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THE DEFENDANT'S VIEW OF MONTREAL

By John J. Martin†

Any discussion of the Warsaw Convention automatically divides itself into two views. First, the plaintiff's view and the other the defendant air carrier's view. The State Department appears to have a third view with which none of us seems to quite agree. I would like to try to explain the carrier's view. When we speak of the carrier we are also speaking of the carrier's insurers.

There is no question about it. The Warsaw Convention is forty years old. Times have changed. There has been a great deal of progress. Obviously, the Convention needs facelifting. I don't think there is anyone who disputes that. Furthermore, it seems to me that the basic concept is good. It has proven to be a very functional convention. As far as documentation is concerned, it's been par excellence. Without it we could never travel as we do today. Those of us who traveled in the old days, when you were required to have your tickets validated over, remember the problems we had. You missed planes regularly because no airline would accept any other airline's ticket. There are many other areas in which the Convention has proved itself to be a good commercial treaty and it is doubtful that similar agreements could have been reached between the airlines without a formal treaty. The whole area of cargo shipment is an example.

At this point we might digress to the State Department. It seems to me it is a little out of character for our State Department to be blackmailing the carriers into any kind of a convention. However, that is what has happened as a result of CAB Agreement No. 18900—the Montreal Agreement. Indeed, it is not only blackmailing United States carriers but it is overburdening the foreign carriers and overburdening people who we are trying to help with our foreign aid—the so-called emerging countries. On the one hand we are taking from them. On the other hand we are giving it back to them. It seems to me that when we have something worthwhile like the Convention we should not be trying to destroy it. Rather, we should seek to modify it.

The limitation appears to be the center of attraction. Of course, $8,300 in this day and age, even in remote countries, is a minor amount of money. It doesn't appear that there are many countries which wish to stay at that level. The Hague Protocol indicates that. At the same time it appears that most countries prefer a limitation. I believe all carriers prefer a limit. They want to know their exposure. Now, it's easy to say you can go out and get a lot of insurance. You can. But the rates vary a great deal and they are going to vary even more if we are going to have an unlimited situation. The limitation certainly has many worthwhile aspects. A carrier is not left to the mercy of an unsympathetic trier of the facts or a cru-

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sader for "social justice." It prevents "accidents" of foreign law; prevents much of the conflict on amounts of damages; and it prevents juries and judges from succumbing to lawyers, plaintiffs' lawyers, who have more than a passing interest in the size of the verdict. I do not quarrel with the fact that they have an interest but at this point the airlines have become a new breed of "sugar daddy." Widows and orphans today are getting many hundreds of thousands of dollars more than they could ever have expected from their fathers—there are three hundred to four hundred thousand dollar ($300,000-400,000) verdicts which have no relation to actuality.

Here again I suppose the plaintiffs' bar objects. But it seems to me that these awards have now become as exaggerated and as artificial as the limitations which they decry—the nominal limitation of $8,300. But, I submit, that a reasonable limitation, one say $75,000-100,000, would certainly be one which everyone could live with, even widows and children. Limitations are not unknown to us in the United States; nor are they unknown in other parts of the world. We have had them in the Admiralty field for many years. They have worked very well. They have been modified as conditions changed but they have proved a way of limiting liability giving the shipping industry a norm—a method of determining the shipowner's exposure. As a matter of fact, approximately a quarter of our states still have limitations and they vary considerably. Two of our most populated states have limitations—Massachusetts and Illinois. In Illinois, if we are talking about air transportation, O'Hare International is the busiest airport in the world. If the State Department is so concerned about limitations perhaps they should start right here in the United States and raise some of those limitations.

Those of you who have read the Harvard Law Review article that Mr. Mendelsohn and Mr. Lowenfeld wrote on negotiations leading to the Montreal Agreement know that it is just loaded with comments about social justice and taking care of the poor and the like. It seems to me that this is all misplaced sympathy. Here they are worrying about taking care of international travelers—people who are either traveling on business or on pleasure. I submit those who are fortunate enough to make international trips certainly carry adequate life insurance or can afford to buy trip insurance. However, if the State Department is going to become concerned with the traveling public and the traveling public in foreign countries then perhaps it should become concerned with the limitations and other aspects of the tort law of each of the foreign countries.

As far as I am concerned, the $8,300 limitation is ridiculous. I would like to see a limitation of $100,000. That seems to me to be a reasonable figure. It is one that is bearable; one that is compensatory. It is equivalent to at least a $150,000 jury verdict and that is a fairly decent verdict. It becomes even more reasonable when viewed in the light of the fact that the majority of people traveling today are pretty adequately covered by insurance. Certainly, businessmen are. They not only have travel insurance that is carried by the firm but they have their own life insurance. It has been my experience over the last fifteen-twenty years that the insurance has been so adequate that most widows and their attorneys are not concerned about prompt settlement.
It does not appear to me that it is unreasonable to ask for limitation. Nor is it unreasonable for governments and carriers to require that there be a limitation. The carrier has a right to try to limit its risks, to limit its exposure. A passenger takes care of himself by life insurance and the like. He is expected to take care of himself domestically. Why can't he protect himself on foreign trips in the same way? This is not a community obligation as the plaintiffs' advocate has suggested. If it is a community obligation perhaps we should abandon all concepts of fault and go into fixed compensation. Let us work out a workmen's compensation arrangement for this community obligation. I do not think anyone wants this but that is what they are heading to and I think plaintiffs' attorneys are beginning to realize this. If they continue to press for unlimited liability and higher and higher verdicts they are going to "kill the goose that laid the golden egg."

