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FAULT AS THE BASIS OF LIABILITY*

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IF we confine our consideration to the relationship to liability insurance of the degree of liability imposed, the answer could be summarized in the one word: "basic." The degree of fault required to constitute liability has everything to do with both the acceptance of an insurance risk and the cost to the insured. The degree might be so drastic that the risk would be undesirable for insurers, and certainly the greater the degree of liability imposed, the greater the cost of satisfying that liability, whether or not there is insurance.

There are astonishing misapprehensions about insurance and about aviation-fixed ideas that sometimes are so completely unsupported in fact that it is incomprehensible that persons of high intelligence could accept them. Unfortunately, these erroneous ideas are being accepted as important factors in demanding changes in liability laws. I shall try to correct several of them in this paper by turning upon them the revealing light of fact and reason.

The first general misunderstanding is an almost universal confusion as between accident insurance and liability insurance. Our scholars deride such an idea. They say "of course, we know that accident insurance pays a specified benefit upon proof of specified injuries, without regard to liability, whereas liability insurance protects the insured from loss because of his legal liability." But they go blithely along with the uninformed in the firm conviction that if a person is injured or killed, regardless of the circumstances of the injury, he or his heirs should be paid. In other words, they expect all insurance to function like accident insurance and consider the defense that no payment is due, because there is no legal liability, a resort to a mere technicality in an effort to avoid payment.

Of course, most educated men know the difference in the theory but many let their ideology get mixed up with their intelligence. It is their social belief that in any activity that causes injury or damage the operator should pay for it, regardless of fault, so they would force their belief on the world by making laws that would in effect convert liability insurance into compulsory accident insurance.

If accident insurance is what is wanted, it is quite simple — and quite as unintelligent, arbitrary and unjust — to simply provide by law that every passenger or member of the public be insured with accident insurance and every claim for property damage paid without question

*A paper prepared for the International Academy of Comparative Law meeting in Paris, August 1954.

as to fault. Although most proponents of absolute liability regardless of fault will stoutly maintain that they are not socialists — especially in the U. S. A. where socialism is not popular — this is socialism pure and simple. It is nothing more or less than the Marxian axiom: "To everyone according to his needs; from everyone according to his means." However, this paper is concerned, not with accident insurance, but with liability insurance and the relationship of fault to it.

If fault as a basis for liability is to be considered at all, it must rest upon the desire to achieve justice as between the air carrier and those his activities may injure. That must be the basic objective, not the satisfying of a social theory. If we wish to provide privilege for one class against another — if we want to penalize constructive service to the public by making the server the insurer of the served under any and all circumstances, this discussion is useless because that is class discrimination, not justice.

If justice is our objective, there must be equality to all to achieve real justice. Insurance should not be the basic consideration. Insurance is only one — although admittedly the most practical and economical — way to provide financial responsibility and the only way to distribute a loss that would be crushing to one operator over a large section of a whole industry. Let us try to achieve justice first by considering the relation of fault as a basis of liability to justice and then consider the place of insurance in the picture. Equal justice is the basic objective — insurance merely an instrument of achieving that justice.

May I digress briefly here to dispel another misapprehension about insurance? Too many otherwise intelligent persons believe, because insurance companies must be strong financially in order to fulfill their function of paying claims, that they are fair game for plundering. Also, that they try to hold liability requirements low to avoid paying out their money. Not one of these accusations is true, and especially with respect to air carrier insurance.

Insurance companies are business organizations, not gamblers or philanthropists. Insurance is one of the most strictly regulated and most highly competitive industries. There are few air carriers in all the world to insure. U.S. air carriers, which fly twice as many passenger-miles as all of the other nations of the free world combined, had only 1,227 airplanes in service¹ in 1952. Air carriers pay premiums largely based upon a combination of individual and industry experience. The insurer does not charge a premium and then try to cut corners and chisel claimants so they can make a profit. They charge a premium to cover the cost of claims, expense of doing business and handling claims, plus a fair profit, if they can keep their operations competitively efficient. It is not finally insurance company money being paid out for claims but air carrier money. If costs exceed premium, the premium goes up. There must be money with which to operate and pay claims. The adjuster haggles over excessive demands

¹ CAA Statistical Handbook 1953.

to keep air carrier premiums down, not to save insurance companies money.

Because I am employed by insurance companies, I am charged with serving the self-interest of the insurance industry in attempting to keep limits down and permissible defenses against liability strong. Nothing could be further from the truth. The imposition of high limits of liability and the limiting of defenses by which liability may be avoided increases claim costs. This increased volume in the cost of losses makes increased premium volume inevitable. Insurance profits are permitted on volume, so when you increase the volume, more profits are permissible. To oppose high limits and ineffective defenses against liability restricts rather than augments insurance profits except perhaps for the long range view that what is good for the air carrier and encourages his development is ultimately good for his insurer. No, I am not an insurance propagandist. I have devoted most of my life to the law and to aviation — about half and half — and those are my interests. My whole ambition is to keep the law just to all — not a special class — and to see aviation unhampered by special privilege to the end that it may achieve its great destiny as a servant of man — all men.

To return to our principal theme; what is equal justice in relation to liability? It is certainly not a special privilege to any one class. The evolution of the concept of liability has progressed with the development of society. We hear of it first in those primitive days when associated strength was necessary for survival: The dispenser of justice was the chief — then the over-lord and his barons — then the absolute monarch. These were the days of absolute liability — an eye for an eye, a tooth for a tooth! The ancient Anglo-Saxon legal maxim: "Buy spear from side or bear it" clearly illustrates the theory of that primitive stage when the offender must buy off the vengeance of the offended or fight it out.

