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# *Liability of Aircraft for Injuries to Innocent Parties on the Ground*

Since the first years of this century, the growth and use of aircraft as a means of transportation has been tremendous. From its infant days, it has become a first-class competitor with the railroad, bus, and automobile. By its nature, air transportation appears a degree more hazardous than the afore-mentioned, conventional-type transportation. When the airplane begins to function improperly, there is the problem not only of bringing the craft to a safe landing, but of saving persons and property from any possible harm. The rules of liability which the courts apply, their development to the present, and the possible effects of The Rome Convention of 1952 upon the continued development of these rules of liability will be treated in this article.

## The Era of No Liability

In the early years in this century, when an aeronaut happened to descend on a farmer's land, destroying crops and scaring farm animals, the farmer welcomed the intruder with open arms, fed him, aided the aviator in the repair of his aircraft, and possibly even tore down his fence so that the airplane would have sufficient room to take-off. There was no problem or rule of liability, for the farmer would never take the necessary action to bring the aviator into court. Reasons for this reluctance on the part of the farmer could be narrowed to these: 1) The farmer was isolated from his neighbors, and this intrusion came as a pleasant interlude; 2) The aviator was regarded as a dare-devil, and the fact that his farm was chosen as the emergency landing-field was regarded as a privilege bestowed by the hero.

This period of immunity from suit soon passed with the growth in number of aircraft and frequency of the landings on farms. The period of liability soon began.

## Absolute Liability

Aircraft appeared to be extremely hazardous. The inability of the operator to control the vertical descent of the craft and the occasional resultant severe damage to persons and property in the path, coupled with the apparent incapability of those on the ground to take appropriate measures to avoid injury gave justifiable reasons for the adoption, as to aircraft, of the same absolute liability set forth in *Fletcher v. Rylands*.<sup>1</sup> In an early article, written on the problem of liability, the writer definitely favored absolute liability.

An air-ship which descends on a house and tears off the roof does the owner an injury. Of what consequence is it that the aeronaut did not mean to strike it, but was endeavoring to light in a field beyond? He must answer for what he did. He undertook to launch into the air, for his own purposes or pleasure, something which the force of gravity would certainly constantly be dragging downward. It did drag this thing down upon this roof. The thing was, while

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<sup>1</sup> 3 Hurl. & C. 774, L. R. 1 Exch. 265, L. R. 3 H. L. 330 (1868).

in the air, inherently and continually a menace to the security of everything beneath it. It was a thing of danger to all men and to the property of all men.<sup>2</sup>

*Guille v. Swan*,<sup>3</sup> one of the first cases recorded on liability of an aviator, imposed the absolute liability of *Fletcher v. Rylands*. In the *Guille* case, damages for injury to the crops was imposed on the balloonist because ". . . it is certain, that the Aeronaut has no control over its motion horizontally; it is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard."

On the basis of the *Rylands* and *Guille* cases, law-writers, in the early years of aviation, advanced the idea that absolute liability should be imposed on the operator and owner of aircraft. An important effect of this was the Uniform Aeronautics Law<sup>4</sup> which contained a provision for this absolute liability. Fourteen states and the territory of Hawaii adopted this law with the absolute liability provision intact.<sup>5</sup>

### The Decline of Absolute Liability

In states which had not adopted the uniform law with the absolute liability provision, it soon became apparent that aircraft should not be burdened with this hardship. In *Greunke v. North American Airways Company*,<sup>6</sup> the degree of skill the aviator need exercise was held to be only ordinary skill and care, and was not necessarily the greatest care. A few years later, in *Herrick v. Curtiss Flying Service*,<sup>7</sup> on the question of the danger arising from the use of aircraft, it was held that an airplane is not an inherently dangerous instrument, even though the possibilities from careless handling are apparent.

The states which adopted the Uniform Aeronautics Law with the provision of absolute liability intact, all adopted the act within a few years of its promulgation. In recent years, there has been an indication of a reversal of thought in some of these states. In 17 *Journal of Air Law and Commerce* 362 (1950), it is noted:

Indication of the efforts of state aviation directors to achieve elimination or some modification of the "absolute liability" provision of the early model Aeronautics Act Section 5, is found in 1949 amendments to the aviation laws of South Dakota, Maryland, and Wisconsin.

The imposition of liability without negligence does not enjoy wide acceptance in the United States. In *Ives v. South Buffalo Railway Company*,<sup>8</sup> Judge Cullen stated that "you may not impose a liability without fault" and goes on to

<sup>2</sup> 9 Mich. L. R. 20 (1910).

