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## *Actions in Contract Resulting From Aircraft Crashes*

*Stephen M. Feldman\**

**T**HE PURPOSE OF THIS ARTICLE is to examine possible causes of actions sounding in contract available in cases of death or personal injuries arising out of aircraft crashes. The ability of the plaintiff to sustain an action in contract may have a decisive effect on the outcome of the litigation in any one of the following respects: First, as a general rule the law of the place of the accident governs tort actions, while the law of the place of contracting governs contract actions and for one of several reasons it may be advantageous to the plaintiff to avoid the law of the place of the accident; the place of the accident may impose a monetary limitation on the amount recoverable for wrongful death; the place of the accident may have a shorter period of limitations than the place of contracting; the place of the accident may grant only a survival action and not an action for wrongful death, while the place of the contract allows both. Second, the sustaining of an action in contract may be a means of avoiding the need to prove negligence.

Since general principles of personal injury govern aircraft accidents, much of what is said here might be applied generally to personal injuries but there can be little doubt that aviation, because of its own uniqueness, has developed a somewhat unique body of law. This is particularly true in relation to choice of law problems, for only in aviation accidents can the place of the accident be completely fortuitous, as when an aircraft is blown off course in a storm and crashes in a jurisdiction over which the plane was not scheduled to fly.

### **Actions Against the Airline**

The advantage to be gained by a plaintiff from an action in contract against the airline for the injury or death of a passenger on an international flight which is covered by the Warsaw Convention<sup>1</sup> is considerably more limited than in cases not within

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<sup>1</sup> The Warsaw Convention is formally entitled "Convention for the Unification of Certain Rules Relating to International Transportation By Air." It

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the Convention. The Convention provides for liability of the airline without proof of negligence where death or injury takes place on board the aircraft<sup>2</sup> unless the airline proves that it has taken all necessary measures to avoid the damage.<sup>3</sup> However, the amount of recovery is limited to 125,000 francs (about \$8,300)<sup>4</sup> unless it is proved that the damage was caused by the wilful misconduct of the airline.<sup>5</sup> The Convention specifically provides that any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention.<sup>6</sup> Thus, regardless of whether the plaintiff's action be founded in tort or contract, he would be required to prove wilful misconduct<sup>7</sup> on the part of the airline to be entitled to collect an amount in excess of \$8,300, and would not have to prove even negligence to collect up to \$8,300.

However the situation with regard to the Warsaw Convention is considerably more complicated than may at first appear. Despite the fact that Article 17 of the Convention appears on its face to create a cause of action for the injury or wrongful death of passengers, it has been unequivocally held that neither Article 17 nor any other part of the Convention creates any substantive right of action.<sup>8</sup> The plaintiff in a case covered by the Convention must look to some locally created right on which to found his action. Assuming he can prove wilful misconduct, how much in excess of \$8,300 he is entitled to collect would depend on whether the applicable local statute creates an action for wrongful death, a survival action or both, and whether there is included in the statute a monetary limitation. If the local mone-

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was concluded at an international convention at Warsaw, Poland, in 1929, and was adhered to by the United States upon the advice of the Senate in 1934. It is set forth at 49 Stat. 3000 et seq. (1934). Article 1 defines the applicability of the Convention, which is basically to international flights between nations adhering to the Convention.

<sup>2</sup> Warsaw Convention, Article 17, 49 Stat. 3000 (1934).

<sup>3</sup> Warsaw Convention, Article 20, 49 Stat. 3000 (1934).

<sup>4</sup> Warsaw Convention, Article 22, 49 Stat. 3000 (1934).

<sup>5</sup> Warsaw Convention, Article 25, 49 Stat. 3000 (1934).

<sup>6</sup> Warsaw Convention, Article 24, 49 Stat. 3000 (1934).

<sup>7</sup> For a definition of wilful misconduct as used in the Warsaw Convention, see *Tuller v. Koninklijke Luchvaart Maatschappij*, 292 F. 2d 775 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 921 (1961).

<sup>8</sup> *Noel v. Linea Aeropostal Venezolana*, 257 F. 2d 677 (2d Cir. 1957), *cert. denied*, 355 U. S. 907 (1957).

tary limitation were deemed a limitation on the right itself it might apply despite the provisions of the Convention.<sup>9</sup>

In Warsaw Convention cases, because of the onus of proving wilful misconduct, it is particularly important for the plaintiff to consider the liability of the manufacturer, who is not protected by the provisions of the Warsaw Convention. Because of the normal absence of control by the manufacturer and consequent difficulty in establishing negligence on a *res ipsa loquitur* theory, the plaintiff should consider the question of manufacturers' warranties.

