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Notes, Comments, Digests

NOTES, COMMENTS, DIGESTS

COMMENTS AND OPINIONS

Municipal Corporations—Liability for Injuries at Municipal Airport.—[Georgia] Plaintiff rode out to defendant's airport on a motorcycle with a passenger. After finishing a conversation with a city employee, plaintiff started back to the city on the pavement inside the airport. When the motorcycle struck a broken part of the pavement, plaintiff was thrown and severely injured. Plaintiff alleged that the city permitted the pavement to become broken, defective and dangerous and that the holes existed for such a length of time that the defendant was charged with notice thereof, and was therefore negligent in failing to keep the pavement in a safe and suitable condition for persons operating vehicles over it. The city demurred contending that its operation of the airport was a governmental function and hence there could be no liability while acting in this capacity. The trial court overruled the demurrer and the city excepted. The appellate court reversed and entered judgment for the city. *Mayor of Savannah* v. *Lyons*, 189 S. E. 63 (Ct. App. Ga. 1936).

The court's decision that the airport is to be considered in the nature of a park in the discharge of its "governmental" duty, thus preventing any liability attaching, raises the long controverted issue of whether or not a particular function carried on by a municipality is, on the one hand, "sovereign," "governmental," "political," or is, on the other hand, "corporate," "proprietary," "municipal."[1] Once the function is labeled, the result as concerns tort liability is well known. Courts have, nevertheless, experienced great difficulty in applying these categories to a particular set of facts for the distinction is at best shadowy, vague and uncertain.[2] Thus it is not unnatural for courts in separate jurisdictions to reach contrary conclusions as to whether or not similar enterprises are corporate or governmental. Though there are several tests which courts use in deciding into which category the function belongs, it seems as though many courts first determine whether liability ought to exist and then use these words to rationalize the conclusion. There is, however, the danger that some courts might place a particular set of facts in one

1. A similar controversy arose in *City of Blackwell* v. *Lee*, 62 P. (2d) 1219 (Okla. 1936) where plaintiff's plane was burned in the hangar of a municipal airport. The court held the defendant liable, stating that it operated the airport in a proprietary capacity. The entire problem is adequately covered in 1 JOURNAL OF AIR LAW 365 (1930) which discusses *Mobile* v. *Lartigue*, 127 So. 257 (Ala. App. 1930). See note, 2 JOURNAL OF AIR LAW 436 (1931) discussing *Coleman* v. *Oakland*, 64 Cal. App. 732, 295 Pac. 59 (1931). Other cases raising the problem are: *Mollencop* v. *City of Salem*, 139 Ore. 137, 8 P. (2d) 783 (1932); *Krenwinkle* v. *City of Los Angeles*, 4 Cal. (2d) 611, 51 P. (2d) 1098 (1936). See also, *Hubbard, MacClintock and Williams*, Airports (1930). *Doddridge*, in his article "Distinction between Governmental and Proprietary Functions of Municipal Corporations," 23 Mich. L. Rev. 325 (1925), points out that there are six types of cases in which the distinction is met: eminent domain, execution upon property, taxation, alienation of property, cases concerning power of legislature over property, and tort liability. The distinction has its greatest bearing in the field of tort.

2. It is difficult to announce a rule as to just where the liability of a municipality commences or where it ceases. *Lynch* v. *North Yakima*, 37 Wash. 657, 661, 80 P. 79 (1905). See *Dillon*, Municipal Corporations, (5th ed. 1911) §1625; *McQuillin*, Municipal Corporations (1913) §2625.

of the categories without first giving due consideration to the question of liability. The court should not use any of the above mentioned devices to evade the responsibility of a municipality, but should treat the situation as an ordinary tort case.[3]

