Liability of Aircraft Owners and Operators for Ground Injury

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LIABILITY OF AIRCRAFT OWNERS AND OPERATORS FOR GROUND INJURY

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This paper recently brought to its author the Braniff Essay Award in Aviation Law, an annual award in memory of the late Thomas E. Braniff, airline pioneer, established by Roger J. Whiteford and Hubert A. Schneider of the law firm of Whiteford, Hart, Carmody and Wilson, Washington, D. C.

I. INTRODUCTION

AVIATION has developed from an oddity to an industry in the past two score years. During this interval of time it has been definitely established that there are relative rights of aircraft and landowners in the superjacent airspace\(^1\) and that low flights by aircraft may violate a landowner's rights as well as actual contact with the earth's surface.\(^2\) This writing is not concerned with what legal elements constitute a tort or whether or not a particular event caused by an aircraft is a tortious act. The main purpose of this study is to determine the theories of legal liability, and the statutory and common law principles that enter into the judicial determination of the aircraft owner's obligations for injuries and damages caused by this new instrumentality of transportation upon the surface of the earth. This study will encompass only accidents caused by flights over the United States by aircraft owned by citizens of the United States.

In the future, air transportation portends to be a far more influential factor in modern living so that it is logically to be expected that the legal contacts will also multiply. What are the legal obligations of an aircraft owner for injuries that his aircraft has committed upon ground objects and persons? Does his liability change depending upon the state wherein the injury occurred? Further, why should there be a basic difference in law among the various states? With the rapid development in the aviation field these problems should take on ever greater significance; therefore it is important that this subject be investigated.

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\(^1\) J. A. Eubank, *The Right of Air Flight*, 58 Dick. L. Rev. 141 (1954) “Every state in the union by express terms or clear implication has given legal force to the concept of right of flight. Navigation of the airspace is an absolute existing right. The right of flight is an inherent natural right. Aerial navigation is universally recognized and practiced. Its very existence is for the general enrichment of mankind and the development and advancement of civilization.”

II. THE LIABILITY OF AIRCRAFT OWNERS FOR GROUND DAMAGE

The liability for damage to property and for injuries caused by aircraft contact with the earth's surface has been the source of much diverse litigation within the various states. Whether or not the owner of the aircraft has any duty towards the inhabitants on the ground for the damages inflicted by an airplane that he owns, depends upon the theory of liability that is adopted in the particular state where the airplane causes the damage.

There are two major categories into which the liability for surface damage by aircraft is separable; absolute liability and land rules of tort and negligence.

A. Absolute Liability

The theory of absolute liability is founded in the common law and in the statutes.

1. Non-Statutory Liability

The jurisdictions that apply absolute liability without statute use two concepts in holding the aircraft owner absolutely liable. The one concept of absolute liability is under the theory of trespass,\(^3\) the other is under the proposition that air flight is an ultrahazardous activity.\(^4\)

(a) Trespass

Under the theory of trespass the owner is liable because of the doctrine of *respondeat superior*.\(^5\) It is therefore necessary that there be established either a master-servant or a principal-agent relationship between the owner and the pilot.\(^6\) Further, it is necessary that the servant be acting within the scope of his employment at the time the injury occurs, since the doctrine is inapplicable where the injury occurs while a servant is acting outside the legitimate scope of his authority.\(^7\) Non-statutory absolute liability on the basis of an action in trespass will not excuse the pilot, even though it permits the owner to escape absolute liability himself because of the common law defense.\(^8\) The pilot, even though he is without fault, is held strictly liable for the damages resulting from his own trespass. New York is the chief exponent of the theory of absolute liability for damages from trespass without fault. As early as 1822 (the earliest aircraft case in the United


\(^6\) D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D. N.Y. 1954) where the court applied New York law which imposes absolute liability for damages resulting from trespass without fault but held that owner is not liable for negligence of an independent pilot.

\(^7\) Riveer v. Thornton, 202 Okla. 96, 210 P. 2d 366 (1949) where the court held it was a fact for the jury whether the pilot at the time of collision with a tractor on a field was a servant of owner of aircraft acting in scope of employment.

\(^8\) King v. U. S., 178 F. 2d 320 (5th Cir. 1949) where an intoxicated Air Force Cadet took a plane aloft without permission and crashed it into a house. The court held that as the cadet was on a frolic of his own and not acting as a servant, the United States was not liable.
LIABILITY FOR GROUND INJURY

The court required that the pilot of a balloon compensate the owner of land on which the balloon landed causing damage that amounted to fifteen dollars. However, seventy-five dollars in additional damage ensued when the crowd trampled on the grounds, and the pilot was held responsible for all damages that the landowner sustained. New York has not deviated in this rule of absolute liability for trespass since 1822, and although the pilot is always responsible as a matter of law, New York permits the owner to escape liability if he has a common law defense as

“The law of this state does not impose any absolute liability on airplane owners as it does on automobile owners by statute.”

Non-statutory absolute liability under the theory of trespass is therefore not all-embracing and may prevent the plaintiff from reaching the party that can financially satisfy his claim. The owner is much more likely in the normal situation to be in a position to pay a judgment rendered against him than a non-owner pilot.

