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Aviation Law--Problems in Litigation Arising from Aircraft Disasters

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AVIATION LAW — PROBLEMS IN LITIGATION ARISING FROM AIRCRAFT DISASTERS

The fatality rate of commercial aviation has fallen considerably in the past few years, but, as safe as aviation might have become, accidents still occur.[1] This Note is concerned with the problems that arise when action is brought against the airline for injuries sustained in these disasters. The most formidable problem is evidentiary — marshaling the evidence to prove the liability of the airline. Because of the difficulty of proof, a very large number of cases are voluntarily settled before trial.[2]

Another major problem area in the field of aviation accident litigation was outlined in *Kilberg v. Northeast Airlines, Inc.*,[3] by Chief Judge Desmond:

> An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths [that have laws differing from those of New York]. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. *The place of the injury becomes entirely fortuitous.*[4]

The applicable law is indeed fortuitous because there is no uniform law of aviation liability among the several states. Thus, in addition to the problems connected with gathering evidence, the plaintiff must consider the laws of the several states — particularly the *lex fori* and the *lex loci delictus*.

The Standard of Care

The duty owned by the operators of aircraft to their passengers depends upon whether the aircraft in question is considered to be a private or common carrier. The operator of a private carrier owes only the duty of ordinary care to his passengers,[5] while a common carrier is charged with the highest degree of care consistent with the practical operation of its aircraft.[6] This is true for all common

1 Commercial aviation accidents caused 326 deaths in 1960, for a fatality rate of 1.01 deaths per 100 million passenger miles. Chicago Tribune, Sept. 24, 1961, p. 7, col. 1. This marked an increase over the 1959 statistics of 249 fatalities, with a death rate of 0.7, attributed to domestic air travel, but when compared with the 1934 fatality rate of 9.0 deaths per 100 million passenger miles, the advances that commercial aviation has made are clearly seen. STATISTICAL ABSTRACT OF THE UNITED STATES 580 (81st ed. 1960).

The saying that a person is safer in flight than during the drive to the airport is vividly demonstrated by the 1959 statistics that show a fatality rate for automobiles of 5.4 per million vehicle miles. *Id.* at 559.

2 Although no recent statistics are available, it appears that most fatal passenger claims are settled before trial.

> The insurance underwriters' claim and settlement records for airline passenger claims were examined . . . in 1940. They indicated that . . . 86.3% of the airline fatal passenger claims were voluntarily settled for substantial amounts and 85.7% of non-scheduled commercial fatal passenger claims were similarly settled.

Sweeney, *Is Special Aviation Liability Essential?* — Part I, 19 J. OF AIR LAW & COMM. 166, 170 (1952).

The highly technical nature of the evidence, with the corresponding difficulty in proving negligence, is recognized by the courts today:

> It is now a matter of unhappy but common knowledge that the cause and circumstances of air tragedy where mass death occurs must be determined by an examination of the wreckage with an application of the physical facts discovered to expert knowledge of flight control. *By the very nature of the problem, the proof can seldom rise to the degree of certainty* but can often surpass that of pure speculation.

Underwriters at Lloyds v. Cherokee Laboratories, Inc., 288 F.2d 95 (10th Cir. 1961). (Emphasis added.)

3 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

4 172 N.E.2d at 527. (Emphasis added.)

5 See, *e.g.*, Scarborough v. Aeroservice, 155 Neb. 749, 53 N.W.2d 902 (1952).

6 See, *e.g.*, Kasanof v. Embry-Riddle Co., 157 Fla. 677, 26 So.2d 889 (1946).

carriers, whether the particular mode of transportation is firmly established or relatively new and untried:

> If the craft be employed as a common carrier vehicle, it is not a reason for applying different rules of liability to say that it and the industry are new. If too new . . . should not its owner either decline to use it for the purpose, or assume the liability incident to the use to which he puts it? [7]

The common carrier is not an insurer of the safety of its passengers, bound to anticipate unusual and unexpected perils,[8] but rather is normally liable only for negligence.[9] A presumption of negligence is sometimes created against the common carrier when it is involved in an accident, and some courts have extended this to common carriers by air.[10] This presumption is rebuttable, but nevertheless the initial burden is placed on the defendant common carrier.

A common carrier by air is defined by the same characteristics as a common carrier by other means of transportation — one which holds itself out to the public as being in the business of transporting passengers from place to place for payment, offering its services to all who choose to employ it and pay for its use. The distinctive characteristic of a common carrier is the operation of a business carrying all people indiscriminately; it may not refuse to do so without just cause.[11] Air services have been classified as common carriers where they operated without a schedule,[12] and where they ran a sightseeing service.[13] Thus, most airlines, even the unscheduled supplementary lines, are common carriers.

