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## 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 1929<sup>1</sup>

The first International Conference on Air Law was held in 1925 in Paris.<sup>2</sup> 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.<sup>3</sup>

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).<sup>4</sup>

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

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12 October 1929.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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,<sup>5</sup> 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.<sup>6</sup> Participating States modified the draft and finally signed the Warsaw Convention 1929 (the WC29).<sup>7</sup>

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.<sup>8</sup> This Convention recognized the conditions of the early 20<sup>th</sup> century and the common economic interests of customers and operators, determined the limitation of liability<sup>9</sup> on the one hand, and harmonized the civil law and common law rules on the other hand.<sup>10</sup> 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

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<sup>5</sup> 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading.

<sup>6</sup> See Minutes Warsaw 1929, *supra* note 4, at 185.

<sup>7</sup> 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>.

<sup>8</sup> See Ide, *supra* note 3, at 31.

<sup>9</sup> H. Drion, *Limitation of Liabilities in International Law* (1954) 12 - 44.

<sup>10</sup> See Minutes Warsaw 1929, *supra* note 4, at 12.

(MIA); and 8) The 1996 ATA Intercarrier Agreement Provisions Implementing the 1995 and 1996 IATA Intercarrier Agreement (IPA).<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> The claimants could achieve compensation in domestic law more than the limitation of liability in the WC29.<sup>14</sup> 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.<sup>15</sup> 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.

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<sup>11</sup> 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 Intercarrier 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 Intercarrier Agreement Provisions Implementing the 1995 and 1996 IATA Intercarrier Agreement will not be investigated..

<sup>12</sup> K. Beaumont, 'Proposed the Protocol to the Warsaw Convention of 1929', (1953) *Journal of Air Law and Commerce* 264, at 264-265.

<sup>13</sup> See Arts. 22 and 25 of the Warsaw Convention 1929.

<sup>14</sup> See Beaumont, *supra* note 12, at 264.

<sup>15</sup> *Ibid.*

1. The Hague Protocol<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

2. In the US, carriers were unlimitedly liable for compensation in domestic flights.<sup>19</sup> 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,<sup>20</sup> passengers on participating carriers going to, from, or with an agreed stopover in the United States, became subject to increased limitation of liability.<sup>21</sup>

In the 1966 Montreal Intercarrier Agreement provided strict liability<sup>22</sup> instead of presumption of liability as basis of liability.<sup>23</sup>

3. The execution of the 1966 Montreal Intercarrier Agreement paved the way for a concerted effort to update the terms of the Convention to reflect a modern legal and technological

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<sup>16</sup> 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 1<sup>st</sup> 1963.

<sup>17</sup> See Art. XI of The Hague Protocol 1955.

<sup>18</sup> See Arts. III, IV, and VI of The Hague Protocol 1955.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> CAB Press Release 66-61, May 13, 1966. The formal CAB order appears in 31 Fed. Reg. 7302 (1966)

<sup>22</sup> 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.

<sup>23</sup> 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.<sup>24</sup> In March 1971, the Guatemala City Protocol was signed by 21 States but did not enter into force.<sup>25</sup>

4. According to the international demand for revision of the air carrier's liability towards cargo, States<sup>26</sup> decided to revise air carrier's liability through a new system.<sup>27</sup> Additional Montreal Protocol No.4,<sup>28</sup> in addition to new provisions on E-ticketing, changed the basis of liability.<sup>29</sup>

5. The air transport industry in the 1990s achieved a strong global position.<sup>30</sup> Therefore, it was difficult to find strong arguments for protecting airlines in international air transport.<sup>31</sup> 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.<sup>32</sup> International efforts to re-establish a uniform system of liability did not cease thereafter. Finally the ICAO, according to IATA<sup>33</sup> and Regulations of the Council of

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<sup>24</sup> *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)

<sup>25</sup> 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.

<sup>26</sup> ICAO Doc 9134-LC/173-2, at 1- 64.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> See Art. IV of Additional Montreal Protocol No 4 of 1975.

<sup>30</sup> See Minutes Warsaw 1929, *supra* note 4, at 17.

<sup>31</sup> 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.

<sup>32</sup> *Ibid.*

<sup>33</sup> Essential Documents on International Air Carrier Liability (2<sup>nd</sup> Edition Issued by January 2004), IATA, Montreal –Geneva), at 68.

the European Union on air carrier's liability,<sup>34</sup> proposed a draft of the Montreal Convention 1999.<sup>35</sup>

#### 4.1.3 The Montreal Convention 1999

The drafters of the Montreal Convention 1999 (the MC99)<sup>36</sup> intended it to be a 'compromising convention of the international air law and the unification of private air law.'<sup>37</sup>

They intended to update the Warsaw System since the WC29 was adopted at a time when the aviation industry was in its infancy.<sup>38</sup> 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.<sup>39</sup>

In the light of technological developments and improved safety of air transportation, this reason for the limitation of liability carried less weight.<sup>40</sup> As a result, the drafters of the MC99 intended to establish fair and just compensation and unlimited liability for victims.<sup>41</sup> They, insofar as possible, followed the Warsaw System agreements which were applied by different countries, jurisdictions, and statutes.<sup>42</sup> They kept it intact except in cases in which the modifications helped uniformity and were in line with the international community's demands.<sup>43</sup>

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<sup>34</sup> EC Council Regulation No. 2027/97.

<sup>35</sup> ICAO DCW Doc No. 10.

<sup>36</sup> The Convention entered into force on November 4, 2003. Up to 2011, 102 states ratified it. <http://www.icao.int>.

<sup>37</sup> See Milde, *supra* note 32, at 156-7.

<sup>38</sup> ICAO Doc. 9775-DC/2, Vol. I.

<sup>39</sup> See Tompkins, *supra* note 19, at 27.

<sup>40</sup> ICAO Doc. 9775-DC/2, vol I.

<sup>41</sup> ICAO DCW Doc. No.10.

<sup>42</sup> See Tompkins, *supra* note 19, at 27-28.

<sup>43</sup> ICAO Doc. 9775-DC/2.C-WP/1038 1, at 2.

Therefore, the ICAO decided to consider the issue and held the Conference.<sup>44</sup> It proposed a new Convention that complied with the legal and economic conditions of States in international and domestic flights.<sup>45</sup> 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.<sup>46</sup>

Although the Montreal Convention replaced WC29 in 1999, the main principles of the WC29 remained almost intact.<sup>47</sup> 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.<sup>48</sup> 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.

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<sup>44</sup> ICAO DCW Doc. No.10; ICAO DCW Doc. No. 42.

<sup>45</sup> ICAO DCW Doc. No.17.

<sup>46</sup> ICAO DCW Doc. No. 2.

<sup>47</sup> See Tompkins, *supra* note 19, at 42.

<sup>48</sup> *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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> As noted by Haanappel:

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<sup>49</sup> Ibid.

<sup>50</sup> 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>.

<sup>51</sup> 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.'<sup>52</sup>

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.<sup>53</sup> 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'.<sup>54</sup>

Another example is in relation to the 1966 Montreal Intercarrier Agreement. Milde and Dempsey express that the WC29 as applied in the 1966 Montreal Intercarrier Agreement was

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<sup>52</sup> See Unpublished Note from Haanappel, 'What is in a Name', Appendix 1.

<sup>53</sup> 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.

