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## AVIATION—THE NEED FOR UNIFORM LEGISLATION

JOHN J. KENNELLY\*

At the outset, it should be noted that the title of this article does not speak of the need for “federal” legislation, but rather the need for “uniform” legislation in regard to the rights of claimants and the rights and duties of defendants arising out of airplane accidents. The passage of uniform legislation can best be achieved through the implementation of traditional methods to obtain *state* enacted legislation, namely by utilizing the National Commissioners on Uniform State Laws. Attempts by Congress to enact comprehensive and fair legislation have been fruitless.

### I. THE NEED FOR UNIFORM LEGISLATION

There is need for uniformity in the law pertaining to cases arising out of aviation accidents. In regard to the compensatory damages in wrongful death cases, the statutes of some states permit damages for the mental pain and suffering of the surviving next of kin, whereas others do not.<sup>1</sup> Some states permit damages for the loss of society, companionship, services and consortium to the surviving spouse.<sup>2</sup> Still other

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<sup>1</sup> See, e.g., ARK. STAT. ANN. § 27-906 (1979), W.VA. CODE § 55-7:6 (Supp. 1982). But See N.Y. EST. POWERS & TRUST LAW § 5-4, 3 (McKinney Supp. 1982-83).

<sup>2</sup> See, e.g., MO. ANN. STAT § 537.090 (Vernon Supp. 1983); OKLA. STAT. ANN. tit. 12, § 1053(B) (West Supp. 1982-83).

states permit damages for pre-death pain and suffering, while others do not.<sup>3</sup> Some states permit damages for loss of inheritance, yet others do not.<sup>4</sup> Some states permit punitive damages in both injury and death cases, while still others permit such damages in injury cases, but not in death cases.<sup>5</sup> Some states allow punitive damages based upon vicarious liability.<sup>6</sup> Others require proof of egregious conduct of a corporation at a managerial level.<sup>7</sup> Some states impose an arbitrary amount of damages for the deaths of single persons without dependents.<sup>8</sup> Some states allow prejudgment interest, i.e., interest from the date of death.<sup>9</sup> Even as to those states which allow

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<sup>3</sup> See, e.g., MO. ANN. STAT. § 537.095 (Vernon Supp. 1983), TEX. REV. CIV. STAT. ANN. art 4677 (Vernon 1942).

<sup>4</sup> For a listing of states that do permit damages for loss of inheritance, see L. KREINDLER, AVIATION ACCIDENT LAW § 13.04 [3], at 13-30 (1982).

<sup>5</sup> See generally J. GHIARDI & J. KIERCHER, PUNITIVE DAMAGES: LAW AND PRACTICE (1980 & Supp. 1981).

<sup>6</sup> See generally 22 Am. Jur. 2d Damages § 257 (1965 & Supp 1982). See, e.g. Pullman v. Hall, 46 F.2d 399 (1931)(in dicta the court stated that ratification and authorization are necessary to find liability, unless is common carrier); Parson v. Weinstein Enterprises Inc., 387 So. 2d 1044 (Fla. App. 1980) (punitive liability regardless of fact that employer did not know of, or ratify, assault by employee); Ford Motor Credit Corp. v. Johns, 269 So. 2d 54 (1972) (punitive damages against company, even when employee's assault liability did not impose punitive damages against employee); Clemmons v. Life Ins. Co. of Georgia, 274 N.C. 416, 163 S.E. 2d 761 (1968) (corporate liability for punitive damage for agent's willful, wanton, and malicious assault against plaintiff); Miller v. Blanton, 210 S.W. 2d 293 (1948) (punitive damages against employer for employee's reckless driving even where employer did not authorize, ratify or have knowledge of act).

<sup>7</sup> *Id.* at §§ 260-61; See, e.g. Doralee Estates Inc. v. Cities Services Oil Co., 569 F.2d 716 (2d Cir. 1977) (where management knew of oil spill and failed to respond, punitive damages were proper on finding of negligence); Burk Royalty Co. v. Walls, 616 S.W. 2d 911 (Tex. 1981) (company liable for punitive damages where district manager acted negligently. Court found company acted with "conscious indifference"); Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 424 N.E. 2d 568 (1981)(test drive accident by negligent retailer could be linked to advertizing of manufacturer which was of such a degree that punitive damages against manufacturer proper); Montgomery Ward and Co. v. Marvin Riggs Co., 584 S.W. 2d 863 (Tex. Civ. App. 1979) (gross negligence in hiring attributed to company after truck driver acted negligently, resulting in company's liability for punitive damages).

<sup>8</sup> *Id.* at § 28; See, e.g., Illinois Annot. Stat. Ch. 70 § 2 (Smith-Hurd 1959); Colorado Revised Stat. § 13-21-203 (1974).

<sup>9</sup> *Id.* at § 275; See, e.g. 16 A.L.R. Fed 679, 699 § 12 (1973) (cases allowing prejudgment interest in federal courts); 92 A.L.R. Fed. 679, 699 § G (1973) (cases allowing pre-judgement interest in state courts); 92 A.L.R. 2d 1104, 1115-17 § 6-7(a) (1964) (cases allowing prejudgment interest in state courts).

prejudgment interest, the rates of such interest vary substantially.<sup>10</sup>

There are other patently indefensible differences among the laws of the states regarding damages in wrongful death cases.<sup>11</sup> Under Florida law, for example, which permits damages for mental pain and suffering of next of kin, an award of \$1.8 million in damages was affirmed for the death of a 16-year-old boy, as a result of the crash of a commercial airliner.<sup>12</sup> Indiana law, on the other hand, limits the damages in such a case to funeral expenses and nominal costs for administering the estate.<sup>13</sup> This hardly is consonant with common sense or with anyone's concept of justice.

The determination of what law applies in regard to compensatory damages arising out of airplane accidents and many other types of occurrences, in itself, presents threshold issues, the resolution of which is not predictable by even the most experienced and knowledgeable lawyers and judges. Federal courts have jurisdiction over aviation litigation only on the basis of diversity of citizenship,<sup>14</sup> except in suits which involve the United States government as a defendant.<sup>15</sup> Possibly in part for that reason, federal courts hearing this type of litigation, rather than employing "federal law" (if there is such a thing) so as to provide equal justice for all parties, usually adhere inflexibly to Justice Frankfurter's statement in *Guaranty Trust Co. v. York*,<sup>16</sup> a leading *Erie*-type<sup>17</sup> case decided thirty-five years ago, which held that a federal court adjudicating state-created rights in diversity cases "is, for that purpose, in effect *only another court of the State*."<sup>18</sup> Adherence to this rule leads to serious problems because a federal court, by at-

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<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., *infra* notes 12-13 and accompanying text; See also Kennelly, *Proving Damages in Wrongful Death Cases*, 1975 TRIAL LAW. GUIDE 25-27.

<sup>12</sup> *Compania Dominicana de Aviacion v. Knapp*, 251 So.2d 18 (Fla. Dist. Ct. App. 1971).

<sup>13</sup> IND. CODE ANN. § 34-1-2 (Burns Supp. 1982).

<sup>14</sup> 28 U.S.C. § 1332(a) (1976).

<sup>15</sup> *Id.* at § 1346(a) (1976 & Supp. V 1981).

<sup>16</sup> 326 U.S. 99 (1945).

<sup>17</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>18</sup> *Guaranty Trust Co. v. York*, 326 U.S. at 108. (emphasis added).

tempting to determine what "outcome-determinative"<sup>19</sup> law applies to different issues in this type of litigation, is required to adopt the choice-of-law rules of each of the various states where suits before it were originally filed, whether they were filed in state court and removed to federal court, or whether they were originally filed in federal court.<sup>20</sup>

These problems are accentuated because states have significantly different choice-of-law doctrines.<sup>21</sup> Within the confines of this article, it is impossible to review the choice-of-law doctrines of each of the fifty states, much less of the various territories of the United States. Suffice it to say that there is a wide divergence of criteria employed by the various state and territorial courts when making a determination of what particular law should apply in a particular case.

Some courts apply inflexibly the doctrine of *lex loci delicti*.<sup>22</sup> Other states adopt various types of "interest" doctrines in determining what law applies to particular issues.<sup>23</sup> Obviously, the present system does not permit uniform treatment of the families of passenger-victims or of defendants. A claimant may have a viable claim for punitive damages against one of several defendants simply because that particular claimant filed suit in a state whose choice-of-law doctrine mandates the application of the law of a state which permits claims for punitive damages as to that defendant.<sup>24</sup> Another claimant, whose claim arose out of the same occurrence, may be precluded from claiming punitive damages as to the identical defendant simply because he filed suit in a different state with a different choice-of-law doctrine.<sup>25</sup> Delay and uncer-

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<sup>19</sup> *Id.*

<sup>20</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

<sup>21</sup> See generally R. LEFLAR, *AMERICAN CONFLICTS LAW* (3d ed. 1977).

