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**THE EFFECT OF TORT LITIGATION ON
THE AIRLINE INDUSTRY**

David Rapoport

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The Effect of Tort Litigation on the Airline Industry†

David Rapoport*

MR. HAVEL: My name is Brian Havel, and I am a professor here at DePaul. We are proceeding with our program, and this afternoon we are mixing tort liability and competition rule, not necessarily in that order.

Our first speaker, who I am delighted to introduce on behalf of DePaul, is David Rapoport. Mr. Rapoport is a Chicago attorney specializing in cases involving major air disasters. He has had the distinction of taking numerous multimillion-dollar settlements and verdicts in cases involving major air disasters. He is a court-appointed member of the Plaintiff Steering Committee in cases arising out of the crashes of Egypt Air 990, American Airlines Flight 1420, and, most recently, Swiss Air Flight 111.

In America your distinction, of course, is always characterized by your number of appearances on *60 Minutes*, and Mr. Rapoport has been featured on the television program *60 Minutes* in a segment entitled “Open and Shut Case?” in which he led a discussion on some of the unexpected issues the plane crash victims or their family members may encounter in the aftermath of a major air disaster.

Victims’ rights in the context of air disasters have become one of the hottest areas of civil litigation in the United States. So I am very pleased on behalf of the Symposium to welcome David Rapoport.

MR. RAPOPORT: Professor Havel, thank you very much for the kind introduction, and good afternoon, ladies and gentlemen. I want to thank you for inviting me to come here. It is my privilege in day-to-

† This is an edited version of the transcript from Mr. Rapoport’s address at the DEPAUL BUSINESS LAW JOURNAL Symposium, *Terrorism, Security, and Competition: The Future of the Airline Industry*, held on February 8, 2002.

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day life to speak on behalf of victims of air disasters, the families of those that are killed, and people that are injured, and I am honored to be here to share some perspectives with you all today. I have been in practice since 1981. I did not start out with the idea that I would be involved in air crash litigation; but somehow in the years that have gone by since 1981, I have been involved in civil cases against American Airlines, against American Eagle, against United Airlines, against United Express, against USAir on several occasions, against Swissair, against Egypt Air, Boeing, McDonald Douglas, Fairchild, Fokker, British Aerospace, and other companies in a variety of major disaster cases, starting with United Flight 811 back in 1988.

I have been involved in a dozen major air crash commercial cases and similar number of what I think we still call general aviation disasters, although I guess soon we are going to be calling them PAT (Personal Air Transport) disasters. I want to talk about a number of questions today; some of them are easier than others.

The questions are these: What is tort litigation? We will not be spending a lot of time on that one, but I think it is a good starting point. What is it supposed to do? Which of the purposes of tort litigation are most important? How well does tort litigation work for victims of commercial air crashes, and the fifth question, will tort litigation destroy the airlines? I have some answers and some thoughts that I would like to share with you about these five questions.

I remember the first day of law school when the entire session of the torts class was dedicated to a rather brutal Socratic-method professor tossing around the room the question, "what is a tort?" A question, I might add, that not one student got right and which was not actually answered until the second session. I suspect, these many years later, if that professor was here, he would probably find something incorrect about the definition of tort litigation that I am going to share with you now.

Tort litigation is a fancy word for civil lawsuits for money damages, usually not including breach of contract claims. It should come as no surprise to anyone here that tort cases are frequently filed in the aftermath of an air disaster. So, that is the first question, and the first and easiest answer.

Second question: What is tort litigation supposed to do? Tort litigation is certainly a controversial thing. There are people that think we ought to throw the tort litigation system out, that it is a giveaway program, and that it is ridiculous, but the purposes of tort litigation are not that often discussed. I did a search last night, thinking about

this speech, to see just what the U.S. Supreme Court had to say about the purpose of tort litigation, and it is remarkable because they have said virtually nothing on the topic. Not so of the courts of appeals, but the U.S. Supreme Court in all of these years has not really talked about the purposes of tort litigation.

Well, there is not much controversy that there are really two major purposes of tort litigation. One of them is to compensate victims, and separately, because these are really different ideas, the second is to deter bad conduct.

