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**Carrier's Liability in Air Transport
with Particular Reference to Iran**

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Carrier's Liability in Air Transport with Particular Reference to Iran

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Finally, I offer my regards and blessings to all of those who supported me in any respect during the completion of the thesis.

Hamid Kazemi

Leiden, 2012

This manuscript is dedicated to:

My parents, Ahmad and Effat,

My wife, Akram Tayyebi,

My son Ali,

My brothers Hussein, Asghar and Reza,

For you, who are the perfect components in my equation of happiness

Preface

The author's interest in air carrier's liability, and the conflict between the *Shariah* and private international air law, took root in 1996 when he was completing his M.A. thesis on the role of international law in the investigation of air accidents. Two years preceding that, an air accident involving Aseman Airlines occurred in Iran. At that time, heated discussions took place between Islamic jurists and legal experts on the liability of the air carrier for the death and bodily injury suffered by the passengers. In the course of the court proceedings, it transpired that there was a conflict between the *Shariah* principles and those of private international air law. Whilst the *Shariah* prescribes the *Diyah* in the case of death or bodily injury, this differs from the principles of liability and compensation under private international air law. The critical question that emerged was whether the Warsaw-Hague rules should have priority over the *Shariah* when determining liability for passenger's death and bodily injury. No decisive unified opinion has hitherto been held on the matter. Indeed, diverse views have been proffered by the Iranian courts and legislative bodies.

Iran has just ratified and given effect to the Warsaw Convention 1929, The Hague Protocol 1955, and the Guadalajara Protocol 1961 for international flights, in 1975. According to the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' in air transport accidents of domestic flights, Iran applies the provisions of limited liability in the Warsaw Convention as amended at the Hague in 1955.

The Guardian Council of the Constitution, which consists of Islamic jurists, claimed that the *Shariah* regulations have priority over the rules of the Warsaw Convention. They should therefore prevail in cases of conflict of laws. However, this point of view may impede the attainment of uniform regulation of air carrier's liability.

Working for the legal bureau of the Civil Aviation Organization of Iran was an opportunity to be closely involved in and therewith learn about aspects of air carrier's liability. When the author decided to pursue a PhD in air law in 2005, he chose to work on the legal aspects of air carrier's liability for death and bodily injury. With this in mind, this thesis aims to investigate and compare the principles of liability in private international air law with those of the *Shariah*. In particular, it will critically study the relevant laws in two common law countries (England and the United States) and

two civil law countries (France and Germany) that have had significant influence on private international air law. These will be compared with the *Shariah* system which underlies Iranian law.

Since the liability principle for death or bodily injury in the *Shariah* may be at odds with those outlined in international rules, the principal aim of this thesis is to find a way forward that would help promote uniformity of international air carrier's liability. It will be argued that contrary to the views of the Guardian Council of the Constitution, in the event of a conflict of laws, it is possible to reconcile the *Shariah* principles of liability with the Warsaw-Montreal regime. Also, Iran may adopt the Montreal Convention 1999. Any probable conflict between the provisions of this Convention and the *Shariah* can be resolved through the application of a specific statute by the Parliament.

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CHAPTER 1

GENERAL INTRODUCTION

1.1 Introduction (Uniformity)

As the use of aircraft as a mode of general transportation began at the beginning of the 20th century, the liability of air carriers and the issue of compensation for injury to passengers and damage to goods became two important issues encountered by European States. The concept of carrier's liability, which assumes a prominent position in legal and national systems, was extended to the air carrier. Prior to the ascendancy of the international aspect of air transport, these States applied their civil law and private law (conflict of laws)¹ to legal relations between passengers and airlines.² Only a few States, which were the biggest as well, developed their own domestic air law.³

International flights, however, have introduced political, social, economic and legal complications to European States since they face a large number of people and aircraft from various nationalities within their territory. Due to the huge increase in international flights and the presence of foreign elements in the civil law of international air transport (which does not occur to the same extent in any other branch of human activity), a large number of cases

¹ Private international law is frequently used in Europe to describe what the Anglo-American system usually refers to as conflict of laws, i.e. a response to a problem of which several possible laws apply to a transaction or event having more than one geographic element. For instance, the place of registration of an aircraft, the nationality, residence, or domicile of passengers; and the origin and destination of voyage; are among the issues that international air transportation is presented with. See A.F. Lowenfeld, *Aviation Law* (1981), 2-6.

² International air carrier's liability which falls within private international law has its own peculiarities. Through the presence of foreign elements in civil law relationships, it is connected to the territorial civil law of that country. It is simultaneously related to the interpretation of international conventions for the unification of some related rules, which intend to complete territorial law rules. At the domestic level, courts therefore face two legal rules when dealing with the issue of compensation in air carrier's liability: 1) Conflict of laws, in that the courts of any country, when a case is referred to them, will seek the governing law in that conflict; and 2) the rules explained in related international Conventions, which unify some of the civil law rules. See R.C. Horner and D.R. Legers, *Second International Conference on Private Aeronautical Law Minutes* (1975), 19.

³ Examples include the Air Navigation Law of 1924 in France; the Air Traffic Act of 1922 in Germany; and the Air Navigation Act 1920 and the Air Navigation (Investigation of Accidents) Regulations of 1922 in England - see D. Goedhuis, *National Air Legislation and the Warsaw Convention* (1937), 64-66.

related to foreign citizens went to court.⁴ Therefore court awards for air carrier's liability and damages for passengers differed from one State to another. They were severely placed under the impact of national legal systems. Thus a need for uniformity of rules / laws was felt in Europe.

1.1.1 Possibilities

The establishment of unified international rules enables air carriers in European States to face the economic challenges confronting them in a more robust fashion. Similarly, by knowing their rights against air carriers and receiving assurances that their rights would be supported in different States, passengers and shippers would be encouraged to use this new mode of transport, hence helping it to develop further.⁵ European States had three options open to them initially:

1. Unification, by unifying the rules that govern conflict of laws and the regulations related to specific jurisdictions;
2. Unifying the meaning of legal terms. This could be carried out by developing an international agreement about legal regulations which States could then absorb into their domestic legal system, thereby leading to uniformity at domestic and international levels; or
3. Unifying the rules that are applicable to international relations along lines that were similar to the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) and the International Conditions of Sale (CIV).

⁴ M. Milde, *The Problems of Liabilities in International Carriage by Air: A Study in Private International Law* (1963), 14.

⁵ R. Hill, *The Law and Politics of Air Liability (Compensating Victims of Aviation Terrorism)* (1991), 11.

However, owing to the differences in the legal systems and regulations of individual States, only the third option was considered feasible and eventually chosen.⁶

Even so, a more practical way in overcoming difficulties in private international law is by establishing international agreements with regard to substantive rules, applicable to the international relationships.⁷ Since air carrier's liability is clearly an issue of private international law, at the beginning of the twentieth century European States tended to settle this issue by developing international rules in harmony with the then prevailing trends among the States. Through this, they therefore attempted to develop international agreements for unifying their conflict of laws.⁸

This task was accomplished in the 1920s⁹ when the States concerned developed rules that satisfy the legal systems that they were representative of and adopted the Second International Conference on Private Aeronautical Law in 1929, i.e. the Warsaw Convention.¹⁰ States thereby recognized the economic, political and technical privileges of the unification of some rules governing the liability of air carriers at the international level for the development of the air transport industry. This Convention recognized the conditions of the early twentieth century and the common economic interests of customers and operators; and it determined the limit of liability on the one hand, and harmonized the civil law and common law rules on the other hand.¹¹

⁶ See Milde, *supra* note 4, at 18.

⁷ Private international law here has the following meaning: all laws made by countries are of course public laws (as contrasted with the rules of clubs or trade associations), in that they apply to all persons to whom they are directed, whether they like it or not. See Lowenfeld, *supra* note 1, at 7.

⁸ See Milde, *supra* note 4, at 18.

⁹ R. David and J.E.C. Brierley, *Major Legal System in the World Today, Introduction to the Comparative Study of Law* (1985), 10.

¹⁰ J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts', (1932) *Journal of Air Law* 27, at 28-31.

¹¹ With regard to the justification of the limitation of liability, some evidence have been presented by Dr. H Drion whereby an analogy had been drawn with maritime law with its global limitation of the ship owner's liability and the necessity of protecting a financially weak industry. Likewise, catastrophic risks should not be

Through developments in aircraft technology, air transport expanded rapidly to other States.¹²

As the Warsaw Convention successfully attracted attention to the issue of uniformity of carrier's liability, a majority of States adhered to it. This Convention is the most successful international instrument for international private air law.¹³

Enjoying firm legal foundations, with the threat that change would have compromised the whole system of international air carrier's liability lurking in the background, this Convention has remained intact for more than 80 years, except for the changes laid down in the amendments. These changes, made within the framework of the Warsaw system, were nevertheless deemed insufficient by passengers because of the low levels of compensation available. At the same time, these diverse international regulations compromised the uniformity which the pioneers had been seeking in air transport regulations. However, since they helped to inject more energy and vitality into the regulations and their gradual development, they were regarded as reasonable and constructive. Ultimately, member States approved a new international convention, the Montreal Convention of 1999, in order to assemble all international air transport instruments on air transport liability (based on the Warsaw system), and add recent requirements to them.¹⁴

borne by aviation alone. Notwithstanding the desirability that carriers or operators be able to insure their risks; there are also the possibilities that: potential claimants could take insurance out themselves; limitation of liability could serve as a counterpart to the aggravated system of liability imposed upon the carrier and operator; and the avoidance of litigation by facilitating quick settlements. See H. Drion, *Limitation of Liabilities in International Law* (1954).

¹² The total statistics of international and domestic passenger and freight traffic of scheduled services of airlines of ICAO contracting states for the period between 1950 to 2001 show that in 1950, only 31 million passengers had used this mode of transport in comparison with 1,623 million passengers who flew in 2002. Likewise, only 730 million ton-kilometers freight had been carried by these airlines in 1950 compared with the 110,700 million ton-kilometers freight carried in 2001. See A.D. Groenewege, *Compendium of International Civil Aviation* (2003), 1281-1282.

¹³ The Convention entered into force after the deposit of the fifth ratification in February 1933. Up to 2011, 152 States ratified it. See <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

¹⁴ P. Dempsey and M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), 17.

1.1.2 Challenges

If international regulations are not in accordance with the economic, political and social conditions of their members, they will gradually lose their effectiveness since the States concerned will tend to apply their domestic laws to fit particular situations in spite of their international commitments. International conventions for air carrier's liability are not insulated from this phenomenon.

1.1.2.1 Economic Conflicts

The new conditions issued after the Second World War challenged the unity and coordination resulting from the Warsaw Convention for the unification of air carrier's liability. One of the serious obstacles to unification was the wide gap between the interests of developed countries and developing countries. Global unification is achieved through pressure from stronger States who were concerned that their standard and cost of living would determine the level of compensation for injury, death or loss of goods. Therefore, States whose citizens enjoy higher life standards, and earn more income, have higher limits of compensation compared to economically weaker countries.¹⁵ It is clear that in the former, customer interests take priority over the interests of airlines. But in developing countries, it is the interest of airlines which take precedence over the interest of customers and the States pay subsidies to airlines to help them survive.¹⁶

In the US, for example, lawyers having special interest in the accident expense system backed the removal of liability limit, stating that airlines could overcome any attendant financial problems by using the insurance system and by distributing the extra expenses through the

¹⁵ A.F. Lowenfeld and A.I. Mendelson, 'The United States and the Warsaw Convention', (1967) 80 *Harvard Law Review* 515, at 555- 565.

¹⁶ ICAO DCW Doc. No.20(1999).

tickets they sell.¹⁷ But for developing countries, it is not possible to distribute the expenses through the tickets, and relevant States have had to invest money in the industry to support the operation of air transport as part of national policy. Due to their comparatively lower rate of economic growth, they are therefore in favour of low rates of compensation in order to help their national airlines.¹⁸

So, although the draftsmen of the Warsaw Convention had initially determined liability in a way which balanced the interests of carriers with those of customers, some States, in practice, went contrary to it.

As a result, after two decades of success in unifying limits of liability, the Warsaw Convention gradually headed towards a breakdown. In later decades, protocols or agreements were amended to move up the limits of liability, while States increasingly preferred to apply their own domestic rather than international regulations.¹⁹

1.1.2.2 Different Legal Systems

Since States follow different legal systems, the main goal of international private law conferences had been to bring together the legal principles of States and overlook the differences in order to achieve uniformity. As Sir Alfred Dennis, representative of Great Britain in the second private international law conference states: ‘As regards the British

¹⁷ As stated by W Guldemann, the factual basis of liability problem developed mainly after the Second World War when: ‘i) air transport become a mature industry, (ii) air transport become a big business at the forefront, (iii) the insurance industry grew as well...(iv) the differences in the standards of living of different countries... and the differences in their legal systems become more important, (v) the liability limits established in 1929 become clearly insufficient for passengers in most of the industrialized countries, and insufficiency was aggravated by the impact of the progressive inflation...(vi) in the industrialized countries, the development of the claim mentality in the public become more general, more progressive and more aggressive...(vii) the system of system civil aviation - airlines, aircraft, airports, air traffic services- and their operation become progressively more complex and more interdependent, (viii) the same holds good for the legal relations between the parties involved in serious accidents’. W. Guldemann, *Air Transport in International Law –Possibilities and Limits in International Unification* (1982), 164.

¹⁸ Ibid.

¹⁹ See Dempsey and Milde, *supra* note 14, at 14.

government, the sole reason which it has for entering into this convention is the desire to achieve uniformity.²⁰

However, uniformity of international regulations is subject to the following threats:

1. The Warsaw Convention includes only some regulations for the substantive rules, providing no solutions for numerous other issues. For example, in the case of the death of a passenger or the interpretation of damage, the question of who the deceased's representatives are, arises. Which person can claim on his behalf? Does the exemption clause have no effect on the representatives' claim as it is a separate one or his own? The answers to these questions will differ in the different States and would depend on national laws²¹ and their interpretation of concepts such as the definition of accident.²²
2. Since the legal systems of contracting parties are different, a clause in a contract would be considered valid in some States, whereas in other States it would be considered void. In some States where the passenger will have an option to sue in contract or in tort, the exemption of liability could be considered valid as far as contractual liability is concerned, but void regarding liability for tort.²³
3. The legal rules of private law are dynamic and not static, changing according to the economic, social and political conditions of States. Air carrier's liability is no exception. Due to the abovementioned conditions as well as technological advancements, the rules regulating this area had undergone changes at domestic level. An example would be the liability system in France which is based on fault. Although the burden of proof had previously been on claimants, due to the aforementioned conditions and since it had been too onerous for

²⁰ See David and Brierley, *supra* note 9, at 21.

²¹ P.P.C. Haanappel, 'The Right to Sue in Death Cases under the Warsaw Convention', (1981) *Air and Space Law* 66, at 69-70.

²² See Dempsey and Milde, *supra* note 14, at 61.

²³ See Goedhuis, *supra* note 3, at 3.

claimants to prove fault in industrial cases, and defendants had the upper hand, the burden of proof was shifted to defendants to prove that they had not committed a fault. Another interesting example would be Germany. Although the basis of tort there is based on fault, in some special statutes such as the Road Traffic Act, liability is based on risk or strict liability.²⁴

4. The Warsaw Convention was primarily written with the two main legal systems, common law and civil law, in mind. Since the transport industry was then operating and growing mostly in developed countries, it was justifiable to tackle the issue of liability according to their legal systems. However, the period after the Second World War witnessed the emergence of new States, some of whose legal systems differ from the two prevailing systems. These legal systems include independent regulations.

A large part of these new States had been Islamic States, mostly situated in the Middle East and North Africa and some in South East Asia. There is an increasing trend in Islamic States to apply Islamic law.²⁵ On the other hand international air transport operations are fast growing in these States.²⁶ Based on these two facts, it is necessary to study the principles of liability in Islamic law and Islamic States in order to clarify their similarities and differences with the international system to help achieve the uniformity of international rules in the

²⁴ See Chr 2.2, *infra*.

²⁵ In many Islamic countries, Islam has been declared as an official religion and it is the main source of law. The Parliaments in these countries have to be sure that the conventions are in line with Islamic rules. For instance, see Article 4 of the Constitution of the I.R. Iran, Article 3(2) of the Constitution of Syria, Article 2 of the Constitution of Algeria, Article 3 of the Constitution of Afghanistan, Article 7 of the Constitution of Iraq, Article 3 of the Constitution of Yemen, Article 6 of the Constitution of Morocco. Article 1 of the Constitution of Tunisia, Article 2 of the Constitution of Libya, See M. Jabbari and E. Shoarian, *Legal Aspects and Advantages for Iran to Ratify the 1999 Montreal Convention with Emphasis on Islamic law*, Air Transport, Air & Space Law and Regulation Workshop and Conference, April 12-16, 2009, Abu Dhabi (UAE). <http://www.mcgill.ca/iasl/press/abudhabi2009/>.

²⁶ The strongest international passenger demand growth is forecast for the Middle East where an Average Annual Growth Rate (AAGR) of 6.8% will be driven by Gross domestic product (GDP) expansion along with significant new routes and capacity. Within the region, UAE (8.4%) will show the strongest growth. Total international passenger numbers are forecast to be around 105 million in 2011, an increase of 30 million over 2006 levels. See <http://www.iata.org/pressroom/>.

future.²⁷ The majority of Islamic States in the Middle East and a number in Africa and South East Asia (e.g. Indonesia) had been under the influence of both civil law and Islamic law. The legal system of Iran, for example, has been influenced by these two legal systems with one taking precedence over the other at different times.²⁸ The Iranian legal system is therefore a mixture of the two and their respective degrees of influence differ from one area of law to another. For instance, whilst liability for death or bodily injury follows the *Shariah*, obligation and trade law are under the influence of civil law. This difference between the *Shariah* and civil law or common law is crystallized when the provisions of the Warsaw, and later Montreal, Conventions and those of Islamic law were simultaneously applied to domestic flights in Iran. In places where rules of the two systems are in conflict, the rules of the Islamic system prevail.²⁹

Hence, it seems that one of the factors impeding the global uniformity of international rules governing air carrier's liability was the tendency to overlook the principles of liability in Islamic States that follow the *Shariah*. Ignoring other legal systems would cause inconsistency in air carrier's liability at the international level in the future.

It is submitted that the basis of legal liability and compensation in Islamic law are partly different from the principles of civil law and common law. So, Islamic law differs from the international system of liability governing the international conventions and in particular, international instruments of air carrier's liability.

Although most States adhere to the international system of air carrier's liability, it is possible for Islamic States to gradually withdraw from the international system by referring to

²⁷ See David and Brierley, *supra* note 9, at 10.

²⁸ The Code Napoleon had a great influence on the legal systems of Middle East countries. French law, in comparison to other European legal systems (Common law and German law) had been more influential. However, the depth and width of this influence varied from country to country. See R.B. Schlesinger, H.W. Baade and P.E. Herzog, *Comparative Law: Cases-Text- Materials* (1988), 324.

²⁹ *Ibid.*, at 325.

compensation on the basis of the *Diyah*. The *Diyah* is discussed in Islamic texts and Islamic law under criminal law rather than tort law. This means that compensation in air carrier's liability for death is deemed to be a criminal law matter. It will be discussed how this criminal law issue has also been extended to tort law. This topic will be discussed within the scope of the Islamic legal system in Iran.³⁰

This would be particularly relevant where there is a wide gap between the *Diyah* and liability limits under this system, thus causing a huge difference in the compensation levels for domestic and international flights. Therefore in order to unify liability rules at the international level, it is necessary to pay due attention to the Islamic legal system for which the most important concept is the *Diyah*.

1.2 Aims of the Thesis

The main question posed in this thesis is as follows. Do differences between the *Shariah* regulations and those of the Warsaw-Montreal Conventions obstruct the implementation and application of uniform international regulations? Or, can the *Shariah*, like common law and civil law systems, compromise some of its regulations so as to enable a harmonious and fruitful coexistence with the international system?

The main purpose of the current study is therefore to explore the hypothesis that although Islamic law has its independent principles of liability, Islamic States can adopt international air carrier's liability in international flights and allow the two systems to coexist in domestic flights, irrespective of the fact that such States have not been active in the drafting of most of these regulations. In so doing, the work focuses mainly on the legal system of Iran.

³⁰ See Chr 3.3, *infra*.

The thesis has two further sub-hypotheses. One, that since the principles of liability and terms related to air carrier's liability in international instruments are prescribed in a way that each State can apply them according to its own specific system, the principles of liability in the Warsaw-Montreal regime are in fact dynamic and flexible. States with different legal systems can therefore easily implement those concepts and principles. Secondly, that although Islamic law has its own special principles regarding carrier's liability, since it is a dynamic legal system, States that have based their legal system on the *Shariah* (such as Iran) can join the international system of air carrier's liability and ratify related instruments without facing undue obstacles.

1.3 Methodological Framework of the Research

The combination of various legal aspects including private international air law and legal systems in this work provides the basis for a study which utilizes three different methodologies: analytical, descriptive and comparative. However, the overall research is predominantly based on a critical legal analysis of the *Shariah*.

The thesis consists of five chapters. Chapter 2 will discuss the prevailing legal systems that are the common law and civil law that have affected the Warsaw system. A close study of the principles underlying legal liability in these two systems would lead to an appreciation of their similarities and differences. This would in turn be very useful in gaining a better understanding of air carrier's liability in private international law especially since international commentators desired to use the rules of liability of the two systems in the new Convention to make it more comprehensive so as to achieve more uniformity.³¹ Further, an analysis of these two systems provides an important insight into the reasons for the collapse

³¹ See *Ide*, *supra* note 10, at 29.

of the Warsaw System. It also helps make clear that in order to achieve uniformity within the framework of the Warsaw Convention, States follow these systems. England from among the common law States and France from the civil law States adopted principles such as liability limitation, invalid contractual conditions, or the presumption of fault for death or bodily injuries which had no precedence in either of their pertinent legal systems.

Chapter 3 will investigate the legal liability under the *Shariah* and Iranian law. The *Shariah* provides sufficient principles that make it a self-contained and independent system. The most important subject will be the *Diyah* as a legal principle and compensation for death or bodily injury. Familiarity with these principles is essential for comparing the principles of liability in the *Shariah* with air carrier's liability in international instruments in Chapter 4.

Chapter 3 also deals with air transport regulation in Iran. To comprehend the air carrier's liability system in Iran, one should understand the State's legal system and its legislators. An appreciation of its air transport system can also offer a clearer view of the overt and covert rules governing air carrier's liability and the way they are implemented in this State.

Chapter 4 deals with the general principles of liability that govern air carrier's liability in international instruments. There, the author analyses these principles and compares them with the *Shariah* principles. In Chapter 4 it will be argued and demonstrated that the principles of air carrier's liability in international treaties are neither static nor completely dependent on the common law and civil law systems. It is a dynamic system that continuously evolves. Therefore, States with diverse legal systems including common law, civil law and Islamic law, can adapt themselves to the principles of the international system. Chapter 4 explains that there are issues in the international system of air carrier's liability that are designed flexibly, so that States with different legal systems may investigate legal cases according to the principles of their respective legal systems.

Chapter 4 also deals with air carrier's liability for death or bodily injury in domestic flights, which operate under the influence of the *Shariah* and the Warsaw system.

Chapter 5 provides a general conclusion. It addresses the question of whether Islamic States, whose independent liability principles for death or bodily injury differ from that of the common law and civil law, are in a position to adopt the international system of air carrier's liability? Drawing on the discussion in previous Chapters, this Chapter concludes by highlighting that the *Shariah* is indeed consistent and able to co-exist with the liability principles of the Warsaw-Montreal regime.

CHAPTER 2

LIABILITY IN DIFFERENT LEGAL SYSTEMS: A COMPARATIVE STUDY

2.1 Introduction

Liability for compensation has its roots in legal systems.¹ Although civil law States mostly have written laws and common law States have paid a lot of attention to case law, countries like France and Germany (which belong to the former system) and England and the United States (of the latter) have implemented their specific laws on air carrier's liability for many years.² The two legal traditions have different systems of categorizing legal relationships and may have delicately different understandings of apparently identical concepts such as injury, cargo, and carriage of contract.³ The differences may be concealed or apparent. Nevertheless, the methods employed in each system are not totally dissimilar and the two systems have tended, particularly in recent years, to draw more closely together.⁴

The international system of air carrier liability which was established for unifying certain principles of air carrier liability through the Warsaw Convention 1929 and through it the Montreal Convention 1999 was inspired by the two systems.⁵ Countries following these systems such as England, the United States, Germany and France, disregarded some of their domestic principles for the sake of uniformity, in regulations, which are in the interest of customers and airlines.⁶

¹ R. David and J.E.C. Brierley, *Major Legal Systems in the World Today: Introduction to the Comparative Study of Law* (1985), 11.

² A. Farnsworth, *An Introduction to the Legal System of the United States* (1996), 122.

³ P. Martin, J.D. McClean et.al *Shawcross & Beaumont On Air Law*, (4th ed.), 2; (hereinafter referred to as '*Shawcross and Beaumont on Air Law*')

⁴ S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', (2009) 107 *Michigan Law Review* 1583, at 1583.

⁵ J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Expert's, (1932) *Journal of Air Law* 27, at 28.

⁶ Ibid.

In this Chapter, the author outlines the general principles of liability in these systems to explore situations where States following a particular system, have changed their principle of liability. They have been flexible in modifying liability principles or adopting principles in this regard even when these are contrary to their traditional system wherever the situation required. The author also demonstrates that these principles of liability have similarities as well as differences. On the issue of the carriage of passengers, for instance, the common law jurisdictions apply negligence,⁷ while in civil law jurisdictions the issue of the carriage of passengers is principally based on contract of carriage.⁸ Through a comparative study of these two systems, the author intends to display how the systems have been interacting with the international system. It investigates their common principles and the places of differences. It investigates whether the international system inclined towards the principles of one of these systems, or if despite being based on the two systems, it contains dissimilarities with the legal principles of the common law and civil law jurisdictions.⁹

2.2. The Common Law

A common law is a legal system that is modeled on English law. It places great weight on precedents which are developed by judges who had to resolve specific disputes in trials.¹⁰ The legal rule in this system seeks to primarily provide a solution for a trial rather than to formulate a general rule of conduct for the future.¹¹ The general principles of liability under the common law jurisdictions are discussed below. In particular, the thesis looks at the legal systems of England and the United States. The author chooses England since it is the

⁷ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 249.

⁸ M. Planiol and G. Ripert, *Treatise on the Civil Law* (2005), 467.

⁹ This issue will be discussed in Chr. 4.2.1.1 when investigating the international liability regime.

¹⁰ See Farnsworth, *supra* note 2, at 122.

¹¹ R. David and J.E.C. Brierley, *supra* note 1, at 24.

jurisdiction where the common law system originated from and because it played a direct role in the drafting of the Warsaw Convention 1929. The United States was also selected because most of the important case laws which had a great impact on the enhancement of private international air law and are available to the public, also come from this country.

2.2.1 General Principles of Liability

The author begins with the common principles of this system and then investigates the legal systems of England and the United States, and shows the differences in the liability principles of these two countries.

2.2.1.1 Tort

(i) Negligence

In the traditional common law of tort, aviation liability depends on the legal concept of negligence, which is more than mere carelessness and includes the idea of a breach of duty. Negligence is the result of doing something, but on occasions, it can be the failure to act at all.¹² Literally, it means the absence of care, neglect, or inattention. The term ‘negligence’ is used in this general sense to describe careless conduct in all manners of different contexts throughout the law of tort.¹³ It is a conduct which fails to conform to a required standard of care.¹⁴

The concept developed under English law. Although English common law had long imposed liability for the wrongful acts of others, negligence did not emerge as an independent cause of action until the eighteenth century.¹⁵ Another important concept which emerged at that time

¹² D. Owles and H. Cockerel, *Liability for Defective Services* (1985), 2.

¹³ J. Cooke and D. Oughton, *The Common Law of Obligations* (2005), 221-5.

¹⁴ P. Birks, *English Private Law II* (2000), 415.

¹⁵ Ibid.

was legal liability for a failure to act. Originally, liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service. Gradually, the law began to imply a promise to exercise care or skill in the performance of certain services.¹⁶

The concept of negligence was exported to the United States when each State adopted the common law of Great Britain.¹⁷ Although there have been important developments in negligence law, the basic concepts have remained the same since the nineteenth century. Negligence is by far the widest-ranging tort today, encompassing virtually all unintentional, wrongful conduct that injures others. At the heart of negligence law is the 'reasonable person', which provides the standard by which a person's conduct is judged.¹⁸

In the United States, negligence emerged out of the action on the case around 1825 and has since been recognized as a separate basis of tort liability, independent of other causes of action.¹⁹ Prior to that time, the term had been used in a very general sense to describe the breach of any legal obligation.²⁰

One of the earliest appearances of what is known as the tort of negligence was in the liability of those who professed to be competent in certain 'public' callings. A carrier was regarded as holding himself out to the public as one in whom confidence might be reposed, and hence as assuming an obligation to give proper service-the breach of which by any negligent conduct, he might be liable for.²¹ Regarding acts or omissions which may constitute negligence, it must be remembered that negligence or non negligence is a question of fact to be decided in

¹⁶ Ibid.

¹⁷ Except for Louisiana which adopted the civil law of France and Spain.

¹⁸ V.E. Schwartz, K. Kelly and D.F. Partlett, *Prosser, Wade and Schwartz's Torts: Cases And Materials* (2005), 131.

¹⁹ Ibid.

²⁰ Ibid.

²¹ See H.G. Beale (eds.), *Chitty on Contracts Vol. II* (2004), at 551.

relation to all circumstances of each particular case, and advances in aviation make some of the earlier cases an unreliable guide, especially in cases involving modern airlines.

In negligence, the four elements that an injured claimant must prove are duty, breach, causation, and damage.

1. Duty of Care

The defendant must have an obligation to safeguard the claimant. The duty of care is the main conceptual device for expressing liability for negligence.²² The traditional approach recognizes and formulates duties for specific situations, each exhibiting its own particular characteristics. A more modern approach seeks to identify a general principle applicable to all circumstances.²³

2. Breach of the Duty

The defendant must have breached his duty to be considered liable. Where the duty is in place, its content is to take care to prevent the harm. The requisite care has to be measured by a standard, and that standard is an objective one.²⁴ It is negligent not to take the care expected by the community for the activity in question. The personification of community standards has long been the 'reasonable man'.²⁵

3. Causation

Causation is an element of negligence.²⁶ In the field of negligence, there must be a causal link between the negligent act and the harm or damage. Negligence is only actionable if it causes

²² J.H. Baker, *Introduction to English Legal History* (1990), 466-7.

²³ See Birks, *supra* note 14, at 416.

²⁴ *Ibid.*

²⁵ The court defined it as 'such reasonable caution as a prudent man would have exercised under such circumstances'. Another early formulation of the standard provided that 'negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do'. *Blyth v. Birmingham Waterworks*, 156 Eng Rep. 1047 (EX. 1856).

²⁶ See Birks, *supra* note 14, at 428.

damage.²⁷ In order to prove causation, the breached duty must be the factual and legal causes of the harm. In other words, the claimant must not only be able to prove that the action of the defendant has caused damage, but that the action was a legally sufficient cause to hold the defendant liable. To establish factual causation, it is not necessary to show that the defendant was the sole or even the major cause of the damage as long as it is proved that but-for the defendant's negligence, the damage would not have happened.²⁸ Once a party has factually proven that the actions of the other party have caused his or her injuries, the question becomes one of legal causation.²⁹ One of the key factors influencing legal causation is the remoteness of the person's harm from the negligence of the other. A person's negligence is too remote or not a 'proximate cause' of another's injury or damage if it is of a type which is not foreseeable.³⁰

4. Damage

When duty, breach, and causation have been established in a tort action, the claimant may recover for the pecuniary and non-pecuniary losses sustained. The measure of damages is determined by the nature of the tort committed and the type of injury suffered. Damages for tortious acts generally fall into one of four categories: damages for injury to person, damages for injury to personal property, damages for injury to real property,³¹ and punitive damages.³² Damages place a monetary value on the harm done, following the principle of restoration to

²⁷ Ibid.

²⁸ *Barnett v. Chelsea and Kensington Hospital Management Committee* [196] 1 Q.B. 428.

²⁹ Ibid.

³⁰ *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound) (No.1)* [1961] A.C. 388.

³¹ A. Best and D.W. Barnes, *Basic Tort Law: Cases, Statutes and Problems* (2003), 127.

³² Punitive damages can be awarded against a defendant whose conduct has been particularly outrageous. Punitive damages go beyond the general common law principle of the compensatory nature of damages and become a punishment. Ibid.

the original condition.³³ Thus, for most purposes connected to the quantification of damage, the degree of fault in breach of the duty of care is irrelevant except in punitive damages.³⁴ Once the breach of the duty is established, the only requirement is to compensate the victim. The court's award of damages aims to bring the claimant back to his pre-tort condition.

(ii) *Res Ipsa Loquitur*

Normally in a negligence case, the burden of proving all the elements of the tort is on the claimant.³⁵ However, under a concept known as *res ipsa loquitur*,³⁶ if the cause of harm was under the defendant's control, and the harm would not normally have occurred without negligence or intention, the claimant does not have to prove negligence. It is the defendant who has to disprove it.³⁷

The following conditions must be satisfied in order to apply this general rule:

1. The instrument or circumstances causing the damage must have been under the exclusive control of the defendants or his servants;
2. The circumstances must be such that the damage does not ordinarily occur in the absence of negligence; and
3. The real cause of damage must be unknown.³⁸

The defendant will turn away the application of the maxim if he explains the accident in a way that is consistent with an absence of negligence on his part, and reasonably distinct from

³³ S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law* (2003), 355.

³⁴ In *BMW of North America, Inc. v. Gore* (1996), the Court held that punitive damages must be reasonable, as determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury, the ratio of punitive damages to compensatory damages, and any comparable criminal or civil penalties applicable to the conduct. See *BMW of North America v. Gore*, 517 U.S. 519, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

³⁵ R. Youngs, *English, French and German Comparative Law* (1998), 243.

³⁶ This means 'the fact speaks for itself'.

³⁷ See Youngs, *supra* note 35, at 243.

³⁸ *Ibid.*

a theoretically possible explanation.³⁹ Therefore, the defendant can avoid liability if he can show that (a) the harm was due to the fault or consent of the claimant; (b) the damage was caused by the act of a stranger (if the defendant can refute the argument that this should have been foreseen and prevented); (c) there was statutory authorization; or (d) the cause was an act of God.⁴⁰

2.2.1.2 Bailment

The law of bailment was developed in the common law long before the law of contract.⁴¹ Bailment is a legal relationship distinct from both contract and tort. It exists whenever one person (the bailee) is voluntarily in possession of goods which belong to another (the bailor).⁴² Common forms of bailment result from carriage of goods, delivery for custody or repair, hire, pledge and loan.⁴³

Bailment involves a delivery of goods from one person (the bailor) to another person (the bailee).⁴⁴ Bailment may stand at the point at which contract, property and tort converge. In its standard form, it represents a conveyance of personal property created by contract and enforceable in tort. Bailment therefore partakes of all three phenomena, and remedies may correspond with remedies available under other forms of action. A bailment may also exist

³⁹ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 249.

⁴⁰ See Youngs, *supra* note 35, at 231.

⁴¹ In Iranian law, there is a notion called *amanat* which displays similarities to bailment. *Amanat* exists whenever one person (*amin*) is voluntarily in possession of goods which belong to another. *Amanat* involves the delivery of a property from one person to another person. The primary duties of *amin* are to take proper care of the property and to refrain from converting it. *Amin* is required to use the care of a reasonably prudent person in similar or identical circumstances. Where *amin* goes beyond the purpose of *Amanat*, he is absolutely liable for damage to or loss of the bailed property although the loss was not due to his negligence. See Chr. 3.4.4.1, *infra*.

⁴² Six forms of bailment are recognized: the custody of goods without reward; the loan of goods; the hire of goods; the pawn or pledge of goods; the carrying of goods or the performance of some other service about them for reward; and the carrying of goods or the performance of some other service about them without reward. N.E. Palmer, *Bailment* (1991), 3.

⁴³ See Birks, *supra* note 14, at 357-8.

⁴⁴ *Ibid.* at 19.

independently of contract but most bailment arises from a contract between the bailor and the bailee.⁴⁵

The primary duties of the bailee in common law jurisdictions were to take proper care of the property bailed and to refrain from converting it.⁴⁶ A bailee is required to use the care of a reasonably prudent person in the same or similar circumstances, i.e. ordinary care, in caring for the property entrusted to him.⁴⁷ Where the bailee goes beyond the purpose of the bailment, he is absolutely liable for damage to or loss of the bailed property although the loss was not due to his negligence.⁴⁸

The bailee must also take reasonable care of the goods and abstain from converting them. He must not deviate from the terms of the bailment, and becomes an insurer of the goods if he does so. Where goods are lost or damaged while in the bailee's possession, the bailee is liable unless he can show that the misadventure occurred independently of his fault.⁴⁹

The parties in a contract of carriage are usually subject to a contract by which the liability of the carrier may be, and normally is, either extended or restricted. However, insofar as there is no agreement to the contrary, bailment is the framework for an ordinary carrier's liability.⁵⁰

The carrier is a bailee; he is liable to the bailor if he fails to deliver the goods intact. The owner of the goods may succeed against the carrier in an action for damages by reason of the loss of, or damage to, the goods, although he cannot allege the existence of a contract of

⁴⁵ Ibid., at 20.

⁴⁶ Ibid., at 44-5.

⁴⁷ G.O. Dycstra and L.G. Dycstra, *The Business Law of Aviation* (1946), 364.

⁴⁸ Conventionally, the measure of diligence to be expected of a bailee is governed primarily by the existence and location of any benefit or reward. Ibid.

⁴⁹ See Birks, *supra* note 14, at 358.

⁵⁰ See Palmer, *supra* note 42, at 19-20.

carriage.⁵¹ Therefore, the principles which govern the relationship between bailor and bailee, govern that between the owners of goods and a carrier who is an ordinary bailee.⁵²

2.2.1.3 Contract

At common law jurisdictions, the rights and obligations of a carrier are defined by contract together with the status of the carrier. A distinction between tort and contract is that tortious liability is negligence –based, whereas contractual liability is strict.⁵³ No negligence or fault need to be proved in order for the victim to obtain judgment. One of the most basic principles of contract law is that a breach of contract imports strict or absolute liability, i.e. the victim is automatically entitled to judgment, though not necessarily to damages. Strict liability in contract means that a breach of contract is not in any sense immoral and does not imply any fault on the part of the party in question.⁵⁴

The common law jurisdictions approve the insertion of contractual conditions for exempting or delimiting liability.⁵⁵ However, courts and legislatures have recently become increasingly concerned with the abuse of bargaining power and the imposition of unfair terms.⁵⁶ Common examples involve the use of the contracts of adhesion, such as tickets, leases and retail sales contracts that are forced upon the weaker party.⁵⁷ In the USA, the Uniform Commercial Code empowers courts to deal with the problem directly by refusing to enforce a contract or term that the court determined to be unreasonable.⁵⁸

⁵¹ O.K. Freund, *The Law of Carriage by Inland Transport* (1965), 194.

⁵² *Ibid.*, at 195.

⁵³ See Cooke and Oughton, *supra* note 13, at 219.

⁵⁴ M. Arnheim, *Principles of the Common Law* (2004), 251.

⁵⁵ See Beale, *supra* note 21, at 4.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ See Farnsworth, *supra* note 2, at 124.

Historically, contract actions developed considerably later than tort liability.⁵⁹ It remained possible to maintain the old tort action on a case.⁶⁰ An action for personal injuries sustained by a passenger because of the negligence of the carrier would be barred by the statute of limitation if the action were pursued in tort, but not so if it were pursued in contract. A claimant, who elects to treat his action as one for breach of contract, would not be barred by the tort statute.⁶¹

2.2.1.4 Contract of Carriage

In common law jurisdictions, the rights and obligations of a carrier are defined by contract and the status of the carrier.⁶² Depending on whether he is a common carrier or a private carrier, he enjoys different rights and obligations. A carrier is a person who transports goods or passengers or both, from one place to another in a manner agreed with the passengers or the owners of the goods to be carried.⁶³

(i) Common Carrier

For centuries, the common carrier occupied a special position in common law jurisdictions.⁶⁴ A common carrier is a person who publicly professes, orally or by conduct, to undertake for reward to all such persons indiscriminately, who desire to employ him, the transportation of

⁵⁹ Ibid.

⁶⁰ A good illustration is *Louisville & Nashville R Co. v. Spinks*, 104 Ga 692, 30 se. 698 (1898). See Schwartz, Kelly, and Partlett, *supra* note 18, at 404.

⁶¹ Ibid, at 405.

⁶² Ibid.

⁶³ See Beale, *supra* note 21, at 539-543.

⁶⁴ In English law, however, the common carrier is practically extinct today. The modern law of carriage is not so much enshrined in reported cases as exemplified by the contractual terms by which carriers define the conditions on which they are prepared to carry goods, passengers and baggage. Any account of the modern law must necessarily take account of these contractual terms, many of which have become standard forms of contract. Some of these terms have, of course, themselves been the subject of judicial interpretation. Ibid.

goods and passengers, provided that he has room.⁶⁵ A common carrier therefore chooses to be a common carrier for such times, places and goods as he considers appropriate, provided that he offers carriage in accordance with the calling of the common carrier and is thereby prepared to accept the burden of that calling.⁶⁶ However, as discussed below, the scope of his duty of care is different in England and the United States.⁶⁷

1. Common Carrier of Goods

The liability of a common carrier of goods is distinguishable in two ways: a) liability for loss by negligence which is the liability of a bailee; and b) liability for losses by accident or other unavoidable occurrences, which is the liability of an insurer for goods.⁶⁸ Therefore, he is liable for all losses of or damage to, those goods while they are in the course of transit. There is consequently a rule which makes the common carrier an insurer for the safe carriage of goods under the common law.⁶⁹

In fact, the law draws a distinction between strict liability and liability for negligence. Where a carrier is liable to compensate the owner of goods or the consignor or consignee for loss irrespective of the carrier's conduct, and whether or not he was at fault, he is said to be strictly liable. He is not liable if such loss or damage is caused by one of the few exceptions recognized by the common law jurisdictions. These exceptions are acts of God, acts of the Queen's or public enemies, inherent vices, and consignor's fault.⁷⁰

However, the common carrier is not exempted from liability merely by proving that the loss or damage was due to an excepted danger. He must also show that no negligence on his part

⁶⁵ Ibid.

⁶⁶ Ibid., at 544.

⁶⁷ See Chr. 2.2.4, *infra*.

⁶⁸ L.H. Cha, 'The Air Carrier's Liability to Passengers in Anglo-American Law', (1936) 7 *Air Law Review* 146, at 154.

⁶⁹ See Freund, *supra* note 51, at 199.

⁷⁰ Ibid.

contributed thereto. It may also be noted that even if the damage has been caused by an excepted peril, he will be liable in respect of subsequent aggravation of such damage by his negligence.⁷¹

2. Common Carrier of Passengers

The common carrier of passengers is not subject to the strict form of liability applicable to the common carrier of goods. At common law jurisdictions, the carrier's liability for the safety of his passengers is not strict but is based on negligence. His duty is to see to it that reasonable care is taken for the safety of his passengers. A carrier's obligation to his passengers, whether it is expressed in contract or in tort, is to provide a carriage that is as free from defects as the exercise of all reasonable care can make it.⁷²

(ii) Private Carrier

Any carrier who is not a common carrier is a private carrier.⁷³ A private carrier is a person who undertakes to perform carriage in a particular instance only, not holding himself out to the public ready to act for all who desire his services. He incurs only the responsibility of an ordinary bailee for hire, namely that of ordinary diligence.⁷⁴ The private carrier is liable if he has wilfully damaged or lost the goods or if he has been negligent.⁷⁵

The private carrier is under no obligation to accept any goods for carriage, but once he has done so, usually for reward, his obligations are regulated by the contract, which governs the carriage, or by the bailment.⁷⁶ His duty is to take reasonable care in a way that if the goods are lost or damaged, he can exonerate himself by proving that he and his servants took

⁷¹ See Beale, *supra* note 21, at 551.

⁷² *Ibid.*, at 571.

⁷³ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 299-300.

⁷⁴ See Cha, *supra* note 68, at 154.

⁷⁵ See Beale, *supra* note 21, at 551.

⁷⁶ *Ibid.*

reasonable care.⁷⁷ Typically, the private carrier will operate under the terms of a contract, subject to applicable legislation.⁷⁸

2.2.2 Liability in English Law

2.2.2.1 Tort Liability

In English law, tort law is a collection of causes of action, each made up of three main components: an interest protected by the law, conduct affecting that interest which the law sanctioned, and a remedy by which the interest is protected and the conduct sanctioned.⁷⁹ At the centre of tort law is the protection of persons from physical injury and to a limited extent, from mental injury. Liability in modern English law is generally based on fault, which is the general standard of liability in tort. Strict liability in modern tort law is imposed in certain situations.⁸⁰

Tortious conduct may be an act, a statement, or an omission. Liability for acts which cause damage to others is more general than liability for the failure to take steps to prevent harm to others. Liability for the failure to act is imposed only in particular circumstances or where there is a special relationship between the parties.⁸¹

2.2.2.2 Contractual Liability

The rights and liabilities between consignors and consignees and the carriers of goods are based on a contract of carriage, which does not necessarily mean that there is an express contract.⁸² The mere fact that in the ordinary course of his business a carrier accepts goods

⁷⁷ Ibid., at 545.

⁷⁸ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 299-300.

⁷⁹ P. Cane, *The Anatomy of Tort Law* (1998), Chr. 2.

⁸⁰ See Birks, *supra* note 14, at 409.

⁸¹ Ibid.

⁸² Ibid.

for carriage and delivery implies the making of a contract of carriage.⁸³ The carrier is liable not only to carry the goods, but to carry them safely and to deliver them intact to the goods' owner or his agent.⁸⁴ It is still open to the owner of the goods to rely on his right as a bailor against a bailee, and to sue in tort rather than in contract, but normally he will only do this if for one reason or another he cannot rely on the contract, or chooses not to do so.⁸⁵

In English law, the liability of a common carrier of passengers depends on negligence. Where the matter relates to death or personal injury, and the carriage falls outside the statutory instrument, the carrier's liability will depend upon proof of negligence. Where liability is directly based on negligence, the claimant does not necessarily have to prove fault by positive evidence because the circumstances may raise an inference of negligence on the defendant's part.⁸⁶ This is because of the doctrine of *res ipsa loquitur*.⁸⁷ At one time, there was a tendency to regard this as a principle which would, upon the conditions being fulfilled, lead to a formal reversal of the burden of proof. Nowadays, however, the general view is that *res ipsa loquitur* is no more than a way of saying that the facts that have been shown by the claimant amount to a *prima facie* case that may be strong or it may be weak and there is no formal reversal of the burden of proof.⁸⁸

Under the English legal system, a common carrier can avoid the burden of a common carrier's liability, i.e. reject the status of a common carrier, by exhibiting a notice or by otherwise reserving the right to accept or reject offers within the carrier's discretion. The carrier, whether serving in a common or private capacity, can deny all liability unless this is expressly prohibited by law. In this jurisdiction, the use of contractual terms excludes the

⁸³ Ibid.

⁸⁴ See Freund, *supra* note 51, at 194.

⁸⁵ Ibid., at 209.

⁸⁶ Ibid.

⁸⁷ A.D. McNair, *The Law of the Air* (1964), 76-77.

⁸⁸ Ibid.

liabilities, which normally attach to common carriers. In other words, a major function of the standard-form contract is the exclusion or limitation of liability for the benefit of the dominant party.⁸⁹

The carrier's capacity to impose terms purporting to exclude or restrict his liability for negligence in the case of loss or damage is now restricted in that any contractual terms or notice to that effect have to satisfy the requirement of reasonableness under the Unfair Contract Terms Act 1977.⁹⁰ The carrier may also be subject to obligations implied by other law. The Supply of Goods and Services Act 1982⁹¹ may imply terms⁹² and the Unfair Terms in Consumer Contracts Regulation 1999⁹³ may prevent the use of certain terms.⁹⁴

There is no English case as yet in which an air carrier has been held to be a common carrier. In practice, it seems unlikely that this would be so held in the foreseeable future in view of the conditions of contract under which such carriers normally operate.⁹⁵

2.2.2.3 English Law and International Liability

The effect of international conventions in the United Kingdom is to limit, to a very narrow scope, the applicability of common law principles on carrier's liability.⁹⁶ Air carrier liability in carriage by air is governed by statutory instrument, which is closely based on the rules of international carriage.⁹⁷ However, if there are gaps in the regime, common law usually

⁸⁹ See Beale, *supra* note 21, at 544.

⁹⁰ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 301-2.

⁹¹ This Act requires traders to provide services to a proper standard of workmanship. Furthermore, if a definite completion date or a price has not been fixed, then the work must be completed within a reasonable time and for a reasonable charge. *Ibid.*

⁹² See Beale, *supra* note 21, at 812.

⁹³ *Ibid.*, at 854.

⁹⁴ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 10- 21.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*, at 2.

⁹⁷ The effect of the English legislation on carriage by air is that the relationship between passengers and the carrier is regulated by statute whether or not there is a contract in many cases, and the rules apply equally to protect the servants or agents of the carrier i.e. those governed by the Warsaw-Hague text (Carriage by Air Act

applies. Otherwise common law is distinct from the law governing international carriage. Internal carriers may have the duties of common carriers at common law.⁹⁸

The original version of the Warsaw Convention 1929 was first given effect in the UK by the Carriage by Air Act 1932. Although this Act is now repealed, the Warsaw Convention in its original form (but with minor changes, principally of terminology) remains part of English law by virtue of the schedule⁹⁹ 2 to the Carriage by Air Acts (Application of Provisions) Order 1967.¹⁰⁰ The Hague Protocol 1955 is given effect in English law by the Carriage by Air Act 1961 in Schedule 1. Schedule 1, containing the provisions of the Warsaw Convention as amended at the Hague in 1955 and the Montreal Protocols No. 3 and No. 4 in 1975, substituted with saving for Schedule 1 as originally enacted, containing the provisions of the Warsaw Convention with the amendments made in it by the Hague Protocol, by Carriage by Air and Road Act 1979.¹⁰¹

The Montreal Additional Protocol No. 1 is given effect in English law by Order in Council.¹⁰² The UK ratified the Protocol No. 1 in July 1984. The Carriage by Air and Road 1979 enabled the UK to ratify the Montreal Additional Protocol No. 2 and this instrument of ratification was deposited on 5 July 1984. The Montreal Convention 1999 is given the force of law in the UK by the Carriage by Air Acts Order 2002 in Schedule 1.¹⁰³

1961, Sch 1) Art 25a; Montreal Protocol 4, Convention 1999 (Carriage by Air Act 1961, Sch 1999/1312), Art 25a; or Montreal Convention 1999 (Carriage by Air Act 1961, Sch 1b 2002/263) and the Unfair Contract Terms Act 1977. *Ibid.*, at 304.

⁹⁸ See Birks, *supra* note 14, at 410.

⁹⁹ In the English Constitutional system, private law conventions are incorporated into national law by an act together with the translated treaty text in a schedule. The translated English treaty texts in the schedules are the ones applied by the local courts. See P.P.C. Haanappel, 'The Right to Sue in Death Cases under the Warsaw Convention', (1981) *Air and Space Law* 66, at 77.

¹⁰⁰ See *Shawcross and Beaumont on Air Law*, *supra* note 3, VII 251-255.

¹⁰¹ <http://www.legislation.gov.uk/>.

¹⁰² An Order in Council is a type of legislation in the UK. This legislation is formally made in the name of the Queen by the Privy Council (*Queen-in-Council*). <http://www.cabinetoffice.gov.uk/>.

¹⁰³ See *Shawcross and Beaumont on Air Law*, *supra* note 3, VII 122.

The problem which existed in all common law jurisdictions in wrongful death cases, received a statutory solution in England. In the civil court, the death of a human being could not be complained of as an injury. However, jurisprudence changed in 1846 and England adopted the Fatal Accidents Act, known generally as Lord Campbell's Act. In this law, no action will lie in tort regarding the death of a passenger but action will lie under various statutory provisions.¹⁰⁴

On the basis of the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, a claim based on negligence may be brought against a carrier by persons who were not directly involved in an aircraft crash, but who suffered emotional or nervous trauma as a result of hearing of the involvement of friends or relatives.¹⁰⁵ Damages recoverable under the 1976 Act generally include pecuniary losses and funeral expenses. The provisions of the Law Reform Act give certain additional rights of action to the estate of the deceased. According to this Act, relatives of the deceased could take action for the wrongful death.¹⁰⁶

Regarding transportation by air, the existence of a cause of action is a pressing issue only in wrongful death cases because the common law does not provide a cause of action for them. However, in all the other cases which can arise within the scope of the applicable convention, there is always a cause of action, be it based on tort, contract, or bailment. Most of the difficulties in relation to the cause of action in wrongful death have been removed by the

¹⁰⁴ In the case of *Baker v. Bolton* in 1808, Lord Ellenborough appears to have had neither logic nor history on his side, except for some dubious doctrine merging a tort into a felony. His view prevailed and except as modified by statute, it remains the law in England and United States today. See A.F. Lowenfeld, *Aviation Law* (1981), 7-9.

¹⁰⁵ See *Shawcross and Beaumont on Air Law*, *supra* note 3, VII 23.

¹⁰⁶ *Ibid.*

legislation, which implements the Warsaw Convention 1929 (Carriage by Air Act of 1932 and Carriage by Air Act of 1961).¹⁰⁷

The Carriage by Air Act of 1961 applies to international air carriage in the spirit of the Warsaw Convention 1929. In 1967, the Act, including its provisions on the right to sue in death cases, became enforced for almost all forms of carriage by air, be they international or domestic, and governed by the Warsaw Convention 1929 or not.¹⁰⁸ Where a passenger suffers injury as a result of an accident during the performance of the carriage, he can recover damages for his injuries and for losses consequent thereon from the carrier, if the accident is due to a cause for which the latter is liable to the passenger.¹⁰⁹

2.2.3 Liability in the United States

2.2.3.1 Tort Liability

Tort law is chiefly state law rather than federal law.¹¹⁰ Although it is predominantly case law rather than statute law, a variety of statutes deal with special problems.¹¹¹ Common examples include the Wrongful Death Acts and survival statutes, which govern rights upon the death of the injured party.¹¹² Most torts can be divided into three broad categories depending on whether liability is based on intent; negligence; or if it is absolute or strict without requiring either intent or negligence. Economically, however, negligence is a more significant basis for tort liability than intent. Negligence, under American tort law, is the primary criterion for liability in tort. It is established when the defendant acts with the intention of causing harm or

¹⁰⁷ This provision reversed vis-à-vis the 1932 Act. Previously, it was the liability under the Warsaw Convention which was substituted for any other form of liability. The new provision extends the scope of the Fatal Accident Act 1846. *Ibid.*

¹⁰⁸ English courts practically always apply their own law to the right to sue in death cases arising out of aviation accidents. See Haanappel, *supra* note 99, at 72.

¹⁰⁹ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 380.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² See Farnsworth, *supra* note 2, at 125-6.

when his conduct is negligent. There is no fixed limitation on recoverable damages for passenger death or bodily injury in the United States.¹¹³

In aviation accident cases, claims arising from injuries suffered have always been considered under the law of torts. The basis of liability was negligence on the part of the defendant,¹¹⁴ which in an air carriage context is usually the air carrier. In the United States, the law of negligence governs the liability of the air carrier for passenger death or bodily injury proximately causing the accident in domestic flights. The claimant must prove the negligence of the air carrier.

The jury, who is almost universally employed in tort actions in this jurisdiction, plays a central role in negligence cases.¹¹⁵ They will be instructed to decide whether the defendant's conduct met the standard of care expected of a reasonable person under similar circumstances.¹¹⁶ But since the jury's verdict is, within wide limits, conclusive on this issue, there is little to prevent them from imposing nearly absolute liability, regardless of negligence, upon a defendant who, because of his ability to pay or to insure, can in their eyes best bear the loss.¹¹⁷ The jury not only determines liability but also fixes damages.¹¹⁸

However, in order to recover for personal injury or death, the claimant must establish that: a) the defendant was negligent; b) such negligence caused the accident or injury; c) the claimant did not by his negligence contribute to the accident or injury; and d) the claimant (i) suffered an economic loss as a result of the accident or injury, or (ii) sustained other compensable loss,

¹¹³ G. Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States from Warsaw 1929 to Montreal 1999* (2010) 21.

¹¹⁴ See Dycstra *supra* note 47, at 235.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ See Farnsworth, *supra* note 2, at 125-126.

such as pain and suffering or grief.¹¹⁹ Nevertheless, the particular formulation or application of the rules, on matters of proof, on limitation or computation of damages, and on conflicts of laws-vary from state to state.¹²⁰

2.2.3.2 Contractual Liability

The Federal Aviation Administration (FAA) defines a ‘Common Carrier’ as one which holds itself out to a definable segment of the public as willing to transport persons and property for compensation, indiscriminately.¹²¹ The test is an objective one, relying on what the carrier actually does rather than the label it embraces or the purposes, which motivate such activity. In the deregulated environment, the carrier need not maintain tariffs in order to be considered a common carrier. Nor does the maintenance of separately negotiated contracts or an occasional refusal to transport make it a private carrier. What is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public, which it serves.¹²²

In the United States, both common carriers and private carriers must exercise ordinary care but what constitutes ordinary care for a common carrier is a higher degree of care than that required of a private carrier. The common carrier is required to exercise the highest degree of care consistent with the practical operation of its facilities in the transportation of person and property, while a private carrier is required to exercise only care.¹²³

¹¹⁹ Ibid.

¹²⁰ Compensation for aviation accidents could, for instance, have been governed by federal law, as are virtually all other aspects of commercial aviation in the United States. Or aviation accidents might have been treated under the law of contracts. Or a uniform body of transportation law might have been developed which distinguished railroads, buses, and airplanes from private motorists. See Lowenfeld, *supra* note 104, Chrs. 7-9.

¹²¹ FAA Advisory Circular No. 120-112 A (Apr. 24, 1986), P.S. Dempsey and L.E. Gesell, *Air Transportation (Foundation for the 21st Century)* (1997), 723-4.

¹²² Ibid.

¹²³ See Dycstra, *supra* note 47, at 300.

Common carriers and their crews must comply with the strict requirements of parts 121 and 135 of the Federal Aviation Regulations, while private carriers must comply with less strict requirements of part 91 of the Federal Aviation Regulations.¹²⁴ The policy behind this distinction is based on the right of the general public to be confident that the airlines which solicit their business operate under the highest standards of safety.¹²⁵

While the cause of an injury is rarely disputed in air accident cases, the cause of an accident is often not certain, and in many instances it is considerably difficult for a claimant to prove. To alleviate this difficulty, the doctrine of *res ipsa loquitur* is frequently applied to aircraft accidents where the cause of the crash is not readily apparent but the information necessary to explain the accident is mostly in the control of the defendant, i.e. the air carrier.¹²⁶

A carrier has always had the right to insert reasonable conditions, stipulations and restrictions in the ticket,¹²⁷ as long as they are legal and not prohibited by public policy. It is a well-settled rule that a common carrier cannot force a passenger to release it from its legal liability for its own negligence or that of its servants. Such a provision is void because it is against public policy. The carrier can neither limit the amount of its liability for negligence,¹²⁸ nor state on the ticket that it is not a common carrier.¹²⁹

Airlines, like in other modes of transport, may be common carriers as well as private carriers.¹³⁰ They may carry either passengers or goods, or both, and their responsibilities

¹²⁴ Ibid.

¹²⁵ *Woolsey v. NTSB*, 993f. 2d 516(5th Cir. 1993).

¹²⁶ L.S. Kreindler, *Aviation Accident Law* (2001), 53-71.

¹²⁷ The ticket is the evidence of the contract of carriage between the carrier and the passenger. It is regarded as a receipt representing that the person has paid the agreed price for his transportation to a designated place. See Dycstra, *supra* note 47, at 306.

¹²⁸ See Cha, *supra* note 68, at 154.

¹²⁹ See Goedhuis, *National Air Legislation and the Warsaw Convention* (1937), 104.

¹³⁰ See Dycstra, *supra* note 47, at 102.

towards the interests of persons and property are the same as those of other carriers.¹³¹ In relation to goods, a common carrier is usually permitted to contract for a limitation of his liability to a reasonable value, as agreed to by the consignor.¹³² This value has the dual purpose of serving as a base rate to fix the charges due to the carrier and of providing the measure for the carrier's obligation in the case of loss of or damage to the goods.¹³³

2.2.3.3 The United States and International Liability

In the United States, only international civil aviation was made subject to a special nationwide compensation regime because it was introduced by an international treaty.¹³⁴ In the beginning, the U.S. Departments of State and Commerce were interested in the growth of the aviation industry during a depressed economy era. The benefits of limited liability and the uniformity of documentation and litigation procedures were allegedly the insurability of aviation risks and the attraction of capital investment. Accordingly the senate acted promptly, without debate, and gave its consent in an unrecorded voice vote on June 15, 1934; and adhered to the Warsaw Convention 1929 on October 26, 1934.¹³⁵ This became the last favorable action on the Warsaw system for 64 years until September 28, 1998, when it ratified the Montreal Additional Protocol No. 4, on November 5, 1998.

¹³¹ A common carrier usually solicits the patronage of the traveling public by advertising its schedule of routes with times of departure and arrival, its fare, baggage restrictions and the like. No one doubts that an airline company engaged in passenger or cargo service on a regular schedule following a defined route is a common carrier. But this procedure is neither essential nor a prerequisite to render it a common carrier. It is sufficient if the carrier takes anyone, anywhere, at any time, so long as the test already stated has been complied with, i.e. holding out as serving all without discrimination. Ibid.

¹³² Ibid.

¹³³ G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* (1977), 53.

¹³⁴ See Lowenfeld, *supra* note 104, Chr. 7.

¹³⁵ Paul B. Larsen, Joseph C. Sweeney, John E. Gillic, *Aviation Law, Cases, Law and Related Sources*, Transnational Publishers, at 269 (2006).

The United States is a party to the Warsaw Convention 1929, as amended by the 1955 Hague Protocol but only, as of December 14, 2003,¹³⁶ 48 years after the fact (sic) and as further amended by the 1975 Montreal Additional Protocol No. 4, as of March 4, 1999.¹³⁷ The United States has ratified and given effect to the Montreal Convention 1999. The U.S. Senate gave its advice and consent to ratification on August 1, 2003, thus becoming the 30th nation to ratify the Convention. The United States government is not a party to other related instruments (the 1961 Guadalajara Supplementary Convention, the 1971 Guatemala Protocol and the 1975 Montreal Additional Protocols No 1, 2 and 3).¹³⁸

1. Due to the complex structure of the political and judicial jurisdictions which is specific to the United States, the issue of the *cause of action* becomes relevant in a number of situations. On the basis of the constitutional system of the United States, courts refer to the language of the original text of private international law instruments.¹³⁹ In other words, if the United States becomes a party to an international treaty, that treaty directly becomes the law of the land without any enacting legislation. Therefore, when wrongful death cases arose, the natural reaction was to ascertain whether the treaty could provide the necessary basis on which an action could be brought.¹⁴⁰

¹³⁶ The United States did not formally ratify the 1955 Hague Protocol until July, 2003. In the 1950s and 1960s, the United States refused to accept the Hague Protocol, because the United States Senate believed that the limitation of liability in the Warsaw Convention 1929 and the Hague Protocol 1955 were far too low. Hence, the Civil Aeronautics Board of the United States approved the Inter-carrier Agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol in May 13, 1966 (the 1966 Montreal Inter-carrier Agreement). This Agreement applies only to international transportation by air subject to the provisions of the Warsaw Convention and which involves a point in the United States, either as a point of origin, point of destination or agreed stopping place. According to the carrier's agreement filed with the Civil Aeronautics Board, passengers on participating carriers going to, from, or with an agreed stopover in the United States, became subject to increased limitation of liability. In addition, the 1966 Montreal Inter-carrier Agreement provides strict liability instead of presumption of liability. See Chr. 4.1.2 for details and references, *infra*.

¹³⁷ See Tompkins, *supra* note 113, at 5-7.

¹³⁸ Ibid.

¹³⁹ See Haanappel, *supra* note 99, at 77.

¹⁴⁰ See Lowenfeld, *supra* note 104, Chr. 7.

