

# 4

## BASIC PRINCIPLES OF CIVIL LIABILITY

The law is generally subdivided into categories of administrative, civil, and criminal law. In the preceding part, we examined the workings of administrative law, law made and enforced by administrative agencies in the aviation industry. We also touched on the criminal law implications of falsifying applications for FAA certificates and other records required by the federal government and for security violations. Other criminal law aspects of civil aviation (especially security, an area still undergoing change in the wake of the terrorist attacks of 9/11/01) will be further explored in greater detail in Chapter 15. For now, we will turn our attention to the civil law, which may be further subdivided into *tort* law and *contract* law. In this part on aircraft accidents, we will examine the workings of tort law and techniques available to reduce the risk of civil liability for the consequences of aircraft accidents. In the following part on aircraft transactions, we will examine contract law in the context of buying, selling, leasing, time-sharing, and managing aircraft.

This chapter introduces the basic principles of liability and procedures for civil litigation arising out of aircraft accidents, building the foundation for the other chapters of this part, which focus on risk management techniques useful to avoid such liability. The purpose of this chapter is to ensure that you have a working knowledge of the kinds of behavior you must refrain from to avoid such liability.

What is a Tort?

A *tort* is an act or omission that causes injury to another person by breach of a legal duty not arising out of a contract and subjects the actor to liability for damages in a civil lawsuit.

Whenever you read a headline like this one from a recent USA Today: *Jury awards \$480 million to 3 hurt in plane crash*, you are almost certainly reading about a tort case. Chapters 5 through 10 will cover risk management techniques to reduce the impact of tort liability for aviation accidents, including selection of an appropriate form of organization for the aviation business, insurance, exculpatory contracts, and statutes and international agreements that limit the tort liability of airlines and governments. This chapter focuses on basic principles of tort liability.

Torts may be further subdivided into two kinds: *intentional torts and negligence*.

## **Intentional Torts**

Intentional torts are all “acts” while negligence may consist of either an act or an omission. Some intentional torts are also crimes under federal, state, or local law, and may also be FAR violations. In such a case, the wrongdoer may be not only subject to a fine or imprisonment in a criminal action, but also ordered to pay compensation to the victim in a civil tort action, and fined or subjected to certificate suspension or revocation by the FAA or other federal and state regulatory agencies, all for the same misbehavior. The courts have generally held that this is not *double jeopardy*, which is prohibited by the Fifth Amendment to the Constitution of the United States, interpreting that provision only to prohibit the government from *criminally* penalizing a person twice for the same misdeed.

For example, state criminal charges including 110 counts of murder and 110 counts of manslaughter (one of each for each person killed in the crash) were filed against SabreTech, Inc., an airline maintenance contractor that shipped highly flammable oxygen canisters that were improperly packaged and not identified as hazardous material and that caused an in-flight fire, and against several of its employees in connection with the 1996 ValuJet DC-9 crash in the Florida Everglades, a crash that also gave rise to extensive civil litigation and FAA enforcement action. The state criminal action was ultimately settled for a \$500,000 fine.

Meanwhile, a federal grand jury indictment charged SabreTech with several criminal violations of the Hazardous Materials Transportation Act in connection with the crash. In that case, the trial judge sentenced SabreTech to pay \$2 million in criminal penalties and \$9 million in restitution to victim’s families (over and above the civil settlements already reached). This was the first

time an aviation business was convicted of criminal charges arising out of a commercial jet airliner crash in the U.S., and some legal analysts suspect that the fine would have been much larger if the company had not already been in bankruptcy at the time. On appeal, the U.S. Court of Appeals overturned the \$9 million portion of the sentence for restitution.

In the civil (tort) action, SabreTech and its insurers paid out some \$262 million in settlements to the families of the victims.

In addition, the FAA initiated a \$2.23 million civil penalty action against SabreTech for related FAR violations. The company settled that case by a compromise agreement to pay the FAA \$1.75 million.

Now, let's look at some intentional torts that may arise in an aviation context, exposing a person and their employer to civil liability.

### **Battery**

*Battery* is a harmful or offensive contact with another person with intent to cause the contact or apprehension of contact and without the consent of the other person (or where consent is obtained by fraud or duress). This could range from punching a person in the nose to uninvited sexually oriented contact.

### **Assault**

An *assault* is simply an attempted battery that missed. If you tried to punch someone in the nose but he ducked and you missed, you have committed the intentional tort of assault.

### **Intentional Infliction of Mental Distress**

The name of this intentional tort is an accurate description of what you are prohibited from doing. Here is an example: A flight instructor is aloft in a trainer with a student. The student pilot keeps repeating the same mistake. The flight instructor, in a fit of temper, reaches over and releases the student's seat belt while rolling the airplane into a very steep bank toward the student's side, grasps the handle of the cabin door beside the student, and threatens to expel the student. That is intentional infliction of mental distress.

### **False Imprisonment**

Anyone can commit the intentional tort of false imprisonment; you don't have to be a law enforcement officer. *False imprisonment* consists of intentionally confining, restraining, or detaining another person against her will.

This occurs most often in the aviation industry in the debt collection context when people or businesses resort to some use of force instead of litigation to collect a debt. Here's an example: An FBO's manager notices on the ramp an aircraft belonging to a person who owes the FBO money. The manager sends a line service attendant out to block the aircraft's departure with a gas truck and bring the owner into the office. That's false imprisonment.

