Aviation Law Section

A Publication of the Association of Trial Lawyers of America — Vol. 14, No. 1, Fall 2006

GARY C. ROBB

Letter From the Chair

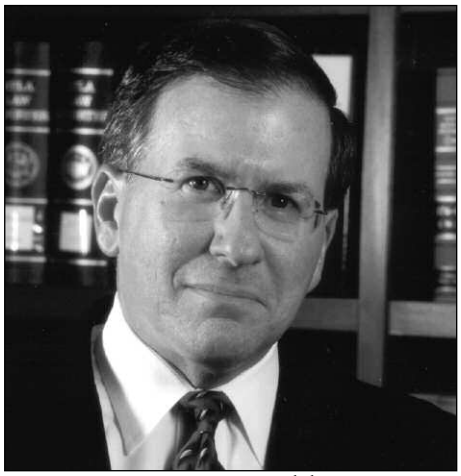
A New Chair and New Projects

Greetings Fellow Aviation Law Section Members:

It is my professional honor and privilege to serve as chair of this wonderful Section for this next year. I would like each of you to know that your Aviation Law Section officers have been hard at work in accomplishing our primary objective: To provide you, the aviation law practitioner, with user-friendly, practical, topical, and **timely** tools to enable you to better represent your clients.

I follow in the footsteps of a very hard-working and extremely successful chair, Brian Alexander of New York. Brian spent a great deal of time in improving our Section Web site (if you haven't logged on in a while, please do so) and in upgrading our deposition and document repository. Brian assembled an excellent group of speakers for our Annual Convention education program in Seattle and made sure our Section continued to run smoothly. During Brian's tenure, we were one of the few ATLA Sections to actually gain members.

Special thanks also to Dan Barks of Washington, D.C. for a superb job as our newsletter editor. You should know that our newsletter was one of the finalists for the Best Section Newsletter of the Year Award and we were narrowly beaten out by the Civil Rights Section. We are pleased to have Alisa Brodkowitz of



Gary C. Robb

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Inside

~Endowed by: John Howie~

The 9/11 Tort Litigation, Five Years On

By Brian J. Alexander, New York, N.Y.

As I write this article just days before the five-year anniversary of the 9/11 tragedy, I am preparing for the first depositions in the September 11th Tort Litigation which are scheduled to finally take place next week. The cliché about the wheels of justice turning slowly certainly rings true in this case, but at long last we will have our chance to get answers to the many questions never asked by the 9/11 Commission.

Indeed, while the Commission's efforts are in many respects to be applauded it is surprising how little of the final report actually addresses the deficiencies that existed in our aviation security system before September 11, 2001. Frankly, in the days, months, and now years following 9/11, I have been amazed at how little focus and attention has been paid to what the airlines and

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Seattle as our new newsletter editor. Please call or e-mail Alisa with any of your ideas for an article.

Along with the continuation of the core support items which Brian has emphasized (newsletter quality, Web site upgrade, and deposition/document repository, quality educational programs), I am looking at some additional projects for this year:

• Becoming more proactive in dealing with FAA and NTSB on policy matters. For example, access to tear-downs, better communication with IIC's, more informational updates to families, etc.;

• Safety initiatives proposed to FAA: increased regulation for scenic helicopter tours, enhanced training for pilots for the soon-to-be certificated "small" jets, mandatory equipment upgrades for GA aircraft in the avionics area, etc.;

• Increased Aviation Law Section participation at the ATLA Winter Convention in Miami. Our Section's business meeting and Bring Your Files Forum will be held on Monday, February 12, 2007, starting at 2 p.m. in the Sundial Room at the Loews Miami Beach Hotel. Please join us!

• Supporting our members in fighting the ever-present *Daubert* challenge—a wonderful suggestion by Dan Barks;

• Formation of an Amicus Curiae Committee to assist in briefing issues critical to our membership (proposed by Victor Diaz); and

• Any other matters which you believe we could assist ***you*** in your practice in making a difference for the better.

Call me or any of the other Section officers so that we may address your idea at our next conference call.

These are not the easiest of times for handling air crash cases on behalf of plaintiffs. Many of the political and social forces at work over the last several years have conspired against us. However, by collaborating, sharing ideas and work product, and sharing our experiences we can provide our clients with the best representation possible.

Thank you again for the opportunity to serve you this year and I wish you every success in all of your aviation cases!

