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# DIGEST OF RECENT CASES

## AIRPLANE PASSENGER — DAMAGE TO HEARING AND SPEECH — FEDERAL TORT CLAIMS ACT

### *Pignataro v. United States*

6 CCH Aviation Law Rep. 17,356 (E.D. N.Y. April 9, 1959)

A fourteen-month-old infant lost his hearing and has his speech impaired as a result of a flight upon a United States Air Force plane from Saudi-Arabia to Eritrea. Plaintiff sued under the Federal Tort Claims Act, alleging negligence in flying at high altitudes in an unpressurized plane. The court held that the Federal Tort Claims Act cannot be used to bring an action against the government where the claim arises in a foreign country.

## AIRCRAFT COLLISION — PASSENGER — EVIDENCE — DAMAGES

### *Ratner v. Arrington*

6 CCH Aviation Law Rep. 17,357 (Fla. April 9, 1959)

Plaintiff passenger brought a damage action for an injury incurred in a collision between a private aircraft in which he was riding and another aircraft. Defendant objected to testimony by a Civil Aeronautics Administration investigator with regard to the plane's landing approach patterns, under sec. 701 of the Civil Aeronautics Act of 1938 which prohibits the introduction into evidence of investigators' reports. The court sustained the admissibility of such testimony construing sec. 701 to mean that only evidence of opinions and conclusions as to possible causes of accidents is prohibited, not merely statements made to an investigator. On the question of damages, the court found no error in permitting counsel to present a chart showing pain and suffering and loss of earning capacity on a per-diem basis.

## ANTITRUST LAWS — CONCERTED RATE QUOTATIONS BY RAILROADS FOR MILITARY TRAVEL — SUPPLEMENTAL AIR CARRIERS

### *Aircoach Transport Association v. Atchison, Topeka & S. F. Ry. Co.*

6 CCH Aviation Law Rep. 17,397 (U.S.C.A. D.C. Cir. Feb. 24, 1959)

Plaintiff supplemental air carriers brought an action against defendant railroads seeking treble damages and injunctive relief in connection with the railroads' practice of transporting military personnel at reduced rates. The trial court had initially granted such relief to the air carriers on the ground that such concerted rate quotations made under the Interstate Commerce Act were in violation of the antitrust laws. On appeal, the trial court's injunction was dissolved and the case remanded because the trial court should have retained its jurisdiction and withheld its decision on the interpretation of the Interstate Commerce Act and existing agreements approved under that Act, until the Commission had passed on the question of whether the railroads could be relieved from the operation of the antitrust laws, and if so, whether they had been so relieved by any approved agreement, and if so, by which agreements, by what provisions thereof, and as of what date. The appellate court's opinion noted that the railroads' practices constituted price fixing among competing non-connecting carriers and were consequently illegal per se under the Sherman Antitrust Act, unless the antitrust laws were

relieved of their operation by virtue of sec. 5a of the Interstate Commerce Act. Moreover, the issue of the intent and effect of any agreement approved by the Commission must, in a case where such issue is the sole and dominant issue in the case, first be referred to the Commission prior to a court determination of whether such an agreement violates the antitrust laws. Hence, as to that aspect of the case in which it was asserted that the railroads' purpose was to destroy competition by the supplemental air carriers, such issue of the intent and effect of the agreement was the sole or dominant issue. Such being the case, the railroads were granted a motion to submit that issue, along with the other issues previously submitted, to the Interstate Commerce Commission for its determination.

#### MUNICIPAL AIRPORT — LEASE — NON-EXCLUSIVE GRANT TO LESSEE

*Southwest Texas Flying Club, Inc. v. City of Del Rio*

6 CCH Aviation Law Rep. 17,412 (Tex. Apr. 8, 1959)

Plaintiff lessee sought in trespass to try title to recover a leasehold estate in a portion of the leased property which was leased by the defendant to a third party, allegedly in violation of the lease agreement. The court held that although the lessee secured certain privileges in the operation of the airport, the lessor retained the ultimate control and management. Hence, the ambiguous terms in the lease were construed against the lessee as being a non-exclusive grant, thereby enabling the lessor to lease a portion of the premises to a third party.

#### AIRCRAFT — SERVICE OF PASSENGER WHILE IN FLIGHT — JURISDICTION

*Grace v. MacArthur*

6 CCH Aviation Law Rep. 17,436 (E.D. Ark. February 16, 1959)

Plaintiff brought an action for damages for breach of contract in Arkansas against the defendant corporation. Process was served upon the president of said corporation aboard a non-stop flight from Memphis to Dallas, said process being delivered at a time when the aircraft was directly over the Eastern District of Arkansas. Defendant filed a motion to quash claiming that he had not been properly served "within the state." The court held that a person moving in interstate commerce in a regular commercial aircraft, flying in the regular navigable airspace above a state, is within the territorial limits of that state. Accordingly, such aircraft passenger is amenable to service of process while on the plane in flight over the territorial limits of the state in which the process is sought to be served.