<sup>3</sup> 19 Johnson (N. Y.) 381, 1928 U. S. Av. R. 53, 1 Avi. 1 (1882).

<sup>4</sup> 8 U. L. A. 5 (1922).

<sup>5</sup> Rhyne, *Aviation Accident Law* (1947), p. 66; Cf., *State, to the Use of Birckhead v. Sammon*, 171 Md. 178, 189 Atl. 265 (1927).

<sup>6</sup> 201 Wis. 565, 230 N. W. 618, 1930 U. S. Av. R. 126, 1 Avi. 219 (1930).

<sup>7</sup> 1932 U. S. Av. R. 110, 1 Avi. 369 (1932).

<sup>8</sup> 201 N. Y. 271, 94 N. E. 431 (1911).

say, "I know of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."

### The Doctrine of Presumed Liability

The doctrine of Presumed Liability or Res Ipsa Loquitur results only in the shifting of the burden of going forward with the proof from the plaintiff to the defendant. The nature of an airplane accident and its circumstances naturally lend themselves to the doctrine. One of the first cases to apply this doctrine was *Robinson v. Consolidated Gas Company of New York*,<sup>9</sup> where it was stated in the following terms:

If proof of the occurrence shows that the accident was such as could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done.

In *Sollak v. State of New York*,<sup>10</sup> the doctrine as stated in the *Robinson* case was followed when the court, in allowing recovery, held:

. . . if the entire circumstances as proven could not have happened without negligence of some kind, negligence is presumed and the burden of explanation is on the defendant.

However, the airplane operator or owner could escape liability. The fact that there is motor failure, would not, of itself, justify recovery.<sup>11</sup> But where it could be shown that a structural failure had caused a crash which had killed a person on the ground, the doctrine of Presumed Liability was held to apply, the court saying:

The present case is of the class in which the instrumentality that produced the injury was under the control and management of the defendants, and the accident was such as does not happen if due care has been used.<sup>12</sup>

The courts in these two cases took into consideration the fact that there may be motor failure even if the greatest diligence is applied but in the latter case, the structural failure was the breaking of a worn rudder cable. Proper maintenance and inspection could have discovered this defect.

Speaking on the doctrine of liability in the book "Aviation Law," Henry Hotchkiss stated:

Should this rule (Res Ipsa Loquitur) be fixed in cases of aviation accidents it would not impose an absolute liability on the owners and operators of aircraft, but it would require them to adduce evidence to disprove the apparent existence of negligence. It would fix an intermediate point between the rule of absolute liability and the ordinary rules of negligence.<sup>13</sup>

In *United States v. Kesinger*,<sup>14</sup> it was stated that:

Two theories of liability are advanced. One, absolute liability for trespass, since the accident occurred in the pursuit of an extra-hazardous activity, and two, negligence.

<sup>9</sup> 194 N. Y. 37, 86 N. E. 805 (1909).

<sup>10</sup> (N. Y. Ct. Cl.), 1929 U. S. Av. R. 42, 1 Avi. 92 (1927).

<sup>11</sup> *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N. Y. S. 469 (1933).

<sup>12</sup> *Kadylak v. O'Brien*, (D. C. Ct. Pa.) 32 F. Supp. 281 (1941).

<sup>13</sup> Hotchkiss, *Aviation Law* (1928), p. 31.

<sup>14</sup> 190 F. 2d 529 (1951).

The modern trend of authority is to hold the rule of *res ipsa loquitur* applicable to airplane accidents, and we hold that it was applicable under the facts and circumstances presented in the instant case.

## The Airport Commission Report

As a result of several air crashes in the City of Elizabeth, near the Newark Airport in New Jersey, the President of the United States organized an Airport Commission to study the problems of these and other air crashes. In its report, the committee, headed by James J. Doolittle, stated:

Thus, statistically, for every person killed on the ground by airplanes, 6,700 die as a result of other accidental causes.<sup>15</sup>

The report stated further that ". . . the 6-year average (1946-51) for ground fatalities due to airplanes comes to only 15."

The greatest danger of an airplane crash comes at the time it is either landing or taking-off. Airports, being situated near or in populated areas, cause an airplane crash to result in severe damage to persons and property on the ground. Speaking of the ratio of safe landing to aircrashes, the report says:

In 1946-51 there were approximately 6,500,000 landings by aircraft of scheduled and non-scheduled airlines for each crash claiming the lives of people on the ground who were not occupants of an airplane. Inclusion of the three 1952 crashes within the New York-Northeastern New Jersey Metropolitan Area reduced the ratio to 4,000,000. Despite the unusual concentration of crashes in that locality early in 1952, the probability for this type of accident happening was and still is remote.