The concept of absolute liability of owners and operators of aircraft for damages to ground victims resulting from flight has three bases which the common law applies to novel situations.

First, absolute liability is enforced because of the inherently great danger to which innocent parties are exposed because of the nature of the activity. The danger will be great even though the enterprise is conducted with every possible precaution. The reasoning here is that air flights always have a certain element of danger that cannot be eliminated by taking every precaution.

The second basis for requiring absolute liability is the one-sidedness of the benefit from the activity and the one-sidedness in the creation of risks to others. Flying is a hazardous activity that the aircraft owner benefits from or derives a profit from, and there is no gain to the landowner over whose land the airplane flies. Further, the risk to which the landowner is subjected because of the flight over his land is completely caused by the aircraft, there being no defense the person on the ground has to protect either his property or himself if the aircraft were to plunge down from the sky. The utter helplessness of the ground victim in avoiding the accident is a strong reason for adopting absolute liability.

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13 Of course insurance coverage is the usual method that is used to protect both the pilot and the owner. Couch, Cyclopedia of Insurance Law § 5 (1956 Supp.) “Aeroplanes and flying boats have become the subject of insurance in much the same manner as have automobiles. For instance insurance has been written which provides indemnity for damage from ‘collision’ with the earth of any moving or stationary object.”
14 Frosser, Torts § 56 (1941).
15 Ibid.
The third basis for the common law courts to impose absolute liability upon the operator of the aircraft is the ability of the type of enterprise that causes the damage or injury to distribute the loss as part of the costs to those who receive its benefits.\(^\text{16}\) The possibility that the airplanes that one uses for business may trespass on the land of someone else should be taken into consideration in determining the rates to charge. Therefore, the aircraft owner, either by setting up a reserve for such a contingency or by prorating the costs of insurance protection, can prepare himself for such an eventuality. The landowner has no means available for spreading the risk of aircraft damage because, unlike the aircraft owner who derives a profit from the operation, the landowner has no one upon whom he can shift the expense of the aircraft flight because he has no commercial interest in the aircraft venture. Therefore, as a matter of economics, the aircraft owner is in a better position to assume the risks of flights over other people's land.\(^\text{17}\)

In Vold's *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas*, 5 Hast. L. J. 1 (1933), the author presents the argument for absolute liability as falling within the common law analogy concerning the use of the property of another for self-protection. Thus, where the emergency arises, one person may prudently and reasonably use another's property for the purpose of preserving his own much more valuable interest. However, he, of course, having taken the benefit, must compensate for the actual damage caused to the other. This argument covers the case where there is a deliberate landing upon another's property, but there are many situations where there is no weighing of values; where, in fact, the operator has no control over the aircraft. Therefore, the concept of absolute liability based upon the nature of the activity is more workable as it covers all circumstances rather than the narrow limitation of forced landings.

(b) Ultrahazardous Undertaking

The theory that the use of an airplane is an ultrahazardous undertaking is the position taken by the Restatement, Torts Sec. 520 (1938) which defines an activity as ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage.

The Restatement expressly includes aviation within the scope of section 520 because in the comment on Clause (a), it states,

"Aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated,

\(^{16}\) *Ibid.*

\(^{17}\) Prentiss v. National Airlines, 112 F. Supp. 306 (D. N.J. 1953). (Subsequently settled, so that no appeal was taken.)
may crash to the injury of persons, structures and chattels on the
land over which the flight is made."

Comment (g) of section 520 declares that both Clauses (a) and
(b) of the definition must be satisfied. The comment maintains that,
unlike automobiles, aviation fulfills the requirement of Clause (b),
uncommon usage, as well as Clause (a). Aviation, section 520 of the
Restatement declares, has not become either a common or an essential
means of transportation. Automobiles are eliminated from ultrahazard-
ous activity because the use of the automobile has become common-
place and the risk is slight which cannot be eliminated by careful
driving and maintenance.

Restatement, Torts Sec. 519 (1938) makes one who carries on an
ultrahazardous activity liable to another whose person, land, or chattels
he injures through his performance of the ultrahazardous activity.

Although Clause (b) of section 520 is affected by time, as demon-
strated by automobiles being removed from ultrahazardous activity,
jurisdictions that impose absolute liability on the common law do not
consider that air flight (nearly twenty years after the restatement) has
progressed to the point where it is removed from the ultrahazardous
group. This was expressly affirmed in Margosean v. U. S. Airlines,
Inc. In this case, District Judge Byers in 1955 rejected the idea that
the Restatement of Torts, section 520 (b), no longer applies since the
operation of airplanes is now a matter of common usage. Judge Byers
stated:

"It may be fully conceded that many more planes are now oper-
ating than when the text was drawn; if the argument means as I
think it does, that the element of hazard diminishes directly with
the multiplication of air-traffic, it carries its own answer. The more
planes there are in the sky, the more the take-offs and landings, and
therefore the more frequent the exposure to the accidents incident
thereo on the part of the persons and property in the line of pos-
sible misadventure."

