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AIRCRAFT PASSENGER TICKET CONTRACTS

JOHN K. EDMUNDS*

The tremendous growth of the aviation industry has given rise to numerous problems concerning the duties, rights, and liabilities of carriers of passengers by air. In the carriage of passengers, the regular companies have found it desirable to include, in their tickets, certain provisions concerning the liability of the company in case of injury to passengers. This has been rendered desirable, in part, by the lack of legislation governing the subject.¹ For some time, the provisions in these contracts were as varied as the number of companies offering tickets, but recently² there has been a movement toward uniformity which has culminated in the proposed uniform passenger contract.³

It is the purpose of this article to consider the provisions of some of these contracts and, especially, those of the uniform contract, including, also, a discussion of the question of limitation of carrier liability for injury to revenue passengers carried. For the purpose of this discussion, it will be assumed that these regular companies are engaged in a common carriage business.⁴

*Mr. Edmunds is a graduate student in Northwestern University Law School, and this article is part of a thesis to be submitted toward the requirements of a master's degree.

1. The report of the Department of Commerce, Aeronautics Branch, Aeronautics Bulletin, No. 18, revised to Sept. 1, 1929, reveals that, with three exceptions (Alabama, Georgia, and Oklahoma) every state in the Union, the District of Columbia, Alaska, Hawaii and the Philippine Islands, have passed legislation of some sort regulating aircraft. But, of these, Alaska, District of Columbia, Philippine Islands, and twenty-three states make no mention of liability whatever. Those states which have adopted the uniform law proposed by the American Bar Association are in no better position since this uniform law contains no provision with respect to carrier liability for injury to passengers. (See sections 5, 6 and 7.) Three states (Arizona, Connecticut, and Pennsylvania) definitely provide for such liability when the injury is due to negligence, while two other states (Louisiana and Virginia) deal with the matter through the medium of insurance—either in the act governing aviation or in other legislation.

2. See the report of the Committee on Uniform Ticket Contract and Standard Ticket Forms, of the American Air Transport Association; J. W. Brennan, chairman, R. A. Bishop, Col. L. H. Brittin, Howard Wikoff, counsel, and Winsor Williams, manager.

3. See 1 JOURNAL OF AIR LAW, 228, for report of the committee on uniform contract.

4. The Committee of the American Air Transport Association, an organization which includes twenty-two air carriers, in its recent report urging

While the legislatures of the great majority of the States and territories have studiously avoided the matter of liability of air carriers for injuries to passengers, the air transport companies themselves have, for the most part, not been idle. Most of them have definitely denied all liability for injury to passengers.

A typical example of this is to be found in the contract provisions of the ticket used by the Transcontinental Air Transport Company.⁵ In signing the contract, the purchaser expressly agrees as follows:

1. The holder of this ticket agrees that this ticket represents merely a personal license and is revocable at the will of the Company, upon refund of the purchase price therefor, without further liability to the Company.

2. The user of this ticket agrees to observe the rules and regulations of the Company and to obey the instructions of its agents and employees.

3. The user of this ticket agrees that the Company, in the performance of the transportation covered by his ticket, is not a common carrier for hire and/or liable as such, but is a private carrier; and that the Company shall not be liable for injury or death to the person or loss or damage to the property of the said user caused in any manner whatsoever, *whether attributable to negligence or not*,⁶ occurring during and/or arising out of the performance, or failure of performance, of the transportation for which this ticket is issued.

4. The user of this ticket agrees that the Company shall not be liable for any loss or damage caused by the delay or failure of aircraft to depart from any point or arrive at any point, according to any schedule, agreement, or otherwise.

5. The user of this ticket agrees that the Company may cancel the trip or any part thereof and land and discharge him or her whenever and wherever it deems fit, upon refund of that part of the fare equal to the unused portion of this ticket, without further liability to the Company.

6. Any and all authorized sellers of this ticket act as the agent or agents of this Company only and not as the agent of any railroad company.

7. The above rules and conditions are binding, also, upon the heirs, and/or personal representatives, and/or anyone claiming through, the user of this ticket.

