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Discussion - Session Two

DISCUSSION — SESSION TWO

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CHAIRMAN GERARD DES ILES: We now solicit questions from the floor about the presentation of Professor Sand and Mr. Onek; after that we may invite comments on Mr. Stephen's able presentation at lunch.

MR. ALLAN MENDELSOHN: I address my question to both Mr. Onek and Mr. Sand. It seems to me that there is a certain disparity between your respective points of view. You, Mr. Sand, argue in favor of the two limit system and you, Mr. Onek, suggest that the second limit, that is, the gross negligence limit or the willful misconduct limit, should really be taken care of by the state. . . . I can phrase my question directly; there are many of us who wonder whether or not a one limit system might not be best, a one limit system that has a relatively high limit and that does not provide for a suit beyond. In suggesting such a system I point to the fact that under the present interim-arrangement we do have absolute liability up to that limit, and it seems to me only equitable and fair for the carrier to be subject to absolute liability up to that limit. . . . Then again, it seems only equitable and fair that he should not be required to pay in addition for anything attributable to his gross negligence or to his willful misconduct. Do you have any comments on whether or not a one-limit system with absolute liability might be superior to the two limit system?

MR. PETER SAND: Well, first of all, we should clear up one misunderstanding. We're not talking about two limits, just two *levels*, one below the limit and one above the limit. I'm not concerned with solution No. 2 of the Panel of Experts, which talks about two different limits. I'm only concerned with one limit, and as I tried to explain to you, below the limit there should be strict liability according to the agreement, and above the limit there still is some fault liability. I realize that we differ on these points. Mr. Onek has just presented his point in favor of not having any concept of fault interwoven in this system of liability, because he thinks, along with many other thinkers in the field of accident compensation, particularly Professor Calabresi, that the concept of fault has no more function today, no further function such as the prevention of accidents. . . . I tried to explain that there are . . . some reasons to retain a level of liability where fault could provide an additional basis for recovery. These have been elaborated by the writers I have quoted, Blum and Kalven particularly. . . .

I do believe that there still is a point for fault as a basis of excess recovery . . . in the exceptional case where there is something like criminal negligence. . . . The idea of "indignation" which you feel at the behavior of an airline in a particular case, I think should find some reward in our system of liability. We should be able to point to a particular type of behavior of which we disapprove, not only by criminal sanctions, but also by a type of sanctions which current tort liability can share. . . . I believe that there is a legitimate interest in singling out a certain type of behavior not only by criminal sanctions, but also by a type of sanction which would increase the airlines' liability in these particular cases. There is a question as to how you'd define this; I advocated a broader definition than the definition in the Warsaw Convention . . . namely Article 25 as amended at The Hague. I argue a wider definition, but still I don't think it should be the ordinary

tort liability, not just ordinary negligence. It should be something where you would say, "This is incredible!"

MR. JOSEPH ONEK: My position is, thinking of $75,000 as the limit, if in fact the plaintiff has only suffered $75,000 worth of damage, I don't think he should get more just because the airline has been grossly negligent. That amounts to punitive damages, and I think . . . it should be handled through some sort of criminal penalties or fines. On the other hand, if the plaintiff has suffered $150,000 in damages, I don't think that he should have to prove criminal negligence or something else to recover that. I think he should get the $150,000. . . .

CHAIRMAN DES ILES: Dr. Swart.

DR. PIETER SWART: I should like to put two questions to Mr. Sand.

My first question concerns Article 25. Personally I am very much against maintaining the possibility of breaking the limit, especially if that limit is raised substantially. However, if this possibility is to be maintained it is very important to know what the criterion will be. We should realize that Article 25, even in its original form, was meant for very exceptional cases only. Mr. Sand speaks about "criminal negligence," but I should like to know where he would draw the line.

