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PASSENGER LIABILITY OF AIR CARRIERS IN COLOMBIAN LAW

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The oldest commercial airline in the Western Hemisphere was founded in Barranquilla, Colombia, on December 5, 1919. Sociedad Colombo-Alemana de Transportes Aéreos (SCADTA) initiated passenger service along the Magdalena River in Sept., 1920 with two Junkers F-13 hydroplanes and in a few years established routes connecting the principal cities of Colombia, as well as airmail and aerial photography services.

In his fascinating history of Colombian Aviation, Una Historia Con Alas, the well known and respected aviation pioneer, Col. Herbert Boy, tells the story of how Colombia moved directly from the burro to the airplane as the principal means of transportation. SCADTA opened international routes to other South American countries and in 1925 made a sensational flight across the Caribbean to Miami, seeking permission to inaugurate regular service to the United States. This flight, interestingly, led to the formation of Pan American Airways.1

SCADTA is today AVIANCA (Aerovias Nacionales de Colombia, S.A.) and is recognized as a great contributor to the progress of civil aviation in the Americas. In 1957 AVIANCA, the largest airline in Colombia, made 47,679 flights carrying more than 1 million passengers and more than 71 million kilos of cargo almost 23 million kilometers. The many other aviation companies in Colombia include passenger, all-cargo, helicopter exploration companies and fumigation and aerial photography enterprises.

Colombia's importance historically and currently in civil aviation, her geographic position in inter-hemispheric air routes, and the tempo of her commercial activity commend the study of certain legal aspects of airline passenger service.

PART I. CONTRACTUAL LIABILITY

This discussion will be mainly concerned with contractual liability of air carriers for death or injury to passengers, and will deal with

1 In his book, Global Mission, Gen. H. H. Arnold relates that he and other U.S. Army officers feared the consequences of allowing a “German airline” to fly over the Panama Canal and hurriedly instigated the creation of an American airline (PAA) to carry U.S. mail from Havana to Florida, thus providing the basis for denial of SCADTA's request.
decisions of the Supreme Court, commentaries of leading Colombian publicists, the validity of clauses limiting liability, and miscellaneous factors affecting liability claims.

**Decisions of the Supreme Court**

Newton C. Marshall and 2 other passengers boarded a plane of SCADTA at Quibdó, Colombia on March 10, 1934 for a routine flight to Bogotá. The flight took off under normal conditions. The route calls for crossing the Western Cordillera of the Andes and at that point these were the last messages received from the plane:

10:18 “Airplane in perfect condition; we can descend through the clouds.”
10:41 “Attention! We are flying blind in the mountains; maintain contact with us.”

There followed a series of “V’s” on the wireless and then silence. The plane had crashed in the rugged jungle area of the northwest part of Colombia. All of the occupants, except Marshall, were either killed in the crash or died from injuries. Although injured himself, Marshall miraculously made his way to an inhabited region and was saved. The precise cause of the accident remained undetermined.

Three years later he filed suit in Barranquilla against SCADTA for damages in the sum of $200,000.00 Colombian pesos, and this suit later resulted in the first Supreme Court decision in Colombia directly on the liability of air carriers. Marshall’s demand was primarily based on extracontractual liability for negligence and only secondarily on contractual liability. The Trial Court held (and was later sustained by the Supreme Court) that the two causes of action were incompatible in the same complaint, and that where a contractual basis exists, an extracontractual claim in the same demand will be disregarded unless separate injuries can be shown. The Trial Court found the defendant airline liable on a contractual basis and set damages at $100,000.00 Colombian pesos for physical injuries and suffering.

The Appeal Court reversed the decision, and finally, on May 15, 1946 the Supreme Court rendered its decision affirming the exoneration of the defendant airline. In so doing the Court established the much discussed doctrine of “prudence and diligence” as the standard of care for public air carriers in Colombia.

First, the Court examined the nature of air transportation in general and found that “. . . because of its characteristics, nature and medium of movement, the aircraft is quite different from modes of land and maritime transportation.” It noted, “In Colombia there is a lack of special legislation on air carriage. Therefore, the decisions

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2 May 15, 1946 G.J. No. 2032, p. 440 (The practice in citing Supreme Court decisions in Colombia is by date, volume or number, and page of the official publication, *Gaceta Judicial*, rather than by names of the plaintiff and defendant. This will be followed throughout).
of the Court must fill the vacuum, constructing a doctrine which best harmonizes with our general legal order, without forgetting the special characteristics of air transportation and the necessity of the Nation to stimulate its growth and development.” Thus, the Court chose not to apply directly the Code of Land Commerce or the Code of Maritime Commerce to air transportation.

Second, on the nature of the air carriage contract itself, the Court held that, in the absence of special legislation and since the carrier can offer at best relative security to the passenger, the carrier’s duty of care is one of prudence and diligence in its operations. The carrier is not required to prove an act of God (caso fortuito) to escape liability, as was previously required of carriers engaged in land transportation.

In the words of the Court: “In order to precisely define the contractual obligations of safety in air transportation, the factor of risk must play a preponderating role . . . For this reason the obligation of safe carriage on the part of the air carrier, in the absence of special legislation, cannot be other than simple prudence and diligence. It is fitting that the carrier be required to perform with much diligence and care for the safety of passengers, but the essentially dangerous character and nature of aviation cannot impose on the carrier such a degree of perfection, that exhausting the precautions possible of occurring to the human mind, the passenger can be relieved of all danger.”

