

## LIABILITY FOR GROUND DAMAGE FROM CRASHES OR FORCED LANDINGS OF AIRCRAFT

With respect to ground damage caused by the crash or forced landing of aircraft, the liability of the owner, lessee or operator of the plane is not to be determined in California according to any theory of absolute or strict liability since aviation should not be considered an ultrahazardous activity. This was the holding of a California District Court of Appeal in *Boyd v. White*.<sup>1</sup>

Knowing his airplane would be flown by a student pilot, the owner (defendant-respondent) had rented it to an instructor. The instructor took the student aloft for 30 or 40 minutes, satisfied himself that the student was qualified to fly solo<sup>2</sup> (the plane appeared to be sound mechanically)<sup>3</sup> and returned to the ground. The student then took the plane on a flight. The student later testified that at about 1,000 feet the motor started to sputter and the plane began to lose altitude. Observing a school yard with a baseball field, the student attempted a forced landing, was unable to reach the baseball field and crashed into a house.<sup>4</sup>

The owner of the house brought actions against all parties involved,<sup>5</sup> the material allegation being that the owners were absolutely liable by virtue of mere ownership, due to the extrahazardous nature of the activity.<sup>6</sup>

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<sup>1</sup> 128 A.C.A. 762, 773, 276 P.2d 92, 99 (1954), *hearing denied*, January 3, 1955. Professor Lawrence Vold, Hastings College of Law, was counsel for the plaintiff in this case. For an argument that as a matter of public policy there should be strict liability for ground damage resulting from aircraft crashes, see Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside Established Landing Areas*, 5 HAST. L.J. 1 (1953).

<sup>2</sup> The record indicates that the student previously had 18 hours of solo flight and had been issued a student pilot certificate. *Boyd v. White*, 128 A.C.A. 762, 765, 276 P.2d 92, 94 (1954).

<sup>3</sup> *Id.* at 778, 276 P.2d at 102.

<sup>4</sup> *Boyd v. White*, 128 A.C.A. 762, 764-766, 276 P.2d 92, 93, 95 (1954).

<sup>5</sup> Plaintiff's action against the instructor and the student was tried with a jury in the Superior Court for the County of Santa Clara. The student defaulted. In denying the instructor's motion for a non-suit, the court ruled that the instructor was subject to strict liability and submitted the question of the amount of damages to the jury. The jury awarded plaintiff \$5,559.00. The instructor did not appeal. In a previous action, the owner of the plane brought an action against the instructor on the theory that, as bailee, the instructor had been negligent in entrusting the plane to the student, resulting in damage to the plane. The jury returned a verdict in favor of the owner, from which the instructor did not appeal. Vold, *Strict Tort Liability to Ground Victims is Applicable to Aviation Flying School Operators Who Send Planes Aloft*, 5 HAST. L.J. 181, 186-187 (1954).

<sup>6</sup> Against the owner of the plane, it was alleged that the business of renting planes to untrained pilots was extrahazardous and that the owners, acting through the instructor, their agent, negligently permitted an untrained and unlicensed student pilot to fly the plane. The court struck this agency allegation, there being no evidence that the instructor acted under the owners' control or direction and no evidence that the instructor had agreed to act on behalf of the owners. *Boyd v. White*, 128 A.C.A. 762, 767, 276 P.2d 82, 95 (1954). There was a third cause of action alleging that the owners were negligent in connection with the maintenance and repair of the plane, but this was dropped by stipulation. *Id.* at 767, 778, 276 P.2d at 95.

Other possible bases on which the owners might have been held liable were rejected by the court as not supported by the evidence, *i.e.*, negligence of bailor in furnishing a defective chattel or in allowing a vehicle to be operated by an incompetent pilot, and joint venture. *Id.* at 775-778, 276 P.2d at 100-102.

*The California Statute—Liability "as provided by law"*

The holding that ordinary rules of law apply in cases involving ground damage caused by aircraft crashes or forced landings is based primarily on an interpretation of the last clause of Section 21403 of the California Public Utilities Code. This section provides:<sup>7</sup>

It is further declared that flight in aircraft over the lands and waters of this state is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, the owner or lessee of the aircraft or the operator thereof shall be liable, *as provided by law*.

Section 21403 is closely patterned after Section 4 of the Uniform Aeronautics Act, the important difference being that the Act provides:<sup>8</sup>

[F]or damages caused by a forced landing, however, the owner or lessee of the aircraft shall be liable, *as provided in Section 5*.

Section 5 of the Uniform Aeronautics Act was not adopted by California. Section 5 declares:<sup>9</sup>

The owner of every aircraft which is operated over the lands and waters of this State *is absolutely liable* for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, *whether such owner was negligent or not*, unless the injury was caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence.

In tracing the history of the California statute, the court notes that, according to the legislative counsel, the Uniform Aeronautics Act containing the absolute liability provisions of Sections 4 and 5 was adopted by the California legislature in 1923, 1925 and 1927.<sup>10</sup> Each time the Act was pocket vetoed by the governor. In 1929, the California Air Navigation Act<sup>11</sup> was passed and signed, but this measure did not deal with the question of liability for ground damage. In 1933, Section 11½ was added to the 1929 Act. This relieved pilots of liability for non-paying passengers, mak-

<sup>7</sup> Emphasis added. This provision was enacted in 1947, Cal. Stats. 1947, c.1379, pp.2929, 2937. Codification dates from Cal. Stats. 1953, c.151, pp.927, 934.

