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TRIAL PROCEDURE: A COMPOSITION ANALYZING SOME OF THE ELEMENTS

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I. Introduction

In April, 1968, Senator Joseph D. Tydings introduced legislation in an attempt to deal with some of the problems arising from modern aircraft crashes. Basically the legislation would provide a uniform body of federal law to apply to all aviation activities and provide exclusive federal jurisdiction for those aircraft crashes which ordinarily involve substantial numbers of people and suits in multiple courts.

Under Section 1407 of Title 28, United States Code, passed in 1968, the judicial panel for multiple litigation has the power to transfer aircraft disaster cases filed in federal court for pre-trial purposes to a single district, and this power has been frequently exercised. Remand to the district from which the case was transferred is required after the completion of the pre-trial on the common questions of tort.

Of course, transfer under § 1404(a),[1] or the so-called "Forum Non-Convenience" transfers, are still available as far as aircraft suits filed in federal courts are concerned, but the doctrine is limited to transferring only to any district or division where suit might have been brought.

The judicial panel for multiple litigation referred to above is authorized to select the central point for transfer and to send a judge to preside in any sensitive depositions. The panel has dealt with a group of cases which grew out of the *American Flyer Airline Corporation* crash near Ardmore, Oklahoma, in which 82 were killed and the remainder seriously injured; the July, 1967, Boeing 727 collision with a private aircraft near Hendersonville, North Carolina; a group of cases arising out of the crash of Thai Airways at the Hong Kong Airport. Under submission now before the panel is a group of cases resulting from the Braniff Airways crash near Falls City, Nebraska. Aircraft disaster cases constitute about a third of the multiple trial docket o nthe basis of experience to date.

I feel it is fair to say that the presently pending Tydings' Bill is considered unnecessary and undesirable by most lawyers familiar with aviation litigation. In my opinion, there is no great need for it. The present judicial machinery, both state and federal, generally functions well in handling the problem. The primary difficulty in the conflicts of law area has been

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[1] 28 U.S.C. § 1404(a) (1966).

state laws limiting recoveries for wrongful death. These laws are being repealed in recent years and only a few remaining states now have such limitations. As has been pointed out in other presentations here, there has been a revolution in choice of law principles which has permitted state courts much greater flexibility in applying reasonable law to these situations. This is not to suggest, however, that problems do not exist in multi-plaintiff major aircraft disaster situations.

For one thing—it will be infrequent when the evidence in an aircraft disaster will point solely to one party as the liable culprit. Frequently the disasters have been the culmination of a series of mishaps and errors attributable to a number of different people—the crew, the air carrier's maintenace personnel, the Government Air Traffic Controllers or the air frame or parts manufacturer. This does obviously present the problems discussed by a previous speaker of who should be sued, where they can be sued, how they should be sued and how to place the blame, if any, where it belongs. Should all the cases be filed in the same court? Should all be filed for discovery? However, it has been my experience in multi-plaintiff air crash situations that sensible and co-operative efforts at solving these questions have usually been made by all attorneys for the litigation. Deciding on who to sue, when, and where, conducting voluntary consolidated discovery efforts and agreement to the trial of a test case has not been difficult among the lawyers, plaintiff and defendant alike, with whom I have dealt in multi-litigation situations. Contrary to popular belief, lawyers want our system of justice to work. Lawyers want speedy and fair disposition of our legal business in this country.

For example, in the Idlewild Accident of 1962, by the process of removal and transfer the lawyers were successful in placing all the suits for damages and wrongful death before Judge Alfuzzo sitting in the U. S. District Court for the Eastern District of New York. One case was tried, *Ingram v. Eastern Airlines and the United States of America*,[2] and after his findings were affirmed by the appelate courts, all litigation arising out of the accident was settled. In the *Jones Beach* accident of February, 1969, all suits were collected in the same court before Judge Rayfill by means of removal and transfer—and I understand all of the cases have now been settled or are in the process of being settled. In the *Mt. Fuju, Japan*, crash of 1966, settlements were consummated within one year after the crash without the necessity of the formal intervention of the judicial panel for multi-district litigation. In the *Buffalo, Texas*, crash of 1959, almost all of the cases were handled in the state court of Houston, Texas, and after the trial of one test case, all other cases were settled. In the more recent *Dawson, Texas*, crash, most of the cases were settled within a year and a half, voluntary consolidated discovery was conducted with co-operation from all parties, and no case has yet been tried.