2. *Wrongful death statutes* have taken a variety of forms in the United States.¹⁴¹ In many States, the statutes had limitations on the amount recoverable. However, in others there were restrictions on who could apply in a wrongful death action, i.e. certain dependents but not others, or only dependents but not relatives who received no support (or whom the deceased was not obligated to support). Some states did not enact wrongful death statutes that way, but instead adopted ‘survival statutes’ planned to preserve the cause of action vested in the victim at the moment of the death.¹⁴² Some jurisdictions have both survival and wrongful death statutes.¹⁴³ However, in all jurisdictions, courts and legislatures have faced the problem of how an equation can be drawn putting a person’s life on one side and a sum of money on the other.¹⁴⁴ And regarding the right to sue in fatal accidents, each state applies its own relative law.¹⁴⁵

3. The *independent cause of action* for passenger death and bodily injury created by the Warsaw Convention 1929 began to be recognized and accepted by United States courts in 1978. Earlier in the case of *Komlos v. Compagnie Nationale Air France*, the court decided that the Warsaw Convention 1929 did not create a right of action for wrongful death¹⁴⁶ and in many subsequent cases that had been endorsed.¹⁴⁷ So the answer to the question of whether the Warsaw Convention 1929 creates a cause of action was negative. The courts had to

¹⁴¹ After 1846 when England adopted the Fatal Accidents Act (Lord Campbell’s Act), every state in the United States adopted some form of legislative reversal of the common law rule. Congress also adopted the Death on the High Seas Act providing a remedy in admiralty for death resulting from wrongful act on the high seas. Ibid.

¹⁴² In a survival act, the actions of the deceased’s dependants are not personal, but are in their capacity as heirs to the estate of the deceased. See Haanappel, *supra* note 99, at 77.

¹⁴³ The theory of recovery under a wrongful death statute; based on a loss to survivors statute, is to compensate the beneficiaries for the loss of the economic benefits they would have expected to receive from the deceased. See Lowenfeld, *supra* note 104, Chr.7.

¹⁴⁴ See Kreindler, *supra* note 126, at 13-9.

¹⁴⁵ See Haanappel, *supra* note 99, at 76.

¹⁴⁶ See *Komlos v. Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y.1952), and *Spencer v. Northwest Orient Airlines, Inc.*, 201 F.Supp. 504 (S.D.N.Y.1962).

¹⁴⁷ See *Spencer v. Northwest Orient Airlines, Inc.*, 201 F.Supp. 504 (S.D.N.Y.1962), and *Husserl v. Swiss Air Transport Co.*, 388 F.Supp. 1238, 1249 (SDNY 1975).

examine the Convention itself to see whether it created the cause of action without which no action for wrongful death was to be allowed. It was important to find which law would determine who could bring the suit, which had a right or interest in the suit, and what damages could be recovered. Therefore this procedure accompanies conflict of laws and jurisdiction problems and the applicability of the law of Death on the High Seas Act (DOHSA) to aviation cases.

In *Benjamins v. British European Airways*, the Federal Appellate Court was the first Federal Appellate Court that held that the Warsaw Convention 1929 creates a cause of action.¹⁴⁸ In 1996, in *Air France v. Saks*, the Supreme Court recognized a cause of action arising from the Convention.¹⁴⁹ Finally, the Supreme Court held in *El Al Israel Airlines Ltd. v. Tseng* in 1999 that where the Convention creates the cause of action, it is exclusive of all local and national laws.¹⁵⁰ The court made clear that a choice of law analysis must be made by the court in which the case is filed to determine who has the right to bring the action and what damages are recoverable, all in accordance with Article 24(2) of the Convention.¹⁵¹

4. The Supreme Court in *Zicherman* restricted recoverable damages to pecuniary losses only.¹⁵² In the light of *Zicherman*, non-pecuniary damages are not recoverable where a passenger death occurs on the high seas within the meaning of the United States Death on the High Sea Act, or during the course of international transportation by air, within the meaning of the Warsaw Convention 1929.¹⁵³ The Montreal Convention 1999 preserves the interpretation made by the court in the *Zicherman* case.¹⁵⁴ It expressly excludes the recovery

¹⁴⁸ *Benjamins v. British European Airways* 572 F. 2d 913 (2d Cir. 1978).

¹⁴⁹ *Air France v. Saks*, 470 U.S. 392 (1985).

¹⁵⁰ *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155 (1999).

¹⁵¹ See Tompkins, *supra* note 113, at 133-134.

¹⁵² *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996).

¹⁵³ See Tompkins, *supra* note 113, at 133-134.

¹⁵⁴ *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996).

of any punitive, exemplary "or any *other* non-compensatory damages" in any passenger, baggage or cargo action for damages to which this Convention is applicable.¹⁵⁵

2.2.4 American Law and English Law: A Comparative Analysis

States that follow the common law share the same general principles of liability. However, each State may deviate from these principles in accordance with its pertinent circumstances. This accounts for a number of differences between the duties and obligations of a common carrier in English law and the law of the United States. These include the following:

1. In English law, the passenger may claim damages for breach of contract or for negligence; but he cannot claim both. In English law, it makes no difference which of these alternative legal routes he chooses to take.¹⁵⁶ However, in the United States, it is possible to maintain an action both in contract and tort.¹⁵⁷

This being the case, a number of questions may arise as to which different rules of law are applicable to the two actions. For example, a particular court may have jurisdiction over one type of action but not the other. There is also the issue of the remedies available as well as which statutes of limitations may apply.¹⁵⁸ Likewise, different rules on damages may prevail, especially in regard to punitive damages or for emotional harm. Defences such as infancy or the statute of frauds may also be set up against one action and not the other.¹⁵⁹

In the United States, the passenger may claim damages for breach of contract or for negligence. In the United States, two different lines are pursued in such situations. One is to permit the claimant to choose his course of action and to dispose of the particular question

¹⁵⁵ According to Professor Haanappel, the problem lies precisely in the word '*other*'. This leaves according to him, open the possibility to consider pain and suffering, loss of company and the like as pecuniary damage. See Art.29 of the Montreal Convention 1999.

¹⁵⁶ See Freund, *supra* note 51, at 450.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

accordingly. Another one is not to permit the claimant this latitude. Rather, the court will determine the gist of the action, which is to say the essential facts on which the claimant's claim rests.¹⁶⁰

2. The law of the United States draws distinctions that are not found in English law between the degrees of care required of common, private and gratuitous carriers. The common law rule of imposing a higher duty of care upon a common carrier is of an ancient origin.¹⁶¹ It found wide application against railroads in the 19th century.¹⁶² Common carriers have to hold the strictest responsibility of care, vigilance and skill, on behalf of themselves and all persons employed by them, and they are paid accordingly. The rule is based on the expediency of allocating the risk upon those who can best guard against it.¹⁶³

In English law, the carriers without being absolutely liable have a duty to use the greatest amount of care and forethought which are reasonably necessary to secure the safety of the passengers whom they undertake to carry. The failure, on their part or that of their servants who were acting within the scope of their employment, to use such care and forethought would amount to negligence and they would be liable in damages if injury was caused.¹⁶⁴

Whilst the liability of a common carrier of passengers depends on negligence under English law, the law on this point is different in the United States. In most United States jurisdictions, a higher standard of care is required of a common carrier of passengers than of a private carrier. A common carrier of passengers, though not an insurer, is under a duty to use the highest degree of care consistent with the practical operation of the aircraft.¹⁶⁵ Courts have

¹⁶⁰ See Schwartz, Kelly, and Partlett, *supra* note 18, at 406.

¹⁶¹ *Ibid.*, at 132.

¹⁶² See Birks, *supra* note 14, at 416.

¹⁶³ See Dempsey and Gesell, *supra* note 121, at 726.

¹⁶⁴ See Freund, *supra* note 51, at 453.

¹⁶⁵ *Ibid.*, at 8.

held that this duty is higher than that of reasonable care.¹⁶⁶ Common carriers owe the highest strict duty of care, vigilance and skill both on behalf of themselves and that of all persons employed by them. Underlying this is the expediency of throwing the risk upon those who can best guard against it.¹⁶⁷ Common carriers are therefore liable for the slightest negligence which caused injury to their passengers.¹⁶⁸

3. In English law, causation proves a direct link between the defendant's negligence and the claimant's loss and damage. For these purposes, liability in negligence is established when there is a breach of the duty of care owed by the defendant to the claimant that causes loss and damage, and it is reasonable that the defendant should compensate the claimant.¹⁶⁹ In the United States, the breach of duty to act with care, or the failure to act as a reasonable and prudent person would, fall under similar circumstances. For a claimant to be able to recover for damages, this action or failure must be the 'proximate cause' of an injury, and actual loss must occur.

4. In English practice, the use of contractual terms excluding the liabilities which normally attach to common carriers has led to the extinction of the common carrier.¹⁷⁰ Such contractual terms are excluded on public policy grounds in the United States, where the common carrier category is much used in case law and statutory regulation.¹⁷¹ The released value doctrine in the United States' federal common law prevents a common carrier from limiting liability in the carriage of goods to an amount less than the actual loss unless the carrier provides an

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ P.S. Dempsey and L.E. Gessell, *Air Commerce and the Law* (2004), 672.

¹⁶⁹ P. Cane, *Atiyah's Accidents, Compensation and the Law* (1999), Chr. 5; W.V.H. Rogers, *Winfield and Jolowicz on Tort* (2006), 195-231.

¹⁷⁰ See Beale, *supra* note 21, para. 36-010.

¹⁷¹ P.B. Larsen, J.C. Sweeney and J.E. Gillic, *supra* note 135, at 454.

option of paying a higher charge to avoid the limitation.¹⁷² A carrier has nevertheless always been recognized as having the right to insert in the ticket such reasonable conditions, stipulations, and restrictions as it may deem necessary so long as they are legal and not prohibited by public policy. It is a rule that a common carrier cannot compel a passenger to release it from its legal liability for its own negligence or that of its servants. Such a provision would be void as it goes against public policy. It has also been held that the carrier cannot limit the amount of its liability for negligence.¹⁷³

5. In English law, the common carrier may by a special contract restrict his insurer's liability at common law without losing his status as a common carrier. To the extent that the provisions of the contract do not modify them, he is still subject to the liabilities and entitled to the rights of a common carrier. The common carrier may modify the obligations, which rest on him by virtue of his public status via the contract with the consignor or owner of the goods. In such a case, his liability will be determined by his special contract.¹⁷⁴ Owing to the common carrier's heavy liability, they have always tried to balance liability by inserting some conditions in the contract. In England, unlike the United States, no limit has been introduced in this regard.¹⁷⁵

6. English law does not in general enforce gratuitous promises. It enforces bargains rather than agreements.¹⁷⁶ However, the modern usage most readily relies on the language of promise.¹⁷⁷ Further, legislation of the European Union has now had a very considerable effect on English contracts.¹⁷⁸

¹⁷² See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 6.

¹⁷³ *Ibid.*, at 306.

¹⁷⁴ *Ibid.*, at 545.

¹⁷⁵ *Ibid.*

¹⁷⁶ P.S. Atiyah, *Essays on Contract* (1986), 207.

¹⁷⁷ See Beale, *supra* note 21, at 4.

¹⁷⁸ *Ibid.*, at 8.

In the United States, contract law is largely state rather federal law, but it usually differs only in detail from one state to another.¹⁷⁹ Some rules laid down by statute or case law are mandatory and cannot be avoided by the parties, while others are supplementary and depend on agreement.¹⁸⁰ Not all promises are enforceable and several criteria must be met before the law gives a remedy for breach of a promise. The important ones are the requirement of writing and the requirement of consideration. However, most contracts to furnish services are not included and they are enforceable even if there is no writing.¹⁸¹

7. Thus, although England and the United States are both common law States and their legal systems follow the same rules, each has disregarded certain rules and changed them to suit specific circumstances. For instance, they have both disregarded the common law rule on the insertion of exemption conditions by carriers.¹⁸² Regarding carrier's liability towards passengers, the United States accepts the highest strict care in this regard whilst the common law only based it on negligence.¹⁸³ This therefore proves the hypothesis that common law States may in some respect distance themselves from the legal system that they follow because of the conditions of their pertinent State. Now that the common law system had been studied, the civil law jurisdictions in France and Germany will be investigated below.

¹⁷⁹ Ibid.

¹⁸⁰ See Farnsworth, *supra* note 2, at 122.

¹⁸¹ Ibid., at 123.

¹⁸² See Freund, *supra* note 51, at 453.

¹⁸³ *Shawcross and Beaumont on Air Law*, *supra* note 3, at 6.

2.3. Civil Law

The civil law system (Romano-Germanic)¹⁸⁴ refers to the entire system of law that currently applies to most Western European countries, Latin America, countries of the Near East, large parts of Africa, Indonesia and Japan. It is derived from ancient Roman law, and originated in Europe on the basis of the Roman *jus civile*.¹⁸⁵

In civil law jurisdictions, the central source of private law is a code or a series of codes. A code is an authoritative, comprehensive and systematic collection of general clauses and legal principles, divided into books or parts dealing in a logical fashion with the law relating thereto. Therefore, civil law codes are regarded as the primary sources of law to which all other sources are subordinate and they are often the only sources of law on a particular matter.¹⁸⁶

The fundamental concept in all civil law countries is obligation. Tort and contract are treated in nearly all civil law countries as an aspect of the law of obligations which itself is a branch of civil law, i.e. that part of law covered by the Civil Code.

Under Napoleon, France adopted five codes: a Civil code, a Commercial code, a Penal code, a code of Civil Procedure and a code of Criminal Procedure. Most civil law countries followed this example though in some cases, two of the codes namely Civil Code and Commercial Code were combined.¹⁸⁷ Also, some countries adopted certain specialized codes concerning subjects such as transportation (for example the Italian Code of Navigation). The

¹⁸⁴ The term Romano-Germanic is selected to acknowledge the joint effort of the universities from both Latin and Germanic countries. The term civil law is used in the English speaking world to indicate that this law derives from Roman Law. See David and Brierley *supra* note 1, at 23.

¹⁸⁵ *Jus civile* began with the Twelve Tables and was developed by juristic interpretation. It means the private law which was applicable to the citizen, and between citizens, within the boundaries of a state in a domestic context. Ibid.

¹⁸⁶ B. Whittaker, *Principles of French Law* (2007), 5.

¹⁸⁷ R.B. Hans (ed.), *Comparative Law: Cases-Text-Materials* (1988), 325.

first civil code of the modern era was the French Civil Code of 1804.¹⁸⁸ With regard to the sources of law, the term ‘Civil liability’ is used in France as a comprehensive term covering contractual and tortious liabilities.

The German Civil Code (BGB)¹⁸⁹ provides the legal basis for all sorts of relationships between private individuals whether their concerned areas of business and professions are contracts of sale, services etc. The BGB is divided into five books, of which book two (241-853) deals with the law of obligations (tort and contract).¹⁹⁰

The author intends to investigate the general principles of liability in France and Germany since they are the founding parents of civil law on the European continent and they had also been influential in discussions on the drafting of private international law instruments of air carrier liability. An analysis of the system will then be provided.

2.3.1 General Principles of Liability

2.3.1.1 Tort

Almost the entire French law of tort (*delict* and *quasi-delict*) rests on five Articles in the Civil Code (Articles 1382-1386). They have been unchanged since 1804, with exceptions, which are not relevant here. Two of these (Articles 1385 and 1386) address special cases of owners of animals and owners of buildings that collapse. Thus, the development of the law of liability has been based on the other three Articles. In contrast to the German Civil Code, which has developed the theory of fault in numerous Articles, the French Civil Code contains only a summary and a vague disposition on the subject.¹⁹¹

¹⁸⁸ Many countries in Europe, Asia and the Middle East (like Iran) have civil codes modeled on the French code, either directly or indirectly. Ibid.

¹⁸⁹ *Bürgerliches Gesetzbuch*

¹⁹⁰ N. Foster and S. Sule, *German Legal System and Laws* (2002), 364-6.

¹⁹¹ See Planiol and Ripert, *supra* note 8, at 464.

Germany and many States of the nineteenth century developed their codes based on the French codes. However, when Germany was unified in 1871, a German Civil Code developed on January 1, 1900. The German Civil Code became the model for some countries in Europe and Asia.¹⁹²

In Germany, the basic rules on contractual as well as tortious liability are mainly contained in the BGB of 1900. The Code clearly distinguishes between contractual and tortious liability. Generally, it is less difficult for claimants to get compensation when they can establish contractual liability.¹⁹³

2.3.1.2 Contract

Contract, in civil law countries, is any agreement giving rise to a legal duty. The notion of a contract also includes agreements aiming at a transfer of rights.¹⁹⁴ Breach of contract includes non-performance of the contract and every case in which the performance, which was in fact rendered, falls short in some way of what was promised in the contract. Civil law jurisdictions, in principle, do not treat every contract as containing a guarantee.¹⁹⁵ If the defendant fails to do what he promised, he is liable in damages for ‘breach of contract’ considering fault.¹⁹⁶

Civil law jurisdictions separate and systematize the various causes of non-performance of a contract; as German law does with its careful distinction between impossibility, delay, and

¹⁹² J. Bell, *French Legal Culture* (2001), at 57.

¹⁹³ See Deakin, Johnston and Markesinis, *supra* note 33, at 6.

¹⁹⁴ R. David, *English Law and French law: A Comparison in Substance* (1976), 128.

¹⁹⁵ *Ibid.*

¹⁹⁶ K. Freund and L. Rudden, *A Source-Book on French Law* (1991), 298-9.

positive breach of contract.¹⁹⁷ It is a matter of importance whether the defendant has entirely failed to perform as promised, or has performed too late, or has performed unsatisfactorily.¹⁹⁸

2.3.2 Liability in French Law

2.3.2.1 Tort Liability

Tort liability in French Law is based on fault.¹⁹⁹ The first law referring to it is the general clause of Article 1382 of the Civil Code, which is supplemented by Article 1383. Article 1382 provides that: ‘All human conduct of any kind which causes harm to another requires the person by whose fault it occurred to redress it’, and Article 1383 adds that: ‘Every one is responsible not only for the damage which he has caused by his own act but also for that which he causes by his negligence or imprudence.’²⁰⁰

Three conditions must be established under Article 1382 for a claim of damage to be successful: a) the victim should have suffered injury (damage), b) the injury must be attributable to the behavior of the defendant (fault), and c) there must be a causal relation between the conduct of the defendant and the injury suffered by the claimant (cause).²⁰¹

In French Law, the presumption of fault is not unknown. In certain determined cases, instead of obliging the injured person to prove the fault committed by the author of the damage, the law establishes a presumption of fault which dispenses with the need to provide such a proof.

¹⁹⁷ See David, *supra* note 194, at 128.

¹⁹⁸ Ibid.

¹⁹⁹ See Planiol and Ripert, *supra* note 8, at 464-6.

²⁰⁰ Ibid.

²⁰¹ The Civil Code offers no definition of ‘faute’ but commentators have produced many different theories, most of which treat ‘faute’ as a failure to observe a precept of behavior which the defendant should have respected. French lawyers draw no clear distinction between unlawfulness and fault. Both are contained within the concept of ‘faute’, but the French courts also award damages under Art.1382 of the Civil Code where the defendant had no intention of causing damage by the exercise of his right but simply acted without the care called for in the circumstance. See David, *supra* note 194, at 128.

These presumptions apply in cases of liability for: a) the act of another person (Art. 1384); b) damage caused by an animal (Art. 1385); and c) damage caused by a building (Art. 1386).²⁰²

Article 1384 which has been the principal focus of recent development in French tort law provides that: ‘A person is liable not only for injury which one causes by one’s own deed, but also for that which is caused by the deed of persons for whom one is responsible, or of things which one has in one’s keeping.’²⁰³

Apart from the standard rules on tortious liability under Article 1384, the French liability system adopted an additional rule which establishes tortious liability for a keeper of a thing ‘*gardien*’ for damage done by the thing.²⁰⁴ This particular liability proceeds from a presumption of the keeper’s fault. Therefore, the claimant does not bear the burden of proving the keeper’s fault. A person who merely uses a thing (e.g. borrowers and tenants) might be liable for the improper use of the thing ‘*garde du comportement*’, whereas its keeper may be liable for any damage arising from the faultiness of the thing ‘*garde de la structure*’.²⁰⁵ A keeper of a thing can only exonerate himself by showing *force majeure* and he may reduce or even exclude his liability by establishing the claimant's own contributory fault.²⁰⁶

It is evident that the legislator intended to cover, at the same time, persons and things under the surveillance and direction of others, who could be a source of danger to third parties.²⁰⁷

²⁰² Since 1896, the *Cour de Cassation* has embraced this proposition. See the decision of the *Remorqueur Marie* in *Cour de Cassation* 18 June 1896:S. 1897.1.17, note A. Esmein; D. 1897.1.433, conclusions Sarrut, note Saleilles in G. Viney, *Tort Law*, in G.A. Bermann and E. Picard, *Introduction to French Law* (2008), at 249.

²⁰³ P. Jouadain, *Les Principes De La Responsabilité Civile, Traduit et annotéen persan par M. Adib*(2007), 124-126.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ See Planiol and Ripert, *supra* note 8, at 515.

²⁰⁷ Ibid.

The basis for this liability is the duty of surveillance.²⁰⁸ One can or cannot infer from the text of Article 1384 the concept of liability without fault, depending on the particular culture in question.²⁰⁹

In a series of decisions between 1919 and 1930, the Supreme Court established the rule that an injured person need not prove fault to recover from someone who had ‘*guard*’ of a thing. The thing need not be a dangerous object but could include ordinary objects like automobiles, which is just what the presumption of liability under Article 1384 means in the context of transportation.²¹⁰

Although liability for things under Article 1384 is strict when the thing is defective, it takes the form of a presumption of liability in other cases.²¹¹ It is presumed that the thing is the cause of injury, unless the defendant can show that there is a *force majeure*.²¹² If the thing was stationary or did not make contact with the claimant or his property, the presumption does not apply and the claimant must prove that the thing caused the damage.²¹³

Article 1384 established a general rule of liability for the acts of things and the jurisprudence based all liability on fault.²¹⁴ The fault of the guardian of a thing is presumed because the existence of damage due to the act of such thing suffices to establish that a fault has been

²⁰⁸ Ibid.

²⁰⁹ The civil liability in Iran is under the influence of the civil law system in addition to the *Shariah*. Among the civil liability regulations, there are provisions adopted from the civil law. The Civil Liability Act of 1960 has adopted liability principles from the civil law. In this Act, liability is based on fault. This Act was annexed to the Civil Code, and in fact, it was a supplement to that Code and put aside the liability principles of that Code. See Chr. 3.3.2.2 for details and references, *infra*.

²¹⁰ See Viney, *supra* note 202, at 249.

²¹¹ The author refers to where the thing of which the defendant was guardian was in motion and impacted on the person injured or property damaged, then proof of these physical circumstances gives rise to a presumption of liability. The typical case is of motor-vehicle which knocks over a pedestrian or crashes into another vehicle. Ibid.

²¹² See Planiol and Ripert, *supra* note 8, at 517.

²¹³ Ibid.

²¹⁴ Ibid.

committed by him who assumed the care of it and was not able to prevent the damage.²¹⁵ However, regarding liability based on the risk theory,²¹⁶ French jurisprudence never admitted it, and some recent doctrine is less favorable to risk theory with compared to presumed fault theory.²¹⁷ The mere idea of causality between things and the occurrence of destruction cannot by itself constitute a general principle of liability. However, a general principle of liability is constituted when the fault has been committed by the guardian of a thing who assumed the care of it and was not able to prevent the damage. There can, in certain cases, be legal liability to make reparation without there being any fault. However, in such cases, the obligation is not based on the idea of strict liability or liability based on the risk theory. In fact, there is no act of the thing. Instead, there is always the act of a person and the thing is the instrument and not the cause of damage.²¹⁸ Therefore, as noted by Haanappel: ‘French doctrine, as usual, is extremely elaborate. They speak of subjective / fault liability, with the possibility of presumptions, by law or by fact.’²¹⁹

2.3.2.2 Contractual Liability

In the French Civil Code, the relevant provision relating to contractual liability is Article 1147. French law places great importance on the definition of the obligations of the contracting parties and makes a distinction between three types of obligations: the obligation to give, the obligation to do, and the obligation to not do. In this system, contractual liability as well as tort liability is based on fault, i.e. the most prominent common factor of contractual liability is the requirement of fault.²²⁰ A claim for damages in a contract will only succeed if

²¹⁵ Ibid., at 524.

²¹⁶ B. Nicholas, *The French Law of Contract* (1992), 224.

²¹⁷ Ibid. For details about liability based on the risk theory, See 2.4.1.3, *infra*.

²¹⁸ See Planiol and Ripert, *supra* note 8, at 467.

²¹⁹ See Unpublished Note from Prof. Dr. P.P.C. Haanappel, ‘What is in a Name’, Appendix 1.

²²⁰ See Planiol and Ripert, *supra* note 8, at 467.

the circumstance which prevented the performance of the contract is ‘imputable’ to the defendant.²²¹

Fault, in modern law, is presumed in contracts. Under contractual law, the creditor will have to prove the fact that the debtor fell short in the performance of the contract. This failure is then considered to be the fault. Such proof, once furnished, establishes the debtor’s fault. The debtor is condemned to pay damages without the creditor having to prove the fault in a special manner. Injury of a passenger because of an accident occurring during carriage must be considered as a fact constituting a presumption of breach of the carrier’s obligation.²²² Therefore, the passenger will not have to prove that the carrier was negligent; but only the contract of carriage, the injury, and the connection between the injury and the carriage.²²³

Contractual liability requires a valid and enforceable contract.²²⁴ It arises in the event of the non-performance of a contractual obligation and if the other contracting party sustains damage.²²⁵ Furthermore, it demands causation between fault and damage. Moreover causation must be evident between the damage claimed and the defendant’s fault, i.e. the non-performance of his contractual obligation. The requirement of directness is seen by doctrine as the necessary casual link between the non performance or the defendant's fault, and the damage. The requirement of foreseeability , on the other hand, is confined to contract

²²¹ See Nicholas, *supra* note 216, at 231.

²²² See Planiol and Ripert, *supra* note 8, at 495.

²²³ In Iranian law, the mere existence of a contract is not sufficient for the obligation to repair the damage. If a party undertakes to perform or abstain from an act, he is liable where he has not carried out his undertaking provided that compensation for such loss has been provided for in the contract, or that it is implied in the contract according to customary law, or that such compensation is taken for granted by law. See Chr. 3.4.3 for details and references, *infra*.

²²⁴ See Planiol and Ripert, *supra* note 8, at 495.

²²⁵ Ibid.

and is a mitigation of the full rigour of the requirement of directness in favour of the debtor.²²⁶

In contractual matters, the jurisprudence admits the validity of non-liability clauses, which exonerate one of the parties from the consequences of his fault, except in the cases of fraud and of gross fault.²²⁷ Such clauses always become null in offences because the legal duties sanctioned by Article 1382 are a matter of public order.²²⁸

The content of a contractual obligation is the performance of what has been undertaken. All obligations are grouped into two categories. The French legal system distinguishes between contracts which oblige the debtor to merely provide his services to the best of his knowledge and belief (*obligation de moyens*) and contracts according to which the debtor owes a particular result (*obligation de résultat*).²²⁹ The distinction between these two categories is the role to be played by the fault element in the case of breach of contract. This refers to the contractual fault, i.e. the non-performance of (a) contractual obligation(s). The proof of such fault is brought differently depending on whether we are dealing with an obligation of means or an obligation of result.²³⁰

(i) *Obligation de moyens*

Contractual liability is fault-based when the duty is *obligation de moyens*. The victim must prove the fault. If it appears from what was agreed or from the thrust of the contract that the debtor was not promising a given result but only to use his best efforts in that regard, it is simply an *obligation de moyens*.²³¹ If a debtor is bound to it, he is obliged to serve the obligee

²²⁶ Art.1151 of the Civil Code.

²²⁷ See Nicholas, *supra* note 216, at 230.

²²⁸ See Planiol and Ripert, *supra* note 8, at 493.

²²⁹ See Nicholas, *supra* note 216, at 156.

²³⁰ Ibid.

²³¹ See Art.1137 of the Civil Code.

with all the means he can dispose of and to apply all necessary diligence whilst exercising the contract and to use his best efforts.²³² Contractual liability claims might be asserted if either a contractual obligation is not performed at all or performed partially; according to which the debtor is to exercise the care of a reasonable, prudent businessman. Contractual liability also arises in case of bad execution or late execution.²³³

The only possible interpretation to be put on the contract of carriage is that the carrier concluding a contract of carriage undertakes to carry by a means commonly used with regard to the carriage. The carrier undertakes to take all the measures, which a good carrier must take. The defendant should be able to exempt himself from liability by proving that he committed no fault. This is because, the contract puts him under an obligation to carry by a means commonly used in carriage and to be a good carrier, the defendant has not committed fault if he proves that he has taken all the measures, which a good carrier must take. In contractual matters, the fault is therefore an objective notion.²³⁴

(ii) *Obligation de résultat*

Obligation de résultat means that the debtor has promised to obtain a certain result emerging from the contract. In such a case, the notion of fault of the defaulting party is immaterial.²³⁵ There is a contractual liability for non-performance if the result has not been achieved, irrespective of whether the defaulting party has committed a fault or not. In this case, the only defences open to the defaulting party will be the act of a third party, an act of the injured

²³² See Freund and Rudden, *supra* note 196, at 401.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ In Iranian law, there are not any regulations for *obligation de moyens* and *obligation de résultat*. However, Iranian legal experts, following French law, divide obligations into *obligation de moyens* and *obligation de résultat*. See Chr. 3.4.3 and 3.4.5.3 for details and references, *infra*.

party, or *force majeure*.²³⁶ Contractual liability is strict when the breached duty is an *obligation de résultat*. Such are the obligations of the carrier to keep the goods or cargo safe and deliver them to the proper destination.²³⁷

It is also possible to find an intermediate solution. The defendant may be under a third kind of duty, called either *obligation de moyens renforcée (aggravée)* or *obligation de résultat allégée (ou atténuée)*. In this case, the victim does not have to prove fault and from this point of view, he stands in a better position than the beneficiary of a mere *obligation de moyens*. Still, he does not enjoy the same privilege as the beneficiary of an *obligation de résultat*, since the defendant may rebut the presumption of fault.²³⁸

In a contract of carriage, the carrier promises to accept goods and passengers for carriage at a given point and to deliver them at another point. If he does not do so, that is if damage or loss occurs, he is presumed liable.²³⁹ However, Planiol in his book says that sometimes courts have changed jurisprudence and established the obligations of the carrier as that of keeping the goods or passengers safe and deliver them on time to the proper destination. The mere fact that a passenger is injured, or that goods are lost or damaged during the transportation, is an evidence of a breach of duty and contract. Therefore, a presumption of fault on the part of carriers has been recognized and they are under a strict contractual duty to safely transport passengers and goods. The law asserts that they have the duty to achieve a result- *an obligation de résultat* - which is to carry passengers and goods safely.²⁴⁰

²³⁶ See Viney, *supra* note 202, at 249.

²³⁷ Some courts have treated the duty of the carrier to avoid dangers prior to embarkation and subsequent to disembarkation from the conveyance as an *obligation de moyens* (Civ.21 July 1970, D. 1970, 767) whereas for accidents occurring during the voyage, it is an *obligation de résultat*. See Freund and Rudden, *supra* note 196, at 402.

²³⁸ See Planiol and Ripert, *supra* note 8, at 408.

²³⁹ Ibid.

²⁴⁰ The Iranian Commercial Code determines the rights, duties and obligations of the consignor, the consignee and the carrier in carriage contracts. It provides presumed fault liability so the claimant does not need to prove

Fault or neglect is presumed provided that the claimant proves, first, that a contract of carriage exists between him and the carrier, and secondly that he or his goods have suffered damage during the carriage.²⁴¹ As a result, a real presumption of liability rests upon the carrier; it is not only presumed that he has been negligent, but also that his negligence actually caused the damage. The carrier can only rebut this presumption by proving that one of the exceptions enumerated in the law applies to his particular case.²⁴²

(iii) *Force majeure*

Force majeure is an external cause, which can prevent the existence of the causal link. Thus, it completely exonerates a defendant who successfully proves that the damage was in reality attributable to a cause, which was not imputable to him.²⁴³ *Force majeure*, defined as an irresistible and unforeseeable event outside the control of the defendant, constitutes such a ‘*cause étrangère*’, as do the fault of the victim himself and the behavior of a third party which could not normally be foreseen by the defendant.²⁴⁴

Force majeure in contract law is dealt with under Article 1148 of the Civil Code. The Civil Code provides that *force majeure* excuses a person from paying damages for non-performance of the obligation affected, but it does not define *force majeure*. In contract, the essential effect of *force majeure* is that the debtor is released both from his obligation and his liability for the breach of this obligation. The concept is also recognized in tort but it has not received any mention in the Civil Code. In tort, *force majeure* can only be used as a defence

the fault of the defendant. This is identical to the position of the carrier in French law. However, the carrier can prove that the loss or destruction of goods has been because of the goods’ inherent defects or it has occurred because of the fault of the consignor or the consignee. In such cases, he is not liable. See Chr. 3.4.4.4.4 for details and references, *infra*.

²⁴¹ R. De Witt, *Multimodal Transport* (1995), 34.

²⁴² Ibid.

²⁴³ See Planiol and Ripert, *supra* note 8, at 475.

²⁴⁴ Ibid.

in the case of liability for the guardianship of things. Although a guardian of things can not escape liability by showing that he was not at fault, he can do so by showing *force majeure*.

The effect of the proof of *force majeure* is to break the presumption of liability, which is otherwise upon him, for damage caused by the thing under his guardianship.²⁴⁵

The typical case of *cause étrangère* is a *force majeure*, which will relieve all carriers from liability. Beyond that, carrier's liability is governed by specific rules.²⁴⁶ When damage is caused to goods in contract of carriage, it usually is admitted that there was contractual fault on the part of the carrier.²⁴⁷ The carrier is responsible unless he can prove that it was an accident. The carrier of goods can be exempted from liability by showing that the *force majeure* caused the damage. If the carrier can prove that he is not guilty of fault, which is usually caused under such circumstances, or rather if he indicates the precautions he has taken which gives the proof its positive aspect, the judge will have to conclude that a case of *force majeure* has caused the damage.²⁴⁸ In the French view, if the judge finds a case of *force majeure*, he may reduce the amount of damages by an appropriate amount.²⁴⁹ However, in the case of injured passengers, there has been some hesitation.²⁵⁰ This is because, carriers are under an obligation to carry their passengers safely to their destinations.²⁵¹

²⁴⁵ In Iranian law, the Civil Code does not use terms such as *force majeure*. However, it does make reference to 'external cause', a term that includes all causes which are external to the obligor. In carriage contracts, the Commercial Code also states that if the carrier proves that the loss, destruction or delay is caused by events that no diligent carrier can prevent, he is not liable. Thus, the two Codes provide for the carrier to be exonerated when he cannot prevent damage. Consequently, *force majeure* applies when any cause that is not related to the carrier leads to non-performance and any event external to the carrier which cannot be attributed to him brings exoneration. See Chr. 3.4.3 for details and references, *infra*.

²⁴⁶ Ibid.

²⁴⁷ See Art.1784 of the Civil Code.

²⁴⁸ The significance of this difference is twofold: on the one hand, there was liability on the part of the carrier to perform the contract of transportation of passengers safely without reference to fault; on the other hand, carriers were permitted to limit or exclude their liability by contract (i.e., through the ticket). See Miller, *supra* note 133, at 56-57.

²⁴⁹ Ibid., at 476.

²⁵⁰ See Planiol and Ripert, *supra* note 8, at 486.

²⁵¹ Ibid.

2.3.2.3 French Law and International Liability

France has ratified and given effect to the Warsaw Convention 1929,²⁵² the Hague Protocol 1955,²⁵³ the Guadalajara Protocol 1961,²⁵⁴ the Montreal Convention 1999,²⁵⁵ and the E.C. Regulation on Air Carrier Liability 2027/97 (amended version). France, in accordance with Articles L 321-3 and L.322-3 of the Civil Aviation Code in air transport accidents of domestic flights, applies the provisions of the above-mentioned E.C. Regulation and the Montreal Convention 1999.²⁵⁶

According to French law, the action brought against the carrier is contractual where actions in liability against carriers in general cannot be anything but contractual when they are brought by passengers and consignors alleging faulty performance. The parties cannot refer to tortious action and resort to features that may be more advantageous to them. This is a rule which plays an important role in the general framework of civil liability in France. Difficulties arise in cases of death, where the parties want to have their action considered outside the scope of contract. They may bring a tort action based on the violation of their personal right. The advantages of tort action are considerable if the contract contains limitation or exclusion clauses, which become inapplicable because the public order characteristic of rules of tort liability makes such clauses null and void.

The French courts, insofar as the remoteness of harm is concerned, take the view that harm calls for compensation only if it is a direct and immediate consequence of the event in question. This is inferred from Article 1151 of the Civil Code, which by its terms applies to

²⁵² 12.10.1929 signed; 15.11.1932 ratified; 13.02.1933 is the date of its entry into force.

²⁵³ 28.09.1955 signed; 19.05.1959 ratified; 01.08.1963 is the date of its entry into force.

²⁵⁴ 18.09.1961 signed; 24.01.1964 ratified; 01.05.1964 is the date of its entry into force.

²⁵⁵ 28.05.1999 signed; 29.04.2004 ratified; 28.06.2004 is the date of its entry into force.

²⁵⁶ *Code De L'aviation Civile* (Partie Législative), Livre Ier Aéronefs. See <http://www.legifrance.gouv.fr/WAspad/UnCode?commun=&code=CAVIACIL.rcv>.

the law of contract.²⁵⁷ The right to sue in death cases is left to the general rules of the law of obligations.²⁵⁸ In this relation, courts are restrictive in awarding moral damage. In transport cases, each contract of transport of passengers contains an implicit stipulation for third parties. The stipulation entitles them to a contractual action against the carrier for personal damage.²⁵⁹

In carriage by air, the cause of action will in most cases be provided by the contract of carriage which can provide a basis for any action, be it wrongful death, delay or damage to baggage or cargo. If, for whatever reason, a claimant could not rely on the contract of carriage, he could turn to Article 1382 of the Civil Code. However, this renunciation is not allowed for death actions arising from the international air carrier liability.²⁶⁰

2.3.3 Liability in German Law

2.3.3.1 Tort Liability

Torts under German law are characterized by the degree of fault. The basic principle and the most common category is the traditional fault liability of Articles 823 and 826 of the Civil Code (BGB).²⁶¹ It has a general statement of liability for intentional or negligent injury to persons or property subject to a somewhat restricted definition of vicarious responsibility,²⁶² also subject to the principle of co-responsibility, which means reduction in recovery by reason of contributory fault.²⁶³

²⁵⁷ T. Weir, *Tort Law* (2002), at 621.

²⁵⁸ See Arts.1382-1383 of the Civil Code.

²⁵⁹ See Haanappel, *supra* note 99, at 73-74

²⁶⁰ Ibid.

²⁶¹ F.E. Werner, M.W. Finkin and A. Ebke, *Introduction to German Law*, (1996), 200.

²⁶² See Art.831 of the Civil Code.

²⁶³ See Art.254 of the Civil Code.

Three types of torts are recognized under German law, which are explored below, together with the basis of liability.²⁶⁴

1. Article 823(1) of the BGB provides that: ‘A person who, contrary to the law, deliberately or negligently, causes harm to the life, health, liberty, property, or other rights of another person must compensate that person for any damage arising there from.’

Liability for causing injury in an unlawful and culpable manner only arises if the injury affects the victim in one of the legal interests enumerated in the text.²⁶⁵ The requirement of unlawfulness is satisfied by any invasion of one of the legal interests specified in this Article. The requirement of ‘deliberately or negligently’ is satisfied if the injury is inflicted either intentionally (that is, accompanied by the intention to invade the protected legal interest), or negligently.²⁶⁶

The person whose unlawful and culpable behavior violates one of the legal interests listed in Article 823(1) must pay for all the harm, which the victim suffers as a consequence of the invasion. The only limit to the extent of compensation is a legally relevant causal connection between the behaviors, which renders the defendant liable for the consequential harm.²⁶⁷

2. Article 823(2) provides that: ‘The same obligation [as in Article 823(1) BGB, i.e. to compensate for harm caused] is placed upon a person who violates a statute intended for the protection of others. If, in accordance with the provisions of the statute, a violation is possible even without fault, the duty to compensate arises only in the event of fault.’

²⁶⁴ J. Zekoll and M. Reimann, *Introduction to German Law* (2005), 207- 209.

²⁶⁵ Ibid.

²⁶⁶ According to one modern view, harmful behavior should only be qualified as unlawful if it is disapproved by law as breaching some legal prohibition or command addressed to the citizen. On this view, conduct does not become unlawful under § 823 paper I BGB simply because it causes an infringement of one of the legal interests specified. It is unlawful only if the person causing the damage behaved either deliberately or without the care generally required in society. See Deakin, Johnston and Markesinis, *supra* note 33, at 103.

²⁶⁷ Ibid., at 106.

Liability under this section arises when a statute designed to protect others is wrongfully broken. Protective statutes in this sense include all the rules of private and public law, especially criminal law, which are substantially designed to protect an individual or a group of individuals rather than the public as a whole.²⁶⁸

3. The third type of general tort liability can be found in Article 826. Under this provision, a person is liable if he intentionally causes harm to others in a way that is contrary to public policy (unreasonable, *contra bonos mores*).²⁶⁹ This provision is used to impose liability in diverse types of cases where one party has caused harm to another by a conduct considered offensive and improper so as to incur strong disapproval from the average person in the relevant section of society.²⁷⁰

4. Regarding the basis of liability, normally a claimant must prove all the elements of his claim.²⁷¹ However, this is subject to two kinds of exceptions: a) where the judge applies the concept of *prima facie* proof, i.e. events take place in the way experience would suggest. This can be presumed unless the defendant shows that there were some abnormal factors; b) the subjective and objective burdens of proof. The former means that the party with the burden of proof needs to present evidence to prove his argument, otherwise he will lose. The latter means that if a court cannot reach a conclusion in a case, the party with the burden of proof will lose. In some cases, these subjective and objective burdens are transferred to the defendant.²⁷²

²⁶⁸ Ibid., at 83.

²⁶⁹ Ibid.

²⁷⁰ Ibid., at 885.

²⁷¹ See Zekoll and M. Reimann, *supra* note 264, at 214 -215.

²⁷² Ibid.

5. A number of specific, but important, statutory provisions, establish strict liability.²⁷³ This liability is based only on the control of a particular dangerous activity, which causes damage.²⁷⁴ It is independent of any fault on the part of the tortfeasor and is based only on his control of a particular dangerous activity, which caused damage.²⁷⁵ In Germany, risk-based liability has its origins in the rise of industrial enterprises in the late 19th century.²⁷⁶ Although there is no general provision on strict liability in German civil law, the common rationale underlying these statutes is that consequences of certain risks should be borne by those who control and take advantage of them.²⁷⁷ In 1922, Germany adopted an Air Traffic Act. Modeled on the Road Traffic Law, it provided for liability without fault up to stated amounts. Unlike the law applicable to road and railway accidents, however, the Air Traffic Act did not contain the defences of *force majeure* or unavoidable external accidents. The limits were made applicable both to persons and goods carried for hire, and to persons and property on the ground.

²⁷³ Germany adopted the Road Traffic Act, which, with some modifications, is still in effect. Article 7 of the Road Traffic Act imposes upon the holder, i.e. the person who uses the car at his own expense, strict liability for personal injury, death and property damage caused by the operation of his motor vehicle. Under this Act, the holder of a vehicle was made liable without fault, subject only, as in the law applicable to railroads, to the defence of unavoidable external accidents as well as to apply a reduction in damages by reason of contributory fault. There was no liability to gratuitous passengers, and no liability for pain and suffering. Claims on behalf of persons not entitled to sue under the Road Traffic Act (e.g., gratuitous passengers) or for items of damages not allowed (e.g., pain and suffering) could still be brought under the Civil Code by proving negligence. See Deakin, Johnston and Markesinis, *supra* note 33, at 850.

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ As early as 1838, Prussia adopted a railway enterprise law which provided, *inter alia*, for railway companies to be liable for all damage arising from railway transportation, without reference to fault, and subject only to two defences: that of the claimant's contributory fault and those of unavoidable external accidents. Prussia further adopted the Railroad Act of 1871. Ibid.

²⁷⁷ See Werner, Finkin, and Ebke, *supra* note 261, at 213-215.

2.3.3.2 Contractual Liability

A major focus of the German Contract Law is the principle of fault.²⁷⁸ As a rule, it is necessary that the defendant was at least negligent in causing the damage.²⁷⁹ Moreover, the claimant must have suffered a recoverable loss. The BGB has no unitary concept of breach of contract, and does not deal generally with the rights of a contractor who has not received the promised and expected performance.²⁸⁰ It concentrates instead on the case where non-performance is due to impossibility, delay, and insufficiency; regulating them in great detail for the circumstances where for whatever reason, the promisor is late in performing.²⁸¹ The notion of positive performance is used in breach of contract where breach of contractual duties of care has caused personal injury or property damage to the other party, for example where a passenger is injured while travelling in a vehicle.²⁸²

The contractual duties have to be fixed by the parties to the contract.²⁸³ The parties' agreement, together with a reasonable construction of the agreement, determine the contents of the obligations and in particular whether the defendant is obliged to achieve a certain result or whether he is 'only' obliged to act with reasonable care but cannot and should not be expected to guarantee the result.²⁸⁴ If the parties have not fixed their respective duties, even if the conclusion of the contract is certain, then the objective law, i.e. statute and case law, have to step in.²⁸⁵

²⁷⁸ Ibid., at 180.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid., at 179.

²⁸² The BGB did not address the situations that resulted from the debtor's imperfect performance or his breach of accompanying contractual duties. In order to fill this gap, judges began to apply the doctrine of positive breach of contract. Ibid., at 192.

²⁸³ Ibid.

²⁸⁴ B.S. Markesinis, H. Unberath, and A. Johnston, *The German Law of Contract* (2006), at 388.

²⁸⁵ Ibid.

However, the BGB does foresee as a general duty only the duty to act in good faith, and duties relating to the place and time of performance.²⁸⁶ How far this duty extends, and what its precise contents are, depends very much on the terms, purpose and interpretation of the respective contract.²⁸⁷ In any event, a contract is always void if at the time it was formed, the promised performance was objectively incapable of being rendered by anyone (*impossibilium nulla obligatio*).²⁸⁸

The Code seeks to modify this result by making the contractor who knew or should have known of the initial impossibility, pay compensation to the innocent party for any harm that he has suffered in reliance on the validity of the contract.²⁸⁹ Subsequently, the important question is who is blameworthy for the obstacle to performance. In all cases, the general rule is inferred from the principle '*pacta sunt servanda*', i.e. the defendant who fails to perform is liable unless he proves that he was not answerable for the obstacle to performance.²⁹⁰ Each party is answerable for any obstacle to performance, which occurs because of a lack of proper care on its part or on the part of those who were helping them to perform.²⁹¹

Contractual liability, in general but also with respect to personal injury, presumes a contractual duty which has been violated and whose violation has caused the claimant's loss.²⁹² If a contracting party injures the other during the course of the performance of the contract, it implies that the duty is violated unless the injury has no connection with the

²⁸⁶ Werner, Finkin, and Ebke, *supra* note 261, at 185.

²⁸⁷ Ibid.

²⁸⁸ See Zekoll and M. Reimann, *supra* note 264, at 192.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

performance of the contract. The burden of proof lies generally with the claimant who must prove that a contractual duty existed and had been violated.²⁹³

Provisions of the Civil Code do not rule out the waiving of liability in connection with the carriage of passengers by aircraft. Indeed, German jurisprudence has confirmed that carriers are allowed to exclude their liability by special agreement.²⁹⁴

2.3.3.3 German Law and International Liability

Germany has also ratified and given effect to the Warsaw Convention 1929,²⁹⁵ The Hague Protocol 1955,²⁹⁶ the Guadalajara Convention 1961,²⁹⁷ and the Montreal Convention 1999.²⁹⁸ According to §§ 44 I 1, 2 and II, 46 I, II, 47, 35, 38 *Luftverkehrsgesetz* (LVG) and 425 I, 429, 431 *Handelsgesetzbuch* (HGB), in air transport accidents involving domestic flights, the provisions of the E.C. Regulation and the Montreal Convention 1999 apply.²⁹⁹

As mentioned above, Germany has a special law on aviation (*Luftverkehrsgesetz*) that has provisions on the right to sue in cases involving death and on recoverable damage that is alike to the general rule, which has come in Article 844 (2) of the Civil Code.³⁰⁰ In cases involving death, the obligation of the person liable is to support the dependents of the deceased in the manner and to the extent that the deceased would have maintained them.³⁰¹

Following the adoption of the Warsaw Convention 1929, the Air Traffic Act was amended to achieve conformity with the Convention. This resulted in a distinction being drawn between passengers and third parties who are entitled to resort to other remedies (as under the Civil

²⁹³ See Deakin, Johnston and Markesinis, *supra* note 33, at 380-7.

²⁹⁴ See Markesinis and Unberath, *supra* note 284, at 204.

²⁹⁵ 12.10.1929 signed; 30.09.1933 ratified; 29.12.1933 is the date of its entry into force.

²⁹⁶ 28.09.1955 signed; 27.10.1970 ratified; 01.08.1963 is the date of its entry into force.

²⁹⁷ 18.09.1961 signed; 02.03.1964 ratified; 31.05.1964 is the date of its entry into force.

²⁹⁸ 28.05.1999 signed; 29.04.2004 ratified; 28.06.2004 is the date of its entry into force.

²⁹⁹ Final Report Working Group Legal Issues, Rail-Air Intermodality Facilitation Forum, at 140.

³⁰⁰ See Haanappel, *supra* note 99, at 75.

³⁰¹ See Lowenfeld, *supra* note 104, Chrs. 7-9.

Code) only in cases of grave misconduct and subject in most cases to substantially lower limits than other traffic victims.³⁰²

Apart from aviation, German accident compensation law features compulsory liability insurance up to the limits of the relevant special laws, direct action against insurers, and relatively little litigation. However, damages are generally payable in periodic instalments rather than in a lump sum.³⁰³ German courts only apply their own law on air carriers and claimants. At first, courts applied the *lex fori* to cases of the Warsaw Convention 1929. Later on, some cases were governed by the law of the principal residence of the air carrier.³⁰⁴

2.3.4 French Law and German Law: a Comparative Analysis

In investigating the liability principles in France and Germany, the following observations can be made.

1. In Germany, if liability is created by a breach of contract, but in a situation where either tort or contract is applicable, the injured person can have recourse to tort liability and ignore the limits of contract. However, in French jurisprudence, where there is an overlap between tort and contract liabilities, a party injured in contract is not allowed to apply the rules of tort liability.³⁰⁵

2. A person is liable in civil law jurisdictions provided that the other conditions of liability are fulfilled. That is, if his conduct is not in conformity with what could reasonably be expected from him. The German BGB establishes a general clause for liability based on fault, comparable to the general provision, which exists in several important continental codes, like Article 1382 of the French Civil Code. In a broader perspective, the German BGB (Article

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ See Haanappel, *supra* note 99, at 75-76.

³⁰⁵ See Viney, *supra* note 202, at 248.

823), notwithstanding its different structure, pursues the same goal as the common law (if one subsumes intent and negligence under a general concept of fault).³⁰⁶

3. Although the liability principle in French Law and German law is based on fault, in the event of damage or loss, presumed fault is the general rule for the carrier's contractual liability in the modern civil law jurisdictions. The presumption, however, may be rebutted by the carrier. The general nature of defences in civil law jurisdictions is less severe than the common carriers in common law jurisdictions.³⁰⁷

4. In most civil law jurisdictions, strict liability seems to be based on individual rules rather than general or at least broader clauses.³⁰⁸ Although French law has a clause which introduces general liability for 'deeds of the things within one's keeping',³⁰⁹ and courts, furthermore seem to be open for an extensive application of other rules,³¹⁰ German law has so far denied the possibility of extending its statutory regimes in this way.³¹¹

5. Strict liability in traditional German law deserves special attention. This is because, first, strict liability was introduced there only by specific enactments, whilst traditional French law remained faithful to the fault principle. Secondly, the vast majority of German strict liability statutes contain similar clauses on the monetary limits of liability per damage. Thirdly, the compensation available under the strict liability statutes are subject to limits so that if unlimited liability is claimed, recourse to the ordinary rules of tort is permissible.³¹²

³⁰⁶ See Deakin, Johnston and Markesinis, *supra* note 33, at 112.

³⁰⁷ See De Witt, *supra* note 241, at 33.

³⁰⁸ H.D. Fisher, *The German Legal System and Legal Language* (2002), 45.

³⁰⁹ See Art.1384 of Civil Code.

³¹⁰ See Viney, *supra* note 202, at 249.

³¹¹ *Ibid.*, at 255.

³¹² See De Witt, *supra* note 241, at 33.

6. In Germany, strict liability may be imposed on carriers for claims arising out of an accident in domestic law.³¹³ However, in France, the legal liability may be based on fault.³¹⁴

2.4 An Analysis of the General Principles of Liability under the Two Legal Systems

Studying the legal approaches in both systems contributes to a better understanding of the foundations of the Warsaw-Montreal Convention's regime, which will be looked at in Chapter 4. Since the 1920s, the international community has tended to provide regulations for air carrier liability in private international air law, based on common grounds in the two major legal systems of the common law and civil law. In Europe at the time, aircraft began to cross several borders to get to their destinations, and airlines and customers had a variety of legal systems and regulations to contend with. This situation gave rise to legal problems, which made European States eager to establish uniform international regulations.

In order to balance the interests of both air carriers and customers (especially passengers), the drafters of the Warsaw Convention 1929 and Montreal Convention 1999 provided principles such as the presumption of liability, limitation of liability, exclusion of exemption conditions, and strict liability with a focus on protecting the carriers. However, they inclined towards protecting passengers. Criteria of the legal liabilities that were derived from the two legal systems and their similarities and differences will be discussed below.

2.4.1 Tort Liability

Tort is generally understood as a civil wrong, which takes place outside a contractual relationship.³¹⁵ There are three main categories of torts: intentional torts, negligence or fault

³¹³ See Markesinis and Unberath, *supra* note 284, at 79.

³¹⁴ See De Witt, *supra* note 241, at 33.

³¹⁵ R.R. Cummins, *Tort Law* (1999), at 2.

and strict liability.³¹⁶ In this study that focuses on air carrier's liability, intentional torts were ignored since the majority of potential tort situations arising out of transportation by air are not intentional torts.

It can generally be claimed that the main liability principle in both the common law and civil law jurisdictions was based on fault or negligence. However, in cases of transport, it gradually inclined towards liability based on presumption of fault, presumption of liability or strict liability. This author is of the opinion that liability in the international system, which is affected by this trend, has gradually proceeded from presumption of liability, which can be rebutted by the defendant by proving absence of negligence / fault, towards strict liability. Thus, each of these principles will be analyzed below.

2.4.1.1 Liability Based on Fault or Negligence

The word 'fault' comes from *faute*, which has its etymological root in the Latin verb *fallere*. The original meaning of that word was 'to deceive', but it later came to express the notion of failing in some way.³¹⁷ Fault usually means that the infringement in question was committed intentionally, recklessly, or negligently.³¹⁸ Fault is a breach of a pre-existing obligation, for which the law orders compensation, when damage is caused to another. Violation of a rule which is of either a juridical or practical order is necessary.³¹⁹

To justify fault in the context of tort, it has been said that the case for preserving some notion of fault results from its moral logic, since it is generally accepted that a person should be accountable for the damage he has caused.³²⁰ There is a strong moral content to such a

³¹⁶ Ibid.

³¹⁷ De Cruz, *Comparative Law in a Changing World* (1995), 334 -5.

³¹⁸ See Cane, *supra* note 79, Chr. 2.

³¹⁹ See Planiol and Ripert, *supra* note 8, at 464.

³²⁰ Ibid.

principle and, indeed, fault derives from the canon law notion of sin and the need to atone for one's sins.³²¹ Fault also seems necessary to reflect social expectations and deviations from socially accepted standards of behavior.³²²

Fault was not defined by either French law or German law. However, the general basis of liability in the civil law system is fault. Under civil law jurisdictions, liability based on fault arises when a number of general elements are met.³²³ The legal interests protected by fault liability may be different but their main elements, namely unlawfulness, fault, damage, conduct, and causation (i.e. a causal connection between the act and the damage), are comparable.³²⁴ In French law, *faute* is interpreted not merely as *culpa*, in the sense of negligence, but in the sense of wrongfulness.³²⁵

In English law, the Law Reform (Contributory Negligence) Act 1945 defined fault as to mean negligence, or the breach of a statutory duty or other act or omission, which gives rise to a liability in tort.³²⁶ The duty of care component, which is an integral part of the common law tort of negligence, is not explicitly stated in the civil law system. The main elements of negligence in common law jurisdictions are duty of care, breach of duty, causation, damage, and the defences that can be invoked by alleged tortfeasors.³²⁷

Fault is therefore a question of law in civil law jurisdictions, much as duty of care is under English law, so that judges in both systems have the discretion to delimit the scope of liability

³²¹ E.J. Weinrib, *Tort Law* (2002), 190.

³²² *Ibid.*, at 190.

³²³ See Zekoll and M. Reimann, *supra* note 264, at 211.

³²⁴ *Ibid.*

³²⁵ Planiol defined fault as the violation of a pre-existing duty. This definition is still widely referred to, in spite of its often criticized vagueness, for the mere reason that it is almost impossible to be more precise with the range of pre-existing duties recognized by law as being unlimited. Thus, it is not only the breach of a statutory duty which amounts to fault, but also the infringement of general duties, such as the duty to behave, in all circumstances, in a careful and diligent way. See Planiol and Ripert, *supra* note 8, at 464; See Markesinis and Unberath, *supra* note 284, at 82.

³²⁶ See <http://www.legislation.gov.uk>.

³²⁷ See Schwartz, Kelly, and Partlett, *supra* note 18, at 131.

for damage resulting from a failure to act with reasonable care. Crucially, any fault which causes damage is actionable irrespective of whether it is a delictual or contractual obligation that has been breached.

The legislators in Iran have provided no definition for fault. In order to find a definition for it in Iranian law, one should resort to instances where the Civil Code bases liability on fault. Following the *Shariah*, the Civil Code has used the two terms of *ta'addi* and *tafrīt* in this regard for *tasbib* and *amanat* contracts.³²⁸

Ta'addi consists of conduct surpassing the permitted limits or ordinary usage, in relation to a thing or a right belonging to (an)other person(s).³²⁹ It means doing something that should not be done but is subject to the act going beyond legal or customary limits, and causing damage to life, property, or the rights of others. The criterion for *ta'addi* is that a person conducts an act that according to law or custom, he is not supposed to do. In most cases, a person harms the other party by a positive act.³³⁰ As a result, *ta'addi* is an illegal act, which is (personally or customarily) reproachable.³³¹ *Tafrīt* consists of an omission to act which legally, customarily or because of an agreement, the act is necessary for the protection of another's property.³³² Therefore, *tafrīt* is also a type of fault.

2.4.1.2 Fault 'Rebuttably Presumed'

In both civil law and common law jurisdictions, as a general rule, the burden of proving fault / negligence lies on the claimant.³³³ Normally, a claimant has to prove each element of his case. Sometimes, however, the law assists him by allowing certain elements to be presumed.

³²⁸ See Art.953 of the Civil Code.

³²⁹ See Art.951 of the Civil Code.

³³⁰ M.J. Langeroodi, *Hoghoh Madani va Bazargani* (1357 A.H. 1978), 759 – 879.

³³¹ M.A. Brojerdi, *Kolliyat Hoghogh Islami* (1339 A.H. 1960), 24.

³³² See Art.952 of the Civil Code.

³³³ Ibid.

It is up to the defendant to disprove them, and if he fails to do so, the claimant wins the case.³³⁴

The civil law and the common law jurisdictions have sometimes revised the burden of proof in tort and contract law.³³⁵ As mentioned above,³³⁶ in French law they speak of subjective / fault liability.³³⁷ In English law, for example, a bailee of goods is liable if the goods are lost, damaged or destroyed by his fault while in his charge but he bears the burden of showing that the loss etc. was not his fault.³³⁸ In respect of passengers, even where liability is directly based on negligence, the claimant does not necessarily have to prove fault by positive evidence where the doctrine of *res ipsa loquitur* applies.³³⁹ This is because, the circumstances may raise an inference of negligence on the defendant's part. In the literature one can speak of presumption of liability or a presumption of fault.³⁴⁰

It is worth mentioning that in drafting the Warsaw Convention 1929, countries such as England, France and Germany played important roles as representatives of the two systems of common law and civil law jurisdictions. In their respective systems, liability was based on fault / negligence and the burden of proof was on the claimant. However, due to the specific nature of the air carriage, the Convention preferred to speak of a presumption of liability which can be rebutted by the defendant by proving absence of negligence / fault.³⁴¹ This principle was pursued in all amendments of the Warsaw Convention 1929 and the Montreal Convention 1999.

³³⁴ Ibid.

³³⁵ See Freund and Rudden, *supra* note 196, at 402.

³³⁶ See 2.3.2.1, *supra*.

³³⁷ See footnote 219, *supra*.

³³⁸ See Planiol and Ripert, *supra* note 8, at 466.

³³⁹ See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 249.

³⁴⁰ See footnote 219, *supra*.

³⁴¹ Ibid.

It cannot be claimed that fault is the exclusive basis of liability in Iranian law. In addition to the *etlāf* rule,³⁴² in some cases because of the necessity to remedy an illegal act, or due to the hazardous environment or business that a person has initiated for his own interest, legislators have accepted civil liability without fault. For example, the liability of carriers is based on the presumption of fault in carriage contracts. He can be relieved by proving *force majeure*.³⁴³

2.4.1.3 Liability Based on No–Fault (Strict or Absolute Liability)

It is accepted in tort law that in most circumstances there must be some degree of blameworthiness on the part of the defendant, i.e. not merely that the act or omission was his, but that it was also intentional, reckless or negligent.³⁴⁴ However, in some cases, this element of fault is not required. It is a tort law concept that imposes liability for harm suffered without requiring proof of fault or negligence.³⁴⁵

In civil law and common law jurisdictions, liability based on fault has been marginalized by the emergence of a number of statutes introducing liability based on no fault. The operators of activities, holders or owners of goods and materials are made liable independently of any blame of having been negligent or violating a duty of care, particularly in those national systems which have enacted such forms of liability in the transport sector.³⁴⁶

Liability based on no–fault has received different names such as strict, absolute, based on risk in different jurisdictions. French doctrine speaks of objective liability with two forms, one based upon an obligation of result (defence of ‘*force majeure*’). The defendant, as soon as he proves that he was not at fault for the occurrence of damage, would be exempted. Another

³⁴² See Chr. 3.4.2, *infra*.

³⁴³ G.R. Hoseini Marani, *Maseoliat Mahz dar Hoghogh Iran* (1379 A.H. 2000), 18; M.J. Langeroodi, *Hoghogh Amval* (1380 A.H. 2001), 8.

³⁴⁴ See Planiol and Ripert, *supra* note 8, at 468.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

form is based upon an obligation of warranty (no such defence). German doctrine speaks of Gefährdungshaftung (based on risk) more or less corresponding to the French doctrine.³⁴⁷

Common law doctrine speaks of strict or absolute liability. In common law, the concepts of strict or absolute liability are often used synonymously and it is difficult to distinguish them in practice. Nevertheless, there are differences between strict liability and absolute liability.

As noted by Haanappel:

'Common law gets more "fuzzy" when it comes to absolute or strict liability. For most, absolute liability is a form of liability (for instance, for nuclear damage) where, once there is damage and causation, the defendant has no defenses at all (the opinion, for instance, of *Mircea Matte*). Strict liability then is no-fault liability where, nevertheless, the defendant has defenses available such as Act of God / fortuitous event, and own fault of the victim. But, where the defense of Act of God / fortuitous event is not available but the defense of own fault of the victim is.'³⁴⁸

The major common law area of strict liability was created by the House of Lords in the case of *Rylands v. Fletcher (1866)*. The remit was broader than just 'rebuttably presumed'.³⁴⁹

Strict or absolute liability is also created by statute in the United Kingdom and the United States in a number of other specific circumstances, e.g. oil pollution at sea, storage of gas underground, personal injury and property damage arising from nuclear material, and material damage.³⁵⁰ He who causes a new risk to be borne becomes responsible for the damage caused, if damage occurs. This is an objective liability, which analyzes the fault of the author of the act.³⁵¹

³⁴⁷ Strict liability in German law is the imposition of liability on a party regardless of the existence of fault or negligence. In Germany, strict liability has been introduced only by specific enactments, while French law remains faithful to the fault principle. In French law, strict liability has evolved from Article 1384 of the Civil Code. See Viney, *supra* note 202, at 249.

³⁴⁸ See footnote 219, *supra*.

³⁴⁹ H. Osterhout, 'The Doctrine of *Res Ipsa Loquitur* as Applied to Aviation', (1931) *Air Law Review* 3 at 10.

³⁵⁰ See Youngs, *supra* note 35, at 231.

³⁵¹ Some believe that this new doctrine, far from being a step forward, constitutes a regression which goes back to barbaric times, and prior to the *lex aquilia*. *Ibid.*, at 466.

