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Air Traffic Control: A Recommendation for a Proof of Fault System without a Limitation on Liability

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AIR TRAFFIC CONTROL: A RECOMMENDATION FOR A PROOF OF FAULT SYSTEM WITHOUT A LIMITATION ON LIABILITY

By Paul B. Larsen†

I. Introduction

THE LEGAL problem which the world faces in regard to air traffic control services can be described this way: commerce must not be unreasonably restricted. Swift aerial intercourse between states is favored by community policy, but, as has been true for all forms of traffic, there must be regulation of flight to make it safe. Moreover, liability must be borne by the air traffic control agency for its conduct of air traffic. That liability is of growing concern, yet remains badly defined and is the subject of the present discussion.

First we will gain perspective on the issue by construing a frame of reference, that is, by mentioning certain recent technical and legal developments and defining important terms.

II. The Technological and Legal Situation

Fed by astonishing technical developments, air traffic has raced far ahead of the controls which our legal system exercises. We have recognized the dangers without having had time to enact adequate, encompassing legislation. Air traffic control (hereinafter ATC) is today in the hands of separate States, or their regional groupings, with guidelines set forth in the Annexes to the Chicago Convention.[1]

During 1964, airport control towers in the United States handled 32,857,745 aircraft operations, and the number is rapidly increasing.[2] Other countries also report great air traffic burdens. Western Germany handled 750,000 aircraft operations in 1963 in spite of a much smaller airspace.[3] Add to this a picture of aircraft becoming larger and faster, with a prospect of supersonic carriage, and the consequence must be our deep concern with the probability of aircraft collision.

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[1] Convention on International Civil Aviation, 7 Dec. 1944, 61 Stat. 1180, T.I.A.S. No. 1591 (effective 4 April 1947) [hereinafter cited as Chicago Convention]. Annex 2 (Rules of the Air); Annex 11 (Air Traffic Services); Annex 14 (Aerodromes). Article 12 of the Convention delegates air traffic control over the high seas to ICAO so that the Annexes are directly applicable here.

[2] 6 FAA Ann. Rep. 25 (1964).

[3] Meyer, Introductory Remarks to the 3 May 1965 Meeting of the Rechtsausschuss der Wissenschaftlichen Gesellschaft für Luft- und Raumfahrt (unpublished to date).

Bo Lundberg presents an almost terrifying picture of the future.[4] On the premise that air transport will continue its present rate of increase, and supposing that the present fatality rate is maintained, he predicts that scheduled air carriers will cause the deaths of 25,000 persons annually in the year 2010; and, if general aviation and charter flights are added, that figure will rise to 60,000 fatalities. If people were to read about aircraft-caused fatalities every day, transport by air would become seriously affected by public opinion.

All the participants in transport by air—the aircraft commander representing the pole of potential claimants, the air traffic controller representing the pole of potential defendants—want to improve the safety situation in order to reduce economic losses. Two strategies are involved: (1) vast improvement of air traffic control in order to reduce economic losses, and (2) legal protection of investment in improved technology.

The Federal Aviation Agency, encouraged by earlier studies,[5] but in direct response to the "Project Beacon" report of 1961,[6] has now established area positive control service above 24,000 feet altitude. Area positive control extends substantially beyond the three mile limit over the high seas, and it is hoped that the air floor can soon be lowered from 24,000 feet to 18,000 feet.[7]

Computer-run ATC is central to the FAA's area positive control system. In present use is a sixty-four code, ten channel beacon system. Corresponding to this method of ground radar, aircraft are equipped with a transponder which can be activated by the ground control and automatically gives position reports. If radio contact is lost, the transponder can show the emergency on the controller's radar scope. It is, in fact, such an intricate communication system that the transponder not only identifies the plane, but can automatically read the altimeter and report the plane's changing altitude to the ground radar.[8]

Only Instrument Flight Rules[9] are permitted in area positive control. In this zone, the pilot may not change from IFR to Visual Flight Rules (VFR). He may not operate his plane contrary to ATC instructions while in area positive control, or in any other area which is subject to ATC. The pilot is forbidden to deviate from his ATC clearance unless an emergency exists.[10]

Fifty per cent of all passenger miles in the United States will soon be flown in airspace above 18,000 feet, where area positive control will exist.

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[4] Lundberg, *Speed and Safety in Civil Aviation*, 95 FLYGTEKNISKA FORSOKSANSTALTEN 15-16 (1963-1964).

[5] *Airport and Its Neighbors*, REPORT OF THE PRESIDENT'S AIRPORT COMMISSION [The Doolittle Report] (1952).

[6] FAA, REPORT OF THE TASK FORCE ON AIR TRAFFIC CONTROL, PROJECT BEACON (1961).

[7] Klass, *Air Traffic Control Blueprint—Part 1: System Moderization Starts to Pay Off*, Aviation Week & Space Technology, 20 Jan. 1964, pp. 52, 59.

[8] *Ibid.* Time, 23 April 1965, p. 77 is the first report to come to this writer's attention that the FAA goal described in its 1964 annual report, *supra* note 2, at 38-39, was achieved.

[9] Instrument Flight Rules are hereinafter referred to as IFR, while the opposite Visual Flight Rules will be referred to as VFR.

[10] FAA Reg. Part 91, § 91.75, 14 C.F.R. Part 91.75 (1963).

FAA is now planning an advanced form of ATC which will be able to automatically track 4,096 transponder-equipped aircraft simultaneously.[11] The size of the investment in air traffic control may best be illustrated by the FAA's budget increase from $131 million in 1955 to $717 million in 1965.[12]

A major shift in responsibility from the aircraft commander to the ground controller is the result of this tremendous investment in technology. As the air traffic controller assumes greater legal responsibility, the aircraft commander is relieved of some of his. A multitude of varying laws, reflecting almost every legal system in the world, regulates ATC liability to claimants damaged in international air transport. Regional ATC organizations have been formed in Europe, Africa, and Central America,[13] and have alleviated in a local way, but not solved, the problems of foreign litigants. Only a convention on ATC liability would help them overcome the obstacles of sovereign immunity attached to claims against government-operated ATC. A convention would establish a definite legal uniformity, provide certainty of recovery, promote safer air traffic control,[14] and fill a vacuum in private international air law. This is so because, although the Warsaw and Rome Conventions[15] regulate claims against the aircraft carrier or operator, claims against ATC are not regulated by convention.