#### INSURANCE — AIRCRAFT "ALL RISK GROUND AND FLIGHT" COVERAGE — SUBROGATION

*Isley v. Bolling Aero Club, Inc.*

6 CCH Aviation Law Rep. 17,460 (D.C. March 3, 1959)

Defendant, a member of plaintiff aviation flying club, damaged a plane belonging to the club in a crash landing. The club's insurance carrier reimbursed the club in part under an "all risk ground and flight" policy. Plaintiff insurer, as the club's subrogee, sought to recover the amount paid to the club, and the club in turn sought recovery for the deductible amount which was provided by the policy. The court held that as between the club and its members, the insurance inured to the benefit of the members as well as to

the club, and that the club had no right against one of its members to recover for damages covered by insurance. Therefore, if the club has no such right, then neither does the insurance company as subrogee of the club. The club, however, was permitted to recover the deductible portion, as this was a part of the damages which was not insured.

#### MUNICIPAL AIRPORTS — ADJOINING PROPERTY OWNER — LOW FLIGHTS OF AIRCRAFT — NUISANCE

*Chronister v. City of Atlanta*

6 CCH Aviation Law Rep. 17,448 (Ga. April 24, 1959)

Plaintiff property owner claimed interference with the reasonable use of his property which adjoined defendant's airport, because of continued low flights of aircraft which used said airport. The court, in sustaining a nuisance action, held that even though the regulation and control of flights of aircraft are vested in the federal government, state sovereignty precludes an invasion of the rights of people. Accordingly, an owner of property adjoining a municipal airport has a preferred claim to the airspace over his property to a height of at least seventy-five feet above the buildings.

#### AIR CARRIERS — RAILWAY LABOR ACT — FOREIGN FLIGHT OPERATIONS

*Air Line Stewards Assoc. v. Northwest Airlines, Inc.*

6 CCH Aviation Law Rep. 17,467 (U.S.C.A. 8th Cir. May 29, 1959)

Plaintiff seeks to upset an arbitration award that excepted foreign national cabin attendants on foreign flight operations from the scope of a collective bargaining agreement between plaintiff union and defendant air carrier. The court, in affirming the award, held that because the Interstate Commerce Act, which is incorporated into the Railway Labor Act by reference, is limited in its territorial scope to the transportation of persons and property within the United States, so should the Railway Labor Act. Hence, the Railway Labor Act should not apply to flight service attendants or to other crew members of American flag air carriers who engage in services for said carriers between points outside the continental United States and its territories. The desirability of the Act's applying to all employees alike, is considered a problem directed to the Congress, and not to the courts.

#### WRONGFUL DEATH — AIR FORCE CRASH — CIVILIAN RETAINED BY AIR FORCE — RELEASE FROM LIABILITY — RES IPSA LOQUITUR

*Rogow v. United States*

6 CCH Aviation Law Rep. 17,474 (S.D. N.Y. May 25, 1959)

Decedent had been retained by the Air Force to make a recruiting film and was killed instantly in the crash of a B-25 bomber at the inception of his undertaking. Decedent was in the actual employ of his film company however, receiving his wages from them and only certain expenses from the Air Force. He had also signed a release absolving the government from liability for its own negligence, but in this wrongful death action, his executors challenge the release as invalid since the decedent was not receiving a gratuity. The court upheld this contention, stated that although the decedent paid nothing for the flight resulting in the crash, he would have nevertheless been paid for any commercial travel which he might have made instead of by government means. On the negligence question, the court held that

because the B-25 is not an experimental plane, the failure of one engine must be attributable to negligence in either operation or maintenance, and hence applied the doctrine of *res ipsa loquitur*.

#### CONDEMNATION — NAVIGATION EASEMENT — ELEMENTS SUBJECT TO COMPENSATION

##### *Pope v. United States*

6 CCH Aviation Law Rep. 17,548 (N.D. Texas May 22, 1959)

Plaintiff property owner claimed various damages as a result of the construction and use of an Air Force base near his property. The court allowed just compensation for the taking of an easement in conducting flights over his property, for the closing up of an access road to his property, for pasture land which has been converted into creek beds due to a straightening of the creek channel, and for erosion which destroyed a well on plaintiff's property. No compensation, however, was allowed for the injurious effects of noise, vibration and fumes from the operation of a test cell by the defendant, because everyone living in the vicinity is subject to it in varying degrees.

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#### AIRCRAFT LANDING ACCIDENT — INSURANCE — COVERAGE ONLY FOR TAXIING

##### *Jackson v. Royal Indemnity Co.*

6 CCH Aviation Law Rep. 17,350 (D.C. Mass. April 2, 1959)

Plaintiff private airplane owner held an aircraft insurance policy which excluded coverage for accidents occurring while in flight, and under the definition section, considered landing and taking off as part of the flight. Taxiing however, was covered. The court held that where an insured under such a policy, knowing he has defective brakes, overruns an airstrip and turns over, such accident must be considered a flight or landing loss, even though the speed of the aircraft had dropped to normal taxiing speed at or prior to the actual instant of the impact which caused the turn over.