UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 33 | Number 4 Article 16

6-1-1955

Torts -- Res Ipsa Loquitur -- Mid-Air Explosion of Aircraft

Walter Lee Horton Jr.

Torts—Res Ipsa Loquitur—Mid-Air Explosion of Aircraft

Plaintiffs' homes were showered with burning fuel and debris following the mid-air explosion of a B-47 Stratojet operated by the United States Air Force. The aircraft was totally destroyed and there were no survivors. The wives of both plaintiffs and plaintiff Williams' two children were burned, the latter fatally, and the homes of both plaintiffs were destroyed.[1] At trial plaintiffs were unable to show any specific "negligent or wrongful act or omission"[2] and rested their case on the rule of res ipsa loquitur. At the close of the plaintiffs' evidence, counsel for the defendant moved for judgment in its favor, stating that as national security would be imperiled the government would not call any witnesses to testify.[3] Judgment was entered for the United States on the grounds that the court lacked jurisdiction, the activity being of the sort falling within the section of the Federal Tort Claims Act related to discretionary activities of the United States government.[4] The United States Court of Appeals for the Fifth Circuit held these grounds untenable but refused to disturb the decision, affirming the ruling on the ground that the doctrine of res ipsa loquitur was inapplicable to the facts.[5]

Under Florida law, the rule of res ipsa loquitur is one of circumstantial evidence, by which allegations and proof of the circumstances surrounding the occurrence may raise a presumption of negligence, based on the probability that negligence on the part of some person was the legal cause of the plaintiff's injury. To rebut this presumption the defendant must show that proper care was in fact exercised.[6] The rule has various effects in different jurisdictions,[7] but in Florida the effect of the rule is to afford a sufficient basis for a finding that the accident arose from want of care in the absence of a satisfactory showing to the con-

[1] Williams v. United States, 115 F. Supp. 386 (N. D. Fla. 1952).

[2] Suits against the government for torts of its employees are brought under the Federal Tort Claims Act, 60 STAT. 843 (1946), 28 U. S. C. §§ 1346(b), 2671 *et seq.* (1952). This act in substance provides that the United States shall be liable for the negligence of its employees, acting within the scope of their employment, if a private person, in accordance with the law of the place where the act or omission occurred, would be liable. *Cf.* United States v. Harris, 205 F. 2d 765 (11th Cir. 1953). It is procedural and bare of any substantive tort law implications.

[3] See United States v. Reynolds *et al.*, 345 U. S. 1 (1953). See Note, 32 A. L. R. 2d 393 (1953).

[4] Under 28 U. S. C. § 2680 (a) (1950), jurisdiction is withheld as to discretionary acts of the United States Government. See Dalehite v. United States, 346 U. S. 15 (1953), and Note, 32 N. C. L. REV. 118 (1954).

[5] Williams v. United States, 218 F. 2d 473 (5th Cir. 1955).

[6] Orme v. Burr, 157 Fla. 378, 25 So. 2d 870 (1946).

[7] The majority rule is that the effect of the doctrine is to raise an inference of negligence. See Williams v. United States, 218 F. 2d 473, 475 (5th Cir. 1955). See PROSSER, TORTS § 43 (1941). It is also said to raise an inference of fact. Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951) and cases cited therein. See Notes, 53 A. L. R. 1494 (1928) and 167 A. L. R. 658 (1947). The difference in the statements of the effect of the rule may be semantic. See Seavey, *Res Ipsa Loquitur, Tabula in Naufragio,* 63 HARV. L. REV. 643 (1950).

trary by the defendant.[8] The rationale for the rule is that as between the plaintiff and the defendant, the defendant is more likely to know or have access to knowledge as to whether proper care was exercised. To justify this reasoning, there must be a showing that the defendant had exclusive control of the instrumentality causing injury to the plaintiff, and that the occurrence was one which does not happen in the ordinary course of events if those having the management of the instrumentality use proper care.[9]

The instant case refers to the rule as one of human experience and notes that although inapplicable at one time, in that it cannot be shown that the occurrence was extraordinary in the absence of negligence, it may later become applicable, "when experience . . . in the situation is so uniform and well established that it is not necessary to prove this by extrinsic evidence."[10] Speaking of the requirement that plaintiff show extraordinariness, the court said further:

> "We have no knowledge, judicial or otherwise as to what would cause a jet airplane to explode while in mid-air."[11]

The court points, as do many legal writers, to a split of authority as to the applicability of the doctrine to aircraft accidents.[12] Both the "exclusive control" and "extraordinary event" requirements have given difficulty in this application of the res ipsa loquitur doctrine. The former is more often involved in litigation involving private aircraft, where there is the problem of dual control, and the latter in the commercial carrier cases, although the first requirement is troublesome even in these cases where the problem is one of negligence in the repair or maintenance of the aircraft by an independent contractor. The applicability of the doctrine has been tested predominantly in suits by passengers or guests against the owners or operators of private or commercial aircraft.[13]

