The Japanese Initiative: Absolute Unlimited Liability in International Air Travel

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THE JAPANESE INITIATIVE: ABSOLUTE UNLIMITED LIABILITY IN INTERNATIONAL AIR TRAVEL

CHAIRDED BY JOSEPH J. AESELTA AND LEE S. KREINDLER

PROCEEDINGS

Mr. Asselta: Good evening, I'm Joe Asselta and I welcome you to this New York County Law Association forum. I think we have prepared an exciting program. The topic: the Japanese Initiative, Absolute Unlimited Liability in International Air Travel.

First, I will give you a few words. Then, each of the advocates presenting a position on the Initiative will speak. We will start with the pro position, the con position, and the alternate positions. Then we are going to have a brief rebuttal, and I'll refer to these gentlemen as the advocates for the positions known. Then we will have comments on these positions by some distinguished spokesmen from the aircraft builders, United States government, and insurers. Time permitting, the advocates may then respond to their critics and then take questions from whomever may offer them.

Leading off will be George N. Tompkins, Jr. Many years ago, when I was still in law school, George was already a legend. His reputation as a litigator and defender of airlines was established worldwide. His defense of Warsaw
Convention cases has taken him to more courts than anyone I know, including two arguments in the United States Supreme Court. That's not bad for a hockey player from Canada who also dabbles in yacht litigation. George's views of the Warsaw Convention and the Montreal Agreements, although staunchly defensive, have been innovative, and he has addressed them at a number of symposia.

Mr. Tompkins was an adviser to Japan Airlines (JAL) in formulating the Japanese Initiative, whereby JAL waived all applicable limitations of liability effective November 20, 1992, by a simple amendment to the conditions of carriage for JAL. This brings up why we are here this evening. Besides being a scratch golfer, George is a fellow of the International Academy of Trial Lawyers and a member of their board of directors. He is also a fellow in the American College of Trial Lawyers. Thank you for being here, George, I'm sure that you will come out swinging in a few minutes.

Following George, advocating the opposition to the Japanese position will be my co-chair, Lee Kreindler. The name Kreindler is so well known it is synonymous with aviation law. Lee, with his father, were the pioneers on behalf of plaintiffs in aviation accidents. Lee pursued his advocacy in those early days when the deck was really stacked in favor of the defendants. Largely through his efforts in the courts and in the legislatures, this playing field has been leveled. Lee is the author of Aviation Accident Law, which, as long as I can recall, has been the treatise for those of us in the practice of aviation law. Lee is also a regular contributor to the New York Law Journal, as well as numerous aviation symposia over the years.

Mr. Kreindler has been elected plaintiffs' lead counsel in many major aviation lawsuits, the most recent being the Pan Am 103, Lockerbie accident, in which the second circuit

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just approved the jury verdict in favor of the plaintiffs. I'm sure you will hear more of this later.

Our third advocate, at the end, will take the position that there must be alternatives to the Japanese Initiative and totally open advocacy. Warren L. Dean, who is special counsel to the Air Transport Association, will argue this position. Warren Dean is a senior partner in the Washington, D.C. law firm of Dyer, Ellis, Joseph & Mills. His practice includes environmental, transportation, and general corporate law. He also is an adjunct professor of law at Georgetown Law Center, where he teaches international transportation law in the graduate program.

Mr. Dean obtained law degrees from the University of Maryland and from Georgetown, where he has his master's of law in tax. He is contributing editor to the Oil Spill Law Information Service Publishing Group. He has also authored a number of articles on international law, including *Airlines Liability and International Air Transportation: Time For a Change*.4

Mr. Dean served as assistant general counsel for international law at the Department of Transportation from 1983 until his departure in 1988. He previously held other positions in the general counsel's office of the Department of Transportation, the Office of International Tax Counselors of the Department of Treasury, and the Office of General Counsel of the United States International Trade Commission.

So with that, you have the advocates. Later we will hear comments from the panel here. So George, lead it off.

Mr. Tompkins: Thank you very much, Joe.

My role tonight is to set the stage for the discussion that will follow, so I intend to set a pretty active stage and then sit back and enjoy the debate.

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3 See In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 709 F. Supp. 231 (J.P.M.L. 1989), aff'd, 16 F.3d 513 (2d Cir. 1994).

The first thing I have to do is correct this title. I am not pro the title of this discussion. The title is "The Japanese Initiative: Absolute Unlimited Liability in International Air Travel," and, if there is anything that the Japanese Initiative is not, it is that. The Japanese Initiative is intended to bring the Warsaw Convention liability regime back to what it originally was, which was fault liability. The Japanese Initiative is not absolute liability, it is fault liability. So that is the first surprise of the night, I am not pro absolute unlimited liability.

The Japanese Initiative really does something very simple. It takes away, by amendment to the conditions of carriage, the limitation of liability provided by the Warsaw Convention, the Hague Protocol, the Montreal Agreement or any other international treaty that may come along covering passenger injury or death arising out of an accident contemplated by Article 17 of the Warsaw Convention—for those passengers traveling with a Japanese airline that has amended its conditions of carriage. The defenses contained in Article 20 of the Warsaw Convention (hereinafter all references to specific numbered Articles are to Articles of the Warsaw Convention) are waived up to the limit of 100,000 Special Drawing Rights (SDR), but the Article 20 defenses are reinstated for any claim in excess of 100,000 SDR. The Japanese Initiative, therefore, brings the Warsaw Convention system back to what it originally was designed to be, which is a fault liability system.

In summary, Article 17 is still here. That is for the benefit of the passenger. Article 20 is back for claims in excess of 100,000 SDR and the Article 22 limit of liability is waived.


6 Additional Protocols 1-4 to Amend the Convention for the Unification of Certain Rules Pertaining to International Carriage by Air, Montreal, Sept. 25, 1975, ICAO Docs. 9145, 9148 (not in force) [hereinafter Montreal Agreement, Montreal Protocols, or the Protocols]. The United States Senate held hearings on these Protocols in 1977, 1981, and 1983. Although the Senate approved the Protocols on March 19, 1983, by a vote of 50 to 42, the Protocols did not come into effect because the required two-thirds majority was not obtained.
As a result, Article 3, as to ticket delivery, and Article 25, as to willful misconduct, are no longer relevant if you are flying on a Japanese airline.

The question has arisen as to whether the reestablishment of the Article 20 defenses, with respect to claims in excess of 100,000 SDR, simply represents a return to the original Warsaw Convention liability system and the attendant litigation by passengers to break the liability limit, but with a different limitation of liability on recoverable damages. The primary objective of the airline in waiving the limitation of liability is to place the airline in a position where it can negotiate settlements in excess of the applicable Warsaw Convention limit of liability without requiring the families of the passengers to engage in proof of Article 25 willful misconduct.

The primary purpose of the reinstatement of the Article 20 defenses with respect to claims in excess of 100,000 SDR is to avoid claims by other potential third parties (i.e., manufacturers and air traffic control facilities) that the airline, by waiving the Warsaw Convention limitation of liability, becomes a volunteer and is not entitled to seek contribution or indemnity from another responsible party. In an appropriate case, therefore, the airline will be in a position to negotiate and conclude settlements with families of passengers in excess of the Warsaw Convention limit without prejudice to claims for contribution and indemnity against other potentially liable third parties. The contribution and indemnity action need not, and should not, result in any unnecessary delay in compensating passengers or their families.

Thus, while the Japanese Initiative returns the Warsaw Convention liability system to the original 1929 format, it is the intention of the participating airlines not to invoke the per passenger limitation of liability when negotiating settlements but to preserve the right to do so in order to proceed with contribution and indemnity claims against other responsible third parties. This should enable the participating airline, in an appropriate case, to reach an early
agreement with other potentially responsible third parties to share the overall liability for the passenger injuries or deaths.

Let me raise a few other misunderstandings that may exist as to my personal position and views on the Warsaw Convention. I am glad to see that Lee Wilcox has joined us tonight. I do not think there is anybody here who can outrank Lee Wilcox in dealing with Warsaw Convention cases in the history of the Convention. Also here, John Brennan, Lee Kreindler and me, who were the three bad musketeers from 1983 acknowledged in the Congressional Record when Montreal Protocol 3 did not pass muster in the Senate.7 There has never been any doubt in my mind that the Warsaw Convention must remain a part of the law of the United States. That the Warsaw Convention remain a part of United States law is absolutely essential in international aviation.

The problem has always been the passenger limit of liability—it was a problem in the late 1940s when Jane Froman was injured in a crash in the Bay of Lisbon8 and has been a problem ever since—and all of the attention of the United States has been directed to raising the limit of liability. In the same time frame, every state in the United States has done away with limitations of liability on recoverable damages, and the airlines have grown to the economic powerhouses they are today, despite what we read in the Wall Street Journal. Does continuing to push for a limit of liability internationally make sense? Why?

