

THE CANADIAN LAW OF CIVIL AVIATION*

The above was the subject matter of my address to the Canadian Bar Association in 1937 (see annual proceedings 1937, page 140). Subsequently the Association formed its Commercial Law Section (including aviation) and in 1939 I reviewed the new developments in a paper before the Section (see CANADIAN BAR REVIEW, April 1940, page 292). I have been asked again to deal with the further developments. They have been few, but of importance.

Conditions of Air Traffic Tickets or Releases Purporting to Limit or Relieve from Liabilities

The case of *Ludditt v. Ginger Coote Airways Limited*, [1941], 2 W.W.R. 397, a decision of Sidney Smith J. in British Columbia, is calculated to change existing ideas of what an aeroplane carrier can do in the way of limiting his liability for accidents to passengers or damage to goods carried. In the past the English view, which has been followed in Canada, has been that when special conditions exempting the carrier from liability for the negligence of its servants are endorsed upon a ticket issued to and accepted by the passenger, and provided the passenger's attention is called to the conditions, he is bound by them. Numerous cases relating to limitation by carriers of their common law liability are mentioned in the books, practically all of them relating to railway and shipping contracts. Mr. Justice Smith, however, has now decided that by virtue of the provisions of The Transport Act, Dominion Statutes, 1938, c. 53, and in view of the principle laid down in *Clarke v. West Ham Corporation*, [1909] 2 K.B. 858, such attempts to limit or relieve from liability, at least in the case of passengers carried by air on scheduled air routes and at scheduled rates or tolls, are invalid.

In the *Ludditt Case* the plaintiffs booked passage on the defendant's aeroplane for a trip from Vancouver to Zeballos. The defendant had been granted a licence under The Transport Act. The schedule provided for a tri-weekly service between Vancouver and Zeballos. Under the approved schedule and charges the passenger fare between those two points was \$25.00.

During the course of the trip a fire occurred on board the plane, forcing it to land on the surface of the water and, in consequence, the plaintiffs lost their baggage and were severely

* A paper presented to the Commercial Law Section of The Canadian Bar Association at the Annual Meeting at Toronto, September 12, 1941.

injured. It was found as a fact at the trial that the fire was due to the negligent operation of the plane.

The tickets issued to the plaintiffs were expressed to be subject to certain conditions, set out on the backs, to the effect that the defendant company should in no case be liable to the passenger for injury, loss or damage to person or property where the injury, loss or damage was caused by negligence or default or misconduct by its agent, servants, or otherwise howsoever.

The argument for the plaintiffs (accepted by the judge) was that as the fare between the two points had been established under the statutory regulations, the defendant could not attach conditions to the contract of carriage abolishing its liability, at least not without a new and valuable consideration.

As this decision was predicated on *Clarke v. West Ham*, it is necessary to refer back to that case. It is a remarkable decision which seems to stand by itself and has not, apparently, been mentioned in any other subsequent case with the exception of *Baker v. Ellison*, [1914] 2 K.B. 762, where it was referred to casually on the question whether a bus operator at a certain point was a common carrier. The *Clarke Case* was a decision of the English Court of Appeal, consisting of Cozens-Hardy M.R., Farwell L.J. and Kennedy L.J., who affirmed the decision of Lord Coleridge J. The headnote of the case states in part as follows: "Held, affirming the decision of Lord Coleridge J., by Cozens-Hardy M.R. upon the construction of the statutes regulating the tramway, by Farwell L.J. upon the ground that the corporation were common carriers of passengers at common law, in the sense that they were bound to carry according to their profession, and, by Kennedy L.J., on both grounds, that so long as the tramway was open for public traffic, the corporation were bound to carry any passenger, not being an objectionable person, who offered himself and was willing to pay the published fare, provided that they had accommodation for him, and were not entitled to impose a condition limiting their liability for negligence without giving the passenger the option of travelling at a higher fare without any such condition." Commenting on the case, *Chitty on Contracts*, 9th edition, page 724, in the section dealing with railway companies as carriers, states: "Whether in the case of ordinary passengers railway companies have complete freedom of contract or not is a matter of some doubt. On the one hand there are the opinions of Farwell L.J. and of Lord Coleridge J. in *Clarke v. West Ham Corporation*, that a common carrier of passengers is not entitled to impose unrea-

sonable conditions. On the other hand there are dicta of Huddleston B. in *McCartan v. N.E.R.* (1885), 54 L.J.Q.B. 441, of Alverstone L.C.J. in *Duckworth v. Lancashire and Yorkshire Railway* (1901), 84 L.T. 774 and of Atkin L.J. in *Hearn v. Southern Railway* (1935), 41 T.L.R. 305, to the effect that railway companies may impose what conditions they please. The actual decision in the West Ham case does not resolve the question as it turned on the construction of the corporation's special statutes." The summary contained in the last sentence of this passage does less than justice to the views of Kennedy and Farwell L.J. both of whom discussed at length the obligations of a common carrier of passengers.