Regarding the reasonable obligations of the carrier assumed in the carriage contract, the Court said, “. . . To require of the public air carrier proof of an act of God to exonerate itself from contractual liability originating in an air accident, would be equivalent to forcing it to accept an obligation more serious than it assumes. The carrier guarantees that it will take all the precautions relating to the proper condition of the aircraft, the qualifications of the pilot, the carrying out of schedules on approved routes, etc., but it cannot give an unlimited guarantee against the so-called ‘risks of the air.’”

Third, the Court observed that even applying the provisions of the Civil Code, the Code of Land Commerce and the Code of Maritime Commerce to air travel, the standard of care would be the same.

With respect to the Code of Land Commerce, the Court noted the difference between “public” and “private” carriers expressed in Art. 2713 and cited with approval a 1941 case4 to show that the stand-

3 Art. 271: “Transportation enterprises are private and public. Private carriers are those which, engaging in the transportation business, have not offered their services to the public and which freely engage in the transportation of persons and goods at agreed prices. Public carriers are those which have a transportation establishment announced and open to the public, and carriage is effected at the times and prices and under the conditions previously fixed in their announce-

4 April 23, 1941 G.J. Vol. 51, p. 461.
ard of care of a "public carrier," by virtue of Art. 3225 is different from that of a "private carrier" under Art. 306. The cited case, dealing with transportation by aerial cable car, held that under Art. 306, a private carrier could only escape liability by showing that the accident occurred because of an act of God, while Art. 322 (Section 4) required merely showing absence of fault (prudence and diligence) on the part of the public carrier. In the Marshall decision the Court found Art. 306 "incompatible" with air transportation by public carriers.

Prior decisions had been almost unanimous in holding that a public carrier in land transportation was required to prove an act of God to escape liability.7

On the application of the Civil Code, Art. 2072, to air transportation, the Court in another dictum in the Marshall case found that the terms of this article indicate a distinction between liability of a carrier for transportation of persons and for transportation of things. "... the first part of Art. 2072 prescribes that the carrier is liable for the injury to a person carried, occurring as a result of the bad condition of the vehicle, ship or vessel in which the carriage is effected; the second part of the article, relating to the carriage of things, makes a carrier liable for the destruction of cargo unless it proves an inherent defect in the cargo or an act of God." The Court concluded: "The Civil Code ... exonerates the carrier of persons by mere proof of absence of fault."

Going further, the Court said that only if the Land Commercial Code permitted the above interpretation, could that Code be applied to air transportation. If not, then the provisions of the Civil Code and the Maritime Code would govern. As seen above, the application of the Civil Code to air carriage of persons results in a duty of prudence and diligence, and, in the view of the Court, the same standard of care results from the application of the Maritime Code, Art. 353.

Two subsequent decisions of the Supreme Court in air carriage cases adhered to the doctrine of the Marshall case.8 The latest published Supreme Court decision on liability of air carriers for death or injury to passengers, that of Sept. 27, 1955,9 reviews the previous cases on the subject and reaffirms the holding in the Marshall case.

5 Art. 322: "Public carriers are under the obligation: Sec. 4 — To indemnify passengers for injury which they may suffer in their persons, due to bad condition of the vehicle, due to the fault of the carriers and that of their drivers and post-boys."

6 Art. 306: "The carrier is liable for both slight and gross negligence in the fulfillment of the obligations imposed by the carriage. It is presumed that the loss, damage or delay occurred through negligence of the carrier. In order to exonerate itself from all liability, the carrier must prove that the act of God did not result in the damage through its negligence, and that its care and experience were ineffective to prevent or modify the effects of the accident that caused the loss, damage or delay."


9 Sept. 27, 1955 G.J. Vol. 81, p. 162.
In the 1955 case an aircraft of AVIANCA was on an instrument flight in bad weather and crashed into a mountain near the airport of Bucaramanga, causing the death of all aboard. The Court held the defendant liable for failing to take proper precautions in the maintenance of emergency radio equipment at the airport, the malfunctioning of which prevented adequate transmission of weather information to the flight in question.

The Court stated, "The appellant (airline) . . . asserts . . . the doctrine of the Court, by virtue of which an air carrier is charged with a general obligation of prudence and diligence and therefore is exonerated from liability by proving absence of fault . . . . This Court reiterates this doctrine, developed especially in the following decisions: April 23, 1941 G.J. Vol. 51 p. 461; May 15, 1946 G.J. Vol. 60 p. 430; Nov. 29, 1946 Vol. 61 p. 661; Aug. 27, 1947 G.J. Vol. 62 p. 678; and corrects those of April 23, 1954 G.J. Vol. 77 p. 411; and Nov. 23, 1954 G.J. Vol. 79 p. 665, in keeping with this same doctrine."

"Therefore, in case of accident, air carriers, to exonerate themselves from liability originating in the carriage contract, need prove only that they have taken all the measures conducing to the complete fulfillment of their obligation to transport the passenger without injury to his destination. This Court has reviewed the juridical construction elaborated in these decisions, with diverse elements of the positive law, since the positive law does not have special provisions concerning the mentioned type of transportation, and the Court considers such construction adjusted to the law, the peculiar nature of air navigation and the general doctrine on this important subject."

