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THE LAW GOVERNING AIRPLANE ACCIDENTS

WILLIS L. M. REESE*

This paper owes its genesis to the fertile mind of Professor Frederic L. Kirgis, the Director of the Francis Lewis Law Center of the Washington and Lee Law School. He invited the writer to develop some preliminary ideas on what law should govern airplane accidents with the understanding that these ideas would be submitted to a group of knowledgeable persons.¹ This group would then meet at the Washington and Lee Law School for an intensive discussion during which, it was hoped, a consensus of some sort would be reached. Things transpired as Professor Kirgis desired. The group met during the period of February 4-5, 1982. There was, to be sure, no complete agreement on the part of anyone, but it seems fair to say that all present were in sympathy with the general approach suggested and with its underlying rationale. The following article is a more developed version of the paper discussed in Lexington. It incorporates many of the ideas advanced at the meeting, but the responsibility for what is said is that of the writer. Undoubtedly, each of the consultants would disagree in varying measure with some of the points that will be made.

Professor Kirgis established one ground rule. This was that it should not be proposed to have federal law govern the rights and liabilities of parties involved in airplane accidents in the United States. As a practical matter, this might well be the best solution. Surely, there would be no constitutional objection to the development of a federal rule that would preempt the field. Also, much could be said in favor of having a uniform rule apply throughout the United States.² Indeed it can be said with little exaggeration that the current situation is almost intolerable. Suits involving a single airplane accident are frequently brought in federal courts sitting in a number of states and then transferred to a single federal court by the Judicial Panel on Multistate Litigation.³ Under current practice, the transferee court will then be faced in the

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The writer wishes to express his thanks to Professors Oliver Lissitzyn and Andreas Lowenfeld for reading and commenting upon this paper when it was in draft form.

¹ In addition to Professor Kirgis, these persons were Lee Kreindler, Esq. of the New York Bar, Professor Andreas Lowenfeld of New York University Law School, and George Tompkins, Esq. of the New York Bar. Messrs. Kreindler and Tompkins specialize in cases involving airplane accidents. Professor Lowenfeld is the author of *AVIATION LAW* (2d ed. 1981).

² See Note, *The Case for a Federal Common Law of Aircraft Disaster Litigation*, 51 N.Y.U.L. REV. 232 (1976); Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (7th Cir. 1974).

³ 28 U.S.C. § 1407 (1976).

case of each suit with the unenviable task of applying the choice-of-law rules of the state in which the suit was originally brought.⁴ On the other hand, a choice-of-law solution would have to be adopted in the case of many accidents that occurred in foreign countries.⁵ This being so, it might be simpler and more desirable to follow the same path in the case of United States accidents as well. In any event, Professor Kirgis occupies a world where he does not feel bound by purely pragmatic considerations. He desired a choice-of-law solution which might prove of interest not only in the field of airplane accidents but also in other areas of torts. The writer was only too happy to oblige.

The writer's proposals were derived from a number of principles. First, the suggested formulations should consist of actual rules of choice of law which would afford some predictability of result and would be relatively easy for the courts to apply.⁶ If possible, it would be desirable to avoid such vague criteria as application of the law of the state with the most significant relationship⁷ or of the state which has the greatest interest in the decision of the issue at hand⁸ or of the state whose interests would be most impaired if its law were not applied.⁹ Formulations of this sort are hard for the courts to apply and afford little predictability of result except in the clearest of cases.

Most of the modern cases dealing with airplane accidents purport to apply criteria of this sort. The opinions make for dreary reading, but, worse still, they do not state the real reasons which led the court to the particular decision. It seems almost certain that by and large the judges first decided upon the result they wished to reach and only then thought of a rationale that would more or less support their conclusions. For example, one finds judges saying, in apparent seriousness, that it would be in the interest of a state to apply its more liberal rule of damages against

⁴ See, e.g., *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981); *In re Air Crash Disaster at Boston*, 399 F.Supp. 1106 (D. Mass. 1975).

The proposals that will be made for changes in the current choice-of-law approach to airplane disasters would not ameliorate this situation unless either (1) the great majority of the states were to adopt these proposals or (2) the federal courts were to adopt the proposals as a matter of federal law and also hold that federal rather than state choice-of-law rules should be applied in the case of litigation transferred to a single federal court under federal law. It could be suggested with some persuasiveness that because of the complexities involved the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), requiring application of the choice-of-law rules of the state from which a case has been transferred, should not be applicable in this instance.

⁵ This would be true in the case of suits against producers of air frames or other component parts of an aircraft. Suits against carriers to recover for injuries suffered in the course of international flights are today likely to be governed by the Warsaw Convention. Choice-of-law problems would arise in such cases if the United States were to denounce the Convention.

⁶ Cf. Reese, *Choice of Laws: Rules or Approach*, 57 CORNELL L.Q. 315 (1971).

⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

⁸ See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

⁹ Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

a local manufacturer in favor of a nonresident plaintiff who had suffered injury in an airplane accident in another state.¹⁰ The results reached in the cases may well be desirable, but the written opinions hardly aid in the development of the law since the reasons they advance are so largely a sham. It was hoped to suggest formulations that not only are clear and precise, but would also lead to results that are generally in line with those that the courts would currently reach.

The settlement process would also be speeded and facilitated by the existence of choice-of-law rules governing airplane accidents. This is of significance, since undoubtedly the great majority of cases involving such accidents are concluded by means of a settlement between the parties. Much time is currently spent in settlement negotiations on choice-of-law questions because agreement on what is the applicable law must logically precede discussion of such basic issues as standards of liability and measure of damages. If some certainty and precision could be brought to choice of law, attention could be directed more speedily and more efficiently to the important substantive issues.