As noted, the problems involved in proving negligence are difficult.[14] The growth or development of the case law with respect to accidents which occur because of mishaps in bad weather is marked.[15] The degree of care owed to the passenger is commensurate with the instrumentality used; as a result, airlines must use particular care with regard to equipment,[16] crew,[17] or persons concerned with the manufacture of the aircraft.[18]

Sources of Evidence

The best source of evidence concerning aircraft disasters is found in the investigation reports of the Civil Aeronautics Board. The CAB has a statutory mandate to investigate all airplane accidents and determine the "probable cause" thereof.[19] The information gathered from these investigations is available upon request, but the Board will not release "that portion of the file containing any

7 Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933, 934 (1932).
8 Atcheson v. Braniff International Airways, 327 S.W.2d 112 (Mo. Sup. Ct. 1959).
9 See, *e.g.*, Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 816 (1960); Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952); Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933 (1932).
10 Johnson v. Eastern Air Lines, Inc., 177 F.2d 713 (2d Cir. 1949); Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N.E.2d 131 (1944).
11 See, *e.g.*, Smith v. O'Donnell 215 Cal. 714, 12 P.2d 933 (1932).
12 McCusker v. Curtiss Wright Flying Service, Inc., 269 Ill.App. 502 (1933).
13 See, *e.g.*, Kamienski v. Bluebird Air Service, Inc., 321 Ill.App. 340, 53 N.E.2d 131 (1944).
14 See, Sweeny, *Is Special Aviation Liability Legislation Essential?* (pts. 1-2), 19 J. AIR L. & COM. 166, 316 (1952).
15 *Compare* Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); *and* Stiles v. National Air Lines, 161 F.Supp. 125 (E.D.La. 1958); *and* Cudney v. Braniff Airways, Inc., 300 S.W.2d 412 (Mo. Sup. Ct. 1957); *with* Law v. Transcontinental Air Transport, Inc., 1931 U.S.Av. 205 (E.D.Pa. 1931).
16 See, *e.g.*, Foot v Northwest Airways, Inc., 1931 U.S.Av. 66 (D.Minn. 1930).
17 See, *e.g.*, Stiles v. National Air Lines, 161 F.Supp. 125 (E.D. La. 1958).
18 See, *e.g.*, DeVito v. United Air Lines, Inc., 98 F.Supp. 88 (E.D.N.Y. 1951).
19 72 Stat. 781 (1958), 49 U.S.C. § 1441(a) (2): "It shall be the power of the Board to. . . . investigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof."

opinion, suggestion, or recommendation of any employee."[20] Still the problem of proving negligence on the part of the carrier remains a tedious, if not a nearly impossible task for the plaintiff. The factual situations involved in aviation cases are normally complex; the terminology of the industry must be learned and the complex scientific knowledge must be comprehended before even the CAB reports can be reduced to workable data by a plaintiff.

In this age of transcontinental and intercontinental flights, many mishaps occur great distances from the victim's residence or the place of trial;[21] hence the use of any available reports becomes a matter of practical importance for the plaintiff. From these must be gathered most of the specific acts of the defendant which will later be alleged, and (hopefully) proved, to establish negligence.

Congress, while commanding the CAB to investigate accidents, explicitly refused to allow the investigating board's reports to be used in negligence suits arising from commercial aircraft disasters. "No part of any report . . . shall be admitted as evidence or used in any suit . . . for damages growing out of any matter mentioned in such reports. . . ."[22]

The courts, however, have narrowly construed this provision,[23] probably in an effort to have all possible facts on record so that factual issues can be fairly determined. Since the rules of evidence before the CAB investigating committee are not the same as before the courts, the purpose of Congress was to preserve the traditional rules of evidence in the courts:

> [T]he report consisted wholly of the investigator's personal observations about the condition of the plane after the accident. There were in the report no opinions or conclusions about possible causes of the accident or defendant's negligence; there were no findings based on interviews or anything but personal observations. Nothing in the report offends either the opinion or the hearsay rule. § 701(e) [§ 1441(e)] was designed to guard against the introduction of C.A.B. reports expressing agency views about matters which are within the functions of courts and juries to decide.[24]

Thus, an investigation report is not "used" within the meaning of the statute when a witness is permitted to refresh his memory from a copy of the investigation record.[25] And the purpose of Congress is not thwarted when a witness "is confronted

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20 14 C.F.R. § 311.2:

> Information secured by the Board concerning accidents involving aircraft may be released only as follows:
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> * * *
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> (b) *The Washington office.* The Director of the Bureau of Safety Investigation or such persons in the Washington office as he may designate, shall, upon request, release the information described in paragraph (a) of this section. In addition, the Director or such designee shall, upon request:
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> (1) Release the names of witness and their addresses;
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> (2) Make replies as to facts in answer to specific inquiries, either verbal or written, concerning aircraft accidents, and shall furnish copies of documents in accident files, provided the expense of making such copies is borne by the recipient. In both instances, however, any suggestion, opinion, or recommendation made by any employee of the Board or any employee of the Civil Aeronautics Administration, when acting on behalf of the Board, shall be omitted; and
>
> (3) Make available for inspection that portion of the file containing data pertinent to the accident but shall not make available that portion of the file containing any opinion, suggestion, or recommendation of any employee of the Board or any employee of the Civil Aeronautics Administration, when acting on behalf of the Board.

21 See, *e.g.*, Haasman v. Pacific Alaska Air Express, Inc., 100 F.Supp. 1 (D. Alaska 1951), *aff'd per curiam sub nom.* Des Marais v. Beckman, 198 F.2d 550 (9th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953); Wyman v. Pan American Airways, Inc., 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882 (1945).

