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Jeanne Philbin, J.D.

Aviation

VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

A. General Principles [§ § 108-159]

4. Defenses, Generally [§ § 141-146]

8A Am Jur 2d AVIATION § 142

§ 142 Negligence of passenger or guest

The general rules of contributoryn94 or comparativen95 negligence, as they have been adopted within a particular jurisdiction, apply with regard to recovery of damages for the injury or death of a guest or passenger in an aircraft.n96 Thus, it is the duty of a guest or passenger in an aircraft to exercise ordinary care for his own safety,n97 and to warn the pilot of impending danger if reasonably necessary, but it is not part of the passenger's duty in the exercise of ordinary care to keep a vigilant lookout for other planes.n98 Also, a guest's consent to the pilot's action in landing on an unsafe place is not negligence barring or diminishing recovery where the guest knew little about flying an aircraft.n99

Ordinarily, the question of the negligence of the plaintiff or his decedent, injured or killed in an aviation accident, is a question for the jury,n1 and this is true with regard to actions to recover damages for the injury or death of a passenger or guest in an aircraft.n2 However, one who voluntarily becomes a passenger in a plane operated by one visibly intoxicated has been held to be guilty of negligence as a matter of law.n3

In most of the cases involving the question of an air carrier's liability to passengers injured while alighting from aircraft, the carrier has contended that the passenger's negligence contributed to, or was the cause of, the injury complained of. However, the courts have generally held that this question was for the jury.n4 In determining whether a passenger sustaining injuries while alighting from an aircraft has been guilty of negligence as a matter of law, the experience of the passenger as an air traveler, with knowledge of the conditions and dangers presented in alighting, is an important element to be considered.n5

The negligence of a pilot, resulting in the crash of a plane during takeoff, cannot be imputed to a gratuitous guest.n6

FOOTNOTES:

n94 See 57A Am. Jur. 2d, Negligence § § 847 et seq.

n95 See 57B Am. Jur. 2d, Negligence § § 1128 et seq.

n96 Pappas v. Pieper, 325 S.W.2d 789, 75 A.L.R.2d 850 (Mo. 1959) (guest's contributory negligence was question for jury); Grimm v. Gargis, 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957) (guest held not guilty of contributory negligence as a matter of law); Adair v. Valley Flying Service, 196 Or. 479, 250 P.2d 104 (1952).

A person in an airplane cockpit has a duty not to disrupt cockpit discipline by unwarranted behavior. McCullough v. U. S., 538 F. Supp. 694 (E.D.N.Y. 1982).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 4.

Air carrier's liability for injury to passenger from changes in air pressure, 75 A.L.R. 2d 848.

Liability for injury to guest in airplane, 40 A.L.R. 3d 1117 § 13.

Answer alleging contributory negligence of intoxicated passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 239.

Answer alleging that negligence or contributory negligence was proximate cause of passenger's injury. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 272.

Instructions to jury as to contributory negligence of passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 241, 242.

n97 Prashker v. Beech Aircraft Corp, 258 F.2d 602, 76 A.L.R.2d 78 (3d Cir. 1958), cert. denied, 358 U.S. 910, 79 S. Ct. 236, 3 L. Ed. 2d 230 (1958) (due care for his own safety); Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950); Haley v. U.S., 654 F. Supp. 481 (W.D.N.C. 1987), judgment aff'd, 829 F.2d 1120 (4th Cir. 1987) (passenger who was also pilot was negligent when plane took off in adverse weather conditions, but not the proximate cause of the accident).

n98 Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950).

n99 Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952).

n1 § 208.

n2 Freeman v. U. S., 509 F.2d 626 (6th Cir. 1975); American Airlines, Inc. v. Marchant, 249 F.2d 612, 75 A.L.R.2d 843 (1st Cir. 1957); Pappas v. Pieper, 325 S.W.2d 789, 75 A.L.R.2d 850 (Mo. 1959).

Air carrier's liability for injury to passenger from changes in air pressure, 75 A.L.R. 2d 848.

Interference with airplane pilot or controls as negligence or contributory negligence, 75 A.L.R. 2d 858.

n3 Adair v. Valley Flying Service, 196 Or. 479, 250 P.2d 104 (1952).

Answer -- Defense -- Contributory negligence -- Intoxication of pilot known to passenger prior to flight. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 239.

n4 Brown v. American Airlines, Inc., 244 F.2d 128, 61 A.L.R.2d 1108 (5th Cir. 1957); Stewart v. Loughman, 367 Pa. 486, 80 A.2d 715 (1951).

Liability of air carrier to passenger injured while boarding or alighting, 61

A.L.R. 2d 1113 § 4.

n5 Brown v. American Airlines, Inc., 244 F.2d 128, 61 A.L.R.2d 1108 (5th Cir. 1957); Stewart v. Loughman, 367 Pa. 486, 80 A.2d 715 (1951); Curtiss-Wright Flying Service v. Williamson, 51 S.W.2d 1047 (Tex. Civ. App. El Paso 1932), writ refused, (Nov. 28, 1932); Cape Charles Flying Service v. Nottingham, 187 Va. 444, 47 S.E.2d 540 (1948).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 4.

n6 Israel v. U S, 247 F.2d 426 (2d Cir. 1957) (disagreement recognized on other grounds by, Champlain Enterprises, Inc. v. U.S., 957 F. Supp. 26 (N.D.N.Y. 1997)).

SUPPLEMENT:

Statutes

49 U.S.C.A. § 44701 note, added in 1998, provides for a decision on whether external defibrillators should be carried on aircraft. It also limits liability for damages arising out of attempts to assist a passenger in an inflight medical emergency, and liability for one passenger rendering assistance to another.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
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3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
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8A Am Jur 2d AVIATION § 143

§ 143 Assumption of risk

One who becomes a passenger on the plane of an air carrier necessarily takes upon himself all the usual and ordinary perils incident to airplane travel.n7 That is, an airplane passenger for hire necessarily takes upon himself all the usual and ordinary perils incident to airplane travel and the risk of those dangers which cannot be averted by the carrier by the exercise of the degree of care which the law requires.n8 However, the mere undertaking of a flight in a modern aircraft free from mechanical defects, where no dangerous conditions known or reasonably to be apprehended are shown, does not provide a sufficient evidentiary basis upon which to submit assumption of risk.n9 The passenger does not assume the risk that the plane may be improperly, carelessly, or negligently operated.n10 Commercial air passengers do not assume the risk of injury from a repairer's negligence merely by purchasing an airline ticket.n11 A guest in an airplane does not undertake any risks except obvious and apparent ones, and does not assume the risk of concealed defects in the plane nor of the pilot's negligence or incompetence.n12

In the absence of knowledge to the contrary, one invited to ride in an airplane has been held entitled to assume that his host has the requisite knowledge and skill to operate the conveyance.n13 Accordingly, an airplane passenger assumes the risk of the pilot's lack of nighttime flying experience only if he has knowledge thereof, and of its significance.n14

One riding in a plane assumes the risk that storms may be encountered and that the plane must of necessity be brought to earth under conditions of weather, lights, and landing field that involve unusual risk and dangers in landing, provided the meeting of the risk is not in any way due to the negligence of the carrier. But the principle applies only to sudden and unavoidable storms and weather conditions; storms which can be expected and avoided, and the extent of which can be calculated, do not come within the meaning of the rule.n15

An aviation instructor has been held to have assumed the risk of the action taken by a student in interfering with and freezing to the controls, since the instructor knew and appreciated the risk involved in flying a dual-control

airplane with a student, and voluntarily exposed himself to injury.n16 On the other hand, a student pilot without training in meteorology does not assume the risk of a downdraft causing a crash.n17

FOOTNOTES:

n7 Allison v. Standard Air Lines, 65 F.2d 668 (C.C.A. 9th Cir. 1933).

A pilot who was a passenger/copilot of plane was subject to assumption of risk. Osburn v. Pilgrim, 246 Ga. 688, 273 S.E.2d 118 (1980).

Air carrier as common or private carrier, and resulting duties as to passenger's safety, 73 A.L.R. 2d 346 § 4[a].

Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew, or mechanic, 13 A.L.R. 2d 1137.

Answer -- Defense -- Risk of injury assumed by aircraft passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 231.

Answer alleging assumption of risk by nonpaying passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation, Form 282.

Answer -- Defense -- Risk of injury assumed by aircraft passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 230.

Instruction to jury -- Risks assumed -- By paying aircraft passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 234.

Instruction to jury -- Risks assumed -- By guest. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 235.

n8 Wilson v. Colonial Air Transport, 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329 (1932).

n9 Lange v. Nelson-Ryan Flight Service, Inc., 263 Minn. 152, 116 N.W.2d 266 (1962), cert. denied, 371 U.S. 953, 83 S. Ct. 508, 9 L. Ed. 2d 500 (1963)

Where passenger in plane was unaware of any particular danger and did not consent to harm, he could not be held to have assumed the risk. Palmer v. Krueger, 897 F.2d 1529, 30 Fed. R. Evid. Serv. (LCP) 297 (10th Cir. 1990), reh'g denied, (Apr. 3, 1990).

A passenger who is a diplomat does not assume the risk of being murdered by terrorists. Stanford v. Kuwait Airways Corp., 648 F. Supp. 1158 (S.D.N.Y. 1986).

n10 McCusker v. Curtiss Wright Flying Service, 269 Ill. App. 502 (1st Dist. 1933); Messmer v. Ker, 96 Idaho 75, 524 P.2d 536 (1974).

n11 Lopez v. Resort Airlines, 18 F.R.D. 37 (S.D.N.Y. 1955) (applying Kentucky law).

n12 McCutcheon v. Larsen, 134 Mont. 511, 333 P.2d 1013, 74 A.L.R.2d 622 (1959) (trial court properly instructed that one who takes a plane ride for pleasure as a guest of the pilot assumes all ordinary risks incident to the undertaking except negligence of the pilot); Bruce v. O'Neal Flying Service, 231 N.C. 181, 56 S.E.2d 560, 12 A.L.R.2d 647 (1949).

But where the plaintiff's decedent was invited to go along on a "test" flight, being a pilot himself, he was thoroughly aware of the danger of the

undertaking and must have known that the flight was for the purpose of ascertaining the capabilities of the plane for regular service, the implication being that it was not then known to anyone whether or not the plane was in such condition that it would respond to its expected functions. Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865 (D. Wyo. 1937).

Liability for injury to guest in airplane, 40 A.L.R. 3d 1117 § 12.

n13 Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 46 A.L.R.2d 1038 (9th Cir. 1954).

n14 Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 46 A.L.R.2d 1038 (9th Cir. 1954).

Liability for injury to guest in airplane, 40 A.L.R. 3d 1117 § 12.

n15 Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952).

n16 Massey v. U.S., 198 F.2d 359 (4th Cir. 1952) (applying Alabama law).

Interference with airplane pilot or controls as negligence or contributory negligence, 75 A.L.R. 2d 858.

Pilot's contributory negligence or assumption of risk as defense in action for his injuries or death resulting from airplane accident, 35 A.L.R. 3d 614 § 6[b].

n17 Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952).

Answer -- Defense -- Risks assumed by student pilot. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 232, 233.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Flight Training;
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A.L.R. Index: Navigation Instruments: Pilot;
A.L.R. Index: Propellers;
A.L.R. Index: Warsaw Convention
3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
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8A Am Jur 2d AVIATION § 144

§ 144 Sudden emergency; errors of judgment

It is a general rule that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence, provided that no wrongful, reckless, wanton, or negligent conduct on his part contributed to cause the emergency, and he exercised in the emergency the care of a reasonably prudent individual under like circumstances.n18 This rule is applicable to injuries resulting from the operation of aircraft,n19 and an air carrier is not liable for an error of judgment of its pilot which does not constitute positive negligence on his part in exercising such judgment.n20 If the pilot in charge of the airplane, without fault on his part, was suddenly confronted by a condition of imminent danger, then the law does not require him to exercise any higher degree of care than would have been exercised by a reasonably prudent person under the same or similar circumstances, and if there was more than one course of conduct open to him, the law will not hold him negligent because of an unwise choice in pursuing the course which he did, or for an error of judgment on his part.n21 Liability may be incurred, however, if the pilot, by his negligence and careless conduct, has created a situation requiring the formation of a judgment and then errs in the exercise thereof.n22

FOOTNOTES:

n18 See 57A Am. Jur. 2d, Negligence § § 213 et seq.

n19 Chapman v. U.S., 194 F.2d 974 (5th Cir. 1952), cert. denied, 344 U.S. 821, 73 S. Ct. 19, 97 L. Ed. 639 (1952); Palmer v. Krueger, 897 F.2d 1529, 30 Fed. R. Evid. Serv. (LCP) 297 (10th Cir. 1990), reh'g denied, (Apr. 3, 1990).

However, the rule can have no application when a crash occurred in making a landing not required by an emergency. McCusker v. Curtiss Wright Flying Service, 269 Ill. App. 502 (1st Dist. 1933).

n20 Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960); Murphy v. Neely, 319 Pa. 437, 179 A. 439 (1935) (cutting off ignition during fall of aircraft, rather than attempting to use engine to regain control of plane).

n21 Palmer v. Krueger, 897 F.2d 1529, 30 Fed. R. Evid. Serv. (LCP) 297 (10th Cir. 1990), reh'g denied, (Apr. 3, 1990).

Answer -- Defense -- Sudden emergency. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 225.

Instruction to jury -- Sudden emergency -- Duty of care of pilot. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 226.

n22 Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
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A. General Principles [§ § 108-159]

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8A Am Jur 2d AVIATION § 145

§ 145 Unavoidable accident; act of God

It is well known that aircraft accidents may happen notwithstanding the fact that all the parties involved exercised proper care under the circumstances,n23 and, in accordance with the general rule that a carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard, and not in any degree caused by negligence,n24 an air carrier of passengers for hire is not liable for an injury to, or the death of, a passenger resulting from an unavoidable or inevitable accident, unforeseen events, and the like, not attributable in any way to any negligence on the part of the carrier.n25 An air carrier of passengers for hire is not liable for injury to, or the death of, a passenger caused by some overwhelming natural agency over which it has no control, or by an act of God.n26 If a natural elemental force was involved in an accident and the evidence supports the defendant's theory that the accident was caused by an act of God, the defendant is entitled to an instruction in that respect.n27 An act of God is not ipso facto a defense, however, as it may constitute negligence to fail to avoid its known or foreseeable consequences. For instance, although in some instances, air turbulence has been termed an act of God, it has been generally recognized that it may constitute negligence of an airline or its pilot to operate an aircraft without taking precautions to guard against the effect of air turbulence or weather conditions which are known to be dangerous or when it is known that adverse flying conditions are apt to be encountered.n28

FOOTNOTES:

n23 § 108.

n24 See 14 Am. Jur. 2d, Carriers § 914.

n25 U.S. v. Douglas Aircraft Co., 169 F.2d 755 (C.C.A. 9th Cir. 1948); Allison v. Standard Air Lines, 65 F.2d 668 (C.C.A. 9th Cir. 1933); Curtiss-Wright Flying Service v. Williamson, 51 S.W.2d 1047 (Tex. Civ. App. El Paso 1932), writ refused, (Nov. 28, 1932).

Air carrier as common or private carrier, and resulting duties as to

passenger's safety, 73 A.L.R. 2d 346 § 4[a].

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 2.

n26 Allison v. Standard Air Lines, 65 F.2d 668 (C.C.A. 9th Cir. 1933); Seaman v. Curtiss Flying Service, 231 A.D. 867, 247 N.Y.S. 251 (1930); Keldsen v. Brimmer, 79 Wyo. 152, 331 P.2d 825, 75 A.L.R.2d 859 (1958).

Answer -- Defense -- Act of God. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 228.

As to what is an act of God, generally, see 1 Am. Jur. 2d, Act of God § § 1 et seq.

n27 Keldsen v. Brimmer, 79 Wyo. 152, 331 P.2d 825, 75 A.L.R.2d 859 (1958).

Instruction to jury -- Liability for damages caused by Act of God. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 229.

n28 § 163.

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 146

§ 146 Lapse of time for giving notice of claim or bringing action

Provisions in passenger tickets exempting a carrier from liability upon failure to notify it of a claim against it within a stipulated period of time, even though such time is considerably less than the limitation period upon which the right of action is founded, have been held valid in airplane passenger transportation cases in the United States.n29 Provisions in passenger tickets of air carriers that such tickets are issued in accordance with tariff regulations, which do not appear on the ticket but which are duly posted at the place of business of the carrier and other places provided, have been held effectual as notice of time limitations for filing claim of suit.n30 A passenger is not bound by the limitations provision contained in a tariff, notwithstanding the ticket contained a notation that it was sold subject to tariff regulations, where the tariff's provision as to time for bringing the action is not authorized by statute.n31 And time limitations contained in an air carrier's filed tariff have been held not applicable to accidents occurring in an airport which are not related to air transportation.n32

FOOTNOTES:

n29 Herman v. Northwest Airlines, 222 F.2d 326 (2d Cir. 1955), cert. denied, 350 U.S. 843, 76 S. Ct. 84, 100 L. Ed. 751 (1955) (clause in airline passenger's ticket limiting time for bringing suit for personal injuries valid until deemed otherwise by Civil Aeronautics Board); Indemnity Ins. Co. of North America v. Pan Am. Airways, 58 F. Supp. 338 (S.D.N.Y. 1944) (30-day limitation provision in contract of passage was held effective as against insurance carrier of passenger, which was suing as assignee of the right of action); Sheldon v. Pan American Airways, 190 Misc. 537, 74 N.Y.S.2d 578 (Sup. Ct. 1947), judgment aff'd, 272 A.D. 1000, 74 N.Y.S.2d 267 (1st Dep't 1947) (30-day limitation was not in conflict with Warsaw Convention).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n30 Wilhelmy v. Northwest Airlines, 86 F. Supp. 565 (W.D. Wash. 1949).

In Glenn v. Compania Cubana de Aviacion, S.A., 102 F. Supp. 631 (S.D. Fla. 1952), however, it was held that the rules and regulations tariff applicable to an air carrier and requiring notice of claim within 30 days after injury is no defense in a death action where the notice requirement is not set forth on the face of the ticket.

n31 Turoff v. Eastern Airlines, 129 F. Supp. 319 (N.D. Ill. 1955); Bernard v. U. S. Aircoach, 117 F. Supp. 134 (S.D. Cal. 1953); Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954) (declined to follow by, Kantonides v. KLM Royal Dutch Airlines, 802 F. Supp. 1203 (D.N.J. 1992)).

n32 See § 102.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
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A. General Principles [§ § 108-159]

5. Limitation of Liability for Personal Injury or Death [§ § 147-159]

a. In General [§ § 147, 148]

8A Am Jur 2d AVIATION § 147

§ 147 Generally

In accordance with the general rule in this country that, apart from any statutory provisions to the contrary, any contract purporting to exempt a common carrier of persons from liability for the negligence of itself or its servants to a passenger carried for compensation is void as being against public policy,n33 a common carrier by air cannot, by contract, limit its liability for personal injuries to its passengers, and any such attempted limitation is contrary to public policy and void.n34 Accordingly, a limitation of its liability in the ticket sold a passenger by an air carrier does not preclude a recovery of damages in excess of the limitation for the passenger's death in an airplane crash caused by the carrier's negligence.n35 It has been held, however, that a condition in an airline employee's pass, stating that the airline would not be liable for loss caused by negligence, relieved the airline of liability, on the ground of ordinary negligence, for the death of the employee in a plane crash, but did not affect its liability for gross or wanton negligence.n36

FOOTNOTES:

n33 See 14 Am. Jur. 2d, Carriers § 942.

n34 Curtiss-Wright Flying Service v. Glose, 66 F.2d 710 (C.C.A. 3d Cir. 1933), cert. denied, 290 U.S. 696, 54 S. Ct. 132, 78 L. Ed. 599 (1933); Allison v. Standard Air Lines, 65 F.2d 668 (C.C.A. 9th Cir. 1933); Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n35 Curtiss-Wright Flying Service v. Glose, 66 F.2d 710 (C.C.A. 3d Cir. 1933), cert. denied, 290 U.S. 696, 54 S. Ct. 132, 78 L. Ed. 599 (1933); Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935).