## The Rome Convention of 1952

In Article 2 of The Rome Convention of 1933, the rule of absolute liability was used. In the intervening years, five nations, Belgium, Brazil, Guatemala, Roumania, and Spain, ratified the Convention. This placed the Convention technically in force, but of no use, since most principle nations do not participate.<sup>16</sup>

During the last several years, the International Civil Aviation Organization<sup>17</sup> has held conferences which considered the problems of revision of this almost totally inoperative Rome Convention of 1933. In the Lisbon Conference, held in 1949, I.C.A.O. phrased questions to discover objections which the various governments had to this Convention of 1933. At the Montreal Conference, held in June, 1949, the United States answered in the following manner, the question of absolute liability.

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<sup>15</sup> The Airport And Its Neighbors, The Report of The President's Airport Commission (1952).

<sup>16</sup> *supra*, note 5, Aviation Accident Law, p. 275; 49 Mich. L. R. 1163, pp. 1164-1165 (1952); note 3.

<sup>17</sup> The International Civil Aviation Organization (I.C.A.O.), established by Part II of the Convention on International Civil Aviation Treaties and International Acts, Series 1591, which became effective on April 4, 1947.

. . . (The Aviation Industry) should be liable for damages to innocent third persons or property on the ground only that he is not able to prove that he had taken all measures to avoid damage and all events leading thereto which an operator exercising the highest degree of care would have taken under the circumstances . . .

. . . the laws in the United States as to surface transport generally require the injured party to sustain the burden of proving negligence on the part of the operator. Shifting the burden of proof to the aircraft operator is as far as the United States Government feels it is fair to go in putting a special burden on the aviation industry.<sup>18</sup>

In discussions at this conference, the delegates from the United States said that the use of the doctrine of *res ipsa loquitur* would place the responsibility of showing the lack of fault on the operator or owner of the airplane causing the damage. Mr. John Cooper, of the International Air Transport Association, continuing the discussion on this topic, said:

. . . there was no system of law applicable to a moving instrumentality which placed upon the owner of the instrumentality absolute liability in the case of the removal or escape of the instrumentality from the control of the owner, except in the case of wild animals.

During the Conference the Chairman recognized that most of the nations still adhered to the rule of absolute liability. Only a few of the nations, those having a great amount of air activity, and, as a result, familiarity with the problems of aviation, advocated that the basis of liability be determined on the ground of negligence or fault. Those nations still in a comparative infancy as to the industry are advocating the same rule of liability as was pronounced in the Uniform Aeronautics Act of 1922.

After much discussion in this and other conferences held in Rome, 1950, and Mexico City, 1951, those adhering to the panacea of the rule of absolute liability, had incorporated into the draft, this provision:

Any person who suffers damage on the surface, shall upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation . . .<sup>19</sup>

The incorporation of this provision, as Article 1 of Chapter I in The Rome Convention of 1952 amounted to a clear victory for the advocates of the rule of absolute liability.

### Conclusion

The Uniform Aeronautics Act of 1922, using the rule of absolute liability, was adopted when air transportation in the United States was in its infancy. Notwithstanding this fact, only fourteen states rushed to adopt this act incorporating the provision of absolute liability. Several of those states are now in the process of reconsidering this early action. This reconsideration will probably result in abrogating the absolute liability rule for the rule of presumed liability.

<sup>18</sup> Doc. 6027, IC 124, Annex ¶1, App. A, p. 224.

<sup>19</sup> The Rome Convention of 1952, Chapter I, Article 1.

The Commissioners on Uniform Laws have withdrawn this Act and it is no longer recommended for enactment.

This same absolute liability rule was incorporated into The Rome Convention of 1933. This Convention was ratified by only five nations but was never ratified by the United States. The Rome Convention of 1933 has followed the Uniform Aeronautics Act. It has been superseded by a new Convention. The problem is that The Rome Convention of 1952, replacing the old Rome Convention, still contains the absolute liability rule.

Ratification by the United States of The Rome Convention of 1952 would not directly affect the rule of liability as applied by the courts as to domestic craft, but it would affect foreign craft crashing in the United States.

The trend of domestic courts has been to a negligence theory or presumed liability rule.

The application, by the domestic courts, of the absolute liability rule to air-crashes which would require the application of The Rome Convention of 1952 could very probably cause a reversal in the trend of thought of the courts which would result in the application of an absolute liability.

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