INDIANA LAW JOURNAL

Volume 31 FALL 1955 Number 1

The Indiana Law Journal is published quarterly by
THE INDIANA UNIVERSITY SCHOOL OF LAW

Editorial and Publication Office: Indiana University School of Law
BLOOMINGTON, INDIANA

NOTES

LIABILITY FOR AIRCRAFT DAMAGE TO GROUND OCCUPIERS —A STUDY OF CURRENT TRENDS IN TORT LAW

Tort law may properly be considered as an ever flexible body of law constantly changing to meet the needs of society. It must be admitted, however, that legal concepts have not always succeeded in keeping apace with the development of the activity. A study of the considerations affecting liability growing out of aircraft damages to persons and property on the ground seems useful in reflecting the present trends and bases of tort law generally. Here the law, caught in a state of flux, can be objectively appraised in an atmosphere unfettered by rigid precedent.

Historically aviation was considered an ultrahazardous activity. For this reason aircraft owners were absolutely liable for damage to persons and property on the ground.[1] This rule of liability without fault was adopted in England and many other foreign countries[2] as well

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1. In 1910 the airplane was thought to be very dangerous to the public. See Baldwin, *Liability for Accidents in Aerial Navigation,* 9 MICH. L. REV. 20 (1910). This attitude was based, partly at least, on Guille v. Swan, 19 Johns. R. 381 (N.Y. 1822), holding a balloon owner liable for damage to the plaintiff since the aeronaut had no control over his motion horizontally, having to descend when and how he could, hazarding all ground occupiers.

As late as 1938, the American Law Institute thought aviation was an ultrahazardous activity. RESTATEMENT, TORTS § 520, Comment b (1938), states that no matter how carefully constructed, maintained, and operated, the airplane may crash, causing injury to persons, structures, and chattels on the ground. The same idea was expressed in Rochester Gas & Electric Corp. v. Dunlop, 148 Msic. 849, 851, 266 N.Y.S. 469, 472 (1933). The RESTATEMENT, TORTS § 520 (1938), Comment d, notes the dependency of the airplane operators upon unpredictable weather conditions.

2. See Eubank, *Land Damage Liability in Aircraft Cases,* 57 DICK. L. REV. 188, 195, 196 (1953). The British Air Navigation Acts of 1920 and 1936, both imposing absolute liability for ground damages, are discussed. The author mentioned that nearly all the nations of continental Europe have or had the absolute liability rule in force. Bulgaria, Finland, Sweden, Switzerland, Hungary, Germany, Austria, Italy, Danzig, Yugoslavia, Belgium, Czechoslovakia, Denmark, France, Russia, and Norway were listed.

International conferences to determine the basis of damage caused by foreign aircraft have repeatedly adopted absolute liability. Rome Convention of 1952, Art. 1, 19 J. AIR L. & COM. 447 (1952); Taormina Draft Revision of the Rome Convention on Damage Caused by Aircraft to Third Parties on the Surface, Art. 1, 17 J. AIR L. 194 (1950); Mexico City Convention of 1951, Art. 1, 18 J. AIR L. 98 (1951); Rome Convention of 1933, Art. 2, 6 HUDSON, INTERNATIONAL LEGISLATION 334, 336 (1937).

as in those jurisdictions in the United States which adopted section five of the Uniform Aeronautics Act.[3]

Due to the technological advancements made in the industry and to the commendable safety records compiled since World War II, aviation can no longer be said to be an ultrahazardous activity.[4] If the imposition of absolute liability is purely a question of whether or not aviation is ultrahazardous,[5] then it would seem that the basis for this liability no longer exists. Although courts,[6] legislatures,[7] and authorities[8] in the field agree on this point, they differ as to the method which should be

3. UNIFORM AERONAUTICS ACT, § 5. The following states had adopted § 5: Delaware, Indiana, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wisconsin.

4. In United States v. Kesinger, 190 F.2d 529, 531 (10th Cir. 1951), the court acknowledged the many improvements in design, construction, operation, and maintenance. Aviation is relatively as safe as other methods of transportation. Insurance rates for passengers are the same for train, bus, or airplane. In 1938 the passenger fatality rate was 4.5 per 100 million passenger miles flown; in 1952 the rate was only 0.4 per 100 million miles. Over 16,000,000 take-offs and landings were made in the United States during 1951 without causing death to any persons on the ground. CAB statistics show that from March 1946 to March 7, 1953, there were only six air carrier accidents which involved fatalities to persons on the ground in the United States, and there were only four more such accidents in which persons on the ground were non-fatally injured. Only 15 persons on the ground have been killed in the greater New York area in the past ten years whereas the automobile has killed 5,865 pedestrians. See Orr, *Is Aviation Ultrahazardous?*, 21 INS. COUNSEL J. 48, 52-55 (1954). See also Case Comment, 16 U. PITT. L. REV. 291 (1955).

