Journal of Air Law and Commerce

Volume 37 | Issue 3 Article 3

1971

Case for the Uncommon Law

Harold Caplan

CASE FOR THE UNCOMMON LAW

HAROLD CAPLAN*

GENERAL aviation is a topic which means nothing to the uninitiated; and even to the initiated, it means many different things. It ranges from the private owner of a small aircraft to the corporate owner of quite large and busy jets. I suspect that one of the problems that general aviation faces in the U.S.A. is the lack of a clear image. One can focus on private aviation, business aviation, fixed-base operators or air taxi operations; but general aviation is too broad a description to be truly meaningful. In the small amount of research that I have done, I discovered enough to be terrified of the subject. When I started to try to find out something about it, I found to my joy that the NTSB and the FAA had conducted several studies, and I quote from a press release of the NTSB:

> Preliminary 1970 statistics indicate that general aviation, including private and business planes, recorded fewer fatal accidents and fewer fatalities last year than in 1969. There were 4,927 accidents, 621 of them involving 1,270 fatalities in general aviation flying last year.

I became further excited when I read another release from NTSB dealing with a midair collision which occurred near Indianapolis in September 1969 between a DC-9 and a Piper PA-28. Again I quote:

> The Board's report highlighted ten specific subjects that warranted detailed discussion and recommended action. [And there are ten separate things listed.] The Board reported in the ten-year period, '59-'68, there were 223 midair collisions involving U.S. registered aircraft. About half of these accidents, 109, were fatal, resulting in 528 fatalities. Initially, it would appear that the problem of midair collisions is predominantly one involving general aviation aircraft since 98% of these collisions involved this segment of aviation.

I began to think that I understood something. I then came across a release from the Aircraft Owners and Pilots Association in February 1971 with the headline: "General Aviation Planes Have the Safest Record in FAA Report and Near-Midair Collision Study." I then realized that this was not a job for boys. It was clearly a job for men, and I knew too little about general aviation to tread in its technical

* British insurance underwriter. International Insurance Services, London, England.

water. All I confess is my humility in approaching you, and I shall try to interest you in some aspects of what I choose to refer to as "the uncommon law," which may be pertinent in your deliberations.

I come to you very humbly because Europe and the rest of the world, the United Kingdom in particular, really has not been exposed to general aviation in the same way as this country. You have over 130,000 airplanes registered in general aviation. Our population in United Kingdom is between 54 and 55 million. Yours is approximately four times this great. And if we were maintaining that kind of a ratio, you would expect there to be something over 40,000 aircraft in United Kingdom registered in general aviation. In fact, we have 2,108, of which just over 1,000 are business aviation. I searched our own statistics to find something comparable with the numbers involved, and I struck upon one gruesome statistic; in the United Kingdom, there were more people who died from being poisoned at home than general aviation killed in the last full year of operation. That is a pretty useful statistic, and I advise you to keep it by you on all occasions.

What do we do in England that might be of interest to lawyers in relation to general aviation? I would say only that our law really distinguishes between those who carry for hire or reward and those who do not. Those who are involved in the business of air transport, whether with small aircraft or larger ones, are governed by a statutory scheme of liability which enables most cases to be dealt with quite expeditiously. It involves contentious features insofar as you are concerned, that is to say, an assumption of liability coupled with a limit of liability. I hardly dare mention a limit of liability in the United States, but our limit is taken currently from the lower of the two which emerge from the infamous Montreal Agreement of 1966. Anybody who carries a passenger for hire or reward will find that he is presumed to be liable, but he has a limit of liability of approximately the equivalent of $58,000, unless he can prove that the carrier was guilty of wilful misconduct. On the other hand, the purely private owner who is merely carrying his friends and relations, or the business house which is carrying its guests, are governed by the common law.

We have a curious exception to both of these regimes for flying clubs and gliding clubs who, because they make a charge for the use of aircraft whether by pilots or passengers, might be held to be operating for hire or reward. They are allowed to be exempted from those provisions if the people they carry as passengers have been members of the relevant club for not less than 48 hours and have signed a complete waiver of liability. I think this an odd condition, but we are such a docile people that we take it quite quietly.

So general aviation is a very limited category including only private

aircraft and business aircraft which are carrying people gratuitously. Gratuitous carriage is not the sole test in England; if an organization is in the business of air transport, the fact that someone is carried gratuitously becomes irrelevant, and the rules that I have just referred to apply, together with the limit of liability.

