

1-1951

Torts: Liability in Aviation Accident Cases

William Dannemeyer

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

William Dannemeyer, *Torts: Liability in Aviation Accident Cases*, 3 HASTINGS L.J. 79 (1951).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol3/iss1/15

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

individual a person who can have legal rights? (3) Has this person interests which the law will protect?

If we concede a wrong we can hardly deny a remedy. If the plaintiff has suffered injuries and can prove that they were the result of the defendant's tortious action he should be able to recover his damages.¹⁹

David Dibble.

TORTS: LIABILITY IN AVIATION ACCIDENT CASES.—In the recent case of *United States v. Kesinger*,¹ a federal court has seen fit to apply the doctrine of *res ipsa loquitur* to a case where an airplane crash caused damage to property on the ground.² In the instant case, the plaintiff brought an action to recover damages for the destruction of a barn and milk house caused by the crash of an Army Air Force B-17 shortly after it had taken off. Two theories of liability were advanced by the plaintiff. One, absolute liability regardless of fault when an accident occurred in the pursuit of an extra-hazardous activity; and two, negligence. The trial court found the pilot had been guilty of negligence in flying his airplane too low, thereby making the United States liable under the Federal Torts Claim Act.³ The court approved this finding, saying, "The modern trend of authority is to hold the rule of *res ipsa loquitur* applicable under the facts and circumstances presented in the instant case."⁴

The leading case applying strict liability to a case involving an airplane crash is *Rochester Gas and Electric Corp. v. Dunlop*.⁵ In that case, the plaintiff was the owner of an electric transmission line supported by a steel tower which was damaged when the defendant's airplane struck it in an unsuccessful attempt to land. The plaintiff sought to recover on the basis of negligence, contending the theory of *res ipsa loquitur* was applicable. Held, on appeal, that the cause of action upon the ground of negligence was properly dismissed by the lower court. The court went on to allow the plaintiff recovery on the basis of an "inexcusable trespass," pointing out that when damage occurs in an aviation accident the party who brought about the chance occurrence should bear the burden. This traditional view of strict liability is also embodied in the Restatement of Torts characterizing aviation as an "ultrahazardous instrumentality."⁶

¹⁹It is suggested that the problem of prenatal personality could be avoided by looking at the problem as merely one of causation of injury to a child living after birth. Suppose A left explosives negligently in B's house before C was born. After C's birth the explosives blew up and injured C. Would A be able to avoid responsibility by pleading that C had no personality at the time of A's negligent act? No case has taken this approach but it is an interesting possibility.

¹190 F. 2d 529 (Kan., 1951).

²*Res ipsa loquitur* creates a rebuttable presumption that the defendant was negligent. The presumption arises upon proof that the accident was one which ordinarily does not occur in the absence of someone's negligence; that the accident was caused by an instrumentality within the exclusive control of the defendant; and, it was not due to any voluntary action on the part of the plaintiff. See *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P. 2d 687 (1944).

³28 U. S. C. A. 1346, 2671.

⁴*United States v. Kesinger*, *supra*, note 1.

⁵266 N. Y. S. 469, 148 Misc. 849 (1933). In this case Judge Lynn made the now famous statement, "To hold that the defendant here is absolved from liability, because he was himself free from negligence, is to hazard all the chimneys in the land, as well as the live stock on the farms, and even the people in their homes."

⁶RESTATEMENT, TORTS, § 520, comment B (1934), states "Thus, aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so

The case for strict liability as applied to airplane crashes has traditionally rested upon the social policy calling for compensation to the innocent party who has suffered damage through no fault of his own.⁷ The theory of strict liability has appeared particularly apropos in aviation crash cases since there is little mutuality between the risks and advantages inherent in a situation where the airplane is operating in the air for its own commercial gain and the injured party is engaged in passive activity on the ground below. The defendant, who is reaping the advantages of carrying on a commercial enterprise, is deemed to be in a better position to administer the risk by passing it on to the public as an incident to its cost of operations than is the innocent victim.⁸ On the other hand, the theory of negligence has been used for a number of years in cases involving passenger fatalities.⁹ In such cases, both the passenger and the aviation industry are enjoying the advantages of air travel and both parties are required to bear the risk of loss in the absence of negligence. It is, therefore, incumbent on the injured party in aviation passenger cases to prove negligence in order to recover. *Res ipsa loquitur* is often used as the means of establishing a *prima facie* inference of negligence which the defendant airline must rebut.¹⁰

The question which now presents itself is whether or not the Kesinger case purports to change any of the existing law governing aviation accident cases? Has the Kesinger case indicated a trend toward the use of negligence as the proper theory to invoke in the case of an airplane crash which causes property damage? On close analysis it is submitted that the facts presented in the Kesinger case merely tend to show that since the court was able to find the pilot had been negligent in the operations of the airplane, the court was content to allow the plaintiff recovery on the ground of negligence without the necessity of relying on strict liability. Having found such negligence, the court merely refused to discuss the strict liability allegation saying, "We deem it unnecessary to pass upon the other theory of liability advanced." These words do not tend to warrant any implication that the theory of strict liability is no longer applicable to property damage cases caused by an airplane crash. On the contrary, the language used shows the court's inclination to allow the plaintiff recovery when negligence has been established and as an alternative the court indicates it would have granted compensation for damages on the theory of strict liability if the plaintiff had failed to prove such negligence.

