SOME ASPECTS OF AIR CARRIERS' LIABILITY

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The crash of the Army B-25 bomber into the Empire State Building on Saturday morning last July killed ten occupants of the building and injured twenty-six others. It was spectacular, but it could have happened on a week-day with an 80 passenger Stratocruiser, the commercial version of the B-29, and ten times the gasoline load of the B-25. The need for an efficient method for compensating the persons injured is apparent. Likewise, there is a need for some limit to the potential liability of air carriers. One accident, conceivably without fault on the part of anyone, could wipe out the resources of some air carriers.[1]

The application of the common law rules of liability to such problems has given rise to much discussion[1a] and effort to adjust those rules. The problems faced by a passenger or person on the ground seeking recovery against an air carrier[2] and some of the proposals to facilitate such recovery can be discussed in relation to the extent of the air carrier's liability, and certain proposals to limit the amount of such liability. "Air carrier" will be used here to mean any person or corporation who engages in the carriage by aircraft of persons or property as a common carrier for compensation or hire. This will include carriers engaged solely in intrastate transportation.[3]

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[1] Several accidents recently have illustrated how large the losses can be. On May 20, 1943, a B-24 Liberator crashed into a gas-holder in Chicago. The gas lost was valued at $15,000 and the holder cost $1,250,000 or more to replace. (July, 1943) 38 NAT'L FIRE PREV. ASS'N QU. 15. On March 6, 1945 a C-60 crashed into the doors of a hangar at flying speed. Eight men were killed, nine injured and the property damage was reported at $3,000,000. (April, 1945) 40 *id.* at 232. Only ten of the sixteen domestic air carriers reporting to the Civil Aeronautics Board in December 1944 reported assets of over $3,000,000.

[1a] In the thirteen volumes of the JOURNAL OF AIR LAW from 1930 through 1942 were at least fourteen major articles discussing some aspect of the liabilities of operators of aircraft.

[2] Many of the problems relating to the liability of operators of aircraft generally have been dealt with fully in the "Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation," 1941, prepared by the staff of the Civil Aeronautics Board, Edw. C. Sweeney, Attorney in charge of staff investigation. The Study is relied upon herein and will be cited as SWEENEY REPORT.

[3] Cf. "Air carrier" as defined in the Civil Aeronautics Act of 1938, as amended, which includes only those engaged in "air transportation" which, in turn, is defined as "interstate, overseas or foreign air transportation or the transportation of mail by aircraft," 52 STAT. 973 (1938), 49 U. S. C. (1941) §401, (2), (10) and (21). Legislation proposing changes usually deals also with the definition of passengers, survival of personal injury actions, limitations on time for bringing suit and liability with regard to property on the aircraft. These will not be discussed here.

I. WHEN CAN THE PLAINTIFF RECOVER FOR DAMAGE CAUSED BY AIR CARRIER AIRCRAFT?

A. *Recovery for damage on the surface of the earth*

There have been few decisions determining the liability of any aircraft operator for injury to persons and damage to property on the ground as a result of voluntary or forced landing, crash, or objects falling from aircraft in flight. In the decisions thus far, however, the plaintiff has recovered for direct and generally for consequential damages resulting from direct contact with persons and property not on established landing areas[4] by non-air carrier aircraft. No cases have been discovered dealing with recoveries against air carriers for injury or damage by crash on the surface, although there are numerous cases involving damage from flying over land of another.[5]

The legal principles upon which the liability has been established by the courts are not uniform, some cases being decided upon principles of trespass and some on negligence. The American Law Institute, in its Restatement of the Law of Torts, classifies aviation as an ultra-hazardous activity for which absolute liability attaches for injury to third persons or property.[6]

Some states regulate the liability of common carriers and other operators of aircraft for damage on the surface by statute. Thus, the Uniform State Law for Aeronautics, Section 5,[6a] in effect in fourteen states and the territory of Hawaii,[7] provides

[4] Guille v. Swan, 19 Johns. 381 (N. Y. 1822) (free balloon landed in garden); Rochester G. & E. Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. Supp. 469 (1933) (crashed into transmission line tower); Livingston v. Flaherty (Sup. Ct., L. A. Co., Cal., No. 329013, Nov. 15, 1932), (1933) 4 J. Air L. 515, 517, 523-4 (forced night landing killed farmer carrying lantern to aid plane); see, Kirschner v. Jones & White, 1932 U. S. Av. R. 278 (N. J. 1932) (damage to house roof); Sollak v. State of New York, 1929 U. S. Av. R. 42 (Ct. Claims, N. Y. 1927) (automobile passenger struck by plane); Kadylak v. O'Brien (U. S. D. Ct. W. D. Pa.) 1941 U. S. Av. R. 8 (1941) (death of boy swimming in creek by emergency landing); see, Pentz v. Rex. [1931] Exch. C. R. 172, 1936 U. S. Av. R. 294 (Canada; forced landing, a privileged trespass). Liability for injury occurring on established landing area depends upon negligence. State v. Sammon, 171 Md. 178, 189 Atl. 265 (1936); Finfera v. Thomas, 119 F. (2d) 28 (C. C. A. 6th, 1941) (collision of aircraft on the ground governed by negligence).

[5] There have been cases involving damages caused by flight over property rather than direct contact. Many of these involve the concept of the extent of the landowner property rights, in super adjacent air space, and are analogous to nuisance cases: Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385 (1930); Swetland v. Curtiss Airports Corp., 41 F. (2d) 929 (D. Ohio 1930) *mod'f'd.* 55 F. (2d) 201 (C. C. A. 6th 1932); RHYNE, AIRPORTS AND THE COURTS (1944) Chp. VII; Causby v. United States, 60 F. Supp. 751 (Ct. Cl. 1945).

