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PROOF OF PILOT IDENTITY IN MATTERS ARISING FROM THE CRASH OF DUAL CONTROL AIRCRAFT

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I. INTRODUCTION

ACCORDING TO STATISTICS, more than sixty-five percent of fatal general aviation accidents are pilot-related.¹ The vast majority of the light aircraft currently in operation in the United States are equipped with dual controls. In lawsuits arising from the crash of such an aircraft, there is often some ques-

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¹ See AOPA AIR SAFETY FOUNDATION, 1996 NALL REPORT: ACCIDENT TRENDS AND FACTORS FOR 1995 (1996).

tion as to who was at the controls prior to the crash. This question becomes particularly significant if there were two pilots aboard, both of whom had access to the controls, and there are no surviving eyewitnesses.

II. LIABILITY CLAIMS

In the context of liability claims, courts have been called on many times to decide what standard of proof to apply to the question of pilot identity when a dual-control aircraft has crashed, and there is no direct proof of who was controlling the aircraft at the relevant time. Numerous reported decisions in state and federal courts have addressed whether the claimant has presented sufficient evidence to support a claim for pilot negligence. These cases include decisions by the supreme courts of several states.

In the absence of eyewitness testimony as to who was at the controls during the events immediately preceding a crash, the majority of courts have held that there is insufficient evidence to justify submission of the case to the jury. In these cases, the courts have granted a directed verdict or a judgment notwithstanding the verdict.

Relatively few courts have allowed claims under these circumstances. Several courts have based their rulings on a presumption of the identity of the pilot in command, arising from the relationship between the two pilots. The remaining cases in which the courts have allowed the issue of the pilot's identity to be submitted to the jury involve, for the most part, very clear circumstantial evidence of who was actually in control of the aircraft.

A. *MITCHELL v. EYRE* AND THE MAJORITY RULE

The claim in *Mitchell v. Eyre*² arose from the crash of an Aerona L-16 aircraft, equipped with dual controls, during an effectiveness test of the search and rescue capabilities of the Civil Air Patrol (C.A.P.). The aircraft was occupied by two pilots. The plaintiff's decedent had been a private pilot for more than six years. Although there was no evidence of his piloting hours, he was a training officer for the Civil Air Patrol, and was shown on the C.A.P. form as an observer.

² 206 N.W.2d 839 (Neb. 1973).

The defendant's decedent had approximately eighty-eight hours of piloting experience. He was listed as the pilot in command on the C.A.P. form. The court noted, without detailing the evidence, that he was the pilot at takeoff. The Nebraska Supreme Court held that the defendant's motion for directed verdict should have been sustained because proof of who was piloting the aircraft at the time of takeoff was not conclusive as to the identity of the pilot at the relevant time.³ The court explained:

the plaintiff was required to prove who was piloting the plane at the time of the crash. Until she has done so she has not met her burden of proof. The finding of negligence is immaterial until we can determine the identity of the person to be charged with responsibility for the negligence. An issue depending entirely upon speculation, surmise, or conjecture is never sufficient to sustain a judgment.⁴

The court reasoned that even though the evidence indicated that the defendant's decedent was at the controls at takeoff, the other pilot could have taken some action which precipitated the difficulty.⁵ Therefore, any conclusion on this question would be based on surmise and conjecture.⁶

The *Mitchell* decision has been recognized as the majority rule.⁷ A number of other courts have held, based on similar reasoning, that the plaintiff's claim alleging pilot negligence could not be submitted to the jury because either pilot could have taken the actions which directly caused the crash.⁸

Several of these cases involve claims based on *res ipsa loquitur*. The courts' ruling in favor of the defendants was the result of the plaintiffs' inability to prove exclusive control, an essential element of the cause of action for *res ipsa*.⁹ Other decisions are

³ See *id.* at 844.

⁴ *Id.*

⁵ See *id.*

⁶ See *id.*

⁷ See *Udseth v. United States*, 530 F.2d 860, 861 (10th Cir. 1976).