There is a temptation in these situations to sit around and wait for someone else to start the ball rolling. While it is good to find out which of

[2] Inghram v. Eastern Airlines, Inc., 9 Av. Cas. 18,170 (E.D.N.Y. 1966).

your fellow lawyers have which companion cases and to offer your co-operation and try to divide up some of the work, it is not wise to depend on someone else to get the game underway. I believe in going to the scene of the accident regardless of the lapse of time since the crash. I like to talk to witnesses; get a feel of the situation. You may learn very little of a concrete nature but it will probably help you later in the taking of depositions and in trying the case.

If the public hearings have already been held, order a copy of the transcript and exhibits and board findings and read this material thoroughly. Begin the preparation of interrogatories and request for admission and motions for production based upon the N.T.S.B. file. Start defining your probable deposition witnesses. Get your request for admission out of the way prior to depositions; move by co-operation and agreement wherever possible. Be reasonable and considerate, but do not tolerate unreasonable delay on the part of other plaintiffs' counsel or defense counsel.

Work out an equitable agreement among your various clients as to the ultimate sharing of expenses. Expand this to other plaintiffs' lawyers with other clients arising from the same accident. These agreements are not hard to make. There is a guide—be fair!

As I said, talk to the other lawyers as to where they intend to file their case or cases. Tell them where you intend to file yours and why. Tell them who you intend to sue and why, and get their views as to prospective defendants. As a matter of courtesy, notify the other lawyers of any depositions you take by commission and try to make an agreement as to all depositions taken so that they can be used in any case arising from the crash, filed or to be filed.

In the *Buffalo, Texas*, crash of 1959, I filed all the cases in state court in Houston, Texas. They were not consolidated. One case was tried with a favorable plaintiff's verdict against the frame manufacturer and the engine manufacturer. There was no appeal, and all other cases were settled. The *Dawson, Texas*, crash of 1968, and as of this date, all but three for which I have responsibility have been settled. In the *Wein Consolidated* air crash in Alaska in 1960, the cases are in Alaska state court. I have contributed $500 to the expense pot and we are waiting for the public report of the N.T.S.B.

In the *VIASA* crash at Mariciabo of relatively recent date, I have filed two suits in the Federal District Court of Corpus Christi, and I suspect we are headed for handling under Section 1407.

Some points that can effect venue and jurisdiction questions are: (1) the required diversity of citizenship is between all parties plaintiff and all parties defendant; if one of multiple defendants has the same citizenship as one of the multi parties plaintiff, the federal court has no jurisdiction; (2) the Federal Tort Claims Act relating to suits against the United States (where the government is a necessary defendant) requires such an action to be brought where the plaintiff resides or where the accident took place

[3] Federal Tort Claim Act, 28 U.S.C. § 2671 (1966).

[28 U.S.C. § 1402]; (3) suits under the Death on the High Seas Act are to be filed in federal court; (4) most general aviation litigation may be originally instituted in any state court of general jurisdiction in any state in which defendants are suable under the laws of the state in which the suit is filed or, where complete diversity exists, in most federal district courts in the country. [See *International Shoe Co. v. Washington*,[4] establishing "minimal contacts" rule.] (5) removal from state to federal court cannot be accomplished if one defendant is properly sued in the state court; and (6) transfers from one federal district to another under § 1404(a) should not be ordered unless the balance is strongly in favor of defendant as shown by clear and convincing evidence.

