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Notes, Comments, Digests

NOTES, COMMENTS, DIGESTS

COMMENTS AND OPINIONS

Negligence—Res ipsa loquitur—Injuries From Failure of Parachute to Open.—[Illinois] Plaintiff, an experienced parachute jumper, leaped from a plane at a height of 2,500 feet. He carried two parachutes which had been packed by defendant's licensed "rigger." Both parachutes failed to open properly, and the plaintiff suffered injuries from the fall. In his complaint he alleged that the defendant was negligent in not properly preparing, folding and packing the parachute. The jury awarded him $5,000 and costs. *Held:* There was sufficient evidence to support the allegations in the complaint and the verdict for the plaintiff was proper. *Jack Cope* v. *Air Associates Inc.,* 283 Ill. App. 40 (1935).[1]

The court summarily refused to apply the doctrine of *res ipsa loquitur,* saying that it had no application where there is evidence of specific negligence. This statement is based upon the decision in *O'Rourke* v. *Marshall Field and Co.*[2] In that case the plaintiff, a child of six years, was injured in falling from a toy horse in the defendant's playroom. There was evidence that the handle on the horse was loose, and the court said that where specific negligence is shown, the doctrine of *res ipsa loquitur* does not apply. The Illinois court has defined the doctrine in *Feldman* v. *Chicago Ry. Co.*[3] to be: where a thing which has caused injury is shown to be under the management of the party charged with negligence, and the accident is such that in the ordinary course of events it would not have happened if those who had the management had used proper care, the accident itself affords reasonable evidence, in the absence of explanation, that it arose from want of proper care by the party charged. The doctrine thus becomes a rule of evidence which places the burden of explaining on the defendant after the plaintiff has stated facts within the rule.

In the present case the doctrine would be applicable but for the limitation placed upon it by the *O'Rourke* case, for the defendant had exclusive control over the preparation of the parachute (as required by the rules of the Bureau of Air Commerce of the United States Department of Commerce which are in force in Illinois[4]), and it would undoubtedly have opened if it had been properly folded and packed. Had the plaintiff failed to substantiate his allegations of negligence with the proper evidence the doctrine might still be invoked to allow him recovery, for the court has held that an unsuccessful attempt by the plaintiff to make out a case of specific negligence does not prevent his relying on the doctrine when the case is within the rule.[5]

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1. Appeal dismissed by Supreme Court. See Chicago Herald & Examiner, April 23, 1926.
2. 307 Ill. 197, 138 N. E. 625 (1923).
3. 289 Ill. 25, 124 N. E. 334 (1919). See also *Brison* v. *St. Louis Transfer Co.,* 155 Ill. App. 317 (1910); *Chicago Union Traction Co.* v. *Giese,* 229 Ill. 260, 82 N. E. 232 (1907); *Bollenback* v. *Bloomenthal,* 341 Ill. 539, 173 N. E. 670 (1930).
4. *Aeronautics Bulletin No.* 7-D, Dept. of Commerce, Air Commerce Regulations, Parachute Supplement.
5. *Galena & Chicago R. R. Co.* v. *Yarwood,* 17 Ill. 509 (1856); *North*

In the instant case one would hardly criticize the result, but the court seems to have disposed of a serious matter with extreme lightness; there is no mention of any specific negligence of the defendant unless the broad statement that the parachute was improperly prepared, folded and packed satisfies that requirement. Inasmuch as the number of cases in the field of aviation is rapidly increasing, it is fortunate that the court has not completely closed the door for the use of the doctrine of *res ipsa loquitur* in this type of case. Thus, even under the instant decision, if one is injured because of a faulty parachute, and is unable to show a specific act of negligence, the doctrine may be invoked. However, it is regrettable that the court did not take a definite stand in a positive manner and show what is necessary for the application of the rule, as did the California court in *Parker* v. *James E. Granger, Inc.*[6]

JOHN MCNERNEY.[7]