⁸ See, e.g., *Lisa-Jet, Inc. v. Duncan Aviation, Inc.*, 569 F.2d 1044, 1047 (8th Cir. 1978); *Udseth*, 530 F.2d at 862; *Martin v. United States*, 448 F. Supp. 855, 872 (D. Ark. 1977); *In re Hayden's Estate*, 254 P.2d 813, 821 (Kan. 1953). See also *Mitchell*, 206 N.W.2d at 844 (noting that in order to find negligence the negligent person must be identified).

⁹ See, e.g., *Udseth*, 530 F.2d at 861-62; *Towle v. Phillips*, 172 S.W.2d 806, 808 (Tenn. 1943).

based simply on the fact that the plaintiff could not prove that the negligence, if any, was chargeable to the defendant.¹⁰

In several cases, the plaintiff presented substantial evidence as to which pilot was in control at a specific time. Because the plaintiff must prove that the defendant's actions caused the crash, the courts have held that proof of who was in control even minutes before does not justify a conclusion as to who was in control at the precise moment that precipitated the crash.

For example, in *In re Hayden's Estate*,¹¹ the evidence showed that the defendant's decedent, Hayden, was the owner of the aircraft, that he was in the left front seat, and that he had substantially more flying experience than the other front seat occupant. The Bellanca aircraft could not be taken off or landed from the right seat because it was not equipped with a steerable tail wheel, and there were no brake pedals on the right side. Hayden had been barred from the airport before for performing maneuvers similar to those that led to the crash. Finally, there was evidence that the left-side control wheel was pulled off, the column was bent upwards, and Hayden was still strapped into the left seat while the safety strap for the right seat was broken. The plaintiff argued that this circumstantial evidence pointed directly to the acts of Hayden as the cause of the crash.¹²

Noting that none of the experts were able to say with certainty who was at the controls at the time of the crash, the Kansas Supreme Court pointed out that control of the plane could have shifted between the two front-seat occupants at will after take-off.¹³ In sustaining the demurrer to the plaintiff's evidence, the court held that "any answer to the question as to who was at the controls of the plane at the moment of that regrettable tragedy must be predicated upon speculation, surmise or conjecture."¹⁴

B. *LANGE v. NELSON-RYAN FLIGHT SERVICE, INC.*: NEGLIGENCE IMPUTED TO THE FLIGHT INSTRUCTOR

Other courts have sought to avoid the apparent inequity of this rule by imputing negligence based on the relationship be-

¹⁰ See, e.g., *Lisa-Jet*, 569 F.2d at 1047-48; *In re Hayden's Estate*, 254 P.2d at 817-18 (quoting *Snyder v. McDowell*, 203 P.2d 225, 228 (Kan. 1949)).

¹¹ 254 P.2d 813 (Kan. 1953).

¹² See *id.* at 818.

¹³ See *id.* at 821.

¹⁴ *Id.* at 822.

tween the two pilots. In *Lange v. Nelson-Ryan Flight Service, Inc.*¹⁵ the plaintiff's decedent held a commercial pilot's certificate with an instructor rating. Before renting an aircraft from the defendant, he was required to go on a checkout flight with the defendant's employee flight instructor. The aircraft crashed shortly after takeoff, and both occupants were killed.

The evidence indicated that the plaintiff's decedent was in the front seat and the instructor was in the rear. After the crash, the plaintiff's decedent's feet were found under the seat and his hands over his head. The instructor's left hand was near the throttle and his right hand was near the stick, and the position of his feet also indicated that he was handling the controls at the time of impact.

