RES IPSA IN THE AIR

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The doctrine of *res ipsa loquitor*[1] is a shorthand method of saying that an accident itself is of such a character that it: (1) affords reasonable evidence, in the absence of explanation, to permit an inference of culpability on the part of the defendant, (2) makes out the plaintiff's prima facie case, and (3) presents a question of fact for the defendant to meet with an explanation.[2] However, in airplane accident cases the shorthand has not been too legible. Generally speaking, if there is anything unique in airplane accidents the variations from normal would seem to induce rather than retard the application of the doctrine. Nevertheless, the cases disclose a constant caution and continuing confusion in the application of *res ipsa* to aviation.

In any accident case (regardless of the type of instrumentality which caused the harm) the courts will not apply *res ipsa* unless the following circumstances attended the injury:

(1) The general experience of mankind shows that the accident was such as does not usually occur in the ordinary course of events without negligence on the part of those in control.

(2) The person against whom the doctrine is sought to be invoked must have been in exclusive control of the instrumentality.

(3) The person invoking the doctrine must not be in a position to know the cause of the accident.

(4) The person against whom the doctrine is invoked must possess knowledge concerning the cause of the accident, or he must be in a better position to obtain that knowledge, so that the duty of explaining the accident should, in fairness, rest upon him because of his greater knowledge or greater means of knowledge.[3]

After hearing all the evidence the court should bring the doctrine into consideration by instructing the jury as

1. Literal translation: "The thing speaks for itself."
2. Berent v. Metro. Life Ins. Co., 279 Ill., App. 430 (1935).
3. Reiber, "Some Aspects of Air Carriers' Liability" (1946) Law & Contemp. Prob. 524,530.

to whether, from the accident involved, there arises an inference that the proximate cause was some negligent conduct on the part of the defendant.[4]

The authorities are divided on the effect of the doctrine on the plaintiff's burden of proof. Many states adopt the view that the inference is evidence only, and even if the defendant offers no evidence tending to outweigh this inference, the case must still go to the jury. If the inference preponderates in favor of the plaintiff, when all of the evidence in the case is considered, then such inference warrants a verdict in favor of the plaintiff; otherwise not.[5] Several states adopt the view that *res ipsa* shifts the burden of producing evidence to the defendant, and, if the defendant offers no evidence, the verdict should be directed against him. But if he offers any evidence (however slight) the case must go to the jury. In other states the doctrine operates to shift the burden of proof to the defendant, and, unless he produces substantial evidence to outweigh the presumption, there will be a directed verdict. To be entitled to a jury verdict, he must produce a preponderance of the evidence.[6]

From the discussion in 1809 when Lord Mansfield held the burden was upon the owner of a stage coach to prove that he had hired a good driver, had provided steady horses and a sound coach, the doctrine has been applied to injuries caused by practically every mode of common carriage—stage-coaches, steam and electric railroads, steamships, scenic railroads, automobiles, motorcoaches, taxicabs, and elevators.[7] At present, courts are presented with the problem of whether *res ipsa* should be applied to aviation.

The doctrine has been rejected in aviation cases where one or more of the necessary circumstances for its application were not present. Thus, when the instrumentality (the airplane) was not in the exclusive control of the defendant, *res ipsa* was not applied.[8] It was held not applicable in a

4. Thompson, "Inference of Negligence in Aviation Accident Cases" (1944) 259 Ins. L.J. 461.
5. Osterhout, "The Doctrine of Res Ipsa Loquitor as Applied to Aviation" (1931) 2 Air L. Rev. 13.
6. Harper and Heckel, "Effect of the Doctrine of Res Ipsa Loquitor" (1927) 22 Ill. L. Rev. 724, 726.
7. Note (1933) 4 J. Air L. 429,430.
8. Budgett v. Soo Sky Ways, 64 S.D. 243, 266 N.W. 253 (1936); Towle v. Phillips, 180 Tenn. 121, 172 S.W. (2d) 806 (1943); Michigan Aero Club v. Shelley, 1938 U.S. Av. R. 134; Madych v.

case where the plaintiff was in a position to know (and did know) the actual cause of the accident,[9] the court saying, "This ruling is not to be taken as expressing the court's view as applied to a case in which proof of the precise cause of the accident is wanting."[10] In another aviation case[11] the court refused *res ipsa* because the defendant did not possess superior knowledge or means of knowledge of the cause of the accident.