<sup>8</sup> 11 U.L.A. 160 (1938). Emphasis added.

<sup>9</sup> *Ibid.* Emphasis added.

<sup>10</sup> Boyd v. White, 128 A.C.A. 762, 772, 276 P.2d 92, 98 (1954).

<sup>11</sup> Cal. Stats. 1929, c.850, p.1874.

ing them liable only in case of intoxication or wilful misconduct.<sup>12</sup> In 1947 the Uniform Aeronautics Act was again proposed to the legislature, but the bill died in committee. "At the same time, another bill adopting most of the provisions of the proposed uniform act, but omitting the provisions as to absolute liability, was introduced, passed and signed."<sup>13</sup> It is this Act, codified in the Public Utilities Code, which provides that in the case of a "... forced landing, the owner or lessee shall be liable, as provided by law."

As the court points out:<sup>14</sup>

This legislative history certainly supports the reasonable inference that the legislature in 1947 deliberately refused to adopt the provisions of the proposed uniform act as to absolute liability and instead intended that the liability of owners, lessees or operators of planes should be governed by the normal rules applicable to bailments, respondeat superior and negligence.

### *The Common Law*

The court in *Boyd v. White* expressly holds that the "operation of an airplane in the year 1954 is not such a dangerous activity as can be placed in this category" of ultrahazardous activities.<sup>15</sup> In so holding, the court repudiates the application of the rule announced in Sections 519 and 520 of the Restatement of Torts.<sup>16</sup> Under the Restatement view, aviation is classified as an ultrahazardous activity for which the actor is strictly liable in case of harm resulting from a likely miscarriage of the activity. The term "actor" is apparently broad enough to include not only pilots, but owners and lessees as well.

It is noteworthy that there has been little case support for the Restatement view, outside of those states which have adopted the absolute liability provisions of Sections 4 and 5 of the Uniform Aeronautics Act,<sup>17</sup> formulated in 1922.

In New York, strict liability for ground damage caused by aircraft ante-

<sup>12</sup> Cal. Stats. 1953, c.438, p.1135. This is codified in CAL. PUB. UTIL. CODE § 21406.

<sup>13</sup> *Boyd v. White*, 128 A.C.A. 762, 772, 276 P.2d 92, 98 (1954). This statute repealed the California Air Navigation Act, as amended. Cal. Stats. 1947, c.1379, pp.2927, 2941.

<sup>14</sup> *Boyd v. White*, 128 A.C.A. 762, 773, 276 P.2d 92, 99 (1954). This statement seems to answer adequately the contention that the phrase "as provided by law" was intended to pertain to the method of ascertaining the amount of damage, rather than to modify the word "liable." Under that somewhat strained construction, the court would be free to impose *absolute* liability, arriving at the amount of damages "as provided by law."

<sup>15</sup> *Id.* at 775, 276 P.2d at 100.

<sup>16</sup> RESTATEMENT, TORTS § 519 (1938): "One who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent harm." *Id.* § 520: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

The essence of comments *b*, *d*, *e* and *g*, § 520, is that aviation is ultrahazardous because even if the utmost care is used in maintenance and operation, crashes may result; weather conditions create an unusual risk; the character of the harm resulting from a crash is serious; aircraft are not a common or essential means of transportation.

<sup>17</sup> See text following note 52 *infra*, and Appendix.

dates the Restatement of Torts by approximately 116 years. The famous case of *Guille v. Swan*,<sup>18</sup> decided in 1822, imposed absolute liability for trespass on the operator of a balloon. The balloon descended into Swan's field, causing some damage to his potatoes and radishes, but the principal damage was caused by a crowd of some 200 people who had been pursuing the balloon in an attempt to secure it. In its efforts to rescue the balloon operator, the crowd invaded Swan's field, indiscriminately trampling flowers and vegetables. The operator was held liable for all damages on the theory of trespass.

Another leading New York case, *Rochester Gas & Electric Corporation v. Dunlop*,<sup>19</sup> was decided in 1933, five years prior to the Restatement of Torts. In attempting a forced landing at night, the pilot failed to see a power transmission tower and crashed into it. Dismissing an action based on negligence, the court indicated that aviation was an ultrahazardous activity and held the pilot absolutely liable for damages suffered by the plaintiff on the theory of trespass, stating:<sup>20</sup>

[W]hen a man takes over another man's land a machine which he knows is liable to crash upon and do injury to that land and the structures upon it, can it be said that he is an accidental trespasser within the meaning of those decisions which have exempted the trespasser from liability?

It should be noted that New York imposes strict liability for damage resulting from trespass without fault,<sup>21</sup> but this view has been repudiated elsewhere.<sup>22</sup>

The most recent decisions in support of the Restatement view arose out of a 1952 crash of an airliner in the Borough of Queens, New York City. In *Margosian v. U.S. Airlines*,<sup>23</sup> the owner of a house damaged by this crash brought an action alleging negligence. Without passing on the negligence allegation, the federal district court decided that it was not necessary for the plaintiff to prove intent, wilfulness or negligent operation in order to recover for trespass. A recent New York Court of Appeals decision<sup>24</sup> was quoted, which held that trespass is an intentional tort only to the extent that the wrongdoer intended to do an act, which, as to the immediate or inevitable consequence of what was wilfully done (or done so negligently as to amount to wilfulness), resulted in an intrusion. That this rule exactly fitted the principal case was clear to the court, for the plane's "ultimate descent from the level of flight was necessarily intended

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<sup>18</sup> 19 Johns. 381 (N.Y. 1822).

