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# Civil Aviation--Liability Problems of Air Carriers

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# CIVIL AVIATION—LIABILITY PROBLEMS OF AIR CARRIERS

By MRS. ROYAL B. BINZER\*

## I. INTRODUCTION

In the post-war world, air transportation will wield a profound influence. The science and industry of aeronautics were comparatively new until the Second World War gave them a phenomenal development. By the very nature of its potentialities in peace and war, aviation raises serious questions of public policy and numerous problems which must be solved.

One of the most important problems is that of the liability assumed by the owner and operator of an airplane in relation to: (1) injury inflicted on property or persons on the ground, (2) injury to goods carried, (3) injury to passengers carried, (4) injury sustained in a collision in mid-air, and (5) injury sustained in collision on the ground.

This article is concerned with these questions, and both the existing and proposed solutions to them. In order to study and comprehend the proffered solutions, it seemed expedient to compare them with legislation in other fields of transportation.

## II. HISTORICAL BACKGROUND OF LEGISLATION ON AVIATION LIABILITY

### 1. *Foreign*

Since the conclusion of World War I, several international Aviation Conventions have been arranged, but until the Convention of Warsaw (1929), no attempt was made to deal with questions of liability. This Convention set up the rights and liabilities in the international carriage of passengers and goods.

The Convention of Rome (1933)<sup>1</sup> set up the rights and liabilities concerning surface damage; and the Insurance

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<sup>1</sup> Belgium, Brazil, Gautemala, Roumania, Spain are the only signatories.

Protocol to the Convention in 1938 gave detailed provisions as to the rights and liabilities of insurers and insured.<sup>2</sup>

Many important topics have not been touched at all, leaving it largely up to each nation to decide for itself when the owner or operator shall be liable for injuries to person or property caused by the aircraft.<sup>3</sup> This has led to much confusion and conflict between the differing national laws,<sup>4</sup> and in the United States, the differing state laws have added to the confusion.

In England, the Coronation of King George in 1911 was the occasion for the first statute on aviation.<sup>5</sup> Violation of the Act, prohibiting air navigation over the procession and attendant public ceremonies, was to be punished by fine or imprisonment, unless such violation was caused by vis major.

The British Civil Aerial Transport Committee was appointed in May, 1917, and in its report of February, 1918, the Legislative Committee of the British Civil Aerial Transport Committee recommended a provision for absolute liability for injuries caused by aircraft.<sup>6</sup> The British Air Navigation Act of 1920<sup>7</sup> followed that recommendation, excluding liability on the basis of trespass or nuisance only.<sup>8</sup>

The British dominions have enacted similar Acts. France, in its Air Bill of 1913, stipulated that both the aviator and air-

<sup>2</sup> Not ratified as yet.

<sup>3</sup> The Havana (Pan-American) Convention provided that the law of the country over which the accident occurred should apply.

<sup>4</sup> In England, there is absolute liability for property damage. In some countries there is practically no liability.

<sup>5</sup> JOURNAL CROWN LAW 815, 828, 1 & 2 Geo. V, Ch. 4.

<sup>6</sup> Hazeltine, *Law of Civil Aerial Transport* (1919) 1 JOURNAL COMP. LEG. (N.S.) 76.

<sup>7</sup> 10 & 11 Geo. V, Chapter 80.

<sup>8</sup> Section 9:

"No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height which . . . is reasonable, or the ordinary incidents of such flight . . . but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling down from such aircraft . . . damages shall be recoverable from the owner of the aircraft . . . without proof of negligence or intention or other cause of default except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered."

ship were made absolutely liable for damages caused on groundsmen, regardless of negligence.<sup>9</sup>

## 2. Domestic

In 1911, the American Bar Association Committee on Jurisprudence and Law Reform, in a report, stated:

"The navigation of the air has not become so general as to permit uniform legislation so as to fix with legal certainty rules for its government . . . but it is of the opinion that the aviator should not be held to any greater liability than the modern common carrier . . . and even if legislation were desirable it is not deemed proper to say that while a common carrier by land or water is excused from loss caused by the act of God that a common carrier by air should be made responsible, whether injury resulted from negligence or from inevitable accident or vis major. Unless liability springs out of some contract or arises out of some tort, the carrier should not be mulcted in damages, whether the carrier be by land, sea or air."<sup>10</sup>

In 1911, Connecticut adopted the first measure regulating heavier than air aviation in the United States. This Act provided as to liability that:

"Every aeronaut shall be responsible for all damages suffered in this state by any person caused from injuries caused by any voyage in an airship caused by such aeronaut, and if he be the agent or employee of another in making such voyage his principal or employer shall be responsible.

Massachusetts, in 1913, followed the example of Connecticut and enacted an aviation law. This statute created a presumption that damage caused by an airship was due to the negligence of the operator. In 1919, this law was repealed and a new one was passed in which the presumption of negligence on the part of the aviator was abolished.

## 3. Uniform Aeronautics Act

After this beginning, there has been much miscellaneous legislation by the several states, but there has not yet been developed a comprehensive set of regulations that have been generally accepted.

The most important statute in regard to domestic flying was the Uniform Aeronautics Act,<sup>11</sup> which has been adopted

<sup>9</sup> Legislative History of Air Commerce Act of 1926 (corrected 1928), p. 73 et seq., U. S. Govt. Printing Office.

<sup>10</sup> 36 AM. BAR ASSN. REP., 380 et seq.

<sup>11</sup> The Uniform Aeronautics Act covers the subjects of definition of terms, sovereignty of space, ownership of space, lawfulness of flight, damage on land, collision of aircraft, jurisdiction over crimes

by some twenty states and Hawaii.<sup>12</sup> It provides, in Sec. 5, that the owner of an aircraft is absolutely liable for injuries to person or property on the ground, except where the person injured was negligent. Section 6 provides that the liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land. Except for collision cases, no provision is made regarding liability for injury to passengers or for loss or damage to goods carried.<sup>13</sup>

Wyoming, Missouri and Montana have omitted the ground damage section. Arizona provides for a negligence standard for damage done by forced landings. Idaho, in 1931, repealed and reenacted the Uniform Aeronautics Act with several modifications, one of them being to change liability for damage on land from absolute liability to that "applicable to torts on land."

Pennsylvania has adopted a statute which provides that liability shall be determined by the rules of law applicable to torts on land.<sup>14</sup>

Connecticut, which was the first state to enact an aviation statute, and which started the trend toward absolute liability for injuries to persons or property on the ground, in its present statute provides for a negligence standard for all injuries.<sup>15</sup>

Maryland, in addition to the Uniform Aeronautics Act, has a statute<sup>16</sup> providing that the liability of the owner of an aircraft operating in interstate commerce shall be limited to the amount of his interest in the plane and its freight,<sup>17</sup> and Maryland has a statutory provision similar to the Harter Act, relieving owners of aircraft engaging in interstate commerce from

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and torts, jurisdiction over contracts, dangerous flying, hunting from aircraft. This Act was withdrawn from the active list of Uniform Acts recommended for adoption at the National Conference of Comm. on U. S. Laws, August, 1943.