Strict liability can be removed by resorting to certain defences. In common law, if a defendant can prove that firstly, damage has been caused by one of the exceptions, which were not related to him,³⁵² and secondly, that he was not at fault for the occurrence of the damage, he will escape from liability.³⁵³

Therefore, strict liability without exceptions becomes absolute liability. It is a liability independent of wrongful intent or negligence. Absolute liability is stricter than strict liability and industries involved in hazardous activities cannot take any plea. It gives a background of support to certain liabilities where compensation is given even without fault. Its application is, however, limited to hazardous activities, and too much emphasis is placed on enterprise liability.

As mentioned above, due to the specific characteristics of airplanes and the inability of the claimant to prove fault / negligence on the part of the defendant, at first it was the presumption of liability that was adopted. Then, because of developments in air transport on the one hand, and the attractions connected with the protection of passengers on the other hand, this was replaced by strict liability.

Strict liability has been accepted in Iranian law. It is present in tortuous liability and statutes, and obvious examples include *etlāf*, usurpation and the responsibility of land motor vehicle owners.³⁵⁴ This liability is also present in definite contracts like reward, fiduciary and sale contracts.³⁵⁵ In Iranian law, the one who destroys an object or the property of others is liable.

³⁵² Arnheim, *supra* note 54, at 4.

³⁵³ Ibid.

³⁵⁴ See Chr. 3.4.2.1, *infra*.

³⁵⁵ Strict liability arises in a different way here. For instance, it arises in reward contract by a unilateral obligation (the revocation of the contract), in bailment contract by the guarantee clause from the bailor to the bailee in addition to the operation of law, and in sale contract through the seller's failure to deliver the goods intact. See Arts.567-574 of the Civil Code and the Compulsory Insurance for Owners of Engine Vehicle (Ground and Sea) Act 2008.

The element of fault is not a condition for liability.³⁵⁶ If a person destroys a thing, he is liable even if he can prove that he has not been at fault in his conduct. However, there should undoubtedly be a causal link between the destruction and the defendant's behavior.³⁵⁷

Therefore, as mentioned above, liability regimes have received different names in different jurisdictions such as presumption of fault, presumption of liability or strict liability, absolute liability, liability based on risk, and even within a single jurisdiction one author may use a name, term or expression that differs from another author such as strict liability and absolute liability. However, as noted by Haanappel, 'it is not the name that counts, but the liability regime as laid down in a law or treaty.'³⁵⁸ This proposition applies as well in the case of the Warsaw-Montreal regime for air carrier's liability.'³⁵⁹

2.4.2 Contractual Liability

One of the issues that must be explored here is liability in contract. Carriers are usually liable on the basis of contract for damage to goods or injury to passengers, and for breach of contract. However, in England and the United States, liability may sometimes arise on the basis of tort or bailment.³⁶⁰

The legal liability of a carrier in contract of carriage is distinguishable from tort. The latter is essentially a civil wrong and arises where a person is in breach of a legal duty owed to another.³⁶¹ These rights and duties exist by virtue of the law itself and are owed to persons in general, but a breach of contract arises out of rights and duties agreed between, and enforceable by, parties to the contract. Therefore the law of contract, in its application, is

³⁵⁶ S.H. Safaei, *Hoghogh Madani* (1351A.H. 1974), 251.

³⁵⁷ M. Mohaghegh Damad, *Ghavaed Feqh* (1378 A.H. 1999), 115.

³⁵⁸ See footnote 219, *supra*.

³⁵⁹ See Chr. 4.2.1.1, *infra*.

³⁶⁰ See Beale, *supra* note 21, at 728.

³⁶¹ *Ibid*.

potentially much narrower than that of tort.³⁶² By comparing liability in carriage contracts, the author has come to the following conclusions.

2.4.2.1 Similarities

1. In most extra-contractual liability cases, it is an injured person who has to prove that the defendant was at fault.³⁶³ But, in contractual liability, it is the defendant who has to prove that he was not at fault in relation to the performance of the contract.³⁶⁴ In the contemporary era, especially in the USA, legislators and commentators tend to find and make contractual roots for important obligations to exempt injured persons from having to prove fault. This approach is a technical device for establishing liability without fault.³⁶⁵

2. In both common law and civil law jurisdictions, the law of contract would be the primary basis of liability for the carriage of goods. In both legal systems, the contract of carriage between the shipper and the carrier usually defines the responsibility undertaken by either party.

3. Carrier's liability in common law and civil law systems is remarkably similar in nature for goods from one aspect. In common law, air carrier's liability is strict, with a limited number of exceptions exonerating the carrier. In civil law, carrier's liability is based on presumed fault.³⁶⁶ Generally, the same concept of a rebuttable presumption of liability is applied in both legal systems. If the carrier succeeds in proving the existence of one of the enumerated exceptions, he rebuts the presumption of negligence.³⁶⁷ If the carrier does not succeed in delivering such evidence, the inevitable conclusion is that he must have been negligent, or

³⁶² See Planiol and Ripert, *supra* note 8, at 485; See Beale, *supra* note 21, at 731-2.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ See Farnsworth, *supra* note 2, at 124.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

otherwise the loss or damage could not have occurred. Therefore, the claimant is not required to prove actual negligence.³⁶⁸

Thus the contractual liability of carriers appears to be the same in both legal systems. Whether one says that a rebuttable presumption of liability is set up with the burden of proof of liberating circumstances resting upon the carrier, or that a strict liability exists with the burden of proof also resting upon the carrier, makes little practical difference.³⁶⁹ In both systems, a carrier cannot escape his liability by proving one of the excepted perils if he has contributed to the loss or damage by his own negligence.³⁷⁰

4. Both legal systems require full compensation, while both of them accept contractual conditions for limiting or exempting liability. However, countries such as France and Germany, in their earlier statutes on air carriage in the 1920s, intentionally limited liability and accepted different conditions such as the condition for exemption from liability. It seems that these measures have been taken in order to balance the interests of air carriers and customers.³⁷¹

³⁶⁸ See De Witt, *supra* note 241, at 36.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ There is no explicit reference to contractual conditions for dispensing or limiting liability for damaged goods and for passenger death or bodily injury in Iranian law. Their validity is justifiable for damaged goods since both the Commercial Code and the Civil Code accept contractual conditions. The Civil Code provides that if a contract determines the level of compensation for non-performance, the court cannot order the obligor to pay an amount which is higher or lower than the agreed remedy. The Commercial Code also provides that parties to a contract can agree on an amount which is higher or lower than the real compensation. Therefore, carriers can determine a cap for their liability. If the parties agree that the carrier only has to compensate on the basis of limited liability in the event of non-performance, delay or damage, the claimant may receive compensation which is higher or lower than the actual damage. Contractual conditions for dispensing or limiting liability for damaged goods and for passenger death is void because the legislator has determined compensation for death or bodily injury. This is because, it belongs to the family of the dead person and no one can agree to fix compensation lower than the compensation that the law prescribed. See Chr. 3.4.4.4 for details and references, *infra*.

2.4.2.2 Differences

There are differences in the general principles of liability in these two systems. Among them are the following differences regarding carrier's liability in carriage contracts:

1. Bailment does not exist in civil law jurisdictions unlike the common law jurisdictions. The fundamental difference seems to be that when no express contractual provisions about liability are made, carrier's liability may, in the common law, be established in accordance with the rules of bailment. Under continental law, on the other hand, this must be established in accordance with the rules of the general law of contract provided that a contract can be implied.³⁷²

In Iranian law, following the *shariah*, carriage in the civil code is based on *amanat* principles, which has similarities with bailment principles in common law. If contract of carriage does not conform to the Commercial Code, *amanat* provisions in the Civil Code will apply.³⁷³

2. The nature of contractual liability is different in the two legal systems. Carrier's liability in civil law jurisdictions is principally based on fault or negligence. The fact that the burden of proving a certain exception is on the carrier does not change the nature of liability.³⁷⁴ In the common law jurisdictions, carrier's liability is basically strict. It is essentially objective in nature. If a number of conditions are fulfilled, liability will follow automatically. There is no question as to his conduct in the matter, not even the carrier's presumed conduct. It is from this characteristic that the comparison with an insurer of goods comes.³⁷⁵

The scope of exceptions in both legal systems is not the same. French law provides two additional exceptions: the act of a third party for whom the contracting party is not

³⁷² Palmer, *supra* note 42, at 19-20.

³⁷³ See Chr. 3.4.4.1, *infra*.

³⁷⁴ See De Witt, *supra* note 241, at 41.

³⁷⁵ *Ibid*.

vicariously liable for, and the loss of thing which had to be delivered without any fault on the part of the debtor.³⁷⁶ However, at common law jurisdictions, these exceptions are rather narrowly limited. For instance, acts of the Queen's enemies do not pertain to robbers on land or to piratical or traitorous subjects.³⁷⁷ The common law concept of an act of God is less strict than its continental counterpart is in the classic non-attributable impossibility theory. Whereas a rule, extraordinary circumstances are required. However, the common law doctrine is limited by its clearly set out exceptions.

In Iranian law, the exemptions are not limited to the common law defences and as soon as the carrier proves that the accident has been out of his control, he will be exempted from liability.

3. A general and common characteristic of carriage contracts is that they are normally for reward, both in the common law and civil law jurisdictions. No reward means either free transportation or transportation by courtesy. In the common law, this would amount to a gratuitous bailment with probably a different standard of care for the bailee and a different rule on vicarious liability.³⁷⁸ In the civil law jurisdictions, there is some dispute as to whether gratuitous carriage may still constitute a contract for the carriage of goods. This is answered in the negative in France where one reverts to tortious liability.³⁷⁹ In Germany, it is suggested that a contract of carriage may well exist, but that each case turns on its facts.³⁸⁰

4. If liability is created by a breach of contract, can the injured person have recourse to other rules of liability (i.e. tort) and ignore the limits of the contract? There are divergent views in this regard.³⁸¹ No one should be exempted from the protection that the law extends to him

³⁷⁶ See Planiol and Ripert, *supra* note 8, at 476.

³⁷⁷ Ibid.

³⁷⁸ Ibid.

³⁷⁹ See De Witt, *supra* note 241, at 33.

³⁸⁰ Ibid.

³⁸¹ Ibid.

and be made to suffer the damage since he has been a party to the contract.³⁸² This is possible under common law jurisprudence and in Germany where courts allow the application of one of these two devices. However, in French jurisprudence, where there is an overlap between tort and contract liabilities, a party injured in contract is not allowed to engage with rules of extra-contractual liability.³⁸³

Regarding Iranian law, it can be stated that if there is a contract for cargo, the claimant cannot refer to tort. But, as for the *Diyah*, since it is a property of the inheritor(s), inheritors who disregard contract may claim the *Diyah* based on tort.³⁸⁴

5. In French law, not every contractual term, expressed or implied, is a warranty in law.³⁸⁵ However, the common law principally treats every contract as containing a guarantee. If the debtor fails to do what he promised, he would be liable for damages for ‘breach of contract’ regardless of whether or not he himself, or any of his servants or subcontractors has been at fault.³⁸⁶

2.4.3 Interaction between the Two Legal Systems and the International Regime

1. All the four countries under examination; the United States, England, France and Germany, apply the applicable conventions of the Warsaw system and the Montreal Convention 1999 on their international flights. The liability provisions of the Warsaw Convention 1929 and the Montreal Convention 1999, regarding their exclusivity, enjoy priority over domestic regulations and courts have to observe them and cannot refer to their

³⁸² As to the existence of a breach of a contractual term, the common law is usually quite reluctant to accept the existence of implied terms in a contract. In other words, only when there has been a breach of an express term, or of a term known to be implied in the kind of contract considered, will there be contractual liability. This appears to be the reason why claimants were not prevented from suing on alternative grounds, be it the law of tort or the law of bailment.

³⁸³ See Viney, *supra* note 202, at 248.

³⁸⁴ See Chr. 3.4.5, *infra*.

³⁸⁵ See Viney, *supra* note 202, at 248.

³⁸⁶ See David, *supra* note 194, at 129.

domestic tort and contract laws.³⁸⁷ Except for the United States, they apply the international system on their domestic flights too. The United States applies its national and local law on domestic flights and courts refer to tort, bailment and contract laws.³⁸⁸ As a result, the author is of the opinion that this is an indication that the international system has influenced the legal systems of individual countries.

2. Civil law and common law systems follow a nuanced approach with a mixture of strict liability and fault liability elements.³⁸⁹ This approach is based on the both legal systems to balance elements of strict liability and fault liability.³⁹⁰ A comparative law survey shows that international air carrier's liability systems do not opt exclusively for fault liability or strict liability, but adopt a more nuanced approach in accordance with civil law and common law.³⁹¹

3. The Warsaw Convention 1929 and the Montreal Convention 1999's provisions do not require a claimant to prove the fault of a carrier for passenger death or bodily injury, the same as contractual liability in civil law.³⁹² However, in common law this principle is closer to the common carrier's liability for carriage of goods than to his liability for passenger's death or bodily injury.³⁹³

4. Jurisdiction in the United States for passengers' death and bodily injury as well as for goods, progressively imposed more severe requirements on the air carrier to prove non fault.³⁹⁴ The presumption of liability under the WC29 was practically, and in courts, treated

³⁸⁷ See Tompkins, *supra* note 113, at 140-144; *Shawcross and Beaumont on Air Law*, *supra* note 3, VII 251-255; Miller, *supra* note 133, at 56; and See Deakin, Johnston and Markesinis, *supra* note 33, at 850.

³⁸⁸ See Dycstra, *supra* note 47, at 235.

³⁸⁹ See Grundmann, *supra* note 4, at 1584.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

³⁹² See Miller, *supra* note 133, at 47.

³⁹³ See Beale, *supra* note 21, at 551.

³⁹⁴ *Ibid.*

as strict liability.³⁹⁵ On the one hand, the air carrier was strictly liable for goods in the common law.³⁹⁶ On the other hand, it also had a duty to exercise the highest due care and diligence on passengers' carriage.³⁹⁷ Thus, the air carrier was treated strictly liable in cases following an aviation-related accident. Consequently, liability in international regimes found a similar position as in the United States' common law where air carriers are strictly liable for passenger's death or bodily injury, and for goods sustaining damage.³⁹⁸ Therefore, international air carrier's liability in case law practically found a similar position as in common law and the courts applied it to international flights as well as domestic flights.

5. In the Warsaw Convention 1929, the carrier of goods would be exonerated if he can prove due diligence which means an absence of fault. If the carrier could show that a particular situation was unforeseeable and insuperable for damages, he can remove the liability.³⁹⁹ However, in the Montreal Convention 1999, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from an inherent defect, quality or vice of that cargo; defective packing of that cargo performed by a person other than the carrier or its servants or agents; an act of war or an armed conflict; and an act of public authority carried out in connection with the entry, exit or transit of the cargo.⁴⁰⁰ In fact, the Montreal Convention 1999 introduces strict liability on carriers, the same as the common law.⁴⁰¹

6. Both the legal systems of the common law and civil law require full compensation in the case of death or bodily injury, while both of them accept contractual conditions for limiting

³⁹⁵ M.A. Clarke, *Contracts of carriage by air*, (London, LLP, 2002), 136.

³⁹⁶ Ibid.

³⁹⁷ See Kreindler, *supra* note 126, at 53-71.

³⁹⁸ See I. Koning, 'Liability in Air Carriage: Carriage of Cargo under the Warsaw and the Montreal Conventions', (2008) 33 *Air and Space Law* 310, at 319.

³⁹⁹ See Art.20 of the Warsaw Convention 1929.

⁴⁰⁰ See the Art.18 of the Montreal Convention 1999.

⁴⁰¹ See Youngs, *supra* note 35, at 231.

or exempting liability in the case of damage to goods.⁴⁰² The Warsaw Convention 1929, in contrast to the two legal systems, applies a limitation of liability for passenger's death or bodily injury.⁴⁰³ The WC29 went far beyond a common point of principles in the legal systems of the common law and civil law since it imposed uniform limits of liability.⁴⁰⁴ However, the Montreal Convention 1999 approves unlimited liability for passenger's death or bodily injury in accordance with the two legal systems.⁴⁰⁵

7. The international regime created an exceptional system against air carriers, because in the civil law and common law jurisdictions, the carrier is traditionally free to insert clauses in the carriage contract which exclude or reduce his liability.⁴⁰⁶ Of course, common law and civil law jurisdictions gradually moved to restrict contractual conditions exempting, delimiting, or designed to reduce the liability of the provider of services. Therefore, the courts have, in recent years, tended to reject these conditions for the benefit of passengers.⁴⁰⁷

8. Regarding the influence of the common law and civil law jurisdictions on Iranian law, it should be mentioned that basically Iranian law has been under the influence of the *Shariah* but in modern issues such as civil liability, carriage contract and the liability of a carrier, it has been under the influence of civil law jurisdictions. Among the writers of the Civil Code and Commercial Code, there were those who had academic backgrounds in European universities. They adopted the provisions on contract of carriage, and the presumption of liability from the civil law jurisdictions.⁴⁰⁸ Nevertheless, Iranian law was not affected by the common law jurisdictions in the abovementioned areas. Although carriage and liability

⁴⁰² See Farnsworth, *supra* note 2, at 122; and Viney, *supra* note 202, at 249.

⁴⁰³ See Art.22 of the Warsaw Convention 1929.

⁴⁰⁴ See Arts. 22 and 25 of the Warsaw Convention 1929.

⁴⁰⁵ See Art.21 of the Montreal Convention 1999.

⁴⁰⁶ P.B. Larsen, J.C. Sweeney and J.E. Gillic, *supra* note 135, at 454.

⁴⁰⁷ See Freund and Rudden, *supra* note 196, at 298-299.

⁴⁰⁸ See Chr. 3.3.2 for details and references, *infra*.

provisions such as bailment principles in the common law jurisdictions have similar counterparts in Iranian law, it cannot be claimed that in areas of liability or contract of carriage, Iranian law has been under the influence of the common law jurisdictions.

2.5 Concluding Remarks

As discussed above, all legal systems have their own liability principles. The main principle in the common law and civil law systems is based on the fault / negligence principle, which in modern law has been changed to the presumption of liability. Apart from the principle of fault, both systems have accepted strict liability as an exception in certain cases. In England and the United States (i.e. representatives of common law countries) or Germany (a civil law country), there are specific statutes for strict liability in accidents. In French law, this principle is accepted in tort under Article 1384 of the Civil Code.

When liability in contract law is studied, it is clear that these changes have taken effect and contract of carriage is today based on a presumption of liability. For instance, in the United States, the liability is strict and as soon as a breach of contract occurs, the defendant's liability is presumed. Therefore, the legal systems of States have inclined towards a presumption of liability and strict liability in order to balance the interests of stakeholders. The principle of compensation in legal systems requires full compensation and the removal of damage. However, this principle has created problems for both air carriers and passengers in air accidents. Therefore, in order to support the development of air carriage and compensation, countries have ratified statutes that enabled air carriers to accept the lowest insurance. In this way, the parties to a contract of carriage become aware of the probable damages and compensation.

The exemption condition as applied to air carriers has been accepted as a rule in both legal systems. Due to air carrier's highly onerous duty, carriers were allowed to insert exemption

conditions to limit or eliminate their liability. However, when economic conditions inclined towards the interest of passengers, gradually exemption conditions which were not in favor of passengers were recognized as being contrary to the public order. They were held void in the United States. In France, they were considered as illegal conditions and were thereby rejected by the courts. In England, they were held void by special statutes.

This shift occurred in private international air law for air carrier's liability. It can be claimed that although the Warsaw Convention 1929 was based on the principles taken from the common law and civil law jurisdictions, it provided principles that subsequently affected these two systems. As will be discussed, the international system of air carrier's liability was the result of collaboration between member States from the common law and civil law jurisdictions. Nevertheless, in order to maintain a balance between the interests of customers and air carriers, member States disregarded certain principles (on matters such as the insertion of exemption conditions, the fault principle and unlimited liability), and accepted the international principles (such as the presumption of liability, limited liability and the nullification of exemption conditions). This illustrates that the drafters put aside some of their own legal principles in order to achieve uniformity in the liability principles for air carriage.

Now it is clear that the respective legal systems had been flexible enough to accept principles that were more suitable for the transportation system and passengers such as the delimitation of liability or the nullification of exemption conditions although these were against their legal systems. Also they were ready to re-accept principles such as unlimited liability when the transport industry gains enough strength.

In considering the similarities and differences of the two systems, two observations can be made.

1. As the systems distanced themselves from common principles of liability based on fault and proceeded towards liability based on the presumption of liability, and in some cases accepted strict liability through specific Acts, this trend had an impact on air carrier's liability in international instruments such as the Warsaw system and the Montreal Convention 1999. As will be discussed in the next chapter, States had initially accepted the presumption of liability instead of fault liability. However, this principle was later developed to the point where the States accepted strict liability in the Montreal Convention 1999.
2. A difference in some of the principles adopted also proves the hypothesis that states sometimes neglected their own specific principles for the sake of uniformity in international regulations. From this hypothesis, it can be understood that not all international principles are similar to those from one legal system, but that in international circumstances, States should neglect some of their principles.

The next chapter will discuss the general principles of liability in the *Shariah* and Iranian law to clarify their similarities and differences with the liability principles in private international air law. It discusses the possibility that Iran, in certain cases, can neglect her specific principles for the sake of uniformity in international regulations. In other words, although Iranian law has its own independent constant principles on compensation that sets limited liability for death and bodily injury, these rules may be ignored for the sake of international uniformity. This would be in conformity with other jurisdictions that have adopted the same approach in favor of carriers and customers in transportation by air.

CHAPTER 3

LAWS AND REGULATIONS IN IRANIAN AIR TRANSPORTATION

3.1 Introduction

Iranian law was codified according to the *Shariah* and under the influence of the civil law system. Before the Civil Code of Iran was written in 1928, the Iranian courts applied the *Shariah* principles and customary law to cases, and there was no written code.¹ Since 1928, the rules and principles of the *Shariah* have been applied to civil affairs including tort and contract, and have been codified in the Civil Code.² It was later supplemented by the Commercial Code and the Civil Liability Act 1960 which were adopted from civil law.³

Accidents involving domestic or foreign flights had been governed by these codes, since they had been the only enforced laws in this country. Thus if an air accident involving international flights was referred to an Iranian court, the court would have to adjudicate the case in line with the regulations of the Civil Code for liability and conflict of laws. For issues like nationality and personal affairs (such as when determining claimants and their beneficiaries), conflict of laws would refer to the claimant's domicile.⁴

In 1985, Iranian legislators passed the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' that extended limited liability under the Warsaw-Hague Convention to domestic flights.⁵ However, after the Islamic Revolution, certain principles that were adopted from the *Shariah* were also applied to compensation for death or bodily injury in the territory of Iran under the Islamic Criminal code.⁶ This law conflicted with limited liability in the Warsaw-Hague provisions when applied on air carrier

¹ S.H. Amin, *History of Iranian law (Iranashenasi)*, (1382 A.H. 2002), 346.

² Ibid., at 343.

³ H. Sotodeh Tehrani, *Ghanoun -e- Tejarat* Vol. V (1385 A.H. 2005), 77-78

⁴ See Arts.5-7 of the Civil Code.

⁵ *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

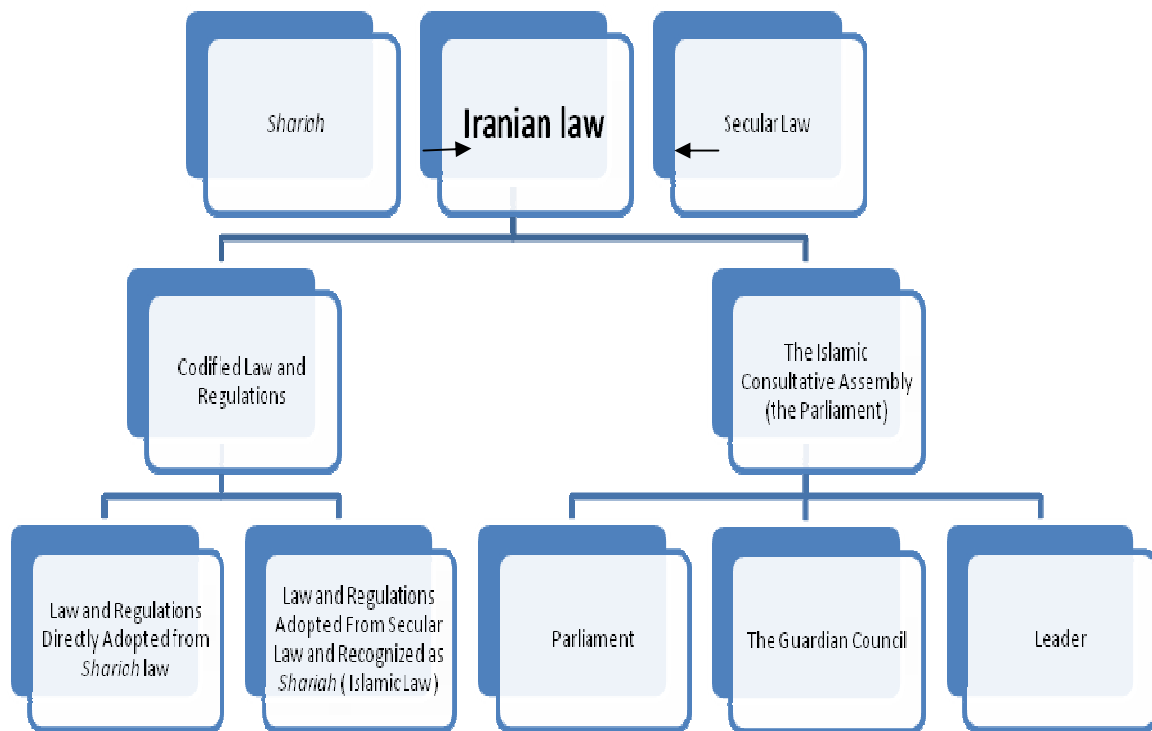
⁶ See Arts.294-407 of the Islamic Criminal Code.

liability for death or bodily injury.⁷ In order to find a solution to this conflict, the principles of liability in Iranian law is firstly studied as it is not be possible to understand Iranian law without comprehending the *Shariah*. This chapter therefore begins with a general exploration of the *Shariah* before investigating Iranian law and the impact, which the *Shariah* has on it through codification and the attempts made by the legislatures to make the law *Shariah*-compliant.

It then investigates liability principles in Iranian law. Chapter 3 ends by explaining international liability and Iranian law in order to lay the foundation for a discussion of liability principles under the *Shariah* and the Warsaw-Montreal regime in the next Chapter. Chapter 4 is designed to understand the conflict between the *Shariah* and the Warsaw–Hague Convention in Iran.

⁷ See Chr. 4, *infra*.

Figure 1: Iranian Law



Iranian law operates under the influence of the *Shariah* (twelver *Shia*) and secular law, the former more so than the latter. Islamic legislature codifies, modifies and interprets laws and regulations according to *feqh* (Islamic jurisprudence). Laws and regulations are directly extracted from the authoritative books of *foqahā* (learned Islamic jurists). If their books do not address a particular issue, secular law will be adopted provided it is not contrary to the *Shariah*. This latter form of law is also considered as Islamic law. Courts have to observe the law and regulations which are codified, modified, and interpreted by the Islamic legislature. According to the Constitutional Code of Iran, if there is no specific regulation for a case, courts have to refer to the authoritative books of the *foqahā*.

Table1. Persian and Arabic transliteration of technical terms

Arabic	Persian
‘ <i>aqd</i> (s) <i>uqūd</i> (pl)	<i>aqd</i> (s) <i>uqood</i> (pl)
<i>āqil</i> (s) ‘ <i>uqala</i> (pl)	<i>āqel</i> (s) <i>uqala</i> (pl)
‘ <i>āqilah</i>	<i>Āqele</i>
‘ <i>aql</i>	<i>aql</i>
‘ <i>ibādah</i> (s) ‘ <i>ibādat</i> (pl)	<i>ebādat</i> (s) <i>ebādāt</i> (pl)
‘ <i>ilm al usūl</i>	<i>elm-e-osul</i>
<i>āfāt samawiyah</i>	<i>afāt-e-samāvi</i>
<i>al-ahkām al-taklīfīyah</i>	<i>ahkām-e-taklīfī</i>
<i>al-ahkām al-waz ‘iyah</i>	<i>ahkām-e-vazei</i>
Ali ibn abi Talib	Ali-ebn-e-abi Taleb
<i>al-ijara</i>	<i>ejāreh</i>
<i>al-itlāf mubasharatūn</i>	<i>etlāf -be-mobāsherat</i>
<i>al-itlāf tasabbūban</i>	<i>etlāf -be-tasbīb</i>
<i>al-qatl al ‘amd</i>	<i>Qatl-e-amd</i>
<i>al-qatl al-khata’</i>	<i>Qatl-e-khataii</i>
<i>al-qatl shibh amd</i>	<i>Qatl-e-shebh-e-amd</i>
<i>amanat</i>	<i>amānat</i>
<i>amin</i>	<i>amin</i>
<i>ayah</i> (s) <i>ayāt</i> (pl)	<i>āyeh</i> (s) <i>āyāt</i> (pl)
<i>dhiman</i>	<i>zemān</i>
<i>Dinar</i>	<i>dinār</i>
<i>Dirham</i>	<i>derhām</i>
<i>Diyah</i>	<i>diyeh</i>
<i>faqīh</i> (s) <i>fuqaha’</i> (pl)	<i>faqīh</i> (s) <i>foqahā</i> (pl)
<i>fatwa</i>	<i>fatvā</i>
<i>fiqh</i>	<i>feqh</i>
<i>hadīth</i>	<i>hadis</i>
<i>harām</i>	<i>harām</i>
<i>hukm</i> (s) <i>ahkām</i> (pl)	<i>hokm</i> (s) <i>ahkām</i> (pl)
<i>ijma’</i>	<i>ejmā</i>
<i>ijtihad</i>	<i>ejtehād</i>
<i>Ithna ‘Ashariah</i>	<i>Esnā Ashari</i>
<i>itlāf</i>	<i>etlāf</i>
<i>J’fari</i>	<i>Jafari</i>
Jaf’ar al-sadiq	Jafar-e-Sadeq
<i>makrūh</i> (s) <i>makrūhūn</i> (pl)	<i>makrouh</i> (s) <i>makrouhāt</i> (pl)
<i>mandūb</i> or <i>mustahab</i>	<i>mostahab</i>
<i>mubāh</i> (s) <i>mubāhāt</i> (pl)	<i>mobāh</i> (s) <i>mobāhāt</i> (pl)
<i>mubashrat</i> (s) <i>mubasharatūn</i> (pl)	<i>mobasherāt</i>
<i>mughallazah</i>	<i>moghallezeh</i>
<i>muḡtahid</i> or <i>mujtahid</i>	<i>mojtahed</i>
<i>Muharim</i>	<i>moharram</i>
<i>Mutahari</i>	<i>Motahari</i>
<i>qasb</i>	<i>ghasb</i>

<i>qisas</i>	<i>Qesas</i>
<i>Qur'ān</i>	<i>Qorān</i>
<i>ra'y</i>	<i>Ray</i>
<i>Safawi</i>	<i>Safaviyyeh</i>
<i>Shafi'i</i>	<i>Shāfei</i>
<i>Sharī'ah</i>	<i>Shariyat</i>
<i>Shi'a</i>	<i>Shieh</i>
<i>sunnah</i>	<i>sonnat</i>
<i>Sunni</i>	<i>Sonni</i>
<i>surah</i>	<i>sureh</i>
<i>talaf</i>	<i>talaf</i>
<i>usūl al-fiqh</i>	<i>Osul-e-feqh</i>
<i>vecalat</i>	<i>vekalat</i>
<i>wāğib (s) wāğibat (pl)</i>	<i>vājeb (s) vajebāt (pl)</i>
<i>waqf</i>	<i>vaqf</i>
<i>wasiyat</i>	<i>vasiyat</i>

Since this study focuses on the Iranian legal system, the legal terminology and certain proper names will be transliterated from Persian to how they are pronounced by the legal community in this country. Although these terms come from the *Shariah* and the Arabic language, they have undergone changes in the Persian phonetic system. In spite of the fact that both languages use the same writing system, i.e. Aramaic alphabet, their sound systems are different. For instance Arabic has a [‘] sound for letter (‘ayn) in words like *Sharī'ah* and *Shi'a* that does not exist in the Persian sound system. Therefore although this letter (‘) exists in the written form of borrowed words from Arabic, it does not have a phonetic representation in the articulated words in Persian. There are, of course, other features like their vowel systems that distinguish the Persian and Arabic sound systems.

For the sake of those who might be familiar with Arabic pronunciation of these terms, the author provides a transliteration of Persian and Arabic pronunciations in table 1. However, he preserves the English spelling for *Quran*, *Shariah*, *Diyah*, *Shia* and *Sunni* throughout the study since these are more familiar to the western audience and English search engines usually use these spellings.

3.2 The *Shariah*

Muslims differ as to what exactly the *Shariah* entails. Different schools of Islamic thought hold different views of the *Shariah*.⁸ Two major branches of Islam are *Sunni*⁹ and *Shia*,¹⁰ which have their followers in different States.¹¹ In this research, the *Shariah* is only studied from the perspective of the *esnā-ashari* jurisprudence (Twelver *Shia* school) because this is the tradition followed in Iran.

According to the constitutional code of Iran, firstly, the official religion of Iran is Islam and the Twelver *Jafari* school,¹² and this principle will remain eternally immutable.¹³ Secondly, all civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations.¹⁴ Thirdly, the Parliament cannot enact laws contrary to principles and regulations of the official

⁸ M.H. Kamali, *Principles of Islamic Jurisprudence* (1990), 6-15.

⁹ There are four Sunni schools of jurisprudence (*feqh*). These are *Hanafi*, *Shafi'i*, *Maliki*, and *Hanbali*. The modern scholars look at these schools as *jus commune*. In terms of methodology, two schools of thought existed. First, there were those who maintained that the free use of human reasoning to develop the law was both legitimate and necessary. These jurists were called the people of *ray* or methodologists and later came to be the *Hanafi* and *Shafi'i* schools. Secondly, there were those who advocated the exclusive authority of precedents and traditions of the Prophet. They were called the traditionalists, who later represented the *Maliki* and *Hanbali* schools. See W. B. Hallaq, *The Origins and Evolution of Islamic Law* (2005), at 157; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 49-54.

¹⁰ The *Shias* are those who followed Ali ibn -e- abi Taleb, the Prophet's cousin and son-in-law. Its name derived from the Arabic for *shiat* Ali, i.e. 'the party of Ali'. *Shia* has three major subdivisions as well as numerous offshoots. The majority is called *Esnā Ashari* (Twelver *Shia*), because they recognize 12 Imams, beginning with Imam Ali. It is believed that the 12th Imam disappeared in 873 but will return as the Mahdi (literally meaning guide). Twelver *Shia* became the state religion of Persia (Iran) under the *Safaviyyeh* dynasty in the 16th century. Imam Jafar -e- Sadeq, the sixth Shia Imam, in rejecting the Abbasid political sponsorship, put forward his own ideological and philosophical viewpoint as the *Shia* school, and asserted that the leadership of the Muslim community was vested in Imams personally, as direct descendents of the Prophet. Therefore, the Iranians consider themselves Twelver *Jafari* School. M.B. al-Sadr, *The Emergence of Shi'ism and the Shi'ites*: in <http://www.islamicecenter.com>.

¹¹ H.P. Glenn, *Legal Traditions of the World*. (2007), 199-201.

¹² See footnote 10, *supra*.

¹³ See Art. 12 of the Constitutional Code of the I.R. Iran.

¹⁴ See Art. 4 of the Constitutional Code of the I.R. Iran.

religion of the country.¹⁵ Fourthly, the judge is bound to endeavor to judge each case based on the codified law. In case of the absence of any such law, he has to deliver his judgment based on authoritative Islamic sources and authentic opinions of prominent *foqahā* (learned Islamic Jurists). He, on the pretext of the silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.¹⁶

3.2.1 Definition of the *Shariah*

There are diverse and overlapping definitions in the way the term *Shariah* is used in the scholarly literature. They have delicate differences that need to be clarified. For the purposes of this study, three technical terms will be elaborated. These are the *Shariah* in general, the *Shariah* as Islamic jurisprudence, and the *Shariah* as Islamic law.

1. Generally, the *Shariah* is the code of conduct or religious law of Islam and is deemed as God's law.¹⁷ The *Shariah* is derived from the holy text revealed to the Prophet Mohammad, known as the Quran. Muslims, from two verses of the Quran, believe that it is necessary for those who desire to obey God and to be loved by Him to follow the *Shariah* as introduced and practiced by the Holy Prophet and his true followers.¹⁸ Muslims use the term '*Shariah*' to refer to these divinely inspired spiritual and worldly commandments, which cover actions of worship and behavior, as well as social and commercial transactions.¹⁹

2. Islamic jurisprudence as the *Shariah* is an effort to comprehend God's law with great precision by *foqahā*. Islamic jurisprudence is a chain of things that must exist, rather than a

¹⁵ See Art. 72 of the Constitutional Code of the I.R. Iran.

¹⁶ See Art. 167 of the Constitutional Code of the I.R. Iran.

¹⁷ M. Motahari, *Jurisprudence and Its Principles: An Introduction to Islamic Sciences* (1368 A.H. 1989), 21.

¹⁸ In the holy Quran, the holy Prophet is told 'then we appointed you the religious-law (the *Shariah*) guide under our command, so follow the command.' (45:18) and in another place the prophet is told to convey to his followers: 'if you truly love Allah, then follow me in order that Allah be affectionate to you.' (3:31).

¹⁹ See Motahari, *supra* note 17, at 21

chain of things, which already exist.²⁰ Islamic jurisprudence, which includes Islamic sources, the principles of jurisprudence (*osul-e-feqh*) and Islamic science (*feqh*),²¹ is the field of study that fulfils this purpose.²²

Since it is possible to refer, in particular ways, to the documents or sources of Islamic law and extract erroneous deductions, as opposed to the actual view of the *Shariah*, essentially there should be a special field of study that enables scholars to discern the correct and valid method of using the sources of Islamic law.²³ Islamic jurisprudence therefore becomes the reference point for deducing and extracting the laws of Islam by means of reasoning and through the guidance provided by God through the Prophet.²⁴ The *Shariah* as Islamic jurisprudence not only involves clear and explicit Quranic text and the Prophet's example,²⁵ but also includes the intellectual efforts of the *foqahā* in deducing or finding rulings whereupon the foundational text is silent or has not been explicit.²⁶

3. Islamic law as the *Shariah* includes laws and regulations that are codified by Islamic States as contemporary legal terminology requires. The broad scope of the *Shariah* and Islamic jurisprudence makes it impossible for the concept to be compared with the term 'law' as used and understood in contemporary legal scholarship. If law is thought of as a body of binding rules for a community, the *Shariah* includes law and much else besides law. It would therefore be misleading to equate the *Shariah* with law.²⁷ Hence, in order to compare the *Shariah* with law, this needs to be narrowed down to topics that cover the social and commercial relations in a State. For the purposes of this study, the above limited topics are

²⁰ Ibid.

²¹ Ibid., at 22.

²² H. Modarressi Tabatabaei, *An Introduction to Shia Law* (1984), 6-9.

²³ See Motahari, *supra* note 17, at 23.

²⁴ Ibid.

²⁵ Ibid.

²⁶ N. Coulsom, *Conflicts and Tension in Islamic Jurisprudence* (1961), at 23.

²⁷ B. G. Weiss, *The Spirit of Islamic Law* (1998), 17.

termed as Islamic law. Therefore, this thesis explores the *Shariah* from the perspective of contemporary legal scholarship, i.e. the *Shariah* as applied by Islamic States in codifying their laws.

3.2.2 Islamic Jurisprudence

Adopting the above definition, this thesis will explore the *Shariah* from the perspective of *Shia* jurisprudence. For this purpose, it refers to the main Islamic sources and books of the prominent *Shia* scholars. It introduces the four main sources of Islamic law before explaining the principles of jurisprudence and the classification of jurisprudence. It is worth noting that they are the main tools for judges and Islamic legislatures. This discussion will lead to a better understanding of the subject matters of subsequent chapters.

3.2.2.1 Islamic Sources

There are four main sources of Islamic law, with varying degrees of emphasis, common to all schools of law. These four sources of *Shia* jurisprudence are the *Quran*; the *Sunnah*; *ejmā*; and *aql*.²⁸

(i) The *Quran*

There is no doubt that the Holy *Quran* is the primary source of Islamic laws and regulations.²⁹ However, the *ayat* or verses of this book are not limited to laws and regulations. Further, although it covers certain substantive legal rules, the *Quran* does not concern itself with all the diversified and detailed requirements of the law.³⁰ It comprises 114 chapters (*surehs*). Each chapter is made up of a different number of verses. Hundreds of different types of

²⁸ M.R. Muzaḥḥar, *usūl -e- Fiqh* (1365 A.H 1986), at 104.

²⁹ Ibid., at 42-60.

³⁰ Ibid, and See M. Cherif Bassiouni (ed.), *The Islamic Criminal Justice System* (1982), 129.

issues were introduced in them but only a part of the *Quran*, about five hundred verses from a total of six thousand six hundred and sixty (i.e. roughly a thirteenth of the *Quran*), pertains to laws.³¹

(ii) The *Sunnah* (Tradition)

When there was no explicit Quranic verse on a particular point, Muslims resorted to the *Sunnah*, which was originally taken as the prevailing Arabian customary law. As time passed, the notion of *Sunnah* became more restricted and it was finally taken to be confined to the traditions of the Prophet. In this way, the second source of law, i.e. the *Sunnah* developed. The *Sunnah* means the words, actions and assertions of the Prophet.³² That is, where a certain law had been verbally explained by him, or how he performed certain religious obligation, or where others had performed certain religious duties in his presence in a way, which earned his blessing and approval. *Foqahā* would consider the action to be the actual law of Islam.³³ The traditions, having received the status of a source of law, were preserved in writing. In Islamic law, the *Sunnah* ranks second after the *Quran* as a source of law.³⁴

(iii) *Ejmā* (Consensus of Opinion)

Consensus means the unanimous view of the Islamic jurists on a particular issue.³⁵ Consensus is binding, because if all Muslims have one view, there is a presumption that the view has been received from the Prophet. It is impossible for all Muslims to share the same view on a

³¹ See Motahari, *supra* note 17, at 26.

³² S.H. Amin, *Islamic law and Its implications for the Modern World* (1989), 2.

³³ See Motahari, *supra* note 17, at 26.

³⁴ See Amin, *supra* note 32, at 10-11.

³⁵ See Motahari, *supra* note 17, at 28.

matter, thus their consensus proves that the origin of that view is the *Sunnah* of the Prophet or an Imam.³⁶

If at any time a consensus is reached on a particular issue among all Islamic jurists, with no exception, it will bind people of that time era. However, it is not binding on subsequent Islamic jurists.³⁷ Thus, consensus is not genuinely binding in its own right. Rather, it is binding inasmuch as it is a means of discovering the *Sunnah*.³⁸

(iv) *Aql* (Judicial Reasoning)

What is reasonable is law and what is law is reasonable, i.e. every individual rule of law has its own rationality.³⁹ When in a given instance there is not any authority either in the textual source or in consensus, the subject of the law is required to do what human reasoning commands in the circumstances.⁴⁰ An Islamic jurist has to first search the *Quran*, then the *Sunnah*, and only afterwards the consensus to find out the rules applicable to a case before him. If there is not an appropriate legal authority or the texts are not clear enough, he is authorized to apply an accepted principle or an assumption, which according to his wisdom and knowledge might fit the problem best.⁴¹ *Aql* is accepted as a supplementary source of law.⁴²

The binding testimony of reason means that if in a set of circumstances reason has a clear rule, then that rule, because it is definite and absolute, is binding. The true and divine points of Islamic law exist independently in the divine knowledge, and Islamic jurists may or may

³⁶ See Amin, *supra* note 32, at 21.

³⁷ Ibid.

³⁸ A.H. Mohammadi, *Osul-e- Estenbat -e- Hoqooq -e- Islami* (1385A.H. 2006), 201.

³⁹ See Amin, *supra* note 32, at 11.

⁴⁰ Such instances of using human reasoning in the course of making judicial decision include the case where if textual sources demand a given performance, the human reasoning would resolve that all the prerequisites for such a performance are also obligatory. Ibid., at 12.

⁴¹ See Motahari, *supra* note 17, at 25-26.

⁴² Ibid., at 32.

not arrive at the same.⁴³ Closely connected to the notion of human reasoning is the unity between *aql* and the *Shariah* as a whole. They are necessarily linked, especially in the sense that legal rules made by *aql* must be regarded as parts of the *Shariah* and people must obey them. The task of jurisprudence is mainly the vindication of the conviction of full agreement between law and reason, rejecting disagreement between them.⁴⁴

As mentioned above, *aql* is a supplementary source of law in Islam. Where there is no explicit discussion about a particular matter in the *Quran* and the *Sunnah*, Islamic legislators and *foqahā* use this source to develop legal rules in accordance with the *Quran* and the *Sunnah*, to regulate social relations. Thus, its function is limited either to interpret the exact meaning of the *Quran* on the one hand, or to work out appropriate legal solutions when there is no provision in other sources of Islamic law on a specific issue.⁴⁵

Islamic legislators and *foqahā* should observe the *Quran* and the *Sunnah* when providing their opinions. For instance, because there is no specific rule in the *Quran* for carriage by air, they who establish rules in this regard need to observe Islamic resources. Since air carrier liability principles are derived from general liability principles, the following section will discuss the general rules governing liability in the *Shariah*.⁴⁶

3.2.2.2 Principles of Jurisprudence (*osul-e-feqh*)

The *osul-e-feqh* assists the study of the rules used in theorizing the *Shariah*.⁴⁷ Since it is possible to refer, in particular ways, to the documents or sources of Islamic law and extract erroneous deductions, as opposed to the real view of the *Shariah*, essentially there should be

⁴³ M. Ansari, *Farā'id al-Usūl* Vol. I (1407A.H. 1986), 270-271.

⁴⁴ Ibid.

⁴⁵ Believing in human reasoning (*ejtehād*) as a supplementary source of law, the *Shia* jurists utilized their juristic reasoning continuously. See Motahari, *supra* note 17, at 44.

⁴⁶ Ibid. at 45.

⁴⁷ Ibid.

a special field of study that enables the *foqahā* to discern the correct and valid method of using the sources of the *Shariah*.⁴⁸ Therefore, the principles of jurisprudence is, in reality, the study of the rules to be used in deducing the *Shariah* and it teaches us the correct and valid way of deducing from relevant sources in jurisprudence.⁴⁹

The most prominent person in *Shia* school, to have compiled books on principles and whose views were discussed for centuries is Mortaza' Alam al Huda (who died in 436 A.H.). His most well-known work was the *al-Dhariyah*.⁵⁰ The approach introduced by him has been followed by the *foqahā* to the present day.

3.2.2.3 Classification of Jurisprudential Issues (*feqh*)

Feqh as such is the end product of *osul-e-feqh*. It is concerned with the knowledge of the detailed rules of the *Shariah* in its various branches, in other words, it is the law itself.⁵¹ The domain of jurisprudence is extremely wide. It contains all issues for which Islam provides instructions. The term '*feqh*' is the extensive, profound knowledge of Islamic instructions and realities and has no special relevance to any particular division.⁵² However, it gradually came to be especially applied to the profound understanding of the *Shariah*.⁵³

Shariah teaching has been divided into three parts: 1) the realities and beliefs, 2) morality and self-perfection, and 3) the law and issues of actions. Islamic jurisprudence has termed this last division *feqh*. Since the early days of Islam, the laws have probably attracted the most attention and queries.⁵⁴

⁴⁸ See Kamali, *supra* note 8, at 12.

⁴⁹ See Motahari, *supra* note 17, at 22.

⁵⁰ *Ibid.*, at 12.

⁵¹ See Kamali, *supra* note 8, at 12.

⁵² *Ibid.*

⁵³ See Motahari, *supra* note 17, at 35-36.

⁵⁴ *Ibid.*

Foqahā have divided divine laws into the law of human duty (*ahkām-e-taklifi*) and the law of human status (*ahkām-e-vazei*). The laws of duty include those duties, which contain obligations (*vājebāt*), prohibitions (*moharamāt*), desirables (*mostahabat*), undesirables (*makrouhāt*), and permissibles (*mobāhāt*). The laws regarding status differ from the laws regarding duty. The former consists of ‘do’s’ and ‘don’ts’, commands and prohibitions, or the giving of permissions; while the latter concerns status like marriage and ownership and the rights thereof.⁵⁵

The famous *Shia* books classify all issues of jurisprudence into four parts: worship, unilateral and bilateral contracts one-party contracts, and *ahkām*. If they are of the first type, like prayer and fasting, they are termed in jurisprudence as worship (*ebādat*).⁵⁶ If an act depends upon the execution of a contract, the contract could be unilateral or bilateral. Bilateral contracts like selling and hire, deposit are called *aqd*.⁵⁷ Acts that do not depend upon the execution of a special contract, like inheritance, punishments, and compensation are termed *ahkām*.⁵⁸ The basis of liability for death or bodily injury and damage should be studied under principles and regulations of *ahkām* in Twelve *Shia* school. *Ahkām* regarding liability in the *Shariah* in Iranian law will be discussed below.

3.3 Iranian Law

The Constitutional Code is the most important legal text that establishes Iran as an Islamic Republic that implements the *Shariah*.⁵⁹ An Islamic government is not like any other government in the contemporary era. It is a regime of Caliphate and Imamate exclusively

⁵⁵ Ibid.

⁵⁶ See Kamali, *supra* note 8, at 42.

⁵⁷ Ibid.

⁵⁸ See Motahari, *supra* note 17, at 36.

⁵⁹ See Art. 4 of the Constitutional Code of the I.R. Iran.

defined by the Islam. Although its people exercise their right by participating in the shaping of legislature power, God's right is observed by accepting Islamic principles as the base of government.⁶⁰

On the one hand, God created people and send Messengers to guide them. On the other hand, people have the free will to choose the right path or not.⁶¹ The Islamic government receives its legitimacy from the people. Constitutionally, therefore, people are at the top of the power hierarchy pyramid in Iran. Thus, the nature of legislation and sovereignty in the Islamic Republic of Iran is based on divine and human foundations.⁶²

The Constitutional Code has accepted the separation of powers among the Legislature, the Judiciary, and the Executive. Each is responsible for a part of government and implements its duties through its related organizations.⁶³ Although it seems that power should be restricted to those three bodies, a close look at the other articles of the Constitutional Code reveals other sources that are independent of the three powers.⁶⁴ In addition to the three powers, those sources also have a right to draft legislation.⁶⁵

3.3.1 The Multiplicity of Islamic Legislatures

Before the Islamic Revolution, there were solely two legislative bodies: the National Parliament and the Senate. However, since the *Shariah* became a fundamental principle in the Iranian jurisdiction for all laws and regulations after the revolution,⁶⁶ the Constitutional Code consequently envisaged different means of supervision in its aim to make the law *Shariah*-

⁶⁰ See the Preamble of the Constitutional Code of the I.R. Iran.

⁶¹ The holy *Quran*, *Sureh* 76:2-3.

⁶² See Art.56 of the Constitutional Code of the I.R. Iran.

⁶³ See Arts.57, 58, 60, 61, 156 and 174 of the Constitutional Code of the I.R. Iran.

⁶⁴ These bodies are the Councils, the national radio and television organization, the national Security Council and the Expediency Council (See Arts. 7, 75, 176 and 112 of the Constitutional Code of the I.R. Iran).

⁶⁵ M. Nasiri, *Tafkik -e- Ghova dar Jomhuri -e- Islami -e- Iran* (1380 A.H. 2002), 35-72.

⁶⁶ See Art.4 of the Constitutional Code of the I.R. Iran.

compliant. This is because, in the post-Revolution era, in addition to the fact that laws had to be in conformity with the *Shariah*, other entities were established alongside the Parliament that have rights equal to legislation and their opinions affect existing laws.

Due to the structure of the Constitutional Code, several legislatures have key roles in the field of air transport industry. Some of them are directly involved in the legislative process such as the Islamic Consultative Assembly (Parliament) which enacts necessary regulations for the operation of air transport in Iran. Others, such as the Guardian Council of the Constitution, the Leader (*velayate faqih*), and *foqahā*, have crucial and key roles in the process of codification and interpretation of laws and regulations, especially those relating to air transportation and air carrier liability. Indeed, their impact has always been greater in these areas than in ordinary laws. This led to a multiplicity of legislative bodies.

In order to understand the process of making the law *Shariah*-compliant, it is necessary to be acquainted with the multiplicity of Islamic legislatures in the post-Revolution era.

3.3.1.1 The Islamic Consultative Assembly (the Parliament)

The State's legislature works through the Islamic Consultative Assembly. Its enactments, after fulfilling legal procedures, are submitted to the executive and judiciary for implementation.⁶⁷ The Constitutional Code has set specific duties for the Legislature. These can be summed up as legislation and supervision.⁶⁸ The Parliament, together with the Guardian Council, makes up the Legislature. The former has the responsibility to enact laws and regulations. The latter is responsible for supervising the compatibility of these laws and regulations with Islam and the Constitutional Code.⁶⁹

⁶⁷ See Art.64 of the Constitutional Code of the I.R. Iran.

⁶⁸ See Arts.58, 71, 88 and 89 of the Constitutional Code of the I.R. Iran.

⁶⁹ J. Madani, *Hooq-e- Asasi* (1382 A.H. 2000), 16.

Chapter 5 of the Constitutional Code deals with Legislature through the Parliament.⁷⁰ The Parliament cannot enact laws, which are contrary to the principles and rules of the *Shariah* or the Constitution.⁷¹

By referring to Islamic jurisprudence, the Parliament paraphrases these principles into contemporary language with a formal format, in order to provide clear and straight forward regulations applicable to daily life. Thus, besides the public interest, the Parliament should observe Islamic principles and the Constitutional Code, which are regarded as the most important public interest. Observing these limits is obligatory, as the enactments cannot otherwise be put into practice.⁷²

In relation to its general duties and the heavy workload involved in enacting laws and regulations, the Parliament has established permanent and temporary commissions. Representatives for these commissions are selected based on their backgrounds and specialties, and the State's priorities at any particular point in time.⁷³ There are different commissions in the Parliament. Every commission consists of a number of representatives who carry out the preliminary research for the codification of regulations on different issues, and present them to the general sessions of the Parliament for final discussions and approval.⁷⁴ The Transport and Civil Commissions are responsible for air transport. They affect the transport industry in two ways:⁷⁵

⁷⁰ Another legislative method is through a referendum but this rarely happens. See S.M. Hashemi, *Hoqooq -e- Asasi Jomhouri Islami Iran* Vol. II (1371 A.H. 1993), 105.

⁷¹ See Art.72 of the Constitutional Code of the I.R. Iran.

⁷² Ibid.

⁷³ See Art.34 of the Assembly's Internal Code of Conduct.

⁷⁴ See Hashemi, *supra* note 70, at 141.

⁷⁵ Ibid.

1. The Transport commission has a pivotal role in the approving or disapproving of Bills related to air transport such as bilateral air transport agreements, and laws relating to air carriers.
2. In the case of an air accident, the Civil Commission instantly participates in and supervises the procedure of the investigation. The commission is diligent in finding the causes of accident, and follows up with payment of compensation to injured parties.

3.3.1.2 The Leader (*velayat-e-faqih*)

The Leader stands above the three organs of power in the Islamic Republic of Iran. The Constitutional Code clearly recognizes his power over all the aforementioned three powers in all sectors and organizations, and explains his rights and responsibilities.⁷⁶

These rights and responsibilities reflect the system and its approach towards leadership. In Iran, the Leader, as a religious leader, enjoys enormous power. He is at the pinnacle of the governmental pyramid,⁷⁷ and, as the Constitutional Code makes clear, his orders are legally binding.⁷⁸ The Leader has executive, legislative, confirming, and judiciary dominance over the affairs of the society through the three organs of power and other entities. In other words, the governing powers in the Islamic Republic of Iran act under his control.⁷⁹

Therefore, the Leader can apply his opinion to the society directly or indirectly. Based on the *Shariah* and the Constitutional Code, the Leader enjoys such a superior position that he can shape laws and regulations, and instructs the three organs of power to carry out their duties,

⁷⁶ See Art.110 of the Constitutional Code of the I.R. Iran

⁷⁷ The Leader is a clergy (*faqih*) who is just and pious, and possesses a clear political vision to lead the Muslim community. See Art. 109 of the Constitutional Code of the I.R. Iran.

⁷⁸ See Hashemi, *supra* note 70, at 57.

⁷⁹ See Art.157of the Constitutional Code of the I.R. Iran.

in accordance with his opinion. This has supposedly affected air carrier liability through one of the following ways:

1. The Leader directly appoints the head of the judiciary, whereas the Islamic scholars are sitting in the Guardian Council for specific periods. He also issues decrees for legislative and political referenda, and asks the National Expediency Council to resolve national problems which cannot be solved in the ordinary manner.⁸⁰

2. When the Leader issues a governmental order, the three organs and other entities in Iran have to obey it. The order is considered as a guarantee for preserving Islamic social order and ranks as basic orders. The Decree for the establishment of the Expediency Council and the decree for the revision of the Constitutional Code, although earlier disqualified by the Guardian Council, are instances of governmental orders issued by the present Leader of Iran.⁸¹

3. The Leader can also indirectly affect the judgments of courts through his opinion. According to Islamic jurisprudence and the Constitutional Code of Iran, the Leader issues his decrees or opinions (*fatva*) for his followers.⁸² When a case is referred to a court, the judge refers to ordinary law and regulations. However, when there is no clear-cut law in that regard, the court issues a judgment in accordance with authentic Islamic sources or authoritative religious decrees. As a result, although judges have the freedom to refer to any decree, they would usually prefer the opinion of the Leader, as he is considered highly knowledgeable of the requirements and circumstances of the time.

The case of equality or inequality for compensation payable to Muslims and non-Muslims in the Islamic Criminal Code for death or bodily injury caused by air accidents is one such case.

⁸⁰ See Art.110 of the Constitutional Code of the I.R. Iran.

⁸¹ See Art.109 of the Constitutional Code of the I.R. Iran.

⁸² M.B. al-Sadr, *The Renewal of Islamic Law* (1993), 59-79.

This is a matter which is not directly mentioned in the law, i.e. there is no decisive source in Islamic jurisprudence in this regard. There is one opinion saying that compensation for Muslims and non-Muslims is different, in that the compensation for non-Muslims is half of that for Muslims.⁸³ However, there is another opinion, which coincides with the Leader's opinion, which states that there is no difference between the compensation for Muslims and non-Muslims, and they should be paid equally. In such cases, the courts prefer to apply the decree of the Leader when issuing their orders.⁸⁴

3.3.1.3 The Guardian Council of the Constitution

The Constitutional Code introduced the Guardian Council and defined a crucial role for it to monitor the conformity of laws with the *Shariah*. Laws and regulations that are approved through the parliamentary process are officially sent to the Guardian Council.⁸⁵ The main difference between this Council and other institutions, which are responsible for supervising the conformity of ordinary laws with Constitutional Codes, is that the Guardian Council, in addition to carrying out this duty, also ensures that they comply with Islamic principles.⁸⁶

The Guardian Council has a dual composition.⁸⁷ It consists of six Islamic scholars (*faqih-e-adel*) who are just and aware of the present needs of the society and are selected by the Leader; and six legal experts who are qualified in different branches of the law and are chosen by the Parliament from among the law experts introduced by the head of the judiciary.⁸⁸ This dual composition therefore enables the Guardian Council to ensure that the

⁸³ Ibid.

⁸⁴ J. Boshehri, *Hoqooq - e- Asasi* (1382 A.H. 2004), 15.

⁸⁵ See Art. 94 of the Constitutional Code of the I.R. Iran.

⁸⁶ See Arts. 72, 85, 94 and 96 of the Constitutional Code of the I.R. Iran.

⁸⁷ See Art. 4 of the Constitutional Code of the I.R. Iran.

⁸⁸ See Art. 191 of the Constitutional Code of the I.R. Iran.

legislations passed by the Parliament conform to both Islamic principles and the Constitutional Code.

If the Guardian Council finds an enactment do not conform with the *Shariah*, the Council returns it to the Parliament for review. As long as the Parliament has not modified the legislation according to the comments received from the Guardian Council, it is not considered a law.⁸⁹

It is believed that Article 4 of the Constitutional Code covers all laws and regulations in the country, both past and present. The phrase ‘all laws and regulations’ has no limitation, either from the perspective of legal hierarchy (constitutional, ordinary, regulations) or time framework (past, present, future).⁹⁰ By applying this broad interpretation, the Guardian Council can revise pre-Revolution laws and regulations. Hence, the council is able to declare which laws and regulations are contrary to the *Shariah* in case they are referred to the Council or when the Council itself investigates them.⁹¹ However, the author is of the opinion that it is possible to infer that this Article does not cover past laws and regulations because the Article is a general one which makes no reference to previous legislations. Therefore, the scope of the Article had to be limited to subsequent parliamentary legislations.

According to the Constitutional Code, the Guardian Council is responsible for interpreting the Constitutional Code as well as to ensure that laws are in conformity with it. However, the Council has interfered with many ordinary laws, rules and regulations by providing its interpretations. Although an interpretation of the law is not legislation, any interpretation has its own consequences. Besides, the text of law can be interpreted differently. Whilst

⁸⁹ F. Hedayatnia and M.H. Kaviani, *Barresi Hhoqooqi -e- Shoraye Negahban* (1375 A.H. 1997), 56.

⁹⁰ S.M. Khamenei, ‘Asl -e- Chahar -e- Ghanon -e- Asasi’, (1369 A.H. 1990) IX *Kanon Vokala Journal* 145, at 152.

⁹¹ The Opinion of Guardian Council No.1360/2/8-1983.

interpretations offered by the Guardian Council on articles of the Constitutional Code or ordinary law do not play a direct role in legislation, new rules may be established or the applicability of an existing one can be limited or expanded, which is in fact the establishment of a right or a responsibility or a special rule.⁹²

Even after the Parliament ratifies a law and it enters into force, the Guardian Council may interpret parts of that law by issuing notes or questions to parliamentary members or governmental bodies. For example, when the Council examined the Act, which determines the liability of air carriers against the Islamic Criminal Code, it implicitly noted that the Act was contrary to Islamic principles. As a result, some courts accepted this interpretation as law and made their decisions accordingly.⁹³

The author is of the opinion that these interpretations can reverse legal cases, and cause non-uniformity in judicial decisions on air carrier liability for passenger's death or bodily injury.⁹⁴ Some courts still apply laws that were declared by the Guardian Council to be contrary to Islamic principles, arguing that the overturning of a law is the right of the Parliament, while others refer to the Council's interpretation in their decisions. Accepting the interpretation as law is contrary to the explicit text of several articles of the Constitutional Code. It therefore seems that the limits of Article 4 of the Constitutional Code are vague and are in need of clarification.⁹⁵

⁹² M. Rahnama, *Maraje Ghanongzari dar Iran* (1380 A.H. 2002), 132-138.

⁹³ Ibid.

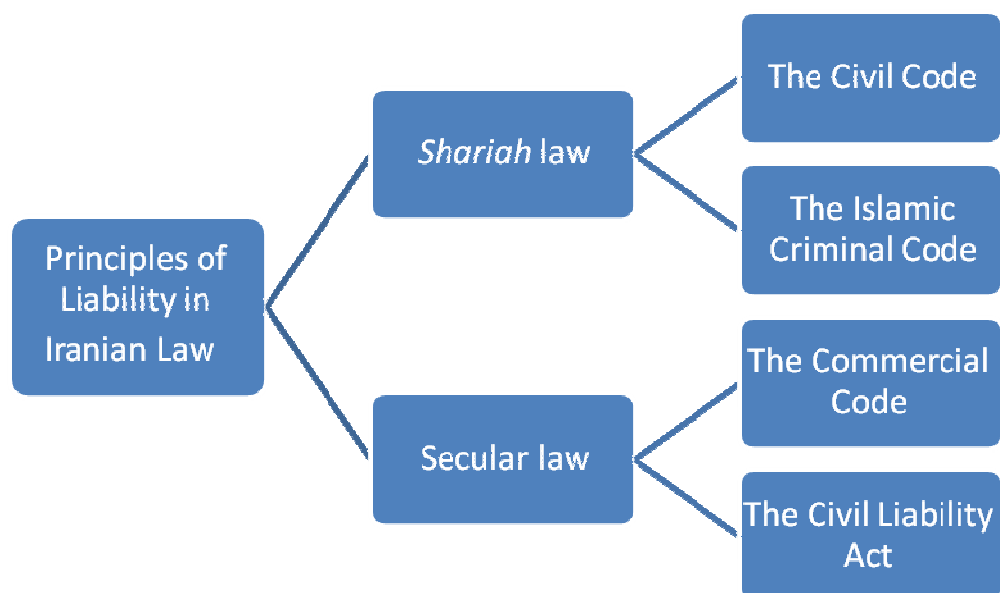
⁹⁴ See Chr. 4.3.2, *infra*.

⁹⁵ See Art. 58 of the Constitutional Code of the I.R. Iran.

