

Aircraft Operator: Liability for Surface Damage

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1960 – collision of UAL DC-8 and TWA Lockheed 1049 over Brooklyn, kills 6 on the ground and 128 aboard
1960 – US military aircraft crashes into Munich, kills 32 on the ground, and 20 aboard
1992 – El Al cargo aircraft crashes into Amsterdam apartment building kills 39 on the ground, and 34 aboard
1997 – Russian military aircraft crashes into Irkutsk, killing 45
2000 – Air France Concorde crashes on takeoff, killing 4 on the ground, and 109 aboard
2001 – hijacked aircraft crash into World Trade Center and Pentagon killing 2,996, including 19 hijackers
2007 – TAM Airbus 320 crashes into Sao Paulo houses, kills 12 on the ground, and 187 aboard
2007 – Anatov 26 crashes into three houses in Kinshasha, killing 49 on the ground
2008 – Kalitta Air Boeing 747 crashes into Bogota farm house, killing 2



Early Common Law

Guille v. Swan 1822: Hot air balloon lands in a garden in New York City; a crowd tramples the landowner's vegetables; the operator is held strictly liable.

The early common law treated aviation as an ultrahazardous activity, for which strict liability was imposed.





The modern common law view

Today, commercial aviation has become so ubiquitous and safe that it is considered a matter of “common usage” rather than an ultrahazardous or abnormally dangerous activity.

Therefore, principals of negligence govern in many jurisdictions.

An exception exists for certain types of “abnormal” aviation, such as stunt flying, experimental aircraft and sonic booms.

But some courts apply negligence principles to aircraft-to-aircraft collisions, and strict liability to ground damage, on principles that the aircraft imposes a “non-reciprocal risk” to surface damage.

Some courts also apply principles of trespass, nuisance and inverse condemnation to surface damage.

UK Civil Aviation Act



“If material damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from aircraft while in flight, taking off, or landing . . . damages in respect of the loss shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the willful act, neglect or default of the owner of the aircraft.”

The Rome Convention of 1933

1. Strict Liability imposed upon the aircraft operator.
2. Liability offset if the damage caused or contributed to by the claimant.
3. Liability limits set according to the weight of the aircraft.
4. Liability ceiling breached only if aircraft operator engaged in gross negligence or willful misconduct.
5. Operators required to carry insurance, or a guarantee.
6. The plaintiff could bring suit either in the State of the operator's residence, or where the damage was caused.
7. The 1933 Convention gained only five State ratifications, and the 1938 Brussels Protocol, which modernized the Convention, attracted only two ratifications.

Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface (**1933 Rome Convention**) adopted in Rome on 29 May 1933; Protocol Supplementary to the Convention for the Unification of Certain Rules Relating to Damage Caused by Foreign Aircraft to Third Parties on the Surface (**1938 Brussels Protocol**), Signed in Rome on 29 May 1933, Done at Brussels on 29 September 1938

The Rome Convention of 1952

Objective: “*ensure **adequate compensation** for persons who suffer damage caused on the surface by foreign aircraft, while **limiting in a reasonable manner the extent of liabilities** incurred for such damage in order not to hinder the development of international civil air transport*”.

Embraced the principles of the 1933 Convention, but raised liability limits up to \$33,000 per person, and \$700,000 per occurrence.

Today 49 ratifications, the largest being the Russian Federation and the UAE.

Australia, Canada and Nigeria ratified, and subsequently renounced ratification.

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952 Rome Convention) signed at Rome on 7 October 1952; *Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, as adopted and signed at Montreal on 23 September 1978 and entered into force on 25 July 2002 (**The 1978 Protocol**) .

The Rome Convention of 1952

The Rome Convention of 1952 governs surface damage by aircraft in flight in any instance where “the damage was caused by an aircraft in flight or by any person or thing falling therefrom . . .”.

Liability of the operator (the registered owner is presumed to be the operator) of the aircraft is not fault based, but is limited, based upon the weight of the aircraft.

The cap for each person killed or hurt on the ground standing at around \$33,000 and the total cap per incident being around \$700,000.

No person who wrongfully solely caused the damage is entitled to recover under the Convention, and a claimant who contributes to the damage is subject to the doctrine of comparative fault.

An exoneration from liability is provided where “damage is the direct consequence of armed conflict or disturbance ...”.

However, where harm is intentionally caused by the aircraft operator’s employees, liability is not capped.

Liability Limited to the Weight of the Aircraft

- (a) 500 000 francs for aircraft weighing 1000 kgs or less;
- (b) 500 000 francs plus 400 francs per kilogramme over 1000 kgs for aircraft weighing more than 1000 but not exceeding 6000 kgs;
- (c) 2 500 000 francs plus 250 francs per kg over 6000 kgs for aircraft weighing more than 6000 but not exceeding 20 000 kgs;
- (d) 6 000 000 francs plus 150 francs per kg over 20 000 kgs for aircraft weighing more than 20 000 but not exceeding 50 000 kgs;
- (e) 10 500 000 francs plus 100 francs per kg over 50 000 kgs for aircraft weighing more than 50 000 kgs;

The liability in respect of loss of life or personal injury shall not exceed 500 000 francs per person killed or injured.

The Montreal Protocol of 1978

Raised liability PER PERSON

from 500,000 (US\$33,200) under the Rome Convention

To 125,000 SDRs (US\$185,000) under the Montreal Protocol.