It appears that advocates of absolute liability on the basis of ultra-
hazardous activity, although paying lip service to the requirements of
section 520 (b) are in reality disregarding the requirement that the
activity be uncommon and novel. Although the Restatement expressly
states that Clauses (a) and (b) both must be satisfied, the weight of
Clause (a) (the risk of serious harm) is carrying Clause (b) (uncom-
mon usage) along, even though there is no longer in fact the situation
of aviation being an uncommon or unessential means of transportation
today.

18 D'Anna v. U. S., 181 F. 2d 335 (4th Cir. 1950) applying Maryland state law
state law cited the Restatement, Tort § 519,520.
20 Id. at 467.
21 Restatement, Torts (1938).
2. Statutory Liability

The statutory basis for absolute liability is embodied in the Uniform Aeronautics Acts, section five. The Uniform Aeronautics Act was first drafted in 1922 and approved by the National Conference of Commissioners on Uniform State Laws. Twenty-four states have at one time enacted the Uniform Aeronautics Acts. Section five, which declares that an owner is absolutely liable for damage on land, reads as follows:

"The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence . . . ."

The Uniform Aeronautics Act is diametrically opposed to the non-statutory absolute liability by means of trespass. Whereas the owner is absolutely liable in section 5 and the operator is only liable for his own negligence, on the basis of absolute liability for trespass, the operator is always held liable and the owner is not liable when he can avail himself of a common law defense.

The Uniform Aeronautics Act, section 5, however, strips the aircraft owner of all the common law defenses. He is liable even if the accident was due to an act of God, to an unauthorized act of the pilot, or if the airplane was bailed to the use of another. The effect of the statute is to make the infliction of injury or damages by the operation of an airplane of itself a wrongful act giving rise to liability.

(a) Constitutionality of Statutory Absolute Liability

The absolute liability of the aircraft owner under section 5 was attacked as unconstitutional on the grounds that the statute deprived aircraft owners of their property without due process of law contrary to the Fourteenth Amendment of the United States Constitution, and also as violative of the Interstate Commerce clause of the United States Constitution. The occasion for the attack was the New Jersey statute

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23 D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D. N.Y. 1954) where the court held that Connecticut common law was the same as New York and the owner is not liable for injuries sustained by third parties when the airplane crashed while under control of bailee.
24 U. S. v. Praylou, 208 F. 2d 291 (4th Cir. 1953) where the court interpreted South Carolina's statute which was identical to 11 U.L.A. § 5.
25 "... nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ." U. S. Const. Amend. XIV.
26 "The Congress shall have power . . . to regulate commerce . . . among the several States . . . ." U. S. Const. Art. I, § 8.
N.J.S.A. 6:2-7 which adopted section five of the Uniform Aeronautics Act. After a series of disastrous airplane crashes at Elizabeth, New Jersey, the airlines involved attempted to set up a series of defenses covering act of God, lack of negligence of the airlines, and negligence of a third party, i.e., the Federal Civil Aeronautics Authority. Because section 5 of the Uniform Aeronautics Act bars these defenses, the airlines claimed the New Jersey statute was unconstitutional.

(1) Due Process

Absolute statutory liability was upheld as not being a deprivation of the owner’s property without due process of law. The New Jersey court pointed out that the statute does not make the owner absolutely liable for aircraft passengers but only “to persons or property on the land or water beneath.” Further, contributory negligence by the plaintiff will bar recovery. In addition, the pilot or operator of the aircraft, if not the owner or lessee, is not to be held absolutely liable. The court used the analogy of workmen’s compensation statutes in placing the cost of the dangers of the enterprise upon the industry itself, rather than the completely innocent third party, who, unlike the owner or passengers, had no interest in the enterprise.

Absolute liability is recognized today as due process. Liability without fault is not a novelty in the law and statutes imposing liability without fault have been sustained as due process by the United States Supreme Court.

As to whether or not absolute liability, even though valid in general, may be applicable to the field of aviation, the Prentiss case held that the operation of aircraft is an ultrahazardous activity. To prove this the court quoted from comments (b) and (d) of the Restatement of Torts Section 520. As added emphasis, the statistics and statements of the Editor of the Journal of Air Law and Commerce, Professor of Law, Northwestern University, were introduced by the court.

“Persons on the ground (not on a landing area of an established airport) should be compensated for injuries directly attributable to the operation of aircraft, irrespective of the aircraft operators’ negligence. . . . The imposition of absolute liability by legislation under such circumstances involves no departure from law as it is now developing. . . . Important as the continued development of civil aviation is believed to be, no convincing reason has been pre-
sented why it should be subsidized at the expense of the luckless victim on the ground who, without participating in aviation in any way, is injured by an aircraft accident even though not attributable to the fault of the operator."\textsuperscript{85}

The court concluded that because statutory absolute liability does not violate due process and that aviation is within such an ultrahazard class, the legislature therefore has a right to impose absolute tort liability and the statute does not violate the "due process" clause.

