

Oliwier MENDALA¹, Jarosław KOZUBA²

¹ University of Economics in Katowice (Uniwersytet Ekonomiczny w Katowicach)

² Silesian University of Technology (Politechnika Śląska)

LIABILITY OF AN AIR CARRIER FOR PERSONAL DAMAGE

Odpowiedzialność przewoźnika lotniczego za szkody wyrządzone na osobie

Abstract: *The aim of the study is to present the principles of civil liability for damage caused to a passenger for which an air carrier is responsible, regulated by the Warsaw and Montreal Conventions, and the norms of national law providing issues that are not included in international law acts. The paper presents a historical overview of the applicable Conventions. The provisions of the Polish Civil Code that are useful for interpretation of law institutions and complement the legal norms contained in the Conventions are also presented. The compiled issues put the legal norms contained in various law systems in order by indicating the practical dimension of the pursuit of potential claims by passengers vis-à-vis air carriers. This is followed by a discussion of the grounds for excluding third party liability of an air carrier in case of excessive or illegitimate claims of the carrier's clients, and of the insurer.*

Keywords: Warsaw and Montreal Conventions, personal damage, forms of remedy, obligations of an air carrier

Streszczenie: *Celem opracowania było przedstawienie zasad odpowiedzialności cywilnej za szkody wyrządzone na osobie pasażera, za które odpowiada przewoźnik lotniczy, uregulowanych w Konwencji Warszawskiej i Montrealskiej oraz w prawie krajowym regulującym kwestie nieporuszone w aktach prawa międzynarodowego. Przedstawiono zarys historyczny obowiązujących Konwencji. Opracowane zagadnienia porządkują normy prawne zawarte w różnych systemach prawnych, wskazując praktyczny wymiar dochodzenia potencjalnych roszczeń ze strony pasażerów w stosunku do przewoźników lotniczych, a także omówienie przesłanek wyłączających odpowiedzialność cywilną przewoźnika w sytuacji nadmiernych lub bezpodstawnych roszczeń klientów przewoźnika oraz ubezpieczycieli.*

Słowa kluczowe: Konwencja Warszawska i Montrealska, szkody na osobie, formy naprawienia szkód na osobie, obowiązki przewoźnika lotniczego

1. Introduction

The concept of civil liability. The legal norms forming the Civil Code or referring to the institutions contained in the civil law acts often use the notion of liability without defining this term. According to the principles of linguistic interpretation, “liability” – referring to the definition contained in the Polish language dictionary – is “a necessity, a moral or legal obligation to be accountable for one’s own actions and to bear their consequences; being accountable to or vis-à-vis someone, for someone or for something”. The term “civil” means “not being military; referring to the legal aspect of personal, family and property related relationships” [14].

In legal terms, the definition and types of liability are understood in various ways. According to the dominant view, legal liability means negative legal consequences provided for with regard to a specific entity in connection with the occurrence of certain events, which are qualified in a negative way by the legal system [10]. For example, criminal, constitutional and civil liability are distinguished.

In civil law, liability is understood as an entitlement of a creditor to claim execution, on the basis of a ruling of a court or another competent decision-making body, of a specific service, with the possibility to apply coercion by state enforcement authorities [10].

Types of civil liability. In the civil law, liability can be distinguished by the scope of pecuniary liability (personal liability, limited personal liability and material liability), by the occurrence of damage due to an act of one entity caused to another entity, which raises liability in damages in tort (on fault basis, on risk basis, on equity basis, or pay-as-you-go liability under insurance) and liability in contract [10] as well as in connection with the possible occurrence on the side of both creditors and debtors of one or more than one entity – liability of one entity, joint and several liability or proportionality [10].

Types of civil liability in respect of property. Personal liability means an entitlement of the creditor to the pursuit and enforcement proceedings in relation to the entire current and future property possessed by the debtor. Limited personal liability consists in being liable up to a specific value of assets or up to a specific volume of the estate [10].

Material liability consists in securing the interests of a creditor by establishing, in most cases, a lien on objects and rights (of a transferable and pecuniary nature) or a mortgage on real estate. In the case when it is impossible to exercise the obligation, the creditor may satisfy their claim from an object, as well as from a transferable and pecuniary right or from a real estate [3]. Mortgage is also established on seagoing vessels and aircrafts, making a constitutive entry in a relevant register. In Poland, the register of civil aircrafts is kept by the President of the Civil Aviation Authority, in compliance with Article 34 section 1 of the Aviation Law Act [16]. In this register, the rights in rem which the aircraft is encumbered with are disclosed in compliance with Article 36 section 1 point 1 letter c. The entry in the register is assessed according to the norms contained in the Act on Land and Mortgage Registers and Mortgage of 06 July 1982 [17].

Types of liability in damages and their principles. In relation to the aviation law in the scope of civil liability in relation to passengers and transported goods, distinguishing of

liability in tort and in contract is the most important. Liability in damages requires, as a rule, the occurrence of three prerequisites fulfilled jointly. Firstly, the occurrence of an event raising the obligation to remedy the damage, secondly, the occurrence of damage and thirdly, a causal relationship between the event and the damage.

