

CHAPTER TWO NEGLIGENCE

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NEGLIGENCE

Actionable negligence is a breach of a duty to another person, thereby causing injury. A defendant in an aviation lawsuit is not liable for negligence without a showing that his negligence legally caused plaintiff some damage.

The four required elements to show actionable negligence are:

- 1) a duty owed to plaintiff,
- 2) a breach of that duty
- 3) that is the legal cause of the injury or loss,
- 4) and plaintiff sustains actual injury, damage, or loss.

General rules of negligence normally apply in aviation accident cases. Generally speaking, every person is liable for an injury caused to another by that person's lack of ordinary care or skill in the management of his or her property or person. Although ordinary care is normally defined as the care of a reasonable, prudent person under similar circumstances, this definition is not adequate for many aviation cases because air personnel, including pilots, mechanics, air traffic controllers, and other Federal Aviation Administration (FAA) certificate holders have knowledge, skills, and experience beyond those of the ‘ordinary person,’ and they are therefore expected to exercise care commensurate with that special knowledge, skill, and experience. In essence, they are experts, and as such they are required to exercise the ordinary skill and competence of an ordinary person within their field of expertise.

NEGLIGENCE PER SE

Under the doctrine of “negligence per se,” the failure of a person to exercise due care may be presumed if the person violated a statute, ordinance, or regulation. In aviation cases, the applicable *state* statutes are found in the state’s Aeronautics Act found in the Public Utilities Code. Violation of one of the provisions of the act may in an appropriate case give rise to a presumption of negligence. For example,

Public Utility Code Section 21407.1 makes it unlawful to operate an aircraft while under the influence of alcohol or drugs (or any combination of alcohol and drugs) or to operate an aircraft while having an alcohol blood content of 0.04 percent or more. (This also a violation of federal regulations.) Because a pilot who flies while intoxicated violates a statute, a presumption of negligence arises.

Federal air regulations provide a comprehensive set of rules governing virtually every aspect of aviation. Aircraft, airports, mechanics, pilots, controllers, parachutists and parachute riggers, and even unmanned rockets and balloons, are all intensely regulated. The regulations are often very specific. For example, pilots are told what they must do before each flight, how much fuel they must have, what altitudes to use, who has the right of way, and what the speed limit is. Additionally, pilots are required to maintain vigilance so as to see and avoid other aircraft.

The federal air regulations were designed for the purpose of protecting those who fly in airplanes or those affected by their flight. So while violation of these regulations may raise a presumption of negligence, not every violation of a federal air regulation creates a presumption of negligence. The violation must have proximately caused the damage in question. For example, unless a violation of the regulations requiring licensing and annual inspections of aircraft caused the accident, such a violation does not create a presumption of negligence. In addition, the violation is not negligence if the resulting damage is not of a type that the regulation was designed to prevent or if the plaintiff was not within the class of persons for whose protection the regulation was adopted. Furthermore, the fact that the regulations hold a pilot in command directly responsible for the safety of the flight does not mean that the pilot is strictly or absolutely liable in the event of an accident.

A party who is attempting to prove negligence on the part of another may be able to establish a presumption of negligence through application of the doctrine of “negligence per se”, which is codified at Evidence Code §669(a).

Pursuant to Evidence Code §669(a), the failure of a person to exercise due care is presumed if:

- (1) the person violated a statute, ordinance, or regulation of a public entity;
- (2) the violation legally caused death or injury to a person or property;
- (3) the death or injury resulted from an occurrence of a nature that the statute, ordinance, or regulation was designed to prevent; and
- (4) the person suffering the death, personal injury, or injury to property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

The negligence per se doctrine is applicable to cases involving air carriers because there are a wide variety of statutes, ordinances, and regulations that prescribe the safe practices of airlines and other common carriers and of the other

persons who share the airways with these carriers. (see Jury Instruction 3.45 below).

Government manuals provide detailed instructions on how pilots, air traffic controllers, flight service specialists, and medical and flight examiners must perform their duties. Another type of manual that specifies standards of care, the breach of which can be negligence, is the operation or maintenance manual of a certificated facility. These manuals are individually prepared by flight schools, repair shops, air taxi services, and airlines, subject to FAA review and approval. The manuals set forth in great detail how the operation must be run, what inspection and review procedures will be followed, and the specific duties of particular employees. Failure of the certificate holder to comply with its own manual is a violation of federal air regulations.

Technically, the manuals themselves are not regulations and thus cannot form the basis for presuming negligence. Violation of a manual directive or good operating practice is therefore only evidence of negligence. For example, violation of good operating practices as specified in the Aeronautical Information Manual can be evidence of a lack of due care by a pilot, but does not give rise to a presumption of negligence.

COMPARATIVE NEGLIGENCE

Contributory negligence may be used to provide a complete defense in an action for negligence, even in an action by a passenger. The California Supreme Court has superseded the all_or_nothing rule of contributory negligence with a rule of comparative negligence that assesses liability in proportion to fault, however, the contributory negligence of the person injured no longer bars recovery. Instead, any damages awarded must be diminished in proportion to the amount of negligence attributable to the person recovering. Li v Yellow Cab Co. (1975) 13 C3d 804, 119 CR 858. Thus, an air carrier may assert the comparative negligence of a passenger as at least a partial defense to a cause of action for negligence against the carrier. Carriers of passengers are held to the highest degree of care, whereas the passengers themselves are bound to use only ordinary care for their own safety.

NEGLIGENCE JURY INSTRUCTIONS

The law of negligence is succinctly stated in the civil jury instructions that the Judge reads to the jury, in every case, just before the case is submitted to them for verdict. Each instruction is set up so that by inclusion or exclusion of certain terms or sections, it can be made applicable to just about every case.

The instructions that follow are derived from over two hundred years of

legal precedents. They are not fixed, but change as the law expands and changes. Read these instructions over and you will have the same legal knowledge as juries that are asked to render verdicts on multimillion dollar cases. Because they are the basic building blocks used in this course, you will be expected to know them. They are numbered according to the Basic Jury Instruction authors, the 3.xx section being reserved for negligence instructions.

3.00 A plaintiff who was injured as a legal result of some negligent conduct on the part of a defendant is entitled to recover compensation for such injury from that defendant. Thus, the plaintiff is entitled to a verdict in this case if you find: 1. That a defendant was negligent, and 2. That such negligence was a legal cause of injury to the plaintiff.

3.10 Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.

3.11 One test that is helpful in determining whether or not a person was negligent is to ask and answer the question whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated that someone might have been injured by or as a result of his action or inaction. If the answer to that question is "yes", and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

3.12 The amount of caution required of a person in the exercise of ordinary care depends upon the conditions apparent to him or that should be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence.

3.13 Every person who, himself, is exercising ordinary care, has a right to assume that every other person will perform his duty and obey the law, and in the absence of reasonable cause for thinking otherwise, it is not negligence for such a person to fail to anticipate an accident which can occur only as a result of a violation of law or duty by another person.

3.14 In the absence of reasonable cause for thinking otherwise, a person who himself is exercising ordinary care has a right to assume that other persons are ordinarily intelligent and possessed of normal sight and hearing.

3.16 Evidence as to whether or not a person conformed to a custom that had grown up in a given locality or business is relevant and ought to be considered, but is not necessarily controlling on the question whether or not he exercised ordinary care, for that question must be determined by the standard of care that I have stated to you.