### A Common Carrier Makes No Implied Warranty of Safe Carriage

Although some early cases speak of a warranty of safe carriage made by a common carrier to its passengers,<sup>10</sup> it seems clear that common carriers are not liable under such a theory. In *Stokes v. Saltonstall*,<sup>11</sup> the Supreme Court of the United States held:

We think that the Court laid down the law correctly in each and all of these instructions. It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God, and the public enemy. But although he does not warrant the safety of the passengers, at all events, yet his undertaking and liability as to them, go to this extent: that he, or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that as far as human care and foresight can go, he will transport them safely.

Although modern aviation cases have added considerable impetus to the argument that the carrier warrants the safe carriage of the passenger, the argument has been generally rejected.<sup>12</sup>

<sup>9</sup> cf. *Kilberg v. Northeast Airlines*, 9 N. Y. 2d 34, 211 N. Y. S. 2d 133 (1961).

<sup>10</sup> See *Atlantic Coast Line R. Co. v. Thompson*, 211 F. 889 (4th Cir. 1914); *Dike v. Erie Railway Co.*, 45 N. Y. 113 (1871); *Sullivan v. Phila. & Reading R. R. Co.*, 30 Pa. 234 (1858).

<sup>11</sup> 13 Pet. 181, 191 (1839).

<sup>12</sup> *Maynard v. Eastern Airlines, Inc.*, 178 F. 2d 139, 13 A. L. R. 2d 646 (2d Cir. 1949); *Herman v. Eastern Airlines*, 149 F. Supp. 417 (S. D. N. Y. 1957); *Kilberg v. Northeast Airlines, Inc.*, *supra*, note 9; *Faron v. Eastern Airlines, Inc.*, 193 Misc. 395, 84 N. Y. S. 2d 568 (1948).

Note: In *Kilberg* the New York Court of Appeals suggested that an action in contract might exist under the law of New York as the *locus contractus* if the breach of contract for safe carriage had not resulted in death.

### Express Warranty Arising From Airline Advertising

Many airlines advertise safety features they offer. For example, one line advertises that it has more experience than any other airline and that its crews have been trained to the world's highest flight standards, and another line advertises that all its aircraft are equipped with radar. To hold that such advertising, if it induces a person to purchase a ticket on that airline, amounts to an express warranty that the flight crews have been trained to the world's highest standards or that the aircraft are equipped with radar, is a logical step from the line of decisions dealing with advertising promises connected with the sale of a product. In *Rogers v. Toni Home Permanent Co.*,<sup>13</sup> the highest court of Ohio held:

Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. . . . What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the labels on his products are inducements to the ultimate consumer, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.

The cause of action by the passenger for breach of express warranties contained in advertising should be even more firmly entrenched in our theories of jurisprudence. First, privity of contract clearly exists in the passenger-carrier case but is usually absent in the consumer-manufacturer case. Second, it has long been the rule of the common law that a common carrier owes its passengers the highest degree of care. By way of contrast, sales

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<sup>13</sup> 167 Ohio St. 244, 147 N. E. 2d 612, 615-616 (1958). See also *Randy Knitwear v. American Cyanamid Co.*, 11 N. Y. 2d 5, 226 N. Y. S. 2d 363, 181 N. E. 2d 399 (1962); *Harmon v. Digliani*, 148 Conn. 710, 174 A. 2d 294 (1961).

warranties developed in a field where *caveat emptor* was the rule as to a person in privity with the manufacturer. Liability did not exist even where there was negligence as to a person not in privity.

Regardless of what question may exist as to the choice of law rule applicable to an implied warranty<sup>14</sup> imposed on a manufacturer or seller by operation of law, the law of the place of contract should govern an express warranty, for it is in a true sense a contractual duty voluntarily assumed by the airline. Thus, an action for breach of express warranties contained in advertising, where supported by the facts, may provide a means of avoiding the law of the place of the accident.