### **False Arrest**

False arrest and false imprisonment sound so similar that fiendish professors are especially fond of asking you to distinguish between them on examinations. A *false arrest* is a false imprisonment carried out by a false or erroneous assertion of legal authority to detain the other person. An example of a false arrest would occur if the line service attendant in the previous example went out to restrain the debtor aircraft owner and found a very large, ill-tempered and imposing adversary. Deciding to outwit rather than attempt to overpower the owner, the quick-thinking attendant approaches the owner from the rear, pokes a finger in his ribs and shouts: "Freeze! FBI! Lock your hands behind your head and come with me. Don't make any fast moves." This false assertion of legal authority ("FBI!") escalates this false imprisonment into a false arrest. The same might be true if you tried to make a "citizen's arrest" of someone you observed violating an FAR. The legal authority to perform a citizen's arrest is generally limited to felonies (major crimes like murder, robbery, or burglary) and does not extend to misdemeanors, violations of administrative regulations, or civil matters such as debt collection.

### **Trespass**

*Trespass* is an intentional invasion of someone else's land. This intentional tort comes into play most frequently in aviation in the context of off-airport landings or landings on airports that are not open to the public, without prior permission of the owner.

Your intent can be determinative of whether you committed a trespass. If you are flying along and suddenly experience a catastrophic engine failure, pick the most suitable open area within gliding distance, and land there without permission, most courts would hold that you did not commit a trespass. That is because you did not intend to invade the landowner's property, but did so only in response to the emergency. At the other extreme, if you are out flying around and decide to land without prior permission in someone's field or on an airport not open to the public to practice your short- or soft-

field landing technique or have a picnic, any court would agree that you were trespassing.

Something of a legal gray area exists in flight operations that are routinely expected to terminate in off-airport landings, such as free flight in hot air balloons and cross-country glider flying. In the absence of a real and credible in-flight emergency, most courts would probably find these landings to constitute trespassing. Thus, in these operations, pilots and ground crews should take special care to obtain the landowner's permission before landing (for example, by orally hailing the landowner from the low-flying balloon or radioing the ground crew to go ahead to the farmhouse to request permission to land and before driving recovery vehicles into the landing area). All possible care should be taken to avoid damaging standing crops and fences or frightening livestock in the landing and recovery efforts. A humble, respectful, and apologetic attitude—coupled with an immediate and sincere offer to pay for any damage caused by the landing and recovery crews, providing information on your liability insurance and exchanging names, addresses, phone numbers and other contact information—may appease the landowner and prevent a legal or physical confrontation.

### **Conversion**

In legal language, this is not what a modifier does to your airplane to make it go faster. Think of conversion as being to someone else's personal property (such as their airplane) as trespass is to someone else's land. *Conversion* is defined as the act of assuming rights to personal property that are inconsistent with the rights of the owner or person entitled to possession (such as a lessee). As an example, if you somehow obtain a key and take someone's airplane joyriding without his permission, you would be committing the intentional tort of conversion.

Conversion also sometimes occurs during improper debt collection methods. For example, an FBO manager spots an airplane belonging to a person who owes the FBO money on a competitor's ramp. The manager sends an employee down the line with a tug to pull the airplane back to the FBO's hangar and locks it up to hold it until the debt is paid. This may constitute a conversion. (Circumstances under which liens against aircraft for services, fuel, parts, etc., provided to the aircraft may be exceptions to the law of conversion are examined later in Chapter 11.)

An interesting feature of the law of conversion is that it gives the aircraft owner the option to sue for either (1) money damages (for the consequences of being deprived of the use of the aircraft while it was in the converter's possession), or (2) a court order that the converter has bought the aircraft, compelling payment of its fair market value. (You took it; you bought it. Pay for it.)

The general theme you may have noticed running through these intentional torts is that the law encourages respect for the personal and property rights of others. The law frowns on resort to force or threat of force to resolve controversies instead of reason, persuasion, and (if all else fails) court procedures. When asked what he thought of Western civilization, Gandhi is reported to have replied: "I think it would be a good idea." The law of intentional torts is an effort in that direction, preferring the use of civilized means to dissolve disputes and seeking to avoid situations that may provoke violence.

### **Fraudulent Misrepresentation**

Although found more frequently in contract litigation, a person or business can also sue for the intentional tort of fraudulent misrepresentation if deceived by a defendant who made a representation intended to deceive the plaintiff and with knowledge that the representation is false, and damage results.

In the aviation context, this could apply if a mechanic, inspector, seller, or lessor knowingly misrepresented the airworthiness of an aircraft and a defect known to that mechanic, inspector, seller, or lessor caused an accident or defrauded the buyer of an aircraft.

### **Negligence and Liability**

Negligence is the most common form of tort involved in aircraft accident litigation. If there is a common theme running through all facets of American law—administrative, civil, and criminal—it is this: *You are responsible for the consequences of your actions.*

Negligence means failing to do an act that a reasonably careful person would do to protect others from harm or doing an act that a reasonably careful person would not do under the same or similar circumstances.

The four elements of a negligence case are:

1. a *duty* to be reasonably careful,

2. a *failure* to be reasonably careful,
3. which is the *proximate cause* of
4. *injury* to another person or her property.

If you are not reasonably careful and injure someone or damage his property, you will be found negligent and will have to pay the other person (or his survivors) for the damage you caused.

