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## A NOVEL RULE OF LIABILITY: ITS IMPLICATIONS

JOHN J. KENNELLY\*

### I. INTRODUCTION

A NOVEL rule of liability in international air travel was proposed at a recent meeting of the Legal Committee of the International Civil Aviation Organization in Montreal. The Committee recommended a modification of the Montreal Interim Agreement so as to make an air carrier absolutely liable to a limit of \$100,000 per passenger, unless the passenger himself had caused or contributed to the accident.

Presently, damages for injury or death occurring in international air travel are limited by the Warsaw Convention or a modification of it. The Warsaw Convention Treaty,<sup>1</sup> initially adopted in Warsaw, Poland, in 1929, limits damages to \$8,291.87 for negligence. It is applicable to most international air travel, except where there is a "contact" with the United States. The Warsaw Convention Treaty was modified by an agreement approved by the United States Civil Aeronautics Board on May 15, 1966.<sup>2</sup>

Known as the "Montreal Interim Agreement," it prescribes a \$75,000 maximum liability, regardless of fault, whenever the air travel has a "contact" with the United States, namely, whenever any place in the United States constitutes the point of origin, destination, or an agreed stopping place. The Hague Protocol, which entered into force on August 1, 1963, modifies the Warsaw Convention by increasing the maximum liability of airlines in international travel to \$16,582. The Hague Protocol was not ratified by the United States.<sup>3</sup> This limitation of liability applies to airlines only, and not to manufacturers or any other party. Virtually none of the general public, and few lawyers or judges, are aware of the possible limitation of recovery against a negligent airline of a mere \$8,291.87.<sup>4</sup> During the period of more than forty years since its adoption, the international air carriers have come to rely upon

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<sup>1</sup> The Warsaw Convention, *opened for signature* October 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11.

<sup>2</sup> Montreal Interim Agreement, *adopted* May 19, 1966, 17 U.S.T. 1521, T.I.A.S. 6108.

<sup>3</sup> CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIAL 282 (rev. ed. 1967).

<sup>4</sup> The Warsaw Convention, *supra* note 1, at art. 22.

the Warsaw Convention to completely insulate them from liability for more than \$8,300 for any negligently caused injury or death in international travel not having a "contact" with the United States. Even as amended by the Interim Agreement of 1966, the Convention purportedly shelters airlines from liability in excess of \$75,000 for the negligently inflicted death or injury of any passenger occurring during international air travel which has a contact with the United States.

## II. HISTORY OF THE WARSAW CONVENTION

Generically, the Warsaw Convention was the result of two international conferences, in Paris in 1925 and in Warsaw in 1929, and of the work done by the Interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference. The project of the Conference was twofold. First, since aviation was obviously going to link many lands with different languages, customs, and legal systems, it was desirable to establish a certain degree of uniformity. The Convention achieved this almost completely as to documentation—tickets, waybills, and the like. The second goal was to limit the potential liability of the carrier in case of accidents. The Convention established the rule that carriers are liable for damage sustained by a passenger in the course of a flight or while embarking or disembarking, but limited this liability to 125,000 Poincaré francs.<sup>5</sup> This limit was low even in 1929, but it was expected that applied uniformity on international flights, it would enable airlines to attract capital during their infancy.

In 1933, the State Department transmitted its approval to the President, who submitted the Treaty to the Senate. On June 15, 1934, *without debate, committee hearing, or report*, the Senate gave its advice and consent by voice vote.<sup>6</sup> The United States deposited its instrument of adherence on July 31, 1934, and the President proclaimed the Treaty ninety days later.<sup>7</sup> Thus, although the United States had *nothing to do with formulation of the convention* and had adhered rather than ratified, it was virtually a charter member.

In critically evaluating the seemingly precipitate action of the Senate, it must be remembered that in 1933 economic conditions throughout the world were disastrous. There was virtually no international air transportation at that time and the few who engaged in such transportation flew in four and six-passenger planes on short European trips. The accident rate was substantially greater than at present. There was no capital for any industries, let alone airlines. All of these reasons for extending

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<sup>5</sup> *Id.*

<sup>6</sup> See 78 CONG. REC. 11582 (1934).

<sup>7</sup> 49 Stat. 3000, T.S. 876 (1934).

preferential treatment to airlines have not only disappeared, but the opposite is now the fact.