<sup>54</sup> See footnote 52, *supra*.

still a fault system – there was not, therefore, an automatic application of liability.<sup>55</sup> Tompkins, however, mentions that the 1966 Montreal Intercarrier Agreement introduces strict liability,<sup>56</sup> while Bin Cheng calls it absolute liability.<sup>57</sup> 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 Intercarrier Agreement 1966 (modifying the Warsaw Convention 1929 for traffic to/from/via the USA).’<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup> On the other hand, in the case of no-fault liability, the element of fault, i.e. blameworthiness on the part of

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<sup>55</sup> See Dempsey and Milde, *supra* note 53 at 215.

<sup>56</sup> *Ibid.*, at 11.

<sup>57</sup> See Cheng, *supra* note 22, at 9.

<sup>58</sup> See footnote 52, *supra*.

<sup>59</sup> P. Cane, *The Anatomy of Tort Law* (1998), Chr. 2.

<sup>60</sup> 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.<sup>61</sup> The concept of strict liability assumes a causal relationship between the person held strictly liable and the damage.<sup>62</sup> It is a liability independent of wrongful intent or negligence. Therefore, absolute liability is stricter than strict liability.<sup>63</sup>

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.<sup>64</sup>

This principle was challenged during discussions in the third session of the CITEJA (Madrid 1928) and also the Warsaw Conference.<sup>65</sup> 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

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<sup>61</sup>See Planiol and Ripert, *supra* note 50, at 468.

<sup>62</sup>G. Viney, *Tort Law*, in G.A. Bermann and E. Picard, *Introduction to French Law* (2008), 249.

<sup>63</sup>M.A. Clarke, *Contracts of carriage by air*, (London, LLP, 2002), 136.

<sup>64</sup>See Viney *supra* note 62, at 250.

<sup>65</sup>*Ibid.*, at 21.

damage, it should be exempt from liability.<sup>66</sup> This theory is also supported by representative of Great Britain at CITEJA.<sup>67</sup>

The second theory which was founded at the end of the 19<sup>th</sup> century<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup>

After discussions, The CITEJA drafted Articles 23 and 24.<sup>71</sup> 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.’<sup>72</sup> 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

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<sup>66</sup> See Minutes Warsaw 1929, *supra* note 4, at 252.

<sup>67</sup> *Ibid.*, at 85.

<sup>68</sup> See *Compte rendu de la 3<sup>e</sup> session* (Minutes of the 3d session of CITEJA Madrid) (1928), 41.

<sup>69</sup> See Minutes Warsaw 1929, *supra* note 4, at 86.

<sup>70</sup> *Ibid.*, at 43.

<sup>71</sup> 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.*

<sup>72</sup> See Minutes of the 3d session of CITEJA, *supra* note 68, at 47.

fault and is inclined towards strict liability.<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> The French and the UK delegations re-insisted on modifying Article 22.<sup>76</sup> 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.<sup>77</sup>

Finally, Article 20 of the WC29 provides:<sup>78</sup>

‘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.’<sup>79</sup>

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<sup>73</sup> Ibid.

<sup>74</sup> See Minutes Warsaw 1929, *supra* note 4, at 40.

<sup>75</sup> Ibid.

<sup>76</sup> 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.

<sup>77</sup> Ibid.

<sup>78</sup> The translation of the French text of the Convention given here was taken from the British Carriage by Air Act of 1932.

<sup>79</sup> 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.<sup>80</sup>

As a result, States with different legal systems accepted it. For example, although Germany applied risk-based liability (strict liability) to domestic flights,<sup>81</sup> it should apply presumed liability on international flights.<sup>82</sup> 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.<sup>83</sup>

Under the common law, there is the rule which makes the common carrier an insurer of the safe carriage of goods.<sup>84</sup> Liability for passengers' death or bodily injury, on the other hand, depends on the legal concept of negligence.<sup>85</sup> 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

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<sup>80</sup> See footnote 52, *supra*.

<sup>81</sup> B.S. Markesinis, H. Unberath, and A. Johnston, *The German Law of Contract* (2006), 850.

<sup>82</sup> J. Zekoll and M. Reimann, *Introduction to German Law* (2005), 210-212.

<sup>83</sup> See Cane, *supra* note 59, at 2.

<sup>84</sup> O. Kahn-Freund, *The Law of Carriage by Inland Transport* (1965), 198-199.

<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup> Consequently, strict liability and unbreakable liability were introduced in the 1966 Montreal Intercarrier Agreement.<sup>89</sup>

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<sup>86</sup> R. Youngs, *English, French and German Comparative Law* (1998), 243.

<sup>87</sup> See Art. X of the Hague Protocol 1955.

<sup>88</sup> See Tompkins, *supra* note 19, at 5.

<sup>89</sup> 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 1933<sup>90</sup> 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.<sup>91</sup> This was despite the overwhelming support for strict liability among the other participating ICAO States.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup>

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

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<sup>90</sup> 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.

<sup>91</sup> Lowenfeld and Mendelson, *supra* note 23, at 558.

<sup>92</sup> 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.

<sup>93</sup> Lowenfeld and Mendelson, *supra* note 23, at 559-560.

<sup>94</sup> *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.<sup>95</sup> However, the Agreement finally accepted strict liability<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

4. States in the Guatemala conference following the 1966 Montreal Intercarrier Agreement changed the basis of liability. The Guatemala City Protocol 1971<sup>99</sup> was provided in order to control amounts for the compensations and to increase the limitation of liability limits.<sup>100</sup> It provided an unbreakable liability and a strict liability.<sup>101</sup> However, air carrier could exonerate itself from liability if it could prove that<sup>102</sup> 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)

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<sup>95</sup> ICAO, *Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and the Hague Protocol* (1966).

<sup>96</sup> Bin Cheng calls this 'absolute liability'. See Cheng, *supra* note 22.

<sup>97</sup> Lowenfeld and Mendelson, *supra* note 23, at 601.

<sup>98</sup> *Ibid.*

<sup>99</sup> 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.

<sup>100</sup> Bin Cheng, 'What is wrong with the 1975 Montreal Additional Protocol No.3', (1989) XIV(6) *Air and Space Law* 230, at 233.

<sup>101</sup> See Chr. 2.2.1.2, *infra*.

<sup>102</sup> 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.<sup>103</sup>

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.<sup>104</sup>

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.<sup>105</sup>

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

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<sup>103</sup> See Art. XX of the Guatemala City Protocol 1971; and ICAO Doc. 9131-LC/173-2 at 109-56 (1975).

<sup>104</sup> Ibid.

<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup>

In the second tier, the MC99 introduced presumed fault and unlimited liability for damages more than 100,000 SDRs.<sup>109</sup> 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.

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<sup>106</sup> Ibid.

<sup>107</sup> See Arts. 20 and 21 of the Montreal Convention 1999.

<sup>108</sup> ICAO Doc. 9775-DC/2, at 116.

<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup>

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

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<sup>110</sup> See Tompkins, *supra* note 19, at 35.

<sup>111</sup> See Dempsey and Milde, *supra* note 53, at 183.

<sup>112</sup> ICAO Doc. 9775-DC/2.

<sup>113</sup> 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.<sup>114</sup>

6.4. The MC99 provides unbreakable limit of liability for cargo damage.<sup>115</sup> 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.<sup>116</sup>

The MC99 adopts a liability for cargo which is identical to the Montreal Protocol No. 4.<sup>117</sup> In fact, the Convention follows common law. In common law, the carrier is not exempt from liability by proving the four defences;<sup>118</sup> 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

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<sup>114</sup> P. Martin et.al, *Shawcross and Beaumont on Air Law* Vol. VII (4<sup>th</sup> Ed.), 797 (hereinafter referred to as '*Shawcross and Beaumont on Air Law*').