As law supplanted this crude dominance of force, reparation for wrong became something the injured could exact. A great first step was taken to get away from the absolute liability that resulted when a person or his animals damaged another: the moral idea developed that liability should be based on fault as a substitute for a penalty exacted to avoid vengeance. Along with this moral awakening came another important social gain. Society was no less affected by negligence than by injury caused by willful aggression. Others should not be subjected to unreasonable risk or injury through want of due care. Fault could include both intentional aggression and negligence. Moral responsibility became legal liability.

We find this first recognized in the ancient culture of Babylon.² Of more modern influence, the early Roman law, well before the time

² In *Babylonian Law*, Vol. I, Driver & Miles ask: "Is not the ancient punishment of one whose carelessly built house collapsed on someone a clear beginning of our law of negligence?"

of Christ,³ included the doctrine of Aquilian *culpa*. Lex Aquila provided for damages done wrongfully, a juristic equitable development covering cases of fault which was not intentional aggression. It became modern Roman law in the Code Napoleon: "Any act whatever done by a man which causes damage to another obliges him by whose fault the damage was caused to repair it."

In the common law of the English speaking peoples, progress was much slower. Absolute liability for injury to person or property resisted progress into the seventeenth century. However, toward the end of the sixteenth century, the theory of justice was gaining. In the Lord Cromwell case,⁴ Coke tells us that the King's Bench held that a statute was against common right and reason and so void, where it provided that "those who do not offend are to be punished." That, of course, is exactly what liability regardless of fault permits — the punishment of one non-offending party for the benefit of another.

Our honored Roscoe Pound, whose fine scholarship, balanced mentality and intellectual honesty has been of great help to me, has summarized the legal liability situation in U. S. law at the end of the first half of the present century thus: "One is liable in damages for (1) intentional aggression upon the personality or substance of another unless he can establish justification or privilege; (2) negligent interference with person or property, i.e., failure to come up to the legal standard of care whereby injury is caused to the person or property of another; and (3) unintended non-negligent interference with person or property of another through failing to restrain or prevent the escape of some thing or agency which one maintains or employs that has a tendency to get out of bounds and do harm."

As Dr. Pound admits, there is still argument as to (1) and (3), but it is my belief that this brief resume is a sound statement of the law as our courts are applying it in the U. S. now. To relate it back to our subject, air carrier liability would come under (2) liability as based upon fault — want of the exercise of due care — unless they can be brought under (3) failure to control an agency that has a tendency to get out of bounds and do harm. As I shall discuss later, the airplane in the hands of the air carrier has proven conclusively that it does not have a tendency to get out of bounds and do harm. Thus, it should not come under (3) but should be held only responsible for injury caused by fault — the failure to exercise due care.

We find liability imposed somewhat differently by the world's two general systems of law: (1) the Code System, and (2) the Common Law System unique to the English speaking nations. Under both systems, the general rule has been that fault is the basis of liability.

The method of proving fault has differed. Most nations using the Code System have imposed presumptive liability upon the common

³ From reference in Monroe's *Ad Legum Aquilian* and Max Radin's *Roman Law* the passage of Lex Aquilia was during the second century B.C.

⁴ 4 Co. 12b, 13a (1578).

(including the air) carrier. This, of course, means that while liability is automatically imposed, it may be avoided by proof that due care has been used — as defined by the laws of the nation involved. I would say from my wide international experience, rather than from actual research, that the majority of nations impose presumptive liability, although the definition of due care varies widely.

A good example of this degree of liability is included in the so-called Warsaw Convention of 1929 which has been accepted by most major nations of the world. The burden of proof is on the carrier to prove due care. Being so near the code requirements of most adherents, many nations have adopted the Warsaw standard of liability for their domestic and non-Warsaw standard to effect uniformity.

The Common Law standard is different. The burden of proving fault is on the claimant. The definition of due care is rigid — the carrier must use the highest degree of care. There is applied the doctrine of *res ipsa loquitur* which creates an inference of fault under certain conditions and assists in proving lack of due care.⁵ But the burden remains on the plaintiff to prove fault. The United Kingdom, one of the common law nations, has adopted the presumptive liability of the Warsaw Convention for its air carriers.⁶

The U. S. laws are based upon the kind of government which we in America have conceived since our independence. They presume a government which maintains peace, order, general security and free opportunity. To us, security has meant protection from the aggression or wrong doing of others. But today in too much of the world security is conceived to include security against one's own fault, improvidence, bad luck and even defects of character.⁷ The idea, called humanitarian, embraces the principle of repairing at the expense of someone else who has the means to pay, all loss to everyone, no matter how caused. It presupposes that every member of society today has the right to expect a full economic and social life, regardless of individual effort and useful production. Such idealists call for the law to guarantee a full economic and social life for every victim of loss, for everyone who for any reason cannot keep pace with the world or attain his expectations. Such liability beyond that for fault, or attached to fault, could not escape ultimately putting an unbearable burden upon enterprise.

In an overemphasis of humanitarian ardor, much of the world is turning to the welfare or service state; legislators and jurists are imposing absolute liability. Idealists sincerely believe they are advocating the welfare of society while the political demagogue appeals to the human greed of the voting public with various "something-for-nothing" schemes. As Marx taught, let the rich pay. Such people call themselves "liberals" (being liberal with other's money) and "progressive"

⁵ Orr, *Airplane Tort Law*, Feb. 1952 *Insurance Law Journal* 120.

⁶ U. K. *Statutory Instruments*, 1952, No. 158; 1952 *US&CAvR* 15.

⁷ Pound, "Law in the Service State," *Proceedings, ABA Ins. Sec.* 1950, p. 33.

in that they advocate change, even though change is not always progress. They overlook the first axiom of life: One can only use what has been created. One regime can steal from the treasure stored up by its predecessors but finally production must equal consumption to maintain existence.

