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IS SPECIAL AVIATION LIABILITY LEGISLATION ESSENTIAL?—PART I*

By Edward C. Sweeney

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RECENT airline crashes near air terminals in the New York area have brought again to public attention the old questions: What is the liability of the airline to its passengers and to injured persons on the ground? What monetary damages should be paid to the innocent victims of these crashes?

Before the inception of successful mechanical flight in 1904, lawyers in this country and abroad questioned the adequacy of common law rules and analogies to handle the anticipated legal disputes. In 1922, a Uniform State Law for Aeronautics prescribed the liability of aviators to persons and property on the ground. This Act was adopted, in whole or in part, by more than twenty-four states. During the 1930's the adequacy and policies enumerated by this Act were re-examined by several legal groups. In 1938, the Commissioners on Uniform State Laws adopted a new Code made up of a Uniform Aviation Liability Act, a Uniform Law of Airflight, and a Uniform Air Jurisdiction Act. This Code was opposed by most aviation interests.

Shortly after the Civil Aeronautics Authority opened its doors in 1938, this Code was presented to it. On December 5, 1938, the Authority issued a finding that the adoption of the proposed uniform liability Acts by the several states might have a vital effect upon the administration of the Civil Aeronautics Act and instituted a full investigation. Later, this writer, as a member of the Authority's legal staff, undertook to make a comprehensive study of all phases of aviation liability and of aviation insurance practices. The writer's study was published in 1941 by the Board as a staff report under the title of "Report to the Civil Aeronautics Board of a Study of the Proposed Aviation Liability Legislation." In this report of over 400 typed pages, the writer recommended the enactment of comprehensive Federal liability legislation which departed radically from ancient common law principles of liability. With the advent of World War II, this staff proposal, as well as the 1938 Uniform State Acts, as approved by the Conference of Commissioners, lost their urgency and no definitive action was taken. The Commissioners withdrew their endorsement.

* Guest Editor's Note: This article is included in this issue at the request of the Guest Editor because of its general importance at this time when the international aviation liability conventions are in the process of being revised.

1 The text of these Acts will be found in Handbook of the National Conference of Commissioners Uniform State Laws and Proceedings of the 48th Annual Conference, pp. 166-70, and 9 J. AIR L. 726-744.
While time has not permitted extensive revision of the study completed in 1941, the writer has been urged from time to time to republish this study as it has long been out of print. The final chapters of this study summarize the factual and legal issues involved in considering the need for recommending any remedial aviation liability legislation. The final chapter presents recommendations. A careful review of the material in these chapters shows that the issues there raised are still vital and worthy of consideration in 1952. In the following pages these chapters are presented with substantial deletions and only minor additions.

**Issues Involved in Remedial Liability Legislation**

Many arguments have been advanced in support of and in opposition to the adoption of special aviation liability legislation. These arguments can be focused on ten issues or questions, dealing with different but interrelated factual and legal aspects as more fully developed in the studies made for the Civil Aeronautics Board in 1941.

1. *Do Accidents Occur More Frequently in Air Transportation than in Other Forms of Transportation?*

A comparison of the annual accident statistics for domestic air carriers, passenger railroads and intercity buses up to the beginning of World War II shows that the number of passenger lives lost per passenger mile traveled by scheduled airlines has always exceeded the number of lives lost per passenger mile traveled on the railroads.

However, when non-fatal injuries as well as fatalities are included in the comparison, the safety record of the airlines becomes more impressive. The ratio of non-fatal to fatal passenger injuries in railroad and bus accidents is much greater than that of the air carriers. In most major airline accidents all the occupants of the plane have been killed outright, whereas even in serious railroad and bus accidents many passengers are injured and maimed, but relatively few killed.

If all kinds of passenger injuries are compared, the statistics show that the chance of a passenger receiving some kind of injury (fatal, severe or minor) is less per mile traveled by air carrier than by railroad or bus; that his chances of receiving a non-fatal injury are substantially less in air carrier operations, but greater with respect to fatal injuries than when traveling by railroad or bus.

Injury to persons on the ground by aircraft is a rarity. The killing of 6 persons in their homes at Elizabeth, New Jersey on January 22, 1952 by an airline plane invoked wide attention in part because of its unprecedented character. Almost all persons who have been injured by aircraft have been participating in aviation as passengers or otherwise. This is not true of the railroads or buses which operate on rights-of-way with grade crossing and on highways which are shared by or accessible to third parties. Barring forced landings, the only non-passengers that an aircraft may conceivably injure between landings
at airports are persons who may be hit by objects dropped from the aircraft or injured as a result of mid-air collisions. Most crashes have not been in congested areas and have not injured persons on the ground. Crashes and mid-air collisions have been and should continue to be extremely rare. Of the few persons injured on the ground, a substantial percentage were on the runways of established landing areas at the time of injury. The Civil Air Regulations require aircraft to fly at altitudes and under conditions that should permit them to effect emergency landings where no damage will be done to persons and property on the ground.

