RIGHTS AGAINST FOREIGN AIRLINES UNDER THE DEATH ON THE HIGH SEAS ACT CLARIFIED

Bergeron v. K. L. M.
188 F. Supp. 594 (S.D.N.Y. 1960)

An airplane operated by K. L. M., the Royal Dutch airline, crashed into the Atlantic Ocean while enroute from Shannon, Ireland to New York. The personal representative of one of the victims of the crash brought actions under sections one and four of the Death on the High Seas Act,[1] in addition to an action at law based upon a right of action granted by Dutch law. The respondent moved to dismiss the action under section one and the action at law. The court upheld the motion on both actions.

The major question involved in the case was the availability of the cause of action created by section one of the act:

> § 1. Right of action; where and by whom brought
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> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States,[2] the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.[3]

The respondent airline argued that the action provided by this section is not available against foreign respondents, due to the presence of section four of the act:

> § 4. Right of action given by laws of foreign countries
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> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.[4]

The availability of the action provided by section one has occasioned considerable confusion. The question has achieved real importance where

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[1] 41 Stat. 537 (1920), 46 U.S.C. §§ 761-68 (1958).

[2] It has been held that a maritime tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action. Noel v. Airponents, Inc., 169 F. Supp. 348, 350 (D.N.J. 1958); Wilson v. Transocean Airlines, 121 F. Supp. 85, 92 (N.D. Cal. 1954).

[3] 41 Stat. 537 (1920), 46 U.S.C. § 761 (1958).

[4] 41 Stat. 537 (1920), 46 U.S.C. § 764 (1958).

the foreign right has been barred by a short statute of limitations[5] or has been otherwise unavailable.[6] Any approach to the problem requires an assessment of congressional intent in order to answer two distinct questions: (1) is the section one action to be restricted to suits against domestic respondents? and (2) does the existence of a foreign right of action preclude the use of section one, even though the first question has been answered in the negative?

The leading case concerned with interpretation of broad statutory language in a maritime act is *Lauritzen v. Larsen*.[7] That case deals with the words "any seaman" in the Jones Act.[8] The libellant was a Danish citizen injured aboard a Danish vessel in Cuban waters. Finding no evidence of the intended breadth of this language in legislative history, the Court "borrowed" the tools of choice of law in order to *supply* that intent. The Court found in the case before it seven factors important as "contacts" providing bases for choice of law.[9] A great deal of emphasis was placed upon "the law of the carrier's flag."[10] The reasons underlying this emphasis are peculiarly applicable to questions of maritime law:

> Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. . . . "And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require . . . ."[11]

It must be noted that the Court selected its contacts and assigned them various weights in accordance with the situation before it. The Court recognized that a degree of flexibility is necessary to this approach:

> The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between *the shipping transaction regulated* and the national interest served by the assertion of authority. . . . We therefore review the several

[5] The Vestris, 53 F.2d 847 (S.D.N.Y. 1931). See also The Vulcania, 32 F. Supp. 815, 816 (S.D.N.Y. 1940).

[6] Noel v. Airponents, Inc., *supra* note 2; Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957); Iafrate v. Compagnie Générale Transatlantique, 106 F. Supp. 619 (S.D.N.Y. 1952); The Vulcania, *supra* note 5.

[7] 345 U.S. 571 (1952).

[8] Jones Act § 20, 38 Stat. 1185 (1915), as amended, 46 U.S.C. § 688 (1958).

[9] These were: (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured party, (4) allegiance of the defendant shipowner, (5) place of contract, (6) inaccessability of the foreign forum, and (7) the law of the forum. The Court placed very little weight upon the last three contacts. 345 U.S. at 583-92.

[10] 345 U.S. at 585-86.

[11] *Ibid.*

> factors which, *alone or in combination,* are generally conceded to influence choice of law to govern a tort claim, *particulary a maritime tort claim,* and the weight and significance accorded them.[12]

The approach outlined in *Lauritzen,* therefore, must be applied with a view toward the specific context, rather than by mechanically applying the factors and their relative weights set out there.