Mr. Kreindler has mentioned the subject of third-party suits and the problems involved where a limitation exists in favor of the carrier. I do not see that this creates any new problem. Suits against the airframe or parts' manufacturer are an everyday occurrence. Manufacturers are in business. They are required to stand behind their products. If one proves defective the manufacturer should bear the risk whether or not the carrier has the benefit of a limitation.

Now a few words on the subject of "absolute liability" as set forth in the Montreal Agreement. I think that this was a grave mistake. It is foreign to our system of law. It is an artificial contrivance to force social legislation, this "community responsibility" on the carriers. It is just another way of sharing the wealth. In addition, and probably even more important as far as the carrier is concerned, it results in the financing of law suits. Now a plaintiffs' attorney will have no problem deciding as to whether or not he should try to establish wilful misconduct. He will try it every time. He will be guaranteed his expenses out of the $75,000 limit and will proceed to try to break the limitation. Consequently, instead of helping the plaintiff, the State Department has increased the carrier's obligation to defend cases. One argument presented in Montreal for absolute liability was that cases would be settled quickly. My experience indicates that cases which can be settled early are settled without the help of absolute liability. Today carriers know where they stand liability wise soon after the accident. They don't need the CAB to tell them how they will fare in litigation. Aside from questions of the relation between the plaintiff and the carrier the absolute liability concept completely ignores the possibility that the accident was caused by someone else. The crash of an aircraft doesn't demonstrate negligence on the part of the carrier alone. Trials arising out of some recent accidents have demonstrated that the carrier was not entirely responsible and perhaps not responsible at all.¹

Finally, I would like to say a few words about the Lisi⁵ decision. Without a doubt this is bad carrier law. The dissenting opinion in the Court of Appeals correctly states the law. However, neither the trial court nor

the Court of Appeals was ready to accept the law where it appeared to do violence to their concepts of social justice—their concepts of this so called "community responsibility." We had known for a long time that many of the judges in our courts were opposed to the $8,300 limitation of the Convention. It was just a matter of time before one of the judges would make an outright denunciation and this is just what Judge McMahon has done. Actually, the *Lisi* decision, in so far as it relates to notice, is academic. Subsequent to the *Lisi* ticket the CAB issued new regulations relating to notice. There have been some additional changes as a result of the Montreal Agreement. In effect the CAB has determined a norm for notice which it deems adequate. The carriers are now providing this notice and will be prepared to prove this type of notice in the event of an accident. Unless our judges are prepared to take issue with the CAB it would appear that they will be required to rule that the passenger had adequate notice.

In summary, it is the carrier's position and that of its insurers that there is a place for a limitation of liability in an international convention. It should be a reasonable and workable amount—an amount which will not overburden the carrier and one which will fairly compensate the injured party. I have suggested $100,000. Finally, this limitation should not be coupled with any concept of "absolute liability." A simple solution to the problems which we are discussing would be the substitution of $100,000 for $8,300 in the Warsaw Convention.

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3 Special Notice of Limitation of Liability for Death or Injury Under the Warsaw Convention, 14 C.F.R. § 221.175 (1967). This regulation was adopted 31 October 1963, and became effective 1 February 1964.
DISCUSSION — SESSION ONE

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

CHAIRMAN ANDREAS LOWENFELD: I think it might be appropriate for me to make just a few remarks about the Montreal Agreement, lest it be thought that barely fifteen months after it was signed, and before, really, it's had any chance to be tested, it has no defenders. Accordingly, I'd like briefly to suggest how the problem looked to us in the United States Government as we undertook in the early sixties to examine afresh the problem of international air accident compensation.

First, it made no sense to us to continue the stalemate that had developed between the opponents of the Warsaw system and the proponents of the Hague Protocol, with neither side having quite enough political strength to get its way, while in the meantime Americans and others in increasing numbers continued to travel around the world subject to $8,300 limitation. While some persons have asked the question, formally and informally, who are we to make such significant decisions, it seemed clear to us that some kind of a decision had to be taken.

Second, as we looked at the problem, it seemed to us that the arguments for special favorable treatment for international air transport were becoming less and less persuasive. The risk of accidents was not very high and from an actuarial standpoint was predictable with a fair degree of accuracy. There was no danger in 1966, as there may have been in 1929, that the needed capital for the expansion of aviation would be discouraged by the risk of catastrophic accidents.

In terms of the cost to the carriers, we had some difficulty in getting exact data. Also, they varied from line to line, not only between the great big lines and the small lines, or between one country and another, but even between company and company depending on the relationship that they had with their insurance company, on the extent to which companies were prepared to either absorb some of the risk themselves through a reserve and insure only for a portion. But in any event, the reasonable estimate was that insurance costs were somewhere between one and one and a half percent of operating costs, which was really fairly small when you consider the overall costs of operation of airlines. And at a time when the efficiencies of jet operation, the huge increases in the volume of traffic, and the forces of competition were driving international fares down quite substantially, a small increased cost for insurance, even a doubling of the insurance bill in some cases, did not seem to us to be unreasonable. Purely as a matter of airline economics, there seemed to be little argument in favor of Warsaw or Warsaw-Hague at roughly the levels then being discussed.

But then, challenged particularly by the advocates of repeal, led by Mr. Kreindler and some of his associates, we began to think about what were the alternatives to Warsaw; and the alternative most frequently suggested, as it were by default, was the good old common law. If it was good enough for domestic transportation, it was good enough for international transportation. It had been tested by time; it had grown up through the years. But the more we looked at the good old common law, the more it seemed to us, at least some of us, that the common law wasn't really such a great system. I am speaking, for the moment, not of the processes of decision making, but of the provisions for accident com-
pensation. For one thing, of course, most of the world didn't subscribe to the common law, or did so in a manner different from the United States. For example, the mother country, England, no longer has juries in civil actions (except for a few instances not relevant to public carrier accidents).