3.3.2 Laws and Regulations

Legislators would codify laws based on the *Shariah* by referring to the authentic books of *foqahā*.⁹⁶ According to the Constitutional Code, all laws and regulations related to the civil, penal, financial, economic, administrative, cultural, military and political fields must be based on Islamic principles.⁹⁷ This underlying principle governs the Constitutional Code and other laws and regulations.⁹⁸ As a result, the laws and regulations of air transportation and air carrier liability must be based on the *Shariah*.

Figure 2: Principles of Liability in Iranian Law



Apart from the laws taken from the *Shariah*, it is possible for an Islamic State to adopt laws, which are not directly derived from the *Shariah* provided that they are not contrary to it. This principle has been applied to laws both before and after the Revolution.

⁹⁶ See Art. 167 of the Constitutional Code of the I.R. Iran.

⁹⁷ M. Faraji, *Hoqooq -e- Asasi* (1384 A.H. 2006), 94.

⁹⁸ See Art. 71 of the Constitutional Code of the I.R. Iran.

After the Revolution, laws that were not in conflict with the *Shariah* were left intact. Prominent among these is the Civil Code whose regulations related to carriage and the principles of liability, and had most of its contents adopted from the *Shariah* in any event. The same is true for the Commercial Code and the Civil Liability Act; while they have been adopted from secular Western codes they fulfill the demands of technological developments. The following section discusses private laws and regulations including liability; it has two parts. 1) Laws directly adopted from the *Shariah* such as the principles of liability in tort and contractual liability in the Civil Code and compensation in the Islamic Criminal Code, which includes air carrier liability; 2) other laws such as the Commercial Code and the Civil Liability Act, which was adopted from the civil law system.

3.3.2.1 Laws Directly Adopted from the *Shariah*

(i) The Iranian Civil Code

The Civil Code in Iran has been ratified during three legislation rounds.⁹⁹ Since the first drafters were familiar with the French culture, they called it the Civil Code. Generally, the Civil Code of Iran is based on the *Shariah* and many parts (such as liability and contract of carriage) are direct translations of Islamic source books.¹⁰⁰ Although the Civil Code was codified before the Revolution, it is based on principles that cannot be easily understood

⁹⁹ Articles 1 to 955 were ratified in May 1928; articles 956 to 1206 were ratified in the 9th period; and articles 1207 to 1335 were ratified in the 10th period. Some of these articles were amended in 1982 by the Judiciary Commission of the Parliament. M.J. Langeroudi, *Terminology of Law*, (1377 A.H. 1998), 268.

¹⁰⁰ The main references of the Civil Code for the special contract section had been the famous *Shia* books such as al-Sharai', Sharh al-Lum'ah, Javahir al-Kalām and al-Makasib in *Shia* Jurisprudence, and their interpretations. For foreign laws, they especially had an eye on the French civil law. Therefore the article related to special contracts was almost entirely adapted from *Shia* Jurisprudence and most of the articles from introduction and property division into movable and immovable, benefit, exploitation and easement rights and the basic rules of the validity of contract were adopted from the French Civil Code and adapted to the *Shariah*. Ibid.

unless the *Shariah* is closely studied. Hence, in addition to the Islamic Criminal Code, one should refer to the Civil Code, which is also based on Islamic jurisprudence.

The Civil Code was the most popular law in Iran, and most of its provisions respect its religious basis and the country's custom.¹⁰¹ However, it was recognized that the *Shariah* alone was not sufficient for the Civil Code, as there are needs that arise in society that would benefit from the experiences of other systems. The Civil Code was influenced by continental law. It adopted legal principles from France, Switzerland and Belgium especially those relating to the formal issues of codification.¹⁰²

The Civil Code contains two articles about transport under the title of rent of carrier.¹⁰³ This title has a historical background. In the past, people let their vehicles out to businessmen, so transport in the *Shariah* and the Civil Code is discussed under this title. This study focuses on two issues in contract of carriage and the basis of carrier liability in the Civil Code¹⁰⁴ because although these were modified in subsequent laws, these articles are still in force.

(ii) The Islamic Criminal Code (ICC)¹⁰⁵

After the Islamic Revolution in 1978, the first piece of law, which was passed by the Parliament in relation to liability for death or bodily injury in 1982, was the Criminal Code. It

¹⁰¹ According to article 3 of the Civil Procedure Code, the courts in Iran are obliged to pass judgments in conformity with the law. Where existing laws are unclear, ambiguous, and contradictory or no law applies to a particular case, the court must decide according to the spirit of the law as determined by custom. Custom is a practice that is habitually followed over a long period. It may be practiced in a particular locality, country or countries; Custom in Iranian jurisprudence is a practice that is habitually followed over a long time in Iran. *Ibid.*, at 422.

¹⁰² N. Katuzian, *Maseoliat -e- Madani dar Moqararat -e- Hoqooqi -e- Akhir* (1381 A.H. 2003), 18-20.

¹⁰³ See Arts. 516 and 517 of the Civil Code.

¹⁰⁴ See 3.4.2.1 and 3.4.4.1, *infra*.

¹⁰⁵ After the Islamic Revolution, the first Code with regard to Islamic punishment was passed by the Assembly on October 13, 1982. That was a tentative Code for a period of 5 years. Then, in 1996, the period was extended for another 10 years - the Discretionary Punishment Code was ratified on May 27, 1996 and was added to Islamic Criminal Code as articles 498-729. M.H. Sadeqi, *Hoqooq -e- Jazay -e- Ekhtesasi* (1386 A.H. 2007), 221.

was revised in 1991.¹⁰⁶ It contained 497 Articles. The Discretionary Punishment Act was ratified in 1996 and added to the Islamic Criminal Code. Ever since, the Islamic Criminal Code has been applied to matters concerning compensation and liability for death or bodily injury. This Code has benefitted from the view of a majority of the *foqahā*.¹⁰⁷

The Islamic Criminal Code of Iran consists of two parts. The general part deals with common aspects of crimes with a first chapter called ‘General Criminal Act’.¹⁰⁸ The second part, which deals with crime classifications and their punishments, is called the Exclusive Criminal Act. The provisions of the Exclusive Criminal Act are in accordance with the *Shariah* principles such as prescribed punishment, retaliation, compensation, or discretionary punishment.¹⁰⁹ The Act explains each crime separately. It outlines their definitions, interpretations, legal characteristics, exclusive elements and respective punishments.¹¹⁰ Crimes dealt with under this Act include murder, manslaughter and unintentional homicide.

Undoubtedly, the worst crimes involving bodily injury are those that result in the death of a victim. When an (air) accident causes death or bodily injury to passengers, the case will be referred to the criminal courts. The Exclusive Criminal Code will be applied in the case of death or bodily injury.¹¹¹ The Code deals with issues such as the principles of civil and

¹⁰⁶ The first exclusive criminal regulation was the law of retaliation and its regulation of 1982 that were passed by the Judiciary Commission of the Parliament. After careful and lengthy examinations and discussions, this law was approved in July 1991. It replaced the regulations in Chapter one of Book Three of the General Criminal Code 1925.

¹⁰⁷ See Sadeqi, *supra* note 105, at 15.

¹⁰⁸ This branch of law includes the general field of criminal law and deals with issues and rules covering all crimes such as the limits of criminal liability, mitigation and suspension of punishment, probation, and recidivism. See I. Golduzian, *Hoqooq -e- Jazay -e- Ekhtesasi* (1375 A.H.1996), 7-10.

¹⁰⁹ See Art.1 of the Islamic Criminal Code.

¹¹⁰ See Sadeqi, *supra* note 105, at 15.

¹¹¹ See 4.3, *infra*.

criminal liability in the event of death or bodily injury, and the types of compensation available.¹¹²

In Iran, carrier's liability for passenger's death or bodily injury is discussed under a specific kind of homicide called quasi-intentional killing (*ghatl dar hokm-e-shebh-e-amd*). This new term, is in fact a mixture of civil liability (compensation) and consolidated Islamic criminal liability (quasi-intentional homicide and unintentional homicide). This kind of killing (or bodily injury) occurs because of negligence, carelessness, or non-observance of related regulations, in such a fashion that if the regulations would have been observed, no accident would have happened.¹¹³

3.3.2.2 Laws Not Directly Adopted from the *Shariah*.

(i) The Commercial Code

The development of various means of transportation and the expansion of trade relations require rules so that while transactions are done faster and with fewer formalities, fraud is strictly avoided. Whereas the Civil Code was not accountable in this regard, a Commercial Code was codified.¹¹⁴ The Commercial Code was ratified in 1932. This law emphasizes some provisions of the Civil Code on carriage contracts. On the other hand, it also follows the commercial codes of European States, especially France.

The Commercial Code consists of 16 chapters and includes regulations on different commercial affairs such as commercial transactions, transport, and the liabilities and duties of

¹¹² Classification of the act of offender, distinguishing civil liability and compensation from criminal liability, and different types of killing will be introduced to determine those issues that merely require civil liability and compensation. See 3.4.5.1, *infra*.

¹¹³ See Art. 295 of the Islamic Criminal Code.

¹¹⁴ Before the Revolution, the Iranian economy was based on capitalism and most of the present trade laws had been prepared on that basis. The Islamic Republic respects individual ownership, free trade, and the non-interference of the state in commercial affairs. Although some of the old regulations have been amended and new ones have been ratified, the original trade law is still in force. See Sadeqi, *supra* note 105, at 15.

carriers. Since the Code should be accountable for new changes, in many cases the legislation ratified regulations to respond to the new trade needs.

The Commercial Code's Book Eight about transportation contains 18 articles.¹¹⁵ They deal with carriage of goods but the book is silent about the carriage of passengers. The legislator at that time has not paid attention to the issue of air and maritime carriage.¹¹⁶ However, the principles of liability in the Commercial Code are general principles that can be applied to all forms of carriage in Iran. The Code explains the duties, obligations, and liabilities of carriers. Courts, when dealing with claims relating to all modes of carriage (road, rail, sea and air), resort to these provisions if there is no specific statute to that effect.¹¹⁷

(ii) The Civil Liability Act 1960

The Civil Liability Act 1960 was adopted from the Civil Code of Germany.¹¹⁸ It contains 16 articles. The main reason for its codification was that the related laws were not sufficient for civil liability and for compensating the losses sustained by people according to socio-economic demands.¹¹⁹ As a result, the drafters of the Civil Liability Act intended to improve tort liability in the Civil Code.¹²⁰

The Civil Liability Act 1960 was in fact an attempt to complete the Civil Code. Firstly, the Act altered the basis of liability in favor of fault theory.¹²¹ Secondly, this Act endorses unlimited liability, and recognizes mental injury in the case of death or bodily injury.

¹¹⁵ See Arts.377-394 of the Commercial Code.

¹¹⁶ See Sotodeh Tehrani, *supra* note 3, at 77.

¹¹⁷ See Arts.377-394 of the Commercial Code.

¹¹⁸ R. Barikloo, *Maseoliat -e- Madani* (1385 A.H. 2007), 31.

¹¹⁹ E. Shafei Sarvestani, 'Diyah va Khesarathay -e- Nashi as Sadamat -e- Badani', (1379 A.H. 2001) Vol. VII *Pagohesh Va Hozeh* 35, at 16.

¹²⁰ See R. Barikloo, *supra* note 118, at 32.

¹²¹ Article 1 of the Act provides that any person who intentionally or negligently hurts life, health, property, freedom, reputation, trade fame, or any other right that the law confers on people, in a way that causes material or immaterial damage, is liable for his act. Anyone who intentionally or due to his negligence injures or harms

There are two opinions in this regard. Firstly, that this Act was to be abolished by the Islamic Criminal Code after the Islamic Revolution. Secondly, that this Act is highly specific and complements the Islamic Criminal Code on the principles of liability and compensation.¹²² If the abolishment of the Act is accepted, there is no possibility for unlimited liability and recognition of compensation of mental injury for passenger's death or bodily injury in Iran. If the second view were adopted, this would create claims for unlimited liability and compensation of mental injury. The former opinion prevails over the latter since the Guardian Council declared that compensation for mental injury is contrary to the *Shariah*. Referring to this opinion, courts are reluctant to award damages according to the Civil Liability Act 1960.¹²³

It is arguable that this Act is still in force. It was never explicitly abolished by the legislature. On their face, provisions of compensation in the Civil Liability Act 1960 are not similar to the compensation provisions in the Islamic Criminal Code since the former approves unlimited liability, which is closer to justice. It can nevertheless be argued that through other general principles of the *Shariah* such as the *la zarar* principle,¹²⁴ which will be discussed in the next sub-section, there would be no conflict; hence, unlimited liability could be accepted.

3.4 Principles of Liability

Liability does not feature as an independent topic in Islamic jurisprudence. However, *foqahā* have talked about liability while discussing different contracts such as renting, buying, and

life, health, property, freedom, prestige, the commercial fame of others, or any other right established for individuals by virtue of the law, and as a result of that harm the victim sustains material or spiritual loss(es), the wrongdoer is liable for compensating damages arising out of his act. See Art.1 of the Civil Liability Act 1960.

¹²² See Barikloo, *supra* note 118, at 55.

¹²³ See Opinion of the Guardian Council, No. 1168 (1994). And Case No. 245-31-22.3.1366 The Appeal Court.

¹²⁴ See 3.4.1, *infra*.

selling and tort such as destruction.¹²⁵ A review of the liability principles in Islamic law shows that *foqahā* have not followed as a single basis for liability in all cases. They have adopted different bases of liability such as, fault, presumed fault, or strict liability. In Islamic jurisprudence, human relations are made up in such a variety that it is impossible to gather all of them under one principle like fault. For liability to arise, one should have done something incorrect or wrong, and sometimes there is no need for there to have been any fault.¹²⁶ A liable person is responsible when a damage or injury occurs in a contract or under tort, and he should necessarily compensate it.¹²⁷

One of the most important rules in the *Shariah* is the *la zarar* principle, which prevails over tort or contract principles. *Foqahā* always observe this general principle. It will therefore be discussed before delving into liability issues. This section discusses the liability principle in Islamic jurisprudence. It also explains how far Iranian law has been influenced by this principle or if the former has modified the principle. The *Shariah* has provided this flexibility for Iranian law to adopt secular law whenever required and to give them the status of Islamic law.

¹²⁵ S.J. Zehni Tehrani, *Tashrih al-Matalib* (1371 A.H.1992), 421.

¹²⁶ N. Katuzian, *Zeman Qahri (Masoliyat -e-Madani)* (1369 A.H. 1990), 186.

¹²⁷ A. Moqaddas Ardabili, *Majma al-Faideh* (1417A.H.1996), at 140.

Figure 3: General rules governing liability in Iranian Law

General Rules Governing Air Carrier's Liability in Iranian Law	Directly Adopted from the <i>Shariah</i>	General Principle	<i>La Zarar</i>		
		Specific Principles	Tort	The Civil Code (<i>talaḥ</i>)	Strict Liability
				The Civil Code (<i>tasbib</i>)	Fault Liability
			Contract	<i>amanat</i> (the Civil Code)	Fault Liability
			Liability for Death or Bodily Injury	The Islamic Criminal Code (<i>Diyah</i>)	Strict Liability
	Adopted from Secular Law and Given the Status of Islamic Law		Tort	The Civil Liability Act	Fault Liability
			Contract	Contract of Carriage (The Commercial Code)	Presumed Fault Liability
			Liability for Passenger Death or Bodily Injury	the Specific Act of 1985 entitled ‘Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights’	Presumed Fault Liability

This figure shows both laws extracted from the *Shariah* and laws adopted from secular law.

3.4.1 *La Zarar* (The Principle of No Harm)

This is one of the most famous principles of Islamic jurisprudence.¹²⁸ Based on the *Sunnah*,¹²⁹ this principle is extracted from the prophetic saying ‘*la zarar wa la zerara fi al Islam*’ which means that there is not any harm in Islam.¹³⁰ *Foqahā* have resorted to the *Quran*, the *Sunnah*, and *aql* for proving the *la zarar* principle.¹³¹ The firmest reason for its authority is *aql*. This principle is based on the order of wisdom, satisfying the interests of people and human society. This principle generally provides that no one unlawfully or unjustly may enjoy either his property or the property of others.¹³² A person who endeavors to achieve his right should be careful not to cause loss or damage to his neighbors, be they people, or a private or public infrastructure.¹³³

The principle of *la zarar* is very broad and it is applicable to any situation. This principle is not confined to a given situation but prevails in any contractual or tort liability. It prohibits people from causing loss to others and from misusing the rights, which affect other members of society. It aims to regulate order and justice in the social and economic relations of the members of society. It also solves the legal conflicts between people, and limits the right of ownership where others suffer a loss.¹³⁴

Wherever judgments result in an illegitimate or disproportionate loss, this principle moderates those judgments and provides a right to the injured party to break the contract and

¹²⁸ Compensation is one of the oldest concepts retained from civil liability. All other rules originated from it. The principle of *la zarar* has the same role in Islamic law. M.H. Mosavi Bojnourdi, *al-Qawa'id al-Fiqhiah* Vol. IV (1413 A.H. 1992), 214-215.

¹²⁹ M.K. Khorasani, *Kifayat al-usul* (1415 A.H. 1994), 431.

¹³⁰ Customarily, *zarar* means causing any defect in property or harming the life of a person or whatever belongs to him. *Zerar* means inflicting harm repeatedly, and a *mozar* is the person who inflicts the harm repeatedly and insists on inflicting it. M. Esmaili, *Teori -e- Jobran -e- Khesarat* (1384 A.H. 2005), 61.

¹³¹ The holy *Quran*: *Surehs* 2: 232 – 283; 5:16 and 9:109.

¹³² S.H. Amin, *Remedies for Breach of Contract in Islamic and Iranian Law* (1984), 33.

¹³³ See Esmaili, *supra* note 130, at 66.

¹³⁴ See Ansari, *supra* note 43, at 234.

claim compensation.¹³⁵ Above all else, the *la zarar* principle is a governing one, i.e. when there is a conflict between this principle and other principles; it is *la zarar*, which prevails.¹³⁶

The *la zarar* principle also covers immaterial damages.¹³⁷ There is no doubt that immaterial damages are considered as a loss and there is no reason for limiting this principle to material damages. As mentioned, the Prophet had used two words to explain loss and damage: *zarar* and *zerar*. The former refers to material damages and injuries to persons. The latter refers to immaterial damages.¹³⁸

The author is of the opinion that whereas in the Islamic texts there is not a direct reference to air carrier liability, this principle can be used to achieve total compensation for (air) passengers. Therefore, in chapter 4 where he analyzes the conflict between the Warsaw Convention 1929 and the *Shariah* principles, he uses this principle for proving the legitimacy of unlimited liability and air carrier's liability for death and bodily injury in Iran.

3.4.2 Tort Liability

3.4.2.1 *Etlāf* (Destruction)

If a person destroys the property of another person, he would be held liable and would have to replace it with an identical item or pay its price, regardless of whether the destruction has been made intentionally or unintentionally, or whether he has destroyed the property itself or its interests; or if the destroyer makes the property imperfect or defected.¹³⁹ Therefore, the person whose act or omission causes damage to baggage and cargo is liable whether he is at fault or not.

¹³⁵ M.M. Naeini, *Muniat al-Talib fi Sharh al-Makasib* Vol. I (1418 A.H. 1997), 201- 294.

¹³⁶ M. Ansari, *Kitab al-Makasib* (1407 A.H. 1986), 273.

¹³⁷ M.A. Serag, *dhaman al-udwan fi Fiqh al- Islamyyah* (1414 A.H. 1993), 117-8.

¹³⁸ J. Sobhani, *Tahdhib al- usul* Vol. III (1378 A.H. 1999), at 94.

¹³⁹ Ibid.

In Islamic jurisprudence, *talaf*, *māl* and *sabab* are elements for the actualization of *etlāf*:

1. Damage (*talaf*). *Talaf* is sometimes considered with the property. This is called actual *talaf*. Sometimes, it is considered with the value of the property without destruction of the property itself.¹⁴⁰

2. Property (*māl*): it is whatever people need in their life for their well-being or while they are sick or on their deathbeds, the money that they use, and the interests and profits of affairs that satisfy the needs of people, or things that these affairs are attained by.¹⁴¹

3. Causation (*sabab*): a causal relation between loss or damage and action is essential.¹⁴² One way for substantiating the *etlāf* principle is to see ‘what a reasonable man thinks’. If a person destroys, uses or damages the property of someone else, he would be liable if he has deviated from the standard of the reasonable man, even if the property still exists.¹⁴³

When something is damaged, the wrongdoer shoulders the compensation, and he is liable for returning its equivalence to the owner.¹⁴⁴ Actual liability is also called the liability of identical items or price, and there is no non-actual liability such as punitive damage. This liability is compensatory damages that provide a claimant with the monetary amount necessary to replace what was lost, and nothing more.¹⁴⁵ If the exact property exists, it should be returned to the owner. If the exact property is destroyed, an identical item or its price should be given to the owner. In this kind of liability, there is total compensation and unlimited liability for damaged property.¹⁴⁶

¹⁴⁰ See Mosavi Bojnourdi, *supra* note 128, at 19.

¹⁴¹ *Ibid.*, at 63.

¹⁴² *Ibid.*

¹⁴³ R. Khomeini, *Kitab al-Bay‘* (1368 A.H. 1989), 341.

¹⁴⁴ *Ibid.*

¹⁴⁵ Langeroudi, *supra* note 99, at 135.

¹⁴⁶ A. Gorji, *Maqalat -e- Hoqooqi (Legal Essays)* Vol. II (1375 A.H. 1996), 247.

The Civil Code has used the principles of the *Shariah* to define *etlāf* and the liability of the destructor.¹⁴⁷ In *etlāf*, the existence of a customary causal relation between the act of a person and the destruction of property is sufficient for liability.

In order to understand *etlāf*, the principles of liability of *mobāsherat* and *tasbib* should be discussed.¹⁴⁸ *Foqahā* have divided liability for damaged property to direct causation of destruction (*etlāf-be-Mobāsherat* or *Mobāsherat*) and indirect causation of destruction (*etlāf-be-tasbib* or *tasbib*).¹⁴⁹

(i) *Mobāsherat* (The Direct Causation of Destruction)

If a wrongdoer directly destroys a property or its interests, he has to return the same property or its price to the owner.¹⁵⁰ According to this principle, the wrongdoer is liable for compensating what he has destroyed even if he was not at fault.

A wrongdoer is considered as a direct causer of a destruction where custom sees a close causality relation between the destruction and that act.¹⁵¹ To distinguish the direct causer from others involved in the destruction, the criterion is objective.¹⁵² Events are so complex and diverse that it is difficult to examine them with a single principle.¹⁵³ Therefore, in proving damage, it is sufficient that a causal relation be established between the act of a person and the destroyed property.¹⁵⁴ It is not necessary to prove the fault of the destructor, since in some

¹⁴⁷ See Art.328 of the Civil Code.

¹⁴⁸ K. Jalili, *Hoqooq -e- Maseoliat -e- Madani* (1383 A.H. 2004), 25.

¹⁴⁹ A. Gol Bararzadeh, *Osul-e- Hoqooq -e- Neveshte dar Feqh* (1383 A.H. 2004), 30-40.

¹⁵⁰ N.M. Shirazi, *al- Ghava'id al-Fiqhyah* Vol. II (1411 A.H. 1990), at 193.

¹⁵¹ See Katuzian, *supra* note 126, at 55.

¹⁵² *Ibid.*

¹⁵³ Shahid Thani (al- Amili), *Masalik al-Afhām* Vol. II (1413 A.H. 1992), 321.

¹⁵⁴ M. Najafi, *Javahir al-Kalām* Vol. VI (1394 A.H. 1973), 636.

cases it is possible to cause destruction without being at fault.¹⁵⁵ As a result, strict liability is applied.

If someone forcefully causes another person to destroy something or deceives him to do so, the direct causer cannot be considered liable. This is because customarily the attribution of destruction to someone who has caused something is more appropriate than to the one who has been the direct causer.¹⁵⁶ Therefore, the liability of the direct causer is limited to cases where his action in destruction is stronger than that of other causers are.¹⁵⁷

(ii) *Tasbib* (The Indirect Destruction)

If a person does not destroy a property himself but arranges a setting for its destruction, his act is called *tasbib*. For instance, when someone digs a well in the public passage and people or animals fall in it,¹⁵⁸ he is liable for the compensation of damage. A causer performs an action that makes a setting ready for destruction, in a way that if that act would have not been done, the destruction would not have happened. There is no direct causality between that act and the occurrence of destruction,¹⁵⁹ but since custom has attributed damage to it,¹⁶⁰ he is therefore liable.¹⁶¹

In case of indirect causation, the person who has destroyed the property and caused damage to others is liable if he has been negligent.¹⁶² A person is also liable if he has not taken any necessary precautions and the damage has occurred because he has not paid attention to the

¹⁵⁵ See Art.329 of the Civil Code.

¹⁵⁶ R. Khomeini, *Tahrir al-Wasilah* Vol. II (1384 A.H. 2005), 189.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid., at 190.

¹⁵⁹ Mohaqiq Hilli, *al-Sharai' al-Islam* Vol. III (1411 A.H. 1990), 76.

¹⁶⁰ Here, the custom means the custom of the '*uqala* (reasonable people). According to the *Shariah*, the custom of the '*uqala* is a practice which reasonable persons habitually follow. The custom of the '*uqala* is permanent and comprehensive. Langeroudi, *supra* note 99, at 423.

¹⁶¹ N. Katuzian, *Osul Kolli -e- Qarardadha* (1372 A.H. 1993), 30.

¹⁶² Ibid.

foreseeable results of his action or in spite of being aware that his action might create damage.¹⁶³

The Civil Code defines *tasbib* as a case when a person prepares a cause for destruction and another person directly destroys the property. In such circumstances, it is the destroyer who is liable and not the causer, unless the cause is stronger than the destruction.¹⁶⁴ In *tasbib*, a person does not directly destroy the property of another, but he prepares the scene for destruction, i.e. he commits an action, because of which the property is destroyed.¹⁶⁵ Customarily, a causer is the one who has created the loss so he is liable. Here the existence of fault is a condition for determining liability.

In order to explain the differences between direct and indirect causation in destruction it can be stated that wherever a person commits what would customarily result in the destruction of a property (making a cause for destruction) his act is deemed *etlāf*.¹⁶⁶ By contrast, if the committed act is not the cause of destruction, but it has provided the setting that could probably result in the destruction, it is called *tasbib*.¹⁶⁷ Therefore, *etlāf* and *tasbib* differ in that:

1. Fault is a condition for liability in *tasbib*, but not in *etlāf*,
2. A wrongdoer directly causes damage in *etlāf*, whereas a wrongdoer arranges the setting for destruction in *tasbib* and it is possible that no destruction occurs at all because of that arrangement.¹⁶⁸

¹⁶³ See Najafi, *supra* note 154, at 106.

¹⁶⁴ See Art.332 of the Civil Code.

¹⁶⁵ See Art. 331 of the Civil Code. See also Art. 318 of the Islamic Criminal Code.

¹⁶⁶ See Najafi, *supra* note 154, at 94.

¹⁶⁷ Although digging a well in a public passage attracts liability, the same if carried out on one's land or other permitted places, do not give rise to liability. See Katuzian, *supra* note 126, at 76.

¹⁶⁸ S.H. Emami, *Hoqooq -e- Madani* Vol. I (1357 A.H. 1978), 39.

3.4.2.2 Fault

The civil liability regime in Iran is influenced by the *Shariah*¹⁶⁹ on the one hand, and the civil law system on the other. Drafters of the Civil Code have based liability principles on Islamic jurisprudence and have explained *etlāf*.¹⁷⁰ However, in the Civil Liability Act 1960, the legislators disregarded Islamic jurisprudence and based liability on fault. Article 1 of the Civil Liability Act 1960 provides: ‘Anyone who, intentionally or due to his negligence, injures the life or health or property or freedom or prestige or commercial fame or any other right established for the individuals by virtue of law, as a result of which another person sustains materially or spiritually losses, shall be liable to compensate the damages arising out of his action.’ It puts aside the liability principles of the Civil Code and caused incompatibility with the *etlāf* provisions adopted from the *Shariah*.

Iranian jurists such as Safaei and Ghaem Magham Farahani mention that the Civil Liability Act 1960 based liability on fault, implicitly nullifying strict liability provisions in the Civil Code, and recognized the fault principle as the only basis for liability. It indicated that in the case of direct destruction, the causality relation between the destructor and the destruction of property should not be considered sufficient for imposing liability. It emphasized that only fault should be considered as a condition for bringing liability.¹⁷¹ As a result, after the approval of the Act, liability based on fault became the main and exclusive rule in Iranian tort law and strict liability was nullified.

The author is of the opinion that Iranian law, depending on the subject matter, recognizes both fault liability and strict liability. According to the general rules in the Civil Code and the

¹⁶⁹ See Art.167 of the Constitutional Code of the I.R. Iran.

¹⁷⁰ Islamic jurists usually discuss civil liability (*zeman*) resulting from *etlāf*, *tasbib* and usurpation (*Ghasb*) in one book since many of their regulations are identical. However, the Civil Code has distinguished them and discussed usurpation separately. See Katuzian, *supra* note 126, at 134.

¹⁷¹ A.M. Ghaem Magham Farahani, *Hogooq -e- Taahodat* Vol. I (1378 A.H. 1999), 161- 215. See also S.H. Safaei, *Hogooq -e- Madani* (1351A.H. 1974), 543-553.

Civil Liability Act 1960, individuals are liable when they commit a fault.¹⁷² However, strict liability regime that was laid down in the Civil Code and special statutes such as the ‘Compulsory Liability Insurance for Motor Cars Act of 1966’,¹⁷³ makes wrongdoers strictly liable.

Furthermore, in the case of death or bodily injury that will be discussed later, legislators provide strict liability within the Islamic Criminal Code¹⁷⁴ and special statutes. For instance, according to the laws passed in 1968 and 2008, civil liability arising from the ownership of motor vehicles is strict, and the owner of the vehicle should compensate for damages in all circumstances and he cannot discharge his liability by proving that he is not at fault.¹⁷⁵

Therefore, these laws and regulations have not been nullified by the Civil Liability Act 1960 and it can be presumed that the legislature has overlooked the principle of fault in the Act and has adopted other principles such as strict liability to meet Iranian social and economic circumstances.¹⁷⁶

3.4.3 Contractual Liability

There are certain general rules for specific individual contracts in the primary sources of the *Shariah*.¹⁷⁷ *Foqahā* have devoted the greatest part of their scholarly writings to specific contracts.¹⁷⁸ However, there is sufficient discussion of the general principles of contract, and there are rules and principles, which are generally and universally applicable to all types of

¹⁷² See Arts.50, 493, 516, 556, 577, 584 and 640 of the Civil Code.

¹⁷³ The Compulsory Liability Insurance for Motor Cars Act of 1966 provides that any person, natural or legal, is strictly liable for harms and damages that his motor vehicle or goods impose on others.

¹⁷⁴ See 3.4.5, *infra*.

¹⁷⁵ See the Compulsory Insurance for Owners of Engine Vehicle (Ground and Sea) Act 2008.

¹⁷⁶ See Arts.333 and 335 of the Civil Code.

¹⁷⁷ See Amin, *supra* note 32, at 10-11.

¹⁷⁸ *Ibid*.

contract.¹⁷⁹ One of the general principles governing the law of contract is the *Quranic* commandment to ‘fulfill your obligations’.¹⁸⁰ Accordingly, all private arrangements mutually agreed upon are enforceable, as long as they are not contrary to the *Shariah*. These rules should be considered as the general principles of contract in the *Shariah*. In fact, legal literature is almost exclusively concerned with specific contracts.¹⁸¹ It covers not only mutual contracts but also unilateral obligations such as gratuitous dispositions and endowments.¹⁸²

The breach of contract may give rise to liability.¹⁸³ Contractual liability is the liability of a person who has undertaken an obligation under contract, resulting from either specific contracts or nonspecific contracts.¹⁸⁴ The wrongdoer or obligator is liable for remedying the non-performance or delay in the performance of his obligations.¹⁸⁵ Contractual liability is established where an obligation is delayed or breached through the fault of the obligator, unless he can prove that the cause is external to his control, and the non-performance of obligation is not attributable to him.¹⁸⁶

For a fault to be considered as a contractual liability, three conditions must be met:

1. There must be an authentic contract. In other words, the contract must be legal, as illegal contracts do not impose contractual liability as they are null and void and then claimant can only claim liability under tort according to laws and regulations.

¹⁷⁹ The *Quranic* principle: ‘*ufu bi al uqud*’ (perform your contracts) covers all agreements which may be reached between parties, regardless of how diverse and different they may be, because there is no limitation to the application of this maxim, except what the holy *Quran* itself has provided to be void or unenforceable. See Khomeini, *supra* note 156, at 191.

¹⁸⁰ See Amin, *supra* note 132, at 82-84.

¹⁸¹ The term used in Islamic law for the concept of contract is *aqd* (which literally means a knot or bond).

¹⁸² See Katuzian, *supra* note 126, at 77.

¹⁸³ S.M.K. Yazdi Tabatabaei, *al- Urwat al- Wusqā* (1404 A.H. 1983), 640.

¹⁸⁴ *Ibid.*

¹⁸⁵ See Emami, *supra* note 168, at 39.

¹⁸⁶ See Katuzian *supra* note 126, at 56.

Moreover, there must be a contractual relation between the claimant and the defendant. Therefore, where a person inappropriately withdraws his offer or the contract becomes void, the fault of one side should not be considered as a contractual fault.

2. There must be a breach of a contractual obligation. That is, one of the parties must have breached an obligation resulting from the contract.

3. There must be a causal relationship (link) between the breach of contract and a sustained damage.¹⁸⁷ The mere existence of a contract is not sufficient for contractual liability. If a party undertakes to perform or abstain from an act, he is liable where he has not carried out his undertaking provided that compensation for such loss has been provided for in the contract, or that it is implied in the contract according to customary law, or that such compensation is taken for granted by law.¹⁸⁸

In contractual obligations, if a party refuses to perform or delays the performance of his obligation, the innocent party has the right to claim for compensation.¹⁸⁹ The wrongdoer is liable for breach of contract, unless he can prove that his failure to perform was caused by external causes outside his control.¹⁹⁰

The *Shariah* recognizes the theory of changed circumstances in a very general and comprehensive way. Not only can contractual obligation be set aside because of an ‘act of God’ (*afāt-e-samāvi*), but also the rescission of a contract is justified when unforeseen developments make the obligation more burdensome and difficult.¹⁹¹ It seems, therefore, that *force majeure* and changed circumstances are deemed as valid reasons for the rescission of the contract. According to *foqahā*, the legal basis for this rule is the required balance between

¹⁸⁷ N. Katuzian, *Ghavaed -e- Omomi -y- Gharardadha* (1385 A.H.), 10-12.

¹⁸⁸ See Art.221 of the Civil Code.

¹⁸⁹ See Najafi, *supra* note 154, at 106.

¹⁹⁰ *Ibid.*, at 28.

¹⁹¹ *Ibid.*, at 26-28.

the rights and undertakings of contracting parties, and the prohibition of unfair loss in the *Shariah*.¹⁹²

If non-performance of a contract is caused by *force majeure*, the obligator is not liable for damages from such time when the execution of the contract was frustrated.¹⁹³ The external cause of the frustration must be outside his control.¹⁹⁴ *Force majeure* relieves the obligator from his liability of performance or payment, only in circumstances where he cannot avoid or negate those forces, which cause the impossibility of performance.¹⁹⁵ Hence, if he is able to remove these causes and does not take the necessary steps to do so, he will be liable for damages.¹⁹⁶

In Iranian law, breach of contract always imposes liability unless it is caused by *force majeure* in which case the wrongdoer is exonerated from liability.¹⁹⁷ The Civil Code does not use terms such as *force majeure*. However, it does refer to ‘external cause’, a term that includes all causes, which are external to the obligor.¹⁹⁸

The author is of the opinion that the regulations on *force majeure* are not part of public policy. If the contractual parties agree on liability even in the event of a *force majeure*, the obligor is liable for not performing his obligations,¹⁹⁹ and he cannot be relieved from liability by resorting to the defence of necessary measures.²⁰⁰ The contracting parties can determine the scope of their rights and obligations as long as these are not contrary to the *Shariah* and the public order.

¹⁹² Ibid.

¹⁹³ See Najafi, *supra* note 154, at 107.

¹⁹⁴ See Katuzian, *supra* note 126, at 79.

¹⁹⁵ See Khomeini, *supra* note 156, at 551.

¹⁹⁶ M. Esmaili, *Force Majeure* (2002), 24-26.

¹⁹⁷ T. Erfani, *Hoqooq -e-Madani dar Qarardad -e-hamle Jaddei va Reili* (1385 A.H. 2006), 238.

¹⁹⁸ See Amin, *supra* note 32, at 55.

¹⁹⁹ See Esmaili, *supra* note 196, at 123.

²⁰⁰ See Art.230 of the Civil Code.

3.4.4 Contract of carriage

After exploring contractual liability in general, the author investigates the contract of carriage. In order to obtain a sound understanding of the contract of carriage in Iran, the liability of carriers in the *Shariah* which are explained in the Civil Code and the Commercial Code, will be discussed below.

The Civil Code and the Commercial Code are two main laws. The rules and regulations on contract of carriage in the Civil Code and the Commercial Code explain the general principles of carrier liability to include rail, road, sea and air carriers. The legislators have dealt mainly with carrier liability for damaged goods in both Codes.²⁰¹ As for the liability principles for passenger's death or bodily injury, these are also discussed in the Islamic Criminal Code, in addition to the general rules in the Civil and Commercial Codes.²⁰² These will be discussed in the next section.

3.4.4.1 *Amanat* or *Wadiyah* (Bailment or Deposit)

The principles of the contract of carriage are inferred from Islamic jurisprudence,²⁰³ following the rules of *amanat*.²⁰⁴ *Amanat* in the *Shariah* is a specific contract (*uqūd-e-mo'ayyane*) whereby one person entrusts a thing belonging to him to another in order that the latter should retain it for him free of charge. The person entrusted with the thing is called an *amin*.²⁰⁵ In

²⁰¹ See Arts.183 and 300 of the Civil Code.

²⁰² The Civil Code applies the principles of carrier liability in *ejāreh* (Hire) and discusses the related provisions of carriage under that title. However, the Commercial Code defines 'carrier' as a person who carries goods for remuneration and considers it as a *vekalat* (agency). Notwithstanding this, the principles of carrier liability contain similarities because the rules of *amanat* in the *Shariah* are applied in *ejāreh* and *vekalat*. B. Akhlaqi, 'Barresi -e- Mahiat -e- Hoqooqi -e- Qarardad -e- Haml dar Hoqooq -e- Madani', (1371 A.H. 1992) *Majelleh Hoqooqi Vokalay -e- Dadgostari* 1, at 4-11.

²⁰³ When discussing the hire of objects in an *ejāreh*, drafters of the Civil Code have provided the definition, general rules and consequences, just as they are found in the famous *Shariah* books but with small modifications.

²⁰⁴ See Art. 607 of the Civil Code.

²⁰⁵ See Najafi, *supra* note 154, at 107.

Islamic jurisprudence, an *amin*²⁰⁶ is not liable for the damage or loss to the property entrusted to him. His possession does not make him liable, and if the property entrusted to him is damaged because of external events or by a third party, he is not liable.

Since the carrier's liability is like that of an *amin*'s in *amanat*, his liability is not presumed. He would only be liable if his extravagancy or negligence is proved.²⁰⁷ An *amin* should exercise the utmost care in maintaining the property, as if it belongs to him. If the property is damaged or lost, provided that the *amin* has done his duty well, he will be absolved from liability. This legal protection continues until such a time that the *amin* chooses to dissolve the attribute of *amanat* from him.²⁰⁸ If he was negligent and the property sustained damage, or if he acts in a way to possess it, the attribute of *amanat* will disappear and he will be liable as a traitor.²⁰⁹

The intention of an *amin* for doing things out of the permitted limits is not necessary.²¹⁰ The criterion for determining fault is not by analyzing the mental conditions and the intentions of the *amin*.²¹¹ His knowledge or awareness of the fact that an act is negligent is not a condition for his liability since his knowledge or ignorance does not change the effects of liability assigned to negligence. Liability is objective. 'A reasonable man's behavior' is the criterion for determining fault.²¹²

²⁰⁶ In all bailment contracts, in which one of the contracting parties possesses the property of the other, the possessor is regarded as an *amin*, and the reason is the permission of the owner. With the satisfaction and awareness of a specific purpose which is agreed to by the two parties, the owner hands over his property into the possession of the other party, just like when passengers leave their property with air carriers. Ibid.

²⁰⁷ See Art.516 of the Commercial Code. See also M. Shahidi, *Gharardad -e- Haml dar Ghanoon -e- Madani va Ghanoon -e- Tejarat* (1378 A.H. 2000), at 70.

²⁰⁸ Ibid.

²⁰⁹ Shahid Thani (Al Amili), *al-Rozat al-Bahiyya* (*Sharh al-Lum'ah*) (1365 A.H. 1986), 385.

²¹⁰ See M.A. F. Husaini Maraḡi, *al-Anāwin* Vol. II (1417 A.H. 1996), at 486.

²¹¹ See Khomeini, *supra* note 156, at 567.

²¹² Ibid.

In *amanat* the burden of proof is on the claimant. He has to prove the *amin*'s fault. When an *amin* claims that he has not committed negligence with regard to the property entrusted to him, that claim is sufficient to exempt him from liability.²¹³ This is subject to the consensus of *foqahā* and legal scholars, and it has been developed into a principle.

If, in the contract, there is a condition in favor of possession (*amin*) and the removal of liability, even upon proving fault, the owner cannot ask for compensation. *Vice versa* when sometimes the owner of goods adds a condition in the contract that just upon proving the damage even without a fault, he can claim compensation.²¹⁴

(i) Exemption

Delimiting an *amin*'s liability to a value less or more than that of the property entrusted to him can be made through conditions of liability. According to this condition, all of the liability or part of it is dissolved.²¹⁵ This condition is valid if the *amin* has been acting duly.²¹⁶

It can be concluded that the *Shariah*, like common law and civil law, accepts exemption conditions in contract of carriage. Islamic jurisprudence considers the correctness and validity of exemption conditions in contractual liability as a clear well-established principle except in two cases: a) when damage was intentional, and b) when the conditions are against public order.²¹⁷

²¹³ It seems that most scholars have asked for proof of the nonexistence of negligence from the *amin*. As it is mentioned in the *Sunnah* that an *amin* is clear of liability only if he is from among reliable persons, or elsewhere it is said that an *amin* should take an oath that he has not committed any fault.

²¹⁴ See Mosavi Bojnourdi, *supra* note 128, at 4-6.

²¹⁵ See Langeroudi, *supra* note 99, at 383-4.

²¹⁶ M. Gharavi Ashtiani, *Ejareh dar Sharh al- Lum'ih* Vol. I (1309 A.H. 1930), 34.

²¹⁷ See Yazdi Tabatabaei, *supra* note 183, at 332.

(ii) Condition of Strict liability

The carrier's strict liability may be inserted in the contract of carriage in favor of the customer. An *amin* may accept liability for the property entrusted to him even in the case of non negligence. In Islamic jurisprudence, there is no objection to accepting the correctness and validity of strict liability in *amanat*.²¹⁸ For example, a carrier may accept by contract liability for damage caused by an act of God. According to the general principles of *amanat*,²¹⁹ the carrier is not liable in such cases. However, due to this contractual condition, he would be liable. It has extended the domain of his liability.²²⁰

3.4.4.2 *Ejāreh* (Hire)

In the Civil Code, a contract of carriage is a kind of *ejāreh* and it is therefore a kind of specific contract (*uqūd-e-mo'ayyane*).²²¹ The legislature has prescribed obligations on carriers similar to the obligations of an *amin* in *amanat*, which has been extended, to *ejāreh* to preserve and take good care of the goods vested in him.²²² A contract of carriage is considered identical to the *amanat* in terms of the responsibility, duty and obligation of an *amin* (carrier).²²³

A carrier is liable for preserving the property vested in him. There is a general rule in the Civil Code that says that a carrier is responsible for keeping goods diligently and in the case

²¹⁸ Ibid.

²¹⁹ In *amanat*, an *amin* is not liable for the damage or loss to the property entrusted to him. His possession does not make him liable, and if the property entrusted to him is damaged because of an act of God, he is not liable.

²²⁰ See Katuzian, *supra* note 126, at 313-837.

²²¹ *Ejāreh* is a contract whereby the hirer becomes the owner of the profits resulting from the item hired. The person who lets out an item on hire is called the *Mujir* (lessor); the person who hires is called the *Mustajir* (lessee) and the item which forms the subject of the hire is called an *Aain -e- musta'jareh* (the item hired). See Arts. 466, 509, 513 and 514 of the Civil Code.

²²² Art. 516 provides that contracts for carriage involve same engagements with regard to the protection and care of objects entrusted to carriers similar to those laid down for contracts of bailment. Therefore, if excessive usage or abuse takes place, a carrier is liable for the destruction or damage to the object he receives for transport.

²²³ See Arts. 607 to 634 of the Civil Code.

of fault, he is liable for making compensation.²²⁴ If he delegates the operation to another person, and during that operation the goods sustain damage, the carrier is liable for compensation.²²⁵

The carrier is liable for the destruction, loss or damage of goods only in the case of extravagancy or negligence.²²⁶ Therefore, the good's owner and consignor can claim against him for compensation solely in the case of extravagancy or negligence, since the basis of possession is *amanat*.²²⁷ The Supreme Court branch 16 held that Article 614 of the Civil Code on the obligations of an *amin* indicates that if extravagancy or negligence is not proved, the *amin*'s statement should be accepted and he is not liable.²²⁸ In another decision, the Supreme Court branch 30 held that based on Articles 614-615 of the Civil Code, an *amin* has civil liability where the extravagancy or negligence in relation to the goods vested in him is clear.²²⁹ The mere loss of entrusted property cannot be considered as carelessness to impose liability on an *amin*.²³⁰

Therefore, the Civil Code treats the contract of carriage as a kind of *ejāreh* and the carrier is liable for his extravagancy or negligence (fault).²³¹ As a result, the carrier is not liable, unless the claimant proves that he is at fault.²³²

²²⁴ See Art.221 of the Civil Code.

²²⁵ See Art.388 of the Commercial Code.

²²⁶ See Art.614 of the Civil Code.

²²⁷ Confirmation Judgment No. 2808, 05.6.1950 of the General Committee of the Supreme Court, in 'The Collection of Judicial Procedures from 1949 to 1963' in the Book on Liability in Ground Transport (1973), 129.

²²⁸ Judgment No 29/54024. Y. Barzigar, *Hoqooq – Madani dar Ahkām -e- Dadgah -e- Ali*(1379 A.H. 2001), 247.

²²⁹ Judgment No. 24/3/16-299. Ibid.

²³⁰ A. Matin, *Majmoeh -y- Raviehhay -e- Qazaei* (1380 A.H. 2002), 74.

²³¹ See Art.953 of the Civil Code.

²³² See Art.516 of the Civil Code states that the carrier's obligation for keeping the goods vested in him is akin to the liability of an *amin*.

3.4.4.3 *Vekalat* (Agency)

In relation to carriage, the Commercial Code deals with topics such as contract of carriage, the characteristics of a contract of carriage, and the duties, rights and exonerations of a carrier.²³³ It provides that provisions of *vekalat* in the Civil Code govern carriage.²³⁴ Article 656 of the Civil Code provides that a *vekalat* is a contract whereby one of the parties appoints the other as his representative for the accomplishment of some matter. As a result, if the principle of *vekalat* is applied to contract of carriage in a way, which is identical to *ejāreh*, it in fact means that the principles of liability for an *amin* are applied.²³⁵

3.4.4.4 Contract of Carriage as an Independent Contract

The author is of the opinion that the contract of carriage has provisions that distinguish it from *amanat*, *ejāreh* and *vekalat*. This is because:

1. In the Civil Code, the carrier is considered as an *amin*, and the claimant should prove fault. However, the drafters of the Commercial Code accepted presumed fault liability.²³⁶ As a result, presumed fault liability is applied to liability for damaged goods and for death or bodily injury.

It seems that the objective of the legislature in shifting the burden of proof to the carrier was to protect the claimant. It is also aimed at preventing probable abuses by the carrier through the attribution of fault and damage to his servants or agents. Therefore, the carrier is liable for any event that occurred during the period of carriage whether he directly performs the contract or delegates its performance to others.²³⁷

²³³ H. Samavati, *Hoqooq -e- Tejarat* (1378 A.H. 2000), 89-104.

²³⁴ See Art.378 of the Commercial Code.

²³⁵ See Art.666 of the Civil Code.

²³⁶ See Art.386 of the Commercial Code.

²³⁷ See Erfani, *supra* note 197, at 135.

2. The author argues that if a contract of carriage is considered as a mere *ejāreh*, there will be problems in applying provisions of *ejāreh* to a contract of carriage. In *ejāreh*, a leased property is possessed. However, in the case of a person, he cannot be possessed and the carrier has complete freedom in performing its obligation.²³⁸ Therefore, a contract of carriage should be regarded as an independent contract rather than an *ejāreh*.

3. The Commercial Code treats a contract of carriage as a *vekalat*.²³⁹ According to the provision of the *vekalat*; both parties to the contract have the right to cancel the contract. They have the right to cancel the contract after paying costs and compensating for related damages.²⁴⁰ However, the contract of carriage is not treated as a revocable contract and the carrier or consignor has no right to unilaterally cancel or nullify the contract, or avoid its obligations.²⁴¹

It is submitted that a *vekalat* is a contract where one party appoints the other as his representative for fulfilling an obligation. It is akin to a case where the representative has performed an act under his principal's name. Whereas in a contract of carriage, the carrier does not perform the act of carriage on behalf of the other party, but performs it independently and under his own name.²⁴²

4. The Commercial Code has not generally dealt with contracts of carriage according to the provisions of *vekalat*.²⁴³ The Commercial Code separates contract of carriage from *vekalat* in certain cases, and gives it a special status. For instance, it does not allow the consignor to retrieve goods from the carrier. The carrier should follow orders from the consignee.²⁴⁴ In

²³⁸ N. Katuzian, *Uqood -e- Moayyaneh* (1383 A.H. 2005), 351.

²³⁹ For details about *vekalat* (agency), See 3.4.4.3, *supra*.

²⁴⁰ See Art.382 of the Commercial Code.

²⁴¹ S. Maleki, *Mahiyyat -e- Hoqooqi -y- Haml va Naghl dar Iran* (1381 A.H. 2003), 75.

²⁴² See Erfani, *supra* note 197, at 107.

²⁴³ See Art.378 of the Commercial Code.

²⁴⁴ See Art.383 of the Commercial Code

addition, the carrier is permitted to sell the goods if they are not collected within a specific time.²⁴⁵

As mentioned above, the author is of the opinion that a contract of carriage is an independent contract from *amanat*, *ejāreh* and *vekalat*. The contract of carriage follows the general conditions of contract mentioned in the Civil Code such as intention, capacity, specificity of transaction, and legitimacy, just like other contracts.²⁴⁶ It is an independent and irrevocable contract.

According to Article 10 of the Civil Code, contracts shall be binding on those who have signed them if they do not violate the explicit provisions of the law. Since the contract of carriage is an independent contract, it is therefore binding unless it is contrary to the law.²⁴⁷

Like other contracts, it has to observe the general conditions of contract mentioned in the Civil Code.²⁴⁸ The carrier is liable for damages resulting from delay, loss or destruction of goods; and for death or bodily injury to passengers within the limits of law and regulations.

The liability principles of the Iranian contract of carriage can be listed below:

(i) Carrier Liability

The Commercial Code determines the rights, duties and obligations of the consignor, the consignee and the carrier.²⁴⁹ It does not consider the carrier as an *amin* and provides presumed fault liability hence the claimant does not need to prove the fault of the

²⁴⁵ See Art.384 of the Commercial Code.

²⁴⁶ See Art.190 of the Civil Code.

²⁴⁷ See Art.10 of the Civil Code.

²⁴⁸ The general rules on contract (*aqd*) are provided in five chapters: the concept of contract; the validity of a transaction; the effect of contracts; the non-performance of contracts; and the termination of obligations. See Katuzian, *supra* note 126, at 10.

²⁴⁹ The provisions of the Commercial Code generally apply to carriage of goods either by rail, sea or air provided that there is no specific law to that effect. Since the Iranian legislature has adopted the Warsaw-Hague Convention for international flights and the provisions of limited liability in the Warsaw-Hague Convention for domestic flights, so the related provisions have priority over the provisions of the Commercial Code.

defendant.²⁵⁰ However, the carrier can prove that the loss or destruction of goods has been caused by its inherent defects or it has occurred because of the fault of the consignor or the consignee.²⁵¹ The Commercial Code states that a carrier is liable unless he proves that the loss, destruction or damage was due to the nature of the goods, or that it resulted from the fault of the consignor or the consignee, or that it was due to the instruction of one of them, or that it has been caused by events that no diligent carrier can avoid.²⁵² Thus, the burden of proof has shifted from the claimant to the carrier.²⁵³

The Commercial Code states that the carrier is obliged to deliver goods diligently to the consignee and he is liable in the case of breach.²⁵⁴ As soon as the goods are delivered to the carrier, he is responsible for taking care of them and delivering them intact and on time to the consignee.²⁵⁵

The Commercial Code accepts presumed fault liability.²⁵⁶ The carrier is liable for events happening during carriage whether he performs the carriage himself or delegates it to his agent. The carrier, besides being liable for events during a carriage, is liable for the acts of his agent, whether they are intentional or unintentional.²⁵⁷ He is liable for his agent's acts against the customer, but then he can refer this back to his agent.²⁵⁸

²⁵⁰ This is identical to the position under Article 17 of the Warsaw Convention 1929.

²⁵¹ This is similar to Article 20 of the Warsaw Convention 1929. M.S. Rad, 'Manteq Garaei dar Hoqooq', (1376 A.H. 1997) 25 *Majalle Hoqooqi Dadgostari*, 105, at 108.

²⁵² See Art.386 of the Commercial Code.

²⁵³ See Arts.386 and 387 of the Commercial Code. Since the Commercial Code and the Civil Code are in conflict with one another, different opinions were provided for what should be the principle of liability. It is submitted that where these two codes are in conflict on the liability of air carriers for baggage and cargo, the Commercial Code should be applied as it is regarded as specific law rather than the Civil Code, which is considered as general. B. Shahriar, 'Mseoliat -e- Motesaddi -y-Haml -e- Khareji dar Iran', (1378 A.H. 2000) 42 *Sanat -e- Haml -o- Naghl Journal* 48, at 53.

²⁵⁴ See Art.386 of the Commercial Code.

²⁵⁵ See Art.388 of the Commercial Code.

²⁵⁶ See Art.377 of the Commercial Code.

²⁵⁷ See Art.388 (1) of the Commercial Code.

²⁵⁸ See Art.388 (2) of the Commercial Code.

If the consignee does not accept the goods, or refuses to pay the carriage costs or other rights of the carrier, or if the carrier does not have access to the consignee, he must inform the consignor and keep the goods temporarily or ask a third party to keep them temporarily.²⁵⁹

(ii) Defenses

The Iranian Commercial Code states that a carrier has to carry goods diligently, and he is liable for any defect, destruction or loss of goods or delay in delivery, unless he proves he has performed his obligation diligently and has taken all necessary measures to avoid the damage.²⁶⁰ Thus, the carrier is liable if he cannot prove that non-performance had an external cause, which cannot be attributed to him.²⁶¹ If the carrier is prevented from performing his duty because of an event, which is out of his control, he is not liable.²⁶²

Consequently, *force majeure* applies when any cause that is not related to the carrier leads to non-performance,²⁶³ and any event external to the carrier which cannot be attributed to him, brings exoneration.²⁶⁴ *Force majeure* is defined as unexpected and unavoidable events, which cannot be attributed to the carrier.²⁶⁵ Owing to such an event, the performance of obligations under the contract becomes completely impossible. Thus, externality, unavoidability and unpredictability are three necessary conditions for *force majeure*; and the existence of damage, the occurrence of an event, and the causal relationship between the damage and the event, are three elements of liability.²⁶⁶

²⁵⁹ See Art.384 of the Commercial Code.

²⁶⁰ See Art.387 of the Commercial Code.

²⁶¹ See Art.277 of the Civil Code.

²⁶² See Art.229 of the Civil Code.

²⁶³ For details about *force majeure* in Islamic jurisprudence and Iranian law, see 3.4.3 (Contractual liability), *supra*.

²⁶⁴ S. Ghamami, *Maseoliat Madani -e- Hokomat* (1376 A.H. 1997), 107.

²⁶⁵ See Katuzian, *supra* note 126, at 291-292.

²⁶⁶ See Erfani, *supra* note 197, at 107.

(iii) Contractual Conditions

A carrier should pay full compensation when he is liable. However, the carrier can limit or exclude his liability in a contract of carriage. There is a dispute over whether a carrier can insert conditions in the contract that would exonerate or limit his liability.²⁶⁷ Although there is no explicit reference to such conditions in Iranian law, their validity is justifiable since both the Commercial Code and the Civil Code accept contractual conditions.²⁶⁸ The Civil Code provides that if a contract determines the level of compensation for non-performance, the court cannot order the obligator to pay an amount, which is higher or lower than the agreed remedy. The Commercial Code also provides that parties to a contract can agree on an amount, which is higher or lower than the actual damage.²⁶⁹ Therefore, carriers can determine a cap for their liability. If the parties agree that the carrier just has to compensate based on limited liability in the event of non-performance, delay or damage, the claimant may receive compensation, which is higher or lower than the actual damages.²⁷⁰

However, the limited liability should not be inappropriate and unjust.²⁷¹ When parties conclude a contract, they display their intention. As long as it is not against public policy, they can insert any conditions in it. When liability is limited, the court cannot change that, even if actual compensation is more than that²⁷² unless law and regulations prohibit that condition or the carrier commits gross negligence.²⁷³

²⁶⁷ H. Afshar, *Hoqooq -e- Tatbiqi* (1380 A.H. 2001), 113; Katuzian, *supra* note 126, at 670.

²⁶⁸ R. Eskini, 'Shart -e- Mojazat dar Qarardad -e- Beinolmelali', (1377 A.H. 1988) 9 *Majale Hoqooqi*, 45, at 68-69.

²⁶⁹ See Art.230 of the Civil Code and Arts.386- 387 of the Commercial Code.

²⁷⁰ Actual Damages are real damages to compensate for loss or injuries that have actually occurred. <http://www.lectlaw.com>.

²⁷¹ See Sotodeh Tehrani, *supra* note 3, at 77.

²⁷² R. Eskini, *supra* note 268, at 66-95.

²⁷³ N. Katuzian, *Vaqaye -e- Hoqooqi* (1384 A.H. 2004), 290; Emami, *supra* note 168, at 247.

3.4.5 *Diyah*²⁷⁴

Liability and compensation for death or bodily injury is based on the Islamic concept of *Diyah*.²⁷⁵ Rules of the *Diyah* cover liability and compensation. In a restricted legal sense, the *Diyah* means remedy payable in the case of death or bodily injury.²⁷⁶ One definition says that the *Diyah* is a property (*māl*) which becomes obligatory (*vājeb*) due to homicide or bodily injury, no matter whether the *Shariah* has determined its amount or not.²⁷⁷

A new issue that can be discussed under the *Diyah* is death and bodily injuries that occur in air transport. At the international level, compensation for fatal accidents in air transport is moving towards unification.²⁷⁸ Consequently, clarification of Islam's constant regulation such as the *Diyah* (and its flexibilities) is necessary.²⁷⁹

Generally, the *Shariah* regulations on civil liability in the case of death and bodily injuries are codified in the Islamic Criminal Code.²⁸⁰ Therefore, the following subjects are identical in the *Shariah* and Iranian law. However, any deviation of Iranian law from the *Shariah* would be highlighted in the following discussion.

²⁷⁴ See Sarvestani, *supra* note 119, at 40.

²⁷⁵ *Ibid.*

²⁷⁶ The holy *Quran* says that, 'should the relatives of the slain forgive the killer; they must be reasonably and gratefully compensated' (*Sureh* 2:178-79). Thus, the practical operation of the institution of the *Diyah* was confined to the field of homicide. However, it was also extended to a certain number of injuries to the body. *Ibid.*, at 112.

²⁷⁷ *Diyah* is the name of a property, which became obligatory because of a crime to life or part of the body. See Najafi, *supra* note 154, at 2; Art.294 of Islamic Criminal Code.

²⁷⁸ International flights introduce political, social, economic and legal complications to countries since they face a large number of people and aircrafts from various nationalities within their territory. Due to the huge increase in international flights and the presence of foreign elements in the civil law of international air transport, a large number of cases related to foreign citizens come to courts. If there are not uniform international regulations, court awards for air carrier's liability and damages for passengers differ from one country to another. They are severely under the impact of national legal systems. Thus a need for uniformity of regulations is felt. For details, see Chr. 4, *infra*.

²⁷⁹ *Ibid.*, at 9.

²⁸⁰ Contrary to secular law, Iranian law following the *Shariah* discusses civil liability for death or bodily injury under Islamic criminal law.

3.4.5.1 Classification of Acts of Offender

In the case of death or bodily injury, the act of the offender is classified as follows:

1. Intentional offence or murder (*qatl-e-amd*) is an act in which the murderer has an intention of killing, or intends for an act that in itself is murderous, but does not have an intention to kill.²⁸¹ The punishment for intentional offence is retaliation (*qisas*).²⁸²
2. Quasi-intentional offences or homicide (*qatl-e-shebh-e-amd*) is an act in which the offender's intention is not murderous. He has no intention to kill and the victim is killed accidentally, e.g. the liability of a carrier in air accidents. In such cases, as soon as the act of offending occurs; the *Diyah* is due to the victim and his inheritors.²⁸³
3. Unintentional offence or homicide (*qatl khataii*) is an act in which the perpetrator has neither an intention to commit an offence against a victim nor an intention for the offending act itself.²⁸⁴ Although this kind of killing is discussed under Islamic criminal law, it also includes the civil liability of wrongdoers for compensation.

The *Diyah* is sometimes optional and sometimes obligatory. It is obligatory in all cases except those of deliberate offences, which entail a right of vengeance or the *Diyah*.²⁸⁵ They are optional in the case of offences committed deliberately (intentional offences). The claimant is entitled to request *qisas* or exempt the offender and accept compensation according to the agreement between the claimant and the defendant.²⁸⁶ For quasi-intentional and unintentional offences, the claimant is only entitled to compensation.²⁸⁷

²⁸¹ See Shahid Thani, *supra* note 208, at 418; Arts. 205 and 206 of Islamic Criminal Code.

²⁸² R. Peters, *Crime and Punishment in Islamic Law, Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), at 44-48.

²⁸³ See Art. 295 of Islamic Criminal Code.

²⁸⁴ See Najafi, *supra* note 154, at 3-4

²⁸⁵ *Ibid.*, at 517.

²⁸⁶ *Ibid.*

²⁸⁷ K. Qeblei Khoei, *Qavaed -e- Hoqooq -e- Mojazat -e- Islami* (1385 A.H. 2006), 23.

Therefore in an intentional offence or murder (*qatl-e-amd*), the criminal liability of the wrongdoer is discussed and its punishment is *qisas*.²⁸⁸ However, if the claimant forgives the wrongdoer, *qisas* punishment will be changed to the *Diyah*.²⁸⁹ In the second type of quasi-intentional offence or homicide (*qatl-e-shebh-e-amd*), there are punishment and the *Diyah*. However, the third type, i.e. unintentional offence or homicide (*qatl khataii*), only includes the *Diyah*.²⁹⁰

3.4.5.2 The Nature of the *Diyah*

The nature of the *Diyah* is not very clear in Iranian law. It contains diverse and contradictory characteristics, which resulted from its origin, and subsequent developments. The Islamic Criminal Code asserts that the *Diyah* is a limited liability paid to the claimant in the case of death or bodily injury. The Code is silent about whether it is applicable to civil liability or whether it has a civil aspect. This ambiguity has led to diverse views on the nature of the *Diyah*. Should it be considered as a criminal liability, or a civil one, or does it have a dual nature?

If the *Diyah* is considered as a mere punishment and a criminal liability,²⁹¹ civil liability should not be accepted. However, where the *Diyah* also applies to cases where no crime has happened, its civil aspect is undeniable. Yet, if it is considered solely as a civil liability, other compensations should be disregarded since the *Shariah* has only recognized the *Diyah* for compensation. Whilst the adoption of any of these opinions would cause rigidity to the liability principles in the *Shariah* and any further compensation would be rejected, a close

²⁸⁸ See Khomeini, *supra* note 156, at 459; Art. 259 of Islamic Criminal Code.

²⁸⁹ See Art. 298 of Islamic Criminal Code.

²⁹⁰ See Khomeini, *supra* note 156, at 500; Art 306 of Islamic Criminal Code.; Peters, *supra* note 282, at 48.

