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DYNAMICS OF AIRLINE CRASH LITIGATION: WHAT MAKES THE CASES MOVE?

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INTRODUCTION

WITH OUR state and federal courts crowded to overflowing and court time at a premium, and with jumbo jet accidents bringing hundreds of claimants into the courts at one time, it is essential that those concerned with the administration of justice take a close look at the most important practical question in this type of litigation: what makes the cases move? What procedures and devices can the courts use to bring these cases to a conclusion as quickly as possible, at the same time preserving the rights of all the litigants?

1. The Forces at Work

Airline crash litigation really started in the post World War II era of the late 1940s and early 1950s. There were a few trials prior to World War II, but they really belong to the Stone Age of aviation litigation. In the 1940s and 1950s, the courts were dealing with accidents to aircraft like the Douglas DC-3, which carried a maximum of twenty-one passengers. Later the DC-4 came into the picture, as a civilian conversion of the wartime Douglas C-54 transport, seating about fifty to sixty passengers in various versions. Both of these aircraft were rather simple to operate compared to today's complex jet liners, and the litigation arising out of their accidents was correspondingly simple. It was rare to find anyone named as a defendant other than the airline which operated the aircraft. Manufacturing defects were hard to find and harder to prove. The doctrine of strict tort liability for defective products

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was not yet established in the courts. The federal government was rarely joined as a defendant (except in those few instances where there was a mid-air collision near an airport), since the Federal Tort Claims Act was not adopted until 1946, and for many years thereafter the "discretionary function" defense hovered over such claims and made them difficult to prosecute.[1]

By the 1970s, this picture had changed dramatically. The airliners of this era are much more complex than the DC-3s and DC-4s, and of course they carry many more passengers. In addition, aviation has become so complicated that the types of accidents that occurred in the DC-3 days are comparatively rare. Typically, a DC-3 accident would involve a pilot straying off course and flying into a mountain, or trying to make an approach in instrument weather while operating partly on instruments and partly on visual flight rules. There was usually very little difficulty in fixing the cause, and only rarely was there occasion to sue defendants other than the airline itself. In the world of the DC-10, the Lockheed 1011, and the Boeing 747, however, it is difficult to separate the responsibilities and causative factors which arise from airline operations, aviation manufacturing, and government regulation. There is now a maze of federal aviation regulations which place responsibilities upon airlines, manufacturers, and FAA personnel in a very broad spectrum of situations.[2]

The stakes are so high in aviation today, the airliners are so expensive, and air safety has advanced so much, that there are now many backup systems which are designed to avoid accidents. You will not expect to see a jumbo jet involved in a DC-3 type accident, in which the pilot strays off course or gets "off the beam" during an instrument approach. What you are more likely to see is an accident in which the airline, manufacturers, and government each play some part.

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[1] Dalehite v. United States, 346 U.S. 15 (1953). *See generally* 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES §§ 249.01-.02 (1964).

[2] The Federal Aviation Regulations will be found at 14 C.F.R., Parts 1-199. The parts most often involved in airline crash litigation are 25 (Airworthiness Standards, Transport Category Airplanes); 61 (Certification: Pilots and Flight Instructors); 63 (Certification: Flight Crewmembers Other Than Pilots); 91 (General Operating and Flight Rules); 97 (Standard Instrument Approach Procedures); 121 (Certification and Operations: Domestic, Flag and Supplemental Air Carriers, etc.); and 129 (Operations of Foreign Air Carriers).

Because jumbo jets are so complicated, it is almost impossible to design them without some defects. Because of their great speed and the disintegration of the wreckage, it is often impossible to pinpoint the exact cause of a jet crash. At the outset of litigation, it is practically impossible for plaintiffs to be certain that the airline will be the only responsible party. Even though the National Transportation Safety Board (NTSB) procedures for hearings and reports on accidents are probably the best in the world, they are concerned with bringing out facts relating to aviation safety rather than determining fault. Often there are facts that can be presented by an airline in defense of its own position that do not come out in NTSB hearings. Sometimes these facts point toward liability of another party, such as a manufacturer or the FAA. Accordingly, a plaintiff who makes a decision to go into court against the airline alone may be taking a grave risk that he will be confronted at the trial by evidence which tends to place the blame on an absent non-defendant. It is too late to bring such parties in as defendants at the time of trial. For that reason, plaintiffs' attorneys in airline litigation have developed the practice of being extremely conscientious in naming all potentially liable parties as defendants.