<sup>115</sup> 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.

<sup>116</sup> See Art. 22 of the Montreal Convention 1999.

<sup>117</sup> See working paper C-WP/ 10420 14/6/96 for the 148<sup>th</sup> session of the ICAO Council in 1996, in *International Conference on Air Law* (Doc. 9775-DC/2), Vol. III.

<sup>118</sup> 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'.<sup>119</sup> 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.<sup>120</sup>

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.<sup>121</sup> 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.<sup>122</sup>

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.<sup>123</sup> 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.<sup>124</sup>

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.<sup>125</sup> The presumption of liability under the WC29 was practically, and in courts, treated as

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<sup>119</sup> *Emphasis added.*

<sup>120</sup> See Koning, *supra* note 105, at 321.

<sup>121</sup> *Ibid.*, at 322.

<sup>122</sup> 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.

<sup>123</sup> ICAO Doc. AT-WP/1769 41 1 I96.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

strict liability.<sup>126</sup> On the one hand, the air carrier was strictly liable for goods in the common law.<sup>127</sup> On the other hand, it also had a duty to exercise the highest due care and diligence on passengers' carriage.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> Indeed, civil law and common law systems follow a nuanced approach with a mixture of strict liability and fault liability elements.<sup>131</sup> 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.<sup>132</sup>

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<sup>126</sup> See Clarke, *supra* note 63, 136.

<sup>127</sup> *Ibid.*

<sup>128</sup> L.S. Kreindler, *Aviation Accident Law* (2001), 53-71.

<sup>129</sup> See Koning, *supra* note 105, at 319.

<sup>130</sup> *Ibid.*

<sup>131</sup> S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach', (2009) 107 *Michigan Law Review* 1583, at 1584.

<sup>132</sup> *Ibid.*



Traditionally, tort and contract are treated in nearly all civil law countries as aspects of the law of obligations.<sup>133</sup> Civil law countries opted for fault liability in contract law and tort,<sup>134</sup> while common law countries opted for strict liability in contract and negligence in tort.<sup>135</sup> Yet this impression is the result of too much abstraction on both sides.<sup>136</sup> 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.<sup>137</sup>

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.<sup>138</sup>

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.<sup>139</sup> According to the general rules, the individuals are bound to

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<sup>133</sup> B. Whittaker, *Principles of French Law* (2007), 5.

<sup>134</sup> 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.

<sup>135</sup> See Chr. 2, *supra*.

<sup>136</sup> See Grundmann, *supra* note 131, at 1585.

<sup>137</sup> *Ibid.*

<sup>138</sup> See Chr. 3, *supra*.

<sup>139</sup> 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.<sup>140</sup> But in exceptional cases, for example, when a contract exists between the parties, they can change the basis of liability to strict liability<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup> 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.<sup>144</sup> In conclusion, Islamic law in Iran modified the *Shariah* rules and accepted presumption of liability.<sup>145</sup>

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

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<sup>140</sup> See Arts. 50, 493, 516, 556, 577, 584 and, 640 of the Iranian Civil Code.

<sup>141</sup> See Arts. 10 and 642 of the Iranian Civil Code.

<sup>142</sup> See Chr. 3, *supra*.

<sup>143</sup> S. Amin, *Remedies for Breach of Contract in Islamic and Iranian Law* (1984), 28.

<sup>144</sup> See Arts. 374 and 378 of the Iranian Commercial Code.

<sup>145</sup> See Art. 386 of the Iranian Commercial Code.

liable for paying the *Diyah* that does not depend on his fault.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> 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

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<sup>146</sup> 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.

<sup>147</sup> See Art. 295 (1) of the Iranian Islamic Criminal Code.

<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup> This wording determines

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<sup>149</sup> See Art. 374 of the Iranian Commercial Code.

<sup>150</sup> 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.

<sup>151</sup> 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’.<sup>152</sup>

However, the MC99 determines on the one hand, four restricted defences for cargo,<sup>153</sup> 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.<sup>154</sup>

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 interpretation<sup>155</sup>, 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.<sup>156</sup>

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

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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.

<sup>152</sup> *Shawcross and Beaumont on Air Law, supra* note 114, at 455.

<sup>153</sup> See Art. 18 of the Montreal Convention 1999.

<sup>154</sup> See *Shawcross and Beaumont on Air Law, supra* note 114, at 453.

<sup>155</sup> 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).

<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup> 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.<sup>159</sup>

## 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.<sup>160</sup> 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),<sup>161</sup> the inherent vice or defect of the goods, or the negligence of the owner of the goods. It is

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<sup>157</sup> G.R Sullivan, ‘Codification of Air Carrier Liability by International Convention’, (1936) *Journal of Air Law* 1, at 20.

<sup>158</sup> *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) .

<sup>160</sup> See Dempsey and Milde, *supra* note 53, at 68.

<sup>161</sup> 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.<sup>162</sup>

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.<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup> 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.<sup>166</sup>

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.<sup>167</sup> 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

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<sup>162</sup> H.G. Beale (eds.), *Chitty on Contracts Vol. II* (2004), 550; See Viney, *supra* note 62, *spara.* 36-010.

<sup>163</sup> *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1049-1050 [205 Cal.Rptr. 211].

<sup>164</sup> *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].

<sup>165</sup> *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9<sup>th</sup> Cir. 2002); See also G. O. Dycstra and L. G. Dycstra, *The Business Law of Aviation* (1946), 300-301.

<sup>166</sup> P.S. Dempsey and L.E. Gesell, *Air Transportation (Foundation for the 21<sup>st</sup> Century)* (1997), 672.

<sup>167</sup> See Planiol and Ripert, *supra* note 50, at 512.

liable.<sup>168</sup> 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.<sup>169</sup> 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.<sup>170</sup> 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*.<sup>171</sup> In general, the *Shariah* recognizes the theory of changed circumstances and

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<sup>168</sup> See Chr. 2, *supra*.

<sup>169</sup> See Miller, *supra* note 53, at 57.

<sup>170</sup> *Haddad v. Cie Air-France*, 179 RFDA 342 (Cass. 16 Feb. 1982).

<sup>171</sup> 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.<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> In order for a carrier to be exempted from liability, the event should be unpredictable and unpreventable.<sup>175</sup> 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.<sup>176</sup> It includes any cause that is unrelated to the carrier that causes non-performance of obligation.<sup>177</sup>

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

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<sup>172</sup> Ibid., at 26-27.

<sup>173</sup> M. Esmaili, *Force Majeure* (1381 A.H. 2002), 123.

<sup>174</sup> See Arts. 277, 229, and 230 of the Iranian Civil Code.

<sup>175</sup> Ibid.

<sup>176</sup> See Art. 386 of the Iranian Commercial Code.

<sup>177</sup> 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*.<sup>178</sup>

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.<sup>179</sup> 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.<sup>180</sup> 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.<sup>181</sup>

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

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<sup>178</sup> See Art. 230 of the Iranian Civil Code.

<sup>179</sup> See Drion, *supra* note 9, at 40.

<sup>180</sup> See Minutes Warsaw 1929, *supra* note 4, at 86.

