NEW DIMENSIONS IN TRANSPORTATION LAW

BY ALAN S. BOYD*
STANFORD G. ROSS**
AND
RICHARD L. TEBERG***

The law is a vital institution through which society achieves its goals. As society changes, as its values change, as its goals change, the law too must change, for the law is a reflection of society.

It is thus appropriate that a Journal devoted to transportation law be started now. For the legislation which created the new Department of Transportation was a reflection of a changing attitude about the role of transportation in our society.[1] That legislation marked the beginning of the development of a new body of law reflecting new attitudes, new values and new goals for transportation. And perhaps most importantly for the practicing lawyer, the DOT Act gave new direction to existing areas of transportation law that should lead to major changes in the years ahead.

We can see only the first of these legal developments now. But the ones we see are dramatic. They reflect important underlying changes in society's concepts about transportation. As time goes on we will develop a comprehensive body of transportation law in areas where now there are only separate and distinct bodies of aviation law, motor carrier law, railroad law or other specialized and fragmented collections of differing legal rules applicable to fundamentally similar circumstances. These changes will be brought about by society's new approach toward our transportation system.

In the past we have dealt, by and large, with each form of

*ALAN S. BOYD was sworn in by President Johnson as the first Cabinet-level Secretary of Transportation on January 16, 1967. Prior to this appointment, Mr. Boyd served as Under Secretary of Commerce for Transportation, Chairman of the Civil Aeronautics Board, and a former member of the Florida Railroad and Public Utilities Commission. He is a member of the Florida Bar.

**STANFORD G. ROSS was sworn in by President Johnson as General Counsel of the Department of Transportation on May 28, 1968. Prior to this appointment, Mr. Ross was a member of the White House staff, a Consultant to the Director of the Bureau of the Budget and Council of Economic Advisers, and served as Executive Director of the President's National Advisory Panel on Insurance in Riot-Affected Areas. He is a member of the California and New York Bars.

***RICHARD L. TEBERG is Special Assistant to Mr. Ross. Prior to this, he was Operations Director and Associate General Counsel for the President's National Advisory Panel on Insurance in Riot-Affected Areas, and Legal Assistant to the Chairman of the Securities and Exchange Commission. He is a member of the District of Columbia Bar.

1. PUB. L. 89-670, Department of Transportation Act, October 15, 1966, 80 Stat. 931.

transportation in isolation from all others. We have thought of transportation only in terms of ships, or railroads, or airplanes, or cars, or trucks or roads. Industry has concentrated on each mode as if it provided the only means to fulfill the transportation needs of America. Government has regulated and promoted each mode separately, sometimes giving perference to one, sometimes another.

Reflecting this concentration on individual modes the law has, to a large extent, developed its own set of principles and rules applicable to each mode. The amount a person may recover when injured while traveling may depend on whether he was on a boat, a train, or a plane. And it may even depend on where he was going. The method of financing goods shipped overseas may depend on whether they are sent by sea or air.

As a result of this concentrated attention we have the greatest system of airlines, railroads, pipelines, highways and waterways in the world. But we also have a great deal of discontent with our transportation system as a whole. The problem is not that we have done badly. Rather, it is that we can—and should—do better.

Too often we have built highways to move more and more cars into our cities without considering where to put the cars when they get there. We have built airline, railroad and shipping facilities without fully considering how to transfer passengers or goods conveniently and rapidly from one mode to another. The result has been costly delay, waste, frustration and mounting criticism.

We have too often overlooked the enormous economic and social impact of the system. Highways, railroads, airplanes, trucks, cars all affect the quality of life in America. Transportation not only moves people and cargo, it affects the air we breathe, the sounds we hear and the sights we see. It changes neighborhoods. It dislocates families and businesses.

Good *private* transportation has helped the affluent move to the suburbs. Inadequate *public* transportation has handicapped the man in the ghetto in his search for jobs, education, and recreation. This combination has drained our cities of too much of the human and financial resources needed to cope with their immense problems and have left the poor isolated and frustrated.

The nation needs a new way of reaching its transportation decisions; a way to emphasize the advantages of its transportation network and avoid its disadvantages; a way to make transportation conform to the needs of people rather than making people conform to the system.

