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Testimony before the United States Senate Committee on Commerce, Science, and Transportation: Accident Compensation in International Transportation

Andreas F. Lowenfeld

TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION: *ACCIDENT COMPENSATION IN INTERNATIONAL TRANSPORTATION*

ANDREAS F. LOWENFELD

Mr. Chairman and Members of the Committee:

I AM PLEASED and honored by your invitation to participate in the process of rethinking the United States' approach to compensation for victims of transportation disasters. Of course, the immediate focus is on the families of those who perished in the horrible disaster of TWA Flight #800. But that was not the first mass disaster involving international aviation—Lockerbie and KAL Flight #007 come to mind, and also the American Airlines plane bound for Cali, and I am afraid it will not be the last one.

I have been thinking about the problem of compensation for accident victims for some forty years, particularly in connection with efforts to revise, abolish, or replace the Warsaw Convention. As Deputy Legal Adviser to the State Department in the mid-1960s, I was among those who urged denunciation of the Convention, which then limited recovery to $8,300 per person unless "willful misconduct" was shown.[1] I led the American delegation to a famous meeting in Montreal early in 1966, which produced no concrete results, but, I believe, changed the world's perception about how accident victims should be compensated.[2] A few months later, I was a principal draftsman of what came to be known as the Montreal Interim Agreement of 1966, which revived U.S. membership in the Warsaw system, raised the limit of liability to $75,000 per person, and elimi-

[1] *See* Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 546-52 (1967).

[2] *See id.* at 563-75; *see also* ICAO, *Special ICAO Meeting on Limits for Passengers Under the Warsaw Convention and the Hague Protocol*, ICAO Doc. 8584-LC/154-182 (1966).

nated, up to that amount, the issue of fault in international aviation accident litigation.[3] I am not altogether proud of my role in crafting the Montreal Agreement; it was really meant to be an interim accord, looking to a new treaty within five years, and it is now more than thirty years old. But the Montreal Agreement did accomplish a breakthrough both in United States law and in the law of many other countries in that it established the principle of liability regardless of fault.

The problem of compensation for victims of transportation disasters has both a moral and a technical dimension, and I want to address both aspects in the brief time allotted to me.

I. THE MORAL DIMENSION OF VICTIM COMPENSATION

Taking up the moral dimension first, it is clear to me that all accident victims and their survivors should be treated alike. There is no justification for distinguishing between ships and airplanes, between accidents over land or over the high seas, or (as in TWA Flight #800) in between.[4] There is no justification for distinguishing between accidents on carriers that are state-owned, such as Iberia or Air France, as contrasted with carriers that are privately owned, such as British Airways or American Airlines. And from the viewpoint of the passengers or their survivors, there is no justification for distinguishing between accidents caused by the fault of the carrier, the manufacturer, the traffic controller, or a terrorist. The providers and their insurers—i.e., carriers, manufacturers, and traffic controllers—should be able to sort out their respective contribution to the compensation of victims among themselves, and here relative fault is an appropriate criterion. But it is of no comfort to victims of disasters to know that the cause was mechanical failure, or pilot error, or sabotage, or that no one knows what happened, as seems to be the present status of TWA Flight #800.

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[3] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, May 13, 1966, Agreement CAB 1890, *approved by* order E23680 (Docket 17325).

[4] "In between" because the definition of "high seas" in the Death on the High Seas Act, 46 U.S.C. app. § 761, is one marine league, equal to three nautical miles. However, President Reagan, by Proclamation, stated that the territorial sea of the United States henceforth extends to 12 nautical miles from the base lines of the United States determined in accordance with international law. *See* Proclamation No. 5928 of Dec. 27, 1988, 54 Fed. Reg. 777 (Jan. 9, 1989). TWA Flight #800 went down approximately nine nautical miles off the coast of Long Island.

