

1967

## Discussion - Session Three

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### Recommended Citation

*Discussion - Session Three*, 33 J. AIR L. & COM. 643 (1967)  
<https://scholar.smu.edu/jalc/vol33/iss4/13>

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## DISCUSSION — SESSION THREE

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CHAIRMAN BRIG. GEN. MARTIN MENTER: If I may open the floor to discussions or questions. Captain Herman from the Air Force Academy, Law Department.

CAPT. ALAN I. HERMAN: It seems to me that this session has been a culmination, almost, of all the talk that went on yesterday. However, I have two or three questions which I'll direct at large to the members.

First of all I think that the matter has to be viewed, in some respect, from the plaintiff's lawyer's view point. Where there is any possibility of a . . . two level system of liability, it is his obligation to his client to seek the higher level. There's no question about that. If the claimants' remedy against the carrier is \$75,000 or \$100,000, no matter what it may be, and there is any possibility of going beyond that figure, he's going to try for it and it's his obligation to try for it. Now this may be against Air Traffic Control, against other carriers, against the manufacturer or against the component manufacturer. I would like to see some comment from a member of the panel on the feasibility of an exclusive remedy for passengers; the exclusive remedy of the passenger being solely against his carrier. And in order to maintain some degree of fairness to the carrier for nonfault or non-negligent claims made against him, a possibility of an action over, up to only the limited amount of \$75,000 or \$100,000, against any one of the other participants, such as the component manufacturer, the manufacturer of the aircraft, ATC, or another aircraft. Now, has this been considered by the Legal Committee or by the Panel of Experts?

DR. PIETER SWART: You take it for granted that the attorney will seek the higher limit. That's logical. It is his duty to try to get everything for his client which he is able to get. I do not understand, however, why the passenger should be able to also make a claim against somebody other than the carrier, such as the manufacturer of the aircraft or the A.T.C. If the carrier is absolutely liable it will pay, provided it is able to do so, and in most cases it will be if compulsory insurance can be introduced, but as far as I know that is not considered very urgent. I do not see why a passenger should have the possibility to claim from other persons who may have caused the accident by their negligence, such as the A.T.C., the manufacturer of the aircraft, the maintenance shop, or other persons such as a passenger or the caterer. In my view it is quite a satisfactory system to concentrate the liability on the operator.

Now the problem, if and to what extent the carrier should have recourse against the other persons who have been negligent. The idea of the Panel was to leave the carrier this possibility. It would have to be provided by the applicable national law. Probably national laws contain provisions to that effect. The same problem arises under the Rome Convention. The idea of the Panel was that national laws would necessarily create such provisions. The Panel expected that the passengers as a rule would sue the carrier, since that would be easier for them. They would however keep the possibility to sue others such as the A.T.C. or the manufacturer of the aircraft directly, but they would only do so in the relatively rare cases that they could prove fault on the part of these parties.

CAPT. HERMAN: I'm recalling the observation that Lee Kreindler made yesterday, that you couldn't preclude the individual seeking recovery from going against the manufacturer on separate litigation.

MR. ALLAN MENDELSON: I thought that was a suggesting statement by Mr. Kreindler. I have the feeling that you probably can, by treaty, preclude suits against anyone other than the carrier himself. The United States hasn't been prepared to do this and indeed hasn't wished to do it.

CAPT. HERMAN: Well, I would think that Mr. Kreindler is referring to the existing state of the law rather than what could be done under a treaty. Any observation on that?

MR. LEE KREINDLER: I would be interested to know if there is anybody in the room who thinks there is a possibility of the United States entering a convention which denies American citizens the opportunity to sue almost anybody.

I would like to very briefly answer a question put by Dr. Swart. You asked, "why does the United States require such high limits when Canada, which also has a high standard of living, is satisfied with much smaller limits?" The answer is quite simply a remarkable difference in awards as between the United States and Canada. In American airline cases plaintiffs customarily, recover hundreds of thousands of dollars and recoveries in Canada are less than \$50,000. Now, I don't know why this is, but I suggest that that's the answer to your question.

I would like to ask you this question, Dr. Swart. You pointed out, quite graphically, and I was very interested to hear you say, that there are other bases for recovery and the satisfaction of the need to take care of the victims of these accidents in your country. You pointed to the highly developed social security system, for example. Isn't this the best indication of the doubtful goal of uniformity in international air laws as far as damages are concerned? Doesn't this fact, that there are possibilities in your country that do not exist in the United States, doesn't this show very graphically the false premise of invoking a standard limitation with standard standards world-wide? Doesn't this show that's what's good in your country is not necessarily good in other countries?

