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CARRIER LEGAL RESPONSIBILITY FOR COMMERCIAL AIR SAFETY

BY JOHN E. STEPHEN†

AIR CARRIER legal responsibility for commercial air safety can normally be thought of as tracking the law of liability. However, significant differences are apparent at the outset when the aviation field is compared to other transport modes. To a large extent, this is because of extraordinary statutory constraints—both state and federal; however, jurisprudence has developed much of the law peculiar to air carrier responsibility.

One law writer has remarked on this distinction, as follows:

All major areas of transportation have their own aggregates of applicable law; and aviation is unique only because the aggregate of law applicable to it is more varied and complex and is undergoing rapid and continuous development.¹

This observation might be justified; but why are the rules applicable to air transport undergoing “more rapid and continuous development” than the rules applied to common carriage generally? An obvious answer might be thought to lie in the dynamic nature of the underlying technology of air transport as compared to surface and water carriage. And, indeed, it is likely that this might explain such unexpected developments as proposed Section 520A, “Ground Damage from Aircraft,” of the American Law Institute *Restatement of Torts*. That section would impose *strict liability* on owners and operators of aircraft for injuries to persons or property on the ground, even though the aircraft operator has exercised “the utmost care” to prevent harm.² Of this, more will be said. Suffice it to note, for the moment, that not only the legal philosophers, but the courts, the legislatures, and indeed, the general public, clearly seem to expect a higher standard of care by air carriers than by other transport modes. What accounts for these extraordinary standards directed solely at air carriers?

One insurance authority has attributed the situation to overzealous coverage of airline accidents by the news media and to the extrajudicial preoccupation of the claimants’ bar with preserving the contingent fee system. He suggests that long-accepted principles of legal responsibility have been warped and strained by these artificial forces, stating:

The search for truth in modern personal injury litigation has been accompanied by a furious attack on legal barriers in the road to recovery, sometimes referred to as old-fashioned, artificial obstructions to justice. Rules relating to contributory negligence, conflicts of law, privity of contract

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¹ D. BILLYOU, *AIR LAW*, 98 (2d ed. 1964).

² *RESTATEMENT (SECOND) OF TORTS* § 520A(a), Tentative Draft No. 12, American Law Institute (1966).

and the art of pleading are all termed relics of the past. At the same time old-fashioned legal doctrines and rules which may assist recovery are updated by broadening their application as for example the recent history of *res ipsa loquitur*, the extension of warranty theories of recovery and strict liability [Footnotes omitted].³

Air carriers generally are held to "the highest degree of care" to their passengers. This has not meant, however, that the carrier must "guard against everything the human mind can imagine."⁴ Some courts have elucidated the principle by referring to "the highest degree of care consistent with the *practical operation* of the plane and protection of its passengers from injury."⁵ And historically, it had always been stressed that, in no event, is an air carrier the *insurer* of its passengers.⁶ That principle, in fact, has been referred to as "the universal rule."⁷

But despite the steadfast refusal of the courts to directly hold air carriers to be the insurers of their passengers, the "broadening" applications of doctrines such as *res ipsa loquitur* are having that effect. Added to these expanding judicial interpretations are such policy and regulatory creations as the aforesaid American Law Institute doctrine of strict liability for ground damage from aircraft and the recent United States-sponsored absolute liability provisions in the Montreal Agreement covering United States-foreign air transportation.⁸

As a matter of judicial philosophy, the allegedly "modern" *res ipsa loquitur* decisions simply close both eyes to the exhaustive, scientific investigations of air carrier accidents by the Civil Aeronautics Board (now, under the Department of Transportation Act, by the National Transportation Safety Board.) One aviation law writer has commented:

It should be apparent that the use of the doctrine may have the effect of making an air carrier, contrary to specific decisions, an insurer of the safety of its passengers. In order to improve aviation safety, an extraordinary amount of creative work has been done to develop and improve investigative techniques; it is indeed strange that air carriers should find themselves subject to a rule which evolved long before such techniques, and which does not reflect the advantages that inure to passengers.⁹

Of course, the principal purpose and concern of the comprehensive federal aviation accident investigation system is the advancement of *safety*, not the determination of legal fault. It is to be doubted, however, that the greater objective of aviation safety will encounter much sympathy in those quarters where the prime interest is in individual dollar claims and recoveries. A well-known member of the negligence bar has put the matter quite bluntly:

³ Address by George I. Whitehead, Jr., Comments on Some Aspects of Civil Litigation from Major Aircraft Accidents, 14, Aviation Law—Air Safety Symposium, University of Southern California, 16 June 1964.

⁴ R. FIXEL, THE LAW OF AVIATION § 487 (4th ed. 1967). See *Arrow Aviation, Inc. v. Moore & Socony Mobil Co.*, 266 F.2d 488 (8th Cir. 1959).