As to the amount of compensation, it is evident that no given sum can be said to be equivalent to the value of a person's life, and that we have no real way to measure that value. I think it follows that limiting compensation to "pecuniary loss" in a death case is an unjustifiable distortion, because it fails to take into account the loss suffered by the survivors. If you kill my child, it may save me money, yet there is no way you could hurt me more. Therefore, non-economic as well as economic loss must figure in a just compensation scheme, and technical distinctions between wrongful death and survival claims are unpersuasive. Monetary ceilings on liability—once hotly contested—are obsolete, as well as being wrong on principle. Punitive damages are generally unjustified, except for intentional criminal conduct. If a terrorist rocket downed TWA Flight #800, punitive damages against the terrorist and his sponsors would be justified. Similarly, if the Libyan government downed Pan Am Flight #103, then (putting aside the intricacies of the law of state immunity) punitive damages would be justified. But once "wilful misconduct" as a way to escape the low limits of liability imposed by the Warsaw system is made unnecessary, the whole concept can be forgotten. No one except criminals wilfully causes an airplane or maritime disaster. Pan Am did not intend to bring down Flight #103, Korean Airlines did not intend to bring down Flight #007, TWA did not intend to bring down Flight #800, American Airlines did not intend to bring down Flight #965. What is needed is a regime under which fair monetary compensation can be provided for those persons who have felt the pain—economic and non-economic—caused by a transportation disaster.

II. THE TECHNICAL DIMENSION OF VICTIM COMPENSATION

Let me now turn to the more technical part of the discussion, where this Committee's action, and the action of the Congress as a whole, is critical. The House of Representatives passed a very brief bill, providing only that the Death on the High Seas Act (DOHSA)[5] does not apply to aircraft accidents.[6] I understand this as a response to the Supreme Court's decision in the *Zicherman* case,[7] which held that the Death on the High Seas Act provides the sole source for determining what harm is cogniza-

[5] 46 U.S.C. app. §§ 761-67.
[6] H.R. 2005, 105th Cong. (July 28, 1997).
[7] Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996).

ble and compensable in an American court for an aviation accident over the high seas, with the result that only certain stated persons may sue for damages (section 761) and only pecuniary loss may be compensated (section 762).

I sympathize with the proponents of this amendment, but I think it is inadequate on several levels. First, if DOHSA is unfair, as I believe it is, it should not remain on the books for maritime disasters, any more than for aviation disasters. True, we have not had a *Titanic* or *Lusitania* recently, but maritime disasters do occur, and their victims are no less deserving of adequate compensation than are victims of airplane disasters. Second, saying DOHSA does not apply, as the House Bill does, gives no give clue as to what law does apply, nor as to whom may bring suit or how damages are to be measured. If Congress is going to legislate in this area, it ought to give more guidance, so as to avoid the unnecessary litigation that would be certain to follow from the void created by S. 943 as it now reads.

Third, and most important, the void may be deeper than anyone realizes. The problem arises because DOHSA as it presently reads has two functions: (1) it creates a cause of action where it was thought none existed previously; and (2) it specifies the elements of compensation, in ways that most of us consider inadequate. If DOHSA is now made inapplicable to aviation accidents, it is not clear what law would be applicable to support a cause of action for wrongful death.

We know now, after years of uncertainty, that the Warsaw Convention does create a cause of action against the carrier in international air transportation. That was the holding in the *Benjamins* case[8] decided by the Second Circuit in 1978 and accepted since that time. But what about suits against the manufacturers, or even against the regulators? And what about suits that do not come under the Warsaw Convention at all, including domestic flights over water, and flights to non-Warsaw destinations? If DOHSA does not apply, as H.R. 2005 and the Senate counterpart,[9] S. 943 would provide, and general maritime law does not apply, as *Zicherman* seems to hold,[10] there may not be

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[8] Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979).

[9] S. 943. 105th Cong. (introduced June 20, 1997).

[10] This is not completely clear, and I would not want to be cited as authority for that proposition. But the Second Circuit in *Zicherman* held that general maritime law does apply, Zicherman v. Korean Air Lines, 43 F.3d 18, 22 (2d Cir. 1994), and that decision was reversed by the Supreme Court. One may expect

any secure source of law for an action against parties that should be brought into a lawsuit arising out of an air accident. And, even if general maritime law is applicable as a fallback, I do not believe that one can be sure that the problems sought to be cured by H.R. 2005 or S. 943 would be cured.