(2) Relation to Interstate Commerce

The Uniform Aeronautics Act, Section 5, as reproduced by N.J.S.A. 6:2-7 is not an unreasonable burden upon interstate commerce so as to be unconstitutional. The provisions of the statute in question have a reasonable relation to the public welfare.\textsuperscript{86} Besides, the statutory provisions clearly show that

(a) They do not affect the actual movements of airplanes in interstate commerce.
(b) They do not affect the average airplane, even financially as a tax.
(c) They only affect an airplane owner financially on the occurrence of an accident. Such an accident is not the ordinary result of air travel.
(d) The benefit of the statute does not go to a participant of the air travel but only to those who are, under ordinary circumstances, total strangers to the activity.\textsuperscript{87}

The court determined that the effect of the absolute liability statute was only indirect and casual on interstate commerce. Also the statute is a rational exercise of the police power and there are a host of cases that settle this point.\textsuperscript{88}

B. The Application of Rules Governing Ordinary Land Torts

The states that have neither passed statutory absolute liability legislation nor have created absolute liability by judicial decisions, apply the same rules for tort actions that involve injury to ground inhabitants by airplanes as they would apply in ordinary tort and negligence actions upon the land. By adopting the body of law of torts that have been developed over the centuries to this twentieth century invention, any basis for analogy must be stretched. Airplanes travel in an entirely new medium; aircraft flights involve a three-dimensional concept for which there is no previous comparable phenomenon. The laws of admiralty were suggested and rejected as possible principles to apply

\textsuperscript{85} Is Special Aviation Liability Legislation Necessary? Journal of Air Law and Commerce 167. The author answers the query in the affirmative.
\textsuperscript{86} Prentiss v. National Airlines, supra, at 313.
\textsuperscript{87} Id. at 314.
\textsuperscript{88} 11 Am. Jur., Constitutional Law, § 265, p. 1002.
in aviation because maritime law, dealing with a different medium of travel, is not suitable for air navigation.\(^9\)

1. *Res ipsa loquitur*

Because land rules of ordinary torts are adopted in the majority of jurisdictions, it is obvious that the maxim of *res ipsa loquitur* must of necessity play an important role in the process of recovery. The almost total destruction of the aircraft and death of the airplane's occupants oftentimes prevents proper evaluation of the cause of the disaster.

The doctrine of *res ipsa loquitur* was first stated in the English case of *Scott v. London and St. Katherine Docks Co.*\(^40\) where it was held:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants, that the accident arose from want of care."\(^41\)

The rule is based in part upon the theory that the defendant, having custody and exclusive control of the instrumentality which causes the injury, has the best opportunity of determining the cause of the accident, and that the injured party has no such knowledge and is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence.\(^42\)

The modern trend is to hold the rule of *res ipsa loquitur* applicable to airplane accidents.\(^43\)

To the extent that the doctrine of *res ipsa loquitur* is recognized and applied in jurisdictions in ordinary negligence action, it is applicable in accidents arising out of aviation accidents where the same reasons for the rule are applicable.\(^44\)

In *Kadylak v. O'Brien*\(^45\) an airplane making a forced landing hit and killed a boy. It was held that proof of negligence was required before a recovery could be had for the child's death, but since the instrumentality that produced the injury was under the control and

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\(^41\) *Id.* at 667.


\(^44\) *Res ipsa loquitur* in Aviation Accidents, 6 A.L.R. 2d 528 (1949).

\(^45\) 1941 U. S. Av. R. 8 (W.D. Pa.), unreported elsewhere.
management of the defendant, the defendant should bear the burden of proving his freedom from fault in operating a dangerous agency.

It is necessary, as this case indicates, to prove negligence before the recovery can be permitted.

The doctrine of *res ipsa loquitur* cannot be applied by merely establishing that there was an accident. The doctrine is a rule of circumstantial evidence which permits the inference of negligence to be drawn from the occurrence of an accident upon proof of certain facts.

The cases where the doctrine has been rejected in air crash cases may be classified into three groups: (1) those holding that the evidence fails to show that the aircraft was under the exclusive control of the defendant,\(^46\) (2) those holding that it is not an unusual occurrence for an airplane to crash without the intervention of a human agency,\(^47\) and (3) those holding that experience is not sufficiently uniform to justify a presumption that such accidents do not happen in the absence of negligence.\(^48\)

Actually, those cases where *res ipsa loquitur* has been rejected have not been caused by the failure of the doctrine to operate in air crash cases in general, but because in the particular fact situation one of the essential elements of the *res ipsa loquitur* doctrine was missing.

This requirement that all elements be present was pointed out most emphatically in *Williams v. U. S.*\(^49\) In this case a United States Air Force jet bomber exploded in mid-air. The injuries and damages were caused by the falling of flaming fuel from the exploded airplane. There were no survivors of the jet bomber and plaintiffs, relying solely on the doctrine of *res ipsa loquitur* to sustain their burden of showing negligence on the part of the government, introduced no evidence other than the explosion of the jet bomber in mid-air and the damages that resulted. The court held that it was not enough that the plaintiffs showed that the thing which injured them was within the exclusive control of the defendant.\(^50\) Plaintiffs must also show that the accident would not have occurred in the ordinary course of events if the defendant had exercised due care.\(^51\) Human experience in the particular

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\(^{46}\) Towle v. Phillips, 180 Tenn. 121, 172 S.W. 2d 806 (1943) which was not a case of injury to landowner but for death of passenger in dual control aircraft. It could not be determined who was at the controls.