The problems involved where negligence in the operation or maintenance of the aircraft causes personal injury or property damage to persons on the ground is totally removed from occurrences in which there is injury to the person or property of the passenger or guest. In the former situation the injured party is removed from questions of assumption of risk or contributory negligence, *i.e.,* there is no question as to the

[8] Orme v. Burr, *supra* note 6.
[9] PROSSER, TORTS § 43 (1941).
[10] Williams v. United States, 218 F. 2d 473, 476 (5th Cir. 1955).
[11] *Ibid.*
[12] See United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951), where authorities on both sides are listed. See also Note, 6 A. L. R. 2d 528 (1949). Comprehensive articles with analytical tabulations appear in McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation,* 37 VA. L. REV. 55 (1951). See also Goldin, *Res Ipsa Loquitur in Aircraft Law,* 18 So. CALIF. L. REV. 15, 152 (1946).
[13] See note 12 *supra.* See also Notes, 22 N. C. L. REV. 160 (1944) and 28 N. C. L. REV. 432 (1950).

defendant's exclusive control. Another distinguishing feature is the nature of the interest invaded in each type case. In the ground damage cases, there is an invasion of two of the plaintiff's interests; (1) freedom from negligently inflicted harm to person or property, and (2) freedom from trespass upon his possessory interests in land.[14]

No reported case on "all fours" with the instant case has been found, and in those cases presenting somewhat similar fact situations the plaintiffs have not chosen to rely solely on negligence with its doctrine of res ipsa loquitur but have asserted in addition strict liability,[15] whether common law for trespass,[16] statutory, [17] or that arising from the carrying on of an ultrahazardous activity.[18] Also, in many of these cases the plaintiff has been able to prove some antecedent acts of specific negligence on the part of the defendant.[19] In the cases asserting that res ipsa loquitur is applicable, it is questionable whether statements to that effect are holdings or *dicta.*

Two cases seem to hold that the doctrine of res ipsa loquiture is applicable. However, in *Parcell v. United States*[20] the court bolsters its decision with the further statement that the defendant was also liable on the grounds of strict liability for carrying on an ultrahazardous activity. In *San Diego Gas & Electric Co. v. United States*[21] there was evidence that the aircraft had been continuously operated below the legal altitude of 500 feet.

In the *Parcell* case two jet aircraft crashed and then exploded, hurling burning fuel into the plaintiff's dwelling and outbuildings. Speaking of the grounds asserted for the decision in the principal case, the court said:

> "If one were to follow this logic to its ultimate conclusion there would be few cases indeed in which the doctrine would be applicable. It is because the facts surrounding the accident *are* unknown that the plaintiff seeks the benefit of the legal inference or presumption. An accident known to grow out of one set of circumstances and no others would supply a plaintiff with good and

[14] PROSSER, TORTS §§ 6, 13 (1941).
[15] RESTATEMENT, TORTS §§ 519, 520 (a), (b), (d). (1938). PROSSER, TORTS § 44 (1941).
[16] United States v. Gaidys *et ux.*, 194 F. 2d 762 (10th Cir. 1952). *Cf.* Rochester Gas and Electric Corp. v. Dunlop, 266 N. Y. Supp. 469 (Monroe Co. Ct. 1933) (Res ipsa loquitur not applicable but defendant liable on theory of trespass.)
[17] United States v. Praylou *et al.*, 208 F. 2d 291 (4th Cir. 1953); D'Anna v. United States, 181 F. 2d 335 (4th Cir. 1950); Prentiss v. National Airlines Inc., 112 F. Supp. 306 (D. N. J. 1953).
[18] Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951).
[19] United States v. Gaidys *et ux.*, 194 F. 2d 762 (10th Cir. 1952); United States v. Kesinger, 190 F. 2d 529 (10th Cir. 1951); San Diego Gas & Elec. Co. v. United States, 173 F. 2d 92 (9th Cir. 1949); Leisy v. United States, 102 F. Supp. 789 (D. Md. 1953); Evans *et al.* v. United States, 100 F. Supp. 5 (D. La. 1951).
[20] Parcell v. United States, 104 F. Supp. 110 (S. D. W. Va. 1951).
[21] San Diego Gas & Elec. Co. v. United States, 173 F. 2d 92 (9th Cir. 1949).

sufficient evidence of itself, without the aid of a rule of law based on probabilities."[22]

In *D'Anna v. United States*[23] an auxiliary fuel tank suspended beneath the fuselage of a diving naval aircraft became detached and fell into the plaintiff's fruitstand injuring the plaintiff and others, and damaging property. Here, there was a statute making the owner of the aircraft prima facie liable, rebuttable by a showing of proper care. The court held res ipsa loquitur was applicable *in addition* to the statutory presumption and justified a finding of liability. Speaking of the burden on the defendant to rebut the presumption, Chief Judge Parker said.

