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CHAPTER 2
LIABILITY IN DIFFERENT LEGAL SYSTEMS: A COMPARATIVE STUDY

2.1 Introduction

Liability for compensation has its roots in legal systems.\(^1\) Although civil law States mostly have written laws and common law States have paid a lot of attention to case law, countries like France and Germany (which belong to the former system) and England and the United States (of the latter) have implemented their specific laws on air carrier’s liability for many years.\(^2\) The two legal traditions have different systems of categorizing legal relationships and may have delicately different understandings of apparently identical concepts such as injury, cargo, and carriage of contract.\(^3\) The differences may be concealed or apparent. Nevertheless, the methods employed in each system are not totally dissimilar and the two systems have tended, particularly in recent years, to draw more closely together.\(^4\)

The international system of air carrier liability which was established for unifying certain principles of air carrier liability through the Warsaw Convention 1929 and through it the Montreal Convention 1999 was inspired by the two systems.\(^5\) Countries following these systems such as England, the United States, Germany and France, disregarded some of their domestic principles for the sake of uniformity, in regulations, which are in the interest of customers and airlines.\(^6\)

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\(^3\) P. Martin, J.D. McClean et.al *Shawcross & Beaumont On Air Law*, (4th ed.), 2; (hereinafter referred to as ‘Shawcross and Beaumont on Air Law’)


\(^6\) Ibid.
In this Chapter, the author outlines the general principles of liability in these systems to explore situations where States following a particular system, have changed their principle of liability. They have been flexible in modifying liability principles or adopting principles in this regard even when these are contrary to their traditional system wherever the situation required. The author also demonstrates that these principles of liability have similarities as well as differences. On the issue of the carriage of passengers, for instance, the common law jurisdictions apply negligence,\(^7\) while in civil law jurisdictions the issue of the carriage of passengers is principally based on contract of carriage.\(^8\) Through a comparative study of these two systems, the author intends to display how the systems have been interacting with the international system. It investigates their common principles and the places of differences. It investigates whether the international system inclined towards the principles of one of these systems, or if despite being based on the two systems, it contains dissimilarities with the legal principles of the common law and civil law jurisdictions.\(^9\)

2.2. The Common Law

A common law is a legal system that is modeled on English law. It places great weight on precedents which are developed by judges who had to resolve specific disputes in trials.\(^{10}\) The legal rule in this system seeks to primarily provide a solution for a trial rather than to formulate a general rule of conduct for the future.\(^{11}\) The general principles of liability under the common law jurisdictions are discussed below. In particular, the thesis looks at the legal systems of England and the United States. The author chooses England since it is the

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\(^{7}\) See Shawcross and Beaumont on Air Law, supra note 3, at 249.

\(^{8}\) M. Planiol and G. Ripert, Treatise on the Civil Law (2005), 467.

\(^{9}\) This issue will be discussed in Chr. 4.2.1.1 when investigating the international liability regime.

\(^{10}\) See Farnsworth, supra note 2, at 122.

\(^{11}\) R. David and J.E.C. Brierley, supra note 1, at 24.
jurisdiction where the common law system originated from and because it played a direct role in the drafting of the Warsaw Convention 1929. The United States was also selected because most of the important case laws which had a great impact on the enhancement of private international air law and are available to the public, also come from this country.

2.2.1 General Principles of Liability

The author begins with the common principles of this system and then investigates the legal systems of England and the United States, and shows the differences in the liability principles of these two countries.

2.2.1.1 Tort

(i) Negligence

In the traditional common law of tort, aviation liability depends on the legal concept of negligence, which is more than mere carelessness and includes the idea of a breach of duty. Negligence is the result of doing something, but on occasions, it can be the failure to act at all.\(^\text{12}\) Literally, it means the absence of care, neglect, or inattention. The term ‘negligence’ is used in this general sense to describe careless conduct in all manners of different contexts throughout the law of tort.\(^\text{13}\) It is a conduct which fails to conform to a required standard of care.\(^\text{14}\)

The concept developed under English law. Although English common law had long imposed liability for the wrongful acts of others, negligence did not emerge as an independent cause of action until the eighteenth century.\(^\text{15}\) Another important concept which emerged at that time

\(^{15}\) Ibid.
was legal liability for a failure to act. Originally, liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service. Gradually, the law began to imply a promise to exercise care or skill in the performance of certain services.  

The concept of negligence was exported to the United States when each State adopted the common law of Great Britain. Although there have been important developments in negligence law, the basic concepts have remained the same since the nineteenth century. Negligence is by far the widest-ranging tort today, encompassing virtually all unintentional, wrongful conduct that injures others. At the heart of negligence law is the ‘reasonable person’, which provides the standard by which a person's conduct is judged.

In the United States, negligence emerged out of the action on the case around 1825 and has since been recognized as a separate basis of tort liability, independent of other causes of action. Prior to that time, the term had been used in a very general sense to describe the breach of any legal obligation.

One of the earliest appearances of what is known as the tort of negligence was in the liability of those who professed to be competent in certain ‘public’ callings. A carrier was regarded as holding himself out to the public as one in whom confidence might be reposed, and hence as assuming an obligation to give proper service-the breach of which by any negligent conduct, he might be liable for. Regarding acts or omissions which may constitute negligence, it must be remembered that negligence or non negligence is a question of fact to be decided in

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16 Ibid.
17 Except for Louisiana which adopted the civil law of France and Spain.
19 Ibid.
20 Ibid.
relation to all circumstances of each particular case, and advances in aviation make some of
the earlier cases an unreliable guide, especially in cases involving modern airlines.

In negligence, the four elements that an injured claimant must prove are duty, breach,
causation, and damage.

1. Duty of Care

The defendant must have an obligation to safeguard the claimant. The duty of care is the
main conceptual device for expressing liability for negligence. The traditional approach
recognizes and formulates duties for specific situations, each exhibiting its own particular
characteristics. A more modern approach seeks to identify a general principle applicable to all
circumstances.

2. Breach of the Duty

The defendant must have breached his duty to be considered liable. Where the duty is in
place, its content is to take care to prevent the harm. The requisite care has to be measured by
a standard, and that standard is an objective one. It is negligent not to take the care expected
by the community for the activity in question. The personification of community standards
has long been the ‘reasonable man’.

3. Causation

Causation is an element of negligence. In the field of negligence, there must be a causal link
between the negligent act and the harm or damage. Negligence is only actionable if it causes

24 Ibid.
25 The court defined it as ‘such reasonable caution as a prudent man would have exercised under such
circumstances’. Another early formulation of the standard provided that ‘negligence is the omission to do
something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of
26 See Birks, *supra* note 14, at 428.
In order to prove causation, the breached duty must be the factual and legal causes of the harm. In other words, the claimant must not only be able to prove that the action of the defendant has caused damage, but that the action was a legally sufficient cause to hold the defendant liable. To establish factual causation, it is not necessary to show that the defendant was the sole or even the major cause of the damage as long as it is proved that but-for the defendant’s negligence, the damage would not have happened. Once a party has factually proven that the actions of the other party have caused his or her injuries, the question becomes one of legal causation. One of the key factors influencing legal causation is the remoteness of the person’s harm from the negligence of the other. A person’s negligence is too remote or not a ‘proximate cause’ of another’s injury or damage if it is of a type which is not foreseeable.

4. Damage

When duty, breach, and causation have been established in a tort action, the claimant may recover for the pecuniary and non-pecuniary losses sustained. The measure of damages is determined by the nature of the tort committed and the type of injury suffered. Damages for tortious acts generally fall into one of four categories: damages for injury to person, damages for injury to personal property, damages for injury to real property, and punitive damages. Damages place a monetary value on the harm done, following the principle of restoration to

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27 Ibid.
29 Ibid.
31 A. Best and D.W. Barnes, Basic Tort Law: Cases, Statutes and Problems (2003), 127.
32 Punitive damages can be awarded against a defendant whose conduct has been particularly outrageous. Punitive damages go beyond the general common law principle of the compensatory nature of damages and become a punishment. Ibid.
the original condition. 33 Thus, for most purposes connected to the quantification of damage, the degree of fault in breach of the duty of care is irrelevant except in punitive damages. 34 Once the breach of the duty is established, the only requirement is to compensate the victim. The court’s award of damages aims to bring the claimant back to his pre-tort condition.

(ii) *Res Ipsa Loquitur*

Normally in a negligence case, the burden of proving all the elements of the tort is on the claimant. 35 However, under a concept known as *res ipsa loquitur*, 36 if the cause of harm was under the defendant’s control, and the harm would not normally have occurred without negligence or intention, the claimant does not have to prove negligence. It is the defendant who has to disprove it. 37

The following conditions must be satisfied in order to apply this general rule:

1. The instrument or circumstances causing the damage must have been under the exclusive control of the defendants or his servants;
2. The circumstances must be such that the damage does not ordinarily occur in the absence of negligence; and
3. The real cause of damage must be unknown. 38

The defendant will turn away the application of the maxim if he explains the accident in a way that is consistent with an absence of negligence on his part, and reasonably distinct from

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34 In *BMW of North America, Inc. v. Gore* (1996), the Court held that punitive damages must be reasonable, as determined by the degree of reprehensibility of the conduct that caused the plaintiff's injury, the ratio of punitive damages to compensatory damages, and any comparable criminal or civil penalties applicable to the conduct. See *BMW of North America v. Gore*, 517 U.S. 519, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).
36 This means ‘the fact speaks for itself’.
37 See Youngs, supra note 35, at 243.
38 Ibid.
a theoretically possible explanation. Therefore, the defendant can avoid liability if he can show that (a) the harm was due to the fault or consent of the claimant; (b) the damage was caused by the act of a stranger (if the defendant can refute the argument that this should have been foreseen and prevented); (c) there was statutory authorization; or (d) the cause was an act of God.

2.2.1.2 Bailment

The law of bailment was developed in the common law long before the law of contract. Bailment is a legal relationship distinct from both contract and tort. It exists whenever one person (the bailee) is voluntarily in possession of goods which belong to another (the bailor). Common forms of bailment result from carriage of goods, delivery for custody or repair, hire, pledge and loan.

Bailment involves a delivery of goods from one person (the bailor) to another person (the bailee). Bailment may stand at the point at which contract, property and tort converge. In its standard form, it represents a conveyance of personal property created by contract and enforceable in tort. Bailment therefore partakes of all three phenomena, and remedies may correspond with remedies available under other forms of action. A bailment may also exist

39 See Shawcross and Beaumont on Air Law, supra note 3, at 249.
40 See Youngs, supra note 35, at 231.
41 In Iranian law, there is a notion called amanat which displays similarities to bailment. Amanat exists whenever one person (amin) is voluntarily in possession of goods which belong to another. Amanat involves the delivery of a property from one person to another person. The primary duties of amin are to take proper care of the property and to refrain from converting it. Amin is required to use the care of a reasonably prudent person in similar or identical circumstances. Where amin goes beyond the purpose of Amanat, he is absolutely liable for damage to or loss of the bailed property although the loss was not due to his negligence. See Chr. 3.4.4.1, infra.
42 Six forms of bailment are recognized: the custody of goods without reward; the loan of goods; the hire of goods; the pawn or pledge of goods; the carrying of goods or the performance of some other service about them for reward; and the carrying of goods or the performance of some other service about them without reward. N.E. Palmer, Bailment (1991), 3.
43 See Birks , supra note 14, at 357-8.
44Ibid. at 19.
independently of contract but most bailment arises from a contract between the bailor and the bailee.45

The primary duties of the bailee in common law jurisdictions were to take proper care of the property bailed and to refrain from converting it.46 A bailee is required to use the care of a reasonably prudent person in the same or similar circumstances, i.e. ordinary care, in caring for the property entrusted to him.47 Where the bailee goes beyond the purpose of the bailment, he is absolutely liable for damage to or loss of the bailed property although the loss was not due to his negligence.48

The bailee must also take reasonable care of the goods and abstain from converting them. He must not deviate from the terms of the bailment, and becomes an insurer of the goods if he does so. Where goods are lost or damaged while in the bailee’s possession, the bailee is liable unless he can show that the misadventure occurred independently of his fault.49

The parties in a contract of carriage are usually subject to a contract by which the liability of the carrier may be, and normally is, either extended or restricted. However, insofar as there is no agreement to the contrary, bailment is the framework for an ordinary carrier’s liability.50

The carrier is a bailee; he is liable to the bailor if he fails to deliver the goods intact. The owner of the goods may succeed against the carrier in an action for damages by reason of the loss of, or damage to, the goods, although he cannot allege the existence of a contract of

46 Ibid., at 44-5.
48 Conventionally, the measure of diligence to be expected of a bailee is governed primarily by the existence and location of any benefit or reward. Ibid.
49 See Birks, supra note 14, at 358.
50 See Palmer, supra note 42, at 19-20.
carriage. Therefore, the principles which govern the relationship between bailor and bailee, govern that between the owners of goods and a carrier who is an ordinary bailee.

2.2.1.3 Contract

At common law jurisdictions, the rights and obligations of a carrier are defined by contract together with the status of the carrier. A distinction between tort and contract is that tortious liability is negligence–based, whereas contractual liability is strict. No negligence or fault need to be proved in order for the victim to obtain judgment. One of the most basic principles of contract law is that a breach of contract imports strict or absolute liability, i.e. the victim is automatically entitled to judgment, though not necessarily to damages. Strict liability in contract means that a breach of contract is not in any sense immoral and does not imply any fault on the part of the party in question.

The common law jurisdictions approve the insertion of contractual conditions for exempting or delimiting liability. However, courts and legislatures have recently become increasingly concerned with the abuse of bargaining power and the imposition of unfair terms. Common examples involve the use of the contracts of adhesion, such as tickets, leases and retail sales contracts that are forced upon the weaker party. In the USA, the Uniform Commercial Code empowers courts to deal with the problem directly by refusing to enforce a contract or term that the court determined to be unreasonable.

52 Ibid., at 195.
53 See Cooke and Oughton, supra note 13, at 219.
55 See Beale, supra note 21, at 4.
56 Ibid.
57 Ibid.
58 See Farnsworth, supra note 2, at 124.
Historically, contract actions developed considerably later than tort liability.\(^5\) It remained possible to maintain the old tort action on a case.\(^6\) An action for personal injuries sustained by a passenger because of the negligence of the carrier would be barred by the statute of limitation if the action were pursued in tort, but not so if it were pursued in contract. A claimant, who elects to treat his action as one for breach of contract, would not be barred by the tort statute.\(^6\)

### 2.2.1.4 Contract of Carriage

In common law jurisdictions, the rights and obligations of a carrier are defined by contract and the status of the carrier.\(^6\) Depending on whether he is a common carrier or a private carrier, he enjoys different rights and obligations. A carrier is a person who transports goods or passengers or both, from one place to another in a manner agreed with the passengers or the owners of the goods to be carried.\(^6\)

#### (i) Common Carrier

For centuries, the common carrier occupied a special position in common law jurisdictions.\(^6\) A common carrier is a person who publicly professes, orally or by conduct, to undertake for reward to all such persons indiscriminately, who desire to employ him, the transportation of

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\(^5\) Ibid.


