

AIR CARRIER LIABILITY FOR PASSENGER DEATH OR INJURY UNDER CARRIAGE BY AIR ACT 1972

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Abstract

Carriers' liability for passenger death or injury during the transportation by air has become a major area of controversy in India especially post Mangalore air crash. The Carriage by Air Act 1972 dealing with carriers' liability in India incorporates Warsaw Convention, Hague Protocol and Montreal Convention, the three international instruments ratified by India. The differences in scheme of liability adopted in these instruments have brought forward significant questions in terms of jurisdiction and computation of compensation. In addition, the application of international carriers' liability regime to domestic carriers with modifications has triggered the questions about justifiability of discrimination. In light of these factors, it is pertinent to address the issues concerning liability for passenger death or injury during the air transportation not only from an academic perspective but also from practical point of views.

The present paper first introduces the structure of liability under the Carriage by Air Act. It moves on to discuss the carriers' liability and defences against liability for passenger death and injury under three

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schedules of the Act. Next part of the paper delves into the problems of the regime in terms of jurisdiction, computation of compensation and discrimination in international and domestic carriers' liability. The last part concludes with suggestions of the author to overcome the problems.

Keywords: Carrier, Air, Liability, Law, Convention.

INTRODUCTION

With the developments in civil aviation in the first half of twentieth century, one of the concerns to emerge early in the field was liability for damage caused to the parties during the air transportation. Since the civil aviation was in its rudimentary stage of development, mishaps were common resulting in death of or injury to passengers and damage to baggage and goods.¹ International deliberations in 1920s resulted in the Warsaw Convention 1929², which was to deal with the liability of carrier for damage caused during air transportation with an objective of having certain degree of uniformity in the laws applicable to different States.³ Though the Convention speaks about the liability of carrier, it is more carrier oriented rather than victim oriented. This is reflected in wide range of defences and limits of liability available to carrier under the Convention. The obvious reason for this is that civil aviation and aviation technology were still in the initial stage of development, and imposition of heavy burden on air carriers would have disincentivised investments and developments in the sector.

However with the developments in aviation sector and consequential increase in revenue generated by the air carriers, it was found that the continuation of carrier oriented regime would be unfair from the public perspective. This awareness has resulted in amendments to the Warsaw

¹ PAUL DEMPSEY & LAURENCE GESELL, AIR TRANSPORTATION: FOUNDATIONS FOR THE 21ST CENTURY 74 (1997).

² Convention for the Unification of Certain Rules Relating to International Carriage by Air, 49 Stat. 3000; 137 LNTS 11.

³ NICHOLAS M. MATTE, TREATISE ON AIR - AERONAUTICAL LAW 379 (1981).

Convention in the form of Hague Protocol 1955⁴, Guadalajara Convention 1961⁵, Guatemala City Protocol 1971⁶ and four Montreal Protocols of 1975⁷. These subsequent instruments reduced the defences available to the carrier, and increased the sphere of application and limits of liability to further the interests of victims. Unfortunately, the amendments of Warsaw Convention were not uniformly accepted by all the State parties to the Convention. Consequently, there has been a complete diversification of air carrier liability regime in different parts of the world. In order to harmonize and modernize the air carrier liability regime in the international level, the Montreal Convention 1999⁸ has been entered.⁹ However, this did not solve the problem, since all the parties to Warsaw system did not become parties to the Montreal Convention. Thus Montreal Convention ended up in adding one more parallel regime to further diversify the international carrier liability law.¹⁰ Once all the parties of Warsaw system become parties to Montreal Convention, the earlier regime would abrogate to establish uniformity.¹¹

⁴ Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, 478 U.N.T.S. 371; 10 ILM 613 (1971).

⁵ Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier, 500 U.N.T.S. 31. y.

⁶ Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 10 ILM 613 (1971).

⁷ Additional Protocol No. 1 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, 2097 UNTS 28; Additional Protocol No. 2 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air; Additional Protocol No. 3 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, ICAO doc. 9151-LC/171-2; Additional Protocol No. 4 to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, 2145 U.N.T.S. 36.

⁸ Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 309.

⁹ Pablo Mendes De Leon & Werner Eyskens, *The Montreal Convention: Analysis of some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66(3) J. AIR L. & COM. 1155, 1162 (2001).

See Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25(1) AIR & SPACE. 12, 14 (2000).

¹⁰ This has posed difficulties in implementation of carriers' liability norms.

See Satadru Goswami, *The Warsaw System and the Montreal Convention: Questions over Implementation of the Liability Regime*, 2(1) ASIAN J. AIR & SPACE L. 97-106 (2012).

¹¹ J.C. Batra, 'Modernization of the Warsaw System - Montreal 1999', 65 J. AIR L. & COM. 429 (2000). (Purpose of the Montreal Convention is not just to amend the Warsaw system but to unify and replace the Warsaw system).

See *Ehrlich v. American Airlines Inc.* 360 F.3d 366 (2d Cir. 2004).

India is a party to Warsaw Convention, Hague Protocol and Montreal Convention. Consequently, the Carriage by Air Act 1972, which is enacted for implementing the international norms in Indian domestic level, contain three sets of liability norms. Section 3 read with First Schedule outlines the Warsaw Convention norms, Section 4 read with Second Schedule outlines the Hague Protocol norms, and Section 4A read with Third Schedule outlines the Montreal Convention norms as applicable to international carriage in India. Part I, II, and III of the Annexure provide the list of States which would be governed by Warsaw Convention, Hague Protocol and Montreal Convention respectively. Section 8 of the Carriage by Air Act empowers the Central Government to come out with the notification to extend carriers' liability norms to the domestic carriage with or without modifications.

LIABILITY NORMS RELATING TO DEATH OR INJURY

Air carriers are liable for death or injury sustained by the passenger during transportation by air under all three schedules.¹² While First and Second Schedules refer to death, wounding and bodily injury, the Third Schedule makes a reference only to death and bodily injury. There are debates about the interpretation of 'bodily injury' especially regarding the status of psychological injury being the part of bodily injury.¹³ It is more or less settled in most of the States that mere psychological injury is not compensable.¹⁴ However, the psychological injury, in order to be compensated, needs to emerge from physical injury.¹⁵

The victim needs to prove that damage is caused by the accident which took place on board the aircraft or in the course of any of the operations of

¹² See Rule 17 of First and Second Schedules, and Rule 17(1) of Third Schedule.

¹³ McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 VAND. J. TRANSNAT'L L. 1-40 (2008).

¹⁴ *Husserl v. Swiss Air Transport Co.* 388 F. Supp. 1238 (S.D.N.Y. 1975); *Rosman v. Trans World Airlines* 314 N.E.2d 848 (N.Y. 1974); *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991); *Kotsambasis v. Singapore Airlines Ltd* (1997) 42 NSWLR 110; *King v. Bristow Helicopters Ltd.* [2002] UKHL 7.

¹⁵ *Jack v. Trans World Airlines Inc.* 854 F. Supp 654 (1994); *Alvarez v. American Airlines Inc.* (1999) 27 Avi 17, 214; 1999 WL 691922; *Ratnaswamy v. Air Afrique* 1998 WL 111652.

embarking or disembarking. Thus mere proof of death or injury is not sufficient, but the plaintiff has to prove the occurrence of accident, which is interpreted as 'happening of unexpected event', causing the damage.¹⁶ In addition, the concerned accident must have occurred on board the aircraft or in the course of embarking or disembarking, which are the questions of fact to be established separately in each case.¹⁷

Limits of liability of carrier under the three schedules are different. Under First Schedule, the maximum limit of liability for passenger death and injury is fixed at 1,25,000 francs.¹⁸ However, there can be a special contract between the passenger and the carrier to increase the limit. In addition, if there is wilful misconduct or a default equivalent to wilful misconduct by the carrier which causes the damage, the limit of liability is lifted to expose the carrier to unlimited liability.¹⁹ Second Schedule increases the limit of liability for passenger death or injury to 2,50,000 francs.²⁰ Similar to First Schedule, the limit can be increased by a special contract. Finally, an intentional act or omission of the carrier to cause damage or his reckless act or omission with the knowledge that damage would probably result would lift the limit of liability of carrier, if the damage is resulting from such act or omission.²¹

¹⁶ Air France v. Saks (1985) 470 US 392.

¹⁷ See for details Paul Stephen Dempsey, *Accidents and Injuries in International Air Law: The Clash of Titans*, 34 ANNALS AIR & SPACE L. 285-310 (2009).