## **Actions Against the Aircraft Manufacturer**

### *I. Implied Warrants of Quality*

Naturally an airline passenger is not in privity of contract with the aircraft manufacturer. Therefore, the pivotal question in a suit against an aircraft manufacturer for the death or injury of a passenger for breach of implied warranty frequently is whether such warranty exists despite the absence of privity.

Historically the action for breach of warranty had its origins in the law of torts, and it was not until the end of the Eighteenth Century that the first such action was brought in contract.<sup>15</sup> The reasons for the rise of the requirement of privity in connection with implied warranties is obscure, but whatever the reason it seems to have been founded more on accident than logic.<sup>16</sup>

The earlier cases in the general movement away from the requirement of privity based their reasoning on some fictitious theory within the realm of contracts. For example some cases talked of the injured party as a third party beneficiary of the contract of sale;<sup>17</sup> others talked of a theoretical assignment of

<sup>14</sup> See the discussion, *infra*, of the choice of law rules applicable to the manufacturer's implied warranties.

<sup>15</sup> Prosser, *Law of Torts* 493 (2d ed. 1955).

<sup>16</sup> Compare the accidental growth of a requirement of privity in negligence cases beginning with *Winterbottom v. Wright*, 10 M. & W. 109, 11 L. J. Ex. 415 (1842), and culminating with Justice Cardozo's classic opinion in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). Compare also the development and fall of the privity requirement in actions for breach of warranty of seaworthiness, culminating in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946).

<sup>17</sup> *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N. E. 557 (1928); *Dryden v. Continental Baking Co.*, 11 Cal. 2d 33, 77 P. 2d 833 (1938).

the warranty;<sup>18</sup> and yet others talked of the person in privity as a theoretical agent of the injured person.<sup>19</sup> Today those same courts find no difficulty in saying that a warranty action is tortious in nature and public policy demands the manufacturer be held liable irrespective of privity.<sup>20</sup>

In some states the development of the exception to the privity requirement depended on the type of product involved. The law of Kansas presents an excellent example of this development. The exception under Kansas law was originally limited to food cases. It was then by steps extended to include a food container,<sup>21</sup> cosmetics,<sup>22</sup> and finally products which if defectively made will be dangerous.<sup>23</sup> Some states today require privity in all but food cases.<sup>24</sup>

In the face of the muddled and rapidly changing state of the law with regard to privity, there is a rapidly increasing body of cases dealing with the rights of an airline passenger to sue the aircraft manufacturer for breach of implied warranty, some cases holding privity required<sup>25</sup> and others not.<sup>26</sup>

<sup>18</sup> *Madouros v. Kansas City Coca Cola Bottling Co.*, 230 Mo. App. 275, 90 S. W. 2d 445 (1936).

<sup>19</sup> *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 P. 1050 (1929); *Grinell v. Carbide & Carbon Chemicals Corp.*, 282 Mich. 509, 276 N. W. 535 (1937).

<sup>20</sup> See *Rogers v. Toni Home Permanent Co.*, *supra*, note 13; *Peterson v. Lamb Rubber Co.*, 5 Cal. Rptr. 863, 353 P. 2d 575 (1960); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S. W. 2d 532 (1952); *Freeman v. Navarre*, 47 Wash. 2d 760, 289 P. 2d 1015 (1955); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N. W. 2d 873 (1958).

<sup>21</sup> *Nichols v. Nold*, 174 Kans. 613, 258 P. 2d 317 (1953).

<sup>22</sup> *Graham v. Bottenfield's Inc.*, 176 Kans. 68, 269 P. 2d 413 (1954).

<sup>23</sup> *B. F. Goodrich v. Hammond*, 269 F. 2d 501 (10th Cir. 1959).

<sup>24</sup> *Harris v. Hampton Roads Tractor & Equipment Co.*, 202 Va. 958, 121 S. E. 2d 471 (1961).

<sup>25</sup> *Prashker v. Beech Aircraft Corp.*, 258 F. 2d 602 (3d Cir. 1958), *cert. denied*, 358 U. S. 910 (1958); *State of Md. for the use of McClanan v. Brantley Helicopter Corp.*, 7 CCH Avi. 17,471 (E. D. Pa. 1961); *Goldberg v. American Airlines, Inc.*, 23 Misc. 2d 215, 199 N. Y. S. 2d 134 (1960); *Egan v. Kollsman Instrument Corp.*, 7 CCH Avi. 17,292 (Supreme Ct., Kings County, N. Y. 1961).

