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THE LIABILITY OF AIRPORT PROPRIETORS

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Some two years ago when the writer had the temerity to put his thoughts on air law into type—a temerity which is rapidly evaporating—the suggestion was made that a rich field for litigation was being opened in the matter of the liability of the proprietors of airports and landing fields. Something of the same thing was said in an address to the Public Utility Section of the American Bar Association at its meeting in Memphis last fall.

There is now seen a bit of evidence here and there that the public is beginning to tire of the noise, dust and other disturbances, apparently necessary in the operation of airports, and also to tire of the frequency of injuries occurring to innocent bystanders, and is beginning to inquire whether or not something should be done about it. It is a new venture, this business of being proprietor of an airport, and a venture into which many individuals and private corporations are entering. But more, many more, of the entrants are municipal corporations.

The dangers of litigation to be apprehended may be conveniently summarized under two main headings, and the classification under these headings should be as follows:

A. Liabilities arising on the field:

- (1) Liability to the airport's tenants.
- (2) Liability to the general public, including employees of tenants.
- (3) Liability to passengers and prospective passengers.
- (4) Liability to specially invited invitees.

B. Liabilities off the field:

- (1) Liability for nuisance to surrounding property owners.
- (2) Liability for trespass over surrounding property including actual injury to persons and property.

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It is not suggested that this classification is either complete or perfect. It is offered as simply a working outline for this discussion.

A. LIABILITIES ARISING ON THE FIELD

(1) LIABILITY TO TENANTS

Most airports are constructed with the specific hope that revenue will be realized from the use of the airport and its facilities by tenants. These tenants may well come under two headings, "permanent" tenants and "casual" or "temporary" tenants. The permanent tenant would be the air transport company, which uses the field regularly and uses a hangar, or the flying school with similar equipment, or the manufacturing company, which uses the field for demonstration and experimental purposes. The temporary tenants are those users of airports, whom the airport proprietor impliedly or expressly invites to use the facilities offered, either for a small fee or for the prospective sale of supplies and services. The first class is treated under heading A(1) of the outline, and the latter under heading A(4).

With respect to the tenant who occupies a hangar or building owned by the airport proprietor, the liability, if any, is for the condition of these premises. The measure of this liability would undoubtedly follow the well-known common law rules, which apply to the relationship of landlord and tenant. For the most part, the landlord is not liable for defects in the condition of the premises, and is probably only liable for hidden defects known to the landlord. The rule which applies here is well stated as follows:

"In the absence of a covenant on the part of the landlord to repair, no obligation will be implied to remedy defects in the demised premises existing at the time of the demise, and the landlord is not liable for subsequent injuries resulting from such defects."¹

A different rule applies, however, with respect to portions of the premises which are not *wholly* under the control or in the possession of tenant.

The tenants, for instance, in a large apartment house do not assume any risks arising from defective conditions in lobbies, elevators, court yards, etc. This rule is stated as follows:

"A landlord, who rents out parts of a building to various tenants, reserving the halls, stairways and other approaches for the common

1. 36 Corpus Juris 205; *Doyle v. Union Pac. R. R.*, 147 U. S. 413; *Byers v. Essex Inv. Co.*, 281 Mo. 375.

use of his tenants, is under an implied duty to use reasonable care to keep such places in a reasonably safe condition."²

The above quoted rule, it seems, would apply to the whole area of the landing field, to the runways, to the lights and other signalling devices, and to the public approaches to the field. This rule could also well apply to buildings owned by the airport proprietor and used by all in common for passenger stations, comfort rooms, restaurants and the like.

To summarize, then, we may conclude that an airport proprietor is not liable for injuries to his tenants by reason of defects in hangars and other structures wholly in the possession of the tenant (not including concealed and known defects). But the airport proprietor is liable for injuries resulting to the tenants for defects in those portions of the field which the tenant is expressly or impliedly permitted to use and which are still under the control of the proprietor.

It would seem even that knowledge of defects on the part of the tenants will not relieve the landlord of this liability unless in connection with the facts of the injury, such knowledge might amount to contributory negligence.