The principal case concerns a situation requiring the application of the *Lauritzen* approach. The terms of the statute's coverage are extremely broad and legislative history is of no aid in assertaining the limits of its coverage. The context of the principal case concerns all the same contacts outlined in *Lauritzen*; however, the relative importance of those contacts must shift radically. Unlike *Lauritzen,* this case concerns an aircraft rather than a seagoing vessel. For this reason great emphasis cannot properly be placed upon "law of the flag," as reasons for the peculiar applicability of that contact disappear when ships are not involved. The "law of the flag" doctrine arose in an age when ships were out of port for months and away from home for years.[13] It loses much of its relevance under conditions of modern air travel involving only brief contact between carrier and passenger.[14] Indeed, courts have not consistently applied the doctrine in aircraft cases. One of the doctrine's purposes was to establish liability for shipboard injury in foreign waters;[15] yet it has been widely held that the "law of the place" governs torts occurring on aircraft over land or territorial seas.[16] Furthermore, courts have differentiated between ships and aircraft when applying other admiralty doctrines.[17] Additionally, the federal statute sanctioning limitation of shipowners' liability does not cover airlines;[18] thus any congressional policy of discrimination against owners

[12] *Id.* at 582 (emphasis added). In addition, the Court, in discussing the weight of each factor individually, does consider elements of the situation before the Court. *Id.* at 583-92.

[13] Higgins & Colombos, International Law of the Sea 212-13 (3d ed. 1954) (floating-territory doctrine traced to 1752); 1 Moore, Digest of International Law 933 (1906). See Note, 67 Yale L.J. 1445, 1454 (1958).

[14] McNair, Law of the Air 110 (2d. ed. 1953); Honig, Legal Status of Aircraft 98-99 (1956).

[15] See, *e.g.,* Markakis v. Liberian S/S The Mparmpa Christos, 161 F. Supp. 487, 504 (S.D.N.Y. 1958). *But see* Uravic v. F. Jarka Co., 282 U.S. 234 (1931); Shorter v. Bermuda and West Indies S.S. Co., 57 F.2d 313 (S.D.N.Y. 1932).

[16] See, *e.g.,* Komlos v. Air France, 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 348 U.S. 820 (1954); Werkley v. K.L.M., 111 F. Supp. 300 (S.D.N.Y. 1951).

[17] *E.g.,* Foss v. The Crawford Bros. No. 2, 215 Fed. 269 (W.D. Wash. 1914) (maritime salvage and repair lien not applicable to aircraft). See also Air Commerce Act § 7(a), 44 Stat. 572 (1926), as amended, 49 U.S.C. § 177(a) (1952) ("the navigation and shipping laws of the United States . . . shall not be construed to apply to seaplanes or other aircraft. . . ."); Comment, 55 Colum. L. Rev. 907, 919 (1955); Note, 67 Yale L.J. 1445, 1457 (1958). Under international law airplanes do not have the right accorded ships to innocent passage over territorial waters. McDougal & Burke, "Crisis in the Law of the Sea: Community Perspective Versus National Egoism," 67 Yale L.J. 539, 579 (1958).

[18] Noakes v. Imperial Airways, Ltd., 29 F. Supp. 412 (S.D.N.Y. 1939) (act

of alien vessels would not be frustrated by limiting the emphasis to be placed upon "law of the flag."[19]

A recent decision adopted the *Lauritzen* analysis where the applicability of section one of the Death on the High Seas Act was in question.[20] That decision recognized the need for shifting emphasis in accordance with the specific situation, and did not follow the primacy accorded "law of the flag" by *Lauritzen*. The *Bergeron* court also adopts this approach. The court notes approvingly the decisions allowing section one actions against foreign respondents where the libellant has not successfully pleaded a section four action.[21] Thus, the court answers our first question in the negative—section one is *not* to be restricted to suits against domestic respondents, but shall be available upon a finding of a preponderance of relevant contacts.

This court, however, takes the *Lauritzen* approach one step beyond previous cases. The approach is used in solving the relationship between sections one and four. This is accomplished by treating the existence of a section four action as one of the factors to be considered in deciding the applicability of section one. Section four is construed as embodying a congressional policy favoring application of foreign law whenever that law provides the libellant an action.[22] An additional relevant contact thus has been added to the weighing and balancing process.

