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NO FAULT INSURANCE IN AVIATION PRODUCTS AND SERVICES—ONE INSURER'S VIEWPOINT

JOHN V. BRENNAN*

THERE HAVE been numerous articles and books written on the general subject of no-fault liability and it is not my intention to bore you with an extensive analysis of that material. You have heard it all before. Instead, I will give you *one underwriter's opinion* regarding no-fault insurance for aviation products and services and hope that it will be of some value. I must emphasize "*one underwriter's opinion*," since it is not unusual for another underwriter to have difficulty with my logic and draw a different conclusion from the same set of facts.

To begin, it will be helpful to review the statements of those favoring no-fault aviation insurance in order to identify areas of agreement or disagreement. Congressman Milford cites aircraft accident investigation as one of the problem areas needing attention. I agree. Aircraft accident investigation has developed into a science unto itself and the United States leads the world in this field. At the site of every airline accident there is a highly trained and professional government investigation team which will retrieve and analyze wreckage, review information contained in the cockpit voice recorder and digital flight data recorder, and ultimately determine the probable cause of accident. When a general aviation accident occurs, however, there is no cockpit voice recorder or flight data recorder to aid in determining the cause of accident and you rarely see a professional investigation team at the site. The lack of sophisticated investigations of general aviation accidents has created great risk, not only for the flying public, but also for the aircraft manufacturer. Too often a series of accidents must occur before a defect in an aircraft or aircraft system is discovered. Of

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less consequence, but also important, is the increased difficulty and additional cost necessary to defend a manufacturer in a products liability action arising out of an accident which occurred some time ago and in which the investigation was minimal or incomplete.

There is one aspect of the accident investigation problem, as described by Congressman Milford, with which I must disagree. I do not believe that the threat of litigation inhibits an investigation in any way. On the contrary, it can be a great impetus to intensify the investigation. Rather than impeding the flow of safety information, the threat of litigation hastens that flow. Manufacturers will readily provide information to prevent an accident and additional information after an accident to avoid any notion of a cover-up or a withholding of data indicating malfeasance. To illustrate this point, I quote the following from a products liability article appearing in the March 30, 1975 edition of *The New York Times*:

Faced with the possibility of expensive product liability settlements and recalls that might engulf a firm's entire product line, companies have taken a more prudent and cautious approach to product defects. In the automotive sector, for example, several of the latest recalls have been initiated not because of consumer complaints about a failing part, but because the company developed data—usually during its own extended product use testing—that suggested the possibility of future failure.¹

Anyone who has been involved in aviation liability, or has done any research concerning aviation liability, knows that our common law tort system and our adversary trial system have made enormous contributions to our knowledge of accident causation. By focusing attention on hitherto unknown facts concerning the cause of an accident, knowledge is gained, corrections are made, and aviation safety is improved. Certainly, in view of recent publicity, one cannot argue that government regulation alone is all that is necessary to encourage and insure safety in aviation.

I must admit that the accident investigation area is one in which the aviation insurance industry has been derelict in its duty and can be justifiably criticized. The attitude historically was that aircraft accident investigation was solely the government's responsibility. Aviation insurance underwriters now recognize that it is also our responsibility and, after developing the necessary technological ex-

¹ N.Y. Times, Mar. 30, 1975, (Business and Financing), at 4, col. 1.

pertise, we now provide professional air safety investigators for all types of aircraft accidents.

Another problem area mentioned by Congressman Milford is aviation liability insurance premiums. He states:

Aviation insurance underwriters are becoming reluctant to provide products liability insurance to aviation manufacturers—at any price. Those that are insured must pay extremely high premiums.

This is a surprising statement in view of the current state of the aviation insurance market. I am unaware of any major aviation insurance underwriter who is unwilling to entertain a products liability risk. Air transport manufacturers such as Boeing, McDonnell Douglas, and Lockheed are able to purchase limits of liability up to 300,000,000 dollars for less than one half of one percent of their gross annual sales. Furthermore, rates and premiums for this category of aircraft manufacturer are lower now than they were five years ago. General aviation manufacturers such as Beech, Cessna, and Piper are able to purchase the necessary products liability coverage for premiums ranging from one and one half to three and one half percent of their gross annual sales. Premiums in the manufacturing category have remained rather constant during the past few years. On the basis of current experience, some aviation products liability premiums should increase in the near future but not dramatically.

While properly noting that insurance costs are passed on to the public consumer, Congressman Milford states that “soaring costs are forcing some segments of general aviation out of business.” Since someone might well infer from that statement that general aviation premiums are soaring, I should like to take this opportunity to set the record straight. General aviation aircraft owners and operators are able to purchase all the insurance they desire at rates that are approximately forty per cent of what they were five years ago. This is true in spite of the fact that during the same period there have been between 600 and 700 fatal accidents per year and between 1300 and 1400 fatalities per year.² Additionally, through this same period, the general aviation industry has been enjoying its greatest growth. Aircraft sales have never been higher. If some segments of general aviation are being forced out of business due to increased

² 1974 NTSB Ann. Rep. 40, Appendix E.

costs, I suggest that one look to the cost of fuel, higher interest rates, taxes, and the rate of inflation as causal factors.