Negligence—Air Carriers—Death of Passenger in an Air Line Aircraft. —[New York] Gentlemen of the Jury:[1] A young man named Harry Pinsley was killed in an airplane accident near Liberty, Sullivan County, in this State, on June 9, 1934. He was at that time, as I recall the testimony, twenty-six years of age, and had an expectancy of 38.11 years of life according to Mortality Tables. Subsequent to his death Mr. Goodheart, the plaintiff in this action, obtained letters of administration upon his estate, and brings this action against the defendant, the American Airlines, Inc., to recover damages for the death of this young man which, he says, was caused by the negligence of the defendant. It appears that on the day in question this young man became a passenger on one of the airplanes owned and operated by the defendant. He boarded the plane over at Newark, New Jersey, and the plane left the airport about 4:03 that afternoon, that is, three minutes after 4:00 o'clock. It was heard from again some little distance north, or northwest of Newburgh, one-half hour later, at 4:33, and it was not heard of again until the airplane was found with its nose imbedded in the side of a mountain 200 feet below the top, and the trees along the side of the mountain and below the mountain for some distance with the tops, parts of them, cut off, parts of the wings of the airplane on the trees and the dead bodies of the occupants of the plane found. There were four passengers on the plane, of which the plaintiff's intestate was one, two pilots, that is, the regular pilot and a co-pilot, and a stewardess. All seven were killed in this accident. The defendant says it was not negligent, that it used the care that was required by law, and that it did everything that human foresight and ingenuity could have foreseen under the circumstances of the case.

The mere fact that this young man was killed in the accident does not entitle the plaintiff to a verdict at your hands. The young man's representa-

Chicago St. R. R. Co. v. *Cotton*, 140 Ill. 486, 29 N. E. 899 (1892); *Chicago City R. R. Co.* v. *Carroll*, 206 Ill. 318, 68 N. E. 1089 (1903).

6. 90 Cal. 475, 52 P. (2d) 226 (1935), Comment (1936) 7 JOURNAL OF AIR LAW 283.

7. Student, Northwestern University School of Law.

1. The following charge to the jury was made April 29, 1936, by Dodd, J., in the case of *Goodheart* v. *American Airlines, Inc.*, before the Superior Court of New York, Nassau County. Copy of the charge to the jury furnished through the courtesy of Pruitt and Grealis, Attorneys, of Chicago.

tive here must prove by a fair preponderance of the believable evidence in the case that his death was caused by the negligence of the defendant, and that he himself was free from contributory negligence. All we know about the case is that the young man boarded the plane on the afternoon in question and that he was killed about an hour or so later. The defendant says that it did everything that prudence and caution could have suggested to prevent such an accident as this. It appears that the plaintiff was bound for Buffalo, and that the direct route usually taken by these planes to that point was by way of Scranton and Elmira, and then across to Buffalo. But they had received weather reports that day; they were accustomed to receive weather reports from time to time throughout the day, and the officers of the company and the pilot had a conference before the plane started and it was decided that because of weather conditions reported to the officers of the company, or those in charge of the management of this service, weather conditions were not to their liking, and they decided to take what was known as the alternate route. That route was up over the Hudson River to a point about twenty miles south of Albany, and then to take a westerly course to their destination, stopping at the City of Syracuse for fueling. They told us what inspections were made of these planes, what the laws of the United States provided for inspection, and what the rules of the company provided, and they say that this plane was inspected early that morning and its equipment was found to be in good condition; that before the pilot boarded the plane he himself looked over the plane, made an examination of the instruments, of all of the equipment, the motor and instruments that have been described here, and all this was done before going; that he had the weather reports and he had a map with him to show the route, and that everything that they could have done was done under the circumstances.

What happened after he reported back to the port at Newark we do not know. All we do know is that at 4:33 that afternoon he reported by air where he was, and the next thing he was to have reported again at 5:03 or 5:00 o'clock sometime, then every half hour, I think the testimony is, his position and what conditions were. They heard nothing from him at 5:00 or 5:30 or 6:00, and at 7:00 o'clock they became alarmed, sent a message to the general manager of the concern who was in Washington, and a search was started for this plane, and it was finally found on the 11th at the place that we have heard.

The defendant in this case was a common carrier of passengers, and it owed to this plaintiff's intestate, this young man who was killed, the highest degree of care. It was not the insurer of the safety of the passengers, but it owed to them the highest degree of care, care in the selection of the airplane itself, care in its proper equipment, care in the selection of the pilot who was to operate it, and care to see that the motor and all of the working parts of the airplane were in a proper and safe condition.