²⁹¹ The *Diyah* is of a punitive nature; refuting any idea that it is a compensation for the damages. It is submitted that *ejtehad* is forbidden where there is an explicit *Sunnah*, especially in criminal laws where their interpretation is limited. R. Norbaha, *Hoqooq -e- Jazaie Omomi* (1377 A.H. 1998), 316.

study of the *Diyah* regulations together with other principles in the *Shariah* seem to indicate that the *Diyah* has a dual nature.

(i) The *Diyah* as a Punitive Damage

There is an opinion that the *Diyah* has a punitive nature. It is a kind of pecuniary punishment and paid as penalty for the offence. Its purpose is therefore to punish the offender and to serve as a lesson to others in the society.²⁹² On the other hand, it can be seen as a form of compensation to the victim.²⁹³ In the *Shariah*, any action that harms the physical totality of a human being partially or totally, and causes an injury or death, is considered an offence or a crime.²⁹⁴

The *Diyah* shares common characteristics with criminal punishment. It is fixed by the Islamic Criminal Code and the court cannot increase or decrease its amount.²⁹⁵

It is claimed that the *Diyah* is an alternative for *qisas* and as the offender has to pay for it, it can be considered a punishment.²⁹⁶ Comparing the Quranic verses on *qisas* and the *Diyah* makes it clear that the *Diyah* is a kind of punishment; either it comes from an intentional or unintentional fault.²⁹⁷

From ancient times, the *Diyah* has been considered as a private punishment.²⁹⁸ When a murder occurs, public opinion considers the payment of the *Diyah* as a restraining force from

²⁹² M.J. Husaini Amili, *Miftah al-Kiramah* Vol. I (1410 A.H. 1989), 2.

²⁹³ It should be noted that whether we consider the *Diyah* as a punishment or compensation or a mixture of the two, we have to use this classification. F. Tarihi, *Majma al-Bahrain* Vol. I (1408 A.H. 1987), 416.

²⁹⁴ F. Salehi, *Diyah ya Mojazat -e- Mali* (1376 A.H. 1997), 55.

²⁹⁵ See Khomeini, *supra* note 156, at 521.

²⁹⁶ See Shahid Thani, *supra* note 208, at 419.

²⁹⁷ See Salehi, *supra* note 294, at 56.

²⁹⁸ The holy *Quran*, *Sureh* 2:179.

similar crimes. *Foqahā* have discussed the *Diyah* in the same chapter as other punishments in their jurisprudence books.²⁹⁹

(ii) The *Diyah* as a Compensation

There is another opinion that the *Diyah* has a civil liability nature. It is argued that there is no reference to the *Diyah* as a punishment in Islamic sources (the *Quran* and the *Sunnah*). On the contrary, there are traditions that can be counter-examples to this claim. Proponents claim that the *Diyah* was established to compensate for death or bodily injuries. It is distinguished from compensation in tort liability or other systems for damages to properties.³⁰⁰

1. The *Diyah* is a compensation for death or bodily injury.³⁰¹ Therefore, it is not a punishment since the purpose of its payment is for compensating the bodily injuries or losses.³⁰² Court adjudicates it to cover the losses caused by offenders. If judge refuses such a judgment (*hokm*), losses to victim would be left uncompensated and this would be against the *la zarar* principle.³⁰³ Whatever is paid to the victim is for compensating the loss and injury he had faced.³⁰⁴

2. Islamic punishments are always for sins and contain intention. However, in the majority of cases, in the *Diyah* there are fault-based acts or quasi-intentional acts, which lacked the factor of intention.³⁰⁵

3. For unintentional offences, the *āqele* and not the offender, is liable for the *Diyah*.³⁰⁶ However, according to Islamic criminal law, punishments are personalized. *Āqele* who is

²⁹⁹ See Salehi, *supra* note 294, at 58.

³⁰⁰ M.H. Marashi, *Didgah -e- Jdid dar Hoqooq -e- Jazai -e- Islami* Vol. I (1376 A.H. 1997), 43.

³⁰¹ See Art. 295 of Islamic Criminal Code.

³⁰² A. Edris, *Avaz*, (1377 A.H. 1998), 178.

³⁰³ *Ibid.*, at 179.

³⁰⁴ A. Mahmoudi, *Hoqooq -e- Jazaie Islami* (1359 A.H. 1980), 55.

³⁰⁵ See Edris, *supra* note 302, at 180.

³⁰⁶ See Art. 305 of Islamic Criminal Code.

liable for paying the *Diyah* is relatives of the offender.³⁰⁷ Thus, it is not meaningful to consider it as a punishment. Had it been stated that the *Diyah* is a punishment, it should be concluded that according to Islamic jurisprudence, innocent people have the capability to come under prosecution and punishment. As this offends against wisdom, the *Diyah* therefore has a civil nature.

(iii) The *Diyah* as an Integrated Special Entity

Regarding the conditions of the *Diyah*, considering it as an integrated special entity seems more realistic as compared with the previous idea which believed that all legal entities have to necessarily be put under one of the traditional dichotomies (i.e. civil or criminal liability). There is no sound reason to confine the *Diyah* to just one of them.³⁰⁸

The following are the most important reasons that support the dual nature of the *Diyah*, and in the mean time, recognizing it as a unique entity:

1. The *Diyah* is a pecuniary penalty. It is also compensation. It is a pecuniary penalty (fine) since there is a kind of hardship and grief for the offender and he will be deprived of some of his property. However, it is also like compensation, since the aim of the *Diyah* is to compensate the claimant.³⁰⁹

However, in some cases, it is different from a pecuniary penalty and compensation. A pecuniary penalty is in law a kind of public punishment, which deprives the offender of some of his property and his liberty like when he is given a prison sentence. The aim of punishment, either to his property or to his liberty, is to remove crime for the benefit of the public. A pecuniary penalty is the right of society, and the victim or his relatives do not have

³⁰⁷ See Art. 307 of Islamic Criminal Code.

³⁰⁸ M. Ashouri, *Aein -e- Dadrasi-e- Jazaei* Vol. I (1385 A.H. 2006), 265.

³⁰⁹ N. Katuzian, 'Mahiat va Qalamro -e- Diyah baray Khesarat', (1372 A.H. 1993) *Kanoon -e- Vokala Journal* 2, at 23.

a right to claim for it, but in the *Diyah* it is different. Firstly, the *Diyah* belongs to the victim and his heirs, and it is not transferred to the public treasury. Secondly, in most cases the *Diyah* payment is made not solely by the offender. His family or tribe contributes to this payment and the offender's share is like that of other members of the tribe. Thirdly, the *Diyah* is only for the benefit of the victim or his heirs. Therefore, it is not possible to consider it merely as a criminal punishment.³¹⁰

2. The *Diyah* is not the only compensation, since there is a condition in consideration that states that the wrongdoer should cover the total compensation whether the damage or injury is material or immaterial, or is a combination of the two. However, the *Diyah* is a limited liability and it is not for all the damage caused by the offence.³¹¹

(iv) The *Diyah* as a Hybrid Nature

The author is of the opinion that the *Diyah* has a hybrid nature with specific characteristics. It has a dual face and an integrated nature that includes criminal and civil liabilities.³¹² Under Islamic criminal law, intentional offences are punished by retaliation (*qisas*), so civil and criminal liabilities have no clear-cut borders. Therefore, efforts to categorize the *Diyah* as a civil remedy or a punishment in criminal liability do not seem necessary in a system in which the boundaries between civil and criminal liabilities are blurred. The *Diyah* is an integration of criminal and civil liabilities, rejecting the concept of standalone criminal or compensatory liability.

It can be argued that by conceiving the *Diyah* as an independent civil institution for compensating victims, this paves the way for legislators to set rules for liability in excess of

³¹⁰ Ibid.

³¹¹ M. Mirsaeidi, *Mahiat -e- Hoqooqi -e- Diyah* (1373 A.H. 1993), 54.

³¹² See Ashouri, *supra* note 308, at 240.

the *Diyah* (unlimited liability). Hence legislators can codify laws and regulations that may contribute to the conditions and circumstances of national and international communities. Therefore, the author is of the opinion that the *Diyah* in *Shariah* law has two aspects. It is a punishment for crimes, and where there is no crime, it is compensation for the victim.³¹³ However, this compensation is the minimum remedy and if damage exceeds the *Diyah*, complete compensation should be made.

A discussion of the nature of the *Diyah* is important for air carrier liability. This is because if the *Diyah* is considered to have either a punitive or a civil nature, there will be a conflict between the international regime and the *Diyah*.³¹⁴ If it is assumed that it has either a punitive or a compensatory nature, it will not be possible to bring the *Shariah* and international conventions to a state of harmonious coexistence. This is owing to the fact that the *foqahā* do not accept principles other than what is explained by the *Shariah*. They would argue that such a principle is in explicit conflict with the *Shariah*. Those *foqahā* hold the *Diyah* as an unchangeable regulation so it is not possible to have liability in excess of the *Diyah* or unlimited liability. However, if a dual nature is conceived for the *Diyah*, there will be no obstacle in the effort to reconcile the *Shariah* and international regulations. By accepting a dual nature, it can be concluded that the *Shariah* is flexible and can be implemented alongside international regimes. The author will investigate the different interpretations.³¹⁵

³¹³ In deliberate and quasi-deliberate homicide, the *Diyah* contains a criminal aspect since the offender is liable for paying it. However, in other purely unintentional offences such as manslaughter; since the tribe (*āqele*) is liable for the payment of the *Diyah*, it contains a civil liability aspect.

³¹⁴ Discussing the nature of *Diyah* is important because of the impact it has on the feasibility of accepting a limitation of liability in excess of the *Diyah* such as what is mentioned in Article 22 of the Warsaw Convention 1929, or the coordination between liability under the *Diyah* and the principles of liability in the Warsaw Convention 1929. For details see 4.3, *infra*.

³¹⁵ See Chr. 4.3, *infra*.

3.4.5.3 The *Diyah* and Liability

(i) The *Diyah* and Tort liability

The *Diyah* is similar to compensation for civil liability, since in civil liability, the aim of payment is compensation. Malice has no place in it, especially in destruction cases. It is almost the same in the *Diyah*, since in quasi-intentional offences and unintentional offences, the payment of the *Diyah* is obligatory and malice is not a condition for its realization.

Foqahā have divided the *Diyah* like in the case of destruction (*etlāf*). Liability for death or bodily injury can be by direct or indirect involvement, due to the harmful results attributed to it.

1. For directly caused destructions, the general principle indicates that ‘passing the passage of man is permissible (*mobāh*), provided that the result is safe’.³¹⁶ Passing included walking on foot, on animals, and nowadays in vehicles. The direct causation of death or bodily injury to persons can be directly attributed to the offender, i.e. he does an act with or without a tool in a way, that death is attributable to him.³¹⁷ Therefore, in this case, strict liability has been accepted.

2. For indirectly caused death or bodily injury (*tasbib*), the liability for death or bodily injury is based on fault. The wrongdoer has not been duly careful, and because of his carelessness, death or bodily injury was caused through acts like digging a well or putting stones in the passage of people. In these cases, the reason for injury is the person slipping and not acts like digging a well.³¹⁸ That is, he has not paid due attention to the foreseeable outcome of his act,

³¹⁶ Islamic jurists have discussed different kinds of indirectly caused negligence under the topic of what a man creates in the public passages. They have resorted to the *la zarar* principle and the Prophet’s tradition for substantiating liability in this case. See Khomeini, *supra* note 156, at 557.

³¹⁷ Ibid., at 560.

³¹⁸ See Najafi, *supra* note 154, at 95.

or acted in spite of knowing the outcome.³¹⁹ In indirect causation, two conditions make the payment of the *Diyah* obligatory: a) a relation between cause and damage, and b) fault.³²⁰ The concept of fault is so broad that even if the act was taken for the public's benefit but accompanied with negligence and results in damage or harm, the one who has caused death or bodily injury is liable.³²¹

However, there are some differences between destruction and the *Diyah*:

1. In destruction (*etlāf*), the property is damaged, but in the *Diyah*, the damage has caused death or injury to a person.
2. In *etlāf*, intention does not make a difference in the liability of the wrongdoer. However, if an offender has acted intentionally, the liability attributed to the act is not the *Diyah* but *qisas*.³²²
3. In civil liability, there is an intention to compensate equally and fully the damage. This requires delicacy in delimiting the damage and in calculating the amount payable for the damage. However, in the *Shariah* there is a fixed amount for the *Diyah*. In *etlāf*, liability is unlimited, and if one causes a defect in the property, he will be liable for the price of the defect.³²³

(ii) The *Diyah* and Contractual Liability

If breaching the obligations of a contract causes death or bodily injury, there will be contractual liability and the liable party has to pay compensation. Generally, contracts made among parties are either for something to be done or for reaching a certain result.³²⁴

³¹⁹ See Emami, *supra* note 168, at 393.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid.

³²³ See Najafi, *supra* note 154, at 95.

³²⁴ See Amin, *supra* note 132, at 16.

1. The *Diyah* and *obligation de résultat*

When a contracting party accepts liability for achieving a certain result, if the aimed result is not achieved, and because of it the other party encounters damage, there is a breach of contract and the party is liable for compensation. The *foqahā* believe that breach of the contract contents is enough for imposing liability, even though the liable party has not committed any fault in carrying out his undertakings.³²⁵

The author is of the opinion that if the carrier undertakes to carry safely passengers to their destination, but fails to do so successfully the mere existence of a causal relationship between the act of the carrier and the death or bodily injury of the passengers imposes an obligation on the *Diyah* on the carrier to pay.

2. The *Diyah* and *obligation de moyen(s)*

When a carrier obliges to merely provide his services to the best of his knowledge and belief, and it becomes clear that the carrier has not committed negligence or extravagancy, and has applied due diligence and caution, but in spite of his endeavors damage is suffered by the other party, he would not be considered liable.³²⁶ In this kind of obligation, according to the contract law, the obligor should do all possible and necessary acts and cautions to get the concerned result.³²⁷

Therefore, according to the rules of breaching *obligation de moyen(s)*, if a contracting party acts in accordance with his contractual obligation and is not negligent, yet somehow causes

³²⁵ See Edris, *supra* note 302, at 126.

³²⁶ Ibid.

³²⁷ See Amin, *supra* note 132, at 20.

bodily injury or death, since it is not due to his fault and / or breach of his obligations, naturally there will not be a contractual obligation on him to pay damages.³²⁸

3.4.5.4 The *Diyah* and Limited and Unlimited Liability

(i) The *Diyah* and Limited Liability

There is a fixed tariff for the *Diyah*, unless another agreement is reached between the parties.³²⁹ In principle, it consists of camels of different ages and sex. The *Diyah* for homicide is one hundred camels, split into five categories and equal in number: twenty four-year-old, twenty three-year-old, twenty two-year-old and twenty one-year-old female camels and twenty one-year-old male camels. This division is subject to divergent *foqahā* options. If the homicide is intentional or quasi-intentional, the value of the *Diyah* increases (*Diyah moghallezeh*), comprising now, and only female camels of the first four categories described. If an offence occurs in one of the *harām* months,³³⁰ the offender, in addition to a full *Diyah*, has to pay another one third of the *Diyah* to the victim. There is a consensus over this rule.³³¹

Although according to the original principle the *Diyah* consists of camels, it was very soon recognized that it, equally well, could be paid in gold coinage (1000 gold Dinārs or 10,000 Derhams according to different versions).³³² As said, the *Diyah* may also consist of cattle (200), sheep (1000) or clothing (200 garments).³³³

As discussed previously, there is a fixed tariff on the *Diyah* which is payable, unless another agreement is reached between the parties. In principle, the *Diyah* is one hundred camels. If

³²⁸ See Esmaili, *supra* note 196, at 67.

³²⁹ See Art. 297 of Islamic Criminal Code.

³³⁰ I.e. the four months of *Rajab*, *Zelqade*, *Zelhaje* and *Moharam* of the Islamic lunar calendar. Art. 299 of Islamic Criminal Code.

³³¹ See Najafi, *supra* note 154, at 27.

³³² See Khomeini, *supra* note 156, at 504; Art. 297 of Islamic Criminal Code; Peters, *supra* note 282, at 51-53.

³³³ See Najafi, *supra* note 154, at 28.

the homicide is intentional or quasi-intentional, the value of the *Diyah* increases.³³⁴ Each year, the Iranian Ministry of Justice announces the *Diyah* in the Iranian currency. Courts and insurance companies use it in their judgments and payments. In 2011, the *Diyah* was set at 67,000,000 Tomans (appr. US \$ 67,000).³³⁵

There are disputes over whether the mode of payment depends upon the agreement between the parties, or whether it depends on the decision of either the offender or the court, or whether a mode is obligatory depending on different circumstances and localities. In addition, whether the payment of the *Diyah* with camels is a fundamental obligation, which is modifiable only in circumstances where payment in this form is impossible. However, it appears that an offender has the right to choose from six kinds of *Diyah*,³³⁶ and the victim's heirs have no right to refuse the *Diyah* that the offender has chosen.³³⁷

The amount of the *Diyah* is due in full only when the victim is a male Muslim.³³⁸ In a majority of opinion, the amount varies according to gender and religion.³³⁹ They believe that the *Diyah* of a woman is half that of a man.³⁴⁰ This reduction to half is only applicable where the *Diyah* exceeds one third of the full *Diyah*; otherwise, the *Diyah* for men and women are equal.³⁴¹ The *Diyah* payable by a non-Muslim foreigner temporarily admitted to the Muslim territory is at the rate of one third or one-half in the opinion of the majority.³⁴²

However, *foqahā* such as Ayatollah Sanei believe that according to the major Islamic sources, i.e. the *Quran* and the *Sunnah*, there is no difference among men and women, and

³³⁴ See Mirsaeidi, *supra* note 311, at 42 -112

³³⁵ <http://www.dadiran.ir/>.

³³⁶ See Husaini al-Amili, *supra* note 292, at 357.

³³⁷ See Najafi, *supra* note 154, at 15.

³³⁸ See Amin, *supra* note 132, at 55

³³⁹ Ibid.

³⁴⁰ See Najafi, *supra* note 154, at 32.

³⁴¹ Ibid.

³⁴² Ibid.

Muslims and non-Muslims with regard to the *Diyah*. Likewise, according to the general rules of Islam, the *Diyah* is equal for women and men, or Muslims and non-Muslims.³⁴³ They argue that the basic reasoning for variations has been a few special traditions and *ejmā* among *foqahā*. However, both of them are authentically refutable.³⁴⁴

Firstly, the traditions supporting variations are against the *Quran* and the *Sunnah*, and they are not authentic. Secondly, *ejmā* is not as authentic as a reason since some *foqahā* such as Ayatollah Sanei have expressed their doubt on it, and *ejmā* is not an independent reason. *Ejmā* is a proof where the *Quran* or the *Sunnah* has not provided a rule.³⁴⁵ It is affected by unauthentic traditions, and since those traditions had been in conflict with the *Quran* and the general rules of Islam, they are therefore not reliable. Consequently, any *ejmā* based on them is not reliable either.³⁴⁶

As explained above, the *Diyah* regulations were directly adopted in Iranian law. However, their application in civil liability is still ambiguous. Among these cases, one can mention the nature of the *Diyah*, the unchangeable limited liability in the *Diyah*, and its application in tort and contractual liability. Since compensation based on the *Diyah* is the main conflict between *Shariah* regulations and the international system of air carrier liability, the author will analyze this issue below. Here the nature of the *Diyah* will be analyzed, and then studied in tort and contract.

(ii) The *Diyah* and Unlimited Liability

The *Diyah* for death, both in civil or criminal liability, is predetermined. It should be paid to the inheritors of the victim according to the *Shariah*. It means that neither the contracting

³⁴³ Y. Sanei, *Nezarat -e- Qzaei* (1385 A.H. 2006), 5-22.

³⁴⁴ Ibid.

³⁴⁵ M.H. al-Amili, *Wasa'il al-Shia* (1421 A.H.2000), 177.

³⁴⁶ Ibid.

parties nor even the legislature can agree on less than that fixed amount predetermined by the *Shariah*. However, compensation in excess of the *Diyah* in favor of the victim is a matter of dispute among the *foqahā*, which will be discussed below.

The dominant view is that the *Diyah* is a limited liability for the victim. Whilst a majority of *foqahā* is of the opinion that the *Diyah* was determined for death and bodily injury, an important question remains as to whether a claimant can claim unlimited liability in addition to the *Diyah*.³⁴⁷ Did ratification of the *Diyah* law abolish the Civil Liability Act 1960?

Iran, according to the Civil Liability Act 1960, had accepted unlimited liability for death or bodily injury. However, the codification of the Islamic Criminal Code and its application by the courts has caused conflicts in the area of compensation for liability in excess of the *Diyah*. This issue surfaced in 1984 when the criminal courts posed the question to the Supreme Court. The Supreme Court responded by clarifying that courts could not condemn defendants to shoulder liability in excess of the *Diyah* for the costs of medical treatment or for incapacity to work.³⁴⁸ Liability in excess of the *Diyah* is important in adjusting the *Diyah* to provisions of limited or unlimited liability in international air Conventions. Otherwise, it would lead to discrepancies in victims' compensation, especially where the limited liability provisions in international air Conventions become applicable to domestic flights. If liability in excess of the *Diyah* is accepted, this will reconcile domestic law with the Warsaw-Hague Convention. After posing this question, the *foqahā* and the courts in Iran elaborated on their opinions.³⁴⁹ These opinions affected the judgments of courts and ended in non-uniformity.³⁵⁰

³⁴⁷ According to Art.1 of the Civil Liability Act of 1960, any damage whether physical or mental, imposes liability; and the offender is liable for compensation.

³⁴⁸ Judgments of the Supreme Court, Civil Branches, No. 68.9.14.

³⁴⁹ Ashouri, *supra* note 308, at 241.

³⁵⁰ Judgments of the Supreme Court, Civil Branches, No. 75.4.5.

The author is of the opinion that the majority view, which is in favour of a limitation on the amount of compensation payable for death or bodily injury in the *Diyah*, is unacceptable in States like Iran. The following opinions support this claim, and indicate an inclination towards complete compensation.

1. Opinions of Prominent Contemporary (*foqahā*)

Since the *Diyah* is a legal entity of the *Shariah*, it is of great importance for both the legislators and the courts to refer to the opinions (*fatvā*) of prominent *foqahā* for its interpretation. Indeed, according to a prescription by the Constitutional Code,³⁵¹ where there is no explicit text of law on an issue, courts should refer to well-known *fatva* of prominent contemporary *foqahā*. Up to the present time, no explicit text of law has discussed the issue of compensation exceeding the *Diyah*. Courts therefore resort to fatwa when investigating such claims.

In the early stages of when the *Diyah* provisions were applied, religious scholars have investigated this issue and their responses indicated that it would be illegitimate for compensation to exceed the *Diyah*. Later on, however, liability in excess of the *Diyah* was limitedly accepted.

a) Ayatollah Golpayegani, in response to the following case, declared that the offender is not liable for any other cost except the *Diyah*, and the offender and the victim should compromise on medical treatment costs. The case was about a car accident in which the driver hit a boy and broke his leg. The boy was an orphan and has a guardian. The driver undertook to compensate for the leg injury and to pay for the medical treatment.³⁵²

³⁵¹ See Art.167 of the Constitutional Code of the I.R. Iran.

³⁵² M.R Golpayegani, *Majma al-Masa'il* Vol. III (1386 A.H. 2007), 249.

b) Ayatollah Makarem Shirazi, in response to another case, mentioned that the *Diyah* is imposed on a person who caused harm to another. If the victim needs medical treatment to recover, it is obligatory on the offender to pay the costs of medical treatment, in addition to the *Diyah*. If, because of the harm the victim suffers a pecuniary loss (e.g. if he cannot do his ordinary tasks or his job), this should also be compensated.³⁵³

c) According to another contemporary Ayatollah, Hossain Nori, where the costs of medical treatment exceed the *Diyah*, the offender should pay this excess cost in accordance with the principle of *la zarar*. The loss should be compensated for by the offender since he is the causer of that offence.³⁵⁴

2. Opinions of the Judiciary

When the courts were investigating liability for death or bodily injury in 1985, they asked the Commission of the Supreme Council of the Judiciary if claimants could claim for compensation according to the Civil Procedure Act. The Commission responded by stating that even when the damage or loss is more than the *Diyah*, the claimant can only claim for the *Diyah* and has no right for the total remedy. It is clear that the Supreme Court rejected any possibility for the claimant to exceed the *Diyah*.³⁵⁵

The Legal Office of the Judiciary, in response to a question about damages exceeding the *Diyah*, had initially stated that these are not compensable and that the defendant is only liable for the *Diyah*.³⁵⁶ However, a clear change of attitude took place in 1997, when in response to several inquiries from the Research Center of the Judiciary Power, it stated that damages

³⁵³ N. M. Shirazi, *Rahnmon* Vol. IV (1373 A.H. 1994), 191.

³⁵⁴ H. Noori Hamedani, *Tozihol Masael* (1376 A.H.1997), 603.

³⁵⁵ Opinion of the Commission of the Supreme Judiciary Council Vol. II (1987), 34.

³⁵⁶ According to this opinion, where an offender is found liable under the General Criminal Act of 1973, the claimant can claim for compensation for any damages, and the court can issue compensation based on the medical treatment documents. However, in relation to an offender who is liable under the *Diyah* law, there is no reason to claim for loss or damage related to death or bodily injury. See S.S. Shahri Jahromi, *Opinions of the Legal Office of the Judiciary in the Field of Criminal Cases* Vol. I (1378 A.H. 1999), 73.

exceeding the *Diyah* are compensable. The Office noted that when resorting to the *la zarar* (no harm) principle, where it is clear that because of an offender's act the victim has suffered an injury higher in value than the *Diyah*, a remedy in excess of the *Diyah* is acceptable.³⁵⁷ In subsequent consultative opinions, the Legal Office repeated this opinion.³⁵⁸ As a result, the Supreme Court in recent years has revised courts' decisions in line with this new opinion.³⁵⁹ In the early stage, different branches of the General Supreme Court had frequently rejected judgments awarded by lower courts in favor of compensation exceeding the *Diyah*. However, in 1995, the General Supreme Court (Civil Branch) confirmed that compensation could exceed the *Diyah* by referring to the *la zarar* principle.

Therefore, although the courts and the *foqahā* did not initially accept liability exceeding the *Diyah*, they gradually inclined towards applying liability that exceeds the *Diyah* and unlimited liability for death or bodily injury. This liability exceeding the *Diyah* can be a basis for the final reform of the *Diyah* regulations in the future.

The author is of the opinion that compensation in excess of the *Diyah* can be accepted since:

1. The *la zarar* principle allows total compensation.
2. *Foqahā* have recently accepted liability in excess of the *Diyah*.
3. The Civil Liability Act 1960 is still in force, which provides unlimited liability for death or bodily injury.³⁶⁰

³⁵⁷ The Opinion of the Legal Office of the Judiciary, No. 1376.127.4125.

³⁵⁸ The Opinion of the Legal Office of the Judiciary, No.s. 1376277.4135 and 137697.4128.

³⁵⁹ Y. Barzigar, *Hoqooq – Madani va Jazaei dar Ahkām -e- Dadgahha -e- Ali*(1379 A.H. 2001), *Criminal Cases* (1388 A.H. 2009), 146.

³⁶⁰ It is submitted that by accepting liability in excess of the *Diyah*, this helps pave the way for the *Diyah* provisions to be harmonized with the provisions of the Conventions. For a comparative study of the *Diyah* and limited liability in the conventions, see 4.3, *infra*.

3.4.5.5 *Āqele* (Defendant)

There is a consensus (*ejmā*) among *foqahā* that in intentional and quasi-intentional murder, the offender should pay the *Diyah* from his property.³⁶¹ However, in unintentional homicide (*qatl khataii*), his *āqele* should pay the *Diyah* instead of the offender.³⁶² *Āqele* has no right to refer to the offender to ask what they have paid for the *Diyah*.³⁶³ The *Diyah* should be paid by *āqele* provided that the unintentional homicide is proved by a reason. Therefore, if the offender confesses to it, or if he comes to an amicable settlement with the heirs of the victim, he should pay the *Diyah* or the amount of money agreed through the amicable settlement.³⁶⁴

In Islamic jurisprudence, the principle of collective liability was firmly maintained in theory. However, in practice it gradually weakened, and ultimately disappeared altogether.³⁶⁵ *Āqele* who has previously been the primary creditor became subordinate to the offender. Consequently, through the disappearance of the tribal organization of the developed Islamic society, the place of *āqele* was taken by the State or insurance.³⁶⁶

In the Islamic Criminal Code, in unintentional homicide, *āqele* is still considered liable for the compensation.³⁶⁷ However, access to *āqele* for compensation is difficult, and even if *āqele* can be contacted, they may be financially unable to pay the *Diyah*. This can cause lengthy litigations. Therefore, the legislators have preferred to introduce a new term to cover

³⁶¹ See Art. 304 of Islamic Criminal Code.

³⁶² See Khomeini, *supra* note 156, at 502; Art. 305 of Islamic Criminal Code.

³⁶³ There is a dispute among scholars with regard to *āqele*. Some are of the opinion that *āqele* are colleagues of the offender; others think that they are his family and tribe; whilst a number believe that they are the offender's paternal relatives (*osbe*). According to *Shia* scholars, *āqele* are the offender's paternal relatives be they children or adults. See Khomeini, *supra* note 156, at 499.

³⁶⁴ Ibid.

³⁶⁵ Ibid., at 503.

³⁶⁶ Ibid.

³⁶⁷ There is a difference here between unintentional homicide (*khataii*) and quasi-intentional acts. In a quasi-intentional offence or homicide, the offender himself should pay the *Diyah* while in an unintentional offence or manslaughter, it is the tribe (*āqele*) who should pay the *Diyah*. Ibid. at 505.

unintentional homicide together with negligent conduct.³⁶⁸ This new term includes most unintentional homicides especially those involving non-observance of governmental regulations. According to this new regulation, the defendant is liable for the *Diyah*.³⁶⁹ Its remit is expressed in Article 259 of the Islamic Criminal Code of 1996.

3.4.5.6 Claimant

The *Diyah* is a property, like other properties, which a man owns through a legal process. The first person who has a right to possess the *Diyah* is the victim. According to *Shariah* rules, if the victim dies, his *Diyah*, like other due property, should be given to his heir(s),³⁷⁰ i.e. they are the legal owners of the *Diyah*.³⁷¹ Therefore, heir(s) can claim for compensation.³⁷² There is a consensus among *foqahā* that the *Diyah* is like any other of the dead person's property. It is divisible among his heirs according to *Shariah* rules.³⁷³

3.5 Iranian law and International Liability

Iran has ratified and given effect to the Warsaw Convention 1929, The Hague Protocol 1955, and the Guadalajara Protocol 1961 for international flights in 1975.³⁷⁴ According to the Specific Act of 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' in air transport accidents of domestic flights, Iran applies the provisions of limited liability in the Warsaw Convention 1929 and the Hague Protocol 1955.³⁷⁵

³⁶⁸ See Arts.305-307 of the Islamic Criminal Code.

³⁶⁹ See Art.259 of the Islamic Criminal Code.

³⁷⁰ See Art. 307 of the Islamic Criminal Code.

³⁷¹ See Khomeini, *supra* note 156, at 504.

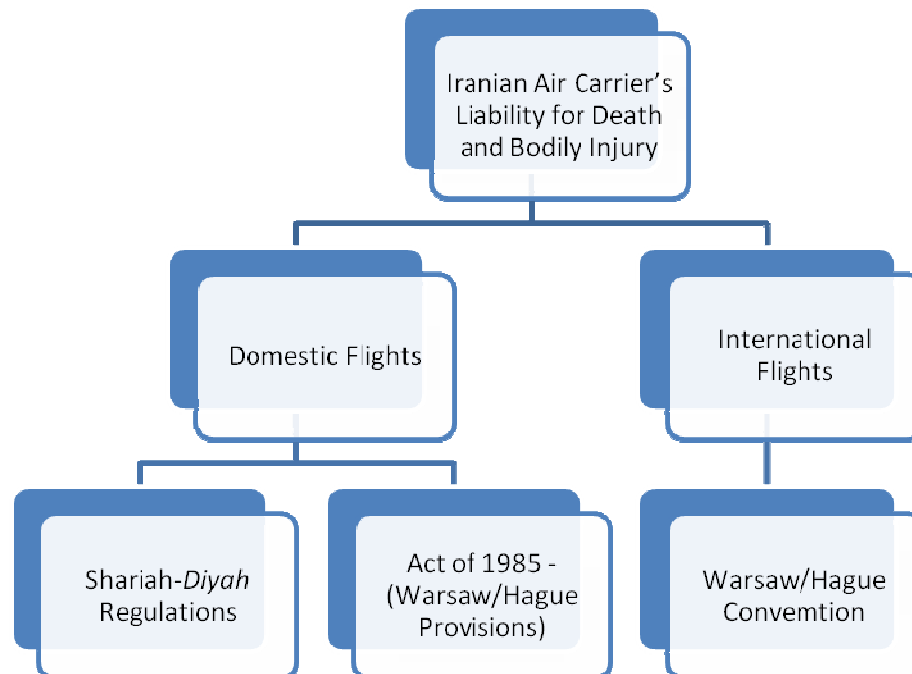
³⁷² The *Shariah* has identified the heirs of a victim in detail. See Arts. 861- 866 of the Civil Code.

³⁷³ See Mirsaeidi, *supra* note 311, at 19.

³⁷⁴ http://www.icao.int/icao/en/leb/StatusForms/iran_islamic_republic_of_en.pdf.

³⁷⁵ *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

Figure 4: Provisions Governing Iranian Air Carrier's Liability for Death and Bodily Injury



3.5.1 International Flights

The treaties that are concluded between Iran and other States in accordance with the Constitutional Code enjoy the status of domestic law.³⁷⁶ For an international treaty to become law in Iran, it must be signed by the plenipotentiary representative of the government. The treaty should then be translated officially, and finally sent to the Parliament for ratification.³⁷⁷ The Parliament examines it and observes the same procedure used for ratifying domestic laws.³⁷⁸

³⁷⁶ H. Enayat, 'Moahadat -e- Beinolmelali dar Hoqooq -e- Iran va Motale -y- Tatbiqi -e- Shariah va Hoqooq -e- Beinolmelali', (1363 A.H.1985) 29, at 36.

³⁷⁷ H. Enayat, 'Hoqooq -e- Moahadat dar Ghanoun -e- Iran' (1363 A.H. 1985) *Law Review* 2, at 42.

³⁷⁸ *Ibid.*, at 81.

Although the Constitutional Code has not explicitly mentioned the Guardian Council as a body in the ratification process, according to Article 94 of the Constitutional Code all enactments of the Parliament must be sent to the Guardian Council to examine their conformity with the *Shariah*, and the Constitutional Code. The Guardian Council should affirm the treaty. Otherwise, it will not be treated as law. If the Council finds the treaty to be contrary to the *Shariah*, the enactment is returned to the Parliament for review. Otherwise, it is applicable law.³⁷⁹

The contents of a treaty are applicable in courts insofar as they relate to the rights of persons and conflict of laws. According to the Constitutional system, private law conventions are incorporated into national law by an Act together with the translated treaty's text. The Farsi version is the one applied by the local courts. Thus, in this law, no action will lie in tort in respect of liability in international carriage, but an action will lie under the applicable Conventions.

3.5.2 Domestic Flights

The Iranian legislators approved a specific statute entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights'. According to this statute, air carrier liability should comply with the limited liability provisions of the Warsaw-Hague Convention.³⁸⁰ Legislature also ratified the Islamic Criminal code. It contains regulations for limited liability against death that are in contradiction with the limited liability provisions for death under the Warsaw Hague convention.³⁸¹

³⁷⁹ Ibid.

³⁸⁰ *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

³⁸¹ See 4.3, *infra*.

3.5.2.1 Air Carrier Liability for Baggage, Goods and Delay

As these principles are not in conflict with other laws in Iran, and they are not unchangeable principles of the *Shariah*, and, moreover, the legislators have clarified their application for the benefit of domestic customers and carriers, courts apply them without ambiguity to domestic flights.³⁸² Therefore, courts exclusively apply the provisions of the Warsaw-Hague Convention as implemented for damage to goods or delay on domestic flights.³⁸³ In related cases they refer to Article 22 of the Warsaw-Hague Convention.³⁸⁴

3.5.2.2 Air Carrier Liability for Passenger's Death or Bodily Injury: Iran's Dual System of Liability

There are two types of regulations for Iranian air carrier's liability for passenger death and bodily injury. One is the *Diyah* that comes from the *Shariah* and is generally applicable for all Iranians including air passengers in domestic flights,³⁸⁵ and the other one the Specific Act of 1985, which considers Warsaw-Hague regulations applicable in domestic flights.³⁸⁶ This is the main point of conflict that the author has examined in this study.³⁸⁷

Iranian legislators approved in 1985 the aforementioned specific statute to determine the scope of liability of Iranian air carriers in domestic flights. According to this statute, air carrier liability should comply with the provisions of limited liability in the Warsaw-Hague Convention. However, this endorsement of the Warsaw-Hague Convention for domestic

³⁸² See Case No. 1-74 -26.7.74 Trial Court, Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court. Case No. 31-154- 6.3.75 Appeal Court, Case No. 192-4675-872- 25.2.76 Appeal Court. Case No. 245-31-26.3 Appeal Court.

³⁸³ See Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court.

³⁸⁴ See 4.2.1.3 4, *infra*.

³⁸⁵ See Art 306 of Islamic Criminal Code.

³⁸⁶ *Collection of Law and Regulations of Civil Aviation of Iran* (1375 A.H. 1996), 125.

³⁸⁷ See 4.3, *infra*.

flights has caused controversy in Iran. The principles of liability for death or bodily injury, which are based on the *Diyah*, operate differently from the limitation of liability in the Warsaw-Hague Convention.³⁸⁸ After comparing the international principles with the *Shariah*, section 3 of Chapter 4 deals with this conflict and the question of whether the limited liability provisions in the Warsaw-Hague Convention govern the *Diyah* law in domestic flights or vice versa.

3.6 Concluding Remarks

Iranian law in general and carrier liability regulations in particular, have been under the influence of Islamic jurisprudence and the *Shariah*. The *Shariah* consists of principles and rules that *foqahā* provide according to Islamic jurisprudence from Islamic sources. There are diverse juristic opinions, and there may be different interpretations of the *Shariah* for an issue such as the *Diyah* which is limited or unlimited liability. However, in most cases there is a majority opinion that makes the dominant view. For example in the *Diyah*, the majority opinion is that it is a limited liability.³⁸⁹

This does not mean that the Islamic legislature has to follow the majority opinion. It can develop another view by referring to the conditions of its pertinent society. However, these principles are in the abstract. As long as they are not implemented through codified laws and regulations in Iran, usually they are not obligatory. Therefore, there are two kinds of laws and regulations in the *Shariah*.

³⁸⁸ Case No. 245-31-26.3.1377 Appeal Court.

³⁸⁹ In *feqh*, there is a technical term called in the Persian sources '*qol -e- mashhoor*' that means a number of *foqahā* have the same opinion on a matter. Usually the books do not mention the name of those *foqahā* and only state '*qol -e- mashhoor*'. In this research, it is translated to 'majority opinion'. Its opposite is '*qol -e- shaz*' that can be translated to 'minority opinion'.

1. If there is an explicit text and there is no need for interpretation, the *Shariah* as a source of law is usually immutable and infallible. For instance, the *Quran* contains provisions on inheritance law and compensation for death or bodily injury. As these are rules in the *Shariah*, legislators in Islamic States cannot modify them.
2. If there is no direct text on a particular matter, laws and regulations are usually flexible and changeable. The basic texts that inspire the *foqahā* are not followed universally and identically. From this, many schools of thought were born that understand the *Shariah* according to their ideas. For example, although the *Quran* generally explains liability for death or bodily injury, there is no explicit text that determines that limited liability is the only rule for compensation and that unlimited liability is unacceptable. As a result, there are different interpretations offered by the *foqahā*.

The *Shariah* has its independent principles for liability that can be summarized as follows:

1. In the *Shariah*, liability is based on compensation. It can be claimed that in tort, it is based on strict liability, i.e. as soon as a person harms another, he has to compensate even though he is not at fault. However, if the damage is indirect, the fault principle will apply.
2. The *Shariah* prescribes *amanat* regulations for contract of carriage. The main principle in *amanat* is based on fault. It means that if the carrier has not committed fault, he would not be liable and the burden of proof would be on the claimant.
3. The *Shariah* nevertheless has specific rules and regulations for death or bodily injury. Sometimes these principles are different from liability in tort and carrier liability. Liability principles in the *Diyah* are the same as *talaf* principles in tort. Consequently, liability is strict. That is, as soon as someone causes death or bodily injury to another person, he will be liable for compensation and if the cause is indirect, the fault principle will govern. Thus if the air carrier is considered as the direct cause of death or bodily injury to the passenger, it will be

subject to strict liability. It means that as soon as a relationship is established between the act of the carrier and the passenger's death or bodily injury, the carrier will be liable for compensation. However, if the causation is indirect, his liability will be based on fault and the burden of proof will be on the claimant.

According to the Constitutional Code of Iran, *Shariah* principles were codified by the Islamic legislature due to the demands of technological developments and the conditions of the Iranian society.

The Parliament is not the only legislative body. Authorities such as the Leader and the Guardian Council play important roles in codifying laws and regulations and their conformity with the *Shariah*.

The laws and regulations on air carrier liability in Iran are complex. When studying air carrier liability in Iran, attention should be paid to the principles of liability in the Civil Code, Commercial Code and Islamic Criminal Code, as well as applicable treaties as implemented in domestic law, and specific statutes. In addition to these, the opinions of *foqahā* and the Guardian Council should also be observed.³⁹⁰

The Civil Code considers a contract of carriage as an *ejāreh* and recognizes rules of liability based on *amanat*. The general rules in the Civil Code govern both carriage of goods and passengers. However, there are other general and special laws and regulations for goods and passengers, which influence the carriage provisions in the Civil Code.

The Commercial Code provides general principles of liability for goods. The provisions of the Commercial Code for liability towards cargo and delay are similar to those of the civil law since the legislature had adopted them from civil law States.

³⁹⁰ In other words, the principles of the *Shariah* enjoy the same status as the text of law. Where there is no explicit law text on a particular matter, the *Shariah* is considered as a formal source of law in Iran. See Art.167 of the Constitutional Code of the I.R. Iran.

The liability in the contract of carriage, according to the Commercial Code, is based on presumption of liability. Therefore, when the Specific Act of 1985 entitled ‘Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights’ was ratified in 1985, the courts faced no difficulty applying the limited liability of the Warsaw Convention 1929, as amended by The Hague Protocol of 1955 to carriage of cargo and delay. In fact, the exact Warsaw-Hague Convention provisions were applied to domestic flights just as in the case of international flights.

For passenger’s death or bodily injury, in addition to the general rules of the Civil Code and the Commercial Code, as well as the Specific Act of 1985 implementing the provisions of limited liability in the Warsaw-Hague Convention in Iranian law, one should refer to the Islamic Criminal Code. This Code, which follows the *Shariah*, provides special provisions for civil liability as well as criminal liability. This involves the inclusion of independent principles of liability for death and bodily injury (the *Diyah*) into the Islamic Criminal Code.³⁹¹

The most important issue in this Code is the determination of liability limits for death and bodily injury, which is in contradiction with the limited liability and unlimited liability for death and bodily injury in the Warsaw-Hague regime.³⁹² Hence, the principles of liability for death or bodily injury in the Warsaw-Hague Convention and the *Shariah* collide in Iranian law. The next chapter discusses the liability principles of the Warsaw-Montreal regime. It will also include a comparison between the *Shariah* principles and the Warsaw-Montreal regime. Then the *Shariah* principles will be compared and contrasted with the international regime to reveal collision in practice in the investigation of an air accident in Iranian courts.

³⁹¹ See Arts.294-297 of the Islamic Criminal Code.

³⁹² The *Diyah* is in contradiction with liability limits under article 20 of the Warsaw - Hague convention. For detailed discussion see 4.3, *infra*.

CHAPTER 4

INTERNATIONAL AIR CARRIER'S LIABILITY: A COMPARATIVE STUDY

4.1 Introduction (From the Warsaw Convention to the Montreal Convention)

In order to carry out a comparative study on international air carrier's liability, this Chapter begins with a brief illustration of the historical background of private international air law. It then compares the principles of air carrier's liability with the relevant terms from the Warsaw and Montreal Conventions in order to demonstrate how some principles of liability in the *Shariah* that seem to ostensibly diverge from the provisions of the Conventions, can indeed co-exist with the Conventions.

4.1.1 The Warsaw Convention 1929¹

The first International Conference on Air Law was held in 1925 in Paris.² In the Conference, representatives of the prevailing legal systems of that time (for example, the United Kingdom for common law countries, and France and Germany for civil law countries) were present.³ The European States in the first international conference established the *Comité International Technique d'Experts Juridiques Aériens* (CITEJA, a committee focused on technically tackling the different aspects of air carrier's liability).⁴

The committee worked for three successive years from 1926 to 1928. The CITEJA submitted its report and final draft which had developed rules satisfying the legal systems that they represented, as well as precedents such as the 1924 Brussels Convention for the Unification

¹ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929.

² The first international conference on private air law was finally held at the Ministry of Foreign Affairs, Paris, from October 27 to November 6, 1925. The conference was composed of representatives from 44 states.

³ In this conference, official delegates from 44 countries were present together with observers from the United States, Japan and Hungary. J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts', (1932) *Journal of Air Law* 27, at 29.

⁴ R. Horner and D. Legers, *The Second International Conference on Private Aeronautical Law: Minutes Warsaw 1929* (1975), 12 (hereinafter referred to as 'Minutes Warsaw 1929') at 15.

of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels,⁵ and the Convention on the Transport of Passengers and Luggage by Rail, concluded in Berne the same year as the Second International Conference on Private Aeronautical Law, in 1929.⁶ Participating States modified the draft and finally signed the Warsaw Convention 1929 (the WC29).⁷

States in the Warsaw Conference recognized the economic, political and technical privileges of unifying some rules governing liability of air carriers at the international level in order to further develop the air transport industry.⁸ This Convention recognized the conditions of the early 20th century and the common economic interests of customers and operators, determined the limitation of liability⁹ on the one hand, and harmonized the civil law and common law rules on the other hand.¹⁰ As a result, it became a successful and durable international agreement which remained in place for over 70 years.

4.1.2 Transitional Stages from the Warsaw Convention 1929 to the Montreal Convention 1999

The WC29, along with its amendments and a series of intercarrier agreements that were adopted before the Montreal Convention, are collectively called the Warsaw System. They include: 1) The 1955 Hague Protocol; 2) The 1961 Guadalajara Convention; 3) The 1971 Guatemala Protocol, 4) The 1975 Montreal Protocols Nos. 1, 2, 3, and 4; 5) The 1966 Montreal Intercarrier Agreement; 6) The 1995 IATA Intercarrier Agreement on Passenger Liability (IIA); 7) The 1996 IATA Intercarrier Agreement on Measures to Implement the IIA

⁵ 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading.

⁶ See Minutes Warsaw 1929, *supra* note 4, at 185.

⁷ The Convention entered into force after the deposit of the fifth ratification on February 1933. Up to 2011, 152 states ratified it. <http://www.icao.int/icao/en/leb/wc-hp.pdf>.

⁸ See Ide, *supra* note 3, at 31.

⁹ H. Drion, *Limitation of Liabilities in International Law* (1954) 12 - 44.

¹⁰ See Minutes Warsaw 1929, *supra* note 4, at 12.

(MIA); and 8) The 1996 ATA Inter-carrier Agreement Provisions Implementing the 1995 and 1996 IATA Inter-carrier Agreement (IPA).¹¹

Changes in the economic and political conditions of countries after the Second World War required a more robust Convention. After the application of the WC29 by the different jurisdictions, certain shortages and inconsistencies came to light. Many countries, especially the United States, faced better economic conditions after the Second World War. Consequently, the level of welfare increased and people expected higher compensations and unlimited liability, just as domestic law.¹²

The WC29 went far beyond a common point of principles in the legal systems of the common law and civil law since it imposed uniform limits of liability, breakable only in cases of faulty documentation or in cases of wilful misconduct of the carrier, in order to unify the cost of living in different countries.¹³ The claimants could achieve compensation in domestic law more than the limitation of liability in the WC29.¹⁴ Thus, they tended to sue based on a domestic cause of action or wilful misconduct to obtain remedy in excess of the applicable limitation of liability.¹⁵ Therefore, in order to increase the liability limits and to clarify terms such as wilful misconduct as well as to update the WC29 itself, States revised it in the Hague Conference 1955, i.e. after 26 years, and they continued revising it until 1999.

¹¹ Chapter 4 reviews the evolution of the air carrier's liability in Conventions. It includes a brief discussion of the Warsaw system and the MC99. This Chapter deals with provisions of the WC29, the Hague Protocol, and the 1975 Montreal Additional Protocol No. 4 and ultimately MC99. In addition to the above instruments, the 1966 Montreal Inter-carrier Agreement, due to its important role in evolution of air carrier's liability, will also be discussed. This Chapter deals with the general principles of liability that govern air carrier's liability in international instruments. First these principles are analyzed and then they are compared them with the *Shariah* principles. Other conventions and protocols such as the Guadalajara Convention 1961 and the 1975 Montreal Additional Protocol No. 1, 2 and 3 and other international agreements such as the 1996 ATA Inter-carrier Agreement Provisions Implementing the 1995 and 1996 IATA Inter-carrier Agreement will not be investigated..

¹² K. Beaumont, 'Proposed the Protocol to the Warsaw Convention of 1929', (1953) *Journal of Air Law and Commerce* 264, at 264-265.

¹³ See Arts. 22 and 25 of the Warsaw Convention 1929.

¹⁴ See Beaumont, *supra* note 12, at 264.

¹⁵ *Ibid.*

1. The Hague Protocol¹⁶ modified principles of liability in order to regulate the interests of customer and air carrier. The important issues, amongst others, were an expansion of limitation and the simplification of transport documents.¹⁷ The provisions regarding air carrier's liability and its limits needed strengthening. On the other hand, certain provisions concerning the formalities of transport documents needed to be clarified.¹⁸

2. In the US, carriers were unlimitedly liable for compensation in domestic flights.¹⁹ There, it was believed that the limitation of liability in the Warsaw Convention and the Hague Protocol were far too low, so it refused to join the Protocol. According to the carrier's agreement filed with the CAB,²⁰ passengers on participating carriers going to, from, or with an agreed stopover in the United States, became subject to increased limitation of liability.²¹

In the 1966 Montreal Inter-carrier Agreement provided strict liability²² instead of presumption of liability as basis of liability.²³

3. The execution of the 1966 Montreal Inter-carrier Agreement paved the way for a concerted effort to update the terms of the Convention to reflect a modern legal and technological

¹⁶ The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air approved in 1955. The Hague Protocol 1955 was presented to the Hague Conference, where it was signed in 1955 and entered into force on August 1st 1963.

¹⁷ See Art. XI of The Hague Protocol 1955.

¹⁸ See Arts. III, IV, and VI of The Hague Protocol 1955.

¹⁹ See the 'Wendell H. Ford Aviation Investment and Reform Act (H.R.1000) for the 21st Century'. The common law of negligence governed the liability of air carriers in the United States for passenger death or bodily injury caused by domestic flights. There were generally no fixed limitations on recoverable damages in any of the fifty States of the United States for death or bodily injury of persons caused by another's negligence. G.N.Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States from Warsaw 1929 to Montreal 1999* (2010), 21.

²⁰ Agreement C.A.B. 18900, C.A.B. order E. 23680, Docket 17325, 44 C.A.B. 8 19, 31 FR 7302. It took effect on 16 May 1966.

²¹ CAB Press Release 66-61, May 13, 1966. The formal CAB order appears in 31 Fed. Reg. 7302 (1966)

²² Bin Cheng calls this 'absolute liability'. Bin Cheng, 'A Reply to Charges of Having *Inter Alia* Misused the Term Absolute Liability in Relation to the 1966 Montreal Inter Carrier Agreement in my Plea for an Integrated System of Aviation Liability', (1981) *VI Annals of Air and Space Law* 3, at 9.

²³ A.F. Lowenfeld and A.I. Mendelson, 'The United States and the Warsaw Convention', (1967) 80 *Harvard Law Review* 520, at 547; David Cohen, 'Happy Birthday: Agreement C.A.B. 18900, A Critical Review of the Montreal Interim Agreement and the Authority for its Implementation', (1982) *VII Air and Space Law* 70, at 558.

standards.²⁴ In March 1971, the Guatemala City Protocol was signed by 21 States but did not enter into force.²⁵

4. According to the international demand for revision of the air carrier's liability towards cargo, States²⁶ decided to revise air carrier's liability through a new system.²⁷ Additional Montreal Protocol No.4,²⁸ in addition to new provisions on E-ticketing, changed the basis of liability.²⁹

5. The air transport industry in the 1990s achieved a strong global position.³⁰ Therefore, it was difficult to find strong arguments for protecting airlines in international air transport.³¹ The international community including the United States, the European Union, IATA and even the airlines of individual countries such as Japanese airlines tried to improve the Warsaw system.³² International efforts to re-establish a uniform system of liability did not cease thereafter. Finally the ICAO, according to IATA³³ and Regulations of the Council of

²⁴ *Husserl v. Swiss Air Transport co.*, 351 F.Supp.702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir.1973)

²⁵ The Guatemala City Protocol did not enter into force because, Article XX of the Guatemala City Protocol put a condition that was never met. It provides 'This Protocol shall enter into force ..., on the condition, however, that the total international scheduled air traffic, expressed in passenger kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, *represents at least 40 % of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year...*' But the United States, which its airlines has a large volume of traffic, did not ratify it. The United States never ratified the protocol due to its use of the volatile gold standard for determining liability limits, its unbreakable ceiling on liability, and its inability to adopt a supplemental compensation plan. E. Cotugno, No Rescue in Sight for Warsaw Plaintiffs From Either Courts or Legislature-Montreal Protocol 3 Drowns in Committee, (1993) 58 *Journal of Air Law and Commerce* 745, at 756.

²⁶ ICAO Doc 9134-LC/173-2, at 1- 64.

²⁷ G.F. FitzGerald, 'The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air', (1976) *Journal of Air Law and Commerce* 273, at 281.

²⁸ Doc ICAO 9145-9148, Additional Protocol No. 1,2,3 and 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929.

²⁹ See Art. IV of Additional Montreal Protocol No 4 of 1975.

³⁰ See Minutes Warsaw 1929, *supra* note 4, at 17.

³¹ M. Milde, 'The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws and the New Warsaw Convention of 28 May 1999', (1999) XXIV *Annals of Air and Space Law* 155, at 163.

³² *Ibid.*

³³ Essential Documents on International Air Carrier Liability (2nd Edition Issued by January 2004), IATA, Montreal –Geneva), at 68.

the European Union on air carrier's liability,³⁴ proposed a draft of the Montreal Convention 1999.³⁵

4.1.3 The Montreal Convention 1999

The drafters of the Montreal Convention 1999 (the MC99)³⁶ intended it to be a 'compromising convention of the international air law and the unification of private air law'.³⁷

They intended to update the Warsaw System since the WC29 was adopted at a time when the aviation industry was in its infancy.³⁸ However, new phenomena such as developments in technological equipment, the globalization of air transport operations, and the shifting balance of interests with an inclination to protect the individual's right to compensation, have made the drafters of the MC99 aware that the rules of law must evolve in accordance with technical, social and economic developments.³⁹

In the light of technological developments and improved safety of air transportation, this reason for the limitation of liability carried less weight.⁴⁰ As a result, the drafters of the MC99 intended to establish fair and just compensation and unlimited liability for victims.⁴¹ They, insofar as possible, followed the Warsaw System agreements which were applied by different countries, jurisdictions, and statutes.⁴² They kept it intact except in cases in which the modifications helped uniformity and were in line with the international community's demands.⁴³

³⁴ EC Council Regulation No. 2027/97.

³⁵ ICAO DCW Doc No. 10.

³⁶ The Convention entered into force on November 4, 2003. Up to 2011, 102 states ratified it. <http://www.icao.int>.

³⁷ See Milde, *supra* note 32, at 156-7.

³⁸ ICAO Doc. 9775-DC/2, Vol. I.

³⁹ See Tompkins, *supra* note 19, at 27.

⁴⁰ ICAO Doc. 9775-DC/2, vol I.

⁴¹ ICAO DCW Doc. No.10.

⁴² See Tompkins, *supra* note 19, at 27-28.

⁴³ ICAO Doc. 9775-DC/2.C-WP/1038 1, at 2.

Therefore, the ICAO decided to consider the issue and held the Conference.⁴⁴ It proposed a new Convention that complied with the legal and economic conditions of States in international and domestic flights.⁴⁵ The MC99 was approved because of the international community's demand for protecting passengers and modernizing air travel treaties. Although the Convention paid particular attention to compensation for passenger's death or bodily injury in an air accident, it tried to balance the interests of both air carriers and the customers.⁴⁶

Although the Montreal Convention replaced WC29 in 1999, the main principles of the WC29 remained almost intact.⁴⁷ Therefore, the Warsaw System and the MC99 in private international air law come under one regime commonly, called the Warsaw-Montreal Regime.

4.2 A Comparative Analysis of the Warsaw-Montreal Regime with that of the 'Shariah'

4.2.1 Principles of Liability

When referring to the principles of air carrier's liability, the author has in mind the air carrier's liability under the Warsaw System and the Montreal Convention. These instruments address various aspects of the contract of carriage including documentation, limits of liability and jurisdiction.⁴⁸ To elaborate further, and to address the matter of air carrier's liability, the thesis will analyze the articles of the Warsaw Convention as well as the corresponding provisions of the Montreal Convention.

⁴⁴ ICAO DCW Doc. No.10; ICAO DCW Doc. No. 42.

⁴⁵ ICAO DCW Doc. No.17.

⁴⁶ ICAO DCW Doc. No. 2.

⁴⁷ See Tompkins, *supra* note 19, at 42.

⁴⁸ *Ibid.*, at 2.

The principles of air carrier's liability could not be studied in isolation from other provisions in the applicable Conventions such as carriage instruments, jurisdictions, or contractual conditions. They had to be considered in the context of the Convention as a whole in order to achieve that delicate balance between the need to protect the interest of passengers with those of air carriers and the general public.⁴⁹ However, the purpose of this section is not to exhaustively describe the contents of liability in the Warsaw System and the Montreal Convention. Only limited or unlimited liability, and the basis of liability (Articles 17, 20, 22, and 25) that have significantly changed in the Montreal Convention compared to the status quo under the Warsaw System will be discussed. This is because, the liability limits outlined in the Articles, especially Article 22, are in apparent conflict with liability under the *Shariah*. This will be elaborated below.

4.2.1.1 The Basis of Liability (The Nuanced Approach in the Conventions)

The Warsaw-Montreal regime has adopted various strategies as the bases of liability, and has used key names, terms and expression such as fault, negligence, the presumption of liability and strict liability. These are briefly outlined below.

1. Various words have been employed to explain the liability regimes.⁵⁰ Terms or expressions such as 'fault', 'negligence', 'presumption of liability', '*res ipsa loquitur*', 'strict liability', and 'absolute liability' are used by different commentators to mean different things even within a single jurisdiction. Although these names, terms or expressions implicate common points, their coverage may be different.⁵¹ As noted by Haanappel:

⁴⁹ Ibid.

⁵⁰ See M. Planiol and G. Ripert, *Treatise on the Civil Law* (2005), 464. Basil S. Markesinis and H. Unberath, *The German Law of Torts* (2002), 82; A. Farnsworth, *An Introduction to the Legal System of the United States* (1996), 122; and <http://www.legislation.gov.uk>.

⁵¹ See Chr. 2, *supra*.

'Common law is less “doctrinal” in nature than civil law. Judges and the laws they apply count more heavily than authors. In the literature, what is “fault”, or to use a better term, “negligence”, is fairly clear, whether it needs to be proven by the plaintiff or disproved by the defendant. In the latter case, one can speak of a presumption of liability or a presumption of fault. Common law gets more “fuzzy” when it comes to absolute or strict liability. For most, absolute liability is a form of liability (for instance, for nuclear damage) where, once there is damage and causation, the defendant has no defenses at all (the opinion, for instance, of Mircea Matte). Strict liability then is no-fault liability where, nevertheless, the defendant has defenses available such as Act of God / fortuitous event, and own fault of the victim. But, where the defense of Act of God / fortuitous event is not available but the defense of own fault of the victim is, French doctrine, as usual, is extremely elaborate. They speak of subjective / fault liability, with the possibility of presumptions, by law or by fact. They speak of objective / causal liability, with two forms, one based upon an obligation of result (with the defense of fortuitous event), one based upon an obligation of warranty (no such defense). German doctrine distinguishes between *Schuldhaftung* (based on fault) and *Gefährdungshaftung* (based on risk), more or less corresponding to the French subjective and objective liability.'⁵²

2. The usage of a variety of names, terms or expressions for the liability regime in treaties may lead to confusion. For example, Milde and Dempsey introduce the liability regime in the WC29 as a fault-based regime with a revised burden of proof.⁵³ However, Haanappel argues: 'In the case of the Warsaw Convention, it is probably best, on the basis of the words of the treaty itself, to speak of a presumption of liability which can be rebutted by the defendant by proving the absence of negligence / fault'.⁵⁴

Another example is in relation to the 1966 Montreal Inter-carrier Agreement. Milde and Dempsey express that the WC29 as applied in the 1966 Montreal Inter-carrier Agreement was

⁵² See Unpublished Note from Haanappel, 'What is in a Name', Appendix 1.

⁵³ Miller says that 'Articles 17, 18, and 19 create a presumption. Article 20(1) indicates that the presumption can be rebutted by proving the absence of fault. The logical conclusion is that the convention places a presumption of fault upon air carrier. Goedhuis observed 'As regards the rules concerning the liability of the air carrier, the drafters of the Warsaw Convention were supporters of the theory of fault' - '...general opinion considers that while the civil liability towards third parties should necessitate the application of the theory of risk, the theory of fault should be admitted with regard to liability towards passengers and goods'. See P Dempsey and M Milde, *International Air Carrier Liability: The Montréal Convention of 1999* (2005), at 33; G Miller, *Liability in International Air Transport -The Warsaw System in Municipal Courts* (1977), 67; and D. Goedhuis, *National Air Legislation and the Warsaw Convention* (1937), 217.

⁵⁴ See footnote 52, *supra*.

still a fault system – there was not, therefore, an automatic application of liability.⁵⁵ Tompkins, however, mentions that the 1966 Montreal Inter-carrier Agreement introduces strict liability,⁵⁶ while Bin Cheng calls it absolute liability.⁵⁷ These denominations may lead to confusion. It is thus appropriate to avoid uncertainty in the liability regime as laid down in a law or treaty, by looking at the text, i.e. the words of the Warsaw-Montreal regime, rather than putting a name on them. As Haanappel noted:

‘...it is not the “name” that counts, but the liability regime as laid down in a law or treaty. This applies as well in general as in the case of the Warsaw 1929 / Montreal 1999 air carrier’s liability regime. In other words: look at the text, the words of the law / treaty rather than putting a “sticker”, a name on it. The latter approach may lead to confusion, as is perhaps best illustrated in air law in one of Bin Cheng’s articles, in (1981) VI Annals of Air and Space Law 3. *In casu*, what Bin Cheng (educated in the British legal system) calls absolute liability, Mircea Matte (educated in the Romanian and French legal systems, and not to be confused with his brother Nicolas) calls strict liability with respect to the Montreal Inter-carrier Agreement 1966 (modifying the Warsaw Convention 1929 for traffic to/from/via the USA).’⁵⁸

3. This study had initially tried to avoid using vague terms such as absolute and strict liability. However, as it is inevitable that they would be mentioned in this study, this author provided the following definitions for each of them so as to avoid confusion:

Fault usually means that the infringement in question was committed intentionally, recklessly, or negligently.⁵⁹ Normally, a claimant has to prove each element of his case. Sometimes, however, the law assists him by allowing certain elements to be presumed. It is up to the defendant to disprove them, and if he fails to do so, the claimant wins the case.⁶⁰ On the other hand, in the case of no-fault liability, the element of fault, i.e. blameworthiness on the part of

⁵⁵ See Dempsey and Milde, *supra* note 53 at 215.

⁵⁶ *Ibid.*, at 11.

⁵⁷ See Cheng, *supra* note 22, at 9.

⁵⁸ See footnote 52, *supra*.

⁵⁹ P. Cane, *The Anatomy of Tort Law* (1998), Chr. 2.

⁶⁰ V.E. Schwartz, K. Kelly and D.F. Partlett, *Prosser, Wade and Schwartz's Torts: Cases And Materials* (2005), 131.

the defendant, does not need to be proved. This is not to say, however, that in these cases the defendant will inevitably be liable for the act or omission.⁶¹ The concept of strict liability assumes a causal relationship between the person held strictly liable and the damage.⁶² It is a liability independent of wrongful intent or negligence. Therefore, absolute liability is stricter than strict liability.⁶³

The author is of the opinion that the drafters of the Warsaw-Montreal regime did not intend to base air carrier's liability on absolute liability, since under this regime, an air carrier is liable if there is a causal relation between the act of defendant and the damage suffered.