<sup>22</sup> *Id.* at § 132.

<sup>23</sup> *Id.* at § 92; cf. *Babcock v. Jackson*, 12 N.Y. 2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1965) (holding that justice may best be achieved in tort cases with multi-state contracts by giving controlling effect to the laws of the jurisdiction which has the greatest concern with the specific issue raised in the litigation).

<sup>24</sup> See J. KENNELLY, *LITIGATION AND TRIAL OF AIR CRASH CASES* 36-46 (1968); Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 248, 267-68 (1975).

<sup>25</sup> J. KENNELLY, *LITIGATION AND TRIAL OF AIR CRASH CASES* 36-46 (1968).

tainty are thus inevitable in resolving threshold issues as to what "outcome-determinative" *state* law is to be applied to particular issues in each case, regardless of the ability, diligence and dedication of judges and lawyers.

Adding to the problems involved in determining what law applies as to the rights of claimants and to the obligations of defendants, not only to claimants but vis-à-vis one another, is the so-called *depecage* method of choosing the law which applies to particular issues in litigation. *Depecage* is an ill-defined, high-sounding cliché which permits the court to apply the laws of *different* states to *different* issues in the *same* litigation, based upon uncertain, ambiguous, and unpredictable criteria.<sup>26</sup> In the real world of litigation, *depecage* simply allows judges to apply the law of whatever state they want to in regard to any and all issues.

Professor Reese states:

Amidst the chaos and tumult of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most appropriately be applied to govern the particular issue. . . .

It also seems probable that the greater use of *depecage* will be an inevitable by-product of the development of satisfactory rules of choice of law. In contrast to the broad rules that have been tried and found wanting, the new rules, if we are indeed to develop such rules, are likely to be narrow in scope and large in number. . . .

In short, a willingness to make a liberal use of *depecage* would seem a prerequisite to the satisfactory development of narrow rules of choice of law.<sup>27</sup>

Consider the words "the rule of law that can most *appropriately* be applied to govern the particular issue." What is

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<sup>26</sup> See generally Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

<sup>27</sup> *Id.* at 58-60.

"most appropriate"? How is the determination to be made? Is this to be a subjective determination based upon the predilections and prejudices of judges? How are lawyers going to advise and counsel their clients? These are some of the difficult questions which the use of *depecage* presents.

The litigation arising out of the crash of American Airlines' Flight 191 at O'Hare International Airport on May 25, 1979, involving a McDonnell Douglas DC-10 illustrates the absurdities which ensue from the ivory tower choice-of-law principle called *depecage*. On May 25, 1979, at 3:04:05 p.m. Chicago time, a McDonnell Douglas DC-10 Series 10 jet transport, operated by American Airlines as Flight 191, crashed shortly after takeoff into an open field and trailer park about 4,600 feet northwest of the departure end of Runway 32R<sup>28</sup> at O'Hare International Airport.<sup>29</sup> The left engine and related structures fell off the aircraft during its takeoff roll.<sup>30</sup> Initially, the aircraft climbed away from the runway in a wings-level attitude,<sup>31</sup> but shortly thereafter it rolled into a steep left bank, descended rapidly, and crashed.<sup>32</sup> The impact occurred one minute and twenty seconds after the takeoff roll had begun.<sup>33</sup> The aircraft carried 258 passengers and 13 crewmembers, all of whom were killed.<sup>34</sup> Additionally, on the ground, two people were killed and two were injured.<sup>35</sup>

This was the fourth worst air disaster in world history, and the worst ever in the United States.<sup>36</sup> Congress and the National Transportation Safety Board, realizing the need for a

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<sup>28</sup> Runway numbering corresponds to the magnetic heading of the runway to the nearest ten degrees on the compass rose; thus, an aircraft landing or taking off on Runway 32 would be flying at a heading of approximately 320 degrees. The letter "r" signifies the Runway 32R is the right of two parallel runways.

<sup>29</sup> NTSB, AIRCRAFT ACCIDENT REPORT, AMERICAN AIRLINES, INC., DC-10-10, N110AA, CHICAGO-O'HARE INTERNATIONAL AIRPORT, May 25, 1979, at 1-2. [hereinafter cited as ACCIDENT REPORT].

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* "Attitude" refers to the relationship between the aircraft's axis and the horizon, i.e., whether the nose is up or down and whether the wings are level or banked.

<sup>32</sup> ACCIDENT REPORT, *supra* note 29, at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> TIME, June 4, 1979, at 12.

prompt and thorough inquiry, initiated a massive investigation.<sup>37</sup> Only twelve days after the accident, the Federal Aviation Administration suspended the Type Certificate for the McDonnell Douglas DC-10,<sup>38</sup> thus grounding all DC-10s operated by U.S. carriers until the Type Certificate was reinstated on July 13, 1979.<sup>39</sup>

The apparent structural failure of a modern jetliner caused reverberations throughout the world. Hundreds of DC-10s carrying thousands of passengers were being flown millions of miles each day by scores of domestic and international airlines. This accident took place in normal weather.<sup>40</sup> There could be no contention of low-level wind shear, vortex turbulence, sabotage or any other outside cause. If there was a fatal flaw in the design of the wing pylons which supported the engines, there would indeed be cause for alarm. If the cause of the pylon fracture and failure could be attributed to improper maintenance, and design defect ruled out, remedial inspection measures would be sufficient to allay the fears of the flying public.

The alleged egregious conduct of the defendants, the airline and the manufacturer took place in multiple states. The airline and the manufacturer were incorporated in and had their principal places of business in different states, and the accident occurred in Illinois.<sup>41</sup>

All federal court litigation, regardless of where the suits were filed, was assigned by the Multidistrict Litigation Panel, pursuant to the Multidistrict Litigation Act,<sup>42</sup> to United States Court Judges Edwin A. Robson and Hubert L. Will, both seasoned experts in the area of multidistrict litigation for coordinated pretrial discovery.<sup>43</sup> Approximately 118 cases en-

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<sup>37</sup> See generally ACCIDENT REPORT, *supra* note 29.

<sup>38</sup> *Id.* at 89-97.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 644 F.2d 594, 604-05 (7th Cir. 1981).

<sup>42</sup> 28 U.S.C. § 1407 (1976).

<sup>43</sup> *In re Air Crash Disaster Near Chicago, Ill. on May 25, 1979*, 500 F. Supp. 1044, 1047 (N.D. Ill. 1980).



ded up in various federal courts throughout the country.<sup>44</sup> About seventy-five cases were filed in the state courts of California. Thus, there was parallel litigation arising out of a single occurrence in both federal and state courts.

This complex litigation posed a myriad of questions. From the standpoint of the families of the deceased passengers, what were their rights? Did the state court plaintiffs have different rights than the federal court plaintiffs? Was consideration of such outcome-determinative issues as the admissibility of income taxes in regard to deceased passengers' past and prospective earnings inadmissible in state court cases, but admissible in federal court cases? What judicial system would resolve their rights? What laws governed the various issues? The passengers were from various states of the United States and from several foreign countries.<sup>45</sup> Some plaintiffs also sued for punitive damages. American Airlines and McDonnell Douglas tendered stipulations to all plaintiffs whereby they agreed not to contest liability for compensatory damages, conditioned, however, upon a waiver of any claim for punitive damages.<sup>46</sup>

The courts, therefore, were confronted with a threshold issue—what law applied in reference to the right of plaintiffs to claim punitive damages in the wrongful death cases as to each of the defendants. Suits had been filed in various states, principally in Illinois, California and New York.<sup>47</sup> Some suits were filed in Puerto Rico.<sup>48</sup> The district court had to decide what law in regard to the punitive damage issue applied in each

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<sup>44</sup> 644 F.2d at 604.

<sup>45</sup> 500 F. Supp. at 1047.