Appraisal. A statistical study of aviation losses and a comparison of the number and rate of such losses with those incurred in other forms of transportation, certainly by itself does not establish that the accident record of civil aviation is so fundamentally different from that experienced in other forms of transportation that special remedial liability legislation is essential. It is one of many factors to be considered. The total number of fatalities attributable to aviation is insignificant in comparison with the number of persons injured by railroad trains and automobiles. Moreover, any comparison of the rate of accident frequency depends very largely upon the standards used for the comparison. The fact that the ratio of non-fatal to fatal injuries differs markedly between the various forms of transportation emphasizes the importance of the standard of comparison employed.

In many respects the significance attached to the comparative accident record depends upon whether one believes that the need for remedial liability legislation is more closely related to the total number of injuries to members of society or to the rate or frequency of such injuries. In either case many other issues must be considered before determining a legislative program.

2. Do an Appreciable Number of Persons Injured by Aircraft Have No Redress at Common Law Because Such Accidents Are Generally Not Due to the Legal Negligence of the Aircraft Operator?

Many aircraft passengers are said not to be able to recover under the common law principles of negligence because many aircraft accidents are the result of *vis major*, unavoidable accident, misconduct of a third person or undetermined causes. Two independent examinations have been made of the accident investigation files of the Federal agencies charged with the promotion of safe flying, the first one by Dean John H. Wigmore in 1937 of the files of the Bureau of Air Commerce and the latter, made in the course of the writer's staff study, of the files of the former Independent Air Safety Board covering accidents involving passenger fatalities in 1939.

It is reported that Dean Wigmore's investigation revealed that "not in 20% of the accidents which have thus far occurred would it have been possible for the plaintiff to find and produce provable evidence of the real cause of the accident." From the examination of 1939 fatal
passenger accidents, the writer was reasonably confident that the plaintiff could establish liability in about 34% of all cases, comprising 44% of the commercial accidents and 32% of the non-commercial accidents.

The following factors show some of the reasons why a larger percentage of aircraft accidents are not due to the operator's negligence than of accidents involving other forms of transportation:

(a) A number of aircraft accidents are due to encountering dangerous weather or atmospheric conditions. If these could not be foreseen or avoided, accidents resulting therefrom cannot be said to be due entirely to negligence. Furthermore, atmospheric conditions are not usually as dangerous or as common on the surface of the earth, and thus do not as frequently cause accidents to surface transportation.

(b) A large proportion of aircraft accidents are due to an "error of judgment" on the part of the pilot, which the most experienced pilots may inadvertently commit. In many instances such an error may not be considered by a judge or jury as legal negligence, although admittedly there would be many borderline cases.

(c) Accidents attributable to "poor technique" on the part of the pilot may often be said not to be due to the pilot's intentional failure to exercise the highest degree of care and skill that he possesses, and his "poor technique" may well be held to be that of a reasonable man with his training and experience.

(d) Aircraft accidents attributable to violations of the Civil Air Regulations are the only group of accidents that are prima facie due to the negligence of the operator.

"Aviation is said to be ultra-hazardous because even the best constructed and maintained aircraft is so incapable of complete control that flying creates a risk that the plane, even though carefully constructed, maintained and operated, may crash to the injury of persons and property on the ground over which the flight is made." This is the argument advanced by the American Law Institute in classifying aviation as an "ultra-hazardous activity" and by so doing in reaching the conclusions that the aircraft operator is subject to "absolute liability" with respect to persons and property on the ground.

In support of this characterization of aviation, it is pointed out that approximately one out of every six aircraft in operation in 1939 was involved in some kind of an accident. It is said that this is proof per se that aircraft are not "fool proof" and that even the best pilots occasionally have accidents, which are not always attributable to their own negligence. In further support of the ultra-hazardous argument it has been urged that negligence plays only a small part in aircraft accidents for the reasons:

(a) pilots, and especially air transport pilots with passengers, never
intentionally endanger their own lives or those of their passengers by slipshod or foolhardy flying,
(b) maintenance personnel realize the importance of performing their duties with the greatest of care,
(c) aircraft manufacturers build aircraft as air-worthy as possible, pursuant to Government regulation, within the limits of the performance specifications prescribed.

Appraisal. At best, any estimate of the percentage of aircraft accidents that may be due to causes for which no liability would be incurred by the operator under the common law standards is highly speculative. In comparison to the number of injuries, the number of lawsuits that have been litigated has been extremely small. Government accident files, although not designed to show liability, are perhaps the most reliable source of information and the foregoing discussion shows some of the difficulties and uncertainties that may be encountered in employing these files for this purpose.

The insurance underwriters’ claim and settlement records for airline passenger claims were examined during the course of the writer’s study in 1940. They indicate that (exclusive of claims shown as unsettled) 86.3% of the airline fatal passenger claims examined were voluntarily settled for substantial amounts and 85.7% of non-scheduled commercial fatal passenger claims were similarly settled. Since the insurance in these cases covered only the legal liability of the operators, it is believed that these percentages are significant notwithstanding the natural desire of the underwriters to avoid litigation wherever possible.