Liability without regard to fault is reaction, pure and simple — back to the days of class privilege and injustice to one class for the benefit of another. But it is gaining, nevertheless, even as the service state is gaining. Because this social movement has gained wide support during the past half century, and particularly during the past quarter century, many sincere students of the law have accepted it as an inevitable trend. It is my humble but earnest belief that this trend should not be accepted but resisted to the utmost. We have seen socialism in its various political forms destroy proud nations and bring others that have been leaders in our modern civilization to the point of impotence. When equal justice is sacrificed for special privilege, no matter how deserving of "human justice" the privileged class may be, progress stops and we sacrifice centuries of real social progress by inevitably reverting to the primitive concept that might makes right. Only the dictator's might can supplant incentive — the right of free men to profit by their own effort — and his only effective instrument is slavery. No matter how popular the trend, if it is against human nature and destructive, thinking men must resist.

The trend of absolute liability is a social trend. It is illustrated by the standard of liability in the Rome Convention, although that Convention has never been accepted by the major nations of the world.

We thus now have three degrees of liability:

1. Liability based solely on fault.
2. Presumed liability.
3. Absolute liability.

Absolute liability is being pressed with regard to air carriers regardless of the most recent action of the Legal Committee of the International Civil Aviation Organization in its suggested revision of the Warsaw Convention and regardless of the proven safety record of the air carriers. The ICAO Legal Committee retained presumptive liability as the standard of liability required by the Warsaw Convention. This recognized fault as the basis of liability. The proven record of the air carrier with respect to liability to all — passenger, cargo and persons and property on the surface is most convincing. Yet proponents of laws and treaties imposing special liability upon aviation constantly cite this record, in their effort to support such laws, either incorrectly or use statements that are true in themselves but which, because they do not tell the whole story, give an incorrect impression to those persons who are uninformed on the subject of aviation — which includes most otherwise well informed lawyers.

I have chosen an article⁸ for analysis published in 1952 which presented a pro and con discussion by an author of unquestioned scholarship, sincerity and integrity but which arrives at a conclusion that I just as sincerely believe to be unwarranted — that legislation imposing special liability is needed for aviation. My views were shared by a group of outstanding practicing attorneys⁹ when the same conclusion was incorporated in a report by that same author in 1941.

Eight pertinent questions are posed and statements — not necessarily accepted as true by that author — are advanced as being perhaps typical of those usually advanced by proponents of legally imposed liability.

Before considering those eight questions, I would like to mention some statements we often hear, entirely true as far as they go, that give a completely false impression that there is great pressure in the U.S.A. for legislation imposing liability upon aviation. There undoubtedly is persistent pressure — from a small but vocal minority including some competent legal scholars — but I believe that we have abundant proof that it is not the desire of the great majority of the American public.

It can be correctly stated that in 1922 a Uniform State Law for Aeronautics prescribed the liability of aviation to persons and property on the ground and that this Act was adopted in whole or in part by more than twenty-four states. That much of the record would indicate that there was a general demand as early as 1922 for imposing liability on aviation. When the whole story is known, however, it proves the exact opposite to be true. In the first place, the law was primarily one to declare state sovereignty over air space and to provide for control of the civil aviation anticipated in the future. Just one lone section — Section 5 — imposed special liability on aviation and that applied only to injury to persons and damage to property on the surface by aircraft in forced landings. Secondly, the majority of the states repudiated the absolute liability section by never passing it originally and all but ten that originally passed it have repealed or amended that section to discontinue the absolute liability. An aviation industry has developed and proved that such discrimination against it was unjust. An overwhelming majority of the United States

⁸ Sweeney — Is Special Aviation Liability Legislation Essential? 19. *Journal of Air Law and Commerce*, 166; 317.

⁹ Report of Committee on Aeronautical Law to the 1942 meeting N. Y. State Bar.

"The proposed federal legislation rests upon the asserted premise that the common law rules of liability have operated unsatisfactorily and unjustly as between operators by air on the one hand, and passengers on the other. The premise has not been established in the Sweeney Report which does not contain facts, statistics or cited cases to sustain the assertion. Considering the success or failure of the common law rules of liability by examination of the reported cases over the last thirteen years, there is little, if any, evidence to indicate that substantial injustice has been done as between operators by air and the travelling or general public. There is no reported aviation decision where the common law rules have been judicially condemned as insufficient or inadequate to accomplish justice between the parties; on the other hand, and even in cases involving the difficult question of rights in air space, the courts seem to have found the principles of common law to have sufficient flexibility to work out an equitable solution to the particular problem." Reaffirmed by same Committee in 1952.

have thus repudiated absolute liability even to persons and property on the surface.

The fact is often correctly cited that in 1938 — before there was an aviation industry of consequence (the airlines were then just reaching the one million passengers a year mark) the National Conference of Commissioners on Uniform State Laws considered promulgating to the states a model code called the Uniform State Liability Act. This code incorporated the principle of absolute liability. This is supposed to indicate that there was popular pressure for such legislation. The facts are that it produced nationwide opposition — within and outside the then infant aviation industry — so great that the newly created Civil Aeronautics Authority asked the Commissioners to delay recommending the model code to the states pending federal study. I was present at the meeting when this was done.

The Authority (changed in 1940 to the Civil Aeronautics Board) delegated the study to its legal staff and one of its staff members made a voluminous and most scholarly report, a copy of which was widely distributed in 1941, which recommended federal legislation. The report was never adopted or approved by the Authority and neither the Authority nor its successor, the CAB, has in the intervening thirteen years officially recommended the legislation recommended in the said study. This lack of action certainly indicates that the Board has not felt that there was popular pressure for such legislation. The matter has not been left in doubt, however. Bills were introduced in several different Congresses imposing liability on the airlines, none of which passed. It is therefore clearly evident that, instead of there being popular pressure for such legislation, such pressure is against it.

Some years later, when the CAB had done nothing about their study, the Commissioners' Aeronautical Code Committee revived a similar code but the Commissioners on Uniform State Laws refused to adopt the code at all at their meeting in Seattle, Washington in 1948. Apparently, they had by now plenty of proof of its undesirability and unpopularity. If there was any implication of pressure for legislation imposing liability on aviation in the Commissioners' 1938 action — which I am satisfied there was not — they certainly set the record straight after the air carrier had proved the injustice of such discrimination by actual performance.