<sup>12</sup> Arizona, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, Hawaii.

<sup>13</sup> Hearings before the Committee on Interstate & Foreign Commerce, House of Rep., 68th Congress, on H. R. 1012, p. 278, *et seq.*

<sup>14</sup> PA. STAT. ANN. (1936), Secs. 1467-73.

<sup>15</sup> CONN. GEN. STAT. (1930), Sec. 3077.

<sup>16</sup> MD. ANN. CODE (1935 Supp.) Art. 1A, Sec. 41.

<sup>17</sup> Similar to the Federal Marine limitation of liability.

liability for errors in navigation, handling, etc.<sup>18</sup> The exemption covers both passengers and goods carried.<sup>19</sup>

Louisiana has a statute which requires compulsory insurance for the owner of an aircraft that carries passengers for hire. This insurance runs in favor of "any person who may be injured in person or property" by the operation of any airplane used in said business.<sup>20</sup>

Virginia, at one time, had such compulsory insurance requirements for commercial aviators operating in intrastate commerce for both personal and property damage, but has since repealed that statute.

On the question of liability for injuries to passengers or property carried by aircraft, it is apparent that the states have enacted little legislation. With the exception of Maryland, which applies the liberal rules of Maritime Law to interstate flying, the few state statutes covering this question provide that liability shall be determined by the rules of law applicable to torts on land, or set up a negligence standard, as is used in the law of carriers, generally.

### III. BASES OF DECISIONS ON LIABILITY OF AIRCRAFT— SUMMARY.

Decisions on these questions have been based on different theories by the various authorities: (1) The aviator is to be likened to the operator of an automobile and proof of actual negligence is required for recovery. (2) The aviator engaged in carrying passengers or freight is subjected to the severe rule usually applied to common carriers on land, and therefore held to a high degree of care. (3) Injuries caused by aircraft are so generally caused by some form of negligence, and proof of actual negligence is so difficult to obtain due to the usual destruction of the machine and the witnesses that the maxim of *res ipsa loquitur* should be applied, giving the presumption of negligence to aid the plaintiff. (4) the law should be so held as to say that the principle of *Rylands v. Fletcher*<sup>21</sup> shall apply to the aerial navigator and he shall be liable for any damages

<sup>18</sup> MD. ANN. CODE (1935 Supp.) Sec. 46.

<sup>19</sup> RITTENBERG, *Limitations of Passenger Liability* (1935) 6 JOURNAL OF AIR LAW 365, 389, 398.

<sup>20</sup> LA. GEN. STAT. (Dart. 1939), SECS. 1-11.

<sup>21</sup> L. R. 3 H. L. 330 (1808).

occurring to anyone from this dangerous instrumentality which he has caused to come into the community.<sup>22</sup> There have been French and Belgian cases making the aerial navigator an insurer of the safety of persons and property below, so far as his own acts are concerned.<sup>23</sup>

#### IV. LIABILITY OF OTHER FORMS OF TRANSPORTATION

Because of the divergence in the bases of aviation decisions and because some of the proposed regulations may seem to be extreme, it seemed advisable to summarize briefly the liability laws for other forms of transportation, so that there may be a sound basis of comparison in order to determine what may be a fair and wise answer to these problems.

##### 1. Railroads

As to injuries to passengers, railroads are held liable for the highest degree of care that is practicable in view of the circumstances, in regard to paying passengers,<sup>24</sup> and cannot free itself from negligent injuries to such passengers, but the railroad is not liable as an insurer of the passenger's safety. Contributory negligence on the part of the passenger is a defense to the carrier.<sup>25</sup> When fare is not paid, the railroad can by contract exempt itself from liability for negligent injuries to the traveler.<sup>26</sup>

With regard to limitation of liability to passengers by contract, there is little common law authority.<sup>27</sup> A number of states have statutes forbidding common carriers to exempt themselves from liability by contract for injuries to passengers or property carried, resulting from their negligence; some statutes specifically forbid limitations on the amount of liability. The doctrine of *res ipsa loquitur* has been sparingly

<sup>22</sup> Zollman, *Liability of Aircraft* (1919) 53 AM. L. R. 379.

<sup>23</sup> HAZELTINE, *LAW OF THE AIR*, Ch. 2.

<sup>24</sup> Pa. R. R. Co. v. Rogers, 244 Fed. 76 (1917); Central of Ga. Ry. Co. v. Robertson, 203 Ala. 358, 83 So. 102 (1919); Pittsburgh Ry. Co. v. Higgs, 165 Ind. 698, 76 N. E. 299 (1905); MacGilvrey v. Boston El. Co., 229 Mass. 65, 118 N. E. 166 (1918).

<sup>25</sup> Winters v. B. & O. Ry. Co., 163 Fed. 106 (1908).

<sup>26</sup> Ulrich v. N. Y. Central Ry. Co., 108 N. Y. 80, 15 N. E. 60 (1888).

<sup>27</sup> Rittenberg, *Limitations of Passenger Liability* (1935) 6 JOURNAL OF AIR LAW 365, 379.

applied<sup>28</sup> in railroad cases of injury or death to passengers. The railroads have a high degree of duty to protect passengers from the negligent and wilful acts of fellow passengers and third persons.

With regard to goods carried, the old common law rule of liability as an insurer, except for loss caused by acts of God, the public enemy, or fault of the shipper, or the inherent nature of the goods has been relaxed to a certain extent.<sup>29</sup> The Cormack Amendment to the Interstate Commerce Act<sup>30</sup> provided that common carriers subject to the Interstate Commerce Act receiving property for interstate transportation should issue a receipt or bill of lading and become liable to the holder thereof for any loss, damage or injury to the property caused by it or connecting carriers; and that no other contract could exempt the carrier from that liability as shown by the declared value. A private carrier of goods, like other ordinary bailees, is liable only for negligence,<sup>31</sup> and this liability can be limited by contract.<sup>32</sup> The common carrier is liable for loss or damage to baggage or for freight, but is held only to a standard of ordinary care in the case of damage or loss of personal effects.<sup>33</sup>

In regard to crossing accidents, the railroad is under a duty to use reasonable care. When the person crossing is a trespasser or mere licensee,<sup>34</sup> the general rule is that the only duty of the railroad is to use due care after knowledge of the impending danger and not to inflict wilful or wanton injury.<sup>35</sup> Contributory negligence is a defense in crossing accidents. There are apparently no statutes requiring railroads to carry liability insurance of any kind.

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<sup>28</sup> *Vischer v. Northwestern El. Ry. Co.*, 256 Ill. 572, 100 N. E. 270 (1912); *Breen v. N. Y. Central R. Co.*, 109 N. Y. 297, 16 N. E. 60 (1888); Knauth, *Compulsory Aviation—Liability Insurance in Great Britain and the United States* (1937) 8 JOURNAL OF AIR LAW 460, 466.

<sup>29</sup> *Cleveland etc. R. Co. v. Blind*, 182 Ind. 298, 105 N. E. 483 (1914).

<sup>30</sup> 38 Stat. 1197, 49 U. S. C. A., Sec. 20-11.