Lord Coleridge had said, page 868: "They (referring to railway companies) may offer a free pass to a passenger or permit him to travel under conditions which necessarily involve a greater risk to himself, on payment of a lower fare or none and call upon him to absolve them of their liability, in whole or in part, but no case has been decided which permits a railway, canal or tramway company which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk. The defendants in their argument had to admit that if they could limit their liability in this case, they must logically claim that they were not bound to carry anyone, or if they did, might carry no one except on terms that they should be absolved from all liability whatever. But I think the statutes and regulations which empowered them to lay and work their lines in the public streets forbid such a contention."

Cozens-Hardy M.R. at page 875 said: "In my opinion it is not useful to refer to provisions contained in the Railway Acts or the cases decided under those Acts. I base my judgment on the simple proposition that the plaintiff, who had a right to be conveyed in a tramcar on payment of the published fare, enjoyed that right with everything incidental to it, including a right to such damages as a jury might assess by reason of the defendant's negligence".

And Kennedy L.J. at page 884: "I think I ought to add that I do not concur in one passage of the judgment in which the Judge appears, if he is correctly reported or if I correctly understand him, to have thought that railway legislation had some application to this case. It appears to me to have no connection with the legal position of the owners of these tramways under special statutes."

Against these statement may be placed those to which *Chitty* refers. In the *McCartan Case* Huddleston B. had said, page 443: "It is quite clear, since the case of *Haigh v. Royal Mail Steam Packet Co.* (1883), 52 L.J.Q.B. 395, that if a company uses apt words for the purpose, they may make a contract excluding themselves from all liability." And Lord Atkin in the *Hearn Case* said (page 309): "By the provisions of that Act (Finance Act of 1921), where there is a reasonable demand for workmen's trains, then the railway company on any part of its systems has to provide workmen's trains to the satisfaction of the proper authority, which is now the Ministry of Transport, at fares that are approved by the Ministry. In respect of that obligation there is no statutory provision as to any limitation of liability on the part of the company; but, presumably, they may make such terms as they please with their passengers and, as far as I know, there is no law, at present, which prevents railway companies from making any stipulation they please as to the liability which they will undertake when they carry their passengers."

In the *West Ham Case*, Kennedy L.J. based his judgment on what he conceived to be the obligations of a common carrier of passengers. The following passage taken from page 883 of the report is self-explanatory: "What the defendants seek to do," said Kennedy L.J., "as it appears to me, is to demand from the plaintiff, one of the public, who at the proper time and place claimed the position of a passenger, adherence to a contract not authorized by the governing statutes and involving a new and additional term of an onerous nature beyond the payment of the toll, namely, the surrender of the plaintiff's common law right to full compensation for injury if caused by the neglect of the defendants to perform their duty as carriers of passengers, which is to use reasonable care and skill in carrying him on his journey. I think that they could not, in conformity with the legislation which governs them as public carriers, insist on the acceptance by the plaintiff of any such condition and that his knowledge when he entered the tramcar that the defendants claimed to exact upon him, in addition to the statutory toll, the acceptance of such a term, cannot be used by the defendants as an act waiving his right to be carried upon the statutory terms, namely, the payment of the conspicuously exhibited fare and obedience to the by-laws in force."

