been entitled on the basis of the actual premiums paid had there been no misrepresentation. It is interesting to note that in this decision the court, without referring to such analogous situations, adopted a remedy which has been provided for in other instances by statute.[26] The principle is generally adopted in connection with misrepresentations as to age in life insurance contracts.[27] Proportionate recovery has also received recognition in statutes relating to fire insurance[28] and in other legislation prescribing the effects of changes of occupation[29] and the carrying of other insurance[30] on liability under accident insurance policies.

Although there are differences between the situation in the instant case and the few other situations in which the proportionate-reduction-of-recovery principle has been applied, the essential elements are the same: Had no misrepresentation been made, the insurer's only action would have been an assessment of higher premiums, not a refusal to insure. The fact that the beneficiaries under the policy were the customers rather than the insured, as in the usual situation, would seem to be no reason to preclude application of this doctrine. While the principle is ordinarily employed to protect the insured against forfeiture, it is appropriate, if not necessary, in the instant case in order to protect the insurer against fraud. The insurer is as deserving under these circumstances as is the insured in the typical proportionate-recovery case. The insurance company should be allowed a remedy which adequately provides that protection.

RES IPSA LOQUITUR IN AIRLINE ACCIDENTS

On June 13, 1947, a Capital DC-4 airliner on a regularly scheduled flight crashed into a mountain in West Virginia, killing all fifty occupants. In a consolidated action before the Federal District Court of the District of Columbia damages were sought for the wrongful death of two passengers on the plane. The defendant's motion to strike from the complaint allegations seeking to invoke the doctrine of res ipsa loquitur was denied by the court. *Smith v. Pennsylvania Central Airlines Company.*[1]

The court held the doctrine of res ipsa loquitur to be part of the substantive law and found that, under local conflict of laws rules, the applicable law was that of West Virginia, where the fatal injuries were incurred. As the question

[26] Reasoning from analogous statutes has been recommended by Roscoe Pound: The Relation of Courts to Legislation Not a New Question, 77 Cent. L.J. 219 (1913); Common Law and Legislation, 21 Harv. L. Rev. 383, 388 (1908).

[27] Authorities cited note 25 supra; Okla. Stat. Ann. (1941) tit. 36, § 218; N.Y. Insurance Law (McKinney, 1940) § 155, 1(d) (life insurance), § 159, 1(d) (annuities and pure endowment contracts), § 161, 1(d) (group life insurance), § 163, 1(d) (industrial life insurance).

[28] N.H. Rev. Laws (1942) c. 326, § 4.

[29] N.Y. Insurance Law (McKinney, 1940) § 164, 3(a) Form D.

[30] Ibid., § 164, 4(b) optional provision 17; Okla. L. (1947) tit. 36, c. 18, § 6 optional provision 2.

[1] 76 F. Supp. 940 (D.C., 1948).

of the applicability of res ipsa loquitur to air accidents was a point of novel impression in that jurisdiction, Justice Holtzoff felt bound to ascertain the relevant law "as a matter of principle and with the aid of such persuasive authorities as are available. . . ."[2]

Originally the doctrine that "the thing speaks for itself" was adopted in England to enable plaintiffs, in certain special circumstances,[3] to bring actions without specific allegations of negligence. The courts realized that in many instances the defendant's exclusive control over the damage-causing instrumentality made it impossible for the plaintiff to establish the cause of his injury.[4] After the Industrial Revolution, the increased degree of control exercised by the owners of enterprise over industrial machinery furnished grounds for the frequent application of the doctrine, and its use seemed particularly appropriate in cases involving accidental injuries to passengers of the large common carriers. In such instances, in addition, the desire of the courts to discourage recklessly carried out expansion and the concomitant neglect of adequate safety measures provided further incentive for the utilization of the doctrine. Hence res ipsa loquitur has been applied frequently against railroads, streetcars, busses, and other types of common (as well as private) carriers.