II. PLEADINGS

Ideally, plaintiff's counsel should know the probably liable defendant or defendants prior to filing suit. In the Lawson, Texas, crash, I felt sure in my own mind within a very short time afterwards that it was probably a pure and simple case of operational neglect. My opinion was that the airline was liable and probably solely so. In such a situation, I personally feel that the airline alone should be sued by the plaintiff and my pleadings were so cast. Other plaintiff counsel entered suit against the airline and the manufacturer. For months I was cajoled by counsel for the airline to amend my pleadings and join the manufacturer as a defendant but I refused to do so. As I suspected they would, the airline filed a cross-action in my cases against the manufacturer. A portion of the pleadings utilized are as follows:

> *IV.* In the vicinity of Dawson, Texas, on May 3, 1968, this Lockheed Electra airplane was involved in a mid-air breakup and crash which resulted in the death of the deceased. Braniff Airways Incorporated owed the highest degree of care to the deceased to safely transport him to his destination, which duty was negligently breached. The airplane crash was due to the negligence and gross negligence of Braniff Airways Incorporated, and such negligence was a proximate cause of the death of the deceased. Further, plaintiffs allege that the airplane involved in this crash was at the time of its mid-air breakup within the exclusive control of the defendant, Braniff, its agents and employees, and ordinarily would not have broken up and crashed had it not been negligently controlled and operated. This being the type of occurrence that would not have ordinarily happened but for Braniff's negligence, it is an appropriate case under the law for application of the legal doctrine known as *res ipsa loquitur*, or "the thing speaks for itself," and the plaintiffs here and now give notice to the defendant of their intentions to rely upon that doctrine as well as their allegations of negligence and gross negligence. Plaintiffs further allege that Braniff warranted and represented that the aircraft in question was suitable for the purpose for which it was being used, that such express and implied warranties were breached on the occasion in question and were a proximate cause of the death of the deceased.
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> *V.* Subsequent to the filing of this suit against Braniff, on or about July 23, 1968, Braniff did thereafter on or about January 17, 1969, file herein a third part action against Lockheed. In such third party action, Braniff re-

[4] 326 U.S. 310 (1945).

quests indemnity and contribution from Lockheed for any damages assessed against Braniff herein. Further, Braniff alleges that the crash in question was caused by failure of the aircraft in flight which was due to structural defects, imperfections and deficiencies which were caused by the negligence of Lockheed. Further, Braniff alleges that "the true facts are that the Electra airplane proved to be clearly defective and unsafe for the purpose of flight and transportation of passengers" as warranted by Lockheed and that Lockheed breached both express and implied warranties of merchantability and suitability of the aircraft for purposes of which it was manufactured and sold. Further, Braniff alleges that the plane failed in flight due to a defective condition caused by Lockheed's negligence and breach of warranty and that such defect rendered the aircraft unreasonably dangerous to Braniff and the passengers thereon.

While still insisting that the crash in question resulted from the negligence, gross negligence, and breach of implied and expressed warranties on the part of Braniff, in order that all possible responsibile parties may be fully before the court and jury for purposes of final judgment herein, plaintiffs adopt the allegations of negligence and breach of warranty in Braniff's third party action against Lockheed.

Personally, I much prefer my trial posture and options over those who initially sued both the airline and manufacturer alleging affirmative specific negligence against both.

In the Buffalo, Texas, crash proof of negligence and cause was very difficult. Great expense and lengthy discovery preceded development of facts which indicated joint liability between the air frame manufacturer and the maker of the engines. I had sued both defendants as well as the airline. At trial time I probably should have dismissed the airline because I knew the case against it was weak. I simply didn't have the guts to do it. I ended up with the defendants being given 24 jury strikes against my six. Needless to say, they "consulted" with reference to their preemptory challenge. That I obtained a fair jury was a modern day miracle. This experience—although not costly in that instance—reinforced my conviction to sue only the primary culprit in a situation where you have a pretty good idea of his identity. Sometimes these "third-party" defendants brought in later by the primary culprit can be very cooperative with and helpful to the plaintiff. At least you haven't "driven them into the arms" of the other defendant and you retain some options.

As to the form of pleadings, I like to "tell the story." If I can't "tell it like it is" going in, I amend and do so as soon as possible. Let me give you an example.

