

NEGLIGENCE ENTRUSTMENT OF AN AIRCRAFT WHAT IS AN FBO TO DO?

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I. INTRODUCTION

Should Orville have permitted his brother Wilbur to take that first flight from Kitty Hawk, North Carolina in December, 1903? Wilbur did not have a pilot's license nor was his aircraft certified. And Kitty Hawk was not a chartered airport. What about Charles Lindenberg. Should he have been allowed to fly over the Atlantic? He had no solo over-water experience. Should NASA have turned John Glenn loose with that space capsule? He did not have a space craft rating on his pilot's license nor a super high altitude check out. Had Wilbur, Lindy or Senator Glenn crashed, could they have sued the aircraft's bailor?

When is an aircraft's owner or lessor liable for turning over the keys to an aircraft? What is an FBO to do before renting an airplane to a current certified pilot?

A brief history of air travel provides context for the concept of an aircraft's bailor's liability. Although the airplane was invented at roughly the same time as the automobile, its coming of age as a common means of transportation lagged at least a generation or more behind. *Black v. Compagnie National Air France* (5th Cir. 1967) 386 F2d 323(ft.3) As air travel has become more commonplace, so have the size and number of claims. At present there are in excess of 215,000 small aircraft including corporate turbo props and jets for use in the United States alone.¹

II. HISTORICAL PERSPECTIVE

The original Restatement of Torts took the view that flying was an ultra-hazardous activity. *Boyd v White* (1954)128 Cal. App. 2d 641, 276 P.2d 92 (noted in a footnote). Dicta in *Prentiss v. National Airlines* (DC NJ1953)112 F. Supp. 306, compared aviation to such ultra hazardous activities as storage of dynamite, fire started by trains, and upheld New Jersey's statute as to injuries sustained by victims on the ground.

However, with the advent of technical improvements in the design, construction, operation and maintenance of aircraft, the general rule emerged that flying was no longer to be considered ultra-hazardous.²

¹ICAO on NTS <http://api.hq.Faa.gov/cen./3-194.htm>.

² *Southern California Edison Co.v. Coleman*, 150 Cal. App. 2d Supp. 829, 310 P.2d 50435, 4 CCH Avi 17415 (Super. Ct.1957); *Boyd v. White*, 128 Cal. App. 2d 641, 276 P.2d 92, 4

Nevertheless, there are still several decisions in both the federal and state courts in Florida which call the aircraft a dangerous instrumentality. This language usually surfaces in situations involving vicarious liability for an owner of a non-carrier aircraft.³

III. CURRENT PERSPECTIVE

Some states, such as New York, have ownership liability statutes that provide, except as stated, every owner of an aircraft is liable for death or injuries to person or property sustained as a result of the use or operation of the aircraft in the business of the owner or otherwise, by any person using or operating the aircraft with the owner's express or implied permission, in any case where the person using or operating the aircraft, or his estate, would be liable for such death or injuries. (N.Y. Gen. Bus. Law, §251).

For the most part however, liability growing out of the operation of an aircraft conforms generally to the same rules of law applicable to torts on land.⁴ In the absence of a specific statute or regulation specifically applicable to the issue of negligence in the operation of an aircraft, the ordinary rules of negligence apply.⁵

Thus, for the most part the current view is that an aircraft properly handled by a competent pilot exercising reasonable care is not an inherently dangerous instrument. With regard to the issue of negligent entrustment of an aircraft, the general rule today is that a bailor or lessor, who entrusts an aircraft to a bailee pilot is not liable for injury, death, or property damage caused by

CCH Avi 17485 (1st Dist. 1954) (“Properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument.”); *Johnson v. Central Aviation Corp.*, 103 Cal. App. 2d 102, 299 P. 2d 114, 3 CCH Avi 17513 (3d Dist. 1951) (same); *In re Kinsey's Estate*, 152 Neb. 95, 40 N.W.2d 526, 2 CCH Avi 15 (1949) (airplane not inherently dangerous instrument); *Herrick v Brynes*, 1 CCH Avi 369 (1932, NY County Ct.) (Early mid-air collision; aeroplane [sic] held not inherently dangerous); *Johnson v. Dew*, 204 Pa. Super. 526, 205 A. 2d 880, 9 CCH Avi 17362 (1964) (“We cannot agree that with the advances made in the manufacture and use of airplanes, the strict rules for maintenance, inspection and certification that they constitute a highly dangerous instrumentality per se....”); *Foebroke-Hobbes v Airwork, Ltd*, 1 CCH Avi 663 (1937). *Aviation Tort and Regulatory Law*, 2nd ed., by Charles F. Krause and Kent C. Krause; § 1.1.

