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A BRIEF SURVEY OF AVIATION CASE LAW IN WISCONSIN

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In his stimulating essay, "Aviation Law Comes Home to the Main Street Lawyer", the author[1] warns us that we are on the threshold of the aviation law era, and reminds us that it is the average practitioner at the bar, rather than the student or specialist, who may get a jolt, unless he can acquaint himself with some fundamentals.

A plethora of accidents, three of which in stunning succession, involved army DC-4's converted for peace-time airline use, the last of which resulted in the death of a well-known member of this association[2] is ample fulfillment of the prophesy and portends tort liabilities of astronomical proportions. Despite some spectacular crashes, the damage inflicted until recently has been miraculously low.[3] With the heavy increase in scheduled air-line traffic which will inevitably be a concomitant of the post-war period, together with the mushroom growth of chartered passenger, freight and express transportation, to which will be added the flights of private planes accommodating the half million pilots now in the country, it is to be expected that the loss of life and the destruction of property incident to aviation will sharply increase. G. C. A. and I. L. S. and improved methods of fog dispersal will accomplish a great deal in the elimination of accidents, but it is not to be expected that much will be accomplished in preventing pilot and other personnel error in the next decade.

Diversified uses of small aircraft have given rise to new safety problems. Spraying and crop dusting of peas recently resulted in two fatal plane crashes in one day within one hundred miles of Milwaukee, destroying both planes and killing the pilots. Planting of fingerlings in lakes by airplane, utilization of planes for towing advertising signs, and transportation of supplies with ski-equipped planes to isolated communities after severe blizzards will add to the accident toll. Such

[1] John C. Cooper, XI Law and Contemporary Problems, 556.

[2] Mr. I. E. Goldberg, for many years a member of the State and American Bar Associations, met death in the crash of a DC-4 in West Virginia on June 13, 1947.

[3] Crash of B-24 into gas holder in Chicago, May 20, 1943, damage $1,265,000; crash of C-60 into hangar, May 6, 1945, damage $3,000,000; crash of B-25 into Empire State building, July, 1945.

increase in accidents will inevitably mean a multiplication of legal problems.

The student of aviation law will find a paucity of decisions in Wisconsin. There are eight cases in all in which aviation has been involved. One of these cases distinguished between proprietary and governmental functions of a state agency; two cases interpreted aviation exclusionary clauses in life insurance policies; three cases presented questions under the workmen's compensation act, and two cases dealt with the question of liability for damages sustained at the airport.

(A) *Governmental vs. proprietary functions.*

The earliest aviation law case in Wisconsin is *Morrison vs. Fisher.*[4] In that case the members of the Wisconsin State Board of Agriculture entered into a contract with Wright Brothers for exhibition flights during the State Fair in September, 1910. It was arranged that take-offs and landings should be made from the race track in front of the grand stand. On one of the take-offs, the airplane reached an altitude of thirty feet, and then settled back to the ground striking and injuring the plaintiff.

The jury exonerated the pilot of negligence, but found that the Board was negligent in permitting the flights to be made. Judgment was entered upon the verdict in favor of the plaintiff from which an appeal was taken to the Supreme Court.

In reversing the judgment, and dismissing the plaintiff's complaint, the Supreme Court held that the giving of a state fair under the Wisconsin statutes was a governmental function of the state from which the board derived no pecuniary profit. The court, therefore, held that the board was not liable for the negligence of its members, agents or officers.

In recent years there has been a decided trend in the courts to increase the scope of liability for negligence and to narrow the field of governmental immunity against tort liability. Undoubtedly this trend has been due in part to legislative enactments. Another factor which has actuated the courts in permitting recovery by injured parties is the wide-spread use of public liability insurance by governmental agencies. In the light of modern decisions it is probable that *Morrison vs. Fisher* would not now be followed.

Special problems will constantly arise in connection with airports. We may, for example, pose the problem as to whether the City of Green Bay in operating its airport does so in a proprietary or governmental capacity. In Iowa, Georgia and Tennessee it has been held that a municipality operates its airport in a governmental capacity, while in

[4] 160 Wis. 621, 152 N. W. 475, 1 Avi. 38 (1915).

