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The Guatemala Protocol

Lee S. Kreindler

THE GUATEMALA PROTOCOL

LEE S. KREINDLER*

IT IS ALWAYS REFRESHING for a practicing lawyer to get out of his office, particularly out of his office in New York, get out of the courtroom and return to the faces, and the feelings, and the aspirations, and the sentiments of people somewhat removed from the business of law, from the business of trying cases, from the business of talking about complex problems, and return to the business of people.

Now, some great man once said of man that there is nothing so simple that the mind of man cannot complicate. What we are talking is in essence very simple, and it has been terribly complicated. We are talking about fundamental principles, and rights, and remedies, as exist in our society and in our law. We are talking about compensating people who are hurt. We are talking about the basis of that compensation.

Now this gobildygook, and that's what it is, about Warsaw, Montreal, and The Hague, and all the other places and stops along the way, is a lot of nonsense. It defies the basic principles of what is right and fundamental in our law, of what is meaningful for people. Pat Boyle is still my friend after many years of speeches like this, and sessions like this, and I trust we'll be good friends for years to come, and I hope I can say the same for Ian McPherson, who is a distinguished airline lawyer.

First, make no mistake about it, Mr. Boyle says Mr. McPherson is on his left and I am on his right, and he is in the middle. They are on one side and I am on the other side. The government of the United States has been in bed with the airlines on this issue for the last 40 years and still is, and there is just no denying it. Mr. Boyle and the State Department, and the CAB and the rest of the IGIA, the United States Interagency Group on International Aviation, all speak with one voice. There is no distinction between the position of the International Air Transport Association and Mr. Boyle's position, and there is no distinction between the positions of the IGIA and the International Air Transport Association. They worked together at the meetings at Montreal, at which I was present on a few occasions. It didn't make any difference if Mr. Gazdick, Legal Counsel of IATA, said something, or Mr. Carter, former Assistant Legal Advisor for Economic Affairs of the State Department, said it. As a matter of fact in many ways, it has been the

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* A.B., Dartmouth College; L.L.B., Harvard Law School. Mr. Kreindler, a senior partner in the firm of Kreindler & Kreindler, specializes in the handling of air crash cases. He is the former Chairman of the Aviation Law Section of the American Trial Lawyers' Association, and is the author of AVIATION ACCIDENT LAW, published by Mathew Bender & Co.

United States that has pushed the countries of the world into the embarrassing and unfortunate position that they are in now.

Let's talk about some very basic fundamentals. If you are injured in an automobile, if you are injured in a railroad train, if you are injured in a bus, or if you are hit by a brick, you are injured, and you suffer a loss. The loss exists. To some extent, more or less, it's measurable. We try to measure the loss. If the amount of our measurement is right, it is right, and if the amount of our measurement is arbitrary, it is wrong. By definition, a limitation is something that cuts off provable damages. If the damages are not greater than the limitation then the limitation does not exist. Whether the amount is $100,000 or $300,000 it is meaningless, unless the losses suffered are greater.

I am not talking about law and articles and books. I am talking about people. It is my burden to represent people. I recently returned from London where I appeared in the inquiry arising out of the British European Airways Trident that crashed while on takeoff from Heatherow Airport on June 18, 1972. This is not an abstraction to me. I represent five families.

I would like to tell you about two of them. I'm not pulling on the heartstrings, but you will see very rapidly that we are not talking about footnotes; we are talking about people. Two of the men who were killed in that accident, were among the country's most brilliant scientists, but forget that, they were fine husbands, and they were fine fathers. One left three children, and the other left four. They were outstanding businessmen as well as scientists. Each of these families has suffered a horrendous loss that in no way can be calculated in money, but money can help. It can help to educate the children, it can pay the bills, it can do some of what these fathers would have done for their families. It is just unconscionable to subsidize the airline at the expense of either one of these families. It is unconscionable! Trucking companies do not have this kind of a subsidy; the Greyhound bus company does not have it; automobile operators do not have it; *domestic* airlines do not have it; and there is not a reason in the world why airlines should have it in international transportation.