My second question concerns the historical explanation Mr. Sand gave us in the beginning. He told us that the present system of the Convention is mainly due to the personal ideas of Ripert and should be regarded as a kind of cover for absolute liability. Now, I remember that Goedhuis, in his well known book on the Warsaw Convention, gave a somewhat different view on the matter. He mentions that in the first Air Law Conference, in Paris in 1925, the present system, based on fault, was chosen in preference to absolute liability, because aviation had not yet reached the point of perfection of railways. I have no opportunity to verify this, but if this is true, it means that the choice of fault liability was very deliberate and not just as a cover for absolute liability. It would show that fault liability was adopted on a very temporary basis only. Seen in this light we might very well switch to absolute liability now, because aviation has in the meantime reached a point of perfection almost equal to that of the railways.

PROF. SAND: There have been attempts to define "criminal" negligence both at Warsaw and subsequently at The Hague, and all we can tell from the cases, is that The Hague definition was a clear restriction on the original definition. . . . I believe that the restriction made at The Hague was excessive, and I would prefer, if you want an approximation of the definition, to return to the more ambiguous concept as it existed in the Warsaw Convention which, although it suffered subsequent different interpretations, at least offered, a broader basis. It offered in The Netherlands, *e.g.*, a concept of gross negligence . . . that was broader than the current concept of willful misconduct. . . . I really don't feel competent to offer definitions here. I just consider that the narrowing down of the definition that was done at The Hague was excessive.

As to the other point, the historical point, I believe there I really have slightly exaggerated. I was trying to present to you what I think was one of the major reasons for the adoption of a presumption of liability. I don't think it is a completely comprehensive historical explanation to say that it was *all* George Ripert. I didn't mean it in this way. What I meant is that the French legal doctrine was the most dominant force at this conference, and French legal doctrine at the time just could not accept a risk theory of liability because this . . . was just the thing that had been rejected in the contemporary discussion between French scholars. As the other view had prevailed, I was trying to show that this concept in the Warsaw conference was a mere reflection of the victory of the other opinion over the risk theory in French civil law. . . .

PROF. CARL McKENRY: I want to comment on our discussion over the entire afternoon and perhaps a little bit this morning on the question of the deter-

rent which has been referred to. . . . As the point of reference, . . . Lee Kreindler . . . you'll recall that this morning started out by dividing us into three parts. The first part was the plaintiffs' attorneys, . . . the second group was the airline insurance personnel, . . . and the third group were the bureaucrats.

In regard to the second area of airline insurance personnel, . . . I'd like to point out that I cannot agree with the idea under either system that we have a deterrent here. I say that for three major reasons. . . . I would say the three reasons are as follows. (They also differ from automobile liability in these three ways.) Number one: Any major carrier has a tremendous investment . . . also, airlines are responsible to stockholders in every one of these corporations. And, in their own enlightened self-interest every exercise of safety is normally present. Now if you say that by a recovery from the airline you're going to raise or set forth a deterrent, all it's really going to do, based on experience, is change the premium rate. But, that won't get to the pilot or to the mechanic or to whoever we may find with the manufacturer who is essentially the tort-feasor here. Now secondly, you have more regulations in this industry, through the Federal Aviation Administration and the Civil Aeronautics Board, than in any other industry I can think of . . . . Thirdly, and I think most significant, is the Railway Labor Act, . . . which limits the relationship between the company and the employees. The Pilots' and the Airline Pilots' Association, the Mechanics and Transport Workers Union, etc., have a very elaborate system of grievances. . . . Try to fire a mechanic or try to fire a pilot. The records are full of attempts based on negligence and carelessness, and they're insulated unless it's a gross negligence concept. . . . I would thus suggest that the idea of a deterrent, aside from whichever system you want to pursue, is not an effective argument. . . .

MR. ONEK: Perhaps it is true that there is not much latitude left for improving airline safety, either because of regulation or because of the airlines' current reasons for wanting safety. I'm not sure that this is true, and I'm not sure that a little prodding, whether it's by an attorney or by just higher premiums, wouldn't help the airlines perhaps in regulating not only their own conduct, their own hiring practices, but investigating what their manufactures are doing, . . . in other words, putting greater responsibility on the airlines to oversee, not merely their own activities, but the activities of all the organizations which feed into them particularly the smaller component manufacturers. If on the other hand it is true that there is nothing more to be done, and that neither a fault system nor a so-called enterprise liability system is going to lead to a greater safety record, then you still have compensation. Then, without question an absolute liability system is better than a fault system, not merely because it provides more compensation to more people, but it does so much more cheaply because it will lead to less lawyers' fees.

