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# The Basis of Air Carrier Liability in International Documents: A Reflection on an Ambiguity

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**Abstract**

Since 1929, the air carrier liability system at the international level has undergone different changes in line with the technological evolution of the aviation industry. The first turning point in the evolution of air carrier liability was the signing of the Warsaw Convention in 1929, which for the first time recognized a presumed liability system to regulate the conduct of air carriers at the international level. The next turning point in evolving the air carrier liability was the "Montreal Agreement" of 1966, concluded between the Federal Aviation Board of the US Government and some air carriers, according to which the liability without fault system was first recognized in the aviation industry and paved the way for the global expansion of this system of liability in the aviation industry. The approach adopted in the Montreal Agreement was followed by the International Civil Aviation Organization (ICAO) and a liability without fault system was implemented by this organization within the framework of 1971 Guatemala Protocol concerning passengers and their baggage, but this protocol did not enter into force for reasons that are beyond the scope of this research. In its subsequent action, the ICAO implemented a without fault liability regime concerning air cargo within the framework of the Montreal Additional Protocol No. 4 of 1975. Finally, the last turning point, known as the "Japanese Initiative", was implemented in 1992, when some Japanese airlines, with the support of the Japanese government, voluntarily concluded an agreement in which a two-tier liability regime imposed for death or bodily injury of the passengers. In the first tier, a without fault liability system was applied up to 100,000 SDR, while in the second tier (for compensation higher than 100,000 SDR), liability was based on the presumption of fault. The Japanese initiative subsequently followed by the IATA members within the framework of IATA Inter-carrier Agreement of 1995. This system of two-tier liability was ultimately adopted in Article 21 of the Montreal Convention of 1999.

There is no explicit term in the Montreal Convention of 1999 or the other mentioned documents to describe the type of liability

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imposed by them. Two approaches, therefore, have been formed to describe this regime of liability in legal texts and judicial decisions; that is to say, in some legal texts and court decisions, the basis of liability has been considered to be strict liability, while in other, this system of liability has been described as absolute liability. It is worth considering that in some legal texts and judicial decisions, the concepts of strict and absolute liability have been used as interchangeable concepts. The ambiguity in describing the type of liability imposed by the mentioned international documents, including the 1999 Montreal Convention, raises several questions, such as whether the concepts of absolute and strict liability are considered synonymous in the field of aviation. Another question that should be answered in this context is which concept is more appropriate to describe the liability defined for air carriers in international documents, including the Montreal Convention? This paper will attempt to answer the said questions through a descriptive-analytical method. To achieve this goal, it will concentrate on examination and analysis of different approaches adopted for describing the type of liability established by the above-mentioned international documents in order to find a satisfactory answer as to the ambiguous situation surrounding the basis of air carrier's liability at the international level.

Regarding the description of the regime of liability imposed by the Montreal Agreement of 1966 and subsequent international documents, legal scholars and judges have not adopted the same approach. While some writers and judges have described the imposed liability as strict, others have described the regime of liability as an absolute one. Although some legal scholars have used the concepts of strict and absolute liability as synonymous concepts, this approach is not acceptable considering the evolution of these concepts in the tort law of common law and the prevailing legal literature in the aviation industry. In fact, those concepts cannot be described as equivalent terms from a legal perspective, in other words, they represent different levels of liability, meaning that absolute liability is much more severe than strict liability.

Although the concepts of strict and absolute liability share the common characteristic that in both of them, the element of fault is not a condition of liability, they differ from two perspectives. The first difference is related to the number of available defenses that can be invoked to escape liability. In strict liability, all the usual defenses, including force majeure, are available except those defenses that used to prove the absence of fault; because the fault is no longer a required condition, but in absolute liability, according to the common law approach, no defense can be invoked in the sense that none of the usual defenses is available. It has to be said that based on the approach adopted in some international conventions, including the Brussels Convention on the Liability of Operators of Nuclear Ships, adopted in 1962, the Vienna Convention on Civil Liability for Nuclear Damage, adopted in 1963 and the Convention

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| | on International Liability for Damage Caused by Space Objects, adopted in 1972, even though the regime of liability is explicitly described as absolute in the text of all the mentioned conventions, limited number of defenses have also been prescribed for exemption from the absolute liability. Another difference is that in strict liability, there should be a causal link between the act of the person to be held liable and the damage, regardless of whether the responsible person committed the fault. However, in absolute liability, there is no requirement of a causal link between the act of the person to be held liable and the damage, but rather the existence of a causal relationship between the conditions prescribed for absolute liability and the damage is necessary.<br>To describe the liability of the air carrier in the framework of the Montreal Convention, it seems more logical to accept the approach adopted in the aforementioned conventions for the following reasons. First, this approach paves the way for maintaining the concept of absolute liability, while according to the common law approach, absolute liability would not have any sense simply because under the common law approach, no defense is available in case of absolute liability. Secondly, since the liability of the air carrier in the framework of the Montreal Convention is a heated debate at the international level, it is obvious that the approach adopted in the aforementioned conventions would much better assist to achieve uniformity than the common law approach. Thirdly, as mentioned before, in strict liability all usual defenses, including force majeure, can be invoked for exemption of liability, while in the framework of the Montreal Convention none of the force majeure events are prescribed as a defense. Fourthly, according to Article 17(1) of the Montreal Convention, the carrier will be liable upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The causal relationship, therefore, should only exist between the prescribed conditions (as mentioned in Article 17(1) and the incurred damage/s. |
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