



# AIR CARRIER LIABILITY: AN OVERVIEW OF LEGAL AND PRACTICAL ASPECT IN NEPAL

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## ABSTRACT

*Warsaw Convention, 1929 and the Montreal Convention, 1999 are the two milestones achieved to make the Air regime reliable. Warsaw's convention ensured limited liability and facilitated the infant aviation industry, while the Montreal Convention addressed genetic flaws resulting in inconsistent decisions by national courts also equitable compensation based on the principle of restitution. Nepal became a member of the Warsaw Convention on 13<sup>th</sup> May 1996, it ruled the Nepali Air space for almost 22 years. After the US-Bangla case, the government of Nepal showed commitment toward higher liability and ratified the Montreal Convention on December 15, 2018. The paper analyses both international conventions and ambiguity in the implementation of air carriers' liability in the domestic sphere in Nepal.*

**Key Words:** Warsaw, Montreal, Limited Liability, Restitution, Convention.

## INTRODUCTION

*Warsaw Convention, 1929 or Montreal Convention, 1999 was an attempt to unify the private international air law to address carrier liability. The advancement of the regime of liability from the Warsaw*

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Convention to the Montreal Convention has made the unification of law, uniform procedure, and regime of substantive law. In 1822 *Gullie v Swan* was the first reported case where Ballon crashed in a farmer's field which resulted in a fine in tort liability in 1889<sup>1</sup>; *Scotts Trustees v Moss*<sup>2</sup> was the first reported event of damage resulting from aviation. By 1923 the government of France foresaw the complication of conflict of law and conflict of jurisdiction as there were no uniform laws to address the liability resulting from the carriage of air.

In the modern era, the terrorist attacks and bombings at Hellenikon Airport, Athens, Greece in 1973 and La Guardia Airport in 1975 helped to raise the topic of air carriers' liability to passengers and escalated the need for security conventions as voiced by the world community.<sup>3</sup> Thus, a uniform attempt to address the liability of carriage was made and is called a Unification of Certain Rules relating to International Carriage by Air, signed in Warsaw on October 12, 1929. The sole aim of the convention was to unify the carriers' liability internationally and impose limitations on such liability. Carriage liability covers passenger death, bodily injury, or delay; baggage loss, damage, or delay however does not address liability for surface damage or liability of the airport.

### **HISTORICAL DEVELOPMENT OF AIR CARRIER'S LIABILITY**

1. The Convention for the Unification of Certain Rules relating to the International Carriage by Air, signed at Warsaw on October 12, 1929 (Warsaw Convention, 1929)
2. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 1955
3. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955 signed at Guatemala City, on 8 March 1971 (Guatemala Protocol, 1971)

<sup>1</sup> *Gullie v Swan*, *New York Supreme Court*, 19,381 (1822).

<sup>2</sup> *Scott and Others (Scott's Trustees) v. Moss*, *Scottish Court of Session*, Nov.6., 1889.

<sup>3</sup> Robert D. McFadpen, 14 Killed, 70 Hurt At La Guardia by Bom in Baggage Claim Area: Airport is Closed until Tonight.

4. Additional Protocols No.1 and No.2 (Montreal Protocols 1975)
5. Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999 (Montreal Convention 1999)

### **Unification of Certain Rules relating to the International Carriage by Air, signed at Warsaw on October 12, 1929**

Warsaw Convention was a codification of private international air law, a historical attempt to create risk management of nascent commercial aviation industry. The enactment of the Warsaw Convention in 1929 was the outcome of two global conferences on private air law<sup>4</sup> and the drafting expertise of the Comité International Technique d'Experts Juridiques Aériens [C.I.T.E.J.A.]<sup>5</sup>. It was also an outgrowth of the 1924 Brussels Convention. It unified the private international air law related to passenger tickets, baggage checks, and airway bills. It also attempted to address the conflicts of law and conflicts of jurisdiction related to the air carrier's liability for death or bodily injury or destruction or loss of baggage and delay. It specifies the documents required for transportation and establishes a presumption of liability on the carrier in the event of death or injury to the passengers<sup>6</sup>.