The *Bergeron* court stated that this was the *first* case in which the question of the relationship between sections one and four has been squarely before the court.[23] While several previous cases have discussed the question, *Bergeron* classifies these discussions as *dicta*, on the ground that no foreign right was available in those cases.[24] However, although there was some evidence in those cases that no foreign right was available, no such finding was made by any of those courts. Those courts have attempted to solve the problem by interpreting the language of the two sections. Such attempts

limiting shipowners' liability not applicable to owner of aircraft). See also Note, 67 Yale L.J. 1445, 1457 (1958).

[19] The Vestris, *supra* note 5. See also S. Rep. No. 216, 66th Cong., 1st Sess. 5 (1919); Note, 71 Harv. L. Rev. 1152, 1154 (1958); Note, 67 Yale L.J. 1445, 1448-49 (1958).

[20] Noel v. Airponents, Inc., *supra* note 2. *But see* Fernandez v. Linea Aeropostal Venezolana, *supra* note 6 (where a "substantive-procedural" test is followed; section one declared "procedural," and therefore available in all cases as the law of the forum). See also Iafrate v. Compagnie Générale Transatlantique, *supra* note 6 (assumed without discussion that section one is available against foreign respondents; *no* conflicts test applied). One very recent case has flatly rejected the *Lauritzen* approach. The court narrowly construed § 1 to cover only actions against *American flag* carriers. The court left open the question of a § 1 action where a foreign right of action is not available. *Bergeron* and other recent cases were ignored. Noel v. United Aircraft Corp., 191 F. Supp. 557 (D. Del. 1961).

[21] Bergeron v. K.L.M., 188 F. Supp. 594, 595-96 (S.D.N.Y. 1960).

[22] *Id.* at 597.

[23] *Id.* at 596.

[24] *Ibid.* See, *e.g.*, cases cited in *supra* note 20.

have resulted in confusion and conflict: some courts have held the sections to be mutually exclusive; others have held both sections to be available.[25]

It is submitted that *Bergeron* has taken the proper approach in applying the *Lauritzen* analysis to this problem. Nowhere in the language of these sections can one find any clear evidence of Congress having expressed *any* intent as to this relationship. Legislative history is of no assistance, and use of this approach nicely "ties together" provisions concerning foreign and domestic actions.

This decision provides a method of discerning the relationship between sections one and four; it also helps resolve conflict over the interpretation of section four itself. The interpretation placed upon this section is obviously crucial to the outcome when the *Lauritzen* approach is applied to section one. The permissive verb "may" opens to doubt any interpretation finding a policy definitely favoring the application of available foreign law. However, the *Bergeron* court advances convincing arguments for its interpretation:

> It is certainly anomalous for the representative of a decedent who died on a foreign vessel to have two bases for recovery, while the representative of a decedent dying on an American vessel is limited to a single cause of action under section one. It is most difficult to attribute such an intent to Congress. It seems clear that the primary purpose for the enactment of the Death on the High Seas Act was to assure that there would be *some* recovery for the wrongful death of American citizens dying in disasters on the high seas.[26]

While conflicting interpretations might be supportable to some degree,[27] the *Bergeron* interpretation appears to follow the principal policy underlying the passage of the act. If future decisions will follow this interpretation, much of the conflict in this area will be resolved.

There is little agreement upon the other question decided in *Bergeron:* the maintenance of an action at law based upon the foreign right of action. A series of decisions has held such an action to be available despite the use of the words "in an appropriate action in admiralty" in section four.[28] These cases hold that section four created an admiralty action in *addition*

[25] Holding the sections to be mutually exclusive: The Vulcania, 32 F. Supp. 815 (S.D.N.Y. 1940), 41 F. Supp. 849 (1941); The Vestris, *supra* note 5. Holding both sections available: cases cited in *supra* note 20. Note that *all* these cases were before the District Court for the Southern District of New York.

