Journal of Air Law and Commerce

Volume 41 | Issue 1 Article 6

1975

Res Ipsa Loquitur in Small Aircraft Litigation

Steven R. Fredrickson

Notes

RES IPSA LOQUITUR IN SMALL AIRCRAFT LITIGATION

Often it is difficult to determine what caused the crash of a small aircraft. Negligence is a likely explanation because an estimated eighty-three percent of airplane accidents are due to pilot error.[1] Assuming there was negligence, it may nevertheless be impossible to determine the specific act of pilot negligence which caused the accident. Seldom do survivors or eyewitnesses exist, and there may be no clues in the wreckage. This lack of evidence points to the potential importance of the doctrine of *res ipsa loquitur* in air crash cases.

Several articles have been written about *res ipsa loquitur* in air law,[2] but recent cases create a need to put the question of *res ipsa loquitur* in small aircraft litigation into fresh perspective.[3] This requires analysis of the difficulties encountered in applying the unique problems of aviation to the theory of *res ipsa loquitur*, discussion of three judicial approaches to *res ipsa loquitur* in small aircraft cases, and consideration of the problems of practice and procedure associated with *res ipsa loquitur.*

---

[1] NATIONAL TRANSPORTATION SAFETY BOARD, AIRCRAFT DESIGN-INDUCED PILOT ERROR (1967), *quoted in* Campbell v. First Nat'l Bank, 370 F. Supp. 1096, 1098-99 (D.N.M. 1973); Davis, *Private Aircraft Crash Cases*, 29 TEXAS B.J. 161 (1966). For a list of 61 pilot activities causing or contributing to accidents see Lawyer, *Liability of Pilots: Plaintiff's Viewpoint*, in AMERICAN BAR ASSOCIATION, SMALL AIRCRAFT ACCIDENT LITIGATION 61-62 (1974).

[2] *E.g.*, Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law*, 18 S. CAL. L. REV. 15, 124 (1944); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55 (1951); Osterhout, *The Doctrine of Res Ipsa Loquitur as Applied to Aviation*, 2 AIR L. REV. 9 (1931).

[3] The scope of this article is limited to the application of *res ipsa loquitur* in crashes of small aircraft. Reference will be made to airline cases to illustrate some points. Related instances for consideration of *res ipsa loquitur* include: Blumenthal v. United States, 306 F.2d 16 (3d Cir. 1962) (civilian lost after bailing out of disabled military plane); United States v. Kesinger, 190 F.2d 529 (10th Cir. 1951) (damages to property on the ground caused by crash of plane); Sapp v. United States, 153 F. Supp. 496 (W.D. La. 1957) (injuries to persons on the ground); Ness v. West Coast Airlines, Inc., 9 Av. Cas. 17,997 (Idaho 1965) (passenger injured by air turbulence); Cope v. Air Associates, Inc., 283

I. THEORY OF RES IPSA LOQUITUR

Res ipsa loquitur, a creature of the common law,[4] is a type of circumstantial evidence concerned with the proof of negligence.[5] The Latin phrase means "the thing speaks for itself," or that the circumstances of the accident imply that the accident was probably the defendant's fault. Traditionally, the following conditions must be met before the doctrine can be applied: (i) the accident must be of a class which ordinarily does not occur unless someone was negligent; (ii) the cause of the accident must be an agency or instrumentality under the exclusive control of the defendant; and (iii) the accident must not have been due to voluntary action or contribution by the plaintiff.[6] Each of these conditions should be examined to gain an understanding of the current relationship between *res ipsa loquitur* and aviation.

A. *The Inference of Negligence*

The first condition requires that there be an accident which ordinarily would not have occurred in the absence of someone's negligence. Airplane cases encounter more difficulty satisfying this condition than do other instances of negligence. According to one court, the determination whether an inference of negligence arises in a given case necessitates "a balancing of the probabilities based upon a consideration of common knowledge, expert testimony and all the circumstances developed by the proof."[7]

The jurisdictions split on the question whether common knowledge justifies an inference of negligence in aviation accidents. At first, courts refused to apply *res ipsa loquitur* because it was common knowledge that airplanes crashed for many reasons other than pilot negligence.[8] For example, airplanes are especially susceptible to the forces of nature, such as turbulence, tricky wind currents,

---

Ill. App. 40 (1935) (preparation and packing of parachute). *See* Annot., 6 A.L.R.2d 528 (1949).

[4] *See* Byrne v. Boadle, 159 Eng. Rep. 299 (Ex. 1863) (a barrel of flour rolled out of a warehouse window and hit a passing pedestrian).

