

2010

## Book Review

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### Recommended Citation

*Book Review*, 75 J. AIR L. & COM. 621 (2010)  
<https://scholar.smu.edu/jalc/vol75/iss3/4>

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GEORGE LELOUDAS: RISK AND LIABILITY IN AIR LAW

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**T**HE TITLE OF George Leloudas's new book, *Risk and Liability in Air Law*,<sup>1</sup> is something of a misnomer. Not to quibble, but a more precise title might have been, "Risk and Liability in *International Air Law*." However, this modest distinction helps to reveal the differences between Leloudas's British and European perspective of aviation law and an American one, where domestic law governs aviation claims far more frequently.

Leloudas brings an impressive background in international aviation law to his subject matter. He currently practices at the London-based aviation firm of Gates and Partners. According to the firm's website, he is admitted to practice in England and Wales, and is also a member of the Athens Bar Association.<sup>2</sup> He recently earned his Ph.D. in law at Trinity Hall, Cambridge University (this book is a product of his Ph.D. dissertation).<sup>3</sup> He served as an assistant to the legal counsel of the International Union of Aviation Insurers (IUAI), providing support in relation to the replacement of the Rome Convention on Surface Damage.<sup>4</sup>

The website describes *Risk and Liability* as "the first book to analyse the relevant international conventions governing the liability of airlines to passengers and third parties on the ground from a risk perspective."<sup>5</sup> The key phrase here is "from a risk perspective"—a view of contemporary social expectations of

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<sup>1</sup> GEORGE LELOUDAS, *RISK AND LIABILITY IN AIR LAW* (Informa, London 2009) [hereinafter *RISK AND LIABILITY*].

<sup>2</sup> GATES AND PARTNERS, [http://www.gatesandpartners.com/content/cc\\_89.asp](http://www.gatesandpartners.com/content/cc_89.asp). (last visited July 26, 2010).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

how air disasters and similar risk-producing events are viewed and dealt with by a society that is increasingly risk-averse. The book does not simply chronicle the evolution of the Warsaw Convention and its successors, but infuses that discussion with a thoughtful critique of the judgments upon which those international agreements have been crafted.

Leloudas's detailed account of the evolution of international agreements relating to air law is thorough and noncontroversial. It follows two, not altogether parallel, tracks. The first track follows a series of agreements, beginning with the 1929 Warsaw Convention, and culminating in the 1999 Montreal Convention, which govern liability for international transportation of persons and goods by air carriers. The second track follows a series of agreements (the 1933 Rome Convention, as modified by the Rome Convention of 1952 and the 1978 Montreal Protocol), which relate to damage caused by foreign aircraft to third parties on the ground. He also summarizes recent efforts to reach international agreement covering the risks of terrorism, particularly in the wake of the tragic events of September 11, 2001.<sup>6</sup>

With respect to liability to passengers, Leloudas points out that the Warsaw Convention, drafted at the dawn of international commercial aviation, was principally designed to establish a "control system" for personal injuries "that would provide the legal basis for carrier operations without stunting the industry's growth."<sup>7</sup> The Warsaw Convention established a system of air carrier liability based on a presumption of fault with a reverse burden of proof on the carrier to establish available defen[s]es<sup>8</sup> (most notably, that the carrier had taken "all necessary measures to avoid the damage or that it was impossible . . . to take such measures").<sup>9</sup> Damages were capped unless the passenger could prove willful misconduct.<sup>10</sup> The Montreal Convention ultimately readjusted the risk allocation by raising the limits of liability and by marginalizing the fault element—waiving the "all necessary measures" defense for claims up to \$75,000 and retaining the quasi-strict liability regime of the Warsaw Conven-

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<sup>6</sup> RISK AND LIABILITY, *supra* note 1, ¶¶ 7.138–153.

<sup>7</sup> *Id.* ¶ 4.7.