The history of the law relating to common carriers of passengers by rail in England does not seem to have been affected

by statute in the same way as carriage of goods. In the case of *Peck v. North Staff. Rly. Co.* (1862), 10 H.L.C. 473, Lord Blackburn traces the course of the law of carriage of goods by rail and the reasons leading up to the passage of The Railway and Canal Traffic Act, 1854. He shows that that important statute, which put a curb on the freedom of contract of railway companies in respect of carriage of goods, was passed with the very object of stopping railway companies from getting away from their common law liability. At page 494 of his judgment, he stated: "Cases decided in our courts between 1832 and 1854 decided that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases of gross negligence, misconduct, or fraud on the part of his servants; and the reason why the Legislature intervened in the Railway and Canal Traffic Act, 1854, was because it thought that the companies took advantage of those decisions 'to evade altogether the salutary policy of the common law'." But no such interference with the freedom of contract of railways in relation to carriage of passengers seems to have been contemplated at any time and the nearest one comes to such a suggestion in the law reports, is such a passage as the following, taken from Lawrence L.J.'s judgment in one of the most recent ticket cases, *Thompson v. L.M.S. Rly.*, [1930] 1 K.B. 41 at page 53, where he says: "If there were a condition that was unreasonable to the knowledge of the company tendering the ticket, I do not think the passenger would be bound."

In Canada the matter of railway carriage of passengers is dealt with in this respect by section 348 of the Railway Act, R.S.C. 1927, c. 170, which prohibits a railway company impairing, restricting, or limiting its liability in respect of the carriage of any traffic (which, by definition, includes passengers) unless such contract has been first authorized or approved by order of the Board. Subsection 2 gives the Board the right to determine the extent to which the liability of the company may be so confined.

The same problem, presumably, does not arise in the case of carriage of passengers by water. See *Beaumont-Thomas v. Blue Star Line Limited*, [1939] 3 All E.R. 127. Section 641 of the Canada Shipping Act, after providing that the liability of the owners of vessels in collision caused by the fault of the vessels, shall be joint and several, expressly states that no person is to be deprived of any defence on which he might have relied to defeat the claim of a person injured in the collision

or affect the right of any person to limit his liability—in the manner provided by law; and sections 649–655 inclusive limit the liability of owners of vessels, where the fault is not theirs, to \$72.97 (£15) for each ton of the ship's tonnage in respect of loss of life or personal injury claims.

The English cases relating to carriage of passengers by air are not helpful on this point. In the case of what is known as international carriage, the limitation fixed by the Warsaw Convention at 125,000 francs applies, with the proviso that the carrier and passenger may, by special contract, agree to a higher limit of liability. This convention was made effective in England by the Carriage by Air Act, 1932. Whether passengers travelling on scheduled air routes within the British Isles can recover damages for injuries caused by the negligence of the carrier, notwithstanding conditions contained on the ticket which limit the liability of the carrier and are brought to the notice of such passengers, is not clear. *Moller on Civil Aviation*, page 205, in a short passage, apparently implies that such conditions would be valid, a position hard to reconcile with the words of Farwell L.J. in the *West Ham Case*, quoted by the same author, at page 268, where he states: "Persons holding themselves out as common carriers are bound to act as such to all persons not in an unfit condition for whom they have accommodation, on having tendered to them the legal fare, without subjecting the person tendering to any unreasonable condition." In the *Peek Case*, quoted above, Lord Blackburn intimated that a condition limiting liability without giving the passenger the option of travelling at a higher rate at the company's risk was unreasonable. It would appear that in England, the tolls and charges for so travelling are regulated by authority. See, for instance, The Air Navigation Act, 1936, section 5 (1) (d) which provides that conditions as to fares, rates or other charges may be attached to the license which must first be obtained before passengers may be carried.

Apart from the decision on the main issue there are other points of interest in the *Ludditt Case*. For instance, at page 400, the judge gives it as his opinion that the Board of Transport Commissioners has no power to abolish liability for negligence. In this connection, section 32 of The Transport Act was not mentioned. That section reads as follows: "Notwithstanding anything in this Act contained, a licensee engaged in transport by water or air may carry traffic free or at reduced rates to the same extent and subject to the same restrictions, limitations

and control as are applied in the case of a railway company under the Railway Act." If, therefore, the judge meant by his dictum to suggest that the Board had no power to validate conditions of limitation of liability contained in a ticket issued at a reduced rate, he would seem to have fallen into error in view of section 348 of the Railway Act.