For many years, writers in this field of municipal responsibility have attempted to change the doctrine that government and its agencies are immune from tort liability.[4] This immunity is founded upon ancient concepts: first, there is the maxim in English law that the King can do no wrong; second, there is the danger of multiplicity of suits against the various members composing the municipality; third, no profit accrues to the city from certain functions; fourth, liability would tend to retard the agents of the city in the performance of their duties; fifth, it is better that the individual should suffer loss rather than that the public should suffer inconvenience. These arguments have all been refuted in the light of modern concepts that tort is not only a legal, but a moral obligation.[5] Neither reason nor policy dictates a rule giving municipal corporations immunity from its torts. The tendency now seems to be to hold municipal corporations to stricter accountability, for the municipality must assume responsibility for the position it occupies in society.[6] In view of this diminishing scope of governmental immunity from tort the possibility of airports receiving such benefit is very slight.[7] To counteract such modern advancement in the branch of tort law, some states by statute provide that the municipality shall in no case be liable for injuries occurring in the operation of an airport.[8] This appears unjust and retrogressive.. The most equitable course would be to have the states adopt the policy of the Uniform Airports Act[9] which leaves the determination of lia-

3. In *Boulineaux* v. *City of Knoxville*, 99 S. W. (2d) 557 (Ct. App. Tenn. 1935), plaintiff claimed that injuries sustained by him and the death of plaintiff's intestate were caused by the negligence of the defendants. The court treated the case as an ordinary tort case and submitted the issue of negligence to the jury.

4. Professor Borchard traces the entire doctrine from its inception to its present status. His research is sure to prove of benefit to future enlightened courts. *Borchard*, "Government Responsibility in Tort," 28 Col. L. Rev. 577-607, 735-775 (1928); 34 Yale L. J. 1-45, 129-143, 229-258 (1924); 36 Yale L. J. 1-41, 757-807, 1037-1100 (1926). See also, *Laski*, "The Responsibility of the States in England," 32 Harv. L. Rev. 447 (1919); *Moore*, "Liability for Acts of Public Servants," 23 L. Q. Rev. 12 (1907); "Liability for Acts of Public Servants," 23 L. Q. Rev. 12 (1907).

5. *Doddridge*, cited *supra* note 1, points out that the idea of divine rights of kings has no place in the present law of corporations, that modern ideas dictate that loss be spread over society as much as possible, that thought of suit against a third party is not a very cogent deterrent of the actor. *Harno*, in his article on "Tort Immunity of Municipal Corporations," 4 Ill. L. Q. 28 (1921), states that the doctrine of immunity was first recognized in *Russell* v. *Men of Devon*, 2 T. R. 667; 100 Eng. Repr. 359 (1798). He argues that fear of multiplicity of suits was fear of separate suits against all inhabitants which has lost its force since incorporation, that tort responsibility is never tested by benefit from an act of the tort-feasor.

6. *Price*, "Governmental Liability for Tort in West Virginia," 38 W. Va. Law Q. 101 (1932); *Barrett*, "Distinction between Public and Private Functions in Tort Liability of Municipal Corporations in Oregon," 11 Ore. L. Rev. 123, 133 (1932); *David*, "Municipal Liability in Tort in California," 6 So. Calif. L. Rev. 269, 280 (1933); note, "The Distinction between Governmental and Municipal Functions as Applied in the Law of Torts," 75 U. of Pa. L. Rev. 555, 563 (1927).

7. *Grover*, "The Legal Basis of Municipal Airports," 5 JOURNAL OF AIR LAW 410 (1934); *Fixel*, "The Regulation of Airports," 1 JOURNAL OF AIR LAW 483, 489 (1930). An argument *contra*, *Zollmann*, "Airports," 13 Marq. L. Rev. 97 (1929).

8. *Iowa Code* (1935) c. 303—c. 1, §5903-c. 11; *Laws, No. Dak.* 1931, c. 92 (1929) U. S. Av. R. 479; Texas Statutes (Vernon 1936) art. 1269h, §3; *Wisconsin Laws* 1929, c. 464, §1.

9. 6 JOURNAL OF AIR LAW 589 (1935). This has not as yet been adopted by any state.

bility to the courts rather than to give an absolute immunity by statute. Perhaps the best means of protection to the municipal corporation would be airport liability insurance which should be a prerequisite to the operation of every municipal or county airport.[10]

EUGENE A. BUSCH.*

Negligence—Carriers—Alleged Injury of Passengers in Transit—Duty of Carrier to Warn Passengers of Rough Weather.—[Federal] The question of the liability of air carriers for passengers' injuries received in transit during rough weather arose for the second[1] time in the consolidated cases of *George P. Kimmel* v. *Pennsylvania Airlines and Transport Company; Homer J. Byrd* v. *Pennsylvania Airlines and Transport Company,* decided February 4, 1937, in the District Court of the United States for the District of Columbia. The cases were tried to a jury and verdicts rendered for the defendant. Appeals were taken but had not been perfected by March 25, 1937, according to the Clerk of the Court. Since the court is one of original jurisdiction, the cases were unreported and the court's charge to the jury, which contains the essentials of the cases, is therefore set out here in full:

Cox, J.: * * * .