[5] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 39 (4th ed. 1971) [hereinafter cited as PROSSER].

[6] *Id.* § 39, at 214.

[7] Newing v. Cheatham, 42 Cal. 3d 593, —, 117 Cal. Rptr. 30, 37 (1974).

[8] *E.g.*, Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); Wilson v. Colonial Air Transp., Inc., 278 Mass. 420, 180 N.E. 212 (1932).

ice and precipitation.[9] Moreover, the possibilities of mechanical failures or defects in aircraft design make it difficult to single out pilot error as the most likely cause of the crash. This view continues to find support in a few jurisdictions,[10] but impressive safety records and great technical progress in the art of flying have caused an increasing number of courts to reach an opposite conclusion.[11]

If common knowledge is an inadequate foundation for an inference of negligence, expert testimony may provide a sufficient basis.[12] The nature of the accident, such as the occurrence of an unexpected and out-of-the-ordinary event, may also justify an inference of negligence.[13] For example, if an airplane with a clean record is flown on a clear day by an inexperienced pilot, an inference of pilot negligence should arise if the plane crashes. Finally, the process of inferring negligence depends partly upon the duty of care owed to the plaintiff. The higher the duty of care, the greater the likelihood that an inference of negligence will be raised. The pilot of a small private plane is held to that duty of care "which an ordinarily prudent or reasonably careful pilot or operator would use under the same or similar circumstances."[14] This is a lesser duty than that applied to common carriers;[15] conse-

[9] McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55, 72-73 (1951).

[10] *E.g.*, Kelley v. Central Nat'l Bank, 345 F. Supp. 737 (E.D. Va. 1972); Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

[11] Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959); Smith v. Pennsylvania Cent. Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948); Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962).

[12] Newing v. Cheatham, 42 Cal. 3d 593, 117 Cal. Rptr. 30 (1974); PROSSER § 39, at 217.

[13] Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973) (helicopter crashed into the ocean); Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691 (S.D.N.Y. 1971) (mid-air collision). *See also* Smith v. O'Donnell, 67 Cal. App. 838, 5 P.2d 690 (1931), *rev'd*, 215 Cal. 714, 12 P.2d 933 (1932) (common carrier).

[14] 8 AM. JUR. 2D *Aviation* § 66 (1963).

[15] As a common carrier, an airline owes its passengers a duty of utmost care for their safety. United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55, 56-57 (1951). Because of the higher degree of care required of common carriers, the doctrine of *res ipsa loquitur* is particularly suitable in actions against them. *See* L. KREINDLER, AIRCRAFT LITIGATION—3D 48, 56 (1972); Annot., 6 A.L.R.2d 528, 529-30 (1949). *Contra*, McLarty, *supra* at 89-90. Common carriers are not liable for inevitable accidents or Acts of God, however, and there have been many decisions exonerating airline companies. Lancaster, *Aviation Law*, 17 TEXAS B.J. 587, 614 (1954).

quently, the courts historically have been less willing to invoke *res ipsa loquitur* in the crash of a private plane than in the crash of a commercial airliner.[16]

B. *Exclusive Control*

The second requirement of *res ipsa loquitur* is that the event must be caused by an agency or instrumentality within the exclusive control of the defendant. If the defendant had exclusive control and management of the airplane, he was in a better position than anyone else to foresee and avert the catastrophe. This requirement is based upon the principle that liability should be imposed by the use of the doctrine of *res ipsa loquitur* only when the identity of the person at fault is clear.

The issue of exclusive control has become the battleground in small aircraft cases. A primary cause of the litigation in this area has been that most private airplanes have dual controls.[17] If more than one occupant is a licensed pilot, it is often difficult to determine who was operating the plane at the time of the crash because control of the plane could have changed hands several times during a flight. Furthermore, an excited passenger could precipitate a crash by grabbing the controls accessible to him. Another problem has been that exclusive control over the mechanical condition of the aircraft must be demonstrated before *res ipsa loquitur* can be applied. One court held that the pilot of a rented aircraft lacked exclusive control because the rental agency inspected and maintained the airplane.[18] For similar reasons, the pilot of a borrowed aircraft would lack exclusive control.[19] Finally, attorneys have contended that certain outside influences affect exclusive control. The courts have not accepted this argument; neither instructions from the control tower at an airport[20] nor requirements prescribed by

[16] *See* Annot., 6 A.L.R.2d 528 (1949); Note, *Torts—Negligence—Res Ipsa Loquitur*, 33 J. AIR L. & COM. 711, 714 (1967).