The Warsaw Convention was a unique attempt in the international arena mainly to deal with certain uniform rules, regarding traffic documents, the liability of the air carrier, notification of damages, and jurisdiction.<sup>7</sup> It is the Convention that addresses all international carriage of passengers, luggage, or goods performed by aircraft for reward. It does apply to gratuitous carriage.<sup>8</sup> The expression 'international carriage'<sup>9</sup> is defined in the Warsaw Convention, and the interesting question that arises in the mind of the reader is- whether the expression 'international carriage' includes domestic carriage or not.

<sup>4</sup> Wright, 'The Warsaw Convention's Damage Limitation', 6 *Cleve-Marshall L. Rev.* 290 (1957).

<sup>5</sup> R. Horner and D. Legrez, Minutes, Second International Conference on Private Aeronautica Law 12 (1975).

<sup>6</sup> David Cohen: Montreal Protocol: the most recent attempt to modify the Warsaw Convention, 3 *Air Law* (1983).

<sup>7</sup> A. Sudhakara Reddy, *International Aviation Liability with Special Reference to Warsaw Regime*,

<sup>8</sup> Unification of Certain Rules Relating to the International Carriage by Air, 1929 Art. 1 (1).

<sup>9</sup> Unification of Certain Rules Relating to the International Carriage by Air, 1929 Art. 1(2).

Warsaw Convention has been an attempt to establish uniform liability rules in the international aviation sphere<sup>10</sup>; the Warsaw system of liability does not cover all carrier's liability- the character and scope of liability depends upon as specified on the passenger ticket<sup>11</sup>; it is a contractual relation between passenger and carrier for an assurance of transportation by air. This convention is attracted when there is an air carrier's liability under the international carriage.

In accordance to Article 17 of the *Warsaw Convention, 1929* "the carrier is liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which led to damage so sustained took place on board on aircraft or in the course of any of the operations of embarking or disembarking". This article cites the presumption of liability rather than a cause of action by placing the burden of proof on the air carrier to show the injury or death has not been the result of negligence on the part of the carrier on the agents.<sup>12</sup> The legal ground of liability of the air carrier is fault-based with a reverse burden on proof<sup>13</sup>, "once the passenger proves there was an accident, the carrier may exonerate itself by proving freedom from negligence"<sup>14</sup>. "The principle of placing the burden on the carrier to show lack of negligence in international air transportation to escape liability seems to be reasonable because of the difficulty which a passenger has in establishing the cause of an accident in air transportation."<sup>15</sup>

Air carrier is responsible for the damage occurred to the passenger in the course of the operations of embarking or disembarking, but it has also mentioned the exception that it shall not be liable if proven that the agents have taken all the necessary measures to avoid the damages<sup>16</sup>; also

<sup>10</sup> A. Sudhakara Reddy, *International Aviation Liability with Special Reference to Warsaw Regime*, p. 240.

<sup>11</sup> Unification of Certain Rules Relating to the International Carriage by Air, 1929 Art. 3(1).

<sup>12</sup> A. Sudhakara Reddy, *International Aviation Liability with Special Reference to Warsaw Regime*, p. 242

<sup>13</sup> Christoffer Thalín, *The Air Carrier's Liability for Passenger Damages*, Lund University (2002), (Jan. 26, 2024, 09:23 AM), <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1562522&fileId=1565988>.

