

1974

Practice Aspects of General Aviation Litigation

Neil D. Reid

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Neil D. Reid, *Practice Aspects of General Aviation Litigation*, 40 J. AIR L. & COM. 661 (1974)
<https://scholar.smu.edu/jalc/vol40/iss4/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

PRACTICAL ASPECTS OF GENERAL AVIATION LITIGATION

NEIL D. REID*

ALTHOUGH general aviation attracts considerable litigation, the majority of matters do not involve the catastrophic losses that make headlines for newspapers and fortunes for plaintiffs' attorneys. Small cases are numerous, however, and are important to the client and to the attorney who assumes responsibility for his affairs. The average attorney is not knowledgeable in aviation matters. He is not a pilot and has perhaps never flown in a light aircraft. The attorney's immediate problem is whether to accept an aviation case at all, or to refer it to a specialist. Cases that involve death or serious injuries quite often require inquiry into complex problems of product liability. They employ the use of highly qualified experts and extensive, costly discovery. It is best to refer such cases to those attorneys who are experienced in the field of aviation litigation and therefore qualified to undertake such responsibility. However, there is no reason why a competent attorney with satisfactory trial experience should turn away a client simply because aviation is involved.

Aircraft are subject to the same rules of tort liability that govern any other type of transportation. Accidents result, in aircraft as elsewhere, from human error or mechanical malfunction. As with all tort cases, insurance coverage is a major factor, and while the aviation policy differs in some respects from that of other coverages, the fundamental principles still apply and relationships between insured and insurer are the same.

The practical aspects of handling smaller general aviation cases are not substantially different whether one is a plaintiff or defendant. Attorneys on both ends of the counsel table must function

* Neil D. Reid is a practicing attorney in San Francisco, California. He has a Commercial Pilot's Certificate with instrument and multi-engine ratings.

efficiently without incurring litigation expenses out of proportion to the value of the case. In aviation cases, as elsewhere, the work must be performed as economically as possible, consistent with good practice and common sense. The difference is that in aviation litigation expenses can soar rapidly if not closely monitored.

The first practical problem is to review where and how to gather the factual information needed to handle the case, and to do so without undue expense or delay. It is also necessary to gain the understanding of the technical details with which one will become involved.

The first notice of an accident will usually come from the client. Generally speaking, he can give a fair account of what happened and his own version of events. This is an excellent time, particularly if representing a pilot, to obtain an education from the client in all aspects of the flight. The attorney should cover, at a minimum, weather briefing, pre-flight inspections, in-flight communications, flight conditions, and a second-by-second description of the accident. One should not hesitate to ask clients to explain or define matters which are factually unclear. If the attorney does not understand the client's explanation, neither will the jury. Attorneys who are not familiar with aircraft and airmen's terms should not try to bluff their way through. It seldom works, and the client will lose respect and confidence. If the client is a passenger or nonflier, however, his version of the case will be technically less reliable and the attorney must obtain the required information and education from other sources.

The primary source of accident information comes through the Federal Aviation Administration (FAA) which has the responsibility to investigate general aviation accidents. For our purposes, general aviation includes virtually everything except the airlines and the military. The National Transportation Safety Board (NTSB) also has the duty of investigating all *fatal* general aviation accidents (as well as accidents involving air carriers and aircraft over 12,500 lbs. gross weight).

A phone call to the local General Aviation District Office (GADO) serving the area where the accident occurred can usually confirm whether they did conduct an investigation of the accident and also produce a verbal factual summary from the Operations

Inspector in charge. He is not permitted to give his opinion, so one should be polite and not ask.

Follow up the call to the FAA with a written request for the full investigation from:

AHQ-300, Federal Aviation Accident Report
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, D.C. 20591
Attention: Virginia Medley

with a carbon copy to the same address:

Attention: Donald Kemp, AFS-50.

If a fatality was involved (and as stated above, if such is the case one should give serious consideration to associating an experienced aviation attorney) a report may be obtained from the National Transportation Safety Board at the following address:

National Transportation Safety Board Accident Report
Accident Section BGM-554
National Transportation Safety Board
800 Independence Ave., S.W.
Washington, D.C. 20591

In addition to the report, there should be a specific request for copies of all photographs and other similar documents such as newspaper clippings. Since the reproductions will be in black and white unless otherwise requested, the attorney must be sure to state that he wants color photographs and that he will pay the cost of such reproductions.