3.35 A minor is not held to the same standard of conduct as an adult. He is only required to exercise the degree of care which ordinarily is exercised by minors of like maturity, intelligence and capacity under similar circumstances. It is for you to determine whether the conduct of [plaintiff]/[defendant] was such as might reasonably have been expected of a minor of his maturity, intelligence and capacity, acting under similar circumstances.

3.36 The amount of caution required of a person whose faculties are impaired is the care which a person of ordinary prudence with similarly impaired faculties would use under circumstances similar to those shown by the evidence.

3.38 Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result.

3.40 When a person's lawful employment requires that he work in a dangerous location or a place that involves unusual possibilities of injury, or requires that in the line of his duty he take risks which ordinarily a reasonably prudent person would avoid, the necessities of such a situation, insofar as they limit the caution that he can take for his own safety, lessen the amount of caution required of him by law in the exercise of ordinary care.

3.41 Because of the great danger involved in the **(name of job)**, a person of ordinary prudence will exercise extreme caution when engaged in such an activity.

3.45 If you find that a party to this action violated **(insert the applicable Federal Air Regulation _____)**, the regulation to be read to you momentarily, and that such violation was a legal cause of injury to another or to himself, you will

find that such violation was negligence unless such party proves by a preponderance of the evidence that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. In order to sustain such burden of proof, such party must prove by a preponderance of the evidence that he was faced with circumstances which prevented compliance or justified noncompliance with the regulation.

3.50 Contributory negligence is negligence on the part of a plaintiff which, combining with the negligence of a defendant, contributes as a legal cause in bringing about the injury. Contributory negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff. Furthermore, any such violation on the part of a minor would not be negligence if such minor proves by a preponderance of the evidence that he exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances.

3.51 Whether or not it is negligence for one to proceed into a dangerous situation of which he had previous knowledge is a question of fact. If you find that plaintiff voluntarily proceeded into a dangerous situation of which he had previous knowledge, but that he momentarily forgot the danger, such forgetfulness is not in itself contributory negligence unless under all the circumstances it shows a want of ordinary care not to have kept the danger in mind.

3.52 Contributory negligence, if any, on the part of the plaintiff does not reduce any recovery by the plaintiff against the defendant for an injury caused by misconduct of the defendant, if you find that the defendant intended to inflict harm upon the plaintiff.

3.53 Contributory negligence is negligence on the part of a decedent which, combining with the negligence of a defendant, contributes as a legal cause in bringing about death. Contributory negligence, if any, on the part of the decedent does not bar a recovery by the heirs/ executor/ administrator against the defendant but the total amount of damages to which the heirs/ executor/ administrator would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the decedent.

3.60 This lawsuit was brought by the plaintiff, a minor, to recover damages for his injuries. Contributory negligence, if any, on the part of the minor does not bar a recovery by him against the defendant but the total amount of damages to which the minor would otherwise be entitled shall be reduced in proportion to the amount

of negligence attributable to the minor. The negligence, if any, of the parents, or either of them, does not bar or reduce recovery of damages for injuries to the minor.

3.72/1 A rider in an aircraft who has no right to the control or management of such vehicle nevertheless has the duty to exercise ordinary care for his own safety and take such steps to protect himself as a person of ordinary prudence would take under the same circumstances. It is for you to determine from all of the evidence what conduct might reasonably have been expected of a person of ordinary prudence in the same circumstances.

In the absence of some fact brought to his attention which would cause a person of ordinary prudence to act otherwise, such rider is not charged with the responsibility [of observing the condition of the traffic on the highway] [of ascertaining whether or not a train is approaching] [of warning the driver of the presence of railroad tracks or of an approaching train]. However, if the rider is aware that the driver is not looking for [trains] [other vehicular traffic] or is driving the vehicle in a negligent manner or is violating the law, or that [an engine, train or car] [another motor vehicle] is approaching [on the tracks] [the intersection] and is so close as to constitute an immediate hazard to those in the rider's vehicle, he has the duty of doing whatever a person of ordinary prudence in the same situation would do to inform or warn the driver in an effort to prevent an accident.

Contributory negligence, if any, on the part of the rider does not bar recovery by him against the defendant but the total amount of damages to which he would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the rider.

3.76 A legal cause of [injury] [damage] [loss] [or] [harm] is a cause which is a substantial factor in bringing about the [injury] [damage] [loss] [or] [harm].

3.77 There may be more than one legal cause of an injury. When negligent conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each of said persons is a legal cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a legal cause of the injury.

3.78 Where two causes combine to bring about an injury and either one of them operating alone would have been sufficient to cause the injury, either cause is considered to be a legal cause of the injury if it is a material element and a substantial factor in bringing it about, even though the result would have occurred without it.

3.79 If you find that defendant (first actor) was negligent and that his negligence was a substantial factor in bringing about an injury to the plaintiff but that the immediate cause of the injury was the negligent conduct of defendant (second actor), the defendant (first actor) is not relieved of liability for such injury if: 1. At the time of his conduct defendant (first actor) realized or reasonably should have realized that defendant (second actor) might act as he did; or the risk of harm suffered was reasonably foreseeable; or 2. A reasonable person knowing the situation existing at the time of the conduct of the defendant (second actor) would not have regarded it as highly extraordinary that the defendant (second actor) had so acted; or 3. The conduct of the defendant (second actor) was not extraordinarily negligent and was a normal consequence of the situation created by defendant (first actor).

3.80 If the plaintiff establishes by a preponderance of the evidence all of the facts necessary to prove (1) that each of the defendants was negligent, and (2) that the negligent act of one of the defendants was a legal cause of plaintiff's injury, and (3) that the injury was such that it could only result from the negligent act of one of the defendants, and (4) that from the circumstances of the accident the plaintiff cannot reasonably establish which defendant's negligence was a legal cause of the injury, then you will find that each defendant is liable for plaintiff's injury. However, under such circumstances, a defendant is not liable if he establishes by a preponderance of the evidence all of the facts necessary to prove that his negligence was not a legal cause of plaintiff's injury.

As mentioned earlier, California law was not always a “comparative fault” jurisdiction. For over a hundred years California did not permit a plaintiff to recover any compensation from the defendant if the jury found that the plaintiff was even slightly at fault for the accident. This meant that sometimes persons who were killed or severely injured, who might have done something a little different (1% fault on their part), could not get a dime from 99% at fault defendant. Trials back then were often more concerned with the plaintiff’s conduct rather than with the defendant’s. Occasionally, huge miscarriages of justice resulted. In order to avoid an unfair result, juries (who are sworn to follow the law) often secretly deducted from its verdict a percentage of plaintiff’s monetary recovery in order to avoid finding that the plaintiff was partially at fault. Appellate and trial courts often struggled to avoid such harsh results. One way to avoid giving the plaintiff -0- was to find that the defendant was guilty of wilful or wanton misconduct. In short, it was such bad conduct that was almost certain to result in harm to others. With this history in mind, the Mittleman case below is illustrative of what transpired before 1975.