Sincerely,

Gary C. Robb
Chair, ATLA Aviation Law Section

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ALISA R. BRODKOWITZ

EDITOR'S COMMENT

Welcome to the Fall 2006 Aviation Law Section Newsletter

As this year's newsletter editor, my goal is to deliver a resource to you, something that you will retain and refer to. We are currently gathering articles aimed at educating all of us on ways to defeat federal preemption attempts by aircraft and component parts manufacturers.

Please contact us if you have recently addressed this issue and can contribute the fruits of your experience. This fall issue contains a variety of articles, addressing topics from 9/11 to *Daubert*, and the FSIA. We hope you will find it both interesting and practical.

Brian Alexander, co-liaison counsel for the September 11th Litigation and our immediate past chair, imparts his unique understanding of what the airlines and their security companies actually knew before the attack and why they are responsible.

Dan Nelson, an aviation litigator with the firm of Schaden, Katzman, Lampert & McClune in Colorado, contributes a comprehensive article on the defensive and offensive aspects of *Daubert* challenges. Athan Tsimpedes, who represented the plaintiff in *Kirkham v. Societe Air France*, 429 F.3d 288 (D.C. Cir. 2005), shares his experience analyzing the Foreign Sovereign Immunity Act as applied to the case.

Finally, Justin Green, our Section's vice chair, solicits your help in improving the Aviation Document Library on the ATLA Exchange.

Alisa R. Brodkowitz

The 9/11 Tort Litigation, cont. from Page 1

their security companies actually knew about the threat and the deplorable state of their aviation security system.

Not too long ago I gave a speech in Washington, D.C., and just moments before I began, a father in the crowd who had lost his daughter at the Pentagon, approached me and questioned how I could give a talk on the airlines' culpability for September 11. He felt that the "terrorists alone are to blame" and if not them, it was our intelligence community which fell down on the job. He went on to tell me that he did not believe the airlines and their security companies could have "seen this coming" or that they could have done anything to stop it.

In response, I made a deal with this kind-hearted father asking only that he listen in exchange for my promise to present "spin-free" facts each backed up with a specific source. Set forth below are some of the highlights from that presentation.

WHO IS REALLY RESPONSIBLE FOR AVIATION SECURITY? ***The Airlines and Aviation Security Companies.***

Under federal law, the airlines have a duty "to provide for the safety of persons and property against acts of criminal violence and air piracy" and "to prevent or deter the carriage of any explosive, incendiary, or deadly or dangerous weapon on or about each individual's person or accessible property before boarding an aircraft or entering the sterile area." CFR 108.103 and 108.201.

In his opinion denying the airlines' motion to dismiss, Judge Alvin Hellerstein noted: "The airlines, airport authorities and security companies controlled who came onto the planes and what was carried aboard. They had an obligation to take reasonable care in screening precisely because of the risk of terrorist hijackings, and the dangerous consequences that would inevitably follow." *In Re September 11 Litigation*, 280 F.Supp.2d 279, 296 (SDNY 2003).

"The air carriers are responsible for screening all passengers and baggage, hiring and training their employees or contracting for screening services, and procuring equipment to screen passengers and baggage. The screening of passengers and baggage is a critical element in the FAA's strategy against terrorism." GAO Report, Aviation Security, February 1999.

A DYSFUNCTIONAL SYSTEM

Evaluating the Aviation Security System as a whole the 9/11 Commission concluded: "Each layer relevant to hijacking—Intelligence, Passenger Prescreening, Checkpoint Screening, and Onboard Security—was seriously flawed prior to 9/11." 9/11 Commission Report, p. 83.

THE AIRLINES KNEW THE DANGER AND THE RISK OF HIJACKING

Despite the political spin since 9/11, the evidence demonstrates that the airlines knew that 1) there was an increasing terrorist threat to civil aviation from hijackings and bombings; and, (2) the aviation security system they were charged with implementing was completely "vulnerable" and in "urgent" need of repair.

In 1999, the FAA published its annual report on Criminal Acts Against Civil Aviation (CAACA). The report specifically identifies Bin Laden as a

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threat: "Another threat to civil aviation is from Saudi terrorist financier Usama Bin Laden, who has been indicted for the August 1998 bombings of U.S. embassies… A[n] Islamic leader in the United Kingdom proclaimed in August 1998 that Bin Laden would 'bring down an airliner, or hijack an airliner to humiliate the U.S.'"

The 1999 CAACA Report also reminded the airlines of another recent example "which suggests that the threat to civil aviation" is still real—the infamous Manila Air or Bojinca plot which contemplated the simultaneous destruction of as many as 12 U.S. airliners flying out of the Far East. The report concluded by noting that "there is every reason to believe that civil aviation will continue to be an attractive target for terrorist groups."