While NTSB reports, because of the seriousness of the accident, tend to be much more complete than that of the FAA reports, the general information contained will be much the same.

The *Factual Aircraft Accident Report—General Aviation* is NTSB Form 6120.4 and consists of eight pages, to which may be added supplemental pages such as witness statements, diagrams, photos, etc. The report is categorized into specific areas commencing with a Statement of Accident—giving location, time, etc. and continuing in great detail covering every reasonable area of inquiry; *e.g.* pilot's history, accident history, examination of wreck-

age, weather, etc. and ending with a narrative statement of facts, conditions and circumstances. It resembles, in principle, a typical highway patrol report, but contains far greater detail.

It may take some time to obtain copies of the reports, but often a preliminary, less detailed report is obtainable almost immediately. The FAA or NTSB will *not*, however, do the work of the attorney since their interests are in accident prevention and safety and not in obtaining evidence for trial purposes.

In addition to calling the GADO, contact should be made with the news media and if they have a story obtain news releases and photographs as well as names of witnesses which they may have uncovered.

The employment of an investigator to contact witnesses will of course depend on the nature of the case itself and the amount of expense justified by the case. If the case warrants some investigation beyond that obtainable from the client, FAA, and the other sources here mentioned, the attorney should employ an investigator with aviation experience or at least an interest in aviation. Aviation experience is not essential, however, provided one is willing to spend some time with the investigator and the client, and go over in detail the kind of questions to be asked and the vocabulary likely to be encountered. A good investigator is quick to pick up important factual details from a witness provided he has some guidelines to go by. In aviation this is particularly important. It is usually better to have a witness interviewed and statements taken by a good investigator who is not a pilot than not to have any statements or investigation at all.

It is strongly recommended that the attorney (and his investigator, if he has one) personally visit the site of the crash and examine the wreckage (which will often have been moved to a storage hangar). If the attorney is not well versed in aviation matters it would be an excellent idea to have the client accompany him and bring a good photographer along, unless the attorney feels competent to take his own photographs or have his investigator do so.

Getting to the wreckage and preserving it is generally important, but it is seldom necessary to preserve an entire aircraft, particularly when the accident was caused by a single part that failed. Photographs and retention of a particular part will cost a client virtually

nothing compared to storage of an entire aircraft until trial time.

Once some factual information is obtained concerning the accident, the attorney must decide whether to employ expert testimony, and if so where and what time to obtain it. The use of experts is a critical area in aviation cases. No major case should be tried without consulting a professional expert in the aviation field. A great many minor cases, however, cannot be tried with the use of such professional witnesses because of the expenses involved. Most aviation experts charge in the neighborhood of \$300 to \$500 per day of trial and seldom testify without devoting a considerable amount of costly time in pre-trial preparation. If such an expert will be used, hire him early and discuss with him just what is involved in the case as a whole and what he will be required to establish. Many experts, if they realize that they are not going to be under cross-examination for six or seven days, will take into account the real needs of the attorney and can be of tremendous assistance. Many times a brief examination by a professional expert or even a telephone consultation will steer the attorney in the right direction toward winning his lawsuit.

The names and addresses of aviation experts specializing in accident reconstruction, air safety, weather, human factors, etc., are all available. The simplest way to ascertain their identity is to ask an attorney specializing in aviation work. If one does not wish to do that, an off-the-record discussion with the FAA investigator who was at the scene of the crash will probably provide some good clues. He cannot and should not specifically recommend a particular investigator, but if asked who he usually finds involved in aircraft accident investigations that he has conducted he will probably recall the names of two or three well-known persons or organizations. In the small general aviation case it may not be necessary to hire one of the professionals in the field. There are a number of other people who would serve equally well and who in some cases are even more impressive to a jury because they are not so polished.

The FAA investigator who went to the scene of the crash may be called as a witness, but not as an expert. FAA personnel are, however, generally knowledgeable with regard to their specialties (some are maintenance specialists; others deal with certification, operations, etc.). An FAA employee testifying before a jury, even

though he may not be asked to express an opinion, can be a very effective witness and his testimony will be regarded as equivalent to that of an expert. Other than the ordinary witness fee, which he is required to return to the federal government, his testimony costs nothing.

