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George F. Killinger

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AERONAUTIC RISK EXCLUSIONS UNDER LIFE AND ACCIDENT POLICIES

BY GEORGE F. KILLINGER*

As nearly as the author can tell from reading the reported cases there are probably three schools of thought evidenced by the bench in dealing with aeronautic risk exclusions. First, the courts that distinguish between the facts of a particular case and the facts appearing in cases of a similar nature, although not identical, and that differentiate the law to be applied to the facts of the case before the bar, thus opening the door for an expression of wisdom and sagacity as may be appropriate at the time; second, the courts that follow the doctrine of *stare decisis*, which helps to establish rules of law, whether good or bad, (at this date the doctrine of *stare decisis* is gaining recognition in some of the cases on the subject, although reported cases on aeronautic risk exclusions have been forthcoming for only approximately twenty years); and third, the courts that, in reliance upon something like the sixth sense and the accumulation of knowledge of cases previously decided, feel that a case before the bar belongs on that side of the cases which permit recovery or on the other side that require that recovery be denied. Your prospects of favorable results depend in a measure upon which kind of a court you are before.

Perhaps the insurance companies are in some degree responsible for this state of flux in judicial opinions because of the unfortunate language which has been employed in the aeronautic risk exclusion clauses. Then again when we consider the processes by which the common law is developed, possibly it would be expecting too much to hope for a uniformity of construction of policy provisions under the varying facts and conditions that are presented by such an extensive field of activity as aviation or aeronautics.¹ In recent years the insurance companies have

*Member Illinois and Chicago Bars

1. See *Mass. Protective Ass'n v. Bayersdorfer*, 105 F. (2d) 595, 597 (C. C. A. 6) (an appeal from the District Court of the United States for the Southern District of Ohio E. D.) (1939): "We think that the later cases reflect a changing attitude toward aviation, due no doubt to the marvelous progress made in the art of flying. In the early days each flight was a venture. The pilot and passenger, if he had one, flew tandem, or side by side, in an open cockpit over unknown terrain, to make-shift landing fields. Today transport flying is a business. The air lines have modern landing fields and passenger stations, and their established scheduled routes are protected by radio beams, beacons, weather reports, etc. * * * If it was

made considerable improvement in the aeronautic risk exclusion clauses by making the language thereof more explicit (not necessarily because of the judicial construction of old clauses being helpful, but rather because of a complete change of phraseology to make more explicit the expressions of intention). Attached hereto as Appendix A are the various clauses, words and phrases, appearing in many of the reported cases hereinafter discussed. There is set forth in said Appendix A, by way of comparison, a number of the clauses in current use by some of the leading insurance companies of the country and you will observe at once the difference in the wording of aeronautic risk exclusion clauses. The above observations are more or less the natural result when you consider that in 1909 the word "aviation" did not appear in the Oxford Dictionary and when you realize that in various dictionaries the word "aviation" and the word "aeronautics" each have been variously defined from time to time.²

Some how the writer has had a feeling that possibly the insurance companies over-emphasized the aeronautic risk and accordingly statistical data was obtained from the Department of Commerce, Civil Aeronautics Administration. An extract from the figures thus obtained is appended hereto as Appendix B, in which appears COMPARATIVE OPERATION and ACCIDENT FIGURES FOR DOMESTIC AIR CARRIERS AND PASSENGER RAILROADS FOR THE YEARS 1929, 1933 and 1939 and some STATISTICS PERTAINING TO PRIVATE FLYING OPERATIONS for the same years. Your attention particularly is called to the fact that air carriers in 1939 traveled 41,285,762 miles per fatal passenger accident as against 21,720,674 miles traveled per fatal passenger accident on railroads and to the fact that the number of accidents involving passenger fatalities per 100,000,000 miles traveled was only 2.42 in the case of air carriers as against 4.60 in the case of railroads in the year 1939. Now in the case of private flying operations, it is apparent that the hazard is much greater although probably not as great as you might assume. Take for example, the miles flown per accident: In 1939 the figure was 81,778 miles as against 44,431 miles in 1933 and the miles flown per fatal accident were 916,846 in 1939 as against 391,334 in 1933. Another significant thing is

ever true, it cannot now be said that a fare-paying passenger on a commercial air liner 'participates in aviation or aeronautics.' Words, after all, are but labels whose content and meaning are continually shifting with the times."

2. Note 1.

that co-pilot or student fatalities are relatively small, being 7 in 1939, 19 in 1933 and two in 1929. Pilot fatalities run somewhat higher although the miles flown per pilot fatality in 1939 amounted to 1,104,771 as against 462,486 miles in 1933. Correspondingly, the miles flown per passenger fatality in the same years are somewhat in the same ratio. Bear in mind that in 1939 there were almost twice as many airplanes in private flying operations as in 1933, and that in 1939 there were more than twice as many pilots and student pilots, respectively, certificated than there were in 1933.

In 1941, to elucidate further, according to the Civil Aeronautics Journal of January 1, 1942, the air lines in 1941 carried some 4,500,000 passengers against 3,185,278 in 1940 and the distance flown by them increased from 119,517,263 miles in 1940 to about 150,000,000 miles in 1941, and the fatality rate per 100,000,000 passenger miles declined from 3.05 passengers in 1940 to 2.20 in 1941. At the end of 1941 the nation's airports numbered 2,453 as compared with 2,331 in 1940. On January 1, 1942, there were 94,080 certificated civil pilots in the United States and 98,133 students (from Civil Aeronautics Journal, January 1, 1942.)

The foregoing statistical data is given in order that you may more thoroughly understand and appreciate aeronautic developments to date and that you may visualize to some extent the effect that this activity is likely to have upon insurance risks, particularly as aviation and aeronautics may be stimulated by the war effort for the present and in the post war era.

No attempt will be made to review all of the authorities to date as this would be unnecessary repetition of work, and besides to do so would be an enormous task which the author would hesitate to undertake. A thorough treatise on the subject was prepared by Fred M. Glass in 1936 and published in *The Journal of Air Law* in July and October 1936 (Vol. 7, pp. 305, 560). The reader is referred to these articles for a discussion on the cases and the law as it developed to about the middle of the year 1936 and this paper will attempt to review for you the development of the law from about the middle of the year 1936 to date. Incidentally, the reported cases on the subject of aeronautic risks, and causes of loss, injury or death under life policies, are gathered together in annotations in the *American Law Reports*

under the heading, "Aviation, Death While Flying as Within Policy" Sec. 639 under "Insurance".³

Lawyers Cooperative Publishing Company recently advised that the annotation in 99 A. L. R. 173 has not been supplemented. However, all of the supplemental decisions listed in the current Blue Book have been examined and the results of the examination are included in the present study.

Before taking up the later cases, let us review briefly the earlier land-mark decisions as to aviation or aeronautic risk exclusion clauses,⁴ which earlier cases had to do principally with the construction of the "engage" and "participate" exceptions, i.e., the earlier exclusion clauses which were to the effect that participation in aviation or aeronautics, or engaging in aviation or aeronautics was to be excepted from the coverage of the insurance contract.

