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THE EFFECT OF THE MONTREAL AGREEMENT ON THE CONSOLIDATION OF PRIVATE AIR LAW CONVENTIONS

BY PAUL B. LARSEN†

I. A TRILOGY OF CONVENTIONS

THE WARSAW CONVENTION ceased long ago to offer total regulation of air transport. In 1929, when aviation involved a few passengers and light planes, its coverage of problem areas was nearly all-encompassing. Today, however, potential participants have multiplied, as accidents like the 1960 Staten Island collision¹ so surprisingly show. If that collision had involved a foreign carrier and a domestic carrier, both flying under positive air traffic control, and the falling airplane parts had caused extensive ground damage,² the participants whose relationships would be directly affected are these: (1.) Passengers and shippers; (2.) Third persons on the surface; (3.) Operators of the two planes; and (4.) The Air Traffic Control Agency (ATC). If several parties are at fault, and in varying degrees are causes of the accident (*e.g.*, one carrier is 61 percent at fault, the other carrier 15 percent at fault and the control tower 24 percent at fault³), the situation well overlaps the context of passenger-shipper versus carrier which is the subject matter of the Warsaw Convention. In fact, the Warsaw Convention could no longer be relied upon to cover the passenger-shipper-operator relationship even if one only considers the presently increasing amount of general aviation. Those non-Warsaw areas which are regulated, are covered by only weak restrictions. A major aviation problem, facing governments today, is whether the ancillary conventions should be freed of Warsaw influence, or tied more significantly to it.

A. *The Unique Influence Of The Warsaw Convention On Air Transport Regulation*

Since 1929, developing aviation technology has quickly produced areas of air transport not regulated by Warsaw. The tendency has been to fill these gaps by separate conventions. A trilogy concept developed which was thought could solve all legal problems of international air transport: the Warsaw Convention regulating the operators' relationships with pas-

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¹ Note, *Governmental Liability—The December 1960 Air Disaster—Is Executive Settlement Desirable?*, 30 *J. AIR L. & COM.* 281 (1964).

² In the Staten Island collision compensation for surface damage amounted to about one million dollars. 1966 Report of the ICAO Legal Committee Subcommittee on the Rome Convention, 32 *J. AIR L. & COM.* 426 (1966). Compensation to passengers and shippers amounted to about twelve million dollars, *supra* note 1, at 286.

³ These are the actual percentages worked out in the settlement of the Staten Island collision, *supra* note 2.

sengers and shippers;⁴ the Rome Convention on Surface Damages to regulate the operators' relationships with innocent third parties;⁵ and a third convention on aerial collisions now in draft form, which would govern claims between the innocent and culpable operator, and also between the passengers and shippers on the innocent plane and the culpable operator.⁶

The Warsaw Convention is the oldest, the most successful, and the most influential convention in the trilogy. Although the Rome Convention has adopted a system of absolute liability coupled with liability limits, which are higher than those of the Warsaw Convention,⁷ it is still tied down by Warsaw precedence. For example, during the recent negotiations for higher limits in the Rome Convention, it was generally felt that a raising of the limits should attract more states to sign the convention.⁸ However, the subcommittee concluded that such a move would be unwise "until the outcome of present and future deliberations about the Warsaw Convention was known."⁹ Now, the third part of the trilogy, the Draft Convention on Aerial Collisions, has adopted in its Article 5 the Warsaw regime¹⁰ of presumed liability of the operator in order to place all passengers and shippers on the two colliding aircraft in the same situation, *vis a vis*, the aircraft operator who caused the collision.¹¹ The Warsaw liability system was adopted here in spite of the fact that *there is no contractual relationship* between the passengers and shippers on the plane which was hit and the operator who caused the collision. The Draft Convention on Aerial Collisions also has adopted the Warsaw liability limits as they are modified by the Hague Protocol,¹² in spite of the United States efforts to raise those limits.¹³ The general desire in the ICAO Legal Committee for uniformity with the Warsaw Convention was too strong for the United States to dislodge.¹⁴ The other two conventions are clearly

⁴ Gaps in the operators' relationship with passengers and shippers were filled by the Protocol to Amend the Warsaw Convention (hereinafter the Hague Protocol), 28 Sept. 1955, 1955 U.S. & Can. Av. 521, extending the Warsaw Convention to employees; and by the Convention Supplementary to the Warsaw Convention (hereinafter Guadalajara Convention), 18 Sept. 1961, 1963 U.S. & Can. Av. 313, reprinted in 28 J. AIR L. & COM. 45 (1961), regulating carriage by air performed by a person other than a contracting carrier.