But see Prentiss v. National Airlines, 112 F.Supp. 306, 311-13 (D.N.J. 1953); Parcell v. United States, 104 F.Supp. 110, 116 (S.D.W.Va. 1951).

5. It has been suggested that the question of absolute liability is merely one of fact. "Once it has been determined that flying, even student flying, is not per se ultrahazardous, the question of liability must be determined by general principles of liability unless or until the Legislature . . . provides to the contrary." Boyd v. White, 128 C.A.2d 641, 655, 276 P.2d 92, 100 (1954). See Orr, *supra* note 4, at 53.

6. "The modern trend of authority is to hold the rule of res ipsa loquitur applicable to airplane accidents. . . ." United States v. Kesinger, 190 F.2d 529, 532 & n. 6 (10th Cir. 1951) and cases cited therein; Boyd v. White, 128 C.A.2d 641, 276 P.2d 92 (1954).

7. A trend to repeal section five of the Uniform Aeronautics Act imposing absolute liability on the basis of ultrahazardousness is discernible. In 1947 absolute liability was repealed by Nevada (NEV. COMP. LAWS § 279 (Supp. 1949) providing a rebuttable presumption and impliedly overruling NEV. COMP. LAWS § 279 (1929)) and by North Carolina (Session Laws 1947, c. 1069, s. 3, expressly repealing N.C. GEN. STAT. § 63-14 (1943)). In 1949 Maryland provided a rebuttable presumption of negligence (MD. ANN. CODE GEN. LAWS art. 1A, § 9 (1951); South Dakota adopted the rules of law applicable to torts in the state (S.D. CODE § 2.0305 (Supp. 1952)); and Wisconsin provided a rebuttable presumption (WIS. STAT. § 114.05 (1953)). Indiana expressly repealed section 5 in 1951 (IND. ANN. STAT. § 14-105 (Burns 1950) was repealed by Acts 1951, ch. 267, § 26, p. 773, effective July 1, 1951).

8. Some authorities say the airplane is no longer a dangerous instrumentality and should not be burdened by absolute liability. Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law*, 18 So. CALIF. L. REV. 124, 127 (1944); Orr, *Airplane Tort Law*, 19 INS. COUNSEL J. 64, 66 (1952); Orr, *Is Aviation Ultrahazardous?*, 21 INS. COUNSEL J. 48 (1954); Comment, 16 GA. B. J. 239, 241 (1953); Note, 4 VAND. L. REV. 857, 861 (1951).

used to determine liability.[9] Theories of liability ranging from trespass[10] to negligence[11] have been applied in the reported cases.[12]

The varied theories used to determine liability are a contrast to the uniformity of results—in practically all reported cases the plaintiff has recovered. Even in the absence of the supposed basis of absolute liability—an ultrahazardous activity—the courts have imposed liability which is absolute in effect.[13] It appears that the true rationale for imposing liability without fault rests on considerations other than the dangerousness of the activity involved.

One factor influencing such liability has been the shifting emphasis of society. Tort law has not turned on technical theories but on the social and economic requirements of the times.[14] At common law a man

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9. In United States v. Kesinger, 190 F.2d 529, 533 (10th Cir. 1951), after using res ipsa loquitur to determine liability, the court said that, since the United States was clearly liable under that theory, passing upon the applicability of absolute liability was unnecessary. It has been pointed out that res ipsa loquitur and the principle of strict liability are rules which exist side by side and may be invoked alternatively. 3 HASTINGS L.J. 79, 80 (1951).

10. Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (1933).

11. Boyd v. White, 128 C.A.2d 641, 276 P.2d 92 (1954).

12. Res ipsa loquitur has been a favorite. United States v. Kesinger, 190 F.2d 529 (10th Cir. 1951); D'Anna v. United States, 181 F.2d 335 (4th Cir. 1950); Parcell v. United States, 104 F.Supp. 110 (S.D.W.Va. 1951); Kadylak v. O'Brien, 1941 U.S.Av.Rep. 8 (1941); Sollak v. State of New York, 1929 U.S.Av.Rep. 42 (1927).

13. "[I]t cannot be said that there is a uniform rule for ground injuries, but the cases show certain tendencies: (1) A plane owner or operator will be held absolutely liable for damage to property caused by an unauthorized landing or crash on that property." Binzer, *Civil Aviation—Liability Problems of Air Carriers,* 34 KY. L. J. 34, 48 (1945).

A 1941 article stated that airplane owners had been liable for property and personal damages to ground occupiers in all reported cases to date, the legal theory being the only problem unsettled. 12 J. AIR L. 377 (1941). Legislation imposing absolute liability in New York was considered unnecessary by one author since the New York courts had not failed to give adequate relief in any instance. Orr, *Tort Liability of Airlines,* 20 N.Y.S.B.A. 185, 191 (1948) and cases cited. A federal circuit court noted that since it is usually impossible to establish with any certainty the cause of the accident, the application of res ipsa loquitur is not very different from that of absolute liability. United States v. Praylou, 208 F.2d 291, 295 (4th Cir. 1953). See also Comment, 38 CORNELL L. Q. 570, 576 (1953).