The D.C. Circuit in 1984 said the two principal purposes of tort law are the deterrence of misconduct and the provision of just compensation to victims of wrongdoing.¹ Our local Federal Court of Appeals in this area, the Seventh Circuit, said in 1986, "Tort law compensates for injuries and also induces people to take care."² This is important background that I want to build on as we get into how all of this works with air crash cases.

Which of these purposes, if there are two – compensating on the one hand and deterring bad conduct on the other – which of these is most important? Well, there may be a difference of opinion on that point. I have some pretty strong support for my view on the question, again, from the Seventh Circuit, this time in 1976, when they said, "It is too well established to require extended discussion that the basis in Illinois and elsewhere is to afford compensation for injuries sustained by one person as the result of the conduct of another."³

I offer that quote and the personal opinion that the primary and most important reason for tort litigation, in general, as well as tort litigation in the field of aviation disaster work in particular, is to, in a humane way, provide fair, reasonable, and appropriate compensation for losses. Our law recognizes the principle of money damages, and there is really not much controversy in the courts about that.

How well does this tort system work on behalf of the victims in commercial air crash cases? I cringed a little bit when I listened to the kind introduction that Professor Havel gave me about getting multi-million dollar results on behalf of families in air crash cases because, while that is accurate, it does not tell the whole story. I want to talk some about the rest of the story.

1. *Friends For All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984).

2. *Edwardsville Nat'l Bank & Trust Co. v. Marion Labs., Inc.*, 808 F.2d 648, 652 (7th Cir. 1987).

3. *Garris v. Schwartz*, 551 F.2d 156, 159 (7th Cir. 1977) (Pell, J., dissenting).

I think that most of you, perhaps even those that came across an ocean to get here, have heard about some woman in the United States that was awarded millions of dollars by an American jury because she spilled hot coffee on herself while driving out of McDonald's.⁴ Has anybody here not heard of that story? Good. Not one person raised their hand. So as I suspected, that story is on everyone's minds, and while there are different sides of that story and there are those that can make some persuasive arguments that it may not be the whole story, I am not here to talk about that. It is a comparison that I am interested in.

How many of you knew that before last year in a case of an international flight that crashed into the ocean – like Korean Airlines 007, for example – the Death on the High Seas Act⁵ applies. Or, that until Congress changed the provisions of that Act last year, unless there were economic losses, the law said the families of people killed in the crash were entitled to nothing, and it did not matter how bad the neglect that caused the crash because damages were limited to economic losses only? How many of you knew that? This meant that the families of young and older people on board, in some instances, were entitled to nothing. Okay. Let the record reflect that ten percent or so of the people in the crowd knew that, and I might add that this is a crowd with more than one law professor in attendance. And if we were to remove the law professors' hands, we would have even less than a ten percent showing. Well, now, that is interesting.

McDonald's, on the one hand, everybody knows about, but on the other hand, even though the Death on the High Seas Act is a law that has been on the books for over eighty years, few know about its unique brand of injustice. Under it, before it was amended, unless the person who died was supporting somebody financially, his family may be entitled to nothing, no matter how filthy and gross the neglect.

How many of you think that a law like the one that I just described is fair, reasonable, and appropriate? Let our record reflect not a single hand went up. I am pleased to report that through efforts of many people, political efforts of many people, sufficient votes were garnered last year in order to get some relief from Congress on that injustice. It was on the books throughout the time that the public concluded,

4. *Liebeck v. McDonald's Rest.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994).

5. *Death on the High Seas Act*, Pub. L. No. 66-165, 41 Stat. 537, amended by *Wendell H. Ford Aviation Investment and Reform Act for the 21st Century*, Pub. L. No. 106-181, 114 Stat. 61 (2000).

based on the McDonald's story, that ours must be a system that we should throw in the garbage, this tort litigation system.

So, now, let me talk a little bit about how well this system works for air crash victims. The straightforward answer is that the results are inconsistent. That is the honest answer. Why do I say so? Well, first of all, if one is going to honestly look at how well the purpose of compensating victims and the purpose of deterrence has worked for air crashes over the years, you have to separate out certain facts. Some crashes are in the United States; some crashes are not in the United States; some planes take off from the United States and crash somewhere on the way to another country; some planes crash when they take off in the United States and land somewhere else in the United States.