Aviation is probably one of the best documented activities in the world. There are literally thousands of pages of manuals, regulations, and forms which relate to the design, construction, operation, and regulation of jet aircraft. Often there is evidence in this mass of documents which helps to establish liability on the part of airlines, manufacturers, and the government. Unless the government and the manufacturers are joined as defendants, it is difficult to obtain access to these documents. Thus, the great complexity of modern aviation puts pressure on plaintiffs' attorneys to sue all parties involved in manufacturing, operating, and regulating the aircraft in question. This tendency toward multiple defendants has been accelerated by two developments of the past quarter century: the trend toward strict liability for product defects[3] and the expanded concept of government liability under the Federal Tort

[3] The first holding of strict liability of a manufacturer in an airline case was Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

Claims Act.[4]

Another complicating factor is the huge increase in value of aircraft. In the DC-3 days, aircraft hull values were in the range of $50,000 to $100,000, which was less than the amount paid for one passenger death. Today, insurance claims for the value of the airframe (including loss of use) may be as high as $25 million to $50 million,[5] which in many cases will approach or exceed the amount that will be paid out for an entire planeload of passenger claims. Thus there is another party sitting in at the settlement table, holding a sizeable hand: the attorney for the hull insurer who has paid out millions of dollars to the airline on the hull insurance policy, and who now seeks to recover part or all of that payment through a subrogation suit against the government or a manufacturer. With claims increasing in size because of inflation and expanded liability concepts, it is not unusual for airline crash litigation to result in total payment of more than $100 million.[6] With the stakes that high, and with so many parties involved, the stage is set for compromise through appropriate contributions by various defendants to the final settlement. The litigation process thus becomes the mechanism through which a satisfactory formula can be worked out to accommodate the interests of all of these parties.

Because of the size and complexity of these claims, it generally takes a year or more of extensive discovery to bring all the parties to the point where a satisfactory contribution formula can be arranged. A trial or threat of trial on the issue of liability may sometimes be required to bring about such a formula. But the "Settlement Formula" has become the immediate target of lawyers who are continuously involved in this type of litigation. Once the percentages of contribution have been arrived at, the log jam is usually broken, and the litigation can be terminated by payments which satisfy all of the interests involved. The combined financial

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[4] 28 U.S.C. § 1346 (1976). Dickens v. United States, 545 F.2d 886 (5th Cir. 1977); United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964); Union Trust Co. v. United States, 113 F. Supp. 80 (D.D.C. 1953), *aff'd in part, rev'd in part on other grounds*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd sub nom.* United States v. Union Trust Co., 350 U.S. 907 (1955).

[5] For example, in the Tenerife disaster, the hull loss was over $60 million. BUS. INS., Feb. 20, 1978, at 30.

[6] For example, in the Turkish Airlines DC-10 accident of 1974, the total payment was in the neighborhood of $100 million. BUS. INS., Dec. 12, 1977, at 6.

resources and insurance coverage of airlines, manufacturers, airport operators, and other parties are adequate to provide satisfactory settlements in the few hundred cases of passenger injury and death that occur each year, without costing the airlines and manufacturers as much as one per cent of their total operating costs. Therefore, airline crash litigation is one area in which the potential exists for fair compensation of all claimants and fair spreading of the risks, with a minimal burden on commerce and on society as a whole.

These dynamic forces, if harnessed, can be used to bring speedy justice in airline crash litigation. The question remains, what devices and procedures are most effective in bringing about the Settlement Formula at the earliest date.

2. *The Multidistrict Litigation Procedures*

Prior to 1968, the courts were hard pressed to find suitable procedures for processing airline crash cases, particularly in situations where suits were filed in several different jurisdictions.[7] In 1968, Congress enacted 28 U.S.C. section 1407,[8] creating the Judicial

[7] For example, in the litigation arising out of the collision between two airliners which occurred over the Grand Canyon on June 30, 1956, suits were filed in at least twelve different state and federal courts, and the issues were tried to conclusion separately in four different state and federal courts.

[8] 28 U.S.C. § 1407 (1970), provides as follows:

> (a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judical panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.
>
> (b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee

Panel on Multidistrict Litigation. The Panel, consisting of seven federal circuit and district judges appointed by the Chief Justice of the United States, is authorized to transfer civil actions which are

district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed

pending in different federal district courts and which involve common factual questions to one district for consolidated pre-trial proceedings. Although the statutory authority for transfer and consolidation was limited to pre-trial proceedings, in practice the great majority of aviation accident cases transferred by the Panel under section 1407 have been settled or tried by transferee courts, rather than being remanded to the district courts from which they were transferred. The general subject of the Panel's functions in aviation accident cases and in other types of litigation has been well covered elsewhere.[9] For purposes of this article it is assumed that practically all major airline accident cases will be subject to transfer to a single district judge under section 1407, since there are usually passengers and claimants from several different federal districts who will file suit in different federal district courts. The question, therefore, is not whether Multidistrict Litigation (MDL) procedures will be used, but how they can best be used to expedite this litigation.