22 72 Stat. 781 (1958), 49 U.S.C. § 1441(e).

23 See, *e.g.*, Israel v. United States, 247 F.2d 426 n.2 (2d Cir. 1957); Ratner v. Arrington, 111 So. 2d 82 (Fla. Ct.App. 1959).

24 Lobel v. American Airlines, Inc., 192 F.2d 217, 220 (2d Cir. 1951).

25 Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953).

with his testimony given at the investigation in order to refresh his recollection or impeach him as a witness."[26]

Employees of the CAB may serve as witnesses in civil litigation arising from aircraft accidents where the evidence they might present is not available from any other source. CAB employees may not act as expert witnesses when they testify but must confine their testimony to the facts actually observed in the course of their investigation.[27]

The policy whereby the law grants a privilege against examination of CAB reports does not extend to accident investigations conducted by the defendant airlines,[28] and these reports are subject to discovery before trial.[29]

Res Ipsa Loquitur

When the injured plaintiff cannot meet the burden of proving specific negligence, he can resort to the doctrine of res ipsa loquitur — a doctrine particularly adaptable to accidents involving carriers.[30] However, the application of res ipsa loquitur, in the case of air carriers has been especially slow, and then often unsuccessful.[31] It appears, however, that corresponding to the advances made by air

26 Ritts v. American Overseas Airlines, Inc., 97 F.Supp. 457, 458 (S.D.N.Y. 1947).

27 14 C.F.R. § 311.3:

> No Board employee shall make public by testimony in court aircraft accident information obtained by him in the performance of his official duties, except in accordance with the following:
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> (a) *Testimony of employees.* Employees may serve as witnesses for the purpose of testifying to the facts observed by them in the course of accident investigations in those cases in which an appropriate showing has been made that the facts desired to be adduced are not reasonably available to the party seeking such evidence by any other method, including the use of discovery procedures against the opposing party. Employees shall testify only as to facts actually observed by them in the course of accident investigations and shall not give opinion evidence as expert witnesses.

28 Tansey v. Transcontinental & Western Air, Inc., 97 F.Supp. 458 (D.D.C. 1950).

29 FED. R. CIV. P. 34:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control; or (2) order any party to permit entry upon designated land or other party in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

For an example of a case in which the plaintiff attempted to establish his case through the use of discovery, see, *Merrill v. United Air Lines,* 151 F.Supp. 104 (S.D.N.Y. 1957). The plaintiff phrased his interrogatories in very broad language: "Is the defendant aware of any facts or evidence indicating a mechanical mal-function or failure that caused or contributed to the accident? If so, state the nature of the facts or evidence and the mal-function or failure it indicates. . . . If the answer to the preceding interrogatory is in the affirmative, state specifically and in detail what the said claim of the defendant will be." *Id.* at 105.

30 See, *e.g.,* Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 22 P.2d 554, 558 (1933): "Originally the doctrine was applicable only in cases against common carriers"; Crozier v. Hawkeye Stages, Inc., 209 Iowa 313, 228 N.W. 320, 322 (1929): "The rule of res ipsa loquitur has been recognized as of peculiar application in actions for negligence against carriers of passengers."

31 See, Mc Larty, *Res Ipsa Loquitur in Airline Passenger Litigation,* 37 VA. L. REV. 55 (1951).

travel, the willingness of the courts to apply this doctrine in recent years has increased.[32]

In general, there are three criteria set forth which must be met before the doctrine of res ipsa loquitur may be invoked: the accident must be of the type that ordinarily does not happen in the absence of negligence; the defendant must have control of both inspection and use of the instrumentality at the time of the injury; the injurious occurrence must have happened irrespective of any voluntary action by the plaintiff at the time of the injury.[33] An additional requirement has been sometimes stated, that knowledge of the causes of the accident must be more readily available to the defendant than to the plaintiff,[34] but this condition is not universally accepted and has been criticized by some commentators.[35]

The procedural effects of the doctrine vary in different jurisdictions. In some, an inference of negligence is created so that the plaintiff's case will withstand a motion by the defendant for a directed verdict. But the inference is not strong enough to compel the jury to bring in a verdict for the plaintiff in the absence of evidence from the defendant. Other courts treat the doctrine as raising a presumption of negligence, requiring a directed verdict for the plaintiff if the defendant offers no evidence in explanation.[36]

In the case of commercial air travel it is clear that the plaintiff has no control over the plane at the time of the accident.[37] In the case of private carriers, especially where the plane was equipped with dual controls and where the possibility that the passenger had control of the plane existed, the courts have not allowed the application of res ipsa loquitur.[38] Some courts have held, particularly in the early years of aviation, that adverse weather conditions deprived the defendant of absolute control over the aircraft, and therefore refused to apply the doctrine.[39]

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32 *Compare* Smith v. Pennsylvania Central Airlines Corp., 76 F.Supp. 940 (D.D.C. 1948), *with* Cohn v. United Air Lines Transport Corp., 17 F.Supp. 865 (D. Wyo. 1937).

33 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

34 2 HARPER & JAMES, THE LAW OF TORTS § 19.5 (1956).