By bringing together the Federal Government's major promotional

and safety responsibilities into one organization the new Department of Transportation now gives us an opportunity to take a new look at transportation. It gives us an opportunity to think of all modes of transportation in terms of what they really are—the interrelated parts of a single system, vast and complex as it may be. It gives us an opportunity to think of transportation not only as a carrier of passengers and goods but also as an integral part of society and our environment, capable of enhancing our lives or making them all but intolerable. It allows us to take a more balanced approach to our transportation decisions, to balance the need for both public and private transportation, to balance economic interests with social values. And it gives us a chance to recognize that a transportation decision is not simply a technical decision. It is also an economic decision, a social decision, and a political decision vitally affecting our lives, our cities and our countryside.

A major mission of the Department of Transportation then is to serve as a catalyst to cause others to look at transportation as a single system, with all elements working together to serve the total needs of our society.

We have been heartened by the developments since the establishment of the Department on April 1, 1967. We find, for example, an increasing awareness among American businessmen that transportation is a total system. The states of Florida and North Carolina have established new Departments of Transportation within the past year to provide a new institutional framework within which to evaluate their transportation policies.

With financial assistance from the Department the cities of Baltimore and Chicago are experimenting with a new institutional framework within which to evaluate the total impact of proposed sections of Interstate highway. A "Design Concept Team" representing all the disciplines involved in urban planning and design, and in transportation has been established in each of these cities to help use the urban Interstate Highway Program as a means for integrating broadly conceived development programs along the highway corridors. Architects, international, national, or even local implications of the revolution. Thus "sponsor group" composed of city, state, and Federal officials and local citizen organizations. In this way technicians planning and designing a highway are guided by the people of the city. With early planning consideration of the highway's social, economic, historic and functional impact, the highway can be used to make a significant contribution to the city's development goals.

The Federal Government has also taken additional steps to provide a better institutional framework for it to help deal with the transportation problems in our cities by transferring a substantial part of its urban mass transportation programs from the Department of Housing and Urban Development to the Department of Transportation.[2] Acting through a new Urban Mass Transportation Administration the Department of Transportation can now provide national leadership in urban transportation research and assistance. It will work with the Department of Housing and Urban Development to assure that urban transportation develops as an integral part of the overall development of our growing urban areas. With approximately three out of every four Americans now living in our cities it is vital that all steps possible be taken to properly focus on the transportation problems of our cities and fully recognize transportation's social and environmental impact on their residents.

Lawyers too are beginning to take a new look at transportation and its social impact, as this new Transportation Law Journal demonstrates. A review of the topics covered in this first issue shows that lawyers are becoming increasingly interested and concerned with the legal and social problems of creating an integrated transportation system.

These are significant steps forward. Our answers in transportation, as in other fields, can be no better than the questions we ask. And the questions we ask are likely to be the result of the way in which we look at problems and how we think about them. If we think, for example, of how to build a better highway we can build a better highway. But if we think about how to integrate a better highway into a transportation system that improves the economic, social and esthetic aspects of a city, we can do that too.

A new approach to transportation, however, will create many novel and challenging problems for the transportation lawyer. It will require the development of new ideas, and new approaches to accomplish new goals for our transportation system. And it will raise many new legal-policy issues for which there is now little or no precedent.

We already know a great deal about the engineering, economic and efficiency aspects of transportation. But, we know every little about the social effects of transportation. The human implications of dislocation, noise, air pollution and destruction of the landscape and recreational areas resulting from transportation decisions are largely unexplored.

2.Reorganization Plan No. 2 of 1968 Re Urban Mass Transportation, 2 U.S. Cong. News 604 (1968).

The social effects of transportation have not played an important part in our transportation decisions in the past. Now they must if we are to create a satisfactory system.

