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AIR DISASTERS: THE CASE FOR RATIONALIZATION

JOHN V. ALLEN*

THE NEED to rationalize the legal and financial consequences of a major air disaster is becoming increasingly evident. Because of the involvement of many different, and sometimes conflicting interests, the object of any attempted rationalization must be to achieve some kind of compromise or common denominator, to combine or coalesce the interests of the different parties concerned, on the basis of the broadest possible consensus. Apart from the obvious interest of the flying public, there are four other concerned elements—airline operators, airline manufacturers, insurance underwriters and governments. The following proposal for rationalization of the legal and financial consequences following major air disasters is presented with the hope that as aviation safety increases, the need for such a theory will decline.

The objectives of any compensation formula, whether international or national, are to provide: (1) adequate, certain and prompt compensation for all accident victims; and (2) fair distribution of the costs of compensation among all parties concerned, including (i) operators and carriers; (ii) all manufacturers, from prime

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contractors to tire-setters; (iii) insurance underwriters; and (iv) government organizations concerned with potential responsibility for accidents. A major consideration regarding both objectives is whether existing differences should be retained between international and non-international flights and whether the difference between the liability positions of manufacturers and operators should be retained.

The breadth of the problem is more clearly understood when one considers the following hypothetical fact situation. Citizens of a half dozen countries board an airline owned by a carrier from a seventh country and manufactured by a party from an eighth country, with a hundred or so manufacturing participants from still other countries. The plane is scheduled to fly between a ninth and tenth country. It is not surprising that under such circumstances, a legal imbroglio results in the event the plane crashes. Despite the fact that the passengers are identical as far as age, earning power, family dependency, and all other relevant factors, under different systems of law, each may have an entirely different entitlement. Recovery for some victims will be on the basis of one or another of a whole series of different applicable Convention bases, dependent upon such considerations as where the ticket was purchased, while in other cases, recovery will be founded upon non-Convention bases. The non-Convention bases may include damage actions by victims against operators, manufacturers, and appropriate governmental regulatory bodies, as well as subrogation claims by airline carriers against manufacturers or their underwriters. Numerous legal systems and the resolution of conflict between them will be involved. Artificial factors, such as punitive damages and contingent attorneys fees, will determine the amount of compensation recoverable by victims. Equivalent victims may be compensated unequally. It could fairly be called a lottery, even a form of Russian roulette.

It has been assumed that an improved solution would be preferred, although doubtless some may prefer the present confusion and uncertainty which arguably provide more scope for negotiating better compensation. This article advocates taking the problem to pieces and putting them back together to make an improved structure. In order to do so, the following steps need to be taken: (1) A determination of what constitutes the most acceptable form-

ula for the "best," in the sense of the most just, solution concerning the compensation applicable to passenger victims and the responsibilities of other parties for providing this compensation. A separate consideration may be required for the elements already referred to—operators, manufacturers, insurance underwriters, and governments.

(2) A determination of how this formula can be funded. In awaiting formulation of an ultimate or long term solution, interim or pragmatic solutions may be required. Obviously, it is no comfort to a disabled plaintiff or to the survivors of an air disaster victim to enjoy an open and shut case with the judgment measured in the millions of dollars if the defendant manufacturer or operator is bankrupt.

(3) An examination of the basic legal elements, including (i) liability (fault or no-fault); (ii) quantum of compensation; and (iii) applicable legal systems or conflict of laws.

What is the "best" formulary compensation? Should a passenger be entitled to any compensation at all? How should it be measured? Should it be limited? If so, to what amount or on what basis? Should compensation be awarded in the case of unavoidable accident? Arguably there is no logic behind leaving victims of unavoidable accidents unrequited, while victims of accidents due to pilot error or mechanical failure are compensated. These questions must be considered and rationalized before reaching any decisions regarding who should bear the risk of such loss.

