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Negligence -- Res Ipsa Loquitur -- Application to Airplane Accidents

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viso was designed to prevent the Administrator from using his authority to bring test cases involving new or novel questions of law.²⁰ But the difficulties which the proviso injects are at once obvious. The phrasing of it supplies to ingenious defendants incentive to obscure the principal issue with a smoke screen of preliminary questions as to whether the case does, or does not, involve an issue of law which has been settled finally by the courts. Does the proviso mean that the Supreme Court must have ruled on the question? Or is it sufficient that certiorari has been denied? Or is it enough that one of the courts of appeals has ruled on the point? And what if there is disagreement among the circuits?^{20a}

Employee suits will continue to be an important instrument for collection of wages,²¹ and the *Jacksonville* case still provides a means for the Administrator to act as a collecting agent in a limited number of situations. Section 16(c), inasmuch as it provides that when an employee accepts payment under the Administrator's supervision or consents to an action on his behalf by the Administrator, he waives his right of action under 16(b) to sue for liquidated damages, should stimulate voluntary payments by fair-minded employers who formerly did not make payment voluntarily because they feared that a subsequent suit for liquidated damages might be brought. But 16(c) may prove not to be the panacea which the Administrator originally envisioned. The full efficacy of the section, in view of the proviso limiting the authority of the Administrator to bring suit to those cases in which the law has been settled with finality, will depend upon a determination of what the proviso really means. It is significant that though half the states have somewhat similar statutes none of these is similarly restricted.²²

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Negligence—Res Ipsa Loquitur—Application to Airplane Accidents

Decedent, who also held a pilot's license, was permitted by the pilot to ride in a dual control airplane which was to execute "precision spins" as part of a demonstration of airplane maneuvers. The pilot was in the instructor's seat when the plane took off, decedent being seated in the rear seat. The plane, once aloft, began the maneuver, but instead of pulling out of the spin and resuming level flight, it continued its downward movement until it crashed on the ground, killing both occupants. In a suit brought by decedent's administrator to recover for wrongful

²⁰ *Id.* at 32.

^{20a} See note, 63 HARV. L. R. 1078 (1950), which appeared after this note was in proof.

²¹ The Division can inspect each year less than 5% of the establishments now covered by the Act. *Hearings on S. 653, supra* note 7, at 74.

²² See note 17 *supra*.

death from the pilot's employer, a nonsuit at the close of plaintiff's evidence was reversed by a divided court in *Bruce v. O'Neal Flying Service*.¹ The decision was based primarily on (1) the presumption that the pilot, having been in control of the airplane when it left the airport, continued to operate it until the moment of impact, despite the accessibility of the controls to the decedent, and (2) the expert testimony of two pilots who witnessed the accident attesting to the safety of the maneuver when properly performed.² *Res ipsa loquitur* was not mentioned. The dissent regarded *Smith v. Whitley*,³ which refused to apply *res ipsa loquitur* to an unexplained airplane accident and which the majority endeavored to distinguish, as controlling the present case, and emphasized the lack of positive evidence of the cause of the accident and of who was in control.

The apparently inconsistent results of the *Smith* and *Bruce* cases, on almost identical facts, in deciding whether there was an inference of negligence sufficient for submission to the jury raise the issue of the applicability of *res ipsa loquitur* in North Carolina airplane accident cases. Since an earlier note in 1943 in this LAW REVIEW⁴ has dealt with its applicability to airplane disasters generally, its application prior to the date of that note or in other situations in the law of negligence will not be considered.

In accordance with the usual requirements, in order to invoke the doctrine of *res ipsa loquitur*, it must be shown that the accident would not have occurred in the absence of negligence, that the airplane was within the control of defendant, that plaintiff is not in position to know the cause of the accident, and that the defendant possesses, or may acquire, superior knowledge as to the cause of the accident.⁵

In recent years *res ipsa loquitur* has been considered with regard to aircraft accidents most frequently in cases involving private or non-carrier aircraft. Eight courts have rejected the doctrine either expressly⁶ or by implication.⁷ On the other hand, in two cases, both of

¹ 231 N. C. 181, 56 S. E. 2d 560 (1949).

² "... the pilot . . . just overdid it a little bit too much . . . he tried to make it too good. He just went too low."

³ 223 N. C. 534, 27 S. E. 2d 442 (1943). The pilot and passenger survived the crash and testified respectively, "the plane went into a spin and crashed and I do not know why," and "I don't know just why the plane crashed; it just came down in a spin with the nose to the ground." A judgment of nonsuit was affirmed; the court expressly stated that *res ipsa loquitur* did not apply to such accidents.

⁴ Note, 22 N. C. L. REV. 160 (1943).