As we learn more about the human implications of transportation we will need to balance the importance of competing goals. We have come to recognize, for example, that an attractive landscape and spacious parks are important values and under the DOT Act must be taken into consideration by the Department in reaching transportation decisions.[3] But we have as yet few criteria for determining just how important these values are when measured against other competing values, such as economy, safety, preserving homes and businesses. It is difficult—indeed perhaps impossible—to measure the importance of natural beauty and recreational areas in terms of dollars and cents. Even if a monetary value were placed on these factors criteria must also be established for weighing their value against other considerations such as safety and efficiency. Can a potentially dangerous curve in a highway be justified on the grounds that without it a lovely park or popular recreational area would be destroyed? The answer to that question, as with others, depends on the relative values assigned to competing community goals. It depends on weighing the degree of potential danger presented by the necessary curve against the importance to the community of preserving the park and the costs of avoiding both. Determining these goals and community values will involve lawyers more and more in the details of the transportation decision-making process than has been true in the past.

The hallmark of the law is the application of abstract concepts to particular circumstances, and there is no concept more abstract than that of "community goals." The relative community values must be articulated, weighed one against the other, and applied to real circumstances. Lawyers are accustomed to and specially trained for this process. The law has traditionally dealt with the problems of resolving in concrete cases issues that as matters of intellectual concept seem irreconcilable. While philosophers can argue in generalities, lawyers must apply facts and values to specific cases so that decisions can be made. The reasons for preserving a particular park, for example, must be competently presented if the community is to assign appropriate weight to this goal. The argument for economy, efficiency and safety in the particular case must also be articulately presented. Then, a decision can be reached. For in a democracy, the final choice from among competing values—like the trial of a case—results from an adversary

3.See section 4(f) of the DOT Act (49 U.S.C. 1653(f)).

process where all views are well presented and carefully weighed one against the other.

Too often we find in the field of transportation that we have taken too narrow and limited a view of the factors that are important—indeed even critical—to developing a satisfactory transportation system. Our thoughts have been too concentrated on developing individual modes and too much on narrow and short range economic interests. We find, for example, in cases before the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Maritime Commission that there are often no well-spoken advocates of the general public's interest. Many regulatory cases are incomplete in their presentation. Most witnesses promote special interests. The broad public interest in better service, lower rates, noise abatement, and clean air too often goes unrepresented. The result is that the agencies frequently do not have sufficient facts to make proper judgments and cases are decided by default. It is not surprising then to find there are those who criticize our transportation regulations on the ground they are designed too often to protect competitors from each other rather than to protect the interest of the user of transportation and those who are affected by it.

As the Federal Department charged with developing and carrying out a national transportation policy, we are acting as a spokesman for the public interest. We will seek to amend the regulatory statutes where we feel it is necessary. And we will intervene, within the limits of our manpower, in important regulatory proceedings before the ICC, the CAB and the FMC which present significant transportation policy issues.

For example, in the Bermuda Service Investigation we asked the CAB to consider airport and airspace congestion in making its route awards.[4] We have recently adopted a rule to limit flights at Chicago, New York and Washington (33 FR 17896). We are also participating in the multi-carrier discussions authorized by the CAB on how to meet those limitations.[5] And, we are continually reviewing our total regulatory approach to the problems presented for the air traffic control system by congestion.

The relief of air congestion is a major national problem affecting many different interests. To name just a few: For the passenger, the airlines, and the airport operator it means delay, increased costs,

4.CAB Docket No. 18361 (1968).

5.CAB Order Nos. 68-7-138; 68-8-30; 68-10-45-33 FR 11035; 11475; 15354 (1968).

poorer service, and greater flying hazards. For the residents of the surrounding area it means more noise, more air pollution and other inconveniences. For the city it means poorer, less convenient transportation service which could hinder its economic growth and development. Reaching viable transportation decisions to meet the crisis in our airways will require that all affected parties be adequately and vigorously represented.

We have also intervened in a number of other regulatory cases which involve major national transportation policy issues. For example, in Ex Parte MC-65 the Department urged the Interstate Commerce Commission to provide a simplified procedure for motor carriers wishing to use the Interstate highway system.[6] It is our view that a national investment of upwards of $50 billion in this system justifies the development of procedures to permit its maximum utilization.