The Bew case is the pioneer decision on the question of whether or not a person who is a guest or fare-paying passenger in an airplane is within an exception of an accident policy providing that the insurance under the policy shall not cover "*injuries, fatal or non-fatal, sustained by the insured while participating in or in consequence of having participated in aeronautics*". The insured was killed by the falling of an airplane in which he was riding as a passenger. In an action at law in the Supreme Court tried at the Atlantic Circuit, New Jersey, before the court without a jury, plaintiff was non-suited on defendant's motion at the close of the plaintiff's evidence and judgment was entered accordingly.

Plaintiff beneficiary sought to collect on the policy and to recover double indemnity under the following provision:

"If such injuries are sustained (1) while a passenger in or on a public conveyance provided by a common carrier for passenger service (including the platform, steps, or running board of railway or street railway cars), . . . the company will pay double the amount otherwise payable."

Defendant offered no testimony and the facts were uncontradicted.

3. 14 A.L.R. 986;	69 A.L.R. 331;
40 A.L.R. 1176;	83 A.L.R. 329; 333-412
57 A.L.R. 625;	99 A.L.R. 158; 173-216
61 A.L.R. 846;	

4. *Bew v. Travelers Insurance Co.*, 95 N. J. Law, 533; 112 Atl. 859; (1921) 14 A.L.R. 983; *Gregory, et al. v. Mutual Life Insurance Co. of New York*, 78 F. (2d) 522 (C.C.A. 8th Cir. 1935) (appealed from the District Court for the Eastern District of Arkansas.) Cert. denied, 56 Sup. Ct. 157, 80 L. Ed. 126.

From a reading of the reported case it appears that the court determined the principal question from what it assumed to be "ordinary and usual meaning of the words" as gathered from dictionary definitions and from the court's reason. After referring to several illustrations to demonstrate the meaning of the word "participating", such as, "if one rides in the rear seat of an automobile, is he not participating in automobiling?" and "if one hires a motor boat and crew to take him for a ride on a river, would it be said that he was not participating in boating?" The court concludes, "These illustrations show the speciousness of plaintiff's contention."

The appellant contended that the word, "participate" theoretically defined and practically applied permits within it affirmative action and is never used to express inactivity. The court concluded that the insured met his fatal injuries while participating in aeronautics and that the exception in the policy barred recovery. The court further stated that its conclusion rendered it unnecessary to consider whether the injured met his death while a passenger in or on a public conveyance provided by a common carrier.

In the language of the court, "His presence in the plane makes him a participant in the flight, which is aeronautical." The court's idea of aeronautics is expressed in the following language:

" 'Aeronautics' does not describe a business or occupation, like 'engineering' or 'railroading', but an art which may be practiced for pleasure or profit, and is indulged in by all who ride, whether as pilots or passengers.' "

Since the Bew case it has been pointed out that the New Jersey court in that case did not give significance to the ambiguity, i.e., the double meaning of "participate" as meaning either active or passive sharetaking⁵ and that it does not appear in the Bew case whether the passenger was a fare-paying passenger.⁶

The case of *Gregory, et al. v. Mutual Life Insurance Co. of New York* (note 4, supra) decided in 1935 is the leading case for the

5. *Mutual Benefit Health & Accident Ass'n v. Bowman*, 99 F. (2d) 856 (1938).

6. *Bayersdorfer v. Massachusetts Protective Ass'n, Inc.*, 20 F. Supp. 489 (1937). (District Court, Southern District of Ohio.)

opposite construction. In the Gregory case it appears that three life insurance policies written by the appellee on the life of William N. Gregory provided for double indemnity in certain cases and that the insured was killed on April 18, 1933, in an airplane crash. The insurance company paid the face of the policies but declined to pay double indemnity. The insured's son owned a plane which was purchased with money provided by his father, the insured. The son held a transport pilot's certificate and the plane was registered in his name. The insured knew nothing about flying and was a guest passenger in his son's plane which at the time of the crash was being piloted by his son, bound for St. Louis, where he, the insured, was going on private business. The plane was in the sole charge of the son.

The policies contained a provision that the insurance company should not be liable for double indemnity for death resulting from "participation in aeronautics."

The trial court, upon trial without a jury, on defendant's motion, declared that "one who rides in an airplane as a passenger participates in aeronautics within the meaning of the terms of the policies" and also declared that "one who rides in an airplane as a guest participates in aeronautics", and entered judgment for the defendant. The court concluded that while the science or art of aeronautics was in its experimental stage most persons who then had to do with the airplane were participating in aeronautics, but observed that there have been revolutionary developments in the last ten or fifteen years as a result of which airplanes "have been developed from the stage of dangerous experiment to a well-recognized standard means of passenger transportation."

In the light of these changes and noted facts and circumstances in the instant case, the court held that "the words, participation in aeronautics, as used in these policies, do not, properly construed, include a passenger on a transport airplane" and the judgment of the lower court was reversed. It should be noted that the result might have been otherwise if the policies contained the words "from engaging, as a passenger or otherwise, in submarine or aeronautic operations."⁷ The court in its decision went on to say that the expression in the policies "being doubtful and ambiguous must be construed most strongly against the insurance company."

7. See *Goldsmith v. N. Y. Life Insurance Co.* (C.C.A.) 69 F. (2d) 273, 274, decided by the same court (1934).

At the time of the publication of the treatise by Fred M. Glass mentioned *supra*, no case involving the aeronautic risk inclusion clauses had been passed upon by the Supreme Court of the United States and it appears that no such case has been decided by the Supreme Court to date. Consequently, there still remains the possibility of reconciliation of the divergent points of view which appertain in the various jurisdictions.

Since 1935 a majority of the courts have followed the reasoning of the Gregory case, but because of the variety of facts and circumstances, and the differences in phraseology of the various policies involved, it is not practicable to refer to groups of cases as following the law laid down in either the Bew case or the Gregory case. To some it appears that the decisions are harmonious and reconcilable. It is submitted that there exists a conflict of authority, but as it is not the province of this paper to review the authorities prior to 1936, it is necessary to pass that particular problem at this time.

At the time of publication of the Glass articles only two cases involving pilots' death had been decided.⁸ Since that time but one additional case appears to have been reported.⁹ In the Reed case, action was brought to recover double indemnity upon the policy issued in 1930. The insured, engaged as a co-pilot, was killed in a commercial airplane accident in 1937. The face amount of the policy was paid to the beneficiary (but liability under the double indemnity feature was denied.)

The double indemnity benefits were payable in the case of proof that death resulted from bodily injury effected solely through external or violent means, etc. and part of the double indemnity provisions read:

"This double indemnity benefit shall not be payable if the insured's death resulted * * * from engaging as a passenger or otherwise in submarine or aeronautic operations * * *."

The insured paid an extra annual premium of \$1.50 for the double indemnity benefit. The principal question confronting the court was to determine whether the provision in the double indemnity provisions relative to aeronautic operations served to

8. *Taylor v. Prudential Insurance Co. of America*, 142 Misc. Rep. 94, 253 N. Y. S. 55 (1931); *Charette v. Prudential Insurance Company of America*, 202 Wis. 470; 232 N. W. 848 (1931).