Now, of course, we all know that we are dealing here with an art that is comparatively new. Men have for ages been traveling on the surface of the earth and on the surface of the water. This new art takes men traveling through the ocean of air that surrounds the earth. The art is still no doubt in its infancy, but it is so far advanced that men are now engaged in the business of transporting passengers through the air for hire and become what we call carriers of passengers, required to serve all alike.

These carriers do not insure the safety of their passengers, but because they are paid for their services and have control of their instrumentalities of transportation in which they carry passengers, they are required to exercise a very high degree of care for the safe transportation of their passengers. Now, the duties of these carriers are defined in some of the instructions which the Court has granted, most of which, I think, have been read to you, but some of which I will read briefly again.

You are instructed that at the time of the injuries complained of by the plaintiffs the defendant was a common carrier of passengers by airplane and that the plaintiffs were passengers in one of these airplanes bound for Cleveland, Ohio; that because of this relationship between the defendant and the plaintiffs, it owed to the plaintiffs a duty to exercise in the operation of the plane through its agents the highest degree of care and prudence commensurate with the practical operation of the plane so as to avoid injuring the plaintiffs. A failure on the part of the agents of the defendant to perform this duty which they owed to their passengers would be negligence on the part of the defendant.

Another instruction granted is as follows: The jury is instructed that if you find that the ship in which the plaintiffs were passengers was in good mechanical condition and handled by a careful and experienced pilot but that the plaintiffs received injuries from a climatical condition which the pilot could not have foreseen, taking into consideration the testimony of the various witnesses and the United States weather reports, all the evidence before you, your verdict must be for the defendant.

The jury is instructed that the pilot of the defendant's plane was only required to exercise such care and skill as is ordinarily possessed by those experienced skillful pilots engaged in the same business or art, and if he

10. 7 So. Calif. L. Rev. 48 (1933); *Grover,* cited *supra* note 7, at 438.

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1. See *Hope* v. *United Air Lines, Inc.,* in 8 JOURNAL OF AIR LAW 132, 139 (1937).

exercised such care and skill in his operation of the plane he was not negligent, although the accident might have been avoided if he had acted in a different manner.

Now, you will note in this connection also that the mere happening of an accident, any kind of an accident, does not prove negligence. Accidents are happening all the time, of various kinds and in various places. The fact that an accident happens does not prove that somebody failed to do his duty and that that failure was the cause of the accident.

So the burden of proof always rests upon the plaintiff or the person who comes making a charge that he has been injured due to negligence, just as it does in this case.

You are instructed that the burden is upon the plaintiffs to show by a preponderance of the evidence that the defendant was negligent and that the negligence of the defendant was the proximate cause of their injuries, and if you find that the plaintiffs have failed to prove facts constituting negligence on the part of the defendant, by a preponderance of the evidence, then your verdict must be for the defendant.

That means that the person who charges another with failure in having done his duty and so having produced harm, has the burden of convincing you that the other person did not do his duty, because we all start out with the presumption that every person has done his duty and that presumption stands until the evidence convinces you to the contrary.

What I have been saying, of course, deals with negligence in general.

Now, here the specific charge of negligence which has been tried before you is not that any action of the defendant pilots in the movement or movements of the plane was the immediate producing cause of the injuries in this case. There is no dispute from the evidence that the immediate producing cause of the accident here was the action of a downdraft of air upon the plane passing through it. This apparently caused the plane to descend rapidly or to be deflected so violently that the plaintiffs were thrown from their seats and injured.

The claim here is that the company's pilot could and ought to have averted the effect of this shake-up of the passengers by warning them, particularly these plaintiffs, so that they could have strapped themselves in their seats before the plane struck the downdraft. That is the real question in the case and the only respect in which you can consider whether the pilot or co-pilot or either of them was negligent; whether the conditions were such preceding the accident as to impose upon them the duty of directing or notifying the passengers to fasten their seat belts.

