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LITIGATION IMPLICATIONS OF THE CHICAGO O'HARE AIRPORT CRASH OF AMERICAN AIRLINES FLIGHT 191

JOHN J. KENNELLY*

BACKGROUND

On May 25, 1979, at 3:04:05 p.m. Chicago time, a McDonnell Douglas DC-10 Series 10 jet transport, operated by American Airlines as Flight 191, crashed shortly after takeoff into an open field and trailer park about 4,600 feet northwest of the departure end of Runway 32R[1] at O'Hare International Airport.[2] The left engine and related structures fell off the aircraft during its take-off roll.[3] Initially, the aircraft climbed away from the runway in a wings level attitude,[4] but shortly thereafter rolled into a steep left bank, descended rapidly, and crashed. The impact occurred one minute and 20 seconds after the takeoff roll had begun.[5] The aircraft carried 258 passengers and 13 crewmembers, all of whom were killed.[6] Additionally, on the ground, two people were killed and two were injured.[7]

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1. Runway numbering corresponds to the magnetic heading of the runway to the nearest ten degrees on the compass rose; thus, an aircraft landing or taking off on Runway 32 would be flying a heading of approximately 320°. The letter "R" signifies that Runway 32R is the right of two parallel runways.

2. NATIONAL TRANSPORTATION SAFETY BOARD, *Aircraft Accident Report: American Airlines, Inc., DC-10-10, N110AA, Chicago-O'Hare International Airport, Chicago, Illinois, May 25, 1979* at 1 (1979). [hereinafter cited as *Accident Report.*]

3. *Id.*

4. *Id.* at 2. "Attitude" refers to the aircraft's relation to the horizon, i.e., whether the nose is up or down and whether the wings are level or banked. Attitude is the relationship between the aircraft's axes and the horizon.

5. *Id.*

6. *Id.*

7. *Id.*

This was the fourth worst air disaster in world history, and the worst ever in the United States.[8] The National Transportation Safety Board and Congress, realizing the need for a prompt and thorough inquiry, initiated a massive investigation.[9] Only twelve days after the accident, the Federal Aviation Administration suspended the Type Certificate for the McDonnell Douglas DC-10,[10] thus grounding all DC-10s operated by U.S. carriers until the Type Certificate was reinstated on July 13, 1979.[11]

The apparent structural failure of a modern jetliner caused reverberations throughout the world. Hundreds of DC-10s carrying thousands of passengers were being flown millions of miles each day by scores of domestic and international airlines. This accident took place in normal weather.[12] There could be no contention of low level wind shear, vortex turbulence, sabotage or any other outside cause. If there was a fatal flaw in the design of the wing pylons which support the engines, there was indeed cause for alarm. If the cause of the pylon fracture and failure could be attributed to improper maintenance, and a design or structural defect ruled out, remedial inspection measures would be sufficient to allay the fears of the flying public.

Impact was most direct upon the families of the deceased victims. The passengers were from various states of the United States and from different foreign countries. What were their rights? Against whom? What judicial system would resolve their rights? What laws governed the various issues?

Various problems were involved. For instance, one threshold issue was whether a legal right existed to claim punitive damages in the death cases, assuming that a factual basis could be made out to warrant such damages. Moreover, what law or laws governed compensatory damages? Did different laws apply depending upon the place of residence of each deceased passenger; or did the traditional *lex loci delicti*[13] rule apply? If so, the Illinois Wrongful Death Statute and Survival Act would provide the criteria for compensatory damages in all death cases regardless of the state or country where the decedent lived.

States' standards for measuring compensatory damages in wrongful death cases differ markedly throughout the United

8. TIME, June 4, 1979, at 12.

9. *See, e.g., supra, Accident Report*, note 2.

10. 44 C.F.R. § 33,389 (1979).

11. 44 C.F.R. § 42,170 (1979).

12. *Accident Report, supra*, note 2, at 3.

13. *Lex loci delicti* is the doctrine which applies the law of the state in which the place of the wrong took place. "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

States.[14] Some states even set arbitrary limits upon compensatory awards for the deaths of single persons without dependents.[15] In like manner, states differ on the allowance of punitive damages[16] and prejudgment interest.[17]

The foregoing merely alerts the reader to the confused state of transitory tort litigation arising out of airplane crashes. Although the judiciary has attempted to achieve consistency, the diverse laws within the United States and among over two hundred sovereign countries remain an insurmountable obstacle to equal treatment of the claimants. This article will demonstrate the complexity of the problems which confront judges and counsel in attempting to fairly and expeditiously resolve the claims arising out of an accident such as the Flight 191 crash.

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14. Depending on the state in question, the following might or might not be elements of compensatory damages: the mental pain and suffering of the surviving next of kin, *e.g.* Martin v. United Sec. Serv., 314 So. 2d 765 (Fla. 1975); the loss of society suffered by a surviving spouse, *e.g.* Howard v. Mansell, 430 P.2d 9 (Okla. 1967); a child's loss of parental care and guidance, *e.g.* Westfall v. Benton, 1 Mich. App. 612, 137 N.E.2d 757 (1965); the loss of probable estate accumulations of the decedent, *e.g.* Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (1965).

15. *See, e.g.*, N.H. REV. STAT. ANN. § 556.13 (1973) (limit is $50,000.00 if there is no surviving spouse, dependent child or dependent parent); COLO. REV. STAT. § 14-1-3 (1969) (damages not to exceed $45,000.00 if decedent left neither a widow, widower, nor minor children, nor a dependent father or mother).

16. In some states, punitive damages claims are permitted Kritser v. Beech Aircraft Corp., 479 F.2d 1069 (5th Cir. 1973). In other states, punitive damages may be awarded in injury cases, but not in death cases. *E.g.* Pause v. Beech Aircraft Corp., 38 Cal. App. 3d 455, 113 Cal. Rptr. 416 (1974). The United States Court of Appeals, Seventh Circuit held that, under Illinois law, punitive damages are not recoverable in a wrongful death action. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 604-05 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713). There are additional differences in the treatment of corporations in awarding punitive damages. A corporation might be vicariously liable for the egregious conduct of its employees, regardless of their lack of authority or the absence of ratification. *E.g.*, Southern Camp W.O.W. v. Roland, 232 Ala. 541, 168 So. 576 (1936). Other states require proof of egregious conduct by the corporation at a managerial level. Tolle v. Interstate Sys. Truck Lines, Inc., 42 Ill. App. 3d 771, 356 N.E.2d 625 (1976).

17. Some states, by statute, allow prejudgment interest, i.e., interest from the date of death upon the total awards in death cases. *See, e.g.* MICH. STAT. ANN. § 27A.6013 (1981) (amending Mich. Comp. Laws Ann. § 600.6013). Other states, as a result of judicial interpretation of wrongful death statutes, allow prejudgment interest on awards of compensatory damages, even absent a specific provision. *See, e.g.*, State v. Phillips, 470 P.2d 266 (Alaska 1976). In those states which allow prejudgment interest, the rates of such interest vary substantially. Michigan for instance, allows prejudgment interest at a reasonable rate determined by the jury from the date of death to the date of filing, and interest of 12% per year from the date of filing to the date of trial. MICH. STAT. ANN. § 27A.6013 (Callaghan 1981). In contrast, New York allows prejudgment interest at a rate of 6% per year. N.Y. CIV. PRAC. LAW § 5004 (McKinney 1979).

Choice of Law Problems

A preliminary problem confronting lawyers engaged in the practice of aviation law is that they are compelled to deal with outmoded, anachronistic and frequently unworkable laws in resolving highly technical disputes. The United States District Court judges to whom the DC-10 cases were assigned, Judges Robson and Will, recognized the inadequacy of the law governing the Flight 191 disaster and strongly recommended the adoption of national legislation.[18] The United States Court of Appeals reiterated and explicitly approved these observations and recommendations of Judges Robson and Will.[19]

The DC-10 cases were in federal court by virtue of the diverse citizenship of the litigants. Federal courts must apply relevant state laws in deciding diversity cases.[20] The courts were faced with the dilemma of fashioning remedies for the families of the victims with some semblance of uniformity. As is demonstrated in this article, lacking national legislation, the system does not permit uniformity of treatment. Delay and uncertainty are inevitable, regardless of the ability, diligence and dedication of the judges and lawyers involved in the litigation.

Suits arising out of the Flight 191 disaster were filed by various plaintiffs in state and federal courts throughout the country but principally in Illinois and California. Some plaintiffs named only American Airlines and McDonnell Douglas as defendants. Others named various component parts manufacturers as well as individuals (principally employees of McDonnell Douglas). Such plaintiffs prevented federal court jurisdiction by joining corporations which had their principal places of business in the state where suits were filed, or by joining individual defendants who were residents of the state where suits were filed.[21]

Opinions were sharply divided among plaintiffs' attorneys as to whether to sue in federal or state court, the majority opting for the federal court. Some believed that federal court juries are preferable; others liked state court juries. Some liked the flex-

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18. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044, 1054 (N.D. Ill. 1980), *aff'd*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713).

19. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 632-33 (7th Cir. 1981).

20. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The United States district courts, when hearing diversity cases, must sit as a state court in the sense that they may not employ a "federal law" or "equitable principles" in order to achieve uniformity.

21. *See* Corrigan, *Remandment from Federal to State Court*, 1975 TRIAL L. GUIDE 222. (Cases filed in California state court were remanded back to the state court after removal by U.S. District Judge Matthew J. Byrne of Los Angeles).

ibility and permissiveness of the Federal Rules of Evidence, while others preferred state court procedures.[22]

Approximately 150 cases ended up in various federal courts throughout the country, and were transferred by the Multidistrict Litigation Panel[23] to the United States district court in Chicago for coordinated pretrial discovery. All federal court cases were assigned to United States District Court Judges Edwin A. Robson and Hubert L. Will, both seasoned experts in the area of multidistrict litigation. About 75 cases remained in the state court of California in Los Angeles. Thus, demonstrative of the need for national legislation, there was parallel litigation in the federal and state courts.[24]

As mentioned, the choice-of-law rules applied to diversity suits are those of the states where the actions were originally filed.[25] Determination of what *substantive* law applied to the various issues in this litigation was like trying to tatoo soap bubbles. Judges Robson and Will recognized the chaotic condition of this type of litigation in the absence of national legislation. The United States Court of Appeals agreed with their comments:

> In conclusion, we agree with the district court's comments on the problems involved in determining choice-of-law issues in airplane crash cases. Airline corporations and airplane manufacturers are subject to uniform federal regulation in almost every aspect of their operations, except their liability in tort. . . . Along with the district court, we conclude that it is clearly in the interests of pas-

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22. This author believes that every jury is different whether in the state or federal court and there is no definitive choice between the two courts.

23. *See infra* notes 91-124 and accompanying text.

24. The absurd consequences of this are discussed in this article, especially from the standpoint of the application of *res judicata* and estoppel by verdict. See notes 113-124 and accompanying text *infra*. It so happened that these doctrines have become largely academic in this litigation. American Airlines and McDonnell Douglas conceded responsibility to pay compensatory damages by admitting that at least one of them is liable for compensatory damages. Brief for Plaintiff's Committee at 3, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (7th Cir. 1981). They also tendered stipulations that they would not contest compensatory damages if the stipulating plaintiffs would not claim punitive damages. *Id.*

On the subject of punitive damages, United States District Court Judge Hubert L. Will demonstrated his attunement to reality and grasp of the issues:

> I think at this point the whole punitive damages issue is vastly out of proportion with its possible benefit. * * * * I am not trying to decide a case before I hear the evidence, but it is true, isn't it, *that there never have been punitive damages awarded in the air crash disaster case.*

Transcript Pretrial Hearing of June 26, 1980, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980) (emphasis added).

25. Van Dusen v. Barrack, 376 U.S. 612 (1964); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

sengers, airline corporations, airline manufacturers, and state and federal governments, that airline tort liability be regulated by federal law. Of course, we are well aware of the fact that it is up to Congress, and not the courts, to create the needed uniform law.[26]

Two choice of law principles for determining which state substantive law applies have developed at the state level. The traditional doctrine of *lex loci delicti*[27] requires the court to apply the law of the place of the occurrence. The law of "paramount interest"[28] requires the court to consider varying factors in determining what substantive law applies to a particular issue in the litigation. The criteria differs from state to state. A federal court must apply the choice of law rule of the state in which it sits in determining what substantive law to apply.[29]

Strict adherence to *lex loci delicti* resulted in such gross injustice that courts devised ways to avoid it. In *Kilberg v. Northeast Airlines*[30] the New York Court of Appeals rejected Massachusetts' $15,000 limit on claims by survivors of a New York resident who was killed in Massachusetts. The court instead applied the law of New York (which had no limit of damages), opining that New York's interest in the litigation was the greater. In 1963, a further departure from the *lex loci delicti* doctrine was made in *Babcock v. Jackson*,[31] where the court rejected the law of the place of the accident, and held that the court may apply the law of the place which has the greatest concern with the *particular issue* raised in the litigation.[32] *Babcock* became the first case to use the "paramount interest" test.[33]

United States District Court Judge Manuel L. Real aptly articulated the choice of law chaos with reference to litigation arising out of a Paris air crash which killed 322 passengers:

> The Paris Air Crash brought us—as it had never been brought to us before the stark realization of the magnitude of this peculiarly 20th century phenomena. With it came a recognition that a system mired down with 18th and 19th century rules and procedures is illsuited to the fair, just and speedy disposition of cases contemplated by our Federal Rules of Civil Procedure.
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> ***
>
> The Paris Air Crash with its 201 lawsuits involving 322 decedents—who—at the time of their death—resided in 24 separate countries and 12 different states in the United States—presented Judge Hall with con-

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26. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594, 632-33 (7th Cir. 1981).

27. *See supra* note 13.

28. This rule is also variously known as "grouping of contacts," "center of gravity," or "most significant relationship."

29. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

30. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

31. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

32. *Id.* at 481, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 50.

33. 1 KREINDLER, AVIATION ACCIDENT LAW § 2.02 (1980).

flict of laws problems that not even the most sadistic law professor would inflict upon his students.