Case #1

Mittelman v. Seifert

(1971) 17 Cal.App.3d 51, 94 Cal. Rptr. 654

OPINION

Minor plaintiffs (Linda D., Paul B., and Kirk E. Mittelman) by their guardian ad litem (Florence C. Hind) appeal from a judgment in a wrongful death action, on a 9_3 verdict, denying recovery based on the death of their parents, Joseph and Edna Mittelman. They were killed, along with the pilot, Charles J. Seifert, Jr., about 2:50 a.m. March 19, 1966, when 10 days after he acquired it Seifert's twin engine Apache airplane crashed one_quarter to one_half mile northeasterly of the end of the runway of the Half Moon Bay Airport; from whence they were returning on the 20_25 mile flight to Palo Alto Airport. The evidence established that Seifert was the pilot at the moment of impact.

The crash was at high speed, on a 10 percent slope near the adjacent hilltop resulting in complete disintegration of the plane and its riders. Human body parts were strewn over the path of collision from one_and_a_half to two blocks.

It was stipulated that at the time of the impact, the Apache aircraft was traveling with the right wing in a near vertical downward position and the nose of the plane down. The magnetic heading of its course, as shown by the distribution of the wreckage was in an east, northeasterly direction. There was no evidence of preimpact failure or malfunction of the aircraft's two engines, spark plugs or magnetos, nor any physical evidence of lack of structural integrity of the plane prior to the accident. Adequate fuel was present. Recovered from the crash site, the aircraft clock read "2:50."

The Half Moon Bay Airport is located on the coast of the Pacific Ocean 64 feet above sea level. It is separated from the Palo Alto Airport by a ridge of the Coast Range Mountains. These vary in elevation from about 1,900 feet at the highest, to a minimum 1,000 feet at the lowest pass, the San Mateo Canyon Road. Safe flight in daytime requires these elevations be cleared by 1,000 feet; and at night one expert testified 2,000_foot clearance was necessary for safety. Though one might cross to the south, at the Saratoga Gap, or follow a hairpin course, north through the Golden Gate and then south to Palo Alto, the most practical route between these two airports necessitates crossing this coastal range.

Mr. Silvestri, (2) aviation expert and manager of the Half Moon Bay Airport, testified that even through the San Mateo Canyon pass, the minimum safe crossing

altitude would be 2,500 feet. For safety at night, expert Cutter (3) who was familiar with these airports testified pilots should clear the top of the Coast Range by 2,000 feet. The first hill adjacent to the airport on the east slopes upward to an altitude of 400 feet. The crash site as shown by Exhibit 28, was at a considerably less elevation.

Planes departing from the airport are required to follow the Federal Aviation Agency (hereafter FAA) flight pattern. At night, a plane takes off to the north and at an elevation of 800 feet is to make a right turn easterly toward the hills, as indicated by the lighted tetrahedron. The 800-foot altitude is measured from sea level rather than from the base elevation of the airport, because of the frequent low overcast. The Half Moon Bay Airport is not well lighted at night. Only the lighted outline of the single runway can be seen, not the surface.

Dr. Cutter, himself an expert flyer, testified that the few lights at Half Moon Bay Airport are confusing for night flight. The pilot may line them up as horizon when in fact they are on the ground.

On March 19, John Preuss, United Air Lines employee and former flight engineer, left the San Francisco Airport at 12:30 a.m. and after stopping to eat, returned to his home at Moss Beach, about three-quarters of a mile north of the crash site. Outside his home, while attending to his dog, he heard a twin engine plane and saw its lights, recalling its red light rising above the blue.⁴ The lights disappeared into the cloud bank or fog. He couldn't give the flight level, everything was on the ground. The aircraft appeared to come from the direction of the airport, was above the trees, perhaps 150 feet above ground, was gaining altitude, slow gain. At that time it was pitch black, the weather bad, no visibility of any kind; there was rain, heavy fog and clouds.

On his way home he had passed through fog and rain so hard that his single speed windshield wipers could not clear the water away. At the time he saw the plane there was ground fog from Montara north; he could see the dull mass of trees 150 yards away. The plane did not appear in difficulty, though he noted an engine was running rough, spluttering, like out of gas.⁵ His observation was for about 10 seconds, and he paid no attention after the plane was out of sight and did not hear any crash. He stated the occasion was very unusual; because planes don't fly out of Half Moon Bay Airport at night. He thought, "today is a hell of a night to be up there on a plane or either running out of gas and or anything else."

According to his deposition taken two years after the crash, on May 18, 1968, defense witness Donald Hadding was on duty as a night watchman at the candle factory to the west of the landing strip of the Half Moon Bay Airport. He stated that on March 19, 1966, he saw an aircraft headed north land or take off

about 1 a.m. not very high. The plane about 1:05 a.m. came in south to north, touched down, bounced_like and took off; about 1:35 a.m. made another touchdown; back again, it touched down about 2:05 a.m.; it was going too fast to land. On the third pass, it turned to the right instead of the left and gradually turned east toward the hills. He was sure this was a one_engine plane and that it was the plane that crashed.

Hadding stated that between 1 and 2 a.m., the weather was clear and he could see stars. About an hour earlier, at midnight, there had been fog. It was raining before 10 p.m., fog, 10:30 p.m. to 12 midnight. The expert testimony of Captain Paul T. Adams (6) was that during the climbing portion of the flight from the airport at night in the type of aircraft here involved, the structure of the cockpit and the nose of the aircraft would tend to obscure the runway lights on the ground and any lights in front of the aircraft. When the aircraft is in a nose_up position, this obscured visibility is increased. The wing on the left_hand side of the aircraft interferes with the pilot's ability to see the ground on his left side, particularly while the aircraft is in a right turn where the left wing is up and the right wing is down. Loss of horizon in flying blind, whether because of darkness or flight into clouds, produces spatial disorientation and vertigo in a pilot rapidly, and usually leads to disaster.

Since an aircraft operates in a three_axial plane and travels at a great speed, spatial disorientation and vertigo can be serious impairments to safe aircraft operation. Spatial disorientation occurs when a person has lost his reference to the horizon, "flying blind." Vertigo is the sense of dizziness that can develop from spatial disorientation and is very likely to occur in a person suffering from fatigue.

Expert Captain Adams described what could occur from loss of horizon. At night without stars or ground lights a pilot could not get by without instrument flight. A pilot penetrating a cloud could not remain level without instruments. If he lost the horizon, he would go into a steep turn, drop the nose of the plane, speed increasing. Trying to correct this, probably he would try to pull back on the yoke to raise the nose, pull up too much, and stall. This would initiate the "graveyard spiral," the "dead man's spiral."

Defense expert Roger D. Goetz (7) said vertigo was common under conditions of blind flying and testified that if one runs into a cloud flying visually, not flying by instrument reference, he tends to have vertigo in from 30 seconds to 5 to 7 minutes. It can be of such duration and intensity as to cause the pilot to lose control of the aircraft.

The purpose of instrument flight discipline is to train a pilot to rely on

instruments despite false senses as to his position in space and the dizziness or vertigo. This takes considerable time and continual practice. To stay proficient, recurrent training of at least six hours every six months is required. Carrying passengers under instrument flight conditions without having the rating clearly violates the regulations prohibiting such flights. Seifert had not qualified for instrument flight.

Dr. Albert W. Cutter, an expert aviator, testified that spatial disorientation from loss of horizon, and vertigo, result from blind flying, and that it takes a great deal of time and practice to evaluate and coordinate instrument readings. A pilot with no recent experience probably would lose 100 percent control within one minute. Even without complications imposed by clouds and bad weather it is evident that one may be flying blind at night. "[A] night flight is practically an instrument flight, whether you penetrate clouds or not, and this would be a very variable factor as to how much visibility there was, but if there was just three miles visibility this would be very limited and I think it would probably be about, well, I would say 90 percent chance of loss of control occurring. ... Without penetrating clouds, ..." said Dr. Cutter.

