Is Special Aviation Liability Legislation Essential - Part II

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IS SPECIAL AVIATION LIABILITY LEGISLATION ESSENTIAL?—PART II*

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The need for remedial aviation liability legislation to be applicable "AFTER" accidents occur should in no way be confused with the need for safety measures "BEFORE" accidents occur, i.e., of developing safer aircraft, training better pilots and formulating more effective traffic and airport control.

Accident records show that substantial progress has been made in decreasing the rate of accident frequency. This improvement should continue in all forms of civil aviation. Notwithstanding, considering the presence of human error and of mechanical failure, and the hazards of atmospheric disturbances, there will always remain the possibility of accidents as long as man flies by mechanical means. "AFTER" the accident happens, no amount of prevention or safety measures can undo the resulting damage. From that point on, the Federal Government or the States, through their respective legislatures, should implement the accident prevention program by a judicial process which will provide compensation to the victims of aviation accidents commensurate with the importance of the social problem involved.

In Part I of this Article eight factual and legal issues were considered dealing with interrelated arguments that have been advanced in support of and in opposition to the adoption in the United States of special aviation liability legislation. This discussion was condensed from the writer's study for the CAB, published in 1941, and at that point in the discussion of issues it had been shown that the common law rules of negligence and proximate cause applicable to torts on land and to passengers of common carriers were not particularly well adapted to accidents occurring in any modern form of transportation. In an alarming percentage of accidents the victim fails to recover what he should, and in a few cases he receives more than compensatory damages due to fortuitous circumstances which frequently have little or nothing to do with his deserts or the merits of his claims. Expense, delay, and uncertainty of the application of common law principles do in fact work hardship upon plaintiffs in all transportation negligence suits.

However ill adapted these common law rules appear, this writer's

* Continued from 19 J. AIR L. & C. 166 (1952).
original study for the CAB recognized that these rules were working out as satisfactorily with respect to aircraft accidents, and only as satisfactorily, as these same "old" rules have worked out for other modern forms of transportation. The 1941 study discredited the contention that there are fundamental grounds for according aviation accidents a treatment different from that which should be accorded to railroad, motor bus, and private automobile accidents. As a result, aviation liability legislation must be looked upon as an effort, in one field of transportation, to effect a reform or improvement of rules of tort liability along lines which might be equally suited to other forms of modern transportation. The fact that any legislation recommended for modernizing aviation liability standards and procedures may have ramifications in other fields of transportation should be no reason for delaying its application to aviation if found presently desirable for the victims of aircraft accidents, for the aviation industry, and for the general public.

Less serious social adjustments will have to be made in putting into effect legislation embodying radical changes in the principles of liability governing aviation torts than if such principles affected other common forms of transportation because (1) air transportation, as an industry, is relatively smaller and is still in its developmental period as compared with the railroad and bus industries, (2) private aircraft are not yet as commonly used as private automobiles, and (3) due to these conditions, the total number of casualties and the total value of property damage attributable to civil aviation is relatively small compared with other forms of transportation.

There remains to consider, in Part II of this article the issue of constitutionality of special aviation liability legislation and the merits of incorporating such a proposal in a federal rather than a uniform state statute. These are numbered issues nine and ten.


A. *Contentions Supporting State Legislation.* Any system of uniform state legislation predicated upon principles of absolute limited liability and compulsory insurance is certain to give rise to questions of its validity under the Federal and State Constitutions. In general a state aviation liability statute would be a proper exercise of the State's police power in the absence of congressional legislation. This is merely the equivalent of saying that the State is competent to enact legislation governing tort liability as a means of preserving the public health and safety.

The reported cases support the proposition that the imposition of absolute liability upon the aircraft operator would not be a denial of due process of law under the Federal Constitution, if it can successfully be contended that the operation of aircraft is an ultrahazardous activity
as to the persons for whose benefit absolute liability is imposed. The peculiar nature of the hazards imposed and the inability of the person exposed to it to protect himself in the exercise of reasonable care seems to be the constitutional basis for the imposition of absolute liability. That aviation ranks as an ultrahazardous activity is the opinion expressed in the Restatement of the Law of Torts (1938). There is little or no precedent indicating whether absolute liability may be imposed upon the aircraft operator if aviation is not classified as an ultrahazardous activity.

The equal protection clause of the Federal Constitution would not inhibit the imposition of such absolute liability upon operators of aircraft so long as no discrimination among operators was involved and all operators falling within the same classification were treated alike.

No point seems ever to have been made that the imposition of absolute liability upon an interstate carrier by a state statute constituted an unjust burden upon interstate commerce. It would not seem that such would be a valid objection if it be determined that the imposition of such liability is a proper exercise of the police power of the State, for any regulation of interstate commerce would be purely incidental.

Statutory limitations on recovery for death do not seem to be in conflict with the United States Constitution, but whether such limitations upon recovery for personal injuries or damage to property are valid is perhaps open to some question. In the absence of a state constitutional prohibition against legislation limiting the amount of recovery for death, there would seem to be no constitutional question involved in the proposed limitations upon the amount recoverable for the death of a person on the ground or a passenger in the plane. With respect to a statutory limit applicable to non-fatal injuries, the Federal statutes imposing limitations upon the liabilities of ship owners and the state statutes limiting the recovery of injured employees under the Workmen's Compensation Law may be urged as precedents. Neither of these situations is strictly analogous to the point involved herein and the question of the right of an injured party to compensatory damages is still undetermined. Limited liability would certainly be contrary to the constitutions of several states and the alternative sections provided in the proposed Uniform Aviation Liability Act of 1938 for use in such states would themselves be open to challenge on the basis that they were not inherently voluntary.