Damage is understood as causing of detriment to property (pecuniary damage) or to a person (damage to personal interests, both of pecuniary and non-pecuniary nature, called “harm”) against the will of the aggrieved party [1].

Causal relationship is the relationship between the cause and effect; in this case, it is the relationship between the prohibited act and the caused damage. It is important that the consequence is adequate, i.e. that it is a normal and typical effect of the given behaviour. It is the so-called adequate relationship theory developed in the ground of the criminal doctrine [10], considered also in the rulings of the Supreme Court [8].

Liability in tort on fault basis occurs after joint fulfilment of four prerequisites:

- causing of a damage,
- as a result of commitment of a prohibited act,
- of an act that was intentional,
- there was a causal relationship between the act and the damage. Prohibited act, called also tort, is an action or omission that causes a damage. Therefore, a relationship of primary character occurs; causing of the detriment causes occurrence of a claim for damage remedying [10].

Fault means the possibility to accuse a specific person of an act, consisting of an objective element (illegality of an intentional act, i.e. behaviour that is incompliant with the legal system) and of a subjective element (a mistake in the decision-making process, i.e. making of an improper decision or a failure to make a decision that should have been made). Fault may be intentional (behaviour in the form of an action or omission or conscious agreement to causing of a damage to another person) or unintentional (negligence connected with a failure to exercise due diligence) [10].

A stricter form of liability in tort is liability on risk basis, in which the liable entity is accountable for the effects of the acts, for which there is no necessity of occurrence of fault. This liability is adopted *inter alia* in the Civil Code [15], in relation to the entities conducting activity connected with the industry, which may cause threats to the environment, e.g. to health, life or property, as well as connected with the risk of participation of persons in the road traffic. For example, in compliance with Article 436 of the Civil Code in connection with Article 206 of the Aviation Law Act (ALA), liability on risk basis is borne by a holder of a mechanical means of transport powered by natural forces, which includes any vehicles powered by mechanical appliances, i.e. *inter alia* aircrafts.

Liability on equity basis occurs in exceptional situations when there are no prerequisites for liability on fault or risk basis and it is supported by the principles of community life [10].

Pay-as-you-go and guarantee liability is connected with existence of the system of insurance, in this case, of economic character. The essence of the insurance is payment of premiums to an insurance fund in order to secure compensation of a damage occurring as

a result of fortuitous events, e.g. an accident [11]. The parties to the liability are the insurer and the insuring party, while the source of their liability is the contract. The Civil Code creates the framework regulation for the insurance contract; *lex specialis* is constituted by other Acts specifying the insurance issues. Insurance may be divided into property and personal insurance, which may have an obligatory or voluntary nature [1]. In accordance with Article 209 of ALA, air carriers and aircraft users are required to take out civil liability insurance for damage caused in connection with the aviation activity they are conducting. This article repeats the norms contained in the European Union laws [13]. Such insurance is to secure the potential damage to passengers, their baggage or goods transported in the baggage hold. Liability in contract results from non-performance or improper performance of an obligation and as a rule, it occurs as a result of non-performance of a contract. A damage and a causal relationship have to occur. It covers solely pecuniary damage. In the Civil Code, there is a presumption of fault of the debtor. The obligation to remedy the damage is of a consequential nature here [1].

Liability in terms of the number of entities. A typical case in the structure of a liability is the presence of one creditor and one debtor. In this case, liability is limited e.g. to the property of the debtor or to the object securing the claim. Nevertheless, it may happen that there is more than one entity both at the side of the creditors and of the debtors. Such situation may originate from an Act or a legal transaction. Active joint and several liability (of the creditors) and passive joint and several liability (of the debtors) may be distinguished. In case of an active joint and several liability, the debtor may satisfy the entire claim to the benefit of one of the creditors according to own discretion of the debtor unless one of the creditors brings an action against the debtor; in such case, the debtor should satisfy the entire claim in to the benefit of this creditor. Satisfying one creditor, the debtor relieves themselves from the debt in relation to all creditors. Active joint and several liability may be established solely through a legal transaction. Passive joint and several liability occurs in case of multiple debtors. The creditor may demand claim satisfaction from all of the debtors jointly, from a couple of them or from each of them separately. Satisfaction of the claim to the benefit of the creditor by one of the debtors relieves all of the debtors from the debt [10]. A recourse claim rises occurs between the debtor who paid the liability and the other debtors as well as between the creditor who accepted the payment for the liability and the other creditors. It consists in division of the debt or benefit among all co-liable or co-entitled parties [7].

An example of joint and several liability of debtors on the ground of the Aviation Law Act is the norm determined in Article 207 Section 6, where a person who uses an aircraft in an unlawful way causes damage through the movement of such an aircraft. The person using (i.e. for example the owner or a lessee entered in the register of civil aircrafts) the aircraft is co-liable, unless they demonstrate lack of their fault.