But beyond that, the common law as observed in the United States had, it seemed to us, a number of drawbacks. One, it turns completely on fault, although punishment in a personal sense is rarely relevant and deterrence seemed doubtful. Two, the common law provides for enormous verdicts in some cases and low ones in others, depending to a large extent on the skill of the lawyers appearing before the jury or their shrewdness in bargaining with the insurance company or its lawyers. Third, the common law system that we had provides in many cases for very long delays between accident and recovery, or in the alternative, a choice of settling for less at the earlier stages; that is, a kind of gamble that the survivors of air disaster victims seemed to us to be ill-equipped to cope with. And fourth, the common law system seemed to provide in a fair number of cases for no recovery at all, which is clearly inconsistent with what Mr. Kreindler, for example, has spoken of as the public or societal responsibility for caring for disaster victims.

Now, the points that I am making about our common law system are, of course, not peculiar to aviation, let alone to international aviation. I myself have always considered that the approach to the problem that we took in Montreal and Washington in 1966 was a part of the general reexamination of the law of accident compensation, along with various plans for socializing the cost of automobile accidents and spreading the concepts of employers' or enterprise liabilities and the like. Similarly, in a sense, the emphasis by the United States government and recently by the courts on adequate notice is to be understood in the context of the current climate in favor of such legislation as truth in lending or truth in packaging. In short, the attitude prevailing, or at least developing, in many areas of the law today is very different from the common law as it was received in the United States in 1789 or even as it stood in 1929. And lest anyone assert that I'm being disrespectful to that great tradition, it is worth recalling that at common law, as it came down from the judges, that is to say before major statutory and judicial reforms, actions for personal injuries did not survive the victim's death; assumption of risk was defined to exclude a large number of accident victims; manufacturers of defective products were able to defend successfully on a basis of a lack of privity with the persons injured; and defendants, particularly transportation companies, could and did contract out of all liability simply through what they wrote on the back of a ticket. In varying degrees portions of this doctrine still survive in parts of the common law world. Some of you, particularly those from continental and civil law countries, might add, for example, to the list of ancient barbarisms the concept that contributory negligence bars all recovery, though my impression is that juries don't really believe that.

At all events, it seemed to many of us in the government in the mid-sixties that there was nothing inappropriate about tampering with the common law. On the other hand, if we were going to forcibly export our way of doing things, which in effect was the case so long as most of the world's airlines derived a substantial portion of their revenue from carrying Americans, we'd better have an attractive system to export.

Whether we did it right at Montreal, I do not know. I have said before, orally and in writing, that calling it a provisional or interim agreement was perhaps its most important feature. But I would add that of all the partisans to this controversy the protagonists within the United States Government were the least certain of the correctness of their position. And, moreover, I would say in response to what Sir William and others have said about pressures by the United States on foreign governments and carriers, it is worth considering what pres-
sures we, particularly Under Secretary Mann and the President, were under during the past year, during 1966, from all directions—international and domestic; carriers and plaintiffs; a hundred Senators, nearly all of whom were in one way or another engaged in the controversy.

In looking back at the Montreal Agreement of fifteen months ago, it seems to me that the limit may be somewhat too low, but it's not out of all proportion. It is rather interesting that today our representative of the defendants' or insurance bar suggested that $100,000 seemed to him an appropriate amount. We certainly didn't hear that in the Fall of 1965. I don't know what the right number is, but $75,000 doesn't seem to be out of all proportion. Second, the principle of absolute liability may be ahead of its time, but I would guess not by much. The notice provision may be unenforceable and in any case, naive. Whatever the courts will do, I would say I think I share much of Mr. Kreindler's prediction that says the Supreme Court will deny certiorari in Lisi. I don't share his prediction that all notices are going to be thrown out. My own view is that real compliance with both the text and the technique of giving notice, as worked out in the Montreal Agreement and as supported officially by the CAB and now by the Solicitor General, will be held in the United States to be adequate, and not to deprive the carrier of his defenses. In any event, it may be true that all notice is naive and that even the mythical tape recorded personal conversation may not really communicate, because all of us here who have studied the problem know how long it has taken us to understand even the basic fundamentals and you can't expect that of the typical traveler.

We have no evidence as yet on one critical factor which loomed very large in our decision within the Government. That is our expectation that air accident claims coming under the Agreement can be settled quickly and without litigation in the manner of health or life insurance claims. There are also a number of other questions about the Agreement that we haven't really faced. For instance, we haven't faced the question of the conflict of laws problem that remain under the Montreal solution. For example, if a resident of Pakistan with an income of a few hundred rupees a year is killed on a BOAC flight on landing in New York, you still have a choice of law problem; you don't just have a limit. As Mr. Kreindler suggested earlier, we haven't adequately addressed the problem of liability of aircraft or component manufacturers, though I must say I fail to see that the existence or not of a convention with respect to limited liability on the part of airlines has much effect on that. It seems to me that the component manufacturers are likely to be sued by somebody, and it may be the plaintiff, if he feels deprived by the limit; it may be the airline; it may be the ground control; it's hard to say. But again I stress here only that it is a problem that we didn't really address in the Montreal solution and that we need to face.