³*Orefice v. Albert*, 237 So. 2d 142, 11 CCH Avi 17639 (Fla. 1970), conformed to (Fla App D3) 239 So. 2d 46 (an airplane is a dangerous instrumentality under Florida law); *Shattuck v. Mullen*, 115 So. 2d 597, 6 CCH Avi 17713 (Fla. Dist. Ct. App. 2d Dist. 1959).

⁴*Block v. U.S.*, 441 F.2d 741, 11 CCH Avi 18104 (5th Cir. 1971); *Franklin v. U.S.*, 342 F. 2d 581, 9 CCH Avi 17465 (7th Cir. 1965) (helicopter) Calif. Public Utilities Code §21404.

⁵*U.S. v Schultetus*; 277 F.2d 322, 86 A.L.R. 2d 375, 6 CCH Avi 17991 (5th Cir. 1960); *Parker v. James E Grenger, Inc.* 4 Cal.2d 668, 52 P.2d 226, 1 CCH Avi 590 (1935)

the operational negligence of a bailee pilot unless the bailor or lessor knows or should have known that the bailee pilot was incompetent to operate the aircraft or was reckless by nature. This is also the general rule for bailment or loan of automobiles or other powered vehicles.⁶

In *Anderson Aviation Sales Co., Inc. v. Perez*, 19 Ariz App. 422, 508 P.2d 87, the bailor of an aircraft was found potentially liable for the pilot's negligence. The intermediate court found that there was sufficient evidence of negligent entrustment of the bailor to go to the jury based upon any one of the following reasons:

1. The fixed base operator had allowed the rental arrangements of the aircraft to be handled by the receptionist even though the FBO's chief pilot was available and under company policy, should have handled the flight arrangements.
2. There was insufficient checking of the pilot's currency with FAA regulations and no check-out of the pilot for night flying.
3. The pilot was not required by the FBO to file a flight plan before taking off.
4. The FBO failed to notify the pilot of weather conditions over the destination airstrip or that the lights were out at that lonely strip. *Id* at 427.

Thus, the pilot attempted to land during a pitch black night on a field that had no runway lights because of a power failure and crashed into the desert killing himself and 5 passengers. It should be noted that the *Perez* Appellate Court drew a distinction between automobile rentals and aircraft rentals, stating that:

“We must be realistic and comment that an airplane and an automobile are different breeds of cat. What might not be negligence in the rental of a car could be gross negligence in the rental of a plane. There is little room for error in the sky and the consequences of such errors are usually magnified over a similar driver's mistake in an automobile. The skills involved and the consequences of a plane or pilot failure demand more care in the rental of a plane than is required of an automobile.” *Id.* at 426.

In North Carolina, an aviation statute provided that any person who caused or authorized the operation of aircraft would be deemed engaged in its operation. Yet the court found that this statute did not affect the common law of bailment; therefore, the owner-lessor of an aircraft was not liable for the negligence of the renter-pilot absent a showing that the owner-lessor was himself negligent. *Broadway v. Webb*. 462 F.Supp 429 (W.D.N.C. 1977)

A federal court in Texas however, ruled otherwise where the court applied a federal

⁶*Anderson Aviation Sales Co. Inc., v Perez* 19 Ariz. App 422, 508 P.2d 87, 12 Cch Avi 17808 (Div. 1 1973); *Haslcin v Northeast Airways Inc.*, 226 Minn. 210, 123 N.W. 2d 81, 8 CCH Avi 17808 (1963) recognizing that liability could exist if entrusting a chattel [airplane] to another whom the supplier knows, or should know, will be likely, because of his youth or inexperience to use it in a manner involving “unreasonable risk of harm to others whom the supplier should expect to be in the vicinity of its use...”

statute (49 U.S.C. §1301(26)) which provided that any person who authorized the operation of an aircraft in the capacity of an owner would be deemed to be engaged in the operation of aircraft. Thus, in an action for wrongful death of 3 passengers who were killed when a private aircraft was leased by defendant to a student pilot who crashed, the negligence of the student pilot was imputed to the owner-lessor. *Sosa v. Young Flying Service*, 277 F.Supp. 554 (S.D. Tex. 1967) Yet the Court expressed its opinion that its denying defendant lessor's motion to dismiss involved a controlling question of law as to which there was substantial ground for difference of opinion and found that immediate appeal from the order might materially advance the ultimate termination of the litigation.