There is no claim and no evidence that the airplane was not in proper condition or that the pilots did not properly and successfully fly it. Under the practice of the company passengers were required to fasten their seat belts when the plane was taking off or when it was landing. Of course, the likelihood of danger under these circumstances, when the plane was moving on the ground or landing on the ground—danger of a rough shaking up of passengers—was recognized.

It seems also plain from the evidence in the case that passengers can also be bumped about and injured while a plane is in the air as a result of rough or turbulent conditions; but the passengers are not required under ordinary conditions to keep their seat belts fastened after the plane is straightened out on its course in the air.

I suppose this question has arisen in your mind as it has probably arisen in all our minds: Why didn't the airplane company require the passengers to keep on their belts all the time, or at least as much of the time as the company could compel them to keep them on? We do not have to go into the reason for that, however, for whatever the reason may be, the carriers do not require it. No one has charged that the failure to require this is negligence, and we assume that there are reasons for permitting the passengers to do as they please under ordinary and usual flying conditions, so far as keeping their belts fastened or moving about the cabin is concerned. Passengers are not chained down to their seats or anything of that sort in modern airplanes. The passenger goes in there and moves about as he

pleases, and he has a seat belt available to fasten when he wants to, or to make loose when he wants to, without any guidance or direction of the company by any rule or regulation, except when leaving the ground or getting ready to land on the ground.

So, of course, with respect to that part of the situation, passengers must assume as one of the risks or perils of their voyage the risk arising from their belts being unfastened under ordinary and usual flying conditions. But they do not assume the risk for the negligent failure of the carrier to advise them of perils on account of approaching rough or turbulent air which becomes known or indicated to the carrier, or the pilots. The pilots have the means available to warn the passengers of the perils that the pilots expect, and if the passengers know of such a condition they may be in a position to fasten themselves in their seats and thus obtain the protection afforded by reason of their seat belts.

The evidence shows that rough and bumpy weather may at times be encountered without warning. So it is only at times when the pilots themselves, as reasonable men, have warning that rough or dangerous conditions are about to be encountered or likely to be encountered that the duty arises to warn the passengers.

The first question for you to determine, as it appears to me, is whether there was anything in the situation as the plane approached the point of the accident to warn the pilots that rough flying was about to be or was likely to be encountered.

The second question would be whether the pilots had opportunity, if they had such warning, to give the passengers timely warning after such a situation showing the probable danger arose.

Then there would be a third one: whether if timely warning had been given them the injuries would have been averted by the passengers themselves.

Now, you are to consider how the situation actually appeared to the pilot and co-pilot as reasonable men, and skilled pilots as they approached the place of the accident. To do that you have to try to reconstruct the picture there and put yourselves in the place of those pilots.

What were the weather conditions through which they had been traveling? What does the evidence show about that? Of course, you have to try the case by the evidence. Just when did that accident occur and what happened immediately before the accident?

Now, you have to bear in mind the speed of that plane. Planes fly with great speed and great rapidity. They travel two or three times as fast as railroad trains or automobiles. You have to keep in mind, as I have said, the conditions through which they were passing and the degree of care, which the pilots were required to exercise in carrying and transporting passengers. Looking at the situation as reasonable and prudent pilots, was there anything before them or in their course to suggest that rough and turbulent weather likely to injure passengers was about to be or was likely to be encountered?

Now, we know, of course, planes travel rapidly. The passengers as well as the pilots know that. Your question is, how did the condition appear to the pilots? Was there anything that would have required a reasonable pilot to warn the passengers? Did any threatening condition appear in time for a reasonable pilot to warn them of it and for them to act upon it?

If the evidence does not satisfy you on this point, of course, the plaintiff's case would fail. You must be satisfied or convinced by the weight of the evidence that the pilots failed to do their duty.

Did the plane go into a cloud or mist or rain, and if so, were the weather conditions such prior to the accident as to put the pilots on notice of probable rough or dangerous conditions so that they could and should warn the passengers in time for them to fasten their seat belts Now, you have got to determine the situation from the evidence before you and this, of course, requires your careful consideration of all the evidence. I ask you to recall and consider it all and try to reconstruct the picture as it presented itself to the pilots as they approach the point of the accident.