Airline insurance rates are currently twenty-five to thirty-five percent of the rates in effect five years ago. These favorable rates apply in spite of the fact that there were only 146 fatalities arising out of U.S. airline operations in 1970, whereas 1974 saw a record 467 fatalities.³

The next problem identified by Congressman Milford is the threat of business termination of major segments of the aviation industry due to single catastrophic aircraft accidents. No one can deny the existence of this threat, but that is precisely why there is an insurance industry—to spread the risk among those similarly situated. The aviation insurance market has participants throughout the world who compete aggressively for every aviation risk, whether the insured is a major manufacturer, airline, or member of the general aviation community. This market has developed more aviation insurance capacity at lower rates today than at any time in history. Additionally, it cannot be argued that liability insurance insulates manufacturers from the consequences of producing unsafe products. On the contrary, it serves to make them more safety conscious since no underwriter will knowingly write insurance on poorly designed or carelessly made products.

The last problem identified by Congressman Milford is that aircraft technology and product improvement are being seriously hampered as a result of civil liability lawsuits. It is true that more time is now being spent on such things as human factor engineering, fail-safe design and crashworthiness, but is not that as it should be? Are not new developments in these areas to be considered product improvements and advances in aircraft technology? We have proven that we can build the biggest, fastest, and most economical aircraft in the world. Should we not work with equal vigor to improve the safety and survivability factors of these aircraft in which so much of the world's population places its trust each day? The United States enjoys a virtual monopoly on aircraft production, and the way to maintain our position of leadership is to concentrate as much of our energies on safety technology as we do on efficiency and performance technology.

The specter of products liability lawsuits as well as environ-

³ *Id.* at 37, Appendix A.

mental lawsuits hangs over the foreign aircraft manufacturers just as it does over their U.S. colleagues. In fact, many nations are now raising the level of their damage awards in addition to adopting a similar approach to our products liability law. These developments do not indicate that the leadership position of the United States aircraft manufacturers is in any way being jeopardized by the common law tort system.

Congressman Milford goes on to explain how aviation is unique as a mode of transportation. Who can disagree? He describes how the aviation industry is very closely regulated by the federal government and adds that this protective measure makes common law recovery unnecessary. It seems to me that the thing that makes aviation unique is that it is dramatically less forgiving of error than any other mode of transportation and that is why the safeguards of our common law tort system should apply. Remove or minimize the substantial consequences flowing from the acts of the government as well as the aircraft manufacturers and operators and you have eliminated a major deterrent to unsafe conduct. Because of the sometimes overwhelming economic pressures generated by his business, a manufacturer or aircraft operator might engage in unsound or imprudent practices which might not otherwise be contemplated. Likewise, a government employee under political pressure or as an act of friendship, might delay or forego a decision relating to safety which can have a devastating effect.

Another proponent of aviation no-fault has stated the following:

The major argument for no-fault insurance is that it will reverse the present trend for juries and courts to award excessive settlements to claimants which has resulted in increasing insurance premiums for all. Unless there is some restraint on these large settlements, the cost of insurance will continue to soar.⁴

We have all heard this story before but has anyone taken the time to check the facts behind the rhetoric? According to Jury Verdict Research, Inc. of Cleveland, Ohio, awards in serious personal injury cases have increased nearly twenty-eight percent since 1970. During the same period, the Consumer Price Index has risen a whopping thirty-eight percent! There is always a great deal of publicity concerning the occasional multi-million dollar damage

⁴2A PERSONAL INJURY VALUATION HANDBOOKS 1031 (1974).

award leaving the impression that these awards are the rule rather than the exception. No one can debate the fact that the awards and settlements have been on the increase, but the record does not indicate that these increases are unwarranted.

Workmen's compensation laws are usually cited as a good example of no-fault liability in action and that is an accurate description. They provide for the efficient distribution of funds to the injured party, but I seriously question whether they act as a deterrent to unsafe working conditions. Unfortunately, workmen's compensation insurance has so diluted the safety concern of employers that many times worker's injuries are just another item on the union negotiating list. In many cases, it is cheaper for the employer to pay for his workmen's compensation insurance and run the risk of employee injuries than it is to incur the substantial cost of modernizing his equipment and improving the safety environment of his facilities. If this was not the case, it would not have been necessary for Congress to pass the Occupational Health and Safety Act in order to reduce the number and severity of worker injuries. Hopefully, this will provide the necessary incentive to foster job safety that was obviously lacking in the workmen's compensation laws.

