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ACCIDENTS IN COMMERCIAL AIR TRANSPORTATION—A PROPOSED REFORM OF THE LIABILITY AND COMPENSATION SYSTEM

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THE TOPIC of this Symposium is the present system of liability and compensation for the consequences of accidents in commercial air transportation. My purpose is to invite a broad discussion of what is wrong with that system and of how it might be changed by federal legislation. Those of us in the Aerospace Industries Association have some ideas on the subject and these ideas are embodied in the draft bill and explanatory memorandum which have been circulated as part of your program.

We are hopeful that these proposals will provide a basis for an exchange of ideas among—

- the interested agencies of the Federal government, notably the Civil Aeronautics Board, the Federal Aviation Administration, the Department of Transportation, and the Department of Justice;
- consumer groups;
- the plaintiffs' and defendants' bar;
- the law school community; and
- the three interested elements of industry: the insurers, the airlines, and the manufacturers.

The ideal forum for this exchange would be public hearings before the Aviation Subcommittees of the House Committee on Public Works and Transportation, and the Senate Committee on Commerce.

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I

It is hard to find a good word for the present system of aircraft accident litigation.

First, persons injured in an accident should have the assurance, and I emphasize the word assurance, of prompt and fair compensation—the assurance, if you will, of a no-fault recovery system. In spite of the changes in classical tort law doctrines, notably in liability for product defects, there is no such assurance now. Litigation is usually prolonged and expensive, the contingent fee system operates to reduce materially the injured person's recovery, and the injured person cannot be confident that he will recover at all. Moreover, settlement offers are bound to have a discount factor for the uncertainties of litigation.

Secondly, the present system of accident litigation is unreasonably expensive. The fees for plaintiffs' and defendants' counsel put too heavy a burden on both injured persons and the users of airline service who ultimately bear the cost of insurance premiums. It is not just a matter of contingent fees; the whole system of protracted, one might say nearly interminable, tort litigation takes too much time and costs too much money—too much measured by the value either to injured persons who are entitled to recovery, or to users of airline service who are entitled to a system which is reasonably economical and efficient.

Thirdly, a system of liability based on fault sets up an inevitable and damaging conflict between the public interest in ascertaining, and when possible, correcting the causes of airline accidents, and the interest of those charged in litigation to present an effective defense. The way to avoid this conflict of interest is to disengage the issue of compensation for the victims of the accident from the issue of liability.

Fourthly, there is the problem of the availability of adequate liability insurance. The greatly expanded passenger capacity of the wide-bodied aircraft, the Boeing 747, the McDonnell Douglas DC-10 and the Lockheed L-1011, and the constantly escalating level of jury verdicts raise the question of whether insurance will be adequate to take care of the larger accident. There is also the possibility of a mid-air collision or of a crash causing injury and damage to persons and property on the ground. A series of such losses could

lead to large reductions in the present policy amounts. In this connection, it is important to realize that insurers, who may be covering several defendants with a joint and several liability for a large accident, may have obligations arising from the accident far beyond the face amount of any single policy.

Finally, an economically wasteful aspect of the present system is the cross-claim problem—the effort to fix financial responsibility on just one of the many parties who are somewhere in the vicinity, the airline, the Federal Aviation Administration, the aircraft builder, or the supplier of components for the aircraft. The conflicts among defendants, or realistically, among insurers for defendants, serve no useful purpose, if one assumes that a system can be put in place which assures fair recovery by injured persons.

II.

There is a model for dealing with problems of this kind in the Price-Anderson Act,¹ adopted by Congress in 1957 for potential nuclear accidents. I realize that this system is currently controversial in the nuclear area, but the controversy is about questions which are not relevant in the context of commercial air transportation.

The following is an “over-simplified outline” of the Price-Anderson system. Briefly, this system provides:

1. Mandatory private financial protection (insurance in most cases) for the first tier of liability. The amount of financial protection to be required by the federal government is measured by the amount of insurance reasonably available in the private insurance market;

2. A federal government indemnity for liability above the amount of private financial protection; and,

3. A no-fault recovery with further provisions for quick partial payments to injured persons and for settlement of all claims in a single federal court.

For those of you familiar with the Price-Anderson Act, I should state at once that the indemnity system proposed for air transportation differs from the nuclear model in three key aspects:

1. There would be no ceiling on the aggregate amount of the federal government indemnity;

¹ Atomic Energy Act of 1954, as amended, § 170, 42 U.S.C. § 2210 (1958).

2. The cost of the federal government indemnity would be borne not by the taxpayer, but by the users of airline services because it would be funded by a ticket surcharge. The federal government's role would be as administrator of the funding system rather than as provider of the funds; and,

3. Because there is no ceiling on the Government indemnity obligation, there would be no monetary ceiling on individual recoveries. We do propose some limits on the kinds of damage recoverable, which I will discuss later in this article.

Before leaving this indemnity issue, I should point out that resort to the indemnity would occur only in those unusual cases where the mandatory private coverage was inadequate to pay all valid claims on a no-fault basis.

III.

We referred earlier to two distinctly wasteful aspects of the present liability and insurance system: first, the cross-claim problem among defendants, and second, the fact that insurers can have unreasonable exposures beyond the face amount of any given policy because they may be covering a number of persons involved in an incident who may be found jointly and severally liable. The Price-Anderson solution to these problems is to establish a system of mandatory private coverage and to require that this coverage apply to any person who may be found liable.