DR. SWART: I agree with you that it is not easy to reach unification in this field. That is clear from the fact that the Convention left several items to the applicable national law, which has had the result that the differences have become even bigger than they were at first. Concerning the differences between the United States and the Netherlands: I agree that there is some difference, but it is not as big as it seems, because the pensions and the social security system mentioned by me also exist, be it to a lesser extent, in the United States. However, there one does ignore them under the present system. I am convinced that the differences will become smaller in the future. That difference should not be used as an argument against the existing unification of the law.

MR. EUGENE JERICHO: I wanted to touch on something that I don't think has been really mentioned here, and may be beyond the scope of this conference, but I'd like to direct an inquiry to you, Mr. Mendelson, if I may on this proposition. Since the State Department has undertaken the commendable goal of looking after United States citizens and in this particular conference being in the realm of continuing absolute liability in international air traffic and pushing for a continued increase in limits, I'm wondering, Mr. Mendelson, if the State Department envisions their efforts, if successful here, in extending that philosophy to perhaps domestic air transportation, then on to other forms of transportation. . . . I would in all sincerity wonder what the State Department envisions as to the extension of this philosophy beyond the immediate concern of this Symposium.

MR. MENDELSON: I think you're asking for the social philosophy of the United States government and not necessarily the Department of State. What State legislatures will in the future do in this area is something that I frankly

don't know. I think they're on their way at this point to eliminating the limitation laws in the various States. They may go forward. You may get unification of laws simply by a Restatement or by way of uniform tort law, but I've taken no part in this at all and I really can't predict.

MR. GERARD DES ILES: I wonder if Mr. Mendelsohn would be good enough to explain for my benefit his concept of domicile in the proposed amendment. I'm not too sure we're talking about the same thing. . . .

MR. MENDELSON: Mr. des Iles, I think that's a very interesting question. I think in ninety-five percent of the cases you can tell where a man is domiciled. I think by international law and by domestic law there is a test for domicile where his estate will be probated, where he has most of his contacts, things of that nature. I agree and I am frank to admit that there is a five percent factor, perhaps it's five percent. Mr. Milligan raised one problem to me of a TWA representative who's been living in Europe for twenty years. Mr. Onk raised a further example of a TWA representative living in Europe for twenty years and married to a French girl with three children in France. I think those are cases which the courts would have to resolve and I think we can give a certain amount of leeway to the courts in being able to resolve this five percent. But it was my thought that the mere fact that we have a small difficulty, what I consider to be a relatively minor problem in this, shouldn't mean, as was so often said in Montreal during the conference, that we should throw out the baby with the bath water.

MR. DES ILES: It's important for my point of view if the law of domicile is going to control the liability, the amount of money you recover. I would be very happy to know that the Trinidad law would be what the judge would be applying. I consider it very important that the judge understood that the man was domiciled in Trinidad as opposed to being permanently a resident. Would the element of having no immediate intention of going away therefrom be incorporated in your idea of domicile?

MR. MENDELSON: I think that would be one of the elements. I think there's another element that is where the widow and children are likely to stay. I think the problem of domicile might even be more difficult in a domestic United States context than it would be in international context.

CHAIRMAN MENTER: Mr. Brennan.

MR. P. J. BRENNAN: Mr. Chairman, there's just a couple of comments I'd like to make. The first point I'd like to go back to in this whole debate is really not so much a legal problem; it's a problem of public relations, policy, tactics, anything else you'd like to call it, and that is the point that Mr. Kreindler made about the attitude of the Senate, the hard line that the Senate has taken and he predicted would continue to take. And I think we have to face up to this because it is a fact. And it's a fact which, in all due respect to the Senate, undoubtedly been influenced by the fact, in turn, that a member of their own cloth was involved in this controversy. I don't know if they'd have taken the same view if it had been otherwise. It's a very natural reaction, but it's one we have to bear in mind and I think we ignore it at our peril. The Trial Lawyer's Association obviously has done something about its side of the case and more power to it. And therefore, I think it's up to other interests involved who are also concerned with the public interest to do something in this direction.

In relation to the question in general of the tort liability system, of what is called the free tort liability system, we have to recognize that there was an effort by the airlines to establish a free contract system of liability, but this, by statute, judgments and otherwise has in general tended to be overruled. So that it just isn't possible to get either an idea of a statutory and conventional situation that would take care of all our problems just as the free, *so called free*, tort liability system doesn't solve all our problems.