Florida, Texas, California, Oregon, Oklahoma, Michigan and Alabama it has been held that a municipal airport is operated in a proprietary capacity.[5]

It has been recently pointed out[6] that the case law in Wisconsin is a welter of hopeless confusion with respect to the distinction between a governmental function and a proprietary function performed by a municipal corporation. In *Virovatz vs. Cudahy*[7] it was held that the operation of a swimming pool was a governmental function, but in *Christian vs. New London*[8] it was held that the furnishing of street lighting service by a municipally owned electric utility was a proprietary function.

A number of activities conducted at an airport, such as the operation of a restaurant, the furnishing of taxi service, or the operation of a flying school for profit, may readily be catalogued as proprietary in nature. On the other hand, there are some activities which will give rise to serious questions. Suppose that the City of Green Bay erected a control tower for the purpose of directing aerial traffic in the vicinity of the airport, and that the operator employed by the city was negligent in directing the landing of an airplane either by the use of radio or an Aldis lamp. We venture to predict that in such a case liability of the municipality will be denied upon the ground that it is performing a mere governmental function.[9]

In the case of buildings located on an airport, little difficulty may be anticipated. It is now well settled that the safe place statute[10] applies to public buildings. Failure to construct or maintain the buildings, and the parts thereof designed for use by the public, in as safe a condition as the circumstances reasonably permit, results in liability on the part of the municipality in case injury is sustained by reason of a violation of the statutory duty.[11]

Liability of the municipality is not absolute under the statute. Suppose a pilot wanders into the operations room at Billy Mitchell Field in Milwaukee reserved for the use of employees, or strays into the portion of the building reserved for the employees of the weather bureau and is injured. Under the decision in *Flynn vs. Chippewa County*[12] there could be no recovery. In that case a prisoner committed to the county jail was injured in a portion of the building which was not designed for use by the public. The court held that the safe place statute

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[5] Rhyne, Airports and the Courts, 73; Annotation 83 A. L. R. 350.
[6] 1941 Wisconsin Law Review, 540.
[7] 211 Wis. 357, 247 N. W. 341 (1933).
[8] 234 Wis. 123, 126-127, 290 N. W. 621 (1940).
[9] See Finfera vs. Thomas, 119 F. (2nd) 28 (C.C.A. 6, 1941).
[10] Sec. 101.06, Wis. Stats.
[11] Heiden vs. Milwaukee, 226 Wis. 92, 275 N. W. 922 (1937).
[12] 244 Wis. 455, 12 N. W. (2nd) 683 (1944).

did not apply, and that since the county operated the jail in its governmental capacity, there could be no recovery by the plaintiff.

In the event of an accident at a municipal airport at any point outside of the buildings a different situation exists. The safe place statute which in terms applies only to public buildings[13] clearly can afford no comfort to the injured person.[14]

There is ample precedent in Wisconsin to sustain the conclusion that an airport such as Billy Mitchell Field in Milwaukee which is operated by Milwaukee County for profit has the same status as though it were privately owned. With respect to its operation in a proprietary capacity, there is no distinction between such an airport and a municipally owned electric or gas utility.[15] Where, however, the municipality does not operate the airport for profit, a cogent argument may be made that such an airport stands upon the same ground as an electric plant operated by a municipality solely for street lighting purposes.[16] Tort liability may thus depend upon a question of fact.

(B) *Life Insurance Aspect of Aviation Law.*

In *Charete vs. Prudential Insurance Company*[17] an action was brought to recover on a policy of life insurance containing a clause for an additional payment of $2,000 in the event of accidental death. The policy contained the following exception:

> "Provided, however, that no accidental death benefit shall be payable if such death resulted from * * * having been engaged in aviation * * *".

The insured met death by drowning when the plane he was piloting crashed into Milwaukee Bay. Judgment for the plaintiff was entered by the trial court and the insurance company appealed. The supreme court sustained the judgment of the lower court upon the ground that the policy provision was ambiguous, and that the situation was one for the application of the familiar rule that an interpretation most favorable to the insured would be adopted.

In *Bolonski vs. Bankers Life Company*[18] the question presented was whether the plaintiff was entitled to recover under a policy which provided:

> "The disability benefits herein provided shall not be granted if the disability shall result from * * * engaging or participating as a passenger or otherwise in aviation or aeronautics."