All factors considered, the writer concluded in 1941 that if all the facts concerning the causes of aircraft accident were available, the pilot or operator would be liable under common law standards of negligence in at least two-thirds of fatal passenger accidents.

Accidents due to vis major, unpredictable mechanical failure, and undetermined causes should, it is believed, become less frequent as government agencies continue to make thorough investigations of the probable causes of all major accidents and as the science of air navigation advances with improved equipment and navigational aids, and as these are installed and used.

In non-commercial flying a surprisingly large number of accidents were found to involve a wilful violation of the Civil Air Regulations and to flying practices which were clearly contrary to commonly accepted standards of safe flying—the buzz pilot. While many accidents may have occurred in the past which were not the fault of the pilot or operator according to common law standards, probably many of these accidents were so classified because of the lack of familiarity with aircraft operations, or an inability to prove the cause, the latter being the issue raised by the next question.
3. Do Practical Difficulties Unduly Hinder Production of Legally Competent Evidence to Prove Negligence in Aviation Suits?

During the 12 years preceding World War II more than 250 passengers were killed in scheduled air carrier accidents, and many more in other types of flying operations, and yet few aircraft negligence suits were litigated. It is contended this is due to the fact that counsel for the plaintiffs have considered it would be impossible to prove that negligence of the aircraft operator was the proximate cause of the accident. For this reason it is concluded such parties have found it expedient to accept any settlement offered by the aircraft operator or his insurer rather than to hazard their entire recovery upon the success of proving the negligence of the aircraft operator.

The difficulties confronting the plaintiff in an aircraft negligence suit are said to be due to the following conditions which are peculiarly applicable to such accidents:

(1) The aircraft operator, and especially the airline, has control of all records and physical equipment and properties involved. This forces the plaintiff to resort to legal process of discovery in order to determine whether he has cause of action and in order to organize his case.

(2) Whereas the airline is in a position to prepare its defense immediately following a crash, a delay must necessarily follow before the plaintiff obtains counsel and is able to organize his suit. As a result, essential physical evidence frequently is handled or moved so as to be difficult or expensive for plaintiff to examine.

(3) Aircraft crashes usually kill all occupants. There are few "inside" witnesses.

(4) There are seldom any "outside" witnesses to aircraft accidents, for the reason that the airlanes are not watched by as many pairs of eyes as are the highways. Aircraft accidents occur suddenly, frequently commence above the overcast clouds and in remote areas.

(5) Aircraft operation and navigation is highly technical and the testimony of lay witnesses, when available, is generally indefinite and of little use.

(6) All physical evidence of what occurred on an aircraft at the time of and immediately prior to most serious accidents is usually demolished by the crash, consumed by fire, and occasionally lost under water.

(7) The track followed by an aircraft is traced in the sky and cannot be reconstructed as easily as the course of an object on a highway. This makes it difficult for the plaintiff to prove what happened to an aircraft immediately preceding a crash.

The foregoing conditions which may tend to render it difficult to produce legally competent evidence in aircraft negligence suits have been vociferously challenged as inaccurate:
The assertion that “aircraft crashes usually kill all of the occupants and inside witnesses” is challenged. In the 85 accidents involving death to passengers on the domestic airlines between the years 1933 and 1940, inclusive, 25 resulted in the death of all occupants of the plane and 10 left some survivors. Among the 7 passenger fatal accidents that occurred in foreign air transportation during this same period, there were survivors in 4. Of course, in some cases there were eye witnesses to the accident other than occupants of the plane.

The assertion that “the track followed by an aircraft is traced in the sky and cannot be reconstructed as easily as the course of an object on a highway” is challenged with respect to air carriers. In the air carrier accidents of which full government investigations have been made, seldom is difficulty encountered in accurately reconstructing the flight of the aircraft prior to crash and the events on the aircraft. The investigators are aided by the filed flight plan, weather reports, and the plane-to-ground radio communications during flight.

The assertion that “all physical evidence of what happened ... is usually demolished by the crash, consumed by fire, and occasionally lost under water” is denied by many experts. The Government investigators are able to reconstruct precisely what happened prior to crash in the vast majority of cases. The wrecked aircraft is seldom so completely burned as to leave no record of the progress of the fire or cause.

In aircraft accidents the negligence of the operator usually occurs some time prior to the actual crash. In air carrier accidents, particularly, such acts of negligence are frequently a matter of public and company record which is not kept in the aircraft, such as, for example, the ship-to-ground radio communications, the dispatchers’ reports, the flight plan, loading schedules and Government weather reports.

**Appraisal.** Practical difficulties confronting the plaintiff in securing legally competent evidence to prove a cause of action in an aircraft negligence suit are both real and substantial. Aircraft traverse a new medium of travel at great speed and accidents occur suddenly and with devastating results. Fundamentally, the difficulties appear to be due to the fact that aviation is a new and highly mechanized form of transportation in which the personal element — the skill of the pilot, the mechanic and the manufacturer plays an important role. The public accident hearings, conducted by the Civil Aeronautics Board, reduce these difficulties considerably, even though the Board’s accident investigation reports may not be used in court.

