1957

Problems Confronting Trial Counsel in Aviation Cases

Richard W. Galiher

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol6/iss3/3

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
The problems confronting trial counsel in an aviation case are to a large extent the same as those confronting counsel in any involved tort case multiplied several times. The careful experienced trial lawyer about to try an aviation case will take the same general steps in preparing his case for trial that he takes in any tort case. However, he will likely find that the amount of preparation required in most aviation cases to be enormous. For example, in one case in which I participated there were approximately forty eye-witnesses to a mid-air collision from which only one (1) person survived. Involved in the case was not only the question of negligence, but the situs of the accident, and a number of intricate legal principles. I would not say that a capable experienced tort trial lawyer could not adequately try an aviation case which confronts him for the first time but I would say that in most instances he will find that he has embarked upon a new and uncharted course and one that will require intense study and preparation before he walks into the court room.

To interview each witness, to eliminate the wheat from the chaff, to select the best witnesses, to plan the method of procedure, and to prepare a memorandum of law, represents in many instances a gigantic task and one which is time-consuming. Fortunately, there are few air crashes, but when they occur, their consequences are usually tragic and devastating. Many times, an experienced aeronautical engineer can help chart the preparation of an aviation law suit and can link together an otherwise puzzling chain of circumstances.

The last ten years has brought a considerable change in the type of airplane litigation with which I have had contact. Ten years ago, most of the law suits seemed to involve injuries received as a result of crashes

* An address delivered at a meeting of the Federation of Insurance Counsel in Houston, Texas in August, 1956. The address was published in the Fall (1956) issue of the Federation of Insurance Counsel Quarterly.
** A member of the District of Columbia bar and a graduate of the School of Law of The Catholic University of America.
or from turbulences. However, gradually and perceptibly, the type of litigation has broadened. Lawyers are now instituting suits based upon improper location of baggage racks within planes, defective seats, defective steps or landing ramps. The more airplane travel the more claims of this nature. One airline official has remarked to me that each winter his Company is flooded with nuisance claims on its Florida run, designed of course, to pay for a vacation trip.

Within the last ten years we have seen the adoption by a number of states of legislation covering suits against a non-resident owner and operator of an aircraft involved in an accident within a particular state as well as legislation which applied financial responsibility acts to airplane accidents.

There are some occasions when airplane accidents bring about suits against both the federal government and an individual air line as a result of an aircraft collision. A suit against the government is, of course, permissible under the Federal Tort Claims Act, but a jury trial is not permitted by the Act and the law suit must be tried before a judge. A common law right of trial by jury is always available to the claimant against the air line. In some cases, attempts are made to consolidate the matters for trial, but my advice to defendant's counsel is never to agree to such a consolidation.

I have personal experience of such a consolidation and the difficulties that it leads to. In 1949 a bad air crash occurred at Washington National Airport as a result of which approximately forty law suits were instituted against an air line and against the federal government. Only two of them joined both the air line and the United States in the same suit; probably because this was prior to the Yellow Cab decision in the Supreme Court of the United States permitting the government to be joined as any ordinary tortfeasor with another defendant. It seemed to be to everyone's advantage to consolidate the cases for trial and most of the attorneys entered into a stipulation providing for the trial of a test case on liability, the measure of damages being reserved. I spent nine solid weeks before a federal court on behalf of the air line involved and I witnessed the impracticality and inadvisability of trying a jury trial in the same court room and at the same time a non-jury trial was being heard by the court, as it was in this test case, which was to determine the liability of the federal government in a non-jury case and the liability of the air line in a jury case. The jury, in my opinion, could not understand why it could not decide the case involving the government, and I feel that it would have held the government responsible if it had been so permitted. During the course of the trial of this case, there were frequent quarrels between counsel representing the plaintiffs and counsel representing the government. As an innocent bystander to most of these disputes, I am
satisfied that they reflected to our disadvantage, particularly because it was necessary for us to work reasonably close with the government, for the reason that its vast resources were available in preparing the case for trial, and most important the United States did not consider my client to be in any way to blame for the accident. I am convinced that some ill feeling was engendered by the arguments and quarrels between opposing counsel which affected our chances.

