

1967

Helen M. Grimshaw, Administratrix of The Estate of Ronald Grimshaw, Deceased v. R & R Flying Service, Inc. : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

HELEN M. GRIMSHAW, Admin-
istratrix of the Estate of Ronald
Grimshaw, Deceased,

Plaintiff and Appellant,

vs.

R & R FLYING SERVICE, INC.,
a corporation,

Defendant and Respondent.

No.
10750

APPELLANT'S BRIEF

Appeal from the Judgment of the Sixth Judicial District Court
for Sevier County
Honorable Ferdinand Erickson, Esq., Judge

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FILED

FEB 7 - 1967

Clerk, Supreme Court, Utah

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10750

APPELLANT'S BRIEF

STATEMENT OF NATURE OF CASE

The appellant in her Amended Complaint sought damages for the wrongful death of her husband caused by the negligent operation of a commercial, air-carrier flight by the defendant in which plaintiff's husband was being transported for hire as a passenger.

DISPOSITION IN THE LOWER COURT

The case was tried to a jury and after the appellant rested its case, on the third day of the trial, the respondent moved to dismiss pursuant to Rule 41 (b) U.R.C.P. The trial court granted the motion of respondent and dismissed the complaint and thereafter erroneously made and entered Findings of Fact and Conclusions of Law.

RELIEF SOUGHT ON APPEAL

It was error for the trial court to dismiss the plaintiff's complaint pursuant to 41 (b) U.R.C.P., and since the case was being tried to a jury it was error for the trial court to make and enter Findings of Fact and Conclusions of Law. The Findings and Conclusions should be stricken, the Order dismissing the complaint should be vacated and reversed and the case remanded for a new trial.

STATEMENT OF FACTS

The appellant submits the following Statement of Facts in accordance with the well accepted principle that when a case is tried to a jury, the trial court must, in considering a Motion to Dismiss, made pursuant to Rule 41 (b) U.R.C.P., consider the evidence in the light most favorable to the plaintiff.

Prior to and on August 6, 1963, the respondent operated a duly licensed, commercial air-carrier service for hire. The respondent had a regular place of business and held itself out to the public as available for hire. It had an arrangement to fly for Utah Power & Light Company at the call of the company and to bill the company for the flight. (T-34, 88, 89, 91. Exhs. 3, 4.)

On August 6, 1963, the respondent was hired by the Utah Power & Light Company to fly one of its employees, (Ronald Grimshaw, the husband of the appellant) on a flight from Richfield, Utah, to Cottonwood Canyon southwest of Marysville, Utah, so that Mr. Grimshaw could ascertain the cause of a power failure in a power line running southwesterly through the canyon from the Marysville area to Beaver. (T-28, 29, 33, 34, 42, 44, 87, 97, 98, Exhs. 1, 5, 6, 7.)

Reed Madsen, the president of respondent corporation, first received the flight request at 3:30 p.m. at his residence (T-97). Mr. Grimshaw was to meet the pilot at the airport at 4:00 p.m. (T-98). The pilot, Ralph Ross, was not present at the Madsen residence at 3:30 p.m. when the call was received. It was about 15 minutes before he returned to the Madsen residence and was advised of the call. Thereafter the pilot had to drive to the airport (T-105).

When the pilot (Mr. Ross) arrived at the airport Mr. Grimshaw was not yet present, but another aircraft arrived. Mr. Ross fueled the other aircraft and had a

conversation about the weather with the pilot of the other aircraft (T-46, 47, 48, 54). It would have been at least 4:00 p.m. before the respondent's aircraft with Mr. Grimshaw aboard departed the Richfield Airport (T-108).

The aircraft used on the ill-fated flight was a Cessna 172D (T-111). It was being flown by Ralph Ross, an officer and an employee of the respondent corporation acting within the scope of his duty and authority (T-87, 108, Exhs. 5, 6). Ralph Ross was a commercially licensed and experienced pilot with 2,500 hours of commercial flying time (T-92, 93). Mr. Grimshaw was also a pilot but relatively inexperienced with only 277 hours of flying time (T-246).

The aircraft was fairly new (T-119), had recently had its 100-hour inspection and was in first class condition (T-120). There was no evidence or claim made that there was any indication of any malfunction or failure of the aircraft, its engine or any of its other component parts or any of its instruments prior to impact (T-21, 72, 159, R-26).