The rule has been variously interpreted as: 1) only permitting the jury to infer the defendant's negligence from the allegations made, thus saving the plaintiff merely from an involuntary nonsuit or from a directed verdict for the defendant where the latter makes no attempt to rebut;[5] 2) requiring the defendant to "go forward with the evidence" after the plaintiff's allegation of his prima facie case and, in case the defendant fails to present evidence, subjecting him to a directed verdict;[6] or 3) shifting the actual burden of proof from the plaintiff to the defendant, thereby placing upon the latter the "risk of nonpersuasion" of the jury.[7]

[2] Ibid., at 942.

[3] Conventionally the rule is held applicable when:
1) the defendant's instrumentality would not likely be injurious without human fault;
2) the instrumentality causing the injury is in the exclusive control of the defendant;
3) no act of the plaintiff can contribute to his injury.
9 Wigmore, Evidence § 2509 (3d ed., 1940); Res Ipsa Loquitur: Its Nature and Effect, 3 Univ. Chi. L. Rev. 126 (1935).

[4] The defendant's exercise of exclusive control does not necessarily mean that he can explain the actual cause of an injury better than the plaintiff, although this has sometimes been assumed as a reason for the rule. It does mean that the balance of probabilities points to the defendant's culpability. See generally Prosser, Torts 301 (1941).

[5] Blanton v. Great A. & P. Tea Co., 61 F. 2d 427 (C.C.A. 5th, 1932), cert. den. 288 U.S. 609 (1933); Foltis v. New York, 287 N.Y. 108, 38 N.E. 2d 455 (1941); Glowacki v. North Western Ohio R. & P. Co., 116 Ohio St. 451, 157 N.E. 21 (1927); see Alabama & V. Ry. v. Groome, 97 Miss. 201, 52 So. 703 (1910).

[6] Welter v. Bowman Dairy Co., 318 Ill. App. 305, 47 N.E. 2d 739 (1943); Riggsby v. Tritton, 143 Va. 903, 129 S.E. 493 (1925); 147 Va. 1084, 133 S.E. 580 (1925); Hogan v. Manhattan Ry., 149 N.Y. 23, 43 N.E. 403 (1896).

[7] Valletke v. Maison Blanche Co., 29 So. 2d 528 (La. App., 1947); Alabama Great Southern R. Co. vJohnson, 14 Ala. App . 558, 71 So. 620 (1916).
For collections of cases and discussion of the different theories see Harper and Heckel, Effect

Precedent on the application of res ipsa loquitur to carrier airlines is unsettled. Seven courts have sidestepped the question of applicability because evidence of specific negligence was introduced, making it unnecessary or even improper to invoke the doctrine.[8] Use of the doctrine in cases which involved fact situations similar to that in the instant action, but many of which were distinguishable with respect to the amount of evidence available from survivors or observers, has been approved in six jurisdictions[9] and disapproved in four.[10]

Courts favoring applicability are impressed by the carrier-passenger relationship, which, in the United States,[11] is subject to "the highest" duty of care on the part of the carrier.[12] They are careful, however, to limit their holdings to the particular facts before them, thereby forestalling possible abuse of the doctrine through overgeneralization. An opinion by the Tenth Circuit Court of Appeals subsequent to the instant case confirms the applicability of the rule, although indicating that it may sometimes not be of much help to the plaintiff.[13]

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of the Doctrine of Res Ipsa Loquitur, 22 Ill. L. Rev. 724 (1928); Carpenter, The Doctrine of Res Ipsa Loquitur, 1 Univ. Chi. L. Rev. 519 (1934); Res Ipsa Loquitur: Its Nature and Effect, 3 Univ. Chi. L. Rev. 126 (1935); 167 A.L.R. 658 (1947); 153 A.L.R. 1134 (1944); 58 A.L.R. 1494 (1928).

