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Tort Liability in Aircraft Accidents

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have refused to go along with this, and have acted to enjoin or stay arbitration.[78]

Of course, labor arbitration is much too young a field to be fully accepted; but the courts should be slower to hold there is no jurisdiction to arbitrate; and the parties, having agreed to arbitrate, should resort to the courts less frequently. It seems that the trend is in this direction, but it is important to note that arbitration can be really successful only where there is a history of collective bargaining by the parties. Where there is maturity in the relationship, the importance of jurisdiction problems disappears.[79]

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TORT LIABILITY IN AIRCRAFT ACCIDENTS

INTRODUCTION

Over twenty years ago, Justice Cardozo said, "Aviation is to-day an established method of transportation. The future, even the near future will make it still more general."[1] Aviation is now a vital part of our daily lives and a familiarity well steeped in American tradition. But even with this apparent adoption of the place of aviation in our economic cycle it is accompanied by misunderstanding and confusion[2]—witness the placement of serious auto accidents on page six of our newspapers, where headlines scream of aviation's failure if a crash occurs. But as was said in *Cohn v. United Air Lines Transport Corp.*:[3] "Man has made rapid strides within a very small cycle in his endeavor to become master of the air, of which the bird until recently has been exclusively king in his own right, but

78. For a similar discussion, see Scoles, *Review of Labor Arbitration Awards on Jurisdictional Grounds*, 17 U. OF CHI. L. REV. 616 (1950).

79. Davey, *Hazards in Labor Arbitration*, 1 IND. AND LAB. REL. REV. 386, 387-88 (1948); Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12 LAW & CONTEMP. PROB. 211, 215 (1947). For an example of such mature relationship in the hosiery industry see KENNEDY, EFFECTIVE LABOR ARBITRATION (1948). For the history of arbitration in America, generally, see KELLOR, AMERICAN ARBITRATION (1948).

1. Hesse v. Rath, 249 N.Y. 436, 164 N.E. 342 (1928). That aviation is a highly specialized commercial industry and a common and essential means of transportation, see Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502, 1932 U.S. Av. Rep. 100 (1932). See NOTE, 19 TEMP. L.Q. 496 (1946). *Contra:* RESTATEMENT, TORTS § 520g (1938) ("... aviation has not as yet become either a common or an essential means of transportation.").

2. *E.g.*, in Foot v. Northwest Airways, Inc., 1931 U.S. Av. Rep. 66, 68 (U.S.D.C., D. Minn. 1930), in his instructions the court impressed upon the jury the agency in consideration, "you are to keep in mind the agency which was being employed—not a lumber wagon—not a vessel on water—not an automobile,—but an airplane."

3. 17 F. Supp. 865, 869 (D. Wyo. 1937).

with the exceedingly large number of unexplained and inexplicable catastrophies it is evident that he has not yet become such master."

There is no better illustration of misunderstanding and uncertainty toward aviation than in the realm of legal problems concerning tort liability arising in aircraft accidents.[4] The purpose of this Note is briefly to survey the problems involved, the legal principles applicable, and the present status of the court holdings, all called into play when an airplane is involved in an accident. Because of its broad, all-inclusive field of law, it is necessary to limit the discussion of aircraft tort liability to tort actions involving the operator and owner of the airplane in an accident. The liability of aircraft manufacturers,[5] bailors of aircraft,[6] ground operators[7] and airports[8] will

4. See Orr, *The Law Affecting Aviation Liability,* 20 TEMP. L.Q. 64 (1946).

5. See Hotchkiss, *Aircraft Manufacturers' Liability and the Civil Aeronautics Act of 1938,* 16 GEO. WASH. L. REV. 469 (1948). The basis on which aircraft manufacturers' liability rests is that laid down in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Even jurisdictions which have not followed the *MacPherson* case might hold liability under Huset v. J.I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903) for the manufacture of an instrument imminently dangerous to life.

6. That the general rules of bailment apply to aircraft as well as to an automobile for hire, see Fuelberth v. Splittgerber, 150 Neb. 309, 34 N.W.2d 380, 383 (1948). Ordinarily, the bailor of an airplane is not liable for injuries to third persons solely from the negligence of the bailee in operation of the aircraft, Spartan Aircraft Co. v. Jamison, 181 Okla. 645, 75 P.2d 1096 (1938). A rented aircraft's fall by reason of failure of fuel supply has been held, as a matter of law, not due to the bailor's negligence but to the negligence of the bailee, where evidence showed failure to switch fuel supply to full tank. State, for use of Piper v. Henson Flying Service, Inc., 191 Md. 240, 60 A.2d 675, 4 A.L.R.2d 1300 (1948). See also Brewer v. Thomason, 215 Ark. 164, 219 S.W.2d 758 (1949) (owner of airplane held not responsible for negligence of the renter-pilot to whom he rented the plane for the lawful transport of a passenger who was injured); Northeast Aviation Co. v. Rozzi, 64 A.2d 26 (Me. 1949) (bailee of aircraft who fails to return it because it drops into the ocean has burden of showing that loss accrued without his fault); Note, 4 A.L.R.2d 1306 (1949).

7. See Marino v. United States, 84 F. Supp. 721 (E.D.N.Y. 1949) (ground operator held liable for injuries sustained by tractor-driver hit by aircraft, where driver instructed to watch tower for signal, and ground operator failed to warn of approaching aircraft); Eastman, *Liability of the Ground Control Operator for Negligence,* 17 J. AIR L. 170 (1950).

8. That an airport is liable in tort for damage to third persons by its agents, see Beck v. Wings Field, Inc., 35 F. Supp. 953 (E.D. Pa. 1940) (airport duty to keep runway open and clear); Stevenson v. Reimer, 240 Iowa 652, 35 N.W.2d 764 (1949) (duty of airport to keep runways clear of obstructions); *cf.* Prokop v. Becker, 345 Pa. 607, 29 A.2d 23 (1942) (airport operator not liable for death of 13-year-old boy hit by landing aircraft, where evidence showed boy contributorily negligent). That the operation of a municipal airport is a proprietary function, and the municipality may be held liable in tort for damages incurred by negligence of airport's agents, see Rhodes v. Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949); *cf.* Pignet v. Santa Monica, 45 Cal. App. 2d 766, 115 P.2d 194 (1941) (city not absolutely liable where auto allowed on field collided with aircraft, but entitled to jury trial). *Contra:* Mayor of Savannah v. Lyons, 54 Ga. App. 661, 189 S.E. 63 (1936) (airport a governmental function of municipality, no liability to person injured at airport); Stocker v. Nashville, 174 Tenn. 483, 126 S.W.2d 339 (1939) (statute declaring maintenance of municipal airport a governmental function and forbidding action against municipality relating thereto held not violative of constitutional provisions). For liability of airport on nuisance theory, see Anderson v. Souza 1949 U.S. Av. Rep. 276 (Cal. Super.) (abatement of airport by "nuisance theory"); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942) (airport liable to adjacent landowner for nuisanse by low-flying aircraft); Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934) (nuisance by excessive dust raised by airport, interfering with the rights of an adjacent landowner); *cf.* Meloy v.

be mentioned only as it concerns the liability of the operator of the aircraft to third persons.[9]

Air law, as a singular body of legal principles pertaining to aviation, is relatively new, having seen its primary development within the past thirty years.[10] But because an accident arises from an instrumentality of the air, is it necessary to apply different principles of law from those of ordinary tort law developed through the centuries? Is there such a novelty surrounding air law that a new mold for legal relations among people had to be devised? It has been said,

> "In this changing world, we have come far from the modal conditions of transportation out of which came the genesis and development of our law of common carriers, although perhaps as measured by these latter day conceptions not so far from the original doctrine of regulation of public agencies. In adapting the general principles to the newest mode of transportation, it is not altogether 'putting new wine in old bottles.' Although the same principles must obtain and be applied, the law of aeronautics cannot be completely synchronized with the law pertaining to other agencies, for it must be modified to meet the traffic problems of the novel method. The inherent nature of the facilities of an airplane cannot be disregarded."[11]

Santa Monica, 124 Cal. App. 622, 12 P.2d 1072 (1932) (lessor of land for use as airport not liable to adjacent owner for nuisance created by airport unless owner authorized or ratified conduct).