Drawing upon nearly ten years of MDL airline accident litigation experience, it is possible to reach some general conclusions about the procedures which have achieved the best results. These conclusions all relate to the methods which should be employed by the transferee court in dealing with multidistrict litigation. First,

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only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a). (Added Pub. L. 90-296, § 1, Apr. 29, 1968, 82 Stat. 109.)

[9] *See* Cahn, *A Look at the Judical Panel on Multidistrict Litigation*, 72 F.R.D. 211 (1976); Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 HARV. L. REV. 1001 (1974); McDermott, 37 J. AIR L. & COM. 159 (1971); *and* articles by McDermott, Farrell, Beatty, von Kalinowsky, and Atkins in 38 J. AIR L. & COM. (1972).

the transferee court should assume firm control of discovery and pre-trial activities, setting firm deadlines for completion of all pre-trial proceedings, including motions, discovery, and pre-trial conferences. Secondly, the transferee court should set an early date for consolidated trial on the issue of liability. Thirdly, section 1404(a)[10] or similar procedures should be used to transfer all cases to the transferee court for purposes of trial, at least on questions of liability. Fourthly, the transferee court should avoid the use of class action procedures under Rule 23 of the Federal Rules of Civil Procedure. Lastly, and perhaps most importantly, the transferee court should make suitable provisions for the representation of all plaintiffs by a Plaintiffs' Committee, which is given the sole responsibility and power to conduct discovery and pre-trial proceedings on behalf of all plaintiffs. In four cases since 1971, application of these methods has resulted in efficient and expeditious handling of multidistrict litigation.

3. *Examples of Major MDL Successes*

As federal district judges gained experience with MDL procedures, the results improved dramatically. Senior District Judge Peirson M. Hall of the Central District of California must be considered the pioneer in breathing life into the MDL procedures.[11] In

[10] 28 U.S.C. § 1404(a) (1970), provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[11] Judge Hall is the undisputed champion American judge in terms of number of aviation accident cases. His first airline crash assignment was the 1958 mid-air collision which occurred above Las Vegas. Judge Hall wrote thirty separate opinions during that litigation, which took more than eight years to conclude. *See* United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964). This experience led Judge Hall to search for better ways to handle such cases. He was also the trial judge in cases arising out of the United Air Lines Salt Lake City crash of November 1, 1965, and the Bonanza Air Lines crash of November 15, 1964. After the MDL procedures came into effect in 1968, Judge Hall was assigned as transferee judge in cases arising out of the Thai Airways crash which occurred at Hong Kong on June 30, 1967 (MDL No. 15), *In re* Air Crash Disaster at Hong Kong, 298 F. Supp. 390 (J.P.M.D.L. 1969); the Air Canada crash which occurred at Toronto on July 15, 1970 (MDL No. 103), *In re* Air Crash Disaster at Toronto International Airport, 345 F. Supp. 533 (J.P.M.D.L. 1972); the mid-air collision between a Hughes Air West DC-9 and a military aircraft which occurred at Duarte, California on June 6, 1961 (MDL No. 106), *In re* Air Crash Disaster at Duarte, California, 346 F. Supp. 529 (J.P.M.D.L. 1972); the Alaska Airlines crash at Juneau, Alaska which occurred on September 4, 1971 (MDL No. 107), *In re* Air Juneau, Alaska, Air Disaster Litigation, 350 F. Supp. 1163 (J.P.M.D.L. 1972); the Turkish Airlines DC-10 crash which occurred near Paris

the litigation arising out of the crash of a Boeing 727 operated by Alaska Airlines at Juneau, Alaska, on September 4, 1971, involving 111 deaths, the cases were transferred to Judge Hall under 28 U.S.C. section 1407 (MDL Docket No. 107). Although Judge Hall was confronted by about sixty different plaintiffs' attorneys at his first pre-trial conference in San Francisco, he appointed a Plaintiffs' Committee to conduct all pre-trial proceedings on behalf of all the plaintiffs. He then proceeded to expedite the litigation by holding numerous pre-trial conferences, keeping a tight rein on discovery, and setting an early trial date. His efforts brought about settlement of most of the cases by January 1974, less than thirty months after the crash. This was considered a speedy performance by 1971 standards, especially in a case involving complicated issues of liability of the airline and the United States Government. Writing in the Autumn 1971 edition of the *Journal of Air Law & Commerce*, Professor John T. McDermott (who formerly served as Executive Attorney to the Judicial Panel on Multidistrict Litigation) made a detailed study of airline crash litigation commenced prior to 1971, which showed that the average time from crash to termination was 42.8 months for cases transferred under MDL, and 44 months for non-transferred cases.[12]

