Pre-Trial Strategy in American Air Disaster Litigation

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I. INTRODUCTION

Regardless of where an airline disaster occurs, resulting litigation often is brought in the United States due to the attractiveness of American law.[1] Contingency fee arrangements allow most everyone to gain access to the courts without financial burden, especially since the losing party is rarely forced to pay the prevailing party's attorney's fees. The right to jury trial and liberal criteria of what are compensable damages result in higher money awards. The American concept of product liability increases the chances that the manufacturer also will be held liable. For these reasons incidents occurring in such places as India, France, Uganda, Tenerife, Yugoslavia, Norway, and Antartica have been litigated in America.

Like most litigation, many air disaster cases are settled before reaching trial. The amount of settlement often depends upon the forum. Thus, pre-trial strategy concerning forum selection is very important.

II. THE PLAINTIFF'S PERSPECTIVE

A. VARIATIONS IN SUBSTANTIVE LAW

When an attorney files suit, his objective is to obtain the maximum recovery for his client. In order to achieve that goal, he must carefully research the available forums for available theories of liability and the quantum and basis of damages recoverable.

1. BASIS OF LIABILITY

Each of the United States has its own common law which may or may not agree with that of other states. Different standards of care are applied among the states in regard to the duty of a pilot.[2] Most states apply a

1. Casenote, Piper Aircraft Co. v. Reyno, 48 J. AIR L. & COM. 407 (1983).

2. In Alabama a pilot is charged with that knowledge which, in the exercise of the highest degree of care, he should have known. Todd v. United States, 384 F. Supp. 1284 (M.D. Fla. 1974). However, under North Carolina law, in the absence of statute, only ordinary rules of

highest degree of care standard to the airline as a common carrier.

The use of statutes in establishing liability also varies dramatically. In Alabama[3] and California[4] violation of a Federal Aviation Regulation amounts to negligence *per se* where it proximately causes the injury. Violation of such a regulation in Ohio may, under appropriate circumstances, be negligence *per se*,[5] but Missouri considers this violation only as evidence of negligence and proximate causation.[6]

In products liability actions against the manufacturer, California applies a standard whereby one need only show that the product was defective, and that it caused injury to the plaintiff.[7] Other states require some showing that the product was unreasonably dangerous due to defective design, mismanufacture, or failure to warn.

2. *Damages*

The availability of punitive damages is important to plaintiffs. The litigation from the 1979 crash of a DC-10 near Chicago[8] shows the marked difference among forums in the availability of punitive damages in wrongful death actions.[9] In the case of the 1979 Chicago crash, New York law was found to be controlling against American Airlines since it was then the airline's principal place of business.

California provides punitive damages for personal injury but not for wrongful death.[10] Punitive damages are generally not available under

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negligence and due care apply with respect to aircraft operation. Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D. N.C. 1962). Washington and Texas also use ordinary rules of negligence and due care. Baker v. United States, 417 F. Supp. 471 (W.D. Wash. 1975); Brooks v. United States, 695 F.2d 984 (5th Cir. 1983).

3. Freemen v. United States, 509 F.2d 626 (6th Cir. 1975).

4. McGee v. Cessna Aircraft Co., 139 Cal. App. 3d 179, 188 Cal. Rptr. 542 (1983); Rudelson v. United States, 431 F. Supp. 1101 (C.D. Cal. 1977); Aardena v. United States, 444 F. Supp. 1354 (C.D. Cal. 1977); Nat'l Indem. Co. v. United States, 444 F. Supp. 1356 (C.D. Cal. 1977), *aff'd* 602 F.2d 1326 (9th Cir. 1979).

5. *Todd*, 384 F. Supp. at 1294.

6. Allnutt v. United States, 498 F. Supp. 832 (W.D. Mo. 1980).

7. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153 (1972); Barker v. Lull Engineering Co., 20 Cal. 3d 413, 573 P.2d 443 (1978).

8. In re Air Crash Disaster Near Chicago, Ill. 500 F. Supp. 1044 (N.D. Ill. 1980), *aff'd in part and rev'd in part*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981).

9. Oklahoma allows punitive damages. *Id.*; 12 OKLA. STAT. ANN. tit. 12, § 1053, subd. C (West 1984). New York and Illinois do not allow punitive damages. *Air Crash Disaster Near Chicago*, 500 F. Supp. 1044, 1047 (N.D. Ill. 1980); ILL. ANN. STAT. ch. 110-1/2 § 27-6 (Smith-Hurd 1978); Ch. 111-2/3 § 77 (Smith-Hurd Supp. 1985). Missouri allows damages for "aggravating circumstances;" which are punitive or exemplary. *Air Crash Disaster Near Chicago*, 500 F. Supp. 1044, 1047 (N.D. Ill. 1980); MO. ANN. STAT. §§ 537.080 *et. seq.*, 537.090 (Vernon 1986).

10. Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980); Kalinsky v. General Dynamics Corp., 449 U.S. 976 (1980).

contract actions for defective products.[11] This would bar punitive damages from implied or express warranty claims, but not from actions in tort arising from injury by a defective product.

The quantum of punitive damages available is another consideration. Some states[12] require that a reasonable relationship exist between the award of punitive damages and the amount of actual damages sustained by plaintiff, while others[13] hold that there need be no such relationship.[14]

The basis of compensatory damages recoverable under the state wrongful death statutes varies. Under Nebraska law, the measure of damages recoverable is generally limited to pecuniary loss sustained by the statutory beneficiaries.[15] Damages for pain, anguish, loss of society and companionship are not recoverable under this statute.[16] Many states, however, would allow recovery for such non-pecuniary injuries. The calculation of lost future earnings depends on many factors such as present value, inflation and income tax obligations. The states take several different approaches.[17] Pre-judgment interest can sizably increase the amount of the award, especially where the case continues for several years. Many states[18] allow interest to be awarded from the time of death to the date of the judgment, but a few, such as Montana,[19] forbid such a practice.