[6] 3 RESTATEMENT, TORTS (1938) §520.

[6a] Sec. 5 reads as follows: "The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft objects falling from it." 11 UNIF. LAWS ANN. (1938) 161. This section has been interpreted not to apply to accidents occurring at airports. Birckhead v. Sammon, *supra* n. 4.

[7] DEL. REV. CODE (1935) §5780; IND. STAT. ANN. (Burns, 1933) §14-105; MICH. STAT. ANN. (1937)

that the owner or lessee of an aircraft is absolutely liable for injuries to persons or property on the ground "caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the person injured was contributorily negligent." This responsibility, since it reaches the owner when the craft is leased, would appear to apply to a person who is "owner" of an aircraft by virtue of being trustee in an equipment trust certificate. This has caused sufficient concern among prospective lenders on air-carrier equipment to lead them to propose a federal statute excluding liability as follows:[7a]

"No person or corporation having a security interest in, or title to, any civil aircraft . . . under a conditional sale . . . shall be liable, by virtue of such interest or title, for injury to person or property as a result of the operation of such aircraft unless such person or corporation was in possession or control of such aircraft. . . ."

Maryland enacted the absolute liability statute in 1922, but repealed it in 1937[7b] to provide that the aircraft owner shall be *prima facie* liable unless the "presumption of liability" is "rebutted by proof that the injury was not caused by negligence on the part of such owner," or of any person operating the aircraft with his permission or of any person maintaining or repairing it with his permission. Georgia has a similar statute making proof of injury *prima facie* evidence of negligence.[8] Three states provide that liability for injury or damage on the surface shall be determined by the law applicable to torts on land.[9] The Arizona statute states that "negligence" is the test of such liability.[10]

Liability for "forced landings" are also dealt with by statute in several states. Seventeen states have adopted Section 4[10a] of the Uniform State Law for Aeronautics of 1922 which provides that the landing of an aircraft on the land of another, without his consent, is unlawful except in the case of a "forced landing,"[10b] and even in that

§10.25; MINN. STAT. (Mason, Supp. 1940) §5494-11; NEV. COMP. LAWS (1929) §279; N. J. REV. STAT. (1927) §6:2-7; N. C. GEN. STAT. (1943) §63-14; N. D. REV. CODE (1943) §2-0305; R. I. GEN. LAWS (1938) Ch. 109, §5; S. C. CODE (1942) §7104; S. D. CODE (1939) §2.0305; TENN. CODE (1938) §2720; VT. PUB. LAWS (1933) §5224 as amended by Public Acts, 1939, p. 157; WIS. STAT. (1943) §114.05; HAWAII REV. LAWS (1945) §4925. The text of each of these statutes will be found in either 1928 or 1929 U. S. Aviation Reports.

[7a] AIRLINE FINANCE (Bankers Trust Co., *et al.*, 1945) 12.

[7b] MD. CODE ANN. (1939) Art. 1A, §5 (L. 1937, c. 528), 1937 U. S. AV. R. 631.

[8] GA. CODE (1933) §11-105, 1933 U. S. AV. R. 422.

[9] ARK. STAT. (1944 Supp.) p. 1267; IDAHO CODE ANN. (1932) §21-105, 1931 U. S. AV. R. 336; PA. STAT. ANN. (Purdon, Pocket Supp. 1944) Title 2, §1469.

[10] ARIZ. CODE ANN. (1939) §48-111, 1929 U. S. AV. R. 406.

[10a] Sec. 4 reads as follows: "Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in sec. 5." 11 UNIF. LAWS ANN. (1938) 160, 1928 U. S. AV. R. 473.

[10b] "Forced landing" is not defined in the uniform act. Presumably it means the landing of an aircraft in the control of the operator short of destination in an emergency.

event the owner is absolutely liable for the damages so caused.[11] Six additional state statutes make the landing of an aircraft on the land of another unlawful, when made without his consent, except in case of a forced landing. Three of the six statutes provide that liability for damage caused by such landings will be governed by the rules of torts on land;[12] Maryland holds the owner *prima facie* liable, subject to proof of absence of negligence; and two of these states are silent as to liability for forced landings.[13]

Forced landings are analogous to problems dealt with by two old legal doctrines. One is that entry may be made on land of another without the owner's permission for the purpose of saving life. This may be done as a "privileged trespass"[14] pursuant to which the actor should be liable only for the actual damage inflicted.[14a] The second notion applicable to a forced landing is that of "accidental intrusion." Thus, when the plane must be landed for reasons beyond the control of the pilot, the result is an accidental intrusion[15] (if flying is not an ultra-hazardous activity).

Proposed legislation dealing with the aircraft operators' liability for damage on the surface would permit the plaintiff to recover solely upon proof of the damage having been caused by aircraft. This is the effect of the Rome Convention,[16] concluded in 1933, but not widely adopted;[17] the state law proposed in 1938 by the Commissioners on Uniform State Laws;[18] and the pending O'Hara Bill.[18a]

[11] In addition to the states listed in footnote 7 the following three states have adopted sec. 4; COL. STAT. ANN. (1944 Cum. Supp.) Ch. 17, §16; MONT. REV. CODE (1939 Supp. to 1935 Code) §2736.7; WYO. REV. STAT. (1931) §4-107.

[12] ARIZ. CODE (1939) §48-111 provides that the test shall be negligence; IDAHO CODE ANN. (1932) §21-104 and 21-105; PA. STAT. ANN. (Purdon, Supp. 1944) Title 2, §1468-1469.

[13] ARK. STAT. (1944 Supp.) p. 1266, §9; MO. REV. STAT. ANN. (1943) Vol. 26, §15108.

[14] Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908); see Pentz v. Rex, *supra* note 4.

