Journal of Air Law and Commerce

Volume 39 | Issue 3 Article 8

1973

Liability of the Pilot-Bailee

Robert F. Maris

Notes

LIABILITY OF THE PILOT-BAILEE

Common law rules have been applied to aircraft bailments since the earliest cases on the subject were litigated.[1] Although these common law rules are still applied, bailments of aircraft raise problems peculiar to the field of air law. The rights and duties of the pilot-bailee are determined by this mixture of old and new principles. To fully analyze the problem, it is necessary to note and discuss the following: (i) the standard of care the pilot-bailee is required to meet, (ii) the proof and presumptions applicable to the bailment of aircraft and (iii) special circumstances that may arise in the course of an aircraft bailment.[2]

I. The Standard of Care

A bailment is a contract in which the personal property of the owner is delivered to and possessed by another for a specific purpose, either express or implied. When this purpose has been completed, the bailee must return the property to its owner.[3] There are three classes of bailments: (i) those for the mutual benefit of the bailor and the bailee, (ii) those for the exclusive benefit of the bailee, and (iii) those for the bailor's exclusive benefit.[4] Each of these classes has an attendant standard of care that the bailee must exercise to preserve the bailed article.[5]

[1] Braman-Johnson Flying Service, Inc. v. Thomson, 167 Misc. 167, 3 N.Y.S.2d 602 (N.Y. Mun. Ct. 1938); Whitehead v. Johnson, 150 Misc. 86, 268 N.Y.S. 368 (N.Y. Mun. Ct. 1934). *See also* Colbert v. Franklin Limestone Co., 4 Av. Cas. ¶ 17,754 (Tenn. Ct. App. 1955) for a discussion of this subject. Aircraft bailments discussed in this note are limited to the field of general aviation.

[2] *See* 44 A.L.R.3d 862 (1972) for a discussion of aircraft bailments on a more general scale.

[3] R. Brown, Personal Property 225-453 (1936). *See also* Simons v. First National Bank of Denver, 491 P.2d 602 (Colo. Ct. App. 1971) for a general discussion of aircraft bailments.

[4] R. Brown, Personal Property 284 (1936).

[5] *Id.* at 284, 289, 291. The mutual benefit bailment requires an ordinary standard of care; the bailment for the sole benefit of the bailee requires a high degree of care; and the bailment for the sole benefit of the bailor requires only a slight degree of care. *See also* Reynolds v. Bank of America National Trust and Savings

The most important and commonly used type of bailment is that for the mutual benefit of the contracting parties.[6] The courts have traditionally held the bailee to the standard of ordinary care under the circumstances in this type of bailment.[7] It is imperative that the pilot-bailee clearly establish a mutual benefit relationship with his bailor to avoid the higher standard of care demanded of the gratuitous bailee. A comparison of two cases illustrates this point. In *Pattawatomie Airport and Flying Service v. Winger,*[8] defendant-pilot brought his plane to plaintiff-airport for repairs and was given another aircraft by airport personnel for his temporary use. Although the airport recognized some benefit from receiving the pilot's repair business, the court reviewing the pilot's subsequent accident in the bailed aircraft determined that the bailment was gratuitous; *i.e.* the bailment was for the exclusive benefit of the bailee. Applying the high degree of care standard demanded of the gratuitous bailee, defendant was found liable for the damage to the aircraft. In *Hastings v. Thweatt,*[9] defendant borrowed plaintiff's aircraft representing that he "might" buy it if the plane's performance was adequate. Again the type of bailment created was unclear. The Texas Court of Civil Appeals found that the bailee's expressed desire to purchase the plane was sufficient to create a mutual benefit bailment; therefore, applying the standard of ordinary care, the bailee in *Hastings* was found not to be liable for the damage the plane sustained.

Not only must the type of bailment be lucidly set out by the parties, but the existence of the bailment relationship itself must be established. The importance of this is noted in *Serrano v. Midyett.*[10] In *Serrano,* the pilot of a bailed aircraft was injured due to

Assoc., 335 P.2d 741 (Cal. Dist. Ct. App. 1959), *rev'd,* 53 Cal. 2d 47, 343 P.2d 926 (1959) for a discussion on damages breaching bailees may be liable for.

