

1968

Discussion - Session Two

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Discussion - Session Two, 34 J. AIR L. & COM. 427 (1968)
<https://scholar.smu.edu/jalc/vol34/iss3/14>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

DISCUSSION — SESSION TWO

The comments made by the speakers are their own personal remarks and do not necessarily represent the official view of any organization or agency they represent.

MR. CHARLES J. PETERS: I am with the FAA. I have a question for Mr. Driscoll. I was wondering if you could elaborate on the reluctance of the FAA to make recordings available to you. Our policy is to release them.

MR. DRISCOLL: Maybe my experiences were not too good, but I have had a problem with them.

MR. PETERS: Could you give us a case, sir?

MR. DRISCOLL: I prefer not to since it is now in litigation. I will be glad to speak to you afterwards. Your litigation is with other California lawyers, some of which are present.

MR. PETERS: We do have a firm policy to make available the original tapes for listening, to allow any attorney to make his own recordings of the tapes and also to furnish a copy of the transcript of the recordings.

MR. DRISCOLL: I would like to say that the control towers are involved in these things.

MR. PETERS: Yes, that is what we are talking about.

MR. DRISCOLL: I am glad to hear that.

CHAIRMAN JERICHO: Any other questions from the audience?

MR. MIKE J. BATES: I have a question for Bobbie Allen. We saw some computer data that the airports were using for their retrieval and storage systems. I wonder if the NTSB has gone to this sort of thing or *is* going to?

MR. B. R. ALLEN: Mike, the Board has a 360 64K, which we have had in operations now for approximately three years. We have just recently converted from the 1401 language to the 360 language. We have approximately four years of data stored on the computer now. When I say four years of data, I am talking roughly six thousand accidents per year. Our data that is stored on the computer goes back to 1964. We found that for approximately six thousand accidents per year, to convert to automatic data language which has already been stored to date, cost us about \$30,000 per year. I rather doubt that we will go back much beyond 1964. Tying in with what Mr. Russler said, obviously one of the difficulties that faces you when you go into a computer program is your coding and classification system. We have about six years, six man years, invested in the development of code and classification books. We have made copies of this particular book available to Member States of ICAO. I personally hope that at some point in time that we get an international coding and classification system. I am not saying the one we have is the best; all I am saying is we have one. If this could be used as a base, and improved to satisfy the needs of other participating ICAO states, military, or anybody, if we could improve on this coding and classification manual and identify the types of data and material that would be needed in accident prevention programs, it seems to me this is the only real progress that one is ever going to make. Looking at an individual accident, you see the obvious. In any number of accident investigations in which I have participated, you will have one or more investigators stand around and say, "You remember the old convair back in 1952 that went down in east Missouri?" Then you start correlating the evidence that came out of that investigation with the one you are working on. Now if you can do this rapidly with the computer, I personally maintain, and I am firmly con-

vinced, that for most of the answers we need for good substantive accident prevention programs, the data is presently available based on history. If you can write programs that will ask the right questions of the computer, then you can find those subtle and those elusive common denominators that are not obvious on an individual accident basis.

MR. LEE KREINDLER: I would like to ask Bobbie Allen if he has ever personally encountered the kind of thing we heard from Earl Cabell, where people with knowledge of accidents have been reluctant to give that knowledge to the court in connection with the litigation.

MR. ALLEN: Mr. Kreindler, if I understand you, you are asking if I know of a case where an individual has been reluctant to or has not come forward with accident information. I think in all candor, I would have to say that it may be a problem, but I do not think it is a problem of a serious magnitude. I think one of the greatest problems, and the reason that an individual fails to communicate information, is primarily because he fails to recognize the significance of it. You have a pilot or a mechanic or anyone in an operational situation, and he becomes a rare situation. There might be any number of reasons why he might be reluctant to divulge the information; he may be somewhat reluctant to talk because of your litigation and his pride. But I think in many instances an individual will walk in and say, "Hey, do you know what happened to me today?" And then he would spew it out. Somebody would say, "Doggone, boy, that was a close one." Then they both go their way, neither one of them really recognizing the significance of the thing. It is not like an accident; I am speaking now primarily of incidents. You do not have that concentration of interest and the spotlight of attention focused on an incident which you have on an accident where you had 150, 125, 123, and unfortunately one of these days maybe 500 or 1,000 people killed. To me, I think the greatest problem is the inability of some people to recognize the significance of the information that they possess. I do not know who subscribes to that, but I believe it.

MR. JOHN EVANS: I would like to ask Mr. Gray a couple of questions. With the liability without fault concept, would you just walk into court and try a case, and just have the judge tell the jury that it is a case in which the defendant has to pay on what they afix the amount? Would that be your idea on how this should be handled?

MR. ROBERT R. GRAY: No, that is not really it. You have almost got the situation now in the international field where you have the Montreal Agreement which, in effect, modifies Warsaw. Under the Montreal Agreement the direct air carriers who participated, and everybody in the United States, and just about all the carriers in the world, have waived defenses under the Warsaw Convention, which provides for liability by the carriers; in some countries you have left the question of attorney's fees. How is that liability impaired? The only question you argue about is, what are the damages.

MR. EVANS: That is just the first step, though. You then come back and have another play at them by alleging gross negligence—willful wanton conduct—so, in effect, you are going to get a second bite at them.