Judge Hall's success in the *Alaska Airlines* crash, however, came at the time when the jumbo jets (with passenger capacity over 300) were being phased into airline operation. *Alaska Airlines* involved 111 deaths. The question still remained, what would happen when the first jumbo jet case hit the already overburdened courts.

On December 29, 1972, the first jumbo jet accident occurred when an Eastern Airlines Lockheed 1011 Tri-Star crashed in the Everglades west of Miami International Airport, resulting in 101 deaths and 75 injuries. The Judicial Panel on Multidistrict Litigation transferred all the pending federal cases under 28 U.S.C. section 1407 to the Southern District of Florida, where they were assigned to U. S. District Judge Peter T. Fay for consolidated dis-

on March 3, 1974 (MDL No. 172), *In re* Air Crash Disaster at Paris, France, 376 F. Supp. 887 (J.P.M.D.L. 1974); and the Pan American crash which occurred at Pago Pago, American Samoa on January 30, 1974 (MDL No. 176), *In re* Air Crash Disaster at Pago Pago, American Samoa, 383 F. Supp. 501 (J.P.M.D.L. 1974).

[12] McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. AIR L. & COM. 423, at 454-455 (1971).

covery on the issue of liability. The MDL order of transfer was dated June 28, 1973.[13]

Judge Fay assumed firm control of discovery, and was able to set a date of November 26, 1973, for consolidated trial on the issue of liability. As far as available records indicate, this was the first time that the trial of a major airline accident case was scheduled to take place less than one year from the date of the crash. Discovery was actually completed and the parties ready for trial on October 31, 1973. On November 16, 1973, ten days before the scheduled opening of trial, a Settlement Formula was reached by the three defendants (Eastern Airlines, Lockheed Aircraft Corporation, and the United States Government). On that date, Judge Fay approved a stipulation under which the three defendants agreed to pay compensatory damages to all claimants, based upon settlements or, if necessary, upon trial of the issue of damages alone. By early 1974, most of the cases had been settled, and it was necessary to try only two cases on the issue of damages. Thus, the first jumbo jet crash resulted in an amazing performance by the judicial system, with the cases being disposed of in considerably less time than was generally taken for the much less complicated airline crash cases of the 1960s.

The *Everglades* case was followed by an even more complicated jumbo jet disaster: the crash of a Turkish Airlines DC-10 outside of Paris on March 3, 1974, which caused the deaths of 346 occupants, of whom 23 were Americans (from 12 different states) and the remainder were citizens of 24 foreign countries. Named as defendants were Turkish Airlines, McDonnell Douglas Corporation (manufacturer of the airplane), General Dynamics Corporation (manufacturer of certain sub-assemblies involved in the failure of a cargo door), and the United States. The Judicial Panel on Multidistrict Litigation transferred the cases to the Central District of California and assigned them to Judge Peirson M. Hall.[14] Despite knotty problems relating to forum non conveniens and choice of law, Judge Hall was able to maintain steady momentum, and on July 8, 1975, barely sixteen months after the accident,

[13] *In re* Air Crash Disaster at Florida Everglades, 360 F. Supp. 1394 (J.P.M.D.L. 1973).

[14] *In re* Air Crash Disaster at Paris, France, 367 F. Supp. 87 (J.P.M.D.L. 1974).

Judge Hall was able to announce that the defendants had agreed on a Settlement Formula and were willing to negotiate settlements or conduct trials limited to the issue of compensatory damages.[15]

Settlement negotiations in the Turkish Airlines DC-10 cases were complicated by the large number of claims and by the fact that the great majority of the decedents lived in foreign countries, requiring a great deal of difficult, international discovery activity on damages. In spite of these difficulties, most of the cases were settled during 1976. Judge Hall supplied a new twist to break deadlocked settlement negotiations by appointing a panel of nine retired California Superior Court judges. These judges agreed to sit in groups of three as special masters to receive informal presentations of damage data and to estimate the damages that would be awarded by a Los Angeles jury in each case. This special masters plan worked beautifully, supplying all parties with a "dry run" trial result in each case. In many of the cases the masters actually assisted in final settlement negotiations. Only two cases had to be tried to verdict on damages, and at this writing only a handful of cases remain unsettled.