### III. CONSTITUTIONAL ASPECTS OF THE WARSAW CONVENTION, MONTREAL INTERIM AGREEMENT, AND THE PROPOSED TREATY.

For many years prior to 1966, the United States and other nations were becoming increasingly dissatisfied with the arbitrary limitation of damages prescribed by the Warsaw Convention. On September 28, 1955, the Hague Protocol was drafted, and it became effective August 1, 1963, as to those nations which ratified it. The Hague Protocol increased the Warsaw Convention limitation from \$8,291 to \$16,582, but was not ratified by the United States because the increase was considered nominal. The United States then served notice of denunciation of the Warsaw Convention, to become effective May 15, 1966. Shortly before this was to become effective, the International Air Transport Association (IATA) brought about an arrangement among air carriers having landing privileges in the United States, which increased the limitation of liability of signatory airlines to \$75,000 per passenger on an international flight, regardless of negligence. On May 13, 1966, the Civil Aeronautics Board "approved" this agreement, and on May 14, 1966, the United States Government withdrew its notice of denunciation. Thus, the net effect of the agreement approved by the CAB is that certain airlines agreed *among themselves* to increase the payment for either a death or injury in international air travel to a *maximum* of \$75,000, regardless of the extent of damages inflicted by their negligent operation.

Even though the Hague Protocol was not adopted by the United States, its limitation might apply to an American citizen engaged in an international flight covered by the Hague Protocol. Such a flight would be one in which the origin and destination on the contract of carriage consist of signatories to the Hague Protocol. Thus, the determination of which limitation applies has no connection with the citizenship of the passenger.

The conflicts resulting from the three separate limitations of liability, imposed by the Warsaw Convention of 1929, the Hague Protocol of 1955 and the Montreal Interim Agreement of 1966, may lead to incongruous results, unjust in some instances to passengers, in others to airlines, and in still others to aircraft manufacturers, aircraft component part makers, and the United States Government. These limitations of liability are not related to safety or risk. They are based solely upon such determinants as the point of destination, or point of origin, or agreed stopping place. The limitations apply to passengers from all nations, who may be restricted in damages for injury or death in international flight to one of three different recoveries for no logical or economic reason

whatever. The source of the authority of the State Department or CAB to impose upon the passenger public of the United States a \$75,000 limitation is not clear. By analogy, it is as though the Vehicle Commissioner of New York were to agree to a \$75,000 limitation of damages applicable to the taxicab companies in New York, for any injury or death which occurs to any passenger in a taxicab.

A new treaty has been proposed which would supersede the Warsaw Convention and the Montreal Interim Agreement to the extent that it is adopted within the community of nations. Citizens of other countries have every right to criticize the Montreal Interim Agreement, which favors the American passenger public and requires passengers from other countries to pay for the preferential treatment accorded to American citizens. One advantage of the new treaty would be equal treatment for the passenger public. The fallacy of this proposed new treaty, however, is that it is wrongfully assumed that a treaty which would insulate commercial airlines against the imposition of otherwise allowable fair damages may be imposed constitutionally upon the international air traveling public. The most serious constitutional defect of the proposed treaty is that it would limit liability for damages in favor of *only airlines*. Aircraft manufacturers, suppliers of component parts, the United States and all other parties, would enjoy no such preferential treatment. The following examples illustrate the discriminatory effect of the proposed treaty on these various other parties.

#### A. *Effect on Manufacturers Alone*

If a jumbo-jet from Chicago enroute to London with 400 businessmen aboard, and crashes on take-off due to a combination of negligence of the airline and breach of warranty by a manufacturer of a component part, and damages are set at \$500,000 per passenger, payment under the new treaty would be as follows:

- (1) the airline, guilty of negligence, would be limited to payment of \$100,000 per passenger or 20% of the total damages;
- (2) the manufacturer, guilty of breach of warranty, would be liable for the remaining 80% of the damages, or \$400,000 per passenger.

Moreover, in many instances the airline, *although at fault*, could recover from the manufacturer, which was *not at fault*, all amounts paid by it to the families of its passenger victims. The law, at least in the United States, is now clear that an airline is entitled to *full indemnity* from a manufacturer which delivers an unsafe airplane, or a component part maker, which manufactures a defective part, *even though the airline was negligent*.<sup>8</sup>

<sup>8</sup> Cf. *Texaco, Inc. v. McGraw Lumber Co.*, 117 Ill. App. 2d 351, 254 N.E. 2d 584 (1969), *contra* 13 ALR 3d 1100-01 (1970).

