

1971

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Recommended Citation

Louis G. Davidson, *Factors Influencing Choice of Forum in Aircraft Disaster Litigation*, 37 J. AIR L. & COM. 309 (1971)

<https://scholar.smu.edu/jalc/vol37/iss3/6>

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FACTORS INFLUENCING CHOICE OF FORUM IN AIRCRAFT DISASTER LITIGATION

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I. INTRODUCTION

WHEN an aircraft disaster involves parties or events touching more than one state, some of the primary considerations, both in time and importance, to be considered involve the choice of the forum. In addition to the myriad of customary problems of venue, the attorney responsible for claims resulting from an aircraft crash must carefully analyze the facts of the case along with the law of several possible forum states in order to select the forum most likely to afford the survivors, both passengers and heirs, the greatest opportunity to receive just compensation. By one choice of forum the plaintiff may bring the "most significant contacts" rule of conflict of laws into operation rather than *lex loci delicti*, thereby choosing a rule of law which could conceivably be decisive of the final outcome of the litigation. Other factors which may influence the choice of the forum include: (1) the possible application of strict liability or *res ipsa loquitur*; (2) the possible application of a guest statute; and (3) the possible vicarious liability of the owner, such as a fixed base operator who, although physically absent from the airplane, may be deemed to be operating it. Consideration must also be given to the scope of discovery available in one forum as compared with another. Adjectival law as well as substantive law problems may enter into the decision, particularly in reference to what evidence is admissible, what presumptions arise, whether presumptions persist despite proof to the contrary and finally go to the jury with the opposing evidence or whether the "bursting bubble" view prevails.

When suit is filed in a federal district court, that court under *Erie R.R. Co. v. Tompkins*¹ will ordinarily apply the substantive law of the state in which it sits. When the action is filed in a federal court and then

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¹ 304 U.S. 64 (1938). See also *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Fidelity Union Co. v. Field*, 311 U.S. 169 (1940).

transferred under section 1407² or section 1404(a),³ because it is part of multi-district litigation under *Van Dusen v. Barrack*,⁴ the court will apply the state law of the district in which the action was originally commenced.

At this early juncture, mention should be made of the common objection that these factors tend to promote forum shopping. A certain element of choice is available, at least to the extent that there are several appropriate states in which the action can be brought. However, to charge forum shopping is to challenge the very nature of the federal system which creates sovereign states, each having diverse rules of substantive tort law. It has long been settled that claimants are entitled to select their forum, within rules, and bring an action wherever the defendants can be found and served. Therefore, in the *Erie* sense there is no forum shopping present when an injured claimant chooses to file his claim in a jurisdiction providing favorable rules of law.⁵

² 28 U.S.C. § 1407(a) (1970): Multidistrict litigation.

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, that the panel may separate any claim, cross-claim, counter-claim, or third party claim and remand any of such claims before the remainder of the action is remanded.

³ 28 U.S.C. § 1404(a) (1970): Change of Venue.

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

⁴ 376 U.S. 612 (1964). The law of the original forum state in which plaintiff filed suit would be applied even though the case was subsequently transferred to a district with conflicting state law.

⁵ Concerning plaintiff's ability to select the most favorable forum, the Illinois Supreme Court has observed:

'There is nothing which requires a plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner. There is nothing to restrain use of that privilege as all choices of tribunal are commonly used by all plaintiffs to get away from judges who are considered to be unsympathetic and to get before those who are considered more favorable; to get away from juries thought to be small-minded in the matter of verdicts and to get to those thought to be generous; to escape courts whose procedures make the going easy.' [Quoting Justice Robert Jackson, concurring in *Miles v. Illinois Central R.R.*, 315 U.S. 698, 705 (1942)] If it is 'shopping' for a plaintiff to bring a suit in a great metropolis where a large verdict is anticipated, why is it not also 'shopping' for a defendant to attempt to have the case dismissed on the ground that it should have been brought in a small community where the defendant anticipates a smaller verdict would result. This is in accord with the reasoning of Judge Hand in his concurring opinion in *Ford Motor Co. v. Ryan*, 182 F.2d 329, (an anti-trust suit under Title 15 of the U.S. Code, which

An aircraft crash case, more than other types of tort cases, raises numerous choice-influencing considerations before the lawsuit is filed. These considerations may extend to rules of pleading and proof which may differ from state to state, thereby affording claimants a better opportunity for success in one state than in another. Usually, however, these rules are the same for most states (such as application of evidentiary or discovery rules) or are insignificant. Nevertheless, several significant considerations remain and a mistake as to any one could disastrously preclude any recovery by the claimant. This article will discuss these considerations.

