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Aviation Law - Tort Liability for Damage to Persons or Property on the Ground - Res Ipsa Loquitur

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AVIATION LAW—TORT LIABILITY FOR DAMAGE TO PERSONS OR PROPERTY ON THE GROUND—RES IPSA LOQUITUR—Plaintiff's fishing vessel was struck and sunk by a practice bomb released from a Marine Corps aircraft. An action was brought against the government under the Federal Tort Claims Act.[1] Plaintiff could produce no proof of negligence on the part of the government. *Held,* recovery allowed. The doctrine of res ipsa loquitur is applicable. *Goodwin v. United States,* (E.D. N.C. 1956) 141 F. Supp. 445.

Aviation accidents may be broadly classified into two groups: those involving injury to passengers, and those involving injury or damages to persons or property on the ground. Different theories of liability have been applied to each of these situations. In passenger cases the courts have generally required proof of negligence on the part of the owner or operator of the aircraft.[2] The more recent of these cases have permitted the plaintiff to

[1] 28 U.S.C. (1952) §1346 (b).

[2] Seaman v. Curtiss Flying Service, 231 App. Div. 867, 247 N.Y.S. 251 (1930); Johnson

employ the doctrine of res ipsa loquitur.[3] In the relatively few common law decisions involving injury to persons or property on the ground, the theory of liability has not been completely clear. In most ground damage cases the courts have allowed the plaintiff to recover without introducing factual evidence of negligence on the part of the defendant. Some ground damage cases completely avoid the negligence issue and impose liability without any plea as to the fault of the defendant. Liability in these cases seems to rest on traditional trespass to land doctrines.[4] Under the trespass theory, any unprivileged entry onto land gives rise to liability.[5] In a few ground damage cases, there is an indication that the court actually has imposed strict liability for the reason that aircraft are extrahazardous instrumentalities.[6] Eminent authorities interpret these cases as resting on extrahazardous instrumentality principles and, in most instances, the writers support the theory as applied to aviation.[7] Some authorities would impose strict liability for policy reasons even if aviation were held to be reasonably safe.[8]

Some courts, as in the principal case, have applied the rules of ordinary negligence actions, including the doctrine of res ipsa loquitur.[9] While in result consistent with the absolute liability cases, the res ipsa loquitur decisions are clearly in conflict with at least one of the bases for the im-

v. Eastern Airlines, (2d Cir. 1949) 177 F. (2d) 713. See generally 6 A.L.R. (2d) 528, n. 5 (1949).

[3] Lobel v. American Airlines, (2d Cir. 1951) 192 F. (2d) 217; Hassman v. Pacific Alaska Air Express, (D.C. Alaska 1951) 100 F. Supp. 1. *Contra,* Morrison v. Le Tourneau Co. of Georgia, (5th Cir. 1943) 138 F. (2d) 339.

[4] Guille v. Swan, 19 Johns. (N.Y.) 381 (1822); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469 (1933).

[5] PROSSER, TORTS, 2d ed., 55 (1955).

[6] In Rochester Gas & Electric Co. v. Dunlop, note 4 supra, at 851-852, the court said that the defendant had committed an "inexcusable trespass" because "common experience requires the . . . conclusion . . . that no matter how perfectly constructed or how carefully managed an aeroplane may be, it may still fall. . . ." See also D'Anna v. United States, (4th Cir. 1950) 181 F. (2d) 335; Parcell v. United States, (S.D. W.Va. 1951) 104 F. Supp. 110.

[7] Professor Bohlen interprets Rochester Gas & Electric Co. v. Dunlop, note 5 supra, as an application of the strict liability rule derived from Rylands v. Fletcher, 3 H.L. 330 (1868). He says: "If . . . aviators are to be required to answer for harm done to ground-owners despite the exercise of all conceivable precaution, skill, and care to prevent it, the liability is imposed because of the peculiar hazards of aviation." Bohlen, "Aviation Under the Common Law," 48 HARV. L. REV. 216 at 219 (1934). In 3 TORTS RESTATEMENT §520, comment *b* (1938), aviation is classified as ultrahazardous. (Professor Bohlen was the chief draftsman of the Restatement.) PROSSER, TORTS, 2d ed., 56 (1955), interprets the Rochester Gas & Electric case as "strict liability on the basis of trespass" but goes on to say "most of the other decisions have turned upon the dispute as to whether aviation is to be treated as an abnormal and excessively hazardous activity. . . ." Parcell v. United States, note 6 supra, is the only case cited by Prosser which directly involved the issue of whether aviation is extrahazardous. See also Vold, "Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas," 5 HASTINGS L.J. 1 (1953).