\(^6\) Ibid, at 405.

\(^6\) Ibid.

\(^6\) See Beale, *supra* note 21, at 539-543.

\(^6\) In English law, however, the common carrier is practically extinct today. The modern law of carriage is not so much enshrined in reported cases as exemplified by the contractual terms by which carriers define the conditions on which they are prepared to carry goods, passengers and baggage. Any account of the modern law must necessarily take account of these contractual terms, many of which have become standard forms of contract. Some of these terms have, of course, themselves been the subject of judicial interpretation. Ibid.
goods and passengers, provided that he has room.\textsuperscript{65} A common carrier therefore chooses to be a common carrier for such times, places and goods as he considers appropriate, provided that he offers carriage in accordance with the calling of the common carrier and is thereby prepared to accept the burden of that calling.\textsuperscript{66} However, as discussed below, the scope of his duty of care is different in England and the United States.\textsuperscript{67}

1. Common Carrier of Goods

The liability of a common carrier of goods is distinguishable in two ways: a) liability for loss by negligence which is the liability of a bailee; and b) liability for losses by accident or other unavoidable occurrences, which is the liability of an insurer for goods.\textsuperscript{68} Therefore, he is liable for all losses of or damage to, those goods while they are in the course of transit. There is consequently a rule which makes the common carrier an insurer for the safe carriage of goods under the common law.\textsuperscript{69}

In fact, the law draws a distinction between strict liability and liability for negligence. Where a carrier is liable to compensate the owner of goods or the consignor or consignee for loss irrespective of the carrier’s conduct, and whether or not he was at fault, he is said to be strictly liable. He is not liable if such loss or damage is caused by one of the few exceptions recognized by the common law jurisdictions. These exceptions are acts of God, acts of the Queen’s or public enemies, inherent vices, and consignor’s fault.\textsuperscript{70} However, the common carrier is not exempted from liability merely by proving that the loss or damage was due to an excepted danger. He must also show that no negligence on his part

\textsuperscript{65} Ibid.
\textsuperscript{66} Ibid., at 544.
\textsuperscript{67} See Chr. 2.2.4, infra.
\textsuperscript{69} See Freund, supra note 51, at 199.
\textsuperscript{70} Ibid.
contributed thereto. It may also be noted that even if the damage has been caused by an excepted peril, he will be liable in respect of subsequent aggravation of such damage by his negligence.  

2. Common Carrier of Passengers

The common carrier of passengers is not subject to the strict form of liability applicable to the common carrier of goods. At common law jurisdictions, the carrier’s liability for the safety of his passengers is not strict but is based on negligence. His duty is to see to it that reasonable care is taken for the safety of his passengers. A carrier’s obligation to his passengers, whether it is expressed in contract or in tort, is to provide a carriage that is as free from defects as the exercise of all reasonable care can make it.

(ii) Private Carrier

Any carrier who is not a common carrier is a private carrier. A private carrier is a person who undertakes to perform carriage in a particular instance only, not holding himself out to the public ready to act for all who desire his services. He incurs only the responsibility of an ordinary bailee for hire, namely that of ordinary diligence. The private carrier is liable if he has wilfully damaged or lost the goods or if he has been negligent.

The private carrier is under no obligation to accept any goods for carriage, but once he has done so, usually for reward, his obligations are regulated by the contract, which governs the carriage, or by the bailment. His duty is to take reasonable care in a way that if the goods are lost or damaged, he can exonerate himself by proving that he and his servants took

71 See Beale, supra note 21, at 551.
72 Ibid., at 571.
73 See Shawcross and Beaumont on Air Law, supra note 3, at 299-300.
74 See Cha, supra note 68, at 154.
75 See Beale, supra note 21, at 551.
76 Ibid.
reasonable care. Typically, the private carrier will operate under the terms of a contract, subject to applicable legislation.

2.2.2 Liability in English Law

2.2.2.1 Tort Liability

In English law, tort law is a collection of causes of action, each made up of three main components: an interest protected by the law, conduct affecting that interest which the law sanctioned, and a remedy by which the interest is protected and the conduct sanctioned. At the centre of tort law is the protection of persons from physical injury and to a limited extent, from mental injury. Liability in modern English law is generally based on fault, which is the general standard of liability in tort. Strict liability in modern tort law is imposed in certain situations.

Tortious conduct may be an act, a statement, or an omission. Liability for acts which cause damage to others is more general than liability for the failure to take steps to prevent harm to others. Liability for the failure to act is imposed only in particular circumstances or where there is a special relationship between the parties.

2.2.2.2 Contractual Liability

The rights and liabilities between consignors and consignees and the carriers of goods are based on a contract of carriage, which does not necessarily mean that there is an express contract. The mere fact that in the ordinary course of his business a carrier accepts goods

77 Ibid., at 545.
78 See Shawcross and Beaumont on Air Law, supra note 3, at 299-300.
79 P. Cane, The Anatomy of Tort Law (1998), Chr. 2.
80 See Birks, supra note 14, at 409.
81 Ibid.
82 Ibid.
for carriage and delivery implies the making of a contract of carriage.\textsuperscript{83} The carrier is liable not only to carry the goods, but to carry them safely and to deliver them intact to the goods’ owner or his agent.\textsuperscript{84} It is still open to the owner of the goods to rely on his right as a bailor against a bailee, and to sue in tort rather than in contract, but normally he will only do this if for one reason or another he cannot rely on the contract, or chooses not to do so.\textsuperscript{85}

In English law, the liability of a common carrier of passengers depends on negligence. Where the matter relates to death or personal injury, and the carriage falls outside the statutory instrument, the carrier’s liability will depend upon proof of negligence. Where liability is directly based on negligence, the claimant does not necessarily have to prove fault by positive evidence because the circumstances may raise an inference of negligence on the defendant’s part.\textsuperscript{86} This is because of the doctrine of \textit{res ipsa loquitur}.\textsuperscript{87} At one time, there was a tendency to regard this as a principle which would, upon the conditions being fulfilled, lead to a formal reversal of the burden of proof. Nowadays, however, the general view is that \textit{res ipsa loquitur} is no more than a way of saying that the facts that have been shown by the claimant amount to a \textit{prima facie} case that may be strong or it may be weak and there is no formal reversal of the burden of proof.\textsuperscript{88}

Under the English legal system, a common carrier can avoid the burden of a common carrier’s liability, i.e. reject the status of a common carrier, by exhibiting a notice or by otherwise reserving the right to accept or reject offers within the carrier’s discretion. The carrier, whether serving in a common or private capacity, can deny all liability unless this is expressly prohibited by law. In this jurisdiction, the use of contractual terms excludes the

\textsuperscript{83} Ibid.
\textsuperscript{84} See Freund, \textit{supra} note 51, at 194.
\textsuperscript{85} Ibid., at 209.
\textsuperscript{86} Ibid.
\textsuperscript{87} A.D. McNair, \textit{The Law of the Air} (1964), 76-77.
\textsuperscript{88} Ibid.
liabilities, which normally attach to common carriers. In other words, a major function of the 
standard-form contract is the exclusion or limitation of liability for the benefit of the 
dominant party.89
The carrier’s capacity to impose terms purporting to exclude or restrict his liability for 
negligence in the case of loss or damage is now restricted in that any contractual terms or 
notice to that effect have to satisfy the requirement of reasonableness under the Unfair 
Contract Terms Act 1977.90 The carrier may also be subject to obligations implied by other 
law. The Supply of Goods and Services Act 198291 may imply terms92 and the Unfair Terms 
in Consumer Contracts Regulation 199993 may prevent the use of certain terms.94
There is no English case as yet in which an air carrier has been held to be a common carrier. 
In practice, it seems unlikely that this would be so held in the foreseeable future in view of 
the conditions of contract under which such carriers normally operate.95

2.2.2.3 English Law and International Liability

The effect of international conventions in the United Kingdom is to limit, to a very narrow 
scope, the applicability of common law principles on carrier’s liability.96 Air carrier liability 
in carriage by air is governed by statutory instrument, which is closely based on the rules of 
international carriage.97 However, if there are gaps in the regime, common law usually

89 See Beale, supra note 21, at 544.
90 See Shawcross and Beaumont on Air Law, supra note 3, at 301-2.
91 This Act requires traders to provide services to a proper standard of workmanship. Furthermore, if a definite 
completion date or a price has not been fixed, then the work must be completed within a reasonable time and for 
a reasonable charge. Ibid.
92 See Beale, supra note 21, at 812.
93 Ibid., at 854.
94 See Shawcross and Beaumont on Air Law, supra note 3, at 10- 21.
95 Ibid.
96 Ibid., at 2.
97 The effect of the English legislation on carriage by air is that the relationship between passengers and the 
carrier is regulated by statute whether or not there is a contract in many cases, and the rules apply equally to 
protect the servants or agents of the carrier i.e. those governed by the Warsaw-Hague text (Carriage by Air Act
applies. Otherwise common law is distinct from the law governing international carriage.

Internal carriers may have the duties of common carriers at common law.  

The original version of the Warsaw Convention 1929 was first given effect in the UK by the Carriage by Air Act 1932. Although this Act is now repealed, the Warsaw Convention in its original form (but with minor changes, principally of terminology) remains part of English law by virtue of the schedule to the Carriage by Air Acts (Application of Provisions) Order 1967. The Hague Protocol 1955 is given effect in English law by the Carriage by Air Act 1961 in Schedule 1. Schedule 1, containing the provisions of the Warsaw Convention as amended at the Hague in 1955 and the Montreal Protocols No. 3 and No. 4 in 1975, substituted with saving for Schedule 1 as originally enacted, containing the provisions of the Warsaw Convention with the amendments made in it by the Hague Protocol, by Carriage by Air and Road Act 1979.

The Montreal Additional Protocol No. 1 is given effect in English law by Order in Council. The UK ratified the Protocol No. 1 in July 1984. The Carriage by Air and Road 1979 enabled the UK to ratify the Montreal Additional Protocol No. 2 and this instrument of ratification was deposited on 5 July 1984. The Montreal Convention 1999 is given the force of law in the UK by the Carriage by Air Acts Order 2002 in Schedule 1.

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98 See Birks, supra note 14, at 410.

99 In the English Constitutional system, private law conventions are incorporated into national law by an act together with the translated treaty text in a schedule. The translated English treaty texts in the schedules are the ones applied by the local courts. See P.P.C. Haanappel, ‘The Right to Sue in Death Cases under the Warsaw Convention’, (1981) Air and Space Law 66, at 77.

100 See Shawcross and Beaumont on Air Law, supra note 3, VII 251-255.


102 An Order in Council is a type of legislation in the UK. This legislation is formally made in the name of the Queen by the Privy Council (Queen-in-Council). http://www.cabinetoffice.gov.uk/.

103 See Shawcross and Beaumont on Air Law, supra note 3, VII 122.
The problem which existed in all common law jurisdictions in wrongful death cases, received a statutory solution in England. In the civil court, the death of a human being could not be complained of as an injury. However, jurisprudence changed in 1846 and England adopted the Fatal Accidents Act, known generally as Lord Campbell’s Act. In this law, no action will lie in tort regarding the death of a passenger but action will lie under various statutory provisions.104

On the basis of the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934, a claim based on negligence may be brought against a carrier by persons who were not directly involved in an aircraft crash, but who suffered emotional or nervous trauma as a result of hearing of the involvement of friends or relatives.105 Damages recoverable under the 1976 Act generally include pecuniary losses and funeral expenses. The provisions of the Law Reform Act give certain additional rights of action to the estate of the deceased. According to this Act, relatives of the deceased could take action for the wrongful death.106

Regarding transportation by air, the existence of a cause of action is a pressing issue only in wrongful death cases because the common law does not provide a cause of action for them. However, in all the other cases which can arise within the scope of the applicable convention, there is always a cause of action, be it based on tort, contract, or bailment. Most of the difficulties in relation to the cause of action in wrongful death have been removed by the

104 In the case of Baker v. Bolton in 1808, Lord Ellenborough appears to have had neither logic nor history on his side, except for some dubious doctrine merging a tort into a felony. His view prevailed and except as modified by statute, it remains the law in England and United States today. See A.F. Lowenfeld, Aviation Law (1981), 7-9.
105 See Shawcross and Beaumont on Air Law, supra note 3, VII 23.
106 Ibid.
legislation, which implements the Warsaw Convention 1929 (Carriage by Air Act of 1932 and Carriage by Air Act of 1961).\textsuperscript{107}

The Carriage by Air Act of 1961 applies to international air carriage in the spirit of the Warsaw Convention 1929. In 1967, the Act, including its provisions on the right to sue in death cases, became enforced for almost all forms of carriage by air, be they international or domestic, and governed by the Warsaw Convention 1929 or not.\textsuperscript{108} Where a passenger suffers injury as a result of an accident during the performance of the carriage, he can recover damages for his injuries and for losses consequent thereon from the carrier, if the accident is due to a cause for which the latter is liable to the passenger.\textsuperscript{109}

2.2.3 Liability in the United States

2.2.3.1 Tort Liability

Tort law is chiefly state law rather than federal law.\textsuperscript{110} Although it is predominantly case law rather than statute law, a variety of statutes deal with special problems.\textsuperscript{111} Common examples include the Wrongful Death Acts and survival statutes, which govern rights upon the death of the injured party.\textsuperscript{112} Most torts can be divided into three broad categories depending on whether liability is based on intent; negligence; or if it is absolute or strict without requiring either intent or negligence. Economically, however, negligence is a more significant basis for tort liability than intent. Negligence, under American tort law, is the primary criterion for liability in tort. It is established when the defendant acts with the intention of causing harm or

\textsuperscript{107} This provision reversed vis-à-vis the 1932 Act. Previously, it was the liability under the Warsaw Convention which was substituted for any other form of liability. The new provision extends the scope of the Fatal Accident Act 1846. Ibid.

\textsuperscript{108} English courts practically always apply their own law to the right to sue in death cases arising out of aviation accidents. See Haanappel, supra note 99, at 72.

\textsuperscript{109} See Shawcross and Beaumont on Air Law, supra note 3, at 380.

\textsuperscript{110} Ibid.

\textsuperscript{111} Ibid.

\textsuperscript{112} See Farnsworth, supra note 2, at 125-6.
when his conduct is negligent. There is no fixed limitation on recoverable damages for passenger death or bodily injury in the United States.\textsuperscript{113}

In aviation accident cases, claims arising from injuries suffered have always been considered under the law of torts. The basis of liability was negligence on the part of the defendant,\textsuperscript{114} which in an air carriage context is usually the air carrier. In the United States, the law of negligence governs the liability of the air carrier for passenger death or bodily injury proximately causing the accident in domestic flights. The claimant must prove the negligence of the air carrier.