Limitation of liability of air carrier for personal injury or death, 91

A.L.R. Fed. 547.

n36 Braughton v. United Air Lines, Inc., 189 F. Supp. 137 (W.D. Mo. 1960).

Generally, as to the right of a carrier to exempt itself from liability for injury to a gratuitous passenger sustained as a result of its negligence, see 14 Am. Jur. 2d, Carriers § § 946 et seq.

SUPPLEMENT:

Cases

Disabled airplane passenger was not entitled to punitive damages in action against airline to recover for emotional distress she suffered as result of failure of airline employees to aid her in boarding and deplaning airplanes, even if punitive damages were allowed under Air Carrier Access Act (ACAA), since employees' conduct was not wanton or malicious. Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
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A.L.R. Index: Warsaw Convention
3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
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Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557;
Airline Passenger Death Cases, 8 Am. Jur. Trials 173;

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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

A. General Principles [§ § 108-159]

5. Limitation of Liability for Personal Injury or Death [§ § 147-159]

a. In General [§ § 147, 148]

8A Am Jur 2d AVIATION § 148

§ 148 Limitation by statute

Under the wrongful death statutes of some states, the amount of recovery in cases within the scope of the statute is limited,n37 but where a plane crash or accident occurs in such a state, and the action is brought in another jurisdiction, the application of the limitation depends upon the view followed in the forum state. Thus, where choice-of-law considerations are involved, the statutory limitation on damages in the state where the crash or accident occurred would be applied only in those jurisdictions adhering to the traditional "lex loci delicti" rule.n38 The limitation would not govern the amount of recovery in those jurisdictions which have departed from strict application of the traditional "place of wrong" rule in favor of a more flexible approach which has been termed, inter alia, the "most significant relationships" test.n39 In this regard, where the issue is the measure of damages, the controlling law should be the law of the place of dominant contacts and a superior claim for the application of its law.n40 Where such a statute is applied in an action against the United States under the Federal Tort Claims Act for the death of an airplane passenger, the limitation governs the recovery.n41

Since under maritime law, a limitation of liability for the wrongful death of a passenger in a "vessel" has been established by statute,n42 the question whether a particular type of aircraft comes within the statutory description of a "vessel" has arisen. The question has been answered in the negative, making the liability limitations of maritime law inapplicable to airplane accidents occurring over the sea.n43

FOOTNOTES:

n37 See 22A Am. Jur. 2d, Death § § 217, 218, 231.

n38 § 110, 111.

n39 In re Air Crash Disaster at Boston, Massachusetts on July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975); Griffith v. United Air Lines, Inc., 416 Pa. 1,

203 A.2d 796 (1964).

n40 Gordon v. Eastern Air Lines, Inc., 391 F. Supp. 31 (S.D.N.Y. 1975), wherein the court stated, however, that New York policy is to protect its citizens against unjust foreign laws not to enhance their recovery by application of a more favorable foreign law, and held that in a wrongful death action which was originally brought in a New York state court, but removed to federal court, New York law was applicable on the issue of damages rather than Florida law, and that the trial court properly granted defendant's motion to strike part of the damages clause which demanded compensation for loss of society, companionship, love, and affection, where the plaintiff's decedent had been a New York resident, his estate was pending in New York, the widow and two children were residents of New York, the decedent had purchased a round trip ticket in New York, the fatal flight originated in New York, and the only contacts with Florida were that the accident occurred there and that the defendant's principal place of business was there.

See also Junco v. Eastern Air Lines, Inc., 399 F. Supp. 666 (S.D.N.Y. 1975), aff'd, 538 F.2d 310 (2d Cir. 1976), holding that in a wrongful death action for the benefit of the surviving infant of New York domiciliaries who were killed in an airplane crash in Florida, New York law applied to exclude any claim for damages based on mental anguish and grief.

n41 Richards v. U. S., 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

n42 See 70 Am. Jur. 2d, Shipping § 488.

n43 Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D. Phil. I. 1977); Noakes v. Imperial Airways, 29 F. Supp. 412 (S.D.N.Y. 1939); Dollins v. Pan-American Grace Airways, 27 F. Supp. 487 (S.D.N.Y. 1939).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

SUPPLEMENT:

Statutes

49 U.S.C.A. § 44701 note, added in 1998, provides for a decision on whether external defibrillators should be carried on aircraft. It also limits liability for damages arising out of attempts to assist a passenger in an inflight medical emergency, and liability for one passenger rendering assistance to another.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
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A.L.R. Index: Warsaw Convention

3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
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Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
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A. General Principles [§ § 108-159]

5. Limitation of Liability for Personal Injury or Death [§ § 147-159]

b. Liability and Limitations under Warsaw Convention [§ § 149-159]

8A Am Jur 2d AVIATION § 149

§ 149 Generally

The liability of air carriers for personal injuries to passengers in international air transportation is generally governed by rules promulgated in an international treaty known as the "Warsaw Convention,"n44 to which the United States is a party.n45 The fundamental purpose of the Warsaw Convention is to establish a uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of transportation and the substantive law applicable to such claims,n46 and to limit potential liability.n47

Under the Convention, an air carriers are absolutely liable up to a preset monetary ceiling for any accident in which a passenger suffers bodily injury or death, as long as the accident took place on board the aircraft or in the process of any of the operations of embarking or disembarking.n48 The Convention limits the liability of the carrier for each passenger to the sum of 125,000 francs,n49 unless the carrier and passenger by special contract agree to a higher limit of liability,n50 or unless it can be established that the carrier has been guilty of "willful misconduct."n51 The Convention contains a two-year time limitation for bringing suit,n52 and also absolves the carrier from liability upon a showing of due care on its part.n53

FOOTNOTES:

n44 Op Atty Gen: 49 Stat. 3000; 49 USCA § 40105 note.

n45 In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. (LCP) 1102, 34 Fed. R. Serv. 3d (LCP) 1067 (6th Cir. 1996); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991); Sopcak v. Northern Mountain Helicopter Services, 924 P.2d 1006 (Alaska 1996); Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert.

denied, 118 S. Ct. 75 (U.S. 1997); Johnson v. Allied Eastern States Maintenance Corp., 488 A.2d 1341 (D.C. 1985).

n46 Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996); Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), cert. granted, 496 U.S. 904, 110 S. Ct. 2585, 110 L. Ed. 2d 266 (1990) and judgment rev'd on other grounds, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Reed v. Wiser, 555 F.2d 1079, 38 A.L.R. Fed. 928 (2d Cir. 1977), cert. denied, 434 U.S. 922, 98 S. Ct. 399, 54 L. Ed. 2d 279 (1977); Lavadenz de Estenssoro v. American Jet, S.A., 944 F. Supp. 813 (C.D. Cal. 1996); Fishman by Fishman v. Delta Air Lines, Inc., 938 F. Supp. 228 (S.D.N.Y. 1996); Sopcak v. Northern Mountain Helicopter Services, 924 P.2d 1006 (Alaska 1996); Johnson v. Allied Eastern States Maintenance Corp., 488 A.2d 1341 (D.C. 1985); Koehler v. Scandinavian Airlines Systems, 285 Ill. App. 3d 520, 220 Ill. Dec. 841, 674 N.E.2d 112 (1st Dist. 1996), appeal denied, 171 Ill. 2d 567, 222 Ill. Dec. 432, 677 N.E.2d 966 (1997).

n47 Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989), cert. granted, 496 U.S. 904, 110 S. Ct. 2585, 110 L. Ed. 2d 266 (1990) and judgment rev'd on other grounds, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Lavadenz de Estenssoro v. American Jet, S.A., 944 F. Supp. 813 (C.D. Cal. 1996); Johnson v. Allied Eastern States Maintenance Corp., 488 A.2d 1341 (D.C. 1985); Koehler v. Scandinavian Airlines Systems, 285 Ill. App. 3d 520, 220 Ill. Dec. 841, 674 N.E.2d 112 (1st Dist. 1996), appeal denied, 171 Ill. 2d 567, 222 Ill. Dec. 432, 677 N.E.2d 966 (1997).

n48 McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995); Sakaria v. Trans World Airlines, 8 F.3d 164, 38 Fed. R. Evid. Serv. (LCP) 47 (4th Cir. 1993), cert. denied, 511 U.S. 1083, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994), reh'g denied, 512 U.S. 1247, 114 S. Ct. 2772, 129 L. Ed. 2d 885 (1994); Pflug v. Egyptair Corp., 961 F.2d 26 (2d Cir. 1992); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991); Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984); In re Air Crash Disaster at Gander, Newfoundland, On Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987); Harris v. Polskie Linie Lotnicze, 641 F. Supp. 94 (N.D. Cal. 1986), judgment aff'd, 820 F.2d 1000 (9th Cir. 1987).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n49 Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989) ($ 8,300); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) ($ 8,300); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994) ($ 8,300); Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984) ($ 8,500); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

n50 Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994); In re Aircrash In Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 11 Fed. R. Evid. Serv. (LCP) 875 (9th Cir. 1982); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

n51 § 158.

n52 Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997) (not subject to tolling); Fishman by Fishman v. Delta Air Lines, Inc., 938 F. Supp. 228 (S.D.N.Y. 1996) (not subject to tolling); Johnson v. Allied Eastern States Maintenance Corp., 488 A.2d 1341 (D.C. 1985); Kordich v. Butler Aviation Detroit, Inc., 103 Mich. App. 566, 303 N.W.2d 238 (1981); Lyons v. American Trans Air, Inc., 231 A.D.2d 689, 647 N.Y.S.2d 845 (2d Dep't 1996); Kahn v. Trans World Airlines, Inc., 82 A.D.2d 696, 443 N.Y.S.2d 79 (2d Dep't 1981).

The Warsaw Convention's two-year time limitation was applicable in an airline passenger's damage suit even though notification of the limitation was not printed on the plaintiff's ticket. Molitch v. Irish Intern. Airlines, 436 F.2d 42 (2d Cir. 1970).

Construction and application of Warsaw Convention provision (USCA Conventions, Warsaw Convention Art 29(1)) establishing two-year limitation period for damage action, 103 A.L.R. Fed. 286.

n53 Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984).

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention, 39 A.L.R. Fed. 452 § 1.

SUPPLEMENT:

Research References

Unlimited liability: The new ball game in international transportation by air, 64 Def Couns J 3:381 (1998).

Research References

The Warsaw Convention and where we are today, 62 J Air L&C 4:1071 (1997).

Cases

A complementary purpose of the Warsaw Convention is to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability. Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

The cardinal purpose of the Warsaw Convention is to achieve uniformity of rules governing claims arising from international air transportation. Warsaw Convention, Art. 1 et seq., 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

Emotional injuries that mother allegedly suffered as result of scalding injuries her minor child suffered on international flight when stewardess applied over-hot compress to alleviate child's earache resulted from "accident" within meaning of Warsaw Convention, and thus, were not compensable. Fishman by Fishman v. Delta Air Lines, Inc., 132 F.3d 138 (2d Cir. 1998).

Damages for loss of guidance, training, and advice were not available under Warsaw Convention to adult children of passengers killed in crash of airliner on international flight. Oldham v. Korean Air Lines Co., Ltd., 127 F.3d 43 (D.C.

Cir. 1997).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 150

§ 150 Montreal Agreement

The dissatisfaction of the United States with the low liability limit of the Warsaw Convention led, in 1966, to the adoption of an interim arrangement known as the Montreal Agreement.n54 Under this arrangement, the majority of international air carriers agreed to increase their liability limit per passenger to $ 75,000 inclusive of legal fees, and to waive the defense of due care, as to flights originating, terminating, or having a stopping place within the United States.n55 Thus, with regard to international flights subject to the terms of the Warsaw Convention, as modified by the Montreal Agreement, the carrier is absolutely liable, unless it can prove negligence on the part of the passenger, for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.n56

FOOTNOTES:

n54 Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984); In re Aircrash In Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 11 Fed. R. Evid. Serv. (LCP) 875 (9th Cir. 1982); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

For the text of the Montreal Agreement, see Op Atty Gen: Agreement CAB 18900, May 13, 1966, Federal Register 7302.

n55 Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989); In re Aircrash In Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 11 Fed. R. Evid. Serv. (LCP) 875 (9th Cir. 1982); Tandon v. United Air Lines, 926 F. Supp. 366 (S.D.N.Y. 1996); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994); In re Korean Air Lines Disaster of Sept. 1, 1983, 814 F. Supp. 592 (E.D. Mich. 1993); Hill v. United Airlines, 550 F. Supp. 1048

(D. Kan. 1982); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991).

$ 75,000 is an absolute limit on damages which cannot be increased by prejudgment interest. O'Rourke v. Eastern Air Lines, Inc., 553 F. Supp. 226 (E.D.N.Y. 1982).

The Montreal Agreement does not impose absolute liability on air carriers, except in the sense that an airline cannot defend a claim on the ground that it took all necessary measures to avoid the injury. Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985).

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention, 39 A.L.R. Fed. 452 § 1.

n56 In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. (LCP) 1102, 34 Fed. R. Serv. 3d (LCP) 1067 (6th Cir. 1996), related reference, 1997 WL 577769 (E.D. Mich. 1997); Sakaria v. Trans World Airlines, 8 F.3d 164, 38 Fed. R. Evid. Serv. (LCP) 47 (4th Cir. 1993), cert. denied, 511 U.S. 1083, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994), reh'g denied, 512 U.S. 1247, 114 S. Ct. 2772, 129 L. Ed. 2d 885 (1994); Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985), reh'g denied, 471 U.S. 1112, 105 S. Ct. 2350, 85 L. Ed. 2d 866 (1985); Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984); In re Korean Air Lines Disaster of Sept. 1, 1983, 814 F. Supp. 592 (E.D. Mich. 1993); Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert. denied, 118 S. Ct. 75 (U.S. 1997); Koehler v. Scandinavian Airlines Systems, 285 Ill. App. 3d 520, 220 Ill. Dec. 841, 674 N.E.2d 112 (1st Dist. 1996), appeal denied, 171 Ill. 2d 567, 222 Ill. Dec. 432, 677 N.E.2d 966 (1997); Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992); Lear v. New York Helicopter Corp., 190 A.D.2d 7, 597 N.Y.S.2d 411 (2d Dep't 1993).

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 A.L.R. 3d 1299 § 2[a].

Liability under Warsaw Convention (49 Stat 3000 et seq.) of international air carrier for death or injury of passenger sustained in airport terminal during course of terrorist attack, 36 A.L.R. Fed. 490.

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention, 39 A.L.R. Fed. 452.

Treaty or international executive agreement as limiting recovery available to United States citizens or businesses -- Supreme Court cases, 80 L Ed 2d 871.

Conditions under Warsaw Convention -- International carriage of passengers. 3A Am. Jur. Legal Forms 2d, Aviation § 34:165.

-- Limitation of and exemption from liability for injuries. 3A Am. Jur. Legal Forms 2d, Aviation § 34:166.

Allegations of complaint based on Warsaw Convention. 3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331.

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You'll love the way we fly -- But if you don't, too bad: Does Zicherman v. Korean Air Lines offer hope of subjecting reckless international airlines to punitive damages? 48 Case W Res LR 1:73 (1998).

Research References

The Warsaw Convention's facelift: Will it meet the needs of 21st century air travel, [Zicherman v. Korean Air Lines, 116 S Ct 629 (1996)], 62 J Air L&C 4:1083 (1997).

Cases

Montreal Protocol No. 4, which amended Warsaw Convention to preclude passengers from bringing actions under local law when they cannot establish air carrier liability under treaty, merely clarifies, and does not alter, Convention's rule of exclusivity. Warsaw Convention, Arts. 17, 24, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 151

§ 151 Nature of cause of action under Warsaw Convention; Convention remedy as exclusive

The Warsaw Convention provides an independent federal cause of actionn57 governed by federal common lawn58 and by federal choice-of-law rules.n59 It has been held that the Convention supplies the exclusive remedy when it applies to a particular situation,n60 and that state law claims are pre-empted where the Convention applies.n61 Other authority, however, holds that the Convention does not offer the sole remedy for injuries within its scope, but rather operates only to limit the recovery available.n62

In any event, if the Convention is found to be inapplicable to a particular case, a passenger may pursue traditional tort remedies.n63

FOOTNOTES:

n57 Sakaria v. Trans World Airlines, 8 F.3d 164, 38 Fed. R. Evid. Serv. (LCP) 47 (4th Cir. 1993), cert. denied, 511 U.S. 1083, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994), reh'g denied, 512 U.S. 1247, 114 S. Ct. 2772, 129 L. Ed. 2d 885 (1994); In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983); Campos v. Sociedad Aeronautica de Medellin Consolidada, S.A., 882 F. Supp. 1056 (S.D. Fla. 1994); Diaz Lugo v. American Airlines, Inc., 686 F. Supp. 373 (D.P.R. 1988); In re Air Crash Disaster at Gander, Newfoundland, On Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987).

Warsaw Convention (49 Stat 3000 et seq.) as creating cause of action, 51 A.L.R. Fed. 949.

Complaint, petition or declaration -- Allegation -- Action based on Warsaw Convention. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 114.

n58 In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 40 Fed. R. Evid. Serv. (LCP) 318 (2d Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995).

n59 Bickel v. Korean Air Lines Co., Ltd., 83 F.3d 127, 1996 A.M.C. 1541, 1996 FED App. 126P (6th Cir. 1996); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987); Anderson v. SAM Airlines, 939 F. Supp. 167 (E.D.N.Y. 1996), related reference, 1996 WL 635711 (E.D.N.Y. 1996); In re Korean Air Lines Disaster of Sept. 1, 1983, 935 F. Supp. 10, 1997 A.M.C. 1216 (D.D.C. 1996).

n60 Pflug v. Egyptair Corp., 961 F.2d 26 (2d Cir. 1992); Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985), reh'g denied, 471 U.S. 1112, 105 S. Ct. 2350, 85 L. Ed. 2d 866 (1985); Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997); Diaz Lugo v. American Airlines, Inc., 686 F. Supp. 373 (D.P.R. 1988); Bianchi v. United Air Lines, 22 Wash. App. 81, 587 P.2d 632 (1978).

When the Warsaw Convention applies, the court will lack jurisdiction over the action unless it is brought in accordance with the Convention's limitations. Pflug v. Egyptair Corp., 961 F.2d 26 (2d Cir. 1992); Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996); Cortes v. Delta Air Lines, Inc., 638 So. 2d 108 (Fla. Dist. Ct. App. 3d Dist. 1994).

n61 Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997); Fishman by Fishman v. Delta Air Lines, Inc., 938 F. Supp. 228 (S.D.N.Y. 1996); Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 29 Fed. R. Serv. 3d (LCP) 896 (N.D. Cal. 1994); Sopcak v. Northern Mountain Helicopter Services, 924 P.2d 1006 (Alaska 1996); Bianchi v. United Air Lines, 22 Wash. App. 81, 587 P.2d 632 (1978).

n62 Lavadenz de Estenssoro v. American Jet, S.A., 944 F. Supp. 813 (C.D. Cal. 1996); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); Campos v. Sociedad Aeronautica de Medellin Consolidada, S.A., 882 F. Supp. 1056 (S.D. Fla. 1994).

"[T]he delegates [who formulated the Warsaw Convention] did not intend that the cause of action created by the Convention to [sic] be exclusive. For example, in the United States, state law causes of action may be invoked by plaintiffs injured during international air transportation. Such causes of action might, consistently with the Convention, provide varying measures of damages or varying specifications of persons entitled to relief." In re Mexico City Aircrash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983).