[8] Johnson v. Western Air Express Corp., 45 Cal. App. 2d 614, 114 P. 2d 688 (1941) (crash in bad weather, specific negligence averred); Galer v. Wings, Ltd., 47 Man. Rep. 281 (K.B. Manitoba, 1938) (specific negligence averred); Goodheart v. American Airlines, Inc., 1936 U.S. Av. Rep. 177 (Sup. Ct. Nassau Cty. N.Y., 1936) (introduction of evidence on specific acts of negligence); McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502 (1933) (plaintiff made out prima facie case even without doctrine); State ex rel. Beall v. McLeod, 1932 U.S. Av. Rep. 94 (Md. Super. Ct. Baltimore, 1932) (proceeding formally based upon violation of a federal safety statute); Hagymasi v. Colonial Western Airways, Inc., 1931 U.S. Av. Rep. 73 (N.J. Sup. Ct., 1931), aff'd 10 N.J. Misc. 1118, 162 Atl. 591 (1931) (specific negligence averred); Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205 (D.C. Pa., 1931) (evidence introduced as to prudence of pilot's judgment under adverse weather conditions).

[9] Smith v. Pacific Alaska Airways, Inc., 89 F. 2d 253 (C.C.A. 9th, 1937), cert. den. 302 U.S. 700 (1937); Curtiss-Wright Flying Service, Inc., v. Glose 66 F. 2d 710 (C.C.A. 3d, 1933), cert. den. 290 U.S. 696 (1934), aff'g Glose v. Curtiss-Wright Flying Service, Inc., 1933 U.S. Av. Rep. 228 (D.C. N.Y., 1932); Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N.E.2d 131 (1944), aff'd 389 Ill. 462, 59 N.E. 2d 853 (1945); Rainger v. American Airlines, 1943 U.S. Av. Rep. 122 (Cal. Super. Ct., 1943); Malone v. Trans-Canada Airlines, 1942 O.R. 453, 3 D.L.R. 369 (Ont. App., 1942); Fosbroke-Hobbes v. Airworks, Ltd., [1937] 1 All E. R. 108 (K.B., 1936); Thomas v. American Airways, Inc., 1935 U.S. Av. Rep. 102 (D.C. Cal., 1935); Smith v. O'Donnell, 5 P. 2d 690 (1931), rev'd on other grounds 215 Cal. 714, 12 P. 2d 933 (1932); Seaman v. Curtiss Flying Service, Inc., 231 App. Div. 867, 247 N.Y. Supp. 251 (1930).

[10] Smith v. Whitley, 223 N.C. 534, 27 S.E. 2d 442 (1943); Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 99 S.W. 2d 557 (1935); Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292 (D.C. Cal., 1930), aff'd 65 F. 2d 668 (C.C.A. 9th, 1933); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932). Evidently the same federal court in California both approved and disapproved of the doctrine.

[11] In England there is no difference, regarding the safe carriage of passengers, in the duties and liabilities of common carriers as compared with those of private carriers. Shawcross and Beaumont, Air Law § 342, at 182 (1945).

[12] Wilson v. Colonial Air Transport Co., 278 Mass. 420, 425, 180 N.E. 212, 214 (1932).

[13] Bratt v. Western Air Lines, Inc., 169 F. 2d 214 (C.C.A. 10th, 1948). The plaintiff's error in relying on a structural defect to indicate specific negligence enabled the circuit court to hold

Even in the absence of any carrier-passenger relationship, plaintiffs have successfully invoked res ipsa loquitur in many plane accident cases.[14] In view of the stricter standard of care required of common carriers toward passengers, these decisions should constitute persuasive precedents in actions like the instant case.[15]

Courts opposing application in the carrier-passenger cases tend to agree that "it [is] common knowledge that airplanes do fall without the fault of the pilot."[16] They doubt, as a matter of the balance of probabilities, that the cause of an unexplained accident would be the carrier's negligence rather than some cause beyond its control. Although recent government statistics indicate that most crashes are still due to something other than the *pilot's* negligence,[17] a carrier can of course be negligent even where its pilot has used all due care. Nonetheless, though railroad accidents are also often the result of causes beyond the carrier's control,[18] the doctrine has from the outset been strictly ap-

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non-prejudicial an erroneous trial court instruction that the plane's pilot is presumed to have exercised due care for his own welfare. A verdict for the defendant was held to be supported by some evidence, although it would seem clearly wrong on the facts.