PROF. SAND: The argument of whether the increased insurance costs can eventually be spread, or do not have to be spread to the passenger, has, of course, been very much in this whole discussion. I believe that if we accept the fact that some *indignation factor* is to be satisfied, or is potentially to be satisfied, by the concept of fault above a certain limit, this indignation factor may benefit all of the potential passengers. I agree that it probably will not take effect except in those cases where these passengers, in addition to having been the subject of a gross negligence of the air carrier, also have suffered damages which are in excess of those limits. But, as we have heard from Mr. Kreindler, this may very well be the case even with people who are not in the millionaire category. . . . I believe it is in the interest of the passengers to take into account the potentially increased insurance costs that would exist in the case of such a second level of fault liability.

Actually, I don't see why there should be an increased insurance cost, because this has been the system. We have actually *had* fault liability above the limits of liability. Right now what has changed, and what will change, is, of course, the

amount up to which we have strict liability. It is another question whether that increase in insurance premiums which is derived from the increase of strict liability limits is to be absorbed by fares or by something like that. . . .

MR. LEE KREINDLER: I agree with Mr. McKenry's classification of the members of the audience. The trouble I have with your point of view, Mr. Onek, is that you have never lived through the experience of being face to face across a deposition table or in a court with the pilot, or the mechanic or the designer—who has caused a serious accident. There *is* a deterrent aspect to tort liability so long as it's related to fault. The people who design the 747 are largely the same people who designed the 727 and the 707. Many of those people, and I'm just thinking about a handful of accidents, have been through this process that I'm talking about, the fault liability process, in which they have had to sit across the table and answer direct questions. . . . I don't believe that anyone of them will ever make the same kind of mistake again. There may be others who'll make the mistakes, but the experience of answering for personal fault is, believe me, a memorable experience. And you, Mr. Onek, would do away with that and change the enterprise liability . * * * I do suggest you would do well to read the testimony of the particular people. I think you will be taken with the personal effect of the litigation process on individuals.

MR. ONEK: This is three years later. Your pilot that you get on trial three years later may have been recommitting this fault and the mechanic may have been on the assembly line for three years. I'm not sure that necessarily, the litigation that you're describing, is so valuable, particularly as in this country when it takes place three years later.

COL. MORTON S. JAFFE: I'd like to add a footnote to this recent discussion. I think you're both tending to overlook the whole technology of how an aircraft is developed, designed, and produced. You're overlooking the hundreds of thousands of parts and components that go into an aircraft like the 707 for example and all the subcontractors that are involved in heat-treating, for example, a part, a very small part in that aircraft. Finally you have the quality control features in the production, the final acceptance and testing by the FAA, then the quality control by the buyer or the carrier, the pilots themselves, the mechanical staffs, and all are working on these things constantly. . . . I think they are far more important . . . in insuring quality and safety in flight than the cross-examination of some poor fellow who happens to be the one who's caught across a deposition table three years after the accident that may have resulted from a defective part produced by some subcontractor. . . .

DR. RENÉ H. MANKIEWICZ: I think there was a misunderstanding with regard to two-level liability. If you have a level of $75,000, it doesn't mean that the rest is punitive damage. We are talking about the chap whose damage is $200,000; under the system of limited liability he gets $75,000 without any proof. Now, the question comes, what type of fault, if any, would permit going above it. Professor Sand has already shown the difficulty in finding that fault. * * *

The pilot is no more the commander of his aircraft; he is the continuation of the machine. If a light goes on in red, he's supposed to do this and that; and if the air traffic controller tells him something, he's told to do this without thinking because there is no time. Now, if you push the wrong button, if he understood 38 instead of 39; or on the other end of the line, if the air traffic controller pushed the wrong button, or if his machine broke down in a critical moment, who would have known it? Can you really speak about fault? Is the system really still working on the principle of personal judgment and, thereby, personal liabilities?