The results in these, and similar cases, are not authority for the proposition that *res ipsa* is not applicable to aviation cases. They stand merely for the well established rule that where an essential circumstance is missing, the doctrine will not be applied, regardless of the instrumentality.

Where the plaintiff alleges specific acts of negligence, a few jurisdictions prevent him from relying on *res ipsa*, but the view of most courts is that allegations of specific acts of negligence do not bar the application of the doctrine.[12] Better reasoning supports this view; *i.e.*, to have a good complaint, the plaintiff must plead negligence. He cannot plead less, and, by alleging specific acts of negligence, he does not do more, so there is no reason to deny the application.[13] Furthermore, the doctrine is founded on the absence of specific proof of facts or omissions constituting negligence, not on the absence of specific allegations thereof.[14]

In air law, as in other fields, only the minority holds that reliance on specific allegations of negligence forfeits

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Shelley, 1938 U.S. Av. R. 79; Harper, "Res Ipsa Loquitor in Air Law" (1930) 1 Air L. Rev. 478, 479 "Res ipsa raises a double presumption. It raises a presumption of negligence and a presumption that defendant's negligence was the legal cause of the injury. The latter is sometimes denied, but what is actually intended is that there is no presumption that defendant's acts were the cause in fact of the injury. Now if the instrument or agency which precipitated the injury is not under the exclusive control of the defendant, the basis for the presumption of legal cause fails. The injury might just as readily be caused by the negligence of a third party as by the defendant's presumed negligence."

9. Law v. Transcontinental, 1931 U.S. Av. R. 205.
10. Id. at 207.
11. Parker v. Granger, 4 Cal. (2d) 668, 39 P. (2d) 883 (1934), aff'd. 52 P.(2d) 226 (1936).
12. Harper, "Res ipsa Loquitor in Air Law" (1930) 1 Air L. Rev. 478; Niles, "Pleading Res Ipsa Loquitor" (1929) 7 N.Y.U.L.Q. Rev. 415; Note (1932) 3 J. Air L. 662,664.
13. Harper and Heckel, "Effect of the Doctrine of Res Ipsa Loquitur" (1927) 22 Ill. L. Rev. 724, 727.
14. Banger et al. v. Chelpon, 60 S.D. 66, 243 N.W. 97 (1932).

the right to invoke *res ipsa*;[15] the majority hold that the specific allegations of negligence are mere surplusage and the plaintiff has a right to rely on *res ipsa*.[16] Where the plaintiff is able to prove specific allegations of negligence, the courts usually refuse to determine whether *res ipsa* is applicable, and permit recovery based on the proved acts of negligence.[17]

Indeed, a court may not ignore the plaintiff's specific allegation of negligence and submit the case to the jury solely on *res ipsa*. To do so constitutes reversible error.[18] Thus, when the circumstances are such as would permit the application of the doctrine, a plaintiff, be invoking it, in addition to alleging specific acts of negligence, only adds to the power of his attack. No disadvantage results, as his reliance on the latter is in no way weakened by his invocation of the former. Nevertheless, many plaintiffs have elected to rely solely on specific allegations of negligence and have ignored *res ipsa*.

Frequently these plaintiffs successfully prove their specific allegations and receive a verdict in their favor.[19] They, of course, are not harmed by their failure to invoke the doctrine. Just as frequently, however, plaintiffs fail to prove specific allegations of negligence and verdicts are returned in favor of the defendants.[20] They failed to avail themselves of an attack which could not have prejudiced their cases, but which might have earned decisions in their favor.