<sup>46</sup> American Airlines and McDonnell Douglas offered a stipulation to all plaintiffs whose cases were pending in both state and federal courts. The stipulation provided that those defendants would not contest liability for reasonable compensatory damages conditioned upon a waiver by plaintiffs for claims of punitive damages. *See, In re Air Crash Disaster near Chicago, Ill. on May 25, 1979*, 480 F. Supp. 1280, 1286-87 (N.D. Ill. 1979); *In re Air Crash Disaster near Chicago, Ill. on May 25, 1979*, 644 F.2d 633 (7th Cir. 1981). The lead counsel for plaintiff, is not aware of any case in which the stipulation was rejected.

<sup>47</sup> 644 F.2d at 604.

<sup>48</sup> *Id.*

case as to each defendant.<sup>49</sup> There were different choice-of-law doctrines in each of the states and also in Puerto Rico.<sup>50</sup> District Court Judges Robson and Will could not, with intellectual honesty, simply gloss over the significant differences in the applicable choice-of-law doctrines and rationalize a pre-ordained decision which would be palatable, pleasant, and plausible so as to achieve a uniform result as to all plaintiffs and all defendants, regardless of where they filed suit. These able judges decried the ridiculousness of the system, but lawyer-like, carried out their obligation to apply the choice-of-law rules of the state where each suit was filed.<sup>51</sup> Judges Robson and Will expressed their chagrin with the state of the law and the need for uniform legislation.<sup>52</sup> Judge Will pointed out that while he and Judge Robson would have liked to achieve a uniform result as to all plaintiffs and defendants, they were obliged to apply the varying choice-of-law doctrines of different states to different cases, depending upon where each suit had been filed.<sup>53</sup>

In determining what law applied as to the punitive damage issue, the United States District Court thus had to consider the choice-of-law rules of Illinois, California, New York and Puerto Rico. Illinois uses the "most significant relationship" test.<sup>54</sup> California follows a "comparative impairment" approach<sup>55</sup> under which the court must determine which state's policy, as reflected by its law, would be more severely affected if it were not applied.<sup>56</sup> New York applies a "governmental interest" approach,<sup>57</sup> and Puerto Rico employs the traditional

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<sup>49</sup> 500 F. Supp. at 1047-48.

<sup>50</sup> *Id.* at 1047-52.

<sup>51</sup> *Id.* at 1054.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *In re Air Crash Disaster near Chicago, Ill. on May 25, 1979*, 500 F. Supp 1044, 1048 (N.D. Ill. 1980), *aff'd*, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981).

<sup>55</sup> *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 321, 546 P.2d 719, 724, 128 Cal. Rptr. 215, 220 (1976).

<sup>56</sup> *Id.* 16 Cal.3d 320, 546 P.2d at 723, 128 Cal. Rptr. at 219.

<sup>57</sup> 500 F. Supp. at 1051; *see Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 179, 240 N.Y.S.2d 743 (1923).

*lex loci delicti* doctrine.<sup>58</sup>

At the time of the occurrence, McDonnell Douglas had its principal place of business in Missouri,<sup>59</sup> and American Airlines, in New York.<sup>60</sup> Missouri law authorizes punitive damage claims in wrongful death cases,<sup>61</sup> whereas New York does not.<sup>62</sup> Illinois, the place of the occurrence, probably does not allow punitive damages as to cases brought under its wrongful death statute<sup>63</sup> although Illinois permits punitive damages in survival actions.<sup>64</sup> Applying the choice-of-law doctrines of Illinois, California and New York to the suits filed in those states, the district court concluded that the law of the principal place of business of each defendant applied as to that defendant.<sup>65</sup> The suits filed in Puerto Rico required application of the *lex loci delicti* rule, making Illinois law applicable.<sup>66</sup>

<sup>58</sup> 500 F. Supp. at 1052.

<sup>59</sup> *Id.* at 1050.

<sup>60</sup> *Id.* at 1049.

<sup>61</sup> *Id.* at 1050. Missouri does not allow punitive damages per se. It allows the jury to consider aggravating as well as mitigating circumstances attending the death. If aggravating circumstances are found, additional damages can be assessed although they are not characterized as punitive damages. *Id.*

<sup>62</sup> *Id.* at 1052. New York choice-of-law doctrine applies the law of the principal place of business to determine if punitive damages will be awarded. *Id.*

<sup>63</sup> *Id.* at 1048-50.

<sup>64</sup> See *McEwen v. Walsh*, 96 Ill. App. 2d 326, 238 N.E.2d 616 (1968); *Madison v. Wigal*, 18 Ill. App. 2d 564, 153 N.E.2d 90 (1958).

<sup>65</sup> 500 F. Supp. at 1048-52.

<sup>66</sup> *Id.* at 1052. In determining that McDonnell Douglas was subject to punitive damages, but American Airlines was not, Judges Robson and Will recognized the incongruity of the law in this regard, which required them to apply varying choice of law to different issues in the same case. Judge Will forthrightly stated that his opinion was "incongruous":

The bottom line is, it is inconsistent, incongruous and crazy, but that is the way the conflicts of laws rules work. And you can take this opinion and I think you will have very great difficulty — we tried, let me tell you very hard, Judge Robson, our law clerks, and all of our law clerks, to figure out some way to get a uniform result and still not do violence to what we conceive to be intellectual honesty in the responsibility of a judge to apply the law as it appears under this federal system under which we operate. Nobody here is happy to reach this kind of incongruous result . . . You will see how we came up with what I think is compelled by the current state of law, but which I am the first to concede and Judge Robson and I are the first two people to concede is something less than ideal.

*In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979 Transcript of Proceedings, May 23, 1980, at 8.

As to all cases filed in Illinois, California or New York: (a) American Airlines was exempt from claims for punitive damages as to all plaintiffs because it was allegedly based principally in New York on the date of the occurrence, and New York law does not allow punitive damages in wrongful death cases;<sup>67</sup> (b) McDonnell Douglas was subject to claims for punitive damages in all cases filed in Illinois, California and New York because its principal place of business on the date of the accident was in Missouri, and Missouri allows punitive damage claims in wrongful death cases;<sup>68</sup> (c) as to all cases filed in Puerto Rico, neither defendant was subject to claims for punitive damages.<sup>69</sup>

While these rulings may at first blush appear to be paradoxical and inexplicable, Judges Robson and Will did not attempt to reach a preordained, palatable ruling which would treat all plaintiffs and both defendants alike. Instead, while recognizing the indefensibility of the state of the law in regard to choice-of-law doctrines, they reached a decision which, while not resulting in a uniform finding as to all claimants and defendants, was in their opinion required by the applicable choice-of-law rules of California, New York, Illinois, and Puerto Rico.

The United States Court of Appeals for the Seventh Circuit concluded otherwise, however, and ruled that the law of Illinois, the place of the accident, applied as to all cases and both defendants regardless of where they were filed.<sup>70</sup> All plaintiffs accordingly were precluded from claiming punitive damages as to both defendants.<sup>71</sup> The Seventh Circuit thus reached a more palatable and uniform result than the district court. In doing so, the court ruled that neither the substantive law of the state where the principal place of business of the respective defendants was located, nor the law of the state wherein the alleged egregious conduct of the defendants took place,

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<sup>67</sup> 500 F. Supp. at 1049-51.

<sup>68</sup> *Id.* at 1050-52.

<sup>69</sup> *Id.* at 1052.

<sup>70</sup> *In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979, 644 F.2d 594, 616 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981).

<sup>71</sup> 644 F.2d at 617.

was controlling.<sup>72</sup>

The court of appeals ably reviewed the complexity of the law in regard to choice of law, and in doing so interpreted all applicable choice-of-law doctrines so as to apply the law of Illinois, where the accident occurred, as to the punitive damages issue.<sup>73</sup> The court of appeals approved the District Judges Robson and Will's calling for legislative action to relieve litigants, lawyers and the courts from the problems emanating from the lack of uniformity of state legislation and state choice-of-law doctrines.<sup>74</sup> The court emphasized the need to provide uniformity of treatment of plaintiffs and defendants in this type of litigation.<sup>75</sup>

In litigation growing out of the Pago Pago air crash of January 30, 1974,<sup>76</sup> in which Pan American, Boeing and the United States were defendants, the Court of Appeals for the Ninth Circuit on October 2, 1982, construed the California choice-of-law doctrine as requiring the application of the law of the state where a defendant has its principal place of business in regard to that defendant's liability.<sup>77</sup> The court concluded that the law of Washington controlled in regard to the liability of Boeing.<sup>78</sup>

These real-life examples of the chaos caused by the varying choice-of-law doctrines of the more than fifty states and territories of the United States, and the so called *depeccage* doctrine, emphasize the need for legislation which will apply uniform laws to all claimants and all defendants. The problem is how to achieve comprehensive and just uniform legislation. The inadequate achievements of federal legislators over a period of fifteen years make it apparent that the only way to achieve such needed legislation is through the auspices of the

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<sup>72</sup> *Id.* at 633.