[6] A lease is a mutual benefit bailment. *See* Sky Aviation Corp. v. Colt, 475 P.2d 301 (Wyo. 1970); Hastings v. Thweatt, 425 S.W.2d 661 (Tex. Civ. App. 1968); Middlesex Mutual Ins. Co. v. Johnson, 12 AVI. L. REP. ¶ 583 (Cal. Ct. App. 1972).

[7] *Id. See* note 5 *supra.*

[8] 176 Kan. 445, 271 P.2d 754 (1954).

[9] 425 S.W.2d 661 (Tex. Civ. App. 1968).

[10] 3 Av. Cas. ¶ 18,223 (Ill. Ct. App. 1953). *See* Simons v. First National Bank of Denver, 30 Colo. App. 260, 491 P.2d 602 (Colo. Ct. App. 1971). In *Simons,* the owner left his plane on the premises of the alleged bailee. No bailment was found, however, since the owner locked the aircraft, retained the keys and discouraged anyone from disturbing it.

the unairworthy condition of his plane. Although the bailor has a duty to the bailee to provide an airworthy aircraft,[11] the Illinois Court of Appeals determined that the pilot was in possession of the aircraft by virtue of a conditional sales contract. Under this relationship, the bailor had no duty to provide an airworthy plane.

Once the mutual benefit bailment is established, the pilot-bailee must be certain he maintains the standard of ordinary care. The Supreme Court has defined the standard of ordinary care as "that care which men of ordinary prudence customarily take of their own goods of a similar kind under similar circumstances."[12] What constitutes ordinary care necessarily varies with the circumstances under which the bailment is made. An airplane is a very expensive, technical and potentially dangerous piece of equipment. The operation of an aircraft demands a high degree of skill. Therefore, the standard of care to which a pilot-bailee must be subjected is very high.[13] It is a well established principle of air law that a pilot has the primary responsibility for the operation of his aircraft;[14] this principle demands of pilots the most circumspect conduct possible.

The degree of care expected of pilots is illustrated by a recent Texas Court of Civil Appeals case, *Trevillian v. Albert.*[15] In *Trevillian,* a doctor rented a plane in Texas with the intention of flying it to southern Mexico. The doctor, however, collided with a mountain top in transit completely destroying the rented aircraft. When suit was brought by the bailor, the doctor claimed that he had become disoriented after a long period of acceleration and that this was a normal phenomenon. The court in *Trevillian* refused to accept the argument finding that a prudent pilot would have used the plane's instruments to keep himself oriented. Another case, *Fuelberth v. Splittgerber,*[16] provides further insight into a pilot-bailee's standard of care. In this case, even though defendant-bailee proved that the bailors had constructed their airfield's runway too close to power lines, the bailee was found negligent when his leased

[11] *See* notes 28-30 *infra* and text accompanying.

[12] Preston v. Prather, 137 U.S. 604, 608 (1891).

[13] Anderson Aviation Sales Company, Inc. v. Perez, 19 Ariz. App. 422, 508 P.2d 87 (Ariz. Ct. App. 1973).

[14] Sawyer v. United States, 436 F.2d 640 (2d Cir. 1971); Rich v. Finley, 325 Mass. 99, 89 N.E.2d 213 (1949).

[15] 469 S.W.2d 617 (Tex. Civ. App. 1971).

[16] 150 Neb. 309, 34 N.W.2d 380 (1948).

aircraft hit these power lines while landing because he was familiar with their presence. The prudent pilot-bailee must take account of the known negligence of his bailor.[17]

Another important circumstance that tends to elevate the degree of care that a bailee must meet when piloting an aircraft is the comprehensive Federal Aviation Regulations.[18] Violation of these regulations is conclusive proof of negligence; *e.g.*, if a pilot is only licensed to fly under Visual Flight Rule conditions,[19] he will be held accountable for damage occurring as a result of his flying at night or in bad weather.[20] The circumstances in *McCouley v. United States*[21] further illustrate this point. In this case, a pilot hit a power line suspended ninety-four feet above the surface of a lake. The applicable Federal Aviation Regulation prescribed that pilots must maintain a minimum altitude of 500 feet.[22] The Ninth Circuit found that "a pilot who flies in violation of federal regulations is negligent as a matter of law . . . ."[23]

