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## SESSION TWO

### RISK IN THE AIR AND THE MYTH OF FAULT

BY PETER H. SAND†

#### I. INTRODUCTION

LET ME START with a story which, though related to my current teaching assignment in Africa, is certainly quite unrelated to our present subject.

There is an ancient legal custom in Ethiopia, which is in theory abolished by the new codes, but which you can still observe in operation in many country villages: When a crime or a tort has been committed for which no culprit can be found, the village chief may call the entire population for a hearing called "*afersata*." All the villagers abandon their work and, for a day or two, gather under the judgment-tree for a public inquisition during which everybody is questioned. If, at the end of the meeting, no culprit has been found, the community as a whole shares the damage and compensates the victim.

This, as I said, is a very ancient custom. Life is beginning to change in the Ethiopian village, too; and I personally know of one village chief who faces a serious financial problem every year. With a very backward tax system on the one hand, and growing expenses for the village school, roads, water supply and sanitation on the other, he winds up with a chronic deficit in the village budget. So what does he do? Every year at the beginning of the rainy season, he announces that the village treasury has been stolen by an unknown thief. An "*afersata*" is called; the day of inquisition passes, with no culprit found; — and as soon as the sun sets, the villagers get up from under the tree and grudgingly pay their share for the "loss," to cover the community deficit. Mind you, none of them is fooling himself, and they all know perfectly well that there just is no individual "culprit" for this "damage." But they prefer to look for a wrong-doer, because that is the way it was always done, and that is the law as they know it.

This African story, I repeat, is quite unrelated to my present subject—except to show, perhaps, the tenacity with which some people cling to a legal institution long after it ceased to fit the social and economic conditions of the jet age.

This brings me to my subject: *viz*, the venerable dogma of "fault liability" in air law, and the allegedly radical departure from the dogma in the Montreal Agreement of May 1966.

To begin with, it is not quite correct to say that the Montreal Agreement has "abandoned" the concept of fault in favor of "absolute liability." True, the airlines have waived their defenses, up to the new limits of

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liability: but *above* these limits they remain free to raise the old "no-fault" excuse, requiring the plaintiff to prove either negligence (in accidents not covered by the Warsaw Convention) or "wilful misconduct," the aggravated negligence of Article 25 of the Convention. This practically amounts to what is called a "two-level system of liability" in the jargon of traffic accident compensation plans:<sup>1</sup> namely, automatic but limited compensation to all victims, plus unlimited compensation to victims who can establish an aggravated-fault basis for recovery.

The issue here, therefore, is *not* "fault liability vs. strict liability." The question now before us rather is: Does the "two-level system of liability" set up by the Montreal Agreement take a rational approach to contemporary air accident law, and does it offer a realistic basis for a new agreement in the future—for a step forward from the Warsaw Convention?

It is indeed difficult to see what should be so radical or "revolutionary" about this new system. Those who call it revolutionary presumably start from one or several of the following three premises: from the old Warsaw Convention of 1929-1955; or from the actual compensation practice of air carriers prior to the Montreal Agreement; or from contemporary legal theory regarding accident compensation. (I deliberately omit those critics who start from the simple premise that the system is different from American law, for that does not strike me as a very rational approach to international agreements).

Here, then, are what I consider as the three main areas for discussion of the new liability system, and—in order to simplify matters for the purpose of disagreement—here are my own positions:

1. Is the two-level liability system of the Montreal Agreement radically out of step with the original Warsaw Convention? I submit that it is not.
2. Is the two-level system radically out of step with current practice in aviation claims settlement and insurance? I submit that it is not.
3. Is this new system radically out of step with contemporary legal thinking, both here and abroad, in the field of accident compensation in general and automobile plans in particular? Again I submit that it is not, and I shall now proceed to reformulate and to illustrate my three contentions.

## II. QUESTION ONE

Question No. 1: Can the new system of liability be fitted in the framework of the Warsaw Convention as it was conceived thirty-eight years ago and as it was handed down to us?