On the afternoon of the flight there were cumulus clouds (thunderheads) in the area over the mountains where the flight would go to make the power line inspection. Rain, downdrafts and turbulence could be expected (T-50, 51, 52, 53). There was a 15-knot wind from the southwest (a headwind, considering that the flight was from Richfield to Marysville) and turbulence in the

area (T-167, Ex. 6). There were thunderstorms, rain and winds throughout the general area including Milford, Cedar City, Delta and Bryce Canyon at the time of the flight (T-75, 76, 77, 80, Ex. 2).

Winds from the southwest were to be expected with resulting downdraft and turbulence on the eastern (lee-ward) side of the mountains where the crash occurred (T-165, 166, 167, 167, 171, 172, 173). Downdrafts and turbulence were to be anticipated, expected and guarded against where the crash took place on the eastern (lee-ward) side of the mountains (T-175, 176). Mr. Grimshaw relied on the respondent to determine the weather conditions and the advisability of flying into the area under the existing conditions (T-170).

Because of the effects of altitude and temperature on flight characteristics the efficiency of the aircraft at the 9,000 foot elevation had been reduced by 77% (T-111, 112, 140, Ex. 7). The rate of climb of the aircraft had been reduced from 900 feet per minute to 200 feet per minute, which is the service ceiling of the aircraft. (T-146, 147, 148.)

Testimony was received that in flying a power line inspection in the mountains the safe manner is to first top the hill and fly down the line. If there is any weather the line is not flown at all. (T-103, 129).

It is not safe procedure to fly up the line because it does not leave any way out (T-129). By flying downhill you are not faced with a situation where because of

the steep rate of climb or the necessity of making a sudden sharp bank you are risking a stall (T-131, 223). Reed Madsen, the president of the respondent corporation, and an adverse witness, testified that you never fly up a canyon, even in good weather. He characterized a flight "up" a canyon as "stupid" (T-131, 132, 133, 134).

The crash occurred on the east side of the mountains near the power line which runs generally west and then southwest up Cottonwood Canyon from an area south of Marysville over the mountains and down to Beaver on the western side of the mountain (T-30, 31, 32, 35, 36, Ex. 1). The elevation at Richfield Airport is 5,623 feet (Ex. 7). The elevation at the side of the crash was 9,000 feet (R-24, T-70, Ex. 6). The mountain rises immediately to the west of the crash site to an elevation of 12,173 feet at the top of Delano Peak (Ex. 7, T-152). At the site of the crash Cottonwood Canyon runs in a generally east-west-west direction (T-37, 61). The bottom of the canyon floor at the site of the crash was only 50 yards wide (T-66). The plane with its dead occupants was found in the bottom of the canyon, twenty-five to thirty yards south of the creek and the nose of the plane was headed south into the side of the south canyon wall (T-36, 37, 38, 60, 155, 156, 158, 162, 229). The canyon wall to the south of the crashed aircraft rose steeply above the aircraft (T-39, 60, 64). The ridges on the south, west and north sides of the canyon rose 1,000 feet above the crash site (T-

161). The plane could not have topped any of the ridges from the position it was in (T-161, 162).

The aircraft departed Richfield Airport at 1600 (4:00 p.m.) (Ex. 6). Flying time from the Richfield Airport direct to the crash site is 25 minutes (T-103, 104, 184, 185). A damaged watch found in the wreck had stopped at 4:25 (T-70, R-25). It would have taken 10 or 15 minutes more than the actual elapsed time to fly to the top of the mountain and then back down the line (T-185).

Reed Madsen, an experienced pilot and the president of respondent corporation explained in detail the principles of flight. He testified that if an airplane maintains speed the airflow over the wings creates sufficient lift to cause the plane to fly. If the speed is reduced, the lift is reduced and the airplane stalls (T-121). If the airplane stalls control is lost (T-126). If control is lost the aircraft has a tendency to wing over (T-127). The aircraft was in a wing-over position at the time of crash (T-171). If there is adequate elevation to regain flying speed, control is restored and there is no problem (T-124). If you are flying downhill even a downdraft will not cause a stall (T-224). A steep bank increases the possibility of a stall (T-176). On a downhill flight steep banks are not required (T-235).

Reed Madsen filed a formal report of the accident and testified concerning the cause of the crash. He said that the crash was caused by a stall of the aircraft and

the resulting loss of control (T-179, 180, 200, Ex. 6) and that the stall was caused by downdraft and existing turbulence (Ex. 6) which were to be expected (T-181). The pilot didn't leave an adequate margin of safety and didn't have sufficient altitude to recover from the stall (T-180, 181, 182, 183, 184). He indicated that the pilot lost control of the aircraft (T-228) and that loss of control is pilot error (T-229).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS AT THE CONCLUSION OF THE APPELLANT'S CASE BECAUSE THE APPELLANT PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE.