⁵ *Urban v. Frontier Airlines, Inc.*, 139 F. Supp. 288 (D. Wyo. 1956).

⁶ FIXEL, *supra* note 4; BILLYOU, *supra* note 1.

⁷ I. KREINDLER, AVIATION ACCIDENT LAW § 3.07 (1963).

⁸ Stephen, *The Montreal Conference and International Aviation Liability Limitation*, 33 J. AIR L. & COM. 554 (1967).

⁹ BILLYOU, *supra* note 1, at 106.

While no one can quarrel with the importance of advancing safety, it must be remembered that the purpose of the tort system is not to promote aviation safety, but, rather, to properly compensate victims of accidents, and to deter repetition by imposing the cost on the party at fault.¹⁰

To assert "deterrence" from imposing liability under *res ipsa loquitur*, in circumstances where the accident resulted from known but unforeseeable causes, such as, meteorological phenomenon or other act of God, is manifestly not supportable. It is this very detachment from primary cause determination which makes the fairness of the *res ipsa loquitur* doctrine questionable in aviation accidents. While it must be recognized that there are multiple causal factors in many accidents, the number of United States major (and fatal) accidents of which the primary cause is classified as "unknown" amounts to only slightly over 3.0 percent. Of the total 117 major (and fatal) jet aircraft accidents of the United States scheduled airlines from 1959 to 1 December 1967, CAB and other source data and accident analysis shows that: the primary cause for 36.0 percent of the accidents was attributed to pilot error (with weather a contributing factor); weather as a primary cause—25.0 percent; the air vehicle subsystem (frame, powerplant and control systems)—27.0 percent; other causes—9.0 percent; and "unknown" causes—3.0 percent.¹¹

It is evident from the analysis stated that weather is figured as a principal element in a substantial percentage of the total accidents. Specifically, it has been stated that:

Inaccurate or incomplete weather reports not descriptive of the general and specific weather conditions at the particular time and place of a jet flight are the common problem. Unexpected storm turbulence and clear air turbulence are significant causative factors in major damage to aircraft and serious injury to occupants.¹²

This is not to suggest that all adverse weather conditions are to be viewed as acts of God. Acknowledgement must be made of the observation of a leading aviation negligence writer and practitioner, that:

It must be pointed out, of course, that many so-called "Acts of God" are simply manifestations of weather or meteorological conditions, which could have been anticipated or avoided. It is clearly "the duty of a prudent operator to take precautions against known possibilities," and the claimed negligence is likely to be failure to do just that. [Footnotes omitted].¹³

While his assertion that "the claimed negligence is *likely* to be failure to do just that" is probably strained, the basic premise of his comment is valid for some cases. Air carriers at times do operate in marginal weather conditions, although not when it is knowingly unsafe to do so. The ultimate "go-no-go" decision is normally the decision of the pilot as the aircraft commander. And, there is a logical presumption of due care on the part of the deceased pilot in the event of a fatal accident, or as stated by one court:

¹⁰ Address by L. Kreindler, Tort Law and Aviation—for the Plaintiff, 4 Aviation Law—Air Safety Symposium, University of Southern California, 16 June 1964.

¹¹ Air Transport Association, A Comparative Look at the World and U.S. Airline Jet Aircraft Safety Record, 10 (December 1967).

¹² *Id.*

¹³ KREINDLER, *supra* note 7, at § 3:13(4).

When a person is killed in an accident, there is a presumption arising from the general knowledge of the strength of the instinct of self-preservation and the natural desire to avoid pain and injury to oneself that the deceased at the time of the accident was exercising due care.¹⁴

The pilot, of course, makes his decision to go based on official weather information and forecasts. Predictions of certain meteorological conditions, such as clear air turbulence, however, are extremely difficult, if not impossible.¹⁵ Even general weather conditions en route or at a destination can change rapidly and drastically. Although the aircraft captain may have exercised the highest degree of care in formulating his flight plan based on weather advisories, his decision can be no better than his information. If official weather information is inadequate or misleading, there may be, of course, a question of government liability, as Mr. Peters will presumably discuss in reviewing the recent Fifth Circuit decision in *Hartz, Roth & Globe Indemnity Co. v. United States*.¹⁶

The airline captain's qualification to exercise the high degree of care demanded of him is a function of careful selection and intensive professional training and testing. It takes a pilot longer to qualify for command of an airline aircraft than it does for a doctor to qualify for medical practice; indeed, although the doctor never has to take an examination again, the pilot does. He must maintain proficiency through a retraining program every six months. This very high degree of care has enabled airlines to steadily reduce the passenger fatalities rate despite faster, heavier and more complex aircraft operating in increasingly crowded airspace as reflected in the following tabulation of five-year averages.