⁵ Convention on Damage Caused by Aircraft to Third Parties on the Surface (hereinafter Rome Convention), 29 May 1933, reprinted in 2 C. SHAWCROSS & K. BEAUMONT, AIR LAW, 83 (3rd ed. 1966), followed by its replacement, the 1952 Rome Convention, 7 Oct. 1952, 310 U.N.T.S. 181 (1958), reprinted in 2 C. SHAWCROSS & K. BEAUMONT, *Id.* at 157, and in 19 J. AIR L. & COM. 447 (1952).

⁶ Only a draft convention on aerial collisions (hereinafter the Draft Convention on Aerial Collisions) has been produced, ICAO Doc. 8582-LC/153-2 at 281 (1964).

⁷ \$33,164 limit on fatalities in the Rome Convention (Art. 11) compared with \$8,291 in the Warsaw Convention (Art. 22).

⁸ Proposal of Mexico for Examination of the Rome Convention of 1952, *supra* note 6, at 163; see 1966 Report of the ICAO Subcommittee on the Rome Convention, *supra* note 2, at 434 regarding United States emphasis on higher limits, "that the United States of America which had formerly been opposed to a single forum and to the requirement of execution of the judgments of that forum had since made it be known that these provisions would not constitute a major obstacle to ratification of the other provisions of the Convention, particularly those relating to limits of liability were satisfactory."

⁹ *Id.* at 431.

¹⁰ Warsaw Convention, Arts. 17, 18, 19, 20 and 21.

¹¹ ICAO Doc. LC/SC/ Aerial Collisions No. 72 at 8-9 (1961).

¹² Limits provided by the Warsaw Convention Art. 22, as amended by the Hague Protocol Art. XI are: Each person killed, impaired or delayed, 250,000 gold francs (\$16,582); Objects carried by a person, 5,000 gold francs (\$331.64); Baggage, Cargo, Mail delayed, damaged or lost: 250 gold francs per kilo (\$16.50).

¹³ ICAO Doc. 8582-LC/153-1 at 103 (1964).

¹⁴ *Id.* at 106.

subordinate youngsters which can scarcely hope to be free of the Warsaw parental influence.

B. Breakdown Of The Trilogy Concept

Administration of air traffic control (hereinafter ATC) has, in recent years, become very important to air transport. It was felt by many at the 1964 ICAO Legal Committee meeting that ATC liability was a much more serious issue than that of aerial collisions.¹⁵ This of course has been borne out by the number of suits against ATC in the United States.¹⁶ The appearance of the ATC liability issue brought home the difficulty involved in having air transport regulated by an increasing number of separate conventions which fail to establish coordinated regulation on a systematic basis. For example, the Draft Convention on Aerial Collisions provides that if it is impossible to prove the fault of either of the carriers involved in the collision, then they shall share in the liability for the damage "in proportion to the weight of the respective aircraft."¹⁷ Suppose, however, that both aircraft involved in the collision were under positive air traffic control and that only ATC was at fault. The carriers would still be held liable under the collisions convention.¹⁸

It is particularly the proper regulation of recourse actions which has proved the weakness of a system of separate liability conventions, for potential recourse actions increase in direct ratio to the number of conventions. For a Staten Island-type collision, involving varying degrees of fault of both operators and air traffic controllers, the Draft Convention on Aerial Collisions provides that its liability limits may not be exceeded.¹⁹ This means that if the ATC agency is sued directly by a passenger, who recovers \$500,000, it can only recover up to the limit of the convention (\$16,582) from the two carriers, and loses the remainder²⁰ though the agency is only twenty-four percent at fault. Mr. Kean, the United Kingdom representative, observed that in writing a separate convention on aerial collisions, the ICAO Legal Committee had incidentally "produced the extraordinary system under which an air traffic control agency had its right

¹⁵ The International Union of Aviation Insurers, *supra* note 6, at 232, argued that "since when flying under instrument flight rules, or at very high speeds, the chief responsibility for the avoidance of collisions normally rests with Air Traffic Control and will do so to an increasing extent as speeds go up and the possibility of 'avoiding action' diminishes in consequence."

