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OUR TORT SYSTEM AND AVIATION SAFETY

By LEE S. KREINDLER†

I. INTRODUCTION

AS A PLAINTIFFS' LAWYER, my role is very simple, and very clear, and brief. We have heard a lot in the last few interesting days about the aviation safety system, and we have heard a lot about the legal system. I would like to delineate the places where the aviation safety system and the legal system meet and the responsibilities that each serves. First, I would be remiss if I did not extend my thanks to Southern Methodist University and the *Journal of Air Law and Commerce* for providing this forum. I think it is certainly true that through communication, good must evolve.

In a sense this is the second forum that we have had, but in another sense it is really the third on related subjects. We started about four years ago at the University of Southern California and at that time, not unlike this time, I felt somewhat in the minority. But I learned just yesterday that as a result of that symposium, at which time a great many things were said by aviation people and a few things by myself, material changes have been made in one of the areas which we discussed several years ago. For example, the military attitude toward privileges and immunities with respect to the circulation of aviation information has changed. For those of you who do not know it, the military, which has been the primary advocate of the "privileged" withholding of accident investigation information, has substantially retrenched. That makes me feel quite good. It makes me feel that communication—whatever the forum, whatever the opportunity, whatever the odds—will lead to better law, better aviation safety and certainly greater understanding among all of us who participate in this one industry.

I would like to say at the outset, that I do not feel an adverse relationship with the airlines, nor do I feel an adverse relationship with the manufacturers or with the air traffic control facility people. It goes without saying that I have the greatest affection for John Stephen, George Whitehead and Harold Caplan, and all of my truly good friends on the other side of the table in lawsuits and at this symposium. But more important, I do not feel that my position, as a plaintiffs' lawyer in lawsuits, is an adverse function, although I can certainly understand how such a distinguished participant in this seminar as Mike Bates from McDonnell Douglas, who has been subjected to the deposition process, might feel differently.

But I feel—and I mean that I *feel*—that I am a participant in the industry just as much as the man that designs the airplane. That is not to say, and I have not said, that I can design an airplane or a component as well as, or better than, any one of the distinguished companies that is represented

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here today. It is to say that we all ought to recognize that we live in a community; we live in a society that has many parts, has many facets, and many functions. It is important for us to recognize that there is no black and there is no white, that each of us participates in the overall community responsibility in a different way. And just as much as I respect what all of you do, I hope that you will respect the importance of the role that I serve and other plaintiffs' lawyers serve in the overall scheme of things.

What is the role that I serve? We do not say, and I have not said—and this has been something of a distortion at this meeting—that we make, in the handling of a particular case, a contribution to aviation safety. The particular case, of course, involves an accident that has happened, and nothing is going to undo that accident. I am not saying that the financial effect, the economic consequences of the accident in this insurance-minded age, does not have a direct relationship to aviation safety. Although it may be a factor in safety, I think that paying the cost of an accident, generally speaking, does exercise a deterrent effect. But I freely admit and have always said, that in aviation, as large as it is, with the generalized system of insurance that it has, the imposition of damages in a particular case does not exercise a substantial deterrent effect. What I have said, and what I do say today, is that the existence of the tort system, the fact that individuals, companies, and even governments are going to be held responsible for their fault and their negligence and will have to answer in sometimes very personal ways, has contributed and does contribute to aviation safety. To make the point as simple and clear as I can, I would shudder to think of what the conditions would be without that system.

With respect to the attitudes of the various organizations that appear as defendants in these cases, I think it is very interesting to note that today we heard from representatives of airlines, manufacturers, and the government. We saw what to me was a living example of the system at work. We saw something happening here today to indicate an attitude that needs correction and that indeed has been corrected within the last year. If ever there was an illustration of living law or the need for the legal system, I think we saw it in operation today. What I have in mind is Chuck Peters' fine statement of liability on the part of the government, and more particularly, liability on the part of the Air Traffic Control services. Mr. Peters said that controllers were taught that there were manuals, and they were taught regulations, and they thought they derived some support or some sustenance from the language of regulation "63B," or whatever it was.

First let me say in defense of our general law system, that it is a very big system, and there are a great many people in it. Most of the cases are right, but some of them are wrong. I think you must realize that when Mr. Peters talks about an accident, or a court decision, whether it be the Logan Airport bird ingestion finding against the government or the finding of lack of contributory negligence on the part of the Mohawk crew up in Rochester, not all of us think that those decisions were correct. I think that you should also know that they are being appealed and may be changed

in higher courts. The appellate procedure exists to correct mistakes. I think the two illustrations of bad operation of law in this field are nothing more than examples of mistakes that will be corrected.