In 1964, the newly formed ICAO Subcommittee on the Liability of Air Traffic Control Agencies (hereafter called the Subcommittee) met for the first time. The Subcommittee has met twice, and it was authorized by the ICAO Legal Committee meeting in the autumn of 1964 to continue its work. One of the most important ways through which, it suggested, regulation could be accomplished, was a special convention on ATC liability.[16]

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[11] Klass, *supra* note 7, at 53; Klass, *Air Traffic Control Blueprint—Part 3: Modernization Plan Faces Cost Obstacles,* Aviation Week & Space Technology, 3 Feb. 1964, p. 87, 94.

[12] 6 FAA ANN. REP. 116 (1964).

[13] "Eurocontrol," International Convention Relating to Co-operation for the Safety of Air Navigation, 13 Dec. 1960. "ASECNA," Convention Relative á la Création d'une Agence Chargée de Gérer les Installations et Services Destinés á Assurer la Sécurité de la Navigation Aérienne en Afrique et á Madagascar, 12 Dec. 1959. "COCESNA," Convention Portant Création d'une Société des Services de Navigation Aerienne Pour l'Amerique Centrale, 24 Feb. 1960. Reprinted in MATTE, TRAITE DE DROIT AERIEN-AERONAUTIQUE 823, 783, 803 (2d ed. 1964).

[14] PROJECT BEACON, *op. cit. supra* note 6, at 99, emphasizes that high quality ATC needs constant quality testing and inspection.

[15] Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 12 Oct. 1929, 49 Stat. 3000, T.S. 876 (1929); amended by the Protocol to Amend the Warsaw Convention (The Hague Protocol), 28 Sept. 1955, 1955 U.S. & Can. Av. 521; enlarged by the Convention Supplementary to the Warsaw Convention (Guadalajara Convention), 18 Sept. 1961, 1963 U.S. Av. 313, reprinted in 28 J. AIR L. & COM. 45 (1961-62). Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention), 7 Oct. 1952, 310 U.N.T.S. 181 (1958), reprinted in 19 J. AIR L. & COM. 447 (1952).

[16] First Report of the ICAO Legal Committee's Subcommittee on the Liability of Air Traffic Control Agencies, ICAO LC/SC/LATC No. 19, at 16 (1964) [hereinafter cited as LATC No. 19].

Other ways of regulating ATC liability are: (1) Incorporation of ATC liability into a consolidated convention which would also regulate liability for damage caused by foreign aircraft to third parties on the surface, and aerial collisions. (2) Combination of ATC liability with the proposed Convention on Aerial Collisions. (3) Amendment of other private air law conventions to include ATC liability. (4) Regulation of ATC liability within a convention on the international responsibility of states for injuries to aliens under the auspices of the United Nations. For a discussion of these alternatives see Larsen, The Regulation of Air Traffic Control Liability by Inter-

III. The Convention's Definition of ATC

The legal protection of ATC agencies lies best with the court which will include in its consideration of negligence the nature of the services offered, the nature of the terrain, the amount of reliance by the pilot, whether he reasonably should have relied, and whether such defenses as contributory negligence or assumption of the risk should be allowed.

Central to a proof of fault liability system, which the author favors, is a wide definition of responsible agents, giving the plaintiff a spectrum of possibilities upon which to base his difficult court procedure. The following definition should be noted:

(1) *ATC Proper.* Annex 11 of the Chicago Convention[17] defines ATC as area and approach control for IFR flying, and airport control service for all flights. This is a technical definition for the purpose of directing air traffic, not for the allocation of legal responsibility, so we are free to include within it any other appropriate air traffic services.

(2) *Flight Information* is a service usually available in controlled airspace to give weather information and related statistics when requested by pilots.[18]

(3) *Air Traffic Advisory Service* provides more reliable information about collision danger than is given by Flight Information Service. It is temporary, pending the establishment of ATC Proper.[19]

(4) *Alerting Service* is offered by ATC Proper and by Flight Information Centers in case of an emergency, to call the alert and to collect and disseminate information.[20]

(5) *Operation and Maintenance of Air Navigation Facilities.* Air navigation aids enable the pilot to fly without reference to landmarks below. There is a close relationship between ATC Proper and navigation aids which are, in fact, now being combined in the United States to simplify pilot tasks.[21]

(6) The *Airport Facilities* category involves dangerous conditions which may interfere with the orderly flow of traffic.

(7) *Meteorological Services* are often supplied by separate weather bureaus, and then transmitted by ATC Proper or Flight Information Service to the pilot. Only liability for meteorological information generated by the transmitter himself, or his faulty transmission of correct weather information, is our concern.

(8) *Search and Rescue Services*[22] performed by air traffic control agencies, rather than by third parties, concern us here.

A legal definition of ATC should include all these services so as to make

national Convention, August 1965 (unpublished thesis in McGill University Institute of Air and Space Law Library). The thesis was supported through the generosity of the v. Humbolt Stiftung at the University of Cologne, Germany.

[17] Chicago Convention, Annex 11, para. 2.3.

[18] Chicago Convention, Annex 11, para. 2.6.

[19] ICAO Doc. 4444-RAC/501/1, Part VII, para. 1.2.1 (1960).

[20] Chicago Convention, Annex 11, paras. 5.1.2-3.

[21] FAA, Design for the National Airspace Utilization System 57-61 (1961). FAA, Air Traffic System Requirements 24 (1963).

[22] Chicago Convention, Annex 12.

the proof of fault system protect investments as widely as possible. The burden is on the plaintiff to prove that a legal duty of care toward him was breached. The farther away one moves from ATC Proper, the harder it is to prove the existence of a duty of care in the performance of services.

IV. Choice of Liability Systems

Traffic control on the roads and railroads does not provide sufficiently useful analogies for a regulation of ATC liability, because of the differences in speed, modes of regulation, and economic values involved. Sea traffic provides some interesting comparison between the aircraft commander and the ship captain, but since our focus is on ATC, which does not well correspond to speeds and traffic control methods at sea, it is more useful to look to other private air law conventions in a search for legal regulation of ATC liability. Such comparisons will be made as they correspond to each part of our discussion.

In the Warsaw Convention, the air carriers, passengers, and shippers are all participants in a joint venture and should all assume some of the economic burdens connected with the risk involved. Therefore presumed liability of the air carrier exists.[23] With respect to the Rome Convention, the third party on the ground has no interest in the flight. Therefore, he should not carry any part of the risk. This is the reason for the absolute liability of the carrier in that convention.[24]

The Draft Convention on Aerial Collisions has a mixed system of fault liability. The liability of the other operator is determined through the claimant's (operator's) proof of fault, but a presumption of fault exists in regard to collision damage suffered by passengers and shippers.[25] The draftsmen of this convention believed that a single system of liability would not be desirable.