9. Several related topics have not been discussed. For international conventions see COOPER, RIGHT TO FLY (1947). For reference to workmen's compensation in aviation see Duskin v. Pennsylvania-Central Airlines Corp., 167 F.2d 727 (6th Cir. 1948), *cert. denied,* 335 U.S. 829 (1948) (pilot of Tennessee killed in Georgia governed by workmen's compensation law in Pennsylvania under which employment contract made); Republic Aviation Corp. v. Lowe, 164 F.2d 18 (2d Cir. 1947), *cert. denied,* 333 U.S. 845 (1948) (workmen's compensation law held applicable to test pilot killed on Okinawa). For determination of "air space" see DYKSTRA & DYKSTRA, BUSINESS LAW OF AVIATION 168 (1946); MANION, LAW OF THE AIR 1 (1950); Notes, 35 CALIF. L. REV. 110 (1947), 25 N.C.L. REV. 64 (1946). For interpretation of aviation insurance policies, see Smith v. East & West Ins. Co., 37 So.2d 376 (La. App. 1948) (insured could not recover for loss of aircraft in crash where policy provided coverage during flight for "collision with ground and fire following" where no fire followed crash); Carolina Aviation, Inc. v. Glens Falls Ins. Co., 214 S.C. 222, 51 S.E.2d 757 (1949) (oral agreement to transfer insurance from one aircraft to another in effect and covered loss where new aircraft crashed before policy transferred). See Hall v. Mutual Ben. Health & Acc. Ass'n, 220 S.W.2d 934 (Tex. Civ. App. 1949) (policy of life insurance covering "powered aircraft" held not to include death in glider); Glass, *Aeronautic Risk Exclusion in Life Insurance Contracts,* 7 J. AIR L. 305, 560 (1936). For discussion of liability for aircraft cropdusting, see Note, 17 J. AIR L. 364 (1950).

10. The earliest cases involving the airplane in its heavier-than-air state arose in connection with barnstormers performing for county fairs—*e.g.,* Platt v. Erie County Agricultural Society, 164 App. Div. 99, 149 N.Y. Supp. 520 (4th Dep't 1914) (that pilot giving an exhibition at a fair is an independent contractor does not relieve the fair association from liability where a sufficient landing space not provided); Morrison v. MacLaren, 160 Wis. 621, 152 N.W. 475 (1915) (fair association held to be a public corporation engaged in a governmental function and not liable for injury to third party caused by barnstormer's negligence).

11. Casteel v. American Airways, Inc., 261 Ky. 818, 88 S.W.2d 976, 980 (1935). *But cf.* Galer v. Wings, Ltd., [1938] 3 W.W.R. 481, 482, 1938 U.S. Av. Rep. 177 (Man. 1938) (in which the court said, "Passenger transport started with 'shank's mare.' There have been many stages in its development and flying is simply the latest. There are, however, . . . no new basic principles involved in it such as have not risen in regard to other incidents of human life and commerce. . . . As in other means of transport divergences of detail will appear in their practical applications."

In reality, the influx of the law of the air is but a further indication of the ability of the common law to grow[12]—being based upon fundamental principles of law branching into the peculiarities of a given field.[13]

STRICT LIABILITY

The first reported case on tort liability of a craft of the air was *Guille v. Swan*,[14] in which the court enunciated the doctrine of absolute liability. This doctrine of strict liability stems from that premise of early law that one who hurts another is required to make good the damage inflicted.[15] Though this extreme position has subsided through the years, the courts have adhered to the older rule of strict liability where dangerous conditions or ultrahazardous activities are involved.[16]

> "The courts have tended to lay stress upon the fact that the defendant is acting for its own purposes, and is seeking a benefit or a profit of his own from such hazardous activities, and that he is in a better position to administer the risk by passing it on to the public than the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is placed upon the party best able to shoulder it. The defendant, although he departs in no way from the ordinary standards, must proceed 'at his peril,' and his conduct is regarded as tortious, not because it is morally or socially wrong, but because as a matter of social engineering the responsibility must be his."[17]

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12. See Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 944 (D.D.C. 1948) ("The problem represented for solution . . . illustrates the capacity of the common law to grow and its adaptability to the requirements of new conditions. Its general theories and principles may be molded and rendered applicable to novel and unexpected situations. 'The principle . . . does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.'").

13. For comprehensive review of cases on aeronautics see Notes, 18 A.L.R. 1327 (1922) (jurisdiction of admiralty over aircraft), 42 A.L.R. 945 (1926) (air-space), 69 A.L.R. 316 (1930) (air navigation), 83 A.L.R. 333 (1933) (aeroplanes and aeronautics), 99 A.L.R. 173 (1935), 6 A.L.R.2d 528 (1949) (res ipsa loquitur in aviation accidents). For treatises on air law, see DAVIS, AERONAUTICAL LAW (1930); DYKSTRA AND DYKSTRA, BUSINESS LAW OF AVIATION (1946); FIXEL, LAW OF AVIATION (3d ed. 1948); HOTCHKISS, AVIATION LAW (2d ed. 1938); LUPTON, CIVIL AVIATION LAW (1935); MANION, LAW OF THE AIR (1950); RHYNE, AVIATION ACCIDENT LAW (1947); SHAWCROSS AND BEAUMONT, AIR LAW (2d ed. 1951). For digest of state legislation on aeronautics, 1913-1944, see 1944 U.S. AV. REP. 129.

14. 19 Johns. 381 (N.Y. 1822).

15. PROSSER, TORTS 426 (1941).

16. The doctrine of strict liability was revived in Rylands v. Fletcher, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330, 333 (1868), in which the court said, "We think that the true rule of law is that the person who for his own purposes brings on his lands and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape." From the *Rylands* case was evolved the doctrine of dangerous instrumentality or ultrahazardous activity. See, RESTATEMENT, TORTS § 520, comment *b* (1938) ("An activity may be ultrahazardous because of the instrumentality which is used in carrying it on, the nature of the subject matter with which it deals or the condition which it creates."). For general discussion on trespass and absolute liability see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

17. PROSSER, TORTS, 429-30 (1941).

This strict liability has been imposed upon blasting operations,[18] the keeping of dangerous animals,[19] and with the advent of the Wright Brothers, the airplane.[20] Aviation in its infancy became branded as a highly questionable and dangerous enterprise.[21] This obstacle to progress in the aeronautical field was more apparent in the first few years after World War I. "Barnstormers" and "Gypsy Fliers" roamed the countryside, and with the accompanying high toll of accidents the brand of dangerous instrumentality continued.[22] Only after passage of the Air Commerce Act of 1926[23] were sanity and regulatory safety attained in the aeronautical field. However, even today there are jurisdictions which apply the doctrine of strict liability to aviation accidents.[24] But as the operation of the locomotive or the automobile before it passed from the characterization of an ultrahazardous activity to one of commonplace, it is evident that with the highly developed technology of aviation today, the airplane will soon take its place among the commonplace type of activities free from any burdens of absolute liability.[25]

Trespass

The advent of aviation made essential a reconsideration of the common law maxim, *cujus est solum ejus usque ad coelum.*[26] Although the maxim in its literal interpretation is now repudiated and does not give the owner of land ownership of the airspace above him to indefinite limits, it does, nevertheless, guarantee to him property rights in the airspace to reasonable

18. *E.g.,* Federoff v. Harrison Const. Co., 362 Pa. 181, 66 A.2d 817 (1949), 3 VAND. L. REV. 151; Aycock v. N.C. & St. L. Ry., 4 Tenn. App. 655 (M.S. 1927).