(i) Private International Air Law

The principle of the liability system was provided in the First International Conference for Private Air Law. In its preliminary draft, liability was based on the fault theory proposed by Pittard, shifting the burden of proof onto the air carrier.⁶⁴

This principle was challenged during discussions in the third session of the CITEJA (Madrid 1928) and also the Warsaw Conference.⁶⁵ There was no consensus between the proponents of the theories of fault liability and strict liability as to the basis of liability for passengers and cargo in the Convention.

Two theories were discussed at the CITEJA and the Warsaw conference. The first theory was based on the principle of liability based on fault, intended by the authors of the French Civil Code. Ripert (representative of France at CITEJA) argued that imposing absolute liability on air carriers was undesirable. If an air carrier has taken the usual reasonable measures to avoid

⁶¹See Planiol and Ripert, *supra* note 50, at 468.

⁶²G. Viney, *Tort Law*, in G.A. Bermann and E. Picard, *Introduction to French Law* (2008), 249.

⁶³M.A. Clarke, *Contracts of carriage by air*, (London, LLP, 2002), 136.

⁶⁴See Viney *supra* note 62, at 250.

⁶⁵*Ibid.*, at 21.

damage, it should be exempt from liability.⁶⁶ This theory is also supported by representative of Great Britain at CITEJA.⁶⁷

The second theory which was founded at the end of the 19th century⁶⁸ was based on strict liability. This theory was subscribed to by Germany and put forward by Italy. It rejected the necessity of fault for the civil liability of the defendant.⁶⁹ Richter from Germany in the third session of the CITEJA supported strict liability for passengers' death and bodily injury. He believed that in practice, the original system merely presented a greatly reduced guarantee from the perspective of passengers if one excludes liability for errors of navigation and piloting. However, goods are different, because there can be a default in the handling of goods, i.e. commercial fault.⁷⁰

After discussions, The CITEJA drafted Articles 23 and 24.⁷¹ Article 23 was formulated to the following:

(‘The carrier is not liable if he and his agents have taken reasonable measures to avoid the damage or that it was impossible for him or them to take such measures, unless the damage arises from a inherent defect in the aircraft.’⁷² Meanwhile, Article 24 was amended to the following: ‘In the carriage of goods and baggage, the carrier shall not be liable for errors of piloting, or flying of the aircraft, or of navigation, if he proves that he himself took reasonable measures to avoid the damage.’)

In fact, the drafters modified the two Articles. Firstly, the second part of Article 23 distinguishes inherent defect whereas the first part exempts the air carrier and its employees from liability regarding navigation errors, where necessary measures had been taken or where taking such measures was impossible. This provision has moved away from liability based on

⁶⁶ See Minutes Warsaw 1929, *supra* note 4, at 252.

⁶⁷ *Ibid.*, at 85.

⁶⁸ See *Compte rendu de la 3^e session* (Minutes of the 3d session of CITEJA Madrid) (1928), 41.

⁶⁹ See Minutes Warsaw 1929, *supra* note 4, at 86.

⁷⁰ *Ibid.*, at 43.

⁷¹ Report presented in the name of the international technical committee of aeronautical legal experts by Henri De Vos, reporter, on the preliminary draft of a Convention relating to documents of air carriage and the liability of the carrier in international carriage by aircraft. *Ibid.*

⁷² See Minutes of the 3d session of CITEJA, *supra* note 68, at 47.

fault and is inclined towards strict liability.⁷³ It mentions, in fact, one exception which is where the damage arises out of an inherent defect in the aircraft, this exception imposes strict liability on the carrier where the damage arises out of a inherent defect in the aircraft.⁷⁴ Secondly, the carrier is presumed to be liable for the actions of its employees or agents and it is just relieved from liability in cases of pilotage or aircraft handling or navigation errors in the carriage of goods and baggage.

In the Second Conference on International Private Air Law, representatives of France and England once again challenged strict liability in Article 22 paragraphs 1 and 2 of the CITEJA draft.⁷⁵ The French and the UK delegations re-insisted on modifying Article 22.⁷⁶ After lengthy discussions on the two proposals, the chairman presented a compromise. The delegations accepted the omission of the phrase ‘unless the damage arises out of an inherent defect in the aircraft’ from the first sub-paragraph, and the second sub-paragraph remained without modification.⁷⁷

Finally, Article 20 of the WC29 provides:⁷⁸

‘1. The carrier is not 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. 2. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.’⁷⁹

⁷³ Ibid.

⁷⁴ See Minutes Warsaw 1929, *supra* note 4, at 40.

⁷⁵ Ibid.

⁷⁶ The delegations from France and Great Britain proposed to eliminate the last part of the first paragraph: ‘unless the damage arises out of an inherent defect of the aircraft’ and the French delegation proposed to eliminate from the second paragraph: ‘in the carriage of goods and baggage.’ See Minutes Warsaw 1929, *supra* note 4, at 252.

⁷⁷ Ibid.

⁷⁸ The translation of the French text of the Convention given here was taken from the British Carriage by Air Act of 1932.

⁷⁹ The interpretation of Article 20 about the necessary measures in different jurisprudences is discussed in the next sub section – See 4.2.1.2, *infra*.

The WC29 introduced a presumption of liability which can be rebutted by the defendant by proving the absence of negligence / fault. However, the amendments to this convention and the MC99 challenged it.

1. The WC29 accepted the presumption of liability. Liability is presumed in the matter of carriage contract; the claimant has nothing to prove, except the contract from which his credit arose. Injury of a passenger because of an accident occurring during carriage must be considered as a fact constituting a presumption of breach of the carrier's obligation. Therefore, the passenger does not need to prove that the carrier was negligent. He only has to prove the contract of carriage, the damage, and the causation between the damage and the carriage.⁸⁰

As a result, States with different legal systems accepted it. For example, although Germany applied risk-based liability (strict liability) to domestic flights,⁸¹ it should apply presumed liability on international flights.⁸² Likewise in the United Kingdom where the negligence principle is applied to domestic flights for passenger's death or bodily injury, presumed liability is applied to both goods and passengers in international flights.⁸³

Under the common law, there is the rule which makes the common carrier an insurer of the safe carriage of goods.⁸⁴ Liability for passengers' death or bodily injury, on the other hand, depends on the legal concept of negligence.⁸⁵ Normally in a negligence case, the burden of proving all elements of a tort is on the claimant. However, under a concept known as '*res ipsa loquitur*', if the cause of harm was under the defendant's control, and the harm would not

⁸⁰ See footnote 52, *supra*.

⁸¹ B.S. Markesinis, H. Unberath, and A. Johnston, *The German Law of Contract* (2006), 850.

⁸² J. Zekoll and M. Reimann, *Introduction to German Law* (2005), 210-212.

⁸³ See Cane, *supra* note 59, at 2.

⁸⁴ O. Kahn-Freund, *The Law of Carriage by Inland Transport* (1965), 198-199.

⁸⁵ D. Owles and H. Cockerel, *Liability for Defective Services* (1985), 2.

have normally occurred without negligence or intention, the claimant does not have to prove negligence. In other words, the defendant has to disprove it.⁸⁶

The author is of the opinion that, in fact, the admitted approach in the WC29 regarding presumption of liability is a middle ground between strict liability and fault liability. The Convention accepts presumed fault liability to balance the interests of passengers and carriers. However, it refuses strict liability. Firstly, presumed fault liability is stricter than fault liability because the carrier should prove that it is not at fault. Secondly, it is weaker than strict liability, because the air carrier still has the right to resort to necessary measures. In strict liability, the defendant has no right to resort to the defence of necessary measures. Thus, the drafters of the WC29 preferred to formulate a middle way - on the one hand the air carrier is not absolutely liable, and on the other hand, it is not necessary for the claimant to prove that the air carrier is at fault.

2. The Hague Protocol 1955 omitted Article 20 (2) and therefore terminated its vagueness.⁸⁷

Therefore, the liability of the carrier is based on a theory of presumed fault without exception.

3. The basis of liability in international air carrier changed in 1966. As a relatively large amount of international passenger traffic, about 25 percent at that time, was carried to, from or via a point in the United States, the country enjoyed the necessary influence for changing the basis of liability.⁸⁸ Consequently, strict liability and unbreakable liability were introduced in the 1966 Montreal Intercarrier Agreement.⁸⁹

⁸⁶ R. Youngs, *English, French and German Comparative Law* (1998), 243.

⁸⁷ See Art. X of the Hague Protocol 1955.

⁸⁸ See Tompkins, *supra* note 19, at 5.

⁸⁹ Agreement C.A.B. 18900, C.A.B. order E. 23680, Docket 17325, 44 C.A.B. 8 19, 31 FR 7302. It took effect on 16 May 1966.

From the earliest postwar consideration of the Rome Convention 1933⁹⁰ to 1965, the United States opposed the principle of strict liability since it was their belief that the theory of strict liability was unjust to the aircraft operator in requiring it to respond to damage regardless of fault.⁹¹ This was despite the overwhelming support for strict liability among the other participating ICAO States.⁹²

Subsequently, a new basis for strict liability for aircraft operators was introduced: the concept of risk distribution between all the parties involved in the accident. It posed the question of ‘who is in the best position to administer the risk, either by insurance or by loss distribution, so as to involve the least hardship’. For purposes of compensation, the question should not be one of ‘right or wrong’ but rather who could best bear or distribute the loss.⁹³ Between the victim and the carrier, loss can be borne better by the carrier. It can distribute the loss or bear the insurance to cover it, as part of its cost of operation. Insurance by the victim is still a limited and uncertain protection.⁹⁴

The adoption of absolute liability for third parties did not mean that the thrust of the argument applied to passengers in private international air law. An argument about ‘assumption of risk’ was not persuasive for air travel in the 1960s. The significant issue, in both cases, was who could best bear and distribute the loss. Thus, when the issue came up again in the context of preparing for the Montreal agreement, the basic evidence had been laid for the acceptance of absolute liability. In 1966, the United States’ airlines opposed strict liability during the

⁹⁰ Despite opposition from the United States, absolute liability was adopted in the Rome Convention (Article 1), ‘Report of the Chairman of the United States Delegation’, (1953) 20 *Journal of Air Law and Commerce* 89, at 91.

⁹¹ Lowenfeld and Mendelson, *supra* note 23, at 558.

⁹² G. Rinck, ‘Damage Caused by Foreign Aircraft to Third Parties’, (1962) 28 *Journal of Air Law and Commerce* 405, at 406. The appendix to the Article shows that out of 43 countries, only 7 (including the United States) based liability on either fault or presumed fault.

⁹³ Lowenfeld and Mendelson, *supra* note 23, at 559-560.

⁹⁴ *Ibid.*, at 561.

sessions, at least in the absence of a corresponding amendment eliminating the wilful misconduct exception. The IATA also firmly opposed strict liability and cast doubt on its acceptability in the United States. Thus strict liability was eliminated in the draft and from further discussion in those meetings.⁹⁵ However, the Agreement finally accepted strict liability⁹⁶ in terms of the prospect of quicker and less expensive settlements, with less time and less money going for litigation than would have prevailed under the common law system.⁹⁷ The prospect of accident investigation at remote locations and of complex conflicts of laws questions gave added emphasis to this problem in respect of international aviation accidents. The attraction of strict liability was that it would benefit most those who need the damage payments most urgently.⁹⁸

4. States in the Guatemala conference following the 1966 Montreal Inter-carrier Agreement changed the basis of liability. The Guatemala City Protocol 1971⁹⁹ was provided in order to control amounts for the compensations and to increase the limitation of liability limits.¹⁰⁰ It provided an unbreakable liability and a strict liability.¹⁰¹ However, air carrier could exonerate itself from liability if it could prove that¹⁰² a) the damage results solely from a cause which is related to the state of health of the passenger or an inherent defect of the baggage; and b)

⁹⁵ ICAO, *Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and the Hague Protocol* (1966).

⁹⁶ Bin Cheng calls this 'absolute liability'. See Cheng, *supra* note 22.

⁹⁷ Lowenfeld and Mendelson, *supra* note 23, at 601.

⁹⁸ *Ibid.*

⁹⁹ The Guatemala City Protocol 1971 is the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 as amended by the Protocol issued in The Hague on 28 September 1955.

¹⁰⁰ Bin Cheng, 'What is wrong with the 1975 Montreal Additional Protocol No.3', (1989) XIV(6) *Air and Space Law* 230, at 233.

¹⁰¹ See Chr. 2.2.1.2, *infra*.

¹⁰² See Arts. IV and VII of the Guatemala City Protocol 1971.

contributory negligence, or wrongful act or omission on the part of the passenger, causing or at least partly causing the damage.¹⁰³

5. States in the Montreal Conference 1975 after the failure of the Guatemala City Protocol 1971, in their next step, focused on the principle of strict liability in the Additional Montreal Protocol No. 4 of 1975 for cargo damage, and distinguished between air carrier's liability for passenger and cargo. The Protocol restricted the defences of carrier with regard to destruction of, loss of and damage to the cargo. Thus, liability of the carrier was based on strict liability.¹⁰⁴

Under Article 18 of the Additional Montreal Protocol No. 4 of 1975, the carrier could only exonerate itself from liability if it could prove that the damage had been caused solely by one of the four specific causes described in the Protocol. Any fault on the part of the carrier prevented it from being exonerated from liability. Likewise with unknown or unclear causes of damage which would be attributed to the carrier.¹⁰⁵

6. The MC99, as contrasted to the Warsaw-Hague Convention, distinguishes between the basis of liability for passenger death or bodily injury, from those for baggage, cargo and delay.

6.1 The MC99 discussed the principles of liability in its chapter III. The provisions of liability were outlined to balance the interests of the users of international air transportation, the carriers, and the general public. It intended to ensure that a great equity would emerge, which would be widespread and gain substantial support, and which would bring more uniformity through the strict liability concepts for passengers' death or bodily injury, as per the liability

¹⁰³ See Art. XX of the Guatemala City Protocol 1971; and ICAO Doc. 9131-LC/173-2 at 109-56 (1975).

¹⁰⁴ Ibid.

¹⁰⁵ I. Koning, 'Liability in Air Carriage: Carriage of Cargo under the Warsaw and the Montreal Conventions', (2008) 33 *Air and Space Law* 310, at 321.

rules established by the Montreal Protocol No. 4 for carriage of cargo.¹⁰⁶ As a result, the MC99 distinguished between the basis of liability for passenger, cargo, baggage, and delay.

6.2. The MC99 provided a two tier liability regime for passengers' death or bodily injury. In the first tier, it imposes strict liability for damages up to SDR 100,000 to alleviate the heavy burden of unlimited liability. The Convention provides the amount that covers a large number of claims. It removed any defence based on taking necessary measures to avoid the damage. It prescribed that the carrier is unable to exclude or limit its liability for the first 100,000 SDRs, except to the extent that the carrier proves that the damage was caused by, or contributed to, the negligence or other wrongful act or omission of the passenger or the person claiming damages through the passenger.¹⁰⁷

Strict liability does not mean that any passenger could easily bring a claim for compensation for an air accident whether bodily or mentally injured. Firstly, the passenger must prove that an accident has occurred, that he has sustained damage in that accident, and that there had been a bodily injury which importantly affected his health. The liability of air carrier is recognized since the passenger proves causality and the cause and relationship between the accident and damage.¹⁰⁸

In the second tier, the MC99 introduced presumed fault and unlimited liability for damages more than 100,000 SDRs.¹⁰⁹ The air carrier is liable for proven damages in excess of 100,000 SDRs, if the carrier cannot prove that the damage was not caused by negligence or other wrongful act or omission of the carrier or that the damage was due solely to the negligence or other wrongful act or omission of a third party.

¹⁰⁶ Ibid.

¹⁰⁷ See Arts. 20 and 21 of the Montreal Convention 1999.

¹⁰⁸ ICAO Doc. 9775-DC/2, at 116.

¹⁰⁹ ICAO Doc. 9775-DC/2.

Consequently, although the MC99 refers to a two tier system of liability for passengers' death or bodily injury, in practice the MC99 provides strictly liable unless the carrier elects to and in fact proves either or both of the defences of Article 21(2). While Article 21 has been loosely referred to as two-tier system of liability, the burden of proof falls on the carrier to decide whether to pay all of the proven damages, or to attempt to avoid liability for the proven damages in excess of 100,000 SDRs by proof of one or both of the Article 21 (2), as to which the carrier has the burden of proof.¹¹⁰

Despite the fact that carrier's liability under the second tier of liability is unlimited, the quantum of damages has to be proved by the claimant. In addition, determining such proved damages should be subject to the *lex fori* principle.¹¹¹ Therefore, as soon as an air accident occurs which causes damage, strict liability applies; and if the air carrier can prove contributory negligence (of the victim), he wholly or partly is exonerated from liability.¹¹²

6.3. Regarding unchecked baggage, which includes passengers' personal items, if the damage is caused due to the fault of the air carrier or its employees or agents, the air carrier is liable for damage. However, the MC99 provides strict liability for checked baggage. The carrier is not liable if and to the extent that the damage resulted from an inherent defect, quality or vice of the baggage.¹¹³

Where the passenger himself is in charge of his related items, under the Convention the air carrier is considered liable only if the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. MC99 speaks of an 'event'. The requirement that the event

¹¹⁰ See Tompkins, *supra* note 19, at 35.

¹¹¹ See Dempsey and Milde, *supra* note 53, at 183.

¹¹² ICAO Doc. 9775-DC/2.

¹¹³ ICAO DCW Doc. No.17.

causing the destruction, loss or damage took place on board the aircraft or during a period whilst the checked baggage was in charge of the carrier is, by the way, also a requirement for unchecked baggage. However, in certain case laws, air carrier is considered liable only if the passenger is on board the aircraft or in the course of any of the operations of embarking or disembarking. The fact is that the passenger needs to be on board the aircraft or if the damage needs to happen in the course of any of those operation.¹¹⁴

6.4. The MC99 provides unbreakable limit of liability for cargo damage.¹¹⁵ Air carrier's liability for cargo damage is strict because the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to the cargo resulted from one or more of the following: (a) inherent defect, quality or vice of that cargo; (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents; (c) an act of war or an armed conflict; (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.¹¹⁶

The MC99 adopts a liability for cargo which is identical to the Montreal Protocol No. 4.¹¹⁷ In fact, the Convention follows common law. In common law, the carrier is not exempt from liability by proving the four defences;¹¹⁸ it should not be at fault as well. However, the MC99 deviates from the Protocol and the common law on one important point. Article 18(2) of the Convention states that 'the carrier would not be liable *if and to the extent that* the damage is

¹¹⁴ P. Martin et.al, *Shawcross and Beaumont on Air Law* Vol. VII (4th Ed.), 797 (hereinafter referred to as '*Shawcross and Beaumont on Air Law*').

¹¹⁵ See Art. 18 of the Montreal Convention 1999; S. Dempsey, 'Carrier Liability for Loss and Damage of International Air Freight', (2004) XXIX *Annals of Air and Space Law* 120, at 134; Koning, *supra* note 105, at 315.

¹¹⁶ See Art. 22 of the Montreal Convention 1999.

¹¹⁷ See working paper C-WP/ 10420 14/6/96 for the 148th session of the ICAO Council in 1996, in *International Conference on Air Law* (Doc. 9775-DC/2), Vol. III.

¹¹⁸ These defences are the acts of God, the acts of the Queen's or public enemies, inherent vices, and the consignor's fault. For a detailed discussion, see Chr. 2, *supra*.

resulted from one of the four causes mentioned'.¹¹⁹ The additional wrongful act on the part of the carrier no longer leads automatically to air carrier's liability, but it can be divided proportionally among the parties.¹²⁰

It is submitted that the position of the carrier has improved because it no longer has to prove the absence of all possible concurrent causes to be exonerated under Additional Montreal Protocol No.4 of 1975. Instead, the carrier has gone half way there, when it proves that one of the causes listed in Article 18(2) of the MC99 caused the damage.¹²¹ It becomes the responsibility of the claimant to prove that there is another concurrent cause for which the carrier is liable. Then courts can divide the liability evenly amongst the parties.¹²²

Due to improvements in economic and welfare conditions, developments in the air transport industry, and jurisdiction experiences that developed over time; States (such as the United States, the European Union member States and Japan), air carriers and organizations inclined to move from presumed fault liability to strict liability.¹²³ Fast settlement of claims and the avoidance of lengthy and costly litigations were among the main factors and reasons for this new trend towards strict liability.¹²⁴

Over 70 years, case law in the United States for passengers' death and bodily injury as well as for goods, progressively imposed more severe requirements on the air carrier to prove non fault.¹²⁵ The presumption of liability under the WC29 was practically, and in courts, treated as

¹¹⁹ *Emphasis added.*

¹²⁰ See Koning, *supra* note 105, at 321.

¹²¹ *Ibid.*, at 322.

¹²² Report of the meeting of the special group on the modernization and consolidation of the 'Warsaw System' (SGMW); See also ICAO International Conference on Air Law, Montreal, 10–28 May 1999 (Doc. 9775-DC/2), Volume III, Preparatory Material, at. 257.

¹²³ ICAO Doc. AT-WP/1769 41 1 I96.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

strict liability.¹²⁶ On the one hand, the air carrier was strictly liable for goods in the common law.¹²⁷ On the other hand, it also had a duty to exercise the highest due care and diligence on passengers' carriage.¹²⁸ Thus, the air carrier was treated strictly liable in cases following an aviation-related accident.

Consequently, liability in international regimes found a similar position as in the United States' common law where air carriers are strictly liable for passenger's death or bodily injury, and for goods sustaining damage.¹²⁹ Therefore, international air carrier's liability in case law practically found a similar position as in common law and the courts applied it to international flights as well as domestic flights.

A comparative law survey shows that international air carrier's liability systems do not opt exclusively for fault liability or strict liability, but recently adopt a more nuanced approach according to civil law and common law.¹³⁰ Indeed, civil law and common law systems follow a nuanced approach with a mixture of strict liability and fault liability elements.¹³¹ The economic environment such as mankind enjoyed a relatively better welfare is a core criterion for combining strict and fault liability and that, therefore, legal regimes should take an economic approach. This approach is based on these systems to balance elements of strict liability and fault liability. This approach includes intermediate solutions such as reversing the burden of proof using an objective standard of care and distinguishing between goods and passenger.¹³²

¹²⁶ See Clarke, *supra* note 63, 136.

¹²⁷ Ibid.

¹²⁸ L.S. Kreindler, *Aviation Accident Law* (2001), 53-71.

¹²⁹ See Koning, *supra* note 105, at 319.

¹³⁰ Ibid.

¹³¹ S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', (2009) 107 *Michigan Law Review* 1583, at 1584.

¹³² Ibid.

Traditionally, tort and contract are treated in nearly all civil law countries as aspects of the law of obligations.¹³³ Civil law countries opted for fault liability in contract law and tort,¹³⁴ while common law countries opted for strict liability in contract and negligence in tort.¹³⁵ Yet this impression is the result of too much abstraction on both sides.¹³⁶ Upon closer inspection, the common denominator between civil and common law is that all systems opt for a nuanced combination of the two bases of liability.¹³⁷

The nuanced approach regarding the basis of liability, that is, (presumed fault liability and strict liability, in common law and civil law systems that ultimately displayed itself in the international regime of Warsaw-Montreal, can be seen in the *Shariah* principles and Iranian law. However, there are similarities and differences between them that will be discussed below.

(ii) The *Shariah*

Comparing the basis of liability under the *Shariah* with the Warsaw-Montreal regime presents various points of similarities and differences, which are particularly important when studying air carrier's liability in Iran.¹³⁸

The burden of proof is upon the claimant in the *Shariah* but this principle cannot be applied where proof and evidence require a professional's intervention, to the extent that a layman cannot follow the evidence.¹³⁹ According to the general rules, the individuals are bound to

¹³³ B. Whittaker, *Principles of French Law* (2007), 5.

¹³⁴ See Planiol and Ripert, *supra* note 50, at 495 and F.E. Werner, M.W. Finkin and A. Ebke, *Introduction to German Law*, (1996), 200.

¹³⁵ See Chr. 2, *supra*.

¹³⁶ See Grundmann, *supra* note 131, at 1585.

¹³⁷ Ibid.

¹³⁸ See Chr. 3, *supra*.

¹³⁹ A. Kho'i, *Mabāni Takmelat al Minhāj Vol. II* (1363 A.H. 1984), 221.

compensate for the loss incurred to others when they commit a fault.¹⁴⁰ But in exceptional cases, for example, when a contract exists between the parties, they can change the basis of liability to strict liability¹⁴¹ or the legislator can provide strict liability in a special statute. For instance, according to the Acts passed in 1968 and 2008 on the civil liability arising out of the ownership of motor vehicles, liability is strict, and the owner of the vehicle should in all circumstances compensate for the damages and cannot discharge himself from liabilities incurred as a result of his act by proving that he is not at fault.¹⁴²

1. In comparison with the WC29:

The basis of liability in the WC29 is based on presumed fault for passengers as well as goods. However, *the Shariah* distinguishes between goods and people.

a) In *the Shariah*, liability in contract of carriage is based on fault liability. The burden of proof is on the claimant in contrast with the Convention where the air carrier is liable for breach of contract, unless it can prove that the damage was caused by external causes outside its control.¹⁴³ However, Iranian law accepts presumption of liability. The air carrier is supposed to be liable until it can prove it is not at fault. According to the Iranian Commercial Code the legislature presumes that the air carrier is liable unless proven otherwise.¹⁴⁴ In conclusion, Islamic law in Iran modified the *Shariah* rules and accepted presumption of liability.¹⁴⁵

b) In *the Shariah*, liability for death or bodily injury is based on strict liability. Once a person directly causes death or bodily injury to another person unintentionally, the wrongdoer is

¹⁴⁰ See Arts. 50, 493, 516, 556, 577, 584 and, 640 of the Iranian Civil Code.

¹⁴¹ See Arts. 10 and 642 of the Iranian Civil Code.

¹⁴² See Chr. 3, *supra*.

¹⁴³ S. Amin, *Remedies for Breach of Contract in Islamic and Iranian Law* (1984), 28.

¹⁴⁴ See Arts. 374 and 378 of the Iranian Commercial Code.

¹⁴⁵ See Art. 386 of the Iranian Commercial Code.

liable for paying the *Diyah* that does not depend on his fault.¹⁴⁶ However, Iranian law modified it with regard to accidents, and admitted presumption of liability. Although *the Shariah* differs from the WC29, Iranian law applies presumption of liability in air accidents. Since the air carrier is liable because of negligence, carelessness, or non-observance of related regulations in a way that if the regulations had been observed, no accident would have happened.¹⁴⁷

In Iran, liability for passengers' death or bodily injury is discussed under a specific kind of homicide called quasi-intentional killing. The defendant is liable because of negligence, carelessness, or non-observance of related regulations, in a way that if the regulations had been observed, no accident would have happened.¹⁴⁸ Therefore, although *the Shariah* establishes strict liability for death or bodily injury, Iranian law recognizes liability based on the presumption of fault and expands defence limits. It can be concluded that *the Shariah* is not against changing the basis of liability whenever situations in a society require it.

2. In comparison with the MC99:

- a) The principle of liability in the MC99 is based on a two tier liability regime for passengers' death or bodily injury. As mentioned above, the *Shariah* also provides strict liability for death or bodily injury.
- b) Liability in the *Shariah* with regard to damaged goods is based on fault unlike the MC99 where there is strict liability. The claimant should firstly prove the fault of the wrongdoer. Secondly, the defendant cannot be relieved from liability except by showing that damage is caused through *force majeure*. Liability for damaged goods is broadly defined and not limited

¹⁴⁶ In an unintentional offence or homicide (*khataei*), the perpetrator has neither an intention to commit an offence against a victim nor an intention for the offending act. M. Najafi, *Javahir al-Kalam Vol. VI* (1394 A.H. 1973), 554.

¹⁴⁷ See Art. 295 (1) of the Iranian Islamic Criminal Code.

¹⁴⁸ See Art. 295 (2) of the Iranian Islamic Criminal Code.

to the four defences in the Convention. However, the *Shariah* accepts contractual conditions to restrict the defence according to contractual conditions or special statute. Therefore, there is no conflict between the *Shariah* and the MC99 because Iranian law accepts a presumption of liability in the carriage of contract and allows parties to restrict their defence.¹⁴⁹ As mentioned above, the basis of liability (strict, fault or presumed fault) depends on the scope of the defendant's defence, so in the next section, the defence of 'all necessary measures' will be discussed.

4.2.1.2 The Defence of the Air Carrier

One of the rules which attracted a lot of attention in the Warsaw-Montreal regime is the acceptable defence of the air carrier. The basis of liability directly correlates to the scope of defences. Except the 'contributory negligence' defence that is mentioned in all applicable Conventions, the most important defence was the 'all necessary measures' one. As any discussion of the basis of liability would not be complete without mentioning this defence, it will be discussed below.

(i) Private International Air Law

Article 20 of the WC29 provides the defence for passenger, goods and delay equally.¹⁵⁰ It provides 'The carrier is not 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.' The concept 'all necessary measures' is extracted from the diligence conception and has entered into air law from the maritime law Conventions.¹⁵¹ This wording determines

¹⁴⁹ See Art. 374 of the Iranian Commercial Code.

¹⁵⁰ The previous subsection discussed the basis of liability in Article 20 of the WC29. There, the author introduced the different interpretations of this Article in various jurisprudences.

¹⁵¹ The Hague Conference in 1955 again discussed various proposals to replace the expression 'all necessary measures' by, for example, 'all possible and foreseeable measures' or even to redraft Article 20(1) to read: 'the

the basis of liability of the air carrier. It means ‘all reasonably necessary measures’, i.e. the air carrier should show and prove that it has taken ‘all reasonable measures’ and not just ‘reasonable measures’.¹⁵²

However, the MC99 determines on the one hand, four restricted defences for cargo,¹⁵³ whilst refusing, on the other hand, to mention the defence of ‘necessary measures’ for passengers’ death or bodily injury. The MC99 provides that the air carrier can be relieved from liability if it proves that such damage is not caused by fault or wrongdoing or omission by it or its employees or agents or such damages are exclusively caused by wrongdoing or omission of a third party. However, it does not reaffirm the defence of necessary measures.¹⁵⁴

The defence pertaining to ‘necessary measures’ may be interpreted broadly or narrowly, which extends or diminishes the air carrier’s liability. Considering the various interpretations, the scope of the defence is subject to the courts’ interpretation in different legal systems.

1. Restricted Interpretation:

According to the restricted interpretation¹⁵⁵, the air carrier is not liable if it can prove that it has taken all measures as to direct and proximate connection with the cause of accident, and that these measures were adequate to the concrete cause which resulted in the damage.¹⁵⁶

If, however, the cause of the accident is not reliably determined, the carrier can never produce positive proof to show that it has taken all measures to avoid the concrete damage. Hence, it cannot be exonerated, because the cause of an air accident usually remains unknown and it is

carrier is not liable if he proves that the damage was not caused by his negligence or of his servants and agents.’ These proposals were rejected by a majority of 28 votes to 8 because they would have unduly reduced the liability adopted in the Warsaw Convention; Minutes of the Hague Conference, ICAO Doc. 7686.

¹⁵² *Shawcross and Beaumont on Air Law*, *supra* note 114, at 455.

¹⁵³ See Art. 18 of the Montreal Convention 1999.

¹⁵⁴ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 453.

¹⁵⁵ The restricted interpretation was accepted by the US courts prior to 1970’s. See *Ritts, Ex’ x v. American Overseas Airlines*, (1949) U.S.Av.R.65 (S.D.N.Y.1949).

¹⁵⁶ See Dempsey and Milde, *supra* note 53, at 68.

obvious that it will be too challenging for the air carrier that has to prove the cause of the accident.¹⁵⁷

Not only does the air carrier need to prove that it has taken precautionary measures, it also has to prove that it has taken the reasonable care required for preventing the damage or loss.¹⁵⁸ In other words, it must have taken ‘necessary measures’ to avoid the damage. It is not sufficient for the air carrier to show that it, or its employees or agents, have taken usual and normal care. They must have also taken additional ‘necessary measures’ in line with the air carriage industry’s requirements. As a result, if the air carrier fails to provide adequate explanation of the causes of the accident, it, in fact, would not be successful in its defenses.¹⁵⁹

2. Broad Interpretation:

According to the broad interpretation, the air carrier is not liable if it can prove that it has carried out its duty with the utmost diligence, as duly expected from him, according to the terms of the carriage contract. When a court accepts the broad interpretation, the air carrier can be relieved from liability when it meets the general proof indicating that it has taken all necessary measures for implementing a safe flight.¹⁶⁰ The broad interpretation corresponds to the common law and civil law systems.

In common law, a common carrier can be exempted from liability for any loss or damage that occurs to goods. However, it must prove that that loss or damage has occurred because of an act of God, the act of the Queen’s enemies,(in the United States, the act of public enemies),¹⁶¹ the inherent vice or defect of the goods, or the negligence of the owner of the goods. It is

¹⁵⁷ G.R Sullivan, ‘Codification of Air Carrier Liability by International Convention’, (1936) *Journal of Air Law* 1, at 20.

¹⁵⁸ *Gradus v. Hanson Aviation, Inc.*, (1984) 158 Cal.App.3d 1038, 1049-1050 [205 Cal.Rptr. 211].
American Smelting and Refining Co v. Philippine Airlines Inc., 4Avi.17,413 (N.Y.Supp.Ct 1956) .

¹⁶⁰ See Dempsey and Milde, *supra* note 53, at 68.

¹⁶¹ This exception covers a number of situations which were outside original scope of common carrier such as many type of governmental intervention like intervention of Customs authorities in airports. See Freund, *supra* note 84, at 246. See Miller, *supra* note 53, at 51.

obvious that it complies with the restricted interpretation of ‘all necessary measures’ defence which is a heavier duty compared with when a carrier exempts itself by proving that it has not been at fault.¹⁶²

With regard to passengers, the courts in the United States have expressed different opinions about whether a defendant may exempt himself. He either has to positively prove the cause of the accident, or it suffices to negatively prove that he has not been at fault.¹⁶³ In general, there is no absolute warranty of fitness of the transport vehicle for the carriage of passengers. However, although the carrier does not guarantee the absolute safety of the carriage vehicle, it is admitted that it warrants that the vehicle is as safe as care and skill on the part of anyone can make it to be.¹⁶⁴

In the United States, after the WC29 entered into force, the courts tended to apply the strictest responsibility of care, vigilance and skill on the part of the air carrier and all persons employed by it. As a result, the necessary measures defence is restrictedly interpreted.¹⁶⁵ The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Hence, the common carrier, is liable for the slightest negligence that caused injury to the passenger.¹⁶⁶

In civil law countries such as France, if a passenger sustains damage resulting from an accident which is related to carriage, the carrier should prove *force majeure* to be exempted.¹⁶⁷ As the liability principle in civil law is based on the air carrier’s fault, if it could prove that it has not committed fault and had taken all reasonable measures, it is no longer

¹⁶² H.G. Beale (eds.), *Chitty on Contracts Vol. II* (2004), 550; See Viney, *supra* note 62, *spara.* 36-010.

¹⁶³ *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1049-1050 [205 Cal.Rptr. 211].

¹⁶⁴ *Powell v. Dell-Air Aviation, Inc.* (1968) 268 Cal.App.2d 451, 457-458 [74 Cal.Rptr. 3], *Marshall v. United Airlines* (1973) 35 Cal.App.3d 84, 86 [110 Cal.Rptr. 416].

¹⁶⁵ *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002); See also G. O. Dycstra and L. G. Dycstra, *The Business Law of Aviation* (1946), 300-301.

¹⁶⁶ P.S. Dempsey and L.E. Gesell, *Air Transportation (Foundation for the 21st Century)* (1997), 672.

¹⁶⁷ See Planiol and Ripert, *supra* note 50, at 512.

liable.¹⁶⁸ The air carrier would not be liable for inherent defects if it operates an aircraft which is manufactured from good average equipment, and it applies its control through related equipment.¹⁶⁹ When *force majeure* is not regarded to be equivalent to an absence of fault, the air carrier would be liable for inherent defects, even if it operates an aircraft which is manufactured from good average equipment, and it applies its control through related equipment.¹⁷⁰ Therefore, the interpretations made by courts regarding Article 20 play an important role in establishing strict liability or presumed fault liability.

The author is of the opinion that the defence of the adoption of necessary measures provides a possibility for courts to decide according to their pertinent legal system and economic environments. As we have seen above, the United States imposes the highest due care for passengers' death or bodily injury, which in effect is an application of strict liability in such circumstances. As the rights of the consumers are gradually observed in domestic and international areas throughout the world, the restricted interpretation is more appropriate than the broad interpretation, especially when the applicable Conventions provide limitation of liability.

(ii) The *Shariah*

The acceptable defences are not defined in a specific chapter in the *Shariah*. Although it does not pay due attention to defences in the same way as the WC29 does, it discusses the justifiable defences in specific contracts such as hire, bailment, sale contracts, or in tort such as the *Diyah*.¹⁷¹ In general, the *Shariah* recognizes the theory of changed circumstances and

¹⁶⁸ See Chr. 2, *supra*.

¹⁶⁹ See Miller, *supra* note 53, at 57.

¹⁷⁰ *Haddad v. Cie Air-France*, 179 RFDA 342 (Cass. 16 Feb. 1982).

¹⁷¹ See M.A. F. Hosseini Maraqi, *al-Anāwin Vol. II* (1417 A.H. 1996), at, 446-449.

acts of God (*afat samavi*) for goods damaged in contracts.¹⁷² Therefore, *force majeure* and changed circumstances are deemed as valid reasons to be relieved from liability. The juridical basis for this legal resolution by Islamic jurists is the required balance between rights and the undertakings of parties, and the prohibition of unfair loss.¹⁷³

In Iranian law, breach of contract always imposes liability unless it is caused by *force majeure* in which case the wrongdoer is exonerated from liability.¹⁷⁴ In order for a carrier to be exempted from liability, the event should be unpredictable and unpreventable.¹⁷⁵ This term includes all causes, which are external or internal to the wrongdoer. If the carrier proves that loss, destruction, or delay in carriage is caused by events that are not related to its diligence, it is discharged from liability.¹⁷⁶ It includes any cause that is unrelated to the carrier that causes non-performance of obligation.¹⁷⁷

However, the carrier is strictly liable for death or bodily injury. It is only exonerated when death or bodily injury occurs by an external cause. Once death or bodily injury occurs, compensation should be made whether the accident occurs through direct or indirect causes, or a combination of the two. Therefore, the *Shariah* interprets *force majeure* broadly for damaged good, allowing the carrier to be exonerated easier. However, it interprets *force majeure* restrictively for passengers' death or bodily injury, and so, it becomes more difficult for the air carrier to escape liability.

The author is of the opinion that the *Shariah* determines strict liability for death or bodily injury, but Iranian law recognizes liability based on the presumption of fault and expands defence limits. It can be concluded that the *Shariah* is not against changing the basis of

¹⁷² Ibid., at 26-27.

¹⁷³ M. Esmaili, *Force Majeure* (1381 A.H. 2002), 123.

¹⁷⁴ See Arts. 277, 229, and 230 of the Iranian Civil Code.

¹⁷⁵ Ibid.

¹⁷⁶ See Art. 386 of the Iranian Commercial Code.

¹⁷⁷ S. Ghamami, *Maseoliat Madani -e- Hokomat* (1376 A.H. 1997), at 107.

liability whenever situations in a society require it. Regulations relating to *force majeure* are not public policy nor obligatory in the *Shariah*. As a result, parties can agree upon the contrary, i.e. they can agree to restrict or broaden the scope of *force majeure*.¹⁷⁸

The author is of the opinion that the scope of defence has a direct relation with limited or unlimited liability. If limitation of liability is applied, the acceptable defence may be restrictively interpreted because injured parties can obtain compensation. If unlimited liability is applied, it is better to interpret the defence broadly because liability limits are not determined and heavy liability is imposed on the defendant.

4.2.1.3 Liability Limits

(i) Private International Air Law

The drafters of WC29, aiming to balance the interests of the consumers with those of the airlines, inserted limitation of liability under the impact of maritime law in the WC29.¹⁷⁹

Therefore, the institution of ship-owners' liability limit, with its long history, became a source of inspiration, when the possibility of a global limitation of liability in air law was being considered by the CITEJA.¹⁸⁰ Owners of ships were pecuniarily liable to total loss involving large values and extensive life claims under circumstances over which the owner had only remote control. The tenable argument for the limitation of ship owners' liability is to offer to national ship-owners the same protection which foreign ship-owners enjoy under their own law.¹⁸¹

Air law commentators such as Drion did not accept this argument as appropriate for establishing equal and fair opportunities in international accident remedy, nor for legal

¹⁷⁸ See Art. 230 of the Iranian Civil Code.

¹⁷⁹ See Drion, *supra* note 9, at 40.

¹⁸⁰ See Minutes Warsaw 1929, *supra* note 4, at 86.

¹⁸¹ *Ibid*, at 13.

uniformity of liability limits.¹⁸² The argument was never recognized as an admissible theory for justifying limited liability in air law.¹⁸³ He believed more pivotal evidences go back to protection of a financially weak industry, the air carriers, and uniformity of the law with respect to the compensations sums to be paid.¹⁸⁴ The air carrier's liability, as far as it is in the interest of aviation, should be limited. The liability limit was deemed as an encouragement for the aviation industry to protect itself from risks that would discourage people from investing in this industry which had social benefits.¹⁸⁵ Liability limits were considered as a counterpart of an aggravated liability system imposed on air carriers at that time.¹⁸⁶

The WC29 limited internationally the liability for death or bodily injury to 125,000 Poincaré francs,¹⁸⁷ approximately USD 8,300.¹⁸⁸ In the carriage of registered luggage and of goods, the liability of the carrier was limited to a sum of 250 francs per kilogram. Regarding the objects which the passenger carries with him or her, the liability of the carrier was limited to 5,000 francs per passenger.

When the WC29 came into force in 1933, the liability limits of the WC29 were not low in those early days. Rather, it was the government that diminished it through their

¹⁸² See Minutes of the 3d session of CITEJA, *supra* note 68, at 45.

¹⁸³ See Minutes Warsaw 1929, *supra* note 4, at 82.

¹⁸⁴ Drion provided different grounds for justifying liability limits of air carriers. He divided and discussed rationales of limitation under a) an analogy with maritime law with its global limitation of the ship owner's liability; b) the necessary protection of a financially weak industry; c) the catastrophic risks that should not be borne by aviation alone; d) the necessity of the carrier or operator being able to insure against these risks; e) the possibility for the potential claimant to take insurance out themselves; f) the limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator; g) the avoidance of litigation by facilitating quick settlements; h) the unification of the law with respect to the amount of damages to be paid. See Drion, *supra* note 9, at 12 - 44.

¹⁸⁵ See Beaumont, *supra* note 12, at 223.

¹⁸⁶ CITEJA Doc.31, at.2R.C.1952, I, 129 (1930 Mexico); see Drion, *supra* note 9, at 29-30.

¹⁸⁷ See Art 22 of Warsaw Convention 1929.

¹⁸⁸ This dollar equivalent has been in effect since the United States' devaluation in 1933. At the time of the Warsaw Conference in 1929, the value of 125,000 Poincaré francs was equivalent to \$4,898 or £1,006. See J. Clare, 'Evaluation of Proposals To Increase the "Warsaw Convention" Limit of Passenger Liability', (1949) 16 *Journal of Air Law and Commerce* 53, at 54-57.

interpretations.¹⁸⁹ Customers' dissatisfaction with the limitation of liability in applicable Conventions prompted their abolition by international movements. The international community witnessed the dissatisfaction of several countries in respect to a low limitation of liability.¹⁹⁰ This fact, together with improvements in economic circumstances, encouraged States, international organizations and air carriers to lift the limits after 26 years of approving the WC29. Subsequently other international treaties gradually increased the sum of limited liability. The air carrier's liability limits for death or bodily injury were doubled and became 250,000 French francs, approximately USD 16,600 in the Hague Protocol 1955. However, the liability limits of the air carrier for cargo remained unchanged.¹⁹¹

Then the Guatemala Protocol 1971, although it never entered into force, increased the unbreakable liability limits to 1,500,000 francs for passengers' death or bodily injury.¹⁹² Finally,¹⁹³ in the first tier, the MC99 imposed strict liability for damages up to SDR 100,000¹⁹⁴ and in the second tier introduced presumed fault and unlimited liability for remedies more than 100,000 SDRs.¹⁹⁵

(ii) The *Shariah*

The *Shariah* distinguishes liability for property from liability for death or bodily injury. It introduces unlimited liability for damaged goods¹⁹⁶ and the *Diyah* as a limited liability for death or bodily injury. In a restricted legal sense, the *Diyah* is a specified amount of money or

¹⁸⁹ See Dempsey and Milde, *supra* note 53, at 17.

¹⁹⁰ Ibid.

¹⁹⁰ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ See Arts. XI and VIII of the Hague Protocol 1955 and Art. IV of the Guatemala City Protocol 1971.

¹⁹² See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 132.

¹⁹³ See Dempsey and Milde, *supra* note 53, at 41-42.

¹⁹⁴ See Art.21 of the Montreal Convention 1999.

¹⁹⁵ See Arts. 21 and 22 of the Montreal Convention 1999. Limitation of liability in international flights was useful with regard to insurance which were in favor of customers and carriers. ICAO Doc. 9775-DC/2, at 21.

¹⁹⁶ A. Gorji, *Maqalat -e- Hoqooqi (Legal Essays) Vol. II* (1375 A.H. 1996), 247.

goods for compensation in death or bodily injury.¹⁹⁷ In fact, the main principle for death and bodily injury in the *Shariah*, unlike the common law and civil law systems, is limited liability. As discussed in the previous Chapter, in its original form, the *Diyah* consisted of camels. Very soon after the Prophet Mohammad, Imam Ali ibn-e-Abi Taleb¹⁹⁸ ruled that it could, equally well, be paid in gold coinage.¹⁹⁹

There is an important question as to whether a claimant can claim, in addition to the *Diyah*, for other losses and damages resulting from death or bodily injury.²⁰⁰ This issue is important in adjusting the *Diyah* to limited or unlimited liability in the applicable Conventions. It would lead to a discrepancy when compensating victims, especially where the limited liability in international air Conventions becomes applicable on domestic flights. If liability in excess of the *Diyah* is accepted, it can reconcile domestic law with the WC29; otherwise there would be an obstacle in this regard.²⁰¹

Islamic jurists express different opinions about compensation in excess of the *Diyah*. In the past, they believed that the *Diyah* was constant and unchangeable. However, after the Islamic Revolution in Iran, they accepted unlimited liability. This issue surfaced in 1984 when trial courts posed the question concerning it to the Supreme Court. The relevant commission in the Supreme Court responded by saying that courts could not condemn defendants to liability in excess of the *Diyah* by covering medical treatment costs or for incapacity to work. After posing this question, experts in the Islamic law and experts in the Iranian law elaborated on their opinions.²⁰² These opinions affected different court judgments.²⁰³

¹⁹⁷ M. Mirsaeidi, *Mahiat -e- Hoqooqi -e- Diyah* (1373 A.H. 1993), 42.

¹⁹⁸ See 3.2, *supra*.

¹⁹⁹ *Ibid*, at 28.

²⁰⁰ According to Art. 1 of the Iranian Civil Liability Act of 1960, any damage whether physical or mental, imposes liability and the offender is liable for compensation.

²⁰¹ See 3.4.5.4, *supra*.

²⁰² *Ibid*.

1. Comparing the principles and methodologies of the *Shariah* with the WC29 presents various points of convergence and divergence.

1.1 Liability for goods damaged has been unlimited in *the Shariah* and defendant should pay the total compensation. However, the WC29 provides limitation of liability for goods that sustained damage.²⁰⁴

1.2. The WC29 and the *Shariah* both accept limited liability for death or bodily injury.²⁰⁵ Whilst the *Shariah* provides limited liability under the *Diyah*, the WC29 provides limited liability under Article 22. The basis of limits or extent of liability as enumerated in the WC29 is a point of divergence from the *Diyah* system.

In the *Shariah*, liability is fundamentally based on the *Diyah*. The main assumption is that liability is limited for death or bodily injury. It would concentrate on compensating the victims within unified limits.²⁰⁶ All suffering persons should be similarly compensated. An action for the *Diyah* should not exceed the limits enumerated for each person. In fact, it fixes the amount of compensation to be paid to the victim.²⁰⁷ However, the WC29's approach accepts both unlimited (Article 25) and limited liability (Article 22). The WC29 accepts a uniform ceiling of liability that may not apply in the case of a failure to conform to certain formalities²⁰⁸ and in the case of wilful misconduct.²⁰⁹

The method of calculation in the *Diyah* is different from that of the Convention. The *Diyah* system provides the way of calculating the sum that suffering persons should receive. The main issue is to convert the value of the *Diyah* as enumerated by the Prophet into

²⁰³ M. Ashouri, *Aein -e- Dadrasi-e- Jazaei Vol I* (1385 A.H. 2006), 241.

²⁰⁴ See Art. 22 of the Warsaw Convention 1929.

²⁰⁵ M.J. Hosseini Amili, *Miftah al-Kiramah Vol.I* (1410 A.H. 1989), at 357.

²⁰⁶ See 3.4.5.4, *supra*.

²⁰⁷ A. Edris, *Avaz* (1377A.H. 1998), 7.

²⁰⁸ See Arts. 3 and 4 of the Warsaw Convention of 1929.

²⁰⁹ See Art. 25 of the Warsaw Convention of 1929.

contemporary values. However, the Convention uses another method for calculation. In the carriage of passengers, the liability of the carrier for each passenger is limited to the sum of 125,000 francs.²¹⁰

2. The above analysis is applicable when comparing the *Shariah* with liability limits for death or bodily injury under the MC99.

2.1. In relation to cargo, the *Shariah*, in contrast with the MC99, introduces unlimited liability.

2.2. As previously mentioned, the *Shariah* introduces the *Diyah* which limits liability for death or bodily injury. However the MC99 provides unlimited liability.²¹¹ Any action under the *Diyah* should not exceed the limits enumerated for a person. In fact, it fixes the amount of compensation to be paid to the victim.²¹² However, the MC99 accepts a two tier liability regime (unlimited liability). Principally, the liability for passengers' death or bodily injury is unlimited.²¹³

3. As mentioned above, the method of calculation in the context of the *Diyah* is different. The *Diyah* for unintentional acts is based on limited liability and there is a fixed tariff for it. The Convention, on other hand, has introduced 100,000 SDR for death or bodily injury.²¹⁴

Limited liability in the WC29 and unlimited liability in the MC99 for death or bodily injury are the main points of conflict between the *Shariah* principles and those of the international regime. In section 3, the author analyzes this conflict and brings proposal for resolving it.

²¹⁰ The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900. See Art. 22 of the Warsaw Convention 1929.

²¹¹ See Art. 21 of the Montreal Convention 1999.

²¹² See Edris, *supra* note 207, at 7.

²¹³ See Arts. 3 and 25 of the Warsaw Convention 1929.

²¹⁴ See Art. 21 of the Montreal Convention 1999.

4.2.1.4 Breaking the Liability Limits

(i) Private International Air Law

Wilful misconduct was a tool to break limited liability in the WC29. As limitation of liability in the WC29 might be an advantage for the air carrier, the drafters excluded the intentional acts of the air carrier and its employees in order to balance the interests of both air carriers and customers.²¹⁵ As compensation in common law and civil law was based on fault and unlimited liability, the drafters intended to accept the limitation of liability just for fault liability; not to add other actions of air carrier including its intentional act. As a result, they excluded the intentional action of the air carrier.²¹⁶

This concept was challenged in the Warsaw System several times.

1. 'Wilful misconduct' was considered as a vague equivalent of '*faute lourde*' and '*dol*'. Therefore, Article 25 of the WC29 was revised accordingly.²¹⁷ The vagueness of the concept of wilful misconduct in this Article caused a lack of uniformity in its interpretation.²¹⁸ Wilful misconduct connotes different things in French and English. In French, it contains an element of intention or will for making harm, while translating this concept into English is difficult.²¹⁹ The concepts of *dol* and wilful misconduct both include intentional acts, an intent of committing the act and knowledge of the wrongfulness of the act. But these two concepts differ. In wilful misconduct, the committed act only requires that a risk of probable damage is caused to others, whereas in *dol* the committed act is designed to harm others.²²⁰ Further,

²¹⁵ See Minutes Warsaw 1929, *supra* note 4, at 34.

²¹⁶ Ibid.

²¹⁷ Article 25 of the Warsaw Convention provided that the convention's liability ceiling would be waived if the claimant proved that the carrier has engaged in 'wilful misconduct'. The authentic French language text used the words '*dol*' and '*faute...* equivalent *au dol*'. These terms suggest an intention to inflict damage on another person or 'gross negligence'. See Dempsey, *supra* note 115, at 134.

²¹⁸ See Drion, *supra* note 9, at 202.

²¹⁹ See Shawcross and Beaumont on Air Law, *supra* note 114, at 474.

²²⁰ See Dempsey, *supra* note 115, at 134.

while in wilful misconduct, the one who commits the act probably does not have an intention to cause damage, in *dol* he must have an intention to harm.²²¹ So during the discussion of the Hague Protocol, the drafters paid special attention to the concept of wilful misconduct and replaced it with a new phrase that clearly explained the intention of the drafters of the Warsaw Convention.

The courts faced challenges on clarifying the concept of wilful misconduct in the Hague Protocol 1955 because it opened a way for the customer to achieve total remedy as it was available for them in their legal systems.²²² Since wilful misconduct could be intentional acts or reckless acts, the delegates discussed it seriously and the Hague Protocol finally provided a more precise definition.²²³ In this Protocol ‘wilful misconduct’ was replaced by phrases ‘intent to cause damage or recklessly’ and ‘with knowledge that the damage would probably result’. This language explicitly asserts the intention and recklessness of the act.

2. The international instruments after the Warsaw-Hague Convention gradually inclined to reduce the impact of wilful misconduct in establishing unlimited liability.²²⁴ The Guatemala City Protocol 1971 and the Additional Montreal Protocol No. 4 of 1975 provided unbreakable liability.²²⁵ The main idea was that breaking the limitation of liability caused lengthy, costly

²²¹ Wilful misconduct goes far beyond any negligence, be it gross or culpable negligence. It involves an action or omission which is not only negligent, but which the person knows and appreciates is wrong, and is done or omitted regardless of the consequences. Bin Cheng, 'Wilful misconduct: from Warsaw to the Hague and from Brussels to Paris', (1977) II, *Annals of Air and Space Law*, at 76.

²²² *Cohen v. Varig Airlines, Inc.*, 62 A.D. 2d 324, 405 N.Y.S. 2d 44 (1978). *Nugent and Killick v. Michael Goss Aviation Ltd.*, Court of Appeal, [2000] 2 Lloyd's Rep 222, 3 (July 2001) XXVI *Air and Space Law* (195 PAGE?), at 195-196; See also *Tarar v. Pakistan Int'l Airlines*, 554 F.Supp. 471, 478 (S.D.Tex.1982), See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 495.

²²³ See W.J. Hickey, 'Breaking the Limit-Liability for Wilful Misconduct under the Guatemala Protocol', (1976) II *Journal of Air Law and Commerce* 590, at 605.

²²⁴ *Ibid.*, at 475. See Art. XIV of the Hague Protocol 1955.

²²⁵ See Art. X of the Guatemala City Protocol of 1971 and Art. IX of Montreal Protocol No 4 of 1975.

and very inefficient litigations.²²⁶ As a result, the claim of wilful misconduct was an advantage neither for air carriers nor customers.²²⁷ Thus, unbreakable liability was accepted.

3. The drafters of the MC99 reconsidered wilful misconduct. Since the MC99 makes provision for a strict liability system, unlimited potential damage recovery for passenger death or bodily injury and unbreakable limit of liability for cargo damage claims, ‘the likelihood of wilful misconduct claims and litigation is very remote at best’.²²⁸

The drafters argued that it was not necessary to have the concept of wilful misconduct or phrases like ‘intent to cause damage or recklessly’ and ‘with knowledge that the damage would probably result’ to help break the limitation of liability for passenger death or bodily injury. This is because, the MC99 recognizes that a carrier would be unlimitedly liable ‘if he cannot prove that the damage was not caused by negligence or other wrongful act or omission...’.²²⁹

In relation to cargo, the drafters of the MC99 had initially reintroduced the provision for breaking the limitation of liability. In all the preliminary drafts and preparatory works, the provision was maintained. Even the final text of the MC99, the 30th session of ICAO’s Legal Committee in Montreal in 1997, approved the possibility of breaking the limitation of liability for the carriage of goods. It appeared in Article 21 A(5). However, the drafters removed it from the MC99 without substantial discussion.²³⁰

Consequently, the MC99 admitted wilful misconduct just for removing and excluding limitation of liability for damaged baggage and delay.²³¹ The MC99 provides that the

²²⁶ See Hickey JR, *supra* note 223, at 606.

²²⁷ ICAO DCW Doc. No. 3.

²²⁸ See Tompkins, *supra* note 19, at 111.

²²⁹ See ICAO Doc. 9775-DC/2, at 40 and, ICAO Doc. C-WP/10862, at 120.

²³⁰ See International Conference on Air Law, Montreal 10-28 May 1999, Vol. II documents (Doc. 9775-DC/2), at 20 (DCW Doc. No. 3).

²³¹ *Ibid.*, at 498.

limitation of liability should not be applied if it is proved that the damage resulted from an action or omission by the air carrier or its employees or agents with an intention to cause damage or with recklessness, with knowledge that that would probably cause damage. Regarding the action or omission of its employee or agent, it must be proved that the employee or agent had taken the measures within its employment remit.²³² Therefore, intentional conduct or recklessness only applies to the delay in the carriage of passengers and baggage.²³³

Therefore, the author is of the opinion that the MC99 concentrates on the legal systems of the common law and civil law countries for liability for passengers' death or bodily injury, and the protection of passengers, more than the WC29 did as the latter focused on protecting the air carriers. When the MC99 based carrier's liability on fault and accepted unlimited liability, it includes wilful misconduct as well.

(ii) The *Shariah*

The *Shariah* provides different rules for death or bodily injury and goods in civil liability.²³⁴

1. Regarding liability for damaged baggage and goods in the *Shariah*, firstly liability is based on fault.²³⁵ Secondly, damage should be compensated totally.²³⁶ Consequently, while the *Shariah* accepts unlimited liability for damaged goods based on fault, naturally unlimited liability is applied for the wilful misconduct of the carrier.

²³² See Art. 22(5) of the Montreal Convention 1999.

²³³ See Dempsey, *supra* note 115, at 134.

²³⁴ M. Amani, 'A Comparative Study of Fraud and Gross Negligence of Carrier', (1385 A.H. 2006) XIII *Majaleh Feqh Va Hoghogh* 70, at 89.

²³⁵ See Najafi, *supra* notes 146, Vol. 17, at 517.

²³⁶ See Chr. 3, *supra*.

2. Regarding liability for death or bodily injury, there should be a distinction between intentional acts and reckless acts, and with knowledge that that act could probably cause damage.

2.1. If it is proved that the wrongdoer has inflicted death or bodily injury intentionally, he is punished according to Islamic criminal law. Liability for an intentional offence is retribution (*qisas*).²³⁷ However, the claimant is entitled to request compensation (the *Diyah*) instead of *qisas*. Consequently, the claimant can exempt the defendant, and receive the *Diyah* (limited liability) or total remedy (unlimited liability) according to an agreement between the claimant and the wrongdoer.²³⁸

2.2. If it is proved that death or bodily injury has occurred recklessly and with knowledge that damage would probably result, the claimant is entitled to claim just for limited liability (the *Diyah*).²³⁹ Therefore, one can say that the *Shariah* distinguishes between a reckless act with knowledge that damage would probably result, and an intentional act for death or bodily injury.

The *Shariah*, when juxtaposed against the Warsaw-Montreal regime, presents various points of convergence and divergence:

1. In comparison with the WC29:

a) The *Shariah* accepts unlimited liability for goods sustaining damage whether it results from fault or intentional act.²⁴⁰ However, the WC29 only accepts unlimited liability for wilful misconduct.²⁴¹ As a result, wilful misconduct triggers unlimited liability in both.

b) The *Shariah* accepts unlimited liability for death or bodily injury where firstly an

²³⁷ See Najafi, *supra* notes 146, Vol. 17, at 517.

²³⁸ See Kho'i, *supra* note 139, at 221.

²³⁹ See Chr. 3.4.5.1, *supra*.

²⁴⁰ Ibid.

²⁴¹ See Art. 25 of the Warsaw Convention 1999.

intentional act occurs, and secondly it is agreed upon between the claimant and the defendant.²⁴² Thus, both the *Shariah* and the WC29 apply unlimited liability for intentional acts. In relation to reckless acts with knowledge that damage would probably result, the WC29 applies unlimited liability. However, the *Shariah* applies limited liability.²⁴³

2. In comparison with the MC99:

- a) The *Shariah* applies unlimited liability for cargo sustaining damaged whether fault or intentional act occurs. However, the MC99 applies unbreakable liability.²⁴⁴
- b) The *Shariah* applies only limited liability for death or bodily injury resulting from an act or omission of the carrier, done recklessly and with knowledge that damage would probably result. However, the MC99 applies unlimited liability.²⁴⁵

4.1.2.5 Contractual Conditions

(i) Private International Air Law

Article 23 of the WC29 provides that: ‘Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.’ This Article was later reaffirmed in Article 26 of the MC99.

Article 22(1) of the WC29 expressly gives the right to agree on higher limits of liability. Nevertheless, Article 23 of the Convention considers null and void any agreement between the parties that tended to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention.

²⁴² See Chr. 3.4.5.4, *supra*.

²⁴³ Ibid.

²⁴⁴ See Art. 22 of the Montreal Convention 1999.

²⁴⁵ See Art. 21 of the Montreal Convention 1999.

This Convention created an exceptional system against air carriers, because in the civil law and common law systems, the carrier is traditionally free to insert clauses in the carriage contract which exclude or reduce his liability.²⁴⁶ The WC29 imposes upon them a compulsory system of liability and declared void all clauses which contradict the provisions of the Convention unless these are better for passengers.²⁴⁷

In the 1920s, although carriers in common law countries such as England and civil law countries such as France might impose any contractual conditions for exempting or delimiting liability in domestic carriages,²⁴⁸ the Convention restricted those conditions. The drafters believed that contractual conditions would diminish customer rights since it is the air carriers that usually impose the carriage contractual conditions. Thus the WC29 declares such contractual conditions null and void in order to unify regulation and protect the passengers.²⁴⁹ In conclusion, the drafters did not accept contractual conditions that relieve the carrier of liability or let them fix a lower limit.²⁵⁰

Of course, common law and civil law countries gradually moved to restrict contractual conditions exempting, delimiting, or designed to reduce the liability of the provider of services. For example, the courts in the United States refused to accept such conditions because they believed that these were against public policy.²⁵¹ In the United Kingdom, these conditions were also restricted by specific statutes.²⁵² A similar situation can also be observed

²⁴⁶ P.B. Larsen, J. C. Sweeney, and J. E. Gillic, *Aviation Law, Cases, Law and Related Sources* (2006), 454.

²⁴⁷ See Minutes Warsaw 1929, *supra* note 4, at 47.

²⁴⁸ See Chr. 2, *supra*.

²⁴⁹ See Art. 23 of the Warsaw Convention 1929.

²⁵⁰ See Minutes Warsaw 1929, *supra* note 4, at 34-47.

²⁵¹ See G. O. Dycstra and L. G. Dycstra, *supra* note 165, at 102.

²⁵² See Beale, *supra* note 162, para. 36-010.

in civil law countries.²⁵³ Therefore, the courts have, in recent years, tended to reject these conditions for the benefit of passengers.²⁵⁴

(ii) The *Shariah*

In the *Shariah*, exemptions from liability are recognized as valid.²⁵⁵ However, according to Islamic jurisprudence, the validity of a non-liability condition in contractual liability is considered as a well-established principle; except in two cases: 1) when causing intentional damage and heavy fault; and 2) when the conditions contradict public order. However, in all other cases, such conditions are valid because non-liability is not contradicting any mandatory principles or public order.²⁵⁶

There is no explicit reference to such conditions in Iranian law. Therefore, there is a dispute as to whether carriers can insert conditions in a contract that restrict their liability or exempt them from liability.²⁵⁷ In general, both the Iranian Commercial Code and the Iranian Civil Code accept contractual conditions.²⁵⁸ The Civil Code provides that if a sum of compensation is determined in a contract for non-performance, the court cannot hold the obligor to pay more or less than that fixed amount.²⁵⁹ The Commercial Code also provides that parties of a contract can agree upon a sum less or more than the total value of goods.²⁶⁰

However, the Supreme Court in its judgment²⁶¹ did not accept compensation up to a limited liability mentioned in the carriage contract which was less than the price of goods. It held that

²⁵³ See Chr. 2, *supra*.

²⁵⁴ K. Freund and L. Rudden, *A Source-book on French Law* (1991), 298-299.