<sup>8</sup> *Id.* ¶ 4.12 n.17.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 4.12. As these provisions describe, the interpretation of these provisions evolved over a lengthy period of time following adoption of the Warsaw Convention. *Id.* ¶¶ 4.27–38.

tion.<sup>11</sup> However, the Montreal Convention did not go so far as providing a no-fault compensation system. Passenger claimants still needed “[(1)] to prove the occurrence of an ‘accident;’ [(2)] to ascertain whether the ‘accident’ took place aboard the aircraft or in the course of any of the operations of embarking or disembarking; [and (3)] to establish a causal link between the ‘accident’ and the claimants’ injuries/death.”<sup>12</sup>

Two successive Rome Conventions for damage caused by aircraft to third parties on the ground imposed upon airlines a higher liability standard from the outset—near-absolute liability rather than the presumed-fault standard of the Warsaw Convention.<sup>13</sup> The rationale for the different standard was that persons on the ground, unlike passengers, have not accepted part of the risk.<sup>14</sup> In 1978, the 1978 Montreal Protocol increased the liability limits and authorized countries to require aircraft operators to maintain insurance coverage or other security to cover liability up to the amounts specified in the Protocol.<sup>15</sup> The Montreal Protocol did not address the ramifications of terrorist or other intentional acts causing damage to persons or property on the ground.<sup>16</sup>

In addition to recounting the evolution of these international agreements, Leloudas analyzes the failure of those agreements to keep pace with changes in social expectations. Until recently, he argues, our society was governed by a “science-centric rationality.”<sup>17</sup> People assumed that risk could be controlled by scientific competence.<sup>18</sup> However, an “uncertainty of trust” has arisen from society’s media-driven perception of sensationalized air disasters and a need to assign blame even for risks that Leloudas believes are beyond the industry’s control.<sup>19</sup> Improvements in airlines’ actual safety practices, as well as air transportation’s superior safety record compared to that of alternate means of transportation,<sup>20</sup> have not produced a corresponding

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<sup>11</sup> *Id.* ¶ 4.92.

<sup>12</sup> *Id.* ¶ 4.98.

<sup>13</sup> *Id.* ¶¶ 7.10, 7.50–52.

<sup>14</sup> *Id.* ¶¶ 7.10, 7.52.

<sup>15</sup> *Id.* ¶¶ 7.100–101.

<sup>16</sup> *Id.* ¶¶ 7.107–108.

<sup>17</sup> *Id.* ¶ 8.2.

<sup>18</sup> *Id.*

<sup>19</sup> *See id.* ¶¶ 8.4–5; *see also* ¶¶ 2.37–39.

<sup>20</sup> One cannot help but acknowledge the comment from the English comedy revue, Flanders and Swann’s “*At The Drop of Another Hat*,” (1964), that flying is

increase in the public's level of trust.<sup>21</sup> Leloudas believes that damages sustained in international aviation accidents should be compensated without reliance on traditional tort principles. Otherwise, he argues, mass media will inevitably sow doubt and skepticism concerning airlines' risk management, thereby exacerbating the public's distrust of the airline industry.

Rebuilding trust, according to Leloudas, requires a change in the image of air carriers. This, in turn, must take into account not only technological safety improvements, but also the social environment in which air carriers operate.<sup>22</sup> Although the international agreements governing airline liability, from Warsaw to Montreal, have become more generous to injured persons, they have not kept pace with changing social expectations, and courts have too frequently retreated to traditional fault-based and causation-oriented tort analyses to resolve legal issues arising under those agreements.<sup>23</sup> Therefore, he argues, international agreements should seek to balance the competing concerns of airlines, passengers, insurers, and society at large by jettisoning the fault-based legal system.<sup>24</sup>

Most importantly, Leloudas asserts, international conventions must go beyond their traditional role of providing an avenue for corrective justice and "contribute to the overall social trust-building effort."<sup>25</sup> If international conventions completely fail to balance the interests of carriers and passengers so that courts can satisfy these interests in accordance with "prevailing socio-technological demands," or if they channel liability indiscriminately to air carriers "the belief that they are in a better position

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very, very safe, even safer than crossing the road, and that the airline bus drivers, "have instructions to keep the statistics favorable."

<sup>21</sup> See RISK AND LIABILITY, *supra* note 1, ¶¶ 8.2-6.

<sup>22</sup> *Id.* ¶ 8.7.