[14a] Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N. W. 221 (1910).

[15] 1 RESTATEMENT, TORTS, p. 395, ill. 1.

[16] DEP'T OF STATE, TREATY INFORMATION BULLETIN No. 47 (August 1933). Article 2 reads:
"(1) The damage caused by an aircraft in flight to persons or property, on the surface shall give a right to compensation by the mere fact that it is established that the damage exists and that it was caused by the aircraft.
"(2) This provision shall be applicable to the following:
"(a) Damage caused by any body whatever falling from the aircraft, even in the case of regulation jettison of ballast or jettison made in a case of necessity.
"(b) Damage caused by any person on board the aircraft, except in the case of an act intentionally committed by a person who is not a member of the crew, not connected with the operations, without the operator or his agents having been able to prevent it.
"(3) The aircraft is considered as in flight from the beginning of the operations of departure until the end of the operations of arrival."

[17] The following countries have ratified the Convention: Spain, Rumania, Belgium, Guatemala and Brazil. Latchford, *Private International Air Law* (Jan. 7, 1945) 12 DEP'T OF STATE BULL. (No. 289) 11, 13.

[18] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 48TH ANNUAL CONFERENCE (1938) 318-347. (Hereafter cited as "HANDBOOK.") See Godehn, Brophy, Butler and Hale, *Proposed Law of Airflight* (1937) 8 J. OF AIR L. 505, (1938) 9 *id.* 132.

[18a] H. R. 532, 79th Cong., 1st Sess. (Jan. 1945). Sec. 1252 of the Bill as introduced, reads: "The carrier shall be absolutely liable for bodily injury or death caused to persons or damage caused to property within the scope of this article: *Provided,* That for injury, death, or damage caused within the area of an airport available for use for the storage, handling, loading, unloading, taxying, take-off, or landing of aircraft, the carrier shall be liable only upon proof of negligence."

The imposition of absolute liability for personal injury and property damage on the surface has been regarded as particularly onerous.[19] By such a standard the air carrier would be liable, regardless of its conduct, when it crashed because of the negligent operation by another operator, when an unpredicted storm strikes down the ship, when the craft is stolen and crashes and for the damage done by bombs dropped from a stolen plane by a thief.

The imposition of absolute liability may go beyond what is necessary to facilitate the plaintiff's recovery.[19a] Thus, if the air carrier would be liable unless he proved he was not at fault, the plaintiff's difficulties would be eased considerably yet the carrier would not have to bear the losses caused by third persons. This would follow the precedent of the Maryland and Georgia statutes which provide that the owner of the aircraft causing the damage is *prima facie* liable unless the owner can prove he was not negligent.

There is no federal statute requiring an air carrier to carry insurance to cover liabilities arising from damage caused on the surface, as there is in the case of motor carriers.[19b] But in surveys made by the staff of the Civil Aeronautics Authority in 1939,[19c] it was learned that all domestic air carriers certificated by the Board at that time carried insurance against such liabilities.

B. *Recovery by a passenger for personal injury*

A passenger can recover damages from an air carrier for personal injuries on the same basis as a passenger can from a surface carrier. The carrier must have been at fault and the fault caused the damage.[20] This distinguishes the liability of a common carrier of goods who is an insurer thereof,[21] i.e., it is liable on proof of

[19] Cooper, *Aircraft Liability to Persons and Property on the Ground* (1931) 17 A. B. A. J. 435.

[19a] See, Kingsley and Gates, *Liability to Persons and Property on the Ground* (1933) 4 J. OF AIR L. 515.

[19b] 49 STAT. 557 (1935), 49 U. S. C. (1941) §315.

[19c] SWEENEY REPORT, *supra* note 2, at 148.

[20] "Carriers of passengers by land . . . are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but . . . the smallest negligence would render the carrier liable." City of Panama v. Phelps, 101 U. S. 453, 462 (1880). See the instructions to the jury in McCusker v. Curtiss-Wright (Cir. Ct., Cook Co. Ill. 1932) 1932 U. S. Av. R. 100, 106, approved in McCusker v. Curtiss-Wright, 269 Ill. App. 502, 1933 U. S. Av. R. 105 (1933). Much of the early argument was whether air carriers were common carriers. Law v. Transcontinental Air Transport, Inc. (U. S. D. C. E. D. Pa.) 1931 U. S. Av. R. 205 (1931). Wilson and Anderson, *Liability of Air Carriers* (1942) 13 J. OF AIR L. 281. But once an air carrier was held to be a common carrier it was held to the same responsibilities as a common carrier on land. Curtiss-Wright Flying Service v. Glose, 66 F. (2d) 710, 1933 U. S. Av. R. 26 (1933); Smith v. O'Donnell, 215 Cal. 714, 12 P. (2d) 933, 1932 U. S. Av. R. 145 (1932).

[21] The rules are contrasted in 4 R. C. L. 582-586: "While carriers of goods are practically insurers of the property entrusted to them, yet in the carriage of passengers the same principles of law are not applied, for the obvious reason that a great distinction exists between persons and goods, passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods who have entrusted them to others cannot do. Although a few early English cases apparently countenanced the doctrine that common carriers of passengers are liable as insurers of the safety of the passengers whom they undertake to carry, it is now well established, both in England and in the United States, that carriers of passengers are not insurers against accident, but are answerable for any injury to a passenger only when there has been a want of proper care, diligence or skill on the part of the carrier or his servants, unless such injury be wilfully inflicted. It will thus be seen that the liability of the carrier of passengers differs materially from that of a carrier of goods."

loss, unless it can establish that the damage was caused by an act of God or public enemy, mandate of public authority, inherent nature of the goods or fault of the shipper.[22]