35 PROSSER, TORTS § 42 (2d ed. 1955).

36 See, *Id.* at § 43.

37 In fact, Federal legislation has recently made it a crime for a passenger to wrest away control of an airliner from the carrier's flight personnel:

> (i)(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished —
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> (A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or
>
> (B) by imprisonment for not less than twenty years, if the death penalty is not imposed.
>
> (2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of any aircraft in flight in air commerce.
>
> (j) Whoever, while aboard an aircraft in flight in air commerce, assaults, intimidates, or threatens any flight crew member or flight attendant (including any steward or stewardess) of such aircraft, so as to interfere with the performance by such member or attendant of his duties or lessen the ability of such member or attendant to perform his duties, shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be imprisoned for any term of years or for life. 75 Stat. 466 (1961), 49 U.S.C. 1472.

38 See, *e.g.*, Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936); Parker v. James E. Granger, Inc., 4 Cal.2d 668, 52 P.2d 226 (1935).

39 See, Herndon v. Gregory, 81 S.W.2d 849, 852 (Ark. 1935):

> [O]ne taking flight in an aircraft assumes certain apparent risks in this mode of travel which are of greater hazard than travel on land or water. Not only are the laws of gravitation being defied, but a high rate of speed is attained and peril from the elements is greater. The inherent nature and risk of travel at great speed and altitude at the same time requires a high

Since the contributory conduct of the plaintiff usually has no bearing on the cause of the accident, the application of res ipsa loquitur cannot be precluded on the grounds that the plaintiff's voluntary action had an effect on the injury complained of. Even early cases recognized that there is no assumption of risk by the plaintiff merely because he chose to travel by air, although one commentator has said that, "[A]n airplane soaring into the wild blue yonder is subject to the 'perils of the air' even as a vessel embarking upon an ocean voyage is subject to the 'perils of the sea.' "[40]

It is with respect to the requirement that the accident must be of the type that ordinarily does not happen in the absence of negligence that the courts have most often refused to apply the doctrine, especially in the earlier cases. Most often it is said that the aircraft could fail for any number of causes over which the operator of the plane had no control.[41]

> Our daily newspapers are replete with airplane accidents, the solution of which will never be known. . . . [T]he causes of accidents attributable to carelessness or negligence are but a small percentage of all the causes which are known in this young but growing enterprise. It is definitely known that the presence of air pockets, cross-currents, clouds, fog, mists, and a variety of climatic conditions bring about disaster for which no one is responsible, except it might be said that he who assumes to fly must look well to his own fate.[42]

But with modern apparatus improving the mechanical operation of aircraft, mechanical failures at the present time would seem less likely to occur in the face of adverse weather conditions. Thus it appears that human errors tend to account for the greater proportion of the mishaps. Acts of God would relieve the defendant of liability but the courts are recognizing, in view of modern storm detection and tracking devices, that weather conditions are highly predictable, so that the operator might be guilty of negligence for flying in the particular area at that time:

> [W]here science does afford or comes to afford a forewarning of a weather condition attended by the probability or reasonable likelihood of a hazard of dangerous turbulence, it would be too much to say that the airline need not anticipate and take the commensurate precautions reasonably available to guard against the hazard; and where the means or precautions, in given circumstances, of avoiding the hazard of dangerous turbulence are known . . . the failure to take such specific commensurate precautions . . . constitutes negligence.[43]

The slight possibility that the accident occurred because of an act of God should not preclude the application of res ipsa. With each advance in aircraft technology, it would seem more improbable that a given accident was due to an act of God, and more probable that some negligent act on the part of the airline was responsible.

With respect to the requirement that evidence of the true explanation of the accident be more accessible to the defendant than to the plaintiff, one commentator has concluded that since the CAB conducts extensive investigations concerning the causes of accidents, the plaintiff has as much knowledge as the defendant:

> When all of the evidence is assembled it is presented at a public hearing, and the Board subsequently isues [sic] a report of its findings, giving to one

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> degree of care in the construction, inspection and navigation of an airpline. However, faulty construction of the airplane, or negligence in its management in flight, enter very little into consideration of the cause of loss of many flyers who attempted a trans-oceanic flight and have never since been heard from. Many of the most skillful and best trained aviators, using the best constructed airplanes obtainable, have been lost. Usually public opinion presumes such loss attributable to storms, fog, air currents and other hazards of such travel.

40 McLarty, *supra* note 31, at 72.

41 See, *e.g.*, Cohn v. United Air Lines Transport Corp., 17 F.Supp. 865 (D.Wyo. 1937); Deojay v. Lyford, 139 Me. 234, 29 A.2d 111 (1942); Herndon v. Gregory, 17 Ark. 702, 81 S.W.2d 849 (1935).

42 Cohn v. United Air Lines Transport Corp., 17 F.Supp. 865, 867 (D.Wyo. 1937).

43 Cudney v. Braniff Airways, Inc., 300 S.W.2d 412, 417 (Mo. 1957).

> and all every bit of available information on the cause of the accident. How then can it be said that the airline has superior knowledge of the cause of the accident or superior means of obtaining that knowledge? [44]

The court in *Smith v. Pennsylvania Central Airlines Corp.*[45] provided an account to the question.

