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Report on the Proposed Uniform Aeronautical Code

REPORT ON THE PROPOSED UNIFORM AERONAUTICAL CODE*

Pursuant to your appointment of July 10, the undersigned committee has studied the "Uniform Aviation Liability Act," the "Uniform Law of Airflight," and the "Uniform Air Jurisdiction Act," as prepared by the Special Committee on Uniform Aeronautical Code at the national conference of Commissioners on Uniform State Laws.

This committee has not had a meeting. A meeting was called for Cleveland September 2nd, but only two of the five members could attend. However, views have been exchanged by correspondence between all of the members of the committee, and the following is our unanimous report:

UNIFORM AVIATION LIABILITY ACT

This is the first of the three proposed uniform codes. The general scheme and plan of this act is to make the "operators" of aircraft absolutely liable for all injuries to passengers and to persons and property on the ground and for loss of or damage to baggage and "personal effects." Passenger and baggage liability is limited to those operators carrying passengers and baggage for hire.

Offsetting this absolute liability is a limitation of the sums recoverable. As a part of the limitation of the sums recoverable is a requirement of liability insurance, or bond, or cash deposit from all operators, sufficient to cover the liabilities imposed by the act.

Behind this scheme and plan of legislation lies the honest belief of the framers that

(a) The present laws on the subject of liability of aviation operators, as developed by the court decisions, are uncertain, conflicting, and unsatisfactory.

(b) It is next to impossible for persons injured, or for the representatives of persons killed, to obtain competent evidence to prove negligence, if any.

(c) For this reason, plaintiffs should not be required to prove negligence or to rebut the evidence of the operators that there was no negligence.

* Report to the President of the National Association of State Aviation Officials, from the Special Study Committee. George B. Logan, Chairman, Howard C. Knotts, Charles L. Morris, Raymond R. Staub, Gill Robb Wilson.

(d) Therefore, the operators should be held absolutely liable.

(e) Hence, the liability should be limited in amount—providing the operator is insured or otherwise insures payment.

(f) It, therefore, should be made unlawful to fly without the required insurance.

With this reasoning, your committee cannot agree. The errors in the reasoning are, in our opinion, and as briefly as possible, as follows:

(a) The present law on the subject of liability, as developed by court decisions, is not uncertain nor conflicting nor unsatisfactory. Approximately one hundred cases (including lower court and appellate court decisions) have been tried arising out of liabilities claimed for injuries in aviation. These cases embraced the entire possible gamut of relationships. They included paid passengers, guest passengers, passengers of common carriers, passengers of private carriers, passengers of non-commercial operators. They included employees on duty and not on duty, persons and property on the ground. They included collisions in the air and collisions between aircraft and other aircraft and objects on the ground.

Practically without exception, the following well-defined rules of law have been applied from precedents in other fields and these ruless are as follows:

(a) That common carriers owe to their passengers the duty of exercising the highest degree of care, but they are not insurers and may successfully defend if not negligent.

(b) Private carriers for hire, as well as operators for pleasure, owe to their passengers, paid or guest, the duty of exercising ordinary care under the circumstances, which is, of course, a high degree of care, but they are not insurers.

(c) The burden is upon the plaintiff to prove a failure to exercise the required degree of care just as it is in all cases arising out of other types of transportation such as trains, buses, taxicabs, automobiles, etc.

(d) The rule of "res ipsa loquitur," a rule of evidence, a presumption of negligence arising from the happening, is being generally and more frequently applied. While the burden remains upon the plaintiff to prove negligence, this rule of evidence requires the defendant to explain or prove that the occurrence was not due to his negligence.

These principles of law, as developed in aviation cases, are

not unsatisfactory. The air operators have not complained of the application of these rules. Nor is there any demand for a change on the part of the air traveling public. A great majority of cases actually tried have resulted in verdicts for the plaintiffs. The law is developing satisfactorily, with uniformity, and with sufficient speed.