[17] The problem of dual controls is analyzed fully *infra* in conjunction with the application of *res ipsa loquitur* to small aircraft crashes.

[18] Campbell v. First Nat'l Bank, 370 F. Supp. 1096 (D.N.M. 1973). *See* Wilson v. Colonial Air Transp., Inc., 278 Mass. 420, 180 N.E. 212 (1932) (no evidence of who had inspected the airplane).

[19] Perhaps it could be argued that a pilot who inspected someone else's plane before he flew it should be held responsible for its condition.

[20] Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962). Suits between occupants of the airplane are to be distinguished from suits to establish negligence of an air traffic controller. In the latter instance an

the Civil Aeronautics Board[21] have been held to deprive the pilot of exclusive control of the airplane. Although regulations govern the height at which planes travel, one court found exclusive control because the pilot's complete physical control of the mechanism meant he could disregard the regulations, if necessary, for the immediate safety of his passengers.[22] Considering these three aspects of exclusive control together, the current test seems to be that a pilot has exclusive control if he is responsible for both the mechanical condition of the plane and the physical control of the plane in flight.

C. *No Action by Plaintiff*

The final condition which must be met before the courts will apply *res ipsa loquitur* is that the aircraft accident must not have been caused by any voluntary action or contribution on the part of the plaintiff. This condition is concerned with the defenses of contributory negligence[23] and assumption of the risk. For example, a potential contributory negligence situation exists in small airplanes equipped with dual controls. In one case the court found contributory negligence on the part of the plaintiff by showing that the plaintiff had stepped on a rudder control, causing the plane to spin into a crash.[24] It was reasoned in early cases that travel by air was so dangerous that anyone entering an airplane had assumed the risk of an accident.[25] As air travel became safer, the defense of assumption of the risk lost most of its impact. Knowledge of the general risks of aviation is no longer sufficient to invoke the defense because those general risks have decreased with improved technology.[26] Assumption of the risk is now a proper subject for the

air traffic controller's instructions to a pilot are regarded as mandatory, not merely advisory. Yates v. United States, 497 F.2d 878 (10th Cir. 1974); Allen v. United States, 370 F. Supp. 992 (E.D. Mo. 1973).

[21] "This is merely confounding control of the plane with regulation by public authority." Haasman v. Pacific Alas. Air Express, 100 F. Supp. 1, 2 (D. Alas. 1951), *aff'd sub nom.* Des Marais v. Beckman, 198 F.2d 550 (9th Cir. 1952), *cert. denied*, 344 U.S. 922 (1953).

[22] Lobel v. American Airlines, Inc., 192 F.2d 217, 219-20 n.3 (2d Cir. 1951).

[23] *See* Annot., 75 A.L.R.2d 858 (1961).

[24] Crawford v. Rogers, 406 P.2d 189 (Alas. 1965).

[25] *See, e.g.*, Cohn v. United Air Lines Transp. Corp., 17 F. Supp. 865 (D. Wyo. 1937).

[26] Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law*, 18 S. CAL. L. REV. 15, 36 (1944).

jury only when the plaintiff is fully informed about specific risks prior to his flight.[27]

II. APPLICATION OF THEORY TO SMALL AIRCRAFT CRASHES

Case law involving *res ipsa loquitur* in small aircraft litigation can be separated into three categories according to the theories applied by courts. Some courts hold that *res ipsa loquitur* cannot be applied because any verdict on the issues of negligence and causation would be based on mere conjecture.[28] Other courts hold that the circumstantial evidence permits the questions of negligence and pilot identity to go to the jury;[29] a third group of courts resolves the problems by deeming the pilot in command to have exclusive control.[30] These different approaches relate to all three elements of

---

[27] Krause v. Chartier, 406 F.2d 898 (1st Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). For other defenses to *res ipsa loquitur* see Roberts v. TWA, 225 Cal. App. 2d 344, 37 Cal. Rptr. 291 (1964) (a showing of utmost care and diligence on the part of the defendant) (common carrier); Nelson v. American Airlines, Inc., 263 Cal. App. 2d 742, 70 Cal. Rptr. 33 (1968) (evidence did not provide defense of proof of the exact cause of the accident, nor did it show the accident was preventable).