Law Reviews: Warsaw's wingspan over state laws: Towards a streamlined system of recovery, 59 J Air L&C 587 (1994).

n63 Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985), reh'g denied, 471 U.S. 1112, 105 S. Ct. 2350, 85 L. Ed. 2d 866 (1985); Tandon v. United Air Lines, 926 F. Supp. 366 (S.D.N.Y. 1996); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); Koehler v. Scandinavian Airlines Systems, 285 Ill. App. 3d 520, 220 Ill. Dec. 841, 674 N.E.2d 112 (1st Dist. 1996), appeal denied, 171 Ill. 2d 567, 222 Ill. Dec. 432, 677 N.E.2d 966 (1997).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;

A.L.R. Index: Aviation;
A.L.R. Index: Flight Training;
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Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
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A. General Principles [§ § 108-159]

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8A Am Jur 2d AVIATION § 152

§ 152 Construction of Warsaw Convention

The Warsaw Convention is a treaty of the United States, the interpretation of which is a federal question.n64 It has been said that the Warsaw Convention, like any other statute, must be construed reasonably and so as to accomplish its obvious purposes.n65

When interpreting a treaty such as the Warsaw Convention, one begins with the text of the treaty and the context in which the written words are used.n66 Other general rules of construction may be brought to bear on difficult or ambiguous passages.n67 The Convention, like other treaties,n68 is construed more liberally than is a private agreement.n69 To ascertain its meaning, a court may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties.n70

FOOTNOTES:

n64 Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996).

n65 Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

n66 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994).

n67 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991).

n68 See generally 74 Am. Jur. 2d, Treaties § 24.

n69 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996) (declined to follow by, Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99 (2d Cir. 1997)); Sulewski v. Federal Exp. Corp., 933 F.2d 180 (2d Cir. 1991).

n70 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991); Sulewski v. Federal Exp. Corp., 933 F.2d 180 (2d Cir. 1991); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991); Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996) (declined to follow by, Tseng v. El Al Israel Airlines, Ltd., 122 F.3d 99 (2d Cir. 1997)); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988).

Supreme Court's construction and application of Warsaw Convention (49 Stat 3000 et seq.), pertaining to international air transportation, 113 L Ed 2d 806.

SUPPLEMENT:

Cases

America's preemption analysis should not be applied, mechanically, in construing international obligations under the Warsaw Convention. Warsaw Convention, Art. 1 et seq., 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

Even though proposal to state in Warsaw Convention that, in absence of stipulation in Convention itself, "the provisions of laws and national rules relative to carriage in each [signatory] State shall apply," was withdrawn when Convention's title was amended to read "CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR," such withdrawal did not mean that claim for personal injuries suffered during international flight may be pursued in state court if Convention does not apply to those injuries; proposal may have been meant only to underscore that national law controlled chapters of law relating to international carriage by air with which Convention was not attempting to deal. Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

The opinions of our sister signatories are entitled to considerable weight when construing the Warsaw Convention. Warsaw Convention, Art. 1 et seq., 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 153

§ 153 Who may claim limitations

The limitations of the Warsaw Convention, as modified by the Montreal Agreement, have been held applicable to charter flights engaged in international air transportation, in the same manner as regularly scheduled flights.n71 The limitation on liability is applicable to the employees and agents of carriers,n72 including interrelated corporations,n73 and independent contractors operating as skycaps.n74 The limitation is also applicable to a carrier's nonemployee agent performing security services for the carrier.n75

FOOTNOTES:

n71 Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905, 88 S. Ct. 2053, 20 L. Ed. 2d 1363 (1968); Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert. denied, 118 S. Ct. 75 (U.S. 1997); Independent Air, Inc. v. Tosini, 600 So. 2d 3 (Fla. Dist. Ct. App. 3d Dist. 1992), review dismissed, 613 So. 2d 5 (Fla. 1992).

n72 Reed v. Wiser, 555 F.2d 1079, 38 A.L.R. Fed. 928 (2d Cir. 1977), cert. denied, 434 U.S. 922, 98 S. Ct. 399, 54 L. Ed. 2d 279 (1977); Lufthansa German Airlines v. American Airlines, Inc., 797 F. Supp. 446 (D.V.I. 1992); Lear v. New York Helicopter Corp., 190 A.D.2d 7, 597 N.Y.S.2d 411 (2d Dep't 1993).

Right of airline employee to invoke liability limitations of Warsaw Convention as defense, 38 A.L.R. Fed. 949.

n73 Lear v. New York Helicopter Corp., 190 A.D.2d 7, 597 N.Y.S.2d 411 (2d Dep't 1993).

n74 Johnson v. Allied Eastern States Maintenance Corp., 488 A.2d 1341 (D.C. 1985).

n75 In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988, 776 F. Supp. 710 (E.D.N.Y. 1991).

SUPPLEMENT:

Statutes

49 U.S.C.A. § 44701 note, added in 1998, provides for a decision on whether external defibrillators should be carried on aircraft. It also limits liability for damages arising out of attempts to assist a passenger in an inflight medical emergency, and liability for one passenger rendering assistance to another.

Cases

Airline crew on international flight engaged in "wilful misconduct" within meaning of Warsaw Convention by failing to discern during six minutes between plane's execution of 360-degree turn (rather than 180-degree turn that crew intended) and plane's crash into mountain that plane was heading north into known dangerous terrain, instead of south; thus, Warsaw Convention's $ 75,000 cap on damages for personal injury did not apply in action against airline by relatives of passengers killed in crash. Koirala v. Thai Airways Intern., Ltd., 126 F.3d 1205 (9th Cir. 1997).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 154

§ 154 Delivery and conditions of ticket; noncontractual nature of limitations

Unlike the ordinary case involving a statutory limitation of liability which is applicable by force of law (as distinguished from limitations arising by special contract between the parties), the provisions of the Warsaw Convention require, as a condition precedent to its taking effect, that a carrier "deliver" a passenger ticket to the passenger, and that such ticket contain certain particulars.n76 The requirement of ticket delivery is based on the contractual nature of the passenger-carrier relationship. The obligations arising from the contract carry out the conference's goal that rules of limited liability be known.n77 All that is required is that the passenger be delivered a ticket which gives him or her a reasonable opportunity to learn of the limitations and to take steps to obtain additional protection, if desired.n78 The requirement of the delivery of the ticket is only a condition determinative of the applicability of the limited liability rules.n79 Actual notice of the limitation of liability provision is not required.n80 The carrier need not produce affirmative proof that the individual buying the ticket was the passenger himself, or someone specifically authorized by the passenger to consent to limited liability.n81

International air carriers who were parties to the Montreal Agreementn82 stipulated that they would at the time of delivery of tickets furnish, to each passenger governed by the Warsaw Convention and by the special contract, a notice in 10-point type advising international passengers of the limitations of liability established by the Convention or the higher liability agreed to by the special contracts pursuant to the Convention.n83 However, the liability limitation will still be applied even though the ticket contains a notice of the limitation in smaller type than stipulated in the Montreal Agreement. Deviation from the type face requirements have been deemed a mere irregularity which does not prevent the ticket from being considered a ticket.n84

FOOTNOTES:

n76 Glenn v. Compania Cubana de Aviacion, S.A., 102 F. Supp. 631 (S.D. Fla. 1952); Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert. denied, 118 S. Ct. 75 (U.S. 1997) (charter passenger without a ticket was not subject to liability limitations); Manion v. Pan American World Airways, Inc., 55 N.Y.2d 398, 449 N.Y.S.2d 693, 434 N.E.2d 1060 (1982) (ticket delivery must occur before initiation of the first leg of the trip in order for the Warsaw limitations to apply).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n77 Manion v. Pan American World Airways, Inc., 55 N.Y.2d 398, 449 N.Y.S.2d 693, 434 N.E.2d 1060 (1982).

n78 Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984), related reference, 758 F.2d 1016 (5th Cir. 1984), cert. denied, 474 U.S. 1036, 106 S. Ct. 603, 88 L. Ed. 2d 582 (1985) and (rejected by, Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385, 11 Fed. R. Serv. 3d (LCP) 1420 (7th Cir. 1988)) and (declined to follow by, The Limited Stores, Inc. v. Pan American World Airways, Inc., 65 Ohio St. 3d 66, 600 N.E.2d 1027 (1992)).

n79 Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert. denied, 118 S. Ct. 75 (U.S. 1997); Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

n80 Williams Dental Co., Inc. v. Air Exp. Intern., 824 F. Supp. 435 (S.D.N.Y. 1993), aff'd, 17 F.3d 392 (2d Cir. 1993) (in contrast, notice is required for limitation to apply to air cargo shipment); Domangue v. Eastern Air Lines, Inc., 722 F.2d 256 (5th Cir. 1984).

There is no requirement that the passenger tickets contain a notice of the statute of limitations provision in order for that provision to apply. Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997).

n81 Block v. Compagnie Nationale Air France, 386 F.2d 323 (5th Cir. 1967), cert. denied, 392 U.S. 905, 88 S. Ct. 2053, 20 L. Ed. 2d 1363 (1968); Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

n82 See § 150.

n83 In re Air Crash Disaster Near New Orleans, La. On July 9, 1982, 789 F.2d 1092 (5th Cir. 1986), reh'g granted, 795 F.2d 381 (5th Cir. 1986), on reh'g, 821 F.2d 1147, 1987 A.M.C. 2735 (5th Cir. 1987), cert. granted, judgment vacated, 490 U.S. 1032, 109 S. Ct. 1928, 104 L. Ed. 2d 400 (1989).

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention, 39 A.L.R. Fed. 452.

n84 Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
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8A Am Jur 2d AVIATION § 155

§ 155 What constitutes "international transportation"

"International transportation" under the Warsaw Convention is expressly stated to be any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two high contracting parties or within the territory of a single high contracting party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate, or authority of another power, even though that power is not a party to this convention.n85

In a round-trip journey, where both the point of departure and destination are within the territory of a single party to the Convention, with intermediate stops elsewhere in territory not governed by the rules of the Convention, the view has been taken that this is international transportation so as to make the liability limitations of the Convention applicable.n86

FOOTNOTES:

n85 Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997); Shen v. Japan Airlines, 918 F. Supp. 686 (S.D.N.Y. 1994), aff'd, 43 F.3d 1459 (2d Cir. 1994); Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); Cortes v. Delta Air Lines, Inc., 638 So. 2d 108 (Fla. Dist. Ct. App. 3d Dist. 1994); Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

When the plaintiff is injured by delay in the domestic leg of what is clearly international travel (because of continuing flights abroad), the Warsaw limitation will apply. Duff v. Trans World Airlines, Inc., 173 Ill. App. 3d 266, 123 Ill. Dec. 35, 527 N.E.2d 498 (1st Dist. 1988).

When tickets were issued from San Jose, California to San Diego, California on one airline and the passenger then crossed the border to Tijuana, Mexico and flew to Monterey, Mexico on another airline, separately ticketed without

reference to the travel in California, there was no international travel. Hernandez v. Aeronaves de Mexico, S.A., 583 F. Supp. 331 (N.D. Cal. 1984).

There was no contract for international travel between passenger injured on domestic leg of international trip where passenger had purchased two tickets in separate transactions for (1) domestic leg of trip from Baltimore to New York, and (2) from New York to Saudi Arabia, for travel on two separate days on two different airlines, and where there was no showing that domestic airline was aware that passenger would be departing on international flight on different airline on following day. Lemly v. Trans World Airlines, Inc., 807 F.2d 26 (2d Cir. 1986).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n86 Alexander v. Pan American World Airways, Inc., 757 F.2d 362 (D.C. Cir. 1985); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990); Ross v. Pan American Airways, 299 N.Y. 88, 85 N.E.2d 880, 13 A.L.R.2d 319 (1949).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

SUPPLEMENT:
Who is a "consumer" entitled to protection of statedeceptive trade practice and consumer protection acts, 63 A.L.R. 5th 1.

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
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8A Am Jur 2d AVIATION § 156

§ 156 What constitutes "accident" on aircraft; generally

An air carrier's liability under the Warsaw Convention extends to damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage took place on board the aircraft, or in the course of any of the operations of embarking or disembarking.n87 An "accident," in this context, is an unexpected or unusual event or happening external to the passenger.n88 An event or occurrence is not an "accident" if it results solely from the state of health of the passenger and is unconnected with the flight.n89 A terrorist attack is an accident, as that term is used in the Convention.n90 So, too, is the hijacking of an aircraft.n91

FOOTNOTES:

n87 § 149.

As to what constitutes embarking or disembarking, see § 157.

n88 Potter v. Delta Air Lines, Inc., 98 F.3d 881 (5th Cir. 1996) (no accident was found when passenger tore a ligament trying to get over sleeping passenger); Sakaria v. Trans World Airlines, 8 F.3d 164, 38 Fed. R. Evid. Serv. (LCP) 47 (4th Cir. 1993), cert. denied, 511 U.S. 1083, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994), reh'g denied, 512 U.S. 1247, 114 S. Ct. 2772, 129 L. Ed. 2d 885 (1994) (two-hour wait in an airplane during a terrorist attack was not an accident); Fishman by Fishman v. Delta Air Lines, Inc., 938 F. Supp. 228 (S.D.N.Y. 1996) (an accident occurred when a passenger was injured when a flight attendant spilled scalding water on her); Stone v. Continental Airlines, Inc., 905 F. Supp. 823 (D. Haw. 1995) (assault by another passenger on board airplane is not an accident); Diaz Lugo v. American Airlines, Inc., 686 F. Supp. 373 (D.P.R. 1988) (injury resulting from hot coffee spilled on passenger while in flight was accident).

The detention of passenger for 15 hours for the purpose of a security check

was an accident compensable under the Warsaw Convention. Shen v. Japan Airlines, 918 F. Supp. 686 (S.D.N.Y. 1994), aff'd, 43 F.3d 1459 (2d Cir. 1994).

A claim of intentional interference with custodial rights in connection with smuggling a child out of the United States was not an accident within the Warsaw Convention. Pittman v. Grayson, 869 F. Supp. 1065 (S.D.N.Y. 1994).

What constitutes "accident" under Warsaw Convention, 78 A.L.R. Fed. 459.

Complaint in federal court -- By pregnant passenger against international carrier for miscarriage resulting from carrier's knowledge of bomb threat -- Bomb threat constituting accident under Warsaw Convention. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 112.

n89 Northern Trust Co. v. American Airlines, Inc., 142 Ill. App. 3d 21, 96 Ill. Dec. 371, 491 N.E.2d 417 (1st Dist. 1985), appeal denied, (Oct. 2, 1986).

Failure to provide adequate medical care to a heart attack victim was not an accident. Tandon v. United Air Lines, 926 F. Supp. 366 (S.D.N.Y. 1996); Fischer v. Northwest Airlines, Inc., 623 F. Supp. 1064 (N.D. Ill. 1985).

Attack of hiatal hernia during flight and airline's response thereto was not an accident. Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130 (3d Cir. 1984), cert. denied, 470 U.S. 1059, 105 S. Ct. 1776, 84 L. Ed. 2d 835 (1985), reh'g denied, 471 U.S. 1112, 105 S. Ct. 2350, 85 L. Ed. 2d 866 (1985).

n90 Pflug v. Egyptair Corp., 961 F.2d 26 (2d Cir. 1992).

Liability under Warsaw Convention (49 Stat 3000 et seq.) of international air carrier for death or injury of passenger sustained in airport terminal during course of terrorist attack, 36 A.L.R. Fed. 490 § 3.

n91 Pflug v. Egyptair Corp., 961 F.2d 26 (2d Cir. 1992); People ex rel. Compagnie Nationale Air France v. Giliberto, 74 Ill. 2d 90, 23 Ill. Dec. 106, 383 N.E.2d 977 (1978), cert. denied, 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979).

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 A.L.R. 3d 1299 § 3[a].

SUPPLEMENT:
What Constitutes Accident under Warsaw Convention (49 USCA § 40105), 147 A.L.R. Fed. 535.

Cases

"Accident," as used in Article 17 of the Warsaw Convention, which establishes the conditions of liability for personal injury to passengers, should be flexibly applied. Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

The definition of "accident" under Article 17 of the Warsaw Convention, which establishes the conditions of liability for personal injury to passengers, is an unusual event external to the passenger. Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

Summary judgment granted to defendants, seat belt manufacturer and owner of

helicopter, on claim alleging that manufacturer was liable under Louisiana Products Liability Act (LPLA) for making unreasonably dangerous product, and that owner was strictly liable for owning unreasonably dangerous thing, brought by survivors of helicopter pilot who was killed in crash when helicopter's seat belt failed, was affirmed. Helicopter crashed shortly after takeoff and pilot was fatally injured when his seat belt failed to restrain him and he was flung into rotor; had it operated correctly, seat belt might well have saved his life, as accident was not necessarily fatal. Crash itself was caused by mechanic of decedent's employer who removed wrong control tube from helicopter during routine maintenance, resulting in its total loss of cyclic control immediately after take-off. During resulting crash, seat belt failed because one of its components, "take-up bar," had been at some point removed and reinserted upside down. Seat belt in question was not part of helicopter's original equipment, but had been installed as replacement. Most likely explanation for take-up bar's being upside down at time of crash was that seat belt was reassembled incorrectly during its refurbishment by contractor; there was not, however, any direct evidence of this. Defendant manufacturer was aware that take-up bar could be positioned upside down; it issued two written warnings that clearly described problem, potential danger, and solution with easy to understand diagrams. There was no dispute that warnings would have been effective to avoid incorrect configuration of take-up bar in hands of someone performing reassembly of seat belt and there was also no dispute that warnings were in possession of decedent's employer at all relevant times. Plaintiffs argued that seat belt was defective because it could be taken apart and reassembled in way that made it likely to fail in crash, and that there was no adequate warning of this characteristic. At time of manufacture of seat belt, there existed both symmetric designs that could not be incorrectly reassembled in this way, and other designs that could not be disassembled at all. Allegedly negligent seat belt design was not proximate cause of pilot's death; failure of seat belt was not proximately caused by mere capability of misassembly inherent in its design. Actual failure simply could not have occurred without actual negligent misassembly, and this actual misassembly was intervening cause that broke natural and continuous sequence of events flowing from design. Although there was no evidence of exactly when, how or by whom this misassembly occurred, it was clear that it must have happened sometime after design of seat belt but before accident; greater precision was not required to resolve case. Furthermore, owner, who had leased helicopter to employer under lease, terms of which provided that employer had sole right and responsibility to determine how helicopter was to be used, where it was to be flown, and what maintenance, inspections and repairs were to be performed on it, did not have "custody" of helicopter at time of crash. Owner never had any kind of substantial power of usage, direction or control of helicopter; nor was it ever in position to discover defects through maintenance of helicopter. Pickett v. RTS Helicopter, 128 F.3d 925 (5th Cir. 1997) (applying Louisiana law).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Flight Training;

A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments: Pilot;
A.L.R. Index: Propellers;
A.L.R. Index: Warsaw Convention
3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
Helicopter Accident Litigation, 22 Am. Jur. Trials 517
Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557;
Airline Passenger Death Cases, 8 Am. Jur. Trials 173;

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Aviation

VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

A. General Principles [§ § 108-159]

5. Limitation of Liability for Personal Injury or Death [§ § 147-159]

b. Liability and Limitations under Warsaw Convention [§ § 149-159]

8A Am Jur 2d AVIATION § 157

§ 157 What constitutes embarking or disembarking

"Embarking and disembarking," for the purposes of the Warsaw Convention, does not include within its scope all injuries a passenger sustains from the time he or she first enters the airport of departure until he or she leaves the airport of arrival.n92 The phrase "embarking and disembarking" connotes a close temporal and spatial relationship with the flight itself.n93 In determining whether an incident causing death or injury to a passenger occurred during the course of "any of the operations of embarking or disembarking," within the provisions of the Warsaw Convention, it has been held that courts will look at the following factors:

The activity of the passenger at the time of the accident or injury; whether the activity is related to boarding or leaving the plane

The passenger's whereabouts at the time of the injury; the physical proximity of the passenger to the gate and whether the passenger was in an area controlled by the carrier

The extent to which the carrier was exercising control over the passenger at the moment of injury; whether the passenger was acting at the direction of the carrier or was restricted by the carrier

The imminence of actual boarding or leaving the planen94

Generally, people injured in the common areas of airports are found not to be embarking or disembarking.n95 And if an accident occurs more than an hour before the scheduled departure, it is generally not considered to have occurred in the course of embarking.n96 But where the carrier on an international flight has announced the flight and has taken control of the passengers as a group, the passengers have surrendered their tickets, passed through passport control, entered an area reserved for those about to depart on international flights, and have completed virtually all activities required of them before boarding, an "accident" (in the form of a terrorist attack) occurring to such passengers is deemed to have occurred in the course of operations of embarking for the purposes of the Convention.n97

FOOTNOTES:

n92 Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994).

n93 McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995).

n94 McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995); Buonocore v. Trans World Airlines, Inc., 900 F.2d 8 (2d Cir. 1990); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990); Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994); Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992).

A passenger who had just deplaned and was injured while walking down a controlled corridor, escorted by airline personnel to customs (a necessary step in disembarking), was injured in the course of disembarking. Lyons v. American Trans Air, Inc., 231 A.D.2d 689, 647 N.Y.S.2d 845 (2d Dep't 1996).