Also on the ground of the Guadalajara Convention and the norms transferred therefrom to the Montreal Convention, joint and several liability occurs between the contractual carrier and the actual carrier for damage caused during transport [4].

Prerequisites excluding liability. In the civil law, there are prerequisites excluding fault, called exculpatory conditions, prerequisites lifting illegality as to fault basis and prerequisites excluding the bearing of liability on risk basis, called exonerative conditions [10].

Exculpatory conditions are:

- insanity of the perpetrator (impossibility to direct their conduct as a result of a disorder or mental illness),
- age of the perpetrator (as a rule, liability as of 13 years of age).

Prerequisites excluding illegality are:

- legitimate self-defence (avoiding of a direct threat as a result of unlawful attack on generally understood legal rights committed by other persons),
- state of need (avoiding of a danger to the generally understood legal rights, when the source of the danger is an object or an animal),
- permitted self-aid (own protection of the state being compliant with the content of the subjective right or of the actual state protected by the law),
- consent of the aggrieved party (consent to interfere in the goods administered by them),
- exercise of own subjective rights.

Not all prerequisites excluding fault and illegality are relevant on the ground of the aviation law. It should be stated that liability on fault basis is relevant in case of courtesy transport (free of charge, voluntary, without a contract) and in case of a crash of moving aircrafts, e.g. on the airport apron or in the air [5].

Exonerative conditions are:

- force majeure,
- occurrence of damage solely due to fault of the injured party,
- occurrence of damage due to fault of a third party, for which the debtor (in this case, the person running the company or the holder of the vehicle) is not liable [10].

Even though the last two prerequisites do not require an in-depth analysis, the first one, i.e. force majeure, should be defined. According to the rulings of the Supreme Court, force majeure has to be caused by external events, i.e. the ones taking place outside the device, with the functioning of which liability is connected; the event must be unforeseeable (but as a rule, it is about a minor degree of probability of occurrence of the specific situation); the event must be unpreventable, which results in the impossibility to prevent its consequences [10].

Manners of remedying damage. The aggrieved party has the right to select the manner of remedying of the damage. There is a possibility to restore the state from before the damage was caused or to pay a financial compensation. This is stipulated in Article 263 of the Civil Code (CC) and applies both to damage caused in tort and to damage caused by non-performance or improper performance of an obligation. The form of the financial compensation which may eliminate the negative effects occurring as a result of the damage is selected much more often. Among financial compensation, damages (for damage of

a pecuniary nature caused to property or to a person) and redress (for damage of a non-pecuniary nature caused to a person) may be distinguished [10].

Consequently, for damage caused e.g. to baggage, equipment, parcels, and for damage related to bodily injury (violation of physical integrity, e.g. a wound or a fracture), damage connected with health disorders (disturbance in functioning of the organism, e.g. neurosis), or for damage which resulted in death, the injured party or their legal successors may claim damages which should compensate for the damage suffered and for the costs resulting from the need to undergo hospitalisation, travels of those close to the harmed person, rehabilitation, disability pension for the injured party who has been fully or partially deprived of capability to work as a result of disability or for the persons vis-à-vis whom the injured party had a maintenance obligation, one-off compensation and, possibly, reimbursement of the cost of medical treatment, transport of corpse and funeral [10].

Redress is due for harm, i.e. for physical suffering (connected e.g. with bodily injury or health disorder) or for psychical suffering (e.g. fear, trauma) of the injured party. It may be connected with the violation of personal rights determined in Article 23 of CC, for example health, life or freedom. Widely understood damage caused by a prohibited act may interfere with pecuniary and non-pecuniary spheres at the same time. It should be pointed out that courts may adjudicate both damages and redress due to one prohibited act. Redress has the form of a one-off payment and may be pursued by the harmed party or by their legal successors if the action was brought when the harmed party was alive or was accepted in writing.

The amount of the compensation or redress depends on the incurred costs, suffered losses and the volume of harm. The measure of the damaged property or costs are the prices applicable, as a rule, at the date of determining the compensation (Article 361 of CC).

2. Historical overview of the air carrier's liability

The Warsaw Convention 1929 was the first act of this type, governing inter alia civil liability of an air carrier. In practice, some problems in its application and interpretation occurred. The Warsaw Convention was originally prepared in French. The fact of translation of the Convention into the languages of the States Parties often created interpretation problems; some institutions were not known to the domestic legislators. Also the practice of the states, mainly the Anglo-Saxon ones, exceeded the amounts of compensation in relation to the limits contained in the Warsaw Convention. It was a stimulus for changes. The Hague Protocol 1955 increased the amount limits of liability and modified the liability principle. The next step was adoption of the Guadalajara Convention 1961, which introduced the term of the contractual carrier and of the actual carrier as well as governed joint and several liability of the carriers. The dynamic technical development and the increased number of the transported passengers entailed further changes, lobbied mainly by the United States. The Guatemala Protocol 1971, which was to make liability of the air carriers stricter, to introduce increased liability limits as well as

some *novum* in the field of selection of jurisdiction, was to be the response to these problems (but it was not applicable due to a failure to obtain the required number of thirty ratifying countries). Further changes came in 1975, when four Montreal Protocols were signed in Montreal which, first of all, changed the “currency” used to determine the amount of the compensation [4].