The plaintiff's burden of proving fault by a common carrier of passengers is easier than the burden in a non-carrier case, because a common carrier has the duty of being careful in all the numerous acts that constitute transportation and slight negligence imposes liability. The courts describe this standard as the carriers' duty to exercise the "highest degree of care."[23] Nevertheless, from the plaintiff's point of view the proof of fault remains difficult. The burden was described as follows:

"Suppose, for example, that Mrs. Smith has sustained a fracture of an arm as a result of a sudden lurch of a street car in which she was riding. To become informed as to her right against the company she must consult a lawyer. The lawyer will tell her that her right to recover damages from the company depends in the first place upon her ability to prove that the lurch was caused by some fault upon the part of an employee of the company. The fault might have been in the operation of the car, and to prove this it would be necessary to show how a car should have been operated under the conditions which prevailed at the time of the accident, and just how the motorman or conductor failed to observe the proper standard of conduct. Or the negligence might have consisted in the use of improper appliances, or in failing to keep up the equipment of a car, or the condition of the roadbed and tracks. To establish such negligence it would probably be necessary to call electrical engineers, civil engineers, or other experts."[24]

The difficulties of plaintiff passengers and persons on the ground in air carrier cases are alleged to be greater than those of plaintiffs in surface carrier cases, for the following reasons:

1. Many crashes kill all occupants, who are presumably the best witnesses. Thus, of 44 domestic airline accidents involving the death of a passenger between 1933 and 1942, inclusive, 29 resulted in the death of all occupants and 15 left some survivors.[25] Reliable witnesses on the ground who can testify as to an aircraft accident are difficult to find, particularly when crashes occur in remote places.

2. The operation and navigation of aircraft is so technical that the testimony of lay witnesses, even when available, is generally indefinite and of little value.

3. The physical evidence of what occurred in an aircraft at the time of, or immediately prior to most serious accidents, is often demolished by the crash, consumed by fire and occasionally lost under water.

4. The path of an aircraft in the sky is more difficult to reconstruct than would be the course of an object on a highway.

These difficulties of the plaintiff are summarized in a statement ascribed to Dean John H. Wigmore, who is reported[26] to have said, after an investigation of the acci-

[22] 9 AM. JUR., *Carriers* (1937) §705 *et seq.* How the liability of air carriers for transportation of property is affected by the Civil Aeronautics Act of 1938, is considered in SWEENEY REPORT, pp. 73-86.

[23] Wilson v. Colonial Air Transport, 478 Mass. 420, 180 N. E. 212, 1932 U. S. Av. R. 139. Instruction to jury in McCusker v. Curtiss-Wright, *supra* note 22.

[24] Ballantine, *A Compensation Plan for Railway Accident Claims* (1915) 29 HARV. L. REV. 705, 706.

[25] SWEENEY REPORT, *supra* note 2, at 343, supplemented by analysis prepared by Mr. Stafford Kernan, Chief Statistical Section, Civil Aeronautics Administration.

[26] Statement of Mr. Schnader before the National Conference of Commissioners on Uniform State Laws at Cleveland, Ohio, July 19, 1938, HANDBOOK, *supra* note 18, at 72.

dent files of the former Bureau of Air Commerce, that less than 20 per cent of the cases reveal the existence of legally competent evidence to prove the negligence of the aircraft operator.

These contentions are not unchallenged, however.

1. The assertion that "all physical evidence of what happened is demolished by the crash" is denied by many experts. Government investigators, with two exceptions,[27] have been able to reconstruct what happened prior to the crash of air carrier planes.

2. An advantage to the plaintiff in aircraft crash litigation is the fact that the Civil Aeronautics Board makes an extensive investigation[28] of the cause of the accident and, although the Board's report may not be used in court,[29] the hearings are public and the transcripts can be purchased by the plaintiffs as an aid in determining the cause of the crash.

The plaintiff's burden of proof must be considered also in the light of the common law doctrine of *res ipsa loquitur*. That doctrine was designed to aid plaintiffs whose burden of proof was unusually severe.[30] The notion is that in situations in which the cause of the accident is within the exclusive and predominant knowledge of the defendant so that he alone can adequately show what brought it about and where the accident must have been almost impossible, or at least extremely unlikely to happen in the absence of negligence, the plaintiff can prove the surrounding circumstances and negligence may be inferred.

In order to apply the doctrine, it has been stated that four conditions must be present:

"1. That the general experience of mankind shows that the accident was such that it does not usually occur in the ordinary course of events without negligence upon the part of those in control. 2. The person against whom the doctrine is sought to be invoked must have been in control of that instrumentality. 3. The person invoking the doctrine must not be in a position to know the cause of the accident. 4. The person against whom the doctrine is invoked must possess or have possessed either knowledge as to the cause of the accident or must be in a better position to obtain that knowledge so that the duty of explaining the accident should in fairness rest upon him on account of that greater knowledge or greater means of knowledge."[31]

Litigants have had difficulty getting the courts to apply the rule in aviation cases generally.[32] The first difficulty is in determining whether at any given time a par-

[27] The Board was unable to determine the cause of the American Airline crashes at St. Thomas, Ontario, on October 30, 1941, or at Memphis, Tenn., on February 10, 1944.

[28] The duty of the Board in this respect is set out in 52 STAT. 1013 (1938) 49 U. S. C. (1941) §582(a)(2).

[29] *Id.*, §581.

[30] The doctrine in relation to air transportation is discussed in the following: Bohlen, *Aviation Under the Common Law* (1934) 48 HARV. L. REV. 216, (1935) 6 AIR L. REV. 155; Gates, *Res Ipsa Loquitur* (1933) 4 J. OF AIR L. 429; HOTCHKISS, THE LAW OF AVIATION (2d ed. 1938) 50; Osterhout, *The Doctrine of Res Ipsa Loquitur* (1931) 2 AIR L. REV. 9.

