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LIABILITY OF AIR CARRIERS

*BY G. LLOYD WILSON AND WALTER S. ANDERSON

Aircraft Operators as Common Carriers

The liability of operators of airplanes in commercial services, carrying property or persons for hire, for personal injury or death of passengers or for loss or damage of property is in the process of development. The courts have rejected as untenable the contention that the novelty of the airplane or the youth of the industry should exclude them from the category of common carriers if they hold themselves out to serve the public for hire. Air transport carriers operating on regular schedules over fixed or definite routes have been held to be subject to the laws applicable to common carriers. The manner in which the aircraft are used determines the character of their operations as common carriers or carriers of other classifications.

In North American Accident Ins. Co. v. Pitts, the court applied the general definition of a common carrier sanctioned by long usage in testing the status of an operator of an aircraft,—that of the holding out to serve the general public for hire up to the limit of his facilities. Thus, the court remarked,—“This court, in Georgia Life Ins. Co. v. Easter, 189 Ala., 478, 66 So., 514, L. R. A. 1915 C, 456, quoted with approval this definition of a common carrier ‘by land or water,’ and the words ‘or air’ might be added after the word water with propriety, since we now have the aeroplane:

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The real test whether a man is a common carrier, whether by land or water, therefore, really is whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying as a public employment or whether he carries to a fixed place, but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he had room, the goods of all persons indifferently who send him goods to be carried.

"This court in that case then stated:

'Under this rule a stage coach, a bus, an automobile, or a hackney coach, a cab, dray, cart, wagon, or sled, which undertakes for a reward to carry, indiscriminately, passengers or baggage for the public 'so long as there is room,' is a common carrier.'

Where the air transport service operators solicit the patronage of the traveling public; advertise their services, schedules and routes; announce rates of fares; publish their baggage regulations; and otherwise call the attention of the public to their services and charges they have been held by the courts to be common carriers. In Curtiss-Wright Flying Service v. Glose, action was brought by the widow of a passenger who purchased of the defendant airplane operator a round trip ticket for transportation service by airplane between Miami and Tampa, Florida. The plane was crashed in attempting to make an emergency landing near Tampa. The Federal Court held that the decedent was a passenger and not a charterer of the plane. The arrangement between the operator and the decedent was based on a ticket sold at a fixed price. No undertaking to charter a plane had been discussed by the parties and the service was rendered in the usual course of the operator's business. A standard contract drawn by the operator was signed by the decedent over the printed designation "passenger."

Fixed Routes and Schedules Not Essential Characteristic of Common Carriers

In the same year in which the Glose case was decided, an Illinois court determined that an airplane operating company which offered to transport passengers to any destination, but did not oper-

ate over fixed routes or upon set schedules, and based its rates not
upon a point to point basis but upon a mileage basis of rates, was
liable as a common carrier for the death of a passenger resulting
from the negligent operation of the aircraft. In Ziser v. Colonial
Western Airways, Inc., a New Jersey court held an air transport
operator liable as a common carrier for the consequences of the negli-
gent operation of an airplane used in sight-seeing service. The com-
pany offered its facilities at the airport for sight-seeing trips and
accepted all applicants for the service excepting persons obnoxious,
because of intoxication or otherwise. The court regarded the operator
as a common carrier although it had on many occasions rejected per-
sons who were objectionable for such reasons, and some times
required prospective passengers to leave the plane to make room for
large parties. The court ruled that a set schedule was not a requisite
in establishing the common carrier status.

In the previous year, a California court, in Smith v. O'Donnell,
cited above, determined that an aircraft operator may be a common
carrier and liable as such although the aircraft are operated in
circular service returning to the point of departure without landing
en route.

Upon the basis of the cases decided, it may be stated that
the courts, in determining whether or not the operator of an air-
plane service is a common carrier, follow the definitions of com-
mon carriers of long usage in other forms of transport. They find
to be common carriers of passengers by air transport those who
undertake for hire to carry all persons, indifferently, who may
apply for passage, so long as there is room and there is no legal
excuse for refusing.

**Excuses for Refusing Passengers**

An operator of air transportation service may avail himself
of a number of legal excuses for excluding prospective pas-
engers. Thus persons may be refused who are objectionable to
the operator because of improper conduct, drunkenness or nois-
iness. If he avails himself of these legal excuses to refuse accom-

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U. S. Av. R. 105), 1933.
6. (5 Pac. (2d) 690), affirmed (12 Pac. (2d) 933), 1932.
et al., (158 N. Y. 34, 52 N. E. 685), 1899; and see Terminal Tuxford Co. v. Rute,
(341 U. S. 252), 1951, in which the court held that it is what a carrier elects in
fact to do and not what it purports by words to be that governs its status as a
common carrier.
modations, or to exclude passengers the operator is none the less a common carrier, if his service is offered to the general public.

