Journal of Air Law and Commerce

Volume 9

1938

Uniform Aviation Liability Act

William A. Schnader

UNIFORM AVIATION LIABILITY ACT*

WILLIAM A. SCHNADER†

It is my purpose to present to you as briefly as possible the point of view of the committees which prepared the three uniform state laws, known respectivly as the Uniform Aviation Liability Act, the Uniform Law of Airflight and the Uniform Air Jurisdiction Act.

Before doing so, perhaps you will indulge me for a few minutes while I give you the history of the preparation of these acts.

As you doubtless know, as early as 1922, the National Conference of Commissioners on Uniform State Laws prepared and, with the approval of the American Bar Association, recommended to the states for adoption, the Uniform Aeronautics Act.

This act dealt with the following topics only: Sovereignty in space, Ownership of space, Lawfulness of flight, Damage on land, Collision of aircraft, Jurisdiction over crimes and torts, Jurisdiction over contracts, Dangerous flying, and Hunting from an aircraft.

Section 3 of the Act provided that the ownership of the space above the lands and waters of a State, is vested in the several owners of the surface beneath, subject to the right of flight provided in Section 4.

Section 4 provided that flight by aircraft over the lands and waters of a state is lawful unless at such a low altitude as to interfere with the then existing use to which the land or the space over the land is put by the owner or unless so conducted as to be imminently dangerous to persons or property lawfully on the land beneath. Landing by an aircraft on the land of another without his consent was declared to be unlawful except in the case of a forced landing.

Section 5 imposed upon the owner of an aircraft absolute and unlimited liability for injuries to persons or property on the land,—that is for ground damage. This liability was declared to be regardless of negligence on the part of the owner, but he was exempted from liability if the injury was caused, in whole or in part, by the negligence of the person or the owner or bailee of the property injured.

---

* Address presented at the Eighth Annual Convention of the National Association of State Aviation Officials, October 13-15, 1938.

† Chairman, Committee on Uniform Aeronautical Code, National Conference of Commissioners on Uniform State Law.

Section 6 provided that liability of owners of aircraft in case of collision should be determined by the rules of law applicable to torts on land.

Twenty-two states have adopted the Uniform Aeronautics Act.

Since 1923, the American Law Institute has been engaged in restating the common law of the United States. One of the subjects of the restatement is "Torts." In Volume 1, pages 366-367, the Restatement of Torts deals with intrusion by aircraft into air space above property. These statements appear:

"e. An unprivileged intrusion in the space above the surface of the earth, at whatever height above the surface, is a trespass.

* * * * *

"f. A temporary invasion of the air space by aircraft, for the purpose of travel through it or other legitimate purpose, if done in a reasonable manner, and at such a height as is in conformity with legislative requirements and does not interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, is privileged.

"g. Where a person is carefully and skilfully operating an aircraft in a place where he may lawfully so operate it and against his will and without any culpability on his part the aircraft, its cargo or any part thereof, or the operator himself, or any person traveling therein, invades the air space above premises in the possession of another at an unreasonably low altitude, or comes to earth upon the surface thereof, the actor is under no liability if no harm results to the land or to the possessor or to anything or third person in whose security the possessor has a legally protected interest. On the other hand, if the entry causes such a harm the actor is subject to liability therefor even though he has acted with due care, since at the present time the operation of aircraft is an extra-hazardous activity."

At page 460 of the same volume appears Paragraph 194, dealing with "Travel Through Airspace." It is as follows:

"An entry above the surface of the earth, in the air space in the possession of another, by a person who is traveling in an aircraft, is privileged if the flight is conducted

"(a) for the purpose of travel through the air space or for any other legitimate purpose,

"(b) in a reasonable manner,

"(c) at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and

"(d) in conformity with such regulations of the State and federal aeronautical authorities as are in force in the particular State."

Although the Restatement of Torts was finally published in 1934, it was in course of preparation for the preceding ten years. During this period, various tentative drafts were circulated for

discussion and there was a great deal of controversy over the paragraphs to which I have referred.