Furthermore, the difficulties of proof directly attributable to the highly technical nature of aviation should progressively become less formidable as plaintiffs and their counsel become more familiar with the technical aspects of aircraft and of aerial navigation. Eventually
these should prove no more serious than those now confronting persons injured by other modern mechanized vehicles. It is believed, however, that much of the confusion resulting from the technical aspects of aviation may be eliminated by remedial legislation clarifying the burden of proof, i.e., the burden of going forward with evidence and the burden of persuasion.


Appraisal. The uncertainty of application of common law principles and defenses in aviation negligence suits (the rules of proximate causation, assumption of risks, the degree of care owed by the operator to his passengers, contributory negligence, and res ipsa loquitur) and the expense and delay incident to such litigation present problems for the plaintiffs in such suits which are also real and substantial. These same difficulties likewise cause hardships to the defense, with the result that litigation is unsatisfactory for all concerned.

The precise application of legal principles to aviation negligence suits is in a formative state. Since the degree of care that the operator is required to exercise in order to avoid liability is determined by what the reasonably prudent man would do under the circumstances, this degree of care will not be predictable for every circumstance until many suits involving all types of accidents are litigated. Only a few aviation negligence suits are currently being litigated and the lack of definite precedent will probably continue for some time.

The election imposed in many jurisdictions upon plaintiffs of pleading either specific acts of negligence or of relying upon the rule of res ipsa loquitur, and the uncertainty existing as to the effect of pleading the rule, admittedly cause hardship in many cases. The reports of the decisions indicate that the courts are aware of these difficulties and prevent injustice resulting therefrom wherever possible.

It is believed that a considerable amount of this confusion can be eliminated by adoption of liability legislation. With respect to passengers, the confusion due to the lack of legal precedent and to the novel technical aspects of aviation (see Issue No. 3) may be eliminated by remedial legislation clarifying the burden of proof, i.e., the burden of going forward with evidence and the burden of persuasion.

5. Does the Existing Diversity of Liability Standards Among the Several States Hinder the Development of Aviation?

As most commercial aviation is interstate in nature, the air carrier operates under the peculiar condition that both the standard and the extent or limit of his liability may change each time he flies over a state line. A survey of the present law and rules of liability among the several States reveals a startling lack of uniformity in the standards of liability and in the application of common law principles. In most of
the states liability is predicated upon general common law principles of negligence with resulting confusion in application and interpretation among the different states.

In some 25 jurisdictions, state statutes of various types regulate the liability of the aircraft operator. Many of these states have statutes regulating the operator's liability to persons and property on the ground, and quite a few impose absolute liability. In the remaining states, there have been so few cases litigated that it is impossible to ascertain whether the courts will continue to hold the aircraft operator liable for all damage done to persons and property on the ground or upon what theory they will proceed if they so hold. With respect to liability to passengers, there are, on the other hand, few regulatory statutes, but there are many decisions in which the courts have applied common law principles of negligence with some diversity of holding, particularly in respect to what constitutes negligence and to the effect of the rule of res ipsa loquitur.

In addition to the diversity in the standards of liability among the several states, there is an absence of uniformity as to the amount recoverable. Some states have statutes limiting the amount of recovery for wrongful death. Others have constitutional provisions prohibiting such statutes, as well as prohibiting legislative limitations upon the amount recoverable for personal injuries. 

Appraisal. An appreciable lack of uniformity among the several states is apparent in the standards of liability and in the amount recoverable. Underwriters of aviation liability insurance must take into consideration the most unfavorable standards in fixing premium rates. It undoubtedly would be advisable to have a single standard of liability applicable to an activity which is so essentially interstate in character as aviation. On the other hand, each aircraft accident is a liability problem in itself and the rules that would be applicable thereto in other states are of little importance. What is most important is that the rules of the state wherein the accident occurred (or those which govern the liabilities) are well established and readily applicable to each individual accident.

6. Does the Present Lack of a Limit Upon the Amount Recoverable Under the Common Law Constitute a Catastrophe Hazard Which Creates a Deterrent to the Development of Civil Aviation?

Air carriers are said to be particularly vulnerable to the award of large judgments under the common law rules governing the measure of damages. Under the common law the amount recoverable for personal injury and wrongful death depends upon proof of damages. For personal injuries the common law attempts to compensate in damages for the pain and suffering and the financial expenses incurred, and for the loss of earning power. In death cases the amount recoverable is generally controlled by the applicable "Death by Wrongful Act" statute, which may be a survivorship statute perpetuating the
right of action of the deceased, or may create an entirely new cause of action in dependents for wrongful deprivation of support.

There is no statutory limit in any state on the amount recoverable for nonfatal injuries, and no limit with respect to death in more than two-thirds of the states. As a result, if a single airline accident injures or kills a large number of persons, there is almost no limit to the amount that may be recovered in personal injury and death-by-wrongful-act suits. In jury trials the amount of damages is determined by the jury who have great discretion, although they are directed to follow the instructions given by the judge and their verdict may be reviewed by the court if an abuse of discretion is found.