This ticket contract is open to serious criticism. In the first

the adoption of the uniform ticket stated: "There is hardly a company that has submitted its ticket form to your committee that is not, in the opinion of a majority of the committee, a common carrier and would be adjudicated such in any supreme court of the land." See, also, *North American Accident Insurance Co. v. Pitts*, 213 Ala. 103 (1905) and *Brown v. Mutual Life Ins. Co.*, 8 F. (2d) 996 (1925).

5. Cited in full, 1 JOUR. AIR LAW, 36-37.

6. Italics ours.

place, the company cannot avoid its status as a common carrier by a stipulation in its contract to the effect that it is a private carrier, and the fact that the passenger agrees makes no difference.⁷ Again, the third provision of the contract purporting to exempt the carrier from all liability whatsoever, whether resulting from negligence or not, would not, in the opinion of the writer, be upheld by any court in the United States, because of public policy.^{7a} The fifth provision—relative to landing and discharging of passengers—will no doubt be upheld providing the landing and discharge of passengers in reasonably necessary and that the place and manner of discharge are also reasonable, but only if reasonable.

Companies using tickets with such contract provisions are no doubt of the opinion that even if the provisions are not upheld by the courts, they may at least aid in getting a less unfavorable decision. It is believed that this position is unsound, and that the provisions will militate against, rather than aid, the securing of a decision favorable to the carriers.⁸

The use of ticket contracts purporting to exempt the carrier from all liability for injury to passengers is not confined to the carriers operating in the United States. They were used in Europe for some years before being adopted here. The following is an extract from the general conditions regarding air transportation of the ticket contract used by the German Luft Hansa:⁹

7. *The Railroad Co. v. Lockwood*, 84 U. S. 357 (1873).

7a. *The Railroad Co. v. Lockwood*, supra; *Powell v. Union Pacific R. Co.*, 255 Mo. 420 (1914); *Coleman v. Penn. R. Co.*, 242 Pa. 304 (1913); *Davis v. Chicago, etc., R. Co.*, 93 Wis. 470 (1896).

8. In a letter from Mr. Tex Marshall, Vice-President and General Manager of the Thompson Aeronautical Corporation, addressed to Mr. Winsor Williams, Manager, American Air Transport Association, the former says: "As a matter of fact contracts were used on railway tickets for many years and it was actually found that if anything the contract prejudiced the court against the transport company because it more or less seemed to be a safe-guard against a known weakness or other defect known to the transport company in their organization or equipment. Furthermore, we have been told that in no instances did it prove of material assistance in preventing a fair judgment against a transport company."

9. AUSZUG AUS DEN "ALLGEMEINEN BEFÖRDERUNGSBEDINGUNGEN FÜR DEN PASSAGIERLUFTVERKEHR."

Jeder Fluggast muss im Besitze eines gültigen Flugscheines sein. Der Flugschein hat nur für den Tag und die Person, wie angegeben, Geltung.

Wird auf einen Flugschein einer Luftverkehrsgesellschaft die Beförderung durch ein Flugzeug einer anderen oder mehrerer anderer Luftverkehrsgesellschaften ausgeführt, so sind die Ausführenden jeweils allein Vertragsgegner.

Ein Anspruch auf Ersatz eines Schadens—gleich, aus welchem Rechtsgrunde—der sich aus der Teilnahme am Fluge und der Benutzung des Zubringerdienstes ergibt, gesteht weder gegenüber der Luftverkehrsgesellschaft, ihren Angestellten, den Unternehmungen und den Personen, deren sie sich

Every passenger by air must be in possession of a valid air ticket. This air ticket is good only for the day and for the person specified on the ticket.

If a ticket of the air transport company provides for transportation by an airplane of another company or several other companies, these companies are alone responsible.

A right of action for damages, regardless of the legal grounds, which arises out of participation in the flight and the use of the services given, exists neither against the air company itself, its employees, the enterprises and the persons who serve toward the performance of their obligations, nor against the agencies. Personal and baggage insurance may be obtained at the agencies and from the commander of the aircraft.

One may enter and leave the aircraft only after obtaining permission from the commander of the aircraft. The entrance doors may not be opened by the passengers.

Furthermore, all "General Conditions Regarding Air Transportation" which are posted in the hangars and agencies are binding and serve to enlarge upon the foregoing rules and regulations.