On December 1, 1974, TWA flight 514, a Boeing 727, crashed into a mountain while on instrument approach near Upperville, Virginia, approximately twenty miles from Dulles International Airport, killing all of the ninety-two people aboard. This accident gave rise to the most prolonged and hotly contested public hearing and accident investigation procedure ever conducted by the National Transportation Safety Board (NTSB). The NTSB hearing lasted four weeks and was extensively covered by television and other media. The airlines, the pilots' unions, and FAA officials used these NTSB hearings as a sounding board to air their sharply conflicting views on the meaning of phraseology used in granting clearances during instrument approaches. This bitter controversy spilled over into the ensuing litigation, in which the passengers' families sued TWA, the United States, and Boeing.

Suits were filed in several jurisdictions, and eventually they were all transferred by the Judicial Panel on Multidistrict Litigation to the U. S. District Court for the Eastern District of Virginia, where

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[15] *In re* Paris Air Crash, 399 F. Supp. 732 (C.D. Cal. 1975).

they were assigned to U. S. District Judge Albert V. Bryan, Jr.[16] Judge Bryan took firm control of the litigation, appointing a Plaintiffs' Committee on June 24, 1975, and setting a cut-off for discovery of October 31, 1975, with a final pre-trial conference set for November 14, 1975, and a trial on all liability issues set for December 8, 1975. This tight schedule required double teaming on discovery, with various members of the Plaintiffs' Committee taking depositions of different witnesses at the same time.

The results were again highly successful. Although Judge Bryan had set the liability trial for one week following the first anniversary of the crash, the Settlement Formula was reached on November 21, 1975, less than one year from the date of the accident. Judge Bryan subsequently set down a schedule of more than forty cases for damage trials to be held during a period of six weeks. Only seven cases actually went to trial on damages, all of the others pending before Judge Bryan being settled without trial.

These performances by three United States District Judges illustrate how the MDL procedures can be used to expedite airline crash litigation. Obviously, the mere assignment of cases to one judge for pre-trial proceedings under section 1407 does not automatically speed things up or bring about disposition of cases, as shown by Professor McDermott's studies.[17] It is only in those cases where the transferee judges used the MDL tools aggressively that salutary results were reached. In all of the examples studied above (*Alaska Airlines, Everglades, Turkish Airlines,* and *Upperville*), the transferee judges utilized strict control over discovery procedures, strict deadlines for discovery and trial dates, the pressure of a liability trial date, and the transfer of all cases for purposes of trial under section 1404(a) or other procedures.[18] Each of these

[16] *In re* Air Crash Disaster near Upperville, Virginia, 373 F. Supp. 1098 (J.P.M.D.L. 1975).

[17] *See* note 12 *supra.*

[18] While Judge Fay transferred all the cases to his court for trial on liability under 28 U.S.C. § 1404(a) (1976) in the *Everglades* litigation, Judge Bryan found this unnecessary in the *Upperville* litigation. He had set a date for consolidated trial of all the cases on liability, and when a settlement formula was reached on the eve of that trial, he simply set all of the cases down for damage trial in his court, putting the burden on each plaintiff to move to remand each case to the transferor court if this was desired. While the transfer under section 1407 is for pre-trial purposes, transferee judges have transferred cases to themselves for all purposes under section 1404(a) on the ground that it is a motion

transferee judges also paid special attention to what is probably the most important variable that can be controlled by the court: the character and makeup of the Plaintiffs' Committee. The work of experienced professionals can obviously expedite airline crash litigation and can help the parties to reach a Settlement Formula at the earliest date. Since the defendants customarily select specialists to represent them, the court has no discretion on that side of the case. The one option open to the court, therefore, is on the plaintiffs' side of the case. The issue now arises as to how the selection of the Plaintiffs' Committee can assist the court and the parties to obtain speedy justice.

4. *The Plaintiffs' Committee*

One of the most frightening aspects of jumbo jet litigation is the number of different attorneys who represent various plaintiffs and how their interests can be combined without doing violence to the principle that each plaintiff is entitled to be represented by an attorney of his own choice. The courts have long held, however, that the trial judge has inherent power to select one or more attorneys to supervise and coordinate the claims of the plaintiffs in proceedings involving numerous claimants.[19] The old concept that each plaintiff should be allowed to litigate the case to conclusion through his own attorney, said the Fifth Circuit Court of Appeals recently, is

> a nostalgic luxury no longer available in the hard-pressed federal courts. It overlooks the much larger interests which arise in litigation such as this. Each case in the consolidated case was private in its inception. But the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large. The power of the court must be assayed in this semi-public context.[20]

for a change of venue, which is part of the pre-trial procedure. This position was upheld in Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1974).