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[13] Sec. 101.06, Wis. Stats.
[14] Herrick vs. Luberts, 230 Wis. 387, 389, 284 N. W. 27 (1939). Compare Bent vs. Jonet, 213 Wis. 635, 252 N. W. 290 (1934), and Jaeger vs. Evan. Luth. Holy Ghost Cong. 219 Wis. 209, 262 N. W. 585 (1935).
[15] Christian vs. New London, 234 Wis. 123, 290 N. W. 621 (1940).
[16] Christian vs. New London, supra, note 15.
[17] 202 Wis. 470, 232 N. W. 848, 1 Avi. 245 (1930).
[18] 209 Wis. 5, 243 N. W. 410, 1 Avi. 353 (1932).

The plaintiff was preparing to take off on a solo flight in a plane and was injured by the propeller as he was attempting to start the engine. The court held that the plaintiff when injured was engaging in aviation or aeronautics within the meaning of the exemption provision, and for that reason the judgment of the trial court denying recovery was affirmed.

These decisions cannot be reconciled upon any rational basis. The former is in line with the weight of authority.[19] The modern trend of thought is mirrored in *Bull vs. Sun Life Assur. Company.*[20] In that case the policy provided that there could be no recovery where death resulted from service, travel or flight in an aircraft as a passenger or otherwise. The assured was a lieutenant in the Navy and was shot down by the Japanese in the Pacific Ocean. When last seen, he was attempting to launch a rubber raft from a wing of the airplane. While he was so engaged, a Japanese plane strafed the wreckage, and the lieutenant was never seen again. The court allowed recovery under the policy.

In some jurisdictions recovery is denied upon authority of cases such as the *Blonski* case. Thus in *Order of United Commercial Travelers vs. King*[21] the policy sued upon contained a clause excluding liability for death resulting from participation as a passenger or otherwise in aviation. The insured was piloting a plane which crashed in the Atlantic Ocean. The pilot was seen alive in the water but his body found later indicated death from drowning. Recovery was denied under the policy. The court distinguished the *Bull* case upon the ground that there the death of the assured was caused by Japanese gun fire.

Life insurance companies have in recent years taken cognizance of the development of aviation with the result that the old exclusionary clauses have been quite generally limited to cases where the assured is piloting the aircraft. Recovery may thus be had where the assured is a passenger in any type of aircraft. It is therefore improbable that the question presented in the *Blonski* case will again confront the Wisconsin Supreme Court.

(C) *Workman's Compensation in Aviation Law.*

In *Indebro. vs. Industrial Commission*[22] the industrial commission denied compensation because of the death of the claimant's husband. The death was caused by a crash of an airplane in which the deceased was flying as a passenger. The commission concluded from the evidence that the decedent was merely taking a trip in the airplane and

[19] Annotations 83 A.L.R. 384; 99 A.L.R. 199. See War and Aviation clauses in Life Insurance Policies, Price, XIV Ins. Counsel Journal, January, 1947.
[20] 141 F. (2d) 456 (C.C.A. 7, 1944).
[21] 161 F. (2d) 108 (C.C.A. 4, 1947).
[22] 209 Wis. 272, 243 N. W. 464, 1 Avi. 354 (1932).

was not performing any services incidental to his employment. The Supreme court upheld the award upon the ground that the evidence sustained the award. It was remarked by the court that had the finding of the Industrial Commission been to the contrary, the court quite likely would have been obliged to uphold it.

The second conpensation case involving aviation was *Sheboygan Airways, Inc. vs. Industrial Commission*[23]. In that case the deceased was employed as a flight instructor and met his death when the plane in which he was flying with two passengers crashed. The Industrial Commission awarded compensation upon findings that at the time of his injury the deceased was engaged in performing service growing out of and incidental to his employment by the Sheboygan Airways, Inc. It was contended by the employer that the deceased was engaged in acrobatic flying, contrary to air-traffic rules, at the time of his death, and that his action while so doing took him out of his course of employment. In answering the objection, the Industrial Commission remarked that there was evidence from which it might be inferred that the deceased was engaged in acrobatic or stunt flying, and the Commission concluded that whether or not the deceased was engaged in stunt or acrobatic flying was immaterial. The judgment of the trial court vacating and setting aside the award of the Industrial Commission was reversed, and the cause was remanded with directions to the Industrial Commission to make findings as to whether the deceased had engaged in stunt or acrobatic flying.

