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Recent Decisions

RECENT DECISIONS

Admiralty — Wrongful Death — Comparative Negligence

Two single-engine aircraft collided over the Gulf of Mexico, killing both pilots. The accident occurred within the territorial waters of Louisiana, while the pilots were engaged in spotting schools of menhaden for their respective employers' fishing vessels. The representatives of each estate filed a complaint in federal court, seeking damages for wrongful death under the Louisiana wrongful death statute against the decedents' respective employers. The district court determined that the pilots were equally responsible for the accident and therefore declined recovery to both estates on the ground that under Louisiana law contributory negligence was a complete bar to recovery. *Held, reversed and remanded*: A cause of action for wrongful death lies under the general maritime law, which is independent of adjacent state law. Consequently, the amount of recoverable damages is determined by the maritime rule of comparative negligence. *Hornsby v. The Fishmeal Co.*, — F.2d —, 11 Av. Cas. 17,695 (5th Cir. 1970).

Prior to the United States Supreme Court decision of *Moragne v. States Marine Lines, Inc.*,[1] recovery for wrongful death was not recognized under the maritime law apart from statute.[2] Thus, if tortious death occurred within the state's territorial waters, a federal court sitting in admiralty could only grant recovery if the action was allowed by state statute, there being no federal statute applicable.[3] Moreover, state substantive provisions, as provided for in the statutory text or as interpreted by the state courts, controlled the action.[4] As a result, contributory negligence was a complete bar to recovery for maritime death in most jurisdictions.[5] The recent decision of *Moragne* overruled the proprosition that the maritime law did not provide a right of action for wrongful death within state's waters, but left open the question concerning the amount of recovery when the decedent was found negligent.[6]

In the instant case Chief Judge Brown, writing for the Fifth Circuit,

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[1] 398 U.S. 375 (1970). Noted, this issue at 745.

[2] The Harrisburg, 119 U.S. 199 (1886); The Tungus v. Skovgaard, 358 U.S. 588 (1959); *see generally* Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 TUL. L. REV. 386 (1942).

[3] The Tungus v. Skovgaard, 358 U.S. 588 (1959). The Death on the High Seas Act, 46 U.S.C. § 766 (1964), applies only when death occurs beyond the state's three-mile limit. The Jones Act, 46 U.S.C. § 761 (1964), applies only to seamen working on board ship.

[4] The Tungus v. Skovgaard, 358 U.S. 588 (1959).

[5] *E.g.*, Neipert v. Cleveland Elec. Illuminating Co., 241 F.2d 916 (6th Cir. 1957), *cert. denied*, 354 U.S. 909 (1957); Curtis v. A. Garcia Y Cia., Ltda., 241 F.2d 30 (3d Cir. 1957). *Contra*, Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959), *cert. denied*, 361 U.S. 883 (1959); Halecki v. United Pilots Ass'n, 251 F.2d 708 (2d Cir. 1958), *rev'd on other grounds*, 358 U.S. 613 (1959). *See generally* 45 VA. L. REV. 1222 (1959).

[6] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 378 (1970).

cited no authority for the court's holding other than in light of *Moragne* "the traditional admiralty comparative negligence doctrine is applicable."[7] While this conclusion may very well be correct, the present case is questionable authority for that proposition. For example, there is authority for a contrary conclusion, as some courts have felt that the limitations on actions is within the special competence of the state, even though the remedy is provided by federal law.[8] Although the Supreme Court indicated in *Moragne* that it would not agree when faced with the question, this is mere dicta; the Court expressly declined to decide the issue until it was properly before it.[9] More reasoned authority is therefore felt to be necessary for a conclusion that the maritime rule of comparative negligence is applicable for wrongful death occurring within the state's territorial waters than is provided in the instant case.

L.G.A.

