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## THE ROLE OF THE TRIAL ATTORNEY IN MASS AIR DISASTER LITIGATION

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SINCE the passage of Title 28 U.S.C. section 1407 on April 29, 1968, providing for consolidated pre-trial procedures, it has become a virtual certainty that mass disaster aircraft litigation will find its way into a single federal jurisdiction. Actions pending in various federal courts will be consolidated under this section in a single jurisdiction for the ostensible purpose of completing all pre-trial discovery.

As a practical matter, these transfers under section 1407, which are for pre-trial procedures only, will be followed by a further consolidation, either for all purposes—*i.e.*, a common trial on liability, and a separate trial on damages—or, in some instances, for a common trial on liability only, with the return of each individual case thereafter to the jurisdiction in which it had been instituted for a trial on the damages only.

Notwithstanding the fact that the National Transportation Safety Board (NTSB) holds extensive hearings, compiles extensive exhibits, and that the recording devices aboard the aircraft, as well as on the ground, frequently depict the last minutes of the tragic episode leading to the mass disaster, there ensues in almost every case an imbroglio of discovery procedures hitherto unknown in accident litigation. It is no exaggeration to state that tens of thousands of pages of depositions and documents are collected during the course of extensive discovery. In many instances, the discovery undertaken by the plaintiffs inures to the benefit of one or another

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of the co-defendants. A typical example involves a case in which the carrier is the primarily culpable party, with the manufacturer of either the plane or a component part, and the United States Government, sharing a part of the blame. During the course of pre-trial proceedings, it is not unusual for the plaintiffs to uncover sufficient evidence to implicate the lesser-responsible parties who perhaps had remained unscathed by the investigation undertaken by the NTSB.

These extensive procedures concomitant with the multidistrict approach often involve a repeat of the procedures followed by the NTSB, whose hearings are transcribed and are available, but are not generally admissible in civil litigation. Not only are transcriptions available of the testimony received at these hearings, but in addition, the exhibits, investigatory statements, and the like, are also available. So, too, are the read-outs made of the cockpit voice recorder and the instrument flight data recorder on the aircraft. The work undertaken in this discovery procedure is that traditionally assigned to attorneys on the staff of trial counsel who, more often than not, are the heads of their firms, and who specialize in the courtroom presentation of the evidence which has been accumulated by their staff.

Whether by reason of this extensive pre-trial discovery made possible by sharing of expenses under the multidistrict procedures, or by reason of the essential equity of the claims of innocent passengers or their survivors who have fallen victim to the dereliction of the carrier or of the manufacturer of the aircraft or of the Government, the simple fact is that, more and more, we are finding that defendants, without conceding liability, are nevertheless in one form or another waiving their defenses on liability, and are seeking trials on damages only. For example, in the Lebanon, New Hampshire Crash, the Florida Everglades Crash, and the Upperville, Virginia Crash, the defendants simply reached the point, after extensive discovery, where their resistance to payment of compensatory damages was withdrawn. On the other hand, in the West Virginia Crash, the need for discovery was obviated by the defendants' concession as to responsibility for compensatory damages under the West Virginia Wrongful Death Statute.

In the Paris Crash litigation, the defendants have adopted this

posture only as to liability for compensatory damages. Claims for punitive damages are being asserted in that litigation, which the defendants strenuously oppose. They have taken the position that in those cases in which the plaintiffs agree to waive any claim for punitive damages, the defendants will not press their defenses and will proceed to assessment of compensatory damages, whether by agreement or by trial. However, the plaintiffs who insist on maintaining their claims for punitive damages face a liability trial, now scheduled for October 1976, in which the defendants intend to contest liability not only for punitive damages but for compensatory damages as well.