[14] The following cases approve the doctrine: Kadylack v. O'Brien, 1941 U.S. Av. Rep. 8 (D.C. Pa., 1941) (boy swimmer killed in plane's emergency landing); Genero v. Ewing, 176 Wash. 78, 28 P. 2d 116 (1934) (doctrine given minimum inferential effect and verdict for defendant upheld where unsecured empty plane crashed into hangar on emergency field); Stoll v. Curtiss Flying Service, 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct., 1930), aff'd 236 App. Div. 664, 257 N.Y. Supp. 1010 (1932) (crash of private carrier killing all aboard); Miller v. English, 43 S.W. 2d 642, 1932 U.S. Av. Rep. 153 (Tex. Civ. App., 1931) (minor killed after crash following pilot's stunting; doctrine approved but held inapplicable because of averments of specific negligence); Sollak v. New York, 1929 U.S. Av. Rep. 42 (N.Y. Ct. Cl., 1927) (plaintiff injured when his automobile was struck by plane).

The following cases, directly or by implication, disapprove the use of the doctrine: Deojay v. Lyford, 29 A. 2d 111 (Sup. Jud. Ct. Maine, 1942) (flagman struck as plane landed); Cohn v. United Air Lines Transport Co., 17 F. Supp. 865 (Wyo., 1937) (skilled pilot invited to test flight assumed risk of crash); Parker v. Granger, 4 Cal. 2d 668, 52 P. 2d 226 (1935), cert. den. 298 U.S. 644 (1935) (both airplanes colliding in midair were not under the exclusive control of the defendant); Herndon v. Gregory, 190 Ark. 702, 81 S.W. 2d 849 (1935), dissenting opinion 82 S.W. 2d 244 (1935) (guest was traveling in private plane with an inexperienced pilot); Rochester Gas & Electric Co. v. Dunlop, 148 N.Y. Misc. 849, 266 N.Y. Supp. 469 (1933) (plane crashed into plaintiff's steel tower; recovery allowed in trespass).

Finally, there are some interesting cases where the cracked-up plane was equipped with dual controls. All except one disapprove the use of the doctrine: Morrison v. LeTourneau, 138 F. 2d 339 (C.C.A. 5th, 1943); Towle v. Phillips, 180 Tenn. 121, 172 S.W. 2d 807 (1943); Madyck v. Shelley, 283 Mich. 396, 278 N.W. 110 (1938); Michigan Areo Club v. Shelley, 283 Mich. 401, 278 N.W. 121 (1938); Budgett v. Soo Sky Ways, Inc., 64 S.D. 243, 266 N.W. 253 (1936). The exception is McInnerny v. McDougall, 47 Man. Rep. 119 (K.B. Manitoba, 1937), where res ipsa loquitur was held proper because the pilot's failure to disconnect the dual controls indicated negligence on his part.

[15] The district court in the instant action recognized such cases as precedent by citing six of them in support of its decision. 76 F. Supp. 940, 945 (1948).

[16] Smith v. Whitley, 223 N.C. 534, 536, 27 S.E. 2d 442, 443 (1943).

[17] Sweeney, Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation, exhibits 22, 31 (1941).

[18] See generally ICC, Summaries of Accident Investigation Reports.

plied in such cases.[19] There the courts have presumably felt that common carriers, unlike the "reasonable and prudent man," should be held responsible for *any* causally-connected negligence, and that their accidents would not have occurred but for *some* neglect on their part. Furthermore, such carriers can always present full compliance with all prescribed duties as a defense.