Now, I think I should comment on the point Mr. Mendelsohn made that in-

insurance costs pose no problem. Well, of course they pose no problem for the State Department because they don't have to pay them, but they do pose problems for some of our airlines, and this is just one of those facts, fortuitous or otherwise, that we have to take account of. And in passing may I just warn everybody concerned that another fortuitous factor slipped into Mr. Mendelsohn's paper, as he gets the figure of \$150,000 in, e.g. Just let's be careful about that tendency. Now, the compulsory insurance, which is referred to, is predicated on the availability of that insurance. And when we consider the larger aircraft which are coming and the relationships of accidents to landings and takeoffs, I think you can see where you're moving into in the question of coverage and coverage against enormous indemnities.

As a final point I'd like to suggest that if we are referring to this interim agreement and we want to try to extend it, and it may seem a small point but an important psychological point, I would like to suggest that we don't call it the CAB Agreement or the Washington Agreement; let's call it the Montreal Agreement. I'm sure my American friends will get the message on that one and they will agree with us indeed if they are interested, as they should be, in extending that type of system. And I have envisioned that we should modify it in some way, improve the agreement, then extend it.

CHAIRMAN MENTER: Col. Jaffe.

COL. MORTON S. JAFFE: Thank you. I just wanted to say that I think in respect to Mr. Mendelsohn's proposal that we adopt the domicile principle that we've probably been overtaken by events. Even our courts are getting away from it now, getting more into this center of gravity theory in conflict situations; in other words where are all of the contacts, the most numerous contacts, and to talk about domicile in this context I think is maybe a little old fashioned. I think we ought to keep up with the trend of the law, not only in this country but transnational law in other areas that Professor Sand can talk about more appropriately than I can. That was the only point I wanted to make.

CHAIRMAN MENTER: Professor Sand.

PROF. PETER SAND: I must say, I'm rather frightened by the can of worms that is going to open up on the question of domicile which certainly will cause quite a lot of new sessions in the ICAO Panel of Experts. And I just want to point out one thing. Does this proposal for establishing the passenger's domicile as a possible jurisdiction and a possible governing law, or maybe the governing law for the awarding of damages, does this include passengers residing in non-Warsaw countries? It would logically have to, which would mean that a passenger who resides in Turkey and takes a Warsaw flight would then have to be judged by the standards of Turkey, which is not a member of the Warsaw Convention. You would have to assume, then, for the award of damages, that you will have to construe a new law of Turkey: apply the law of Turkey as if she had ratified the Warsaw Convention or if she were a member of the Interim Agreement. I do believe that this will really pose tremendous problems in establishing the law that will govern the awarding of damages.

MR. MENDELSON: In answer to the Colonel's question, it was my point of view in the remarks that I made that we are really applying, under *Kilberg*, *Pearson*, *Long* and all the rest of those cases, a *domicile theory* of law though we call it center of gravity, contacts, or predominance of contacts. It is indeed no more than the selection of the passenger's domicile or permanent place of residence. So the purpose of most of my proposal is simply to recognize reality and apply the law of the domicile both in the context of the Warsaw Convention as well as in a domestic context.

Now, this brings me to Professor Sand's question and I don't think that would really raise a problem. Let's say the victim is on a Warsaw flight and let's say that the limit is, much to the shock of Mr. Brennan, \$150,000, because I don't

think the limit is very important when the law of the domicile controls. I don't think that these figures are out of the picture by any means. Now let's say the limit is \$100,000 or \$150,000. If the Turk brought his suit in a United States court, and whether or not it was controlled by the Convention, whether or not it was a Convention flight, the United States court would apply the law of Turkey and would award that Turk damages just as though he were suing in a court in Turkey. And that's the proposal.

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(A hypothetical illustration concerning domiciliary problems was posed.)

MR. MENDELSON: I appreciate your question very much. I think that this is what we are always up against in the International Civil Aviation Organization. The easiest way to kill a proposal is by figuring out the most obtuse hypothetical, and posing that as the means to defeat the proposal. Now, I agree with you; there will be perhaps five percent of the cases, including the tax dodger who's established a residence in Geneva, but that's a very, very small percentage of the cases. I think in that case, however, his citizenship would be one factor; the reasons why he moved to Switzerland would be another factor; the permanence of his residence in Switzerland might be a third factor; where his estate will be probated will be a fourth factor; where the dependents will reside is a fifth factor; and all of these factors go together in permitting a court, and I think we should give a court some discretion in these five percent of the cases, to determine precisely what his domicile is.

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CHAIRMAN MENTER: Let me ask if Dr. Swart has a comment.