\(^{47}\) Smith v. Whitney, 223 N. C. 594, 27 S.E. 2d 449 (1943) for passenger injury. Boueineau v. Knoxville, 20 Tenn. App. 404, 99 S.W. 2d 577 (1936) where court said it was duty of plaintiff to point out the negligence upon which they attributed the proximate cause of the injury. Here plaintiffs were suing for injuries and death of passengers in an airplane accident. Herndon v. Gregory, 190 Ark. 707, 81 S.W. 2d 849 (1935), "Practically all cases where the doctrine has been held to apply involve accidents which could not well have occurred without the intervention of man . . . In the case of airplanes it is more probable the accident could occur even if in the ordinary course of things, proper care is used in its control." In this case suit was brought to recover for the death of a guest in an airplane that crashed.

\(^{48}\) Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932), which was a suit by a passenger of an airplane and not by a landowner or a person on the ground.

\(^{49}\) 218 F. 2d 473 (5th Cir. 1955).

\(^{50}\) *Id.* at 476.

\(^{51}\) *Ibid.*
situation is often so uniform and well established that it is not necessary to prove this by extraneous evidence. However, in this particular new situation, the court had no knowledge, judicial or technical, of what might cause a jet airplane to explode in mid-air while in flight. Since there was no evidence introduced by the plaintiffs to show that such an accident could not occur except for negligence, the doctrine of res ipsa loquitur could not be introduced. There must be evidence of negligence before the defendant must be required by the doctrine of res ipsa loquitur to explain why he was not negligent.\(^5\)

In general, therefore, the doctrine of res ipsa loquitur is applicable where the state requires that the ordinary land rules of tort and negligence be adopted to recover damages for injuries resulting from aircraft damages on the ground. In the instances where the doctrine has been rejected, it has been due partially to the degree of development of aviation at the time of making the decision. In other words, the cases are made obsolete by the further technical development and the increased familiarity of the judges with the new invention. Another reason for the rejection in some instances is that the same diversity of judicial opinion along conservative and judicial lines that exists in the application of the doctrine in general is reflected in the application within the same jurisdictions in their treatment of aviation cases also.\(^5\)

The third reason for denying the doctrine is based upon the absence of a reliable background of experience for determining the balance of probabilities, as between negligence and natural hazards, as causative factors.

The first and third reasons are similar in that novelty of air navigation is the underlying cause for the rejection of res ipsa loquitur. As has been demonstrated by the experience of the railroads and automobiles, the attitude of the judiciary toward aviation will follow the same course as it had towards the other inventions. Eventually the only reason for refusing to apply res ipsa loquitur will be where the court would not apply it under the particular circumstances, no matter what the instrumentality that caused the injury.

The importance of the res ipsa loquitur doctrine in the recovery by the plaintiff is shown by a statement in the Journal of Air Law and Commerce\(^5\) quoting Dean John H. Wigmore as having found, after investigation as to aviation accidents, that “not in twenty per cent of the accidents which have thus far occurred would it have been possible for the plaintiff to find and produce provable evidence of the real cause of the accident.”

Shifting the burden upon the defendant to explain the cause of the crash becomes the key to a recovery by the plaintiff in such a situation.

\(^5\) Ibid.
\(^5\) 6 ALR 2d 531 (1949).
\(^5\) Vol. 19 No. 2 p. 168.
2. **Defenses**

The adoption of the same ordinary rules of torts for injury caused by aircraft, as are applicable on land, provides the defendant aircraft owner with the same defenses that are permitted in conventional tort situations. The defendant has a far greater ability to maintain a defense in these jurisdictions than he would have in jurisdictions that enforce absolute liability, because in these jurisdictions the defendant has no defense except contributory negligence by the plaintiff. Negligence does not have to be shown to make the defendant liable for all damages.

(a) **Act of God**

An act of God is a proper defense to an air crash negligence action where the ordinary rules of land torts have been adopted.\(^5\)

In *Johnson v. Western Air Express Corp.*\(^6\) it was held that the disaster occurred because of the unusual forces of nature and that it could not have been reasonably anticipated, guarded against, or resisted. The defendant airline corporation was therefore not responsible. This is in contrast to *Prentiss v. National Airlines*\(^7\) where the court in an absolute liability state would not even entertain the defense of act of God.

(b) **Bailment**

In states where the normal rules applicable for torts govern the liability of owners, lessees, or operators of aircraft, the fact that the owner of the aircraft rented or loaned the aircraft to another does not make the owner liable for injuries in case of bailment where he has not been negligent.\(^8\) Only if the owner was negligent himself or if there was an agency relationship can be held liable for ground damage caused by the pilot.

The most important case on aircraft bailment is *Boyd v. White.*\(^9\) In this case, which arose in a state that applies the same rules of tort for aircraft liability as for ordinary tort actions, the owner leased the airplane to a flying instructor knowing it would be flown by a student pilot. The student pilot and the instructor were held liable for the ground damage caused by the negligent operation of airplane but the court affirmed the nonsuit in favor of the defendant airplane owner. The California statute read:\(^{10}\)

"For damages caused by a forced landing, the owner or lessee of the aircraft or the operator thereof shall be liable, as provided by law."

\(^5\) Note, 83 ALR 358 (1933), supplemented by 99 ALR 190 (1935).