Sir William Hildred has compared the Convention to an old English country mansion, suggesting that instead of rebuilding it entirely, it could well be made more functional by appropriate modifications. Yet, before we begin to tamper with parts of the Convention, such as the system of liability, we have to ask the architect's question: Can this particular part be modified or replaced without damage, or will the whole structure collapse? In order to determine whether or not Article 20 is a "structural wall" of the Convention, we therefore must take a look at its original plan.

<sup>1</sup> W. BLUM & H. KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 36-39 (1965); Blum & Kalven, *Public Law Perspectives on a Private Law Problem: Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964); see further discussion *infra*, note 31.

This, I am afraid, requires some historical investigation, and I have to take you at least as far back as the roaring twenties, and at least as far away as Paris. For it was Paris where the CITEJA (International Committee of Air Law Experts) was founded<sup>2</sup> and where it had its headquarters; and Paris, *not* Warsaw, was the birthplace of most of the legal concepts that have emerged from this Convention to puzzle posterity. French Civil Law not only provided the only common language for the draftsmen, it also dominated the kind of legal reasoning in which most of them had been brought up. A living incarnation of this undisputed French predominance was Georges Ripert, the chairman of the Warsaw Conference, and Dean of the Faculty of Law in Paris.

There are cases where the personality of a single man, his individual opinions and prejudices, can offer more insight into a legal theory than abstract analysis. I have come to the conclusion that the best key to the "Warsaw system" of liability is Georges Ripert<sup>3</sup> and *his* concept of fault, which I now propose to consider against the background of French law at the time when the Warsaw Convention was drafted.

This, I may say, is not at all a strange and inaccessible field for American lawyers today: there are excellent books in English available on this subject, to which I only have to add some related footnotes. I am referring, in particular, to Professor Lawson's *Negligence in the Civil Law*,<sup>4</sup> and to Professor von Mehren's *Civil Law System*, which contains a comprehensive chapter on the French legal system's reactions to the Industrial Revolution and to mechanized means of transportation.<sup>5</sup> To these studies by competent Anglo-American observers we may now add the masterly translations of French treatises published by the Louisiana State Law Institute. It is a rather helpful coincidence that the first major work thus translated into English is the classic *Treatise on the Civil Law* by Planiol and Ripert—our man Ripert, whose hand is quite unmistakable in the chapter dealing with *fault*.<sup>6</sup>

The French concept of fault is laid down in Article 1382, probably one of the most frequently quoted articles of the Napoleonic Code of 1804: "Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it." While the principle of liability based on individual fault can be traced to the *Lex Aquilia* of Roman law, two factors contributed to entrenching it as a "dogma" in French Civil Law; the political ideas of the French revolution, and the economic ideas of *laissez-faire*—both promoting a concept of individual freedom which found its necessary correlative in individual responsibility. When the Industrial Revolution generated new hazards, which in France first wrought judicial exceptions from the dogma as late as 1896,<sup>7</sup> these exceptions were

<sup>2</sup> *Comité International Technique d'Experts Juridiques Aériens*, established by the "First International Conference on Private Air Law" (Paris 1925), and wholly responsible for the drafting of the Warsaw Convention. See Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. AIR L. & COM. 27 (1932); Wilberforce, *The International Technical Committee of Experts in Air Law*, 1 INT'L L.Q. 498 (1947).

<sup>3</sup> On the personal influence of French scholars in the pre-war air law conferences, see Sand, *The International Unification of Air Law*, 30 LAW & CONTEMP. PROB. 400, 424 (1965).

<sup>4</sup> F. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* (1950).

<sup>5</sup> A. VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW* 367-414 (1957).

<sup>6</sup> 2 M. PLANIOL & G. RIPERT, *TREATISE ON THE CIVIL LAW*, Pt. 1, 463-535 (1959) (translation from 11th ed. 1939).

