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## LIMITATIONS OF LIABILITY TO PASSENGERS BY AIR CARRIERS

WILLIAM M. ALLEN\*

The subject with which I shall treat in this article has so often been dealt with in legal periodicals that I should hesitate to advance my views if I did not feel they were decidedly out of line with accepted opinion. The subject has been considered in several articles appearing in this Journal and in each instance the author has concluded, that since a common carrier by land or water cannot limit its liability for its negligent acts, attempts by the regularly operated air carrier to so limit its liability are ineffective. The authors have assumed that the law of common carriers developed around carriers by rail and water is equally applicable to carriers by air.<sup>1</sup> In this article I intend to advance the thought that we are not justified in blindly casting air carriers into exactly the same legal category as the carrier by rail or the carrier by water.<sup>2</sup>

The common law lawyer reasons by analogy; that is the technique of the common law. Present a specific problem to an American or English lawyer and he immediately will attempt to solve it by comparing it with a situation which he believes to be similar and applying to the problem at hand the same rule of law as was applied in the alleged similar situation. Consequently, when the air carrier appeared on the horizon, it was most natural to say that those air carriers having the characteristics of a common carrier were subject to the same conditions and limitations, as defined by law, as other common carriers.

One of the limitations placed by the existing law of common carriers upon the carrier by land or water is that such a carrier cannot relieve itself from liability for injuries to passengers caused by its negligent acts. Since the appearance of the air carrier, it has

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1. See: *Rowan A. Greer* Civil Liability of an Aviator as Carrier of Goods and Passengers. 1 *JOUR. AIR LAW*, 241, and *John K. Edmunds*, Aircraft Passenger Ticket Contracts, 1 *JOUR. AIR LAW*, 321.

2. The legality of a limitation of liability and its advisability from a business standpoint was discussed at the First National Legislative Air Conference. See 1 *JOUR. AIR LAW*, 535-542.

No attempt is made in this article to consider the advisability of a limitation of liability as a matter of business policy. That is a problem for the air transport executive.

been generally assumed that this rule of law is equally applicable to the common carrier by air.<sup>3</sup>

Perhaps we can get the problem more clearly before us by considering a concrete illustration. Mr. Smith of Chicago buys a ticket for New York and soon is winging his way eastward. The pilot, in landing at Cleveland, through negligent operation of his plane, crashes, and Mr. Smith takes his departure from this world. Mr. Smith was traveling by a ticket which contained the following provision:

"LIMITATION OF LIABILITY—This is a Class "A" ticket. The fare under a Class "A" ticket is lower than under a Class "B" ticket. In consideration of said reduced fare the passenger agrees that the Company shall not be liable to said passenger, his heirs or representatives, for injury or damage to said passenger, whether from acts of negligence or otherwise, in an amount in excess of \$25,000."

Now, the deceased Mr. Smith, like many business men whose time is so precious as to justify travel by air, had a large income and his heirs decide that the air transportation company should pay \$150,000 for the negligent acts of the pilot which caused the death of passenger Smith.<sup>4</sup> Should a court give effect to the above provision and limit the liability of the air carrier to \$25,000?

The argument of counsel in behalf of the passenger will not be difficult to follow. He first will assert that the defendant is a common carrier. Does not defendant hold itself out as a carrier for hire? Does it not operate between fixed termini on a fixed schedule? Of course! There is no doubt that defendant is a common carrier. Counsel then will proceed to the next step in his hypothesis, to wit: that, as a matter of law, a common carrier cannot limit its liability arising from its acts of negligence. Counsel will read such a statement from Corpus Juris and from Ruling Case Law. Many cases dealing with carriers by rail will be cited. "The conclusion must follow", says counsel, "that since defendant is

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3. It also appears that some air carriers have attempted to exempt themselves from liability upon the theory that they are private carriers. See ticket provisions quoted *John K. Edmunds*, in *Aircraft Passenger Ticket contracts*, 1 *JOUR. AIR LAW*, 321.