Let's examine each of these elements in greater detail in the context of aviation accidents.

### **Duty**

Your duty to be reasonably careful to avoid harming others extends to anyone who might foreseeably be injured by your neglect. Whether you are a flight crewmember, an aircraft owner/operator, a manufacturer of aircraft or components, an airport owner/operator, an aircraft mechanic or inspector, an air traffic controller, or other person involved in aviation, you have a duty to be reasonably careful. That duty extends to everyone who could foreseeably suffer harm if you are not careful. This could include, for example, other flight crewmembers, passengers, people on the ground and their property, the owner of the aircraft, owners of any personal property carried aboard the aircraft, occupants of other nearby aircraft, and the owners of those aircraft and property carried aboard those aircraft.

### **Failure to Use Care**

Who decides whether you were "reasonably careful" under the circumstances, and how? The jury or (if you do not request a jury) the trial judge decides whether you were reasonably careful. It is unlikely that either the judge or the jurors will have any aviation background. Instead, they will rely upon the testimony of aviation expert witnesses, the FARs, and other written guidance introduced as exhibits at trial.

If mandatory government standards such as an FAR or airworthiness directive (AD) state what you must do, then that is what is reasonable. Otherwise, the question the judge or jury must decide is what "a reasonably prudent person" in your position would have done under the circumstances.

Non-mandatory guidance such as the *Aeronautical Information Manual* (AIM) and advisory circulars (AC), along with the opinions of aviation expert witnesses who testify at trial, are typically also considered by the jury.

### **Injury**

Ordinarily, this must be real physical injury or property damage, not just frightening someone. If, however, you've inflicted mental distress which resulted in an emotional breakdown requiring hospitalization, that would be considered real physical injury.

Even if you were not reasonably careful, if your carelessness did not actually cause such harm to someone, you cannot be successfully sued for negligence. For example, you failed to perform an adequate preflight inspection, attempted to take off on almost empty fuel tanks, and fuel starvation caused the engine to quit on takeoff. But when it did, you were able to abort the take-off without damaging the aircraft or harming its occupants or anyone else. In that situation, you could not successfully be sued for negligence since there was no injury. (But that will not stop the FAA from suspending or revoking your pilot certificate for careless operation under 14 CFR §91.13, inadequate preflight action under 14 CFR §91.103, or your lack of the care, judgment, and responsibility required of the holder of a pilot certificate.)

### **Proximate Cause**

Your neglect must have actually caused the injury, at least by setting in motion a sequence of events that would not otherwise have occurred. Indeed, most aviation accidents result not from a single mistake but from a series of errors that snowball and cause the accident. The legal concept of *proximate cause* is not the same thing as the NTSB's finding of *probable cause*. Nor will the NTSB's opinion of probable cause be admissible as evidence at trial. However, facts found by NTSB investigators during their investigation of the accident will be admissible at trial.

For example: A single-engine general aviation aircraft flying from San Francisco to Denver reports an engine stoppage to ATC over the Colorado Rockies. The aircraft is substantially damaged while attempting a forced landing, and its occupants are seriously injured. The NTSB is notified, and an investigator heads for the scene. Having first determined the time the aircraft took off from San Francisco and the time the engine stoppage was reported to ATC, and knowing the standard fuel capacity and burn rate for the type of aircraft involved, the investigator suspects fuel exhaustion. Arriving at the scene of the accident, the investigator sniffs around, but smells no avgas. He removes the overturned aircraft's fuel caps. No fuel runs out, nor can he find any trace of leaked fuel on the ground. The investigator then probes the fuel tanks with a dipstick, but still finds no fuel. A salvage crew dispatched by the owner's



insurance company arrives on the scene to dismantle the aircraft and haul it out. The NTSB investigator watches as the aircraft's wings are disconnected from the fuselage and asks the salvage crew to stand each wing on end, root downward. No fuel runs out. Based upon these facts observed by the investigator, the NTSB later determines the probable cause of the accident to have been the pilot's inadequate preflight planning and failure to properly monitor his fuel supply, resulting in in-flight fuel exhaustion.

When the injured passengers sue the pilot for negligence, the NTSB investigator's testimony as to what he did and what he saw would be admitted into evidence. Then, instead of being able to use the NTSB's finding of probable cause as evidence, the plaintiffs would have to hire their own expert witness to analyze the facts found by the investigator and testify to an opinion of the proximate cause of the accident, based upon those facts. That opinion may, of course, well be the same one the NTSB expressed in its finding of probable cause.

There may be more than one proximate cause of an accident, and more than one person's negligence may be proximate causes of an accident. Consider this example: A student pilot is flying solo, shooting touch-and-go landings at a tower-controlled airport in a rented light trainer. The controller observes the student pilot turning onto a close in base leg that will bring the trainer into a position on final approach close behind a landing heavy jet. The controller, however, fails to instruct the student to extend downwind or to warn the student of the possibility of wake turbulence from the heavy jet. The student encounters the wake turbulence on short final, loses control of the airplane and crashes, destroying the rented trainer. Under these circumstances, a judge or jury might find that the student pilot, the student's instructor, and the air traffic controller each owed a duty to the aircraft owner not to allow the aircraft to encounter wake turbulence, to avoid risk of damage to the trainer. In this case, the judge or jury might find that the student pilot, the student's instructor, and the controller had each failed to exercise reasonable care to avoid this accident and that each of them proximately caused the accident: the student (by failing to recognize and avoid the potential wake turbulence encounter), the instructor (by failing to teach the student wake turbulence recognition and avoidance techniques), and the controller (by failing to warn and guide the student away from the observed danger).