Aircraft Insurance Coverage — Vandalism — All Risk Coverage

This was an action to recover damages under an insurance policy covering ". . . all risks . . . while the aircraft is not in flight . . ."[1] The respondent's airplane was vandalized by an unknown person who broke into the hanger and poured grease into the plane's fuel tank. While the plane was in flight, the grease mixed with the fuel and entered the fuel line causing the engine to fail. This failure led to a forced landing which resulted in damage to the aircraft. The policy in question provided for: "All risks of physical loss of or damage to the aircraft sustained while the aircraft is not in flight and not the result of fire or explosion following crash or collision while the aircraft was in flight."[2] Because the damage resulted from vandalism to the aircraft while it was on the ground, the trial court held that the loss was covered as a matter of law by the express wording of the policy. Defendant appealed on the theory that the damage to the plane occurred while the craft was in flight rather than while it was on the ground.[3] *Held, affirmed*: Although damages caused by the vandalism do not appear until the plane is in flight, the loss is within the insurance coverage providing for risk of loss or damage sustained while the aircraft is not in flight. *Bryant v. Continental Insurance Company*, — P.2d — 11 Av. Cas. 17,503 (Wash. Ct. App., March 9, 1970).

The words "all risks" in the policy were held by the court to cover any loss other than a wilful or fraudulent act of the insured. Utilizing this

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7. F.2d at

8 *See* Neipert v. Cleveland Elec. Illuminating Co., 241 F.2d 916 (6th Cir. 1957).

9 Moragne v. States Marine Lines, Inc., 398 U.S. 375, 378 (1970).

1 ___ P.2d ___, 11 Av. Cas. 17,503 (Wash. Ct. App., March 9, 1970).

2 *Id.*

3 *Id.* Defendant's policy defined "flight" as: "the time commencing with the actual take off of the aircraft and continuing thereafter until it has completed its landing run."

broad definition, the court reasoned that the risk of loss was sustained when the plane was vandalized in its hanger. The potential for damage arose at the instant the grease was poured into the fuel tank. The damage did not need to be manifest while the plane was on the ground, but the court did indicate that the origin of the chain of causation was a critical factor and must occur while the plane is not in flight.

R.R.C.

Passengers — Personal Injuries — Assumption of Risk

This was an action for personal injuries to plaintiff-daughter and for reimbursement of medical expenses incurred by plaintiff-father when the fractured ankle of plaintiff-daughter was allegedly aggravated by the breach of contract and negligence of the defendant, KLM Royal Dutch Airlines. The daughter had previously fractured her ankle in a railroad station in Venice, Italy. The father had arranged for the defendant to transport the daughter to the airport in an ambulance and to provide her with nine seats on the flight to New York so that she could keep her injured ankle elevated. The daughter was driven to the airport in a limousine and was unable to elevate her foot. Upon arrival at the airport, she was informed that there would be a two hour delay in departure. At her request, the defendant booked her on an earlier flight, at the same time informing her that no provisions for reclining could be made on that flight. Nevertheless, she agreed to the change in booking, unaware of the previous arrangements agreed to by her father and the defendant. The jury found that the defendant was not negligent, that the defendant did breach the contract of carriage and that the daughter had assumed the risk. *Held*: A passenger who had fractured her ankle in a non-aviation accident assumes the risk of further injury when she voluntarily accepts the substitute accommodations offered by an air carrier, and such assumption of risk bars her action against the air carrier for a breach of contract. Any claim by a passenger's parent for reimbursement of medical expenses must be dependent upon the success or failure of the passenger's claim. *Barash v. KLM Royal Dutch Airlines*, — F. Supp —, 11 Av. Cas. 17,452 (E.D.N.Y. 1970).

The court's main concern was whether a finding that the daughter assumed the risk of injury was a bar to an action for breach of contract. The court reasoned that a denial of the assumption of risk defense in contractual actions while allowing the defense in negligence actions would amount to the creation of a distinction without a difference. Furthermore, actions for personal injuries, whether based on a breach of contract or negligence, are essentially attacks on the failure of the defendant to perform a duty owed to the plaintiff and differ only in the source of the duty. This difference should have no legal significance when the plaintiff has assumed the risk. The court further reasoned that the father's claim for

reimbursement should also be rejected as being dependent on the daughter's claim.