In response to petitions filed by air taxi associations seeking additional economic regulations by the CAB, we argued against such regulation on the ground that the carriers and the public have benefitted from a policy of relatively free entry and exit and open competition.[7]

In the Rent-A-Train case, before the ICC, we supported an innovative form of tariff filed by the Illinois Central Railroad which, by encouraging more efficient utilization of the rail system, promises to produce significant cost saving both to the carrier and the grain shipper.[8]

In the Washington-Baltimore Helicopter case, we urged the CAB to consider both the needs for rapid transit in the area and the environmental impact—for example, noise—of the proposed helicopter service as elements in its determination of public convenience and necessity.[9]

These cases illustrate our belief that social values can, and should, be important elements considered by the regulatory agencies in reaching their decisions. These values are as much as part of the "public interest" as are the economic factors usually at issue. The cases also illustrate our belief in promoting innovation and efficiency in utilizing our transportation system. Further, they show that we believe that competition can play a greater role in transportation regulation than it has in the past.

6.107 M.C.C. 95 (1968).

7.CAB Dockets Nos. 18211, 18366, 18563 (1967), 19730 (1968).

8.ICC Docket No. 34905 (1967).

9.CAB Docket No. 18712 (1967).

The Department should not be alone in these cases. Private attorneys too should find that this expanded view of the public interest in our Nation's transportation system has application in their own arguments and briefs before the regulatory agencies.

The lawyer's role in society, however, is not limited to the presentation of cases. He also has a vital interest in assisting in legal reform. He is in an excellent position to spot deficiencies in our legal structure and to assist in its revision.

There are many areas in our legal and regulatory structure affecting transportation which require reexamination. For example, the roles of regulation and competition in transportation must be examined in the light of developing a new integrated transportation system.

Our private-government partnership in transportation makes some regulation of transportation essential. Private cars and trucks run on publicly financed highways. Private boats run on publicly maintained waterways. Private airplanes use public airways and airports. By its decisions the government can significantly help or hinder the competitive position of a particular mode of transportation. Monopolistic profits can be made by some and the competitive position of others eroded if the government's transportation decisions are not properly balanced or if it does not take steps to regulate transportation during periods of temporary imbalance.

On the other hand, our transportation system is too vast and too complex to develop regulations for every facet of its operation. The market place, however, is an automatic regulator. It rewards efficiency and punishes inefficiency, in a manner which can never be accomplsihed by government regulation. The market place demonstrates vividly the relative dollar values consumers place on such abstract concepts as speed, reliability, comfort and convenience, matters about which a government regulator can only guess.

In the years ahead, lawyers and others must consider the roles which greater competition could play in developing an integrated transportation system. What regulations can be eliminated? What regulations should be revised? We will need to reexamine our entire transportation regulatory structure to determine if we can promote competition instead of impeding it. It has been suggested, for example, that a system of maximum rate regulation might provide our nation with a better overall transportation system than minimum rate

regulation.[10] What are the legal implications of such a change? How would it affect individual companies?

We will have to reexamine the institutional framework in which our regulatory decisions are made. For example, former ICC Chairman Tucker has suggested that the regulatory functions of the ICC, CAB and FMC might be combined into a single regulatory body.[11] What would be the advantages and disadvantages to the carriers, to the shipper, to society? Are there other institutional rearrangements that can, or should, be made to improve our nation's transportation system? The arguments for and against change must be well presented and openly debated. Otherwise, important interests may be overlooked and decisions made by default. Private lawyers representing carriers, shippers, consumers, and others can play a vital role by articulating the pros and cons of propsoals for change from many different points of view.

We must also examine the structure of regulation of the various modes to determine their similarities and dissimilarities. We must examine the dissimilarities and seeming inconsistencies to determine whether they are justified in the light of changing conditions. We must determine whether they result from real differences between the modes or whether they are only the result of past considerations arising from concentrated thought on a particular mode.

We need to examine every facet of our law affecting transportation and ask where the law itself may be impeding the development of intermodal transportation. The restrictions on common ownership of different types of carriers, for example, raise some important questions. The "Air-Truck-Railroad-Ship-Bus Company" could eagerly seek out ways to encourage maximum intermodal use of its own facilities. To be sure such a combination of transportation facilities under one corporate roof might create problems. But again we must not be afraid to reexamine the potential problems in a new light—the desirability of creating a truly integrated transportation system.