We do not agree with the statement that it is "next to impossible" for plaintiffs to prove negligence. It may be difficult to show exactly what happened in the air, but such a showing is not requisite to prove negligence. As said before, in the great majority of cases the plaintiffs have prevailed.

It has been said that an examination of the accident files of the Air Commerce Bureau discloses that in only 20% of the cases would it have been possible for the plaintiff to prove negligence. This, of course, is a conclusion and honestly reached, but we cannot concur in the conclusion.

An examination of the reports of the Secretary of Commerce, as sent out from time to time, discloses the fact that the accident investigation boards, in a vast majority of the cases, have worked out a very clear and reasonable hypothesis as to why the accident happened. Most of the evidence which justifies these hypotheses would be evidence admissible in court and experts are always available to testify as to their opinions arising from the proven facts. In a good many of the few cases lost by the plaintiffs there has been a clear demonstration of both a lack of knowledge of aviation and a lack of aviation legal precedents on the part of plaintiffs' counsel. These results will obtain wherever the plaintiff in any kind of law suit is adequately represented.

We see no reason why an aviation operator should be held absolutely liable. When automobiles were new, (and even now), very few people understood what made them go, back up, get out of control, skid or stop, but it is not necessary to prove these things to win an automobile damage suit. All that is needed to be shown is what happened, not why. An examination of the cases actually tried in aviation cases proves that the same rule is followed in these cases.

As far as the plaintiff being required to rebut the defendant's explanation is concerned, that has always been necessary. If an automobile swerves off the road and injures a person, the driver may still contend that a steering wheel broke and that reasonable

care would not have disclosed the defect. The plaintiff would have to meet this rebuttal evidence.

There appears to have been no great disadvantage to automobile plaintiffs arising out of this rule. In fact, the advantage seems to have been the other way.

Absolute liability for injury to passengers has never been imposed upon operators of steamships, steamboats, railroad trains, street cars, automobile buses, taxicabs, or private automobiles. We are unimpressed by the argument that it should be imposed upon the operators of aircraft.

The offsetting of absolute liability with limitations in amount is not an "even break" for aircraft operators. Our information from aviation insurance companies is that requiring payment to be made in every case of injury or death to paid passengers, and in every case of injury, death or damage to property or persons on the ground, will create a much greater total liability than is now expended in payment of judgments or in settlement of doubtful cases. Besides, the limitation of liability is granted only upon a guarantee of payment—i. e., compulsory insurance or bond or cash deposit. This latter is an evil in itself.

A study of the experience of Massachusetts, the only state which has compulsory automobile liability insurance, discloses that insurance carriers have increased their rates 20%. This rate increase, in turn, is due to greatly increased litigation, an increase in fraudulent and collusive claims, an increase in contempt of automobile traffic laws, and an increased disregard of all the rules of prudent driving.

So much for our general reasons.

We now call your attention to a few specific sections of this Liability Act.

By Section 102, the word "operator" is defined. The registered owner is deemed to be the operator with certain exceptions. One of these exceptions is in the case of a lease or bailment of a plane for more than 14 days. The reason for this limitation of 14 days is exceedingly obscure. It would in effect prevent an air carrier or private operator in need of emergency equipment from renting same from someone else, if it was rented or leased for 14 days or a shorter rental. The registered owner apparently would be liable entirely without negligence and entirely without operation on his part. It is like making the New York Central Railroad liable for a

wreck resulting from the operation of a locomotive borrowed by the Pennsylvania Railroad.

By Section 300, there is set up a limitation for liability for injury or death to paid passengers. These limitations run from $10,000.00 for death to $3,000.00 for the loss of an eye, and all other injuries except death are limited to a maximum of $5,000.00. If there is to be a limitation, we have no objection to these.