The jury, who is almost universally employed in tort actions in this jurisdiction, plays a central role in negligence cases.\textsuperscript{115} They will be instructed to decide whether the defendant’s conduct met the standard of care expected of a reasonable person under similar circumstances.\textsuperscript{116} But since the jury’s verdict is, within wide limits, conclusive on this issue, there is little to prevent them from imposing nearly absolute liability, regardless of negligence, upon a defendant who, because of his ability to pay or to insure, can in their eyes best bear the loss.\textsuperscript{117} The jury not only determines liability but also fixes damages.\textsuperscript{118}

However, in order to recover for personal injury or death, the claimant must establish that: a) the defendant was negligent; b) such negligence caused the accident or injury; c) the claimant did not by his negligence contribute to the accident or injury; and d) the claimant (i) suffered an economic loss as a result of the accident or injury, or (ii) sustained other compensable loss,


\textsuperscript{114} See Dycstra \textit{supra} note 47, at 235.

\textsuperscript{115} Ibid.

\textsuperscript{116} Ibid.

\textsuperscript{117} Ibid.

\textsuperscript{118} See Farnsworth, \textit{supra} note 2, at 125-126.
such as pain and suffering or grief.\textsuperscript{119} Nevertheless, the particular formulation or application of the rules, on matters of proof, on limitation or computation of damages, and on conflicts of laws-vary from state to state.\textsuperscript{120}

\subsection*{2.2.3.2 Contractual Liability}

The Federal Aviation Administration (FAA) defines a ‘Common Carrier’ as one which holds itself out to a definable segment of the public as willing to transport persons and property for compensation, indiscriminately.\textsuperscript{121} The test is an objective one, relying on what the carrier actually does rather than the label it embraces or the purposes, which motivate such activity. In the deregulated environment, the carrier need not maintain tariffs in order to be considered a common carrier. Nor does the maintenance of separately negotiated contracts or an occasional refusal to transport make it a private carrier. What is crucial is that the common carrier defines itself through its own marketing efforts as being willing to carry any member of that segment of the public, which it serves.\textsuperscript{122}

In the United States, both common carriers and private carriers must exercise ordinary care but what constitutes ordinary care for a common carrier is a higher degree of care than that required of a private carrier. The common carrier is required to exercise the highest degree of care consistent with the practical operation of its facilities in the transportation of person and property, while a private carrier is required to exercise only care.\textsuperscript{123}

\begin{flushright}
\textsuperscript{119} Ibid.
\textsuperscript{120} Compensation for aviation accidents could, for instance, have been governed by federal law, as are virtually all other aspects of commercial aviation in the United States. Or aviation accidents might have been treated under the law of contracts. Or a uniform body of transportation law might have been developed which distinguished railroads, buses, and airplanes from private motorists. See Lowenfeld, \textit{supra} note104, Chrs. 7-9.
\textsuperscript{122} Ibid.
\textsuperscript{123} See Dycstra, \textit{supra} note 47, at 300.
\end{flushright}
Common carriers and their crews must comply with the strict requirements of parts 121 and 135 of the Federal Aviation Regulations, while private carriers must comply with less strict requirements of part 91 of the Federal Aviation Regulations.\textsuperscript{124} The policy behind this distinction is based on the right of the general public to be confident that the airlines which solicit their business operate under the highest standards of safety.\textsuperscript{125} While the cause of an injury is rarely disputed in air accident cases, the cause of an accident is often not certain, and in many instances it is considerably difficult for a claimant to prove. To alleviate this difficulty, the doctrine of \textit{res ipsa loquitur} is frequently applied to aircraft accidents where the cause of the crash is not readily apparent but the information necessary to explain the accident is mostly in the control of the defendant, i.e. the air carrier.\textsuperscript{126} A carrier has always had the right to insert reasonable conditions, stipulations and restrictions in the ticket,\textsuperscript{127} as long as they are legal and not prohibited by public policy. It is a well-settled rule that a common carrier cannot force a passenger to release it from its legal liability for its own negligence or that of its servants. Such a provision is void because it is against public policy. The carrier can neither limit the amount of its liability for negligence,\textsuperscript{128} nor state on the ticket that it is not a common carrier.\textsuperscript{129} Airlines, like in other modes of transport, may be common carriers as well as private carriers.\textsuperscript{130} They may carry either passengers or goods, or both, and their responsibilities

\textsuperscript{124} Ibid.
\textsuperscript{125} \textit{Woolsey v. NTSB}, 993f. 2d 516(5th Cir. 1993).
\textsuperscript{126} L.S. Kreindler, \textit{Aviation Accident Law} (2001), 53-71.
\textsuperscript{127} The ticket is the evidence of the contract of carriage between the carrier and the passenger. It is regarded as a receipt representing that the person has paid the agreed price for his transportation to a designated place. See Dycstra, \textit{supra} note 47, at 306.
\textsuperscript{128} See Cha, \textit{supra} note 68, at 154.
\textsuperscript{129} See Goedhuis, \textit{National Air Legislation and the Warsaw Convention} (1937), 104.
\textsuperscript{130} See Dycstra, \textit{supra} note 47, at 102.
towards the interests of persons and property are the same as those of other carriers. In relation to goods, a common carrier is usually permitted to contract for a limitation of his liability to a reasonable value, as agreed to by the consignor. This value has the dual purpose of serving as a base rate to fix the charges due to the carrier and of providing the measure for the carrier’s obligation in the case of loss of or damage to the goods.

2.2.3.3 The United States and International Liability

In the United States, only international civil aviation was made subject to a special nationwide compensation regime because it was introduced by an international treaty. In the beginning, the U.S. Departments of State and Commerce were interested in the growth of the aviation industry during a depressed economy era. The benefits of limited liability and the uniformity of documentation and litigation procedures were allegedly the insurability of aviation risks and the attraction of capital investment. Accordingly the senate acted promptly, without debate, and gave its consent in an unrecorded voice vote on June 15, 1934; and adhered to the Warsaw Convention 1929 on October 26, 1934. This became the last favorable action on the Warsaw system for 64 years until September 28, 1998, when it ratified the Montreal Additional Protocol No. 4, on November 5, 1998.

131 A common carrier usually solicits the patronage of the traveling public by advertising its schedule of routes with times of departure and arrival, its fare, baggage restrictions and the like. No one doubts that an airline company engaged in passenger or cargo service on a regular schedule following a defined route is a common carrier. But this procedure is neither essential nor a prerequisite to render it a common carrier. It is sufficient if the carrier takes anyone, anywhere, at any time, so long as the test already stated has been complied with, i.e. holding out as serving all without discrimination. Ibid.

132 Ibid.


134 See Lowenfeld, supra note 104, Chr. 7.

The United States is a party to the Warsaw Convention 1929, as amended by the 1955 Hague Protocol but only, as of December 14, 2003, 48 years after the fact (sic) and as further amended by the 1975 Montreal Additional Protocol No. 4, as of March 4, 1999. The United States has ratified and given effect to the Montreal Convention 1999. The U.S. Senate gave its advice and consent to ratification on August 1, 2003, thus becoming the 30th nation to ratify the Convention. The United States government is not a party to other related instruments (the 1961 Guadalajara Supplementary Convention, the 1971 Guatemala Protocol and the 1975 Montreal Additional Protocols No 1, 2 and 3).

1. Due to the complex structure of the political and judicial jurisdictions which is specific to the United States, the issue of the cause of action becomes relevant in a number of situations. On the basis of the constitutional system of the United States, courts refer to the language of the original text of private international law instruments. In other words, if the United States becomes a party to an international treaty, that treaty directly becomes the law of the land without any enacting legislation. Therefore, when wrongful death cases arose, the natural reaction was to ascertain whether the treaty could provide the necessary basis on which an action could be brought.

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136 The United States did not formally ratify the 1955 Hague Protocol until July, 2003. In the 1950s and 1960s, the United States refused to accept the Hague Protocol, because the United States Senate believed that the limitation of liability in the Warsaw Convention 1929 and the Hague Protocol 1955 were far too low. Hence, the Civil Aeronautics Board of the United States approved the Intercarrier Agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol in May 13, 1966 (the 1966 Montreal Intercarrier Agreement). This Agreement applies only to international transportation by air subject to the provisions of the Warsaw Convention and which involves a point in the United States, either as a point of origin, point of destination or agreed stopping place. According to the carrier’s agreement filed with the Civil Aeronautics Board, passengers on participating carriers going to, from, or with an agreed stopover in the United States, became subject to increased limitation of liability. In addition, the 1966 Montreal Intercarrier Agreement provides strict liability instead of presumption of liability. See Chr. 4.1.2 for details and references, infra.

137 See Tompkins, supra note 113, at 5-7.

138 Ibid.

139 See Haanappel, supra note 99, at 77.

140 See Lowenfeld, supra note 104, Chr.7.
2. **Wrongful death statutes** have taken a variety of forms in the United States.\(^{141}\) In many States, the statutes had limitations on the amount recoverable. However, in others there were restrictions on who could apply in a wrongful death action, i.e. certain dependents but not others, or only dependents but not relatives who received no support (or whom the deceased was not obligated to support). Some states did not enact wrongful death statutes that way, but instead adopted ‘survival statutes’ planned to preserve the cause of action vested in the victim at the moment of the death.\(^{142}\) Some jurisdictions have both survival and wrongful death statutes.\(^{143}\) However, in all jurisdictions, courts and legislatures have faced the problem of how an equation can be drawn putting a person’s life on one side and a sum of money on the other.\(^{144}\) And regarding the right to sue in fatal accidents, each state applies its own relative law.\(^{145}\)

3. The **independent cause of action** for passenger death and bodily injury created by the Warsaw Convention 1929 began to be recognized and accepted by United States courts in 1978. Earlier in the case of *Komlos v. Comagnie Nationale Air France*, the court decided that the Warsaw Convention 1929 did not create a right of action for wrongful death\(^ {146}\) and in many subsequent cases that had been endorsed.\(^ {147}\) So the answer to the question of whether the Warsaw Convention 1929 creates a cause of action was negative. The courts had to

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\(^{141}\) After 1846 when England adopted the Fatal Accidents Act (Lord Campbell’s Act), every state in the United States adopted some form of legislative reversal of the common law rule. Congress also adopted the Death on the High Seas Act providing a remedy in admiralty for death resulting from wrongful act on the high seas. Ibid.

\(^{142}\) In a survival act, the actions of the deceased’s dependants are not personal, but are in their capacity as heirs to the estate of the deceased. See Haanappel, *supra* note 99, at 77.

\(^{143}\) The theory of recovery under a wrongful death statute; based on a loss to survivors statute, is to compensate the beneficiaries for the loss of the economic benefits they would have expected to receive from the deceased. See Lowenfeld, *supra* note 104, Chr.7.

\(^{144}\) See Kreindler, *supra* note 126, at13-9.

\(^{145}\) See Haanappel, *supra* note 99, at 76.


examine the Convention itself to see whether it created the cause of action without which no action for wrongful death was to be allowed. It was important to find which law would determine who could bring the suit, which had a right or interest in the suit, and what damages could be recovered. Therefore this procedure accompanies conflict of laws and jurisdiction problems and the applicability of the law of Death on the High Seas Act (DOHSA) to aviation cases.

In *Benjamins v. British European Airways*, the Federal Appellate Court was the first Federal Appellate Court that held that the Warsaw Convention 1929 creates a cause of action. In 1996, in *Air France v. Saks*, the Supreme Court recognized a cause of action arising from the Convention. Finally, the Supreme Court held in *El Al Israel Airlines Ltd. v. Tseng* in 1999 that where the Convention creates the cause of action, it is exclusive of all local and national laws. The court made clear that a choice of law analysis must be made by the court in which the case is filed to determine who has the right to bring the action and what damages are recoverable, all in accordance with Article 24(2) of the Convention.

4. The Supreme Court in *Zicherman* restricted recoverable damages to pecuniary losses only. In the light of *Zicherman*, non-pecuniary damages are not recoverable where a passenger death occurs on the high seas within the meaning of the United States Death on the High Sea Act, or during the course of international transportation by air, within the meaning of the Warsaw Convention 1929. The Montreal Convention 1999 preserves the interpretation made by the court in the *Zicherman* case. It expressly excludes the recovery

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148 *Benjamins v. British European Airways* 5 72 F. 2d 913 (2d Cir. 1978).
of any punitive, exemplary "or any other non-compensatory damages" in any passenger, baggage or cargo action for damages to which this Convention is applicable.\textsuperscript{155}

\textbf{2.2.4 American Law and English Law: A Comparative Analysis}

States that follow the common law share the same general principles of liability. However, each State may deviate from these principles in accordance with its pertinent circumstances. This accounts for a number of differences between the duties and obligations of a common carrier in English law and the law of the United States. These include the following:

1. In English law, the passenger may claim damages for breach of contract or for negligence; but he cannot claim both. In English law, it makes no difference which of these alternative legal routes he chooses to take.\textsuperscript{156} However, in the United States, it is possible to maintain an action both in contract and tort.\textsuperscript{157}

This being the case, a number of questions may arise as to which different rules of law are applicable to the two actions. For example, a particular court may have jurisdiction over one type of action but not the other. There is also the issue of the remedies available as well as which statutes of limitations may apply.\textsuperscript{158} Likewise, different rules on damages may prevail, especially in regard to punitive damages or for emotional harm. Defences such as infancy or the statute of frauds may also be set up against one action and not the other.\textsuperscript{159}

In the United States, the passenger may claim damages for breach of contract or for negligence. In the United States, two different lines are pursued in such situations. One is to permit the claimant to choose his course of action and to dispose of the particular question

\textsuperscript{155} According to Professor Haanappel, the problem lies precisely in the world ‘other’. This leaves according to him, open the possibility to consider pain and suffering, loss of company and the like as pecuniary damage. See Art.29 of the Montreal Convention 1999.
\textsuperscript{156} See Freund, \textit{supra} note 51, at 450.
\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid.
\textsuperscript{159} Ibid.
accordingly. Another one is not to permit the claimant this latitude. Rather, the court will
determine the gist of the action, which is to say the essential facts on which the claimant’s
claim rests.160

2. The law of the United States draws distinctions that are not found in English law between
the degrees of care required of common, private and gratuitous carriers. The common law
rule of imposing a higher duty of care upon a common carrier is of an ancient origin.161 It
found wide application against railroads in the 19th century.162 Common carriers have to hold
the strictest responsibility of care, vigilance and skill, on behalf of themselves and all persons
employed by them, and they are paid accordingly. The rule is based on the expediency of
allocating the risk upon those who can best guard against it.163

In English law, the carriers without being absolutely liable have a duty to use the greatest
amount of care and forethought which are reasonably necessary to secure the safety of the
passengers whom they undertake to carry. The failure, on their part or that of their servants
who were acting within the scope of their employment, to use such care and forethought
would amount to negligence and they would be liable in damages if injury was caused.164

Whilst the liability of a common carrier of passengers depends on negligence under English
law, the law on this point is different in the United States. In most United States jurisdictions,
a higher standard of care is required of a common carrier of passengers than of a private
carrier. A common carrier of passengers, though not an insurer, is under a duty to use the
highest degree of care consistent with the practical operation of the aircraft.165 Courts have

160 See Schwartz, Kelly, and Partlett, supra note 18, at 406.
161 Ibid., at 132.
162 See Birks, supra note 14, at 416.
163 See Dempsey and Gesell, supra note 121, at 726.
164 See Freund, supra note 51, at 453.
165 Ibid., at 8.
held that this duty is higher than that of reasonable care.\textsuperscript{166} Common carriers owe the highest strict duty of care, vigilance and skill both on behalf of themselves and that of all persons employed by them. Underlying this is the expediency of throwing the risk upon those who can best guard against it.\textsuperscript{167} Common carriers are therefore liable for the slightest negligence which caused injury to their passengers.\textsuperscript{168}

3. In English law, causation proves a direct link between the defendant’s negligence and the claimant’s loss and damage. For these purposes, liability in negligence is established when there is a breach of the duty of care owed by the defendant to the claimant that causes loss and damage, and it is reasonable that the defendant should compensate the claimant.\textsuperscript{169} In the United States, the breach of duty to act with care, or the failure to act as a reasonable and prudent person would, fall under similar circumstances. For a claimant to be able to recover for damages, this action or failure must be the ‘proximate cause’ of an injury, and actual loss must occur.

