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Fatalities in Aircraft Crashes - A Contractual Basis of Recovery

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FATALITIES IN AIRCRAFT CRASHES—A CONTRACTUAL BASIS OF RECOVERY?

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IN an effort to avoid the monetary limitations of certain wrongful death statutes,[1] the plaintiffs in a number of recent suits involving airplane crashes have proceeded in the courts on the theory that the resulting death of passengers constituted a breach of the contract of safe carriage by the carrier, for which a cause of action properly lay.[2] In rejecting this theory, the courts have not given it the careful consideration which it merits. This article shall attempt to make the type of analysis which is warranted.

STATUS OF PRESENT LAW—ANALYSIS OF THE LEADING CASE

The contractual theory of recovery was first advanced in Faron v. Eastern Airlines, Inc.[3] A Boston-bound plane which had taken off from New York City crashed in Connecticut. The plaintiff, administrator of the estate of one of the deceased passengers, alleging that the ticket constituted a contract of safe carriage, sought recovery under the New York wrongful death act,[4] which did not limit liability, since the ticket was purchased within that state. The carrier contended, however, that since the injuries and the death occurred in Connecticut, the law of that forum was controlling,[5] and the amount of plaintiff's recovery was limited by the Connecticut wrongful death statute.[6] Plaintiff's motion to strike the interposed defense was denied by the court, which ruled:[7]

> . . . Although they [the causes of action] are couched in contract language, it is obvious that liability, if any, will be predicated upon proof of negligence. Where, as here, the gravamen of the cause of action is an alleged breach of a duty through negligence, the action is governed by the applicable law of torts, even though the allegations refer to a breach of contract.

The principal case relied upon by the *Faron* court to justify its looking at the gist of the action and determining that defendant's liability, if any, must arise from its negligence and hence was governed by tort law, was *Loehr v. East Side Omnibus Corp.*[8] The court in *Blessington v. McCrory Stores Corp.*,[9] however, modified the effect of the *Loehr* case. In speaking of the *Loehr* case and similar cases, the *Blessington* court said:[10]

> The particular reasoning of those cases [Webber v. Herkimer; Loehr v. East Side Omnibus; Hermes v. Westchester Racing Assn., 213 App. Div. 147 (1925)] applies only to instances where the alleged breach of contract is failure to use due care—in other words, negligence. Since the common law duty and the implied contractual obligation, in such situations, are one and the same, the suit however labeled, is one in negligence, *at least for time limitation purposes.* (Italics added)

Although the italicized phrase appears to limit the effect of the *Loehr* decision, or at least question its extension for other reasons, the court in *Faron* ignored the phrase and cited the *Loehr* case as holding that where the gist of the action is negligence, the action is controlled by tort law.

The *Faron* decision is the cornerstone upon which a series of other cases have rejected the contract theory.[11] They have held, with one exception,[12] that there is no contractual action for death in airplane crashes.

NOTE: Footnotes follow end of article on pages 265-267.

PATTERSON V. AMERICAN AIRLINES: AN EXCEPTION TO THE RULE

In Patterson v. American Airlines, a case arising out of the crash in New Jersey of a flight that had originated in New York, plaintiff sued on a theory of breach of contract and one of tort under both the New Jersey wrongful death[13] and survival[14] acts. The court denied defendant's motion to dismiss the claims based on breach of contract, holding that the applicable law was that of the forum where the crash occurred, and that a contractual action would lie under both the statutes.[15]

The defendant in *Patterson* advanced the *Faron* and *Maynard* cases to support its motion to dismiss. The court, because of the lack of New Jersey precedent, considered the law of New York, with emphasis on the reasoning of the *Faron* and *Maynard* cases. The court concluded that the authorities upon which those cases were decided were cases which involved the issue of whether the contract or tort statute of limitations should apply, and thus were not necessarily controlling as to the issue before it.