As to compulsory insurance imposed upon interstate carriers for the protection of the public within a state, there seems to be no doubt of its validity, for the securing of such protection to the public, *i.e.*, third persons and property on the ground, is a proper exercise of the state police power and any regulation of interstate commerce which arises therefrom is purely incidental. However, any attempt to impose upon interstate carriers the duty of carrying liability insurance for the protection of interstate passengers and shippers would appear to be questionable as being an attempt directly to regulate interstate commerce, and
as such, invalid under the Federal Constitution. As applied to purely intrastate carriers, the requirement of either type of insurance would seem to be a valid exercise of the police power of the State. The comprehensive system of liability established by the proposed Uniform Liability Act of 1938 in attempting to distribute more equitably the risks involved in aviation is analogous to the broad social policy upon which the Workmen's Compensation Laws were upheld.

**Contentions Supporting Federal Legislation.** The power of Congress extends to the regulation of the liability of air carriers and of operators of other aircraft coming within the interstate and foreign commerce grant of power to Congress and other constitutional grants of power. A valid Federal enactment would have the virtue of avoiding all questions of conflict of law.

The validity of any regulatory statute depends upon the extent of the Federal power. Presumably this power extends to the regulation of all air carriers and other operators of aircraft engaging in "air commerce" as defined in section 1 (8) of the Civil Aeronautics Act of 1938 as regards their liability with respect to passengers, cargo, and baggage; in this connection there is a regulation of interstate commerce per se.

Furthermore, a strong argument can be made on principle, though it must be admitted that conclusive authority is lacking, that the Federal Government, which owns and maintains the airway facilities in the interest of safety and of the furtherance of air commerce, may, for the purpose of promoting these objects, exercise complete control of any aircraft which enters such airways. Under recent decisions of the United States Supreme Court, it would seem that a properly drawn Federal statute could extend the Federal power still further, so as to include all aircraft which use any part of the navigable air space of the United States. In any event, it is clear that once the essential Federal power to regulate the commerce in question is established the form of regulation adopted may go beyond purely navigational aspects of the commerce and impose a variety of conditions not directly relating to navigation.

There seems to be little question as to the power of Congress to regulate the rights and liabilities as between an air carrier and passengers carried and the shipper of goods and baggage. Whether Congress may validly regulate the liability of an interstate operator to persons and property on the ground cannot be categorically answered. Apparently the regulation of the liability of an air carrier to persons and property on the ground may even be justified as a regulation of interstate commerce per se if Congress declares that interstate commerce is involved. Whether or not it would be justified as a means of removing a burden upon interstate commerce is largely dependent upon the factual situation which could be developed in support of the proposition. This would depend in turn upon whether or not it was possible to convince the courts that the present confused state of the law of
liability among the various states is in fact a burden upon the operations of interstate carriers.

Any liability statute that Congress may properly enact, if it embraces the principle of absolute liability, would be open to the same questions under the Fifth Amendment as are involved in similar state legislation under the Fourteenth Amendment. Similarly, limitations of liability in a Federal statute would involve the same questions as those heretofore presented in relation to a state statute imposing limitations upon recovery. The power of Congress to require interstate carriers to carry insurance against liability to passengers and shippers and to third persons bearing no contractual relation to them is established under the Federal Constitution regardless of whether Congress has authority to regulate the liability itself.

In conclusion, it should be pointed out that all of the principles embodied in either a State or Federal system of limited compensation, i.e., absolute liability, limitation of recovery, and compulsory insurance, must be sustained in order for the system to function. As a result, in passing upon the constitutionality thereof, a court would very likely not pass upon the constitutionality of each principle separately, but would treat each principle as an essential part of a new system of liability designed the better to distribute the losses attributable to civil aviation. The Workmen’s Compensation Laws were treated in this way by the United States Supreme Court.

**Appraisal.** The principles of absolute liability and of a maximum limit on the amount of recovery are the two most important principles involved in a system of limited compensation and represent the most radical departure from common law principles. Both Federal and State legislation embodying these principles are confronted with substantially the same constitutional law problems and none of these difficulties appear to present such obstacles as to render it inadvisable to recommend legislation incorporating these principles if other considerations make the legislation desirable. With respect to compulsory insurance, a state aviation liability act might be held to create an unconstitutional burden upon interstate commerce. In the light of recent United States Supreme Court decisions it seems probable that a Federal act regulating the liability of interstate operators with reference to persons and property on the ground would be upheld.

If a Federal statute comprehends only aircraft employed as instrumentalities of interstate or foreign commerce, there appears little question as to the extent of Federal power. However, it would be desirable to go further in order to obtain an act that would bring all aircraft within the scope of a single legislative standard. Although no Federal act has attempted to regulate all aircraft, recent decisions of the Supreme Court would indicate that Congress has such jurisdiction under the commerce grant of power, as being a reasonable regulation of instruments utilizing a medium of interstate commerce.

There appears no evident reason in fact or policy why the national
power over navigable air space should not be coextensive with the national power over navigable waters. It would therefore seem that constitutional limitations do not impose insurmountable obstructions to proposing any reasonable type of a comprehensive system of aviation liability legislation.

10. Is a Federal Aviation Liability Statute More Desirable Than Any Form of State Legislation, Whether a Uniform State Act or Not?

A. Contentions Favoring Federal Legislation. Any form of liability legislation is of such a controversial nature that it cannot be anticipated that it will be adopted by any substantial number of states for many years and for this reason the desired uniformity of liability standards will not be attained through state action in the near future. Even though adopted by all of the states, many state legislatures may be expected to introduce various modifications, and thus defeat complete uniformity.

