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DIGEST OF RECENT CASES

DEATH OF PILOT AFTER LEAVING DITCHED PLANE—EXCLUSION CLAUSE IN INSURANCE POLICY—LIABILITY OF INSURER

Eschweiler v. General Accident Fire & Life Assurance Co.
241 F. 2d 101 (7th Cir. Feb. 14, 1957).

The plaintiff's decedent was insured under a health and accident policy issued by the defendant company. The policy contained a clause which excluded from coverage injuries sustained "while in or on any vehicle or mechanical device for aerial navigation or in falling therefrom or therewith or while operating or handling any such vehicle or device." The insured was flying his private plane when an intense snowstorm caused him to make a forced landing on the ice-covered surface of a lake. In landing, the plane was severely damaged and it was necessary for the insured to abandon it. He started on foot for the nearest highway, which would necessitate about a half mile of travel across the ice. During this half mile journey the insured fell through the ice a number of times, but each time he emerged to pull himself out of the water, and finally he succeeded in reaching the shore. He then crawled the remaining few feet to the highway where he was found. Almost immediately upon being found, the insured lost consciousness and he was dead upon the arrival of a physician. An autopsy performed the following day revealed no evidence of physical disease or injury, other than ailments fairly common to men of his age and a superficial abrasion. The plaintiff sued as beneficiary under the insurance policy, alleging that the death was accidental and within the provisions of the policy. The trial court, sitting without a jury, found that the insured was not injured in the forced landing or in extricating himself from the plane thereafter, but that the great physical effort expended in journeying to the highway caused a cardiac failure and his death. Hence, the injuries which resulted in the insured's death were not caused while he was in or on an airplane, while he was falling with or from an airplane, or while he was operating or handling an airplane. Therefore, the exclusionary clause did not bar the defendant's liability. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the trial court, holding that there was substantial evidence to support the trial court's findings and, therefore, it could not say that these findings were clearly erroneous. Furthermore, the court said, since the defendant relied upon the exclusionary clause to defeat recovery, the burden of proof rested upon it. In order to prevail, the defendant would have had to prove that the insured's injury was sustained while (1) in or on the airplane, (2) in falling therefrom or therewith, or (3) while operating or handling the plane. This burden the defendant failed to sustain.

PRESSURE DIFFERENCES IN AIRPLANE CABIN—RUPTURED EARDRUM—AIRLINE'S NEGLIGENCE

Marchant v. American Airlines, Inc.
146 F. Supp. 612 (D.R.I. Oct. 17, 1956).

The plaintiff, while a passenger on one of the defendant airline's flights, suffered a ruptured eardrum, damage to his inner ear which resulted in some loss of hearing, and tinnitus—defined as a continual hissing sound in the