<sup>19</sup> 148 Misc. 849, 266 N.Y. Supp. 469 (1933).

<sup>20</sup> *Id.* at 851, 266 N.Y. Supp. at 472.

<sup>21</sup> *Van Alstyne v. Rochester Telephone Corp.*, 163 Misc. 258, 296 N.Y. Supp. 726 (1937).

*But cf. Kank Realty Co. v. Brown*, 114 Misc. 357, 187 N.Y. Supp. 556 (1921).

<sup>22</sup> *The Nitro-glycerine Case*, 15 Wall. 524 (U.S. 1872); *Durst v. Wareham*, 132 Kan. 785, 297 Pac. 675 (1931); *Edgerton v. H. P. Welch Co.*, 321 Mass. 603, 74 N.E.2d 674 (1947); *Puchlopek v. Portsmouth Power Co.*, 82 N.H. 440, 136 Atl. 259 (1926).

<sup>23</sup> 127 F. Supp. 464, (E.D.N.Y. 1955).

<sup>24</sup> *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331, 121 N.E.2d 249, 250 (1954).

to be accomplished—without expectation, however, of the intrusion suffered by this plaintiff.”<sup>25</sup>

The court dismissed the argument that Section 520 of the Restatement of Torts was outdated by reason of common usage of aircraft, stating:<sup>26</sup>

[T]he more planes there are in the sky, the more the take-offs and landings, and therefore the more frequent the exposure to the accidents incident thereto on the part of the persons and property in the line of possible misadventure.

The court cited as authority for its holding another case arising out of the same accident, *Hahn v. U.S. Airlines*.<sup>27</sup>

In an action involving a Colorado crash,<sup>28</sup> the Court of Appeals for the Tenth Circuit affirmed a district court decision, *Gaidys v. United States*,<sup>29</sup> holding the United States absolutely liable on the basis of trespass for damage caused by the crash of a jet plane during takeoff. The theory was that the takeoff of a jet plane in a residential area constituted an extrahazardous activity and that the damage was caused by a trespass resulting from the miscarriage of the activity. Deciding the claim under the Federal Tort Claims Act,<sup>30</sup> the court had no Colorado decisions or statute to aid it.

It is submitted that these cases, *Guille v. Swan*, *Rochester Gas & Electric Corporation v. Dunlop*, *Margosian v. U.S. Airlines* and *Gaidys v. United States*, are not authority for the proposition that the owner or lessee of an airplane will be held absolutely liable in the event of ground damage caused by a crash or forced landing, absent some relationship of agency with the operator. These four decisions do stand for the principle that aviation is an ultrahazardous activity for which absolute liability for trespass will be imposed on the operator in the event of a miscarriage of the activity resulting in ground damage. If an agency relationship were established, the doctrine of respondeat superior might make the owner or lessee responsible for the operator's tort. These cases may be distinguished from *Boyd v. White* in that they do not touch the issue of the owner's liability for damage caused by a bailee (or bailee of a bailee).

In *Parcell v. United States*,<sup>31</sup> a federal district court, applying West Virginia law, held that the United States was absolutely liable for ground damage caused by a mid-air collision of two jet aircraft. The court cited the Restatement of Torts, stating that West Virginia never had denied ab-

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<sup>25</sup> *Margosian v. U.S. Airlines*, 127 F. Supp. 464, 466 (E.D. N.Y. 1955).

<sup>26</sup> *Id.* at 467.

<sup>27</sup> 127 F. Supp. 950 (E.D. N.Y. 1954).

<sup>28</sup> *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952).

<sup>29</sup> [1951] U.S. Av. R. 352 (D. Colo. 1951). The court held that the accident might have occurred even if due care with respect to operation, maintenance and inspection had been exercised, so that the doctrine of *res ipsa loquitur* was held not to apply.

<sup>30</sup> 28 U.S.C. § 1346 (1952).

<sup>31</sup> 104 F. Supp. 110 (D.W.Va. 1951). An alternative holding of the court was that the inference of negligence created by applying the doctrine of *res ipsa loquitur* had not been overcome.

solute liability.<sup>32</sup> While the language of this decision is sufficiently broad to be used as authority for imposing absolute liability on the owner, the fact situation before the court involved a servant of the United States who had caused damage to a third party, not a bailee of a United States plane who had damaged a third party.

There are other cases frequently cited as authority for imposing absolute liability<sup>33</sup> which on examination prove to be distinguishable. For instance, in the case of *Kirschner v. Jones*,<sup>34</sup> a New Jersey trial court did not state the grounds on which it imposed liability. It must be assumed that the case was decided in accordance with Section 5 of the Uniform Aeronautics Act, which had been in force in New Jersey for three years.<sup>35</sup> In *Canney v. Rochester Agricultural & Mechanical Association*<sup>36</sup> liability was imposed on the owner of a fair when the independent contractor hired by the fair let a balloon get out of control. The theory of that case was that by the hiring of an independent contractor one cannot avoid the responsibility for consequences naturally to be apprehended.