19. *E.g.,* Phillips v. Garner, 106 Miss. 828, 64 So. 735 (1941) (monkey); City of Mangum v. Brownless, 181 Okla. 515, 75 P.2d 174 (1938) (bears).

20. *E.g.,* Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (Co. Ct. 1933).

21. See, *e.g.,* HOTCHKISS, AVIATION LAW 43, n.4 (2d ed. 1938) citing an early Connecticut statute, since repealed, showing the attitude of the legislature toward early aviation, which provided that "every aeronaut shall be responsible for all damages suffered in this state by any person for injuries caused by any voyage in an airship directed by such aeronaut and his principal or employer shall be responsible for such damage."

22. See 1924 *Aircraft Yearbook* 103-21; Nation, Dec. 22. 1926, p. 659. For application of strict liability see UNIFORM AERONAUTICS ACT, 11 U.L.A. (1938) (approved in 1922).

23. 44 STAT. 568 (1926), *as amended,* 49 U.S.C.A. §§ 171-84 (Supp. 1951).

24. Several jurisdictions still adhere to section 5 of the Uniform Aeronautics Act, imposing strict liability; *e.g.* MICH. STAT. ANN. § 10.25 (1937); N.J. STAT. ANN. § 6:2-7 (Cum. Supp. 1950); S.C. CODE ANN. § 7104 (1942). The Uniform Aeronautics Act was withdrawn from the active list of Uniform Acts recommended for adoption by the states in August, 1943. See RESTATEMENT, TORTS § 520, comment *b* (1938) (". . . aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane 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 person, structures and chattels on the land over which the flight is made").

25. That an aircraft is not inherently dangerous, see Herrick v. Curtiss Flying Service, Inc., 1932 U.S. Av. Rep. 110 (N.Y. Sup. Ct.); Fosbroke-Hobbes v. Airwork, Ltd., [1937] 1 All E.R. 108 (K.B. 1936).

26. Literal translation: "Whose is the soil, his it is also to the sky."

heights for his general enjoyment and usage.[27] Thus, when an aircraft invades this stratus of the landowner, the operator is at least committing a trespass. A balloon once fell in a garden, and in finding himself unable to extricate himself from the lines of his "instrument," the balloonist called for help. The samaritan crowd coming to his rescue trampled down the vegetables in the garden, and the balloonist was held liable in trespass for the damage so inflicted.[28] This case, as indicated above, was the beginning of air law and the forcible doctrine of absolute liability to the man of the air for damage to property on the ground. Over one hundred years later a pilot in a night emergency landing damaged a plaintiff's electric transmission tower. Basing the decision on the doctrine of *Guille v. Swan*,[29] the court held the pilot absolutely liable. The court summed up its reasons for applying this doctrine by saying,[30]

> "To hold that the defendant here is absolved from liability, because he was himself free from negligence, is to hazard all the chimneys in the land, as well as live stock on the farms, and even the people in their homes. . . . Such chance as there may be that a properly equipped and well-handled aeroplane may still crash upon and injure private property shall be borne by him who takes the machine aloft."

An operator of an aircraft has also been held liable where an aircraft has crashed into an auto,[31] rowboat,[32] or hangar,[33] and where the falling or dropping of objects from the plane injured persons or property on the ground.[34] Closely akin to this liability are cases involving flight over land at low altitudes frightening animals and game.[35] In consideration of the

27. See Hinman v. Pacific Air Transport, 84 F.2d 755, 757 (9th Cir. 1936) (repudiates "ad coelum" theory). *Cf.* Swetland v. Curtiss Airports Corp., 41 F.2d 929 (N.D. Ohio 1930), *modified*, 55 F.2d 201 (6th Cir. 1932) (maxim *"ad coelum"* must be interpreted and applied in harmony with the economic and social needs of the time—remedy of landowner against unreasonable flight is an action of nuisance and not trespass). For discussion of air trespass see DYKSTRA AND DYKSTRA, BUSINESS LAW OF AVIATION 168 (1946); MANION, LAW OF THE AIR 1 (1950); Thurston, *Trespass to Air Space*, in HARV. LEG. ESS. 501 (1934).

28. Guille v. Swan, 19 Johns. 381 (N.Y. 1822).

29. *Supra* note 28.

30. Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469, 473 (Co. Ct. 1933). The same result was reached in Kirschner v. Jones, 1932 U.S. Av. Rep. 278 (N.J. Sup. Ct.) (crash into roof). *But cf.* State to Use of Birckhead v. Sammon, 171 Md. 178, 189 Atl. 265 (1936) (absolute liability statute not applied to death of child killed on runway in authorized landing at airport by defendant operator).

31. Sollak v. State, 1929 U.S. Av. Rep. 42 (N.Y. Ct. Cl. 1927).

32. Bono v. Mellor, 5 N.J. Super. 167, 68 A.2d 558 (1949).

33. Genero v. Ewing, 176 Wash. 78, 28 P.2d 116 (1934) (pilot cranked aircraft with no occupant in plane and without chocks on wheels, resulting in crash into hangar).

34. *E.g.*, S.A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933) (insecticide from aircraft spraying defendant's lettuce fell upon plaintiff's apiary, killing bees). Gay v. Taylor, 1934 U.S. Av. Rep. 146, 151 (Pa. C.P.) (cushion dropped from aircraft). *Cf.* Vanderslice v. Shwan, 26 Del. Ch. 225, 27 A.2d 87 (1942) (dropping of circulars from aircraft held to be a nuisance).

35. See Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929) (farmer injured by horses frightened by low flying dirgible allowed recovery); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949) (low flying aircraft over a mink farm during "whelping" season, frightening mother minks into eating their young, held liable for value of minks destroyed).

operator's liability to the landowner, mention must also be given to that class of cases holding the operator of the aircraft liable for a nuisance.[36]

This rule of absolute liability for damage to persons or property on the ground is embodied in statutes as well as in case law.[37] It would thus seem that the owner and operator of an aircraft infringing on the peace and quiet of the landowner is held to strict liability in many jurisdictions.[38] However, with the readiness of the courts to apply the doctrine of *res ipsa loquitur* and the receiving of defenses from the operator, there is a tendency to get away from the imposition of this strict doctrine to the once dangerous instrumentality of the air.

NEGLIGENCE

Standard of Care

If liability is not imposed on the basis of strict liability, the plaintiff must show negligence on the part of the defendant to procure recovery. This necessarily raises the problem of the standard of care required of the air carrier.

In the absence of statute providing otherwise, a pilot in the operation of an aircraft is not required by law to exercise the highest degree of care that men of reasonable diligence or foresight could possibly exercise in any and all circumstances. He is only required to exercise that degree of care commensurate with the dangerous consequences to be reasonably apprehended by other pilots in his situation.[39] This degree of care is not static but is variable—it may be of a very high degree under some circumstances and a slight degree under other circumstances.[40] In *Faron v. Eastern Airlines, Inc.*, the court said,[41] "Where . . . the gravamen of the cause of action is an alleged breach of a duty through negligence, the action is

36. *E.g.*, Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1942) (low flying held nuisance); Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1937) (airport held liable for nuisance by dust raised by visiting aircraft).

37. See note 24, *supra*.

38. But may a landowner invoke absolute liability against a trespassing automobile, horse or damaging baseball?

39. Long v. Clinton Aviation Co., 180 F.2d 665, 667 (10th Cir. 1950); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212, 214 (1932); *In re* Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526 (1949); Fuelberth v. Splittgerber, 150 Neb. 309, 34 N.W.2d 380 (1948); Greunke v. North American Airways Co., 201 Wis. 565, 230 N.W. 618 (1930); 2 C.J.S., *Aerial Navigation* § 19 (1936); *cf.* Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292 (U.S.D.C., S.D. Cal.), *aff'd*, 65 F.2d 668 (9th Cir. 1933) (utmost care required of common carrier); Davies v. Oshkosh Airport, Inc., 214 Wis. 236, 252 N.W. 602 (1934) (for pilot to recover damages to his aircraft he must have exercised ordinary care).