II. THE AVAILABILITY OF RES IPSA LOQUITUR

The selection of the most appropriate forum may well have a decisive bearing on the prospect of ultimate recovery as well as the amount of recovery. Because an air crash catastrophically causes destruction of the aircraft and loss of life, proof of the cause of the crash, if possible at all, often depends on circumstantial evidence. In this situation one forum may apply *res ipsa loquitur* and consider the case as presenting a question of fact for a jury, while another forum may hold the case insufficient to go to the jury. Obviously the difference could be decisive.

The federal forum is available if there is diversity of citizenship⁶ or if the claim is based upon the Federal Tort Claims Act,⁷ in which case it must be brought in the federal court. If the action is based upon the Death on the High Seas Act,⁸ it will be brought in admiralty in the fed-

law contains a venue provision comparable to 6 of the F.E.L.A.), where he said (p. 332): 'I wish to put my vote solely upon the ground that 15 of Title 15 gives to plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums.'

Cotton v. Louisville & N.R.R., 14 Ill.2d 144, 148; 152 N.E. 2d 385, 389(1958).

⁶ 28 U.S.C. § 1332(a) (1970): Diversity of citizenship; amount in controversy; costs.

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (a) citizens of different States;
- (b) citizens of a State, and foreign states or citizens or subjects thereof;
- and
- (c) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

⁷ 28 U.S.C. § 1346(b) (1970): United States as defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accord with the law of the place where the act or omission occurred.

⁸ 46 U.S.C. § 761 (1970): Right of action; where and by whom brought
Whenever the death of a person shall be caused by wrongful act,

eral court. However, in many instances there is no adequate ground for federal jurisdiction, and the claimant is limited to the state court forum. In whatever forum he proceeds, the claimant may wish to rely on the doctrine of *res ipsa loquitur*. Moreover, several jurisdictions allow the use of doctrine for the simple reason that specific acts of negligence often may not be provable.

One of the earliest cases to apply *res ipsa loquitur* couched the decision in terms of common carriers. In *Smith v. Pennsylvania Central Airlines Corp.*⁹ a commercial airline flew into a mountain in West Virginia while en route from Pittsburgh to Washington, D.C. A complaint was filed in federal court charging specific negligence but also relied upon the doctrine of *res ipsa loquitur*. The court held that it was bound to follow the laws of the state in which the accident occurred and, in the absence of any state law in point, would attempt to ascertain the applicable law with the aid of such persuasive authorities as "are available." The court held that the doctrine would be applicable to accidents involving airplanes operating as common carriers, notwithstanding contentions that the cause of this airplane accident may not be ascertainable. The defense argument that, since the CAB conducts an inquiry into every aircraft disaster and embodies its findings in a public report, the plaintiff and the defendant are in parity in respect to access to information as to the causes of the catastrophe was rejected. Noting that the majority of reported cases had concluded that *res ipsa loquitur* is applicable to accidents occurring on airplanes operating as common carriers, the court further observed that none of the cases in which the courts had declined to apply the doctrine of *res ipsa loquitur* to airplane accidents, with the exception of *Smith v. Whitley*,¹⁰ involved a common carrier; *i.e.*, in each instance the plane was either a private plane or on a test flight. More recently, in *Cox v. Northwest Airlines, Inc.*,¹¹ where a Douglas DC-7C on a flight from McChord Air Force Base near Seattle, Washington, to Elmendorf, A.F.B., Alaska, crashed into the ocean, the court upheld the application of *res ipsa loquitur* by the trial court where there was no specific evidence as to the cause of the crash. About 1,500 pounds of the wreckage identified as being from the aircraft, including life vests still encased in their plastic containers and extremely deformed seat

neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

⁹ 76 F. Supp. 940 (D.D.C. 1948) (applying law of West Virginia).