The Civil Aeronautics Board makes a practice of conducting hearings into certain aircraft accidents. Some of these hearings are public in nature and are sometimes extended and time-consuming. I can remember one such hearing following a very serious aircraft accident which brought about the death of a number of persons, and which consumed a period of ten days. The records of these hearings are published and are available for examination by anyone. In the CAB file is usually found the names, addresses and statements of all persons having knowledge or pertinent information about the accident. Many times I have received inquiries from lawyers involved in aircraft litigation in some locality far removed from Washington. I have been asked to obtain certain information from the Civil Aeronautics Board on some occasions and on others I have been asked to check the Civil Aeronautics Board record to make certain that the lawyer involved in the litigation had all of the information contained in the CAB file. Invariably, we have discovered vital and important information in the files of CAB which was not in the possession of the trial lawyer. This sometimes applied to the names of witnesses and other times to statements given by witnesses. I cannot urge too strongly that anyone involved in aircraft litigation, should check, or have checked, the investigation file of the Civil Aeronautics Board and I mean by this that a personal investigation should be made and that it should not be left to correspondence, because all too often, I have seen that the correspondence did not bring about the securing of the complete record. I do not mean to indicate any intentional failure on the part of the Government to send the information to the inquiring attorney. I mean simply that in the operations of our Government, there are human failures and inadvertence which can sometimes react to the prejudice of the person relying upon his belief that he had the entire record.

It is the policy of the Civil Aeronautics Board where testimony of its investigators is desired in a law suit to require the party desiring the testimony to write to the CAB requesting that the CAB permit the investigator to testify in court. This reflects a modification of the CAB's original policy which was to refuse to permit its employees to testify in court. In some instances, the CAB would approve the taking of the testimony of the witness so that it would be available in deposition form for use in court. Where the investigator has testimony not available to a party,
the CAB will permit its investigator to testify in court. However, the giving of opinions by the investigator or employee are frowned upon and usually will not be given voluntarily in court. In a few cases, the courts have ordered the giving of such testimony. In *Universal Air Lines v. Eastern Air Lines*, the question of the giving of testimony by such an investigator was involved. There the investigator’s deposition had been taken pursuant to authority given by the Board, but when it was offered during the trial, one of the parties objected to its admissibility because of the availability of the witness for the giving of oral testimony. The court ordered the witness to testify and he did so over the objection of the CAB and gave testimony concerning his investigation of the accident. Since the witness was a recognized aeronautical engineer, he was also ordered by the court to give his opinion concerning the angle of collision of the two planes involved in the accident. On Appeal the CAB filed its brief as Amicus Curiae and asserted that the court should have regarded the witness as unavailable to appear because permission had not been granted by the Board, and further that his deposition should have been admitted into evidence.

The District of Columbia Circuit Court stated that the trial court should ordinarily receive the deposition of the CAB investigator, but considered the action taken by the lower court in ordering the witness to testify as proper. The court further said that where the CAB investigator is the sole source of evidence reasonably available to the parties, with regard to the precise position and condition of aircraft after a disaster, that it is incumbent upon the CAB to make his testimony available by deposition or in person; and further, that if the deposition is not forthcoming or is insufficient, the court has power to order his personal attendance. The court did approve the position taken by the CAB that it could not be required to produce its reports, orders, or private files or to testify to the contents of such private papers. Finally, the court said that the conclusion or opinions of the administrative agencies or boards or any testimony reflecting directly or indirectly the ultimate views or findings of the agency or board would probably be inadmissible because they would tend to usurp the function of the jury. The court believed that such testimony was inadmissible because it fell within the general rule which excludes hearsay and opinion evidence.

Query: Does this decision exclude opinion testimony where the investigator as in this case was qualified by experience and training to give an expert opinion? I think not!

The Civil Aeronautics Act of 1938 did not require that carrier tariffs contain provisions of written notice of injury to the airline within a prescribed period following an accident, or institution of suit.

---

1 188 F.2d 993 (D.C. Cir. 1951).
against the airline within a certain period of time. However, for many years it was the practice of air carriers to file such rules tariffs and the Board for many years did not reject them. There has been voluminous litigation over the validity of the tariff limitation requiring written notice of injury or death and institution of suit within a prescribed period and there is no unanimity on the question of the validity of such regulations. Finally the Civil Aeronautics Board concluded that the presence in the tariffs of limitations on the institution of personal injury or death actions constituted a trap to the unwary and consequently on November 10, 1954, (CAB Order E 8756) provided that commencing January 1, 1955, all carriers should cancel provisions in tariff regulations which contained any limitation or condition on the carrier’s liability for personal injury, death or property damage.

