DIVERSITY OF LIABILITY REGIMES IN INDONESIA*

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ABSTRAK

Mengingat pluralisme dalam sistem hukum di Indonesia, terdapat berbagai macam asas tanggung jawab yang berlaku. Asas standar sebagaimana diatur dalam Pasal 1365 KUHPerdata tidak mampu lagi menampung semua permasalahan yang muncul dalam lapangan hukum tertentu, misalnya dalam lapangan hukum udara dan angkasa. Untuk itu berbagai asas tanggung jawab yang dikenal dalam hukum modern telah diterapkan secara tersendiri dalam aneka peraturan, dan hal seperti ini tentu membawa dampak yang besar bagi pembangunan sistem hukum Indonesia secara keseluruhannya.

I. INTRODUCTION

A Welknown expert on air law once wrote when writing on aviation insurance that aviation insurance is the insurance of people, goods, and liability. So the writer was very right in the sense that insurance wise the matter of liability is without doubt one of the most important problems in law.

What is liabiltiy? Liabiltiy is clearly a risk, that is to say a financial risk, the risk of being under the legal obligation to pay compensation to others for damages suffered as a consequence of our acts.

II. PRINCIPLES AND REGIMES OF LIABILITY

The best approach to explore the problem of liability in Indonesia is to start with Article 1365 of the Civil Code of Indonesia. In fact, it appears that most Indonesian lawyers are only familiar with the liability regime of Article 1365, which refers to liability arising out of an unlawful act of a person or in Dutch "onrechtmatige daad", which has been interpreted by the Supreme Court of the Netherlands in the case Lindebaum v. Cohen in 1919 as an act "...contrary to the law, to one's legal obligations, to another person's

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rights and to the treatment of another person or property of another person which is considered proper in society." This very broad interpretation has been considered as a revolution and has been followed faithfully up to this day, also in Indonesia.

It is clear that this liability regime is based on the principle of fault being proven by the party suffering the damage. An Indonesian lawyer once wrote that in Indonesia we do not have the doctrine of the shifting or reversal of the burden of proof. However, permit me to explore the field of law which I know best, the field of air and space law, to arrive at some general observations on the regimes of liability applied in Indonesia. The lawyer who wrote that we have not the doctrine of shifting of the burden of proof, might have changed his views if he took the trouble of studying the Carriage by Air Ordinance of 1939 for example. Even the stipulations of the Commercial Code as set forth in Article 468 on the liability of a ship's operator indicates that it is different from the liability regime of Article 1365 of the Civil Code.

It is not denied that two of several areas where the risk of liability is great, are the areas of air transportation and space activities, also caused by the fact that the loss is almost always catastrophical. An accident with a Boeing Jumbo Jet could give rise to claims of millions of dollars. With let's say 400 passengers on board, passenger liability claims alone could easily be in excess of 40 million US Dollars, if we apply the limit of liability of US$ 100.000 per passenger stipulated in the Guatemala Protocol of 1971, providing certain amendments to the Warsaw Convention of 1929 on International Carriage by Air. Claims for surface damage could run into several million dollars more. A satellite crashing to earth, especially a nuclear powered satellite, like the Russian Cosmos 954, which came down in Canada in 1978, could cause damage to property and injury to persons on the surface.

What principles of liability are there and what systems or regimes of liability are there, aside from the liability regime provided for in Article 1365 of the Civil Code?

A good starting point to approach the problem of the diversity of liability regimes is to examine the liability regimes applicable in transportation in Indonesia, with reference to international conventions in this field, especially in the field of aviation and space activities, to which Indonesia is a party or which are tacitly observed and which Indonesian courts will apply in relevant cases.

For the moment let me pose the following principles of liability and then examine in what fields they are being applied. Those are the principles of: (1) liability based on fault, (2) presumption of liability, (3) presumption of non-liability, (4) absolute liability, and (5) limitation of liability.