\(^6\) 45 CA 2d 614, 114 p. 2d 688 (1941). This was not a land damage case but was for death of the famous African explorer as a passenger in the crash of a passenger airliner.


\(^8\) Note, ALR 2d 1806 (1949).


There are no other California statutes referring to liability of bailors or owners of planes for forced landings.

The court refused to impose any liability because the owner, once he had leased the plane to the instructor, had no right of control or interest in its use.

Applying the law of bailment the court applied the general law of bailment that "... bailor is not only not absolutely liable for the acts of the bailee, but is not liable for the negligence of the bailee, at least in the absence of knowledge on the part of the bailor that the bailee is incompetent or reckless." 61

The California court refused to adopt the non-statutory absolute liability doctrine because the court opposed the continuance of the viewpoint that aviation is an ultrahazardous activity as expressed in the American Law Institute, Restatement, Torts Sec. 520 (1938). 62

This view of the California court was also adopted in Nebraska where the court declared that an airplane is not an inherently dangerous instrument, even in flight. 63

It will be observed that those states that apply the ordinary rules of land torts to cases involving injury caused by air crashes or forced landings take the attitude that the thesis of the restatement is no longer applicable, i.e., aviation is not in the inherently dangerous instrumentality category.

(c) Agency Relationship

A defense not available to an owner under the absolute liability statute is the lack of an agency relationship. Therefore where the owner can prove that the operator was not performing his agency function there will be no liability under the ordinary rules of tort. 64

"Not only must the pilot of the plane at the time of the injury have been acting for the owner and within the scope of his employment, but the injury must have been the proximate result of the negligence of such pilot." 65

(d) Proximate Cause of the Accident

The defense that the owner or his agents were not the persons responsible for the injury is a defense that is permitted in the ordinary tort liability jurisdictions. The most famous case, a non-aviation case, is Palsgraf v. Long Island R. R. Co. 66 which established that the defendant must be held only for the foreseeable consequences of his own actions. In addition, "proximate cause" gives the defendant the defense

62 Id. "... Properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that in the absence of statute the ordinary rules of negligence control, and the owner (or operator) of an airship is only liable for injury inflicted upon another where such damage is caused by a defect in the plane or its negligent operation."
63 In re Kinsey's Estate, 152 Neb. 95, 103, 40 N.W. 2d 526, 531 (1949).
65 Spartan Aircraft Co. v. Jamison, supra, 1099.
that another actor whom the defendant could not have foreseen or prevented was responsible for the accident. In other words the owner can introduce evidence that another party was primarily responsible for the accident that resulted in the injuries to persons or property on the earth's surface, thereby shifting the responsibility to the actual tortfeasor. The absolute liability statutes, of course, do not provide for any defense other than the contributory negligence of the plaintiff. It then follows that in an action by the injured party, the owner of the aircraft cannot escape liability by this defense in jurisdictions that enforce absolute liability.

III. The Law Applicable to the Situation

A. Choice of Law

The states that apply the absolute liability doctrine and the states that follow the ordinary rules of land torts can arrive at diametrically opposite decisions based upon the same fact situations. This was demonstrated by the analysis of the defenses available to the aircraft owner in the different jurisdictions. The law that is applied to the tort, therefore, becomes of paramount importance in determining whether or not the aircraft owner is liable for injuries sustained by surface property or persons on the ground.

The law governing torts is the law of the place where the injury occurred. This conflict of law rule applies with equal force to damage caused by aircraft as to any other tort.67

The Uniform Aeronautics Act, section 7, provides that "all torts, crimes or other wrongs committed by or to aircraft while in flight over the state shall be governed by the laws of the state and the question whether damage occasioned by or to an aircraft while in flight over the state constitutes a tort, crime, or other wrong by or against the owner of such aircraft shall be determined by the laws of the state that the aircraft was flying over."

The Uniform Aeronautics Act is in agreement with the conflict of laws rule that applies to torts.

The state where the proceedings are brought must follow the law where the tort arose because the liability imposed by either the statute or judicial decisions of the state goes to the substantive rights of the litigants and is not merely a procedural matter.68 That the statutes and judicial decisions affect the substantive right to recover is borne out by the fact that in states that impose absolute liability for ground damage caused by aircraft, the aircraft owner has no defense regardless of negligence. In states that impose the land tort liabilities, where neither the owner nor his agent are negligent, the plaintiff has no cause of action against the owner.