Apart from the international agreements and protocols negotiated by the representatives of the governments or accredited persons, also the understandings of the carriers, which voluntarily increased the liability limits or cancelled them completely, should be indicated. *Inter alia* the Malta understanding 1974 (an informal request of the European Economic Community to licensed carriers in the EEC Member States for increasing of the liability limits) or the Japanese initiative 1992 (where Japan airlines paid a compensation to each passenger in the amount of USD 850 thousand) may be distinguished. Contractual increase of limits between the carrier and the passenger is compliant with Article 22 section 1 of the Warsaw Convention [4].

An important role was played by national legislations which usually governed the issues that were disputable in the Warsaw Convention, sometimes modifying its provisions. The Warsaw Convention and the further conventions and protocols caused disputes and chaos since not all States Parties to the Warsaw Convention ratified the further modifying acts, creating a complicated legal system. The solution was creation of a new convention not being strictly the continuation of the Warsaw system. Finally, the Montreal Convention was prepared in 1999 (it is not a protocol or convention amending the Warsaw Convention), eliminating the limits of liability for personal damage to the passenger and able to cancel or increase the liability limits with differentiation of the scope of liability. It instituted advances for compensation payments and additional jurisdiction was adopted for the pursuit of damages. The Montreal Convention takes advantage of all prior conventions and protocols, also the ones that were not ratified.

Applicability of the Warsaw and Montreal Conventions. Both the Warsaw Convention and the Montreal Convention, in accordance with Article 1, Section 1, are applicable to each international transport of persons, baggage or goods, performed by means of an aircraft against payment. It is also applicable to free transports performed by an aircraft by an air transport company. The air transport company is assessed through national norms (the carrier that obtained a licence or an equivalent act of another state).

International transport should be understood as transport where in compliance with the contract between the parties the place of departure and the destination, independently of the fact whether the flight had a break or not, is located on the area of two States Parties to the Warsaw Convention or on the area of only one State Party if landing on the territory of another state, even the one not being a State Party, was provided for in the contract. Transport without such landing between two points located on the territory of one State Party is not considered as international transport in the meaning of the Warsaw Convention in compliance with Article 1 section 2. An analogical solution was adopted in the Montreal Convention, also in Article 1 section 2.

As a rule, in domestic transport the provisions of the Warsaw Convention or of the Montreal Convention are not applicable, but the Polish legislator extended application of the conventions ratified by the Republic of Poland. In compliance with Article 208 section 1 of ALA, the air carrier is liable for damage in transport of passengers, baggage and goods according to the principles determined in the international agreements ratified by the Republic of Poland, according to the scope of their application. Article 208 section 2 of ALA indicates that provisions of the agreements determined in section 1 are also applicable to liability of the air carrier for damage in international transport not being subject to these agreements and starting or ending on the territory of the Republic of Poland or with performance of commercial landing on this territory as well as in domestic air transport. In case of adoption of various international agreements as well as amendments and supplements thereto by the Republic of Poland, in this transport only the provisions of the agreement that was last ratified by the Republic of Poland are applied. The general principle of conflicts of laws, *lex posterior derogat legi priori*, orders that in case of discrepancies in interpretation of equivalent acts, the later act should be applied.

In Article 1 section 3 of both the Warsaw Convention and the Montreal Convention there is a provision stating that transport to be performed by two or more subsequent carriers is considered with application of this Convention as one transport if it was considered as one activity by the parties, independently of the fact whether it was agreed upon in the form of one contract or a number of contracts and it does not lose the character of international transport due to the fact that the contract or the number of contracts are to be performed in the entirety within the borders of the territory of the same state. It means that transport of the next carriers under even several contracts is treated as one indivisible transport, even if there was a break between these transports, lasting e.g. a couple of days. Transport must be understood in this way by all parties (i.e. by the carrier, the passenger, the sender). Application of the Warsaw Convention and of the Montreal Convention is possible also on domestic sections if the objective is further travel having international character (e.g. Washington - New York - Warsaw) [9].

3. Liability for personal damage on the ground of the Warsaw & Montreal System

In Article 17 of the Warsaw Convention, the carrier is liable for damage incurred in the case of death, wounding or any other bodily injury suffered by a passenger if the accident that caused the damage happened on the board of the aircraft or during any activities connected with getting on or off the aircraft. Liability is limited to the amount of

FP 125,000 (Franc Poincaré), which is stipulated in Article 22 Section 1 of the Warsaw Convention¹. The Hague Protocol increased the liability limit to FP 250,000.