In *Law v. Transcontinental Air Transport, Inc.*, a Federal District Court held that an airplane operator could refuse to transport an overload or refuse to transport passengers in bad weather without altering its status from that of a common carrier to that of a private carrier.9

The Court of Appeals of Kentucky, in 1935, in *Casteel, et al v. American Airways, Inc.*, affirmed the judgment of a lower court for the defendant air operator in a suit for damages for the impairment of the health, humiliation, exposure and mental and physical distress and discomfort of two of its passengers. In that case a patron who was known to be suffering with tuberculosis, and his wife, engaged transportation by airplane from El Paso, Texas, to Louisville, Kentucky. At Fort Worth, Texas, the ill passenger was examined by a physician at the instance of the air transportation company. The physician advised that the passenger should not continue his trip by plane. Over the protests of himself and his wife, he was excluded from the plane. The defendant air transport company arranged for first-class hotel accommodations and for transportation of the passengers by rail to their destination. The railroad fares were paid from the refund due the passengers for the unused portions of the air carrier’s tickets. The trip was completed by railroad and the ill passenger died within a week after arrival at Louisville.

In its decision, the Court said, inter alia:

“Although the same principles must obtain and be applied, the law of aeronautics cannot be completely synchronized with the law pertaining to other agencies, for it must be modified to meet the traffic problems of the novel method. The inherent nature of the facilities of an airplane cannot be disregarded. . . .

“. . . Although the safety of the passengers, individually and collectively, must ever be regarded as the prime criterion, provision for their convenience and comfort is more essential aboard an airplane in flight with its restrictions and limitations of space than on surface carriers where passengers may move about with some degree of freedom. The right to reject or eject passengers from an airplane must be sustained not only upon grounds deemed justifiable where older methods of carriage are

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used, but other reasonable grounds as well because of the necessarily close personal proximity of the passengers."

The Purpose of the Flight as a Criterion of the Air Carrier's Status.

The decisions of the courts in cases where the status and liability of the airplane operator as a common or private carrier has been considered, in relation to the purpose of the flights, are not reconcilable. In Ziser v. Colonial Airways, Inc., and Smith v. O'Donnell, both cited above, the courts held that the lack of a fixed schedule, and the operations of planes without landing at points other than the places where the flights started, were not factors which negatived the common carrier status of such operations, if other characteristics of common carriage were present.

In suits brought upon policies of insurance covering persons killed in airplane accidents, the courts have held that an operator engaged in taking persons for ten minute pleasure flights over a summer resort was not a common carrier. In two cases brought in different courts upon separate insurance policies, both covering a person killed during such a flight, the courts held that an operator engaged in sight-seeing or pleasure-hop service, who operates on such days and at hours and under conditions determined by him; who did not make flights with less than three nor more than five persons; and who accepted only white persons, was not a common carrier. Both courts stressed the facts that the flights were made only upon special arrangements and that the operator assumed no obligation to serve all who applied for such transportation. The courts of Illinois and New York have also decided that the operators of this type of flying service are not to be treated as common carriers.

Degree of Care Required

It has generally been held by the courts that common carriers of passengers must exercise the highest degree of care, vigilance and caution. In seeking to measure the quantum of such care the courts have usually distinguished between the standards required of com-

11. (10 N. J. Misc. R. 1118, 162 A. 591), 1932; and (5 Pac. (2d) 690), affirmed (12 Pac. (2d) 923, 215 Cal. 714), 1932.
mon carriers and those imposed by law upon private or contract carriers. The Supreme Court of Massachusetts, in *Wilson v. Colonial Air Transport, Inc.*, stated the rule: "It is settled that the degree of care (required) of a common carrier for hire is measurably greater than the law imposes on a private carrier for hire, and it would seem that the proof of the facts and surrounding circumstances need only be slight in order to set up the presumptive rule of negligence and call upon the defendant for an explanation; and that in either case negligence will not be presumed from the mere happening of an accident."

The courts have usually given due regard to the characteristics of the instrumentality of transportation used, in the application of these rules of law to the duty owed by carriers to their patrons. Trial courts in a number of jurisdictions have included in their instructions to the juries the statement that carriers by air are charged with the highest degree of care in the safeguarding of their passengers, consistent with the practical operation of the plane.

Common carriers by aircraft, although required to use utmost care and diligence, have been held not to be required "to exercise all the care, skill and diligence of which the human mind can conceive, nor such as will free the transportation of passengers from all possible perils." Thus a carrier was held not liable for damages resulting from an accident caused by a crash during a fog, in the absence of negligence on the part of the carrier. The passenger by airplane was held to have assumed all the usual and ordinary perils incident to airplane travel that exist over and above the dangers against which the common carrier is under a legal responsibility to guard. However, in *Greunke v. North American Airways Co.*, the court held the carrier liable for only ordinary care.