Thus, one should consider whether some compensation at some level should be payable to all victims, regardless of blame or circumstances; secondly, whether in certain cases additional compensation should be paid, whether unlimited or fixed, and if the latter, on what basis. It would seem logical to suggest that a passenger victim should have only one claim rather than separate claims against manufacturers and carriers. Such an approach would construct one liability facing one entitlement. The one claim could be divided into two parts, the lower level providing basic limited compensation, fixed and standard everywhere and automatically applicable to all passengers. The second level would be recoverable on a compensatory basis governed by the law of the passenger's own country.

Although the question of compensatory damages in addition

to the automatic recovery is admittedly a difficult one, the logical recommendation is that the compensatory recovery be determined by the law of the country which determines the passenger's personal living standards. For instance, if a passenger is struck by a taxi at the airport in his own country, his scale of compensation is fixed by its national laws. Should he be entitled to recover on some higher scale while traveling in an aircraft a few miles away? It is patently illogical. The illogicality recently has been demonstrated by the Paris air crash case.

It is natural that a claimant will go to the forum where the compensation is higher, if the higher scale of compensation can be made to apply to him. Thus, a laborer from Somalia in Africa, working for British contractors in the Persian Gulf and there suffering a worker's accident, will prefer to recover damages or compensation in the courts of London, on a scale far higher than would be applied to him in the Persian Gulf or Somalia. While the claimant must be expected to go where he can best succeed, the system, which permits him to do better in the courts of a foreign country than in the courts of his own country, is plainly wrong, or at best illogical. Higher damages are awarded in other countries because of a higher standard of living, and damages on a higher scale should not apply to claimants concerned with living on a lower scale.

The position would be open-ended if the compensatory level had no limit. In the context of the air disaster, it is felt that, in the general interest, punitive damages should be impermissible and the compensatory level limited. Such limitation could be established, for instance, in accordance with the $300,000 limit proposed by the Guatemala Supplemental Compensation Plan now before the Civil Aeronautics Board (CAB) in Washington. The limit could be even higher, but there must be a finite amount, above which there can be no recovery. This layer of finite compensatory damages always will be subject to proof of loss. If an individual case requires further provision, resort can be had to the personal accident insurance market. Under this formulation, any accident victim can recover (i) his first layer of absolute compensation; (ii) compensation on proof of loss on top of (i); and (iii) to the extent required, any personal accident insurance on top of (ii).

The obvious forum for the international regulation of air disas-

ters is the International Civil Aviation Organization (ICAO), the aviation arm of the United Nations. There are over 120 member-states, all with at least one national airline which is in many if not most cases owned and operated by a State corporation. Of those countries, however, only about twenty have a manufacturing industry, whether established or currently developing. While this means that manufacturing nations are outnumbered in the United Nations, it does not mean to say that a solution achieving justice between manufacturers and operators is impossible, only that a necessarily long time might be required to accomplish the goal.

In the long term, an ICAO Convention would be the most appropriate procedure for total regulation of the financial consequences of air disasters. This regulation could not be achieved for many years, however, making an interim solution essential. One possible interim solution is that the major commercial aviation nations of the world evolve, on a country-by-country basis, an equivalent solution, subject only to differing national legal or procedural requirements. In this situation, one country will have to take the lead. The most influential candidate would be the United States. What, then, is the present position in the United States concerning the financial consequences of air disasters? Such a question cannot be answered briefly, but examination of certain pending activities in the field will be helpful.