The second principle is that the proposed choice-of-law rules should favor the plaintiff over the defendant. This would be in line with the results reached in the cases involving airplane accidents. This would also be in line with what is thought to be the basic policy underlying the law in the field of personal injuries and, indeed, in most areas of torts. The trend in recent years has been, increasingly, to favor the tort plaintiff, except in the areas of defamation and privacy.¹¹ This, in turn, leads to the conclusion that the basic policy underlying most areas of torts is to afford compensation to the plaintiff and thus, by reason of the prevalence of liability insurance, to spread the risk of loss.

It seems beyond argument that, insofar as possible, the rules in one field of the law should seek to complement the rules in other areas. There is, therefore, every reason why choice-of-law rules should be designed whenever possible to further the basic policy underlying the substantive field of law to which they apply. This has already been done in so many areas that it seems necessary to give only a few examples. The basic policy in the field of contracts is to protect the justified expectations of the parties. This policy is furthered by the choice-of-law rule that, subject to some exceptions, the parties can choose the law to govern their contract.¹² It is also furthered by the rule that a contract will not be invalidated for lack of the requisite formalities if it complies either with the requirements of the law of the place of contracting or of that which governs the validity of the contract in general.¹³ Likewise,

¹⁰ See, e.g., *In re Paris Air Crash*, 399 F. Supp. 732, 745 (C.D. Cal. 1975).

¹¹ W. PROSSER, *THE LAW OF TORTS*, xi (4th ed. 1971).

¹² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

¹³ *Id.* § 199.

there is probably a general tendency on the part of the courts to apply a law that will uphold the contract.¹⁴

The basic policy in the field of trusts is undoubtedly to protect the expectations of the settlor. Here we find the courts eager in their choice-of-law decisions to apply a law that will sustain the trust.¹⁵ The same policy underlies the law of wills, where statutes which provide that a will should be held valid with respect to formalities if it complies with any one of a number of enumerated laws.¹⁶ A Hague Convention on the subject takes a similar approach.¹⁷ Finally, coming closer to our subject, there is the German rule that in a personal injury action, the law more favorable to the plaintiff, as between that of the place of injury or of the defendant's conduct, is the law that should generally be applied.¹⁸ Also, a Hague Convention on the law governing products liability¹⁹ gives the plaintiff, in certain circumstances, a limited choice between one of two laws.

Favoring the plaintiff is not, of course, the only value that should be considered in formulating rules of choice of law for airplane accidents. The defendant should be accorded fair treatment and regard should also be had for the needs of the interstate and international systems. At the very least, a defendant should not be held subject to a law whose application he had no reason to foresee. Likewise, the interests of the interstate and international systems require that the law of a state should not be applied in situations where such application would not serve the purpose of this law or would invade the proper domain of other states.²⁰

Another principle on which the writer proceeded, but which evoked almost unanimous disagreement from those present at the meeting in Lexington, is that domicile should play no role in the selection of the law to determine rights arising from a typical airplane accident in which a number of persons are either killed or injured. The reason is that, otherwise, different treatment would be accorded to persons who essentially are similarly situated.²¹ In the writer's opinion, it would be unseemly, for

¹⁴ See, e.g., *Pritchard v. Norton*, 106 U.S. 124 (1882); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 1175 (1959).

¹⁵ See, e.g., *Shannon v. Irving Trust Co.*, 275 N.Y. 95, 9 N.E.2d 792 (1937); *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933); *Cross v. United States Trust Co.*, 131 N.Y. 330, 30 N.E.2d 125 (1892).

¹⁶ See, e.g., UNIFORM WILLS ACT § 7.

¹⁷ Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, reprinted in 9 AM. J. COMP. L. 705 (1960).

¹⁸ The German rule is discussed in U. DROBNIG, AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW 213-16 (2d ed. 1972); Juenger, *Lessons Comparison Might Teach*, 23 AM. J. COMP. L. 742 (1975).

¹⁹ Hague Convention on the Law Applicable to Products Liability, reprinted in 21 AM. J. COMP. L. 150 (1973).

²⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1973).

²¹ This would not be the case, of course, if all passengers on the plane had the same domicile. Such a situation, however, would be unlikely to occur on commercial flights and, as

example, for a passenger to recover either more or less than other passengers on the same plane by reason of the law of his domicile. Likewise, differentiating among passengers on the basis of their respective domiciles would impose a heavy burden on the courts in situations where the rights of a considerable number of passengers are in issue. It must be recognized, however, that a number of courts have given great weight in their choice-of-law decisions to the domicile of the respective plaintiffs,²² and weighty arguments can be advanced for doing so. Almost invariably the state of a person's domicile has the greatest interest in him and therefore good reason exists why its law should be applied.²³ The case for doing so is probably weaker when standards of liability are in issue. It might be thought inappropriate, for example, for a manufacturer or a carrier to owe some passengers a duty in strict liability and to owe others on the same plane only a duty in negligence. It might also be inappropriate for a manufacturer or carrier which has no substantial contact with a state imposing strict liability to be nevertheless subject so such liability to one or more passengers by reason of the law of their respective domiciles.²⁴ On the other hand, there would be less objection to having the law of a passenger's domicile determine issues relating to damages. This is an issue with which the state of a person's domicile will be particularly concerned. Consequently, there is greater reason to overlook in this instance the fact that differing treatment will thereby frequently be accorded to passengers on the same plane, or stated in other words, to persons who essentially are similarly situated.

Despite these persuasive arguments, the writer remains of the opinion that the law of a person's domicile should be disregarded. Primarily, this is because of the view that persons who are similarly situated should, usually at least, receive similar treatment. In part, this is also because, as already stated, a heavy burden would be imposed upon the courts if they were required to differentiate among numerous passengers on the basis of the law of their respective domiciles. Further-

will be indicated, the proposed formulations are concerned only with such flights. See text accompanying note 29 *infra*.