The common law system of measuring damages permits large recoveries by the person who has a large earning capacity at the time of injury, that is, the active executive with a large annual salary. Children, college students, housewives, and retired businessmen are ordinarily precluded from substantial recoveries because they are not active earners at the time of the accident. Air transportation attracts the business executive, and a higher percentage of airline passengers have larger annual earnings than have passengers using other forms of transportation. While no comparative figures are submitted to support this statement, it is well known that up to the advent of air tourist service air transportation attracted the luxury class of travelers, comparable to those that employ the Pullman accommodations of the railroad. This means that, in respect of the average passenger, the air carrier is subject to a greater potential liability than the ordinary railroad or bus operator.

Phenomenally high settlements and judgments have occasionally been secured by representatives of passengers killed in airline crashes. Before 1941 settlements are known to have ranged up to as high as $75,000, although such instances are rare. The author's pre-war study for the CAB developed that the average of the judgments and voluntary settlements negotiated by the underwriters with respect to airline passenger fatal injuries occurring between 1934 and 1938, which were settled before 1940, amounted to $11,144, including 15 claims where only nominal settlements were made.

Appraisal. The fact that there is no limit under the common law upon the amount that injured parties may recover for non-fatal injuries in any state and for wrongful death in two-thirds of the states, and the further fact that there is no over-all limit upon the total liability that an aircraft operator may incur for damages caused by a single accident do present a catastrophe hazard to civil aviation. The lack of a limit upon the liability that the aircraft operator may incur increases the average of claim settlements and consequently the premium rates that must be charged for aircraft liability insurance with reasonably adequate policy limits. On the other hand, such a potential liability is not different from that to which the operators of other forms of transportation are now subject in their relations with the public and
it can hardly be said to be a financial burden to pay compensatory damages.

A limitation of liability may be justified in part as the *quid pro quo* for imposing liability regardless of negligence. If the common law standard of liability based upon negligence is preserved, a limitation may be justified only as a method of subsidizing or encouraging civil aviation by reducing premium rates and by removing the possibility that a particularly disastrous accident may occasion liabilities that may bankrupt the operator. If civil aviation, or commercial air transport alone, is considered of such national importance that this should be done, then a statute limiting liability is an effective way of subsidizing it. Such a limitation of liability in effect shifts to the individual victim or victims, or to society as a whole, the burden of bearing a portion of the damages caused by civil aviation whenever damage beyond the applicable limit of liability is caused by a single accident. Additional considerations involved in limiting the liability of the aircraft operator are discussed under question number 8, wherein the advisability of a system of limited compensation is discussed.

7. *Is There a Public Need for Compulsory Aviation Liability or Accident Insurance?*

It is asserted that persons injured in aircraft accidents seldom recover adequate compensation if the aircraft operator does not carry liability insurance, and that this condition presents a serious problem due to the small percentage of such operators (other than air carriers) who carry insurance. The author’s study for the CAB showed that on December 31, 1939, only 5.8% of all non-air carrier aircraft were insured against passenger liability, 11.2% against public liability and 9.83% against property damage. At that time all domestic air carriers carried liability insurance as a matter of good business practice.

In the event of a crash demolishing the aircraft, many individual operators are probably unable, irrespective of their degree of negligence, to compensate passengers and third parties injured by the crash or to reimburse the owners of property damaged. Some aircraft operators, even those carrying passengers on an irregular basis, are alleged to be operating on a “shoestring” with little financial backing.

The possibility exists that these operators, in order to avoid personal liability, may register their aircraft in the names of “Dummy Corporations” or in the names of members of their families who are “judgment proof.” This is certainly not true of the established airlines, aircraft operated by large corporations, and many others.

Insurance guarantees the solvency of the potential defendant and spreads the loss among all operators of a particular class. It is undoubtedly the cheapest way for the individual flyer to provide a method of paying the damages which may be caused by his flying, and if all aircraft operators were required to carry such insurance the cost of such insurance coverage, it is pointed out, should be substantially less
than it is now because of the great increase in the volume of insurance that would be written.

If a flier cannot pay for the damages he inflicts on the general public, particularly that which is due to his own negligence, it is contended by some he is not in a position to discharge his duty to society and should not fly until provision is made to discharge this duty. If the aircraft operator cannot afford to pay premiums to insure the payment of the damages his flying causes to the general public, should he be permitted to fly? Is any form of transportation, flying included, so important that serious damage done to individual members of the general public should go uncompensated?

The Motor Carrier Act of 1935 requires the interstate truck and bus operator to carry small amounts of public and property liability insurance. Massachusetts alone requires liability insurance on all private automobiles. Aircraft operators are not now required to carry insurance, although several states at one time enacted such requirements. However, foreign governments frequently require aircraft operators to carry insurance.