14. Contrast what was said by the same author in 1911 and in 1934. In 1911: "What may appear desirable in an ancient and highly organized society . . . may be utterly inappropriate and harmful in a newly settled country whose natural resources still require exploitation. In the former, the natural tendency is to preserve the early recognized right . . . as of paramount importance. In the latter the pressing need is not the preservation of existing rights, not the proper distribution of wealth already in existence, but its creation, the permutation of opportunity into wealth, and so the tendency is to encourage an enterprise which tends toward the material development of the country, even at the expense of the legal rights of the individuals." Bohlen, *The Rule in Rylands v. Fletcher,* 59 U. OF PA. L. REV. 298, 318 (1911).

In 1934: "It is significant that this tendency to bring American law into accord with the British law synchronizes with the realization that America is no longer a frontier country in which production activities are needed to develop latent and unlimited resources and that, therefore, the proper distribution of what we have is of

was liable whenever he harmed another.[15] American courts of the late 1800's criticized this view as considering only the suffering of the injured person and failing to see that shifting the loss or substituting one suffering party for another must have some justification.[16] They felt the only basis for liability should be fault.[17] Since the main interest of society at that time was rapid industrial expansion,[18] the courts assessed damages to the injured party only when the conduct of the actor fell below some minimum standard of care. As the rapid growth of industry gave rise to new social considerations, the basis of recovery was broadened to include other types of liability.[19]

In determining who should bear the losses connected with the activity in question, the ultimate objective that the law intends to accomplish must be considered. Allegedly the two functions of tort law are compensation of the injured party and deterrence of negligent conduct.[20] However, the "injured party" is a legalistic concept and must be determined by the application of laws.[21] Moreover, ascertaining what conduct is to be labeled "negligent" is also a function of the theory of law which is applied.[22] An examination and balancing of the oppos-

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more importance than the production of a surplus which, to say the least, is embarrassing." Bohlen, *Aviation Under the Common Law,* 6 AIR L. REV. 155, 156 (1935), 48 HARV. L. REV. 216, 217 (1934).

15. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, 446 (1926).

16. Brown v. Collins, 53 N.H. 442, 446 (1873).

17. Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850). See also L.R. & F.S. Railway v. Finley, 37 Ark. 562 (1881); Beatty v. Central Iowa R.R., 58 Iowa 242, 12 N.W. 332 (1882); Brown v. Collins, 53 N.H. 442 (1873); Losee v. Buchanan, 51 N.Y. 476 (1873); Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886).

18. One court summed up the prevailing ideas of the times: "We must have factories, machinery, dams, canals, and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization." Losee v. Buchanan, 51 N.Y. 476, 484 (1873).

19. Workmen's compensation is the classic example. Negligence, with its defenses of contributory negligence, fellow servant's negligence, and assumption of the risk, was thought inapplicable to the conditions of modern employment. The causes of industrial accidents were often so obscure and complex that it was impossible for an accurate judgment, and the delay and expense amounted to a defeat of justice. The injured workman was left to assume the greater part of industrial accident loss which he was usually unable to bear; he and those dependent upon him frequently became a burden upon public or private charity. New York Central R. R. v. White, 243 U.S. 188, 197 (1917).

20. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT, 38 (1951); Morris, *Rough Justice and Some Utopian Ideas,* 24 ILL. L. REV. 730, 733 (1930).

21. The law does not attempt redress for every loss. For example, the party is not injured in the eyes of the law if he was contributorily negligent or if the actor was privileged.

22. "It is fundamental that the standard of conduct which is the basis of the law of negligence is determined by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of the harm, against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued. For this reason, it is seldom possible to reduce negligence to any definite rules;

ing interests which operate in an area seems to be the means of determining what theory of law will accomplish the most desirable results. In conflict are two interests of society, the one being encouraging the activity and the other protecting the wronged.

The law which is applied materially affects the development of the activity.[23] Indeed the extent of tort liability placed on the aviation industry is a major factor in gauging its growth.[24] Rapid expansion of aviation might be accomplished by not holding the industry to a high standard of care and by letting injured persons protect themselves as best they can.[25] A consideration of the many hardships to ground occupiers who are injured or whose property is damaged by falling aircraft, however, suggests that it might be better to protect all injured persons from the economic consequences of airplane crashes despite the adverse effect on the progress of the industry itself.[26]

One approach to the problem of airplane damage to persons and property on the ground is to let the loss lie where it falls, damages being granted only in the event that the conduct of the airplane owners falls below a minimum standard of care.[27] But under a negligence theory the plaintiff would have difficulty in proving liability of the airplane owner due to the nature of such accidents. The entire airplane may be destroyed; witnesses in the airplane may be killed; the operation of the airplane is so technical that eye witnesses may only give evidence of speculative value; the course of flight is difficult to reconstruct; the suddenness of the accident makes eyewitness evidence difficult to obtain.[28]

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it is 'relative to the need and the occasion,' and conduct which would be proper under some circumstances becomes negligence under others." PROSSER, TORTS, 223 (1941).