How does all of that work out? Well, we do not have to go to the international scene generally, where justice is rare and injustice common, to find some injustices and problems. We all can remember when an American Airlines plane crashed into a mountain in Cali, Columbia a few years ago. There was a big old hunk of litigation after that, which went on for a long time.⁶ An international treaty known as the Warsaw Convention governed the rights of the passengers in that case.

The Warsaw Convention⁷ at the time – the way that it was at the time of that crash, and it did apply to that crash – had a \$75,000 damages cap. So, at the time that the Cali crash happened a few years ago, the Warsaw Convention had a \$75,000 limit unless the victims could prove willful neglect to bust through that cap. The trial court found the proof so strong on the point, however, that summary judgment in favor of the plaintiffs on willful neglect was granted. But, in one of the most disappointing court of appeals decisions concerning the Warsaw Convention, and what will probably be the last ever word, for good reasons that I will explain in a second on the point, the court of appeals ruled in that case that willful neglect basically meant subjective intent to harm. The summary judgment for the victims was reversed and the case remanded for trial on the merits and under a very difficult burden of proof.⁸

Fortunately, through an agreement that has been reached by virtually all of the airlines that operate in the United States and is in effect

6. See, e.g., *In re Air Crash near Cali, Colom.*, 985 F. Supp. 1106 (S.D. Fla. 1997).

7. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C. 1143 (1994) [hereinafter Warsaw Convention].

8. *Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999).

already, something called the IATA Inter-carrier Agreement,⁹ the injustice of the \$75,000 damages cap is hopefully going to be a fact of historical interest only, because we have made major advances for the rights of passengers flying on international flights or the families of those people killed in the last few years. Before this agreement, I can tell you, there were some serious legal obstacles and not a small number of terrible injustices in compensating people in the international crashes.

While at the same time, in the United States, the law in most states is better, but I want to share with you one other ugly, little fact before we start talking in some detail about September Eleventh. Are there any torts professors in the crowd? No. That is good then, I can speak without intimidation.

There was a statute called Lord Campbell's Act¹⁰ that we got from the British. Lord Campbell's Act became the model on which most of the wrongful death statutes in this country were built. But Lord Campbell's Act has some unfortunate language about pecuniary losses, which would make you think that I am telling you stories. We are now in the new century, and some of these issues could have been debated when we turned the last century. That is how archaic some of these ideas are, but this principle of limiting recovery to economic loss only in wrongful death cases is an idea that still has support in a minority of U.S. states, including the State of New York. How many of you knew that?

Loss of care, comfort, companionship, society, love – these are intangibles. These intangibles are important losses. Modern wrongful death statutes recognize this. How many of you think that a rule that limits wrongful death damages to economic losses is fair? Let our record show that no hand went up. So what do we have here? Let us look at September Eleventh. Again, we are on the topic of how fair it is for the victims. We are going to shift in a minute to how fair it is for the airlines. How is it for the victims? How is it?

The September Eleventh tragedies are not really best understood in the same way that neglect by a cockpit crew that chooses to land in a thunderstorm is understood. September Eleventh involved criminal attacks, and our civil justice system is really not well set up to deal with criminal attacks, frankly. The deterrence purpose of tort litigation is not going to work with people that fundamentally exist in order to defy the rule of law. The tort system is wonderful for resolving

9. IATA Inter-carrier Agreement on Passenger Liability, *available at* www.iata.org/legal (last visited Mar. 25, 2002).

10. 9 & 10 Vict., c.93 (1846).

problems without violence. That is one of the things it does best, but it is not very good for September Eleventh, and our Congress passed a statute that on the face of things really looks good for the families.¹¹

The statute embraced the principle that families could have a choice. Behind door number one is the usual litigation option with a few modifications, like no punitive damages, but these have not been actually collected against an airline anyway; damages limited to available insurance coverage, which for purposes of the passengers on the plane is adequate, but if you add all of the people on the ground, it never would be.

But our Government stepped in and said, behind door number one, you people that were victimized can do whatever you want to do in the court system with a few modifications. We may tell you where you have to file it and that you cannot get punishment and that you are limited to insurance money. Or, behind door number two is an automatic payment system. The statute itself passed in a trade-off set of negotiations where the airlines were running in looking for help to deal with problems certainly triggered by September Eleventh, but probably not limited to September Eleventh. There were troubles before.