The opinions of all the expert witnesses, based upon the hypothesis of a pilot of the physical condition, training and experience of Seifert, at night, and under the varied testimony as to the weather conditions aloft, were that it would not be prudent, even reckless and foolhardy for a pilot like Seifert not rated for instrument flight to attempt to fly over the coastal hills from Half Moon Bay to Palo Alto. Thus, Silvestri testified that a prudent pilot would not attempt such flight under conditions he observed at 10:30 p.m. and would expect to continue through the night (ceiling of 400 feet, overcast, visibility one mile, light rain and fog; nor with ceiling of 500 feet, scattered clouds, 1,100 feet broken overcast, visibility three miles). Dr. Cutter testified in relation to the official weather report the arrival of a weather front perhaps contemporaneous with Seifert's departure, he would not attempt such a flight visually. (Weak cold front, expected Boise_Reno_King City line by 11 p.m., mostly 800 to 1,500 feet broken cloud, to overcast, with 2,000 to 4,000 feet broken to overcast layers along coastal sections with visibilities locally two to four miles, light rain and fog following frontal passage.)

Dr. Cutter, knowing the hills and the area, testified that even with an 1,100-foot ceiling, the ceiling would run into the hills, and visual flight over them probably would be impossible, and flight between the two airports would not be possible without penetrating clouds; and accordingly, it would be reckless and foolhardy to attempt such a flight visually; the probability of crashing being approximately 100 percent shortly after takeoff.

Defendant's expert, Dr. Carney, (8) testified he wouldn't recommend that anyone without instrument training fly into a cloud; that he had flown into clouds unexpectedly and was glad he was instrument trained. Likewise, he testified that at night with 1,100-foot overcast ceiling with no holes one could not fly visually from Half Moon Bay Airport to Palo Alto Airport, except by flying south. Mr. Goetz said under the same conditions, one could not make a visual flight; he would not have terrain clearance.

Captain Adams asserted that if Seifert penetrated clouds on the takeoff on the night in question, that alone would carry a 90 percent probability an accident would occur. Even on a clear night, with only his fatigue and lack of training, there was a 25 percent probability he would lose control of the aircraft. With between 400 and 900 feet overcast, wind and some drizzle, a plane piloted by one in Seifert's state of training and physical condition would have 100 percent probability of crashing soon after takeoff.

Testimony of conditions at ground level about the time of the departure from Princeton Inn presented some diversity. Before considering further evidence bearing upon the crash and its causes, we will consider the aviation guest statute, Public Utilities Code section 21406.

II

Respondent administratrix successfully asserted upon the trial that Joseph Mittelman and Edna Mittelman at the time of their deaths were guests in the airplane, and Seifert was not chargeable with wilful misconduct; and therefore appellants were barred from recovery under California Public Utilities Code section 21406.9 Appellants contend that denial of their request for instructions that as a matter of law their deceased parents were "passengers," and not "guests," under the terms of the statute was prejudicial error; and that likewise the failure to instruct that Seifert was chargeable with wilful misconduct under the terms of the guest statute was prejudicial error, as was the denial of their motion for judgment notwithstanding the verdict, on the issue of liability.

Appellants' first contention, that the section is unconstitutional, for want of due process and equal protection of the laws, is not tenable. These issues have been determined to the contrary in relation to the comparable automobile guest statute.

Appellants' further contention is that Public Utilities Code section 21406 is invalid because of an asserted conflict with 14 Code of Federal Regulations section 91.9: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

The argument is advanced that there is an implied federal right of action, created by any breach of section 91.9; and that by limiting recovery under Public Utilities Code section 21406, there is an unlawful attempt to cut down the federal right. There are two false assumptions underlying this argument. The first is, that the plaintiffs are persons whose life or property has been endangered.

In Buckley v. Chadwick, the Supreme Court held in a comparable wrongful death action, that "The plaintiffs are not persons injured as contemplated by the statute; they are persons who have suffered consequential damage ensuing from the death of the person injured," limited to pecuniary loss resulting from their economic relationship to the deceased.

The second unwarranted assumption is that breach of a federal aviation regulation resulting in death impliedly creates a right of action for wrongful death. There is a federal statute, relating to death on the high seas; but the federal aviation statute otherwise expressly provides for the application of state law.

Violation of the federal or state provisions would have been the basis for imposition of penalties upon the offending airman Seifert, had he survived the catastrophe. (49 U.S.C.A. § 1471, subd. (a), subsec. (1); Pub. Util. Code, §§ 21408, 21407.5, 21019, 21407.6, 21409.) By their explicit terms, these sections are operative no matter who may be a rider nor what property is involved; regardless of whether or not there is a civil remedy, or a guest statute or a statutory remedy for wrongful death. Any violation of these sections did not "endanger the life or property" of either of these appellants.

Therefore, the guest statute as construed in wrongful death actions does not impinge at all upon the stated regulation. The so-called guest statutes are explained, on the basis that suits by a rider against his host are a "breach of hospitality"; and that it is necessary to prevent collusive suits between host and guest against insurance carriers. The guest statutes had some parallel originally with the relative immunity of the host from liability to the social guest on his premises. This has been removed from California law. It takes mental gymnastics of which we are not capable to find collusion in an airplane crash, fatal to both a pilot and his rider. Though cogent reasons are urged by legal writers, seconded by appellants, why guest statutes should be abrogated, we are confronted by the statute, which must be honored. The power of the Legislature to prescribe and limit recoveries permitted under the wrongful death statute is well established. The wrongful death provisions, Code of Civil Procedure section 377, and Public Utilities Code section 21406, must be read together, as if parts of a single statute. Suits for death in intrastate flight are governed by California law.

On the fatal trip, were Mittelmans "guests" or "passengers"? Maximart was a discount house, opened in Palo Alto in 1961, in which 13 concessions were leased out. Joseph Mittelman was president and Edna Mittelman was vice president of Maximart. With Mr. R. V. Smith his floor manager, Mittelman operated Maximart, while his equal in the business, Mrs. Mittelman, operated their retained concession, dealing with jewelry and luggage. Maximart was open on Sunday from 11 a.m. to 6 p.m., Saturdays 10:30 a.m. to 7 p.m., and on other days from 10 a.m. to 9 p.m. After closing time, it took from 15 to 30 minutes to close the store, and upon occasions, even longer. Mittelmans never left the store before closing.

Charles Seifert was both an attorney and a certified public accountant, and Maximart provided over one half of his business, and took one half of his office time. Mittelmans regarded him as a very brilliant lawyer and business adviser. They had daily telephone conferences. He came into Maximart many times a week. There were meetings almost nightly, involving the leases. Their business was usually conducted over dinner, following the closing of Maximart. Manager Smith stated it was very commonplace to plan such a meeting after 9 o'clock at night; some weeks, this was every night. The main place for such dinner meetings was Dinah's, in Palo Alto, but they also would go to the Normandy in San Francisco. Said daughter Linda Mittelman, "They would do a lot of business over dinner ... during the evening ... they would go to different restaurants. ... Just wherever there was a good restaurant." There were discussions with Seifert about tenants in, tenants out, the opening of a new department, or plans for expansion, almost on a daily basis. Being an equal in the business, Mrs. Mittelman was rarely absent from such business discussions with Seifert.

