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A Plaintiff's View of Montreal

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A PLAINTIFF'S VIEW OF MONTREAL

By Lee S. Kreindler†

I WILL APPROACH the task at hand in a spirit of good will, assuming for the moment, at least, that you are really interested in why many of us do not believe in a convention system, why many of us do not believe in limitations of liability, and why many of us are opposed to Warsaw, Hague and Montreal.

I think it's very important, and I said this in London at the meeting that Sir William was gracious enough to mention last night, that we do communicate. And I think one of the difficulties that we have had and when I say we, I mean the airlines, the airline insurers and the passengers who are the victims of these accidents, I think that we are all victims of a failure to communicate over the past fifteen or twenty years. I must say that I consider the present system somewhat unsatisfactory. I've heard many airline and many aviation insurance people say that it is unsatisfactory. I think it is the fact that some relatively nonprofessional people have made the situation what it is today. I think the reason for that is the failure of the professionals, and when I say professionals I mean the professional airline, the professional aviation insurance and the professional plaintiff's lawyers, their failure to get together and work out a more satisfactory overall system. Now, if I am right, that through some kind of communication we can evolve a more satisfactory system, then it seems to me that it follows that the airline and aviation insurance people should listen to what I have to say or should listen to what plaintiff's lawyers have to say on this subject. And with great respect, I mean great respect for the distinguished members of this audience who hold other views, and with great respect for the distinguished experts on the Panel of Experts that met up in Montreal, I would like to express to you some opinions and thoughts that I have about the United States' attitude toward limitations of liability, and about what appears to me to be a quite unrealistic approach to the problem by the Panel of Experts and the representatives of the various governments.

I could be quite wrong, but I do not think that the United States will ever again adhere to or ratify a convention which incorporates any limitation of damages. Now, maybe I am wrong. I recognize that this thought has not been expressed in this way by the United States expert, Mr. Wanner. I recognize that within the last year, our Government did enforce a system of limited liability—the so-called Montreal Agreement—but I ask you to remember the very excited events of the two or three weeks that preceded 15 May 1966. I ask you to think of what was happening in the United States Senate and the feeling on my part and the part of others that the strong views of the Senate were completely ignored in what happened on 13 May 1966. I may be wrong but I do speak with con-

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siderable personal experience working in the Senate of the United States and with the Senators on the resolution, and our chairman (Mr. Lowenfeld), I am sure with some pain, remembers some of this pretty well. I do speak with considerable personal experience with, and understanding of, how these men think. And I think that in this sense perhaps I'm a little bit closer to the people than some of the airline and aviation insurance people present in the sense that it is my job, day in and day out, to talk to people who are affected by accidents, to talk to passengers, or the families of passengers.

I do not think you will ever again see the United States adhere to a convention with a limitation of liability.

I do not mean to have you think that this is a threat in any way, but I can assure you that if any convention comes up, whether it's the Hague Protocol or an effectuation of the Montreal Agreement that we have now, or the so-called "solution two," is there any doubt in the mind of anyone here who was involved in the proceedings of 1966 what my attitude would be or the attitude of the plaintiffs' bar would be? Is there any doubt of the fact that at the very least one-third of the Senate of the United States is receptive to the point of view that in the 1960's there is no place for artificial limitations of liability?

I say this very seriously, because in a sense this is my only opportunity to speak to the Panel of Experts. The meeting of the Panel of Experts according to the report was a closed meeting. It is true that there were representatives of the airlines (IATA) there. And representatives of the insurers were there through the IUAI. So, it was "closed" only in the sense that passengers were not there, or passenger's representatives were not there. I was not there. This meeting was "closed" to me; but I do have the report and I have read the report and I have read the report with the feeling that these eminent gentlemen have failed to realize that no convention with a limitation of damages can possibly pass the Senate of the United States. After all, all of the talk is concerned with a treaty, some kind of new convention. Who in this room can say that two-thirds of the Senate of the United States, given the fact of limited liability, will approve?