Now, that is going to require, of course, your examination of the evidence. In this connection I will call your attention to the fact that you have two kinds of evidence in the case:

The evidence that would fall in one division that deals with the situation as it actually existed at that time and as the whole situation was presented: the records, reports, the witnesses that were there on the plane all had something to tell you about the situation as the pilots were dealing with it. That is as to what they could know at the time. The test is what a reasonable man of care and prudence, a skilled pilot under those circumstances, ought to have done.

Now, there is another class of witness that were not there at all, experts on both sides. They were not there on the scene. They know nothing about what happened at all because they were not witnesses as to what occurred any more than you were witnesses. They were called as what we call experts, and their purpose and function was to help you to interpret the evidence that is before you. What goes on in the air, in the clouds, and in the operation of the plane, are matters that we are not conversant with, at least most of us are not.

So they called men who have had experience in such business to give their views as to the interpretation that ought to be put upon the evidence as it was presented and as it was submitted to them in the questions asked, so that they could give us some information about things we are not familiar with, just to enable you to analyze and apply and test this evidence in the light of their experience, which they, as it were, loaned to us for the purpose of passing on these questions of fact.

Now, it is your duty, of course, to consider and give weight and regard to all the evidence that has been adduced before you. There is one class of evidence as to which a prayer was read to you that you can occasionally totally discredit. That is covered by a prayer which reads:

If you believe a witness wilfully and deliberately testifies falsely upon a matter about which he could not reasonably be mistaken, you are at liberty to disregard any part or all of the testimony of that witness.

That means a man who deliberately falsifies puts himself in a position where you have a right to discredit him entirely, throw his testimony out, or take it for whatever you might think it is worth. Aside from that, it is the duty of the jury to consider all the testimony that may be produced.

All honest witnesses are to be considered and you have a right to regard and you should regard witnesses as honest until you are convinced to the contrary. You may, of course, consider the interest that any witness has in the matter and the natural tendency of witnesses to see and remember things in a favorable light accordingly as they have or take an interest in one side or the other. You may also bear in mind the opportunity of a witness to see and observe the things that he testifies to, whether he was actually observing at the time, whether he was really paying attention or not, whether he was under a duty to pay attention at the time, whether he had the experience to make him a competent observer, whether his attention was distracted at the time by other things—all those matters you will take into consideration in saying who was in the best position, who was best likely to observe, who inspires you with the most confidence in matters that affect credibility or weight of testimony, and that is to be looked at along with all the circumstances and details that indicate the matters that a witness carefully and particularly observes.

Now, I call your attention to certain other instructions that have been granted. You are instructed the defendant was not a guarantor or insurer of the safety of the plaintiffs during the passage or the trip in question, but that under the law it was only required to exercise the highest degree of care in the management and control of said plane consistent with the practical operation of the same, and if you believe from the evidence in this case that said plane was, at and immediately prior to the time of the happening of the accident in question, being operated and controlled with the highest degree of care consistent with the practical operation of the same, then in such case you should find for the defendant, operation of the plane, of

course, including the giving of the signals that the pilots were required to give if they knew or had reason to believe that rough weather conditions were just ahead.

You are instructed that the plaintiffs assumed the risks necessarily incident to traveling in the air, known as perils of the air, when the plane is being operated with the highest degree of skill and care commensurate with the practical operation of the plane, and if you find from the evidence that the plane at the time it hit a downdraft was being operated with the highest degree of skill and care, commensurate with the practical operation of the plane, but, nevertheless, the plaintiffs were injured, then your verdict must be for the defendant, that, of course, merely indicating that the pilots cannot control the air conditions, cannot control winds and storms, downdrafts, or things of that sort, but the fact that they cannot control those things and that passengers may be injured in those things does not relieve pilots from exercising the duty to avoid the consequences of them, to protect against them to the best of their ability and to take such action as ought to be required of a reasonable pilot under the circumstances whenever he knows or has reason to know or to believe that dangerous conditions are about to be encountered.