Unlike the FAA, the members of the NTSB investigating team are ostensibly working for the purpose of air safety. They can neither give an opinion, comment on probable cause, nor can they be required to testify in court. They can be deposed, however, and their depositions may be read in court. Since their depositions usually refer to everything that they have seen, observed and recorded in the NTSB report, deposition testimony must be obtained if one wishes to bring to the attention of the jury factual matters discovered by the NTSB.

Where considering the possible need for expert testimony where a mechanical problem is the key to the case, go to the local Fixed Base Operator (FBO) and ask to see his shop foreman. Explain the problem. A little negotiation can probably produce an expert witness to be used in the small aviation case for a reasonable cost to the client. There are a number of different aircraft specialties that are practiced and not all mechanics will qualify across the board. If they are not qualified they can often suggest a colleague.

For example, propellers must be inspected and repaired in a special shop and require specially trained mechanics. Aircraft instruments are also separately serviced and maintained. Radios and electronic equipment, known collectively as "avionics," require their own specialty shop and specialty mechanics. Once the decision is made that an expert is needed in a particular area, however, virtually anyone familiar with aircraft maintenance will help locate a person who can qualify and testify for a very reasonable fee. Before considering whether to employ expert testimony regarding a pilot's involvement in an aircraft accident, a preliminary investigation will give a general idea of pilot qualification and will assist in the selection of the type of expert required.

A great many accidents are attributable to the error of the pilot, and this usually suggests the question of the pilot's qualifications. Very briefly, pilots receive certificates (not licenses) and these certificates are some indication of the degree of experience and skill the pilot has demonstrated. This subject is covered extensively

in Part 61 of the Federal Aviation Regulations (FAR).¹ To summarize briefly, there are four grades of pilot certificates: student, private, commercial and air line transport pilot.² All pilots require current medical certificates.

A pilot, besides holding these two certificates, must be rated in the aircraft he is operating. Ratings appear on the face of the certificate and show for example that he is rated in one or more of the four *categories* of aircraft: airplanes, rotorcraft, glider or lighter than air (FAR 61-15(a)).³ Within the category airplane there are several *classes*: single engine, multi-engine, land and sea (FAR 61-15(a)).⁴ Additionally if the aircraft weighs more than 12,500 lbs. or is powered by turbojet engines, the pilot must be also rated in type, *i.e.*, especially trained and licensed in that make and model of aircraft.

A pilot who is operating under instrument flight rules (IFR) must hold an Instrument Rating and be current in instrument flight. To be current means that he has flown six hours in actual or simulated instrument flight within the last six months and performed six instrument approaches. (An instrument flight is one conducted solely by reference to instruments, without using outside visual references.)

A pilot's hours and experience, and in particular his experience in type, *i.e.*, the make and model of aircraft, may have considerable significance in determining his qualifications. Not all pilots log all of the time that they have and so one occasionally meets a pilot who claims a great number of hours, but does not have it recorded in log books.

Since maintenance of a log book is not mandatory, except as proof in seeking a higher rating, many pilots simply do not bother. As a practical matter one can get some idea of a pilot's qualifications and whether he is exaggerating his flight experience (or has falsified his logs) by considering the following: An ordinary person with a job which does not involve flying, can fly only on weekends and holidays. Since it involves both time and expense to go to the airport and rent an aircraft, the average pilot could hardly

¹ 14 C.F.R. pt. 61 (1974).

² 14 C.F.R. § 61.5(a)(1) (1974).

³ 14 C.F.R. § 61.5(b)(1) (1974).