[31] Parker v. James E. Granger, Inc., 4 Cal. (2d) 668, 52 P. (2d) 226 (1935).

ticular accident does or does not occur in the ordinary course of events without negligence upon the part of those in control. In Wilson v. Colonial Air Transport,[33] a case involving an air carrier, the court refused to conclude that negligence necessarily caused an airplane motor to stop immediately after a plane took off. In Boulineaux v. City of Knoxville,[34] a case involving a local carrier on sightseeing flights, the court said, "It is a common and not an unusual occurrence for airplanes to stall and fall while in operation and without the interference of any action on the part of the operator." Another case[35] where the court refused to apply the doctrine involved a guest on a test flight by the carrier. In view of the performance record of the scheduled carriers, it would appear that the doctrine should be applied as it has been in several carrier cases,[36] but the decisions do not warrant a categorical statement that it would be applied.

The courts have applied the doctrine where there was a collision.[38]

Another difficulty is that if the plaintiff pleads specific acts of negligence, the doctrine apparently will not apply.[39]

Once the difficulties discussed above are overcome and *res ipsa loquitur* is applied there are two views as to how *res ipsa loquitur* affects the burden of proof. One view is that a presentation of the surrounding circumstances permits, but does not compel, an inference of negligence. Thus, a verdict could not be directed, even if the defendant failed to present evidence, for the burden of proof remains with the plaintiff. This appears to be the weight of authority.[40] A second view is that when the doctrine is applied a presumption is created which requires a verdict for

[32] The doctrine was not applied in: Herndon v. Gregory, 190 Ark. 702, 82 S. W. (2d) 244 (1935); Smith v. Whitely, 223 N. C. 534, 27 S. E. (2d) 442 (1943) in which the court said "The doctrine of res ipsa loquitur does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aeroplanes do fall without fault of the pilot." In Deojay v. Lyford, 139 Me. 234, 29 A. (2d) 111 (1942), the court refused to apply the doctrine to a case involving the swerving of a plane at landing. The doctrine was applied by the trial court in instructions to the jury in the following cases: Seaman c. Curtiss-Wright (Sup. Ct. Suffolk County, N. Y.) 1931 U. S. Av. R. 229 (1931); Stoll v. Curtiss-Wright (Sup. Ct. N. Y. County) 1930 U. S. Av. R. 148 (1930), *aff'd.* without opinion, 236 App. Div. 664, 1932 U. S. Av. R. 163; Morrison v. Le Tourneau Co. of Georgia, 138 F. (2d) 339 C. C. A. 5th 1943).

[33] (Boston Mun. Ct. 1931) 1931 U. S. Av. R. 109, *aff'd.* Wilson v. Colonial Air Transport, *supra* n. 23.

[34] 20 Tenn. App. 404, 99 S. W. (2d) 557 (1935).

[35] Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865 (D. Wyo. 1937).

[36] In Smith v. O'Donnell, the doctrine was applied in the trial court but the decision reversed for other reasons, 5 P. (2d) 690 (1931), *aff'd.* 215 Calif. 714, 12 P. (2d) 933; Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N. E. (2d) 131 (1944) *aff'd.* 389 Ill. 462, 59 N. E. (2d) 853 (1945).

[38] Doctrine applied in a case involving a collision in Smith v. O'Donnell, *supra* note 36; Parker v. Granger, *supra* note 31.

[39] Goodheart v. American Airlines, Inc., 1 N. Y. S. (2d) 288, 1938 U. S. Av. R. 148 (1937); Johnson v. Western Air Express Corporation, 45 C. A. (2d) 614, 114 P. (2d) 688 (1941) (the court said the doctrine was not relied upon because plaintiff asserted specific acts of negligence, and did not ask for an instruction to the jury on the doctrine).

[40] Sweeney v. Eving, 228 U. S. 233 (1913); Nashville C. and St. L. Ry. Co. v. York, 127 Fed. (2d) 606 (C. C. A. 6 1942); Ryan v. St. Paul Union Depot Co., 168 Minn. 287, 210 N. W. 32 (1926).

the plaintiff unless the defendant proves not only the pertinent facts, but also persuades the trier of fact that his conduct was not negligent.[41]

It is pertinent to consider whether present rules have resulted in unreasonably small recoveries to plaintiffs in air carrier liability suits. A survey of the settlements made by the aviation insurance underwriters over a period of years shows that the average settlement for the death of persons riding as passengers on air carriers for the years 1934 through 1941 has been $11,240. Two judgments recovered for death during the period totaled $95,650. The average compensation for 71 claims for severe personal injuries was $753. For 340 minor injury claims during the same period, the average compensation was $261. Although the average settlements may shed little light on the problem of adequacy of individual settlements, it is interesting to note that the staff of the Civil Aeronautics Board which studied a series of individual claim files of the underwriters and the amounts paid between 1934 and 1938, concluded that, "Proponents of remedial legislation contend that because of uncertainty of recovery under the common law, worthy claimants cannot prove the liability of the aircraft operator, and that the underwriters take advantage of this situation to effect unreasonably low settlements whenever possible. No statistics have been submitted by such proponents in support of this contention and the examination made of underwriters' records and claim files discredits it."[42]

A comparison with the recoveries and settlements in claims of passengers for injury in railroad accidents cannot be made for such figures are not available from public records. The Interstate Commerce Commission reports show total costs for "persons injured" which include not only payments to the claimants, but other costs which leave the amount paid passenger claimants obscure.[43] Average recoveries for personal injuries rising out of the operation of private automobiles were much lower than those in air carrier cases.[44]

How many people are directly affected by the rules of liability applicable to air carriers? The following table indicates the number of people injured and killed due to the operation of air carrier aircraft on the one hand, and by all other civil aircraft on the other. The number of railroad passengers and railroad employees injured and killed and the number of persons injured and killed by the operation of private automobiles are also set out.