This I think is the difference, when you can't define the degree of fault where the second level starts. And should one not take this more realistic view? It is the same thing when you have an accident because your car went out of control. You would probably go to court and say, "Well, I had that car carefully checked

and every thousand miles I brought it back and they looked it over and all was fine. I'm not a mechanic; I know nothing." You're also supposed to react to the behavior of the other car in a certain way, and for some reason you didn't. There's nothing moral; there's no judgment of values. And in highly mechanized transportation, people are *trained* not to think but to act automatically, like a machine, because the machine can not do it yet. . . . What we call absolute liability, is no more liability; it's *responsibility* for the damage caused by the thing out of which you get your profit. Now, this principle is not acceptable at certain stages of economic and legal development; therefore it would be very difficult to get it accepted on a world-wide basis. But I think that is the basic issue. I would merely like Professor Sand to give us some more ideas as to the type of behavior that allows you to go above the limit. Would it be the answer that there is just no limit, but windfalls?

PROF. SAND: May I, just for the sake of argument, imagine that we completely rule out the idea of fault, what I've called the "second level" of fault liability on the top of the limit. If we abandon this system and accept another system where there is no second level, where the limit cannot be broken by proof of any fault, the bargaining thought which was brought into this discussion would then suggest that we probably could adopt a different limit. Wouldn't that be the case? And I think this was the point which was raised by Allan Mendelsohn in a private discussion and in an article he wrote. But a new proposal would have to be formulated: would the Conference . . . be prepared to accept a different limit, and I suppose a higher limit, if the concept of fault were completely eliminated? And I think the person whom we should ask is Lee Kreindler. . . . .

MR. KREINDLER: I would just as soon say something tomorrow when I have had a chance to talk to Professor Sand.

CHAIRMAN DES ILES: Could we move on to Mr. Brennan?

MR. P. J. BRENNAN: Mr. Chairman, just a couple of points. First of all the question of criminal negligence came up and, with great respect, I would like to suggest that there is no such thing. Either an act or an omission is a crime or it's not; and in each jurisdiction there is a criminal code and if it fits within that code, it is then a crime. But obviously what people have in mind when they use this expression is gross negligence, dol, or something like that. If we want, therefore, to take care of the punitive element we must, I think, leave it to the criminal code. . . .

The second point I'd like to make is about the reference that was made to pilots and manufacturers, engineers going through the wringer; certainly in certain circumstances, the penalty for the fault can be out of all proportion to the level of fault. This is a point I think that some people have ignored and I think that Mr. Kreindler has ignored in his analysis of this particular process. . . . Now Warsaw is not only a limitation system; it has the concept of willful misconduct which, as interpreted by American courts, it appears to me, takes care of all the plaintiff lawyer's problems or most of them. The Montreal Agreement, in turn, was based upon this concept because, remember, The Hague doesn't rule in the United States, only Warsaw. So you have the concept of Article 25 as it was written in Warsaw and not in The Hague. The Montreal Agreement . . . seems to me to offer something which is not a perfect solution in a very imperfect world. . . . We can only get solutions which would be approximate and should take care of the majority of the situations. Finally I suggest that we should build on the Montreal Agreement, modify it, and extend it.

CHAIRMAN DES ILES: Thank you very much. Mr. Caplan.

MR. HAROLD CAPLAN: Mr. Chairman, its' usual to declare an interest when you speak, so I declare a lack of interest. I have very little interest in theories of liability. The reason is purely practical; I don't have time. We deal with claims in a hundred different jurisdictions and once upon a time it used to be a relief to

know that a case was going to be governed by Warsaw. I used to think I knew how it worked; I don't know any more.