In 1996, the GAO warned that "The threat of terrorism has increased and aviation is an attractive target well into the foreseeable future. The World Trade Center bombing [and other plots to bomb landmarks] … revealed that the international terrorist threat in the U.S. is more serious and more extensive than previously believed." The report warned of increased attacks by "radical fundamentalist groups" inside the U.S. and that the terrorists "were aware of airport' vulnerabilities and how existing security measures could be defeated."

In March 2000, the GAO warned that "events over the past decade have shown that the threat of terrorism against the U.S. is an ever-present danger." "A single lapse in aviation security can result in hundreds of deaths, destruction … and have immeasurable negative impacts on the economy."

In April 2000, the GAO cautioned the airlines: "The fact that there have been no major security incidents in recent years...could breed an attitude of complacency...However, serious vulnerabilities in our aviation system exist and must be adequately addressed." The report also again warned that the threat to aviation was increasing, including threats from hostile and criminal acts which "could be potentially catastrophic if dangerous objects, such as weapons were to be involved."

Brian J. Alexander

In June 2000, the GAO again reminded the airlines that the Bojinca plot demonstrates that the "potential for the destruction of aircraft and great loss of life has increased" and that "concerns are growing about the potential for attacks within the U.S."

THE THREAT WARNINGS

According to press reports, in 1998, the FAA warned airline officials about possible hijackings at a metropolitan airport in the eastern United States by Osama bin Laden (OBL). In 2001, the FAA issued 15 warnings to the airlines in the months leading up to 9/11. Beginning in January, the FAA warned the airlines that terrorists might attack U.S. interests and mentioned OBL in the alerts.

In January 2001, U.S. carriers were warned about the continuing possibility of violence against Americans. In April 2001, an alert advised "some of the current active [terrorist] groups are known to plan and train for hijackings… The FAA encourages U.S. carriers to demonstrate a high degree of alertness."

In June 2001, a warning that the "potential for terrorist operations, such as an airline hijacking … remains a concern." In July 2001, encouraging airlines to be on high alert and warning that the terrorists are known to be planning and training for a hijacking. In August 2001, the FAA warned about disguised weapons terrorists might use as weapons.

THE AIRLINES KNEW "SUICIDE HIJACKINGS" WERE POSSIBLE

According to the 9/11 Commission, prior to 9/11, the FAA presented a CD-ROM to air carriers describing the increased threat to civil aviation. "The presentation mentioned the possibility of suicide hijackings…" and indicated "that if a hijacker was intending to commit suicide in a spectacular explosion, the terrorist would be likely to prefer a domestic hijacking." 9/11 Commission Report, p. 264, 535 n.47.

According to the 9/11 Commission:

> "In early August 1999, the FAA Civil Aviation Security intelligence office summarized the Bin Laden hijacking threat. After a solid recitation of all information available on this topic, the paper identified a few principal scenarios, one of which was a "suicide hijacking operation." 9/11 Commission Report, p. 345

One former FAA official has stated that there was an FAA Report issued in the late 1990's which evaluated nearly ten years of hijacking incidents and concluded that small knives were the most frequently used weapons to hijack aircraft. As such, the means by which hijackers would take over an aircraft were neither unpredictable nor unexpected. In the three decades prior to 9/11 there were at least 800 reported hijacking incidents with nearly 175 involving U.S. carriers.

A SYSTEM DESIGNED TO FAIL

Since the early 1990's, the GAO published numerous reports critical of aviation security focusing on screener performance problems, low pay, inadequate training, and high turnover rates. Two Presidential Commissions detailed dangerous flaws in airport security. FAA audits, red team inspections, and years of documented security violations demonstrated that the system was vulnerable and getting worse. A pre-9/11 study from 1991 to 2000 reported more than 50,000 aviation security violations at the nation's top 25 airports.

As noted by the GAO and 9/11 Commission, the screening checkpoints and screeners who operate them are "the most important line of defense against the introduction of dangerous objects into the aviation

system. All passengers and their baggage must be checked for weapons, explosives, or other dangerous articles that could pose a threat to the safety of an aircraft and those aboard it."

Despite its importance, the poor performance of the checkpoint screening was well known and well documented for years leading up to 9/11. After several years and numerous reports on the long-standing problems, a GAO official testified in May 2000, that the airline industry "had made little progress in improving the effectiveness of airport checkpoint screeners."

He added, "Screeners are not adequately detecting dangerous objects and long-standing problems affecting screeners' performance [low wages, inadequate training, and rapid turnover] remain."