I think that the Panel of Experts is wasting its time. And I think it is unfortunate because there are great problems in international aviation that we have not even reached that an eminnt panel of experts should be concerning itself with, and I hope to talk about some of these real problems. Let me express to you what I have said in the past and what some of you heard me say in London about two months ago. If it is repetitive, I apologize. If it is simple, I apologize. But it seems to me that what we are talking about is quite simple. Now just that proposition is complicated enough to have aroused considerable opposition over in London. But let me say to you in the simplest terms, and it is a very simple concept, what I think the problem is in awarding damages to injured people or to the families of those who have been killed. The problem is quite simply the problem of compensation, the problem of awarding to the victims of accidents, compensation for the loss or the losses they have sustained.

Compensation, by definition, should compensate. If a man is badly in-

jured, and his damages are great, the damages should be tailor-made to compensate for those great injuries. If a man has a minor injury, the compensation should be small. Compensation which gives too little, in my way of thinking, is not right, and compensation which gives too much is not right.

Over the years, over the centuries, a system has evolved which has achieved a certain degree of fruition in the United States. It is our system of common law tort liability. It has survived the test of time and the test of experience. It is not the system I would have advocated when I graduated from law school. It is not the system which I would have favored from a *theoretical* vantage point. But it is a system that in my judgment, based on my experience, has worked marvelously well.

The purpose of the system is to compensate and there is no country in the world to my knowledge, and we have here today, many people from many countries of the world who can correct me if I am wrong, where injured people or families of those who have been killed can get the kind of compensation, the degree of adequate compensation, the degree of tailor-made compensation scaled to the kind of loss sustained, as we do today in the United States.

It is interesting to me, incidentally, that some of the opposition to our system in the aviation field has come from the airlines and aviation insurers who would like to see liability finite and measured and predicted. And on the other hand, some of the opposition to our free tort system, and I will use that term simply as an abbreviation for what I consider to be our American tort system, has come on the other side from professional people, intellectuals, scholars. "Absolute liability should be the order of the day, not negligence liability." "We should abandon the fault concept in favor of enterprise liability." "Today's life is too complicated to support long calendar delays and the difficult detailed process of litagation." We have all heard this from our scholars and you all know that this cry, this position, this concept, is not limited to aviation. You hear it today in terms of automobile liability. The one thing, it seems to me, that the scholars forget is that what seems right in theory is not necessarily what's going to survive the test of time and experience, and is not necessarily what is going to work right. And again, I advance the proposition that there is no system in the world that has ever provided in terms of net compensation to injured people the benefits that our time-tested American system provides today.

When we translate the basic concepts of tort liability, that is liability based on fault with no artificial limitations whether they be minimum or maximum limitations, to the aviation field, we can readily see why a problem has arisen. It is absolutely basic and fundamental to American citizens that an injured person should be appropriately compensated for the loss he has sustained. It is basic, it is something that every client assumes. When the client walks into my office, whether he finds ultimately that his rights are going to be controlled by Warsaw, Hague or whatever, the basic assumption is that he is entitled to compensation for the loss sustained. This is fundamental, this is not a surface literary or legal proposition. This goes to the roots of the way we live and the way we think in the United States.

The concept of appropriate compensation in my judgment is very close to the concept of the dignity of the individual. If you deprive a man of his means to earn a livelihood, you should compensate him for that. And so, when anyone or anything, be it an international organization, or an outdated treaty, attempts to impose an arbitrary or artificial limitation of any kind on this concept, there is going to be a clash of ideology. And I do not think in this day and age you will see any further ratification of limitations.