The ordinary degree of care under the circumstances standard does not unduly favor the bailor. There are at least three factors that tend to alleviate the bailee's susceptibility to liability. The decision in *Upper Valley Aviation v. Fryer*[24] illustrates one factor. In this case, the Texas Court of Civil Appeals found that although a pilot is expected to exercise a high degree of care in the operation of an aircraft, the burden need not be carried to extremes. Here, the pilot checked the gas gauge in his aircraft, but did not bother to look into the gas tank to make sure the guage was correct. Subsequently, the plane crashed, having run out of fuel in flight. The pilot proved that the fuel gauge was inaccurate; this negligence on the part of the bailor exonerated the bailee from

[17] *Id.*

[18] 14 C.F.R. § 91 (1973). Beyond these federal safety regulations, the state law regarding bailments controls. The Federal Aviation Act of 1958 has not preempted state law in the area of aircraft bailments. Rogers v. Ray Gardener Flying Service, 435 F.2d 1389 (5th Cir. 1970).

[19] 14 C.F.R. §§ 91.105-91.109 (1973). Generally, the Visual Flight Rules provide minimum standards of visibility (three miles) and altitude with which pilots without instrument ratings must comply.

[20] *See* Hall v. Osell, 102 Cal. Ct. App.2d 849, 228 P.2d 293 (1951).

[21] 470 F.2d 137 (9th Cir. 1972).

[22] *Id.* at 139.

[23] 470 F.2d 137, 139. *Accord*, Gatenby v. Altoona Aviation Corp., 268 F. Supp. 599 (W.D. Pa. 1967).

[24] 392 S.W.2d 737 (Tex. Civ. App. 1965).

liability. The ordinary care standard does not require that the pilot-bailee engage in any conduct or take any precaution not ordinarily taken under the circumstances.[25]

The second factor that tends to alleviate the bailee's liability is that the pilot-bailee is not expected to take account of facts beyond the normal range of a pilots' competence. In *Atlantic Aircraft Distributors v. Rankin*,[26] the bailees attempted a parachute jump from the wing of a leased aircraft. The presence of the jumper on the wing caused the plane to crash. In dismissing the bailor's suit against the bailees, the Superior Court of Baltimore, Maryland, concluded that a bailment requires only ordinary care and that knowledge of the parachutist's effect on the aerodynamics of the plane's wing was beyond ordinary comprehension.[27]

Thirdly, the duty of care the bailor owes the bailee in a mutual benefit bailment tends to limit the bailee's liability. The bailor of aircraft is under a duty to exercise ordinary care to provide an airworthy aircraft;[28] this duty extends to any latent defect that could have been discovered in the exercise of ordinary care.[29] If the bailee can prove that the injury to the bailed aircraft was due to the bailor's lack of care, the bailee will be absolved of fault and the bailor will be held liable. The court in *Anderson Aviation Sales Company v. Perez*[30] noted that the bailor must also exercise ordinary care in checking the qualifications of pilots seeking to lease planes. In this case, the Arizona Court of Appeals found that the bailor had neglected to ascertain a pilot-bailee's qualifications; therefore, the bailor was held primarily responsible for the damage caused when the pilot crashed.

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[25] *See* Falls Church Airpark Co. v. Mooney Aircraft, 254 F.2d 920 (5th Cir. 1958). In this case, the court determined that the bailee did not have to inspect the plane's engine for a cracked oil line before take-off.

[26] 3 Av. Cas. ¶ 18,042 (Super. Ct. Md. 1952).

[27] *See* Lunsford v. Tucson Aviation Corp., 73 Ariz. 277, 240 P.2d 545 (Ariz. 1952).