B. *Procedural and Practical Considerations*

Choice of forum is also important under circumstances unique to a

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11. U.C.C. § 1-106(1) (1985).

12. *See, e.g.*, Wynn Oil Co. v. Purolator Chem. Corp., 403 F. Supp. 226 (M.D. Fla. 1975).

13. *See, e.g.*, Gass v. Gamble-Skogmo, Inc., 357 F.2d 215 (7th Cir. 1966), *cert. denied*, 384 U.S. 943 (1966); Hannigan v. Sears, Roebuck & Co., 410 F.2d 285 (7th Cir. 1969), *cert. denied*, 396 U.S. 902 (1969) (applying Illinois law).

14. The Alabama wrongful death statute is punitive in nature, making the measure of damages equal to the degree of culpability in causing the death. Ross v. Newsome, 289 F.2d 209 (5th Cir. 1961); Denny v. Seaboard Lacquer, Inc., 487 F.2d 485 (4th Cir. 1973). In contrast, punitive damages under Connecticut law are limited to the amount of plaintiff's actual litigation expenses less taxable costs. Givens v. W.T. Grant Co., 457 F.2d 612 (2d Cir. 1972), *vacated*, 409 U.S. 56 (1972), *on remand* 472 F.2d 1039 (2d Cir. 1972). Puerto Rico takes another view, holding that such expenses are not an appropriate measure of damages. Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir. 1976).

15. Wright v. Hoover, 329 F.2d 72 (8th Cir. 1969).

16. *Id.* at 74.

17. Florida does not consider the effect of future inflation. Henderson v. S.C. Loveland Co., 396 F. Supp. 685 (N.D. Fla. 1975). Mississippi does not allow a deduction for income tax. In re M/V Elaine Jones, 480 F.2d 11 (5th Cir. 1973), *amended sub nom* Canal Barge Co. v. Griffith, 513 F.2d 911 (5th Cir. 1975). Colorado leaves it to the judge's discretion. United States v. Sommers, 351 F.2d 354 (10th Cir. 1965).

18. *E.g.* Circle Line Sightseeing Yachts, Inc. v. Storbeck, 325 F.2d 338, 341 (2d Cir. 1963).

19. Ryan v. Ford Motor Co., 334 F. Supp. 674 (E.D. Mich. 1971) (applying MONT. CODE ANN. 27-1-212 (1985)).

particular suit. If the case was not received shortly after the accident, the statute of limitations may be a concern.[20] Breach of warranty actions usually have a four year statute of limitations.[21] Obtaining jurisdiction over the defendants is not usually a problem, but the plaintiff may want a forum where he can join all of the possible defendants.

Standing to sue may be of concern. *Piper Aircraft Co. v. Reyno*[22] illustrates this in an international sense. California, as most states, allows an estate to be set up in that state to allow a wrongful death action to be commenced there. This can be done by a next friend, which, in the *Reyno* case was the plaintiffs' attorney's secretary. The estate to be administered consisted wholly of the expected recovery from the lawsuit, thus standing to sue is generally not a problem in the U.S. because of the fictional estate or personal representative,[23] but nationality of the plaintiffs may play a key role in *forum non conveniens* actions, as will be discussed later.[24]

C. STATE VS. FEDERAL COURT

Air disaster cases are often commenced in state courts due to the belief that the forum state's law will be more favorably interpreted. Filing in state court also prevents the joinder of cases filed in other states, thus increasing the stakes for the defendant, i.e., the cost of litigation. State procedural law is often less onerous for plaintiffs than the Federal Rules of Civil Procedure. Even if plaintiff's attempt to keep a suit in state court is unsuccessful, the initial filing will cause that state's law to be applied if the case is removed to federal court. Cases can generally only be shifted

20. California has a general statute of limitations of three years in tort actions, but wrongful death actions must be brought within one year. Klingebiel v. Lockheed Aircraft Corp., 372 F. Supp. 1086 (N.D. Cal. 1971), *aff'd*, 494 F.2d 345 (9th Cir. 1974). Wrongful death actions can be filed up to two years after death in Illinois and Georgia. Illinois Wrongful Death Act, ILL. REV. STAT. ch. 70, § 2 (1985); Gates v. Montalbano, 555 F. Supp. 708 (N.D. Ill. 1983); Curry v. P.D. Marchessini, Inc., 274 F. Supp. 167 (S.D. N.Y. 1967).

21. U.C.C. Sec. 2-725(1) (1985).

22. 455 U.S. 928 (1981). *See infra* notes 98-114 and accompanying text.

23. Under Indiana law, only the parents have standing to sue where the decedent is an unemancipated minor. Ruckman v. Pinecrest Marina, Inc., 367 F. Supp. 25, 26 (N.D. Ind. 1973).

24. The location of the plaintiffs' attorney's office may play a substantial role in determining where a suit is filed. It is no coincidence that substantial aircraft litigation is filed in Los Angeles, Chicago, Washington, D.C. and, to a lesser extent, in New York, where prominent aviation specialists are located. Litigation across the street from one's office is easier to handle than a thousand miles away. The expenses of trial are also reduced. Where the court is in another state, a local attorney will have to be retained. This will result in some sort of fee arrangement, potentially reducing the original attorney's income.