ear. The plaintiff's evidence tended to show that at the time of the flight he was not suffering from any cold or other disorder and that he had never experienced any trouble with his ears on previous flights he had made. The plaintiff claimed that the ruptured eardrum was due to a traumatic inflammation of his middle ear caused by pressure differences between his middle ear cavity and the surrounding atmosphere in the airplane cabin. He contended that prior to the rupture of the eardrum, he had advised the defendant's stewardess that he was suffering from the effects of such pressure differences, but that the stewardess took no action to alleviate his condition. Although there was a conflict in the evidence as to whether the plaintiff had in fact complained of his discomfort prior to the rupture of his eardrum, it is undisputed that the stewardess gave no care or attention to the plaintiff until after his eardrum had ruptured. Furthermore, it is undisputed that the defendant, prior to the rupture of the plaintiff's eardrum, did not take any action to eliminate the differences in pressure, and that the defendant's airplane continued to rise to greater altitudes and was still climbing at the time of said rupture. The evidence further indicated that if the stewardness had given the plaintiff prompt and proper care or if action were taken to eliminate the pressure differences, the plaintiff's injury would not have occurred. In answer to the plaintiff's evidence, the defendant presented medical testimony that the rupture was not due to a traumatic inflammation, but rather to some unknown infection or inflammation which prevented the Eustachion tubes from making normal adjustments to differences in air pressure. In a suit for personal injuries, the jury returned a verdict for the plaintiff in the sum of $24,500. The defendant then moved in the alternative for a judgment notwithstanding the verdict or for a new trial. In denying the motion for judgment notwithstanding the verdict, the court held that, viewing the evidence and all reasonable inferences deducible therefrom in a light most favorable to the plaintiff, it could not say that there was a complete lack of probative facts to support the jury's verdict. The court also denied the motion for a new trial, holding that to order a new trial would be an invasion of the province of the jury. There was ample evidence, the court said, to support the jury's verdict insofar as the negligence of the defendant and the proximate cause of the injury were concerned. With respect to the defendant's contention that the verdict was excessive and the result of passion, prejudice, and sympathy, the court said that on all the evidence the jury was clearly warranted in finding that the plaintiff had suffered an injury which would cause him annoyance and discomfort as long as he lived. Therefore, there was substantial evidence to support the award. In rejecting the defendant's contention that a new trial should be granted on the basis of newly discovered evidence, the court held that in order to constitute a proper basis for a new trial, such evidence must clearly show that it would probably change the result, and cannot merely serve to affect the credibility of other evidence.

INJURIES TO AIRLINE PASSENGER—NO PRESUMPTION OF NEGLIGENCE ON PART OF CARRIER

Wilson v. Capital Airlines
240 F. 2d 492 (4th Cir. Jan. 7, 1957).

The plaintiff had suffered a fractured hip while she was a passenger on one of the defendant's planes. Prior to the flight in question, the plaintiff had had a tumor in the bones around the left hip joint, which had left the bone breatly weakened and susceptible to pathological fracture. She had been advised against bearing any weight on her left leg and had been using two crutches for several months. At one of the stops on her flight, the

plaintiff asked the steward to assist her to the plane's lavatory. The plaintiff testified that upon entering the lavatory she did not observe any handhold, and that in order to turn around, she gave the steward her right crutch, keeping the left under her arm, and placed her right hand on the tissue container. She further testified that while she was turning around the tissue container came open and she fell on her left leg, at the same time experiencing severe pain. She then testified that she called the steward and that she had never closed the lavatory door. The steward and a passenger who had helped the steward assist the plaintiff to the lavatory testified in behalf of the defendant and said they had helped the plaintiff turn around, then took both her crutches, closed the door and left, leaving the plaintiff situated to use the lavatory. They further testified that when they heard the plaintiff unlock the lavatory door they opened it, returned her crutches, and helped her to return to her seat. The witnesses agreed that the plaintiff had rested her right hand on the tissue container while they were turning her around and that the container had come open, but they denied that she fell or that she complained of having hurt herself. When she arrived at her destination, it was found that the plaintiff had a small pathological fracture in the area affected by the tumor, which could have been caused by the fall which she described, by placing any substantial weight on her left leg, or by any shift of gate. The plaintiff brought a personal injury action and contended that the defendant was negligent in failing to place a handhold in the restroom, and in placing an unsafe and unfit appliance, the tissue container, at a position where a passenger would normally use it as a brace or grasp in the absence of any other handholds. Upon hearing the testimony, the trial judge directed a verdict for the defendant on the ground that there was insufficient evidence to prove negligence. On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision, holding that although, as a common carrier, the defendant was bound to exercise the highest degree of case and forsight for its passenger's safety, the defendant was not an insurer, and the mere fact of the injury was not sufficient to raise a presumption of negligence on the part of the defendant. It was not clear, the court said, from the plaintiff's own evidence that there was no handhold in the lavatory. However, even if there were no handhold, the court indicated that it would not have allowed recovery. The defendant was under no duty to furnish handholds nor to forsee that in the absence of a handhold, a passenger would rest its weight on the tissue container, which was obviously not provided for that purpose.