Where multiple defendants are found negligent, some states allow judges and juries to apportion the percentage of negligence among them (as fractions of 100 percent) and to apportion the resulting damage accordingly. In these states, if the trainer that was destroyed was worth \$150,000 and the judge or jury apportioned the negligence equally among the student, instructor, and ATC, then each would be liable to the aircraft owner for \$50,000. Some states provide for *joint and several liability* in such cases, with no apportionment by the court. In these states, even if more than one defendant is found negligent, the victorious plaintiff can collect the entire judgment (\$150,000 in this example) from any defendant found negligent. In these states, plaintiffs' attorneys often tend to follow the path of least resistance by enforcing their entire judgment against the defendant having the "deepest pockets" (the one most able to pay).

### **Negligent Entrustment**

FBOs and other businesses and individuals who allow others to use their aircraft, whether through a commercial rental or simply by allowing uncompensated use by a friend, face exposure to a subcategory of negligence known as *negligent entrustment*. If the person allowed to take the aircraft has an accident causing injuries to others (or their property), and subsequent investigation reveals that the pilot was unqualified (as, for example, having an expired medical certificate or lacking the recent experience required for currency), some courts have found aircraft to be a *dangerous instrumentality* and FBOs have been held liable for the accident. Some courts are also expanding the scope of the law of negligent entrustment to apply to employers, such as air taxi operators, who negligently entrust their aircraft to unqualified employees.

### **Proof of Negligence**

The procedure at trial is that the plaintiff (the person who claims to be injured) must first present evidence to prove each of the four elements of negligence to satisfy her *burden of proof*. Here, too, the proof must be by a *preponderance of the evidence* (51 percent), not *beyond a reasonable doubt*. There are, however, a few legal exceptions to this procedure that may lighten the plaintiff's burden of proof under some circumstances.

### **Negligence Per Se**

Where the plaintiff can prove that the accident resulted from violation of an FAR that is intended to prevent such accidents, the FAR violation also constitutes civil negligence as a matter of law.

For example, 14 CFR §43.13(a) requires persons performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance to “use the methods, techniques, and practices prescribed in the current manufacturer’s maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator.” Finding no such guidance on how to perform a particular task, a mechanic invents a solution, uses it to accomplish the fix without first obtaining FAA approval, and returns the aircraft to service. The repair fails, causing an accident. The FAA charges the mechanic with a violation of the quoted FAR.

If an FAA finding of the violation has already become final (either because the mechanic failed to appeal or defend an enforcement action, or because all appeals have been exhausted and the FAA’s finding has been affirmed), that finding may be used in a subsequent civil trial to prove negligence. This is known as the doctrine of *res judicata* (the matter is decided). If not, the judge or jury may take the FAR into account and make a finding in the civil trial whether the regulation was violated. In either case, such a finding of negligence as a matter of law based upon an FAR violation is called *negligence per se* (negligence as such). Therefore, complying with the FARs and defending against charges of FAR violations takes on special importance in connection with related pending or potential civil litigation. Losing (or failing to defend) an FAA enforcement case arising out of an accident may also cause you to lose the civil suit!

### **Res Ipsa Loquitur**

The legal doctrine of *res ipsa loquitur* (the facts speak for themselves) can be relied upon by a plaintiff to prove negligence, even if no one knows what really happened to the aircraft, if:

- the accident is not the sort of thing that normally occurs unless someone was negligent;
- the aircraft involved in the accident was within the exclusive control of the defendant (person or business being sued); and
- whatever happened, the accident was not caused by any fault of the plaintiff.

This doctrine effectively relieves the plaintiff of the burden of proving some specific act of carelessness proximately caused the accident. It has been used successfully by survivors of passengers where an airliner has crashed and the cause of the crash could not be determined, as when the aircraft was lost at sea.

### **Strict Liability for Defective Product**

The seller of any product (including an aircraft or aircraft component) delivered in a defective condition unreasonably dangerous to the purchaser, an anticipated user, or other persons in the area of anticipated use is *strictly liable* for injuries to them resulting from the defect even if they were careful, if:

- the seller is in the business of selling such a product; and
- the product is expected to be used without substantial change in the condition in which it is sold.

In such a case, negligence need not be proved and the seller is liable for resulting injury to users and others even if the seller exercised all possible care in the manufacture, inspection, and sale of the product and even if the seller had no contract with the injured person.

This strict liability applies to everyone in the *stream of commerce* from original component and airframe manufacturers through distributors and dealers, so long as the product left the hands of each in that dangerously defective condition.

It does not matter whether the defect is in the design or manufacture of the product, and may even apply where instructions for use of the product (such as the accompanying pilot's operating handbook or maintenance manual) prove inadequate.

And remember that in this context the term "product" includes not only the obvious, such as a compressor turbine, engine, rotor blade or aircraft, but also fuel and lubricants. Thus, businesses refining, transporting, and selling aviation fuels are exposed to strict liability for defects in the product.