¹⁸ Rule 22(1), First Schedule: In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

¹⁹ Rule 25(1), *ibid*: The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

²⁰ Rule 22(1), Second Schedule: In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 2,50,000 francs. Where in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed 2,50,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

²¹ Rule 25, *ibid*: The limits of liability specified in rule 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Same rule on lifting the liability limit is applicable under both First and Second Schedule, if servants or agents of carrier are found within the sphere of application of the provision.²²

Third Schedule introduces a different scheme of liability consisting of two tiers. Under the first tier, carrier is strictly liable up to 1,00,000 SDR.²³ He cannot avail the defences or limits of liability except the defence of contributory negligence of the victim.²⁴ Under the second tier, carrier is liable over and above 1,00,000 SDR on the basis of fault liability. If the carrier wants to escape liability under the second tier, he has to prove either the absence of negligence or other wrongful act or omission on his part, or that the damage is solely caused by third party's negligence or other wrongful act or omission.²⁵

Contributory negligence of the victim stands as a defence available to the carrier under all three schedules regarding the passenger death or injury.²⁶ This defence has got the effect of either complete or partial exoneration from liability depending on the extent of contributory negligence. In addition, First and Second Schedules provide the defence of taking all necessary

²² *Ibid* and Rule 25(2), First Schedule.

²³ Rule 21(1), Third Schedule: For damages arising under sub-rule (1) of rule 17 not exceeding one lakh Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

²⁴ Rule 20, Third Schedule: If the carrier proves that the damages was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This rule applies to all the liability provisions of these rules, including sub-rule (1) of rule 21.

²⁵ Rule 21(2), Third Schedule: The carrier shall not be liable for damages arising under sub-rule (1) of rule 17 to the extent that they exceed for each passenger one lakh Special Drawing Rights if the carrier proves that - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

²⁶ Rule 21, First and Second Schedules: If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, [in accordance with the provisions of its own law], exonerate the carrier wholly or partly from his liability. Words in brackets are found only in Second Schedule. Rule 20, Third Schedule: see *supra* note 24.

measures to avoid damage or impossibility of taking such measures by the carrier²⁷, which is not available under Third Schedule in case of passenger death or injury. This is of particular relevance as it has the effect of completely changing the nature of liability from fault based liability (under First and Second Schedules) to strict liability with the only exception of contributory negligence of victim (under Third Schedule).

The above discussion clearly outlines the differences in the regime set forth under three schedules of Carriage by Air Act. This has resulted in the emergence of several critical issues in air carrier liability regime adopted by India. The major reason for problems is found in the conflicting basis of three international instruments, Warsaw Convention, Hague Protocol and Montreal Convention, on the basis of which the Carriage by Air Act is enacted. As mentioned above, the Warsaw Convention (First Schedule) is fundamentally carrier oriented and the Montreal Convention (Third Schedule) is completely victim oriented. Hague Protocol (Second Schedule) stands somewhere in between the two extreme points.

JURISDICTIONAL CONCERNS

First and Second Schedules provide four jurisdictions in which the plaintiff can file case seeking compensation. The jurisdictions include the ordinary residence of the carrier²⁸, principal place of business of the carrier, place of business of the carrier wherein the contract of carriage is made and the place of destination.²⁹ Exercise of jurisdiction by any other State or by a State that

²⁷ Rule 20(1), First Schedule and Rule 20, Second Schedule: The carrier is not liable if he proves that he and his [servants or] agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Words in brackets are found only in Second Schedule.

²⁸ Gregory C. Walker. *Doing Business in Montreal: The Effects of Addition of Fifth Forum Jurisdiction under the Montreal Convention*, 23(1) PENN ST. INT'L L. REV. 125-146 (2004). (It has been interpreted in different cases to mean the location of carrier's headquarters, place where the carrier is managed and controlled by its officers and directors or place of incorporation of carrier)

²⁹ See Rule 28, First Schedule and Rule 29(1), Second Schedule.

is not a Contracting Party to the Warsaw Convention would result in rejecting the enforcement of the decision on the ground of forum not having jurisdiction to hear the case.³⁰ A glance at these jurisdictions show that they are chosen by giving due weightage to the interests of carrier. Third Schedule adds fifth jurisdiction in the form of place of principal and permanent residence of the plaintiff to or from which the carrier operates services for the carriage of passengers by air.³¹

The fifth jurisdiction under Third Schedule gives due consideration to victims' interest by allowing the victims to choose the most advantageous jurisdiction of their own respective State.³² It is of added advantage to those victims and their families who are handicapped to move out of their country to seek compensation from carriers. However this may result in discrimination between victims of same accident depending on the State to which they belong, since the applicability of respective Schedule depends on the concerned State's ratification of corresponding international instrument/s. Purely looking from victims' perspective, discrimination does not seem to be on any sound premise but only due to the sheer chance of victim hailing from one particular State as against another.