The various regimes of liability apply combinations of these principles. One of the most complete applications is to be found in the liability regime of the Carriage by Air Ordinance of 1939 which is identical to the so-called Warsaw regime of liability, applying first the principle of presumption of liability, then in certain situations liability based on fault, all combined with the principle of limitation of liability. The principle of presumption of non-liability applies escpecially to handbaggage, combined with the principle of limitation of liability. The principle of absolute liability is a new concept in the liability of the air carrier and first used in the liability regime of the Rome Convention of 1933, later replaced by the Rome Convention of 1952, on liability of the operator for damage to third parties on the surface caused by foreign aircraft. The principle is combined with the principle of limitation of liability, calculated on the basis of the weight of the aircraft. In the various regimes the limits of liability may be either breakable or unbreakable.

III. LIABILITY IN TRANSPORTATION, SURFACE, SEA AND AIR

A. Surface Transportation

Article 45 of Law No. 14/1992 on Road Transportation provides as follows:

(1) The operator of public road transportation shall be responsible for damages sustained by the passenger, consignor of goods or third parties, caused by his negligence in the provision of transportation services.

(2) The amounts of compensations referred to in paragraph (1), shall be equal to the actual damages suffered by the passanger, consignor of goods or third parties.

(3) The liability of the operator of public transportation services towards the passenger referred to in paragraph (1), commences at departures and ends at arrival at the agreed place of destination.

(4) The liability of the operator of public transportation services towards the owner of goods referred to in paragraph (1), commences after receipt of the goods by the operator for transportation until delivery of the goods to the consignor and/or consignee of the goods.

Article 46 provides for compulsary liability insurance.

The provision in paragraph (1) may be interpreted as applying the principle of liability based on fault, identical to the principle contained in the liability regime

of Article 1365 of the Civil Code. No mention has been made of limitation of the liability of the carrier.

Article 28 of Law No. 13/1992 on Transportation by Rail states as follows:

(1) The operator shall be liable for damage sufferred by the user of its services and/or third parties caused by the operation of the services of transportation by rail.

(2) The liability as stipulated in paragraph (1), shall be subject to the following provisions:

   a. the surface of the damage is caused by the transportation services and shall be subject to proof of negligence of the servant, or other persons employed by the operator;

   b. the amount of damages shall be limited by the amount of insurance taken by the operator in relation with his activities.

Furthermore, the operator is subject to compulsory insurance to cover his liability (Article 34 of Law No. 13/1992).

The liability regime of the railroad operator again appears to be based on the principle of liability based on fault. It differs from the liability regime of the operator of road transportation in that item (b) provides for a limit of liability, albeit in a rather curious way. Reading this provision a lawyer remarked what if the operator takes out insurance only for a very low amount?

B. Sea Transportation

Article 86 of Law No. 21/1992 states:

(1) The operator of transportation services at sea shall be liable for the following consequences of the operation of his ship:
   a. death of or injury to his passenger;
   b. destruction, loss or damage of the cargo carried;
   c. delay in the carriage of passenger, and or cargo carried;
   d. damage to third parties.

(2) In the case that the operator is able to prove that the damage referred to in paragraph (1) b, c, and d has not been caused by his fault, he may be exonerated in part or in whole from his liability.

(3) The operator of transportation services shall insure his liability referred to in paragraph (1).

For the carrier at sea it appears that a different regime of liability applies, namely a regime applying the principle of presumption of liability, the main feature being the possibility of being exonerated from liability, but with the onus of proof being shifted to the carrier. No limitation of liability is provided for.

C. Air Transportation

In this part we will discuss some rules applied in the Carriage by Air Ordinance, the Warsaw Convention of 1929, Monterial Interim Agreement of 1966, Guatemala Protocol of 1971, and Law No. 15/1992 on Aviation. We also mention the "flate rate" system of liabiltiy and the draft law to replace the Carriage by Air Ordinance of 1939.