Under any system of state laws, unless a uniform act be adopted by all 48 of the states, there will continue to be present many questions of conflict of laws. At the present time, the contracts of carriage of interstate air carriers are subject to varying interpretations as to validity, depending upon the conflict of laws rules in force in the states wherein the contract is litigated. On the other hand, any attempt by a state statute to give extra-territorial effect to conditions attached to a contract of carriage, such as is contained in the proposed Uniform Liability Act of 1938, would do nothing to clear up the difficulty because of the confusion in the interpretation of the full faith and credit clause.

A Federal law governing the liability of interstate air carriers and other aircraft coming within the Federal jurisdiction would not be open to conflict of laws difficulties for the reason that no state may refuse to enforce a Federal law regardless of its terms upon the basis that the public policy of the state is contrary to the enactment of such legislation.

Commercial transportation by aircraft of persons and property is essentially interstate in character, and the relations of the air carrier to his passengers should be regulated on a national and not on a state basis. By a single Federal statute, the enactment of which could probably be secured as easily as the enactment of such a liability statute in many individual states, a uniform system of liability may be secured which is applicable to all aircraft coming within the interstate and foreign commerce power of the Federal Government.

Possible constitutional difficulties involved in enacting Federal aviation liability legislation, including legislation with reference to persons and property on the ground, may not be regarded as serious in the light of recent United States Supreme Court decisions.

B. Contentions Favoring State Legislation. The present conflict of laws difficulties are not serious and have given rise to practically no
litigation, and therefore this aspect of the problem can be ignored. In addition, if state liability legislation is otherwise considered desirable, the conflict of laws difficulties involved therein may perhaps be eliminated by a Federal act supplementing the state legislation which would prescribe the effect, pursuant to Article IV, Section 1 of the Constitution, of state legislation in the courts of other states. This does not involve enacting a complete Federal liability statute.

Liability being a matter of common law and dependent upon local social policy, should be left to the individual state. This is particularly true of the liability of the aircraft operator to persons and property on the ground within the state. The regulation of the liability of aircraft operators, including interstate operators, to persons and property on the ground, is not within the interstate commerce power of the Federal Government, and a Federal statute would not extend to the liability of aircraft operators carrying passengers exclusively in intrastate operations until it is demonstrated that Federal power extends to all phases of private and intrastate flying. The constitutional difficulties involved are so serious that it is not desirable to recommend such legislation in preference to the proposed state legislation.

**Appraisal.** Uniform State aviation liability legislation is believed inadvisable for the following reasons:

1. The vast majority of aircraft operations is undoubtedly within the power of the Federal Government to regulate, and such regulation may be effected by the enactment of a single statute;
2. State legislation in the field of aviation liability would not bring about uniformity because the controversial nature of the proposals involved would prevent uniform adoption.
3. While the aircraft operators' liability with respect to persons and property on the ground may ordinarily be a proper field for State legislation, it is believed that such liability may be regulated as an incident of general Federal regulation of aviation liability. Even if it may not be so regulated, the infrequency and small amount of damage now caused by aircraft to persons and property on the ground does not warrant the effort of obtaining uniform legislation by the 48 states, particularly in view of the fact that persons and property on the ground appear in practice to receive adequate protection from the courts.

**Comprehensive Federal Aviation Liability Act Recommended**

The author's study for the CAB in 1941 concluded that a system of limited liability, coupled with compulsory insurance, established by Federal legislation, would be the most feasible and desirable solution of the aviation liability problem and its adoption would be in the best interest of aviation and the general public. The author recommended, therefore, that the Civil Aeronautics Board recommend the enactment of a Federal Aviation Liability Act which would be applicable to all aircraft that may be brought within the scope of the commerce power of the Federal Government and which would embody the legal principles hereinafter outlined.
The Warsaw Convention of 1929 which the United States ratified in 1934 and which governs certain liabilities of United States airlines in foreign air transportation, was not recommended as a model to follow in drafting legislation for domestic flying in the United States. The standard of liability found in that Convention is somewhat similar to that hereinafter considered, but the phraseology of the translated text frequently leaves the rights of both injured parties and operators uncertain and would give rise to much interpretive litigation.

At the outset it should be emphasized that the comprehensive federal legislative program recommended in 1941 was looked upon then as a completely new method of handling claims for damages arising from civil aviation accidents and it was urged that the several legal principles involved should be considered as integral and inter-related parts of the system. This inter-relation will appear from the following discussions. The constitutionality of the entire system, rather than of its component parts, should be the subject of inquiry if the suggested legislation is challenged.

A. Standards of Liability in Recommended Federal Statute

(1) Persons on the Ground.

(a) Persons on the ground (not on a landing area of an established airport) should be compensated for injuries directly attributable to the operation of aircraft, irrespective of the aircraft operators' negligence. This should include injuries and damages due to forced landings, crashes or objects or persons falling from aircraft in flight, but not necessarily claims arising from the alleged nuisance of ordinary flight. It is believed that the imposition of absolute liability by legislation under such circumstances involves no departure from law as it is now developing. As far as is known, the courts have consistently rendered judgments for the plaintiffs and have held the aircraft operator liable for direct, and generally consequential damages, in all cases of direct contact by aircraft with innocent persons and property on the ground who were not at the time on an established landing area. The proposal would also have the desired effect of eliminating the confusion in legal theories prevailing in the decisions of the courts that have considered this liability. 1 Important as the continued development of civil aviation is believed to be, no convincing reason has been presented why it should be subsidized at the expense of the

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1 The legal theories are not always clear upon which the liability of the aircraft operator for crashes and forced landings has been established. Both a "crash," occurring while the aircraft is completely out of control of the pilot, and a "forced landing," may be considered a "privileged trespass" for the purpose of saving life and under common law doctrine an operator in such a case may only be liable for actual damages. Or the crash may be considered an unintentional and non-negligent entry, and therefore, an "accidental intrusion" for which no liability results at common law unless aviation is classified as an "ultra-hazardous" activity. Of course, if negligence on the part of the operator is proved, liability is established.
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luckless victim on the ground who, without participating in aviation in any way, is injured by an aircraft accident even though not attributable to the fault of the operator.