> It is further argued that since the Civil Aeronautics Board conducts an inquiry into every aircraft disaster and embodies its findings in a public report, the plaintiff and the defendant are on a parity in respect to access to information as to the causes of such catastrophe. If this line of argument were determinative of the question at issue, it would apply equally to railroad wrecks, since they are investigated by the Interstate Commerce Commission. This circumstance, however, has never been deemed a ground for denying the application of res ipsa loquitur to railroads. [46]

In *Haasman v. Pacific Alaska Air Express,*[47] the court also faced the applicability of res ipsa loquitur. There an airplane disappeared near Sitka on a day when no storm conditions prevailed in the area. No trace of the plane, its cargo or passengers was found. The court, allowing application of the doctrine, said: "The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant . . . is applied to cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff — not to cases in which there is an equality of ignorance as in the present case."[48]

There is a sharp conflict of authority as to whether specific acts of negligence may be alleged or introduced in evidence when the doctrine of res ipsa loquitur is invoked. The conflict is well illustrated in the aviation cases.

The courts have taken divergent positions: (1) that by specific allegations of negligence, the plaintiff has lost his right to rely on the doctrine; (2) that the plaintiff may take advantage of the doctrine if the inference of negligence to be drawn supports the specific allegations; (3) that the doctrine may be applied only if a general allegation of negligence accompanies the specific pleading; and (4) that the doctrine is available without regards to the form of the pleading.[49]

In *Goodheart v. American Airlines,*[50] the plaintiff alleged that the pilot was negligent because, among other things, he deviated from the course he was directed to follow and took a course over a mountainous area at an unsafe altitude. The court held that to submit the case to the jury on a theory of res ipsa was clearly in error because the doctrine "is a rule of necessity, to be invoked only when . . . direct evidence is absent and not readily available."[51] In *Johnson v. Western Air Express Corp.,*[52] the California court upheld the trial judge's refusal to instruct the jury on res ipsa loquitur because the plaintiff had relied on specific acts of negligence.

Lobel v. American Airlines,[53] applying New York law, distinguished *Goodheart,* and held that the doctrine was applicable even though the plaintiff was able to obtain information on cross-examination as to specific acts of negligence that might have caused the accident.

> We assume the New York Courts would oppose any rule which encouraged plaintiffs to go easy on defendants in cross-examination and which destroyed this truth-testing technique in *res ipsa loquitur* cases, for the information elicited under cross-examination helps the jury to decide intelligently whether or not a permissible inference of negligence should be drawn. [54]

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44 McLarty, *supra* note 31, at 77.
45 76 F.Supp. 940 (D.D.C. 1948).
46 *Id.* at 944-45.
47 100 F.Supp. 1 (D. Alaska 1951), *aff'd per curiam sub nom.,* Des Marais v. Beckman, 198 F.2d 550 (9th Cir. 1952), *cert. denied* 344 U.S. 922 (1953).
48 *Id.* at 2.
49 PROSSER, TORTS § 43 (2d ed. 1955).
50 1 N.Y.S.2d 288 (App. Div. 1937).
51 *Id.* at 291.
52 45 Cal.App. 614, 114 P.2d 688 (1941).
53 192 F.2d 217 (2d Cir. 1951).
54 *Id.* at 220.

In a 1959 case decided by the Second Circuit, the court held that under New York law, the jury was properly instructed as to res ipsa even though plaintiff's proof suggested that the crash might have been caused by negligence on the part of the pilot in flying too low, since the latter might not have been the only cause of the accident.[55]

The problems confronting the plaintiff in successfully maintaining an action against an airline for negligence can be grouped into two general categories: the divergence of the laws of the several states with respect to aviation accidents, whatever law is applicable being almost "fortuitous"; and the formidable task of proving the defendant's negligence. Attempts toward solving these problems — uniformity of law, and calling the carrier to the fore to explain the accident — have been made by the so-called "Warsaw Convention" and the Uniform Aviation Liability Act of the Commissioners on Uniform State Legislation.

International Air Travel

Liability rules for aviation accidents involving injury to passengers, baggage or goods in international air travel are prescribed by the "Convention for the Unification of Certain Rules Relating to International Transportation by Air" — the "Warsaw Convention" of 1929. The United States, though not a signatory to the Convention, became a party to it in 1934.[56] With international flights a common occurrence today, the Warsaw Convention is of highly practical importance.

Secretary of State Hull expressed the underlying policy of that Article of the Convention which gives the injured passenger a limited amount of damages in return for holding the carrier to almost absolute liability in a letter of transmittal to President Roosevelt, urging the acceptance of the Warsaw Convention by the United States.

