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NEGLIGENCE-RES IPSA LOQUITUR-APPLICABILITY TO AIRPLANE CRASHES

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NEGLIGENCE—RES IPSA LOQUITUR—APPLICABILITY TO AIRPLANE CRASHES—In an action for the wrongful death of an airplane passenger killed in a crash of a commercial airliner, plaintiff relied upon specific acts of negligence and the doctrine of *res ipsa loquitur*. Defendant moved to strike from the complaint all allegations pertaining to *res ipsa loquitur*, on the ground that the doctrine did not apply to airplane crashes. *Held*, motion denied. *Smith v. Pennsylvania Central Airline Corp.*, (D.C. D.C. 1948) 76 F. Supp. 940.

The court in the instant case bases its opinion primarily on analogy to application of the doctrine of *res ipsa loquitur* in negligence actions involving land carriers. Essentially the doctrine is a rule of evidence, applicable only when the instrumentality involved was entirely within control of the defendant at the time of injury, both as to operation and inspection, and when it can be said that the accident ordinarily would not have occurred had the defendant used due care.[1] If these factors are present, the inference that the defendant was negligent is justified.[2] Granting control by the defendant, the primary inquiry in any such case should be whether the accident would have occurred only if the defendant

[1] 9 WIGMORE, EVIDENCE, § 2509 (1940).

[2] O'Connor, "Res Ipsa in the Air," 22 IND. L. J. 221 (1947); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932).

had been negligent. While negligent operation and improper pre-flight inspection do result in airplane crashes, weather conditions, structural defects and instrument failures not caused by negligence account for a large proportion of the total number of accidents. It has been seriously argued by some authorities that for these reasons the rule should not be applied to airplane accidents, at least until far superior materials or better methods of inspection are developed.[3] In most cases involving airlines, the courts have failed to give this argument the weight it should be accorded. Instead, they have emphasized three things: (1) the difficulty encountered by the plaintiff in proving specific facts of negligence, particularly if all the occupants are killed in the crash;[4] (2) the asserted analogy to railroad accident cases,[5] and (3) the policy in favor of increasing the degree of care required of airlines.[6] The cases in which the doctrine has been held inapplicable generally have concerned crashes of small, individually owned craft, where the courts have not been influenced by policy arguments for increasing the common law liability of carriers or doubtful analogies to other modes of transportation.[7] It is submitted that the reasoning of the latter group of cases is to be preferred, regardless of whether the plane is a common carrier. That the plaintiff may have a difficult job of proof does not call for the application of the rule unless the factors of control and probability of negligence are also present.[8] The analogy to the railroad cases seems unsound, since railroad accidents are more likely to result from negligent operation or construction than are those involving airplanes.[9] The existence of policy requiring a high degree of care from commercial airlines does not lead irresistibly to the conclusion that any accident indicates in itself absence of care by the operators of the machine. If greater liability is to be imposed upon the airlines, this should be achieved by legislation rather than by judicial attempts to apply a rule of evidence to situations which do not necessarily warrant its application.[10]

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[3] Goldin, "The Doctrine of Res Ipsa Loquitur in Aviation Law," 18 So. CAL. L. REV. 124 (1944); Cohn v. United Air Lines, (D.C. Wyo. 1937) 17 F. Supp. 865; Smith v. Whitley, 223 N.C. 534, 27 S.E. (2d) 442 (1943); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932).

[4] See Bohlen, "Aviation Under the Common Law," 48 HARV. L. REV. 216 (1934).

[5] See O'Connor, "Res Ipsa in the Air," 22 IND. L. J. 221 (1947).

[6] Smith v. O'Donnell, 215 Cal. 714, 12 P. (2d) 933 (1932); Smith v. Pacific Alaska Airways, Inc., (C.C.A. 9th, 1937) 89 F. (2d) 253; Goodheart v. American Airlines, 252 App. Div. 660, 1 N. Y. S. (2d) 288 (1938).

[7] Morrison v. Le Tourneau Co., (C.C.A. 5th, 1943) 138 F. (2d) 339; Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932); Herndon v. Gregory, 190 Ark. 702, 81 S.W. (2d) 849 (1935); Budgett v. Soo Sky Ways, 64 S.D. 243, 266 N.W. 253 (1936); Towle v. Phillips, 180 Tenn. 121, 172 S.W. (2d) 806 (1943); Smith v. Whitley, 223 N.C. 534, 27 S.E. (2d) 442 (1943).

[8] DAVIS, THE LAW OF AIR CARRIERS (1934).

[9] Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932); Towle v. Phillips, 180 Tenn. 121, 172 S.W. (2d) 806 (1943).

[10] Buhler, "Limitation of Air Carriers Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act," 11 AIR L. REV. 262 (1940).