With all of the innovation and wisdom that Judge Hall could bring to these cases they did point up one very dramatic defect in how we are handling this type of massive litigation. It is a very costly, demanding and time consuming process. More than six years later we have not yet seen the end. There still lingers—now on writ of certiorari to the Supreme Court of the United States—the last remnants of these 201 lawsuits.

This kind of delay—much just inherent in the present process—is—I believe—an intolerable burden on our justice system. No survivor—often desperately in need of relief—should have to wait for their relief simply because questions of liability between defendants are the only real contest in the litigation.[34]

The Liability Issue

At first blush, the case appeared simple. Clearly, *either* American Airlines *or* McDonnell Douglas was liable for compensatory damages. Accordingly, both defendants tendered stipulations of liability for compensatory damages at the outset. The stipulations were, however, conditioned upon waiver by the plaintiffs of any claims for punitive damages.[35] Some plaintiffs stipulated; most did not. Moreover, both defendants consistently and vigorously denied their own liability. The critical issue would be *which* was liable for compensatory damages. As to the non-stipulating plaintiffs, proof was required to show the liability of at least one of the defendants.

Lawyers who have not tried this type of case may feel that they can rely on *res ipsa loquitur*, and simply prove the fact of the crash. Such reliance is misplaced. In many courts, if a plaintiff tries the case in reliance on *res ipsa loquitur*, he is precluded from submitting proof of specific acts of negligence.[36] The circumstances of the instant litigation, however, set each defendant in opposition with the other. Evidence of causation would thus be necessary to establish the identity of the negligent party or parties.

In response to the *res ipsa* theory, the airline would come forth with proof of careful maintenance, and the manufacturer would present evidence of the following: due care in the design and production of the aircraft; compliance with government regulations and the state of the art; extensive research and testing; and the absence of any similar accidents involving its DC-10 aircraft. Bearing in mind that in the early stages of this litigation the punitive damage issue remained unresolved, plaintiffs had

34. Address by the Hon. Manuel L. Real, Aircraft Builders' Counsel, Inc. Fall Seminar (September 25, 1980).

35. *See supra* note 24 and accompanying text.

36. KENNELLY, LITIGATION AND TRIAL OF AIRCRAFT CASES at 2 (1969).

no choice but to pursue discovery or, more accurately, the taking of depositions. They had to prove the probable cause of the loss of the pylon and engine and its proximate causal relationship to the crash of the aircraft in order to supply the basis for a liability finding as to compensatory and possibly punitive damages.

Proof of specific acts of negligence thus became necessary. What caused the pylon to fracture and fail? Could and should the aircraft have been flown safely after the engine fell off the airplane? If so, would this constitute an intervening superseding cause, so as to insulate the manufacturer? Was the pylon fracture due to a design or manufacturing defect, or both? Was it due to negligent maintenance, or to a combination of a design or manufacturing defect and negligent maintenance on the part of the airline? Assuming negligent maintenance on the part of the airline, was the aircraft design such that the pylons were peculiarly susceptible to fractures which could propogate without warning so as to result in the failure of a pylon to support an engine, causing hydraulic failure and the crash? If such was the case, both the airline and the manufacturer would be liable. If the pylon fracture was caused solely by negligent maintenance, which the manufacturer could not reasonably have foreseen, then only the airline would be liable.[37] On the other hand, if the pylon fracture was due solely to a design or manufacturing defect, or to both, and the airline had no reasonable way to discover such defect, the airline could urge a "latent defect" defense.[38]

Thus, while the punitive damages issue remained open during the pendency of the appeal to the Court of Appeals, Judges Robson and Will wisely ordered that discovery concerning *all* liability issues proceed rapidly.[39] At this juncture, American Airlines and McDonnell Douglas had not resolved their dispute with one another. American was claiming approximately $35,000,000 in damages from McDonnell Douglas for its loss of

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37. Assuming the manufacturer did not violate some other duty by failing to provide a backup hydraulic system.

38. *But see* Devito v. United Airlines, 98 F. Supp. 88 (E.D.N.Y. 1951) (nonavailability of a latent defect defense to an aircarrier).

39. The United States Supreme Court has denied the Petition for Writ of Certiorari filed by some of the plaintiffs. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044, 1050 (N.D. Ill. 1980), *aff'd*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713). Some experienced aviation attorneys did not make any claims for punitive damages, apparently believing that their clients' interests would better be served by pursuing only compensatory damages. *See infra* notes and accompanying text. Otherwise, the claims of their clients could be delayed for years, during which substantial cumulative interest would be lost. Also, historically, there is no record of a plaintiff ever recovering punitive damages in commercial airline accident litigation.

the aircraft. In addition, each continued to blame the other; if both were liable, the comparative negligence of each would have to be determined.[40]

Efforts to delay discovery were flatly rejected by the District Court. Regardless of the outcome of the appeal of the punitive damages issue, a petition for certiorari would eventually be filed in the United States Supreme Court.[41] No one had the prescience to predict how or when the punitive damage issue would finally be decided.

The plaintiffs, of course, were not concerned with the comparative negligence issue as far as the airline and manufacturer were concerned. Each defendant was adequately insured and, in any event, solvent and able to pay any judgments. Despite their lack of interest in the internecine battle between American Airlines and McDonnell Douglas, the plaintiffs had no choice but to proceed with discovery, or more accurately, the taking of evidence depositions to show the liability of the defendants. The Plaintiffs' Committee concluded that the plaintiffs needed only nine depositions to prove liability.[42] The defendants, however, served notices for the taking of approximately 200 additional depositions.[43] Practically speaking, there was nothing the court or the plaintiffs could do to prevent this massive discovery.[44] To expedite matters, the district court ordered that depositions be taken simultaneously.[45] Accordingly, there were as many as three "tracks" of depositions at the same time.[46]

40. *See* Skinner v. Reed-Prentice Div. Package Mach. Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1977), *modified*, 70 Ill. 2d 16, 374 N.E.2d 444 (1978).

41. A Petition for Certiorari was in fact filed, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), *aff'd*, 644 F.2d 594 (7th Cir. 1981), *petition for cert. filed sub. nom.* Lin v. American Airlines, 50 U.S.L.W. 3080 (U.S. April 6, 1981), and *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713).

42. Brief of Plaintiffs' Committee at 4, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

43. *Id.*

44. If protective orders were sought and granted, attempting to limit the depositions or arbitrarily impose "cut off" dates, there was a risk that the Court of Appeals would later rule that such orders constituted reversible error, thus compelling a new trial and many years of delay.

45. Transcript Pretrial Hearing of June 26, 1980, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713).

46. While this system expedited discovery, this author has serious misgivings as to whether it is conducive to accurate and complete fact finding in this type of litigation. If liability as to the defendants constituted a *genuine* issue in this litigation, the plaintiffs would have been confronted with difficult and in instances insoluble problems in the examination of the witness. This is especially true in federal court litigation where so-called "discovery" depositions are admissible in evidence. *See* FED. R. CIV. P. 32 (1980). For example, if two employees of American Airlines are being interrogated at

It would unduly lengthen this article to attempt to review the enormous amount of discovery carried out in this litigation. The dispute between American and McDonnell Douglas is, however, worth mentioning. The principal contention against the airline was that it negligently engaged in a single unit removal procedure of the engine and pylon during maintenance contrary to the maintenance manual of the manufacturer. The airline took the position, however, that there was nothing unusual about its procedure and that the cause of the fracture and separation of the pylon was attributable entirely to the absence of quality control on the part of the manufacturer.[47]

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the same time, but in different locales, one might refer to meetings, conversation or correspondence with the other. Obviously, if different plaintiffs' attorneys are questioning the witnesses simultaneously in different rooms, there is no way for them to interrogate such witnesses effectively. In the Flight 191 litigation, the problem was largely academic because of the stipulation as to compensatory damages. Except for the nine depositions taken by the plaintiffs, discovery consisted of depositions taken by the defendants in which they sought to show their own exercise of care and the negligence of the other. While this might seem helpful to the plaintiffs, in reality the families of the innocent passengers were being victimized. While this internecine contest was being litigated, the insurers of the defendants had the benefit of enormous cumulative interest. *See* notes 136-44 and accompanying text *supra*.

47. Defendant's Answer to Plaintiff's Complaint, Schade v. American Airlines, No. 79 C 2551, (N.D. Ill. 1979). In addition, an American Airlines' maintenance supervisor was examined in reference to the maintenance procedures of the airline, the extent to which the airline deviated from the procedures prescribed by the manufacturer, the knowledge of the manufacturer of the changed methods employed by the airline for removing the pylon and engine as a single unit, instead of separately, the preparation and use by the airline of an "Engineering Change Order" (ECO) which described the changed method of removing the pylon and engine, the methods employed by other airlines to perform such work, and generally facts together with opinion evidence as to the cause or causes of the pylon fracture and failure on the subject aircraft. On examination by Mr. Kennelly, this witness testified *inter alia*,

Q. Do you have an opinion whether the explanation for the ten inch crack in N110AA lies in the incontrovertible deficiency in design, manufacture, assembly and installation by McDonnell Douglas?
(This question was asked on the basis of documents obtained as a result of Requests for Production served upon both defendants before depositions were taken.)

A. I have an opinion, yes.

Q. What is your opinion?

A. I believe that a thrust load was imposed on the aft pylon bulkhead, which caused the failure of the bulkhead. And I believe that the thrust load was imposed because of a lack of clearance between the forward leg of the clevis and the forward face of the Monoball or spherical bearing.

Q. Have you an opinion as to the cause of the lack of clearance you just described?

A. I believe that when the pylon was manufactured, the tolerance stack-up reduced the clearance to the point where a contact could be made with the spherical bearing and the forward leg of the clevis

In view of the defendants' agreement not to dispute liability for compensatory damages, it is improbable that either the district or the state courts will permit trials as to liability.[48] Cases predicated on this type of stipulation have resulted in very substantial verdicts.[49] Despite the early statements of the attorneys of the airline and the manufacturer that they "agreed" that plaintiffs were entitled to recover from *one* of them (while *each* contended that it was not liable), plaintiffs had no choice but to proceed with proof of liability. Until American Airlines and McDonnell Douglas agreed in open court to withdraw their answers in which they denied any negligence or liability, the contingency remained as to the liability of each of them. In consequence, even though the district court wisely accelerated discovery, the end result is that liability for compensatory damages is no longer a genuine issue in this litigation.

A DETAILED LOOK AT THE FLIGHT 191 CRASH

The Aircraft

The DC-10 is a three engined, wide-body commercial jet transport.[50] The Series 10 is the earliest version of the DC-10 and was designed for use on routes ranging from 300 to 3,600 miles.[51] The aircraft can accommodate up to 380 passengers in a high-density seating configuration, and measures 181 feet, 5 inches in overall length, with a wingspan of 155 feet, 5 inches.[52]

The four physical forces which act upon an aircraft in flight are lift, weight, thrust, and drag. Figure 1 illustrates the relationship between these four forces.

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on the first application of thrust after bearing replacement. I don't believe the design created the lack of clearance. *I believe the quality control when the pylon was built created the lack of clearance problem.*

48. Brief of Plaintiffs' Committee at 3, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (1981).

49. Personal Injury Newsletter, Sept. 1981, at 43.

50. The McDonnell Douglas DC-10 Type Certificate (No. 422WE) was initially applied for on December 26, 1967, and was originally issued by the FAA on July 29, 1971. The aircraft involved in the Chicago disaster was manufacturer's serial number 46510, U.S. Registration Number N110AA. Assembly of N110AA was completed by McDonnell Douglas on October 29, 1971, and American Airlines accepted delivery of the aircraft on February 28, 1972.

51. W. GREEN, THE OBSERVER'S BOOK OF AIRCRAFT 154-55 (Warne 22d ed. 1973).

52. *Id.*

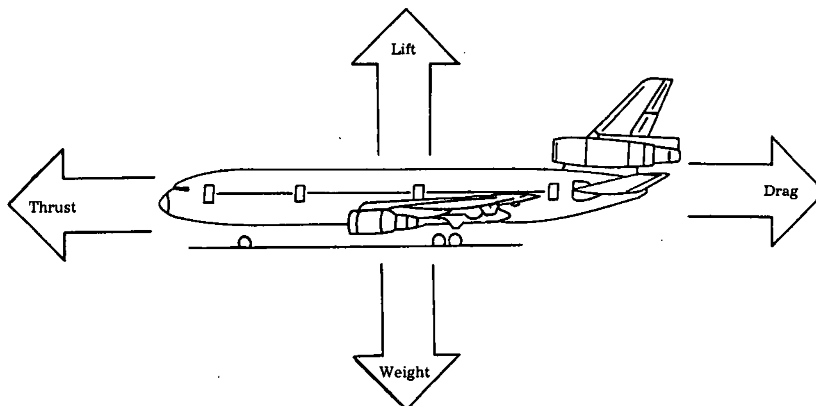

FIGURE 1

A fixed-wing[53] airplane, such as the McDonnell Douglas DC-10, overcomes the force of gravity (its weight) when available thrust propels the aircraft forward at a speed sufficient to permit Bernoulli's Principle[54] to take effect.

The Cause of the Crash

In the case of Flight 191, the aircraft indisputably suffered a structural failure while taking off in normal weather conditions. The left, or No. 1 (underwing) engine fell off the aircraft while the aircraft was in the air[55] because of the failure of one of the pylons.[56] There are three major structural fittings attaching the

53. The term "fixed-wing" is used in opposition to the term "rotary-wing." "Rotary-wing" refers to helicopters, "fixed-wing" to conventional aircraft.

54. Daniel Bernoulli (1700-82), Swiss scientist.

> BERNOULLI'S THEOREM: A theory of hydro-dynamics which states that Fluid pressure is inversely proportional to its velocity squared, i.e., increase the speed and decrease the pressure, or decrease the speed and increase the pressure. This law is a very important law, and one common case of its application is to the air flow over the upper surface of an air-foil, causing a low pressure area (suction) because the air stream has been speeded up and the high pressure area upon the lower surface of the airfoil where the air-stream has been slowed down (or damned up under the wing).