9. *Reed v. Home State Life Insurance Co.*, 97 P. (2d) 53 (1939) (Oklahoma).

exclude the risk, or stated a mere condition, the violation of which could not be urged as a defense after the incontestable period. The court held that the double indemnity provision constituted a policy of life insurance within the meaning of the state statute, and that the provision stated an exclusion of risk and not a mere condition. The court went on to state, "Had the insured agreed not to engage in the occupation mentioned, the provision would have constituted a condition, and perhaps incontestable after the expiration of the first two years." The court also held that there was no ambiguity in this case on account of the coverage under the ordinary policy provisions and the exclusion of risk under the double indemnity feature.

A different result was reached in the case of *Equitable Life Assurance Society of the United States v. Dyess*,¹⁰ where almost the identical exclusion clause was involved; plaintiff in the Dyess case, the insured, was traveling not as a pilot but as an airplane passenger when the fatal accident occurred. The court held in the Dyess case that the insured, while on a scheduled trip in an American Airlines plane was not "engaged as a passenger, or otherwise in aeronautic expeditions or operations" within the provisions of the double indemnity clause of a life policy exempting insurer from double liability when death resulted while insured was engaged in such activities. The court there pointed out that "operations" mean only the management and control of the airplane and "passenger" is used to designate a person who does not engage in operation of the airplane but who engages in aeronautic expeditions. The court in the Dyess case went on to point out that certain cases cited¹¹ were out of line with the better reasoned cases cited by the court,¹² that the double indemnity provision did not include death resulting from "engaging as a passenger or otherwise in submarine or aeronautic expeditions or operations." It was contended by the appellant that the insertion of the word passenger was to provide that a person may engage as a passenger in aeronautic operations only by riding in an airplane. At the time Mr. Glass prepared his paper in 1936 there were no cases which had been decided by the courts construing an exception involving "as a passenger or otherwise"

10. *Equitable Life Assurance Society of U. S. v. Dyess*, 109 S. W. (2d) 1263 (1937) (Ark.)

11. *Goldsmith v. N. Y. Life Ins. Co.* (C.C.A. 8th) 69 F. (2d) 273; *Mayer v. N. Y. Life Ins. Co.* (C.C.A. 6th) 74 F. (2d) 118, 99 A.L.R. 155; *Christen v. New York Life Ins. Co.* (D. C.) 19 F. Supp. 440

12. *Benefit Ass'n Ry. Employees v. Hayden*, 175 Ark 565, 299 S. W. 995, 57 A. L. R. 622; *Missouri State Life Insurance Co. v. Martin* 188 Ark. 907, 69 S. W. (2d) 1081).

used in connection with "participating in aeronautical operations," and there does not appear to have been any case involving that language to date.

There was a complete lack of litigation prior to 1936 on the question of whether or not an ordinary aeronautical exception clause would cover the death of a member of the crew of an airplane whose employment called for constant flying but who took no part in the actual operation of the plane nor rode in the manner of a casual passenger. Since 1936, the only case involving this point is a case which came before the Supreme Court of Missouri¹³ in 1939. In that case the participles "participating" and "engaging" were not used in the exception clause but instead the word "riding" was used.

In that case the facts were: Insured was a stewardess on an airplane and was killed in an airplane crash while performing her duties. The policy of insurance involved provided under Section 1 thereof:

*"Double indemnity shall not be payable if death resulted directly or indirectly from * * (mentioning such acts as self destruction, taking poison, etc.) from military or naval service in time of war, or from any act incident to war; from operating or riding in any kind of aircraft, whether as a passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft * * *"*

The policy further provided under a clause styled, "occupation":

"This policy is free from restrictions as to occupation except the restrictions as to military or naval service applying to double indemnity as provided in Section 1."

This action involved only the double indemnity provisions, as the insurer paid under the ordinary death benefit provisions. Insured's application was dated December 12, 1932 and stated that insured was a "trained nurse employed as an assistant to a physician." The policy was dated December 30, 1932 and some time thereafter the insured changed her occupation to that of "stewardess on airplanes."

At the trial the insurer moved for judgment on the pleadings and opening statement of plaintiff and its motion was sustained, but the judgment was reversed and the cause remanded by the Court of Appeals. The case is before the Supreme Court of Missouri in this

13. *State of Missouri, ex. rel, Mutual Life Insurance Co. of N. Y. v. Shain. et al.* 126 S. W. (2d) 181 (1939) (Rehearing denied March 15, 1939).

case to review the rulings of the Kansas City Court of Appeals. The view of the Court of Appeals was that the exclusion provisions of Section 1 referred to those who operate or ride in aircraft other than those required to engage therein as a necessary part of the duties of his occupation, or such duties as must be performed in order that the occupation itself be performed. Otherwise, the clause would be a restriction, limitation or restraint as to occupation. The insurance company did not interpose any defense resting on insured's "occupation" but asserted its defense went solely to the manner and cause of death disregarding insured's occupation, and that since the death of insured resulted directly or indirectly from riding in an airplane while not a fare-paying passenger, the beneficiary may not recover under the double indemnity provisions of the policy. The Supreme Court quashed the opinion of the Court of Appeals and held that the language of the exception stated in the double indemnity portion of the policy states an *excepted risk*, and that the death of the insured was the result of an act or event, which, during its pendency, suspended liability for double indemnity without regard to her occupation.

No cases have been found which, since 1936, have considered the phrases "aviation hazard" or "aeronautic casualty". Nor are there cases reported involving these phrases prior to 1936. Some policies use such phraseology and perhaps at some future time some case will arise to bring such a policy before the courts for construction. In view of the development which is taking place in aeronautics it may be more difficult as time goes on to make out a defense which would be good under either of these phrases. Any proof of negligence or other circumstances which would tend to overcome the idea of a "hazard" or of a "casualty" might result in a finding in favor of the plaintiff in such cases.

You will observe from the Appendix B, attached to this paper, that the "participating" clauses are first set forth with respective references to the cases; that the cases involving clauses, "engaging as a passenger or otherwise" are next set forth with respective references to the cases cited. You are respectfully referred to the cases for construction of the particular language employed in the exclusion clause which might be of interest. No attempt will be made to review the facts and decisions in each of the cases. Suffice to say that the courts, for the most part, are keen to distinguish the facts in each case when construing the particular language of the exclusion clause appearing in the policy which may be before the court. In several

therein (which you recall referred to the "speciousness" of the argument of the plaintiff) have been severely criticised and the courts in some cases have expressly disproved both the reasoning and the result of that case.¹⁴

Some of the cases deserve analysis, and those considered to be of most importance will be discussed in the remainder of this paper. First, let us take the case of *Spychala v. Metropolitan Life Insurance Co.*¹⁵, a Pennsylvania case in which the beneficiary sued on two accident policies to recover death benefits because of the death of her husband, the insured. The exception clause in each policy was: "This insurance shall not cover * * * injuries, fatal or non-fatal, sustained while participating in aviation or aeronautics except as a fare-paying passenger * * *". The insured was killed when a glider which he was operating fell to earth. The glider was owned by a fraternal organization and used solely for recreation. Plaintiff contended that the policy provisions were not intended to refer to short flights undertaken as a form of sport or recreation where a person ascends but a few hundred feet and remains aloft but a few minutes. The court held that the plaintiff was not entitled to the death benefits because of the exception clause and held that a glider was within the exception, that recreation purpose was of no significance nor was the distance nor length of time in the air. Judgment for defendant was affirmed. It should be observed that a similar result was arrived at by a federal court in a case from the Eastern District of Michigan in 1933.¹⁶ In that case it was held that one operating a glider and killed by crash to the ground was at the time of death "engaged in" aviation operations.