The aircraft in question suffered a structural breakup in mid-air initiated by the structural failure of the right wing. There was no lightning strike, hail strike or explosion which initiated the right wing failure. The testimony of the Braniff experts assigns the cause of the initial failure to (1) an upset of the aircraft; (2) structural and/or design deficiency of the right wing. Braniff admits that 'but for' the upset of the aircraft the accident would not have occurred.

The upset immediately followed the efforts of the pilot of the plane to negotiate a 180° turn in order to turn away from severe weather conditions that were in his flight path. Normally, the Electra aircraft would not upset

if such a maneuver is properly carried out. Such an upset is an abnormal occurrence and normally will not occur if the aircraft is being properly controlled. Needless to say, the loss of a wing in flight is a highly unusual occurrence.

Braniff owed to the deceased a high degree of care.

Braniff was in complete control of the aircraft.

Braniff, under their own testimony and without regard to their wreckless-ness in deliberately penetrating a severe storm, stands convicted of negligence which was a proximate cause of the damages suffered by plaintiff. Any finding to the contrary would have no evidence to sustain it.

He was a loving and protecting husband and a devoted father and son and provided plaintiffs with financial support as well as providing them with care, council, protection, advance, moral and mental training, guidance, nurture and education.

The deceased would have continued to provide guidance, attention, training, education, counsel, care, nurture and protection to your plaintiffs throughout his normal span of life but for his untimely and tragic death. He was only thirty-eight (38) years of age and had a life expectancy of approximately 33.6 years, according to the 1964 U. S. life tables.

Finally, I have a check list which I look over in connection with negligence allegations.

(1) Violation of civil air regulations.

(a) formerly promulgated by F.A.A.

(b) Admissible in evidence as "establishing impartial and authoritative criteria"[5] for determining negligence and as "establishing the proper standard of care under the circumstances."[6]

(2) Violation of manual provisions.

(a) Airlines *own* rules and procedures.

(b) Violations may be evidence of negligence.

(*Citrola* case).

(3) Improper control, improper lookout, errors of judgment, flying into storm, deviation from route, failure to consider weather, failure to warn crew concerning weather, employment of incompetent or insufficiently trained crew, using known, defective or inadequate equipment, failure to inspect, maintain and overhaul equipment and overloading.

(4) Manufacturer's liability for negligence.

(a) Faulty manufacture—defective fuel pump.

(b) Hooking up controls improperly.

(c) Bad welding.

(d) Omitting to install safety wire.

(e) Failure to inspect.

(f) Faulty design.

(g) Failure to warn (continuing duty to warn and make changes) with service bulletins and airworthiness directives.

(h) Failure to instruct (maintenance and operation manuals).

(5) For breach of warranty—express or implied (see my article on privity).

(6) They are liable for negligence—failure to maintain and repair, failure to inspect—failure to warn, and probably breach of warranty.

(7) Liability of airport owners and operators:

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[5] Prosper v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).

[6] Citrola v. Eastern Airlines, Inc., 264 F.2d 815 (2d Cir. 1959).

As to private—can be liable for such things as rough runways, obstructions on runways, insufficient lighting.

III. Discovery

In all events a thorough review of the N.T.S.B. transcripts, exhibits and reports is a must. This must be a personal review by leading trial counsel. As previously indicated, it is my practice to frame written interrogatories and request for admission of relevant facts as I wade through this voluminous material. Normally it is about a two weeks job, but you must not short-cut this responsibility.

There is usually no need to file these interrogatories and motions in each of your cases. Just file them in the one you intend to try first. I have never had opposing counsel refuse to agree that they may be considered as having been filed in all cases.

Where necessary, supplement your interrogatories and requests for admission with a motion to produce and inspect. In this connection, most modern courts hold that it is proper to ask for production of any documents in the possession of the adversary which fall into a described category. It is not necessary that the moving party describe any particular document or even have knowledge that the adversary in fact has documents in a described category.[7] An example would be "all documents, memos, correspondence, drawings and other writings directly or indirectly relating to the design of the Electra aircraft." Also, as stated previously, write a letter to the airlines requesting that they preserve the wreckage and that they grant you and your representative an early opportunity to inspect.