This necessarily causes one to ponder seriously over the problems of the hundreds of airports, mostly municipal, existing and being brought into existence throughout the United States, where, perhaps the sole effort made for rendering them safe, in many cases, is to cut down the trees, leaving ditches, washout, stumps and other defects, not to mention unlighted hazards, to bring injury and tragedy to tenants and prospective tenants.

(2) LIABILITY TO THE PUBLIC GENERALLY

In considering the liability of the airport proprietor to the public generally, it is perhaps convenient to subdivide "public" into two subdivisions, not because the care required by the landlord is different, but because the knowledge of the two classes in regard to existing defects is not coextensive. As most of the tenants of airports are apt to be corporations, there is a large class of employees and agents of these tenants to which the same duty is owed as is owed to the public in general, but the knowledge of these employees and agents, of possible dangers, is apt to be on a different scale.

2. 36 Corpus Juris 213; *Roman v. King*, 289 Mo. 641.

It should be stated at the outset that the liability of the airport proprietor to the public does not arise out of the relationship of landlord and tenant. It is based upon an entirely different rule of law. If an employee of a tenant is injured through defective condition of premises controlled by the tenant, the airport proprietor is "out" of it; but if the injury is due to defective condition of premises under the landlord's control, the landlord is decidedly "in"; but his being in is not due to the fact that he is landlord. It is due to his ownership of the property and to the resultant duty owed by him to persons lawfully thereon or therein. This rule is well stated as follows:

"The owner or occupant of premises is required to exercise ordinary care to keep them in a safe condition for the uses, purposes, activities and operations known or contemplated by him."³

As stated before, there is no difference in the duty owed by the landlord to the employees of his tenants, on the one hand, and to the public on the other hand, except as to what may constitute want of ordinary care, and as to what may constitute contributory negligence.

This duty may be broader or narrower as the case may be. The landlord would be bound to anticipate and expect the presence of the employees of the tenants at places and at times where he would not be bound to anticipate the presence of others, and would hence owe a duty to these employees under such circumstances that he might not owe to the general public. Contrary-wise, the public would probably have no knowledge of defective conditions, whereas the employees of the tenants might well have, and hence under the same facts, the employees of the tenant might be guilty of contributory negligence, whereas the public would not be.

What is meant by ordinary care is too well known to merit discussion, but suppositious illustrations in connection with airports might not be amiss. Suppose a hazard exists on the landing field by reason of an open ditch. The existence of this hazard *prima facie* constitutes negligence on the part of the airport proprietor. If an employee of a tenant, say of a flying school, who has used the field daily and who is well aware of the open ditch, and its location, should land in the ditch in broad daylight and was injured, he might well be barred from recovering by his contributory negligence. Such a bar would not operate in the case of a stranger.

3. 45 Corpus Juris 856; *Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

On the other hand, suppose there was a passage way which employees of various tenants used for a specific purpose. The landlord clearly must anticipate such use and must keep it in a reasonably safe condition for such as are expected to use it. It is not so clear that he owes the same duty to the general public, they being not expected, and their presence being unanticipated.

(3) LIABILITY TO PASSENGERS

We now consider the duty of the airport proprietor to the special class of the public, which duty is measured not so much by the fact that he is the proprietor, but by the capacity in which, as a proprietor, he is functioning. In other words, the proprietor of an airport may be purely a private corporation, engaged in private business; or the proprietor might be a corporation, properly classified as a public utility and engaged in a business strongly impressed with a public interest, in short, a common carrier.

The writer, perhaps, has made himself decidedly obnoxious by insisting heretofore on other occasions that certain passenger-carrying air lines are common carriers. This is a matter which has been frequently discussed and on which much, perhaps too much, has been written. There is no intention of devoting space to that discussion here. It is assumed that a corporation engaged in carrying passengers for hire, advertising for the public generally, accepting the public generally at fixed rates, and operating on fixed schedules between fixed termini, is a common carrier.