On the other hand, by Section 204, there is set up a limitation of liability for injury to persons on the ground and there is only one limitation, to-wit, the maximum of $10,000.00. In other words, as much as $10,000.00 may be recovered, the jury willing for anything from abrasions and nervous shock to death. From our experience in automobile cases we know that broken arms may bring a verdict of $5,000.00 to $7,500.00, and "nervous shock" as much as $10,000.00.

In view of the fact that there is absolute liability on all operators, commercial, private and pleasure, for damages to persons and property on the ground, we cannot understand why there should be greater possible recoveries for injuries in the one case than in the other, particularly in view of the fact that insurance is required against both risks.

The total limitation for damage to persons on the ground varies according to the horsepower and the weight of the plane. This, of course, is a "copy" from the proposed Rome Convention of 1933. This was an ill-fitting compromise, never ratified by the United States. However, under the Rome Convention, the air carrier was not absolutely liable, but could avoid liability if he proved the injured party guilty of negligence. Further, under the Rome Convention, the limitations were removed if insurance was not carried, but under the proposed Uniform Liability Act, the removal of limitations is not the sole penalty for failure to carry insurance. There is, in addition, a criminal penalty for flying without it.

Under Section 206, the procedure under the Liability Act is outlined. The operator is expected to file his own suit within 60 days, naming his passengers (at least the injured ones) and his insurer. Notice of the suit is to be published in at least 2 newspapers in the county. (Missouri, Illinois and other backward states please note.) We would be surprised to find all counties boasting 2 or more newspapers; in fact, we would be surprised to find that all counties boast of even one. If the air operator does not file his own suit within 60 days, then any injured person may file a suit

at any time. Evidently, there is to be no statute of limitation as to the time in which an injured person may remember he was hurt and desire to file his suit.

Section 308 requires every air operator carrying passengers for hire to keep a record of the name and address of each passenger. Clearly, this applies to sight-seeing trips, as well as to the common carrier lines. One wonders just how this would work if applied to sight-seeing buses in Washington, D. C., or other cities, such as the "trips to China Town" in New York and San Francisco. It is a piece of unnecessary hardship to a legitimate industry, but—properly required if the rest of the act is to become law.

Section 401 makes an air carrier absolutely liable for loss to or damage of baggage and "personal effects." This section does not even say that the loss or damage must result from a damage to or a wreck of the aircraft. Apparently, the air carrier is to be liable for the work of a pickpocket, or perhaps, that of a card sharp. We find no other form of transportation has imposed upon it an absolute liability for hand-baggage (in the possession of the passengers), much less for "personal effects," which would include watch and chain, personal jewelry, money, and ladies' handbags with their unbelievable contents.

Sections 501 to 507 set up the rules applicable to air collisions. If only one operator is negligent, he alone is liable; if both, then both are liable according to the percentage or degree of negligence. If this degree of negligence cannot be definitely ascertained, then the liability is to be equally divided.

The exceeding difficulty of proving comparative degrees of negligence may for the moment, be passed over. The glaring fault of the collision scheme is that under the absolute liability doctrine, the carrier of passengers, though wrecked by the grossest negligence of the other plane, must first pay his own injured passengers and then may "proceed against the other operator."

It just might happen that this other operator would come from a state where insurance was not required and was insolvent, and hence, the blameless operator, not at all negligent, must carry the loss of the other's negligence definitely and finally.

We admit in all candor that picking out isolated sections of this act for criticism without the entire context is apt to be misleading. These sections criticized are doubtless necessary and required, if the whole legislative scheme of absolute liability is to

work. But the fact that such sections are necessary in the scheme is indicative of the error of the whole conception.

There is one other feature of the proposed Uniform Liability Act which should be discussed. No uniform state law has ever been passed simultaneously by all forty-eight states. This particular law is not the kind or character which can be passed in one state without having serious effects in other states, particularly the adjoining states. It would not be similar to passing a uniform divorce law or a uniform negotiable instruments law which has effect only in the states which desire it.