How can the ATC liability situation be compared to the subject matters of the other private air law conventions? No joint venture similar to that described in the Warsaw Convention exists between the ATC agency and any of its potential victims. Furthermore, the ATC agency has no contract to share risk with any of those potential victims.[26] The third person on the surface is perhaps in a special position, in that he has absolutely no interest in the flight. In general, however, we will look for a system which regulates the relationship between independents.

A. *Approach I: Search For A System Stronger Than Proof Of Fault*

One can begin a summary of arguments concerning a proof of fault

[23] Warsaw Convention, Chap. III. Drion, Limitation on Liabilities in International Air Law 12 (1954).

[24] Rome Convention, Chapter I. Drion, *op. cit. supra* note 23, at 12.

[25] Draft Convention on Aerial Collisions, ICAO Doc. 8444 LC/151, Arts. 4, 5 (1964). For the text of the Convention and commentary relating to the Convention see Mankiewicz, *The ICAO Draft Convention on Aerial Collisions*, 30 J. Air L. & Com. 375 (1964)

[26] A rare exception is the contractual relationship between pilot and ATC found in the United Kingdom under its Standard Conditions under which Aircraft may Land, be Parked, Housed or Otherwise Dealt with on Airdromes under the Control of the Minister of Aviation, FAL 24 and 25, U.K. "Air Pilot."

system from the standpoint that it should be accepted, unless it can be shown that absolute liability or presumed liability better suits the subject matter. From the now obsolete Sweeney-Orr debate[27] we can list Sweeney's points (1) that evidence in aviation cases is difficult to obtain, (2) that there is a need for uniformity, (3) that unlimited liability could create a catastrophe hazard to aviation, (4) that insurance is necessary, and (5) that assured payments are better than potentially complete but difficult to obtain ones. Orr, who describes himself as having been engaged in "directing more litigation involving aviation liability than any other man certainly in this hemisphere,"[28] has in this writer's opinion substantially countered that position by presenting the following arguments: (1) evidence of negligence in aviation is not unusually difficult to obtain, (2) there is no need for regulation of liability for the sake of uniformity alone, (3) United States practice has indicated that a lack of a limit has not deterred aviation, (4) there is no tendency in aviation of failure to pay claims because they are too high, and (5) thus there is no need for an absolute but limited liability system like that found in the United States workmen's compensation system.

At this point we may add Ehrenzweig's significant arguments against a proof of fault system for traffic victims. In general, his opinions concur with Sweeney's, but he develops them further in two areas—morality and economy. The moral point is that a proof of fault system does not effectively fix guilt. When one contends with juries and witnesses, it is most difficult to discover "truth."[29] Therefore, one should lift the problem out of a moral frame-of-reference. Absolute liability has the disadvantage of favoring the victim, but if one concedes that the victim should be favored over the tortfeasor, then it follows that the tortfeasor's "innocence" or "guilt" is less important than reparation to the victim. Ehrenzweig's economic arguments are that proof of fault causes cases to be brought into courts instead of being settled outside, thus clogging the court system and causing great delay in recovery and often forcing the victim to settle too easily for too little.[30]

One is forced to note, after relating these arguments to ATC, that the fixing of guilt is not the justification of the proof of fault system, particularly when governments or large corporations, rather than individuals, are involved. Guilt pales beside fact—it is the procedure which brings valuable evidence concerning the negligence, that justifies the proof of fault system. Moreover, in the United States at least, the claimant would

[27] Sweeney, *Is Special Aviation Liability Legislation Essential?* (pts. 1 & 2), 19 J. AIR L. & COM. 166, 317 (1952). Professor Sweeney edited the *Journal of Air Law and Commerce* from 1947 through 1957; he prepared Report to the Civil Aeronautics Board of a Study of the Proposed Aviation Liability Legislation, which first appeared in 1941 (typed) and forms the basis of his views on liability systems.

Orr, *Fault as the Basis of Liability,* 21 J. AIR L. & COM. 399 (1954). As Director of Claims, United States Aircraft Insurance Group, Orr expressed opinions often diametrically opposite to those of Sweeney. In view of his capacity, he must be considered as expressing the interests of aviation insurers.

[28] Orr, *Is Aviation Ultra Hazardous?* 21 INS. COUNSEL J. 48 (1954).

[29] EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM 4-6 (1954).

[30] *Id.* at 5.

face not a jury, but a judge, in an ATC case against the government. Although there may be delay in the victim recovering within a court, one cannot say that such injustice outweighs that suffered when a straight settlement is made which does not take into any great account evidentiary facts and is not flexible enough to adjust the award to the injury. Circumventing the courts seems only to substitute difficulties, not to mend them.

It is in the area of unprovable cases that Finn Hjalsted's argument against proof of fault is the strongest. He believes that most aviation cases fall in the "grey area" where it is difficult to prove negligence. A proof of fault system then throws the burden on the claimant, leaving him with no possibility of recompense.[31] He believes, with Calkins,[32] that the carrier (in this case the ATC agency), not the individual, should bear the risk from a public policy point of view.

When the foregoing theory is related to ATC negligence, one cannot help but see an ATC convention working in concert with other private air law conventions. It does not make up deficits which fall on the fringe of the ATC subject matter, but covers its central problems well, as should other conventions cover theirs. Thus, if the controller is clearly at fault, his negligence will not be difficult to prove. If his fault is not clear, the presumed and absolute liability systems of the other air law conventions will absorb the "grey" cases.

B. *Approach II: Making The Proof Of Fault System Show Its Strength*

If we begin from the standpoint that another system must exist unless proof of fault can show its worth, we have the following arguments, considered from points of view of the States, claimants, defendants, and the subjects of other private air law conventions.

In the first place, reference to the ICAO questionnaire in relation to liability of ATC agencies shows one that proof of fault system for ATC liability is what states and regional organizations now have.[33] It would require the least amount of adjustment on their part.

More basically, we must consider the system as would those who must use it. For governments—the potential defendants—the proof of fault system provides maximum protection. It allows the greatest number of defenses:[34] (1) that no causal relationship between the ATC agency's act or omission and the injury existed, (2) contributory negligence by the plaintiff, (3) *force majeure,* (4) waiver of liability by the plaintiff, and (5) plaintiff's assumption of the risk. Moreover, fewer claims will be initiated, because the difficulty of proving fault will contrast in the claimant's mind with the relative ease of recovery under the Warsaw, Rome,

[31] Hjalstead, *Air Carrier's Liability in Cases of Unknown Cause of Damage,* 27 J. AIR L. & COM. 1, 14 (1960).