In the context of the push for this legislation some victims' rights were put in, the statute looked pretty good. The special master has been appointed, and the rules or draft rules are circulating now about how the money is going to work. It is a timely topic – it must be timely, because *TIME* magazine has led with it this week. How many of you have seen this? Okay. If you have not, then I will describe some of what is in the *TIME* article a little bit. Well, *TIME* magazine puts out a big old header like, "Paying 9/11 Families For Their Grief," and they describe, with some attachments, just how it is going to work because schedules have been put together.

The statute itself says there should be automatic payments. There are no arbitrary damages caps in it. There are economic and noneconomic losses. There is an idea that if you receive life insurance or other payments, there would be credit adjustments. But the rules have come out and then *TIME* took it a step further and described the effect of the rules on particular family situations. They actually name names.

I am going to leave the names out for the privacy of these people, but they describe a fifty-six-year-old person killed on September Elev-

11. The Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

enth who was working at Marsh & McClennan, making \$500,000 per year, had no plan of retirement, was married with one adult son, and was also taking care of his mother. The gross award in that case under these rules would be \$1.4 million, but the deductions because of the other insurance that this man had would be \$2.6 million, leaving a final award, under these rules, of zero. That is case number one.

Case number two shares the story of a thirty-five year old man making \$60,000 per year, married with two-year old twins and a baby on the way. Gross award: \$1.6 million. Deductions: \$491,000 for other insurance payments, and \$379,000 for the Social Security benefits at present value, and \$543,000 for some other credit items. Final award to that man's family from the fund: \$137,000.

Here is another one; there is only one more. A thirty-six-year-old working for a security firm earning \$22,000 a year, married with four kids and one on the way. Gross award: \$1 million. After deductions, because he had less insurance, final award: \$444,000.

Who among us thinks that those numbers look fair, reasonable, and appropriate for these victims? Raise your hand. Let the record show that not a hand went up.

Now, there are principles of what the value of noneconomic loss in these regulations that Ken Feinberg circulated, it is around \$300,000 for somebody who is not married – and I may get these numbers a little bit off – \$500,000 if they are married, and then, of course, the deductions come after that. That is the concept of noneconomic loss, and it really does not matter if the particular person was a wife-beater or a great husband.

So am I criticizing Congress? Not really. The question on the floor here is: How does the current system work for families? It is my contention that it has had mixed results with some serious problems as bad as anyone thinks the McDonald's isolated result may be, the problems that I am talking about here affect thousands of people and are more serious.

There is fundamental fairness involved. If this were a State of the Law address concerning the rights of air crash victims, I would say to you, ladies and gentlemen, the State of the Law is not so great.

The majority of states have more liberal views than I have described and more liberal rules than the State of New York. But the fact that a state like New York could still be clinging to a rule that does not allow noneconomic losses, I submit, is out of step in 2002.

The fact that Illinois, this fine state, did not abandon that rule until the late 1970s – well, I remember a client of mine who cried when she talked about how twenty years before I represented her, when her

daughter was killed by a drunken driver in Colorado, she could not believe it when the maximum offer of settlement, even though the drunk driver was wealthy and had lots of insurance, the maximum offer to settle was \$10,000, and her lawyer told her to take it. She cried as she remembered how she refused the offer then how they tried the case and the jury found the driver guilty but still awarded nothing because that poor mother was not being supported by her daughter. Yet, we still have a substantial minority of states, and up until last year, the federal Death on the High Seas Act, that continued to perpetuate this particular travesty of justice.

I want to come back to September Eleventh when we talk about this next topic, which is how does this tort litigation affect the airlines? You know, the argument is made that the industry has problems, which it does, that the losses are so staggering, which they are, and then there is a giant leap that really does a disservice to the tort litigation system.

When people assume that the claims by all of these people on the ground, if Congress did not step in to protect the airlines, were just going to be converted to instant money and kill the airlines, they are simply misinformed on basics. Any first-year law student can tell you that there is a famous case called *Palsgraf*¹² that some of us know about. The principle of bad conduct is one thing, but *Palsgraf*¹³ also makes clear that the causal link between bad conduct and the result must be foreseeable and that unforeseeable victims will not be protected under the law. All of this is the idea of “proximate” cause.