It is a long established and well accepted principle of law that the trial court in considering a Motion to Dismiss made pursuant to Rule 41(b) U.R.C.P. must view the evidence in the light most favorable to the appellant. The appellant is also entitled to have this Honorable Court

“Review all of the evidence, together with every logical inference which may fairly be drawn therefrom in the light most favorable to him.” (Martin v. Stevens, 121 Utah 484, 243 P.2d 747).

The appellant in Count One of her Amended Complaint pleaded the specific negligence of the defendant and in Count Two pleaded a negligence case under the theory of *res ipsa loquitur* to be inferred from the general circumstances surrounding the crash. This court has previously recognized the right of a party to proceed under both specific negligence as well as under the doctrine of *res ipso loquitur*. In the case of *Loos v. Mountain Fuel Supply*, 99 Utah 496, 108 P.2d 254, under headnotes 12 and 13 on page 259 this court said:

“In some cases where specific acts of negligence are alleged in the complaint the specific allegations of violation of duty can be ignored and the pleadings still show a cause of action based on *res ipsa loquitur*. . . . Nevertheless we think one who wishes to rely on that doctrine, as well as specifically assigned acts of negligence, must so plead, either by a separate count or by proper allegation to the effect that the negligence to be inferred from the general situation caused the injury, thereby notifying the other party that he intends to rely on the Doctrine of *res ipsa loquitur*.”

There is substantial and compelling evidence of the respondent's negligence in undertaking the flight in the existing weather conditions. There is evidence of the respondent's negligence in attempting to fly “across” or “up” the canyon instead of following safe procedures and flying “down” the canyon. There is substantial evidence that the fatal crash would not have occurred in the absence of negligence and from those facts an infer-

ence of negligence could be drawn by the jury under the theory of *res ipsa loquitur*.

It is submitted that this appellant properly plead and proceeded to try the case under both the theory of specific negligence and *res ipsa loquitur*. It is also submitted that the appellant established a *prima facie* case under both theories and that the evidence viewed in the light most favorable to the appellant entitled her to have the case submitted to the jury.

POINT II

THE RESPONDENT WAS A "CARRIER FOR HIRE" AND OWED TO RONALD GRIMSHAW THE DUTY TO EXERCISE THE "UTMOST CARE" IN TRANSPORTING HIM SAFELY.

The respondent was licensed as a commercial flight operator on January 18, 1963, under License No. 11, issued by the Utah State Aeronautics Commission, pursuant to 2-1-35 Utah Code Annotated, 1953 (1966 Pocket Part, page 83).

2-1-1 (31 and 32) Utah Code Annotated, 1953, (1966 Pocket Part, page 79) defines:

"Commercial flight operations shall be defined as the carrying of persons or goods for hire
... "

The respondent was also licensed as a commercial carrier by the Federal Aviation Agency (T-91). Re-

spondent held itself out to the public at large as being a carrier for hire (T-88, 89, Ex. 4), and was regularly hired by the Utah Power & Light Company to transport its employees (T-34).

In response to a call from the Utah Power & Light Company the respondent undertook, for compensation, to transport Ronald Grimshaw, an employee of Utah Power & Light Company, on an observation flight of a power company line. Under these circumstances, the respondent was a "carrier for hire" and as such owed Ronald Grimshaw, its passenger, the duty exercise the utmost care in transporting him safely.

In Volume 8, Am. Jur. 2d, AVIATION, Sections 37 through 46, inclusive, Carriers in relation to aviation are defined:

Section 38. "Generally, a 'common carrier' may be defined as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place, for compensation, offering his services to the public generally; the distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and the dominant and controlling factor in determining the status of one as a common carrier in his public profession or holding out, by words or by a course of conduct, as to the service offered or performed. A 'common carrier of passengers' has been defined generally, as one who undertakes to carry for hire all persons who may apply for passage, provided there is sufficient space or room available and no legal excuse exists for re-

fusing Furthermore, scheduled operations upon regular routes are not essential to a finding that a carrier of passengers by air is a common carrier, and 'air taxi services' may be held or found to be operated as common carriers. Sight-seeing flights are also usually deemed to fall within the classification where the carrier accepts indiscriminately all who apply so long as there is room and no legal excuse for refusing, and the fact that the airplane does not carry passengers from one point to another, but regularly returns without landing to the place from which it started, has been held not to prevent the operation from being that of a common carrier."