It is now necessary to go one step further and assert that if a proprietor of an airport which is used even partially as a passenger terminal, is a corporation engaged in carrying passengers for hire, then it is as to persons using or about to use its carrying facilities, a common carrier, to the extent of measuring its degree of liability to these persons while on its airport.⁴

If this statement is correct then the liability of the airport proprietor is differently measured as to its passengers and prospective passengers on the air field, the difference being, as all lawyers know, largely in the burden of proof. This difference is a vast one. The public has the burden of proving that the proprietor of premises failed to exercise ordinary care, which failure resulted in the injury to the public; the common carrier, on the other hand, has the burden of proving that the injury to its passenger was not due to its failure to exercise the highest degree of care.⁵

4. *U. S. V. Sioux City*, 162 Fed. 557, affirmed, 167 Fed. 126.

5. 10 Corpus Juris 1025 and 1029, and cases cited therein.

(4) LIABILITY TO SPECIALLY INVITED INVITEES

We have left for final discussion under this subdivision the question of the liability of the airport proprietor to persons specially invited. As a matter of actual fact, the public is generally invited to most airports. At most airports, either the proprietor or his tenants conduct daily sight seeing and joyriding air trips. The public is certainly invited for this purpose. The public is almost as certainly invited to come and look on.

There is a class of persons, however, who are more definitely invited. These are the persons who are operating planes and whose presence is desired either for the fee which the airport proprietor may obtain for giving temporary housing or garaging, or for the revenue to be realized from supplying his wants.

When many cases are analyzed, it is found that there is no great difference between the measure of care owed by the proprietor of any premises to "invitees" and to "licensees." The public in general are either invitees or licensees. The users of the itinerant planes are certainly invitees.

To these, the airport proprietor owes the duty of exercising ordinary care to keep the landing field and its facilities in a reasonably safe condition for the uses anticipated. Of course, the question of what constitutes "ordinary care" and what is "reasonably safe" is always a question of fact. It appears, however, to the writer that the measure of care owed to these stranger-visitors, expressly invited to land in their planes, is a higher measure of care because they are almost entirely free from the possibility of contributory negligence.

They are in no wise bound with any knowledge of existing defects. They are in no wise bound to know of surrounding flight hazards. Temporary cessation of lights or temporary abandonment of runways are matters not imputable to them. As to these, it certainly behooves the airport proprietor to take every possible care and precaution. This is not intended as stating a new rule of law, but as and for warning of the possibilities of infinitely varying fact situations.

It might be well to point out before leaving this branch of the subject, that the liability of the airport proprietor to the public is not limited to defective conditions of the property. It is broad enough to include liability for failure to take proper and positive precautions to protect people on his property from the dangers of the ordinary use of the airport. In other words, something must

be done. Some care must be exercised to keep people out of harm's way.

A long list of cases of amusement parks, circuses and bathing beaches well illustrate this doctrine. Some of these cases particularly cover the duty of the proprietor to protect spectators from airplanes and balloons.

The case of *Platt v. Erie County Agricultural Society*,⁶ is such a case. There, an airplane exhibition was given and a spectator was injured. The liability of the Erie County Agricultural Society was bottomed on its failure to erect proper barriers to keep spectators sufficiently far away to avoid injuries by the plane.

The case of *Morrison v. Fisher*,⁷ is a similar case, although in that case the Wisconsin State Fair Board was excused from liability on the grounds that it was a governmental agency and not subject to suit. This likewise, however, was a case of an injury to a spectator at an airplane exhibition.

It would seem to follow from a study of this class of cases that it is necessary that an airport proprietor either erect barriers, or otherwise by demarcations or limitations, prevent the public from exposing itself to the danger of airplanes on the field, and the failure to take such precaution would undoubtedly be negligence.

B. LIABILITIES OFF THE FIELD

(1) LIABILITY FOR NUISANCE

An entirely strange vista is opened up when we consider the liability of the airport proprietor for matters and things off the field.

Here the first consideration that offers itself is the question of nuisance. Property owners at and near airports are beginning to complain seriously of the noise, the danger and the fear inspired thereby, as witness the recent case of *Worcester Smith v. New England Aircraft Company*, decided by the Massachusetts Supreme Court, March 4, 1930, and now reported in 170 N. E. 385. Also witness the case of *Swetland v. Curtis* now pending in U. S. Dis. Ct. for Eastern Dis. of Ohio.

In spite of the fact that in the Smith case it was held on the facts, that no nuisance existed, it seems entirely likely that nuisances do exist in some places and will exist as planes increase in number in many more places.

