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THE MONTREAL AGREEMENT AND ENTERPRISE LIABILITY

BY JOSEPH N. ONEK†

THE MONTREAL AGREEMENT of 1966, by instituting a limited system of absolute liability, aroused the ire of many aviation lawyers. It should also arouse the interest of many tort scholars. For years tort scholars have debated the merit of non-fault liability with little opportunity to study the workings of such a system in a major industry. The Montreal Agreement should provide them with new arguments and new data.

I would like to speak briefly about enterprise liability. Enterprise liability received its initial impetus from the failure of the traditional fault system to ensure adequate compensation in an inexpensive manner. More recently, enterprise liability has also received support from sophisticated theories of resource allocation.

In most academic circles I would be accused of flogging a dead horse if I discussed the inadequacies of the traditional fault system. But it appears that among aviation lawyers the traditional system—like Pegasus—is a high flying horse indeed. I would, therefore, like to say a few words about the defects of the fault system.

The most obvious defect is that the fault system does not ensure adequate compensation to many accident victims. Negligent victims may be barred from any recovery even though their negligence was slight and their damages great.¹ Their families, who are completely without fault, also recover nothing. And even in aviation accidents, where virtually all the victims are without fault, victims may get no recovery or an insufficient settlement.

In international aviation the problem of insufficient recoveries has probably assumed greater significance in recent years. There was a time when international flights were the province only of the wealthy. These people generally had considerable awareness of financial matters and were likely to have adequate life or trip insurance. Today many people in lower income brackets take international flights. Their deaths would cause great economic hardship to their families, yet these travelers are less likely to have enough life or trip insurance.

The inadequacy of the compensation is compounded by the fact that the fault system has proved to be extremely unwieldly and extremely expensive to administer. Trials are long and lawyers' fees high. This is

† LL.B., Yale; currently clerk to Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia. I would like to acknowledge my debt to Professor Guido Calabresi of Yale Law School. It is no exaggeration to say that any novel ideas in this article are his and any errors mine.

¹ It is true that juries often ignore contributory negligence, or merely scale down the award according to the relative negligence of the victim. But this is a haphazard process and does not ensure adequate compensation. Nor does the system of comparative negligence ensure adequate compensation.

particularly true in a field such as aviation where proof of fault often requires a highly technical presentation. Many foreign observers, including Sir William Hildred,² express horror at the size of the fees collected by American lawyers. For my part, I have a feeling that under the present system the American lawyers earn every penny they get in most cases. But any system which requires that lawyers obtain such high fees is clearly in need of reform.

These faults of the fault system have been fairly widely publicized. They are commonplace to recent generations of law students. But there is another defect of the fault system which is less widely known. It is simply that the fault system is not a good one for rooting out fault. The case-by-case method grossly distorts our picture of what causes accident costs. In each case, we tend to look for the unique feature which caused the *accident*, but we ignore the underlying features which may have contributed most to the *costs* of the accident. Thus in automobile accidents we investigate how much the driver had to drink and whether he was going over the speed limit, but we ignore the fact that the major damage may have been caused by the lack of a collapsible steering wheel or a collapsible front section. We have had thousands of automobile accident trials, tried by able members of the bar, yet these trials did not lead to the introduction of the collapsible steering wheel. The fault system is not geared to correcting underlying defects which exist throughout an industry.³ And the more complex the technology, the greater the significance of these underlying defects, as compared to the human errors we term negligence.

Finally, as technology becomes more complex, the whole concept of fault becomes inappropriate. An airplane design is the result of the work of literally thousands of people. If, in a hard-to-foresee contingency, the design proves inadequate, can we really say that a single person or even the company as a whole is at fault in some moral sense?

The economic inadequacies of the fault system provided the initial impetus for enterprise liability. Recently, however, tort scholars have pointed out that enterprise liability is also justified in terms of a rational allocation of resources and meaningful expression of consumer preferences.⁴ Accidents and injuries are part of the costs of any activity. These accident costs, like the more commonly considered costs of production, must be reflected in the market price of the activities which engender them if the consumer is able to make meaningful market decisions.

The impact on safety of making activities reflect their accident costs is clear. If an activity must pay for its accident costs in the same way it pays for other costs, it will constantly be under market pressure to reduce these costs by increasing safety. This deterrence of accident costs through the market mechanism has been aptly termed "general deterrence," in contrast to the "specific deterrence" of accident costs through collective

² Secretary General of the International Air Transport Association, 1946-1966. Sir William expressed his views at the opening session of the conference.