¹⁶ Representative suits in which the Government has been held liable are: *Furumizo v. United States*, 381 F.2d 965 (9th Cir. 1967) (Turbulence); *Ingham v. Eastern Airlines*, 373 F.2d 227 (2d Cir. 1967) (weather information); *Eastern Air Lines v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955) (separation of traffic); *Maryland v. United States*, 257 F. Supp. 768 (D. D.C. 1966) (separation of traffic); *Cattaro v. Northwest Airlines*, 236 F. Supp. 889 (E.D. Va. 1964) (separation of traffic).

¹⁷ Draft Convention on Aerial Collisions, Art. 7.

¹⁸ Compare remarks by Mr. Crawford of the United States delegation to the 1964 session of the ICAO Legal Committee, *supra* note 13, at 91.

¹⁹ Draft Convention on Aerial Collisions, Art. 8: "[A]n operator shall not be liable in any action in recourse by another operator or by any other person for the payment of any sum which would result in his liability exceeding any applicable limits of liability under this Convention or any other international convention."

²⁰ Note the remarks by the observer from Eurocontrol, Mr. Outers, who at the 1964 ICAO Legal Committee meeting "pointed out an injustice which could arise in the case of an air traffic control agency whose right of recourse was based on Article 8 of the draft Convention and, therefore, subject to the limits of the Convention. It might happen that an air traffic control agency, which was only ten percent liable might have to bear the whole of the damages and in recourse action against an operator who was ninety percent liable be subject to limits under the convention," *supra* note 13, at 137.

of recourse limited. . . .²¹ Indeed, Sir Richard Wilberforce saw no reason for limiting passenger action against carriers if claims against ATC were unlimited.²² Under the Warsaw Convention and the Montreal Agreement, a passenger's estate can recover \$75,000 from the airline on which he was carried under the absolute liability clause of the Montreal Agreement. However, even if the airline is not at fault or only five percent at fault, it can only recover up to \$16,582 in a recourse action against another operator under the Draft Convention on Aerial Collisions, and from ATC, only up to whatever limit is established in an ATC Liability Convention.²³

The trilogy concept did not break down solely because recourse actions became a problem. Other reasons have been that the Rome Convention failed to find general acceptance among states, an Aerial Collisions Convention has been delayed year after year, and the Warsaw Convention inadequately regulated passengers' and shippers' relationships with their carriers. A tantalizing suggestion then arises: why should there not be an attempt to combine all liability problems in one convention?²⁴

II. THE IMMEDIATE PROSPECTS FOR A CONSOLIDATED CONVENTION

Although the influence of the Warsaw Convention on the regulation of surface damage, aerial collisions and air traffic control is demonstrable, and the need to correlate regulation of all air transport liability problems seems evident, it must be noted that little is being done about consolidation.

Naturally, the states with high concentration of air transport are those most caught up in the complex of participants, which clog the way to a fair financial solution after an accident. Consequently, the United States began early to argue for consolidation of aerial collisions and ATC liability but the 1960 session of the ICAO Legal Committee decided not to combine the two.²⁵

In 1964 the United States raised the issue of consolidation on a broader scale, proposing to the ICAO Legal Committee a combined regulation of surface damage, aerial collisions and air traffic control liability,²⁶ but excluding passengers and shippers claims against their carriers. Reduction of litigation, by lessening the need for separate recourse actions after successful direct actions, was a major reason for the new suggestion. Retention of the Warsaw Convention intact would still offer some obstacles, however, for when a passenger's estate recovered \$75,000 under the War-

²¹ *Id.* at 133.