<sup>73</sup> *Id.* at 632-33. The choice-of-law analysis of the court of appeals was attacked in a petition for *certiorari* which was denied by the United States Supreme Court. 454 U.S. 878 (1981).

<sup>74</sup> 644 F.2d at 732-33.

<sup>75</sup> *Id.* at 633.

<sup>76</sup> *In re Air Crash Disaster Near Pago Pago on Jan. 30, 1974*, 692 F.2d 764 (9th Cir. 1981).

<sup>77</sup> *What Law Applies*, 26 TR. LAW GUIDE 450, 450-54 (1982).

<sup>78</sup> *Id.*

National Commissioners on Uniform State Laws. This may take longer, but the delay will be worthwhile. These commissioners will make an in-depth study of all of the problems with regard to all types of aviation accident claims and litigation, utilize the expertise of the industry and its representatives, and finalize legislation which will be comprehensive and just.

I have set forth only a few of the problems which courts and lawyers face in aviation litigation. The *Chicago, Illinois* and *Pago Pago* cases illustrate that the law of the United States relating to transitory tort litigation arising out of airplane crashes is marked by mystery, confusion, and inconsistency. Lawyers and judges have attempted pragmatic approaches to litigation arising out of such disasters so as to achieve some degree of consistency in order to provide a semblance of justice. The results are largely cosmetic. Claimants continue to be treated in vastly different ways. Defendants are also treated differently depending upon where the suit is filed, where the accident occurs, where the defendant's principal place of business is located, where the egregious conduct took place, and other varying factors.

The American Airlines Flight 191 litigation<sup>79</sup> worked out well, due in large part to the experience and wisdom of the federal judges to whom the cases were assigned. They did everything within the system to expedite and fairly resolve the cases. Discovery was completed as to liability within approximately two years, which was in itself a considerable accomplishment.<sup>80</sup> Discovery as to damages was also completed in all the federal court suits except for a small number filed shortly before the expiration of the Illinois statute of limitations.<sup>81</sup> A considerable number of these cases have been settled, and the plaintiffs have had the benefit of substantial cu-

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<sup>79</sup> See *supra* notes 28-35 and accompanying text.

<sup>80</sup> See, *In re Air Crash Disaster near Chicago, Illinois* on May 25, 1979, 480 F. Supp. 1280 (N.D. Ill. 1979); *In re Air Crash Disaster near Chicago, Illinois* on May 25, 1979, 644 F.2d 633 (7th Cir. 1981). Mr. Kennelly was one of the plaintiff's lead counsel.

<sup>81</sup> *Id.*

mulative interest.<sup>82</sup> The district and appellate court judges utilized every procedure permitted by the system to resolve the litigation as expeditiously as possible.<sup>83</sup> Three interlocutory appeals were required, however, merely to obtain final rulings as to significant threshold issues. These issues included what law applied in regard to punitive damages and prejudgment interest, and the effect of the ruling of the United States Supreme Court in *Norfolk & Western Railway Co. v. Liepelt*,<sup>84</sup> relating to the propriety of proof of the effect of income taxes upon earnings with regard to damages.<sup>85</sup>

The resolution of outcome-determinative threshold issues at the trial and appellate levels consumes time. Obviously, these issues must be decided before a trial takes place. In addition, the resolution of the liability issue may be prolonged by a battle between the defendants as to their rights and liabilities vis-à-vis contribution. Some air crash litigation has taken almost a decade to complete.<sup>86</sup>

In addition to these problems, there is another serious obstacle to the achievement of justice in air crash litigation. It is caused by adherence to the myth that each state of the United States is a separate sovereign and that because of this, a defendant may not be sued within any particular state, even if an accident occurs in that state, unless there exist "minimum contacts" between the defendant and the forum state consistent with "traditional concepts of fair play and substantial justice."<sup>87</sup> The problem with the "minimum contacts" test for *in personam* jurisdiction is that neither case law or state statutes provide the practitioner with a definitive rule of application.<sup>88</sup> Consequently, the present system sometimes results in the necessity to sue multiple defendants in multiple

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 444 U.S. 490 (1980).

<sup>85</sup> *Id.* at 493-94.

<sup>86</sup> Speech by Robert Alpert, Vice President of United States Aviation Insurance Group, International Law Seminar sponsored by Lloyd's Press in Tobago (March, 1981) (obtainable from Lloyd's Press, London).

<sup>87</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980).

<sup>88</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

states. Even worse, the present system also leads to parallel litigation, arising out of the same aircraft accident, in various state and federal courts.

## II. HISTORY OF PROPOSED FEDERAL LEGISLATION

Federal legislation was first proposed in regard to major aviation accidents in 1967 by Senator Tydings of Maryland. Three bills were introduced,<sup>89</sup> which, briefly stated, provided for exclusive jurisdiction of the federal courts over several types of actions involving common carriers, aircraft having a seating capacity of ten or more persons, and crashes resulting in the death or injury of five or more persons. State courts would retain jurisdiction over all other types of cases arising out of aviation accidents. These bills adopted the then traditional contributory negligence doctrine that a plaintiff was completely barred if negligent at all. Provisions were made for contribution among defendant-tortfeasors on the basis of comparative negligence. These bills were never enacted. As is later pointed out, these bills failed to address many of the serious problems involved in aviation accident litigation.

In 1978, Representative Danielson of California introduced a bill known as H.R. 10917.<sup>90</sup> This bill contained many of the same deficiencies of those proposed by Senator Tydings. It also was not enacted.

### A. Pending Legislation: H.R. 1027

In 1981, H.R. 1027 was introduced by Representative Danielson and other Congresspersons.<sup>91</sup> Public hearings have been held by the Subcommittee on the Judiciary, whose chairman is Representative Hill of Texas. H.R. 1027 has substantially the same deficiencies as the prior proposed legislation.<sup>92</sup> This statute also fails to address, let alone solve, many of the problems which burden lawyers and judges in regard to avia-

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<sup>89</sup> S. 3305, 90th Cong., 1st Sess. (1967); S. 3306, 90th Cong., 1st Sess. (1967); S. 4089, 90th Cong., 1st Sess. (1967).

<sup>90</sup> H.R. 10917, 95th Cong., 2d Sess. (1978).

<sup>91</sup> H.R. 1027, 97th Cong., 1st Sess. (1981).

<sup>92</sup> See *supra* note 89 and accompanying text.



tion claims and litigation. The criteria as to compensatory damages, "fair and just compensation for pecuniary losses," fails to define what is meant by those generic words.<sup>93</sup> This would lead to years of appeals simply to determine their meaning.

Also, there is no mention in the bill regarding punitive damages. Does this mean that punitive damages would not be recoverable, regardless of the extent of egregious conduct of a particular defendant? The answer probably is in the affirmative.<sup>94</sup> There is no sense in eliminating claims for punitive damages arising out of those aviation accidents which result in five or more persons being killed,<sup>95</sup> while allowing claims for punitive damages arising out of other aviation accidents in which four or fewer persons were killed. This is but one indefensible absurdity contained in H.R. 1027; others are noted subsequently.

Section 1364, regarding jurisdiction, provides:

(a) The district courts, concurrently with state courts, shall have original jurisdiction of any civil action which—

(1) arises out of or in the course of aviation activity by

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(A) large aircraft,

(B) high-performance aircraft,

(C) public aircraft

(D) common carrier aircraft;

(2) arises out of a transaction or occurrence in the course of aviation activity which results in the death of five or more persons;

(3) arises under chapter 174 of this title and is on a claim the liability for which is indemnified in whole or in part by the United States; or

(4) arises out of a transaction or occurrence which gives rise to an action of which the district courts otherwise have jurisdiction under section 1346(b) of this chapter, and to which chapter 174 of this title is applicable.

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<sup>93</sup> H.R. 1027, 97th Cong., 1st Sess. § 2752(d) (1981).

<sup>94</sup> See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, *on remand*, 578 F.2d 565 (5th Cir.), *reh'g denied*, 439 U.S. 884 (1978).

<sup>95</sup> H.R. 1027, 97th Cong., 1st Sess. § 1364(a)(2) (1981).