Another interesting point is whether an air transport company can issue a ticket containing conditions which limit the liability of the company when a trip is taken on a special contract from point to point where there is no regular schedule in operation or where a plane is chartered. Apparently Part V (proclaimed, effective November 15, 1938, see *Canada Gazette* November 12, 1938) of The Transport Act deals with agreed charges only in respect of carriage of goods, and so far as can be seen there is nothing in the Act which deals specifically with chartering contracts for the carriage of passengers. Part III which deals with the licensing of aircraft used in transport is, by section 15, expressed to apply only where the air transport services are between points named by the Governor-in-Council and are reasonably regular. Part IV, which deals with tolls and tariffs, provides by sec. 88 (4) that the licensee shall not "charge, levy or collect any toll for any service except under and in accordance with the provisions of this Act", and authorizes the division of passenger tariffs (which must be filed with the Board, sec. 17 (1)) into "standard passenger" and "special passenger" (sec. 20), the former being the maximum mileage tolls to be charged and the latter, a lower toll, and by implication seems to require the supervision of all chartering arrangements. In other words, it appears that any special contract of this nature should have the approval of the Board. Whether the Board would or could allow the licensee to limit its liability in any instance is uncertain, but the point taken in the paragraph immediately above may again be referred to, namely, that the Board has wide powers in this respect under section 348 of the Railway Act. Incidentally, it may be noted that the "agreed charges" for carriage of goods are not left entirely to freedom of contract but require the approval of the Board (sec. 35 (1)).

Res Ipsa Loquitur

In aviation disasters, where frequently all evidence is destroyed and all witnesses killed, the application of this principle must become a question of great importance and in my original

paper I submitted that the principle should be applied with great caution, if at all, to those unexplained crashes which destroy the evidence, including the company's servants who would ordinarily be available to give the explanations which would shift the onus, and I pointed out that the American decisions so far appeared to be to the effect that the principle of *res ipsa loquitur* does not apply where the only evidence is that the plane fell, and that to hold otherwise would remove the principle of negligence entirely and establish a principle of absolute liability in a large number of aviation cases. This never was the purpose of the principle which is merely a rule of evidence.

In my second paper I questioned whether the trial court was right when in the case of *McInnerny et al. v. McDougall*, [1937] 3 W.W.R. 625, 47 M.R. 119, it held that the doctrine of *res ipsa loquitur* applied to the facts of such case. In *Galer v. Wings (Limited)*, [1938] 3 W.W.R. 481, where the propeller broke in mid air, the court, probably rightly, applied the doctrine but later found that the onus placed by the doctrine upon the defendant had been satisfied by the defendant. Another case arising out of the same accident and being one brought by a passenger, as was *Galer*, is now awaiting judgment in the courts of Manitoba, the plaintiff basing his action on the same evidence as did *Galer*, with, however, certain additional evidence.

Malone v. Trans-Canada Air Lines, [1941] O.W.N. 238, reports the disposition of a motion made by the defendant before the Master (whose decision was appealed from unsuccessfully to a judge in chambers) for an order for particulars of negligence. The defendant maintained that it was entitled to know what negligence if any was alleged by the plaintiff. The action arose out of the recent crash of the defendant's aeroplane near Armstrong, Ontario. A general allegation of negligence was set out in the statement of claim and, evidently, the plaintiff relied on the doctrine *res ipsa loquitur*. Counsel for the defendant contended that this principle could not apply in this case because the aeroplane had been in flight for some hours before the accident happened. The court, however, declared that there was no difference in the application of the principle when an aeroplane was about to make a landing and when it was about to take off as in the case of *Fosbrooke-Hobbs v. Air Works Limited*, [1937] 1 All E.R. 108, and accordingly it was held that the plaintiff in this present case should not be required to give particulars of negligence of which he knew nothing. This case

would appear to indicate a further tendency on the part of the Canadian courts to allow the claimants the rather liberal use of the doctrine. It will be remembered that the crew of three, and I believe all passengers, were killed and the accident happened at night, making observation from the ground difficult, to say the least.