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15. Miller v. English, 141 Mo. 602, 43 S.W. (2d) 642 (1932); Cope v. Air Association, 1937 U.S. Av. R. 99.
16. Seaman v. Curtiss Flying Service, 231 App. Div. 867, 245 N.Y. Supp. 251 (1930), 1931 U.S. Av. R. 227; Genero v. Ewing, 176 Wash. 78, 28 P.(2d) 116 (1934); Stoll v. Curtiss Flying Service, 236 App. Div. 664, 257 N.Y. Supp. 1010 (1932), 1932 U.S. Av. R. 153.
17. Conklin Adm'x. v. Canadian Col. Airways, 266 N.Y. 244, 194 N.E. 692 (1934); McCusker v. Curtiss Wright, 269 Ill. App. 502 (1933), 1933 U.S. Av. R. 105.
18. Goodheart Adm'r. v. Am. Airlines, 252 App. Div. 660, 1 N.Y.S. (2) 288 (1938), 1938 U.S. Av. R. 148.
19. Curtiss-Wright v. Glose, 290 U.S. 696 (1933); T.A.T. Flying Service v. Adamson, 47 Ga. App. 108, 159 S.E. 851 (1933); Conklin v. Curtiss Flying Service, 1930 U.S. Av. R. 188; Hagymasi v. Colonial Western, 1931 U.S. Av. R. 73; Beale v. Talbert, 1932 U.S. Av. R. 94.
20. Allison v. Standard Air Lines, 65 F.(2d) 668 (1933), 1933 U.S. Av. R. 92; Johnson v. West Air Ex. Co., 45 Cal. App. (2d) 614, 114 P. (2d) 688 (1941); Bird v. Louer, 272 Ill. 522 (1934), 1934 U.S. Av. R. 188; Murphy v. Neely, 319 Pa. 566, 179 Atl. 439 (1935); Kimmel and Byrd v. Penn. Airlines, 1937 U.S Av. R. 104.

In two aviation cases,[21] the plaintiffs alleged on appeal that even though they had not relied on the doctrine, the trial court erred in not invoking it. In both cases, the appellate courts held that this responsibility was on the plaintiff, and in the absence of a request from him for an instruction to the jury concerning the doctrine, the trial courts did not err by failing to so instruct. However, in *Seaman v. Curtiss Flying Service,*[22] the court held that this responsibility rested with the trial court and that its failure to invoke the doctrine constituted reversible error.

One of the principal arguments against the application of *res ipsa* in aviation cases is that the industry is so young that reliable statistics are not yet available; that it is impossible to tell just what are the causes of air accidents. Therefore, it is argued that without specific evidence on the subject, it cannot be said that an accident would have occurred if an air transport company had used due care.[23]

Courts which accept this argument will not apply *res ipsa* if there exists any other reasonable or probable cause from which it might be inferred that there was no negligence at all. Thus, in *Cohn, Adm'x.* v. *U.S. Airlines,*[24] the court rejected the doctrine, saying that a variety of causes might have brought about the disaster; e.g., weather, air pockets, engine failure, etc; an Arkansas court,[25] refused to apply *res ipsa* on the ground that the accident might have been caused by an act of God. Similarly, in *Morrison* v. *Le Tourneau Co.,*[26] the court suggested that there existed reasonable and probable causes other than negligence on the part of the defendant, and refused the doctrine, saying that accidents of this nature can happen to the most skilled pilots in planes of the finest type and condition without the existence of any negligence. That the disaster might have been the result of latent engine defects or vibrations, induced the court in

21. Allison v. Standard Air Lines, 65 F. (2d) 668 (1933), 1933 U.S. Av. R. 92; Johnson v. West Air Ex. Co., 45 Cal. App. (2d) 614, 114 P. (2d) 688 (1941).
22. 231 App. Div. 867, 245 N.Y. Supp. 251 (1930), 1931 U.S. Av. R. 227.
23. Allen, "Transportation by Air and The Doctrine of Res Ipsa Loquitur" (1930) 16 A.B.A.J.455, 458.
24. 17 F. Supp. 865 (1937), 1937 U.S.Av.R. 119.
25. Herndon v. Gregory, 190 Ark. 702, 81 S.W. (2d) 849 (1935); 82 S.W. (2d) 244 (1935).
26. 138 Fed. (2d) 339 (1943), 1943 U.S. Av. R. 22.