[28] D'Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954); Aircraft Sales and Service v. Gantt, 255 Ala. 508, 52 So.2d 388 (1951). *See also* Bachner v. Pearson, 479 P.2d 319 (Alas. 1970) where the court applied the doctrine of strict liability to commercial leases.

[29] Southeastern Air Service v. Crowell, 88 Ga. 820, 78 S.E.2d 103 (1953); Stevenson v. Reimer, 240 Iowa 652, 35 N.W.2d 764 (1948).

[30] 19 Ariz. App. 422, 508 P.2d 87 (Ariz. Ct. App. 1973). *See* Boyd v. White, 128 Cal.2d 641, 276 P.2d 92 (Cal. Dist. Ct. App. 1954); Central Flying Service v. Criggs, 215 Ark. 400, 221 S.W.2d 45 (1949).

II. BURDEN OF PROOF

The circumstances giving rise to *Sky Aviation Corp. v. Colt*[31] illustrate the major problems of proof in aircraft bailment cases.[32] In *Sky Aviation,* a pilot-bailee had successfully landed his aircraft at a Wyoming airport and proceeded to taxi toward a hangar. Before the pilot reached the hangar, however, his high-winged plane was struck by a strong cross-wind and was flipped onto its back causing extensive damage. The bailor, who was the proponent of the action against the pilot, had the initial burden of proof. The bailor could meet this burden by either of the following: (i) alleging and proving specific acts of negligence and/or (ii) asserting a presumption of negligence against the bailee.[33] This presumption will arise when the bailor proves these facts: (i) the existence of the bailment contract, (ii) delivery of the bailed article to the bailee and (iii) that the bailee either failed to return the article or returned it in a damaged condition.[34] When these simple proofs are made, the bailor has made a *prima facie* case for recovery.[35] In *Sky Aviation,* the bailor asserted both specific acts of negligence (*i.e.* that the bailee had refused the aid offered by airport employees to hold down the plane even though he was aware of the danger that high winds created for light, high-winged aircraft) and the presumption of negligence.[36] Once the presumption was raised and

[31] 475 P.2d 301 (Wyo. 1970).

[32] *See generally* Brodkey, *Practical Aspects of Bailment Proof,* 45 MARQ. L. REV. 531 (1962).

[33] If the bailee alleges negligence on the part of the bailor, he must do so without the aid of a presumption; he must assert and prove specific acts of negligence. *See* Clark v. Chishop, 241 P.2d 171 (Idaho 1952); Kernek v. Masterson, 311 Ky. 826, 226 S.W.2d 12 (Ky. Ct. App. 1950); Farish v. Canton Flying Services, 214 Miss. 370, 58 So.2d 915 (1952); Stone v. Farmington Aviation Corp., 360 Mo. 1015, 232 S.W.2d 495 (1950).

[34] *See* Son v. Carter, 450 S.W.2d 110 (Tex. Civ. App. 1969); Henon v. Penn-Air, 8 Av. Cas. ¶ 18,053 (Pa. C.P. 1963).

[35] There is a difference of opinion among the courts in defining what a *prima facie* case is. Does it mean that plaintiff has made enough of a case to go to the jury, *i.e.* one qualitatively sufficient to cause reasonable minds to differ; or does it mean that the case is not just strong enough to go to the jury, but is strong enough to require a directed verdict for the proponent if defendant does not come forward with evidence? *See* Brodkey, *Practical Aspects of Bailment Proof,* 45 MARQ. L. REV. 531, 534-7 (1962).

[36] There is a strong similarity between the presumption applied in bailment cases and the doctrine of *res ipsa loquitur.* Some courts have applied this doctrine in bailment cases rather than the presumption. *See* Lejeune v. Collard, 44 So.2d 504 (La. Ct. App. 1950); Wehkamp v. Garden City, 187 Kan. 310, 356 P.2d

the proper elements were shown, the bailee had the burden to come forward and produce evidence proving he had not breached his duty and that the damage resulted from other causes.[37] Here, the bailee attempted to rebut the presumption by claiming that the accident was caused by an act of God. The court in *Sky Aviation* concluded, however, that the damage resulted more from defendant's negligence than from nature and rendered judgment for the bailor on the basis of the presumption.[38]