Thus, it can be affirmed that the doctrine of the Supreme Court establishing the duty of simple "prudence and diligence," and allowing a public air carrier to escape liability for death or injury to passengers by showing "absence of fault" without having to attribute the accident to an act of God, is the present rule of law in Colombia.

Commentaries of Leading Colombian Publicists

In Colombia, a Civil Law country, the written commentaries of jurists and outstanding legal writers, called tratadistas, are often of greater importance in the development of the law, than under the Anglo-American system in which the doctrine of stare decisis predominates. And attention to the opinion of publicists is necessary in a subject such as Air Law, on which there is no special legislation on passenger liability of air carriers.

While in general, all of the writers on the subject agree with the views of the Supreme Court in the Marshall case as to the unique nature of air transportation and the need for special laws, they

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10 Colombia's historical and traditional ties are with Spain and France. The Colombian Civil Code was patterned after the Bello Code of Chile, which was based on the French Code. Colombia's Commercial Codes were adopted from those of the former State of Panama, which in turn were based on Chilean legislation.
unanimously disagree with the Court's interpretation of the nature of the air carriage contract and the application of the Civil and Commercial Codes to air transportation.

In the Marshall case the Court did not directly discuss the classification of the transportation contract in terms of traditional Civil Law definitions, but, emphasizing the factor of risk, found the contract of air carriage implied a duty to use proper means in carrying out the contract, rather than a guarantee of successful completion of the carriage. The precise nature of the transportation contract in Civil Law countries has been the subject of many divergent views expressed by European writers.11

In his article, "La Responsabilidad Civil del Transportador Aéreo,"12 Dr. Alberto Zuleta-Angel13 attacks the reasoning and the conclusions of the Court in the Marshall case. He refers to the division of obligations to perform (obligaciones de hacer) made by Demogue14 into obligations to take proper means (obligaciones de medio) and obligations to accomplish a certain result (obligaciones de resultado). Dr. Angel strongly affirms that the carrier's obligation is to transport the passenger safe and sound to his destination, and not simply to use proper means to effect this result. Therefore, he finds, the carrier is liable for non-fulfillment of this obligation unless it can show that the interruption of the carriage was due to an act of God or the intervention of a foreign element. In his terms, the carrier's obligation is an obligación de resultado and not an obligación de medio. The fact that the carrier operated with diligence and prudence is insufficient to exonerate it, as this type of defense is only applicable to obligaciones de medio.

Dr. Alvaro Pérez-Vives,15 in his authoritative treatise on obligations16 classifies the contract of transportation as the most important example of the obligación de resultado, and argues along the line of reasoning of Dr. Zuleta-Angel.

Agreeing with the views expressed by these authors are Dr. Carlos Samper-Wills17 and Professor Carlos Holguín.18 Dr. Pablo Emilio Jurado,19 while basing his opposition to the standard of care of "pru-

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11 Ortega-Torres, Código de Comercio Terrestre (Bogotá, 1956), p. 98.
12 Revista Trimestral de Derecho Comercial, No. 2 (1947).
13 Professor of Commercial Law, National University; ex-Magistrate of the Supreme Court; legal commentator of great prestige.
14 Demogue, Traité des Obligations, Vol. 5, No. 123.
15 Professor of Law, National University; Member of the Society of Comparative Legislation, Paris; Authority on obligations.
17 Colombian attorney; author of the book, El Contrato de Transporte Aéreo y la Responsabilidad, (Bogotá, 1947).
18 Professor of Law, National University; author of the article, "La Responsabilidad del Transportador Aéreo y el Contrato de Seguro," Revista Jurídica. No. 20 (April, 1961).
19 Specialist in Air Law; former Counsel and Director General of Civil Aeronautics.
dence and diligence" on the practical problems of the plaintiff in producing evidence of specific fault in aviation accidents, and on the unequal capacity of the plaintiff and the carrier to sustain losses, would impose a system of strict liability.\(^{20}\)

The mentioned writers, cite several Supreme Court cases\(^{21}\) dealing with land transportation, in which cases the Court found the obligation of safe carriage to be an *obligación de resultado*.

In addition to attacking the Court's interpretation of the air carriage contract as expressed in the Marshall case, the majority of writers also disagree with the Court's application of the various Codes to air transportation which application was presented in dicta.

Regarding the application of the Code of Land Commerce, Art. 306 and Art. 322 (Sec. 4) and the distinction between public and private carriers' duties found in these provisions, Dr. Zuleta-Angel affirms "it is indubitable that the doctrine established by Art. 306 (requiring evidence of act of God to escape liability) is applicable to public carriers. This is expressly provided by Art. 318."\(^{22}\) He would apply these provisions to air transportation. For support of his position he cites a 1938 railroad case\(^{23}\) in which the Supreme Court stated that Art. 306 is applicable to public carriers by virtue of Art. 318. Other writers on the subject agree with Dr. Zuleta-Angel.

None of the commentators accept the difference observed by the Court in the obligations of carriers of persons (first part of Art. 2072 of the Civil Code) and carriers of goods (second part of the same article). They assert that the Civil Code should not be interpreted so as to give more protection to goods than to human life. The Court's dictum applying the Code of Maritime Commerce to air transportation by analogy, is also generally rejected.