The Warsaw Convention is a good international private law. How many people understand what it really is—a choice of law rule? The Convention does not create any rights between nations. The Convention confers rights on passengers, confers rights on the users of air transport, and confers obligations on airlines. The Convention tells you when you can sue, when the convention applies, why you

can sue, where you can sue, whom you can sue, how much you can recover, and the time frame within which you must sue. The one thing that is probably least susceptible to international uniformity is personal injury or death damages. You cannot, in common sense or logic, have an international uniform limit of liability on recoverable damages. Every country is different. Twenty-five thousand dollars was an awful lot of money in damages in the United States in the 1950s. Today the average award runs as high as $1,500,000. We have seen that since 1966 awards have grown from $30,000 to close to $800,000 in Japan where there is no limitation applicable.

So why do we continue to push for a limitation in the United States? Obviously the people in Japan got tired of waiting for some international change, and what did they do? They studied the Convention and, lo and behold, there in Article 22 is found a provision that says the passenger and carrier can agree to a higher limit of liability. Without running afoul of the treaty we can just say no limit, which is what the airlines of Japan did. A very simple solution. All of the attacks on the Warsaw Convention in this country and the protracted litigation that so many people complain about have been because of the Convention limitation of liability. All you have to do is punch the aviation cases out on a computer and look at the number of Warsaw Convention cases. All of the efforts at the federal level have been to preserve the concept of the limitation of liability while increasing the limit to the great sum of 100,000 SDR ($135,000) requiring the passenger to pay for additional insurance coverage.

Airlines today can buy as much as $1.5 billion in coverage for any one accident from their insurance carriers. The coverage already is in place. No airline in the United States that I am aware of buys liability insurance on the belief or premise that a limitation is going to apply in the event of an accident. So why should the government down in Washington be telling us we are going to limit liability to this new limit of 100,000 SDR, but you can have extra protection if
you pay $2, $3, $4 or $5 a ticket? The cost of insurance, as purchased by airlines today, is probably less than one tenth of one cent for each dollar in the ticket price, and that is for coverage of $1.5 billion per accident. There is another way the United States can address the problem.

If the U.S. carriers do not want to follow the Japanese Initiative, and I urge that they should, as should all the carriers in the world, because it is the simple solution — in the United States there is an even simpler solution, which I have believed to be valid for many, many years. Simply amend the Federal Aviation Act of 19589 to provide that the limits of liability will not apply in the United States. Now people say that would breach the treaty, but why? The Warsaw Convention is a private law treaty, not a public law treaty. Is Australia in breach of the treaty because two weeks ago one of their judges said that the United States Supreme Court was flawed? Their reasoning was contrary to the intent of the parties of the treaty. Does that mean Australia is breaching the treaty? Of course not. The Convention is a choice of law treaty, much like the restatement of the law. You can adopt it as it is, or change it to suit your own state, but you are not in breach of the treaty because you do so.

There are no public rights that derive under the Warsaw Convention, as there are under the Chicago Convention.10 All they have to do in the Senate is sign a one-sentence amendment to the Federal Aviation Act and that would be a problem solved. What did the Japanese do? Put a sentence in the conditions of carriage of the carrier. Problem solved for the people in Japan. They had the same problem we have. They had no domestic limits of liability for any form of transportation, and the disparity between the interna-

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10 The 1944 Chicago Convention, 61 Stat. 1180 (1944).
tional and domestic laws just grew, and grew and Japan did something about it. We are still thrashing around in this country trying to make modern in 1994 something that made sense in 1929. We are trying to force the government to adopt, in 1994, a concept of liability limits that emerged in the early 1950s, which went from $8,000 to $16,000 and then to $75,000 in the 60s, and now to 100,000 SDR. To me, this does not make sense. My friend, Lee Kreindler, wants to do away with the Warsaw Convention entirely, and that would be a terrible mistake, because it does bring a tremendous amount of stability to the international aviation community in all except the limitation of liability.

Professor Bin Cheng has called the Convention limitation of liability the eye of the storm. Limitation could bring the downfall of the Convention system throughout the world. The solution is very simple: Do what the Japanese airlines have done. The storm is then gone. The attacks will go away. The litigation will end. There is another solution that is put forward by the advocates of amending the Convention, adopt Montreal Protocol 3, put in the supplemental compensation plan. Listen to the arguments. The recovery of damages will become certain. How many lawyers out there who have represented families have failed to get a recovery? The system will be more just. Why? Nobody comes up with the answer. The people who are advocating these things are not involved in the litigation. I should say — adopt Montreal Protocol 3, adopt the supplemental compensation plan, and I can see another thirty-six years of litigation at my doorstep trying to unravel those plans. But, the simple solution for the aviation community, the insurance community, the passengers, and the courts, really, is to waive the limit. Then the problem is gone. I am sure that the insurers who have been in the business of insuring airlines for fifty or sixty years will be able to find a very, very simple solution as to how to fund an unlimited regime, because they already are doing it anyway.

I have an enormous respect for everyone on this program, and I have enormous respect for the views that they
express. There are honest differences to be dealt with, and the value of a meeting like this is that it gives an opportunity to quietly, patiently, carefully, and intelligently examine the merits of the respective positions. Let there be no misunderstandings about my position, it is, with respect to the Japanese Initiative, simply this: I think that Japan Airlines, all Nippon Airlines, the other Japanese airlines, and the Japanese government are to be congratulated, to be utterly commended for doing a remarkably sensible thing. They have come to grips with the simple fact that there is no defense in this day and age for a limitation of liability. I am in agreement probably with eighty percent of what my dear friend, George Tompkins, has said. Why then, do I oppose the Japanese Initiative?

I would put it this way: Why are we here? What is the purpose of the exercise? What is the purpose of our legal system, our tort system in aviation? An accident happens, terrible disaster occurs, families are ravaged, compensation has to be paid, and the public must know what happened so that this terrible thing may never happen again. That's what we are talking about.

My problem with the position advocated by George is that it focuses on only one of the two purposes of the system. Compensation is extremely important, it is one of the two purposes of the system, but there is another reason that the tort system exists, and that is the interest in unraveling and exposing the fault, exposing lack of care, and finding out what happened in these awful airplane crashes. There are, thus, two separate and distinct purposes, and there is merit and importance to both of them.

The Japanese Initiative solves the purpose of compensation, and I agree with George, it is the best way to solve the compensation need; and, if that's all we were talking about, I would be in favor of the initiative without question at all. But, the Japanese Initiative, which builds upon the Warsaw Convention, would also eliminate from our legal system, from our private investigative system, from our tort system, any examination whatsoever into fault or accident causa-
tion. The disaster occurs, the accident occurs, under the Japanese Initiative, Japan Airlines is liable, Japan Airlines will pay. Damages will be adequate, which means that the early offers will be reasonably adequate offers. I can't see any better means of compensating accident victims. That is true; but there is another aspect that has been close to me for over 40 years and is still close to me today. I am pleased to see in this room an interest represented, though they are on different sides of this issue, at least two Lockerbie families. Vickie Cummock has taken a position in favor of the Montreal Protocol. Kathleen Flynn appeared with me before the Senate Foreign Relations Committee to testify against the Montreal Protocol.

Why? Why did Kathleen Flynn and other Lockerbie victims take this position against the Montreal Protocol? Let's use Lockerbie as an example. While only one example, it is the most recent. The main reason that the world knows what happened in Lockerbie is the Lockerbie litigation. We had an opportunity to probe into the disaster. We had a chance to peel off the outer wrapper. We had to keep clear of the criminal investigation; but, we had the right to examine witnesses. We had the right to go into the Frankfurt base of Pan Am and take the testimony of the people who used the x-ray machine, people who did the security, the screeners who were supposed to be screening passengers. Our case was the basis for the world knowing about the filth of Lockerbie. We uncovered an awful mess and also, with respect to Lockerbie, we had an opportunity to go into the question of what caused Lockerbie in terms of how the bomb got on the airplane. We, in a sense, were the public's representatives, in taking the testimony of people in Frankfurt who ran off the computer printout that demonstrated that there was an unaccompanied bag from Air Malta KM 180, destined for Pan Am 103. We were doing the public's work of explaining how 270 of our citizens and the citizens of other countries were killed.

11 See In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 709 F. Supp. 231 (J.P.M.L. 1989), aff'd, 16 F.3d 513 (2d Cir. 1994).
The problem with the Japanese Initiative is that public investigation would not happen under it. This exposure wouldn’t have happened in any one of the myriad cases that I have participated in myself, and I’m just one lawyer. We had a chance to examine what went wrong, we had a chance to focus on fault, and we had a chance to focus on causation in a way that has made, and will continue to make, aviation safer. That will continue to protect all of us.