[19] MacAlister v. Guterma, 263 F.2d 65, 68 (2d Cir. 1958).

[20] *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1012 (5th Cir. 1977). While the Fifth Circuit spoke of a "class-type interest," note that this is not the same as a class action. Class actions were designed to afford claimants with relatively insignificant financial interests the opportunity to combine their claims in litigation which would otherwise be prohibitively expensive for each individual plaintiff to pursue. Usually this element is not present in airline crash litigation, since each individual case usually represents a six or seven

Since the primary goal of the courts and the parties in airline crash litigation is to reach the Settlement Formula at the earliest date, it is essential that experienced professionals be engaged on both sides to work toward that end. The defendants take care of this problem themselves by retaining experienced professional specialists in the great majority of cases. This narrows the problem down to the plaintiffs. There are usually aviation specialists available who have already been retained by some plaintiffs and who have prior experience in the work of MDL Plaintiffs' Committees. The problem, therefore, narrows itself down to the best method for selection and compensation of such counsel.

Various methods have been tried by various courts. Some courts have tried to follow the suggestions in the *Manual for Complex Litigation*,[21] which contains suggested pre-trial and trial procedures for complex cases, whether or not multidistrict litigation is involved. The suggestions in the *Manual* relating to appointment of representative counsel for plaintiff, however, are based upon peculiar needs of class action and antitrust litigation, in which there are often hundreds and sometimes thousands of plaintiffs. The provisions of the *Manual* relating to control of attorneys' fees and expenses in class actions,[22] liaison counsel,[23] and lead counsel and steering committee[24] have not been found particularly useful in meeting the special problems of airline crash litigation, which represents less than twenty per cent of multidistrict litigation, and an even smaller percentage of the complex litigation addressed by the *Manual*. Class action and antitrust cases demand a large volume of detailed administrative work, requiring the services of steering committees to coordinate the actions of groups of parties having common interests and liaison counsel to assure proper

figure financial loss. The advantages which individual plaintiffs could gain from class actions in airline crash litigation are available to them through the MDL procedures. Therefore, in the absence of special circumstances, the courts have not granted class action status to airline crash litigation or to other forms of tort litigation. Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977); McDonnell Douglas v. United States District Court, 523 F.2d 1083 (9th Cir. 1975).

[21] 1 MOORE'S FEDERAL PRACTICE, *Manual for Complex Litigation* (2d ed. 1977).

[22] *Id.* ¶ 1.47, at 267.

[23] *Id.* ¶ 1.90, at 276.

[24] *Id.* ¶ 1.92, at 278.

communications between the court and all counsel. These problems, however, do not usually arise in airline crash litigation, even in the jumbo jet variety such as the Turkish Airlines DC-10 case which involved more than 300 lawsuits. Normally there is a fairly small group of attorneys representing plaintiffs who are in a position professionally and financially to undertake the rigors of pre-trial preparation and trial of the liability phase of these cases. It is to these counsel that the courts have turned in the most successful instances of MDL airlines litigation.

From the successful experience of Judges Hall, Fay, and Bryan in the MDL litigation referred to above, it is possible to draw a composite picture of the most effective means of selection of counsel to represent plaintiffs. Various titles have been used, such as "Plaintiffs' Committee," "Plaintiffs' Lead Counsel," or "Plaintiffs' Discovery Committee." "Plaintiffs' Committee" is the most flexible and therefore the most desirable title, especially since the title "Plaintiffs' Lead Counsel" gives the impression that these attorneys have been selected to try the case for the plaintiffs. It is not necessary for the court to designate trial counsel. The primary target of the litigation is the Settlement Formula, which often can be reached without a trial of liability. This phase is likely to occupy the court for at least the first year of litigation. Accordingly, the first order designating counsel for the plaintiffs can be limited to the appointment of a Plaintiffs' Committee which is given the responsibility and duty of conducting pre-trial discovery on behalf of all the plaintiffs. This includes making all necessary motions on matters such as choice of law, and all other phases of the case which are common to all of the plaintiffs, up to the time of trial. Normally this appointment is made in a "practice and procedure order" which should make it clear that the Plaintiffs' Committee serves in a fiduciary capacity for all of the plaintiffs. Thus, even though the members of the Plaintiffs' Committee normally represent their own clients as well as the clients of other lawyers, if their own clients should settle their cases before the work of the committee is completed, the members of the Plaintiffs' Committee are obligated to carry on their duties for the benefit of those non-clients whom they have come to represent through their duties on the Plaintiffs' Committee.