The cost of insurance is an expense which the commercial airplane operator would naturally pass on to his customers in the form of increased fares to the extent the traffic will bear it. The private flier, on the other hand, must bear the entire cost himself. Insurance costs may weigh heavily on the private flier, who is often a youthful enthusiast to whom the gratification of his desire for flying is already a major expense. Moreover, the cost of the premiums is a considerably larger item per mile of operation for him than for a commercial operator who can usually spread it over greater mileage. However, the actual amount of the premiums should not be large, and if a private flier cannot afford to pay these modest premiums annually, should he be permitted to fly an aircraft to the possible serious injury of the public?

Compulsory insurance would undoubtedly be a financial burden to many operators no matter how far premium rates were reduced, and any such requirement would offer a serious deterrent to the continued development of private and non-scheduled commercial flying to the possible impairment of our national defense. The turnover in individual airplane ownership is high. This is in part due to the great expense involved in maintaining and operating private aircraft, and if the expense of carrying insurance were added to the financial burden of such operators, this rate would be accelerated.

It is argued that since all scheduled airline operators carry liability insurance in amounts far exceeding that which would probably be required by any Governmental regulation, it would appear that there is no need for including these airlines in any compulsory insurance requirement. Furthermore, commercial corporations operating executive type aircraft are generally financially solvent, and there is little need to require them to carry liability insurance. The private aircraft seldom injures fare-paying passengers who can recover judgments. The passengers of these small planes are usually "guest riders," students
receiving dual instructions or joint adventurers. Under this analysis a statute requiring all aircraft operators to carry liability insurance would burden many operators and benefit the public only with respect to the irresponsible commercial aircraft operator, the airport base operators who may not be solvent and the individual pilot with respect to large third party claims.

Again, insurance policies do not ordinarily cover accidents resulting from strikes, war, riot, civil commotion, acts of public authority, or accidents (including violations of air traffic rules, etc.). Thus, compulsory insurance would not afford protection for every victim of an aircraft accident unless insurance is radically changed, which would undoubtedly be opposed by the aviation underwriters.

In order for any statute requiring aircraft operators to carry liability insurance not to operate as a deterrent to the development of civil aviation, the insurance required to be carried would, of necessity, have to be written for comparatively small limits. While such insurance would take care of the ordinary claims that arise, it would not insure payment of damage (or protection to the aircraft operator) in case of catastrophes. If compulsory insurance does not afford protection to the public against catastrophe hazards it is argued that it loses much of its usefulness and does not satisfy one of the fundamental reasons for requiring aircraft operators to carry liability insurance.

Appraisal. The victim of an aircraft accident has two problems in attempting by law suit to secure compensation for his injury; the first is to establish the liability of the aircraft operator by securing a judgment, and the second is to collect the judgment he obtains. The collection of judgments for wrongful death or personal injuries is a problem that is not peculiar to aviation, but is found in all tort litigation, and in a particularly exaggerated form in connection with private automobile accidents where so many drivers are "judgment proof."

Undoubtedly the victim of an aircraft accident has a much better chance of obtaining compensation if the operator carries insurance. While the ordinary insurance policy does not cover all types of accidents for which the operator may be liable (particularly those involving violations of laws and regulations), and may not be written in an amount to cover catastrophe hazards, it affords protection to the vast majority of persons injured by the insured. Thus, a statute prescribing the carrying of liability or accident (admitted liability) insurance would benefit the victim of aircraft accidents and would be desirable if it involves no serious disadvantages to aviation.

It is difficult to estimate the premium that would have to be charged if liability or accident insurance were prescribed for aircraft operators, but it appears that the cost would be fairly small if the accident record of past years may be relied upon. While compulsory insurance may have an initial adverse effect upon the development of general and non-scheduled commercial flying, it should not create a serious and lasting impediment.

It was concluded in 1941 that action should then be initiated
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looking toward the eventual insurance of all aircraft, provided proper safeguards could be taken to prevent such action from imposing an undue financial burden on the development of any form of civil aviation. The means of accomplishing this, are suggested in the final recommendations.

8. Would a System of Absolute Limited Liability, Similar to Workmen's Compensation, Be a Fairer Method of Adjusting Aviation Losses Than the Present Common Law System?

Contentions supporting the adoption of such a system, as a matter of social philosophy, it is urged that it is better there be an assured recovery to everyone injured of a limited amount than that recovery depend upon proof of negligence and only a small percentage of injured persons recover any amount of damages. The common law system, even with recovery assured by means of a compulsory insurance requirement, does not take care of those cases where injuries are sustained when neither the operator nor the injured party is at fault.

A system of absolute limited liability, such as is embodied in the Workmen's Compensation Laws, is represented as the modern trend in American jurisprudence. In such a system, the three elements of absolute liability, limited recovery, and compulsory insurance are equally essential. Absolute liability is represented as a principle not only of social expediency, but of social necessity, which alone will afford reasonable compensation to all persons injured by civil aircraft.