More particularly, it has been ruled that the pilot of a plane, as an agent of a common carrier, is required to guard and provide against predictable conditions in discharging the carrier's legal duty to its passengers. He is not held accountable for dif-

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difficulties which result when unexpected events occur. He is not charged with responsibility if accidents are caused by gusts of wind, sudden snow squalls, fogs, rain or similar unforeseen conditions, unless he has been negligent in assuming that such conditions were not to be encountered.20 "In an aeroplane accident the limitation of responsibility may be said to consist of a plane in good mechanical condition, handled by a careful pilot, maneuvered in a careful way under conditions that, so far as can be foreseen, are normal, or such as may be foreseen and overcome by the use of ordinary skill, such as unfavorable weather conditions, so that the ordinary pilot could observe them as such."21

Although its juridical import is somewhat lessened by the fact that the decision of the court was governed by the code law of California, the determination reached in the suit resulting from the crash of the Western Air Express plane, on which Martin E. Johnson and Osa Johnson were passengers, in 1937, is indicative of the extent of the carrier’s responsibility when mishaps occur because of unusual conditions. The famous couple had engaged passage from Salt Lake City to Burbank. The plane proceeded from Salt Lake City to Las Vegas by contact flying. At Las Vegas the pilot was directed to proceed to Daggett, California, where he would receive further instructions from defendant’s chief dispatcher at Burbank. Upon arriving at Daggett, the pilot communicated by radio with the ground station at Burbank and requested instrument clearance into Burbank. He was authorized to follow the “procedure to land down through with aid of radio range.” In executing the procedure the pilot was able to maintain his course until he had passed what is known as the cone of silence at Saugus for the second time. However, when he had passed it the first time, he had encountered ice which had caused the ship to toss, roll and vibrate. The pilot testified that he at that time had given the co-pilot instructions to turn on the de-icers. The latter did not do so and the pilot was admittedly aware of the fact. After passing the cone of silence the second time the ship started to lose altitude. The pilot then switched off his radio from the Saugus station beam, and depended upon an average compass reading to guide him in his course. His explanation for this was that the ship began to toss and roll so violently that he had to do it. After leaving the cone of silence for the second time and while en route from Saugus to Burbank the plane went ap-

20. See instructions by court in Law v. Transcontinental Air Transport, supra.
approximately three miles off its course to the left. While the pilot was attempting to regain his position on the course the plane crashed on Los Pinetos peak in the San Gabriel mountains.

Action was commenced by Osa Johnson for the injuries she sustained as the result of the crash and for the wrongful death of her husband. The jury returned verdicts for the defendants, and on appeal, the plaintiffs urged as a reason for reversal that the evidence was insufficient to justify the verdicts, in that undisputed negligence, constituting the proximate cause of the accident, was admitted upon or by the pilot and others and that the affirmative defense of Western Air Express that the accident occurred because of an act of God was not established by the defendants.

In dismissing the appeal the court held it to be “a question of fact for the jury to determine, and not a question of law, whether the pilot was guilty of negligence in abandoning the Saugus beam and flying on an average compass reading, and in consideration of this question they were entitled to consider that during all of his difficulties the pilot was trying to hold to a compass course of 125 degrees, because, as he testified, he knew that was the compass course which would lead to the Burbank airport.”

Continuing, the court said:

“Whether the failure of the pilot to do the exact things provided in the ‘procedure to land down through with aid of radio range’ was a proximate cause of the accident was a question of fact for the jury to determine in the light of existing conditions. Respondent Western Air Express concedes that if conditions had been normal and Pilot Lewis had been able to follow each step of the ‘procedure’ and had simply failed to do so, with the resultant crash and no explanation for its occurrence, there would be no question whatsoever but that the accident was due to the negligence of the pilot, but respondent contends, and its contention must be upheld, that it was for the jury to determine whether the pilot, in the exercise of the highest degree of care, was unable to do the things required by the ‘procedure’ because of an act of God (Civil Code, §3526); and further, that it was within the province of the jury to conclude that the pilot’s failure to remain tuned to a beam under the facts and circumstances present was not the proximate cause of the crash and that unusual conditions of icing and turbulence were such that the pilot could not have
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followed a beam because the combination of ice in the carburetors and extreme air turbulence made it impossible for the pilot to control the plane either as to course or altitude. The testimony of both the pilot and plaintiff Mrs. Johnson herself furnished grounds upon which the jury could predicate a finding that the disaster occurred by reason of the unusual forces of nature, and was one which could not have been reasonably anticipated, guarded against or resisted; that the crash was occasioned by the violence of the elements alone, and that the agency of men had nothing to do therewith. 22

In Seaman v. Curtiss Flying Service, Inc., action was commenced for the wrongful death of plaintiff's decedent caused by the crash of an airplane in which the deceased was a passenger. It was conceded at the trial that there were no mechanical defects in the plane. The proof established that the weather was clear on the day of the accident and that there was a wind blowing from the northwest at a velocity of not more than fifteen miles an hour. Testimony was also offered that just before the plane crashed it was seen to turn and dip its right wing. In charging the jury the trial court submitted the question "whether this particular accident was caused by the negligent act of the pilot, or whether it was caused by some outside force over which he had no control. That is, whether it was due to an act of God or atmospheric conditions due to a wind and change of temperature which is known as an unavoidable accident."