¹⁰ 223 N.C. 534, 27 S.E.2d 442 (1943).

¹¹ 379 F.2d 893 (7th Cir. 1967).

frames, was recovered. None of the bodies of the crew or passengers were recovered. The application of *res ipsa loquitur* was upheld on the theory that the instrumentality which produced the death was under the exclusive control and management of the defendant airline and that the occurrence in question was such as does not ordinarily occur in the absence of negligence. There was no possible contributing conduct by the decedent Cox. The reviewing court said the application of *res ipsa loquitur* was warranted though not compelled.¹² The cogent opinion in *Des Marais v. Beckman*¹³ affirmed a District Court award of damages by application of *res ipsa loquitur*. The court expressly held that where there is "equality of ignorance," the rule precluding application of the doctrine when parties possess equal knowledge of the cause is inapplicable.

In *Blumenthal v. United States*¹⁴ a civilian lost his life after bailing out of a disabled military aircraft over international waters between Korea and Japan. The bail-out of all passengers had followed the loss of one engine of the airplane. The trial court held that *res ipsa loquitur* was applicable because the respondent failed to explain satisfactorily either the malfunction of the propeller or the loss of the engine. The court of appeals expressed the view that the aircraft was under the exclusive management and control of the respondent and held that the facts and circumstances surrounding the occurrence justified application of the rules of *res ipsa loquitur*.¹⁵ After *Southeastern Aviation, Inc. v. Hurd*,¹⁶ there is little question that the courts generally follow the view that an aircraft crash is not an ordinary occurrence. In this instance the court reasoned that in the last decade the progress of aviation has been such that it has now become an ordinary mode of transportation that is as safe or safer than other modes of transportation. This premise leads to the court's conclusion that airplane accidents do not happen in the ordinary course of things if those who have control use proper care. Therefore, the court indicated the doctrine of *res ipsa loquitur* is applicable to aviation accidents.¹⁷

Where there are dual controls in private aircraft cases, there may be doubt whether the court will apply *res ipsa loquitur* in the absence of clear and convincing evidence that the defendant was in control of the

¹² See also *Sweeney v. Erving*, 228 U.S. 233 (1913); *Haasman v. Pacific, Alaska Air Express*, 100 F. Supp. 1 (D. Alaska, 1951); *Des Marais v. Beckman*, 198 F.2d 550 (9th Cir. 1952).

¹³ 198 F.2d 550 (9th Cir. 1952). See *Haasman v. Pacific Alaska Air Express*, 100 F. Supp. 1 (D. Alaska, 1951).

¹⁴ 306 F.2d 16 (3d Cir. 1962). The initial action was brought in admiralty under the Death on the High Seas Act, 46 U.S.C. § 761 (1970).

¹⁵ See *Wiegand v. Pennsylvania R.R.*, 276 F.2d 281 (3d Cir. 1959).

¹⁶ 209 Tenn. 639, 355 S.W.2d 436 (1962).

¹⁷ See generally Annot., 6 A.L.R.2d 528 (1949).