<sup>181</sup> *Ibid*, at 13.

uniformity of liability limits.<sup>182</sup> The argument was never recognized as an admissible theory for justifying limited liability in air law.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> Liability limits were considered as a counterpart of an aggravated liability system imposed on air carriers at that time.<sup>186</sup>

The WC29 limited internationally the liability for death or bodily injury to 125,000 Poincaré francs,<sup>187</sup> approximately USD 8,300.<sup>188</sup> 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

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<sup>182</sup> See Minutes of the 3d session of CITEJA, *supra* note 68, at 45.

<sup>183</sup> See Minutes Warsaw 1929, *supra* note 4, at 82.

<sup>184</sup> 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.

<sup>185</sup> See Beaumont, *supra* note 12, at 223.

<sup>186</sup> CITEJA Doc.31, at 2R.C.1952, I, 129 (1930 Mexico); see Drion, *supra* note 9, at 29-30.

<sup>187</sup> See Art 22 of Warsaw Convention 1929.

<sup>188</sup> 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.<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup>

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.<sup>192</sup> Finally,<sup>193</sup> in the first tier, the MC99 imposed strict liability for damages up to SDR 100,000<sup>194</sup> and in the second tier introduced presumed fault and unlimited liability for remedies more than 100,000 SDRs.<sup>195</sup>

## **(ii) The *Shariah***

The *Shariah* distinguishes liability for property from liability for death or bodily injury. It introduces unlimited liability for damaged goods<sup>196</sup> 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

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<sup>189</sup> See Dempsey and Milde, *supra* note 53, at 17.

<sup>190</sup> Ibid.

<sup>190</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> See Arts. XI and VIII of the Hague Protocol 1955 and Art. IV of the Guatemala City Protocol 1971.

<sup>192</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 132.

<sup>193</sup> See Dempsey and Milde, *supra* note 53, at 41-42.

<sup>194</sup> See Art.21 of the Montreal Convention 1999.

<sup>195</sup> 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.

<sup>196</sup> A. Gorji, *Maqalat -e- Hoqooqi (Legal Essays) Vol. II* (1375 A.H. 1996), 247.

goods for compensation in death of bodily injury.<sup>197</sup> 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 ebn-e-Abi Taleb<sup>198</sup> ruled that it could, equally well, be paid in gold coinage.<sup>199</sup>

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.<sup>200</sup> 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.<sup>201</sup>

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.<sup>202</sup> These opinions affected different court judgments.<sup>203</sup>

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<sup>197</sup> M. Mirsaeidi, *Mahiat -e- Hoqooqi -e- Diyah* (1373 A.H. 1993), 42.

<sup>198</sup> See 3.2, *supra*.

<sup>199</sup> *Ibid*, at 28.

<sup>200</sup> 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.

<sup>201</sup> See 3.4.5.4, *supra*.

<sup>202</sup> *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.<sup>204</sup>

1.2. The WC29 and the *Shariah* both accept limited liability for death or bodily injury.<sup>205</sup> 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.<sup>206</sup> 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.<sup>207</sup> 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 formalities<sup>208</sup> and in the case of wilful misconduct.<sup>209</sup>

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

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<sup>203</sup> M. Ashouri, *Aein -e- Dadrasi-e- Jazaei Vol I* (1385 A.H. 2006), 241.

<sup>204</sup> See Art. 22 of the Warsaw Convention 1929.

<sup>205</sup> M.J. Hosseini Amili, *Miftah al-Kiramah Vol.I* (1410 A.H. 1989), at 357.

<sup>206</sup> See 3.4.5.4, *supra*.

<sup>207</sup> A. Edris, *Avaz* (1377A.H. 1998), 7.

<sup>208</sup> See Arts. 3 and 4 of the Warsaw Convention of 1929.

<sup>209</sup> 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.<sup>210</sup>

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.<sup>211</sup> 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.<sup>212</sup> However, the MC99 accepts a two tier liability regime (unlimited liability). Principally, the liability for passengers' death or bodily injury is unlimited.<sup>213</sup>

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.<sup>214</sup>

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.

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<sup>210</sup> 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.

<sup>211</sup> See Art. 21 of the Montreal Convention 1929.

<sup>212</sup> See Edris, *supra* note 207, at 7.

<sup>213</sup> See Arts. 3 and 25 of the Warsaw Convention 1929.

<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup>

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.<sup>217</sup> The vagueness of the concept of wilful misconduct in this Article caused a lack of uniformity in its interpretation.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> Further,

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<sup>215</sup> See Minutes Warsaw 1929, *supra* note 4, at 34.

<sup>216</sup> *Ibid.*

<sup>217</sup> 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.

<sup>218</sup> See Drion, *supra* note 9, at 202.

<sup>219</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 474.

<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup> 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.<sup>224</sup> The Guatemala City Protocol 1971 and the Additional Montreal Protocol No. 4 of 1975 provided unbreakable liability.<sup>225</sup> The main idea was that breaking the limitation of liability caused lengthy, costly

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<sup>221</sup> 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.

<sup>222</sup> *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.

<sup>223</sup> 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.

<sup>224</sup> *Ibid.*, at 475. See Art. XIV of the Hague Protocol 1955.

<sup>225</sup> See Art. X of the Guatemala City Protocol of 1971 and Art. IX of Montreal Protocol No 4 of 1975.

and very inefficient litigations.<sup>226</sup> As a result, the claim of wilful misconduct was an advantage neither for air carriers nor customers.<sup>227</sup> 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’.<sup>228</sup>

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...’.<sup>229</sup>

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 30<sup>th</sup> 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.<sup>230</sup>

Consequently, the MC99 admitted wilful misconduct just for removing and excluding limitation of liability for damaged baggage and delay.<sup>231</sup> The MC99 provides that the

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<sup>226</sup> See Hickey JR, *supra* note 223, at 606.

<sup>227</sup> ICAO DCW Doc. No. 3.

<sup>228</sup> See Tompkins, *supra* note 19, at 111.

<sup>229</sup> See ICAO Doc. 9775-DC/2, at 40 and, ICAO Doc. C-WP/10862, at 120.

<sup>230</sup> See International Conference on Air Law, Montreal 10-28 May 1999, Vol. II documents (Doc. 9775-DC/2), at 20 (DCW Doc. No. 3).

<sup>231</sup> *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.<sup>232</sup> Therefore, intentional conduct or recklessness only applies to the delay in the carriage of passengers and baggage.<sup>233</sup>

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.<sup>234</sup>

1. Regarding liability for damaged baggage and goods in the *Shariah*, firstly liability is based on fault.<sup>235</sup> Secondly, damage should be compensated totally.<sup>236</sup> 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.

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<sup>232</sup> See Art. 22(5) of the Montreal Convention 1999.

<sup>233</sup> See Dempsey, *supra* note 115, at 134.

<sup>234</sup> M. Amani, 'A Comparative Study of Fraud and Gross Negligence of Carrier', (1385 A.H. 2006) XIII *Majaleh Feqh Va Hoghogh* 70, at 89.

<sup>235</sup> See Najafi, *supra* notes 146, Vol. 17, at 517.

<sup>236</sup> 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*).<sup>237</sup> 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.<sup>238</sup>

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*).<sup>239</sup> 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.<sup>240</sup> However, the WC29 only accepts unlimited liability for wilful misconduct.<sup>241</sup> As a result, wilful misconduct triggers unlimited liability in both.

b) The *Shariah* accepts unlimited liability for death or bodily injury where firstly an

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<sup>237</sup> See Najafi, *supra* notes 146, Vol. 17, at 517.

<sup>238</sup> See Kho'i, *supra* note 139, at 221.

<sup>239</sup> See Chr. 3.4.5.1, *supra*.