(b) Except as provided in subsection (a) of this section, original jurisdiction of any civil action arising under chapter 174 of this title shall be vested in state courts.<sup>96</sup>

Section 1452 provides:

Removal of actions arising out of aviation activity:

(a) Any civil action brought in a State court of which the district courts of the United States have original jurisdiction under section 1364 of this title may be removed by any party to the action to the the district court of the United States for the district and division embracing the place where such action is pending.

(b)(1) In removals under this section, removal is effective whether or not coparties join therein, section 1441 of this chapter does not apply, no bond shall be required, and time for removal is as follows:

(A) by any defendant, as provided in section 1446(b) of this chapter;

(B) by any party other than a defendant, a petition for removal may be filed not later than thirty days after becoming or being made a party; and

(C) if the action arises out of the same occurrence as actions pending in district courts and the Judicial Panel on Multidistrict Litigation under section 1407 and 1408 of this title has ordered coordinated or consolidated proceedings in such actions, the time for removal commences anew on the date of the order of the Judicial Panel on Multidistrict Litigation and a petition for removal by any party may be filed not later than thirty days after the date of the order.

(2) Except as provided above, procedures for removal under section 1446-1450 of this chapter apply.<sup>97</sup>

The statute does not address serious problems in regard to the doctrines of estoppel by verdict and *res judicata*. If a plaintiff's suit is removed to the federal court and thereafter "multidistricted,"<sup>98</sup> the plaintiff, unlike in class action litiga-

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<sup>96</sup> *Id.* at § 1364.

<sup>97</sup> *Id.* at § 1452.

<sup>98</sup> See 28 U.S.C. § 1407 (1976). When civil actions involving one or more common questions of fact are pending in several different federal district courts, such actions

tion, has no right to "opt out."<sup>99</sup> The pendency of parallel litigation growing out of a single air crash in both state and federal courts leads to the absurd situation where those who act expeditiously can be severely penalized. If the first case is tried in the state court and that trial results in a defense verdict, the plaintiffs in the federal court are *not* bound by that verdict. On the other hand, if the federal court tries the liability issue first and a defense verdict is rendered, the state court cases are not bound by that federal court defense verdict.<sup>100</sup>

It is axiomatic that one who might be affected by a trial has the right to be present in person and to be represented by counsel of his choosing.<sup>101</sup> No person has the right to appear as another's attorney without authority from the client.<sup>102</sup> How are the courts going to reconcile these fundamental constitutional rights of litigants with the preemption of such litigants and their attorneys by a plaintiffs' committee or "lead counsel"?

H.R. 1027 contains no provision for the allowance of prejudgment interest; thus it attempts to nullify the prejudgment interest statutes of fourteen states as to *only* those claims coming within its restricted provisions. Fourteen states have seen fit to enact prejudgment interest legislation.<sup>103</sup> Thus, some families of victims of airplane accidents will receive prejudgment interest, but others will not. Fair-minded persons must conclude that unless reasonable prejudgment interest is provided, victims and their families will suffer enormous economic losses. The enactment of H.R. 1027 will not remedy the inevitable delays which are inherent in the system, and in consequence, claimants will suffer. While they wait for the

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may be transferred to one district for coordinated and consolidated management and trial under a single judge. BLACK'S LAW DICTIONARY 915 (5th ed. 1979).

<sup>99</sup> See FED. R. CIV. P. 23(c)(2).

<sup>100</sup> O'Connor & Kukankos, *Estoppel by Verdict, The Multidistrict Litigation Act, and Constitutional Rights of Litigants—Can They Coexist?*, 20 TRIAL LAW. GUIDE 249 (1976).

<sup>101</sup> 16 AM. JUR. 2d *Constitutional Law* § 842 (1979).

<sup>102</sup> *The Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927). See also 7 AM. JUR. 2d *Attorneys At Law* § 133 (1979).

<sup>103</sup> Fleming, *Prejudgment Interest: An Element of Full Compensation in Wrongful Death Cases*, 1981 U. ILL. L. F. 453, 474-75.

resolution of liability, they will be deprived of substantial cumulative interest, which over a period of several years can often equal the total damages. There are many aviation cases in which the liability of at *least* one of the defendants is unquestionable. In other words, the facts in the case are such that no court would permit a defense verdict in favor of *all* defendants. The plaintiffs have no interest in how the defendants' liabilities are allocated. The only genuine liability issue in most commercial accident cases involves the extent of the liability of the various defendants in terms of their comparative negligence vis-à-vis one another. There has never been a commercial airplane case in which the contributory negligence of passengers was an issue.

There is no reason why plaintiffs, usually the families of innocent passenger-victims, should be utilized as vehicles in order to accommodate the defendants in regard to their interne-cine disputes. H.R. 1027 not only will not expedite the disposition of claims, but will encourage the protraction of litigation although there is no genuine issue as to liability of at least one adequately insured defendant. The mere fact that a large number of passengers are killed does not make litigation complicated. It has become an unfortunate practice on the part of plaintiffs' committees to engage in extensive, unnecessary discovery in cases where there is no genuine issue as to the liability of at least one defendant, usually, but not always, the common carrier.

Although the American College of Trial Lawyers encourages the use of summary judgment motions, summary judgment procedures are rarely implemented in aviation accident litigation. Knowledgeable aviation litigation lawyers and judges have become all too familiar with saturation techniques employed in regard to discovery. Privately, many lawyers and judges are concerned that depositions are taken which inevitably degenerate into a mish-mash of thousands of pages of testimony, usually speculative and conjectural in nature. Such depositions not only do not help in resolving the litigation, but often result in making a comparatively simply case complicated.

H.R. 1027 will have no effect upon the great majority of general aviation accidents, thus resulting in grossly disparate treatment of plaintiffs and defendants based upon such illogical and senseless considerations as the number of persons killed in an accident, whether the aircraft is "large" or "small," whether the aircraft is "high" performance or "low" performance, whether the aircraft is a "public" aircraft, and whether it is a "common carrier" aircraft.<sup>104</sup> One would think that Congress would be concerned with the rights of the passenger public, particularly in regard to all common carriers of passengers by air. Instead, the proposed statute grants enormous preferential treatment to major common carriers. It leaves open too much greater exposure (including claims for punitive damages, prejudgment interest, damages for pre-death pain and suffering, loss to children of parental care and guidance, loss of consortium of surviving spouses, mental pain and suffering of survivors) all other segments of the aircraft industry, including general aviation manufacturers, makers of their components, fixed base operators, repair stations, fuel suppliers, corporate owners of aircraft, and *the over one million* general aviation pilots in this country. Why should general aviation pilots be subjected to much greater exposure than major airlines? One would think Congress would be more concerned with the pilots' problem than those of a few trunk airlines. One of this country's leading aviation lawyers, James M. FitzSimons, has forthrightly and accurately pointed out that: "It is conceivable that the passage of the Bill [H.R. 1027] could result in the anomaly of two separate and distinct bodies of law for aviation accidents—one for large accidents, and one for small accidents."<sup>105</sup>

The rights of claimants and the rights and duties of defendants in regard to aviation accident litigation should not depend upon the arbitrary, irrational classifications contained in H.R. 1027. H.R. 1027 is almost a carbon copy of Senator Tyd-

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<sup>104</sup> See H.R. 1027, 97th Cong., 1st Sess. § 2741 (1981).

<sup>105</sup> Address by James M. FitzSimons, ABA National Institute on Litigation in Aviation and Space Law, in Washington D.C. (May 27-29, 1982) [hereinafter cited as "Address"].

ings' statutes proposed fifteen years ago. They were discarded because they made no sense. The proposed cure was worse than the sickness. The same can be said of H.R. 1027.

### B. *The Air Travel Protection Act*

Another bill which may soon be introduced in Congress has been appropriately christened as the Air Travel Protection Act. It does indeed "protect" major airlines and major aircraft manufacturers. This is a no-fault statute which provides for the allowance to claimants of very restricted compensatory damages arising out of *major* aviation accidents. The statute will have no application to the vast majority of airplane accident claims and litigation. In as much as liability is almost never a genuine issue in accidents involving major airlines (the only real issue, if there is any issue at all, involves the claims for contribution or indemnity among the defendants), nothing is being "given" by the "protection" statute to injured passengers of the large commercial airlines or to their survivors, if they are killed. Under the guise of giving something, i.e., concession of liability, this proposed statute severely restricts the rights of injured passengers and the rights of their heirs, if they are killed in major airline accidents.