23. See note 25 *infra.*

24. For a short discussion on this point, see Vold, *Aircraft Operator's Liability for Ground Damage and Passenger Injury,* 13 NEB. L. REV. 373, 383 (1935).

25. The early courts protected the railroads. "Railroads have been subsidized by throwing upon travelers over highway crossings the burden of acting so carefully as to make the negligent operation of the road incapable of injuring, instead of requiring the railroads to protect the travelers upon the highway by adequate guards, safety gates, or by lowering or raising their tracks below or above the highway." Bohlen, *Aviation under the Common Law,* 6 AIR L. REV. 155, 157, 48 HARV. L. REV. 216, 218 (1934).

"Such increase of danger is necessarily incident to, and attendant upon, this improved mode of transportation. All persons must accept the advantages of this mode of intercommunication with the danger and inconveniences which necessarily attend it; the price of progress cannot be withheld." Beatty v. Central Iowa R. R., 58 Iowa 242, 247, 12 N.W. 332, 334 (1882).

26. See notes 35, 36, and 37, *infra.*

27. RESTATEMENT, TORTS § 282 (1938), defines negligence as conduct "which falls below the standard established by law for the protection of others against unreasonable risk of harm."

28. Dean Wigmore reported that in no more than 20% of the accidents through 1937 would it have been possible for the plaintiff to find and produce provable evidence of the real cause of the accident. A Survey of the Independent Air Safety Board covering accidents involving passenger fatalities in 1939 disclosed that plaintiff could estab-

Today the CAB determines the causes of most accidents,[29] but no part of any report is admissible in an action for damages growing out of matter mentioned in the report.[30] Difficulty of proof should not be overemphasized, as CAB reports are open to the public and can give valuable leads; also, more complete records are kept in airline operations than perhaps any other industry.[31]

Res ipsa loquitur as a procedural device shifts these evidentiary disadvantages to the defendant.[32] Actually, rather than helping in the determination of negligence in this area, res ipsa loquitur imposes an absolute liability.[33] Since the defendant airplane-owner also will very possibly be unable to produce an explanation of the accident, he will lose.[34]

Yet negligence as the basis of liability, without res ipsa loquitur, might place the loss on the ground occupier due to difficulty of proof. The injured party on the ground has no means of protection other than insurance.[35] His property will usually be insured against loss;[36] it is doubtful that he would be protected by personal injury insurance.[37]

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lish liability in about 34% of all cases. Sweeney, *Is Special Aviation Liability Legislation Essential?*, 19 J. AIR L. & COM. 166, 168 (1952). A discussion of the plaintiff's plight can be found in O'Connor, *Res Ipsa in the Air*, 22 IND. L. J. 221, 227 (1947).

29. In only one in thirty-seven cases reported from December, 1946, to May, 1948, did the board fail to establish the probable cause of the accident. McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 37 VA. L. REV. 55, 57 (1951).

30. 52 STAT. 1012 (1949), 49 U.S.C. § 581 (1952). For a discussion of this statute see Simpson, *Use of Aircraft Accident Investigation Information in Actions for Damages*, 17 J. AIR L. 283 (1950).

31. See McLarty, *supra* note 29, at 58; Orr, *Airplane Tort Law*, 19 INS. COUNSEL J. 64, 67 (1952).

32. One of the reasons for applying res ipsa loquitur is that the duty of explaining the accident should rest upon the defendant because of his greater knowledge or greater means of knowledge. O'Connor, *supra* note 28, at 221; Reiber, *Some Aspects of Air Carriers' Liability*, 11 LAW & CONTEMP. PROB. 524, 530 (1946).

33. Comment, 38 CORNELL L. Q. 570, 576 (1953). See 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940) for other illustrations of how res ipsa loquitur is used to impose liability absolute in effect.

34. "It is generally impossible to establish with any certainty the cause of the falling of an airplane. To apply the *res ipsa loquitur* rule, as we did in the *D'Anna case, supra*, is, as stated not very different from applying the rule of strict liability. . . ." United States v. Praylou, 308 F.2d 291, 295 (4th Cir. 1953).

35. The property owner can see the road or railroad near the property and note the type of traffic. If a person is buying property, he can consider the dangers from automobiles or trains; if he is building, he can situate his structure accordingly. All property, however, no matter how or where it is built, could be damaged by an airplane accident. See Binzer, *supra* note 13, at 46; Goldin, *supra* note 8, at 125; Newman, *Damage Liability in Aircraft Cases*, 29 COLUM. L. REV. 1039, 1041 (1929).

36. Most real property of any appreciable value is insured against loss by fire, storm, and various other destructive forces. Comprehensive policies are usually broad enough to include damage by airplanes, some policies expressly including such damage. See Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L. J. 1172 (1952).

37. For a discussion of the plight of uncompensated accident victims, see Corstvet, *The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROB. 46 (1936).