Eight questions are posed in considering whether special liability legislation for aviation is needed and statements, pro and con, are advanced for consideration. I have attempted to supply correct and up-to-date data to correct erroneous statements and implications which are often advanced by proponents of imposed liability and too often accepted by persons uninformed with respect to aviation.

1. Do Accidents Occur More Frequently in Air Transportation than in Other Forms of Transportation?

The statement is often made that more people are killed per passenger mile on airplanes than on railways or buses. Since the figures are not given, we are apparently supposed to infer that the difference is so great as to demand special liability legislation. While it is true that more people are killed per passenger mile on airplanes, the difference is so slight and the air carrier experience so good that the implication that a more drastic liability should therefore be imposed on the air carrier is not justified. U. S. railways, buses and air carriers have all recently had less than one fatality for each one hundred million passenger miles. In 1952 and 1953 domestic airlines had a fatality rate of 0.4 and 0.6 per one hundred million miles, and the average for the past seven years has been little over one fatality per 100 million. That is equivalent to flying around the earth some 4,000 times. Certainly, such a record does not justify special legislation.

It is generally and quite correctly admitted that non-fatal injury is much higher on surface carriers than air carriers. But another incorrect statement that is accepted by the uninformed general public and has adversely prejudiced their conclusions as to aviation liability is too often heard: that in most major airline accidents all of the occupants of the plane have been killed outright. That statement is incorrect now and has been so for a long time. The only way it could be true would be to classify as a major accident only those in which all of the occupants had been killed. The truth is that a very small percentage of passengers are killed in serious aircraft accidents. Considering only accidents so serious as to be classified by the CAB as destruction or substantial damage to the aircraft involved or death of one or more persons aboard, a study of all thirty seven accidents from December, 1946 to May, 1948 reveals that only 8% of the passengers involved were seriously injured or killed. That was typical. For instance, my study of the most recent figures available¹⁰ reveals that out of 760 passengers aboard in all 30 such accidents in 1952, only 46 persons were killed — 6%. In the same 30 accidents, only 15% were either killed or seriously injured. Eliminating accidents in which the airplane was substantially damaged and counting only accidents in which the airplane was destroyed or one or more persons aboard killed — which should be “major” enough for anyone — only slightly over 11% were killed. To say that all passengers aboard in major accidents are killed is cruelly unfair to aviation in a consideration of liability. It has no foundation whatever in fact.

Since even proponents of imposed liability have to admit that injury to persons on the surface is a rarity, it is difficult to understand the arbitrary injustice of imposing absolute liability on aviation in connection with “innocent” third parties and their property on the

¹⁰ CAB Resume of Air Carrier Accidents, May 15, 1953.

ground — as is done by the proposed Rome Convention and its revision. To merely say that such injury is a rarity is a bit too conservative to adequately depict the true situation. Here are the facts:

Over 16,000,000 take-offs and landings were made in the U.S. during 1951 without even one fatality to persons on the surface. The accidents near the Newark, New Jersey airport aroused much interest. Millions upon millions of take-offs and landings had been made at the Newark airport but Newark had an unblemished safety record for twenty years! And it should be remembered that nearly a third of all plane movements in the N.J.-N.Y. metropolitan area were handled at Newark — some 1,355,000 passengers and 110,000,000 pounds of airmail and cargo in 1951 alone.¹¹

The Civil Aeronautics Board developed statistics on all air carrier accidents which involved fatalities to persons on the ground in the whole United States from March, 1946 to March 7, 1953 — six years. There were only six such accidents on that list, including the Elizabeth accidents, and there were only four more such accidents in which persons on the ground were non-fatally injured. In the next place, the death toll, as deplorable as any death is, was comparatively small. In the Elizabeth-Newark area, there were only twelve persons on the ground killed in those Elizabeth crashes, although the propagandists always added the persons on the plane to make the list more impressive and to create the erroneous impression, which many have, that many persons on the ground were killed. Compare these twelve deaths with 550 persons on the ground — pedestrians — killed by automobiles in the Newark-Elizabeth area just since 1941¹² — 550 persons on the ground killed by automobiles while only a dozen were killed by landing or departing airplanes from busy Newark Airport in twice that time. Only 15 persons on the ground have been killed (the Elizabeth dozen and three killed in the Jamaica, New York accident) in the greater New York area in the last ten years, whereas 5,865 pedestrians have been killed in that area by automobiles.¹³ I mentioned above six accidents in the whole United States in six years. Only 21 persons on the ground were killed in those six accidents. In the six years (1945-1950) 60,600 pedestrians were killed by automobiles.¹⁴ The point at issue is that the airplane is being called ultra hazardous when the automobile, which is not so held¹⁵ is taking some 3,000 times more lives of third parties on the surface.¹⁶

There are more facts from the authoritative report of the General Doolittle Committee to the President:¹⁷ "Even bicycles kill more innocent bystanders annually than aeroplanes." As a matter of fact, seventeen were killed by bicycles alone in 1949 — more than airlines

¹¹ Rickenbacker before N. J. Legislative Comm., March 21, 1952.

¹² National Safety Council.

¹³ Greater New York Safety Council.

¹⁴ Note 12 *supra*.

¹⁵ Except in Florida.

¹⁶ 21 to 60,600.

¹⁷ Sec. 4, Analysis of Risk.

have killed in using Greater New York (including new Jersey) airports in twenty years! Does that sound like the airplane is extra hazardous to "innocent" persons on the ground?

The Doolittle report says further: "In 1946-1951 there were approximately 6,500,000 landings and take-offs by aircraft of scheduled and non-scheduled lines for each crash claiming the lives of people on the ground." Even including the disastrous Elizabeth accidents of 1952, the ratio was only reduced to 4,000,000 to 1. Does that sound like ultra hazard or that it has a tendency to get out of bounds or do harm? I submit that the actual record as given here clearly indicates that to impose special liability legislation on air carriers would be rank injustice.