On the other hand, *McCoy et al. v. Stinson Aircraft Corporation*, a decision of Kelly J. of the High Court of Justice for Ontario, November 23, 1939, reported or digested in 5 Dominion Report Service 41, does not apply the doctrine. This was an action for damages arising out of the death of an aeroplane pilot who was killed in an aeroplane crash in Northern Ontario. The action was against the manufacturer of the aeroplane which crashed. The plaintiff's case was put entirely on alleged negligence in and about the welding of a gusset to a wing. It was alleged that in the nature of aeroplane structure it was a negligent thing to weld a gusset to the wing, that it was negligent because the welding operation would weaken the plate, which did break and so caused the crash. The second ground was that the welding itself was done negligently so that it formed a weak bond which in itself caused the crash. The judge found that the welding did not in any way weaken the plate or, at any rate, weaken the plate as regards the force which brought about the crash; second that it had not been proven that a weak weld was the cause of the break, that is, in the original plate. The repair job was done in September, the plane was in continuous operation from September to January except for a period of about five weeks. It was held that the plaintiff fell far short of eliminating extraneous causes which might have accounted for the defective condition which undoubtedly brought about the crash. Further it was held that on the evidence, there was no negligence, that there was nothing of which the defendant corporation was under a duty to warn anybody; and that the repair was a matter of good practice, and that the action should be dismissed. Here, although the wing broke in mid air, the court apparently did not apply the doctrine *res ipsa loquitur*.

General

It might be noted that the Carriage by Air Act, 1939, being chapter 12 of the Statutes of Canada of that year has not yet been proclaimed, and is, therefore, not yet law. It will be remembered that this was the Act to give effect, in part at least,

to the Warsaw Convention for the unification of certain rules relating to international carriage by air.

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[EDITOR'S NOTE : In view of the fact that none of the American cases dealing with the application of *res ipsa loquitur* were cited to the Court in *Malone v. Trans-Canada Air Lines*, [1941] O.W.N. 238, and as the American authorities may not be available to many of our readers, we are reprinting here extracts from a 1937 decision in which most of the American authorities are collected and discussed. The case is *Cohn v. United Air Lines Transport Corporation* (1937), 17 Fed. Supp. 865 (District Court, D. Wyoming).

In this action the plaintiff sued for damages caused by the death of one Cohn, arising from an airplane accident. The statement of claim alleged that Cohn, at the request of the defendant, boarded a plane of the defendant and took off on a test flight with three of the defendant's employees. The plane crashed, killing the four occupants and the claim merely alleged that the crash was due to the negligence of the defendant.

The question of the sufficiency of the pleadings regarding negligence was allowed to be brought before the Court by way of a demurrer to the statement of claim, since it was admitted that the plaintiff could not give any particulars of negligence, and it was on that demurrer that the judgment was given. This raised the question whether *res ipsa loquitur* was sufficient to call on the defendants to disprove negligence.

The Court held that *res ipsa loquitur* was not applicable, taking the view that it applied only when the conclusion from the admitted facts pointed in the direction only of negligence, and no other inference. In part the Court spoke as follows : Justice Riner, in speaking for the Wyoming Supreme Court in *Stanolind Oil & Gas Co. v. Bunce*, 62 P. (2d) 1297, at pages 1307, 1308, adopts the language of another court in his opinion: "It may be observed additionally, that as suggested by the Massachusetts court in *Wilson v. Colonial Air Transport*, supra [278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329], that the doctrine of *res ipsa loquitur* should not be applied 'if there is any other reasonable or probable cause from which it might be inferred there was no negligence at all.' The testimony referred to in the preceding paragraph was such as to authorize the jury to find that there was no negligence on the defendants' part."

It will thus be seen that, generally speaking, the doctrine has a somewhat limited application, making it, as it were, a sort of refuge of

last resort for the relief of injured persons where specific acts of negligence are incapable of being alleged and proved by the ordinary methods.

It will be noted by the above-quoted portion of the petition that there was a crash of an airplane in which all the occupants were killed; that the airplane at the time was in charge of a pilot who was accompanied by two mechanics all of whom were in the employ of the defendant; that the plaintiff's intestate was requested to board the plane, which under the circumstances may be reasonably construed as equivalent to an invitation; and that at the time the accident occurred the plane took off for a test flight. Under these circumstances it is apparent that the plaintiff's intestate was not a passenger for hire to whom the defendant was charged with the highest degree of care. The inference is also imperative that plaintiff's intestate, being invited to participate in a "test" flight, must have known that such a flight was for the purpose of ascertaining the capabilities of the plane for regular service, which were by such flight to be determined. Being himself a pilot, he was thoroughly aware of the danger of the undertaking. Necessarily this situation would imply that it was not then known to any one whether or not the plane was in such condition that it would respond to its expected functions. The plane was in charge of a pilot who was accompanied by two mechanics, and from this the natural inference would be that at least for a test flight it was properly and adequately manned. It would be the ordinary duty and function of a trained pilot and trained mechanics to ascertain the defects, if any, in an airplane through a test flight. The last word in the tragedy is that in the crash all the occupants were killed, so that no one will ever definitely know what actually caused the plane to fall.