<sup>23</sup> The foremost example Leloudas cites is the case of *Olympic Airlines v. Husain*, 540 U.S. 644 (2004), in which a non-smoker died of an asthma attack after being forced to sit in the smoking section of the aircraft. *Id.* ¶¶ 5.112-146. The U.S. Supreme Court upheld liability. The majority opinion, authored by Justice Thomas, injected elements of duty and foreseeability into the analysis of whether the incident was an "accident" under the Warsaw Convention. Even more troubling to Leloudas was the Court's use of causation to decide what was an "accident." Under the *Husain* analysis, then, international air carrier liability would not be based on the idea of justice as formulated by the drafters of the Convention, but rather on the judges' conclusions as to what ordinary persons consider to be accidents. *Id.* ¶ 5.138, 5.161. *But see id.* ¶¶ 5.139-156 (discussing dissenting opinion of Justice Scalia).

<sup>24</sup> RISK AND LIABILITY, *supra* note 1, ¶¶ 8.2-8.

<sup>25</sup> *Id.* ¶ 8.8.

to manage the risks of the new era" litigation will destroy the uniformity of the international regime and trigger additional public distress, disappointment, and sense of betrayal.<sup>26</sup>

The sense of public distrust has been exacerbated in recent decades because some of the most notorious aviation disasters, from Lockerbie to 9/11, have been caused by intentional acts of terrorism, rather than inadequate safety precautions of the airlines.<sup>27</sup> Thus, Leloudas asserts, there has been a tendency to stretch the current liability system to channel liability to air carriers for terrorism risks that cannot be controlled, cannot be maintained within national boundaries, cannot be delimited to a certain period of time, and for which personal responsibility cannot be placed.<sup>28</sup> Yet the agreements governing liability for such disasters have not fully accounted for this change.

There is much to commend in Leloudas's analysis. He has explored the research in the social sciences concerning human perception of risk. He cites the pioneering work of Paul Slovic and others,<sup>29</sup> which demonstrates that perception of risk affects trust at least as much as actual risk, and that people rely on mental shortcuts and rules of thumb in assessing risk rather than any systematic analysis of the actual available data.<sup>30</sup> The practical consequence is that members of the traveling public are usually far more fearful of dying in an air disaster (or of being bitten by a shark at the beach, for that matter) than in an automobile crash, even though irrefutable empirical data prove just the opposite. One need not be an expert in mass media to realize that, when disasters occur, the media focus public attention on the most emotionally gripping plot lines, without necessarily contributing to a better technical understanding of events.<sup>31</sup> This is particularly true in an age when the internet

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<sup>26</sup> *Id.* ¶¶ 8.8–9.

<sup>27</sup> *See id.* ¶¶ 3.51–52.

<sup>28</sup> *Id.* ¶¶ 3.49–55.

<sup>29</sup> In the interest of full disclosure, this writer as a teenager participated in one of Dr. Slovic's early experiments on the subject of risk, running Slovic's "M&M machine" at the Lane County Fair, in Eugene, Oregon, in August of 1964—a device that tested children's propensity for risk. *See generally* Paul Slovic, *Risk-Taking in Children: Age and Sex Differences*, 37 *CHILD DEVELOPMENT* 169 (1966). This writer's father was the founder of Oregon Research Institute, where much of early research on risk was conducted by Drs. Slovic, Lichtenstein, Tversky, and Kahneman, all of whom are cited by Leloudas. *RISK AND LIABILITY*, *supra* note 1, at 16 nn.51 & 53–54, 17 n.60, 22 n.97.

<sup>30</sup> *Id.* ¶¶ 2.26–28.

<sup>31</sup> *Id.* ¶ 2.39.

and the 24-hour news cycle make the public less patient than ever. Exposing conspiracies in such an environment is more compelling than identifying innocent or even careless errors in judgment.<sup>32</sup> Leloudas is also correct that the deliberate pace of the investigations, compounded by governmental requirements of secrecy and the lack of fault finding by accident investigation authorities, increase the incentives for the media to search for simplistic alternate causes.<sup>33</sup> These facts of modern life have real consequences, however. Not only can they result in catastrophic economic damage to airlines and manufacturers, but, according to Leloudas, they can also distract the public and the regulators from less dramatic, but more effective, safety measures. Some of the examples Leloudas cites are compelling.