Res ipsa loquitur or a like rule has not been applied in actions for wrongful death or injury to passengers on ocean carriers.[20] The courts apparently wanted to protect the shipping industry from excessive losses in its infant, risky stage,[21] and an early case suggested that similar policy reasons should apply to the aviation industry.[22] Although the court in the instant cases dismissed the suggested analogy by referring to the special nature of admiralty law, the comparison is well founded. The loss of a single plane, like that of a ship, commonly represents a substantial portion of the carrier's transport equipment, which is not true for rail carriers in case of the loss of part of a train.[23] Conditions affecting aviation often resemble those operative in shipping and are quite different from those affecting rail carriers. In the formative years of admiralty law ships were subject to weather hazards similar to those now affecting planes, to which other carriers are relatively immune. Also, major accidents in the air as well as on water often leave no survivors and result in complete destruction of the plane or ship, making it doubly difficult, if not impossible, for the defendant to prove that he has exercised the highest degree of care.[24] Railroads, on the other hand, usually experience little difficulty in showing the causal intervention of forces beyond their control, as they can secure evidence from survivors and/or the wreckage itself. Finally, planes resemble ships in their accepted disregard for political boundaries and are therefore subjected to extensive federal and inter-

[19] The doctrine, not yet expressed in Latin, was applied to railroads in England as early as 1844. Carpue v. London & Brighton Ry. Co., [1844] 5 Q.B. 747.

[20] Davis, Aeronautical Law 294 (1930).

[21] Modern engineering accomplishments, particularly wireless communication and radar, have of course made short shrift of the traditional "perils of the sea" doctrine, but the precedent is still there, supported by statutory enactment. 37 Stat. 445 (1893), 46 U.S.C.A. § 192 (1928).

[22] Herndon v. Gregory, 190 Ark. 702, 81 S.W. 2d 849 (1935).

[23] A new Constellation plane, comparable in seating capacity to a bus, cost about $800,000 in 1946. Cohu, The Paradox of the Airlines, 15 J. Air Law 307 (1948). A new streamliner train, carrying about twenty times as many passengers, requiring a fraction of the maintenance, and lasting several times the useful life of the plane, then cost about $1,500,000. In most train wrecks, only part of the train is damaged. American Airlines, the largest domestic air carrier, has a total of 154 planes (of which only its forty-seven DC-6's are not obsolete) and lists total assets of $121,315,020. Pennsylvania Railroad, the biggest domestic rail carrier, has 4,526 locomotives and 5,989 passenger cars (not to mention hundreds of thousands of freight cars) and lists total assets of $2,220,597,888. Moody's Industrials 1177, 1178 (1948); Moody's Steam Railroads 771, 779 (1948).

[24] This is now more true for planes than for ships, because of their more sudden and complete destruction in an accident. Few ships are now lost without survivors, and usually a sinking ship has sufficient time to relay information by radio as to the cause of the accident.

national regulation. Compliance with such regulation narrows the field of the carrier's possible negligence as compared to that of carriers not so regulated.[25] Hence the instant court's reliance on the railroad analogy to support its broad language seems questionable, even though airlines compete directly with first-class rail travel.[26] However, the Warsaw Convention on international civil aviation, while limiting liability for passenger death damages to a reasonable amount,[27] has established a sort of statutory res ipsa loquitur applicable to international flights.[28]

Domestic commercial airlines are thoroughly controlled by the federal government, which considers their welfare a matter of national concern[29] and subsidizes their operations not only by direct grants[30] but also by the establishment of auxiliary services[31] and even by the suppression of price-cutting competition.[32] A general imposition of res ipsa loquitur would therefore amount to judicially-legislated disposition of the tax dollar. For under such a development the government would have either to increase its subsidy to keep the airlines in business or to reinsure aviation insurance underwriters in order to avoid premium rates which the industry could not meet.[33] Without legislation requiring such a result, it would be unfair to impose a liability of possibly several million dollars[34] upon an airline as the result of an accident in which the carrier

[25] Some of these arguments seeking to show the similarity between aviation and shipping and thereby proposing the application of like liability rules might be considered, apart from the analogy, as providing strong grounds for, rather than against, the application of res ipsa loquitur.