4. In English practice, the use of contractual terms excluding the liabilities which normally attach to common carriers has led to the extinction of the common carrier.\textsuperscript{170} Such contractual terms are excluded on public policy grounds in the United States, where the common carrier category is much used in case law and statutory regulation.\textsuperscript{171} The released value doctrine in the United States’ federal common law prevents a common carrier from limiting liability in the carriage of goods to an amount less than the actual loss unless the carrier provides an

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\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid.
\textsuperscript{168} P.S. Dempsey and L.E. Gessell, \textit{Air Commerce and the Law} (2004), 672.
\textsuperscript{169} P. Cane, \textit{Atiyah’s Accidents, Compensation and the Law} (1999), Chr. 5; W.V.H. Rogers, \textit{Winfield and Jolowicz on Tort} (2006), 195-231.
\textsuperscript{170} See Beale, \textit{supra} note 21, para. 36-010.
\textsuperscript{171} P.B. Larsen, J.C. Sweeney and J.E. Gillic, \textit{supra} note 135, at 454.
option of paying a higher charge to avoid the limitation. A carrier has nevertheless always been recognized as having the right to insert in the ticket such reasonable conditions, stipulations, and restrictions as it may deem necessary so long as they are legal and not prohibited by public policy. It is a rule that a common carrier cannot compel a passenger to release it from its legal liability for its own negligence or that of its servants. Such a provision would be void as it goes against public policy. It has also been held that the carrier cannot limit the amount of its liability for negligence.

5. In English law, the common carrier may by a special contract restrict his insurer’s liability at common law without losing his status as a common carrier. To the extent that the provisions of the contract do not modify them, he is still subject to the liabilities and entitled to the rights of a common carrier. The common carrier may modify the obligations, which rest on him by virtue of his public status via the contract with the consignor or owner of the goods. In such a case, his liability will be determined by his special contract. Owing to the common carrier’s heavy liability, they have always tried to balance liability by inserting some conditions in the contract. In England, unlike the United States, no limit has been introduced in this regard.

6. English law does not in general enforce gratuitous promises. It enforces bargains rather than agreements. However, the modern usage most readily relies on the language of promise. Further, legislation of the European Union has now had a very considerable effect on English contracts.

172 See Shawcross and Beaumont on Air Law, supra note 3, at 6.
173 Ibid., at 306.
174 Ibid., at 545.
175 Ibid.
177 See Beale, supra note 21, at 4.
178 Ibid., at 8.
In the United States, contract law is largely state rather federal law, but it usually differs only in detail from one state to another.\textsuperscript{179} Some rules laid down by statute or case law are mandatory and cannot be avoided by the parties, while others are supplementary and depend on agreement.\textsuperscript{180} Not all promises are enforceable and several criteria must be met before the law gives a remedy for breach of a promise. The important ones are the requirement of writing and the requirement of consideration. However, most contracts to furnish services are not included and they are enforceable even if there is no writing.\textsuperscript{181}

7. Thus, although England and the United States are both common law States and their legal systems follow the same rules, each has disregarded certain rules and changed them to suit specific circumstances. For instance, they have both disregarded the common law rule on the insertion of exemption conditions by carriers.\textsuperscript{182} Regarding carrier’s liability towards passengers, the United States accepts the highest strict care in this regard whilst the common law only based it on negligence.\textsuperscript{183} This therefore proves the hypothesis that common law States may in some respect distance themselves from the legal system that they follow because of the conditions of their pertinent State. Now that the common law system had been studied, the civil law jurisdictions in France and Germany will be investigated below.

\textsuperscript{179} Ibid.  
\textsuperscript{180} See Farnsworth, \textit{supra} note 2, at 122.  
\textsuperscript{181} Ibid., at 123.  
\textsuperscript{182} See Freund, \textit{supra} note 51, at 453.  
\textsuperscript{183} \textit{Shawcross and Beaumont on Air Law, supra} note 3, at 6.
2.3. Civil Law

The civil law system (Romano-Germanic)\(^{184}\) refers to the entire system of law that currently applies to most Western European countries, Latin America, countries of the Near East, large parts of Africa, Indonesia and Japan. It is derived from ancient Roman law, and originated in Europe on the basis of the Roman *jus civile*.\(^{185}\)

In civil law jurisdictions, the central source of private law is a code or a series of codes. A code is an authoritative, comprehensive and systematic collection of general clauses and legal principles, divided into books or parts dealing in a logical fashion with the law relating thereto. Therefore, civil law codes are regarded as the primary sources of law to which all other sources are subordinate and they are often the only sources of law on a particular matter.\(^{186}\)

The fundamental concept in all civil law countries is obligation. Tort and contract are treated in nearly all civil law countries as an aspect of the law of obligations which itself is a branch of civil law, i.e. that part of law covered by the Civil Code.

Under Napoleon, France adopted five codes: a Civil code, a Commercial code, a Penal code, a code of Civil Procedure and a code of Criminal Procedure. Most civil law countries followed this example though in some cases, two of the codes namely Civil Code and Commercial Code were combined.\(^{187}\) Also, some countries adopted certain specialized codes concerning subjects such as transportation (for example the Italian Code of Navigation). The

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\(^{184}\) The term Romano-Germanic is selected to acknowledge the joint effort of the universities from both Latin and Germanic countries. The term civil law is used in the English speaking world to indicate that this law derives from Roman Law. See David and Brierley *supra* note 1, at 23.

\(^{185}\) *Jus civile* began with the Twelve Tables and was developed by juristic interpretation. It means the private law which was applicable to the citizen, and between citizens, within the boundaries of a state in a domestic context. Ibid.


first civil code of the modern era was the French Civil Code of 1804.\footnote{188} With regard to the sources of law, the term ‘Civil liability’ is used in France as a comprehensive term covering contractual and tortious liabilities.

The German Civil Code (BGB)\footnote{189} provides the legal basis for all sorts of relationships between private individuals whether their concerned areas of business and professions are contracts of sale, services etc. The BGB is divided into five books, of which book two (241-853) deals with the law of obligations (tort and contract).\footnote{190}

The author intends to investigate the general principles of liability in France and Germany since they are the founding parents of civil law on the European continent and they had also been influential in discussions on the drafting of private international law instruments of air carrier liability. An analysis of the system will then be provided.

2.3.1 General Principles of Liability

2.3.1.1 Tort

Almost the entire French law of tort (\textit{delict} and \textit{quasi-delict}) rests on five Articles in the Civil Code (Articles 1382-1386). They have been unchanged since 1804, with exceptions, which are not relevant here. Two of these (Articles 1385 and 1386) address special cases of owners of animals and owners of buildings that collapse. Thus, the development of the law of liability has been based on the other three Articles. In contrast to the German Civil Code, which has developed the theory of fault in numerous Articles, the French Civil Code contains only a summary and a vague disposition on the subject.\footnote{191}

\footnote{188} Many countries in Europe, Asia and the Middle East (like Iran) have civil codes modeled on the French code, either directly or indirectly. Ibid.
\footnote{189} \textit{Bürgerliches Gesetzbuch}
\footnote{190} N. Foster and S. Sule, \textit{German Legal System and Laws} (2002), 364-6.
\footnote{191} See Planiol and Ripert, \textit{supra} note 8, at 464.
Germany and many States of the nineteenth century developed their codes based on the French codes. However, when Germany was unified in 1871, a German Civil Code developed on January 1, 1900. The German Civil Code became the model for some countries in Europe and Asia.\(^{192}\)

In Germany, the basic rules on contractual as well as tortious liability are mainly contained in the BGB of 1900. The Code clearly distinguishes between contractual and tortious liability. Generally, it is less difficult for claimants to get compensation when they can establish contractual liability.\(^{193}\)

### 2.3.1.2 Contract

Contract, in civil law countries, is any agreement giving rise to a legal duty. The notion of a contract also includes agreements aiming at a transfer of rights.\(^ {194}\) Breach of contract includes non-performance of the contract and every case in which the performance, which was in fact rendered, falls short in some way of what was promised in the contract. Civil law jurisdictions, in principle, do not treat every contract as containing a guarantee.\(^ {195}\) If the defendant fails to do what he promised, he is liable in damages for ‘breach of contract’ considering fault.\(^ {196}\)

Civil law jurisdictions separate and systematize the various causes of non-performance of a contract; as German law does with its careful distinction between impossibility, delay, and

\(^{192}\) J. Bell, *French Legal Culture* (2001), at 57.

\(^{193}\) See Deakin, Johnston and Markesinis, *supra* note 33, at 6.


\(^{195}\) Ibid.

positive breach of contract.\textsuperscript{197} It is a matter of importance whether the defendant has entirely failed to perform as promised, or has performed too late, or has performed unsatisfactorily.\textsuperscript{198}

2.3.2 Liability in French Law

2.3.2.1 Tort Liability

Tort liability in French Law is based on fault.\textsuperscript{199} The first law referring to it is the general clause of Article 1382 of the Civil Code, which is supplemented by Article 1383. Article 1382 provides that: ‘All human conduct of any kind which causes harm to another requires the person by whose fault it occurred to redress it’, and Article 1383 adds that: ‘Every one is responsible not only for the damage which he has caused by his own act but also for that which he causes by his negligence or imprudence.’\textsuperscript{200}

Three conditions must be established under Article 1382 for a claim of damage to be successful: a) the victim should have suffered injury (damage), b) the injury must be attributable to the behavior of the defendant (fault), and c) there must be a causal relation between the conduct of the defendant and the injury suffered by the claimant (cause).\textsuperscript{201}

In French Law, the presumption of fault is not unknown. In certain determined cases, instead of obliging the injured person to prove the fault committed by the author of the damage, the law establishes a presumption of fault which dispenses with the need to provide such a proof.

\textsuperscript{197} See David, \textit{supra} note 194, at 128.
\textsuperscript{198} Ibid.
\textsuperscript{199} See Planiol and Ripert, \textit{supra} note 8, at 464-6.
\textsuperscript{200} Ibid.
\textsuperscript{201} The Civil Code offers no definition of \textquote{faute} but commentators have produced many different theories, most of which treat \textquote{faute} as a failure to observe a precept of behavior which the defendant should have respected. French lawyers draw no clear distinction between unlawfulness and fault. Both are contained within the concept of \textquote{faute}, but the French courts also award damages under Art.1382 of the Civil Code where the defendant had no intention of causing damage by the exercise of his right but simply acted without the care called for in the circumstance. See David, \textit{supra} note 194, at 128.
These presumptions apply in cases of liability for: a) the act of another person (Art. 1384); b) damage caused by an animal (Art. 1385); and c) damage caused by a building (Art. 1386). 202

Article 1384 which has been the principal focus of recent development in French tort law provides that: ‘A person is liable not only for injury which one causes by one’s own deed, but also for that which is caused by the deed of persons for whom one is responsible, or of things which one has in one’s keeping.’ 203

Apart from the standard rules on tortious liability under Article 1384, the French liability system adopted an additional rule which establishes tortious liability for a keeper of a thing ‘gardien’ for damage done by the thing. 204 This particular liability proceeds from a presumption of the keeper’s fault. Therefore, the claimant does not bear the burden of proving the keeper’s fault. A person who merely uses a thing (e.g. borrowers and tenants) might be liable for the improper use of the thing ‘garde du comportement’, whereas its keeper may be liable for any damage arising from the faultiness of the thing ‘garde de la structure’. 205 A keeper of a thing can only exonerate himself by showing force majeure and he may reduce or even exclude his liability by establishing the claimant's own contributory fault. 206

It is evident that the legislator intended to cover, at the same time, persons and things under the surveillance and direction of others, who could be a source of danger to third parties. 207

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202 Since 1896, the Cour de Cassation has embraced this proposition. See the decision of the Remorqueur Marie in Cour de Cassation 18 June 1896:S. 1897.1.17, note A. Esmein; D. 1897.1.433, conclusions Sarrut, note Saleilles in G. Viney, Tort Law, in G.A. Bermann and E. Picard, Introduction to French Law (2008), at 249.
204 Ibid.
205 Ibid.
206 See Planiol and Ripert, supra note 8, at 515.
207 Ibid.
The basis for this liability is the duty of surveillance.\textsuperscript{208} One can or cannot infer from the text of Article 1384 the concept of liability without fault, depending on the particular culture in question.\textsuperscript{209}

In a series of decisions between 1919 and 1930, the Supreme Court established the rule that an injured person need not prove fault to recover from someone who had ‘guard’ of a thing. The thing need not be a dangerous object but could include ordinary objects like automobiles, which is just what the presumption of liability under Article 1384 means in the context of transportation.\textsuperscript{210}

Although liability for things under Article 1384 is strict when the thing is defective, it takes the form of a presumption of liability in other cases.\textsuperscript{211} It is presumed that the thing is the cause of injury, unless the defendant can show that there is a force majeure.\textsuperscript{212} If the thing was stationary or did not make contact with the claimant or his property, the presumption does not apply and the claimant must prove that the thing caused the damage.\textsuperscript{213} Article 1384 established a general rule of liability for the acts of things and the jurisprudence based all liability on fault.\textsuperscript{214} The fault of the guardian of a thing is presumed because the existence of damage due to the act of such thing suffices to establish that a fault has been

\textsuperscript{208} Ibid.
\textsuperscript{209} The civil liability in Iran is under the influence of the civil law system in addition to the Shariah. Among the civil liability regulations, there are provisions adopted from the civil law. The Civil Liability Act of 1960 has adopted liability principles from the civil law. In this Act, liability is based on fault. This Act was annexed to the Civil Code, and in fact, it was a supplement to that Code and put aside the liability principles of that Code. See Chr. 3.3.2.2 for details and references, \textit{infra}.
\textsuperscript{210} See Viney, \textit{supra} note 202, at 249.
\textsuperscript{211} The author refers to where the thing of which the defendant was guardian was in motion and impacted on the person injured or property damaged, then proof of these physical circumstances gives rise to a presumption of liability. The typical case is of motor-vehicle which knocks over a pedestrian or crashes into another vehicle.Ibid.
\textsuperscript{212} See Planiol and Ripert, \textit{supra} note 8, at 517.
\textsuperscript{213} Ibid.
\textsuperscript{214} Ibid.
committed by him who assumed the care of it and was not able to prevent the damage.\textsuperscript{215} However, regarding liability based on the risk theory,\textsuperscript{216} French jurisprudence never admitted it, and some recent doctrine is less favorable to risk theory with compared to presumed fault theory.\textsuperscript{217} The mere idea of causality between things and the occurrence of destruction cannot by itself constitute a general principle of liability. However, a general principle of liability is constituted when the fault has been committed by the guardian of a thing who assumed the care of it and was not able to prevent the damage. There can, in certain cases, be legal liability to make reparation without there being any fault. However, in such cases, the obligation is not based on the idea of strict liability or liability based on the risk theory. In fact, there is no act of the thing. Instead, there is always the act of a person and the thing is the instrument and not the cause of damage.\textsuperscript{218} Therefore, as noted by Haanappel: ‘French doctrine, as usual, is extremely elaborate. They speak of subjective / fault liability, with the possibility of presumptions, by law or by fact.’\textsuperscript{219}