⁵ *Parker v. James E. Granger, Inc.*, 4 Cal. 2d 668, 52 P. 2d 226 (1934), cert. denied, 298 U. S. 644 (1936).

⁶ *Morrison v. Le Tourneau Co.*, 138 F. 2d 339 (5th Cir. 1943) (plane with dual controls; hence, no theory upon which jury could infer negligence; court said case not to be decided solely by speculation of jury); *Deojay v. Lyford*, 139 Me. 234, 29 A. 2d 111 (1943) (while landing, plane swerved off of concrete runway, and tail assembly struck and injured a workman; held, not analogous to car running off highway because not unusual for airplanes to swerve in this manner when

which concerned military aircraft, the doctrine has been indorsed and applied.⁸ Three of those courts rejecting *res ipsa loquitur*⁹ have been confronted with crashes of dual control aircraft, as in the *Bruce* case, and have based their decisions in part at least, on defendant's lack of complete control.

The courts have been more amenable to the application of *res ipsa loquitur* where air carriers have been involved. For example, in *Smith v. Pennsylvania Central Airlines Corp.*¹⁰ the airplane crashed into a mountainside while on a scheduled flight; the administrator of a de-

landing, and no inference of negligence therefrom); *State for use of Piper v. Henson Flying Service*, 60 A. 2d 675 (Md. 1948) (*res ipsa loquitur* rejected because of evidence of decedent's negligence in failing to switch from empty to full gas tank); *Smith v. Whitley*, 223 N. C. 534, 27 S. E. 2d 442 (1943) (not clear whether carrier or non-carrier involved; facts would seem to indicate that it was non-carrier); *Towle v. Phillips*, 180 Tenn. 121, 172 S. W. 2d 806 (1943) (plane equipped with dual controls and therefore not completely within control of defendant).

⁷ *Brewer v. Thomason*, 219 S. W. 2d 758 (Ark. 1949) (ground observers testified that while plane in flight motor suddenly "went dead"; held, there must be some evidence of negligence upon which verdict may be based; *res ipsa loquitur* not alluded to); *Hall v. Payne*, 189 Va. 140, 52 S. E. 2d 76 (1949) (dual control airplane crashed while in flight; testimony that immediately prior to take-off motor did not appear to be functioning properly; held, jury may not decide case by conjecture or speculation; the court stated, "It is not contended that *res ipsa loquitur* applies."); *Neel v. Henne*, 30 Wash. 2d 24, 190 P. 2d 775 (1948) (motor ceased to operate immediately after plane took off; held, jury could determine cause of resulting crash only by conjecture; *res ipsa loquitur* not mentioned).

⁸ *San Diego Gas & Elec. Co. v. United States*, 173 F. 2d 92 (9th Cir. 1949) (Coast Guard plane observed flying continually at hazardingly low altitude; five seconds later, while not observed, collided with plaintiff's power line at altitude of 187 feet; held, there was presumption of continuing negligence and *res ipsa loquitur* applied); *Yukon Southern Air Transp., Ltd. v. The King* [1943] 1 D. L. R. 305 (Ex. 1941) (while taking off, R. C. A. F. fighter plane collided with plaintiff's empty passenger plane parked near runway, killing pilot).

⁹ *Morrison v. Le Tourneau Co.*, 138 F. 2d 339 (5th Cir. 1943); *Towle v. Phillips*, 180 Tenn. 121, 172 S. W. 2d 806 (1943); *Hall v. Payne*, 189 Va. 140, 52 S. E. 2d 76 (1949).

¹⁰ 76 F. Supp. 940 (D. D. C. 1948); *accord*, *Bratt v. Western Air Lines*, 169 F. 2d 214 (10th Cir.), *cert. denied*, 335 U. S. 886 (1948) (air carrier crashed on scheduled flight killing plaintiff's decedent; plaintiff relied on *res ipsa loquitur* and structural failure; held, doctrine properly applied, but jury verdict for defendant affirmed); *La Tour v. United Air Lines, Inc.*, 65 N. Y. S. 2d 839 (Sup. Ct. 1946) (held, plaintiff's general allegations of negligence had effect of invoking *res ipsa loquitur*, and defendant could not force plaintiff to give bill of particulars because plaintiff may not have sufficient definite facts at his disposal); *Malone v. Trans Canada Lines* [1942] 3 D. L. R. 369 (Ont. C. A.) (while landing, air liner made approach too precipitously; endeavored to pull up; crashed; killed all aboard).