²⁵⁵ M. Gharavi Ashtiani, *Ejareh dar Sharh al- Lum'ih Vol. I* (1309 A.H. 1930), 34.

²⁵⁶ S.M.K. Yazdi Tabatabaei, *al- Urwat al- Wusqa* (1404 A.H. 1983), 332.

²⁵⁷ N. Katuzian, *Zeman Qahri (Masoliyat -e-Madani)* (1369), 670.

²⁵⁸ R. Eskini, 'Shart -e- Mojazat dar Qarardad -e- Beinolmelali', (1377 A.H. 1988) 9 *Majale Hoqooqi*, 45, at 68-69.

²⁵⁹ See Art. 230 of the Civil Code.

²⁶⁰ See Arts. 386 and 387 of the Iranian Commercial Code.

²⁶¹ Case No. 29/4/25- 805 Supreme Court.

the carrier has to compensate for all damages sustained and he cannot resort to the agreement for compensating less than the price of goods.²⁶² The Supreme Court held that except in cases mentioned explicitly in law, the carrier is liable in full for events and faults that happen.²⁶³

The author is of the opinion that contractual conditions in general are valid unless they are contrary to public policy. Firstly, the Warsaw-Montreal regime provides that exemption conditions are void and invalid.²⁶⁴ Secondly, different common law countries such as the United States and England, or civil law countries such as France and Germany, contrary to their legal systems, tend to render void these conditions in their modern domestic law. In fact, States now pay more attention to the rights of customers because of the improvements in the economic circumstances, thus they refuse to accept these conditions. Therefore, it can be inferred that currently, contractual conditions for exemption or limiting liability for death or bodily injury are not consistent with public policy.

The above clarification indicates that the basis of liability in the Warsaw-Montreal regime was based on the common law and the civil law, whilst taking into account the conditions of the transport industry at that time as well as the economic status of air carriers and the general welfare of States. For so many years, it has undergone changes to survive in line with international circumstances, which was an indication of its dynamism that paved the way for States with different legal systems such as Islamic countries like Iran, to access the international system.

²⁶² T. Erfani, *Hoqooq -e-Madani dar Qarardad -e-hamle Jaddei va reili* (1385 A.H. 2006), 275.

²⁶³ Case No. 27/4/28-644 Supreme Court.

²⁶⁴ See Art. 23 of the Warsaw Convention 1929 and Art. 26 of the Montreal Convention 1999.

4.2.2 Terms

Although a majority of the liability principles in the international system was written in a way which was acceptable to the two legal systems, the drafters did not reach a consensus on the definition of key terms so as to be acceptable by all legal systems. Consequently, they left the interpretation of those terms such as ‘accident’ to courts in WC29. Hence in this section the author will elaborate on this flexibility as a main feature that attract States such as Iran to these Conventions.

The key terms in applicable agreements can be interpreted in accordance with the different countries’ legal systems and circumstances.²⁶⁵ In spite of several modifications in the Warsaw System and over 70 years case law in the United States, the MC99 does not determine general and key terms. The drafters of the MC99 preferred to leave the interpretation of these concepts to the legal systems. It is believed that the danger of defining these terms precisely is that the adopted definition will not be all-inclusive of the intent of the drafters.²⁶⁶ The uncertainties of events can dictate the outcomes of important legal developments.²⁶⁷ These terms were therefore left to court decisions.²⁶⁸

4.2.2.1 Claimants in Liability for Death or Bodily Injury

(i) Private International Air Law

Article of 17 of the Warsaw-Montreal regime does not expressly determine who a ‘claimant’ is. Although Article 24(1) of the WC29 and Article 29 of the MC99 ensure that the Convention preempts over national laws, it does not determine who is entitled to be a

²⁶⁵ See Tompkins, *supra* note 19, at 45-6.

²⁶⁶ *Ibid.*, at 125.

²⁶⁷ *Lisi v. Alitalia Line Aeree Italiane. S.p.A.*, 370Fd 508(2dCir.1966), affirmed by an equally divided court, 390 U.S.455(1968); and *Chan v. Korean Air Lines Co. Ltd* 490 U.S. 122 (1988).

²⁶⁸ The drafters of Montreal Convention were satisfied that the courts had given the correct meaning to these terms when deciding cases over the seventy years of the life of the Warsaw System. See Tompkins, *supra* note 19, at 123.

claimant in relation to harm to passenger and cargo. The determination of who is entitled to be a claimant is a substantial legal issue for States when applying their pertinent provisions. The group of entitled claimants is not uniformly and equally defined in different legal systems.²⁶⁹ As a result, the drafters of the WC29 and MC99 could not provide a provision that harmonizes different legal systems. Where there were principles that legal systems insist to apply when determining who can be a claimant, the applicable Conventions left it to the laws and regulations of contracting States.²⁷⁰ Therefore, they provide that the claimant for death of passengers should be determined under national law.²⁷¹

Claims based on Article 17 should be brought to the courts that have jurisdiction under Article 28 of the WC29, regardless of whether they are filed by the passenger himself, or, by a person entitled to sue in the event of death, because inheritance is more a social entity than a legal one.²⁷²

It is submitted that the right of persons other than the passenger or his personal representative to claim should firstly be in accordance with the substantive rule of the *lex fori*, or it can be designated by the choice of law. Countries such as Australia and Canada which have enacted the WC29 by special legislation usually have substantive rules specific to Warsaw cases, or the choice of law as in the United States.²⁷³ Secondly, exempting, delimiting, or designed to reduce the liability of the provider of services should be within the liability limits of the WC29. This is in accordance with the US Supreme court's decision in the case of *Zicherman*

²⁶⁹ Since the Convention does not provide the substantive rule to be applied, the court seized of a particular case must determine that rule. It can be a substantive rule of the *lex fori*. See Miller, *supra* note 53, at 248.

²⁷⁰ E. Giumulla, et. al., *The Warsaw Convention Annotated: A Legal Handbook* (2000), 9.

²⁷¹ *Ibid.*, at 52.

²⁷² Minutes Warsaw 1929, *supra* note 4, at 45.

²⁷³ P.P.C. Haanappel, 'The Right to Sue in Death Cases under the Warsaw Convention', (1981) *Air and Space Law* 66, at 69 -75.

*v. Korean Airlines Ltd.*²⁷⁴ The court held that persons who bring suit and may be compensated, are to be settled by the domestic law selected by the courts of the contracting parties. This opinion has been supported by the drafting history of Article 24 as well as the post-ratification understanding of the contracting parties.²⁷⁵

The common law confers the right of a deceased to his personal representative. The personal representative has the right to sue on behalf of his principal for compensation following death or other damages, i.e. the heirs need to be appointed by a qualified court as personal representatives, otherwise they cannot bring the action in their own names.²⁷⁶ In civil law, the deceased person's rights automatically transfer to his beneficiaries. Therefore in such countries, the beneficiaries do not need to be appointed as the personal representatives by a court and they have the right to sue in their own name.²⁷⁷

(ii) The *Shariah*

The *Shariah* has prescribed all rules and regulations of inheritance, and its rules are stable and unbreakable. Claimants eligible for claiming compensation in the event of death were specifically determined in the *Shariah*. No court can investigate a claim unless an interested person(s) or his representative claims for an action.²⁷⁸

In the *Shariah*, claimants for the death of a person are defined by the inheritance law. Provisions of inheritance do not depend on the will of the legislature or the courts, and no one can change them through legislation. The legislature or courts could not modify the *Shariah*. Therefore, courts should determine claimant(s) in accordance with inheritance law. Thus, if

²⁷⁴ *Zicherman v. Korean Airlines Co. Ltd.* (94-1361), 516 U.S. 217 (1996).

²⁷⁵ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 705- 705A.

²⁷⁶ L. Goldhirish, *The Warsaw Convention Annotated: A Legal Handbook* (2000), 146.

²⁷⁷ See Miller, *supra* note 53, at 251.

²⁷⁸ See Art. 2 of the Iranian Civil Procedure Act.

the national and international treaties are approved to be contrary to the *Shariah*, the legislature would abolish them.

Whereas the claimants in an inheritance case are determined by the primary source in Islamic law that is the Quran, there is no room for jurists' interpretation. They cannot provide an opinion contrary to the explicit text of this book. Therefore, the Iranian legislature would not accede to a treaty that accepts inheritance claimants as other than what is mentioned in the Quran. Or, if it had ratified such a treaty, it would withdraw it. In the *Shariah*, claimants in a death case are beneficiaries who have the right to claim on behalf of the deceased for compensation.²⁷⁹ The belongings of the deceased automatically and obligatorily transfer to his beneficiaries. This is so, irrespective of whether the deceased or his beneficiaries want that transfer or not, or even if they have requested for a non-transfer, or were silent about it. This is owing to the fact that inheritance is a property that the beneficiary cannot entirely estrange from himself.²⁸⁰ Also, it is not possible for the deceased (passenger) to change his beneficiaries or their respective shares.²⁸¹

In fact, inheritance is a relation between two persons where on the death of one, the other inherits from him.²⁸² Inheritance is based on various degrees of kinship. Heirs of the lower categories take an inheritance when no person of a higher category exists.²⁸³ While in each class, there is also a hierarchy and the closer ones have priority in receiving inheritance, and they prevent others from having a share.²⁸⁴ The determining factor in total exclusion from

²⁷⁹ M, Shahidi, *Ers*, (2003), 15.

²⁸⁰ See Art. 959 of the Iranian Civil Code.

²⁸¹ See Shahidi, *supra* note 279, at 251.

²⁸² See Art. 861 of the Iranian Civil Code.

²⁸³ See Art. 863 of the Iranian Civil Code.

²⁸⁴ See Art. 862 of the Iranian Civil Code. Persons who take inheritance by relationship are of three categories: 1) Father, mother and children; 2) Grandparents, brothers, sisters and their children; 3) Paternal uncles and aunts, maternal uncles and aunts and their children.

inheritance is the nearness of the relationship to the deceased. Hence each class of heirs deprives the next class from taking any inheritance.²⁸⁵

Inheritance law applies to all Iranian citizens regardless of their place of domicile.²⁸⁶ If an Iranian passenger dies in air accident, the courts can identify his eligible beneficiaries in the claim for compensation. Therefore if an Iranian passenger dies in an international flight, and subsequently a claim for remedy arises according to Article 28 of the WC29 in Iran, the inheritance regulations of the Iranian Civil Code should be observed for identifying eligible claimants.

Principally, all residents, whether they are of Iranian or foreign nationalities, shall be subject to the laws and regulations of Iran. However, the Iranian Civil Code has made an exception regarding personal status.²⁸⁷ Foreign nationals in Iran are bound by the substantive laws and decrees of that national's own State, including the rights of inheritance.²⁸⁸

In conclusion, if the victim of an air accident is an Iranian, Iranian law would apply even though the victim had been a resident of another country. However, if the passenger is not Iranian, his beneficiaries may claim according to the inheritance law of the passenger's country.

According to the Iranian conflicts of law, two conditions should be meeting if a foreign law is to be applied. Firstly, a foreign law may apply if it is not contrary to public order, otherwise it is not applicable.²⁸⁹ For instance, if a foreign law accepts unmarried partners as eligible beneficiaries, the Iranian courts could not accept it because the court treats it as contrary to public order. Secondly, the application of a foreign law is confined to the mutual treaties

²⁸⁵ See Arts. 888 and 940 of the Iranian Civil Code.

²⁸⁶ See Art. 6 of the Iranian Civil Code. The laws relating to personal status, such as marriage, divorce, capacity and inheritance, shall be observed by all Iranian subjects, even if resident abroad.

²⁸⁷ See Art. 5 of the Iranian Civil Code.

²⁸⁸ See Art. 7 of the Iranian Civil Code.

²⁸⁹ Ibid.

between Iran and the concerned foreign State.²⁹⁰ As a result, foreign law is applied in Iran provided that it is not contrary to public order and there is a bilateral agreement for that purpose.

The author is of the opinion that since the *Shariah*, like the civil law and common law systems,²⁹¹ has its own special principles on the rights of claimants in death claims, and as they are stable and unchangeable, if the Warsaw-Montreal regime had determined claimants in death cases, it would have placed an important preventive element for Iran to adhere to the relevant Convention. In conclusion, the flexibility of the WC29 and the MC99 in delegating the determination of claimants in the case of death to national laws, paved the way for Islamic States such as Iran to smoothly adhere to these applicable Conventions without much difficulties for those questions.

4.2.2.2. The Definition of ‘Accident’

(i) Private International Air Law

Although Article 17 of the WC29 indicates that the air carrier’s liability is established when an accident occurs, it does not provide a definition for it. The term ‘accident’ changes in the Guatemala City Protocol 1971 that follows the 1966 Montreal Intercarrier Agreement, where it is replaced with the term ‘event’.²⁹² However, the term ‘accident’ was preserved in the MC99. As a result, the drafters never defined in a way that would clarify its limits and scope.²⁹³ The definition and interpretation of the term is left to the courts.

²⁹⁰ Ibid.

²⁹¹ See Haanappel, *supra* note 273, at 69-75.

²⁹² Won-Hwa Park, ‘Use of the Terms “Accident” and “Incident” in Air Law’, (1990) XV *Annals of Air and Space Law* 198, at 201.

²⁹³ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 531.

The definition of ‘accident’ was a controversial issue that received different interpretations, especially in the United States.²⁹⁴ According to Article 17 of the WC29, the air carrier is liable only for *accidents*, not events, that cause damage. If an event takes place in an international air carriage, that event is not compensable unless that event occurs as an accident.²⁹⁵ In cases involving passengers, the first thing a court must do is to find out if an accident occurred, as that is the first requirement for carrier liability under the Convention. The courts had struggled to define the term ‘accident’ in Article 17, before the United States Supreme Court addressed the issue.²⁹⁶ The courts needed to know what an accident is and what its delimitation is. After searching for evidence of negligence in events that were related to the technological capabilities of aircraft and found none, they dismissed the claim.²⁹⁷ However, the changing times effectively pressured the courts in the United States to expand air carrier’s liability.²⁹⁸ They must know firstly if an accident has taken place according to the Convention, and secondly, what is the exact definition of the accident.²⁹⁹

In attempts to define accident, we face two approaches of narrow and broad definitions. If the accident is defined narrowly, the area of air carrier’s liability would be restricted. If the accident is interpreted broadly, the liability of the air carrier will increase.

1. Narrow definition:

Regarding the objectives of the WC29, the drafters in the 1920s supported the development of the air transport industry while protecting air carriers. Subsequently, courts in the early days

²⁹⁴ See Tompkins, *supra* note 19, at 154-157.

²⁹⁵ *MacDonald v. Air Canada* 439 F. 2d. 1402 (1st Cir. 1971) and see: *Air France v. Saks* 724 F.2d 1383 (9th Cir. 1984), rev’d 470 U.S. 392 (1985).

²⁹⁶ See Goldhirish, *supra* note 276, at 215.

²⁹⁷ *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978). See Dempsey and Milde, *supra* note 53, at 68.

²⁹⁸ A. Ciobanu, ‘Saving the Airlines: A Narrower Interpretation of the Term “Accident” In Article 17 of the Montreal Convention’, (2006) XXXI *Annals of Air and Space Law* 1, at 11.

²⁹⁹ *Ibid.*

of the WC29 inclined more towards defining the accident narrowly. The drafters of the WC29 sought to limit carrier liability for air accidents rather than to confer uniformity on liability questions in the case of any type of passenger injury.³⁰⁰ They restricted its domain to aviation risks and the control exercised by the air carrier over the accident.³⁰¹ Thus, the accident was related to a characteristic risk of air travel to be legally defined as an accident.

Consequently, the term ‘accident’ as used in Article 17 of the WC29 was intended only to cover events that were related to the technological capabilities of aircraft.³⁰² As a result, air carriers are exempted from liability for passengers’ death or bodily injury that arises from events which are not caused by aviation risks. The WC29 did not intend to expand the coverage of accidents to incorporate failures of security screening devices, and other modern security measures or omission of air carriers, and the attitude or behavior of passengers toward each other, or the impact on health of a passenger on accident occurrence.³⁰³

By adopting the narrow definition, the WC29 distinguishes between liability in air accidents with the traditional tort liability in the concerned countries.³⁰⁴ For instance, if an air hostess pours coffee on a passenger, according to tort in domestic law, the air carrier will be liable for the injury. However, under the WC29, no air accident has happened there.³⁰⁵ Thus, if injury or loss results from the reaction of a passenger to the normal operation of an aircraft, the event is not regarded as an air accident. According to this interpretation, the expression ‘normal operation of the plane’ shows that the negligence must be related to the aircraft and

³⁰⁰ See Dempsey and Milde, *supra* note 53, at 211.

³⁰¹ *Pittman v. Grayson*, 869 F. Supp.1067(S.D.N.Y. 1994); *Levy v. American Airlines. Inc.*, 1993 WL 205857 (S.D.N.Y 1993).

³⁰² *Warshaw v. Trans World Airline*, 442F. Supp 400(E.D.Pa 1977).

³⁰³ See Ciobanu , *supra* note 298, at 12.

³⁰⁴ *Evangelinos v. Trans World Airlines*, 550 F.2d 152 (3d Cir.1977); *Day v. Trans world Airlines*, 393F. Supp. 217, 13 Avi. 17,647 (S.D. N.Y. 1975), affirmed, 528F. 2d 31, 13 Avi. 18,144 (2d Cir. 1975), cert. denied (US Supreme Court 1976).

³⁰⁵ See Ciobanu , *supra* note 298, at 13.

its equipment.³⁰⁶ Therefore, the purview of Article 17 of the WC29 limited air carrier's liability. However, subsequent judicial procedures of the courts in the United States gradually expanded liability through a broad interpretation of the accident.³⁰⁷

2. Broad definition:

If the courts defined the accident broadly, it goes beyond the aviation risks and includes incidents that are not fully related to aviation.³⁰⁸ The legal system of the pertinent courts plays an important role in such circumstances. The US Supreme Court, in the case of *Air France v Saks*, defined an accident as “an unexpected or unusual event or happening that is external to the passenger”.³⁰⁹ This definition explains the cause of the accident.³¹⁰ Using this definition, the injured party in the *Saks* case only needed to prove that some unexpected, unusual or external event to the travel had resulted in damage.³¹¹ The court recognizes the air carrier liable where there is a chain of caused links among the acts or omissions of the air carrier or his employees. This definition is in fact an attempt to expand the definition of accident from air carriage characteristics or aircraft operation to cases beyond them. The US Supreme Court in the *Saks* case does not require that the accident to have necessarily resulted from an air carriage risk or be related to aircraft operation.³¹²

The definition given by the French legal system for accident was principally identical with the definition in England,³¹³ and was similar to the *Saks* case.³¹⁴ For instance, the French Supreme Court in the *Haddad* case did not limit the accident to mechanical accidents

³⁰⁶ Ibid.

³⁰⁷ Ibid., at 88.

³⁰⁸ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 643-641.

³⁰⁹ *Air Franc v. Saks*, 470 U.S. 392 (1985).

³¹⁰ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 631-632.

³¹¹ Ibid.

³¹² *Air Franc v. Saks*, 470 U.S. 392; (1985). *Gezzi v. British Airways*, 991 F2d 603 (9th Cir. 1993).

³¹³ *Société Camat v. Duboscq* (Cour de cass, 6 December 1988), (1988) 42 RFDA 381.

³¹⁴ *Chaudhari v. British Airways plc* (16th April 1997, Court of Appeal; CCRTI 96/0229/G); and *Deep Vein Thrombosis and Air Travel Group Litigation v. British Airways* [2005] UKHL 72, [2006] 1 AC 495.

affecting the aircraft.³¹⁵ By extending the interpretation of accident to include ‘fortuitous or unexpected’ events, this therefore makes the French approach compatible with the *Saks* case. However, they do differ in one important regard in that the French Supreme Court applied the definition of ‘accident’ as used in Annex 13 of the Chicago Convention in the context of accident investigation.³¹⁶

Under the *Saks* case, there was no need for the occurrence to be fortuitous, unexpected or in any way abnormal.³¹⁷ The court held that mistakes taking place during a normal and usual flight such as hijacking which are the consequences of unforeseeable and unpredictable interference by unruly passengers and malevolent (third parties) was presumed as an accident. However, the air carrier can avoid liability under the due care defence provided in Article 20 of the WC29. An accident should even be extended to unexpected acts of a third party during a flight and the claimant should enjoy the right to sue against the air carrier for damages sustained during the terrorist attack.³¹⁸

Despite the fact that the *Saks* decision answers the question of what an accident is, in principle, there is not a specific methodology to be followed to decide whether an incident is an unexpected or unusual event or a happening that is external to the passenger. It is for this reason that there exist such variations amongst court decisions. Consequently, courts consider events like the following as accidents even if they do not arise from normal aviation risks: events caused by unruly (fellow) passengers,³¹⁹ inaction of the air carrier,³²⁰ turbulence, some

³¹⁵ *Haddad v. Cie Air-France*, 179 REFDA 342 (Cass. 16 Feb. 1982).

³¹⁶ Convention on International Civil Aviation Signed at Chicago, On 7 December 1944. ICAO Doc.7300/7 (7th ed.–1997).

³¹⁷ Won-Hwa Park, *Supra* note 292, at 202.

³¹⁸ See Goldhirish, *supra* note 276, at 87.

³¹⁹ *Langadinos v. American airlines*, 199 F3d 68 (1st Cir., 2000); *Wallace v. Korean air*, 214 F.3d 293, 296 (2d Cir. 2000).

³²⁰ *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

of the events that happen to passengers in the cabin³²¹ such as supply of infected food which causes food poisoning, or food contaminated in other ways,³²² and hijacking and terrorist acts.³²³ These were examples from court decisions where a broad interpretation of accidents was applied.

The author is of the opinion that the above mentioned judicial procedures indicate that the definition of accident has to be made by courts. Courts seek to observe justice and fairness in either broad or narrow interpretations. If a legal system expects higher due care of passengers from the air carrier, some events may be considered accident, even though they are not qualified under the limited sense of accident. Also, if necessary due care or reasonable measures became obligatory for the operator per the contract, if it happens, they are considered accident even if they are not absolutely set up within the scope of accident.³²⁴

(ii) The *Shariah*

When damage is caused by an event and there is a casual link between the event and the damage, the wrongdoer is liable such as the tort liability in the two legal systems. As a result, the carrier is liable for the result of his acts, rather than for his efforts.

The carrier's obligation in this context is to exert the highest due diligence to carry the passenger safely.³²⁵ Accordingly, carriers are requested to exert their best efforts to transport

³²¹ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 649.

³²² *Chaudhari v. British Airways plc* (16th April 1997, Court of Appeal; CCRTI 96/0229/G); *Tsevas v. Delta Airlines, Inc.*, No. 97 C 0320, 1997 WL 767278, at 2 (N.D. Ill. Dec. 1, 1997); *Tsevas v. Delta Airlines, Inc.*, No. 97 C 0320, 1997 WL 767278, at 2 (N.D. Ill. Dec. 1, 1997).

³²³ *Stone v. Continental Airlines*, 2005 N.Y. Misc. Lexis 5514 (App. Term, 1st Dep't 2005).

³²⁴ *Gupta v. Austrian Airlines*, U.S. District Court, Northern District of Illinois, Eastern Division, 18 July 2002, 28 *Avi.* 16,602. Digest, (February 2005) Vol. xxx/1 *Air and Space law*, at 52-3.

³²⁵ See Katuzian, *supra* note 257, at 637.

the passenger. Upon its failure to accord with these measures, an air carrier is considered to be performing negligently and will therefore be considered an aggressor.³²⁶

Where there is a relation between the causer and the damage, the wrongdoer becomes liable for compensation, whether the damage occurred because of an accident related to the operation of the aircraft,³²⁷ or if it arises from a risk inherent in air travel,³²⁸ or if the injury is caused by the unusual, unexpected and abnormal operation of the aircraft.³²⁹ In fact, the accident is not based on any notion of negligence or fault. It requires a relation to the inappropriate event(s) in the operation of the aircraft or by employees of the carrier.³³⁰

The author is of the opinion that *the Shariah* would nevertheless apply a slightly different approach than the common law and civil law. An Islamic court would not require that the event or happening be unexpected or unusual. It would rather concentrate on the casual link between the event and the damage. This link is presumed, so long as the passenger or goods are under the care or custody of the carrier.³³¹ Nonetheless, such liability is not strict for goods and the carrier still has ways to avoid liability by proving non-fault. In practice, however, liability is strict for passengers' death or bodily injury, if the carrier directly causes damage.³³² Therefore, the *Shariah* always demands a causal link between the action of the carrier and the death or bodily injury.

³²⁶ Ibid.

³²⁷ *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y. 1992).

³²⁸ *Maxwell v. Aer Lingus Ltd.*, 122F.2d 210, 213 (D. Mass.2000).

³²⁹ *Air France v. Saks*, 470 U.S. 392, 406 (1985).

³³⁰ See Najafi, *supra* note 146, at 94.

³³¹ See Katuzian, *supra* note 257, at 635.

³³² Ibid.

4.2.2.3 Operation of ‘Embarking’ and ‘Disembarking’

(i) Private International Air Law

The period and place of the accident are also not defined. According to the Warsaw-Montreal regime, the accident which has caused damage must occur on board an aircraft,³³³ or in the course of any of the operations of embarking and disembarking of passenger. The Warsaw-Montreal regime refers to the course of any of the operations of embarking and disembarking, but in practice the domain of embarking and disembarking are not determined. Do the airport or airline instructions indicate precisely when a passenger’s movement is classed as embarking and disembarking for a specific flight? The domain of embarking and disembarking is vague in the Conventions and its interpretation has been left to the courts.

States from both the civil law and common law systems in the WC29 concluded that the implementation of the Convention is not limited to the flight time.³³⁴ Consequently, to cover most situations, the courts should have considered several tests. In spite of all common points among courts of the two legal systems, it seems that the scope of liability coverage in the common law, and especially in the United States, is broader than the civil law which pays attention to the carriage contract when passengers are in the zone of transport risks.³³⁵

Civil law countries such as France, determine the scope of the time and place of an accident in accordance with their domestic law. Courts examine whether the passenger is within the exclusive zone of the air carrier. Therefore, the carrier is responsible for the safe carriage under the terms of the contract of carriage. According to this approach, as soon as the accident falls within the contractual limits and obligations, the passenger does not have to prove that the carrier was at fault. When a carrier is in charge of the passengers, as determined by the

³³³ See Art. 17 of the Warsaw Convention 1929 and the Montreal Convention 1999.

³³⁴ See Goldhirish, *supra* note 276, at 85.

³³⁵ See *Bibabcea c. Air France*, 1960 RFDA 725 (TRIB.Comm. Marseille 27 May 1960); *Ibid.*, at 86.

contract of carriage, the carrier is liable for compensation.³³⁶ The French court in *Mache c. Air France*³³⁷ held that in order for the air carrier to be liable under the Convention, the place where the damage occurred should be exposed to the inherent risks of air navigation and operation. However, other French courts have qualified accidents that had not happened in such areas.³³⁸ As a result, it seems that the approach of determining the place of accident is an important element in French jurisprudence.

In England, while investigating accidents to verify if a passenger is under the control of the air carrier, the courts pay more attention to the movement of the passenger according to the procedure. The Court of Appeal in *Adatia v. Air Canada* (1992)³³⁹ stated that English courts should be cautioned and should pay precise attention to the issue of passenger movement through airport procedure in a certain flight during embarking and disembarking operations.

There are general procedures for passengers at the airport terminal such as check-in and security screening between the operations of embarking on or disembarking from a certain flight.³⁴⁰ Therefore, the courts should pay precise attention to the place where the passenger was, in the airport procedure.

In United States domestic law, the approach is slightly different. Firstly, the negligence of the air carrier at the time of the accident should be proved and the rule is that the air carrier in the carriage of passengers is liable only if it was negligent.³⁴¹ Secondly, the carrier is expected to provide a highest due care to passengers.³⁴² Where this care is not extended, the carrier is

³³⁶ See Miller, *supra* note 53, at 140.

³³⁷ *Maché c. Air France* 1961 RFDA 283 and RCA 292.

³³⁸ H. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* (1981), 152.

³³⁹ *Adatia v. Air Canada* (1992) 2 s & B Av R VII/63, CA.

³⁴⁰ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 720.

³⁴¹ *MacDonald v. Air Canada*, 439F2nd 1402 (1st Cir. 1971).

³⁴² See Chr. 2, *supra*.

liable. This intense care which is expected from the carrier leaves its impact on the period it is liable.³⁴³

The courts applied factors for specific conditions like the procedures that a passenger takes to enter the aircraft or a certain place in the concerned airport, especially when dealing with passengers who have sustained damage.³⁴⁴ The court in the *Price v. British Airways* case paid attention to the operation of the aircraft³⁴⁵ and the court in *Maxwell v. Aer Lingus Ltd* paid attention to the risks inherent in air travel.³⁴⁶ However, the court in *Husain v Olympic Airways* interpreted the scope of liability and set additional requirements to be met by the claimant's claims.³⁴⁷

As the one test is not sufficient for determining liability, as a result, courts resort to a combination of approaches which seem closer to justice and the objectives of the drafters of the WC29. The courts in the United States have applied a triple test in the 1970s.³⁴⁸ If conditions are met, the air carrier is liable. The tripartite test was recognized as being more useful, but the primary emphasis was on the place where the passenger was located, and in all claims there must be a reasonable link between the stages of air travel and the accident.³⁴⁹

³⁴³ A. Lowenfeld, *Aviation Law* (1981), at 2-6.

³⁴⁴ *Ibid.*, at 685-6.

³⁴⁵ *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y. 1992).

³⁴⁶ *Maxwell v. Aer Lingus Ltd.*, 122F.2d 210, 213 (D. Mass.2000).

³⁴⁷ *Husain v. Olympic Airways*, 316 F3d 829 (9th Cir, 2002), 29 Avi 17, 358, cert granted 123 SCt 2215 (2003); *Evangelinos v. Trans World Airlines*, 550 F.2d 152 (3d Cir.1977). See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 694.

³⁴⁸ In the *Day* case, the tripartite test was introduced which included examining the claimant's activity (i.e. what was the claimant doing at the time of accident), control (i.e. under whose direction has he been), and location (where he was) for determining whether the accident qualified under Article 17. The courts are not concerned with how the passengers get into the aircraft. If these three conditions are met, the air carrier is considered liable. See *Day v. Trans world Airlines*, 393F. Supp.217, 13 Avi. 17,647 (S.D. N.Y. 1975), affirmed, 528F. 2d 31, 13 Avi. 18,144 (2d Cir. 1975), cert. denied (US Supreme Court 1976); *Marotte v. American Airlines, Inc.*, 296 F.3d 1255, 1260 (11th Cir.2002); *King v. Am. Airlines, Inc.*, 284 F.3d 352, 358-60 (2d Cir. 2002).

³⁴⁹ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 691.

Three factors that designate the location of the air carrier's liability under Article 17 of the WC29 are: 1) The location of the accident, 2) The activity of the injured party at the time of the accident, the duration of the activity that the injured party was involved with during the course of any of the operations of embarking or disembarking, and 3) control.³⁵⁰

In special circumstances, the courts of the United States defined the operations of embarking and disembarking broadly.³⁵¹ Special circumstances have also influenced the tripartite. They imposed liability on the air carrier for any accident from the beginning of the process of embarking in the departure airport to safe disembarking at the destination with regard to the Warsaw negotiations.³⁵²

In *Air France v. Gilberto*,³⁵³ where passengers were forced by hijackers to stay in an empty building at the Entebbe airport, the Illinois Supreme Court applied Article 17 of the WC29, arguing that the taking of the claimants to a point that was neither their intended destination nor an intended intermediate stop, cannot realistically be looked upon as a disembarking.³⁵⁴

As far as disembarking is concerned, an accident takes place, according to Article 17, if the accident occurs in the apron, or when the passenger is on the bus which takes him to the aircraft on apron, especially when these buses operate under the control of the air carrier.³⁵⁵

The Court of Appeal in the *McDonald v. Air Canada* case in the first circuit held that the

³⁵⁰ *Evangelinos v. Trans World Airlines*, 550 F.2d 152 (3d Cir.1977); *Day v. Trans world Airlines*, 393F. Supp. 217, 13 Avi. 17,647 (S.D. N.Y. 1975), affirmed, 528F. 2d 31, 13 Avi. 18,144 (2d Cir. 1975), cert. denied (US Supreme Court 1976); *Marotte v. American Airlines, Inc.* 296 F.3d 1255, 1260 (11th Cir.2002).

³⁵¹ *Alleyn v. Port. Auth. of New York and New Jersey*, District Court, Eastern District of New York, 13 July 1999, 27 Avi 17,130. (2000) XXV *Air and Space Law* 301, at 301.

³⁵² *Fazio v. Northwest Airlines, Inc.*, No.1:03-CV-808 (W.D. Mich. Mar. 15, 2004) (Bell, D.J.) Noted by *Air & Space Law*, vol. XXVIII/3 (June 2004); *Dick v. American Airline Inc*, 476 F Supp 2d 61 (DC Mass, 2007), 31 Avi. 18,636, noted by GN Tompkins Jr, (2007) 32 *Air and Space Law* 225, at 226; George N. Tompkins, Jr, DVT Litigation Update, (July 2004), XXIX/3 *Air and Space Law*233, at 233; *Philips v. Air New Zealand*, 27 March 2002 in the High Court of Justice Queen's Bench Division. Noted by Kathryn Ward, Solicitor, DLA, 3 (June 2003) XXVIII *Air and Space Law* 193, at 194.

³⁵³ *Air France v. Gilberto*, 15 Avi 17,429, 1978 USAvR 505, Illinois Supreme Court.

³⁵⁴ See Giemulla et. al., *supra* note 270, at 33.

³⁵⁵ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 692.

operation of disembarking terminated by the time the passenger had descended from the plane by the use of whatever mechanical means which had been supplied, and he had reached a safe point inside the terminal.³⁵⁶ Therefore, the air carrier is not liable if the passenger sustains damage in the baggage reclaim area. The operation of disembarking terminates when the passenger reaches a safe place within the terminal, even though he remains a passenger of the air carrier while inside the building.³⁵⁷

However, it is accepted that according to the carriage contract, the air carrier has a duty to deliver checked baggage to the passenger in the baggage claim area, and as long as passengers do not receive their baggage(s), they are under its control, even though none of the air carrier employees are present in that area.³⁵⁸

When a passenger, who has passed the check-in counter, the security procedures, and has received the boarding card enters the area designated as that to be under the control of his chosen airline, from this moment his freedom of movement will be restricted. The passenger can only use one specific route to the aircraft, and the passenger cannot enter or exit other common areas in the airport. In fact, only the air carrier now has the necessary facilities for protecting the passengers against harm.³⁵⁹ Therefore, the duty of the air carrier to care for the passenger and his properties starts from the time of check-in and only ends when the passenger reaches or must reach a place designed for receiving his checked baggage.³⁶⁰ In conclusion, the scope of the course of any of the operations of ‘embarking’ or ‘disembarking’ is flexible, and the courts are able to interpret it broadly or narrowly.

³⁵⁶ *MacDonald v. Air Canada*, 11 Avi.18, 029 (1st Cir. 1971); Miller, *supra* note 53, at 140.

³⁵⁷ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 722.

³⁵⁸ *O’Brein v. American Airlines*, 916 F.2d 709, US Court of Appeals, (2nd Cir. 1990). *Husserl v. Swiss Air Transport* co.13 Avi 17,603 (and 388 Fsupp.1238; 1975 AL 262) (1975); Gjemulla et. al., *supra* note 270, at 28.

³⁵⁹ *Day v. Trans world Airlines*, 393F. Supp. 217, 13 Avi. 17,647 (S.D. N.Y. 1975), affirmed, 528F. 2d 31, 13 Avi. 18,144 (2d Cir. 1975), cert. denied (US Supreme Court 1976).

³⁶⁰ See Mankiewicz, *supra* note 338, at 151.

The author agrees with the view that the carriage of passengers should start from the time that the passenger puts himself under the control of the employees of the air carrier.³⁶¹ When the passenger enters the terminal, the mere entering into the terminal does not indicate that he is under the control of the air carrier, since usually the air carrier is not aware of that passenger's presence in the terminal, and the control of the air carrier only starts when the passenger gives his ticket at the counter for checking-in his baggage. At this moment, the passenger comes under the control of the air carrier.³⁶² Of course, after the baggage check-in, the air carrier is not in charge of the passenger since the passenger can roam around the terminal without the control of his contracting air carrier.³⁶³ Therefore, the period that the passenger is under the control of the air carrier can be determined by examining the actual circumstances in each certain case. The due care can include the cases where the air carrier or its dependent bodies have an impact on the carriage operation in the airport with technical equipment.³⁶⁴

(ii) The *Shariah*

The *Shariah* concentrates on the undertakings of the air carrier and the responsibility of the passengers. The *Shariah* questions in whose custody the passenger is.³⁶⁵ It then considers the matter objectively to determine whether the one in charge took the necessary precautions to protect the passenger from suffering harm regardless of whether the injury took place on the aircraft or in the course of any of the operations of embarking or disembarking.³⁶⁶ As a result, as soon as the air carrier causes the death or bodily injury of passengers, it becomes liable.

³⁶¹ Diedreiks-Verschoor, *An Introduction to Air Law* (2006), 123.

³⁶² See Mankiewicz, *supra* note 338, at 181.

³⁶³ *Upton v. Iran Air*, 15 Avi.17, 101 and 1979 AL 171, US District Court, SDNY, Miller, *supra* note 53, at 56.

³⁶⁴ See Giemulla, et.al., *supra* note 270, at 25.

³⁶⁵ See Katuzian, *supra* note 257, at 639.

³⁶⁶ *Ibid.*

Therefore, according to the *Shariah*, the carrier is liable if it causes death or bodily injury when they control passengers. Conversely, it is not liable when it is not in charge of passengers even if they are in the course of embarking and disembarking.³⁶⁷

There is no case law in Iran to show when the air carrier becomes responsible for the passengers. However, when airdromes, airports and terminals are under the control of general official authorities (an Iranian airport company or air securities),³⁶⁸ it is predictable that courts would interpret the phrase narrowly unless there is agreement between the parties.³⁶⁹

4.2.2.4 ‘Bodily Injury’ and ‘Mental Injury’

(i) Private International Air Law

Mental injury is a controversial issue in the Warsaw-Montreal regime. Damages that could be compensated under Article 17 of the WC29 covers: ‘Damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger.’ The phrase did not help to recognize mental injury in the Convention. Article 17(1) of the MC99 subsequently uses the shorter form ‘death or bodily injury’.

Prior to the economic and social developments, courts usually paid less attention to compensation for mental injury in international flights.³⁷⁰ Several factors account for this state of affairs:

1. The minutes of the WC29 negotiations do not indicate that mental injury which is not connected to bodily injury could be compensated.
2. The aim of the Convention was to protect air carriers against extending liabilities.³⁷¹

³⁶⁷ See Chr. 3.4.4.4; and Chr. 3.4.5.3, *supra*.

³⁶⁸ S.M. Hashemi, *Hoqooq - e-Asasi Jomhouri Islami Iran Vol. II* (1371 A.H. 1993), 642.

³⁶⁹ *Upton v. Iran Air*, 15 Avi17, 101 and 1979 AL 171, US District Court.

³⁷⁰ This is contrary to the strict and literal interpretation of Article 18 as seen in *Victoria Sales v. Emery Air Freight*, US Court of Appeals (2nd Circ.), 22 October 1990; 22 Avi. 18,502; (1991) XVI *Air and Space Law* 202, at 202.

However, after the Second World War, the international community experienced economic and political stability. Due to the economic prosperity, especially in developed countries, mankind enjoyed a relatively better welfare.³⁷² Thus human dignity, and the preservation of individual rights by States, public and private institutions and other people, gained ever increasing importance. In the light of these developments which inevitably draw attention to passengers' rights, claimants started to claim for mental injuries. In response, legislators were inclined to codify regulations for mental injury.³⁷³ As a result, this tendency transmits from civil liability in domestic law to international air carrier's liability Conventions.³⁷⁴

Drafters of the MC99 and many States in the Montreal Conference 1999 tried to insert mental injury in addition to bodily injury in Article 17. Indeed, it was a major topic of discussion at the Conference.³⁷⁵ The phrase 'mental injury' was finally rejected and as a result, the Convention does not resolve the issue of whether mental injury in the absence of any bodily injury would be recoverable.³⁷⁶ Therefore, the drafters again left it to courts to decide whether Article 17(1) covers mental injury.³⁷⁷

Although the explicit wording of Article 17 of the WC29 only refers to physical injury and nothing else, it can be reasoned that compensation for mental injury can be deduced from the WC29. The meaning of '*lésion corporelle*' (translated into English as 'bodily injury'), which appeared in the authentic version of the WC29, was vague and played an important role in

³⁷¹ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 670-680.

³⁷² *Ibid.*

³⁷³ ICAO DCW Doc No. 10, at 97.

³⁷⁴ *Ibid.*

³⁷⁵ ICAO DCW Doc. No. 10, 14 and 35.

³⁷⁶ See Art. 17 of the Montreal Convention 1999.

³⁷⁷ P. Mendes de Leon and W. Eyskens, 'The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System', (2000-2001) 66 *Journal of Air Law and Commerce* 1172, at 1176.

mental injury cases.³⁷⁸ The ambiguity is caused by different interpretations regarding mental injury and there is no uniform approach among contracting States.³⁷⁹

No reason could be found in the preliminary discussions of the Convention indicating that the drafters or the contracting parties had paid special attention to psychiatric injury within the meaning of '*lésion corporelle*'. The English equivalent of '*lésion corporelle*' (which means the 'wounding of a passenger or any other bodily injury') only covers physical injury. In fact, there is no counterpart in French law for the common law doctrine which distinguishes between physical injury (compensable), and purely mental or emotional injury unaccompanied by physical injury (not compensable).³⁸⁰ Common law jurisdictions exclude recovery for mental distress and make a distinction between mental and physical injuries.³⁸¹

1. Mental Injury Accompanied by Bodily Injury

In common law, pure mental injury is not compensable.³⁸² In the United States, court decisions that preceded the Supreme Court decision in *Eastern Airlines Inc. v. Floyd*,³⁸³ accepted that damages were recoverable under Article 17 for mental injury caused by an accident.³⁸⁴ The court stated that bodily and '*corporelle*' are in fact logical compromises in order to implement strict liability for physical injuries which were obvious. However, this phrase does not include emotional reactions or any other mental injuries.³⁸⁵ Therefore, although French law permits recovery for any damage, whether material or moral, and the

³⁷⁸ N. Lachance, 'The Sky is the Limit, Accident, Bodily Injury and Liability under the Montreal Convention', (2001) XXVI *Annals of Air and Space Law* 125, at 146.

³⁷⁹ The New York courts first granted compensation for mental anguish alone in 1961; *Battala v. State of New York*, 10 N.Y. 2d 237 (N.Y. Ct. App. 1961).

³⁸⁰ *Rosman v. Trans World Airlines, Inc.*, 13 Avi. 17,231 at 17,233 (N.Y.C.A., 1974).

³⁸¹ See Mendes de Leon and Eyskens, *supra* note 377, at 1165-66.

³⁸² See Tompkins, *supra* note 19, at 147.

³⁸³ *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 525-530 (1991).

³⁸⁴ *Burnett v. Trans World Airlines Inc.*, 368 F. Supp.1152 (D.N.M. 1973).

³⁸⁵ *Bobian v. Czech Airlines*, No. 03-1262 (3rd Cir. Mar. 29, 2004)G. N. Tompkins, Jr, DVT Litigation Update, (2004) XXIX/3 *Air and Space Law* 233, at 233-234.

phrase ‘*dommage corporelle*’ covers both physical and mental injuries, the phrase ‘*lésion corporelle*’ in the Convention does not include mental distress.³⁸⁶

Although pure mental distress has not been accepted in the United States, mental injuries have recently been compensated by the courts.³⁸⁷ The ruling in the *Australian* case³⁸⁸ differed from the accepted standards in the *Floyd* case by explicitly stating that damages for mental trauma alone could be compensated.³⁸⁹ Also in the *Zicherman* case,³⁹⁰ the court determined that the French word ‘*dommage*’ could be interpreted broadly and that it was used by the drafters of the WC29 in the sense of a legally recognizable harm. This decision indisputably indicated the significance of legally recognizable harm as a compensable element. It therefore admits mental injury as damage under Article 17 providing compensation for emotional injuries based on bodily injury, where there is no causal link between them. It thus reverses the principles referred to in the *Floyd* case.³⁹¹

2. Post-Traumatic Stress Disorder (PTSD) as Bodily Injury

³⁸⁶ At the time of drafting the WC29, in French law a type of mental injury could be compensated. However, neither French legal materials nor any French case allowed a party to recover for mental injuries caused by fright or shock suffered during an accident where these were not associated with physical injuries. B. E. Young, ‘Responsibility and Liability for Unlawful Interference in International Civil Aviation’, (2003) XXVIII *Air and Space Law* 56, at 60; *Shawcross and Beaumont on Air Law*, *supra* note 114, at 670.

³⁸⁷ As a result, the court in the *Roselawn* case permitted recovery for pre-impact terror notwithstanding the fact that the mental injuries did not flow from the physical injuries: In *Re Air Crash Disaster near Roselawn*, Indiana on October 31, 1994, 954 F. Supp. 175 (N.D. Ill. (1997).

³⁸⁸ *American Airlines Inc v. Georgeopoulos & Anor*, [No. 2] N.S.W.S.C. 463 (N.S.W. Ct. App. Aug. 4, 1998).

³⁸⁹ See Lachance, *supra* note 378, at 152.

³⁹⁰ *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996).

³⁹¹ The court in the case of *Jack v. Trans World Airlines Inc.* held that the French text implied no causal link between the mental injuries and bodily injury, and examined a range of French legal materials and noted that no French case prior to 1929 allowed a party to recover for his own mental injuries caused by fright or shock suffered during an accident where they did not flow from physical injuries sustained by that same party. *Jack v Trans World Airlines Inc*, (1994) 854 F Supp 654; J. Brent Alldredge, ‘The Ninth Circuit Holds that Physical Manifestations of Emotional and Mental Distress Do Not Satisfy the Warsaw Convention’s “Bodily Injury” Requirement- *Carey v. United Airlines*’, (2002) 67 *Journal of Air Law and Commerce* 988, at 1001.

One group of damages claimed by passengers refers to a mental injury called Post-Traumatic Stress Disorder (PTSD).³⁹² These claims are based on symptoms like headaches, nausea, panic attacks. Using developments in medical science, if the claimant can prove that some parts of the brain are damaged, these injuries would be compensable under Article 17 of the WC29.³⁹³ Thus, courts do not have a right to refuse compensation under such circumstances.³⁹⁴ However, it would be accurate to say that evidence always need to be produced, and that physical injury is conceptually distinguishable from any damage impacting on the mind. Hence in order to receive compensation, claimants have brought their claims in a different way.³⁹⁵ They claim that this disease itself is a compensable physical damage. Thus, lawyers and courts face the issue of whether PTSD could be considered a compensable physical damage.³⁹⁶

In conclusion, the provisions in air carrier's liability conventions have not determined whether mental injury accompanied by bodily injury, pure mental trauma, or just bodily injury, are compensable. There is no clear answer for the question and it depends on the interpretation of the courts and their jurisdiction on the term 'bodily injury'. There is no uniform international procedure in this regard. Thus, courts make different interpretations from Article 17 of the WC29. Usually, in most cases, judges avoid favoring claims for pure

³⁹² *Terrafranca v. Virgin Atlantic Airways, Ltd.*, 151 F.3d 108 (3d Cir. 1998); T.A. Weigand, 'Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention', (2001) AM. U. INT'L L. REV. 891, at 914-19.

³⁹³ *Alvarez v. American Air- lines, Inc.*, No. 98 Civ. 1027, 1999 WL 691922 (S.D.N.Y. Sept. 7, 1999); A. Mercer, 'Liability of Air Carriers for Mental Injury under the Warsaw Convention', (2003) XXVIII/3 *Air and Space Law* 135, at 156.

³⁹⁴ R. Garcia-Bennett, 'Psychological Injuries under Article 17 of the Warsaw Convention', (2001) *Air and Space Law* 38, at 51.

³⁹⁵ *Weaver v. Delta Airlines, Inc.*, 56 F. Supp. 2d 1190 (D. Mont. 1999); *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165, 1167 (Or. 1999), affd, 255 F.3d 1044 (9th Cir. 2001); and *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165, 1167 (Or. 1999), affd, 255 F.3d 1044 [2002].

³⁹⁶ D. Westwood Wilson and J. L. Geraghty, 'The Progeny of Tseng' (2000) XXV(2) *Air and Space Law* 68, at 69.

mental trauma and psychological injuries.³⁹⁷ As a result, it depends on various court interpretations which are based on their legal systems.

The author is of the opinion that pure mental trauma and fear are not compensable. This is firstly since the nature of aircraft operation involves mental and psychological pressures and stresses for all passengers with varying degrees. Secondly, States have adopted different measures for tackling mental injuries. Thirdly, accepting compensation for these injuries would invite many cases to be litigated. However, the author believes that only mental injuries accompanied by bodily injuries, or severe mental injuries that cause bodily injuries, are compensable because these kinds of mental injuries can be treated as bodily injuries as mentioned in the international regime.

(ii) The *Shariah*

The *Shariah* does not expressly mention mental injury as a compensable damage. As discussed in Chapter 3,³⁹⁸ according to the *Shariah* rules, an offender causing wrongful death or bodily injury must pay the *Diyah* to the heirs of the victim. It has determined a limitation of liability for death or bodily injury. Its provisions have also explained compensation recovery for some immaterial damage such as loss of beauty. Pure mental injury is not mentioned there. However, it is generally submitted that pure mental trauma should be compensated. Mental injury as a compensable damage could be justified by two reasons:

1. The *Shariah* recognizes mental injury implicitly because the *la zarar* principle emphasizes mental injury. The principle is based on compensable recovery for bodily injury, mental injury and emotional distress.³⁹⁹ Since mental injury is considered as a form of loss, there is

³⁹⁷ See Lachance, *supra* note 378, at 144-5.

³⁹⁸ See Chr. 3.4.5.4, *supra*.

³⁹⁹ M. Esmaili, *Teori -e- Jobran -e- Khesarat* (1384 A.H. 2005), 61-65.

no reason for limiting this principle to physical injury. As mentioned before, the Prophet had used two words for explaining this principle (*zarar* and *zerar*). The former refers to material damages and injuries to persons; and the latter refers to mental injury.⁴⁰⁰

2. For bodily injury which cannot be calculated through the *Diyah*, the court can apply its discretion to justly evaluate the damage and decide on the deserved compensation through *arsh*. *Arsh* includes the loss on damaged organs where the *Shariah* has not determined them.⁴⁰¹ Therefore, although the *Shariah* has not determined mental injury in the *Diyah*, according to the *la zarar* principle and as a rule of wisdom that no damage should be left uncompensated, the courts can also award mental injury through *arsh*.

In Iranian law, there is likewise no regulation for authorizing pure mental injury. However, the ex-Criminal Procedure Act recognized mental injury as compensable. Article 9 of the Criminal Procedure Act of 1957 states that if a victim sustains pure mental injury, he can claim for compensation. Consequently, courts accepted claims for mental injury on the basis of this provision. After the Islamic Revolution, the provision was abolished by the Criminal Procedure Act 1999 which omitted the phrase regarding mental injury. Since then, the Guardian Council⁴⁰² had declared compensation for mental injury to be contrary to the *Shariah*. Courts referring to this opinion are reluctant to award compensation for mental injuries.⁴⁰³

It is nevertheless submitted that there is evidence other than the *la zarar* principle that recognizes mental injury in Iran.⁴⁰⁴ Although there is no explicit reference to mental injury in Iranian law, there are provisions in the Civil Law Act 1960 that are related to mental

⁴⁰⁰ J. Sobhani, *Tahdhib al- usul Vol. III* (1999), 94.

⁴⁰¹ R. Khomeini, *Tahrir al-Wasilah Vol. II*, (1384 A.H. 2005), 553.

⁴⁰² The structure and the duties of this Council in relation to air carrier liability are discussed in 3.3.1.3, *supra*.

⁴⁰³ See Chr. 3.3.2.2, *supra*.

⁴⁰⁴ See Chr. 3.4.1, *supra*.

injury.⁴⁰⁵ The Civil Liability Act 1960 implicitly refers to mental injuries when it mentions that immaterial damages including mental injury are compensable.⁴⁰⁶ Thus, mental injury can be investigated where it is accompanied by bodily injury, or where it is claimed independently. According to this Act, if bodily injury causes mental injury, the defendant is liable. Thus the courts can accept mental injury, regardless of the Guardian Council's opinion, on the basis of this Act.

According to the above analysis, as the provisions of the Warsaw-Montreal Convention's regime do not explicitly refer to mental injury, it may be seen as an indication that Islamic States can refer to their legal systems on this issue. The *Shariah* is flexible and it can accept mental injury so there is no obstacle for courts when investigating and ruling on mental injury cases. Although the courts in Iran, following the Guardian Council's opinion, currently refuse to award compensation for mental injury, they can give recognition to mental injury on the basis of the *la zarar* principle and the Iranian Civil Liability Act 1960.

So far the principles of liability under the international regime were compared with those of the *Shariah* in Iranian law. It became clear that the main point of conflict is limited and unlimited liability under the international regime and the *Shariah*. The author will analyze this conflict in the Iranian law.⁴⁰⁷

⁴⁰⁵ See Art. 1 of the Iranian Civil Liability Act 1960.

⁴⁰⁶ See 3.3.2.2, *supra*.

⁴⁰⁷ See 4.3, *infra*.

4.2.2.5 Exclusivity of Remedy

(i) Private International Air Law

The WC29 states that any actions for damage can only be brought subject to the conditions and limits that are explained in the Convention.⁴⁰⁸ But the wording of Article 24 explicitly made no mention of any exclusivity of remedy.⁴⁰⁹ Preparatory works in the CITEJA and Warsaw Conference 1929 are not helpful in determining the exclusivity of remedy in the WC29.

Most air carrier's and passenger's hesitations are about whether different jurisprudences intend to affirm only one regime for liability in international air carriers, where no liability has been established under the Convention and the event that has happened is not qualified under the definition of accident in the Convention; or if they are looking for a remedy in any other way that is not mentioned in this Convention by admitting that the Convention is not an exclusivity of the WC29.⁴¹⁰

Ambiguity of the exclusivity of the WC29 may arise where a claim is brought on the limits of Articles 17 and 24 of the WC29. One of the ambiguities is on whether the Warsaw Convention exclusively covers all aspects of air carrier liability in international air carriage. This issue can be questionable where, under the WC29, no liability had been considered for damage that occurred without any accident in international air carriage.⁴¹¹

⁴⁰⁸ Article 29 of the MC99 provides that: 'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.' The wording of the Article therefore referred to an exclusivity of remedy; J. Wegter, 'The ECJ decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention', XXXI (2)(2006) *Air and Space Law*, at 137.

⁴⁰⁹ See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 357.

⁴¹⁰ See Weigand, *supra* note 392 at 916.

⁴¹¹ *Rosman v. Trans World Airlines, Inc.*, 13 Avi. 17,231 at 17,233 (N.Y.C.A., 1974).

The ambiguity was an issue that had been interpreted differently in the United States jurisprudence.⁴¹² Two different interpretations have been provided.⁴¹³ Until 1999, the courts in the United States did not follow just one approach. One approach did not accept cause of action and the exclusivity of the WC29.⁴¹⁴ They permitted remedies that were not mentioned in the Convention. However, another approach accepted cause of action and the exclusivity of the WC29.⁴¹⁵ These approaches are crucial where in the absence of liability under Article 17 of the WC29, a claim arises out of international carriage by air.

After years of uncertainty, two important decisions, one in the *Sidhu* case⁴¹⁶ in the United Kingdom and another in the *Tseng* case⁴¹⁷ in the United States, affirmed the WC29's exclusivity of remedy, and put an end to disputes and contradictions among US courts on this matter.⁴¹⁸

According to the court decision in *Tseng*, if the Convention was the only basis on which a passenger could claim for compensation in international flights, exclusivity of remedy under the Convention was provided. The court stated that if a claimed damage was not qualified under the limits of Article 17, remedy was not allowed under the Convention and its amending protocols.⁴¹⁹

⁴¹²See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 370.

⁴¹³See Dempsey and Milde, *supra* note 53, at 208.

⁴¹⁴Lowenfeld and Mendelson, *supra* note 23, at 519.

⁴¹⁵*Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978).

⁴¹⁶*Sidhu v. British Airways*, 2 Lloyd's Law Rep. 76 (1997).

⁴¹⁷*El Al Israel Airlines, Ltd. v. Tseng*, 525 US 155 (1999).

⁴¹⁸See Tompkins, *supra* note 19, at 143.

⁴¹⁹J Robins, 'the Montreal Convention of 1999 and the Smoking Wreckage of Accident', XXXII (2007)*Annals of Air and Space Law*, at 12.

After the court decision in *Tseng*,⁴²⁰ courts in the United States accept that the Convention provides the exclusive basis for a death or bodily injury claim arising during the course of international air transportation to which the Convention applies.

The court in *Acevedo-Reinoso v. Iberia Lineas Areas de Espafia* held that WC29, as amended, pre-empts claims based on tort or illicit act.⁴²¹ The court held that remedy should be exclusively within the framework of the Convention, although it could be provided under tort or contract, it should be exclusively within the conventions' limits and conditions. A claimant can bring the action under tort. However, to prove the liability of an air carrier, only the provisions of WC29 should apply.⁴²²

The author believes that the exclusivity of remedy under the WC29 and the MC99 can play an important role in the broad definition of an accident, the mental injury and the scope of the operation of embarking and disembarking. Since remedy should be made exclusively within the framework of the applicable conventions or there would otherwise be no compensation from the air carrier envisaged, courts should try to prevent an injured party from being uncompensated as far as possible by expanding the definition of accident, bodily injury and the scope of the operation of embarking and disembarking.⁴²³

For example, prior to the *Tseng* case, the courts in the United States held that an air carrier's conduct in responding to a medical emergency did not qualify as an accident under the Convention.⁴²⁴ The claimant could avoid the WC29, and he could probably use state law tort remedies. However, the *Tseng* case changed the situation. Because of the exclusivity of

⁴²⁰*De George v. American Airlines, Inc.*, 29 Avi.17,203 (S.D.N.Y. 2002).

⁴²¹*Acevedo-Reinoso v. Iberia Lineas Areas de Espafia*.S.A. 449 F.3d 7, 14 (1st Cir. 2006).*King v. Am. Airlines, Inc.*, 284 F.3d 352, 357-58 (2d Cir. 2002). *Mbaba v. Societe Air Fr.*, 457 F.3d 496, 497 (5th Cir. 2006).

⁴²²*Sobol v. Continental Airlines Inc.*, 2006 U.S. Dist LEXIS 71096 [S.D.N.Y.2006]). O. Beiersdorf and J.A. Guidea, 'Recent Development', 72 (2007), *Journal of Air Law and Com*, at 215-219.

⁴²³*Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Il. 2002).

⁴²⁴*Rosman v. Trans World Airlines, Inc.*, 13 Avi. 17,231 at 17,233 (N.Y.C.A., 1974).

remedy, if the claimant is unable to identify the accident, he will probably lose the remedy. Therefore, courts should be more flexible when observing justice and fairness in defining accident to compensate losses.⁴²⁵

Claimants would wish the phrase to be interpreted broadly to recover damages. By contrast, air carriers are reluctant for the phrase to be interpreted broadly and they would wish that an accident falls out of the scope of any of the operations of embarking or disembarking, in order to waive liability. Thus the courts, taking into account justice and the interests of both the air carriers and the passengers, tend to interpret the phrase broadly or narrowly.

(ii) The *Shariah*

The issue about the exclusivity of remedy in the WC29 and the *Shariah* arises when an accident causing the death or bodily injury of Iranian passengers takes place on board the aircraft or in the course of any of the operations of embarking or disembarking. Can claimants claim the *Diyah* in addition to limited liability in the WC29?

If a treaty explicitly provides for exclusivity, the Iranian jurisprudence cannot hold, according to domestic law. As mentioned in Chapter 3,⁴²⁶ treaties that are concluded between Iran and other States in accordance with the Constitutional Code⁴²⁷ enjoy the status of domestic law and they have priority over other domestic law,⁴²⁸ unless Iran legally withdraws from the treaty. For example, if Iran accedes to the MC99, the courts can only accept remedy in the MC99 because of the wording of Article 29 which explicitly provides for the exclusivity of remedy.

⁴²⁵ J.G. Sams John, 'Recent Developments in Aviation Law', (2003) *Journal of Air Law and Commerce* 730, at 742.

⁴²⁶ See Chr. 3.5.1, *supra*.

⁴²⁷ See Art. 74 of the Constitutional Code of the I.R. Iran.

⁴²⁸ H. Enayat, '*Moahadat -e- Beinolmelali dar Hoqooq -e- Iran va Motale -y- Tatbiqi -e- Shariah va Hoqooq -e- Beinolmelali*', (1363 A.H.1985) 29, at 36.

However, Iran only applies the Warsaw-Hague Convention. As the wording of Article 24 of the WC29 does not explicitly state an exclusivity of remedy and Iranian courts do not consider other jurisprudences such as the *Sidhu* case⁴²⁹ in the United Kingdom or the *Tseng* case⁴³⁰ in the United State. There is no case law and interpretation in Iran which determines and admits the exclusivity of the cause of action and remedy in the WC29. However, the author argues that when the appeal court in the *Aseman Airline* case⁴³¹ only referred to the limited liability provisions in the Warsaw-Hague Convention and has not admitted the *Diyah* in domestic air carriage,⁴³² it indicates that Iranian jurisprudence has implicitly admitted the exclusivity of the WC29. However, one should wait to see how the courts in Iran will make decisions in the future.

4.3 The Warsaw Convention and the *Shariah*: On a Collision Course?

Air carrier's liability in domestic accidents has attracted the special attention of the legislature of Iran since 1984. In 1985, the Parliament approved a specific statute to determine the limits of Iranian air carrier's liability in domestic flights, which was based on the limits approved for international flights by the Warsaw-Hague Convention (the Act of 1985).⁴³³

The explicit language of the Act in determining liability for domestic flights according to the Warsaw-Hague Convention on the one hand, and the insufficiency of compensation according to the *Diyah* regulation on the other hand, caused controversies from legal and executive points of view. In practise, it has caused problems for the courts when determining

⁴²⁹ *Sidhu v. British Airways*. 2 Lloyd's Law Rep. 76 (1997)

⁴³⁰ *El Al Israel Airlines, Ltd. v. Tseng*, 525 US 155 (1999).

⁴³¹ Case No. 245-31-26.3.1377 Appeal Court.

⁴³² See the next sub-section, 4.3.1, *infra*.

⁴³³ Official Gazette, No. 11888 – 30-9-1364.

liability in air accidents. An example of this would be the Aseman Airline accident in which the Airline asked the Guardian Council for its interpretation of related laws.

4.3.1 The Aseman Airline Case

The Aseman Airline accident is an important case that challenged the liability for passengers' death or bodily injury in Iran.⁴³⁴ In 1994, an Aseman Airline Fokker F-28 crashed during a domestic flight from Isfahan to Tehran, killing all 66 people aboard. It crashed near Natanz, 150 miles south of Tehran. Courts, when adjudicating this case, came to different judgments.⁴³⁵ The first court ruled that the air carrier should pay the *Diyah* to the victims' beneficiaries.⁴³⁶ Nevertheless, when the claimants appealed and asked for the 1985 Act to be applied, the Appeal Court issued a different judgment.⁴³⁷ Basing their claim on the 1985 Act and Article 22 of the Warsaw-Hague Convention, the claimants asked for 250,000 francs per passenger and 5,000 francs for luggage, which were more than the *Diyah*.⁴³⁸ The Appeal Court investigated the case and ruled in favour of the claimants. The court rejected the judgment of the trial court and declared that the liability could not be based on the *Diyah*, and it had specific conditions of a civil liability. The court applied the official price of gold and awarded damages equal to 300,000,000 tomans (US dollars 300,000) per passenger.

⁴³⁴ See Case No. 1-74 -26.7.74 the Trial Court.

⁴³⁵ See Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court.

⁴³⁶ See Case No. 1-74 -26.7.74 Trial Court, Case No. 31-5394-11 Supreme Court, Case No. 31-154- 6.3.75 Appeal Court, Case No.192-4675-872- 25.2.76 Appeal Court, Case No. 245-31-26.3.1377 Appeal Court. Case No. 31-154- 6.3.75 Appeal Court, Case No. 192-4675-872- 25.2.76 Appeal Court. Case No. 245-31-26.3 Appeal Court.

⁴³⁷ Case No. 31-154- 6.3.75 Appeal Court, Case No. 192-4675-872- 25.2.76 Appeal Court. Case No. 245-31-26.3 Appeal Court.

⁴³⁸ Case No. 245-31-26.3.1377 Appeal Court.