Prior to 9/11, the GAO unambiguously identified the scope and magnitude of the checkpoint vulnerabilities in a series of reports. Relying on FAA tests, the GAO noted that in 1978, screeners failed to detect 13 percent of the FAA tests. By 1987, the failure rate grew to 20 percent. The GAO noted that the declining trend in detection rates continued in the 1990s.

Prior to 9/11, "an FAA requirement for screeners to conduct 'continuous' and 'random' hand searches of carry-on luggage at checkpoints had … simply become ignored by the air carriers. Therefore, secondary screening of individuals and their carry-on bags to identify weapons was non-existent, except for passengers who triggered the metal detectors." 9/11 Commission Report, p. 84.

According to their own guidelines, box cutters, mace, tear gas, and menacing knives of any size were strictly prohibited items which were banned from the sterile area of on aircraft. Yet we know these were the weapons of choice for the terrorists.

ON BOARD SECURITY

The Commission appears to have accepted the convenient excuses proffered by the airline industry: reinforced cockpit doors were unnecessary because of the need for emergency egress and the common strategy of cooperation. Again however, the airlines had ample warning of the dangers of unlocked, penetrable doors as evidenced by the hundreds of cockpit intrusions in recent years.

As noted by the Commission, the doors should have been locked as was required by rules established in the 1960s. 9/11 Commission Report, p. 85. Hardened cockpit doors were known to be a critical last line of defense and were technologically feasible for a relatively minor cost – unfortunately it was a cost the airlines were not willing to bear.

A GLIMPSE AT WHY THE SYSTEM FAILED

The air carriers played a major role in pre-9/11 security, and were therefore able to exert "great pressures to control security costs and to limit the impact of security requirements on aviation operations so that the industry could concentrate on its primary mission of moving passengers and aircraft … [T]hose counter-pressures in turn manifested themselves as significant weaknesses in security." 9/11 Commission Report, p. 85.

One longtime FAA security official described the airlines approach to security as "decry, deny, and delay." Tragically, these denials and delays cost many brave Americans their lives.

Following the presentation, the father returned to the podium as I was shutting down the power point projector and simply said "go get 'em."

Our efforts have begun. We will keep you all posted.

Brian J. Alexander is immediate past chair of the Aviation Law Section. Kreindler & Kreindler LLP, 100 Park Ave., New York, NY 10017-5516, T: 212/687-8181, balexander@kreindler.com.

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Daubert and Aviation: Circumnavigating the Turbulence

By Danial A. Nelson, Broomfield, Colo.

If you practice aviation law, you have had defendants attempt to "*Daubert*-out" your experts from trial. The use of the *Daubert* exclusionary motion is pervasive.

The stated purpose of *Daubert* is to ensure the relevance and reliability of expert testimony offered under Rule 702.[1] In its *Daubert* decision, the Supreme Court assigned a gatekeeping role to district courts, requiring them to ensure that proffered testimony both assists the jury and is reliable.[2]

To determine reliability, the Court suggested four factors for consideration, none of which were to be dispositive: "(1) whether a theory or technique has been tested; (2) whether the theory 'has been subjected to peer review and publication;' (3) whether a technique is subject to a 'known or potential rate of error' and whether the technique has standard controls or conditions to prevent error; and, (4) whether the theory or technique is generally accepted within the 'relevant scientific community.'"[3]

Though the Court originally applied these factors to scientific testimony, it later extended the gatekeeping function to include all testifying experts.[4] Ironically, *Daubert* was actually an attempt to liberalize admission standards by removing the *Frye* requirement that proffered testimony be generally accepted in the scientific community.[5] In essence, *Daubert* added new criteria, but stated that none of the new criteria are dispositive, and that their applications should be flexible.

As a result of *Daubert*, it is now common for a plaintiff's expert to be struck, leading to summary judgment in favor of the defendant.[6] This problem was compounded by the Supreme Court's decision in *Joiner*,[7] which held that abuse of discretion was the proper standard in reviewing the admission or exclusion of expert testimony.

As a result, inflexible and mechanical applications of *Daubert* are often upheld. Occasionally, the district judges' aggression in excluding valid testimony leads to reversal by courts of appeal,[8] even under the high standard of abuse of discretion. However, once an expert is excluded, the damage to the plaintiff's case is usually done.