Different conventions, ranging from the Warsaw Convention up to the Guatemala Protocol of 1971, apply to international flights. These international conventions are challenged by the American plaintiffs' bar as contrary to the United States Constitution on the ground that they restrict the free right to appropriate compensation. The Guatemala Convention has not been introduced yet in the United States, and until it is, it cannot be introduced elsewhere. It has been the policy of the American government not to introduce the Guatemala Convention without the Supplemental Compensation Plan (SCP) which implements the Interagency Group on International Aviation contract to that effect. The SCP provides for compensation up to $200,000 on top of the Guatemala $100,000, making a top level of $300,000, subject to the recent "gold" upward adjustments. The SCP has been submitted to the CAB in Washington for approval as an inter-airline agreement within the Federal Aviation Act of 1958. Written representations have

been submitted by the Federal Aviation Administration (FAA) and interested government departments in favor of the SCP, while the plaintiffs' bar opposes the proposal. The CAB may convene "public interest" hearings before reaching a conclusion. If the SCP is not approved by the CAB, the whole position remains at large, leaving much room for reassessment. If the SCP ultimately is approved by the CAB, the United States may introduce Guatemala plus SCP for international flights. Other countries may follow Guatemala then, and, if desired, introduce their own SCP.

The above outlined program would fit into the previously conceived formula in the following manner: (i) automatic compensation up to $100,000 plus (ii) compensatory damages or compensation up to an additional $200,000 on top of (i), provided it is proved that legal compensation as evaluated by the courts would exceed the underlying $100,000, and (iii) personal accident insurance, if required, on top of (ii). It would be much easier at top levels for personal accident insurance to be obtained than liability insurance. Alternatively, the operators' and manufacturers' liability insurance market can be supported by additional compensation coming from the personal accident insurance market.

Another pending American development is the Magnuson Bill (S. 2992, 94th Cong., 2d Sess.). The bill relates to domestic or non-international traffic and provides an excellent solution, which complies with all relevant criteria already outlined, but which exacerbates the illogical disparity between international and non-international procedures. For example, manufacturers face unlimited exposure at home and abroad. Carriers, on the other hand, face limited liabilities abroad under any one of several international conventions, while liability remains unlimited at home. The Magnuson Bill provides that operators, manufacturers, government departments, and all others facing possible public liability constitute one single liability, and one compensation entitlement for the passenger victim will be allowed. This compensation would be provided at shared cost among the parties concerned, by insurance up to the available market level and above that by government indemnification recoverable by ticket surcharge. However the financial consequences may be arranged, recoupment costs will affect the fare structure. Liability costs and increased insurance premiums of manufacturers will be reflected in the cost of aircraft and equip-

ment sold to operators and passed on to the flying public in the form of increased ticket prices.

Regarding the high-risk exposure applicable to operators, in non-international traffic, and to manufacturers, in all cases, it seems undesirable and unfair to impose open-ended exposure without fault. The difficulty of determining fault liability in the case of air accidents, however, is recognized. The fair solution would appear to be an intermediate course of reversing the burden of proof unless the manufacturer or operator concerned can discharge the burden of proof by showing that the accident occurred without fault. For instance, no matter how reliable aircraft equipment may be, it is impossible to rule out the prospect of a failure due to some hitherto unknown metallurgical phenomenon, the cause of the accident ascertained in post-accident investigations constituting new knowledge. It seems patently unfair to blame a manufacturer or operator for not possessing and applying knowledge which he did not and could not have had at the material time. The state of the art should become an effective defense, subject to proof positive by the defending manufacturer.

Consumerism is becoming a powerful force in the social conscience of the modern world. Although much can be said in its favor, consumerism should not be taken too far by applying strict liability without fault beyond any reasonable pecuniary amount. Aviation, by reason of its special features of internationalism and high-risk exposure, should be controlled by a special regime, as is nuclear energy under the United States' Price-Anderson legislation and Europe's variety of international treaties under the surveillance of the Organization for Economic Cooperation and Development. In Europe, the European Economic Community has recently produced the third draft of a proposed directive imposing, with many qualifications, strict liability as part of product liability. A limit of thirty million dollars has been suggested. The directive, however, is far from completion and unlikely to emerge, if at all, without substantial modification.

In considering manufacturers' legal liabilities, the ultimate deterrent to taking consumerism too far is consideration of the additional element previously mentioned—the manufacturers' ability to respond in damages. It is without meaning to impose liabilities without ensuring they can be satisfied. That apart, the prospect of

manufacturing bankruptcies, which would create unemployment or at least reduce investment in research and development, can only be regarded as wholly against the public interest.