The "Patterson" conclusion was also reached under New York law in Roche v. St. John's Riverside Hospital.[16] The cause of action in this case arose when a child, while under the care of the hospital, was fatally burned from contact with steam pipes on the hospital premises. The court, finding that the hospital had entered into a contract with the child's mother for her safe and reasonable care, held that its breach was a sufficient complaint under the New York wrongful death statute.[17]

Since the *Patterson* and *St. John's* cases were decided under statute, however, they cannot be cited as supporting a "common law" contractual action for the victims of an airplane crash. They are still important, however, in the development of the "common law" contract theory, since they have recognized the existence of a breach of contract action where the gist of the action is a breach of duty through negligence. The *Faron* and *Maynard* decisions, which were also decided under a New York law, which recognizes the survival of contract actions, could thus have been decided differently. In any event, the courts' cursory treatment of the problem was highly unwarranted.

The common thread which runs through the decisions of most of the courts which have considered the contract theory is that negligence means tort. However, negligence is not synonymous with tort. Negligence is merely a method whereby a duty is violated or breached. If the duty is imposed by contract the negligent breach is not a tort. It would only be so if the duty is one imposed by law. If a contract is breached through negligence, a proper remedy is in contract, as shown by the *Patterson* case. The reason why courts have consistently equated negligence with tort remains a mystery.

SURVIVAL OF A CONTRACT ACTION: AT COMMON LAW AND UNDER STATUTE

Contract actions generally survive at common law, while tort actions do not.[18] This rule is further refined, however, in that contract breaches which result in personal injuries to the decedent abate upon the death of the party who would have been entitled to sue on the contract, while those resulting in damages to his estate, or a benefit to another party, survive.[19] Thus it would appear that in most cases a plaintiff in a suit such as those under consideration would have a valid common law contract cause of action.

Many American jurisdictions, however, have enacted "survival statutes,"[20] which either merely codify the common law or modify it. For example, an action for death usually survives to the estate of the decedent under these statutes, while it did not do so at common law.[21] These statutes, with some exceptions,[22] are interpreted in light of the common law distinction between contractual breaches which result in injuries to the person and those which result in injuries to his estate. Thus, in the absence of specific

statutory language to the contra, it is felt that a contract cause of action should be recognized under such statutes. If this were done, there would be no question of plaintiff's right to seek a contract recovery.

A Choice of Actions: General Denial By Courts

Even where it appears that there is a contractual action as well as a tort action, the courts are loath to give plaintiff his choice, at least where the action is one to recover for the death of a person.[23]

Although most courts have held that an action under the wrongful death statutes cannot be predicated upon a breach of contract,[24] the language of many of these statutes could certainly be readily open to a construction which would allow a contractual action,[25] and since they are intended to be remedial in nature, they should be interpreted broadly.[26] It should be noted, however, that if the cause of action is given to the decedent's wife, the fact that she is not a party to the contract will present a real problem. While a theory of third party beneficiary might be used in this instance, its application is, at best, far-fetched. One of the reasons often given by the courts taking this limiting view is that the duty imposed on common carriers by the contract is no higher than the duty imposed on them by law as a matter of public policy, and since the duty would exist even without the contract the action is properly a tort rather than contractual one. However, this in itself should not be determinative, for it appears that the state would not impose such a duty if it were not for the contractual relationship between the parties,[27] nor does it adequately support their action in dismissing the contractual obligations which would exist in spite of the public policy obligations. If the duty imposed by the contract were less than the publicly imposed duty under tort law, one might be able to argue that the contract is void as being contrary to the public interest. This is not the case, however, and therefore unless the legislators have specifically precluded private contract obligations, they should be recognized by the courts since they do not in any way oppose the public interest.

Conclusions

Uncertainty is the prevailing note in aviation accident law. An injured passenger's welfare is at the mercy of a maze of legal rules and procedures which vary considerably between the states and which often result in inadequate redress for his wrongs.[28] The publication of this fact before the general public has led to a greater concern for some simplification of the situation.[29]

To allow a contractual basis of recovery would be a step in this direction. By the passenger knowing the monetary limitations of recovery, if any, in the state in which he purchased his ticket, he can determine whether the purchase of additional insurance is warranted. He fails to have this opportunity now since he rarely knows which states the aircraft will pass over during his journey.