Probably one of the most important cases decided since 1936 is the case of *Mutual Benefit Health & Accident Ass'n v. Bowman*.¹⁷ This case is important because it is a case which did get to the United States Supreme Court to test conflicting law, although that court did not pass upon the issues involved. The court merely granted certiorari

14. *Chappell v. Commercial Casualty Ins. Co.*, 197 S. E. 723 (W. Va. 1938); *Beveridge v. Jefferson Standard Life Ins. Co.*, 197 S.E. 721 (W. Va.) (1938); *Moyer v. Mutual Benefit Health & Acc. Ass'n*, 9 Alaska 79 (1936); *Mutual Benefit Health & Acc. Assn. v. Moyer*, 94 F. (2d) 906 (C.C.A. 9) (1938); *Bayersdorfer v. Mass. Protective Ass'n, Inc.* 20 F. Supp. 489 (D.C.S.D. Ohio) (1937).

15. *Spychala v. Metropolitan Life Insurance Co.*, 13 Atl. (2d) 32 (1940) (Pa. Sup. Ct.)

16. *Irwin v. Prudential Insurance Co. of America*, 5 F. Supp. 382 (1933).

17. *Mutual Benefit Health & Accident Ass'n v. Bowman*, 96 F. (2d) 7 (March 15, 1938) (C.C.A.—8th Cir., from the District Court of Dist. of Nebraska); 82 L. Ed. 1521 May 31/38—certiorari granted by Supreme Court, judgment vac. and remanded cause for redetermination "limited to the question of the right of respondent to recover under the law of New Mexico";

99 F. (2d) 856, judgment appealed from affirmed Nov. 23, 1938; rehearing denied Dec. 10, 1938.

and remanded the cause for redetermination "limited to the question of the right of the respondent to recover under the law of New Mexico."

Upon the mandate from the United States Supreme Court, on certiorari granted, the Circuit Court of Appeals found it possible to get around the conclusions reached in the case of *Sneddon v. Massachusetts Protective Association*, a New Mexico Case.¹⁸ In the *Sneddon* case the court held that a casually invited passenger who met death in an airplane crash came to his death while participating in aviation or aeronautics.¹⁸ The policy involved in the *Sneddon* case provided:

"This policy does not cover death or other loss due to disease, whether acquired accidentally or otherwise, or sustained as a result of participation in aviation, aeronautics or subaquatics * * * ."

The words "aviation" and "aeronautics" are used in the alternative in the *Sneddon* case.

In the first decision of the Circuit Court of Appeals in the *Bowman* case it held that the insured was not participating in aeronautics at the time of the accident but was only a passenger. Thus it appeared that the decision was in conflict with the decision in the *Sneddon* case if the law of New Mexico was applicable. Remember the case was tried in the District Court of Nebraska. The facts in the case were: The policy provided:

"This policy does not cover death, disability, or other loss * * * received because of or while participating in aeronautics * * * ."

The insured, a farmer, who himself had nothing to do with airplanes as a pilot or mechanic, etc., bought a plane located at Blackwell, Oklahoma, and took title in his name, intending it as a gift to his son who was in the commercial airplane school and flying business at El Paso, Texas. The insured went with his son to Blackwell, Oklahoma, where the plane was delivered and from Blackwell, Oklahoma, the insured and his son, with his son acting as pilot and the insured as a passenger, flew to Wichita, Kansas, and the next day the two were killed while on their way from Wichita, Kansas, to El Paso, Texas. On such statement of facts the court held that the insured was not "participating" in aeronautics at the time of the accident and on petition for rehearing denied the same. Then the appeal to the United States Supreme Court followed, and upon the

18. *Sneddon v. Massachusetts Protective Ass'n*, 39 New Mexico, 74; 39 Pac. (2d) 1023.

hearing conforming to the mandate the facts were further stated as follows:

The assured met his death in an airplane accident on February 10, 1935 in New Mexico. The insured was a resident of New Mexico and the insurance policy was delivered to him in New Mexico.

The court then proceeded to distinguish between "aviation" and "aeronautics", saying that by definition "aeronautics" is defined as "the doctrine, science or art of sailing in the air by means of a balloon or airship" and "aviation" is defined as "that part of aerial navigation dealing with dynamically raised or 'heavier-than-air' machines", citing Webster's Dictionary. The question before the court appeared to have been: Was the assured participating in "aeronautics"? It seemed that this question was decided in the Sneddon case but not according to the reasoning of the trial court, for it held that assured was not participating in aeronautics, and distinguished the Sneddon case by pointing out the difference in the policy provision, and said that the precise question involved in the instant case had not been passed upon in the Sneddon case, inasmuch as in the Sneddon case there was no issue before the court as to the meaning of the terms "aviation" or "aeronautics".

The court in the Sneddon case emphasized that the insured was "participating". This court pointed out that the verb "participating" is defined as "to take or have a part or share in". The word denotes active or passive share taking and having a double meaning is patently ambiguous. This ambiguity was not given significance in the Bew case. A mere passenger has no part in the art of the aeronaut and does not study, apply or advance the science of aerial navigation. The court cited definitions as follows: "Aeronaut includes aviator, pilot, balloonist, and every other person having any part in the operation of aircraft while in flight," and "'passenger' includes any person riding in an aircraft, but having no part in its operation." Said definitions being taken from the Uniform State Law for Aeronautics Act (1922) approved by the National Conference of Commissioners on Uniform State Laws, which Conference approved another uniform act in 1935 which does not define "passenger". Hence the court concluded that a mere passenger is not participating in the work of an aeronaut or in aeronautics and therefore the judgment appealed from was affirmed. Thus the Federal Court for the 8th Circuit Court of Appeals, while having what appeared to be almost, if not exactly, a "horse case" decided in New Mexico before it, succeeded in arriving at a conclusion diametrically opposed

to the conclusion reached by the New Mexico Court, perhaps because of some variation in the use of words or in punctuation. This case illustrates the cases in the first category mentioned in the opening statement in this paper and is some indication to you of the refinement which you may look for in cases which will arise in the future as the science of aeronautics expands and grows and as the English language develops in its usefulness.