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68 U. S. Const. Art. IV § 1 "Full Faith and Credit Clause."
However, where the action is brought in a jurisdiction other than the one in which the tort was committed, it is necessary to prove the law of the state where the wrong occurred because the court does not necessarily take judicial notice of the foreign law when counsel did not indicate at the trial that some foreign law governed.69

B. Torts by the Federal Government

The United States Government permits suits against itself for ground damage and injury caused by government aircraft under the Federal Tort Claims Act.70 28 USCA Sec. 1346 (b) states that:

"... (district courts) shall have exclusive jurisdiction of civil actions or claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USCA Sec. 2674 states:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The issue has arisen whether the national government could be held liable under state statutes which enacted the Uniform Aeronautics Act because 28 U.S.C.A. Sec. 1346 (b) provides for a remedy where a government employee has committed "a negligent or wrongful act or omission." The Uniform Aeronautics Act provides for absolute liability irrespective of negligence. In U. S. v. Praylou71 the court held that even where the state statutes embody the absolute liability doctrine, the government can be held liable because ... "infliction of injury or damages by the operation of an airplane (is) of itself a wrongful act giving rise to liability."72

The court also stated "... one of the principal purposes of the legislation was to eliminate the necessity for the passage of private acts, which had consumed so much of the time of Congress; and it is not consonant with such purpose that Congress should have intended to exclude from the coverage of the act liability arising from operations of the sort here involved merely because under state law the liability for injury was made absolute and not dependent upon negligence."73

As a further reason that the national government is liable without negligence in states that have applied absolute liability for damage

69 Krasnow v. National Airlines, 228 F. 2d 326, 327 (2nd Cir. 1955).
70 U. S. v. Caidys, 194 F. 2d 762 (10th Cir. 1952).
71 208 F. 2d 291 (4th Cir. 1953).
72 Id. at 293.
73 Id. at 294.
done to surface property and persons by aircraft, the court pointed out
that to hold the government liable in those states only where negligence
was shown, and to hold private individuals to the absolute liability of
the statute would be contrary to the requirements of 28 U.S.C.A. Sec.
2674 that requires the United States to be liable to the same extent as
a private individual under the circumstances.\textsuperscript{74}

Thus governmental liability for damages to surface property or
injuries to persons on the ground is permitted under the same circum-
stances as individual persons are liable, and the law of the state where
the tort occurred governs the liability of the federal government also.

C. Classification of States

1. Six states at the present time have retained the Absolute Liabil-
ity Statute of the Uniform Aeronautics Act which makes the owner and
lessee absolutely liable but makes the pilot only liable for his own
negligence. They are:

- Delaware; Del. Code Ann. tit. 2, Sec. 305 (1953)
- Minnesota; M.S.A. Sec. 360.012 (4)
- New Jersey; N.J.S.A. 6:2-7 (Supp. 1955)
- North Dakota; N.D. Rev. Code, tit. 2, C. 0305
- South Carolina; Code of Laws of South Carolina of 1952 Sec. 2-6
- Tennessee; Williams’ Tenn. Code Ann. Sec. 2720

2. Seven states repealed statutes that incorporated the Absolute
Liability Provision of the Uniform Aeronautical Act.

- Maryland Laws 1949, c. 422 repealed
- Maryland Laws 1927, c. 637
- Nevada Statute 1947, c. 141 repealed
- Nevada Comp. Laws Sec. 279 (1929)
- Rhode Island Acts 1940, c. 851 Sec. 22 repealed
- Rhode Island Acts 1929, c. 1435
- North Carolina Session Laws 1947, c. 1069 s. 3 repealed
- Sessions Laws 1929, c. 190, s. 4
- South Dakota Code Sec. 2.0305 (1952 Supp.) repealed
- South Dakota Session Laws 1925, c. 6
- Vermont Laws 1951, No. 110 repealed
- Vermont Laws 1923 No. 155 Sec. 5
- Wisconsin Statutes Sec. 114.05 (1949) repealed
- Wisconsin Laws 1929, c. 348

These states apparently have considered that aeronautics no longer
fulfills the requirements for absolute liability. Aeronautics has made
tremendous strides in the intervening thirty odd years that these abso-
lute liability statutes were passed. The Restatement, Torts Sec. 520
(1938) requires that the ultrahazardous activity is such that can not
be eliminated by the exercise of the utmost care and is not a matter of
common usage. The elimination of either requirement removes the

\textsuperscript{74} Id. at 295; cf. Indian Towing Co. v. U. S., 350 U. S. 61 (1955) which is not
an aviation case.
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activity from the ultrahazardous category. These states consider aviation has progressed to the point where one or both of these requirements no longer is applicable. The same course of development followed the automobile which the Restatement once classified as ultrahazardous, but through technical improvements and common usage outgrew the classification.

3. Eight states have statutes that apply the ordinary rules of negligence common to land torts:
   - California; West's, Ann. Cal. Codes, Public Utilities, Sec. 21403 (1956)
   - Idaho; Idaho Code Ann. Sec. 21-205 (1948)
   - Missouri; No. Rev. Stat., 305.040 (1955)
   - Pennsylvania; 2 PS Sec. 1469 (1955 Supp.)
   - South Dakota; S.D. Code Sec. 2.0305 (1952)
   - Vermont; Vt. Laws 1951 No. 110

Those states applying the ordinary rules of torts, do not hold the owner absolutely liable unless there is negligence shown that can be imputed to the owner.

4. Twenty-six states have no statutory provisions on the liability of an owner for surface damage and injuries to persons on the ground. They are alphabetically: Alabama, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, New York, North Carolina (by virtue of repealing the statute), Ohio, Oklahoma, Oregon, Texas, Utah, Virginia, Washington, and West Virginia.

In these states the legislature has not passed any laws pertaining to the liability of aircraft owners and therefore the judicial decisions based upon the common law control. This does not prevent inconsistent decisions because the courts then either adopt the absolute liability rules of tort or negligence depending upon whether the court considers the activity ultrahazardous or not.