[32] Calkins, *Grand Canyon, Warsaw, and The Hague Protocol,* 23 J. AIR L. & COM. 253, 256 (1956).

[33] Answers to the ICAO Questionnaire in Relation to Liability of ATC Agencies, ICAO LC/SC/LATC Nos. 1-15, 17 [hereinafter cited as ICAO Questionnaire]; LC/Working Draft No. 701, Addenda Nos. 1-15 (1963-1964).

[34] Larsen, The Regulation of Air Traffic Control by International Convention, *op. cit. supra* note 16, at 24.

or Draft Aerial Collisions Conventions. Fewer recourse actions by the ATC agency against the air carrier will be initiated because, similarly, the relatively difficult procedure will discourage claimants from suing the ATC agency in order to recover higher amounts indirectly.[35] Since governments are three times involved as ICAO delegates, as signers of the convention, and as the very subject matter, we cannot discount the argument that governments will insist on a proof of fault system as the one which provides maximum protection.

How does the system look to the claimant? He will want the wide definition of ATC services which the proof of fault system allows the drafters to include, because he will want to sue for as many kinds of damages as possible. Beyond that, it can be supposed that since damages in aviation cases are likely to be severe, the claimant will want to be made "whole," and he will not want a token payment. If that claimant produces good evidence that the ATC agency was at fault, he can recover to his satisfaction. He has an entire national court system within which to show his case to best advantage. If he does not have conclusive evidence of ATC negligence, he retains a reasonable chance of recovering an assured limited amount from the air carrier under the other private air law conventions. The claimant then gains the advantage of a full recovery, while not losing the opportunity to recover from the air carrier under easier procedure.

How would the aircraft operator or carrier, who is the potential defendant under other private air law conventions, regard an ATC liability convention based on proof of fault? Undoubtedly most cases would be directed against the air carrier, since claimants who do not have specific evidence of ATC negligence will try to fit their cases under the Warsaw, Rome, or Draft Aerial Collisions Conventions. Another side to that argument, however, is that a proof of fault system will discourage recourse actions, thus encouraging claims to be settled in one action. If fewer claims are initiated and contested, less money will be spent on fringe benefits such as legal fees.

The previous ICAO study of liability systems has been in connection with the Draft Convention on Aerial Collisions. In that study, we find that proof of fault exists as a basic rule.[36] The exception—passengers and shippers of goods who recover from the negligent airline on a presumed fault system—seems to arise for the sake of uniformity; it "gives passengers and consignors the same benefit of presumed liability of the operator of the other aircraft—with whom they would normally have no contractual relationship—as they would have with respect to their own operator if he were a carrier under a Warsaw contract."[37]

If the exception in the Draft Convention on Aerial Collisions exists merely for the sake of uniformity with the Warsaw Convention, what

[35] See VI C *infra*.

[36] ICAO Doc. 8444 LC/151, *supra* note 25, at 15 ("Principles of Liability"); ICAO LC/SC/Aerial Collisions No. 72, at 8 (1962).

[37] ICAO LC/SC/Aerial Collisions No. 72, *supra* note 36, at 8-9.

compelling reasons are there for a system other than proof of fault in the Warsaw and Rome Conventions? Since the parties covered by the Warsaw Convention are all participants in a "joint venture," the theory is that they should all assume some of the risk, proportioned so that the greatest burden rests on the air carrier, and the claimants are slightly favored. In the Rome Convention, the third person on the ground has no interest in the flight; therefore, he should assume no risk at all. Absolute liability completely weights the chances in favor of the claimant.

In an ATC liability convention, there would be no contractual agreement to share risks between the ATC agency on the one hand, and the air carrier, passengers, and shippers on the other. First, the passengers and shippers have a contract, not with the ATC agency but with the air carrier. Second, although the aircraft operator and air traffic controller are often in direct contact, they are not contractual members of a joint venture, but simply two independents mutually interested in the safe completion of a flight. For the sake of uniformity with the Warsaw Convention, the Draft Convention on Aerial Collisions artificially creates a bond in the form of presumed liability between the negligent aircraft operator and the passenger and shippers of the other aircraft. Since no other conventions exist on the subject of ATC, exceptions for uniformity do not come into question.

The only participant for whom an exception might be justified is the third person on the surface. He is truly innocent in that he has no interest in the flight at all. It is reasonable to believe, however, that the third person on the surface will recover under the Rome Convention, unless he desires higher compensation. If he has certain evidence of ATC negligence, he will have little difficulty in recovering under a proof of fault system. Therefore, the third person on the surface does not seem to be that compelling a reason for an exception.

The writer favors the proof of fault system, and in addition suggests that an adoption of the definition of "fault" found in Article 3 of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens would be best in the interest of uniformity:

> An act or omission attributable to a defendant is a "fault" within the meaning of this convention, (a) if, without sufficient justification, it is intended to cause or to facilitate the causing of an injury; (b) if, without justification, it creates an unreasonable risk of injury through a failure to exercise due care.[38]

Now we move forward to the complicated problem of a limitation on liability.

V. Limitation on Liability Problems

A. *Policy Considerations.*

In this review of the arguments for a limitation on liability, the second-

[38] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, Art. 3 (1961), reprinted in 55 Am. J. Int'l L. 548 (1961).

ary problem will be whether or not that limit in question will be one monetary limitation uniform for all the private air law conventions. Those who champion a limit on liability have compelling supporting arguments. Those who deny the value of a limit cannot refute those arguments but offer their own equally interesting points of view. That is the curious aspect of the limitation debate. A dilemma exists, and it must be solved, but successful refutation of all the arguments on either side is impossible. Whatever choice is made is bound to be uncomfortable.

Let us look in on the debate to illustrate our point. The pro-limitation group argues that States now expect limits on liability in private air law conventions, and many will rebel if it is not included. Economically impoverished countries cannot pay $900,000[39] for the loss of a single life—$8,300 (the present Warsaw Convention limit) would probably be the most they could afford. If the convention included such a limit, every claimant could hope to recover that amount. Lacking that limit, the foreign claimant would have to contend with such a variety of court standards that his claim might be considered hopeless from the beginning. For example, if the claimant is from a State with an exceptionally high standard of living, and he must press his suit in an economically impoverished State, he cannot expect to be fully recompensed for his loss. He cannot hope that the judge will appreciate his need for what would there seem unreasonable compensation, and the claimant might find his proof of fault suit so difficult that the final award would barely cover court costs. On the other hand, if there is a limit, that same claimant would undoubtedly receive it with much less difficulty, simply because it was established, it was accepted. The fact that States will tend to pay the limit seems to be substantiated by Warsaw cases. The claimant receives a less, but certain, amount. Another forceful argument is that uniformity is important to prevent unjust recourse actions, where the ATC agency might be sued for enormous amounts but might be able to recover only the Warsaw limit in a recourse action against the airline.