In the case of *Arrow Aviation, Inc. v. Moore*, C.C.A. 8th Cir., 266 F. 2d 488 (1959), the Court said:

"Whether an air carrier is a common carrier is determined by the same principles as are applied in the cases of carriers by other means. . . . A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately. The holding out may be either by advertising or by actually engaging in the business of carriage for hire."

In *Christensen v. Oregon S.L.R. Co.*, 35 Utah 137, 99 P. 676, (1909) the Court stated:

"The law imposes the duty upon the carrier of exercising the utmost care to protect his passengers against accidents; and, in case an accident occurs, the inference arises that the carrier has not exercised that high degree of care which the law imposes."

In *McMaster v. Salt Lake Transportation Co.*, 108 Utah 207, 159 P.2d 121 (1945), the court stated:

“The duty imposed upon the defendant by law was to use the utmost care to transport the plaintiff safely.”

In the case of *Johnson v. Lewis*, 121 Utah 218, 240 P.2d 498 (1952), the court quoted with approval language from an opinion by Judge Learned Hand and again reaffirmed and restated the duty owed by a carrier to its passenger:

“A carrier of passengers has indeed an important public function, and a lawful personal interest in his calling; so far as concerns those whom he does not carry, these excuse injuries which might be avoided, if he were extravagantly far-sighted. But his very enterprise is to carry passengers safely, and he is bound to a much longer forecast of the dangers which surround them than he is as regards strangers. It is not perhaps important in just what terms this duty is measured; usually they include the ‘highest human foresight’ possible in the circumstances. (Citing cases.) It is enough that the law exacts from him a solicitude which would be unnecessary, and indeed undesirable, in most enterprises. We are not therefore to measure what the defendant should have foreseen by ordinary standards, the law imposes on him a meticulous regard for possibilities which should ordinarily be ignored.”

POINT III

THE FACTS VIEWED IN THE LIGHT MOST FAVORABLE TO THE APPELLANT ESTABLISH THE NEGLIGENCE OF THE RESPONDENT IN THREE PARTICULAR AREAS:

(1) IN UNDERTAKING TO TRANSPORT THE PASSENGER INTO THE MOUNTAINOUS TERRAIN IN THE FACE OF THE WIND, TURBULENCE AND WEATHER FACTORS KNOWN BY THE RESPONDENT, OR WHICH, IN THE EXERCISE OF THE CARE AND DUTY REQUIRED, SHOULD HAVE BEEN KNOWN BY IT.

(2) IN FLYING THE AIRCRAFT ACROSS THE CANYON IN VIOLATION OF SAFE FLIGHT PROCEDURES.

(3) IN FLYING THE AIRCRAFT UP THE CANYON IN VIOLATION OF SAFE FLIGHT PROCEDURE.

A disinterested witness, who is also a pilot and therefore interested in weather conditions, testified that she made an observation of the weather conditions from the Richfield Airport immediately prior to the origination of the ill-fated flight and that she observed cumulus clouds (thunderheads) in the immediate area and over the mountains where the crash ultimately occurred and within one hour thereafter (T-50, 51, 53, 56). Don Elmer, a weather observer for the United States Weather Bureau, testified and also identified Exhibit 2 which was offered and received in evidence. His testimony and Exhibit 2 establishes winds, thunderstorms, thunderheads and rain in the general area of the state where the crash occurred, including Milford, Cedar City, Delta and Bryce Canyon (T-75, 76, 77, 80, 81).

The most persuasive testimony concerning wind and weather conditions was elicited from Reed Madsen, the president of the respondent corporation and an adverse witness. Exhibit 6, which is a report prepared and filed by Madsen within ten days after the crash, indicates a 15-knot wind from the southwest and existing turbulence (Ex. 6). Mr. Madsen's testimony also established that downdrafts and turbulence could be expected in the area (T-171, 172, 173, 174, 175, 176, 178, 220, 221). His testimony further established that Ronald Grimshaw relied on the respondent to determine the weather conditions and the advisability of flying in those conditions (T-170, 171), and that there was no aircraft malfunction and that the crash resulted from loss of control by the pilot occasioned by a "stall" caused by the pilot's error in flying into a steep, narrow canyon and there being confronted with turbulence and downdrafts which should have been expected (T-72, 172, 228, 229, 180, 200). Mr. Madsen also testified that if there were adverse weather conditions the flight should not have been undertaken (T-103).