Doubtless to say that on the basis of Article 17 of the Warsaw Convention it is possible to claim compensation for pecuniary damage and for pecuniary damage to a person. On the ground of this article, some discrepancies whether this legal norm may be applied to harm as a non-pecuniary personal damage have occurred. In compliance with rulings issued on the basis of Article 17, it is possible to claim also redress, if harm results directly from a physical injury [4]. Also Article 17 section 1 of the Montreal Convention stipulates that the carrier bears liability for the damage occurring in case of death or bodily injury or disorder of health of the passenger if only the event that caused the death, bodily injury or health disorder took place on the board of the aircraft or during all activities connected with getting on or off the aircraft. Liability of the carrier on the ground of Article 21 section 1 shows that the carrier may not exclude or limit its liability for damage provided for in Article 17 section 1 which does not exceed SDR 100,000 (Special Drawing Rights) per passenger². Liability of the air carrier in the Montreal Convention is stricter than in the Warsaw Convention, assuming increase of liability on risk basis to the amount of SDR 100,000. The SDR unit was established in 1970 and was introduced by the Montreal Protocols 1975 which did not modify the liability limit and only converted FP to SDR. Therefore, Protocol 1 converted the upper amount of compensation under the Warsaw Convention, i.e. FP 125,000 = SDR 8,300 and Protocol 2 converted the upper limit of liability from the Hague Protocol amending the Warsaw Convention, i.e. FP 250,000 = SDR 16,000.

If the value of damage exceeds SDR 100,000 per passenger, the carrier does not bear liability if it proves that:

- such damage was not caused by negligence or another improper action or omission of the carrier or of the persons acting for it, or
- such damage was caused solely by negligence or another improper action or omission of a third party (Article 21 section 2 points a and b of the Montreal Convention).

In Article 24 sections 1 and 2 of the Montreal Convention the amounts may be revised taking into account inflation when it exceeds 10 percent since the previous revision or the first revision since entry of the Convention into force. At present, the limit increased from SDR 100,000 to SDR 113,100 is applicable. The limits determined above in fact demarcate the liability principles, where up to SDR 113,100 objective liability, i.e. on risk basis, applies, while above this amount liability with presumption of fault occurs. The amount demarcation of liability under the Montreal Convention was lifted in relation to personal damage to the passenger. Article 22 section 1 of the Warsaw Convention and Article 25 of the Montreal Convention stipulating that the carrier may agree that in relation to the

¹ FP (*Franc Poincaré*) is a special currency unit which does not occur in circulation, containing 65.5 mg of gold of millesimal fineness 900. It corresponded to the exchange rate of French franc.

² SDR (*Special Drawing Rights*) are a contractual international monetary unit performing the settlement function between the Member States of the International Monetary Fund. SDR 1.00 is USD 1.37 (as at 12 November 2019).

transport contract higher liability limits than the ones provided for in this Convention are applied or no liability limits are applied (under the contract with the carrier) is a favourable solution for the passengers. Also on the ground of the Montreal Convention, the courts adjudicate on the basis of Article 17 that redress for moral harm must be connected with a physical injury which is assessed from the point of view of internal provisions of the states. The terms used in the original English and French texts: *injury*, *bodily injury*, *lesion corporelle*, which could indicate liability solely for bodily injuries, should be understood in a wide way. During the discussions about the form of the Montreal Convention, the parties proposed to include a separate damage, the so-called *mental injury*. Finally, it was not decided to introduce a separate norm as it could lead to adjudication for mental injuries not connected with a physical injury, which could increase the number of claims for damages, accurate determination of which would be impossible [4]. Therefore, the original term *injury* should be understood broadly, as damage and harm to health in connection with a physical injury. In the Polish translation of the Montreal Convention, the same terminology as in Article 444 of CC was used for the term “health disorder”.

Concept of Accident and Place of Accident. In compliance with Article 17 of the Warsaw Convention and of the Montreal Convention, the air carrier is liable for an accident. According to J. Rajska, an accident is “any event which, while operating from the outside in a sudden way, has caused death, wounding or another bodily injury of a passenger” [12].

In the rulings of the courts from different States Members, mainly the following events were considered as the accident:

- aircraft hijacking,
- terrorist attacks,
- bomb explosion,
- threat of bomb explosion,
- emergency landing,
- assault by an employee of the air carrier, for which the carrier is liable towards third parties [4].

The most pro-consumer rulings are issued by the American courts, considering e.g. turbulences, bodily injury caused by a needle in the seat or spilling of hot water on the passenger as the accident. The American courts adjudicate also the highest damages in comparison with other states; in domestic transport, in which the Conventions do not apply, it is also possible to adjudicate damages for harm not connected with a physical injury.

Damage caused, for example, by the following is not considered as an accident:

- fight of passengers under the influence of alcohol,
- food poisoning of a passenger,
- stumble of a passenger under the influence of alcohol,
- heart attack of a passenger (as a rule, if the condition of health of the passenger indicated earlier a threat to health or life caused by the travel, the heart attack may in exceptional situations be considered as the accident).

However, it is disputable who and to what extent as well as on what basis is liable for a crash of the aircraft with birds. The rulings relating to this issue differ. It should

be examined on a case-to-case basis; it is not excluded that it may be considered as the accident [4].