Possibly this controversy led to the inauguration, about 1928 of a movement to have the American Bar Association prepare a Uniform Aeronautical Code.

The plan to prepare such a Code was initiated by the Bar Association's Committee on Aeronautical Law of which your counsel, Mr. Logan, was a member,—and a very useful member,—for a number of years.

Under the Constitution of the American Bar Association, all proposed state legislation must be referred to the National Conference of Commissioners on Uniform State Laws.

Accordingly, the proposal to prepare a Uniform Aeronautical Code became current business of the Commissioners on Uniform State Laws shortly after the Bar Association Committee had inaugurated the movement to prepare a State Aeronautical Code.

For several years, the Bar Association Committee and the Committee of Commissioners on Uniform State Laws assigned to the task of dealing with the subject, were not at all in harmony.

However, in one respect, there was no disagreement, namely, that two separate divisions of a Uniform Aeronautical Code should be known as the Uniform Air Licensing Act and the Uniform Airports Act. Later on the name of the former act was changed to the Uniform Aeronautical Regulatory Act. Beginning in 1935, the American Bar Association Committee on Aeronautical Law and the Conference Committee on Uniform Aeronautical Code joined forces in their work on an Aeronautical Code. From that year until this year, I was chairman of both committees and neither committee ever held a meeting to discuss the proposed code, unless the members of the other were invited to be present. And, according to my best recollection, no meeting was ever held which was not attended by a quorum of each committee.

In 1935, the work on the Uniform Airports Act and on the Uniform Aeronautical Regulatory Act was completed. In the last stages of this work, we received great assistance from your organization through Professor Fagg. I think it is fair to say that the Airports Act and the Regulatory Act represented the combined judgment of your organization, the National Conference of Commissioners on Uniform State Laws and the Committee on Aeronautical Law of the American Bar Association.

The remaining chapters of the Code involved much more seri-

ous problems than those which have been solved in the Airports Act and the Regulatory Act.

In the first place, there was great dissatisfaction among those interested in aviation, in the restatement of the common law by the American Law Institute as I have given it to you.

The restatement dealt only with the subjects of ground damage and the lawfulness of flight over another's land.

As far as concerned passenger liability, the restatement was silent.

But the courts have, from the beginning, differed widely as to the rules of law to be applied in suits between passengers and operators of aircraft.

There are decisions holding that the rules to be applied in air cases are the same as in any others.

Under these decisions, the passenger, or in the case of his death, those who have the right to sue for damages for his death, have the burden of proving negligence on the part of the carrier, and failing such proof, they cannot recover.

Other courts have decided that in aircraft accident cases, the doctrine of *res ipsa loquitur* is applicable. Under this rule, the very happening of the accident imputes negligence, and the burden is on the defendant to show the absence of negligence.

Intermediately, there are decisions which do not consistently apply either of the two rules I have mentioned.

Under any of these rules, if the plaintiff meets his burden of proof, the amount of his recovery is unlimited. Damages are assessable by a jury; and the amount at which a jury may appraise an injury or a death is always unpredictable.

We may summarize the situation which confronted us as follows:

1. *Liability for Ground Damage:* Under both the common law as restated by the American Law Institute and the Uniform Aeronautics Act enacted by 22 states, there is absolute and unlimited liability;

2. *Passenger Liability:* There is an irrreconcilable conflict of view as to the rules of law which should be applied. Liability is unlimited if negligence is either proved or presumed;

3. *Collision:* The same rules apply as in the case of collision between other types of craft;

4. *Lawfulness of Flight:* Under the common law, as restated by the American Law Institute, flight over another's land is a

trespass unless privileged. A flight is privileged only under very restricted circumstances.

Incidentally, in 1936 the American Law Institute agreed to cooperate with the Bar Association and the Commissioners on Uniform State Laws in completing the Uniform Aeronautical Code. Although the Institute was satisfied that it has correctly stated the common law relating to lawfulness of flight, it felt that the common law was too harsh and that it should be modified by statute.