<sup>14</sup> Paul Stephen Dempsey, *Air Carrier Liability under the Warsaw Regime and the Montreal Convention*, McGill University, 2015

<sup>15</sup> *Block v. Compagnie Nationale Air France, United States of Appeals, Fifth Circuit, Nov 8, 1967.*

<sup>16</sup> Warsaw Convention 1929 Art. 20.

if the carrier evinces that the damage resulted due to dereliction of duty of the battered person the Court may acquit the carrier wholly or partly from liability.<sup>17</sup> Under this convention, the liability of the carrier for each passenger is limited to the sum of 125,000 Poincare francs and damages shall be awarded in the form of periodic payments<sup>18</sup>. “Warsaw Convention to attain limited liability recognized the need for a quid pro quo by establishing a presumption of the carrier’s liability, thereby shifting the burden of proof from the passenger to the carrier”<sup>19</sup>. The provisions expressly indicate it is a limited form of liability for the air carrier, while there are some incidents where the carrier can be held accountable for unlimited liability. The carrier shall be accountable for unlimited liability during the ‘willful misconduct’ of the carrier<sup>20</sup>. The term ‘willful misconduct’ in the original French document ‘dol’ which is translated into English version is “willful misconduct” is the ground for inexhaustible liability. Also, for registered luggage and goods, the obligation of the carrier is confined to a sum of 250 francs per kilogram.<sup>21</sup>

For any damage claims, the jurisdiction for the aggrieved party to bring claim are the ordinary residence of the carrier, principal place of business, place of business where a contract is made, and place of destination of the passenger<sup>22</sup>.

### **Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Hague Protocol), 1955**

After World War II the common understanding was to expand the economic limit of the carrier’s liability. The limitation of liability created ambiguity as numerous lawsuits were filed to circumvent the limitation provisions mainly by the United States of America by taking grounds such as willful misconduct by the carrier or that the ticket was delivered in a faulty state<sup>23</sup>.

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<sup>17</sup> Warsaw Convention 1929 Art. 21.

<sup>18</sup> Warsaw Convention 1929 Art. 22.

<sup>19</sup> *Block v. Compagnie Nationale Air France, United States of Appeals, Fifth Circuit, Nov 8, 1967.*

<sup>20</sup> Warsaw Convention, 1929 Art. 25.

<sup>21</sup> Warsaw Convention, 1929 Art. 22(2).

<sup>22</sup> Warsaw Convention, 1929 Art. 28.

<sup>23</sup> Christoffer Thalín, *The Air Carrier’s Liability for Passenger Damages*, Lund University, 2002.

*Hague Protocol, 1955* is the outcome of a diplomatic conference convened in The Hague in September 1955 which adopted certain amendments to the original Warsaw Convention of 1929. The objective of the Hague Protocol 1955 is to amend the Warsaw Convention to end the uncertainty of the law.

The fundamental changes brought under the Protocol are as follows:

- a) It has doubled the limits of liability by amending Article 22 to increase the gold francs limit from 125000 to 250000<sup>24</sup>.
- b) A more precise definition was given to the phrase “willful misconduct” under Article 25 of the Warsaw Convention. Article 25 of the Warsaw Convention envisaged inexhaustible liability if there was unwillful misconduct. The Hague Protocol permitted unlimited liability only if the plaintiff could establish that “the damage resulted from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly with the knowledge that damage would probably result”.<sup>25</sup>

The Hague Protocol amended the ambiguity with the Warsaw Convention as it doubled the carrier liability and a precise definition of the phrase “willful misconduct”.

### **The Montreal Interim Agreement, 1966**

The Montreal Agreement is a private agreement concluded between the International Aviation Transport Association (IATA) airlines, an attempt to persuade United States government not to denunciate the Warsaw Convention.<sup>26</sup> The agreement increased the limit of liability to USD 75,000 and widen up the regime of absolute liability. The increment of limit of liability was related to personal injury or death but did not cover the limitation on liability for baggage and cargo.<sup>27</sup>

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<sup>24</sup> *Hague Protocol, 1955* Art. XI.

<sup>25</sup> Art. XIII of the *Hague Protocol, 1955*; A. Sudhakara Reddy, *International Aviation Liability with Special Reference to Warsaw Regime*, pp. 250-251.