This is *common law* (law made by judges deciding cases over the years, as distinguished from *constitutional law* made by citizens, *statutory law* made by legislatures, and *regulations* adopted by administrative agencies). The courts have always given high priority to protecting people's health and safety as a matter of public policy. In the area of product liability, the courts have reasoned that manufacturers of products and others in the stream of

commerce (such as distributors and dealers) are in the best position to ensure that products delivered to customers are safe. The courts believe that the best way to motivate those businesses to exercise every possible effort to ensure safe products is to make them pay every time someone is injured by an unsafe product.

Note that this applies only to injuries and damage to persons and property, *other than the product itself*, caused by the defect. Damage to the product itself (such as a defective aircraft) is covered by warranty law, which is discussed in Chapter 11. Also bear in mind that strict liability for defective products applies only where the seller is in the business of selling such products and not to a private sale by an owner who is not in the business of selling aircraft. Even an airline that routinely sells many of its aircraft each year as it upgrades or “right-sizes” its fleet is not exposed to this strict liability if it sells a dangerously defective airplane, because the airline is in the business of carrying passengers and freight, not selling airplanes.

### **Strict Liability for Ultrahazardous Activities**

The courts may also impose strict liability without regard for negligence where a nonparticipant is injured as a result of the defendant’s conducting what the court considers to be an *ultrahazardous activity*. For example, if farm workers or nearby residents were poisoned by an aerial application of restricted-use pesticides, a court may deem that application to be an ultrahazardous activity and hold the aerial applicator strictly liable for the consequences, even if he had used reasonable care in the application.

### **Defenses**

Once the plaintiff has carried the burden of proving negligence at trial, either by proof of the four basic elements or by proving negligence per se, *res ipsa loquitur*, or strict liability for a defective product or ultrahazardous activity, the burden then shifts to the defendant. To prevail, the defendant must then present evidence to rebut the plaintiff’s proof and support any legal defenses asserted. Such defenses may include:

#### **Sudden Emergency**

Under the *sudden emergency doctrine*, the law recognizes that the stresses imposed by the sudden onset of an in-flight emergency situation may interfere with human decision-making. Imagine that you take off in a fully loaded multi-engine aircraft on a high density altitude day and an engine quits fifty

feet over the lake at the end of the runway. In contrast, imagine that you have the luxury of a night to study the *Pilot's Operating Handbook* in the comfort of your library and draft an essay on emergency procedures in event of engine failure on takeoff. In which of these imaginary situations are you most likely to arrive at the right answer in time?

By applying the sudden emergency doctrine, the judge or jury weighing the reasonableness of your behavior may take into account the sudden emergency. Thus, an imperfect performance that might otherwise have been considered not reasonably careful could still be found not to constitute negligence in the face of a sudden emergency.

You do not, however, get the benefit of this reduced standard of care if your own prior negligence caused the emergency. For example: If the engine failure in our example resulted from fuel starvation caused by either your attempt to take off on almost empty fuel tanks following an inadequate preflight inspection, or your failure to select the proper fuel tank for takeoff because you did not follow the pre-takeoff checklist in the airplane flight manual, the sudden emergency doctrine would not relieve you of responsibility for the consequences of the resulting crash.

### **Assumption of Risk**

The doctrine of *assumption of risk* may serve to relieve others of legal responsibility for harm befalling an injured person where it is proved that the injured person:

- knew and understood the scope, nature, and extent of the risk involved in the activity and
- voluntarily and freely chose to incur that risk.

Consider the following scenario: An aeronautical engineer who is a professional experimental test pilot and also holds an airline transport pilot certificate with a flight instructor rating goes flying with a friend in the friend's aircraft, which is placarded against intentional spins. In the air, the engineer/pilot says, "I've heard that these babies really go flat in a spin and can't be recovered." The owner/friend replies, "Aw, that's an old wives' tale, and nothing could be further from the truth. It's very docile and easy to recover. Would you like me to show you?" The engineer/pilot enthusiastically replies, "I sure would!" The owner deliberately spins the aircraft and the spin goes flat. The owner is unable to affect a recovery and crashes, injuring the engineer/pilot. Under these facts, a judge or jury might find that, given his background, the

engineer/pilot knew and understood the scope, nature, and extent of the risk involved and voluntarily and freely chose to incur that risk. The engineer/pilot having assumed the risk, his former friend (the owner of the aircraft) should not be held liable to pay for the engineer/pilot's injuries.

Contrast the above with this scenario: The same owner has taken a friend with no aviation background flying in the same airplane. After takeoff, the passenger inquires about the placard: "What does this mean, 'intentional spins prohibited'?" The owner replies: "Oh, that's a bunch of FAA bull. This baby spins and recovers like a dream. Here, I'll show you." The owner deliberately spins the aircraft, the spin goes flat, the owner is unable to recover, the airplane crashes, and the passenger is injured. Under these facts, a judge or jury would almost certainly find that the injured passenger, having no aviation background or knowledge, was unlikely to have known or understood the scope, nature, and extent of the risk of spinning that airplane and did not voluntarily and freely choose to incur that risk. Thus, the doctrine of assumption of risk would not apply to relieve the owner of legal liability to pay for this passenger's injuries.