* * * * *

The exclusive General Air-Passenger Accident Insurance between the German Luft Hansa Corporation and the Alliance and Stuttgart Company Insurance Corporation is valid only when the air-passenger

1. Has paid in full for his ticket, or has paid the premium before entering upon the flight, and
2. Has made the flight in a plane operated by the German Luft Hansa Corporation, the German-Russian Air Transport Company, or the Austrian Air Transport Corporation.

If the flight is made in another aircraft, the passenger, if he wishes

zur Erfüllung ihrer Verbindlichkeiten bedient, noch gegenüber den Agenturen, Personen—und Gepäckversicherungen sind in den Agenturen und Flugleitungen erhältlich.

Das Besteigen oder Verlassen des Flugzeuges darf erst nach Aufforderung durch die Flugleitung erfolgen. Die Einsteigtüren dürfen von den Mitreisenden nicht geöffnet werden.

Im übrigen finden die in den Flughäfen und Agenturen aushängenden "Allgemeine Beförderungsbedingungen für den Passagierluftverkehr" Anwendung, durch die auch die vorstehenden Bestimmungen ergänzt werden.

Die zwischen der Deutsche Luft Hansa A. G., und der Allianz und Stuttgarter Verein Versicherungs A. G. abgeschlossene Allgemeine Fluggast-Unfallversicherung gilt nur, wenn der Fluggast

1. den Flugschein voll gezahlt oder vor Antritt des Fluges die darauf entfallende Prämie entrichtet hat und
2. DEN FLUG MIT EINEM FLUGZEUG AUSFÜHRT, DAS VON DER DEUTSCHE LUFT HANSA A. G., DER DEUTSCHE-RUSSISCHE LUFTVERKEHRSGESELLSCHAFT OD. D. ÖSTEREICHISCHE LUFTVERKEHRS A. G. BETRIEBEN WIRD.

Wird der Flug mit einem anderen Flugzeug durchgeführt, so muss der Fluggast, sofern er versichert sein will, auf seine Kosten hier für eine besondere Versicherung nehmen.

Versicherungsleistungen und Bedingungen können bei allen Flugleitungen der Deutsche Luft Hansa A. G. eingesehen werden.

Auskünfte darüber, inwieweit allgemeine Fluggast-Unfallversicherungen auch bei anderen Luftverkehrsgesellschaften bestehen, erteilen die Flugleitungen und Agenturen.

to be insured must obtain (a) special insurance (policy) at his own expense.

Insurance rates and stipulations, etc., can be examined at all offices of the German Luft Hansa.

Information regarding general air passenger accident insurance in relation to other companies, as well, may be had from the aircraft commanders and at the agencies.

The views of the German courts with respect to the validity of such contracts exempting the carrier from all liability for injuries to the passenger are in direct conflict.¹⁰

Other air transport companies in the United States, while not attempting to *exempt* themselves from liability altogether, have inserted in their contracts certain provisions *limiting* their liability to definite amounts. Among these are the Boeing Air Transport Corporation and the Colonial Airways Corporation. Paragraph 7 of the new contract proposed for use by the Boeing Corporation is as follows:

"LIMITATION OF LIABILITY. This is a Class A ticket. The fare under a Class A ticket is lower than under a Class B ticket. In consideration of said reduced fare, the passenger agrees that the Company shall in no event be liable to said passenger, his heirs or representatives, for injury or damage to said passenger in an excess of \$25,000.00."

The ticket contract used by the Colonial Airways Corporation, in addition to the usual provisions concerning the status of the company as a private carrier, etc., contains the following provisions regarding liability:

"6. That the holder voluntarily assumes the ordinary risks of air transportation and stipulates that the Company shall not be responsible save for its own negligence of duty, and that the liability of the Company to the holder hereof or his legal representatives, in case of accident resulting in death or physical disability, in any event, and under any circumstances, is limited as follows:

Class A Contract (Minimum rate) Maximum liability \$ 5,000.00.
Class B Contract (Double rate) Maximum liability \$10,000.00.
Class C Contract (Triple rate) Maximum liability \$15,000.00."