May I make first some slight observations on Mr. Sand's information and classification system. He referred to the automatic personal accident insurance system. That doesn't work, if I may say so, to my knowledge, in the way he suggests. It isn't used to offset against liability claims. Either somebody accepts the sum offered against a complete release of liability or they get nothing, and they sue for legal liability. There is only one country I know which makes provision for an offset and that is Germany. There may be others, but Germany is a perfect example because they have automatic accident insurance for the Warsaw limit. They are a party to The Hague Protocol, and they have imposed yet new limits on the domestic carriers. . . .

As a side comment on the situation in Russia; I was amazed Mr. Onek did not use this to his advantage because if a liability system is to have any deterrent value at all, which I question, then surely the next consequence would be to make it impossible for the enterprise to insure that liability, otherwise the liability is merely transmitted to the insurer and all that the enterprise suffers is perhaps increased premiums. In fact this is the case in the U.S.S.R. You can not insure the results of your own gross negligence; it is not permitted. So again there is another area we might learn something from our friends on the other side of the Iron Curtain.

My argument with a great deal of the discussion today is that even if you accept that absolute liability is or is not a desirable thing, nobody has distinguished sufficiently between what you achieve by operation of law, and what you achieve by the pseudo-special contract. It leads to quite different consequences, and I believe one ought to examine the differences carefully.

Finally I'd like to support my friends, Col. Jaffe and Mr. Brennan, in disputing the deterrent value of any liability system. I know full well the effects of individuals, designers, pilots and others facing plaintiff lawyers across the table. I know more than one case where people have had a nervous breakdown. Furthermore, I know positively that the fear of litigation and being exposed to these processes of depositions, which are very real human situations, are so real in many peoples' minds that it actually inhibits the exchange of information which is vital to the progress of air safety. Air safety is *far too important* to be left to the capricious whim of plaintiffs' lawyers who years afterwards get hold of something and tear it to bits, and they tear *people* to bits in the process. It is not their function; and I believe it is preposterous nonsense to suggest that any liability system can have a deterrent value by this means. Of course, I admit that management must take into account the possibility of increased costs of their operations, but they are already conscious of that for many other reasons. The investigation of accidents must be left to professionals. It is unfortunate that not all the plaintiff's lawyers have the skill of Mr. Kreindler and his colleagues, because I know that many times they have penetrated to a truth which has lain hidden from others. But it is too late; by the time these truths become obvious in de positions, the next generation of aircraft has been edsigned already. The pilot may have left the organization. It's the new men who need to be imbued with it. It's the training system whcih need altering, not the poor man who sits quivering on the other side of the table. . . .

CHAIRMAN DES ILES: Thank you very much indeed. Mr. Corrigan.

MR. MATTHEW J. CORRIGAN: I have a question for Prof. Sand. I'm not sure that he's contemplated all the consequences that might grow from the absolute liability concept incorporated in the Montreal Agreement. And to test this, I would ask you to assume that I am the owner of a 747 with 500 passengers on board, and I am flying at an altitude assigned to me by Air Traffic Control under an instrument flight plan. Another airliner overtakes me under circumstances in which I am not at fault, for example the other airplane overtakes my airplane

from behind. If my arithmetic is correct, I pay out of my pocket $37,500,000 and this creates in me an "indignation factor." (laughter) I just wonder how, under the absolute liability concept, you might propose to relieve that by trying to get that money back from the airplane that ran into me.

PROF. SAND: Well, there are two points I would like to answer directly before we forget them: Mr. Caplan's one point about the insurance systems and yours. Perhaps the automatic accident insurance system needs clarification. The system to which you were referring, in which a passenger has only the choice of either accepting the insurance or getting nothing at all, exists under the Air France Automatic Insurance and under the KLM Insurance; also Japan Airlines, I understand, has followed the same system. Here are three airlines which have adopted this system where they offer the passenger an alternative: either you accept the automatic insurance up to the limit or you fall back on the ordinary fault liability system and get no automatic compensation. But there are at least three countries, Germany, Austria, and Switzerland, which have the offset type of insurance. In Switzerland it's a voluntary admitted-liability system where the collateral benefits rule doesn't apply; in other words, if you have received something under this automatic payment from Swiss Air and bring another liability suit against Swiss Air, this benefit of the automatic compensation will be taken into account. The same is true under statutory systems in Western Germany and in Austria. So this is just to clarify this.