No other cases imposing absolute liability have been found except those applying the provisions of some statute expressly providing for it.<sup>37</sup>

In one unique case, however, the court held that proof of the accident itself was enough, even in the total absence of statute, to create a prima facie case of negligence, and that the burden was on the defendant to overcome the presumption of negligence (which defendant was unable to do). This was the case of *Northwestern National Insurance Co. v. United States*,<sup>38</sup> a federal district court decision applying Illinois law to the crash of a fighter plane into a house. While there are states which by statute make proof of damage prima facie evidence of negligence,<sup>39</sup> the case stands alone as a common law decision. In effect, the result was that the United States was held absolutely liable for the injury caused by its servant.

While there are few cases involving the imposition of absolute liability, there are fewer still which speak in terms of ordinary tort rules of fault liability.

A 1954 federal district court decision, *D'Aquila v. Pryor*,<sup>40</sup> squarely held that in the event of a crash or forced landing, the owner is not liable

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<sup>32</sup> 104 F. Supp. 110, 116 (D. W. Va. 1951).

<sup>33</sup> E.g., Vold, *Strict Liability for Aircraft Crashes and Forced Landings on Ground Victims Outside Established Landing Areas*, 5 HAST. L.J. 1, 9n. 33 (1953); Eubank, *Land Damage Liability in Aircraft Cases*, 57 DICK. L. REV. 188, 189 (1953); Annot., 4 A.L.R.2d 1308 (1949).

<sup>34</sup> [1932] U.S. Av. R. 278 (N.J. Sup. Ct.).

<sup>35</sup> N.J. Laws 1929, c.311.

<sup>36</sup> 76 N.H. 60, 79 Atl. 517 (1911). *Contra*, *Lansing v. Miller*, 19 La. App. 257, 140 So. 79 (1932).

<sup>37</sup> E.g., *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953), *cert. denied*, 347 U.S. 934 (1954) (applying South Carolina statute imposing absolute liability); *Prentiss v. National Airlines*, 112 F. Supp. 306 (D.N.J. 1953) (applying New Jersey statute imposing absolute liability).

<sup>38</sup> [1949] U.S. Av. R. 316 (N.D. Ill. 1949).

<sup>39</sup> See text following note 66 *infra*, and Appendix.

<sup>40</sup> 122 F. Supp. 346 (S.D. N.Y. 1954).

for the negligence of an independent pilot. Applying New York law, the court stated:<sup>41</sup>

[T]he law of this state does not impose any absolute liability on airplane owners as it does on automobile owners by statute . . . . The law in neither of these states [Connecticut, where the accident occurred, and New York, where the owner resided] classifies aviation as an ultrahazardous activity. . . . It cannot be held that the owner of the plane is liable for the negligence of an independent pilot.

The decision in *Rochester Gas & Electric Corporation v. Dunlop*,<sup>42</sup> which was not cited in *D'Aquila v. Pryor*, did classify aviation as an ultrahazardous activity, but the *Rochester* case, as well as *Guille v. Swan*,<sup>43</sup> is distinguishable as involving trespass actions against the operator, not against the owner. Also distinguishable is the later decision in *Margosian v. U.S. Airlines*,<sup>44</sup> which presumably was an action against the owner-master for the trespass of the pilot-servant, under the doctrine of *respondeat superior*.

Another case in point is *King v. United States*.<sup>45</sup> An intoxicated United States Air Force cadet took a plane aloft without permission and crashed into a house. The Court of Appeals for the Fifth Circuit, interpreting Texas law, held that in the absence of statute the rules of law applicable to ordinary torts on land govern.<sup>46</sup> Since the cadet was on a frolic of his own and not acting as a servant, the United States was not liable.

There are other cases dealing with the liability of the owner or bailor to third persons, stating or implying that the ordinary rules of law applicable to ordinary torts on land govern, but these decisions are not in point. They involve the collision of two aircraft (either on the ground<sup>47</sup> or in the

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<sup>41</sup> *Id.* at 346, 347.

<sup>42</sup> 148 Misc. 849, 266 N.Y. Supp. 469 (1933).

<sup>43</sup> 19 Johns. 381 (N.Y. 1822).

<sup>44</sup> 127 F. Supp. 464 (E.D.N.Y. 1955).

<sup>45</sup> *King v. United States*, 178 F.2d 320 (5th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950).

<sup>46</sup> *Id.* at 321.

<sup>47</sup> *Johnson v. Central Aviation Corp.*, 103 Cal.App.2d 102, 229 P.2d 114 (1951). The court in the principal case, *Boyd v. White*, bases its opinion in part on the *Johnson* decision. In the *Johnson* case, a student pilot taxied a plane into another parked plane. This type of accident is covered by CAL. PUB. UTIL. CODE § 21405 (in substance identical to Section 6 of the Uniform Aeronautics Act) which provides that "the liability of the owner of one aircraft to the owner of another aircraft, or to operators or passengers on either aircraft, for damage caused by collision on land or in the air is determined by the rules of law applicable to torts on land." Although certain dicta in the *Johnson* case to the effect that ordinary rules of law should govern aviation accident cases were expressly adopted by the court in *Boyd v. White*, 128 A.C.A. 762, 775, 276 P.2d 92, 100, the force was somewhat weakened by this qualification: "[N]ow it is considered that *properly handled by a competent pilot* an airplane is not an inherently dangerous instrument." *Johnson v. Central Aviation Corp.*, 103 Cal.App.2d 102, 111, 229 P.2d 114, 120 (1951) (emphasis added). This language appears in Annot., 4 A.L.R.2d 1306 (1949).