Since the facts conclusively show and the jury held that the defendant was not negligent and that the daughter had assumed the risk, this result, in regard to the daughter's cause of action, is not surprising. The reasoning behind this result and the validity of the decision in regard to the father is questionable. The cases cited in support of the decision to bar the daughter's claim all involved a *breach of warranty* in which the plaintiffs and the defendants were the principle parties to the agreement.[1] In the case at bar, the daughter was not a party to the actual contract and in fact was unaware that it had been made. The father, one of the principle parties to the contract, had assumed no risk whatsoever. Finally, the court cites two decisions in support of the decision against the father's claim. One was based on a parent's right of recovery for a child's automobile accident and was clearly contingent on the child's recovery.[2] The second denied recovery to the parents because the children had already been emancipated.[3] Neither appears to be on point with the case at bar, and it would seem that the father's cause of action would be legitimate.

A.W.E.

Air Carriers — Intrastate Regulation — State Court Jurisdiction

In February, 1968 the Texas Aeronautics Commission (Commission) issued a certificate of public conveyance and necessity to Air Southwest Company to provide intrastate scheduled commuter air service between Dallas/Ft. Worth, San Antonio and Houston. By scheduling only non-stop passage between these cities, Air Southwest proposed to serve the routes more efficiently and at a lower fare than the present carriers.

The major, incumbent, interstate carriers on the above routes, Braniff Airways, Continental Airlines, and Trans-Texas Airways, filed suit to set aside the certificate because of the absence of substantial evidence that there was a public necessity for the proposed service. The complaint also sought a temporary restraining order, a temporary injunction, and a permanent injunction prohibiting the issuance of the certificate to Air Southwest. The lower court reversed the Commission's decision.[1] The Texas Court of Civil Appeals held that there was no substantial evidence to uphold the Commission's order for the need for additional service, and no public necessity and convenience which would be necessary for the

[1] Fredenall v. Abraham & Strauss, 279 N.Y. 146, 18 N.E.2d 11 (1938); Rozey v. J.B. Colt Co., 106 App. Div. 103, 94 N.Y. Supp. 59 (1905); Bruce v. Riss, Doerr & Carroll Horse Co., 47 App. Div. 273, 62 N.Y. Supp. 96 (1900).

[2] Reilly v. Rowleigh, 245 App. Div. 190, 281 N.Y. Supp. 366 (1935).

[3] Roher v. State, 279 App. Div. 1116, 112 N.Y. Supp. 2d 603 (1952).

[1] Note, 35 J. AIR L. & COM. 663 (1969).

order to stand under the enabling act.[2] *Held, reversed*: The decision concerning where the public interest lies and what air service is best for Texas must be made by the Texas Aeronautics Commission, and the courts may interfere with the Commission's decision only if there is no reasonable support for the order in the judicial record. *Texas Aeronautics Commission v. Braniff Airways, Inc.*, 454 S.W.2d 199 (Tex. 1970).

The respondent carriers (Braniff, Continental, Trans-Texas) contended that the court need only to examine the present service which they offer to the cities in question to conclude the case in their favor, upon finding such service to be adequate. They argued that there was no need to look at the effect that the proposed service by Air Southwest would have upon passenger traffic or upon the state. The court reasoned that the statute governing the regulation of air carriers does not specifically require the Aeronautics Commission to determine that existing services are inadequate prior to the granting of a new certificate. Nevertheless, whether named in the statute or not, such adequacy of service is an important consideration in determining the need for new service. The court did not feel that "adequacy" in this context should be taken to mean bare sufficiency:

> The existing air service . . . could be inadequate even though anyone with the fare is presently able to obtain passage. If it can be said that the public need does not ordinarily require a new service where existing service is adequate it can also be said that the public need would ordinarily require that new service which will substantially improve existing serivce.[3]