The jury is instructed that while the law demands the utmost care for the safety of passengers, it does not require the defendant to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils. That is a simple way of stating that there are dangers in all these lines of transportation, that dangers exist, and that the practical operation of none of these agencies, ships or trains or airplanes, can relieve it of the practical fact that there are dangers in the operation of instrumentalities of such kinds.

The jury is instructed that an unavoidable accident is one that is not occasioned in any degree, either remotely or directly, by the want of such skill or care as the law holds the defendant is bound to exercise, and the defendant cannot be held to be negligent merely because it fails to provide against an accident which it could not reasonably be expected to foresee, and if you find from the evidence in this case that the injuries sustained by the plaintiffs were due to an unavoidable accident, then your verdict must be for the defendant.

So I call attention again to the real point in the case; the duty of these pilots here was to exercise the highest care with respect to matters over which they had control in order to carry the passengers safely to their destination and to use like care to warn the passengers against any unusual or dangerous condition with respect to which the passengers could protect themselves if warned. The primary question that stands throughout this whole case is whether as reasonable men skilled in piloting planes the pilot and co-pilot had warning or had reason to believe that the plane was coming into a place where there was or was likely to be rough or turbulent conditions and that the pilots had notice or warning of such conditions as to which they ought to warn their passengers, in time to give effective warning to the passengers.

There are two or three other matters that I also call to your attention. Of course, if you do not find that the defendant here was guilty of negligence, that ends the case.

If you are satisfied that the defendant through its pilots was guilty of negligence, then you would have another question to consider, and that would be to assess and determine what the damages in the case ought to be.

If you find for the plaintiff your verdict would be in such amount as you consider would fairly compensate for such injury as you found he sustained. That would apply in each case. To determine the amount of damages to be awarded you would be authorized to take into consideration the pain and suffering such as you found the plaintiff sustained or will sustain, expenses such as you found he has incurred or will incur, and any other pecuniary loss which you found he has sustained or will sustain. Damages in a case of this kind are not imposed by way of punishment but are imposed by way of compensation for losses sustained, and in that connection I give you another instruction:

Sympathy for the alleged injuries and disabilities claimed by the plaintiffs, if any, from whatever source they may have come, should have no influence upon you in determining whether or not the defendant is liable, or, if liable, control in any way your verdict. Both liability and damages are matters to be determined by the evidence, and, under the instructions of the Court, prejudices, sympathy or any outside matter should not affect your judgment. In other words, it is your duty to give every question in the case a calm, careful and conscientious consideration, uninfluenced by sympathy or any consideration other than the evidence and the law as given to you in these instructions.

Something was said in some part of the argument about the ability or lack of ability of anybody connected with the case or of any part connected with it to make compensation. That has not anything to do with you. You are just coldly, seriously analyzing the evidence, finding what the truth about it is, and then drawing your verdict, your conclusion as to what is just, what ought to be done in the case; so you will not concern yourself about other points in the matter except to reach a conclusion and verdict based upon the evidence and rendered in accordance with the law.

These are all the matters I had in mind to call to your attention. If there is anything in particular—

MR. DOHERTY (interposing): Mr. Yeatman referred in his argument to contributory negligence. I did not ask you, but—

THE COURT (interposing): I did not give any instruction because there is no evidence, so far as I can see, of contributory negligence, and nobody asked for such instruction.

MR. YEATMAN: Your Honor, I suppose you will instruct the jury there will be a separate verdict in each case.

THE COURT: The jury understand that there are two cases here. You will return a verdict in each case, just as if you were trying them separately; and you understand, of course, you are to select a foreman to report the case. You may take the case now and consider your verdict.

(Thereupon at 11:20 a.m. the jury retired to consider its verdict.)

(At 2:05 p. m. the jury assembled in the court room and, in the presence of the Court and counsel for the plaintiffs and counsel for the defendant, the following occurred:)

THE CLERK OF THE COURT: Mr. Foreman, have the jury agreed upon a verdict?

THE FOREMAN OF THE JURY: Yes, sir.

THE CLERK OF THE COURT: How do you find in the case of *George P. Kimmel against the Pennsylvanit Airlines?*

THE FOREMAN OF THE JURY: We find for the defendant.

THE CLERK OF THE COURT: How do you find in the case of *Homer J. Byrd against the Pennsylvania Airlines?*

THE FOREMAN OF THE JURY: We find for the defendant.