Aviation defendants have played a leading role in the campaign to strike the opinions of highly qualified experts.[9] In complex aviation cases, defense attorneys will raise a *Daubert* challenge in almost every case. Even when a defendant admits at trial that there likely was a problem with a certain aircraft or component, that defendant will still challenge the plaintiff's expert under *Daubert* for making the same finding.[10]

In one case, a defendant acknowledged that a fuel pump operated in an "explosive environment," agreed with the plaintiff that the detailed design drawings of the pump did not match the finished pump, yet moved for summary judgment and accused plaintiff's evidence as being too speculative.[11] The sheer volume of challenges that defendants have brought has created a maze of restrictive precedent and microscopic scrutiny of expert testimony. This is a far cry from the Supreme Court's goal and Rule 702 to ensure liberal admission standards.

"TESTING" IN AVIATION CASES

A common problem relating to expert testimony in aviation cases is a defendant's admission of a particular failure mode. For instance, an instruction manual, maintenance manual, or overhaul manual will contain an admission that if certain conditions are met, an engine will fail.

Plaintiff's counsel will retain engineers and metallurgists to examine the engine and component parts. These experts may find that damage to the engine is consistent with the known failure mode discussed in the applicable publication. If these experts conclude, to a reasonable degree of probability, that the known failure mode was, indeed, the cause of the failure at issue, the defendant will undoubtedly file *Daubert* motions.

Danial A. Nelson

These motions will use common *Daubert* terms like *ipse dixit*[12], and will argue that the experts leapt to a predetermined conclusion. Without fail, the motions will focus on what the expert did or didn't do to "test" the theory that the engine failed. The defendants will point out that testing is a factor to be considered by the court in ruling on the admissibility of the expert, and that the expert, much to their shock and abhorrence, has not conducted a test to prove that the engine was susceptible to failure. Some motions will actually suggest specific outrageously expensive and unhelpful tests on exemplar components.

Plaintiffs' attorneys counter these challenges in a variety of fashions, with mixed results. On one hand, the response brief could focus on the difficulty and expense associated with such "tests." However, the better approach combines a focus on the *Daubert* language itself, and a discussion of whether the issue "can be (and has been) tested."[13]

In many cases, the tests suggested by the defendants' motions would be inadmissible, because they would not be probative of the real issue, i.e. whether a

particular component failed on the subject aircraft at the time of the accident for the reasons opined. Additionally, many experts are challenged for failing to prove causation or using circumstantial evidence. However, neither of these factors should result in exclusion of an expert's testimony.[14]

Equally important is a focus on the plaintiff's expert's actions in a given situation. He or she has examined physical evidence, and applied their skills, training, and experience in order to determine that a part has suffered a known, foreseeable failure.

Rule 702 specifically allows experience, skill, or training to qualify an expert.[15] In fact, Rule 702 Advisory Committee Notes to the 2000 amendment state that "[n]othing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony.

To the contrary, Rule 702 text expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.

Few disagree that a treating physician should be allowed to testify that a patient's arm is broken, applying skills, training, experience, and X-ray technology to reach that informed conclusion without having to "test" the theory that a plane crash can result in a broke arm.[16] Likewise, an accident reconstructionist should be able to examine aircraft components and apply his or her skills, training, experience, and applicable technology to determine that part of an aircraft is broken without the expert opinion being held hostage by the factors suggested by *Daubert*.[17]

A DANGEROUS HEADING: WHO'S MOVING, WHO'S WINNING

Available research on the numbers and success rates of *Daubert* motions is not favorable to plaintiffs. The leading article finds that "[e]xamination of a large random sample of court of appeals civil cases shows that nearly 90 percent of such cases involved challenges by civil defendants of plaintiff-proffered expertise, and that the defendants prevailed nearly two-thirds of the time."[18] Clearly, defendants are winning the war, and in the process, excluding a tremendous amount of proffered testimony. The result is devastating to plaintiffs—summary judgment for defendants or crippled cases at trial.[19]

As troubling as the results of challenges to plaintiffs' expert testimony is the lack of such challenges to defense experts. Why aren't plaintiffs using *Daubert* as an offensive weapon? Plaintiffs' attorneys tend to favor liberal evidence admission rules, and may be reluctant to exclude experts. *Daubert* motions can be time consuming and involve extra expense. Plaintiffs do not seem to have as much to gain from successful challenges, since they rarely result in summary judgment for the plaintiff. The fact remains that far too few defense experts are challenged, though they remain just as vulnerable to exclusion.[20]

RECOVERING FROM THE TAILSPIN

Since it is unlikely that the Supreme Court will revisit *Daubert* anytime soon, plaintiffs' attorneys must become more aggressive in their approach. In fact, "[i]n the small number of cases where civil plaintiffs attacked defense-proffered expertise," plaintiffs were successful more than 50 percent of the time.[21]

Arguably, the statistics would be even more favorable if there were more plaintiffs challenging defense experts. Aviation attorneys are acutely aware that defense experts are less qualified than plaintiffs' experts and are no better at applying their conclusions in a reasonable fashion to the facts of the case. Moreover, plaintiffs' attorneys should more effectively defend their experts from challenge by emphasizing the flexibility of the *Daubert* analysis.