Accordingly, from 1936 to the completion of our work, the American Bar Association, the American Law Institute and the National Conference of Commissioners on Uniform State Laws collaborated in the preparation of the drafts I am discussing.

In order to attack the problem of preparing a statute relating to liability for ground damage and passenger liability, it was necessary to obtain the greatest possible amount of practical information regarding the number of accidents, the extent to which the causes of accidents can be determined, the amount of insurance which is presently carried by operators of aircraft, insurance rates, and the results of certain suggested measures upon aviation and aviation insurance rates.

Conferences were held in New York and Chicago to which aviation insurance underwriters, representatives of the commercial air lines and others were invited.

We also sought and obtained information from other sources.

As a result of all of the information obtainable, I believe that the following statement fairly represents the situation as it exists:

I. As to Liability for Ground Damage

(a) *From the Standpoint of the Public:* The person or the owner of property on the ground is absolutely helpless to avoid damage by aircraft. Crashes, when they come, are unheralded and unpredictable. The situation is entirely different from any other hazard to which persons and property are subjected. For example, by keeping off the highways, personal injury by automobile can, except in rare instances, be escaped, but there is no way to keep either persons or property out of the zone of possible aircraft crash. Accordingly, the feeling seems to be universal, (except among aviators themselves), that for so-called ground damage operators of aircraft must continue to be held liable regardless of negligence.

However, from the standpoint of the public, the abstract right to recover an unlimited amount for this type of damage affords less

actual protection than insurance in a limited amount. Therefore, it would seem that the public would be afforded better protection, practically, by holding operators of aircraft liable regardless of negligence only within limits determined according to the weight of the aircraft or its speed or its horsepower or some other definite factor, provided that each operator be required to carry insurance to the extent to which his liability is limited.

It is generally agreed that it would be impossible under our federal and state constitutions to compel a property owner or a person on the ground to accept in full satisfaction of a claim for injury inflicted by aircraft a limited sum, if the injured party can prove that the accident was due to the operator's negligence. For this reason it was felt necessary to give to the injured party alternative rights of recovery. First, he may recover a limited amount without proving negligence, but, second, if he can prove negligence, he may recover whatever damages he can prove. However, the draft makes it perfectly plain that if the ground damage claimant elects to seek unlimited recovery, he must assume completely the burden of proving negligence without the aid of any presumption whatever in his favor. No insurance is required against any liability except the limited liability regardless of negligence, which the act imposes.

(b) *From the Standpoint of the Operator of Aircraft:* The insurance requirements proposed in the draft are less than the amount of insurance normally carried by commercial air lines. Accordingly, the insurance requirements can impose no serious hardship there.

As both the common law and the statutory law in almost one-half of the states impose *unlimited* absolute liability for ground damage, the proposal that the new act impose *limited* absolute liability, favors all operators of aircraft.

The real pinch is the requirement that private fliers as well as commercial air lines carry insurance against ground damage within the limits specified in the act. We were given to understand that the insurance rate for a policy required for a small aircraft would cost in the neighborhood of $60 or $70 per annum. We were also informed that there are a number of private fliers to whom $60 or $70 per annum for insurance would be a burden.

We gave earnest consideration to this situation. We concluded that any private flier who could not afford to pay $60 or $70 per

annum for an insurance premium, ought not to be permitted to endanger life and property by flying an aircraft.

Obviously, the statutory and common law imposition of unlimited absolute liability upon all operators of aircraft for ground damage affords no protection whatever against harm at the hands of a flier whose resources are so meager that he cannot afford a small premium to protect him against claims, and claimants against loss, resulting from contacts between his plane and objects on the ground.

The committees were informed that the number of cases of ground damage are relatively very, very few. This, however, is small consolation for the owners of property or the relatives of persons who *are* the victims of the few crashes which do inflict ground damage.

We also learned that the number of private fliers who carry insurance against ground liability is almost *negligible*. Certainly if *all* fliers were compelled to carry this type of insurance, the rates should be substantially reduced.