DR. SWART: Yes, Mr. Chairman, I should like to say a few words in connection with the suggestion made by Mr. Mendelsohn. The Panel discussed similar proposals, one based on nationality as a criterion, and one based on residence or domicile. You will find a reference to it somewhere in the report. I agree with Mr. Mendelsohn that the criterion of domicile is more satisfactory than the criterion of nationality and that it is also more satisfactory than the criterion of origin and destination. Both proposals, the one based on residence and the one based on nationality, were rejected by the Panel for three main reasons. In the *first* place, the reason already mentioned by Mr. Mendelsohn, that in a certain number of cases the residence of a passenger is very difficult to ascertain. This is a serious difficulty even if the case arises in only 5 percent of the cases, this being the estimate of Mr. Mendelsohn. The *second* reason is that it would add a new criterion to the Convention which already has a different criterion for the determination of its scope. By adding a new criterion one would create a very complicated system. The *third* and most important reason is that it would result in discrimination between passengers paying the same fare, since they would recover differently according to their residence. I believe these were the main reasons.

CHAIRMAN MENTER: Now I call on Sir William Hildred.

SIR WILLIAM HILDRED: Mr. Chairman, Mr. Mendelsohn's reference to the word domicile causes me more concern than his casual references, *e.g.*, to \$150,000. But I'm probably the only man in this room, indeed I hope I am, who has suffered the agonies of double residence. . . . The agony of double residence, the confusion about residence, is a dreadful thing and if you keep this session going, you will come up with one little quirkish question after another and you will never settle it. Residence, ordinary residence, you can be resident and ordinarily resident; you can be resident and not ordinarily resident. You can be asked what is your domicile of origin; then you can be asked what is your domicile of intent. And, when questioned about 1960—Where do I live?—I just couldn't answer it. If there is anything likely to create more confusion—agony—misery—lawyer's bonanza's—it is this matter of domicile. I couldn't keep quiet when that word was uttered. . . . Next I have Mr. McKenry of the University of Miami.

CHAIRMAN MENTER: Next I have Prof. McKenry of the University of Miami.

PROF. CARL MCKENRY: In keeping with Mr. Brennan, our Irish colleague, I have a comment or two according to Mr. Mendelsohn's definition. The first one is in regard to a comment that was made today that was also made by Professor Sand yesterday. That is in regard to the elimination of the claimant's attorney at the first plateau. . . . It brings to mind the quotation from Shakespeare, the first thing we do is kill all the lawyers, in the sense that I don't see how we can expect the claimant not to get counsel, even on this first level, because relying on the generosity of the insurance carrier I think is asking too much of the insurance carrier who has stockholders, directors and other problems and pressures. And at the same time, who will make determinations, such as shall we try for the second plateau; who will evaluate the medical evidence; who will determine on behalf of the claimant (who is going to look to someone to advise him) what amount would be proper and appropriate?

As an alternative to this approach I would suggest, number one, that the claimants' bar, through their own enlightened self-interest, in those cases where the recovery is below the first plateau, where we're talking about absolute liability, keep their fees commensurate, when we're talking about a lower recovery. Now, the suggestion of enlightened self-interest would be a sword of Damocles of putting in the Convention, if needed, a provision that the attorney's fees would be set by the court. I think that, while that alternative might not be acceptable, certainly the idea that the claimant can rely on the insurance carrier at the first plateau is neither realistic, nor fair to the plaintiff.

Secondly, the question of statistics has emerged. I would characterize that since noon yesterday we have had a battle of statistics. Mr. Kreindler mentioned it; Mr. Stephen mentioned it; and we started talking about statistics this morning. And without asking for a reply, I noticed that on the schedule this afternoon we have two Titans of the insurance industry in this particular area and it would seem to me this afternoon one appropriate thing that might be done is try and seek a way of getting acceptable statistics. It's rather frightening that we're talking about three different sets of statistics. One point Mr. Kreindler made was that the statistics from his office indicated a substantially higher award than a roughly \$38,000. I'm sure Mr. Stephen will comment on this later. But on the other hand, one of the attorneys in Mr. Martin's office was telling me of a case where the passenger had received some sort of a superficial cut and it left a scar on her leg and he settled that case in the office, I think he said, for about a \$1,000. Now, I don't know whether that case is in the statistics or not. It was a Warsaw case. So my second comment is that perhaps an *ad hoc* statistics committee of some sort could grow out of this symposium.

The third one is that in regard to the change in Article 28, I concur with Professor Sand. I think this is a real can of worms we may be opening because Article 28 has pretty well been hammered down in terms of the state versus federal jurisdictional question in the United States. It's been fairly well cleared up as to the third contact which is the principle place of business of the carrier. To open this up, for what I believe is maybe less than five percent, might cause a great deal of mischief.

CHAIRMAN MENTER: I have on my list several more . . . Mr. Winsler.