Another case involving the application of a statute similar to the California statute cited above is *Greunke v. North American Airways Co.*, 201 Wis. 565, 230 N.W. 618 (1930). In attempting a landing, the pilot hit a parked plane and the court applied the rules of law applicable to torts on land.

air),<sup>48</sup> or the collision of taxiing aircraft with other vehicles<sup>49</sup> or objects,<sup>50</sup> or wrongful death actions brought by the survivors of pilots or student pilots.<sup>51</sup> One case often cited involved an action for damages brought by a passenger.<sup>52</sup>

Though the language of these cases is very broad in relieving the bailor of liability to third persons, the decisions are not authority for the point that, with respect to ground damage caused by a crash or forced landing, the owner or lessee or operator is not absolutely liable. Absolute liability for aviation is based on the theory that a plane is likely to crash or land on property or persons on the ground,<sup>53</sup> not on the theory that there may be what can best be termed a vehicular collision, or that a passenger will be injured.<sup>54</sup>

To conclude this brief survey of the common law, there are a few cases holding the pilot<sup>55</sup> or his principal<sup>56</sup> absolutely liable for ground damage resulting from a crash or forced landing on the theory of trespass. There is but one case indicating that the owner is absolutely liable, and that case involved liability of the United States for the tort of a servant.<sup>57</sup>

On the other hand, there is one case definitely holding that the owner of an aircraft is not liable to third persons for ground damage caused by the crash or forced landing of an independent pilot.<sup>58</sup> There is another decision indicating that the owner-master will not be liable for the tort of the pilot-servant when that servant is on a frolic of his own.<sup>59</sup> Finally, several cases indicate that the owner or bailor of an aircraft will not be liable for the negligence of the operator where no agency relationship exists, but these cases do not touch the issue of ground damage resulting from a crash or forced landing.<sup>60</sup>

<sup>48</sup> *Herrick and Olsen v. Curtiss*, [1932] U.S. Av. R. 110 (N.Y. Sup. Ct.); *Munch & Romeo, Inc. v. Caton*, [1937] U.S. Av. R. 57 (N.Y. County Court 1936). These cases are often cited for the broad proposition that "an airplane is not an inherently dangerous instrumentality" and that the ordinary rules of negligence apply in aviation accident cases.

<sup>49</sup> *Read v. New York City Airport, Inc.*, 145 Misc. 294, 259 N.Y. Supp. 245 (1932) (collision of taxiing plane with parked truck).

<sup>50</sup> *Spartan Aircraft Co. v. Jamison*, 181 Okla. 645, 75 P.2d 1096 (1938) (employee attempting to put out fire on grounded aircraft hit by propeller).

<sup>51</sup> *Lejeune v. Collard*, 44 S.2d 504 (La. App. 1950) (negligence of student pilot responsible for accident; owner relieved of liability to student's survivor); *State v. Henson Flying Service*, 191 Md. 240, 60 A.2d 675 (1948), 4 A.L.R.2d 1300 (1949) (owner held not liable for negligence of student pilot in failing to switch over to full fuel tank; action brought by survivor of student).

<sup>52</sup> *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N.E. 212 (1932), 83 A.L.R. 329 (1933) (passenger for hire sued owner for damages caused to clothing and personal effects when plane crashed into water).

<sup>53</sup> RESTATEMENT, TORTS § 520, comments *b*, *d*, *e*, *f* and *g* (1938).

<sup>54</sup> RESTATEMENT, TORTS § 523, comments *e* and *f* (1938).

<sup>55</sup> *Rochester Gas & Electric Corporation v. Dunlop*, 148 Misc. 849, 266 N.Y. Supp. 469 (1933); *Guille v. Swan*, 19 Johns. 381 (N.Y. 1822).

<sup>56</sup> *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952); *Margosian v. U.S. Airlines*, 127 F. Supp. 464 (E.D. N.Y. 1955).

<sup>57</sup> *Parcell v. United States*, 104 F. Supp. 110 (D. W. Va. 1951).

<sup>58</sup> *D'Aquila v. Pryor*, 112 F. Supp. 346 (S.D. N.Y. 1954).

<sup>59</sup> *King v. United States*, 178 F.2d 320 (5th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950).

<sup>60</sup> See text at note 33 *supra*.