There is a real difference of opinion as to how valuable the tort system is in uncovering what has happened. I won’t go into the details of a lot of cases, but I’ll tell you one personal story. Tom McLaughlin might get a kick out of this, his partner Keith Gerrard might not get so much of a kick out of it, but I remember a case back in 1961 when the American Ice Skating Team was flying over to Europe to participate in the World Skating Championships. I have thought of this many times in the last few weeks in light of the Tonya Harding problem. As the Sabena Airlines Boeing 707 approached the Brussels airport, it suddenly was observed to begin to porpoise, and it porpoised and porpoised, and circled the airport many times and then crashed. For the next three years of my life I was involved in litigation against Boeing, a tort case, a Warsaw Convention tort case.\(^1\)\(^2\) We found no way to break the liability limit with respect to the airline, but we did have a chance to pursue the manufacturer. In those days, the head of the Boeing investigative team and the interface between us, Boeing, and its engineers was a wonderful man by the name of Prater Hogue. I’m sure Tom remembers him well, and Prater was the sweetest, softest, most wonderful guy I remember. I remember, after all my cases and all the problems I was causing Boeing, he personally escorted me through the Boeing plant in Renton, Washington. Of course, he tried to explain what those white tickets were — this aircraft is for Pan Am, this is for American. That engineer, you see, works for Pan Am. That guy is the represen-

tative of American, and that fellow Lufthansa. So, Boeing really wasn't making the airplanes; the airlines themselves were, and why should I have to sue Boeing?

But, that aside, Prater gave me my tour of the Boeing plant and Prater would sit in the room when I took depositions of Boeing's engineers. I remember taking the deposition of Roger Chandler in that case. Chandler was the chief control systems designer for Boeing. At this time they were beginning to work on the 747, and Roger Chandler, who had been in charge of the control system of the 707, was in charge of the control system design of the 747. Patiently, across the deposition table, with no shouting or screaming, but with a lot of documents and quiet questions, we got into the areas that caused that horrible accident. We were able to pinpoint the design errors that caused the crash. The cases were ultimately settled.

A long time later, about ten years ago, Prater retired from Boeing, and, mind you, in virtually all the depositions we had taken in cases against Boeing, Prater was in the room, always puffing away on his pipe, always with a little wistful smile on his face. And when he retired Boeing gave him a retirement party, and one of the greatest honors in my life was that Prater invited me to that party and asked me to say a few words, and to me that was recognition that these cases do some good. Prater never said it to me, but they do some good and they make aviation safer.

That process, in my opinion, we cannot give up. The Japanese Initiative is a great step forward but we have to find some better way. The better way is to denounce the Warsaw Convention. We don't need the Warsaw Convention. We don't need it for choice of law; we never did need the treaty for choice of law in the United States. We get along without it in handling domestic cases. It serves no purpose whatsoever. We don't need the Warsaw Convention. We should denounce it. That is the best solution. The best solution would provide early settlements in adequate amounts, because there is plenty of exposure in virtually
every airline crash. There is no limitation under the free
tort system based on negligence.

The solution that Warren Dean will offer, and I'll have
something to say after Warren speaks, has the same basic
defect in it that the Japanese Initiative has—under the
Montreal Protocols, there would be no examination whatso-
ever into fault or into accident causation. Under the Mon-
treal Protocols, the airlines would be liable up to 100,000
SDR, roughly $130,000 today. That's the limitation, and
limitations are inexcusable. I'll rely on everything George
said on that subject.

Recovering more than the $130,000 or 100,000 SDR
would require a supplemental compensation plan, which is
the other main reason I oppose the Montreal Protocols.
Adoption of the Protocols is the worst possible way to solve
the problem. The Protocol would be an amendment to the
Warsaw Convention. That's what the word "protocol"
means in international law. Under Article 35-A of the Pro-
tocol, a country, such as the United States can have a sup-
plemental compensation plan, provided it doesn't increase
the airline's liability and provided it doesn't increase ad-
ministrative burden. What that means is, for the passenger
to get anything above $130,000, there has to be, and there
can only be a system of first party insurance. The passen-
gers will have to buy insurance to protect themselves against
the airline's negligence. That's what Montreal Protocol
number 3 means: mandatory insurance imposed on the pas-
sengers. It would be just as though you went to see your
medical doctor, and you had to buy an insurance policy
when you walked in the door in case the doctor committed
malpractice.

To sum up, the Montreal Protocols are no good because
they perpetuate the limit of liability. We lose the benefit of
the fault system. We would lose the benefit of digging into
fault and causation. We would have to set up another new
bureaucracy. And we would impose the cost on the
passenger.
The best way to protect the public, recognizing the need for adequate compensation on the one hand, but also recognizing the need to keep society protected, to protect itself from malfeasance and to protect future accidents, is to denounce Warsaw.

Thank you.

Mr. Asselta: George, you will get another chance and so will Lee and Warren. Let's have your view.

Mr. Dean: Thank you, Joe, and thank you for the introduction. I have been at this a little less time than some of my distinguished colleagues here, but already I'm getting to feel quite old. You see, I can remember standing up in forums like this and debating with Lee Kreindler when he took the position that what we ought to do is exactly what the Japanese did. Today, however, Lee takes the position that we should denounce the Warsaw Convention.13 Some time ago Lee participated in a symposium where he said that if the carriers would agree to absolute liability without limitation, he would have to support them in spite of his selfish interest as a lawyer. I commended him for his position then, but given his new position I'm beginning to think things are starting to pass me by. I also have to point out that arguments change with time and they change with time for reasons that are hard to foresee. George properly points out that $100,000 is not a lot of money. You see the $100,000 was agreed to in 1971. In today's dollars, $100,000 in 1971 currency would be somewhere around $400,000. The treaty itself provided for an adjustment mechanism, part automatic and part discretionary, to increase the limit of liability. The United States has nobody but itself to blame for the fact that the Protocol was not ratified. I have no doubt, however, that the government of the United States will fulfill its commitment to ratify the Protocol. The United States took the lead role in the negotiations and would have updated the limit. So, I think it is a

13 In fact, Mr. Kreindler has strongly opposed the Warsaw Convention consistently for a long time. See, Lee S. Kreindler, The Denunciation of the Warsaw Convention, 31 J. AIR L. & COM. 291 (1965).
false premise to argue about whether the $100,000 makes sense simply because the United States failed to ratify, within the time frame, the Protocol they took the lead in negotiating. I'm not here to argue, however, for or against what we now refer to as the Japanese Initiative. George is absolutely right—the Japanese Initiative is fault-based. Specifically, it establishes a fault-based system for claims for compensatory damages over 100,000 SDR, and, to that extent, it preserves, as Mr. Kreindler would like to, some system of accountability. The question is, however, does such a system of accountability function, is it necessary, is it appropriate in international air transportation, and is it something that's worth paying for? And the answer to all those questions is, obviously, "no."

The reason the answer to these questions is obviously no is because, first, the Japanese Initiative doesn't work. A couple of years ago I brought a claim as a plaintiff's lawyer. It was a very interesting case up here in New York involving a product liability claim in the medical area. The product, which was used widely, was very important to medical safety. In fact, there may come a time when more than one of you have to rely on a product like this. I'd love to tell you about it and give you my conclusion about why I thought it was unsafe. I think you all would find it so, but "unfortunately" I signed a protective order, and I can't tell you a thing about that case, because if I did, I'd violate the protective order and impair my client's recovery, impair my obligations to the court, and impair my obligations to the tort system. So, the idea that tort law serves as a vehicle for exposing defects in products that circulate in society is a false premise. Quite simply, the tort system never has, and never will effectively do so. Furthermore, the tort law's function is not to find out exactly what happened; its function is to provide for recovery. We have seen that, as long as we are going to mention cases, in the KAL 007 litigation,14 where we found out what happened after Boris Yeltsin revealed

the tapes— but that was after the trial. We don’t actually know what happened and we may never know, even though that case has gone through the court system. The point is that the tort system does not function as a safety watchdog. If we were to try and sell it as a safety watchdog I assume the Federal Trade Commission (FTC) would come after us for false and misleading advertising, and rightly so.

The interesting thing about that aspect of the tort system, though, is its cost. Even if it did provide some kind of public venting of the causes of accidents that brought the litigation, consider the cost, both human and financial, of maintaining such a system. People go without compensation for five or ten years, and many people go without any compensation, all for the privilege of having some satisfaction about knowing that they may or may not find out what caused the accident. For example, when you have a child that is heading off to college and you can’t get compensation for your economic losses in sufficient time to pay for that one period, that one fleeting and very valuable moment in a child’s life when that child gets ready to go to college, what cost have you extracted, against the will of most of the people who go through this experience, for the privilege of trying to discover what you may or may not find out was the cause of the accident?

This cost is a huge tax; it is an unconscionable tax, and it is a very, very unfair tax to the people who go through it. And, it is not just the standard of liability that imposes the tax. If you have to prove fault, you have to obtain some discovery. We are talking international commerce here. I know of one case that took five years, and, whether the standard is willful misconduct, gross negligence, the Warsaw-Hague standard, which is too lengthy to repeat here, simple negligence, or even, but hopefully not, rebuttable negligence.

You still have to take the deposition. The deponent may be in a foreign country, or may not be an employee of one of the parties to the litigation. If the deponent is not a party to the litigation, then you have to pursue interna-
tional discovery procedures that are represented in treaties too arcane to even discuss today, and that, in and of itself, is a real problem. So the question that we have here is whether, as in the case of almost all other international treaties that establish liability regimes, we should recognize the difficulties, recognize the fact that we are dealing with international commerce, and devise a treaty that provides a responsible system that allows people to bridge those difficulties.