<sup>31</sup> *Hanes v. Shapero*, 168 N. C. 24, 84 S. E. 33 (1915).

<sup>32</sup> *Pilson v. Tip Top Auto*, 67 Ore. 528, 136 Pac. 642 (1913).

<sup>33</sup> *Ill. Central R. Co. v. Fontaine*, 217 Ky. 211, 289 S. W. 263, A. L. R. 1064 (1926).

<sup>34</sup> *Sperry v. Consolidated R. Co.*, 79 Conn. 565, 65 Atl. 962 (1907); *Nashville C. & St. L. R. Co. v. Lillie*, 112 Tenn. 331, 78 S. W. 1055 (1904).

<sup>35</sup> *Cunningham v. Toledo etc. Ry. Co.*, 260 Ill. 589, 103 N. E. 594 (1913); *Chesney v. Fletchburg R. Co.*, 160 Mass. 211, 35 N. E. 554 (1893).



## 2. *Motor Vehicles*

In the case of motor vehicles, the general rules of common law liability for common carriers for injuries to passengers and damage to property apply. Motor vehicles used in interstate commerce are bound by Sec. 129 of the Motor Carrier Act,<sup>36</sup> which extends the Cormack Amendment to cover goods shipped by motor vehicle.

The operator of a motor vehicle may use the defense of contributory negligence in an action for personal injury<sup>37</sup> or for damages resulting from a collision.<sup>38</sup>

Several states<sup>39</sup> require compulsory liability insurance or a bond to be put up by owners or operators of motor vehicles for hire. These statutes differ in their provisions as to amounts of insurance to be carried and as to whether it is in favor of passengers and goods carried or in favor of third persons or both. Eighteen states have passed so-called financial responsibility laws.<sup>40</sup> Typical of this type of legislation is the Uniform Automobile Liability Act.

At common law, the operator of a private motor vehicle owes a duty of due care to guests in his automobile, but several states have passed guest statutes which make the operator liable to non-paying guests only in case of gross negligence.

## 3. *Ships*

The common carrier by water is under a duty to use the highest standard of care toward its passengers,<sup>41</sup> but it is not an insurer of their safety; it may use the defense of contributory negligence.<sup>42</sup> It is under a duty to use the utmost care to protect passengers from the negligent and reckless acts of fellow passengers,<sup>43</sup> but is not liable for the negligent or wilful acts of third persons which could not have been anticipated or guarded against.<sup>44</sup>

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<sup>36</sup> 49 U. S. C. A., Par. 319, 49 Stat. 563 (1935).

<sup>37</sup> *Gibbs v. Hardwick*, 241 Mass. 546, 135 N. E. 868 (1922).

<sup>38</sup> *Derks v. Towne*, 183 Ia. 403, 167 N. W. 103 (1918).

<sup>39</sup> Georgia, Kansas, Massachusetts, Michigan, South Carolina, Texas, Washington.

<sup>40</sup> Dowling, *Compensation for Automobile Accidents: A Symposium* (1932) 32 Col. L. R. 785.

<sup>41</sup> *The Arabia*, 34 F. (2d) 559 (1929); *Oceanic v. Conoran*, 9 F. (2d) 734 (1925).

<sup>42</sup> *Gretschmann v. Fox*, 189 Fed. 716 (1911).

<sup>43</sup> *Northern Comm. Co. v. Nestor*, 138 Fed. 383 (1908).

<sup>44</sup> *The Lusitania*, 251 Fed. 715 (1918).

The carrier, in regard to goods carried, may limit its liability only by the stipulation of value in the bill of lading.<sup>45</sup> It is under duty to exercise due diligence in regard to safety<sup>46</sup> and careful navigation.

The ordinary basis of collision liability is negligence, but where both parties are negligent, the rule is to divide the total damages.<sup>47</sup> The liability of a ship owner for passengers' baggage is, generally speaking, the same as for merchandise or goods carried for hire.<sup>48</sup>

Because of the provisions in regard to maximum liability in the proposed aviation liability acts, a word should be added about the wrongful death statutes. In thirty-four states and territories, the wrongful death acts place no limitation upon the amount of damages recoverable. In nine of these states, there are constitutional provisions prohibiting this type of limitation.<sup>49</sup> Eighteen states and territories have statutes which limit the maximum amount recoverable for wrongful death.<sup>50</sup> In the majority of these states, the limit is \$10,000. Maine and Colorado have a \$5,000 limit, and Connecticut goes up to \$15,000.

The Federal "Death on the High Seas by Wrongful Act" Statute, which provides for suit in an admiralty court, sets no limitation on maximum recovery.

#### 4. Summary

From this survey it is clear that in none of these forms of transportation is the carrier liable as an insurer of safety to the passengers; with regard to goods carried, the old common law rule of liability as insurer has been relaxed only slightly. The common carrier is liable for loss or damage to baggage, but is held only to a standard of ordinary care in the case of per-

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<sup>45</sup> Harter Act, 46 U. S. C. A., Pars. 190-195, Sec. 1; *Reid v. Fargo*, 241 U. S. 544 (1916).

<sup>46</sup> Harter Act, *supra*, n. 45, Secs. 2 and 3; *The Rosedale*, 89 Fed. 324 (1898).

<sup>47</sup> *Green, The Harter Act* (1903) 16 HARV. L. REV. 157, 174, 177. For further provisions, see 46 U. S. C. A., Par. 183 (1935, 1936).

<sup>48</sup> *The Thessalonika*, 267 Fed. 67, *cert. denied* 254 U. S. 49 (1920).

<sup>49</sup> Arizona, Arkansas, Kentucky, New York, Ohio, Oklahoma, Pennsylvania, Utah, Wyoming.

<sup>50</sup> Alaska, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Virginia, West Virginia, Wisconsin.

sonal effects. The carriers may use the defense of contributory negligence, and only in the case of motor vehicles in some states is the operator required to carry compulsory insurance.

## V. PRESENT AIRCRAFT LIABILITY CASE LAW

### 1. *Aircraft as carriers*

The first question that has to be considered in order to determine the liability is whether the aircraft involved is a common or a private carrier. Generally speaking, it is a question of law for the court to determine what constitutes a common carrier,<sup>51</sup> but whether or not the person charged is operating his business within that capacity is a question of fact.<sup>52</sup>

It has been commonly stated that:

"The real test as to whether a man is a common carrier by land or sea or air is whether he has held out that he will, so long as he has room, carry for hire all persons applying, or the goods of every person who will bring goods to him to be carried . . . Whether he holds out either expressly or by a course of conduct that he will carry for hire, so long as he has room, all persons applying or the goods of all persons indifferently who send him goods to be carried."<sup>53</sup>

In the United States it has been recognized since 1925 that an air carrier may be a common carrier of passengers<sup>54</sup> and since the Air Commerce Act of 1926, that an air carrier may be a common carrier of goods. It is believed that there is no English case in which an air carrier has been held to be a common carrier. In *Anslon v. Imperial Airways*,<sup>55</sup> it was said that if a man chose to engage in carrying goods by air as a regular business and so represented himself to the public, he very likely would become a common carrier, but that "the defendants in the case at bar were not a common carrier as the conditions of carriage reserved to the carrier the right to refuse to accept goods for carriage."<sup>56</sup> Thus air lines in the United States, which are engaged in passenger services on regular schedules

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<sup>51</sup> *Smallwood v. Jeter*, 42 Idaho 169, 244 Pac. 149 (1926).