(b) Persons who voluntarily go upon the landing area of an established airport ordinarily do so with knowledge of its use by aircraft, and assume certain risks of accidental harm to themselves. They should, therefore, be entitled to recover only when the aircraft operator is negligent, i.e., fails to exercise ordinary care. This should include other aircraft on the airport ramp and on the taxi-ways, including their passengers. This recommendation likewise does not involve a departure from present law.

(2) Passengers and Guests of Common Carriers by Air and Private Aircraft.

(a) Passengers of Common Carriers by Air, in voluntarily selecting air transportation, assume certain risks of unavoidable harm, and as a result it is believed that "common carriers" by aircraft should not by legislation be made responsible to their passengers for injuries attributable to such risks. Accordingly the injured passenger is entitled to no compensation whenever the operator can show that the accident was due to vis major (Act of God), or the negligent act of a person not associated with the operator. Conversely the revenue and the non-revenue passenger should be permitted to recover when his injury is due to the operator's failure to exercise the highest degree of care for his safety. This standard should be applicable to both revenue and non-revenue passengers. The imposition of absolute liability to passengers in the manner suggested by the 1938 Uniform State Aviation Liability Code does not appear necessary in order to remove the serious difficulties and uncertainties now encountered by passenger plaintiffs in aircraft negligence suits.

The burden of persuasion should be fixed so that the airplane operator would be liable in a suit brought by the passenger unless the operator proves affirmatively and convinces the trier of the facts that the injury or death of his passenger—

(a) did not approximately result from his failure to live up to the standard of care indicated, or

(b) was in part due to the wilful misconduct of the passenger or his failure to obey reasonable regulations of the operator actually brought to the passenger's attention.

In considering the constitutionality of a statute embodying this standard of liability it is believed that it should be looked upon as

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The American Law Institute, in its Restatement of the Law of Torts, classified aviation as an ultra-hazardous activity for which absolute liability attaches for injury to third persons or property. Many legal scholars and jurists do not accept the ultra-hazardous classification of aviation, but agree that the aviator should be liable, regardless of his own fault, to the innocent person he injures on the surface of the earth.
more than a procedural change and should be considered a change in the substantive standard of liability, i.e., absolute liability with recognized defenses upon presentation of specified proof. Under the standard of liability suggested, the injured passenger or his representative would not hesitate to bring a suit in court if an unreasonably low settlement was offered by the aircraft operator or his insurer. Pre-war studies of government accident files, which were made to determine the percentage of total passenger accidents due to the negligence of the operator, give little indication of the percentage of passenger claims that could be successfully established under such a standard of liability. However, under the recommended standard it is difficult to see how more than a small percentage, not over 10% to 20% of fatal claims, would be defeated. Efforts now being made to promote safety by all parties interested in civil aviation should and do tend to reduce the number of accidents due to vis major and undetermined causes, and as accidents become progressively fewer the proportion that will be due to human failure of the flight personnel or others controlling the actual operation of the aircraft may be expected to become more numerous. The statute should, insofar as practicable, define what is meant by the “highest degree of care.”

(b) **Revenue Passengers of Private Air Carriers** should be permitted to recover where their injuries are due to the operator’s failure to exercise “ordinary care” under the particular circumstances. The burden of persuasion should be fixed in the same manner as heretofore suggested with respect to passengers of air carriers. The private operator would therefore be liable unless he proves affirmatively that the injury or death of his passenger (a) did not approximately result from his failure to live up to the standard indicated, or (b) was in part due to the contributory negligence or wilful misconduct of the passenger or to his failure to obey reasonable regulations of the operator actually brought to the passenger’s attention. It would be advisable for the statute to indicate the difference between “highest degree of care” and “ordinary care” and perhaps between “common carrier” and “private carrier.”

(c) **Guests of Private Aircraft Operators** assume all ordinary risks of air travel and should be permitted to hold the operator liable only for injuries due to his “gross negligence” or “wilful misconduct,” such as flying intentionally or negligently in violation of Civil Air Regulations. By the term “private carrier” we include commercial and non-commercial operators. The burden of persuasion should be upon the passenger to prove the fault of the operator, and contributory negligence or wilful misconduct on the part of the passenger should be defenses available to the operator.

(3) **Property on the Ground and Property Carried in Aircraft**

(a) With respect to damage to property on the ground the aircraft operator should be liable regardless of negligence as he is in the
case of persons on the ground. (b) With respect to loss of or damage to baggage and personal effects of aircraft passengers, the operator should be liable according to the same standards and under the same necessity of proof as govern his liability to the person of the passenger whose baggage and personal effects are involved. (c) With respect to goods shipped by aircraft, including air express, the liability of the air carrier should be the same as that of the surface carrier, i.e., generally that of an insurer where the common carrier status is established. No standard of liability should be established by statute with respect to mail carried pursuant to arrangements with the postal administration of a government.