²² See, e.g., *In re Air Crash Disaster Near Chicago*, 480 F.Supp. 1280 (N.D. Ill. 1979); *In re Air Crash Disaster at Boston*, 399 F.Supp. 1106 (D. Mass. 1975); *Gordon v. Eastern Air Lines, Inc.*, 391 F.Supp. 31 (S.D.N.Y. 1975); *Long v. Pan American World Airways*, 16 N.Y.2d 337, 213 N.E.2d 796 (1965); *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964).

²³ Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. AND COM. 624 (1967); Note, *Lex Domicilii and the Warsaw Convention*, 9 WM. & MARY L. REV. 1118 (1968).

²⁴ To impose strict liability might impinge improperly upon the interests of the state of incorporation and thus be contrary to the best interests of the interstate and international systems. Cf. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); Kirgis, *The Rules of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Martin, *Constitutional Limitations on Choice of Law*, CORNELL L. REV. 185 (1976). Recently, however, the Supreme Court has indicated that there are few constitutional constraints on choice of law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

more, wholesale application of the law of a person's domicile would lead to this law being applied to the disadvantage of producers and carriers that have had little or no contact with the domiciliary state. Take the case, for example, of a New Yorker who purchases a ticket in Istanbul for a flight on Turkish Airlines from Istanbul to Cairo. The plane, which, we will assume, was manufactured in France, crashes in the course of the flight. Would it not be objectionable in these circumstances for a New York court, assuming that suit could be brought in this state, to apply New York law to the suit against either carrier or producer? Would not such application of New York law constitute an invasion to other states and, hence, be contrary to the best interests of the international system?²⁵ Would not it likewise be contrary to the best interests of the interstate system for New York law to be applied in a similar situation involving contacts that are located almost entirely in sister states?

One point on which everyone in Lexington agreed is that no weight in the selection of the applicable law should be given to the state where a particular passenger acquired his ticket. This state might lack any substantial relation to the parties or to the occurrence. Also, in the normal situation, some passengers on a particular flight would have acquired their tickets in different states. Hence, giving weight to the place of acquisition in the choice-of-law process would inevitably lead to different treatment of passengers.

A further principle on which the writer based his suggestions is that choice of the applicable law should depend upon the particular issue. This is in line with current thinking²⁶ and hence is hardly surprising. Needless to say, the same law will frequently govern a number of issues, but it is not to be expected that a single law will necessarily govern all issues in a case. This poses a problem to one who seeks to construct rules, since it would be burdensome, and probably impossible, to deal separately with every issue that could possibly arise. Nothing like this was attempted here. The suggested rules deal only with a few main issues. Perhaps these rules could satisfactorily be applied to other issues as well, but this is not here asserted.

The final, and perhaps the most important, principle on which the proposed formulations are based is that the plaintiff should be given a

²⁵ It may be that application of New York law in this case would be unconstitutional under due process. See authorities cited in note 24, *supra*, and Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

²⁶ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS chs. 7 & 8 (1971).

There are, of course, limitations on the extent to which different laws can appropriately be applied to govern different issues. For example, it might be inappropriate to hold a defendant strictly liable under the law of state X and subject to punitive damages under the law of state Y if X did not allow punitive damages because of its rule imposing strict liability. See Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

limited power to choose the applicable law.²⁷ This is in line with the principle previously discussed that choice-of-law solutions in this area should favor the plaintiff. To make the court decide which among a number of specified laws is most favorable to the plaintiff would impose a considerable burden upon it and might also complicate and extend the litigation. The content of each of the specified laws might have to be brought to the attention of the court. Also the court's decision as to which is the most favorable law on a given issue might be the subject of an appeal. All these difficulties would be avoided by giving the plaintiff the power of choice. His counsel would have the burden of making the choice of law, and this decision would not be subject to appeal. The court would be freed, at least in large part, from the task of determining foreign law and the litigation process would be expedited. Also, giving plaintiff this power of choice would not add to his already favored position. The court, if given the task, would have to determine which law, among a number of specified choices, is most favorable to the plaintiff. The plaintiff would be given exactly the same limited choice. The net result, whether the choice was made by the plaintiff or the court, should be the same.

If the plaintiff is to be given the power of choice, there would be the question of when in the litigation process the choice should be exercised. Presumably, this should be at some time after discovery has been completed. Only then will the plaintiff have had the opportunity to ascertain all the relevant facts. And only after he has ascertained the facts will he be in a position to determine which law would favor him the most. Take, for example, a case where it is unclear at the outset whether the crash of an airplane results from the negligence of the airplane producer or whether the latter can be held liable, if at all, only on the basis of strict liability. In such a situation, the plaintiff would have to wait until the end of discovery to decide upon the theory of his action against the manufacturer and, in all probability, on the law of which state would be most favorable to him.

Giving each plaintiff a power of choice among the laws that will be suggested should not lead to any serious disparity of treatment among passengers on the same plane. In almost every case, one of these laws should prove to be the most favorable on the particular issue to all of the passengers involved. Each could therefore be expected to make the same choice. This would not be true, of course, if each plaintiff was given the option of selecting the law of his domicile.

A plaintiff's power of choice would not, of course, extend to issues of judicial administration or, as more popularly known, to issues of pro-

²⁷ There is some precedent for giving such a choice to a tort plaintiff. See, e.g., Article 6 of II Hague Convention on the Law Applicable to Products Liability, reprinted in 23 AM. J. COMP. L. 150 (1973); Reese, *Products Liability and Choice of Law: The United States Proposals to The Hague Conference*, 25 VAND. L. REV. 29 (1972).

cedure. Such issues would continue to be governed, as they have been in the past, by the law of the forum.²⁸ Included within this category are issues relating to the pleadings and to evidence, to the conduct of the trial as, for example, whether the plaintiff should open and close, to the relative role of judge and jury, and to whether a jury verdict must be unanimous or can be by a stated majority.