From the standpoint of the airlines, the court's approval of a contract action would possibly lead to larger damage awards against them wherein the contractual action could be used to avoid the monetary limitations of certain states. This potential increase in monetary liability however, might be justified on at least two bases:

1. Since the carrier has entered into a contract and has profited thereby, it should also entertain the liability of such a contract.
2. The interest of the state in providing protection for its residents or travelers using its transportation facilities and in seeing that they have adequate remedies for wrongs done to them. The interest of the state in which the contract is made appears more valid than

that of the state where an accident occurs, since that state's contacts with the aggrieved parties is often fortuitous and results merely from use of their airspace.

Therefore, it is suggested that the contract theory has a sound basis in law and policy and deserves greater consideration by the courts.

EDITORS' NOTE: As this article went to press the New York Court of Appeals, on January 12, 1961, rendered a decision in respect to the plaintiff's appeal in Kilberg v. Northeast Airlines (see note 7 of preceding article). The court affirmed the Appellate Division's dismissal of the complaint based on breach of contract holding that the suit was one in tort for negligently causing death and as such was subject to the Massachusetts wrongful death statute. The majority opinion, however, was not confined solely to the breach of contract theory, the singular issue appealed, but to the consternation of three members of the court, it contained extensive dicta in respect to the plaintiff's alternate cause of action based on the Massachusetts statute. It was found by the majority of the court that the plaintiff, although bound by the Massachusetts statute on substantive issues, was not bound by the monetary limitations within that statute since this was a procedural issue to be resolved by the law of the forum wherein the action was litigated. Since such limitations were against the public policy of the State of New York and since there was ample judicial precedence for holding such limitations inapplicable in a situation such as this, the plaintiff was given the right to apply for leave to amend his alternate cause of action accordingly.

AUTHOR'S NOTE: The court's handling of the breach of contract issue is typical of the inadequate treatment mentioned in my article. As to the court's dicta on the monetary limitation issue, it would appear, at first reading and with little time to explore the court's theory thoroughly, that if such dicta becomes law, plaintiff's in New York and in those states adopting a similar view will not resort to a breach of contract cause of action since the need for so doing has been extinguished. The theory, however, will still have great vitality in those jurisdictions which subscribe to what appears to be the more universally accepted views of two dissenting justices on this issue.

FOOTNOTES

[1] American courts have uniformly accepted the statement of Lord Ellenborough in Baker v. Bolton, 1 Campb. 493 at 495 (1808) that "In a civil court the death of a human being cannot be complained of as an injury."

England remedied this situation by passage of the Fatal Accidents Act of 1846, 9 and 10 Vict. c. 93, more popularly known as Lord Campbell's Act. It provided, in part:

> "That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of a person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

All American jurisdictions have enacted similar legislation. The U.S. statutes are generally of two types: "death" statutes which are said to create a cause of action for the survivors of the decedent; and "survival" statutes, which provide that the decedent's cause of action will survive to his estate. An example of the former type is the Illinois statute, Ill. Rev. Stat., ch. 70, 1, 2 (1959); an example of the latter type is N. J. Stat. Ann. § 2A:15-3 (1952).

For a more general discussion of the history of such legislation and the manner in which the statutes have been interpreted, see Prosser, Torts 710 (2d ed. 1955).