Wilson v. *Colonial Air Transport, Inc.*,[27] to hold that since these causes did not involve negligence, *res ipsa* was not applicable.

Also it is argued that *res ipsa* is inapplicable because the air transportation industry has not yet reached the stage of perfection where planes will not crash, in the usual course of events, unless the operating company or its agents are negligent.[28] So in *Rochester Corp.* v. *Dunlop*,[29] the court refused to apply *res ipsa*, saying, "In the present stage of aircraft development, it cannot be said, in the ordinary experience of mankind, that the mere fall of a plane for an unknown reason necessarily proves that the accident could not have happened without negligence." Similarly in *Deojay* v. *Lyford*,[30] the court, in rejecting the doctrine, said, "In spite . . . of the vast advances which have been made in air transportation, it is still recognized that in all such operations there is a wide element of chance which the ingenuity of man has not yet overcome; we accordingly cannot apply the doctrine to the same extent that we do to accidents on the highways.***' The truth of the matter is that the facts of each case must be carefully considered, and in the days to come, tested in the light of the advances in this art which we are certain to see." Likewise, limited knowledge concerning the care and operation of airplanes does not warrant the application of *res ipsa*.[31] "Man has made rapid strides to become master of the air, but because of the large number of unexplained catastrophies, it is evident that he has not yet become master."[32] In *Thomas* v. *American Airways*,[33] the court instructed the jury that they were to determine, from the evidence presented, whether the aviation industry was such that the accident would not have occurred without negligence on the part of those in control of the airplane. In

27. 278 Mass. 420, 180 N.E. 212 (1932), 83 A.L.R. 329; For a discussion of this case see Note (1932) 3 J. Air L. 662.
28. Allen, "Transportation By Air and The Doctrine of Res Ipsa Loquitur" (1930) 16 A.B.A.J. 455, 458.
29. 148 Misc. 849, 266 N.Y. S. 469 (1933), 1933 U.S. Av. R. 511; For a discussion of this case see Bohlen, "Aviation Under The Common Law" (1934) 48 Harv. L. Rev. 216.
30. 139 Me. 234, 29 A. (2d) 111 (1942).
31. Towle v. Phillips, 180 Tenn. 121, 172 S.W. (2d) 806 (1943).
32. Cohn, Adm'x. v. U.S. Airlanes, 17 F. Supp. 865 (1937), 1937 U.S. Av. R. 119.
33. 1935 U.S. Av. R. 102.

two other cases,[34] the doctrine of *res ipsa* was rejected because it is a common occurrence for airplanes to fall without the intervention of any negligence. In one other aviation case,[35] the doctrine was rejected; the court refusing to grant plaintiff's request that the jury be instructed as to the applicability of *res ipsa.*

The principal argument for the use of *res ipsa* in aviation cases are: (1) public policy and (2) the difficulties attending the plaintiff's attempt to prove the defendant's negligance. As one writer states, "The real reason for the rule, particularly in the case of common carriers (as evidenced by the multiude of decision involving carriers by rail) is predicated upon public policy. Obviously, the same public interest which seeks to protect travellers by rail must reach forward to protect travelers by air. A passenger on an airplane can never know what act or omision of the pilot or what act of negligence in the maintenance of the airway system has resulted in his injury."[36]

In air carrier cases the plaintiff's difficulties are considerably greater than those of plaintiffs in surface carrier cases, because: (1) Many crashes kill all occupants, leaving no witnesses. For example, in forty-four domestic air line accidents involving the death of a passenger between 1933 and 1942 incluive, twenty-nine resulted in the deaths of all occupants and only fifteen left some survivors.