It would be an unreasonable extension of the actual decision of the principal case if it were to be considered as indicative of a proposition requiring proof of negligence by the plaintiff in order to recover in every case wherein an airplane crash has caused property damage. Suffice it to say that the plaintiff is at liberty to prove negligence on the part of the aircraft, but he is not deprived of his long established right to use the theory of strict liability as a means of obtaining relief for the loss he suffers when an airplane disrupts his peaceful domain.

Howard McKissick.
Howard Swanson.

incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained and operated, may crash to the injury of persons, structures, and chattels on the land over which the flight is made."

⁷The earliest case is believed to be *Guille v. Swan*, 19 Johnson 381 (N. Y. 1822), where a balloonist landed in the plaintiff's garden and it, together with the crowd attracted by the unusual event, caused damage to the vegetables. See LUPTON, *CIVIL AVIATION LAW* (1st ed., 1935) 110.

⁸PROSSER ON TORTS (1st ed., 1941) Sec. 56.

⁹The most recent case being *Johnson v. Eastern Air Lines*, 177 F. 2d 713 (1951).

¹⁰McLarty, *Res Ipsa Loquitur* in Air Line Passenger Litigation, 37 VA. L. REV. 55 (1951). The author points out that *res ipsa loquitur* has found its way into 24 aviation cases for establishing passenger fatality claims and 22 have been decided by the jury in favor of the defendant airlines.

TORTS: LIABILITY OF CHARITABLE CORPORATIONS.—As the result of an auto accident in San Mateo, in the summer of 1943, caused by the negligence of one who was regarded as its authorized agent, the Presbytery of San Francisco was held to be liable.¹ This decision tore down the last barrier in California shielding charitable corporations from liability for their torts, the plaintiff in this case being a nonpaying beneficiary of the Presbytery's San Mateo Mission Bible School. Former decisions had set down the California rule that charitable corporations were liable only to strangers and paying beneficiaries.

An examination of the trend illustrated by California decisions for the past forty years is helpful in determining the reasons which caused this last barrier to fall.

The foundation of immunity in this country is the dictum of Lord Cottenham in the *Feoffes of Heriots Hospital v. Ross*:²

"To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose."

The action was for damages for wrongful exclusion from the benefits of the charity, not for personal injury inflicted in its operation. This dictum was made law in a subsequent case,³ but was overruled some ten years later.⁴

Evidently unaware that the *Heriot* case had been overruled, Massachusetts followed it in 1876,⁵ and Maryland followed suit some nine years later.⁶

After these two states adopted the immunity concept, the immunity of the trust fund itself was extended by other states to include the immunity of charitable corporations as well.

Dictum found in the first California case in point⁷ stated that if one accepts the benefit of a public or private charity, the beneficiary exempts by implied contract the charity for torts committed by servants, if the charity has used due care in the selection of its servants. In the opinion of this case a Rhode Island decision was cited,⁸ such decision furnishing the basis for the California rule, holding the Salvation Army liable for the negligent operation of one of its wagons engaged in charitable work, even though the charity had used due care in the selection of its servants. By the *Thomas* case, which indicated California law on the point, paying and nonpaying beneficiaries were precluded from recovery against a charity, but strangers could recover upon the showing of negligent conduct of servants.

In 1918, a paying patient of a charitable hospital was denied relief against the hospital for injury caused by acts of negligent nurses,⁹ thus declaring the dictum of the *Thomas* case as the law in California.

Nine years later the Salvation Army was held liable to a third person stranger who was injured through the negligence of a servant of the Army engaged in charitable work.¹⁰

Charitable corporations in California, realizing their liability to strangers,

¹Malloy v. Fong, 37 A. C. 356, 232 P. 2d 241 (1951).

²12 Clark and Fin. 507, 513, 8 Eng. Rep. 1508 (1846).

³Holliday v. St. Leonard, 11 C. B. (N. S.) 192 (1861).

⁴Foreman v. Mayor of Canterbury, L. R. 6 Q. B. 214 (1871).

⁵McDonald v. Mass. Gen. Hosp., 120 Mass. 432 (1876).

⁶Perry v. House of Refuge, 63 Md. 20 (1885).

⁷Thomas v. German General Benevolent Society, 168 Cal. 183, 141 Pac. 1186 (1914).

⁸Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120 (1912).

⁹Burdell v. St. Luke's Hospital, 37 C. A. 310, 173 Pac. 1008 (1918).

¹⁰Phoenix Assurance Co. Ltd. v. Salvation Army, 83 Cal. App. 455, 256 Pac. 1106 (1927).

strangers usually being defined to include employees and third persons other than beneficiaries or patients, began to insure themselves against liability for the negligence of their servants. In a case involving a hospital,¹¹ it was ruled, by the way of non-admissibility of such evidence, that the fact that a charitable corporation took out insurance to remedy injured parties did not alter the status of the charity to that of a business for profit.