I'm not sure altogether that an international solution to the problem of accident compensation in aviation is possible or, indeed, is necessary. We have managed, after all, to do without it for quite a long time in the case of steamships. I do think the effort is worth continuing. And in that effort I would suggest only that all countries, particularly the United States, but others as well, take a good look at what they are trying to export and internationalize. I suggest that all countries, and all the airlines and insurance companies concerned resist the argument that we cannot permit such and such a plan in international aviation because it might spread to other forms of travel or to other forms of accident situations. To me, the notion that international air travel should have a pioneering role in the solution of social as well as technical problems is stimulating and challenging and not at all alarming.

That concludes my remarks. I will now ask immediately for floor discussion, and then the panel will be quite able, I think, to answer one another.

BRIG. GEN. MARTIN MENTER: I would like to address this to Lee Kreind-
Assume an accident occurs on a flight over the Atlantic Ocean; the plane is last heard from en route and doesn’t arrive and nobody knows the cause of the crash, but after a while it’s definitely proved down in the ocean, and you can never recover the bodies. In that situation, where there are no survivors and no determining the cause of the crash, if there isn’t a Warsaw Convention or some other convention which provides a basis of action, here in the United States, how would the plaintiffs have any basis of recovery?

MR. LEE KREINDLER: Number one, the fact that the airplane disappears does not necessarily mean that the cause can not be determined. There is other evidence, such as copies of log book pages and maintenance records from which a record of trouble in the aircraft may be put together; sometimes radio messages; there are innumerable sources.

GEN. MENTER: My assumption was that you don’t have these causes.

MR. KREINDLER: All right. . . . Under the law of all states now, the plaintiffs have the benefit of the res ipsa loquitur doctrine which, when properly handled by a plaintiff’s lawyer can be successful in virtually all cases. . . . In your case, General Menter, I can virtually assure you that today, 1967, if an accident like that happens, involving the death of a man whose loss would normally in the United States mean damages in excess of $100,000 or $200,000, that the immediate settlement value of that case the day after the accident will far exceed the kind of limitations that we’ve been talking about. . . . In the most difficult of the cases which you have mentioned, the settlement value is still quite high, and in a substantial case, higher than the limitations we have been talking about.

GEN. MENTER: Actually, I had in mind some cases I read, I admit, a couple of years ago where the court had stated that in the absence of the Convention there would be no recovery.

MR. KREINDLER: The Convention doesn’t create a right, it doesn’t create a remedy either. . . .

CHAIRMAN LOWENFELD: Who else has a question?

PROF. RENÉ H. MANKIEWICZ: I would like to add a couple of footnotes to what started our remarks. The Warsaw Convention is not really a convention to limit liability. Mr. Martin has already pointed out that that is only one aspect; and when it was made, the main purpose was not to limit liability but to avoid conflicts of laws and to establish certainty of law. It was the objective of the Convention to know what law to apply—the law of the place of the accident or any other place. The new tendency in conflicts of laws now, to apply the law where the most contacts are located, causes even bigger problems; and certain legislation and the Convention were made to avoid that. It made sure which law to apply on international flights and solved other problems which have been mentioned—like giving notice of the damage, like documents, like what is the period of limitations—it was just in connection with these that you also had chances to find out what type of liability would apply. . . . That was the main purpose of the Convention; and, of course, it still fulfills this very useful purpose. To ask of the Convention, how far does it go, is an incidental question which may be discussed differently now because the situation has changed—but that is no reason to get rid of the rules, because there would be a lot of difficult problems and a lot of litigation if the Convention is done away with even by one major state. That, I think, is basic.

It has been tried to accommodate certain passengers whereby they will be covered by the new limit, which is called, sometimes the Montreal Agreement, sometimes the CAB Agreement, and which I with due respect would call the “CAB decision” because, from what I know, the CAB has no power to enter into agreements with private carriers. The CAB makes decisions and the Agreement is nothing more than advance acceptance by certain carriers of what the CAB will decide. And the CAB has imposed certain conditions saying that if the United States de-
announces the Convention the carrier will be under unlimited liability in the United States. This decision, which is binding only within the United States, is given extraterritorial effect not only vis-à-vis carriers who subscribe to the Montreal Agreement but also for many other successive carriers because there should be a notice attached to the ticket and, therefore, the decision becomes part of the contract. And, therefore, it would be applicable to contracts which are enforced in foreign countries. Now, this is something really extraordinary, and I think this system should be abolished as quickly as possible and placed in the museum of legal monsters where it really belongs. It amounts practically to a reservation to a convention which provides that there can't be any reservation. . . . We require the best system would be introduced and would replace the Convention for Unification with a "convention for the diversification," and that I understand is also one of the shortcomings of the last report of Panel of Experts which I have received, I assume it is no secret, making two systems—which is contra to what you call unification.

This being so there remains the basic problem, and I think in this respect . . . that I would like Mr. Kreindler to explain a little bit—I personally don't see how the situation of the manufacturer of the altimeter would be changed if the liability limits are changed. It has just now been mentioned by Prof. [Lowenfeld], the trend in tort law is no more to look for fault. A pilot who happens to punch the wrong button didn't necessarily commit negligence because he was trained to react automatically. . . . The question today is to apportion the damages and although this is a matter of public policy, I still think the question of allocation of damages is a matter of private law.

Now, we had this in the manufacturer's warranty, which is a complete new thing, and this basically amounts to the following: If I do business out of which I make money then I have to indemnify the people who suffer from my business. . . . If one takes this attitude that the maker of the article is responsible for the damage caused by it, and, therefore, adopts a realistic or sociological approach to questions of tort liability, you have to . . . ask what are really the damages of the victim—and then you create a new feature which didn’t exist in 1929. Namely, that in the countries which do not need any development, most people have private insurance or get disability pensions or death benefits from their employers and so on. The situation is no longer as it was at the beginning of this century; and if one establishes absolute liability throughout the air industry, which need not be limited, one must also take into account that for many people this damage caused by the air industry is nothing extraordinary but compensation is due in the developing countries anyway. In the developed countries the situation would be different.