40. See Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932); Greunke v. North American Airways Co., 201 Wis. 565, 230 N.W. 618 (1930) (pilot landing aircraft held required only to use ordinary care and not the highest degree of care which men of reasonable vigilance and foresight ordinarily exercise in the landing of an aircraft).

41. 193 Misc. 395, 84 N.Y.S.2d 568, 570 (Sup. Ct. 1938).

governed by the applicable law of torts. . . ." To determine the standard of care to be applied in a given situation involving a carrier, the tort principles and rules of liability to be applied depend upon whether the carrier was operated as a private or common carrier. The courts in analyzing an aircraft accident use this distinction as a starting point for the determination of liability.[42] It is a question of law for the court to determine what constitutes a common carrier, but it is a question of fact whether one charged as a common carrier is within that definition and is carrying on his business in that capacity.[43] Generally, a common carrier may be defined as one who holds himself out to the public as engaged in the business of transporting persons and property from place to place for compensation.[44] This test of the existence of a common carrier was exemplified in *Nugent v. Smith,* where the court said:[45]

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

The law has long imposed a higher standard of duty upon the commercial carrier for the safety of the passengers than that standard required of a private carrier.[46] A common carrier by air is indistinguishable from other commerce carriers with respect to the policy of the law;[47] and with the commercial air carrier this higher requirement of duty is imposed by law not only with respect to the operation of the aircraft but also as to equipment, maintenance, a skillful pilot, and a proper and safe landing field.[48] It has been held to be the duty of the commercial air carrier, then, to exercise the highest degree of care consistent with the practical operation of the aircraft.[49] But the common carriers of the air, like carriers

42. The distinction between common and private carriers is important also in determining liability under insurance policies, as where recovery is limited to accidents arising from the use of common carriers. Also under the Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), 49 U.S.C.A. § 401 (Supp. 1951) (the economic regulations in the Act apply only to common carriers). See Alaska Air Transport, Inc. v. Alaska Airplane Charter Co., 72 F. Supp. 609 (D. Alaska 1947).

43. Curtiss-Wright Flying Service, Inc. v. Glose, 66 F.2d 710, 712 (3d Cir.), *cert. denied,* 290 U.S. 696 (1933); Smallwood v. Jeter, 42 Idaho 169, 244 Pac. 149, 154 (1926); 13 C.J.S., *Carriers* § 3 (1939).

44. 9 AM. JUR., *Carriers* § 4 (1937).

45. 1 C.P.D. 19, 27 (1875).

46. PROSSER, TORTS 256 (1941).

47. State Railway Comm'n v. Ramsey, 151 Neb. 333, 37 N.W.2d 502 (1949).

48. Kasanof v. Embry-Riddle Co., 157 Fla. 677, 26 So.2d 889 (1946); Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N.E.2d 131 (1944) (government inspection alone does not fulfill requirements for high degree of care); 6 AM. JUR., *Aviation* § 52 (1950).

49. Kasanof v. Embry-Riddle Co., 157 Fla. 677, 26 So.2d 889 (1946); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932); Parsley v. Mid-

of other forms of transportation, are not insurers.[50] Thus, where there is injury to a passenger through an aircraft accident caused by the want of proper care on the part of the air carrier, the carrier is tortiously liable for all damages proximately resulting from its negligent act or omission.[51]

Assuming that an aircraft is not a common carrier at the time of an accident but merely a private carrier, the degree of care required is ordinary care—*i.e.,* that degree of care which would be exercised by pilots of ordinary skill under like circumstances.[52] This of necessity entails a balancing in the individual case of such factors as the type of aircraft, experience and skill of the pilot, weather, wind, velocity and the like.[53]

The courts have not been very consistent in applying the distinction between common and private carriers in aviation cases, and the one term or the other "may not fit exactly all the great variety of arrangements which

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Continent Airlines, Inc., 1949 U.S. Av. Rep. 424 (U.S.D.C., D. Minn.); Foot v. Northwest Airways, Inc., 1931 U.S. Av. Rep. 66 (U.S.D.C., D. Minn. 1930). *Cf.* Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205, 209 (U.S.D.C., E.D. Pa.) ("This rule does not require the utmost degree of care which the human mind is capable of imagining. . . . Gusts of wind, sudden snow squalls, fogs and rain, and other frequently occurring phenomena, often come up so quickly that no human foresight can possibly take any precautions against them"). See Witherspoon, *Aviation Law: What Care Is Required of an Air Carrier?* 33 A.B.A.J. 900 (1947).

50. See Johnson v. Eastern Air Lines, Inc., 177 F.2d 713, 716 (2d Cir. 1949); Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292, 298, (U.S.D.C., S.D. Cal.), *aff'd,* 65 F.2d 668 (9th Cir. 1933) ("A carrier is not an insurer of the safety of its passengers and is not bound absolutely and at all events to carry them safely and without injury."); Allen v. Chanute, 1949 U.S. Av. Rep. 29, 33 (Colo. D.C. 1947).

51. 10 AM. JUR., *Carriers* §§ 1236 *et seq.* (1937). See DYKSTRA AND DYKSTRA, BUSINESS LAW OF AVIATION 313 (1946); Wilson & Anderson, *Liability of Air Carriers,* 13 J. AIR L. 281, 285 (1942). *But cf.* Fosbroke-Hobbes v. Airworks, Ltd., [1936] 2 All E.R. 108 (K.B.) (court did not consider distinction between common and private carriers and no question raised as to the degree of care which applied to their aviation accident liabilities). See Armour & Moorhead, *Analysis of the Civil Aeronautics Board's Precedents in Safety Enforcement Cases,* 17 J. AIR L. 54 (1950) (not only may an operator be subject to tort liability, but every accident necessarily results in a hearing before the Civil Aeronautics Board, subjecting the pilot to revocation of his license; causes for such sanctions are, *e.g.,* careless flying, violation of weather conditions, discontinuing a flight, inadequate preparation for flight, use of drugs, low flight, violations of traffic rules, etc.).

52. 6 AM. JUR., *Aviation* § 60 (1950).

53. This standard of care for private carriers is exemplified in Greunke v. North American Airways Co., 201 Wis. 565, 230 N.W. 618, 620 (1930) ("It was not the duty . . . 'to use the *highest* degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct and operation of an airplane . . . under the same or similar circumstances,' but it was his duty to use ordinary care, as that term has been so often defined to mean. Ordinary care differs under different circumstances. It is such care as the danger of the situation and the consequences that may follow an accident demand. The care used must be commensurate with the dangerous consequences to be reasonably apprehended. . . . Ordinary care, however, is not 'the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct' of any pursuit. On the contrary, it is the degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of their affairs."). For other cases on standard of care required of private carriers see Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950); Peavey v. Miami, 146 Fla. 692, 1 So.2d 614, 618 (1941); *In re* Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526 (1949).

can be made with respect to carriage by air."[54] There appears to be no great difficulty in holding the airlines to be common carriers,[55] but the difficulty arises in determining the status of the "chartered aircraft," the "nonscheduled service," the "barnstormers," and the "contact carrier." Thus, "barnstormers" have been held to be common carriers,[56] but there is a conflict as to the status of "sightseeing planes."[57] Depending upon the nomenclature applied, the identical type of aircraft performing the same type of function may at one time be deemed a private carrier and at another time a common carrier. Where the characteristics of a common carrier are present, the fact that the carrier does not operate according to schedule is not controlling;[58] and an air transport company selling tickets generally to the public and advertising its schedules is a common carrier.[59]

Application.—In the application of the general standard of care several holdings warrant specific reference. Thus, it has been held that the most precarious parts of flight are the "takeoff" and "landing;"[60] and a jury in

54. RHYNE, AVIATION ACCIDENT LAW 45 (1947).

55. See Curtiss-Wright Flying Service, Inc. v. Glose, 66 F.2d 710 (3d Cir. 1933), *cert. denied,* 290 U.S. 696 (1933); Law v. Transcontinental Air Transport, Inc., 1931 U. S. Av. Rep. 205 (U.S.D.C., E.D. Pa. 1931); Smith v. O'Donnell, 5 P.2d 690 (Cal. App. 1931), *aff'd per curiam,* 215 Cal. 714, 12 P.2d 933 (1932); Ziser v. Colonial Western Airways, Inc., 10 N.J. Misc. 1118, 162 Atl. 591 (Sup. Ct. 1932).