The Air Travel Protection Act suffers from many of the same deficiencies as H.R. 1027. It will have no effect upon flights involving an aircraft with 30 or fewer seats,<sup>106</sup> or payload capacity of 7,500 pounds or less<sup>107</sup> (involving most commuter flights), private flights,<sup>108</sup> military flights,<sup>109</sup> and flights involving foreign-owned aircraft or aircraft being operated in foreign or international air commerce.<sup>110</sup> The only exceptions will be in those rare instances where an aircraft of a domestic common carrier being operated in domestic air commerce is concurrently involved<sup>111</sup> (such as a mid-air collision).

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<sup>106</sup> Air Travel Protection Act. § § 1401(m)(1), 1402(a).

<sup>107</sup> *Id.* at § 1401(m)(1)(A).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at § 1402(c)(3)(A).

<sup>110</sup> *Id.* at § 1402(a).

<sup>111</sup> *Id.* at § 1402(c).

In that event, the claims of all victims, including those flying in commuter, private, military, foreign or international flights, would be subject to the provisions of the proposed statute.<sup>112</sup>

Obviously, this exception will be most rare. This proposed statute (not yet formally introduced in Congress) adopts an arbitrary classification of restricted types of airplane accidents, which markedly and unconstitutionally extends enormously preferential treatment to:

(a) owners and operators of "large" aircraft vis-à-vis "small" aircraft;

(b) large trunk airlines and large aircraft manufacturers vis-à-vis (1) small or commuter airlines and charter aircraft companies; (2) private (general) aviation aircraft owners; (3) over one million general (private) aviation pilots; (4) manufacturers of "small" aircraft, "small" actually including aircraft carrying as many as *thirty* passengers; (5) manufacturers of component parts of "small" aircraft; (6) fixed base operators; (7) repair stations; (8) military aircraft manufacturers; (9) last but by no means least, the United States of America (in reality, the taxpayers of this country). All of these segments of the aviation industry, which are excluded from the protection of the Air Travel Protection Act,<sup>113</sup> will remain exposed to much larger compensatory damages than the major airlines and manufacturers, and also to claims for punitive damages.

This "Protection" statute provides that claims will be limited to pecuniary loss.<sup>114</sup> No provisions are made for damages for the pre-death pain or suffering of the decedent, for pre-judgment pain and suffering, for the loss to spouses of companionship, society, services and consortium, for the loss to children of parental care and guidance, or for any of the other traditional items of damage which have been allowed by the states throughout the United States for many years.

In addition, presumably by limiting damages to pecuniary loss, claims for punitive damages will be prohibited,<sup>115</sup> regard-

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at § § 1401(m)(1),(2).

<sup>114</sup> *Id.* at § 1403.

<sup>115</sup> *Id.* at § 1403(a)(3).

less of the nature or extent of the egregious conduct of those "protected" by the statute, i.e., major airlines and manufacturers of large passenger jetliners.<sup>116</sup> Whether aviation lawyers usually represent claimants or defendants, they must be concerned with these attempted federal intrusions into tort claims. If there is to be a "protection" statute applicable to aircraft accidents, why should it not be applied to all types of aircraft accidents, to all types of railroad, bus, taxicab and other common carrier accidents, to all vehicular and other types of accidents?

James M. FitzSimons has emphasized that he has not taken a position concerning this proposed statute. However, he has posed these perceptive questions in regard to the Air Travel Protection Act:

1. Is the current system so bad that a complete restructuring and federal takeover is required, or can we first try to make smaller, admittedly needed changes so as to make the system, and the people within it, work better; and even in the event of such massive restructuring and takeover, will the system truly more meet the needs of the victims of major air disasters?
2. Should a proposal to restructure a significant section of our tort system—compensation of major aviation accident victims—be combined in the same Bill with a proposal to protect the tortfeasors involved?
3. If the proposed Air Travel Protection Act is passed, will it herald federal takeovers in other tort areas such as asbestos, Agent Orange, drug and other cases?
4. Is the concern about the availability of adequate private insurance at reasonable rates really well founded?<sup>117</sup>

These are forthright inquiries which cannot lightly be disregarded. Other leading lawyers and judges have posed ques-

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<sup>116</sup> This author recognizes that not only corporations, but also individuals including general aviation pilots, have serious problems resulting from the inability to insure themselves against punitive damages. The point is that this proposed statute arbitrarily singles out a very limited segment of the aircraft industry (major airlines and aircraft manufacturers) for grossly preferential treatment without a rational basis. It would appear that if protection is to be given, especially in regard to claims for punitive damages, it should be given to the general aviation pilots in this country, rather than to a few airlines and manufacturers.

<sup>117</sup> Address, *supra* note 105.



tions regarding the feasibility of any federal intervention in regard to tort litigation. As to the fourth question presented by Mr. FitzSimons, there is no problem of major air carriers and manufacturers of passenger jetliners as to obtaining more than adequate liability insurance at relatively nominal cost.<sup>118</sup>

The bottom line is that the Air Travel Protection Act is well-named. It will indeed protect the major trunk airlines and major aircraft manufacturers to the detriment of the passenger public, the taxpayers of the United States, and of all excluded segments of the aviation industry. Consideration of H.R. 1027 and the so-called "Air Travel Protection Act" leads to the conclusion that the need for uniform legislation in regard to aviation accidents (or any other types of accidents) should not be entrusted to the Congress of the United States.

C. *"Federal Law" Cannot Be Implemented So As To Achieve Uniformity In All Types of Aviation Litigation*

It is an illusion that "federal common law" may be utilized in federal court so as to achieve uniformity as to plaintiffs and defendants in regard to litigation arising out of aviation accidents. In the first place, under the present system, many cases arising out of aviation accidents must be instituted in state courts because of the lack of federal diversity jurisdiction.<sup>119</sup> State courts, of course, may not employ "federal common law." Furthermore, the law is clear that federal courts must apply *state* law as to all "outcome-determinative" issues.<sup>120</sup> There is no way that the federal courts can achieve uniform treatment of claimants or defendants in litigation growing out of aviation accidents in the absence of the passage of uniform legislation.<sup>121</sup>

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<sup>118</sup> J. Brennan, Comments at the International Law Seminar, in Tobago, British West Indies (March 16-19, 1981) (Mr. Brennan was president of the United States Aviation Underwriters).

<sup>119</sup> See 28 U.S.C. § 1332(a) (1976).

<sup>120</sup> See *Guaranty Trust Co. v. York*, 316 U.S. 99 (1945); see also *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525 (1958), *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938).

<sup>121</sup> See Prewett, *Federal Common Law of Aviation and the Erie Doctrine*, 40 J. AIR L. & COM. 653 (1974) (citing Keeffe & DeValerio, *Dallas, Dred Scott and Eyrie Eire*, 38 J. AIR L. & COM. 107 (1972) and Keeffe, *In Praise of Joseph Story, Swift v.*

Although precedent has been established for the creation of federal common law in air disaster litigation, the federal courts have not implemented this decision in the last eight years. In *Kohr v. Allegheny Airlines, Inc.*,<sup>122</sup> the Seventh Circuit Court of Appeals applied a "federal law" in regard to suits arising out of a mid-air collision between a small aircraft and a large jet aircraft owned by a national airline.<sup>123</sup> The accident occurred in Indiana.<sup>124</sup> The jet aircraft was operated by Allegheny Airlines, and the small aircraft, a Piper Cherokee, was operated by a student.<sup>125</sup> As a result of the mid-air collision, both aircraft were totally destroyed and all eighty-three occupants of the Allegheny airplane were killed.<sup>126</sup>

Wrongful death actions were commenced on behalf of the estates of eighty-two of the deceased passengers, the estates of the three of the four Allegheny crew members,<sup>127</sup> and the estate of Robert W. Carey, the student pilot. In addition, property damage suits were initiated to recover for the destruction of both aircraft.<sup>128</sup> The defendants in the passenger cases were: Allegheny Airlines; the United States of America; the estate of Carey, the student pilot; the Brookside Company, the flying school which owned the aircraft and was instructing Carey; and Forth Corporation, a wholly-owned subsidiary of the Brookside Company.<sup>129</sup> The Judicial Panel on Multidistrict Litigation<sup>130</sup> assumed jurisdiction over the various actions commenced outside of Indiana for supervision of the pretrial discovery.<sup>131</sup> Allegheny and the United States settled

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Tyson and "The" True National Common Law, 18 AM. U.L. REV. 316 (1968) (federal common law cannot be applied in aviation disasters until the Supreme Court reviews the *Erie* doctrine).