Plaintiffs in an action brought in the 5th Circuit argued that 49 U.S.C. §1301(26), providing that an owner who authorizes the operation of an aircraft is deemed to be engaged in the aircraft's operation, established liability on the part of a non-operating owner. They also based an argument upon 49 U.S.C. §1404 which was designed to protect owners of a security interest in aircraft from liability. The plaintiffs stated that since 49 U.S.C. §1404 limited the exemption from liability to those specified, that is, to persons holding a security interest in aircraft and lessors of aircraft for thirty days or more, bailors were not exempted from liability and came within the ambit of Section 1301(26). While the Fifth Circuit did not question that under its commerce clause powers Congress could pre-empt state law with regard to liability for injuries resulting from air crashes, it was not convinced that Congress clearly indicated an intent to supersede state laws of bailment as related to the operation of aircraft. The Court thus rejected plaintiffs' argument and held that 49 U.S.C. §1301(26) was not intended to alter state laws of vicarious liability. *Hayes v Morgan* 221 F2d 481 (5th Cir. 1955)

In Alabama, a federal court found that under Alabama law's standard of "negligent and wanton conduct", the airplane lessor that leased the plane to a student pilot who crashed into plaintiffs' house due to fuel exhaustion was not directly liable to the homeowners where there was no evidence that the lessor may have acted negligently or wantonly in maintaining the aircraft or fueling the aircraft or in entrusting it to the student pilot. *Brown v. Astron Enterprises, Inc.*, 989 F.Supp 1399 (N.D. Ala. 1997)

Nor was a flying school owner in California liable for damage caused by a student pilot absent evidence that the owner knowingly permitted an incompetent person to use the aircraft. *Johnson. v. Central Aviation Corp.* (1951) 103 Cal.App.2d 102, 229 P.2d 114 (3rd Dist. 1951).

Yet in 1954, there was an attempt, ultimately unsuccessful, in California to impose a theory of strict liability upon one bailing or leasing an aircraft to a student pilot. Two reasons given in support of this movement were (1) public policy, and (2) strict liability should be the rule when the lessee is a student pilot because a student pilot is inherently inexperienced and/or incompetent.⁷

⁷*Aviation Tort and Regulatory Law* 2d Ed., Charles F . Krause and Kent C. Krause, West Group Vol. 2, pg 14:8

This movement arose in part as a reaction when a student pilot flew a rental airplane into plaintiff's house while attempting a forced landing after his aircraft's engine sputtered and the plane continued to lose altitude.⁸

The intermediate court rejected its appellant's contention that the lessor of the aircraft should be held strictly liable for the crash. It stated:

"The basic question involved is whether renting airplanes to a qualified instructor when it is foreseeable that a student pilot will fly the plane is engaging in such an extra hazardous occupation that the courts should hold that the doctrine of strict liability should be applied... So far as the liability of the owner of a plane who rents it to another is conceived, the general prevailing view is that in the absence of statute or in the absence of an agency relationship, the bailor is not only not absolutely liable for the acts of the bailee, but is not liable for the negligence of the bailee, at least in the absence of knowledge on the part of the bailor that the bailee is incompetent or reckless... Normally a bailor is not liable to third persons for the for the bailee's acts causing damage, even negligent acts, in the use of the bailed article... but to this rule there is an exception... that a bailor is liable for the negligent acts of the bailee when he entrusts a vehicle to a person known by him to be incompetent or reckless... Appellant contends that permitting a plane to be flown solo by a student pilot comes within such exception. In other words, that renting a plane to a competent flying instructor knowing that instructor intends to rent it to a student pilot, amounts to bailing the chattel to an inexperienced and therefore reckless or incompetent person... Such reasoning is not convincing. It is predicated upon the assumption that it is a logical inference that a student pilot is per se incompetent, reckless and inexperienced regardless of the care he might exercise. We cannot say as a matter of law, that all student pilots are incompetent, because such is not the fact. It cannot even be inferred that student pilots, under competent instruction, are more prone to accidents, or cause more accidents than regular pilots.." 128 CA2d at 648 (emphasis added)

Yet in spite of this holding by the California Court of Appeals, and its reasoning that an inexperienced pilot is not per se reckless or incompetent, another California Court of Appeals, 45 years later, in *White v Inbound* (1999) 69 Cal.App.4th 910, 82 Cal.Rptr.2d 71, found basically the opposite. A fairly inexperienced pilot was deemed incompetent to fly into and out of the airport where the crash occurred and the lessor was deemed negligent for having leased its aircraft to an incompetent pilot.