[26] In 1947, the airlines accounted for 32.7 per cent of all first-class travel, on the basis of passenger-miles. 48 Aviation Week, No. 15, at 44 (Apr. 12, 1948).

[27] $8,291.87 (125,000 gold francs at par of $.066335). Art. 22, c. iii, §§ 1, 3 (ratified by United States Senate June 15, 1934).

[28] "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Ibid., § 17.

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Ibid., § 20.

[29] See "Brewster Report," National Aviation Policy, S. Rep. 949, 80th Cong. 2d Sess. (1948); "Survival in the Air Age: A Report by the President's Air Policy Commission" (Finletter Report), 1948 U.S. Av. Rep. 252.

[30] Civil Aeronautics Act § 406 (b), 52 Stat. 998 (1938), 49 U.S.C.A. § 486 (b) (Supp., 1947); see Allocation of Air Transportation Costs in Determining Domestic Mail, Passenger, and Cargo Rates, 15 J. Air Law 354 (1948).

[31] Civil Aeronautics Act §§ 302–5, 52 Stat. 985, 986 (1938), 49 U.S.C.A. §§ 452–55 (Supp. 1947). A program proposed by the Radio Technical Commission for Aeronautics for installation of an ultramodern system of all-weather navigation, landing aids, and airways traffic control, to cost $1,113,000,000 over a period of fifteen years, has been recommended to Congress. Brewster Report, 1948 U.S. Av. Rep. 252, 272.

[32] Civil Aeronautics Act §§ 401, 411, 610, 52 Stat. 987, 1003, 1012 (1938), 49 U.S.C.A. §§ 481, 491, 560 (Supp., 1947); see N.Y. Times, p. 27, col. 3 (July 25, 1948).

[33] Thompson, Some Problems in Aircraft Insurance, 1946 Ins. L. J. 451, 720.

[34] Thompson, Conflict of Laws and International Carriage, 1948 Ins. L. J. 627.

may not have been negligent at all. Nor is there much merit in the thesis that an imposition of the doctrine would force the airline to exercise a greater degree of care, since, in the absence of any liability, an airline on which a crash had occurred would still experience a huge drop in revenue due to the disturbed confidence of the public.[35] This alone would seem sufficient to insure a maximum of precaution. In addition, if an airline has too many crashes the Civil Aeronautics Board may put it out of business by revoking its "certificate of convenience and necessity."[36] Finally, as the CAB's report on the instant crash[37] indicates, many air safety measures are controlled by agencies other than the individual airline. Other carriers fully control their own safety systems even though they may be required to comply with statutory regulations.

On the other hand, the air passenger must be protected against risks which he does not assume in flying, and it is the accepted view that a crash is one of the non-assumed risks. Perhaps the most workable solution might be found in federal legislation[38] automatically imposing liability on a carrier for harm done to a passenger in flight unless the carrier proves its exercise of the highest degree of care, but limiting the total damages payable by the carrier for a single crash to some given sum times the number of seats in the plane.[39] This manner of limiting damages is preferable to setting a maximum liability for each passenger,[40] since under the latter method recovery in particularly meritorious actions might be unduly low while actions of little or no merit might result in recovery of the full amount because of the tendency of the maximum to become the norm.[41] In order to do justice to all claims arising out of an accident, however, the method here advocated must either require the defendant to bring in all possible claimants as third-party plaintiffs[42] or provide that the time during which a claim may be brought be limited to some such period as one year, at

[35] 48 Aviation Week, No. 8, at 97 (Feb. 23, 1948): "In June, 1947, about 50,000 fewer passengers were handled by the airlines than in the previous month." This was attributed almost entirely to the crashes on May 29, 1947 (LaGuardia Field, United Air Lines DC-4, 43 killed), May 30, 1947 (Pt. Deposit, Md., Eastern Air Lines, 53 killed), and June 13, 1947 (the crash resulting in the instant action).