\textbf{2.3.2.2 Contractual Liability}

In the French Civil Code, the relevant provision relating to contractual liability is Article 1147. French law places great importance on the definition of the obligations of the contracting parties and makes a distinction between three types of obligations: the obligation to give, the obligation to do, and the obligation to not do. In this system, contractual liability as well as tort liability is based on fault, i.e. the most prominent common factor of contractual liability is the requirement of fault.\textsuperscript{220} A claim for damages in a contract will only succeed if

\textsuperscript{215} Ibid., at 524.
\textsuperscript{217} Ibid. For details about liability based on the risk theory, See 2.4.1.3, \textit{infra}.
\textsuperscript{218} See Planiol and Ripert, \textit{supra} note 8, at 467.
\textsuperscript{219} See Unpublished Note from Prof. Dr. P.P.C. Haanappel, ‘What is in a Name’, Appendix 1.
\textsuperscript{220} See Planiol and Ripert, \textit{supra} note 8, at 467.
the circumstance which prevented the performance of the contract is ‘imputable’ to the defendant.\textsuperscript{221}

Fault, in modern law, is presumed in contracts. Under contractual law, the creditor will have to prove the fact that the debtor fell short in the performance of the contract. This failure is then considered to be the fault. Such proof, once furnished, establishes the debtor’s fault. The debtor is condemned to pay damages without the creditor having to prove the fault in a special manner. Injury of a passenger because of an accident occurring during carriage must be considered as a fact constituting a presumption of breach of the carrier’s obligation.\textsuperscript{222}

Therefore, the passenger will not have to prove that the carrier was negligent; but only the contract of carriage, the injury, and the connection between the injury and the carriage.\textsuperscript{223}

Contractual liability requires a valid and enforceable contract.\textsuperscript{224} It arises in the event of the non-performance of a contractual obligation and if the other contracting party sustains damage.\textsuperscript{225} Furthermore, it demands causation between fault and damage. Moreover causation must be evident between the damage claimed and the defendant’s fault, i.e. the non-performance of his contractual obligation. The requirement of directness is seen by doctrine as the necessary casual link between the non performance or the defendant's fault, and the damage. The requirement of foreseeability, on the other hand, is confined to contract

\textsuperscript{221} See Nicholas, \textit{supra} note 216, at 231.
\textsuperscript{222} See Planiol and Ripert, \textit{supra} note 8, at 495.
\textsuperscript{223} In Iranian law, the mere existence of a contract is not sufficient for the obligation to repair the damage If a party undertakes to perform or abstain from an act, he is liable where he has not carried out his undertaking provided that compensation for such loss has been provided for in the contract, or that it is implied in the contract according to customary law, or that such compensation is taken for granted by law. See Chr. 3.4.3 for details and references, \textit{infra}.
\textsuperscript{224} See Planiol and Ripert, \textit{supra} note 8, at 495.
\textsuperscript{225} Ibid.
and is a mitigation of the full rigour of the requirement of directness in favour of the debtor.226

In contractual matters, the jurisprudence admits the validity of non-liability clauses, which exonerate one of the parties from the consequences of his fault, except in the cases of fraud and of gross fault.227 Such clauses always become null in offences because the legal duties sanctioned by Article 1382 are a matter of public order.228

The content of a contractual obligation is the performance of what has been undertaken. All obligations are grouped into two categories. The French legal system distinguishes between contracts which oblige the debtor to merely provide his services to the best of his knowledge and belief (obligation de moyens) and contracts according to which the debtor owes a particular result (obligation de résultat).229 The distinction between these two categories is the role to be played by the fault element in the case of breach of contract. This refers to the contractual fault, i.e. the non-performance of (a) contractual obligation(s). The proof of such fault is brought differently depending on whether we are dealing with an obligation of means or an obligation of result.230

(i) Obligation de moyens

Contractual liability is fault-based when the duty is obligation de moyens. The victim must prove the fault. If it appears from what was agreed or from the thrust of the contract that the debtor was not promising a given result but only to use his best efforts in that regard, it is simply an obligation de moyens.231 If a debtor is bound to it, he is obliged to serve the obligee

226 Art.1151 of the Civil Code.
227 See Nicholas, supra note 216, at 230.
228 See Planiol and Ripert, supra note 8, at 493.
229 See Nicholas, supra note 216, at 156.
230 Ibid.
231 See Art.1137 of the Civil Code.
with all the means he can dispose of and to apply all necessary diligence whilst exercising the contract and to use his best efforts. Contractual liability claims might be asserted if either a contractual obligation is not performed at all or performed partially; according to which the debtor is to exercise the care of a reasonable, prudent businessman. Contractual liability also arises in case of bad execution or late execution.

The only possible interpretation to be put on the contract of carriage is that the carrier concluding a contract of carriage undertakes to carry by a means commonly used with regard to the carriage. The carrier undertakes to take all the measures, which a good carrier must take. The defendant should be able to exempt himself from liability by proving that he committed no fault. This is because, the contract puts him under an obligation to carry by a means commonly used in carriage and to be a good carrier, the defendant has not committed fault if he proves that he has taken all the measures, which a good carrier must take. In contractual matters, the fault is therefore an objective notion.

(ii) Obligation de résultat

Obligation de résultat means that the debtor has promised to obtain a certain result emerging from the contract. In such a case, the notion of fault of the defaulting party is immaterial.

There is a contractual liability for non-performance if the result has not been achieved, irrespective of whether the defaulting party has committed a fault or not. In this case, the only defences open to the defaulting party will be the act of a third party, an act of the injured

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232 See Freund and Rudden, supra note 196, at 401.
233 Ibid.
234 Ibid.
235 In Iranian law, there are not any regulations for obligation de moyens and obligation de résultat. However, Iranian legal experts, following French law, divide obligations into obligation de moyens and obligation de résultat. See Chr. 3.4.3 and 3.4.5.3 for details and references, infra.
party, or force majeure. Contractual liability is strict when the breached duty is an obligation de résultat. Such are the obligations of the carrier to keep the goods or cargo safe and deliver them to the proper destination.

It is also possible to find an intermediate solution. The defendant may be under a third kind of duty, called either obligation de moyens renforcée (aggravée) or obligation de résultat allégée (ou atténuée). In this case, the victim does not have to prove fault and from this point of view, he stands in a better position than the beneficiary of a mere obligation de moyens. Still, he does not enjoy the same privilege as the beneficiary of an obligation de résultat, since the defendant may rebut the presumption of fault.

In a contract of carriage, the carrier promises to accept goods and passengers for carriage at a given point and to deliver them at another point. If he does not do so, that is if damage or loss occurs, he is presumed liable. However, Planiol in his book says that sometimes courts have changed jurisprudence and established the obligations of the carrier as that of keeping the goods or passengers safe and deliver them on time to the proper destination. The mere fact that a passenger is injured, or that goods are lost or damaged during the transportation, is an evidence of a breach of duty and contract. Therefore, a presumption of fault on the part of carriers has been recognized and they are under a strict contractual duty to safely transport passengers and goods. The law asserts that they have the duty to achieve a result- an obligation de résultat - which is to carry passengers and goods safely.

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236 See Viney, supra note 202, at 249.
237 Some courts have treated the duty of the carrier to avoid dangers prior to embarkation and subsequent to disembarkation from the conveyance as an obligation de moyens (Civ.21 July 1970, D. 1970, 767) whereas for accidents occurring during the voyage, it is an obligation de résultat. See Freund and Rudden, supra note 196, at 402.
238 See Planiol and Ripert, supra note 8, at 408.
239 Ibid.
240 The Iranian Commercial Code determines the rights, duties and obligations of the consignor, the consignee and the carrier in carriage contracts. It provides presumed fault liability so the claimant does not need to prove
Fault or neglect is presumed provided that the claimant proves, first, that a contract of carriage exists between him and the carrier, and secondly that he or his goods have suffered damage during the carriage.\textsuperscript{241} As a result, a real presumption of liability rests upon the carrier; it is not only presumed that he has been negligent, but also that his negligence actually caused the damage. The carrier can only rebut this presumption by proving that one of the exceptions enumerated in the law applies to his particular case.\textsuperscript{242}

(iii) \textit{Force majeure}

\textit{Force majeure} is an external cause, which can prevent the existence of the causal link. Thus, it completely exonerates a defendant who successfully proves that the damage was in reality attributable to a cause, which was not imputable to him.\textsuperscript{243} \textit{Force majeure}, defined as an irresistible and unforeseeable event outside the control of the defendant, constitutes such a \textit{‘cause étrangère’}, as do the fault of the victim himself and the behavior of a third party which could not normally be foreseen by the defendant.\textsuperscript{244} 

\textit{Force majeure} in contract law is dealt with under Article 1148 of the Civil Code. The Civil Code provides that \textit{force majeure} excuses a person from paying damages for non-performance of the obligation affected, but it does not define \textit{force majeure}. In contract, the essential effect of \textit{force majeure} is that the debtor is released both from his obligation and his liability for the breach of this obligation. The concept is also recognized in tort but it has not received any mention in the Civil Code. In tort, \textit{force majeure} can only be used as a defence

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\textsuperscript{241} R. De Witt, \textit{Multimodal Transport} (1995), 34.
\textsuperscript{242} Ibid.
\textsuperscript{243} See Planiol and Ripert, \textit{supra} note 8, at 475.
\textsuperscript{244} Ibid.
in the case of liability for the guardianship of things. Although a guardian of things can not escape liability by showing that he was not at fault, he can do so by showing *force majeure*. The effect of the proof of *force majeure* is to break the presumption of liability, which is otherwise upon him, for damage caused by the thing under his guardianship.\(^{245}\)

The typical case of *cause étrangère* is a *force majeure*, which will relieve all carriers from liability. Beyond that, carrier’s liability is governed by specific rules.\(^{246}\) When damage is caused to goods in contrac of carriage, it usually is admitted that there was contractual fault on the part of the carrier.\(^{247}\) The carrier is responsible unless he can prove that it was an accident. The carrier of goods can be exempted from liability by showing that the *force majeure* caused the damage. If the carrier can prove that he is not guilty of fault, which is usually caused under such circumstances, or rather if he indicates the precautions he has taken which gives the proof its positive aspect, the judge will have to conclude that a case of *force majeure* has caused the damage.\(^{248}\) In the French view, if the judge finds a case of *force majeure*, he may reduce the amount of damages by an appropriate amount.\(^{249}\) However, in the case of injured passengers, there has been some hesitation.\(^{250}\) This is because, carriers are under an obligation to carry their passengers safely to their destinations.\(^{251}\)

\(^{245}\) In Iranian law, the Civil Code does not use terms such as *force majeure*. However, it does make reference to ‘external cause’, a term that includes all causes which are external to the obligor. In carriage contracts, the Commercial Code also states that if the carrier proves that the loss, destruction or delay is caused by events that no diligent carrier can prevent, he is not liable. Thus, the two Codes provide for the carrier to be exonerated when he cannot prevent damage. Consequently, *force majeure* applies when any cause that is not related to the carrier leads to non-performance and any event external to the carrier which cannot be attributed to him brings exoneration. See Chr. 3.4.3 for details and references, *infra*.

\(^{246}\) Ibid.

\(^{247}\) See Art.1784 of the Civil Code.

\(^{248}\) The significance of this difference is twofold: on the one hand, there was liability on the part of the carrier to perform the contract of transportation of passengers safely without reference to fault; on the other hand, carriers were permitted to limit or exclude their liability by contract (i.e., through the ticket). See Miller, *supra* note 133, at 56-57.

\(^{249}\) Ibid., at 476.

\(^{250}\) See Planiol and Ripert, *supra* note 8, at 486.

\(^{251}\) Ibid.
### 2.3.2.3 French Law and International Liability


According to French law, the action brought against the carrier is contractual where actions in liability against carriers in general cannot be anything but contractual when they are brought by passengers and consignors alleging faulty performance. The parties cannot refer to tortuous action and resort to features that may be more advantageous to them. This is a rule which plays an important role in the general framework of civil liability in France. Difficulties arise in cases of death, where the parties want to have their action considered outside the scope of contract. They may bring a tort action based on the violation of their personal right. The advantages of tort action are considerable if the contract contains limitation or exclusion clauses, which become inapplicable because the public order characteristic of rules of tort liability makes such clauses null and void.

The French courts, insofar as the remoteness of harm is concerned, take the view that harm calls for compensation only if it is a direct and immediate consequence of the event in question. This is inferred from Article 1151 of the Civil Code, which by its terms applies to

\(^{252}\) 12.10.1929 signed; 15.11.1932 ratified; 13.02.1933 is the date of its entry into force.

\(^{253}\) 28.09.1955 signed; 19.05.1959 ratified; 01.08.1963 is the date of its entry into force.

\(^{254}\) 18.09.1961 signed; 24.01.1964 ratified; 01.05.1964 is the date of its entry into force.

