 4.

nullify the limitation provisions altogether. Passengers are also encouraged, in the search for a deeper pocket, to bring claims against as many targets as possible, such as the aircraft manufacturers and airport operators, where the damage awards promise to be more lucrative. These criticisms, however, go to the matter of the amounts awarded and would not be valid if the limits were high enough to be viewed by the victims as giving adequate compensation. The implementation of higher limits would thus help solve the problems of limited liability by putting the victim, to a greater extent, in the position he would have been in had the accident not occurred.

There are a number of English authors who have spoken out in favour of unlimited liability. Tobolewski maintains that the fixing of maximum limits is used merely to protect and promote the interests of the aviation industry:

> The deprivation of the full recovery of damages by artificially imposed protective laws has no justification from the point of view of society as a whole. Monetary limitations of liability are seen as being archaic, reminiscent of the early days of aviation.

As an alternative to fixed monetary limitations he suggests a regime of strict liability with mandatory insurance whereby victims would be fully compensated up to the maximum coverage.

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11 Tobolewski, supra, note 9 at 279.
The minimum insurance limits would be determined in accordance with the potential liability of each carrier, depending on the type of commercial operation and the aircraft used, and would be periodically reviewed to take into account inflationary trends. In the case of catastrophic accidents where damages might exceed the total insurance coverage, compensation would be paid on a pro rata distribution system. Such a self-regulatory scheme, he submits, would simplify and unify the rules of liability, bringing the existing system in line with current aviation practice. Most importantly, it would ensure equal treatment of victims for similar aviation accidents.

Professor B. Cheng also supports a regime of strict unlimited liability for personal injury and death of passengers, a regime which would be "integrated...absolute, unlimited and secured". His proposal is for a recovery system consisting of three broad stages -- self-insurance, cooperative insurance and governmental insurance -- whereby each successive stage may be resorted to as a "back-up" in the event of only partial compensation from a prior stage. The first stage, self-insurance, conforms to the existing practice of carriers insuring themselves for their potential liability. The novelty of the proposal is in the second and third stages.
which come into play when damages exceed the carrier's maximum insurance coverage. A system of cooperative insurance, either on a national or transnational basis, would be resorted to in phase two and, should this fail due to a limit of liability or insolvency, a system of governmental insurance would take over in phase three. In practice, this third stage would only be resorted to in cases of catastrophic accidents where "it does not seem unfair to spread the risk among the members of the community at large and call on governments to shoulder the residuary liability". 14 The implementation of such a system would ensure full compensation for injuries suffered, except in the case of contributory negligence. All passenger claims would be funnelled through the carrier and operator of the aircraft, respectively, and these parties would then be subrogated to the rights of the victims as against any other potential defendants such as the aircraft manufacturers or air traffic controllers. 15

SECTION 2: THE CASE FOR GUATEMALA

The problem with the proposals discussed thus far is that they focus primarily on the carrier as the defendant

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14 Cheng, ILA Conference Materials at 10.

responsible for compensating victims.\textsuperscript{16} In cases of aviation terrorist attacks, however, the decision to hold carriers liable is motivated, not so much because the carrier has truly been negligent but in a desire to compensate the victims. The Court in \textit{Evangelinos v. Trans World Airlines} admitted:

The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become "accident victims". ........

If article 17 were not applicable [to hold the carrier liable], the passengers could recover -- if at all -- only by maintaining a costly suit in a foreign land against the operator of the airport. The expense and inconvenience of such litigation would be compounded by the need to prove fault and the requirements of extensive pre-trial investigation, travel, and other factors too difficult to anticipate.

It is submitted that a better step toward unifying limitations is ratification of the \textit{Guatemala City Protocol}, where liability, strictly imposed for passenger injury or death, is limited to 1,500,000 Poincaré francs (approximately U.S. $100,000), subject to periodic review. This limit is absolutely unbreakable, even in the case of gross negligence or wilful misconduct.\textsuperscript{17} For damages exceeding this limit, the \textit{Protocol} provides for the implementation of a domestic supplementary compensation scheme so long as the burden does

\begin{footnotesize}
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\item[\textsuperscript{16}]
It is also difficult to imagine how such proposals would ever be implemented in practice. Opposition would certainly come from the carriers where unlimited liability translates into increased insurance premiums as well as from states who would refuse or could not afford to be party to cooperative funding schemes.

\item[\textsuperscript{17}]
\textit{Q. y}, whether this is contrary to public policy or unconstitutional as per the discussion in infra, ch. 3, p.46.
\end{itemize}
\end{footnotesize}
not fall upon the carrier. Art XIV, creating a new article 35A of the Warsaw system, provides:

No provision contained in this Convention shall prevent a state from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;
b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required to do so;
c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;
d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.

The burden, therefore, of compensating victims of aviation terrorist attacks beyond the U.S. $100,000 the carrier is originally liable for, would be distributed among the users (passengers) of air transport services. Even if the Guatemala City Protocol is not brought into force, there is nothing to prevent the Canadian government from establishing such a national supplementary scheme. This would relieve both the Canadian government and carriers from suit should Canadian airports or airlines be involved in another terrorist attack.
CONCLUSIONS

A comparison of the liability regimes governing the carrier and the Crown has shown that the existing air transport system lacks consistency and uniformity.

With respect to the air carrier, the mosaic of laws and treaties regulating passenger injury and death discriminates against victims in two fundamental respects: first, as regards the basis of liability -- which fluctuates from fault-based liability to de facto strict liability to pure strict liability -- and secondly, as regards the potential recovery of damages -- which may be U.S. $10,000, $20,000 or $75,000 or unlimited. A passenger, for example, may be entitled to up to $75,000 when the carrier is not at fault but will be limited to $10,000 even thought the carrier is negligent. Such inconsistencies are wholly illogical when it is realized that the basis of the unequal treatment of victims revolves solely around the fortuitousness of the passenger's departure point and destination.

With respect to the liability of the Crown the law is also uncertain since it is difficult to determine when a court will hold that a policy, as opposed to an operational decision, was in question. There will never be any precise test for determining which governmental actions fall within the zone of protected acts. The result is ad hoc decision making on a case by case basis.

The ultimate decision of who should bear the burden
of compensating victims for criminal acts depends in large part on how one views the social function of liability for negligent acts. It is submitted that the most equitable solution would be the adoption of the Guatemala City Protocol -- strict liability with absolutely unbreakable, but higher, limits with the establishment of a supplementary insurance scheme which would ensure adequate compensation in cases where the damage suffered was beyond the statutory limit. This would provide a system of universal application, putting all passengers within a common framework.
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