The Minnesota Supreme Court noted that the evidence was reasonably clear that the instructor was at the controls at the moment of impact.¹⁶ However, based on the same reasoning implemented in the cases discussed above, the court recognized that this evidence does not prove that the instructor was at the controls for any particular preceding period and that when the controls passed from one to the other would be a matter of conjecture.¹⁷

While acknowledging its "inescapable ignorance of who did what preceding the crash,"¹⁸ the court nonetheless overruled the trial court's entry of judgment in favor of the defendant notwithstanding the verdict.¹⁹ The court based its decision on the evidence proving that the flight instructor was the "pilot in command" throughout the flight.²⁰ The court concluded that if an aircraft is operated negligently, the pilot in command is negligent, regardless of whether or not he was at the controls at the time.²¹ Stating that the Civil Air Regulations (predecessor to the Federal Aviation regulations) do not establish rules for the imposition of liability, the court nonetheless relied on the C.A.R.s as the basis for its decision.²²

The language of the *Lange* decision clearly indicates approval of the general rule followed in *Mitchell*. In fact, the court ap-

¹⁵ 108 N.W.2d 428 (Minn. 1961).

¹⁶ *See id.* at 431.

¹⁷ *See id.*

¹⁸ *Id.* at 432.

¹⁹ *See id.* at 433.

²⁰ *See id.*

²¹ *See id.*

²² *See id.* at 432.

plied the *Mitchell* rule to bar the defendant's assertion of contributory negligence, holding that "there was no evidence from which the jury could reasonably infer which of the two men in the plane was operating the controls at the time that the fatal fault occurred."²³

Under the particular facts of *Lange*, the court's imputation of negligence to the instructor results in a judgment that is plainly inequitable and inconsistent with any other rule of law: if the actual cause of the crash was the negligence of the student (plaintiff's decedent), then the instructor is held liable to the student for the student's own fault. Notably, two judges dissented, on the basis that the verdict was based on speculation and conjecture.²⁴ Furthermore, the *Lange* holding has been limited, at least by the federal district court in Minnesota, to that particular fact pattern.²⁵

Although the *Lange* decision is often cited as the "minority view," it is apparently the only case so holding.²⁶ A number of courts have declined to follow the "pilot in command" argument, even under analogous facts.²⁷

C. *COLLINS v. STROH*: NEGLIGENCE IMPUTED TO THE OWNER

A similar result was reached in *Collins v. Stroh*²⁸ on the basis that one pilot-occupant was the owner of the aircraft. The plaintiff brought a claim for the wrongful death of a minor passenger in the aircraft under the theory of *res ipsa loquitur*. The aircraft was equipped with dual controls, two pilots were aboard, and there were no survivors who could testify as to who was at the controls at any particular time. The defendant argued that because *res ipsa loquitur* applies only if the defendant had exclusive control of the aircraft, the plaintiffs had not met their burden of proof.²⁹

²³ *Id.* at 433.

²⁴ *See id.*

²⁵ *See* Held v. Mitsubishi Aircraft Int'l, Inc., 672 F. Supp. 369, 392 (D. Minn. 1987).

²⁶ *See* Udseth v. United States, 530 F.2d 860 (10th Cir. 1976); Walker v. Imperial Casualty & Indem. Co., 564 P.2d 588, 591 (Kan. Ct. App. 1977).

²⁷ *See, e.g.,* Udseth, 530 F.2d at 861-62; Avemco Ins. Co. v. United States Fire Ins. Co. 513 A.2d 962, 966 (N.J. Super. Ct. App. Div. 1986); Lisa-Jet, Inc. v. Duncan Aviation, Inc., 569 F.2d 1044, 1047-48 (8th Cir. 1978); Jetcraft Corp. v. Flight Safety Int'l, 16 F.3d 362, 364 (10th Cir. 1993).

²⁸ 426 S.W.2d 681 (Mo. Ct. App. 1968).

²⁹ *See id.* at 688-89.

The Missouri Court of Appeals held that *res ipsa loquitur* was properly applied to allow the plaintiffs to recover.³⁰ The court discussed evidence that only the defendant's decedent knew of the destination, that he had more flying experience, and that his experience and skill were what persuaded the plaintiff's decedent to make the trip.³¹ However, the court's decision was based primarily on the theory that because the defendant's decedent owned the plane and was aboard it, he had the "right of control" and would be vicariously liable, even if the other pilot was operating the controls at the relevant time.³²

The *Collins* decision appears to be based on a reasonable application of the common law rule on joint venture or joint enterprise applicable at the time. However, the basic premise that negligence will be imputed to the owner of a vehicle, absent a common pecuniary interest, is contrary to the current status of the common law in most states, including Missouri.³³ Thus, the decision in *Collins* is of limited, if any, precedential value.