In setting aside the determination of the lower court, the Appellate Division, after commenting upon the omission of the lower court to include in its charge any exposition of the law as to what constituted an act of God which would in a proper case excuse the defendant carrier, stated:

"the doctrine of vis major, introduced into the situation by the court in its charge, had no application to the testimony adduced upon the trial contained in this record." 23

That the air carrier is bound to exercise ordinary precaution for the safety of its passengers and to protect them against harm which can be anticipated, either while aloft or on the ground, is demonstrated in Curtiss-Wright Flying Service, Inc. v. Williamson. In that case a Texas court affirmed judgment for plaintiff in an action in which plaintiff's decedent, in alighting from the plane walked toward

the front of the craft and sustained fatal injuries by coming in contact with the propeller which had continued to revolve, the motors not having been cut off when the plane landed. The court held that the appellant owed to the deceased, as a passenger upon its plane, "the exercise of that high degree of care for his safety which under the settled rules of law apply under such circumstances. It was appellant's duty to furnish," appellant's passenger, "a safe place to alight and a safe egress from its plane to the hangar where he desired to go. If for any reason it was unsafe to appellant's passenger for the plane to be stopped opposite the hangar and facing north, the issue of negligence in so doing was one of fact for the jury." 24

General Rule of Proof

The mere occurrence of an accident per se does not raise a presumption of negligence on the part of a common carrier by airplane, despite the fact that the carrier is charged with the duty of exercising the highest degree of care in protecting its passengers. The same general rule of proof governs in cases of airplane accidents as in suits against other types of common carriers excepting when the doctrine of res ipsa loquitur is applied.

The general rule applicable in suits against carriers for injuries or other damage alleged to have been caused by the carrier's negligence is that the party who alleges the existence of a fact as the basis of a cause of accident must bear the burden of establishing it by proof. The gist of the cause of action is the carrier's negligence and the burden of proving the negligence and that it was the proximate cause of the injury or damage rests upon the plaintiff who alleges it. 25

Application of Res Ipsa Loquitur

The doctrine of res ipsa loquitur may be stated as asserting "that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery" by the plaintiff, "in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. * * * The presump-
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tion of negligence herein considered, is, of course, a rebuttable pres-
sumption. It imports merely that the plaintiff has made out a prima
facie case which entitles him to a favorable finding unless the defen-
dant introduces evidence to meet and offset its effect. Where
all the facts attending the injury are disclosed by the evidence, and
nothing is left to inference, no presumption can be indulged—the
doctrine of res ipsa loquitur has no application.\(^{26}\)

The application of the doctrine to cases arising out of aircraft
accidents has not yet been sufficiently extensive to warrant a valid
statement of the principles or limitation of such application.

*Wilson v. Colonial Air Transport* was an action brought in the
courts of Massachusetts for injuries sustained by an airline passenger
in a crash alleged to have been caused by one of the motors “going
dead” a few seconds after the plane had taken off. The plaintiff who
sustained the damages testified that the right-wing motor back-fired
after he had entered the plane and while the plane was taxying to
the take-off position. He testified, moreover, that he could see that
the right-wing motor did not revolve at the same speed as the others
when the pilot “revved” them. A few seconds after the plane had left
the ground the right-wing motor went dead, the right side of the
plane tipped, and the plane went into a nose-dive despite the “frantic
efforts of the pilot” to right it.

Defendant offered testimony of the pilot of the plane that it
was in good working order on a previous trip from New York to
Boston, and that he had turned the plane over to inspectors upon
arrival at Boston. Pilot testified that the slower “revving” of the
right-wing motor was done deliberately by him in order to steer the
plane on the ground, that the motors were tested before the take-off,
and that they were running at the same speed on leaving the ground.

The court denied the applicability of the doctrine of *res ipsa
loquitur* on the basis of this evidence, and stated, in part.