The practice and procedure order appointing the Plaintiffs' Com-

mittee should give notice to all counsel that the fees for the services of the Plaintiffs' Committee will be fixed by the court and that no further cases will be settled or dismissed by the court without proper provision being made for payment of such fees. The right of the Plaintiffs' Committee to be compensated for services is well established in aviation cases, as in other types of mass disaster and common interest litigation.[25] It is also appropriate for the order to provide that the fees of the Plaintiffs' Committee will be payable out of the fees of the personal attorneys rather than by the claimants. The claimants have already contracted to pay their personal attorneys an overall fee which presumably includes the burden of preparing and trying the liability phase of the case. Since the personal attorneys are being relieved of the burden of handling the liability phase of the case and are having the work done for them by the Plaintiffs' Committee, the courts deem it fair and equitable to charge the fees of the Plaintiffs' Committee against fees of the personal attorneys rather than the claimants involved.[26]

[25] Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939); Vincent v. Hughes Air West, Inc., 557 F.2d 759 (9th Cir. 1977); *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006 (5th Cir. 1977). 1 S. SPEISER, ATTORNEYS' FEES ch. 7 (1973). The *Everglades* decision upheld the award by Judge Fay of a fee of 8% to the Plaintiffs' Committee, for the work that they did in pre-trial discovery which led to the establishment of the settlement formula on the eve of trial. (In otherwise approving the handling of the fee question by Judge Fay, the Fifth Circuit directed him to hold a full evidentiary hearing and to enter findings of fact and conclusions of law on the award of attorney's fees to the Plaintiffs' Committee.) In cases where the Plaintiffs' Committee or Plaintiffs' Lead Counsel actually takes the case to trial on liability, presumably higher fees might be awarded, depending upon the amount and complexity of the work involved.

[26] *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1019-1020 (5th Cir. 1977). In that decision, the Fifth Circuit adopted the views of Judge Peirson M. Hall that in airline crash cases, "the costs of this type of litigation are inordinately and unpredictably great, and the legal skills required of plaintiffs' counsel in such cases are prodigiously exacting for preparation and for trial on the question of liability," and that "it is fair and just that those who are deriving benefits from efforts of counsel inuring to the benefit of all claimants resulting from the death of passengers should bear their fair share of repayment of the costs and payment for counsel's skill and time and effort which have been devoted to the common question of establishing liability." 549 F.2d at 1020. The personal attorneys are relieved of the burden of taking a year or more out of their practices to work on a single case, and are thus able to devote most of their time to the affairs of other clients while the Plaintiffs' Committee is making it possible for them to obtan a maximum recovery and a higher overall fee by disposing of the liability issue. If aviation specialists were not available to staff Plantiffs' Committees, the airlines and other defendants would soon gain the upper hand in this litigation, due to their superior financial leverage and centralization of effort. This was the pattern before World War II and in the early post-

As to selection of the members of the Plaintiffs' Committee, various methods have been tried, ranging from the "town meeting" type of election to selection by the court itself. The most effective method that has emerged from experience occurs when the court directs each plaintiff's attorney to submit to the court a suggested program for handling the liability phase of the case, together with a statement of the experience and qualifications of counsel suggested as members of the Plaintiffs' Committee. The most effective Plaintiffs' Committees have been composed of two, three, or at most four attorneys, since any groups larger than this tend to become less efficient.[27]

If and when a trial on liability becomes necessary, the court can deal with the selection of lead trial counsel. Normally lead trial counsel will be one or two attorneys, a smaller number than serve on the Plaintiffs' Committee. The court should certainly take into consideration the recommendations of the majority of the Plaintiffs' Committee as to who should be lead trial counsel. This determination can best be made by the trial judge around the time of final pre-trial hearing, assuming that a Settlement Formula has not been reached by that time. As previously pointed out, where there is an effective Plaintiffs' Committee, and where the transferee judge aggressively uses the other tools available under MDL procedures, the dynamic forces at work in this litigation will usually bring the parties to a satisfactory Settlement Formula, and trial of liability will not be necessary.

5. *State Court Cases in MDL Situations*

It has been suggested that one of the weaknesses of the MDL

war days, when many airline crash cases were settled for relatively low amounts because the plaintiffs' attorneys did not have the resources to bring such cases to trial under favorable circumstances. Judges Hall and Fay also took into consideration the fact that the Plaintiffs' Committee is called upon to advance large sums for costs of depositions and other pre-trial preparation.