Ascertainment of the accident on the board of the aircraft does not require any greater deliberations in terms of place. However, determination of the time and place scope in connection with liability of the air carrier as a result of the accident in the course of any activity connected with getting on or off the aircraft may be problematic. The Conventions do not refer to this issue so it is necessary to use the standpoint presented in the judicial decisions. In the rulings, it is the most often assumed that the moment and place of the activity connected with getting on the aircraft is entry of the airport apron up to the moment of getting on the board of the aircraft; analogically, liability for the activities connected with getting off the aircraft refers to the place and time of leaving of the plane and reaching of the airport terminal building [4]. There are many theories in the doctrine stating for example that liability of the air carrier should be interpreted from the moment of entry of the passenger on the area of the airport to the moment of leaving of the area of the airport in the destination or from the moment of the check-in to the moment of collection of the registered baggage [4]. The Supreme Court referred to such a wide understanding of the activity connected with getting on or off the aircraft in a critical way by means of the ruling of 18 January 1971 which states that it is the airport and not the air carrier that is liable for damage occurring on the area of the airport as a result of a heart attack of a passenger.

The theory that is worth considering is the scope of liability of the air carrier from the moment of entry of the passengers in the room, from which they go directly to the aircraft, at the same time separating them from the passengers waiting for another flight as well as from the passengers staying within the limits of the airport, or from the moment of demonstration of the air ticket to the employees of the air carrier and getting on the so-called jet bridge or bus. Then, the actual supervision and impact on the behaviour of the passenger from the side of the employees of the air carrier takes place. This moment stops when the passengers come to a place, in which they are outside the supervision of the employees of the air carrier, i.e. e.g. to the common passenger zone. Various theories may be used depending on the structure of the airport [4]. None of the interpretations of the place of accident is dominant, since the analysis of the court rulings of such countries as the United States, Germany, England and France indicates various understanding of this concept.

Circumstances exempting from liability. On the grounds of the Warsaw Convention, pursuant to Article 20 para. 1 and Article 21, the carrier is not liable if it proves that:

- it and its servants or agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures;
- the damage was contributed to by the injured person.

Article 20 (1) of the Warsaw Convention refers to the presumption of fault. In order to exonerate an air carrier from liability, a positive proof of force majeure or fault of a third party, as a matter of principle, would be required. Article 25 para. 1 and 2 of the Warsaw Convention increase the extent of liability of the carrier if the damage resulted from his deception or fault, which according to the law of the adjudicating court is considered to be

equivalent to deception (intentional fault) or if the damage was caused in the same conditions by one of the persons acting for the carrier in the performance of his functions. In such a case, the provisions of the Convention which exclude or limit the liability of the air carrier cannot be invoked. Article 21 of the Warsaw Convention allows the carrier to prove that the injured party's fault caused the damage or contributed to it and the court will be then able to remove or mitigate the liability of the carrier in accordance with its law.

Article 362 of the Civil Code provides that if the aggrieved party has contributed to the occurrence or increase of damage, the obligation to remedy the damage shall be reduced accordingly, depending on the circumstances, and in particular to the degree of fault of both parties. In the Montreal Convention, it is Article 20 that addresses the issue of exemption from liability. According to its provisions, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation or the person from whom they derive their rights, the carrier is wholly or partly exonerated from its liability to the claimant to the extent that such negligence or other wrongful act or omission caused or contributed to the damage. If compensation for death, bodily injury or a disturbance in health of a passenger is claimed by a person other than the passenger, the carrier is also relieved of liability in whole or in part to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger. This article applies to all the provisions of the Convention which concern liability. The difference between the Conventions is the auxiliary application of internal laws in the assessment of contribution to damage by third parties in the Warsaw Convention, while the Montreal Convention adopts self-containedness of the norm, without referring to internal norms.

It should be added that, in accordance with Article 23 of the Warsaw Convention and Article 26 of the Montreal Convention, any contractual provisions aimed at exempting the carrier from liability or at fixing limits of liability lower than those provided for in these two Conventions are to be deemed non-existent and with no legal effects. However, the invalidity of such provisions does not invalidate agreements that remain subject to the provisions of the Conventions. This is an expression of protection of passengers as consumers, by providing semi-imperative regulations that guarantee a minimum level of protection of passengers' interests, which cannot be abolished or reduced. On the other hand, passengers cannot make claims which are not provided for in the Warsaw or Montreal Conventions [9].

Liability of the contracting carrier and the actual carrier. The first provisions regarding this matter were introduced by the 1961 Guadalajara Convention. It was followed by the Montreal Convention which distinguishes and defines the contracting and the actual carrier in Article 39, where: a person (hereinafter referred to as "the contracting carrier") makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part

a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

According to Article 41 (1) of the Montreal Convention, the acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier. Also, pursuant to Article 42 (2), the acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. The liability for causing damage to a passenger is joint and several, which can be inferred from the wording of Articles 41, 44 and 45 of the Montreal Convention, but this is not explicitly stated either in the original document or in its translation into the Polish language. Following M. Polkowska and I. Szymajda, it cannot be ruled out that if the plaintiff sues both the contracting and the actual carrier, the court could award damages on the basis of proportionality rather than solidarity [9].