aircraft.¹⁸ Where the owner is a licensed pilot, C.F.R. 60.2 provides that the pilot in command of the aircraft shall be directly responsible for, and have final authority over, the aircraft's operation.¹⁹ However, the fact of dual controls did not prevent application of the doctrine of *res ipsa loquitur* in *Vollins v. Stroh*,²⁰ where the owner of the plane was aboard and had the right to control the flight. When all mechanical failures can be eliminated as possible causes by the CAB examination, courts should and do hold that a reasonable inference could arise that human fault was the cause and recovery could be based upon *res ipsa loquitur*. In *Snethen v. Gomez*,²¹ a somewhat backward looking case, proof was offered for the purpose of rebutting any inferences which might reasonably arise from the facts of the occurrence. When the plaintiff offered proof of specific acts of negligence, the court held that the doctrine of *res ipsa loquitur* was no longer available because evidence of specific negligence had been introduced. Many courts following the modern trend will permit the case to go to the jury both on *res ipsa loquitur* and with proof of specific negligence so that the jury can determine whether it believes specific negligence was proved.²² If it is concluded that specific negligence was not proved, the jury may then properly rest its verdict upon the doctrine of *res ipsa loquitur*. It is regrettable that some courts still hold that once specific negligence is proved the plaintiff must make an election as to whether he will rely upon either specific negligence or *res ipsa loquitur*, but that he cannot rely upon both. The danger and unfairness to the claimant under that view lurks in the fact that the jury may not believe the proof of specific negligence. Any rule which deters a party from proving the truth is not a good rule. For that reason one must favor the view which permits the claimant who has sufficient evidence of specific negligence to go to the jury to rely both on specific negligence and *res ipsa loquitur* when the facts so warrant.

For example, in *Farrell v. Topp*,²³ applying Arkansas law, the court moved away from the older cases holding that *res ipsa loquitur* could not be applied to impose liability in a dual control situation. The owner of the airplane was at the controls, with the decedent passenger in the other seat, equally in position to operate the plane. The court held that

¹⁸ L. KREINDLER, AVIATION ACCIDENT LAW 178 (1963), expressing the author's view that the better, more recent cases are more liberal in permitting recovery in dual control cases.

¹⁹ See *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108 N.W.2d 428 (1961).

²⁰ 426 S.W.2d 681 (Mo. App. 1968).

²¹ 432 P.2d 914 (Ariz. App. 1967).

²² See, e.g., *Di Mare v. Cresci*, 58 Cal.2d 292, 373 P.2d 860 (1962); *Loketch v. Capital Transit Co.*, 248 F.2d 609 (D.C. Cir. 1957); *Abbott v. Page Airways*, 23 N.Y.2d 502, 245 N.E.2d 388 (1969); Annot., 33 A.L.R.2d 791 (1954).

²³ 386 S.W.2d 33 (Mo. 1964).

the evidence justified a finding that the owner was operating the airplane when it crashed.

*Lighenburger v. Gordon*²⁴ involved a variety of questions of particular interest in a light airplane crash case in which all occupants of the airplane died. The owner of the airplane and the bodies of three other passengers were recovered from the burned aircraft after the crash. The owner's body was in the left front seat, the one usually occupied by the pilot. He was the only person aboard certified as a pilot. The verdict for the defendant was reversed and remanded for a new trial because the trial court erred in giving an instruction and in excluding the opinion evidence of investigators who examined the aircraft following the crash. The airplane had been about to land when it suddenly banked to the left, crashed, and burned. Issues of disorientation were argued, and there was a dispute as to conditions of visibility. The reviewing court held that the trial court erred in excluding opinion evidence that there had not been failure of a critical component of the aircraft prior to the crash and also erred in excluding the testimony of CAB investigators that the components of the airplane examined by them following the crash were capable of normal operations prior to the impact. Although this opinion was held to be admissible, the reviewing court indicated that more acceptable terminology, in response to a proper question, would have been "the examination of the wreckage showed no evidence of operational stress" or "that the damage in every instance could be attributed to impact or fire."²⁵ The court also noted that it did not consider whether the statement of opinion violated the provisions of the Civil Aeronautics Act, 49 U.S.C. section 1441(e)²⁶ because the objection was not on that ground. The testimony contained no opinions or conclusions as to the cause of the accident. The special concurring opinion which disagreed with the reasons given by the majority for reversal and remand expressed the view that the statements in question were more nearly an opinion than a statement of fact and therefore barred by the Act despite the fact that such an objection apparently had not been raised by the defendant in the trial court.

It would be a rare case in which the plaintiff could not discover any cause of the crash. If physical examination of debris reveals some negligence, it is an essential element of the truth-seeking process that such evidence be shown to a jury. However, just as it is rare that no evidence of negligence can be found, often only the most minimal proof of negli-

²⁴ 407 P.2d 728 (1965).