Limitation of liability in consideration of a reduced rate of fare has been tried with varying degrees of success in England, Canada, and the United States. In the case of *Clarke v. West Ham Corporation*,¹¹ decided in England in 1909, a municipal corporation owned a tramway constructed under statutory powers. In accordance with

10. See *Aircraft as Common Carriers*, Carl Zollmann, 1 JOUR. AIR LAW 197 (1930).

11. 2 K. B. 858.

a statutory requirement they exhibited in a conspicuous place in their tramcars a list of the fares to be exacted, and they appended thereto a special notice to passengers stating, as the fact was, that the fares charged were less than the maximum authorized charges, and that in consideration thereof a passenger was only carried on the terms that the maximum amount recoverable from the corporation, on account of an injury suffered by a passenger and for which the corporation was legally liable, was £25. It was said by the court in that case that if the corporation published alternative lists of fares, one containing the maximum rates and the other containing reduced rates, and gave an option to the passenger to pay either the full rate without any condition limiting the liability or the reduced rate with such a condition, a passenger electing to pay the smaller rate would be bound by the conditions. In delivering the opinion, Lord Coleridge said: "It is settled law that a railway company . . . may under certain circumstances limit their liability. They may, if they please, offer a free pass to a passenger, or permit him to travel under conditions which necessarily involve a greater risk to himself on payment of a lower fare or none, and call upon him to absolve them of their liability in whole or in part;¹² but no case has been decided which permits a railway, canal, or tramway, company, which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk."¹³

In Canada, the validity of a contract limiting or even exempting the carrier from liability where the passenger rides for less than full fare has been upheld.¹⁴

The New York courts seem to follow the English rule that a carrier may limit or even exempt itself from liability for injuries to the passenger where the passenger rides at a reduced rate of fare. In the case of *Anderson v. Erie R. Co.*,¹⁵ where a clergyman procured a clerical ticket for about one-half of the regular fare and, in consideration thereof, expressly assumed "all risk of accidents

12. *McCawley v. Furness Ry. Co.*, *Gallin v. London & North Western Ry. Co.*, *all v. North Eastern Ry. Co.* These are cases cited in *Clarke v. West Ham Corporation*, *supra*.

13. For other English cases regarding limitation of and exemption from liability, see *Hood v. Anchor Line* (1918) A. C. 837; *Cooke v. Wilson* (1915) 85 L. T. (K.B.) 888; *Spence v. Laird Line, Ltd.* (1915) 41 I.L.T. 193. For limitation of liability on workmen's tickets, see *Hearn v. Southern Ry. Co.* (1925) 41 T.L.R. 305. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553 (1891).

14. *Grand Trunk v. Robinson* (1915) A.C. 740 P.C.

15. 171 N. Y. App. Div. 687, 157 N. Y. S. 740 (1916) (Aff. 223 N. Y. 277 (1918)).

and damage to person or property, whether caused by negligence of the company or that of its agents or employees or otherwise," and was killed by the derailment of the train resulting from the breaking of a defective rail, the court held that his administratrix could not recover against the railroad company where it appeared that any negligence causing the accident was that of the servants¹⁶ of the defendant who laid the rails and had charge of the repairing of the track." But, of course, such a ticket is used only by a special class of people and is not available to all. There seems to be no case in the United States which parallels the facts and holding of the English case. It is submitted, however, that the offering of an alternative rate with greater liability will not be sufficient to permit limitation of liability for injury to passengers in the United States generally, however well the doctrine may be established in the carriage of goods.¹⁷ From what has been said, a contract such as the Boeing Company proposes would be upheld by the English courts and in New York, provided the passenger is given the option of paying full fare and riding at the company's risk. The contract of the Colonial Airways Corporation, however, which limits liability in cases both where the passenger rides at a reduced fare and where he pays the maximum fare would probably be held invalid in any court. The limitation with respect to Class A and Class B contracts would no doubt be held valid in the English courts and in New York, but no limitation could be placed upon the Class C contract calling for the payment by the passenger of the maximum fare.¹⁸

In the opinion of the writer, the uniform passenger contract, drafted by the Committee of the American Air Transport Associa-

16. *Perkins v. New York Central Rd. Co.*, 24 N. Y. 196 (1862) as to distinction made by the New York courts between negligence of the board of directors or managers who represent the corporation itself, for all general purposes, and the negligence of other servants, holding that the company cannot exempt itself from liability for negligence of the former.