AVIATION AND SPACE DICTIONARY. 60 (4th Ed. 1961).

55. *Accident Report, supra* note 2, at 2. Not only did all eyewitnesses verify this, but photographs demonstrated beyond doubt that the aircraft sustained the loss of its left engine during takeoff and crashed shortly thereafter.

56. *Id.* Pylons are the structures beneath the wings, and incorporated into the tail assembly, which support and connect the engine assembly to the main frame of the aircraft. There are three pylons on DC-10 aircraft,

pylon to the wing.[57] Immediately behind the pylon forward bulkhead is the thrust link, designed to transmit engine thrust from the engine to the wing.[58] The thrust link is attached to the wing and the pylon by means of bushing and bolt assemblies at each attach point.[59]

Initially, a spokesman for the National Transportation Safety Board publicly attributed the crash to a fatigue fracture and failure of a three-inch bolt vital to the integrity of the pylon.[60] This alleged cause was later repudiated. The bolt fracture was described as typical of overload, and was not the cause but rather the result of the pylon failure.[61] The pylon failure in turn caused the hydraulic system[62] to fail. When the left engine and

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one on each wing and one in the vertical tail section. The pylons suspend and support the demountable General Electric CF6-6D engines. *Id.* at 3.

Each DC-10 pylon consists of a main frame, an auxiliary structure, major support fittings for the engine and pylon-to-wing attach points. There are also attach points for a rail structure to support the engine during disassembly or replacement.

57. *Id.*

58. *Id.*

59. *Id.*

60. Chicago Sun Times, May 28, 1979, at 2 (remarks of Elwood Driver, National Transportation Safety Board Vice Chairman). The bolt, called the thrust link attach bolt, is made of steel and is approximately three-eighths of an inch in diameter. Located under the wing, it connects structural members of the wing with a piece of metal called the thrust link. The bolt helped connect the engine to the wing. It was one of two steel bolts that kept the engine secured during the crucial maneuvers of takeoff and landing. *Id.*

61. *Accident Report, supra* note 2, at 67. The National Transportation Safety Board completely disregarded the initial conclusion and found:

> The overload fracture and fatigue cracking on the pylon aft bulkhead's upper flange were the only preexisting damages on the bulkhead. The length of the overload fracture and fatigue cracking was about 12 inches. The fracture was caused by an upward movement of the aft end of the pylon which brought the upper flange and its fasteners into contact with the wing clevis.
>
> The pylon to wing attach hardware was properly installed at all attachment points.
>
> All electrical power to the No. 1 a.c. generator bus and No. 1 d.c. bus was lost after the pylon separated. The captain's flight director instrument, the stall warning system, and the slat disagreement warning light systems were rendered inoperative. Power to these buses was never restored.
>
> The No. 1 hydraulic system was lost when the pylon separated. Hydraulic systems No. 2 and No. 3 operated at their full capability throughout the flight. Except for spoiler panels No. 2 and No. 4 on each wing, all flight controls were operating.

62. A hydraulic system uses a fluid to transmit pressure from one mechanical device to another. DC-10 aircraft are equipped with hydraulic systems which move the flight controls. Additional hydraulic systems power the horizontal stabilizer, the retraction and extension of the landing gear, the brakes, and the nosewheel steering. *DC-10 Flight Crew Operating Manual*, Vol. 3, ch. 12, p. 12-10-01 (published by McDonnell Douglas Corp., Long Beach, California).

pylon separated from the DC-10, the aircraft had already accelerated through V_1 speed.[63] Consequently, in spite of the loss of one-third of the aircraft's available power, the flightcrew had no choice but to continue the takeoff.[64] In the takeoff sequence V_1 is the first critical speed after V_R.[65] For this DC-10 aircraft, V_R on final takeoff was 142 knots. Separation of the aircraft's left engine and pylon occurred at about the time Flight 191 reached V_R speed.[66] The No. 1 engine and pylon assembly detached from the aircraft, went over the top of the left wing and the fuselage, and fell to the side of the runway.[67] Despite the total loss of the No. 1 engine thrust, the aircraft continued its takeoff and became airborne at 3:03:38 p.m. CDT, approximately 6,700 feet from the start of its takeoff roll.[68]

During an 18 second period after becoming airborne,[69] the crew managed to maintain a relatively stable attitude,[70] indicating that the aircraft was being flown to gain altitude. During this 18 second period, the DC-10 reached an altitude of approximately 325 feet above ground level.[71]

63. When it began its final takeoff, N110AA's gross weight was approximately 379,000 pounds. The slats were in takeoff position, and the flaps were extended 10°. Under these circumstances, the aircraft's V_1 speed was 139 knots. *Accident Report, supra* note 2, at 20. V_1, also known as "critical engine failure speed" or "decision speed," is the speed reached during the takeoff roll at and above which the aircraft is committed to takeoff. In other words, once the aircraft has accelerated to V_1, the takeoff may no longer safely be aborted, even if an engine failure occurs. When the airspeed indicator reaches V_1, the pilot who is not actually flying the aircraft will call out "V_1" in order to alert the other pilot that takeoff must be continued, regardless of any subsequent occurrences.

64. The loss of the pylon and engine also severed an electronic warning system, thus creating a situation in which the flightcrew had inadequate opportunity to recognize and prevent the ensuing stall.

65. V_R is the speed at which the aircraft is "rotated," which is the action of applying back pressure to the control column and thereby lifting the plane's nosewheel off the runway (while the underwing landing gear continues to roll along the runway surface).

66. These facts are known from an analysis of the digital flight data recorder which was aboard the aircraft. Federal Aviation Regulations require every aircraft certificated for operation above 25,000 feet or powered by turbine engines to be equipped with a flight data recorder. 14 C.F.R. § 121.343 (1980). A recorder is used to preserve a record of various flight and control information, which facilitates investigation of aircraft accidents. The recorder must operate continuously from the instant the airplane begins the takeoff roll until it has completed the landing roll at an airport. 14 C.F.R. § 121.343(b) (1980).

67. *Accident Report, supra* note 2, at 2.

68. *Id.* at 5.

69. From 3:03:38 to 3:03:56 p.m. C.D.T.

70. *Accident Report, supra* note 2, at 5. The aircraft rolled only slightly, varying from zero to five degrees roll attitude from left to right. The pitch attitude also remained stable between 10 and 15 degrees above the horizon. *Id.*

71. *Id.*

Only 22 seconds after the DC-10 became airborne, however, the aircraft's previously stable roll attitude began to deteriorate.[72] At this point, the aircraft reached its highest altitude, 350 feet above ground level,[73] then the aircraft's *attitude* (not altitude) began to deteriorate rapidly.[74] Five seconds later, the aircraft crashed.

The foregoing review demonstrates one of the most unusual major aviation accidents in the history of United States airline operations. The inflight structural failure of a turbo-prop or jet airliner is a virtually unheard of phenomenon.[75] The remainder of this article will address some of the interesting aspects of the litigation arising from this unique disaster.

THE LITIGATION

Jurisdiction

No legislation specifically confers jurisdiction to hear air disaster cases upon the federal courts. Thus, air disaster suits against private corporations cannot be removed from state courts to United States district courts on the basis of "federal question" jurisdiction.[76] Federal jurisdiction in these cases requires complete diversity of citizenship.[77] Litigation growing out of a major domestic airplane accident, such as Flight 191 inevitably involves domicillaries of different states or even different nations. Multiple suits may usually be filed in any state or federal court, subject to the rules relating to jurisdiction and venue in transitory tort actions. This leads to parallel litigation, arising out of the same occurrence, being pursued simultaneously, in state and federal courts.

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72. The aircraft first rolled to the left in a 4.57° bank, then an 8.44° bank, and finally 12.30° bank. *Id.*

73. *Id.* at 6.

74. The aircraft's positive pitch attitude began to drop toward the horizon. The plane first yawed approximately 20° to the left of the runway centerline heading, then rolled drastically into a 112° left bank. The nose of the aircraft reached 21.7° below the horizon, and the heading changed from 300° to 234°. *Id.* at 5.

75. It has been almost 20 years since a similar occurrence, when two Lockheed Electras suffered loss of wings during flight.

76. A "federal question" is one arising under the Constitution, laws or treaties of the United States. the federal courts have original jurisdiction of federal questions. 28 U.S.C. § 1331 (1976). *See, e.g.*, Snuggs v. Eastern Airlines, Inc., 13 Avi. Cas. 17631 (S.D. Fla. 1975); D'Arcy v. Delta Airlines, Inc., 12 Avi. Cas. 18282 (S.D. N.Y. 1974). *But see* Gobel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972) (private cause of action based on the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1976), in addition to any state remedies).

77. *See Symposium on Federal Practice and Aviation*, 38 J. AIR L. & COM. 285 (1972).

The arguments for federal legislation which would operate to centralize claims are compelling. Centralization would clearly result in enormous savings to all parties as well as expeditious and more uniform dispositions. In addition, the emergence of the doctrines of comparative negligence and contribution among defendants make it imperative that litigation arising out of a single disaster be centralized in one court, and under uniform laws. Centralization via legislation is the intelligent solution.

The Flight 191 litigation follows the traditional path.[78] As this article goes to press, approximately one hundred cases are pending in federal court and fifty cases in state courts, principally in California. Although American Airlines and McDonnell Douglas have admitted responsibility for compensatory damages,[79] thus rendering trial of that issue unnecessary, the pendency of cases in federal and state courts remains a major obstacle to the litigants. For example, if the liability of the defendants, or one of them, has to be established, reason dictates that the issue be litigated in one court. Parallel litigation of liability results in insoluble problems relating to *res judicata* and estoppel by verdict.[80]

In any event, the "system" compels such parallel litigation; many plaintiffs elected or were required to litigate in the federal court. Most of the federal court plaintiffs sued only American Airlines and McDonnell Douglas.[81] A brief discussion of these claims follows.

The Plaintiffs' Claims

American Airlines was charged with three counts of negligence: it improperly performed maintenance of the left engine pylon of the DC-10[82]; it instituted a DC-10 engine pylon re-

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78. Approximately 150 cases ended up in various federal courts throughout the country. All of those, pursuant to the Multidistrict Litigation Act, were transferred to the United States district court in Chicago, and assigned to Judges Edwin A. Robson and Hubert L. Will for consolidated discovery and pretrial purposes. *See supra* notes 91-104 and accompanying text.

Another 75 cases remained in state courts, principally the superior court of Los Angeles, California. By carefully naming various defendants in addition to American Airlines and McDonnell Douglas, the plaintiffs were able to destroy diversity and defeat motions to remove such cases to the federal court.

79. *See supra* note 24 and accompanying text.

80. *See infra* notes 113-24 and accompanying text.

81. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 480 F. Supp. 1280, 1282 (N.D. Ill. 1979).

82. Schade v. American Airlines, No. 79 C 2351, 25-27 (N.D. Ill. 1979).

moval/installation procedure which was at variance with the procedure specified by the manufacturer;[83] and it released a non-airworthy and improperly maintained aircraft for flight on the day of the accident.[84]

McDonnell Douglas was charged with two counts of negligence. One count was negligence in approving American Airlines' procedure in removal/installation of engine pylons which varied from McDonnell Douglas' own procedure. The other count charged McDonnell Douglas with negligence in its quality control by manufacturing some pylons with tolerances less than that specified in the DC-10 design criteria.[85] In addition, most plaintiffs alleged strict liability against McDonnell Douglas for manufacturing, selling, and delivering an aircraft which was not reasonably safe for reasonably foreseeable uses and events.[86] Both American Airlines and McDonnell Douglas were also charged with concurrent negligence in causing failure of the left pylon aft bulkhead with resulting loss of the left engine and pylon assembly. The plaintiffs alleged that this negligence was the proximate cause of the crash.[87]

Major Issues in the DC-10 Litigation

The National Transportation Safety Board Hearings

Various government investigations of the Flight 191 accident were instituted. The principal inquiry was conducted by the National Transportation Safety Board[88] at an ostensibly nonadversary public hearing. Unfortunately, such public hearings are anything but nonadversary. Attorneys and experts for the prospective *defendants* are permitted to participate actively in the

83. *Id.* at 27.
84. *Id.* at 27-28.
85. *Id.* at 6-14.
86. *Id.* at 14-16.
87. *Id.* at 27-28. Some of the plaintiffs alleged only negligence or strict liability, and claimed only compensatory damages. Others, however, alleged willful and wanton misconduct on the part of American Airlines or McDonnell Douglas or both, and requested punitive damages. Both American Airlines and McDonnell Douglas denied negligence or any wrongful conduct, and denied that the plaintiffs were entitled to compensatory or punitive damages.
88. A ten day public hearing was held near the scene of the Flight 191 crash in Rosemount, Illinois. *Accident Report, supra* note 2, at 74. The National Transportation Safety Board follows the ICAO Annex 13 definition of investigation: "A process conducted for the purpose of accident prevention which includes the gathering and analysis of information, the drawing of conclusions, including the determination of causes(s) and, when appropriate, the making of safety recommendations." ICAO, ANNEX 13 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION, *Aircraft Accident Investigation* 9 (4th ed. 1976).

hearings, but *plaintiffs* are not permitted to have their experts or attorneys participate at all. Because of this patently discriminatory treatment, some plaintiffs filed a complaint in the United States district court against the United States of America, the Federal Aviation Administration, and the National Transportation Safety Board.[89]

The plaintiffs alleged that it was grossly unfair for the National Safety Transportation Board to exclude the plaintiffs' experts and attorneys from participating in the hearing.[90] Testimony elicited at the hearing, as a result of interrogation of the witnesses by attorneys for the airline and manufacturer could later be used by the defendants as potential impeachment evidence[91] or for admissions. The victims' representatives, however, had no such opportunity. Moreover, they were precluded from protecting their clients' interests at the hearing. The court, however, dismissed plaintiffs' prayer that their representatives be allowed to participate in the same manner and to the same extent that the defendants' experts and witnesses were allowed to participate.[92]

The Board concluded after the public hearing that the probable cause of the crash was the separation of the left engine and pylon assembly at a critical point during takeoff.[93] The separation resulted from improper maintenance procedures. Two con-

89. Bellavia v. United States, No. 79 C 30004 (N.D. Ill. 1981).

90. Motion by Plaintiffs, Ballavia v. United States, No. 79 C 30004 (N.D. Ill. 1979).

91. *See* FED. R. EVID. 613(b).