<sup>122</sup> 504 F. 2d 400 (7th Cir. 1974), *cert denied*, 421 U.S. 978 (1975).

<sup>123</sup> *Id.* at 403.

<sup>124</sup> *Id.* at 401.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> 28 U.S.C. § 1407 (1976).

<sup>131</sup> *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (J.P.M.L. 1970).

the passenger cases.<sup>132</sup> They then sought contribution from Carey's estate, Brookside, and Forth.<sup>133</sup> The district court first determined that Indiana substantive law was to be applied in regard to whether the defendants who settled (Allegheny Airlines and the United States) had a right to seek contribution from the defendants who did not settle (the estate of Carey, Brookside Company and Forth Corporation).<sup>134</sup> The district court then granted motions to dismiss the claims of Allegheny and the United States for contribution, on the basis that Indiana substantive law did not permit claims for contribution among joint tortfeasors.<sup>135</sup>

The court of appeals reversed the district court and ruled that it was unnecessary to determine what particular *state* law applied with respect to the rights of Allegheny and the United States to claim contribution,<sup>136</sup> and that it also was not necessary to determine whether the district court erred in applying Indiana law to the issue relating to contribution.<sup>137</sup> Instead, the court of appeals held: "We need not reach these issues, however, for we agree with Allegheny that there should be a federal law of contribution and indemnity governing mid-air collisions such as the one here."<sup>138</sup>

The court of appeals thus applied a so-called "federal law," which it said was consonant with "sense and justice," and ruled that in regard to interstate air crash cases it had the right to apply a federal law *as to this particular case* (in which the federal government was a party) *independent* of any otherwise applicable law:

The basis for imposing a federal law of contribution and indemnity is what we perceive to be the predominant, indeed almost exclusive, interest of the federal government in regulating the affairs of the nation's airways. Moreover, the imposition of a federal rule of contribution and indemnity serves a second

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<sup>132</sup> *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 403.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

purpose of eliminating inconsistency of result in similar collision occurrences as well as within the same occurrence due to the application of differing state laws on contribution and indemnity. Given the prevailing federal interest in uniform air law regulation, we deem it desirable that a federal rule of contribution and indemnity be applied.”<sup>139</sup>

The court emphasized the need to invoke a federal rule of law so as to achieve “sense and justice” in litigation growing out of disasters involving interstate major air carriers, where passengers from multiple states are killed.<sup>140</sup> The court adopted a “federal law” on the basis of predominant federal interest in regulating the airways.<sup>141</sup> The Seventh Circuit stated that “[w]ith the passage of the Federal Aviation Act of 1958, Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government.”<sup>142</sup> The court also emphasized that the *Kohr* litigation had “since its inception been subject to the supervision of the Judicial Panel created by the Multidistrict Litigation Act,”<sup>143</sup> and that “there is no perceptive reason why federal law should not be applied to determine the rights and liabilities of the parties involved.”<sup>144</sup>

In *Smith v. Cessna Aircraft Corp.*,<sup>145</sup> District Court Judge Hubert L. Will ruled that the *Kohr* doctrine did not apply to actions arising from the crash of a general aviation aircraft, a Cessna 177 Cardinal, where all of the parties were from Illinois, and the actions involved “a single, non-commercial aircraft and a wholly intrastate flight, [and where] practically all the relevant contacts [were] centered in Illinois and [involved] an area of law, torts, traditionally subject to local control.”<sup>146</sup> In that type of situation, the court held, “the interest of Illinois in applying its own substantive law of indemnity and

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 405.

<sup>141</sup> *Id.* at 403. *See, e.g.,* *Northwest Airlines v. Minn.*, 322 U.S. 292, 303 (1944).

<sup>142</sup> 504 F.2d at 404.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 428 F. Supp. 1285 (N.D. Ill. 1977).

<sup>146</sup> *Id.* at 1288.

contribution [was] greater than the federal interest in the field."<sup>147</sup> The court, however, expressly recognized the need for the adoption of "federal law" in litigation where interstate flights of large commercial aircraft are involved, stating:

[W]e recognize that, despite Justice Brandeis' assertion in *Erie* that, 'there is no federal general common law,' *federal* common law does exist and may even be essential in airline disasters involving citizens and laws of numerous states.<sup>148</sup>

In litigation growing out of the DC-10 accident at O'Hare Airport in Chicago, Illinois, the plaintiffs' committee urged the Seventh Circuit Court of Appeals to utilize its decision in *Kohr*, in which it had said the federal courts could and should apply federal law so as to achieve "sense and justice" by providing for uniform treatment of the families of victims.<sup>149</sup> It was undisputed that *some* of the plaintiffs would receive prejudgment interest because some of the passenger-victims resided in states which permitted the allowance of prejudgment interest.<sup>150</sup> It did not seem to be consistent with "sense and justice" for the families of some of the victims to receive prejudgment interest and others not to receive prejudgment interest.<sup>151</sup> The court of appeals, however, disregarded this argument and unequivocally ruled that state law and only state law applied to air crash litigation.<sup>152</sup> In another appeal growing out of this disaster, involving what law applied in regard to claims for punitive damages, the court of appeals again flatly held that state law applied.<sup>153</sup>

The federal courts have not implemented the *Kohr* decision.<sup>154</sup> This is not difficult to understand. It would be somewhat inane for federal courts to make "outcome-determinative" rules, on the basis of federal law, which would be

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979, 644 F.2d 633, 637 (7th Cir. 1981).

<sup>150</sup> *Id.* at 639-38.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 638.

<sup>153</sup> *Id.* at 637.

<sup>154</sup> *Id.*

markedly different from state court rulings arising out of the same occurrence. Instead, the Court of Appeals for the Seventh Circuit recognized that federal courts are bound by the *Erie* doctrine to apply state law if "outcome-determinative," but the court did urge legislative action.<sup>155</sup> In short, there is no federal common law which can be utilized so as to achieve uniform treatment of plaintiffs and defendants in regard to aviation litigation.<sup>156</sup> It is unrealistic to expect the federal courts to implement "federal law" so as to achieve uniformity of treatment of both plaintiffs and defendants.

The Seventh Circuit Court of Appeals has flatly ruled that state law and only state law governs as to all "outcome-determinative" issues in regard to aviation litigation.<sup>157</sup> In fact, in the litigation growing out of the DC-10 accident at O'Hare Airport, American Airlines argued in regard to the prejudgment interest issue, "It is a rule of long standing that federal courts, sitting by virtue of their diversity jurisdiction, *must* apply the applicable *state* decisional and statutory law as the law exists, and not as the court or any of the parties might prefer the law to be."<sup>158</sup> Chief Justice Warren Burger has repeatedly argued that the fiction of diversity of citizenship as a basis for federal jurisdiction no longer has any purpose.<sup>159</sup> It would be the height of absurdity if cases filed in or removed to the federal courts were to be tried with different "outcome-determinative" rules on the basis of "federal common law" in contrast to cases filed in the state courts arising out of the same occurrence.

In *Turcotte v. Ford Motor Company*,<sup>160</sup> a wrongful death case involving Rhode Island law, the defendants contended

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<sup>155</sup> *Id.*

<sup>156</sup> Conklin, *Aviation—Doubt in the Courthouse; Is the Federal Law Supreme or Not?*, 20 TRIAL LAW. GUIDE 476, 480 (1976); Kennelly, *Aviation Law: Domestic Air Travel—A Brief Diagnosis and Prognosis*, 56 CHI. B. REC. 248, 267-68 (1975).

<sup>157</sup> *In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979, 644 F.2d 633, 637 (7th Cir. 1981).

<sup>158</sup> Brief for American Airlines at 8, *In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

<sup>159</sup> Burger, *Chief Justice Burger's 1977 Report to the American Bar Association*, 63 A.B.A. J. 504, 506 (1977).

<sup>160</sup> 494 F.2d 172 (1st Cir. 1974).

that the United States district court should have applied Rhode Island law, which requires evidence of income taxes in computing damages in wrongful death actions.<sup>161</sup> Obviously, a plaintiff would prefer that the court apply a "federal law" that income taxes should not be considered.<sup>162</sup> The First Circuit rejected the contention of the plaintiff and sustained the position of the defendants, namely, that the federal court must apply the state law which would have been applied if the same case were pending in the state court rather than in the federal court:

The 'twin aims' of the doctrine of *Erie R.R. v. Tompkins* are the discouragement of forum shopping and avoidance of inequitable administration of the laws. Under *Erie*, a state rule should be applied in a diversity case if it 'would have so important an effect upon the fortunes of one or both litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.' In the instant case, if Rhode Island law required evidence of income taxes in computing wrongful death damages, yet the federal district court in Rhode Island barred such evidence in diversity cases, no rational plaintiff who had the choice would ever bring a wrongful death action in the state courts. The difference in wrongful death recoveries between the two forums would be staggering. Therefore, under *Erie*, state law must control.<sup>163</sup>

If the federal court were to sanction the admissibility of evidence relating to income taxes and also were to require the *Liepelt*<sup>164</sup> type of negative instruction, warning the jury as to exemption of wrongful death awards from taxation, every plaintiff would make every effort to stay out of the federal courts. The federal courts would be inundated with motions to remand.