I am not defending anybody for having bad security, but the fact is murderers who are willing to die fighting for their own cause are hard to stop. Let us assume United Airlines and American Airlines were negligent for failing to stop the attacks on September Eleventh. It is still a giant leap to assume that the court system would, in fact, hold the airlines and their insurers liable for all of the damage that was done at the World Trade Center and at the Pentagon in this particular attack.

Professor Havel, maybe you could help me – I suspect that in the Torts class, *Palsgraf*¹⁴ probably still takes up two or three class sessions or at least one for an hour or two.

MR. HAVEL: In the very first class, it is always mentioned.

12. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

13. *Id.*

14. *Id.*

MR. RAPOPORT: Yes, it is always mentioned, but it takes awhile to explain, so I am not going to try to really explain the proximate cause principle except to point out that it is not a *fait accompli* that the airlines would be held liable to ground-based victims of the attacks. I do not argue against it, but it is not a decided point, and this is why a great majority of commentators that look at this assume, in spite of the low numbers in the Federal system – the door number one that I described – that many families will likely accept the federal remedy because there is certainty. There is finality. There is speed, and it may well create rights for some that otherwise did not exist.

The families of the passengers have a stronger legal position than the people on the ground, as unfair as that may seem. If this legislation is viewed in the context of creating some rights where none existed before for purposes of being compassionate, then I say, as a taxpayer, by all means. I say, as a taxpayer, let us pony up some more. These numbers are really not adequate. They are really not appropriate, but a speedy system that gets compensation to war victims is certainly a good thing.

Now, will tort litigation destroy the airlines? I submit to you, ladies and gentlemen, that the answer to that question is absolutely not. Lack of public confidence might, but tort litigation does not even come close as a threat to destroying the airlines, and I want to take a minute or two to prove that up.

First of all, airlines have liability insurance. Second, the premiums that are paid for this liability insurance are a tiny part of an airline's operating budget. According to the Air Transport Association (ATA), the latest published statistics that we were able to find from 2001, though admittedly before September Eleventh, showed that the cost of liability and hull insurance was three-tenths of one percent of the total operating budget. In a list of ten enumerated categories by the ATA, which is a well-respected industry airline group here, insurance was the smallest by far to be compared, for example, with close to 35 percent as labor costs and fuel running at 13.6 percent. Again, that number is three-tenths of one percent.

According to a publication put out by Skandia International Insurance, overall aviation insurance costs is a small part of airline operating costs – Skandia's figure is eight-tenths of one percent, and it is using world data here. If the cost is looked at in relation to a single flight, it also looks very low. The cost to the airline for aviation insurance covering hull and liability for a single passenger flying from London to Rome, for example, would be approximately fifty cents.

Now, I think fifty cents per flight is probably light. I am not sure that anyone has a perfect number, and I can tell you that the people that really complain are the aviation insurers because, in the aggregate, the losses to the entire world aviation industry have averaged, before September Eleventh, approximately \$1.6 to \$1.7 billion. The premiums that are collected, in some years, have fallen short. In essence, the aviation insurers have probably charged the airlines premiums that may be a little bit too low. But when we are talking about these numbers, the right number might be a dollar per ticket. It might be a dollar and a half per ticket. It might even be as high as three dollars per ticket. It is probably not outside of those ranges. The cost to this industry of providing appropriate insurance that gives full, fair, and appropriate compensatory damages to the innocent victims of air crashes is cheap, relatively speaking, and it is not what will kill our airlines.

I have good experiences riding on our airlines since September Eleventh. I am not in the Service or the Armed Forces. I am not fighting for my country. But I feel great about flying on our airlines. I feel great about flying on United. I feel great about flying on American. I feel great about flying on other airlines that I am proud of in this country. As somebody that has obtained compensation for air crash victims for many years, I do not disrespect our aviation industry, which fundamentally is made up of hardworking people who are, for the most part, trying to do their best.