A prominent defense attorney in the field of mass disaster litigation, and a competent trial lawyer himself, has commented most cogently on this point:

Aside from legal questions with respect to the efficacy of the 1407 transfer we have found a very practical objection insofar as defendants are concerned. *Generally speaking, it doesn't take a defendant in any major aircraft disaster very long to determine the extent, if any, of his liability.* At the same time, no defendant is interested in a drawn out discovery proving what it already knows—the nature and extent of its liability. Rather, these defendants would prefer to negotiate prompt fair settlements. Experience has shown that settlements of this type are virtually impossible once the local litigation is “multidistricted.” Indeed, even when defendants express an evident interest in settlement the transferee courts often neglect to accept the challenge. Thus, one of the main aims and desires of the Congress and the Multidistrict Panel is frustrated, namely, the speedy, economical determination of mass litigation.<sup>1</sup> (Emphasis added.)

This, of course, presents a rather optimistic view of settlement possibilities prior to the undertaking of extensive pre-trial work. The need for pre-trial discovery varies from case to case. While experience has demonstrated that more often than not extensive pre-trial discovery is undertaken, the question is whether it is helpful, or even necessary. Frequently it assists in clarifying liability as among the various defendants, since liability with respect to innocent passengers is usually a fairly clear-cut proposition.

One might ask whether the development of these refined tech-

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<sup>1</sup> Martin, *Multidistrict Litigation—A Panacea Or A Blight?*, 10 THE FORUM 853, 865 (1975).

niques under the mass litigation approach has left any room for the trial attorney who has become expert in the presentation of cases to court and jury. It has been our experience that more than ever, a competent trial lawyer who is prepared to devote special attention to the requirements of the individual cases in which he has been retained remains the only assurance of adequate and just compensation.

In most cases, during the course of the pre-trial procedures, there is intensive dedication to the common questions of law and fact in the mass disaster, but other questions arise which are peculiar to the rights of the individual litigants. As to these individual rights, there can be no substitute for the traditional method of preparing the case. Thus, in the first instance, trial counsel must see to it that his client institutes the action in the jurisdiction which will afford the maximum recovery. For example, Florida law allows damages for the grief, anguish and mental pain and suffering endured by a surviving parent who has lost a minor child. Further, at least to this time, Florida has continued the *lex loci delicti* doctrine in its choice of law rules. Clearly, trial counsel who is consulted in an air crash case occurring in Florida will insist that the action be instituted in Florida, unless the law of the domicile of the deceased and his survivors provides a more liberal standard for the measurement of damages. Examples may be culled from almost every mass disaster case to substantiate the importance of this initial determination. Suffice it to say that this is only the beginning of trial counsel's obligation.

The case on damages must be tailor-made to fit the given situation. Thus, in the air disaster which occurred near Upperville, Virginia, actions were commenced in Virginia since its law allows damages for mental pain and anguish of the survivors. Detailed investigation was done, of course, including in-depth interviews with family members, clergy, friends, business associates, and other persons in the community who might shed light upon significant aspects of the behavior patterns of the survivors. Alterations in their conduct could be related to deep-seated despondency arising from their bereavement.

Needless to say, it is necessary to make a careful search for documents which might establish the closeness of the relationship

to the deceased. In one case, the records of a religious family service organization provided crucial evidence because these records revealed details of survivor problems, manifesting mental anguish which corroborated the tremendous impact upon them of the death of the loved one.

After the investigation has begun, it must be periodically updated in order that the full history from the date of death to the point of trial be documented and brought to the attention of the trier of fact. Further, the damage claim must be detailed in interrogatories or depositions, lists of witnesses and documents must be supplied, and frequently, experts must be deposed as a precondition to the admissibility of their testimony at the time of trial. All of this requires the close attention of trial counsel; it will be his job to project the totality of the loss sustained by the survivors, and he must be aware of the kind, nature and quality of the proof he proposes to offer.

Even in jurisdictions which adhere to a strict pecuniary standard of measurement of damages in wrongful death cases, loss of services is frequently regarded as a species of pecuniary loss. In some states, this is written into the statute; in others, judicial interpretation has allowed for this type of proof.<sup>2</sup> Thus, in a case where the de-

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<sup>2</sup> Thus, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the Court first explains that loss of actual monetary support—*i.e.*, financial contributions of the decedent to the dependent survivors—is universally recognized as a basis for damages. Going one step further, the Court then states that the overwhelming majority of wrongful-death statutes provide for the monetary value of loss of services as an additional basis for a pecuniary award. Where the statute does not specifically so provide, the Court points out, the courts have interpreted pecuniary loss as permitting recovery for the monetary value of the services of the deceased. The Court says, in part:

Similarly, the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable. *Sea-Land Services, Inc.*, *supra* at 585.