²⁵ *Id.* at 730.

²⁶ 49 U.S.C. § 1441(e) (1970): Use of records and reports as evidence

No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

gence can be made from charred or destroyed debris. When this is so, no plaintiff should be precluded from offering this small quantum of evidence and also calling on the jury to rely on reasonable inferences of negligence unless rebutted by the defense. If, therefore, the plaintiff is to be allowed the benefit of whatever inferences the jury might draw, *Farrell*, *Lighenburger* and numerous other cases can be understood to provide the plaintiff with the opportunity to have the jury consider all available information even though circumstantial and insufficient to prove specific negligence.

Finally, as illustrated by *Lighenburger*, another factor which may serve as additional input on one side or the other in attempting to determine the best court in which to bring the action, is what evidence will be admissible in a given jurisdiction on the issues of liability and damages. If the proposed Federal Rules of Evidence go into effect, opening the door even wider than it now is for the admissibility of hearsay and giving the court very broad discretion in this area, the federal forum, in certain situations, may become a more attractive one. The adoption of the rules, and it may be anticipated that this will soon occur, may lead many states, as they did in connection with the Federal Rules of Civil Procedure, to adopt similar uniform rules of evidence in their courts.

III. CHOICE OF FORUM: PROOF OF PILOT IN CONTROL

In the foregoing section, the doctrine of *res ipsa loquitur* was discussed, in part as it applied to permitting a jury to draw the inference of who was in control of the aircraft when it crashed. This application becomes unnecessary if the forum state statutorily draws the inference or creates a presumption of pilot control.²⁷ The Ohio legislature has attempted to deal rationally with the problem of proof where the identity of the pilot was uncertain. The statute is particularly helpful in the dual control situation. The Ohio Revised Code, section 4561.23, Presumption of Pilot in Command, provides that the "pilot in command" is rebuttably presumed to be:

- (a) The occupant of the left front seat in airplanes having side-by-side and fore-and-aft seating;
- (b) The occupant of the left seat of an airplane which has only one transverse seat;
- (c) In a tandem seated airplane, the occupant of the seat recommended by the manufacturer of such airplane when the airplane is flown solo;

²⁷ Such a statute purports merely to control the evidentiary question of how control is proved. The forum state's statute should apply even though the substantive law of some other state may also be applied as to one or more other questions, because evidentiary questions, in conflicts of laws analysis, have traditionally and are presently most often regarded as procedural and therefore governed by the law of the forum state. See 5 J. MOORE, *FEDERAL PRACTICE*, 43.02 (2d ed. 1969); Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197 (1941).

(d) Notwithstanding divisions (a), (b), and (c) of this section, the occupant of the airplane possessed of an instructor's rating is rebuttably presumed to be the pilot-in-command when any part of the flight is for the purpose of instructing another in any phase of flying or navigating;

(e) Notwithstanding divisions (a), (b), (c) and (d) of this section, in all flights conducted under instrument flight rules, the pilot-in-command is rebuttably presumed to be the pilot whose name appears on the flight plan;

(f) In the event that the occupants and their positions in the airplane at the time of the crash cannot be established otherwise from the evidence with reasonable certainty, it is presumed that the airplane was being flown at the time of the crash, and immediately prior thereto, by the person occupying the pilot-in-command seat, as designated above, during or immediately before take-off.²⁸

This statute makes good sense. It codifies those elements of evidence, proof of which, as a matter of common sense, justify the conclusion that the pilot-in-command was flying the airplane. Such an approach by the Ohio legislature and by the courts is also philosophically consistent with the practicality of our law makers, judicial or legislative, in accepting as sufficient the highest and best proof that can be made in any given case, particularly in death cases where eyewitnesses are often not available.