It is contended that it is more desirable to require the aviation industry to pay limited compensation to all injured parties than to have those who fail to recover damages under the present law become immediately dependent upon society as a whole.

It is argued by some that aviation is ultrahazardous in the sense that accidents frequently occur which are not due to the negligence of the aircraft operator and that, this being true, all losses directly attributable thereto should be borne by the industry as part of its cost rather than by the public or any member thereof who is injured without the fault of either party. Civil aviation, even in 1952, is a relatively new and growing form of transportation, and it is urged this is an appropriate time to adopt a new system of liability that incorporates modern social philosophy.

Such a system of compensation applied to commercial aviation would result in passing on the cost thereof to the users of the service. Private aviation presents a somewhat different problem, in that few advocate that the private flier should be absolutely liable for injury or death to passengers gratuitously carried, but the argument is that he should not participate in aviation if he cannot afford to carry insurance to compensate persons and property on the ground for injuries caused by his aircraft.

A satisfactory social adjustment of losses attributable to aviation demands, it is asserted, that all injured parties, both passengers and persons on the ground, recover a limited sum with a minimum of delay,
expense and uncertainty. This would eliminate the gambling element of lawsuits by which many injured persons recover nothing at all and a few recover exorbitant amounts, depending upon the skill of their counsel as much as on the merits of their claims.

An arbitrary limitation upon the amount that may be recovered appears socially justifiable. Pecuniary damages can at best only constitute approximate compensation for pain and personal injury. Compensation for loss of earning power may perhaps be more accurately measured, but even this depends upon an estimation of future earnings. Recognizing that damages awarded by a court or a jury are only an approximation, a legal system of compensation need not attempt to grant more than a specified maximum amount of compensation — an amount that will not permit the injured party or his dependents to become dependents on society. The balance of the loss may properly be borne by the injured party and not shifted to a new and essential form of transportation such as aviation, which is today not only commercially indispensable, but also a vital part of our national defense. As in all other forms of transportation, the passenger may properly be held to assume certain risks inherent in the means of conveyance he has chosen. One of these risks may well be a limitation on the amount he may recover, irrespective of negligence.

The limited liability feature of a system of compulsory compensation should have the result of fostering aviation by reducing the present cost of insurance. Placing a reasonable limitation upon the amount of recovery and removing the uncertainty and expense now involved in litigation should reduce substantially, it is estimated, the total sum paid by the aviation industry in adjustment and satisfaction of claims, notwithstanding the adoption of absolute liability.

Adoption of a limited compensation plan should also have no appreciable effect, it is contended, in increasing the number of fraudulent claims, or lead to other abuses feared by those who oppose such legislation. Requiring liability insurance to be carried by the motor carrier operator under the Motor Carrier Act, 1935, has led to no such abuses, and independent investigating committees have found that the Massachusetts Automobile Security Act has not appreciably increased fraudulent claims.

Statistics of aircraft accidents kept by the aviation underwriters as well as by the Government should furnish ample experience for scientifically establishing insurance rates. If complete, absolute liability is approximated the only statistics necessary to determine an insurance rate are the number of accidents and the number of persons killed and injured, and the amount of damages. Placing of a limitation on the amount recoverable should remove the necessity of loading rates to take care of the potential catastrophe hazard now presented. The imposition of absolute liability should not result in the successful prosecution of false claims.

A limited compensation plan would also prevent the aviation
underwriters (if they ever have) from taking advantage of the uncertainty and confusion existing in the present law of liability to effect unreasonably low settlements with claimants. Such a system would eliminate the necessity of claimants employing attorneys, at least to the same extent as this has been true of workmen's compensation cases. This would mean that the contingent fees usually paid attorneys, ranging from 25 to 50% of the amount recovered, should go to the injured persons themselves, or their representatives or dependents, thus in effect substantially increasing the amount of compensation.

Although it is recognized that the employer-employee relationship may well furnish the ideal condition for the smooth functioning of an absolutely automatic compensation system, why is such a situation the only one in which a compensation system should be found workable? In the relationship of the aircraft operator to the persons injured by his flying the principle of limited absolute liability (compensation) may well be adopted, and the amount of such compensation for any given case may be permitted to vary between a fixed maximum and a fixed minimum in order to afford the flexibility necessary to meet the varying economic considerations which will be found. Such a flexible system of compensation is better, it is contended, than the common law systems of completely unlimited liability on the one hand, and better than an absolutely right compensation systems on the other.

The adoption of a comprehensive system of compensation for aviation accidents should be accepted by the public not as a branding of aviation as extrahazardous, but rather as an indication that aviation as a transportation industry has reached a point of maturity at which it is regarded as feasible to provide for the cooperative underwriting (by operators, insurers and, to a certain extent, by the United States Government through the medium of mail pay) of all accidents which may occur. An attitude of cooperation on the part of the industry in favoring such a system should strengthen this impression while an attitude of hostility might somewhat weaken it.