Now what is all this nonsense that we are talking about? If you look at the figures, the number of cases we are talking about, you will wonder why we are all debating this subject. Over the last ten years the average number of Americans killed in scheduled airline accidents, domestic and international (and mind you this whole business we are talking about is only international) together averages 186 American passengers a year! Why on earth do we go to this unbelievable expense arguing about this miniscule and silly thing? Why is there an IGIA? Why are there International Conferences? Why did we spend untold thousands of dollars meeting up at Montreal, to solve a problem, that arises from the death of, or serious personal injury to 186 Americans a year? I don't know!

Why should you single out the family of the fine ladies I represent, in San Francisco, for example, and say each can only get $75,000 under the idiotic Montreal agreement, or $100,000 under the Guatemala Protocol, or $300,000? The loss to each of those families is in excess of a million dollars, in my opinion.

Is a million dollars frightening? Is it too much money? Let us take the example of one of the men I just mentioned. The day he died, the minute he died, he and his estate lost the right to exercise stock options that he had earned because of his unique position of setting up an outstanding young company in San Francisco that employed him. The money lost to that family that instant in stock options alone exceeds $300,000. Why should we subsidize BEA, BOAC, or Air Canada, or American Airlines, at the expense of four people living in San Francisco? I don't know.

It is absurd, it is nonsensible, it is a subsidy and it is discrimination. It is not only discrimination against people, like the individuals I represent in this accident, but it is discrimination against everyone else in the aviation industry. It is discrimination against the government, the taxpayers, the same ones that Pat Boyle represents; the manufacturers and everyone else, except arlines. Why?

The last case I tried, was a mid-air collision, resulting from the collision over Indianapolis between the Allegheny DC 9 and a light aircraft. I tried one case. It was settled after two and a half weeks and I went ahead and settled the other cases that I had in that accident, some seven of them. Out of all the settlements, the United States Government paid one-third because of the negligence of the air traffic controllers, and the airline paid two-thirds. The settlements in those seven cases amounted to about three million dollars.

What does the Guatemala Protocol provide for? There is a sublime, an exquisitely unbreakable limit of $100,000 applicable to an airline.[1] The supplement that Pat Boyle talks about means that the passenger's going to have to pay the airline an additional $2 for the benefit of having his damages limited if the airline injures him or kills him.

There is a limit of $100,000 under the Guatemala Protocol and if you include the $200,000 that they are giving you in this ridiculous supplement, one can get up to $300,000. Let's take the million-dollar case. What happens to the other $700,000 in the mid-air collision over Indianapolis that I tried a couple of months ago? The government of the

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), as amended at the Hague, 1955 and at Guatemala City, 1971. Article VIII [hereinafter references to specific provisions shall be: The Guatemala Protocol, Art. .....].

United States will pick up the balance. Not the balance, as a matter of fact. The government will pick up $900,000 because this plan, the Guatemala Protocol, with supplement, provides that the contractor, this insurance company, or accounting company, or whatever it turns out to be—the contractor will stand in the shoes of the passenger; will be subrogated to the rights to sue in the name of the passenger.[2] So the accident happens, the mid-air collision happens, let us say caused almost entirely by the airline, with just a little bit of negligence on the part of air traffic control, and the airline gets off virtually scot-free for the $100,000. The passenger gets $200,000 more from the contractor, and the contractor is now also in a position to sue the government. So the United States government, you the taxpayers, pay $900,000 out of the million-dollar loss and the airline is subsidized for the damages it has caused.