<sup>52</sup> *People v. Duntley*, 217 Cal. 150, 17 P. (2d) 715 (1932).

<sup>53</sup> *N. American Acc. Ins. Co. v. Pitts*, 213 Ala. 102, 40 A. L. R. 1111-4 (1928), 45 Am. Rep. 178 (1925).

<sup>54</sup> *N. American Acc. Ins. Co. v. Pitts*, *supra*, n. 53.

<sup>55</sup> 38 Com. Cas. 227 (1933).

<sup>56</sup> SHAWCROSS AND BEAUMONT, AIR LAW, p. 147 (1945).

on definite routes are common carriers.<sup>57</sup> A common carrier may refuse to carry an objectionable person, for instance, an inebriated or insane person without a caretaker, and still be a common carrier.<sup>58</sup>

## 2. *Air Carriers—Liability for Goods Carried*

Within the two groups of carriers (private or common), carriers of passengers are distinguished from carriers of goods, both as to the extent of liability and as to the nature of the contract. In aviation cases, as in other fields, the carriage of goods is a bailment, and the injury arising from the damage is a liability arising *ex contractu*, so that the carrier is held to be absolutely liable except as to such injuries caused by the negligence of the bailor, by the inherent nature of the goods, or by an act of God, or of the public enemy.<sup>59</sup>

## 3. *Air Carriers—Liability for Passengers' Safety*

In the United States and Canada, it is generally held that a common carrier by air is bound to exercise the highest degree of care and safety consistent with the practical operation of the plane, but that the air carrier is not an insurer of the passengers' safety.<sup>60</sup> In Great Britain the standard is of reasonable care. This duty to observe the highest degree of care extends to all employees and servants of the common carrier connected with the flight.<sup>61</sup>

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<sup>57</sup> *Smith v. O'Donnell*, 215 Cal. 714, 12 P. (2d) 933; 1932 U. S. Av. Rep. 148 (1932); *McCusker v. Curtiss Wright Flying Service*, 269 Ill. App. 502, 1933 U. S. Av. Rep. 105 (1933).

<sup>58</sup> *Smith v. O'Donnell*, *supra*, n. 57; *Beall v. McLeod*, 1932 U. S. Av. Rep. 94 (1932).

<sup>59</sup> In *Wilson v. Colonial Air Transport*, 278 Mass. 420, 180 N. E. 202 (1931), which was an action for loss and damage to baggage and personal effects when the plane in which plaintiff was a passenger nose-dived into the water, the defendant was a private carrier and the court indicated that it was to be held to an ordinary or reasonable standard of care. This is in line with the general railroad rule regarding personal effects. In a Canadian case, *Ludditt v. Ginger Coote Airways*, 1942 U. S. Av. Rep. 178 (1942), the Supreme Court of Canada held that an air carrier had successfully excluded all liability by special conditions which the passengers had signed.

<sup>60</sup> *Smith v. O'Donnell*, 215 Cal. 714, 2 P. (2d) 933 (1932); *McCusker v. Curtiss Wright Flying Service*, 269 Ill. App. 502, 1933 U. S. Av. Rep. 105 (1933); *Law v. Transcontinental Air Trans. Co.*, 1932 U. S. Av. Rep. 139 (1931).

<sup>61</sup> *Goodheart v. Am. Airlines, Inc.*, 1936 U. S. Av. Rep. 177 (1936).

The ordinary rule regarding private carriers by air is that reasonable or ordinary care is required.<sup>62</sup> However, some courts have imposed on private carriers the duty of highest degree of care.<sup>63</sup>

The cases further appear to establish these rules: (1) A common carrier cannot by contract exempt itself from liability to a passenger for negligence; nor can it limit its liability for negligence to a certain amount by a provision printed on the ticket.<sup>64</sup>

If a pilot, without negligence on his part, is confronted with a sudden emergency requiring an immediate decision, he is only required to act as a reasonably prudent man would act in such a situation, and a mere error of judgment on his part does not amount to negligence.<sup>65</sup>

Where an accident is attributed to unforeseen events, an inevitable or unavoidable accident, or act of God, no liability is attached to the carrier, if the pilot has not been negligent.<sup>66</sup> A passenger on an airplane assumes all the usual risks of transportation,<sup>67</sup> but not the negligence of the carrier either in the handling of the craft, or its construction.<sup>68</sup>

Thus, generally, as regards aircraft liability for damage or loss of goods carried and injuries or death to passengers, the rules of law which have been applied by the courts have, with some variations, been those of the law of carriers generally.

#### 4. Air Carriers—Liability for Personal Effects

The question of flying over land as a trespass per se is not discussed in this article. In the field of negligence, there

<sup>62</sup> *Bird v. Louer*, 272 Ill. App. 522 (1933); *Seaman v. Curtiss Flying Service*, 1931 U. S. Av. Rep. 229 (1931); *Stoll v. Curtiss Flying Service*, 1931 U. S. Av. Rep. 148 (1931).

<sup>63</sup> *Berg v. Seitz*, 1931 U. S. Av. Rep. 111 (1931); *North Am. Acc. Ins. Co. v. Pitts*, 213 Ala. 102, 104 So. 21 (1925).

<sup>64</sup> *Law v. Transcontinental Air Transportation Co.*, 1931 U. S. Av. Rep. 205 (1931); *Curtiss-Wright Flying Service v. Glose*, 66 F. (2d) 710 (1933).

<sup>65</sup> *Conklin v. Curtiss Flying Service*, 1930 U. S. Av. Rep. 188 (1930); *Allison v. Standard Air Lines*, 1930 U. S. Av. Rep. 292 (1930); *Hagymasi v. Colonial Western Airways*, 1931 U. S. Av. Rep. 73 (1931); *Seaman v. Curtiss Flying Service*, *supra*, n. 62; *Conklin v. Canadian Col. Airways, Inc.*, 1934 U. S. Av. Rep. 21 (1933).

<sup>66</sup> *Allison v. Standard Air Lines*, *supra*, n. 65; *Johnson v. Western Air Express Corp.*, 114 P. (2d) 638, 1941 U. S. Av. Rep. 95 (1941).

<sup>67</sup> *Boulineaux v. Knoxville*, 20 Tenn. App. 804, 96 S. W. (2d) 575 (1935); *Allison v. Standard Air Lines*, *supra*, n. 66.

<sup>68</sup> *Beall v. McLeod*, 1932 U. S. Av. Rep. 94 (1932).

is a generally accepted axiom that there shall be no liability without fault, but, nevertheless, there is a wide field of cases adopting the theory of absolute liability. These are based on the concept expressed in *Rylands v. Fletcher*,<sup>69</sup> that he who maintains a dangerous instrumentality is liable for all damages caused by the escape of such instrumentality, without regard to negligence or actual fault. Proponents of this theory in aviation cases contend that persons on the ground are helpless to avoid the injury to themselves or their property caused by the dangerous instrumentality, and further that it is almost impossible for the person injured to prove the cause of the accident.