Now, to conclude this, I think that approach which we are trying to encourage is not yet acceptable to everyone. Law is not developing at the same speed in all countries. Therefore, if we are to take a realistic approach under the present Convention one should come to a solution where one should establish limits, which are generally acceptable as a unified system, with the victims having to look out for themselves for the difference. This they are doing and doing very well and for a relatively small cost. In other parts of the world the peasant shouldn't have to pay for the king's dinner. The king can take care of himself quite well for very little cost.

This last footnote I would like to add: of all of the international tickets I have seen issued by carriers who are parties to the CAB Decision, not one had the notice. Now, what is the result? I think the result is very simple. This notice applies ipso jure inside the United States but its absence has the effect that no new agreement has been made between the carrier and the passenger in a foreign country on top of the law applicable under the Warsaw-Hague system. However, the widow may go to Mr. Kreindler and say "the company should nevertheless pay
because they are at fault by not giving me this notice, and I should now get $75,000 instead of $8,300." Also, the Warsaw Convention is not in dollars. The Warsaw Convention is in gold francs and if the gold had a free market one may well expect that the Hague limits actually would be something in the order of $35,000.

CHAIRMAN LOWENFELD: Let me address a couple of the points made by Professor Mankiewicz on the Warsaw Convention itself. He says, look at all the other important features that the Convention had, and I perhaps should have stressed in my remarks that certainly preservation of these, and more than the specific features, preservation of the system of international agreement, accord on an important matter of this kind was very much in the minds of all those in the United States and elsewhere who were seeking to save the Convention. But, on the substance of these points, let me say just a couple of things. One, the issue of documentation, which is always raised, was important in 1929; it seemed to us that through IATA and through custom the idea of the uniform ticket, the ongoing way bill, all of those things could be done without the Convention. It was never seriously in our minds that if the Convention had died, those would have died with it anymore than the IATA clearing house would have died. Indeed, as Sir William knows, there are countries that are members of the clearing house that are not in IATA or in Warsaw, but make use of these facilities. So it seemed to us, one, that some of the fringe benefits of the Warsaw Convention... could be preserved without the Convention.

The second point is that, as to choice of law, we did feel that it was important to try to avoid some of the conflict of laws problems that would emerge in the absence of a convention, although the history of the Warsaw Convention has not been free from litigation, including litigation on conflict of laws points, as to jurisdiction, as to whether it creates a cause of action, as to what law governs. I submit that the higher the limits go, under whatever system we have, the more there will be choice of law problems, as people may argue that... the accident happened or the plaintiff was a resident or a domiciliary of a system of law with a limitation.

Now, what follows from that seems to me two things. One, by raising the limit, bringing it up to date, you haven’t avoided conflict of laws problems. The other, it may be that what is called for is an international convention with specific choice of law. We may say the damages should be apportioned with the place of the accident. To me that seems a poor idea, but that’s a possible one. We may say it should be in accordance with the residence or domicile of the decedent. That may be a reasonable one; there are arguments for and against that. Conceivably you could say the law of the carrier should govern or the law of the place of contracting. There are three or four possible choices of governing law. It may well be that what those who seek a new agreement ought to do is to try to agree on some such system. I submit that neither the present Warsaw nor the Montreal Agreement does that. It’s possible that you could avoid a lot of the litigation, establish principles of liability whether they be absolute or presumptive, as under Warsaw, or some other exoneration from specific risks. I know the Panel of Experts talked about the war risks problem. I have a good deal of doubt what the right answer ought to be if I take a Pan American plane from San Francisco to Bangkok and it lands in Saigon and there’s a mine that goes off. I am not at all sure that my widow should receive nothing at that point. But pass that; all I am suggesting is that these problems need to be addressed as such and just harking back to Warsaw won’t do it.

Now, the second point that Professor Mankiewicz raised is what he calls, quote, "the CAB decision." Well, I won’t quarrel with him on the powers of the CAB under the Federal Aviation Act; I don’t think he purports to be an expert in United States administrative law. I also think, in fairness, it was not just a deci-
sion of the CAB; it was a decision of the United States government, and of course it's the President who gives, and in that case withdrew, the notice of denunciation. That's part of the treaty power and not of the CAB. But aside from the technical point of what was the means, and it certainly was a novel means of achieving the Montreal settlement, I would make just one general comment. Professor Mankiewicz has said and others have said the United States, one, dictated the solution (though as Sir William said, really, in form it came from IATA after the United States had decided at the highest levels to let the whole thing drop); and two, it has extra-territorial effect (forgetting the non-participating carriers) . . . Another way to put that is to say there is an international agreement in effect. But, to come back to the issue of how the United States acted to impose its will, let me just say the United States was in a position that normally doesn't happen in international treaties. Typically, when you have a treaty, anybody can withdraw from the treaty by giving the appropriate notice . . . Then the treaty goes along, the club functions without your being a member of the club. In real terms, that just wasn't possible with respect to the United States and the Warsaw Convention. I think everybody realized that, just because so much of the world's traffic depends on carriage to or from the United States. It was everybody's feeling that, had the United States withdrawn from the Convention, the Convention would, perhaps quickly, perhaps slowly, have come apart. Therefore, sir, I submit that while technically no one could have accused the United States, if we had just withdrawn, of asserting extra-territorial influence, in practical fact, that would have been the effect, so that any alternative the United States picked to get out of what I described originally as a stalemate was in some sense extra-territorial. I think it ought to be seen in terms of those options. Mr. Kreindler, would you like to answer one of the other points?

