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LAND DAMAGE LIABILITY IN AIRCRAFT CASES

By

PROFESSOR JOHN AUGUSTINE EUBANK*

Frequently, when the courts are about to decide a suit brought against an aircraft owner, lessee or operator for damages to persons and property on the surface resulting from the flight, ascent or descent of the aircraft or the dropping of objects therefrom, students of the law are alert to learn if the courts apply or reject the *liability-without-fault* rule in deciding for or against the groundsmen. (Of course this has no reference to suits wherein there is evidence of negligence on the part of the aircraft or contributory negligence of the landmen, because in those actions, generally there is no particular problem.)

In some instances the courts have circumvented the *liability-without-fault* rule or have disregarded the rule by basing their decisions on trespass. In *Rochester Gas and Electric Corp. v. Dunlop*¹ in which the defendant's aircraft crashed into and damaged a steel tower supporting wires, it was ruled that the defendant was liable in trespass as a matter of law. The court said:

"If, on the other hand, common experience requires the opposite conclusion, namely, that no matter how perfectly constructed or how carefully managed an aeroplane may be, it may still fall, then the man who takes it over another's land and kills his cow or knocks off his chimney, has committed an inexcusable trespass. It must be kept in mind that when

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¹ 148 Misc. 849 (N.Y.).

damage occurs in such a case, one or the other party has to stand it, and no reason readily suggests itself why it should not be the one who has brought about the chance occurrence."

Although the basis of this decision was trespass, the reasoning closely leans to the liability-without-fault rule. In the over a century old case of *Guille v. Swan*,² wherein the defendant's balloon descended into plaintiff's garden and attracted a crowd of people who in their desire to help the aeronaut or out of curiosity overran the property with the result that plaintiff's garden was damaged. It was held that defendant was liable as a trespasser. In the case, *Portsmouth Land and Hotel Co. v. U. S.*,³ the United States was held liable to the groundsman for having fired shots across its property. Damages were awarded to a person who while walking on the highway was injured by a falling balloon. *Carney v. Rochester Agriculture Association*.⁴

In the recent case of *Gaidys v. U. S.*,⁵ a U. S. Army jet plane crashed into plaintiff's house. The court held that in the present stage of development of jet airplanes, the take-off and landing of such a craft in a residential area is an extra hazardous activity. Therefore, such an act was a wrongful act and a trespass on plaintiff's property. It also constituted a breach of a privileged passage through plaintiff's airspace for the reason that said flight endangered and damaged the land and the structures, property and persons thereon. It was therefore a trespass by the defendant for which the plaintiff should recover. This case was appealed, and on February 21, 1952, the United States Circuit Court of Appeals, Tenth Circuit, affirmed the decision of the United States District Court of Colorado. The appellate court made the significant statement that if the plane had been flying at a safe altitude, perhaps questions more difficult of solution would have been presented. In this case the aircraft was flying low, only 100 feet in the non-navigable airspace and fell on plaintiff's house. From this statement of the court, it can reasonably be inferred that if immediately before the crash occurred, the aircraft had been flying above 1000 feet in the navigable airspace as prescribed by Section 10 of the *Air Commerce Act* and Section L(24) of the *Civil Aeronautics Act* and regulations thereunder, the solution of the problem confronting the court would have been determined on one of the following grounds:

- (1) Liability-without-fault.
- (2) Liability based on evidence of negligence and freedom from contributory negligence upon the party aggrieved.
- (3) Evidence that the use of the airplane was an extra-hazardous undertaking.

² 19 Johnson 381 (N.Y., 1822).

³ 260 U.S. 327.

⁴ 76 N.H. 603, U.S. Aviation Reports, 105 (1928). See also *Sollak v. State of New York*, U. S. Av. Rep. 42 (1929); *cattle frightened by plane*, U.S. Av. Rep. 46 (1928); *Smith v. New England Aircraft Co.*, 270 Mass. 311; *King v. U.S.*, U.S. Av. Rep. 73 (1950); *Webb v. Sessler*, U. S. Av. Rep. 271 (1951); *Evans v. U.S.*, U.S. Av. Rep. 496 (1951).

⁵ U.S. Av. Rep. 352 (1951).

(4) No liability if there was evidence that the accident was due to an Act of God or unavoidable causes.