Fourteen of the wrongful death statutes impose a limit of from $20,000 to $30,000 on the amount of damages recoverable: Colorado, $25,000, Colo. Rev. Stat. Ann. § 41-1-3 (1953); Connecticut, $25,000, Conn. Gen. Stat., Rev. § 52-555 (Supp. 1958); Illinois, $30,000, Ill. Rev. Stat., ch. 70, §§ 1, 2 (1959); Kansas, $25,000, Kan. Gen. Stat. Ann. § 60-3203 (1949); Maine, $20,000, Me. Rev. Stat. Ann. ch. 165, § 10 (1954); Massachusetts, $20,000, Mass. Ann. Laws, ch. 229, § 6E (1955); Minnesota, $25,000, Minn. Stat. Ann., § 573.02 (1947); Missouri, $25,000, Vernons Ann. Mo. Stat., § 537.090 (1949); New Hampshire, $25,000, N. H. Rev. Stat. Ann., § 556:13 (1955); Oregon, $20,000, Ore. Rev. Stat. § 30.020 (1959); South Dakota, $20,000, S. D. Code, § 37.2203 (1939); Virginia, $30,000, Va. Code Ann., § 8-636 (1950); West Virginia, $20,000, W. Va. Code of 1955 Ann. § 5475; Wisconsin, $25,000, Wis. Stat. Ann., § 331.04 (1958).

On the other hand, personal injury suits, when brought under the common law often result in damage awards in excess of $100,000. See Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959) [airplane collision, $198,339].

[2] Recent actions against plane manufacturers have also been based on the theory of breach of an implied warranty of the fitness of the plane to carry passengers safely. This theory has been accepted by some courts. See, e.g., Siegel v. Braniff Airways, 6 Av. Cas., 17,978 (S.D.N.Y., 1960); and, Conlon v. Republic Aviation Corp., 6 Av. Cas. 17,982 (S.D.N.Y., 1960).

[3] 193 Misc. 395, 84 N.Y.S. 2d 568 (Sup. Ct., N.Y. County, 1948).

[4] N.Y. Decedent Estate Law, sec. 130 (1949).

[5] The court in the *Faron* case cited the Restatement, Conflict of Laws, § 391 (1934), which states: "The law of the place of wrong governs the right of action for death." Sec. 377 defines the "place of wrong" thusly: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged *tort* takes place." [Italics added.]

The relevant sections of the *Restatement* dealing with contractual actions, secs. 337, 346, and 358, indicate that the governing law is that of the state where the contract was entered into. Sec. 337 deals specifically with contracts of carriage, providing that: "When passengers or goods are accepted for carriage pursuant to a contract, the law of the place of contracting determines the duties of the carrier."

Another conflicts of laws theory applicable to contract actions is "center of gravity," which theorizes that the applicable conflict law is that of the forum having the most to do with all aspects of the problem involved. Auten v. Auten, 308 N.Y. 1955, 124 N.E. 2nd 99 (1954). This theory was rejected in an aviation fatality action on the basis that the action was one in tort, and the "center of gravity" theory was inapplicable in tort law. Riley, Admx. v. Capital Airlines, Inc., 6 Av. Cas., 18,159 (N.Y. Sup. Ct., Monroe County, 1960).

[6] Conn. Gen. Stat. Rev. § 52-555 (1958).

[7] 84 N.Y.S. 2d at 570.

The Second Circuit, in Maynard v. Eastern Airlines, 178 F. 2d 139 (2d Cir. 1949), a suit arising out of the same crash, relied on the *Faron* case in coming to a similar conclusion. This case is of particular interest, however, since that court dismissed Dyke v. Erie Ry. Co., 45 N.Y. 113 (1871), as not controlling. The *Dyke* court had held that a plaintiff who purchased a train ticket between two points in New York and was injured while the train was passing through a small portion of Pennsylvania, had a right to sue for his injuries under the common law of New York, since the contract of carriage was entered into in that state. The plaintiff was thus able to avoid the Pennsylvania statute which limited the liability of common carriers for injuries to passengers to $3,000. The court in *Maynard* felt that the *Dyke* case lacked vitality and was irreconcilable with later decisions, and hence dismissed it as not controlling.