### B. *Effect on Manufacturers and the United States Government*

If a jumbo-jet from Chicago to Paris with 400 businessmen aboard crashes on take-off due to: (a) 90% negligence of the airline; (b) 5% negligence of the manufacturer for failure, for example, to issue complete operating instructions or some other relatively minimal negligent omission, which nonetheless constitutes *a* concurrent proximate cause of the accident; and (c) 5% negligence of the United States by reason of the relatively small (compared to the airline) degree of fault of the tower operator, and the payments are \$500,000 for the death of each of the passengers, payments are made as follows:

- (1) the airline, 90% at fault, pays only \$100,000 out of each \$500,000 paid;
- (2) the manufacturer, 5% at fault, pays \$200,000 per passenger;
- (3) the United States, also being 5% at fault, pays \$200,000 per passenger.

Of the \$200,000,000 paid, the airline, 90% at fault, pays \$40,000,000. The manufacturer, only 5% at fault, pays \$80,000,000. The United States also pays \$80,000,000, although only 5% at fault.

In this and many other types of easily imaginable situations, United States taxpayers and manufacturers throughout the world could be forced to pay a disproportionate share of the total damages, although their negligence was much less than that of the common carrier airline, or in the case of manufacturers, the manufacturers might not have been negligent at all.

### C. *Discriminatory Preference of Airlines over Individuals*

An American businessman purchases a ticket in Paris to fly to London. Due to the negligence of the airline, he is killed during landing in London. His family is limited to \$100,000, even though actual damages may be much greater. If the same passenger disembarks from the aircraft, and is walking across the street outside the airport, and is killed due to the negligent operation of an automobile by another person, including an American citizen, the negligent driver is liable for full damages. The airlines thus are granted preference over not only other competing carriers and manufacturers, but also over individual citizens.

### D. *Discriminatory Preference of Airlines over Competing Carriers*

A commercial aircraft is flying from Chicago to Jamaica, via Florida. Due to the negligence of the airline, the aircraft crashes while landing in Florida. The liability of the airline is limited to \$100,000 for the death of passengers ticketed through to Jamaica, whether they intend to stay on the same airplane or intend to transfer to another airline. If a passenger traveling the same route were killed in a bus or train collision, the carrier would enjoy no such limitation.

E. *Discriminatory Preference of Airlines over Component Part Manufacturers*

A 747 is scheduled to fly from Chicago to London. Several tires are defective and the airline has knowledge of this. The aircraft crashes during takeoff due to the failure of the tires. The cost of the tires was less than 1/100 of 1% of the value of the aircraft. The airline manifestly was grossly negligent for attempting to take off with defective tires. Yet, if 400 passengers are killed, and each passenger's family receives \$500,000 in damages, *the tire manufacturer* will be required to pay \$400,000 per passenger, whereas the airline is required to pay only \$100,000 per passenger.

If the airline did not *actually* know the tires were defective, it might be able to recover from the tire manufacturer its payments of *forty million dollars*, as well as hull damages of approximately twenty-five million dollars. Thus, the tire manufacturer may pay *two hundred million dollars* for a single accident, and the airline *nothing*.

F. *Discriminatory Preference of Airlines over General Aviation Operators*

A 747 is circling in a traffic pattern while waiting to land at O'Hare Field in Chicago, enroute from London. A small general aviation corporate aircraft and the 747 collide. Assume that each is at fault. If the 400 passengers on the 747 are killed and payments of \$500,000 per passenger are made, the airline pays forty million dollars and the operator of the small aircraft pays one hundred sixty million dollars.

G. *Discriminatory Preference of Airlines over General Aviation Manufacturers*

Assume the same facts as stated above, except that the accident occurs due to combined negligence of the commercial jetliner and altimeter failure in the small, privately owned aircraft. In such cases, the general aircraft manufacturer is liable for four-fifths of the total damages, *or one hundred sixty million dollars*, whereas the commercial airline's exposure would only be *forty million dollars*.

H. *Discriminatory Preference of Airlines over Other Companies and Individuals*

A 747, taking off from Chicago to London, is negligently operated so as to collide with a gasoline truck, whose operator is also negligent. The collision causes an explosion and fire. Assume 400 passengers are killed and the payment per passenger is \$500,000. Despite its negligence, the airline pays \$100,000 maximum per passenger or forty million dollars, whereas the owner of the gasoline truck would be liable for unlimited

damages, which in this instance could well exceed *one hundred sixty million dollars*.