IV. Depositions

N.T.S.B. investigators can be forced to testify in civil litigation, § 701(2) of the Federal Aviation Act[8] notwithstanding, so long as the testimony is limited to matters of fact as distinguished from opinions and conclusions. By way of courtesy, the testimony of such persons is usually by way of deposition and the courts will usually accept such testimony in lieu of personal appearance. Arrangements for the depositions should be made thorugh the general counsel of the FAA, and time and place on a voluntary basis with opposing counsel and all concerned.

In my view, the enormous responsibility placed upon trial counsel in a multi-plaintiff air crash case requires that he personally prepare the case if he is going to try it, and in particular, it requires him to personally take all key depositions.

What has been referred to as "saturation" is sometimes employed by plaintiff's counsel who, although possessing impressive technical qualifications in aviation matters, lack trial experience and do not question the witness so as to develop a usable and understandable deposition for trial

[7] *See* 4 J. Moore, Federal Practice ¶ 34.07, at 2998 (2d ed. 1953).
[8] Federal Aviation Act of 1958, 49 U.S.C. § 1301 (1958).

use. This should be avoided. Depositions should be taken with a view to their actual use in trial. If possible, all lawyers involved should agree on a "lead" counsel in the taking of depositions, reserving the right to each counsel to supplement questions if he feels it necessary. This is one of the toughest problems I face in multi-plaintiff aircraft cases, because I am afraid most trial lawyers are prima donnas and most of us don't enjoy the second chair.

In all events, be sure to work out an agreement binding on all parties and counsel that the depositions will be filed in the papers in one case (usually the one you have picked out to try first) and that they may be used in all cases filed *or to be filed* arising from the disaster. Also, have a clear understanding as to how long the witness will have in which to review, correct and sign the deposition. Otherwise, you can come down to trial time with many depositions still not actually filed for use.

I have always been able to work out an agreement prior to depositions to waive all objections as to substance until the time of trial and obtaining such an agreement is absolutely vital to speeding up the proceedings.

The manner and way in which you use these depositions upon trial can be very important.

In the trial of the Buffalo, Texas, crash, every time that I offered a few "juicy" excerpts from a deposition, the defendants would exercise their privilege to offer all other "relevant" portions of the deposition and this usually meant that they read the entire deposition. This was very boring to the jury, as I am sure was defendants' wish. These depositions were hundreds of pages long and took days—not hours—to read. By this method, defense counsel was making me pay a terrible price for the introduction of the "guts" of the deposition which were essential for plaintiff's prima facie case. I moaned and I groaned and I pleaded with the court to defer defendant counsel's reading of "cross-examination" until plaintiff rested—but to no avail. Finally, I quit reading depositions and started calling the defendants' designated agents to the stand as live witnesses under the adverse witness rule. This had the desired effect. Defendants agreed that if I would not call any more of their witnesses live in my cases they would permit me to read my little excerpted "gems" from the various depositions without any additional reading by them.

Absent such an agreement, plaintiff is probably better off to read the entire deposition offered from cover to cover—under the adverse witness rule, of course. At least, that way you continue to carry the ball. You control the volume and crescendos of voice. Even then, it is pretty painful and boring, believe me. But it is better than letting defense counsel occupy center stage for several hours while you sit there and suffer in silence.

V. Settlement Negotiations

Each case should be settled strictly on its own merits. Negotiations should be conducted on the highest authority level—face to face. All attempts to lump cases together for settlement should be discouraged. A

full settlement brochure for each case should be submitted to defense council following the taking of the widow's deposition. There should be included in a typical brochure photographs of the entire family, copies of withholding statements, tax returns, accountant's reports and audits, letters and other documentary proof of the character, industry and ability of the decedent, and a biographical sketch summarizing the family history, education, employment record and prospects for increased earnings. Acturial testimony should be prepared by a competent actuary and made a part of the brochure.