Another example is to be found in the New York statute, N.Y. ESTATES, POWERS & TRUSTS LAW § 5-4.3 (McKinney 1967), which provides for fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. Although the statute does not specifically include loss of services, nevertheless the courts in New York have consistently gone beyond the amount contributed by the deceased for the support of

cedent is a mother, her child's deprivation of the religious and moral training the mother would have provided is a fruitful area for exploration. Of necessity, this will require consultation with clergy and perhaps school teachers, who can attest to the kind and quality of the supervision given by the deceased mother in the care and guidance of her child. Another aspect of the loss of the mother in such a situation entails the use of an experienced home economist to translate the loss of the mother's care and services in the home into terms of dollars and cents. This, of course, is not permitted in all jurisdictions, but where allowed may prove to be a valuable adjunct to the proofs.

We do not mean by these references to provide an exhaustive list of all the things which must be accomplished to properly project the loss to the survivors by the wrongful death of the victim of a mass disaster. We merely wish to point out that the role and function of the trial lawyer, as it has evolved within our tradition, has in no way become anachronistic by reason of the present approach to pre-trial discovery under section 1407. To the contrary, because the common questions of law and fact have spawned a paper-work deluge never before reached in accident litigation, it becomes even more necessary for each case to be handled on an individual basis by capable trial lawyers who will not be deflected in their pursuit of a full recovery by the diversions attendant to over-abundant discovery.

When the case reaches the pre-trial stage, the trial lawyer must formulate a plan for the introduction of witnesses and documents in conformity with the prevailing local rules. It is not uncommon

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his survivors and have permitted an award to include loss of services in the nature of guidance, advice, and care of a deceased spouse or parent to his surviving spouse and child. See *Lucivero v. Long Island R.R. Co.*, 22 Misc. 2d 674, 200 N.Y.S.2d 728 (Sup. Ct. 1960). The Florida Wrongful Death Act is a further illustration. FLA. STAT. ANN. § 768.21 (Supp. 1976) states:

Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children may be considered.

for a judge to order a series of pre-trial discussions before a magistrate, in which the issues are narrowed and the authenticity and admissibility of documents are stipulated to or ruled upon in a preliminary hearing. This, in itself, in a properly prepared presentation, may require much time, effort and research.

Finally, on the day of the trial, with the witnesses and documents assembled and the case ready, the trial lawyer proceeds in traditional fashion to present his evidence. This requires a minute-by-minute evaluation and re-evaluation of all of the developments. During the course of the trial, he may well decide for one reason or another to withdraw offers of evidence or eliminate someone from the roster of witnesses; however, his actual presentation of the individual case varies not one iota from the presentation of any other wrongful death action.

The guarantee to the citizen of the right to be represented by a lawyer of his own choosing has become even more significant because of the intrusion upon the lawyer-client contract of the rules requiring the consolidation of mass disaster cases into one jurisdiction. Although the initial consolidation under section 1407 involves only pre-trial procedures, nonetheless the liability trial, if one becomes necessary, will in the greatest likelihood be a consolidated trial. In no instance, however, can or should the damage trials be consolidated, because they encompass individual questions of fact. It would, in our opinion, be so prejudicial to the rights of a party to have his damage claim conjoined with that of an unrelated party as to warrant reversal.