INTERROGATORIES—EXTENT TO WHICH PARTY MUST REVEAL ITS CASE—EXCEPTION TO GENERAL RULE IN AIRPLANE CRASHES

Merrill v. United Airlines, Inc.
5 CCH Aviation L. Rep. 17,317 (S.D.N.Y. Mar. 10, 1957).

In a wrongful death action the plaintiff prepared several interrogatories asking the defendant if it had any knowledge as to several enumerated factors which could have caused or contributed to the accident in which the plaintiff's decedent had been killed. The subsequent interrogatories then asked if the defendant would claim at the trial that one of those factors caused or contributed to the accident and if so, what the said claim of the defendant would be. The defendant objected to these interrogatories on the ground that their net effect was to ask it what would be its story at the trial. The United States District Court for the Southern District of New York, while recognizing that the purpose of modern federal practice is to

eliminate surprise and that such interrogatories would be proper in an ordinary case, held that there is an exception to the general rule in cases where the parties would be required to commit themselves too definitely. A case involving an airplane crash, the court continued, would be one such instance. In airplane crashes, the defendant frequently knows little about the cause of the accident, and yet it is asked to commit itself to a particular cause of the accident. However, the court held that the interrogatories would be acceptable if the one in which the defendant was asked if he would claim that one of the enumerated factor "caused or contributed to the accident" were changed to read "*may have* caused or contributed to the accident." If such change were made, the court reasoned, the defendant would be protected from being required to put itself in a straight jacket and still the plaintiff would be able to get all the information to which he was entitled.

CROP DUSTING—LACK OF ACTIONABLE NEGLIGENCE—APPLICABILITY OF STRICT LIABILITY DOCTRINE

Vrazel v. Bieri

294 S.W. 2d 148 (Tex. Ct. Civ. App. Sept. 20, 1956).

Gotreaux v. Gary

5 CCH Aviation L. Rep. 17,269 (La. Feb. 25, 1957).

In the *Vrazel* case, the plaintiff's crops were damaged by a herbicide which was blown onto his property during crop dusting operations taking place on a neighboring farm. The plaintiff brought action against the farmer whose crops were being dusted and also against the owner of the airplanes employed in the operation, charging both defendants with negligence. At the trial, the jury found, *inter alia*, that the damage to the plaintiff's crops was caused by the herbicide which the defendants failed to keep confined within the boundaries of the field being sprayed. However, the jury found that this failure was not due to the defendants' negligence and, therefore, denied recovery. On appeal, the plaintiff did not attack the findings as lacking support in the evidence or as being contrary to the weight of the evidence, but contended rather that the failure to confine the poison being sprayed constituted negligence as a matter of law. Therefore, the plaintiff argued that the jury's finding of absence of negligence was a mere conclusion of law or opinion which was "of no legal effect or significance and [which] should be disregarded." The Texas Court of Civil Appeals, in affirming the trial court, held that the plaintiff was in effect arguing that the doctrine of absolute liability should be applied. That doctrine, the court said, is not recognized in Texas, and in order to recover in a case such as this, the plaintiff would have to obtain a finding of actionable negligence. Since such a finding was not obtained, the defendant was entitled to judgment.

The *Gotreaux* case presented essentially the same facts and the trial court dismissed the plaintiff's action, holding that the defendants were free from any negligence. On appeal, the plaintiff contended that the defendant's actions constituted a private nuisance and that liability for damages resulting from the maintenance of a nuisance does not depend on a question of negligence. The Louisiana Supreme Court rejected this contention, but nevertheless reversed the trial court. The court held that in cases where a landowner's use of his property unreasonably inconveniences others and deprives them of the enjoyment of their property, negligence or fault is not a requisite of liability. Therefore, the court reasoned, strict liability should be imposed in this case.