There is sound reason for raising the presumption of negligence in bailment cases. In the usual bailment situation, a chattel is entrusted to a bailee who has exclusive control and custody over it; therefore, he is normally in sole possession of any evidence explaining the circumstances attending the loss or damage. In *Northeast Aviation Company v. Rozzi*,[39] the bailee, who crashed his leased aircraft into the Atlantic Ocean where it sank, was the only person having direct knowledge of the accident. In these cases, the bailor is at the mercy of the bailee unless the bailee can be forced to come forward with evidence.[40]

III. Special Bailment Situations

Even though the pilot-bailee's liability is measured by the standard of ordinary care under the circumstances, the degree of care expected of him in the operation of bailed aircraft is very high. This factor, together with the presumption of negligence, would seem to place the pilot-bailee in a disadvantaged position in a suit brought against him by the bailor. This situation may be altered, however, under a number of special circumstances.

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826 (1960). The similarity between these two theories is illustrated by the elements the proponent must show to recover via *res ipsa locquitur*: (i) the event must be the sort that does not ordinarily occur without negligence, (ii) the instrumentality must have been in the exclusive control of defendant and (iii) plaintiff cannot have been guilty of contributory negligence. W. Prosser, Law of Torts 214 (4th ed. 1971).

[37] *See* Graham v. Rockman, 504 P.2d 1351 (Alas. 1972); Son v. Carter, 450 S.W.2d 110 (Tex. Civ. App. 1969).

[38] *See* Falls Church Airpark Co. v. Mooney Aircraft, Inc., 254 F.2d 920 (5th Cir. 1958). In this case, defendant-bailee successfully rebutted the presumption of negligence.

[39] 144 Me. 47, 64 A.2d 26 (1949). For a more recent decision discussing this issue, *see* Graham v. Rockman, 504 P.2d 1351 (Alas. 1972).

[40] *See* Comment, 31 Texas L. Rev. 46 (1953); 14 Stan. L. Rev. 200 (1961).

A. The Student Pilot

The inexperience of student pilots and the knowledge of this inexperience on the part of the bailor present a unique bailment situation. In this situation, the underlying problem the courts must face is to differentiate between the student pilot's lack of skill and his lack of care.

The ordinary care under the circumstances standard applies in all bailment situations. Most courts recognize, however, the student pilot's comparative lack of skill as a circumstance within the general standard that tends to lower the degree of care required.[41] In *Vee Bar Airport v. De Vries*,[42] a student pilot stalled his plane's engine and crashed while attempting a difficult maneuver. Although noting that an experienced pilot with a high degree of skill could have avoided the accident, the court in *Vee Bar Airport* determined that this degree of skill could not be expected of student pilots. Any damage attributable to the student's lack of skill was one of the risks the bailor assumed in its training program.

Bailors are more susceptible to liability when a student is the bailee. Although a pilot must assume the risk of those known and appreciated dangers incident to flying, these assumed risks will necessarily be fewer when a student is the bailee since his experience is not as great. For example, a flying school that allows an inexperienced student pilot to take-off into an area susceptible to violent down-drafts cannot successfully claim assumption of the risk as a defense when sued for this negligent conduct.[43]

Student pilots may, however, be held liable for damaging their bailed aircraft under certain circumstances. In *Jones v. O'Bryon*,[44] a student ineptly performed a landing resulting in the demolition of the plane he was flying. The Iowa Supreme Court found that the student was liable for the loss even though the bailor had assumed the risk of the natural and usual incidents of a student's using his plane; defendant, according to the court, had not conducted himself with the care that might reasonably be expected

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[41] Some courts do not recognize a different standard for student pilots. *See* Ambassador Airways v. Frank, 12 P.2d 127 (Cal. Ct. App. 1932); Bailey v. Insurance Co. of North America, 80 Ga. 521, 56 S.E.2d 848 (Ga. Ct. App. 1949).

[42] 73 S.D. 356, 43 N.W.2d 369 (1950).