(4) Liabilities Arising Out of Collision of Two or More Aircraft

(a) Passengers and Shippers should be permitted to recover from the operator of the aircraft which each uses in accordance with the principles set forth in section A (2) and A (3). With respect to the liability of the operator of the other aircraft involved in the collision, the passengers or shippers of the first aircraft should be entitled to recover from the second operator only when they can prove that the other operator failed to exercise the required standard of care. In this case, the burden of persuasion should be on the claimants to show negligence.

(b) Persons and Property on the Ground. In the first instances, each operator should be liable regardless of negligence, for the damage caused by his own aircraft to persons and property on the ground. This liability should extend to the proximate damages due to the faulty navigation of one aircraft causing a second aircraft to crash although the first continues in flight. If injury and damage on the ground is due to the impact of both aircraft, and the damage caused by each cannot be established, both aircraft operators should be jointly and severally liable.

(c) Operators, as Against Each Other. Between the operators involved in a collision of aircraft the liability of the one to the other should be predicated upon the principle of comparative negligence and the damages so prorated between operators should include the damages to each aircraft, to passengers and flight personnel and to persons and property on the ground. The degree of care owed by each operator to the other is that of ordinary care under the circumstances. When the aircraft collision is due to the negligence of one of the operators, that operator alone should be liable to the other operator. If the collision is due to the negligence of both operators, the liability of one to the other should be in proportion to the comparative degree of each operator’s negligence.

The principle of comparative negligence is found in admiralty practice and in dealing with marine collisions is considered superior
to the common law rule of contributory negligence. This principle is suggested here because of the apparent similarity between the liability of operators of aircraft and of ships arising out of collisions. The amounts involved will usually be large, especially if losses have occurred to passengers and to property on the ground. It is recognized that it will be difficult for the courts to weigh and determine the degrees of negligence of several operators, as the proximate causes of aircraft collisions do not lend themselves to comparative measurement. When such difficulties are insurmountable following the admiralty rule, the statute should provide for the equal sharing of liability, up to the respective limits of liability hereinafter suggested. When there is considerable difference in the value of the aircraft the principle works to the disadvantage of the operator with the less valuable craft. However, this result seems preferable to the common law rule of contributory negligence which leaves each party to bear his own loss even though the collision would have occurred had one operator not committed (or omitted) what the court considered mere contributory negligence.

(5) **Scope of Substantive Liability Provisions of Recommended Federal Statute**

The standard of liability and the burden of proof suggested for each of the foregoing situations should be made exclusively applicable by the Federal Statute to all aircraft coming within the purview of the Commerce power of the Federal Government. The statute should expressly provide that this include all aircraft (a) engaged in interstate or foreign commerce at the time of the accident (including within this particular category all interstate and foreign flights), (b) reasonably classified as "instrumentalities of interstate or foreign commerce," i.e., aircraft generally operated in interstate or foreign commerce, or (c) being flown in the navigable airspace or on a designated civil airway of the United States. Few, if any, aircraft will fail to come within one of these categories, but, of course, the liability of aircraft not coming therein would not come within the scope of the statute.

Recent decisions of the United States Supreme Court indicate that the court would uphold the imposition of the foregoing standards of liability with respect to the above enumerated classes of aircraft operators as a reasonable regulation of interstate commerce *per se*, and also as a proper regulation of intrastate activities designed to relieve interstate commerce of the burden of conflicting local tort liability. Such legislation may also be considered as a "condition" which Congress may prescribe as an incident to the exercise of its power under the commerce clause of the Constitution.
B. Measure of Damages and Limitation on Recovery in Recommended Federal Statute

Damages to all persons and property should be compensatory only, and, except with respect to the minimum liability suggested for death and weekly benefits, should depend upon proof of injury, disability, dependence or earning capacity, i.e., the common law measure of damages prevailing in the state wherein the injury occurred. Gross negligence on the part of the operator or his servants should not deprive the operator of the benefits of the suggested statutory limits upon the amount of damages recoverable.¹

(1) Limit of damages with Respect to any one Passenger or Other Person.

For the death of all persons, both passengers and persons on the ground, directly attributable to the operation of aircraft, there should be a minimum and maximum limit placed upon the amounts recoverable, for example, $2,500 minimum and $20,000 or $30,000 maximum.

With respect to non-fatal injuries to passengers and persons on the ground directly attributable to the operation of aircraft, recovery should consist of (a) expenses incurred as a result of the accident to the extent of $3,000 to $5,000, including hospital, medical, doctor, ambulance, and nursing services; (b) payment of a fixed amount for designated dismemberments or the loss of eyesight; and (c) compensation payments during the period of incapacity varying between specified amounts per week, depending upon the number of dependents and the earning capacity of the injured person at the time of the accident—say between $20 and $80. For substantial partial disability impairing earning capacity a percentage of such weekly payments should be paid.

Imposition of such limits upon recovery follow the social philosophy of Workmen's Compensation Acts which usually impose a limit upon recovery for death (as also do many of the "Death by Wrongful Act" statutes) and limit recovery for non-fatal injuries to an amount payable weekly during incapacity. Although occasionally hardship may result from imposing a limit upon the amount recoverable for a non-fatal injury, it is believed that a pecuniary limit should be placed upon the obligation of the aircraft operator to compensate and support the person incapacitated by an aircraft accident. As commercial aircraft become larger and more "crash proof" the proportion of non-fatal to fatal injuries will probably increase and the total amount paid out in settlement of non-fatal injury claims will become correspondingly greater. This indicates the importance of fixing a

¹ If penalties are to be provided for wilful misconduct, it seems that they should more appropriately take the form of criminal or civil penalties imposed by public authority, such as those imposed by sections 901 and 902 of the Civil Aeronautics Act of 1938.
limit upon the amount recoverable for such injuries if a comprehen-
sive system of limited liability is regarded as being generally in the
public interest.