4. In some states in which death statutes create a direct right of action in the heirs against the wrong doer, a limitation of liability is not binding upon the heirs although it would have been binding upon the decedent. See *Early v. Pacific Electric Ry. Co.*, 176 Cal. 79, 167 Pac. 513. Where the death statute is of the "survival" type, i. e., the cause of action in the decedent survives for his heirs, the limitation of liability binds the heirs if it would have been enforceable against the decedent. See: *Gardner v. Beck*, 195 Iowa 62, 189 N. W. 962; *Chicago R. I. & P. Co. v. Young*, 58 Neb. 678, 79 N. W. 556.

a common carrier, its attempt to limit its liability is legally ineffective. The proposed limitation of liability is wholly void".

Counsel is undoubtedly correct in his assertion that the defendant company has all of the characteristics of a common carrier. But, is he justified in assuming that a rule of law which has developed around carriers by rail and water is in all respects applicable to a carrier by air? The writer contends that before our courts are justified in applying the existing law of common carriers to air carriers, they must first determine whether the nature of the transportation justifies the application. When our courts established the rule, that a carrier by rail could not relieve itself of liability to passengers for its negligent acts, there were some very real reasons which caused them to come to that conclusion. In determining whether a carrier by air should be allowed to limit its liability, our courts should again examine into the reasons behind the rule, and decide whether the rule when applied to carriers by air would be supported by those reasons which our courts have given as the basis for the rule.

Why have our courts almost unanimously held that common carriers by rail or water cannot relieve themselves of liability for negligent acts resulting in injuries to their passengers? The case of *New York Central Railroad Co. v. Lockwood*,<sup>5</sup> is recognized as our leading authority upon this subject.<sup>6</sup> In this case the Supreme Court of the United States, speaking through Mr. Justice Bradley, examines into the reasons why a common carrier by rail should not be allowed to exempt itself from liability to a passenger for hire, when the passenger was injured by reason of the negligent acts of the Railroad Company. In this case the plaintiff was injured while traveling on a stock train. He had signed an agreement relieving the Company of all liability for injuries to himself or to his cattle. Justice Bradley, in a lengthy opinion, reviews many of the English and American authorities upon the subject.

The Justice considers in particular the New York cases, where limitations of liability by common carriers have been upheld. The Learned Justice does not content himself with the mere statement that such attempts by common carriers to relieve themselves of liability are void because they are against public policy. On the con-

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5. 17 Wall, 357, 21 L. Ed. 627.

6. The principles enunciated in the *Lockwood* case have been widely followed. In particular see: *President, etc. Bank of Ky. v. Adams Ex. Co.*, 93 U. S. 174, 23 L. Ed. 872. *Hart v. Pennsylvania R. R. Co.* 112 U. S. 331, 28 L. Ed. 717; *Liverpool, etc. Steam Co. v. The Phenix Ins. Co.* 129 U. S. 397, 32 L. Ed. 788.

trary, he carefully examines the reasons underlying the rule. He says, in the first place, that if such exemptions from liability were upheld, it would result in a tendency, upon the part of the carrier, to exercise less care in regard to the safety of its passengers.

"In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust."

Justice Bradley also observes that the carrier and passenger do not stand upon an equal basis; that the prospective passenger must, of necessity, accept such terms as the carrier desires to impose upon him; that since the passenger has no other alternative than to accept the conditions imposed by the carrier, the courts should not allow the imposition of unjust and unfair conditions.

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business."

The court agrees, however, that if the limitation of liability is just and reasonable, such a limitation should be upheld by the Courts.

"It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws, had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence, the exemptions referred to were deemed reasonable and proper to be allowed."

The Court then goes on to say, that, although limitations that are just and reasonable should be upheld, any attempt on the part

of the carrier to exempt itself from liability arising from its negligence is so repugnant to the public good as to be wholly invalid.

"Conceding therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; When they ask to go still further and to be excused for negligence, an excuse so repugnant to the law of their foundation and to the public good, they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity."

In conclusion Justice Bradley summarizes his opinion, as follows:

"The conclusions to which we have come are: First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

"Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

We therefore see that some limitations by a carrier upon its liability may be valid; that the test of determining whether such a limitation is or is not valid is the justness and the reasonableness of the limitation.