<sup>26</sup> *Conlon v. Republic Aviation Corp.*, 204 F. Supp. 865 (S. D. N. Y. 1960); *Siegel v. Braniff Airways, Inc.*, 204 F. Supp. 861 (S. D. N. Y. 1960); *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S. D. N. Y. 1960); *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S. D. N. Y. 1959); *Garon v. Lockheed Aircraft Corp.*, 7 CCH Avi. 17,418 (Calif. Super. Ct., L. A. County 1961).

Certain factual circumstances surrounding the relationship of the aircraft manufacturer to the airline passenger bear analysis in determining the existence of a warranty. First, although there is a certain amount of advertising by the aircraft manufacturer, it is limited and obviously different from the high pressure advertisements of food or cosmetic manufacturers. Second, the average airline passenger pays little attention to the manufacturer of the aircraft on which he will fly, except perhaps to inquire if the plane is a jet. To the extent that the passenger relies on anyone, he undoubtedly relies on the airline and not the manufacturer. Third, the passenger is not a buyer of the aircraft, and thus is one step further removed from the traditional remedy for breach of implied warranty than even the buyer of the product who, because he bought from a retailer, lacks privity with the manufacturer. The remedies for breach of warranty enumerated in Section 69 of the Uniform Sales Act are all remedies of the "buyer." It is not suggested in the Act that someone in the position of a temporary user of a product has any remedy for breach of warranty.

In *Chapman v. Brown*,<sup>27</sup> the United States District Court held that under Hawaii law there exists, in addition to those implied warranties in the Uniform Sales Act, a common law implied warranty that extends to the user of products, regardless of privity, where the goods sold constitute a dangerous instrumentality. The reasoning of this opinion is most apposite in aviation cases. In addition to the policies that favor imposing implied warranties on manufacturers, in this country at least, strict governmental regulation of aircraft manufacture provides an additional policy reason for imposing such warranties on aircraft manufacturers.

## II. The Choice of Law Rule

In addition to the usual considerations that exist with regard to choice of laws, in warranty cases the choice of law may determine the very existence of the right of action, for the law of one state may require privity of contract and the law of another state may not require it.

The choice of laws rules which could conceivably be applied to a breach of implied warranty are as follows:

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<sup>27</sup> 198 F. Supp. 78 (D. Hawaii 1961), aff'd 304 F. 2d 149 (9th Cir. 1962).



1. The law of the place of the sale.<sup>28</sup> This rule may be difficult of application, as where a warranty is asserted against an engine manufacturer who sold the engine in state *x* to the aircraft manufacturer who in turn sold the aircraft with the engine assembled into it to the airline.
2. The law of the place of performance of the contract.<sup>29</sup>
3. The law of the place of the accident.<sup>30</sup>
4. The law of the place of the most significant contacts.<sup>31</sup>

There is an interesting dearth of textual material on the question of the choice of law rule to be applied to breaches of implied warranties of fitness. The Restatement of Conflict of Laws does not make any special mention of breaches of warranty, apparently assuming that they will be treated under either the contract rule or the tort rule as a matter of course.

There is a divergence in the cases as to what choice of law rule should be applied to a manufacturer's breach of implied warranties of fitness. However, a careful analysis of the nature of the breach of implied warranty action leads inevitably to the conclusion that regardless of the contract language which has attached to the action, its true nature is tortious, and the choice of law rule to be applied should be the same as in a negligence action:

1. Historically the action for breach of warranty originated in tort and it was not until 1778 that the first decision was reported in which breach of warranty was pursued in contract.<sup>32</sup>

2. Liability for breach of contract arises because of the voluntary manifestations of the parties to the contract, while liability in tort is imposed by the law in furtherance of social policy completely irrespective of the intention of the parties.<sup>33</sup> The action for breach of implied warranty falls in the latter class.<sup>34</sup>

<sup>28</sup> Prashker v. Beech Aircraft Corp., *supra*, note 25; Texas Motorcoaches v. A. C. F. Motors Co., 154 F. 2d 91 (3rd Cir. 1946).

<sup>29</sup> See Restatement, Conflict of Laws § 358.

<sup>30</sup> Conlon v. Republic Aviation Corp., *supra*, note 26; State of Md. for the use of McClanan v. Brantley Helicopter Corp., *supra*, note 25.