6. 164 App. Div. 99.

7. 160 Wisc. 62.

It cannot be reasonably contended that a constantly recurring noise or a constantly recurring fear—inspiring danger does not amount to a nuisance. Professor Zollman in his book took justifiably a very definite stand on this question:

“That a landowner constantly disturbed and subjected to danger is entitled to compensation cannot admit of a question.”⁸

If on the facts then there is a nuisance, there must be a remedy by abatement or a compensation by damages. The next step is to determine who may bring such a suit and against whom it may be brought. There was for a time a theory that a person who moved next door to a known nuisance would not be heard to complain of its existence. This theory seems to have been exploded by later holdings, with courts giving less and less consideration to the fact that the complaining landowner was a recent arrival in the neighborhood of the nuisance.⁹

In fact, it was held in a recent decision that consent to a nuisance of certain proportions was not a consent to the same nuisance in larger proportions. This was the point in *Ralston v. United Verde Copper Co.*, U. S. Dist. Ct., District of Arizona, decided November 11, 1929. The facts in that case indicated that a landowner, who had not objected to gaseous fumes passing over his property, was entitled to object when the volume thereof was trebled by trebling the output of the plant complained of. Under such a theory, it may well be that a landowner moving to a lot adjoining an airport may be held to consent to whatever nuisance was created by the five or six planes then constituting the entire use of the airport, and still may be in a position to complain of the nuisance created by fifteen or twenty-five planes.

Let us consider, however, the case of the landowner who was there before the creation of the airport. His right to complain of the creation of the nuisance is obvious. To whom will he complain? The creator and perpetrator of the nuisance is undoubtedly the airport proprietor. It is not one plane that makes a nuisance any more than one robin brings spring. It is the gathering, the concourse, the assembly of planes, and the continuity of the noise, that makes the nuisance. Only one person is responsible for *all* of this. It is the airport proprietor, who has established the field, dedicated it to this particular purpose, and invited this particular and multiplied use.

8. Zollman, *Law of the Air*, p. 55.

9. Note, 8 A. L. R. 614, and cases cited therein.

There are many cases which hold that an amusement park in a residential district, or a baseball park, is a nuisance. It is significant to note that these cases which are of infinite variety are never directed against the roller coaster, the ferriswheel, the merry-go-round, the shooting gallery, the baseball players, nor against the applauding patrons of these devices. They are all directed against the owner of the property.¹⁰

Whether the landowner, suffering from a nuisance, would be granted relief by injunction or whether he will be limited to a recovery of damages, is the next question to be considered. It may be necessary in order to give complete relief by injunction, especially by an injunction against an airport proprietor, to stop all flying at a particular airport. The dire effects of this would not, of course, stand in the way of a court doing full equity if the use of the airport was limited solely to private enterprise, as opposed to a public service. If, however, complete relief by injunction requires the cessation of all flying and if a portion of the flying is by common carrier, the court would doubtless invoke the rule that private inconvenience is outweighed by public necessity and would refuse the injunction.¹¹

Indeed the courts hold that not even damages may be recovered by the owner of the property discommoded by the *proper* operation of a business which is a public necessity.¹²

Thus, we see that if the nuisance results partly from the planes of common carriers and partly from the planes of private flyers, all properly operated, and no damages may be had against the common carriers, nor injunction obtained, then all the more reason why the airport proprietor, the author of the "accumulation" of planes, might be held liable in damages for the nuisance.

Queerly enough, this question of nuisance by airports may have two distinct sides to it. It is hard to predict which way a legal cat may jump. The proprietors of airports have recently been considering the problem as to how they may restrict the use of property surrounding them so as not to interfere with the proper functioning of the airport. This is putting the shoe on the other foot.

In fact, a committee has recently been appointed by Colonel Clarence M. Young, Assistant Secretary of Commerce for Aeronautics, for the express purpose of considering the possibility of legislation which will permit the zoning of real estate surrounding

10. *Peden v. Furman University*, Sup. Ct. of S. Car., decided February 19, 1930. Note, 50 L. R. A. (N.S.) 286 and 295, and cases cited therein.