²² ICAO Doc. 8137-LC/147-1 at 174 (1960). Generally see Miyagi, "Applicable Limits of Liability" under Article 8 of the 1964 Draft Convention on Aerial Collisions, 32 J. AIR L. & COM. 195 (1966).

²³ The recourse situation would be the same if the innocent operator in a collision were compelled to pay compensation for a fatality on the surface. In fact the absolute liability system of the interim agreement makes the operator's recourse action even more difficult, provoking Sincoff to remark that "[T]he absolute liability regime produces the unfair effect of requiring only the air carrier to compensate damages up to \$75,000.00 when another concurrently causes the accident," Sincoff, *Absolute Liability and Increased Damages in International Aviation Accidents*, 33 J. AIR L. & COM. 147, 153 (1967).

²⁴ This idea has been expressed by several ICAO Legal Committee members, including P. J. Swart, *supra* note 13, at 35.

²⁵ Remarks by Mr. Boyle, delegate of the United States, ICAO Doc., *supra* note 22, at 167. The United States motion was supported by the United Kingdom, *Id.* at 168, and by Switzerland, *Id.* at 171; but the Legal Committee decision against the motion was made by a 13-10 vote, *Id.* at 176.

²⁶ United States letter of 27 July 1964 to ICAO, *supra* note 6, at 227.

saw Convention as modified by the Montreal Agreement, the carrier would still have to seek recourse against other carriers and against ATC under the consolidated convention. The Proposal was not acceptable to the ICAO Legal Committee. Instead it decided to consider aerial collisions separately and instructed its ATC Subcommittee to proceed in the direction of a separate convention for air traffic control liability.²⁷

III. AVAILABLE ALTERNATIVES WITHIN A CONSOLIDATED CONVENTION

A. *Liability Systems*

The most useful perspective on the question of liability systems is from the point of view of the four different types of claimants: passengers and shippers, people on the surface, aircraft operators, and air traffic control agencies.

1. *A Consolidated Convention Based Uniformly on Absolute Liability*

PASSENGERS AND SHIPPERS: The United States evidently decided, when insisting on absolute liability in the 1966 Montreal Agreement, that this was the best system for passengers and shippers claims against operators. Without questioning further the reasons behind the decision, it immediately appears that if this is the Administration's firm policy, it can have far reaching influence on the consolidation issue, for Warsaw, under the Montreal Agreement, will shed its light on the other conventions, as it always does. For example, the ICAO Legal Committee philosophy is that a fair social policy is to ensure that the passengers and shippers of both carriers involved in a collision are granted the same chances of recovery from the culpable operators.²⁸ If absolute liability is the system of recovery from one carrier, it will also be the same from the other carrier. Likewise, if absolute liability is in effect for passengers' and shippers' recovery from air carriers, it will ethically have to be the system under which passengers' and shippers' claims against ATC are managed.

PEOPLE ON THE SURFACE: The Rome Convention already has a policy of air carriers' absolute liability for surface damage, to which the United States no longer objects,²⁹ so there would be no difficulty in consolidating surface owners claims with those of passengers and shippers under a system of absolute liability.

AIRCRAFT OPERATORS: Can claims of operators be regulated by a general absolute liability system? In the Staten Island-type hypothetical illustration, where two operators and ATC are all at fault and in varying degrees, payment of the claims can be adjusted by the court, as it is in any other case where parties are jointly liable. Of course, if only one operator is sued by passengers or shippers it would be in his interest to join other potential defendants. In fact, the operator should be required to do so. This system of apportionment would solve the problem of recourse actions in a consolidated convention based on absolute liability.

²⁷ *Supra* note 13, at 142. The ICAO Legal Committee did not preclude the subcommittee from considering alternative solutions.

²⁸ *Supra* note 11.

²⁹ The United States abandoned its objection to this principle of liability at the 1966 meeting of the Subcommittee on the Rome Convention, 32 J. AIR L. & COM. 426 (1966); the reason for the policy change is explained in Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 558-61 (1967).