Let me go a little bit more deeply, conceptually, into what I think the system is, because this perhaps touches on the attitudes of airline and insurance people. The Warsaw Convention, interestingly enough, is considered a convention of private air law—*private air law!* This is quite interesting. The convention, as you all know, was originally written in French, after a conference held in French, all of committee work was in French and it was essentially the effectuation of European or civil law concepts. But we do not, in the United States, consider liability to be a *private* problem. We do not consider the loss to Mr. Jones, the injuries to Mr. Jones or the death of Mr. Jones to be a *private* problem. And this perhaps is one of the reasons we have had difficulty on the international level. The protection of the Jones family is a public problem in the United States. A man who is injured, or the family of the man who has been killed, is a drain on society and a societal responsibility. And we deem it a societal responsibility to properly and adequately compensate him for his loss. We do not consider it to be his personal responsibility to anticipate what he cannot in fact anticipate. We do not think it was Mr. Jones' job when he boarded an American Airlines airplane or a Pan American Airlines airplane to think through the problem of whether he might be killed in Timbuktu or seriously injured in the British Isles. Mr. Jones cannot possibly anticipate what will happen to him on that airplane. We think that if Mr. Jones is injured or killed, our community, our society, has the responsibility of setting up a system that can give appropriate compensation and appropriate compensation should not be too low and it should not be too high.

Now, it follows that any limitation which is effective interferes with proper damages. If the limitation is so high that it never limits damages, then it's simply not effective. So the only time that the airlines really want a limitation of liability, whether it's $75,000 to $100,000 or $8,300, is when that limitation is scaled lower than the actual damages. And it therefore follows, that any time a limitation is effective, the normal, the basic, the conceptual workings of our system and our concepts are violated. For that reason, approaching the problem in more depth, we are opposed to limitations of liability.

Our fight against the Warsaw Convention was long and arduous and all too familiar to many of you. Professor Lowenfeld is quite right that I oppose the Montreal Agreement. I oppose the Montreal Agreement because it continues to effectuate a system of limited liability. I oppose the Montreal Agreement even though it probably constituted a benefit for passengers above and beyond what they had before, because it deprived the American people of the opportunity to get rid of the limited liability concept. I oppose "solution two" of the Panel of Experts for the same

reason. And I suggest to you that the only system that can possibly satisfy the needs of the coming generation is a system of free liability.

I would like you to consider that for a moment. Let's look at the Montreal Agreement and some of the problems that it has created. There are many more problems inherent in the Agreement but just to mention one for example, the airline must give notice in a prescribed form to the passenger of the applicability of the arrangement. But nowhere in the Agreement, or in the tariffs that Mr. Lowenfeld mentioned, or in the CAB order that approved the tariffs, do we find the consequences of a failure to give that notice. We have cases pending right now where notice was not in fact given by the travel agencies that wrote the tickets for the passengers. We do not know what the consequences will be of that failure, but, of course, we claim that this constitutes a waiver of defense on the part of the airline and an agreement to unlimited liability. The Agreement itself having been drawn entirely by airlines and entered into among airlines should be construed against them. That is but one problem that has arisen out of the Montreal Agreement.

But, take another problem which I know is of great concern to the airlines and the aviation insurers. There is now absolute liability, under Montreal. That means there is liability even when the airline is not a fault. We all know, that some of our modern accidents are caused by failures on the part of the air traffic control system. We all know that some of our modern accidents are caused by manufacturer's fault in the absence of airline fault. And yet the airline is automatically and absolutely liable for $75,000! What is the right of recovery by the airline against the manufacturer or the air traffic control facility in that situation? The airline payment is the result of contract, not law. It is a very serious problem that is of current concern to airlines and airline insurers.

Let us go a little further and project ourselves just three or four years from now when we will be flying (Boeing) 747's or a year or two beyond that when we will be flying the SST. Let us consider for a moment the crash of one 747 and the losses that that would entail. I am not a statistcian but from my rough estimates, I would say that the loss of a single 747 reasonably loaded with passengers, assuming that it does not crash into a city and cause any substantial ground damage, and assuming it does not hit another airplane, will be a loss of some sixty to seventy million dollars. The loss of an SST would probably be more than that.