The attorney will prefer to argue a motion to a local court where he is known. He is acquainted with the local rules of practice and unwritten codes of conduct. In local courts he also is more likely to know the judges and to have developed a rapport. Law is the art of persuasion and it is usually easier to persuade a judge with whom one already has a working relationship.

between the two by removal. Two exceptions are that Federal courts may abstain from ruling on essentially state law matters[25] or certify such questions of law to the state's highest court for decision where state law has made provision for such a procedure.[26]

1. JURISDICTION

As a device to obtain *in personam* jurisdiction over a defendant, states have enacted legal fictions known as "long-arm statutes." Most state long-arm statutes are broad enough to allow major airlines to be haled into their courts.[27] The Due Process clause of the U.S. Constitution has been interpreted to require that there be "minimum" contacts between the defendant and the forum state so that "the maintenance of the suit does not offend 'traditional' notions of fair play and substantial justice."[28] Under the *World-Wide Volkswagen*[29] analysis, a major airline can reasonably foresee being subject to jurisdiction in most states.[30]

2. CONFLICT OF LAWS

The federal court in a diversity action must generally apply the conflict-of-laws rule of the state in which it is sitting. The traditional rule of *lex loci delecti* (law of the place of injury) has all but been replaced by the "paramount interest" test[31] or other similar rules wherein the court examines each legal issue to determine which state has the superior interest in having its law applied. Under the "most significant relationship" test, the appropriate forums to be considered are 1) the place of injury; 2) the place of the misconduct resulting in the injury; 3) the domicile and place of business of the parties; and 4) the place where the relationship between the parties is centered.[32] Among these forums the court must attempt to discover and evaluate for each potential source of law: 1) what interest the legislature of that jurisdiction might have in applying its law;[33]

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25. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

26. Lehman Bros. v. Schein, 416 U.S. 386 (1974).

27. *See* Schaffer v. Heitner, 433 U.S. 186, 216 (1977); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

28. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *Shaffer*, 433 U.S. 186; Helicopteros Nacionales de Colombia v. Hall, _ U.S. _, 104 S. Ct. 1868, 80 L Ed 404 (1984).

29. *World-Wide*, 444 U.S. at 297.

30. Serving an airport or advertising and promoting within the state has satisfied the minimum contacts requirement. Bryant v. Finnish Nat'l. Airline, 15 N.Y.2d 426, 260 N.Y.S.2d 625 (1965).

31. This has also been called the "most significant relationship" test. *See* Ingersoll v. Klein, 46 Ill.2d 42, 262 N.E.2d 593, 595 (1970). California applies a test called "comparative impairment"; *see* Bernhard v. Harrah's Club, 16 Cal. 3d 313, 320, 546 P.2d 719, 723 (1976), which usually reaches the same result. *Air Crash Disaster*, 644 F.2d at 625.

32. *Air Crash Disaster*, 644 F.2d at 612.

33. Air Crash Disaster Near Saigon, 476 F. Supp. 521 (D.D.C. 1979).

2) the needs and interests of the parties; 3) the needs of judicial administration; 4) the promotion of interstate order; and 5) the basic policies underlying that field of law.[34] The Ninth Circuit has held that where two states have an equal interest, the law of the state where the injury occurred must be applied.[35]

In the Chicago DC-10 crash, Illinois was deemed to have the paramount interest on the punitive damages issue due to: 1) the shock wave suffered and the expenses incurred by the state on account of the crash; 2) the fact that all but two of the decedents whose suits were filed in Illinois were from the state; and 3) Illinois, as home of one of the world's busiest airports, had a strong interest in encouraging air transportation companies to do business in Illinois.[36] This is a criticizable conclusion,[37] but it does achieve uniformity in that it prevented some plaintiffs from recovering punitive damages in a case where others could not. The end result was that none of the defendants were held liable for punitive damages.

Some courts have avoided the complexities of conflicts cases by novel means. In *Kohr v. Allegheny Airlines, Inc.*,[38] the federal district court applied "federal common law" on the basis that the federal government has primary interest in regulating the affairs of the nation's airways.[39] The Supreme Court, however, has indicated that courts are not free to depart from the applicability of state law in air crash cases,[40] hence the *Kohr* case is restricted to its facts if it has any remaining viability[41].

The effect of choice-of-law decisions is important in the area of liability, punitive damages, general damages, and statutes of limitation. In *Browne v. McDonnell Douglas Corp.*,[42] California product liability law was found to be applicable, but Yugoslavia's rule of proportionate liability was applied to the claim against the manufacturer. This decision allowed California to protect its interest in regulating resident manufacturers while

34. Air Crash Disaster at Boston, 399 F. Supp. 1106 (D. Mass. 1975).

35. *Air Crash Disaster*, 644 F.2d at 621.

36. *Id.* at 612.

37. *See* Casenote, *Conflict of Laws—When There Is True Conflict Between the Laws of States Having Equal Interests, the Law of the Place of the Injury Is To Be Used. In re Air Crash Disaster Near Chicago*, 47 J. AIR L. & COM. 339, 358-59 (1982).

38. 504 F.2d 400 (7th Cir. 1974).

39. This argument has some support in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (noise pollution; FAA, in conjunction with E.P.A. has full control over aircraft noise, pre-empting state and local control).

40. Mirnee v. Dekalb County, 433 U.S. 25 (1977).

41. Bowen v. United States, 570 F.2d 1311, 1317 (7th Cir. 1978).

42. 504 F. Supp. 514 (N.D. Cal. 1980).

shielding McDonnell-Douglas from full liability since it could not implead the Yugoslav airline or the Yugoslav government.