The tendency to impose the rule of absolute liability in the new industry of aviation began with *Guille v. Swan*,<sup>70</sup> with the forced landing of a balloonist in a private garden. The balloonist was held liable for the entire amount of damage incurred, including that caused by a large crowd of people who rushed into the garden, thereby damaging plaintiff's property. It was held that, because of the dangerous instrumentality the defendant had loosed, he was absolutely liable.<sup>71</sup>

The modern trend, however, is to apply the general rules concerning torts on land to aviation cases,<sup>72</sup> so that the owner and operator of an aircraft is charged with the duty to exercise reasonable care under the particular circumstances,<sup>73</sup> and unless the plaintiff can show some actual damage or interference with his use of the land, there has not been even a technical trespass.<sup>74</sup>

In *Sollak v. State of New York*,<sup>75</sup> the plaintiff was injured while he was a passenger in an automobile temporarily parked on a public highway, when an airplane operated by the State of New York struck the car. The New York Court held that when a collision occurred between an airplane and an auto-

<sup>69</sup> 3 H. L. 330 (1868).

<sup>70</sup> 19 Johns. 381, 10 Am. Dec. 234 (N. Y., 1822).

<sup>71</sup> *Rochester Gas & Electric Corp. v. Dunlap*, 199 Misc. 84, 266 N. Y. Supp. 469 (1933); see also *Canney v. Rochester Agricultural Assn.*, 76 N. H. 603, 7 Atl. 517, 1928 U. S. Av. Rep. 105 (1911).

<sup>72</sup> *Gruenke v. N. American Airways, Inc.*, 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. Rep. 126 (1930).

<sup>73</sup> *Smith v. New England Aircraft Co.*, 290 Mass. 511, 170 N. E. 385 (1930).

<sup>74</sup> *Hinman v. Pacific Air Transport*, 94 F. (2d) 755 (1936).

<sup>75</sup> 1929 U. S. Av. Rep. 42 (1927).

mobile being driven on a public highway, the doctrine of *res ipsa loquitur*<sup>76</sup> raises a presumption of negligence on the part of the airplane and its operator.<sup>77</sup>

In *Kadylak v. O'Brien*,<sup>78</sup> the plaintiff's minor son was swimming in a pool where a plane made a forced landing. Plaintiff recovered damages for the death. The Court said the case was of that class where the instrumentality was under the control of the defendant, and the accident was of such a type as does not ordinarily happen, if due care has been used, and that the burden was on the defendant to prove himself without fault.

##### 5. Air Carriers—Liability to Persons and Property on the Ground, Assumption of Risk, Collisions, etc.

The doctrine of assumption of risk must be considered in connection with those cases of injuries incurred on the ground at an airport. That is, a person who voluntarily enters upon an authorized landing area assumes certain risks from airplane accidents.

The courts have not applied any rule of absolute liability, the owner or operator is only held responsible for actual damage to persons and property caused by his negligence. In *State to the use of Bulkhead v. Sammon*,<sup>79</sup> the Maryland Court of Appeals held that the provisions of Section 5 of the Uniform Aeronautics Act<sup>80</sup> providing for absolute liability for ground damage or injuries did not apply to authorized landings at an airport. The defendant was not held to be absolutely liable for injuries to a boy riding a bicycle across the airport, who was hit by defendant's plane while he was landing. The operator was under a duty to use reasonable or ordinary care.<sup>81</sup>

##### Collisions

In *Greunke v. North American Airways Co.*,<sup>82</sup> a plane carrying a student for instruction collided, while landing, with a plane at rest on the landing field. Wisconsin had adopted

<sup>76</sup> Fuller discussion under *res ipsa loquitur, infra*.

<sup>77</sup> See, also, *Kirschner v. Jones & White*, 1932 U. S. Av. Rep. 278 (N. J. Supp. Ct. 1932).

<sup>78</sup> 1941 U. S. Av. Rep. 8 (W. D. Pa. 1941).

<sup>79</sup> 171 Md. 178, 189 Atl. 265, 1937 U. S. Av. Rep. 11 (1936).

<sup>80</sup> See Uniform Aeronautics Act, *supra*, n. 12.

<sup>81</sup> See also *Prokop v. Becker*, 345 Pa. 607, 29 A. (2d) 23, 1942 U. S. Av. Rep. 84 (1942).

<sup>82</sup> 201 Wis. 565, 230 N. W. 618 (1930).

the Uniform Aeronautics Act, which provides that liability in collision cases shall be determined by the rules of law applicable to torts on land. It was held that the defendant was under a duty to use ordinary care.

In *Weadock, et al. v. Eagle Indemnity*,<sup>83</sup> in which there was a mid-air collision of two planes operated by students, the school operator was held liable because he had not installed a signal system, and the knowledge that the student had taken off and was performing a dangerous maneuver was imputed to him. The court said that by exercise of ordinary care he could have acquired such knowledge and should have informed the trainee. Thus, while a student of flying assumes the ordinary risks attendant thereto, he does not assume such a risk as this one, which his instructor, the operator of the school, should have eliminated.

In *New York City Airport, Inc. v. Reed*,<sup>84</sup> the collision was between a plane taxiing down the runway and a truck parked on the runway. This happened in broad daylight. Here the court held that no matter how negligent the defendant corporation was in not keeping the runway clear, the deceased pilot was guilty of contributory negligence in failing to use reasonable care in looking for obstructions.<sup>85</sup>

#### *Accidents from Propellor Blades*

Several cases have come up where persons have been killed or injured by whirling propellor blades. In *Williamson v. Curtiss-Wright Flying Service*,<sup>86</sup> the plaintiff was a passenger, and in *Moon v. Lewis*,<sup>87</sup> the plaintiff was an employee with the duty to help pilots to start their motors. In both cases, the courts used the ordinary common law rules of negligence and proximate cause, placing the burden on the plaintiff to establish the negligence of the defendant and leaving the determination of the issue to the jury.

#### *Summary of Ground Injuries*

From the above cases, it cannot be said that there is a uniform rule for ground injuries, but the cases show certain

<sup>83</sup> 15 So. (2d) 132 (La. App. 1943).

<sup>84</sup> 259 N. Y. S. 245, 1933 U. S. Av. Rep. 31 (1932).

<sup>85</sup> Similarly, *Peavey v. City of Miami*, 1941 U. S. Av. Rep. 28 (Fla. Sup. Ct. 1941) and *Magic City Airways, Inc. v. same*.

<sup>86</sup> 1931 U. S. Av. Rep. 119 (D. C. Tex. 1931) aff. 1932.

<sup>87</sup> 116 N. J. L. 521, 185 Atl. 12, 1937 U. S. Av. Rep. 167 (1936).



tendencies: (1) A plane owner or operator will be held absolutely liable for damage to property caused by an unauthorized landing or crash on that property. By common law, personal injuries to the owner of the land or some one properly on it might fall into the same category. The Uniform Aeronautics Act places them there. (2) At an authorized landing place, the operator of a plane will be held to a negligence standard only. As to injuries occurring at public places, such as on the highway, the *Sollak* case applies a negligence standard; other courts might impose absolute liability.