Our courts were not meant to be the tort forum for the world and they don't function well in that capacity. George mentioned that he thought that most plaintiffs recovered. Well, I have a list; and some of them are published names. Some of them are called bar canon, and other cases that are familiar to you here, and they didn’t get recovery; at least not by their expectations. When I was in government, people used to come in and see us on a regular basis about how the system was working for them, and it was not a particularly pretty picture. So, I guess I have to say I’m not necessarily here to suggest that we ought to have one particular approach or another. We must have an international system. We must have an international treaty. We must have rules that people can understand and rely upon, and we must have a system that works to bridge the awkwardness and difficulty of the international air transportation system that people encounter in attempting to get compensation for their losses.

That is our obligation. That's an obligation of the government, and the government has met that obligation. They signed a treaty. The treaty is not perfect, but I can assure you that we can make it work and we can make it work for the benefit of the passengers that use the service. I also want to mention one thing in passing, however. The treaty covers a lot more than passenger compensation.

The treaty provides rules for cargo and baggage as well, and those are important components of the treaty system. And, not only are those important components of the treaty system, but George is absolutely right when he says it is a
private international law treaty, but, the treaty does establish obligations for governments, and those obligations are that governments cannot pass laws that prohibit compensation to victims of air crashes. Those obligations are that governments cannot unilaterally change the terms of liability that are available to passengers in international air transportation, as they could without a treaty.

Absent a treaty, there is absolutely no assurance that governments will not unilaterally change such terms. As a matter of fact, I can think of 500 ways right now that a foreign government could frustrate the jurisdiction of U.S. courts with the kind of reach that foreign governments have over foreign air transportation. Thus, the question is whether the government should agree to make sure that people are compensated for their losses and whether the United States Government should agree to carry forward its commitment along those lines to make sure that the Americans get the recoveries to which they are accustomed. I think the answer to that is yes, but if we cannot obtain approval of the Montreal Protocols, then I think the inevitable question is raised about what we do next, and I think something along the lines of the Japanese Initiative is going to be something that we will take a hard look at.

The International Air Transport Association (IATA) says it filed a petition before the Department of Transportation seeking discussion authority and antitrust immunity to consider the wide range of issues posed by special contracts like the Japanese Initiative. Absent such authority and immunity, the carriers may not jointly discuss those issues in light of the operation of U.S. antitrust laws. That petition remains pending. Some way or another we are going to find a way to solve this problem, but we will solve it with an international treaty system, and the reason we will solve it that way is because we must. Thank you.

Mr. Asselta: Now the time for rebuttal. Now we have had the advocates give their position, and the question is whether any of the commentators or people that we have invited will agree with anyone.
First, we have a perspective from an airframe manufacturer, by way of a representative from the law firm of Perkins Coie. He is Tom McLaughlin. His firm, of which he is a partner, has been general counsel to the Boeing company for many years. Tom comes to New York from Seattle for his partner, Keith Gerrard. Tom is a Harvard man and has been in aviation products defense for 18 years. He has represented Boeing in several major air crashes such as Lauda Air in Thailand, United Airlines' Colorado Springs accident, Japan Airlines, and the Air Florida accident. Besides the "big boy" defenses we referred to, the heavy iron people, Tom has defended some general aviation cases. He has also been active in the legislative area for product liability and tort reform. In this regard, Tom has represented Boeing and the Aerospace Industries Association and other AIA members such as McDonnell Douglas, General Electric and Pratt & Whitney in connection with the airlines' efforts to obtain ratification of the Montreal Protocol.

Tom also gave me a hand by participating in an amicus brief on behalf of the AIA in my position for Piper Aircraft, when we tried to go to the United States Supreme Court for federal preemption of the FAR's for manufacturers.

Again, I thank you.

The second observation will come from Gary Allen, who is the director of aviation and admiralty litigation for the torts branch, civil division of the Department of Justice. In this position, Gary is responsible for approximately 1500 claims, for or against the United States, with alleged values exceeding $16 billion. He has a staff of 60 attorneys in offices in Washington, D.C., New York, and San Francisco. Among the claims handled by Gary and his staff were the space shuttle Challenger explosion and Exxon Valdez spill in Alaska, as well as many, many that you all have been in-
involved in. He was a Phi Beta Kappa graduate from Ohio State, and served as editor of the Georgetown Law Journal on his way to his juris doctor degree. Gary started at the Department of Transportation in its legal honors program, then the Federal Aviation Administration (FAA) litigation division. He has tried many aviation cases and now is only two circuits short of having argued in every United States Court of Appeals.

Mr. Allen is an active pilot and recreational boater. He is a contributing editor to the Lawyer Pilot Bar Association Journal, and his regular column, *The View From Justice*, is a must on my reading list.

I thank you for coming from Washington, D.C.

Our third commentator, an old friend of mine, Peter Magee, will be presenting the views of the insurers. Pete is now executive vice president and general counsel and director of claims for Associated Aviation Underwriters (AAU), one of the world's largest leading aviation underwriters.

I first met Pete when he was a plaintiff's attorney with a forerunner firm of Speiser Krause and Madole. Pete, you really had a checkered career, didn't you?

After having begun as a defense lawyer at Bigham, Engler, he has been with the AAU for the past 20 years. Before AAU moved to New Jersey, we used to enjoy Pete's war stories from his Marine Corps days in Korea, where he flew the Corsair and later the Grumman F-9F Panther jet, and again, I thank you for being here. Tom, you may start it off.

Mr. McLaughlin: Thank you very much, Joe.

I don't have terribly extensive comments to make, and I'm certainly not speaking on behalf of any particular manufacturer. As Joe mentioned, I have worked with a number of the major airframe and engine manufacturers on issues related to the Montreal Protocol and have had an opportunity to pick up on some of their views. So, I think I can speak reasonably accurately.
I think manufacturers certainly are in agreement that the existing system is a bad one and is in desperate need of replacement. The existing system is one that creates an unlevel playing field, frequently causes claimants large delays, as has been mentioned, and frequently presents claimants with a choice of trying to jump over the willful misconduct hurdle that's been placed before them — which increasingly seems to be not that high a hurdle — or, alternatively, trying to find some other deep pocket, such as Lee alluded to in the case of the Sabena accident many years ago, well before my time. The existing system is grossly unfair and outdated, and needs to be changed.

Now, if we were to renounce the Warsaw Convention, entirely, or if we were to go to a fault system along the model that the Japanese have proposed, the manufacturers believe that you would be returning the system pretty close to what we have in the domestic arena today. In the domestic area, the manufacturers find the system to be reasonably tolerable, given some of the basic faults of the tort system. Domestic accident litigation tends to result in agreements among the defendants or between plaintiffs and defendants so that the cases don't end up going to trial. There are no-contest stipulations in the exchange for waivers of punitive damages, and compensation is available in reasonable amounts fairly early in the game.

There may also be funding agreements where the manufacturers, the airlines and other parties, such as the FAA, agree at some early stage on how they are going to divide things up, or at least fund matters, and agree later how to divide up the payments. So the system seems to function reasonably well in the domestic arena.

A number of years ago the manufacturers tried to get Congress interested in what was called an Air Travel Compensation Act, which basically went to a no fault system in the domestic area. Under this Act, if you were killed or injured on a domestic flight, which obviously wasn't your fault, you would get quick compensation and the involved parties would sort out their shares later. I think many of
the manufacturers still think that this Act would be a good idea.

Lee mentioned the deterrence function of tort law and the need to publicly expose wrongdoing. There are plenty of other ways that the deterrence function of the tort system is satisfied after aviation accidents. We have the official investigation, of course. Huge resources go into the National Transportation Safety Board’s efforts to find out what caused the crash, and all of their findings are public knowledge. I recognize that circumstances may be different sometimes in foreign investigated accidents. You also, of course, have the deterrence effect of the amounts of money that are paid and the adverse public relations and sales image for the companies involved. Manufacturers don’t want to see accidents involving their products. They don’t want to have the associated costs affect their future premiums. So, there are plenty of reasons for deterrence short of plaintiffs’ lawyers acting as private attorneys general.

The manufacturers have been taking a close look, over the last few years, at the package that the airlines have proposed in the way of a supplemental compensation plan that would go on top of the Montreal Protocol if it were ratified in the United States, and, frankly, the manufacturers have serious problems with what has been proposed.

The Montreal Protocol, of course, throws up not just a hurdle like willful misconduct, but an absolute wall against any further liability of the airline. The Protocol provides nothing in the way of protection for the manufacturer. So, there are serious concerns about what the impact of that would be on manufacturers. They also have a lot of questions about the details of how it would work.

For example, the plan administrator, who would be in charge of making the supplemental compensation plan payments, is charged under the proposed bill with using all reasonable efforts to try to collect the amounts that have been paid to the plaintiffs from at-fault entities other than the involved airline. He does that by taking an assignment from everyone he settles with, standing in their shoes, and,
presumably, going after anyone and everyone in order to satisfy this all reasonable efforts test. The manufacturers are concerned that the plan administrator will be likely to make some bad choices in that regard because he is going to be questioned by Congress and by the administration about why he is charging $5 a ticket instead of $4 a ticket when he didn't go over XYZ in a particular case trying to get some money back. So, there are likely to be claims by the plan administrator that would not be brought if we were in the area of a fault system where cooperative agreements are reached.