### *The Statutory Law*

Of fifty-one American jurisdictions (including Alaska, the District of Columbia and Hawaii), thirty have no statute concerning liability for ground damage.<sup>61</sup> Of these, four originally adopted the absolute liability provisions of the Uniform Aeronautics Act but have since repealed them.<sup>62</sup>

At the other extreme, there are seven jurisdictions which have adopted and presently retain Sections 4 and 5 of the Uniform Aeronautics Act,<sup>63</sup> which impose absolute liability on the owner or lessee of aircraft for damage caused by forced landing or crash, but under the Act the operator is liable only for his own negligence, assuming he is not also the owner or lessee. An additional two states have enacted Section 4 of the Act but not Section 5.<sup>64</sup> Section 4 makes the owner or lessee of aircraft absolutely liable for damage caused by a forced landing, but as to other types of crashes the rules of law applicable to ordinary torts on land apply. If this type of statute is deemed exclusive in its statement of liability, presumably the operator would be liable only for his own negligence, as under Section 5, unless he were an owner or lessee.

It might be stated parenthetically that it is illogical and anomalous for a statute to make an owner or lessee absolutely liable, while holding an operator liable only for his own negligence. If aviation is an ultrahazardous activity for which the "actor" will be held absolutely liable in the event of a likely miscarriage of the activity,<sup>65</sup> then the owner, lessee and operator should all be absolutely liable.

Occupying the middle ground between the two extremes, between jurisdictions with no statute at all and jurisdictions whose statutes provide for absolute liability, are seven states which expressly or impliedly provide for liability in accordance with the rules of law applicable to ordinary torts on land.<sup>66</sup> There are an additional five jurisdictions which by statute expressly or in effect create rebuttable presumptions against the owner or lessee in

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<sup>61</sup> See Appendix.

<sup>62</sup> Ind. Acts 1927, c.43, repealed Ind. Acts 1951, c.267; Mich. Pub. Acts 1923, No. 224, repealed Mich. Pub. Acts 1945, No. 327, § 207; N. C. Pub. Laws 1929, c.190, repealed N. C. Sess. Laws 1947, c.1069; Utah Laws 1923, c.24, repealed Utah Laws 1939, c.12.

<sup>63</sup> DEL. CODE ANN., tit. 2, § 305 (1953); HAWAII REV. LAWS c.87, § 4925 (1945); MINN. STAT. § 360.012(4) (1949); N. J. STAT. ANN., tit. 6, c.2, § 7 (Supp. 1954); N. D. REV. CODE, tit. 2, c.0305 (1943); S. C. CODE, tit. 2, c.6 (1952); TENN. CODE ANN. § 2720 (Williams 1934).

<sup>64</sup> MONT. REV. CODES ANN. § 1-603 (1947); WYO. COMP. STAT. ANN. § 33-207 (1945).

<sup>65</sup> See note 16 *supra*.

<sup>66</sup> ARIZ. CODE ANN. § 48-111 (1939) (each pilot liable for his own negligence); ARK. STAT. § 74-110 (1947) (owner *and* pilot liable under rules applicable to torts on land); CAL. PUB. UTIL. CODE § 21404; IDAHO CODE ANN. § 21-205 (1948); PA. STAT. ANN. tit. 2, § 1469 (Supp. 1954); S. D. CODE § 2.0305 (Supp. 1952); Vt. Laws 1951, No. 110 (this statute amended Vermont's equivalent of Section 5 of the Uniform Aeronautics Act by striking out the words "absolute" and "whether such owner was negligent or not." Although there are no reported cases interpreting this revision, it would seem that if such change is to mean anything, it must mean that the owner or lessee will be liable under the rules of law applicable to torts on land, instead of absolutely liable. Another possible interpretation of this change would be that proof of a crash would create a presumption of negligence on the part of the owner or lessee).

case of ground damage by crash or forced landing of aircraft.<sup>67</sup> Of these twelve states, six originally adopted, but later repealed, statutes which incorporated the absolute liability provisions of the Uniform Aeronautics Act.<sup>68</sup>

Of nineteen jurisdictions which at one time enacted either Section 4 or Section 5, or both, of the Uniform Aeronautics Act, only nine presently retain them. It is significant that the entire Uniform Aeronautics Act was withdrawn from the recommended list of uniform acts in 1943.<sup>69</sup> The remaining jurisdictions either have no statute, apply ordinary tort rules or create rebuttable presumptions.

### *Conclusion—The Victim's Remedies*

There are not enough cases squarely faced with the problem of the liability of the owner, lessee or operator for ground damage resulting from forced landings or crashes to provide a basis for a statement of the "common law weight of authority." In part this may be due to the fact that twenty-one jurisdictions have statutes dealing with this problem, but probably a more important reason is that the majority of cases is settled out of court.

The trend is away from the adoption by statute of absolute liability provisions, as only nine of the nineteen states originally enacting such provisions presently retain them. Thirty jurisdictions, including four which had adopted the Uniform Aeronautics Act, have no statutes at all covering ground damage liability in cases involving forced landings or crashes.

In the absence of statute, a court could reach a different conclusion from that reached in *Boyd v. White*. But in California there have been so many unsuccessful attempts to enact statutes providing for absolute liability that it is unreasonable to contend that in making the owner, lessee and operator liable "as provided by law" the legislature intended to make them absolutely liable. As a matter of statutory interpretation, it seems clear that *Boyd v. White* was correctly decided. Whether as a matter of policy there should be absolute liability would seem to be for the legislature, not the courts, in view of the legislative history.<sup>70</sup>

While aviation in California is not considered an ultrahazardous activity for which absolute liability attaches, there are other grounds on which liability may be imposed on the owner. Principal among these is respondeat

<sup>67</sup> GA. CODE §11-105 (1933) (proof of injury inflicted to persons or property on the ground by the operation of any aircraft shall be prima facie evidence of operator's negligence); MD. ANN. CODE GEN. LAWS art. 1A, § 9 (1951) (owner prima facie liable, operator liable only for his own negligence); NEV. COMP. LAWS § 279 (Supp. 1949); R. I. ACTS, c.851, § 3 (1940) (proof that plane was registered in name of owner prima facie proof that owner had control); WIS. STAT. § 114.05 (1949) (presumption that owner, lessee or pilot is liable).