It should be observed that although these outstanding jurists and commentators have strongly criticized the doctrine set forth in the Marshall case, their criticism has been of no avail. In view of the unanimity of their views and the prestige they enjoy in a country which usually gives great weight to the writings of *tratadistas*, it is truly surprising that all of their arguments have fallen on deaf ears. The net effect has been that the mentioned doctrine, followed in later cases, has become more firmly established.

The reasoning of these writers is cogent and convincing on the general nature of the carriage contract in the context of the Colombian legal system. Under this system it is logical that a public carrier be held to an obligation of safe carriage to destination. The emphasis given by the Court in the Marshall case to the factor of risk is not justified. Nearly all human activity involves some risk and no carrier,

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\(^{21}\) Supra, note 7.

\(^{22}\) Art. 318: "The provisions of this Title (which includes Art. 306 relating to private carriers) are applicable to public carriers."

\(^{23}\) Nov. 28, 1938 G.J. No. 1943, p. 44.
whether engaged in land, sea, or air transportation, can guarantee absolute and perfect security at all times. If evidence of specific fault is available, then there is little question of liability. But the lack of any clear indication of the causes of accidents is frequent in aviation cases, and this was true in the Marshall incident.

The essential question is "Who is going to bear the loss?", or "Who has the burden of proof?" Should the carrier be given the burden of showing the intervention of a foreign element to escape liability? Or should the plaintiff be required to show specific fault on the part of the carrier in all cases?

As to the matter of producing evidence it is obvious that the carrier is in a far better position to explain the non-fulfillment of the carriage contract. It has available all the records dealing with its operations and is intimately familiar with the details of its activities and the dangers inherent in them.

The relative abilities of plaintiff and carrier to sustain losses is certainly a debatable question and examples can be given to show how unlimited claims can adversely affect an airline. At any rate, the award to the plaintiff of $100,000.00 Colombian pesos by the Trial Court in the Marshall case would have been a very heavy burden on the airline if the decision had not been reversed on appeal.

The basic philosophy behind the Supreme Court doctrine in the Marshall case is expressed in this part of the decision: "Therefore, the decisions of the Court must fill the vacuum (of special legislation) constructing a doctrine which best harmonizes with our general legal order, without forgetting the special characteristics of air transportation, and the necessity of the Nation to stimulate its growth and development." (emphasis supplied)

It is submitted that the Court determined to protect the nascent air transportation industry from ruinous lawsuits by devising a doctrine which allows the airline to exonerate itself when the specific cause of an accident is unknown. In effect, then, it is the passenger or his heirs who must ultimately bear the loss relating to an injury or death of a passenger in the mentioned circumstances. This reasoning loses much force in view of the extensive development of aviation liability insurance.

In the Marshall decision, the Court's dicta on the application of the Land Commercial Code and Civil Code, with the careful distinctions between public and private carriers, and between carriage of goods and persons, is not so much a contribution to the interpretation of the air carriage contract as it is an attempt to give support to the Court's basic philosophy expressed in the body of the opinion.

Validity of Clauses Limiting Liability

It is necessary, in determining the contractual liability of air carriers for injury or death of passengers, to consider the legal and prac-
tical value of clauses limiting liability. The practice of inserting such clauses in conditions of passenger tickets and tariffs is of long and wide-spread usage. The legal validity of these clauses in the light of legislation, decisions of the Supreme Court and opinions of commentators will now be discussed, leaving the practical value to later consideration.

Art. 1604 of the Civil Code, which fixes the general obligations and rights of parties to a contract, states in part: “... nevertheless, it is understood that these provisions are without prejudice to special stipulations of the laws and the express stipulations of the parties.” Clearly, the freedom of contract here presented is limited by Art. 1522 of the Civil Code which invalidates clauses condoning future wilful misconduct (dolo), and by Art. 63 of the same Code, which makes gross negligence (culpa grave) equivalent to wilful misconduct. The Supreme Court has so held, adding that in any case a clause thus limiting liability will have at least the effect of inverting the burden of proof.24

With special reference to the transportation contract, Art. 2072 of the Civil Code makes a carrier of goods liable for their destruction or damage, unless the carrier can prove latent defect in the goods or act of God, or unless it can show stipulations to the contrary in the carriage contract. This latter provision would seem to be limited by Art. 8 of Law 52 of 1919 prohibiting the use by public carriers of goods, of clauses which limit the obligations or liability of carriers.

While the two legislative provisions just mentioned refer specifically to goods only, Art. 329 of the Code of Land Commerce states that “The printed tickets issued by public carriers with clauses limiting liability to a stipulated sum do not exempt the carrier from complete indemnification of the passengers or shippers of goods for the losses which they may justly prove to have suffered.”

The Supreme Court decisions on the validity of exonerative clauses in air transportation are three. First, in the Marshall case, the Court extended its reasoning on the unique nature of air transportation to the application of Art. 329 of the Code of Land Commerce and Art. 8 of Law 52 of 1919. It found these laws, like Art. 306 of the Land Commercial Code, “incompatible” with air transportation.

A clause in Marshall’s ticket specified that “All travel is at the entire risk of the passenger,” and the Court found that this did not imply any limitation on the contractual liability of the carrier with respect to “risks of the air.” The carrier is not held responsible anyway for accidents arising from such risks. However, the Court added that the validity of such clauses cannot be interpreted to condone future wilful misconduct.