For instance, an Indiana operator, complying with all the laws of his own state, would, upon crossing the state line into Illinois (if Illinois should pass this act), find himself guilty of a criminal offense and liable to a $5,000.00 fine and a year's imprisonment for flying over Illinois without the insurance required by Section 205. If he carried a paid passenger, he would be liable for a double fine and imprisonment for not having the insurance called for by Section 306.

The first state to pass this law would be shunned by every air operator, as if it were plague infested . We might even see new routes of transcontinental travel by the common carrier, if it were possible to avoid the particular state.

The mandatory insurance provisions are practically impossible of performance, if the law is passed by many states, for to protect one's self in *each state,* the aviation operator must have a policy which appoints the Secretary of each state the insurance carrier's agent for service. Absent such a policy, the air carrier is guilty of criminal offense. The policy may not be cancelled until the Aviation Commission in *each state* is given 15 days' notice.

It is obvious that confusion untold will result from any effort to get this legislation passed state by state. To have flying criminal in one state and legal in another is to lose sight of the nature of flying. There are no feasible boundary lines to warn the pilot when he has crossed a state line. Not even Massachusetts—and on the highways its boundaries are usually marked—makes it a criminal offense for a non-resident uninsured automobilist to drive over its roads.

We must accept as true the statement of the framers of this Act when they say they are not unfriendly to aviation. As a corollary to that, we must attribute such penal legislation as this to the

lack of appreciation of the necessities of the case, to a misconception of the desirability of the object sought to be obtained, and to a misunderstanding of the effect of the legislation and of the nature of the industry sought to be thus regulated.

Finally we are told the Uniform Acts are an endeavor to bring our domestic law in line with our international private law. Our earlier analysis demonstrates that the framers of the proposed legislation under consideration must have rejected the general plan of the Warsaw Convention (dealing with persons, baggage and goods) in spite of the fact that it has worked well thus far (particularly in the Hindenberg disaster settlements), was adhered to by the United States effective October 29, 1934, and governs international flying almost everywhere.

Except for Portugal, it is the law of Europe and her Colonies, of Russia, of Mexico and of Brazil. It is a modified res ipsa loquitur (the thing speaks for itself) plan in that the air carrier is prima facie absolutely liable regardless of negligence for the injury of a passenger, with a limitation of $8,300.00 On the other hand the air carrier may completely defeat liability by establishing that there was no negligence up to the moment of the accident, and the passenger may recover his provable damages without limit if he can establish that the accident was caused by the carrier's wilful misconduct or its equivalent.

Then, it must be that the framers of the Uniform Acts must be seeking to follow the pattern of the Rome Convention of 1933. If so, the model has feet of clay, for the Rome Convention with its ground liability insurance plan has been shunned by practically all of its twenty-six signatory powers, so far as adherence is concerned. The true answer is found in the inability of European insurers to provide insurance under the Rome plan,—and this on the European Continent where practically every flight involves the crossing of an international border and its attendant necessity of protecting nationals from internationals. No such situation exists in the United States from either an international or domestic standpoint. Already the Rome Convention is the subject of considerable doctoring,—a protocol having been presented at Brussels this September. The Rome Convention has not been ratified by the United States and we would do well to shelve it entirely for the time being. Hence it is hard for your committee to understand how the proposed Uniform Acts accomplish any uniformity with treaty law, when the drafts reject the already working plan of one treaty, with

its large international coverage, and embrace the substance of another treaty which experience has proved a "dead horse."

Uniform Law of Airflight

The second of the proposed uniform codes is called "The Uniform Law of Airflight." It has only one major section. Many definitions, notably that of "operator," so voluminously defined in the Uniform Aviation Liability Act, are lacking. Doubtless, it was presumed that both of these acts would be simultaneously passed and the lack of definition in the Uniform Law of Airflight might be made up by reference to the definition in the Uniform Aviation Liability Act.