1. The Carriage by Air Ordinance, State Gazette No. 100/1939

This act is almost a literal translation of the Warsaw Convention of 1929, or in other words it is the Warsaw Convention applied to domestic air transportation, except for one very important change concerning liability for delay. Contrary to the Warsaw Convention the carrier is allowed to contract himself out of liability for delay.

2. The Warsaw Convention of 1929

This convention (Convention for the Unification of Certain Rules relating to International Transportaion by Air) provides for the oldest regime of liability in air law. Indonesia is a party to this convention and an Indonesian court will apply this regime when a case of air carrier's liability occuring on an international flight is submitted to it. The Warsaw regime has introduced principles of liability heretofore unknown in Indonesia, the principle of "presumption of liability" and the principle of "limitation of liability". However, the Warsaw regime also applies the principle of liability based on fault in certain cases. Furthermore, the carrier may also exonerate himself from liability.

Article 17 of the Warsaw Convention states that the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by the passenger. Article 18 and 19 further provides for liability of the carrier for damage to checked baggage and cargo and for damage occasioned by delay.

It has been said that the Warsaw Convention of 1929 is the result of a compromise between two major legal systems, the Continental and the Common Law systems. For example, in some countries limitation or liabilities is unacceptable and considered contrary to public order, especially liability for death or injury. However, the principle of limitation of liability was accepted in the Warsaw Convention.

The principle of "presumption of liability" places a heavier burden on the carrier, especially in those countries where the common principle is liability based on fault. The carrier is at all times presumed to be liable, and the onus to exonerate himself is on the carrier, although his defenses are very limited. Only if he can prove that he has taken "all necessary measures to avoid the damage" will be free from liability. However, in almost all cases he has failed to do so. One argument: if all the necessary measures to avoid the damage has been taken, how could the damage still occur. So the principle of limitation of liability was accepted. The rationale: *quid pro quo*.

The reason for the principle of presumption of liability was that the aircraft at those times were still very frail contraptions by today's standards and not too trustworthy, and prone to accidents. It was considered fair that the risks of aviation should be shared equally by the carrier and the user of transportation services. I remember reading a book written in 1927 by a Dutch engineer who, when writing on the general condition of transportation in the Netherlands East Indies (Indonesia), wrote that: "The aircraft as a means of public transportation will not be of too much importance in the next few decades." How wrong he was.

Internationally, there seemed to be a trend towards the principle of absolute liability, following the precedent set by the Convention on Liability for Damage caused to Third Parties on the Surface by Foreign Aircraft, the Rome Convention of 1933 and 1952. The principle of absolute liability became evident in the Guatemala Protocol of 1971. As a prelude to the Guatemala Protocol, the Montreal Agreement of 1956 applied the principle of absolute liabililty, especially towards passengers.

3. Montreal Interim Agreement of 1966

This agreement is not an agreement between states, but between the Civil Aviation Board (CAB) of the United States and the International Air Transport Association (IATA) representing its members, and applicable to flight to, from and through the United States. This agreement was a step taken by the IATA to prevent the USA from withdrawing as party to the Warsaw Convention of 1929, an event which the IATA regarded as harming the interest of its members, considering the

very high compensations awarded by American courts in cases of accidents occurring on domestic flights. The IATA and its members agreed to apply the principle of absolute liability in the carriage of passangers and agreed to apply a limit a liability, approaximately ten times the limit of liability provided for in the Warsaw Convention.

4. Guatemala Protocol of 1971

The precedent of the Montreal Interim Agreement was followed in the Guatemala Protocol of 1971, amending the Warsaw Convention. The Guatemala regime of liability contains a complete combination of the principle of liability, for passanger, checked baggage, handbaggage, cargo, and delay.

5. Law No. 15/1992 on Aviaton

Article 43 of Law No. 15/1992 states:

(1) The operator of commercial air services shall be liable for:
   a. death of or injury to his passengers;
   b. destruction, loss or damage of the cargo carried;
   c. delay in the carriage of passangers, and or cargo carried, if such delay is caused the fault of the operator;

(2) The limits of liability referred to in paragraph (1) shall be further provided for in government regulations.