<sup>31</sup> Bowles v. Zimmer Manufacturing Co., 277 F. 2d 868 (7th Cir. 1960); Noel v. United Aircraft Corp., 202 F. Supp. 556 (D. Del. 1962).

<sup>32</sup> Prosser, Law of Torts 493 (2d ed. 1955).

<sup>33</sup> See *Ibid.*, 478 (2d ed. 1955).

<sup>34</sup> *Id.* at 493.

3. The measure of damages in actions for breach of contracts is that expressed in the classic English case *Hadley v. Baxendale*,<sup>35</sup> to be those damages that could have been fairly and reasonably contemplated by both the parties when they made the contract.<sup>36</sup> On the other hand, the tort rule is that the plaintiff may recover for all damages proximately caused by defendant's conduct.<sup>37</sup> If the contract rule of damages were applied in actions for breach of implied warranty, the plaintiff would not be entitled to collect for an aggravation of a pre-existing medical condition, of which the defendant neither knew nor had reason to know. But universally the courts have applied the broader tort measure of damages in breach of warranty actions.<sup>38</sup>

Normally damages will not be allowed for mental suffering in actions for breach of contract,<sup>39</sup> but will be allowed in tort actions.<sup>40</sup> The rule in breach of warranty actions follows the tort rule, allowing damages for emotional distress.<sup>41</sup>

4. The tort rather than the longer contract period of limitations has been applied to breach of warranty actions.<sup>42</sup>

5. Contributory negligence has generally been held to be a defense to actions for breach of warranty.<sup>43</sup>

6. In one case involving a breach of warranty the defendant sought to avoid liability on the ground that the contract, having been made on Sunday, was illegal, and therefore should not be enforced by the court. However, the court refused to apply this purely contract concept to the action.<sup>44</sup>

<sup>35</sup> 9 Exch. 341 (1854).

<sup>36</sup> See Chief Justice Cardozo's opinion in *Kerr S. S. Co., Inc. v. Radio Corporation of America*, 245 N. Y. 284, 157 N. E. 140 (1927).

<sup>37</sup> Restatement, Torts § 435.

<sup>38</sup> See *Worstel v. Stern Brothers*, 3 Misc. 2d 848, 156 N. Y. S. 2d 335 (Supreme Ct. Kings County 1956), in which the seller of a bed was held liable for an aggravation of a pre-existing heart condition when a leg of the bed collapsed; and *Medieros v. Coca-Cola Bottling Co. of Turlock, Ltd.*, 135 P. 2d 676 (Cal. App. 1943), in which damages were allowed for aggravation of plaintiff's pre-existing ulcer condition resulting from an impurity in a Coca-Cola.

<sup>39</sup> Restatement, Contracts § 341.

<sup>40</sup> Restatement, Torts § 924(a).

<sup>41</sup> See *Hamilton Corp. v. O'Neill*, 273 F. 2d 89 (D. C. Cir. 1959).

<sup>42</sup> *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P. 2d 163 (1954); *Jones v. Boggs & Buhl, Inc.*, 355 Pa. 242, 49 A. 2d 379 (1946); *Schlick v. New York Dugan Bros., Inc.*, 175 Misc. 182, 22 N. Y. S. 2d 238 (City Ct. of N. Y., Kings County 1940).

<sup>43</sup> *Siebrand v. Eyerly Aircraft Co.*, 196 F. Supp. 936 (D. Ore. 1961).

<sup>44</sup> *Anderson v. Tyler*, 223 Iowa 1033, 274 N. W. 48 (1937).

7. Interest is generally allowed in contract actions from the date performance was due<sup>45</sup> but is not allowed in tort actions.<sup>46</sup> It seems clear that breach of warranty actions would fall in the latter category.

### **Actions Against Independent Repair Agencies**

It is not uncommon for airlines to employ an independent contractor to repair or overhaul various parts of the aircraft, and a plaintiff in a case of improper repair or overhaul can look to the repairman for liability. However, the law with regard to repairmen has developed somewhat more slowly than that of manufacturers. The case of *MacPherson v. Buick Motor Co.*,<sup>47</sup> dealt with the liability of manufacturers according to its facts. Although some courts were reluctant to extend the theory of *MacPherson* to repairmen, it is now generally accepted that the law has been so extended.<sup>48</sup>

There is little if any talk of an implied warranty of proper repair made by a repairman, but most of the policies of the law which led to the imposition of this form of liability on the manufacturer exist with regard to the repairman.