Exercising what I thought was a reasonable role in the Mohawk accident, for example, I did not sue the government because I did not think, personally, that the government was liable. Others did, for obvious reasons. Obviously the crew of the airplane has a different interest from that of the passengers. Their only recourse was against the government. But just bear in mind that you cannot absorb in the space of a day, or two days, an accurate glimpse of the overall operation of the system. I think the system operates very well indeed across its length and breadth.

II. LITIGATION BREEDS RESPONSIBILITY—AWARENESS

How does the overall tort system work to promote safety? The attitude of the government, the Air Traffic Control service, and the lawyers that have represented them, has been an unrealistic attitude over the last few years. Compare it with the attitude of the airlines or the manufacturers. It is true that perhaps 20 or 30 years ago, airline attitudes in negligence cases were quite different. The airlines now recognize within the functioning of our tort system, that the fact that a particular pilot on a particular occasion was negligent does not mean that the airline is sick or that the industry is sick. The airlines have come to recognize that the fact that a mechanic did his work improperly in a particular case does not mean that the airline was bad. There is a reasonableness that has attached itself to the airline attitude over the years that is reflected in court and is reflected in the manner in which the airlines have defended themselves in these negligence suits.

Turning to the manufacturers for a moment, that is not as true of the manufacturers, as it is of the airlines, simply because we have not been suing the manufacturers for so long. However, there is a growing sophistication on the part of manufacturers who have now been exposed to the litigation process and who have attacked the problem realistically by recognizing their responsibilities within the functioning of the overall system. It has been my personal experience, and I speak only for myself, that the same has not been true within the area of air traffic control. It is not true that merely because a pilot followed the language, the letter, the comma, and the word of a regulation, that he did everything that he should have done under the circumstances. Regulations are only words; negligence occurs only in dynamic situations where the facts and the circumstances dictate the need to do something. In the case of Air Traffic Control and the operation of FAA facilities, the attitude has been unrealistic. As reflected by Chuck Peters today, "We have a book of regulations and a manual, and it does not say in here that the controller should not have left his desk under these circumstances." Much of the unrealism reached the surface in the mid-air collision over Brooklyn and Staten Island, where the government was sued, and the Air Traffic Control service had to answer for its conduct. We went on and on, taking 16,000 pages of testimony. Bear that in mind, incidentally, when you assess the role of the legal system in put-

ting its finger on fault. Notwithstanding the finding by the Civil Aeronautics Board, which essentially exonerated the FAA air traffic control facilities from responsibility, the lawsuit proved that the people in Air Traffic Control had not done what reasonable people would have done under those circumstances. The government contributed substantially to the settlements of those cases.

Another example is the *Ingham* case that Chuck Peters mentioned—the weather reporting case that was decided last year. Sure, a few years ago, when aviation was much simpler and responsibilities much clearer and we did not have so many airplanes in the sky or so many passengers to be concerned about, the pilot was the pilot in command and the responsibility of properly operating the airplane was entirely on him. But is this realistic from the standpoint of the airline? Is it realistic to expect “reasonableness” of the airline? Is it realistic to expect “reasonableness” on the part of an airline, but a mere “going by the book” on the part of Air Traffic Control?

And what has happened? The legal system, which has been criticized here as contributing nothing to air safety, has told the ATC that this defense is no better for them than it is for airlines. It has been held that the man in the control tower with the opportunity to prevent an accident has just as much responsibility to be reasonable and do the right thing under the circumstances as the man flying the airplane. This change in attitude was not made by the FAA. In this case the FAA was the facility itself. It was not made by the CAB which investigated that accident. It was accomplished in the civil litigation; this will make the operation of the Air Traffic Control facilities a safer operation. And so I think we have seen reflected today something that we live with in litigation: the fact that it takes time to respond; the fact that the FAA system or the NTSB system is not the whole answer; the fact that throughout our whole community, each of us must answer to the community itself. The tort system that I serve and that my friends of the defense bar serve is the community in operation.

III. FEAR OF LITIGATION AND WITHHELD INFORMATION

What about the two issues that have been posed at this meeting? What about setting up a system of privileges or immunities? I have heard it said here by a reasonable person for whom I have the greatest respect, that information is not given after aircraft accidents because of the fear of civil litigation. That is unadulterated nonsense. Consider the third crash of an F-111 over Viet Nam. Is there anybody in the room who really believes that civil litigation is on the minds of the General Dynamics Company, or anybody else? The consequences of that crash are so enormous in so many other directions that civil litigation is not even a practical consideration. The reputation of the company and the future of the aircraft, for example, are far more significant.