[28] *See* Morrison v. LeTourneau Co., 138 F.2d 339 (5th Cir. 1943); Campbell v. First Nat'l Bank, 370 F. Supp. 1096 (D.N.M. 1974); Kelley v. Central Nat'l Bank, 345 F. Supp. 737 (E.D. Va. 1972); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); *In re* Estate of Rivers, 175 Kan. 809, 267 P.2d 506 (1954); *In re* Hayden's Estate, 174 Kan. 140, 254 P.2d 813 (1953); Wilson v. Colonial Air Transp., Inc., 278 Mass. 420, 180 N.E. 212 (1932); Madyck v. Shelley, 283 Mich. 396, 278 N.W. 110 (1938); Mitchell v. Eyre, 190 Neb. 182, 206 N.W.2d 839 (1973); Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964); Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936); Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943); Hall v. Payne, 189 Va. 140, 52 S.E.2d 76 (1949).

[29] *See* Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968); United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958); Boise Payette Lumber Co. v. Larsen, 214 F.2d 373 (9th Cir. 1954); Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951); Higginbotham v. Mobil Oil Corp., 357 F. Supp. 1164 (W.D. La. 1973); Colditz v. Eastern Airlines, Inc., 329 F. Supp. 691 (S.D.N.Y. 1971); Insurance Co. of N. America v. Butte Aero Sales & Serv., 243 F. Supp. 276 (D. Mont. 1965); Newing v. Cheatham, 42 Cal. 3d 593, 117 Cal. Rptr. 30 (1974); Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 737, 151 P.2d 670 (1944); Bird v. Louer, 272 Ill. App. 522 (1933); Drahmann's Adm'rx v. Brink's Adm'rx, 290 S.W.2d 449 (Ky. Ct. App. 1956); Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E.2d 388, 297 N.Y.S.2d 713 (1969); Bruce v. O'Neal Flying Serv., Inc., 231 N.C. 181, 56 S.E.2d 560 (1949); Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962).

[30] Lange v. Nelson-Ryan Flight Serv., Inc., 259 Minn. 460, 108 N.W.2d 428 (1961); Collins v. Stroh, 426 S.W.2d 681 (Mo. Ct. App. 1968).

res ipsa loquitur, but to avoid repetitious analysis, discussion of each judicial approach will focus upon the element of exclusive control.

Res ipsa loquitur is inapplicable if a passenger was in actual control of the plane,[31] but when it is clear that only the pilot was indeed flying the plane, *res ipsa loquitur* has been applied.[32] The difficult cases are those in which it is not clear who was the pilot. Proof of the identity of the pilot is usually based upon circumstantial evidence. Some circumstances demonstrating that a particular occupant was the pilot are that he owned the plane, was the only occupant who held a license, was listed on the flight plan as the pilot in command, had the most flying experience of the occupants, was in the habit of controlling the plane, was seated in the position customarily occupied by the pilot, and was in communication with the control tower.[33] Also relevant are the post-crash circumstances. Damage to only one set of controls suggests that those were the controls used at the moment of impact.[34] A pathologist's autopsy report stating that the occupants had different patterns of broken bones could show that only one occupant braced himself in anticipation of an imminent crash.[35] Thus, the issue often becomes what quantum of circumstantial evidence is required to establish the identity of the pilot.

A. *The Conjecture Theory*

The conjecture theory represents one judicial attitude toward circumstantial evidence and exclusive control. Courts that accept

[31] Parker v. James Granger, Inc., 4 Cal. 2d 66, 52 P.2d 226 (1935), *appeal dismissed*, 298 U.S. 644 (1936); Piper v. Henson Flying Serv., 191 Md. 240, 60 A.2d 675 (1948). *But see* Lange v. Nelson-Ryan Flight Serv., Inc., 259 Minn. 460, 108 N.W.2d 428 (1961), holding the pilot in command responsible regardless of whether he was actually at the controls.

[32] Ferrell v. Topp, 386 S.W.2d 33 (Mo. 1964) (no evidence that plaintiff's decedent had operated the plane at all). *See* Butts v. Union Cent. Life Ins. Co., 266 F. Supp. 739 (M.D. Tenn. 1967). "The facts show that he owned the plane, that he started out on the fatal trip flying the plane, and that no one else was in the plane with access to the controls who was capable of flying the plane." *Id.* at 741.

[33] 2 AM. JUR. PROOF OF FACTS, *Aviation Proof No. 3, Identity of Person Piloting Dual Controlled Plane* 123 (Supp. 1974); Davis, *Private Aircraft Crash Cases*, 29 TEXAS B.J. 161, 203 (1966).

[34] *But see In re* Hayden's Estate, 174 Kan. 140, 254 P.2d 813 (1953).

