Journal of Air Law and Commerce

Volume 11 | Issue 3 Article 7

1940

# Notes, Comments, Digests

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Recommended Citation

*Notes, Comments, Digests*, 11 J. Air L. & Com. 293 (1940)
https://scholar.smu.edu/jalc/vol11/iss3/7

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# NOTES, COMMENTS AND DIGESTS

## SEAPLANE CRASH—DEFENSE AS "VESSEL" WITHIN FEDERAL LIMITATION OF LIABILITY STATUTES.*

Defendant was sued for the death of plaintiff's intestate who was killed while traveling as a passenger on one of defendant's "seaplanes," the wreckage of which was later found in the ocean. While the normal use of the plane was as an aircraft, it was so designed as to navigate either on land or water when taking off or landing. Hence the defendant alleged in defense, the Federal limitation of liability statutes.[1] On motion, the court struck this defense, holding that the defendant's amphibian seaplane was not a "vessel" within the meaning of the statutes.

This and one other case,[2] where the same result was reached, are the only reported decisions which squarely hold that a seaplane is not a "vessel" within the statutes. However there exist a number of cases closely analagous.[3] To any court considering the question, three positions are available: (1) that a seaplane is never a "vessel" within the Federal limitation of liability statutes, (2) that "vessel" always includes seaplanes, and (3) that a seaplane is only a "vessel" when afloat on the water, but not when aloft.

At first blush, the third alternative offers considerable appeal. However as instanced by the present case, such a theory presents difficult problems of administration. For a court to determine whether at any given moment, a craft is a vessel, is ordinarily impossible. Often no evidence exists as to why, when and where a decedent met his death—whether in the air, on the water or while still in the seaplane.

*Dollins v. Pan-American Grace Airways, Inc., 27 F. Supp. 487 (S. D. N. Y., 1939).

1. 46 USCA 183, ff.

2. Noakes, as Executor, etc. v. Imperial Airways, Ltd. et al, 235 C. C. H. (Aviation Law Service) 936 (1939).

3. In, *The Crawford Bros. No. 2,* 215 Fed. 269 (D. C. W. D. Wash., 1914), the court held it had no admiralty jurisdiction of a libel for repairs to a plane which had fallen into Puget Sound. It does not appear whether the plane was a seaplane, amphibian or landplane. In, *The matter of the claim of Aksel E. Reinhardt* v. *Newport Flying Service Corporation, et al.,* 232 N. Y. 115, 133 N. E. 371 (1921), the court held that state tribunals had no jurisdiction of a workman's compensation claim for injuries caused by the propeller of a hydroplane while floating on the water—that the hydroplane, under those circumstances was a "vessel" and subject exclusively to admiralty jurisdiction. The Court indicated that had the hydroplane been in the air, they would have taken jurisdiction. In, *People ex rel Cushing* v. *Smith,* 119 Misc. Rep. 294, 196 N. Y. Supp. 241 (1922), not referred to in the instant case, the trial court held that a hydroplane was not a "floating structure" within the penal code of New York prohibiting "vessels" or "floating structures" from operating without mufflers. On appeal, the Appellate Division reversed on the authority of the *Reinhardt* case. In, *Wendorff, admr., etc.,* v. *Missouri State Life Insurance Co.,* 318 Mo. 363 (1927), not referred to in the instant case, the court held that seaplane was a "mechanical device of aerial navigation" within the meaning of a life insurance clause excepting from coverage, injuries suffered by the insured while in such a device. Although the insured was not allowed to plead that the plane was exclusively a "vessel" at the time of the accident, the court indicated that under some circumstances they might consider a seaplane as a "vessel." In, *United States* v. *One Fairchild Seaplane, et al.,* 6 F. Supp. 579 (W. D. Wash., 1934) the trial court held that a mechanic who repaired a seaplane while in the shops, was entitled to a maritime lien against the plane, because a "vessel." This holding was reversed in *United States* v. *Northwest Air Service, Inc.,* 80 F. (2d) 804 (C. C. A. 9th, 1935). The court held that though a seaplane might be a "vessel" while afloat on navigable waters, it was never such while stored in a hangar on land.