⁴ 14 C.F.R. § 61.5(b)(2) (1974).

be expected to fly more than one day a week and then only for a couple of hours. If he flew *every* weekend in the year (and weather certainly would preclude him from doing so except in a very few parts of the United States) and he flew on the average of two hours for each flight, he would amass only about 100 hours per year. Considering that the rental of an aircraft, depending upon the horsepower and complexity, will vary anywhere from \$15 to \$60 per hour, his flight experience at even \$25 an hour average will cost him somewhere in the neighborhood of \$2,500 per year. Therefore, when discussing a pilot's flight experience from a practical standpoint one should also look at his occupation and income. A married man with children who flies as a hobby more than 100 hours a year will have to have a very understanding wife or a very good income. On the other hand, someone who has flown as a flight instructor, flying five or six hours a day, five days a week, can quickly log a considerable amount of time. Any pilot flying professionally as a crop duster or charter pilot on regular schedules can build up time very rapidly. It is important in determining a pilot's qualifications that one has some understanding of what it takes to amass 1,000 hours of flight experience and what it means to do so. An exaggeration, no matter how innocently offered, can be easily punctured so as to discredit a witness to a point where he appears to be a braggart and generally unreliable in his testimony. Most pilots have a very good idea of what is required to acquire a special qualification, and will be quick to detect a false note.

Incidentally, all pilots, effective November 1, 1974, are required to have a biennial flight review. Such biennial flight review must be entered in the log book with the name and certificate number of the flight instructor giving the review. This individual therefore may be a source of information with regard to qualifications, particularly concerning subjective aspects of a pilot in question.

A word of caution while considering flight experience and pilot proficiency: In the course of interviewing or deposing pilot witnesses regarding an accident, you may find that they often place the blame squarely on the pilot involved; seldom do pilots blame the hardware for someone else's accident. There seems to be a feeling among many pilots that the other fellow's accident was something that could have been avoided had he done "what I would have done under the same circumstances." This peculiar attitude may not

come out quite so obviously or blatantly as stated here, but it does exist. Perhaps it is because pilots live with the knowledge that each has his own personal limitations of skill and judgment, and that the environment of flight is totally unforgiving. Strong self-confidence, humility, and a respect for the machine seem to go together so that, when an accident does occur, "pilot error" is not really excusable. This is an underlying attitude which can color testimony, and should be understood by the attorney who must deal with this type of witness.

An excellent source of expert testimony regarding the qualifications and conduct of pilots is a certified flight instructor employed at the local general aviation airfield. Occasionally the flight instructor himself is working only to build up time to qualify for an airline job, and the flight instructor chosen as an expert witness should, therefore, have better qualifications than the pilot on whose performance he is being asked to comment. Many flight instructors tend to work continuously with low time pilots and may have little or no familiarity with the actual type of operation involved. In such case, however, they may be a good source of information as to whom one should contact with the particular qualifications which fit the problem. The aviation community is still rather small, particularly among the professionals within a given locality.

Weather quite often figures prominently in aircraft accidents. The non-instrument-rated private pilot flying into bad weather where reliance on instruments is necessary is one of the major factors of all private aircraft accidents. FAR 91.5 imposes a duty upon a pilot to make himself aware of the weather not only at his destination but along his route as well. Therefore, if weather is a factor, an attorney handling a small general aviation case may find it necessary to inform himself as to what precautions were taken.

A record is maintained of every pilot's request for weather information from the FAA Flight Service Station. This record is not kept in the pilot's name, but rather under the aircraft number. The Flight Service Stations are often associated with local weather bureaus and the pilot can be briefed either by telephone or in person.

Aviation weather information is a very complex subject and is one area where technical assistance may be required. The federal employees working in this field are always helpful and will patiently

explain and interpret weather information when requested. The local weather bureau, the Flight Service Station, or the local control tower all can provide information on weather. It may also be possible to obtain copies of briefings or tape recordings of contacts made by the pilot by radio during the course of the flight. If the flight was flown on an instrument flight plan, a great deal more information of this nature may be obtainable.

In any event, should it be required, the FAA regional office can provide information of contacts with the aircraft. For aviation weather reports, a request to the National Climate Center at Asheville, North Carolina, may be of some assistance. Include in requests for information the aviation terminal forecasts, the hourly aviation reports, the surface weather observations, aviation severe weather watch bulletins (where applicable), aviation hourly observations available on surface A circuits, and a radar scope photograph (for information on thunderstorms).