The proposed formulations are limited to the liability of producers of air frames or of other component parts and to the liability of air carriers. Likewise, they deal only with commercial flights and thus do not cover accidents on small aircraft, such as corporate jets.²⁹ The formulations also are not concerned with choice-of-law problems relating to the liability of those responsible for the issuance of faulty instructions by air controllers and the like. On the other hand, the formulations are not subject to geographical limitations. They apply to airplane accidents that take place anywhere in the world.

The proposed formulations, each supplemented by commentary, are as follows:

I. PASSENGER V. PRODUCER

As here used, "producer" means the manufacturer of the air frame or of any other component part of the aircraft.

A. *Whether Producer's Conduct Was Liability-Creating*

Plaintiff can choose law of:

- (1) Place of manufacture or design;
- (2) Producer's principal place of business;
- (3) Place of departure on trip; or
- (4) Place of intended destination.

Comment: Whether the conduct was liability-creating will normally present the question of whether the producer can be held strictly liable or only liable for negligence.

Permitting the plaintiff to choose either the law of the state of manufacture or design³⁰ or of the producer's principal place of business would surely not be unfair to the producer. It could naturally be expected to comply with all the requirements of these laws and to insure against any liability it might incur for failure to do so. Also, these states have a real interest in the producer and in how it conducts its affairs. In situations where injury was caused by reason of the failure of the producer to comply with one of the state's requirements, such as subjecting

²⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 123-130 (1971).

²⁹ Different formulations might be appropriate in the case of accidents involving small aircraft. For example, it might frequently occur in such cases that all of the passengers involved had the same domicile.

³⁰ The place of design may, of course, be different from that of manufacture.

a component part to a required inspection, it can be said with good logic that the interests of the state would be served by the application of its law to hold the producer liable.³¹ This is not so clear when the question is whether the producer should be held strictly liable under, say, the law of the state of manufacture in a situation where, under the law of all other states having contacts with the case, there would only be liability for negligence. That the interests of the state of manufacture would be furthered in such a situation by the application of its law seems somewhat dubious. Nevertheless, application of this law can be justified on the ground that this would not be unfair to the producer and would be in line with the tort policy of providing compensation to the injured plaintiff.

On the other hand, it would be unwise to restrict the plaintiff's choice to either the law of the state of manufacture or design or of the producer's principal place of business. The plaintiff might have no contact with either of these states and, perhaps of greater significance, the producer might choose to conduct its activities in states whose law is favorable to it. What other choice should be given the plaintiff, however, poses a difficult problem. For reasons stated above, it is thought that the plaintiff should not be able to choose either the law of the state of his domicile³² or of that where he purchased his ticket.³³ What other states remain? One possibility would be the state where the plaintiff suffered injury during the course of the flight. The difficulty, of course, is that this state might be purely fortuitous and bear no reasonable relation to either the plaintiff or the producer. This law has accordingly been rejected with the realization, however, that better substitutes are not easy to find. The laws selected, although with some hesitation, are those of the place of departure and of the intended place of destination.

The place of departure seems an obvious choice. It will necessarily bear some relationship to the plaintiff since it is the place where he started his trip.³⁴ Also, the producer would have good reason to foresee that planes of its manufacture would come to this place and hence could hardly contend that application of the law of this place would be unfair. There is a problem in the case of a flight with scheduled stops. Suppose, for example, that a plane starts in state A with an ultimate destination in state C and a scheduled stop in state B and that the plane crashes somewhere on its flight from B to C. Should a passenger who boarded the plane in state A be permitted to choose the law of state B? Perhaps of greater difficulty, should a passenger who boarded the plane in state B be permitted to choose the law of state A? It is thought that in both instances the answer should be in the affirmative. Otherwise, passengers

³¹ *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980), *rev'd on other grounds*, 102 U.S. 252 (1981); *In re Paris Air Crash*, 399 F.Supp. 732 (C.D. Cal. 1975); *cf. Halstead v. United States*, 535 F.Supp. 782 (D. Conn.-1982).

³² See text accompanying notes 21-25 *supra*.

³³ See text prior to note 26 *supra*.

³⁴ *Cf. Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

on the same flight would have a different choice of laws with the result that, in all probability, there would be disparity of treatment for those who in essence are similarly situated. This is a result that should be avoided. Also, giving passengers this additional choice would be in line with the pro-plaintiff bias of the formulations.

The place of intended destination does not provide as obvious a choice as does that of departure.³⁵ Of necessity, the plaintiff will have a substantial relation with this place and there will be good reason for permitting him to choose its law, if the plane crashes there upon arrival. If the crash occurs somewhere else, however, a particular plaintiff's relation to the place of his intended destination may be tenuous at best. Nevertheless, for lack of a better alternative, it is suggested that the plaintiff should be able to choose to have the law of this place applied. This place, at the least, will be within the contemplation of the plaintiff—something that might not be true of the place of injury if the crash occurred during the course of the trip. Also, application of the law of the place of intended destination would not be unfair to the producer since it would have reason to foresee that planes of its manufacture would come there in the course of their flights. A problem would be posed by a plane making several scheduled stops, since some of the passengers could be expected to have different places of destination. To avoid disparity of treatment, in such a situation, each passenger should be able to choose the law of any scheduled stop even though it was not his intended place of destination.