The aggrieved party has the right to bring an action:

- against the actual carrier or the contracting carrier (one suit against one carrier),
- against the actual and contracting carriers jointly (one suit against at least two carriers),
- against the actual carrier or the contracting carrier separately (at least two suits against at least two carriers) [9].

According to Article 45 of the Montreal Convention, if the action is brought against only one of those carriers, that carrier has the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seized of the case. These norms protect both the passenger, who has the possibility to claim from a wider range of entities, and the carrier, who can pass on part of the liability to other entities. The contracting carrier is liable for the entire carriage, while the actual carrier is responsible for the carriage it performs (partly or entirely, but not more than the contracting carrier). The actual carrier is not liable for sums in excess of the limits stipulated in the Montreal Convention. With regard to charter contracts, the charterer is considered the contracting carrier and the air carrier is considered the actual carrier [4].

Liability for persons acting on behalf of the air carrier. An air carrier as a company, e.g. a state-owned or joint stock company, operates through its employees or agencies. The Warsaw Convention (in French: *preposes*) refers to "persons acting for the carrier". The Montreal Convention adopted a broader definition by mentioning *servants and agents* in the English version (in the French version: *preposes et mandataire*), although the Polish translation reads "persons acting for the carrier". Following M. Żylicz, "persons acting for the carrier" should be understood as its employees, agents and those employed on the basis of a contract of mandate, other contract for provision of services (including any civil law contracts) or under special authorization [18]. For example, it is possible to indicate the liability of an air carrier for incorrect decisions of aircraft pilots, which have caused damage, or liability for persons serving passengers during the flight, as well as for the acts or omissions of commercial agents. Based on Article 30 of the Montreal Convention, if an

action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, is entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under the Convention.

In the case of death of a person liable, an action for damages may be brought, in accordance with the terms of the Convention, against legal successors of that person. This is stipulated in Article 27 of the Warsaw Convention. The same norm is included in the Montreal Convention in Article 32, which also applies to persons legally representing the estate of the carrier. This means that claims can also be made to companies that would e.g. buy out the company of the carrier responsible for the damage.

The right to claim damages expires if an action is not brought within a period of two years from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the carriage was stopped. The method of calculating that period is determined by the law of the court seized of the case. This issue is addressed in Article 39 (1) and (2) of the Warsaw Convention.

The term and method of its calculation is also specified in Article 35 of the Montreal Convention. An important novelty is the payment of advances stipulated in Article 28 of the Montreal Convention which provides that in the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, 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.

In Poland which is a member state of the European Union, Regulation (EC) No. 2027/1997 on air carrier liability in the event of accidents, as amended by Regulation No. 889/2002 of the European Parliament and of the Council, is in force. In accordance with its provisions:

- the Community air carrier shall without delay, and in any event not later than fifteen days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered (Article 5 para. 1),
- without prejudice to paragraph 1, an advance payment shall not be less than the equivalent in euro of 16,000 SDRs per passenger in the event of death (Article 5 para. 2),
- An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 20 of the Montreal Convention or where the person who received the advance payment was not the person entitled to compensation (Article 5 para. 3). The reference to Article 20 of the Montreal Convention means the possibility to claim back the advance payment if the person contributed to the damage.

4. Aviation insurance obligation

The Warsaw Convention does not contain any provision requiring air carriers to conclude insurance agreements. However, the Montreal Convention in Article 50 stipulates that States Parties shall require their carriers to maintain adequate insurance covering their liability under the Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance.

State parties must therefore ensure that their carriers have an insurance policy in place, covering any potential claims for damage to passengers, baggage and cargo. This is another manifestation of protection of passengers as consumers against insolvency or bankruptcy of the air transport service provider [9].

In the EU law system, the obligation of insurance is contained in Regulations Nos. 2027/1997 and 889/2002, Article 3 (1b). It requires compulsory insurance up to a limit of 100 000 SDRs and above this amount, up to a “reasonable level”. This refers to air carriers of the EU Member States. In Polish law, the insurance obligation is set out in Article 209 of the ALA, where air carriers and the aircraft operators are obliged to be insured to cover third party liability for damage resulting from their aviation activities in accordance with Regulation (EC) No. 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

Types of insurance. The following may be subject to aviation insurance:

- aircraft owned or operated by the air carrier,
- third party liability of the air carrier that operates the aircraft with respect to passengers and their baggage,
- third party liability of the air carrier that operates the aircraft with respect to third parties other than passengers.
- liability of the air carrier with respect to the cargo being carried,
- accidents resulting from the acts or omissions of crew members, i.e. persons for whom the air carrier is responsible,
- belongings of crew members [6].