Opinions may differ as to the wisdom of the proposed provisions, but there can be no just accusation that the committees which prepared the acts did not consider all the factors and all the arguments pertinent to the solution of the problem.

It is also an interesting fact that the principles which I have been discussing were approved by the American Law Institute after protracted debate by an almost unanimous vote, and, also after protracted debate, by the Conference of Commissioners on Uniform States Laws by a vote of more than a majority of the states represented, at its 1937 meeting.

II. As to Passenger Liability

(a) *From the Public Standpoint:* The question has been asked, Why should operators of aircraft be singled out from all other carriers of passengers as far as concerns the rules applicable to liability for injury or death?

The committees believed that there are two answers to this question, of which the first is much the more important.

We had the valuable assistance, first as an unofficial consultant, and latterly as a member of the Conference Committee, of Colonel John H. Wigmore, formerly Dean of the Northwestern University Law School. Colonel Wigmore had access to the files of the Bureau of Air Commerce of the Federal Government.

After an exhaustive study of the files, Colonel Wigmore reported to us that in less than 20% of all air crashes would it be possible for the victims or their relatives to obtain provable evidence of the cause of the crash. Differently stated, it would not be possible for the plaintiffs in air accident cases to prove negligence or to rebut evidence of care offered by the aircraft operators, in one case out of five.

This fact alone would seem to warrant a rule of liability for injury to or death of passengers, regardless of the operator's negligence.

The second fact which would seem to justify a different rule in air accident cases, is the relative number of fatalities resulting from air travel as compared with other modes of travel.

The most recent figures released by the National Safety Council show the relative number of lives lost for every billion passenger miles traveled to have been (in 1936):

Trains, 1;
Automobiles, including busses, 45;
Scheduled aircraft, 101;
Non-scheduled aircraft, 1622.

From the public standpoint it seemed to the committees that there was no occasion by statute to give special protection to the person who rides in aircraft as a guest passenger. On the other hand, we felt that aircraft which carry passengers for compensation,—and particularly, the non-commercial air lines,—ought to be required to carry insurance in fixed amounts to assure passengers or their families of a limited recovery for injury or death. If in more than four cases out of five the cause of an air crash is not susceptible of proof in court, it is a mere mockery to talk about the burden of proof or in any other way to consider proof of negligence as a factor which ought to be considered in determining whether and in what amount compensation should be paid.

(b) *From the Standpoint of Aviation:* The committees were informed that the commercial airlines now carry more insurance than the proposed uniform act would require. At present there is no limit to the amount in which they may be held liable for an injury or death. Accordingly, their risks are speculative, at least to a substantial degree. To require commercial airlines to carry insurance to the extent of $10,000 per passenger could not possibly impose a burden on the industry.

As far as concerns non-scheduled fliers the insurance require-

ment may deter certain operators from carrying passengers for compensation. However, the committees felt that, as in the case of ground damage, the operator who cannot afford to carry insurance within the limitations specified in the act, ought not to be permitted to carry passengers for hire. If he cannot pay the insurance premium, he certainly could not respond in damages.

Consideration was also given to the question whether limited liability on the part of air carriers would discourage air travel.

The proposed act provides that an operator may establish a schedule of higher liabilities dependent upon higher rates charged the passenger. This permission given to the operator, will certainly enable him to offset any unfavorable reaction to statutory limited liability. And from the standpoint of the passenger the certainty of recovering a definite amount more than compensates for the loss of the ability to recover an unlimited amount, if the passenger or his relatives can accomplish the almost impossible task of obtaining provable evidence of negligence on the part of the operator.

III. As to Collision

I shall pass over this subject by outlining in brief the provisions of the proposed act.

The act provides that if a collision was due to the negligence of only one of the aircraft involved, the operator of that aircraft shall be liable to the other aircraft for whatever damages they sustained.

On the other hand, if more than one operator was negligent, the liabilities of the several negligent operators shall be proportioned according to the degree of negligence of which they were respectively guilty, if such degrees can be determined. Otherwise, the damages must be borne equally. There are appropriate provisions to the effect that each operator shall pay his own passenger and ground damage liabilities in the first instance, but may subsequently recover from other operators involved in the collision the amounts paid or payable on account of passenger and ground damage liability.