17. The rule adopted in the overwhelming majority of states is well expressed by the court in *Walther v. So. Pac. Co.*, 159 Cal. 769 (1911) as follows: "Independent of statutory provisions it is almost universally held that any contract purporting to exempt a common carrier of persons from liability for negligence of himself or his servants to a passenger carried for compensation is void, as being against public policy, and it is immaterial in such cases that the attempted limitation on such liability as agreed to by the passenger in consideration of special concessions in the matter of rate of fare or other departure from the rules applicable to passengers paying full fare. It is enough that there is any consideration for the carriage." See also *Crary v. Lehigh Valley Railroad Co.* 203 Penn. St. Rep. 525 (1902).

18. See *Bissel v. N. Y. Central Rd. Co.*, 25 N. Y. 442 (1862), affirmed in *Mynard v. Rd. Co.*, 71 N. Y. 180 (1877), see *Meuer v. Chi., M. & St. P. Ry. Co.*, 5 S. D. 568 (1894), where such limitation of liability has been provided for by statute.

tion possesses considerable merit, and is quite likely to receive the approval of the courts. It reads as follows:

"In consideration of the issuance to me of this ticket for transportation, I hereby agree as follows:

"ONE: (1) That said ticket represents a revocable license and that the company or companies represented herein may, with sufficient cause to it or them, decline to carry me, and in that event the sole responsibility of the company or companies shall be to refund to me, through regular channels, the price paid by me for said ticket; (2) that if I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein shall not be responsible save for its or their own neglect of duty; (3) that after the commencement of the flight, I may be landed or discharged in such manner and in such place or places as the pilot, in his sole discretion, shall see fit, and in that event the only responsibility of the company or companies named herein shall be to refund to me such proportion of the price paid by me for this ticket as the distance between the place of landing and the place of destination bears to the whole length of the flight for which this ticket has been issued.

TWO: (4) That this ticket is non-transferable and if presented for passage by any person other than myself may be taken up and cancelled without refund. (5) The presentation of this ticket and the use of it by any person other than myself shall be considered a fraud and trespass upon the company or companies.

THREE: (6) I further agree that the company or companies represented herein shall not be liable for any loss or claim arising out of delay or failure, for any reason, with or without advance notice, of aircraft to depart from any point or arrive at any point according to any schedule, agreement, statement or otherwise, nor for any loss or damage or injury to any person or property, arising out of such condition or otherwise, except negligence upon the part of the company or companies represented herein.

FOUR: (7) The air transport company is not responsible beyond its own lines and in selling this ticket and checking baggage thereon for transportation beyond its own lines, this company acts as agent for the other transportation agency or agencies. (8) The liability of the air company for loss or damage to baggage and/or personal property is limited to the amount of \$100.00, unless a higher valuation be declared and an additional charge paid therefor.

In this proposed contract, there is no attempt to exempt the carrier from liability for injuries to passengers or to limit such liability in any manner where the injury or damage grows out of the negligence of the company. This proposed uniform contract has been approved by nine¹⁹ regular companies, and has been accepted, in

19. Colonial Airways Corporation, National Parks Airways, Hawaiian Airways Company, Ltd., Rapid Air Lines, Northwest Airways, Stout Airways,

principle, by many others. Various minor objections have been made on the ground that it is better to have no contract at all,²⁰ that it leaves no choice to the passenger,²¹ and that the contract makes no provision for a limitation of liability in consideration of a reduced fare.²²

The provision of the uniform contract that is open to the most serious question and which will involve the most litigation is believed to be part two of paragraph one: "that if I am accepted as a passenger, I voluntarily assume the ordinary risks of air transportation and stipulate that the company or companies represented herein shall not be responsible save for its or their own neglect of duty." Two problems will certainly arise when the courts have occasion to consider this provision: (1) shall the rules of law governing other common carriers, with respect to assumption of risk, be applied to the carrier by air? (2) If so, what are the ordinary risks of air transportation?²³

Clifford Ball, Inc., Universal Aviation Corporation, Continental Air Services, Inc.

20. This is the position of the Thompson Aeronautical Corporation, as expressed in a letter to Mr. Winsor Williams. The letters referred to in this article were made available to the writer through the kindness of Mr. Howard Wikoff and Mr. Winsor Williams.

21. This is the suggestion of Mr. John F. O'Ryan, President, Colonial Airways Corporation, in a letter of Feb. 18, 1930 to Mr. Winsor Williams.

22. This is the position of the Boeing Air Transport Corporation, as expressed by Mr. A. K. Humphries in a letter of Feb. 26, 1930 to Mr. Winsor Williams.