92. The ruling was understandable. The Federal Aviation regulations enable the National Transportation Safety Board's chairman to designate parties to the hearing, but no party can be represented by a person also representing a claimant or an insurer. 49 C.F.R. § 845.13 (1980). The defendants were designated as parties to the hearing because they were in a position to have knowledge of facts related to the crash. It can be argued that, for the very reason that the defendants were so intimately involved in the crash, the plaintiffs should have had an equal opportunity to participate; also, at the very least, the Board should have selected *independent* qualified experts to take an active role in the inquiry. The District Court held that in the absence of authority that the regulations were invalid, the court could not preempt the discretionary power of an administrative agency. Bellavia v. United States, No. 79 C 30004 (N.D. Ill. 1979).

The only sure way of correcting this prejudicial method of conducting hearings is for Congress to amend the Independent Safety Board Act of 1974, 49 U.S.C. § 1903 (1979), or for the National Transportation Safety Board to revise its rules. An *ad hoc* committee of aviation lawyers and nationally recognized aeronautical experts has requested that the Board amend its regulations. The Committee proposes that the Board improve its methods of investigation and permit active participation by experts and attorneys on behalf of victims of aircraft accidents. Petition of Various Aviation Community Members to the Chairman of the National Transportation Safety Board (March 25, 1981). The Board has not yet responded to the petition.

93. *Accident Report, supra* note 2, at 1.

tributory factors were noted: the design of the pylon, and deficiencies in the Federal Aviation Administration's surveillance and reporting systems.[94]

Admissibility of the Board's Conclusions

There are usually two parts to a National Transportation Safety Board report: an accident report, which states what the Board believes to be the probable cause of the accident; and a factual report compiled by the investigator in charge of the accident.[95] The Board may utilize the factual report in making its probable cause finding,[96] but the accident report need not agree with the factual report.[97] The federal courts and most state courts which have dealt with the issue of admissibility have allowed investigators to testify as to their factual findings.[98] Conversely, the probable cause conclusions of the accident report are not admissible into evidence.[99] An investigator may refer to the factual report during testimony, and may use it to refresh his recollection.[100] The factual report itself may be admissible into evidence pursuant to Federal Rule 803(8).[101]

Transfer Under the Multidistrict Litigation Act

In 1968, Congress created the Judicial Panel on Multidistrict Litigation.[102] The Act provides in relevant part:

94. *Id.*

95. 49 C.F.R. § 835.2 (1979).

96. 49 U.S.C. § 114(f) (1979).

97. *See* Beech Aircraft Corp. v. Harvey, 558 P.2d 874, 883 (Alaska, 1976).

98. *See* 49 C.F.R. § 835.3(c) (1979). *See also* Lobel v. American Airlines, 192 F.2d 217, 220 (2d Cir. 1951), *cert. denied*, 342 U.S. 945 (1952). *See also* American Airlines, Inc. v. United States, 418 F.2d 180, 196 (5th Cir. 1969) (opinion testimony should be excluded only when it embraces the probable cause of the accident or the negligence of the defendant).

99. *See* 49 U.S.C. § 1441(e) (1979); 49 C.F.R. § 835.2 (1979). *See also* Berguido v. Eastern Airlines, 317 F.2d 628 (2d Cir. 1963); Universal Airlines v. Eastern Airlines, Inc., 188 F.2d 993 (D.C. Cir. 1951).

100. 49 C.F.R. § 835.4 (1979).

101. FED. R. EVID. 803(8), allowing admission into evidence of public records and reports. *Cf.* Chandler v. Roudebush, 425 U.S. 840, 863 (1976) (administrative findings made by Civil Service Commission admissible under Rule 803(8)(c)); Smith v. Ithaco Corp., 612 F.2d 215, 222 (5th Cir. 1980) (Coast Guard investigative report admissible under Rule 803(8)); Baker v. Eccona Homes Corp., 588 F.2d 551, 557 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (police report admissible under 803(8)(A), even though police officer arrived several minutes after fatal automobile collision occurred). Applying the same criteria to the NTSB investigator's factual report, it should be admissible in its entirely. *See* Papadakis, *Admissibility of Aircraft Accident Reports: An Update*, 18 S. TEX. L.J. 519 (1977).

102. Multidistrict Litigation Act of 1968, 28 U.S.C. § 1407 (1976). The purpose of the Act is to streamline the pretrial process by eliminating duplication in discovery, litigation costs, and time. Cahn, *A Look at the Judicial*

> 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 . . . panel . . . upon its determination that [they] will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.[103]

Where there is controversy over the proper forum for transfer, the Multidistrict Panel looks to the location of witnesses, documents, and other discovery material pertinent to the litigation.[104] Absent exceptional circumstances, the Panel transfers cases to the forum where the crash occurred.[105]

In the Flight 191 litigation, various plaintiffs favored consolidation in Illinois,[106] California,[107] and New York.[108] The Multidistrict Litigation Panel unanimously ordered transfer to the United States District Court for the Northern District of Illinois.[109] The following factors were important in their decision: critical witnesses were subject to that court's jurisdiction; the court is centrally located and easily accessible;[110] the court's calendar was reasonably current; and the judges had demonstrated exceptional expertise in complex, multi-party litigation, expediting discovery and disposing of litigation fairly.[111] Perhaps the most important factor was the willingness of Judges Robson and

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Panel on Multidistrict Litigation, 72 F.R.D. 212, 213 (1976). Judicial economy is a key consideration in § 1407 motions. H.R. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 1900.

103. 28 U.S.C. § 1407(a) (1979) (emphasis added).

104. *In re* Aircrash Disaster near Hanover, New Hampshire, 314 F. Supp. 62 (J.P.M.D.L. 1974); *In re* Air Crash at Florida Everglades on December 29, 1972, 360 F. Supp. 1394 (J.P.M.D.L. 1973); *In re* San Juan, Puerto Rico Air Crash Disaster, 316 F. Supp. 981 (J.P.M.D.L. 1970).

105. *In re* Air Crash Disaster at John F. Kennedy Int., 407 F. Supp. 244 (J.P.M.D.L. 1976); *In re* Air Crash Disaster near Natchitoches, 407 F. Supp. 1401 (J.P.M.D.L. 1976) (general rule is that the "most efficient and expeditious resolution of domestic air disaster litigation can normally be best achieved by transferring all actions to the district of the sites of the crash").

106. Plaintiff's Motion for Transfer, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979).

107. In re Air Crash Disaster near Chicago, Illinois on May 25, 1979, 476 F. Supp. 445, 447 (J.P.M.D.L. 1979).

108. *Id.*

109. *Id.* at 452.

110. Pretrial proceedings concerning liability issues would focus on at least six different geographic areas: California; New York; Chicago; Washington, D.C.; Oklahoma (the location of American's primary maintenance facility); and Ohio (where the engine was manufactured). *Id.* at 449.

111. Briefs presented on behalf of plaintiff, Bellavia, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 476 F. Supp. 445 (J.P.M.D.L. 1979).

Will, both highly experienced in multidistrict litigation,[112] to assume the task of this litigation.

Once transfer was accomplished, Judges Robson and Will quickly got to work. They recognized at the outset that it was important to expeditiously resolve various disputed threshold issues, principally: whether plaintiffs in the wrongful death cases had a legal right to claim punitive damages;[113] whether plaintiffs in the wrongful death cases had a right to prejudgment interest, *i.e.*, interest from the date of death to the date of trial;[114] and whether the plaintiffs were entitled to claim damages for predeath pain and suffering, and, if so, to what extent.[115] In order to expedite the pretrial proceedings, Robson and Will ruled that discovery was to proceed while the legal issues were being resolved.

Proceeding Under the Multidistrict Litigation Act

While consolidation under the Multidistrict Litigation Act presented many advantages, it also had the potential for creating real problems in the Flight 191 litigation. Two byproducts of the Act are of major concern: consolidated trials and Plaintiffs' Attorneys' Committees. Since these facets of multidistrict litigation are inextricably intertwined, each must be briefly described before their impact on litigation is discussed.

The Multidistrict Litigation Act was originally designed to alleviate the court congestion created by massive antitrust suits.[116] Its provisions were soon found useful in other potential multidistrict litigation, including air disasters. Accordingly, actions arising from air crashes are not routinely consolidated for pretrial proceedings in accordance with the Act.[117] The language of the Act applies only to pretrial stays of litigation. The Panel is required to remand each case to the originating district at the close of coordinated pretrial proceedings.[118] Despite the

112. Judge Will, at the time of the hearings, was winding up one of the largest and most complicated antitrust cases in the history of the federal courts.

113. *See infra* notes 125-35 and accompanying text.

114. *See infra* notes 136-78 and accompanying text.

115. *See infra* notes 216-26 and accompanying text.

116. In 1961, antitrust litigation began against the electrical equipment industry. There were 25,623 separate claims for relief in 1,912 civil actions filed in 35 federal district courts. Martin, *Multidistrict Litigation—A Panacea or a Blight?* 2 THE FORUM 853 (1975). The Multidistrict Litigation Act, 28 U.S.C. § 1407, was the direct result of a perceived need for a new approach to antitrust litigation.

117. Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR. L. & COMM. 159, 159 (1972).

118. 28 U.S.C. § 1407(a) (1976).

statute's clarity, however, many transferee courts conduct trials on the issue of liability alone.[119]

Another phenomenon of the Act's proliferation is the formation of Plaintiffs' Attorneys' Committees.[120] The purposes of the Act, expediting the proceedings and limiting costs, would be frustrated by allowing the hundreds of attorneys involved to participate in discovery procedure or in any trial on the issue of liability. Designating a small number of attorneys to act for the plaintiffs is therefore considered vital to multidistrict litigation.

Despite its lauditory purpose, there are serious problems involved in the use of a committee. When a lawyer is employed by a victim's family, he should have the right to litigate his client's case. The taking of depositions is one of the most important parts of aviation litigation because evidence depositions *are* the trial.[121] It is obviously impossible, however, for fifty or a hundred lawyers to partake in the questioning of witnesses. In balance, the use of Plaintiffs' Committees leads to myriad practical problems, and possibly, interferes with the due process rights of plaintiffs who are represented by nonmembers of the committee.

For example, one attorney may decide to try his case upon the doctrine of *res ipsa loquitur*, with no or very few and brief depositions. Another attorney may decide to present his case for the plaintiff on the basis of inadequate training of the pilot. Where plaintiffs' theories are incompatible, Committee attorneys may be compelled to present evidence in support of such theories. The result of intra-committee conflict is, inevitably, protracted and unnecessary discovery.[122]

A cardinal principle of examination is knowing "when to stop." This principle cannot be followed when depositions are

119. Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. & COM. 159 (1972).

120. Originally, these committees were voluntary. More recently, they have been sanctioned or appointed by the transferee court when the plaintiffs' attorneys can not agree on a system for electing the committee. In the Flight 191 litigation, a meeting was called of all lawyers representing plaintiffs whose suits had been filed in or transferred to the federal court. With some difficulty, seven attorneys were finally elected to the committee. To attempt to bring about peace, subcommittees were appointed to permit a greater number of attorneys to participate.

121. KENNELLY, LITIGATION AND TRIAL OF AIR CRAFT CRASH CASES ch. 4, at 22 (1969).

122. Plaintiff's trial counsel must ask questions with the same sensitivity and brevity that he would ask if the jury were present. He must determine the probable cause of the accident and concentrate upon evidence to support such probable cause. It has been the author's experience that excessive questioning of witnesses is harmful. It is sometimes strategically advantageous to either question a witness very briefly or *not at all*.

conducted by a Plaintiff's Committee. Would "lead counsel" for plaintiffs dare not ask any questions of an important witness called by the defense, when he might be criticized by "secondary" counsel? Who is to determine which theories of liability are to be pursued and the relative importance of each? Is the pretrial a dry-run for every possible theory? What about the weapon of surprise? Are the depositions to be a dress rehearsal for the defendants, who have the option of not asking any questions of their employee-witnesses because they can produce them at the actual trial?

Some lawyers seem to equate preparation of mass litigation, arising out of a single disaster, with the necessity for a multitude of lawyers.[123] The fact is that the larger the litigation, the more necessary it is to restrict the number of counsel. Aviation litigation cannot be blueprinted in advance. Delegation of responsibility for preparation to a "team" is as unsatisfactory as a surgeon delegating an operation to a team of associates. Yet, as a matter of "diplomacy," Plaintiffs' Committees have become increasingly large and the taking of depositions is oft delegated to assistants who have not had trial experience. It is worthy of note that plaintiffs may be deprived of their constitutional rights as a result of implementation of the Multidistrict Litigation Act. Suppose that the existence of liability in the immediate litigation had not been stipulated and that defendants were exonerated in a bifurcated trial in the federal court of one case as to liability. Would the other federal court plaintiffs be bound? What about the *state* court plaintiffs? Would they be estopped from claiming liability of those defendants who were found not liable in the federal court and vice versa? What if the first trial as to liability took place in the *state* court? Would a defense verdict in that court estop all other state court plaintiffs? What about the federal court plaintiffs? Would they also be estopped?

In one case arising out of a mid-air collision of two aircraft, a district court held that *all* federal court plaintiffs were collaterally estopped from relitigating the liability of the owner and operator of one of the aircraft because he had been found not guilty at an earlier trial initiated by different plaintiffs.[124] The Sixth Circuit Court of Appeals reversed, holding that due process requires that the person against whom collateral estoppel

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123. The defense, however, does not make this mistake. Generally major litigation is assigned to one or two special counsel.