### I. *Effect on the Airlines Themselves*

Suppose 10,000 passengers are in the international embarkation terminal of a United States airport, waiting to board various aircraft for international flight. Due to arson and vandalism this international embarkation terminal is burned and all of the passengers are killed or severely injured. The 10,000 passengers waiting to board aircraft for international flights are "passengers"<sup>9</sup> and if they are killed due to sabotage, their families are entitled to recover up to \$100,000 per death under the proposed new treaty. This could result in the imposition of an aggregate liability upon these international airlines of up to *one billion dollars*. The liability of an international air carrier could extend in similar situations to passengers in embarkation terminals throughout the world.

Likewise, in the recent Jordanian tragedy, if the passengers had been killed by the guerrillas, their families would be entitled to full payment of up to \$100,000 from the international air carriers.

Thus, airlines may well have a valid basis for claiming that the treaty is unconstitutional as applied to them. They could very well question the validity of a treaty which would impose against them damages of *one billion dollars* for the deaths of 10,000 international passengers who are killed as a result of the criminal acts of others.

### J. *Effect on Passengers as Compared to Other Victims*

The proposed treaty applies only to commercial airlines and their passengers. What happens if a commercial airliner crashes into a populated area? Are the *passengers* to be limited to \$100,000 per person, whereas persons who are killed or injured on the ground may receive unlimited damages against the airline?

### K. *Discriminatory Preference of International over Domestic Air Carriers*

A Lufthansa 747 takes off from Chicago enroute to Frankfurt, Germany, at the same time that a United DC-8 takes off from Chicago for New York. They collide over Pennsylvania due to negligence of both airlines. The 400 passengers in the 747 are killed. Payments of \$500,000 per death are made. The 100 passengers in the United Air Lines DC-8 are killed and \$500,000 per death is also paid. Under the proposed treaty, the liability would be as follows:

#### (1) Lufthansa Airlines—

##### (a) As to its own passengers in which the aggregate liability

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<sup>9</sup> The Warsaw Convention, *supra* note 1, at art. 18, sec. 2.



is two hundred million dollars, assuming payments per passenger are \$500,000, it pays only forty million dollars.

- (b) As to the passengers in the United Air Lines plane, assuming an aggregate amount of fifty million dollars, the damages would be divided equally.

(2) United Air Lines—

- (a) As to the passengers in the Lufthansa plane, with aggregate damages of two hundred million dollars, it pays *one hundred sixty million dollars or four-fifths* of the total damages due the passengers in the Lufthansa plane.
- (b) As to its passengers, as noted above, the damages are divided equally.

Therefore, Lufthansa pays seventy-five million dollars and United Air Lines pays one hundred eighty-five million dollars, even though both are equally at fault.

#### IV. THE EFFECT OF THE PROPOSED TREATY ON INSURERS

Some proponents of this treaty seem to think that this preferential treatment of airlines is going to be beneficial to their insurers. Examination of this premise reveals its invalidity. This treaty will not benefit insurers. For all practical purposes it will *eliminate* insurers, as far as airlines are concerned. The major international trunk carriers who are to be singled out for such preferential treatment, to the detriment of manufacturers, etc., will not need excess insurance coverage. In fact, most of the major airlines undoubtedly will eliminate *all* passenger liability insurance, whether at the primary or excess levels. If a major airline knows that its liability is an unbreakable maximum of \$100,000 per passenger regardless of its degree of fault, what need is there for insurance? Insurance, traditionally and practically, is designed to insure risks. But there will be no risks. Thus, if this proposed treaty is adopted, there appears to be little question but that excess or reinsurance companies will be immediately eliminated for all practical purposes from the insurance market, insofar as airlines are concerned, and within a short time, primary insurance carriers will also become extinct as far as most international air carriers are concerned.

Liability insurance companies serve two purposes: to insure risks and to investigate and to litigate or settle claims. The imposition of unbreakable damage limits may eliminate the need for insurance companies. Airline insurance companies have not done such an unsatisfactory job of serving the airline industry and the passenger public that they should promote a treaty which will eliminate their writing insurance coverage for airlines in relation to international travel.

Concededly, much can be done to improve the administration of justice in respect to major aviation litigation. However, there does not seem to be much logic for the attempts of international airlines and strangely some of their insurance carriers to impose arbitrary damage limitations applicable only to airlines.