#### 6. Doctrine of *Res Ipsa Loquitur* in Aviation Cases<sup>88</sup>

The doctrine of *res ipsa loquitur* has been applied in some cases where it was improbable that an accident would have happened without the carrier's negligence. A note in the *Journal of Air Law* states:<sup>89</sup>

"If the instrumentality causing the injury is exclusively controlled by the defendant, and if, in the exercise of due care, accidents of a particular nature do not usually occur from ordinary operation and use, then it is said by the courts, for the purpose of requiring the defendant to go forward with the evidence and make explanation, that a 'presumption' or 'inference' of negligence is raised."

The requirements or conditions which must be present before the doctrine may be invoked are usually stated as follows:<sup>90</sup> (1) The apparatus must be such that, in ordinary instances, no injurious operation may be expected unless from a careless construction or user; (2) The injury must have been caused by the use of an instrumentality in the exclusive control and possession of the defendant; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action or contribution at the time by the party injured.

Thus, if the above conditions are proved by the plaintiff and the defendant fails to give a reasonable explanation which is at least equally consistent with no negligence on his part, the plaintiff is entitled to succeed without giving any further evidence of negligence.<sup>91</sup>

<sup>88</sup> For a comprehensive discussion see Golden, *Doctrine of Res Ipsa Loquitur in Aviation Law* (1944) So. CAL. L. R. 15; (1944) 30 So. CAL. L. R. 124.

<sup>89</sup> Gates, *Negligence—Common Carriers*, 4 JOURNAL AIR LAW 429, 431 (1933).

<sup>90</sup> MARK SHAIN, *RES IPSA LOQUITUR* (1945) p. 433, *et seq.*

<sup>91</sup> SHAWCROSS & BEAUMONT, *AIR LAW*, pp. 215-252 (1942).

It has not been applied where there was an unexplained crash where there were no survivors,<sup>92</sup> "the accident might have been caused by one or more of a number of reasons over which the owner and operator had no control" and "ordinarily recognized natural hazards of flying which have not yet been overcome" and it could not be said that the accident was one which could not reasonably happen in the absence of negligence.<sup>93</sup>

This doctrine also has not been applied in cases where a machine crashed within a few seconds of leaving the ground due to engine failure;<sup>94</sup> where the machine was fitted with dual controls<sup>95</sup> and therefore not under exclusive control of the operator; when a machine crashed making an emergency landing;<sup>96</sup> when a machine crashed owing to engine failure;<sup>97</sup> when a passenger was a voluntary passenger on a test flight.<sup>98</sup>

*Res ipsa loquitur* has been applied: when an aeroplane in flight collided with a stationary motor car;<sup>99</sup> when two planes collided in mid-air and plaintiff was a passenger in one;<sup>100</sup> when a machine crashed in looping-the-loop at 200-400 foot level;<sup>101</sup> and when a machine suddenly crashed from about 200 feet shortly after taking off and in attempting to return.<sup>102</sup>

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<sup>92</sup> Herndon v. Gregory, 1936 U. S. Av. R. 28 (1935); Cohen v. United Air Lines, 1937 U. S. Av. R. 119 (1937).

<sup>93</sup> Ccnklin v. Canadian Colonial Airways (1934) U. S. Av. R. 21 (1934), affd. 1935 U. S. Av. R. 97 (collision with high tension wires in fog); and Rochester Gas & El. Corp. v. Dunlap, 1933 U. S. Av. R. 511 (1932).

<sup>94</sup> Wilson v. Colonial Air Transport, 1932 U. S. Av. R. 139 (1932); Hagymasi v. Colonial Western Airway, Inc., 1931 U. S. Av. R. 73 (1931); Law v. Transcontinental Air Transport, 1931 U. S. Av. R. 205 (1930).

<sup>95</sup> Parker v. Granger, 1936 U. S. Av. Rep. 251 (1936); Budgett v. Soo Sky Ways, 1936 U. S. Av. R. 174 (1936); Mich. Aero Club v. Shelby, 1938 U. S. Av. R. 79 (1938); Towle v. Phillips, 1943 U. S. Av. R. 9 (1942); Morrison v. Tourneau, 1943 U. S. Av. R. 22 (1943).

<sup>96</sup> Curtiss-Wright Flying Service v. Glose, 1933 U. S. Av. R. 26 (1933); Herndon v. Gregory, 1935 U. S. Av. R. 38 (1934).

<sup>97</sup> Boulineaux v. City of Knoxville, 96 S. W. (2d) 575, 1937 U. S. Av. R. 145 (1935).

<sup>98</sup> Cohn v. United Air Lines, 1937 U. S. Av. R. 144 (1936).

<sup>99</sup> Sollak v. State of N. Y., 1929 U. S. Av. R. 42 (1927); but contrast McCusker v. Curtiss-Wright, 1933 U. S. Av. R. 105 (1933).

<sup>100</sup> Smith v. O'Donnell, 12 P. (2d) 933, 1932 U. S. Av. R. 145 (1932).

<sup>101</sup> Miller v. English, 1932 U. S. Av. R. 153 (1932).

<sup>102</sup> Seaman v. Curtiss Flying Service, 1931 U. S. Av. R. 229 (1931).

These cases indicate that the application of the doctrine of *res ipsa loquitur* in airplane accidents is still an unsettled matter, but the tendency seems to be to extend the application, as lately the courts have rejected the contention that the novelty of the airplane or the youth of the industry should exclude them from the category of common carriers if they held themselves out to serve the public for hire.<sup>103</sup>

The doctrine of *res ipsa loquitur* has been regarded as peculiarly applicable to common carriers, for assuming that the accident was of the type that ordinarily would not happen without negligence, and the common carrier has the duty of a high degree of care, in the case of a common carrier it is more probable that the act or omission of the negligent party may be lawfully attributable to the defendant carrier.

The law seems well settled to the effect that *res ipsa loquitur* can be invoked where the plane is a private carrier.<sup>104</sup>

#### 7. Summary

From this survey it can be seen: (1) A common air carrier in the United States is under a duty to use the highest degree of care toward its passengers. The carrier, however, is not an insurer of the passengers' safety. The carrier cannot ordinarily contract itself out of liability for its own negligence. The common law regarding limitation of liability to a certain amount is unsettled. (2) The ordinary rule regarding goods and baggage carried by a common carrier is that the carrier is liable as an insurer, with certain exceptions, such as an act of God, or the public enemy, or inherent nature of the goods, etc. (3) In regard to persons and property on the ground, the modern trend appears to be that the owner and operator of an aircraft is charged with the duty to exercise reasonable care under the particular circumstances. (4) The doctrine of *res ipsa loquitur* is being applied to a somewhat wider extent; and (5) All of these seemingly predominant trends are subject to many and diverse variations depending on the law of the state in which the case is heard.

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<sup>103</sup> SHAIN, *RES IPSA LOQUITUR*, p. 476 (1945); *Smith v. O'Donnell*, 215 Cal. 714, 12 P. (2d) 933 (1932).