In this case we do not know what occurred, except that we do know that the plane was destroyed and this plaintiff was killed. We have proof of an accident resulting in the death of the plaintiff's intestate. Where in such a case the accident cannot reasonably be accounted for except on a basis of negligence, the defendant is called upon to explain the accident, and in the absence of an explanation consistent with the exercise of due care the jury

may find the defendant negligent. It may find a verdict in favor of the plaintiff. It does not, however, relieve the plaintiff of the burden of proving negligence. That burden remains upon the plaintiff throughout the case and does not shift, and he must prove this by a fair preponderance of the evidence. Has the defendant overcome the presumption of negligence which resulted from the occurrence of the accident? If it has, then you cannot find the defendant negligent, you must find it free from negligence and your verdict will be for the defendant, but if it has not overcome that presumption then you may find a verdict in favor of the plaintiff.

Was the plaintiff's intestate free from contributory negligence? Did he do everything that a reasonably prudent person could have done under the circumstances? We do not know what happened in the airplane, and I do not think that the defendant in this case urges the question of contributory negligence, so it is not necessary for you to consider that, but you will consider, gentlemen, whether or not the defendant was negligent under the rules that I have laid down for your guidance. If you find the defendant negligent, then your verdict of course must be for the plaintiff.

We have here, as I said, a young man twenty-six years of age, with an expectancy of 38.11 years. He left him surviving a father, whose age was fifty-eight. The father had an expectancy of 15.39 years. His mother was forty-eight years of age, and she had an expectancy of 22.36 years. What was the value of the life to those whom this young man left behind him? It is a cold-blooded way to consider matters, but we have nothing else that we can do. We cannot restore the life of the young man to his parents, to his sister and brothers, and the only other thing that is left for us, if his death was caused by the negligence of the defendant, is to award to those who are left behind damages that they sustain by reason of his death. Hence comes the question what in dollars and cents was his life worth to his father, mother, brothers and sisters at the date of his death? There is testimony here that after having been graduated from law school he never practiced his profession, but he did go to work for a music concern, and you heard the testimony as to what his duties were and as to his compensation. The plaintiff in this case, the administrator of the estate of the young man says that he was in the employ of their company from 1932; that that year he received in salary and bonus $3,825; in the year 1933 he received in salary and bonus $8,500. In 1934 he was paid a salary of $400 a month. His death occurred that year and he received no bonus, and all he received from them during that time was the $400 a month. His father says that he made allowances to him, sent him money every month and he told us what it was. All of these things you will take into consideration, gentlemen, if you find that the plaintiff is entitled to damages.

Come right down to the old question, what in dollars and cents was his life worth to his next of kin on the day of his death? That is for you to say from all of the evidence in the case.

You are the sole judges of the facts both on the question of negligence and the question of damages, if you get to that point. You are not bound by any statement of facts made by counsel or by myself, unless that statement of fact agrees entirely with your recollection of the testimony given by the witnesses on the stand. The duty and responsibility of determining where the truth lies is upon you, not upon counsel or upon myself. That

is your part of this trial. The law you must take from me as I have given it to you. That does not mean that I cannot commit error, make a mistake, I am not infallible, it does not mean anything of the sort, but it means just this, that if this case goes to an Appellate Court for review that Court will assume, as it has the right to assume, that the jury followed the instructions of the Judge and determined for themselves, from the evidence in the case, what are the facts, and to the facts as they found them to be applied the law as given to them by him. So you see, if you do not follow my instructions you may do great and irreparable injury to either of the parties to this litigation.

This is a Court of Justice. You and I are here to do exact justice, so far as it is humanly possible to do it between the plaintiff on the one side and the defendant on the other. Into our deliberations must enter no consideration of sympathy, of charity, of bias or of prejudice, nor is this a place for generosity. We have no right to be generous with other people's money, but we must be just. If this man's death was caused by the negligence of the defendant then we must award to his next of kin damages that are fair and reasonable under all the circumstances of the case. And it is for you to decide if you find that the defendant was negligent what lump sum will compensate his next of kin for his death.