Now I would like to review some of the abuses of the common law tort system highlighted by many no-fault advocates and certainly in need of redress. One abuse is that practiced by some aviation underwriters who, upon presentation of a claim, either search high and low for some reason to deny the claim, or initiate subrogation actions, cross claims, or impleaders without adequate justification in order to limit or reduce their liability. Another abusive practice by some aviation underwriters is entering into so-called "guarantee agreements" which involve inducing claimants injured in aircraft accidents to sue the manufacturer and then, in effect, finance and participate in some form in the recovery. This procedure is questionable at best from an ethical standpoint, and at worst may be illegal. Once these insurance companies realize the overall cost they are adding to the system, as well as the very detrimental effect they are having on their particular business, these abuses should cease. The successful aviation insurer must investigate accidents, make a very early determination of liability, and offer prompt and equitable settlements when indicated. Litigation should be the exception rather than the rule.

Additional abuses are perpetrated by plaintiffs' attorneys. Much publicity has been given to the contingent fee system, most of which has been critical. We have all heard that the contingent fee is the poor man's key to the courthouse, but some plaintiffs' attorneys have turned it into their key to the bank. For example, recently my company settled a claim involving the death of an airline passenger in an accident which occurred four months earlier. The total sum of the settlement was 325,000 dollars. The so-called reasonable attorney's fee allowed was 108,333 dollars. The services rendered by this attorney were as follows:

- (1) The service of a summons and complaint;
- (2) Attendance at an NTSB hearing which lasted two days;
- (3) The receipt of some interrogatories for which answers were not prepared;
- (4) The furnishing of income and dependency information;
- (5) Three settlement discussions; and
- (6) The preparation of an order of compromise and a general release.

This attorney would have difficulty in justifying more than twenty hours of actual work on this uncontested claim. Incidentally, the exorbitant fee exacted by this attorney and approved by the federal court came out of the pocket of a widow and two minor children.

There are also some plaintiffs' attorneys who abuse the system by unduly delaying the acceptance of very equitable settlement offers in order to justify their unconscionable fees or to allow the settlement to take place during a year which is more favorable to them from a personal tax standpoint. These abuses cannot be tolerated.

Abuses also occur on the defense side, although they are less inflammatory. Too many defense attorneys are going through the paper work ritual of answering complaints, serving interrogatories, attending drawn out depositions, all of which lead nowhere but add greatly to the cost of the system. Too often the insurance company is advised that its insured is not liable, so the paperwork machine is put in motion and all the necessary preparations for a successful defense are commenced. A few years later, this same insurance company is advised from the courthouse steps that the case has gone sour, the judge is the wrong judge, and the jury is

the wrong jury. Needless to say, the legal expenses at that point, as well as the cost to settle the claim, have both increased dramatically. Much earlier determinations of liability can and must be made.

With the right cooperation among professionals, more claims can be handled in less time for less cost than has been the case. There has been a tremendous improvement in this area in recent years, but much more needs to be done if we are to meet our public trust and maintain the common law tort system. Unless those who have custody of the common law tort system—the insurance industry, the bench, and the bar—cooperate to reduce and eliminate these abuses, ultimately some form of no-fault liability system is likely to find acceptance, notwithstanding its adverse effect on safety. One only has to look at the malpractice problem facing the medical and health care industry in this country to appreciate the disaster that can befall a profession that fails to adequately discipline its membership.

The demand for a no-fault liability system does not come from the public, but rather from the ivory towers of academia, some well-meaning but misinformed legislators, or some insurance or industry committees, wherein the concept is seized upon as another way to limit corporate risk and improve financial forecast. I have not heard a claimant or an ordinary citizen anywhere favor the removal or lessening of individual responsibility, let alone corporate responsibility, and I do not believe the public is willing to reward the negligent and incompetent at the expense of the conscientious and the responsible. One can see a firsthand illustration by witnessing a products liability trial. Even though the judge has charged the jury with respect to strict liability, a no-fault concept, the jury still makes its determination on the basis of fault. Most successful plaintiffs' attorneys, while proving the existence of the necessary defect in a strict liability case, will labor hard to establish that the defendant was at fault, since juries want to hold someone responsible only if they can find culpability.

If our fantastic economic growth, new knowledge, and technological innovations have made us so impersonal and materialistic that we focus only on the most efficient way to distribute some compensation to accident victims, rather than how to prevent the accident in the first place, our future is sad to contemplate. The pri-

mary goal should be to promote the public welfare by preventing accidents and thereby saving lives and avoiding injuries. Secondly, and of much less consequence, is the monetary reimbursement of the victims of aircraft accidents. This does not reflect so much the unimportance of adequate compensation, as it does the importance of life and health. A no-fault system may accomplish the secondary objective of monetary reimbursement at the expense of sacrificing the primary objective of saving lives and avoiding injuries. The expedient thing and the right thing are seldom the same thing.

