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## DEFENDANT COUNSEL'S CONSIDERATIONS IN AIR ACCIDENT LITIGATION

BY EUGENE JERICHO†

FOR THE most part, the trial of aviation litigation is not fundamentally different than other damage suits. However, because of the speed and range of modern aircraft, this type of case seems to create more problems in technical fields. This is understandable considering the great progress being made in aeronautical engineering and electronic development in the last ten or fifteen years.

Then too, because of the great mobility of high speed aircraft carrying passengers from various parts of the world, there seems to arise an inordinate number of problems created by conflicts of law. Conflicts, however, is a subject requiring the interpretation of so many cases in recent years that even a superficial discussion here would not be practical. Rather, I would prefer to dwell more on practical considerations than to delve into prolonged legal theories.

### I. ECONOMICS

Discovery proceedings often become extensive in any kind of aviation litigation, but particularly is this true when there are multiple plaintiffs and defendants. In the event of an air carrier crash, the problem is compounded even further. It is apparent that problems could arise in multiple litigation as to the admissibility of discovery evidence throughout the country. However, as a practical matter, parties to such cases can ill afford either the time or money of requiring depositions or other discovery proceedings to be repeated. These requirements usually bring about an agreement among all interested litigants and their attorneys to provide for admissibility in all pending litigation, or for that matter, litigation yet to be filed, regarding evidence so developed. Manufacturers and airline companies cannot afford to have their key personnel spend their valuable time on prolonged depositions, much less, allowing this to be repeated with the same witness more than once.

With reference to depositions of employees of federal governmental agencies, the Economic Regulations under the Federal Aviation Act would apply.<sup>1</sup>

However, this provision seems to apply only to employees of the National Transportation Safety Board (NTSB), and places the duty on

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<sup>1</sup> Fed. Av. Act, 49 Stat. 435 (1958) (Reg. 435.4).

counsel for the litigant to advise all other parties to multiple litigation that the deposition is to be taken so that they can attend.

Further, in the interest of economics it is customary for counsel to withhold objections as to admissibility until the time of trial to expedite the progress of depositions. Of course, where the witness is one that is not likely to be available at trial time, it behooves counsel to agree to make known objections during the deposition going to the form of a question so that counsel can change the form to meet the objection rather than finding out too late at trial time that the testimony is not admissible. Occasionally, attorneys will be encountered who are not agreeable to reserving until trial time objections as to admissibility which makes it very difficult to proceed in an economical and expeditious manner.

It is often possible to minimize the need of expensive oral depositions by the use of request for admissions or interrogatories to parties which can, in and of themselves, become quite detailed and lengthy. Nonetheless, generally speaking, they are helpful and usually economically advisable for all parties.

If it is apparent from the inception that the accident involves highly technical areas of specialized knowledge, it is often advisable, if not absolutely necessary, to engage at an early date a specialized expert to guide the preliminary investigation of the case as well as to sit with counsel during depositions to aid him in examination of other expert witnesses in a particular field or specialty. While this can be an expensive aid to the attorney, it may very well pay dividends in the long run for a case of large potential damages. Often the defendant's counsel has available to him from his own client's staff these type of experts which can guide him in early stages of the litigation. At some point before trial, it may become advisable to engage an outside consultant expert to supplement the defendant organization's own staff experts.

## II. VENUE

Except for removing to federal court cases filed in state courts, the defendant ordinarily has no great control over where the case will be tried since this decision has largely been determined by the plaintiff's counsel. However, the multidistrict panel is available which provides for consolidation of discovery and pre-trial in multidistrict litigation.<sup>2</sup> This relatively new provision, however, has met some criticism of prolonging rather than streamlining discovery in some instances and causing increased costs to litigants rather than allowing more efficient disposition of cases.

The United States Code further provides for transfers to any other district where the case might have been brought.<sup>3</sup>

Note should be made of the proposed Tydings Aviation Bill providing for exclusive federal court jurisdiction of certain aviation accidents and seeking to create a new body of federal aviation law.<sup>4</sup> This proposed legis-

<sup>2</sup> 28 U.S.C. § 1407 (1964).

<sup>3</sup> 28 U.S.C. § 1404 (1964).

<sup>4</sup> Tydings Bill S. 961, 89 Cong., 1st Sess. (1969).

lation is designed to fill in the proceedings where present provisions<sup>5</sup> stop, in that it would provide for consolidation of all actions arising from a common aviation disaster from the beginning of multiple litigation until a final determination. Again, this proposal has been met with considerable opposition with the contention that it would delay individual cases and cause more confusion than experienced with present judicial machinery.