From the foregoing facts the jury could have reasonably found that the respondent failed to exercise the required care, judgment, prudence and foresight in undertaking the flight and that the fatal crash was proximately caused by that failure.

Mr. Allen L. Simkins, the Sheriff of Piute County, testified that he visited the crash site early the morning following the crash and spent all the next day at the

site and that he made observations of the terrain. He described the terrain as "rugged country, awfully steep country." He said the "plane was, oh, I would say twenty-five to thirty yards south of the creek, right on the bottom of the canyon, and it was — the nose was headed towards the south and it was upside down." (T-60, 64). He testified that the bottom of the canyon was only 50 yards wide and that it went up equally steep on either side of the canyon (T-66). The south canyon wall was characterized as "very steep." (T-39). Mr. Madsen, the adverse witness, testified that it was "probably one thousand feet from the aircraft up to the top of the ridges." (T-161).

All of the evidence indicated that at the site of the crash the canyon runs in a generally east-west direction (T-36, 37, 61) and that the aircraft crashed headed south into the side of the south canyon wall (T-36, 37, 38, 60, 155, 156, 158, 162, 229).

The adverse witness, Reed Madsen, testified that it would require one-half mile to turn the plane around (T-177) and that the plane couldn't have "topped" the ridges from its position in the canyon (T-161, 162). He further testified that the only safe procedure is to fly down the canyon so that you will have a way out (T-103, 129, 131, 132, 133). He characterized any other procedure as stupid (T-134).

The evidence was conclusive that at the time of the crash the aircraft was in a steep banking turn to the right (T-71), which would be directing the flight of the

aircraft from south (across the canyon) to west (up the canyon).

From the foregoing facts a jury could reasonably have found that the pilot was directing the aircraft either across (south) or up (west) the canyon at the time of the crash and that to do so was in violation of the respondent's duty to exercise the required degree of care for the safety of Ronald Grimshaw.

The testimony of Reed Madsen, the adverse witness, clearly established that the only safe way to make the flight under any circumstances is to fly down the canyon (T-129, 131, 132, 133, 134, 223). The testimony of Mrs. Peterson, when coupled with that of Reed Madsen, establishes that the aircraft could not have departed the Richfield Airport prior to 4:00 p.m. (1600) (T-46, 47, 48, 54, 97, 98, 105). Furthermore, when Reed Madsen filed his official report within ten days after the fatal crash he indicated a 1600 (4:00 p.m.) departure time from the Richfield Airport (Ex. 6). He further testified that flying time direct from the Richfield Airport to the crash site is 25 minutes (T-103, 104, 184, 195). A damaged watch found in the wreck had stopped at 4:25 (T-70, R-25). It was also Mr. Madsen's testimony that to first fly to the top of the mountain and then fly back down the canyon would require 10 or 15 minutes more (T-185).

Mr. Madsen also testified concerning the rate of climb of the aircraft (T-111, 112, 140, 146, 147, 148, Ex. 7). Based on his testimony the amount of time nec-

essary to leave Richfield and climb to the top of the mountain can be mathematically computed to be 32 minutes: Mt. Delano elevation 12,173 feet minus Richfield elevation 5,623 feet equals 6,550 feet divided by 200 feet per minute (the established rate of climb) equals 32 minutes. If the pilot had first "topped" the mountain, it would have required several more minutes to fly back down the canyon to the crash site.

From the foregoing facts a jury could reasonably have concluded that the respondent, in violation of safe flying procedures, attempted to fly up the canyon since there was only sufficient time lapse, between takeoff at 4:00 p.m. and crash at 4:25, to fly direct to the site which direct flight would of necessity be up the canyon. There was not sufficient time elapse (32 minutes plus) to have "topped" the mountain and then have flown back down to the crash site. If the jury found that the Respondent attempted to fly "up" the canyon it would be compelled to find that the death of Ronald Grimshaw resulted from the failure of the respondent to exercise the required degree of care for his safety.

POINT IV

THE APPELLANT PLEAD RES IPSA LOQUITUR IN COUNT TWO OF HER AMENDED COMPLAINT, AND IS ENTITLED TO HAVE A JURY CONSIDER THE EVIDENCE UNDER THAT THEORY.