<sup>240</sup> *Ibid*.

<sup>241</sup> See Art. 25 of the Warsaw Convention 1999.

intentional act occurs, and secondly it is agreed upon between the claimant and the defendant.<sup>242</sup> 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.<sup>243</sup>

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.<sup>244</sup>

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.<sup>245</sup>

#### **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.

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<sup>242</sup> See Chr. 3.4.5.4, *supra*.

<sup>243</sup> *Ibid*.

<sup>244</sup> See Art. 22 of the Montreal Convention 1999.

<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup>

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,<sup>248</sup> 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.<sup>249</sup> In conclusion, the drafters did not accept contractual conditions that relieve the carrier of liability or let them fix a lower limit.<sup>250</sup>

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.<sup>251</sup> In the United Kingdom, these conditions were also restricted by specific statutes.<sup>252</sup> A similar situation can also be observed

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<sup>246</sup> P.B. Larsen, J. C. Sweeney, and J. E. Gillic, *Aviation Law, Cases, Law and Related Sources* (2006), 454.

<sup>247</sup> See Minutes Warsaw 1929, *supra* note 4, at 47.

<sup>248</sup> See Chr. 2, *supra*.

<sup>249</sup> See Art. 23 of the Warsaw Convention 1929.

<sup>250</sup> See Minutes Warsaw 1929, *supra* note 4, at 34-47.

<sup>251</sup> See G. O. Dycstra and L. G. Dycstra, *supra* note 165, at 102.

<sup>252</sup> See Beale, *supra* note 162, para. 36-010.

in civil law countries.<sup>253</sup> Therefore, the courts have, in recent years, tended to reject these conditions for the benefit of passengers.<sup>254</sup>

## **(ii) The *Shariah***

In the *Shariah*, exemptions from liability are recognized as valid.<sup>255</sup> 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.<sup>256</sup>

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.<sup>257</sup> In general, both the Iranian Commercial Code and the Iranian Civil Code accept contractual conditions.<sup>258</sup> 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.<sup>259</sup> The Commercial Code also provides that parties of a contract can agree upon a sum less or more than the total value of goods.<sup>260</sup>

However, the Supreme Court in its judgment<sup>261</sup> 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

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<sup>253</sup> See Chr. 2, *supra*.

<sup>254</sup> K. Freund and L. Rudden, *A Source-book on French Law* (1991), 298-299.

<sup>255</sup> M. Gharavi Ashtiani, *Ejareh dar Sharh al- Lum'ih Vol. I* (1309 A.H. 1930), 34.

<sup>256</sup> S.M.K. Yazdi Tabatabaei, *al- Urwat al- Wusqā* (1404 A.H. 1983), 332.

<sup>257</sup> N. Katuzian, *Zeman Qahri (Masoliyat -e-Madani )* (1369), 670.

<sup>258</sup> R. Eskini, 'Shart -e- Mojazat dar Qarardad -e- Beinolmelali', ( 1377 A.H. 1988) 9 *Majale Hoqooqi*, 45, at 68-69.

<sup>259</sup> See Art. 230 of the Civil Code.

<sup>260</sup> See Arts. 386 and 387 of the Iranian Commercial Code.

<sup>261</sup> 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.<sup>262</sup> The Supreme Court held that except in cases mentioned explicitly in law, the carrier is liable in full for events and faults that happen.<sup>263</sup>

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.<sup>264</sup> 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.

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<sup>262</sup> T. Erfani, *Hoqooq -e-Madani dar Qarardad -e-hamle Jaddei va reili* (1385 A.H. 2006), 275.

<sup>263</sup> Case No. 27/4/28-644 Supreme Court.

<sup>264</sup> 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.<sup>265</sup> 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.<sup>266</sup> The uncertainties of events can dictate the outcomes of important legal developments.<sup>267</sup> These terms were therefore left to court decisions.<sup>268</sup>

### 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

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<sup>265</sup> See Tompkins, *supra* note 19, at45-6.

<sup>266</sup> *Ibid.*, at 125.

<sup>267</sup> *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).

<sup>268</sup> 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.<sup>269</sup> 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.<sup>270</sup> Therefore, they provide that the claimant for death of passengers should be determined under national law.<sup>271</sup>

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.<sup>272</sup>

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.<sup>273</sup> 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*

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<sup>269</sup> 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.

<sup>270</sup> E. Giemulla, et. al., *The Warsaw Convention Annotated: A Legal Handbook* (2000), 9.

<sup>271</sup> *Ibid.*, at 52.

<sup>272</sup> Minutes Warsaw 1929, *supra* note 4, at 45.

<sup>273</sup> 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.*<sup>274</sup> 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.<sup>275</sup>

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.<sup>276</sup> 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.<sup>277</sup>

#### **(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.<sup>278</sup>

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

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<sup>274</sup> *Zicherman v. Korean Airlines Co. Ltd.* (94-1361), 516 U.S. 217 (1996).

<sup>275</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 705- 705A.

<sup>276</sup> L. Goldhirish, *The Warsaw Convention Annotated: A Legal Handbook* (2000), 146.

<sup>277</sup> See Miller, *supra* note 53, at 251.

<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup> Also, it is not possible for the deceased (passenger) to change his beneficiaries or their respective shares.<sup>281</sup>

In fact, inheritance is a relation between two persons where on the death of one, the other inherits from him.<sup>282</sup> Inheritance is based on various degrees of kinship. Heirs of the lower categories take an inheritance when no person of a higher category exists.<sup>283</sup> 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.<sup>284</sup> The determining factor in total exclusion from

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<sup>279</sup> M, Shahidi, *Ers*, (2003), 15.

<sup>280</sup> See Art. 959 of the Iranian Civil Code.

<sup>281</sup> See Shahidi, *supra* note 279, at 251.

<sup>282</sup> See Art. 861 of the Iranian Civil Code.

<sup>283</sup> See Art. 863 of the Iranian Civil Code.

<sup>284</sup> 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.<sup>285</sup>

Inheritance law applies to all Iranian citizens regardless of their place of domicile.<sup>286</sup> 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.<sup>287</sup> Foreign nationals in Iran are bound by the substantive laws and decrees of that national's own State, including the rights of inheritance.<sup>288</sup>

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.<sup>289</sup> 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

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<sup>285</sup> See Arts. 888 and 940 of the Iranian Civil Code.

<sup>286</sup> 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.

<sup>287</sup> See Art. 5 of the Iranian Civil Code.

<sup>288</sup> See Art. 7 of the Iranian Civil Code.

<sup>289</sup> Ibid.

between Iran and the concerned foreign State.<sup>290</sup> 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,<sup>291</sup> 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’.<sup>292</sup> 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.<sup>293</sup> The definition and interpretation of the term is left to the courts.

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<sup>290</sup> Ibid.

<sup>291</sup> See Haanappel, *supra* note 273, at 69-75.

<sup>292</sup> Won-Hwa Park, ‘Use of the Terms “Accident” and “Incident” in Air Law’, (1990) XV *Annals of Air and Space Law* 198, at 201.

<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup> 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.<sup>296</sup> 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.<sup>297</sup> However, the changing times effectively pressured the courts in the United States to expand air carrier’s liability.<sup>298</sup> They must know firstly if an accident has taken place according to the Convention, and secondly, what is the exact definition of the accident.<sup>299</sup>

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

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<sup>294</sup> See Tompkins, *supra* note 19, at 154-157.