Well, forget the United States government, what about the manufacturers? The case which I tried in London may turn out to be a case where we are able to recover against both the airline, and Hawker Siddelley, the manufacturer of the Trident. We recover all the time against airlines, right today, under the Warsaw Convention and the Montreal Agreement, as Mr. McPherson and other airline counsel well know. That is why the limitation under the Guatemala Protocol is exquisitely unbreakable, no matter what happens. Under Guatemala, even if you can prove murder on the part of an airline employee, you cannot recover more than the limitation, against the airline; however, this is not true as against the manufacturer.[3]

Today, we can recover unlimited damages against the airline by showing that it did not give adequate notice to a passenger.[4] The Warsaw-Montreal system now is bad enough compared to our domestic system of liability based upon fault with unlimited compensation. Litigants break the limitation all the time. It is shown that the airline did not notify the passenger, did not put in big letters the fact to the passenger that he had better buy some extra insurance because this airline's liability may be limited.[5] In other words, under the Warsaw Convention, now, notice is required. The airline must inform the passenger that his damages may be

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[2] Proposed Supplemental Compensation Plan Pursuant to Article 35 of the Warsaw Convention, 4.4d.

[3] The Guatemala Protocol, Arts. VIII, IX.

[4] Warren v. Flying Tiger Line, Inc., 352 F.2d 494 (9th Cir. 1965); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851 (2d Cir. 1965); Lisi v. Alitalia-Linee Aeree Italiane, 253 F. Supp. 237 (S.D.N.Y. 1966), *aff'd*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, Alitalia-Linee Aeree Italiane v. Lisi, 390 U.S. 455, *rehearing denied*, 391 U.S. 929 (1968); Egan v. Kollsman Instrument Corp., 21 N.Y.2d 160, 234 N.E.2d 199, 287 N.Y.S.2d 14 (1967); *cert. denied*, 390 U.S. 1039 (1968).

[5] *Id.*

limited in case of an airline accident.[6] This is out with the Guatemala Protocol.[7] The limitation cannot be broken. Lack of notice against the airline is only one way one can recover today in our international aviation.[8] One can also recover against the manufacturer, and we frequently do.

The vice in the new Guatemala Protocol is that no matter how responsible, no matter how faulty the airline is, and no matter how limited the fault of the manufacturer is, the manufacturer is going to end up paying practically everything.

Let us take a simple case. Assume that a pilot violates every rule in the books. Let us say the weather is bad, and the pilot violates all the rules and attempts to sneak under the weather, and he hits a mountain or something and there is an accident. Assume, it is 99% caused by the negligence of the airline. Under the Guatemala Protocol, if it ever comes to be, do you know what I will do if I represent passengers in that accident, when I am faced with the terrible responsibility of providing the money to educate children or to pay for medical expenses which can exceed the kind of money they are talking about? If I can only recover $100,000 or $300,000 as the case may be, against the airline or that contractor, and I have a $600,000 case, a case where the losses are extreme, I am going to look for other people who may be legally obliged to pay. A little bit of negligence is all you need. Any negligence is enough to establish liability. Let us take our case. A pilot sneaks under the weather and runs into a mountain. It may be true that the altimeter was not the latest, or the best, and the manufacturer who designed it could have made it a little better. We appear in court with a plaintiff with horrifying personal injuries. Paraplegics, and quadraplegics, legs off and arms off. That's what happens in airplane accidents: or families without breadwinners, and admittedly a little bit of negligence on the part of the manufacturer. Under the Guatemala Protocol who would pay? Not the airline. It now has the benefit of this exquisite limitation, $100,000, possibly with more thrown in because the passenger has been forced to pay a couple of bucks extra on his flight to London.

It is really silly! We ought to get back in international aviation to where we are in domestic aviation. For the fraction of the 186 passengers per year who are killed or injured, we can afford to give justice to the people injured in international aviation as we do give justice today in domestic aviation. The domestic airlines in the United States are among the most successful in the world. They haven't been harmed by the lack of any artificial limitation.

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[6] The Guatemala Protocol, Art. II. *See also* CAB Order No. E-23680 (May 13, 1966), 31 Fed. Reg. 7302 (1966).

[7] The Guatemala Protocol, Art. II.

[8] Recovery can also be based upon proof of "wilful misconduct" as provided for in the Warsaw Convention, Art. 25.