[36] Civil Aeronautics Act § 401, 52 Stat. 987 (1938), 49 U.S.C.A. § 481 (Supp., 1947).

[37] CAB, Accident Investigation Report SA-146, released Nov. 19, 1947.

[38] State regulation of air carriers has been unanimously rejected as unable to cope with the problem, primarily because of the failure of the proposed Uniform State Law for Aeronautics of 1922, 11 Unif. Laws Ann. (1938).

[39] For example, if the sum were $10,000, and the plane had fifty seats, the maximum liability of the carrier would be $500,000. Ideally, this sum should also include claims in trespass for damage to ground property resulting from the crash.

[40] As proposed in H.R. 532, 79th Cong. 1st Sess. (1946).

[41] See Reiber, Some Aspects of Air Carrier's Liability, 11 Law & Contemp. Prob. 524 (1946).

[42] Of course claimants would have the right to refuse to sue, but in that case their claims should be permanently barred. In the absence of contributory negligence by one of the claimants, claims arising out of a plane crash would seem to be best disposed of by class suits, as the cause of action is identical for all. However, claimants whose real property has been damaged by the crash might find it more advantageous to bring actions in trespass.

the end of which all judgments rendered, if their total exceeds the maximum permissible amount, would be adjusted on a pro-rata basis.

The advantages of statutory imposition of liability are: 1) The issues would be submitted to public debate prior to enactment by Congress.[43] 2) A passenger-plaintiff would be vested with a legal right more advantageous to him than res ipsa loquitur as applied under the more limited interpretations, since the risk of non-persuasion of the jury would be shifted to the defendant. 3) Airlines, knowing what is demanded of them, would more readily settle claims out of court. 4) Aviation insurance underwriters, protected by the maximum liability provision from huge potential losses which unrestricted application of the doctrine might impose upon them, would not have to seek greater premiums or government reinsurance but might even lower their charges, thus encouraging more air transportation by allowing airlines to reduce fares.[44] 5) If for any reason such a law should not prove workable, it can be repealed or amended far more easily than a well-established common-law precedent.

Although the findings of the CAB investigation in the instant case[45] may not be admitted as evidence for obvious reasons,[46] their tenor supports the court's decision in this case. But as precedent this and similar decisions should be narrowly construed and confined to the particular facts of their cases. While, in the absence of suitable legislation, it may be necessary to invoke res ipsa loquitur in some actions arising out of air disasters, the doctrine should be applied only where all the circumstances, including available statistics on the causes of similar previous crashes, indicate that the likelihood of the defendant's negligence clearly outweighs all other possibilities.

FRANCHISE "VALUE" IN EMINENT DOMAIN PROCEEDINGS

In connection with the wartime expansion of the Brooklyn Navy Yard, the United States condemned some seventy acres of land in the borough of Brooklyn. For the most part, the taking by the government concerned privately owned real estate, and the various condemnation proceedings in respect to such property raised no noteworthy questions. Also involved, however, were municipal facilities owned by the city of New York and certain property rights of two

[43] The occasional advantages of open legislation are pointed out by Miller, A Law is Passed —The Atomic Energy Act of 1946, 15 Univ. Chi. L. Rev. 799 (1948).

[44] Barnes, Economic Role of Air Transportation, 11 Law & Contemp. Prob. 431 (1946).

[45] "The Board finds that the probable cause of this accident was the action of the pilot in descending below the minimum enroute altitude under conditions of weather which prevented adequate visual reference to the ground. A contributing cause was the faulty clearance given by Airway Traffic Control, tacitly approved by the company dispatcher, and accepted by Flight 410." CAB, op. cit. supra note 37, at 8. The summary, however, sounds much more impressive than the facts in the report seem to justify.

[46] Civil Aeronautics Act § 701, 52 Stat. 1012 (1938), 49 U.S.C.A. § 581 (Supp., 1947).