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

[44] 254 Iowa 31, 116 N.W.2d 461 (1962).

even of a student. The courts will protect the student-bailee only to a limited degree. Students are charged with having: (i) knowledge of the basic rules and regulations of flying aircraft, (ii) common sense and (iii) retained knowledge of their training. A student pilot who fails to utilize these resources will be found negligent.[45]

B. Contractual Alteration

Since a bailment is a contract, the parties to it are free to alter the usual bailment relations; a bailee's liability may be either extended or limited by the terms of the bailment contract.[46] This is exemplified by the circumstances in *Leeds v. Mundy*,[47] where the bailor absolved himself of the duty to provide an airworthy aircraft. A term of the bailment contract provided that the bailee could not rescind the contract for any mistake or constructive fraud relating to the condition of the leased aircraft. Because of this clause, when the leased plane was later found to be defective, the bailee was not allowed to rescind the contract.

In *Davies Flying Service v. United States*,[48] the bailor entered into a bailment contract with the Civil Aeronautics Administration agreeing that the CAA could use the bailor's planes whenever necessary. The pertinent part of the contract read:

> The contractor shall assume full responsibility for loss of or damage to the rented aircraft, and agrees to save the [g]overnment harmless from liability for damage to the property of and injury to or death of third persons, except due to negligence on the part of the [g]overnment.[49]

Later, one of Davies' planes piloted by a CAA employee crashed,

[45] *See* Morton v. Martin Aviation Corp., 205 Tenn. 41, 325 S.W.2d 524 (1959). In this case, the student-bailee was given instruction on the use of his plane's reserve tank. When the plane ran out of fuel and crashed, the student was held liable for the loss to the bailor because he did not use his reserve fuel.

[46] Brodkey, *Contractual Limitation of Bailee's Liability in Illinois*, 8 DE PAUL L. REV. 25 (1959). The parties may not, however, completely exempt themselves from liability. *Id. See* Silvestri v. South Orange Storage Corp., 14 N.J. Super. Ct. 205, 81 A.2d 502 (1951). In Central Bucks Aero, Inc. v. Smith, 12 AVI. L. REP. ¶ 17,927 (Pa. C.P. 1973), a twenty year old pilot rented an aircraft and subsequently crashed it. Although the pilot-bailee was found to have been negligent, he could not be held liable for damages because the tort arose out of a contract that he disaffirmed as a minor.

[47] 212 Va. 475, 184 S.E.2d 751 (1971).

[48] 216 F.2d 104 (6th Cir. 1954).

[49] *Id.* at 105.

killing all those aboard and completely destroying the aircraft. Since no evidence could be obtained indicating specific acts of negligence by the bailee, the bailor raised the presumption of negligence. The Sixth Circuit, however, found that the contract forbade the use of the presumption. The contract was interpreted to mean that the bailor could only hold the bailee liable if actual negligence was proved. Because no evidence was available, the complaint was dismissed.[50]

Oral warnings or instructions may be considered part of the bailment contract. In *Whitehead v. Johnson*,[51] the bailor warned the bailee of a plane with two cockpits that the aircraft tended toward "nose-heaviness" when operated from the front cockpit without a passenger in the rear compartment. Despite this oral warning, the pilot-bailee flew the plane from the front cockpit and "cracked up" when the plane nosed down while landing. The municipal court found that the bailor's admonition had become a condition of the bailment contract and that the bailee had breached it.[52] By the same token, any assurances by the bailor regarding the condition or performance of his aircraft may become a term of the bailment. In *Rutherford v. Page*,[53] the bailor, during negotiations prior to the creation of the bailment contract, claimed that his aircraft had recently undergone a complete overhaul and was in excellent condition. When it became apparent to the bailee that the bailed plane did not measure up to these assertions, he was allowed to rescind the agreement.[54]

C. Unauthorized Use

A bailee may be held liable for damage sustained by his bailed aircraft during an unauthorized use. The courts have had no difficulty in finding a breach of contract and liability when the pilot-bailee has knowingly permitted the unauthorized use.[55] In *Seale v.*

[50] *See* Neel v. Henne, 30 Wash.2d 24, 190 P.2d 775 (1948).