Property losses might be spread among all owners; the burden of personal injuries would remain on the individual concerned. However, with the adoption of compulsory health insurance, which in one form or another seems remotely possible, public attitude might change from one of compensation to one of deterrence in the tort law; the pressing need of the injured person would no longer be before the court.

Another approach to the problem is to let the airplane owners be liable without fault.[38] In this era of large scale enterprise it is normally possible for activities to bear the losses which can reasonably be anticipated as a consequence of their being carried on, without disastrous results to the activity.[39] Enterprise liability has been justified on the theory that the person who receives the benefits of the activity rather than the innocent members of society should bear the losses.[40] The actor can pass the loss to the consumers by increasing the cost of his services or goods. The actor can better insure than the average member of society who cannot possibly foresee all the ways in which he could suffer losses.[41]

The suggestion that an enterprise should bear all losses incidental to its continuing operation, passing that cost on to the public which must

38. This has been justified by classifying aviation as a dangerous activity. See note 1 *supra;* Prentiss v. National Airlines, 112 F. Supp. 306, 311-13 (D.N.J. 1953); Parcell v. United States, 104 F. Supp. 110, 116 (S.D.W.Va. 1951); Vold, *Strict Liability for Aircraft Crashes and Forced Landing on Ground Victims Outside of Established Landing Areas,* 5 HASTINGS L.J. 1, 17 (1953). Other reasons advanced have been that absolute liability will be the greatest incentive for the development of safety, Vold, *Aircraft Operator's Liability for Ground Damage and Passenger Injury,* 13 NEB. L. REV. 373, 382 (1935); that the risk involved is one-sided (the ground-owner never threatens the aviator), Vold, *Strict Liability for Aircraft Crashes and Forced Landing on Ground Victims Outside of Established Landing Areas,* 5 HASTINGS L.J. 1, 17 (1953); Wherry, *Aeronautics and the Problem of Tort Liability,* 10 AIR L. REV. 337, 346 (1939); and that all the benefits accrue directly to the aviator, Vold, *Aircraft Operator's Liability for Ground Damage and Passenger Injury,* 13 NEB. L. REV. 373, 382 (1935); Note, 33 COLUM. L. REV. 1459, 1460 (1933). The extreme difficulty of the injured party proving the cause of the accident has been considered. Newman, *supra* note 35, at 1042. Res ipsa loquitur may solve these problems. See notes 33, 34 *supra.*

39. For an excellent discussion of enterprise liability see EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

40. This has been suggested in airplane damage to ground occupiers. "It must be kept in mind that, when 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." Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 852, 266 N.Y.Supp. 469, 473 (1933). Note, 33 COLUM. L. REV. 1459 (1933).

41. "The best and most efficient way to do this is to assure the accident victims of compensation, and to distribute the losses involved over society as a whole or some very large segment of it. Such a basis for administering losses may be called social insurance.

"This at once brings in an important new element. For while no social good may come from the mere shifting of a loss, society does benefit from the wide and regular distribution of losses taken alone." James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549, 550 (1948). See also EHRENZWEIG, *op. cit. supra* note 39, at 41.

decide whether the cost justifies the enterprise, is not without merit. Two considerations must be balanced: using an enterprise to distribute reasonably foreseeable losses caused by it, and burdening enterprise growth and depriving society of the additional benefits which that enterprise would contribute.[42] Even if the balance is in favor of encouraging the development of aviation, the relative infrequency of airplane damage to property and persons on the ground suggests that the cost of absolute liability would not seriously hamper continued operation of commercial airplanes.[43] Moreover, though absolute liability does impose a financial burden, it is doubtful that the best way to subsidize the activity is to force innocently injured individuals to bear the cost of continued operation.[44] As important as the continued development of civil aviation is believed to be, no convincing reason has been advanced why it should be subsidized by the luckless victim on the ground who has no direct connection with the airplane owner. If aviation must be subsidized, a fairer distribution of the burden would place the cost upon the public treasury either by direct grant or under the guise of contracts for carrying mail.[45]

Whether absolute liability would discourage widespread ownership of private airplanes is difficult to ascertain; liability insurance for these airplanes should not be prohibitive.[46] Insurance has been one of the prime considerations in the advancement of enterprise liability.[47]

The Rome Convention of 1952, which dealt with ground damages caused by aircraft outside their home nations, adopted an absolute lia-

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42. Note, 37 CALIF. L. REV. 269, 275 (1949).

43. It has been stated that aviation is a type of enterprise which can distribute the losses it causes to the ground occupier by its use of insurance and price calculation. Vold, *Strict Liability for Aircraft Crashes and Forced Landing on Ground Victims Outside of Established Landing Areas,* 5 HASTINGS L. J. 1, 20 (1953). The relatively few airplane accidents and the large volume of business carried on by the commercial airlines suggest this. Note 4 *supra* and note 66 *infra.* However property damage can be extensive; only the large airlines could withstand some losses. See note 68 *infra.*

44. Note, 37 CALIF. L. REV. 269, 275 (1949).

45. Bohlen, *Aviation under the Common Law,* 48 HARV. L. REV. 216, 219 (1934), 6 AIR L. REV. 155, 157 (1935); Sweeney, *Is Special Aviation Liability Legislation Essential?,* 19 J. AIR L. & COM. 166, 317, 324 (1952).