The statute under which the Commission acted provides that after final determination by the Commission, any interested party may appeal to the state court for a de novo review of all facts and circumstances presented in the matter.[4] In accordance with well established precedence the court interpreted these words to mean that its responsibility was to determine if the order was reasonably supported by substantial evidence. In summarizing the "reasonable support" which it found for the Commission's order, the court stressed the poor performance of the existing carriers in schedule reliability and schedule convenience. For example, in 1967 on the Dallas/Ft. Worth-Houston route, present carriers either cancelled or were late on more than one-fourth of their scheduled flights. These schedule aberrations were more common on the southbound flights, because of weather and traffic delays in distant cities where the interstate, through-flights originated. Air Southwest, on the other hand, would be free from problems in

[2] TEX. REV. CIV. STAT. ANN. art. 46(c)-6, § 3 (1969): For the public convenience and necessity, the Commission is granted the right, power and authority to exercise economic and safety regulations over only scheduled intrastate carriers . . . . As to economic regulations promulgated, the Commission shall take into account the financial responsibility of the carrier, the public convenience and necessity for the proposed service, routes, proposed rates or charges, the effect on existing carriers, and any other factors bearing a relation thereto and pertaining to the public interest and necessity.

[3] Texas Aeronautics Commission v. Braniff Airways, Inc., 454 S.W.2d 199, 201 (Tex. 1970).

[4] TEX. REV. CIV. STAT. ANN. art. 46(c)-6, § 3 (1969): . . . [F]inal determination shall be made by the Commission and shall be evidenced by a final written order granting or denying such certificate in whole or in part. Any interested party, affected by the Commission's final order to the state courts shall be entitled to a trial de novo on all facts and circumstances involved in such matter.

other states and would have only Texas weather to contend with.

The court was also impressed with the proposed operational planning and financial responsibility exhibited by Air Southwest, and determined that the record did reasonably support the order of the Texas Aeronautics Commission. Thus, the order was entitled to be given full effect.

J.A.K.

Insurance — Direct Action —Absence of "Direct Action" Statute

The plaintiffs, residents of New York, sustained injuries as a result of an accident which occurred at the Miami International Airport. The plaintiffs charged the defendant owner of the airport and the defendant operator of the airport with negligent conduct in their maintenance and operation of the airport. The defendant insurer issued a policy of liability insurance to the owner and operator of the airport, covering claims or actions for personal injuries. The plaintiffs, in accordance with the procedures set down in *Seider v. Roth*,[1] obtained in rem jurisdiction in the State of New York over the defendants owner and operator of the airport, under an order of attachment and a levy upon the debt arising under the policy of insurance issued by the insurer. The action was then removed to federal district court on the basis of diversity of citizenship. *Held*: Direct action against the insurer by New York residents, arising from an out-of-state accident, can be maintained where direct actions have been supported in both states on the basis of public policy, despite the fact that neither state has a "direct action" statute. *Barrios v. Dade County of the State of Florida*, 310 F. Supp. 744 (S.D.N.Y. 1970).

In the *Barrios* case, the United States District Court for the Southern District of New York was called upon to forecast whether New York would be hostile to the maintenance of a direct action by the injured party against the insurer. The court pointed out that such a direct action was favored in *Seider v. Roth*,[2] and the cases decided under it. The court relied on *Oltrash v. Aetna Ins. Co.*[3] The New York court, under its conflict of laws rules, applied a Puerto Rico "direct action" statute which gave the injured person a substantive right to sue the insurer directly. Although New York had no "direct action" statute, the New York Court of Appeals held that such a suit was not against the public policy of New York, and the action was allowed. The court in the instant case held that New York was receptive to direct actions by its residents against insurers, arising from out-of-state accidents.

Although the maintenance of a direct action in this case was dependent upon New York's receptiveness and public policy, the action was also

[1] Seider v. Roth, 269 N.Y.S.2d 99, 216 N.E.2d 312 (N.Y. App. 1966).
[2] *Id.*
[3] Oltarsh v. Aetna Ins. Co., 256 N.Y.S.2d 577, 204 N.E.2d 622 (N.Y. App. 1965).

dependent upon Florida's authorization of such a direct action. Overruling a series of prior decisions, the Supreme Court of Florida, in *Shingleton v. Bussey*,[4] permitted a direct action against the insurer despite the absence of a "direct action" statute. The Florida court stated that, as a product of the prevailing public policy of Florida, a direct action would inure to a third-party beneficiary against an insurer in automobile liability insurance cases.[5]

The court, in the instant case, reasoned that Florida, to the same extent as Puerto Rico, had created a "separate and distinct right of action against the [insurer?] where no such right had previously evisted and [had] thus affected a radical change in the rights accorded injured persons."[6] The court stated further that the fact that the right to sue the insurer directly was created judicially, rather than legislatively, did not detract from the force of the right.