In *Horsley v. Robinson*, 112 Utah 227, 186 P.2d 592, at page 599, the Utah Supreme Court unequivocally stated and adopted the common law theory of *res ipsa loquitur* when it stated at page 599:

"It is universally recognized that negligence may be inferred from the happening of the accident and the surrounding facts and circumstances where the facts are such as to reasonably justify such inference even though there is no direct testimony to establish the exact grounds of negligence which caused the accident."

Furthermore, the Utah Supreme Court has adopted the theory that where the duty is that of the utmost care owed by a carrier to its passenger that,

". . . in case an accident occurs, the inference arises that the carrier has not exercised that high degree of care which the law imposes." See *Christensen v. Oregon S.L.R. Co.*, 35 Utah 137, 99 P. 676 (1909).

A general statement of the law of *res ipsa loquitur* as it relates to aviation cases is set forth in 6 A.L.R. 2d 528 where it is stated as follows on page 529:

"It may be stated as a very general proposition that, to the extent that the doctrine of *res ipsa loquitur* is recognized and applied in the particular jurisdiction in negligence actions generally, it is applicable in actions arising out of aviation accidents where the airplane or other instrumentality was under the exclusive control and management of the defendant, and the accident was of a kind of character that does not ordinarily happen if due care is used. The doctrine has

been applied most frequently in actions for the injury or death of passengers for hire. It has been stated that it is peculiarly suitable in actions against common carriers, due to the higher degree of care required. The doctrine has also been applied in actions for the injury or death of an occupant other than a passenger for hire, and for injuries to persons and property on the ground . . .”

In the case of *Stoll v. Curtiss Flying Service*, annotated in 6 A.L.R. 2d 536, the court applies the alternative theory of *res ipsa loquitur* to aviation cases. The rule is similar to that suggested in the Utah case of *Loos v. Mountain Fuel Supply*, *supra*. In *Stoll v. Curtiss Flying Service* the court instructed the jury as follows:

“You must not invoke that doctrine if you find that the accident happened as the plaintiff’s witnesses claim it did, and that the claim indicates to you negligence on the part of this pilot. The presumption can only be invoked if you find that the plaintiff did not prove what caused the accident. If you find that the cause the plaintiff adduced or suggested was not the cause, the plaintiff is in the position of not knowing the cause, and he, therefore, may invoke the doctrine.”

It is submitted that the evidence readily supports an inference of negligence under the doctrine of *res ipsa loquitur*. The jury, from the evidence, could have reasonably found the following facts:

1. The aircraft was under the exclusive control of the respondent.

2. That the crash was of such a nature that it would not have happened in the ordinary course unless the respondent had failed to exercise the duty imposed by law — the duty to exercise the utmost degree of care in the transportation for hire of its passenger; the duty not to fly into the canyon at all in face of the weather and the to be expected turbulence and downdraft; nor to fly up the canyon or across the canyon under any circumstances.

Ronald Grimshaw was an amateur pilot and since the aircraft had dual controls it has been the contention of the respondent that the aircraft was under the control of Ronald Grimshaw. There is absolutely no evidence of control of the aircraft by Ronald Grimshaw. In the absence of such evidence the law does not support the contention of the respondent but presumes that the control was in the respondent. In the case of *Lange v. Nelson-Ryan Flight Service, Inc.*, 108 N.W. 428 (Minn. 1961), a licensed pilot was flying with a flight instructor and both were killed in a crash of the airplane. The court held that the duty of care owed to the plaintiff by the defendant was equivalent to that owed by a carrier and that negligence can be inferred where evidence tends to exclude all causes for a crash other than human fault. The court further said that where there is no evidence as to who was operating the controls, and the crash results from negligence, the pilot in command is responsible and is considered to be negligent regardless of whether or not he is at the controls at the time of the calamity.

The respondent at the time of the crash was licensed by the Federal Agency and the regulation of that Agency is published in 14 C.F.R. 91.3 (1965) :

“The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.”

The Utah State Aeronautics Commission has by reference adopted the Federal Regulations. Subsection 1. (a) of Section III of the Rules and Regulations adopted and promulgated by the Utah State Aeronautics Commission provides as follows:

“Pilots operating aircraft over the lands and waters of the State of Utah shall comply with all pertinent rules and regulations of the United States Government, relating to air traffic, and all rules and regulations promulgated by the Utah State Aeronautics Commission.”

Under the circumstances of this case where the respondent is a carrier for hire and where there is no evidence to the contrary, it may be said as a matter of law that the aircraft was under the exclusive control of the respondent.