Our daily newspapers are replete with airplane accidents, the solution of which will never be known, as in the case at bar. The Department of Commerce, through its Bureau of Air Commerce, has published documents purporting to deal with accidents in the air and their causes. In publications of July and August, 1935, the causes of accidents attributable to carelessness or negligence are but a small percentage of all the causes which are known in this young but growing enterprise. It is definitely known that the presence of air-pockets, cross-currents, clouds, fog, mists, and a variety of climatic conditions bring about disaster for which no one is responsible, except it might be said that he who assumes to fly must look well to his own fate. Stalling motors frequently bring about failures to negotiate the air. Experience teaches us that this is still common in the automobile motor, which has the same method of propulsion as that of the airplane, but with a much longer period of experimentation and development. Of course, when the motor in an auto stalls it generally causes nothing more serious than disappointment, inconvenience, and vexation to the driver and occupants; but when the motor of an airplane stalls when in the air it is very likely to mean death to the occupants. Only a few of the ordinarily recognized natural hazards of flying which have not yet been definitely overcome, have been mentioned. How can the court legitimately say under all the circumstances that a fall of an airplane upon a test flight was, through an exclusion of all other causes, attributable to the negligence of the ones engaged in the operation? And in the face of this, the law tells us that the doctrine of *res ipsa loquitur* shall not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all. It seems impractic-

able, if not impossible in the case at bar, to reasonably apply the doctrine to the pleaded facts and thereby save the petition.

The facts here seem to me to be much out of line with those in the old English cases out of which the doctrine arose, as in *Byrne v. Boadle*, 2 H. & C. 722, 159 English Rep. 299, where a barrel of flour fell upon the pedestrian from an upper window; or in *Scott v. London Dock Company*, 3 H. & C. 596, 159 English Rep. 665, where goods fell upon the Custom House officer from a crane fixed over the doorway; or in *Kearney v. London Brighton Railway Company*, 4 Ex. 885, 154 English Rep. 1476, where a brick fell upon a person underneath from a bridge structure over which a train was passing; or in *Skinner v. London Brighton Railway Company*, 5 Ex. 787, 155 English Rep. 345, where one train struck against another train standing at a station and injuring a passenger, both trains being operated by the same company; or, as in the old familiar illustration of a case clearly within the doctrine, of two trains operated by the same agency in collision on the same track in opposite directions. In these and similar cases all theories of the cause of the accident other than that of negligence are logically excluded by the facts themselves, while in the case at bar there are a variety of causes other than negligence which may have brought about the disaster.

Among the more recent cases dealing with the point is *Herndon v. Gregory*, 190 Ark. 702, 81 S.W. (2d) 849, 82 S.W. (2d) 244, which was a case involving an airplane accident in which all the occupants of the plane were killed, as in the case at bar. It was pleaded there that the plane was caused to be manned by an unskilled pilot and yet the court held that the petition could not be sustained against demurrer. It was the theory of the court that unless it could be pleaded and proved that the action of the unskilled pilot was the direct cause of the accident, which the petition did not allege and which of course could not be proved, the petition should not be sustained and that otherwise upon the facts the doctrine should not be applied. The court summarizes its conclusions in 190 Ark. 702, 81 S.W. (2d) 849, at page 852, 82 S.W. (2d) 244, 245, in the following language: "We are therefore of the opinion that the *res ipsa loquitur* doctrine is not applicable in this case, and that no presumption of negligence arises 'from the mere fact of injury, when that fact is as consistent with the presumption that it was unavoidable as it is with negligence.' This accident may have been caused by one or more of a number of reasons over which the owner and operator of the airplane had no control; 'and therefore, if it be left in doubt what the cause of the accident was or if it may as well be attributable to the act of God or unknown causes as to negligence, there is no such presumption.' If the complaint had alleged some particular act of negligence or some unusual or out of the ordinary occurrence, from which negligence might be presumed, such as cranking the engine without blocks in front of the wheels as in the *Genero Case*, supra [*Genero v. Ewing*, 178 Wash. 78, 28 P. (2d) 116], or attempting to land at too low and unsafe a speed or at a dangerous or unsafe place as in the *Seaman* [*Seaman v. Curtiss Flying Service, Inc.*, 231 App. Div. 867, 247 N.Y.S. 251] and *Stoll Cases* [*Stoll v. Curtiss Flying Service, Inc.* 1930 U.S. Aviation Rep. 148], supra, or had a collision occurred with another airplane as in the *Smith Case*, supra [*Smith v. O'Donnell*, 215 Cal. 714, 12 P. (2d) 933], or had he in a careless and negligent manner piloted his plane into a tree as in the