G.N.O.

Death on the High Seas Act — Damages — Computation of Pecuniary Loss

On 29 December 1965, Theodore H. Hart and two minor children, Christina M. Hart and Kathryn Cecile Dugas, left South Caicos Island for San Juan, Puerto Rico on board a Piper Commanche piloted by Mr. Hart. The pilot and passengers were never heard from or seen again, and the airplane was never found. Co-plaintiff Betty R. Guisinger, administrator of the estate of Christina M. Hart, and co-plaintiff Xavier Maxime Dugas, administrator of the estate of Kathryn Cecile Dugas, alleged that the negligent operation of the aircraft by Theodore H. Hart caused the deaths of the plaintiffs' decedents. The defendants moved for a judgment on the pleadings, and Judge Kraft[1] ruled that the plaintiffs' right to recover in admiralty under the Death on the High Seas Act[2] was not the exclusive basis for recovery in this case. Since both the plaintiffs and the defendants admitted that the aircraft crashed in international waters, the court found that the survival statute of the state where both defendants resided[3] could

[4] Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

[5] In *Shingleton*, the Florida Supreme Court limited its holding to direct actions against automobile liability insurers, whereas the instant case involves a general liability insurer. The federal court, however, felt that the reasoning of the Florida court in *Shingleton* was sufficiently generalized to permit a direct action in the present context. It should also be noted that the Florida Supreme Court, on July 1, 1970, upheld the federal court's interpretation of *Shingleton*. In Beta Eta House Corp., Inc. v. Gregory, 39 U.S.L.W. 2061 (1970), the court held that the principals expressed in *Shingleton* were applicable not only to automobile liability insurance, but also to other forms of liability insurance.

[6] Barrios v. Dade County of State of Florida, 310 F. Supp. 744, 748 (S.D.N.Y. 1970). The court in *Barrios* misquoted the passage from *Oltarsh* (see *supra*, note 3, at page 624). The passage should read "a separate and distinct right of action against the *insurer* . . . " (emphasis added).

[1] In this case, Judge Kraft sat as a judge of co-ordinate jurisdiction, see note 9.

[2] Death On The High Seas By Wrongful Act, 46 U.S.C.A. §§ 761, 762 (1958).

[3] Pennsylvania Survival Act, 20 PA. STAT. ANN. § 320.601 (1968).

supplement the amount recoverable under the admiralty wrongful death provision.[4] Thus, upon proof of liability of the defendants, the plaintiffs would be entitled to recover an award in addition to the damages collectible as "pecuniary loss" under the Death on the High Seas Act. After Judge Kraft's opinion, jurisdiction was retained on the ground that the actions arose in admiralty under the Death on the High Seas Act. *Held*: Under the Death on the High Seas Act, the pecuniary loss to parents for the deaths of minor children in an aircraft accident is measured by the probable future voluntary contributions to the parents of the minor decedents as they reach majority, rather than by the loss of society and companionship or by the parents' loss of investment in the minors. *Dugas v. National Aircraft Corp.*, 310 F. Supp. 21 (E.D. Pa., 1970).

In the *Dugas* case, the court dealt primarily with the question of which components, or factors, could be taken into consideration under the statutory measure of "pecuniary loss" provided by the Death on the High Seas Act. The first factor considered was the defendants' assertion that the court was not permitted to award damages for the period after the deceased minor would have reached majority. The court, however, rejected the defendants' contention, citing numerous instances where parents were allowed substantial awards for the deaths of both minor and adult children.