Convinced that these arguments have value, we turn to the other side to hear the following points of view: the government ATC agency does not need the economic protection of a limit when it has a high degree of protection from its national court system and the proof of fault procedure. Unless the ATC agency has been very obviously negligent, the claimant will try to fit his suit under the Warsaw or Rome Conventions, where the procedure will not be so difficult and the award will be more certain. Clear-cut cases of ATC negligence will be rare, and in the large number of cases in the "grey" area, where the blame is uncertain, the ATC agency is favored. The government, of course, has attorneys whose specialty is air law, where the average person may have an attorney whose first acquaintance with air law comes in dealing with the claimant's case.

[39] Berner v. British Commonwealth Pac. Airlines, Ltd., 219 F. Supp. 289 (S.D.N.Y. 1963), *rev'd*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 86 Sup. Ct. 559 (1966). The district court's decision but not its estimated value of human life was reversed by the Second Circuit. The district court opinion was discussed in 30 J. AIR L. & COM. 394 (1964).

In the United States there is no jury trial for claimants suing the Government, and instead of the sympathy of fellow citizens, the claimant must face a knowledgeable and experienced judge.

More persuasively, there is intense difficulty in agreeing on limits. The United States, which handles by far the most air traffic, would not join a convention with limited liability unless the limits were very high. Certainly, in working this matter out, we should begin from the premise that the need for a limit must be clearly established before we accept it. The two strongest arguments are economic considerations and the need for uniformity. The problems of sovereign immunity and security follow. We will investigate each of these.

B. *Economic Considerations*

In weighing the economic advantages and disadvantages of a limitation on liability for the ATC convention, a conflict between ideal and pragmatic points of view can be noted. When a government undertakes to establish air transportation, including the obligatory aid of ATC, it should certainly be prepared to pay for the consequences of its negligence. Theoretically, one should not have to ask whether a State can afford unlimited liability, but should be able to assume its readiness to pay for its faults and make the injured party "whole" again. Actually, States may establish air transportation for such unrelated reasons as prestige, and thus incur the obligation to provide ATC, while being unable to pay for the *full* consequences of their negligence.

If we are pragmatic, we admit a flaw in our legal philosophy and admit the inability of court systems to make a claimant "whole" and, perhaps, encourage that inability by establishing a limit on government liability. If, on the contrary, we insist that the claimant has the right to justly recover damages if he can prove the ATC agency's negligence, do we flout reality?

The actual division is not so harsh. The law can be allowed to establish a standard, which, in this case, is that governments desiring the benefits of air transportation must be able to pay for damages of their ensuing negligence, while at the same time giving those governments such protection, through a proof of fault system, that the chances of their being sued repeatedly would be so greatly reduced that their resources would be sufficient to pay awards on those few successful claims.

Government protection, which is a major object of a proof of fault system for an ATC convention, is insured to such an extent that we can discount the argument that impoverished States could not pay awards to claimants from wealthy States. Instead, it must be asked how useful a convention would be without the inclusion of the United States, which would almost certainly not join a convention with a limit acceptable to poorer countries, particularly when so much of the world's air traffic is over the North Atlantic and deals with United States ATC. To prove that point, it need only be noted that the United States has not joined the unsuccessful Rome Convention, much because of the Convention's low

limits, and has announced its withdrawal from the Warsaw Convention for the same reason.[40]

If a limit were established, could States not supplement it with insurance, as Sand persuasively proposes?[41] Indeed, that suggestion found the support of the United States Administration which introduced a bill into Congress to that effect, but the bill was opposed by the aircraft operators, who after all would be forced to contend with a variety of limits if the practice spread to foreign states. According to the aircraft operators, a convention is supposed to smooth the difficulties of international flight, not to create new obstacles.

Would a limit encourage States to provide more air traffic control? In the ICAO Subcommittee it was argued that States' major concern in providing ATC was safety rather than liability,[42] and it is hoped that this is indeed true. Nevertheless, it cannot be denied that the high cost of air traffic services is a curb on expansion. It is significant that the Federal Aviation Agency's budget has risen tremendously in the last decade, and that it is becoming increasingly difficult to persuade legislatures to grant more money for ATC services. Are not the impoverished States the very ones which should be encouraged to produce better ATC services? Yet, we cannot rely on the assumption that the money, which a limit might save an impoverished State, would be spent on improving ATC services. There would of course be no way for that State to calculate the difference, and there would be other pressing claims in its budget. On the contrary, we can employ the primitive argument of deterrence: if a State knows that its liability is unlimited, it may be induced to lessen the chance of negligence by improving its ATC facilities.

A more powerful argument for a limit on liability is that it avoids litigation by facilitating quick settlements. It is a definite economic benefit if compensation is paid quickly after the damage has been done. "Reduction of litigation by offering an easy basis for settlement" is one justification for creating a limit,[43] but it is at the same time an admission that our court system is inadequate, that claims in courts will not be adjudged within a reasonable amount of time (which in many cases is true), and that a settlement outside of court for an established limit is more just (which is many times untrue).

The refutation to this is, that in a proof of fault system, the ATC agency would be so protected that it would undoubtedly insist on taking the claim into court. This contrasts with the carriers or operators under the Rome and Warsaw Conventions, who are absolutely or presumed

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[40] On 15 Nov. 1965, the State Department gave notice of the denunciation by the United States of the Warsaw Convention to become effective on 15 May 1966. See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965). The text of the denunciation is reprinted *id.* at 303.

[41] Sand, *Limitation of Liability and Passengers' Accident Compensation under the Warsaw Convention*, 28 J. AIR L. & COM. 260, 277 (1962). Professor Sand's article greatly influenced the Administration's bill on compulsory insurance.

[42] LATC No. 19, at 16.

[43] DRION, *op. cit. supra* note 23, at 42.

liable, in a way that favors the claimant, so that a settlement out of court actually saves both parties money.