23. This question was raised by Mr. George B. Logan in a letter of Feb. 26, 1930 to Mr. Howard Wikoff. Mr. Logan writes as follows:

"By paragraph (1) of the ticket, you ask the passenger to agree to two things, first, to assume the ordinary risks of air transportation, and second, to waive liability except for neglect of duty.

"Under many decisions, this contract, because you are a common carrier, is void. The common carrier may not only not limit its liability for its negligence, but it may not limit the degree of care required of it. There are ample authorities for this statement.

"Assuming, however, that the foregoing statement of Law is incorrect and assuming that your contract is valid, you then have a new contract concerning a comparatively new industry in which two extremely indefinite terms are left undefined. These terms are "ordinary risks of air transportation" and "duty."

"Taking the latter one first, if we accept the word "duty" as meaning the duty of a common carrier to a pay passenger, then you are back where you started before the contract was signed. The duty of the common carrier to its pay passengers is to exercise the highest degree of care; that being so, there are no ordinary risks of transportation which the passenger may or can assume.

"So far as I am aware, there are no "ordinary risks of railroad transportation" as differentiated from failure to exercise the highest degree of care. It is true that the State of New York has a statute allowing railroads to contract against the ordinary risks of railway travel, including defective rails, tracks, locomotives, cars, etc. Other states expressly disapprove of such

That passengers by rail and other means of public carriage must assume the risks necessarily incident to the mode of travel they

a statute and certainly in the absence of such a statute, the railway company would be liable.

"What would be the ordinary risks of air transportation? Would a structural failure of the plane, due to hidden defects, be such a risk? If that were the carrier's defense, would it not be properly left to the jury? If that were the carrier's defense, then under your ticket the carrier would have to prove that it was an ordinary risk, assuming the ticket to be valid. If the ticket is not valid and the common law rule applies, the burden would be upon the carrier to establish the fact that the accident was not due to his failure to exercise the highest degree of care. In either case, a practical impossibility before a jury.

"Please bear in mind that my interest in the success of aviation is as keen as that of anyone. I particularly would regret being put in a position of being an enemy to progress or an enemy to success. My own humble opinion is that the aircraft carriers should not, by ticket or otherwise, advertise the risks of air transportation, nor should they attempt to secure for themselves privileges from liability not afforded other common carriers. After all, it is largely a question of policy. Do the carriers prefer to attempt to save some dollars out of accident claims by a doubtful legal expedient, or do they prefer to put themselves on a parity with other common carriers as speedily as possible in the public confidence, and thus attract additional dollars by way of additional use of facilities offered.

"A study of the results of ticket-contract liability limitations in Germany, both in the way of public opinion and of court decisions, is illuminative of the futility of this policy.

"The status of air transport companies as common carriers has already become fixed. In my opinion it is advantageous that this should be so, as certain privileges will immediately follow the legal recognition of this fact. Air carriers will very shortly require the privilege of eminent domain, which they will not secure while claiming for themselves exemptions as private carriers.

"This claim, of course, is not openly made in your ticket, but the limited liability clause can be based upon no other assumption.

"With your attempt to limit your liability for loss of baggage to \$100.00, I am quite in sympathy. Legally, it is not possible without statute. It was the Carmack Amendment to the Interstate Commerce Act which permitted the railroads to do this and until such a statute is enacted, I do not see how the courts can fail to enforce the common law rule.

"In my opinion, clause (3) of paragraph (1) is probably enforceable, but it would be very bad policy on the part of the companies to enforce it strictly. If one should take passage from Chicago to St. Louis and should pay \$30.00 for the ticket (the former rate and possibly the future rate), and the pilot was forced to descend in a corn field after traveling two-thirds of the way, there would be necessary delays and expenses in transportation to the nearest town and the securing of a train or other means to complete the trip. The net result would doubtless be a complete loss of the time expected to be saved by the air trip. A more satisfactory settlement with the passenger would be to see to it that his total trip should cost him no more than the same trip by railroad or other means requiring the same length of time.