5. Five states have passed statutes creating rebuttable presumption of liability against the aircraft owner and lessee. They are:
   - Georgia; Ga. code Sec. 11-105 (1933)
   - Maryland, Md. Ann. Code Gen. Laws Art. 1A Sec. 9 (1951)
   - Nevada, Nev. Comp. Laws Sec. 279
   - Rhode Island, R.I. Acts, c. 851, Sec. 3 (1940), and
   - Wisconsin, Wis. Stat. Sec. 114.05 (1949) which, besides creating the rebuttable presumption against the owner, also includes the pilot.

By creating rebuttable presumptions of liability these states have placed the burden upon the owner to establish that neither he nor his agents or employees were negligent. This eases the plaintiff's case as
it is extremely difficult to determine the cause of an aircraft accident when the plane is destroyed and the personnel are killed.

6. Two states impose absolute liability on the owner and lessee in the case of forced landings only. They are:

   Montana, Mont. Rev. Codes Ann. Sec. 1-603 (1947) and

   In these two states the rules of law applicable to ordinary torts on land apply as to other types of crashes and the dropping of objects from planes.

IV. Conclusion

The liability of aircraft owners and operators for surface damage and injury to individuals on the ground is by no means uniform throughout the forty-eight states. The original tendency toward adopting the Uniform Aeronautics Act as proposed by the National Conference of Commissioners on Uniform State Laws has been reversed. Today only six states have retained the section of the Uniform Aeronautics Act that provided for absolute liability, although other sections of the Uniform Aeronautics Act that do not refer to tort liability have been widely adopted. Seven states have repealed the absolute liability section.

The majority of states have no statutory provisions regarding the damage or injury inflicted by aircraft upon the property or inhabitants on the earth below. This leaves the matter up to the state and federal courts within the states to formulate the body of law of aircraft damage to the earth's surface. Unfortunately litigation on the subject is meagre. One reason for this is that many accidents are at airports or desolate locations where no damage is done to ground surface. Another reason is that most of the aircraft cases that do cause damage to land or persons on the ground are settled outside of court so that no judicial decision is recorded. This is in large amount due to the fact that most commercial aircraft owners insure their aircraft so that they look to their insurance companies to pay any damages they cause while operating their airplanes. In addition, commercial aircraft owners prefer their insurance companies to compensate an injured party without litigation because the unfavorable publicity is deleterious to the airlines. The traveling public is more sensitive to aircrashes than to accidents involving any other medium of transportation. Consequently, the desire to avoid harmful public notice is a strong deterrent to litigation.

The same general facts are applied by the courts that hold that there is a non-statutory absolute liability as are applied by the courts that declare that there is no absolute liability. Both maintain that the increased use of aircraft support their different position. Those judges, who deny the aircraft owner any common law defense where his airplane, by crashing or forced landings, has caused injury to ground inhabitants or property, state that the increased use of aircraft intensifies the problem of air crashes. The judges who refuse to recognize
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absolute liability under the same circumstances state that the increased use of aircraft removes aircraft from the category of ultrahazardous activity.

Aviation is no longer ultrahazardous because neither of the two concurrent requirements as stated in the Restatement of Torts for being in this classification is any longer valid, i.e., there is no risk of serious harm which cannot be eliminated by the exercise of the utmost care and airplane flights are now a matter of common usage. The Restatement of Torts, sec. 520, comment (g) provides that if either of the two requirements for ultrahazardous activity has been eliminated by progress, then the absolute liability of ultrahazardous activities should no longer be imposed.

Despite the consideration of whether or not aircraft operation is an ultra-hazardous activity, the application of absolute liability, either statutory or non-statutory for damage to land or injury to persons on the ground, has more of the elements of justice than do the ordinary rules of negligence.

Where either of two innocent parties must suffer, the airplane owner or the landowner or individual upon the ground, there are more social-economic reasons for holding the airplane owner liable for the aircraft damage than to leave the surface inhabitant remediless in some situations. The aircraft owner set the stage for the tort by the acquisition of the aircraft. The person on the surface had no relationship with the aircraft until the aircraft caused the tort. It was therefore not reasonable to expect him to take any measures to protect himself. On the other hand the aircraft owner either derives pleasure if he is a private plane owner, or else uses his aircraft for commercial gain if he is a commercial airline operator. It is within his power to protect himself either by insurance or by spreading the risk of possible accidents by prorating the cost among all the shippers and passengers that use his services. In that way, similar to workmen's compensation laws in that the damages, regardless of negligence, are reflected in the economic structure of the industry, the aircraft owner will bear the full responsibility for all damages committed upon the earth's surface.

Another factor that should not be overlooked in favor of uniform laws throughout the states on tort liability of aircraft owners is the tremendous speeds at which advanced aircraft travel. Progress in aircraft propulsion has been spectacular. It is incongruous that a fraction of a second will take an aircraft over a different state and thereby change his liability. Liability should not be predicated on mere chance. An aircraft owner in the future will have little power to determine in what territory his aircraft may inflict damage. Only by uniform laws can the rights and obligations of all parties be determined in advance.