At least one court has held that a flight school could be held liable for the negligence of a student pilot because it was engaged in a joint enterprise with the student with the common objective of obtaining a private pilot's license for the student.³⁴ Other plaintiffs have argued that liability should be imputed to the owner because the "operator" of an aircraft, as defined by statute, includes anyone authorizing its operation.³⁵ Nearly all of the courts presented with this argument have held that this definition alone does not support the imputation of liability to a non-negligent owner.³⁶

³⁰ See *id.* at 689.

³¹ See *id.*

³² *Id.*

³³ See RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (1965); *Stover v. Patrick*, 459 S.W.2d 393, 401 (Mo. 1970) (en banc); *Shoemaker v. Whistler*, 513 S.W. 2d 10,15 (Tex. 1974); Janet Boeth Jones, Annotation, *Fact That Passenger in Negligently Operated Motor Vehicle is Owner as Affecting Passenger's Liability to or Rights Against Third Person—Modern Cases*, 37 A.L.R. 4th 565 (1985).

³⁴ See *Allegheny Airlines, Inc. v. United States*, 504 F.2d 104 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

³⁵ See 49 U.S.C. § 40102(32) (1994).

³⁶ See, e.g., *Rogers v. Ray Gardener Flying Serv.*, 435 F.2d 1389, 1394 (5th Cir. 1970); *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971); *Sanz v. Renton Aviation, Inc.*, 13 Av. Case (CCH) ¶ 17,542 (9th Cir. 1975). *But cf. Sosa v. Young Flying Serv.*, 277 F. Supp. 554, 557 (S.D. Tex. 1967); *Lamasters v. Snodgrass*, 85 N.W. 2d 622 (Iowa 1957) in which similar language in the statute was interpreted as fixing liability on the owner "even though he is not in actual control, for the negligent conduct of one to whom he entrusts his airplane." *Id.*

D. PILOT IDENTITY AS A QUESTION FOR THE TRIER OF FACT

A few cases dealing with this issue have concluded, based on the evidence presented, that the issue of the pilot's identity was properly a question of fact for the jury. Most of these cases involve clear, if not overwhelming, evidence of who was the pilot in control.

The plaintiff's claim in *Todd v. Weikle*³⁷ arose from the crash of a Cessna Skymaster in instrument weather conditions. The survivors of Mrs. Weikle sued the corporate owner of the plane and Mr. Todd, the corporate president, who was allegedly the pilot.

Relying on the general rule that jury speculation will not be allowed, the Maryland Court of Special Appeals recognized that the plaintiff should be required to submit probative evidence that the individual claimed to be the pilot was the one in charge of the controls at the critical instant of time.³⁸ However, the court found that there was sufficient circumstantial evidence to allow submission of the plaintiff's claim to the jury.³⁹ That evidence included the following:

- (1) Mr. Todd occupied the left-front seat, the seat customarily occupied by the pilot;
- (2) Mr. Todd was in communication with Air Traffic Control;
- (3) Mr. Todd was the president of the company which owned the aircraft and had over 740 hours of pilot time, including a small amount under IFR conditions;
- (4) Mrs. Weikle was a student pilot with 20-30 hours of pilot time, all under VFR conditions;
- (5) The weather conditions at takeoff and during the flight were IFR;
- (6) While the aircraft was equipped with dual controls, the instruments required for IFR flight were only in front of the left seat;
- (7) Mr. Todd was the pilot at takeoff;

Several state aviation statutes have imputed pilot negligence to the aircraft owner. See, e.g., MICH. COMP. LAWS. ANN. § 259.180a (West 1997); MINN. STAT. ANN. § 360.012(4) (West 1997); N.D. CENT. CODE § 2-03-05 (1997); See also Joseph E. Edwards, Annotation, *Provision of Federal Aviation Act (49 U.S.C.A. § 1301(26)) That Any Person Who Causes or Authorizes Operation of Aircraft Shall Be Deemed to be Engaged in Operation, as Basis for Vicarious Liability or for Imputing Pilot's Negligence to Owner in Action Arising Out of Aircraft Accident*, 11 A.L.R. Fed. 901 (1972).