A Maryland statute provides for a presumption of negligence. In *D'Anna v. U. S.*,⁶ *C. C. A.*, 4th Circuit, April 11, 1950, wherein a U. S. Army plane fell into a fruit market stand injuring persons and damaging property, it was held that the United States did not meet the presumption and was liable. In speaking of the common law the court stated:

"At common law, the hazardous nature of the enterprise subjected the operator of the plane to a rule of absolute liability to one upon the ground who was injured or whose property was damaged as the result of the operation. Restatement of Torts Sections 519, 520(d), Prosser on Torts, p. 452. The Maryland act has modified this rule to the extent that the owner or operator of the plane may exculpate himself by showing the injury was not caused by negligence on his part."

Thus, the consideration of liability of aircraft operators for damages (possibly other than that caused by the mere passage of aircraft in trespass and nuisance cases) to persons and property on the surface, wherein the damages are the result of negligence of the aircraft operator and the party aggrieved is free from contributory negligence, is, of course, quickly disposed of through the application of the common law rules of negligence applicable to torts on the land.

When damages occur which are not the result of negligence of the aircraft operator and the party injured has not contributed to the injury, the question arises whether or not liability should be imposed on the aircraft operator, his lessee, agent or servant. The problem is one which has given students of aeronautical law much concern, and over which there has risen a division of viewpoint among authorities of that branch of jurisprudence. From doctrinaire, statutory enactment, adjudicated cases with some support from the common law there has developed a rule of absolute liability. Under this rule an aircraft operator, his agents, servants or lessees are absolutely liable for damages caused by such aircraft to persons and property on the ground, irrespective of whether or not the damage is the result of the negligence of the aircraft. Of course, the injured party must be free from contributory negligence. This absolute liability doctrine has been sharply challenged.⁷

* * * * *

Nevertheless, the rule is part of the statutory law of a number of states and is embodied in the *Uniform State Law for Aeronautics*, Section 5, which reads as follows:

"Section 5. *Damage On Land.* 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

⁶ U.S. Av. Rep. 282 (1950).

⁷ Eubank, *Unfair Damage Liability Imposed on Aircraft*, *Pacific Aviation* (February, 1929).

or falling of any objects 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 consequence 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 or objects falling from it."

Section 5 would apply when damages occur while the aircraft is rolling on the ground with its motor running both in the take-off and in landing because such transitional movements are part of the flight contemplated in the terms "ascent" and "descent" mentioned in the section. However, Section 5 would not apply while an aircraft was taking-off and landing on an airdrome.⁸

This section is a decidedly far-reaching example of legislative enactment imposing absolute liability in the absence of negligence. Section 5 has been incorporated into the statutory laws of a number of the states in the union. However, of the twenty-two jurisdictions (twenty-one states and the Territory of Hawaii) which have adopted the *Uniform State Law for Aeronautics*, not all have seen fit to include therein the provisions of the absolute liability rule. Furthermore, some of the states which originally enacted Section 5 *in toto* have repealed the liability-without-fault provision and have substituted provisions which either provide for the application of the (1) rules of law applicable to torts on the land, (2) liability only on proof of negligence, (3) a rule of *prima facie* negligence or (4) some modification or limitation of the general rule applicable to torts in general. Idaho, Nevada and Maryland are three such examples. While *Pennsylvania* and *Missouri* have largely adopted the *Uniform State Law for Aeronautics* (otherwise known as the *Uniform Aeronautics Act*) or have incorporated most of its provisions in their own codes, neither of them have included the absolute liability rule. Moreover, *Montana* only has a provision of liability of aircraft without fault when the damages result from forced landing.

After taking different stands in the matter, *Pennsylvania* finally adopted the law applicable to torts on the land and *Missouri* deals only with liability for damages occurred in collision between aircraft, being silent as to damages to the groundsmen in other cases. This renouncement or absence of the rule of absolute liability by a number of jurisdictions is convincing evidence of its severity.

Some of the sovereignties which have adopted the *Uniform State Laws for Aeronautics*, and which have accepted Section 5 *en masse*, thereby adopting the rule of liability without fault, are *Vermont*, *New Jersey*, *Delaware*, *Minnesota*, *Tennessee*, *North Dakota* and the *Territory of Hawaii*.

⁸ *Birkhead v. Sammon*, 171 Md. 178. See § 20, *British Navigation and Art. 2 (3) of the Rome Convention*.