MR. KREINDLER: I think Professor Mankiewicz directed a question to me which I think, Mr. Chairman, you directed to me also. I think you said you failed to see how the Convention, the existence or non-existence of a convention, had any effect on the problem I raised concerning liability of manufacturers and component manufacturers and I think Professor Mankiewicz raised the same question. My point is that only a free system, unencumbered by artificial limitations or restrictions, can possibly accommodate the needs of the industry; that you can't devise a system which in advance can contemplate the many problems that will come up—the many insurance problems, the many problems of claims over and rights over, the many conflicts problems. You just can't devise a convention in advance which would give you an answer to all of these possibilities . . . .

DR. MANKIEWICZ: I know, Mr. Kreindler; but if the liability of the air carrier is not limited and the fault lies with the altimeter man, the carrier goes against the altimeter manufacturer.

MR. KREINDLER: The right of any defendant to proceed against any other possible defendant is itself in jeopardy; that, itself, arouses different principles of choice of law, conflicts of law, than the initial claim. We have that all the time right now. In some states of the United States a defendant has a right to proceed against a joint tort-feasor; in some states he does not. My point is a simple point: that a free system, unencumbered by limitations and special rules, is the only system that can accommodate all of these potentially conflicting interests. Now, I build upon that with one additional step which goes beyond the scope of, really, what we are talking about here and what the Panel of Experts has discussed, to point out that I think there is a fruitful area of exploration in terms of the coming generation of problems and possibly limited liabilities. Let me illustrate that in one additional way. If a 747 goes down, let's assume that the loss is something like 70 million dollars. If we were to go to the world-wide insurance market, and say there's a potential loss of 70 million dollars and we ask you only to insure that loss, whether the party liable is an airline, a manufacturer, a component manufacturer, or what
have you, that is a risk which, it seems to me, the insurance market would con-
template and could economically handle. But that's not what we have now. Now
we have a very complex system; with or without the Convention we have a very
complex system where, I illustrated, a small component manufacturer is in the
position of going to the insurance market and then the insurance market can't
evaluate his potential loss. And build upon that a convention-based system with
artificial limitations which may encourage claims against component manufac-
turers and you make it impossible. What I am suggesting is a new look at the
insurance problem industry-wide, so that insurance can be made available within
the capacity of the world-wide insurance market that will protect the entire in-
dustry from the airline to the component manufacturer.

There is one other point that I would like to make. There seems to be, Professor
Mankiewicz, running through your comments, and indeed through the comments
of some others, the assumption that uniformity is desirable. Uniformity is, per-
haps, desirable. It certainly is desirable in terms of ticketing for passengers; but
in my judgment, uniformity is undesirable in terms of awarding damages to in-
jured people or to the families of those who've been killed. What is appropriate in
Ethiopia is not appropriate in the United States. The concepts, the mores of the
people, are different from place to place. To me it simply defies experience and
knowledge to say that there must be one limitation, whether we're talking about
Ethiopia or the United States. Why should there be one limitation? If the purpose
of the Warsaw Convention is, as you suggest, and as Professor Lowenfeld has sug-
gested, the resolution of conflict of laws problems, then let the Panel of Experts
work on a new convention which will pronounce a choice of law rules.

CHAIRMAN LOWENFELD: I think it would interest the group to hear John
Martin's and then Lee Kreindler's assertion that basically everybody, including the
lawyer and the tax collector, gets something from a damage settlement.

MR. JOHN J. MARTIN: Well, basically, everyone might get something,
but I don't know if that is quite accurate. I don't agree with Lee's comment that
in an unexplained accident the defendants, no matter who they are represented by,
are ready to pay out handsome rewards. That's not a fact. When settlements are
made, they are made with some intelligent reasoning behind them and perhaps
with more knowledge than the plaintiffs have of what occurred. If we are
speaking only of nuisance values, certainly you will dispose of all cases. But ade-
quate awards are not paid in cases where the carrier feels that it has a defense.

MR. KREINDLER: I would answer, very briefly, that there's a great big dif-
ference between average recoveries and particular recoveries. Of course, I represent
not average people, but I represent particular people. And the concern that I have
had, and I think the concern that the United States government has had, has been
with the large number of American passengers whose awards, or whose potential
losses, will far exceed the average figure of $150,000 that you referred to. It's easy
to look at a piece of paper or a statistical abstract and say, it all adds up to the
same thing. We were kidding around a little bit last night with a case that I hap-
pened to settle yesterday. It wasn't an airplane case, but it could have been. A
young boy, a twenty-four year old student had the misfortune of being in a sta-

tionwagon that was hit by an automobile. He turned out to be a quadraplegic.
      That case was settled for $490,000, and it was only settled that low because of
the possibility that he may die, and since the accident happened in West Virginia,
there's a death limitation in West Virginia of $110,000. Now, that could have
been an airplane case, and it could have worked its way into the figures that gave
rise to my $150,000 average, but I can assure you that I am very much concerned,
with the problem of this poor, young fellow in a system of liability limited to
$100,000, $150,000, or $400,000.

CHAIRMAN LOWENFELD: Mr. Brennan.