And, the fact that, when those reimbursement claims are brought by the plan administrator, the manufacturer might be responsible for paying more than its fair share, under joint and several liability concepts, with absent parties' fault not being taken into consideration is more troubling. Manufacturers, I believe, are willing to pay their fair share when they are responsible for a portion of an accident, but they are naturally quite resistant to having to pay more than that.

Mention was made of the cargo aspects of the treaty. Manufacturers have been supportive of the cargo airlines in their attempts to get modernization of the various paperwork that goes along with that type of activity. At least to date, Montreal Protocol 4 has been lumped together with Montreal Protocol 3 and hasn't gone anywhere. I think I will leave it at that, and may have additional comments later.

Thank you.

Mr. Asselta: Thank you, Tom.

Now, for the government's point of view, Gary Allen.

Mr. Allen: Thank you.

I'm one of those guys George was referring to who is down in Washington trying to do this and that with the Montreal Protocol system. Actually, I'm not, and I should make that clear from the outset. In my job, which is not a policy job, we have the opportunity to provide support to an administration as it works through and develops posi-
tions on matters like the Montreal Protocols. In that role, we had the privilege of working with, in my case, three administrations on this issue. So, first of all, let me say that the Clinton administration has, like every administration since 1976, endorsed, just recently through its Civil Aviation Initiative, an adoption of Montreal Protocol 3 and 4, basically for the same reasons that other administrations have endorsed it. They recognized, as virtually all of us do here, the difficulties that other speakers have alluded to, and with which most of us have personal familiarity, that the present circumstances force on us, whether we are plaintiffs or defendants in litigation. But, I also think — and from here on I launch into my personal observations and not those of the Administration — that one can safely say there is a recognition in this Administration, as in those before, of the historic value of the Warsaw Convention. One way, I suppose, is to see the Warsaw Convention as a 1929 car with a 1994 engine stuffed into it, but I think that does a little bit of a disservice to this vehicle, which has served, in many ways, very well over the years as the industry has evolved from its fledgling beginnings to what we have today. Listening to the stories of Lee Kreindler and others that have been at this a long time reminds me of the story back in the mid 1960s of a traveler regarding, with some trepidation, the DC-6 leaking oil on the ramp as he was about to board to cross the Atlantic. He said to the gate agent, “How long has it been since one of those things of yours went in the drink?” The guy thought for a minute and said, “1957.” The traveler said, “Well that’s not so bad.” The gate agent said, “Well, I guess you don’t think so, it’s 21:30 now.”

I would echo some of the comments here that when we turn to the tort system to be the superior vehicle of choice in accident investigation, I think that’s a troublesome concept. I would certainly agree that on occasion the tort system has been invaluable in getting to some of the root

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*See generally, Administration Unveils Sweeping Aviation Initiative, INSIDE DOT & TRANSP. Wk., Jan. 7, 1994, at 1 (commenting on the Clinton Administration’s Initiative to Promote a Strong Competitive Aviation Industry, released in January 1994).*
causes of aviation accidents, but I would say that normally the accident investigators of the United States and certainly of most of the International Civil Aviation Organization (ICAO) countries, have proven themselves most capable over the years of performing that function and performing it well. I think it also important to remember that on the odd occasion out, and fortunately they are rare so far, where you have sabotage or terrorism, as we had in Pan Am 103, the very workings of our tort litigation system can be most difficult for those charged with the vital task of bringing to the bar of criminal justice those responsible for such reprehensible acts. My office did play a role in the Pan Am 103 litigation in defending the government against attempted encroachments by both sides, both the defendant Pan Am and the plaintiffs, each of whom sought, for their own valid litigative reasons, to reach into the government’s ongoing criminal investigation to get information helpful to their cause. The distress and resource displacement that caused within the law enforcement community was very real, and very difficult, and, unfortunately, distracting in a time such as ours where government resources of all sorts are severely strained. So, I think remembering that the fact-finding, or alleged fact-finding, of a piece of civil litigation can, in fact, be very difficult when there are criminal matters involved is important.

I think, to be brief, the Japanese Initiative certainly is an alternative to the present situation. Is it superior to the opportunity posed by Montreal Protocols 3 and 4, and the supplemental compensation plans presently proposed? I suspect not. Under the supplemental compensation plan, the very worst that one would have, first of all, is a circumstance in which U.S. passengers would be assured of full, and hopefully speedy, compensation under a system whose values would be based in U.S. tort law, the most generous in the world. Secondly, as to the ultimate allocation of those burdens among potential tortfeasors, I think the present tort system on the defense side works reasonably well.
I have had the privilege of sitting down at tables with John Brennan, Russ Mirabile, Pete Magee, and others in this audience, on the plaintiff and defense side. Speaking as a defendant, we have had the opportunity to sit down in many cases, certainly not all, to see whether a reasonable accommodation can be reached that would, at the end of the day, provide a relatively meaningful allocation without the need of expensive litigation. I don’t see operation under the supplemental compensation plan as being appreciably different from that. I don’t frankly see potential congressional oversight, or anything of that sort, as a significant factor. I think the plan would be a simple extension and relatively seamless transition from the system that we presently have.

One thing is clear. The present situation, though workable, is extremely difficult, is inefficient, distorts litigative relationships, and brings parties into litigation that don’t belong there. The existing regime is fractious and inefficient.

And, so, the Japanese Initiative, though a step in the right direction, is not as attractive a step as would be the proper ratification of Protocols 3 and 4 with a supplemental plan.

Thank you.

Mr. Asselta: Now for the insurance view, Pete Magee.

Mr. Magee: Thank you, Joe.

After listening to everyone, I feel very much like Admiral Stockdale at the vice presidential debate. Why am I here? I have had a second career. I have been on all sides. I started out as a defense attorney for about seven years, and then, for about eight years, was a plaintiffs’ attorney for a firm in competition with Lee. The last 21 years or so of my career has been with the underwriters. On any of the sides I was on, I never felt that I was there promoting safety. I had a client and I represented the client. And on the defense side, I was protecting the client and minimizing damages. As a plaintiff, I was there to get money for them. The one thing I’ve learned over all these years is that the system works because we’ve got the money, and they come to us
and they want to get it. Safety has never been an issue. I don’t doubt that Lee believes safety is an issue. We have argued this over the years, but I think the system itself has that built into it, and I don’t think that other nations may not be as sophisticated as us—they have an interest in it too, the manufacturer wants to know his product doesn’t cause another accident. The government is interested in air traffic control, and so on, so I never felt that safety was an issue in which I was involved.

As for the insurance industry, from the comments you can understand that any decision, whether as to Montreal Protocol 3 and its supplemental plan or the Japanese Initiative, affects a lot of the segments of the industry. I think that the position of the insurers is misunderstood, and I think this is because we don’t have a position. I represent the Associated Aviation Underwriters (AAU), and we are in the same position as the other aviation insurers. We are a supplier to the aviation industry—we supply a product that is capacity and service, and we supply it to all segments of the aviation industry, whether airlines, manufacturers, airports, or whatever.

So, taking a position would be inappropriate, and, in fact, there isn’t any official position. To put it another way, as a supplier we adapt to the rules; we don’t make them. But, we do have thoughts on the things that have been proposed.

As to the Japanese Initiative, the beauty of it, and I have said this in other places, is its simplicity. Use Article 22 and just say “no limit.” In all the years in which I was dealing with the Warsaw Convention, that was the point I would raise—why can’t we just do away with the limit, because it causes more problems and we spend more time and money on litigation on a very small segment of cases that are disproportionate to major accidents. In the the Arrow litigation,19 remember the military airlift coming back some years ago, I think 1989, involving an accident up in Canada,

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we had 250 soldiers on board. We had all that litigation wrapped up within two years and everyone recovered. We spend more time and effort on a single Warsaw Convention case than we spend on all others. We have litigation, like the United Airlines accident at Colorado Springs. There is a domestic accident, I think the flight was from Peoria to Chicago to Denver to Colorado Springs. We had three tickets covered by the Warsaw Convention on the airplane. We will get rid of that case even though it is a very interesting one. No one to this day knows what happened, and I don't see any plaintiffs' attorneys running out wanting to get on the committee to get there and take the lead on that one, but, we will have more trouble with those three Warsaw Convention cases than anything else involved with that accident.

But, I was always told we had to keep the Warsaw Convention because it was the only way the other nations could abide by it and we wanted uniformity, those things you have heard, ticketing, waybills and the like. My thought always was, all right, keep all those things, like the ocean marine people do, and just remove the limit. The Japanese did it, the world has not come to an end, and their system seems to be functioning. But, the Japanese Initiative has some problems and I will comment on them.