There was no explanation of the crash inconsistent with the respondent's negligence and there was no evidence of aircraft malfunction. To the contrary, all of the evidence indicated that the aircraft was functioning properly at the time of the crash (R-25). The only explanation for the crash was the pilot's negligence (see Ex. 6). With reference to that Exhibit the adverse

witness, Reed Madsen, the president of the respondent corporation testified (T-179):

Q. Is this the report that you filed?

A. Yes.

Q. In the report you described the flight to the best of your knowledge?

A. To the best of my knowledge, yes, sir.

Q. And your description of the flight was: Pilot left Richfield at 1600 to check power line after trouble reported by Utah Power & Light Company. Power Company sent employee on flight.

From experience of pilot reporting it was believed Mr. Ross had flown part of line. Due to steep terrain he probably pulled off the line and into a side canyon to lose altitude to come back onto line at lower altitude. The canyon has existing turbulence and downdraft. The plane was probably taken down by severe downdraft and pilot made steep right bank to avoid crashing side of canyon. Aircraft stalled in bank and struck a tree?

A. This would be one explanation.

Q. It was your explanation, wasn't it, Mr. Madsen?

A. I don't think there is any such thing as an explanation. It could have happened that way. This is one way. Other things could have happened, but this is just one of the ways.

Q. This is merely your best opinion as to what happened?

A. This is correct.

(T-228) Q. It's nice to ignore all we do know, including your inspection or your investigation and your experience by the facts that you know and the opinion you expressed as to what happened, you just indicated and with that indication that he lost control of the aircraft; is that right?

A. This is my opinion as stated in that report. I testified that I agreed as to this being one good plausible explanation.

Q. And that would indicate the pilot lost control of the aircraft?

A. He could have.

Q. And that loss of control of the aircraft in your opinion would be pilot error, would it not?

A. It depends upon the circumstances. If there was some unforeseen circumstances, no. If it was circumstances that he erroneously got himself into, yes.

Q. Directing your attention to your deposition, Mr. Madsen, page 49, the question was asked you on line 3, if an airplane has its power, then went into a stall as a result of pilot error unless it is done intentionally and you answered: "At a low altitude possibly, yes," and the question, "But certainly to stall it out in that canyon was an error, was it not?" And your answer: "I suppose it would have to be. They are both dead." Is that correct?

A. The answer on line 6 I said, "Possibly, yes."

It can no longer be said that flying is inherently dangerous. This court in this modern age can take judicial notice of the advertised fact that "it is safer by far to travel by air." Principles of flight are known, understood and practiced. Aircraft overcome the forces of gravity and fly, and their occasional failure is not due to some mysterious force or act of God. Their failure is either mechanical or the failure of the pilot to exercise that degree of care, judgment, prudence and foresight which is consistent with the dangers involved.

From the occurrence of the crash and in the absence of any explanation for the cause of the crash, the inference arises that the respondent carrier for hire failed to exercise that high degree of care which the law imposes upon a carrier for hire. A jury could have so found.

POINT V

THE DEFENSES OF ASSUMPTION OF RISK AND CONTRIBUTORY NEGLIGENCE BY RONALD GRIMSHAW ARE WITHOUT MERIT.

A. Assumption of Risk

The respondent in its answer to appellant's Amended Complaint asserted the theory that Ronald Grimshaw assumed the risk. The law is otherwise. In the case of *Fox v. Trans World Airlines*, 20 F.R.D. 565 (USDC, E.D. Pa. 1957) the court stated:

“Finally, in view of the well settled rule that a passenger on a common carrier does not assume the risk of an injury to himself or his property due to the negligence of the carrier, and the modern view that the rules applicable to common carriers of passengers apply with equal force to aircraft, it follows that the defense of assumption of risk is without merit and is stricken.”

In *Urban vs. Frontier Air Lines*, 139 F. Supp. 288 (USDC, Wyoming, 1956) the court said:

“... it can no longer be said that a passenger entering upon the modern commercial plane voluntarily assumes a risk with respect to the plane itself or its operation. . . .

The rules applicable to common carriers of passengers apply with equal force to aircraft. . . . It follows that the defense of assumption of risk is without merit.”

In *Montellier v. United States*, 202 F. Supp. 384 (USDC, E.D. New York, 1962) the court said:

“It is now well settled that merely by boarding the plane commercial airline passengers no longer assent to encountering a known danger either with respect to the plane itself or its operation.”

B. Contributory Negligence

The respondent also raises the defense of contributory negligence. It is difficult to see how a passenger being transported by a carrier for hire can contribute to the negligence of those charged with the duty to transport him safely.