11. *Baltimore & P. R. Ry. v. Fifth Baptist Church*, 108 U. S. 317; L. R. A. 1917C, 346, and notes.

12. Note, 6 A. L. R. 723, and cases cited therein.

airports, so that there may be thereafter no structures which will interfere with the development and use of the port.

On the other hand, as already pointed out, we have the owners of property surrounding the airports complaining that the use of the airport is disturbing their enjoyment of their property. To a person naturally holding a large and hopeful sympathy with the future development of aviation, the prediction as to the course of coming decisions is exceedingly difficult.

(2) LIABILITY FOR TRESPASS

Before concluding these desultory remarks concerning the liability of airports, it is well to consider the cases of actual damage by trespass aside from the question of nuisance.

The recent case of *Worcester Smith v. New England Air-Craft Company* furnished some discussion but unfortunately no real decision of such a situation. The proprietor of the airport was one of the named defendants. The evidence disclosed that no flying was done by any plane owned by the proprietor. The flying was all done by planes owned by the licensees and lessees of the airport proprietor. The court held that certain of these flights, which according to the testimony had taken place at a height of less than 100 feet, over woodland portions of the plaintiff's property, were actual invasions of the plaintiff's property rights. Thus such flights constituted trespasses. The court, however, denied relief by injunction.

One is left with the belief that the defendants would have been liable in damages for these trespasses according to the court's holding, although the damages would necessarily have been slight. Whether the airport proprietor, who did no flying, would have been so held is not so clear. We cannot find any analogy which leads us to believe that trespass may be committed by a tenant who is not an agent. In other words, the airport proprietor is not, with respect to his tenants, bound by any doctrine of respondeat superior, and we might hopefully conclude that an airport proprietor will not be liable for actual trespasses committed by planes, nor for damages to persons, merely in his capacity as proprietor. Agency, or other contractual authority for the flying, would have to be shown.

CONCLUSION

In conclusion, it is necessary to consider two classes of airport proprietors. The one is the private proprietor, whether an individual or a corporation, and the other is the public corporation, the municipality, the county or other form of local government. It

has been stated in many articles and by this writer before that a municipality operating an airport is just as liable for acts of negligence as an individual engaged in the same business; that the operation of an airport is not a governmental function, and in so operating, the city is engaged in a private enterprise. This doctrine is borne out by several cases.¹³

Very recently we have a decision involving an airport directly. This is the case of *City of Mobile v. Lartigue*, decided by the Alabama Court of Appeals on March 25th last. In this case the City of Mobile was the owner of a municipal airport. William Lartigue was the owner and lessee of property adjacent to the airport. In improving the municipal airport, the city engineer caused surface water to drain on to the plaintiff's land in an unlawful manner, to the damage of his crops. Trial in the lower court resulted in a judgment for the plaintiff for \$350.00 damages. From this the city appealed, contending that it was not liable, for the operation of the airport was a "governmental" function.

The court held that while the operation of a municipal airport might indicate a commendable degree of foresight on the part of the city, it was purely a corporate or ministerial act and that while acting in such capacity, it was to be held to the same standard of just dealing prescribed by law for private individuals.

A doctrine similar to this was announced in the case of *Augustine v. Town of Brant*, decided on November 20, 1928, by the Court of Appeals of New York and reported in 163 N. E. 732. In this case a city was held liable for the death by drowning of a patron of the city's public park and bathing beach on the shore of Lake Erie. The negligence consisted in the city's failure to provide proper safeguards for bathers. The court held that the city in conducting this park and bathing beach was not performing a governmental function; that it acted as private individual and was bound by the same rules of law applicable to an individual.

In fact, in this case, the court held that the modern tendency is against the rule of municipal non-liability.

In view of these recent decisions, it would seem that this tendency is correct, and we may safely state that all of the foregoing doctrines announced as governing the liability of airports will apply to municipalities as well as to individuals. Whether these doctrines are correct or not remains to be seen, but their correctness will not depend upon whether the airport is municipally or privately owned.

13. *Kokomo v. Loy*, 185 Ind. 18; *Lambton v. Wood*, 199 Ky. 250; *U. S. Trucking Corp. v. New York*, 14 Fed. (2d) 528.