And I also think of one other point, the Russian point which you mentioned. I understand Aeroflot also has an automatic compensation system; at least this is what the code says. The code says there is an obligation on Aeroflot to have passenger accident group insurance for everybody who travels there.

As to the point you raised, the possibility of even the airline itself feeling something like indignation at the costs which it incurs in the strict liability system: I guess there must be such an indignation, certainly, but in this case I'm more concerned about the indignation of 500 passengers who, if you don't pay them, will feel, I think, much more of an indignation because they will have no remedy. If you come to them and say, "I was not at fault," who is going to pay for them?

MR. CORRIGAN: I would hope they had a remedy against the other airplane.

PROF. SAND: Do they? And if he says he also had some reasons why, *e.g.*, he couldn't see you. . . .

MR. CORRIGAN: No. My situation set the liability on the part of the overtaking airplane. . . . The other carrier is definitely liable, but because I have to pay the $37,500,000, I can't recover it from the other airplane. That's the thing that creates the indignation.

PROF. SAND: Well, under what I suggested, these passengers would recover from the other airline, and if they bring another suit against you, as I've just said, after the abolition of the collateral benefits rule, they would no longer be able to recover from you because they have already recovered.

MR. CORRIGAN: But could I recover from the overtaking airplane? . . . My understanding of the law is that I can't get it back from the overtaking airplane.

MR. FLOYD A. DEMANES: Just one question that's really quite brief, and I wanted to address it to Mr. Sand, to ask whether or not it isn't somewhat naive to believe that you're going to eliminate the lawyers by this system of absolute liability if you've got a $75,000 limit? As we heard at lunch today there are only 39 cases that are going to go over the limit so that's going to leave the question of how much the party's entitled to and this is something that is strictly the business of the lawyer. I think these people are going to seek legal advice, with respect to how much they are entitled to, and I'd like to have you comment on that.

PROF. SAND: Oh, I fully agree. I just stated that it is not my intention to eliminate the lawyers from this business. In the first place, I'm a lawyer myself; I'm not in the "racket" of aviation accident claims, but I do think that there is a

function for a lawyer in society whenever you have an *exceptional* claim of wrong, an exceptional type of wrong that was done, and I just stated before that I do see a point for a highly-specialized lawyer to take up this case and try to break the limit, and even on a reasonable contingent fee basis if need be, although my European background revolts against this. On the other hand, I see absolutely no call for lawyers to come into the picture at the average aviation accident damage. I do not think that we should aggravate the losses that already were incurred by society and by the individuals by the air crash itself . . . by an additional tort litigation process which is a waste. It is a waste which burdens the victims, which burdens the courts, which burdens the airlines, and which hinders rather than promotes the investigation of aircraft accidents and which eventually, I think, only benefits a section of aviation accident plaintiffs and aviation accident attorneys. I do not mean this personally in the direction of Mr. Kreindler, but I think there is a section of aviation accident lawyers which are something like a parasitic section in the legal profession.

MR. DEMANES: Are you going to eliminate what you described as waste or the legal cost by adoption of that system?

PROF. SAND: For claims not exceeding $75,000 I don't think there is any need for a lawyer. You go to the airline and you get it, after you prove damages.

MR. DEMANES: May I say that I think we all understand each other that the absolute liability provisions only applies to the issue of liability and not to the amount of damages. The limit is the maximum that you could recover under that systems but you till must prove your damages up to $75,000? What I'm saying is, isn't that cost still going to be there?

PROF. SAND: The fact that you have to prove damages . . . well, there may be cases where you will not be able to prove your damages, which you've suffered, without the help of a lawyer. I agree. But I don't think in the average case you will have trouble to establish damages by hospital bills, etc., which the airlines will have to accept.