In the case of a self-employed decedent, present an evaluation of loss of estate and inheritance by accountants and economists in line with *O'Toole v. United States.*[9]

While there are instances when aviation cases are tried even when liability is clear, most clear liability cases are settled. When liability is not clear or the proportionate fault of multiple defendants is seriously in dispute, at least one trial is usually inevitable. In such a situation, the question arises as to whether to consolidate the various cases for trial as opposed to trying a single test case.

From the plaintiff's standpoint, I never favor consolidation for trial purposes. I simply feel that each family is entitled to its separate day in court and will usually fare better on damages if theirs is the only case being tried. Also, once a verdict is rendered, in favor of any one plaintiff, it may constitute an estoppel by judgment as to all remaining cases.[10]

VI. Jury Summation

I have always believed in stressing damages in jury argument. You should cover liaiblity but save the majority of your time to discuss damages. The Buffalo, Texas, trial which involved a widow, four minor children and the parents as plaintiffs presents a good example of this concept of discussing damages.[11]

You should return to damages after discussing the broad aspects of liability. You may solve all of your multitude of problems dealing with liability in a multi-plaintiff air crash case, but the ultimate profit depends upon whether an adequate award was returned and never lose sight of that basic objective.

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[9] 242 F.2d 308 (2d Cir. 1957).

[10] United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub nom*, United Air Lines, Inc. v. Weiner, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1965). *See also* Dewitt v. Han, 19 N.Y.2d 141, 225 N.E.2d 195 (1967) (applying estoppel "offensively"); *but see* Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965).

[11] The following is the first part of my jury arguments in the Buffalo, Texas, crash of 1959:

"May it please your honor, and may it please you ladies and gentlemen of the jury. I can't begin to tell you ladies and gentlemen the awful burden that the responsibility of this case has been for me personally. I am sure that perhaps a lawyer with more years back of him could have shouldered that responsibility better. I must confess that at times during the last two years I came near my breaking point. However, I have been comforted with the fact that there would come a time when the obvious truth and simplicity of what had happened in this great tragedy was presented to a jury of twelve free Americans—twelve fair and impartial people—that the pretense and smokescreen and pretended complexity and technicality of this defense would be exposed. Now, I come back to you now and ask you again, as fair and impartial people, to do your job and let the chips fall

where they may. You do your job, as sworn by your oath to do, and I think we will see a just end to this sordid chapter in American aviation. My plea again, ladies and gentlemen, is to insist upon a legal standard of damages, and a full legal standard of damages, for each of the plaintiffs who stands before you here in this case. I have previously talked at some length about the propriety of this and the legal reasons for this. I ask you again to apply, as you promised us you would when we carefully selected each and every one of you to serve on this jury, to apply in a full measure the legal applicable test for each of these children, this good mother of those children, and this mother and father of the deceased.

I am glad the two older children were down here for the trial. I asked them to be here because I want them to hear what I have to say in their daddy's case and to see what happens in the trial of their daddy's case. They are big enough to know. They oughtn't to have somebody else tell them about it. Now, the little ones, they will be told soon enough. And I want them to be told some day that the law of their daddy's case said that each and every individual child, each creature of God, each flesh and blood child, was entitled to have his loss measured separately, fully and completely. This isn't my law. This isn't Lockheed Aircraft from California's law nor General Motors' from Indianapolis law. This is Texas law given to you in instruction by this court. And the only reason that the children's issue is encompassed in one special issue is because, obviously, the standard and applicable language is the same, but the judge gives you a separate place to answer for each individual child in this case. And I ask you to make these answers, first on behalf of Jerry, that little fellow that I held in my arms here in the courtroom and who will be back here when you return with the verdict that, I believe, will be a living legal monument to the father that he lost and which verdict will, I believe, demonstrate that what his daddy gave for everyone of us when he was over enemy territory in fighter planes and what he stood for as an American all through his life—this verdict will demonstrate that he was not fighting for cut-rate American justice.

I ask you on behalf of Mark, who is not here, that little namesake of Admiral Mitchner who thought so much of his daddy—to make a full answer for him. I can't help but feel that if that boy's daddy could walk in here now he would say to all of us 'be fair and right about the American principles that I wanted my life to stand for.' Give a full answer, ladies and gentlemen, to this little Mark, who has already been knocked to his knees from this loss—had one year cut and carved straight out of his life—set back in school through the loss of this care, nurture and guidance that I have talked about and that is so important to a child and which when taken away can make a tremendous difference in that child's life.