Naturally the question arose in many instances, just what constitutes a charitable corporation? The question is answered by stating that the burden rests upon the defendant to prove its charitable character and its consequent exemption from liability for the negligence of its servants.¹²

In 1939, two cases were decided, both involving hospitals. In each the patient had been injured by the negligence of servants of the charitable hospitals, both patients were paying patients, and in each recovery was allowed the patients.¹³ The court said in the *Silva* case, "the implied contract doctrine has been used to rationalize a result and is not based upon the intention of the parties, as legal principles require." Thus by these two cases California law allowed recovery to paying beneficiaries, directly overruling *Burdell v. St. Luke's Hospital*,¹⁴ taking the view that if a charity wanted to aid an individual, it ought to be required to exercise due care in such aid.

Thus far we have traced the subject from California's first stand, namely, recovery to an injured stranger as against the charity, to the point where the *Silva* and *England* cases declare that recovery may be had by a paying beneficiary as well.

The only remaining class of persons who could not recover against charitable corporations was taken under the fold of Justice Rutledge:¹⁵

"Abolition of the immunity as to the paying patient is justified as the last short step but one to extinction. Retention for the non-paying patient is the least defensible and most unfortunate of the distinction's refinement. He, least of all, is able to bear the burden. More than all others, he has no choice. He is the last person the donor would want to go without indemnity. With everyone else protected, the additional burden of protecting him cannot break the trust. He should be the first to have reparation, not last and least among those who receive it. So stripped of foundation, the distinction fails. It should fall in line with, not away from, the trend which has brought it about. The immunity should go and the object of the charity should be placed on a par with all others."

When the principal case under discussion was decided, the court quoted the preceding language of Justice Rutledge, and must have felt the time had come to properly state the law in California. In order to justify the inclusion of nonpaying beneficiaries with paying beneficiaries in allowing recovery, this rationalization was resorted to:

"If the theories discussed and discarded by this court in the *Silva* and *England* cases do not justify immunity from liability in the case of a paying beneficiary, there is no logical justification for clinging to them in the case of the beneficiary who does not pay."

Most of the cases which have arisen involving negligence actions against charities have had to do with hospitals. These institutions look after the physical side of the

¹¹*Stonaker v. Big Sisters Hospital*, 116 Cal. App. 375, 2 P. 2d 520 (1931).

¹²*Inderbitzen v. Lane Hospital*, 124 Cal. App. 462, 13 P. 2d 905 (1932).

¹³*Silva v. Providence Hospital*, 14 Cal. 2d 762 (776), 97 P. 2d 798 (1939); *England v. Hospital of the Good Samaritan*, 14 Cal. 2d 791, 97 P. 2d 813 (1939).

¹⁴37 Cal. App. 310, 173 Pac. 1008 (1918).

¹⁵*President and Directors of Georgetown College v. Hughes*, 130 F. 2d 810, 827 (D. C. Cir. 1942).

person. The question might arise, should there be, or has there been a distinction drawn between those institutions which look after an individual's physical side, and those which look after his spiritual side? As evidenced by the principal case, the answer seems to be no. In a recent Vermont case,¹⁶ no such distinction was even hinted at, the court discarding the trust fund theory and holding the church liable for the negligence of its servants.

By the decision in the principal case, California is now in step with a trend which is evidencing itself with increasing strength throughout the country, namely, to hold charitable corporations liable for their torts, regardless of the status of the victim injured.¹⁷

A logical justification for this trend is due to many factors, each adding its relative weight. Considering that the doctrine of immunity in this country was based upon an English decision which had, at the time it was cited, been overruled in England, the courts of this country in attempting to rationally justify the result, found its basis devoid of logical legal principles, and sound social reasoning.

The extension of workmen's compensation acts and social security legislation to include the employees of charitable corporations bears much weight upon the result. Also charities may today, due to the wide extension of insurance coverage, obtain liability insurance for a relatively small fee. The growing population of the country, with consequent crowding of conditions, undoubtedly causes more accidents, with more charities being involved due to the increased volume. As immunity is the exception, with more injured victims, the immunity should and has withered considerably. People today frequent hospitals, a large portion of them being charitable, more often than they did fifty years ago, not necessarily because there are more sick people, but because there are more facilities to handle the normal rate of sick people, due to increased living standards. Hence with a greater volume, more people are injured; the cry for recovery becomes louder, and the effect upon the concept of immunity can readily be seen.

The anomaly of exempting charitable corporations and trust funds, while individuals performing charity are not exempt, is a distinction which is not justifiable by logical reasoning, and should fall.

William Dannemeyer.

¹⁶Foster v. Roman Catholic Diocese of Vermont, 116 Vt. 124, 70 A. 2d 230 (1950).

¹⁷Mulliner v. Evangelischer Diakonissenverein, 144 Minn. 392, 175 N. W. 699 (1920); Tucker v. Mobile Infirmary Assn., 191 Ala. 572, 68 So. 4 (1915); City of Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354 (1923).