56. See Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292 (U.S.D.C., S.D. Cal.), *aff'd,* 65 F.2d 668 (9th Cir. 1933); Ebrite v. Crawford, 5 P.2d 686 (Cal. App. 1931), *aff'd per curiam,* 215 Cal. 724, 12 P.2d 937 (1932); Conklin v. Canadian-Colonial Airways, Inc., 242 App. Div. 625, 271 N.Y. Supp. 1107 (1st Dep't 1934), *aff'd,* 266 N.Y. 244, 194 N.E. 692 (1935). See Coblentz, *Limitation of Liability for Aircraft,* 23 So. CALIF. L. REV. 473 (1950), 1950 INS. L.J. 649.

57. That a "sightseeing plane" is a common carrier see Smith v. O'Donnell, 5 P.2d 690 (Cal. App. 1931), *aff'd per curiam,* 215 Cal. 714, 12 P.2d 933 (1932); Beall v. McLeod, 1932 U.S. Av. Rep. 94 (Md. Super. Ct. 1932). That "sightseeing planes" are private carriers see Brown v. Pacific Mut. Life Ins. Co. of California, 8 F.2d 996 (5th Cir. 1925) (sightseeing plane not a common carrier within terms of double indemnity insurance policy); North American Acc. Ins. Co. v. Pitts, 213 Ala. 102, 104 So. 21 (1925); Bird v. Louer, 272 Ill. App. 522 (1933); Seaman v. Curtiss Flying Service, Inc., 1929 U.S. Av. Rep. 48 (N.Y. Sup. Ct. 1929), *rev'd on other grounds,* 231 App. Div. 867, 247 N.Y. Supp. 251 (2d Dep't 1930). *Cf.* English v. Miller, 43 S.W.2d 642 (Tex. Civ. App. 1931) (court submitted case on negligence rather than on basis whether pilot a common carrier and no separate point made on this ground of distinction as to duty and degree of care).

58. See Alaska Air Transport, Inc. v. Alaska Airplane Charter Co., 72 F. Supp. 609, 611 (D. Alaska, 1947); Ziser v. Colonial Western Airways, Inc., 10 N.J. Misc. 1118, 162 Atl. 591, 592 (Sup. Ct. 1932).

59. *See* Curtiss-Wright Flying Service, Inc. v. Glose, 66 F.2d 710, 713 (3d Cir. 1933), *cert. denied,* 290 U.S. 696 (1933); Law v. Transcontinental Air Transport, Inc. 1931 U.S. Av. Rep. 205, 208 (U.S.D.C., E.D. Pa.).

60. Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205, 211 (U.S.D.C., E.D. Pa.) (whether pilot's landing down wind is negligence is jury question); Fuelberth v. Splittgerber, 150 Neb. 309, 34 N.W.2d 380, 384 (1948) (pilot must use ordinary care to observe the fixed objects adjoining the field and look where he is going to land); Conklin v. Curtiss Flying Service, Inc., 1930 U.S. Av. Rep. 188 (N.J. Sup. Ct.) (question for the jury whether or not a pilot's attempt in landing after engine failure was negligence); Stoll v. Curtiss Flying Service, Inc., 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct.), *aff'd,* 236 App. Div. 664, 257 N.Y. Supp. 1010 (1st Dep't 1932); Davies v. Oshkosh Airport, Inc., 214 Wis. 236, 252 N.W. 602 (1934) (pilot held contributorily negligent as a matter of law when attempting a landing without ascertaining whether the runway was clear).

assessing liability against the pilot here must necessarily take into account the ground turbulence, weather conditions and mechanical failures. Negligence has been attributed to the operator for the failure to warn his passengers to fasten their safety belts,[61] or to warn passengers alighting from the aircraft to be aware of a revolving propellor.[62] In the latter instance a pilot was held liable for negligent operation of his aircraft by failing to prevent or minimize the known tendency of persons inexperienced in aviation to become nauseated, dizzy, or mentally or physically upset in flight, and in failing to warn the passengers on alighting of the danger of the revolving propellor or to direct them to a place of safety.[63] Where an act is obviously inconsistent with ordinary care, the courts have evoked a presumption of negligence against the operator. This is aptly illustrated in *Piper v. Henson Flying Service, Inc.,* where it is said,[64]

> "With respect to a subject so technical and complicated as the construction and operation of an airplane, there are few facts that are obvious to the uninitiate. One of the few is that, though the consequences are more tragic, the mechanical result of 'running out of gas' is the same for an airplane as for an automobile."

The law arising from mid-air collisions has generally been held to be that applicable to torts committed on land.[65] Generally, when such an accident occurs there are no survivors, and few, if any, witnesses; and the aircraft are strewn over large areas with the result that investigation for mechanical errors is practically impossible. However, several principles have evolved from such collisions. A military pilot involved in a mid-air collision has been held negligent, with consequent liability for failure to keep a proper lookout in flight.[66] And a pilot in a collision is generally held not to be liable to his passengers if it can be adequately shown that the pilot of the other aircraft was negligent.[67] It is not unlawful under certain conditions for private carriers to fly formation; and when there is a collision resulting from such formation, the question whether a par-

61. Parsley v. Mid-Continent Airlines, Inc., 1949 U.S. Av. Rep. 424 (U.S.D.C., D.Minn.).

62. Curtiss-Wright Flying Service, Inc. v. Williamson, 51 S.W.2d 1047 (Tex. Civ. App. 1932); Cape Charles Flying Service, Inc. v. Nottingham, 187 Va. 444, 47 S.E.2d 540 (1948).

63. Cape Charles Flying Service, Inc. v. Nottingham, note 62 *supra.*

64. 191 Md. 240, 60 A.2d 675, 677 (1948).

65. See UNIFORM AERONAUTICS ACT § 6, 11 U.L.A. (1938) followed in many jurisdictions. *E.g.,* Michigan [MICH. STAT. ANN. § 10.26 (1937)]; New Jersey [N.J. STAT. ANN. § 6:2-8(1939)]; Tennessee [TENN. CODE ANN. § 2721 (Williams 1934)]. For cases involving mid-air collisions see Parker v. Granger, 4 Cal.2d 668, 52 P.2d 226 (1935), *cert. denied,* 298 U.S. 644 (1936); Bird v. Louer, 272 Ill. App. 522 (1933); *In re* Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526 (1949); Herrick v. Curtiss Flying Service, Inc., 1932 U.S. Av. Rep. 110 (N.Y. Sup. Ct.).