However, as that may be, the principal section of this act is Section 2, which is as follows:

"Section 2. (Lawfulness of Flight.) Flight of aircraft in this State is lawful:

(a) If the operator of the aircraft holds a valid certificate of airworthiness from the (State Aeronautics Commisssion), or the proper agency of the Government of the United States and the aircraft is being navigated by a pilot holding a valid certificate of competency issued by the (State Aeronautics Commission) or the proper agency of the Government of the United States; and

(b) If at a height permitted by the rules, regulations or orders adopted and promulgated by the (State Aeronautics Commission), and the applicable rules of the proper agency of the Government of the United States; and

(c) Unless so conducted as to involve a substantial risk of harm to individuals or property on the land; or

(d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land or adversely affect the then existing value of the land and structures thereon."

This section seems, therefore, to be particularly inept by reason both of things omitted and of things included. In the first place, the bald statement is made that flight is lawful if—(a), (b), (c) and (d). This would be an untruth in many states, or, at best, a partial truth. In most states where there are regulations of flying, a flight is not lawful if only the height regulation is obeyed. Most states have other regulations, a violation of which may occur at almost any height. Under the new Federal law, there will be many regulations affecting flight which we formerly thought of as purely intrastate. Consequently, the statement in this section that such flight is lawful would be a contradiction in terms of the state regu-

latory act of the Federal law, and of the regulations issued thereunder.

Further, a "valid certificate of competency" is not all that is needed to make flight legal. Much depends upon the nature of the flight, its purpose and business. A "private pilot" could violate the law if he carried pay passengers, but nevertheless his certificate is a "valid certificate of competency."

Perhaps the framers of this act had a different meaning for the word "valid." But "valid" to us would seem to include that it was honestly, and not fraudulently, issued, that it had not expired and had not been cancelled. Perhaps more was meant.

Aside from these, there is a much more serious objection. The law says that flight is lawful unless—

> (d) Unless so conducted as to constitute a substantial interference with the then existing use and enjoyment of the land or structures on the land or space over the land and structures thereon.

By inference, at least, flight is *unlawful* if it constitutes a *substantial interference with the use, etc.,* or *adversely affects the then existing value.*

There are, of course, many instances dependent upon all of the surrounding circumstances where flight might constitute a nuisance, and wherever it is a nuisance we quite agree that such flight is unlawful and may result either in an injunction against it or in recoverable damages. However, interference with the use of private property is not alone unlawful.

A church bell may interfere with sleep; so may automobiles, newsboys, fire engines, ambulances, trains and street cars. To this extent they may "substantially interfere with the use" of private property used as dwellings, apartments, or hotels, but none of these things are unlawful.

To say that flight of a common carrier over an established airway is unlawful, because it "substantially interferes with the use" of the underlying land, is to state a legal untruth. Suppose, for instance, that an enterprising farmer, whose land is under an established airway, should conceive the idea of establishing a nudist camp or a sun-bathing health resort. Obviously, flying over it would interfere with its use for that purpose, but we do not conceive of any court holding that the flight, for that reason, would be unlawful; that it might be otherwise if not under an established airway, we concede. It is just one of the defects of this act that it is too broad and takes in too much territory.

Then, again, this act says (inferentially) that flight is unlawful if it interferes with the use of the land or of the "space over the land." The question immediately arises as to whose use of the space is meant. Who is using the space over the land? Neither buildings nor trees nor flagpoles nor wires nor transmission towers are space, nor do we conceive that the person who has erected them is "using" space. He has displaced space—or filled it with contents. The aviator is just as much entitled to use space as the land owner. The new Federal law recognizes that the navigable airspace is subject to an absolute right of air passage, by any person, in "Air Commerce." The new definition of air commerce includes practically all flight. Unless the land owner be an aviator operator himself, we do not see how he is using "the space over the land."