We must also look at transportation law as it affects the consumers of transportation, the shipper and the passenger. Past dissimilarities in the treatment of consumers generally appear to have arisen out of

10.For a discussion of minimum and maximum rate regulation see Boies, *Experiment in Mercantilism: Minimum Rate Regulation by the Interstate Commerce Commission*, 68 Colum. L. Rev. 599 (1968).

11.Tucker, *Wanted: The Air-Truck-Railroad-Water-Bus Company*, Journal of World Business (1967).

concentrated attention on a particular mode rather than from fundamental differences in the mode or society's goals.

Take, for example, our national expenditure on safety. In the abstract, it would seem that society would be equally concerned about preventing dealth or injury regardless of the mode of transportation. That has not been the result of our political process. The United States Government today makes a direct investment of approximately $1 billion in safety programs for air travelers. Approximately 1,500 Americans die each year in aviation accidents. The Federal Government, however, spent only about $30 million last fiscal year on automobile safety programs, although over 50,000 Americans die each year in automobile accidents, and another 160,000 are left permanently crippled.

Obviously, the process by which safety decisions are made requires improvement. The Department of Transportation represents one step in the improvement of the process. For the first time, it provides a matrix for rational decisions about what mix of safety resources will most benefit society. We now have the resources for developing better techniques for relating programs to their consequences and for providing more balanced government involvement.

Traditionally, all fatal air and marine accidents have been fully investigated. This has not been true for automobile, motor carrier and rail accidents. We are putting increasing effort into the heretofore neglected modes. The Department's National Transportation Safety Board is already beginning to fill in gaps in the investigation of accidents and the determination of causes.

The Department now administers comprehensive statutes covering aviation, motor vehicle, highway and commercial marine safety. We have proposed legislation to improve our Nation's transportation safety programs to better protect the public from death and injury by railroads, recreational boats, and natural gas pipelines.

Reported train accidents increased 75% from 1961 to 1967. Approximately 95% of these accidents, however, resulted from factors not now subject to control by the Department's Federal Railroad Administration which is responsible for promoting railroad safety. To help assure the safety of both railroad employees and the public the Department has proposed the Federal Railroad Safety Act of 1968[12] to give it broad and flexible authority to establish safety standards for railroad equipment,

12.H.R. 16980 and S. 3426, 90th Cong. 2d Sess. (1968).

trackage, facilities and operations and to assist state railroad safety programs.

In 1966, 1,318 deaths occurred in recreational boating accidents, almost as many as occur in aviation accidents. Yet there has been no Federal assistance or incentive for the development of a meaningful recreational boat safety program. To provide a coordinated national safety program to reduce deaths and injuries from this activity we have proposed the Recreational Boat Safety Act of 1968.[13] Under this proposal approximately $5,000,000 would be authorized to help states establish and improve existing state programs. The Department would also be authorized to establish safety standards for the design, construction and performance of recreational boats and associated equipment.

While relatively few people have been killed or injured by gas pipeline accidents, the over 800,000 mile network of gas pipelines in the United States is a source of potential danger. To prevent future accidents the Department proposed, and Congress adopted, the Natural Gas Pipeline Safety Act of 1968.[14] Under this legislation the Department, working in cooperation with the states and the industry will be able to establish and enforce meaningful pipeline safety regulations.

We are also working toward developing a more uniform and more complete system for regulating the handling of hazardous materials in transit to better assure the safety of those who handle, or may be affected by, these materials.

In other areas we are attempting to eliminate legal and practical restrictions which affect the consumers choice of transportation. One example of this activity is our proposed bill which would authorize the publishing of joint intermodal rates for door-to-door international transportation and would enable international shipments to travel under a single bill of lading: The Trade Simplification Act of 1968.[15]

The new technology of transportation—containers and more efficient carriers of all modes—has given us the opportunity to move cargo with greatly increased speed and economy. It is now technologically feasible to load a container at a manufacturing plant in Kansas City, Missouri, move the container by truck or rail to a seaport or airport, ship the container overseas, and then move it to a destination inland in Europe, without once breaking the seal. Eliminating the handling of the

13.H.R. 15223 and S. 3015, 90th Cong. 2d Sess. (1968).
14.Pub. L. 90-481, 82 Stat. 720.
15.H.R. 16023 and S. 3235, 90th Cong. 2d Sess. (1968).

contents of the container can reduce transit time for shippers and can reduce handling charges, pilferage, insurance costs and the cost of export packing.