MR. PATRICK BRENNAN: The first point I would like to make in relation
to the Convention itself is that it does provide a basic legal framework in relation to the problems that are facing us. There has been a tendency to treat this problem as if it were purely a matter of insurance. And this very often means that airline lawyers amongst others tend to neglect the problem and then find that because they have neglected basically the concepts, they’re going to be in trouble when it comes to paying for them. I think the chairman referred to insurance costs as being one and a half per cent of operating costs. Taking my cue from Mr. Kreindler, I would talk of a particular airline and one that I would obviously know most about. The insurance cost, the effect on our net profit, is something of great significance. In other words, it is a sum of money; it isn’t a percentage and it isn’t a statistic. I’m not suggesting, one way or another, that we shouldn’t pay the appropriate premiums for the appropriate liability, but I certainly do suggest that to toss off these costs as though they were insignificant is misleading.

Now, as to the description of the Montreal Interim Agreement as a “CAB decision,” my belief, my understanding of it is that it is in fact an agreement by a carrier with passenger arising out of the terms of the Warsaw Convention itself, so in fact it is in conformity with the Convention. This is not to ignore the powerful and very subtle influence of the CAB and of the State Department. In relation to all these problems, I would take the view, naturally being very objective, that the Irish point of view on things is always the reasonable one. Our country is a well-known friend of the United States, and I believe sincerely that the United States has a tremendous international conscience that is not sufficiently recognized by many other countries, and that because of that it has the obligation not to be smug and satisfied of the solution to a problem which takes care of their problem. In other words, the United States, I believe, should never take the “I’m all right, Jack” type of attitude. It has both the opportunities and the challenges and also the responsibilities that a great international country has. It has responded with tremendous virtue, I would even say, in programs such as the Marshall Aid Program and things of that sort. But when you come down to this area, I certainly get the feeling from time to time (we have heard some expression of it today) that if a solution is all right for the United States, then either it should be all right for everybody else or, in any case, whether it is or not, don’t bother us about it. The virtue of what’s called the free tort system is based on the assumption that judges, juries, and counsel, whether for plaintiffs or defendants, and witnesses and claimants and airlines and manufacturers are always truthful, reasonable, and fair, and that in some way some catharsis of absolute justice will emerge. I don’t think that this is necessarily the case. Therefore I think you need a framework of rules, particularly when you’re dealing with, inevitably, different legal systems. And just as I think it was wrong for the French or the Irish or the Germans or anybody else to assert that their legal system was the ideal, then I think the United States and Britain and Canada and any other country must feel the same way or should feel the same way.

Now, Mr. Kreindler made a remark which he made at the meeting in London—I hope he will appreciate, as I said at the coffee break, that if I’m more critical of him at this meeting than I was at the one in London, it’s simply because in London I sat beside his charming wife. I’m not suffering from that inhibiting situation this morning. Mr. Kreindler referred to the failure to communicate on the part of airlines, insurers, plaintiff lawyers, and governments in relation to this sort of problem. But mind you, he gave evidence today of coming with a closed mind. It’s not that he hasn’t heard the arguments, I’m sure, and if I were in Mr. Kreindler’s position and Mr. Kreindler’s job, far from the fact that I’d be a lot wealthier than I am at the moment, I’m sure I would take the same position. I mean, when you work for an organization or you work at a certain profession, you are reversing your blood stream, as it were, if you don’t feel that
you're doing something worthwhile. And yet his opposite number, Mr. Martin, you'll notice, took a slightly different view of the same problem.

Equally understandable and equally reflecting, thank God, the human fallibility of us all, there is another problem we are faced with in this, and that is the tremendous situation you have in the United States of the influence of the lobby. I'm not referring to any one particular one, because, I'm told (of course the Irish don't know much about this) that there are lobbies in the United States who are influencing Senators who, you would think, because they are Senators wouldn't really need anyone to influence them. . . . However, you have these influences at work through this system, and I don't think anyone would really think it's a very good system, and yet it's almost an inevitable system in human terms. But there are other countries and there are other problems and I think the United States has its obligation to which I referred before.

There is such a disease as "compensationitis" that we know of; and this has been referred to, indeed, by Mr. Martin in his remarks when he referred to the airlines as a new breed of sugar daddies. And it is true to say that in many cases awards can be as artificial as the limitations decried by plaintiff lawyers. In relation to the wonderful workings of the United States tort system, though Mr. Kreindler would talk about the eighty-five and ninety percent of the cases which are settled out of court, it is, I think, fair to point to the fact the Lisi accident occurred in 1960 and we're just now talking about it. As far as the courts are concerned, it isn't finished. So that some other system, a variation, is necessary. I don't come down on one side or the other firmly, except that I do think we need some kind of international framework for what is an international industry with international problems. Thank you.

CHAIRMAN LOWENFELD: Mr. Brennan, did you want a specific answer from one of us?

MR. BRENNAN: No. Just to agree with what was said!

CHAIRMAN LOWENFELD: Mr. Onek.

MR. JOSEPH ONEK: Mr. Kreindler, given your solicitude for plaintiffs, I wonder why you seem to reject any notion of enterprise or absolute liability since your concern would seem to be benefited if such a system were adopted?

MR. KREINDLER: I don't reject the concept of absolute liability. I think that absolute liability has much to be said for it and has much to be said against it. I think that absolute liability in international aviation terms must be evaluated in the context of what we get with it. Let's indicate the advantages, in my view, of absolute liability and the disadvantages of absolute liability. The advantages of absolute liability have been stated today. The obvious advantage is that it guarantees a recovery to the plaintiff, to the passenger. Secondary advantage, it's hoped, is that it will result in the elimination of delay and in the rapid compensation to these people who have suffered. As to those advantages, there can be no question and I'm all for them.