124. *In re* Air Crash Disaster near Dayton, Ohio, 350 F. Supp. 757, 768 (S.D. Ohio 1972).

is asserted have been an *actual* party or "in privity" with a party to the earlier suit and trial.[125]

Only because the case which was tried first had not been consolidated with the other cases[126] did the Circuit reverse on the estoppel issue. The decision thus points up the injustice which may inure from compulsory consolidation and the use of Plaintiffs' Committees.[127] The success of any given claimant should not hinge upon the technique used by a different party's lawyer. Where the actions are compulsorily consolidated, the availability of a remedy may depend upon such indefinite criteria as the "competency" of counsel who first tried the case.

Conducting a trial of consolidated cases may be objectionable because it abrogates the constitutionally guaranteed right to trial by jury.[128] Moreover, consolidation for the purpose of trial is neither contemplated nor permitted by the Multidistrict Litigation Act. At least one commentator has noted:

> A disturbing trend . . . in multidistrict litigation cases by which a transferee judge is permitted to transfer cases to himself for trial on the issues of liability and damages. . . . Rights of litigants should not be cast aside to satisfy some nebulous concept of judicial efficiency, absent some controlling reason and statutory authority. It is time for the reviewing courts to put some brakes upon the usurpation of power by the district courts contrary to a direct statutory command. In view of the attack upon our judicial institutions from many fronts, the courts must be increasingly alert to abuses creeping into the judicial system. Disregard of congressional mandates is an abuse that should not be countenanced.[129]

It is axiomatic that one who might be affected by a trial has the right to be present in person and to be represented by counsel of his choosing.[130] No person has the right to appear as an-

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125. Humphreys v. Tann, 487 F.2d 666 (6th Cir. 1973).

126. The Flight 191 litigation resulted in the appointment of a Plaintiffs' Committee, but no "lead counsel." Donald Madole of Washington, D.C., an experienced aviation lawyer, became Chairman of the Discovery Committee. The litigants were fortunate in the election of an exceptionally competent liaison counsel, Kevin M. Forde.

127. Humphreys v. Tann, 487 F.2d 666, 671 (6th Cir. 1973).

128. *See* Farrell, *Multidistrict Litigation in Aviation Accident Cases*, 38 J. AIR L. COM. 159, 167 (1972). The Supreme Court may prescribe rules of practice, but may not "abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." 28 U.S.C. § 2072 (1972).

129. Von Kalinowski, *The Power of a Transferee Judge to Transfer Liability and Damages Trial*, 38 J. AIR L. & COM. 197 (1972). *See also* McElhaney, *A Plea for the Preservation of the "Worm's Eye View": Multidistrict Aviation Litigation*, 27 J. AIR L. & COM. 49 (1971); Seeley, *Procedures for Coordinating Multidistrict Litigation: A Nineteenth Century Mind Views with Alarm*, 19 ANTITRUST BULL. 91, 96 (1961).

130. 16 AM. JUR. 2d *Constitutional Law* § 573 (1979).

other's attorney without authority from the client.[131] How are the courts going to reconcile these fundamental constitutional rights of litigants with the preemption of such litigants and their attorneys by a Plaintiffs' Committee or "lead counsel?"

Although there are presently no decisions interpreting the Multidistrict Litigation Act as it affects estoppel by verdict, the federal courts will probably rely upon decisions in class action litigation holding that all members of the class (except those who opt out of the class action) are estopped if their interests have been validly represented in a class action by a competent attorney.[132] The analogy to class actions is, however, inapt. Class actions are not permissible in aircraft crash litigation.[133] The plaintiffs' right to "opt out"[134] of a class action is not available to a plaintiff in this type of litigation who files his case in federal court or whose case is removed to the federal court, and consolidated for discovery and trial with all other federal court cases growing out of the same disaster. Thus, because cases arising out of airplane accidents are not subject to class actions,[135] class action cases do not support verdict by estoppel in multidistrict litigation.

Choice of Law Problems and the Claims for Punitive Damages

One of the significant threshold questions was whether a legal basis existed for punitive damages claims in the wrongful death cases. The defendants asserted that applicable state substantive law precluded such claims. The court was therefore confronted with the difficult question of which state's (or states') law was applicable.[136] Suits had been filed in various

131. The Pueblo of Santa Rosa v. Fall, 315 U.S. 315 (1927). *See also* AM. JR. 2d *Attorneys at Law* § 112 (1979).

132. Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

133. Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392 (D.C. Va. 1975).

134. FED. R. CIV. P. 23(c)(2).

135. O'Connor and Kukankos, *Estoppel by Verdict, The Multidistrict Litigation Act, and Constitutional Rights of Litigants—Can They Coexist*, 20 TRIAL LAW. GUIDE 249 (1976).

Fortunately, this problem need not be confronted in the Flight 191 litigation. Trials need not be transferred to Chicago because there is no longer any issue regarding liability for compensatory damages, *see* note 24 and accompanying text *supra*, or punitive damages, *see infra* notes 125-35 and accompanying text.

136. For example, in the present case, the court had to deal with the choice of law rules of Illinois, California, New York, and Puerto Rico, among others. Illinois uses the "most significant relationship" test. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), *aff'd*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713). California follows a "comparative impairment" approach, under which the court must determine "which state's policy, as reflected by its law, would be more severely affected if it were not applied."

state and federal courts throughout the country and in the territory of Puerto Rico. Most cases were removed to the federal court on the basis of diversity of citizenship. Therefore, the district court, and later the court of appeals, had to consider the choice of law rules of each state and territory where suit had been filed in order to determine the applicable substantive law.

States have significantly different choice of laws doctrines. Within the confines of this article, it is impossible to review the choice of laws doctrines of each of the fifty states. It is sufficient to say that widely divergent criteria are employed in the courts of the various states and territories when making a determination of what substantive law applies to a particular issue.

The district court, applying the choice of law rules of the various states where suits were filed, held: that McDonnell Douglas was subject to punitive damages claims in all wrongful death cases except those filed in the territory of Puerto Rico; that American Airlines was exempt from all punitive damages claims in the wrongful death actions. This anomalous result was reached under the following rationales.

The court found that the choice of law rule of each state where suits were filed required it to select the law of the state which had the greatest interest in the issue. In each case, the court found the greatest interest in the state where the defendant's principal place of business was located at the time of the occurrence.[137] At the time of the occurrence, McDonnell Douglas' principal place of business was in Missouri,[138] American Airlines' was in New York.[139] Missouri law authorized punitive damage claims in wrongful death cases,[140] New York did not.[141] Only Puerto Rico applied the *lex loci delicti* rule, making Illinois law applicable.[142] Illinois does not allow punitive damages claims in wrongful death actions.

Bernhard v. Harrah's Club, 128 Cal. Rptr. 215, 546 P.2d 712, 724 (1976). New York applies a "governmental interest" approach, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 272, 240 N.Y.S.2d 743 (1965), and Puerto Rico employs the *lex loci delicti* doctrine. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044, 1052 (N.D. Ill. 1980).

137. *Id.* at 1049.

138. *Id.* at 1050.

139. *Id.* at 1049.

140. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044, 1050 (N.D. Ill. 1980). Missouri, however, does not characterize these damages as punitive. *Id.*

141. *Id.* at 1052.

142. *Id.* In determining that American Airlines was subject to punitive damages, but McDonnell Douglas was not, Judges Robson and Will recognized the incongruity of the law in this regard, which requires them to apply varying choice of laws to different issues in the same case.
Judge Will forthrightly stated that his opinion was "incongruous":

The United States Court of Appeals for the Seventh Circuit reversed in part and affirmed in part[143] finding that, under all applicable choice of law rules, the substantive law of Illinois applied in determining the right to punitive damages in the wrongful death cases. The Court of Appeals thus concluded that neither American Airlines nor McDonnell Douglas was subject to claims for punitive damages in the wrongful death cases, regardless of where the suits were filed, the principal place of business of the respective defendants, or the place of the commission of the alleged egregious conduct.[144]

The present choice of laws system frequently results in absurd and unequal treatment of plaintiffs and defendants. The Seventh Circuit approach, for example, is potentially discriminatory of plaintiffs and defendants. Suppose that the choice of law rules of New Hampshire mandate application of the substantive law of the place of incorporation of a corporate defendant in respect to claims for punitive damages in death cases. Also suppose a defendant is incorporated in Missouri, and that the alleged egregious conduct of such defendant occurred in Illinois. If suit is filed in the federal district court of New Hampshire, and then transferred to Illinois on the basis of *forum non conveniens*, the Illinois court would be required to follow the New Hampshire choice of law rules.[145] Thus, the defendant in *that* case, filed in New Hampshire, would be subject to a claim for punitive damages. The same defendant would not be subject to a claim for punitive damages in suits arising out of the same occurrence filed against it in Illinois.

The court of appeals reached a palatable result in the sense that it construed each relevant choice of law doctrine in a manner that achieved uniformity as to both defendants. The court of

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> The bottom line is, it is inconsistent, incongruous and crazy, but that is the way the conflicts of laws rules work. And you can take this opinion and I think you will have very great difficulty—we tried, let me tell you, very hard, Judge Robson, our law clerks, and all of our law clerks, to figure out some way to get a uniform result and still not do violence to what we conceive to be intellectual honesty in the responsibility of a judge to apply the law as it appears under this federal system under which we operate. Nobody is happy to reach this kind of incongruous result. You will see how we anguished, and how we came up with what I think is compelled by the current state of law, but which I am the first to concede and Judge Robson and I are the first two people to concede is something less than ideal.

Transcript Pretrial Hearing of June 26, 1980, at 8-9, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980).

143. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713).

144. *Id.* at 633.

145. Van Dusen v. Barrack, 376 U.S. 612 (1964).

appeals ably portrayed the complexity of the law and the difficulty of resolving what law applied to each issue.[146] The court called for Congressional action to relieve the litigants and the courts of the insoluble problems emanating from the lack of national legislation providing for uniformity of treatment of plaintiffs and defendants in this type of litigation.

The Prejudgment Interest Issue

Another issue of significance was whether the plaintiffs in the wrongful death cases were entitled to prejudgment interest.[147] As to some of the plaintiffs, there was no question but that they were entitled to prejudgment interest based upon the law of the residence of the deceased passengers.[148] American Airlines and McDonnell Douglas stipulated that the law of the place of residence of the victims would control the prejudgment interest issue. This stipulation did not, however, aid plaintiffs whose decedents did not reside in states which allowed prejudgment interest by express statute or by reason of judicial interpretation.

Some Illinois plaintiffs filed a motion for a pretrial ruling that they would be entitled to interest from May 25, 1979, upon verdicts for compensatory damages, at a reasonable rate to be determined by the jury. It was their position that although both defendants denied liability for compensatory or punitive damages, the litigation essentially involved a dispute between American and Douglas as to which of them was responsible and the degrees of their comparative negligence. The rationale was that if, as conceded, at least one of the defendants was liable for compensatory damages, the prejudgment interest award was inevitable and not contingent upon the result of further argument. Under Illinois law, no court could find in favor of both defendants where each defendant blamed the other, no one else, and

146. *See supra* note 26 and accompanying text. The choice of law analyses of the Court of Appeals were attacked in a Petition for Certiorari which was denied by the United States Supreme Court. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), *aff'd*, 644 F.2d (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3250 (U.S. Oct. 6, 1981) (No. 80-1713).

147. In other words, interest figured from the date of the occurrence rather than from the date of judgment.

148. For example, Michigan allows prejudgment interest at a reasonable rate determined by the jury from the date of death to the date of filing, and interest of 12% per year from the date of filing to the date of trial. MICH. STAT. ANN. § 27A.6013 (1981) (amending MICH. COMP. LAWS ANN. § 600.6013). *See, e.g.*, Vannoy v. City of Warren, 26 Mich. 283, 288-89, 182 N.W.2d 65, 69 (1970), *aff'd on other grounds*, 386 Mich. 686, 194 N.W.2d 304 (1975); Curry v. Fitting, 375 Mich. 440, 454-55, 134 N.W.2d 611, 616 (1975).

nothing else.[149] In support of the prejudgment interest motion, in the wrongful death cases, it was argued that there was a transparently clear "Scenario," "Game Plan" and "Bottom Line."[150]

The Scenario

A DC-10 aircraft crashed in good weather when an engine fell off. There could be no contention of any intervening, superceding cause such as vortex turbulence, clear air turbulence, unsafe runway, sabotage or anything else which could exonerate both the airline and the manufacturer.

The Game Plan

Both the airline and the manufacturer deny any liability. Each blames the other.

The Bottom Line

The more protracted the litigation, the happier the insurers. Viewing defendants collectively, there is no question of liability in this case. Thus, defendants' insurers must reserve funds for a potentially major loss. So long as the dispute about *which* party (or parties) is liable continues, the insurers can invest this reserve at the lavish prime rate; a rate of interest greatly in excess of the statutorily authorized rate of interest on pre *or* post judgment recoveries. The "bottom line" is that the insurers double their money in five years.[151] The insurers, therefore, stand to

149. Garrett v. S.N. Nielsen Co., 49 Ill. App. 2d 422, 200 N.E.2d 88 (1964).

150. Plaintiffs' Reply Brief at 16, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

151. Consider one of the more substantial wrongful death cases involved in this litigation, namely, one with a reasonable verdict value of $1,000,000. The defendants' insurers can, while litigation is pending, obtain a total cumulative interest over a five year period of $1,010,034, calculated as follows:

(a) From May 25, 1979, to May 25, 1980, a one year delay, the profit to the insurance company of interest alone, based upon 15% of $1,000,000 (*excluding* capital gain) is $150,000.00.

(b) From May 25, 1980 to May 25, 1981, a two year delay, the profit to the insurance company of interest alone, based upon 15% interest on $1,000,000 plus interest on the $150,000 in interest obtained by the insurance company in the first year of delay (*excluding* capital gain) is $172,500.00.