In another case, a federal judge in the Western District of Washington refused to dismiss a case arising from an air crash into the sea near Bombay, India because the statute of limitations in India had run.[43] However, the court required that Indian law be applied in all other respects, thus depriving the plaintiffs of more favorable American products liability law.

The effect upon outcome of choice of law determination was graphically illustrated by *In re Air Crash Disaster at Boston, Mass. July 31, 1973*.[44] The court found that the wrongful death statutes of the decedents' domicile should apply. Thus, a recovery ceiling under Massachusetts law[45] applied only to decedents from Massachusetts. Others from Vermont,[46] New Hampshire,[47] Florida[48] were not so limited. Also, determination of damages under the wrongful death statutes of Vermont and Massachusetts is based on different principles. Vermont's law is premised on compensation of the victim for pecuniary losses while Massachusetts' is punitive in nature, invoking very different standards of liability.

3. *JOINDER*

In certain circumstances, plaintiff's attorney may avoid joining all possible defendants.[49] If all plaintiffs are of foreign citizenship in an overseas crash, the attorney may sue only the U.S. manufacturer to avoid removal of the case to federal court. Joinder of a foreign airline could provide grounds for removal to federal court.[50] The case also may be dismissed on *forum non conveniens* grounds if plaintiffs and the airline defendant are located overseas as well as most of the evidence and witnesses. The product liability action against the U.S. manufacturer may be seen only as nominal, and consequently inadequate to continue jurisdic-

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43. Air Crash Disaster Near Bombay, 531 F. Supp. 1175 (W.D. Wash. 1982).

44. 399 F. Supp. 1107 (D. Mass. 1975).

45. The limit was $200,000. *Id.* at 1110 (citing MASS. GEN. LAWS ANN. ch. 229, § 2 (West 1981).

46. *Id.*

47. *Id.* at 1114.

48. *Id.* at 1119.

49. For many reasons, a plaintiff will usually try to sue every possible defendant in one action. First, the plaintiff wants to avoid being faced with evidence at trial which tends to place the blame on an absent non-defendant. *See* Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?*, 43 J. AIR L. & COM. 565, 567 (1977). Second, the government and the manufacturer may be joined in order to obtain access to documents in their possession. Third, the plaintiff wants to create a large enough pool of resources to fund potential settlements. In addition, the larger the number of potentially responsible defendants, the less each would contribute thereby facilitating settlement opportunity.

50. *See* 28 U.S.C. § 1441(d) (1973).

tion,[51] or, alternatively, the manufacturer may offer stipulations to cure foreign forum considerations.

III. DEFENDANT'S PERSPECTIVE

A. PROCEDURAL TACTICS

The defendants in air disaster cases are, in reality, the insurers. The federal government is also often named as defendant. Reducing risk of exposure to liability both in number and value of claims is the insurer's prime goal. The insurer focuses on probability of success in court and the amount that he could potentially pay if verdict is for plaintiff. Often liability is not contested in airline cases, leaving only the issue of damages to be settled. Thus, airline defendants look from the outset to settle claims quickly and reasonably.

1. REMOVAL

Defense lawyers generally prefer to be in federal court. Federal procedural rules are uniform throughout the country and federal courts are less tainted by local bias. Removal can also facilitate a later change of venue or consolidation of cases. Consequently, one of the defense attorney's first activities is to ascertain if he may remove a case filed in state court to federal court.

A case can be removed from state court to federal court[52] where there is diversity between the parties (i.e. the parties are not residents of the same state);[53] where the action is based on the Warsaw Convention[54] or any other treaty of the U.S.;[55] where there is a claim against the U.S. government;[56] or where the claim arises under a federal cause of action,[57] such as the Federal Aviation Act,[58] Death on the High Seas Act,[59] common law wrongful death,[60] or the Foreign Sovereign Immunities Act.[61] Defendant is precluded from introducing a possible federal issue in order to obtain federal jurisdiction. Also, subject matter jurisdiction cannot be waived by either party in order to place a case in federal court.

51. Fitzpatrick, *"Reyno": Its Progeny and Its Effects on Aviation Litigation*, 48 J. AIR L. & COM. at 539, 556 (1983).
52. 28 U.S.C. § 1441 (1982).
53. Egan v. American Airlines, Inc., 324 F.2d 565 (2d Cir. 1963).
54. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978).
55. 28 U.S.C. § 1331 (1982).
56. 28 U.S.C. § 1346 (1982).
57. 28 U.S.C. § 1331 (1982).
58. 49 U.S.C. § 1301, *et seq* (1982).
59. 46 U.S.C. §§ 761-68; 28 U.S.C. § 1333 (1982).
60. Moragne v. States Marine Lines, 398 U.S. 375 (1970).
61. 28 U.S.C. 1602 (1982).

The federal court must have had jurisdiction at time the original suit was filed.

2. *Consolidation and Change of Venue*

Once a case is removed to federal court, defendant may seek a change of venue, to transfer to a more convenient federal forum[62] or to consolidate related cases.[63] Such a transfer can only be to a jurisdiction where the suit could have been originally brought.[64] A transferred case brings with it the law of the transferor state and circuit.[65] A transfer is a "mere change of courtroom."[66] Transfer, however, may still provide a tactical advantage to the defendant where the transferor state law is more liberal than the recipient state.