66. Brouse v. United States, 83 F. Supp. 373 (N.D. Ohio 1949) (lookout every 15 seconds insufficient).

67. Smith v. O'Donnell, 5 P.2d 690 (Cal. App. 1931), *aff'd per curiam,* 215 Cal. 714, 12 P.2d 933 (1932); Bird v. Louer, 272 Ill. App. 522 (1933).

ticular pilot exercised the duty required of him by law is to be determined by the standard of care and diligence required of pilots of ordinary care and skill in the same circumstances.[68] In accidents involving aircraft with dual controls, the courts have held that the cause of the accident cannot be attributed to the sole fault of the pilot.[69]

Proof of Negligence

Res Ipsa Loquitur.—The applicability or nonapplicability of *res ipsa loquitur* in aviation accidents is one of fundamental importance in the widening field of air transport. A literal translation of *res ipsa loquitur* means that the "thing speaks for itself." This is an abbreviated way of saying that the circumstances attending the accident are such as to justify the conclusion that negligence was the cause of the accident; this inference of negligence arises, not from the happening of the accident alone, but from the circumstances attending the mishap. The general prerequisites for the application of the doctrine by a plaintiff are that the instrumentality be under the exclusive control of the defendant, that an accident would normally not occur without negligence of the defendant, and an absence of contributory negligence on tbe part of the plaintiff.[70] Two further practical requirements that have often been announced are that the plaintiff must be unable to prove negligence of the defendant and that the defendant must be in a superior position to know the cause of the accident.[71] Divergent conclusions have been reached in aviation accident cases as to the application of the doctrine, even where all of the conditions are met.[72] The argument for

68. *In re* Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526 (1949) (defendant's deceased over ran plaintiff's deceased in "joining up" in formation resulting in mid-air collision).

69. *E.g.* Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943); Hall v. Payne, 189 Va. 140, 52 S.E.2d 76 (1949).

70. See DYKSTRA AND DYKSTRA, BUSINESS LAW OF AVIATION 264 (1946); RHYNE, AVIATION ACCIDENT LAW 121 (1947); Binzer, *Civil Aviation—Liability Problems of Air Carriers,* 34 KY. L.J. 34, 49 (1945); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation,* 37 VA. L. REV. 55 (1951); O'Connor, *Res Ipsa in the Air,* 22 IND. L.J. 221 (1947); Richardson, *The Canadian Law of Civil Aviation,* 19 CAN. B. REV. 576 (1941); Notes, 6 A.L.R.2d 528 (1949), 11 GA. B.J. 90 (1948), 22 TEMP. L.Q. 440 (1949).

71. See 38 AM. JUR., *Negligence* § 296 (1941); 65 C.J.S., *Negligence* § 220 (1950).

72. That the doctrine of *res ipsa* is applicable, see Johnson v. Eastern Air Lines, Inc., 177 F.2d 713 (2d Cir. 1949); Bratt v. Western Air Lines, Inc., 169 F.2d 214 (10th Cir. 1948), *cert. denied,* 335 U.S. 886 (1948); Smith v. Pacific Alaska Airways, Inc., 89 F.2d 253 (9th Cir. 1937), *cert. denied,* 302 U.S. 700 (1937); Smith v. O'Donnell, 5 P.2d 690 (Cal. App. 1931), *aff'd per curiam,* 215 Cal. 714, 12 P.2d 933 (1932); Seaman v. Curtiss Flying Service, Inc., 1929 U.S. Av. Rep. 48 (N.Y. Sup. Ct.), *rev'd on other grounds,* 231 App. Div. 867, 247 N.Y. Supp. 251 (2d Dep't 1930); Genero v. Ewing, 176 Wash. 78, 28 P.2d 116 (1934); Galer v. Wings, [1938] 3 W.W.R. 481 (Man.).

That *res ipsa* does not apply, see San Diego Gas & Electric Co. v. United States, 173 F.2d 92 (9th Cir. 1949); Ortiz v. Eastern Air Lines, Inc., 1948 U.S. Av. Rep. 623 (U.S.D.C., D. Md. 1948); Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865 (D. Wyo. 1937) (lack of knowledge of aviation makes *res ipsa* inapplicable); Allison v. Standard Air Lines, Inc., 1930 U.S. Av. Rep. 292 (U.S.D.C., S.D. Cal. 1930),

the application of *res ipsa* is advanced on the ground that the plaintiff is unable in the average aviation accident to discover any proof of negligence; and as the plane was in the exclusive control of the defendant, an inference of negligence on his part should be drawn from the happening of the accident. The use of *res ipsa* is attacked principally on the ground of the newness of aviation and the absence of a reliable background of aeronautical knowledge sufficient to determine a balance of the probabilities between the natural hazards to be encountered and negligence.

The sharp conflict in general tort cases as to the right of a plaintiff to invoke the doctrine of *res ipsa* when he specially pleads acts of negligence is reflected in aviation accident cases. The stronger view supports the theory that the plaintiff forfeits his right to the benefits of *res ipsa* by alleging specific negligence.[73]

Similarly, the general conflict among the courts on the effect of a *res ipsa* case is reflected in aviation accident cases. Some cases regard the doctrine as nothing more than another form of circumstantial evidence against which the defendant may introduce his defenses; and the failure of the defendant to offer any evidence does not burden the defendant with a directed verdict against him and the jury may still find in his favor.[74] Other courts have held the application of the doctrine to create a presumption which requires a directed verdict for the plaintiff if the defendant offers no evidence to meet it.[75] Still other jurisdictions not only permit the pre-

aff'd, 65 F.2d 668 (9th Cir. 1933) (though jury instructed on *res ipsa* appellate court ignored such application holding it is not a presumption of negligence which is evidence); Foot v. Northwest Airways, Inc., 1931 U.S. Av. Rep. 66 (U.S.D.C. Minn. 1930); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); Deojay v. Lyford, 139 Me. 234, 29 A.2d 111 (1942); Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N.E. 212 (1932) (no common knowledge as to aviation); Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (Co. Ct. 1933) (*res ipsa* not apply as pilot absolutely liable); Smith v. Whitley, 223 N.C. 534, 27 S.E.2d 442, 443 (1943) (*res ipsa* not apply, "it being common knowledge that aeroplanes do fall without fault of the pilot"); Boulineaux v. Knoxville, 20 Tenn. App. 404, 99 S.W.2d 557 (E.S. 1935) (*res ipsa* inapplicable it being plaintiff's duty to point out negligence constituting proximate cause of injury).

That *res ipsa* is usually not applicable where the aircraft involved has dual control, see Morrison v. Le Tourneaus, 138 F.2d 339 (5th Cir. 1943); Parker v. Granger, 4 Cal.2d 668, 52 P.2d 226 (1935), *cert. denied*, 298 U.S. 644 (1936); Piper v. Henson Flying Service, Inc., 191 Md. 240, 60 A.2d 675 (1948); Towle v. Phillips, 180 Tenn. 121, 172 S.W.2d 806 (1943).

73. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205 (U.S.D.C., E.D. Pa.); Foot v. Northwest Airways, Inc., 1931 U.S. Av. Rep. 66 (U.S.D.C., D. Minn. 1930); Johnson v. Western Air Express Corp., 45 Cal. App.2d 614, 114 P.2d 688 (1941); English v. Miller, 43 S.W.2d 642 (Tex. Civ. App. 1931). *Contra:* Stoll v. Curtiss Flying Service, Inc., 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct.), *aff'd*, 236 App. Div. 664, 257 N.Y. Supp. 1010 (1st Dep't 1932); Genero v. Ewing, 176 Wash. 78, 28 P.2d 116 (1934); Fosbroke-Hobbes v. Airwork, Ltd., [1937] 1 All E.R. 108 (K.B. 1936).

74. *E.g.*, Johnson v. Eastern Air Lines, Inc., 177 F.2d 713 (2d Cir. 1949); Stoll v. Curtiss Flying Service, Inc., 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct.), *aff'd*, 236 App. Div. 664, 257 N.Y. Supp. 1010 (1st Dep't 1932).