<sup>295</sup> *MacDonald v. Air Canada* 439 F. 2d. 1402 (1<sup>st</sup> Cir. 1971) and see: *Air France v. Saks* 724 F.2d 1383 (9<sup>th</sup> Cir. 1984), rev'd 470 U.S. 392 (1985).

<sup>296</sup> See Goldhirish, *supra* note 276, at 215.

<sup>297</sup> *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3rd Cir. 1978). See Dempsey and Milde, *supra* note 53, at 68.

<sup>298</sup> 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.

<sup>299</sup> *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.<sup>300</sup> They restricted its domain to aviation risks and the control exercised by the air carrier over the accident.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup>

By adopting the narrow definition, the WC29 distinguishes between liability in air accidents with the traditional tort liability in the concerned countries.<sup>304</sup> 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.<sup>305</sup> 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

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<sup>300</sup> See Dempsey and Milde, *supra* note 53, at 211.

<sup>301</sup> *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).

<sup>302</sup> *Warshaw v. Trans World Airline*, 442F. Supp 400(E.D.Pa 1977).

<sup>303</sup> See Ciobanu , *supra* note 298, at 12.

<sup>304</sup> *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).

<sup>305</sup> See Ciobanu , *supra* note 298, at 13.



its equipment.<sup>306</sup> 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.<sup>307</sup>

## 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.<sup>308</sup> 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”.<sup>309</sup> This definition explains the cause of the accident.<sup>310</sup> 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.<sup>311</sup> 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.<sup>312</sup>

The definition given by the French legal system for accident was principally identical with the definition in England,<sup>313</sup> and was similar to the *Saks* case.<sup>314</sup> For instance, the French Supreme Court in the *Haddad* case did not limit the accident to mechanical accidents

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<sup>306</sup> Ibid.

<sup>307</sup> Ibid., at 88.

<sup>308</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 643-641.

<sup>309</sup> *Air Franc v. Saks*, 470 U.S. 392 (1985).

<sup>310</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 631-632.

<sup>311</sup> Ibid.

<sup>312</sup> *Air Franc v. Saks*, 470 U.S. 392; (1985). *Gezzi v. British Airways*, 991 F2d 603 (9<sup>th</sup> Cir. 1993).

<sup>313</sup> *Société Camat v. Duboscq* (Cour de cass, 6 December 1988), (1988) 42 RFDA 381.

<sup>314</sup> *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.<sup>315</sup> 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.<sup>316</sup>

Under the *Saks* case, there was no need for the occurrence to be fortuitous, unexpected or in any way abnormal.<sup>317</sup> 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.<sup>318</sup>

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,<sup>319</sup> inaction of the air carrier,<sup>320</sup> turbulence, some

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<sup>315</sup> *Haddad v. Cie Air-France*, 179 REFDA 342 (Cass. 16 Feb. 1982).

<sup>316</sup> Convention on International Civil Aviation Signed at Chicago, On 7 December 1944. ICAO Doc.7300/7 (7th ed.–1997).

<sup>317</sup> Won-Hwa Park, *Supra* note 292, at 202.

<sup>318</sup> See Goldhirish, *supra* note 276, at 87.

<sup>319</sup> *Langadinos v. American airlines*, 199 F3d 68 (1st Cir., 2000); *Wallace v. Korean air*, 214 F.3d 293, 296 (2d Cir. 2000).

<sup>320</sup> *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9<sup>th</sup> Cir. 2002).

of the events that happen to passengers in the cabin<sup>321</sup> such as supply of infected food which causes food poisoning, or food contaminated in other ways,<sup>322</sup> and hijacking and terrorist acts.<sup>323</sup> 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.<sup>324</sup>

#### **(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.<sup>325</sup> Accordingly, carriers are requested to exert their best efforts to transport

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<sup>321</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 649.

<sup>322</sup> *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).

<sup>323</sup> *Stone v. Continental Airlines*, 2005 N.Y. Misc. Lexis 5514 (App. Term, 1<sup>st</sup> Dep't 2005).

<sup>324</sup> *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.

<sup>325</sup> 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.<sup>326</sup>

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,<sup>327</sup> or if it arises from a risk inherent in air travel,<sup>328</sup> or if the injury is caused by the unusual, unexpected and abnormal operation of the aircraft.<sup>329</sup> 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.<sup>330</sup>

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.<sup>331</sup> 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.<sup>332</sup> Therefore, the *Shariah* always demands a causal link between the action of the carrier and the death or bodily injury.

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<sup>326</sup> Ibid.

<sup>327</sup> *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y. 1992).

<sup>328</sup> *Maxwell v. Aer Lingus Ltd.*, 122F.2d 210, 213 (D. Mass.2000).

<sup>329</sup> *Air France v. Saks*, 470 U.S. 392, 406 (1985).

<sup>330</sup> See Najafi, *supra* note 146, at 94.

<sup>331</sup> See Katuzian, *supra* note 257, at 635.

<sup>332</sup> 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,<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup>

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

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<sup>333</sup> See Art. 17 of the Warsaw Convention 1929 and the Montreal Convention 1999.

<sup>334</sup> See Goldhirish, *supra* note 276, at 85.

<sup>335</sup> 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.<sup>336</sup> The French court in *Mache c. Air France*<sup>337</sup> 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.<sup>338</sup> 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)<sup>339</sup> 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.<sup>340</sup> 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.<sup>341</sup> Secondly, the carrier is expected to provide a highest due care to passengers.<sup>342</sup> Where this care is not extended, the carrier is

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<sup>336</sup> See Miller, *supra* note 53, at 140.

<sup>337</sup> *Maché c. Air France* 1961 RFDA 283 and RCA 292.

<sup>338</sup> H. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* (1981), 152.

<sup>339</sup> *Adatia v. Air Canada* (1992) 2 S & B Av R VII/63, CA.

<sup>340</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 720.

<sup>341</sup> *MacDonald v. Air Canada*, 439 F2<sup>nd</sup> 1402 (1<sup>st</sup> Cir. 1971).

<sup>342</sup> See Chr. 2, *supra*.

liable. This intense care which is expected from the carrier leaves its impact on the period it is liable.<sup>343</sup>

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.<sup>344</sup> The court in the *Price v. British Airways* case paid attention to the operation of the aircraft<sup>345</sup> and the court in *Maxwell v. Aer Lingus Ltd* paid attention to the risks inherent in air travel.<sup>346</sup> 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.<sup>347</sup>

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.<sup>348</sup> 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.<sup>349</sup>

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<sup>343</sup> A. Lowenfeld, *Aviation Law* (1981), at 2-6.

<sup>344</sup> *Ibid.*, at 685-6.

<sup>345</sup> *Price v. British Airways*, 1992 WL 170679 (S.D.N.Y. 1992).

<sup>346</sup> *Maxwell v. Aer Lingus Ltd.*, 122F.2d 210, 213 (D. Mass.2000).

<sup>347</sup> *Husain v. Olympic Airways*, 316 F3d 829 (9<sup>th</sup> 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.

<sup>348</sup> 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).

<sup>349</sup> 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.<sup>350</sup>

In special circumstances, the courts of the United States defined the operations of embarking and disembarking broadly.<sup>351</sup> 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.<sup>352</sup>

In *Air France v. Gilberto*,<sup>353</sup> 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.<sup>354</sup>

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.<sup>355</sup>

The Court of Appeal in the *McDonald v. Air Canada* case in the first circuit held that the

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<sup>350</sup> *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).

<sup>351</sup> *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.

<sup>352</sup> *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.