To say then that we must choose between the first and second alternative, is simply to state that we must determine whether or not admiralty law is to be applied in these circumstances. The limitation of liability of vessel owners for damages occasioned to freight and passengers is not new in the law of admiralty.[4] Congress has approved the policy by providing that no vessel owner shall be liable for damages to a greater extent than the amount of his interest in the vessel and her freight.[5] Difficulty however arises, for though Congress has elsewhere generally defined "vessel" as that "used or capable of being used" as a means of transportation on water,[6] no specific definition is given of the term as used in the limitation statutes.

Looking first at the limitation statutes themselves, it is obvious as to the original statute, passed in 1851, that Congress could not have contemplated aircraft, for such were nonexistent. Primarily the purpose of these statutes was to aid in the development of the Merchant Marine. No broader intent can be ascribed to them. When amended in 1935, no basic changes were made in Section 183(a), which embodied substantially the law of 1851. What was added, was Section 183(b) through (f), wherein are to be found such terms as "seagoing vessel," "seagoing steam vessel," "motor vessel" and "seagoing sailing vessel." These terms seem naturally to apply to crafts operated exclusively in water.[7] The failure of Congress specifically to mention seaplanes would seem to be a factor of some importance in statutory construction, particularly as it must be presumed that Congress was familiar with the legal problems which had previously arisen.[8]

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4. The principle has been applied in Europe for centuries, and in England, by virtue of statute since at least 1734. The first limitation of liability statute in this country was adopted in 1851 and with slight changes, the general principles in force today are substantially the same as when then adopted.

5. 46 USCA 183(a)—"The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

46 USCA 188—"Except as otherwise specifically provided therein, the provisions of section . . . 183, 183b, 183c, . . . of this title shall apply to all seagoing vessels used on lakes or rivers or in inland navigations, including canal boats, barges and lighters."

6. (a). In 1 USCA 3, it is provided: "The word 'vessel' includes every description of water craft or other artificial contrivance *used or capable of being used* as a means of transportation on water." (Italics supplied.) (Derived from an act of 1866.)

(b). In 46 USCA 801, it is provided: "The term 'vessel' includes all water craft and other artificial contrivance of whatever description and at whatever stage of construction, whether on the stocks or launched, which are *used or are capable of being or are intended to be used* as a means of transportation on water." (Italics supplied.) (Derived from the Shipping Act of 1916.)

Evidently these definitions are to be applied to the limitation of liability statutes.

7. Dictionaries and legal works often attribute a broad meaning to the term "vessel." *Black's* and *Bouvier's* law dictionaries define the term to mean: "A ship, brig, sloop, or other craft used in navigation." *Webster* defines it to mean: "Any structure, esp. a hollow one, made to float upon the water for purposes of navigation; a craft for navigation of the water, usually, specg., one larger than a common row-boat; as a war vessel; a passenger vessel; also in modern use, any of various types of aircraft; a ship." *Corpus Juris Secundum*, Vol. 21, p. 80, says: "The word 'vessel' included every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water; and if the business of employment of a vessel appertains to travel or trade and commerce on the water, it is subject to the admiralty jurisdiction whatever may be its size, form, capacity, or means of propulsion, and the status of a craft as a vessel depends not on the use to which it is put, but on the use to which it is capable of being put." *American Jurisprudence* Vol. 1, p. 562-31, says: "The term 'vessel' has been interpreted liberally and broadly, and indicates any structure used, or capable of being used, for transportation upon water, and of which movement, rather than fixity or permanence, is the predominant characteristic."

8. See cases cited in note 3, supra.

It must be admitted that courts by liberal construction of the statutes have held them to apply to objects which would scarcely seem to be "vessels."[9] The test which has been adopted for determining whether a craft is a "vessel," is, the purpose of the craft and its *capability* for use in transportation—not whether it is actually so used.[10] The method of propulsion seems to be immaterial. It is difficult however to conclude that courts would ordinarily extend the definition of "vessel," either under their own doctrine or as used in the statute, to include seaplanes.[11]

This position finds support in the fact that the court's test of a "vessel" is similar to that established by general congressional definition. As the first of these definitions was passed in 1866,[12] obviously seaplanes could not have been included. In 1916 when the second was adopted, seaplanes, though known, were not specifically referred to. Instead the language of 1866 was substantially reincorporated.[13]

Taking the words of the definite statutes literally, it would seem that a seaplane might be a "vessel" within the statutory requirements, for it might be considered as "capable of being used" as a means of transportation on water. However it is doubtful whether a seaplane would qualify as a "vessel" under the further clause, "intended to be used,"[14] particularly as the words "capable of being used," have been qualified by judicial construction to mean "practically" or "practicably" capable of being used.[15] A seaplane does not fulfill such requirements. Primarily its function is to transport through the air, the use it makes of the water being for a negligible time only. Though perhaps "capable of being used" on water, it cannot be said that they were designed for such purpose.