Another question that has arisen on the jurisdiction under the Carriage by Air Act is, whether the consumer forum are courts of competent jurisdiction under the Act to entertain the cases? In other words, the question is about

³⁰ LAWRENCE B. GOLDBIRSH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK*, 141 (1988); Alan H. Collier, *Forum Non Conveniens in Foreign Air Carrier Litigation: A Sustained Response to an Evolving Plaintiffs' Strategy*, <http://www.aircraftbuilders.com/UserFiles/File/lr2004b.pdf>.

³¹ Rule 33(2), Third Schedule: In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in sub-rule (1), or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

³² Devendra Pradhan, *The Fifth Jurisdiction under the Montreal Liability Convention: Wandering American or Wandering Everybody?*, 68(4) J. AIR L. & COM. 717, 720 (2003).

the possible overlap between the Consumer Protection Act and Carriage by Air Act. This question was contested in many cases³³, finally reaching the Supreme Court for determination in *Trans Mediterranean Airways v. M/s. Universal Exports and Another*³⁴. While answering the question in affirmative, the Supreme Court held that “Section 3 of the Consumer Protection Act gives an additional remedy for deficiency of service and that remedy is not in derogation of any other remedy under any other law.” Thus, the consumer forum are the courts of competent jurisdiction under Carriage by Air Act.³⁵

However, by virtue of Section 5 of Carriage by Air Act³⁶, the above logic is not applicable in case of death of the passengers consequent to aviation accidents. Section 5 has the effect of excluding the liability of carrier for death under the Fatal Accidents Act 1855 and any other enactment or rule of law in force in India except the three schedules of Carriage by Air Act. Hence, the consumer forums are not competent to deal with the cases involving the death of passengers.

COMPUTATION OF COMPENSATION

International instruments on carriers’ liability do not provide guidelines for computation of compensation for passenger death or injury. In general

³³ See *Bharat S. Modi v. British Airways* O.P. No. 48/96 decided on 10 December 2001 (National Consumer Disputes Redressal Commission); *Govind S. Poddar v. M/s. Cathay Pacific Airways Ltd. and Others* O.P. No. 167/2001, decided on 31 May 2002 (National Consumer Disputes Redressal Commission); *Geetha Jethani v. Airport Authority of India and Others* 2004 (3) CPJ 106 (National Consumer Disputes Redressal Commission); *J. P. Singh v. British Airways* No. C-220/1998, decided on 26 February 2007 (State Consumer Disputes Redressal Commission, Delhi); *Marudhamuthu Varadharajan v. M/s. Bahrain Airport Services and Others* C.C.No.30/2008, decided on 26 September 2011 (Tamil Nadu State Consumer Disputes Redressal Commission, Chennai).

³⁴ (2011) 10 S.C.C. 316 (India).

³⁵ *Ranjana Kaul & Ram S. Jakhu, Regulation of Space Activities in India*, in NATIONAL REGULATION OF SPACE ACTIVITIES 153, p 191, (Ram S. Jakhu (ed.), 2010).

³⁶ Liability in case of death - (1) Notwithstanding anything contained in the Fatal Accidents Act, 1855 (13 of 1855) or any other enactment or rule of law in force in any part of India, the rules contained in the First Schedule, the Second Schedule a [and the Third Schedule] shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger.

liability cases, domestic courts have a more or less uniform policy of calculating the amount of compensation by considering multiple factors like, age, income, earning capacity, family status, loss of future prospects etc. of the plaintiff. The extent to which these multiple factors are relevant in the computation of compensation under Carriage by Air Act is a matter of debate especially under the Third Schedule.