2. Do an Appreciable Number of Persons Injured by Aircraft Have No Redress at Common Law Because Such Accidents Are Generally Not Due to the Legal Negligence of the Aircraft Operator?

We hear the statement made that many aircraft passengers are not able to recover under common law principles of negligence because many aircraft accidents are the result of *vis major*, unavoidable accident, misconduct of a third person, or undetermined causes. Authority for the statement is seldom given because it is as inaccurate as the statement that all passengers were killed in major accidents. As the lawyer who has directed the handling of more airline death settlements and litigation than any other man in this hemisphere, I can say that failure to recover damages for the reasons given would be a negligible fraction.

Dean John H. Wigmore is quoted as having said that not in 20% of the accidents thus far would it be possible for the plaintiff to prove the cause of the accident. This writer has greatest respect for Professor Wigmore's legal scholarship. He was one of our great legal scholars. However, I have found even under modern conditions the most experienced trial lawyer cannot predict what a jury will or will not find. But Dean Wigmore's statement is utterly worthless today, regardless of what it was worth when he made it. The tools with which the plaintiff now works to prove the cause of accident — and what is more to the point, to prove fault — are different than when Dean Wigmore made his study 17 years ago. There were no exhaustive CAB investigations because neither the CAA nor the CAB was even created then. The Bureau created in 1926 offered no comparable facilities. There were no such procedures as at present for pretrial discovery, etc. There was in fact no aviation industry to speak of, as will be discussed later. There is no industry in which more help is given to the plaintiff than in air carrier litigation.

Very appropriately, since it is equally of no value today, the pure conjecture of the American Law Institute is cited as authority when it opined that aviation was ultra hazardous at about this same time

(1938). The basis upon which that opinion was based has been clearly disproven by the actual record of aviation.

I do not challenge the legal authority of the jurists who constitute the American Law Institute. As lawyers, they speak with authority. I do definitely challenge their fitness as fact finders to reach such a conclusion or that in 1938 they had available sufficient factual data to support such a conclusion. Except to enumerate most of the dangers, these worthy gentlemen had heard about the new art of flying, I recall no factual evidence offered to substantiate their fear. I think it may be assumed that they knew little about aviation themselves and certainly not enough to pronounce such drastic judgment.

The learned jurists apparently recognized this situation, for they based their observation upon "*aviation in its present state of development.*" Such a conclusion is utterly valueless in judging aviation today when aviation has grown from the experimental state of an industry just getting its start to a seasoned and experienced factor in transportation. For instance, in 1938 when the jurists called aviation ultra hazardous, just over one million passengers were carried by U.S. scheduled domestic air carriers—1,197,100 to be exact. The passenger fatality rate was 4.5 per 100 million passenger miles flown. In 1953 over 31 million revenue passengers were carried over 19 billion passenger miles. The domestic passenger fatality rate was 0.6 per 100 million passenger miles flown.¹⁸ In other words, since that pronouncement based upon a situation existing so many years ago, the passenger traffic has increased over 30 times. The utter lack of present value of the statement of the Institute is plainly evident.

It has been published that based upon an official examination of underwriter's claim and settlement records in 1941 (which were this writer's records), that 86.3% of fatal airline claims examined were voluntarily settled for substantial amounts and 85% of non-scheduled commercial fatal passenger claims were similarly settled. I consider that a conservative statement then and now. I submit that the situation today, including the discussion under the next question, indicates clearly that special aviation liability legislation is not indicated because of the inability of the plaintiff to prove legal negligence under common law rules.

3. Do Practical Difficulties Unduly Hinder Production of Legally Competent Evidence to Prove Negligence in Aviation Suits?

It is contended that only a small percentage of death claims reach actual trial and that the reason for this is that it is often impossible to prove that negligence was the proximate cause of the accident.

Such a contention is absolutely unfounded and there could not possibly be authority for such a statement. It is taken from thin air. The fact is that in the great majority of trials, the plaintiff has been

¹⁸ Estimate by Director, CAB Bureau of Safety Investigation, January 14, 1954.

successful. Out of 64 recent cases involving passenger and public claims for injury or death against aeronautical operators examined over a period of the last few years¹⁹ the plaintiff prevailed in 78% of them. It must be remembered that the operators are not always at fault. The real reason for the paucity of litigation is twofold:

1. The airlines are sincerely interested in fair settlements with passengers and the public, and insist that their insurers voluntarily offer fair settlements. It is only where excessive demands are made that the expense and chance of litigation is undertaken.
2. Some plaintiff's lawyers are reluctant to spend sufficient time and energy to properly prepare cases and are most interested in settlement. Such lawyers account for much of the pressure for imposed liability — to avoid the trouble of proving fault — and higher limits — which produce higher contingent fees.

It is a fact that in almost every case, the plaintiff has the advice of the counsel of his own choosing and who are usually of high caliber. Each would undoubtedly sue if he thought there was negligence involved and a fair settlement was not available without suit. I repeat, there is no industry that does as much to assist the plaintiff's lawyer as aviation.

The plaintiff's difficulties are said to be:

1. The aircraft operator, and especially the airline, has control of all records and physical equipment and properties involved. This forces the plaintiff to resort to legal process of discovery in order to determine whether he has cause of action and in order to organize his case.

No such situation exists. The CAB Bureau of Investigation holds public hearings promptly on major air carrier accidents. These hearings are not only held by experts but have the power (by subpoena) and the influence to produce and examine lay and professional witnesses under oath that no private investigator would have. The record of this exhaustive inquiry is available to any legitimately interested person immediately or at any later date, and at a nominal prefixed cost per page. While supposedly inadmissible in a lawsuit, the plaintiff's attorney, even when entering the case late, has an unprecedented opportunity to determine whether he has a cause of action. Not only that, but he knows exactly what evidence to admissibly secure under the liberal processes now at his disposal.