### **Plaintiff's Contributory and Comparative Negligence**

If the plaintiff's negligence was also a proximate cause of the accident, this fact may reduce the extent of the defendant's liability or relieve the defendant of all liability. Most states have now adopted a *comparative negligence* approach. This allows the judge or jury to decide what percentage of the proximate cause of the accident was attributable to the defendant and what percentage resulted from the plaintiff's own (contributory) negligence, and then apportion liability for the plaintiff's injuries accordingly. A few states (Alabama, Maryland, North Carolina and Virginia, along with the District of Columbia), however, still follow the harsh and old-fashioned *contributory negligence* approach, which holds that if the accident was even slightly the fault of the person injured, that person is not entitled to any compensation from anyone else, no matter how negligent that someone else may have been.

Among states having the more modern comparative negligence laws, two different general approaches to the apportionment of liability are found. In some states, the jury simply makes a finding of percentages and then apportions liability for the plaintiff's injuries accordingly. In states following this approach, the result is pretty simple. Say a jury in one of these states found that an accident was caused 60 percent by the defendant's carelessness and

40 percent by the plaintiff's own carelessness. If the jury further found that the plaintiff had suffered \$1 million in injuries (medical expenses, lost income, etc.), then by applying the 60–40 split, the defendant would be liable to pay the plaintiff \$600,000 and the plaintiff would have to bear the other \$400,000 of loss. Other states draw a line, usually at 50 percent. In these states, if the jury finds the plaintiff's contributory negligence accounted for 50 percent or less of the cause, the apportionment process described above applies, but if the jury finds the plaintiff's contributory negligence to have been more than 50 percent of the cause, the defendant has no liability.

Under the humanitarian doctrine of *last clear chance*, a defendant cannot rely upon the plaintiff's contributory negligence to escape liability if the facts show that even though the plaintiff was negligent, the defendant had the last clear chance to extricate the plaintiff from a position of peril. This is another example of the courts striving to protect people's health and safety. Thus, if a pedestrian carelessly steps out in front of your car as you are approaching a green light, you must still step on your brakes and try to avoid running over the person. Likewise, an air traffic controller observing on radar an aircraft receiving ATC services descending below a minimum safe altitude in a mountainous area is encouraged to alert the flight crew of their error before an impact with the ground results.

### **Government Contractors**

The *government contractor defense* shields manufacturers from liability for injuries and death to both military and civilian personnel caused by the manufacturer's products that are ordered by the government for *military use* (Figure 4-1). The defense protects the manufacturer only from design defects, and not manufacturing defects. Liability for design defects cannot be imposed upon a civilian manufacturer of military equipment if:

- the United States approved reasonably precise specifications;
- the equipment conformed to those specifications; and
- the manufacturer warned the United States about any dangers in the use of the equipment that were known to the supplier but not to the United States.





**Figure 4-1.** Manufacturers of aircraft designed to government specifications for military use, such as this C-17, may be shielded from suit by the government contractor defense, even if the equipment later passes into private ownership.

That warning should always be given in writing, with proof of delivery, to avoid any possible future dispute over whether the manufacturer actually gave it.

The defense continues to protect the manufacturer even after the equipment passes into civilian hands.

### **Statutes of Limitation**

All states have statutes of limitation that impose time limits on how long a person has *after an injury* to file suit or be forever barred. These vary from state to state and according to the nature of the case.

### **Statutes of Repose**

Statutes of repose impose time limits on how long *after a product is manufactured* the manufacturer may be held liable for injuries caused by defects in the product (whether in design or fabrication and whether brought under a strict liability or a negligence theory).

Under the provisions of the *General Aviation Revitalization Act (GARA)* passed by Congress in late 1994, there is now a federal 18-year statute of repose for FAA-certified general aviation aircraft having less than twenty seats (Figure 4-2). This means that the original manufacturer cannot be held

legally liable for injuries caused by one of these aircraft that is more than eighteen years old. GARA does not apply if the manufacturer deliberately concealed the defect, nor does it apply to claims by passengers receiving emergency medical transportation or persons on the ground who were injured by an aircraft accident. As new parts and equipment are added to the aircraft as replacements or upgrades, a new 18-year period begins to run *for that part or equipment only*. Before GARA's enactment, about \$40,000 of the cost of a new general aviation aircraft was attributable to the "tail" of potential liability for aircraft produced long ago. (In the United States, today's fleet of single-engine piston-powered aircraft has an average age of 43 years, so GARA eliminated the manufacturer's exposure to liability for over one-half of the average life of one of these aircraft.) Before GARA, that cost made it so difficult for U.S. manufacturers to compete against their foreign competitors who had more recently entered the U.S. market that Cessna suspended production of its piston aircraft line until Congress enacted GARA.



**Figure 4-2.** When one of these new general aviation aircraft is delivered to its first buyer, GARA's 18-year statute of repose begins to run. Manufacturers of parts and equipment added later in the aircraft's life are protected by GARA beginning 18 years after each such item is installed.

According to the General Aviation Manufacturers Association (GAMA), the number of product liability lawsuits brought against general aviation aircraft and component manufacturers decreased dramatically following the enactment of GARA. One major general aviation aircraft manufacturer told the General Accountability Office (GAO, the investigative arm of Congress) that

the number of open lawsuits the company was defending fell from a high of around 900 in the early 1980s to a total of about 80 in early 2001. Meanwhile, general aviation manufacturing rebounded, with shipments of piston aircraft, for example, increasing nearly fourfold between 1994 and 2000.