[35] Address by attorney Windle Turley, Medico-Legal Problems course, School of Law, Southern Methodist University, Mar. 13, 1975.

this theory declare that the circumstantial evidence of the identity of the pilot is inconclusive; they conclude that it would be speculative to say whose negligence caused the crash.[36] One recent case, *Mitchell v. Eyre*,[37] held that a plaintiff must not only establish the identity of the operator of the aircraft at the time of the accident, but, when the aircraft is equipped with dual controls and both occupants are pilots, proof showing who operated the aircraft at the time of take-off will not be conclusive evidence to establish who was operating the plane one hour later at the time of the crash. The effect of the conjecture theory, therefore, is to preclude application of *res ipsa loquitur.*

Dual controls provide the key to the conjecture theory. The mere fact that an airplane was equipped with dual controls has been held to indicate that the plane was not in the exclusive control of the defendant.[38] According to the theory, if a crash may have been caused by one occupant's handling of the controls available to him or by another occupant's handling of the second set of controls, then it would be a mere guess to say who was the pilot.[39] It is contended that the proven facts in the crash of a dual control plane give equal support to each of two inconsistent inferences. The courts conclude that because neither inference is established, judgment must go against the plaintiff, the party who had the burden of establishing one inference against the other.[40]

It is interesting to note that the burden of proof provokes a different result in suits concerning the exclusionary clauses of pilots' insurance policies. In *American Casualty Co. v. Mitchell*,[41] a suit arising from the same crash discussed in *Mitchell v. Eyre*,[42] an exclusionary clause eliminated coverage of a person while he was

---

[36] "Judgments may not find a landing place in the field of conjecture alone." Madyck v. Shelley, 283 Mich. 396, —, 278 N.W. 110, 112 (1938).

[37] 190 Neb. 182, 206 N.W.2d 839 (1973). The issue is framed in terms of the burden of proof rather than *res ipsa loquitur*, but the problems are identical, and the court cites cases that did discuss *res ipsa loquitur.*

[38] McWilliam v. Thunder Bay Flying Club, [1950] Ont. W.N. 696. *Contra*, Collins v. Stroh, 426 S.W.2d 681 (Mo. Ct. App. 1968).

[39] Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943). *See, e.g., In re* Hayden's Estate, 174 Kan. 140, 254 P.2d 813 (1953); Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936).

[40] Morrison v. LeTourneau Co., 138 F.2d 339 (5th Cir. 1943).

[41] 393 F.2d 452 (8th Cir. 1968).

[42] 190 Neb. 182, 206 N.W.2d 839 (1973).

operating, or learning to operate, or performing duties as a member of the crew of any aircraft. The insurance company had the burden of sustaining the inference that plaintiff had been the pilot of a dual control plane. Since the company could not prove that an occupant was operating the controls by proving the *possibility* that he could have been operating the controls, the company was held liable on the policy.

The weakness in the conjecture theory is its requirement of an unrealistic standard of proof. The plaintiff must completely negate the possibility that someone other than the defendant was at the controls. This "beyond a reasonable doubt" standard is appropriate only in criminal cases. It is inappropriate and unfair to invoke such a high standard in a civil suit, especially when it is invoked *before* the plaintiff gets his case into the juryroom. To avoid a directed verdict the plaintiff should be required to show only some evidence that the defendant was flying the plane.[43] The very nature of such an inquiry causes this proof to be largely circumstantial and it should be weighed by the jury.

Although courts which follow the conjecture theory announce that speculation should not determine the outcome of cases, they allow speculative possibility regarding what may have occurred to overcome reasonable inferences raised by the circumstantial evidence. The evidence usually indicates that one man probably was the pilot; the courts are the ones who speculate that the other occupant might have used his own set of controls. Such a result borders too closely on an assumption that the *second* occupant either was the pilot or was guilty of contributory negligence.[44]

B. *The Pilot in Command Theory*

Under this approach to the problem of exclusive control, the pilot in command,[45] the occupant who had a right to control the aircraft, is held responsible for the accident even though he may not have been the negligent party. Even when the crash might have been caused by the negligence of a passenger, that negligence is imputed to the pilot in command. The jury must decide who was the pilot in command and that determination is then conclusive

[43] Davis, *Private Airplane Crash Cases*, 29 TEXAS B.J. 161, 203 (1966).

[44] 10 J. AIR L. & COM. 415, 416 n.7 (1939).

[45] The pilot in command is "the pilot responsible for the operation and safety of an aircraft during flight time." 14 C.F.R. § 1.1 (1974).

on the issue of exclusive control, for the pilot in command is deemed to be in exclusive control of the aircraft as a matter of law.