And I ask you to answer fully on behalf of Suzy, just a year older, who was hit so hard by this tragedy. And I haven't tried to embellish this matter—I don't want to win lawsuits parading children before juries. Everyone knows Suzy's loss is tremendous. A little girl at that age—there is a tremendous reaction between a child of that age and her daddy and I appeal for Suzy on her own individual personal behalf because you must do this as though each one of these children were the only living party before you. As I said before, it is not a question of what it adds up to and you promised faithfully, and we accepted you upon this jury with the promise, faithfully made and faithfully accepted that overall amounts were not going to control your judgments; that you were going to take each one of these children and give them each a square and full and fair deal so that the money awarded to each could be put in the hands of this fine court to the end that he could do with it at least half of the things that Charles Quick could have done for each one of these children but for the negligence that was proved in this courthouse. And don't cut it down and don't compromise. And let me say this further thing about these two sitting here. God bless them, they exemplify the type of Christian, God-fearing attitudes and moral character that Charles Quick was capable of building into a child. Thank God they got enough of it before their daddy was taken away from them. This young fellow sitting here was 12—oh, he looks a little older now, but you know 30 months, 31,600 hours, millions of minutes, God knows how many seconds, go pretty quick when you just talk about it in a courtroom. But this young man has lived it. He has lived it from the day that they put away the few remains right up until this good day, and he has lived it like a man. And he has had to become a man at a young age. His sister is just like him. She has a few problems that any pretty teenage girl has, many of which a daddy can help on, I guarantee you that. Decisions are made at this time of life that can ruin children. But I know that this girl got enough from her daddy to demonstrate—oh, she didn't get what God meant for her to have, what the law meant for her to have, but it is to be pointed out if there was ever a living illustration that makes it unnecessary to guess and wonder about the pecuniary value of Charles Quick's care, nurture and guidance, it abides in this fine young girl.

Let me say a word now for one of the most deserving, one of the most regular, one of the most down to earth, one of the finest women that God ever made. A person who, like so many fine American women, stuck with their man, worked with their man, and loved their man. Not too proud to get her husband the type of education that he wanted for every one of his kids and in a better degree and more of it. And who, as she came finally to a little of the 'queenly' side of life, had it all knocked out from under her and taken away.

And I don't forget to speak a word again for these fine folks from Cowtown, the parents of Charles Quick. There is bound to have been some real upbringing to produce that kind of a man and you will remember Mrs. Quick's testimony to the very deep interest that son took, as any good son would, in his parents.

Now, I realize at this point that, like the airlines when they proved up the value of their lost