The federal district court in litigation arising out of the O'Hare Airport air crash recognized the need to comply with the admonitions of the United States Supreme Court that fo-

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<sup>161</sup> *Id.* at 185.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (citations omitted).

<sup>164</sup> *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980).

rum-shopping is to be discouraged:

[O]ur decision that the issues raised by the parties' motions *in limine* are to be resolved by application of *Illinois law* rests upon the 'realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.' That *Erie's* policies of discouraging forum-shopping and avoiding inequitable administration of the laws serve as a better touchstone than does a simple 'substantive-procedural' dichotomy is persuasively demonstrated in the First Circuit's opinion in *Turcotte v. Ford Motor Co.*<sup>165</sup>

The O'Hare Airport DC-10 air crash litigation supplies a noteworthy example of the chaotic condition of the law which would result if the federal court were to apply "federal law" in a manner so as to bring about vastly different results as to either plaintiffs or defendants, in contrast to suits brought in state court arising out of the same occurrence.

### III. CONCLUSION

Uniform legislation is required in order to alleviate, at least to some extent, the confusion and contradictions which permeate the law pertaining to tort litigation arising out of airplane crashes involving multiple plaintiffs and defendants. Such uniform legislation should apply to *all* types of aviation accidents. It should:

1. Provide for uniform rules pertaining to the rights of defendants to contribution based upon comparative negligence.
2. Provide uniform criteria for the determination of com-

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<sup>165</sup> *In re Air Crash Disaster near Chicago, Ill.* on May 25, 1979, 526 F. Supp. 226, 232 (N.D. Ill. 1981) (holding that evidence of the impact of income taxes upon earnings of a decedent and an instruction advising the jury that its verdict was free from taxes were precluded by Illinois law. The United States Court of Appeals for the Seventh Circuit, on February 15, 1983, reversed the district court and ruled that evidence of the effect of income taxes upon earnings was admissible, and that the district court should give the *Liepelt*-type instruction to the jurors, advising that their verdict would not be subject to income taxes. This opinion of the United States Court of Appeals is reported at 701 F.2d 1189 (1983). This author has filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 82-2129).



pensatory damages, particularly relating to wrongful death cases. The prescribed criteria of damages should include, with regard to compensatory damages, those elements which are necessary to the rendition of justice to claimants.

3. Provide for the appearance at the trial of any employee of any party to the suit, regardless of place of residence, subject to the rule that there be no harrassment of any litigant's employees.

4. Provide that any insurer of an alleged tortfeasor which carries on business in any state should be subject to suit in that state. This would eliminate the absurd situation of having to sue different defendants in different states.<sup>166</sup>

5. Provide that a defendant or potential defendant may settle in good faith with claimants without being subjected to claims for contribution, but permit the settling defendant to seek contribution from nonsettling defendants.

6. Provide for either uniform rules as to the type of proof required to obtain punitive damages and who should receive such damages, or eliminate claims for punitive damages as to both injury and death cases.<sup>167</sup> There is a manifest need for uniform laws pertaining to aviation litigation. New and dynamic laws, followed by real-life implementation, are urgently required in the interests of both the passenger public and the aircraft industry. The Congress of the United States should not attempt to enact utopian legislation providing "national uniformity of relief" in regard to a limited type of aviation accident claims.<sup>168</sup> Note that the proposed federal legislation is probably unconstitutional. A fundamental tenet of constitu-

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<sup>166</sup> See *supra* text accompanying notes 87-8.

<sup>167</sup> The present system makes no sense in that some states permit punitive damages in both death and injury cases, while other states allow such damages only in injury cases. See generally 11 AM. JUR. 2D *Death* § 136 (1965). Some states require proof of egregious conduct at a managerial level. Other states impose vicarious liability upon companies for the egregious conduct of their non-managerial employees even though their wrongful conduct is not authorized or ratified by their employers. Some states forbid insuring against punitive damages. Others permit such insurance. See generally, W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971).

<sup>168</sup> See, e.g., Dombroff, *Against a Federal Law for Air Disaster Litigation*, 10 THE BRIEF 30 (1981); Haskell, *Federal Regulation Not Needed for Airline Liability*, 10 THE BRIEF 26 (1981).

tional law is that legislation which singles out one segment of an industry for preferential treatment must not be arbitrary and must have a rational basis.<sup>169</sup>

The world has been transformed in little more than a generation, catapulted from the horse and buggy to conventional jetliners, supersonic and soon hypersonic air travel, and the space age. The legal profession throughout the world simply has not kept up with these massive alterations. It has been said that lawyers have, in effect, painted themselves into a corner. Society views lawyers as technicians, practicing a rather esoteric craft of small value. Others state that some lawyers are irrelevant, even obsolescent. Those attorneys or representatives who remain polarized in their viewpoints on behalf of passengers, airlines, manufacturers, the federal government, or other segments of the aviation industry, and who take unrealistic, biased viewpoints which seek discriminatory treatment for their clients' particular interests, should realize that the passenger public and all segments of the industry are entitled to fair treatment consistent with the economic well-being of the entire aircraft industry, as well as just treatment of injured passengers who are killed.

Compromise and common sense are needed so that the adversary system can be retained and still work. The way to keep the system is not to blindly tell one another at seminars and bar meetings how well the system is working. The answer is to face up to the deficiencies in the system and for lawyers to lead the way in the enactment of remedial legislation, by utilizing traditional methods which have been proven effective, i.e., the passage of uniform statutes by state legislatures. Examples of well-drafted uniform state laws include the Uniform Commercial Code and the Uniform Probate Act. The problems cannot be entrusted to Congress. The cure will be worse than the sickness.

There are three officially appointed commissioners from each jurisdiction (all fifty states, the District of Columbia,

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<sup>169</sup> See *Morgane v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); see also *Grasse v. Dealers Transport Co.*, 412 Ill. 179, 106 N.E.2d 124 (1952); *Harvey v. Clyde Park District*, 32 Ill.2d 60, 203 N.E.2d 573 (1965). *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

Puerto Rico and most United States territories), plus a few life members.<sup>170</sup> The commissioners meet annually at the same place as the American Bar Association and record their activities in their own handbook.<sup>171</sup> No doubt the National Commissioners on Uniform State Laws will call upon the expertise of a large number of representatives of the aircraft industry, the Justice Department, experienced aviation lawyers and judges in order to bring about genuine, workable, and just reform. It must be obvious by now that the Congress of the United States does not possess the capacity to enact legislation which will rectify the problems which indisputably need corrective action in aviation accident litigation. H.R. 1027<sup>172</sup> and the Air Travel Protection Act<sup>173</sup> are examples of the inability of Congress to deal adequately with this problem. In the past, resolutions in conflicting state laws have resulted from careful and prudent action of the National Commissioners on Uniform State Laws. Almost every knowledgeable observer of aviation law realizes the need for uniform laws. The way to get them is through the action of the National Commissioners on Uniform State Laws, and not as a result of Congressional intervention.

The bottom line is that uniform legislation clearly is needed. The aviation bar must lead the way by recommending that H.R. 1027 and the Air Travel Protection Act not be enacted or adopted. At the same time, it must propose workable and just legislation to the National Commissioners on Uniform State Laws. Lawyers who are opposed to change and reform in the law of aviation accident litigation are akin to dentists who are opposed to fluoride and doctors who are opposed to penicillin.

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<sup>170</sup> Leflar, *Maurice H. Merrill and Uniform State Law*, 25 OKLA. L. REV. 501 (1972).

<sup>171</sup> Note, *Uniformity in the Law—The National Conference of Commissioners on Uniform State Laws*, 19 MONT. L. REV. 149, 153 (1958).

<sup>172</sup> See *supra* note 91 and accompanying text.

<sup>173</sup> See *supra* notes 106-15 and accompanying text.