Since aircraft passengers and the persons on the ground who may
be injured by aircraft accidents will come from all stations in life, a
single fixed recovery applicable to all persons would be arbitrary, and
some flexibility in the limit of recovery is desirable. The administra-
tion of a system providing for minimum and maximum limits will
involve resort to the courts of law or to a duly authorized administra-
tive agency with jurisdiction to fix the amount of recovery. It is be-
lieved that such machinery, operating within the limits suggested, will
satisfy the requirements of the Fifth Amendment. Theoretically, it
would be advisable to have a Federal Accident Board determine the
award, but because of the small number of persons injured and killed
by civil aircraft now and in the foreseeable future, the advantages to
be derived from having such an agency would not appear to warrant
the administrative expense that would be incurred. As a result the
courts of law should be empowered to fix the award pursuant to
statutory standards.

(2) Overall Limit of Damages With Respect to All Persons and
Property Injured or Damaged in One Accident

(a) With respect to passengers, there should be no limit upon the
total amount recoverable in any one accident since the liability should
vary in reasonably direct proportion to the number of passengers car-
ried and the revenue derived.

(b) With respect to persons other than passengers, there should
be, in addition to the individual maximum limit, an overall limit on
the amount of recovery per accident depending on the weight of the
aircraft used. This overall limit per accident should be applicable to
the operator's liability to persons on the ground and to his liability
to other operators involved in a collision, particularly in view of the
absolute character of the liability to persons on the ground and the
unlimited amount of the potential hazard. The overall limit should
be fairly high—not less than $50,000 per aircraft for light planes and
should increase by a specified rate as the weight or horsepower in-
creases and in no event should be less than the original cost or value
of the aircraft. As this liability will probably be covered by insurance,
a fixed limit to be insured is essential before the practical problem of
writing insurance can be approached.

Relatively high overall limits will assure recovery to all victims
except in the event of a single accident giving rise to a catastrophe of
great magnitude—possible, but very unlikely. Premiums to insure
the relatively high limits here suggested will probably add only a very
small percentage to the premiums that would be required for much
lower insurance limits under the same standards of liability. This is
because it is anticipated total settlements for any one accident will approach the overall top limit only rarely. The average should be far below the limits, but on the other hand, it is desirable to provide insurance protection for the catastrophe victims to the extent insurance can reasonably be written.

(3) Limit of recovery with Respect to Property

(a) Recovery for loss of or damage to personal effects and baggage of passengers should be in the amount of actual loss or damage, but not to exceed $250 per passenger unless the passenger has declared and paid for a higher valuation. This liability limit is designed to cover the value of the personal effects and baggage of the ordinary airline traveler, and a lower limit would not appear adequate.

(b) Recovery for loss of or damage to, or unreasonable delay in the delivery of, goods shipped should be in the amount of the actual loss, but not to exceed $100 for any shipment of 100 pounds or less in actual weight, or $1.00 per pound for any shipment of more than 100 pounds, unless the shipper has declared and paid for a higher valuation.

(c) With respect to liability for delay in delivery of baggage and goods carried, the carrier shall be liable in the amount of the actual loss for such loss as might reasonably have been contemplated by the parties at the time the shipment commenced, but not exceeding the limits suggested for total loss. No liability should be incurred by the carrier for failure to make prompt delivery, or for special damage for loss from delay which would not reasonably have been contemplated by the parties, unless the need for prompt delivery or the possibility of special damage was declared by the shipper at the time the contract of carriage was made and an additional rate of compensation paid, if requested.

(d) For damage to real and personal property on the ground recovery should be in the amount of the actual loss, but not to exceed a maximum amount varying according to the weight of the aircraft. This overall limit per accident should also include the operator's liability to other operators involved in a collision for property damage. It is believed that the reasons advanced for a limitation on the overall liability with respect to persons on the ground also justify the limitation suggested with respect to property damage.

(4) Proration of Claims

When the damage resulting from a given accident exceeds the applicable overall limit, provision should be made for a pro rata re-
duction in the individual amounts of recovery to be allowed. This will happen only in connection with accidents involving persons and property on the ground or between operators of aircraft involved in a collision. Since separate maximum liabilities are recommended with respect to persons and property, and it is contemplated that these liabilities will be covered by separate provisions in the insurance policies, there need be no question of applying the proration principle to personal injury and property damage claims together. Difficulties may arise where it is necessary to prorate personal injury claims involving single payments for fatalities and periodical payments for non-fatal personal injuries. The final disposition of this matter will probably require that non-fatal injury claims be valued according to designated mortality tables and rates of interest.

(5) Liability Limited by Contract

The statute should make it illegal for aircraft operators to attempt to contract with passengers and shippers for a lower limit of liability than the limits prescribed. The operator should be permitted to contract for higher limits of liability with his passengers.

(6) Scope of Measure of Damages and Limitation on Recovery Provisions of Recommended Federal Statute

The foregoing limits of liability and procedural provisions should be made exclusively applicable to the operation of all aircraft coming within the purview of the commerce power of the Federal Government. Persons injured by aircraft and desiring to have recourse to the protection afforded by the insurance hereinafter described (section C) and of the benefits of the standards of liability and methods of proof provided in the legislation (section A) would of course be limited in their recovery to the maximums indicated above.