B. *Recovery by Passenger of Compensatory Damages from Producer*

The passenger should have the same choice of laws as in the case where the issue involves standards of liability. Namely, he should be able to choose the law of the place of manufacture or design, or of the producer's principal place of business, or of the passenger's place of departure on the trip, or of the place of his intended destination.

Comment: The choice-of-law formulation suggested above to govern the producer's standard of liability seems equally appropriate in the case of compensatory damages. The statements made in the previous comment are generally applicable here, although the state of incorporation or of the principal place of business may have little interest in subjecting the producer to a more onerous measure of damages. Persuasive arguments can be advanced for the proposition that the law of a plaintiff's domicile should either have exclusive application on the issue of compensatory damages or, alternatively, that choice of this law should be among those available to the plaintiff.³⁶ Without question, the state of

³⁵ Under the Warsaw Convention, a passenger's place of destination is the last destination mentioned on his ticket. *Galli v. Re-al Brazilian International Airlines*, 29 Misc. 2d 499, 211 N.Y.S.2d 208 (1961).

³⁶ See text accompanying notes 21-25 *supra*.

domicile will have a real interest in the determination of this issue and, therefore, a substantial claim for being, at the least, within the scope of the plaintiff's choice. Nevertheless, the law of the domicile has been rejected for the reason that its application would frequently lead to different treatment of passengers on the same plane and thus would discriminate among persons who, in essence, are similarly situated.

A distinction must here be drawn between the elements or heads of damages and the measurement or calculation of damages. The former should be determined by the law selected in accordance with the proposed formulation and the latter by the law of the forum.³⁷ Within the first category fall such questions as whether there can be recovery for pain and suffering, for grief, and for loss of society and of consortium.³⁸ Also, in the first category are the items for which damages may be recovered, either by named beneficiaries or by the estate, in an action for injuries that resulted in death.³⁹ Included, likewise, is the extent, if any, to which recovery will be reduced by payments received on account of the injury from such collateral sources as insurance, worker's compensation, and the like. On the other hand, the measurement or calculation of damages will be done in accordance with the processes of the forum. So forum law will determine whether damages should be calculated by judge or jury and the extent to which a jury determination is subject to being overturned by the judge.

C. *Recovery by Passenger of Punitive Damages from Producer*

Plaintiff can choose law of:

- (1) Place of manufacture or design; or
- (2) Producer's principal place of business.

Comment: The plaintiff should not in this case have as wide a choice as he has with respect to compensatory damages. The primary purpose of punitive damages is to punish the defendant rather than to compensate the plaintiff for his injuries. It follows that a defendant should only be held liable for punitive damages under the law of a state that has a substantial interest in regulating his activities and, in particular, in deterring him from engaging in improper conduct. In the case of the producer of an air frame or of any other component part of an airplane, the two states that clearly meet this requirement are that where the part in question was either manufactured or designed or that of the producer's principal place of business. Accordingly, the plaintiff should be given the

³⁷ It is hardly necessary to cite authority in support of so obvious a proposition. The distinction between heads of damages and the measurement of damages was explicitly made by the House of Lords in *Chaplin v. Boys*, [1969] 3 W.L.R. 322, [1969] 2 ALL E.R. 1085; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 171 (1971).

³⁸ See, e.g., *Casey v. Manson Constr. and Eng'g Co.*, 247 Or. 274, 428 P.2d 898 (1967).

³⁹ See, e.g., *Long v. Pan American World Airways, Inc.*, 16 N.Y.2d 377, 213 N.E.2d 796 (1965); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

choice of seeking punitive damages under the law of either one of these states.⁴⁰ The state where the plane crashed, and where, almost invariably, the plaintiff would have suffered injury, could also be said to have an interest in deterring the manufacture of defective planes. This state might, however, have no substantial relation to either the producer or the passenger. For this reason, it is not believed that the plaintiff should be given the choice of this law.

II. PASSENGER V. CARRIER

A preliminary question is whether the carrier can control which law governs the passenger's claim for personal injury by means of a choice-of-law provision in the ticket. Should, for example, effect be given to a provision in the ticket that the law of the state of the carrier's incorporation should be applied? There seems little doubt that the ticket would be considered a contract between carrier and passenger,⁴¹ and it is true that choice-of-law provisions in contracts are usually respected.⁴² In this case, it is believed, however, that the choice-of-law provision would be denied effect. The ticket would obviously be considered a contract of adhesion, and on this ground the efficacy of any choice-of-law provision it contained would be suspect.⁴³ Also, the provision would probably be refused enforcement on public policy grounds.⁴⁴

The suggested choice-of-law formulations are as follows:

A. *Whether Conduct of Carrier Was Liability-Creating*⁴⁵

1. Where Injury Resulted from Carrier's Failure Properly to Inspect or Repair the Plane

Plaintiff can choose the law of:

- (1) Place where the carrier maintained, inspected or repaired the airplane;
- (2) Carrier's principal place of business;
- (3) Place of departure on trip; or
- (4) Place of intended destination.

⁴⁰ See, e.g., *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594 (7th Cir. 1981); *Jackson v. KLM*, 459 F.Supp. 953 (S.D.N.Y. 1978); *Sibley v. KLM-Royal Dutch Airlines*, 454 F.Supp. 425 (S.D.N.Y. 1978).

⁴¹ *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955).

⁴² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

⁴³ Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

⁴⁴ Cf. *Conklin v. Canadian-Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692 (1935); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, Comment g (1971).

⁴⁵ The proposed formulations could not, of course, be applied to international travel falling within the scope of the Warsaw Convention as long as the United States remains a party to this Convention.