[41] In SHAIN, RES IPSA LOQUITUR (1945) 182, the author argues that this view is the one intended by the doctrine, but he recognizes that the majority of American courts now support the first view.

[42] SWEENEY REPORT, *supra* note 2, at 161, 162. (Exh. 25 was supplemented to bring settlement statistics through 1941 as the basis for the figures used above.)

[43] I. C. C., STATISTICS OF RAILWAYS IN THE U. S. (1943) 168, shows an item, "Injuries to persons" $39,296,031, of which $12,242,702 is apportioned to passenger service. But this item includes costs of carriage fees, claim adjusters and clerks' services, claim adjusters' office expenses, railway transportation, and witness' fees and expenses at inquests and law suits as well as judgments, and medical and hospital expenses. The figure also includes expenses with regard to employees injured in passenger service.

[44] For findings by the Committee to Study Compensation for Automobile Accidents of the Columbia University Council for Research in the Social Sciences, see Smith, *Compensation for Automobile Accidents: A Symposium* (part I, *The Problem and Its Solution*) (1932) 32 COL. L. REV. 785, 794.

	Air Carrier Aircraft[45] Passengers		Air Carrier Aircraft[45] Employees		Other[45] Civil Aircraft		Railroad[46] Passengers		Railroad[46] Employees		Private[47] Autos	
	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured
1941	35	48	9	14	325	742	41	2,909	826	25,188	39,969	1,400,000
1942	55	6	16	4	218	646	98	3,388	1,043	35,106	28,309	1,000,000
1943	22	10	8	8	255	686	271	5,013	1,089	45,685	23,823	800,000
1944	48	22	10	11	257	619	245	4,678	1,087	47,221	24,300	850,000

Death rate per 100,000[48] passenger miles, 1944

Scheduled air carrier	2.1
Railroad passenger trains	0.26

Suggestions that legislation should be enacted to afford special liability rules for persons injured by aircraft have been met by observations that more persons are killed per year by venomous animals than were killed and injured by air carrier accidents.[49] This may appear to be a humorous aside, but it indicates sharply that the problem affects a relatively small number of people.

Legislation to change the present rules governing the passenger's recovery from air carriers was proposed in a uniform state law by the Commissioners on Uniform State Laws in 1938. The rule proposed was that air carriers be absolutely liable for injuries to passengers. The act was not recommended to the states at the request of the then newly created Civil Aeronautics Authority until that body could study the matter.[50] The pressure of war activities postponed for a time the Board's consideration of liability legislation.[51]

Since 1943 a bill to regulate certain liabilities of air carriers by federal statute has been introduced in each session of Congress. The current bill, like each of its predecessors, would hold the carrier liable for passenger injuries unless the "carrier proves affirmatively that the injury or death did not proximately result from a failure to use the highest degree of care on the part of itself or any of its servants acting within the scope of their employment."[52] This is a statutory version of the minority view application of *res ipsa loquitur* which would shift the burden of proof and permit a directed verdict for the plaintiff, if the carrier failed to sustain its burden.

Precedent for such a shift of the burden of proof by legislation exists in the Warsaw Convention,[53] concluded in 1929, which came into force in the United States on October 29, 1934 and is now in effect in thirty countries.[54] Article 20, thereof

[45] SWEENEY REPORT, *supra* note 2, supplement to Exhs. 5 and 6.

[46] NAT'L SAFETY COUNCIL, INC., ACCIDENT FACTS (1945 ed.) 44, 88.

[47] *Id.* at 73. [48] *Id.* at 87.

[49] Thus in 1944, 140 persons were poisoned by such animals and only 91 were injured or killed in air carrier accidents. *Id.* at 54, 89; SWEENEY REPORT, *supra* note 2, supplementing to Exh. 5.

[50] SWEENEY REPORT, *supra* note 2, at 9. [51] C. A. B. Press Release, April 9, 1942.

[52] Sec. 1212 of H. R. 532, 79th Cong., 1st Sess. (1945). [53] U. S. Treaty Series 876.

[54] Ratifying countries: Australia and territories under mandate; Belgium, including Belgian Congo and territory under mandate; Brazil; Czechoslovakia; Denmark; France, including Colonies, Protectorates and mandated territories; Germany; Great Britain and Northern Ireland, including the largest part of her possessions and Colonies; Italy, including possessions and Colonies; Latvia; Netherlands, including Netherlands West Indies, Surinam and Curacao; Norway and possessions; Poland; Rumania; Spain and Spanish Morocco and Colonies; Switzerland; U. S. S. R.; Yugoslavia. Adhering countries: Danzig; Finland; Greece; Hungary; India; Ireland; Liberia; Liechtenstein; Mexico; New Zealand; Sweden; United States of America.

provides that "the carrier shall not be liable, if he proves that he and his agents have taken all necessary measures to avoid the damage, or that it was impossible for him, or them, to take such measures." The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire" so that, under the contract of carriage, passengers whose destination is one of the thirty countries, or passengers who have an agreed stop at any foreign country and return to the United States will have their claims for compensation governed by the Convention.[55] Thus, where the crash occurred at Lisbon, the Convention applied to a passenger bound to Lisbon, *and return,* from New York, despite the fact that Lisbon is not a signatory.[56]

II. CAN THE DEFENDANT AIR CARRIER LIMIT ITS LIABILITIES?

Limiting liability to passengers by contract, or otherwise, involves questions which in the past have depended on state law.[57] Most jurisdictions hold that a common carrier cannot contract to exempt itself from liability to its passenger for its own negligence[58] or contract to limit the amount of recovery for negligence.[59]