On this day of the flight to Half Moon Bay, Seifert's secretary, Mrs. Modro, testified he worked all day on a big project for Mittelmans. Defendant Mrs. Seifert testified that on that day Mittelman and her husband were discussing a new corporation for the jewelry department. Mrs. Modro also testified he had opened an Anaheim office, with some business for Mittelman there. In the week preceding, he had made two trips there on business with Mittelman, flying the Apache plane. There were plans for Mittelmans to expand to Orange or Santa Ana, Fairfield and Lake Tahoe, stated R. V. Smith, Maximart floor manager; and Mr. Lewis Perry, at time of trial president of Maximart, testified Mittelman wanted to develop the jewelry business in Big A, or Murray Manor, Anaheim. Mittelman sought to set up an expanded line of credit for his jewelry venture with Mr. Perry, who was a factory representative, about 10 days before the crash. Smith testified Seifert and Mittelman were discussing future layouts for expanding at Fairfield or southern California.

Previously, Seifert had flown Mittelman to Half Moon Bay, to the Nut Tree

near Fairfield and back to Palo Alto, as well as taking him on the two air trips to Santa Ana. Mrs. Seifert had occasional social contacts with the Mittelmans, but they never discussed business in her presence. About a week before March 18, Mrs. Mittelman, in a note to Mrs. Seifert, proposed that on that date they would let the men take them out to dinner.

On the day in question (March 18) a noon meeting was set up for Seifert, Mr. Mittelman and Mrs. Mittelman at the store, to discuss the plans for a jewelry development in the southern part of the state, Orange County. Mrs. Mittelman went out at noon and came back late for this appointment. After waiting to 1:30 p.m. Seifert said he had an appointment; he had to go, they would discuss and finish the business later on that evening. This meant, after 9 p.m. because Mittelmans never left the store until after closing.

Having arrived from a court reporter's school in San Francisco, Mrs. Seifert called her husband's office about 4:30 p.m. Later, he returned the call. She said they might have discussed a departure time, and what she should wear. She did not know the nature of the trip, whether it was to be strictly business or pleasure or both. She didn't know they were going to Half Moon Bay, only that they were going somewhere in the plane.

At 8 p.m., he called from the hospital, where he had taken a will for execution. Apparently she was advised the trip was going to be late, for she decided not to go along. She did not feel any necessity to cancel out with or to give her excuses to Mrs. Mittelman who had invited her; but left that to Mr. Seifert. Mrs. Seifert had never had any social contacts with Mrs. Mittelman alone.

Mr. Seifert sometime in the evening had called to the Princeton Inn at the Half Moon Bay Airport, and made a reservation for four, to arrive at from 10:30 to 11 p.m. Waitress Reed received the reservation. She and Maitre d' Salet testified Mittelmans and Seifert came in at 10:30 p.m., and they were still there at 1:50 a.m. Saturday, March 19, when the bright lights were turned on, preliminary to closing. The band had left at 1 a.m. The Mittelmans and Seifert came so late that there was a considerable delay in serving dinner, since the regular cook had already left. They did not dance; they said they were not there for dancing, that would await another time. They chatted with waitress Mannon during the evening. Mittelman identified himself and the Palo Alto business, Seifert stated he was the pilot of the plane, and Mittelman introduced Seifert as their attorney, and said "they had been out on business." This, of course, was not decisive as to whether or not it had been concluded.

Waitress Mannon testified that the Mittelmans and Seifert were serious the

whole time, Mrs. Mittelman didn't say over five words all evening; they seemed to be discussing business; they stopped their conversations abruptly whenever she approached; they had a typewritten paper before them which Seifert put in his pocket when she came around. Salet said (with the lights low) the tables were no place for reading, but that the parties talked all evening. Waitress Reed testified they were discussing business, jewelry business, and that Seifert did most of the talking. He did not wear glasses at any time. After the crash, there were papers blowing all about. Seifert's briefcase was never found. He had started to the office with it Friday morning. Among the few papers retrieved from the wreckage of the aircraft was a document describing the tax advantages of a business aircraft.

Defendant's expert witness Goetz testified that he sold Seifert both the Cherokee and the Apache planes. "About a month later [after purchase of the Cherokee] he came back in to see me and discussed the obvious advantage of a multi aircraft for the type of flying he was doing. And I in turn took the Cherokee back in trade on an Apache. Q. What type of flying was he doing? A. He was commuting between the Palo Alto and Orange County Airport, as near as I knew. It was my understanding he had an office in Santa Ana or some place close to Orange County."

The court's instruction concerning the "passenger," as opposed to the "guest" relationship correctly stated that there must be a "tangible benefit ... which is a motivating influence for furnishing the [rider's] transportation" flowing to the pilot. But this was followed by an instruction which specified that "a motivating influence" had to be "a chief inducement" for the transportation. This was prejudicial error, which alone would require reversal of the judgment, under the circumstances here.

The error was understandable, in view of the diverse statements found in the decisions before Bozanich v. Kenney.

Since this issue was submitted to the jury under an erroneous instruction, the general verdict cannot be deemed to support the judgment in respect to other issues, such as wilful misconduct, tort liability or damages.

There is no question that this excursion started out with a social motif; though it was not Seifert, as host, inviting the Mittelmans, but the converse. Perhaps the noontime business conference was to clear the decks; but it aborted, and was put over until later. It is arguable that the social excursion ended when Mrs. Seifert canceled out; and it is inferable that she may have been induced to do so, because the important business of the day still was to be resolved; and she never was included in any of Mittelmans' business discussions. Appellants' thesis

then is that according to their habitude, the Half Moon Bay dinner was a business conference, like so many held over the dinner table theretofore, and that the undisputed evidence shows that the benefit to Seifert, arising from the attorney_client relationship, was a sufficient motivating influence to render the Mittelmans "passengers" under the aviation guest statute.

But the defendant contends that the Princeton Inn gathering was solely social. The thesis is, that the business postponed at noon could have been completed at Seifert's office before the flight was made; (13) and despite the mention of their jewelry business at the Princeton Inn, it was not a motivating factor in the aerial flight. However weak the contention may seem, opposed by the strong evidence to the contrary, our appellate role demands that we hold the status of Mittelmans as passengers cannot be declared as a matter of law.

Death proximately resulting from intoxication of the airman removes the guest statute limitation. As an independent ground, plaintiff withdrew this issue from the case, but was entitled to and did urge the effect of alcoholic beverages, under the issue of wilful misconduct; and was entitled to an instruction relative thereto, had it been requested so as to avoid any confusion; here at least evident in the colloquies between court and plaintiffs' counsel on the subject. Wilful misconduct has been held to be established by evidence of driver fatigue when a driver had been awake continuously for 20 hours and consumption of a number of beers.

We turn to consideration of the issue of wilful misconduct.

III

Violations of any applicable aerial flight rules, state or federal, are considered only as they bear upon the existence of negligence or wilful misconduct. The declarations of Public Utilities Code sections 21404 and 21407 are to this effect.

As to any matter not covered by specific law or applicable regulation, the general law of negligence applies.

Violations of statutes or rules having the force of law when coupled with circumstances may constitute wilful misconduct.