McCusker Case, *supra* [McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502], then it would have alleged a fact over which human conduct had control which might give rise to the application of the doctrine of *res ipsa loquitur*. Not having done so, we are of the opinion that the complaint did not state a cause of action, and that the trial court correctly sustained the general demurrer thereto."

The last cited case was decided by a four-three decision of the Supreme Court of Arkansas, and a dissenting opinion is found under the same title in 82 S.W. (2d) 244. The gist of the dissenting opinion, however, revolves around the contention that the allegation in the petition that the plane was placed in the hands of an unskilled pilot was sufficient to sustain it against demurrer. With some of the general language of this dissenting opinion, however, I do not find myself in accord, as for example, that found on page 245 of 82 S.W. (2d), as follows: "But if there were nothing stated in the complaint except that the plane fell and the parties were injured, this, under the rule of *res ipsa loquitur*, would state a cause of action. It seems clear that the plane would not have crashed and fallen unless the person operating it had been guilty of some negligence."

But even should the contention of the minority opinion of that court be accepted here, it could not rule this case, for the reason that the petitioner here pleads that the plane was in charge of a regularly employed pilot of the defendant company who must be presumed under such pleading to be one skilled in his calling.

Another case involving an airplane accident in which the doctrine here invoked was held not to be applicable, was decided by the Supreme Judicial Court of Massachusetts in *Wilson v. Colonial Transport Co.*, 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329. The case apparently involved the irregular performance of one of the motors when the plane was about to take off. After reiterating the substance of the doctrine as previously herein set out, the court concludes its opinion with the following significant language, 278 Mass. 420, 180 N.E. 212, at page 214, 83 A.L.R. 329: "We are not as yet, in respect to the operation, care and characteristics of aircraft, in a position where the doctrine of cases like *Ware v. Gay*, 11 Pick. [Mass.] 106, as to a stagecoach; *O'Neil v. Toomey*, 218 Mass. 242, 105 N.E. 974, as to the qualities of ice; or *Gilchrist v. Boston Elevated Railway Co.*, 272 Mass. 346, 172 N.E. 349, as to trolley cars or steam railroad trains, can be applied. The decision of cases of that nature rests upon facts constituting a part of a widespread fund of information. No ruling of that character could be made upon the meager facts here shown."

It may be that in the not too distant future in the evolution and development of the wonderful and enchanting science of aviation, a sufficient fund of information and knowledge may be afforded to make a safe basis in compensating for injuries sustained, the application of the doctrine here invoked; but it seems to me quite clear that that time has not yet arrived. Man has made rapid strides within a very small cycle in his endeavour to become master of the air, of which the bird until recently has been exclusively king in his own right, but with the exceedingly large number of unexplained and inexplicable catastrophes it is evident that he has not yet become such master. It will not do to discourage the pioneer by making him assume undue hazards in a monetary way. In the meantime it is quite evident that those who choose air-ways for transportation must in many instances be held to have themselves assumed the risk.

An order may be entered sustaining the demurrer; and it being evident that the plaintiff cannot plead further, judgment will be for the defendant in a dismissal of plaintiff's petition with costs and reserving to her all proper exceptions.

In *Herndon v. Gregory* (1935), 81 S.W. (2d) 849, the Supreme Court of Arkansas relied to a great extent on the analogy of a ship at sea and likened "perils of the air" to "perils of the sea". In doing so, they quoted from *Davis, Aeronautical Law*, pp. 852-3:

Practically all cases where the doctrine has been held to apply involve accidents which could not well have happened without the intervention of man. With ships at sea the possibility of accidents occurring without the intervention of man or because of hazards beyond his control become more pronounced, and in fact no discussion of the doctrine can be found in the many books on maritime law. Here the doctrine of presumed negligence gives way almost entirely to the probability that the accident unexplained resulted from sources beyond the carrier's control and for which he is not liable. In the case of airplanes it is more probable the accident could occur even if, in the ordinary course of things, proper care is used in its control.]