[26] Bergeron v. K.L.M., *supra* note 21, at 596-97. See also The Vestris, *supra* note 25; Robinson, "Wrongful Death in Admiralty and the Conflict of Laws," 36 Colum. L. Rev. 406 (1936); Comment, 41 Cornell L.Q. 243 (1956).

[27] See, *e.g.*, Fernandez v. Linea Aeropostal Venezolana, *supra* note 6.

[28] See, *e.g.*, Sierra v. Pan-American World Airways, Inc., 107 F. Supp. 519 (D.P.R. 1952); Powers v. Cunard S.S. Co., Ltd., 32 F.2d 720 (S.D.N.Y. 1925); Bergden v. Trawler Cambridge, 319 Mass. 315, 65 N.E.2d 533 (1946); Wyman v. Pan-American Airways, Inc., 1941 Am. Mar. Cas. 483 (N.Y. Sup. Ct.), *aff'd,* 262 App. Div. 995, 30 N.Y.S.2d. 816 (1941); Elliot v. Steinfeldt, 254 App. Div. 739, 4 N.Y.S.2d 9 (1938).

to the action at law. Another line of cases has held that section four intends the admiralty action to be the only action available.[29] Writers on the subject similarly disagree on this question, each stating flatly that one or the other of these views is "the law."[30] This is also a question of legislative intent, but legislative history is ambiguous and has been construed to support either view.[31] Thus the courts are left to construe the ambiguous terms of the statute. *Bergeron* follows the cases disallowing the action, largely because allowing the action makes a jury trial available in the action against the foreign respondent, while jury trial remains unavailable in admiralty actions against domestic respondents.[32] The court also noted "the administrative difficulties in allowing claims based on identical statutes to be brought in the same action both at law, with a jury, and in admiralty, without a jury . . . ."[33]

Confusion has been the keynote of suits brought under the Death on the High Seas Act for the past two decades. Courts have reached a measure of agreement only in the application of *Lauritzen's* "contacts" to the action under section one to determine "which law" shall apply. The *Bergeron* court appears to have settled much of the confusion on the relationship between sections one and four. It has brought to the inquiry a test flexible enough to meet all situations, and a test which explains much of the conflict in previous decisions. The court has followed this with a reasonable interpretation of section four: one which—if followed—can eliminate much of the remaining confusion.

There has been a similar lack of agreement on availability of the action at law. The reasoning of *Bergeron* is persuasive, but does little to help ascertain congressional intent. So long as the provision of the act is ambiguous on this point no agreement can be expected, since courts put emphasis on different, equally persuasive, factors lying outside the statute.[34]

The questions involving the interpretation of section four could best be resolved by legislative determination. The present terms are ambiguous, and there is no certainty that courts will follow *Bergeron's* interpretation of section four.

Congress can do a great service to transoceanic air passengers by making separate provision for aviation deaths on the high seas. Tenuous

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29 See, *e.g.*, D'Aleman v. Pan-American World Airways, Inc., 259 F.2d 493 (2d Cir. 1958); Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); Wilson v. Transocean Airlines, *supra* note 2. See also Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) (dictum in n. 25 and n. 28).

30 Supporting the restricted view: Edelman, Maritime Injury and Death 139 (1960); Comment, 41 Cornell L.Q. 243, 248-49 (1956). Supporting the other view: Benedict, Admiralty 382 (6th ed. 1940); Robinson, Admiralty Law 141-43 (1939).

31 See Wilson v. Transocean Airlines, *supra* note 2.

32 Bergeron v. K.L.M., *supra* note 21, at 598.

33 *Ibid.*

34 *Compare* Wilson v. Transocean Airlines, *supra* note 2, *with* Elliot v. Steinfeldt, *supra* note 28.

and unpopular[35] analogies between transoceanic air and sea commerce, supporting the application of admiralty doctrines to aviation cases, can be avoided by provision of a true "air law" applicable to these cases. This would afford Congress an opportunity clearly to state and implement policies drafted with a consideration of the requirements and factual circumstances of modern aviation.

[35] Fernandez v. Linea Aeropostal Venezolana, *supra* note 6; Note, 67 Yale L.J. 1445 (1958). See also McNair, Law of the Air 107-16 (2d ed. 1953).