(2) The operation and navigation of aircraft are so technical that the testimony of lay witnesses, even when available, is generally indefinite and of little value.

(3) The physical evidence of what occurred in an aircraft at the time of, or immediately prior to, most serious accidents, is often destroyed by the crash, consumed by fire, or accasionally lost under water.

(4) The path of an aircraft in the sky is more difficult to reconstruct than the course of a vehicle on the ground.

Indeed, less than twenty per cent of the cases investigated by the former Bureau of Air Commerce reveal com-

34. Smith v. Whitley, 223 N.C. 534, 27 S.E. (2d) 442 (1943); Boulineax v. City of Knoxville, 20 Tenn. App. 404, 99 S.W. (2d) 557 (1937).

35. Foot v. Northeastern Airways, 1931 U.S. Av. R. 66.

36. Note (1933) 4 J. Air L. 429, 433.

petent evidence of the conduct of the aircraft operator.[37] Thus, Professor Bohlen argues that "Whatever the future may hold, it is certain that today flying can be made safe only by the most meticulous care in the construction and inspection of planes. Those who choose to fly and to invite others to share in their flight, should bear the responsibility of these essential precautions."[38]

Another writer argues that the doctrine should apply because aircraft regulations are such that accidents are not likely to happen in the absence of negligence on the part of those in control and that the circumstances attending an aircraft accident are such that the defendant is better able to explain the cause: "The common carriers by air are constantly advertising to the public the high quality of safety of their transportation systems. The Department of Commerce regulations require air transport companies to maintain meteorological stations, to provide for adequate inspection of the mechanical and structural parts of the plane, to maintain adequate airports with modern lighting facilities and to engage only highly skilled pilots. Certainly the defendant, under such conditions, is better able to explain whether or not he has complied with these requirements. Under such circumstances, it would seem only fair to hold them to all of the liabilities of common carriers under our system of law."[39]

Airplane accidents can be grouped into the following four general classifications: (1) Damage by aircraft (or objects falling therefrom) to persons or property on the ground; (2) Collision between airplanes; (3) Injury to the aircraft itself by the bailee or lessee in control; (4) Injury or death to persons or property transported.

There is no real opposition to the application of the doctrine to the first classification. Indeed, many authorities who contend that the doctrine should not be applied to the remaining classifications find no objection to its application to cases where aircraft cause injury to persons or property

37. Reiber, "Some Aspects of Air Carriers' Liability" (1946) Law and Contemp. Prob. 524, 529; Buhler, "Limitation of Air Carriers' Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passengers' Liability Act" (1940) 11 Air L. Rev. 262, 288.

38. Bohlen, "Aviation Under the Common Law" (1934) 48 Harv. L. Rev. 216, 237.

39. Note (1933) 4 J. Air L. 429, 435.

on the ground.[40] In explanation of this Professor Bohlen says, "Where some purpose is served peculiar to those in charge rather than common to the great masses of mankind, it is held that these ventures must be carried out at the risk of those interested in them and not at the risk of those whose bad luck it is to be in, or to possess property in, the neighborhood of their prosecution."[41]

Thus, the doctrine was applied where an airplane, in attempting to land, struck an automobile and severely injured the plaintiff, an occupant of the automobile.[42] The court applied *res ipsa* where the defendant's plane crashed into the plaintiff's hangar.[43] Where the defendant, in attempting a forced landing, struck and killed the plaintiff's son, the court held, "The present case is of that class in which the instrumentality that produced the injury was under the control and management of the defendant and the accident was such as does not happen if due care has been used. The accident having occurred under such circumstances, the burden was upon the defendant to establish his freedom from fault."[44]

Although there is opposition to the application of the doctrine in cases which fall into classifications two, three, and four, courts nevertheless, have applied it in cases in each of these groups.