[27] In the *Everglades* litigation, Judge Fay appointed a committee of two local (Miami) attorneys, and authorized the use of two aviation law specialists as counsel to the committee. In the *Upperville* litigation, Judge Bryan appointed a committee of three attorneys. In the *Turkish Airlines DC-10* litigation, there were three large groups of claimants, each of which was represented by specialist firms. These specialist firms got together and worked out the coordination of discovery and other pre-trial preparation among themselves, and therefore it was not necessary to make any provision for attorneys' fees for a Plaintiffs' Committee.

procedure is that it cannot work when some cases are pending in the state courts, since the Judicial Panel on Multidistrict Litigation can order transfers only of cases pending in the federal district courts.[28] Sophisticated techniques have been developed, however, which make it possible to coordinate all the litigation even though part of it is pending in state courts. For example, in one of the earliest MDL cases (MDL No. 13), involving the death cases arising out of the crash of a Piedmont Airlines Boeing 727 which collided with a Cessna 310 near Hendersonville, North Carolina, on July 9, 1967, many of the suits were filed in North Carolina state courts because of lack of diversity of citizenship. In that case, the airline was domiciled in North Carolina, as were a number of the plaintiffs. An effective Plaintiffs' Committee was appointed, however, and excellent coordination was established between Judge Woodrow W. Jones of the U. S. District Court for Western District of North Carolina, and Judge Harry C. Martin of the Superior Court for Henderson County, North Carolina. A number of joint hearings were held by these two judges, and discovery was effectively coordinated between the state and federal courts.[29]

In addition, some state courts have established procedures similar to those used by federal courts in MDL cases. In litigation arising out of the Boeing 707 Varig Airlines crash which occurred near Paris on July 11, 1973, sixty-one cases were filed in the Supreme Court of the State of New York for the County of New York. Supreme Court Justice Edward R. Dudley, Administrative Judge for the Civil Branch of the First Judicial District (covering the area of New York City in which most of the world's airlines have offices), recognized this litigation as a "complex case" and arranged to give it special treatment similar to the MDL procedures. He assigned the entire litigation to Justice Arnold Fraiman, and from

[28] Martin, *Multidistrict Litigation—A Panacea or a Blight?*, 10 FORUM 853, 864 (1975).

[29] One of the orders entered by Judge Martin relating to joint discovery and the functions of the Plaintiffs' Committee is reproduced in S. SPEISER & P. RHEINGOLD, NEGLIGENCE CASE TECHNIQUES—HANDLING THE BIG NEGLIGENCE CASE 356-58 (Practising Law Institute 1969). In the Florida *Everglades* litigation, Judge Fay used similar techniques to coordinate with the state court judge who had about 25 related cases assigned to him. Had a trial on liability become necessary, Judge Fay planned to conduct a joint trial of the federal and state cases, using two separate juries, with the federal and state judges presiding jointly. However, this became unnecessary when all of the parties in the state court actions agreed to be bound by the results of the federal liability trial.

that point on it was processed in a manner very similar to an MDL case. The result was that in less than two years from the date when the first suit was filed, most of the cases were settled or were in the process of settlement, with payments being shared by various defendants.

The existence of this state court "complex case" procedure should prove useful in the litigation arising out of the collision between two Boeing 747 jumbo jets (one operated by Pan American Airways and the other by KLM Royal Dutch Airlines), which occurred at Tenerife in the Canary Islands on March 27, 1977. The Tenerife accident was the worst air disaster of all time up to that point, involving 580 deaths and dozens of serious injuries. The Tenerife litigation was brought to the Judicial Panel on Multidistrict Litigation, which transferred all the pending cases to the Southern District of New York and assigned them to U. S. District Judge Robert J. Ward.[30] While most of the claims made on behalf of decedents or passengers who were aboard the Pan American plane were filed in federal courts, most of the claims made on behalf of Dutch families were filed in the New York state courts, because of lack of diversity of citizenship between Dutch claimants and the Dutch airline. Justice Dudley again decided that complex case treatment was appropriate, and he assigned all of the Tenerife cases pending in the New York Supreme Court to Justice Martin B. Stecher. Accordingly, the Tenerife litigation will provide another test of the flexibility of the MDL procedures working in conjunction with state court procedures. The existence of the New York State Complex Case procedure should greatly expedite the use of MDL procedures in the Tenerife litigation.

[30] *In re* Air Crash Disaster at Tenerife, Canary Islands, No. 306 (J.P.M.D.L., opinion and order dated August 16, 1977).

Case Notes