“The principal of *res ipsa loquitur* only applies where the
direct cause of the accident and so much of the surrounding
circumstances as were essential to its occurrence were within
the sole control of the defendants or of their servants. * * *
It is also to be observed that the doctrine will not be applied
if there is any other reasonable or probable cause from which
it might be inferred there was no negligence at all; nor does it
apply in any instance where the agency causing the accident is

\(^{26}\) (20 R. C. L. 185-188, §156), and Fike, L. R., *Air Transport Protection,*
not under the sole and exclusive control of the person sought to be charged with the injury."\(^{27}\)

The inspectors to whom the plane was turned over upon landing at Boston were not shown by the testimony to be the employees or agents of the defendant airline. It was to this that the court referred in its qualification cited above.

In the New York case of *Goodheart v. American Air Lines, Inc.*, damages were sought for the death of a passenger, alleged to have resulted from an accident caused by the negligence of the defendant airline in which the plane crashed on a mountainside. The plaintiff alleged that the pilot of the plane was negligent in that, among other things, he deviated many miles from the safe course which he was directed to follow, flew at an unsafe altitude, carelessly and without necessity, in order to avoid extra mileage, and offered proof to sustain these allegations.

The trial court admitted the evidence and submitted the case to the jury on the theory of *res ipsa loquitur*. Judgment was for the plaintiff. On appeal, the Appellate Division reversed the judgment of the court below and stated that the submission of the case to the jury on the *res ipsa loquitur* theory clearly was error. It cited an earlier decision in which a *res ipsa loquitur* problem was presented, stating:

"The doctrine of *res ipsa loquitur*, although it provides a substitute for direct proof of negligence where plaintiff is unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances involved, direct evidence is absent and not readily available."\(^{28}\)

In applying this rule to the case appealed, the Appellate Division stated in part:

"Here, the plaintiff did not reply on the presumption arising from the doctrine of *res ipsa loquitur*. On the contrary, he pleaded and introduced evidence to establish specific acts of negligence which, he alleged, resulted in the accident. Under these circumstances, the doctrine did not apply."\(^{29}\)

In *Conklin v. Curtiss Flying Service, Inc.*, a New Jersey trial court, in an action at law resulting from the crash of a plane alleged

\(^{27}\) Wilson *v. Colonial Air Transport, Inc.*, supra.


to have been due to the stopping of the motors during flight, instructed the jury that there was no obligation on the part of the air transport carrier to explain what actually caused the accident, but that it was the plaintiff's duty to prove negligence by a fair preponderance of the evidence. 30

A contrary view was expressed by the New York Appellate Division in Seaman v. Curtiss Flying Service, Inc., which has been discussed above. 31 From the court's opinion it is not evident that the plaintiff offered any testimony as to the cause of the crash, but that the theory was advanced that the mishap was the result of the negligent act of an over-confident pilot making a sharp turn at too steep a bank at an altitude and at a place where it was reasonably to be expected that upper currents of air might tip the wing of the plane, thereby exposing its passengers to danger. In setting aside the verdict of the court below, the court said:

"The charge was likewise prejudicial, in its failure to charge the doctrine of res ipsa loquitur, which had, under the facts appearing in this record, application to this case as a rule of evidence to aid the jury in passing upon the issue of liability." 32

During one of the trials had in Stoll, Adm. v. Curtiss Flying Service, Inc., a New York trial court instructed the jury that it should take into consideration the res ipsa loquitur doctrine, in weighing the evidence, if no proof was offered in support of any allegation that the accident occurred through the defendant's negligence. 33

In Smith v. O'Donnell, cited above, the court was called upon to determine whether or not the res ipsa loquitur doctrine could be resorted to by the plaintiff in an action involving the crash of aircraft in mid air. The court remarked that since such a mishap does not ordinarily occur if the proper degree of care is used the doctrine was properly submitted to the jury. 34

In Cohn v. United Air Lines Transport Corporation, action was commenced by an administratrix to recover damages on account of the death of her intestate resulting from the crash of an airplane while on a test flight. The facts of the case did not involve the liability of a common carrier of passengers, but the determination of the court with respect to the same is of interest here in relation to the application of the res ipsa loquitur doctrine. The plaintiff alleged

31. Page 12, ante.
34. Smith v. O'Donnell, supra.
negligence of the defendant generally, but set forth no specific acts of negligence and relied entirely on the *res ipsa loquitur* doctrine in establishing her right to recovery. In its opinion, the court made the following remarks: “The doctrine has a somewhat limited application, making it, as it were, a sort of refuge of last resort for the relief of injured persons where specific acts of negligence are incapable of being alleged and proved by the ordinary methods.” After mentioning a few of the unavoidable causes for crashes of airplanes, the court then determined the doctrine could not apply “if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all.”

This court also made the observation that there existed no widespread fund of information as to the operation, care and characteristics of airplanes, such as is available relating to trolleys and steam railroads, to justify the application of the *res ipsa loquitur* doctrine.

Courts of Texas and California, and a Federal Court, have held that if an injured party or a representative of a decedent alleges specific acts of negligence on the part of the defendant carriers, he may not then avoid the burden of proving the carrier’s negligence by relying upon the doctrine of *res ipsa loquitur* to raise a presumption of negligence on the part of the defendant carrier.