46. One writer suggests that to impose absolute liability would result in no person daring to own an aircraft without fantastically high limits of insurance. Orr, *Tort Liability of Airlines,* 20 N.Y.S.B.A. 185, 191 (1948). Another author stated that rates for compulsory insurance for small aircraft would cost $60 to $70 per year and that any private flyer unable to pay that ought not be permitted to endanger life and property. Schnader, *Uniform Aviation Liability Act,* 9 J. AIR L. 664, 669 (1938).

47. EHRENZWEIG, *op. cit. supra* note 39, at 4, 30, 42; Friedmann, *Social Insurance and the Principles of Tort Liability,* 63 HARV. L. REV. 241 (1949); James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L.J. 549 (1948).

bility limited in amount.[48] The amount of liability was ascertained by balancing the need to keep the limits low enough to prevent the cost of third party insurance from becoming an excessive burden on civil aviation and high enough to compensate third parties in all but extremely rare catastrophic accidents.[49] If adopted in this country, however, absolute liability limited in amount might deprive claimants of substantial rights without due process when negligence could be proved.[50] Probably the airplane industry would welcome limitations since plaintiffs have been unusually successful in the past[51] and damage can be extensive.[52]

Other areas of the law have been governed by absolute liability even though definitely not ultrahazardous. Publishing,[53] radio broadcasting,[54] and respondeat superior[55] are examples. The classical example of enterprise liability has been workman's compensation. It was the apparent belief of the legislatures that the losses to society in injured workmen should be borne by the industrial enterprise which necessitated such losses.[56]

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48. For discussions of these limitations see Coblentz, *Limitation of Liability for Aircraft,* 23 So. CALIF. L. REV. 473 (1950) and Shelley, *The Draft Rome Convention from the Standpoint of Residents and Other Persons in this Country,* 19 J. AIR L. & COM. 289 (1952).

49. Comment, 31 CAN. B. REV. 90, 93 (1953).

50. See Shelley, *supra* note 48, at 303.

51. See note 13 *supra.*

52. See note 68 *infra.*

53. Peck v. Tribune Co., 214 U.S. 185, 189 (1909); Washington Post Co. v. Kennedy, 3 F.2d 207 (D.C. Cir. 1925); Butler v. Every Evening Printing Co., 140 Fed. 934 (3rd Cir. 1905); Davis v. Hearst, 160 Cal. 143, 116 Pac. 530 (1911); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 126 N.E. 260 (1920); Laudati v. Stea, 44 R.I. 303, 117 Atl. 422 (1922); Carey v. Hearst Publications, Inc., 19 Wash.2d 655, 143 P.2d 857 (1943).

54. Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Miles v. Wasmer Inc., 172 Wash. 466, 20 P.2d 847 (1933).

55. EHRENZWEIG, *op. cit. supra* note 39, at 67-73; James, *Vicarious Liability,* 28 TUL. L. REV. 161 (1954). "I am liable for what is done for me and under my orders by the man I employ . . . and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." Duncan v. Findlater, 6 Clark & F. 894, 910, 7 Eng. Rep. 934, 940 (H.L. 1839).

56. "Within its sphere this too provides a measure of compensation tailored to need and not to fault, and provides effective means for distributing accident losses among the beneficiaries of the enterprise that created the risks that caused the losses." James, *supra* note 55, at 171. See also note 19 *supra.*

Under FELA, although couched in terms of negligence, recovery by the plaintiff seems to be the court's paramount concern. The standard of fault indicates that the principle is without much practical meaning. Wilkerson v. McCarthy, 336 U.S. 53, 76 (1949) (dissent). In that case Justice Frankfurter, in concurring, said: "The difficulties in these cases derive largely from the outmoded concept of 'negligence' as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry." *Id.* at 65. Even under FELA, however, injuries which cannot be anticipated and against which the defendant could not adequately protect himself by insurance and cost calculation may be uncompensated. Recovery for physical consequences of fright and shock which resulted from the plaintiff's seeing

Enterprise liability has crept into other areas which theoretically require negligence for recovery. This encroachment has been made possible by a standard of care so elastic that some breach of duty can usually be discovered, by a shifting of the burden of proof, by presumptions and inferences, and by use of res ipsa loquitur.[57] In the food products cases, for instance, the manufacturer has been liable on a mere fiction of negligence.[58] This liability has been justified on the ground that the manufacturer is in a better position to stand the immediate loss. He may cover that loss by insurance or by shifting the risk directly to the general public in the form of higher priced commodities.[59]

An analogy may be drawn between the liability of automobile owners and airplane owners. Although automobiles are more numerous, cause more damage, and create a graver social problem, it is likely that in the foreseeable future the airplane will be as popular and as widely used as the automobile is today.