In *Smith* v. *O'Donnell*,[45] the plaintiff was a passenger in the defendant's plane which collided in mid-air with another plane. The court said, "If a proper degree of care is used, a collision of two airplanes in mid-air does not ordinarily occur and in such action, where defendant was a common carrier, and plaintiff was a passenger, and the collision of the two planes took place in mid-air, the doctrine of res ipsa is applicable." In *Ranger* v. *American Airlines, Inc.*,[46] the plaintiff, a passenger in the defendant's plane which was

40. Harper, "Res Ipsa Loquitor In Air Law" (1930) 1 Air L. Rev. 478; In connection with this, see Restatement, "Torts" (1934) §520, comment b.
41. Bohlen, "Aviation Under the Common Law" (1934) 48 Harv. L. Rev. 216, 217.
42. Sollak v. New York, 1929 U.S. Av. R. 42; (N.Y. Ct. Cl. 1927).
43. Genero v. Ewing, 176 Wash. 78, 28 P.(2d) 116 (1934).
44. Kadylak v. O'Brien, 1941 U.S. Av. R. 8.
45. 215 Cal. 714, 5 P. (2d) 690, 12 P. (2d) 933 (1932).
46. 1943 U.S. Av. R. 122.

involved in a mid-air collision with an Army plane, was permitted the use of *res ipsa.*

In *Braman-Johnson Flying Service, Inc.* v. *Thompson, Jr.*,[47] the defendant was a bailee of the plaintiff's airplane. On a flight, with the defendant in sole control, the plane crashed. Plaintiff's recovery was probably based on his specific proof of defendant's negligence, but the court by way of dicta said, "Although the burden of proof of negligence in such cases (as in the case at bar) unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. The negligence may be inferred from the circumstances of the case."

Cases involving injury or death to persons transported comprise the bulk of the tort litigation in aviation cases. The first case of this type in which *res ipsa* was applied was litigated in 1931.[48] In 1932 the doctrine was again applied.[49] Both cases grew out of the same accident; the defendant's plane fell out of the sky (for an unknown reason) killing the pilot and the two passengers.

In 1938 a plane took off on a regularly scheduled flight; two days later it was found with its nose imbedded in a mountain with all its passengers and crew dead. In an action brought by the administrator of one of the passengers, the court held that the doctrine of *res ipsa* was applicable.[50] In a 1945 case,[51] the plaintiff sought to recover for injuries sustained as a passenger in defendant's plane which crashed shortly after takeoff. Although the court did not mention *res ipsa* as such, it stated that a presumption of negligence arises.

In England, the doctrine is applicable to aviation and applies whether or not the plaintiff, in addition to his reliance on *res ipsa*, alleges specific acts of negligence. In a leading English case[52] in which the plaintiff relied on *res ipsa* and

47. 3 N.Y. S.(2d) 602 (1938). 1938 U.S. Av. R. 153.
48. Seaman v. Curtiss Flying Service, 231 App. Div. 867, 245 N.Y. S. 251 (1930), 1931 U.S. Av. R. 227.
49. Stoll v. Curtiss Flying Service, 236 App. Div. 664, 257 N.Y. S. 1010 (1932), 1932 U.S. Av. R. 163.
50. Goodheart Adm. v. Am. Airlines, 252 App. Div. 660, 1 N.Y.S. (2d) 288 (1938), 1938 U.S. Av. R. 148.
51. Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N.E.(2d) 131 (1944), aff'd. 389 Ill. 462, 59 N.E. (2d) 853 (1945).
52. Fosbroke Hobbs v. Airworks, 1938 U.S. Av. R. 194, 197.

alleged specific acts of negligence, the court held, "The doctrine of res ipsa loquitur applies. It was argued that I ought not to apply this doctrine to an airplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of airplanes are daily engaged in carrying mails and passengers all over the world, and, as is well-known, they arrive and depart with the regularity of express train. They have indeed become a commonplace method of travel, supplementing, though not superseding, rail and transport."