<sup>26</sup> Irene Larsen, *Regime of Liability in Private International Air Law- with Focus on the Warsaw System and Montreal Convention of 28 May 1999*,

<sup>27</sup> Thomas J. Dolan, *Warsaw Convention Liability Limitation: Constitutional Issues*, 6 *Northwestern Journal of International Law and Business* (1984).

**Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol done at the Hague on 28 September 1955 signed at Guatemala City, on 8 March 1971**

In 1970 Legal Committee of ICAO adopted a ‘package plan’ proposed by New Zealand delegates which became the basis of a protocol adopted on 17 March 1971<sup>28</sup>. It was known as the Guatemala City Protocol of 1971. The protocol established a new system of strict liability “unbreakable limit of 100000” dollars per passenger in case of death or injury, however, it maintained the presumption of faulty and limited liability notion for carriage of goods<sup>29</sup>.

**Additional Protocols 1 and 2 (Montreal Protocols, 1975)**

International Conference on Air Law held in Montreal on September 3 to 25, 1975 adopted four protocols. The protocols adopted replaced the obsolete unit of account in Warsaw System i.e. ‘Poincare Gold Francs’ by the Special Drawing Rights of the International Monetary Fund.<sup>30</sup>

Montreal Protocol No.1 revised the carriers’ liability stipulated in the Warsaw Convention. It mentions that the liability for the passenger under protocol was to 8,300 SDR.<sup>31</sup>

Montreal Protocol No.2 amended the Warsaw Convention and Hague Protocol in 1955. The protocol stipulates liability for the passenger to to 16,600 SDR.<sup>32</sup>

**Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (The *Montreal Convention, 1999*)**

*Montreal Convention, 1999* is the descendant of the Warsaw Convention, which protects interest of consumers and foresees equitable

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<sup>28</sup> Rene H. Mankiewicz, 38 The 1971 Protocol of Guatemala City to Further Amend the 1929 Warsaw Convention (1971).

<sup>29</sup> *Ibid.*

<sup>30</sup> Gerald Fitzgerald, The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air, 42 Journal of Air Law and Commerce (1976).

<sup>31</sup> Additional Protocol 1 to amend Convention for the Unification of Certain Rules relating to International Carriage by Air, 1975 Art. II.

<sup>32</sup> Additional Protocol 2 Art. II

compensation based on the principle of restitution<sup>33</sup>. It incorporated most of the liability provisions of Intercarrier Agreements<sup>34</sup> and disregarded the loopholes related to the liability regime in the Warsaw Convention is believed to be the patchwork of regulation and private voluntary agreements.<sup>35</sup>

The most notable features of the new Convention include:

- a. A two-tier liability system with strict liability for death or bodily injury up to 100,000 SDR
- b. The carrier's liability is exonerated if there is claimant's negligence or wrongful act
- c. Liability limits shall be revised every five years and adjusted accordingly for inflation
- d. It also provides a fifth jurisdiction

This convention applies to all international carriage of passenger, baggage, or cargo that is performed for reward and gratuitous carriage by aircraft performed by an air transport.<sup>36</sup>

The chapter III of the Montreal Convention deals with the 'Liability of The Carriage and Extent of Compensation for Damage'. Article 17 (1) mentions that "the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon the condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking and disembarking. The carrier is liable for damage to baggage; cargo and delay".<sup>37</sup>

Likewise, as the Warsaw Convention, of 1929 this convention also mentioned exoneration<sup>38</sup>, where the air carrier shall be exclusively or

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<sup>33</sup> Paul Stephen Dempsey, *Air Carrier Liability under the Warsaw Regime and the Montreal Convention*, McGill University (2015).

<sup>34</sup> Preamble of Montreal Convention

<sup>35</sup> Bartholomew. J. Banino, *Recent development in Air Carrier Liability Under the Montreal Convention*, 38(3) *The Brief* (2009).

<sup>36</sup> *Convention for The Unification of Certain Rules For International Carriage by Air*, 1999 Art. 1.

<sup>37</sup> *Montreal Convention*, 1999 Art. 17 (2), 18 and 19.