Let us assume for the moment that the Panel of Experts in the International Civil Aviation Organization attempts to enforce "solution two" as the convention of the future, and let us assume that you impose or enact a $75,000 limitation applicable only to airlines. Is there any doubt in your mind as to what a responsible plaintiff's attorney would do, given a case in that era or under those circumstances? Don't you know that now, because of limitations of liability effective as against airlines, wherever there is any possibility of negligence on the part of another defendent, whether it be an air traffic control facility or a manufacturer, we *must* sue the other defendants. So, assuming the great values that Sir William Hildred discussed last night of predictable losses and predictable liability, and cheap insurance for the airlines and an airline insuring on the basis of the $75,000 limit, we have an accident in which the loss is sixty to

seventy million dollars, greatly limited insofar as the airline's liability is concerned, but unlimited so far as the liability of Boeing or an air traffic control facility or an airport operator is concerned.

And we now have plaintiffs who must proceed against these other defendents for huge, huge damages. We now have an airline insuror who has written insurance for the ABC Airline, not knowing if despite the $75,000 limitation, *despite* the $75,000 limitation, liability will turn out to be virtually unlimited because of the claims over from Boeing against the airline or from the air traffic control facility against the airline.

Take the case that John Martin and I handled so recently. It is not completely disposed of yet because the Government has not decided yet whether to petition the Supreme Court for certiorari. That is the *Ingham*[1] case, which so many of you know. The *Ingham* case involved a DC-7 accident at Idlewild (Kennedy) several years ago and we proceeded against Eastern Air Lines for the negligence of the pilot and against the United States Government for the negligence of the air traffic controllers in the operation of the weather reporting system. I am sure many of you know that the plaintiffs prevailed against both, the court holding that the Government was liable for failure to report proper weather information to the crew. And this was affirmed on appeal by the United States Court of Appeals for the Second Circuit so that the plaintiffs prevailed against both Eastern Air Lines and the United States Government.

Assume for the moment that the Montreal Agreement or "solution two" is the rule. Assume that we get large judgments against both airline and air traffic control facility, but as against the airline there is an artificial limitation. Assume if you will that in this case, the airline's negligence has been primarily responsible for the accident and the negligence of air traffic control is somewhat less in character. Under that situation it is quite obvious to me that there will be a substantial recovery over by the air traffic control facility or the Government against the airline. The same is true of products cases like the *Sabena Airlines*[2] cases arising out of the crash in Brussels. The Warsaw Convention applied, limiting damages to $8,300 to each passenger. But the accident was primarily caused by negligence in design by the manufacturer, Boeing. Complete adequate damages were recovered by the plaintiffs against Boeing.

But take a situation where the reverse is true, where the negligence was slight on the part of Boeing and great on the part of Sabena with a limitation applicable to Sabena and think in the term of problems of recoveries over, think of the problems that a system of limited liability applicable to airlines would create.

And let us go one step beyond the liability problems as such and talk about an industry problem in the United States. When we get into the era of the 747 and the SST, we run a danger as I understand it of using up our international insurance capacity to handle those accidents. The losses are so great, seventy million dollars, for the loss of a 747.

Let us consider for a moment not the problem of the passenger, or the problem of the airline but the problem of the XYZ Manufacturing Company which makes a small instrument that finds its way into the 747.

[1] Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir. 1967).
[2] Kelley v. Societe Anonyme Belge D'Exploitation, Etc., 242 F. Supp. 129 (E.D.N.Y. 1965).

XYZ is a small company. Its volume of business is six million dollars a year, its profit is one-half million dollars a year, but it does make one valuable part and this part finds its way into the 747 and the SST. And then the accident happens and there is a seventy million dollar loss. And there is limited liability on the airline by virtue of "solution two" or the Montreal Agreement. The responsible plaintiff's lawyer looks around and, to protect his client, he must sue not only the airline but the manufacturer of the airplane, and the XYZ Corporation which has made the instrument which somehow contributed to the cause of the accident. Now, let us think in terms of the stockholders or the owners of the XYZ Corporation. They tried to insure against potential losses and they went to responsible insurance companies and insurers over in London and they said, "We do not make very much money, we just have a six million dollar a year operation and we would like to protect ourselves." The insurance company said, "Well, maybe you do not make very much money, but if your instrument causes a 747 to fail, the loss is going to be seventy million dollars. The amount of premium you can pay, in a reasonable way so far as you are concerned, just is not enough to make it worthwhile for us to incur this kind of risk." So the result has been, even today, that most of the component manufacturers in the aviation manufacturing industry are uninsured against the real potential liabilities that they live with.