> It is believed that the principle of limitation of liability will not only be beneficial to passengers . . . as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers . . . in the way of reduced transportation charges. [57]

In *Garcia v. Pan American Airways, Inc.*,[58] the court said that the purpose of the Warsaw Convention was "to unify rules relating to international transportation by air."[59] And one commentator wrote, along the same lines as Secretary Hull that, "The plan of liability embodied in the Warsaw Convention . . . appears to have been designed in part to *promote* international aviation by relieving it of certain liabilities."[60]

In the United States, any attempted limitation of liability by a common carrier, based on contract, has been struck down by the courts as a violation of public policy and therefore void.[61] However, with respect to the Warsaw Convention: "The public policy . . . must bow to the overriding policy of the treaty."[62] The Convention takes effect automatically when the required conditions are met; "[T]he Convention has automatic full impact, by its own terms and not because the parties

55 Citrola v. Eastern Air Lines, Inc., 264 F.2d 815 (2d Cir. 1959).
56 49 Stat. 3000 (1934).
57 S. Doc. Exec. G., 73d Cong., 2d Sess. 3 (1934).
58 55 N.Y.S.2d 317 (App. Div. 1945), *cert. denied,* 295 N.Y. 981, 68 N.E.2d 59 (1946), *cert. denied,* 329 U.S. 741.
59 *Id.* at 322.
60 Sweeny, *supra* note 14, at 183. (Emphasis added.)
61 See, *e.g.,* Conklin v. Canadian-Colonial Airways, Inc., 266 N.Y. 244, 194 N.E. 692 (Ct. App. 1935).
62 Indemnity Ins. Co. of No. America v. Pan American Airways, Inc., 58 F.Supp. 338 340 (S.D.N.Y. 1944).

have so agreed."[63] Of the Convention countries there is probably more criticism of the limitation on liability in the United States than elsewhere. "[T]he main interest . . . has been transposed *from* the problem: liability or non-liability, *to* the question of limited-unlimited liability."[64]

The Warsaw Convention applies "to all international transportation of persons, baggage, or goods performed by aircraft for hire."[65] The Convention defines "international transportation" as "any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Power, if there is an agreed stopping place within a territory subject to the sovereignty . . . of another power, even though that power is not a party to this convention."[66] Thus when the passenger ticket states that the transportation is subject to the rules of the Convention relating to liability, the route designated on the ticket, especially as to the place of departure and destination, determines whether the provisions of the Convention are applicable.

The effect of the Convention, in the absence of an agreement to the contrary between the airline and the passenger, is to set a limit on the liability of the airline in return for shifting the burden of proof regarding the airline's negligence from the plaintiff to the defendant. Any agreement waiving the liability limits must set higher limits of liability.[67] The maximum amount recoverable against the airline is the equivalent of $8,291.87 for the injury to or the death of a passenger.[68] In *Wyman v. Pan American Airways, Inc.*,[69] the court said: "The Warsaw Convention rules . . . raise a presumption of liability on the part of the carrier for injury or death to a passenger. . . ."[70] and in *Garcia*: "The Warsaw Convention contains, not only a limitation of liability . . . but a *declaration of liability* on the part of the carrier. . . ."[71] The presumption or declaration of liability on the part of the carrier can be defeated if the carrier is able to prove that "all necessary measures to avoid the damage"[72] had been taken or that "it was impossible . . . to take such measures."[73]

> [T]he overwhelming majority of the authors has construed "all necessary measures" as including a requirement for the exercising of due diligence — or the diligence of a *bonus pater familias*. . . . The same view has also been expressed by stating that "all necessary measures" are equivalent to "reasonable measures," . . . or that the carrier is not liable when no fault has been committed. . . .[74]

In the case of damage by "dol" (officially translated as "wilful misconduct")[75] by the carrier or its agents the liability limitations do not apply.[76] There has been

63 Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880, 885 (1949).
64 Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law — Part II*, 27 J. AIR LAW & COMM. 119, 124 (1960).
65 49 STAT. 3000, 3014, Art. 1(1) (1934).
66 *Id.* at Art. 1(2).
67 *Id.* at Art. 22(1).
68 *Ibid.*
69 43 N.Y.S.2d 420 (Sup. Ct. Trial Term 1943), *aff'd mem.*, 48 N.Y.S.2d 459 (App. Div. 1944), *motion for leave to appeal denied*, 49 N.Y.S.2d 271 (App. Div.), *cert. denied*, 324 U.S. 882 (1945).
70 *Id.* at 422.
71 Garcia v. Pan American Airways, Inc., 55 N.Y.S.2d 317, 319 (App. Div. 1945), *cert. denied*, 295 N.Y. 981, 68 N.E.2d 59 (1946), *cert. denied*, 329 U.S. 741. (Emphasis added.)
72 49 STAT. 3000, 3019 (1934), Art. 20(1).
73. *Ibid.*
74 Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law — Part I*, 27 J. AIR LAW & COMM. 1, 9 (1960).
75 49 STAT. 3000, 3014, Art. 25(1) (1934).
76 *Ibid.* See, Drion, *Limitation of Liabilities in International Air Law*, 197 (1954): "Article 25(1) of the Warsaw Convention requires 'dol' or 'une faute qui, d'après la loi du tribunal saise, est considerée comme équivalente au dol.' This is probably the most unhappy phrase of the entire Convention. It is the result and the starting point of a comedy of errors."

some problem in interpretation of the Warsaw Convention with respect to whether the agents of the carrier may be sued in an effort to circumvent the damage limitation provision.[77]

The Convention provides for a two-year statute of limitations,[78] but aside from that, with the exception of certain venue restrictions,[79] the procedural questions arising in a case in which the Convention applies are governed by the court's own law.[80]