Upon consideration of the scope of damages embraced within the term "pecuniary loss", the court was faced with two component theories; first, the loss of investment theory, and secondly, the loss of the child's society and companionship theory. Under the loss of investment theory, the "pecuniary loss" included the expenditures made in rearing the child. With regard to this theory, the court observed that, "Under modern economic and social conditions, children are probably net economic liabilities, and it is unlikely that jurors actually apply the loss of wages and services standards given their presumed knowledge of economic realities."[5]

As to the applicability of the loss of the child's society and companionship theory, the court stated that ". . . it has long been the law that pecuniary loss does not include the loss of the decedents' society and companionship under the . . . Death on the High Seas Act."[6] After rejecting these component theories, the court adopted the measure of damages applied by Judge Kalodner in *Wade v. Ragola*,[7] considering only ". . . the probable future voluntary contributions by the two minor decedents to their respective parents once each girl had reached majority."[8] In applying this measure of damages to the instant case, the court considered the health and financial conditions of the statutory beneficiaries. In particular, the court considered the family size; the health of the family members and more particularly, the health of the sole provider; the status of the decedent inthe family; the family source of income; and the decedent's prospects

[4] 46 U.S.C.A. §§ 761, 762 (1958).
[5] Dugas v. National Aircraft Corporation, 310 F. Supp. 21, 28 (E.D. Pa. 1970).
[6] *Id.* at 28.
[7] Wade v. Ragola, 270 F.2d 280, 285 (3d Cir. 1959).
[8] Dugas *supra*, note 5, at 29.

in the family; the family source of income; and the decedent's prospects for future financial contribution.

In view of the court's finding that Judge Kraft's ruling was the law of the case,[9] upon proof of liability, the plaintiffs were allowed to recover "the present worth of the excess of decedents' future earnings over the cost of his [their] maintenance,"[10] for the benefit of the decedents' estates under the Pennsylvania Survival Act.[11]

As a matter of law, the court concluded that James Hart, administrator of the estate of Theodore H. Hart was liable to the co-plaintiffs and the co-plaintiffs were allowed to recover under both the Pennsylvania Survival Act and the Death on the High Seas Act.

G.N.O.

Air Carriers — Duty to Passengers — Safe Passage To Terminal Building

Plaintiff accompanied her mother, a litter patient, on a chartered private plane owned by defendant, Lane Aviation Corp., to Cleveland. Upon landing, plaintiff attempted to walk a distance of two blocks from the plane to the terminal building. The surface underfoot was covered with ice and snow and, after having walked a few feet, she slipped and fell, injuring her right hand and arm. During this brief walk she was not accompanied by any representative of the defendant, but rather was holding on to the arm of her brother, an indication that she had observed and was aware of the hazardous condition which existed. This passenger brought an action, claiming that the defendant had failed to provide her "the highest degree of care" with which a common carrier is charged. In the trial court, a motion for a dismissal was sustained for the defendant at the conclusion of the plaintiff's case and plaintiff appealed. *Held, affirmed*: An air carrier only owes a duty to furnish *reasonably* safe passage to and from the terminal building and does not violate this duty by allowing a passenger to walk a distance over ice and snow to the terminal building. *Morrell v. Lane Aviation Corp.*, 258 N.E.2d 250 (Ohio Ct. App. 1970).

The appellant urged that the prior case of *Homa v. Wilkes-Barre Tran-*

[9] Another issue raised in this case was whether the defendants could relitigate the question concerning the purported inapplicability of the Pennsylvania Survival Statute (see note 3) where that issue had been presented to and decided by Judge Kraft when he disposed of the defendant's motion for judgment on the pleadings. As a matter of law, the court rejected the defendants' contention that Judge Kraft's ruling was not binding. The court cited TCF Film Corp. v. Gourley, 240 F.2d 711, 713 (3d Cir. 1957) and United States v. Wheeler, 256 F.2d 745 (3d Cir. 1958) for the rule, "that judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other . . . "

[10] The court cites Frankel v. William Waring, Inc., 275 F. Supp. 320, 325 (E.D. Pa. 1967). This citation appears to be incorrect, it should read Frankel v. Willow Brook Marina, Inc., 275 F. Supp. 320, 325 (E.D. Pa. 1967).

