

TIME FLIES WHEN YOU'RE HAVING FUN
(From the perspective of “war horses” and “young turks”)

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Accept these few pages as an introduction to the panel discussion “What Does the Future Hold for Aviation Litigators?”

In the blink of an eye a century of aviation history has been recorded.

The Wright brothers pushed their bi-plane into the air in 1903. Six decades later we were glued to our TV screens when our first astronauts landed on the moon and we now watch space shuttles take-off, orbit and return to earth with such regularity that those remarkable technical achievements rarely command our close attention. Planes are being built to carry more than 500 passengers at near supersonic speed. Recently there have been fewer accidents than in years past, but that may turn out to be a statistical anomaly. No one doubts that accidents will occur. This is the real world.

It is when, where and why that is unknown. In this context, what can we learn from the aviation litigation experience of those whose professional lives have been devoted largely to that specialized field?

Looking back we all know that the nascent commercial aviation industry in the early years of the 20th century was fearful that it would be unable to tolerate the liability exposure it might face in the event of an inevitable air crash. In response to this risk the nations that pioneered civil aviation adopted the Warsaw Convention in 1929 to severely limit the liability of commercial air carriers to less than \$10,000 for victims of accidents that occurred in the course of international

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transportation. Other nations later joined as treaty signatories. In addition, the Convention provided that the liability limit could be overcome only if the passenger-plaintiff or his or her heirs could prove that the accident which caused death or injury was the result of “wilful misconduct,” assuming a valid ticket had been issued and delivered to the unlucky passenger. Victims of air accidents on the ground were not burdened by those limitations. Indeed, liability to ground victims was virtually absolute. In domestic aviation accident cases air carriers had no similar protection to those enjoyed by international carriers.

Soon after the Warsaw Convention was enacted dissatisfaction with the low limits of liability emerged and the public clamor for reform gained traction. Nevertheless it took until 1955, nearly three decades later for most of the Convention signatories to ratify the Hague Protocol which doubled the roughly \$10,000 Convention limit to \$20,000. The United States found this amendment still so inadequate that it refused to sign on. It took another eleven years of frustration before our government’s threat to withdraw from the Warsaw Convention system entirely resulted in the airlines adopting the Montreal Agreement in 1966. The Agreement raised the absolute liability limit to \$75,000 for passengers for whom the United States was either the place of origin, destination or a stopping place. Aside from raising the liability limit by a paltry \$55,000 nothing else changed. “Wilful misconduct” still had to be proved for an international passenger to be able to secure full recovery. Dissatisfaction continued to grow and the hard-fought litigation struggles to gain full compensation for passengers drew increased attention to the injustice of shifting the burden of loss to victims in very practical terms.

What made the situation especially troublesome was that despite the fact that insurers’ money always satisfied airline liability, by 1955 no one, not the airlines nor their insurers, could

demonstrate an economic necessity for the limited liability protection the treaty scheme created for international aviation claims only. Demands for economic data by a number of Congressional Committees directed to the airline industry went unanswered. Whatever economic concerns may have justified limited liability for international air transportation accident in the 20's, 30's, 40's and 50's, had completely evaporated and everyone in the aviation claims business knew it. And, since only the airlines had treaty protection, aircraft manufacturers weighed in alongside the passenger interests to address the inequities.

Despite no evidence of economic need for the liability protection afforded airlines by the Warsaw Convention, the airlines sought to preserve the "wilful misconduct" exception and opposed its elimination into the 70's. An airline sponsored treaty amendment was proposed in 1977 which would have perpetuated the limited liability scheme. When it reached the floor of the United States Senate in 1982 it fortunately failed to win the necessary votes to secure passage. This heavily lobbied victory for the traveling public added steam to the need to reform the whole limited liability system, even to abandon it. This was especially the case since airlines flying domestic routes involved in accidents made plain that no economic protection was necessary. Adequate insurance was always available at reasonable cost. In that regard nothing has changed. A billion and a half dollars per occurrence coverage is easily purchased now by major commercial carriers.

Interestingly, in the early days of civil aviation some justification for the limits of liability to passengers was based on the premise that passengers assumed the risk of flying in airplanes. On the other hand as the science of aviation progressed with the enormous advances in aviation technology both in the physical strength and structure of airplanes, large and small, their

instrumentation and redundant fail-safe features, every passenger in a commercial airplane is supposedly assured by law and practice that the equipment is airworthy and passengers will get to their destination safely. Today not only do passengers not assume the risk of a crash, they assume they will be safe. Likewise the people who own, operate and fly in general aviation aircraft or rotor craft trust their equipment and assume they will be safe if the people who pilot the machines fly by the rules and exercise common pilot sense. Add to this the public's reliance on the safe operation of the government-run air traffic control system even though it is overburdened, and some say, using obsolete equipment. The reality is we have a complicated and sophisticated global air transportation network with an extraordinary safety record, especially over the past few years, . . . and especially in the United States. Even accidents in foreign countries are few and, fortunately, far between. Clearly, therefore, when a crash occurs someone in the link between the plane manufacturer and the pilot made a major mistake. Accidents don't just happen; they are caused by people.