### What Risks Does An Airplane Passenger Assume?

It has now become well established as a principle of law that an airplane passenger may be held to have assumed all the ordinary and usual perils incident to this mode of travel.

Airplane passengers do not assume the risks that the planes may be “improperly, carelessly or negligently operated.” Nor do they take upon themselves the risk of any defects in the construction of the planes or the adjustments of the planes not patent to them when they enter the planes.

They do, however, assume dangers which cannot be averted by the carriers by the exercise of the degree of care which the law

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requires.\textsuperscript{40} Thus airplane passengers have been held to assume the risk involved in the sudden occurrence of storms, the dangers incident to navigation through storms, and landing, provided the pilots have not been negligent in the manner of handling the plane under the unexpected circumstances.\textsuperscript{41}

In \textit{Cohn v. United Air Lines Transport Corporation}, cited above, the court after making its observation as to the applicability of the \textit{res ipsa loquitur} doctrine, stated the following:

"Man has made rapid strides within a very small cycle in his endeavor to become master of the air, * * *, but with the exceedingly large number of unexplained and inexplicable catastrophes it is evident that he has not yet become such master. It will not do to discourage the pioneer by making him assume undue hazards in a monetary way. In the meantime it is quite evident that those who choose air-ways for transportation must in many instances be held to have themselves assumed the risk."\textsuperscript{42}

\textbf{Contractual Limitations of Carriers' Liability for Negligence}

The courts of the United States have generally accepted the rule that provisions in contracts of transportation, between air lines and their passengers, recited in tickets or otherwise, exempting airplane carriers for hire from liability for loss or damage suffered by their passengers arising from the negligence of the carriers or their servants are unavailing to relieve the carriers from responsibility because they are contrary to public policy.

In \textit{Law v. Transcontinental Air Transport, Inc.}, the trial court in charging the jury intimated strongly that the fact that a ticket issued to the passenger contained a statement that the air transport company was not a common carrier was not controlling in determining the carrier's status and that the jury might properly find the defendant to be a common carrier. The court explained that the status was to be ascertained not by the ticket's stipulation but by what the carrier held itself out to be.\textsuperscript{42a} Likewise, a stipulation in the carrier's ticket that the carrier was not to be liable for its negligence, or that its liability was to be limited, has been held to give the carriers no immunity for the consequences of their negligence.\textsuperscript{43}

\textsuperscript{40} See Instructions by court in \textit{Allison, Adm. v. Standard Air Lines, Inc.}, supra.
\textsuperscript{41} See Instructions by court in \textit{Law v. Continental Air Transport, Inc.}, supra.
\textsuperscript{42} \textit{Cohn v. United Air Lines Transport Corporation}, supra.
\textsuperscript{42a} \textit{Law v. Transcontinental Air Transport, Inc.}, supra.
\textsuperscript{43} \textit{Curtiss-Wright Flying Service v. Glose}, supra.
In *Conklin v. Colonial Airways, Inc.*, the air line offered three trips or classes of tickets to prospective passengers. Class A tickets provided for a $5,000 maximum liability for death or injury of passengers, Class B for a $10,000 maximum liability, and Class C ticket for a maximum of $15,000 liability. Under New York law passenger carriers may lawfully offer passengers their choice between full common carrier liability and limited liability, provided the passengers are given consideration in the form of reduction in rates if they voluntarily choose transportation subject to limited liability. In this case, however, the court held that the passenger had not been given a voluntary choice between full and limited liability, and, for this reason, the stipulation appearing in the ticket, held by the plaintiff's decedent, did not serve to prevent recovery in an amount in excess of the amount designated on the ticket.\(^\text{44}\)

Under English law, carriers of passenger by air may by special contracts limit their liability even when the loss or damage suffered by the passengers is caused by the carrier's negligence.\(^\text{45}\)

Generally, under American decisions, attempts to limit or avoid liability by camouflage of words in tickets or contracts are unavailing to relieve a common carrier of its obligations as such.\(^\text{46}\)

In *Noakes v. Imperial Airways, Ltd., et al*, a libel was filed by the widow of a passenger who was killed in the crash of the flying boat Cavalier, which fell while en route from New York to Bermuda. Respondent contended the Cavalier was a "vessel" within the definition contained in (R. S. §3, 1 U. S. C. §3, 1 U. S. C. A. §3) and therefore entitled to the benefit of the limitation of liability statutes which preclude recovery beyond the amount or value of the interest of the owner in the vessel and its pending freight. (R. S. §4283-4289, 46 U. S. C. §183 et seq., 46 U. S. C. A. §183 et seq.) The Federal District Court of the Southern District of New York did not agree with this contention and had the following to say: "It seems to me that the Cavalier in the progress of her flight through the air as she was at the time the occurrence complained of was alleged to have taken place, cannot be classified as a 'vessel' such as the statutes and laws relating to vessels are intended to include. The trend of the statutes and the courts is to treat aviation as *sui generis*."\(^\text{47}\)

\(^{44}\) *Conklin v. Canadian Colonial Airways, Inc.*, supra.