C. Compulsory Insurance or Other Security Provisions in Recommended Federal Statute.

(1) A Federal statute should vest a Federal agency with power by regulation to require all aircraft operators as a condition precedent to obtaining a certificate of airworthiness for their aircraft to present satisfactory evidence that the operation of the aircraft in question has been insured, in accordance with regulations to be prescribed by the agency, against the liabilities enumerated in section A and for the limits set forth in section B.

Aircraft operators, pursuant to regulations of the agency, should be permitted to file surety bonds or to qualify as self-insurers in lieu of presenting insurance. Operators for whom the underwriters refuse to write insurance will of necessity have to comply with the latter regulations. Operation of aircraft without complying with the regulations relating to insurance and other security promulgated by the
agency should be made a misdemeanor punishable by fine. The agency should be vested with power to (1) prescribe the limits of the insurance coverage (not exceeding the limits set forth in section B; (2) prescribe the terms of the insurance policies to be issued, including a specification of defenses that the insurer may interpose that are not available to the insured; (3) fix the notice to be given the agency by the insurer before the cancelation of a policy becomes effective; (4) study and prescribe reasonable minimum and maximum premium rates; and (5) exempt, after study, designated classes of aircraft operators from the requirement of carrying some or all of the types of insurance that may be required of other classes of operators.

In the 1941 report of the author to the Civil Aeronautics Board, he wrote: Nothwithstanding excellent cooperation from all interests concerned, the writer has been unable to obtain information upon which he is willing to base a recommendation for a hard and fast system of compulsory insurance. Therefore it is recommended that the Federal agency, (1) be placed under no duty to impose any insurance requirements unless and until it has satisfied itself by investigation that such insurance is presently desirable in the public interest, and (2) be permitted to exempt classes of operators from the requirements of carrying insurance if the financial burden of carrying such insurance is found by the agency to be unduly burdensome or otherwise not in the public interest. Probably no insurance need be carried for the protection of guest passengers, personal effects, baggage, or goods shipped.

Compulsory insurance is believed to be both desirable and feasible with respect to the aircraft operator's liability to persons and property on the ground. It would assure payment of judgments to innocent third parties and would place the burden of such losses on civil aviation generally, including the traveling public (except exceptional catastrophies of great magnitude where the damage exceeds the insurance limits prescribed) and not upon the luckless individual victim or operator.

With respect to all types of insurance, it is believed that there is now a sufficient number of civil aircraft operators to spread such losses among the operators by insurance without undue hardship on any individual operator, including the private flyer. There is little upon which to base an estimate of the cost of the insurance here suggested, and if such a statute were adopted the initial premium rates would undoubtedly have to be provisional and vary with actual experience. The satisfactory experience of the Federal Bureau of Motor Carriers in the administration of the compulsory insurance requirements of the Motor Carrier Act of 1935, with respect to interstate motor carriers is believed to be a better indication of that which may be anticipated in administering compulsory aviation insurance than the experiences associated with the Massachusetts State Compulsory Automobile Security Act.
(2) Scope of Compulsory Insurance and Other Security Provisions of Recommended Federal Statute.

Under the Civil Aeronautics Act of 1938 no aircraft may be operated in "air commerce" as defined in section 1(3) of that Act unless the operator applies for and receives a certificate of airworthiness for his aircraft (section 610). This definition of air commerce is so broad that as a practical matter all aircraft must obtain certificates of airworthiness before being operated. Tying the insurance requirement to the certificate of airworthiness is suggested as the most practical way of assuring that all aircraft required to carry insurance do so before engaging in any form of flying that comes within the substantive provisions of the statute described in section A(5) and B(6). Under recent decisions of the United States Supreme Court it is believed that the court would uphold a compulsory insurance requirement as a condition which Congress may prescribe as an incident to the exercise of its power under the commerce clause of the Constitution.

Injured parties, of course, should be denied recourse to the protection afforded by such insurance unless they accept the standard of liability (section A) and the limits of recovery specified in the Federal law (section B). Thus, insofar as claimants for damages arising from aircraft accidents make use of the machinery provided by Federal law, it will be relatively simple to compel the claimant to be bound by the limitation of liability as a quid pro quo for obtaining the benefits. Furthermore, the limits prescribed by the Federal legislation may be made mandatory in any case where operations are involved which come within the purview of the commerce power of the Federal Government as hereinbefore explained (section A(5)).

On the other hand, it should be recognized that there may still be situations where the Federal Government is without power to prescribe the nature of the liability and the amounts of the recovery for a given aircraft accident. In such cases, either the injured person or the aircraft operator may insist that the claim for damages be governed by common law rules. In this event, the plaintiff would be deprived of the methods of proof provided in the legislation, and the defendant would lose the benefit of the limitation upon recovery. It is contemplated, however, that the insurance which the aircraft operator may be required to carry would be broad enough to cover his common law liability in amounts equal to the amounts recoverable under the statute. Such claims would constitute a relatively small proportion of all claims and consequently the effect on insurance premiums should be slight. Indeed, it may be supposed that as a matter of practice both underwriter and insured would prefer that policies be written in terms broad enough to cover not only the statutory liability but also all other claims.
SPECIAL LIABILITY LEGISLATION

D. Administrative and General Provisions in Recommended Federal Statute.

The statute should provide that the district courts of the United States would have exclusive jurisdiction over claims arising under the proposed legislation. The court first obtaining jurisdiction of a suit arising out of an accident should be given exclusive jurisdiction of all suits arising out of that accident and provision should be made for consolidating suits filed in other Federal districts. A provision should specify that the liability imposed by the statute would survive the aircraft operator's death. A limitation upon the time within which suit may be brought should be specified. The statute should define the terms "passenger," "operator," "highest degree of care," "air commerce," and other terms.

ALTERNATIVE FEDERAL LEGISLATION RECOMMENDED.