Although the writer is unable to find any cases in point decided by the Illinois courts, in contrast with the manner of arriving at a decision in the preceding case, your attention is directed to a case which was decided in the District Court of the United States for the Northern District of Illinois, Eastern Division¹⁹ *Christen v. New York Life Insurance Co.*

In this case suit was brought to collect double indemnity benefits on seven policies of insurance made by the defendant to Henry J. Christen, insured, the single indemnity having been paid. In five of the policies, double indemnity benefits do not apply if death of the insured resulted from "engaging, as a passenger or otherwise, in aeronautic operations", and in the other two policies double indemnity benefits do not apply if death resulted from "participation as a passenger or otherwise in aviation or aeronautics." Christen, the insured, was a draftsman and a designer of store fixtures and was not engaged in occupations having to do with aeroplanes. On March 31, 1931, he took a train to Kansas City, Missouri, where he became a passenger for hire on a certificated airplane, occupying the passenger cabin, intending a flight to Los Angeles. After flying for about two hours the plane crashed to the ground near Bazar, Kansas, and the insured was instantly killed in the crash. He previously had made but one flight by airplane. The court held for the defendant and denied recovery.

In this case as to the five policies the court followed the decisions in *Goldsmith v. New York Life Insurance Co.*, 69 F. (2d) 273 (C.C.A. 8th) and *Mayer v. New York Life Insurance Co.* 74 F. (2d) 118, 119 (C.C.A. 6th), in which cases the identical language of these policies was subject to scrutiny, to-wit: "Engaging as a passenger or otherwise."

As to the other two policies, the court followed the case of *Head v. New York Life Insurance Co.*, 43 F. (2d), 517, 518 (C.C.A. 10th) in which case the identical language was before the court

19. *Christen v. New York Life Insurance Co.*, 19 F. Supp. 440 (1937).

which there held that double indemnity benefits do not apply if death of the insured resulted from "participation as a passenger or otherwise in aviation or aeronautics." Said the court:

" 'As a passenger or otherwise' covers everyone, whether an airplane employe, pilot, mechanic or executive, whether a fare-paying passenger or one traveling on a pass, or under a license, whose death results from his presence on the plane at the time of the accident."

The court also quoted from the Head case as follows:

"We think there can be no doubt that a person who rides in an aeroplane, along with the pilot who operates and navigates the airplane, has a part or share with such pilot in flying in the air and is participating in aeronautics."

Here you will observe a case falling in the second category mentioned in this paper's opening statement, a case in which the doctrine of stare decisis is in full force and effect. It is conceivable, of course, that the Supreme Court of Illinois if and when confronted with a case involving the subject under discussion may be persuaded to follow other authorities.

In the Gits case,²⁰ decided by the Circuit Court of Appeals of the Seventh Circuit in 1929, the policy there involved provided that double indemnity benefits will not apply if the insured's death resulted from "engaging in submarine or aeronautic operations." The insured was killed in the crash of a plane in which he was taking a short pleasure flight at Estes Park, Colorado. In that case the court held that the word, "operations" tends to indicate an intended continuous and occupational relation, and that the exception did not include the death of Gits. Further the court held the exception to be ambiguous and judgment was given for plaintiff.

On July 1, 1937, in a case decided in the District Court for the Western District of Pennsylvania,²¹ which we will call the Bayersdorfer case, the insured, Bayersdorfer, was killed on April 7, 1936, when an airliner on a regular scheduled flight on which he was a fare-paying passenger, crashed, causing his death. That was a suit on five policies of life insurance, one of which contained the following double indemnity provision:

"The provision for double indemnity benefit * * * will not apply if the insured's death resulted * * * from engaging

20. *Gits v. New York Life Insurance Co.*, 32 F. (2d) 7 (1929) (C.C.A. 7th)

21. *National Exchange Bank & Trust Company of Steubenville v. New York Life Ins. Co.*, 19 F. Supp. 790 (1937).

as a passenger or otherwise in * * * aeronautic operations." and the other four of which contained the following:

"This double indemnity shall not be payable if the insured's death resulted * * * from participation as a passenger or otherwise in aviation or aeronautics."

As to the four policies containing the provision mentioned, the court found that the plaintiff had tacitly admitted by its failure to press its claim for a new trial, that the authorities precluded recovery on construction of the language in the exclusion clause of said policies; the court denied recovery on the other policy, citing as authorities, the Christen case and the Goldsmith and Mayer cases therein cited. Here again the doctrine of stare decisis was fully recognized and followed.

Now contrast the decision in the Bayersdorfer case from Pennsylvania with the case which came before the District Court for the Southern District of Ohio,²² which we will call the Bayersdorfer Ohio case.

The Ohio case was one of first impression according to the trial court. There, action was brought by the beneficiary under an accident policy issued by the defendant on August 15, 1933, to Stanley W. Bayersdorfer, the same Bayersdorfer who was the insured under the policies involved in the Bayersdorfer case decided by the District Court of the Western District of Pennsylvania. As stated above, insured was a fare-paying passenger on an airliner and was killed in an accident on April 7, 1936, when the plane crashed. In the policy before the court in the Bayersdorfer Ohio case the exclusion clause read:

"This policy does not cover death or other loss due to disease, whether acquired accidentally or otherwise, or sustained as the result of participation in aviation, aeronautics or subaquatics, or while engaged in rioting, fighting or strikes."

The question before the court was, "Was the insured participating in aviation or aeronautics when he met his death?" A very good discussion of the authorities is set forth in the opinion. The trial court held the exclusion clause of the policy to be ambiguous and uncertain in meaning, and that the insured was not participating in aviation or aeronautics at the time of his accidental death.

22. *Bayersdorfer v. Massachusetts Protective Ass'n, Inc.*, 20 F. Supp. 489 (Sept. 13, 1937); *Bayersdorfer v. Mass. Protective Ass'n, Inc.*, 105 F. (2d) 595 (C.C.A. 6th) (June 28, 1939.) (Affg.)

On appeal to the Circuit Court of Appeals the decision of the trial court was affirmed. The court on appeal stated that it was affirmed not on the ground that the exclusion provision in the policy is ambiguous, but on the express interpretation that a fare-paying passenger on an airliner is not participating in aviation or aeronautics. This case would fall in the first category of cases mentioned in the opening statement.

A case typical of the cases which we might place in the third category mentioned in the opening statement is the case of²³ *Beveridge v. Jefferson Standard Life Insurance Co.*, in which case it appears that the insured under a life policy, a guest passenger, lost her life in a plane crash. The policy provided that the double indemnity clause is not applicable "in case death results * * * from engaging in aeronautic or submarine operations, either as a passenger or otherwise". The sole question was whether the fatality of the insured is covered by the double indemnity clause or whether because of the exception there is no double liability. The court held for the defendant. By way of analysis the court sets forth a group of cases²⁴, some of which involved "participation" clauses and some of which involved the "engaging" clauses, and stated that in such cases recovery was allowed, and then sets forth a group of cases²⁵, again involving the "participating" clauses and the "engaging" clauses, and stated that in those cases recovery was denied. Then the court concluded that the case at bar belonged to the second group of cases, the court placing emphasis upon the use of the words "passenger or otherwise" as unequivocally placing the "case within the principles and enunciations of the above stated second group of cases."