A passenger injured when she slipped and pulled magazine rack on herself in airline-maintained lounge limited to ticketed passengers with passports and boarding passes, although she was waiting for flight from Scotland to Chicago, was not near the gate nor under the direction of the airline and so was not "in course of any operations of embarking" when she was injured. Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994).

When is passenger on aircraft in international transportation embarking or disembarking within meaning of Article 17 of Warsaw Convention, 39 A.L.R. Fed. 452 § 2.

n95 McCarthy v. Northwest Airlines, Inc., 56 F.3d 313 (1st Cir. 1995) (passenger injured on escalator in common area); Buonocore v. Trans World Airlines, Inc., 900 F.2d 8 (2d Cir. 1990) (passenger killed by terrorist in public area of airport after checking baggage); Martinez Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1976), cert. denied, 430 U.S. 950, 97 S. Ct. 1592, 51 L. Ed. 2d 800 (1977) (terrorist attack in baggage claim area of airport); MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971) (passenger injured in baggage claim area); Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994) (passenger injured on escalator in common area of airport); Knoll v. Trans World Airlines, Inc., 610 F. Supp. 844 (D. Colo. 1985) (slip and fall near immigration area at least 300 yards from gate); Kantonides v. KLM Royal Dutch Airlines, 802 F. Supp. 1203 (D.N.J. 1992) (passenger injured on moving sidewalk in common area of airport); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990) (passenger injured on moving sidewalk in public are of airport); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988) (passengers in line to check baggage and receive boarding passes when terrorists attacked).

Passengers injured on a public bus transporting them between terminals were not in the process of embarking or disembarking. Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992).

n96 Abu Hamdeh v. American Airlines, Inc., 862 F. Supp. 243 (E.D. Mo. 1994) (11/2 hours before flight); Rabinowitz v. Scandinavian Airlines, 741 F. Supp. 441 (S.D.N.Y. 1990) (more than 11/2 hours before flight); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988) (more than 11/2 hours before flight); Stovall v. Northwest Airlines, Inc., 33 Mass. App. Ct. 1, 595 N.E.2d 330 (1992) (more than one hour after landing and 21/2 hours before next flight).

n97 Evangelinos v. Trans World Airlines, Inc., 550 F.2d 152 (3d Cir. 1977); Day v. Trans World Airlines, Inc., 528 F.2d 31, 36 A.L.R. Fed. 477 (2d Cir. 1975), cert. denied, 429 U.S. 890, 97 S. Ct. 246, 50 L. Ed. 2d 172 (1976), reh'g denied, 429 U.S. 1124, 97 S. Ct. 1162, 51 L. Ed. 2d 574 (1977); Leppo v. Trans World Airlines, Inc., 56 A.D.2d 813, 392 N.Y.S.2d 660 (1st Dep't 1977).

Liability under Warsaw Convention (49 Stat 3000 et seq.) of international air carrier for death or injury of passenger sustained in airport terminal during course of terrorist attack, 36 A.L.R. Fed. 490 § 4.

SUPPLEMENT:
Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage, 49 A.L.R. 5th 659.

Cases

Recovery for personal injury suffered "on board an aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of Warsaw Convention, is not available at all; abrogating Potter v. Delta Air Lines, Inc., 98 F.3d 881. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Flight Training;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments: Pilot;
A.L.R. Index: Propellers;
A.L.R. Index: Warsaw Convention
3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
Helicopter Accident Litigation, 22 Am. Jur. Trials 517
Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557;
Airline Passenger Death Cases, 8 Am. Jur. Trials 173;

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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

A. General Principles [§ § 108-159]

5. Limitation of Liability for Personal Injury or Death [§ § 147-159]

b. Liability and Limitations under Warsaw Convention [§ § 149-159]

8A Am Jur 2d AVIATION § 158

§ 158 Exception as to "willful misconduct"

By the express terms of the Warsaw Convention,n98 a carrier is not entitled to avail itself of the limitation provisions of the Convention for injury or damage caused by its willful misconduct or by such default on its part as, in accordance with the law of the court to which the case is submitted, is considered equivalent to willful misconduct.n99 To support a finding of willful misconduct, the carrier must have acted with knowledge that its actions would probably result in death or injury, or in conscious or reckless disregard of the fact that death or injury would be the probable consequences of its actions.n1 Willful misconduct may be based on a consideration of a series of actions or inactions that lead to a disaster.n2 Deliberate violation of rules promulgated by Federal authorities for safe flying has been held to come within the definition of willful misconduct.n3 Evidence that a flight crew falsely reported its airplane's position will also support a finding of willful misconduct.n4

The laxity of an airline's security measures, especially in light of bomb threats, can raise a jury question as to willful misconduct when an aircraft is later destroyed by a bomb placed in its cargo hold.n5 However, where there has been no specific threat, and where airline personnel comply with all positive FAA safety procedures and regulations concerning the detection of bombs, as well as the laws of the countries in which the airline operates, their failure to employ particular procedures not specifically required by the FAA to discover a bomb concealed in an airplane has been held insufficient to sustain a finding of willful misconduct.n6

While willful misconduct will negate the Warsaw Convention's limitation of liability, it does not excuse the plaintiff from complying with the Convention's two-year limitation period on the bringing of an action.n7 Willful misconduct does not create an additional or independent predicate for liability,n8 nor will it result in an award of punitive damages.n9

FOOTNOTES:

n98 Op Atty Gen: Warsaw Convention, Art 25, 49 Stat 3020.

n99 In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. (LCP) 1102, 34 Fed. R. Serv. 3d (LCP) 1067 (6th Cir. 1996), related reference, 1997 WL 577769 (E.D. Mich. 1997); In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 40 Fed. R. Evid. Serv. (LCP) 318 (2d Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995); In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991); Johnson v. American Airlines, Inc., 834 F.2d 721 (9th Cir. 1987); Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland v. Tuller, 292 F.2d 775 (D.C. Cir. 1961), cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed. 2d 136 (1961) (setting out the provisions of the Convention in this respect); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982); Miceli v. MGM Grand Air, Inc., 51 Cal. App. 4th 702, 59 Cal. Rptr. 2d 311 (2d Dist. 1996), review denied, (Mar. 19, 1997) and cert. denied, 118 S. Ct. 75 (U.S. 1997); Eastern Airlines, Inc. v. King, 557 So. 2d 574 (Fla. 1990); Kordich v. Butler Aviation Detroit, Inc., 103 Mich. App. 566, 303 N.W.2d 238 (1981); Lear v. New York Helicopter Corp., 190 A.D.2d 7, 597 N.Y.S.2d 411 (2d Dep't 1993).

Limitation of liability of air carrier for personal injury or death, 91 A.L.R. Fed. 547.

n1 In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 40 Fed. R. Evid. Serv. (LCP) 318 (2d Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995); Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

n2 In re Air Crash Disaster, 86 F.3d 498, 44 Fed. R. Evid. Serv. (LCP) 1102, 34 Fed. R. Serv. 3d (LCP) 1067 (6th Cir. 1996).

The conduct of an airplane's crew amounted to willful misconduct where the crew knew early on in flight that there were clouds in the vicinity of the destination that might develop into dangerous weather, the radar had been turned off despite the pilot's having seen or been able to see severe weather in the vicinity of the destination, the pilot deliberately and intentionally elected not to abort his approach or to activate radar to determine the nature of the weather, the crew failed to execute a missed approach despite having control of airplane, flight crew deliberately continued their descent after they had lost visibility and still had control, and where the aircraft might have made a safe landing had it been properly aligned with the runway. Butler v. Aeromexico, 774 F.2d 429 (11th Cir. 1985), reh'g denied, 781 F.2d 905 (11th Cir. 1985).

n3 American Airlines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949).

,31 A.L.R. Fed. 270 § 7 Liability of airline for injury or death of passenger resulting from violation of duty imposed by Federal Aviation Act of 1958 (49 USCA § § 1301 et seq.) and implementing regulations, 31 A.L.R. Fed. 270 § 2.

Instruction to jury -- International flight -- Warsaw Convention -- Limitation of liability -- Willful misconduct of carrier. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 116.

n4 LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (2d Cir. 1965), cert.

denied, 382 U.S. 878, 86 S. Ct. 161, 15 L. Ed. 2d 119 (1965) (under circumstances of crash, carrier's negligence constituted willful misconduct or its equivalent).

n5 In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 40 Fed. R. Evid. Serv. (LCP) 318 (2d Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995).

n6 Ospina v. Trans World Airlines, Inc., 975 F.2d 35 (2d Cir. 1992), cert. denied, 507 U.S. 1051, 113 S. Ct. 1944, 123 L. Ed. 2d 650 (1993).

n7 Castro v. Hinson, 959 F. Supp. 160 (E.D.N.Y. 1997); Kordich v. Butler Aviation Detroit, Inc., 103 Mich. App. 566, 303 N.W.2d 238 (1981).

n8 In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi Intern. Airport, Pakistan on Sept. 5, 1986, 920 F. Supp. 408 (S.D.N.Y. 1996).

n9 § 160.

SUPPLEMENT:

Cases

Intentional omission of act may support finding of "wilful misconduct" within meaning of Warsaw Convention provision stating that Convention's $ 75,000 cap on damages for personal injury does not apply in cases of wilful misconduct. Koirala v. Thai Airways Intern., Ltd., 126 F.3d 1205 (9th Cir. 1997).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;
49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
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A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments: Pilot;
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3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
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8A Am Jur 2d AVIATION § 159

§ 159 Nature of injuries for which damages may be recovered

Recovery cannot be had under the Warsaw Convention for mental injury unaccompanied by physical injury,n10 even if the defendant engaged in willful misconduct.n11 However, if there is a manifestation of physical injury, then emotional and mental damages are recoverable.n12

Otherwise, which harms are cognizable and compensable under the Warsaw Convention is generally an issue left by Article 17 of the Convention to be determined by adjudicating courts applying domestic law.n13 In determining the recoverability of particular damages, the court will apply the law that would govern in the absence of the Convention.n14 When the Death on the High Seas Act would apply, loss-of-society damagesn15 and damages for a survivor's grief and pain and sufferingn16 are not recoverable. However, loss-of-society damages are recoverable by a spouse or dependent when the case is governed by general maritime law.n17

Punitive damages are generally not recoverable under the Warsaw Convention,n18 even though the defendant engaged in willful misconduct within the meaning of the Convention.n19 It has been held, however, that punitive damages may be recovered under the Convention for an intentional tort.n20

FOOTNOTES:

n10 Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed. 2d 569 (1991).

n11 Li v. Quraishi, 780 F. Supp. 117 (E.D.N.Y. 1992).

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 A.L.R. 3d 1299 § 3[b].

n12 Chendrimada v. Air-India, 802 F. Supp. 1089 (S.D.N.Y. 1992); In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997) (pre-death pain and suffering); In re Air Crash Disaster Near

Honolulu, Hawaii, on Feb. 24, 1989, 783 F. Supp. 1261, 1992 A.M.C. 1146 (N.D. Cal. 1992) (pre-death pain and suffering).

Emotional distress flowing from a physical impact or manifestation thereof is recoverable; recovery is not allowed for distress about the accident itself. Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 29 Fed. R. Serv. 3d (LCP) 896 (N.D. Cal. 1994).

Complaint -- Hijacking of aircraft -- Damages for psychic trauma and for bodily injuries flowing from psychic trauma. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 120.

n13 Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596, 1996 A.M.C. 319 (1996).

n14 In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997), related reference, 172 F.R.D. 295 (N.D. Ill. 1997), related reference, 1997 WL 97096 (N.D. Ill. 1997) and related reference, 960 F. Supp. 150 (N.D. Ill. 1997), related reference, 1997 WL 572897 (N.D. Ill. 1997), related reference, 1997 WL 572898 (N.D. Ill. 1997), related reference, 1997 WL 572896 (N.D. Ill. 1997).

n15 Zicherman v. Korean Air Lines Co., Ltd., 516 U.S. 217, 116 S. Ct. 629, 133 L. Ed. 2d 596, 1996 A.M.C. 319 (1996).

n16 Bickel v. Korean Air Lines Co., Ltd., 83 F.3d 127, 1996 A.M.C. 1541, 1996 FED App. 126P (6th Cir. 1996).

n17 In re Air Disaster at Lockerbie Scotland on Dec. 21, 1988, 37 F.3d 804, 40 Fed. R. Evid. Serv. (LCP) 318 (2d Cir. 1994), cert. denied, 513 U.S. 1126, 115 S. Ct. 934, 130 L. Ed. 2d 880 (1995).

n18 In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991); In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 954 F. Supp. 175 (N.D. Ill. 1997), related reference, 172 F.R.D. 295 (N.D. Ill. 1997), related reference, 1997 WL 97096 (N.D. Ill. 1997) and related reference, 960 F. Supp. 150 (N.D. Ill. 1997), related reference, 1997 WL 572897 (N.D. Ill. 1997), related reference, 1997 WL 572898 (N.D. Ill. 1997), related reference, 1997 WL 572896 (N.D. Ill. 1997); Jack v. Trans World Airlines, Inc., 854 F. Supp. 654, 29 Fed. R. Serv. 3d (LCP) 896 (N.D. Cal. 1994); Chendrimada v. Air-India, 802 F. Supp. 1089 (S.D.N.Y. 1992); In re Air Crash Disaster at Gander, Newfoundland, On Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987).

n19 In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F.2d 1475, 32 Fed. R. Evid. Serv. (LCP) 1057 (D.C. Cir. 1991), reh'g denied, (July 5, 1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991) and cert. denied, 502 U.S. 994, 112 S. Ct. 616, 116 L. Ed. 2d 638 (1991); In re Air Crash Disaster at Gander, Newfoundland, On Dec. 12, 1985, 684 F. Supp. 927 (W.D. Ky. 1987); Harpalani v. Air-India, Inc., 634 F. Supp. 797 (N.D. Ill. 1986).

As to what constitutes willful misconduct in this context, see § 159.

n20 Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982).

REFERENCE: 46 USCA § § 183, 688, 761 et seq.;

49 USCA § § 40102(a)(32), 40105 note, 44112
A.L.R. Digest: Aviation § § 28-43
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Flight Training;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments: Pilot;
A.L.R. Index: Propellers;
A.L.R. Index: Warsaw Convention
3A Am. Jur. Legal Forms 2d, Aviation § § 34:165, 34:166
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 111-132, 136, 146-151, 154, 158, 224-243, 180, 195
3A Federal Procedural Forms, L. Ed., Aviation and Space § 7:331
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215
Helicopter Accident Litigation, 22 Am. Jur. Trials 517
Light Aircraft Accident Litigation, 13 Am. Jur. Trials 557;
Airline Passenger Death Cases, 8 Am. Jur. Trials 173;

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Aviation

VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 160

§ 160 Boarding or alighting from aircraft

In accordance with the rule applying to common carriers of passengers for hire generally, an air carrier is under a duty with respect to boarding or alighting passengers to exercise either a high or the highest degree of care for their safety.n21 An air carrier is under a duty to furnish to its passengers a safe means for boarding its aircraft, and to warn the passenger of any known defects to be encountered while using the means so provided, and a failure of that duty will impose liability upon the carrier,n22 subject to the effect of negligence on the part of the passenger.n23 Likewise, where injury results to an alighting passenger through an accident caused by want of proper care on the part of an air carrier, or which might have been averted by the exercise of such care, the air carrier is liable for damages proximately resulting from its negligent act or omission.n24 Thus, liability has been predicated upon the failure of the carrier or its employees to warn inexperienced air travelers of the existence of known hazards to be encountered while alighting.n25 Carriers by air may also be held or found to be liable for negligence in failing to protect alighting passengers from injury by the revolving propellers of the aircraft.n26

Evidence merely showing that a passenger fell and sustained injuries while boarding an airplane has been held insufficient to justify application of the doctrine of res ipsa loquitur.n27

FOOTNOTES:

n21 § 118.

As to an air carrier's liability for a slip or fall at an airport in circumstances not connected with the operation of aircraft, see § 102.

n22 Dudley v. Business Exp., Inc., 882 F. Supp. 199, 26 U.C.C. Rep. Serv. 2d (CBC) 1113 (D.N.H. 1994); Weller v. Northwest Airlines, 239 Minn. 298, 58 N.W.2d 739 (1953).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 3[b].

Instructions to jury -- Degree of care owed to passenger alighting from aircraft. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 172.

Instruction to jury -- Duty of care required of passenger alighting from aircraft. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 173.

n23 § 141, 142.

n24 Brown v. American Airlines, Inc., 244 F.2d 128, 61 A.L.R.2d 1108 (5th Cir. 1957); Jamerson v. Atlantic Southeast Airlines, 860 F. Supp. 821 (M.D. Ala. 1994) (overruled on other grounds by, Abdullah v. American Airlines, Inc., 969 F. Supp. 337 (D.V.I. 1997)); Khourey v. American Airlines, Inc., 170 Ohio St. 310, 10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960).

But where the testimony of a passenger, who fell and sustained injuries while debarking from the carrier's airplane, that her fall was caused when her heel caught on a metal strip on one of the steps of the airplane's retractable landing ramp, appeared to be no more than a conclusion reached by her of what probably happened, and a mere afterthought, and the record was devoid of any other evidence to show that the step, or the metal strip, was defective, there was insufficient evidence to take the case to the jury. Reuter v. Eastern Air Lines, 226 F.2d 443 (5th Cir. 1955).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 3[a].

Open door as ground of liability of carrier for injury to passenger falling or alighting from vehicle, 7 A.L.R. 2d 1427.

Complaint in federal court -- Diversity of citizenship -- Fall of passenger through open door after aircraft landed. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 124.

n25 Brown v. American Airlines, Inc., 244 F.2d 128, 61 A.L.R.2d 1108 (5th Cir. 1957); Haldane v. Alaska Airlines, 15 Alaska 298, 126 F. Supp. 224 (D. Alaska 1954).

Complaint -- Allegation -- Oil on step of movable stairway used by alighting passengers. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 171.

n26 Stewart v. Loughman, 367 Pa. 486, 80 A.2d 715 (1951); Curtiss-Wright Flying Service v. Williamson, 51 S.W.2d 1047 (Tex. Civ. App. El Paso 1932), writ refused, (Nov. 28, 1932); Cape Charles Flying Service v. Nottingham, 187 Va. 444, 47 S.E.2d 540 (1948).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 3[a].

Complaint, petition, or declaration -- Airline passenger struck by aircraft propeller at airport -- Failure to provide safe, marked passageway or to warn passenger of danger -- Against airline and municipality operating airport. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 170.

n27 Capps v. American Airlines, Inc., 81 Ariz. 232, 303 P.2d 717 (1956).

Liability of air carrier to passenger injured while boarding or alighting, 61 A.L.R. 2d 1113 § 3[b].

SUPPLEMENT:
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

Cases

An air carrier is subject to liability under local law for personal injuries arising outside of the Warsaw Convention's substantive scope, e.g., for passenger injuries occurring before "any of the operations of embarking or disembarking." Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

Recovery for personal injury suffered "on board [an] aircraft or in the course of any of the operations of embarking or disembarking," if not allowed under Article 17 of Warsaw Convention, is not available at all; abrogating Potter v. Delta Air Lines, Inc., 98 F.3d 881. Warsaw Convention, Arts. 17, 24, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

Airline Deregulation Act (ADA) preempted airline passenger's intentional tort claims of false imprisonment and infliction of emotional distress to extent they were premised on defendant airline's refusal to permit him to board his flight; boarding procedures were "service" rendered by airline within meaning of ADA section that preempts state laws "related to a price, route, or service of an air carrier." Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998).

Airline Deregulation Act (ADA) preempted airline passenger's breach of contract claim arising from airline's refusal to permit him to board his flight after layover due to airline's failure to ask for photo identification at point of original departure; because airline invoked defenses provided by federal law, passenger's contract claim could only be adjudicated by reference to law and policies external to parties' bargain. Smith v. Comair, Inc., 134 F.3d 254 (4th Cir. 1998).