<sup>38</sup> *Montreal Convention*, 1999 Art. 20.

partially exonerated from liability to the claimant to the extent that such neglect or unlawful act or blunder caused or contributed by the damage<sup>39</sup>. The Montreal Convention stipulates about two-tier liability system- one limited liability and other unlimited liability for compensation in case of death or injury of a passenger. The carrier is liable for the death, injury of passenger if the accident occurred on board or in the course of embarking or disembarking.<sup>40</sup> Article 21 (1) mentions that a passenger shall receive compensation amount not exceeding 100000 Special Drawing Right<sup>41</sup> for the damage sustained in case of death or bodily injury of a passenger.<sup>42</sup> This is the concept of absolute liability, where the air carrier will not be discharged from liability even though the carrier proved that the damage was not caused by its carelessness. The only exclusion to this absolute liability is that the carrier can claim exoneration for damage under provisions of Article 20<sup>43</sup>. In *DB v Australian Airlines AG*, 2023 European Court of Justice interpreted Article 17(1) as strict liability of carrier under Montreal Convention where the accident of pouring hot coffee that scalded him and inadequate first aid on 2019 fall under the same incident.<sup>44</sup>

The convention envisages the limits of liability about delay is limited to 4150 Special Drawing Rights; baggage is limited to 1000 Special Drawing Rights for each passenger and cargo is limited to a sum of 17 Special Drawing Rights per kilogram.<sup>45</sup>

Article 24 of the Convention stipulates review of limits where the liability amount is revised based on inflation every five years. Article 25 of the Convention concedes the rights of carriers to instruct to ascend or disregard the limits of liability established by the Convention<sup>46</sup>.

Montreal Convention, 1999 established 'fifth jurisdiction' along with additional four bases jurisdiction assured under the Warsaw

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<sup>39</sup> *Montreal Convention, 1999* Art. 20.

<sup>40</sup> *Montreal Convention, 1999* Art. 17.

<sup>41</sup> *Montreal Convention, 1999* Art. 20.

<sup>42</sup> In the case of damage not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; such damage was solely due to the negligence or other wrongful act or omission of a third party then the carrier is liable for only limited liability.

<sup>43</sup> *Montreal Convention, 1999* Art. 17(1).

<sup>44</sup> Gabriel DeBono, *Strict Liability of Airline Carrier's under the Montreal Convention* (Jan.18, 2024).

<sup>45</sup> *Montreal Convention, 1999* Art. 22.

<sup>46</sup> *Montreal Convention, 1999* Art. 25.

Convention Article 33(1) of the convention establishes jurisdiction as the Warsaw Convention, allows a suit to be brought against a carrier in the country:

- (1) air carriage's principal residence
- (2) principal whereabouts of business;
- (3) location of business where contract is signed
- (4) place of destination of passenger
- (5) principal and permanent residence of the passenger at the time of accident

It is important to understand -whether the emotional damages such as severe turbulence, crash landing can be subject to compensation under Montreal Convention. The interpretation of convention can be done through various cases as *Eastern Airlines v Floyd*, 499 U.S. 530 where the United States Supreme Court stated "the passenger who does not sustain bodily injury in the accident cannot recover any damages whatsoever"<sup>47</sup>. Likewise in *Jack v TWA*, 854 F.Supp 654 district court of California held that 'a plaintiff may only recover damages for emotional harm under the Warsaw Convention if caused by bodily injury'<sup>48</sup>. However, in the Air crash Disaster Near Roseland Indiana, 1994 the court held that 'passengers who sustained a physical injury during the accident could recover for pre-impact terror regardless of whether the emotional injury'<sup>49</sup>.

## **LEGAL AND PRACTICAL ASPECT OF AIR CARRIER LIABILITY IN NEPAL**

It is disheartening to read out the Guardian newspaper titled "Nepal as one of the World's most dangerous places to fly" which cites "there were 72 fatal air accidents in Nepal between 1962 and January 2023". Nepal's air safety has been questioned by the European Union and ICAO as well, while looking into the different dimensions then air safety, it is important to look into air carriers' liability practices in Nepal as well.