Even today! What is that going to be in a few years with the 747 and what is it going to be if you make it almost mandatory that we sue the XYZ Corporation and Boeing and Douglas and everybody else in sight because of an artificially pegged limitation of liability against the airline?

The Panel of Experts can't possibly put together a convention limiting damages applicable to every possible defendant. At least in terms of the United States, it is unrealistic to even think in those terms. In addition, any solution to be effective will involve conflict of laws problems, because I guarantee that if a limitation is applicable under the law of New York but not under the law of New Jersey, then the attack will be on a conflict of laws basis to make effective the law of New Jersey.

You cannot possibly anticipate the problems that a system of limited liability will create in the future. You cannot possibly create a universal system of limited liability. So what is the answer? Again, I suggest to you that the answer is something that we already have and that we already understand and we already use day in and day out and it is a system of *free liability* based upon *fault* without artificial limitations of liability.

If the Panel of Experts wants to spend its time doing something useful, I would like to suggest that it direct its attention to the industry-wide problem of protecting people and companies up and down through the industry against huge losses that they are not in a position to handle. I think that can be accomplished. If the Panel can at one and the same time protect passengers, in terms of getting them proper compensation for their losses, and protect airlines along with manufacturers and component manufacturers, it will have performed a valuable service. I would suggest *that*, instead of what appears to me to be the present waste of time considering unachievable limits of liability.

I would like to say a few words about the system we have today, and venture a couple of predictions, and then I will sit down. We have, in the

United States, today, not the Montreal or the CAB Agreement at all. We have the *Lisi v. Alitalia*[3] concept of unlimited liability. This is a system of liability that surpasses even my wildest dreams, absolute liability on the part of airlines with no limitation at all! The Court of Appeals for the Second Circuit in *Lisi v. Alitalia* found, and properly found so far as I am concerned, that the Warsaw Convention required adequate notice, by the airline to the passenger, of the limitation of liability, and that the consequence of the failure to give notice was the loss of defenses in the Warsaw Convention that limit or exclude liability on the part of the airline. So, we have today absolute liability with no limitation. This surpasses the Montreal Agreement and makes it academic. The *Lisi* case is now before the Supreme Court of the United States on a petition for certiorari.

I predict, for what it is worth, and I have no pipeline into the Supreme Court, but I predict that the petition for certiorari will be denied. If it is granted I predict that the Supreme Court of the United States will affirm the *Lisi* case because I think the *Lisi* case is right. I think an examination of the *substance* of the Convention, as distinguished from its literal language dictates the *Lisi* conclusion. The *Lisi* case, as you know, is largely based on the size type of the notice on the ticket. Once *Lisi* is affirmed, I predict that the airlines will make an effort to satisfy its dictates by some other form of ticket or notice.

I predict, for what it is worth, that when after this scrambling around in an attempt to put together another form of ticket that would satisfy the needs of *Lisi* (which will take 3 or 4 years), that our courts will then hold that even with the large size print the airlines have failed to notify the passengers of the applicability of limited liability in an meaningful manner. I suggest to you, that you carefully examine the *Lisi* case, and particularly the footnotes in the *Lisi* opinion, and I think you will see there a requirement by the court that passenger Jones be told, and that he *understand*, that his liability on this particular flight is limited to $75,000. I predict, for what it is worth, that the airlines will never be able to come up with a form ticket that will satisfy the needs of *Lisi*. So it seems to me that our discussion of Montreal is somewhat academic, because the system of liability that we have today goes beyond Montreal, it is not limited to $75,000.

And so comes the Panel of Experts at its closed meeting and it reviews the solutions including "solution one," which is an effectuation of the Warsaw Convention system with a $100,000 limitation, and "solution two," a Montreal type system with a $75,000 limitation. Of course, as between the two, the Panel of Experts prefers number two, for the very learned and impartial reason that the limitation is $75,000 instead of $100,000.