The recovery for the death of a passenger, or of a person on the surface, is now subject to any state statute limiting the amount recoverable because of wrongful death. Thus, in sixteen states and two territories the recovery is limited to sums between $5,000 and $15,000.[60] There are no statutory limitations on recoveries for personal injuries and for property damage; in fact, in several states there are constitutional prohibitions against limitations on recoveries for personal injury or death.[61]

Recoveries by passengers subject to the Warsaw Convention are limited by Article 22 to 125,000 francs (approximately $8,300). These treaty provisions override the public policy of the states.[62]

It is significant that all recent proposals would limit the amount for which an air carrier would be liable for either injury to persons or damage to property. The

[55] Choy v. Pan-American Airways (U. S. D. C., S. D. N. Y. Mar. 16, 1941, unreported) 1941 U. S. Av. R. 10; Wyman v. Pan-American Airways, Inc., 43 N. Y. S. (2d) 420; 1943 U. S. Av. R. 1 (1943), *aff'd* 267 App. Div. 947, 293 N. Y. 878, *cert. den.* April 23, 1945, 324 U. S. ——; Indemnity Ins. Co. v. Pan-American Airways (U. S. D. C., S. D. N. Y. December 22, 1944) 235 C. C. H. 1255. See, also, GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (1937); Sullivan, *Codification of Air Carrier Liability* (1936) 7 J. OF AIR L. 1.

[56] Garcia v. Pan-American Airways, Inc., 269 App. Div. 287, 55 N. Y. S. (2d) 317 (1945).

[57] Conklin v. Canadian-Colonial Airways, 266 N. Y. 244, 194 N. E. 692 (1935).

[58] E.g., N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357 (U. S. 1873). But New York, England, and Canada permit limitation. Anderson v. Erie R. Co., 223 N. Y. 277, 119 N. E. 557 (1918); Forder v. Great Western Rwy., [1905] 2 K. B. 532; Luddit v. Ginger Coote Airways, [1942] 4 D. L. R. 353; 1942 U. S. Av. R. 178.

[59] Conklin v. Canadian-Colonial Airways, Inc., 266 N. Y. 244, 194 N. E. 692 (1935) (limitation invalid because no choice of rate offered with unlimited liability).

[60] States and territories having statutory limitations on liability for wrongful death: Alaska $5,000, Cal. $5,000, Conn. $15,000, D. C. $10,000, Ill. $10,000, Ind. $10,000, Kan. $10,000, Me. $10,000, Mass. $5,000, Minn. $10,000, Mo. $10,000, N. H. $10,000, N. M. $7,500 (public conveyance only, see N. M. Const. Art. 20, §16), Ore. $10,000, S. D. $10,000, Va. $15,000, W. Va. $10,000, Wis. $15,000.

[61] States with constitutional provisions prohibiting the limitation of liability for wrongful death: Ariz., Ark., Ky., N. Y., Ohio, Okla., Pa., Utah, Wyo.

[62] Indemnity Ins. Co. v. Pan-American Airways, *supra* note 55.

Rome Convention, Article 8, would limit the recoveries for personal injury and property damage on the surface to 2,000,000 francs for one aircraft. The Uniform Act proposed by the Commissioners on Uniform State Laws would limit recoveries by passengers and persons on the surface to $10,000 per person, and for property damage to $100,000 per accident.[62a] The pending Congressional bill would limit recovery of passengers and persons on the surface to $10,000 for death and $50,000 for personal injury per person. For property damage on the surface the recoveries would be limited to $7 per pound of the landing weight of the aircraft. A similar over-all limit applies to liability for injury to persons on the surface.[63]

A limitation on recoveries against the carrier is urged, particularly if the burden of proof is placed on the defendant, because it weakens the bargaining position of the carrier in the settlement negotiations. A limitation of the carrier's liability is reasonable, if the burden of proof is shifted in cases where the causes of the accident are obscure, the loss will not be left spread among several persons as under the present rules, but will be concentrated on the carrier.

The opposing considerations regarding the amount of limitation are, on the one hand, that the limit should not be too low, particularly for recoveries for personal injury, because the consequences of permanent disability can cause more pecuniary damage in some cases than death. On the other hand, the establishment of high maximum recoveries is feared by insurance underwriters because it may raise individual recoveries to make such a maximum an actual minimum. One compromise regarding the amount to which recoveries be limited would be to set a maximum not on the amount which can be recovered per person, but a maximum sum for which the air carrier could be liable per aircraft. Such a figure for recovery by passengers might be formulated on the number of passenger seats, i.e., the air carrier would be liable for a figure not to exceed the equivalent of $10,000 for each seat. In this way, a figure could be set high enough to permit adequate recovery by passengers; i.e., for a DC-3 with twenty-one seats the maximum liability would be $210,000 and for a 100 seat plane, the maximum would be $1,000,000.[63a] Since a normal occupancy of a passenger airliner is 65 per cent and some individual settlements are low because there is no claim or no showing of dependency,[64] such a maximum would permit an allocation of varying amounts among the individual plaintiffs in proportion to their loss. At the same time, the air carrier would have a maximum over-all limit. Each claimant would sue and prove his damage as is true at present. The statutory limitation would have no bearing on the case, unless the total recoveries exceeded the maximum, in which event, the maximum would be

[62a] HANDBOOK, *loc. cit. supra* note 18.

[63] H. R. 532, §1255, 79th Cong., 1st Sess. (1945).

[63a] In addition a limit based on a given number of dollars per pound of the aircraft could be applied to claims for personal injury and property damage on the surface, cf. sec. 1255 of H. R. 532, *supra* note 63.