One such decision which the *Maynard* court felt was irreconcilable was Caroll v. Staten Island R. Co., 58 N.Y. 126, (1884), where the plaintiff sued for injuries he received as the result of a boiler explosion on the ferry boat carrying him as a passenger. The defendant contended that the action was based on breach of contract, and that the contract was illegal, as a statute prohibited travel for pleasure on Sunday and plaintiff was admittedly traveling for pleasure on Sunday. The court found, however, that the action was one based on negligence, and hence need not depend on the validity of the contract of carriage. The case is not irreconcilable with the *Dyke* decision as contended by the *Maynard* court, however, since the issue of a contract action was never decided by the court.

In Webber v. Herkimer & M. St. R. Co., 109 N.Y. 311, 16 N.E. 358 (1888), an action for injury to a passenger on a street railway, the issue involved was whether plaintiff's claim was barred by the tort statute of limitations or whether it was timely under the applicable contract statute of limitations. The court held that the action was one in negligence, and hence governed by the tort statute of limitations.

In Kilberg v. Northeast Airlines, Inc., 6 Av. Cas. 17,988 (N.Y. Sup. Ct., App. Div., 1960), the court considered the *Dyke* case differently. The court distinguished the *Dyke* case from the wrongful death action under consideration on the basis that it was a personal injury suit. The court, apparently feeling that the distinction was self-explanatory, made no effort to point out its importance. It appears that the only important distinction that one can arrive at is that the applicable statute in the *Kilberg* case created the cause of action and without such a statute no cause of action would exist for death, whereas in the case of personal injury the cause of action would be predicated on the contract or on tort law without any reliance on a statute.

This distinction is not necessarily valid, for a contract action, under specific conditions, does survive at common law, and certain wrongful death statutes and survival statutes can be broadly interpreted to provide for a contractual basis of recovery. See text and footnotes to follow in this article.

[8] 259 App. Div. 200 (N.Y. Sup. Ct., App. Div., 1940). Plaintiff, a paying passenger on an omnibus, was injured when the conductor refused to permit her to disembark.

[9] 305 N.Y. 140 (1953). A child was burned to death when a cowboy suit purchased at defendant's store caught fire. Suit was brought for the child's pain and suffering, not for his wrongful death under section 130. It was held that the action for breach of implied warranty of fitness for use was timely and was not barred by the tort statute of limitations.

[10] 305 N.Y. at 147-148.

[11] Maynard v. Eastern Airlines, Inc., 178 F. 2d 139 (2d Cir., 1949); Herman v. Eastern Airlines, Inc., 149 F. Supp. 417 (E.D.N.Y., 1957); Pearson v. Northeast Airlines, Inc., 180 F. Supp. 97 (S.D.N.Y., 1960); Snow v. Northeast Airlines, Inc., 176 F. Supp. 385 (S.D.N.Y., 1959); Bannister v. Northeast Airlines, Inc., 6 Av. Cas. 17,688 (E.D.N.Y., 1959); Riley, Admx. v. Capital Airlines, Inc., 6 Av. Cas. 18,159 (N.Y. Sup. Ct., Monroe County, 1960); Kilberg v. Northeast Airlines, Inc., 6 Av. Cas. 17,988 (N.Y. Sup. Ct., App. Div., 1960).

[12] Patterson v. American Airlines, Inc., 3 Av. Cas. 18,214 (S.D.N.Y., 1953).

[13] N. J. Stat. Ann., § 2A: 31-1 (1952).

[14] N. J. Stat. Ann., § 2A: 15-3 (1952).

[15] It should be noted that the action was brought under the statutes of New Jersey, the state where the crash occurred, not the state where the flight originated.

[16] 96 Misc. 289, 160 N.Y.S. 401, aff'd 176 App. Div. 885, 161 N.Y.S. 1143 (Sup. Ct., App. Div., 1916).

[17] N. Y. Decedent Estate Law, sec. 130 (1949).

[18] 3 Holdsworth, History of English Law, 3d ed. (1923).

