cipal case, would be entirely negligible. From the outset, these statutes have run into judicial hostility, and should they survive the gauntlet of loose construction, they next have to leap the hurdle of constitutionality. This has proved exceedingly difficult in the state courts, although the Supreme Court of the United States has not been called upon to make such a determination under the Fourteenth Amendment of the Federal Constitution. However there is a serious question as to the validity of the "due process and equal protection" argument. Entirely apart from the original definition given to "equal protection of the laws" by the courts,[19] it is now definitely established that for a statute to deny such protection it must actually and palpably be unreasonable and arbitrary.[20] It would seem that the legislature is free to recognize degrees of harm[21] and the fact that a newspaper is singled out constitutes no violation of equal protection. As for the due process argument, if the statute is entirely prospective, then the plaintiff has never been deprived of a legal interest since there are conditions precedent set up that he must fullfill before any interest whatsoever exists. So it seems that the legislature could constitutionally provide for retraction as full "compensation" to the plaintiff unless he can prove his special damages. However, whether this would fully compensate him is another matter. In any event, it is definitely shown that courts are loath to depart from the old common law principles of libel.

MERLE BASSETT

TORTS—LIABILITY OF BAILOR OF AIRPLANE PASSENGER TAKEN UP IN VIOLATION OF CIVIL AERONAUTICS AUTHORITY REGULATION. The problem presented in a recent Arkansas decision involved the liability of the bailor of an airplane taken aloft by the bailee in violation of a Civil Aeronautics Board regulation.[1] The action against the bailor was based on his negligence in renting a plane to a pilot whom he knew to have been reckless previously, the death of a passenger resulting from the negli-

---

19. Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950).
20. U.S. v. Carolene Products Co., 304 U.S. 144 (1938); Wallace v. Currin, 95 F.2d 856 (4th Cir. 1938).
21. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
1. Central Flying Service *et al.* v. Crigger *et al.*, 215 Ark. 400, 221 S.W.2d 45 (1949).

gence of the pilot. An Arkansas statute provided that the liability of aircraft owners to passengers be determined according to the rules applicable to torts on land.[2] The upper court agreed with the trial court that there was sufficient evidence to support the jury findings that: (1) the pilot was notorious for his negligence;[3] (2) the passenger was killed because of the pilot's negligence; and (3) the defendant had actual or imputed knowledge of the pilot's recklessness. Nevertheless, the upper court reversed the trial court on the ground that there was not sufficient evidence to support a finding that the taking up of a passenger was foresseable, and that, therefore, the defendant's negligence was not the proximate cause of the plaintiff's injuries.

The dissenting judges, however, found a sufficient proximate causal relation between the negligence of the defendant and the death of the passenger. They felt that the potentially dangerous situation created by the defendant's conduct was such that the intervening action by the pilot should not be considered such an intervening cause as to break the chain of causation. The conduct of the pilot, *viewed after the fact,* was not of such a highly extraordinary nature as to insulate the bailor from liability.

The law of private aviation is still comparatively new. An attempt was made to satisfy an obvious need in airplane jurisprudence by the promulgation of the Uniform State Laws for Aeronautics of 1922.[4] But since it does not include provisions defining the liability of private aircraft operators to passengers, the law does not apply to the specialized situation presented by the principal case. In recognition of the need for statutes regulating such liability, several states have enacted statutes defining the bailor's liability toward the passenger. These statutes, in general, provide that the liability shall be determined according to the rules applicable to torts on land.[5] Even in the absence of statute, the courts have demonstrated

---

2. ARK. ACTS 1941, No. 457.
3. The only evidence of previous misconduct on the part of the pilot was a single suspension for low flying.
4. 9 UNIFORM LAWS ANN. 17 (1923); see full text in (1928) U.S. AV. R. 472-476.
5. ARK. ACTS 1941, No. 457; GA. LAWS 1933, No. 206; PA. LAWS 1933, No. 224.

a tendency to draw an analogy to similar problems in automobile cases.[6]