The consolidation of federal court suits reduces duplicate litigation, but parallel suits in state and federal court cannot be merged since they are in separate systems. Consolidation is normally sought by defendants to reduce the expense of defending claims, but certain plaintiffs' counsel seem also to support the operation of the Judicial Panel on Multi-District Litigation. Consolidation has reduced the usual period from crash to termination of litigation[67] and it may also serve to equalize the parties by giving plaintiffs the advantage enjoyed by defendants in having specialist counsel and large resources to support the litigation.[68]

A defendant seeking individual case transfer bears the burden of demonstrating that the balance of convenience strongly favors him under 28 U.S.C. 1404(a).[69] In so doing, defendant cannot assert plaintiff's inconvenience, nor is it enough to show that defendant's principal place of business or convenient location for counsel is in another district.[70] Yet, it is easier to satisfy the standard to obtain a transfer within the system than obtain dismissal due to *forum non conveniens*.[71] Due to the harsher result of dismissal,[72] the court's option to transfer under Section 1404 is exercised more liberally than dismissal.

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62. 28 U.S.C. §§ 1404, 1406 (1982).
63. 28 U.S.C. § 1407 (1982).
64. Hoffman v. Blaski, 363 U.S. 335 (1960).
65. *Air Crash Disaster*, 399 F. Supp. at 1106.
66. Van Dusen v. Barrack, 376 U.S. 612 (1964).
67. McDermott, *A Plea for the Preservation of the Public's Interest in Multidistrict Litigation*, 37 J. Air L. & Com. 423, 454-55 (1971).
68. Speiser, *supra* note 49, at 577-79.
69. American Can Co. v. Crown Cork & Seal Co., 433 F. Supp. 333, 337 (E.D. Wis. 1977).
70. *American Can*, 433 F. Supp. at 338.
71. Norwood v. Kirkpatrick, 349 U.S. 29, 31-32 (1955).
72. *Id.* at 32.

B. Dismissal Via Forum Non Conveniens

The high point of foreign case jurisdiction in the U.S. was *In re Paris Air Crash of March 3, 1974*.[73] Since then the American courts have increasingly shown a willingness to dismiss cases on the ground of *forum non conveniens* where the air crash occurred abroad, most of the witnesses and evidence are abroad, and the real parties are foreigners.[74] A *forum non conveniens* dismissal presupposes that the court properly has jurisdiction but nonetheless declines to exercise that jurisdiction. "The principle of *forum non conveniens* is simply that the court may resist imposition upon its jurisdiction where jurisdiction is authorized by the letter of a general venue statute."[75]

1. The Traditional Analysis

The test to be used in deciding a dismissal motion for *forum non conveniens* was set out in 1947 in *Gulf Oil v. Gilbert*. Generally, the *Gilbert* approach calls for a balancing of the interests of the plaintiff, the defendant and the chosen forum,[76] with the qualification that the plaintiff's choice of forum should rarely be disturbed unless the balance of convenience factors strongly favors defendant. Within these guidelines, the decision whether to dismiss is a matter of the trial judge's discretion.[77]

Given *Gilbert's* rather broad contours, it is not surprising that a great

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73. *Paris Air Crash*, 399 F. Supp. at 732.

74. Tompkins, *Barring Air Crash Cases from American Courts. Part I: Jurisdiction*, For The Defense, June 1981, at 16, 17; Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 Va. J. Int'l L. 755, 764 (1977).

75. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

76. *Id.* at 508-09. The Court went on to set out the factors to be considered in the balancing analysis. The inquiry should include:

1. Whether an adequate alternative forum exists.
2. Once established that an alternative forum is available, consider all relevant factors of private interest, weighing the relative advantages and obstacles to fair trial in that forum:
   a. Relative ease of access to sources of proof.
   b. Availability of compulsory process for attendance of unwilling witnesses.
   c. Cost of obtaining willing witnesses.
   d. Possibility of viewing the scene of the injury, if appropriate.
   e. Enforceability of judgment, if obtained,
   f. All other practical problems affecting the efficiency and fairness of the trial.
3. If these factors are substantially in equipoise the court must consider factors of public interest:
   a. Court calendar congestion.
   b. Burden of jury duty on people of a community unrelated to the litigation.
   c. Local interest in having localized controversies decided near to home.
   d. Avoidance of complex conflict of law problems, and
   e. Appropriateness of having the trial in a forum familiar with the law governing the case rather than having some other forum untangle foreign law.

77. *Id.* at 511.

deal of uncertainty followed in its wake. One particularly troublesome question dealt with the importance of the citizenship of the plaintiff. Most courts adopted a rule which placed a greater burden upon defendants seeking to dismiss suits brought by American plaintiffs;[78] conversely, suits by foreigners were more readily dismissed.[79] Other courts took a different approach, declaring that a plaintiff's citizenship was irrelevant to the *Gilbert* balance.[80]

Another issue left unresolved in *Gilbert* was whether the possibility of a change in substantive law should enter into the *forum non conveniens* analysis. Once again, the lower courts reached different conclusions.[81]

2. *Piper Aircraft v. Reyno*

The problems discussed above were directly confronted in 1981 in the landmark case, *Piper Aircraft v. Reyno*.[82] The case arose when a small chartered aircraft crashed in Scotland. The pilot and five passengers, all Scottish citizens and residents, were killed. The decedents' heirs and survivors, their estates, the company operating the plane, the company from which it was leased and the accident investigation were all located in the United Kingdom. Nonetheless, a suit was filed in California state court against the manufacturers of the airplane and its propellers.[83] The nominal plaintiff was unrelated to any of the decedants or their survivors; she was a legal secretary to the attorney who filed the suit. Parallel suits by the survivors were brought in the United Kingdom. The only nexus between the U.S. and the American litigation was the American domicile of the manufacturers. The Scottish courts and law were clearly more appropriate, but the case was filed in California admittedly due to more favorable laws.[84] Scotland has not adopted product liability and

78. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1344 (2d Cir. 1972) (plaintiff's American citizenship precluded dismissal, despite the fact that balance otherwise favored foreign forum).