But there are certain disadvantages to absolute liability as I see it. First of all, absolute liability, in my experience, has always been presented with some kind of quid pro quo; it always comes in a package that includes a limitation. . . . To that extent I, of course, oppose it as I oppose all limitations. The second disadvantage of absolute liability, in my view, is that it means the abandonment of the fault concept. I think the fault concept does exercise an important deterrent influence on our society. . . . I know that tort litigation makes people more prudent, and I can say that categorically from my own experience. With the imposition of absolute liability we lose the fault aspect of our general tort system and I think that's a disadvantage. And there are lesser disadvantages which have already been stated. It's possible in the aviation context that absolute liability may encourage sabotage of airplanes, and it has been said by some that it's possible that absolute liability may encourage small, nuisance type claims. Now, when you ask me am
I for it or against it, I would like to know what the package consists of. If you ask me am I for a system of absolute liability and no limitation with damages ascertained in accordance with our general United States tort principles, I am categorically and unequivocally in favor of that system.

MR. BRENNAN: But how can Mr. Kreindler make that kind of statement if he believed that tort liability helped safety?

MR. KREINDLER: Because the advantages outweigh the disadvantages. In other words, it's a question of balance, Mr. Brennan.

CHAIRMAN LOWENFELD: If I may just interrupt here, I think we do have a whole session on the subject of absolute liability. . . . Mr. Madole.

MR. DONALD W. MADOLE: My specific question is to you, Mr. Lowenfeld and that is, as I understand the action of the United States government, we filed a notice of withdrawal from Warsaw and then that notice was ultimately cancelled. My question is in relation to the action of the CAB decision, I'm not now talking about the extra-territorial effect; I'm talking about the consideration of the United States government to its effect as part of the supreme law of the land, if you will. This has not been ratified by the Senate, as I understand it. I'm wondering if there are any cases you cite as precedent that were used by the United States government in determining the effectiveness of this section, an agreement between private companies and ratified by the President as binding as part of the supreme law of the land or treaty?

CHAIRMAN LOWENFELD: In part it was a pioneering action and we had no precise precedent in the terms of this kind of agreement and I'm not aware that it's been tested. The question was raised at several times whether the United States, having given notice of withdrawal of a convention, could withdraw it. There are half a dozen examples of that, and they are cited in the article that Mr. Mendelsohn and I wrote. And third, on the issue of whether the Senate has a part to play in this process, it is the prevailing and virtually, though not completely, unchallenged view that the Senate acts in the capacity of advice and consent to the making of a treaty, but not to withdrawal of a treaty. So we felt we're on quite strong legal ground in that respect.

MR. MADOLE: But what about an amendment of the treaty?

CHAIRMAN LOWENFELD: Well, I think Mr. Brennan answered that question. The Convention provides for special contract of carriage and we believe that it is such a special contract within the meaning of Article 22 of the Convention.

MR. MADOLE: Then, it is the U.S. government's position that this is the special contract whereby the carrier and the passenger agree to a higher limit of liability.

CHAIRMAN LOWENFELD: That's correct. The contract appears in the ticket and the ticket is issued to him pursuant to the tariff on file with the Board. (Here appeared an explanation by Sir William Hildred of terms used by him in his speech of the preceding evening.)

PROF. CARL McKENRY: I'll pick again on Mr. Kreindler. . . . I do not perceive any give or take in your position through the last two years of writing in the Journal of Air Law and Commerce and so forth. My point is that since you use the good old common law as the basis for this, you must concede that the wrongful death aspect is, of course, a statutory creature. We've got this very basic problem that goes beyond aviation in the twelve states, I believe it is, whose wrongful death statutes will carry a limitation of liability. Your reference is to equate human dignity with compensation. In a give and take type attitude, what would your attitude be or response be to no limitation where we have personal injury. . . . It would seem to me that human dignity would indicate it is more important to have a minimum recovery on wrongful death than a maximum.

MR. KREINDLER: Professor McKenry, first of all let me bring you a little bit up to date in terms of the states which limit damages for wrongful death. . . .
I think that there are now only ten states that limit damage for wrongful death. . . . These are fast disappearing and, being somewhat dauntless, I'll make another prediction and say that within the next few years all of the United States states will have abolished their limitations. . . .

I do think your suggestion that the limit be withdrawn from personal injury cases has great merit. I certainly concede that it is easier for an individual to insure against the possibility of his death than it is for him to insure against the possibility of serious personal injury. Some of the most difficult cases that we face in international air law are the personal injury cases, because no matter what a prudent individual has done before embarking on his journey, it's impossible for him to have contemplated the precise nature of the injuries. . . . Of course, I think, as I've made clear, that all limitations should be removed.

MR. JAMES J. McCARTHY: Mr. Kreindler, if your decision is that justice and equity cry out for fair compensation in all cases, would you go along with my semantical difference and call it "fully informed compensation" where the trier of fact in a given case is fully informed on all of the facts of the case as it comes to them at the time of trial? For example, we both know in my jurisdiction [California], and in most jurisdictions, the evidence that a widow has remarried is not admissible. If fair compensation is the test, is it not fair to let the trier of fact know that the widow has been married? I'm not suggesting a counterclaim on the part of the carrier for giving her this opportunity.

MR. KREINDLER: I'm fully in favor of the admissibility of all relevant evidence. I disagree with you in your conclusion on the admissibility of subsequent marriage. I think the loss should be fixed as of the time of the accident, and I'll give you one example. I've had this illustration; I've had a widow remarried after the accident and the second husband dying.

CHAIRMAN LOWENFELD: Thank you.

End of Thursday morning discussion.