Some representatives of insurance companies apparently think, paradoxical as it may sound, that they are going to go on getting high insurance premiums, and at the same time be the recipients of an unbreakable damage limit. That would indeed be the best of all possible worlds for insurance companies. But I believe these representatives underestimate the intelligence of airline executives and regulatory boards. There would be no reason whatever for most airlines to carry any liability insurance if they know that they are totally and completely protected from damage suits of any kind, and if insurance is carried the premiums would have to be drastically reduced immediately. Although some smaller foreign carriers will continue to carry insurance, it is obvious that the large trunk lines, such as Pan American, TWA, etc., would be foolish to pay for liability insurance coverage, if such a treaty were adopted.

Insurance litigation will only increase. The airlines will be seeking reimbursement from the manufacturers or governments in a vast number of cases and families of passengers will employ the \$100,000 recoveries from the airlines to sue the manufacturers. Illogical, divergent measures of legal responsibility, applicable to domestic carriers, as distinguished from international carriers, will lead to an enormous amount of litigation in collision cases between domestic and international carriers. In cases involving alleged air traffic control errors, the plaintiffs will seek full recoveries against the United States Government, and in many instances, the international airlines will seek reimbursement from the United States for their payments to passengers. *Even if the imposition of restricted damages applicable to international air travel were socially desirable and economically necessary, the same argument could be presented for all other enterprises.*

#### V. THE CONSTITUTIONALITY OF THE PROPOSED TREATY

There may have been a valid economic reason in 1933 for the Warsaw Convention treaty which insulated airlines from liability in excess of a stipulated amount. When the Warsaw Treaty was initially drafted in the late 1920's, international air travel was virtually non-existent, and flying was very hazardous. Capital was difficult to obtain. Passenger planes were able to fly but short distances of approximately 400 miles and were able to carry only a few passengers. Contrast those economic facts with the economic facts of the present. International air carriers carry millions of passengers in aircraft capable of carrying as many as 400 passengers.

Amazing safety records have been made in the last decade, since the jet age began. Fatal accidents are considerably less per passenger mile than twenty years ago, although there are more and much faster planes. This is a tribute to the entire aircraft industry worldwide and to all governments which are concerned with aircraft safety. For example, during 1970, there were approximately 150,000,000 travelers upon commercial airlines in the United States alone. Yet there was not a *single crash* in 1970 in any State of the United States of a scheduled commercial carrier aircraft. A person flying from Chicago to Florida via commercial airline is statistically safer than if he were to drive an automobile for that distance. In fact, the International Civil Aviation Organization recently reported that 1970 was the safest year in the history of commercial aviation in respect to both international and domestic air travel. Although the aircraft industry and the governments of the world are confronted with a serious problem because of vastly increasing air travel and planes, the industry and such governments, to a considerable extent, have successfully resolved safety problems since the jet age began in 1959.

When the Warsaw Convention Treaty was initially adopted, manufacturers and component part makers were not liable to passengers, the "reason" being the absence of "privity" between the manufacturers and the passengers. Likewise, when the Warsaw Treaty was initially adopted, the United States Government was not liable for negligence of air traffic controllers because of the doctrine of "sovereign immunity." Thus, there was no need for the authors of these treaties to concern themselves with insulation of manufacturers or governments. This is no longer the case. Manufacturers can be held liable to passengers or their families, even though the manufacturers are not negligent, because of the doctrine of strict liability.<sup>10</sup> Likewise, the United States Government is liable for unlimited damages for any negligent acts or omissions of its Air Traffic Control and weather personnel, as well as its military aircraft for negligence within the United States. Therefore, there is no longer any rational basis for having laws applicable to the aviation industry which are markedly different from the laws applicable to all companies and all entities.

Under basic American constitutional law, no statute or treaty may take away from the family of a wrongful death victim that fair recovery to which it is entitled under the common law. In *Moragne v. States Marine Lines, Inc.*,<sup>11</sup> the United States Supreme Court squarely overruled *The Harrisburg*<sup>12</sup> and later decisions following *The Harrisburg*, which in

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<sup>10</sup> *Goldberg & Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 81, 240 N.Y.S. 2d 592 (1963); *RESTATEMENT (SECOND) OF TORTS, comments* § 402A (1965).

<sup>11</sup> 398 U.S. 375 (1970).

<sup>12</sup> 119 U.S. 199 (1886).

effect followed the alleged common law rule that there is no civil action for wrongful death in the absence of statute. The Court, in this landmark decision which has far-reaching consequences, flatly rejected the alleged common law rule denying civil action for wrongful death, stating:

Our analysis of the history of the common-law rule indicates that it was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all.

Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous.'