Throughout the United States there is a network of more than 500 airport weather stations, which currently report weather, and most of these stations have trained personnel on duty twenty-four hours a day. This information is sent out in hourly reports to central points and if a pilot intelligently seeks this information he can derive a great deal of important knowledge about his flight before he ever leaves the ground. Changes do occur, but the responsibility of the pilot to observe and deal with these changes is never shifted. When weather does become a factor, a practical approach for the attorney is first to obtain the assistance of an older, high-time pilot who has at least a commercial pilot's certificate with instrument rating, and who has been employed either as a flight instructor, charter pilot or in some such capacity which has given him the opportunity to encounter a variety of weather conditions over the years. With his assistance, the attorney can tackle the problem of obtaining the weather information from the sources outlined above. Eyewitness reports can describe the actual weather at the time of the accident. Pilot reports made by other aircraft in the vicinity, commonly known as "PIREPS," are also available. Incidentally, a very good book on this subject is entitled *Weather Flying*.⁵ It bears a subtitle of "A Practical Book On Flying in All Kinds of Weather

⁵ R. BUCK, *WEATHER FLYING* (1970).

by a Pilot for Pilots." This is highly recommended to any one who has the need to understand, from a pilot's standpoint, just what weather flying involves.

Although we have been considering various sources of information, as well as expert assistance which is readily available to the attorney, some attention should be directed to the role of the FAA itself as a potential party defendant and the reliable sources for information regarding its involvement. The FAA is not immune to error (all rumors to the contrary). The scope and duty of air traffic controllers goes back to 1938 and the Civil Aeronautics Act.⁶ Today it is all under the Federal Aviation Administration, a part of the Department of Transportation. There is no question but that the United States may be sued under the Federal Tort Claims Act for the negligence of their traffic control personnel and there are numerous cases so holding, such as *United States v. Miller*.⁷ However, what the attorney needs to know is that the FAA personnel must conduct their operation in accordance with an air traffic control procedure manual which includes the terminal air traffic control manual, 7110.8C,⁸ the air route traffic control manual, 7110.9C,⁹ and the facility management handbook, 7210.3B.¹⁰ In addition, each facility also adopts its own internal publications which are available upon request. These publications set the standards; failure to comply is often negligence.

The FAA always conducts its own investigation where there is any possibility that the FAA controller is involved in an accident. Reports of these investigations are seldom, if ever, turned over voluntarily, and a court order from the local federal court is generally necessary. Statements of the controller are either written or recorded and should be specifically requested and any records reflecting the evaluation of the FAA ruling in the accident should be requested, including disciplinary records, if any.

Tower tapes of tower to pilot conversations are not retained and preserved unless requested within fifteen days. Therefore, if you have any reason to believe that the accident is due to controller

⁶ Civil Aeronautics Act of June 23, 1938, ch. 601, § 302(a)(4).

⁷ 303 F.2d 703 (9th Cir. 1962).

⁸ FAA, AIR TRAFFIC CONTROL PROCEDURE MANUAL § 7110.8C.

⁹ *Id.* at § 7110.9C.

¹⁰ *Id.* at § 7210.3B.

error it is quite important to immediately contact the FAA employees and request preservation of the tape. Assistance in this regard can be obtained from the Regional Counsel, who can quite often provide invaluable shortcuts from a procedural standpoint. They are usually quite cooperative. From a practical standpoint, if the accident was due wholly or in part to an error or omission of a tower operator the FAA itself will have made a prompt investigation of the circumstances and will know far more about the subject than the attorney. The federal government does not, however, hold itself out as an adversary and if a claim is promptly presented on the correct form the claim may be paid in full without argument. This attitude on the part of the federal government is very refreshing. On the other hand, if they are convinced that they were not at fault, the case will usually have to be resolved by the courts.

While it may not be necessary for the non-aviation oriented attorney to be knowledgeable of all the publications and documentary information available from governmental services, he should be aware that an abundance of information can be had upon request. As a practical matter, some assistance or suggestions from more knowledgeable persons in the aviation field may be useful in suggesting particular publications.

The federal government's Flight Standard Technical Division publishes a considerable number of books and pamphlets related to aviation which are available through the Government Printing Office, or directly from the Department of Transportation. Some publications are free for the asking, others are available at a nominal charge. For example: *Terrain Flying*, *Pilots Weight and Balance Handbook*, and *Pilot and Commercial Pilots Refresher Courses* are but a few dealing with both general and specialized aspects of flight.

When seeking information relating to a possible mechanical defect it is important to know that a record of previous complaints is compiled and computerized. These are known as *Malfunction and Defect Reports* and are available through the FAA Aeronautical Center, P.O. Box 25082, Oklahoma City, Oklahoma 73125. *Flight Service Difficulty Reports* are also available and pertain to specific airframe and engine failures.