The Appeal Court investigated the case and ruled in favour of plaintiffs. The court rejected judgment of the trial court for payment of *Diyah* as remedy to the inheritors and declared that the liability could not be based on *Diyah* and it had specific conditions of a civil liability.

The Appeal Court therefore approved liability in excess of the *Diyah*.⁴³⁹ After examining Islamic jurisprudence and the legal foundations related to liability in excess of the *Diyah* for death or bodily injury in air accidents, it stated that contemporary Islamic jurists approve liability in excess of the *Diyah*. Hence, by referring to liability based on the Act of 1985, which is a specific law, the court ruled in favour of the beneficiaries and based air carrier liability on the Warsaw-Hague Convention.

Then, the defendant claimed that the legislature, by ratifying the Islamic Criminal Code 1991 and Article 714 of the law of Criminal Code 1996, had abolished the Act of 1985. Therefore, the new law should be applied in the case of death or bodily injury in air accidents. The Appeal Court responded by stating firstly that the referred provisions in the Islamic Criminal Code only include pilots where they have a direct role in causing the accident, whereas the subject of the Act of 1985 has been remedies which have a civil liability aspect and refers to air carrier's liability. Since that Act also includes baggage and cargo, it cannot be abolished by the *Diyah* regulations. Secondly, that the Act of 1985 is specific and Article 714 is general, and a succeeding general Article cannot abolish a preceding specific one.

The air carrier also claimed that there was a condition in the carriage contract that exempted domestic flights from the purview of the Warsaw-Hague Convention. However, the Appeal Court held that according to Article 10 of the Civil Code, private contracts are binding on parties if they are not contrary to the explicit text of the law; while the said condition which

⁴³⁹ The General Committee of Supreme Court (No. 6 dated 1996), stated that by referring to the Iranian Civil Code and after having taken into consideration the general principles of *etlāf*, *tasbīb* and *la zarar* in the *Shariah*, total remedy is necessary.

was approved and implemented by the Ministry of Road and Transport, is explicitly contrary to the text of the 1985 Act. It further stated that since the Warsaw Convention 1929 and the Hague Protocol 1955 are binding on domestic flights according to the 1985 Act, all of their provisions are binding and the air carrier cannot relieve itself by contractual conditions.

In 1995, when the Appeal Court refused to apply the Islamic Criminal Code on the *Diyah* provisions and issued its judgment according to air carrier liability in the Warsaw-Hague Convention, the Ministry of Road and Transport intervened. The Minister of Road and Transport, using the procedure provided for in the law,⁴⁴⁰ requested that the Guardian Council (GC) verify whether compensation under the Warsaw-Hague Convention is in conformity with the *Shariah*. He also requested the Council's interpretation of the 1985 Act.

4.3.2 The Guardian Council of the Constitution's Interpretation of the Law related to Air Accidents

The Act of 1985 explicitly refers to the provisions of the Warsaw-Hague Convention that allow payments in excess of the *Diyah* for death or bodily injury in domestic flights. However, the Ministry of Road and Transport had sought the GC's official opinion about their conformity with the *Shariah*.⁴⁴¹ In fact, the Ministry believed that the *Diyah* is an unchangeable regulation in the *Shariah* and that domestic flights should be governed by its regulations. The Ministry is therefore of the view that the remedy for Iranian passengers in domestic flights should be decided accordingly, since the regulations are in force for all Iranians.

The GC declared that the Warsaw-Hague Convention is relevant to international air carriage and the obligations of the Islamic Republic of Iran towards its signatories. But, it is not

⁴⁴⁰ See Art. 4 of the Constitutional Code of the I.R. Iran.

⁴⁴¹ *Collection of Law and Regulations of Civil Aviation Organization of Iran* (1375 A.H. 1996).

relevant to domestic flights.⁴⁴² However, since the Act explicitly indicated that Iranian air carriers should be governed by the limited liability provisions in the Warsaw-Hague Convention for domestic flights whether the passengers are Iranians or not, the GC thereby disregarded the Act of 1985, providing no sound reason for their decision. Later on, the Minister of Road and Transport once again questioned the GC about that opinion.⁴⁴³ He asked the Council to clarify whether a new judgment according to the Warsaw Convention in addition to *Diyah* is contrary to the *Shariah* or not. The Council responded by opining that since there is an insurance contract between the air carrier and the insurance company, the beneficiaries are entitled only to the *Diyah* and they have no right to any other sum.

This opinion also indicates that it is not possible for the court to find for unlimited liability. Regarding the segregation of regulations between Iranian passengers in domestic flights from foreign passengers, the legal system governing damages resulting from the death or bodily injury of the former is based on the *Diyah* provisions and is not covered by the Warsaw-Hague Convention.

4.3.3 A Critique of the Guardian Council's Interpretation

These two interpretations by the Guardian Council are refutable:

1. The GC was supposed to explain its opinion about the conformity of the Warsaw-Hague Convention with the *Shariah*. Instead, it provides an opinion about the conformity of the 1985 Act with the *Shariah*. In so doing, it went beyond its jurisdiction and interpreted an ordinary law (i.e. the Act of 1985), while according to the Constitutional Code, the Council should

⁴⁴² Opinion of the Guardian Council, No. 1191 (1995).

⁴⁴³ Opinion of the Guardian Council, No. 1226 (1995).

only interpret Constitutional Articles.⁴⁴⁴ It is not clear why the GC disregarded its jurisdiction by interpreting an ordinary law and provided such an unexpected interpretation.⁴⁴⁵

2. Regardless of the formal critique on the interpretation of the GC, even if it is accepted that the Council has a right to interpret an ordinary law, the opinion expressed suffers from internal inconsistencies. It does not seem logical to reserve the Warsaw Convention 1929 for international air carriage, and for non-Iranian passengers. If the Convention is applicable exclusively to international flights, all domestic flight passengers would be beyond its purview, not solely Iranian passengers on such flights.

3. The GC has not paid attention to the fact that the Act of 1985 has been ratified by the Parliament and affirmed by the GC itself. The Warsaw-Hague Convention is enforced in Iran, and according to the Act of 1985, air carrier's liability in domestic flights should be governed by the provisions of the Convention. Therefore, it is not possible to exclude Iranian passengers from this Act, since these treaties are considered as ordinary laws once they have been ratified by the Assembly and enjoy the same status as the Criminal or Civil Codes.

4.3.4 Reconciling the *Shariah* and the Warsaw-Hague Convention

The author is of the opinion that although there are discrepancies between the Convention and the *Shariah*, the latter has the capability to adopt the Warsaw-Hague Convention's limitation of liability and unlimited liability for passengers' death or bodily injury in domestic flights as well as international flights. Solutions for unlimited liability could be negotiated through the

⁴⁴⁴ Art. 73 of the Constitutional Code of the I.R. Iran.

⁴⁴⁵ Art. 73 of the Constitutional Code of the I.R. Iran indicates that it is the duty of the Islamic Assembly to interpret ordinary laws. In fact, the legislature, more than any other authority, is aware of the objective of any particular law and it is they who could provide its correct meaning. See N. Katuzian, *Introduction of Legal Science and Iranian Legal System* (1382 A.H. 2003), 45.

application of the *la zarar* principle,⁴⁴⁶ the insertion of contractual conditions and the use of special statutes.

1. The Islamic legislature leaves no loss without compensation, even if the wrongdoer is not at fault.⁴⁴⁷ The principle of *la zarar*, which encompasses all in a society, prohibits causing any loss to others and the misusing of one's rights.⁴⁴⁸ Wherever judgments result in an illegitimate or disproportionate loss, this principle moderates those judgments and provides a right for the injured party to break the contract and ask for total remedy.⁴⁴⁹ By referring to the *la zarar* principle, unlimited liability is therefore justifiable. Under this approach, the sums awarded for the *Diyah* are taken to be the baseline. To calculate the value of total remedy or unlimited liability, courts are thereby authorized to reach sums which are in excess of the *Diyah* (unlimited liability).

2. The *Shariah* authorizes parties to insert a term for liability in excess of the *Diyah* in the contract. If the parties agree to this arrangement, the courts cannot refuse to uphold it.⁴⁵⁰ Therefore, if the limitation of liability provision from the Warsaw-Hague Convention is inserted into domestic contracts, this would not be against public order or the *Shariah* even if the final amount may be higher than the *Diyah*.⁴⁵¹

3. The Islamic legislature approved two specific statutes that authorize unlimited liability: the Civil Liability Act 1960 authorizes total compensation, and the Warsaw-Hague Convention is applied to domestic flights in Iran. According to Article 1 of the Iranian Civil Liability Act

⁴⁴⁶ This principle is extracted from the prophetic saying '*la zarar va la zerara fil Islam*' which means there is not any harm in Islam. *Zarar* is making any defect to the property or life of a person or whatever that belongs to him, and *Zerar* means causing harm repeatedly, and *Mozar* is the person who causes harm repeatedly and insists on doing it. See M. Esmaili, *supra* note 399, at 61.

⁴⁴⁷ Shahid Thani, *Al Rozat al Bahiya* (1365 A.H. 1986), at 352.

⁴⁴⁸ See Chr. 3, *supra*.

⁴⁴⁹ See Edris, *supra* note 207, at 7.

⁴⁵⁰ See Art. 10 of the Civil Code.

⁴⁵¹ K. Qeblei Khoei, *Qavaed -e- Hoqooq -e- Mojazat -e- Islami* (1385 A.H. 2006), 23.

and Article 25 (wilful misconduct) of the Warsaw-Hague Convention, unlimited liability is allowed. After being approved by the Parliament and the Guardian Council, the Warsaw-Hague Convention is treated as a specific statute for domestic flights.⁴⁵² Iran can therefore apply the *Diyah* regulations simultaneously with unlimited liability.⁴⁵³

4.4 Concluding Remarks

This Chapter elaborated the evolution of the air carrier's liability regime since its inception to the present. It discussed the Warsaw-Montreal regime which evolved within a purely common law and civil law framework that did not take into consideration the principle of the *Diyah* as espoused by the *Shariah*. However, the flexibility and dynamism of the international system enabled countries with other legal systems, such as Islamic countries, to adopt it.

The Chapter compared the principles of liability such as the basis of liability, and limited or unlimited liability, to prove that the international system is dynamic. Certain aspects of air carrier's liability such as 'claimant', 'bodily injury', 'mental injury' and 'exclusivity of remedy' were discussed in order to prove that the international system is flexible.

1. International air carrier's liability principles are dynamic. At the beginning, the founders of the Warsaw Convention wished to unify regulations.⁴⁵⁴ Limited liability and presumed fault liability, instead of strict liability and unlimited liability, were provided to protect air carriers against death and bodily injury.⁴⁵⁵ However, after the Second World War, the Warsaw Convention became contestable, because air transportation and public welfare improved. The

⁴⁵² Arts. 77 and 125 of Constitutional Code of I.R. Iran.

⁴⁵³ It may be asked why, if there were no legal obstacle, that Iran has not accessed the MC99. The author is of the opinion that what has blocked its ratification in Iran is the economic concerns of air carriers: air carriers fear higher insurance and liability limits for death and bodily injuries. They therefore oppose its ratification. Because of the direct protective policies of air carriers, the government is not interested in taking serious steps in this regard. Further research should be carried out to verify this hypothesis.

⁴⁵⁴ See Minutes Warsaw 1929, *supra* note 4, at 12.

⁴⁵⁵ *Ibid.*, at 68.

drafters modified them frequently to balance the interests of both customers and airlines. Although they intended to maintain this balance, in practice it turned out to be in favour of carriers since the limitation of liability in the System were far too low. Gradually, in subsequent instruments of the Warsaw System and in the Montreal Convention 1999, they inclined towards the interests of passengers.⁴⁵⁶ Through the amendments of the WC29, the principles of liability such as the basis of liability and liability limits (unlimited or limited liability) were modified. These modifications played an important role in its survival for over eight decades.

At the same time, the author also showed that the claim by Zweigert & Kotz that the *Shariah* is rigid and inflexible is not valid.⁴⁵⁷ Regarding the *Diyah*, although there are specific regulations to that effect in the *Shariah*, Islamic countries may, by applying a broad interpretation, adopt the liability principles of other systems which are appropriate for air carriage in their domestic and international flights, and reconcile between the *Shariah* and the international system of air carrier's liability.

From the discussions above, it can therefore be concluded that there are two main issues that cause a conflict between the *Shariah* and the Warsaw-Montreal regime. Firstly, the *Shariah* accepts unlimited liability for any damage to property,⁴⁵⁸ but according to Article 22(2) and 22(3) of the WC29 approves limited liability in this regard. Secondly, in relation to passengers' death or bodily injury, the former recognizes limited liability for death or bodily injury, while Article 22(1) of the WC29 firstly accept limited liability which is different from

⁴⁵⁶ See Dempsey and Milde, *supra* note 53, at 90.

⁴⁵⁷ K. Zweigert & H. Kotz, *Introduction to Comparative Law Vol. I*, trans. T. Weir (1987), 373.

⁴⁵⁸ See Chr. 3, *supra*.

the *Shariah* and secondly, the WC99 (Article 25) and the MC99 (22) adopt unlimited liability.⁴⁵⁹

2. International air carrier's liability principles are flexible. In spite of several modifications, the Montreal Convention 1999 does not determine general and vague key terms such as the definition of 'accident', 'operations of embarking', 'operations disembarking', and 'bodily injury' since, in an 80-year process, these terms had been defined and interpreted by courts and have become clearer for air carriers and customers. This is also aimed at preserving the validity of the vast body of existing legal precedents and their interpretations. The key terms were left for the courts to interpret, i.e. they can interpret applicable agreements in accordance with their legal systems and circumstances.⁴⁶⁰ If these concepts had been defined in the MC99, the definitions might have differed from the ones made by courts. This issue would compromise the outcomes gained by case law and would harm the flexibility of the international regime of air carrier's liability.⁴⁶¹ Not only can common law and civil law countries apply these principles, other legal regimes such as Iran can do so too.⁴⁶²

The *Shariah* has defined claimants and their rights in death claims. As they are stable, if the Warsaw-Montreal regime had determined claimants in death cases, it would have placed an important preventive element for Iran to adhere to the relevant Convention.

The *Shariah* does not define the accident nor requires that the event or happening be unexpected or unusual. It rather concentrates on the causal link between the event and the damage. This link is presumed, so long as the passenger or goods are under the care or custody of the carrier. The *Shariah* then considers the matter objectively to determine

⁴⁵⁹ See Art. 25 of the Warsaw Convention 1929 and Art. 21(2) of the Montreal Convention 1999.

⁴⁶⁰ See Tompkins, *supra* note 19, at, 45-6.

⁴⁶¹ Ibid.

⁴⁶² See Chr.3, *supra*.

whether the one in charge took the necessary precautions to protect the passenger from suffering harm regardless of whether the injury took place on the aircraft or in the course of any of the operations of embarking or disembarking.

The *Shari ah* does not expressly mention mental injury as a compensable damage. However, the Guardian Council declared compensation of mental injury to be contrary to the *Shariah*. Courts referring to this opinion are reluctant to award compensation for mental injuries. The author is of the opinion that the *Shariah* recognizes mental injury implicitly because the *la zarar* principle emphasizes on mental injury. The principle is based on compensable recovery for bodily injury and mental injury.

3. Iranian legislators have approved a specific statute entitled ‘Determining the Scope of Liability of Iranian Air Carriers in Domestic Flights’ (the Act of 1985). According to this statute, air carrier’s liability should be in compliance with the provisions of the Warsaw-Hague Convention for baggage, cargo, delay and passengers’ death or bodily injury.⁴⁶³

3.1. Since there are no significant conflicts between domestic regulations and regulations of the Warsaw-Hague Convention regarding air carrier’s liability for cargo and delay, the latter regulations are applied to domestic flights without exception.

3.2. In addition to the 1985 Act, the liability of air carriers for passengers’ death or bodily injury is determined by the *Diyah* in the Islamic Criminal Code which places a special limitation on liability. As a result, there is a conflict between the *Diyah* and the compensation scheme under the Warsaw-Hague Convention for passengers’ death or bodily injury (whereby limitation of liability was prescribed in Article 22 and unlimited liability in Article 25).

⁴⁶³ *Collection of Law and Regulations of Civil Aviation* (1375 A.H. 1996), 59.

3.3. The Guardian Council in its interpretive opinion declared that the *Diyah* regulations should be applied to all Iranian citizens.⁴⁶⁴ Thus compensation should be meted out according to the *Diyah* regulations for Iranian air passengers' death or bodily injury in domestic flights. There is no judicial consensus with regard to liability for death or bodily injury in domestic flights. Courts have made different decisions based on this interpretive opinion. Some have accepted it and awarded compensation according to the *Diyah*, while others have focused their judgments on the Act 1985 which considers the Warsaw-Hague Convention enforced and ruled according to its Article 22.⁴⁶⁵ As a result, there is no unified judicial precedent in this regard.

The author claims that regulations of the Warsaw-Hague Convention and the *Diyah* can be simultaneously applied to domestic flights. Conflicting cases can be resolved through the application of contractual conditions, the *la zarar* principle, or the ratification of a specific statute.

It can be concluded that:

1. Iranian law, which is adopted from the *Shariah*, faces no obstacle in accepting limited or unlimited liability. The Islamic jurists and the courts have paid attention to damage exceeding the *Diyah*. It is submitted that the *Diyah* as a limited liability is not in favour of the injured party. It is therefore against Islamic principles such as the *la zarar* principle.
2. The limitation of liability and unlimited liability provisions of the Warsaw-Hague Convention allow higher levels of compensation than the limits set by the *Diyah*. If parties

⁴⁶⁴ Opinion of the Guardian Council, No. 1191(1995).

⁴⁶⁵ Case No. 245-31-26.3.1377 The Appeal Court.

have agreed to incorporate these in the carriage contract, they would be applicable since the conditions are not against public order and the *Shariah*.⁴⁶⁶

3. Since the legislators have approved the Warsaw-Hague Convention for domestic flights in a specific statute,⁴⁶⁷ and the Guardian Council as a supervisory authority has affirmed the statute and subsequently has not explicitly declared the provisions of the Convention to be contrary to the *Shariah*, it can be inferred that it is possible to determine liability limits other than the *Diyah*. Hence on domestic flights, liability for passengers' death or bodily injury is as prescribed by Article 22 for limitation of liability and Article 25 for unlimited liability.

Therefore, in Iran and under the *Shariah*, not only is there no obstacle for applying this Convention to international flights, it is also applicable to domestic flights. This can be a step towards uniformity.

It has been shown above firstly because of the dynamism and flexibility of the Warsaw-Montreal regime, countries with different legal systems are usually interested in accessing the international Conventions for air carrier's liability even if their legal systems may differ from the applicable Conventions. Secondly, the basic concepts of the Warsaw-Montreal regime can also be made compatible in the liability principles of Iranian law as laid down in the *Shariah* and the *Diyah*.

⁴⁶⁶ See Art. 230 of the Civil Code and Arts. 386-387 of the Commercial Code.

⁴⁶⁷ *Collection of Law and Regulations of Civil Aviation* (1375 A.H. 1996), 59.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5. 1 Reconciling Principles from Various Jurisdictions

To the best of the author's knowledge, no study has yet been carried out on air carrier's liability comparing the international liability system with Islamic law with a special focus on Iran. A study of the air carrier's liability in an Islamic State like Iran, and comparing it with other liability regimes, offer the drafters of international conventions new insights that could help them to appreciate the similarities and differences among the various foundations of liability. This innovative contribution to the knowledge in the field of air carrier's liability analyzes the compensation for death or bodily injury in air accidents from the perspective of Islamic law. In this thesis, old concepts of the *Shariah* have been explored and new avenues have been proposed for them.

The findings from this study are important for the drafters of international conventions, States that follow the *Shariah* like Iran, practitioners and air law researchers. The first group may use these findings in future amendments of the international regime of air carrier's liability to achieve more uniformity across different legal systems. This study helps the second and third group by showing them how an Islamic State has dealt with the air carrier liability regime and which solutions can harmonize domestic laws applying the *Shariah* with international regulations of air carrier's liability.

Air carrier's liabilities as regulated in the above legal regimes are based on various foundations, since the issue of liability towards others is a kind of social behavior. However, through compromises, many commonalities can be found. Since the 1920s, European States have provided regulations for air carrier's liability in private international air law. Such initiatives were based on the common grounds of liability rules in the two major legal systems

that is, the common law and civil law systems of those States. They have attempted to minimize legal conflicts relating to liability for the compensation of damages caused by accidents for air carriers, passengers, consignors and consignees by providing uniform regulations of certain aspects of air carrier's liability.

In addition to the principles of liability laid down in those two legal systems, the drafters of private international air law treaties implemented principles adopted from other conventions including but not limited to the international maritime and rail conventions. For instance, they adopted the idea of limited liability that was deemed appropriate for air carrier's liability. European States thereby recognized the economic, political and technical privileges of the unification of certain rules governing the liability of air carriers at the international level for the development of the air transport industry.

Yet, unlike the 1920s and the following decades, uniformity of international air carrier's liability is not solely a demand from European States. After the Second World War, new States emerged employing legal systems which differ from the two prevailing systems. For instance, although Islamic States in Asia and Africa engage in international air transport, they follow different legal, social and political principles. Disregarding the legal system of the Islam may in the long term harm the uniformity of international air carrier's liability. Islamic States may, for example, prefer to apply only their domestic laws and regulations whilst ignoring internationally agreed principles. Hence, one of the challenges confronting international private air law is the legal structure and legislation of Islamic States.

An important question that needs to be asked is: could Islamic States that have not been actively participating in the drafting of the Warsaw Convention 1929 as variously amended and the Montreal Convention 1999, hereinafter referred to as 'the Warsaw-Montreal regime', and whose legal system differs from the common law or civil law, accept the current

international regime of air carrier's liability? And do principles of the *Shariah* as codified in the legal system of such States, allow them to access the international principles?

To answer these questions, in addition to the two legal systems of common law and civil law and the Warsaw-Montreal regime, the author investigated the legal system of Iran, which follows the *Shariah*. After the 1979 Revolution, the Iranian Legislature, implemented both the *Shariah* and the Warsaw-Hague regulations for the regulation of international and domestic flights. However, there is a conflict between the liability principles under the *Shariah* and the Warsaw-Montreal regime on the limited liability for death or bodily injury to passengers.

The author's principal conclusion is based on the assumption that Iran, as an Islamic state, can adopt the Warsaw-Montreal regime on liability that occurs during its international flights and domestic flights and could also overlook the *Diyah* provisions for air passenger's death or bodily injury, which are in conflict with the Warsaw-Montreal regime even if the Guardian Council, as the official body that determines the conformity of regulations with the *Shariah*, provides a different opinion.

5.2 Common and Civil Law Principles of the International Regime Governing Air Carrier's Liability

As said the Warsaw-Montreal regime is a compromise of features of the civil law and the common law systems. These two systems have similarities and differences. States following the Warsaw-Montreal regime have disregarded the common law rule on the insertion of exemption conditions by carriers or unlimited liability for death or bodily injury to establish and successfully implement the international system. To verify this finding, Chapter 2 of the thesis investigated the principles of liability under civil law and common law. This investigation revealed a number of important points.

1. As the systems distanced themselves from common principles of liability which are based on fault and proceed towards liability based on the presumption of liability,¹ and in some cases such as hazardous activities accepted strict liability through specific statutes,² this trend had an impact on air carrier's liability in international instruments like the Warsaw Convention 1929³ and the Montreal Convention 1999.⁴ Air carrier's liability in the Warsaw Convention 1929 and the Montreal Convention 1999 is based on presumption of liability, which can be rebutted by the defendant by proving absence of negligence or fault.⁵ The presumption of liability under the Warsaw Convention 1929 was practically treated as strict liability in different jurisprudences such as United States jurisprudence.⁶ Hence, the Montreal Convention 1999 provides a strict liability regime.⁷ Fast settlement of claims and avoidance of lengthy and costly litigation were among the main reasons for adopting this new trend.⁸

The comparative law survey showed that international air carrier's liability systems do not opt exclusively for fault liability or strict liability, but adopt a more nuanced approach according to civil law and common law. This approach includes intermediate solutions such as shifting the burden of proof, using an objective standard of care, and distinguishing between carriage of goods and passengers.

¹ S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', (2009) 107 *Michigan Law Review* 1583, at 1584.

² M. Planiol and G. Ripert, *Treatise on the Civil Law* (2005), 468; and M. Arnheim, *Principles of the Common Law* (2004), 251.

³ R. Horner and D. Legers, *The Second International Conference on Private Aeronautical Law: Minutes Warsaw 1929* (1975), 12 (hereinafter referred to as "Minutes Warsaw 1929") at 15.

⁴ G.N. Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States from Warsaw 1929 to Montreal 1999* (2010), 5.

⁵ See Unpublished Note from Prof. Dr. P.C.C. Haanappel, 'What is in a Name', Appendix 1.

⁶ A.F. Lowenfeld and A.I. Mendelson, 'The United States and the Warsaw Convention', (1967) 80 *Harvard Law Review* 520, at 547; David Cohen, 'Happy Birthday: Agreement C.A.B. 18900, A Critical Review of the Montreal Interim Agreement and the Authority for its Implementation', (1982) VII *Air and Space Law* 70, at 558.

⁷ See Tompkins, *supra* note 4, at 27.

⁸ ICAO Doc. 9775-DC/2, at 116.

2. Differences in liability principles also confirm the conclusion that States like France and Germany, which have a civil law system and the United Kingdom and the United States, which use common law sometimes neglected their own specific principles for the sake of uniformity of international regulations. Not all of the international principles are identical with those from a national legal system. However, in the international arena, States should neglect their domestic specific principles, if they are constitutionally allowed to do so. For example when no contractual provisions regarding liability are expressly made, carrier's liability may, in common law, be established according to the rules of bailment.⁹ However, since the concept of bailment does not exist in civil law¹⁰ as well as Warsaw-Montreal regime, this must be established according to the rules of the general law of contract, provided that a contract can be implied.

5.3 Flexibility and Dynamism of the International Air Carrier Liability System

The international air carrier liability regime laid down in the Warsaw-Montreal regime, in addition to the common principles drawn up in the legal systems of common law and civil law, contains principles that have no precedence in either system, such as delimitation of liability and nullification of conditions limiting liability. However, these were adopted since they were in the interest of parties to a carriage contract, and uniformity in the international regulations of air carrier's liability. I conclude that the process of adopting principles has bestowed the international regime with dynamism and flexibility.

Flexibility and dynamism of the international air carrier liability regime can be noticed in the following issues:

⁹ N.E. Palmer, *Bailment* (1991), 3.

¹⁰ K. Freund and L. Rudden, *A Source-Book on French Law* (1991), 298-9.

1. The international air carrier liability system laid down in the Warsaw-Montreal regime is aimed at balancing the interests of carriers and customers in the following fashion.

In the 1920s, the trend was to support the nascent aviation industry by accepting limited liability.¹¹ Air carrier's liability established by the Warsaw Convention 1929 was limited to a fixed maximum for death or bodily injury of a passenger or his delay; or for damage, losses or delays of baggage and cargo.¹² This regime was aimed at maintaining a balance between the interests of air carriers and passengers. The unification of international air carrier's liability rules in relation to limitation of liability also helped air carriers to insure their liabilities. The introduction of the limitation of liability was an essential departure from total compensation. It was a common point among States whose airlines engaged in international air transportation, whether or not their legal system accepted unlimited liability.¹³

In the course of the 20th century States tried to increase the amount of limited liability to respond to economic and social conditions worldwide through various amendments of the Warsaw Convention 1929.¹⁴ Finally, whereas limitation of liability was contrary to the legal systems of the common law and civil law, and to economic conditions, the Montreal Convention 1999 provided unlimited liability for passengers' death or bodily injury. However, it maintained limitation of liability for cargo, baggage, delayed baggage, and delay sustaining damage.¹⁵ This is because limitation of liability on international carriage by air was useful for insurance purposes and could deliver fast and low cost litigation.¹⁶

¹¹ J. Ide, 'The History and Accomplishments of the International Technical Committee of Aerial Legal Experts', (1932) *Journal of Air Law* 27, at 29.

¹² See Art. 22 of the Warsaw Convention 1929.

¹³ W. Guldemann, *Air Transport in International Law – Possibilities and Limits in International Unification* (1982), 164. Lowenfeld and Mendelson, *supra* note 6, at 559-560.

¹⁴ K. Beaumont, 'Proposed the Protocol to the Warsaw Convention of 1929', (1953) *Journal of Air Law and Commerce* 264, at 264-265.

¹⁵ See Tompkins, *supra* note 4, at 209.

¹⁶ ICAO Doc. 9775-DC/2, at 21.

2. The Warsaw-Montreal regime does not expressly determine who is entitled to be a ‘claimant’. Although Article 24(1) and Article 29 of the Montreal Convention 1999 ensure that they preempt over national laws, the group of entitled claimants is not uniformly and equally defined in the different legal systems. The right of persons other than the passenger or his or her personal representative to claim, should firstly be decided according to the substantive law of the forum, which includes relevant rules of conflict of laws. Secondly, those rights should accord with the liability limits of the Warsaw Convention 1929.¹⁷

3. The Warsaw-Montreal regime does not provide a definition of key terms such as the definition of ‘accident’, ‘embarking’, ‘disembarking’, and ‘bodily injury’. These terms have been defined and interpreted by courts and have become clear for air carriers and passengers. The key terms were left for the courts to interpret, i.e. they can interpret applicable agreements in accordance with their legal systems and circumstances.¹⁸

The exclusivity of remedy under the Warsaw-Montreal regime can play an important role in the broad definition of the key terms. Since compensation should be made exclusively within the framework of the applicable conventions, courts should try to prevent an injured party from staying uncompensated as much as possible by giving broad definitions, interpretations of terms.¹⁹

5.4 Impacts of the *Shariah* on Air Carrier’s Liability in Iran

Next to the civil and common law systems, the *Shariah* too has its specific principles. However, it has equally been flexible and can modify itself to meet the requirements of the

¹⁷ P.P.C. Haanappel, ‘The Right to Sue in Death Cases under the Warsaw Convention’, (1981) *Air and Space Law* 66, at 69-75.

¹⁸ P. Martin et.al, *Shawcross and Beaumont on Air Law* Vol. VII (4th Ed.), 705 (hereinafter referred to as ‘*Shawcross and Beaumont on Air Law*’); *MacDonald v. Air Canada* 439 F. 2d. 1402 (1st Cir. 1971) and see: *Air France v. Saks* 724 F.2d 1383 (9th Cir. 1984), rev'd 470 U.S. 392 (1985).

¹⁹ See 4.2.2.5, *supra*.

current era and international law. The author concludes that Islamic jurists can resort to Islamic jurisprudence and Islamic sources, which provide flexible rules for contemporary situations in their society. For instance, liability limits for death or bodily injury in the *Diyah* regulations were set by the Prophet of Islam in accordance with the social conditions of his era. However, they underwent changes after his passing away.

The principles of liability in the *Shariah* that impact on air carrier's liability in Iran are the following:

1. There is a general principle called *la zarar* that can be used for regulating liabilities for death, bodily injury and damage to property. This principle is extracted from the Prophetic saying '*la zarar va la zerara fil Islam*', which means that there is not any harm in Islam.²⁰

Where the *Shariah* does not provide a direct reference to the liability of air carriers, this rule can be used for claiming compensation for passengers' death or bodily injury.²¹

2. The principle of destruction (*etlāf*) mentioned in most Islamic jurisprudence discussions, is applied by jurists when a destruction or loss occurs to baggage or cargo in transportation. If a person directly destroys the property of another person or the interests pertaining to it either intentionally or ignorantly, he is liable for compensation. According to this principle, the destructor is strictly liable.²²

3. Islamic jurists study the contract of carriage in the framework of *amanat* and impose the principles of liability from it on the contract of carriage.²³ An *amin*²⁴ should do his best to maintain the property as if it belongs to him. If the property is damaged or lost, provided that

²⁰S.J. Zehni Tehrani, *Tashrih al-Matalib*, (1371 A.H.1992), 421.

²¹ See 3.4.1, *supra*

²² R. Khomeini, *Tahrir al-Wasilah Vol. II* (1384 A.H. 2005), 189.

²³ Shahid Thani (Al Amili), *al-Rozat al-Bahiyya* (*Sharh al-Lum'ah*) (1365 A.h. 1986), 385.

²⁴ *Amanat* in the *Shariah* is a specific contract whereby one person entrusts a thing belonging to him to another in order that the latter should retain it for him free of charge. The person entrusted with the thing is called an *amin*. See 3.4.4.1, *supra*.

he accomplished his duty well, the *amin* (holder) is not liable and he is protected by law.²⁵

However, according to the Commercial Code, the contract of carriage is an independent contract of *amanat*. It accepts a presumption of liability. The Commercial Code has also adopted defences such as *force majeure*.²⁶

4. Liability for death and bodily injury in the *Shariah* is based on the *Diyah*.²⁷ The *Diyah* prescribes limited liability for death or bodily injury even where the wrongdoer is not at fault. Therefore, the *Diyah* imposes strict and limited liability.

5.5 Reconciling Conflicts between the *Shariah* and International principles

Liability for death or bodily injury is the point of conflict between the *Shariah* and international principles. Limited liability under the *Diyah* stands in contrast to the liability outlined in Articles 20, 22 and 25 of the Warsaw Convention 1929 and in Article of 21 of the Montreal Convention 1999. This study therefore investigated whether this conflict is solvable, or if the *Shariah* is impeding the attainment of uniform international regulations.

In order to illustrate the points of collision between the *Shariah* and the international regime of air carrier's liability, the author investigated the laws relating to air carrier's liability in Iran. Iran, as an Islamic State, has concurrently implemented liability under the *Shariah* and the international regime. After the Islamic Revolution in 1979, domestic air accidents were investigated under the Islamic Criminal Code (*Diyah*) and the Specific Act of 1985 entitled "Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights". According to this Specific Act, limited liability of air carrier for baggage, cargo, delay and passengers'

²⁵ See Art. 4 of the Civil Code.

²⁶ See Art.377 of the Commercial Code.

²⁷ E. Shafei Sarvestani, 'Diyah Va Khesarathay -e- Nashi as Sadamat -e- Badani', (1379 A.H. 2001) VII *Pagohesh Va Hozeh* 35, at 16.

death or bodily injury should be in compliance with the provisions of the Warsaw-Hague Convention.²⁸

Later on, the Guardian Council as a body responsible for supervising the laws' compliance with the *Shariah* in its interpretive opinion of the Specific Act of 1985, declared that the *Diyah* regulations should be applied to all Iranian citizens including death or bodily injury in domestic flights and the Warsaw-Hague Convention to be in force just in international flights.²⁹ However, courts have made different decisions based on this interpretive opinion. Some courts have accepted it and awarded compensation according to the *Diyah*,³⁰ while others have focused on the Specific Act of 1985, which considers the Warsaw-Hague Convention to be in force and applied Article 22 of the Warsaw-Hague Convention to domestic flights and international flights.³¹ The latter courts argue that the Guardian Council did not provide an opinion about the conformity of the the Specific Act of 1985 with the *Shariah*. In so doing, it went beyond its jurisdiction and interpreted an ordinary law (i.e. the Specific Act of 1985) as according to the Constitutional Code, the Council should only interpret Constitutional Articles.³² It is not clear why the Guardian Council disregarded its jurisdiction by interpreting an ordinary law and provided such an unexpected interpretation.³³ Meanwhile, the author concludes that conflicting cases can be resolved through the application of a specific statute such as the Specific Act of 1985 and the *la zarar* principle, pursuant to the following approaches:

²⁸ See 4.3, *supra*.

²⁹ Opinion of the Guardian Council, No. 1191 (1995).

³⁰ See Case No. 1-74 -26.7.74 the Trial Court.

³¹ Case No. 245-31-26.3.1377 Appeal Court.

³² Art. 73 of the Constitutional Code of the I.R. Iran.

³³ Art. 73 of the Constitutional Code of the I.R. Iran indicates that it is the duty of the Islamic Assembly to interpret ordinary laws. In fact, the legislature, more than any other authority, is aware of the objective of any particular law and it is they who could provide its correct meaning. See N. Katuzian, *Introduction of Legal Science and Iranian Legal System* (1382 A.H. 2003), 45.

1. The law of Iran, which is adopted from the *Shariah*, faces no obstacle in accepting limited liability of the Warsaw-Hague Convention or unlimited liability of the Montreal Convention 1999. Islamic jurists and courts are today paying attention to damages exceeding the *Diyah*. It is submitted that restricting compensation merely to the *Diyah* principles is not in favour of the injured party. Hence, it is against Islamic principles such as *la zarar*.

2. Since the legislators have approved the Warsaw-Hague Convention for domestic flights in the Specific Act of 1985, and the Guardian Council as a supervisory authority has affirmed the statute and subsequently has not explicitly declared provisions of the Convention to be contrary to the *Shariah*, it can be inferred that it is possible to determine liability limits other than the *Diyah*. Thus liability for passengers' death or bodily injury sustained on domestic flights is also subject to the Convention's Article 22 on limitation of liability.

It can therefore be concluded that in Iran as an Islamic State, not only is there no obstacle to applying the Warsaw-Montreal regime to international flights, but the regime can also be made applicable to domestic flights. The Iranian legislature may interpret the regulation in a manner that would help pave the way for a uniform application of international regulations that balances the interests of the contracting parties. This can be a step towards uniformity of carrier's liability in international carriage by air.

5.6 Recommendations

Based on the conclusions explained above, the author puts forward the following proposals:

1. The drafters of private international air treaties should research different jurisdictions before submitting their reports and final drafts. The uniformity of treaties would be enhanced if they provide provisions and principles that include the common points of different jurisdictions and jurisprudences in order to achieve coherence of liability principles. In the past, the drafters of the international air carrier's liability regime such as the *CITEJA* on the

Warsaw Convention 1929 and the Secretariat Study Group of ICAO on the Montreal Convention 1999 proceeded from legal principles of civil and common law States. They disregarded other legal systems such as those of Islamic States, which also have special principles. One of the factors impeding the global uniformity of international rules governing air carrier's liability was the tendency to overlook the principles of liability in Islamic States that follow the *Shariah*. This could lead to inconsistency in air carrier's liability at the international level. It is therefore appropriate and important for the drafters to consider other jurisprudences, such as Islamic Law, in the future.

2. This study analyzed the Warsaw 1929-Montreal 1999 air carrier's liability regime and the *Shariah* in Iranian law. The *Shariah* is applied by different Islamic States, each of which has developed its own case law. It is therefore recommended that academic researchers study the principles of liability in other Islamic states in order to clarify their similarities and differences with the international system and to standardize international rules in the future pursuant to this approach.

3. The treaties had initially balanced the interests of carriers with those of passengers while bringing together the legal principles of States and overlooking differences between the various jurisdictions in order to achieve uniformity. They also attempted to develop international agreements to unify their conflict of laws in the interest of developing the air transport industry, which is beneficial for the same States. This makes it appropriate for the Islamic legislators to give priority to international provisions when there is a conflict between local law and international law depending on constitutional provisions regarding the implementation of international agreements, whether based on monism or dualism.³⁴ It is

³⁴ The terms monism and dualism are used to describe two different theories of the relationship between international law and national law. Monists accept that the internal and international legal systems form a unity.

therefore recommended that legislators of Islamic States such as the Parliament and the Guardian Council in Iran be more flexible when they approve and interpret private international air agreements.

4. Since the Specific Act of 1985 explicitly determines the limits of Iranian air carrier's liability for the operation of domestic flights which was based on the limits approved for international flights by the Warsaw-Hague Convention on the one hand, and compensation according to the *Diyah* provisions for all Iranian people on the other hand, there are contradicting points of view in Iranian jurisprudence. In practice, such conflicts have caused problems for the courts, claimants and airlines when determining liability for domestic air accidents. They were in doubt as to exclusivity of the Specific Act of 1985 for death or bodily injury. It seems to me that it is appropriate for the Iranian Parliament to amend the Specific Act of 1985. It is therefore recommended that the amended Act clearly states that it *exclusively* adopts the limited liability provisions stipulated in the Warsaw-Hague Convention and that this prevails over the *Diyah* regulation. Alternatively, the Parliament is recommended to abolish the Specific Act of 1985 and only apply the *Diyah* regulations to domestic flights.

The Parliament can remove the present ambiguity of the Act through either of the above-mentioned proposals. However, the author would give priority to the first proposal since the

In a pure monist State, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates the law into national law; and customary international law is treated as part of national law as well. International law can be directly applied by a national judge, and can be directly invoked by citizens, just as if it were national law. However, Dualists emphasize the difference between national and international law, and require the translation of the latter into the former. Without this translation, international law does not exist as law. International law has to be national law as well, or it is no law at all. A. Cassese, *International Law in a Divided World* (1992), 27; M. Akehurst, *A Modern Introduction to International Law* (1990), 45.

application of international regulations to domestic flights is a step towards uniformity of regulations throughout the world.

5. With reference to Chapter 4 where the author analyzed the Montreal Convention 1999 and the application of the *Shariah* in Iranian air carrier's liability, it is proposed that Iran adopts this Convention. This is for four reasons. Firstly, the development of air transport in the international arena is achieved by observing uniform international regulations. Secondly, it updates the Warsaw System and develops private international air law for air carrier's liability in accordance with technical, social and economic developments. Thirdly, up to 2011, 103 States have ratified it. Fourthly, the study confirmed that conflict between the provisions of the Montreal Convention 1999 and the *Shariah* can be resolved through the application of a specific statute by the Parliament such as the Specific Act of 1985. As a result, if Iran wishes to develop its air transport, it is advisable that the international Conventions, especially the Montreal Convention 1999, be incorporated in to domestic Iranian law.

Summary

The Warsaw Convention was primarily written with the two main legal systems that is common law and civil law in mind. Since the transport industry was then operating and growing mostly in European States, it was justifiable to tackle the issue of liability according to their legal systems. However, the period after the Second World War witnessed the emergence of new States, some of whose legal systems differ from the two prevailing systems. A large part of these new States had been Islamic States, mostly situated in the Middle East and North Africa and some in South East Asia. On the one hand, there is an increasing trend in Islamic States to apply Islamic law. On the other hand international air transport operations are fast growing in these States. Based on these two facts, if the Islamic states insist on implementing certain principles such as principles of compensation for death or bodily injury according to the *Shariah*, there would be a conflict between these principles and those of the international system of air carrier's liability. Consequently this conflict weakens the uniformity of the international regulation. Therefore, it is necessary to study the principles of liability in Islamic law and Islamic States in order to clarify their similarities and differences with the international system to help achieve the uniformity of international rules in the future.

The majority of Islamic States had been under the influence of civil law or common law and Islamic law. The legal system of Iran, for example, has been influenced by civil law and Islamic law.

The Iranian legal system is therefore a mixture of the two and their respective degrees of influence differ from one area of law to another. For instance, whilst liability for death or bodily injury follows the *Shariah*; obligation and trade law are under the influence of civil law. The basis of legal liability and compensation in Islamic law are partly different from the principles of civil law and common law. So, Islamic law differs from international instruments of air carrier's liability.

Iran ratified and gave effect to the Warsaw Convention 1929, The Hague Protocol 1955, and the Guadalajara Protocol 1961 for international flights in 1975. According to the Act 1985 entitled 'Determining the Scope of Liability of Iranian Air Carriers on Domestic Flights' in air transport accidents of domestic flights, Iran applies the provisions of limited liability in the Warsaw Convention as amended at the Hague in 1955.

This difference between the *Shariah* and the international system is crystallized when the provisions of the Warsaw, and later Montreal Conventions and those of Islamic law were simultaneously applied to domestic flights in Iran. This would be particularly relevant where there is a gap between the *Diyah* in the *Shariah* regulations and liability limits under the international system, thus causing a huge difference in the compensation levels. Therefore in order to unify liability rules at the international level, it is necessary to pay due attention to the Islamic legal system for which the most important concept is the *Diyah*.

Can the *Shariah*, like common law and civil law systems, compromise some of its regulations so as to enable a harmonious and fruitful coexistence with the international system? The main purpose of the current study is to explore the hypothesis that although Islamic law has its independent principles of liability, Islamic States can adopt international air carrier's liability in international flights and allow the two systems to coexist in domestic flights, irrespective

of the fact that such States have not been active in the drafting of most of these regulations. In so doing, the work focuses mainly on the legal system of Iran.

To answer this question and verify the hypothesis, the author provides five chapters. This thesis consists of five chapters. After presenting a general introduction to possibilities and challenges of uniformity of international regulations on air carrier's liability, in addition to the aim of study and methodology in Chapter 1, Chapter 2 discusses the prevailing legal systems that are the common law and civil law that have affected the Warsaw system. A close study of the principles underlying legal liability in these two systems would lead to an appreciation of their similarities and differences. This would in turn be very useful in gaining a better understanding of air carrier's liability in private international law especially since international commentators desired to use the rules of liability of the two systems in the new Convention to make it more comprehensive so as to achieve more uniformity. Further, an analysis of these two systems provides an important insight into the reasons for the collapse of the Warsaw System. It also helps make clear that in order to achieve uniformity within the framework of the Warsaw Convention, States adopted principles such as liability limitation, invalid contractual conditions, or the presumption of fault for death or bodily injuries which had no precedence in either of their pertinent legal systems.

Chapter 3 investigates the legal liability under the *Shariah* and Iranian law. The *Shariah* provides sufficient principles that make it a self-contained and independent system. The most important subject related to this study will be the *Diyah* as a legal principle and compensation for death or bodily injury. Chapter 3 also deals with air transport regulations in Iran. To comprehend the air carrier's liability system in Iran, one should understand the State's legal system and its legislators. *Shariah* principles were codified by the Islamic legislature due to

the demands of technological developments and the conditions of the Iranian society. The Iranian Parliament is not the only legislative body. Authorities such as the Guardian Council of the Constitution play important roles in codifying laws and regulations and their conformity with the *Shariah*.

The laws and regulations on air carrier liability in Iran are complex. When studying air carrier liability in Iran, attention should be paid to the principles of liability in the Civil Code, Commercial Code and Islamic Criminal Code, as well as applicable treaties as implemented in domestic law, and specific statutes. For passenger's death or bodily injury, in addition to the general rules of the Civil Code and the Commercial Code, as well as the Specific Act 1985 implementing the provisions of limited liability in the Warsaw-Hague Convention in Iranian law, one should refer to the Islamic Criminal Code. This Code, which follows the *Shariah*, provides special provisions for civil liability as well as criminal liability.

The most important issue in this Code is the determination of liability limits for death and bodily injury, which is in contradiction with the limited liability and unlimited liability for death and bodily injury in the Warsaw-Hague regime. Hence, the principles of liability for death or bodily injury in the Warsaw-Hague Convention and the *Shariah* collide in Iranian law. The wide gap between the *Diyah* and liability limits under this system causes a huge difference in the compensation levels for domestic and international flights. Familiarity with these principles is essential for comparing the principles of liability in the *Shariah* with air carrier's liability in international instruments in Chapter 4.

Chapter 4 deals with the general principles of liability that govern air carrier's liability in international instruments. There, the author analyses these principles and compares them with the *Shariah* principles. The Chapter 4 argues and demonstrates that the principles of air

carrier's liability in international treaties are neither static nor completely dependent on the common law and civil law systems. It is a dynamic system that continuously evolves. Therefore, States with diverse legal systems including common law, civil law and Islamic law, can adapt themselves to the principles of the international system. Chapter 4 explains that there are issues in the international system of air carrier's liability that are designed flexibly, so that States with different legal systems may investigate legal cases according to the principles of their respective legal systems.

Chapter 4 also deals with air carrier's liability for death or bodily injury in domestic flights, which operate under the influence of the *Shariah* and the Warsaw system. In addition to the Act 1985, the liability of air carriers for passenger's death or bodily injury is determined by the *Diyah* in the Islamic Criminal Code which places a special limitation on liability. As a result, there is a conflict between the *Diyah* and the compensation scheme under the Warsaw-Hague Convention for passenger's death or bodily injury (whereby limitation of liability was prescribed in Article 22 and unlimited liability in Article 25).

There is no judicial consensus with regard to liability for death or bodily injury in domestic flights. The Guardian Council of the Constitution in its interpretive opinion declared that the *Diyah* regulations should be applied to all Iranian citizens. Thus compensation should be meted out according to the *Diyah* regulations for Iranian air passenger's death or bodily injury in domestic flights. Courts have made different decisions based on this interpretive opinion. Some have accepted it and awarded compensation according to the *Diyah*, while others have focused their judgments on the Act 1985 which considers the Warsaw-Hague Convention enforced and ruled according to its Article 22. The author claims that regulations of the Warsaw-Hague Convention and the *Diyah* can be simultaneously applied to domestic

flights. Conflicting cases can be resolved through the application of contractual conditions, the *la zarar* principle, or the ratification of a specific statute.

Chapter 5 provides a general conclusion. It addresses the question of whether Islamic States, whose independent liability principles for death or bodily injury differ from those of the common law and civil law, are in a position to adopt the international system of air carrier's liability. Drawing on the discussion in previous Chapters, this Chapter concludes by highlighting that the *Shariah* is indeed consistent and able to co-exist with the liability principles of the Warsaw-Montreal regime. Also, Iran may adopt the Montreal Convention 1999. Any probable conflict between the provisions of this Convention and the *Shariah* can be resolved through the application of a specific statute by the Parliament.

DE AANSPRAKELIJKHEID VAN DE LUCHTVAARTMAATSCHAPPIJ, IN HET BIJZONDER ONDER IRAANS RECHT

Samenvatting

Het Verdrag van Warschau is opgesteld op basis van de twee voornaamste juridische systemen, namelijk 'Common Law' en 'Civil Law'. Aangezien de luchtvaart destijds vooral werd uitgevoerd en groeide in Europese landen was het gerechtvaardigd de aansprakelijkheid volgens hun juridische systemen te regelen. Echter, in de periode na de Tweede Wereldoorlog kwamen nieuwe landen en regio's op, waarvan enkele systemen hebben die verschillen van de heersende Westerse systemen. Een groot deel van deze nieuwe landen waren Islamitisch, vooral gelegen in het Midden-Oosten, Noord-Afrika en een paar in Zuid-Oost Azië.

Aan de ene kant is er een trend in Islamitische landen om het Islamitisch recht toe te passen. Aan de andere kant groeit het internationale luchtvervoer snel in deze landen. Wanneer derhalve Islamitische landen erop staan bepaalde voorschriften, zoals voorschriften over vergoeding voor dood of lichamelijk letsel volgens de *Shariah* toe te passen, zou er een conflict kunnen ontstaan tussen deze voorschriften en die van het internationale systeem van aansprakelijkheid van de luchtvervoerder, met als gevolg dat dit conflict de uniformiteit van de internationale regeling aantast. Daarom is het noodzakelijk de voorschriften voor aansprakelijkheid in de Islamitische regelgeving te bestuderen om hun overeenkomsten en verschillen met het internationale systeem duidelijk te maken en om de uniformiteit van internationale regels te handhaven.

De meerderheid van Islamitische landen past ‘Civil Law’ of ‘Common Law’, in combinatie met Islamitische regelgeving toe. Het wettelijk systeem van bijvoorbeeld Iran wordt beïnvloed door civiel recht en Islamitisch recht.

Het Iraanse juridische systeem is derhalve een mengsel van deze twee regimes die op verschillende wijze invloed uitoefenen op het luchtvervoer. Terwijl bijvoorbeeld aansprakelijkheid voor dood of lichamelijk letsel de *Shariah* volgt, vallen verplichtingen en handelsrecht onder invloed van het civiele recht. De basis van juridische aansprakelijkheid en vergoeding in het Islamitisch recht zijn deels verschillend van de voorschriften van ‘Civil Law’ en ‘Common Law’, met als gevolg dat het Islamitisch recht zich op die punten onderscheidt van de internationale verdragen betreffende de aansprakelijkheid van de luchtvervoerder.

Iran heeft het Verdrag van Warschau (1929), het Haagse Protocol (1955) en het Guadalajara Protocol (1961) voor internationale vluchten vanaf 1975 toegepast. Overeenkomstig de Iraanse Wet van 1985, getiteld “*Determining the Scope of Liability of Iranian Carriers on Domestic Flights*” past Iran bij luchtvaartongelukken op binnenlandse vluchten de voorschriften toe betreffende de beperkte aansprakelijkheid van het Verdrag van Warschau zoals gewijzigd in Den Haag in 1955.

Dit verschil tussen de *Shariah* en het internationale regime wordt duidelijk als de voorschriften van de Verdrag van Warschau en zijn opvolger, het Verdrag van Montreal (1999) en die van het Islamitische recht gelijktijdig worden toegepast op de uitvoering van binnenlandse vluchten in Iran. Bedoeld verschil is des te opvallender waar er een hiaat is tussen de *Diyah* in de *Shariah* regels en aansprakelijkheidsbeperkingen in het internationale systeem. Ten einde de internationale aansprakelijkheidsregels gelijk te schakelen met de

lokale regelgeving is het nodig om intensief aandacht te schenken aan het Islamitisch systeem, waarin het belangrijkste concept de *Diyah* is.

Kan de *Shariah* haar regels aanpassen aan ‘Common Law’ en ‘Civil Law’ beginselen om een harmonieus samenspel met het internationale regime te realiseren? Het voornaamste doel van deze studie is de vraag te onderzoeken of, hoewel het Islamitische recht zijn onafhankelijke voorschriften voor aansprakelijkheid heeft, Islamitische landen aansprakelijkheid voor schade ontstaan bij internationale vluchten kunnen aanvaarden, en de twee systemen op coherente wijze kunnen toepassen op schade ontstaan tijdens binnenlandse vluchten, ondanks het feit dat deze landen niet actief zijn geweest bij het opstellen van het merendeel van deze regels.

Hiervan uitgaande richt deze studie zich hoofdzakelijk op het juridisch systeem van Iran. De bovenstaande vragen worden behandeld aan de hand van vijf hoofdstukken.

Na een inleiding over mogelijkheden en vragen betreffende de uniformiteit van internationale regels voor de aansprakelijkheid van de luchtvervoerder, en over het doel en de methodologie van de studie in Hoofdstuk 1, bespreekt Hoofdstuk 2 de heersende juridische systemen, te weten het ‘Common Law’-systeem en ‘Civil Law’-systeem, die beide het Warschau Systeem hebben beïnvloed. Een nauwkeurige studie van de voorschriften die ten grondslag liggen aan de wettelijke aansprakelijkheid volgens deze twee traditionele systemen leidt tot een onderkenning van hun overeenkomsten en verschillen. Dit onderzoek is ook nuttig om de aansprakelijkheid in luchtvervoer onder het internationale privaatrecht te analyseren, vooral omdat internationale commentatoren de aansprakelijkheidsbeginselen van twee systemen wilden gebruiken om een hoger niveau van uniformiteit in het Verdrag van Montreal (1999) te bereiken. Verder verschaft deze analyse een belangrijk inzicht in de redenen voor de tekortkomingen van het Warschau systeem, terwijl die ook duidelijk maakt dat, ter wille van

de uniformiteit, landen voorschriften aannemen zoals beperking van aansprakelijkheid, ongeldige contractuele voorwaarden, of het vermoeden van schuld voor dood of lichamelijk letsel, welke voorschriften geen prioriteit hebben in hun eigen juridische kaders.

Hoofdstuk 3 onderzoekt de juridische aansprakelijkheid onder de *Shariah* en de Iraanse wetgeving. De *Shariah* voorziet in een opzichzelfstaand en onafhankelijk systeem van beginselen. Het belangrijkste onderwerp in verband met deze studie is de *Diyah* als een juridisch beginsel ter vergoeding van schade in geval van dood of lichamelijk letsel. Hoofdstuk 3 gaat ook over regels voor luchtvervoer in Iran. Om het aansprakelijkheidssysteem in Iran te begrijpen moet het juridisch systeem inclusief de wetgeving van het land worden uitgelegd. *Shariah* voorschriften die worden gecodificeerd door de Islamitische wetgevende macht worden aangepast aan de eisen van technologische ontwikkelingen en de voorwaarden van de Iraanse gemeenschap. Het Iraanse Parlement is niet het enige wetgevende lichaam. Instanties zoals de Raad van Toezicht op de Grondwet spelen een belangrijke rol in het codificeren van wetten en regels, en hun aanpassing aan de *Shariah*.

De wetten en regels voor de aansprakelijkheid in het luchtvervoer in Iran zijn ingewikkeld. Bij de bestudering van aansprakelijkheid bij luchtvervoer in Iran moet aandacht worden besteed aan de voorschriften voor aansprakelijkheid in het Burgerlijk Wetboek, het Wetboek van Handelsrecht en het Islamitisch Wetboek van Strafrecht, alsmede relevante verdragen die zijn opgenomen in het binnenlandse recht en in specifieke wetten. Voor dood of lichamelijk letsel van een passagier moet, in aanvulling op de algemene regels van het Burgerlijk Wetboek, het Wetboek van Handelsrecht en de Speciale Wet van 1985, die de bepalingen van beperkte aansprakelijkheid van het Verdrag van Warschau – zoals gewijzigd in Den Haag in de Iraanse wet heeft ingevoerd, ook rekening worden gehouden met het Islamitisch

Wetboek van Strafrecht. Dit Wetboek, dat de *Shariah* volgt, voorziet in speciale bepalingen voor zowel civiele als strafrechtelijke aansprakelijkheid.

Het belangrijkste punt in het laatstgenoemde Wetboek is de bepaling van aansprakelijkheidsbeperkingen voor dood en lichamelijk letsel die niet stroken met de beperkte aansprakelijkheid, en in bepaalde gevallen ongelimiteerde aansprakelijkheid voor dood en lichamelijk letsel zoals neergelegd in het Warschau - Den Haag regime. Immers, de voorschriften betreffende aansprakelijkheid voor dood en lichamelijk letsel in het Warschau - Den Haag regime en in de *Shariah* conflicteren met bepalingen van de Iraanse wet. Dat grote verschil tussen de aansprakelijkheidsbeperkingen van de *Diyah* enerzijds en die van het internationale systeem anderzijds veroorzaakt een enorm verschil in de niveaus van vergoedingen bij binnenlandse en internationale vluchten. Bekendheid met deze voorschriften is noodzakelijk om de voorschriften betreffende aansprakelijkheid in de *Shariah* te kunnen vergelijken met aansprakelijkheid van de luchtvervoerder onder internationale verdragen.

Hoofdstuk 4 behandelt de algemene beginselen aangaande de aansprakelijkheid van de luchtvervoerder onder internationale regelgeving. Daarin analyseert de auteur deze beginselen en vergelijkt ze met de *Shariah* beginselen. Dit hoofdstuk toont aan dat de beginselen over de aansprakelijkheid van de luchtvervoerder in internationale verdragen noch statisch, noch geheel afhankelijk zijn van 'Common Law' en 'Civil Law' systemen. Het is een dynamisch systeem dat zich steeds verder ontwikkelt. Daarom kunnen landen met verscheidene juridische systemen zoals 'Common Law', 'Civil Law' en 'Islamic Law' zich aanpassen aan de beginselen van het internationale regime. Hoofdstuk 4 legt ook uit dat er punten zijn in het internationale systeem van aansprakelijkheid van de luchtvervoerder, die flexibel zijn ontworpen, zodat landen met verschillende juridische systemen juridische vragen kunnen aanpassen aan hun respectievelijke wettelijke systemen. Dit hoofdstuk gaat ook over de

aansprakelijkheid van de luchtvervoerder voor dood of lichamelijk letsel bij binnenlandse vluchten die worden geregeld door de *Shariah* en het Warschau Systeem.

Naast de Wet van 1985 wordt de aansprakelijkheid van de luchtvervoerder voor dood of lichamelijk letsel van een passagier bepaald door de *Diyah* in het Islamitische Wetboek van Strafrecht, die een speciale beperking voor aansprakelijkheid oplegt, met als gevolg dat er een conflict bestaat tussen de *Diyah* en het vergoedingsschema volgens het Warschau Systeem voor dood of lichamelijk letsel van een passagier, in welk systeem beperking van aansprakelijkheid is neergelegd in Artikel 22 en ongelimiteerde aansprakelijkheid in Artikel 25.

Er is geen gerechtelijke consensus met betrekking tot de aansprakelijkheid voor dood of lichamelijk letsel bij binnenlandse vluchten. De Raad van Toezicht op de Grondwet verklaarde dat de *Diyah* regels moeten worden toegepast op alle Iraanse burgers, als gevolg waarvan vergoeding moet worden toegekend volgens de *Diyah* regels in geval van dood of lichamelijk letsel van een Iraanse passagier bij binnenlandse vluchten. Rechtbanken hebben verschillende beslissingen genomen die zijn gebaseerd op deze interpretatie door de Raad van Toezicht. Sommige rechtbanken hebben die geaccepteerd en vergoeding toegekend in overeenstemming met de *Diyah*, terwijl andere hun oordeel hebben gebaseerd op de Wet van 1985, die het Warschau - Den Haag regime als richtinggevend beschouwt en hebben derhalve gehandeld overeenkomstig Artikel 22 van deze verdragen. De auteur poneert dat de regels van het Warschau - Den Haag regime en de *Diyah* gelijktijdig kunnen worden toegepast bij binnenlandse vluchten. Tegenstrijdige zaken kunnen worden opgelost door gebruik te maken van contractuele voorwaarden, het *la zarar* beginsel of door de bekrachtiging van een bijzondere wet.

Hoofdstuk 5 geeft een algemene conclusie. Het onderzoekt de vraag of Islamitische landen waarvan beginselen voor aansprakelijkheid voor dood of lichamelijk letsel verschillen van ‘Common Law’ en ‘Civil Law’, in staat zijn het internationale systeem van aansprakelijkheid van de luchtvervoerder aan te nemen. Voortbordurend op de discussie in de voorafgaande hoofdstukken concludeert dit hoofdstuk met nadruk dat de *Shariah* inderdaad consistent is met de aansprakelijkheidsvoorschriften van het Warschau - Montreal regime, en dat Iran het Verdrag van Montreal zou kunnen ratificeren. Een mogelijk conflict tussen de voorschriften van het Verdrag van Montreal en de *Shariah* kan worden opgelost door gebruik te maken van een bijzondere wet die door het Parlement moet worden aanvaard.

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Appendix A

WHAT IS IN A NAME? (Note from Prof. Dr. P.C.C. Haanappel)

Liability regimes have received different names in different jurisdictions, and even within a single jurisdiction one author may use a name, term or expression that differs from another author.

The essence of this short note is to postulate that it is not the “name” that counts, but the liability regime as laid down in a law or treaty. This applies as well in general as in the case of the Warsaw 1929 / Montreal 1999 air carrier’s liability regime. In other words: look at the text, the words of the law / treaty rather than putting a “sticker”, a name on it. The latter approach may lead to confusion, as is perhaps best illustrated in air law in one of Bin Cheng’s articles, in (1981) VI Annals of Air and Space Law 3. *In casu*, what Bin Cheng (educated in the British legal system) calls absolute liability, Mircea Matte (educated in the Romanian and French legal systems, and not to be confused with his brother Nicolas) calls strict liability with respect to the Montreal Intercarrier Agreement 1966 (modifying the Warsaw Convention 1929 for traffic to/from/via the USA).

Common law is less “doctrinal” in nature than civil law. Judges and the laws they apply count more heavily than authors. In the literature what is “fault”, or to use a better term, “negligence”, is fairly clear, whether it needs to be proven by the plaintiff or disproved by the defendant. In the latter case, one can speak of a presumption of liability or a presumption of fault. In the case of the Warsaw Convention, it is probably best, on the basis of the words of the treaty itself, to speak of a presumption of liability which can be rebutted by the defendant by proving absence of negligence / fault.

Common law gets more “fuzzy” when it comes to absolute or strict liability. For most, absolute liability is a form of liability (for instance, for nuclear damage) where, once there is damage and causation, the defendant has no defenses at all (the opinion, for instance, of Mircea Matte). Strict liability then is no-fault liability where, nevertheless, the defendant has defenses available such as Act of God / fortuitous event, and own fault of the victim. But, where the defense of Act of God / fortuitous event is not available but the defense of own fault of the victim is, some (like Bin Cheng) speak of absolute liability. Again, nobody, it is submitted, is right or wrong: it is not the “word”, the expression that counts, but the actual liability regime as per treaty or law.

Curriculum vitae

Hamid Kazemi was born in Tehran, Iran in 1967. He studied Islamic law in the theological School in Tehran from 1983 to 1990. He studied law (LL.B) at the Faculty of Law of Tehran University and public international law (LL.M) at the Faculty of Law of Shahid Beheshti University in Tehran. His interest in air law, and the conflict between the *Shariah* and private international air law, took root in 1996 when he was completing his thesis on the role of international law in the investigation of air accidents. He obtained his LL.M degree in 1997.

Working for the legal bureau of the Civil Aviation Organization of Iran from 1994 to 2005 was an opportunity to be closely involved in and therewith learn about aspects of air law. When he decided to pursue a PhD in air law in 2005, he chose to work on the legal aspects of air carrier's liability for death and bodily injury.

Mr. Hamid Kazemi is now legal advisor and legal secretary of the Iranian Airlines Association.