[11] Pennsylvania Survival Act, *see* note 3, *supra*. As an additional element of damages in this case, the court awarded prejudgment interest under the Death on the High Seas Act.

sit Corp.[1] should be controlling. In *Homa*, a bus passenger had been put off a bus a good distance from its appointed stop during a sleet and hail storm and slipped and hurt herself on the ice. There the court held the driver had been negligent in failing to provide safe passage. The court in *Morrell* stated several points were distinguishable between the two cases. Buses have regular routes with definite stops and such bus stops are in the direct control of the driver. The court stated that the pilot of a plane has no particular stop to make on the runway and, generally, when the plane stops, it is the control tower, not the pilot, which decides where the stop shall be.

The duty of *highest care* owed by the carrier, applies only while the passenger is on board the plane, and does not include passage to and from the terminal.[2] The duty existing in this case was only to provide a reasonable safe means of passage to the terminal building. The court held that Lane, as a matter of law, had provided a passageway within the requirements of "reasonable care."

In deciding that Lane was not negligent, the court emphasized the fact that the plaintiff had not been forced to walk an unreasonable distance, saying that it was not ". . . inherently wrong for a person to walk even 'a quarter-mile or more.' Such distances are often walked by choice by many people with or without the advice of their physician."[3] Lane had fulfilled his duty to provide a reasonably safe passageway while still following the directions of the control tower. The basic purpose of the contract to transport the plaintiff's mother was, after all, not to bring her to a particular point on the runway, as in a bus ride, but rather to deliver her to an airport. To make such a delivery the plane could only follow the orders of the control tower as to where to stop.

The element of the plaintiff's choice also was given weight in the court's decision that, even if Lane were negligent, the plaintiff was contributorily negligent in that (1) she recognized the slippery conditions and could see them as well or better than the defendant's agent, (2) she could have requested the pilot to taxi closer and (3) she could have ridden in the ambulance with her mother. The court also held that the plaintiff assumed the risk by walking to the terminal under the adverse conditions which she knew existed.

J.B.W.

Airworthiness Certification — Negligence Misrepresentation — U. S. Liability Exempton

The purchaser of a Cessna Model 310D aircraft, contending it was not in the condition as represented, sued the vendors on the basis of fraudulent misrepresentation and breach of express and implied warranties. The de-

[1] 394 Pa. 309, 147 A.2d 377 (1959).
[2] Delta Air Lines v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952).

fendants filed a third-party complaint against the United States, alleging that in representing the conditions of the aircraft to the buyer, they relied upon a cerification of airworthiness given by an authorized Federal Aviation Administration inspector. The defendants contended that if the plane was not airworthy, the government inspector was negligent in making his inspection and certifying the craft's airworthiness. The United States filed a motion to dismiss or, in the alternative, a motion for summary judgment, contending: (1) the aircraft inspector was not a federal employee within the meaning of § 2680(h) of the Federal Tort Claims Act,[1] and any negligence on his part would therefore not bind the United States under doctrines of respondeat superior; and (2) the defendants' cause of action arose out of misrepresentation, thus exempting the United States from liability.[2] *Held, dismissed*: The defendants complaint was based upon misrepresentation, an action within the meaning of § 2680(h) of the Federal Tort Claims Act which exempts the United States from liability. *Marival, Inc. v. Planes, Inc.*, 306 F. Supp. 855 (N.D. Ga. 1969).

After rejecting the question raised by the United States' first contention as not appropriate for decision on either motion due to the barren record before it, the court granted the government's motion to dismiss, basing its decision upon § 2680(h) of the Federal Torts Claim Act which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
> (h) Any claim arising out of assault . . . *misrepresentation* . . . or interference with contract rights [Emphasis added.].

An examination by the court of the leading cases of negligence misrepresentation[3] indicated that in each case the cause of action rose directly from reliance on the negligent communication of certain erroneous facts. The crucial question in the present case was whether the third-party complaint was founded upon an allegation of negligent conduct or negligent misrepresentation.