Legal historians have concluded that the sole substantial basis for the rule at common law is a feature of the early English law that did not survive into this century—the felony-merger doctrine.

The first explicit statement of the common-law rule against recovery for wrongful death was in the opinion of Lord Ellenborough, sitting at nisi prius, in *Baker v. Bolton*, Camp. 493, 170 Eng. Rep. 1033 (1808). That opinion did not cite authority, nor give supporting reasoning . . . in announcing that '[i]n a civil court, the death of a human being could not be complained of as an injury.'

The historical justification marshalled for the rule in England never existed in this country. . . . American courts generally adopted the English rule as the common law of this country as well. Throughout the period of this adoption . . . the courts failed to produce any satisfactory justification for applying the rule in this country.<sup>13</sup>

The decision concluded:

The most likely reason that the English rule was adopted in this country without much question is *simply that it had the blessing of age*. . . . The American courts never made the inquiry whether this particular English rule, bitterly criticized in England, 'was applicable to their situation,' and it is difficult to imagine on what basis they might have concluded that it was.

The Fifth Circuit Court, through Chief Judge Brown, in *Hornsby v. The Fishmeal Co.*,<sup>14</sup> stated: "There is now a cause of action for wrongful death in admiralty that is *not* dependent on adjacent state law." Commenting on *Moragne*, the court said: "Time and tide do not wait, but Courts do. What was perplexing issue has been resolved by the deliverance of the Supreme Court, an event for which we hopefully waited." The *Hornsby* decision, following *Moragne*, erased for all time, within the United States, any wrongful death statutes or treaties which would deprive families of victims of aircraft disasters or any accident,

<sup>13</sup> *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 384 (1970).

<sup>14</sup> 431 F.2d 856 (5th Cir. 1970).

of fair recoveries, based upon pecuniary loss and the other criteria of damages.

It is fundamental that any legislation or treaty which singles out any one segment of industry for preferential treatment must have a "rational basis." Statutory patterns which result in arbitrary discrimination have been held violative of both state and federal constitutional safeguards. In *Shapiro v. Thompson*,<sup>15</sup> the United States Supreme Court in discussing the Fifth Amendment to the United States Constitution, said: "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " And in *Harvey v. Clyde Park District*,<sup>16</sup> a state court struck down the so-called sovereign immunity statutes because they were arbitrary and discriminated against plaintiffs and in favor of *governmental entities*.

A classification to be valid must rest upon material differences between the persons, activities or things included in it and those excluded, and furthermore, must be based upon *substantial* distinctions.<sup>17</sup> A classification in order to avoid the constitutional prohibition must be founded upon pertinent and real differences as distinguished from irrelevant and artificial ones and must have a rational basis.<sup>18</sup>

These are but a few of the many cases which reiterate the well-recognized rule that any statute which singles out any entity including even a government-owned school, for preferential insulation, is unconstitutional. It would seem that if statutes which attempt to restrict the imposition of damages against governmental bodies are unconstitutional, treaties, which are subject to the same constitutional restraints, which attempt to discriminatorily insulate international airlines from liability to their passengers are unconstitutional.

### CONCLUSION

The enormous concentration of risks necessarily involved in the use of commercial aircraft presents a critical legal problem. Airplane safety has been proven indeed not a myth. The insurance industry has supplied economical protection for the aircraft industry, which has enabled that industry to rapidly progress technologically, without being diverted by claims problems.

The dedicated efforts of the many organizations, working constantly toward aircraft safety, have demonstrated their effectiveness. The record speaks for itself. A few hundred deaths a year out of 150 million pas-

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<sup>15</sup> 394 U.S. 618, 642 (1969).

<sup>16</sup> 32 Ill. 2d 60, 203 N.E. 2d 573 (1965).

<sup>17</sup> *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 197 (1936).

<sup>18</sup> *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

sengers is an unassailable statistic, especially when compared with more than 50,000 persons killed on highways. Certainly, statistics refute any assertion that airplane safety is a myth. There is no basis why commercial air carriers, engaged in international air travel, should be the object of preferential treatment.

The solution to these problems is not a treaty which will protect reckless airlines and impose 80 or more per cent of the damages upon manufacturers, general aviation owners or operators or the United States Government. Nor will the remedy result from an unrestrained attack by one group of lawyers against another, or by insurance companies against plaintiffs' counsel or vice versa. The remedy may result from dispassionate dialogue which may produce measures beneficial because they are fair, not only to the passenger public, but also to *all* segments of the aviation industry.