In the recent case of *Evans v. Otis Elevator Co.*,<sup>49</sup> the Pennsylvania Supreme Court held:

Generally a party to a contract does not become liable for a breach thereof to one who is not a party thereto. However, a party to a contract by the very nature of his contractual undertaking may place himself in such a position that the law will impose upon him a duty to perform his contractual undertaking in such manner that third persons—strangers to the contract—will not be injured thereby; Prosser, *Torts*, (2nd ed. 1955), § 85, pp. 514-519. It is not the contract per se which creates the duty; it is the law which imposes the duty because of the nature of the undertaking in the contract. If a person undertakes by contract to make periodic examinations and inspections of equipment, such as elevators, he should reasonably foresee that a normal and natural result of his failure to properly perform such undertaking might result in injury not only to the owner of the equipment but also third persons, including the owner's employees:

<sup>45</sup> Restatement, *Contracts* § 337.

<sup>46</sup> Restatement, *Torts* § 913.

<sup>47</sup> *Supra*, note 16.

<sup>48</sup> See Restatement, *Torts* §§ 403, 404 (1934).

<sup>49</sup> 403 Pa. 13, 18-19, 168 A. 2d 573 (1961).

*Bollin v. Elevator Construction & Repair Co.*, 361 Pa. 7, 17, 18, 63 A. 2d 19 and cases therein cited. The orbit of Otis' duty to third persons is measured by the nature and scope of his contractual undertaking with Sperling and, if, as presently appears, Otis undertook to inspect the elevator at regular intervals, and, if the elevator was in a defective or dangerous condition discoverable by reasonable inspection, Otis would be liable to third persons, regardless of any privity of contract, who might be injured by Otis' failure to properly perform its contractual undertaking of inspection. Such principle finds support in reason, justice and precedent.

### Conclusion

It seems like a step backward for the law again to become preoccupied with the form of actions. The two concerns of plaintiffs asserting actions in contract for death or injuries arising out of aircraft crashes are choice of laws and avoidance of the need of proving negligence. As to choice of laws there is an increasing movement, which originated in contracts and has moved into torts,<sup>50</sup> toward a center of gravity theory, applying the law of the place having the most predominant contacts with the operative facts of the case. If the center of gravity theory is applied in the case of an aircraft crash, it would make no difference whether the action were treated as one in contract or one in tort, for the place of the sale of the ticket and the place of the crash would be factors to weigh in determining the center of gravity under either form of action.<sup>51</sup> The application of the center of gravity theory of choice of laws probably makes more sense in aircraft crash cases than in any other type of personal injury case, because it provides a means for avoiding the completely fortuitous consequences of a crash in a jurisdiction, the application of the law of which the parties never contemplated.

As to the factor of avoiding the need to prove negligence, certain negligence theories such as failure to warn<sup>52</sup> and *res*

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<sup>50</sup> On May 25, 1963, the American Law Institute approved Restatement, Conflict of Laws § 379 (Second Tentative Draft No. 8, 1963), replacing the strict orthodox rule of *lex loci delicti* with a rule applying "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."

<sup>51</sup> See *Bowles v. Zimmer Manufacturing Co.*, *supra*, note 31, where the court applied the local law of the state most closely associated with the transaction in a case involving implied warranty.

<sup>52</sup> See Restatement, Torts § 388 (1934).

*ipsa loquitur* may provide the plaintiff with all the advantages that an action in contract would provide. For example, in *Hopkins v. E. I. DuPont DeNemours & Co.*,<sup>53</sup> the court sustained the plaintiff's theory of liability against a dynamite manufacturer for failure to warn of the danger of premature explosion when dynamite is inserted in holes recently drilled in particularly hard rock. The plaintiff had admitted that there was nothing defective about the dynamite. Thus, the defendant had breached no warranties but had been negligent in failing to warn.

Therefore, by development of the center of gravity theory of choice of law and such theories of negligence as *res ipsa loquitur*, where control in the defendant is not absolute, the law can obtain sensible and just results without forcing advocates to resort to a battle of pleading, reminiscent of days gone by.

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<sup>53</sup> 199 F. 2d 930 (3rd Cir. 1952).