(c) From May 25, 1981 to May 25, 1982, a three year delay, the profit to the insurance company of interest alone, based upon 15% interest on $1,000,000, plus interest on the $322,500 accumulated interest (*excluding* capital gain) is $197,375.00.

(d) From May 25, 1982 to May 25, 1983, a four year delay, the profit to the insurance company of interest alone, based upon 15% interest on $519,875 accumulated interest (*excluding* capital gain) is $227,981.00.

(e) From May 25, 1983 to May 25, 1984, a five year delay, the profit to the insurance company of interest alone, based upon 15% interest on

gain by delaying settlement of the litigation[152] and retaining claimants' money for as long as possible.

In contrast, decedents' plaintiffs have much to lose if the litigation is prolonged. Unless the courts rule in plaintiffs' favor on the prejudgment interest issue, the plaintiffs, unlike the insurers, cannot reap the benefits of immediate investment. The insurers' edge is aggravated by the fact that prejudgment interest payments invariably accompany recovery for property loss, but are not always included in damages for wrongful death.

For example, American Airlines has indicated its intention to sue McDonnell Douglas for $35,000,000, the value of the aircraft lost. Should the suit be successful, American Airline's insurers can recover interest from the date of the occurrence[153] *because the claim involves a property loss*. Similarly, if an aircraft carrying a racehorse and its trainer crashed, the horse owner would be entitled to interest from the date of the accident.[154] The trainer's family, on the other hand, might be entitled to interest only from the date of judgment, which could be

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$1,000,000, plus interest on $747,856 accumulated interest (*excluding* capital gain) is $262,178.00.

At the end of five years, the insurers have more than doubled their money. They then have $2,010,034.00. The total *cumulative* interest obtained by defendants' insurers over a period of five years, upon a case indisputably worth *at least* $1,000,000 on May 25, 1979 is $1,010,034.00. This figure does not take into account the economic fact that insurers do not invest solely in United States treasury notes and similar securities, but participate in enormous commercial building enterprises even to the extent of obtaining a portion of the equity and capital gains as well as income.

152. Continuing the above example, *supra* note 140, on May 25, 1984 the insurance company would have on hand $2,010,034 (adding the $1,000,000 which the insurers fairly owed to the plaintiff on May 25, 1979 to the cumulative interest of $1,010,034). Thus, even by paying the full, fair value of the case, i.e., $1,000,000, five years later the insurance company realistically has not paid anything to the plaintiff, and still has on hand, *after* payment, $1,010,034. There are further gains to the defendants' insurers and losses to the plaintiffs, entirely apart from consideration of cumulative interest, e.g., capital gains to the insurers, and loss in the purchasing value of the dollars eventually paid to the plaintiff.

153. Brief of Plaintiffs' Committee at 37, *In re* Air Crash Disaster near Chicago on May 25, 1979, 644 F.2d 633 (7th Cir. 1981). *See, e.g.*, Robert C. Herd & Co. v. Krawill Mach. Corp., 256 F.2d 946 (4th Cir. 1958), *aff'd*, 359 U.S. 297 (1959); Chicago & N.W. Ry. Co. v. Ames, 40 Ill. 249 (1866).

154. Interest has been allowed from the date of death in respect to the loss of the following animals: St. Louis S.W. R.R. Co. v. Burce, 251 S.W. 584 (Tex. Civ. App. 1923) (cows); Baltimore & O. R.R. Co. v. Schultz, 43 Ohio St. 270, 1 N.E. 324 (1885) (pigs); Dewell v. Northern P.R. Co., 54 Mont. 350, 170 P.2d 753 (1918) (goats); Chicago & E.R. Co. v. Leiter, 59 Ind. App. 212, 109 N.E. 213 (1915) (sheep); Wabash R. Co. v. Williamson, 3 Ind. App. 190, 29 N.E.2d 455 (1891) (sheep dogs); Chicago & N.W. R.R. Co. v. Schultz, 55 Ill. 421 (1870) (colt); Macon D. & S.R. Co. v. Hasty, 10 Ga. App. 103, 72 S.E. 717 (1911) (horse); Western & A.R. Co. v. Brown, 102 Ga. 13, 29 S.E. 130 (1897) (cattle); Georgia R. & Bkg. Co. v. Crawley, 87 Ga. 191, 13 S.E. 508 (1891) (mule); Western & A.R. Co. v. McCauley, 68 Ga. 818 (1882) (bull).

many years later. Why should the loss of a human being result in less compensation? It could not be because the damages in respect to a human being's death are "not liquidated," whereas the damages for an animal's death are.[155] Indeed, it may be more difficult to ascertain the value of certain types of animals, *e.g.* racehorses, than it is to calculate damages pursuant to a wrongful death statute.

The defendants contended that prejudgment interest in Illinois is available only as provided by statute,[156] and that no such statute exists. The plaintiffs, however, contended that no decision by an Illinois court of review rules either way on the prejudgment interest issue in wrongful death cases. Furthermore, the provisions of the Illinois Wrongful Death Statute[157] allow "fair and just compensation with reference to the pecuniary injuries resulting from such death."[158] The allowance of prejudgment interest constitutes an essential part of "fair and just compensation."

Other courts, considering precisely this issue, have ruled for the plaintiffs.[159] Plaintiffs' position is further supported by decisions construing the Death on the High Seas Act.[160] The language of the Act parallels the Illinois statute,[161] and according to the cases, permits prejudgment interest.[162] The defendants attempted to distinguish the Death on the High Seas Act on the ground that suits thereunder are in admiralty. This construc-

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155. *Cf.* 22 AM. JUR. 2d *Damages* § 191 (1965). *But see* First Nat'l Bank of Chicago v. Material Serv. Corp., 597 F.2d 1110 (7th Cir. 1979) (rejecting disallowance of prejudgment interest in a wrongful death action because damages were not liquidated).

156. *See, e.g.*, Gonzalez v. Donaher, 30 Ill. App. 3d 992, 332 N.E.2d 603 (1975).

157. ILL. REV. STAT. ch. 70, § 2 (1977).

158. *Id.*

159. *See, e.g.*, State v. Phillips, 470 P.2d 266 (Alaska, 1970) (under statute not explicitly mentioning prejudgment interest, such interest awarded to avoid injustice); Wetz v. Thorpe, 215 N.W.2d 350 (Iowa, 1974) (under statute similar to Illinois', allowance of prejudgment interest found necessary for adequate compensation); Busik v. Levine, 63 N.J. 351, 307 A.2d 571 (1973) (prejudgment interest necessary to avoid detriment to client and windfall to defendant as result of delay).

160. 46 U.S.C. §§ 761-67 (1976).

161. *Compare* 46 U.S.C. § 762 (1976) ("fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought") *with* ILL. REV. STAT. ch. 70, § 2 (1977) ("fair and just compensation with reference to the pecuniary injuries resulting from such death to the surviving spouse and next of kin of such deceased person").

162. National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959) (absent prejudgment interest, plaintiff would not receive full value of award if judgment occurred several years in the future. Interest on the entire verdict was awarded from the date of death to make her recovery complete). *Id.* at 405.

tion loses credibility when one considers its consequences: the family of one decedent receives prejudgment interest because he died in salt water more than one marine league[163] from shore; the family of another decedent receives none because he died on land.[164] Had Flight 191 crashed in the Chicago River, the court would be entitled to award prejudgment interest.[165]

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163. A marine league is a unit of distance equal to three miles. AMERICAN HERITAGE DICTIONARY 744 (1st ed. 1969).

164. An example can show the absurd result of affording markedly different treatment to the families of passengers on the same aircraft, based solely upon the coincidence of where the aircraft crashed, or even where the various victims happened to be killed. Suppose Flight 191, instead of crashing at O'Hare, crashed under the same circumstances after takeoff from Los Angeles International Airport. It is aeronautically feasible that such a loss of structural integrity could cause the aircraft to come apart, in successive stages, partly over land, partly over the Pacific *within* three miles of shore, and partly *more than* three miles from shore. Some of the 273 occupants thus might have been killed on land, some at sea within three miles of shore, and still others, more than three miles from shore. Should these facts, in and of themselves, mandate that different damage laws be applied, so that the families of those victims who happened to be killed three miles or more from shore would receive prejudgment interest and others would not?

The observations of Judges Nicholas J. Bua, during his tenure as a judge in the Circuit Court of Cook County, Illinois, in Leroy v. United Air Lines, Inc., Il. Av. Cas. 17,919 (1970) make good sense:

> It would be the height of absurdity if the families of wrongfully killed persons could recover full and fair damages if the deaths occurred in water, but could not recover similar damages if the deaths occurred on land. A moment's reflection will demonstrate the incongruousness of such a ruling. If a plane were to crash and some of the victims were to land in a lake and some upon land (such as in Wisconsin), it would be a peculiar law if the families of those victims who fell into water and were drowned could recover more than the families of those who were killed by falling onto land. This court can hardly believe that the sole criterion of determination of damages is going to be determined by whether the victim was killed on land or water.

Id. at 17,922.

165. *See, e.g.*, First Nat'l Bank of Chicago v. Material Serv. Corp., 597 F.2d 1110 (7th Cir. 1979). The Court ruled that, in a wrongful death action brought under general maritime law, the district court was required to award prejudgment interest. That case involved the death of a pleasure boat operator who was killed when his boat collided with a tow on the Chicago River. In ordering the award of prejudgment interest, the court said:

> It is quite obvious that a party suffering a financial loss from the death of a bread winner, just as from the destruction of a ship, can be placed in the same position as he previously enjoyed only if the award is made at the time of the loss or if interest for the time between loss and payment is allowed.
>
> We are persuaded that the reasons justifying prejudgment interest under DOHSA and the Jones Act are equally applicable to actions brought under the general maritime law. Indeed, defendants, having had the use and benefit of the death award money during the prejudgment period, are in poor position to complain when required to pay interest on it.

Surprisingly, the only Illinois decision dealing with the subject of prejudgment interest in wrongful death actions held that such interest was not obtainable under Illinois law.[166] In that case, however, prejudgment interest was not requested until the trial was completed. Moreover, the liability issue was sharply disputed.[167] In the Flight 191 cases, the liability issue could hardly be considered "real," when each defendant admitted that plaintiffs had the right to compensatory damages from *one* of them.[168] As one commentator has stated:

> Why then should families of such victims receive prejudicially low amounts simply because the courts and the adversary system are used as a device to delay litigation for a protracted period during which insurance carriers are permitted to benefit financially from the acquisition of cumulative interest and capital increment while the families of victims are made to suffer?[169]

The district court in the Flight 191 litigation ruled that the plaintiffs should recover reasonable prejudgment interest upon their total verdicts for compensatory damages, calculated by the jury from the date of death to the date of trial.[170] The decision was based on authority interpreting statutes substantively identical to the Illinois Wrongful Death statute, and cn equitable considerations. The court found that a denial of prejudgment interest would be inequitable because there was no question

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Id. at 1120-21.

In *Material Service*, this court's holding that prejudgment interest was properly recoverable was not based upon the express provisions of any statute, federal or state, which provided for the award of such interest. The Court of Appeals, in conclusion, found that prejudgment interest was compensatory in nature and was germane to the determination of what is meant by the words, "fair and just compensation with reference to pecuniary injuries" in the Illinois Wrongful Death statute, ILL. REV. STAT. ch. 70, § 2 (1977).

166. Klepser v. Standard Serv. Refuse Disposal Co., No. 75 L 23749 (Cir. Ct. Cook Cty., May 8, 1980).

167. *Id.*

168. One court has addressed an argument concerning the legitimacy of the defendant's denial of liability. Beech Aircraft v. Harvey, 558 P.2d 879 (Alaska, 1976). The defendant argues that prejudgment interest was improperly assessed because the award encompassed 7½ years, a period of time greatly in excess of that reasonably needed by the parties for preparation of their respective cases. In addition, several lengthy delays were attributable solely to the plaintiffs. *Id.* at 887. The court rejected this argument, reasoning that, regardless of whose fault it was that such a long period had elapsed the defendant still had the use of the money for that time, and the plaintiffs during that period had been denied the use of money to which the jury ruled they had become entitled. *Id.* at 888. The court concluded that the prejudgment interest award was proper. *Id.*

169. Wolf & Evans, *A Case for Allowance of Prejudgment Interest in Reference to Wrongful Death Cases*, 17 TRIAL L. GUIDE 302, 310 (1973).

170. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 480 F. Supp. 1280 (N.D. Ill. 1979). The court first determined that there was no true conflict of law, since each state involved would reach the same result. *Id.* at 1283.

but that one or both defendants were liable, and there existed a real incentive for defendants to postpone payment.[171] Furthermore, the interest which the plaintiffs would earn but for the defendants' delay would be substantial.

The District Court ruled that prejudgment interest was an essential element of "fair and just compensation under the Illinois Wrongful Death Statute."[172] The court reasoned that the losses arise at the moment of the decedent's death and the award of judgment in a subsequent wrongful death suit is merely an *ex post facto* determination of a preexisting obligation.[173] Unless interest is calculated from the date of death, the survivors suffer an additional loss of income.[174]

The first case tried[175] resulted in a verdict against defendants, collectively, for $250,000.00 in compensatory damages, and a separate verdict by the jury of $27,500.00 in prejudgment interest. The defendants appealed only from that portion of the judgment awarding prejudgment interest. The appellate court, however, affirmed the award of $27,500.00 constituting prejudgment interest.[176] However, at the same time, the court rendered dictum to the effect that in future cases the damages should be computed as of the date of trial rather than the date of death, and that prejudgment interest should be computed only on the amount of monetary contributions which the decedent would have contributed to his family between the date of death and the date of trial.[177] The precise effect of this dictum has not been resolved. If, for example, a court rules that a plaintiff may compute damages as of the date of death, as has been done repeatedly in both federal and state courts in Illinois and other states, the opinion and mandate of the Court of Appeals would support an instruction to the jury authorizing it to award prejudgment interest at a reasonable rate, to be determined by it, from the date of death to the date of verdict.[178]

The precise effect of this dictum has not been resolved. Relying on its prior opinion which denied punitive damages in wrongful death cases arising out of the Flight 191 accident, the

171. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 480 F. Supp. 1280, 1286-87 (N.D. Ill. 1979).