While compensating air crash victims does not have to involve finger pointing, assessing fault is of crucial importance. Safety is the primary concern. The time has come though to put aside the rhetoric about throwing away tort systems. The time has come to stop depriving families, like the three described by *TIME*, of the damages they deserve. The time has come to stop depriving the Korean Airline families. The TWA 800 families should not have to lobby, as they did, for three years in order to get fundamental fairness. The reality is that we, as a public, have in our hands the power to save our aviation industry by flying and not crawling into a hole and being afraid to fly. We need to fly and we need to have a good tort system – these things are not mutually exclusive.

This is my eyewitness testimony from having spent a few years in the trenches representing air crash victims. I thank you for your attention. Does anybody have any questions?

MR. HAVEL: I have one question for you. Did you see Frank Fleming's submission to the Government? Frank Fleming is a distinguished colleague of yours.

MR. RAPOPORT: I know him well.

MR. HAVEL: He submitted a very lengthy document to the government complaining about the way the compensation fund was set up, and his major complaint is that a great deal of the content of the fund does not mirror Congress's mandate. I will give you one example and ask you to comment on it.

There is a cap of approximately \$230,000, which is the ninety-eighth percentile of income in the United States. You cannot get any more money under this compensation fund – I am talking about the victims – if the victim earned more than \$230,000. So if the victim earned \$1 million, and according to Frank, there were many people in the World Trade Center who, at thirty-five years of age, were earning \$1 million, they can only be compensated under that fund to a level of a person earning \$230,000. He regards that as arbitrary and a violation of due process, and there are many more examples in the regulations adopting the compensation fund that mirror his complaint. I just wanted you to comment.

MR. RAPOPORT: Yes. I am happy to comment. I have not read Frank's paper, but I know Frank, and he is certainly a credible source. I have a number of different reactions. I want to put aside the legal questions of validity and whether these regulations track the Congressional mandate and talk practically for a moment because I once tried a case on behalf of the family of a doctor that made a lot of money. Our study of jury dynamics – we tried the case in Ohio – led us to be worried about whether jurors, or the public, would embrace the principle that the man made so much money that his family should get some arbitrary limited amount.

I argued that case to a jury, and I said something like this to them, and I will say the same thing in answer to this, if that plane – this particular one was USAir Flight 405, which crashed in New York some years ago carrying people to Cleveland – if that plane had in the hold a \$4 million piece of art that was lost to its owner through neglect of the airline, and it was a case of negligence, who is the airline and who is the jury to say that \$4 million is a lot of money for a piece of art and that, therefore, we will only pay \$150,000 for that? Who are they to say that if a woman had a mink coat, that no woman should have a mink coat and that no coat should be worth more than \$150, so we are

not going to give \$7,000 in damages? These examples of arbitrary limits are not fair. The fact is that it is not fair, reasonable, or appropriate for the family of a \$1 million wage earner to have an arbitrary cap on economic losses. As far as I am concerned, arbitrary caps are not ever fair, reasonable, or appropriate.

I agree with Frank Fleming that such limitations would also be outside of the Congressional mandate. I was interviewed by the Congressional Budget Office not long after this legislation was passed and before the proposed rules were circulated and provided guesstimates about what, in the aggregate, the legislation might cost us. Right now these regulations are paying out a fraction of what I estimated. Still, Congress may be creating rights where rights did not exist before in some people's cases. So how we balance that as a society, I am not so sure, but I suspect that if I read Frank's paper, I would probably agree with most of it. Thank you. That was a great question. Anybody else?

MR. JOHNSON: Brett Johnson from Qantas Airlines. I guess it is a fundamental question of, in a scenario like September Eleventh, when there was a terrorist attack, security aside, who should be responsible for compensating the people in the buildings, the airline or, because it was an act of war, is it a government issue?

MR. RAPOPORT: Well, let me separate this out – I am going to give you some personal opinions about that. Let me separate this out a little bit, okay.

The link between – I am not here to judge anybody, but assuming it was neglect in failing to stop terrorists, who should have been stopped by an airline employee, if we just assume that, it is clear to me that the airlines and most importantly the airlines' insurers should be compensating the people on that plane's families without question and without limitations under the traditional system. But, if I was a judge, I am not sure how I would work out the issue of whether the airlines should be liable for the people in the building against proximate cause – unforeseeable plaintiff – arguments. So I might break the causal link there, or I might not. I think I would be really troubled by that, whether to let that issue go to the jury at all.