When it comes to the phrase, "adversely affect the then existing value," we find that this is even a greater departure from established law. It would be no news to a real estate dealer that the erection of an apartment house or a store of any kind or a filling station or movie theatre adjacent to or even within the same block as a dwelling house "adversely affects its value." An unsightly vacant lot does the same thing. But it would be, indeed news if any of these things, absent local ordinances, would be deemed unlawful. Besides, these things which we have mentioned are permanent in their nature, but flight is a momentary thing. Yet, under this act there is nothing to prevent a land owner from claiming, by inference at least, that a single flight adversely affected the value of his land and hence it was unlawful.

Finally, it will be observed that this act does not say that a flight is unlawful if *improperly* conducted as to interfere with the use or adversely affect the value, but it merely says if it is "so conducted." Legitimate business properly conducted has never had imposed upon it the servitude of being unlawful, unless, as said before, under the many facts and circumstances involved, it might be held to constitute a nuisance.

This particular section of this act is in the alleged interest of the land owner. It has been the subject of at least ten years of controversy. There are those who have proclaimed for years that the land owner owns the airspace and who, in spite of all the court decisions, still believe that "cujus solum est, etc." has a sacred halo. We believe the time has come to bury the halo, once and for all.

They have offered this section in the nature of a compromise. They would grant a limited "right of flight" in exchange for abso-

lute liability. They expect the aviation operator to submit to the absolute liability in exchange for what is clearly not freedom of flight.

There was a time when the weight of the venerable maxim persuaded some of us that such a compromise might be advantageous. England adopted a similar compromise in 1920, but it was a better trade than now offered. The right of flight granted in England was not hampered by "interference with use" or "adversely affecting value."

But England made her compromise too soon, and made it before any court had had a chance to declare that the venerable maxim 'that he who owns the soil owns to the zenith' did not tell the legal truth. The one here offered is presented too late. The land owners have nothing to offer. Court decisions and the Federal Act have taught us this. We now know that they do not own the airspace. The right of flight is just as clear and just as untrammeled as the right to drive an automobile, and much broader. The right to drive an automobile is limited to public ways. All of the airspace is public. Absent the sovereign right of the government or of the state to set aside restricted airspaces, there is no privately owned airspace.

This, of course, does not mean that the right of flight is any more free from legislative limitation than the driving of an automobile. It is subject to the rule that it must not be so used as to unnecessarily interfere with the rights of others. Flight which constitutes a nuisance is unlawful. The common law has already declared that. It is clear from the decisions in this country that no statute is necessary to amplify it. But that is a far cry from saying that any flight which "substantially interferes with use" or "adversely affects value" is unlawful.

Nor do we mean that the land owner has no rights in airspace. We simply mean he doesn't own it. But arising out of and incident to his ownership of the land, he has the right to the full enjoyment of his land consistent with the rights of other people. We include aviators as people. One of these rights would be clearly to build on the land and enclose or fill the airspace, again consistent with the rights of other people. More than that the land owner never had.

Queerly enough, the framers of this act have not said that the converse of their proposed lawful flights would be unlawful. No penalties have been prescribed. They are unlawful only by infer-

ence. Obviously, the sole purpose of the act is to create additional rights in the land owners.

No such act is needed to create the right of flight. Flying has been going on now for many years in all of the states of the Union without any such act.

Uniform Air Jurisdiction Act

The third proposed Uniform Code is called the Uniform Air Jurisdiction Act.

Section 1 relates to the jurisdiction over contracts and merely provides that contracts and legal relations entered into in the air shall have the same effect as if entered into on the land.

There is no objection to this. In fact, we see no need of it. It is simply declarative of the common law.

The second section provides for jurisdiction in torts and crimes and may serve a useful purpose in relieving doubt in criminal prosecutions. We see no objection to it and believe it is a good law to be enacted.

Summarizing, your committee recommends that this Association go on record as opposing, in their present form, the Uniform Aviation Liability Act and the Uniform Law of Airflight, and that the Association recommend the passage of the Uniform Air Jurisdiction Act. The committee further recommends a continuation of a study committee to the end that there be vigilance by the states and cooperation by them with the Conference of Commissioners on Uniform State Laws.