The common law, which I find American lawyers venerate a great deal more than English lawyers, has a limited scope in the United Kingdom. Of course you know that the law in the United Kingdom is not uniform. The law in Scotland, being more based on Roman law, is regarded as foreign law in the English courts and has to be proved as such. But I would like to discuss concepts of the common law, because it leads me to my concept of the uncommon law. Latin falls into lawyers' notions of law. It often amuses me to think whether the common law would have made great progress here in the United States had it been referred to the lex communis. I think there might have been a reaction against it. American lawyers often cite the great English lawyer Coke, who almost used to worship the common law as the perfection of reason. And many judges can be heard to say today that common law is common sense. What I hope to tell you, and pursuade you to believe, is that it is nothing of the sort and never has been.

Common law, in the eyes of many people is something very firm, of great flexibility and may be distinguished from statutory law, on the one hand, and the old type of law called equity, on the other. But in fact, if you go back into the distant past in England, you will find that early statutes, the Norman statutes, were actually treated as part of the common law. The law as enunciated by our judges, the law which lives in their breasts, has gone through many, many changes. American lawyers regard the cornerstone of the common law as they understand it in England as the doctrine of stare decisis, the binding precedent, when an English judge in the fourteenth century was able to say that no precedent was of such force as justice or that which was right. It was really only as late as the nineteenth century when the doctrine of precedent became irrevocably confirmed. In this century, our House of Lords has announced that it is free to overrule itself instead of making distinguishing judgments by a very complex reasoning, and we have no less a man than the Master of the Rolls, Lord Denning, who does not even wish to wait for the House of Lords to overrule itself. He would like the Court of Appeal to stray from precedent when the situation demands.

The jury system is often thought to be essentially an English device, but that is not so. It was imported into England by William the Conqueror. True, it was some time ago, in 1066. When he came the Anglo-Saxons already had a system of justice which depended on twelve re-

porters in each area, telling the judges about offences in their district and who the suspects were. That was their duty. The first type of jury, which William the Conqueror introduced, was really a method of commanding persons to appear and supply information to the authorities, mainly for tax purposes. The most famous example of the results of their work was the Dooms Day Book. Even when the jury had developed a little more, they had a lot more work to do than modern juries. At first, if the jury did not know the facts of the case, they were sent away for two weeks to find out. It was until the fifteenth century that juries became finders of fact, and by the eighteenth century, it was quite clear that if a jury reached a conclusion of its own knowledge, this would be grounds for a new trial. I hear that the Federal Government is proposing to reduce civil juries to six, so the jury is not a sacred or an unchangeable feature of the common law scene.

Another cornerstone of the common law is supposed to be the tort of negligence based on fault and the concept of fault. But just before the time of William the Conqueror, and shortly thereafter, there was no such concept in the law. There were wrongs which were not even divided into crimes or torts. They were punishable in very picturesque ways: punishable by outlawry, putting a man outside the bounds of the law, by a blood feud and by tariffs of wer, wite and bot. And the nice thing about a blood feud was it did not involve very much expense. The idea was that, if someone had wronged you, you were allowed to exact vengence. The community forces would hold off while the aggrieved person and his relatives would seek vengence at a rate of exchange whereby six churls would equal one thane. In more enlightened days, by about the thirteenth century, it became unlawful to exact a blood feud unless there was a complete failure to exact one of the known tariffs of wer, wite and bot. "Wer" was the value set on a man's life according to his rank. "Wite" was a fine payable to the king or public authority. And "bot" was the general name for compensation of any kind. By the twelfth century this uniform, if you like, amorphous category of wrongs had begun to separate into crime and tort. And it was the action of trespass by force and arms against the peace of the king, which gave rise to damages. And it is quite clear from these early medieval origins that the origin of damages, the origin of what today has become negligence, was based on liability without fault. Today we call it a form of strict liability. In England it was the twentieth century before the tort of negligence became sufficiently clear for good textbooks to be written to guide the next generation of lawyers.

Things I find most attractive about the medieval law, which forms part of the corpus of the common law, were the forms of trial; the trial by ordeal, where witches were allowed to sink or swim, or to hold

molten metal in their hands, and be found guilty if they were still festering after seven days. Wage of law was an attractive method of trial which should certainly be considered today; all you needed was eleven or twelve oath keepers who would swear that the defendant was telling the truth. For those with the resources, trial by witnesses was also quite attractive, because really that meant that the side with the largest number of witnesses would win. Trial by battle, where there would be a fight until one side or the other cried craven, should not be discounted. I think this would be a great economy in the administration of justice, certainly shortening trials and clearing the court calendar quite quickly.