<sup>47</sup> Rumberger Kirk, *Emotional Harm Damages for Personal Injury Claims Under Montreal Convention* (2011).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

Nepal's regime concerning carrier liability began on 13<sup>th</sup> May 1996 as it back party to the amended Warsaw Convention on 13<sup>th</sup> May 1996. This convention ruled Nepali Airspace for almost 22 years. Montreal Convention 1999 with a promise of higher carrier liability was ratified by Nepal on December 15, 2018.

Nepal as a party to the Warsaw Convention, the air carriers acknowledge the limited liability concept under Article 22(1) of the convention where the compensation amount was limited to \$20000 for death, wounding, or bodily injury of passengers. Yeti Airlines' condition of the contract stipulates US Dollar 20000 as liability for death, wounding, or bodily injury<sup>50</sup>. Buddha Airlines' condition of contract also stipulates US Dollar 20000 as liability for death, wounding, or bodily injury.<sup>51</sup> However, Nepal Airlines' condition of carriage stipulates US Dollar 22000 as liability for death, wounding, or bodily injury. This provides us a clear picture that air carriers' limited liability under the Warsaw Convention is continuing though we have ratified the Montreal Convention 1999.

US Bangla plane crash at Tribhuvan International Airport raised the question related to the implementation of liability under the Montreal Convention. It was unfortunate during the incident period; Nepal did not ratify the Montreal Convention. The probable compensation amount could be US Dollar 50000. Now, Nepal has acceded to the Montreal Convention the rise in limitation of liability seems challenging in the Nepali scenario. It has been analyzed that "The convention ratified by the parliament, however, provides an exemption to international air carriage operated directly by the Government of Nepal for non-commercial purposes, the carriage of persons, domestic flights, cargo and baggage for its military authorities on aircraft registered in or leased by the Government of Nepal".<sup>52</sup>

Thus as cited in the Economic Times- "Delayed bill" Grieving families of victims of Yeti Airlines plane crash in Nepal could miss out on

<sup>50</sup> Yeti Airlines, Terms and Conditions (Jan. 25, 2024, 8:00 AM), <https://www.yetiairlines.com/content/condition-of-carriage>.

<sup>51</sup> Buddha Airlines, Terms and Conditions (Jan. 25, 2024, 8:00 AM), <https://www.buddhaair.com/detail/terms-and-conditions>.

<sup>52</sup> My Republica, Montreal Convention comes into effect in today (December 15, 2018), Yeti Airlines, Terms and Conditions (July 25, 2024, 7:00 AM), <https://myrepublica.nagariknetwork.com/news/montreal-convention-comes-into-effect-in-nepal-today/>.

millions in compensation”. Nepal Government should take the situation seriously and try to implement Montreal Convention through legislative framework or reforming the conditions of contract of Nepali Airlines.

## CONCLUSION

The Warsaw Convention and the Montreal Convention are two of the prominent conventions in the field of air carriers’ liability. The Warsaw Convention considered the infancy of the aviation industry and developed quid pro quo provisions for carriers and passengers with limited liability. While the Montreal Convention was more consumer-oriented and was based on the equitable compensation based on the principle of restitution. This convention ensured two-tier liability with strict liability for death, wounding, and bodily injury. The practical provision the convention foresaw was a revision of limits of liability every five years and adjusted the compensatory amount for inflation. Also, it established the fifth jurisdiction where the passer can bring claims in the principal and permanent residence of the passenger at the time of the accident. Nepal has ratified both conventions, however, the conditions of carriage of Yeti Airlines, Buddha Airlines, and Nepal Airlines showed the concept of limited liability has been practiced in the domestic air sphere where air carriers’ liability is around \$ 20000 though the Montreal Convention stipulates 100000 SDR while the revised limit as of 28<sup>th</sup> December 2019 is 128 821 SDR.