The fact that I am giving this case to you must not create in your mind any idea that I have an opinion as to the facts in this case. It does not mean that at all. It means that in my judgment there is a question of fact here which must be passed upon by you gentlemen of the jury. I have no opinion as to the facts. If I had and you knew what it was, it would be your solemn duty to disregard that entirely, because the duty and responsibility of determining the facts is upon you. The same is true as to the rule of damages. The fact that I have charged you on the subject of damages means just this, that if you find the plaintiff was entitled to damages that is the rule you must follow in fixing your award.

MR. UTERHART: I ask your Honor to charge the jury that the rule of the highest degree of care extends to all the employees of the defendant, who were connected with this flight including Holbrook and the co-pilot.

THE COURT: Yes. If you so find that this accident was caused by the negligence of any agent or servant of the defendant, then your verdict must be for the plaintiff.

MR. LODER: May I call the Court's attention to the fact I believe in this case there are only two next of kin, that is, father and mother.

THE COURT: Father and mother.

MR. LODER: You mentioned brother and sister.

THE COURT: I meant father and mother. Of course, we do not know how long this man may have lived, he may have turned out to be the finest son in the world, he may have turned out to be otherwise, we do not know. The best we can do is use our own judgment in fixing the amount of damages, if we find the plaintiff is entitled to them.

MR. UTERHART: I would ask your Honor to charge more specifically on the question of contributory negligence.

THE COURT: I think that has been withdrawn from the case entirely. There is no claim of contributory negligence in this case?

MR. LODER: We have no proof of it.

THE COURT: Take the case and do justice between the parties.

Verdict

THE FOREMAN: The jury say they find the defendant not guilty.

THE CLERK: You say you find a verdict in favor of the defendant?

MR. LODER: I presume the verdict should be rendered as a verdict in favor of the defendant.

THE COURT: It is a defendant's verdict.

MR. UTERHART: I ask that the jury be polled.

MR. UTERHART: I move to set aside the verdict upon the ground it is against the law, against the evidence, against the weight thereof, and upon all other grounds set forth in Section 549 of the Civil Practice Act.

THE COURT: Decision is reserved.

DIGESTS

Air Exhibitions—Personal Injuries—Conspiracy to Commit Illegal Act by Members of State Fair Board—Violation of State Air Traffic Rules.—[Iowa] In the conduct of the Iowa State Fair held over a 7 day period in August of 1930, as one of the attractions and entertainments, the State Fair Board entered into a contract with the Curtiss-Wright Exhibition Corporation for aerial exhibition programs to be presented before the grandstand. On August 28th in pursuance of the terms of the contract, the employees of the Curtiss-Wright Company were stunting three planes over the fairgrounds at an alleged height of less than 500 feet and within 300 feet of each other, in violation of Sec. 8338-c7 and Sec. 8338-c8 of the Iowa statutes. Two of said airplanes collided and one crashed, striking several guests in the crowd below and fatally injuring the plaintiff's decedent, Vernon F. De Votie. The fact situation in this case came before the same court in the case of *De Votie* v. *Iowa State Fair Board* (216 Iowa 281). It was there held that the Iowa State Fair Board, being an arm of the State, was not suable. Plaintiff then filed an amended and substituted petition, alleging generally the same facts, and claiming that the defendants, as individual members of the State Fair Board, were guilty of conspiracy to do an illegal act and were therefore liable personally to respond in damages. Defendant's motion to strike the amended and substituted petition was sustained, whereupon plaintiff excepted and appealed. *Held:* on appeal affirmed. Since the State in its sovereign capacity was conducting the state fair, and since the statutes (dealing with minimum altitudes and acrobatic flying, and commonly considered a part of the state air traffic rules) which are made the basis of the charge of conspiracy to do illegal acts do not expressly or by clear intent apply to the State, then such statutory provisions are not applicable to the State, and it cannot be said therefore that the State was a party to or engaged in an illegal or unlawful act. Nor are the defendants as individual members of the State Fair Board liable. The Fair Board being an agency of the State, the members of the Board, while in the discharge of their duties as such members, stand in the place of the State, and their action is the action of the State. Plaintiff's amended and substituted petition and amendment therefore did not show a cause of action against the defendant Board or against them as individuals. *R. G. De Votie, Administrator of the Estate of Vernon F. De Votie, Deceased* v. *Charles E. Cameron, et al.*, — Iowa —, 265 N. W. 637. (Decided March 10, 1936, Supreme Court of Iowa.)