[51] 150 Misc. 86, 268 N.Y.S. 368 (N.Y. Mun. Ct. 1934).

[52] *See* Martin School of Aviation v. Bank of America, 48 Cal.2d 689, 312 P.2d 251 (1957). Although the bailor failed to establish that the term had become a part of the contract, it was asserted in the case.

[53] 429 S.W.2d 602 (Tex. Civ. App. 1968).

[54] Terms may impliedly become a part of the bailment contract through prevailing trade usage. *See* Tursair Executive Aircraft Service, Inc. v. United States, 383 F.2d 381 (5th Cir. 1967).

[55] Any use of an aircraft beyond the terms of the bailment contract may be

White,[56] the bailee was given possession of the bailor's plane for the express purpose of selling it. The bailee was authorized to display the aircraft and even give demonstration rides in it. When, however, the bailee wrecked the plane when using it for personal enjoyment, the contract was breached.[57]

Further problems arise when the unauthorized use takes place without the knowledge of the bailee. In *Lewis v. Jensen*,[58] the bailee left the bailor's plane overnight in an open hangar with the key in the ignition. During the night, two intoxicants appropriated the aircraft and crashed it into a nearby hillside. Although the bailee had not authorized the illicit use, the Washington Supreme Court found him liable for the damage holding that a bailee's duty to the bailed aircraft extends to the storage of the aircraft as well as its operation.[59] Had the bailee in *Lewis* exercised due care in attempting to prevent the theft, he could have escaped liability.

D. Emergency

An emergency is another circumstance that may affect the standard of care the bailee of an aircraft is expected to exercise. A pilot exercising ordinary care cannot be expected to avoid unexpected and unforeseen circumstances. The conduct, required, however, is still that of the reasonable man under the circumstances; the emergency is merely one of the circumstances.[60]

In *Shaw v. Carson*,[61] the bailee experienced serious difficulties with the engine of his leased aircraft; a forced landing was necessitated in which the plane was damaged. The bailee was not held

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regarded by the bailor as a conversion. *See* Trans-Alaska Telephone Co. v. Flightcraft, Inc., 353 F.2d 800 (9th Cir. 1965).

[56] 217 S.W.2d 39 (Tex. Civ. App. 1949).

[57] The bailee's liability for breach of contract was based on the unauthorized use rather than negligent operation. *See* Southeastern Air Service, Inc. v. Carter, 78 Ga. App. 8, 50 S.E.2d 156 (1948); Ogden v. Transcontinental Airport of Toledo, 39 Ohio App. 301, 177 N.E. 536 (1931).

[58] 39 Wash.2d 301, 235 P.2d 312 (1951).

[59] *See* Messer v. Southern Airways Sales Co., 246 Ala. 287, 20 So.2d 585 (1945); City of Enid v. Reiser, 355 P.2d 407 (Okla. 1960).

[60] An emergency is a sudden and unexpected event that deprives the actor of the opportunity to deliberate and consider his decision. The actor may not assert emergency as a defense if it has been created through his own negligence. Some emergencies must be anticipated when the actor engages in an activity in which they are likely to arise. *See* W. PROSSER, LAW OF TORTS 169-70 (4th ed. 1971).

[61] 218 Iowa 1251, 257 N.W. 194 (1934).

liable for the loss since the Iowa Supreme Court concluded that his conduct was reasonable under the circumstances.

When claiming the "emergency" defense, a defendant has the burden of proving each of the following: (i) that the exculpatory situation existed, (ii) that the damage was caused by forces beyond his control and (iii) that he exercised due care under the circumstances.[62] The pilot-bailee in *Priester v. Judkins*[63] claimed to have been subjected to a similar set of circumstances that existed in *Shaw*. In this case, however, defendant-bailee failed to meet his burden by establishing that an emergency existed.[64] Defendant's conduct was found to be substandard without proof of an emergency situation.[65]