"Wilful misconduct means intentional wrongful conduct, done either with knowledge that serious injury to the guest probably will result or with a wanton and reckless disregard of the possible results." Such knowledge, and wantonness and recklessness can be implied. The probability of serious injury or death is the

probability apparent to a person of ordinary prudence and intelligence. The fact that the defendant thought he was flying safely, and had no intention to cause an accident or to injure his rider does not of itself absolve a pilot from wilful misconduct.

In determining whether the pilot of a plane is guilty of wilful misconduct, his entire course of conduct is to be considered.

Therefore, we proceed to review that of Seifert as bearing upon the fatal 19th of March; with the rules applicable to such review in mind.

The testimony of experts of course if competent even though it embraces their opinions on the ultimate facts in issue (Evidence. Code, § 805). Their uncontradicted testimony upon matters of expert knowledge is conclusive. The circumstances do not permit a reasonable doubt that pilot Seifert was chargeable with wilful misconduct upon the occasion in question, proximately contributing to the death of the Mittelmans. The jury was not free to disregard such testimony, and it is proper to resolve the issue here as a matter of law.

The Mittelmans did not know how to fly. They relied upon Seifert's judgment in this, as in their business affairs. We concur in the views expressed by the trial judge that there was no substantial evidence that there was any contributory negligence or assumption of risk on their parts, and denial of instructions on these points was proper.

As an ensign, Seifert had been a licensed Navy pilot. His last flight with the Navy occurred on August 10, 1949. In February 1966, he was reissued a license to operate an aircraft by the Federal Aviation Agency based on his previous Navy license. He was not required to undergo any testing, examination or study to qualify for the license in 1966, except to secure the second class medical certificate.

The fatal catastrophe occurred some 37 days after he resumed flying. On February 10, he purchased a Piper Cherokee single_engine plane from Nystrom Aviation. A month later, 10 days before the crash, he traded this in for the twin_engine Piper Apache PA 23_150 for some \$16,000. As for twin_engine aircraft operation, Seifert in the Navy accumulated a total of 11.7 hours flying in a DC_3 twin_engine aircraft. His solo time in all aircraft was 189.4 hours. He flew as passenger, student, pilot or copilot during his naval career on all types of aircraft a total of 955.49 hours. Upon resuming flying in 1966, because of his intervening lack of flying experience for about 17 years, he was regarded by his instructors as a beginning pilot.

Defendant's expert Carney testified that qualification to fly naval aircraft years ago does not necessarily qualify one to operate civilian aircraft. Dr. Cutter testified one does not pick up where one left off original training. Also, in changing from a single_engine to a dual_engine aircraft, one must have additional training. In this process, Captain Adams stated he would be afraid a former DC_3 pilot would be careless, thinking the civilian aircraft is just a toy alongside the other.

Dr. Carney testified he ceased flying in 1948; that when he resumed flying in 1961, he was "rusty," had to go through the whole training process as if he had never flown before; that the new navigational facilities and instruments are the chief stumbling blocks, and that it took 10 to 15 hours before the Federal Aviation Authority (FAA) was satisfied with his performance with instruments. This followed renewal of basic flying proficiency regained in 10_15 hours. Carney was qualified for instrument flight. Dr. Carney stated that after Seifert resumed flying, "I cautioned him about the difference in the navigational system, principally, and that he should be certain to get his instrument rating." He testified as a defense expert that 14 hours of instruction was necessary for transition from a single_engined plane (like the Cherokee) to a twin_engined plane (like the Apache). So did defendant's expert Goetz.

As part of the consideration of the purchase of the plane, Seifert was offered 15 hours of free flight instruction time in the operation of the Apache twin_engine aircraft. This was deemed necessary for proper familiarization. As of March 11, he had received only a total of 5.3 of the 15 flight hours. Captain Adams, his instructor, was not satisfied with Seifert's performance. Some items relating to "Emergency procedures" were not checked off, probably because Adams thought he should have more time on those particular items. The list of such procedures applicable to the Apache plane is extensive, as shown in the flight manual. 14 Code of Federal Regulations section 91.6, provides in part, "(a) No person may operate a civil aircraft in a Category II operation unless ... (2) Each flight crewmember has adequate knowledge of and familiarity with, the aircraft and the procedures to be used by him." Instruction is required; mere time in the air does not give competency, stated Captain Adams.

14 Code of Federal Regulations section 91.34, provides no one shall operate a civil aircraft in this category unless a manual for the aircraft is carried and "(2) The operation is conducted in accord with the procedures, instructions, and limitations in that manual."

Captain Adams testified that as of the date of his last instruction, Seifert did not have sufficient flight proficiency to qualify him to carry passengers, either in

daytime or at night. Forty hours of flight time with the plane is requisite and fifty hours in urban areas. Seifert's last instruction was about one week before the accident. Adams indicated that although Seifert had accumulated a flight total of about 12 hours, both dual and solo in the twin_engine Apache between March 11 and the accident, in his opinion Seifert's flying ability would not have improved after the instruction given without further dual flying instruction.

Defense expert Goetz testified that he would accept Captain Adams' opinion on Seifert's competency as a pilot. The defense is bound thereby.

Seifert was not qualified for "instrument flight" under conditions of darkness or weather when visual flight was not safe.

On March 4, 11, 12 and 14, in 1966, Seifert entered in his private pilot's log actual instrument flying time while flying solo, although he was not an instrument rated pilot. Before such rating, defense witness Goetz stated it is not legal to fly without an accompanying pilot for safety, which regulation Seifert ignored. A pilot may not legally fly an aircraft under instrument flight rules without the rating. Instrument flying involves flying an aircraft solely by reference to the flight instruments without being able to see the ground or horizon and requires an extensive period of training of a minimum of 20 hours and a FAA check ride. To stay proficient, recurrent training of at least six hours every six months is required. Flying under instrument flight conditions by a person who is not instrument rated is a clear violation of the federal aviation regulation prohibiting such flights.¹⁴ In 1947, Seifert was denied certification for instrument navigation. Admittedly, he never thereafter received any certification at any time qualifying him for instrument navigation.

Although the precise weather conditions at ground level were in dispute, both plaintiffs' and defense experts agreed that any attempted crossing of the coast range under the existing weather by a non-instrument rated pilot presented extreme hazard.

Frank Silvestri, aviation expert, as an official licensed United States weather observer, made weather observations from the Half Moon Bay Airport for the Oakland Flight Service Center and the San Francisco International Airport for use by commercial and private pilots.

Silvestri made several entries of his weather observations in his log on Friday, March 18, commencing at one o'clock in the afternoon when the weather was clear with 15 miles' visibility. His entries for the afternoon at 4 p.m. showed steadily deteriorating weather conditions going from clear to broken clouds, visibility reduced to 7 miles; at 8 p.m. there was an estimated ceiling of 600 feet,

overcast with a visibility of 3 miles in light rain and a barometer fallen from 30.11 at 1 p.m. to 29.94. At 10:30 p.m. the estimated ceiling was 400 feet, overcast, 1 mile visibility, light rain, fog, barometer 29.94. As of 2 a.m. on March 19, approximately the time of the crash, he stated it probably would have been about the same, but could have gone either way.