Two courts have avoided a decision on the doctrine by ruling that inferences of negligence were sufficient to carry plaintiff's case to the jury. *Kamienski v. Bluebird Air Service, Inc.*, 321 Ill. App. 340, 53 N. E. 2d 131 (1944), *aff'd*, 389 Ill. 462, 59 N. E. 2d 853 (1945) (evidence that cause of engine failure was defective cam gear; held, without alluding to *res ipsa loquitur*, failure of defendant to prove due care by mechanics who inspected cam gear justified verdict for plaintiff); *Gill v. Northwest Airline, Inc.*, 228 Minn. 164, 36 N. W. 2d 785 (1949) (air carrier crashed 40 miles off course; no survivors or witnesses; court ruled that it was unnecessary to decide applicability of *res ipsa loquitur* because possible for jury to infer negligence from fact that plane left established course and radio beam without apparent cause).

ceased passenger alleged specific acts of negligence and sought to invoke *res ipsa loquitur*. The court held the doctrine applicable to crashes of common carriers despite the allegations of specific negligence. In but one case of this type has the court expressly repudiated it.¹¹

It would seem that the doctrine has been invoked more frequently in public carrier cases because of the requirement that an air carrier "is bound to exercise the highest degree of practical care and diligence and is liable for all matters against which human providence and foresight might guard . . .";¹² the slightest deviation from this standard will raise an inference of negligence.¹³ Some jurisdictions hold that an accident involving injury to a passenger will immediately raise a rebuttable presumption of negligence on the part of the carrier.¹⁴ However, the plaintiff injured in a private airplane crash benefits from no such presumption, and non-carrier operators and owners must exercise only ". . . the degree of care that men of reasonable vigilance and foresight exercise in the practical conduct of their affairs."¹⁵

The confusion in this field of the law has brought into sharp conflict a governmental policy to encourage the development of commercial air transportation, and the right of the passenger to redress for individual injuries. Conceivably, a single crash of an air carrier could result in judgments in favor of all of the passengers aboard, and thus produce financial disaster for the defendant airline.¹⁶ Hence, concern over the role which could be played by *res ipsa loquitur* in effecting these paralyzing recoveries from an industry which has been promoted by direct federal aid¹⁷ and by the establishment of auxiliary services¹⁸ has fostered efforts to limit carrier liability.

¹¹ *Ortiz v. Eastern Air Lines* [1948] U. S. Av. R. 623 (D. C. Md.) (Defendant's air liner suddenly plunged earthward in clear, quiet weather, carrying all passengers to deaths. Plaintiff alleged negligence generally and endeavored to invoke *res ipsa loquitur*. Court dismissed the action, holding that the doctrine was inapplicable because controlling state law repudiated it "in relation to a case of this kind." The court cited *Morrison v. Le Tourneau*, note 6 *supra*, and approved the reasoning therein, but it would appear that the cases are distinguishable on their facts.).

¹² *Law v. Transcontinental Air Transport, Inc.* [1931] U. S. Av. R. 205 (E. D. Pa.).

¹³ *Kamienski v. Bluebird Air Service*, 321 Ill. App. 340, 53 N. E. 2d 131 (1944), *aff'd*, 389 Ill. 462, 59 N. E. 2d 853 (1945); DYKSTRA AND DYKSTRA, *BUSINESS LAW OF AVIATION* 314 (1946); FIXEL, *LAW OF AVIATION* 182 (2d ed. 1945); RHYNE, *AVIATION ACCIDENT LAW* 44, 55 (1947).

¹⁴ *Johnson v. Eastern Air Lines*, 177 F. 2d 713 (2d Cir. 1949) (in refusing to set aside verdict for defendant, held, in South Carolina and New York presumption of negligence rebuttable).

¹⁵ *Greunke v. North Am. Airways Co.*, 201 Wis. 565, 230 N. W. 618 (1930); DYKSTRA AND DYKSTRA, *op. cit. supra* note 13 at 243; RHYNE, *op. cit. supra* note 13, at 57.

¹⁶ Rieber, *Some Aspects of Air Carriers' Liability*, 11 *LAW AND CONTEMP. PROB.* 524 (1946); Note, *U. CHI. L. REV.* 365 (1948).

¹⁷ 52 *STAT.* 998 (1938), 49 *U. S. C.* §486(b) (1946).

¹⁸ 52 *STAT.* 985, 986 (1938), 49 *U. S. C.* §452-457 (1946).

Paramount among these efforts, and the most successful, has been the Warsaw Convention of 1929.¹⁹ This agreement among the principal nations of the world, applying to international air transportation, makes proof of negligence unnecessary²⁰ but relieves from liability the carrier which proves that all necessary measures to avoid damage were taken or that it was impossible to take them,²¹ and in the absence of a showing of willful misconduct by the carrier, limits recovery to \$8,291.87²²

The adoption of similar federal legislation designed to protect the interests of the passenger, carrier and public has been recommended.²³ While the suggested plans for limiting liability on domestic airlines have varied, generally they have in effect called for a statutory declaration of *res ipsa loquitur*, at least insofar as plaintiffs are relieved from proving specific negligence, and have established a fixed maximum on recoveries, absent proof of willful misconduct. These proposals are an adoption of the pattern and spirit of the Warsaw Convention for domestic purposes.