MR. C. ANTHONY WINSLER: Well, I have a question for Mr. Mendelsohn primarily on his *e.g.* My interest, I might add, does lie in the field of aviation insurance. I've been listening for three days to everybody discuss \$75,000 or \$100,000. This morning we broke the barrier and went up to \$150,000. A point that I have is, and I don't know if it's ever been surveyed or not, I'm quite curious, has anybody in the Government or any independent body ever made any kind of study of what we can expect in the way of a total insurance capacity

with the advent of the Boeing-Hilton, otherwise known as the 747, which is just around the corner? The insurance world is not a bottomless market. We've been tossing the figure around of a 70 million dollar claim. I think that's reasonable; it's quite possible. And we could have a midair collision of 140 million dollars. Now, there are a lot of people in aviation insurance and this capacity for 70 million exists today. But I think it would only exist perhaps once, certainly not more than twice, because many people in the aviation insurance business at the moment are not the hard core of the aviation insurance world; there are people being brought in and they can easily go out again. They came in to make money; if they don't make money, they'll duck out. In addition to what we have in aviation you could easily have some of the national disasters we've had this year like the McCormack fire, Pepsi a few years ago, riots, and so forth. All these things are going to affect your aviation insurance market. My question to you, and perhaps a suggestion, why not conduct an objective survey and develop what your capacity is and then take it and spread it back down? This would determine how much you want to pay a passenger rather than starting at how much you should pay him? You might be very much surprised, Mr. Mendelsohn, to find that there isn't anything like the capacity you think there is to pay the insurance claims of the world's airlines. I don't know. I'm saying someone should find out.

MR. MENDELSON: I think that's an extremely interesting approach and I think that we could well begin to study that. Let me say only one word about this. We might be able to do this in conjunction with the United States air carriers because, after all, and I take this from our distinguished friend Mr. Harold Caplan, and I owe him a debt of gratitude for this thought, the American carriers are facing this same problem with 747's operating in the United States without limits, totally without limits. And as Mr. Caplan points out, it has involved no increase in fares. Indeed, our fares in the United States are significantly lower than the per milage fares in Europe. So I have great faith in the ability of the insurance carriers to handle this and to carry this. I really have sufficient confidence in the world insurers to know that even though it may mean a rise in insurance costs you will be able to come through, and you will especially be able to come through with a limitation.

May I say one last word to Sir William Hildred . . . I would like to ask him one question. When, in his two million miles of travel, he had a permanent residence as the distinguished Director-General of IATA and a permanent residence in England, where did he consider himself domiciled?

SIR WILLIAM HILDRED: Yes sir. There's no doubt of twenty years domiciled in Peel Street, Montreal, but the Inland Revenue said none of it; you're living in England.

MR. HAROLD CAPLAN: Mr. Chairman, I'm grateful to my friend, Mr. Tony Winsor, for suggesting that the problem of capacity be examined. I can only assure those present that the problem of capacity on a world-wide basis is at the present moment the subject of a serious international study by Aviation Insurers. . . . I can assure you that if we get the premiums and if there are reasonable limits of liability in international aviation, there's no problem about capacity that we can see. Those are the two problems.

MR. LEIGH RATINER: I'm very disappointed to hear the remarks of people in this room which I would categorize unqualifiedly as bureaucratic in the worst sense with respect to opening a can of worms. I wish I could never hear that word again. I hear it a dozen times every single day. There has been no analysis of Mr. Mendelsohn's proposal. Sir William's remarks were amusing, it's true, but I think domicile could be defined in the Warsaw Convention. And if it can't be defined, we in the Government and you lawyers in the industry, and the law firms aren't worth the money we're paid. Now, I would like to hear from the low level proponents, that Mr. Mendelsohn mentioned, exactly why

his theory wouldn't work. And I'd like it to be analytical rather than humorous.

CHAIRMAN MENTER: I think we've run out of time gentlemen. . . . I have a responsibility as moderator to summarize. As I saw it Dr. Swart gave us the presentation on why the United States's proposal wasn't a good one, the effect as he saw it, and as he saw other countries view it. Allan Mendelsohn gave us a rather refreshing or novel, interesting proposal. I would like to summarize this proposal; it has one top limit of liability, which won't be broken for wilfulness, probably a test of absolute liability, which he said was negotiable, with the law of the domicile of the passenger to decide his case, wherever that case was heard. And, lastly, Professor Larsen gave us his comments on the consolidation proposal of the Rome Convention, the Aerial Collisions Convention, perhaps bringing in the Warsaw Convention; all of these where liability grows out of a single aviation mishap being considered in one convention and how that applied to the interim proposal.

End of Friday morning discussion.