About 9 p.m. on the evening of March 18, Silvestri left the airport and went over to the Princeton Inn for dinner. It was about 200 yards from the airplane tie down area to the inn. While there, the cocktail waitress pointed out a party of three persons who had flown in for dinner and identified Seifert as the pilot. They complained about the muddy conditions encountered when they walked from their plane to the inn. Silvestri returned to his airport office about 10:30 p.m., made his final weather observation as noted above. Because of prior private plane accidents at Half Moon Bay, he was in the habit of recording weather observations whenever he saw a plane on the airport runway and conditions were such as to suggest that an accident might occur. He did not say anything to Seifert and party about their complaint of mud on the airport or respecting weather flight conditions. He did not hear them take off nor had he seen them arrive. His written statement to the Civil Aeronautics Board was placed in evidence.

In reference to the fog, Silvestri's testimony was that the fog was solid, that he could not see the bases of the hills, which were all bathed in fog and that he could see 400 feet from the bases. He did not believe anyone would have attempted to come into the airport on March 18, even on instruments, from 9:30 to 10:30 p.m. He could not see how a man in his right mind could make an approach from above the clouds under visual flight regulation, he probably would be killed.

But Seifert did come in, and since he came in, this was argued as evidence he was able to get out. Expert Captain Adams testified that if there was a 400_900 foot ceiling, some drizzle and some wind, the chances are that Seifert would run into trouble as soon as he left the ground; and as soon as he progressed out of the takeoff path, as soon as he lost sight of the lights, or entered into a cloud, he would be in trouble.

The Half Moon Bay Airport does not have a control tower and is off a regular airway. It is subject to the visual flight rules (VFR), a specific set of rules for pilots who are not instrument rated, who must fly visually, with a requirement that the sky be clear of clouds and horizontal visibility of one mile before any takeoff. Therefore, it would be legal (although not good judgment) for a pilot to take off with a 400_ foot ceiling if there is a mile of horizontal visibility.

Expert Cutter said that 1,000_ foot ceiling was the minimum, and so did

defense expert Goetz who stated visibility should be three miles. A non-instrument-rated pilot could not legally fly over to Palo Alto even with a 1,000-foot ceiling. A prudent pilot would not attempt to take off under such circumstances, said Silvestri. Expert Cutter said a pilot who attempted to go from Half Moon Bay to Palo Alto with a 1,100-foot ceiling could not make this flight without penetrating clouds; if not instrument-rated, but O.K. in all other factors, his chances of losing control and crashing still would be practically 100 percent.

Defendant's expert Carney testified he wouldn't recommend that anyone without instrument training fly into a cloud; that he had flown into clouds unexpectedly and was glad he was instrument trained. Dr. Carney asserted that with an 1,100-foot ceiling, three miles visibility, light rain, one could safely fly avoiding clouds; but did not state one could safely fly above the 1,100-foot level, en route to Palo Alto.

At the approximately possible times of the accident, a cold weather front had moved into the San Francisco-Half Moon Bay area. Based on the weather observations of Moffett Field and San Jose, introduced into evidence by the defendant, expert Cutter testified that the clouds would have been up against the mountain ranges on the ocean side of the peninsula. Accordingly, it would have been impossible to fly from the Half Moon Bay Airport to the Palo Alto Airport without entering those clouds. Expert Silvestri testified no non-instrument-rated person should fly an Apache in frontal weather. Concededly, Seifert was not so rated. In fact, he had been denied such a rating before he left the service.

Failure to make required weather check.

Pursuant to 14 Code of Federal Regulations section 91.5, it is mandatory that a pilot familiarize himself with all available information concerning the flight, including available weather reports and forecasts prior to either an instrument flight or a flight in the vicinity of the airport. The flight from Half Moon Bay to Palo Alto was subject to Regulation 91.5. The customary procedure for compliance while on the ground at Half Moon Bay Airport is by telephone to the FAA Oakland Flight Service Center, as it is not possible to receive radio communication from local sources that would contain the latest information covering passage throughout the intended flight.

Seifert did not make any such telephone call from Princeton Inn, and the flight center had no record of any such call. The flight service would not give the specific Half Moon Bay weather condition, but would cover other points involved in such a flight. But if instrument flight was indicated, it would take control of the airplane movement. There is a Woodside station which could not be heard by radio

unless the plane was up 1,100 feet.

Flight pattern for takeoff.

It is provided by 14 Code of Federal Regulations section 91.89, "Each person operating an aircraft to or from an airport without an operating control tower shall ... (3) In the case of an aircraft departing the airport, comply with any FAA traffic pattern for that airport."

Reference has been made to the FAA flight pattern established for the Half Moon Bay Airport, wherein the pilot after attaining 800 feet altitude was to make a right turn. The crash occurred in the attitude of the right turn at an altitude of 100_120 feet above sea level, as shown by the map exhibits, close to the end of the airport runway. An inference of negligence arises. Mr. Preuss' observation placed the banking plane twice as high as the adjacent trees, elevation about 150 feet, slowly gaining altitude. Inspection of the map shows that the adjacent terrain would have been cleared on a right turn had the requisite altitude been obtained. According to defense witness Hadding, the plane previously landed on the airstrip, bouncing, the last time at a speed too fast to land, and started its turn east to the hills.

If the crash did not occur from a turn at too low an altitude, then from Preuss' testimony, the plane entered a cloud at low altitude, and the expert hypothesis is that there was loss of control from spatial disorientation, as both plaintiffs' and defendant's experts described it. Both could have happened together. The site of the crash was close to the end of the airport runway.

Absence of required takeoffs and landings at night, before carrying passengers.

Under 14 Code of Federal Regulations section 61.47, subdivision (b), and as testified by defense witness Goetz, a pilot to be qualified to carry passengers on night flights, must (without passengers) have five takeoffs and landings to a full stop at night within the preceding 90 days, in an aircraft of the same type and category. Seifert did not comply with this prior to the fatal trip. He previously had returned in flight with Mrs. Seifert from the Nut Tree without such previous compliance, after dark.

It was reckless misconduct for one in Seifert's physical condition and fatigue to attempt a flight at night with passengers in a multi_engined airplane.

(a) As applied to a pilot, the testimony confirmed the obvious fact that fatigue reduces alertness and coordination, though its effect is relative.

On the morning of March 18, Seifert began his day around 7 a.m. and was active and busy running around throughout the day. If the accident occurred March 19, about 2:50 a.m., the time shown on the aircraft clock, he would have been awake and active for approximately 19_21 hours.

Seifert's personal physician, Dr. W. R. Carney, who testified for the defense, stated that Seifert, height 5 feet 8 inches, weighing about 250 pounds, was about 90 pounds overweight. This condition put a tremendous load on his heart and arteries and caused shortness of breath. The overweight condition also slowed him down and caused him to become more easily fatigued.

Dr. Carney gave as his expert opinion that a person with Seifert's physical condition under the circumstances disclosed here would be extremely tired so that a takeoff at night in a multi_engine aircraft would be risky and dangerous.

Dr. A. W. Cutter, expert pilot, specialist in aviation medicine and senior FAA medical examiner, testified that a large individual awake for 19_20 hours would have a fairly high degree of fatigue. Drink and a meal (Seifert had both at the Princeton Inn) would add to it. A pilot shouldn't eat a heavy meal. A cold would add to fatigue. If one is awake for 20_21 hours, reaction time is markedly prolonged, from half again to twice as long. There is deterioration of judgment; an inability to think clearly, a likelihood of spatial disorientation and of developing vertigo.

The regulation, 14 Code of Federal regulations section 61.45, provides: "No person may act as a pilot in command ... while he has a known physical deficiency, or increase of known physical deficiency, that would make him unable to meet the physical requirements for his current medical certificate."