⁸*Boyd v. White* 128 Cal.App.2d 641, 276 p. 2d 92, 4CCH Avi 17485 (1st/Dist. 1954)

Plaintiffs argued that although decedent pilot Meier had satisfied FAA requirements to obtain a pilot's license, Meier "was not competent" to fly an aircraft into and out of South Lake Tahoe airport. (69 Cal.App.4th at 919). Plaintiffs' expert said that Meier was "desensitized" to the conditions at South Lake Tahoe airport and lacked the maturity and judgment to deal with these conditions because of his inexperience. Basically, therefore, an inexperienced pilot such as Meier, with 75 hours of flying experience of which only 23 hours were "solo", can be automatically considered "incompetent" depending upon where he or she chooses to fly.

White's finding of bailor liability presents many interesting issues including:

1. Who determines pilot competency? The FAA? The fixed base operator? Or the jury?
2. What are the guidelines and standards for pilot competency?
3. By what standards does an aircraft supplier determine flight risks?

IV. WHAT IS AN FBO TO DO?

With regard to who determines whether a pilot is competent, typically a pilot is deemed "competent" as a matter of law by virtue of possessing a current and valid pilot's license. Pilots are required to comply with the FARs (Federal Aviation Regulations) and to be familiar with the information contained in pertinent FAA publications such as the AIM (Aeronautical Information Manual) and FAA Advisory Circulars. 14 C.F.R. §61.105(a); *Crossman v. United States*, 378 F. Supp. 1312 (D. Or. 1974).

The FARs require each pilot in command to become familiar with all available information concerning that flight before beginning that flight. Specifically, pilots are required to obtain weather reports and weather forecasts as well as other relevant information concerning the flight including alternatives available if the planned flight cannot be completed. 14 C.F.R. § 91.103. Pilots are trained to remain vigilant throughout the flight and are charged with knowledge of those facts material to the safe operation of the flight. *Associated Aviation Underwriters v. United States*, 466 F. Supp. 674 (N.D. Tex. 1978).

By regulatory mandate, the final decision with respect to the operation of an aircraft rests with the pilot-in-command. The pilot-in-command of an aircraft is directly responsible for, and has the final authority as to, the operation of that aircraft. 14 C.F.R. § 91.3(a).

Clearly this makes sense. Who but the pilot is better able to determine pilot competency? It should be pointed out that the concept of a pilot's "competence" in the world of aviation is always a moving target, even for highly experienced pilots. Thus, the pilot is deemed pursuant to the FARs best situated to determine the risks and evaluate his or her level of competency to handle those risks. Is it fair or reasonable to assume that the supplier of the aircraft is as well or better situated to determine the relative riskiness of the proposed mission? If so, what guidelines is the supplier to follow and who sets them?

As almost every pilot knows, crashes seldom occur due to one factor. Usually a combination of things go wrong simultaneously or in a series that cause a crash. Flying in and

out of a high altitude airport such as South Lake Tahoe can be very simple and straightforward or it can be highly technical and dangerous, depending on the specific circumstances of the aircraft involved, the weather and even the runway in use.

Had the same pilot in the *Inbound* case chosen to try to land at a sea-level airport, not surrounded by mountains, on a rainy day with a heavy crosswind, he may also have crashed. Would the aircraft's supplier have been deemed negligent in those circumstances as well? If not, why not? The point is, merely knowing a pilot's destination is a high altitude airport does not mean that a reasonable bailor, knowledgeable about aviation, would automatically conclude that a novice pilot such as Meier is not competent to pilot the aircraft.

From the time one begins pilot training, and through the process of taking the FAA mandated written, oral and practical exams, a new pilot is taught over and over that simply obtaining a pilot's license does not mean that one is a "competent" pilot in all situations. Arguably, a new, low-time pilot does not have the skill to do many things with his airplane including landing in a strong crosswind, negotiating very busy airspace and evaluating marginal weather conditions. Does this mean that an aircraft supplier/bailor is negligent if he or she rents the aircraft to any low-time pilot in any of these circumstances? If so, what is the value of a pilot's certificate? Is its worth dependent upon who is leasing the aircraft?