³ A company will rarely be found negligent on the basis of a defect which exists throughout the industry, even if the standards for the industry as a whole are too low.

⁴ See, e.g., Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961); Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 *HARV. L. REV.* 713 (1965).

law-making.⁵ To the extent that an activity is relieved of responsibility for accident costs, general deterrence is diminished.

The activity we are concerned with here is flying. General deterrence will be advanced if this activity bears the accident costs it engenders. But, since both passengers and airlines participate in this activity, general deterrence does not tell us which of these two groups should bear the costs. In fact, economists have pointed out that, in theory, it does not matter whether the costs of aviation accidents are initially borne by the airlines or the passengers.⁶ This is because the airline and the passengers stand in a bargaining relationship to each other. If the accident costs are placed on the airline, it will charge more for tickets in order to purchase liability insurance or self-insure. If the costs are placed on the passengers, they will wish to take out insurance and, in theory, at least, will demand that airline prices be lowered accordingly. Either way the same market pressure for greater safety will ultimately reach the airline.

But several practical considerations indicate that it is better to place the costs on the airline rather than on the passengers. First the passenger is likely to under-estimate potential accident costs and may not demand the lower prices required to cover his insurance costs.⁷ Consequently, the full cost of accidents will not be shifted back to the airline and general deterrence will be diminished. The airline on the other hand, will likely be able to make a more accurate assessment of accident costs. Second, it is cheaper for the airline to obtain insurance than for the passengers individually to insure. Thus, it is more efficient to put the costs on the airline. Finally, it is possible that if all the accident costs were initially placed on the passengers, the government, for reasons of social policy, might step in to defray the costs. This, of course, would remove the costs from the activity of flying and reduce the economic pressure for safety. The removal (externalization) of accident costs defeats the purposes of general deterrence.

In short, as between airlines and passengers, the airlines should probably bear the costs of aviation accidents. Since the Montreal Agreement only deals with these two parties, I need go no further. I would like to emphasize, however, that under a full-fledged system of enterprise liability a large percentage of aviation accident costs might well be placed on other participants in the activity of flying, *e.g.*, manufacturers and air traffic control. Enterprise liability does not single out the airlines. It merely requires that the allocation of accident costs among the various parties be based on who can most accurately estimate these costs and most cheaply avoid them rather than on who is negligent. The object is to allocate accident costs in such a way as to deter *any* conduct which leads to accidents, not just negligent conduct.

Enterprise liability, then, has two grounds of support. First it could provide more adequate compensation than the fault system and do it less expensively. But if an inexpensive system of compensation were our only

⁵ The terms are Professor Calabresi's. See, *e.g.*, Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 *YALE L.J.* 216, 221 (1965).

⁶ See, *e.g.*, Coase, *The Problem of Social Cost*, 3 *J. LAW & ECON.* 1 (1960).

⁷ Potential victims tend to under-estimate the risk of accidents because of lack of knowledge and, more important, because of psychological factors. We wish to believe that accidents only happen to the other fellow. It is significant in this regard that most drivers take out more liability insurance (*i.e.*, for an accident to the other fellow) than personal accident insurance.

goal we could best achieve it through some form of social insurance. Enterprise liability is important because it could give us something more. It would discourage accidents through economic pressure, and it would discourage all accidents, not just those caused through traditional negligence.

Of course, I am aware that economic pressure for safety is more important in some industries than others. In the automobile industry safety does not "sell." Thus economic pressure on car manufacturers is more important than economic pressure on airlines, who are already extremely safety conscious. But there is no doubt that general deterrence has a role to play even in the aviation industry.⁸

One final point. There has been some discussion at this conference about the collateral benefits rule. It has been suggested that if a plaintiff receives insurance or social security benefits, the airline's payment should be reduced accordingly. But if an airline's payments are reduced because of collateral benefits, part of the cost of aviation accidents is removed from the activity of flying.⁹ This externalization reduces general deterrence. If we are really that concerned about the plaintiff's excessive recovery we should contrive some way to permit the collateral benefits to be reduced because of the airline payments.

⁸ In particular, increased economic pressure would stimulate more extensive research into safer materials, methods, *etc.*

⁹ I am assuming that the collateral benefits derive from some source other than flight insurance. If they derive from flight insurance, no externalization takes place, since the cost of the premium is a cost of flying and no other activity. Contrast accident and life insurance premiums, which are in part a cost of flying but are chiefly a cost of myriad other activities.