Even before the Third Schedule was incorporated, there were conflicting decisions of High Courts on the computation of compensation. In *Kandimallan Bharathi Devi and Others v. The General Insurance Corporation of India*³⁷, the Andhra Pradesh High Court had to decide on the question, whether the benefit received out of the personal accident insurance policy has to be set-off in computing the compensation under the Carriage by Air Act? While answering this question in negative, the Court ruled that compensation under Rule 22 (1) is the minimum compensation in case of death subject to the higher limit under special contract between the carrier and passenger.³⁸ Hence, the Court did not base the computation of compensation for death on any extrinsic factor, rather went by the logic that death of passenger, irrespective of his/her status, would result in reaching the full limit of compensation set forth under Rule 22(1).

The question on computation of compensation under the Carriage by Air Act further came to the limelight in *Airport Authority of India v. Ushaben Shirishbhai Shah*³⁹. In this case, despite poor visibility in Ahmedabad airport⁴⁰, Air India pilots decided to land the aircraft resulting in accident. Though this accident happened in 1988, it took 22 years of litigation for final

³⁷ A.I.R. 1988 A.P. 361.

³⁸ *Ibid*, para 23.

³⁹ (2010) 1 G.L.R. 321. Both Airport Authority of India and National Aviation Company of India Ltd. (Air India) are made as parties to the litigation, since both have contributed to damage. While the latter's employees (pilots) recklessly decided to land, the former had given permission for landing.

⁴⁰ Visibility was so poor that pilots could not see the runway even after descending below 1000 meters.

determination in 2010 by the Gujarat High Court. Plaintiff's claim to lift the limit of liability of the carrier under the Second Schedule (which was the applicable law) was allowed by the Court, since there was a reckless act of carrier's employees (pilots) causing damage.⁴¹ However, the Court went on to calculate the compensation on the basis of victim's income in 1988 coupled with other extrinsic factors⁴² and awarded a compensation of Rs. 7.53 lakhs.⁴³ This is certainly much less the amount than what is normally expected in an aviation claim in other States.

After the Third Schedule was incorporated in the Carriage by Air Act, the first major incident to test the norms on computation of compensation under the Third Schedule is Mangalore air crash of 2010. Soon after the accident, the carrier, Air India, negotiated compensation to be offered to the victims. The compensation offered was on an average Rs. 80 lakhs, but individually varied from Rs. 7.757 crores to Rs. 35 lakhs depending on victims' positions. One of the victims, Mohammed Rafi, was a 24 year old working at UAE as a salesman with a monthly salary of Rs. 25,000. The legal heirs of Mohammed Rafi were offered a sum of Rs. 35 lakhs as full and final compensation for his untimely death. Unsatisfied with the offered sum, the victim's family approached the Kerala High Court resulting in the case, *S. Abdul Salam v. Union of India and National Aviation Company of India Ltd.*⁴⁴

The plaintiffs' contention in this case was that the principle of strict liability is applicable to the extent of 1,00,000 SDR (approximately Rs. 75 lakhs) while deciding the liability under Rule 21(1) of the Third Schedule. They went on to contend that the proof of extent of damage sustained is required only in case of bodily injury, which is partial damage, but not in case of full damage

⁴¹ See Rule 25, Second Schedule.

⁴² The factors such as likely residual life, potential expenses and interest at the rate of 9% are also considered in decision-making.

⁴³ National Aviation Company of India Ltd. (Air India) and Airport Authority of India were asked to pay the compensation amount at 70:30 ratio.

⁴⁴ I.L.R. 2011 (3) Ker. 457.

like death. In case of full damage (death), the compensation shall be full, that is, 1,00,000 SDR. Rule 26 was used in support of this argument, since it states that “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void...”

The Single Judge while agreeing to the above argument, observed that the factors such as age, income, earning capacity, loss of dependency, loss of future prospects etc. need not be taken into consideration, since the liability norms under the Third Schedule do not make any specific reference to them. The proof of extent of damage caused by injury becomes irrelevant when the injury leads to death. In addition, the Court relied on the statement of Minister for Civil Aviation during the parliamentary debates leading to the amendment of Carriage by Air Act in 2009 to incorporate Montreal Convention 1999. While answering the question whether there would be a distinction in compensation between a passenger travelling in economy class and a passenger travelling in business class, the minister replied that all passengers would be treated equally, since compensation is guided by the principle of equity. Assessing all these cumulatively, the Court concluded that the plaintiffs are entitled to a minimum of 1,00,000 SDR on the basis of no fault liability under the Third Schedule.