"Such burden . . . is more difficult to meet where the plane itself or an object attached to it crashes to the ground and inflicts injury, for the falling in such case is the strongest sort of proof of either negligent operation defective constrution or equipment."[24]

The court points out in *Kesigner v. United States*[25] that the hazards of flying have been so reduced that the proposition is now acceptable that aircraft do not usually fall in the absence of negligence. This view has gained some support since World War II largely due to considerations of the social value of air transport and the desire to remove the fledgling industry from under the rules of strict liability. On the other hand, there has been much agitation pro and con among the legal writers as to which policy should control, and the trend in thinking seems to be veering towards idea that flying is an ultrahazardous activity and that those legally responsibile should be liable accordingly.[26]

The court in the instant case seems convinced that aviation has not yet reached the staged where the fiction of *vis major* or Act of God has no application, and feels that there are some "accidents" which no amount of care would avoid. The distinction drawn between jet and conventional aircraft may be valid, and if so, the application of the legal rule is probably correct. However, if such be the case, this is the strongest argument for the imposition of strict liability. Other considerations would seem to indicate that the modified strict liability statute such as

[22] 104 F. Supp. 110, 115.
[23] 181 F. 2d 335 (4th Cir. 1950).
[24] *Id.* at 337.
[25] 190 F. 2d 529 (10th Cir. 1951).
[26] See Notes, 22 GEO. WASH. L. REV. 245 (1954), 30 TEXAS L. REV. 790 (1952). Orr, *Constitutionality of Prentiss v. National Airlines,* 21 INSUR. COUNSEL JOUR. 48 (1954) (Statistical survey of air operations in relation to fatal accidents.) Leading articles urging strict liability are: Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas,* 5 HASTING L. JOUR. 1 (1953) and Baker, *An Eclipse of Fault Liability,* 40 VA. L. REV. 273 (1954). By international agreement absolute liability is imposed for damages caused on the surface by aircraft or objects falling therefrom. See discussion of 1952 Rome Aircraft Convention in 31 CAN. BAR. REV. 90 (1953).

that involved in the *D'Anna* case presents the most workable approach to the problem for the benefit of all concerned.[27] Without the benefit of the statute and without access to some evidence of negligence the plaintiff faces the difficulty illustrated here.[28]

North Carolina has not considered the problem directly, and has no explicit statutory provision.[29] If the case applying the doctrine of res ipsa loquitur where injuries were sustained by a guest is held not to be controlling,[30] the policy of the statutory provision as to dangerous flying may afford the plaintiff some evidence of negligence.[31]

WALTER LEE HORTON, JR.

Libel—Special Damages

The law of libel is an area of the law which at the present time is fraught with confusion in this jurisdiction.

Some of this confusion in North Carolina and elsewhere may be attributed to the fact that the common law distinguishes between that defamation which is oral and that which is written. Originally the common law courts took no jurisdiction over defamatory utterances, *i.e.*, spoken statements calculated to detract in a substantial way from the esteem in which a person is held in the community. The ecclesiastical courts took them under their jurisdiction, regarding them as sins, and dealt with them accordingly. As these spiritual courts began to lose

[27] Art. I-A Maryland Code § 9 (1951) as applied in D'Anna v. United States, 181 F. 2d 335 (4th Cir. 1950), provides that the owner of any aircraft damaging property or injuring persons in ascent, descent, or flight shall be prima facie liable in the absence of contributory negligence of the person involved or unless the aircraft is used without the consent, express or implied, of the owner. This statute provides the plaintiff a way to the jury as contrasted with the futility of the plaintiff's position in the *Williams* case. It does not burden the aircraft industry with absolute liability, but at the same time affords the plaintiff protection.

[28] These problems are set out and discussed fully in Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages,* 17 J. AIR L. 283 (1950). As to preparation for trial see Finley, *Trial Technique in Aircraft Accident Cases,* 31 TEXAS L. REV. 809 (1953), in which the author points out the overwhelming ignorance of most attorneys in the intricacies of obtaining, evaluating, and presenting evidence in aircraft litigation. As was indicated in Williams v. United States, 115 F. Supp. 386 (N. D. Fla. 1952), where military aircraft are involved recourse may be had to Congress for legislative relief. For some of the difficulties involved in obtaining Congressional relief where the judiciary offers none see Gellhorn and Lauer, *Congressional Settlement of Tort Claims against the United States,* 55 COL. L. REV. 1 (1955).

[29] Section 5 of the Uniform Aviation Act was adopted by North Carolina in 1927, as N. C. GEN. STAT. § 63-14 (1943). It was repealed in 1947 by c. 1069, § 3 of Session Laws of 1947. This statute is identical with that involved in the *Praylou* and *Prentiss* cases cited in footnote 17 *supra.* This statute imposed strict liability under precisely the same conditions as the Maryland statute set out in footnote 27 *supra* raises a prima facie presumption.

[30] Smith v. Whitley, 223 N. C. 534, 27 S. E. 2d 442 (1943). See Note, 28 N. C. L. REV. 432 (1950).

[31] N. C. GEN. STAT. § 63-18 (1953) makes it a misdemeanor to drop any object from an aircraft other than water or loose sand.