For instance, although the lifetime safety record of DC-10s is comparable to that of other heavy jet aircraft, they continue to have a reputation for being unsafe as a result of a series of highly publicized crashes in the 1970s that prompted the Federal Aviation Administration (FAA) to decertify the entire fleet for a brief period.<sup>34</sup> Front-page headlines of "air-carrier accidents attract 60 times greater attention than AIDS, 1,500 times greater attention than car crashes, and 6,000 times greater attention than cancer."<sup>35</sup> In the mid-1980s, a "60 Minutes" broadcast concerning a "sudden acceleration" defect in the Audi 5000 resulted in a major recall, millions of dollars of legal claims, and a loss of reputation of the company, even though an investigation by the National Highway Traffic Safety Administration later demonstrated that there had never been any defect at all.<sup>36</sup>

These points support Leloudas's explanation of how the society in which we live has evolved into a "risk society," whose predominant social outlook is no longer based on "tort thinking," even though the Warsaw Convention, its successor international conventions, as well as the law governing domestic aviation litigation, has been built upon traditional tort formulas. Leloudas concludes that international aviation conventions ought to be redesigned as "a comprehensive scheme of compensation to the formal exclusion of litigation and domestic law influences."<sup>37</sup>

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<sup>32</sup> See *id.* ¶ 2.38.

<sup>33</sup> *Id.* ¶¶ 2.47-.50.

<sup>34</sup> *Id.* ¶ 2.43.

<sup>35</sup> *Id.* ¶ 2.44.

<sup>36</sup> PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 57-74 (1993).

<sup>37</sup> RISK AND LIABILITY, *supra* note 1, ¶ 8.14.

Such a model already exists in the 1971 Guatemala City Protocol and “the initial drafts of the terrorism Convention for third parties on the ground, as well as the first-party insurance scheme suggested by Peter Cane.”<sup>38</sup>

However, none of these proposals has ever gained much traction. The Guatemala City Protocol never went into effect because the United States refused to ratify it.<sup>39</sup> Early drafts of the Guatemala City Protocol would have created something tantamount to no-fault compensation, effectively making international air-carriers the insurers of their passengers’ safety, subject to an unbreakable liability limit of \$100,000.<sup>40</sup> In the post-9/11 environment, the no-fault scheme disappeared.

Is Leloudas right in suggesting that such a system, if adopted, would bring the law governing international air-carrier liability more in line with contemporary expectations and increase confidence in the airline industry, while giving injured parties a simplified, quick, and fair resolution of their claims? In part, I think he is. Such a no-fault system might well result in quicker claims resolution. That, in turn, would provide a significant benefit to the families of victims of mass aviation disasters and help them avoid some of the expense, delay, uncertainty, and emotional turmoil of the litigation system.

But would such a system provide a corresponding reduction of the public’s sense of distrust of airlines and the other large entities responsible for today’s air transportation system? I doubt it, and here is why.

First and foremost, Leloudas treats the evolution of international air-carrier liability law as concerning a triangular relation between passengers, carriers, and the public. This would be true enough if we were only talking about domestic aviation. But when we are dealing with international carriage, there are more than one “public.” There are likely to be a variety of social expectations and policies among the affected/interested countries. For example, should a citizen of Nicaragua, injured in the crash in that country of a flight from Guatemala City, be permitted to litigate a claim against a multinational defendant in the United States? Although such suits have frequently been dismissed under the doctrine of *forum non conveniens*, abuses continue to occur, such as when the country where the injury

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* ¶¶ 4.112–.121.

<sup>40</sup> *Id.* ¶¶ 4.113–.116.



occurred has enacted a foreign blocking statute in an attempt to force foreign litigation into U.S. courts.<sup>41</sup> To expose the defendant to such a suit is to impose American-style liability exposures—in breadth as well as magnitude—for airlines based in other countries, and to provide windfalls for residents of other countries (whose recoveries can be far larger than what they would ever reasonably expect under the laws of their own country or the country where the injury occurred), as long as they can come under the umbrella of a more generous court in the United States.<sup>42</sup>

Furthermore, would a no-fault, non-tort compensation system for international travel actually improve the public's trust of the airline industry? I seriously doubt it, for two reasons. First, although such a system would almost certainly result in quicker resolution of claims than the current system, it is doubtful that it could ever be quick enough to reduce substantially the climate of distrust that currently arises from the media frenzy following a major disaster. For example, the post-9/11 claims process, while deservedly lauded as highly successful, nevertheless took over two-and-a-half years to complete.<sup>43</sup> Such a system may well be worth exploring—if only as a more efficient method for handling claims arising from mass torts—but is unlikely to increase public trust of the airlines.

