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FROM A TO B — THE AVIATION INDUSTRY'S RESPONSIBILITY TO PASSENGERS

BY MATTHEW J. CORRIGAN†

I. INTRODUCTION

AVIATION negligence litigation today is complicated, time consuming and expensive. The coming of the big airplanes with capacities to 500 passengers will compound these three undesirable characteristics. Society requires that if an airline fails to safely transport a passenger to his destination the passenger should receive prompt and fair compensation for his injuries. Admittedly, there is at times delay in achieving this result and the delay is undesirable. Before outlining possible solutions to this problem it may be appropriate to briefly review past aviation negligence litigation.

II. HISTORICAL REVIEW

It was not long ago when an airline was permitted under the law to assert a number of defenses to a negligence claim alleged by a passenger in the event the passenger was injured or killed in an accident. Defense lawyers contended that the accident was caused by an Act of God or that the passenger assumed the risk of the hazards inherent in aviation. Sometimes these defenses were successful. In fact, to a degree the public regarded those who flew on the airlines as slightly wild persons who should not complain if things did not go perfectly.

Back in the 1930's, a woman sued an airline for her injuries and for the death of her husband as the result of a crash that occurred while the pilot was trying to execute a forced landing in bad weather. Assumption of risk and Act of God were advanced as defenses. During the examination of the widow by the airline's lawyer, she was asked whether her husband had said anything just before the airplane crashed. Her response was that he said, "My God." The lawyer asked no further questions. The jury returned a defense verdict. Obviously, they had matched the airline's defense of Act of God with the spontaneous exclamation of the passenger.

III. THE PRESENT

A. *The Old Defenses*

For all practical purposes, such defenses are now obsolete. The airlines must safely carry its passengers from A to B and failure to do so requires

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them to pay compensation. This is as it should be. There are few but important exceptions such as sabotage.

B. *The Government*

With reference to government responsibility in aviation let us consider an accident in which a radar controller or tower operator commits a negligent act causing an aircraft to crash. Before the Federal Tort Claims Act, the injured passenger had no cause of action against the government. After the Act was passed, on the basis of the *Texas City* decision the government was exonerated in a number of cases because of the "discretionary function" exception. Later cases, however, have modified the *Texas City* reasoning and the government is now more frequently found liable for negligence of personnel directing air traffic and providing weather information. One should therefore take into account when analyzing aviation litigation the government's present and future role in the industry. Mid-air collisions particularly focus attention on possible government responsibility.

C. *The Manufacturers*

We are all familiar with the many developments in recent years in manufacturers' or products liability law. At one time the airplane assembler or component supplier had the defense of lack of privity. The defense has been discarded and today in a great number of jurisdictions there is strict manufacturers' liability, at least for the airplane assembler. If there is a defect in the airplane existing at the time of delivery which was a cause of the accident, absent any abuse of the airplane by the operator, there is strict liability. The defense of "state of the art" will not exonerate the manufacturer. This trend in the law is demonstrated by the fact that in almost all accident litigation both the airline and the assembler are named as defendants. Often component suppliers are also made defendants.

D. *Changing Technology And Its Effect On Litigation*

1. *Scientific Advance*

These changes in the law have been accompanied by amazing technological progress in the industry. No longer is airline flying a battle with nature. Modern airplanes piloted by dedicated professionals fly over most of the weather guided by amazingly accurate electronic devices. Weather forecasting is also marked by great reliability. The result is increased safety. Statistics show that airline travel is safer than automobile travel; however, accidents continue to occur and they will be followed by lawsuits.

2. *Complication of Lawsuits*

Aviation litigation in the future will become more complicated as the

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lawyers seek to demonstrate for the courts why a particular accident occurred. With increasingly sophisticated airplanes, it will take longer to sort out the facts of an accident. Much time is spent by both sides with experts who attempt to educate the lawyers so that they can make a reasonably intelligent effort to communicate this knowledge to a jury. The effort is often frustrating, particularly because there is simply no sure way today for technically uneducated laymen to comprehend in a trial setting the highly complex systems that make airplanes fly. Housewives cannot or will not comprehend how, for example, an integrated instrument flight system incorporating an automatic pilot operates in airline use.

Even a fairly simple lawsuit against an airline can get bogged down in highly technical byways. Consider the problems in a lawsuit arising out of a mid-air collision between two airliners operating under instrument flight plans and instructions issued by employees of the FAA. Both airlines and the government are named as defendants. Often a manufacturer or component supplier is added as a party. The liability in the initial stage is not clear because the facts, as they will be proved in court, are not developed. The pre-trial preparation will be extensive and expensive. The plaintiffs attack all defendants in shotgun style. They defend themselves and probably attack each other by crossclaims. An attitude of mistrust arises, not only between defendants and plaintiffs, but among the defendants. This brings about delay in payment of compensation, eventually higher settlements or judgments and increased legal fees and expenses.

3. *Responsibility for Delay*

Who is responsible for the delay, sometimes as long as five years, before the claims arising out of an accident are concluded? In the collision situation just described it could be the plaintiffs, the airline, the manufacturer, the government, or a combination of them. In addition there is a built-in delay in a number of jurisdictions because of court congestion. Of course, the obvious example leading to delay is where the plaintiff and defendant cannot agree on settlement. There can be honest differences of opinion on amount and these do not merit criticism. But from the defendants' view, it seems that plaintiffs' lawyers at times engage in a contest to get the highest settlement or highest verdict in their area in order to get an edge on the competition. Extremely unrealistic demands are made with the result that settlement becomes impossible or greatly delayed. This type of conduct is deplorable and fortunately is on a small scale. To avoid such criticism plaintiffs' attorneys might consider modifying their contingent fee contracts so that if upon trial their recovery is less than the last offer of defendant, they would reduce the fee percentage, possibly by one-third.

