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A Response to Lee Kreindler

Robert P. Boyle

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LEE KREINDLER is certainly right; if you are injured by a car, a train, a bus or a brick you suffer a measurable loss for which you want to recover. He is also right that the Warsaw Convention limitation of liability cuts off some portion of that recovery for some people. Probably in the cases he mentioned that would happen. He concludes that to the extent that such loss is not fully compensated the airlines, manufacturers, government and others have been subsidized by the international passengers and that none of these need subsidy at the expense of the needy claimants.

However, before accepting this as an inescapable conclusion, possibly a look at some other facets of the problem might be desirable. First, under the Guatemala Protocol, the carrier is made absolutely liable to the passenger for death or injury and has given up all defenses except that of contributory negligence.[1] In other words, the carrier cannot escape liability because the accident was caused by an act of God, war, hijacking, riot, insurrection, sabotage or any one of a number of other circumstances over which the carrier has no control and which, under normal conditions, the carrier would be able to plead in defense of his liability. The only defense the carrier has left is that of contributory negligence which, in most cases, is of limited value.

Now, this means to the international passenger that he doesn't have to prove any fault by the carrier, and, except in rare cases, the carrier has no way to avoid liability, even if it could prove in a given case that it was not at fault. The net result is that the process of obtaining compensation for the claimant is made substantially easier because the issues of fault and the possible availability of defenses are removed. Lee Kreindler may well respond to this that the doctrine of *res ipsa loquitur*, almost universally applied by United States courts in aviation accident cases, really accomplishes this result anyway.[2] I happen not to agree. For instance, under the Guatemala Protocol, the carrier with one exception

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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, Art. IV.

[2] Hildred, *Air Carriers' Liability: Significance of The Warsaw Convention and Events Leading Up To The Montreal Agreement*, 33 J. AIR L. & COM. 545 (1967); *see also Id.* at 711-714.

will have no defenses left at all which, in today's aviation environment where the hijacker, the saboteur, and even armed attack are lamentably frequent, is probably as important to the air carrier as the opportunity to prove freedom from fault. In any event, even to get to the point where the *res ipsa loquitur* applies, you are inevitably involved in litigation and its expense which is one of the things the Guatemala Protocol tries to minimize.

Thus, I believe that major sources of controversy in aviation accident cases have been removed from the process of compensation by the Guatemala Protocol and that this will speed recovery by the claimant and reduce the cost to the claimant of that recovery. The result of this is that the claimant will get his money quicker, and that more of it will stay in his pocket instead of going for costs of litigation, including attorney's fees. In fact, the only issue left in the compensation process should be the argument over the amount of the damage. Admittedly, this can be controversial, but, with pressure on the carrier to make an adequate and timely offer of settlement, it should not be difficult or protracted. Consequently, I believe that under the Guatemala Protocol the claimant will get his money quicker and with a lot less expense than in the domestic accident where no treaty applies.

Lee Kreindler, I am sure, will respond to what I have just said by saying that the money received by the claimant under Guatemala is not enough and he has cited cases where the $100,000 limit in the Guatemala Protocol appears ridiculously low, but are these typical? The CAB figures showed in 1970 that about one-half of *all* recoveries were $100,000 or less, and if you went up to $300,000 over 80% of all cases had full recovery. Thus, $100,000 is adequate in half the cases and $300,000 would take care of the great majority, although admittedly leaving some few with uncompensated losses. Further, if you take into account the value of the money to the claimant in six months to a year from the date of the loss versus a larger sum received five to seven years later, and after expensive litigation, it may be that even these few not fully compensated cases become even fewer.

Now, as Mr. McPherson has pointed out there are, of course, other reasons why the Guatemala Protocol is of value to the international passenger. U.S. citizens whether we like it or not love to travel; they travel all over the world and on almost anybody's airline. The Guatemala Protocol assures them that if anything happens to them their legal rights will be the same no matter whose airline they are on or where their injury occurs. These rights include absolute liability with virtually no defenses by the air carrier and a number of other benefits, including the opportunity to bring suit in a court of the claimant's domicile if the carrier is otherwise amenable to suit there. Lee Kreindler in his discussion of the cases his firm is handling arising out of the hijacking and sabotage incidents in

the Middle East in 1970 illustrates the value of these rights to claimants.[3] The absolute liability of the airlines makes these actions possible and without it there is no cause of action against the carriers. In other words, the international passenger has the benefit of an internationally agreed upon uniform system that is stacked in his favor.

Such a system was not easy to achieve. Many countries were unwilling to agree to a limit of $100,000 because recoveries in these amounts in their courts are for their nationals unthinkable. However, in the end, they agreed to $100,000 but would not go higher, so we accepted that admittedly low limit on the condition that the other countries would permit us to make separate provision for our citizens. Thus, we could remain a party to a uniform international system, and provide its benefits to United States citizens who use it more than the citizens of any other country. The price for this uniform system is a limitation of liability which may, in some cases, reduce potential recovery. It should be noted, this will happen in only a very few cases and even in those cases a very substantial recovery will be quickly and inexpensively available.

Just to show what speedy and inexpensive recovery can mean let us consider a possible case. A claimant under a system with no limit and no convention recovers ultimately $500,000. Without any convention in existence, this normally will be after expensive litigation and ensuing delays—on the average about six years.[4] Out of the $500,000 will come all court costs, attorney's fees, expenses of investigation, expert witness fees, etcetera. Assuming the usual one-third contigent fee and substantial, but not unreasonable, investigative and other expenses, this means recovery by the claimant after six years will probably be on the order of $300,000, since $200,000 will go for attorney's fees and other litigation costs. Under the Guatemala Protocol with a Supplemental System providing a minimum of an additional $100,000 of recovery the same claimant would get $200,000 ($100,000 from the airline and $100,000 from the Supplemental System). However, his litigation expense and attorney's fees, if any, should not exceed 10% of the $200,000 so that one year from the date of accident he gets in his pocket $180,000. If this is invested for the next five years (the equivalent date of recovery under an unlimited system) it becomes about $240,000 assuming accumulation of interest at the fairly conservative rate of 6%. Thus, the real difference

[3] The cases referred to appear in Mr. Kreindler's article concerning Aerial Hijacking, *infra.* (Ed.)

[4] *See generally* recovery tables published in 33 J. AIR L. & COM. 591-93 (1967).

to the claimant is not the difference between $200,000 and $500,000 which seems to be the effect of a limitation system; the real difference is about $60,000 and the advantage of having it quickly without waiting six years for it may well be worth the price. Of course, if the Supplemental System provides for an additional $200,000 instead of $100,000, the claimant has a potential recovery of $300,000 and thus is probably better off than under a completely unregulated compensation system. Admittedly, these are over-simplified examples, but they do make the point that the claimant does not necessarily suffer all the disadvantages Lee Kreindler notes and that there are real compensatory advantages to the international passenger under the Guatemala Protocol system.