<sup>68</sup> MD. LAWS 1927, c.637, repealed MD. LAWS 1949, c.422; NEV. COMP. LAWS § 279 (1929), repealed NEV. STAT. 1947, c.141; R. I. ACTS 1929, c.1435, repealed R. I. ACTS 1940, c.851, § 22; S. D. SESS. LAWS 1925, c.6, repealed S. D. CODE § 2.0305 (Supp. 1952); VT. LAWS 1923, No. 155, repealed VT. LAWS 1951, No. 110; WIS. LAWS 1929, c.348, repealed WIS. STAT. § 114.05 (1949).

<sup>69</sup> UNIFORM AERONAUTICS ACT, 11 U.L.A. 11 (Supp. 1949).

<sup>70</sup> *Boyd v. White*, 128 A.C.A. 762, 773, 276 P.2d 99, 100 (1954).

superior. However, the decisions in *Boyd v. White*<sup>71</sup> and *Johnson v. Central Aviation Corp.*<sup>72</sup> make it clear that, in the absence of other evidence, the relation between a flying school and a student pilot, or the relation between a bailor of a plane and a flying school which in turn rents to a student pilot, is one of bailment, not agency.

Under the law of bailment, the owner or lessee may be liable for the negligence of the operator of an aircraft if he furnished the aircraft to the operator knowing that such person was reckless or incompetent.<sup>73</sup> In *Boyd v. White* it is clearly stated by the court:<sup>74</sup>

[A] student pilot is [not] per se incompetent, reckless and inexperienced, regardless of the care he might exercise . . . . It cannot even be inferred that student pilots, under competent instruction, are more prone to accidents, or cause more accidents than regular pilots.

Hence, it will be necessary for the victim to prove that the owner or lessee had knowledge or should have had knowledge of facts tending to show that the particular student (or other pilot) was reckless or incompetent. This will not be inferred or presumed.<sup>75</sup>

Another theory on which the owner or lessee may be held liable is the furnishing of a dangerously defective chattel to the operator.<sup>76</sup>

The burden would be on the plaintiff to prove that the airplane was defective.

Under certain circumstances, the doctrine of *res ipsa loquitur* might be invoked to create an inference that the aircraft was defective.<sup>77</sup> Plaintiff would have the difficult burden of proving that it was not equally probable that the accident was due to the operator's negligence.<sup>78</sup> If pilot failure could be eliminated as a cause of the accident, *res ipsa loquitur* might apply. In *Boyd v. White* there is no mention of *res ipsa loquitur*, probably because of the fact that it would have been extremely difficult to infer that the crash

<sup>71</sup> *Id.* at 773-774, 276 P.2d at 99.

<sup>72</sup> 103 Cal.App.2d 102, 112, 229 P.2d 114, 120 (1951).

<sup>73</sup> *Rocca v. Steinmetz*, 61 Cal.App. 102, 214 Pac. 257 (1923); PROSSER, TORTS 673 (1941).

<sup>74</sup> 128 A.C.A. 672, 776, 276 P.2d 93, 101 (1954).

<sup>75</sup> Whether flying schools should be made liable for the negligence of students' accidents is primarily a question of policy. The "fireside equities" are in favor of the innocent ground victim, and there is as much reason for a statute making the owner of an airplane liable for the negligence of the operator as there is for CAL. VEH. CODE § 402, which makes the owner of an automobile liable for the negligence of the operator. It would seem clear that this is a problem for the legislature.

<sup>76</sup> *McNeal v. Greenberg*, 40 Cal.2d 740, 255 P.2d 810 (1953).

<sup>77</sup> An inference of negligence arises when "(a) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and (b) it is caused by an instrumentality within the exclusive control of defendant, and (c) the possibility of contributing conduct which would make plaintiff responsible is eliminated. Some authority suggests the additional requirement that evidence as to the explanation of the accident must be more readily accessible to the defendant than to the plaintiff." PROSSER, TORTS 291 (1941).

<sup>78</sup> California has modified the "exclusive control" doctrine to the extent that it need only be shown that defendant was in exclusive control at the time of the probable negligence. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 201 (1949).

was not due to negligence of the student.<sup>79</sup> But if a plane were rented by the owner to a pilot with 10,000 hours of experience, and that pilot testified that at 1,000 feet the motor began to sputter, that he did everything which 10,000 hours of experience had taught him to do but that the motor continued to sputter with a resultant forced landing and damage to a third person, a jury might find that there was no negligence on the pilot's part.