Airworthiness Directives (A.D. Notes) are published for every general aviation aircraft which requires modification subsequent

to manufacture, where the element of airworthiness and safety is involved. These A.D. Notes require compliance within a specified period of time. Usually this is accomplished by a certified aircraft mechanic who takes the responsibility for the workmanship and enters information onto the aircraft log book. The responsibility for compliance, however, rests with the aircraft owner. This information is available to every mechanic and the attorney should not attempt research in this area independently—it can be done more quickly and accurately by those who are familiar with the matter.

Not all aircraft related accidents require a specialized degree of preparation and investigation. An example is the typical bailment situation where the aircraft is either hangared or “tied down” along the flight line. The owner of a \$50,000 aircraft who leaves it in a hangar only to come back the next day and find that the hangar has blown away taking his aircraft with it (a surprisingly frequent occurrence) may contact his lawyer to do something about it. While these cases require no great knowledge of aircraft on the part of the attorney, there are some practical considerations. It is important to know who built the hangar in the first place, since one may have a municipality as a defendant. There are standards for hangar construction and contacting one of the many companies which build hangars professionally can often produce not only standards but an expert for later testimony. Occasionally wind and weather cause destruction of hangar facilities and raise the defense of “Act of God” but generally such defenses are not sound. The general rules are that high winds, thunderstorms and weather constitute the reasons one hangars an airplane and are foreseeable.

A collateral type of general aviation loss is that arising from the use of tie-down ropes which are attached to the aircraft and secured to the ground in order to hold the aircraft in position. These ropes often fail to adequately secure the aircraft either due to mechanical failure or improper use. A critical issue is whether the owner of the aircraft or an employee of the FBO did the tying down. A client whose aircraft has blown away and smashed up two or three other aircraft may have a number of legal problems. First, he has suffered a considerable economic loss which may not be insured unless he carries hull insurance, and even then there is a deductible. Secondly, if other aircraft have been damaged, he may be exposed

to considerable third party liability. Again, he may or may not have adequate insurance coverage for this problem. His lawyer then will be the first person that he seeks for advice and reassurance. Photographs taken promptly are mandatory. There is nothing better than having a piece of rope itself, one end still tied to the aircraft and a break midway down its length. This indicates that the fixed base operator who provided the tie-down ropes had failed to provide either a strong enough rope, or had failed to replace ropes weakened and rotted with age.

When dealing with the subject of aircraft repairs, that which may seem at first to be a simple bailment problem may quickly resolve itself as a products liability question involving the manufacture of aircraft or components. Where the manufacturer becomes involved as a party defendant, one can anticipate some very serious problems. Manufacturers are usually very litigation-conscious. Whether they are represented by insurance carriers or are self-insured is incidental, since the proof of their mistake may involve extensive discovery usually requiring several trips to the factory to depose relevant personnel. One customarily starts with an extensive set of interrogatories to determine who should be deposed, what the company's system is, and where the manufacturing defect most likely occurred.

In a smaller aviation case, products liability against a manufacturer may not lend itself to adequate preparation or putting it another way, adequate preparation may not be complete preparation. Where the stakes are high enough, hundreds and even thousands of hours of preparation can be justified by the results. But where the attorney's time and expenses do not justify this extensive discovery a more practical approach is necessary. The attorney should rely upon a few key witnesses who are local and convincing.

The attorney should try to put the burden on the manufacturer to produce the experts to show its system, and how it cannot possibly go wrong. The attorney can use the company's experts, which is cheaper. One defense attorney successfully defended a rather complicated case involving a design defect of an aircraft braking system by coming into court with two beer cans attached to plywood and activated by a coat hanger. This device cleverly constructed in his basement was more persuasive to the jury than the most sophisticated diagram or mockup. Where the damage was not

so great as to justify the all-out preparation, his ingenuity and common sense prevailed.

As a practical matter, wherever a suspected defect in maintenance is involved, the log books should immediately be located and gone through carefully with the aid of a qualified AI. The average attorney not being a mechanic may not be able to recognize omissions in maintenance or to recognize the significance of certain repairs which have been made. This type of preparation is relatively inexpensive to the client and under certain circumstances can be freely given by a mechanic who has a good rapport with the client.