It has been my privilege to take the testimony of manufacturers' representatives and of airline representatives. I have been doing this in case after case for the last 19 years. There is not one man among those I examined

about whom I would say that he withheld information from his employer or from an investigating agency out of fear of civil litigation. I have too much respect for the people that I have examined. Look around you in this room at the representatives of our distinguished manufacturers. Is there any man in this room who would withhold information on aviation safety because of fear of a lawsuit? As I stated, it is absolute nonsense; it does not happen. It is true that in society there are good people and there are occasionally not such good people. It is true that people are afraid. It is true that there are people who make mistakes and do not have the moral fiber or the courage to admit their mistakes. However, in the dynamic circumstances that follow a horrible aviation accident the personal factors are going to be far more important, *e.g.*, living with oneself, looking at oneself in the mirror, facing one's friends, and facing one's superiors. Few men would withhold information knowing that another accident of the same kind might result. If there is such a withholding, it is due to factors other than litigation.

I think that we have problems in information circulation. A much more serious problem is one that I have in my own office. We have accumulated information on one Boeing 707 case that would be usable in another 707 case, or a DC-8 case, if we could only recall it and correlate it.

We have the same problem magnificently illustrated by Bill Russler and Colonel Keel. We have the problem of finding and using the information we already have. Remember the photographs of file upon file of information, and the computer designed to make use of and correlate what is already known? This is where the attention should be directed.

Why do people associated with the airline or the insurance side of the question occasionally say that in the interest of air safety we must eliminate the tort system on the grounds that it is restricting the flow of information? I know these people are sincere, but I suggest to you that they are really motivated by the belief that tort litigation is a nuisance. And, they do not like it, and they would like to be relieved of it, because it is a pain in the neck. For example, a fine engineer who has worked on an important project that is on schedule may suddenly be compelled to appear in the courtroom for a week. Or suddenly his deposition is going to be taken for three months. It is a terrible inconvenience to the airline and to the manufacturer. Of course, they would like to get rid of that problem. That is more important to them than paying out the damages, incidentally, because it really interferes with the productive work that they are in business for. They do not like it. But it is not sufficient to say it is a nuisance. A better excuse must be found to eliminate the system of civil tort litigation. And so, we have this concentration on the circulation of information.

I suggest to you, gentlemen, that you cannot get wider dissemination or circulation of information by restricting information to start with. And, I also suggest to you that with respect to the privilege and the immunity concepts they do not make sense logically. As soon as you place artificial barriers and limitations on the circulation of information you have hurt

yourself. You are going to get into perfectly incredible, unworkable, and unrealistic areas.

For example, in an accident that happened within the last few years, a pilot with a long-standing heart condition died of a heart attack. The attack was found to be the cause of the accident. Suppose that the man had the heart attack but did not die in the accident. Further suppose he was granted a privilege so that when he came forward and admitted the background an immunity as to the information that he came forward with was available. Is it seriously to be suggested that the man would be permitted to go on flying aircraft and flying people because he was given an immunity to get the information in the first place? It is ridiculous! The factors that work upon individuals are far more personal, far more direct, than the myth of a concern about the ultimate civil litigation.

IV. THE INDEPENDENCE OF THE TORT SYSTEM AND AIR SAFETY

The tort system does not exist for the purpose of aviation safety. That is obvious. The system exists to provide reasonable compensation to the victims of accidents. When the argument that the tort system detracts from aviation safety is started by the people who would like to change the system, and when we respond to that argument in the negative, then the issue is drawn, and we must talk about it. The systems are independent; they serve different purposes. One really has nothing to do with the other. The tort system will compensate you if you are injured in an accident, or your family if you are killed in an accident. This is a very important part of our community life.

V. THE INTERRELATION OF THE TORT SYSTEM AND AIR SAFETY

How does the tort system contribute to aviation safety? The tort system is an umbrella over everyone. Reduced to its essentials, it provides that individuals or corporations shall be held responsible for the damages that they inflict through their fault. This applies to lawyers; it applies to automobile drivers; it applies to doctors. It also applies to aviation companies and to air traffic control facilities. Everybody is answerable to the community for the damages inflicted by his fault. The community acts through the jury which is so often criticized. The jury is in theory and in practice the representative of the community. Juries occasionally make mistakes. However, across the board, in case after case, they perform quite well. The jury is a group of selected members of the community who may have to determine, as Colonel Keel pointed out, how much money should be spent to save five lives. That decision is not one for a manufacturer. It is not a decision for the manufacturer to make in a vacuum, unanswerable to anyone. The manufacturer should make the decision of reasonableness, or negligence which is the lack of reasonableness, knowing that someday a jury may pass on the question. That someday hardly ever happens. That manufacturer hardly ever makes a significant mistake that causes a major accident. But it is the existence of the system—the fact that the manufacturer will have

to answer or the airline will have to answer or the air traffic control system will have to answer, *if* there is a serious accident—that exercises a beneficial effect on the entire aviation safety picture.