As regards the role of government, governments do not respond as an act of charity, but because of the obvious responsibilities of governments generated by their conscious decision to establish and maintain a national air transport undertaking in their respective countries. The responsibilities include such matters as air traffic control, approval of manufacturers, minimum standards, airport control, meteorological or weather reports, and many other aspects coming within the purview of bodies like the FAA and CAB in the United States and the Civil Aviation Authority in the United Kingdom. In the United Kingdom and Europe, national industries have invited governments to participate in a joint examination of the problems of air transport. Under consideration is the issue of whether a formula akin to that proposed by the Magnuson Bill in the United States Congress should be adopted to afford indemnification on terms to be negotiated. Whatever these terms might become, in the end any cost will fall on the passenger ticket, thus emanating from government to industry and operators to passengers.

To summarize, possible current objections to the present system may include (i) objections by airline operators to open-ended exposure for internal flights compared with limited exposure internationally and to exposure to a mass of differing conventions; (ii) objections by manufacturers to open-ended liabilities, international or non-international; (iii) objections by governments to the uncertainty of their position regarding the causative aspects of air traffic control, certification, and the role of their aviation regulatory bodies, as well as questions concerning the scope of governments' overriding role in the international aviation business; and (iv) objections by the insurance market as to whether insurers should accept centralized liabilities, eliminating subrogation not only from operators to manufacturers, but also from manufacturers to sub-contractors and suppliers.

A comprehensive and general solution is advocated in the general interests of the community, on this basis: (1) the abolition of the artificial distinction between international and non-international traffic; (2) the abolition of the outmoded Warsaw Convention and its successors up to the Guatemala Protocol and its derivative SCP;

(3) provisions for all accident victims to receive adequate, certain, and prompt compensation comprised of

> (A) automatic compensation without any need to differentiate between operators and manufacturers and without any need to consider strict or fault liability. This can be 100 units which could be $100,000, or any other sum to be determined by the ICAO on a year-by-year basis in advance; and, if appropriate
> (B) additional compensation such as the proposed SCP, subject to proof of loss up to, for example, twice the amount of that allowed by subsection (A), which would be, as per the proposed SCP, $200,000 in excess of $100,000, making a possible total of $300,000. For consideration is whether this should be without proof of liability on the part of anyone, or subject to the reverse burden of proof, *i.e.*, a prima facie liability; and, if further appropriate
> (C) excess personal accident coverage beyond the amounts recovered in subsections (A) and (B) in any case where such coverage is bought with the ticket and up to whatever amount the personal accident insurance will stand and is required;

(4) allocation of the cost of subsections (A) and (B) of section (3) above to an aviation accident fund, whether an international ICAO fund or a national government fund, which would be insured up to an insurance level fixed by each government with its insurance market by agreement, or failing agreement, by government determination, and by government indemnification above that level; and (5) subscription to the fund by the partners in the enterprise, including, in any country, the government, all interested and registered operators, and all manufacturers and manufacturing participants. This is the entire cost. The shares would be negotiated in the sense that operators would subscribe X%, manufacturers would subscribe Y%, and government would ascribe or accept Z%, with X% plus Y% plus Z% equalling 100%. X% shared by operators would be collected on some basic pro rata turnover from all registered operators of the country concerned. Likewise, Y% would be collected from subscriptions from all manufacturing participants, whether in negotiating contract prices or otherwise.

A solution based on the foregoing proposal would best be introduced through the ICAO. Nevertheless, because of the delay this approach inevitably would involve, the solution might be introduced more effectively on a country-by-country basis, at least

throughout the leading commercial aviation nations of the world. There are doubtless many snags and unforeseen difficulties awaiting any solution, but they surely cannot approach the present hodge-podge. It is my belief that Europeans would welcome a start along these lines in the United States.