³⁷ 376 A.2d 104 (Md. App. 1977).

³⁸ See *id.* at 108-09.

³⁹ See *id.* at 109.

(8) There was no evidence that Mr. Todd was suddenly taken ill or that Mrs. Weikle panicked.⁴⁰

The court also relied on the Maryland rule known as the "presumption of continuance" to hold that since Mr. Todd was in contact with ATC approximately ten minutes before the accident and was presumably in control of the aircraft at that time, one can presume that he was in control at the time of the crash.⁴¹ Based on the totality of the circumstances, the court held that the case was properly submitted to the jury.⁴²

The courts concluded in a number of other cases that there was sufficient evidence of the pilot's identity to allow submission of the case to the jury.⁴³ In the majority of these cases the evidence, although circumstantial, was quite clear. For example, the courts have universally allowed submission of the case to the jury, despite the fact that the aircraft was equipped with dual controls, when there was only one licensed pilot aboard.⁴⁴ Similarly, where one of the pilots aboard had "sworn off" flying, and the other communicated to the control tower that *he* "would pass over the field", the question of pilot identity was properly for the jury.⁴⁵

One anomalous case is *Suiter v. Collamer*,⁴⁶ in which (in a one-page opinion) the court held that *res ipsa loquitur* was properly applied, although there was no evidence of who was flying the plane at the time it crashed.⁴⁷

The issue of comparative fault was held to have been properly submitted to the jury on the basis of circumstantial evidence in *Held v. Mitsubishi Aircraft International, Inc.*⁴⁸ *Lange* was the only authority submitted to the court.⁴⁹ The Federal District Court in Minnesota distinguished *Lange* on the basis that there was some circumstantial evidence of the pilot's identity.⁵⁰ The evi-

⁴⁰ *Id.* at 109.

⁴¹ *Id.* at 110.

⁴² *See id.* at 111.

⁴³ *See, e.g.,* Tank v. Peterson, 363 N.W.2d 530, 538 (Neb. 1985) (distinguishing Mitchell v. Eyre 206 N.W.2d 839 (Neb. 1973)); Lightenburger v. Gordon, 407 P.2d 728, 739 (Nev. 1965); Ayer v. Boyle, 112 Cal. Rptr. 636, 640 (Cal. App. 1974).

⁴⁴ *See, e.g., id.*

⁴⁵ *See* Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 377 (9th Cir. 1954).

⁴⁶ 235 N.E.2d 924 (N.Y. 1968).

⁴⁷ *See id.* at 924.

⁴⁸ 672 F. Supp. 369 (D. Minn. 1987).

⁴⁹ *See id.* at 392.

⁵⁰ *See id.* at 392-93.

dence included the fact that the pilot in the left seat was instrument rated (though not current). On the other hand, the fact that the left-seat pilot was familiar with this airport, and the aircraft did not line up properly with the runway was cited as evidence that the other pilot was in control.⁵¹

E. SUMMARY OF LIABILITY CASES

Although the various rulings on this issue have been characterized as three separate lines of cases, they actually follow a fairly consistent pattern, depending on the level of circumstantial evidence presented.

Lange and similar cases that find an inference or presumption of control are in conflict with more recent developments in the law of vicarious liability, and therefore have questionable relevance. The few cases allowing the question to be submitted to the jury involve, almost without exception, clear circumstantial evidence of who was at the controls. These cases do not contradict the general rule that the jury will not be allowed to speculate; they are simply unusual fact patterns where the circumstances show only a very minimal possibility that the second occupant could have taken control.