79. *See, e.g.*, Del Monte Corp. v. Everett Steamship Corp., 402 F. Supp. 237 (N.D. Cal. 1973); J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 331 F. Supp. 1215 (W.D. Mo. 1971), *aff'd*, 462 F.2d 998 (8th Cir. 1972).

80. *See, e.g.*, Pain v. United Technologies Corp., 637 F.2d 775, 796, 799 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

81. *Compare* Alcoa S.S. Co. v. M/V Nordic Recent, 654 F.2d 147 (2d Cir. 1978) (the possibility of lesser recovery does not justify a refusal to dismiss), *aff'd en banc*, 654 F.2d 147 (2d Cir. 1980), *cert. denied*, 449 U.S. 890 (1980), *reh'g denied*, 449 U.S. 1103 (1981), *ruling denied*, 450 U.S. 1050 (1981) *with* DeMateos v. Texaco, Inc., 562 F.2d 895 (3d Cir. 1977) (dismissal, like transfer under 28 U.S.C. § 1404(a), should not result in a change in applicable law), *cert. denied*, 435 U.S. 904 (1978).

82. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

83. *Id.* at 239.

84. *Id.* at 240.

solely uses the concept of negligence.[85] Scottish law allows wrongful death actions only by the next of kin and only for loss of support and society.[86]

On defendants' motion, the case was removed from California state court to federal court, then statutorily (Section 1404(a)) transferred to the Middle District of Pennsylvania. After the transfer, defendants moved for dismissal on ground of *forum non conveniens*[87] contending that the case should be heard in Scotland. The district court granted the motion, but the Court of Appeals reversed.

The Supreme Court upheld the district court's ruling and laid down two important points of law. First, the court held that "the possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry."[88] To do so, would be to lose valuable flexibility under the *forum non conveniens* doctrine and would make the doctrine virtually useless. This results because plaintiff would ordinarily choose the forum with the most advantageous choice-of-law rules,[89] requiring the trial courts to engage in complex exercises of comparative law,[90] and substantially increasing the flow of cases into the U.S.[91] Forum shopping by defendants would be discouraged by not giving substantial weight to the possibility of a favorable change in the law to the defendant.[92] The court went on to say that an unfavorable change in law "in rare instances" may not satisfy the initial requirement of an adequate alternative forum, but it gave no guidelines concerning when such a condition would exist.[93]

Second, the court held that a foreign plaintiff's choice of U.S. forum deserves less deference than that by a U.S. plaintiff.[94] In *Reyno*, the attorney's secretary was used as a proxy plaintiff. Earlier appeals court cases had upheld dismissal in such cases, but this was the first endorsement by the nation's highest court.[95]

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85. S. MCLEAN, LEGAL ISSUES IN MEDICINE 68-81 (1981) [refering to Donoghue v. Stevenson, 1932 Sess. Cas. 32; Donaghue v. Concrete Products (Kirkaldy) Ltd., 1956 SLT 58]. *See also* WALKER, THE LAW OF DELICT IN SCOTLAND (1966).

86. Casenote, *supra* note 1, at 408.

87. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 738 (M.D. Pa. 1979), *aff'd*, 454 U.S. 235 (1981).

88. *Reyno*, 454 U.S. at 247.

89. *Id.* at 250.

90. *Id.* at 251.

91. *Id.* at 252.

92. *Id.* at 252, note 19.

93. *Id.* at 254, note 22.

94. *Id.* at 256.

95. Del Monte Corp. v. Everett Steamship Corp., 402 F. Supp. 237 (N.D. Cal. 1973), J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 331 F. Supp. 1215 (W.D. Mo. 1971), *aff'd*, 462 F.2d 998 (8th Cir. 1972).

The advantages of the *Reyno* decision, at least from the point of view of defendants, are apparent. First, the mere fact that an alternate forum's substantive law might be less favorable will no longer be sufficient to defeat dismissal. Further, courts will now apply a different standard to cases involving foreign plaintiffs. *Reyno* rejects the line of reasoning that U.S. law should follow U.S. corporations wherever they go.[96] The policy statement of *Reyno* is that manipulation of the American judicial system through clever forum shopping by foreign plaintiffs should be discouraged.[97] Finally, *Reyno* has implications for suits by American plaintiffs as well. While allowing for greater deference to an American plaintiff's choice of forum, *Reyno* explicitly refuses to go so far as to bar dismissal of such suits altogether.[98] The applicability of the *forum non conveniens* doctrine is thus clarified.

Given *Reyno*, the motion for dismissal on grounds of *forum non conveniens* may be the defendant's strongest weapon in a foreign case. To the defendant, *forum non conveniens* is a means of obtaining leverage over the plaintiff. Dismissal from U.S. jurisdictions will force the plaintiff to litigate elsewhere, with application of appropriate law, to recover. Plaintiff must then weigh the probable amount of recovery abroad against the settlement offer.

C. THE WARSAW CONVENTION

If an accident occurs in the course of an international flight, it is likely that the resulting litigation will be governed by the provisions of the Warsaw Convention.[99] The Convention was formally adopted on October 12, 1929 as a response to the increasing frequency of international air travel. Its purpose was to create a unified body of law upon which passengers and carriers could rely.[100] The Warsaw Convention is binding upon all nations who have elected to ratify it.[101]

The aims of the Convention are two-fold: to regulate the international air carrier's liability and to regulate the documents of international air

96. Casenote, *supra* note 1, at 434-35.

97. Fitzpatrick, *supra* note 64, at 557.

98. *Reyno*, 454 U.S. at 256, note 23.

99. Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) [hereinafter cited as Warsaw Convention]. "International transportation" is defined as air travel in which the place of departure and place of destination are located in different countries or, if departure and destination points are in the same country, there is an agreed stopping place within the territory of another country. *Id.* art. 1(2).

100. N. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 378 (1981).

101. As of January 1981, 113 countries, including the United States, had ratified the convention. *Id.* at note 1.

transportation.[102] Of those dual objectives, counsel in air disaster cases are obviously concerned with the former. The Convention has become the source of much, if not all, of the substantive and procedural aspects of suits against international air carriers. Thus, intimate familiarity with the provisions of the Convention can be a decisive advantage in airline cases.

1. *JURISDICTION*

Article 28 of the Warsaw Convention governs jurisdiction over international air cases. It provides that suit may be brought in the territory of one of the contracting states of the convention, "either before the court of the domicile of the carrier or of its principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination."[103] United States courts have construed this provision in such a way as to limit the exercise of jurisdiction.[104] First, the term "destination" has been interpreted as a ticketholder's ultimate stopping point. In other words, a round trip from France to the United States and back would have France as its "destination." Accordingly, jurisdiction over cases arising out of such a trip would not lie in the United States unless the ticket was purchased in U.S. or the carrier has his principal place of business here. This is true even if the injury occurs within the territory of the United States.[105] Thus, defendants in aircraft cases may properly seek dismissal of actions arising out of such a factual setting.

The convention also imposes a time period within which actions must be brought which supersedes the law of the forum. Pursuant to the Convention, "The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped."[106]

2. *LIMITATION ON LIABILITY*

The outstanding feature of the Warsaw Convention and its subsequent amendments is the codification of the substantive law to be applied

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102. *Id.* at 379.

103. *Id.* art. 28(1); *see also* N. MATTE, *supra* note 100, at 426.

104. Article 28(1) has been interpreted as conveying subject matter jurisdiction, as opposed to mere venue. Thus, if the United States is not among the places enumerated by Article 28(1), the district court lacks jurisdiction and must dismiss the claim. Smith v. Canadian Pac. Airways, 452 F.2d 798 (2d Cir. 1971).

105. *See* Butz v. British Airways, 421 F. Supp. 127 (E.D. Pa. 1976) (no jurisdiction where passenger on round trip from London to New York and back sustained ear injuries as aircraft landed in New York).

106. Warsaw Convention, *supra* note 115, art. 29(1). The method of calculating the period of limitation is left to the law of the forum. *Id.* art. 29(2).

in international aircraft cases. Simply stated, the Convention created a rebuttable presumption of liability on the part of the carrier, and a monetary limit on the recovery which a passenger or his heirs could obtain.[107]

The original Convention provided that an air carrier would generally be liable for passengers' injuries sustained in an accident, so long as the accident took place on board the aircraft or in the course of embarking or disembarking.[108] However, a carrier could escape liability if it could prove that it took all necessary measures to avoid the damage, or that such measures were impossible.[109]

The Convention also imposed a ceiling on an air carrier's liability. Unless the parties contracted otherwise, maximum liability for passenger injuries was limited to 125,000 francs, approximately $10,000.00.[110] However, this limitation would not apply if injury resulted from willful misconduct on the part of the carrier.[111]

The Warsaw Convention was modified in 1955 by the Hague Protocol. The Protocol was prompted in part by a desire to clarify certain of the conventions provisions, but was primarily motivated by the need to increase the liability limitations.

Pursuant to the Protocol, the limitation on liability was doubled to 250,000 francs ($20,000.00).[112] Also, the unlimited liability provision was modified to include both willful and reckless conduct.[113]

Despite these refinements, the United States declined to ratify the Hague Protocol, based on a belief that liability restrictions were still unreasonably low. Instead, the U.S. eventually participated in the Montreal Agreement. Unlike the Convention and Protocol, which are agreements among nations, the Montreal Agreement is a contract between the United States and the international air carriers who fly into and out of this country. Under the Agreement, the liability ceiling is raised to $75,000. Also, liability is absolute; a plaintiff need only show that damage has occurred in order to recover. Except for those provisions, all other matters, such as jurisdiction, are controlled by the terms of the Warsaw Convention.

From a defendants' point of view, it is generally desirable to have a case come under the auspices of the Warsaw Convention. Even the liability limitations contained in the Montreal Agreement are low by Ameri-

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107. Cook, *Counting the Dragon's Teeth: Foreign Sovereign Immunity and its Impact on International Aviation Litigation*, 46 J. AIR L. & COM. 687, 712 (1981).

108. Warsaw Convention, *supra* note 99, art. 17.

109. *Id.* art. 20.

110. Id. art. 22. *See also* N. MATTE, *supra* note 100, at 416-17.

111. Id. art. 25(1)(2).

112. Protocol: Amending 1929 Air Carriage Convention, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter cited as Hague Protocol], art. 22(1).

113. *Id.* art. 25.

can tort law standards. Thus, defense counsel should be alert to the coverage requirements of the Convention in order to invoke its provisions when possible.

D. Foreign Sovereign Immunity

Another potential weapon for defendants in aircraft cases is the doctrine of sovereign immunity. The concept of sovereign immunity—that a foreign state cannot be sued without its consent—developed in the law of nations, including the United States.[114] Over the years, application of the doctrine evolved in the United States to permit liability for "private acts" of foreign governments, while retaining immunity for "public" acts.[115] Eventually, the doctrine was codified with the enactment of the Foreign Sovereign Immunities Act of 1976.[116] As will be demonstrated, this Act may be applicable in certain aircraft cases.