IV. Lawfulness of Flight

The proposed Uniform Law of Airflight deals with this subject.

I have already stated the manner in which the 1922 Uniform Aeronautics Act and the American Law Institute's Restatement of the Law of Torts, respectively, deal with this subject.

The committees felt that neither the common law nor the Uniform Aeronautics Act is satisfactory.

Section 2 of the proposed Uniform Law of Airflight is as follows:

"Section 2. [*Lawfulness of Flight.*] Flight of aircraft in this State is lawful:

"(a) If the operator of the aircraft holds a valid certificate of airworthiness from the [State Aeronautics Commission], or the proper agency of the Government of the United States and the aircraft is being navigated by a pilot holding a valid certificate of competency issued by the [State Aeronautics Commission] or the proper agency of the Government of the United States; and

"(b) If at a height permitted by the rules, regulations or orders adopted and promulgated by the [State Aeronautics Commission], and the applicable rules of the proper agency of the Government of the United States; and

"(c) Unless so conducted as to involve a substantial risk of harm to individuals or property on the land; or

"(d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land or adversely affect the then existing value of the land and structures thereon."

As this Section is phrased the operator of an aircraft has a very insignificant burden to meet in order to establish that his flight over the land of another is lawful. He must show that he holds a valid certificate of airworthiness, that the aircraft is being navigated by a pilot holding a valid certificate of competency, and that the flight is at a height permitted by the rules, regulations or orders adopted and promulgated by the appropriate state agency and the applicable rules of the proper Federal agency.

When the operator proves these facts,—all of which are peculiarly within his ability to prove,—the burden of proof shifts.

His flight is lawful *unless* the property owner proves certain specified facts.

To negative the legality of flight, the land owner must show that the flight is being so conducted as to involve a *substantial* risk of harm to individuals or property on the land, or is being so conducted as to constitute a *substantial* interference with the then existing use of the land or the structures thereon or the space over the land, or so as adversely to affect the then existing (as distinguished from the speculative future) value of the land and the structures thereon.

It was believed that by imposing on the land-owner the burden of proving that the flight was *substantially* dangerous or *substantially* interfering with the present use and enjoyment of the prop-

erty or was adversely affecting the *present value* of the land and the structures thereon, the operators of aircraft were being given full consideration.

The committees recognized that it would be impossible from a practical standpoint to impose upon aircraft operators the burden of negativing these various factors.

We did feel that it was not too much to require that the operators prove that their aircrafts and pilots have official sanction and that they are flying at a lawful height.

It could not be expected that in dealing with a subject so complex any legislative proposal would meet with unanimous approval.

As far as your organization is concerned, I call your attention to the fact that these proposed acts do not in any way affect state regulation of aviation or impose new duties upon state aviation officials, with one single exception. It is provided that if an operator wishes to do so he may furnish a bond or deposit cash in lieu of insuring against the liabilities which the Liability Act ordinarily requires the operator to insure against. In such cases the bond must be filed or the cash deposited with the state aviation regulatory agency.

In all other respects the legislation would be administered through the courts.

The proposed acts deal with a field of law in which uniformity of state legislation is highly desirable.

The United States is party both to the Rome and Warsaw Conventions, which relate to the liability of operators of aircraft flying internationally.

The Rome Convention imposes the rule of absolute but limited liability for ground damage. The Warsaw Convention dealing with passenger liability, limits liability but does not impose it absolutely. There are certain exceptions and conditions under which the carrier can escape liability. The committees which prepared the proposed uniform acts believed that it would tend to increase the volume of air traffic if passengers by air were given the assurance that in the event of their injury or death, recovery would be certain in an amount determinable according to the rate which they paid.

The proposed Liability Act follows the trend of legislation in other countries and of treaties between nations on this subject.

Personally I believe that its proposals are sound in principle and will be beneficial both to the public and to the aviation interests of the country.