That said, it may be helpful to look back at some of the milestones on the road charted by aviation litigators over the last half century to see what has changed and what remains the same to gain some perspective on what lies ahead. One thing that has not changed is that when accidents do occur, whether as a result of a product defect, pilot error, a maintenance error or air traffic controller negligence, the challenge of the investigating government agencies, airlines, insurers, and litigators is to figure out what happened and to assess fault. For both plaintiffs and defense attorneys, even though it may be clear that the victim is entitled to a recovery, sorting out who should pay and how much is rarely an easy task. With aviation so highly technical and instrument driven, even with digital flight data recorders, cockpit voice recorders, air traffic control voice

and flight track recordings memorializing most of what happened in the course of a flight, establishing the precise cause or causes of a crash is often daunting and contested, especially when hundreds of millions of dollars ride on the answer.

Not only has aviation technology made enormous advances, what has also changed dramatically is the law, the legislative impact on the apportionment of fault analysis and recoverable damages, choice of law issues and what is euphemistically referred to as “tort reform”.

Concrete examples of the litigation ironies the limited liability scheme precipitated is evident in some of the major accidents that resulted in protracted litigation.

On March 3, 1974 a Turkish Airlines DC-10 (THY) took off from Orly Airport near Paris and reached an altitude of roughly 12,000 feet when the aft cargo door blew open as soon as the inside cabin air pressure became greater than the outside pressure. Control of the empennage was lost and the plane crashed in a forest killing more than 350 people, all of whom were expecting nothing more than a short trip to London. The cause of the aft cargo door failure was quickly identified as a defective locking mechanism. The original cargo door lock was carelessly forced “closed” by a THY baggage handler though, in fact, the lock was not secure. The defective locking mechanism was identified as a threat to DC-10 airworthiness shortly after a similar June, 1972 incident involving an American Airlines plane. Though the cargo door on the American Airlines plane exploded open the pilot-in-command was able to land safely, losing only a coffin out of the cargo hold. The door lock “fix” designed after the 1972 incident never made it onto the Turkish DC-10. The airline’s liability was limited by the Warsaw Convention and Montreal Agreement so the focus of the litigation was on the two manufacturers, McDonnell Douglas and

General Dynamics who were responsible for the design and manufacture of the plane and the fuselage. Every conceivable issue was vigorously contested. In the 70's spending millions in defense costs on an aviation case was unprecedented. Aviation lore has it that \$20 million was spent between 1974 and 1977 to defend the THY claims. Inevitably, the various roles and responsibilities were sorted out and the cases were settled, but the task was made that much more complicated by the anachronistic protections that insulated the air carrier.

A few years later on the runway at Tenerife, Canary Islands two Boeing 747's owned by Pan Am and KLM collided causing the deaths of the passengers and crew on both planes. In that situation since the limitation of liability of the Warsaw Convention applied only to each carrier and its passengers, each carrier effectively had to cover the other's losses. Pan Am was not insulated from full and unlimited liability to the KLM passengers and visa versa.

Fast forward to December 21, 1988, the day that Libyan terrorists exploded a bomb aboard Pan Am 103 killing all of the passengers and crew. The claims asserted against Pan American again required that the passengers overcome the "wilful misconduct" hurdle placed in path of full recovery. It took years of heavy and very expensive discovery and a full blown liability trial for the plaintiffs to prevail and two appeals to cement the victory. The jury verdict of "wilful misconduct" made crystal clear that the heightened proof standard was grossly unfair to the passengers. Proving negligence alone should have been enough.

Avianca Flight 052 on a flight to JFK in New York from Colombia in January, 1990 crashed at Cove Neck, Long Island. The Boeing 707 ran out of fuel as a result of in-flight air traffic delays and pilot ineptitude. Plaintiffs attributed fault to both the airline and the FAA. Running out of fuel in a holding pattern was not an option nor was air traffic controllers' failure

to respond to the pilot's report "I'm running out of fuel" after hours of delay excusable. Here the irony was that some passengers who purchased round-trip tickets in Colombia could not satisfy the Warsaw Convention Article 28 venue requirements and were thus barred from suing the carrier in the United States. The fact that the crash occurred a few miles from the federal courthouse in Islip, Long Island was irrelevant. No such restriction applied to the FAA or the cross-claim by the air carrier against the FAA. Therefore, when the case went to trial even though the "wilful misconduct" claim against the airline was essentially irrefutable, one class of passengers had to keep their sights set on proving FAA negligence. They were successful.