<sup>7</sup> See F. LAWSON, *supra* note 4, at 46-50.

rationalized by the *Cour de Cassation* by means of a "presumption of fault" for accidents caused by things under one's care. There was a strong current of opinion favoring a new kind of liability "for the risk created;" but by then the fault dogma was too deeply rooted in French scholarly thinking to be eradicated.<sup>8</sup> Instead, the conservative reaction against strict liability gained momentum after the publication of a book entitled *The Moral Rule in Civil Obligations*. The author was Georges Ripert, and the second, most forceful edition of the book appeared in 1927<sup>9</sup>—during the drafting stage of the Warsaw Convention.

To Ripert, the judge-invented "presumption of fault"—subsequently re-christened "presumption of liability,"<sup>10</sup> which his opponents had interpreted as a first step towards a general theory of risk, became the magic device through which the alarming progress of strict liability could be contained within the existing French doctrine of fault. Fault was to be the basis of all liability; wherever a necessity for strict liability arose, it was explained away as a case of "presumed fault," sometimes "irrefutably presumed" or even distinguished as an "obligation . . . not based on the idea of liability" at all.<sup>11</sup>

Ripert's dogmatic insistence on fault as the basis for both delictual and contractual liability prevailed in France,<sup>12</sup> at least until most recently, when a new vigorous campaign against "the myth of fault" was launched by Professor André Tunc.<sup>13</sup> But even the more conservative representatives of French legal scholarship today admit that the concept of "presumed fault" is merely a doctrinal cover for admitting certain inevitable instances of strict liability.<sup>14</sup>

The outcome of the Warsaw conference was a personal victory for Ripert, and he so interpreted it.<sup>15</sup> The "presumption" of Article 20, in theory at least, preserved his cherished fiction of a brooding omnipresence of fault in the skies.

The "demonstration effect" of the Convention was such that even those national legislatures which had previously imposed strict liability on air

<sup>8</sup> F. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 59-60 (1953) points out a parallel reaction of German legal scholars to strict liability "as something statutory and abnormal which did not conform to the general principle of no liability without fault: it was something that Parliament in its wisdom had chosen to create, but for which the jurists would take no responsibility." Despite the subsequent acceptance (due to considerable legislative expansion) of strict liability in Germany, there still is a distinct doctrinal uneasiness about it; see J. ESSER, GRUNDLAGEN UND ENTWICKLUNG DER GEFAEHRDUNGSHAFTUNG (1941), and RINCK, GEFAEHRDUNGSHAFTUNG (1959).

<sup>9</sup> G. RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES (2d ed. 1927).

<sup>10</sup> *Jand'heur v. Les Galeries Belfortaises*, *Cour de Cassation* (Chambres Réunies), [1930] D.P. I. 57; reprinted in F. LAWSON, *supra* note 4, at 249, along with the comments of leading French scholars including Ripert (at 271).

<sup>11</sup> M. PLANIOL & G. RIPERT, *supra* note 6, at 467.

<sup>12</sup> Ever since its decision of 21 November 1911 (SIREY 1912.1.73), the *Cour de Cassation* has considered the carrier of passengers to be under a contractual obligation of safe carriage, "in order to create a system of improved protection for accident victims." 1 H. MAZEAUD & A. TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE 196 (6th ed. 1965). Although the passenger thus is not required to prove the carrier's fault, the majority of French writers interpret this system, again, as a "presumption of fault." See L. CONSTANTINESCO, INEXÉCUTION ET FAUTE CONTRACTUELLE EN DROIT COMPARÉ: DROITS FRANÇAIS, ALLEMAND, ANGLAIS 228 (1960).

<sup>13</sup> A. TUNC, LA SECURITE ROUTIERE 30 (1966).

<sup>14</sup> Marty, *L'expérience française en matière de responsabilité civile et les enseignements du Droit comparé*, 2 MELANGES MAURY 173, 176 (1960).