After having adopted the liability-without-fault rule, Maryland repudiated such rule and now provides for a rule of *prima facie* negligence.⁹ Nevada did likewise in 1947. In Rhode Island, South Carolina and Wisconsin, the liability-without-fault rule has limited application. In the main, however, the rule is retained. By Chapter 1435 of the Laws of 1929 of Rhode Island, the owner or lessee of an aircraft is liable only for the consequence of his own negligence if the aircraft is under the control of a lessee. In both South Carolina and Wisconsin in their Laws of 1929, the owner and lessee are jointly liable but an aeronaut who is not the owner or lessee shall be liable only to the extent of his own negligence. Wyoming has a provision of law making the aircraft liable absolutely for damages resulting from forced landings only and is also silent as to other type of cases.

Connecticut has never adopted the *Uniform Aeronautics Act*, and after some different stands on the question finally adopted the rule of liability only on proof of negligence, but subsequently repealed such final act in 1933. Back in 1911, Connecticut enacted the absolute liability rule.¹¹ Although that law imposed absolute liability, it was silent on the proposition of liability for damages in the absence of negligence, in that no affirmative statement to that effect was embodied in the statute.¹² Seven years later the state in Chapter 176, Laws of 1918, affirmatively stated that an aeronaut was absolutely liable for damages to persons or property, whether caused by negligence or due to an unavoidable accident. In 1931, however, the state reversed its previous position.¹³ By the latter enactment it was provided that every pilot shall be responsible for damages caused to persons or property suffered by any person from injuries by an aircraft directed by or under the control of such pilot but only when the injury is the result of negligence on the part of the pilot. Again in 1927,¹⁴ Connecticut re-enacted substantially the same Law of 1921 which imposed liability only in the event of negligence. This law known as Section 3077 of the General Statute was re-enacted by Section 32 of Chapter 253 of the Laws of 1929 but was repealed by Chapter 146 of the Laws of 1933.

Over thirty-nine years ago, in 1913, Massachusetts¹⁵ created a presumption of liability on aircraft from the mere occurrence of an accident. Later in 1919¹⁶ the state repealed the 1913 law, and today the laws of that commonwealth are silent on the proposition.

In addition to Massachusetts, Montana and Missouri, there are some twenty-four states which are also silent as to the liability of aircraft for damages to persons and property on the surface where there is no negligence on the part of the air-

⁹ Md. Laws, 1937.

¹¹ § 11, ch. 86, Laws of 1911.

¹² Eubank, *Legal Handicap for Aircraft, Airway Age* (February, 1929).

¹³ § 13 ch. 207, Laws of 1921.

¹⁴ § 26, ch. 324, Laws of 1927.

¹⁵ Ch. 663, Laws of 1913.

¹⁶ Ch. 306, Laws of 1919.

craft. Those states are Maine, New Hampshire, New York, Virginia, West Virginia, Alabama, Mississippi, Florida, Kentucky, Louisiana, Ohio, Illinois, Iowa, Kansas, Nebraska, Arkansas, Colorado, Washington, Oklahoma, Alaska, Texas, New Mexico, Oregon and California.

Georgia in 1933 enacted a law providing that proof of injury inflicted to persons or property on the ground by the operator of an aircraft, shall be *prima facie* evidence of negligence on the part of operator of such aircraft in reference to such injury. Minnesota in 1943 reaffirmed the liability-without-fault rule re-enacting the identical provisions of Section 5 of the *Uniform State Laws for Aeronautics*.¹⁷ Vermont re-enacted the rule as recently as 1951.

* * * * *

To summarize, twelve jurisdictions have adopted the absolute liability rule without any restriction or limitation through statutory enactment of Section 5 of the *Uniform State Laws for Aeronautics*. Three states, Rhode Island, South Carolina and Wisconsin, have adopted Section 5 with some limitation on the rule. Two other states, Montana and Wyoming have laws giving the liability-without-fault rule a very restricted application, viz., to damages resulting from forced landings only and without any consideration to the other type of cases. Three states, Georgia, Nevada and Maryland, have adopted the presumption of negligence rule through the declaration that the mere happening of an accident shall spell out a *prima facie* case of negligence against the airman. Arizona permits liability only on proof of negligence. Two other sovereignties, Pennsylvania and Idaho, have laws affirmatively stating that the ordinary rules of negligence applicable to torts on the land shall be invoked. The balance of the twenty-five states of the union have refrained from any statutory declaration on the question or have retreated from previous positions. Connecticut is a striking example. Of course, some of the jurisdictions have spoken through judicial action of the courts. It is apparent that a number of states have been progressive enough to enact laws in an honest attempt to solve the problem. Unless the states which have not finally spoken on the subject or have not expressed themselves through judicial decisions can be accused of passive indifference, they are either opposed to the absolute liability theory or are reluctant to express approval thereof. The absence of uniformity with reference to damage liability of aircraft to persons and property on the surface is one of the compelling evidences of the necessity and wisdom of uniform aeronautical legislation¹⁸ and aeronautical laws in general.