Automobile liability is considered in terms of negligence; however, modern writers, influenced no doubt by widely held insurance and settlement practices of insurance companies,[60] accept as the true basis a doctrine approaching liability without fault.[61] Today the objective seems to

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another person placed in peril by defendant's conduct was recently denied. Angst v. Great Northern Railway, 131 F.Supp. 156 (D. Minn. 1955).

57. These devices allow the plaintiff to take the case to the jury without proof of negligence; in some situations the defendant cannot possibly explain the accident. See Gregory, *Trespass to Negligence to Absolute Liability,* 37 VA. L. REV. 359, 381 (1951); Leflar, *Negligence in Name Only,* 27 N. Y. U. L. REV. 564, 580, (1952); McBratney, *New Trends Toward Liability Without Fault,* 26 ROCKY MT. L. REV. 140, 149 (1953). See also note 34 *supra.*

58. For a recent and detailed discussion, see Note, 29 IND. L. J. 173 (1954). "In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer: that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They have also held the manufacturer liable on a mere fiction of negligence." Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 465, 150 P.2d 436, 442 (1944) (Concurring opinion). See Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees,* 24 VA. L. REV. 134 (1937).

59. Jeanblanc, *supra* note 58, at 158.

60. Settlement practices studied under the auspices of Columbia University Council for Research in the Social Sciences with the aid of the Yale Law School showed that some payment is made in about 85% of motor vehicle accidents causing personal injury or death where the defendant had insurance. The promptness of the settlement declined with the seriousness of the loss. Some non-legal factors have caused this trend—every claim has a nuisance value, prompt settlement promotes good public relations and encourages sales, the insureds do not like to take time to defend, and the injured plaintiffs as a class are prospective customers. The legal factor in encouraging settlement is that juries today are very favorable to the plaintiffs. James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549, 566-67 (1948).

61. Feezer, *A Circle Tour Through Negligence,* 27 N. Y. U. L. REV. 647, 653 (1952); Grad, *Recent Developments in Automobile Accident Compensation,* 50 COLUM. L. REV. 300 (1950); James, *supra* note 60.

be compensation of the injured person. The loss in wages, the medical expenses, and the sudden loss of the wage earner by the family following the accident all carry consequences not restricted to the victim himself.[62] The family purpose and the frolic and detour doctrines have been developed to assure the injured party of a solvent defendant.[63] Financial responsibility statutes have been adopted in most states.[64] Massachusetts has gone a step further and enacted compulsory insurance legislation.[65] Some authorities have even favored adopting social insurance for automobile victims similar to workman's compensation.[66] Automobile ownership, with the opportunity to spread losses through insurance, constitutes an enterprise for integrating the fairly regular losses into the economy with as little disharmony as possible. Imposing this burden on automobile owners apparently has not discouraged the ownership of automobiles as evidenced by their rapid increase in numbers. Restriction of the activity is not an inevitable result of spreading losses to third persons.[67]

If automobile liability and airplane liability for ground damage have certain similarities, a theory of liability applicable to the one might seem useful for the other. Automobile liability is presently determined by negligence theories; under such theories enterprise liability has resulted in practice. However, to say that a negligence theory as applied to aircraft liability for ground damages would result in an acceptable and predictable method of diversifying the loss through enterprise liability

62. One writer emphasizes the seriousness of the problem by saying that the two greatest single causes of accidental injuries are industrial and automobile accidents. Both classes of accidents are a product of the machine age and cannot be substantially reduced by safety measures. Grad, *supra* note 61, at 325.

63. The insurance companies have contributed to this trend by policies protecting the mere borrower of a car under the owner's insurance, extending coverage to the insured while he is driving another's car, and providing limited payment to injured occupants of the insured's car without regard to fault. James, *supra* note 60, at 565.

64. The old type legislation was largely a safety measure to quarantine the careless driver and force him to become financially responsible; the new legislation places more emphasis on compensation of the accident victims. In 1950 forty-four states had legislation on financial responsibility. Grad, *supra* note 61, at 307-09.

65. MASS. ANN. LAWS c. 90, § 34 A-J (1954). Compulsory insurance has been strongly recommended for Minnesota. 27 MINN. L. REV. 103 (1942).

66. The most detailed and comprehensive report was the Report by the Committee to Study Compensation for Automobile Accidents (Columbia University Council for Research in the Social Sciences 1932), known as the Columbia Report. For a recent study recommending social insurance for automobile victims see Grad, *supra* note 61.