Moreover, whatever benefits a no-fault, non-tort system might have for claims arising in the United Kingdom or Europe, it would be unlikely to produce any meaningful benefit in public trust of the airlines in the United States, given that an international agreement would not affect domestic claims. Leloudas's analysis comes from a decidedly European and British frame of reference. His perspective tends to overlook, or at least greatly understate, the effect of domestic aviation claims, particularly in the United States, and perhaps Canada and other large coun-

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<sup>41</sup> See generally Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 HARV. INT'L L.J. ONLINE 95 (2009) (discussing the tactics of foreign plaintiffs seeking tort damages awards in U.S. courts).

<sup>42</sup> Cf. *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009) (illustrating the aggressive efforts of foreign nationals injured in foreign accidents to avail themselves of jurisdiction in U.S. courts, albeit without success); *In re Bridgestone/Firestone, Inc., Tires Prod. Liab. Litig.*, 470 F. Supp. 2d 917 (S.D. Ind. 2006).

<sup>43</sup> Kenneth R. Feinberg, Special Master of the September 11th Victim Compensation Fund, Policy Statement on Program Shutdown Schedule, [http://www.justice.gov/archive/victimcompensation/Shutdown\\_Statement.pdf](http://www.justice.gov/archive/victimcompensation/Shutdown_Statement.pdf) (last visited Aug. 26, 2010).

tries where commercial aviation is predominately domestic.<sup>44</sup> Indeed, the worst airline-related calamity in history, the 9/11 hijackings, arose from domestic flights, as did other historic air disasters (such as the 1956 Grand Canyon midair collision that was pivotal in bringing about the Federal Aviation Act of 1958, and that arguably shaped America's consciousness of the hazards of commercial air travel). Understandably, Leloudas seems to assume that a change in international aviation agreements will have a major impact on aviation claims. This may be true in the United Kingdom and Western European countries (as well as Japan), where distances are less and high-speed train service is a major component of the domestic transportation system. In the United States, such an assumption would be unwarranted.

This distinction matters to the overall effectiveness of the changes Leloudas advocates. For better or worse, the litigious nature of the United States probably makes American claims a much more influential factor in the litigation cost (and insurance premiums) of the world at large—because Americans are more likely than citizens of other countries to file a lawsuit for any injury.<sup>45</sup> Moreover, once litigation is instituted in the United States, the likely jury verdict and, consequently, the likely settlement value, is almost certainly larger and less predictable than what would be awarded in other countries. It is difficult to see how changes in international law would significantly affect the frequency of American domestic claims, the size of settlements and verdicts, the insurance cost, or the public trust and perception of the airline industry.

Second, while I have no reason to doubt Leloudas's conclusion that America and Western Europe have transformed into "risk societies," I question whether the same can be said for very many of the other signatories to international aviation agree-

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<sup>44</sup> For example, Leloudas states that the increasing number of international conventions from the mid-1950s through the late-1970s led to more "uncertainty caused by the increasing complexity and quantity of rules . . . leaving carriers in a state of ambiguity regarding the management of their legal exposures, and leaving passengers with a feeling of discontent." RISK AND LIABILITY, *supra* note 1, ¶ 4.75 (citing Richard Gardiner, *The Warsaw Convention at Three Score Years and Ten*, 24 J. AIR & SPACE L. 114, 116 (1999)). Yet I strongly suspect that, at least in the United States, the vast majority of passengers are utterly unaware of the existence, let alone the content, of any of these international agreements, let alone what they provide.

<sup>45</sup> Indeed, Americans' love of litigation was noted as early as Alexis de Tocqueville's writings in the early Nineteenth Century.

ments, particularly those in the developing world. Indeed, in expressing concern about the Montreal Convention's proposal for adding a "fifth jurisdiction" where claimants can bring suit for damages arising from international flights, the International Union of Aviation Insurers (IUAI) stated:

A fifth jurisdiction will drive up—quite significantly—the exposures of air carriers, especially in those parts of the world which do not engage in carriage to high compensation States. This exposure will lead directly to an increase in insurance charges. It is difficult to justify inviting airlines in the developing world to, in effect, subsidise the domestic compensation regime in high compensation States.<sup>46</sup>

Given the expectations gap between "high compensation States" and the rest of the world in the context of the Montreal Convention, it seems unrealistic to expect international consensus favoring the no-fault, non-tort system of compensation Leloudas advocates.