* * * * *

In the 79th Congress, First Session, a bill (H. R. 532 introduced by Representative O'Hara) was sponsored which provided for the liability-without-fault rule with respect to damage liability of aircraft for damages to persons and prop-

¹⁷ § 20 (4), Minnesota Laws of 1943.

¹⁸ Eubank, *Uniform Air Laws Are Imperative*, *Airway Age* (December, 1929).

erty on the surface with a limitation of the liability as to the amount of recovery. The measure also had a provision that liability would exist only upon proof of negligence when the injury, death, or damage was caused within the area of an airport available for the storage, handling, loading, unloading, taxiing, take-off, or landing of aircraft.

This latter feature of the bill is consistent with the decision in *Birckhead v. Sammon*,¹⁹ in which it was ruled that the liability-without-fault rule as provided for in Section 5 of the *Uniform State Law of Aeronautics* had reference only to injuries to persons or property where the descent of the aircraft would be a trespass upon the rights of the land owner. And certainly the liability-without-fault rule as provided for in said Section 5 was never intended to apply to the authorized landing of an airplane at an airport.

Since the *Birckhead v. Sammon* decision, Maryland has adopted the *prima facie* rule of negligence formula through enactment in the year 1937 of the following law:

"Damages on land—prima facie liability of aircraft owner. The owner of every aircraft which is operated over the lands or waters of this state is *prima facie* 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, 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, or unless at the time of such injury the said aircraft is being used without the consent, express or implied, of the owner. If the aircraft is leased at the time of injury to person or property both owner and lessee shall be *prima facie* liable, and they may be sued jointly, or either or both of them may be sued jointly, or either or both of them may be sued separately. The presumption of liability on the part of the owner, or of the owner and lessee, as the case may be, may be rebutted by proof that the injury was not caused by negligence on the part of such owner or lessee, or of any person operating such aircraft with the permission of the owner or lessee, or of any person maintaining or repairing such aircraft with the permission of the owner or lessee. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence."

In the proposed *Uniform Aviation Liability Act* as formulated by the American Law Institute in May, 1937, there is embodied therein an adoption of the liability-without-fault rule with respect to the liability of aircraft for damages to persons and property on the surface. Section 2 of the 1937 Tentative Draft of such act provided in part as follows:

"Liability for injuries to individuals and property on the land. For injuries within this state to individuals or property on the land, the owner of any aircraft, except a public aircraft, shall be liable, regardless

¹⁹ 171 Md. 178.

of negligence, to those, or to the personal representatives of those, injured in person or property, by the ascent or descent or attempt to ascend or flight or other movement of an aircraft, or by the falling or dropping of any object therefrom, unless the injury was caused by the wilful misconduct of the party injured in person or property."

This section also provided for fixed amounts, limiting liability.

The severity of the liability-without-fault rule might be somewhat alleviated by not having it made applicable when damages result from an Act of God or *vis major*. In some quarters there has been a trend in that direction. Further, there has been a tendency to give application to the rule only to persons in whose economic advantage largely the aircraft is being operated. Consequently, if a pilot is not the owner of the aircraft he is not liable unless the damage is the result of his negligence. This is in accordance with Section 5 of the *Uniform State Laws for Aeronautics*.

The Civil Aeronautics Board in excerpts from a study of proposed aviation liability legislation, dated June, 1941, made the following statement with reference to damage liability of aircraft to persons and property on the surface:

"Persons on the ground (not on a landing area of an established airport) should be compensated for injuries directly attributable to the operation of aircraft, irrespective of the aircraft operators' negligence. It is believed that the imposition of this liability by legislation involves no departure from law as it is now developing, and that it would have the desired effect of eliminating the confusion in legal theories prevailing in the decisions of the courts that have considered this liability. Important as the continued development of civil aviation is believed to be, no convincing reason has been presented why it should be subsidized at the expense of the luckless victim on the ground who, without participating in aviation in any way, is injured by an aircraft accident not attributable to the fault of the operator."

* * * * *

Historically, it is of interest that the liability-without-fault rule or the absolute liability formula has a historic basis as far back as 2000 B.C. In the Hammurabi Code of 4000 years ago there is evidence of principles of law having some similarity to the liability-without-fault rule. The principle of retaliation and the concept of the "an eye for an eye and tooth for a tooth" were manifested in the code. Further evidence of these principles is found in the Twelve Tables of Rome. Through changes in form but fundamentally not in principle, the absolute liability rule became the law of later centuries and the civil law of the modern era.