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 161

§ 161 Aircraft taxiing

The question has arisen, in a number of cases, as to liability for injury or damage resulting from the movement of an aircraft while "taxiing" -- that is, from the controlled movement of an airplane or seaplane on the ground or water at other times than when the plane is moving on the surface of a runway or the water from the impetus of landing or taking off. These cases have arisen under widely varying circumstances, and in some instances the defendants have been held liable,n28 such as in actions based, at least in part, upon the negligence of government-employed tower control personnel.n29 Where two taxiing airplanes collided and the pilot and a guest in one of the planes sued the aviation company which owned the other plane for personal injuries and property damage, it was held error to direct a verdict against the plaintiffs based upon the conclusion that under the evidence both the defendant and the plaintiff pilot were negligent in the operation of their aircraft, since the evidence presented jury questions on those issues.n30 In several cases, however, the circumstances were such that the defendants were held or found not liable for personal injuries or property damage caused or sustained by a taxiing airplane, either on the ground that there was no negligence on the defendant's partn31 or that the defendant was not responsible for the pilot's negligence.n32

Where evidence as to the custom, practice, and duties of the air traffic control tower was in conflict, in an action defended on the ground that negligence of tower employees was the cause of a ground collision, it has been said that whether or not the action or nonaction of the tower in any instance was customary, its operation might constitute negligence, and that the issue was for the jury.n33

FOOTNOTES:

n28 Teas v. Curtiss-Wright Corp., 5 N.J. Super. 274, 68 A.2d 845 (App. Div. 1949); Plewes v. City of Lancaster, 171 Pa. Super. 312, 90 A.2d 279 (1952).

n29 Marino v. U.S., 84 F. Supp. 721 (E.D.N.Y. 1949); Ozark Air Lines, Inc. v. Delta Air Lines, Inc., 402 F. Supp. 687 (N.D. Ill. 1975).

Liability for injury or damage from taxiing aircraft, 74 A.L.R. 2d 654 § 2.

n30 Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950).

n31 U.S. v. Douglas Aircraft Co., 169 F.2d 755 (C.C.A. 9th Cir. 1948); Otte v. American Airlines, Inc., 104 Ohio App. 517, 5 Ohio Op. 2d 244, 145 N.E.2d 322 (8th Dist. Cuyahoga County 1957).

Liability for injury or damage from taxiing aircraft, 74 A.L.R. 2d 654 § 3.

n32 Tilley v. U. S., 375 F.2d 678 (4th Cir. 1967) (air traffic controller not liable for pilot negligence); Johnson v. Central Aviation Corp., 103 Cal. App. 2d 102, 229 P.2d 114 (3d Dist. 1951) (owner of plane not liable for negligence of pilot taking flying lessons); Mathis v. Atlantic Aircraft Distributors, Inc., 216 Md. 262, 140 A.2d 156, 74 A.L.R.2d 647 (1958) (airport lessee not liable for negligence of pilot).

n33 U.S. v. Douglas Aircraft Co., 169 F.2d 755 (C.C.A. 9th Cir. 1948).

SUPPLEMENT:
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
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B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 162

§ 162 Aircraft takeoff

In the cases in which the negligence of a pilot in attempting to take off has been alleged and in issue, the testimony has usually and necessarily been of a technical nature, concerning the way in which the pilot actually operated or maneuvered the plane, and the way in which he or she should have operated or maneuvered it.n34 In some of these cases, it has been alleged that the pilot was negligent in the manner in which he operated the instruments and controls of,n35 or in which he maneuvered,n36 the plane on takeoff. It may constitute negligence for a pilot to take off in an obvious thunderstorm.n37 In several actions involving collisions of airplanes, one of which was taking off, it has been held that the pilot of the ascending airplane was negligent where there was evidence that he did not keep a proper lookout.n38

The doctrine of res ipsa loquitur has been applied in cases involving accidents during takeoff.n39 But in a case which arose out of an accident resulting from the failure of one of the motors a few seconds after leaving the ground, the doctrine was held inapplicable principally upon the ground that the inspection of the plane just prior to the attempted flight had not been shown to have been made by employees of the defendant.n40

FOOTNOTES:

n34 Robart v. Brehmer, 92 Cal. App. 2d 830, 207 P.2d 898 (1st Dist. 1949); Flader v. Simonsen, 148 Colo. 480, 366 P.2d 678 (1961); Grimm v. Gargis, 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957); Paulson v. Hall, 51 Ohio L. Abs. 21, 80 N.E.2d 193 (Ct. App. 7th Dist. Trumbull County 1947); Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953).

Negligence in operation of airplane on take-off, 74 A.L.R. 2d 615 § § 4-6.

Complaint, petition, or declaration -- Crash or fall of aircraft on takeoff -- Death of passenger. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 176.

Proof of negligence in attempting takeoff in wake turbulence created by larger aircraft. Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215 [PARA]26, 27.

n35 Robart v. Brehmer, 92 Cal. App. 2d 830, 207 P.2d 898 (1st Dist. 1949); Grimm v. Gargis, 303 S.W.2d 43, 74 A.L.R.2d 599 (Mo. 1957); Maxwell v. Fink, 264 Wis. 106, 58 N.W.2d 415 (1953).

Negligence in operation of airplane on take-off, 74 A.L.R. 2d 615 § 4.

n36 U.S. v. Kesinger, 190 F.2d 529 (10th Cir. 1951) (Air Force plane; action under Op Atty Gen: Federal Tort Claims Act); Walthew v. Davis, 201 Va. 557, 111 S.E.2d 784 (1960).

Negligence in operation of airplane on take-off, 74 A.L.R. 2d 615 § 5.

n37 In re Air Crash at Dallas/Fort Worth Airport on Aug. 2, 1985, 720 F. Supp. 1258 (N.D. Tex. 1989), judgment aff'd, 919 F.2d 1079 (5th Cir. 1991), reh'g denied, (Jan. 29, 1991) and cert. denied, 502 U.S. 899, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991), reh'g denied, 502 U.S. 1000, 112 S. Ct. 622, 116 L. Ed. 2d 644 (1991) and related reference, 974 F.2d 171 (5th Cir. 1992).

n38 Paulson v. Hall, 51 Ohio L. Abs. 21, 80 N.E.2d 193 (Ct. App. 7th Dist. Trumbull County 1947).

Negligence in operation of airplane on take-off, 74 A.L.R. 2d 615 § 6.

Instruction as to duty of pilot to keep proper lookout. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 200.

n39 Hunziker v. Scheidemantle, 543 F.2d 489, 1 Fed. R. Evid. Serv. (LCP) 323 (3d Cir. 1976) (applying Pennsylvania law).

n40 Wilson v. Colonial Air Transport, 278 Mass. 420, 180 N.E. 212, 83 A.L.R. 329 (1932).

Generally, as to the requirement, under the doctrine of res ipsa loquitur, of exclusive control and management of aircraft by the defendant, see § 205.

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 163

§ 163 Air turbulence in flight

A number of cases have considered the liability of commercial airline companies, or other carriers of passengers for hire by air, for the injury or death of passengers as the result of the airplane's flying into or encountering downdrafts, or other turbulent atmospheric conditions while in flight. The decisions recognized that such meteorological phenomena may be encountered suddenly and unavoidably and cause the plane to lurch or drop under circumstances where no negligence on the part of the pilot exists. Such a phenomenon or manifestation of nature has on occasions been termed an act of God.n41 But passengers do not assume the risk of the carrier's or pilot's negligence in such respect,n42 and where the existence of dangerous turbulence is known to the airline or the pilot, or where it is possible to determine or perhaps even suspect that such adverse flying conditions are likely to be encountered, the decisions indicate that it is the duty of the airline or pilot to take precautions to guard against dangerous consequences, and that a failure to do so will constitute negligence.n43 In particular, it has been held that it is common knowledge in the aviation industry that any convective weather activity or thunderstorm can give rise to a turbulent weather condition known as a "microburst," which can cause even a large commercial airplane to crash while attempting to land, and that attempting to land an airplane under conditions presenting a danger of encountering a microburst can constitute negligence.n44

Permitting a flight to proceed unwarned on a route unsafe for air travel because of known severe turbulent weather conditions has been held to render the aviation company liable when the airplane is destroyed, and all passengers and crew members killed, by a storm which was of the highest degree of severe turbulence.n45 Liability has also been predicated upon the failure of an air carrier's pilot to circumnavigate a storm area containing dangerous currents of air or to decrease the plane's speed -- a safety measure -- while flying through the storm, where the adverse weather conditions were reported, forecast and confirmed by conditions experienced in flight.n46 Negligent operation of aircraft while flying at or over a place where the pilot knew, or should have known, that dangerous air currents might be expected or encountered has been alleged in several cases in which evidence as to the negligence of the pilot has been deemed to raise a question for the jury.n47

Observation: Commercial airplanes are ordinarily equipped with signs which are used to notify or warn passengers to fasten their seat belts when the plane is landing, taking off, or flying through turbulent air, and in several cases where plaintiffs were injured by a plane's lurching or dropping upon encountering turbulent atmospheric conditions, negligence on the part of the carrier has been alleged to consist of its employee's or pilot's failure or omission to warn passengers to fasten their seatbelts under circumstances when the pilot knew, or in the exercise of the proper degree of care should have known, that dangerous turbulence was likely to be encountered.n48 However, there is no duty to warn of possible air turbulence, where no turbulence was forecast for the flight area, and where there was no evidence that a reasonably prudent person would have refused to take the flight in question had she or he been warned of possible air turbulence.n49 Moreover, a passenger's failure to fasten the seat belt tightly may bar or diminish recovery for injury resulting from air turbulence.n50

Practice guide: Where injury due to turbulence is asserted, a defense motion for a directed verdict will be granted where the evidence that turbulence actually occurred is insufficiently strong to permit a finding to that effect in view of countervailing evidence.n51

The doctrine of res ipsa loquitur has been denied application where a passenger was injured by a sudden lurch, jerk, or jolt during flight.n52

FOOTNOTES:

n41 Krasnow v. National Airlines, 228 F.2d 326 (2d Cir. 1955); Small v. Transcontinental & Western Air, 96 Cal. App. 2d 408, 216 P.2d 36 (2d Dist. 1950) (commonly referred to as act of God).; Johnson v. Western Air Exp. Corp., 45 Cal. App. 2d 614, 114 P.2d 688 (2d Dist. 1941).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 2.

n42 Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (1952) (student pilot injured; action against flying school).

n43 In re N-500L Cases, 691 F.2d 15 (1st Cir. 1982) (declined to extend on other grounds by, Hatco Corp. v. W.R. Grace & Co.-Conn., 859 F. Supp. 769, 30 Fed. R. Serv. 3d (LCP) 1024 (D.N.J. 1994)) (duty to avoid wake turbulence); In re Air Crash Disaster at John F. Kennedy Intern. Airport on June 24, 1975., 635 F.2d 67, 7 Fed. R. Evid. Serv. (LCP) 21 (2d Cir. 1980) (pilot has duty to observe adverse weather conditions); First of America Bank-Cent. v. U.S., 639 F. Supp. 446 (W.D. Mich. 1986) (duty to avoid wake turbulence); Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 73 A.L.R.2d 337 (8th Cir. 1959); Dyer v. U.S., 832 F.2d 1062 (9th Cir. 1987) (duty to avoid wake turbulence); Small v. Transcontinental & Western Air, 96 Cal. App. 2d 408, 216 P.2d 36 (2d Dist. 1950); Cudney v. Braniff Airways, Inc., 300 S.W.2d 412, 73 A.L.R.2d 371 (Mo. 1957); Brittain v. Piedmont Aviation, Inc., 254 N.C. 697, 120 S.E.2d 72 (1961); McKinney v. Air Venture Corp., 578 S.W.2d 849 (Tex. Civ. App. Fort Worth 1979), writ refused n.r.e., (July 5, 1979).

An action by a passenger for burns suffered when the aircraft apparently encountered clear air turbulence and a stewardess spilled the contents of coffee cups in the passenger's lap was improperly terminated by a directed verdict for

the airline, since a finding that the passenger failed to prove that the pilot was negligent or that the defendant knew or should have known about the air turbulence overlooked the possibility that the injury was due to negligence of the stewardess. Rudees v. Delta Airlines, Inc., 553 S.W.2d 84 (Tenn. Ct. App. 1977).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 2.

Aviation: Helicopter accidents, 35 A.L.R. 3d 707 § 5[a]

Complaint, petition, or declaration -- Allegation -- Failure to equip aircraft with proper radio and radar -- Inability to navigate so as to avoid turbulent weather conditions. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 160.

n44 In re Air Crash at Dallas/Fort Worth Airport on Aug. 2, 1985, 720 F. Supp. 1258 (N.D. Tex. 1989), judgment aff'd, 919 F.2d 1079 (5th Cir. 1991), reh'g denied, (Jan. 29, 1991) and cert. denied, 502 U.S. 899, 112 S. Ct. 276, 116 L. Ed. 2d 228 (1991), reh'g denied, 502 U.S. 1000, 112 S. Ct. 622, 116 L. Ed. 2d 644 (1991) and related reference, 974 F.2d 171 (5th Cir. 1992).

n45 Stiles v. National Airlines, Inc., 161 F. Supp. 125 (E.D. La. 1958).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 3.

n46 Cudney v. Braniff Airways, Inc., 300 S.W.2d 412, 73 A.L.R.2d 371 (Mo. 1957).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 3.

Complaint -- Allegation -- Turbulent atmospheric condition -- Failure to avoid storm. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 189.

Complaint -- Allegation -- Turbulent atmospheric condition -- Failure to reduce speed. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 190.

n47 Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 73 A.L.R.2d 337 (8th Cir. 1959) (air turbulence affecting landing); Seaman v. Curtiss Flying Service, 231 A.D. 867, 247 N.Y.S. 251 (1930).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 3.

n48 Urban v. Frontier Air Lines, 139 F. Supp. 288 (D. Wyo. 1956); Small v. Transcontinental & Western Air, 96 Cal. App. 2d 408, 216 P.2d 36 (2d Dist. 1950); Ness v. West Coast Airlines, Inc., 90 Idaho 111, 410 P.2d 965 (1965); Brittain v. Piedmont Aviation, Inc., 254 N.C. 697, 120 S.E.2d 72 (1961).

Liability of carrier by air for injury or death of passenger due to downdraft, updraft, or turbulence, 73 A.L.R. 2d 379 § 3.

Liability of owner or operator of motor vehicle or aircraft for injury or death allegedly resulting from failure to furnish or require use of seatbelt, 49 A.L.R. 3d 295 § 4.

Complaint alleging negligence in failing to notify passenger to fasten seat belt. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 184.

Complaint, petition, or declaration -- Seat belt -- Defective construction -- Failure to instruct passenger in use -- Failure to avoid turbulent weather conditions. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 157.

Proof of weather conditions at certain time and place. Rain and Other Weather Phenomena, 10 Am. Jur. Proof of Facts 49, proof 1, 2.

Proof of failure to warn passenger to fasten seat belt. Aviation, 2 Am. Jur. Proof of Facts 277, proof 2.

n49 Kohler v. Aspen Airways, Inc., 171 Cal. App. 3d 1193, 214 Cal. Rptr. 720 (3d Dist. 1985).

n50 Powell v. Dell-Air Aviation, Inc., 268 Cal. App. 2d 451, 74 Cal. Rptr. 3 (2d Dist. 1968).

n51 Schultz v. American Airlines, Inc., 901 F.2d 621 (7th Cir. 1990), related reference, 1990 WL 114653 (N.D. Ill. 1990) (affirming the entry of a directed verdict for the defendant airline where the plaintiff's evidence of severe turbulence during the flight consisted almost solely of his own testimony to that effect, and other passengers testified that the flight was essentially uneventful and even enjoyable).

n52 Kelly v. American Airlines, Inc., 508 F.2d 1379 (5th Cir. 1975) (applying Texas law); Cudney v. Midcontinent Airlines, 363 Mo. 922, 254 S.W.2d 662 (1953); Sanchez v. American Airlines, Inc., 106 Misc. 2d 1010, 436 N.Y.S.2d 824 (City Civ. Ct. 1981) (noting that an encounter with air turbulence can occur without negligence of the pilot).

SUPPLEMENT:
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments;
A.L.R. Index: Pilot;
A.L.R. Index: Take-off
3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223
Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215;
Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
Sonic Boom, 12 Am. Jur. Proof of Facts 593;
Rain and Other Weather Phenomena, 10 Am. Jur. Proof of Facts 49;
Ear Injuries, 4 Am. Jur. Proof of Facts 561;
Aviation, 2 Am. Jur. Proof of Facts 277;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 164

§ 164 Changes in air pressure inside aircraft

An airline owes a duty to its passengers to prevent the occurrence of sudden, abnormal changes in air pressure, and will be liable for injuries caused by a breach of that duty.n53 An air carrier is not liable, under the Warsaw Convention, for a passenger's hearing loss caused by the normal operation of the aircraft's pressurization system.n54

FOOTNOTES:

n53 American Airlines, Inc. v. Marchant, 249 F.2d 612, 75 A.L.R.2d 843 (1st Cir. 1957); O'Hern v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993), related reference, 1994 WL 494703 (N.D. Ill. 1994), related reference, 1995 WL 330888 (N.D. Ill. 1995) and (overruled on other grounds by, Abdullah v. American Airlines, Inc., 969 F. Supp. 337 (D.V.I. 1997)); Marshall v. Western Air Lines, Inc., 62 Wash. App. 251, 813 P.2d 1269 (1991), review denied, 118 Wash. 2d 1002, 822 P.2d 287 (1991).

Air carrier's liability for injury to passenger from changes in air pressure, 75 A.L.R. 2d 848.

Testimony of physician (otolaryngologist) as to rupture of eardrum. Ear Injuries, 4 Am. Jur. Proof of Facts 561, proof 1.

n54 Air France v. Saks, 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985), (declined to follow on other grounds by, Beaudet v. British Airways, PLC, 853 F. Supp. 1062 (N.D. Ill. 1994)).

Generally, as to what constitutes an "accident" within the meaning of the Warsaw Convention, see § 156.

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;

A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments;
A.L.R. Index: Pilot;
A.L.R. Index: Take-off
3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223
Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215;
Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
Sonic Boom, 12 Am. Jur. Proof of Facts 593;
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Aviation, 2 Am. Jur. Proof of Facts 277;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 165

§ 165 Midair collision between aircraft

In line with the recognized principle that, in the absence of any statute to a different effect, the usual negligence rules are applicable in assessing the rights and duties of the parties in cases of death or injury arising from airplane collisions,n55 the courts, in cases involving midair collisions, have determined the rights, duties, and liabilities of the parties by the ordinary rules of negligence,n56 and as affected by the relationship of the partiesn57 and by any violation of air traffic regulations.n58 The items of negligence chiefly relied upon, and upon which liability has been predicated in the cases allowing recovery, have been those of failure to maintain a proper lookout for the other aircraft and failure to maneuver the aircraft owned or operated by the defendant in such manner as to avoid the collision.n59 In some instances, the United States has been held liable, or partly liable under the forum's comparative negligence law, for a midair collision caused by the negligence of its control tower personnel,n60 but it has also been held in midair collision cases that the direction of a control tower does not relieve the pilot from the duties otherwise placed upon him to accord the right of way over an airfield,n61 and even though flying with traffic clearance, the pilot of an aircraft is obligated to observe and avoid other traffic, at least when flying under visual flight rules.n62

In an action for injuries resulting from a midair collision of aircraft, the question of the plaintiff's contributory or comparative negligence is ordinarily one of fact for the jury,n63 and in several cases the evidence has been held sufficient to support a jury finding of negligence barring or diminishing recovery for injury resulting from a midair collision between aircraft.n64

The doctrine of res ipsa loquitur has been applied in some instances in actions for the injury or death of a passenger in an airplane, due to a collision with another airplane in flight.n65 In some instances, however, the doctrine has been held inapplicable under the particular circumstancesn66 or for the reason that the plane was not shown to have been under the exclusive control and management of the defendant.n67 The very high percentage of fatalities resulting from midair collisions of aircraft, and the consequent death of witnesses who have any information as to the actual facts and occurrences, make proof of negligence in such cases most difficult, and, where the circumstances

have been such that the doctrine of res ipsa loquitur has been held unavailable to the plaintiff,n68 failure to obtain and present proof of negligence proximately causing the collision of the two aircraft has been fatal to the plaintiff's recovery.n69

FOOTNOTES:

n55 § 108.

n56 Moore v. U.S., 178 F. Supp. 264 (N.D. Ala. 1959); Khourey v. American Airlines, Inc., 170 Ohio St. 310, 10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960); Mackey v. Miller, 221 Va. 715, 273 S.E.2d 550 (1981).