American Airlines Flight 965 crashed into a mountain attempting to reach Cali, Colombia in December, 1995. This too was a case that required proof of wilful misconduct to secure full recoveries. The Federal District Court judge in Miami where most of the cases were filed was so convinced that proof of wilful misconduct was beyond question that he granted plaintiffs' motion for summary judgment. Though implicitly agreeing with the District Court's conclusion, the Court of Appeals reversed on the ground that wilful misconduct had to be proved based upon a "subjective" rather than "objective" standard which narrowly preserved an "issue of fact" for a jury. The passenger claims were ultimately settled, leaving the airline and the manufacturer of the flight management computer and program to resolve their differences.

In July, 1996 TWA 800, a Boeing 747, exploded off the coast of Long Island. Initial concerns about a terrorist attack took years to overcome although the plaintiffs and our NTSB ultimately came to that conclusion that overheated fuel vapor in the center fuel tank was the cause of the explosion. The tug of war between airline limited liability and manufacturer unlimited liability had to be played out again as well as a critical dispute about whether the Death on the

High Seas Act, or general maritime law or state law damage standards should control.

Retroactive Congressional legislation amending the Death on the High Seas Act several years after the crash helped bring those cases to closure. This was the last international accident case brought in a United States court in which wilful misconduct of the airline was in play.

In 1997 hoping to curtail extended litigation and again responding to the enormous dissatisfaction with the limited liability scheme and its inequities, as well as litigation expenses it generated, the airlines entered into the “IATA” accords. Sponsored by the International Air Transport Association, the airlines agreed to be absolutely liable up to 100,000 Special Drawing Rights, a basket of global currencies now worth around \$150,000, and to be liable without limitation unless the airline could demonstrate its complete freedom from negligence or fault by proving that it had taken “all necessary measures”. The burden of proof to limit damages thus shifted from the passenger to the airlines, a burden that the airlines will readily concede in most cases they cannot meet. The terms of the IATA accords are echoed in the Montreal Convention of 1999, a treaty amending and largely superseding the Warsaw Convention.

These brief recollections about the Warsaw Convention and the evolution of limited recovery system to unlimited recovery finds a reverse parallel in litigation in the United States generally, and that seems to be here to stay. As if seeking to undermine the enlightened effort to address the dissatisfaction with the abysmal recoveries international airlines passengers risked under the Warsaw Convention scheme, “tort reformers” generally attack the right of plaintiffs, i.e. victims of accidents, to obtain full recovery even for the most shattering and life-altering situations. It’s almost as if under the guise of “reform” industry is trying to push back the clock. This short paper does not allow for a full exposition of why the industry’s hue and cry about

excessive plaintiff recoveries is a canard, but suffice it to say publicly data available gives the “tort reformers” very little to support their claim that they need legislative relief from the judicial system they claim impairs their productivity and profitability. Industry simply does not want to be bothered with defending its products. Like the airlines in years past, industry is marketing its tort reform theme with little to back up the need for economic protection. Corporations just don’t like juries and they want nothing to interfere with the drive for profit. It will be a long time before industry, any industry, agrees that any legislation that limits the amount of profit they can earn is in the national interest. Why then should the victims of someone else’s negligence have to bear any part of the burden of the loss caused by a culpable defendant’s action?

In addition to “causation” the issues that now confront plaintiffs and delay resolution of aviation accident claims involve the apportionment of fault among defendants, the terms of sharing or funding agreements among defendants, entitlement to punitive damages, and basic choice of law issues relevant to both liability and damage issues. The November, 2001 crash of American Airlines Flight 587 at Belle Harbor, New York when the tail broke off and the Comair regional jet crash at Lexington, Kentucky in August, 2006 because the crew took-off on the wrong runway are classic examples of the fact that hotly contested commercial aviation accident litigation is not a thing of the past. The American Airlines Flight 587 case is still pending six years after the crash and the Comair case is in the mid-discovery phase with a trial set for December, 2008.

General aviation cases are also complicated, maybe even more so than in years past. Theories of liability necessarily address product integrity, pilot error and maintenance shortfalls, and are present in virtually all crash cases.

What then lies ahead?

What are the kinds of litigation battles that will engage the “aviation” trial lawyers in the future?

Do plaintiffs’ lawyers and defense lawyers play the same role they did in the past?

Is the defense lawyer in control of the “defense” of his case or is the insurer in control?

Are the judges and the courts generally more cynical about “aviation” claims and litigation generally?

Are legislators friend or foe?

Is there a better way to resolve aviation accident claims than the traditional litigation model?

Is the cost of litigating aviation accident claims too high, and, if so, is there a way to reduce the costs?

Is there a way to halt unfair, inappropriate, and misleading solicitation of accident victims?

That said, the “war horses” have had their turn; what’s in store for the “young turks?”