But another question arises: in a collision, can absolute liability be made to regulate the operator's claim for damages against a second operator or by ATC? The Draft Convention on Aerial Collisions provides for a separate liability system based on fault for this particular relationship,³⁰ which seems to indicate a feeling that operators' claims are in a different category than those of passengers. The United States Consolidation Proposal strongly supports a proof of fault liability system for operators' claims against each other and against ATC.³¹ Obviously, certain difficulties exist in drawing operators' direct claims within a consolidated convention based uniformly on absolute liability.

AIR TRAFFIC CONTROL AGENCIES: Recourse claims by ATC against other potential defendants would be required to be impleaded in the same way and for the same reasons as would operators' recourse claims. Direct claims by ATC presumably would be for damage caused by airplane parts falling from planes in the air upon controllers, control towers and equipment, and here ATC would be grouped with property owners on the surface and should be entitled to absolute liability.

It appears, then, that the Montreal Agreement's basis of absolute liability could serve as the uniform system for air transport. It would regulate recourse actions and provide uniformity of law. The greatest argument for an exception within a consolidated convention would be in the area of aircraft operators' direct claims against each other and their claims against ATC.

2. *A Consolidated Convention Based on Several Liability Systems*

Before the United States changed its policy from presumed fault to absolute liability, it had imagined a consolidated convention based on varying liability systems for the different types of claimants. From the participants' point of view such a convention would assume the following appearance.

PASSENGERS AND SHIPPERS: The United States Consolidation Proposal excludes passengers' and shippers' claims against their carriers, thereby allowing either the Warsaw Convention's regime of presumed fault or the Montreal Agreement's regime of absolute liability, to remain in effect. At the same time, the proposal includes claims by passengers and shippers on the innocent plane involved in a collision. This is based on the theory that, in a consolidated convention, these parties should be entitled to either absolute liability or to presumption of fault, but they should be given the choice of a proof of fault system if they wished to remove a limitation upon their recovery. Claims by passengers and shippers against ATC would be based on their proving fault of the ATC Agency.³²

PEOPLE ON THE SURFACE: Absolute liability or presumption of fault, with the option of proving fault if the claimant wanted no limit on his recovery, would also be in effect for surface claimants.³³

AIRCRAFT OPERATORS: Recourse actions by operators would be based on proof of fault with damages apportioned by the court depend-

³⁰ *Supra* note 6, at Art. 4.

³¹ *Id.* at 229.

³² *Id.* at 229-30.

³³ *Id.*

ing on the tortfeasors' degree of fault.³⁴ Their direct actions against other operators and ATC agencies would be based on proof of fault.³⁵

AIR TRAFFIC CONTROL AGENCIES: Recourse actions would be treated like those of the operators³⁶ and their direct actions would probably be classified with other damage to people on the surface.

A consolidated convention, based on several liability systems, would also regulate recourse actions, however, it would not provide uniformity of law.

3. *A Consolidated Convention on Surface, Aerial Collisions and Air Traffic Control Damage Only.*

An attempted distinction between contractual and noncontractual liability is embedded in the United States Proposal. Such a scheme would leave the Warsaw Convention as a separate contractual entity (together with the Hague Protocol and the Guadalajara Convention), and would consolidate liability for surface, aerial collisions and air traffic control damage in the manner described under Section 2, *supra*.³⁷ But, the distinction between contractual and noncontractual liability is not clear, and is in the process of being broken down. Relief under the Warsaw Convention is not limited to contractual recovery, as a study of United States case law makes quite clear.³⁸ Furthermore, in the Draft Convention on Aerial Collisions, a Warsaw-type recovery is provided for all passengers and shippers against the operator who caused the collision regardless of which plane involved in the collision has contracted carriage. Such a situation led Mr. Swart, the Netherlands delegate to the 1964 ICAO Committee, to conclude that "the Warsaw Convention which had never been limited to contractual liability, could not be separated from the Draft Convention on Aerial Collisions."³⁹

It is reasonable to state that the need for this rather strained distinction between contractual and noncontractual liability has been reduced significantly by the 1966 Montreal Agreement. Its change in liability system has brought it closer to the other subject matters as indicated in Section 1, *supra*, so that a re-evaluation of the liability basis in the United States Proposal certainly is in place.