<sup>104</sup> *Bird v. Louer*, 272 Ill. App. 522, 1934 U. S. Av. Rep. 188 (1933); *Stoll v. Curtiss Flying Service, Inc.*, 257 N.Y.S. 1010, 1932 U. S. Av. Rep. 163 (1932).

## VI. PROPOSED UNIFORM AVIATION LIABILITY ACT AND PROPOSED AIR CARRIERS ACT

Because of the diversity of the state decisions, attempts have been made from time to time to formulate a set of rules that would be uniformly applied either by federal legislation or by a uniform state law. So far, none have been adopted. In July, 1938, a proposed Uniform Aviation Liability Act was approved by the National Conference of Commissions on Uniform State laws. All of the Uniform Aeronautics Acts were withdrawn from the active list for recommendation by the National Conference of Commissions, August, 1943. Presentation of the Uniform Aviation Liability Act has been postponed pending study by the Civil Aeronautics Authority. Provisions for liability of air carriers were put into the Lea Bill (Section 58),<sup>105</sup> but this section was later taken out of it and referred to the House of Representatives Interstate and Foreign Commerce Committee, for further study. Because of the bearing on the proposals being discussed in the Committee, in the Congress, it is pertinent to review the provisions of the Uniform Aviation Liability Act and to compare it with the proper clause in the Lea Bill.<sup>106</sup>

This Act covers (1) liability to passengers for injury or death;<sup>107</sup> (2) liability for baggage, personal effects and goods shipped;<sup>108</sup> (3) liability to persons on the ground for injury or death; (4) liability for property damage on the ground;<sup>109</sup> (5) liability for injury and damage, and apportionment of liability arising from collisions of two or more aircraft. This Act applies to all aircraft flying within the boundaries of the state, and in the case of passengers and baggage and goods carried, it applies whenever the contract of carriage is made in the state.

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<sup>105</sup> H. R. 1210, 78th Congress—now H. R. 674, 78th Congress "Air Carrier Liability Act, 1943". Title I prescribes necessary definitions and other general provisions; Title II deals with liability for injury to or death of passengers; Title III covers loss or damage to property, baggage or personal effects; Title IV deals with survival of liability against an express agency or operator of aircraft.

<sup>106</sup> Analysis by G. G. Tipton, Ass. Gen. Counsel Civil Aeronautics Bureau.

<sup>107</sup> H. R. 1210, Sec. 58, Title II.

<sup>108</sup> Title III and includes loss caused by unreasonable delay.

<sup>109</sup> No comparable proposal.

Generally speaking, the owner of aircraft carrying passengers for compensation is made absolutely and exclusively liable for all injuries or deaths to passengers in the course of the journey.<sup>110</sup> The amount of liability is determined by a schedule fixing a definite amount of recovery for certain specified injuries. The amount fixed in case of death is \$10,000.<sup>111</sup>

It is not entirely clear whether \$10,000 is, in all cases, the largest amount any one person can recover for all injuries.<sup>112</sup> Perhaps, if one person suffers several injuries, he could recover more. Compulsory insurance,<sup>113</sup> or a bond or cash deposit by the carrier is required.<sup>114</sup> If the required security is not carried, the limit of liability does not apply, and in addition there is a criminal penalty.

This proposed Act applies to non-commercial flyers only to the extent that it makes guest statutes apply to them, but it does not require them to carry insurance covering liability to passengers.<sup>115</sup>

Absolute liability is imposed upon owners of aircraft flying commercially, for loss or damage to goods, baggage or personal effects.<sup>116</sup> If the value of the personal effects or baggage is not declared, the recovery is limited to \$100, otherwise there can be no recovery for the actual loss, limited only by the declared value. As to goods,<sup>117</sup> there can always be a recovery in the amount of actual loss, except that when the value has been

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<sup>110</sup> Title II provides the operator is liable unless he proves affirmatively that the injury or death did not arise from wilful misconduct or failure to use the highest degree of care. Title III—operator can escape liability if he proves contributory negligence or wilful misconduct of the passenger.

<sup>111</sup> Title II agrees.

<sup>112</sup> Title II "may not exceed \$10,000."

<sup>113</sup> Compare with English rule.

<sup>114</sup> Part III of Air Navigation Act, 1936; SHAWCROSS & BEAUMONT, AIR LAW, p. 271, *et seq.* (1945).

<sup>115</sup> Similar provision in Air Carriers Liability Act.

<sup>116</sup> Title III—liability is imposed unless operator proves affirmatively that the loss or delay did not proximately result from wilful misconduct or failure to use the highest degree of care. He may also escape liability by proving that the loss, damage or delay was not caused by an error of piloting, in the handling of aircraft, or in navigation, or that it was caused by the negligence or wilful misconduct of the person who suffered the loss or his servants.

<sup>117</sup> Title III—Liability for goods, etc., is limited to the amount of actual loss, may not exceed \$50 or 50c per lb. if over 100 lbs., unless value is declared before shipment.

declared, the recovery cannot exceed the amount declared. Again, in this provision the proposed Act does not apply to non-commercial flights.

Absolute liability is imposed on the owners of all aircraft for injuries or death to persons on the ground and for damage to property on the ground.<sup>118</sup> Liability is limited to actual damage with a maximum of \$10,000 for the death or injury of one person, and there is a maximum liability per accident for personal injuries or death based on the horsepower of the plane.<sup>119</sup> Liability for property damage is limited to \$5.00 for each pound of weight of the craft. Compulsory insurance against both property damage and personal injuries or death is required. If insurance is not carried, the liability imposed is unlimited, and there is a criminal penalty. Contrary to the provisions regarding passengers, the plaintiff has an option to sue the owner for negligence. In such a suit, the amount of recovery is unlimited. No insurance against this possibly greater liability is required.

In regard to collisions, owners of aircraft are made liable to the owners, passengers and employees of other aircraft upon the basis of negligence, where a collision caused by the negligence of two or more aircraft is determined upon a comparative negligence basis. The owner of an aircraft in a collision is absolutely liable for injuries to his own passengers and goods carried, and for injuries to persons or property on the land. However, he has a right against the other owners of aircraft in the collision for negligence.<sup>120</sup>

#### VII. COMPARISON OF PRESENT DECISIONS AND THE PROPOSED UNIFORM AVIATION LIABILITY ACT—AIR CARRIERS' LIABILITY ACT

From the recent decisions, it can be seen that: (1) A common carrier is under a duty to use the highest degree of care toward its passengers. The carrier, however, is not an insurer of the passengers' safety. This applies to railroads, motor carriers, ships and aircraft. The carrier cannot ordinarily contract itself out of liability for its own negligence. The

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<sup>118</sup> Nothing comparable in "Air Carriers Liability Act."

<sup>119</sup> \$20,000 for a plane of 200 h. p. or less, to \$100,000 for a plane of over 900 h. p.

<sup>120</sup> This analysis was prepared for the information of a Committee of the Air Transport Ass'n. of America.

common law regarding limitation of liability to a certain amount is unsettled.