The writer quite agrees with Justice Bradley, that the "just and reasonable" test should be applied by our courts in determining the validity of a limitation of liability by a common carrier. He further agrees, that the attempt by the carrier in the *Lockwood* case to wholly exempt itself from liability was "unjust and unreasonable." It is true, that until very recently, carriers by rail had little competition in the carriage on land of goods and passengers. Consequently, if they had been allowed to relieve themselves of liability by contract, the public nevertheless would have been compelled to acquiesce in such an exemption. It would have been a case of either riding or not riding, and very few people could have afforded to forego the advantages of railroad transportation because of such conditions imposed by the railroad company. However, the fact that the ticket provision in the *Lockwood* case was declared invalid does not at all convince me that the limitation in Mr. Smith's ticket as heretofore set forth, also should be held void.

Let us see if the same reasons exist for the imposition of the rule in the case of Mr. Smith as were present in the *Lockwood* case.

In the first place, we should bear in mind that this is not an attempt on the part of the air carrier to exempt itself from liability. Instead, the carrier is simply limiting the amount of its liability, and the limitation proposed is certainly not unreasonably small in amount.

Secondly, the proposed limitation, if upheld, would hardly cause the air carrier to exercise less care and diligence in the carriage of its passengers. Most injuries to aircraft passengers are caused by accidents which also result in serious damage to equipment. We all know that the equipment used by air transportation companies is costly, and for this reason alone the company will use every effort to avoid air accidents. Furthermore, each air accident results in a diminution of public confidence in the carrier and a resultant decrease in the passenger list. In addition, if the limitation is upheld, the liability of the company still may reach \$25,000 and certainly no company is going to incur a liability to that extent if avoidable.

In the third place, the prospective passenger is much more on an equal footing with the air carrier than was the passenger by rail at the time our courts developed the rule against limitations of liability.<sup>7</sup> Regularly operated air transportation companies cover territory which may be reached by other means of transportation. Practically any point upon the regular air routes of this country may be reached by rail or motor. Therefore, the passenger is not at all compelled to travel by air unless he wants to. True, travel by air saves time and it may be imperative for the passenger to save that time. In such an instance, it could be urged that the passenger was compelled to resort to air transportation. For the most part, however, the prospective passenger by air is in a position which enables him to reject a ticket proffered by the air carrier, and choose another means of transportation.

Coming back to the test laid down by Mr. Justice Bradley, is the proposed limitation upon the liability of the air carrier unjust and unreasonable? The passenger is offered a choice of traveling by a ticket containing a limitation of liability, or, of paying a higher fare and traveling without such a limitation. He realizes that there are certain hazards connected with transportation by air, and that air accidents are more apt to be fatal than accidents upon other types of carriers. He knows that once he is in the air his safety is dependent upon one man. He could reach his destination by rail or

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7. The case of *New York Central R. R. Co. v. Lockwood*, *supra*, was decided in 1873.

motor, but a plane will take him there more enjoyably and in less time. He decides that the advantages offered by air travel outweigh the disadvantages.

On the other hand, let us view the situation from the standpoint of the air carrier. It may have pilots and equipment of the highest type, radio communication and weather reporting service, but it has accidents and will continue to have accidents. Some of the mishaps are avoidable; others are not. If the accident is due to the negligence of the carrier, the carrier should be liable in a reasonable amount. Even if the accident is due to an unknown cause, the carrier may be held liable by the application of *res ipsa loquitur*.<sup>8</sup> The carrier realizes a crash may occur, and cause serious or fatal injuries to from one to twenty passengers. In such event it will be faced immediately with a large contingent liability, perhaps in excess of a million dollars. Such a situation would disturb the financial stability of most air carriers and even our largest carriers view with alarm the possibility of such a large contingent liability. They feel, that in order to assure a continuance of their business, they must limit their liability to a known amount and cover that liability by insurance.<sup>9</sup>

In view of the nature of transportation by air, is such a limitation of liability unreasonable and unjust to the passenger? Surely it would not decrease the desire of the carrier to avoid accidents, nor is the limitation forced upon a passenger who must, of necessity, accept it. The passenger may pay more and obtain a ticket without

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8. See, however, the writer's article: *Transportation by Air and the Doctrine of Res Ipsa Loquitur*, *American Bar Journal*, July, 1930.