2. Whereas the airline is in a position to prepare its defense immediately following a crash, a delay must necessarily follow before the plaintiff obtains counsel and is able to organize his suit. As a result, essential physical evidence frequently is handled or moved so as to be difficult or expensive for plaintiff to examine.

¹⁹ CCH Vol. 3 Avi.

The above discussion shows the complete lack of foundation for this contention. There is a complete record by experts of the physical evidence at a fraction of the cost of an on-the-site examination and is available at any time. The plaintiff can know just as much as the defendant in preparing his case.

3. Aircraft crashes usually kill all occupants. There are few "inside" witnesses.

The complete untruth of this contention has been answered. The percentage of survival in serious aircraft accidents is about 90%. Also, the largest verdicts that I recall against air carriers were in cases in which there were no "inside" witnesses since all persons aboard were killed.

4. There are seldom any "outside" witnesses to aircraft accidents, for the reason that the airplanes are not watched by as many pairs of eyes as are the highways. Aircraft accidents occur suddenly, frequently commence above the overcast clouds and in remote areas.

Theorists have the absurd idea that if there are no witnesses, negligence can not be proven. With the records kept in aviation, all of which are made available to legitimately interested parties through governmental accident inquiries, negligence can be proven, if negligence was present, without the assistance of eye-witnesses inside or outside the plane.

Let's take an actual airline catastrophe which occurred on an airline my office represented, but from which all claims are now settled and, therefore, discussion is permissible. On a regularly scheduled trip of a certificated airline, a DC-3 airliner crashed into a mountain some 50 miles from its scheduled destination, instantly killing all on board — both passengers and crew — and the country in which the crash occurred was so wild that there was not a single witness to the accident or the flight before the accident occurred. It took days to find the wreck and when found, it was almost completely demolished by impact and fire.

This is the type of accident that the theoretical lawyer feels is hopeless, either as to proving negligence or defending a suit in which the doctrine of *res ipsa loquitur* is applied. Such a conclusion is completely unjustified. The fact is that volumes of factual evidence were available in that case as is usually true in any airline catastrophe. The reason is that more complete records are kept in airline operation than perhaps in any industry. There are complete records of past performance of the aircraft and engines. There is a complete record of all inspections, repairs and overhauls. There is a complete record of the training and experience as well as the physical condition of the crew. There is a complete record of the loading and dispatching of the aircraft, of the weather before and after the flight was dispatched, with the plan of flight and all radio conversations during airport control and en

route. There is a complete record of the examination of the accident site and of the wreckage by experts. Furthermore, an exhaustive public investigation — with both the hearing and a transcript of the testimony available to plaintiff and defendant alike — brings out all technical and eye-witness evidence far better than any private investigation, since the Civil Aeronautics Board has the power of subpoena. In what other industry is so much done for the claimant and his attorney?

In the illustration mentioned, the CAB published, among other findings of fact, the following:

- “(4) All radio range and air navigation facilities were operating normally with the exception of the Newhall radio range station which was inoperative.
- “(5) Although the Newhall radio range was inoperative, adequate radio facilities were available for instrument flight from Las Vegas to Burbank.
- “(6) Although the flight had reported no difficulty up to the time of the last radio contact at 0337, static conditions and transmissions of other flights on the company radio frequency made the communications of Flight 23 difficult.
- “(7) The flight time from 0320 until 0337 was a period of an unusual amount of radio communication.
- “(9) Other flights had been able to navigate safely through and about the area of the accident.
- “(10) The position report ‘over Newhall’ was in error.
- “(11) The let-down was started without a positive check on the position.”

“Probable Cause: The Board determines that the probable cause of this accident was the action of the pilot in making an instrument let-down without previously establishing a positive radio fix. This action was aggravated by conditions of severe static, wind in excess of anticipated velocities, preoccupation with an unusual amount of radio conversation, and the inoperative Newhall radio range.”

What more could any plaintiff want upon which to base a cause of action and as leads to evidence to prove negligence? The amount of evidence available is usually limited only by the zeal and intelligence of the lawyer. Of course, some of our brethern do not want to have to use either zeal or intelligence. They do not want both parties to have a fair hearing as provided by our established law. They want liability arbitrarily imposed on the airline, so that all they have to do is thumb a code, like looking up a telephone number, to find out what is due and then collect.

5. Aircraft operation and navigation is highly technical and the testimony of lay witnesses, when available, is generally indefinite and of little use.

To the contrary, the testimony of lay witnesses, although not always essential to proving negligence, has proven most helpful in many cases

even though they know nothing of aviation. The largest verdicts in aviation trials have been largely based on the testimony of such lay witnesses.

6. All physical evidence of what occurred on an aircraft at the time of and immediately prior to most serious accidents is usually demolished by the crash, consumed by fire, and occasionally lost under water.

Regardless of the difficulty dreamed up by the theoretical advocates of absolute or special liability to influence the uninformed, the probable cause is determined in most cases — probably in more cases than on the highways where there are supposed to be so many “eyes.” This is true even in cases where the plane was demolished in the crash, consumed by fire or lost under water. As a matter of fact, one of these conditions is usually present and with the probable cause pointed out, sufficient evidence to prove negligence should be available, if there was negligence. That is the reason that about seven out of eight claims are settled voluntarily and, even in the few cases that go to trial, the plaintiff prevails in more than three out of four instances.

I examined all CAB accident reports from December 30, 1946 to May, 1948 (the date of my examination). There were 37 reports, 28 from certificated airlines and 9 from uncertificated airlines.²⁰ In only one case out of the 37 did the Board fail to establish the probable cause of the accident and in only 5 out of the 37 did the CAB fail to charge the accident to the fault of the operator. I have not had occasion to repeat the study but have read all reports and believe that both the probable cause is determined and the cause attributed to operational fault in almost all of the cases.