\(^{255}\) 28.05.1999 signed; 29.04.2004 ratified; 28.06.2004 is the date of its entry into force.

the law of contract.\textsuperscript{257} The right to sue in death cases is left to the general rules of the law of obligations.\textsuperscript{258} In this relation, courts are restrictive in awarding moral damage. In transport cases, each contract of transport of passengers contains an implicit stipulation for third parties. The stipulation entitles them to a contractual action against the carrier for personal damage.\textsuperscript{259}

In carriage by air, the cause of action will in most cases be provided by the contract of carriage which can provide a basis for any action, be it wrongful death, delay or damage to baggage or cargo. If, for whatever reason, a claimant could not rely on the contract of carriage, he could turn to Article 1382 of the Civil Code. However, this renunciation is not allowed for death actions arising from the international air carrier liability.\textsuperscript{260}

\textbf{2.3.3 Liability in German Law}

\textbf{2.3.3.1 Tort Liability}

Torts under German law are characterized by the degree of fault. The basic principle and the most common category is the traditional fault liability of Articles 823 and 826 of the Civil Code (BGB).\textsuperscript{261} It has a general statement of liability for intentional or negligent injury to persons or property subject to a somewhat restricted definition of vicarious responsibility,\textsuperscript{262} also subject to the principle of co-responsibility, which means reduction in recovery by reason of contributory fault.\textsuperscript{263}

\begin{footnotes}
\textsuperscript{257} T. Weir, \textit{Tort Law} (2002), at 621.\\
\textsuperscript{258} See Arts.1382-1383 of the Civil Code.\\
\textsuperscript{259} See Haanappel, supra note 99, at 73-74\\
\textsuperscript{260} Ibid.\\
\textsuperscript{261} F.E. Werner, M.W. Finkin and A. Ebke, \textit{Introduction to German Law}, (1996), 200.\\
\textsuperscript{262} See Art.831 of the Civil Code.\\
\textsuperscript{263} See Art.254 of the Civil Code.\
\end{footnotes}
Three types of torts are recognized under German law, which are explored below, together with the basis of liability.264

1. Article 823(1) of the BGB provides that: ‘A person who, contrary to the law, deliberately or negligently, causes harm to the life, health, liberty, property, or other rights of another person must compensate that person for any damage arising there from.’ Liability for causing injury in an unlawful and culpable manner only arises if the injury affects the victim in one of the legal interests enumerated in the text.265 The requirement of unlawfulness is satisfied by any invasion of one of the legal interests specified in this Article. The requirement of ‘deliberately or negligently’ is satisfied if the injury is inflicted either intentionally (that is, accompanied by the intention to invade the protected legal interest), or negligently.266

The person whose unlawful and culpable behavior violates one of the legal interests listed in Article 823(1) must pay for all the harm, which the victim suffers as a consequence of the invasion. The only limit to the extent of compensation is a legally relevant causal connection between the behaviors, which renders the defendant liable for the consequential harm.267

2. Article 823(2) provides that: ‘The same obligation [as in Article 823(1) BGB, i.e. to compensate for harm caused] is placed upon a person who violates a statute intended for the protection of others. If, in accordance with the provisions of the statute, a violation is possible even without fault, the duty to compensate arises only in the event of fault.’

264 J. Zekoll and M. Reimann, Introduction to German Law (2005), 207-209.
265 Ibid.
266 According to one modern view, harmful behavior should only be qualified as unlawful if it is disapproved by law as breaching some legal prohibition or command addressed to the citizen. On this view, conduct does not become unlawful under § 823 paper .1 BGB simply because it causes an infringement of one of the legal interests specified. It is unlawful only if the person causing the damage behaved either deliberately or without the care generally required in society. See Deakin, Johnston and Markesinis, supra note 33, at 103.
267 Ibid., at 106.
Liability under this section arises when a statute designed to protect others is wrongfully broken. Protective statutes in this sense include all the rules of private and public law, especially criminal law, which are substantially designed to protect an individual or a group of individuals rather than the public as a whole.\footnote{Ibid., at 83.}

3. The third type of general tort liability can be found in Article 826. Under this provision, a person is liable if he intentionally causes harm to others in a way that is contrary to public policy (unreasonable, contra bonos mores).\footnote{Ibid.} This provision is used to impose liability in diverse types of cases where one party has caused harm to another by a conduct considered offensive and improper so as to incur strong disapproval from the average person in the relevant section of society.\footnote{Ibid., at 885.}

4. Regarding the basis of liability, normally a claimant must prove all the elements of his claim.\footnote{See Zekoll and M. Reimann, supra note 264, at 214-215.} However, this is subject to two kinds of exceptions: a) where the judge applies the concept of prima facie proof, i.e. events take place in the way experience would suggest. This can be presumed unless the defendant shows that there were some abnormal factors; b) the subjective and objective burdens of proof. The former means that the party with the burden of proof needs to present evidence to prove his argument, otherwise he will lose. The latter means that if a court cannot reach a conclusion in a case, the party with the burden of proof will lose. In some cases, these subjective and objective burdens are transferred to the defendant.\footnote{Ibid.}
5. A number of specific, but important, statutory provisions, establish strict liability. This liability is based only on the control of a particular dangerous activity, which causes damage. It is independent of any fault on the part of the tortfeasor and is based only on his control of a particular dangerous activity, which caused damage. In Germany, risk-based liability has its origins in the rise of industrial enterprises in the late 19th century. Although there is no general provision on strict liability in German civil law, the common rationale underlying these statutes is that consequences of certain risks should be borne by those who control and take advantage of them. In 1922, Germany adopted an Air Traffic Act. Modeled on the Road Traffic Law, it provided for liability without fault up to stated amounts. Unlike the law applicable to road and railway accidents, however, the Air Traffic Act did not contain the defences of force majeure or unavoidable external accidents. The limits were made applicable both to persons and goods carried for hire, and to persons and property on the ground.

273 Germany adopted the Road Traffic Act, which, with some modifications, is still in effect. Article 7 of the Road Traffic Act imposes upon the holder, i.e. the person who uses the car at his own expense, strict liability for personal injury, death and property damage caused by the operation of his motor vehicle. Under this Act, the holder of a vehicle was made liable without fault, subject only, as in the law applicable to railroads, to the defence of unavoidable external accidents as well as to apply a reduction in damages by reason of contributory fault. There was no liability to gratuitous passengers, and no liability for pain and suffering. Claims on behalf of persons not entitled to sue under the Road Traffic Act (e.g., gratuitous passengers) or for items of damages not allowed (e.g., pain and suffering) could still be brought under the Civil Code by proving negligence. See Deakin, Johnston and Markesinis, supra note 33, at 850.

274 Ibid.

275 Ibid.

276 As early as 1838, Prussia adopted a railway enterprise law which provided, inter alia, for railway companies to be liable for all damage arising from railway transportation, without reference to fault, and subject only to two defences: that of the claimant’s contributory fault and those of unavoidable external accidents. Prussia further adopted the Railroad Act of 1871. Ibid.

277 See Werner, Finkin, and Ebke, supra note 261, at 213-215.
2.3.3.2 Contractual Liability

A major focus of the German Contract Law is the principle of fault.\footnote{Ibid., at 180.} As a rule, it is necessary that the defendant was at least negligent in causing the damage.\footnote{Ibid.} Moreover, the claimant must have suffered a recoverable loss. The BGB has no unitary concept of breach of contract, and does not deal generally with the rights of a contractor who has not received the promised and expected performance.\footnote{Ibid.} It concentrates instead on the case where non-performance is due to impossibility, delay, and insufficiency; regulating them in great detail for the circumstances where for whatever reason, the promisor is late in performing.\footnote{Ibid., at 179.} The notion of positive performance is used in breach of contract where breach of contractual duties of care has caused personal injury or property damage to the other party, for example where a passenger is injured while travelling in a vehicle.\footnote{The BGB did not address the situations that resulted from the debtor’s imperfect performance or his breach of accompanying contractual duties. In order to fill this gap, judges began to apply the doctrine of positive breach of contract. Ibid., at 192.}

The contractual duties have to be fixed by the parties to the contract.\footnote{B.S. Markesinis, H. Unberath, and A. Johnston, \textit{The German Law of Contract} (2006), at 388.} The parties’ agreement, together with a reasonable construction of the agreement, determine the contents of the obligations and in particular whether the defendant is obliged to achieve a certain result or whether he is ‘only’ obliged to act with reasonable care but cannot and should not be expected to guarantee the result.\footnote{Ibid.} If the parties have not fixed their respective duties, even if the conclusion of the contract is certain, then the objective law, i.e. statute and case law, have to step in.\footnote{Ibid.}
However, the BGB does foresee as a general duty only the duty to act in good faith, and duties relating to the place and time of performance. How far this duty extends, and what its precise contents are, depends very much on the terms, purpose and interpretation of the respective contract. In any event, a contract is always void if at the time it was formed, the promised performance was objectively incapable of being rendered by anyone (*impossibilium nulla obligato*).

The Code seeks to modify this result by making the contractor who knew or should have known of the initial impossibility, pay compensation to the innocent party for any harm that he has suffered in reliance on the validity of the contract. Subsequently, the important question is who is blameworthy for the obstacle to performance. In all cases, the general rule is inferred from the principle ‘*pacta sunt servanda*’, i.e. the defendant who fails to perform is liable unless he proves that he was not answerable for the obstacle to performance. Each party is answerable for any obstacle to performance, which occurs because of a lack of proper care on its part or on the part of those who were helping them to perform.

Contractual liability, in general but also with respect to personal injury, presumes a contractual duty which has been violated and whose violation has caused the claimant’s loss. If a contracting party injures the other during the course of the performance of the contract, it implies that the duty is violated unless the injury has no connection with the

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286 Werner, Finkin, and Ebke, *supra* note 261, at 185.
287 Ibid.
289 Ibid.
290 Ibid.
291 Ibid.
292 Ibid.
performance of the contract. The burden of proof lies generally with the claimant who must prove that a contractual duty existed and had been violated.\textsuperscript{293}

Provisions of the Civil Code do not rule out the waiving of liability in connection with the carriage of passengers by aircraft. Indeed, German jurisprudence has confirmed that carriers are allowed to exclude their liability by special agreement.\textsuperscript{294}

\textbf{2.3.3.3 German Law and International Liability}

Germany has also ratified and given effect to the Warsaw Convention 1929,\textsuperscript{295} The Hague Protocol 1955,\textsuperscript{296} the Guadalajara Convention 1961,\textsuperscript{297} and the Montreal Convention 1999.\textsuperscript{298} According to §§ 44 I 1, 2 and II, 46 I, II, 47, 35, 38 Luftverkehrsgesetz (LVG) and 425 I, 429, 431 Handelsgesetzbuch (HGB), in air transport accidents involving domestic flights, the provisions of the E.C. Regulation and the Montreal Convention 1999 apply.\textsuperscript{299}

As mentioned above, Germany has a special law on aviation (Luftverkehrsgesetz) that has provisions on the right to sue in cases involving death and on recoverable damage that is alike to the general rule, which has come in Article 844 (2) of the Civil Code.\textsuperscript{300} In cases involving death, the obligation of the person liable is to support the dependents of the deceased in the manner and to the extent that the deceased would have maintained them.\textsuperscript{301}

Following the adoption of the Warsaw Convention 1929, the Air Traffic Act was amended to achieve conformity with the Convention. This resulted in a distinction being drawn between passengers and third parties who are entitled to resort to other remedies (as under the Civil

\begin{footnotes}
\item[293] See Deakin, Johnston and Markesinis, \textit{supra} note 33, at 380-7.
\item[294] See Markesinis and Unberath, \textit{supra} note 284, at 204.
\item[295] 12.10.1929 signed; 30.09.1933 ratified; 29.12.1933 is the date of its entry into force.
\item[296] 28.09.1955 signed; 27.10.1970 ratified; 01.08.1963 is the date of its entry into force.
\item[297] 18.09.1961 signed; 02.03.1964 ratified; 31.05.1964 is the date of its entry into force.
\item[298] 28.05.1999 signed; 29.04.2004 ratified; 28.06.2004 is the date of its entry into force.
\item[300] See Haanappel, \textit{supra} note 99, at 75.
\item[301] See Lowenfeld, \textit{supra} note 104, Chrs. 7-9.
\end{footnotes}
Code) only in cases of grave misconduct and subject in most cases to substantially lower limits than other traffic victims.  

Apart from aviation, German accident compensation law features compulsory liability insurance up to the limits of the relevant special laws, direct action against insurers, and relatively little litigation. However, damages are generally payable in periodic instalments rather than in a lump sum. German courts only apply their own law on air carriers and claimants. At first, courts applied the lex fori to cases of the Warsaw Convention 1929. Later on, some cases were governed by the law of the principal residence of the air carrier.

2.3.4 French Law and German Law: a Comparative Analysis

In investigating the liability principles in France and Germany, the following observations can be made.

1. In Germany, if liability is created by a breach of contract, but in a situation where either tort or contract is applicable, the injured person can have recourse to tort liability and ignore the limits of contract. However, in French jurisprudence, where there is an overlap between tort and contract liabilities, a party injured in contract is not allowed to apply the rules of tort liability.

2. A person is liable in civil law jurisdictions provided that the other conditions of liability are fulfilled. That is, if his conduct is not in conformity with what could reasonably be expected from him. The German BGB establishes a general clause for liability based on fault, comparable to the general provision, which exists in several important continental codes, like Article 1382 of the French Civil Code. In a broader perspective, the German BGB (Article

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302 Ibid.
303 Ibid.
304 See Haanappel, supra note 99, at 75-76.
305 See Viney, supra note 202, at 248.
823), notwithstanding its different structure, pursues the same goal as the common law (if one subsumes intent and negligence under a general concept of fault).  

3. Although the liability principle in French Law and German law is based on fault, in the event of damage or loss, presumed fault is the general rule for the carrier’s contractual liability in the modern civil law jurisdictions. The presumption, however, may be rebutted by the carrier. The general nature of defences in civil law jurisdictions is less severe than the common carriers in common law jurisdictions.

4. In most civil law jurisdictions, strict liability seems to be based on individual rules rather than general or at least broader clauses. Although French law has a clause which introduces general liability for ‘deeds of the things within one’s keeping’, and courts, furthermore seem to be open for an extensive application of other rules, German law has so far denied the possibility of extending its statutory regimes in this way.

5. Strict liability in traditional German law deserves special attention. This is because, first, strict liability was introduced there only by specific enactments, whilst traditional French law remained faithful to the fault principle. Secondly, the vast majority of German strict liability statutes contain similar clauses on the monetary limits of liability per damage. Thirdly, the compensation available under the strict liability statutes are subject to limits so that if unlimited liability is claimed, recourse to the ordinary rules of tort is permissible.

306 See Deakin, Johnston and Markesinis, supra note 33, at 112.
307 See De Witt, supra note 241, at 33.
309 See Art.1384 of Civil Code.
310 See Viney, supra note 202, at 249.
311 Ibid., at 255.
312 See De Witt, supra note 241, at 33.
6. In Germany, strict liability may be imposed on carriers for claims arising out of an accident in domestic law. However, in France, the legal liability may be based on fault.

2.4 An Analysis of the General Principles of Liability under the Two Legal Systems

Studying the legal approaches in both systems contributes to a better understanding of the foundations of the Warsaw-Montreal Convention’s regime, which will be looked at in Chapter 4. Since the 1920s, the international community has tended to provide regulations for air carrier liability in private international air law, based on common grounds in the two major legal systems of the common law and civil law. In Europe at the time, aircraft began to cross several borders to get to their destinations, and airlines and customers had a variety of legal systems and regulations to contend with. This situation gave rise to legal problems, which made European States eager to establish uniform international regulations.

In order to balance the interests of both air carriers and customers (especially passengers), the drafters of the Warsaw Convention 1929 and Montreal Convention 1999 provided principles such as the presumption of liability, limitation of liability, exclusion of exemption conditions, and strict liability with a focus on protecting the carriers. However, they inclined towards protecting passengers. Criteria of the legal liabilities that were derived from the two legal systems and their similarities and differences will be discussed below.

2.4.1 Tort Liability

Tort is generally understood as a civil wrong, which takes place outside a contractual relationship. There are three main categories of torts: intentional torts, negligence or fault

313 See Markesinis and Unberath, supra note 284, at 79.
314 See De Witt, supra note 241, at 33.
and strict liability. In this study that focuses on air carrier’s liability, intentional torts were ignored since the majority of potential tort situations arising out of transportation by air are not intentional torts.