This would present the second big obstacle to applying *res ipsa loquitur*; having eliminated pilot error as a cause, can it be said that airplanes do not crash unless some one has been negligent in the manufacture, maintenance or inspection of the plane?<sup>80</sup> The cases indicate that in the opinion of the courts, aircraft crashes are likely to occur even after the most thorough inspection.<sup>81</sup> It would be plaintiff's task to prove that aviation has progressed to such a point that, for instance, motors do not fail unless there has been negligence. Other defects, such as a rudder cable breaking,<sup>82</sup> more easily create an inference of negligence.

A final theory on which liability might be imposed on the owner of an aircraft is joint venture.<sup>83</sup> It would be necessary for plaintiff to prove that, as between pilot and owner or lessee, there was a common purpose, a sharing of profits or losses and a mutual right of control over the conduct of all parties involved.<sup>84</sup>

The operator of the plane would be liable for negligent operation. An inference of such negligence could be raised by use of *res ipsa loquitur*.<sup>85</sup> Violation of a safety regulation would be negligence per se.<sup>86</sup> Finally, in the case of a forced landing, the operator might be liable for any damage caused under the doctrine of trespass.<sup>87</sup> However, it was stated in *Boyd v. White*<sup>88</sup> that liability of the owner, lessee or operator is to be determined

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<sup>79</sup> Also, the allegation that a defective chattel was furnished by the bailor was stipulated out. *Boyd v. White*, 228 A.C.A. 762, 778, 276 P.2d 92, 102 (1954).

<sup>80</sup> See *Williams v. United States*, 218 F.2d 473 (5th Cir. 1955). This case summarizes the decisions which have rejected the application of *res ipsa loquitur* into three types: those holding that the evidence fails to show that the airplane was in the exclusive control of the defendant; those holding that it is not an unusual occurrence for an airplane to crash without the intervention of human agency; and those holding that experience is not sufficiently uniform to justify a presumption that accidents do not happen in the absence of negligence. It was on the latter ground that the court refused to apply *res ipsa loquitur* (mid-air explosion of jet bomber, ground damage caused by falling of flaming fuel).

<sup>81</sup> *Brewer v. Thomason*, 215 Ark. 164, 219 S.W.2d 758 (1949); *Wilson v. Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N.E. 212 (1932); *Rochester Gas & Electric Corporation v. Dunlop*, 266 N.Y. Supp. 469, 148 Misc. 849 (1933).

<sup>82</sup> *Kadylak et al. vs. O'Brien et al.*, [1941] U.S. Av. R. 8 (W.D. Pa. 1941).

<sup>83</sup> *Boyd v. White*, 128 A.C.A. 762, 777, 276 P.2d 92, 101 (1954).

<sup>84</sup> *Shook v. Beals*, 96 Cal.App.2d 963, 217 P.2d 56 (1950).

<sup>85</sup> *Parker v. James Granger, Inc.*, 4 Cal.2d 668, 52 P.2d 226 (1935).

<sup>86</sup> See *Hall v. Osell*, 102 Cal.App.2d 849, 228 P.2d 293 (1951); Notes, 32 CALIF. L. REV. 80 (1944), 13 CALIF. L. REV. 428 (1925).

<sup>87</sup> *La Com v. Pacific Gas & Electric Co.*, 132 A.C.A. 124, 281 P.2d ..... (1955); *Strother v. Pacific Gas & Elec. Co.*, 94 Cal.App.2d 525, 535, 211 P.2d 624, 631 (1949); 6 AM. JUR., Aviation § 7 (1950); 24 CAL. JUR. 661 (1926).

<sup>88</sup> 128 A.C.A. 762, 773, 276 P.2d 92, 99 (1954).

in accordance with the ordinary rules of bailments, respondeat superior and negligence. It is not likely that this dictum with respect to the operator's liability will preclude proceeding against an operator for trespass in the event of forced landing damage, as opposed to other type crashes.<sup>89</sup> The equities are clearly in favor of the ground victim.<sup>90</sup>

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## APPENDIX

### The Statutory Law†

Thirty jurisdictions have no statutory provisions.

Alabama	Kentucky	New York
Alaska	Louisiana	North Carolina
Colorado	Maine	Ohio
Connecticut	Massachusetts	Oklahoma
District of Columbia	Michigan	Oregon
Florida	Mississippi	Texas
Illinois	Missouri	Utah
Indiana	Nebraska	Virginia
Iowa	New Hampshire	Washington
Kansas	New Mexico	West Virginia

Seven jurisdictions by statute impose ordinary rules of negligence.

Arizona	Idaho	South Dakota
Arkansas	Pennsylvania	Vermont
California		

Five jurisdictions by statute create rebuttable presumptions against the owner or lessee.

Georgia	Nevada	Wisconsin
Maryland	Rhode Island	

Two jurisdictions impose absolute liability on the owner and lessee in case of a forced landing only.

Montana	Wyoming
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Seven jurisdictions presently retain Sections 4 and 5 of the Uniform Aeronautics Act, which impose absolute liability on the owner and lessee, but make the operator liable only for his own negligence.

Delaware	New Jersey	South Carolina
Hawaii	North Dakota	Tennessee
Minnesota		

<sup>89</sup> PROSSER, TORTS 78n.16 (1941).

<sup>90</sup> Bohlen, *Aviation Under the Common Law*, 48 HARV. L. REV. 216, 221 (1934).

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† For statute citations and a more complete compilation, see text and notes, *The Statutory Law, supra*.