When you get to the question should the government step up and help people, I am proud of our Government for stepping up and helping people. I am proud of our Congress for passing as courageous a law as was passed. I am concerned about the Special Master and the arbitrary limits, and I am frightened that some of the forces of tort

reform that have been pushing for arbitrary damages caps for many years will try to take unfair advantage. I am frightened that people may use an event like September Eleventh to forget about all of the injustices for the victims and to start using this as a springboard to tort reform. So I think, in general terms, it is compassionate for the government to step forward. It is a good thing. I do not think it is legally required. Morally, however, it may be required.

MR. JOHNSON: Practically it probably would be required because the \$1.5 billion more risk policy that money would go very quickly if they were compensating.

MR. RAPOPORT: Yes. Right. There is inadequate insurance money to cover this entire loss. So if anybody is going to do anything, it is going to come from the Government, right, as a practical matter.

MR. JOHNSON: I think that there is some push now in the industry for some of the defense lawyers to revisit Montreal 1999 and to recap and reinstitute limitations.

MR. RAPOPORT: Right. Does everybody understand that comment? That is a really important comment. There is a good treaty that has largely been agreed to, but not yet signed, that does a lot of good things including solidifying an Intercarrier Agreement that otherwise could disappear. Your point is, and I have heard it among the people I am talking to, and you are hearing it too apparently, that, yes, it is troubling. Countries that agreed to revise the Warsaw Convention in Montreal may not follow through.

I think what we have to do is keep our cool and remember that we are a society that has been attacked, but we have not changed. I am not just talking about the American society, but those of us in the civilized world should not go and toss our existing system out and we should not be walking away from treaties that nations have agreed to and just have not signed yet, all because of atrocities committed by terrorists. I appreciate that question. I am worried about it.

MR. JOHNSON: Are you familiar with the push of our carriers to introduce a government-responsible insurance program?

MR. RAPOPORT: Well, I know there are temporary programs.

MR. JOHNSON: They are mainly indemnities.

MR. RAPOPORT: Right. Tell us about that.

MR. JOHNSON: What I understand to have happened is there has been an international governmental aviation group. They had it last week, and what they have agreed to do is put in place – because at this point in time, more risk insurance is impossible to obtain.

Prior to September Eleventh an airline like Qantas had \$2 billion for more risk insurance. This is just in the aviation industry that there is cover for passengers and for the hull and for liability. If there is an act of war, you have to have another cover. That particular cover had a seven-day termination course, and as soon as September Eleventh occurred, the underwriters terminated the cover. They reinstated it we expect to the hull, with respect to the passengers on the aircraft, with respect to the \$50 million U.S. dollars, but they are covering costs about \$2 per passenger per sector. So what our carriers are trying to do is put in place a process whereby the industry in conjunction with the government's guarantee will implement an insurance program. They want to try and raise premiums about \$860 million per annum.

MR. RAPOPORT: Right, per annum, in the aggregate.

MR. JOHNSON: In the aggregate, right. But the advantage of the program is that it is noncancelable, so it would provide \$1.5 billion of cover per incident, but there will be no ability to cancel if there is an incident.

MR. RAPOPORT: Ultimately the public, the passengers, will flip the bill on this and should. It is an important thing to accomplish.

MR. JOHNSON: The interesting thing is the \$1.5 billion was actually set at a level, but the insurance industry did not contemplate what happened on September Eleventh.

MR. RAPOPORT: Right. I know I am out of time, but it reminds me of a quick story about the aviation insurance professional who was trying to explain the business to somebody new and somebody said, well, what is your worst claims nightmare – this is back in the days before DOHSA was amended – my worst claims nightmare would be two jumbo jets crashing over Los Angeles. On the other hand, he explained, a good situation is the same two jumbo jets, filled with children, crashing into the Atlantic far off shore.

MR. HAVEL: Thank you very much. David Rapoport has faced so many juries and so many judges, and he is a man who was put on *60 Minutes*, and yet he is still terrified of law professors. How many

times did he say that in his presentation? But he could be a law professor. He took eight polls of the class in the course of his presentation, I noticed. Good.