In general, when there is no direct evidence of who was actually in control of the aircraft at the crucial time, the question should be decided by directed verdict or judgment notwithstanding the verdict. To hold otherwise would be to encourage the jury to resort to speculation and conjecture to determine a question of fact which simply cannot be known.

III. INSURANCE COVERAGE CASES

The issue of pilot identity also arises frequently in the insurance context. The beneficiaries may raise the question in response to the standard life insurance exclusion for death occurring while serving as a crew member in an aircraft. It may also arise in response to the insurer's denial of coverage under an aircraft insurance policy limiting coverage to certain pilots or to pilots with certain qualifications. The outcome of these cases depends in large part on the specific policy language.

⁵¹ See *id.*

A. LIFE INSURANCE

In the context of the life insurance exclusion, the insurer has the burden of proving that the death resulted while the insured was acting as a pilot or crew member, not as a passenger.⁵² The outcome generally depends on the court's construction of the specific policy language. The policy language addressed in *Vander Laan v. Educators Mutual Ins. Co.*⁵³ excluded coverage if the insured was killed "while operating . . . or serving as a member of the crew" of an aircraft.⁵⁴ The evidence showed that the insured was the owner of the plane, was in the left-front seat, was shown in the flight plan as the pilot, handled most of the radio communications, and had flown the plane during part of the flight. The other pilot generally flew the aircraft, even if the insured was aboard, and had flown the aircraft more than half of the time during the trip.

The Michigan Supreme Court refused to enter a directed verdict for the insurer.⁵⁵ Because there was evidence from which it could be inferred that the insured was not at the controls or a member of the crew at the time of the crash, as well as evidence that he was, the question was properly for the jury. The court refused to apply the Civil Aeronautics Manual definitions of "pilot in command" and "passenger" because they were not incorporated in the policy.⁵⁶

The Kansas Supreme Court reached a different conclusion in construing similar language. The policy analyzed in *Alliance Life Insurance Co. v. Ulysses Volunteer Fireman's Relief Ass'n*⁵⁷ excluded coverage if the insured was killed "while piloting or serving as a crew member" of an airplane.⁵⁸ The court held that the policy provision was ambiguous as to the relevant time, and, therefore, should be strictly construed against the insurer.⁵⁹ The insurer was therefore required to prove that the insured was the operator or a crew member at the time of the crash or at least when the crash was imminent.⁶⁰ The insurer conceded that it could

⁵² See *In re Estate of Carroll*, 857 S.W.2d 848, 851 (Mo. Ct. App. 1993).

⁵³ 97 N.W.2d 6 (Mich. 1959).

⁵⁴ *Id.* at 7.

⁵⁵ See *id.* at 9.

⁵⁶ See *id.* at 9-10.

⁵⁷ 529 P.2d 171 (Kan. 1974).

⁵⁸ *Id.* at 176.

⁵⁹ See *id.* at 179-80.

⁶⁰ See *id.* at 180.

not prove what the insured was doing at the instant of the crash, and the court ordered judgment in favor of the insured.⁶¹

The question of the relevant time was further refined in *Beckwith v. American Home Assurance Co.*⁶² The undisputed evidence in that case proved that the insured was at the controls when the emergency arose, but surrendered the controls to the more experienced pilot. The other pilot attempted an emergency landing and was at the controls at the time of the crash. The court held that the risk of loss increased while coverage was suspended, and because normal operating conditions were never restored prior to the crash, coverage was never restored.⁶³

In *Walker v. Imperial Casualty and Indemnity Co.*,⁶⁴ the Court acknowledged that "[i]n the absence of direct evidence, the party who must prove which of the two pilots was flying a dual-control aircraft at the crucial time has an impossible burden."⁶⁵ However, the court concluded that a student pilot taking a flying lesson and logging time as a student pilot is participating as an operator of the aircraft.⁶⁶ Therefore, it was not necessary to determine who was actually at the controls of the aircraft when it fell from the sky.⁶⁷ Conversely, in two cases involving only partial dual controls, two courts as the finders of fact concluded that the insurer had not proved that the insured was at the controls.⁶⁸