Uniform Legislation

In the early days of commercial aviation a joint committee was formed by the American Bar Association, the American Law Institute and the National Commissioners on Uniform State Laws to study the problems arising from aviation accidents. Because their study showed that at the time it was almost impossible for plaintiffs to find probable evidence of the cause of an accident, they recommended that a common carrier by air be made absolutely liable for death or injury to its passengers.[81] Their recommendations were carried into the code accepted by the National Commissioners:

> The Legislature finds as a fact that it is rarely possible for individuals who have been injured or for personal representatives of individuals who have been killed . . . as the result of an aircraft accident, to establish the cause of the accident. Public policy demands that compensation should not be denied to any person because of his inability to prove negligence or his inability to rebut evidence offered by operators of aircraft that they were not guilty of negligence. It is primarily for this reason that certain provisions of this act impose liability upon operators of aircraft regardless of negligence. [82]

The approved draft provided for absolute liability,[83] unless the injury was

77 *Compare* Chutter v. KLM, 132 F.Supp. 611 (S.D.N.Y. 1955); *with* Pierre v. Eastern Air Lines, Inc., 152 F.Supp. 486 (D.N.J. 1957).

78 49 STAT. 3000, 3021, Art. 29(1) (1934). See, *e.g.*, Chutter v. KLM, 132 F.Supp. 611 (S.D.N.Y. 1955).

79 49 STAT. 3000, 3020 Art. 28(1) (1934).

80 *Id.* at 3021, Art. 28(2).

81 See remarks of Mr. William A. Schnader, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-EIGHTH ANNUAL CONFERENCE, 72 (1938):

> The argument is made, why should there be a different rule of liability applied to aircraft, to automobiles, and to railways? The answer is that in the case of airplane accidents, it is almost impossible for the plaintiff to find probable evidence of the cause of the accident.

82 UNIFORM AVIATION LIABILITY ACT § 103 (1938).

83 *Id.* at § 301-02:

> Section 301. *Scope of Article.*
>
> (a) This article shall apply to all bodily injuries to passengers of aircraft carrying any passengers for compensation, and death resulting therefrom if such injuries occurred within this State or if the contract of carriage was made within this State even if the injuries occurred outside this State.
>
> (b) This article shall not apply to bodily injuries or to death of passengers of aircraft not carrying any passengers for compensation. Liability for such injuries and death shall be determined according to the (common law or under the statutes of this State relating to recovery of damages by guests).
>
> Section 302. (*Absolute Liability Imposed.*) In cases within the scope of this article, the operator of an aircraft shall be liable to the extent hereafter in this article specified.
>
> (a) Regardless of negligence, for bodily injury and for death resulting therefrom, to a passenger, arising out of and in the course of the passenger-air carrier relations; and
>
> (b) For bodily injury to a passenger and for death resulting therefrom, not arising out of and in the course of the passenger-air carrier relation, if the passenger or his personal representative shall prove that the injury was caused by the negligence of the operator of the aircraft. In any such case there shall be no presumption of negligence against the operator.

caused by the passenger's wilful misconduct.[84] The act followed the same principle as the Warsaw Convention and gave the injured passenger a limitation of his damages in consideration for the carrier's being held absolutely liable.

This Uniform Aviation Liability Act was approved by the Commissioners in 1938, but later approval was withdrawn so that other groups could study it. In 1948 it was recommended by the Committee on the Uniform Aeronautics Code that the theory of the Act be changed "from that of absolute liability to that of a rebuttable presumption, or to provide that the carrier must prove that its negligence was not the proximate cause of the injury or death complained of."[85]

After this basic change in theory, no amended drafts were submitted for approval by the National Commissioners. In 1956, it was recommended that a new aeronautical code be drafted:

> . . . were prepared more than 20 years ago. Since their preparation the development of aeronautical law . . . [has] brought developments which render the provisions of these original Acts insufficient in many areas to cover the need of State legislation. . . . The Committee feels that in some All of the above mentioned uniform Acts in the field of Aeronautical law of the areas in which states may act to the extent that the same has not been preempted by the Federal Government, the availability of State legislation will tend to retard the assumption of additional federal authority.[86]

No new code had been submitted to the Commissioners through their 1960 annual conference.

Conclusion

The evidence problems in aircraft accident litigation are formidable, yet they must be surmounted if the plaintiff is to be successful. On the basis of available evidence, the plaintiff has to make an initial decision of great importance to his case — the selection of the forum. The best forum will have to be chosen, after the preliminary questions of jurisdiction and venue have been answered, on an analysis of a series of factors.

Among the first factors to be considered is the quality of the evidence. If there is a possibility that specific negligence can be alleged and proved, a favorable forum would be one, for example, where both specific negligence and the doctrine of res ipsa loquitur could be alleged by the plaintiff. If the evidence points to the possibility that the crash occurred because of some defect in design or manufacture, then a favorable strategy would be to join the manufacturer and airline as co-defendants, and the forum chosen would have to be one that recognizes actions for breach of warranty even though there is no privity of contract between the injured plaintiff and the manufacturer.[87] Another factor that the plaintiff has to

84 *Id.* at § 303: "Section 303. (*Exception.*) The operator of an aircraft shall not be liable for bodily injury to a passenger or death resulting therefrom, if the injury was caused by the passenger's wilful misconduct."