But while the Court seemed to give validity to the mentioned clause in respect to “risks of the air” (which it did not define), this did not

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put the carrier in any better position. The Court concluded: "Thus, with or without an exoneration clause for risks of the air, the company need only prove that the accident was not generated by its fault; therefore, it is sufficient to prove absence of fault, which is different from proving an act of God or the intervention of a foreign element." The important point here is that the carrier, even with the benefit of such a clause must still prove prudence and diligence in its operations.

In a later (1947) case dealing with air transportation the Court affirmed: "The clause exonerating a carrier from liability is not valid in the contract of carriage of persons, whether by land, rivers, ocean or by air, if on the basis of such clause, it is attempted to exonerate the carrier from liability from all classes of fault, whether directly imputable to the carrier or to the persons for whom it is responsible." 25

However, referring specifically to the contract of carriage of persons by air, the Court in the above cited 1947 case said that in keeping with Art. 1620 of the Civil Code which stipulates that if a clause in a contract can be given meaning it should be, and in view of the fact that the so-called "risks of the air" do not arise from the negligence of the carrier, "the Court has ascribed to the exonerative clause in the transportation of persons a limited and circumscribed meaning in which it is valid. On this matter the decision of Nov. 29, 1946 can be consulted." In that case 26 the effect of inverting the burden of proof was ascribed to an exonerative clause, in the sense that the clause permitted showing prudence and diligence, which if proved, would shift the burden of proof to the plaintiff to show specific fault.

While in the Marshall case the Court did not define "risks of the air," Pérez-Vives asserts that this term is equal to an act of God, such as a sudden unpredictable storm en route, etc. This, he says, should not be confused with acts indicating negligence of the carrier, as would be the case of the breaking off of a wing, taking off in sub-normal weather conditions, flying contrary to regulations, etc. In the Nov. 29, 1946 decision "risks of the air" were defined as "those risks not due to deficiencies of the aircraft nor errors of the crew."

On the validity of clauses which limit liability to a certain maximum sum, the Court in the Marshall case referred to Art. 329 of the Land Commercial Code, and Law 52 of 1919 (which prohibits use of such clauses by public carriers of goods) and found these laws "incompatible" with air transportation.

However, this position has apparently been changed by the decision of Aug. 27, 1947 cited above. In this case the Court said, "In this Chapter III (of the Code of Land Commerce) we find Art. 329 and the application of Art. 8 of Law 52 of 1919. Some believe that these last two provisions apply only to the transportation of things. But for the Court, such an observation is not well founded, since human

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26 Nov. 29, 1946 G.J. Vol. 61, p. 661.
safety and integrity are in play and the rights which refer to these cannot be renounced. Thus, the clause which diminishes liability or exonerates a carrier from liability is illicit as against public policy. Attempts to limit general contractual liability of air carriers for acts of their servants or agents would be unenforceable according to this same decision. This view is in accord with the opinions of the publicists.27

The validity of clauses other than those which completely exempt a carrier from all liability to passengers or which limit its liability to a maximum sum, has not been passed on by the Court in air transportation cases. However, a "penal clause," specifying a certain amount as damages, and not just a maximum, would apparently be unenforceable under Art. 1600 of the Civil Code. This article allows an obligor to prove all incurred damages in spite of a penal clause.

On the subject of limitation of time for presenting claims, the equivalent of a "Statute of Limitation" is considered a matter of "public policy" in Colombian law. Clauses which extend or renounce established legislative time limits would be held invalid, and presumably the same would apply to attempts to shorten such established limits. Of course, if unrestricted shortening were allowed, this could amount to practical exemption in an extreme case.

As to the non-fulfillment of "subsidiary obligations" resulting in route deviation, delay, failure to honor a validly issued ticket, etc., clauses which specifically limit liability for breach of this type of obligation would presumably not be against public policy, as not dealing with safety of human life. But, if a limitation is expressed in terms of a maximum sum recoverable, it is submitted that the Supreme Court would find such limitations contrary to Art. 329 of the Code of Land Commerce, as expressed in the 1947 airline case. An exonerative clause would probably be subject to the same decision, and would be found, in effect, unenforceable.

When clauses completely exonerating a carrier or limiting its liability are held unenforceable, this does not have the effect of destroying the entire contract. This is seen from the decisions cited above, in all of which cases the contracts were held valid in spite of the mentioned clauses.28

Miscellaneous Factors Affecting Liability Claims

Although it has been shown that the legal value of clauses limiting liability is in effect nil, these clauses have a practical value which should be considered here. The experience of insurance companies which indemnify Colombian airlines for passenger liability shows a remarkably low incidence of claims.

28 Samper-Wills and Holguin are of this view, and mention Art. 23 of the Warsaw Convention to show international agreement on the subject.
Among the contributing factors is the tendency of the traveling public to accept as valid the clauses limiting liability which are found printed on tickets, schedules, public notices, etc. While it is probably true that the general public in most parts of the world tends to accept as controlling the printed conditions found in contracts and tickets, it should be remembered that in Colombia, air travel has become the accepted means of transportation by persons of all economic and social groups, so that it is not uncommon to see barefoot campesinos boarding flights of the several feeder lines and of the main airline, AVIANCA.