Practitioners faced with identifying the pilot-in-command without the assistance of a statute similar to the one in Ohio should carefully consider the following factors which tend to prove the identity of the actual pilot in the dual control situation:

1. Identity of alleged pilot in control as owner;
2. Possession of license by alleged pilot in control;
3. Nonlicensing of other occupant or other occupants of plane;
4. Asserted pilot in control was the "pilot-in-command" of the flight;
5. Flying experience of the alleged pilot in control as contrasted with the inexperience of other occupant or occupants of the plane;
6. Observed maneuvers of the plane during flight compared with the known flight habits of the asserted pilot in control;
7. Contrast between observed maneuvers of plane and flight habits of other occupants of plane who have had flight experience;
8. Pilot's previous habit of controlling during entire flight;
9. Mechanical set-up prohibiting control and take-off or landing by one other than alleged pilot in control;
10. Seating of alleged pilot in control in position customarily occupied by pilot operating plane;
11. Alleged pilot in control observed at controls at each take-off and landing during flight;
12. Giving and receiving of signals on take-off by alleged pilot in control;

²⁸ OHIO REV. CIV. STAT. 4561.23 (1965).

13. Voice on land radio seeking instructions from control tower, or like personnel, identified as that of alleged pilot in control;

14. Owner's or pilot's agreement with airport not to permit other pilots to operate plane or not to give flight instruction; and

15. Post-crash circumstances such as the position of the bodies and combination of the controls.²⁹

In addition, the case of *Schumacher v. Swartz*,³⁰ presents one novel approach, not mentioned above, for determining the identity of the actual pilot. The court found that the owner and not the passenger was in exclusive control of the plane at the time of the crash because the testimony showed that the owner's flying style was abrupt, sharp and characterized by quick maneuvering, whereas the deceased passenger's style was exceptionally conservative, cautious, gentle and smooth.

It is apparent, therefore, that the imaginative attorney, in addition to reliance on *res ipsa loquitur*, has available either statutory or circumstantial evidence to assist in proving aircraft control. The point here, as elsewhere in this paper, is that counsel must examine the law of each available forum to determine where the lawsuit can be most advantageously brought for the client.

IV. CHOICE OF FORUM: LIABILITY OF AIRCRAFT OWNER AS OPERATOR

Aircraft crashes most commonly leave the catastrophic result of a badly maimed occupant and leave family survivors without the support of the "breadwinner." As between the innocent passenger or survivors and the presumably negligent pilot or owner, it can be reasonably concluded that the loss should not fall on the former. When the modern availability of insurance is considered, any balance of equities between operators of aircraft and passengers or survivors disappears. This is not to say that insurance carriers must absolutely bear all aircraft losses; rather, the thoughtful and humanitarian analyst should readily realize that where the risk has been insured against, such protection most likely will be carried by the owner, somewhat less likely by the pilot, rarely by the passenger and virtually never by the survivor.

Given the foregoing circumstances, between the survivors and an owner who may not even be the actual pilot, it is a desirable social policy to treat the owner as operator and impose on him the burden of ade-

²⁹ Speiser, *Light Aircraft Litigation*, 13 AM. JUR. TRIALS 103 at 743-44 (1967). See also Krause, *Dual Control Plane Crashes*, TRIAL AND TORT TRENDS 237 (1965 Belli Seminar); Davis, *Use of Insurance Policy and Proof of Loss in Solving the Dual Control Problem*, ATLA CONV. PROC., 20th Ann. Conv., Av. L. Sec. (1966); *Ownership of Aircraft, Ownership as Proof of Why Was Flying a Dual Controlled Aircraft*, 2 AM. JUR. P.O.F., Supp. Proof No. 3, cited in Speiser, *supra* note 29.

³⁰ 68 Pa. D. & C. 3 (Phila. Ct. of C.P. 1948).

quately insuring aircraft operations which he authorizes and from which he usually derives profit.