A number of interesting aviation cases have involved the Warsaw Convention. The United States as one of the signatories to this treaty adopted in 1929 made such treaty applicable to all passengers in international transportation subject to this Convention which limited total recovery for accidents to 125,000 gold francs or $8,300.00 in United States currency. All carriers of signatory nations in international transportation are permitted to avail themselves of the provisions of this Convention unless the damage is caused by the carrier’s wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. (49 Stat. 3020). Wilful misconduct has been construed in *American Air Lines v. Ulen,* as the wilful performance by the carrier of any act with the knowledge that the performance of that act was likely to result in injury to a passenger, or the performance of an act with reckless and wanton disregard of its probable consequences. Under these conditions wilful misconduct would exist. Although a number of cases have been tried involving the Warsaw Convention very few have resulted in verdicts in excess of the Convention limitations or in the finding of wilful misconduct. Recently the New York courts have had occasion to pass on several claims involving this Convention. In the celebrated *case of Froman v. Pan American,* the defendant conceded its liability for the account prescribed by the Warsaw Convention, but denied any wilful misconduct, proof of which would have permitted the plaintiff to make an unlimited recovery. The trial in the lower court brought about a verdict for the Convention limits, the appellate courts of New York affirmed the case without opinion, and the Supreme Court denied certiorari in this case. Several other New York cases have brought reversals in suits involving recoveries in the lower court in excess of the Conven-

---

2 *166 F.2d 529 (D.C. Cir. 1949).*

tion where the appellate court found that the Convention should be applied because of the absence of wilful misconduct. *Goepp v. American Overseas Airlines*, and *Grey v. American Air Lines*.

Article 20 of the Convention exonerates an airline from liability if it establishes that it took "all necessary measures to avoid the damage or that it was impossible . . . . to take such measures." This article further provides: "In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of aircraft, or in navigation and that, in all other respects, he and his agent have taken all necessary measures to avoid the damage." (49 Stat. 3019).

On September 28, 1955 at the Hague, 26 nations executed a protocol to amend the Warsaw Treaty. The United States has not as yet ratified or signed the new agreement and it does not become effective under its terms until 30 signatory countries have ratified it. The provision of special significance and importance in the new convention is substituted Article 22 of the Convention which raises the limitation of the carrier's liability from 125 thousand gold francs to 250 thousand ($16,600.00), but allows for a higher limit where negotiated by special contract. It is interesting to note that there is also included therein a provision authorizing the awarding of attorneys' fees and other legal expenses in addition to the amount of the limitation. The limitation provided in Article 22 under the terms of the new convention shall not apply if it is proved that damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result, provided that the employee was acting within the scope of his employment.

For many years, attorneys in the United States have criticized the Warsaw Treaty presently in effect and the limitations therein contained of $8,300.00. What United States attorneys have failed to recognize and realize is the fact that in a number of countries the figure of $8,300.00 is a very large amount of money and to have obtained some signatories to the convention required considerable effort. By United States' standards, $8,300.00 and even $16,600.00 may seem low, but the situation must be considered from a world-wide standpoint and if the proposed protocol is ratified it will provide and allow a recovery for accidents occurring in some countries in an amount which by the standards of that country will be considered enormous. It is interesting to note that many nations have adopted the Warsaw limitation or less for their domestic and non-Warsaw claims.

---

Aviation litigation is a comparatively recent phase of tort law. While each year more and more persons are using air transportation as a means of travel there are still many persons who have never been near or in an airplane. Even those persons who frequently travel upon the large interstate air carriers know very little about airplane parlance. A lawyer about to try an aviation case should realize that there will creep into the testimony many terms respecting the operation of an airplane which a jury will not comprehend. For example, the radio control of a plane involves many strange terms; its operation on an airway, is new and foreign to the average layman. The terms with respect to landing and take-off at an airport are mysterious. The traffic pattern which a plane is required to follow and the instructions given by the control tower all make the trial of an aviation case most difficult. It is my belief that a jury will appreciate and a lawyer will strengthen his case if he endeavors at the outset to as clearly as possible explain and outline some of the aeronautical terms which are expected to come out during the course of a trial. Then, during the course of the trial when, as so often happens, the expert on the witness stand indulges in the use of technical language, instead of a term understandable to a layman, the trial-attorney should make certain that the term is suitably defined. In a recent case, for example, all of the following terms were used:

1. Air Route Traffic Control Center and a number of terms having to do with Air Traffic Control.
2. Approach procedure.
3. Clearance to enter Traffic Pattern.
4. Control Area, Control Zone and Controlled Airport.
5. Final Approach.
6. Landing instructions, and

Picture the average jury trying to unravel the meaning of these without suitable and sufficient explanation.