[64] See Exh. 25 of SWEENEY REPORT, *supra* note 2, which indicates that 15 out of 107 settlements averaged $1,024 each.

allocated among the claimants in a proceeding similar to interpleader. For damage on the surface the recovery would be limited to a figure determined by the weight of the aircraft.

Such limitation would be comparable to that now permitted owners of vessels, *viz.*, when the damage results "without the privity or knowledge of the owners" their liability shall not "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending," except if the amount is insufficient to pay the losses in full and the amount applicable to payment of losses in respect of life or bodily injury is less than $60 per ton of such vessels tonnage, such portion can be increased to an amount equal to $60 per ton.[65] This liability limitation has been applied to personal injuries or death of persons on the ship,[66] seamen's personal injuries,[67] damage to other vessels,[68] damage to structures on land[69] and injuries to persons on land.[70]

Although at first blush it might appear that the source of the federal power to limit liability of owners of vessels lies in the judicial power over cases of admiralty, the early decisions upheld the limitations as an exercise of the power over commerce.[71]

Statutory limitation can be considered as an alternate method of limiting liabilities. Vessel owners could form a corporation to own each vessel so that claims arising from its operation could reach only the remains of the ship. Similarly, if a corporation were formed to own each aircraft and after a crash the victims could look only to the remains of the aircraft and its earnings, the fund for compensation might be negligible, yet the technique would be a familiar one.[71a] In recent years the use of DC-3 airplanes with an original purchase price of approximately $125,000 may have prevented this from receiving serious consideration, but with the coming use of Constellations valued in the neighborhood of $1,000,000 the use of the corporate device is not so far-fetched.

III. CONCLUSION

The law is called upon to find a balance between the interests of air carriers and of persons injured by the operations of such carriers with respect to the compensa-

[65] 49 STAT. 960, 1479 (1935, 1936), 46 U. S. C. (1941) §183.

[66] Butler v. Boston Steamship Co., 130 U. S. 527 (1889).

[67] *In Re* East River Co., 266 U. S. 355 (1924).

[68] Norwich Co. v. Wright, 80 U. S. 104 (1871).

[69] Richardson v. Harmon, 222 U. S. 96 (1911).

[70] The Atlas No. 7, 42 F. (2d) 480 (S. D. N. Y. 1930).

[71] Lord v. Steamship Co., 102 U. S. 541, 545 (1880): "Having found ample authority for the Act as it now stands in the commercial clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction." To the same effect are, Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 (1873); United States v. Hamburg-Amerikan, Etc. Gesellschaft, 212 Fed. 40 (C. C. A. 2d 1914). In The Hamilton, 207 U. S. 398, 404 (1907) the court said: "The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the constitution extending the judicial power to all cases of admiralty and maritime jurisdiction."

[71a] But query as to its efficacy. See LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) 192 ff.

tion for injuries and property damage. One method recommended to compensate persons injured in rail and automobile transportation has been to establish specialized boards, which would make compensatory awards.[72] The number of persons injured by air carriers, however, is too small to justify such elaborate machinery.[73] The proposals to improve the plaintiff's recoveries are based on the purported difficulties of a plaintiff in a suit against an air carrier. While these difficulties can be dramatically stated, there has not been a cataloguing of evidence that the victims of air-carrier accidents have been inadequately paid as has been proved with reference to victims of automobile accidents.

If, however, the rules covering recoveries are to be amended to facilitate the plaintiff's recovery from air carriers, it might be based upon a notion that it would be in exchange for the limitation of liability given the air carrier. Thus, the plaintiff would be given greater assurance of some compensation for his personal injury, although the amount of such recovery would be limited. Second, the proposed improvement, i.e., holding the air carrier liable unless the carrier proves that the injury or death did not result from its failure to use the highest degree of care, should be re-examined to determine whether the burden of proof is stated in language sufficiently clear to be a useful guide to the court in litigation and to be a burden of proof which can be sustained.

The air carrier's interest in limiting its potential liability is based not only upon the amount of liability which may attach in the future, but upon the constant cost of insuring against such possibility. The limitation, in the nature proposed above, would result in a limitation on the individual recovery only when the total recoveries exceeded the maximum liability prescribed in the statute.[74] The damage in excess of the limitation would be left where it fell. This policy can be justified with respect to owners of property on the surface because of the low cost of insurance to the surface property owner as compared with the cost of insurance to the air carrier. An extended coverage endorsement added to a fire insurance policy covers against losses by windstorm, cyclone and tornado, hail, explosion, riot, smoke damage, and vehicle damage, including damage from falling aircraft or objects falling therefrom. This form is the coverage readily available to protect against the airplane hazard. The highest rate for home owners in the District of Columbia for this coverage is six cents per $100 of coverage per year. The amount of insurance against property damage which is available to the carrier is limited and expensive.

The limitation on liability would be a method of furthering the national policy regarding air transportation. Congress has stated affirmatively the public interest in air carrier transportation. The Civil Aeronautics Act in its Declaration of Policy[75] emphasizes the encouragement, and development of an air transportation system

[72] See Ballantine, *supra* note 24, and Smith, *supra* note 44.

[73] SWEENEY REPORT, *supra* note 2, at 413.

[74] No air carrier crash in the United States since 1929 has caused more than $7,000 damage on the surface. This occurred at Los Angeles on December 1, 1944.

[75] Sec. 2 of the Act, 52 STAT. 980, 49 U. S. C. (1941) §402.

and the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges. . . ." Limiting liability is a method of promotion first applied in the days of the great sailing fleet. "The great object of the statute (limiting the liability of the vessel owner) was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship. . . ."[76] The modern venture in air carriers invites the same encouragement.

[76] Hartford Accident Co. v. Sou. Pacific, 273 U. S. 207, 214 (1927).