Elimination of recourse actions was the main objective of the United States Consolidation Proposal. It need hardly be stated that consolidation of only three out of the four subject matters leaving out the major area of law suits, the Warsaw Convention, does not solve the growing recourse problem.

B. *Limitation On Liability.*

Since the trend toward a limitation on liability in air transport is, as indicated in the ICAO deliberations, so strong that it is not likely to be

³⁴ *Id.* at 230.

³⁵ *Id.* at 229.

³⁶ *Id.* at 230.

³⁷ Deleting, of course, mention of passengers' and shippers' claims against their carriers.

³⁸ According to United States case law as stated in *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), and in *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D. N.Y. 1952) the Warsaw Convention does not create a cause of action, it merely regulates whatever causes of action already exist. Lowenfeld & Mendelsohn *supra* note 29, at 517-19.

³⁹ *Supra* note 13, at 15.

overthrown soon. It is useful to discuss which limits are most feasible in a consolidated convention.

Since the limits of the different conventions are closely related (because of the pervasive Warsaw pressure), the significant increase in the Montreal Agreement's limit on recovery for fatalities will have a strong influence on limits in the other conventions if the Agreement is adopted in an amended Warsaw Convention. The extent of the Warsaw Convention's interaction with other air law conventions was perceived by the Canadian delegate to the 1966 Montreal meeting on the Warsaw Convention. He urged his fellow delegates to agree on new Warsaw limits "in order to insure progress" of discussions of limits in the other conventions.⁴⁰ Negotiations for new limits on the Rome Convention are considered to be futile until new limits for the Warsaw Convention are established.⁴¹

The focus of this paper being on the influence of the Montreal Agreement, only the effect of its \$75,000 limit of liability will be discussed.

1. *Uniform Limitation on Liability in a Consolidated Convention Based on Absolute Liability.*

In spite of the Montreal Agreement's higher limit on liability, it would be more difficult to establish uniform limits than it would be to adopt a uniform absolute liability system because of the greater variety of existing limits.

PASSENGERS AND SHIPPERS: If passengers are able to recover up to the \$75,000 limit of the Montreal Agreement from their own carriers, then, in a consolidated convention, the passengers on the innocent plane in an aerial collision should also be able to recover up to this limit from the operator who caused the accident, since it has been decided that all passengers and shippers involved in a collision should be treated equally. The same policy reasons would indicate that passengers should also be able to recover up to this limit from ATC.

PEOPLE ON THE SURFACE: Since the Rome Convention's present limit on recovery for fatalities is \$33,164, an increase to \$75,000 would be substantial. However, proposals for increase of the Rome Convention up to as high as \$150,000 were heard at the 1966 Meeting of the ICAO Subcommittee on the Rome Convention.⁴² At this time it is certainly not settled that a \$75,000 limit could be established for surface injury to people.

AIRCRAFT OPERATORS: If direct actions by passengers against operators were limited to \$75,000 then recourse actions by one carrier against another, or against ATC, could also be limited to this amount. It is difficult to peg the operator's direct claims for damages against another operator or against ATC at any specific figure. The measure of damages in the Draft Convention on Aerial Collisions is a likely solution: the value of the aircraft at the time of the collision or the cost of repairs or replacement, whichever is the least.⁴³

AIR TRAFFIC CONTROL AGENCIES: As in the case of the operators recourse actions, these claims by ATC could be made subject to the same

⁴⁰ ICAO Doc. 8584-LC/154-1 at 18 (1966).

⁴¹ 1966 Report of the ICAO Subcommittee on the Rome Convention, *supra* note 2, at 430-31.

⁴² *Id.* at 431.

⁴³ *Supra* note 6, at Art. 10.

uniform limit on passengers' claims. Direct claims by ATC, if classified as surface damage, would be limited in the same way as would other surface damage.

2. *Limitation on Liability in a Consolidated Convention Based on Several Liability Systems.*

As indicated in the United States Proposal a consolidated convention based on several liability systems would tend to have different limits for the different claimants.