The socio-economic level of a large majority of the traveling public also tends to make that public less "claims conscious" than, for example, the air-traveling public of the United States. Litigation in Colombia is often long and costly, and except for the relatively small group who have the financial resources to maintain a lengthy court action and the education and training which tend to make them aware of their rights, the public is not accustomed to think in terms of suits against air carriers.

Also, the now well established doctrine of "prudence and diligence" in air carrier cases is known to attorneys handling litigation in this field. Unless there is clear evidence available of specific fault on the part of the carrier, the prospects for the plaintiff's attorney are not very attractive. And the practical difficulties of producing evidence showing the cause of an aviation accident are well known.

Of perhaps less apparent but nonetheless real influence on the incidence of claims and suits is a local more which tends to discourage initiative on the part of the heirs of an accident victim. It is strongly felt, at least among the middle and lower economic groups, that seeking indemnification for the death of a relative is unseemly.

The relative importance of the above factors is impossible to evaluate exactly. However, experience indicates that the general credulity of the public concerning clauses limiting liability seems to be of prime importance. The effectiveness of these clauses in discouraging litigation is suggested by the fact that aviation enterprises continue to use restrictive or exonerative clauses despite declarations of the Supreme Court holding them unenforceable.

PART II. EXTRAContractual Liability

The standard of care established by the Supreme Court in respect to contractual liability of air carriers, i.e. "prudence and diligence," applies as well to the field of extracontractual liability. But there are some important consequences worth noting in regard to whether a cause of action is based on contractual or extracontractual liability. Also, the aspect of air transportation as a "dangerous activity" must be considered.
General Concepts

The basis for extracontractual liability in Colombian law is found in Art. 1494 of the Civil Code, which includes as a source of obligations: “an act which has inflicted injury or damages on another.” This act can be either one of commission or omission.29

The obligation to indemnify injuries unintentionally caused is provided in Articles 2341, 2347, and 2356 of the Civil Code. Art. 2341 reads: “One who has committed an intentional wrong or negligence, which has inflicted an injury upon another, is obligated to indemnify the other, without regard to the principal sanction which the law (criminal) may impose for the negligence or intentional wrong committed.” Under Art. 2347, a person is held liable for the negligent acts of persons for whom he is responsible, such as agents, employees, etc. And Art. 2356 provides that one is liable for injuries caused by dangerous activities in which he may be engaged.

It will be noted that Art. 2341 includes both intentional wrongs (delitos) and unintentional wrongs or negligence (cuasidelitos). It has been held that these two civil wrongs are different in nature. For the first to exist, it is necessary that the defendant has actually desired that the injury be inflicted, and that he acted with this purpose. For the second, it is necessary only that the injury has occurred through imprudence or negligence, by act or omission, that is, through an “error in conduct” which would not have been committed by a prudent individual placed in the same external circumstances as the defendant.30

The three principal elements of an action for extracontractual liability are succinctly stated in a decision of the Supreme Court on April 30, 1937:31 “Injury caused to a person gives rise to a legal relationship between the victim and the author of the injury. The inherent and recognized elements of this relationship which must be proved in the corresponding suit are: an injury, a culpable act, and a necessary relation of causation.”

In Colombia the theory of extracontractual liability called teoría del riesgo creado or teoría objetiva, in which it is completely sufficient merely to show that a person suffered an injury in order for the victim to have a right to indemnification, has been rejected by the Court and the publicists. The element of blame-worthiness or culpability of the act causing the injury continues to be the fundamental of civil liability.32

On the general definition of negligence, the Supreme Court has said that it consists of “an error of conduct which a diligent and

prudent person placed in the same external circumstances of the defendant would not have committed."

As to the standard of conduct involved in this concept of negligence, the Court has held that "The conduct of the defendant must be compared with that of an average, normally prudent man placed in the same objective situation as the defendant." This is the modern definition accepted by such authors as Pérez-Vives.

Burden of Proof

As was seen in the discussion of contractual liability, the matter of who has the burden of proof and how this burden of proof is met is a most important question. Art. 1757 of the Civil Code provides: "One who alleges the existence of obligations or their extinction has the burden of proving same... Evidence consists of public and private documents, witnesses, presumptions, confessions, sworn statements and personal inspection by the judge or prefect." This article should be read in conjunction with Art. 1604 of the same Code, which states in part: "... It is incumbent on one who is obligated to exercise diligence and care to prove same; it is incumbent on one who alleges act of God to prove same."

Since 1897 the Supreme Court has uniformly interpreted Art. 1604 as follows: "In every case it is incumbent upon the party who should have exercised prudence and diligence to prove same, whether dealing with a breach of contract, an intentional wrong or negligence."

Air Carrier Decisions

In the only Supreme Court decision directly on the extracontractual liability of air carriers for death or injury to passengers, Calle et al vs. AVIANCA, decided on Sept. 27, 1955, the Court held that its interpretation of the contractual liability of air carriers, expressed in other actions consolidated for decision, was equally applicable to this extracontractual demand based on Art. 2341 and Art. 2347 of the Civil Code. In the contractual actions referred to, the Court reiterated: "In dealing with air transportation, the carrier is exonerated from liability on proving absence of fault, that is, the complete fulfillment of the expressed obligation of prudence and care. This includes showing that the carrier took all means and precautions in order to avoid the occurrence of an accident." "It is the carrier who must prove his own diligence and not the victim (who must prove) lack of diligence of the carrier."