9. In the case of *Hart v. Pennsylvania R. R. Co.* 112 U. S. 331, 28 L. Ed. 717, the court in sustaining a limitation of liability by a rail carrier for damage to goods said:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

Are not the above principles applicable in the case of the limitation agreed to by passenger Smith? By paying a higher fare he could have secured a ticket without a limitation of liability.



such a limitation, or he may choose other means of travel. There may come a time when air transportation will occupy a position in our economic life similar to the position of the railroad today. By that time the hazards of air travel will be greatly lessened. Under such conditions, our courts could with more justification hold such a limitation of liability unjust and unreasonable. Viewing the situation as it is today, however, with proper emphasis upon the nature of air transportation and the present state of its development, the proposed limitation appears to be anything but unjust and unreasonable.

In the final analysis, however, it is the method of approach to the problem that is of the greatest importance. During the next decade our courts will be called upon to define and fix the rights and duties of the regularly operated air carrier. We all are aware that when a carrier becomes a common carrier, it becomes subject to certain obligations and possessed of certain rights which do not exist in the case of private carriers.<sup>10</sup> These rights and obligations are created by law, to-wit, by our legislative bodies and our courts—particularly the latter. If our courts, in determining the rights and duties of the common carrier by air, reach their conclusions after a careful consideration of the nature of the transportation involved and the relationship between the carrier and the passenger, the air carrier will have little cause for complaint. More specifically, if our courts should decide that the limitation of liability discussed in this article is unjust and unreasonable in view of all the circumstances, the writer, for one, will not feel that the air carrier has been treated unfairly. Quite probably, he will disagree with the decision because the limitation does seem just and reasonable to him. However, if the court decides that in view of all the facts and circumstances of the case, the limitation is unfair to the passenger, he will be compelled to admit that it is a question upon which minds might well differ. As Dean Pound says: "There are no texts defining what is reasonable and what arbitrary and unreasonable. There are no fixed starting points in established legal principles from

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10. "The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is, in any respect, dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please; but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the court thereof; and this is so for the public good." *Railway Co. v. McGown*, 65 Tex. 643.

which to deduce mechanically and infallibly that this is reasonable and that is not. The question must be projected on a background of received ideals, received pictures of American society. In effect it is projected upon a background of the common law ideal as adapted to the new world in our formative era. What fits into, what accords with that picture is held reasonable. What does not is held arbitrary and unreasonable."<sup>11</sup>

On the other hand, if our courts simply say, that since the air carrier is a common carrier, and since the law of common carriers does not allow a limitation of liability arising from negligent acts, and, therefore, that the limitation in question is invalid, then the writer believes that the air carrier will have a very real cause for complaint.

We must not forget that we are dealing with an entirely new type of transportation. In formulating a body of law for the air carrier, our courts should make full use of the principles which have been developed around the carrier by land and water. However, due emphasis must be given to the differences between transportation by land and water and transportation by air. For our courts to intelligently deal with the air carrier, they must not only have an understanding of the principles underlying the existing law of common carriers, but also an appreciation of the nature of air transportation and the problems confronting the air carrier.

"Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."<sup>12</sup>

Does the writer advocate an abandonment of that old favorite *stare decisis*? Does he suggest that the air carrier be given a preferred position in the eyes of the law? His reply most positively is in the negative. His contention, that the "just and reasonable" test should be applied in determining the validity of a limitation of liability, is supported by the existing law of common carriers. A holding, that air carriers might limit their liability in a certain amount, would in no sense be a departure from the principles enunciated in the *Lockwood* case. The test of "reasonableness", so well known in the common law, was designed to provide the necessary flexibility in dealing with changed conditions and new developments.<sup>13</sup> I trust that our courts will make good use of this

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11. *Roscoe Pound*, The New Feudalism, American Bar Journal, September, 1930.

12. *Maitland*, Collected Papers, Vol. III, p. 438.

13. "Law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The social interest in the general

old tool in dealing with a carrier as yet almost unknown to the common law.

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security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles we must seek principles of change no less than principles of stability."

*Pound*, Interpretations of Legal History, page 1.