If we accept that reasoning, then we can say that merely because parties in Warsaw cases tend to accept the established limit, *i.e.*, that the carrier almost automatically pays the full limit to the claimant outside of court, a precedent is not thus established for ATC liability. Presumed liability and proof of fault are so different that the ATC agency almost certainly would not pay the full limit unless ordered to do so by a court.

Would a limitation on ATC liability dissuade States from imposing charges for the use of air traffic services?[44] Approximately twenty-five States are reported by ICAO to charge such fees.[45] It seems to this writer that a limitation would indeed be some deterrence to fees, but that since these charges are not yet clearly legal and the problem involves a minority of States, it would not in itself be a justification for a limitation. Drion writes that "the better position of the passenger in insuring the risk of his death or injury in excess of the average passenger accident risk" is a justification for a limitation of liability in the Warsaw Convention.[46] In regard to ATC liability then, if a limit is fixed, the operator, passenger, shipper, or third person on the surface knows the limit on potential liability, and can take out insurance in excess thereof as is needed. However, aiding the passenger with his arithmetic and helping him compute his own value is not a strong reason for establishing a limit.

Limitation of its liability is not needed for the ATC agency to obtain insurance. The governments will in most cases be self-insurers; that is, they will carry the cost themselves, because the operation is so large and widespread that self-insurance is cheaper. Only for the private ATC operator will insurance come into question, but it is noteworthy that none of the governments answering to the ICAO questionnaire on their regulation of ATC mentioned that they required insurance by private ATC operators.[47] The United States, in its answer, reported seventeen non-governmental ATC towers, but these few private ATC operators will usually not serve international flights which must go to those large airports having proper customs and immigration facilities.

The old *quid pro quo* argument for a limitation, *i.e.*, limitation of liability as a counterpart of an aggravated system of liability, is the most often heard justification. The argument is a vicious circle with little meaning, says Drion.[48] The individual claimant in fact suffers, because recovery of all the claimants has been limited as illustrated by claimants' frequent attempts to get around the liability limitation in the Warsaw Convention

[44] LATC No. 19, at 17.

[45] The United States is now working on a payment system for the use of air traffic services. In 1963, the President said that the United States must develop a system of user charges which would apply to international carriers. KENNEDY, STATEMENT ON INTERNATIONAL AIR TRANSPORT POLICY 13 (24 April 1963). Consequently the United States Bureau of the Budget is doing a study of user charges. See 5 FAA ANN. REP. 92 (1963).

[46] DRION, *op. cit. supra* note 23, at 42.

[47] ICAO Questionnaire; DRION, *op. cit. supra* note 23, at 21. Drion rejects the argument that limitation of liability is needed for ability to insure aviation risks. Only for delays and transportation of goods does he accept this argument.

[48] DRION, *op. cit. supra* note 23, at 29-30. He excepts liability for carriage of goods.

by alleging willful misconduct. There is no collective user interest in the exchanged limited liability for presumed or absolute liability.

Air traffic control cannot be considered a catastrophe-risk;[49] one cannot suppose that accidents will be the rule through its use. Even if one were to accept this argument, the refutation is that the risk, borne by governments, is neatly distributed to the taxpayers. It is not sustained by small operators struggling for their existence.

C. *Uniformity Of Law Considerations*

One cannot favor a limitation on liability for the sake of "uniformity" without having something specific in mind. One must inquire as to what the ATC liability convention should be uniform with—national legislation or other private air law conventions?

In national legislation, one can often see two different regimes existing concurrently, one inside and one outside of a convention. For example, there is a deep distinction between Warsaw and non-Warsaw carriage. If a passenger flies on a domestic flight in the United States, he is not subject to the limited liability of the Warsaw Convention; but when he flies on an international flight, although the damage takes place while he is still inside the United States, he is subject to these limits. The United Kingdom, in fact, decided to apply these limits to domestic carriage, so some authorities obviously believe that there is a need for uniformity.

Next, we discuss the question of whether there should be uniformity with other private air law conventions. At the 1960 Session of the ICAO Legal Committee, Sir Richard Wilberforce said that he could not justify a limitation of the operator's liability vis-à-vis passengers, when the passenger was not subject to a limitation of his claim against the ATC.[50] In other words, he thought that ATC liability should be limited in order to conform with the principle of limited liability of other private air law conventions.

The reaction to these arguments can only be to question again the abstract unit "uniformity." Is it desirable that all private air law conventions have a limitation (any limitation?) on damages? Should those limits themselves be uniform?

Naturally, the reply is that *any* limit will not do; it must be a specific one, agreeable to many States. If we have disposed of the necessity of a limitation for economic reasons, then we can scarcely believe that a limitation is justified as an abstract ideal. It must be meant that the *limits* themselves should be uniform, so that the courts, the shippers, the carriers—everyone—will know that the amount of probable recompense is, *e.g.*, $8,300, whether the airline or the ATC agency is being sued or whether third persons on the ground are involved. Of course the argument must break down here, because there is no existing uniformity of limits in private air law conventions, except for such minor points as baggage and

[49] *Id.* at 17-18.

[50] ICAO Doc. 8137-LC/147-1, at 174 (1960).

cargo in the Warsaw and Draft Aerial Collisions Conventions. There is no single norm with which to conform.

Let it be supposed that all the existing air law and draft conventions were amended to allow one uniform amount of compensation. That would simply put a certain monetary value on human life to which no one individual would agree—a clear compromise value. The conventions would say, in effect, no matter whom you have lost, no matter where or how within the realm of air transportation, the value of that loss is $8,300.

Finally, it can be argued that the subjects of the conventions are similar only superficially: the air carrier or operator provides transportation for a profit; the ATC agency aids transportation for the public welfare. To establish a similarity at this point, when so few exist at any other point, is artificial.

D. *Sovereign Immunity And Security Considerations*

States which have not yet waived sovereign immunity might be induced to accept limited liability under the ATC convention.[51] This argument appeared both at the first and the second sessions of the ATC Subcommittee. Some States are so anxious to have an ATC convention that they are willing to compromise and to accept a limitation on liability in order to make it more attractive for States which do not now permit themselves to be held liable to join the ATC convention.[52] However, it seems doubtful that the few remaining States which practice sovereign immunity would be induced to change if they were offered limited liability for their ATC, because the reasons by which those States justify their immunity are supposedly not economic. Those reasons are, instead, that the king is infallible, or that it is illogical to make the source of laws liable.

One writer suggests that States should not permit their air power to be sapped by unlimited payment of claims, because the combined air power has important military value.[53] A way of solving this problem is to include a clause in the ATC convention similar to the Chicago Convention's Article 89 exempting the contracting States from the obligations of the convention in case of war or national emergency.