Although GARA has accomplished its intended purpose of revitalizing the production of general aviation aircraft in the U.S., it has had unintended (though foreseen) adverse side effects on other segments of the general aviation industry. These will be discussed in Chapter 6, Aviation Insurance. GARA has not had any beneficial effect on the average price of new single-engine piston aircraft (the largest segment of the new fixed-wing aircraft market), which has continued to increase, even when the price is adjusted for inflation.

Some states also have statutes of repose that may apply to aircraft larger than those protected by GARA. The state of Indiana, for example, has a 10-year statute of repose on all products. An accident that occurred there provides a good example of the working of a statute of repose. A DC-3 was taking off from an Indiana airport on a skydiving flight when, just after liftoff and as the landing gear was retracting, an elevator control cable jumped off a pulley under the flight deck floor and jammed. The flight crew kept the aircraft's wings level, reduced power, and successfully bellied the airplane into a cornfield. Unfortunately, on impact one of the propellers separated from the engine, penetrated the aircraft's fuselage and injured one of the jumpers. The jumper's attorney then sued everyone in sight, including McDonnell Douglas (the Douglas Commercial Airplane Company had delivered the airplane to the U.S. Army Air Corps about forty years earlier, as a C-47). McDonnell Douglas's attorneys moved for an order to dismiss the manufacturer as a defendant, based upon Indiana's statute of repose. The trial court agreed that the Indiana statute governed the case, and dismissed the claims against the manufacturer under the statute of repose because the product had been first sold more than ten years previously.

In an effort to help attract businesses to be suppliers to the new Airbus jetliner manufacturing plant in Mobile in order to bring jobs to the state, Alabama recently enacted a 12-year statute of repose on commercial aircraft, with the time running from the moment the aircraft is sold to an airline. The legislation was modeled after a similar law in the State of Washington, where the majority of Boeing's commercial aircraft manufacturing is centered.

### **Exculpatory Contracts**

In some comparatively rare circumstances, individuals and aviation businesses can protect themselves from potential liability for aviation accidents beforehand through contracts with voluntary participants. These contracts are discussed in Chapter 7.

## **International Law**

An international treaty known as the *Rome Convention*, officially the *Convention on Damages to Third Parties Caused by Foreign Aircraft*, imposed strict liability on foreign aircraft operators for damage caused to third parties on the ground. Only about 49 nations ratified this treaty, and several of those have since withdrawn. Proposed revisions to the treaty are in the works. Meanwhile, local laws (which can vary widely) may govern.

Other international treaties govern the tort liability of commercial airlines in international flight operations. These are covered in detail in Chapter 8, along with special legislation enacted to protect the airlines and others from litigation arising out of the terrorist attacks of 9/11/01.

## **Employers' Liability**

An employer is said to be *vicariously liable* for torts committed by its employees within the scope of their employment. As an example: An airline flight crew descends below decision height (DH) on an ILS approach in bad weather without having the runway in sight. They allow the aircraft to descend into a stand of trees short of the runway, causing a crash. Because the crew's negligent approach was conducted *within the scope of their employment by the airline*, the airline is also liable for the consequences and must pay for the passenger injuries and deaths that result. The crewmembers also remain personally responsible for the results of their negligence, and they (or their estates if they are killed in the crash) can be sued along with their employer. Vicarious liability adds the employer as a responsible party but never relieves the individual employees of personal liability for their negligence.

If the employee is not doing the employer's work, but is "off on a frolic of his own," then the employer is not vicariously liable for the employee's negligence.

## **Damages and Attorney Fees**

A defendant's potential liability in tort cases is generally limited to *compensatory damages*, the sum that will compensate the injured persons or their survivors for the consequences of the accident. This may include resulting medical expenses (both past and future), lost earnings, and pain and suffering. Reading a headline like *Jury Awards Smith \$10 Million Verdict in Plane Crash*, many people reflexively equate Smith's victory to winning the lottery. Close examination of the facts, however, will usually show that Smith suffered horrible and lasting injuries that have left her confined to a wheelchair or bed, unable to earn a living or enjoy most of the activities she had before the accident. She is in constant pain and faced with incredible expenses for medical care, past and future. You can be pretty certain that if someone from the Eyewitness News Team were to shove a microphone into Smith's face and say, "Can you tell our viewers whether you would rather have this \$10 million or be medically restored to the health you enjoyed before the crash?" Ms. Smith would much prefer to be her old self. But unfortunately the capability of the medical profession to restore broken bodies is still far short of omnipotence, so an award of money is the best a court can do to compensate the victim.

In fact, the judgment rarely accomplishes even that. The plaintiff's lawyer will usually have undertaken the case on the basis of a contingent fee, whereby the lawyer is paid only in the event of victory and then a percentage of the amount collected (typically in the range between 25 percent and 50 percent). This is not necessarily a bad thing, since these cases demand a tremendous amount of work and investment of expense by the plaintiff's lawyers and most injured people could not afford to hire attorneys to represent them in these cases if they had to pay the attorney's usual hourly rates. But the practice does result in plaintiffs actually receiving something less than full compensation for their injuries because of the so-called *American Rule*, which says that under most circumstances, win or lose, each party to a lawsuit is responsible to pay her own attorneys' fees. Personal injury litigation is not a get-rich-quick scheme. In most cases, the most the injured person can hope for is to receive compensation for her injuries, less her attorney's fee.