VI. THE IMPACT OF THE TORT SYSTEM ON INDIVIDUALS

As I said before, the financial responsibility resulting from fault in aviation accidents does not have a significant effect. But there is a factor that is significant. Taking depositions of particular people reveal that litigation has a significant impact on these individuals. The question has come up in a slightly different form. Last year, Harold Caplan said he had heard of a man who was deposed because he “went through the wringer,” so to speak, in civil litigation. He was so upset that he had a nervous breakdown. In this writer’s experience nothing like that has ever happened. In my experience, lawyers have conducted themselves very well, and if they were bad lawyers or they did improper things they did not last in the league that handles the significant cases. They just disappeared. The only lawyers that the distinguished insurance people in this audience know are lawyers who would never be involved in a self-defacing process that reduces people to nervous breakdowns.

But, what does the process do? Litigation has produced for individuals, for the first time, a feeling of personal responsibility. The NTSB investigation or public hearings cannot, in 3 days or 5 days of hearings in which an individual testifies for an hour and a half, or at the most 3 hours, conduct a careful exploration with the documents on the table, or with the opportunity to get more documents on the table.

When George Whitehead said, earlier today, that the manufacturer knows the cause of the accident right after it happened and that five years after, when the litigation came up, there was nothing to be gained from the process, he was incorrect. There is indeed something to be gained from the process. Recently, after a major jet transport accident which caused concern along the length and the breadth of the entire industry because it was an early accident in the experience of this major aircraft, everyone got terribly upset. There was a meeting convened by the manufacturer about five weeks after the accident. The FAA and the CAB were there as well as representatives of every airline around the world that was using that aircraft. Those people were subjected to a program not really too unlike what we have had here for the last two days. There were slides, descriptions, data, graphs, and explanations. The manufacturer said: “We are certainly very concerned about this accident, but we assure you that in this area, this area and this area, the aircraft is perfectly safe and no changes need be made.” Almost everything of significance that was produced for the benefit of the FAA, the CAB, and the airline users at that meeting was false. It was false, and I would say fraudulent! There was no time in any public investigation for a meticulous examination of the facts with the documents on the table.

But what happened in the litigation? For three or four months the chief

engineer in the appropriate area sat in my office with the documents on the table. For the first time someone asked him about his statements at the post-accident meeting. This was but one of the many areas that was covered. The confrontation went something like this:

Question: You spoke at that meeting on such and such a date, and you described this slide. Were your conclusions based on engineering analysis or studies, or was that based on flight test data?

Answer: It was based on both.

Question: All right, you have been ordered to produce the engineering studies. Here they are. Where is the support material?

Answer: It's not there.

Question: Where is it?

Answer: It must be back at the factory.

The deposition was adjourned for a week so that the engineer could go back to the factory. Then the man came back and said: "I am in the aerodynamics department. And I am afraid I should not have said what I said because this is an area outside my competence. You had better ask somebody in the flight test department. It must have been flight test data. Those are files I have not been able to get a hold of." Again the deposition was adjourned for another week while the flight test engineer was deposed. The alleged flight test data was never produced.

The depositions in this civil litigation established for the first time that the material given to the FAA, to the CAB representatives, and to the airlines who were using this major aircraft was invented out of rarified air. It was false, and it was fraudulent; a careful study of the engineering data and the flight test material that was on hand demonstrated just the opposite of what those attending the post-accident meeting had been told. The fact of the matter was, of course, that about two years after the accident necessary changes were made in the aircraft. But, for those of you who are so naive as to think that the FAA is going to catch everything and the NTSB, with the great job that it does in a short period of time, is going to catch everything and that we can go on in sublime comfort to know that our lives are not in jeopardy, I want to tell you that that litigation produced plenty. And what was the most important thing that it produced? It produced for the first time on the part of the engineers who had to testify in that case the knowledge and the understanding that if they ever made mistakes again they might be back at that or a similar table to answer similar questions.

Although perhaps only 4 or 5 people were involved in that investigation in that one piece of litigation, that company is a better company because of the experience each of those individuals who went through the litigation process received. And, this knowledge will continue to be made known to each of their colleagues. The experience of each individual is important because a man who plays a significant role in the design of one airplane will play a significant role in the design of another airplane that is made by his company. The experience is a therapeutic experience. It is part of a learning process.

This has happened with respect to airlines and with respect to manufacturers. It has happened with respect to air traffic control facilities. The people involved and their colleagues will not make the same kind of mistakes in the future. They are different people, and they are better people.

VII. CONCLUSION

In summary, I would not say that our tort system exists to make aviation safer, but I would say that this is one of its consequences.