And at the closed meeting, with very little respect, it seems to me, for the intelligence of the American passengers and their lawyers, the Panel of Experts decides it will eliminate from the new convention which it will enact and which will slide through the Senate of the United States without trouble, it will eliminate the notice requirement! I would really suggest to the Panel of Experts, and I have made this suggestion many

[3] Lisi v. Alitalia—Linee Aeree Italiane S.p.A., 370 F.2d 508 (2d Cir. 1966), *cert. granted*, 387 U.S. 901 (1967).

times and I guess it has been received with some amusement, that their time would be better spent if they would invite, even into the city where the meetings are being held, a representative of the plaintiffs' bar, not to attend the meetings along with the distinguished representatives of the insurers and the airlines, but only in the evening after cocktails, to spend ten minutes listening to what went on during the day and make a few comments, I think the years of expensive effort would be saved. I really am appalled by what Sir William called "the brilliant report of ICAO experts."

Since this is my only formal opportunity to make a few comments, and since Sir William distinguished me sort of in absentia last night by talking about what I said in London without giving me credit for it, I would like to comment on a few minor points that he made.

It is not true that the average recovery in the United States in airline cases is $38,000. I said this in London, I say it here. I have personally documented for the State Department my own knowledge of many of these cases, and this material on its face shows that the figures supplied, apparently by the airlines, to the CAB or ICAO are wrong. There are more cases in my own list than are included in the entire survey from which the $38,000 statistic is derived.

Looking only at those cases that I have personal knowledge of over the last seven or eight years, the average recovery that I come up with, Warsaw and non-Warsaw combined is about $150,000, and the figure is going up. So, the $38,000 figure which is used so prominently by Sir William and John Stephen, the distinguished general counsel of ATA, is a falacious figure with no substance or basis whatsoever and I would like to have an opportunity to examine or cross-examine the sources of this information.

The so-called "customary attorney's fee," Sir William, of fifty percent does not exist. I have not seen a fifty percent contingent fee in fifteen years and I do not remember any airline case where there has been a fifty percent contingent fee. I suppose if you had to depict a norm throughout the United States, I guess you would have to say the fee more often than not in negligence cases generally where they are handled on a contingent fee, the fee is usually thirty-three and one-third percent. In large cases, including particularly airline cases, I would say the fee ranges generally between twenty-five and thirty-three and one-third percent. And that twenty-five or thirty-three and one-third percent usually includes a fee, not only for the attorney who is in personal contact with the passenger or his family, but the specialist, the aviation counsel, who spends a great deal of time and a great deal of money, I might say, in the preparation of these difficult cases.

And I would suggest to you, Sir William, and to others who also like to talk about the contingent fee, that the test is not how much the lawyers get, but the test ought to be the net recovery to the passenger or to his family after the unfortunate accident. And it is on that basis that I have always compared our American system with other systems.

One other point, I know you said it in jest, but "one hundred thousand dollars—Is any corpse worth that?" In the Piedmont Airlines accident in North Carolina just a few weeks ago, a young doctor was killed, and his

widow retained me. He was, I think, forty-two years old. He left a widow who was younger than he and four children, the youngest of whom was two. I think the main difference between your approach and my approach is the fact that I have spoken several times since that accident with the widow of that young doctor, the mother of these four young children, and I say to you in all sincerety that your reference was not appropriate. If you think in terms of puting your question to that lady, and she is but one of some eighty in that accident, with those responsibilities, you will agree with me.

In short, I would like to see a system of free liability without artificial limitations of damages, based upon fault and not based upon absolute liability. Time is such that I have not been able to get into the concept of absolute liability. I think there is something to be said for it—something to be said against it. The trouble with talking about absolute liability is you must talk about it in the context of what comes with it, and time has not permitted me to say much about that.

I would urge upon the international aviation law community consideration of the *real* problems where the Panel of Experts can be of service.