Within the past year I have had occasion to be involved in litigation involving the explosion of an aircraft accumulator, a part of the hydraulic system of an airplane used in connection with landing gear operations. This case proved to be as complicated as any that I have ever been in. First of all, the accident had occurred on a Naval base and the Navy was the only one who had available to it the complete information as to what had occurred. A Navy Board of Inquiry reached one conclusion while another branch of the Navy, the Bureau of Aeronautics, reached another entirely different and distinct. It was impossible to interview the witnesses without the consent of the Navy and without permitting counsel for the other side to be present. It was necessary to write to one branch of the Navy for information; in turn, that branch would try to get the
information from another department; then, the information would be sent from the second department to the first department and finally to me. I was told by certain persons that certain documents and information were not available only to find them turning up five or six months later. I cannot say that the Navy was uncooperative, but I can say that I did not get the cooperation that I really felt that I was entitled to until after I had served subpoenae on several high officials: from that point on all was harmony and I obtained complete cooperation. In order to get a proper grasp of the situation involved in this case, I found it necessary to spend countless hours with engineers from my client's company and also spent one and one-half days at the plant where I learned as fully as I could about the manufacture of the accumulator, its position in the plane and its use. The finest investigation file cannot properly acquaint the trial attorney sufficiently, to enable him to try this type of law suit without his learning for himself, first-hand about the workings of the materials involved.

Much has been already written and said on the doctrine of *res ipsa loquitur* and its application to various aviation law suits. Plaintiffs' counsel contend that it should be applied in practically every case while on the other hand the defendant lawyer denies in most instances its applicability. Our courts recognize this doctrine as an exception to the common law rule that a plaintiff must prove the defendant's fault and as such they require plaintiff to justify the use of the doctrine by showing that the cause of the accident was known, that the aircraft was in the exclusive control of the defendant and that such accident was one which would ordinarily not occur without negligence.

At first blush it would seem that the doctrine should be applied in the case of a paid passenger for hire riding in a large transport which is involved in an aircrash resulting in death to the passenger. However, let us suppose there were many eye-witnesses to the crash who could testify as to its cause. Is there any need for the application of this doctrine under such circumstances? And take those situations wherein no one survives a fatal aircrash or those where no member of the flight crew survives. We must remember that an airplane in flight is subjected to many unusual perils tied in with many types of weather conditions. In the majority of aviation-passenger cases, in which *res ipsa loquitur* has been invoked, the juries have returned verdicts for the defendants. Another reason today for the non-application of the *res ipsa loquitur* rule is the availability to both plaintiffs and defendants of the C.A.B. file and record which contains usually every bit of information obtainable concerning a

---

particular air crash. From this information a claim or defense can be readily prepared.

*Lobel v. American Airlines* illustrates the abundance of information available in an air crash case. The plane which crashed was enroute from New York to Chicago and had made stops in Buffalo and Detroit before crashing in Indiana. The court in an earlier opinion had ruled that an instruction on *res ipso* was not a proper statement of the law of New York. At the retrial, the plaintiff did not rely upon this theory, but sought to prove specific negligence in the maintenance and operation of the plane, while the defendant introduced extensive evidence which showed the condition of the plane, the repairs and servicing made and given to it and the jury found for the defendant. In *Davies Flying Service v. United States*, and *Southeastern Air Service v. Crowell* the court indicated that the mere fact of an air crash did not give adequate grounds for application of the *res ipso loquitur* theory. Within the last few years there have been other cases approving the doctrine. It is my opinion that in most cases the plaintiff is unwise to rely upon *res ipso loquitur* particularly where a defendant will be able to explain how the accident occurred or can demonstrate its freedom from negligence.

It may be interesting to you for me to touch upon the Federal Death on the High Seas Act which provides a cause of action for wrongful deaths occurring on the high seas more than a marine league "from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States." Under this Act the personal representative of the decedent "may maintain a suit for damages in the district courts of the United States." With the great increase in international flights more claims for accidents on the high seas may be expected. The question arises whether recovery for death on the high seas may be had under the state court acts or under the federal statute. A California Federal Court has held that recovery could not be had under the California Death statute, but under the Death on the High Seas Act and, further, that the remedy was cognizable only in admiralty. Another decision has followed this case while an earlier decision took a different view.

---

6 205 F. 2d 927 (2d Cir. 1953), 192 F. 2d 217 (2d Cir. 1951), cert. denied, 342 U.S. 945 (1952).