<sup>15</sup> See Ripert, *La Convention de Varsovie du 12 Octobre 1929 et l'unification du droit privé aérien*, 57 J. DU DROIT INTERNATIONAL 94 (1930); and Ripert, *L'unification du droit aérien*, 1 REVUE GENERALE DE DROIT AERIEN 251 (1932).

carriers (*i.e.*, Germany) eventually receded to the system of "presumed fault."<sup>16</sup> Yet the practical effects of this alleged "fault system" on the carriers' legal position were surprisingly insignificant. It soon became clear that in cases involving damages not exceeding the Warsaw limits, carriers rarely tried to exonerate themselves. What developed was in fact a "two-level system of liability:" Below the limits, carriers used to compensate victims without even raising the question of fault—while *above* the limits they used to fight, either by direct rebuttal of the presumption *via* Article 20, or by reliance on Article 25 (requiring the plaintiff to prove aggravated fault).

From an "architectural" point of view, then, the "presumption of fault" was *not* an essential structural part of the Warsaw Convention, but rather an element of contemporary legal style underneath which there emerges a different, though by no means unfamiliar, structure. The two-level system was the "true rule" of the Warsaw Convention, as opposed to the "invoked rule" of presumed fault." From this point of view, the liability system of the Montreal Agreement hardly looks new, let alone revolutionary. It merely uses plain language where the Warsaw Convention had hesitated to say what it really meant, largely out of deference to the then dominating French doctrine. The reasons for such linguistic precaution have disappeared in the meantime, following the decline of French leadership in the formulation of international air law, and the rise of English as the new *lingua franca* in this field. It may be hoped that the new plain language of the Montreal Agreement will not again be obscured by yet another dogma of "fault"—this time perhaps out of deference to the now dominating American doctrine.

### III. QUESTION TWO

Question No. 2: Does the new system of liability established by the Montreal Agreement adequately take into account current practices and trends in aviation accident compensation?

This definitely calls for some "fact research in law," as Nussbaum called it.<sup>17</sup> For while it may be useful to compare—in the ICAO fashion—the statutory provisions on air carriers' liability in different countries, national legislation does not give the total picture. The effective rights and remedies of accident victims do not depend on legislation alone: they are also affected by the airlines' day-to-day practices of claims settlement and insurance.

The first group of fact situations where insurance has profoundly modified the position of air accident victims arises in those European states where air passengers benefit from a group accident insurance financed, either voluntarily or under government regulations, by the carrier. I have described those systems elsewhere,<sup>18</sup> and at this point only wish

<sup>16</sup> Compare the German aviation acts of 1922 and 1943, as amended.

<sup>17</sup> The terms "true rule vs. rule invoked" have been used by A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951) to contrast the strict liability actually applied by American courts with the "negligence language" used to rationalize its application.

<sup>18</sup> Nussbaum, *Fact Research in Law*, 40 COLUM. L. REV. 189 (1940).

<sup>19</sup> Sand, *Limitation of Liability and Passengers' Accident Compensation Under the Warsaw Convention*, 11 AM. J. COMP. L. 21 (1962), reprinted in 28 J. AIR L. & COM. 260 (1962); see also Sand, *Die USA und das Haager Protokoll: Zum Plan einer gesetzlichen Fluggastversicherung*, 12 ZEITSCHRIFT FUER LUFTRECHT UND WELTRAUMRECHTSFRAGEN 12 (1963).

to stress one essential element of the typical European "automatic insurance plan:" It permits recovery on the basis of proved damages regardless of fault *up to a certain limit*—while *above* this limit the plaintiff is free to resort to the ordinary liability action based on fault, in which case he will *not* be allowed to cumulate damages and collateral insurance benefits.<sup>20</sup> From the victim's point of view, the effect of this automatic insurance scheme is exactly the same as under a "two-level system of liability:" guaranteed recovery regardless of fault, up to a limit—and potential recovery based on fault, above the limit.