Many states have passed statutes which appear to impose liability on the fixed based operator as the owner or bailor of the aircraft even though the airplane is not being flown by his agent, servant or employee. These statutes provide in substance that any person who causes or authorizes the operation of an aircraft, whether with or without the right of legal control (in the capacity of owner, lessee or otherwise) of the aircraft, shall be deemed to be engaged in the operation of the aircraft within the meaning of the particular act. This type of statutory provision exemplified by 49 U.S.C. section 1301 (26),³¹ after which comparable state statutes have been patterned, has been held in *Rogers v. Ray Gardner Flying Service, Inc.*³² not to impose such liability on the owner-bailor. Several states, however, including New Hampshire,³³ Iowa³⁴ and Mississippi,³⁵ having such statutes, have construed them as imposing liability on the owner-bailor as though the pilot were his agent, servant or employee. *Hays v. Morgan*,³⁶ for example, was distinguished in *Rogers* because *Hays* relied on an applicable state statute. Absent a state statute which would impose liability, the court held that the federal statute did not impose liability on the owner-bailor for the negligence or improper control by the pilot. One explanation of this divergent interpretation of the same basic statute is that federal courts feel no compulsion to interpret the congressional act broadly to impose liability³⁷ whereas state courts may seek to interpret the same wording liberally to grant relief to their injured citizens.

V. CHOICE OF FORUM: APPLICATION OF "GUEST ACT"

Thirty or more states, by statute or court decision, preclude liability

³¹ 49 U.S.C. § 1301(26) (1970):

Definitions

As used in this chapter, unless the context otherwise requires:

‘Operation of aircraft’ or ‘operate aircraft’ means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

See also ILL. REV. STAT. ANN. ch. 15-1, 22.11 (1963).

³² 435 F.2d 1389 (5th Cir. 1970), cert. denied, 91 Sup. Ct. 1255 (1971).

³³ *Hoebee v. Howe*, 98 N.H. 168, 97 A.2d 223 (1953).

³⁴ *Lamaster v. Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957).

³⁵ *Hays v. Morgan*, 221 F.2d 481 (5th Cir. 1955) (interpreting a Mississippi statute).

³⁶ *Id.*

³⁷ Jurisdiction of federal courts, if 49 U.S.C. § 1301(26) (1970) were construed to impose liability on the owner, would be founded upon article III to the Constitution and 28 U.S.C. § 1331(a) (1970) which grant jurisdiction to cases arising under the laws of the United States.

of owners or operators of automobiles to guests unless the conduct of the operator is more than merely negligent. These statutes generally require proof that the operator was guilty of willful or wanton misconduct. These automobile statutes are not applicable to aircraft unless the guest statute specifically includes aircraft, but many states have enacted statutes providing that the liability of the operator of an aircraft carrying passengers (other than common carriers) shall be determined by the rules of law applicable to torts on land, thereby applying automobile guest rules to aircraft operation. Other states, for example Illinois,³⁸ restate the automobile guest statute in terms of aircraft, thereby providing no right of action to the guest passenger unless there is willful or wanton misconduct. Therefore, it may become highly important to know whether there are guest statutes in any of the forums in which the action might be brought and whether those statutes will be held applicable. Counsel cannot ignore this question because the result of an error could well deny recovery altogether.

VI. CHOICE OF FORUM: APPLICATION OF CHOICE OF LAWS RULES

Each of the foregoing considerations has been premised upon litigation arising from an aircraft which touches more than one state, either because of the parties or places in which conduct occurred. Perhaps the most obvious question raised by such a multistate situation is the choice of law which will be applied to various questions by the forum court. Evidentiary matters, previously mentioned,³⁹ and pleading problems will largely be decided according to the law of the forum. However, as important as those problems might be, what law will the forum court apply to govern the more prominent substantive questions of liability, negligence or measure of damages? Failure to properly analyze the choice of law rules of the proposed forum may result in the application of some state substantive law which denies recovery altogether or severely limits compensable damages.

The need or importance of determining which wrongful death statute will apply and in which forum to proceed is illustrated in certain graphic respects by *Richards v. United States*.⁴⁰ In that case, the Supreme Court

³⁸ ILL. REV. STAT. ANN. ch. 15½, 22.83 (1963) provides:

No person riding in an aircraft as a guest, without payment for the ride, nor his personal representative in the event of the death of such guest, shall have a cause of action against any airman of such aircraft or its owner or his employee or agent for injury, death or loss, in case of accident, unless the accident was caused by the wilful and wanton misconduct of the airman or such aircraft or its owner or his employee or agent and unless such wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

³⁹ Note 26 *supra*.