75. *E.g.*, Bratt v. Western Air Lines, Inc., 169 F.2d 214 (10th Cir. 1948), *cert. denied*, 335 U.S. 886 (1948); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935).

sumption requiring a directed verdict for the plaintiff if the defendant offers no evidence, but also require the defendant to assume the burden of proof of rebutting the plaintiff's prima facie case by the preponderance of the evidence.[76]

Negligence Per Se.—Generally speaking, the violation of a statute or a municipal ordinance, or any failure to perform a duty imposed for the public safety, is treated as actionable negligence. The majority view is that violation of a statute constitutes negligence *per se* because of the failure to observe the care which an ordinarily prudent man would observe. The minority rule is that violation of a statute is not negligence *per se* but is only evidence of negligence and can at most amount to a prima facie case of negligence.[77] These differing views are carried over into the aviation cases involving violation of statutes on aeronautics, air traffic rules and flight regulations. Based on the authority granted in the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, the Civil Aeronautics Board has promulgated rules and regulations for flight safety which have the force and effect of a statute. These Air Traffic Rules apply to all aircraft operated in the United States except military aircraft.[78]

Whether the violation of a statute is relevant to a particular case depends on a determination whether the statute is intended to protect the class of persons to which the plaintiff belongs against the risk of the type of harm which has in fact occurred. Thus, if the purpose and intent of the statute is exclusively for the benefit of the general public and not for the protection of any class or classes of individual, no private wrong has been committed by its breach and there will be no civil action. By following the majority ruling, the failure of pilots to comply with Air Traffic Rules and appropriate statutes would be held negligence *per se*.[79]

Liability would not be imposed however, unless such failure is the proximate cause of the accident and unless the plaintiff is within the prescribed class of persons protected.[80] A plaintiff could be interpreted to

76. See PROSSER, TORTS § 44 (1941).

77. See PROSSER, TORTS § 36 (1941); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COL. L. REV. 21, 27 (1949); Thayer, *Public Wrong and Private Actions*, 27 HARV. L. REV. 317 (1914).

78. See Civil Aeronautics Act of 1938, § 702, 52 STAT. 973, 1013 (1938), *as amended*, 49 U.S.C.A. §§ 401 *et seq.* (Supp. 1951).

79. T. A. T. Flying Service, Inc. v. Adamson, 47 Ga. App. 108, 169 S.E. 851 (1933) (violation of municipal ordinance prohibiting the leaving of an unattended aircraft on airfield with engine running held negligence *per se*).

80. Morrison v. Le Tourneau Co., 138 F.2d 339 (5th Cir. 1943); Beall v. McLeod, 1932 U.S. Av. Rep. 94 (Md. Super. Ct. 1932); Herrick v. Curtiss Flying Service, Inc., 1932 U.S. Av. Rep. 110 (N.Y. Sup. Ct. 1932); *cf.* American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949) (mere violation of safety regulations even if intentional, would not of necessity constitute unlawful misconduct on the part of the pilot; but an intentional violation with knowledge that such violation would likely cause injury to a passenger or another aircraft would be wilful misconduct sufficient to hold the pilot liable).

fall within one statutory violation of the Air Traffic Rules and not within the purview of another. On the other hand, strict compliance with government regulations does not in itself relieve the pilot from liability if negligent.[81]

Defenses

In the absence of statutes imposing absolute liability upon the aircraft operator, the defendant air carrier in litigation for damages caused by an accident has at his disposal the usual defenses to an action for negligence—assumption of risk and contributory negligence. Two others, frequently treated by the courts as defenses, are "sudden emergency" and "act of God."

Assumption of Risk.—As has been shown above, an air carrier is not an insurer for the safety of its passengers and is not absolutely bound in all events to carry them safely and without possible injury.[82] Interwoven in the common law rules of negligence is the doctrine that one who assumes a risk cannot recover for an injury by reason of such risk. The air passenger necessarily then takes upon himself all of the usual and ordinary dangers incident to airplane travel. Thus, "A passenger who goes up in an airplane must be presumed to have assumed the risks attendant upon that form of locomotion. He knows that a bullock-drawn cart is safer."[83] However, no risks are assumed except those attendant upon the natural consequences of flight, and the passenger does not assume any risk that the aircraft may be improperly, negligently, or carelessly operated.[84] Nor does the passenger assume risks of any defect in the construction of the aircraft unless such faulty construction is obvious to him.[85]

Contributory Negligence.—The general rule at common law that there can be no recovery for damages resulting from the defendant's negligence if the injured party is contributorily negligent is also applied in aviation accidents. This is best exemplified in *Allen v. Chanute,*[86] where a passenger

81. See Kamienski v. Bluebird Air Service, Inc., 321 Ill. App. 340, 53 N.E.2d 131 (1944) (government inspection of aircraft prior to flight not sufficient as defendant's sole reliance for the exercise of the highest degree of care to carrier's passengers).

82. See note 50 *supra.*

83. HOTCHKISS, AVIATION LAW 44 (2d ed. 1938).

84. See Stoll v. Curtiss Flying Service, Inc., 1930 U.S. Av. Rep. 148 (N.Y. Sup. Ct.), *aff'd,* 236 App. Div. 664, 257 N.Y. Supp. 1010 (1st Dep't 1932).

85. See Beall v. McLeod, 1932 U.S. Av. Rep. 94, 97 (Md. Super. Ct. 1932).

86. 1949 U.S. Av. Rep. 29 (Colo. D.C. 1947). On contributory negligence see 6 AM. JUR., *Aviation* §§ 57, 61 (1950); 38 AM. JUR., *Negligence* §§ 174 *et seq.* (1941). *But cf.* Umberger v. Sankey, 151 Neb. 488, 38 N.W.2d 21, *modified,* 151 Neb. 625, 38 N.W.2d 551 (1949) (if pilot and defendant both concurrently negligent to the proximate cause of the accident and damage to plaintiff's aircraft, plaintiff still recovers since issue of contributory negligence, direct and imputed, is no longer available as an affirmative defense). The doctrine of contributory negligence is found more often in aviation cases where a pilot is suing for damage to his aircraft. See Peavey v. Miami, 146 Fla. 629, 1 So.2d 614 (1941) (failure of pilot to drag field and to take constructive notice of field under repair as noticed in "Notice to Airmen" precluded recovery from airport

in a chartered aircraft failed to recover damages from the operator for injuries sustained when the aircraft caught fire where it appeared that the passenger's negligent use of cigarettes was the probable cause of the fire.

Other Defenses.—In an action for negligence arising from an aircraft accident the courts have frequently treated the defendant's pleading of a "sudden emergency" or an "act of God" as affirmative defenses. Thus, the general rule that when one is confronted with a sudden emergency and acts according to his best judgment at the time of the emergency, or in the same light omits to act, he is not chargeable with negligence, has been incorporated int othe law of aviation; and the operator making such judgment is not liable for any error of judgment on his part short of positive negligence.[87] For example, where the nose of the aircraft dropped sharply while flying at 250 feet, the action of the pilot in cutting off the ignition when confronted with this emergency, not shown to have been brought about by any tortious conduct upon his part, was held not to be unreasonable.[88] It is also a general rule that a carrier of passengers is not liable for injuries to a passenger caused by an unavoidable, inevitable, or unforeseen event caused by an "act of God" or some other outside force and not in any way attributable to the negligence of the carrier.[89] This is aptly illustrated in *Johnson v. Western Air Express Corp.*, where the court said,[90]

> ". . . it was for the jury to determine whether the pilot, in the exercise of the highest degree of care, was unable to do the things required by the 'procedure' because of an act of God. . . . [T]he testimony . . . furnished grounds upon which the jury could predicate a finding that the disaster occurred by reason of the unusual forces of nature, and was one which could not have been reasonably anticipated, guarded against or resisted; that the crash was occasioned by the violence of the elements alone, and that the agency of men had nothing to do therewith."