7. The track followed by an aircraft is traced in the sky and cannot be reconstructed as easily as the course of an object on a highway. This makes it difficult for the plaintiff to prove what happened to an aircraft immediately preceding a crash.

I have personally directed the settlement or litigation of a number of collision cases and recall no case in which difficulty in establishing the course of the planes interfered with a clear understanding of what happened. I recall two fairly recent cases under my direction in which even the defendant won because the path of colliding planes could be fixed with convincing exactness.

The conclusion that the plaintiff's difficulties in securing competent evidence are both real and substantial does not appear to be supported by the unprecedented assistance available to the plaintiff since the CAB and revised court rules have become established. Naturally, the difficulties could be eliminated by remedial legislation. No one doubts that to impose liability would lessen the burden of proving negligence in direct ratio to the liability imposed. The question is

²⁰ Orr, *Proceedings of ABA Section of Insurance Law*, 1948, p. 152.

whether it would be just to do so when there is in truth no justification for such discriminatory action.

4. Do Administrative Difficulties in the Common Law System of Liability—Expense, Delay, and Uncertainty of Application of Common Law Principles and Defenses—Work Undue Hardship Upon Plaintiffs in Aviation Cases?

The question as to whether the remedial legislation proponents of imposed liability suggest would work a hardship on the *defendant* does not appear to enter into the consideration. Apparently, the plaintiff only is to be considered. According to the law established in the U.S.A. — and the law of equal justice — no one is guilty of wrong until so proven. Certainly nothing in the usual contentions we have discussed justifies discrimination against the air carrier. He is a useful member of society performing a service in the public interest, according to Congress and the Supreme Court. Every modern consideration confirms that the plaintiff is no more at a disadvantage in a suit involving aviation than in any other industry. In justice, the carrier should assume the burden of using the highest degree of care. But in equal justice, the person who chooses to use those services should assume those risks that are beyond the bounds of due care. Even so-called “innocent” parties on the surface must assume the dangers incident to modern civilization that are not the fault of someone else. If lightning strikes and burns a farmer’s barn, killing his livestock — or his child contracts a fatal malady at school — that is a risk of living that everyone must assume. Should the school insure the child against contracting disease? Why in justice should he be insured if an instrumentality of modern public service does him damage without fault?

5. Does the Existing Diversity of Liability Standards Among the Several States Hinder the Development of Aviation?

The development of aviation in the years that have intervened since the Uniform State Liability Act was considered in 1938 has answered that question. Passengers have increased from about 1 million to 31 million in the U.S.A. Our airlines carry twice as many passengers as all the airlines of the free world combined although diversity of liability standards has continued. Certainly, there is some diversity in liability and of limit recoverable in our several states. Our form of government is set up that way — a federation of sovereign states. But there is no conflict. While it may be a burden to tax a plaintiff’s lawyer with any exertion, the laws of every state are available in any good library in every other state. Plaintiffs have prevailed and claims have been promptly and fairly handled. History, not theory, has proven that diversity of liability standards has neither hindered the development of aviation nor the prompt and fair settlement of claims growing out of air carrier operation.

6. Does the Present Lack of a Limit Upon the Amount Recoverable Under the Common Law Constitute a Catastrophe Hazard Which Creates a Deterrent to the Development of Civil Aviation?

The development of Civil Aviation in the U.S.A. has answered that question in the negative. There have been a few high settlements and high verdicts in aviation as there have been with any other common carrier but the average remains in fair comparison and no scheduled air carrier has yet failed to fulfill its liability obligations. Imposed absolute liability, however, would completely change this situation.

7. Is There a Public Need for Compulsory Aviation Liability or Accident Insurance?

The statement is advanced that persons injured in aircraft accidents seldom recover adequate compensation if the aircraft operation does not carry liability insurance. This is nothing but purest speculation since there are no reliable statistics on the subject that I know of. However, I have been intimately connected with the operation of aircraft and airports for nearly thirty years, including the operation of the largest civil airport in the world for ten years. I know of no legitimate claims that were not paid. Certainly it has not been the rule.

The question of compulsory insurance is not as simple as those only interested in the payment of damages for the plaintiff seem to think. It is a complicated question but one that has been answered with overwhelming finality in the case of automobiles in the U.S. — a situation involving far more claims. That answer is that every state in the U.S. and every province in Canada has studied this problem and there is still, at this writing, only one state (Massachusetts) that imposes compulsory insurance on automobile owners. The Governor of that state said in 1953: "The operation of our compulsory automobile insurance law has been a source of constant vexation to the people of the commonwealth . . ." C. F. J. Harrington, former Commissioner of Insurance (Massachusetts) said in 1954 that there has been continued dissatisfaction with that law. In 1954 alone, for instance, there are 70 bills on the subject. "The experience in Massachusetts over 27 years testifies to the fact that once a compulsory automobile insurance law is enacted it is difficult, if not impossible, to repeal even though a more satisfactory substitute may be offered."

This paper deals with air carriers and certainly there is no certificated air carrier which is not adequately insured and there is no record of their failure to pay legitimate claims.

The Warsaw Convention has been in effect for more than twenty years in most principal nations of the world. It does not compel insurance. There is no record of failure to pay legitimate claims.

8. Would a System of Absolute Limited Liability, Similar to Workmen's Compensation, Be a Fairer Method of Adjusting Aviation Losses Than the Present Common Law System?

Proponents of such laws seem agreed that enactment of legislation applicable to aviation in line with the social philosophy of Workmen's Compensation laws must be premised upon the conviction that the traditional common law system of liability based upon fault is not adaptable to aviation.

Such a conviction should be based upon the proven record that (1) claimants have been unable to enforce legitimate claims without litigation, and (2) claimants are not able to successfully prosecute litigation when necessary to enforce said claims. The record of aviation is quite to the contrary.