PASSENGERS AND SHIPPERS: Limitation of passengers' claims against their carriers would tend to be influenced by the new limit in the Montreal Agreement. The limitation on claims by passengers on the innocent plane, against the operator causing the collision, would likewise be influenced by the Montreal Agreement's \$75,000 limit. However, the United States Proposal favored that these parties be given an opportunity, if they choose, to prove the causing operator's fault and thereby become entitled to no limitation on the operator's liability.⁴⁴ As for passengers' and shippers' claims against ATC, the United States Proposal specifically wanted a proof of fault system without a limit on liability. It should be noted, however, that the majority of the ICAO Subcommittee voiced a preference for limited liability, even if a proof of fault system were adopted.⁴⁵ If this be the case, the new limit of the Montreal Agreement would become influential.

PEOPLE ON THE SURFACE: Claims of this group against operators would, under the United States Proposal, be limited if based on absolute or presumed liability.⁴⁶ Again the limit of the Montreal Agreement would become influential in establishing an acceptable limit on recovery for persons killed or injured. The Proposal favored an option for this group of claimants to prove the operator's fault; in which case they would be entitled to no limitation on their recovery.⁴⁷

AIRCRAFT OPERATORS: The United States Proposal wanted operators recourse action to be based on proof of fault without a limitation on liability. The courts under this scheme would apportion damages according to degree of fault.⁴⁸ Operators' direct actions against other operators and against ATC would likewise be based on proof of fault without a limitation on damages.⁴⁹

AIR TRAFFIC CONTROL AGENCIES: Recourse claims by ATC would, under the United States Proposal, be treated like those of operators.⁵⁰ Direct claims would be grouped under surface damage.

Even if a consolidated convention were limited to surface, aerial collisions and air traffic control damage, as suggested by the United States Proposal, the Montreal Agreement's limit on liability would be influential in establishing the varying limits in these three areas.

⁴⁴ *Supra* note 6, at 229-30.

⁴⁵ ICAO Doc. LC/SL/LATC No. 32 at 10 (1965).

⁴⁶ *Supra* note 6, at 229-30.

⁴⁷ *Id.*

⁴⁸ *Id.* at 230.

⁴⁹ *Id.* at 229.

⁵⁰ *Id.* at 230.

III. CONCLUSION

The 1965 United States notice to denounce the Warsaw Convention⁵¹ and the compromise Montreal Agreement's basically different liability regime have caused much bewilderment for the participants in air transport. The Agreement's absolute liability system and the \$75,000 limit are now seeking general acceptance. In judging the Agreement's performance it is necessary to consider as wide a spectrum of related facts as possible.

The passengers' and shippers' relationship with their carriers is intertwined with the passengers' and shippers' claims against the culpable operator in a collision and their claims against air traffic control; it is interwoven with claims by people on the surface against carriers and air traffic control, with operators' settlement of claims among themselves, with their claims against air traffic control, and with claims by air traffic control agencies. The great increase in air transport has not only increased the number of participants, but it has increased the rate and size of conflicts among them.

This is the point where we begin to see that the Montreal Agreement may offer a light in the morass. Its system of liability has a chance of fairly wide acceptance, since it is already accepted in the Rome Convention. Such a system would be influential on liability systems to be established for passengers' claims arising out of aerial collisions and for ATC related claims. Its limitation on liability will strongly influence all claims by passengers and even affect the limitation on liability for surface damage.

It is no understatement that consolidation of all the aviation liability problems is a huge order to fill and that it would seem that it would be easier to reduce the order by settling for a partial consolidation as suggested by the United States Proposal. A partial consolidation does not sufficiently solve the problem of recourse actions because the greatest source of recourse actions is within the Warsaw Convention. Consequently, if consolidation is even considered, it should, in this writer's opinion, include the Warsaw Convention.⁵²

⁵¹ 32 J. AIR L. & COM. 246 (1966).

⁵² See Larsen, *Air Traffic Control: A Recommendation for a Proof of Fault System Without a Limitation on Liability*, 32 J. AIR L. & COM. 3, 22 (1966).