Unfortunately, a structure of laws and regulations governing movements of international transportation, whose foundation is over a hundred years old, substantially impedes full utilization of this new technology. A prospective international shipper will find that he must obtain a separate rate and separate documentation for each mode of transportation handling his cargo. Tariffs for surface transportation are constructed on the basis of weight, while the maritime tariff is based on the size of the cargo. Moreover, there are nine different systems of commodity classification; 711 CAB tariffs, 100,000 ICC tariffs and 2,700 FMC tariffs in addition to a multitude of foreign rates and charges that must be determined to develop the total transportation cost. As a result transportation costs are difficult and expensive to compute.

Handling complex and voluminous bills of lading adds further to the cost of exporting and importing. It has been estimated that in 1967 the value of our total export-import trade was $58 billion dollars and that the paperwork and administrative costs associated with this traffic was $5 billion. The National Committee on International Trade Documentation has estimated that the documentation cost alone of a typical export shipment totals $163, whereas approximately twenty-five percent of shipments exported from this country are valued at less than $100.

In addition to these impediments, there are numerous domestic and foreign laws and international conventions relating to a carrier's liability for the carriage of goods. These different rules of liability retard the chances for single bills of lading and produce uncertain and variable relief for a shipper should his merchandise be lost, damaged or delayed.

The result of these laws and regulations is that too many American manufacturers, large and small, stay out of import and export trade simply because the complexities and cost of paperwork associated with international trade are too great.

The Trade Simplification bill is designed to reduce some of the impediments of foreign trade.

First, it would put to rest any reservations the regulatory agencies may have about their power to accept intermodal tariffs for filing. This should remove any obstacles to publication of through, single-factor

tariffs. Further, it should encourage the development of uniform commodity descriptions in tariffs.

Second, it would permit all carriers participating in a through movement to issue a single through bill of lading for the entire trip. In addition to reducing much paperwork this through bill of lading should satisfy the desire for paper whose negotiability is recognized by the banking community here and abroad. It should allow financing the shipment at the beginning of a shipment's inland movement rather than waiting for the issuance of the ocean carrier's bill of lading.

Third, the bill would provide the impetus for the initiating carriers to assume full responsibility for loss or damage and to reflect the costs in the joint rates.

Finally, to promote the maximum utilization of containers and related equipment the bill would permit carriers to interchange equipment. This is a prerequisite to an efficient intermodal transportation system.

The fundamental approach of the bill is voluntary and permissive. Carriers and shippers would be *permitted* to establish and use joint rates and to use simplified through bills of lading. They would not be *required* to do so. Care has been taken to avoid creating any new regulations under the bill. Each of the regulatory agencies would continue to perform its functions as before, only under the bill there would be more flexibility for the agencies and the various modes to work in cooperation.

The adoption of the Trade Simplification bill, however, would not eliminate the paperwork jungle now surrounding international trade. Many other changes in the law will be necessary to help eliminate this constraint on the free flow of international trade. It has been estimated that there are a minimum of 28 forms required for export shipments and 35 forms required for import shipments, with from 4 to 36 copies of each form being prepared. Since most, if not all, of these forms are the result of efforts to meet some legal requirement or avoid some legal problem, lawyers are in a position to help eliminate as much of the paperwork as possible by bringing to light new ways of achieving the purpose of this mountain of paperwork, making one document do the work of many, and eliminating requirements which serve no real objective.

No attempt was made in the Trade Simplification bill to unravel the numerous domestic and foreign laws and international conventions relating to a carrier's liability. A shipper's substantive rights vary so greatly under these laws that any attempt to have done so in the time

that was available might have only created more uncertainty. There is, however, a need to develop a simple and uniform system of liability applicable to all modes of transportation. The transportation consumer does not care where injury occurs; he is concerned only with prompt and fair recovery for his loss.