The second group of situations where the statutory scheme is modified by compensation practices concerns the Soviet Union and those countries (such as Bulgaria and Rumania) which closely follow the Soviet system. A superficial reading of the Soviet Air Code<sup>21</sup> creates the impression that under Soviet law air carriers are under strict liability to passengers, with no maximum limits whatever. In practice, however, Soviet courts always limit the victim's compensation to the maximum amounts provided under the Soviet social security scheme;<sup>22</sup> more precisely, to the maximum amounts that would be due to an employee of the very enterprise which is liable for the accident.<sup>23</sup>

Recovery in excess of these limits is granted only in cases of criminal negligence.<sup>24</sup> The practical result of this Soviet practice, then, also is a "two-level system:" compensation regardless of fault up to a certain limit—and possible additional compensation based on aggravated fault.

The third and last group of situations where "the law in the books" does not accurately reflect the reality of air accident compensation includes the United States. The theory is that air carriers in this country are liable only if they are at fault in an accident. But what happens in practice? If air passenger X can prove that he suffered damages not exceeding \$500, he will almost certainly be refunded by the carrier without any questions (I am told that most airlines authorize even their lowest sales agents to pay immediate compensation up to that "petty" amount). If his proved damages are higher, say \$2000, he may have to go somewhat higher up in the corporate echelons of the airline to get his compensation, but I am quite sure that he will still get it without a debate on fault, and even if the accident clearly was due to some fortuitous event. *Above* that category, the amounts of compensation become negotiable, and there inevitably comes a point where the airline finally says: "No—*that* amount we shall not pay you unless you prove our fault." Where exactly this

<sup>20</sup> This is the rule (*pro tanto* deduction) under the German, Austrian and Swiss "automatic insurance" plans. The "*assurance automatique individuelle*" currently operative in France, the Netherlands and Japan is substantially different, since passengers who wish to take advantage of the insurance benefits are required to sign a waiver of all liability claims against the carrier; cf. Nishigori, *Passengers' Accident Compensation Schemes Under the Warsaw Convention*, 62 *et seq.* (McGill University Thesis 1966).

<sup>21</sup> Effective 1 January 1962; for an English translation see Cooper, *Air Code of the U.S.S.R.*, 31 J. AIR L. & COM. 22 (1965).

<sup>22</sup> 1 V. GSOVSKI, *SOVIET CIVIL LAW* 543 (1948); see also Sand, *Die Entwicklung des Luftfabrtrechts in der Sowjetunion*, 10 OSTEUROPA RECHT 157, 185 (1964), with an English summary at 206.

<sup>23</sup> Following a decision by the Supreme Court of the Russian Socialist Republic of 17 January 1927; see Holman & Spinner, *Bases of Liability for Tortious Injury in Soviet Law*, 22 IOWA L. REV. 41 (1936). 2 V. GSOVSKI & K. GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE* 1180 (1959).

<sup>24</sup> V. GSOVSKI, *supra* note 22, at 545; V. GSOVSKI & K. GRZYBOWSKI, *supra* note 23.

line is drawn, depends on a number of factual circumstances. But there can be no doubt that airlines in their compensation practice draw a line between the amounts they are prepared to pay without arguing about fault, and the amounts they will only pay if they are found to be at fault. It is the line between settlement and litigation.

We all know that the so-called "*ex-gratia* settlements" below that line are not granted as a matter of grace or benevolence. The strongest incentive for the airlines to compensate passengers without regard to fault is, of course, their fear of adverse publicity. All litigation that gets into the news is bad for the air carrier: court decisions *against* the airline will hurt its "safety image," court decisions *in favor* of the airline will hurt its corporate "friendly image" with the public. As I used to tell some of my students at the McGill Institute of Air and Space Law, who aspired to airline careers: If an airline ever hires you as its lawyer, your job will not be to win victories over widows and orphans in court—your job will be to keep the courts off the company's neck! The net result of this peculiar psychological pressure is an extremely high settlement rate (my guess is somewhere near eighty percent) and a system of liability which comes surprisingly close to the "two-level" model which I have mentioned repeatedly. Below a certain self-imposed limit, carriers usually grant compensation irrespective of fault (a kind of *de facto* strict liability)—while above the limit they will not grant compensation unless the victim can establish fault.