The respondents went on appeal against the above decision to the division bench of Kerala High Court in *National Aviation Company of India Ltd. v. S. Abdul Salam*⁴⁵. The Division Bench overruled the Single Judge’s decision to hold that there is no minimum compensation fixed for death under the Third Schedule. For this conclusion, it relied on multiple factors. First, Rule 21(1) deals with the compensation not only for death but also for bodily injury as specified under Rule 17(1). The interpretation of minimum compensation of 1,00,000 SDR for death would by the same logic be transported to bodily

⁴⁵ I.L.R. 2011 (4) Ker. 4.

injury, which results in absurdity. Second, the Rule 21(1) is not without any exception, since applicability of Rule 20 exonerates carrier's liability even under Rule 21(1). This shows that 1,00,000 SDR under Rule 21(1) is not a hard and fast rule. Third, Rule 28 while obligating the carrier to make advance payments to meet the immediate economic needs of the victims in case of death or injury of passengers⁴⁶ does not stipulate minimum amount to be paid as advance. According to the Court, if Rule 21(1) is intended to provide minimum compensation, Rule 28 should have fixed a minimum sum as advance payment.

For the above reasons, the Court held that Rule 21(1) does not stipulate minimum compensation to be paid but has the effect of only preventing the carrier from taking the defence of want of negligence within the limit of 1,00,000 SDR. The effect of Rule 21(2) is that in cases where in the claimant can prove the damage caused beyond 1,00,000 SDR, the carrier can invoke the defences to exonerate from liability over and above 1,00,000 SDR. Therefore, the claimant needs to prove the extent of actual damage suffered to get proportionate compensation even in case of strict liability under Rule 21(1). In order to assess the extent of damage, the factors like age, income, earning capacity, loss of dependency, loss of future prospects etc. need to be taken into consideration.

Aggrieved by the verdict of the Division Bench, the claimants have appealed to the Supreme Court. One of the major issues in this regard before the Supreme Court is the interpretation of differing languages of Third Schedule as against the First and Second Schedules. While First and Second Schedules use the words "...liability of the carrier for each passenger is *limited to*"⁴⁷ the

⁴⁶ Notwithstanding anything contained in any other law for the time being in force, where the aircraft accident results in death or injury of passengers, the carrier shall make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

⁴⁷ Emphasis added.

sum of...”⁴⁸, the Third Schedule mentions “...not exceeding one lakh Special Drawing Rights for each passenger, the carrier *shall not be able to exclude or limit*⁴⁹ its liability...”⁵⁰ in case of death or bodily injury. Thus, the First and Second Schedules expressly mention about the limit of liability, which is not found under the Third Schedule. Therefore, the Supreme Court’s stand on the issue of computation of compensation is eagerly awaited.

INTERNATIONAL V. DOMESTIC CARRIAGE LIABILITY

Section 8 of the Carriage by Air Act empowers the Central Government to apply the above-discussed liability norms of international carriage to the domestic carriage with or without exceptions, adaptations and modifications by notification in the Official Gazette. While exercising this power, the Central Government had notified the Second Schedule⁵¹ in 1973 and the Third Schedule in 2014 with modifications.⁵² Since the 2014 Notification expressly supersedes the 1973 Notification, the Third Schedule’s liability norms as modified in 2014 Notification apply currently to the domestic carriage in India.

Interestingly, the 2014 Notification modifies the Third Schedule substantially for application to the domestic air carriage. The sphere of application of liability norms has been reduced down by incorporation of several exceptions under Rule 2 of Third Schedule.⁵³ Such exclusion also includes the carriage of employees of the carrier who are performing duties on board the aircraft. Thus, the flying personnel of the domestic air carriage

⁴⁸ See Rule 22, First Schedule and Second Schedule.

⁴⁹ Emphasis added.

⁵⁰ See Rule 21(1), Third Schedule.

⁵¹ Notification Regarding Application of the Carriage by Air Act, 1972, to Carriage by Air which is not International, Ministry of Tourism and Civil Aviation Notification No. S.O. 186(E) dated 30 March 1973. Hereinafter 1973 Notification.