Article 46 of the Law No. 15/1992 again provides for compulsory insurance, applicable to the carrier.

6. The "Flate Rate" System of Liability

A strange turn in the matter of air carrier's liability took place in Indonesia after two consecutive accidents in 1974 and 1975 with two charter aircrafts carrying haj pilgrims from Indonesia. Both crashed in Ceylon. In practice, Indonesia has applied a liability regime which is populary called the "flat rate" system. However, only based on instructions from the Departement of Communication as to the amounts of compenstation to be paid. I have not been able to trace the inventor of this system or the name "flate rate" system. The term provides for a system of liability whereby victims of aircraft accidents without taking into consideration sex, age, occupation or financial position receive equal amounts of compensation. My interpretation is

that in this so called system the principle of absolute liability is applied. However, it must be said that the system was introduced to circumvent the amounts of compensation the carrier is legally obliged to pay by virtue of the Carriage by Air Ordinance, which provides for very low limits of liability.

7. The Draft Law to Replace the Carriage by Air Ordinance of 1939

The Departement of Communication has finished a draft law to replace the Carriage by Air Ordinance. This draft provides for a liability regime based on the principle of absolute liability for passangers, combined with two limits of liability. The lower limit applies automatically, the higher limit applies when the victim is able to prove that he has a right to a higher compensation, considering his financial problems.

IV. LIABILITY OF THE AIRCRAFT OPERATOR

The Netherland East Indies were a party to the Rome Convention of 1933, which was replaced by the Rome Convention of 1952 on Liability for Damage caused by Foreign Aircraft on the Surface. Indonesia is not a party to this convention, although plans are there to adhere to this most important convention. The Rome Conventions apply the principles of absolute liability and limitation of liability.

V. LIABILITY IN THE LAW ON ENVIRONMENT

Law No. 4 of 1982 on the Basic Rules of the Management of the Environment, Article 20 states: "(1) Any person who damages and or pollutes the living environment shall be liable to pay compensation to the victim whose right to a good and healthty environment has been violated." This article has been interpreted as a liabiltiy based on fault.

However, Article 21 clearly states that a person causing damage is absolutely liable for the damage he causes, but only in the cases of destruction of certain natural resources. In two consecutive articles of this law, two different principles of liability may be found.

VI. LIABILITY FOR SPACE ACTIVITIES

Indonesia has twice been threatened by a satellite crashing in its territory. If that happens what legal means would Indonesia have at its disposal to claim damages from the launching state? Although Indonesia has not signed the Convention on Liability for Damage Caused by Space Objects Launched into Space, 1972, in the launching of its

Palapa communication satellites, the first in 1976, in the Launch Agreements with NASA, Indonesia has alawys referred to the convention. This convention clearly applies the principle of absolute liability to damage caused by space objects.

VII. LIABILITY IN CUSTOMARY LAW

In fact, I should have started my discussion of the various liability regimes in Indonesia by mentioning about the diversity (or plurality) of law as applicable in Indonesia as an inheritance of the colonial days. A welknown Dutch scholar, van Vollenhoven, divided Indonesia into 19 regions of customary law (adat law), mostly unwritten and handed down through the generations, applicable to the Indonesians, while for Europeans and so called Alien Orientals apply entire different laws or "western law". For Indonesian Moslems also apply some rules of Islamic law. A thorough study of the various adat law regions may reveal different regimes of liability. However, one problem is whether adat law can still fill the needs for a system of law applying modern principles. In line with the rapid development in Indonesia society in the fifty years of its independence, from an agrarian society to an industrial society.

VIII. CONCLUSIONS

This brief discussion of the various liability regimes in Indonesia shows that even in one field alone, the field of transportation, various liability regimes exist. If we move to other fields, such as consumer's protection of product liability which in Indonesia is still in the process of being studied to draft rules on consumers protection and product liability, we might find other regimes of liability, aside from the standard regime of Article 1365 of the Civil Code.