E. *Conclusions*

A questionnaire asking Member States whether they, in their domestic laws, imposed limits on the liability of their ATC brought back the answers that none of the twenty-eight reporting States limited ATC liability.[54] Only the United States reported limited liability under the wrongful death statutes of some states. Neither do the international ATC organizations, Eurocontrol, ASECNA, or COCESNA limit their liability. In spite of the answers to the questionnaire, the majority of the ATC

[51] LATC No. 19, at 17.

[52] Second Meeting of the ICAO Legal Committee's Subcommittee, Liability of Air Traffic Control Agencies, ICAO LC/SC/LATC No. 32, at 8 (1965).

[53] Hadjis, Liability Limitations in the Carriage of Passengers and Goods by Air and Sea 111 (1958) (unpublished thesis in McGill University Institute of Air and Space Law Library).

[54] ICAO Questionnaire.

Subcommittee agreed that there should be a limitation of liability in the ATC convention,[55] some upon the slim basis that they were willing to compromise in this respect in order to make the convention more attractive to others. Although compromises may indeed be necessary to make conventions work, it is not clear why that middle group did not swing in the other direction. In general, it is odd that the international policies of a majority of States would be such a contrast to their national practices and policies.

This writer submits that since the ATC agencies are offered such court protection under a proof of fault system, the scales should not be further weighted against claimants, thus making the chance for just recovery so small that it is not worth the claimant's time to pursue it. However, since the ICAO Subcommittee's decision has so far been to establish limits, it is only fair that this discussion include an investigation of what the limits should be, if established.

VI. Choice of Limits on Liability

If it is decided that liability should be limited, one must ask more questions. Would any of the limits in existing private air law conventions and draft conventions be applicable or must new limits be established? Should recourse actions of air carriers and operators against the ATC agency be limited? Which laws would govern the recourse actions of ATC agencies against the air carriers or operators?

In all of these questions one danger is apparent: circumvention. The claimant will always attempt to place his suit under the convention which yields him the most certain return, unless his chances of recovering the higher award are very good. If ATC liability is limited, he will almost always turn to the Warsaw and Rome Conventions. If ATC liability is unlimited, and the claimant's chances of proving the agency at fault are better than fifty per cent, the claimant may risk the proof of fault procedure in the hope of a higher award. If his suit succeeds, the chances are that he has produced such conclusive evidence of the ATC agency's fault that a recourse action by the ATC agency against the private carrier or operator would not be successful. On the other hand, the air carriers' suits against the ATC agency would not involve unreasonable amounts, because they could not hope to recover more than the damage costs originally paid by them to their claimants.

It seems to this writer that passengers, shippers, and third persons on the surface are better served by unlimited ATC liability; their presence in court may thus be worthwhile. The carriers are better protected because unlimited ATC liability will draw some suits away from them, and the ATC agency is well protected because unlimited ATC liability will draw some suits away from them. The ATC agency is also well protected in its proof of fault system, where the air carrier has no better chance of proving the ATC agency at fault in a recourse action than the direct claimant would have had.

[55] LATC No. 32, *supra* note 52, at 10.

This position leads into the issue of causal relationship. No matter where a claimant places his suit, he must show that the defendant *caused* the damage to happen. The claimant thus assesses his chances of proving causal relationship. If he has a twenty-five per cent chance of showing that the air carrier caused the damage, he will sue the air carrier, even though the ATC convention has unlimited liability. The air carrier in a recourse action has only that same twenty-five per cent chance to show that the ATC agency caused the damage. It is not until the claimant's chances of showing causal relationship are better than fifty per cent that one can suppose he will take the risk of a proof of fault system.

A. *Direct Actions Against The ATC Agency*

There are three ways to determine which limits might apply to an ATC convention. In the first place, one can adopt the limits of existing private air law conventions, which have been laboriously agreed upon. Second, one can modify those limits with schemes which might interest wealthier States. Third, one can establish new limits.

The advantage of using the old limits[56] is that they have the backing of the majority, though not necessarily the most important aviation States. Significantly, one member of the ATC Subcommittee wanted limits to be four times higher than the present limits in The Hague Protocol which he considered inadequate.[57] The Hague Protocol is the most updated version, but since its limits are partially found in the Draft Convention on Aerial Collisions, one could say that the Draft Convention's limits would apply to: persons killed, injured, or delayed (also found in The Hague Protocol); objects carried by a person (also in The Hague Protocol); baggage, cargo, and mail delayed, damaged or lost (also in The Hague Protocol); damage to or loss of use of aircraft. The Rome Convention would apply to surface damage.[58]

Another way of utilizing the existing limits is simply to say that the limits of any other air law convention which pertain to the situation, and to which the ATC convention also applied, would be in effect.[59] For example, if surface damage were involved, and if the State were a member of both the Rome and ATC Conventions, then the Rome limits would apply. The defects of this solution are obvious. Depending on which membership a State held, the foreign claimant might or might not be subject to a limit. There would be no certainty. The major defect of applying existing limits under any guise is, of course, that they are too low to be acceptable to certain influential States, notably the United States.

Entirely new limits[60] would, of course, cause much dissension and would involve new surveys. Three conditions, however, might warrant a study

[56] LATC No. 19, at 17.
[57] LATC No. 32, *supra* note 52, at 13.
[58] If the Rome Convention's limits were adopted for ATC-caused surface damage, an apportionment of compensation for surface damage would be included because of the Rome Convention's ceiling on total damages in Art. 14.
[59] LATC No. 19, at 17.
[60] *Ibid.*

of such changes: if the world's economic situation, or a substantial part of it, had altered since the last limits were adopted; or if the ATC agency, being government owned, could not be compared to private air carriers; or if the limits should be different because the ATC convention was adopting a proof of fault system.

In the first case, no move was made to change the limits of the Draft Convention on Aerial Collisions when they were discussed as recently as 1964.[61] So, although one might argue that the standard of living in most of the important aviation States has improved since 1955 when The Hague Protocol's limits were established, the argument must continue that the dissatisfaction with the present limits is not world-wide. It is the attitude of a powerful minority. The majority of the Legal Committee did not find revision of limits justified based on change in the world's economy.

The second argument, that since ATC is government owned it can better afford high limits than can air carriers or operators, may be true. The government theoretically has the resources of every taxpayer in the country, whereas the air carrier or operator will be much more limited. However, it can be argued that if the carrier cannot pay for its negligent acts, its existence is against the public welfare.

