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## LIABILITY OF THE GRATUITOUS AIR CARRIER UNDER FRENCH LAW\*

BY ANDRE GARNAULT†

**B**ETWEEN inaccuracies and omissions of the law and the imaginative endeavors of legal writing, court decisions have not concluded the search for norms governing gratuitous air carriage and the liabilities resulting therefrom.

In the beginning it was the lack of legislation that affected the problem. The law of May 31, 1924, whose eminent proponents were concerned about imposing the classical liability norms upon the ascertainment of the technical obligations peculiar to aviation, brought about satisfactory results through its exceptionally beneficial protections of the profit of the common carrier. This law provided for a system of conventional exculpation which provided a defense in cases of pilot error and of "air risk," but it failed to deal with the problem of the gratuitous carrier. Ascertaining the existence of this gap and exploiting the subject according to which the gratuitous carriage would be outside the convention, court decisions could not admit that the provisions authorizing exculpation (such as provided for in the text, Articles 42 and 48) would be beneficial to the gratuitous carrier. As a consequence a surprising result was found to have been established: the strict classical liability norms were found to be applicable to gratuitous air carriage.

There is no doubt that for moral reasons Article 1384 of the Civil Code and its implied presumptions will be discarded according to the interpretation by courts which finally became unanimous, but Article 1382 of the Civil Code, upon the demonstration of an error which is the primary cause of an accident imputable to the gratuitous carrier, will bring unlimited remedial sanction upon the guilty party.

One more unusual exception deeply affects this rule: the carriage may be gratuitous but interested—when an interest of the carrier is shown. Such a carrier is classed as "interested" according to the language of the judgments, and in such a case, at the price of particularly ambiguous terminology, the gratuitous but interested carrier is subject to Article 1384 of the Civil Code and to its presumptions of liability which cannot be easily overcome.<sup>1</sup>

One must acknowledge that because of these more or less artificial distinctions, and the lack of precision in applying the retained interest test, equity was particularly abused. The carrier for hire, rewarded and at fault, was favored even to the point of exculpation. The gratuitous carrier was subject to damages, arising from a proven negligence, which imposed total reparation. The non-remunerated but interested carrier was charged with heavy presumptions characteristic of the liability of the act of things. Disorder flourished, in fact, in the realm of gratuitous carriage.

Furthermore, in pointing out the unfavorable fate of the gratuitous carrier, we should remember that international law offered no safeguards against the injustices of municipal law. According to Article 1, paragraph

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<sup>1</sup> See Cassation, May 13, 1947, *Revue Générale de l'Air* 469 [1947].

1 of the Warsaw Convention, the gratuitous carrier doubtless benefited from the limiting protection of the liability provided in this text but only in the case where the carrier was a common carrier. Amateurs and sportsmen and clubs were sacrificed.

In short, it was necessary to put things in order. This came about, though too late. Its effectiveness was taken for granted.

The law promulgated on March 2, 1957, had two objectives. The first brought about an alignment of municipal law with the Warsaw Convention concerning the common carrier. All common carriers, whether local or international, were subject to the Convention. Deprived hereafter of the exculpatory benefits provided by the law of 1924, they were not protected by the limitation on damages charged against them.

The next text also envisaged filling the gap in the law of 1924 concerning all gratuitous carriers. Let us first note that as a result of a prolonged "shuttle" between the two Assemblies, the Senate was obliged to undertake a revision of their initial text which demonstrated generosity in favor of the gratuitous carrier. Contrary to the text originally adopted, no exculpation would be stipulated to his benefit in the case of a navigational error, but he could at least claim the benefit of limitations provided by the International Convention and the victim would have to prove his fault in order to obtain redress.

One could therefore take for granted that the controversy would be checked but this would be to underrate carelessly the imagination of certain theorists. Under their instigation a brilliant and destructive assault would be conducted against the effectiveness of the law. The first step would be to deny any effect to this law, except to the extent it would apply to the common carrier, the only party to which the law is linked by the international text. Thus, by referring to the Warsaw Convention, the law of 1957 carried within itself the seed of its ineffectiveness. There was an easy answer to this narrow interpretation of a law which the Assemblies hoped would have general application. The norms of municipal law concerning gratuitous carriage refer to limitations but do not in any manner call upon the restrictive applications of the International Convention provided for in Article I. In other words, the provisions of the 1957 text will apply to all gratuitous carriers without distinction. If it were otherwise, apart from the fact that the will of the makers of the law would have been betrayed, the text they established would become absurd, even as far as frustrating its advantages to those whom it precisely wanted to protect.

To this first attempt one should add an odd academic fantasy exploiting the disorder in the codification. It is recognized that according to the legislative terms of Article 113 of the decree of November 30, 1955, codifying the legislative text relative to Civil and Commercial Aviation, the definition of air carriage appears to exclude round-trip flights. Thus conceived, this article in effect reads: "Air carriage consists of transporting passengers, mail and goods from one point to another point." Therefore if this restrictive definition is accepted by the Courts, it would exclude from the benefits of the law of 1957 all air flights returning the passenger to the airport of his departure. All the pleasure flights of the aero clubs would thus fall outside the application of the law. To this fantasy of an analyst, one must simply rely that the text of Article 113

has absolutely no connection with the régime of air carriage liability. One must immediately stress the geometric absurdity of the argument. This argument could not be sustained unless an absolute coincidence were established between the point of departure and the point of arrival. It is recognized that it is a question of academic hypothesis. Furthermore, the argument in question is nullified by the provisions of Article 121 of the Code. This article stresses that non-stop flights returning passengers to the airfield of departure are classed among the carriages. In fact, inserted into the text of the codification at the beginning of Title III, Article 113 is nothing but a repetition of the first article of the decree of September 23, 1953, which is completely extraneous to the problem of liability. That article relates to organizing the system of coordination of air carriage and thus defining those carriages that are subject to its rules. It is therefore upon the results of a doubtful academic endeavor that such an effort has been made to influence the real scope of the law of 1957.