An analysis of the complaint showed that the third-party did not complain of a direct injury to person or property resulting from the alleged negligent inspection; rather it contended that statements to the plaintiff concerning the aircraft's condition were made by the federal inspector. Thus, the negligent conduct of the inspector was purely secondary, and it was the misrepresentation of the aircraft's condition upon which refendants relied in their commercial transactions with the plaintiff. Section 2680(h) was designed to meet this type of action involving direct reliance on governmental communication of facts, rather than direct injury from negligent conduct.

P.A.W.

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[1] 62 Stat. 982, 28 U.S.C. § 2671 (1964).

[2] 62 Stat. 984, 28 U.S.C. § 2680(h) (1964).

[3] United States v. Neustadt, 366 U.S. 696 (1961); Smith v. United States, 333 F.2d 70 (10th Cir. 1964); Hall v. United States, 274 F.2d 69 (10th Cir. 1959); Jones v. United States, 207 F.2d 563 (2d Cir.), *cert. denied*, 347 U.S. 921 (1953); Western Steel Buildings, Inc. v. Adams, 286 F. Supp. 570 (D. Colo. 1968).

FAA Negligence — Proximate Cause — Contributory Negligence of the Pilot

Dr. Bintliff piloted the light, private aircraft concerned on a flight from Texarkana, Texas to San Antonio, Texas. Gill and Barlow were passengers. Dr. Bintliff had a VFR license which permitted him to fly under prescribed, clear weather conditions. Flying in a southwesterly direction toward San Antonio, Dr. Bintliff contacted FAA flight control facilities at Longview, Texas and Waco, Texas. The Waco controller was advised by the Austin, Texas FAA facility of a solid east-west weather front extending from "Liberty Hill clear on over east of Taylor . . . way east of Taylor." Waco relayed to Bintliff the information received from Austin as "numerous cells extending from Liberty Hill [eastward] *to* Taylor." Dr. Bintliff discussed with the Waco controller the proposed flight plan that would take him "just east of Taylor" and the controller replied that this route was acceptable. Following this route, Bintliff flew directly into the bad weather. Bintliff called "in the blind" for assistance, received none and finally crashed at Easterwood Airport, at College Station, Texas, while attempting to land during a violent thunderstorm. None aboard survived. The subsequent hearing resulted in a judgment against the United States under the Federal Tort Claims Act.[1] Liability was based on findings that the crash was caused by extremely hazardous weather conditions at Easterwood Airport, and that the government through negligent reporting by its FAA facilities at Waco, was responsible for placing the plane in a position of peril which was the proximate cause of the deaths. In addition, the plaintiff-wives of the deceased passengers received $120,000 in state court settlements by the estate of the pilot. *Held, affirmed in part and reversed in part*: The United States is liable for damages where negligent weather reporting by an Air Traffic Control facility is the proximate cause of the crash of an aircraft and the deaths of its occupants. *Gill v. United States*, 11 Avi. 17,585 (5th Cir. 1970).

Expert testimony revealed that the Austin-Waco message described a more extensive bad weather than did the Waco-pilot transmission. From the facts of the case, it appeared that Bintliff relied on the latter transmission and subsequently flew directly into the hazardous weather which caused the crash. The government contended that the pilot, ultimately, was responsible for the safe operation of the aircraft. The court concluded that the government had a duty to furnish accurately weather information in its possession once it had undertaken to supply such information. However, there was no finding in the lower court on the issue of whether the pilot, in talking with the Longview controller before reaching the Waco area, had received weather information which revealed bad weather over the areas ahead. Because it was not known whether Bintliff had received such weather information, the issue of the pilot's contributory negligence could not be resolved adequately. Under Texas law if the pilot

[1] 28 U.S.C. § 2671 (1964).

was a joint tortfeasor the settlement with his estate by the plaintiffs entitled the government to a reduction of the judgment against it by one-half. Thus *Gill* was reversed and remanded in part to resolve the issue of the pilot's contributory negligence.

W.R.W.