Comment: The issue here would usually be whether the carrier had acted negligently. At least in the United States, air carriers are not held strictly liable for injuries suffered by their passengers.⁴⁶

The carrier could hardly complain if it were held liable under either the law of the state where it maintained, inspected or repaired the airplane or of the state of its principal place of business. The first state is the one where presumably any negligent act on the part of the carrier would have occurred and, accordingly, could be said to have a real interest in having its law applied.⁴⁷ The state of the principal place of business also has an interest in the carrier and in the application of its law. The carrier could naturally be expected to insure against liability under the law of either of these two states.

Limiting the choice to the law of one of the two above mentioned states would be unwise for the reason, among others, that the passenger might have no contact with these states. For essentially the same reasons as those stated in the comment to the rule on the law governing the producer's liability, the plaintiff should also be able to choose either the law of the place of his departure on the trip or that of his intended destination.⁴⁸ There would again be the problem posed by a plane making one or more scheduled stops on the way to its ultimate destination. As in the case of the producer, it is believed that in such a situation the plaintiff should be able to choose the law of any point of departure or of any destination.

2. Whether Carrier is Liable for Error in Navigation

Plaintiff can choose the law of:

- (1) Carrier's principal place of business;
- (2) Place of departure on trip;
- (3) Place of intended destination; or
- (4) Place of error in navigation.

Comment: The error in navigation can be committed by the pilot or, less frequently, by a fellow employee, such as a co-pilot or an engineer.

It would make no sense in this situation to permit the plaintiff to choose the law of the state where the carrier maintained, inspected or repaired the airplane, since this state might have no relation whatsoever with the occurrence. For essentially the reasons stated in the preceding comment, however, the plaintiff should be permitted to choose any one of the first three laws.

It is believed that in this situation the plaintiff should also be able to

⁴⁶ Something approaching strict liability in result, although not in theory, can sometimes be obtained by means of the doctrine of *res ipsa loquitur*. A. LOWENFELD, AVIATION LAW ch. 7, § 4.32 (2d ed. 1981).

⁴⁷ See text accompanying notes 30-31 *supra*.

⁴⁸ See authorities cited in notes 34-35 *supra*.

choose the law of the place where the error in navigation occurred. Frequently, the error will consist of a violation of what might be called the "rules of the road." As here used, this term includes all regulations governing the conduct of the carrier during the course of the flight. In the United States, this area is controlled almost exclusively by federal law. The Federal Aviation Administration has set standards for air carriers⁴⁹ that include general flight rules, instrument flight altitudes, standard instrument approach procedures, special traffic patterns, aircraft airworthiness standards, and pilot qualification standards.⁵⁰ Regulations covering aspects of international flights have been issued by the International Civil Aviation Organization (ICAO).⁵¹ Whether violation of these rules constitutes evidence of negligence or negligence per se depends in general upon state law.⁵² And it seems appropriate that the plaintiff should be able, if he so desires, to seek recovery under the law of the state where the error occurred. This state has an obvious interest in having its law applied in order to deter further conduct of this sort and this interest will be even greater if, as will usually be the case, the airplane crash and the resulting injuries took place within its territory.

Giving the plaintiff the choice of the law of the place of error in navigation will not be of assistance to him in situations where the error occurs either at the place of departure or of destination. The suggested formulation already gives the plaintiff the choice of the law of either one of these two places.

For essentially similar reasons, a passenger who suffers injury at an airport by reason of the carrier's failure to maintain the appropriate security should be able to seek recovery against the carrier under any one of the first three of the above-mentioned laws or under the law of the state where the airport is situated.

B. *Recovery by Passenger of Compensatory Damages from Carrier*

When the injury results from the carrier's failure properly to repair or inspect the plane, the passenger should be able to choose the law of the place where the carrier maintained, inspected or repaired the airplane, or of the carrier's principal place of business, or of the place

⁴⁹ The FAA is given such authority by the Federal Aviation Act of 1958. 49 U.S.C. §§ 1301-1552 (1976 & Supp. IV 1980).

⁵⁰ See, e.g., 14 C.F.R. §§ 25, 61, 93, 95, 97 (1982).

⁵¹ These regulations are entitled International Standards and Recommended Practices. They are commonly referred to as SARPs. A. LOWENFELD, *AVIATION LAW* ch. 6, § 6.12 (2d ed. 1981).

⁵² See, e.g., *D'Arcy v. Delta Airlines, Inc.*, 12 Av. Cas. 18,282 (S.D.N.Y. 1974); *Gatenby v. Altoona Av. Corp.*, 407 F.2d 443 (3d Cir. 1968); *Anderson Av. Sales Co., Inc. v. Perez*, 19 Ariz. App. 422, 508 P.2d 87 (1973).

Article 12 of the Chicago Convention of 1944 (Convention on International Civil Aviation) provides that "Over the high seas, the rules in force shall be those established under this Convention."

from which the passenger departed on the trip, or of his intended destination. When the injury results from an error in navigation, the passenger should have the choice of the last three of these laws and also of the law of the place where the error occurred.

Comment: The statements in the comment to the formulations on the carrier's standard of liability are generally applicable here, although the state of incorporation or of the principal place of business may have little interest in subjecting the carrier to a more onerous measure of damages. The state of the passenger's domicile has an obvious interest in the extent to which he can recover damages and therefore a good claim for having its law included within the scope of the passenger's choice. This law has been rejected, however, for the reason that its application would frequently lead to different treatment of passengers on the same plane. Also, application of the law of the passenger's domicile might be unfair to the carrier in situations where the carrier had little or no contact with that state.⁵³

As in the case where recovery of damages against a producer is involved, a distinction should be drawn between the elements or heads of damages and the measurement or calculation of damages. Issues falling within the first category are determined by the law selected in accordance with the above formulation while those belonging to the second category are governed by the law of the forum. The statements in the comment on the recovery of damages against a producer are generally applicable here.⁵⁴

C. *Recovery by Passenger of Punitive Damages Against Carrier*

Plaintiff can choose the law of:

- (1) Carrier's principal place of business;
- (2) Place where the carrier maintained, repaired or inspected the airplane in situations where the injury resulted from carrier's failure properly to inspect or repair the plane; or
- (3) Place of error in navigation in situations where the injury resulted from such error.