More and more the variations in liability among transportation modes is being called into question. Indeed, the entire fault liability system itself is being questioned. It seems obvious to some, for example, that when cargo is shipped in sealed containers by various transportation modes over land, sea or air, it will be difficult if not impossible to determine where the damage to cargo occurs. To attempt to determine the condition of the cargo at various stages of the shipment would militate against realizing the full value of being able to ship in sealed containers. Fault then might play no part in determining who must compensate the shipper.

In the field of international aviation the United States has requested all international air carriers to waive the limited liability limits of the Warsaw Convention ($8,300)[16] and the Hague Protocol ($16,600)[17] for damage to property and personal injury arising out of international air travel. Under the 1966 agreement secured by the United States, sometimes referred to as the "Montreal Agreement" the carriers have assumed absolute liability for damage of up to $75,000, including attorneys' fees, for personal injury or death arising out of airplane accidents in international travel.[18] Some have suggested that this principle of absolute liability should also be extended to domestic airline travel.

The Department of Transportation itself has sponsored a bill to provide for unlimited liability for damages suffered as a result of death or personal injury aboard a vessel.[19] At present a plaintiff's right to recovery is limited by statute (46 U.S.C. 183) to $60 per ton of the vessel's tonnage unless the plaintiff can prove the owner had "privity or knowledge" of the matter leading to the loss. In the latter event the plaintiff can recover provable damages.

The automobile liability system is also under attack. Determining

16.Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), Feb. 13, 1933, 49 Stat. 3000, T.S. No. 876 (effective Oct. 29, 1934).

17.The United States has not become a party to the Hague Protocol.

18.Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, CAB Docket No. 17325, CAB Order No. E-23680 (May 13, 1966).

19.H.R. 17254 and S. 3600, 90th Cong. 2d. Sess. (1968).

liability is often blamed for crowding our court dockets and holding up the administration of justice. In automobile accidents alone, some have to wait as long as five or six years before the completion of trial and the receipt of compensation for their losses. Moreover, because negligence is a *sine qua non* to recovery many accident victims are not compensated at all, because neither, or both, plaintiff and defendant are at fault. Furthermore, it is said by some critics that the results of the adversary system may sometimes depend as much on one's ability to pay the costs of litigation as on the justness of the claim.[20]

In practice several studies have shown that victims suffering small losses usually receive more than their economic loss while the seriously injured often receive much less than their out-of-pocket expenses since they cannot await the outcome of time consuming litigation.[21] The principal beneficiaries of the system, some urge, are the lawyers who receive an estimated $1.3 billion from automobile accident litigation.

Most critics of the automobile liability system suggest eliminating fault as the criteria for recovery of losses. The Basic Protection Plan proposed by Professors Keeton and O'Connell,[22] for example, would replace the existing fault system in traffic accidents with a system to compensate all persons injured regardless of who was at fault where economic loss is less than $10,000. A person would go to court to recover economic losses in excess of $10,000 and losses from pain and suffering in excess of $5,000, the first $5,000 of such loss being unrecoverable.

The Basic Protection Plan would rely on a system of private insurance to cover losses.

Former Assistant Labor Secretary Daniel P. Moynihan has suggested that the auto insurance system be replaced by a wholly Federal program financed out of highway-user taxes.[23] His proposal, patterned after the workman's compensation system, would also make awards on the basis of loss rather than fault.

20.See O'Connell, *Taming the Automobile*, 58 Nw. U.L. Rev. 299, 304 (1963); Keeton and O'Connell, *Basic Protection for the Traffic Victim* (1965), p.2; Zeisel, Kalven and Bucholtz, *Delay in the Court* (1959); Conard, et al., *Automobile Accident Costs* and *Payments—Studies in the Economics of Injury Reparation* (1964), at 246.

21.See, e.g., Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. Pa. L. Rev. 915, 916-24 (1962); Conrad, et al., 192, 249; Hunting and Neuworth, at 23; Keeton and O'Connell, at 2.

22.Keeton and O'Connell, Basic Protection for the Traffic Victim (1965).

23.Moynehan, Next: A New Auto Insurance Policy, New York Times Magazine, Aug. 27, 1967.