B. AIRCRAFT INSURANCE

When the insurer denies coverage under an aircraft insurance policy because the pilot did not meet the qualifications specified in the pilot warranty endorsement, the question of the pilot's identity can be the deciding factor. At least one court has held that this issue was properly submitted to the jury based on evidence that the named pilot was the owner of the new two hundred horsepower Mooney aircraft, had flown it on many occasions, and was in the left seat, while the right-seat pilot had

⁶¹ *See id.*

⁶² 565 F. Supp. 458 (W.D.N.C. 1983).

⁶³ *See id.* at 461.

⁶⁴ 564 P.2d 588 (Kan. Ct. App. 1977).

⁶⁵ *Id.* at 592.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See Daman v. New York Life Ins. Co.*, 540 F.2d 382, 383-84 (8th Cir. 1976); *Durand v. Horace Mann Life Ins. Co.*, 543 So. 2d 579, 581 (La. Ct. App. 1989).

never flown the aircraft.⁶⁹ The fact that an aircraft had only one control wheel has also been held sufficient to justify a jury verdict as to pilot identity.⁷⁰

The question of pilot identity also arises in construing an exclusion for any person operating the aircraft under the terms of a rental agreement. In *Avemco Ins. Co. v. United States Fire Ins. Co.*⁷¹ the court held that the exclusion applies not only to the individual entering into the rental agreement, but to anyone operating the aircraft while it is subject to a rental agreement.⁷² Nonetheless, the insurer could not prevail because it could not establish which pilot was operating the aircraft.⁷³ The *Avemco* court further declined to incorporate the definition of "pilot in command" under the Federal Aviation Regulation to create a presumption of responsibility, suggesting that the policy definition of "operating" could be made more specific to cover this type of situation.⁷⁴

A number of cases have addressed the situation where the evidence indicates that two pilots were simultaneously controlling the aircraft. *Master Feeders II, Inc. v. United States Fire Ins. Co.*⁷⁵ involved a provision that coverage applies "only while the aircraft is being operated by" the approved pilot, in conjunction with an exclusion "while the aircraft is in flight and . . . operated by any pilot other than as specified in the declarations."⁷⁶ The Tenth Circuit Court of Appeals interpreted the policy as providing coverage "only when a qualified pilot is operating the aircraft and not then if anyone else is operating the plane, too."⁷⁷ The court, therefore held that there was no coverage while the aircraft was simultaneously operated by two pilots, even though one was qualified under the policy.⁷⁸ A similar result was

⁶⁹ See *Insurance Co. of N. Am. v. Butte Aero Sales & Serv.*, 243 F. Supp. 276, 281 (D. Mont. 1965).

⁷⁰ See *Underwriters at Lloyds, London v. Cherokee Lab., Inc.*, 288 F.2d 95, 98 (10th Cir. 1961).

⁷¹ 513 A.2d 962 (N.J. Super. Ct. App. Div. 1986).

⁷² See *id.* at 965-66.

⁷³ See *id.* at 966.

⁷⁴ *Id.*

⁷⁵ 1986 U.S. Dist. LEXIS 14395, *14-15, *aff'd*, 17 Av. Cas. (CCH) ¶ 18,205 (10th Cir. 1983).

⁷⁶ *Id.*

⁷⁷ *Id.* at *15 (emphasis added).

⁷⁸ See *id.*

reached in *Powell Valley Elec. Coop., Inc. v. United States Aviation Underwriters, Inc.*⁷⁹

However, the Texas Supreme Court reached a contrary conclusion when it interpreted a provision excluding coverage "while the aircraft is in flight . . . if piloted by other than the pilot or pilots designated in the declarations," with the declarations stating that the aircraft "will be piloted only by" the listed approved pilots with the listed qualifications.⁸⁰ Holding that the policy was ambiguous, the court ruled that if either of the two simultaneous pilots was qualified, coverage was in force.⁸¹ The Kentucky Supreme Court has also ruled under similar circumstances that coverage was in force based on reasoning that the qualified pilot was the pilot in command pursuant to the Federal Aviation Regulations and was, therefore, responsible for the operation of the aircraft.⁸²

C. SUMMARY OF INSURANCE CASES

The insurance cases addressing this issue depend primarily on the specific policy language. However, based on the same general principles applied in the liability cases, the outcome will often depend on the level of circumstantial evidence and which party bears the burden of proof.