Insurance agreements are often constructed in a way that provides for the possibility to limit or exclude the liability of insurance or reinsurance companies. After 11th September 2001, when the terrorist attacks on the World Trade Center and the Pentagon (USA) with the use of passenger planes took place, some companies introduced the possibility of additional insurance cover against war and terror attacks. It can be said that the market responds to the needs that change with the dynamic development of technologies, situations and threats. Additionally, the existence of travel insurance should be mentioned, as well as the insurance cover for aircraft designers and manufacturers (for a faulty design or use of faulty materials, or faulty manufacturing of an aircraft product, i.e. an aircraft in its broadest sense and its components) [6].

Air carriers, often in consultation with insurance companies, offer passengers additional individual cover against accidents, and life insurance. These are usually offered by insurance agencies or, more and more frequently, via the Internet (also when booking

flights through on-line booking systems), as well as by banks. Taking into account the low amount of the insurance premium (which depends on the number of days in the trip and the country of destination, adequately to the risk, the amount of the premium is a percentage of the guarantee amount included in the insurance contract) and the wide scope of the insurance, it is profitable for the passenger to purchase such insurance cover. Individual insurance usually requires that the carriage be performed by a licensed air carrier (i.e. one that has a licence to operate air services) for a fee. Passenger insurance generally include insurance coverage of medical treatment, expenses of medical care, death or permanent disability, as well as insurance against the risk of flight delay, loss of baggage, money or personal effects, and third party liability insurance. In connection with the development of the tourism and insurance market, the insurance agencies offer an increasingly wide range of insurance policies [6]. Such policies, as a matter of principle, also contain clauses that exclude the liability of the insurer, e.g. when using aircraft in violation of law, when the aircraft does not have a valid certificate of airworthiness, or in the case of invalid pilot's licence or in cases when the aircraft has been serviced by maintenance personnel who do not hold legal authorizations; other examples of exclusions are: damage resulting from the use of unregistered airports or unregistered airfields, damage resulting from acts of wilful misconduct or gross negligence, or when the aircraft carried more people than permitted in the documents allowing for its operation [6].

Personal insurance policies also contain clauses excluding the liability of the insurance company, e.g. in the situation of intentional action, attempted or actual suicide, mental disorders and diseases, action of the insured who caused damage under the influence of intoxicating agents, alcohol or psychotropic drugs [6].

5. Summary

Civil liability of air carriers is governed by the Warsaw Convention, the Hague Protocol, the Guadalajara Convention and the Montreal Convention. These conventions have a nature of international agreements, so their provisions cannot be imposed on countries that are not parties to the agreement. In addition, this liability is regulated by EU and national laws to a complementary extent. In the case of possible claims against an air carrier, it should be examined whether the State concerned is a party to the agreement and to what extent, and whether it is a party to subsequent conventions and protocols amending the original wording or termination. The International Civil Aviation Organization (ICAO), affiliated to the United Nations, has 191 member states. In 2015, 152 states were parties to the Warsaw Convention, 137 to the Hague Protocol, 118 to the Montreal Convention, the latter joined also by the European Union as a party (119 in total). Poland is a party to the Warsaw Convention, the Hague Protocol, the Guadalajara Convention and the Montreal Convention. It should be emphasized that it is a complex system, creating a kind of mosaic of legal norms. It is suggested that it would be most convenient to create a uniform system that would be transparent and binding for all countries, but this is a difficult demand to

implement. It follows from the principle of sovereignty of states that a state has the right to be a party to the rights and obligations arising from international agreements, while any coercion or threat could render the agreement null and void. It should be borne in mind that if no international agreement is in force in a given country, the possible damage or incidents that may occur should be governed by the national law, most often by civil law in the field of tort or contracts.

Problems may also arise when interpreting and translating the conventions into national languages. The Warsaw Convention was created in one original language – French. The Montreal Convention was drawn up in six UN languages, namely English, French, Russian, Chinese, Arabic and Spanish, all versions being equally genuine. Problems of interpretation may arise when translating institutions of law, which are understood differently within the system of continental law and *common law*, applicable in Anglo-Saxon countries.

On the grounds of the Warsaw-Montreal system, claims can be made for damage caused to persons or things as a result of an accident. However, no claims can be asserted for non-pecuniary damage to a person if such damage does not arise from physical harm. The air carrier is therefore liable for the death, injury or a disturbance in health of the passenger. This liability applies to accidents occurring on board an aircraft or during any embarking or disembarking activities. The extent of liability of the air carrier must be taken into account. On the basis of the Warsaw Convention, the air carrier is liable up to the amount of 125,000 FP, increased to 250,000 FP in the Hague Protocol, for personal damage caused to the passenger. This liability is based on fault. The Montreal Convention abolishes the extent of liability, allowing for unlimited claims. However, a distinction was introduced between the type of liability (up to 113,000 SDRs strict liability – absolute liability and over 113,000 SDRs based on fault). The air carrier is also responsible for the persons acting on its behalf and is, as a matter of principle, jointly and severally liable with the actual carrier (when the former is the contracting carrier). An important safeguard of passengers' interests is the possibility to receive advance payments for urgent economic needs in case of an accident.

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