Because this is the newest of the three approaches to the issue of exclusive control, few cases have utilized this rationale. The leading case, *Lange v. Nelson-Ryan Flight Service, Inc.*,[46] held that in the absence of extenuating circumstances, the pilot in command is responsible for the negligent operation of the airplane regardless of his presence or absence from the controls at the time of the accident. The requirement of exclusive control is thus relaxed; proof of the right to control the plane permits the use of *res ipsa loquitur*, and the mere presence of dual controls does not in itself prevent application of the doctrine.[47] The Federal Aviation Administration's regulations concerning the pilot in command and the flight plan which reveals the name of the pilot in command of the particular flight are relevant to establish liability under this theory.[48]

A criticism of the pilot in command theory is that it charges the pilot in command not only with exclusive physical control during the flight but also with exclusive control of the mechanical condition of the plane. The pilot in command of a rented or borrowed airplane should not be held responsible for its mechanical condition.[49] This criticism is symptomatic of the inherent nature of the theory: liability is imposed regardless of fault; consequently, a party innocent of blame might be held responsible. The extent to which the pilot in command approach should apply to small aircraft accidents is a policy question. Because the theory is so simi-

[46] 259 Minn. 460, 108 N.W.2d 428 (1961). Although the court refused to decide whether *res ipsa loquitur* was technically applicable, the court discussed exclusive control and the liability of the pilot in command. One writer praised the holding as "admirable." Lambert, *Comments on Recent Important Aviation Cases*, 28 NACCA L.J. 434, 442 (1961-62).

[47] "The fact that he occupied a cockpit which was provided with controls does not compel a conclusion that the aircraft was not under the exclusive control of the pilot in command." Ayer v. Boyle, 12 Av. Cas. 18,365, 18,368 (Cal. Ct. App. 1974). "[H]e would be chargeable of the negligence of Cooper even if Cooper had been operating the controls, for he had the 'right of control.'" Collins v. Stroh, 426 S.W.2d 681, 689 (Mo. Ct. App. 1968) (suit by third party).

[48] Pappas v. Pieper, 325 S.W.2d 789 (Mo. 1959).

[49] Cases cited notes 18-19 *supra*. "We do not question the plaintiffs' assertion that under the applicable federal regulations Birdseye, as 'pilot in command,' was 'directly responsible for, and is the final authority as to, the operation of that aircraft.' 14 C.F.R. § 91.3(a) (1973). This does not, however, compel the conclusion that the airplane was under his exclusive control. He had rented it . . . ." Campbell v. First Nat'l Bank, 370 F. Supp. 1096, 1098 (D.N.M. 1973).

lar to strict liability and because strict liability is often associated with a high duty of care,[50] this theory seems most conducive to situations in which the pilot in command owed a duty of greater than ordinary care to the other occupants of the airplane. Appropriate situations for its application in small aircraft litigation would include the business invitee relationship[51] and the instructor-trainee relationship.[52]

C. *The Weight-of-the-Evidence Theory*

A number of jurisdictions approach the problem of exclusive control by holding that circumstantial evidence raises a question of fact concerning the identity of the pilot.[53] The basis for this theory, as stated by one court, is that "[w]here the evidence is entirely circumstantial a party should not be deprived of competent, relevant evidence because it is not of great strength. Many threads may make a rope."[54] The effect of the introduction of the evidence is that the case goes to the jury so that the jury may weigh all the pieces of evidence concerning pilot identity as a question of fact. If the jury finds exclusive control, then it must consider whether the other requirements of *res ipsa loquitur* are also satisfied. If the jury determines that exclusive control has not been established by a preponderance of the evidence, then *res ipsa loquitur* is not applied.

Compared with the conjecture theory and the pilot in command theory, this theory offers the greatest potential for substantial justice. There is no automatic verdict for either party because the final

---

[50] *See* PROSSER § 81.

[51] *See* Boise Payette Lumber Co. v. Larsen, 214 F.2d 373 (9th Cir. 1954).

[52] Lange v. Nelson-Ryan Flight Serv., Inc., 259 Minn. 460, 108 N.W.2d 428 (1961).

[53] Boise Payette Lumber Co. v. Larsen, 214 F.2d 373 (9th Cir. 1954) (owner of the plane was using the radio) (business invitee case); Insurance Co. of N. America v. Butte Aero Sales & Serv., 243 F. Supp. 276 (D. Mont. 1965) (owner was seated in the left hand seat); Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, 151 P.2d 670 (1944); Bird v. Louer, 272 Ill. App. 522 (1933) (one occupant was an experienced pilot; the other occupant had never flown an airplane); Drahmann's Adm'rx v. Brink's Adm'rx, 290 S.W.2d 449 (Ky. Ct. App. 1956) (plane was landing at the time of the crash, and all prior landings had been made by the owner); Bruce v. O'Neal Flying Serv., Inc., 231 N.C. 181, 56 S.E.2d 560 (1949) (strong inference that pilot in forward seat continued operation of plane during maneuvers).