Comment: Punitive damages are intended to punish the defendant rather than to compensate the plaintiff. Accordingly, the plaintiff should be allowed to choose only the law of a state that has a substantial interest in deterring the carrier from engaging in improper conduct. The state of the carrier's principal place of business will always have such an interest. And so, too, will the state where the carrier maintained, inspected or repaired the airplane in situations when the injury resulted from a defect in the plane.⁵⁵ When, on the other hand, the injury resulted from an error in navigation, it is thought that the plaintiff should be able

⁵³ See text accompanying notes 21-25 *supra*.

⁵⁴ See text accompanying notes 37-38 *supra*.

⁵⁵ *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981).

to seek punitive damages under either the law of the state of the carrier's principal place of business or of the state where the error occurred. In this situation, the latter state has a substantial interest in having its law applied.⁵⁶

III. CARRIER V. PRODUCER

We are concerned here with situations where the parties are not in a contractual relationship. If they are in such a relationship, their mutual rights and obligations would be determined by the law governing their contract.⁵⁷ This paper deals only with actions in tort.

Issues covered by the formulation set forth below involve the right of the carrier to recover from the producer for damage to the plane. The carrier's right to be indemnified by the producer against liability for injuries suffered by a passenger on account of a defect in the plane would presumably be governed by the law under which the carrier had been held liable to the passenger.

A. *Was Producer's Conduct Liability-Creating?*

The carrier can choose law of:

- (1) Place of manufacture or design;
- (2) Producer's principal place of business; or
- (3) Place where the carrier acquired the plane provided that the producer had reason to foresee that the particular plane, or a similar plane of its own manufacture, would reach that state through commercial channels.

Comment: This formulation gives a carrier approximately the same protection accorded a passenger. Perhaps it goes too far, since the carrier can be expected to be in a stronger economic position than the passenger and is more likely to be protected by insurance. On the other hand, the producer is in a stronger position than the carrier. Also, a basic premise of this paper is that a tort plaintiff should usually be favored over the defendant. On balance, it seemed unwise to draw a sharp distinction between the rights of passengers and carriers as against the producer.

As in the case of a passenger, the producer could hardly complain of being held liable to the carrier under either of the first two laws. It could be expected to comply with the requirements of these laws and to insure against the liability that they impose. Also, the two states involved are the ones that are most concerned with how the producer conducts its affairs and with holding it subject to their law.⁵⁸

⁵⁶ Jackson v. KLM, 459 F.Supp. 953 (S.D.N.Y. 1978); Sibley v. KLM-Royal Dutch Airlines, 454 F.Supp. 425 (S.D.N.Y. 1978).

⁵⁷ See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8 (1971).

⁵⁸ See text accompanying note 31 *supra*.

On the other hand, as in the case of a passenger, there are good reasons why the carrier should not be restricted to a choice of one of the first two laws. The producer might choose to conduct its activities in states whose laws are favorable to it. Likewise, situations can be imagined where the carrier would have little or no contact with either of these states. On the other hand, the carrier would have a substantial relationship with both of the last two states. Also, imposing liability upon the producer under either one of their laws could hardly be considered unfair where, as is required in the formulation, the producer had reason to foresee that the plane, or a similar plane of its own manufacture, would reach the state for lease or sale through commercial channels.⁵⁹ A producer probably has reason to foresee that a plane of its manufacture may be taken to any place in the world. A far stricter standard of foreseeability is here required.

A possible addition to the list, or a substitute for one of the laws included, would be the law of the place of the accident. This place might, however, be entirely fortuitous and bear little relation to the parties. Giving the carrier the choice of one of four laws is, in any event, thought to be enough.

B. *Recovery by Carrier of Compensatory Damages from Producer*

The carrier can choose any one of the four laws listed above with respect to standards of liability. As is also true when the rights of a passenger are involved, the same choice of law approach seems equally appropriate for both standards of liability and compensatory damages.

C. *Recovery by Carrier of Punitive Damages from Producer*

The carrier can choose the law of:

- (1) Place of manufacture or design; or
- (2) Producer's principal place of business.

Comment: The same formulation has been employed with respect to the recovery of punitive damages by a passenger from the producer.⁶⁰ Since such damages are designed to punish the defendant rather than to compensate the plaintiff, the carrier's choice should be limited to the law of the two states that have a substantial interest in deterring the producer from manufacturing or assembling a defective product.

IV. THIRD PERSON V. PRODUCER

This category covers actions brought by persons who were neither passengers on the plane nor the carrier that operated the plane. The

⁵⁹ A similar requirement of foreseeability is imposed by Article 7 of the Hague Convention on the Law Governing Products Liability, *reprinted in* 21 AM. J. COMP. L. 150 (1973).

⁶⁰ See text accompanying note 40 *supra*.

"third person" may be one who suffers injury on the ground, or in another plane or the carrier operating the other plane.

A. *Whether Producer's Conduct Was Liability-Creating*

The plaintiff can choose the law of:

- (1) Place of manufacture or design;
- (2) Producer's principal place of business; or
- (3) Place of injury.