LIABILITY LIMITATION

Some air carriers have attempted to limit their liability for aircraft accidents by providing in the passenger's ticket either a limitation or complete waiver of liability. Some Canadian and English cases have permitted the air carrier to make a contract with the passenger evidenced by his ticket by which the passenger takes all the risk and the company accepts no

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for damage to aircraft); Piper v. Henson Flying Service, Inc., 191 Md. 240, 60 A.2d 675 (1948) (pilot's failure to switch gas tanks held contributory negligence); Read v. New York City Airport, Inc., 145 Misc. 294, 259 N.Y. Supp. 245 (Mun. Ct. 1932) (pilot denied recovery when taxied into truck).

87. See Thomas v. American Airways, Inc., 1935 U.S. Av. Rep. 102 (U.S.D.C., S.D. Cal.); Conklin v. Canadian Colonial Airways, Inc., 242 App. Div. 625, 271 N.Y. Supp. 1107 (1st Dep't 1934), *aff'd*, 266 N.Y. 244, 194 N.E. 692 (1935); 38 AM. JUR., *Negligence* § 41 (1941); Note, 83 A.L.R. 333, 367 (1933).

88. Murphy v. Neely, 319 Pa. 437, 179 Atl. 439 (1935).

89. See 10 AM. JUR., *Carriers* §§ 1236 *et seq.* (1937).

90. 45 Cal. App.2d 614, 114 P.2d 688, 696 (1941).

obligation.[91] However, the American courts have held such contracting away of liability void as against public policy. Where the aircraft is a common carrier, it cannot compel a passenger by a ticket contract to release or limit the carrier's legal liability for its own negligence.[92] It is possible that a private carrier may stipulate against liability in aviation cases if they are held analogous to situations involving other types of carriers. This would again raise the difficult task of distinguishing between the types of carriers.[93]

Despite the common law rule forbidding limitation as to domestic travel, in international air travel the United States does impose limited liability. This is exemplified by adherence of the United States to the terms of the Warsaw Convention.[94] Under this international agreement the international air carrier is charged with a duty and liability for damages sustained in the event of death or injury to a passenger, but this liability is limited to the sum of 125,000 francs (approximately $8,300).[95] However, if the carrier proves that the passenger was contributorily negligent or that the carrier has taken all necessary measures to avoid the damage or that it was impossible for him to do so, the carrier is not liable.[96] On the other hand, the carrier is not entitled to the benefits of the Warsaw Convention limiting his liability

91. *See* McKay v. Scottish Airways, Ltd., 1948 U.S. Av. Rep. 79 (Scotland, 1947), (law of Scotland permits an air carrier to make a contract with a passenger so that passenger by his ticket takes all the risks and the company accepts no obligation); Ludditt v. Ginger Coote Airways Ltd., [1942] S.C.R. 406, 1942 U.S. Av. Rep. 178 (Can.); *cf.* Galer v. Wings, [1938] 3 W.W.R. 481 (Man.) (signature of passenger necessary before waiver of right to hold air carrier liable for negligence).

92. *E.g.,* Curtiss-Wright Flying Service, Inc. v. Glose, 66 F.2d 710 (3d Cir. 1933), *cert. denied,* 290 U.S. 696 (1933); Law v. Transcontinental Air Transport, Inc., 1931 U.S. Av. Rep. 205 (U.S.D.C., E.D. Pa.); Conklin v. Canadian-Colonial Airways, Inc., 242 App. Div. 625, 271 N.Y. Supp. 1107 (1st Dep't 1934), *aff'd,* 266 N.Y. 244, 194 N.E. 692 (1935); 10 AM. JUR., *Carriers* § 1134 (1937); *cf.* Dollins v. Pan-American Grace Airways, Inc., 27 F. Supp. 487 (S.D.N.Y. 1939) (air carrier's attempt to limit liability under admiralty rules held not applicable as scaplane not a vessel within meaning of admiralty statutes).

93. See 10 AM. JUR., *Carriers* §§ 1144 *et seq.* (1937).

94. "Convention For the Unification of Certain Rules Relating to International Transportation by Air," adopted at Warsaw Oct. 12, 1929, and proclaimed by the President of the United States Oct. 29, 1934, 49 STAT. 3000, 3014 (translation) (1934) (commonly referred to as Warsaw Convention). For cases relating to the Warsaw Convention see Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950) (single airplane engaged in single flight may be international in respect to some passengers and domestic as to others where the flight was from New York to Mexico City with stops in Washington and Dallas); Indemnity Ins. Co. of North America v. Pan American Airways, Inc., 58 F. Supp. 338 (S.D.N.Y. 1944) (Warsaw Convention limiting liability of aircraft in accidents is constitutional and in itself executing and enforceable without further legislation); Ross v. Pan American Airways, Inc., 299 N.Y. 88, 85 N.E.2d 880 (1949), 48 MICH. L. REV. 237; Wyman v. Pan American Airways, Inc., 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. 1943) (rules of Warsaw Convention applicable only to international flight and raises presumption of liability on the part of carrier for injury or death); Grein v. Imperial Airways, Ltd., [1937] 1 K.B. 50 (1936) (terms of Warsaw Convention apply in round trip flight where point of departure, where ticket issued, a contracting member of the convention even though point of landing not a contracting member). See Orr, *A Status Report on the Warsaw and Rome Convention,* 1950 INS. L.J. 871.

95. Warsaw Convention, Art. 22, 49 STAT. 3019 (1934).

96. Warsaw Convention, Art. 19, 20, 49 STAT. 3019 (1934).

where the damage is caused by his wilful misconduct or the equivalent thereof.[97] There have been several legislative attempts to limit the liability of the domestic air carrier, but as yet there is no state or federal regulation achieving this result.[98]

CONCLUSION

This general survey of tort liability of operators in aircraft accidents indicates the development of a growing and important new branch of law, and an indication of the pattern to be followed by the courts in dealing with aviation accident liability. There is a rising cognizance of aviation as a field of law in which its own principles and doctrines based on general tort law are to be applied, free from, yet formulated from, the tenuous roots of early laws of *ad coelum* and absolute liability. With the increased technological development of aviation and an establishment of aviation as a safe mode of travel, the early doctrine of strict liability against the air carrier is disappearing. The withdrawal of that section of the Uniform Aeronautics Act is an indication that statutes imposing absolute liability against air carriers should be withdrawn by appropriate legislative action.

The classification of an aircraft as a common or private carrier is adhered to strictly in aviation cases for the determination of the degree of care required in a given situation. In general, the courts apply these tests for the determination of the type of carrier as applied in other fields of transportation. As to those hybrid classifications in air terminology, such as the "charter plane," the "nonscheduled flying service," etc., there appears to be no clear-cut definition in determining their status as a carrier for the standard of care required. It is difficult to predict the courts' interpretations where no well defined legislation serves as their guide.

As in other fields of law the doctrine of *res ipsa loquitur* does not approach any standard of harmony among aviation cases. Though aviation has attained that standard of safety and development where strict liability should not be applied, there is still a question as to whether an accident in aviation would ordinarily not happen without negligence of the operator so as to apply *res ipsa*. It seems that *res ipsa* should not be applied indiscriminately

97. Warsaw Convention, Art. 25, 49 STAT. 3020 (1934). See Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122 (2d Cir. 1951) (passenger seeks to show wilful misconduct).

98. For general discussion of liability limitation see Binzer, *Civil Aviation—Liability Problems of Air Carriers*, 34 KY. L.J. 34 (1945); Buhler, *Limitation of Air Carrier's Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act*, 11 AIR L. REV. 262 (1940); Coblentz, *Limitation of Liability for Aircraft*, 23 So. CALIF. L. REV. 473, 150 INS. L.J. 649 (1950); Kuehnl, *Uniform State Aviation Liability Legislation*, 1948 WIS. L. REV. 356; Orr, *The Law Affecting Aviation Liability*, 20 TEMP. L.Q. 64 (1946); Richardson, *The Canadian Law of Civil Aviation*, 19 CAN. B. REV. 576 (1941); Note, 19 TEMP. L.Q. 496 (1946).