Contentions opposing the adoption of such a system. A system of limited compensation is not in accord with the prevailing Anglo-American concept of justice which is based upon the premise that in being a member of organized society one assumes the risk of harm not caused by the fault of another. Pursuant to this philosophy, one injured by the normal course of conduct pursued by another must not expect to collect for unavoidable injuries resulting therefrom. The fact that historically aviation is a relatively new source of harm is immaterial.

Viewed from a social aspect, it is contended, aviation should no more be classified as ultrahazardous and subjected to absolute liability than should railroads or automobiles and other forms of transportation. Imposition of absolute liability in place of the present system under which liability is placed upon fault would be injurious to commercial aviation in that it would constitute an unjust discrimination against it in favor of other forms of transportation.
After an injury has occurred under circumstances indicating that it was caused by legally culpable conduct, other considerations come into play. Any system under which the injured party may not recover the full extent of his losses (as loss is determined by judge and jury) is branded as essentially arbitrary, unfair and not in accord with the American belief that one should pay the full limit of the injury caused by his fault. Liability in damages to the extent of injury caused is viewed by the common law as a sanction whereby legitimate conduct is secured.

When viewed from the economic standpoint, it is argued the absolute liability feature of a system of limited compensation will be disastrous because it necessarily produces a prohibitive increase in insurance rates. Experience under the Massachusetts Compulsory Automobile Security Act has amply demonstrated this to the satisfaction of many competent observers. If every operator of aircraft, commercial and non-commercial, is required to carry insurance, the underwriters will no longer be able to select only sound risks and the combined liability of all operators is bound to be reflected in higher rates. Furthermore, the knowledge on the part of the public that all aircraft operators are insured, and hence financially answerable, will result in many exaggerated and perhaps even fraudulent claims being presented. There will be many opportunities for petty claims for injuries being presented by "passengers" which may not be serious but which may be grossly exaggerated by unscrupulous plaintiffs. Moreover, injuries for which settlements are now being effected in lesser but adequate amounts, will be compensated in accordance with the maximum recovery specified in the legislation.

The underwriters contend, in opposition to the absolute liability feature of any proposal, that it would render it impossible for them to estimate mathematically the cost of the liability insurance prescribed and that they would not be justified in hazarding a guess as to the cost of such insurance. For years following the adoption of a statutory limited compensation plan, the aviation underwriters assert they would be unable to fix rates upon a definite mathematical basis because of complete lack of experience as to the effect of the new standards of liability upon the number and amount of claims. As a result, rates would have to be fixed at a sufficiently high level to take care of any contingency.

If the proposed system involves a substantial increase in present premium rates the cost thereof would be prohibitive to most aircraft operators, particularly the private fliers, who could not pass on the additional cost thereof to the traveling public or to the United States Government in the form of mail pay or subsidy claims. Even a small insurance premium would be a burden to private fliers who find the upkeep and operation of an aircraft an expensive activity.

The pre-war settlement record of the insurance underwriters, as shown by the author's study for the CAB, is said to show that they have not attempted to take advantage of the alleged uncertainty and confu-
sion in the law to effect unreasonably low settlements, but that, on the contrary they have made substantial settlements of most claims and have been fair with each individual claimant.

The fancied analogy between the proposed legislation and the Workmen’s Compensation Laws is said to be illusory because of the absence, as between the aircraft operator and his passengers or persons on the ground, of that relationship which alone renders Workmen’s Compensation Laws fair and workable. The claimant and the aircraft operator are strangers. Between the employer and the employee there are mutual responsibilities and control, and the salary paid to the employee affords an equitable basis for fixing the amount of compensation. It is argued that it would be impossible to devise a fair and equitable scale of compensation benefits for aviation accidents because there is no common norm which could be used as a basis for fixing recovery as in workmen’s compensation cases. With respect to an injured child, housewife or non-worker, there would be no basis on which benefits could be computed. The psychological effect of the imposition of absolute liability would be adverse to aviation, since the imposition of such a liability by statute would brand aviation as ultrahazardous in the eyes of the general public and would retard the development of air travel.

Appraisal. The adoption by legislation of a system of limited absolute liability applicable to aviation losses would be in line with the social philosophy that led to the adoption of workmen’s compensation laws. The enactment of such a system would be premised upon the conviction that the traditional common law system of liability based upon fault is not adaptable to a highly mechanized form of transportation such as aviation. The plan of liability embodied in the Warsaw Convention relative to international passengers appears to have been designed in part to promote international aviation by relieving it of certain liabilities rather than as a complete system governing all the liabilities of the international operator.

A limited compensation system, which eliminates the issue of the operator’s fault, is probably the best proposal that has been advanced to insure that all injured parties, both passengers and persons on the ground, receive a limited sum with a minimum of delay, expense and uncertainty. Admittedly, such a system would be experimental in nature and might not work out as the advocates thereof anticipate. From the best information that can be obtained the cost thereof would not be prohibitive.

One additional problem is whether this is an appropriate time for a Federal Government agency to recommend experimental legislation of this type. There is no public demand for the adoption of such a system and never has been, as there was when workmen’s compensation laws were first adopted.

(To be concluded)