So far as is known, the French have never applied the doctrine of *res ipsa* as such.[53] In at least one aviation case,[54] the court, without mentioning the doctrine by name, indicated that it would not be applied. In that case a passenger plane, flying between Casa Blanca and Toulouse, crashed, and all aboard were killed. The court refused to presume negligence saying, "In the absence of all evidence, many other causes of the accident could, with equal probability, be assigned, certain of which exclude all responsibility on the part of the defendant company."

Canada apparently follows the English rule. In 1937, the court applied the doctrine in an aviation case[55] even though specific acts of negligence were also alleged by the plaintiff. In a 1942 case,[56] the plaintiff's sole reliance was on *res ipsa* and the court, in returning a verdict for him, said, "Travel by air must now be regarded as a common means of transportation, extensively used, not only in North America, but in many other parts of the world. With experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination."

There is general agreement among air law practitioners that the doctrine of *res ipsa* has not solved the problems which arise out of airplane accidents. This very troublesome

53. Note (1932) 3 J. Air L. 662, 665.
54. Veuve de Courson de La Villeneuve v. Society Aeronautique Latecocere, 11 Aevue Juridique Internationale De La Locomotion Aerienne 239 (1927).
55. McImerny v. McDougal, 1938 U.S. Av. R. 166.
56. Malone and Moss v. Trans. Canada, 1942 U.S. Av. R. 144, 146.

rule of evidence is at best only a stop-gap invented by humane judges to help plaintiff surmount the high barriers presented by the general rule that the plaintiff in a negligence suit has the burden of proving some negligence on the part of the defendant. Although the rule works successfully in settled industries its history in airplane litigation has not been satisfactory. A well-planned statute could do better.[57]

Progress in this direction has been made in the field of international air transportation by the adoption of the Warsaw Convention[58] which was concluded in 1929, and the Rome Convention[59] which was concluded in 1933. These Conventions contain a body of rules for determining liability and were offered as the basis of treaties to be entered into among the various nations engaged in air commerce. They are, therefore, intended to apply only to the liability of operators foreign to the country in which the injury occurs.[60]

The Warsaw Convention has been ratified by thirty countries[61] including the United States. According to Article 17, the carrier is responsible in damages in case of death of, and injury to, a passenger, if the accident which caused them took place on board the aircraft or in the course of embarkation or landing. By the provisions of Article 18 the carrier is responsible in damages in case of destruction and loss of, or damage to, registered baggage and merchandise, if the incident which cause the damage took place "in the course of air transportation." "In the course of air transportation" includes the period of time during which the property is under guard of the carrier, whether at the airport

57. Buhler, "Limitation of Air Carriers' Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passengers' Liability Act" (1940) 11 Air L. Rev. 262, 288.

58. U.S. Treaty Series 876, 1934 U.S. Av. R. 245.

59. Dept. of State Treaty Info. Bull. No. 47 (Aug. 1933), 1933 U.S. Av. R. 284.

60. See note 57, supra.

61. Australia and territory under mandate; Belgium, including Belgian Congo and territory under mandate; Brazil; Czechoslovakia; Denmark; France, including colonies, protectorates, and mandated territories; Germany; Great Britain and Northern Ireland, including the largest part of her possessions and colonies; Italy, including possessions and colonies; Latvia; Netherlands, including Netherland West Indies, Surinam Curacao; Norway and possessions; Poland, Rumania; Spain and Spanish Morocco and colonies; Switzerland; U.S.S.R.; and Yugoslavia. Adhering countries: Danzig; Finland; Greece; Hungary; India; Ireland; Liberia; Liechenstein: Mexico; New Zealand; Sweden; U.S. of America; (U.S. announced adherence Oct. 29, 1934).

or on board the airplane, or at some other place, outside an airport, where the plane may be forced to land.[62]

The Warsaw Convention does not provide for absolute liability. On the contrary, Article 20 stipulates that a defendant shall not be liable, if he proves that he or his agents have taken all necessary measures to avoid the injury, or that it was impossible to take such measures. The effect of this provision is to shift the burden of proof to the defendant and if he fails to discharge it, plaintiff is entitled to a directed verdict.