[54] Whittemore v. Lockheed Aircraft Corp., 65 Cal. App. 2d 737, —, 151 P.2d 670, 678 (1944).

determination is based on a flexible question of fact rather than on an absolute rule of law. The test should be whether there is circumstantial evidence of one or more facts from which the identity of the pilot may reasonably be inferred.[55] If reasonable men can differ about the conclusion to be drawn, then this is the type of conflict which should be resolved by a jury.[56] The weight-of-the-evidence theory is especially suitable for most small aircraft cases because an ordinary duty rather than a high degree of care is usually the required standard.

III. Problems of Practice and Procedure

The plaintiff's attorney initially must make a decision about the relevance of *res ipsa loquitur* to his case. If the proximate cause of the crash is clearly something other than negligence and no one is at fault, *res ipsa loquitur* is irrelevant.[57] *Res ipsa loquitur* is valuable in three instances: (i) if the evidence suggests negligence but it is impossible to prove the specific cause of the accident, *e.g.*, when evidence indicates inadequate maintenance of the aircraft; (ii) if neither negligence nor causation can be proven, *e.g.*, when an airplane has disappeared over the sea without a trace; or (iii) if both negligence and causation can be proven but the plaintiff wants to rely upon both the specific act of negligence and *res ipsa loquitur*.[58]

Because local laws differ regarding the use of inconsistent pleadings, a conflict persists whether *res ipsa loquitur* can be invoked if the plaintiff has also pleaded and proved specific acts of negligence.[59] Early decisions in New York[60] and Texas[61] held *res ipsa loquitur* inapplicable when the plaintiff also relied upon specific

---

[55] *See* Prosser § 39, at 212.

[56] Prosser § 37, at 208. It is the function of a jury to weigh the probative value of the evidence and decide whether there is a preponderance of evidence in favor of the plaintiff. 2A C.J.S. *Aeronautics & Aerospace* § 173 (1972); Prosser § 38, at 208.

[57] Kreindler, *Using Res Ipsa Loquitur in Airplane Crash Cases*, 64 Case & Com. 3, 8 (Nov.-Dec. 1959).

[58] *Id.* at 6-10.

[59] Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law*, 18 S. Cal. L. Rev. 15, 124 (1944); Annot., 2 A.L.R.3d 1335 (1965).

[60] Goodheart v. American Airlines, 252 App. Div. 660, 1 N.Y.S.2d 288 (1937).

[61] English v. Miller, 43 S.W.2d 642 (Tex. Civ. App. 1931).

acts of negligence; however, a recent decision in New York[62] announced a different result, holding it proper to allow a case to go to the jury on both the theory of *res ipsa loquitur* and evidence of specific acts of negligence. When local law permits the plaintiff to plead both *res ipsa loquitur* and specific acts of negligence, plaintiff's attorney must make a very important strategy decision. His alternatives are to plead only the specific acts, to plead only *res ipsa loquitur*, or to plead both *res ipsa loquitur* and the specific acts of negligence. Arguments exist for and against each course of action. When specific acts of negligence may be proved, the plaintiff has a better chance for a favorable verdict and the indignation of the jury is likely to result in higher damages;[63] however, plaintiff risks being unable to prove the specific acts constituting negligence. On the other hand, if the plaintiff pleads only *res ipsa loquitur* his case may be less appealing to a jury because it lacks evidence of wrongdoing. One practicing lawyer recommends that the plaintiff argue both *res ipsa loquitur* and any specific acts of negligence.[64] This maintains flexibility at trial while increasing the plaintiff's chances for recovery. Usually proof of the specific acts of negligence should be the first part of plaintiff's attack.[65] If the cause of the accident is unknown, however, the best strategy may be to hold the specific evidence in reserve to use against the opposing party's defenses to *res ipsa loquitur*.[66] The danger in such a strategy is that the plaintiff can only rebut the defendant's defenses and he might not be allowed to prove a new theory at that point in the trial.[67]

The procedural effects of invoking *res ipsa loquitur* are important to learn since jurisdictions vary in their treatment of the doctrine.[68] In some jurisdictions *res ipsa loquitur* raises a presumption

---

[62] Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E.2d 388, 297 N.Y.S.2d 713 (1969) (helicopter crash), *noted in* 33 ALBANY L. REV. 660 (1969). *See* Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962) (plaintiff does not lose the benefit of *res ipsa loquitur* by alleging specific acts of negligence which he fails to prove).