Between such a *de facto* system and *de jure* strict liability there is, however, an important (and, it seems to me, undesirable) difference: This compensation system operates *praeter legem*, outside the formal control of law and courts, handled with wide discretion by claims agents acting for airlines and insurance companies.

When we now compare the actual compensation process as it operates in the three groups selected (automatic insurance in Western Europe, social security in Soviet Russia and *ex gratia* settlements in the United States), there emerges a curiously uniform pattern. All three systems arrive at a dichotomy in practice, which is nowhere reflected in the formal law. A distinct break separates the level of calculable "standardized" compensation—regardless of fault—from the second level where additional "individualized" compensation may be obtained upon proof of fault or aggravated fault. The fact that "two-level systems" thus operate in so diverse legal environments as Western Europe, Soviet Russia and the United States, would seem to suggest that the system established by the Montreal Agreement is realistic.

#### IV. QUESTION THREE

Question No. 3: Can a two-level system of liability be upheld in the light of contemporary legal theory regarding accident compensation? (The purpose of this final chapter is to place the Montreal Agreement in a different context; *viz.*, the current discussion on accident compensation in general, and automobile plans in particular.)

It seems to me that a very significant change has recently taken place in this field. Most of the older, pre-war plans (such as the Columbia Plan of the early thirties) took a rather radical New Deal approach. Their



authors were greatly impressed with the novelty of industrial accidents and motorization, and their position was usually one of deliberate antithesis to traditional tort law. Contemporary plans (such as the Saskatchewan scheme,<sup>25</sup> the proposals by Keeton and O'Connell,<sup>26</sup> by Blum and Kalven,<sup>27</sup> or by Tunc in France<sup>28</sup>) still regard the traditional system of pure fault liability as inadequate, but they now recognize certain salient features of the fault concept. For this "compromise attitude" they have come under attack themselves, from more radical critics like Calabresi.<sup>29</sup> Yet the discussion has ceased to follow the simple antithesis line of "old fault liability vs. new strict liability." The psychological arguments in favor of fault are now taken more seriously; in addition to the primary goal of compensating the victim, new sanctions are sought for the exceptional "blameworthy conduct,"<sup>30</sup> "to satisfy indignation,"<sup>31</sup> and even Calabresi's own "general deterrence" is largely a psychological substitute for the recognized "preventive" function of fault.

A rather complex synthesis of strict liability and fault liability may be the most likely result of these trends. As Blum and Kalven put it:

[T]he dominant view among proponents of compensation plans is that the plans should be what might be called "two-level" . . . . The new view is to provide an underlying plan that will compensate *all* victims but only up to some ceiling level of awards; and to leave the existing fault system alive while abolishing the collateral benefits rule, under which welfare payments could not be deducted from damages in tort suits.<sup>32</sup>

I submit that the Montreal Agreement satisfies these theoretical postulates—except for two points that may deserve further deliberation: One is the collateral benefits rule mentioned by Blum and Kalven, which has also been subjected to very critical analysis in a recent comparative study by Professor Fleming;<sup>33</sup> let me repeat that in the German-Swiss-Austrian type of automatic air accident insurance the rule is explicitly discarded and the insurance awards *are* taken into account if it comes to liability claims—which seems sensible since it is the carrier who provided the insurance in the first place. The other point concerns the type of fault to be retained on the "second level," *i.e.*, above the limits. Even if this is to remain an exceptional remedy, justifiable only in case of aggravated, negligence—plus fault (in the sense of gross "criminal negligence," as suggested by Professor Ehrenzweig<sup>34</sup>), it is arguable whether it ought to be as narrowly circumscribed as Article 25 in the Warsaw/Hague language. That article has aptly been described as "the result and the starting point of a comedy

<sup>25</sup> On the implications for tort law see GREGORY & KALVEN, *CASES ON TORTS* 757-60 (1959).