In *Fliteways, Inc. vs. Ind. Comm.*[24] the deceased was employed as a flight instructor and met his death while he was accompanied by a student on an instructional flight. According to the testimony of witnesses, the plane was buzzing a tavern which was operated by a student of the flight instructor. A number of students of the instructor had organized a flying club the headquarters of which was in the tavern. When the plane was making a turn about forty feet from the ground, one of the wings struck a power wire, the plane crashed, and both of the occupants of the plane were killed. Expert testimony was introduced to establish that the flight instructor was violating the air traffic rules of the Civil Aeronautics Board. The applicant offered evidence tending to establish that at times students become terrified and that they "freeze" to the "stick" thus making it impossible for the instructor to control the plane. The Industrial Commission found that the instructor was performing service growing out of and incidental to his employment at the time of his death and awarded compensation to his dependents. The judgment of the trial court approving the award of the Industrial Commission was affirmed by the supreme court.

[23] 209 Wis. 352, 245 N. W. 178, 1 Avi. 413 (1932).
[24] 249 Wis. 496, 24 N. W. (2d) 900, 2 Avi. 14.251 (1946).

It has long been traditional in Wisconsin that if there is any credible evidence to sustain an award of the Industrial Commission it will not be disturbed by the courts. In the *Fliteways* case the conclusion is irrefragable that the flight instructor was violating the air-traffic rules established by the Civil Air Board. Had the trial judge or any of the members of the supreme court operated a plane as a pilot, there would have been at least a vigorous dissent expressed. Every pilot is familiar with and can quickly recognize "buzzing." Here there is no penumbral field justifying judicial divagations. Flight at tree top level or power line altitude can never be justified upon the conjectural ground that the student was "frozen" to the controls.

Violations of the air traffic rules have become a matter of grave concern to the aviation industry and to every licensed pilot. Wisconsin, in common with other states, has recognized the evil, and at the current session of the legislature, has proscribed reckless flying.[25] It will now be the duty of the Industrial Commission and the courts to lend their assistance in eliminating this hazard to the development of aviation.

(D) *Tort Liability and Aviation Law.*

The growth of aviation in Wisconsin is noteworthy in the field of jurisprudence because of the dearth of cases involving tort liability. The student might reasonably expect to find a considerable body of case law developing from a thirty-year period of flying at airports now numbering well over two hundred, of which one hundred twenty-five are actively operational.[26] The fact that during this period only two cases, both of which occurred at airports, have been decided by the supreme court, is an eloquent tribute to the ability and skill of the pilots.

In *Greunke vs. North American Airways Co.* [27] a plane landed with a dead engine on a runway at an airport. Before the pilot could get the plane off the runway, another plane landed and collided with it. The trial court instructed the jury that the pilot of the second plane was required to use the highest degree of care in order to avoid a collision. The supreme court in reversing a judgment in favor of the pilot-owner of the first airplane held that the instruction was faulty, and that the second pilot owed only the duty to exercise ordinary care in the operation of his plane.

At the time of the accident there was no statute affecting the liability of the parties, but as the time of the decision by the supreme

[25] Chapter 217, Laws of 1947, commonly referred to as the Reckless Flying Act.
[26] Official Wisconsin Airport Map, May 1, 1947, Wisconsin Aeronautics Commission.
[27] 201 Wis. 565, 230 N. W. 618, 1 Avi. 219 (1930).

court (1930) the statutes provided[28] that in such a case liability was dependent upon the rules of law applicable to torts on land.

In *Davies vs. Oshkosh Airport, Inc.*[29] a pilot in landing at an airport struck a hay rake which had been left on one of the runways. It was held that it was the duty of the pilot to maintain a proper lookout for obstacles on the runways, and because of his breach of duty he was guilty of contributory negligence which defeated recovery against the airport.