⁴⁰ 369 U.S. 1 (1962).

held that under the Federal Tort Claims Act the whole law, including the choice of laws rules of the state where the negligent act or omission occurred, was applicable. As the crash in Missouri was alleged to have resulted from negligence committed in Oklahoma, the Court applied the whole law of Oklahoma, including its conflicts rule. Oklahoma followed the rule of *lex loci delicti*, applying the wrongful death act of the state where the injury causing death occurred. The Court thereupon applied the law of Missouri and states that because it is conceded that each petitioner had received \$15,000, the maximum amount recoverable under the Missouri Act, the petitioners had received full compensation for their claims. The petitioners were seeking additional amounts from the United States under the Oklahoma Wrongful Death Act which contained no limitation on the amount of recovery. The ruling of the district court that the complaints failed to state claims upon which relief could be granted was affirmed by the Tenth Circuit Court of Appeals and the United States Supreme Court.

In some accidents, the wreckage of the plane and the bodies of the occupants are never found or recovered. One forum might apply *res ipsa loquitur* and allow a recovery, whereas another jurisdiction might refuse to apply the doctrine and deny a recovery. It can therefore become decisively important to the claimants to attempt to prosecute the action in a forum which will give the claimants the benefit of the most favorable law that might be applied to those circumstances.

Detailed analysis of any state's conflict of laws rules is beyond the scope of this article. It is sufficient to observe that traditional rules such as Oklahoma's *lex loci delicti* are in turmoil and are rapidly being replaced by more modern theories commonly known as the "significant contacts approach," "grouping of contacts approach" or "balancing of interests approach." Counsel must discover the applicable rule of each potential forum and analyze its effect to determine what state's substantive law that forum will adopt. Moreover, if the most desirable forum relies on an older unexamined rule, counsel may wish to evaluate the potential of challenging and changing the forum's conflicts rule.

In resolving the choice of laws problems and in searching for an answer as to the place that had the most significant contact with the parties or the occurrence, it is well to realize that the courts do not necessarily apply the law of any one jurisdiction to all issues in the case but may apply the law of several jurisdictions as a United States district court did in *Manos v. TWA*.⁴¹ Because the district court sat in Illinois, it was bound to apply Illinois conflict of laws principles.⁴² In doing so, the court applied the law of Italy, the place where the crash occurred, to

⁴¹ 295 F. Supp. 1170 (N.D. Ill. 1969).

⁴² See *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941).

determine whether or not a tort had in fact been committed. On the liability aspect of the action, which was based on an expressed or implied warranty in the sale of the aircraft, the court applied the law of the state of Washington where the plane was manufactured and sold, holding that a manufacturer may be held liable in a passenger death case on the theory of a breach of an expressed or implied warranty to a consumer without privity. Washington had adopted the strict liability principle. Finally, a tortious problem presented by releases executed by plaintiffs from California and Arizona which provided that the releases should be interpreted by the law of California was left to a jury determination of facts, ignoring the purported submission to California law. Although this sort of detailed and exhausting analysis may, in fact, be overlooked in practice, counsel should rigorously consider the manner in which the proposed forum will resolve each of the conflicts issues, in order not to deprive the client of any assistance in securing recovery.

CONCLUSION

The trial lawyer's prodigious task in choosing a forum for his client is evident. In addition to the major inquiries posed above, any number of minor matters may be decided in favor of or adversely to the plaintiffs depending upon the choice of forum. While most minor matters either cannot be analyzed before filing, or need not be because minor variances will not be outcome determinative, no attorney can fulfill his obligation to the client without carefully considering the major differences between potential forums. It is no vice to bring the innocent plaintiffs' claim in an appropriate jurisdiction which affords the best hope of securing an adequate recovery. Conversely however, it is a great evil to remain blind to the sovereign distinctions between state law and thereby deny the client just compensation.