By way of diagnosis of the cases in which recovery was upheld, the court said:

"From these cases, it is noted that emphasis has been laid on these thoughts: (a) "'Engaged' means to carry on,

23. *Beveridge v. Jefferson Standard Life Insurance Co.*, 197 S. E. 721 (W. Va. Sup. Ct. of Appeals 1938).

24. *Benefit Ass'n Ry. Employees v. Hayden*, 175 Ark. 565; 57 A.L.R. 622; *Masonic Acc. Ins. Co. v. Jackson*, 200 Ind. 472; 61 A.L.R. 840; *Peters v. Prudential Ins. Co.*, 133 Misc. 780; 233 N. Y. S. 500; *Gits v. N. Y. Life Ins. Co.*, (7th Cir.) 32 F. (2d), 7, 9; *Price v. Prudential Ins. Co.*, 98 Fla. 1044; *Charette v. Prudential Ins. Co.*, 202 Wisc. 470; *Missouri State Life Ins. Co. v. Martin*, 188 Ark. 907; *Martin v. Mutual Life Ins. Co.*, 189 Ark. 291; *Gregory v. Mutual Life Ins. Co.* (8th Cir.) 78 F. (2d) 522; *Bayersdorfer v. Mass. Protective Ass'n, Inc.*, 20 F. Supp. 489; *Mutual Benefit Health & Acc. Ass'n v. Moyer*, (9th Cir.) 94 F. (2d) 906, 907.

25. *Pittman v. Lamar Life Ins. Co.* (5th Cir.), 17 F. (2d) 370; *Head v. N. Y. Life Ins. Co.*, (10th Cir.) 43 F. (2d) 517, 518; *Gibbs v. Equitable Life Ass'n Soc.*, 256 N. Y. 208; *Goldsmith v. New York Life Ins. Co.*, (8th Cir.) 69 F. (2d) 273; *Mayer v. N. Y. Life Ins. Co.* (6th Cir.) 74 F. (2d) 118, 99 A.L.R. 155; *Christen v. N. Y. Life Ins. Co.*, D.C. 19 F. Supp. 440.

to conduct, to employ one's self, and does not relate to a single act. To say that one is engaged in a thing is to say that the act is continuous." (b) "'Participate' does not connote to the average person the meaning that his mere presence is sufficient to participate or engage in such art or occupation (aeronautics)." (c) That a clause of the kind discussed in the above cases "means that the death of the insured must have resulted from having taken part in aviation operations other than by merely being in an airplane when it fell * * "; (d) "'Participating in aeronautics' does not include a passenger." (e) That if by such clauses, insurers intend to exclude passengers in airplanes, the clauses should be so framed as to make the intent clear. (f) That at the very least, such clauses are ambiguous and should consequently be resolved favorably to the insured."

The court pointed out that in the case where recovery was denied there was a difference in phraseology such as "if the insured's death resulted, * * from participation as a passenger or otherwise in aviation or aeronautics" and said "the cases appearing in this latter group are entirely harmonious and consistent with one another, and, in our opinion are clearly distinguishable from the cases appearing in the group first above herein set forth." (i.e., the cases where recovery was upheld.) However, thus concluding that recovery should be denied, the court went on to state that it was unable to accept as precedents: *Providence Trust Company v. Equitable Life Assurance Society*, 316 Pa. 121; *Day v. Equitable Life Assurance Society*, 83 F. (2d) 147 (10th Cir.) and *Equitable Life Assurance Society v. Dyess*, 194 Ark. 1023, in all three of which cases recovery was upheld, and in each of which cases the policy provision contained the words "engaging as a passenger or otherwise." The court could not accept said cases as precedents because as it said, those three cases belonged to the second group of cases where recovery was denied.

The court also disagreed with the view expressed in the *Bew* case and said that it would put that case in the first group of cases in which recovery was upheld. The court found itself in agreement with the result reached in the case of *First National Bank of Chattanooga v. Phoenix Mutual Life Insurance Co.*, 62 F. (2d) 681 (6th C. C. A.), in which recovery was denied, although the phraseology of the policy was similar to that in the cases in which recovery was upheld, because in that case the insured was president of an airplane company and active in its affairs and the trip in which he was killed was undertaken upon his insistence in a plane which he owned, where

he employed the pilot, etc., and the court felt that under the circumstances he was "participating" in aeronautic operations.

In a case decided by the same West Virginia court on the same day that it decided the Beveridge case, the court allowed a recovery²⁶. In the Chappell case an accident insurance policy excluded the disability sustained by the insured "while participating in aeronautics". The court held that the exclusion did not include an injury to the insured while he was a mere passenger on an airplane, thus placing the case in its first group of cases mentioned in the Beveridge case. The court held the word "participating" to be ambiguous and to be construed as meaning some active as well as passive participating. Thus the provision was to be construed most favorably to the insured.

These thoughts are left with the reader. The great common law is still in the making. The doctrine of stare decisis is not a dead doctrine. If you should have a case involving a policy in which identical phraseology is employed that the court has previously construed, everything else being equal, it is likely that the same conclusion will be reached as in the decided cases. If the decision should be adverse to you, you may have a chance by appealing to the Supreme Court of the United States where it may still be possible to have the highest court change the law to your liking. In other cases where a policy is involved containing phraseology which is not identical to that heretofore construed by the courts, you have a fifty-fifty chance of obtaining whatever result you may desire by presentation of the facts in such a manner that the same are distinguishable from those in decided cases and by elucidation of the law whereby you can differentiate the law to be applied to the facts of the case before the bar from the law previously applied in other cases, in the light of the status of the art or science of aeronautics, the conditions and circumstances in relation to time, etc., which may be applicable. However, should you find yourself before a court which, in arriving at its conclusion, attempts to group certain reported cases on one side of a line and another group of reported cases on the other side of a line and by this process arrives at an opinion that the case before the bar belongs on one side of the line or the other, then your only recourse will be to appeal, and to appeal again, and again, until you can appeal no more, in the hope that you may prevail.

26. *Chappell v. Commercial Casualty Ins. Co.*, 197 S. E. 723, (June 14, 1938) (W. Va. Sup. Ct. of Appeals.)

APPENDICES

APPENDIX A

*Clauses, Words and Phrases,
Appearing in Reported Cases:*

1. "This policy does not cover death, disability or loss sustained * * * or * * * received because of, or while participating in aeronautics."

Moyer v. Mut. Benefit Health & Acc. Ass'n. 9 Alaska, 79; (Dist. Ct. of Alaska, 1st Div. Juneau, Dec. 31, 1936.)

Plaintiff, the insured, sustained bodily injuries while riding as a passenger on an airplane between Juneau and Chichagof, Alaska, during the course of which the plane crashed, resulting in the alleged injuries. Plaintiff relied on the "Gregory" case and contended that aeronautics had passed from the experimental stage, when those who took part participated, to a means of transportation when those who fly as passengers do not participate. Defendant demurred and cited the Bew case.