67. The growth of commercial airlines has been phenomenal. Passenger movement in 1952 was 15% greater than that for 1951 and over two and a half times that of 1946; in the 1946-1952 period world air cargo traffic increased more than 500 percent; much air cargo is carried by non-scheduled operators. In 1946 the passenger-miles by air were less than a third of those by Pullman (1st class); however in 1952 air travel exceeded Pullman by 20 percent. On overseas routes more passengers travelled by airplane than by ship. In 1952 the number of revenue passengers increased to 27,386,405; the passenger miles increased to 16,173,405,000. Orr, *Is Aviation Ultrahazardous?*, 21 INS. COUNSEL J. 48, 53 (1954).

ignores a basic dichotomy between the two areas. Automobile accidents which culminate in litigation usually involve personal injury; property damage is incidental. Aircraft ground damage, in monetary terms, consists primarily of property destruction.[68] This difference as to type of damage sought through lawsuits may well result in a totally dissimilar development in the law which will be applied. Though the theory applied in personal injury cases is negligence, an injured plaintiff is more likely to recover, regardless of fault, because personal injuries apparently present a clear and immediate need for compensatory damages to any court or jury. But since property damage presents no such compelling need for compensation, a negligence theory will often result in a denial of recovery to a plaintiff whose property has been damaged.[69] A negligence theory in aviation law will not evolve a predictable type of enterprise liability.

If tort law is to adjust to the socio-economic requirements of the society which it governs, the interest of compensating the injured person must be constantly weighed against the interest of encouraging the development of the activity by not imposing oppressive burdens of liability. Third parties must be protected against unreasonable risk of harm; "unreasonableness," however, is to be interpreted in the light of the period. Fifty years ago a person was protected from negligent conduct and from ultrahazardous activities; if the actor used due care in pursuing common activities, he was protected. Rapid expansion of the economy was of paramount interest. Today the compensation of the injured parties has become a more acute problem than economic expansion. Thus an activity developed in the last half century may have been caught in a dilemma, it being subjected to absolute liability fifty years ago because it was ultrahazardous and today, although no longer ultrahazardous, because of the shifted emphasis of society. The study of liability growing out of aircraft damages to ground occupiers clearly indicates the hazards of compromising or distorting old principles of law to meet current societal needs. The concept of negligence has been used to allow recovery when fault by the defendant has been without basis in fact. Also res ipsa loquitur has been used when the defend-

68. This is evidenced by reported accidents. May 20, 1943—a B-24 hit a gas-holder in Chicago causing $15,000 worth of gas to escape and destroying the $1,250,000 gas-holder. March 6, 1945—a C-60 crashed into the doors of a hangar at flying speed causing property damage amounting to $3,000,000. Reiber, *supra* note 32, at 524 n. 1.

69. This difference in attitudes of the courts and the juries is brought out in cases involving warranties. The courts adopt a much more liberal attitude toward recovery in warranty actions involving a bodily injury than in those based upon property damage. The UNIFORM COMMERCIAL CODE § 2-719(3) also draws a distinction between personal and property harms calling disclaimers for personal harms "prima facie unconscionable." Note, 29 IND. L. J. 173, 182 (1954).

ant obviously could not overcome the effects of that procedural device. Only a few areas of the law, such as workman's compensation, have been settled by legislation.

The basic problem of the law is twofold: determining the proper incidence of an economic burden and formulating the role of the courts and the legislature in accomplishing the desired results. As long as objectives are being attained under varied and contradictory legal theories, results may not be consistent. If public policy demands that those pursuing an activity be absolutely liable, the legislature should act accordingly. If negligence should be the basis of recovery, the courts should not adopt res ipsa loquitur and other devices which in effect impose an absolute liability.[70] A settled theory is necessary in order that the various classes of litigants involved in future cases may take adequate safeguards by insurance and cost calculation.[71] If the activity is one particularly adaptable to enterprise liability, the actor should prepare himself to withstand liability when the risks of his activity mature.

HOW STATES SHOULD RESOLVE CONFLICTS PROBLEMS UNDER THE DIRECT ACTION STATUTE—AN APPROACH

Recent insurance legislation has given rise to many interesting conflict of laws questions. Since their resolution by the courts will materially affect the rights of the injured party, the insured, and the insurer, a critical analysis of these questions seems in order.

To balance more equally the interests of insurance companies, injured and insured parties,[1] states have nullified the "no action" clause[2] which changes the essential nature of the insurance contract from lia-

70. Failure of the courts to establish a definite standard for liability in the food products cases has been criticized. "In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly." Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 463, 150 P.2d 436, 441 (1944) (concurring opinion).

71. "The entire field of liability is in a phase of adjustment. There is, on the part of the public, an increasing dissatisfaction for the way liability claims are handled. Insurance companies are not satisfied either. Verdicts are unpredictable. The guiding principles of liability are insufficiently clear and a satisfactory distribution of the loss foreseeable is practically an impossible task." Niccolini, *Liability Without Negligence,* 1954 INS. L. J. 527, 554 (1954).

1. It has been contended that in liability insurance, the needs of only two basic groups must be satisfied—the claimant who seeks compensation for his loss and the policyholder who needs protection against financial hardship or ruin. Smithsom, *A Philosophy of Liability Insurance,* 1953 INS. L.J. 663.

2. For discussion of trends of modern legislation to circumvent this "no action"