It can generally be claimed that the main liability principle in both the common law and civil law jurisdictions was based on fault or negligence. However, in cases of transport, it gradually inclined towards liability based on presumption of fault, presumption of liability or strict liability. This author is of the opinion that liability in the international system, which is affected by this trend, has gradually proceeded from presumption of liability, which can be rebutted by the defendant by proving absence of negligence / fault, towards strict liability. Thus, each of these principles will be analyzed below.

2.4.1.1 Liability Based on Fault or Negligence

The word ‘fault’ comes from faute, which has its etymological root in the Latin verb fallere. The original meaning of that word was ‘to deceive’, but it later came to express the notion of failing in some way. Fault usually means that the infringement in question was committed intentionally, recklessly, or negligently. Fault is a breach of a pre-existing obligation, for which the law orders compensation, when damage is caused to another. Violation of a rule which is of either a juridical or practical order is necessary.

To justify fault in the context of tort, it has been said that the case for preserving some notion of fault results from its moral logic, since it is generally accepted that a person should be accountable for the damage he has caused. There is a strong moral content to such a

316 Ibid.
318 See Cane, supra note 79, Chr. 2.
319 See Planiol and Ripert, supra note 8, at 464.
320 Ibid.
principle and, indeed, fault derives from the canon law notion of sin and the need to atone for one’s sins. Fault also seems necessary to reflect social expectations and deviations from socially accepted standards of behavior.

Fault was not defined by either French law or German law. However, the general basis of liability in the civil law system is fault. Under civil law jurisdictions, liability based on fault arises when a number of general elements are met. The legal interests protected by fault liability may be different but their main elements, namely unlawfulness, fault, damage, conduct, and causation (i.e. a causal connection between the act and the damage), are comparable. In French law, faute is interpreted not merely as culpa, in the sense of negligence, but in the sense of wrongfulness.

In English law, the Law Reform (Contributory Negligence) Act 1945 defined fault as to mean negligence, or the breach of a statutory duty or other act or omission, which gives rise to a liability in tort. The duty of care component, which is an integral part of the common law tort of negligence, is not explicitly stated in the civil law system. The main elements of negligence in common law jurisdictions are duty of care, breach of duty, causation, damage, and the defences that can be invoked by alleged tortfeasors.

Fault is therefore a question of law in civil law jurisdictions, much as duty of care is under English law, so that judges in both systems have the discretion to delimit the scope of liability

322 Ibid., at 190.
323 See Zekoll and M. Reimann, supra note 264, at 211.
324 Ibid.
325 Planiol defined fault as the violation of a pre-existing duty. This definition is still widely referred to, in spite of its often criticized vagueness, for the mere reason that it is almost impossible to be more precise with the range of pre-existing duties recognized by law as being unlimited. Thus, it is not only the breach of a statutory duty which amounts to fault, but also the infringement of general duties, such as the duty to behave, in all circumstances, in a careful and diligent way. See Planiol and Ripert, supra note 8, at 464; See Markesinis and Unberath, supra note 284, at 82.
327 See Schwartz, Kelly, and Partlett, supra note 18, at 131.
for damage resulting from a failure to act with reasonable care. Crucially, any fault which causes damage is actionable irrespective of whether it is a delictual or contractual obligation that has been breached.

The legislators in Iran have provided no definition for fault. In order to find a definition for it in Iranian law, one should resort to instances where the Civil Code bases liability on fault. Following the Shariah, the Civil Code has used the two terms of ta‘addi and tafrit in this regard for tasbib and amanat contracts.\(^328\)

Ta‘addi consists of conduct surpassing the permitted limits or ordinary usage, in relation to a thing or a right belonging to (an)other person(s).\(^329\) It means doing something that should not be done but is subject to the act going beyond legal or customary limits, and causing damage to life, property, or the rights of others. The criterion for ta‘addi is that a person conducts an act that according to law or custom, he is not supposed to do. In most cases, a person harms the other party by a positive act.\(^330\) As a result, ta‘addi is an illegal act, which is (personally or customarily) reproachable.\(^331\) Tafrit consists of an omission to act which legally, customarily or because of an agreement, the act is necessary for the protection of another’s property.\(^332\) Therefore, tafrit is also a type of fault.

2.4.1.2 Fault ‘Rebuttably Presumed’

In both civil law and common law jurisdictions, as a general rule, the burden of proving fault / negligence lies on the claimant.\(^333\) Normally, a claimant has to prove each element of his case. Sometimes, however, the law assists him by allowing certain elements to be presumed.

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\(^328\) See Art.953 of the Civil Code.
\(^329\) See Art.951 of the Civil Code.
\(^332\) See Art.952 of the Civil Code.
\(^333\) Ibid.
It is up to the defendant to disprove them, and if he fails to do so, the claimant wins the case.334

The civil law and the common law jurisdictions have sometimes revised the burden of proof in tort and contract law.335 As mentioned above,336 in French law they speak of subjective / fault liability.337 In English law, for example, a bailee of goods is liable if the goods are lost, damaged or destroyed by his fault while in his charge but he bears the burden of showing that the loss etc. was not his fault.338 In respect of passengers, even where liability is directly based on negligence, the claimant does not necessarily have to prove fault by positive evidence where the doctrine of *res ipsa loquitur* applies.339 This is because, the circumstances may raise an inference of negligence on the defendant’s part. In the literature one can speak of presumption of liability or a presumption of fault.340

It is worth mentioning that in drafting the Warsaw Convention 1929, countries such as England, France and Germany played important roles as representatives of the two systems of common law and civil law jurisdictions. In their respective systems, liability was based on fault / negligence and the burden of proof was on the claimant. However, due to the specific nature of the air carriage, the Convention preferred to speak of a presumption of liability which can be rebutted by the defendant by proving absence of negligence / fault.341 This principle was pursued in all amendments of the Warsaw Convention 1929 and the Montreal Convention 1999.

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334 Ibid.
335 See Freund and Rudden, *supra* note 196, at 402.
336 See 2.3.2.1, *supra*.
337 See footnote 219, *supra*.
338 See Planiol and Ripert, *supra* note 8, at 466.
339 See *Shawcross and Beaumont on Air Law*, *supra* note 3, at 249.
340 See footnote 219, *supra*.
341 Ibid.
It cannot be claimed that fault is the exclusive basis of liability in Iranian law. In addition to the etlāf rule, in some cases because of the necessity to remedy an illegal act, or due to the hazardous environment or business that a person has initiated for his own interest, legislators have accepted civil liability without fault. For example, the liability of carriers is based on the presumption of fault in carriage contracts. He can be relieved by proving *force majeure*.

### 2.4.1.3 Liability Based on No–Fault (Strict or Absolute Liability)

It is accepted in tort law that in most circumstances there must be some degree of blameworthiness on the part of the defendant, i.e. not merely that the act or omission was his, but that it was also intentional, reckless or negligent. However, in some cases, this element of fault is not required. It is a tort law concept that imposes liability for harm suffered without requiring proof of fault or negligence.

In civil law and common law jurisdictions, liability based on fault has been marginalized by the emergence of a number of statutes introducing liability based on no fault. The operators of activities, holders or owners of goods and materials are made liable independently of any blame of having been negligent or violating a duty of care, particularly in those national systems which have enacted such forms of liability in the transport sector.

Liability based on no–fault has received different names such as strict, absolute, based on risk in different jurisdictions. French doctrine speaks of objective liability with two forms, one based upon an obligation of result (defence of ‘*force majeure*’). The defendant, as soon as he proves that he was not at fault for the occurrence of damage, would be exempted. Another

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342 See Chr. 3.4.2, *infra*.
344 See Planiol and Ripert, *supra* note 8, at 468.
345 Ibid.
346 Ibid.
form is based upon an obligation of warranty (no such defence). German doctrine speaks of Gefährdungshaftung (based on risk) more or less corresponding to the French doctrine. 347

Common law doctrine speaks of strict or absolute liability. In common law, the concepts of strict or absolute liability are often used synonymously and it is difficult to distinguish them in practice. Nevertheless, there are differences between strict liability and absolute liability. As noted by Haanappel:

‘Common law gets more “fuzzy” when it comes to absolute or strict liability. For most, absolute liability is a form of liability (for instance, for nuclear damage) where, once there is damage and causation, the defendant has no defenses at all (the opinion, for instance, of Mircea Matte). Strict liability then is no-fault liability where, nevertheless, the defendant has defenses available such as Act of God / fortuitous event, and own fault of the victim. But, where the defense of Act of God / fortuitous event is not available but the defense of own fault of the victim is.’ 348

The major common law area of strict liability was created by the House of Lords in the case of Rylands v. Fletcher (1866). The remit was broader than just ‘rebuttably presumed’. 349

Strict or absolute liability is also created by statute in the United Kingdom and the United States in a number of other specific circumstances, e.g. oil pollution at sea, storage of gas underground, personal injury and property damage arising from nuclear material, and material damage. 350 He who causes a new risk to be borne becomes responsible for the damage caused, if damage occurs. This is an objective liability, which analyzes the fault of the author of the act. 351

347 Strict liability in German law is the imposition of liability on a party regardless of the existence of fault or negligence. In Germany, strict liability has been introduced only by specific enactments, while French law remains faithful to the fault principle. In French law, strict liability has evolved from Article 1384 of the Civil Code. See Viney, supra note 202, at 249.

348 See footnote 219, supra.


350 See Youngs, supra note 35, at 231.

351 Some believe that this new doctrine, far from being a step forward, constitutes a regression which goes back to barbaric times, and prior to the lex aquilia. Ibid., at 466.
Strict liability can be removed by resorting to certain defences. In common law, if a defendant can prove that firstly, damage has been caused by one of the exceptions, which were not related to him, and secondly, that he was not at fault for the occurrence of the damage, he will escape from liability.

Therefore, strict liability without exceptions becomes absolute liability. It is a liability independent of wrongful intent or negligence. Absolute liability is stricter than strict liability and industries involved in hazardous activities cannot take any plea. It gives a background of support to certain liabilities where compensation is given even without fault. Its application is, however, limited to hazardous activities, and too much emphasis is placed on enterprise liability.

As mentioned above, due to the specific characteristics of airplanes and the inability of the claimant to prove fault / negligence on the part of the defendant, at first it was the presumption of liability that was adopted. Then, because of developments in air transport on the one hand, and the attractions connected with the protection of passengers on the other hand, this was replaced by strict liability.

Strict liability has been accepted in Iranian law. It is present in tortuous liability and statutes, and obvious examples include etlāf, usurpation and the responsibility of land motor vehicle owners. This liability is also present in definite contracts like reward, fiduciary and sale contracts. In Iranian law, the one who destroys an object or the property of others is liable.

352 Arnheim, supra note 54, at 4.
353 Ibid.
354 See Chr. 3.4.2.1, infra.
355 Strict liability arises in a different way here. For instance, it arises in reward contract by a unilateral obligation (the revocation of the contract), in bailment contract by the guarantee clause from the bailor to the bailee in addition to the operation of law, and in sale contract through the seller’s failure to deliver the goods intact. See Arts.567-574 of the Civil Code and the Compulsory Insurance for Owners of Engine Vehicle (Ground and Sea) Act 2008.
The element of fault is not a condition for liability. If a person destroys a thing, he is liable even if he can prove that he has not been at fault in his conduct. However, there should undoubtedly be a causal link between the destruction and the defendant’s behavior.

Therefore, as mentioned above, liability regimes have received different names in different jurisdictions such as presumption of fault, presumption of liability or strict liability, absolute liability, liability based on risk, and even within a single jurisdiction one author may use a name, term or expression that differs from another author such as strict liability and absolute liability. However, as noted by Haanappel, ‘it is not the name that counts, but the liability regime as laid down in a law or treaty.’ This proposition applies as well in the case of the Warsaw-Montreal regime for air carrier’s liability.

### 2.4.2 Contractual Liability

One of the issues that must be explored here is liability in contract. Carriers are usually liable on the basis of contract for damage to goods or injury to passengers, and for breach of contract. However, in England and the United States, liability may sometimes arise on the basis of tort or bailment.

The legal liability of a carrier in contract of carriage is distinguishable from tort. The latter is essentially a civil wrong and arises where a person is in breach of a legal duty owed to another. These rights and duties exist by virtue of the law itself and are owed to persons in general, but a breach of contract arises out of rights and duties agreed between, and enforceable by, parties to the contract. Therefore the law of contract, in its application, is

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358 See footnote 219, supra.
359 See Chr. 4.2.1.1, infra.
360 See Beale, *supra* note 21, at 728.
361 Ibid.
potentially much narrower than that of tort. By comparing liability in carriage contracts, the author has come to the following conclusions.

2.4.2.1 Similarities

1. In most extra-contractual liability cases, it is an injured person who has to prove that the defendant was at fault. But, in contractual liability, it is the defendant who has to prove that he was not at fault in relation to the performance of the contract. In the contemporary era, especially in the USA, legislators and commentators tend to find and make contractual roots for important obligations to exempt injured persons from having to prove fault. This approach is a technical device for establishing liability without fault.

2. In both common law and civil law jurisdictions, the law of contract would be the primary basis of liability for the carriage of goods. In both legal systems, the contract of carriage between the shipper and the carrier usually defines the responsibility undertaken by either party.

3. Carrier’s liability in common law and civil law systems is remarkably similar in nature for goods from one aspect. In common law, air carrier’s liability is strict, with a limited number of exceptions exonerating the carrier. In civil law, carrier’s liability is based on presumed fault. Generally, the same concept of a rebuttable presumption of liability is applied in both legal systems. If the carrier succeeds in proving the existence of one of the enumerated exceptions, he rebuts the presumption of negligence. If the carrier does not succeed in delivering such evidence, the inevitable conclusion is that he must have been negligent, or

362 See Planiol and Ripert, supra note 8, at 485; See Beale, supra note 21, at 731-2.
363 Ibid.
364 Ibid.
365 See Farnsworth, supra note 2, at 124.
366 Ibid.
367 Ibid.