MR. RAYMOND J. DWYER: As I understand it, we're interested in an exchange of ideas so we can attempt to arrive at a workable solution. With that in mind I'd like to suggest a total elimination of the willful misconduct concept as incorporated within the Warsaw Convention, this is the "indignation factor" asked for by Professor Sand and the deterrent factor, I think, recited by Mr. Onek. What we tried to do at Montreal and what we're trying to do here today has been, one, to eliminate fault as a factor and therefore broaden the scope of a carrier's responsibility. Second, you've taken the limits of liability and upped those, so that you have significantly increased the total possible liability from any particular crash. Therefore, if you're attempting to reconcile views, you should be able to offer the carrier a substitute for that.

I'd also like to mention the practical reason for elimination of willful misconduct. . . . Today, simple negligence is sufficient to permit you to recover under the Warsaw act; if you substitute "absolute liability," that simple negligence of today will become the willful misconduct of tomorrow. In the court room the Judge will charge the jury (you've got to remember we're talking about horrible injury cases, and this drastically influences the opinions of the members of the jury) . . . that this particular plaintiff by law is entitled to recover $75,000 . . . but if they find there is willful misconduct (using either The Hague interpretation of that as advanced by Professor Sand or the very vague interpretation of it under the Warsaw) he will say . . . they can render a verdict in any amount. Now the entire concept of present-day jurisprudence is to eliminate punitive damages. Yet you're incorporating built-in punitive damages if, after you have assessed absolute liability, you also assess against the carrier willful misconduct. I would feel that if you are going to make absolute liability a matter of fact by way of a compromise agreement, then willful misconduct should be eliminated,

otherwise every case of simple negligence will become willful misconduct.

CHAIRMAN DES ILES: Thank you Mr. Dwyer. Professor Lowenfeld . . . would you like to comment, incidently, on these proceedings?

PROF. ANDREAS LOWENFELD: Two very small points I would like to make because they've come up repeatedly. Professor Sand was asked about the "claims over." As I understand the Montreal system as it was worked out, there is nothing in the principle of liability without fault that detracts from the notion that the carrier can claim over, so that in the example that Mr. Corrigan picked, I would have thought that the victims go against the carrier, which, regardless of fault, must pay up to the limit, subject to proof of damages. It in turn can sue the other plane. This shifts the burden of proof involving fault from the passenger or his survivors to the carrier; then the carrier can, in turn, proceed against the Air Traffic Controller or the other aircraft and so on.

MR. KREINDLER: I have very serious doubt about the plaintiff. The courts may hold that the airline is a volunteer and not paying because of legal liability.

PROF. LOWENFELD: You're quite right; the courts may hold differently, but I believe that is the understanding of the parties. With respect to Mr. Stephen I really don't want to comment on the merits of his statement now. I think it would be a service to this discussion and to the *Journal* if we would get from him a more precise statement of two statistics. *One,* he referred a number of times to the thirty-nine people; I'm not at all sure what he means by that. *Second,* he referred to the average cost, the average amount of insurance taken out by passengers. I'm almost certain that what he has in mind is the average amount of insurance, trip insurance, taken by people who take trip insurance. When I was preparing to go to Montreal a year ago, the estimates that we got were that approximately twenty percent of all passengers in the United States (it was about the same for domestic and international flights) took out insurance. I cannot believe that if it's all passengers, that the figure is that. . . .

I think, really, I can't very well sum up here yet, except to say that I suppose it shows that the Montreal Agreement is in no sense a final solution. It leaves nobody satisfied; nobody really had a good chance to vote on it; and it is a quite rough and ready compromise of a lot of different criteria. I think probably, if history is any guide, the chances that this agreeemnt will stay around for a while are fairly good. In looking forward to tomorrow we might try, perhaps by reference to multilevel systems and perhaps by some more elaborate discussion of choice of law principles, to see how we can relate some of the various opinions that have been expressed to, what you might call, a legislative proposal.

CHAIRMAN DES ILES: Thank you, Professor Lowenfeld.

End of Thursday afternoon discussion.