<sup>353</sup> *Air France v. Gilberto*, 15 Avi 17,429, 1978 USAvR 505, Illinois Supreme Court.

<sup>354</sup> See Giemulla et. al., *supra* note 270, at 33.

<sup>355</sup> 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.<sup>356</sup> 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.<sup>357</sup>

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.<sup>358</sup>

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.<sup>359</sup> 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.<sup>360</sup> 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.

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<sup>356</sup> *MacDonald v. Air Canada*. 11 Avi.18, 029 (1<sup>st</sup> Cir. 1971); Miller, *supra* note 53, at 140.

<sup>357</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 722.

<sup>358</sup> *O’Brein v. American Airlines*, 916 F2d 709, US Court of Appeals, (2<sup>nd</sup> Cir. 1990). *Husserl v. Swiss Air Transport* co.13 Avi 17,603 (and 388 Fsupp.1238; 1975 AL 262) (1975); Giemulla et. al., *supra* note 270, at 28.

<sup>359</sup> *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).

<sup>360</sup> 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.<sup>361</sup> 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.<sup>362</sup> 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.<sup>363</sup> 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.<sup>364</sup>

**(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.<sup>365</sup> 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.<sup>366</sup> As a result, as soon as the air carrier causes the death or bodily injury of passengers, it becomes liable.

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<sup>361</sup> Diedreiks-Verschoor, *An Introduction to Air Law* (2006), 123.

<sup>362</sup> See Mankiewicz, *supra* note 338, at 181.

<sup>363</sup> *Upton v. Iran Air*, 15 Avi.17, 101 and 1979 AL 171, US District Court, SDNY, Miller, *supra* note 53, at 56.

<sup>364</sup> See Gjemulla, et.al., *supra* note 270, at 25.

<sup>365</sup> See Katuzian, *supra* note 257, at 639.

<sup>366</sup> *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.<sup>367</sup>

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),<sup>368</sup> it is predictable that courts would interpret the phrase narrowly unless there is agreement between the parties.<sup>369</sup>

#### **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.<sup>370</sup> 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.<sup>371</sup>

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<sup>367</sup> See Chr. 3.4.4.4; and Chr. 3.4.5.3, *supra*.

<sup>368</sup> S.M. Hashemi, *Hoqooq - e-Asasi Jomhouri Islami Iran Vol. II* (1371 A.H. 1993), 642.

<sup>369</sup> *Upton v. Iran Air*, 15 Avi17, 101 and 1979 AL 171, US District Court.

<sup>370</sup> 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.<sup>372</sup> 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.<sup>373</sup> As a result, this tendency transmits from civil liability in domestic law to international air carrier's liability Conventions.<sup>374</sup>

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.<sup>375</sup> 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.<sup>376</sup> Therefore, the drafters again left it to courts to decide whether Article 17(1) covers mental injury.<sup>377</sup>

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

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<sup>371</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 670-680.

<sup>372</sup> *Ibid.*

<sup>373</sup> ICAO DCW Doc No. 10, at 97.

<sup>374</sup> *Ibid.*

<sup>375</sup> ICAO DCW Doc. No. 10, 14 and 35.

<sup>376</sup> See Art. 17 of the Montreal Convention 1999.

<sup>377</sup> 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.<sup>378</sup> The ambiguity is caused by different interpretations regarding mental injury and there is no uniform approach among contracting States.<sup>379</sup>

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).<sup>380</sup> Common law jurisdictions exclude recovery for mental distress and make a distinction between mental and physical injuries.<sup>381</sup>

#### 1. Mental Injury Accompanied by Bodily Injury

In common law, pure mental injury is not compensable.<sup>382</sup> In the United States, court decisions that preceded the Supreme Court decision in *Eastern Airlines Inc. v. Floyd*,<sup>383</sup> accepted that damages were recoverable under Article 17 for mental injury caused by an accident.<sup>384</sup> 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.<sup>385</sup> Therefore, although French law permits recovery for any damage, whether material or moral, and the

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<sup>378</sup> 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.

<sup>379</sup> 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).

<sup>380</sup> *Rosman v. Trans World Airlines, Inc.*, 13 Avi. 17,231 at 17,233 (N.Y.C.A., 1974).

<sup>381</sup> See Mendes de Leon and Eyskens, *supra* note 377, at 1165-66.

<sup>382</sup> See Tompkins, *supra* note 19, at 147.

<sup>383</sup> *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 525-530 (1991).

<sup>384</sup> *Burnett v. Trans World Airlines Inc.*, 368 F. Supp.1152 (D.N.M. 1973).

<sup>385</sup> *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.<sup>386</sup>

Although pure mental distress has not been accepted in the United States, mental injuries have recently been compensated by the courts.<sup>387</sup> The ruling in the *Australian* case<sup>388</sup> differed from the accepted standards in the *Floyd* case by explicitly stating that damages for mental trauma alone could be compensated.<sup>389</sup> Also in the *Zicherman* case,<sup>390</sup> 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.<sup>391</sup>

## 2. Post-Traumatic Stress Disorder (PTSD) as Bodily Injury

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<sup>386</sup> 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.

<sup>387</sup> 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).

<sup>388</sup> *American Airlines Inc v. Georgeopoulos & Anor*, [No. 2] N.S.W.S.C. 463 (N.S.W. Ct. App. Aug. 4, 1998).

<sup>389</sup> See Lachance, *supra* note 378, at 152.

<sup>390</sup> *Zicherman v. Korean Airlines Co.*, 516 U.S. 217 (1996).

<sup>391</sup> 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).<sup>392</sup> 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.<sup>393</sup> Thus, courts do not have a right to refuse compensation under such circumstances.<sup>394</sup> 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.<sup>395</sup> 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.<sup>396</sup>

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

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<sup>392</sup> *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.

<sup>393</sup> *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.

<sup>394</sup> R. Garcia-Bennett, 'Psychological Injuries under Article 17 of the Warsaw Convention', (2001) *Air and Space Law* 38, at 51.

<sup>395</sup> *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].

<sup>396</sup> 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.<sup>397</sup> 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,<sup>398</sup> 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.<sup>399</sup> Since mental injury is considered as a form of loss, there is

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<sup>397</sup> See Lachance, *supra* note 378, at 144-5.

<sup>398</sup> See Chr. 3.4.5.4, *supra*.

<sup>399</sup> 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.<sup>400</sup>

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.<sup>401</sup> 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 Council<sup>402</sup> 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.<sup>403</sup>

It is nevertheless submitted that there is evidence other than the *la zarar* principle that recognizes mental injury in Iran.<sup>404</sup> 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

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<sup>400</sup> J. Sobhani, *Tahdhib al-usūl Vol. III* (1999), 94.

<sup>401</sup> R. Khomeini, *Tahrir al-Wasilah Vol. II*, (1384 A.H. 2005), 553.

<sup>402</sup> The structure and the duties of this Council in relation to air carrier liability are discussed in 3.3.1.3, *supra*.

<sup>403</sup> See Chr. 3.3.2.2, *supra*.

<sup>404</sup> See Chr. 3.4.1, *supra*.

injury.<sup>405</sup> The Civil Liability Act 1960 implicitly refers to mental injuries when it mentions that immaterial damages including mental injury are compensable.<sup>406</sup> 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.<sup>407</sup>

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<sup>405</sup> See Art. 1 of the Iranian Civil Liability Act 1960.

<sup>406</sup> See 3.3.2.2, *supra*.