The major controversy, however, arises from an apparently more serious argument. It is noted that the law makes reference only to gratuitous carriage. What is going to happen in the case where carriage, while un-rewarded is not gratuitous but is interested?

It is said that this ambiguous qualification, which is difficult to visualize, would permit the avoidance of the essential norms of the law in all cases where, although uncompensated, the air carriage in question revealed an interest of the carrier. Only the purely gratuitous act would benefit from the protection of the text. So the private pilot who, flying over mountains, takes on board to accompany him on this pleasure cruise a member of a local club particularly familiar with the dangerous aspect of the rough country over which they would be flying, would certainly be undertaking an interested carriage. This carriage, although uncompensated, would then be justiciable under the rules of Article 1384 of the Civil Code, and subject to the rule of the implied presumptions of liability. The same would apply in a flying competition or air rally requiring that the pilots carry a passenger in order to comply with the regulations of the trial in which they take part.

One can thus see how the erosion of the law takes place, becoming prejudicial precisely to those whose interests it would be desirable to preserve and whose activities should be promoted in the public interest. If the restrictive value of the law and the exclusion of the carriage interested in its enforcement are to be retained, the aero clubs and private pilots will be deprived of the advantages of a text the legislative history of which reveals that its objective is especially to protect them. In this manner casuistry would overcome the will of the legislator, and the operation of an uncertain idea of the court would destroy in great part the scope of the text. An effort by the legal writers has been made in this direction but up to the present time the courts have refused to come out in favor of it.<sup>2</sup>

It is our opinion that regarding these court decisions we must keep to the letter of the text. In ruling on the fate of carriage for consideration, by referring to the Warsaw Convention the law defines the position of

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<sup>2</sup> See Tribunal de Grande Instance de Gap, decision of February 9, 1961. 1961 *Revue Française de Droit Aérien* 293; Court of Appeals of Grenoble, October 18, 1961, 1961 *Revue Française de Droit Aérien* 373.

the gratuitous carrier, neglected by previous law. How is it possible to conceive then that the legislator who was concerned over the continuation of a "shuttle" between the Assembly and the Senate, resulting from the problem of the gratuitous carrier would, through an incomprehensible omission which neglected to make any reference to the judicial notion of interested carriage, intended to deny all protection to that special category of carriage. In fact, in dealing with the gratuitous carrier without qualification or limitation the law necessarily excluded the judicial subdivision or distinction between "gratuitous" carriage without any interest and carriage which is gratuitous, but nonetheless "interested."

Furthermore, in order to halt inventions by the court or by the legal writer in this field, the law returned to the ruling of Article 24 of the Warsaw Convention which excluded all distortion affecting the principles it imposes once it defined the norms pertaining to gratuitous carriage: "The liability of the air carrier may not be sought except under the conditions and within the limitations provided for *hereabove*, regardless of the persons concerned and whatever the grounds upon which they intend to bring suit." The situation is therefore clear to a faithful interpreter. In air law the idea of special treatment of an "interested" carriage has not survived the promulgation of the law of March 2, 1957.

The law of March 2, 1957 has as its source a counter-bill of the Senate prepared by a professor of law opposing a text of governmental origin. In the 18th issue of the *Recueil Dalloz* of 1955 one may find as an appendix to an article by Dean Chauveau concerning the proposed bill and the substitute text suggested by him which was again taken up by the High Assembly. Nobody has disputed this eminent professor's authorship of this bill—only its scope and the wording. On this point Dean Ripert who inspired the law of May 31, 1924, has rendered justice to the sponsor of the law of March 2, 1957 in "Liability in Air Carriage," a comment in the *Recueil Dalloz*, May 11, 1957. Dean Chauveau has strongly opposed the attack developed by the supporters of the "interested" carriage against the general scope of the law of March 2, 1957. In an article on the subject of gratuitous air carriage, he denounced the fictitiousness of the distinction between a disinterested gratuitous carriage and an "interested" gratuitous carriage, and affirmed that the law has as its objective all gratuitous carriages which includes both types of carriage.<sup>3</sup> This analysis by the author of the text must not be overlooked. . . .

Finally, with common sense and even with equity, let us note that the hostile position taken regarding this interpretation seems particularly improper. How, for the survival of an artificial concept that is not based upon the law, can one justify that the professional carrier looking to profit, should obtain better treatment as to his liability than the private pilot or the pilot of an aeroclub, carrying a friend in order to meet the requirements of a sporting competition, or carrying a club member whose knowledge of routes makes a pleasure trip more agreeable or more safe.

Here the text, its inspiration and morality help to justify court decisions that have refused to acknowledge the idea of a separate category of "interested" carriage in the matter of air carriage. Against the law, an invention by the courts, even though ingenious, cannot prevail.

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<sup>3</sup> Chauveau, *The Unrewarded Air Carriage*, April 27, 1960, *Juris Classeur périodique* 1556 [1960].