Constitutional Law—Application of Federal Air Traffic Rules.—[Federal] *Per Curiam.* The appeal from a decision of the Supreme Court of California herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936,

937). Treating the papers whereon the appeal was allowed as a petition for a writ of certiorari, Section 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Thomas J. Parker, Adm.* v. *James Granger, Inc., and Tanner Motor Livery,* 56 Sup. Ct. 958. (Decided June 1, 1936, United States Supreme Court). For a prior account of the issues involved in this case, see 7 JOURNAL OF AIR LAW 275, 283 (1936).

Insurance—Double Liability—Construction of "Engaging as a Passenger or Otherwise in Aeronautic Expeditions" Exclusion Clause.— [Federal] Insured held a life insurance policy with defendant in which, for a separate premium, defendant agreed to pay double indemnity if death resulted solely from bodily injuries caused directly by accidental means "and shall not be the result of or be caused directly or indirectly . . . by engaging as a passenger or otherwise in submarine or aeronautic expeditions." The death of insured resulted under the following circumstances: One Reed, a friend of Day's, brought a privately owned plane to Denver some time before the accident. The plane was airworthy but neither it nor Reed was licensed to carry passengers for hire. The exact status of the pilot is not shown, although it appears that he had had some fifty hours of flying experience. Reed took the insured up as a guest for a pleasure flight over the airport and the outskirts of Denver one day when weather conditions were favorable. The pilot made a simple loop and the plane straightened out, then went into a spin and crashed, killing the insured. The question in the case is whether or not those circumstances constituted an aeronautic expedition to relieve the defendant from liability for the death of insured. In the trial court judgment was entered for the defendant. *Held:* on appeal, reversed. As words are ordinarily used, a pleasure trip over an airport on a pleasant day is not an "expedition." The mythical average man when offered such a policy would not think that an ordinary airplane trip was excluded by the formidable words "submarine or aeronautic expeditions." If it were intended, when the policy was drafted and offered for sale, to exclude from coverage every loss resulting from an airplane trip or flight, counsel drafting the clause could have found language less apt to mislead the buying public. In construing contracts words will be given the meaning that common speech imports, and where reasonable men might differ, an ambiguous phrase should be resolved in favor of the customer who purchased the policy and not in favor of the company which drafted it. *Iva A. Day* v. *The Equitable Life Assurance Society of the United States,* 83 F. (2d) 147. (U. S. Circuit Court of Appeals, Tenth Circuit, decided April 7, 1936).

For a review of recent cases involving the construction of similar clauses see article in this isssue, "Aeronautic Risk Exclusion in Life Insurance Contracts," *Fred M. Glass,* 7 JOURNAL OF AIR LAW 305; 7 JOURNAL OF AIR LAW 143 (1936) (note by *Fred M. Glass*); and 6 JOURNAL OF AIR LAW 626 (1935) (note by *William G. Karnes*).

Negligence—Alleged Violation of Air Commerce Regulations Governing Use of Dual Controls in Airplane—Contributory Negligence—Res Ipsa Loquitur.—[South Dakota] Action was brought by plaintiff as administratrix of the estate of her deceased husband, Clarence Budgett, for the recovery of damages resulting from the death of said decedent, claimed to have been caused by the negligence of defendant in the operation of an airplane in which decedent was riding. Defendant was engaged in the business of selling airplanes, and for the purpose of demonstrating them to prospective customers employed a licensed pilot, who was also in general charge of defendant's airport. On March 31, 1931, said Clarence Budgett and one Philip W. Schmidt, both licensed pilots themselves, went to said airport as prospective buyers of an airplane and made arrangements for the demonstration of a certain airplane, a "Travelair OX5," having two cockpits equipped with dual controls, the front cockpit accommodating two passengers and the rear cockpit one. Budgett and his companion occupied the front cockpit and defendant's pilot in control occupied the rear. The

controls in both cockpits were hooked up but the passengers, being licensed pilots, undoubtedly understood the danger of interfering with the dual controls. Shortly after the take-off and two or three turns about the field, the plane stalled and crashed, the two passengers being killed almost instantly, although the pilot was not seriously injured.