E. Agency

The character of the relationship between the pilot and the bailee may also affect the bailee's liability.[66] The federal district court in *Aviation Associates of Puerto Rico v. Dixon Company*[67] was confronted with this problem. Aviation Associates had purchased a plane in Florida and employed the Dixon Company to pilot the aircraft to Puerto Rico. Dixon assigned this task to Johnson who negligently crashed the plane into the Caribbean. The issue of whether Johnson was an agent of Dixon was determinative of Dixon's liability. The court in *Aviation Associates* found Johnson to be an employee of Dixon who was therefore held liable for Johnson's negligence. The Louisiana Court of Appeals in *Kamm v. Morgan*[68] discusses this issue more fully. In *Kamm*, the pilot of a bailed seaplane negligently caused it to sink in the Mississippi River while being used in the pilot's crop-dusting business. The court in *Kamm* found that the pilot had a contract with the Norris

[62] *See* Naxera v. Wathan, 159 N.W.2d 513 (Iowa 1968); Portland Flying Service Inc. v. Smith, 227 A.2d 446 (Me. 1967); Jones v. O'Bryon, 254 Iowa 31, 116 N.W.2d 461 (1962).

[63] 7 Ill. App.2d 414, 129 N.E.2d 583 (1955).

[64] The plane's engine was proved to have worked well both before and after the accident.

[65] *See* Graham v. Rockman, 504 P.2d 1351 (Alas. 1972) for a more recent decision on this subject. In *Graham*, the bailee claimed a sudden down draft and air turbulence caused his crash.

[66] *See* Hillend v. Koltsch, 183 Or. 460, 192 P.2d 274 (1948); United Air Services v. Sampson, 30 Cal. App.2d 135, 86 P.2d 366 (1939).

[67] 333 F. Supp. 982 (M.D. Pa. 1971).

[68] 157 So.2d 118 (La. Ct. App. 1963).

Pest Control Service wherein Norris allowed the pilot to use its name and billing facilities; in return, the pilot gave Norris fifteen per cent of his profit. Norrie escaped liability, however, when the Court of Appeals found its relationship to the pilot to be that of an independent contractor.[69]

The more usual agency problem in bailment cases is illustrated by the fact situation in *Shook v. Beals*.[70] In this case, four nonpilots combined their resources to rent a plane and to hire a pilot for a weekend fishing trip. Even though none of the four bailees were capable of flying the plane, they were found to be in a joint venture and equally liable for the destruction of the aircraft due to the negligence of their pilot. The California Court of Appeals noted in *Shook* that a bailee must be in exclusive control of the bailed article before a bailment situation will arise. "Control" was found because the purpose and the direction of the flight were charted by the nonpilot-bailees even though they lacked actual physical control.

IV. CONCLUSION

This summary of the case law regarding aviation bailments verifies that the pilot-baliee's obligations will generally be governed by principles of common law. The ordinary care under the circumstances standard, however, has undergone a great deal of alteration due to the advent of aircraft. The pressures created by the complexity and potential danger of improperly operated aircraft, the principle of air law that the pilot must assume primary responsibility for the safety of his aircraft and the Federal Aviation Regulations have all worked to elevate the degree of care the pilot-bailee must exercise. These circumstances operating within the ordinary care standard have raised the ordinary care expected of the bailee of aircraft almost to that expected of the gratuitous bailee. The common law presumption of bailee negligence has also had the effect of increasing the bailee's liability.

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[69] The court in *Kamm* notes the distinction between an agent and an independent contractor. There is no agency relationship unless the employer can direct the manner in which the employee performs his work; if the employer is only interested in the end result and retains no right to supervise the manner in which the work is done, he is dealing with an independent contractor.

[70] 96 Cal. App.2d 963, 217 P.2d 56 (1950).

The net effect of this intermingling of old common law rules with the newer principles of aviation has been the creation of a unique and very strict standard of care. Although there are several "alleviating factors" and "special situations" that may have some effect, it is evident that they will not be applicable in many damage suits arising from bailment contracts. For the most part, the pilot-bailee must face the onerous ordinary care under the circumstances standard, the presumption of bailee negligence and a distinct probability of liability.

Robert F. Maris