<sup>26</sup> R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 273 (1965).

<sup>27</sup> W. BLUM & H. KALVEN, *supra* note 1.

<sup>28</sup> A. TUNC, *supra* note 13, and Tunc, *Traffic Accident Compensation in France: The Present Law and a Controversial Proposal*, 79 HARV. L. REV. 1409 (1966).

<sup>29</sup> Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965).

<sup>30</sup> A. EHRENZWEIG, *supra* note 17, as reprinted in 54 CALIF. L. REV. 1422, 1476 (1966).

<sup>31</sup> Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239, 270-72 (1967).

<sup>32</sup> *Id.* at 266-67.

<sup>33</sup> Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966).

<sup>34</sup> A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954).

of errors"<sup>35</sup>—besides having been the subject of an intolerable amount of *quid pro quo* trading<sup>36</sup>—and should not tie the hands of future draftsmen.

Having said that much about the role of fault on the individualized "second level" of compensation, let me emphasize again that the *principal* merit of the Montreal Agreement is its outright acceptance of standardized automatic compensation irrespective of fault on the "first level," which comprises the great bulk of air accidents. It is here where the present system was in need of substantial improvement. I can see the point in a highly specialized lawyer fighting a top-damage case of gross negligence, on a reasonable contingent-fee basis if need be. But I can see absolutely no point in tort litigation over the average aviation accident damage. The social and individual losses caused by an air crash are bad enough by themselves—they do not have to be multiplied by the unnecessary costs of a litigation process that burdens the victims, the airlines and the courts, does not contribute anything to the investigation and prevention of aircraft accidents,<sup>37</sup> and benefits no one except a parasitic section of the legal profession.

"The tremendous wastes of human energy and resources which are involved in the existing tort solution"<sup>38</sup>—this is what reminded me of the African story I told you in the beginning. When I hear somebody arguing the "free fault" dogma for aviation accidents, I think of how that Ethiopian village holds an "*afersata*" investigation in order to pay for its community expenses, and I forget to smile. Just remember those African villagers sitting under their tree for a full working-day, stubbornly pretending to find a culprit for a tort which they know there is really no one to blame. In a recent study, Professor Tunc of Paris came to the devastating conclusion that neither the French nor the English law of traffic accident compensation today could seriously be offered as a model to the new African states that are currently drafting their own laws.<sup>39</sup> I do not know whether anyone among you is prepared to offer them the present American model instead. I do believe, however, that the two-level liability, which is at the heart of the Montreal Agreement, could be worked into a viable new system that can serve the same model function in the future as the old Warsaw Convention has in the past.

<sup>35</sup> H. DRION, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 170 (1954).

<sup>36</sup> On the 1955 bargaining see Calkins, *Hiking the Limits of Liability at The Hague*, 56 *PROCEEDING AM. SOC'Y INT'L L.* 120 (1962).

<sup>37</sup> On the contrary, there are strong indications that the vital expediency and honesty of technical aircraft accident investigations tends to suffer from the prospect of legal implications. See *Aircraft Accident Investigations: A Study in Comparative Administrative Law*, McGill University Joint Research Project No. 4 (Sand ed. 1964).

<sup>38</sup> Lang, *Compensation of Victims: A Pious and Misleading Platitude*, 54 *CALIF. L. REV.* 1559 (1966); cf. Jean Carbonnier (as quoted by TUNC, *supra* note 13: "Un immense gaspillage d'intelligence et de temps, c'est peut-être le bilan qu'on dressera un jour de nôtre célèbre jurisprudence.")

<sup>39</sup> Tunc, *The Twentieth Century Development and Function of the Law of Torts in France*, 14 *INT'L & COMP. L.Q.* 1089, 1102 (1965).