Held: Demurrer overruled. The policy having been issued in 1934 and being an accident policy, in the opinion of the court, was entitled to a more liberal interpretation "than it would be had it been older or a life policy". The language in the policy was considered to be the equivalent of "because of participating in aero-

nautics" or "while participating in aeronautics."

In another case on appeal from the District Court of Alaska from a judgment entered March 13, 1937, the court said, "Participating in aeronautics" is an artificial phrase of ambiguous content, and it was held that a passenger on a regular commercial transport airplane is not then "participating in aeronautics."

Mutual Benefit Health & Acc. Ass'n v. Moyer, 94 F. (2d) 906, (C. C. A. 9) (1938).

2. "This policy does not cover death or other loss due to disease, whether acquired accidentally or otherwise, or sustained as the result of participation in aviation, aeronautics, or subquatics, or while engaged in rioting, fighting, or strikes."

Bayersdorfer v. Mass. Protective Ass'n, Inc., (Dist. Ct. S. D. Ohio 9-13-37); 20 F. Supp 489.

3. "participation as a passenger or otherwise in aviation or aeronautics."

Christen v. New York Life Ins. Co. 19 F. Supp. 441 (1937) (D. C. Nor. Dist. of Ill. E. D.).

4. "while participating in aeronautics."

Chappell v. Commercial Casualty Ins. Co., 197 S.E. 723 (1938) (W. Va.).

5. "This policy does not cover death, disability, or other loss * * received because of or while *participating* in aeronautics * * ."

Mutual Benefit Health & Acc. Ass'n v. Bowman, 99 F. (2d) 856. (C.C.A.8) (1938).

6. "This policy does not cover death or other loss sustained as the result of participation in aviation, aeronautics or subaquatics."

Swasey v. Mass. Protective Ass'n 96 F. (2d) 265 (1938). C. C. A. 9).

In this case an accident policy was issued in 1935; liability was denied on the ground that the cause of death was excluded from the policy. On agreed statement of facts, the question was, "Is a passenger on a plane to be deemed a participant in aviation, aeronautics or subaquatics?"

Held: A passenger is not "participating" as the policy clause is confined "to these active participations in the art and management of the planes and the solution of their problems." Judgment for defendant reversed.

The Court Held: The insured was a passenger for hire, and was none the less so because the pilot violated his license and flew with the insured at night.

7. "participation in aeronautics."

Marks v. Mutual Life Ins. Co. of N. Y., 96 F. (2d) 267 (C. C. A. 9) (1938).

Insured, a passenger in an airplane, was killed in a crash. It was contended that the exclusion provision "participation in aeronautics" included traveling in planes at the time the policy was issued in October, 1928, and that at that time the commonly accepted meaning of the words in the exclusion provision included mere travelers in a plane because of certain decisions in two State Supreme Courts and two intermediate Appellate Courts.

Held: Plaintiff entitled to double indemnity and the judgment of the defendant below reversed. The Court held that the time for reconsideration of earlier views had already arrived when the policy was issued.

8. "This insurance shall not cover * * injuries, fatal or non-fatal, sustained while participating in aviation or aeronautics except as a fare-paying passenger * * ."

Spychala v. Metropolitan Life Ins. Co. 13 A. (2d) 32 (1940) (Pa.).

9. Double indemnity provision did not include death resulting from "engaging as a passenger or otherwise in submarine or aeronautic expeditions or operations."

Equitable Life Ass'n Soc. of U.S. v. Dyess, 109 S. W. (2d) (1263) (Ark.) (1937)

10. Double indemnity benefits do not apply if death of the insured resulted from "engaging as a passenger or otherwise, in aeronautic operations."

Christen v. New York Life Ins. Co., 19 F. Supp. 441 (1937) D.C. Nor. Dist. of Ill. E. D.)

11. "The provision for double indemnity benefit * * * will not apply if the insured's death resulted * * * from engaging as a passenger or otherwise in * * * aeronautic operations."

National Exch. Bk. Tr. Co. of Steubenville v. N. Y. Life Ins. Co., 19 F. Supp. 790. (1937) Dist. C.W.D. of Pa.)

12. Double indemnity clause is not applicable "in case death results * * * from engaging in aeronautic or submarine operations, either as a passenger or otherwise."

Beveridge v. Jefferson Standard Life Ins. Co., 197 S.E. 721 (W. Va.) (1938)

13. "Double Indemnity shall not be payable if death resulted directly or indirectly from * * * military or naval service in time of war, or from any act incident to war; or from operating or riding in any kind of aircraft, whether as a passenger or otherwise, except as a fare-paying passenger in a licensed passenger aircraft * * *."

State of Mo. ex rel Mutual Life Ins. Co. of N. Y. v. Shain, et al., 126 S.W. (2d) 181 (Mo.) (1939)

14. "This Double Indemnity Benefit shall not be payable if the insured's death resulted * * * from engaging as a passenger or otherwise in submarine or aeronautic operations * * *."

Reed v. Home State Life Ins. Co., 97 P. (2d) 53 (1939) (Okla.)

Clauses, Words and Phrases, Currently used by Insurers:*

1. "Aviation Risk Exclusion. * * * as the result of operating or riding in or on any kind of

*Note: Names of insurance companies are not mentioned, because many companies do not use one standard clause in their policies and some make provision for exclusion of aeronautic (or aviation) risks by policy provision, others by rider, and still others by supplemental agreement, varying oftentimes according to States in which adaptable phraseology is necessary or advisable, and because such provisions are constantly in process of revision.

- aircraft, or of falling there-with or therefrom or in any other manner descending therefrom while such aircraft is in flight or in motion, except when the insured is a fare-paying passenger of a commercial airline flying on a regular scheduled route between definitely established airports located within said area."
2. "as a result of being in or on, or of falling or descending with or from, any type of aircraft, except as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular scheduled flight over a regularly established air route between definitely established airports, whether or not the insured is in the military, naval or air force of any country."
 3. "Death (and disability also, if this policy contains any provisions relating thereto) as a result, direct or indirect, of travel or flight in any species of aircraft—except as a passenger ('passenger' does not include a pilot, co-pilot, stewardess, mechanic, or other member of the crew of such aircraft) in an aircraft operated on regular schedule by an incorporated passenger carrier over its established route—is a risk not assumed under this policy."
 4. "As a result of operating or riding in any kind of aircraft, or of descending therefrom, except as a fare-paying passenger on a commercial airline flying on a regularly scheduled route between definitely established airports."
 5. "As the result, directly or indirectly, of service, travel, or flight in, contact with, or descent from any species of aircraft (except as a fare-paying passenger in a licensed airplane piloted by a licensed commercial pilot on a regularly scheduled passenger flight of a commercial carrier between definitely established airports)."
 6. "Death as a result of service, travel or flight in any species of aircraft, except as a passenger on a licensed passenger aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered over an established passenger route between definitely established airports, is a risk not assumed under this contract."
 7. "The death of the insured resulting from service, travel or flight in, or descent from, or contact with, any species of aircraft is a risk not assumed under this policy (including any rider, endorsement or agreement now or hereafter made a part thereof) or under any