A strong position can be presented on the contention that economics will solve many of the problems imagined by the authors of this type of proposed legislation since the various parties will tend to work out their own cooperation because they cannot afford to repeat expensive depositions and other discovery proceedings.

### III. TRIAL

One of the basic problems where there are multiple defendants is to determine whether the defendants are going to assert a common front in opposition to the plaintiffs or whether they are going to exert efforts to absolve themselves from liability by attempting to prove responsibility on the part of one or more of the other defendants. This decision needs to be formulated very early in the litigation.

In recent years it has become more common to find the United States becoming a defendant since so many aviation activities involve the weather bureau, en route traffic controllers, tower controllers, certification of aircraft and the like. United States involvement creates special problems on occasion because of the prohibition against developing opinion testimony from government employees on the theory that the government should not be required to furnish experts to private litigants. For example, the question arose in *Creasy v. United States*<sup>6</sup> wherein the graph plotting of the indicated altitude from the flight recorder was introduced in evidence. Since this information is a very sophisticated evaluation of data received from the instrumentation, the question arose as to whether this interpretation of facts contained in the NTSB reports was fact or opinion. The courts seem to conclude that opinion testimony should be excluded only when it undertakes to determine the probable cause of the accident or the negligence of a defendant.

Problems can also arise when interrogating the government traffic controller concerning his direction of the aircraft which suffered a crash allegedly caused by that controller's own negligence. Should this witness be required to answer opinion testimony as to what is considered good practice among traffic controllers in handling similar situations?

While the reports of participants working on various investigation teams of the NTSB are prohibited from admission into evidence, the taking of depositions of these government employees to develop vital factual testimony, notwithstanding the prohibition against asking them for opinion evidence, is allowed. The problem arises as to the fine line that often is

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<sup>5</sup> 28 U.S.C. §§ 1407, 1404(a) (1964).

<sup>6</sup> 11 Av. Cas. 17,156 (5th Cir. 1969).

encountered between what is factual and what is opinion testimony.

In the case of airline accidents the radio communications as well as conversations within the cockpit are preserved by a recorder which is housed in a crash resistant container, thus making it often available from the wreckage in a usable form. The admissibility of such evidence can rarely be seriously contested as long as the tape recording is understandable. When, due to extraneous noise, the contents of such taped conversations are in dispute, the use of experts may become necessary with refined equipment for interpreting what was actually said by the human voice, as well as other possibly important sounds in the cockpit area, such as outside noises, warning signals and other electronic devices. The cockpit voice recorder, when coupled with the information contained on the flight recorder, often furnishes invaluable information to reconstruct what took place shortly before the crash.<sup>7</sup>

#### IV. COLLATERAL ESTOPPEL

Always present in multiple litigation which is not consolidated is the problem of the effect on cases pending in one jurisdiction which comes as a result of trial to judgment of another case elsewhere, which arose from the same accident.

This problem arose in *Hart v. American Airlines*,<sup>8</sup> where the family of one deceased passenger in New York sought to employ the device of a summary judgment proceeding to adjudicate liability as a matter of law, based upon a previous case of different plaintiffs that had been tried in Texas. While several proceedings were attempted, it appears to have been finally successful on the part of one plaintiff, although this matter is still on appeal. The basis for the offensive use of collateral estoppel stemmed largely from the New York case of *DeWitt v. Hall*,<sup>9</sup> in which this device was successfully used by the plaintiff. Thus, defense counsel must be always mindful of the effect that trial of current litigation might have on other existing or potential cases in other jurisdictions. *Hart* seeks to lay to rest the "doctrine of mutuality" as "a dead letter" in New York, although other states still preserve the rule that there must be an identity of parties to employ collateral estoppel. It would be interesting to see what the New York courts would do in a similar situation if the defendant airline had prevailed in the first passenger case—or if two cases were tried in other jurisdictions in which the plaintiff was successful in one and the defendant escaped liability in the other.

#### V. CONCLUSION

These, then, are a few of the practical considerations in this type of litigation. Perhaps they illustrate only that the aviation trial lawyer needs

<sup>7</sup> On admissibility of cockpit voice recordings, see *Schyler v. United Air Lines*, 94 F. Supp. 472 (M.D. Pa. 1950); *Leroy v. Sabena Belgian World Airlines*, 344 F.2d 266 (2d Cir. 1964).

<sup>8</sup> 10 Av. Cas. 17,894, 297 N.Y. Supp. 2d 587 (1969), see also 11 Av. Cas. 17,309 (1969).

<sup>9</sup> 225 N.E.2d 195 (1967).

to summon up his best ingenuity and energy to meet head-on the changing complexion and posture which seem to have a way of changing more quickly in this type of lawsuit than in more conventional litigation.