The Japanese Initiative is simplicity and all that goes with it. If everyone were to adopt it, then the problem is solved, everything meshes together, and you have the Warsaw Convention as it is now, without the limitation; but, part of the problem is that not all the airlines are going to go along with it. If they don't, then you have problems. Take a flight from Tokyo to Los Angeles to Chicago on United with the Tokyo to Los Angeles portion on Japan Airlines and the Los Angeles to Chicago portion on United. Japan Airlines takes the position in the Initiative and the paper they put out, they say very clearly that the Japanese Initiative only applies to the segment that Japan Airlines flies. That is well of

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them to say and it may be true, but, I can't for one minute believe that a plaintiffs' attorney is going to accept that. And, so, if the injury is on the United segment, and involves an international ticket faced with a Warsaw Convention limitation, they are going to argue there is only one contract of carriage, that it is a seamless garment, and while you can only sue for the injury suffered on United, the entire contract applies and the limitation was removed by Japan Airlines; so, therefore, I have unlimited damages. Litigation is the only way we would find out how that would sort itself out. If all the airlines were to go along with it, then the problem isn't there.

As far as the Montreal Protocols, I think the Japanese said it best. They were waiting and it never got done, so they went and did what they did. The Protocols and the supplemental plan have some problems. On their face, they seem to have solved the problem, that is the recovery for injured people of unlimited damages. The Montreal Protocols have gone through various propositions to where they are today, simply unlimited damages, but they have problems from the underwriting side, and I don't profess to speak as an underwriter. I have enough problems with the claims end, but, from the underwriting side, the way the plan is set up you have to accept unlimited liability. But, you have to put a limit on the amount of the ticket or surcharge you can make. Is that surcharge going to be enough to cover the exposure that you have?

On the claims side, you have shifting responsibilities for adjusting the claim, and the problems that come out of that. Right now, an air carrier will select its lead insurer. Well, I should stop a moment. I'm not sure everyone here would understand. For example, you don't have a single insurer that insures United. The market is vertical. You have all the various markets, the American market, Lloyd's, the French, and so on, all of whom have a portion of the market or a percentage of it. There is one insurer who is designated the lead to handle the underwriting function and, from my point of view, the claim function; and that's
part of the service that we offer. An airline may hire or seek out an insurer for the claims service. Under the plan, the supplemental plan under the Montreal Protocol, the first 100,000 SDR would be adjusted by the claim service that the carrier selected. Above the 100,000 SDR, the plan administrator is involved and he may have a different claims service, and that claims service will adjust the claim for the carrier, and it may be a claims service that the carrier did not want to have representing them in the first instance. But, these are practical problems that probably could be solved along the way. You have other problems where the claim is in the gray area. Maybe we believe, or the plan administrator believes the claim is less than 100,000 SDR in value, and the plaintiffs believe it is more, and then the question that comes up is, whether the plan administrator is going to tell the insurer of the carrier we want you to settle this claim within the 100,000 SDR. If this can be done, am I going to be accused of bad faith if it doesn't happen, and who is going to be suing who? But, again, they may be practical problems that can be solved.

From the insurer's standpoint, I speak with limited knowledge. I'm a claims person, not an underwriter, and there are underwriting problems that perhaps I don't know about. But, even when I look at it from the claims standpoint, I would like to get rid of the Warsaw Convention. It causes more grief, more headaches, and more litigation. Whatever plan they would decide upon, whoever it is that's going to decide, from the insurer's standpoint, just tell us what the rules are and we can price our product to the rules. So, from an insurance standpoint, we have no position other than to ask what the position is.

Thank you.

Mr. Asselta: I guess you can see there are some differing opinions. What we will do now is let the advocates rebut and then anyone who has questions can ask them of any person. Starting with George, do you have any rebuttal?

Mr. Tompkins: I just want to make a few comments.
I forgot to mention that I brought with me several copies of six articles on the Japanese Initiative, which you may find interesting, from a variety of people. The lead article is by Koichi Abe of Japan Airlines, who describes what they did and why. There also is one by Tony Mercer of Air New Zealand, who has been a very staunch advocate of Montreal Protocol 3, but he looked at the Japanese Initiative in a different light and said maybe that it is not a bad idea for those that have the problem they have in Japan — the disparity between international and domestic limits.

Let me make a couple of observations. One thing we tend to overlook in these discussions is the interest of the airlines. If the airline is unfortunate enough to have an accident, all the airline really wants to do is to see that the families of their passengers are compensated fairly, fully, and quickly. They do not want to get embroiled in protracted litigation with the families, or protracted litigation with the FTC or manufacturers, and, thereby, have the passengers' families wait to be compensated. The airlines want to get the matter out of the way and get back to the business of running an airline. That is something we have to keep in mind.

The Japanese Initiative accomplishes the goal of timely compensation because, with the approval of their insurers, the airlines of Japan can go out in any case and compensate all of the families of their passengers. At the same time, if the insurers of the airline want to fight it out with the manufacturer or FTC later on, or during the time the families are being compensated, the prime objective of the airline will not be delayed. That is something we have to keep in mind. Where the limit is not applicable, cases are disposed of fairly quickly, and in big cases, for example, in the Tenerife disaster litigation, the limitation did not apply because there was a collision of the aircraft of two airlines. The passengers in one aircraft sued the operator of the other, and vice versa, and every case dealt with damages only. I

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think only six cases were tried on quantum and they were done as quickly as possible. There were six or seven other cases, if I remember correctly, and one was the Japan airlines crash in 1985 — a domestic flight with 505 passengers killed, no limit of liability, and those cases were all settled by Japan Airlines on behalf of Boeing and Japan Airlines in accordance with Japanese customs, while Tom's partner and I were working behind the curtain as to who was going to pay what, but there was no liability litigation out of that disaster.22

Litigation is absolutely essential when there is a limitation. The insurers have to defend the limitation. We have to defend the limitation because that is the law, and people that Lee represents have to fight to break the limit because $75,000 just is not enough to compensate people today.

The guys in Washington do not agree. I had a frightening experience in the Senate when we were there in 1983. The Senators are those who frighten me, because they do these things without knowing why they are doing them, or anything about them. I had that experience in 1983 with the Senate minority leader, who was thinking of voting in favor of the Protocol because the Foreign Relations Committee said to. And, I think we were meeting Senator Byrd, as I recall, and we went on for an hour talking to him. I asked Lee and John if I could speak and they said jump in, so I did. I said, Senator, let me give you an example. Eight years ago your state legislature abolished the limit of liability, did away with it because it is not in the interest of the citizens of West Virginia. Let's assume your son is coming to visit you and Lee's son is coming to visit him from West Virginia. But, your son is going to go on to play a few rounds of golf in Bermuda, then go back to West Virginia, and the plane never gets out of West Virginia. Your son's widow and children will get $75,000. Lee's son's widow and children, who are only coming up to Washington, will get

22 See generally, Douglas V. Nelms, Where the Fault Lies, AIR TRANSP. WORLD, Oct. 1994, at 40 (discussing the Aug. 12, 1985 crash in Japan, involving a JAL 747, in which Boeing managed to resolve all of the domestic claims without litigation).
whatever the damages are. Senator Byrd said, "you make a good point," and he voted against the Protocol.

The Senators do not really grasp what the limit of liability means in real life. I do not understand why the rest of IATA carriers have not followed what Japan Airlines has done. Antitrust immunity, with all due respect, is a lot of gobbledygook. The Department of Transportation has not acted on the petition before them because they do not know what to do with it. What is the antitrust issue if airlines want to talk about whether they can come to terms with the Japanese Initiative and waive a limit of liability? The antitrust issue just is not there, and I think that is part of the problem. I wear a belt but I don't wear suspenders, and I am sure a lot of airlines would like to have the protection of immunity before they talk, but I think you should forget it and get the carriers to move for the adoption of the Japanese Initiative.

On the KAL 007 case, you say we now know what happened. I hardly think so. We asked Judge Robinson to reopen the case based on information the Russians have now made available, and he is going to hear the motion on April 22. Meanwhile, Judge Robinson has stayed everything in the case pending the rehearing. If you really want to know what happened in that case, you should ask your government.

Thank you.

Mr. Kreindler: I didn't quite know what to expect tonight, but one thing I didn't expect from George Tompkins was for him to be speaking with affection of the time when he, John Brennan and I worked together on a public project. So, in that sense alone this was worth the price of admission.

Another thing I didn't expect, frankly, I spoke to Gary Allen yesterday, and I haven't seen Gary in a long time. I was looking for a cleanshaven young man, and not until he sat up here did I realize that was the real Gary Allen. The most effective point Gary made with me had to do with his
beard and mustache, and not with anything he said from this platform.

With respect to the proposition that the Warsaw Convention has served us, including the United States government, well, for lo these many years, I simply put to you the question, "how?" The Warsaw Convention hasn't done a damned thing, except to infringe on the rights of American citizens in denying them adequate recovery. That's all it has accomplished. With respect to one other point that Gary made that there is no need for the tort system, I could give a lot of examples. One I mentioned earlier, in that 1961 Sabena case involving the Boeing company, there was a public investigation, but you won't find anything in that public investigation that probed into the adequacy of the control system of the airplane; it was not even examined. We are here tonight talking about international airline cases, and that means accidents in Thailand and Belgium and all over the world—countries with less sophistication than the United Kingdom or United States, and I think the public needs that kind of protection.