No discussion of the practical aspects of the small aircraft accident litigation would be complete without a brief discussion of aircraft insurance. Aircraft insurance differs from the average automobile policy and requires careful reading. Particularly important are certain concepts of coverage which one does not ordinarily encounter in other insurance.

Aviation insurance has substantially more limitations than are found in the family automobile or general liability policy. There is a lack of standardization since general aviation insurers must cope with a great variety of pilot capability as well as aircraft characteristics and types of flight operations. The underwriters must tailor the insurance to the risk. Briefly, the aviation policy is divided into five parts: they are usually (i) declaration, (ii) definitions, (iii) insuring agreements, (iv) exclusions, and (v) conditions.

The declaration page is essentially a representation by the insured that a certain aircraft will be used for a particular purpose and operated by a particular type of pilot and it is on such representations that the insurance company relies when it undertakes to insure the aircraft. Since this page determines what coverage is being requested for a particular aircraft and what qualifications are to be expected of the pilot who operates the aircraft, a considerable amount of litigation can ensue where the insured fails to read and understand his policy. As a practical matter, the burden of proof falls on the insurer to prove its contentions to avoid coverage, as those who are familiar with litigation involving insurance coverages would expect.

Insurance carriers feel strongly that if they must bear the risk of insuring a certain type of operation they should have the right to hold the insured to his contract. For example, when the insured

declares that a pilot will have, for example, one hundred hours in type before flying this aircraft, the pilot should in fact have that amount of time. Whether or not a denial holds up in court, of course, depends on the jurisdiction, and the individual circumstances of coverage of each case. But from a practical standpoint, if the client is a pilot or aircraft owner, a great deal of time and expense could be saved by the attorney's going over the policy with him in detail *before* an accident occurs so that he will not inadvertently operate in violation of his contract.

Unlike automobile policies, it is possible to have a permissive user flying an aircraft for which he is individually responsible, while not being an insured under the policy. Most aviation insuring agreements do not extend coverage to permissive users, particularly where hull damage is concerned. An insurance carrier pays for damage to the aircraft and then, pursuant to his subrogation rights, proceeds to bring an action against the permissive user to recover for the damage on a bailment theory.

This often is an unpleasant surprise to the insured and the permissive user. The State of California has recently required that a fixed base operator must advise a renting pilot if there is no insurance provided to him with respect to a rented aircraft. If the client is a permissive user being sued under the subrogation rights of an insurance carrier, the attorney must determine the exact circumstances under which he took the aircraft as there is the possibility of a cross-complaint against the aircraft owner for negligent misrepresentation as to coverage.

Policy exclusions provide a great deal of the litigation involving aviation insurance. Many of these cases while appearing clear-cut will, however, have valid defenses for the insured where the exclusion is against public policy. For example, a policy exclusion which excludes coverage when the pilot is in violation of federal air regulations is invalid and unenforceable by statute in some states, *e.g.* California Insurance Code Section 11584 and by court decisions in others. The reasoning is that since it is virtually impossible to have an accident without an FAR violation, such a provision renders the policy a sham. Insurance carriers depend on their contracts to limit their risks and no one will deny that without insurance most businesses could not successfully operate. This is of little consolation to a pilot first involved in an accident to learn that he

has no insurance coverage because of a violation of a contract which he had never seriously studied.

From the practical standpoint, it would seem that an attorney whether he is representing the carrier or the insured under such circumstances should recognize the problem for what it really is, one of communication rather than of deliberate intent to vex, annoy or defraud.

That which may be a clear violation to a professional insurance claims superintendent may not seem so at all to the insured whose totally dissimilar background and interests have left him no reason to anticipate such a contrary result. It seems, therefore, that some arbitration, negotiation and flexibility on the part of the attorneys can resolve the matter more satisfactorily than the cutting edge of a judgment.

The practical aspect of handling small general aviation litigation does not require, in most instances, so much knowledge of aircraft as it does the willingness to learn that which must be learned in order to protect the client's interests. Remember that the jury will be composed of laymen, many of whom fear and distrust general aviation aircraft as one distrusts the unknown. Therefore, the explanation need not be elaborate to be convincing.

Notes