plane, we have no bill of sale on Charles Quick. We cannot demand a stipulation as to his value. But I have not the slightest doubt but what that man, through his normal life expectancy, would have accumulated in cold dollars and cents in excess [would be?] of what we have here sought. When one asks what was he worth to himself and to his family and considers the various elements of damage in this court's charge that transcend the accumulation of dollars and cents, the overall amount of what we seek comes very well in focus. And since when, may I ask, has the time come when the wrongdoer in the courtrooms seeks to cast a greater burden on the innocent than the law imposes? Since when is it for the wrongdoer to say, 'Oh, he wouldn't have progressed very much, do you think?' Since when? Also, a man or a lawyer that comes to the courtroom and would say or suggest that care, nurture and guidance and expected increased earnings are not compensable items by a jury stands utterly alone and without precedence and without law or anything else to back him up. You jurors must look, and I know you will, into the language of this charge to see what the law says about that, and not be misled by someone speaking in the interest of defending an important client. Indeed, the law has been centuries, working through great judicial minds and great courts, forging out for us the elements that best express these human losses, the elements that are and must be considered by the jury in wrongful death actions. The mere fact that there are just three of them, and that you exclude grief and mental anguish and pain and express the pecuniary loss in terms of care, nurture and guidance doesn't make the elements less important. It makes them more important. They have behind them the standing and tradition of the law that these were the elements upon which the evidence can be brought in and these are the elements that do have great pecuniary value and these are the elements that best say and express what the real loss is. Loss of society? No. But care—that's it. That's an element that can be shown and demonstrated to be related to pecuniary loss and so this, the law says, we will use. So it is with nurture. And so it is with guidance. And remember, these are three separate and distinct items of pecuniary value and loss to these young children and for which we are asking you to place a money value on. And it would be cruel to the extreme, ladies and gentlemen, for anyone to say, 'Well, since we don't have any direct evidence on the value of these items, we must strip ourselves of our good judgment and common sense which would make it imperative that we do truly evaluate these items in their full pecuniary measure.' You are the exclusive judges of the value to be placed upon these elements. The court cannot add one dime to your verdict. No, when you have said what the value of the painstaking, deliberate care that a parent gives to a child, this court cannot add to that deliberation. When you have said what it is worth for a true parent to nurture a child as we nurture plants with water and trees with food, the court cannot add to that deliberation. The same is true as to the guidance. I will never forget the time when I got lost down by the Sabine River when I was about 9 years old. I remember how I longed and pained for a guide. A sign telling me which way to go. Later, in the Navy, as we sailed our little amphibious ships, we needed the navigators; the people to plot the course. We all need the guidance of loving parents, and the need is with us always.

Then, you come over here to the support, maintenance and education items to be considered by you under the court's charge. The evidence here shows that Charles Quick wanted, above all else, for each of his children to have a good education. Such an obligation doesn't necessarily end at age twenty-one. The support and maintenance of a child doesn't necessarily and automatically cut off at any particular period and in considering these cold, bread and butter matters, we would be doing a great injustice were we not to consider not only the past earnings of Mr. Quick but the anticipated earnings. The standard of the law is uniform, but varies in its application from case to case. Obviously, it would be manifestly unjust and wrong for a man to be wrongly and negligently taken in the bloom of life and then for us to say, 'Well, we don't consider the tremendous future that that person probably had, because to do so would be to speculate.' What is life all about except the hopes that all of us have for the future; the hopes for our wives; the hopes for men; the hopes for our children. Would it be proper to strike out a man's life that was making ten or eleven thousand dollars a year and although the record showed that that man was progressing and would in all reasonable probability continue to make increased earnings through his work life, and then just freeze him in his tracks and take away from his family all that he could have probably earned through that life expectancy; because such an attitude would be wrong, the court has placed in this charge the words 'anticipated earnings' for you to consider under this particular record, and your judgment must be based upon the reasonable probabilities reflected by that record.

These losses that I have already discussed are so impressive that it makes other elements which are included in the court's charge, and which are extremely important in and of themselves, begin to appear as eyewash. The services that a husband gives a wife are to be accounted for in your verdict. The repairs, the painting, the fixing, the yardwork—these are some of the more obvious ones but I know I don't have to draw a word picture to an intelligent jury concerning the services of a good husband to his wife. Neither must I dwell at length on the care and counsel which this record reveals was so appreciated by Mrs. Quick and so freely given by her husband. I'm not talking about replacing the poem which he wrote or the loss of society, but the care, or the protection, if you please, which is a part of care. Yes, it is good to have a man around the house. Would I be criticized to suggest that such an item is worth a thousand dollars a year? Would you say the loss of the care of a husband should be measured in less terms? Isn't it true that two heads are better than one? Is it correct that Mama can't be Papa? Is it an appeal to emotions

to suggest that joint decisions between man and wife can enter very critically into the economics of the family? No, indeed, each of these elements is properly recognized by the law and when properly considered under this evidence proves our requested damages to be conservative and fair. Indeed, as has been demonstrated, Mr. Quick's proved earnings and probable expected earnings over his life expectancy would total almost $400,000. Certainly a failure here to award Mrs. Quick in her own right just in actual earnings and anticipated earnings over $200,000 would be tantamount to legal larceny. Because she certainly had a right to her one-half community interest in those earnings."