The third and best argument is that air carriers and operators are either presumed liable or are absolutely liable under the existing air law convention, whereas the ATC agency protected by the proof of fault system will not be liable as often as the operators or carriers will, and the ATC agency will better be able to pay higher awards on the few successful suits. Ideally, of course, the sole test of compensation should be the damages suffered, not the defendant's ability to pay.

Finally it must be concluded that any limit adopted would cause some States to abstain from ratifying the ATC convention. It is perhaps a matter of weighing whether the convention should be attractive to a majority of States, however small their aviation interests may be, or to a minority of States (especially the United States) which form the hub of the world's aviation activities.

B. *Recourse Actions Against The ATC Agency*

If direct actions are limited in the convention on ATC liability, the drafters have a choice of limiting recourse actions. Unlimited recourse actions could cause the ATC agency to suffer.[62] For instance, imagine that a foreign non-Warsaw air carrier crashes in France. A passenger sues the air carrier and recovers; no limits are applicable to the award. The air carrier, believing that it can prove ATC negligence, sues Eurocontrol, which we imagine to be a party to the ATC liability convention, and the carrier wins and recovers full compensation. It is the ATC agency which must bear the difference between what it would have paid the passenger in a direct action subject to limits, and what it finally had to pay in a recourse action not subject to limits.

[61] ICAO Doc. 8444 LC/151, *supra* note 25, at 17.
[62] LATC No. 19, at 19.

Therefore, it is most reasonable that recourse actions should also be subject to limits. Does any hardship result? Yes, but not to the ATC agency. The situation is just reversed, *i.e.*, the passengers may sue the non-Warsaw carrier and recover without regard to limits on recovery. Then the air carrier in a recourse action against the ATC agency cannot recover the full amount, but is subject to limits. Thus, the non-Warsaw carrier must bear a loss for damage caused by negligence of the ATC agency. This situation would be infrequent as long as most States are parties to the Warsaw Convention. If the ATC convention's limits were lower than those of other private air law conventions, the air carriers might suffer in a recourse action, but the possibility of such low limits being established is most unlikely. Thus we can say that if limits were created for direct actions, it would be just to put similar limits on recourse actions.

C. *Recourse Actions By The ATC Agency Against The Air Carrier Or Operator*

A reverse situation exists when the liability of the air carrier or operator is limited under another air law convention, but the ATC convention has higher limits or no limits at all.[63] One argument is that it is to the advantage of the claimant (passenger, shipper, or third person on the surface) to avoid the limits of the other convention by bringing the action against the ATC agency. The ATC agency would then bring a recourse action against the air carrier or operator, thus suffering by being subject to lower limits. The ATC agency would have to bear the difference between what it paid the claimant and what it could recover from the airline.[64] If a limitation on liability in the ATC convention were the same as that on the liability of the air carrier or operator, then one could not construct such a problem.

Another solution would be to apply the air carrier's or operator's limitation to potential recourse actions *only*, in order to avoid the circumvention; or, to carry the argument further, open the ATC convention only to recourse actions. Of course, this is highly impractical, for then few suits against the ATC agency would ever be brought to court under the ATC convention. For instance, if the ATC agency were clearly at fault, a claimant could not base his suit against the air carrier, and he would not be able to present a direct claim under the ATC convention.

If proof of fault, combined with no limitation on liability, were the system adopted for the ATC convention, however, the number of recourse actions would be substantially reduced. The proof of fault shows its strength here. It throws up a barrier against claims which are potential recourse actions, because it encourages passengers, shippers, and third persons on the surface to recover with less difficulty using the presumed liability of

[63] *Ibid.*

[64] Compare Warsaw Convention, Art. 24, which states that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention"; and Rome Convention, Art. 9; and Draft Convention on Aerial Collisions, Art. 8, stating that the operator shall not be liable in a recourse action which would result in his liability exceeding the limitation of the convention.

the Warsaw Convention and the absolute liability of the Rome Convention. Otherwise, the claimant would have to prove the fault of the ATC agency, and that is not simple. However, if the claimant succeeds in his suit against the ATC agency, it is unlikely that the agency would have sufficient cause for recourse action. Combined with unlimited liability, a proof of fault system avoids conflicts with the limited liability of other conventions by cancelling a claimant's temptation to recover indirectly. It discourages circumvention; it encourages claims to be settled in one action.

A solution to the problem of recourse actions is one prepared by the United States for the Fourteenth Session (1964) of the ICAO Legal Committee: a consolidation of private air law conventions. In a consolidated air law convention, *almost all claims would be in the form of direct actions.*

> In regard to recourse actions under such a convention we would be interested in the exploration and possible development of a system without a limitation, in which recoveries would be based on proof of fault, and damages apportioned in relation to the degree of fault of the various tort-feasors.[65]

It should be noted, however, that the United States omitted the Warsaw Convention from its consolidation proposal. To diminish recourse actions by consolidation, it is imperative that the Warsaw Convention be included, since its limitation on liability would usually be related to recourse actions. The great number of claims brought under the Warsaw Convention shows that it is the relationship between the air carrier and the passenger and shipper which is most likely to be tested in concurrence with surface damage, aerial collisions, and ATC-caused damage.

When the subject of limits is introduced, one point leads to another. Each argument is composed of so many variables that it is difficult to build one idea upon another. The structure may collapse if one brick is removed, one factor changed. Therefore, several problems have not been touched. For instance, having made the decision to establish limits, the Subcommittee must deal with their correlation. Should a claimant be able to recover a total of more than the carrier's applicable limits,[66] *i.e.*, should he be subject to a cumulative system of limits? Imagine, for instance, that two different ATC agencies are at fault for a collision in which the claimant lost his wife. Can he sue and recover twice, that is, double the limit for that one loss?[67] A no-limit system of liability, of course, does not have this stumbling block. This article has discussed only the most significant issues in order to illustrate the nature of the problems which arise with each new argument.

VII. Conclusion

The technological trend in ATC is a recognizable, steady improvement,

[65] ICAO LC/Working Draft No. 710, at 4 (1964).
[66] LATC No. 32, *supra* note 52, at 11-13.
[67] Compare Rome Convention, Art. 14.

but the direction of legal protection is not yet clear. It is the purpose of this article to outline a desirable trend. The writer recommends control through the proposed convention on ATC liability, with many ATC-related services included in the definition. There are no compelling reasons for a method of liability other than proof of fault, which has already demonstrated its strengths. Within the context of air traffic control, a limitation on liability is rejected as being incompatible with a proof of fault system.