[19] 1 C.J.S., *Abatement and Revival* § 137; 1 Am. Jur., *Abatement and Revival* § 85.

[20] See, e.g., N. J. Stat. Ann. 2A: § 15-3 (1952); N. C. Gen. Stat., § 28-172 (1950).

[21] However, this is often interpreted to be subject to the limitation that the decedent must have survived for a period of time after the complained of injury. Because instantaneous death often results in airplane crash cases, this last requirement often results in no action surviving, even under the statute.

The theory is that since the action survives the death of decedent, it must have vested in him while he was living. See, e.g., Micks v. Norton, 256 Mich. 308, 239 N.W. 512 (1931); and Royal Indemnity Co. v. Pittsfield Electric Co., 293 Mass. 4, 199 N.E. 69 (1935).

[22] Stewart v. Lee, 70 N.H. 181, 46 Atl. 31, (1900) and Winnegar's Admr. v. Central Passenger Ry. Co., 85 Ky. 547, 4 S.W. 237, (1887) [carriage of passenger on street railway], are actions in which it was held that contracts involving personal injuries to the decedent, as opposed to those to his estate, survived under the statutes.

[23] Where the action is not for wrongful death the courts are more liberal. See, e.g., Lee's Admr. v. Hill, 87 Va. 497, 12 S.E. 1052 (1891), [plaintiff had his choice of actions and could sue in contract for wrongful discharge of his decedent, so that the contract survived]; 5 Corbin, Contracts, § 1019 at 104-105 (1951):

> If the plaintiff has stated and proved facts that constituted both a tort and a breach of contract, he may have an election between the two different measures of recovery; but there is no necessity for requiring him to make an election between them since he can choose the more advantageous one without injustice to the defendant.

[24] Revel v. Illinois Merchants' Trust Co., 238 Ill. App. 4 (1925), aff'd Revel v. Butler, 322 Ill. 337, 153 N.E. 682 (1926); Willey v. Alaska Packers' Ass'n, 9 F. 2d 937 (N.D. Cal., 1925). Contra, Keiper v. Anderson, 138 Minn. 392, 165 N.W. 237 (1917); Roche v. St. John's Riverside Hospital, 96 Misc. 289, 160 N.Y.S. 401, aff'd 176 App. Div. 885, 161 N.Y.S. 1143, (1916).

[25] Ill. Rev. Stat., ch. 70, Sec. 1 (1959), speaks of "act, neglect, or default." Default has been interpreted in the following ways: "The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement," Black, Law Dictionary (4th ed.) at 505; "The non-performance of a duty, whether arising under a contract or otherwise," Bouvier, Law Dictionary (Century Ed., 1946) at 282; "Fault; neglect; omission; the failure of a party to an action to appear when properly served with process; the failure to perform a duty or an obligation; the failure of a person to pay money when due or when lawfully demanded," Ballentine, Law Dictionary (1930) at 346.

[26] Van Beeck v. Sabine Towing Co., Inc., 300 U.S. 342 (1936) [federal statutes giving a cause of action for the death of a merchant seaman.]

[27] See, generally, Prosser, Torts, 478-486, 705-719 (2d ed., 1955); 5 Corbin, Contracts, § 1019 (1951). The analogy of the guest statute may be illustrative. Guest statutes, or common law decisions reaching the same result, usually provide that the driver of a motor vehicle owes to his gratuitous passengers only a duty to refrain from wilful and wanton negligence, while a driver who is compensated by his passengers owes them a duty of reasonable care. While such a distinction is imposed by law, it seems consistent to say that it is based on the contractual relation between the parties when payment is involved. Automobile Ins. Com., 1960, *Automobile Guest Laws Today*, 27 Ins. Counsel J. 223 (1960).

[28] Sweeney, *Is Special Aviation Liability Legislation Essential?* 19 J. Air L. & Com. 166, 317 (1952).

[29] *Many Legal Twists Govern Air Crash Claims*, Business Week, Feb. 6, 1960, pp. 64-65.