⁵² Ministry of Civil Aviation Notification No. S.O. 142(E) dated 17 January 2014. Hereinafter 2014 Notification.

⁵³ See Clause 1(c), 2014 Notification.

are entitled to relief for any damage caused to them under the labour laws and not under the Carriage by Air Act.

As far as the liability for the death of or injury to the passenger is concerned, though the norm of unlimited liability of the carrier is continued, the 2014 Notification reduces the strict liability of the carrier to Rs. 20,00,000.⁵⁴ Thus, the carriers are entitled to the defences available under the Third Schedule once the limit of Rs. 20,00,000 crosses. Added to this, the 2014 Notification exempts the carrier from taking mandatory liability insurance coverage.⁵⁵ These modifications clearly reflect the intent of Central Government to favour the domestic air carriers with a view to promote civil aviation.

The above changes in the liability regime may find support in light of ailing aviation industry in India. However looking from the consumers' perspective, they are problematic. Such a differential norm of liability may end up in being unjustifiable discrimination between the two passengers of equal status, one performing the international carriage and the other performing the domestic carriage in the same aircraft. To better illustrate, let us hypothetically consider that X and Y have equal status and background in all respects, and are travelling in the same aircraft. X is travelling from London to Mumbai with a stopover at Delhi (in the same aircraft), which makes his entire journey, London-Delhi-Mumbai, an international carriage. Y presumably enters the same aircraft in Delhi to reach Mumbai, which is essentially domestic carriage. Unfortunately, the aircraft meets with an accident after takeoff in Delhi due to a bird hit, and both X and Y are seriously injured in the accident. Also presumably both X and Y claim compensation to the tune of Rs. 60,00,000 by establishing the damage suffered by them. In this hypothetical situation, X would be entitled to the full amount without any exception, but Y can get only Rs. 20,00,000 on the basis of strict liability and he would fail to recover remaining Rs. 40,00,000,

⁵⁴ Clause 1(f), *ibid.*

⁵⁵ Clause 1(j), *ibid.*

since it would not be possible for him to overcome the defences of carrier under Rule 21(2). Thus the differential liability norms lead to arbitrary discrimination between the passengers in practical terms.

CONCLUSIONS

Failure to achieve uniformity in the international norms governing carriers' liability is invariably reflected in the Indian domestic legislation adopted to implement the carriers' liability norms. Parallel operation of three international instruments, the Warsaw Convention 1929, Hague Protocol 1955 and Montreal Convention 1999, in the Carriage by Air Act 1972 is of considerable concern in India. Since these three instruments were drafted at different stages of developments of aviation sector across the globe, they cater to different stakeholders' interests depending on the requirements of their respective period of drafting. This has resulted in some inherent contradictions in the fundamental aspects of the regime resulting in the above-discussed concerns relating to jurisdiction and computation of compensation. In addition, the differential approach adopted by the Central Government in implementing the carriers' liability regime to domestic carriage has added difficulties outlined above.

The author is of the view that the jurisdictional problems in the Carriage by Air Act may be solved in the course of time once all the States parties to the Warsaw system become parties to the Montreal Convention, since the Montreal Convention has the effect of superseding the Warsaw system. However, problem is that it is difficult to imagine any timeframe for the realization of this end. As far as concerns in the computation of compensation are concerned, the Supreme Court's decision in the pending appeal against Kerala High Court's decision in *National Aviation Company of India Ltd. v. S. Abdul Salam* is expected to set the precedent for future course of action.

Finally, the problem of difference in the compensation available to the victims of accidents in international carriage and domestic carriage coupled with the absence of obligation on the carrier to procure liability insurance for domestic carriage needs specific attention. This is not going to be solved in the course of time without a proactive step from the Central Government to eliminate such discriminations. Understandably, the Indian aviation sector is in chaos. However, this cannot be attributed to the consumers of air services; rather it is the unregulated competition between the air carriers that has resulted in the sorry state of affairs. Therefore, supporting the cause of domestic air carriers at the cost of consumers of domestic air services is not based on sound principles of justice and equity. This leads to the obvious conclusion that changes need to be introduced to keep the domestic passengers at par with the international passengers not only regarding their right of equal compensation but also regarding the carriers' obligation to procure the insurance coverage, so that the domestic passengers are ensured of their entitlement.