A legislative program embodying limited liability coupled with compulsory insurance, such as recommended in the foregoing section, presents administrative and legal problems that cannot be easily dismissed. The program here recommended is believed workable, however, insofar as the traveling and general public is concerned, most of the benefits of this program may be secured by a much simpler legislative program.

Compulsory Admitted Liability Insurance Required by Federal Legislation. (a) This alternate program would vest a Federal agency with power by regulation to require aircraft operators, either generally or by selected classes, and by the means suggested in section C(1), to carry "admitted" liability insurance with respect to revenue passengers, persons and property on the ground, or others, as the agency may determine. This insurance would be payable directly to the injured party, or his representative, upon proof that his injury was directly due to the operation of the particular aircraft in question, regardless of the circumstances of impact, upon condition that such recipient execute a valid release of all claims against the insured and against all persons acting on his behalf. Under such a statute the injured party, or his representative, would have the option of rejecting the accident insurance and of suing at common law for an unlimited amount of damages. To cover this contingency the policy would be written so as to cover the common law liability of the operator up to the admitted liability policy limit.

The limits for such admitted liability insurance should be amounts somewhat lower than those heretofore suggested by the preferred legislative program (section B). The following limits should be considered: (1) for death, $15,000; (2) for non-fatal personal injuries, an

4 This condition distinguishes "admitted liability insurance" from "personal accident insurance" which is usually purchased by the traveler for his own benefit. Both types of policies are payable regardless of the fault of the aircraft operator or of the insured.
amount not to exceed $50,000 made up of (a) the expenses directly attributable to the accident to the extent of $3,000, (b) a specified sum for designated dismemberments or loss of eyesight, and (c) compensation payments up to $40 per week during the period of incapacity (impairment of earning capacity), provided that the weekly payment should cease when an overall individual limit of about $20,000 was reached; (3) for both fatal and non-fatal injuries to persons on the ground an overall limit, with appropriate provision for proration, of from $25,000 to $1,000,000 for all claims arising out of one accident, varying with the weight of the plane; and (4) for damage to property on the ground, the actual loss or damage as determined by arbitrators (or in some other manner) but not to exceed an overall limit of $25,000 to $1,000,000 with respect to one accident, varying with the weight of the plane.

The statute would not attempt to fix the standard of liability or a limitation upon the amount recoverable by a passenger or person on the ground who refused the insurance and elected to sue at law. Of course, there would be no Federal statute shifting the burden of persuasion or otherwise lessening the passenger's burden of establishing a common law suit.

The Federal agency should be under no duty to impose any insurance requirements unless and until it had satisfied itself, by investigation, that such insurance was presently desirable in the public interest. The agency would be empowered to vary insurance requirements from time to time as appeared desirable in the public interest, to permit aircraft operators to qualify, as self-insurers, or to furnish surety in lieu of insurance, to prescribe policy terms and limits, and to fix maximum and minimum premium rates.

The precise cost of this admitted liability insurance cannot be estimated with the material available but in view of the nature of aviation claims at common law it has been said that the cost of such insurance would not be excessive or a financial burden to any class of operator with the possible exception of the private flier.

(b) In effect, this alternative proposal would insure a minimum recovery for every person injured in person or property by civil aircraft when the aircraft causing the injury carried the prescribed insurance. No maximum would limit the theoretically possible recovery that the injured party who instituted a suit at law could recover provided he established the liability of the aircraft operator under present rules of negligence and proved the measure of damages he claimed.

From the aircraft operator's point of view, the carrying of such insurance would not afford him any concrete protection against large judgments for injuries and damage which were clearly his fault. Of course, the operator would have the option of insuring his common law liability for higher limits at an additional cost. This program has the merit of simplicity and directness and in practice would protect
aerial operators in the vast majority of accidents. It would, moreover, avoid all constitutional problems as to the type of accident to which the program could be made applicable.

PROSPECTS FOR IMMEDIATE REMEDIAL LIABILITY LEGISLATION

Fundamentally any remedial liability legislation is an attempt to improve the procedure for administering the common law liability based upon fault, or is a departure from such liability and an adoption of one form or another of objective or absolute limited liability. Often the program for improving the purely legal aspects of the liability question is supplemented by a feature under which the benefits are to be secured by a system of compulsory insurance. The various legislative proposals here recommended are designed to accomplish the desired objectives by a combination of all the features just enumerated.

Is there a distinct need at this time for some type of special aviation liability legislation? In the report the author made to the Civil Aeronautics Board in 1941, he concluded that there was such a need, and recommended that federal legislation should be considered which would incorporate the foregoing described principles of absolute but limited liability with all risks to be eventually covered by compulsory insurance. This was a radical proposal and one that would have far-reaching effects. As far as can be ascertained that proposal brought forth no great affirmative enthusiasm from any part of the aviation industry or from any public organizations. It was put forth in part to ascertain if others felt that such legislation was needed.

In retrospect, before now advocating any statutory liability program, the author suggests that it might be well to investigate at first hand the experiences of a representative group of attorneys who have represented in recent years the victims of aircraft accidents of the scheduled air carriers, non-scheduled operators and other classes of flyers, as well as to again consult the aircraft operators and their insurers. Inquiry should be made of the problems the plaintiff's attorneys have had in gathering evidence of the circumstances surrounding aircraft accidents, of proving negligence, and of reaching settlements and collecting judgments. As far as I am aware, the victims of aircraft accidents and their attorneys have not been questioned by any government agency or by any bar association committee or research organization. In their experience lies factual information that may go far to re-evaluate the immediate need for special aviation liability legislation.