172. *Id.* at 1286.

173. *Id.*

174. *Id.*

175. *Id.*

176. Brief of Plaintiffs' Committee at 4, *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (1981).

177. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

178. *Id.* at 641.

court said it could neither award damages that were not pecuniary, nor authorize an Illinois court to award prejudgment interest in a wrongful death case. The opinion of the Court of Appeals may, however, authorize the *allowance* of prejudgment interest in those cases where the court rules that the damages are to be determined as of the date of death. Indeed, there may be no other way to assess damages in a death case insofar as the elements of damages consist of loss to the victim's children of parental care and guidance, and loss to the victim's spouse of consortium, services and companionship; losses which arise on the date of death.

Although the court concludes that Illinois law does not allow prejudgment interest unless provided by statute and that the Wrongful Death Act does not explicitly provide for prejudgment interest, the court went on to say:

> Despite the foregoing discussion rejecting prejudgment interest as a separate element of damages, the measure of compensatory damages in wrongful death cases unquestionably does involve some form of interest in the determination of "present value." Prejudgment interest *per se* is not allowable as a separate element of a wrongful death damages award, *but use of interest is implicit in the calculation of the present value of plaintiff's pecuniary loss as of the date of trial.*[179]

Although the court affirmed the full award of prejudgment interest, it attempted to legislate the trial procedure which would govern future cases arising under the Illinois Wrongful Death Statute.

> The question here, then, is how plaintiff's damages ought to be calculated. If the calculation is properly computed, it is possible to resolve both plaintiff's and defendants' objections. Plaintiff argues that she would be harmed by delay between the accident and trial if prejudgment interest is not allowed. Defendants claim that they would be punished for asserting their right to a trial on damages if prejudgment interest is allowed. But neither plaintiffs nor defendants will be unjustly enriched if the correct formula is used to calculate wrongful death damages.[180]

Despite this observation by the Court of Appeals, the defendants are, in fact, "unjustly enriched" if the "correct formula" prescribed by the dictum of the appellate court is used, as opposed to the method employed by United States District Judge Will in the trial of *Valladares.*

The court relied on *Baird v. Chicago, Burlington & Quincy Railroad Co.*[181] and *Allendorf v. Elgin, Joliet & Eastern Railway*

179. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633, 639 (7th Cir. 1981) (emphasis added).

180. *Id.* at 641.

181. 63 Ill. 2d 463, 349 N.E.2d 413 (1976).

Co.[182] in concluding that calculation of present value should require discounting future income as of the date of trial, rather than the date of death. It is submitted that neither decision supports this conclusion. In *Baird*, the working life expectancy, contrary to the appellate court's statement, was calculated from the date of death.[183] The actuary in that case did not and could not make *separate* calculations of monetary contributions from the decedent from the date of death to the date of trial, and then the present value of future contributions from the date of trial. The decedents were unemployed teenage students. Likewise, in *Allendorf*, there is no indication that two separate computations were made: first, interest upon the monetary contributions which the decedent would have made to his family between the date of death and the date of trial; and second, the present cash value of future contributions from the date of trial to the end of the working life expectancy of the decedent.[184]

Neither *Baird* nor *Allendorf* support the method prescribed, in dicta, by the United States Court of Appeals. Indeed, in *Baird*, the basis for the award was the presumption of pecuniary loss in favor of the lineal next of kin. More importantly, the two methods of computation do not yield comparable results.[185]

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182. 8 Ill. 2d 164, 113 N.E.2d 288, *cert. denied*, 352 U.S. 833 (1956).

183. Baird v. Chicago, Burlington & Quincy R.R. Co., 63 Ill. 2d 463, 469, 349 N.E.2d 413, 415-16 (1976).

184. Allendorf v. Elgin, Joliet & Eastern Ry. Co., 8 Ill. 2d 164, 172, 133 N.E.2d 288, 292 (1956).

185. The court engaged in some questionable arithmetic when it sought to demonstrate that computing interest as of the date of trial on the amounts of *monetary* contributions the decedent would have contributed to his family from the date of his death to the date of trial was equivalent to awarding interest from the date of death to the date of trial upon the entire verdict. This assumption is fallacious for several reasons. First, the case in question was tried 13 months from the date of death. The amount the decedent would have contributed to his family was $10,000 per year. Over 13 months, he would have contributed $10,833. Adding in 10% interest on that amount, the total prejudgment interest would have been only $1,083.30. Assuming the Court of Appeals' reasoning, adding 10% interest or $1,083.00 to monetary contributions over a period of 13 months of $10,833.00, the maximum verdict of the jury would have been $261,916.00, rather than the $277,500.00 actual award; a difference of $15,584.00.

Second, the court overlooked damages for loss of parental care and guidance, and for loss of consortium, companionship, and services suffered by the surviving spouse. Assume that a 38 year old man with a wife and six children is killed, that he earned $20,000 per year and his personal consumption was $5,000 per year. A jury makes the following awards: loss of parental care and guidance, $600,000 ($100,000 per child, the amount specificially approved in Scully v. Otis Elevator Co., 2 Ill. App. 3d 185, 275 N.E.2d 905 (1971)); spouse's loss of consortium, companionship, and services, $200,000; loss of past and future contributions, $500,000. The total verdict is $1,300,000. Assuming the trial takes place four years after the death, the decedent would have contributed $60,000 to his family during that period ($15,000 x 4 years). According to the appellate court's calculations, his family would be

The method prescribed by the district court took economic reality into account, the decision of the court of appeals does not.

The mandate of the United States Court of Appeals affirmed an award of $27,500 *in prejudgment interest*. That amount could not possibly constitute interest upon monetary contributions between the date of death and the date of trial. Such interest would amount to $11,916; not $27,500.[186] Furthermore, the district court judge carefully instructed the jury to compute damages at a reasonable rate, *upon its total verdict*, based upon the period between the date of death and the date of trial thirteen months later. The prejudgment interest verdict and the judgment for $277,500 (including $27,500 prejudgment interest) were *affirmed*.

What is the effect of this mandate? District courts are prohibited from varying a mandate or examining it for any other purpose than execution.[187] A trial court cannot deviate from the mandate of an appellate court.[188] Where the entire judgment of the trial court, including its award of prejudgment interest, is affirmed on appeal and the affirmance is part of the appellate court's mandate, the district court has no power to take away or reduce the prejudgment interest.[189] In short, district courts must comply strictly with mandates directed to them by the reviewing court.[190]

The anomaly of this phase of the litigation is, therefore, that the court of appeals' *mandate* affirmed the verdict and judgment

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just as well off if they received interest on the $60,000.00 past monetary contributions as they would be if they received interest on the total verdict of $1,300,000.00 from the date of death to the date of trial. In reality, the $60,000.00 figure would generate $15,000.00 in cumulative interest over the 4 year period, while the $1,300,000.00 figure would generate $520,000.00. The difference to the family of this 38 year old hypothetical victim, depends upon whether the method prescribed by the District Court or that of the Court of Appeals is employed:

a. District Court, prejudgment interest of $520,000.00;

b. Court of Appeals, prejudgment interest $15,000.00.

Thus, the Court of Appeals' method results in a gain to the insurers in this single hypothetical case of $505,000.00.

As an additional example, in a death case involving a single person without dependents, substantial damages may be awarded to lineal next of kin even though no monetary contributions were ever made to them. Under the appellate court's reasoning, the next of kin in this situation would receive no prejudgment interest whatsoever.

186. *See supra* note 176.

187. 14A CYCLOPEDIA OF FEDERAL PROCEDURE § 6933 (3d ed. 1951).

188. Panhandle E. Pipe Line Co. v. Federal Power Comm'n, 359 F.2d 675 (8th Cir. 1966).

189. Gulf Coast Bldg. & Supply Co., Inc. v. Int'l Brd. of Elec. Workers Local 480, 469 F.2d 105 (5th Cir. 1972).

190. Ratay v. Lincoln Nat'l Life Ins. Co., 405 F.2d 286 (3d Cir. 1968).

for $27,500 prejudgment interest, which was computed by the jury at ten percent per annum upon the *entire* compensatory damage verdict of $250,000.00 from the date of death to the date of trial. Concomitanty, the opinion purported to deny prejudgment interest upon *entire* verdicts for compensatory damages in *future* trials of wrongful death cases. The opinion supports and refutes prejudgment interest awards in wrongful death cases.

Contrary to the court of appeals' observation, some plaintiffs' trial attorneys prefer to have an economist or actuary testify as to his calculations as of the date of death, rather than as of the date of trial. The jury is presented with a single figure, rather than a series of small numbers. Furthermore, there is no requirement that plaintiff produce the testimony of an actuary or economist at all.

The matter of prejudgment interest in this type of litigation remains unsettled. Probably the only way to resolve the issue is by the enactment of federal legislation. Meanwhile, the treatment of the plaintiffs in the Flight 191 litigation remains disparate. If the courts remain constricted and inflexible, and do not innovate new methods to accomodate new types of litigation such as that arising out of the Flight 191 disaster, the adversary method of resolving the claims of victims' families, as well as the comparative negligence of defendants, may reach its demise much earlier than some lawyers and judges believe.[191]

The district court judges acted with unusual diligence and efficiency in resolving the significant legal issues. The Seventh Circuit accepted and decided the ensuing interlocutory appeals promptly. Despite judicial efficiency, delay was unavoidable. The only just remedy, is reasonable prejudgment interest. Absent legislation, however, federal courts may be compelled to utilize "federal common law" as authority for prejudgment interest awards.

In *Kohr v. Allegheny Airlines*,[192] the Seventh Circuit innovated a federal law, consonant with "sense and justice," and ruled that in commercial, interstate air disaster cases, "federal

191. Yet, the federal courts can be innovative. Mayer v. Braniff Airways, Inc., 310 F. Supp. 149 (N.D. Ill., 1970). Chief Judge William J. Campbell recognized the incentive that defendants have for delay and the consequent loss to plaintiffs. He therefore ordered the defendants to deposit with the court a sum equal to the estimated amount of damages in all the pending cases, over $2,500,000. As the damages were determined on each case, payment was made from the fund. The effect of this innovation was to reduce the incentive for delay and to speed disposition of the cases. In addition, the plaintiffs received the full amount of damages to which they were entitled. Allowing prejudgment interest would achieve the same results.

192. 504 F.2d 400 (7th Cir. 1974).

law" could preempt relevant state law.[193] Even though the Seventh Circuit rejected any utilization of federal common law in the Flight 191 litigation,[194] it is predicted, that unless Congress adopts national legislation governing rights and obligations arising out of such aircraft disasters, federal common law will be the sole source of "sense and justice." There is no "sense and justice" under the present system, when insurers of two defendants, both of which admit that *one* of them is liable, can deny liability in their responsive pleadings, and thus delay the resolution of the litigation.

Relevancy of Income Taxes, Applied to Past and Future Earnings, and Propriety of an Income Tax Instruction

Another issue raised by the Flight 191 litigation was whether proof of the amount by which income taxes would have reduced decedents' earnings should be admitted at trial, i.e., whether the jury should be permitted to consider taxes in reaching its verdict. Additionally, the court would have to decide whether to instruct the jury that the ultimate award would not be taxed. Plaintiffs filed a motion *in limine* to exclude any reference to taxes.[195] They also requested a ruling that the jury not be instructed to consider the effect of income taxes in arriving at compensatory damages.[196]

In *Norfolk & Western Railway Co. v. Liepelt*,[197] a wrongful death action *brought pursuant to the Federal Employers' Liability Act*,[198] the United States Supreme Court held that it was error to exclude evidence pertaining to the effect of income taxes on the decedent's future earnings,[199] that defendant was erroneously denied an instruction advising the jury that its verdict would not be taxed, and that the jurors were not to consider such taxes when fixing the amount of their award.[200]

The basis of the plaintiffs' motion *in limine* was that *Liepelt* is not applicable in death actions *brought pursuant to state*

193. *Id.* at 402.

194. *In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 644 F.2d 633, 637 n.7 (7th Cir. 1981).

195. Motion *in Limine* and Motion to Preclude Income Tax Instruction and Memorandum in Support of Such Motions, filed in Haider v. American Airlines, U.S. District Court No. 79 C 2444; *In re* Air Crash Disaster near Chicago Illinois on May 25, 1979, Master File MDL 391.

196. *Id.*

197. 444 U.S. 490 (1980).

198. 45 U.S.C. §§ 51–60 (1979).

199. Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 498 (1980).

200. *Id.*

wrongful death statutes.[201] It was the position of the Illinois plaintiffs that Illinois law governed their rights; that Illinois law precluded such evidence and tax instructions.[202] As a result of the choice of law ruling the instant action would be brought pursuant to the Illinois wrongful death statute, thus rendering *Liepolt*, inapt.

In tort actions brought under Illinois law, whether involving injury or death, evidence relating to income taxes, or to the effect of income taxes upon earnings, is not admissible and instructions regarding the nontaxability of verdicts should not be given to the jury. This has been the rule for more than twenty-five years. Moreover, the Illinois Pattern Instructions relating to wrongful death cases[203] contain no instruction pertaining to the effect of income taxes upon earnings, nor is there an instruction regarding the nontaxability of the jury's award of damages.

The defendants in the Flight 191 litigation take the position that the issue of the admissibility of income tax evidence or the propriety of an income tax instruction is procedural rather than substantive. If the issue is wholly procedural, then the court must apply federal law.[204] If, however, the "question of admissibility of evidence is so intertwined with a state *substantive* rule . . . the state rule excluding the evidence will be followed in order to give full effect to the state's substantive policy."[205] At least one court has noted such an intertwining. In *Turcotte v.*

201. Vasina v. Gruman Corp., No. 80-7638 (2d Cir., Mar. 17, 1981) (affirming refusal of trial judge to permit evidence of effect of taxes on computation of future earnings or instruct jury on nontaxability of award of damages); Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980) (*Liepolt* did not control where case arose under state statute); Spinosa v. International Harvester Co., 621 F.2d 1154 (1st Cir. 1980) (even if applicable state law ambiguous, federal court should apply majority rule that effect of income tax cannot be considered in computing damages).