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 A.L.R. 2d 677 § 2.

n57 Irwin v. Pacific Southwest Airlines, 133 Cal. App. 3d 709, 184 Cal. Rptr. 228 (4th Dist. 1982) (declined to follow on other grounds by, Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866 (Iowa 1989)) (carrier-passenger relationship); Weadock v. Eagle Indem. Co., 15 So. 2d 132 (La. Ct. App. 2d Cir. 1943) (instructor-pupil relationship); Khourey v. American Airlines, Inc., 170 Ohio St. 310, 10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960) (airline passenger; airline owed highest duty of care for passenger's safety).

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 A.L.R. 2d 677 § 2.

n58 Corkran v. U.S., 79 F. Supp. 222 (S.D. W. Va. 1948); U.S. v. Compania Cubana De Aviacion, S. A., 224 F.2d 811 (5th Cir. 1955) (negligence either in failure to see other plane or in violating air traffic rule as to right of way); Bibler v. Young, 492 F.2d 1351, 71 Ohio Op. 2d 154 (6th Cir. 1974), cert. denied, 419 U.S. 996, 95 S. Ct. 309, 42 L. Ed. 2d 269 (1974) and (disagreement on other grounds recognized by, Zimmerman v. St. Peter's Catholic Church, 87 Ohio App. 3d 752, 622 N.E.2d 1184 (2d Dist. Montgomery County 1993)); First of America Bank-Cent. v. U.S., 639 F. Supp. 446 (W.D. Mich. 1986); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), cert. dismissed, 379 U.S. 951, 85 S. Ct. 452, 13 L. Ed. 2d 549 (1964); Ratton v. Busby, 230 Ark. 667, 326 S.W.2d 889, 76 A.L.R.2d 751 (1959); Irwin v. Pacific Southwest Airlines, 133 Cal. App. 3d 709, 184 Cal. Rptr. 228 (4th Dist. 1982) (declined to follow on other grounds by, Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866 (Iowa 1989)); Mackey v. Miller, 221 Va. 715, 273 S.E.2d 550 (1981).

Violation of an air traffic regulation triggers a presumption of negligence if the violation proximately caused death or injury, the regulation was designed to prevent death or injury, and the regulation was intended to protect the class of persons or property injured. Steering Committee v. U.S., 6 F.3d 572 (9th Cir. 1993), related reference, 1994 WL 560777 (C.D. Cal. 1994), related reference, 1994 WL 114668 (C.D. Cal. 1994).

Violation of a regulation that prescribed yielding the right of way constituted negligence, but violation of recommendations contained in an advisory circular will not constitute negligence per se, however, such recommendations do increase the pilot's duty to be vigilant. In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995).

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 A.L.R. 2d 677 § 2.

Complaints alleging violation of air traffic regulations in midair collisions. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 193, 194.

n59 In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995); Rodriquez v. U.S., 823 F.2d 735 (3d Cir. 1987); Brouse v. U. S., 83 F. Supp. 373 (N.D. Ohio 1949); Ahmann v. United Air Lines, Inc., 313 F.2d 274 (8th Cir. 1963); Steering Committee v. U.S., 6 F.3d 572 (9th Cir. 1993), related reference, 1994 WL 560777 (C.D. Cal. 1994), related reference, 1994 WL 114668 (C.D. Cal. 1994); In re Kinsey's Estate, 152 Neb. 95, 40 N.W.2d 526 (1949); Khourey v. American Airlines, Inc., 170 Ohio St. 310, 10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960).

On appeal from action to recover for damages sustained to aircraft during midair collision, evidence clearly supported trial court's conclusion that one pilot was clearly negligent in following another aircraft at distance of 100 to 150 feet, and finding that second pilot did not breach his duty to maintain adequate lookout where relative positions of planes made it impossible to see other plane behind and below him. Mackey v. Miller, 221 Va. 715, 273 S.E.2d 550 (1981).

The evidence supported the trial court's finding that a midair collision between a navy plane and an airliner, causing the death of airline passengers, occurred because the two planes were flying on converging courses and the navy plane either negligently failed to see the airliner or violated an air traffic rule as to the right of way. U.S. v. Compania Cubana De Aviacion, S. A., 224 F.2d 811 (5th Cir. 1955).

Complaint, petition, or declaration -- Collision between aircraft in flight -- Failure of pilot to maintain lookout -- Violation of air traffic regulations -- Attempt to pass overtaken aircraft too closely. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 193, 194

Answers alleging pilot's failure to maintain lookout. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 197, 198.

Instruction to jury -- Duty of pilot to keep proper lookout. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 200.

n60 Allegheny Airlines, Inc. v. U. S., 420 F. Supp. 1339 (S.D. Ind. 1976), aff'd in part, rev'd in part on other grounds, 586 F.2d 53 (7th Cir. 1978); Rudelson v. U. S., 431 F. Supp. 1101 (C.D. Cal. 1977), opinion supplemented, 444 F. Supp. 1352 (C.D. Cal. 1977) and opinion supplemented, 444 F. Supp. 1354 (C.D. Cal. 1977) and opinion supplemented, 444 F. Supp. 1356 (C.D. Cal. 1977) and judgment aff'd, 602 F.2d 1326 (9th Cir. 1979).

The air traffic controller and the United States could be liable when the controller failed to issue a warning when he knew or should have known that planes were on a collision course. In re Greenwood Air Crash, 924 F. Supp. 1518 (S.D. Ind. 1995).

Complaint -- Collision between aircraft in flight -- Negligence of FAA tower control personnel. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 195.

n61 Rodriquez v. U.S., 823 F.2d 735 (3d Cir. 1987); First of America Bank-Cent. v. U.S., 639 F. Supp. 446 (W.D. Mich. 1986).

n62 Rodriquez v. U.S., 823 F.2d 735 (3d Cir. 1987); U.S. v. Schultetus, 277

F.2d 322, 86 A.L.R.2d 375 (5th Cir. 1960), cert. denied, 364 U.S. 828, 81 S. Ct. 67, 5 L. Ed. 2d 56 (1960); United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), cert. dismissed, 379 U.S. 951, 85 S. Ct. 452, 13 L. Ed. 2d 549 (1964); citing Irwin v. Pacific Southwest Airlines, 133 Cal. App. 3d 709, 184 Cal. Rptr. 228 (4th Dist. 1982) (declined to follow on other grounds by, Stover v. Lakeland Square Owners Ass'n, 434 N.W.2d 866 (Iowa 1989)).

n63 Rodriquez v. U.S., 823 F.2d 735 (3d Cir. 1987); Hough v. Rapidair, Inc., 298 S.W.2d 378 (Mo. 1957).

n64 Murff v. U.S., 785 F.2d 552 (5th Cir. 1986), cert. denied, 479 U.S. 823, 107 S. Ct. 95, 93 L. Ed. 2d 46 (1986); Ronspiez v. Chambers, 203 Okla. 664, 226 P.2d 388 (1950); Reeves v. Southwest Flying Service, 258 S.W.2d 848 (Tex. Civ. App. El Paso 1953), writ refused n.r.e.

n65 O'Connor v. United States, 251 F.2d 939 (2d Cir. 1958) (under Op Atty Gen: Federal Tort Claims Act); Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933 (1932) (common carrier); Irwin v. Pacific Southwest Airlines, 133 Cal. App. 3d 709, 184 Cal. Rptr. 228 (4th Dist. 1982).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

Generally, as to the application of the doctrine of res ipsa loquitur in actions under the Federal Tort Claims Act arising out of airplane accidents, see 35 Am. Jur. 2d, Federal Tort Claims Act § 90.

n66 Bird v. Louer, 272 Ill. App. 522 (1st Dist. 1933).

n67 § 205.

n68 Generally, as to applicability of the doctrine to particular cases, see § 203 et seq.

n69 Parker v. James E. Granger, Inc., 4 Cal. 2d 668, 52 P.2d 226 (1935), appeal dismissed, cert. denied, 298 U.S. 644, 56 S. Ct. 958, 80 L. Ed. 1375 (1936); Bird v. Louer, 272 Ill. App. 522 (1st Dist. 1933).

Death of or injury to occupant of airplane from collision or near collision with another aircraft, 12 A.L.R. 2d 677 § 2.

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments;
A.L.R. Index: Pilot;
A.L.R. Index: Take-off
3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223

Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623
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Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 166

§ 166 Sonic boom damage

A "sonic boom" is a mechanical phenomenon of the air that consists of pressure waves and sound waves generated by an object moving through the air at speeds equal to or exceeding that of sound. Sonic booms are caused by shock waves of air pressure that are continuously created when any object is moving at speeds greater than that of sound.n70 Because the pressure wave is moving, it exerts its force directionally, pushing against a stationary object on the side from which it approaches and pulling it on the side from which it recedes. The effect is that, where glass breakage has resulted, the shards of glass will tend almost invariably to fall in the direction toward which the aircraft is traveling, sometimes falling at considerable distances, ranging up to 75 or 100 feet, from their point of origin.n71

With regard to the types of damage that may be caused by a sonic boom, the first structural material to be damaged by a sonic boom is usually glass, since that is the most fragile material used in construction. The next structural element that may suffer damage from a sonic boom is plaster. Finally, damage to door frames, walls, and partitions, and other more substantial parts of the structure, may be anticipated.n72

Whether direct personal injuries, as distinguished from injuries arising from flying glass or falling plaster, can be caused by a sonic boom depends on the altitude at which the plane is flying. An aircraft flying at Mach 2 (twice the speed of sound) at a very low altitude creates a severe pressure jump, and direct personal injury could result to a person within the path of the aircraft as it flies by. Damage to the ears is likely when the pressure change is great.n73

In any case in which recovery is sought for damage resulting from a sonic boom, it is necessary to establish by competent evidence that a sonic boom was responsible for the damage involved. Judges have accepted evidence that the pressure of the boom is so great that it can shake otherwise sturdy buildings to the ground, and can crack walls and shatter windows. The testimony of pilots and other aircraft personnel may be offered on the issue whether one or more aircraft had been flown at supersonic speeds. The plaintiff should offer evidence on the condition of his premises before the injury occurred contemporaneously with the boom itself.n74

FOOTNOTES:

n70 Bear Bros., Inc. v. Fidelity & Guaranty Ins. Underwriters, Inc., 41 Ala. App. 80, 123 So. 2d 596 (1960).

The court cannot take judicial notice that a sonic boom is an explosion. Alexander v. Firemen's Ins. Co., 317 S.W.2d 752 (Tex. Civ. App. Waco 1958).

Sonic Boom, 12 Am. Jur. Proof of Facts 593.

n71 Sonic Boom, Introductory Comment, 12 Am. Jur. Proof of Facts 593 [para]2.

n72 Sonic Boom, Introductory Comment, 12 Am. Jur. Proof of Facts 593 [para]5.

n73 Sonic Boom, Introductory Comment, 12 Am. Jur. Proof of Facts 593 [para]5.

n74 Sonic Boom, Introductory Comment, 12 Am. Jur. Proof of Facts 593 [para]6.

As to the discretionary function exclusion of the Op Atty Gen: Federal Tort Claims Act with respect to liability for sonic boom damage caused by military aircraft during training flights, see 35 Am. Jur. 2d, Federal Tort Claims Act § 36.

As to whether sonic boom damage is covered by an insurance policy, see 43 Am. Jur. 2d, Insurance § 507.

Complaints for damage by sonic boom. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 212, 213.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments;
A.L.R. Index: Pilot;
A.L.R. Index: Take-off
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 167

§ 167 Injury or damage to persons or property on ground caused by objects falling from plane or plane crash

Generally, the doctrine of res ipsa loquitur has been applied in actions for injuries to persons and property on the ground caused either by a plane crash or from objects falling from a plane.n75 However, the doctrine of res ipsa loquitur has been held not applicable to an action for the death of a railroad laborer killed by a canopy falling from an airplane while he was sitting on the right of way eating lunch, where the pilot lost control of the plane and bailed out.n76

FOOTNOTES:

n75 Norden v. U. S., 187 F. Supp. 594 (D.R.I. 1960); Parcell v. U.S., 104 F. Supp. 110 (S.D. W. Va. 1951) (doctrine applied where two military planes, flying in formation, apparently collided in midair and crashed, causing damage to property on the ground); U.S. v. Johnson, 288 F.2d 40 (5th Cir. 1961) (crash of planes in, on, or about land leased by plaintiffs); Sapp v. U.S., 153 F. Supp. 496 (W.D. La. 1957) (applying Louisiana law); U.S. v. Kesinger, 190 F.2d 529 (10th Cir. 1951) (applying Kansas law); Genero v. Ewing, 176 Wash. 78, 28 P.2d 116 (1934).

The statutory doctrine of absolute liability is applied in some jurisdictions in actions involving injuries or damage to persons or property on the ground resulting from the fall of an aircraft or an object therefrom. See § 128.

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

Complaint in Federal Court -- Op Atty Gen: Federal Tort Claims Act -- Auxiliary gas tank detached from US Air Force aircraft during flight and fell on business. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 158.

Complaint under Federal Tort Claims Act for death of workman caused by air force jet crashing into factory. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 206.

Complaint under Federal Tort Claims Act -- Inference of negligence from unexplained crash of military aircraft into residence. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 138.

n76 Bright v. U. S., 149 F. Supp. 620 (E.D. Ill. 1956).

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 168

§ 168 Low-altitude flying

Owners and operators of aircraft may be liable when low overflight results in damage or injury to people or property on the ground.n77 The flight of aircraft over land at a low altitude, frightening animals and game, attracting spectators and thus injuring crops and generally inconveniencing the landowner, renders the owner of the planes or other aircraft liable to a judgment for damages,n78 and an injury caused by animals so frightened has been held actionable.n79

The "discretionary function" exception of the Federal Tort Claims Actn80 does not bar an action by a person injured by the low overflight of military aircraft.n81 Also, in a proper case the United States may be sued for injuries to animals caused by low-flying military or naval planes, and a number of such suits have been brought under the Federal Tort Claims Act.n82 The doctrine of res ipsa loquitur has been applied in a case involving property damage caused by low overflight.n83

FOOTNOTES:

n77 Musick v. U.S., 768 F. Supp. 183 (W.D. Va. 1991), related reference, 781 F. Supp. 445 (W.D. Va. 1991) (distinguished on other grounds by, In re Air Crash Disaster at Charlotte, N.C. on July 2, 1994, 1997 WL 638413 (D.S.C. 1997)) (low overflight severed tree limb which fell on plaintiff causing him injury); Faby v. Air France, 113 Misc. 2d 840, 449 N.Y.S.2d 1018 (City Civ. Ct. 1982) (patio window burst after low overflight).

As to low flying as trespass or nuisance, see § 4.

As to the application of statutes imposing strict liability for injuries or damage to persons or property on the ground resulting from the operation of aircraft, see § 128.

Complaint -- Electric wires struck by helicopter. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 202.

n78 Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949).

Complaint, petition, or declaration -- Aircraft used for advertising -- Frightened animals caused plaintiff personal injuries. 4 Am. Jur. Pleading and

Practice Forms (Rev), Aviation § 204.

n79 Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929); Brunt v. Chicago Mill & Lumber Co., 243 Miss. 607, 139 So. 2d 380 (1962) (loss of cattle that stampeded); Hoebee v. Howe, 98 N.H. 168, 97 A.2d 223 (1953) (injury to child when struck by horse frightened by improperly operated plane); Miller v. Maples, 278 S.W.2d 385 (Tex. Civ. App. Amarillo 1954) (loss of turkeys that were killed when running because frightened by aircraft); Maitland v. Twin City Aviation Corp., 254 Wis. 541, 37 N.W.2d 74 (1949) (low flying over mink farm during whelping season, frightening female animals and causing them to destroy their young).

Complaint in Federal Court -- Op Atty Gen: Federal Tort Claims Act -- Frightened animals caused plaintiff personal injuries. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 205.

Generally as to liability for injuries to animals by fright, see 4 Am. Jur. 2d, Animals § 145.

n80 See generally 35 Am. Jur. 2d, Federal Tort Claims Act § § 15 et seq.

n81 Musick v. U.S., 768 F. Supp. 183 (W.D. Va. 1991), related reference, 781 F. Supp. 445 (W.D. Va. 1991) (distinguished on other grounds by, In re Air Crash Disaster at Charlotte, N.C. on July 2, 1994, 1997 WL 638413 (D.S.C. 1997)); Dahlstrom v. U.S., 228 F.2d 819 (8th Cir. 1956).

Construction and application of 28 USC § 2680 excepting specified claims from scope of Federal Tort Claims Act, 6 L Ed 2d 1422 § 10 (air traffic; operation of airplanes).

n82 Wildwood Mink Ranch v. U. S., 218 F. Supp. 67 (D. Minn. 1963) (injury to mink from airplane noise); Leisy v. U. S., 102 F. Supp. 789 (D. Minn. 1952) (injury to mink from low-flying planes).

n83 Faby v. Air France, 113 Misc. 2d 840, 449 N.Y.S.2d 1018 (City Civ. Ct. 1982).

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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 169

§ 169 Spraying or dusting operations

Persons operating or employing airplanes for spraying or dusting crops or other vegetation must use due care to perform such operations under such conditions and in such manner as not to cause injury to others.n84 A defendant who is engaged in spraying or dusting fruit, vegetables, or other products by means of an airplane may, by negligently spreading liquid or powder known to contain a dangerous proportion of poison, in such manner as to endanger the animals of another person in the immediate vicinity, become liable for damage resulting therefrom.n85 Also, negligence in spraying or dusting by airplane may serve as the predicate for liability for damage to an adjoining landowner's crops or other property caused by the drift of the spray or dust or by the failure of the airplane spreader to cut off the spray or dust when making turns over neighbors' crops, trees, or pasture lands.n86 Moreover, the owner of a farm being sprayed by airplane and the operator of the spraying service have been held liable, regardless of negligence, under the doctrine of absolute liability for damage to a neighbor's crops.n87 According to other authorities, however, a landowner spraying his crops with chemical dust by airplane is not absolutely liable for damage to his neighbor's crops by drifting of the dust, but, to impose liability, negligence must be shown, including notice of the dangerous characternn88 and floating qualityn89 of the dust.

In a number of cases, crop-dusting has been recognized as intrinsically dangerous so as to render a landowner vicariously liable for the negligence of an independent contractor who sprayed his fields.n90 On the other hand, the view has been expressed that a landowner is not liable for negligent spraying operations where the crop duster is an independent contractor.n91

FOOTNOTES:

n84 Lundberg v. Bolon, 67 Ariz. 259, 194 P.2d 454 (1948); S. A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933); Hammond Ranch Corp. v. Dodson, 199 Ark. 846, 136 S.W.2d 484 (1940); Miles v. A. Arena & Co., 23 Cal. App. 2d 680, 73 P.2d 1260 (4th Dist. 1937); Underhill v. Motes, 158 Kan. 173, 146 P.2d 374 (1944); Burke v. Thomas, 313 P.2d 1082 (Okla. 1957); Aerial Sprayers, Inc. v. Yerger, Hill & Son, 306 S.W.2d 433 (Tex. Civ. App. Austin 1957).

As to the frightening of animals by spraying or dusting operations, see § 168.

In an action by a former property owner against a cropduster for alleged negligent spraying of a peach orchard, resulting in damages for loss of trees and future profits, no claim for relief was established where, subsequent to the spraying, the owner sold the property to buyers who paid the full price without any reduction because of damage to trees. Barber v. Adams, 145 Ga. App. 627, 244 S.E.2d 149 (1978).

Liability for injury caused by spraying or dusting of crops, 37 A.L.R. 3d 833 § 2[b].

Aircraft lease -- Use of aircraft for pest and weed control. 3A Am. Jur. Legal Forms 2d, Aviation § 34:47.

Complaints in action to recover damages caused by aerial spraying or dusting of crops. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 216-221.

Instruction to jury -- Duty of care in spraying or dusting operation. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 222.

Instruction to jury -- Measure of damages to crop. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 223.