MR. GRAY: You are talking about Warsaw itself. Under Warsaw, you may have that. My suggestion goes further than that, and it carries the Montreal Agreement and Warsaw Convention to the ultimate, and says flatly that the carriers are liable. Then you set some maximum to which the ticket would automatically entitle you—say a figure of \$200,000—with the provision that you could obtain coverage for anything over that by a slight additional fee. We are only talking in generalities now. I do not know how these things can be worked out or

whether they ever can. But it seems to me, if you have reached an agreement that the carrier is liable, the manufacturer is included, the government is included, the pilots are included, everybody is included—even the passengers—then the only question is what do you know? Then you could settle it.

MR. EVANS: Who is going to assess the manufacturer of the parts as opposed to the operator of the plane? Then you have suits in state courts and suits in federal courts; how and where are the funds going to be made available. It looks to me like you are going to be getting into a hornet's nest.

MR. GRAY: I think you have posed a good problem as to what is involved. I think you will end up with a fund from which the payment is made, and you can get results. You are no longer arguing whether the carrier or the manufacturer is liable; that is just understood, accepted; he is liable. I think it will be a lot easier to come to an agreement in terms of the measure of damages.

MR. EVANS: I cannot come to accept the concept that litigation should go out the window and everybody should get some money; just how much he is going to get out of the pot being the only issue. Then you are going to say who is going to put it in the pot; and whose hands are the smartest and the cleverest gets the pot.

MR. GRAY: I also have a gut reaction against absolute liability. But you have workman's compensation. That is absolute liability; you have also got the Warsaw Convention which is in effect absolute liability. But it seems to me that all you are saying now, and you have got to take the step, that the carrier and the people involved with the carrier in any accident are passenger-liable. And, there is a payment out of the funds; if you cannot get agreement as to what the payment is, you do have a trust, and you do go before a jury, but you are not parading before a jury the negligence of a pilot, or the negligence of a carrier. You are parading before a jury what the earnings of that man are, what the proper measure of damages is. It seems to me it is more practical and really a better way of doing it.

MR. BURTON J. JOHNSON: While Mr. Gray is still on his feet—don't sit down Mr. Gray—I understood that your concept of this was because it might tend to allow more freedom of exchange of information at hearings to prevent someone from trying to cover up—not having the fear of litigation. Isn't, actually, the fear of litigation itself, as it has been expressed by various people here, determined in accidents in themselves? Or, you may surely in a few accidents have come to withdraw or withhold information. I could have had a lot more accidents by reason of their not being able to face up to their responsibilities or to improve themselves.

MR. GRAY: Your suggestion is that there are two parts. First part is that this is only designed to improve information. I think part of it is to improve information; this gets all over the business of exchange of safety information where there is no evidence. This is a completely different subject and you are tying it very closely together. I do not think the idea of having absolute liability is only for the purpose of improving the exchange of information or the willingness to cooperate in an investigation. I think it helps substantially. But the second part seems to be that you are suggesting that if a carrier or a manufacturer would be considered ultimately liable, and absolutely liable, that they never would worry about the accident. And, they would not worry about whether they were improving their safety standards. I do not think that follows at all. I think that in terms of people with whom I have dealt—and this includes carriers and manufacturers and pilots as well—the pilots know how to crop these things in; they have got a very great stake in living. Their carriers do not want to drop them in, because if an air carrier drops a number of them in, he gets a very, very bad reputation with his

passengers. If a manufacturer puts out a product that keeps dropping in, on a regular basis, he gets a very bad reputation with the air carriers; and the carrier who flies his product has trouble getting people on board that particular type of aircraft. I do not think it is going to have that effect.

MR. GEORGE GALERSTEIN: I will say with reference to this last question that in all the years I have been involved in accident litigation, I must confess that I have never seen any connection at all between the fear of litigation and the attitude of the manufacturer toward safety, in spite of it, I find quite the contrary. If there were to be absolute liability, the product might even be safer on the basis of transfer amendments. It has not been my experience that any engineer, any safety man, or anybody you want to talk about, considers the fear of litigation when he considers the product of the manufacturer.

MR. LEE KRIENDLER: I would like to ask any of the manufacturers represented here if they have ever witnessed the experience of manufacturer's representatives withholding information because of fear of litigation. I find the suggestion repugnant and insulting to the aviation industry.

MR. JOHNSON: Gene, in defense of my question, it seems like it was in Genesis or one of the Books of the Old Testament where Moses had a law, "An eye for an eye." Now if he had stated, "Those who've had an eye taken out, come to me, and I'll compensate you," there would be a lot of one eyed people going along the streets of the wilderness. I think there is basically behind us, not a fear, but this mark that we have to tow. Nobody here has operated without it; so we cannot say that it has not influenced the decision. Now once you take that away, I think there would be a moral defect of that obligation which they now unconsciously feel.

MR. JOSEPH D. COUGHLAN: Yes, Lee I will try it. A very fundamental thing comes up again. How do you know an accident has been prevented? Your question really is aimed at, "How do you know something didn't happen?" How do you know someone is not withholding information? I am not sure you do, unless he says something about it. I do not think you can list names and phrases in personal conversation, but I can assure you that I have personally had people come to me in my chaplain role, if you want to call it that, and confess in a sense, that, "I know I should have told you this a long time ago, but I was concerned because of the company's position in legal matters." I have had this happen to me in case after case. They come to the board afterwards and say they were afraid to talk because of what it might do to them career-wise and to their families. I have had personal experiences, but getting back to the fundamental point, your question is aimed at how do you establish something that did not happen. If you come across that answer, please let me know.

CHAIRMAN JERICHO: Thank you very much.

End of Tuesday afternoon discussion.