202. Raines v. New York Cent. Ry. Co., 51 Ill. 2d 428, 283 N.E.2d 230 (1972); Hall v. Chicago & N.W. Ry. Co., 5 Ill. 2d 135, 125 N.E.2d 77 (1955). Although these state court cases involved the Federal Tort Claims Act, it is clear that the Illinois court was stating Illinois rather than federal law.

203. I.P.I., Civil, §§ 31.00—31.09. In twenty-four years there has been no change in the wrongful death instructions and none which even intimates that income taxes should be considered. Furthermore, the Committee on Illinois Pattern Jury Instructions emphasizes its repugnance toward negative instructions, such as that sanctioned by the United States Supreme Court in *Liepelt*. The criterion underlying the Committee's policies bears restatement: "First, the Committee has been opposed to negative instructions, that is, instructions which tell the jury to not do something." Forward of the Committee on Illinois Pattern Jury Instructions *quoted in* Reply of Plaintiff to Motion *in Limine* of Defendant McDonnell Corp. at 9, Haider v. McDonnell Douglas Corp., No. 79 C 2444 (N.D. Ill. 1981).

204. FED. R. CIV. P. 43 (1980).

205. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2405 (1969).

Ford Motor Co.,[206] a wrongful death case involving Rhode Island law, the *defendants* contended that the United States District Court had no option but to apply *state* law in regard to the admissibility of the effect of income taxes upon earnings. The plaintiff, in rebuttal, contended that the First Circuit Court of Appeals had previously ruled that income taxes should *not* be considered.

The *Turcotte* court flatly rejected this contention of the plaintiffs and sustained the position of the defendants; namely, that the federal court had to apply the law which would have been applied if the case were pending in the state court rather than in the United States District Court.

> The "twin aims" of the [Erie] doctrine are the discouragement of forum shopping and avoidance of inequitable administration of the laws. . . . Under Erie, a state rule should be applied in a diversity case if it "would have so important an effect upon the fortunes of one or both litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." In the instant case, if Rhode Island law required evidence of income taxes in computing wrongful death damages, yet the federal district court in Rhode Island barred such evidence in diversity cases, no rational plaintiff who had the choice would ever bring a wrongful death action in the state courts. The difference in wrongful death recoveries between the two forums would be staggering. Therefore, under Erie, state law must control.[207]

Parallel litigation, in federal and state courts, adds a wrinkle to the income tax issue in the Flight 191 cases. In suits tried in the state court of California, the court refused to adopt the *Liepelt* holding and ruled that California law governed. The court rejected the contention of defendants and did not permit evidence regarding the impact of income taxes upon earnings of the decedents. The court refused to instruct the juries regarding the nontaxability of their verdicts. It would be the height of absurdity to have some cases arising out of the Flight 191 tragedy, which are filed in state courts, tried *without* evidence relating to income taxes and *without* any income tax instruction, while other cases which have been filed in or transferred to the federal court, on the basis of diversity of citizenship, tried *with* evidence relating to income tax and *with* income tax instruction.

The District Court has granted the plaintiffs' motion *in limine* and motion to preclude any income tax instruction which tells the jury that their verdict is free from income taxes. The District Court certified the questions; the Court of Appeals has granted leave to appeal. Lacking a final disposition of the in-

206. 494 F.2d 173 (1st Cir. 1974).
207. *Id.* at 185.

come tax issue, many of the federal court cases could be tried, only to be reversed and remanded later for new trials at enormous cost to the parties and the courts. By certifying these questions for interlocutory appeal,[208] the district court prudently seeks a final, dispositive ruling, on the issues relating to income taxes, which will lead to conservation of much time, money and judicial effort.

Availability of Damages for Pain and Suffering in Wrongful Death Cases

Various plaintiffs sought damages under the Illinois Wrongful Death Act[209] and also under the Illinois survival act.[210] The survival actions sought damages for "conscious pain and suffering, pre-impact fright and extreme emotional distress prior to the passenger's death."[211]

The defendants moved for summary judgment on the issue of the availability of damages for predeath pain and suffering.[212] Their motion was based upon the contention that the aircraft proceeded normally until just before impact, and that the crash and resulting deaths occurred with no discernible interval between injury and death; therefore, the passengers could not have suffered conscious pain and suffering. Defendants further alleged that in Illinois there is no cause of action for the negligent infliction of "fright or mental distress," where no physical impact or bodily injury occurs contemporaneously with the mental distress.[213]

The defendants were in error in arguing that "the impact" occurred when the plane hit ground; the contention was over-

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208. 28 U.S.C. § 1292(b) (1976).

209. ILL. REV. STAT. ch. 70, §§ 1—2 (1977).

210. ILL. REV. STAT. ch. 3, § 27-6 (1977).

211. Complaint, De Young v. American Airlines, U.S. District Court No. 79 C 2790 (N.D. Ill. Nov. 4, 1980).

212. Defendant's Motion for Summary Judgment, DeYoung v. McDonnell Douglas Corp., No. 79 C 2790 (N.D. Ill. Nov. 4, 1980).

213. The defendants relied on Thompson v. Offshore Co., 440 F. Supp. 752 (S.D. Tex. 1977) (pain and suffering damages not available absent evidence of actual predeath conscious pain and suffering); and National Bank of Bloomington v. Norfolk & West. Ry. Co., 73 Ill. 2d 160, 383 N.E.2d 919 (1978) (no damages allowed for conscious pain and suffering where seven days passed between decedent's being struck by train and death). The plaintiffs relied on three cases: Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) (under Ohio Survival Act, similar to Illinois Act, damages for pain and suffering allowed in drowning); United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967) (damages for predeath pain and suffering sustained although pilot's death was "almost instantaneous"); and Noel v. Linea Aeropostal Venezolana, 260 F. Supp. 1002 (S.D. N.Y. 1966) (fact that death occurred in minutes or less does not preclude damages for predeath pain and suffering).

simplified. The plaintiffs argued that the passengers experienced "impacts," due to cabin motion from the moment the 6 1/2 ton engine/pylon separated and fell off the aircraft until the final crash.[214]

The district judges, employing the "decapage"[215] method of choosing what law applied to particular issues, ruled that Illinois law governed the issue regarding the availability of damages for predeath pain and suffering in the actions involving the Illinois residents;[216] that Illinois courts limit claims for pain and suffering to those accompanied by bodily injury;[217] and further, that Illinois courts disallow claims for negligent infliction of emotional distress or mental anguish unless coupled with or caused by bodily injury.[218]

The court determined that the Illinois plaintiffs could not claim damages for "fright and terror" allegedly experienced during the final fall toward the ground; however, the plaintiffs were entitled to seek recovery for conscious pain and suffering result-

214. With 258 of the 264 seats occupied, the passengers would be knocked against each other and against the aircraft and luggage during the more pronounced maneuvers. With Flight 191's wing at a right angle to the ground (the final roll went "through 90°," *Accident Report, supra* note 2, at 1), loose or unsecured objects within the cabin would become dangerous "missiles," resulting in predeath pain and suffering. The Flight underwent a roll constituting a rocking of wings off their horizontal plane. Simultaneously, the aircraft underwent pitch changes.

215. Decapage is a process of applying the laws of different states to different issues in the same litigation. *See generally* Reese, *Decapage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973). Professor Reese stated:

> Amidst the chaos and tumult of choice of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most approximately be applied to govern the particular issue . . . .
>
> It also seems probable that greater use of depecage will be an inevitable by-product of the development of satisfactory rules of choice of law. In contrast to the broad rules that have been tried and found wanting, the new rules, if we are indeed to develop such rules, are likely to be narrow in scope and large in number. . . .
>
> In short, a willingness to make a liberal use of depecage would seem a prerequisite to the satisfactory development of narrow rules of choice of law.

Id. at 59-60.

216. DeYoung v. McDonnell Douglas Corp., 79 C 2790, slip op. at 4 (N.D. Ill. Nov. 4, 1980). *Cf. In re* Air Crash Disaster near Chicago, Illinois on May 25, 1979, 480 F. Supp. 1280 (N.D. Ill. 1979).

217. Carlinville Nat'l Bank v. Rhoads, 63 Ill. App. 3d 502, 380 N.E.2d 63 (1978).

218. This policy was subsequently overruled in Rickey v. Chicago Transit Authority, 101 Ill. App. 3d, 439, 428 N.E.2d 596 (1981). The Illinois Supreme Court, however, has yet to address this issue since *Rickey*.

ing directly from physical injuries.[219] The district court disagreed with the "instant death" contention of the defendants, and ruled that "although the jury must consider the duration of the pain and suffering in assessing the amount of damages to be awarded, that a person suffered for only a short time is not a bar to a claim for damages for this suffering."[220]

From a tactical standpoint, some attorneys have not sought damages for predeath pain and suffering. Their reasoning is that an attempt to recover a separate allowance for predeath conscious pain and suffering, especially in view of the court's ruling that plaintiffs could not seek damages for fright or terror, would distract the jury from its consideration of clearly attainable damages. In other words, it is tactically disadvantageous to "nit pick" regarding damages. A jury which is asked to consider a relatively minimal item of damages often loses sight of the more important aspects of damages, consisting for the most part of loss of future earnings in the light of inflation during the productive period of a deceased passenger's life. By analogy, some lawyers consider it inadvisable to seek damages for funeral expenses. Proof of such a relatively insignificant item of damages gets the jury thinking "small." Moreover, attempted proof of predeath conscious pain and suffering might be interpreted by the jury as an attempt to present the "macabre," and to obtain sympathy. The choice of whether to seek such damages is for each trial attorney in each case.

CONCLUSION

The Flight 191 litigation illustrates that the law of the United States relating to transitory tort litigation arising out of airplane crashes is marked by mystery, confusion and inconsistency. Lawyers and judges have attempted to find a pragmatic approach to such disasters, and to formulate "consistency" so as to provide a semblance of justice. However, in the absence of national legislation prescribing uniform criteria for claimants' damages, the liability of defendants for compensatory and punitive damages, and the claims of defendants vis-a-vis one another, the system does not always operate satisfactorily. Difficulty derives from the myriad choices of law confronting courts which must determine liability and attendant damages in air disaster cases. As occurred in this litigation, airline passengers may be from many of the states of the United States and from some 200 sovereign nations throughout the world. In the

219. DeYoung v. McDonnell Douglas Corp., 79 C 2790, slip op. at 7 (N.D. Ill. Nov. 4, 1980).

220. *Id.* at 809.

event of the deaths of hundreds of passengers, this results in disparate treatment of their heirs. Apart from the rights of plaintiffs, the liabilities of the defendants to the plaintiffs may differ markedly, as has also been illustrated in this article.

The vastly different judgments awarded families of passenger victims on the same aircraft, hinge largely, upon such happenstances as whether the aircraft crashes on land, in salt water or in fresh water. It is not, however, sensible to award some plaintiffs prejudgment interest while denying prejudgment interest to others. A system under which the measure of damages for predeath pain and suffering, parental care and guidance, and loss of consortium and companionship varies with different plaintiffs, is indefensible. Nothing justifies a system which would impose punitive damages upon one defendant, while insulating another.

The instant litigation worked out well, due in large part, to the experience and wisdom of the federal judges to whom the cases were assigned. They and the Court of Appeals have done everything within the system to expedite and fairly resolve this litigation. Discovery was completed as to liability within approximately two years (in itself a considerable accomplishment). Discovery as to damages was completed in all the federal court suits, except for a miniscule number filed shortly before expiration of the Illinois statute of limitations. A considerable number of cases have been settled, and those plaintiffs have had the benefit of substantial cumulative interest. The district and appellate court judges exhausted every procedure the system permits to expeditiously and fairly resolve the litigation. Despite their efforts, delay was inevitable. The resolution of threshold issues, at the trial and appellate levels, consumes time; resolution of the liability issue may be prolonged by the battle between defendants. Similar litigation has taken almost a decade to complete.[221]

Given the diversity of laws applicable to transitory tort litigation arising out of air crash disasters, the need for Congressional or judicial activism is manifest. New and dynamic laws, followed by real-life implementation, are urgently required in the interests of both the passenger public and the aircraft industry. If the system is to be preserved, it must be improved. In his "Path of the Law" lecture, Oliver Wendell Holmes espoused the benefit of self-criticism to the legal profession:

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221. Speech by Robert Alpert, Vice President of United States Aviation Insurance Group, Seminar sponsored by Lloyd's Press, Tobago (March, 1981).

> I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. . . .
>
> I trust that no one will understand me to be speaking with disrespect of the law because I criticize it so freely. I venerate the law, and especially our system of law as one of the vastest products of the human mind. . . . But one may criticize even what one reveres. Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it.[222]

This article has advocated the recommendations of Judges Robson and Will, as well as those of the United States Court of Appeals, that national legislation, addressed to the unique issues raised by air crash litigation, be enacted. It must be added, that many of the views expressed, have been disputed by experienced, respected trial lawyers who feel that most of the problems raised can be eliminated by the adoption of uniform state legislation.[223] Both arguments, however, admit the problems, and it is hoped, that the foregoing comments at least illuminate the problems. Awareness of the issues is crucial if the law is to keep pace with modern technology.

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222. HOLMES, COLLECTED LEGAL PAPERS 174, 194 (1920), *quoted in* Kennelly, *Litigation of Foreign Aircraft Accidents—Advantages (Pro and Con) from Suits in Foreign Countries*, 16 FORUM 488 (1981).

223. *See, e.g.*, Dombroff, *Against a Federal Law for Air Disaster Litigation*, 10 THE BRIEF 30 (1981); Haskell, *Federal Regulation Not Needed for Airline Liability*, 10 THE BRIEF 26 (1981). *But see* Comment, *Aviation Tort Liability—The Need for a Comprehensive Federal Aviation Liability Act*, 15 J. MAR. L. REV. 177, 184-86 (1981).