I'll give you another example. Not that I came here to make speeches enthusiastically complementing John Brennan, but another example is the Turkish Airlines DC-10 that John reminded me of on many occasions.23 There was no public investigation. John, you know, produced the famous Applegate memorandum, which castigated the conduct of one, and possibly two, major manufacturers, one of whom was insured by John's company.24 This conduct came to light because within the confines of the tort system Mr. Brennan thought it should come to light, and it was the tort system and that case that brought that to public attention. No public investigation, Gary, so I don't want to stand on the soap box and give you case after case, but there are a dozen people in this room who can give you hundreds of

24 See generally MOIRA JOHNSTON, THE LAST NINE MINUTES: THE STORY OF FLIGHT 981 234-37 (discussing the "Applegate Memo").
examples of important matters of public interest that were never even scratched by public investigations.

Warren Dean talks in terms of the five or ten years families had to wait, and that is terrible, awful, but that’s not because of the tort system, that’s because of the limitation of the Warsaw Convention, the idiotic Warsaw Convention, an anachronism, an abomination. That’s why people have had to wait for five and ten years. The Warsaw Convention spawns litigation. It takes a lot of time. We ought to get rid of it. The only thing that’s worse than the Warsaw Convention is Mr. Dean’s Montreal Protocol number 3, which adds, to all of the problems of Warsaw, the additional problem of transferring the burden from the defendants, the tort-feasor, the wrongdoer to the passenger. The burden passes from the wrongdoer, to the innocent passenger under the supplemental compensation plan.

As to the question of my consistency over the years, I probably should plead just a little bit guilty. But, let me make this clear: I would have embraced the Japanese Initiative today if you wanted to compare it to our present odious system; it would be far better for the passengers. I explained that I think we are giving up a lot in giving up the fault system, but in comparison to what we have now, let’s take it. Along with George, I can’t understand why the airlines, all of them, haven’t adopted it, as distinguished from the Montreal Protocols. On a comparative basis I will happily embrace the Japanese Initiative, and there are cases represented here in the room tonight where immediate adequate compensation would have made all of the difference. But, my problem is I also know of cases where the public has benefitted by our tort system.

As far as your protective order point is concerned, Warren, I agree with you. I think protective orders are odious. We fight them all the time. We urge our clients not to agree or let us agree. Of course, if a client for private interest wants us to go along with the protective order, we do it. But, we resist protective orders. They do interfere with the correct operation of the tort system in exposing fault. I
agree with you about that, but next time I would urge you not to sign one.

In summary, the Japanese Initiative is a great step forward in the public interest. If we go that route, let us recognize that we are going to give up something terribly valuable to the public. That concern is what leads me to oppose it.

Thank you.

Mr. Asselta: Those who know me probably are aware I’m rarely without an opinion and I do have one question I will ask. As I sat here, I’m not supposed to take a side and I really won’t, but I notice that the airlines don’t like the Warsaw Convention limitations. George’s position is that the plaintiffs don’t like it, the manufacturers don’t like the Warsaw Convention and the insurers don’t like it. Maybe somebody can explain to me why we have the Warsaw Convention.

Mr. Dean: I certainly didn’t mean to leave the impression that the airlines don’t like the Warsaw system — the airlines view the Warsaw Convention as being critical. They want a Warsaw Convention that works. Nonetheless, they see the treaty system as absolutely essential in international air transportation. I now, for the first time, am clear on something tonight. I always learn something, but I now know why the Montreal Protocols were defeated in 1983. Senator Byrd wasn’t the majority leader, Howard Baker was and the limitation we were talking about was $300,000, not $75,000, but nonetheless, it was, in retrospect, a mistake to have any limitation on the supplemental compensation plan. We talked about the issue of why the airlines don’t, or should or should not adopt the so-called Japanese Initiative and how they should get there. And, I mentioned to you that the IATA had filed an application for approval from the Department of Transportation and antitrust immunity to discuss that very subject. George raised the prospect we didn’t need antitrust immunity to discuss that subject and then he said he wore his belt and doesn’t wear suspenders.
If the belt means tort law and suspenders means antitrust law, I can understand the conclusion before you.

The fact of the matter is any time competitors get together to discuss the terms and conditions under which they will offer their services to the traveling public, including the warranties, of those services, that is, per se, conduct that violates the antitrust laws. There is no public interest exception written into the antitrust laws of the United States. As a matter of fact Section 412 of the Federal Aviation Act specifically says that carriers may apply and obtain antitrust immunity for conduct necessary to secure an important public benefit. If there were public interest exceptions to the antitrust laws of the United States, we wouldn't need that statute. That statute has worked a number of times. Maybe Chrysler, Ford and GM ought to be able to sit down and agree on the terms of their warranty; but, all we need is one lawsuit saying why did you waive limitation of the defense of non-negligence under Article 20 paragraph 1 for only $100,000? What about $200,000 or $250, what about $300,000? And, the plaintiffs in that case would be entitled to treble damages, what ever that might be, in that some state attorney general might be able to bring a lawsuit under his own law or some federal attorney general might be able to bring a lawsuit under his law. The question about whether or not approval and immunity under the operation of the antitrust law to work out a system of special contracts, and to work out some kind of uniformity on special contracts, no matter how beneficial to the public, must obtain prior DOT approval and antitrust immunity. And, as a person who spent all last year litigating an antitrust case brought by the Department of Justice, I can assure you there is no doubt about that.

Mr. Asselta: Thank you.

Mrs. Cummock: Would you entertain comment from a Pan Am 103 widow on this current system?

Mr. Asselta: Yes

Mrs. Cummock:
I'm Victoria Cummock. I'm a Pan Am 103 widow. For the past five years I have had the privilege to listen to the issue of international liabilities, as discussed by various very eloquent and well educated individuals representing not only the airline industry, trial attorneys, and many Departments of Transportation, our own as well as others. I have watched and listened to the lobbying on all sides of this issue, but, unlike most of you here tonight who choose to represent one side or the other, I have had to live with this system, not through choice, but because of tragedy.

My husband John was 38 years old when he boarded Pan Am 103 on December 21, 1988. I was left widowed with three small preschool children. This is when my nightmare began with living through the current Warsaw Convention system. The reason I'm here today is not for your pity, but for your consideration, and to remind you that the voice of the passengers and their families who are left to pick up the pieces of any individual air disaster must be heard during discussions like this. Planes will continue to go down for all types of reasons, and that's a reality that anyone who boards a plane must live with. I'm not so naive to think that corporate interests, whether lawyers, airlines or insurance companies, don't exist, but, more importantly, let us not forget that we are all airline passengers, and so are our family members and our friends. Morally, we must work together to develop a system to care for and protect all future passengers and disaster victims. I think lawyers decided that the issue of air disasters is a civil liability issue versus a compensation issue; and, as an average citizen, I resent being pitted against a major corporation in order to bring supposed justice to a case. Widows, orphans or families should not have to police an airline industry; our government, the FAA, the Department of Transportation, and the Department of Justice should bear this burden.

The current system is an abomination. It only victimizes the victims' families by dragging them in and out of court for over a decade at major emotional and financial cost. On the date the plane went down, I vowed to myself I
was not going to allow either myself or my three children to be victims but to be survivors. Little did I know how hard it was going to be to pick up the pieces when, at any given time, the nose cone of that plane could be flashed on the TV as it lay in the fields of Scotland, whether on TV or newspapers, and most of which is or can be illustrated in the media either by our own attorney or by the opposing attorney. All in the name of justice. It is very hard not to be eventually crippled or revictimized to the point of paralysis, as many families are.

Whether the Montreal Protocol with the compensation plan is ratified will not make a difference to the Pan Am 103 family members or to the KAL family members, it is not a retroactive deal. The reason I’m here today is, hopefully, we can gather all these minds and try to make something come together to change the system. I have worked in Congress with Senator Mitchell and Senator Dole, in the last administration as well as the current one, to analyze the Montreal Protocol system. Man’s inhumanity to man is not limited to evil acts like terrorist bombs; it also deals with each one of us and morally impacts our lives and not just our pocketbooks or egos. Everyone talks about how messed up the system is, and how unjust it is. We are all a part of that system, everyone here. We must all work together to make sure that a more humane system exists.

The Scottish law required compensation of the families in Scotland. They live within a no fault system and have all been able to get back to the business at hand. Families there are putting their lives back together. We need a system that provides support and stability at the outset for victims’ families.

In my estimation, from what I have seen as the options right now, the Montreal Protocol system with the compensation plan at least gives the victims’ families some money at the outset. It gives them money to bury their dead, to probate wills and for trauma support. Supplemental compensation plans allow for incremental damages to be sought
later without having to prove willful misconduct. This will probably shorten the process by half the time.

In another ten years, at the end of my trial probably, do I think that justice is going to be done if we have a positive outcome on the Pan Am trials? I don't feel that we are going to be providing any more than impact for policing the industry.

Pan Am is no longer in existence. Since the executives guilty of breaking the law have not been brought to justice by our government, do I feel that the financial penalties placed against their insurance companies is going to do anything? No. In ten years, my children will probably be ready for college. My three-year-old daughter who—well, she is eight now, but was three at the time of the disaster couldn't learn how to read because of the trauma that she had received here. She needed counseling, as did my three other children.