85 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FIFTY-SEVENTH ANNUAL CONFERENCE, 149 (1948).

86 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE SIXTY-FIFTH ANNUAL CONFERENCE, 179-80 (1956).

87 When an action is grounded on alleged breach of warranty for a particular purpose, the courts generally require that there be privity of contract between the parties before the action can proceed. However, this requirement has been under constant attack, and a growing number of courts are allowing recovery on these grounds even though there is no privity. There are two approaches that have been taken by the courts to reach this result: (1) the exemption of certain products, especially products for human consumption, from the privity requirement; (2) the extension of privity beyond the immediate purchaser to others who would be contemplated to use the product at the time it was purchased.

Cases involving suits by injured passengers against the manufacturers of aircraft, when they have been allowed to proceed even though there is no privity, have taken both of these approaches. An illustration of a case in which aircraft were exempted from the privity requirement is Middleton v. United Aircraft Corp., 6 Av. Cas. 17,975 (S.D.N.Y. 1960):

> The same considerations which have prompted the demise of the privity requisite in negligence actions and in implied warranty actions involving

weigh before selecting the forum is the liberality of the "discovery" procedures in the possible forums, especially if there is the possibility that specific negligence might be proved or if the courts might be against the application of res ipsa loquitur in aviation disaster cases.

These factors are relevant in determining strategy in general litigation, but much more so in the field of aviation accident liability. Clearly, the picture of mass dissimilarity among the states, since "the place of the injury is entirely fortuitous,"[88] calls for a re-examination of the present scheme. The passenger injured in a domestic aviation disaster cannot go to one body of law as can the international air traveler, but instead must plan his case around the varying laws of the state of the injury, the forum state and perhaps the state where the contract of transportation was entered into. When this same situation confronted international aviation, a uniform system of liability was considered best; uniform legislation governing domestic aviation liability might solve some of the problems caused by these varying laws. "In light of the extensive and common use of the airplane in modern times with most flights traversing states beyond the point of origin, the vagaries of different... acts coming into play in the event of accident may make it desirable that earlier doctrines be reconsidered."[89]

Some commentators have urged that *immediate* action be taken, and that this action be taken on the national level. The argument is that uniformity is necessary; by waiting for the fifty state legislatures to act, immediate uniformity is most

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food are present in the breach of warranty action involving an aircraft. The nature of this product is one which may well place life and limb in danger if the product is defective. *Id.* at 17,978.

See also, Siegel v. Braniff Airways, Inc., 6 Av. Cas. 17,978 (S.D.N.Y. 1960); Conlon v. Republic Aviation Corp., 6 Av. Cas. 17,982 (S.D.N.Y. 1960).

Other cases have taken the approach that the case could proceed against the manufacturer, because the passenger was expected to be affected by the goods. See, *e.g.*, Garon v. Lockheed Aircraft Corp., 29 U.S.L. WEEK 2584 (Cal. Super. Ct. 1961): "The passenger . . . should be considered to be in the "commercial family" of the purchaser Northwest Airlines, . . . and therefore, the passenger Mickus stands in such privity to the manufacturer as to be covered by the warranty made by the manufacturer to the purchaser Northwest Airlines."

See also, Hinton v. Republic Aviation Corp., 180 F.Supp. 31 (S.D.N.Y. 1959): "The conclusion seems to be that the duty extends to anyone who may reasonably be expected to be in the vicinity of the chattel's probable use and to be endangered if it is defective." *Id.* at 34.

These cases, however, represent only the landmarks, and the general rule remains that a person injured because of some defect in design or manufacture of the aircraft cannot recover unless he is in privity of contract with the manufacturer. See, *e.g.*, Goldberg v. American Airlines, Inc., 199 N.Y.S.2d 134, 23 Misc. 2d 215 (Sup. Ct. 1960), *aff'd mem.*, 214 N.Y.S.2d 640, 641 (App. Div. 1961):

> It must be conceded that the efforts to extend the doctrine of liability for breach of warranty, proceeding, as they do, on emotional rather than logical grounds, produce situations which are not easily resolved by reason. Basic principles are lost sight of or ignored. The consequences may be self-defeating. In this case extending plaintiff's theory to its next step, there would be no objection to suit against the person who supplied the manufacturer with either machinery, appliances or material. And then would come the one who did the same for that manufacturer or supplier until the chain of liability extended back to such a degree that a trial would involve so many parties and issues as not to be justiciable. *Id.* at 136.

But see Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E. 2d 773 (1961).

For commentaries on the airplane manufacturers' liability, discussing liability in cases proceeding both on the theory of negligence and on the theory of breach of warranty, see generally, Murray, *Aircraft Manufacturers' and Overhaulers' Liability for Defects in Construction, Design and Overhaul — The Extension of the MacPherson v. Buick Rule from the Terrestrial to the Celestial*, 13 U. MIAMI L. REV. 189 (1958); Comment, 1953 WIS. L. REV. 109.

88 Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E. 2d 526, 527, 211 N.Y.S.2d 133 (1961).

89 Pearson v. Northeast Airlines, Inc., 180 F.Supp. 97, 98-99 (S.D.N.Y. 1960).