Air carriers, too, have instituted practices designed to curtail liability. It has become a universal practice for airlines, in contracting with their passengers, to issue tickets stamped "Subject to tariff regulations." This apparently innocuous phrase, probably unnoticed by the passenger, has the legal effect of advising him of the provisions and requirements of the airline's tariffs and regulations on file with the Civil Aeronautics Board, pursuant to statute,²⁴ as for example a requirement that notice of claim be filed or suit brought within a fixed period.²⁵ These provisions of the contract of carriage embodied in the tariff regulations are binding although rarely known to the passenger and virtually never to his personal representative.

The North Carolina Supreme Court has not yet been presented with an air carrier situation in which it would be compelled to decide the applicability of *res ipsa loquitur* and deal with the concomitant problem of policy and the limiting of airline liability. It may be expected, however, that the unparalleled liberality manifested in the *Bruce* decision, in al-

¹⁹ 49 STAT. 3000, U. S. TREATY SER. No. 876 (Dep't State 1929).

²⁰ *Ibid.* Article 26. One seeking damages for death or injury to passengers makes out a prima facie case upon showing a contract of carriage under the Convention, that damage was suffered, and the amount of such damage.

²¹ *Ibid.* Article 20.

²² *Ibid.* Article 22.

²³ Reiber, *op. cit. supra* note 16, at 535.

²⁴ 52 STAT. 992 (1938), 49 U. S. C. §483 (1946).

²⁵ *Brandt v. Eastern Air Lines, Inc.* [1948] U. S. Av. R. 637 (S. D. N. Y.) (in wrongful death action court denied plaintiff's motion to strike airline's defense that notice of claim not filed within 90 days of accident, or suit brought within one year, as required by tariff regulations filed by carrier with CAB); *accord*, *Wilhelmy v. Northwest Airlines Inc.*, 2 Avi. 15,023 (W. D. Wash. 1949) (upheld validity of 30-day notice of claim provision as reasonable).

lowing an inference of negligence to go to the jury, will be duplicated *a fortiori* in air carrier cases, where reasons of policy reinforce the result.

The refusal of some courts to apply *res ipsa loquitur* has resulted from a feeling of uncertainty over the cause of the accident; Justice Barnhill, dissenting in the *Bruce* case, quoted from the *Smith* decision that "airplanes do fall without fault of the pilot," a statement originating in 1933.²⁶ While this statement still may be valid, though to a lesser extent, it should not be concluded that the causes of airplane accidents are so obscure as to defy determination.²⁷ Recent reports of the Civil Aeronautics Board indicate that less than .7% of all aircraft accidents are of undetermined cause.²⁸ This would seem to demonstrate that when airplanes collide or crash today, there is a determinable cause which, when ascertained, may raise an inference of negligence, unavoidable accident, or act of God,²⁹ and hence is a proper matter for jury consideration.

It may be plausibly argued that the *Smith* case insofar as it refused to apply *res ipsa loquitur* conflicts with the approach of the Court in the *Bruce* decision since the Court in the latter case reached a result which other courts, even those expressly applying the doctrine, have been unable to reach in dual control situations. The finding in the *Bruce* decision that there was an inference of negligence is subject to question in view of the existence of dual controls and the absence of proof that the pilot continued to control the airplane throughout the maneuver. In any event, the submission of the inference of negligence to the jury allowed to plaintiff the exact procedural relief which *res ipsa loquitur* is designed to afford, and renders the *Smith* case of dubious value as a precedent.

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²⁶ *Rochester Gas & Elec. Corp. v. Dunlop*, 148 Misc. 849, 266 N. Y. Supp. 469 (County Ct. 1933).

²⁷ RHYNE, *op. cit. supra* note 13, at 137.

²⁸ *Annual Report of CAB-Fiscal Year 1949*. Of 7,465 non-air-carrier accidents, only 47 (.6%) were found to be of undetermined cause, the major causes being pilot error (76%), structural or engine failure (12%), and weather (5%); of 132 air carrier accidents the causes of only 2 (1.5%) were undetermined, the major causes being pilot error (39%), structural or engine failure (28%), and inadequate maintenance (9%).

²⁹ While testimony and findings of the CAB concerning the causes of accidents are not admissible in the courts, they are available to the public, and may advise plaintiff of the most effective manner in which to present his case. 52 STAT. 1012 (1938), 49 U. S. C. §581 (1946).