\(^{45}\) (5 R. C. L., 8, §665).


Liability of Airplane Carriers of Property

Common carriers of goods by all means of transport have been held generally liable for loss or damage of goods entrusted to them for transportation and responsible for their safe transportation and proper delivery to the consignee except for loss or damage occasioned by acts of God, of the public enemy or other excuses for failure to transport or deliver recognized by the common law or applicable statutory law. Common carriers of goods by airplane are logically subject to the same general rule and are under the duty of exercising reasonable care and skill in making their planes fit and safe for the carriage of the goods transported and of transporting the goods with reasonable care. Like other common carriers of goods, airplane carriers apparently may not avoid or limit their liability for loss suffered as the consequence of the carrier's negligence or that of their servants.

The Railway Express Agency, Inc., in the conduct of its air express service, transports goods in interstate commerce upon air express receipts, a species of bill of lading contract, which provides, like the uniform express contract used in the railway express service on land and water routes, that the liability of the carrier is limited, in consideration of the rate charged for the transportation service, which is dependent upon the value of the property, and is based upon an agreed valuation of not exceeding $50.00 for any shipment of 100 pounds or less, and not exceeding 50c per pound, actual weight, for any shipment in excess of $100.00, unless a greater value is stated in the air service uniform express receipt. Unless a greater value is declared and stated in the receipt, the shipper agrees that the value of the air express shipment is so limited and that the liability of the express carrier shall in no event exceed this value. The air service uniform express receipt provides that the Railway Express Agency, Inc., will not be liable, unless caused by its own negligence or that of its agents, for loss or damage occurring through natural shrinkage or evaporation or loss due to defects in or the nature of the goods, escape of live stock, loss of articles of extraordinary value unless enumerated in the express receipt, act or default of the shipper or owner, improper packing, acts of God, public enemy acts, authority of the law, quarantine, strikes, riots, hazards of state of war, occurrences at custom's warehouse, exam-
ination or partial delivery to consignees of C. O. D. shipments, or delivery under instructions of consignor to consignee at non-agency station after shipments have been left at these stations.\footnote{50}{Ibid, paragraphs 3 and 4. So far as can be discovered by these writers, no cases have come before the courts involving the liability or limitations of the liability of the air express division of the Railway Express Agency.}

In \textit{Aslan v. Imperial Airways, Ltd.}, an English Court held that recovery by an owner of a shipment of gold was precluded by the terms and conditions of the contract of carriage under which the goods were transported. The contract contained, among other provisions, stipulations that the air transport company was not a common carrier, that it reserved the right to refuse to accept any goods offered for carriage, that the goods were accepted for transportation only at the sender's risk, and that the air transport company accepted no liability for loss suffered with respect to the goods.

The court observed that the defendant air lines had not expressed willingness to transport goods for all, without discrimination, and was, therefore, not a common carrier of goods, and the sender was precluded from recovery by these terms of the contract of transport. Its opinion indicated, however, that common carriers of airplane were subject to the common law liability of common carriers for goods accepted by them for transportation and delivery.\footnote{51}{(149 L. T. 276), 1933.}

It would appear from this decision that the court in declaring the air carrier a private (or contract) carrier, considered as conclusive the carrier's words in its contract, wherein it disclaimed willingness to carry for the public indiscriminately. Other attempts by carriers to escape common carrier liability by statements of this sort generally have been unsuccessful, and the court in this case would have been on sounder ground had it examined the facts of the carrier's operation rather than to have relied to the extent it evidently did upon its contractual definitions of its status.

In a note in the University of Pennsylvania Law Review, the editor sharply criticizes this decision for the reliance of the court upon the wording of the carrier's contract rather than upon the character of its operations. "The court would have done well to attach a minimum significance to the words used, and to inspect carefully instead the actual character of the defendant's business operations in determining the company's status. Thus the fact that the company was organized for the very purpose of offering an air transportation service, that it published regular tariffs for carriage over established routes, are considerations present in the instant case, but neglected
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by the court, leading to the inference of an intention to serve all who should apply."\(^5\) The decision is open to further criticism in that it gave validity to a contract denying all liability, although the decisions are uniform in permitting carriers to limit their common law liability with reasonable limits only, and in holding that contracts which attempt to stipulate against all liability have long been held in the United States and Great Britain to be of no legal effect because contrary to public policy.\(^5\)