In the absence of any proof of the negligence of the passenger the law would be as stated in *Culver v. Sekulich*, 80 Wyo. 437, 344 P.2d 146 (1959), wherein the court stated:

“We agree with the defendant that there was no proof of the passenger being careful, but neither was there any proof of his being negligent, and under such circumstances the legal presumption is that he was alert to the preservation of his own life and well being.”

This court has adopted a principle of law establishing a presumption of due care in cases of retrograde amnesia. In the case of *Erwan v. Butters*, 16 Utah 2d 272, 399 P.2d 210 (Utah 1965) the court stated:

“Where the loss of memory rendering the survivor of an accident incapable of testifying as to the accident is shown to be attributable to such accident, it will be presumed, in the absence of evidence to the contrary, that he exercised due care.”

It is submitted that the same principle should apply where the party is not merely suffering from retrograde amnesia, but is dead. If that principle is applied the presumption is that in the absence of evidence to the contrary, the deceased passenger, Ronald Grimshaw, was exercising due care for his own safety.

It is of no avail to the respondent to suggest that the flight was inherently hazardous — for the duty of the carrier for hire is commensurate with the risk. If the

flight was hazardous, then the respondent was under a duty imposed by law to apprehend the risks and dangers involved and to consequently exercise a greater degree of human foresight, caution and prudence.

Subsection 4.(a) of Section III of the Rules and Regulations of the Utah State Aeronautics Commission adopted and promulgated pursuant to 2-1-12 Utah Code Annotated, 1953, provides as follows:

“No person shall operate an aircraft within the State of Utah in a reckless or careless manner or in such a way as to endanger the lives or property of persons on the ground or in the air.”

If it is the contention of the respondent that the flight was inherently dangerous, then it is an admission that the flight was being operated in violation of the foregoing regulation — which would in and of itself be negligence.

CONCLUSION

THE TRIAL COURT FAILED TO UNDERSTAND THE FACTS AND CONSIDER THEM IN THE LIGHT OF MODERN FACTS OF AVIATION AND THE PREVAILING LAW.

The trial court demonstrated its lack of understanding of the facts when it stated in the presence of the jury (T-226):

"I don't think there is a man living who knows, of course, save and except the two occupants of that plane. . . . If we knew what that flying was, then I think you would have a right to ask whether or not that would be safe flying."

and on page T-227:

"May I say that my point is that no one knows the circumstances."

and on page T-228:

"I repeat again, if he knew what the pilot was doing at that particular time, what prompted him to go where he went, then I think you would have a right to say to him as an expert now, would flying under these conditions be the prudent thing to do or would it not be, but this jury must conclude this and it is their province to determine whether or not there was negligence in this particular instance, based upon the facts and circumstances. I can't believe that we've got enough factual matters here, because no one knows, no one knows, consequently I am going to deny or sustain the objection."

There has been transmitted to this court as part of the record on appeal an affidavit of the Court Reporter who reported the trial proceedings. It is to be noted from the affidavit that the reporter lost his notes of the arguments of counsel and the remarks of the court made during the argument. We assume that other counsel will remember the remark of the trial judge and will not object to our recital of the same even though it is not in the record. At the conclusion of the arguments on the defendant's motion to dismiss and as a prelude

or an explanation — an apology, even for his decision, the trial court stated:

“I have never been in an airplane and I am never going to.”

The trial court apparently overlooked all of the facts and adopted the “old-fashioned” attitude that flying is inherently dangerous and there is and can be no explanation for the crash of an aircraft — except that it is a mysterious happening — an Act of God.

It is submitted that in the early days of flight — prior to World War II — the courts of this land would have agreed with the trial court. But, it is also submitted that in this modern, technical age it is known that aircraft fail because of understood mechanical failures or because of the pilot's error in operating the aircraft in certain unacceptable manners or in weather and terrain known or reasonably expected to be hazardous to the operation of an aircraft.

While the law may not keep constant pace with the progress of technology, it is suggested that the modern cases dealing with aviation problems have recognized that there is nothing mysterious about flight and that when the facts are known the reason for a flight failure is readily understood.

It is submitted that in this case sufficient facts are known to explain and permit an understanding of the failure. That knowledge and that understanding permit and demand the application of long standing and well

accepted legal principles to the end that the appellant in this action may have her full day in court including the right to have a jury consider the known facts under modern and appropriate instructions as to the law.

Respectfully submitted,

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