Proof of crop duster's liability for negligence in spraying operations. 641, Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623 § § 7 et seq.

n85 See 4 Am. Jur. 2d, Animals § 146.

n86 See 1 Am. Jur. 2d, Adjoining Landowners § 38.

n87 Mayeux v. Cane-Air, Inc., 426 So. 2d 305 (La. Ct. App. 5th Cir. 1983), writ denied, 429 So. 2d 159 (La. 1983) (citing Louisiana statute affording strict liability); Langan v. Valicopters, Inc., 88 Wash. 2d 855, 567 P.2d 218, 10 Env't. Rep. Cas. (BNA) 1614 (1977).

Where the owner of a fish pond sued the operator of an airplane crop spraying service for fish killed due to chemical pollution of the pond, the chemical spraying constituted the "dropping or falling" of an object within the meaning of a statute imposing strict liability on aircraft owners. Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977).

Liability for injury caused by spraying or dusting of crops, 37 A.L.R. 3d 833 § § 5, 8.

n88 Burns v. Vaughn, 216 Ark. 128, 224 S.W.2d 365, 12 A.L.R.2d 433 (1949).

n89 Chapman Chemical Co. v. Taylor, for Use and Benefit of Wilson, 215 Ark. 630, 222 S.W.2d 820 (1949).

n90 McKennon v. Jones, 219 Ark. 671, 244 S.W.2d 138 (1951); Lawler v. Skelton, 241 Miss. 274, 130 So. 2d 565 (1961).

Liability for injury caused by spraying or dusting of crops, 37 A.L.R. 3d 833 § 3.

n91 Pitchfork Land & Cattle Co. v. King, 162 Tex. 331, 346 S.W.2d 598 (1961).

Liability for injury caused by spraying or dusting of crops, 37 A.L.R. 3d 833

§ 6.

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B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 170

§ 170 Falling or crash of aircraft in flight

In a number of cases, the doctrine of res ipsa loquitur has been applied in actions for the injury or death of a passenger in or occupant of an airplane which fell or crashed while in flight.n92 But in other instances involving such accidents the doctrine has been denied application, in some cases because of particular circumstances,n93 and in a few cases on the ground that the fall and crash of an airplane as the result of natural hazards and without human fault is not an unusual occurrence.n94 Also, the doctrine may be held inapplicable in such a case because of the failure to show that the defendant had the exclusive control or management of the plane.n95 It has recognized that the doctrine of res ipsa loquitur may be applicable in a case where an airplane, in the course of flight, collides with a mountain or other land elevation.n96

It has been recognized that the government may be held liable where air traffic control personnel refuse permission to fly at a lower altitude because of extremely hazardous atmospheric conditions and the aircraft subsequently crashes.n97 However, where an airplane crashed into the side of a mountain a short while after takeoff, it was held that the air traffic controllers were not negligent in failing to issue instrument flight rules clearance and in failing to warn the aircraft of the mountain, where no controller was aware of the plane's endangerment, the plane was being operated on visual flight rules, and the mountain was easily observable by the aircraft crew.n98

FOOTNOTES:

n92 Lobel v. American Airlines, 192 F.2d 217 (2d Cir. 1951), cert. denied, 342 U.S. 945, 72 S. Ct. 558, 96 L. Ed. 703 (1952); Rogow v. U S, 173 F. Supp. 547 (S.D.N.Y. 1959) (applying New York law); Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 6 A.L.R.2d 521 (D.D.C. 1948); Newing v. Cheatham, 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33 (1975); Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N.E.2d 131 (1st Dist. 1944), error dismissed, 389 Ill. 462, 59 N.E.2d 853 (1945); Seaman v. Curtiss Flying Service, 231 A.D. 867, 247 N.Y.S. 251 (1930).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

Complaint alleging fall or crash of aircraft in flight. 4 Am. Jur. Pleading

and Practice Forms (Rev), Aviation § § 121-123, 166.

As to injuries to persons or property on the ground caused by falling objects, see § 167.

n93 Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975) (applying Oklahoma law); English v. Miller, 43 S.W.2d 642 (Tex. Civ. App. Amarillo 1931), writ refused, (Apr. 6, 1932) (holding that the doctrine would be applicable except for pleading and proof of specific acts of negligence).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

n94 Trihey v. Transocean Air Lines, Inc., 255 F.2d 824 (9th Cir. 1958), cert. denied, 358 U.S. 838, 79 S. Ct. 62, 3 L. Ed. 2d 74 (1958) (inference of negligence is not compelled by unexplained crash in ocean); Herndon v. Gregory, 190 Ark. 702, 81 S.W.2d 849 (1935); Smith v. Whitley, 223 N.C. 534, 27 S.E.2d 442 (1943); Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 99 S.W.2d 557 (1935).

Res ipsa loquitor would not be applied to the crash of an airplane piloted by an inexperienced student pilot under extremely adverse weather conditions over rugged mountainous terrain at night; however, there was sufficient evidence to create the jury issue as to whether the pilot's negligence in undertaking the flight was the proximate cause of the crash. Surface v. Johnson, 215 Va. 777, 214 S.E.2d 152 (1975) (declining to draw inferences of negligence and proximate cause since it is matter of common knowledge that the fall and crash of the airplane as a result of natural hazards and without human fault is not an unusual occurrence).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

n95 § 205.

n96 Northwest Airlines v. Rowe, 226 F.2d 365 (8th Cir. 1955); Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940, 6 A.L.R.2d 521 (D.D.C. 1948); Tompkins v. Northwestern Union Trust Co. of Helena, 198 Mont. 170, 645 P.2d 402, 25 A.L.R.4th 1220 (1982).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

n97 Spohn v. U S, 16 F.R.D. 240 (S.D.N.Y. 1954).

Liability of United States for negligence of air traffic controller, 46 A.L.R. Fed. 24.

n98 Baker v. U. S., 417 F. Supp. 471 (W.D. Wash. 1975).

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B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 171

§ 171 Landing of aircraft; pilot negligence

The manner, method, place, or time of landing an aircraft may constitute actionable negligence upon which a recovery for injuries or damage proximately caused thereby may be predicated.n99 There are, of course, certain standard procedures which are generally accepted as proper for landings but it is self-evident that some deviation from these procedures may be necessary under some circumstances, and it is also apparent that an accident while landing may take place although the pilot has followed all prescribed procedures and can in no way be found to have been negligent.n1 In other words, there are no absolute and all-embracing standards for the determination of what constitutes negligence in landing an aircraft, and in most cases it has been held or recognized that whether a pilot was negligent with regard to the landing of the aircraft depends upon the circumstances of the particular case and, upon sufficient evidence to raise the issue, is a question for the determination of the jury, or the trial judge as the trier of fact in a case tried without a jury.n2 It has, however, been held that a violation of federal aviation safety regulations while landing an airplane constitutes negligence per se if the harm inflicted was of the type the regulation was designed to prevent and the person injured was within the class of persons the regulation was intended to protect.n3 In any event, even if the pilot is deemed or found to have been negligent with regard to landing the aircraft, it must also be found, in order for the plaintiff to recover, that such negligence proximately caused the plaintiff's injuries, and if such proximate cause is in issue in the case, this also is ordinarily a question for the determination of the trier of fact.n4 In a case in which recovery is sought for injuries to, or the death of, the pilot who landed or attempted to land the plane, recovery may be denied or diminished if the pilot's negligence was a proximate cause of the accident.n5

These principles have been applied with regard to a variety of particular acts, omissions, and circumstances pertaining to injuries or damage sustained in airplane landing accidents, including --

-- the choice of a landing placen6 or area on a landing field in which to make a landing.n7

-- visibility and lookout when landing.n8

-- traffic patterns and the right of way.n9

-- the height of the approach for a landing.n10

-- flying at too slown11 or too greatn12 a speed when attempting a landing.
-- wind direction.n13
-- the "slipping" of an airplane during landing.n14
-- the operation by the pilot of the instruments and controls during a landing.n15

The doctrine of res ipsa loquitur has been applied in an action for the death of a passenger on an airliner resulting from a crash of the plane while attempting a routine landing at an airport.n16 But the doctrine has been held inapplicable, under the particular circumstances, in an action for injury to a workman on the edge of an airport runway who was struck by a plane in landing.n17

FOOTNOTES:

n99 Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 73 A.L.R.2d 337 (8th Cir. 1959); Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 46 A.L.R.2d 1038 (9th Cir. 1954); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (3d Dist. 1954); McCutcheon v. Larsen, 134 Mont. 511, 333 P.2d 1013, 74 A.L.R.2d 622 (1959); Greunke v. North American Airways Co., 201 Wis. 565, 230 N.W. 618, 69 A.L.R. 295 (1930).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628.

Complaint, petition, or declaration -- Damage to aircraft -- Collision between aircraft taking off and aircraft attempting to land. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 34.

Complaint, petition, or declaration -- Crash or fall of aircraft on landing -- Injury to business invitee. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 177.

Complaint -- allegation -- Crash of helicopter on landing. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 181.

n1 Johnson v. Western Air Exp. Corp., 45 Cal. App. 2d 614, 114 P.2d 688 (2d Dist. 1941); Bolick v. Sunbird Airlines, Inc., 96 N.C. App. 443, 386 S.E.2d 76 (1989), review on additional issues denied and aff'd, 327 N.C. 464, 396 S.E.2d 323 (1990).

A seaplane pilot was not negligent in a water landing resulting in a crash with a boat, where the boat came out of a cove in front of the seaplane, the pilot veered to avoid the boat, and the boat turned into the seaplane's path in order to make a U-turn. Flanagan (1995, La App).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 3.

Proper approach procedure -- Testimony of expert. Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333, proof 1.

n2 Redhead v. U. S., 686 F.2d 178, 11 Fed. R. Evid. Serv. (LCP) 1115 (3d Cir. 1982), cert. denied, 459 U.S. 1203, 103 S. Ct. 1190, 75 L. Ed. 2d 435 (1983) and (declined to follow on other grounds by, In re Greenwood Air Crash, 873 F. Supp. 1257 (S.D. Ind. 1995)); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (3d Dist. 1954); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952) (death of guest; gross negligence as question for jury); McCusker v. Curtiss Wright Flying Service, 269 Ill. App. 502 (1st Dist. 1933); Orchard v. Northwest Airlines, 236 Minn. 42, 51 N.W.2d 645 (1952); Umberger v. Sankey, 151 Neb. 488,

38 N.W.2d 21 (1949), reh'g denied, 151 Neb. 625, 38 N.W.2d 551 (1949); Bolick v. Sunbird Airlines, Inc., 96 N.C. App. 443, 386 S.E.2d 76 (1989), review on additional issues denied and aff'd, 327 N.C. 464, 396 S.E.2d 323 (1990); Khourey v. American Airlines, Inc., 170 Ohio St. 310, 10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § § 3-12.

n3 U.S. Aviation Underwriters, Inc. v. National Ins. Underwriters, 117 Wis. 2d 417, 344 N.W.2d 532 (Ct. App. 1984).

n4 Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 46 A.L.R.2d 1038 (9th Cir. 1954) (applying Idaho law); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (3d Dist. 1954); McCutcheon v. Larsen, 134 Mont. 511, 333 P.2d 1013, 74 A.L.R.2d 622 (1959); Umberger v. Sankey, 151 Neb. 488, 38 N.W.2d 21 (1949), reh'g denied, 151 Neb. 625, 38 N.W.2d 551 (1949); Murphy v. Neely, 319 Pa. 437, 179 A. 439 (1935).

n5 Bowen v. U. S., 570 F.2d 1311 (7th Cir. 1978) (called into doubt on other grounds by, Southern Pac. Transp. Co. v. U. S., 462 F. Supp. 1193 (E.D. Cal. 1978)); Miller v. Contra Costa County, 106 Cal. App. 2d 304, 235 P.2d 76 (1st Dist. 1951); Peavey v. City of Miami, 146 Fla. 629, 1 So. 2d 614 (1941); Ronspiez v. Chambers, 203 Okla. 664, 226 P.2d 388 (1950); Plewes v. City of Lancaster, 171 Pa. Super. 312, 90 A.2d 279 (1952).

n6 Chapman v. U.S., 194 F.2d 974 (5th Cir. 1952), cert. denied, 344 U.S. 821, 73 S. Ct. 19, 97 L. Ed. 639 (1952) (pilot was not negligent); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (3d Dist. 1954) (pilot negligent); Shook v. Beals, 96 Cal. App. 2d 963, 217 P.2d 56, 18 A.L.R.2d 919 (4th Dist. 1950) (pilot negligent); Flader v. Simonsen, 148 Colo. 480, 366 P.2d 678 (1961) (pilot was not negligent); Murphy v. Neely, 319 Pa. 437, 179 A. 439 (1935) (pilot was not negligent).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 4.

n7 Falls Church Airpark Co. v. Mooney Aircraft, Inc., 254 F.2d 920 (5th Cir. 1958) (pilot was not negligent); Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 73 A.L.R.2d 337 (8th Cir. 1959) (pilot negligent); Umberger v. Sankey, 151 Neb. 488, 38 N.W.2d 21 (1949), reh'g denied, 151 Neb. 625, 38 N.W.2d 551 (1949) (pilot negligent); Bolick v. Sunbird Airlines, Inc., 96 N.C. App. 443, 386 S.E.2d 76 (1989), review on additional issues denied and aff'd, 327 N.C. 464, 396 S.E.2d 323 (1990) (jury question as to pilot's negligence in failing to touch down on first third of runway).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 4.

n8 In re Air Crash Disaster at New Orleans (Moisant Field), Louisiana on March 20, 1969, 544 F.2d 270 (6th Cir. 1976) (pilot negligent); Dyer v. U.S., 832 F.2d 1062 (9th Cir. 1987) (duty to see and avoid wake turbulence); In re Aircrash Disaster at Boston, Mass., July 31, 1973, 412 F. Supp. 959 (D. Mass. 1976), judgment aff'd, 561 F.2d 381, 46 A.L.R. Fed. 1 (1st Cir. 1977), cert. denied, 434 U.S. 1064, 98 S. Ct. 1238, 55 L. Ed. 2d 764 (1978) (only negligence proximately causing the airplane crash was that of the pilot and co-pilot); Peavey v. City of Miami, 146 Fla. 629, 1 So. 2d 614 (1941) (contributory negligence of pilot, landing airplane at dusk, personally injured in collision with road roller on field); Sammons v. Webb, 86 Ga. App. 382, 71 S.E.2d 832 (1952) (pilot negligent); Khourey v. American Airlines, Inc., 170 Ohio St. 310,

10 Ohio Op. 2d 351, 164 N.E.2d 402 (1960) (pilot negligent).

It is pilot's duty to keep visual flight minimums necessary for visual approach landing, and if he encounters conditions below prescribed minimums, he must execute missed approach. Redhead v. U. S., 686 F.2d 178, 11 Fed. R. Evid. Serv. (LCP) 1115 (3d Cir. 1982), cert. denied, 459 U.S. 1203, 103 S. Ct. 1190, 75 L. Ed. 2d 435 (1983) and (declined to follow on other grounds by, In re Greenwood Air Crash, 873 F. Supp. 1257 (S.D. Ind. 1995)).

Pilot was negligent for flying in poor weather conditions resulting in crash at attempted landing, especially in light of two warnings that visual flight rules were not recommended for that flight. Lombard v. U.S., 601 F. Supp. 10 (E.D. Mo. 1984), judgment aff'd, 767 F.2d 929 (8th Cir. 1985).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 5.

n9 Hamilton v. U. S., 497 F.2d 370 (9th Cir. 1974) (pilot negligent in violating right of way rules); Ratton v. Busby, 230 Ark. 667, 326 S.W.2d 889, 76 A.L.R.2d 751 (1959) (violation of rule that in landing, airplane at lower altitude had right of way); McCutcheon v. Larsen, 134 Mont. 511, 333 P.2d 1013, 74 A.L.R.2d 622 (1959) (evidence that pilot failed to use "prescribed recovery pattern"); U.S. Aviation Underwriters, Inc. v. National Ins. Underwriters, 117 Wis. 2d 417, 344 N.W.2d 532 (Ct. App. 1984) (pilot negligent in violating right of way rules).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 6.

Evidence supported the conclusion that air traffic controllers were negligent and the pilot of a small aircraft was not contributorily negligent where the pilot was told to continue his landing approach following a large aircraft and was subsequently directed to "keep your traffic close behind the TWA jet, there are others behind you," and the pilot subsequently lost control and crashed as the result of encountering wake turbulence from the larger aircraft; notwithstanding the pilot's final authority as to operation of aircraft, he was required to follow the traffic controller's instructions and the controller had a duty to give a warning as to the danger of wake turbulence behind the larger aircraft. Yates v. U. S., 497 F.2d 878 (10th Cir. 1974).

n10 La Com v. Pacific Gas & Elec. Co., 132 Cal. App. 2d 114, 281 P.2d 894, 48 A.L.R.2d 1455 (1st Dist. 1955) (pilot was negligent in flying his airplane too low during an approach); Drahmann's Adm'x v. Brink's Adm'x, 290 S.W.2d 449 (Ky. 1956) (pilot was negligent in flying his airplane too high during an approach); Lea v. Baumann Surgical Supplies Inc., 321 So. 2d 844 (La. Ct. App. 1st Cir. 1975), writ denied, 325 So. 2d 279 (La. 1976) and writ denied, 325 So. 2d 279 (La. 1976) and (declined to follow on other grounds by, Shute v. Moon Lake Elec. Ass'n, Inc., 899 F.2d 999 (10th Cir. 1990)) (pilot was negligent in flying his airplane too low during an approach); Orchard v. Northwest Airlines, 236 Minn. 42, 51 N.W.2d 645 (1952) (pilot was negligent in flying his airplane too low during an approach); Woodall Flying Service, Inc. v. Thomas, 27 N.C. App. 107, 218 S.E.2d 203 (1975) (pilot was negligent in flying his airplane too high during an approach).

The pilot of a plane which crashed while attempting to land was not guilty of contributory negligence based on his failure to report immediately as his plane went over VOR, and his descent below minimum descent altitude in violation of federal regulations, where there was no showing that the pilot failed to observe correct procedures based on information provided to him by air traffic

controllers, which was erroneous and caused him to believe that his altitude and ceiling were higher than they actually were. Martin v. U. S., 448 F. Supp. 855 (E.D. Ark. 1977), judgment aff'd in part, rev'd in part on other grounds, 586 F.2d 1206 (8th Cir. 1978) (applying Arkansas law).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 7.

Complaint -- Crash or fall of aircraft on landing -- Failure to maintain proper altitude and air speed. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 178.

n11 Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison, 190 F.2d 726 (5th Cir. 1951); Halbert v. Berlinger, 127 Cal. App. 2d 6, 273 P.2d 274 (3d Dist. 1954).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 8.

n12 Drahmann's Adm'x v. Brink's Adm'x, 290 S.W.2d 449 (Ky. 1956); Berry Brothers General Contractors, Inc. v. Air Marine, Inc., 328 So. 2d 771 (La. Ct. App. 1st Cir. 1976); Umberger v. Sankey, 151 Neb. 488, 38 N.W.2d 21 (1949), reh'g denied, 151 Neb. 625, 38 N.W.2d 551 (1949).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 8.

n13 Pottawatomie Airport & Flying Service, Inc. v. Winger, 176 Kan. 445, 271 P.2d 754 (1954).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 9.

n14 Grain Dealers Nat. Mut. Fire Ins. Co. v. Harrison, 190 F.2d 726 (5th Cir. 1951) (applying Florida law); Hall v. Stover, 215 Ark. 485, 221 S.W.2d 41 (1949) (expert testimony that prudent pilot would not continue operation of landing airplane on runway in a forward slip).

Hydroplaning of aircraft on touchdown because of a sudden storm was not due to negligence. Bolick v. Sunbird Airlines, Inc., 96 N.C. App. 443, 386 S.E.2d 76 (1989), review on additional issues denied and aff'd, 327 N.C. 464, 396 S.E.2d 323 (1990).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 10.

n15 Miller v. Contra Costa County, 106 Cal. App. 2d 304, 235 P.2d 76 (1st Dist. 1951) (pilot was not negligent in emergency); Shook v. Beals, 96 Cal. App. 2d 963, 217 P.2d 56, 18 A.L.R.2d 919 (4th Dist. 1950) (pilot negligence); Drahmann's Adm'x v. Brink's Adm'x, 290 S.W.2d 449 (Ky. 1956) (pilot negligence); Nichols v. Jones, 260 So. 2d 748 (La. Ct. App. 2d Cir. 1971) (negligence of pilot); McCutcheon v. Larsen, 134 Mont. 511, 333 P.2d 1013, 74 A.L.R.2d 622 (1959) (pilot negligence); Murphy v. Neely, 319 Pa. 437, 179 A. 439 (1935) (Pilot was not negligent in emergency).