**Uniform State Law for Aeronautics and Air Carrier Liability**

The Uniform State Law for Aeronautics was drafted in 1922 by the Conference of Commissioners for Uniform State Laws. This uniform act has been adopted in 22 states and territories of the United States, with modifications in some of the detailed provisions by some of the state or territorial legislatures. In its original form the uniform act contains no specific provisions respecting the liability of air transport carriers for injuries to or death of passengers resulting from airplane accidents. The uniform act as modified and adopted by the Pennsylvania legislature in its act of 1933 includes provisions with respect to the liability of air carriers for their passengers. Liability of air carriers is determined under Pennsylvania law by the rules of law applicable to torts on land.\(^\text{54}^\)

The Civil Aeronautics Act, 1938, contains no provisions with respect to the liability of interstate common carriers by aircraft.

**Uniform Aviation Liability Act**

The Conference of Commissioners on Uniform State Laws in 1938 approved a uniform aviation liability act, but this uniform act has not been adopted by any of the states or territories. In commenting upon state legislation in this field the Civil Aeronautics Board has indicated some of the reasons why this legislation has not been enacted.

"Because the adoption of comprehensive aviation liability legislation by the legislatures of the 48 states would have an important effect upon the functions of the then newly created Civil Aeronautics Authority, the Commissioners on Uniform State Laws decided to refrain from sponsoring the new uniform act until this agency could study the entire problem and submit recommendations with respect thereto.

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\(^5\) (82 U. of P. Law Rev. 165), 1933.


\(^5\) (P. L. 1929 and 1933).
“For some time the Board's staff has been engaged in a study of the problem, covering all phases of the general question. On June 1, 1941, a member of the Board's legal staff completed a report which is believed to be the most exhaustive study yet prepared on aviation liability. The report has not yet been formally considered by the Board, but has been released in order to give interested persons an opportunity to offer comments.

“The report recommends the adoption of a comprehensive federal aviation liability statute in place of the enactment of state aviation liability laws. It is urged that the Federal Government define liability in aircraft accidents, and authorize a federal agency to compel, by regulation, all classes of aircraft operators to carry liability insurance. In addition, the report criticizes the present laws governing accident liability, pointing out that they are not particularly well adapted to the peculiar characteristics of travel by air.”

Summary and Conclusions

Although the law with respect to the liability of aircraft carriers is in the developmental stage both with respect to statutory and case law, the following generalizations appear to be warranted by the present state of the law:

1. Air transportation carriers are included in the category of common carriers if they hold themselves out as such despite the novelty of the mode of transportation.

2. The status of an air carrier as a common carrier is tested by the same criteria as applied to other carriers to ascertain their status.

3. If air carriers do in fact hold themselves out to serve the public with only the well-recognized reservations with respect to capacity and extent of service, they are common carriers.

4. Reasonable rules and regulations with respect to persons accepted or rejected as passengers, limiting the number of passengers carried and the cancellation of service because of weather conditions may be made and enforced by air carriers without changing their status as common carriers.

5. Fixed routes and set schedules are not necessary criteria of the common carrier status,—the holding out appears to be the controlling criterion.

6. Aircraft carriers may have the status of common carriers even

in instances where the planes used take off and land at the same point without landing at any other point en route.

7. If carriers by aircraft do in fact serve the general public as common carriers they are subject generally to the same liability as other common carriers.

8. Aircraft common carriers are under legal obligation to exercise the highest degree of care, vigilance, precaution and skill consistent with the practical operation of the aircraft.

9. Common carriers by airplane are not liable for loss or damage suffered by their passengers caused by unusual or unpredictable weather conditions.

10. Passengers transported by air carriers have been held to assume all the usual or ordinary perils incident to this mode of travel, when the loss or damage they suffer is not due to negligence on the part of the carrier or its employees.

11. No presumption of negligence on the part of the carrier arises from the mere occurrence of an accident. The passenger alleging loss or damage must prove the alleged negligence in accordance with established rules of evidence, excepting in cases where the doctrine of \textit{res ipsa loquitur} is applicable.

12. The \textit{res ipsa loquitur} doctrine has been applied in air carrier accidents only when the cause of the accident and its surrounding circumstances were within the sole control of the carrier, and when no known or acknowledged cause of the accident could be assigned.

13. Common carriers by aircraft cannot provide in advance for avoiding or limiting their liability as common carriers for loss or damage suffered by passengers as a consequence of the negligence of the carrier or its servants, by statements in their tickets or stipulations in their contracts of transportation denying their status as a common carrier, limiting their liability or precluding recovery.

14. The liability of common carriers of property by air is subject to the same rules as those applicable to other common carriers of property.

15. Uniform liability of air carriers of passengers and property appears to be developing along rational lines and the further development of uniformity is being facilitated by state legislation. There is a possibility that uniformity in air carrier liability will be further developed by national legislation.