Puerto Rico has recently adopted a no-fault system—sometimes called the Aponte-Denenberg Plan—for economic losses of less than $2,500, which is administered by the government.[24]

During the next two years the Department of Transportation will be studying the automobile compensation problem. We will be approaching the problem on a multi-disciplinary basis; however, since lawyers administer the liability system, they as much as any group should be a source of innovation and practical creativity in developing a system responsive to the changing needs of society.

The foregoing are only a few of the areas where lawyers can make a significant contribution in the development of a national transportation system responsive to all the needs of society. There are, of course, many others. Lawyers can encourage their clients to engage in the kind of long-range planning that will help them adapt to changing conditions. Lawyers can help their clients function as responsible and progressive members of the transportation community by urging them to do more than the law requires in areas such as safety and air pollution. Practitioners can encourage the agencies before which they practice to make their procedures more efficient. As citizens, lawyers can and should participate in the important civic work being done in their communities and in their states. Lawyers can encourage their bar associations to give full support to these efforts.

The task ahead for the transportation lawyer is enormous. By 1975, our population will climb from 200 million to 275 million. The Gross National Product will increase 50% and will pass the trillion-dollar mark. By then we will be driving 100 million cars, trucks and buses, and auto traffic will be up 40% over what it is today. By then, commercial air traffic will have tripled with nearly one-million people boarding an airliner in this country every day.

These advances will place great strain on our society and on our ability to cope with problems. New ideas, new approaches, perhaps even new institutions, will be required to deal with the problems. We have too long overlooked the inefficiencies of our past approaches to transportation problems. For too long we have ignored the immense social impact of our transportation decisions. In short, we have to adopt a new way of thinking about transportation if we are to be

24.Ley de Protection Social par accidentes de automobiles, Leg. 138 de 26 Junio de 1968 (P. de la C. 874). For a discussion of some underlying considerations of the Aponte and Denenberg Plan see Aponte, Denenberg, *Automobile Problem in Puerto Rico*, 35 Journal of Risk and Insurance 227 (1968).

capable of accommodating the vast growth in transportation needs that lies ahead.

Thinking of transportation as a total system with enormous social impact will present many new issues. Social values not easily expressed in monetary terms must be made a part of transportation decisions which in the past have generally been based on economic considerations alone. Legal rules and regulations that restrict the development of an efficient integrated transportation system must be analyzed and reevaluated in light of changing technology and a changing society. Inconsistency in the regulatory treatment of different modes of transportation and inconsistency in the treatment of consumers of transportation must be revisited to determine their necessity and desirability. The task of developing a simple and uniform method of compensating for losses resulting from transportation must be undertaken.

There is need to develop—and we will develop—a true transportation law, a law whose principles are applicable to all the modes of transportation. To serve their clients well, lawyers in the future will have to do much more than specialize in maritime law, air law, railroad law, or motor carrier law. They will have to become generalists in the field of transportation law, familiar with the problems of creating a single transportation system and its effects on society.

The immense task that lies ahead in developing a transportation law has already been started in the Department's General Counsel's Office. Working with the Department's attorneys who specialize in the law applicable to their particular modal administrations, the General Counsel's Office has been taking a new look at transportation law to determine ways to promote uniformity and consistency in the legal treatment of the various modes and the treatment of the consumers of transportation.[25]

To participate fully in the legal reform that will occur in the years ahead the private lawyer too must take a new look at our transportation law. As a member of the society in which he lives, he should step back from his daily practice and think about the laws he helps to administer and enforce. In surveying the laws he should question them and criticize them. He should originate ideas for improving them and oppose revision of those he believes desirable. By

25.The modal administrations are: The Federal Aviation Administration; the Federal Highway Administration; the Federal Railroad Administration; the Coast Guard; the St. Lawrence Seaway Development Corporation and the Urban Mass Transportation Administration.

what he says and writes the lawyer can help guide society in achieving its aims most efficiently and most effectively. For, after all, the law is not an immutable set of principles, but rather is a means of ordering society to accomplish society's goals. The law is not judged by its internal logic. Rather it is judged by its accomplishment of society's goals.

The development of transportation law will be an exciting and rewarding experience. It will give the transportation lawyer an opportunity to help create not only a better transportation system, but also a better society and a stronger nation. Few, if any, other fields of law will provide more challenges, more opportunities, or more satisfactions than those that lie ahead in transportation law.