[8] See Vold, "Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas," 5 HASTINGS L.J. 1 (1953).

[9] In addition to the principal case, see United States v. Kesinger, (10th Cir. 1951) 190 F. (2d) 529. The court refused to apply res ipsa loquitur in Williams v. United States, (5th Cir. 1955) 218 F. (2d) 473.

position of liability without fault. The use of res ipsa loquitur amounts to an assertion that aviation is so safe that an unexplained accident can best be attributed to negligent conduct.[10] Clearly, this principle cannot be reconciled with the proposition that public policy deems aviation so dangerous that strict liability should be imposed.[11] This apparent conflict may, of course, be explained by attributing to the courts an unawareness of the fact that the doctrines of res ipsa loquitur and extrahazardous instrumentality are fundamentally inconsistent.[12] A more likely explanation is that the courts have never considered aviation to be extrahazardous.[13] The imposition of liability without fault in ground damage cases may be explained simply as the result of classic trespass doctrines or basic policy considerations.[14] The authorities supporting the strict liability view may well have read more into these decisions than the courts intended and in so doing have created, on the surface at least, a basic conflict in the case law. This is not to say that it is erroneous or futile to advocate the imposition of strict liability in ground damage cases. It has been strongly urged that absolute liability should be applied in such cases as a result of pure policy considerations.[15] A basis for strict liability might also be found in the trespass to land that is usually present; yet the law of trespass is changing and the modern view is that no liability is imposed for non-negligent, unintentional trespass.[16] In any case, if absolute liability—the most desirable theory from plaintiff's standpoint—cannot be justified on either policy or trespass principles, the plaintiff may plead a negligence

10 9 WIGMORE, EVIDENCE, 3d ed., §2509 (1940).

11 On the other hand, the passenger cases which apply negligence principles but refuse to use res ipsa loquitur are not necessarily inconsistent with the extrahazardous theory. It is possible to theorize that a passenger assumes the risk of the extra hazard and may recover only upon showing that negligence has increased the risk. Bohlen, "Aviation Under the Common Law," 48 HARV. L. REV. 216 (1943). In many recent passenger cases, however, courts have permitted the plaintiff to plead res ipsa loquitur. Lobel v. American Airlines, note 3 supra; Hassman v. Pacific Alaska Air Express, note 3 supra. As in the ground damage cases, this would appear to refute the proposition that aviation is extrahazardous.

12 At least one court seems to be unaware of the inconsistency. See Parcell v. United States, note 6 supra.

13 One case expressly states that aviation is not extrahazardous. Boyd v. White, 128 Cal. App. (2d) 641, 276 P. (2d) 92 (1954). The language in Rochester Gas & Electric Co. v. Dunlop, note 4 supra, may be interpreted as going to the question of whether the trespass of an aircraft in distress is privileged. D'Anna v. United States, note 6 supra, was decided under a Maryland statute. The language of the court in regard to common law liability is dictum. In Parcell v. United States, note 6 supra, the court bases liability on res ipsa loquitur as well as absolute liability principles. This greatly weakens the case as authority.

14 Parcell v. United States, note 6 supra, will not fit either of these theories, however.

15 Persons on the ground have no direct interest in aviation. Unlike passengers, they are passive bystanders subjected to the risks of passing aircraft without sharing in the direct benefits of the activity. See Vold, "Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas," 5 HASTINGS L.J. 1 (1953).

16 PROSSER, TORTS, 2d ed., 55 (1955).

action. Courts are often willing to allow the use of res ipsa loquitur,[17] and the principal case evidences the fact that recovery is reasonably certain under negligence theories aided by the res ipsa doctrine.[18]

Allan L. Bioff

[17] United States v. Kesinger, note 9 supra; Parcell v. United States, note 6 supra.

[18] See 37 CORN. L.Q. 543 (1952) indicating that res ipsa loquitur as applied in aviation accident cases is often tantamount to absolute liability.