In this case, the Court found that faulty maintenance of emergency radio equipment, indicated in the Civil Aeronautics Authority's offi-
cial accident investigation report, showed lack of prudence and diligence of the carrier.

Since in this case the standard of care required of air carriers was held to be the same whether actions are based on contractual or extracontractual liability, decisions finding lack of prudence and diligence in contractual actions are applicable to this discussion. In one decision, the defendant airline was held liable for the death of a passenger in a crash due to the falling off of a wing and a float during a hydroplane flight under normal conditions.

In another passenger death case, the defendant was held negligent in not providing its plane with radio equipment which would have allowed the pilot to receive warning of bad weather along the route and thus avoid the fatal crash resulting from an attempted emergency landing in adverse atmospheric conditions.

It should be noted that in meeting the burden of proof by establishing the prudence and diligence of its operations, the carrier must take into account the reports of the official accident investigation commissions of the Civil Aeronautics Authority. In the 1955 decision cited above, the Court reaffirmed the rule that such reports (a) have legal value in civil and criminal proceedings, (b) are "public documents" not requiring the usual evidence of proper issuance and execution of formalities, (c) may be admitted in evidence, and (d) have the probative value of tending to show whether or not the carrier fulfilled its duty of prudence and diligence. Of course, such reports may be supported or rebutted in the ordinary manner by the parties.

Comparison of Contractual and Extracontractual Actions

The consequences of actions based on contractual and extracontractual liability are compared by the Court in the 1955 decision and are summarized as follows: in the action based on breach of contract, the origin of the right to damages is based on contractual obligations, while the extracontractual action originates in the culpable act or negligence. The actions are different from the standpoint of the cause of the damage, in that in the one there is non-fulfillment of a determined benefit agreed upon, while in the other, the cause is non-observance of a general rule of good conduct.

The object is different in that in one action, it is sought to establish the balance of preconstituted interests, specific and complete, and related to the contract, while in the other it is sought to repair the damage caused to the personal, individual interests of the party prejudiced. The status of the moving party is different in that on the one hand, it is the representative of the contracting party, while on the other hand it is any other person affected by the conduct of the actor. The act giving rise to the obligation to indemnify is evidenced

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38 Nov. 29, 1946 G.J. Vol. 61, p. 661.
by the contract in the case of contractual action, and in the extracon-
tractual action the alleged wrongful act must be demonstrated, either
directly or by presumption.

The extent of damages in the contractual action is only foreseeable
damages, while in the extracontractual action both foreseeable and
unforeseeable damages are recoverable. The interests which are affected
are distinct, in that in one it is the material interests of the party to
the contract, either claimed by the victim himself or his heirs, and in
the extracontractual claim, the personal and exclusive interests of the
party who suffers a loss.

Also, there are certain aspects peculiar to one or the other action,
such as the compensación de culpas (similar to the concept of com-
parative negligence in Anglo-American Law) which in extracontractual
liability may reduce or nullify the claim for indemnification. In the
contractual action this principle does not operate. The periods of
Statutes of Limitation are different — 20 years in the action based on
breach of contract, and 3 years when the action is based on extracon-
tractual liability.

Of interest in this same decision was the holding that the same act
may give rise to both contractual and extracontractual liability and
that an heir of a deceased passenger may choose either the one basis
or the other. But he may not present both causes of action in the same
complaint, unless separate and distinct damages are alleged under
each cause of action. If both causes of action are included in the same
complaint, without showing separate injuries, the Court will look to
the contractual claim and disregard the extracontractual action, as
was also demonstrated in the Marshall decision and the case of Aug.
27, 1947.40

The decision is instructive, moreover, in showing that Colombian
procedural law, allows the consolidation of contractual and extracon-
tractual actions of different plaintiffs when these actions arise from the
same incident and also that the Court will apply evidence adduced in
one suit to other suits consolidated for decision. In addition, the mod-
ern doctrine that although death of a passenger may be instantaneous,
the cause of action for damages survives and may be brought by heirs
of the deceased was affirmed. On this point the Court cited Art. 2077
of the Civil Code as a basis for survival of actions arising from trans-
portation accidents.

Air Transportation as a “Dangerous Activity”

In the above discussion it is seen that, in general, one who injures
another through conduct which a prudent and diligent person placed
in the same external circumstances as the defendant would not have
committed, will be held liable for the injuries caused. The defendant

is not obligated to indemnify the plaintiff if the defendant can show that he, in fact, did act with prudence and diligence. In effect, Art. 2341 and 2347, in combination with Art. 1604 of the Civil Code create a presumption of fault which is destroyed by evidence of proper conduct. These general principles have been applied to extracontractual liability actions in air transportation, as seen in the case of Calle et al vs. AVIANCA.

However, since 1938 the Supreme Court has found in another provision of the Civil Code a presumption of liability which the defendant can only rebut by showing the accident was due to the intervention of a foreign element, act of God, or fault of the victim. This provision concerns so-called "dangerous activities" and is contained in Art. 2356 of the Civil Code. This article reads: "As a general rule any injury which can be imputed to the malice or negligence of another must be indemnified by that other. Especially obligated to make this indemnification are the following:" Several examples are given, such as the imprudent discharge of firearms, removal of sewer system covers, etc.