Third, even if such a system could solve the "trust" problem for the airlines alone—perhaps by instituting a no-fault compensation scheme with unbreakable caps—it would almost certainly fail to improve the public's trust of the aviation industry as a whole unless it encompassed the liability exposure of *all* potential defendants in aviation disasters. Otherwise, what tends to happen in the United States now under the Warsaw Convention and its successors would likely continue. Making the airlines the beneficiaries of a damages cap will not result in a quick resolution of the claims for a certain sum, but rather would probably increase the liability exposure of non-airline defendants exempt from any cap, such as maintenance facilities, aircraft or component manufacturers or servicers, airport operators, or air traffic controllers.<sup>47</sup> This phenomenon, recently described as the "integrated industry principle," suggests that limiting the liability exposure of one party "directly [and adversely] affects the expo-

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<sup>46</sup> INT'L UNION OF AVIATION INSURERS, AN AVIATION INSURANCE VIEW OF THE DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR 4 (1999) [hereinafter IUAI REPORT], available at <http://www.iuai.org/iuai/htdocs/site%20data/position%20papers/pp1.pdf>.

<sup>47</sup> See Jennifer L. Anton, *A Critical Evaluation of the General Aviation Revitalization Act of 1994*, 63 J. AIR L. & COM. 759, 798–99 (1998) (arguing that the General Aviation Revitalization Act's statute of repose for general aviation manufacturers simply transferred the manufacturer's liability exposure to other potential defendants).

sure of other parties.<sup>48</sup> With or without a cap, and with or without no-fault liability, the airline would invariably become entangled with claims by and against the non-airline defendants under varying schemes of fault allocation within the United States. Any scheme establishing rules for airline liability is unlikely to produce any greater public trust in commercial aviation than exists at present unless it addresses the liabilities of all industry participants.<sup>49</sup>

To be sure, Leloudas discusses a number of proposals that would tend to mitigate this problem by creating a multi-layered system of caps: a relatively low, unbreakable cap funded by the airline's liability insurance; a second layer funded by a passenger surcharge; and the highest layer funded by member governments.<sup>50</sup> The United States government created a system similar to this as part of the air carrier bailout package following the 9/11 disaster, capping the airlines' liability at the limit of their liability insurance and having the FAA offer war risk insurance to the carriers for per-occurrence damages between \$50 million and \$4 billion, funded by a ticket tax.<sup>51</sup> But unless the world is prepared to adopt a comprehensive system for no-fault compensation that quickly and satisfactorily resolves all claims against all entities, a system limited to resolution of airline claims may not do as much as Leloudas hopes.

Fourth, I want to agree with Leloudas's contentions that the tort system is an inefficient, if not ineffective, mechanism for resolution of international airline crash claims, and that it may produce a net loss in public confidence, as compared with the kind of no-fault system he advocates, but his accurate identification of the problem does not necessarily recommend his proposed solution. It is difficult to imagine that the media would suddenly abandon its search for compelling story lines in mass disasters and cease finger-pointing at malefactors (real and imagined), simply because a no-fault compensation system is adopted. It is equally doubtful that any form of no-fault system would compensate the victims before most of the media finger-

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<sup>48</sup> Jeffrey Wool, *Lessor, Financier, and Manufacturer Perspectives on the New Third-Party Liability Conventions*, 22 AIR & SPACE LAW., no. 4, 2010, at 1, 23.

<sup>49</sup> *See id.* Wool advocates such a comprehensive compensation system for victims of major terrorist events. *See generally id.* This approach appears to be consistent with Leloudas's views of the recent proposals for dealing with terrorist-caused injuries.

<sup>50</sup> RISK AND LIABILITY, *supra* note 1, ¶¶ 7.188–246.

<sup>51</sup> *Id.* ¶¶ 7.121–125.

pointing had already taken place, or that it would prevent the public hearings of various governmental bodies that would invariably follow a media exposé.