<sup>407</sup> 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.<sup>408</sup> But the wording of Article 24 explicitly made no mention of any exclusivity of remedy.<sup>409</sup> 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.<sup>410</sup>

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.<sup>411</sup>

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<sup>408</sup> 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.

<sup>409</sup> See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 357.

<sup>410</sup> See Weigand, *supra* note 392 at 916.

<sup>411</sup> *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.<sup>412</sup> Two different interpretations have been provided.<sup>413</sup> 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.<sup>414</sup> They permitted remedies that were not mentioned in the Convention. However, another approach accepted cause of action and the exclusivity of the WC29.<sup>415</sup> 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* case<sup>416</sup> in the United Kingdom and another in the *Tseng* case<sup>417</sup> 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.<sup>418</sup>

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.<sup>419</sup>

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<sup>412</sup>See *Shawcross and Beaumont on Air Law*, *supra* note 114, at 370.

<sup>413</sup>See Dempsey and Milde, *supra* note 53, at 208.

<sup>414</sup>Lowenfeld and Mendelson, *supra* note 23, at 519.

<sup>415</sup>Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978).

<sup>416</sup>*Sidhu v. British Airways*, 2 Lloyd's Law Rep. 76 (1997).

<sup>417</sup>*El Al Israel Airlines, Ltd. v. Tseng*, 525 US 155 (1999).

<sup>418</sup>See Tompkins, *supra* note 19, at 143.

<sup>419</sup>J 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*,<sup>420</sup> 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.<sup>421</sup> 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.<sup>422</sup>

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.<sup>423</sup>

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.<sup>424</sup> 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

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<sup>420</sup>*De George v. American Airlines, Inc.*, 29 Avi.17,203 (S.D.N.Y. 2002).

<sup>421</sup>*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).

<sup>422</sup>*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.

<sup>423</sup>*Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Il. 2002).

<sup>424</sup>*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.<sup>425</sup>

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,<sup>426</sup> treaties that are concluded between Iran and other States in accordance with the Constitutional Code<sup>427</sup> enjoy the status of domestic law and they have priority over other domestic law,<sup>428</sup> 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.

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<sup>425</sup> J.G. Sams John, 'Recent Developments in Aviation Law', (2003) *Journal of Air Law and Commerce* 730, at 742.

<sup>426</sup> See Chr. 3.5.1, *supra*.

<sup>427</sup> See Art. 74 of the Constitutional Code of the I.R. Iran.

<sup>428</sup> 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* case<sup>429</sup> in the United Kingdom or the *Tseng* case<sup>430</sup> 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* case<sup>431</sup> only referred to the limited liability provisions in the Warsaw-Hague Convention and has not admitted the *Diyah* in domestic air carriage,<sup>432</sup> 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).<sup>433</sup>

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

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<sup>429</sup>*Sidhu v. British Airways*. 2 Lloyd's Law Rep. 76 (1997)

<sup>430</sup>*El Al Israel Airlines, Ltd. v. Tseng*, 525 US 155 (1999).

<sup>431</sup> Case No. 245-31-26.3.1377 Appeal Court.

<sup>432</sup> See the next sub-section, 4.3.1, *infra*.

<sup>433</sup> 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.<sup>434</sup> 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.<sup>435</sup> The first court ruled that the air carrier should pay the *Diyah* to the victims' beneficiaries.<sup>436</sup> Nevertheless, when the claimants appealed and asked for the 1985 Act to be applied, the Appeal Court issued a different judgment.<sup>437</sup> 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*.<sup>438</sup> 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.

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<sup>434</sup> See Case No. 1-74 -26.7.74 the Trial Court.

<sup>435</sup> 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.

<sup>436</sup> 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.

<sup>437</sup> 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.

<sup>438</sup> 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*.<sup>439</sup> 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

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<sup>439</sup> 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*, *tasbib* 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,<sup>440</sup> 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*.<sup>441</sup> 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

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<sup>440</sup> See Art. 4 of the Constitutional Code of the I.R. Iran.

<sup>441</sup> *Collection of Law and Regulations of Civil Aviation Organization of Iran* (1375 A.H. 1996).

relevant to domestic flights.<sup>442</sup> 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.<sup>443</sup> 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

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<sup>442</sup> Opinion of the Guardian Council, No. 1191 (1995).

<sup>443</sup> Opinion of the Guardian Council, No. 1226 (1995).

only interpret Constitutional Articles.<sup>444</sup> It is not clear why the GC disregarded its jurisdiction by interpreting an ordinary law and provided such an unexpected interpretation.<sup>445</sup>

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

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<sup>444</sup> Art. 73 of the Constitutional Code of the I.R. Iran.

<sup>445</sup> 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,<sup>446</sup> 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.<sup>447</sup> The principle of *la zarar*, which encompasses all in a society, prohibits causing any loss to others and the misusing of one's rights.<sup>448</sup> 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.<sup>449</sup> 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.<sup>450</sup> 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*.<sup>451</sup>

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

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<sup>446</sup> 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.

<sup>447</sup> Shahid Thani, *Al Rozat al Bahiya* (1365 A.H. 1986), at 352.

<sup>448</sup> See Chr. 3, *supra*.

<sup>449</sup> See Edris, *supra* note 207, at 7.

<sup>450</sup> See Art. 10 of the Civil Code.

<sup>451</sup> 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.<sup>452</sup> Iran can therefore apply the *Diyah* regulations simultaneously with unlimited liability.<sup>453</sup>

#### 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.<sup>454</sup> Limited liability and presumed fault liability, instead of strict liability and unlimited liability, were provided to protect air carriers against death and bodily injury.<sup>455</sup> However, after the Second World War, the Warsaw Convention became contestable, because air transportation and public welfare improved. The

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<sup>452</sup> Arts. 77 and 125 of Constitutional Code of I.R. Iran.

<sup>453</sup> 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.

<sup>454</sup> See Minutes Warsaw 1929, *supra* note 4, at 12.

<sup>455</sup> *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.<sup>456</sup> 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.<sup>457</sup> 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,<sup>458</sup> 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

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<sup>456</sup> See Dempsey and Milde, *supra* note 53, at 90.

<sup>457</sup> K. Zweigert & H. Kotz, *Introduction to Comparative Law Vol. I*, trans. T. Weir (1987), 373.

<sup>458</sup> See Chr. 3, *supra*.

the *Shariah* and secondly, the WC99 (Article 25) and the MC99 ( 22) adopt unlimited liability.<sup>459</sup>

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.<sup>460</sup> 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.<sup>461</sup> Not only can common law and civil law countries apply these principles, other legal regimes such as Iran can do so too.<sup>462</sup>

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

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<sup>459</sup> See Art. 25 of the Warsaw Convention 1929 and Art. 21(2) of the Montreal Convention 1999.

<sup>460</sup> See Tompkins, *supra* note 19, at, 45-6.

<sup>461</sup> *Ibid.*

<sup>462</sup> 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.<sup>463</sup>

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).

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<sup>463</sup> *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.<sup>464</sup> 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.<sup>465</sup> 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

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<sup>464</sup> Opinion of the Guardian Council, No. 1191(1995).

<sup>465</sup> 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*.<sup>466</sup>

3. Since the legislators have approved the Warsaw-Hague Convention for domestic flights in a specific statute,<sup>467</sup> 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*.

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<sup>466</sup> See Art. 230 of the Civil Code and Arts. 386-387 of the Commercial Code.

<sup>467</sup> *Collection of Law and Regulations of Civil Aviation* (1375 A.H. 1996), 59.