- policy issued in exchange therefor, except in consequence of the insured having been a fare-paying passenger in an aircraft operated on regular schedule by an incorporated passenger carrier over its established route.”
8. “Death as a result of operating or riding in, or falling or descending from or with any species of aircraft, unless such death shall result from riding as a fare-paying passenger in a licensed passenger aircraft piloted by a licensed passenger pilot on a scheduled passenger air service regularly offered by an incorporated carrier between specified established airports. ‘Fare-paying passenger’ as used herein includes any person riding in an aircraft for fare, or on a pass issued by an incorporated carrier, who is not a member of the personnel having duties on said aircraft.”
9. “as a result of operating or riding in any kind of aircraft, except as a passenger on a regularly scheduled passenger flight of a commercial aircraft.”
10. “Death as a result of operating or riding in any kind of aircraft, whether as a passenger or otherwise, except riding as a fare-paying passenger (including a passenger traveling solely as such on a pass) in a licensed passenger aircraft provided by an incorporated passenger carrier on a scheduled passenger air service regularly offered over an established passenger route.”
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EDITORS' COMMENT

Because of the obvious good work of the author in carefully examining authorities and related material and in grouping the same, particularly in the appendices, the Editorial Board has deemed the article worthy of publication. However, some members of this Board have been reading each new aviation case as it has come out over the years and the consensus of opinion is that aeronautic risk exclusions can be grouped somewhat in the following fashion:

(a) The early decisions, when aviation was new, experimental and “hazardous” in the minds of the judges, and consequently a passenger, under almost any circumstances, was considered to be both “participating” and/or “engaging in” aeronautics.

(b) A later period very definitely indicated by the enthusiasm following the Lindbergh flight, when the courts began to feel that prior decisions were probably wrong and to find a way out began to

distinguish between "participating" and "engaged in". For several years, a passenger was held to be participating in aeronautics and hence barred from recovery, but where the language "engaged" was used and he was, in fact, in some occupation other than aeronautical, the courts held that he was not engaged in aeronautics and hence the policy covered.

(c) The time when aviation began to be universally accepted by all courts as a normal means of travel, the distinction between the words "participating" and "engaged in" was abolished, and the normal passenger, either fare-paying or guest, was held to be covered by neither expression, and consequently covered by the insurance.

(d) Practically without exception, where the words, "as a passenger or otherwise" have been used, the courts have held that the insurance does not cover because the intention to exclude the aeronautic risk is too plain and too evident to be ignored.

This is no attempt to take issue with the author as to his grouping. Obviously there are cases which support his thesis, but the viewpoint of the Board is that these are the exceptions which prove all rules.

APPENDIX B

STATISTICS-COMPARATIVE FIGURES INDICATIVE OF THE HAZARD OF AERONAUTICS

Comparative Operation and Accident Figures for Domestic Air Carriers and Passenger Railroads, for the Years 1929, 1933 and 1939^a

	1929	1933	1939
Miles Traveled			
Air Carriers	22,380,020	48,771,553	82,571,523
Railroads (Passenger) ¹	573,256,000	387,956,000	390,972,134
Passengers Carried			
Air Carriers	159,751	493,141	1,876,051
Railroads (Passenger) ¹	786,432,000	434,848,000	451,039,262
Passenger Miles			
Air Carriers	75,000,000 ⁴	173,492,119	749,787,096
Railroads (Passenger) ¹	31,164,739,000	16,368,043,000	22,687,000,000

CONTINUED ON NEXT PAGE

(a) Extract from figures furnished by U. S. Department of Commerce, Civil Aeronautics Administration.

(1) Railroad accident and operations figures obtained from Interstate Commerce Commission reports. Includes "Passenger Fatalities" and "Subsequent

	1929	1933	1939
Accidents Involving Passenger			
Fatalities			
Air Carriers	5	3	2
Railroads (Passenger) ¹	39	17	18
Passenger Fatalities			
Air Carriers	14	8	9
Railroads (On trains only) ¹	85	47	32
Accidents Involving Passenger			
Fatalities Per 100,000,000			
Miles Traveled			
Air Carriers	22.34	6.15	2.42
Railroads (Passenger)	6.80	4.38	4.60
Miles Traveled Per Fatal			
Passenger Accident			
Air Carriers	4,476,004	16,257,184	41,285,762
Railroads (Passenger)	14,698,872	22,820,941	21,720,674
Passenger Fatalities Per			
1,000,000 Passengers Carried			
Air Carriers	87.64	16.40	4.80
Railroads (Passenger)	.11	.11	.07
Passenger Fatalities per			
100,000,000 Passenger Miles			
Air Carriers	18.67	4.62	1.20
Railroads (Passenger)	.27	.29	.14
Passenger Miles per Passenger			
Fatality			
Air Carrier	5,357,143	21,686,515	83,309,677
Railroads (Passenger)	366,643,900	348,256,200	708,968,750

Passenger Deaths" in connection with "Train and Train Service Accidents" for all Class I steam railways. (See definitions.)
 (4) Estimated.

DEFINITIONS

"Passenger Fatalities" on railroads include only those deaths occurring within 24 hours after the time of the accident.

"Subsequent Passenger Deaths" on railroads include all fatalities occurring after the expiration of the 24-hour period as a result of "Train or Train Service Accidents."

"Train Accidents" include all accidents with or without casualties arising in connection with the operation or movement

of trains, locomotives or cars that result in damage to equipment or other railroad property in excess of \$150 (including cost of clearing wreck).

"Train Service Accidents" include all accidents arising in connection with the operation or movement of trains, locomotives or cars that result in reportable casualties to persons but not in damage to equipment or other railroad property in excess of \$150 (including cost of clearing wreck).

STATISTICS (ALL AS OF DECEMBER 31ST OF EACH YEAR)—PERTAINING TO PRIVATE FLYING OPERATIONS^a

	1929	1933	1939
Airplanes in operation (certificated and uncertificated)	9,315	8,780	12,274
Accidents:			
Number of accidents.....	1,586	1,603	2,175
Miles flown per accident.....	69,357	44,431	81,778
Number of fatal accidents.....	287	182	194
Miles flown per fatal accident.....	383,275	391,334	916,846
Pilot Fatalities	205	154	161
Co-pilot or student fatalities.....	2	19	7
Passenger fatalities	241	129	139
Aircraft crew fatalities (other than pilot, co-pilot or student).....	3	5	4
Ground crew and third party fatalities	6	3	3
Total fatalities	457	310	314
Miles flown per pilot fatality.....	536,585	462,486	1,104,771
Miles flown per passenger fatality...	456,432	552,115	1,279,627

CERTIFICATES

Certificated (active):

Airplanes	6,803	6,896	12,829
Pilots, airplane	10,287	13,960	31,264

Student pilot certificates (issued yearly):

Airplane	20,400	12,752	29,839
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(a) Extract from statistics on Progress of Civil Aeronautics in the United States, issued by the Civil Aeronautics Administration.