At the time of the accident, which occurred July 10, 1928, Wisconsin had not enacted its comparative negligence law.[30] The court, therefore, was not called upon to determine whether the airport was negligent in permitting the hay rake to remain on the runway. Unless adequate warning could be given to pilots, or unless the airfield had been closed, the airport would be guilty of negligence in permitting obstructions to remain on runways. In *Pignet vs. City of Santa Monica*[31] it was held that an airport was negligent in permitting an automobile to be driven on a runway in the path of a plane engaged in landing. In *Peavey vs. City of Miami*[32] it was held that the airport was not negligent in permitting machinery to remain on a runway where it appeared that the area of the runway in question was marked with red lanterns and flags, and where it appeared that an appropriate notice was printed in the pamphlet "Notice to Airmen" which is an official publication of the Civil Aeronautics Authority.

There are no other decisions in Wisconsin involving liability for damages caused by a plane crash or by objects thrown or falling from a plane. The applicable statute[33] imposes absolute liability upon the owner of aircraft in flight for injury to persons or property on the ground whether or not the pilot was negligent. Thus, the owner of an airplane is liable for damages caused by a passenger leaping out of the plane to commit suicide, or by a passenger throwing a bomb from the plane, or by a crash of the plane shot down by an enemy, or by a crash when the plane is being piloted by a thief.[34] All of the authorities in the United States have thus far uniformly held the owner of a plane liable for all damages to persons and property on the ground outside of an airport.

The rule of absolute liability, though exceptional, is not unknown in Wisconsin jurisprudence. Most lawyers are cognizant of the statute[35]

[28] Sec. 114.06, Wis. Stats., enacted by Chapter 348, Laws of 1929.
[29] 214 Wis. 236, 252 N. W. 602, 1 Avi. 503 (1934).
[30] Sec. 331.045, Wis. Stats., enacted by Chapter 242, Laws of 1931.
[31] 29 Cal. App. (2d) 286, 84 P. (2d) 166, 1 Avi. 794; 45 Cal. App. (2d) 766, 115 P. (2d) 194, 1 Avi. 984.
[32] 146 Fla. 629, 1 So. (2d) 614, 1 Avi. 955.
[33] Sec. 114.05, Wis. Stats.
[34] Restatement, Law of Torts, Secs. 519, 520.
[35] Sec. 192.44, Wis. Stats.

which imposes absolute liability upon a railroad for fires on or along its right-of-way. There is, however, no absolute liability imposed for damage along the right-of-way caused by a collision of two trains or by derailment, notwithstanding the fact that damage so caused would be comparable to damage resulting from the crash of an aircraft.

Where damages are sought as between two aircraft which had collided in flight, or as between a passenger or his representatives and the aircraft in which the passenger had been flying, ordinary rules of negligence apply.[36] In every case involving passengers or aerial freight or express, a painstaking study must be made to determine whether the flight is governed by the Warsaw Convention.[37] The Convention is a part of the law of the land[38] and drastically limits recovery in cases where it is controlling.[39]

CONCLUSION.

The theme in the introduction to this discussion was that aviation has come home to the main street lawyer. The enactment of the so-called "reckless Flying Act" by the legislature at the current session,[40] establishes our thesis. Operation of aircraft in a careless or reckless manner so as to endanger the life or property of another is proscribed by legislative fiat. In determining whether the operation was careless or reckless the court shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. The lawyer called upon to defend the local pilot who insists upon "buzzing the town" must familiarize himself with the air traffic rules adopted by the Federal Civil Aeronautics Board. If he is not a pilot, or if he has not become familiar with the rules governing the operation of an airplane, he will find himself in a labyrinth deprived of the assistance of an Ariadne. Then will aviation law have come home to the Main Street Lawyer!

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[36] Sec. 114.06, Wis. Stats.
[37] U. S. Treaty Series 876, 49 Stat. 3000 (1936), Eng. Translation at 3014.
[38] Clause 2, Article 6, Federal Constitution; Missouri vs. Holland, 252 U. S. 416.
[39] $8,300 for death or injury to passenger, and $16.60 per kilogram for loss or damage to goods. Compare limitation of ilability under Admiralty Law, 46 U.S. C. A. Sec. 183; wrongful death statutes, Secs. 331.031 and 331.04 and Sec. 81.15, Wis. Stats., which limits recovery by any person for personal injuries by defect in highway to $5,000.
[40] Chapter 213, Laws of 1947.