Global Acceptance of the Liability-Without-Fault Rule

Nearly all of the nations of continental Europe have or had the absolute liability rule in force. The European nations or former nations which have or had adopted the rule are Bulgaria, Finland, Sweden, Switzerland, Hungary, Germany, Austria, Italy, Danzig, Yugoslavia, Belgium, Czechoslovakia, Denmark, France,

Russia and Norway. Also Algeria, Chile, Salvador, Irish Free State and Venezuela have accepted the doctrine of liability-without-fault. In this connection it must be borne in mind that the laws of many foreign nations permit one to contract against his own negligence.

Great Britain in the *British Air Navigation Act of 1920* includes the rule therein in the following language:

“. . . where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, to any person or property on land, or water, damage shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered . . .”

In justification for imposing on aircraft the burden of absolute liability, the British Aerial Transport Committee wrote in their report in 1918, and which report was in part at least the basis for the *British Air Navigation Act of 1920*, as follows:

“Admittedly persons on land are practically powerless to ensure their own safety by precautionary measures against damage caused by the fall of aircraft or objects carried therein. It is a matter of some doubt whether under existing principles of law persons suffering from such damage would be called on to prove an affirmative case of negligence or intentional trespass. It is possible that the courts might hold aircraft to be within the class of those things which the owner keeps or uses at his peril. We think it preferable that the principles applicable should be defined by legislation rather than that they should be left for solution by a series of judicial decisions; we think, too, that as far as damage done by aircraft is concerned the deprivation of the land owner of what is almost certainly an existing right of property should be compensated by what will be in effect an insurance on himself and his property against such damage. Nor do we think that in practice the expense of insuring himself against third parties risk will prove very burdensome to the owner of the aircraft.”

Irrespective of the merits of the liability-without-fault doctrine, one cannot subscribe to the statement that because the landowner has been deprived of certain of his rights in airspace, concessions should be made to him in connection with damage resulting other than by the mere passage of aircraft over the subjacent owner's property. If the liability-without-fault doctrine is the correct one, it should be imposed, if not, the contrary should hold, concessions or no concessions.

Since when have fundamental property rights in terms of well established principles of jurisprudence become the subject of barter in determining legal precepts? The *British Air Navigation Act of 1936* also adopts the liability-with-

out-fault rule but with a limitation of liability.²⁰ The *Air Code of the Union of Socialist Soviet Republics* (U. S. S. R.) approved by the Central Executive Committee of the U. S. S. R. on April 27, 1933 in Article 8, Section 53, thereof adopted the liability-without-fault rule. The section read as follows:

"In conformity with the general legislation of the U. S. S. R. and the federated republics, the air transport company is liable for death and bodily injuries occurring to passengers and to members of the personnel of civil aircraft during the take-off, flight and landing, and for damages to third persons and property, in all cases where it is not proved that the damage has been the result of wilful or gross negligence on the part of the victim."

The Havana Convention provides that reparations for damages caused to persons or property located in the subjacent territory shall be governed by the laws of each state.²¹

The Rome Convention signed at Rome, Italy in 1933, a multilateral international agreement in the field of private international law, adopts the liability-without-fault rule with a limitation of liability.²² Forty-three nations including the United States signed the convention agreement but only five nations (Belgium, Spain, Guatemala, Brazil and Rumania) have ratified it. Through these five ratifications it became effective February 11, 1942. There has been considerable opposition to this convention, particularly because of the liability-without-fault rule embodied therein. Back in 1933, the Committee on Aeronautical Law of the Federal Bar Association of New York, New Jersey and Connecticut, adopted a resolution opposing the rule.²³

Since 1933 there have been two draft revisions of the Rome Convention, one a tentative draft adopted in Mexico City in 1951 and a final draft adopted and signed in Rome on October 6, 1952, by delegates from thirty-two nations including the United States. This new and final draft retains the liability-without-fault rule and increases the maximum amount of liability. The previous small maximum amounts had been severely criticized as being wholly inadequate.²⁴ The 1952 draft will become effective upon the ratification of five nations.

²⁰ § 15 (1).

²¹ Art. 28.

²² Art. 2.

²³ American Bar Association Journal 369-370 (June, 1933).

²⁴ Eubank, Aeronautical Jurisprudence, vol. 3, p. 420-421.