THE CLERK OF THE COURT: Members of the jury, your foreman says that your verdict in each of these cases is for the defendant.

Is that your verdict? So say each and all of you?

(No member of the jury indicated the contrary.)

THE COURT: I would like to say to the jury that the Court appreciates the careful attention you gave to the case.

(Thereupon the instant hearing was concluded.)

DIGESTS

Insurance—Interpretation of "Participating in Aeronautics"—Failure to Call Attention of Court to Controlling Case or Important Provisions in Policy and Effect on Granting of New Trial.—[Missouri] This is an action on an insurance policy for death of plaintiff's intestate while riding in an aeroplane. Body of policy did not cover injury sustained while participating or in consequence of having participated in aeronautics. Rider on insurance policy, which was not at first called to attention of court, covered

injury received while insured was riding as a fare-paying passenger in a licensed plane. From a judgment denying plaintiff's motion for a new trial after a directed verdict for defendant, plaintiff appeals. *Held:* Judgment reversed and cause remanded with directions to grant plaintiff a new trial. *Sulzbacher* v. *Continental Casualty Co.,* 88 F. (2d) 122 (Circuit Court of Appeals, Eighth Circuit, Feb. 18, 1937).

On motion for a new trial the court's attention was first called to the *Gregory* case (78 F. (2d) 522), where the court held that one being transported on an aeroplane as a passenger was not participating in aeronautics; also to the provision in the rider to the policy that insurance covered insured while riding as a fare-paying passenger in a licensed aeroplane. While it is true that generally speaking the court will not on appeal consider a question not presented to the lower court, yet this court, to prevent a miscarriage of justice may notice a plain error. It is apparent that the court would not have granted the motion for a directed verdict had its attention been called to the decision in the *Gregory* case. Under the facts disclosed by the record, it was the duty of the lower court to consider a motion for a new trial on its merits. In the instant case there has been a failure or refusal to exercise the discretion vested in the trial court to consider and to act upon motion for a new trial.

Negligence—Municipal Corporations—Res Ipsa Loquitur.—[Tennesee] In an action by two plaintiffs against City of Knoxville, and another, the declaration avers that City of Knoxville leased an airport to a corporation, which entered into an agreement with one Betty Lund to conduct commercial flights and sightseeing trips; that the injuries to one plaintiff and the death of plaintiff's intestate were caused by the negligence of defendants, due to the fact that aircraft in use was not airworthy and not equipped with emergency or safety belts, which conditions the defendants knew or should have known. Defendants filed pleas of not guilty. On verdict by jury for defendants, the plaintiffs appeal in error. *Held:* The court found no reversible error in the record, and affirmed the judgment. *Boulineaux* v. *City of Knoxville,* 99 S. W. (2d) 557 (Court of Appeals of Tennessee, Eastern Section, Dec. 21, 1935).

The city owed the duty to supervise the operation and detect and prevent operative negligence, but as it was exonerated by the jury from affirmative acts of negligence, it is not liable for injuries to passengers because of pilot's negligent acts which could not reasonably have been foreseen and prevented. There is no proof that it was the duty of the defendants to provide belts or to see that they were provided when the machine was not engaged in stunting. There being no duty resting upon the parties to provide the belts, then the failure to provide them will not be a negligent act. The trial court correctly concluded that these acts of negligence should be withdrawn from the jury. This is not a case for the application of the doctrine of *res ipsa loquitur* for it is a common and not an unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of any act upon the part of the operator. As to the question of whether the plaintiffs assumed the risk of flight, the defendants are not insurers of the safety of the passengers, and are responsible only for their negligence.

Trespass—Servitude—Flight of Aircraft—Rights of Landowner and Aviator.—[Federal] The United States Supreme Court on February 1, 1937, denied the petitions of F. R. Hinman and Nannie Hinman for writs of certiorari to the Circuit Court of Appeals, Ninth Circuit, 84 F. (2d) 755): *F. R. Hinman and Nannie Hinman, Petitioners* v. *Pacific Air Transport; Same* v. *United Air Lines Transport Corporation,* 57 S. Ct. 431 (Feb. 1, 1937).

See note on the cases in 7 JOURNAL OF AIR LAW 624 (1936).