Some plaintiffs' lawyers utilize a number of practices that lead to delay and much additional expense. These include:

a. *Defeat Removal Ploy.* Where there is diversity of citizenship it is very simple to add an additional defendant, usually a component supplier incorporated in the particular state. The plaintiffs remain in the state court

as they wish and the unlucky supplier must defend litigation in which he has been frivolously included.

b. *Free Education Ploy*. Plaintiffs' lawyers want to know everything on how a particular system or component in an airplane works. They merely add manufacturer or manufacturers as desired as defendants regardless of whether there is a legitimate claim against them and thereafter at leisure depose their engineers. Plaintiffs will not be required to pay the engineer or the company for the time spent on the deposition.

c. *Fishing Expedition Ploy*. These are similar to the education gambit but the aim is to get sketches, manuals, and practically anything else desired. The procedure is to add desired manufacturers as defendants and initiate discovery and inspection of documents. Under a liberal interpretation of "good cause," the practical effect in a number of courts is that the plaintiffs will be given the key to the factory with access to perhaps a million documents and one hundred thousand drawings. The only cost to plaintiffs' lawyers is duplicating selected papers.

Needless to say, these tactics increase costs and delays. The airline's lawyers may be prompted to hold back from settlement because they may only have to pay half of the damages if the plaintiffs also make out a case against a manufacturer. There is, of course, no reason why the plaintiffs should not sue a manufacturer if there is evidence of a defect. But the promiscuous adding of defendants to accomplish tactical advantages can only in the long run be against the legitimate interests of passengers. In fairly large measure, therefore, the plaintiffs' side is responsible for much of the delay that exists in concluding airline passenger claims. This is not to say that the airlines, manufacturers, or the government have always moved quickly. The government, particularly, is rather slow and reluctant to settle airline passenger claims in which the government has considerable liability exposure. Because the passengers must try their case against the government without a jury, it apparently is the view of government attorneys that it is better to try the cases than settle them. Also, the government can not be brought into state court lawsuits inasmuch as the federal court is where the government must be sued. There have been a number of recent cases, however, in which the government has been found liable and there now may be more inclination for the government to participate in settlement. This will be good for the aviation industry and the traveling public in reducing delay. In the litigation arising out of a collision over Staten Island, the government did share settlements and judgments with the two airlines and this was a decided step in the right direction.

IV. PROPOSED FEDERAL LEGISLATION

A. *Jurisdiction And Uniformity*

A number of aviation lawyers are of the view that there should be federal legislation governing aviation litigation and the idea has considerable merit. Often in the event of an air disaster there are lawsuits in fifteen or twenty states, some in federal court and others in state court. Trial

preparation is often duplicated. There is delay and unnecessary expense. A bill has been introduced in the United States Senate during the present session by Mr. Tydings which would provide for federal jurisdiction and a body of uniform federal law for cases arising out of aviation and space activities. All suits would be in the federal court and must be brought within one year. There would be a single national measure of damages. The recovery would be "a fair and just compensation for the pecuniary loss sustained without any limitation on the amount of recovery except as otherwise provided by treaty." There would be the right of jury trial. Lawyers in the aviation industry should carefully consider this proposed legislation. A law along these lines would reduce delay and there would not be the conflict of laws battles as in recent years beginning with the *Kilberg* rationale.

B. *Compensation Without Fault*

Although a federal law would bring with it many advantages, one should be aware that there may be sentiment in some quarters to later substitute a form of compensation, without fault, similar to workmen's compensation, in place of our present legal system. One need refer only to the so-called Montreal Agreement on the Warsaw Convention which brought in absolute liability to passengers up to \$75,000 and one sees that our present legal system is under serious attack.

C. *Demand For New Legislation*

The possibility of a federal compensation law for aircraft accidents will become greater if the aviation industry and bar does not promptly solve the further problems which will come with the big airplanes. Will the public idly stand for further delay caused by processing 500 claims compared to 150? It seems doubtful, and thus it is up to everyone to make improvements. There are no magic solutions. Let those few in the plaintiffs' bar who unnecessarily delay and encumber aviation litigation take a long look at the consequences if they continue these tactics.

An airline may buy as much as \$800 million in airplanes in one order. Airlines do not buy airplanes off the shelf but work closely with the manufacturer on what the end product should be. Is there any sound reason why they should, after years of service with the airplane in their own particular environment, suddenly claim that it should have been made differently? Unfortunately, this happens on occasion but it should not because the true relationship between the two is that of partnership.

D. *Government's Attitude Towards Trial*

As indicated before, the government has shown signs that it will pay or share settlements rather than litigate in those cases in which it is exposed to probable liability. This trend ought to continue.

V. CONCLUSION

In summary, there is no simple cure to the problems that occur in concluding claims when an airline does not succeed in carrying its passengers to their destination. It seems that what is needed is a difference in philosophical approach so that solutions are considered from the viewpoint of the entire aviation industry and that includes those who represent passenger plaintiffs. Absent a new approach, there is a real danger that the system under our law of handling aviation passenger claims will undergo drastic changes.