Raised liability PER OCCURRENCE from 500,000 – 10,500,000
Francs plus 100 Francs per kg for aircraft over 50,000 kg Per
aircraft (US\$663,000).

To 300,000 SDRs – 2,500,000 SDRs plus 65 SDRs per kg over
30,000 (US\$444,000 to \$3,699,000) under the Montreal
Protocol.

But only 12 States ratified the Montreal Protocol of 1978.

Early Negotiations Toward a New Treaty



In 2004, the ICAO Council created a Special Group on Modernization of the Rome Convention. Early on, the Council Special Group agreed on several points:

- Victim protection should at least match that in the 1999 Montreal Convention.
- Adequate protection for the air transport system, including air carriers, ought to be provided, and should especially address the problems of “catastrophic losses”.
- To balance the aforementioned interest, it would be necessary to take account of the availability of insurance coverage in the market or other mechanisms.
- It will not be possible to reconcile the two goals of providing both adequate victim compensation and appropriate protection for the civil aviation sector within the present scope of the compensation system.
- A supplementary funding mechanism for compensation could bridge the gap between what is an adequate level of victim protection for the civil aviation sector and ensuring the durability of the system.

The Montreal Conventions of 2009:



- (1) **General Risks Convention** - *The Convention on Compensation for Damage Caused by Aircraft to Third Parties* covers liability for third party damages caused by an aircraft on an international flight, but not arising as a result of unlawful interference. It seeks to replace the Rome Convention⁴ by providing strict liability for compensation of victims.
- (2) **Unlawful Interference Convention** - *The Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft* provides compensation to individuals suffering damages as a result of unlawful interference of aircraft and establishes a supplementary compensation mechanism for damages incurred beyond the limits on liability contained in the new Convention.

Overview of the New Conventions

In their preambles, both the General Risks Convention and the Unlawful Interference Convention set out to balance the interests of equitably compensating victims with ensuring the financial viability of the aviation industry.

Both Conventions impose liability upon aircraft operators for damage to third parties occurring in a State Party by an international aircraft in flight.

A person may be making use of the aircraft when he is using it personally or when his agents are using the aircraft in the course of employment, “*whether or not within the scope of their authority*”.

As in the Chicago Convention, State aircraft are excluded from the scope of the Convention.

Damages

Liability limits for the operator range from 750,000 Special Drawing Rights (SDRs) for an aircraft weighing under 500 kilograms, to 700 million SDRs (approximately US\$1.1 billion) for an aircraft weighing over 500,000 kilograms, per event.

If two operators cause the damage, the limit of liability is determined by the aircraft of the highest maximum mass, and the operators are deemed jointly and severally liable.

Aircraft lessors and financiers that are not operators are excluded from liability.

Operators (and under the Unlawful Interference Convention, the International Fund) may be exonerated from liability to the extent that they prove the damage was caused, or contributed to, by an act or omission of a claimant or the person from whom the claimant derives his rights. Specifically, the Conventions limit or exclude liability when the victims committed acts contributing to or causing damage which were “. . . *done with intent or recklessly and with knowledge that damage would probably result . . .*”.

Damages

But liability ceiling can be pierced under General Risks Convention if the operator fails to prove it was not negligent, or the damage was solely due to the act or omission of another.

The Unlawful Interference Convention has **three tiers of liability**:

TIER 1. the first is the same as the General Risks Convention (Tiered, strict liability depending upon the weight of the aircraft; maximum of 750,000 SDRs);

TIER 2. a compensation fund up to 3 billion SDRs per occurrence funded by levies from passengers and shippers;

TIER 3. a non-binding obligation of States to compensate.

The injured party also may break the ceiling if intentional act of operator, or willful misconduct, **unless** operator proves it appropriately selected and monitored its employee and complied with Annex 17.

Comparative fault principles apply.

Recovery for death, bodily injury, and mental injury (“resulting from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury”), and in some States, environmental damage

No recovery for punitive, exemplary or non-compensatory damages.

Other Features of the Two Conventions



The remedy is exclusive

Venue: All litigation is channeled to the courts of the State of the occurrence

Period of Limitations: Two years

Right of Recourse: against anyone who committed, organized or financed the act; no recourse against owner, lessor, financier, or manufacturer

Entry into Force?

Ratifications required to enter into force: 35 States, plus 750 million departures for the Unlawful Interference Convention

These high thresholds were advocated by States seemingly opposed to ratification. As a point of comparison, in 2008, 2.2 billion passengers flew, and 60 per cent of them were in domestic air transport.

Fewer than 50 States ratified the Rome Convention of 1952, and absent were the States that represent the lion's share of commercial aviation movements.

Ratifications to date: **None**



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Signatories

GENERAL RISKS CONVENTION:

Chile 29/9/2009

Congo 2/5/2009

Côte d'Ivoire 2/5/2009

Ghana 2/5/2009

Nigeria 8/10/2009

Panama 15/6/2009

Serbia 2/5/2009

South Africa 30/9/2010

Uganda 2/5/2009

Zambia 2/5/2009

UNLAWFUL INTERFERENCE CONVENTION:

Congo 2/5/2009

Côte d'Ivoire 2/5/2009

Ghana 2/5/2009

Panama 15/6/2009

Serbia 2/5/2009

South Africa 30/9/2010

Uganda 2/5/2009

Zambia 2/5/2009



The Montreal Conventions of 1999:

An evolutionary dead end?



THE END

A Universal Picture