Defendants long have recognized the value of the *Daubert* challenge, and have gained significant courtroom advantage through its employ. Plaintiffs often react defensively, going to great lengths to "*Daubert* proof" their experts' testimony without giving any thought to an offensive attack.

By utilizing the vulnerabilities of expert testimony generally and the uncertainties of *Daubert* that commonly result in testimony exclusions, a plaintiff's attorney can be poised to mount a successful challenge against the defendant's experts. Utilizing *Daubert* offensively will decrease the chances of plaintiffs' experts getting struck, position plaintiffs for trial, and increase the settlement value of cases.

"In fact, "[i]n the small number of cases where civil plaintiffs attacked defense-proffered expertise," plaintiffs were successful more than 50 percent of the time."

Recognizing that *Daubert* is a deeply flawed framework for ensuring the reasonableness and reliability of expert testimony is not enough. Unless it is reversed, it must be utilized more effectively as an offensive weapon to vindicate plaintiffs' rights.

Notes

1. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
2. *See Id.* at 589.
3. *H.C. Smith Investments, L.L.C. v. Outboard Marine Corp.*, 181 F. Supp. 2d 746, 749 (W.D. Mich. 2002) (quoting *Daubert*, 509 U.S. at 592 (1993)).
4. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
5. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
6. *See, e.g., Michaels v. Avitech, Inc.,* 202 F.3d 746, 747 (5th Cir. 2000) (finding plaintiff's experts were improperly struck by lower court, but no genuine issues of material fact exist to warrant a reversal of summary judgment); *Cibbarelli v. Bombardier*, No. 01 CV 6959, 2004 U.S. Dist. Lexis 26009 at *2 (E.D.N.Y. Sept. 1, 2004) (striking plaintiff's expert where expert performed no testing of theory, offers no design, and is unqualified to testify on the subject).
7. *See General Electric Co. v. Joiner*, 522 U.S. 136 (1997) (setting the standard for appellate review of

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Defeating the Foreign Sovereign Immunities Act

The Case of *Kirkham v. Societe Air France*

By Athan Tsimpedes, Washington, D.C.

It was June 12, 2001, and Elisabeth Kirkham,[1] a U.S. citizen and resident of the metropolitan D.C. area, lay in agony on the floor of a Paris airport. Not only was her vacation to France in ruins, but her foot was in similar shape, having been shattered in a violent collision with a baggage cart, while she was being negligently led by an Air France employee to the Air France terminal where she was to board a flight from Paris to Bastia, France.

Mrs. Kirkham required immediate surgery and a fixation plate to provide stability to her mangled ankle. Over the next two years, she focused on healing her foot, later undergoing multiple surgeries and overcoming complications.

Athan Tsimpedes

Because Mrs. Kirkham was traveling between gates when the accident occurred, she had arguably already disembarked and not yet embarked on her next flight, therefore the Warsaw Convention was inapplicable. Most importantly, Warsaw's two-year statute of limitations had passed by the time she sought legal counsel. Therefore, an action under Warsaw would have been time barred. To add insult to injury, Air France is majority owned by the French government, thus entitling it to immunity from suit, with very narrow exceptions, under the Foreign Sovereign Immunities Act (FSIA).[2]

After explaining the difficulties in overcoming the FSIA, Mrs. Kirkham was angered over such protective mechanisms. As her counsel, I expressed my doubts for a recovery but expressed an interest in her case. Kirkham urged me

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lower court gatekeeping under *Daubert* as abuse of discretion).