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otherwise the loss or damage could not have occurred. Therefore, the claimant is not required to prove actual negligence.\textsuperscript{368}

Thus the contractual liability of carriers appears to be the same in both legal systems. Whether one says that a rebuttable presumption of liability is set up with the burden of proof of liberating circumstances resting upon the carrier, or that a strict liability exists with the burden of proof also resting upon the carrier, makes little practical difference.\textsuperscript{369} In both systems, a carrier cannot escape his liability by proving one of the excepted perils if he has contributed to the loss or damage by his own negligence.\textsuperscript{370}

4. Both legal systems require full compensation, while both of them accept contractual conditions for limiting or exempting liability. However, countries such as France and Germany, in their earlier statutes on air carriage in the 1920s, intentionally limited liability and accepted different conditions such as the condition for exemption from liability. It seems that these measures have been taken in order to balance the interests of air carriers and customers.\textsuperscript{371}

\textsuperscript{368} See De Witt, \textit{supra} note 241, at 36.
\textsuperscript{369} Ibid.
\textsuperscript{370} Ibid.
\textsuperscript{371} There is no explicit reference to contractual conditions for dispensing or limiting liability for damaged goods and for passenger death or bodily injury in Iranian law. Their validity is justifiable for damaged goods since both the Commercial Code and the Civil Code accept contractual conditions. The Civil Code provides that if a contract determines the level of compensation for non-performance, the court cannot order the obligor to pay an amount which is higher or lower than the agreed remedy. The Commercial Code also provides that parties to a contract can agree on an amount which is higher or lower than the real compensation. Therefore, carriers can determine a cap for their liability. If the parties agree that the carrier only has to compensate on the basis of limited liability in the event of non-performance, delay or damage, the claimant may receive compensation which is higher or lower than the actual damage. Contractual conditions for dispensing or limiting liability for damaged goods and for passenger death is void because the legislator has determined compensation for death or bodily injury. This is because, it belongs to the family of the dead person and no one can agree to fix compensation lower than the compensation that the law prescribed. See Chr. 3.4.4.4 for details and references, \textit{infra}.
2.4.2.2 Differences

There are differences in the general principles of liability in these two systems. Among them are the following differences regarding carrier’s liability in carriage contracts:

1. Bailment does not exist in civil law jurisdictions unlike the common law jurisdictions. The fundamental difference seems to be that when no express contractual provisions about liability are made, carrier’s liability may, in the common law, be established in accordance with the rules of bailment. Under continental law, on the other hand, this must be established in accordance with the rules of the general law of contract provided that a contract can be implied.372

In Iranian law, following the shariah, carriage in the civil code is based on amanat principles, which has similarities with bailment principles in common law. If contract of carriage does not conform to the Commercial Code, amanat provisions in the Civil Code will apply.373

2. The nature of contractual liability is different in the two legal systems. Carrier’s liability in civil law jurisdictions is principally based on fault or negligence. The fact that the burden of proving a certain exception is on the carrier does not change the nature of liability.374 In the common law jurisdictions, carrier’s liability is basically strict. It is essentially objective in nature. If a number of conditions are fulfilled, liability will follow automatically. There is no question as to his conduct in the matter, not even the carrier’s presumed conduct. It is from this characteristic that the comparison with an insurer of goods comes.375

The scope of exceptions in both legal systems is not the same. French law provides two additional exceptions: the act of a third party for whom the contracting party is not

372 Palmer, supra note 42, at 19-20.
373 See Chr. 3.4.4.1, infra.
374 See De Witt, supra note 241, at 41.
375 Ibid.
vicariously liable for, and the loss of thing which had to be delivered without any fault on the part of the debtor.\textsuperscript{376} However, at common law jurisdictions, these exceptions are rather narrowly limited. For instance, acts of the Queen’s enemies do not pertain to robbers on land or to piratical or traitorous subjects.\textsuperscript{377} The common law concept of an act of God is less strict than its continental counterpart is in the classic non-attributable impossibility theory. Whereas a rule, extraordinary circumstances are required. However, the common law doctrine is limited by its clearly set out exceptions.

In Iranian law, the exemptions are not limited to the common law defences and as soon as the carrier proves that the accident has been out of his control, he will be exempted from liability.

3. A general and common characteristic of carriage contracts is that they are normally for reward, both in the common law and civil law jurisdictions. No reward means either free transportation or transportation by courtesy. In the common law, this would amount to a gratuitous bailment with probably a different standard of care for the bailee and a different rule on vicarious liability.\textsuperscript{378} In the civil law jurisdictions, there is some dispute as to whether gratuitous carriage may still constitute a contract for the carriage of goods. This is answered in the negative in France where one reverts to tortious liability.\textsuperscript{379} In Germany, it is suggested that a contract of carriage may well exist, but that each case turns on its facts.\textsuperscript{380}

4. If liability is created by a breach of contract, can the injured person have recourse to other rules of liability (i.e. tort) and ignore the limits of the contract? There are divergent views in this regard.\textsuperscript{381} No one should be exempted from the protection that the law extends to him

\textsuperscript{376} See Planiol and Ripert, \emph{supra} note 8, at 476.
\textsuperscript{377} Ibid.
\textsuperscript{378} Ibid.
\textsuperscript{379} See De Witt, \emph{supra} note 241, at 33.
\textsuperscript{380} Ibid.
\textsuperscript{381} Ibid.
and be made to suffer the damage since he has been a party to the contract. This is possible under common law jurisprudence and in Germany where courts allow the application of one of these two devices. However, in French jurisprudence, where there is an overlap between tort and contract liabilities, a party injured in contract is not allowed to engage with rules of extra-contractual liability.

Regarding Iranian law, it can be stated that if there is a contract for cargo, the claimant cannot refer to tort. But, as for the Diyah, since it is a property of the inheritor(s), inheritors who disregard contract may claim the Diyah based on tort.

5. In French law, not every contractual term, expressed or implied, is a warranty in law. However, the common law principally treats every contract as containing a guarantee. If the debtor fails to do what he promised, he would be liable for damages for ‘breach of contract’ regardless of whether or not he himself, or any of his servants or subcontractors has been at fault.

2.4.3 Interaction between the Two Legal Systems and the International Regime

1. All the four countries under examination; the United States, England, France and Germany, apply the applicable conventions of the Warsaw system and the Montreal Convention 1999 on their international flights. The liability provisions of the Warsaw Convention 1929 and the Montreal Convention 1999, regarding their exclusivity, enjoy priority over domestic regulations and courts have to observe them and cannot refer to their

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382 As to the existence of a breach of a contractual term, the common law is usually quite reluctant to accept the existence of implied terms in a contract. In other words, only when there has been a breach of an express term, or of a term known to be implied in the kind of contract considered, will there be contractual liability. This appears to be the reason why claimants were not prevented from suing on alternative grounds, be it the law of tort or the law of bailment.

383 See Viney, supra note 202, at 248.

384 See Chr. 3.4.5, infra.

385 See Viney, supra note 202, at 248.

386 See David, supra note 194, at 129.
domestic tort and contract laws.\textsuperscript{387} Except for the United States, they apply the international system on their domestic flights too. The United States applies its national and local law on domestic flights and courts refer to tort, bailment and contract laws.\textsuperscript{388} As a result, the author is of the opinion that this is an indication that the international system has influenced the legal systems of individual countries.

2. Civil law and common law systems follow a nuanced approach with a mixture of strict liability and fault liability elements.\textsuperscript{389} This approach is based on the both legal systems to balance elements of strict liability and fault liability.\textsuperscript{390} A comparative law survey shows that international air carrier’s liability systems do not opt exclusively for fault liability or strict liability, but adopt a more nuanced approach in accordance with civil law and common law.\textsuperscript{391}

3. The Warsaw Convention 1929 and the Montreal Convention 1999’s provisions do not require a claimant to prove the fault of a carrier for passenger death or bodily injury, the same as contractual liability in civil law.\textsuperscript{392} However, in common law this principle is closer to the common carrier’s liability for carriage of goods than to his liability for passenger’s death or bodily injury.\textsuperscript{393}

4. Jurisdiction in the United States for passengers’ death and bodily injury as well as for goods, progressively imposed more severe requirements on the air carrier to prove non fault.\textsuperscript{394} The presumption of liability under the WC29 was practically, and in courts, treated

\textsuperscript{387} See Tompkins, \textit{supra} note113, at 140-144; \textit{Shawcross and Beaumont on Air Law}, \textit{supra} note 3,VII 251-255; Miller, \textit{supra} note 133, at 56; and See Deakin, Johnston and Markesinis, \textit{supra} note 33, at 850.
\textsuperscript{388} See Dyestra, \textit{supra} note 47, at 235.
\textsuperscript{389} See Grundmann, \textit{supra} note 4, at 1584.
\textsuperscript{390} Ibid.
\textsuperscript{391} Ibid.
\textsuperscript{392} See Miller, \textit{supra} note 133, at 47.
\textsuperscript{393} See Beale, \textit{supra} note 21, at 551.
\textsuperscript{394} Ibid.
as strict liability. On the one hand, the air carrier was strictly liable for goods in the common law. On the other hand, it also had a duty to exercise the highest due care and diligence on passengers’ carriage. Thus, the air carrier was treated strictly liable in cases following an aviation-related accident. Consequently, liability in international regimes found a similar position as in the United States’ common law where air carriers are strictly liable for passenger’s death or bodily injury, and for goods sustaining damage. Therefore, international air carrier’s liability in case law practically found a similar position as in common law and the courts applied it to international flights as well as domestic flights.

5. In the Warsaw Convention 1929, the carrier of goods would be exonerated if he can prove due diligence which means an absence of fault. If the carrier could show that a particular situation was unforeseeable and insuperable for damages, he can remove the liability. However, in the Montreal Convention 1999, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from an inherent defect, quality or vice of that cargo; defective packing of that cargo performed by a person other than the carrier or its servants or agents; an act of war or an armed conflict; and an act of public authority carried out in connection with the entry, exit or transit of the cargo. In fact, the Montreal Convention 1999 introduces strict liability on carriers, the same as the common law.

6. Both the legal systems of the common law and civil law require full compensation in the case of death or bodily injury, while both of them accept contractual conditions for limiting

396 Ibid.
397 See Kreindler, supra note 126, at 53-71.
399 See Art.20 of the Warsaw Convention 1929.
400 See the Art.18 of the Montreal Convention 1999.
401 See Youngs, supra note 35, at 231.
or exempting liability in the case of damage to goods.\textsuperscript{402} The Warsaw Convention 1929, in contrast to the two legal systems, applies a limitation of liability for passenger’s death or bodily injury.\textsuperscript{403} The WC29 went far beyond a common point of principles in the legal systems of the common law and civil law since it imposed uniform limits of liability.\textsuperscript{404} However, the Montreal Convention 1999 approves unlimited liability for passenger’s death or bodily injury in accordance with the two legal systems.\textsuperscript{405}

7. The international regime created an exceptional system against air carriers, because in the civil law and common law jurisdictions, the carrier is traditionally free to insert clauses in the carriage contract which exclude or reduce his liability.\textsuperscript{406} Of course, common law and civil law jurisdictions gradually moved to restrict contractual conditions exempting, delimiting, or designed to reduce the liability of the provider of services. Therefore, the courts have, in recent years, tended to reject these conditions for the benefit of passengers.\textsuperscript{407}

8. Regarding the influence of the common law and civil law jurisdictions on Iranian law, it should be mentioned that basically Iranian law has been under the influence of the \textit{Shariah} but in modern issues such as civil liability, carriage contract and the liability of a carrier, it has been under the influence of civil law jurisdictions. Among the writers of the Civil Code and Commercial Code, there were those who had academic backgrounds in European universities. They adopted the provisions on contract of carriage, and the presumption of liability from the civil law jurisdictions.\textsuperscript{408} Nevertheless, Iranian law was not affected by the common law jurisdictions in the abovementioned areas. Although carriage and liability

\textsuperscript{402} See Farnsworth, \textit{supra} note 2, at 122; and Viney, \textit{supra} note 202, at 249.
\textsuperscript{403} See Art.22 of the Warsaw Convention 1929.
\textsuperscript{404} See Arts. 22 and 25 of the Warsaw Convention 1929.
\textsuperscript{405} See Art.21 of the Montreal Convention 1999.
\textsuperscript{406} P.B. Larsen, J.C. Sweeney and J.E. Gillic, \textit{supra} note 135, at 454.
\textsuperscript{407} See Freund and Rudden, \textit{supra} note 196, at 298-299.
\textsuperscript{408} See Chr. 3.3.2 for details and references, \textit{infra}. 84
provisions such as bailment principles in the common law jurisdictions have similar counterparts in Iranian law, it cannot be claimed that in areas of liability or contract of carriage, Iranian law has been under the influence of the common law jurisdictions.

2.5 Concluding Remarks

As discussed above, all legal systems have their own liability principles. The main principle in the common law and civil law systems is based on the fault / negligence principle, which in modern law has been changed to the presumption of liability. Apart from the principle of fault, both systems have accepted strict liability as an exception in certain cases. In England and the United States (i.e. representatives of common law countries) or Germany (a civil law country), there are specific statutes for strict liability in accidents. In French law, this principle is accepted in tort under Article 1384 of the Civil Code.

When liability in contract law is studied, it is clear that these changes have taken effect and contract of carriage is today based on a presumption of liability. For instance, in the United States, the liability is strict and as soon as a breach of contract occurs, the defendant’s liability is presumed. Therefore, the legal systems of States have inclined towards a presumption of liability and strict liability in order to balance the interests of stakeholders. The principle of compensation in legal systems requires full compensation and the removal of damage. However, this principle has created problems for both air carriers and passengers in air accidents. Therefore, in order to support the development of air carriage and compensation, countries have ratified statutes that enabled air carriers to accept the lowest insurance. In this way, the parties to a contract of carriage become aware of the probable damages and compensation.

The exemption condition as applied to air carriers has been accepted as a rule in both legal systems. Due to air carrier’s highly onerous duty, carriers were allowed to insert exemption
conditions to limit or eliminate their liability. However, when economic conditions inclined towards the interest of passengers, gradually exemption conditions which were not in favor of passengers were recognized as being contrary to the public order. They were held void in the United States. In France, they were considered as illegal conditions and were thereby rejected by the courts. In England, they were held void by special statutes.

This shift occurred in private international air law for air carrier’s liability. It can be claimed that although the Warsaw Convention 1929 was based on the principles taken from the common law and civil law jurisdictions, it provided principles that subsequently affected these two systems. As will be discussed, the international system of air carrier’s liability was the result of collaboration between member States from the common law and civil law jurisdictions. Nevertheless, in order to maintain a balance between the interests of customers and air carriers, member States disregarded certain principles (on matters such as the insertion of exemption conditions, the fault principle and unlimited liability), and accepted the international principles (such as the presumption of liability, limited liability and the nullification of exemption conditions). This illustrates that the drafters put aside some of their own legal principles in order to achieve uniformity in the liability principles for air carriage.

Now it is clear that the respective legal systems had been flexible enough to accept principles that were more suitable for the transportation system and passengers such as the delimitation of liability or the nullification of exemption conditions although these were against their legal systems. Also they were ready to re-accept principles such as unlimited liability when the transport industry gains enough strength.

In considering the similarities and differences of the two systems, two observations can be made.
1. As the systems distanced themselves from common principles of liability based on fault and proceeded towards liability based on the presumption of liability, and in some cases accepted strict liability through specific Acts, this trend had an impact on air carrier’s liability in international instruments such as the Warsaw system and the Montreal Convention 1999. As will be discussed in the next chapter, States had initially accepted the presumption of liability instead of fault liability. However, this principle was later developed to the point where the States accepted strict liability in the Montreal Convention 1999.

2. A difference in some of the principles adopted also proves the hypothesis that states sometimes neglected their own specific principles for the sake of uniformity in international regulations. From this hypothesis, it can be understood that not all international principles are similar to those from one legal system, but that in international circumstances, States should neglect some of their principles.

The next chapter will discuss the general principles of liability in the *Shariah* and Iranian law to clarify their similarities and differences with the liability principles in private international air law. It discusses the possibility that Iran, in certain cases, can neglect her specific principles for the sake of uniformity in international regulations. In other words, although Iranian law has its own independent constant principles on compensation that sets limited liability for death and bodily injury, these rules may be ignored for the sake of international uniformity. This would be in conformity with other jurisdictions that have adopted the same approach in favor of carriers and customers in transportation by air.