The law regarding compensation for maritime accidents can only be characterized as confused. In *Mobil Oil Corp. v. Higginbotham*,[11] which arose out of a helicopter accident over the Gulf of Mexico and took back many of the benefits that seemed to have been recognized a few years earlier in *Gaudet*,[12] the Supreme Court observed, correctly, that Congress had never enacted a comprehensive maritime code. But the Court went on to say, incorrectly, that DOHSA announced Congress's considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.[13] In fact, the Death on the High Seas Act was enacted as a complement to the Jones Act,[14] which in turn was designed to place seamen in the same position as railroad workers under the Federal Employers' Liability Act.[15] As Professor Schoenbaum has written, the result is a "crazy-quilt pattern of wrongful death actions,"[16] far from "considered judgment" and certainly not a judgment on how to compensate victims of air transport disasters. I submit that the focus of attention produced by the tragedy of TWA Flight #800 should spur Congress now to "considered judgment" on how to deal with compensation for victims of transportation accidents, or at least air transportation accidents.

My first choice, which I have expressed over the years,[17] would be a comprehensive federal statute, conferring jurisdiction on

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that at the end of the day, it would be held that a product liability action based on a disaster at sea could be brought against a manufacturer under general maritime law, since the rationale of *Zicherman* depended at least in part on the application of the Warsaw Convention, as would not be true in actions against a manufacturer. But counting on such a result is just inviting litigation about litigation, a phenomenon that families of accident victims know only too well.

[11] 436 U.S. 618 (1978).

[12] Sea Land Service, Inc. v. Gaudet, 414 U.S. 573 (1974).

[13] *See Mobile Oil*, 436 U.S. at 625.

[14] 46 U.S.C. app. § 688 (1994).

[15] 45 U.S.C. § 51 (1994).

[16] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 465 (2d ed. 1994).

[17] See my testimony on the Tydings Bill, almost thirty years ago, *Aircraft Crash Litigation: Hearings before Subcomm. on Improvements in Judicial Machinery of Senate Comm. on the Judiciary*, 90th Cong. 91-100 (1968). *See also* Andreas F. Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. ILL. L. REV. 157.

federal courts (whether exclusive or concurrent), and adopting as substantive law the substance of what I laid out in the first part of my testimony. If all the elements of a system of accident compensation cannot command a majority in Congress, my second choice would be a system that clearly establishes the jurisdictional foundation and the principle of liability, but leaves the elements of compensation, including pain and suffering, loss of society, the measure of damages, and eligible beneficiaries, to the law of the state or nation where the victim was domiciled. In other words, if we cannot achieve agreement on substantive law, my second choice is a federal uniform choice of law rule. I believe reference to domicile or habitual residence is most likely to conform with the expectations of accident victims and their families, and most likely to result in damage awards consistent with the relevant values and social conditions, national insurance systems, and so on. It is true that reference to domicile may result in different awards in respect to passengers who sat side by side before the accident. But it will avoid awards grossly excessive or grossly inadequate in terms of the passengers' own living conditions, and may well make it easier to settle accident claims without the need for litigation. My colleague Allan Mendelsohn will spell out how such a rule based on domicile would work, and how it fits in with the recent developments among the major airlines in waiving some of the provisions of the Warsaw Convention.[18] The vision of the Warsaw Convention as providing a uniform measure of damages for accident victims has long ago been rendered obsolete. I am clear that a rule looking to domicile or habitual residence of the victims of an accident is more consistent than any other with modern views of what we call conflict of laws and what much of the world calls private international law.

Since my recommendation would inevitably cause at least some delay, I ought to close with just a few words about retroactivity. We know from the Supreme Court's recent decision in the *Plaut*[19] case that Congress cannot by legislation reopen final judgments. But I do not believe that there is any impediment to legislation that would apply to pending actions, or to claims not yet filed, growing out of an event that occurred prior to passage of the legislation. There is nothing unfair about retroactive leg-

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[18] *See* Allan I. Mendelsohn, *Testimony Before the United States Senate Committee on Commerce, Science, and Transportation: Accident Compensation in International Transportation*, 63 J. AIR LAW & COM. 433 (1997).

[19] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

islation concerning mass disasters, since no one—airlines, manufacturers, regulators, insurers—acted in reliance on immunity from suit arising from a catastrophic accident. It is necessary only that the intent of Congress is clearly expressed, as it is in both the House and the Senate bills.

In sum, I do not believe Congress needs to rush to judgment. I believe Congress should exercise "considered judgment," which is not evident in the present patchwork of statutes, treaties, interim agreements, and court decisions, and is not adequately reflected either in S. 943 or in H.R. 2005.