An exception (and it is a very rare exception) to this is in cases where the jury is allowed to award *exemplary or punitive damages*. In most states, juries are allowed to impose these damages over and above the compensatory damages only where the defendant's negligence was so extreme as to indicate a wanton and reckless disregard of the possible consequences of his actions. Thus

they are called “exemplary” damages (to hold the wrongdoer up as an example to others that society will not tolerate that kind of behavior) or “punitive” damages (to punish the wrongdoer). Exemplary and punitive damages are the same thing; some states use one phrase and some use the other. In order to get an award of exemplary or punitive damages, the plaintiff’s attorney must convince the jury that the wrongdoer just didn’t give a damn whether anybody got hurt or killed. It isn’t enough that the defendant was simply negligent.

For example: An airliner crashes due to a defect in its design. The manufacturer’s business records reveal that it knew about the problem and the potential for catastrophe long before the accident, but rather than acting to correct the defect, the manufacturer chose to cover up the problem. A jury might well find that kind of behavior indicative of a wanton and reckless disregard for the possible consequences of its failure to remedy the problem—that the manufacturer just didn’t care whether anyone got hurt or killed—and might award exemplary or punitive damages. It really takes something that outrages the jury to get punitive damages, and juries are surprisingly difficult to outrage.

## **Litigation Procedures**

The first notice you get that you’ve been sued should come in the form of a *Summons and Complaint*, usually handed to you by a process server. When that is received, it is time to stop what you are doing and contact your lawyer immediately. Lawsuits are like ball games: If you don’t show up on time to play, you lose by default. Your lawyer typically has only twenty days to file a well-considered *Answer* with the court. If you blow that deadline, the plaintiff may get a judgment against you by default, depriving you of your opportunity to defend yourself against the charges.

## **Discovery**

Before trial, your lawyer will have the opportunity to find out what the other side’s case is all about and they’ll have the opportunity to learn about your defenses through *discovery*, including:

- written *interrogatories* (questions to parties to be answered in writing),
- *depositions* (sworn oral testimony by prospective witnesses, transcribed by certified court reporters), and

- the examination of documents and other physical evidence (by a *motion to produce*).

Indeed, until discovery has been conducted, it is usually extremely difficult for your attorney to advise you realistically of the strengths and weaknesses of your and your opponent's positions and thus whether a settlement offer should be made (and if so, in what amount). Discovery can be very expensive and time-consuming, but it is a crucial part of the litigation process.

Faced with litigation or potential litigation, it is very tempting to destroy or deny the existence of potential evidence that might be damaging to your case and to give evasive answers to your opponent's discovery requests. Although tempting, this is very unwise. Where it is shown that a party has destroyed evidence, courts presume that the evidence destroyed was adverse to the party's case and may enter summary judgment against that party, depriving them of the right to a trial. The destroying party may also be charged with the crime of *obstruction of justice*, discussed more fully in Chapter 15. Where parties engage in evasive and delaying tactics in response to legitimate discovery requests, judges routinely impose sanctions against those engaging in such gamesmanship. Sanctions typically include requiring the offending party to pay the fees incurred by opposing counsel in responding to those delaying or evasive tactics.

### **Motions**

If potentially fatal legal or factual weaknesses in either side's case appear at any stage, the attorneys may bring these to the court's attention by filing or stating a *motion*. Motions alert the court to an issue that may be properly resolved at that point, argue the moving party's view of the matter, and ask the court to rule on the issue. The opposing party has the opportunity to respond with counterarguments. Some motions, such as a *motion for summary judgment* or a *motion to dismiss*, may dispose of the entire case.

### **Trial**

Trial may be to the court (that is, a judge sitting without a jury) or to a jury (except in cases brought against the federal government, as we'll see later in Chapter 9).

In cases tried to a jury, we are entitled to be judged by a *jury of our peers*. That phrase does not mean that our jury must consist of fellow aviators, aviation mechanics, aerospace engineers or the like, but only that they be persons who

have not pre-judged us (for example, because of media coverage of the event), have no personal stake in the outcome of the case, and are capable of reaching a verdict based solely on evidence presented at trial. The legal process of jury selection, known as *voir dire*, virtually guarantees that no juror in your case will have any personal knowledge of aviation or know anyone who does. The jury listens to the evidence presented by both sides, and then the judge instructs the jury about the applicable law. The jury then retires to the sanctuary of the jury room to debate which witnesses they found most credible and which side's version of the facts most believable; decide which side proved its case by a *preponderance of the evidence*; relate the facts they believe true to the legal framework provided by the judge; and reach a decision on the outcome. If the jury's decision is not obviously legally flawed, the judge will then enter the jury's decision as the judgment of the court. Appeals may follow.

### **Alternative Dispute Resolution**

Litigation is a very expensive and often-inefficient way to resolve disputes, so many people and businesses are now turning to alternative methods of dispute resolution including *arbitration*, *mediation*, and hybrid approaches, with some success.

While such approaches present attractive alternatives to the costs inherent in litigation, probably the most cost-effective approach is to prevent the accident through strict adherence to the FARs, rigorous training programs, meticulous inspection and maintenance, and habits of uncompromising care. Prudence pays. After all, if the accident doesn't happen, you don't get sued. Another beauty of accident prevention is that you don't need to hire a lawyer. You already know how to do it. In the next three chapters, we will examine other techniques you can use to control the risk of liability for aviation accidents. This field is generally referred to as *risk management*.