The Warsaw Convention stipulates that all rules of the Convention as to responsibility are mandatory and that any contractual modification of, or exemption from, the same are invalid.

The Rome Convention provides for absolute liability, but its scope is more limited than that of the Warsaw Convention. It stipulates that injury caused, by aircraft in flight, to persons or property on the surface, shall give a right to compensation. The plaintiff's burden is merely to establish that the injury exists and that it was caused by the defendant's aircraft. This convention has not enjoyed wide adoption; in fact, it has only been ratified by five countries.[63]

The Uniform State Law for Aeronautics[64] which has been adopted by fourteen states and Hawaii[65] represents an attempt of state legislatures to partially replace *res ipsa* with a statute. Section 5 provides that the owner or lessee of an aircraft is absolutely liable to persons or property on the ground for damage caused by the ascent, descent, or flight of an aircraft or the dropping or falling of any object therefrom. Section 6 stipulates that the owner's liability in cases growing out of collisions between aircraft shall be determined by the rules of law applicable to torts on land. Since the act makes no provision for determining the owner's liability in the ordinary transportation of persons and property, the plaintiffs (even though they bring their actions in states which have adopted the Uniform Act) must still resort to the *res ipsa* doctrine and (or) specific allegations of negligence.

62. For a discussion of this convention see Buhler, "Limitation of Air Carriers' Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passengers' Liability Act" (1940) 11 Air L. Rev. 262, 282.

63. Spain, Rumania, Belgium, Guatemala and Brazil.

64. 11 Uniform Laws Ann. 161 (1938); 1928 U.S. Av. R. 472.

65. Del., Ind., Mich., Minn., Nev., N.J., N.C., N.D., R.I., S.C., S.D., Tenn., Vt., and Wis.

The Civil Aeronautics Act of 1938 contains no provision with respect to the liability of interstate common carriers by aircraft. The Civil Aeronautics Board, however, has recommended the adoption of a comprehensive federal aviation liability statute in place of the enactment of state aviation liability laws. It urges the Federal Government to define liability in aircraft accidents, and authorize a federal agency to compel, by regulation, all classes of aircraft operators to carry liability insurance. In addition, the Board criticizes the present laws governing accident liability, pointing out that they are not particularly well adapted to the peculiar characteristics of travel by air.[66]

The Lea Bill or Air Carrier Liability Act[67] proposes liability for injuries or death of passengers in a form of statutory *res ipsa* and would require the defendant to prove his non-negligence.

The need for passenger protection through *res ipsa* or absolute liability is emphasized by a study of recent aviation accidents. From January to November of 1946, five hundred and forty-six persons lost their lives in forty-six reported crashes of large passenger-carrying planes throughout the world. It is impossible to determine the causes of many of these air accidents; but it seems possible that the extension of liability would tend to make transportation safer; i.e., increased liability would reflect directly on the character of the service. Indeed, the protection of the passengers through compensation against financial loss from injury is as clearly a part of the service as protection from the injury itself.[68] It is certain that the trend is toward such liability; sooner or later it will come.[69]

But for the present, plaintiffs in most jurisdictions and in most types of aviation accident cases (where the cause of the accident is unknown) will be forced to invoke *res ipsa loquitor*. Since the application of the doctrine follows no jurisdictional pattern and is rejected as often as it is applied, plaintiffs can only hope for, but cannot depend on, its application to discharge their burden of showing some negligence on the part of the defendant.

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66. Civil Aeronautics Board Annual Report (1941) p. 6; for a discussion of this, see Wilson & Anderson, "Liabiblity of Air Carriers" (1942) 13 J. Air L. 281, 299.
67. Binzer, "Civil Aviation—The Relative Scope of Juridsdiction of The State and Federal Governments" (1945) 34 Ky. L.J. 276.
68. Note (1933) 4 J. Air L. 429, 434.
69. Fike, "Air Transportation Protection" (1937) 8 Air L. Rev. 316.