I have had to spend the majority of my time and money that has been available to me in order to get our life back together and get the support that we need. If she was not able to receive what she needed, and I had to wait for 10 to 15 years, my daughter would probably grow up illiterate, angry, and with very poor self-esteem. All the money in the world cannot bring back a childhood, and this is the system that we have all been sentenced to use.

I feel it is important for all of us when you have these sessions to also look at the passengers and also to look at each other, because you are all potential passengers. Do not feel that we are all a bunch of faceless people trying to look for deep pockets. I feel if there is compensation that we are entitled to, then it should be a fair amount of compensation but compensation should be received swiftly and adequately—we should not be used as pawns to bring different companies to justice.

Thank you.

Mr. Asselta: I do thank you. Your points are well taken, most appropriate and I appreciate you making them.
Mr. Kreindler: Mrs. Flynn is also a Pan Am family member. She would like to say something.

Mrs. Flynn: Good evening, I don’t have to go up and say anything there. I can see you. I’m also not a victim, but a family member who has survived the Pan Am 103 tragedy. This is my husband, Jack. Our son J.P. Flynn was a junior at Colgate University on his way home for Christmas vacation on December 21, 1988. Mr. Kreindler didn’t know I was coming tonight, so my remarks are not prepared. I don’t have a prepared speech, so I speak from the heart, and, as Mr. Kreindler mentioned, I have testified before the Senate Foreign Relations Committee with regard to the Montreal Protocol.

My feeling is very simple about this. We need accountability. Pan Am 103 went down because something happened to that airline. There were all sorts of warnings. Everybody knew that something was going to happen two weeks prior to the bombing of Pan Am 103, and yet that airline flew. And why did it fly? We don’t know why it flew, but we know now, because of the investigation, not only the criminal investigation but the government investigation also. And, as you know, no one has been brought to justice. There are indictments out there, we haven’t been able to get our hands on anybody, and there certainly is a lot more cover-up than we think as far as the criminal investigation is concerned. But, what we finally know now is how that bomb got on the plane, and what exactly happened, and we also know that there was a whole aura around the bombing of Pan Am 103 where people did not pay attention to the warnings, where Pan Am knew that this was going to happen and yet the airline flew.

So what does that tell you? It tells you about accountability. It tells you about those people who died on that airline when it could have been prevented, and that is the tragedy of this whole thing. We all live with this every day, and say to ourselves, great, yes, the Pan Am case has been upheld. But, what does that really mean? It means much more than compensation, particularly as you all know, to a mother of a
college student. What it means is that there is a moral message being sent to corporations, and particularly, I think, to the airlines, that you are not going to get away with this anymore. This careless, cavalier attitude toward aviation safety is not going to fly any more and that was accomplished so clearly by having delineated the problem in a court system. That's what we are talking about here.

No one wants to wait five years for justice. We are going to wait many years before the countries responsible for this terrorist act are brought to justice, but there are a lot of people responsible for this, and what you have to do is to take each one of them and say who else is responsible? Who else knew about those warnings, and didn't do anything about it? There is a whole other layer there. We are only into one part of that layer, and I would ask you to certainly congratulate Mr. Kreindler and all the people who worked so hard for our families.

Thank you.

A Voice: All right, but I'm not making a speech.

Mr. Asselta: I will take you. I just want to make a couple of observations. I notice we have several subjects for future forums, accident investigation joint and several liability, go ahead.

Mr. Ephraimson: I'm Hans Ephraimson and I have the misfortune to be the chairman of the Families Committee of Korean Airlines incident of September 1, '83 where 269 of our loved ones were blasted away by some Soviet fighter bomber. I'm not going to go into the human problems we have had over the last 11 years, nor am I going to go into our still ongoing litigation, which is going to be reopened by our very esteemed opponent George Tompkins in Judge Robinson's court in Washington, D.C. But we have found out in our incident that while we all retained attorneys to represent us, and we all had a lot of questions on how this incident could have occurred, that our attorneys, as valuable and as valiant as they were to fight for our rights and as successful as they were, really could not answer our questions. We as families had to start to make discovery pro-
ceedings ourselves at our own expense and great amount of work to answer and conduct the investigations Lee Kreindler is speaking of. I found myself in Moscow about a year and a half ago in a state ceremony with President Yeltsin in the Kremlin in order to receive the first documents which the Russian government released to us. I personally, including many of our family members, have spent thousands and thousands of hours trying to find out what happened on our flight, and, as George Tompkins said so rightly, we still are not at the end of it.

So, the investigation of our attorneys, specifically regarding the problems damages, gives us cause to respect them greatly. Lee Kreindler is the best of his profession and I think we all owe him an ovation for having been able to produce willful misconduct both in the Korean Airline and in the Pan American cases. We respect him greatly, but what we need today, in a world which is not dominated by the United States any more, is an international liability system which is accessible to all American citizens wherever they travel all over the world.

In our case, where we have 270 passengers, we only were able to bring 109 lawsuits in the United States. Most of the other passengers had to settle for the $75,000 limit. A few passengers, twelve families, were able to bring lawsuits in Japan, where the Japanese court has not, after 11 years, addressed the question of willful misconduct. Two cases remain pending in the courts of the Philippines.

So, the question is not that we have the American tort system available to us; accidents happen outside of the United States and outside of our tort system. We cannot live without an international treaty that allows the five million Americans living and working outside the United States, many of whose families live in the United States, only to have access to non-American law and non-American courts. That’s exactly what the Montreal Protocols address. They allow American families and American travelers to access American courts and the American system all over the world wherever they travel.
My question to Mr. Kreindler is, is he advocating that we now denounce an international treaty and signal to the world that we are going to be the arbiter of whether we participate in treaties at our choice, thereby giving other countries the possibility to denounce whatever treaties they don't like, and which we would like to see enforced?

Mr. Kreindler: I guess the simple answer is yes. I would like to see it denounced right away. The Warsaw Convention is not a United Nations treaty in any public sense, it is a treaty that goes back to 1929, the year that Lindbergh flew across the Atlantic. It has no public law significance whatsoever. It simply involves private law and the relationship between airline passengers and airlines. I most assuredly would like to see it denounced immediately and I can't understand why it hasn't been already.

Mr. Ephraimson: Welcome to 1920, Mr. Kreindler.

Mr. Dean: I'm privileged to teach a course in international law at Georgetown, and the Warsaw Convention is primarily a private treaty. In fact the assertion it has no public law features is incorrect; it does have public applications. The Warsaw Convention is a treaty that is essentially now operating under ICAO oversight, which is a subsidiary agency technically of the United Nations, although it doesn't operate that way very often. So whether or not it is a United Nations treaty is really kind of a fine point, not very relevant, but I want to make one other point. What we have seen here tonight, with respect to the people that have been through the case, reminds me a little bit of an astronomer whose theory prevailed in the world for over 200 years, and his name was Ptolemy. He had a view of the planets that perfectly explained the movement of the planets on the assumption that everything revolves around the earth, and those of us who worked in the U.S. court system have a Ptolemaic view of the universe. It doesn't work that way. There are people we leave behind. The world does not revolve around the Second Circuit, and certainly it doesn't revolve around Washington.
Mr. Asselta: Thank you. I'll take one more question if anybody has one.

A Voice: One problem with the Warsaw Convention has not been addressed, and that is the forum limiting provisions. I think what everybody has been talking about are really tort problems, and what you have with this Convention is a private treaty with a contractual overlay over a tort problem.

Mr. Asselta: Let me ask Lee something: Has that been a problem in any of your cases, the forum limitations of Warsaw?

Mr. Kreindler: In Warsaw Convention cases it is definitely a serious problem, but not in non-Warsaw Convention cases. The Convention creates the problem.

Mr. Tompkins: One, there is an additional forum added which would be the domicile of the passenger and that is a good amendment but you cannot adopt just that part of Montreal Protocol 3, you have to take the whole thing.

A Voice: You know, in tort cases you are allowed to bring a case where the accident occurred. Yet, the Warsaw Convention prohibits doing that. Why shouldn't you be able to bring a cause of action where the accident occurred?

Mr. Tompkins: You would not want to do that in international aviation. Think of the places you could be. Do you want to bring your action in Thailand or Nepal?

A Voice: You have a case where an accident occurred here. The ticket was bought in Iceland. Iceland Air has its headquarters there. The flight is heading for an Iceland destination, yet something happens here. You have a cause of action. You are not allowed to bring it in this country.

Mr. Tompkins: Sure you are, if you bought the ticket here. One feature of Montreal Protocol 3 is good, add the domicile of the passengers to the available forums. I support that 100 percent. The problem is you cannot get that alone.

A Voice: If the accident happened over Peru we would be in Peruvian courts.
Mr. Asselta: Excuse me, you may continue that wherever you may wish. We do have to conclude this meeting at 8:00, and it is 8:00 now.

I do thank everyone; particularly the panel. Warren, thank you for coming here from Washington, George, and Tom from coming a long distance, and Gary, now that I recognize you. And, of course, Peter, I think they all deserve a nice round of applause.

Thank you very much.
Comments