<i>Passenger Fatalities</i>	
<i>per</i>	
<i>100-Million Passenger Miles</i>	
1942-1946	2.10
1947-1951	1.51
1952-1956	.50
1957-1961	.48
1962-1966	.22

Despite this extraordinary, and virtually unparalleled, demonstration of carrier and pilot dedication to the conscientious discharge of their responsibility for air safety, the claimants' bar remains unimpressed. One of its leading spokesmen and practitioners has commented on the airlines professional pilot qualifications program as follows:

Thus, we have come to expect a stream of uniformed pilots, each testifying to the rigorous training given to airline captains and co-pilots, and to the particular qualifications of the pilot and co-pilot of the ill-fated airplane.

The footnote to this statement was as follows:

¹⁴ *Morin v. Kreidt*, 310 Pa. 90, 97, 164 A. 799 (1933). Cf. *DeVere v. True-Flite, Inc.*, 10 Av. Cas. 17,239 (E.D. N.C. 1967); *First National Bank v. Niagara Therapy Mfg. Corp.*, 229 F. Supp. 460 (W.D. Pa. 1964).

¹⁵ *Eastern Airlines, Inc. v. Silber*, 324 F.2d 38 (5th Cir. 1963).

¹⁶ *Hartz, Roth & Globe Indemnity Co. v. U.S.*, 387 F.2d 870 (5th Cir. 1968).

It is a remarkable fact, in the cases that the author has tried, that the pilot, in each case, was "above average." Apparently the safest thing an airline passenger can do is fly with a below average pilot. Such pilots never seem to be involved in accidents.¹⁷

The inference of the quoted remarks is (a) that in all airlines accidents (tried by the author), the pilot was in some degree at fault, and (b) that above average pilots do not have accidents. Neither of these innuendoes seems warranted. As already noted, pilot error has *not* been a prime causal factor in most accidents. But an accident can happen to even the superior pilot, through no fault of his own.

In trying to rationalize a theory of legal responsibility which will always catch the aircraft operator, the plaintiffs' bar has had difficulty in making up its mind whether aircraft accidents should be assimilated to surface carrier accident, or distinguished from them. Actually, the negligence practitioner argues both ways, depending on the purpose to be served—a near classical case of *Running with the Hare and Hunting with the Hounds*. For example, in arguing that where the claimant's case is based on pilot *negligence*, the airline defendant should be precluded from offering evidence as to pilot training and experience. A leading claimant's spokesman says:

There is no reason why an airline crash case should be any different from a bus case or a railroad case, and as a general proposition, just as proof of conduct on prior occasions, and training and experience would be inadmissible in most railroad and bus cases, such proof should be considered inadmissible in airline cases.¹⁸

But, when arguing that *proximate cause* should be found where the pilot has *not* had sufficient experience in qualifying flights into a provisional airport where the accident occurred, the same author quotes with approval from a dissenting opinion which contends:

What may be required as evidence of proximate cause in a trolley car accident would not be a relevant standard in an accident involving a modern air transport plane or the jet liner now at the threshold of air transportation.¹⁹

Even less justification appears for holding air carriers to *strict liability*, as proposed in draft Section 520A on "Ground Damage from Aircraft," of the *Restatement of Torts*, and as provided for United States origin and destination passenger carriage in foreign air transportation under the Warsaw Convention Interim Liability Agreement (the Montreal Agreement). Not even an attempted rationalization for the Montreal Agreement provision has been stated by the United States aeronautical agencies, which arbitrarily forced absolute liability (*viz.*, "waiver of defenses") on the world's airlines as the price for withdrawing United States denunciation of the Warsaw Convention.

At least the Council of the American Law Institute, in adopting Section 520A in 1965 by a vote of 92 to 57, *purported* to be "meeting the chang-

¹⁷ KREINDLER, *supra* note 7, at § 3.13(8).

¹⁸ *Id.*

¹⁹ *Id.* at § 3.11.

ing laws" and rationalized that, "aviation has not yet reached the stage of development where abnormal danger to persons or property below ceases to exist . . . and while the safety record has been greatly improved, it still cannot be said that the danger of ground damage has been so eliminated or reduced that the ordinary rules of negligence law should be applied."²⁰ The sponsors of Section 520A have recognized that the supporting comment for the rule is extreme and unsupported, and have instructed the redrafting of the official comment to delete references to "abnormally dangerous." Even so, new Section 520A, imposing strict liability on the owner and the operator of the aircraft which causes harm to persons on the ground, apparently still stands.

It is submitted that the contrary view is the correct and rational one, as recommended to the Council by the distinguished reporter, Dean Prosser, that:

The flights of most commercial airlines are to be classified as normal, whether they are carrying passengers or freight. [So too are the flights of private planes, conforming to government regulations, and operated by duly qualified and licensed pilots.] As to these normal flights the responsibility for ground damage stands on the same footing as damage resulting from the operation of railroad trains or automobiles.²¹

²⁰ RESTATEMENT (SECOND) OF TORTS § 520A, Tentative Draft No. 12, American Law Institute (1966).

²¹ *Id.*