Negligence in operation of airplane in landing, 74 A.L.R. 2d 628 § 11.

n16 Capital Airlines, Inc. v. Barger, 47 Tenn. App. 636, 341 S.W.2d 579 (1960) (crash of a plane while attempting a routine landing at night in disagreeable, but not unusually hazardous, weather).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

n17 Deojay v. Lyford, 139 Me. 234, 29 A.2d 111 (1942).

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38

A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
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A.L.R. Index: Hijacking;
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A.L.R. Index: Pilot;
A.L.R. Index: Take-off
3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223
Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623
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Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
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Ear Injuries, 4 Am. Jur. Proof of Facts 561;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 172

§ 172 Air traffic control negligence

Findings that air traffic control operators negligently issued, or failed to issue, clearances, such as "cleared to land," and other advice, information, or warnings to pilots of landing aircraft, have under the circumstances of some of the cases supported decisions holding the government answerable for damage or injury resulting proximately from the negligent acts or omissions of its control tower employees.n18 But in cases presenting questions as to the negligence of control tower personnel in issuing information and clearances, such as clearance to land, courts have recognized that, at least where the flight is being made under visual flight rule weather conditions, such information and clearances are permissive in nature and do not relieve the pilot of his primary responsibility for the operation of his aircraft and the avoidance of collisions.n19 Accordingly, it has been held that a finding that landing field control tower operators were negligent in failing to maintain control over two aircraft so that each would be properly spaced and avoid collision may not be made in violation of the principle that the direct and primary responsibility for the operation of aircraft flying under visual flight rules over or in the vicinity of an airport rests upon the pilots of the aircraft.n20 Furthermore, no breach of duty to a pilot or his passengers was found where control personnel, relying upon the pilot's statements concerning the visibility of a landing field, cleared the plane for a visual flight rules approach and landing although reported weather conditions did not meet visual flight rule minimums.n21

The fact that a clearance to land is permissive only, however, does not relieve tower personnel of the obligation to use reasonable care in granting the clearance, and a failure of control tower personnel to exercise such care, primarily in clearing two planes for the same runway at approximately the same time, has been held to constitute actionable negligence in an action arising out of the midair collision of two landing airplanes.n22 Also, it has been recognized that there is a duty on the part of control tower personnel, when giving clearance to land, to take into consideration the effect that turbulence created by the operation of heavy airplanes might have upon lighter following planes,n23 although the ultimate responsibility rests with the pilot, regardless of the clearance given.n24

FOOTNOTES:

n18 Starr v. U. S., 393 F. Supp. 1359 (N.D. Tex. 1975) (applying Texas law; breach of lookout in failing to see and warn of motorcyclist on the runway); Dyer v. U.S., 551 F. Supp. 1266 (W.D. Mich. 1982) (failure to inform pilot of options and to respond to direct request was negligent could fairly be said to have been proximate cause of failure to land successfully; applying comparative negligence); Bright v. U. S., 149 F. Supp. 620 (E.D. Ill. 1956) (negligence in not warning pilot of military jet aircraft of thunderstorm near airbase at which he was attempting to land for refueling); Air Transport Associates v. U.S., 221 F.2d 467 (9th Cir. 1955) (tower directed a plane to land at night on a runway upon which a stalled truck without lights was being assisted by a second truck, also without lights); DeWeese v. U. S., 419 F. Supp. 147 (D. Colo. 1974), judgment aff'd, 576 F.2d 802, 47 A.L.R. Fed. 723 (10th Cir. 1978) (failure to provide pilot with latest ceiling and visibility information and with a proper altimeter setting); Union Trust Co. of District of Columbia v. U. S., 113 F. Supp. 80 (D.D.C. 1953), aff'd in part, modified in part and rev'd in part on other grounds, 221 F.2d 62 (D.C. Cir. 1955) (actions arising out of midair collision, during excellent weather conditions when visibility unimpeded, of Eastern Airlines plane on final approach for landing on runway three of Washington, D. C., National Airport with Bolivian military aircraft also attempting to land on runway three).

Liability of United States for negligence of air traffic controller, 46 A.L.R. Fed. 24.

Complaint in Federal court -- Op Atty Gen: Federal Tort Claims Act -- Wrongful death resulting from negligence of FAA control tower personnel in instructing landing aircraft. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 180.

n19 New York Airways, Inc. v. U.S., 283 F.2d 496 (2d Cir. 1960); Tilley v. U. S., 375 F.2d 678 (4th Cir. 1967); U.S. v. Schultetus, 277 F.2d 322, 86 A.L.R.2d 375 (5th Cir. 1960), cert. denied, 364 U.S. 828, 81 S. Ct. 67, 5 L. Ed. 2d 56 (1960); Dyer v. U.S., 832 F.2d 1062 (9th Cir. 1987).

Liability of United States for negligence of air traffic controller, 46 A.L.R. Fed. 24.

n20 U.S. v. Schultetus, 277 F.2d 322, 86 A.L.R.2d 375 (5th Cir. 1960), cert. denied, 364 U.S. 828, 81 S. Ct. 67, 5 L. Ed. 2d 56 (1960).

n21 Redhead v. U. S., 686 F.2d 178, 11 Fed. R. Evid. Serv. (LCP) 1115 (3d Cir. 1982), cert. denied, 459 U.S. 1203, 103 S. Ct. 1190, 75 L. Ed. 2d 435 (1983) and (declined to follow on other grounds by, In re Greenwood Air Crash, 873 F. Supp. 1257 (S.D. Ind. 1995)); In re Air Crash Disaster at New Orleans (Moisant Field), Louisiana on March 20, 1969, 544 F.2d 270 (6th Cir. 1976).

n22 Union Trust Co. of District of Columbia v. U. S., 113 F. Supp. 80 (D.D.C. 1953), aff'd in part, modified in part and rev'd in part on other grounds, 221 F.2d 62 (D.C. Cir. 1955), cert. denied, 350 U.S. 911, 76 S. Ct. 192, 100 L. Ed. 799 (1955).

Liability of United States for negligence of air traffic controller, 46 A.L.R. Fed. 24.

n23 Johnson v. U.S., 183 F. Supp. 489 (E.D. Mich. 1960), judgment aff'd, 295 F.2d 509 (6th Cir. 1961) (but no proximate cause); Zoppi v. U. S., 396 F. Supp.

416 (N.D. Ohio 1975) (applying Ohio law) (no proximate cause).

n24 Dyer v. U.S., 832 F.2d 1062 (9th Cir. 1987).

SUPPLEMENT:
Death or Injury to Occupant of Airplane from Collision or Near -- Collision with another Aircraft, 64 A.L.R. 5th 235.
Proof of Liability for Air Crash, 51 Am. Jur. Proof of Facts 3d 81.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
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A.L.R. Index: Hijacking;
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3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223
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Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215;
Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
Sonic Boom, 12 Am. Jur. Proof of Facts 593;
Rain and Other Weather Phenomena, 10 Am. Jur. Proof of Facts 49;
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 173

§ 173 Forced landings

The doctrine of res ipsa loquitur has been invoked and held inapplicable in several instances in actions arising out of accidents occurring in connection with emergency or forced landings.n25 Where a passenger was injured by falling out of the open door of a plane, which, having come to a stop after making an emergency landing, lurched as the passenger was near the door, the question of the negligence of the defendant plane operator has been held to be for the jury.n26

FOOTNOTES:

n25 Johnson v. Eastern Air Lines, 177 F.2d 713 (2d Cir. 1949) (applying law of New York and South Carolina; presumption of negligence existing against an airplane carrier held rebutted, in an action for the death of a passenger for hire, where the pilot attempted an emergency landing at night because of engine trouble); Rochester Gas & Elec. Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469 (County Ct. 1933) (the doctrine was held inapplicable in an action for damage to a tower which was struck by a plane in making a forced landing).

Res ipsa loquitur in aviation accidents, 25 A.L.R. 4th 1237.

n26 McGurty v. Transcontinental & Western Air, 167 F.2d 406 (C.C.A. 7th Cir. 1948).

Open door as ground of liability of carrier for injury to passenger falling or alighting from vehicle, 7 A.L.R. 2d 1427 § 10.

Complaint in Federal Court -- Fall of passenger through open door after aircraft landed. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 124.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
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8A Am Jur 2d AVIATION § 174

§ 174 Hijacking of aircraft

While a common carrier of passengers for hire by air is generally under the duty to exercise either a high or the highest degree of care for the safety of its passengers, it is under no duty to provide against casualties which are not reasonably to be foreseen.n27 Under these general principles, it has been held that the injury for which damages were claimed by a passenger who alleged that she became ill as a result of eating food provided by the Cuban Government to passengers of an aircraft on a domestic flight that had been diverted to Cuba by a hijacker, was too remote to be recoverable.n28

FOOTNOTES:

n27 § 118.

n28 National Airlines, Inc. v. Edwards, 336 So. 2d 545 (Fla. 1976).

As to death or injuries occurring in the course of the hijacking of international flights subject to the terms of the Warsaw Convention, see § 149 et seq.

Liability of air carrier for damage or injury sustained by passenger as result of hijacking, 72 A.L.R. 3d 1299.

Complaint, petition, or declaration -- Hijacking of aircraft -- Damages for psychic trauma and for bodily injuries flowing from psychic trauma. 4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § 120.

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
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3A Am. Jur. Legal Forms 2d, Aviation § 34:47
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VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 175

§ 175 Parachuting accidents

The doctrine of res ipsa loquitur has been applied in an action involving injuries sustained by the plaintiff in making a parachute jump from an airplane, resulting from the failure of the parachute to open.n29 In other cases involving parachuting accidents, it has been held that liability could be predicated on the negligence of an air traffic controller, who mistakenly placed the location of the plane from which skydivers jumped as being over the drop zone, when it was actually over the waters of Lake Erie,n30 but that neither the pilot of a plane from which a student skydiver jumped, nor the operator of the airport and drop zone, was liable for the death of the skydiver who landed in a nearby lake and drowned.n31

Practice guide: A release signed by a prospective parachute jumper absolving a parachute jump training school of liability for injury to the jumper resulting from the school's negligence has been upheld as valid, where: (1) the release was sufficiently clear and unambiguous to be understood by a lay person; (2) the release did not violate public policy by exempting or attempting to exempt the school from liability for its own fraud, infliction of willful injury, or violation of law; (3) enforcement of the release would not have been unconscionable, because the release could not have operated to defeat the jumper's reasonable expectations; and (4) the court declined to hold sport parachuting to be an ultrahazardous activity for which the school could be held strictly liable.n32

The manufacturer of a parachute that should be used only by experienced parachute jumpers may be liable for failure to warn an inexperienced jumper of that fact, where the jumper uses the parachute and is injured as a result of his or her inability to use it properly.n33

FOOTNOTES:

n29 Cope v. Air Associates, Inc., 283 Ill. App. 40 (1st Dist. 1935).

n30 Freeman v. U. S., 509 F.2d 626 (6th Cir. 1975).

Complaint, petition or declaration -- Death of parachutist -- Against pilot and owner of airport -- Violation of rules and regulations. 4 Am. Jur. Pleading

and Practice Forms (Rev), Aviation § 150.

n31 Hammerlind v. Clear Lake Star Factory Skydiver's Club, 258 N.W.2d 590, 95 A.L.R.3d 1273 (Minn. 1977) (holding that neither the pilot nor the operator of the airport and drop zone could be held liable for the decedent's failure to wear a floatation device as required by state regulations).

n32 Hulsey v. Elsinore Parachute Center, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194, Prod. Liab. Rep. (CCH) [para]10581 (4th Dist. 1985).

Liability for civilian skydiver's or parachutist's injury or death, 95 A.L.R. 3d 1280.

n33 Prince v. Parachutes, Inc., 685 P.2d 83 (Alaska 1984).

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
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Helicopter Accident Litigation, 22 Am. Jur. Trials 517

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Jeanne Philbin, J.D.

Aviation

VIII. **Civil Liability for Injuries from Operation of Aircraft** [§ § 108-209]

B. Particular Types and Circumstances of Accident or Injury [§ § 160-177]

8A Am Jur 2d AVIATION § 176

§ 176 Injuries caused by items falling out of overhead compartments on plane

It has been said that it is a jury question whether an airline should be liable for an injury to a passenger where baggage falls out of the overhead compartment in the airplane,n34 and that the airline can be found liable for failing to properly secure the luggage,n35 or for overloading the compartment.n36 The doctrine of res ipsa loquitur has been applied in this context.n37

Generally, where there is evidence that the overhead compartment was opened during flight or taxiing by another passenger, the airline has been found not to be liable.n38 However, where a passenger is injured when a fellow passenger, struggling to stow baggage in the overhead compartment, drops it on the passenger, it has been held that whether the airline could be liable for failing to have a flight attendant supervising or assisting passengers in stowing luggage is a jury question.n39

FOOTNOTES:

n34 Plagianos v. American Airlines, Inc., 912 F.2d 57 (2d Cir. 1990) (declined to extend on other grounds by, Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996)); Andrews v. United Airlines, Inc., 24 F.3d 39, 32 A.L.R.5th 729 (9th Cir. 1994).

Liability of air carrier for injury to passenger caused by fall of object from overhead baggage compartment, 32 A.L.R. 5th 1.

n35 USAir Inc. v. U.S. Dept. of Navy, 14 F.3d 1410 (9th Cir. 1994).

Law Reviews: Crashing carry-on: A look at falling luggage liability, 74 Mich BJ 3:303 (1995).

Overhead luggage, 212 New York LJ 41:3 (1994).

n36 Schwamb v. Delta Air Lines, Inc., 516 So. 2d 452 (La. Ct. App. 1st Cir. 1987), writ denied, 520 So. 2d 750 (La. 1988) and writ denied, 520 So. 2d 750 (La. 1988) and (declined to follow on other grounds by, Graves v. Lou Ana Foods, Inc., 604 So. 2d 150 (La. Ct. App. 3d Cir. 1992)) and (declined to extend on other grounds by, Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App.

1994)).

n37 Smith v. Piedmont Airlines, Inc., 728 F. Supp. 914 (S.D.N.Y. 1989).

n38 Rodriguez Pardo v. Delta Airlines, Inc., 767 F. Supp. 26 (D.P.R. 1991) (refusing to hold airline liable where there was no conclusive evidence that the accident was caused by improper loading or failure to instruct the passenger who opened the compartment to sit down); Haley v. United Airlines, Inc., 728 F. Supp. 374 (D. Md. 1989), judgment aff'd, 927 F.2d 595 (4th Cir. 1991); Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994).

In action by airline passenger against airline to recover damages for injuries sustained when fellow passenger opened overhead storage compartment for carry- on luggage and suitcase fell and struck passenger's hand, court properly set aside jury verdict for passenger on ground that passenger failed to establish negligence on part of airline where (1) airline had no duty to open compartments and examine their contents, but only to observe that passengers stowed luggage in reasonable manner, to provide requested assistance, and to make visual check that compartment doors were closed on takeoff, (2) there was no proof of weight of suitcase that fell on passenger's hand, but there was evidence that suitcase met FAA regulations as to size, and (3) prior incident of object falling and breaking woman's nose was insufficient to establish dangerous condition since there was no evidence to establish that relevant conditions at time of prior incident were same as conditions at issue. Ginter v. Trans World Airlines, Inc., 148 A.D.2d 787, 538 N.Y.S.2d 638 (3d Dep't 1989), order aff'd, 74 N.Y.2d 754, 545 N.Y.S.2d 98, 543 N.E.2d 741 (1989).

n39 Brosnahan v. Western Air Lines, Inc., 892 F.2d 730 (8th Cir. 1989).

REFERENCE: A.L.R. Digest: Aviation § § 28, 31-38
A.L.R. Index: Air Traffic Controllers;
A.L.R. Index: Airports;
A.L.R. Index: Aviation;
A.L.R. Index: Boarding or Alighting;
A.L.R. Index: Helicopters;
A.L.R. Index: Hijacking;
A.L.R. Index: Navigation Instruments;
A.L.R. Index: Pilot;
A.L.R. Index: Take-off
3A Am. Jur. Legal Forms 2d, Aviation § 34:47
4 Am. Jur. Pleading and Practice Forms (Rev), Aviation § § 34, 120-124, 138, 157-223
Crop Duster's Failure to Exercise Care in Dusting Crops, 9 Am. Jur. Proof of Facts 2d 623
Light Airplane Takeoff Accidents, 27 Am. Jur. Proof of Facts 215;
Aircraft Approach and Tower Control, 13 Am. Jur. Proof of Facts 333;
Sonic Boom, 12 Am. Jur. Proof of Facts 593;
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8A Am Jur 2d AVIATION § 177

§ 177 Other particular circumstances

In addition to the particular circumstances of injury in aviation accidents discussed in the preceding sections of this subdivision,n40 various others have been before the courts. For instance, it has been held that liability could be predicated upon --

-- the failure of a pilot to land the plane when it started to misfire during or shortly after the takeoff, and when there was still time to land the plane on the runway.n41

-- the action of the defendant in diving upon the plaintiff's plane while the plaintiff was instructing a student pilot, so that the student pilot became terrified, seized the controls, and caused the plane to crash.n42

-- negligence in allowing an untrained person to operate rescue equipment in a Coast Guard helicopter, causing the death of a woman who fell from the helicopter during an attempt to rescue her from a swamped motorboat.n43

In several cases, liability has been imposed for personal injuries or property damage caused by pilotless, runaway planes.n44

It has been held that for an airplane pilot to dive steeply toward persons on the ground, causing them to feel that they are in immediate danger of being hit, may conceivably constitute an assault.n45

FOOTNOTES:

n40 § 160-175.

n41 Phillips v. Vrooman, 361 Mo. 1098, 238 S.W.2d 355 (1951).

n42 Rich v. Finley, 325 Mass. 99, 89 N.E.2d 213, 12 A.L.R.2d 669 (1949).

n43 U.S. v. Lawter, 219 F.2d 559 (5th Cir. 1955).

Aviation: Helicopter accidents, 35 A.L.R. 3d 707 § 10[a].

Types and causes of helicopter accidents. Helicopter Accident Litigation, 22 Am. Jur. Trials 517, 595 § § 37, 38.

n44 T.A.T. Flying Service v. Adamson, 47 Ga. App. 108, 169 S.E. 851 (1933); Southern Air Transport v. Gulf Airways, 215 La. 366, 40 So. 2d 787 (1949)

(defendant's plane, during rather severe thunderstorm with strong north winds, rolled along concrete apron or ramp and collided with plaintiff's motionless plane); Greiner v. Perry, 13 Ohio L. Abs. 688 (Ct. App. 2d Dist. Clark County 1933).

However, the owner of an airplane for private use and pleasure, kept on a small privately owned field, without attendants or the customary facilities of municipal and commercial fields, who cranked the motor of the plane, with no one at the controls and without blocks in front of the wheels, is not, if it can be said that he used such care as a careful pilot would use under similar circumstances, liable for damages resulting when the plane got away without him and ran into another's hangar on the field. Genero v. Ewing, 176 Wash. 78, 28 P.2d 116 (1934).

n45 U.S. v. Taylor, 236 F.2d 649, 74 A.L.R.2d 860 (6th Cir. 1956), cert. granted, 352 U.S. 963, 77 S. Ct. 364, 1 L. Ed. 2d 320 (1957), motion denied, 353 U.S. 956, 77 S. Ct. 862, 1 L. Ed. 2d 907 (1957) and cert. dismissed, 355 U.S. 801, 78 S. Ct. 6, 2 L. Ed. 2d 19 (1957) (but holding that the record in the case justified no such finding, nor any other finding that would establish "even a tenuous case of assault and battery").

SUPPLEMENT:

Cases

Passenger could not recover from airline under Article 17 of Warsaw Convention for her solely psychic or psychosomatic injuries. Warsaw Convention, Art. 17, 49 U.S.C.A. § 40105 note. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 119 S. Ct. 662, 142 L. Ed. 2d 576 (1999).

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