Each individual flight is completely different from the next, due to the specifics of the weather, airplane loading and performance, air traffic, pilot alertness or fatigue, passenger distractions, and so on so that it is impossible for a supplier of an aircraft to make a reasonable *a priori* judgment regarding the difficulty or risk of the flight, relative to the perceived "competence" of the pilot. If airplane suppliers are going to be held to this standard, they must know everything about the flight from start to finish. Simply knowing the pilot's flying hours and destination airport is not enough upon which to base an opinion that a trip should not be made by any particular pilot. Furthermore, requiring the suppliers of aircraft to gather sufficient information about the flight prior to supplying the aircraft would place an onerous and unreasonable burden upon them. In any event, who or what would determine what information should be gathered and what facts would preclude a rental?

Clearly the *Inbound* pilot violated one of the most basic and fundamental FAA regulations—namely, the pilot in command must familiarize himself with *all aspects of the planned flight, including the anticipated weather, the performance and condition of the aircraft to be used, all airports of intended takeoff and landing, and any flight restrictions along the planned routing.* 14 C.F.R. § 91.103.

This pilot's mistakes included his lack of familiarity with the "hot & high" climb performance of his aircraft and the recommended high altitude take-off procedures with respect to using flaps, or not on takeoff. All of this information by law is specified in the Pilot's Operating Handbook (POH) which is required to be present in the aircraft at all times. It is the pilot's basic and fundamental responsibility to be familiar with the contents of the POH *before* he flies any airplane, and it is his sole responsibility to check the performance charts before

every flight.

It is likely that the *White* jury weighed heavily the fact that Inbound had violated its own policy of requiring a pilot to complete a “high altitude checkout” before being permitted to rent an aircraft for a flight to a “high altitude” airport. However, high altitude checkouts are intended to *verify* that pilots have the basic knowledge and skills necessary to fly to high altitude airports, not to *teach* pilots what they should already know. High altitude airport decision making is a prominent part of the curriculum every student pilot goes through and it is tested in the FAA written and oral exams. The actual practical skills are usually not tested as it would be impractical to do so but the actual physical flying skills employed at a high altitude airport are really not any different than those used at low altitude. Competent high altitude airport flying is really about judgment and decision making.

For example, much was made in the *White* case of the flap setting used by decedent pilot. However, FAA Regulations are very clear about matters such as flap settings. The Pilot’s Operating Handbook (POH) for each specific aircraft is the definitive source for all pertinent information regarding such items as flap settings, loading and engine leaning procedures for various operations. It is the pilot-in-command’s sole responsibility to study and understand the complete contents of an airplane’s POH *before* he flies that airplane. Operating any aircraft in a manner inconsistent with that aircraft’s POH is a serious violation of FAA regulations and constitutes grounds for revocation of flying privileges. (14 C.F.R. §91.9(a)) This is one of the most fundamental rules of piloting and every pilot, no matter how green, knows this. There would be no need for a “high altitude checkout” to teach a pilot that he had better well read the POH and understand it before flying.

It is likely that the industry standard in the aircraft rental business mentioned in *White* requiring a pilot to have a “high altitude checkout” before being permitted to rent an aircraft came about because insurers required it for additional protection. Low altitude airports are more forgiving to pilots who make bad judgments. However, it is arguably more prudent for suppliers of aircraft to require busy airspace checkouts or cross-wind landing checkouts and so on. Because it is impossible to have a “checkout” for each and every conceivable situation, the supplier must draw the line somewhere.

As a practical matter, the burden in *White* was on the pilot to comply with Inbound’s policy of a high altitude checkout. As a matter of course, Inbound did not check each and every pilot’s file prior to leasing him or her an aircraft. Because the policy was in place to protect the pilot, the pilot arguably should bear full responsibility for complying with it.

V. CONCLUSION

In conclusion, the issue of determining a bailor’s liability is, like the issue of determining a pilot’s competency, a moving target. It depends upon numerous factors, most of which are better evaluated in hindsight, including:

(a) Will the bailor's conduct be considered a substantial factor which contributed to the accident?

(b) Was the accident reasonably foreseeable by defendant or any of defendant's agents in any respect and under any theory or claim?

For example, a pilot's failure to familiarize him or herself with the aircraft's POH prior to taking off from a high altitude airport is not reasonably foreseeable by any bailor, but rather results from a pilot's deliberate breach of FAA regulations.

(c) Does the bailor have a written policy in place to protect bailees and their passengers which the bailor routinely fails to enforce?

It appears that juries routinely consider written policies and procedure and the breach of the same when determining liability. Therefore, if a fixed base operator has written policies, it is incumbent upon the operator to enforce them.

Finally, as an historical footnote, it should be noted that Wilbur crashed his aircraft but there is no record that he sued Orville for negligent entrustment.

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