"For your information, a similar case was recently presented to us for an opinion. One of the air service companies here agreed for a fixed sum to transport a passenger in an emergency case from St. Louis to New York. The plane was forced down by a "low ceiling" near Pittsburgh. The passenger was forced to secure transportation from the place of landing to Pittsburgh and thence to New York by train. The net result of the journey was no saving in time. The air company was inclined to refund only the unused "mileage," as represented by their original charge, in other words, about one-

adopt has long been well-settled law.²⁴ But whether the same rule will be applied to carriers by air is open to question. It is urged that because of the danger attendant upon air transportation and the difficulty in determining whether an injury was the result of negligence or whether it was one of the risks incident to air carriage, that a greater liability than that applicable to other carriers should be borne by the aviation companies. These arguments are weighty but not impossible of refutation. Air transportation is not the perilous adventure it was a few years ago. The licensing of pilots, coupled with periodic physical and mental examinations, frequent inspections of licensed planes, improved airways, etc., are constantly adding to the safety of flight. Furthermore, knowledge of air navigation is rapidly increasing. Governmental statistics show that during 1929, there were more than one million miles flown by passenger airplanes for each fatality. If the average person lived long enough, he could travel 10,000 miles per year for over a hundred years before meeting death due to airplane accident.²⁵ We therefore are hardly justified in viewing the airplane as so highly dangerous as to call for any rule of absolute liability. It is manifestly more dangerous than the ox-cart; but it takes less than an hour to make the trip from New York-Philadelphia by air, while the stage-coach in 1758 required three days. A saving of seventy-one hours is worth something. Perhaps it is worth a somewhat increased risk.

The second argument advanced by those who would make the carrier liable for all injuries to persons is that the proof of negligence in airplane accident cases is too great to make negligence the test for recovery. Granting that the proof of negligence is and will be, for some years to come, more difficult than in the case of other common carriers, it remains to answer whether or not the air operator should be liable when there is real doubt as to the cause of the accident. To hold the carrier liable for injuries resulting from unex-

third of the agreed price of transportation. Legally this was possibly correct, but from the standpoint of a satisfied customer and of an enhanced public approval of air lines, it was exceedingly poor policy. We recommended a settlement based on the cost of railroad transportation to New York.

"I believe the idea of the air carriers having a uniform ticket is splendid. In fact, the cooperation and uniformity of policy is essential."

24. *Washington R. R. Co. v. Varnell*, 98 U. S. 479, 25 L. ed. 233 (1878).

25. The National Air Transport Co. advertises that during 1929 its planes, exclusive of experimental equipment, flew a total of 214,354 miles for each mechanical forced landing, a distance equal to 8½ times around the world. This includes mechanical forced landings of every character, including motor failures, of which there was only one for each 785,968 miles flown. See N. A. T. Bulletin No. 37, March, 1930. This information was furnished the writer by Mr. Thomas Wolfe. Other operators, doubtless, will be able to offer similar figures.

plained accidents would be to relieve the passenger from the well-established rule of assumption of risk and to place a very heavy burden on a new industry. But what are these risks? In case of rail carriers, it is held that the risks incident to the mode of travel in the legal sense are "only such as the utmost care, skill, and caution of the carrier in the preparation and management of the vehicle of conveyance is unable to avert."²⁶ Since the assumption of risk on the part of the passenger is greater when traveling by air, unquestionably the courts will hold the carriers to the utmost care in providing for his safety. Where the injury occurs through the failure of the carrier to adopt safety devices of proved value, which might have averted the accident, the carrier will probably be held liable. The companies will no doubt be held to the strictest compliance with all rules and regulations of both state and federal governments, such as licensing requirements, condition of planes, etc. However, it is believed that the mere fact of an accident, without testimony or other evidence of violation of rules and regulations or failure to provide proper equipment and safety devices, should not raise a presumption of negligence against the carrier sufficient to form a basis of recovery.

From the foregoing, it would appear that the provision in the proposed uniform ticket contract to the effect that the passenger "voluntarily assumes the ordinary risks of air transportation" is quite broad and will be qualified somewhat by the courts. Instead, the passenger will be held to assume only such risks as the carrier cannot avert by the utmost skill, care, and caution in the preparation and management of the plane, consistent with the practical operation of the business and strict compliance with governmental rules and regulations pertaining to air passenger transportation.

The provisions relative to the landing and discharge of passengers will be upheld only if the conduct of the pilot is adjudged reasonable.

26. *Washington R. Co. v. Varnell*, supra.