In a 1939 case of passenger transportation by aerial cable car, the Court affirmed that Art. 2356 is not a mere repetition of Art. 2341 and that the examples of dangerous activities given under Art. 2356 are not exclusive but only illustrative. It said that Art. 2341 permits exoneration by showing prudence and diligence while Art. 2356 requires showing intervention of a foreign element.

In this case the Court adopted the analysis of Art. 2356 given in an automobile accident case of 1938: "In Art. 2356 we cannot but find a presumption of liability. Therefore, the burden of proof is not upon the injured but rather upon the one who caused the injury, by the mere showing that the injury can be imputed to malice or negligence. In this interpretation, it is not that the basic concept of our legislation in general on the presumption of innocence is destroyed . . . Rather it is that, simply keeping in mind the essential differences of cases, the Court recognizes that in activities characterized by their dangerousness, of which the use and driving of an automobile is an example, the nature of the inherently dangerous activity and the general way in which injuries are caused by this activity prevent the injured from having at his disposal the necessary elements of proof."

"Our Art. 2356 understood in this manner, does not permit the author of the injury to allege that he was not at fault, nor can he with this allegation require the injured to prove the author's negligence. Rather, to escape liability, the author must destroy the mentioned presumption by demonstrating at least one of these factors: act of God, or the intervention of a foreign element."

Other decisions have established the following interpretation of

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41 April 18, 1939 G. J. Vol. 48, p. 164.
42 March 14, 1938 G.J. Vol. 46, p. 216.
Art. 2356: it is necessary that the thing causing the injury, either operated by man or not, be dangerous, or that the activity in which it is used be dangerous; in case of concurrence of responsibility for injury caused by the simple act of another (Art. 2341, 2347) and responsibility for injury caused by a thing used by another (Art. 2356), the rules applicable to the latter responsibility will be applied; when the foreign element is not exclusive, it is not exonerative — if the fault of the operator of the thing concurs with the fault of a third party, the third party may be sued for full liability, and if it concurs with the fault of the victim, the principle of comparative negligence is applicable.

A few decisions find only a presumption of fault in Art. 2356 instead of a presumption of liability, thus allowing the defendant to meet the burden of proof by showing prudence and diligence instead of intervention of a foreign element. But the vast majority of cases require intervention of a foreign element for exoneration. This latter view is supported by Colombian legal writers.

When can an injury be “imputed to malice or negligence” under Art. 2356? The Court and the commentators have responded uniformly: when the activity involved is characterized as “dangerous.”

The following are some examples of activities which the Supreme Court has found to be dangerous under Art. 2356: excavation with dynamite; maintenance of municipal high tension power lines; construction of a building; municipal supply of electricity to a private house; driving an automobile; operation of a railroad; operation of a foundry. One of the few cases in which the Court specifically held that an activity alleged to be dangerous was not so, was that of the operation of a municipal slaughterhouse. With regard to the transportation of passengers, the Court has held that railroad and aerial cable car service are “dangerous activities” under Art. 2356.

While this article has not been directly applied to airline passenger transportation, the decision of Aug. 21, 1951 is highly significant in declaring that the operation of aircraft is a dangerous activity under Art. 2356. In that case an Air Force DC-3 was making a landing after
a training flight and the control tower, operated by the Colombian Government, gave this plane clearance to land. The tower advised the DC-3 that there was a light plane also attempting to land, but that the light plane would be given the "red light." Either the pilot of the light plane, also on an instruction flight, did not receive the wave-off or did not heed same. At any event, there was a collision of the two planes resulting in the death of all aboard both. The widow of the Air Force pilot of the DC-3 sued the Colombian Government for negligence in the operation of the control tower in failing to adequately control traffic.

The plaintiff's demand was based generally on Title 34 of the Civil Code which deals with extracontractual liability and contains Art. 2356. The Court cited this article and in finding the Government liable, said: "There is no doubt that aviation operations amount to what the decisions of the Supreme Court have defined as a dangerous activity. If on many occasions decisions of the Court have accepted that driving an automobile is that kind of activity, then with more reason, it must be accepted that operating an airplane is a dangerous activity. Thus, the law imposes a presumption of fault on the part of an airport operator for accidents occurring within the airport. (Law 89 of 1938, Art. 63)."

"Therefore, it is not the victim who must prove negligence or carelessness, because the presumption operates in his favor. It is the defendant, here the Nation, who must exonerate itself from this presumption by establishing either: act of God, or the intervention of a foreign element, which can be the imprudence or carelessness of the victim himself."

Strictly speaking, this decision held that operating an airport is a dangerous activity, but the declaration that "operating an airplane is a dangerous activity" bears directly on the extracontractual liability of air carriers. Also, it should be remembered that the rationale of the Court's decision in the Marshall case was based on the "essentially dangerous character and nature of aviation."

It is submitted that if a cause of action were based on Art. 2356 in a case of airline passenger extracontractual liability, the Colombian Supreme Court would find air transportation a "dangerous activity" and would require the defendant airline to show either act of God or intervention of a foreign element in order to rebut the presumption of liability.

Because of the characteristic obscurity as to the causes of aviation accidents, the application of Art. 2356 can have serious and far-reaching implications in the determination of passenger liability of air carriers in Colombia.