The general premise of the Act is that a foreign state is immune from the jurisdiction of the United States courts, subject to certain exceptions.[117] The Act provides that the term "foreign state" includes agencies or instrumentalities of the foreign state,[118] defined as "an organ of a foreign state . . . a majority of whose shares or other ownership interest is owned by a foreign state."[119] It is a fact that there are many "national" airlines whose stock is owned by the government of a foreign country.[120] In cases where one of these airlines is the defendant, the doctrine of sovereign immunity may operate to bar the exercise of jurisdiction by U.S. courts, particularly in foreign crashes.[121]

The mere fact of government stock ownership does not automatically convey immunity, however. The Act also contains various exceptions to the general rule of immunity which must be dealt with.[122] In the context of aviation cases, the most important exceptions cover certain categories of actions involving commercial activity carried on by a foreign state.[123]

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114. *See e.g.*, The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812).

115. Cook, *supra* note 107, at 691.

116. *See id.* at 690-94.

117. *Id.* at 694.

118. 28 U.S.C. § 1603(a) (1982).

119. 28 U.S.C. § 1603(b)(2) (1982).

120. *See* Cook, *supra* note 107, at 705 note 86 (listing fourteen airlines which are 100% state-owned, fourteen others which are at least majority state-owned and another nine whose state ownership, while unclear, appears to be greater than 50%).

121. *But see* Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980) (Court acknowledges, in dicta, that corporation wholly-owned by Mexican Government was an "agency or instrumentality of a foreign state," but defeated the claim of immunity on other grounds).

122. 28 U.S.C. § 1605 (1982).

123. 28 U.S.C. § 1605(a)(2). That section provides:

> "(a) a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commer-

The first two clauses of Section 1605(a)(2) cover actions based upon commercial activity carried on in the United States or upon specific acts performed in the U.S. in connection with commercial activity conducted elsewhere. These two clauses have generally been interpreted to require that the specific act complained of take place in the United States.[124] Thus, under this interpretation, claims arising out of aircraft accidents occurring outside the United States may be barred by immunity.

On its face, the third clause of Section 1605(a)(2) is more troublesome. It denies immunity for claims based upon acts occurring outside the U.S., but which "cause a direct effect" in this country. Arguably, that language could encompass claims for personal injuries suffered by Americans abroad, since such damages might be said to have an "effect" in the United States. However, the "direct effect" language has been interpreted rather narrowly.[125] The mere fact that a plaintiff has suffered an injury has been held to be insufficiently "direct" to satisfy the requirement.[126]

Thus, the doctrine of sovereign immunity can be a formidable weapon for defendants as long as certain criteria are met: (1) the defendant airline must be state-owned; (2) the accident must have occurred outside the territory of the United States; and (3) there must be no other "direct effect" on the United States which would give rise to the 1605(a)(2) exception.

E. Ticket Limitations

Perhaps the most straightforward source of limitations on liability and special procedural requirements is on the flight coupons, or passenger tickets, themselves. It is not uncommon for airlines to impose certain conditions of carriage, and to list such conditions on the coupons. Failure of

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cial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

124. *See, e.g.*, Yessinin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978) (Clauses inapplicable to libel action in which alleged libel was not published in U.S.); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978) (Clauses held inapplicable to claim arising from collapse of roof at Tehran, Iran airport). *But see* Sugarman v. Aeromexico, 626 F.2d 270 (3rd Cir. 1980) (holding that injuries occurring in Mexico were "based upon a commercial activity carried on in the United States" because plaintiff was at mid-point of a round trip, commenced and ticketed in the U.S.).

125. *See, e.g.*, Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978); Harris v. Vao Intourist, 481 F. Supp. 1056, 1062 (E.D. N.Y. 1979) ("Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the direct requirement of section 1605(a)(2).").

126. *Upton*, 459 F. Supp. 264; *Harris*, 481 F. Supp. 1056.

a complaining passenger to comply with required procedures listed on the contract for carriage can give defendants an advantage in aircraft cases.

For example, a ticket may impose limitations on the time period or the location for filing claims. If a plaintiff overlooks these restrictions and fails to comply, he of course may challenge their validity in court. However, the burdensomeness of doing so, as well as the uncertainty of success, gives defendants an enhanced bargaining position in settlement discussions.

Moreover, tickets may impose limitations on the amount which can be recovered. This is especially likely where a passenger is flying on a "free pass," such as those often given to airline employees. Such passes may also include waivers of a cause of action for the airline's negligence. In any event, flight coupons should be carefully reviewed by counsel for the air carrier, for they will often relate to important matters of substance and procedure.

CONCLUSION

The quantam of recovery in the U.S. is extremely dependent upon where a claim is brought and where trial is held. The plaintiff and defendant will engage in extensive pre-trial efforts to gain the most advantageous position possible. The plaintiff will usually file suit in the state which will optimize his chances of receiving the largest recovery. Defendant will attempt to dislodge the case from state court by such devices as removal to federal court or dismissal due to *forum non conveniens*. If successful in removing to federal court, defendant may wish to move the case to a different venue or consolidate all of the related suits stemming from an air crash, or assert *forum non conveniens* if appropriate.

Most motions are decided by a judge applying balancing tests. Due to the subjectiveness of these tests, the outcome of these motions is not always predictable. In the end, the maneuvering is done to maximize each party's position in litigation and settlement negotiations. Needless to say, the strategy employed at the outset of litigation is critical to the result at the end of the day.