PILOT'S KNOWLEDGE OF STORM CENTER ON FLIGHT PATH—FAILURE TO ALTER COURSE CONSTITUTES NEGLIGENCE

Cudney v. Braniff Airways, Inc.
300 S.W. 2d 412 (Mo. Mar. 11, 1957).

The plaintiff, while a passenger on a flight of Midcontinent Airlines, was thrown from her seat and injured when the plane hit a violent downdraft during a thunderstorm. The plaintiff brought a personal injury action against the pilot of the plane and against Midcontinent, and after that airline merged with Braniff Airways, upon motion the latter was substituted as a party defendant for and instead of Midcontinent. The evidence indicated that before taking off on the flight, the pilot was warned by Midcontinent's meteorologist that the route of the contemplated flight was through scattered cumulus cloud formations conducive to thunderstorms which occasion downdrafts. In addition, while the plane was in flight, the pilot adhered to his course and did not diminish his speed, notwithstanding the fact that the air increased in the violence of its turbulence, that there was considerable cloud-to-cloud lightning and some cloud-to-ground lightning, and that a few minutes before it hit the downdraft, the plane encountered heavy rainfall. The evidence further indicated that precipitous downdrafts of disturbed air are more probable where there is lightning, especially cloud-to-ground lightning, and heavy rainfall. After the plane hit the downdraft, the pilot made a ninety degree turn, and after flying in the new direction eight or nine miles, the plane encountered no more turbulent air. Upon hearing the evidence, the jury returned a verdict in favor of the plaintiff; however, the trial court set aside the verdict and entered judgment for the defendant in accordance with the defendant's motion for a directed verdict. The plaintiff appealed on the grounds that there was sufficient evidence to establish negligence on the part of the defendant. The Missouri Supreme Court reversed the trial court's judgment and remanded the cause with directions to reinstate the judgment for the plaintiff. In so ordering, the court held that the evidence tended to show that the pilot knew the forecast of stormy weather on the contemplated flight path, that he saw or could have seen the lightning, that he flew into heavy rainfall, and that he continued in flight at undiminished speed in the rainfall. All these factors indicated that a thunderstorm with probably dangerous currents of air therein concentrated would be encountered on the contemplated flight plan. On the basis of this, the court held that the jury could and did reasonably find that the defendants were guilty in failing to take the precaution to circumnavigate the turbulent area or in failing to diminish speed in passing through the area, or in failing to do both.

CONDEMNATION—CHANGE IN ZONING RESTRICTIONS—JUST COMPENSATION FOR LAND TAKEN

United States v. 50.8 Acres of Land
5 CCH Aviation L. Rep. 17,318 (E.D.N.Y. Mar. 11, 1957).

The government filed a complaint seeking to acquire land which at that time was zoned for residential use. Just prior to the taking, the owner of the land had made an application for a change in zoning from residential to industrial. This change was approved by one adjoining landowner, but opposer by another—the government. Approximately two years after the taking, and after the government had withdrawn its opposition, the change in zoning was affected. At the hearing on the complaint, there was a sharp and irreconcilable conflict between the opinions of the appraisers as to the

value of the appropriated land. The witness for the owner based his value upon industrial use, whereas the government's witness based his opinion upon residential use, which conformed to the existing zoning. In awarding compensation, the United States District Court for the Eastern District of New York recognized that the existing zoning restrictions were a proper and important factor for the appraisers to consider, but held that it was also important for the appraisers to consider the reasonable probability of a change in fixing their estimates of valuation. To appraise the land, the court reasoned, as though the change had occurred, when in fact it had not, would be to totally disregard restrictions upon use, which had been imposed by competent authority for many years, and to permit the owner to receive compensation based on a prohibited use. However, the court continued, to deny the owner any increment in value attributable to the probability of a favorable change in zoning in the reasonably near future, would likewise be unjust. Therefore, the zoning restrictions on the use as they existed at the time and the possibility or probability of a change to industrial use in the near future, should be viewed in the light of all the testimony presented, and compensation should be based upon the result thereof.