But, even more to the point, one must ask why Leloudas assumes that the risk of public distrust, ignited by a disaster, is necessarily a bad thing. Certainly it *can* be if, for example, the public distrusts the DC-10 decades after the problem has been fixed, despite empirical evidence that the DC-10 is just as safe as competitors' aircraft. But media attention and government investigations have on other occasions revealed genuine problems providing ample grounds for public distrust. Faced with evidence of an actual problem, the best companies devise proactive responses that demonstrate to the public that they are deserving of continued trust because of their ability to identify, acknowledge, and rectify a serious problem. McDonnell Douglas lost public trust with the DC-10, not just because of the FAA grounding, but also because its delay in remedying the defect was revealed during the Watergate scandal.<sup>52</sup> By contrast, Johnson & Johnson's quick and forthright response to a crisis when news broke that someone had tampered with its core product by lacing some unspecified number of Tylenol bottles with cyanide earned the company enormous public trust and respect.<sup>53</sup> The lesson: the best way to prevent or minimize corporate distrust is for a company to plan adequately for such crises and to be prepared to respond rapidly, and with integrity, after the crisis occurs. The speed by which the company compensates the victims is never likely to be rapid enough—under any system—to substitute for the measures necessary for a responsible company to maintain or rebuild public trust.

Nor do I believe that a no-fault compensation system would have much of a positive effect on claims—even mass tort claims (such as the large number of claims that arose when passengers were found to have suffered deep vein thrombosis (DVT) as a result of sitting on airplanes for long flights)—that do not arise

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<sup>52</sup> See, e.g., DAVID GERO, AVIATION DISASTERS 125 (2d ed. 1996) (discussing the "gentlemen's agreement" between the FAA Administrator and the president of the Douglas division of McDonnell Douglas to downgrade the fix from an Airworthiness Directive to three Service Bulletins, thereby delaying the remedial action.); JOHN J. NANCE, BLIND TRUST 139–43 (1986).

<sup>53</sup> See Mallen Baker, *Companies in Crisis: What to Do When it All Goes Wrong*, MALLENBAKER.NET, <http://www.mallenbaker.net/csr/crisis02.html> (last visited Mar. 1, 2010) (describing Johnson & Johnson's response as an outstanding example of a company's rapid and appropriate response to a crisis, even when the danger is not of the company's making).

from air *crashes*.<sup>54</sup> Bear in mind the range of recent claims involving such matters as, for example, a medical emergency to a passenger in flight,<sup>55</sup> the detention and bodily search of a passenger prior to boarding,<sup>56</sup> or an altercation between a cantankerous passenger and the flight crew during flight.<sup>57</sup> If an airline was engaging—or even falsely accused of engaging in—truly improper misconduct (strip searching passengers arbitrarily or for salacious purposes, for example), the revelation of such allegations would trigger the same public reactions with or without prompt compensation. Conversely, if a no-fault system permitted easy compensation for false or meritless claims without considering such elements as fault, causation, comparative fault, and other tort defenses, the airlines would be buying many dubious claims—and perhaps encouraging the filing of even more of them—while gaining little if any “trust” in return.

Even with respect to mass disasters, or compensating injuries on a mass scale that do not arise from accidents, like DVT, the idea of “socializing” all such claims to facilitate quick settlements comes with its own problems because of the inherent tension between efficiency and fairness. The potential difficulties arising from the use of more “efficient” mechanisms, such as the treatment of mass tort claims via various forms of “aggregated” proceedings, have been explored elsewhere.<sup>58</sup> The Seventh Circuit, which touched on the issue in a different context, illuminated the tension between the inefficiency of more traditional

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<sup>54</sup> DVT is a serious medical condition. It triggered numerous claims, including class actions, against the airlines in the United States, the United Kingdom, and Australia. See RISK AND LIABILITY, *supra* note 1, ¶¶ 5.170–.250. In the U.K. litigation, the plaintiffs and the airlines agreed upon a “factual matrix:” “(i) that the carriers operated their aircraft in a habitual manner and in accordance with applicable regulations; and (ii) that the carriers were aware of the risk DVT posed to the passengers by the flight but took no steps to warn” or otherwise minimize or eliminate it. *Id.* at ¶ 5.180. The legal issues were whether the events causing DVT were an “accident which caused bodily injury” under Article 17, and “whether DVT itself [could] be an ‘accident’ for the purposes of Article 17.” *Id.* Ultimately, the courts held that DVT sustained aboard aircraft was not an “accident” within the meaning of the Montreal Convention and therefore the claims were not compensable. *Id.* ¶¶ 5.199–.200 (citing *In re DVT* [2006], 1 AC 495 (H.L.)). American courts have also considered the issue. See, e.g., *Twardowski v. Am. Airlines*, 535 F.3d 952 (9th Cir. 2008); *Blansett v. Cont’l Airlines, Inc.*, 379 F.3d 177 (5th Cir. 2004); *In re DVT*, 356 F. Supp. 2d 1055 (N.D. Cal. 2005).