IV. CONCLUSION

In matters arising from the crash of aircraft equipped with dual controls and with no surviving eyewitnesses, the party with the burden of proof has a very difficult task. A party seeking to prove which pilot was in control should be conscientious about promptly collecting all available circumstantial evidence. Considering the factors analyzed in the above cases, this would include the following types of information:

- Eyewitness testimony as to the identity of the pilot in control at any particular point in the flight;⁸³
- Ownership of the aircraft;⁸⁴

⁷⁹ 179 F. Supp. 616, 619 (W.D. Va. 1959).

⁸⁰ *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W. 8d 522, 554 (Tex. 1991).

⁸¹ *See id.* at 556.

⁸² *See Marshall v. Peerless Ins. Co.*, 428 S.W.2d 190, 192 (Ky. 1968).

⁸³ *See generally Todd*, 376 A.2d at 104; *Mitchell*, 206 N.W.2d at 839.

⁸⁴ *See generally Collins*, 426 S.W.2d at 689; *Butte Aero*, 243 F. Supp. at 281; *Todd*, 376 A.2d at 104; *Hayden*, 254 P.2d 813.

- Qualifications and experience of the occupants;⁸⁵
- The controls and instruments available to each pilot;⁸⁶
- The relationship between the two pilots, particularly if one was a flight instructor;⁸⁷
- The relationship between each pilot and the plaintiff, if the plaintiff was a non-pilot;⁸⁸
- Which pilot communicated on the radio and the content of the communications;⁸⁹
- The circumstances leading up to the flight, such as who decided on the destination, who invited whom, and whose purposes were being served;⁹⁰
- The location of each pilot within the aircraft and the identity of the pilot in the seat customarily occupied by the pilot;⁹¹
- Forensic evidence as to the condition of the seatbelts and the controls and the positions of the pilots' hands and feet after impact.⁹²

If the circumstantial evidence points very clearly to one pilot or the other, the court may allow the case to be submitted to the jury. But in the vast majority of cases, a judgment as a matter of law will be appropriate and consistent with precedent. Any other result could only be based on speculation and conjecture by the trier of fact.

⁸⁵ See generally *Held*, 572 F. Supp. at 392-93; *Todd*, 376 A.2d at 104; *Hayden*, 254 P.2d 813; *Tank*, 363 N.W.2d at 530; *Lightenburger*, 407 P.2d at 728; *Ayer*, 112 Cal. Rptr. 636.

⁸⁶ See generally *Hayden*, 254 P.2d at 813; *Todd*, 376 P.2d 104; *Daman*, 540 F.2d at 382; *Underwriters at Lloyds, London*, 288 F.2d at 97.

⁸⁷ See generally *Lange*, 108 N.W.2d at 428; *Udseth*, 530 F.2d at 860; *Lisa-Jet*, 569 F.2d at 1044; *Jetcraft*, 16 F.3d at 362.

⁸⁸ See generally *Collins*, 426 S.W.2d at 689.

⁸⁹ See generally *Boise Payette*, 214 F.2d at 377; *Todd*, 376 A.2d at 104.

⁹⁰ See generally *Collins*, 426 S.W.2d at 689.

⁹¹ See generally *Butte Aero*, 243 F. Supp. at 281; *Durand* 543 So. 2d at 579; *Todd*, 376 A.2d at 104; *Vander Laan*, 97 N.W.2d at 9; *Hayden*, 254 P.2d 813.

⁹² See generally *Lange*, 108 N.W.2d 428; *Hayden*, 254 P.2d 813.