Comment: The reasons for giving the plaintiff the choice of either one of the first two laws have been stated in the comments on the rights against the producer of a passenger on the allegedly defective plane⁶¹ and of the carrier operating that plane.⁶² Also, for the reasons stated in these comments, it would be unwise to limit the plaintiff's choice to one of these two laws. For lack of a better alternative, the law of the place of injury has been added to the list. This place may be essentially fortuitous so far as the producer is concerned. But it is the only place that is certain to have a contact with both the producer and the plaintiff. Also, in the case of an injury suffered on the ground, the place of injury will usually have a close contact with the plaintiff.

B. *Recovery by Third Party of Compensatory Damages from Producer*

The plaintiff can choose any one of the three laws listed above with respect to standards of liability. As is also true in the case of the other situations dealt with in this paper, the same choice-of-law approach seems appropriate for both standards of liability and compensatory damages.⁶³

C. *Recovery by Third Party of Punitive Damages from Producer*

The plaintiff can choose the law of:

- (1) Place of manufacture or design; or
- (2) Producer's principal place of business.

Comment: The same formulation has been employed with respect to the recovery of punitive damages by either a passenger⁶⁴ or a carrier from the producer.⁶⁵ These two states have the most substantial interest in deterring the producer from manufacturing or assembling a defective product.

The state where the third party suffers on the ground has a substantial interest in providing the plaintiff with adequate compensation for

⁶¹ See text accompanying note 31 *supra*.

⁶² See text accompanying note 47 *supra*.

⁶³ See text prior to notes 36 & 54 *supra*.

⁶⁴ See text accompanying note 40 *supra*.

⁶⁵ See text accompanying note 60 *supra*.

his injuries. On the other hand, that state may have only a slight or fortuitous contact with the producer. It is not believed that this state has a sufficient interest to warrant application of its law solely for the purpose of punishing the producer. It is also questioned whether it is desirable to give the plaintiff the choice of seeking punitive damages under the law of more than two states.

V. THIRD PERSON V. CARRIER

This category covers actions brought by persons who were not passengers on the plane operated by the defendant carrier. The "third person" may be one who suffered injury on the ground or in another plane or the carrier operating the other plane.

A. *Whether Conduct of Carrier Was Liability-Creating*

1. Where Injury Resulted from Carrier's Failure to Inspect or Repair Plane

Plaintiff can choose the law of:

- (1) Carrier's principal place of business;
- (2) Place where the carrier maintained, inspected or repaired the airplane; or
- (3) Place of injury.

Comment: The reasons for giving the plaintiff the choice of either one of the first two laws have been stated in the comment on the rights of a passenger against the carrier on whose plane he was riding.⁶⁶ Also for the reasons stated in that comment, it would be unwise to limit the plaintiff's choice to one of these two laws. For lack of a better alternative, the law of the place of injury has been added to the list. This state is certain to have a contact with both the defendant carrier and the plaintiff. Also, in the case of an injury suffered on the ground, the place of injury will usually have a close contact with the plaintiff.

2. Whether Carrier Is Liable on Account of Error in Navigation

Plaintiff can choose the law of:

- (1) Carrier's principal place of business;
- (2) Place of error in navigation; or
- (3) Place of injury.

Comment: It would make no sense in this situation to permit the plaintiff to choose the law of the state where the carrier maintained, inspected or repaired the airplane, since this state might have no relation whatsoever with the occurrence. The reasons for permitting the plaintiff to choose the law of one of the three abovementioned states hardly need

⁶⁶ See text accompanying notes 46-48 *supra*.

mention. The interest of the first two states, and the fairness of applying their law, are apparent. The place of injury is certain to have a contact with both the defendant and the plaintiff.

B. *Recovery by Third Party of Compensatory Damages from the Carrier*

The plaintiff should have the same choice of laws as in the case where the issue is whether the carrier's conduct was liability-creating.

Comment: In this, as in the other situations dealt with in this paper, the same choice-of-law approach seems equally appropriate for both standards of liability and compensatory damages.⁶⁷

C. *Recovery by Third Party of Punitive Damages from the Carrier*

Plaintiff can choose the law of:

- (1) Carrier's principal place of business;
- (2) Place where the carrier maintained, repaired or inspected the airplane in situations where the injury resulted from a failure properly to repair or inspect the plane; or
- (3) Place of error in navigation in situations where the injury resulted from such error.

Comment: In the case of punitive damages, the plaintiff should only be able to choose the law of a state that would have a substantial interest in punishing the defendant for its behavior. The state of the carrier's principal place of business will always have such an interest. What other state has the required interest depends upon whether the injury resulted from a failure properly to repair or inspect the plane or from an error in navigation. In the first instance, such interest is possessed by the state where the carrier maintained, repaired or inspected the plane. In the case of an error in navigation, the second state of interest is that where the error occurred.

CONCLUSION

A virtue of this paper may be the approach employed. The attempt has been made to suggest rules of choice of law which, if adopted, should serve to ease the judicial task of deciding cases and to provide some certainty and predictability of result. Such rules should also do much to counteract the current tendency of the courts to write opinions which are opaque in their reasoning and frequently fail to state the actual reasons for the results reached. The suggested rules favor the plaintiff. This is in line with the notion that choice-of-law rules should, when possible, further the basic policies underlying the substantive field involved.

⁶⁷ See text prior to notes 36 & 53 and text accompanying note 63 *supra*.

In the field of airplane accidents, the basic policy is believed to be that, whenever reasonable, compensation should be granted the plaintiff for his injuries and the risk of loss shifted to those best able to bear it. The rules permit the plaintiff to rely upon the law of any one of a number of designated states. This is perhaps a rather novel concept which is designed to further the goal of favoring the plaintiff, to shorten the litigation process, and to relieve the court of the task of choosing the appropriate law. It is thought that application of the suggested rules would lead to results that are generally the same as those that would be reached by the use of current techniques.

It is hoped that the approach here suggested is worthy of consideration and might usefully be employed in other areas of choice of law.

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