The Arkansas law relative to the liability of the bailor of an automobile is that one who rents to a known reckless driver is liable for damages which proximately result from the bailee's negligent operation.[7] Such was the general rule of law applied in this case. The proximate cause limitation was based on the fact that the court felt that it was not reasonably foreseeable that the pilot should take up a passenger; that is, that under the circumstances the passenger was an unforeseeable plaintiff. When the question is whether a particular plaintiff may recover under circumstances which makes his presence at least somewhat unexpected, the generally stated test is whether a reasonable, prudent man in defendant's position would foresee the presence of such a plaintiff within the danger zone.[8] In applying the test, the determination is whether the defendant *before the event* should have foreseen th likelihood of the plaintiff's presence. Under such a test a considerable degree of foreseeability is required in order to impose liability. On the other hand, the dissenting judges considered the matter more from the viewpoint of the sequence of events which took place, that is, the emphasis was rather on whether the conduct of the pilot was sufficiently unusual so that the bailor should be relieved from responsibility for his negligent act. Considered in that light, the test as generally stated is whether, *viewed restropectively*, the sequence of events is so highly extraordinary that it would be unfair to impose liability on the defendant for the particular consequences of his negligent conduct.[9] Obviously, much less foreseeability is required in order to hold the defendant liable under this test than under that enunciated by the majority of the court. It is indeed difficult to criticize either opinion or to form a definite opinion that one approach is superior to the other in a case of this sort. Yet viewed in the light of injury to an innocent plaintiff and a bailor who permitted use

6. Tiedt v. Gibbons (1940), U.S. Av. R. 63; Finfera v. Thomas, 119 F.2d 28 (6th Cir. 1941); Rinehart v. Woodford Flying Service, Inc., 122 W.Va. 392, 9 S.E.2d 521 (1940).

7. Layes v. Harris, 187 Ark. 1107, 63 S.W.2d 971 (1933); Chaney v. Duncan, 194 Ark. 1076, 110 S.W.2d 21 (1937).

8. Gampin v. Murphy, 295 Pa. 214, 145 Atl. 123 (1928); Bona v. S. R. Thomas Auto Co., 137 Ark. 217, 208 S.W. 306 (1919).

9. RESTATEMENT, TORTS, § 433(b), comment *e* (1939).

of the instrumenality by a known reckless bailee, it would appear that the test applied by the minority opinion is a better approach. Neither test will lead to an automatic solution in proximate cause but it seems undesirable that the solution be automatic. The test applied by the minority appears to be more flexible and to permit the determining agency to place more emphasis on the relative wrongfulness of the defendant's conduct. Thus, where the defendant's conduct is more blameworthy, the extent of liability could be made greater. It is true that the same result could be reached under the majority test, but it would be more difficult to reach that result from a logical, or at least legalistic, point of view.

The value of defining exactly the relationship between a particular defendant and a particular plaintiff seems to be more than offset by the need for flexibility in an area of the law where each set of facts varies to a considerable extent from any other set of facts.

DAVID G. LUPO

TORTS—NORTH DAKOTA ESPOUSES SIMPLE TOOL DOCTRINE—STEPLADDER HELD WITHIN RULE. Plaintiff Olsen brought suit against Ken Temple, Ancient Arabic Order of the Mystic Shrine, to which he belonged.[1] In connection with a visit of the Imperial Potentate to Kem Temple, a dance was scheduled at the State Fairgrounds. The dance pavilion was to be decorated by passing streamers over a wire which ran down the center of the pavilion, about sixteen feet above the floor.[2] The ends of the streamers were to be secured on either side to simulate a canopy. In order to reach the wire, a stepladder had been brought the preceding evening from the temple cloakroom to the fairgrounds. This stepladder was about fourteen feet tall.[3] Plaintiff (a member of the decoration committee) set up the stepladder, making a cursory examination as to its condition by shaking it. He climbed until the wire was at his shoulder, and began passing the streamers over the wire while two helpers below secured the ends to the sides of the pavilion. This work continued for about

1. Olsen v. Kem Temple, Ancient Arabic Order of the Mystic Shrine, 43 N.W.2d 385, *rehearing denied* (N.D. 1950).

2. The actual height of wire and ladder are in doubt. The figures given in this article are averages derived from trial testimony.

3. See note 2 *supra*.