[63] Kreindler, *Using Res Ipsa Loquitur in Airplane Crash Cases*, 64 CASE & COM. 3, 4 (Nov.-Dec. 1959).

[64] L. KREINDLER, AIRCRAFT LITIGATION—3d 49 (1972).

[65] *Id.* at 53.

[66] *Id.* at 50.

[67] *Id.* at 53.

[68] *See* PROSSER § 40.

of negligence that can entitle the plaintiff to a directed verdict;[69] in other jurisdictions the doctrine establishes a prima facie case of negligence that precludes a directed verdict for the defendant;[70] but in the majority view, the effect of *res ipsa loquitur* is to make negligence a permissible inference which the jury may draw.[71] Because the procedural effect of *res ipsa loquitur* depends upon local law, counsel must study the statutes and decisions of his particular jurisdiction.

The final problem is whether *res ipsa loquitur* is a matter of procedure or one of substance in conflict of laws situations. The majority rule is that the application of *res ipsa loquitur* is a procedural matter governed by the law of the forum.[72] A minority of jurisdictions hold that *res ipsa loquitur* presents a question of substantive law and that the forum court must look to the law of the jurisdiction wherein the accident occurred.[73]

IV. CONCLUSIONS

The application of *res ipsa loquitur* to crashes of small aircraft has been litigated in dozens of jurisdictions over a period covering more than forty years. Although the courts agree upon the elements necessary to define the doctrine of *res ipsa loquitur*, the courts have not consistently applied the law to the facts. The first decisions denied the inference of negligence in small aircraft accidents. Changes in aviation have led an increasing number of courts now to believe that these accidents do not occur in the absence of someone's negligence. Common knowledge about the safety of air travel, once an obstacle to *res ipsa loquitur*, now often supports an application of the doctrine. A split of authority persists, however, and

[69] Collgood, Inc. v. Sands Drug Co., 5 Ill. App. 3d 910, 284 N.E.2d 406 (1972) (fire in warehouse; inference of negligence is so strong that reasonable men cannot reject it); Schechter v. Hann, 305 Ky. 794, 205 S.W.2d 690 (1947) (automobile case); Annot., 97 A.L.R.2d 522 (1964).

[70] Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951) (*res ipsa loquitur* merely raises an inference of negligence sufficient to establish a prima facie case, and does not establish a presumption of negligence; plaintiff retains the burden of proving his case by a preponderance of the evidence).

[71] Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958) (although the facts may warrant an inference of negligence under *res ipsa loquitur*, they do not compel that inference).

[72] *See, e.g.*, United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964).

[73] Smith v. Pennsylvania Cent. Airlines Corp., 76 F. Supp. 940 (D.D.C. 1948).

a new obstacle to the inference of negligence may be the development of products liability law. Manufacturers' liability for defective airplanes, conceived as a weapon for the plaintiff, could become an important tool for the defendant pilot in a *res ipsa loquitur* case. The defendant could argue that because manufacturers are found at fault in many recent products liability cases, no inference of pilot negligence can be raised from the happening of an accident.

The requirement for exclusive control has eroded in negligence law in general[74] and can be expected to erode in air law as well. The conjecture and the pilot in command theories illustrate two polar extremes in judicial response to exclusive control of small aircraft. In some instances these theories might be appropriate, but in general the weight to be given circumstantial evidence concerning the identity of the pilot of a dual control plane should be a fact question for the jury. After comparing and contrasting all three approaches, it is clear that the weight-of-the-evidence theory is the most desirable.

Res ipsa loquitur is no panacea for the problems of small aircraft litigation. Even when the plaintiff seeks to invoke the doctrine, his attorney still must be fully prepared on the technical aspects of the case,[75] and also must watch for new appellate decisions because *res ipsa loquitur* is a dynamic area of air law.

Steven R. Fredrickson

[74] Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944) (medical malpractice); Hugo v. Manning, 201 Kan. 391, 441 P.2d 145 (1968) (injury to customer or patron); Beaudoin v. Watertown Memorial Hosp., 32 Wis. 2d 132, 145 N.W.2d 166 (1966) (medical malpractice).

[75] *See* Finley, *Trial Technique in Aviation Accident Cases*, 31 TEXAS L. REV. 809, 818 (1953).