1. After representatives of the CAB legal staff had made an examination of the underwriter's records of claim handling, they reported in 1941 that the underwriters have not attempted to take advantage of the alleged uncertainty and confusion in the law to affect unreasonably low settlements but that, on the contrary, they have made substantial settlements of most claims and have been fair with each individual claimant." I sincerely believe that such fine commendation is still merited in 1954.
2. Previous discussions herein should have left no doubt that the plaintiff has not only had proven success in prevailing in litigation, but more is done to help him do so than in any other industry.

The truth is that informed opponents know perfectly well that claims against air carriers present no more problems because of basing liability on fault than is the case in any other form of transportation. They believe — and say so very frankly — that "rules which base liability on fault are not particularly well *adapted to any modern form of transportation.*" Regardless of such overwhelming proof as is presented in this discussion with respect to aviation — and a convincing record can be shown as to other forms of transportation — proponents of imposed liability have published such a statement as "in an alarming percentage of accidents the victim fails to recover what he should and in a few cases he receives more" In other words, they want to reform the whole system of law as developed over the centuries. It is all wrong. Our modern legal reformers know much more than the collective wisdom of the ages.

The attorneys who have represented these claimants and knew the circumstances of each case apparently did not know what was right and fair. "An alarming percentage fails to recover what they should." The airline's representative also appears not to know what is right because in a few cases he pays more than he should. A procedure is therefore suggested similar to the social philosophy of Workmen's

Compensation laws, whereby absolute liability is imposed and damages paid in accordance with a set scale of benefits. Of course, this would to a great extent do away with the necessity of the plaintiff having an attorney or the courts determining either liability or damages. This would be in the hands of an agency or bureau, staffed by political appointment and subject to political pressure. But that is exactly where the regimenting of liability must necessarily lead. Unless and until it is proven by facts, not sweeping general statements, that our judicial process has completely failed, I cannot imagine the legal profession approving a procedure that would surrender the administration of justice to centralized bureaucracy.

I have taken some arguments of persons favoring the legal imposition of liability rather than retaining fault as the basis of liability and tried to expose them to the light of fact and reason. Many of those lawyers are my friends and quite as sincere as I am in advocating our quite different philosophies. I know the subject simply because I have lived with the practical application of the principles upon which we differ and believe I can see ultimate injustice and social retrogression in the suggested reforms that are really the re-establishment of special privilege. The philosophy of the law has been progressive, keeping pace with the best interests of civilization. Let us encourage this sound progress which maintains the balance of justice between all parties holding each accountable for his own fault rather than arbitrarily imposing liability upon one innocent party for the benefit of another who is quite arbitrarily set apart as more deserving.

CONCLUSION

As stated in the beginning, the degree of fault imposed upon the air carrier is basic to his cost of claims and therefore to his liability insurance. Of the three degrees of fault:

Liability Based Solely on Fault will result in lowest claim cost because the carrier or his servant is not always liable. This means that the carrier will escape liability in cases for which he is not responsible because of lack of due care. From the practical angle, it means that claims without merit and excessive claims can be better controlled. The fact that fault has to be proven deters the claimant from presenting claims without merit and encourages the compromise of claims of questionable liability.

Presumed Liability will result in much higher claims costs than if liability is based solely on fault. This is because the burden of proof is transferred to the carrier and, since the proof of due care is almost of necessity factual, there is little doubt that the matter of liability will get to the jury (or judge of facts) unless there is no rebuttal at all. This means that suit will be instituted even in cases without merit (1) in the hope that a sympathetic jury or court will make an award anyway, or (2) for the nuisance value of getting an unmerited settlement from the carrier in order to avoid the cost and chance of litigation.

Absolute Liability places the carrier at the mercy of the claimant and, with due respect to the idealism of sincere reformers, the majority of claimants are not merciful. This degree of liability will increase the cost greatly over even the higher costs of presumed liability. If no reasonable and absolute limit (without escape for any reason) is provided, it could well make air carriers uninsurable through commercial sources and an inexcusable drain upon governmental sureties. Since most plaintiff's lawyers feel that they can get more from a court awarding other people's money than by negotiation on the merits, a great percentage of cases would go to trial, thus further increasing costs. Certainly the number of claims would pyramid as every possible claim would be presented and the possibility of claims is unlimited, as illustrated by the ridiculous claims now being made, for instance, accidentally swallowing chewing gum, etc., etc. The carrier would be the insurer of the public for every injury or damage occasioned by his operation without any control whatever over the damages he has to pay.

I believe the proponents of absolute liability, who have made any effort to think further than the immediate humanitarian result they hope to accomplish, realize that without control this Frankenstein would destroy the industry. Like all socialistic schemes built on special privilege instead of equal justice, the answer could only be bureaucratic dictatorship. Like Workmen's Compensation laws, the feasibility of absolute liability would depend upon control by an administrative bureau.

There is, of course, no similarity according to established standards between the supposedly paternal relationship between master and servant and the relationship between two independent members of society, the public and the carrier who is serving the public. No one familiar with the partisan administration of Workmen's Compensation laws in most states will contend that equal justice is even attempted. The only protections of the employer are the limited schedules of payment and limit of applicability during the time of employment when a paternal protection is assumed. These safeguards are gradually being eliminated with higher limits and by extending the scope of applicability far beyond the time of actual work. Some of this is justified in keeping economic step with the times. Some is the direct result of social reformers and vote hungry politicians. In any event, I do not believe a thinking legal profession would willingly substitute governmental administrative agencies for the legal profession and our established judicial processes. A large part of the legal profession now supporting imposed liability and higher limits would certainly lose much humanitarian enthusiasm at such a prospect.

The degree of liability imposed on the air carrier is not only basic in its relationship to claim cost and therefore to liability insurance, but, of more importance, it is basic to the preservation or loss of equal justice.