8. *See Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1019 (7th Cir. 2000) (finding district court was overly aggressive as a gatekeeper and reversing district court's decision to exclude expert testimony); *Jahn v. Equine Services, PSC*, 233 F.3d 382, 389, 392-93 (6th Cir. 2000) (holding that district court was more stringent than Rule 702 requires, precise physiological knowledge of the cause of the pony's death was not a prerequisite to admissibility of expert testimony and court abused its discretion in excluding expert testimony); *Sullivan v. U.S. Dept. of the Navy*, 365 F.3d 827, 834 (9th Cir. 2004) (remanding case to a different judge for determination of expert admissibility where district court applied *Daubert* factors too exhaustively and restrictively); *Schneider v. Fried*, 320 F.3d 396, 399, 406 (finding district court erred in excluding expert testimony and such testimony does not have to be generally accepted or subject to peer review to satisfy Rule 702); *Dickenson v. Cardiac and Thoracic Surgery of E. Tenn., P.C.*, 388 F.3d 976, 982 (noting that *Daubert*'s goals are not served by excluding the testimony of a doctor which is supported by extensive relevant experience); *McLean v. Ontario, Ltd.*, 224 F.3d 797, 799-800 (6th Cir. 2000) (reversing the lower court's decision to exclude plaintiff's experts because experts did not contradict themselves and the expert's reliance on circumstantial evidence should go to weight and not admissibility); *Bocanegra v. Vicmar Serv., Inc.,* 320 F.3d 581, 589 (5th Cir. 2003) (noting that the unknown variables of how much marijuana was smoked and ingested did not render the expert's testimony unhelpful to the jury). *See also Living Designs, Inc. v. E.I. Dupont De Nemoursa and Co.,* 431 F.3d 353, 369 (9th Cir. 2005); *First Union Nat'l Bank v. Benham*, 423 F.3d 855, 863 (8th Cir. 2005); *Jaasma v. Shell Oil, Co.*, 412 F.3d 501, 514 (3d Cir. 2005); *Nemir v. Mitsubishi Motor Corp.*, 381 F.3d 540, 560 (6th Cir. 2004); *Beck v. Haik*, 377 F.3d 624, 636 (6th Cir. 2004); *Smith v. Ford Motor Co.*, 215 F.3d 713, 721 (7th Cir. 2000).

9. Case striking highly qualified expert for tiny reason

10. *See DesRosiers v. Flight Int'l of Florida, Inc.*, 156 F.3d 952 (9th Cir. 1998). In this case, Flight admitted at trial that the Distance Measuring Equipment on the crashed airplane was unreliable; however, Flight still challenged the Plaintiff's expert witness's testimony because the crash analyst "failed to use scientific methods" in reaching his conclusions. The court upheld the admission of the testimony, noting that it was uncertain whether *Daubert* standards should be applied to technical, as opposed to scientific, testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) resolved this issue by extending the *Daubert* principles to all testifying experts. *See also Bocanegra v. Vicmar Serv., Inc.*, 320 F.3d 581, 587 (5th Cir. 2003) (noting that the defense expert agreed with the studies used and conclusions reached by the plaintiff's expert).

11. *See Shurr v. Siegler, Inc.*, 70 F. Supp. 2d 900, 909, 912, 925 (E.D. Wis. 1999).

12. *See General Electric*, 522 U.S. at 146. The Court states "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert." This language is often used to exclude plaintiffs' experts. *See, e.g., Cipollone v. Yale Indus. Prods., Inc.*, 202 F.3d 376, 378 (1st Cir. 2000).

13. *Daubert*, 509 U.S. at 593.

14. *See Bocanegra,* 320 F.3d at 587; *Jahn* 233 F.3d at 392-93; *Jaasma*, 412 F.3d at 514.

15. FED. R. EVID. 702.

16. *See, e.g., Dickenson.*, 388 F.3d at 982.

17. *See,, Hynes v. Energy West*, 211 F.3d 1993, 1204 (10th Cir. 2000)(reminding district court that the *Daubert* factors are flexible and may not apply in every instance); *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1245 (10th Cir. 2000) (finding that the *Daubert* factors are not talismanic).

18. D. Michael Risinger, Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?, 64 ALB. L. REV. 99, 108 (2000).

19. *See, e.g., Cibbarelli*, 2004 U.S. Dist. Lexis 26009, at *9-16.

20. *See H.C. Smith Investments, L.L.C.* 181 F. Supp. 2d at 753 (excluding testimony from four defense experts).

21. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 108 (2000).

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Defeating the Foreign . . . cont. from Page 8

to take her case to help offset the costs of her out of pocket medical expenses.

Mrs. Kirkham expressed how poorly Air France treated her throughout her ordeal. As a matter of fact, when she missed her flight due to her injuries, Air France refused to even refund her ticket. After seeing her pain and frustration, I agreed to accept her case regardless of the hurdles that the FSIA presented.

By analyzing the complete factual scenario of what brought Kirkham healthy from her United States home to injured on a Paris airport floor, I was able to set forth a prima facie claim in the U.S. District Court for the District of Columbia. Kirkham had purchased her tickets from a District of Columbia travel agency, the initial trip to Paris being with United Airlines, and a later flight from Paris to Bastia on Air France.[3]

Because the facts in this case established that Kirkham had not boarded the Air France plane, as Kirkham was still in the terminal when injured, Kirkham was enabled to bring a negligence action, which was timely filed within the three-year statute of limitations.