Plaintiff introduced in evidence Aeronautics Bulletin No. 7 containing the following air commerce regulation: "*Supplies and equipment* . . . (B) in licensed aircraft the controls shall be so constructed or arranged as to prevent passenger or cargo from interfering with the course of flight of the aircraft"; and she claimed that in using the ship with the dual controls hooked up while the plane was being used for demonstration purposes, the defendant violated the federal rule set out and was therefore negligent, and that such negligence was the proximate cause of the accident. Plaintiff also invoked the doctrine of *res ipsa loquitur*. Defendant claimed that the passengers, being experienced pilots, were contributorily negligent in riding in the cockpit with the dual controls hooked up. The case was tried to a jury and at the close of the evidence defendant moved for a directed verdict, which motion was denied. The jury returned a verdict for the plaintiff. Defendant then made a motion for judgment *non obstante veredicto*, which was granted. *Held:* on appeal, affirmed. Plaintiff failed to sustain the burden of proof necessary for recovery. The Court found it unnecessary to determine which, if either of the parties was negligent, because, however negligent decedent and his companion may have been in riding in the cockpit with the dual controls hooked up, it is not shown that such negligence contributed in any way or to any extent to the accident. They may have interfered with the controls, but there is no evidence to show that they did so. On the other hand the pilot may have been negligent, but the doctrine of *res ipsa loquitur* cannot be applied because there is not more probability that the accident was caused by negligence on the part of the defendant than on the part of decedent or his companion. *Kathryn Budgett, as Administratrix of the Estate of Clarence Budgett* v. *Soo Sky Ways, Inc., a Corporation,* — S. D. —, 266 N. W. 253. (South Dakota Supreme Court, decided March 30, 1936).

Negligence—Evidence—Death of Mechanic from Blow of Propeller Blade.—[New Jersey] Plaintiff's intestate, Vernie E. Moon, met his death while engaged in the act of aiding the defendant Donald Lewis to start the motor of an aeroplane. Moon was an employee at the airport where the accident occurred, and it was part of his duty to aid the flyers in starting the motors of the various airplanes. The defendant, Donald Lewis, a student flyer, was sitting in the pilot's seat in the cockpit of his father's (the defendant Nathan E. Lewis) airplane awaiting the arrival of the flying instructor, and in the meantime, endeavoring in cooperation with Moon, who was on the ground in front of the airplane, to start the motor so as to warm it up, and while they were thus engaged the propellor of the airplane struck Moon on the head causing his death. Suit was brought by the plaintiff widow to recover damages, she, as administratrix *ad prosequendum* of decedent's estate, alleging that his death was caused by the negligent starting of the propellor blade by the defendant Donald Lewis.

The charge of negligence against the defendant Donald Lewis was that on two occasions he and Moon acting in concert attempted to start the motor by the "compression" method and this having failed, Moon thereupon determined to resort to the "contact" method and that while he had given Lewis the signal for the "contact" method, which required Moon to reach up and take hold of the propeller blade, and while he was in the act of doing so, Lewis instead of following the signal, negligently, and while Moon was in a position of danger, resorted again without warning to the "compression" method and succeeded in starting the motor causing the propeller to turn and strike Moon as he was reaching for it. Plaintiff's only witness, a student mechanic at the airport, signed a written statement previous to the trial which, if allowed in evidence, would have substantiated the allegations of the complaint. Unfortunately for the plaintiff, the witness contradicted

this statement at the trial and the court refused to admit it in evidence. There was no other testimony from which the jury could find or infer negligence. Judgment of nonsuit was entered in favor of the defendants in the Union Circuit of the Supreme Court. *Held:* on appeal, affirmed. A written statement by a witness, which he contradicted at the trial, cannot be used as evidence of negligence; it can be used only to neutralize the effect of the testimony of the witness at the trial. Therefore even assuming, without deciding, that it was error to refuse to admit the statement in evidence, yet it was harmless error and not sufficient grounds for reversal. *Mary C. Moon, Admrx. ad prosequendum, Estate of Vernie E. Moon* v. *Nathan E. Lewis,* — N. J. —, 235 C. C. H. 1211. (New Jersey Court of Errors and Appeals, decided May 14, 1936).