<sup>55</sup> *Olympic Airways v. Husain*, 540 U.S. 644 (2003).

<sup>56</sup> *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999).

<sup>57</sup> *Carey v. United Airlines*, 255 F.3d 1044 (9th Cir. 2001).

<sup>58</sup> See, e.g., John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

mechanisms of dispute resolution and a more efficient system which would disregard "inconvenient" details that otherwise would merit different cases being treated differently:

The district judge did not doubt that differences within the class would lead to difficulties in managing the litigation. But the judge thought it better to cope with these differences than to scatter the suits to the winds and require hundreds of judges to resolve thousands of claims under 50 or more bodies of law. Efficiency is a vital goal in any legal system-but the vision of "efficiency" underlying this class certification is the model of the central planner. Plaintiffs share the premise of the ALI's *Complex Litigation Project* (1993), which devotes more than 700 pages to an analysis of means to consolidate litigation as quickly as possible, by which the authors mean, before multiple trials break out. The authors take as given the benefits of that step. Yet the benefits are elusive.<sup>59</sup>

Finally, one must ask why any special treatment should be afforded to victims of airline disasters at all. Planes, trains, automobiles, buses, and watercraft all have accidents (and many are the targets of terrorism throughout the world as well). Now that aviation has evolved from a pioneering adventure to an ordinary means of travel, is there any reason to treat persons injured in aviation-related events any differently than persons similarly injured by other modes of transportation? Indeed, IUAJ made this very point in response to the Montreal Convention's proposed "fifth jurisdiction":

If it is the wish to introduce some form of fifth jurisdiction option linked to the domicile or permanent residence of the passenger, then the primary consequence will be the prosecution of claims by nationals of high compensation states in their own states regardless of any link between that state and the journey or the operation of the aircraft in question. Member States may question why aviation should be singled out for this treatment. Is the victim of a rail crash not entitled to equal treatment?<sup>60</sup>

No doubt a strong argument can be made that those injured in accidents should *all* receive compensation, without regard to fault. One suspects that the United States' tort systems are more solicitous of tort-based claims than most other countries because there is less of a social safety net for injured persons in the society at large. Yet, it is difficult to justify giving victims of aviation-

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<sup>59</sup> *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1019-20 (7th Cir. 2002).

<sup>60</sup> IUAJ REPORT, *supra* note 46, at 4.

related accidents (or, more precisely, victims of *international* aviation accidents), special treatment, while other persons with similar injuries are relegated to traditional tort law.

Furthermore, air transportation is no longer any more exotic than travel by rail, bus, boat, or automobile, then why does the “trust” of the airline industry require socialization of injuries any more than any other mode of transportation, all of which almost certainly pose greater overall risk to the safety of the traveling public than aviation? And if quick compensation is deemed necessary because the public subjectively “perceives” a greater danger, despite all objective evidence to the contrary, then perhaps we should socialize injuries from shark attacks and snake bites instead. Indeed, if I ever get to fly to Australia for a vacation, I would fear these far more than the flight that takes me there, despite the irrationality of it.<sup>61</sup>

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<sup>61</sup> But in defense of such irrational fears, see travel writer Bill Bryson’s commentary about Australia:

It has more things that will kill you than anywhere else. Of the world’s ten most poisonous snakes, all are Australian. Five of its creatures—the funnel web spider, box jellyfish, blue-ringed octopus, paralysis tick, and stonefish—are the most lethal of their type in the world . . . . If you are not stung or pronged to death in some unexpected manner, you may be fatally chomped by sharks or crocodiles, or carried helplessly out to sea by irresistible currents, or left to stagger to an unhappy death in the baking outback. It’s a tough place.

BILL BRYSON, IN *A SUNBURNED COUNTRY* 6 (2001).





# **Comments**