The negligence action was premised on Kirkham purchasing a ticket from Air France via a District of Columbia travel agency, thus creating the airline-passenger duty of care. In the airport, while looking for the Air France gate, Kirkham encountered an Air France employee who agreed to lead her to the gate, but instead led her headlong into a violent collision.

Air France, is a French corporation, which does business around the globe, including in the United States. Obviously, Air France would not want to litigate this matter in a U.S. federal court, and would want to force Kirkham to travel to France to obtain limited compensation afforded by the civil law of that nation.

Air France filed a motion for summary judgment, raising the legal defense of lack of subject matter jurisdiction, arguing that the FSIA rendered Air France immune as a "foreign state." The district court denied summary judgment finding that Kirkham's action fell within the commercial activity exception to the FSIA. The exception, codified at 28 U.S.C. § 1605(a)(2) reads:

> A foreign state shall not be immune from the jurisdiction of court of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state.

Air France took an immediate appeal to the U.S. Court of Appeals for the District of Columbia. On November 22, 2005, the D.C. Court of Appeals affirmed the district court's decision. The D.C. Court of Appeals began its analysis by reviewing *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), in which the U.S. Supreme Court, clarified the meaning of the commercial activity exception.[4]

In *Nelson*, the Supreme Court barred a claim of an American employee of a Saudi hospital against the Kingdom of Saudi Arabia. The employee argued that the commercial activity exception was triggered by the Saudi hospital's recruiting efforts in the United States, which led to the employee moving to Saudi Arabia where the employee was allegedly detained and tortured by the Saudi government.

In resolving whether the commercial activity exception applied, the Supreme Court reviewed the "quite sparse" legislative history of the FSIA and defined the term "based upon" to mean "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."[5]

The employee's claim failed to satisfy the FSIA commercial activity exception because the Supreme Court reasoned that the Saudi hospital's recruiting efforts were not the basis for the employee's claim, which was essentially an intentional tort claim.[6] In other words, the employee did not need to prove why he was in Saudi Arabia in order to prevail on an intentional tort claim. The recruiting effort was simply not a material fact in the case.

In *Kirkham*, however, the ticket purchase was essential in establishing the passenger-airline duty of care for Kirkham's negligence claim.[7] Without a duty to exercise reasonable care, the Air France employee could not have been negligent in leading Kirkham into the path of an oncoming baggage cart.

Consequently, the failure of Kirkham to allege and to prove at trial the sale of an Air France ticket to her in the United States will be fatal to her case. As such, the Court of Appeals found that Kirkham's claim required a sale of an airplane ticket in the U.S. by Air France, the "foreign state", and the commercial activity exception applied.

The import of the *Kirkham* case is that claims for injuries suffered by an individual from the commercial activity of a foreign nation can be brought in the federal courts if a commercial activity of that nation in the United States created a tort duty that was breached in the foreign nation. The practitioner looking to defeat the FSIA should seek out facts creating a possible breach of the duty of care established by a commercial activity in the United States.

As *Kirkham* proves clearly, successful litigation in the United States of injuries abroad is made possible by a thorough exploration of the bases for jurisdiction, and command of all of the facts leading to the foreign travel and circumstances of the injury.

Notes

1. *Kirkham v. Societe Air France* 429 F.3d 288 (D.C. Cir. 2005).
2. 28 U.S.C.A. § 1602 et seq.
3. It is absolutely crucial in the factual investigation of a claim involving air travel to determine as much information as possible. Travel agencies may provide tickets from different airlines, and clients may be confused as to which airline was involved.
4. The judicial gloss upon this statute is quite important: at first blush, it appears that Kirkham's mere purchase of a ticket from a D.C. travel agency did not create any cause of action, and indeed it did not as Kirkam was not bringing suit because of some irregularity or impropriety of the ticket sale itself.
5. *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993).
6. *Id.*
7. In addition to the sale of the ticket, the Court of Appeals found that to establish the element of a passenger-airline duty, the mere purchase of the ticket was not sufficient, but that it was also necessary for Kirkham to allege and to prove that it was an Air France employee who led her to the collision. However, the Court found that such a fact was not a jurisdictional fact needed to invoke the commercial activity exception, but only relevant insofar as it was needed to establish a prima facie claim of negligence and to prevail at trial.

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