The proposed Uniform Act imposes on aircraft carrying passengers an almost absolute liability, a higher liability than on any other type of carrier, albeit there is a limitation of maximum liability. The proposed Air Carrier Act is somewhat more in line with the present decisions. The operator must prove affirmatively that he was not guilty of misconduct or failure to use the highest degree of care, and he can use the defense of contributory negligence. This Act, too, sets a maximum monetary liability.

(2) The ordinary rule regarding goods and baggage and personal effects carried by a common carrier is that the carrier is liable as an insurer, with certain exceptions, such as an act of God, or the public enemy, or the inherent nature of the goods, etc. Ship owners can limit the amount of their liability by contract, and in some jurisdictions railroads can, too.

The proposed Uniform Act imposes absolute liability without any exceptions; although liability can be limited to a declared value, the privilege is substantially the same as that enjoyed by other types of carriers. This is, again, a higher standard of care than any other form of transportation is subjected to in this country. In the proposed "Air Carrier Act," the section regarding goods, baggage and personal effects carries the same liability as for injury to persons; the operator is liable unless he proves affirmatively that he is without fault, or that the person who suffered the loss was guilty of wilful misconduct or negligence.

(3) The common-law rule as to guests in automobiles is that the operator is under a duty to use reasonable or ordinary care. Some state statutes lower this standard to one of gross negligence. The proposed Uniform Act would make these statutes apply to aircraft, thus lowering the present standard of liability. There is no section on this in the "Air Carriers Act."

(4) Railroads are under a duty to use ordinary or reasonable care regarding persons properly on the tracks; they are under a duty to use due care toward a trespasser only if his

presence is known. Motorists are under a duty to use ordinary care with regard to persons on the street.

The proposed Uniform Act makes aircraft operators absolutely liable on the theory of the helplessness of the landowner to prevent planes from crashing on his land. As has been shown, several states have taken this view; the same result has been reached at common law on the theory of trespass. The Rome Convention<sup>121</sup> and the Air Navigation Act of 1936 in Great Britain also provide for absolute, limited liability.

(5) As to collisions, under the proposed Uniform Act, the standard as between operators of planes involved in the accident is one of negligence, just as it is at common law. Where two or more operators are negligent, the liability is distributed on a comparative negligence basis. This is closely allied to admiralty law, and differs from the present common-law rule that contributory negligence is a defense. The "Air Carriers Act" has no provision on this point.

(6) Both of the proposed Acts provide that all aircraft must carry compulsory insurance against liability for ground injuries and damage; aircraft carrying passengers for hire must insure against liability for injury to them. In the case of railroads, there is no such compulsory insurance.<sup>122</sup> Some states have such statutes for motor vehicles. Louisiana, alone, has such a statute for operators of aircraft. The Rome Convention and the Air Navigation Act of 1936 of Great Britain have such provisions, but neither Act has as yet gone into effect.

### VIII. CONCLUSION

It is necessary to decide two main questions: First, is it necessary to have uniform legislation on questions of liability? Second, assuming that uniformity is necessary, which method, by Uniform State Acts, or by Federal Act, would be the more effective and desirable? Then come the questions as to the substance of the liability provisions.

First, from the viewpoint of the passenger or the man on the ground, uniformity in aviation liability is not a matter of great importance. Uniformity in this matter is much less vital

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<sup>121</sup> See n. 1, *supra*.

<sup>122</sup> The present Lea Bill, as amended, provides for an investigation by the Civil Aeronautics Commission as to matters affecting aviation insurance and reinsurance.



to him than, for example, in the law of sales. From the point of view of the air carrier and the insurance company, however, uniformity would be highly desirable; and as to shipments, it is very important.

With the cessation of hostilities will come a tremendous increase in air traffic, commercial and private. More and more goods will be shipped by air, there will be thousands of air passengers where comparatively few people flew before. With the increase in air miles travelled, and the people and goods being transported and shipped by air, there will come into courts more cases involving questions of liability, and uniformity in law will be essential in this field as well as in the other fields of aviation law. The speed and distance of travel in air transcends state lines.

Second, the chief effect of a uniform statute is to make possible the handling of claims with a minimum of litigation. If an act covering the provisions set out in the proposed Uniform Act is passed, there will undoubtedly be a flood of litigation. Several of the proposals present serious constitutional questions; for instance, the compulsory insurance and absolute liability clauses. These questions might very well have to be tested in each state court, and the federal courts, as well, to establish whether or not such provisions are an unconstitutional burden on interstate commerce. It must be kept in mind that rarely will the contract of carriage, the injury or loss, and the bringing of suit all take place in the same state.

Another possibility to be kept in mind is the length of time that may elapse before all, or substantially all, of the states would pass a Uniform Aviation Liability Act. The Uniform State Aeronautics Act was adopted by the National Conference of Commissioners in 1922, and has never been adopted by even half the states. Also, this should be considered—even if all the states should adopt the Uniform Act, will the courts of all the states interpret the provisions uniformly?

Because of these difficulties, the answer seems to lie in federal legislation, at least with respect to passengers and goods carried on the aircraft. A federal statute applying to interstate operations would cover substantially all airline accidents.

Third, as to the provisions of such an Act:

(1) The proposal of absolute liability as to injuries or death of passengers, as has been shown, would be a heavier burden than any other form of transportation bears. The proposal in the Federal Act seems to be more just. It amounts practically to a form of statutory *res ipsa loquitur*; that the defendant must prove his non-negligence. This principle is incorporated in the Warsaw Convention,<sup>123</sup> which was signed by the United States.

(2) There might also be an exemption of liability for piloting and navigation errors similar to the exemption in the Harter Act, which applies to carriage of goods by sea, and which is also written into the Warsaw Convention with respect to goods and baggage. In neither does the exemption apply to passengers.<sup>124</sup>

(3) As to ground injuries and damage, the time may not yet be ripe to attempt final and permanent codifications. It has been shown that the early decisions were based on absolute liability, and that the modern trend generally seems to relax that harsh rule. It is true that the Rome Convention proposes absolute liability again, but it must also be borne in mind that that Convention has never obtained enough signatories for it to go into effect.

(4) As to compulsory insurance, the Lea Bill, in its amended form, provides for an investigation into that question by the Civil Aeronautics Commission. That Commission will undoubtedly bring in recommendations which will be acted upon. This problem is very controversial and too involved to be discussed fully here.

Aviation has now reached the point in development where uniform standards of liability are essential. The best interests of both the carriers and their patrons demand that those standards should be set by Federal enactment. The standards in the beginning, at least, may not cover all possible situations. Aviation is still a growing industry, a most complex one, and the body of laws governing it must grow with it.

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<sup>123</sup> SHAWCROSS AND BEAUMONT, AIR LAW, pp. 25, 47, 278, 682 (1945).

<sup>124</sup> In the Maryland Statute, the exemption applies to both goods and passengers.

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ELDON S. DUMMIT, Frankfort

ROBERT M. SPRAGENS, Frankfort

FRANK L. MCCARTHY, Lexington

E. H. SMITH, Glasgow

WILLIAM H. CONLEY, Carlisle