Yet to be considered is the effect of the Air Commerce Act of 1926, which provides that the "navigation and shipping laws of the United States"[16] shall not apply to seaplanes and other aircraft. If the limitation of liability statutes may be considered as part of said laws, this provision is rather clear evidence of congressional intention to exclude seaplanes from the catagory of "vessels."

CHARLES G. BRIGGLE, JR.

## INFANTS—RECOVERY OF TRANSPORTATION FEES*

Appeal from Municipal Court, Borough of Manhattan, First District.

Action by Martha Vichnes, also known as Martha Whitney, an infant, etc.,

9. Thus rafts, floating elevators, pump boats, dredges, sunken boats, wrecks, derrick boats and floating dry docks have been held to be "vessels."

10. Warn v. Easton and McMahon Transit Co. 2 N. Y. Supp. 620 (1888); Charles Barnes Co. v. One Dredge Boat, et al, 169 Fed. 895 (1909); Cope v. Vallete Dry Dock Co. 119 U. S. 695 (1887).

11. Examination of the use of the word "vessel" wherever found in the twenty-six chapters of the general "Shipping" laws of the United States (46 USCA.) confirms this position. Of these chapters, the limitation of liability statutes comprise only one (Chapter 8). No reason exists why the term "vessel" should be construed differently in chapter eight than in the remainder of the title. Though certain of the provisions might theoretically be construed to include seaplanes, such is not their natural construction.

12. Note 6(a), supra.

13. Note 6(b), supra.

14. Note 6(b), supra.

15. Evansville and Bowling Green Packet Co. v. Chero Cola Co. et al., 271 U. S. 19 (1926); Petition of Kansas City Bridge Co. 19 F. Supp. 419 (W. D. Mo., 1939).

16. 49 USCA 177 (a). "The navigation and shipping laws of the United States, including any definition of "vessel" or "vehicle" found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft."

*Vichnes v. Transcontinental & Western Air, Inc. 18 N. Y. S. (2d) 603, (Supreme Court, Appellate Term, First Department, March 8, 1940.)

against Transcontinental & Western Air, Incorporated. From an order of the Municipal Court of the City of New York, granting plaintiff's motion for summary judgment, and from the judgment entered thereon, and from an order denying defendant's motion for summary judgment, the defendant appeals.

Judgment and order granting summary judgment reversed, and defendant's motion for summary judgment granted.

Argued January term, 1940, before HAMMER, SHIENTAG, and NOONAN, JJ.

*PER CURIAM—*

(1) Since the facts are not in dispute the question presented is one of law. Plaintiff, a fifteen year old infant, paid defendant $160 for one meal and transportation from New York to Los Angeles. On returning to New York she repudiated the transaction, demanded return of the amount paid, and brought this action in which she has been granted summary judgment. No controlling authority sustaining such a determination has been brought to our attention, and we are unable to agree with the decision below.

(2) The contracts of infants are voidable, not void, and there is no basis for rescisson here in view of the concession that the reasonable value of the transportation was the sum paid by plaintiff.

Judgment and order granting summary judgment reversed, with $10 costs, and defendant's motion for summary judgment granted, with costs.

SHIENTAG and NOONAN, JJ., concur.

HAMMER, Justice.

I concur. But I also observe that by sec. 513 of the Penal Law a common carrier of passengers who, without just cause or excuse, refuses to receive and carry a passenger, is guilty of a misdemeanor. The record shows no fact which would have justified defendant's refusal to receive and carry the plaintiff.

1. This short opinion is given in full and without comment because of its very pertinent relationship to the subject matter of The Liability of an Infant for Flight Instruction by Cyril Hyde Condon (1939), 10 JOURNAL OF AIR LAW 289, which article was prompted by the decision of the Supreme Judicial Court of Massachusetts in *Adamowski* v. *Curtiss-Wright Flying Service, Inc.*, 15 N. E. (2d) 467 (1938); 1938 U. S. Av. R. 38.