So what do I mean by "the uncommon law"? I mean the substitution for what has gone before by scientifically valid rules. Aircraft are not designed by common law, or even by common sense, unless you choose to regard the whole of science and technology as but progressive applications of common sense. Men were not allowed to set foot on the moon just by the application of common sense. It no longer makes sense to talk of common sense when you are talking about advanced technology. But when one hears lawyers make claim for the value of the common law—its deterent effect, its alleged benefits to their safety—you would imagine that it was by these legal processes that aircraft design was improved. I do not think that one can quote legal rules as a license for anything that one would wish to do. The right to bear arms, guaranteed in your Constitution, is not a license for murder. The right guaranteed by the Federal Aviation Act for a public right of freedom of transit in air commerce is not a license to launch a passenger-carrying balloon at Kennedy Airport. So I say that we already accept in many ways that the common law does not provide the answers to today's technical problems; it cannot and never has. The answers to the problems of general aviation may be in such technical solutions as the creation of terminal control areas or climb-and-descent corridors; or it may consist in halving the cost of VHF radio or transponders or enabling pilots to have simulated training for instrument flight practice without risking their necks before they find out they don't really know anything about it. I find therefore that it is in the uncommon law that we must find answers for general aviation.

General aviation ranges from lunatics and joy riders, on the one hand, to highly responsible individuals on the other. With satisfaction I noted that very recently the Associated Aviation Underwriters presented an air safety award to Johns-Mansville, which had operated a fleet of aircraft, and during the 25 years that AAU provided the firm with coverage, it had not filed a single claim. There must be lessons to be learned here apart from the satisfaction of seeing an underwriting organization showing public appreciation for a good record (apart from

its private appreciation, presumably by favorable rates). Somebody should find out how Johns-Mansville managed that quarter of a century without making a claim. So there are answers around, and I suggest they are not in the principles of the common law.

It has often been my pleasure or privilege or doom to spread dire warnings about what might happen. I am sure many of you have heard me speak about the Warsaw Convention; I think it casts shadows for what might happen in a more general field of law in which you gentlemen practice. Not all of you may be aware that a new article to amend the Warsaw Convention was signed March 8, 1971, in Guatemala City. Your government signed this protocol, and I have no doubt that, when it is ready, the Administration will seek the approval of the Senate. In essence the protocol provides for absolute liability with an unbreakable —said to be an unbreakable—limit of $100,000. So a no-fault concept is being proposed for international aviation as a continuation of the Montreal Agreement. It will not come into force unless there are at least thirty ratifications. Those ratifications represent at least 40% of the world's international air traffic, and insure that the protocol does not come into operation unless the U. S. is a party. Of course, $100,000 is a sum frequently exceeded in your practice, so the Administration knows that it cannot sell such a simple package to the Senate without some reenforcement, without some supplementary provisions. They have not yet been revealed, but the Administration will have to find a scheme for supplementary compensation for American citizens over and above the $100,000. If this comes into being, what will happen? Those attorneys who appear for pilots and operators will not need to go to trial or investigate accidents or take depositions; they will discuss the amounts of compensation. If there is a possibility of a suit against a manufacturer, or one whose real damages exceed all of the supplementary scheme, he may need the services of lawyers who can go to trial for him. Will it be successful? I haven't the faintest idea. Will it be applied domestically? I don't know. But these, I believe, are some of the thoughts in the minds of those who favor schemes of this nature.

The no-fault principle is being extensively canvassed in automobile liability. There are already the experiences in the State of Massachusetts. And the scheme proposed in Guatemala earlier this month and signed by your Government takes us right back to the tariffs of wer, wite and bot. Wer is said to be the value set on a man's life according to his rank. I would say that is probably his general damages but, to stretch the illustration, the wer is the $100,000. The bot would be compensation of any kind, and clearly that has to be in excess of a limited amount. What about the wite, the fine payable to the king or public authority? Here I understand, the proposal is to make a surcharge on

air tickets purchased in the U. S. That will be the fine payable to the public authority for the creation of this special fund. This is how I see what used to be the common law of medieval England being reintroduced into the great United States, which has developed its own form of common law for many years now.

So the case for uncommon law is that really you already accept it; you already accept the need for scientifically valid rules. But what some do not wish yet to abandon is the adversary system, the concept of fault; they may be right to resist. But it may seem to future generations that proving negligence was as odd as all the myriad forms of action on the case in medieval England. We return to wer, wite and bot, and see that the NTSB and the FAA are already applying uncommon law to solve the problems of general aviation.