The extreme case posited in the Price-Anderson legislative history in 1956-1957 is that of the plane which crashes into a nuclear reactor.³ If the crash caused a release of radioactivity resulting in injury or damage, the person at fault would be an insured under the nuclear system of mandatory private coverage and Government indemnity. The example is far-fetched, but the Congressional purpose is clear—to assure that insurance and indemnity amounts will always be available to pay injured persons.

There is a more realistic case in the air transport context—that of the saboteur. There could be no recovery by the saboteur or his estate, but the victims of the incident recover because the liability of the saboteur would be covered under the insurance and indemnity system.

³ S. REP. NO. 296, 85th Cong., 1st Sess. (1957); H.R. REP. NO. 435, 85th Cong., 1st Sess. (1957).

Under the Price-Anderson nuclear system the liability of the Atomic Energy Commission or its successor agencies would be covered. Under the comparable system we are suggesting for air transportation, the liability of the Federal Aviation Administration would be covered by the first tier private financial protection and also, of course, by the Government indemnity. In a word, someone will be liable on a no-fault basis because someone's act or omission will have caused the incident and the liability of that someone will be covered by both private insurance and Government indemnity so that there will be funds to pay the victims.

Since the same insurance policy and the same indemnity will cover everyone's responsibility for a given incident, there will be no occasion or incentive for cross-claims. Also, insurers will know where they stand because, by excluding aircraft accidents from their general liability policies, they can limit their liability to the face amount of the omnibus air transport policy covering the particular accident.

The requirement to maintain private coverage in the nuclear case is imposed on the utility which operates the nuclear power plant and the maintenance of this coverage is a condition of the license to operate the plant. In the air transportation case, we are proposing that the airline carry the coverage and that maintenance of the coverage be a condition of the CAB's certificate of convenience and necessity. A split of premium costs among airlines and manufacturers of aircraft and principal components can be negotiated among the parties.

IV.

This brings me to the provisions relating to recovery by injured persons:

First, under the bill we are suggesting, recovery would be on a no-fault basis. The Price-Anderson technique employed would be to require mandatory waivers of (i) the defense of contributory negligence and (ii) the defense of lack of negligence, so that the only issues to be litigated would be causation and measure of damages.

Secondly, there would be provisions for quick partial payments to injured persons and mandatory settlement offers to estates of persons who lost their lives in an accident.

Thirdly, there would be a provision requiring waiver of any defense based on a state statute of limitations of less than two years.

Fourthly, state law limitations on recovery for wrongful death would be inapplicable.

Finally, for substantial accidents a single federal district court would have exclusive jurisdiction.

The tradeoff for these no-fault recovery provisions would be the elimination of certain kinds of damages:

First, there would be no recovery for punitive damages. Judge Friendly made a definitive and devastating analysis of the inappropriateness of this doctrine in situations where there are multiple claimants in *Roginsky v. Richardson-Merrell, Inc.*³ One can agree with Dean Prosser that the "mass disaster" case so well analyzed by Judge Friendly invites "a reexamination of the whole basis and policy of awarding punitive damages."⁴ Certainly one rationale of some of the decisions discussed by Prosser, namely, that punitive damages are a substitute for attorney's fees, would be eliminated if one provides, as we do in the proposed bill, for a separate award of those fees. Again, if one still advocates the additional deterrent effect of monetary penalties, the proper route would seem to be a government-initiated proceeding to recover civil penalties under the provisions of section 901 of the Federal Aviation Act.⁵

Secondly, there would be no recovery for pain and suffering in death actions or in other cases when there was no permanent disability or disfigurement.

Thirdly, recovery in death actions would be for the benefit of the family but only to the extent of actual dependency.

Fourthly, recovery would be limited to definite pecuniary loss, defined to include medical and related expenses and loss of earnings.

Finally, there would be a separate court award of plaintiff's attorney's fees which would be in addition to the plaintiff's recovery for his pecuniary loss. In other words, plaintiff would not have his recovery diminished by legal costs and, conversely, juries would not have to take account of contingent fees. Conduct with respect to making and acceptance of settlement offers would be a factor in setting fees.

³ 378 F.2d 832 (2d Cir. 1967).

⁴ W. PROSSER, HANDBOOK ON LAW OF TORTS (4th ed. 1971).

⁵ 49 U.S.C. § 1471 (1958).

I should observe, while on this point, that the burden on plaintiff's attorney under the proposed system would not be to prove the cause of the accident and certainly not to prove that the accident resulted from someone's negligence. The burden of the plaintiff's attorney would be only to prove that the claimant's loss or injury was caused by the accident and to establish the measure of those damages.

V.

Next, I should note briefly that the plan applies to "air transportation" as defined in the Federal Aviation Act,⁶ that is, to carriage for hire rather than to general aviation, which seems to us to present a special set of problems. The application is to "domestic" air transportation which is defined to exclude "foreign" carriage but to include "interstate" and "overseas" operations as the quoted terms are defined in the Act, and intrastate carriage as well.

These proposals were developed by a working group of legal and insurance professionals under the auspices of Aerospace Industries Association. The plan reflects extended consultation with our colleagues in the airline industry as well as reviews with leading personnel of the insurance industry—but, of course, both of these groups will have to speak for themselves. We do think the time is ripe for a Congressional review of the problem and we look forward to the reactions of consumer organizations and of interested federal agencies. We particularly invite the comments of the law school community and of the bar, both plaintiffs' and defendants' counsel.

⁶ 49 U.S.C. § 1471 (1958).