The treatment accorded damage trials does vary from court to court. In the Virginia air disaster, all the damage trials took place before the transferee judge. In the Everglades disaster, for those cases which were instituted in jurisdictions other than Florida, the damage trials were returned to those jurisdictions after the defendants withdrew their defenses to the liability aspect of the litigation. In the Paris Crash litigation, which is presently pending in California, claims for compensatory damages are being submitted, on a voluntary basis, by those plaintiffs who have waived any claim to punitive damages, to arbitration panels which have been set up by the court, with the agreement of the defendants that they will not press their defenses to liability before those arbitra-



tion panels. It appears most likely that the cases for compensatory damages which are not settled before these panels will not be returned to the jurisdictions where the actions were originally commenced but will be tried in California. In fact, Senior United States District Court Judge Peirson M. Hall, who is presiding in the Paris Crash litigation, has indicated in an extensive opinion that the applicable law on the measure of damages involving all of the decedent estates is to be the California law, with the proviso that the concept of "pecuniary loss" will be applied in accordance with the definition given in the case of *Sea-Land Services, Inc. v. Gaudet*.<sup>3</sup>

From the point of view of the trial lawyer, the presentation in this instance will, of necessity, include not only an analysis of the loss to the survivors of financial contributions (whether in terms of money or other material things of value), but a considerable number of other benefits of which the survivors have been deprived.

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<sup>3</sup> 414 U.S. 573 (1974). In this case the Court held that the maritime wrongful-death remedy allows a decedent's dependents to recover damages for loss of support, services, and society, as well as damages for funeral expenses. The Court had no problem in sustaining an award for loss of support since this is universally recognized. Moreover, it found the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of loss of services. However, when it reached the issue of compensation for loss of society, as a measure of damages, the Court found a much closer question to have been presented. In accepting loss of society as an additional basis for an award in maritime wrongful death cases, the Court stated:

Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to the decedent's dependents. Despite this fact, a number of early wrongful-death statutes were interpreted by courts to preclude recovery for these losses on the ground that the statutes were intended to provide compensation only for "pecuniary loss" and that the loss of society is not such an economic loss. Other wrongful-death statutes contain express language limiting recovery to pecuniary losses; for example, the Death on the High Seas Act limits recovery to "a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought . . . , " 46 U.S.C. § 762 (emphasis added), and consequently has been construed to exclude recovery for the loss of society.

A clear majority of States, on the other hand; have rejected such a narrow view of damages, and, either by express statutory provision or by judicial construction, permit recovery for loss of society.

414 U.S. at 585-87.

Included are: the nurture, training, education and guidance which would have been furnished by a decedent father to his children; and the loss of his society which, of necessity, embraces a broad range of benefits which are cut off by his wrongful death, including love, affection, care, attention, companionship, comfort and protection. In a case which involves the death of a spouse, the loss of the solitudine, aid, comfort and consortium of the spouse provides additional damage aspects.

Thus, the problem of projecting losses, which may not be shaped by mathematical formulae nor provided with scientific precision, necessarily involves the trial lawyer in day-by-day decisions during the course of the trial as to the nature, extent and direction of the proofs. He must bring all of his ability to bear in order to predict the effect that his presentation is having upon the trier of fact, and make the necessary last-minute alterations in his proofs and in his presentation to illuminate more fully the loss actually suffered by his client. This emphasizes the significance of the need to tailor and fashion the presentation of the law suit in a mass disaster type of accident with the same care and individualized attention as has always been required in the more usual type of case. More than ever, it is necessary for the victims of such mass disasters to be protected from the dilution of their rights by the multidistrict consolidation approach. Counsel must remain alert to the need for withstanding the pressure brought to bear by this newly-evolving system which, in the absence of the needed vigilance, may well result in diminishment of individual rights.

It is obvious that each individual case must, by reason of the nature of the instrumentality involved in the accident—*i.e.*, an aircraft—represent an individual disaster to a given family which, in microcosm, reflects the major disaster of the entire group. Death, paralysis or bodily mutilation are typically the results of episodes which form the basis of this class of law suit. With such dire consequences in each individual case, it can readily be seen that each one will generally warrant the fullest kind of preparation and trial. Moreover, more often than not, it will be necessary to bring a given case up to the point of trial in order that its full value be realized for the client.

It is clear that the role and function of trial counsel in this class

of case is in no way diminished by the multidistrict rules which now prevail in the federal court system. However, the trial will usually be solely on the issue of damages since most of the time the defendants will have agreed among themselves to share the responsibility in certain percentages. It therefore remains necessary for trial counsel to prepare his damage case extensively in order to assure maximum client benefit.