Seifert held a second class medical certificate, which required that he be free from any "disease or malformation of the nose or throat that might interfere with, or be aggravated by, flying."

FAA examiner Dr. Cutter testified that the presence of a cold and symptoms was disqualifying under these provisions, requiring, for instance, the grounding of airline pilots until complete recovery. It seems undisputed that down to the fatal morn, Seifert was still experiencing the end effects of a cold. Defendant Mrs. Seifert testified he had his cold, and still was coughing; earlier in the week she asked him not to go to work but "he was too busy to stay in bed." He had a very bad cold and was out a couple of days. He called into the office to say he was sick on the 10th or 11th. Mrs. Natalie Modro, his secretary, testified he talked about his cold a lot all week, he mentioned that it was very bad and he made a big thing out

of it. On March 11, he was flying in spite of his cold. He coughed, sounding like a cow. He said he was taking something for the cold, the doctor was giving him pills for it. She was surprised he was flying with a cold, because one is not supposed to fly with a cold. Mrs. Modro testified that on March 18, he still complained of his cold.

The Monday after the crash Mrs. Modro found a bottle of light-colored pills, a couple of inches tall, half-empty, in his desk. She had never noticed any other medication around the office at any time. It was labeled "Dexa-something," a Santa Ana prescription by Dr. Charles W. Jefferies, whom Seifert had visited the previous weekend. Dr. Jefferies deposed that he might have given Seifert some antihistamines but he denied knowledge of the Dexa-prescription.

Dr. W. R. Carney, Seifert's personal physician, and defense witness, testified that he would proceed with caution in flying with antihistamines; they are within the FAA prohibition of drug use by pilots.¹⁵ Antihistamines might induce drowsiness or mental confusion. Dexedrine and Dexamyl were testified to be antihistamines, but the bottle was not in evidence, and hence the precise drug therein was not identified. Dr. Carney deposed that Dexedrine was used for weight reduction, that it could produce euphoria, impairment of judgment; and temporarily could lessen the sense of fatigue; the rise in blood pressure could have minor effects on the pupil of the eye; and when the effect wears off, results in the sensation of greater fatigue and depression, and would affect a pilot in the area of judgment.

Dr. Cutter stated that the drug effect was such that even after Dristan, a pilot should not fly for 8-12 hours. Antihistamines produce drowsiness in some people and overstimulate others, stated Dr. Carney. Seifert's secretary stated that on March 18, Seifert acted "all revved up," more than usually active, and nervous.

Antecedent use of alcoholic beverages .

Tests made by the coroner's office indicated that at the time of the accident, Seifert's tissue fluid had an average reading of .03 percent ethyl alcohol. In the opinion of the autopsy surgeon, Dr. Arthur Roy Lack, such percentage derived from tissue would be only 70 to 75 percent of that which would have been present in the blood had it been possible to test it; or .042 or .04.

The toxicologist, James W. Brackett, Jr., defense witness, testified that a person having the amount of blood alcohol found in the test of Seifert's tissues would be "under the influence" to the extent he might feel a glow, or feel gay, or feel depressed, or feel moody or something like that. There was testimony showing Seifert kept and occasionally consumed liquor in his office; as well as that

relating to the drinks at dinner in the Princeton Inn.

FAA Regulation 14 Code of Federal Regulations section 91.11, subdivision (a), subsection (1), forbids anyone to act as crewman of a civil aircraft while under the influence of intoxicating liquor. California Public Utilities Code section 21407.5, also provides: "It is unlawful for any person to operate an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor or narcotics."

Experts of both parties, Captain Adams and Dr. Carney, testified that the consumption of any alcohol within a 24_hour period prior to a flight impairs the pilot's ability to handle the aircraft. Upon trial, the plaintiffs abandoned any contention that one who had consumed liquor to the extent the tests indicated was "intoxicated" as that word is used in the guest statute; but correctly maintained that this did not preclude one from being "under the influence of intoxicating liquor."

The Supreme Court in Williams v. Carr, held that wilful misconduct could be established by evidence of driver fatigue and consumption of beer. The use of intoxicants is one factor in wilful misconduct.

Upon careful consideration, we now hold that "intoxication" as used in the aviation guest statute, Public Utilities Code section 21406, is, by section 21407 of that code, to be defined in pari materia with 14 Code of Federal Regulations section 91.11, subdivision (a), subsection (1), as meaning "Under the influence of intoxicating liquor." If this is more restrictive than the application of the word "intoxication" under the automobile guest statute (Vehicle Code section 17158) it is impelled by the paramount federal regulation, 14 Code of Federal Regulations section 91.11, and justified by the special hazards of private aerial navigation. Expert testimony established that the use of any alcohol or drugs such as antihistamines affects coordination and reaction time and is forbidden by the regulations as a safety measure. Any use of alcoholic beverages within 12 hours of flight time is within the prohibition of 14 Code of Federal Regulations section 91.11, as administratively interpreted. Airlines have a 24_hour restriction.

Failure to wear glasses, as required.

Seifert's medical certificate required him to wear corrective glasses while exercising the privileges of his pilot's license. He did not wear glasses during instruction. The coroner picked up a clear pair of glasses, with broken lenses, still in their case, at the scene of the crash, and listed them in the property held by his office. They disappeared before the trial. No other glasses were found. There was no evidence of any contact lenses found on or about the remains. Smith, store

manager, testified Seifert never wore glasses. There was considerable testimony that at his office on the day of the crash, and when Seifert was at, and when he left the Princeton Inn for the fatal flight, he was not wearing glasses. There was none that he did. This direct evidence is not rebutted by testimony he had once tried contact lenses; and that he had habitually worn his glasses of which he had had many pairs at home, in view of the eyewitness testimony as to 18_19 March.

Wilful and wanton character of Seifert's conduct .

Both plaintiffs and defense experts testified that one with Seifert's naval aviation training would have been instructed in, and would fully appreciate the risks undertaken for his own safety and that of his passengers in flying in his state of training and physical condition and in adverse weather in the nighttime.

Since the flight record book shows his own entries of flight and flight time, it seems clear that Seifert's deficiencies of training and performance were well known to himself, but he persisted in flying the plane with passengers under such circumstances. His intent and wilfulness may be implied.

A reasonable pilot under the same circumstances would be aware of the dangerous character of Seifert's course of conduct. Seifert's course of conduct was with a wanton and reckless disregard of the possible results. Statutory violations coupled with the other circumstances are sufficient to establish wilful misconduct.

Seifert illegally logged "instrument flight time" (flying solo) when he was required for safety to have flown dual, prior to qualification. This was stated by expert Captain Adams to show Seifert's bad flying habits. Though minimal, he flew after drinking. He previously flew while suffering the peak of a disqualifying cold. He flew passengers after dark before accomplishing the necessary practice landings and take_offs. The disposition to disregard such safety regulations adequately appears.

The conclusion seems inescapable that Seifert's rash and wanton self_confidence brought him and his passengers to death. The Mittelmanns did not know how to fly. Not being experienced pilots, they would not be able to appreciate the risks involved. They relied upon Seifert's judgment in this, as in their business affairs. We concur in the views expressed by the trial judge that there was no substantial evidence that there was any contributory negligence or assumption of risk on their parts, and denial of instructions on these points was proper.

We therefore hold that under the terms of the aviation guest statute and the

established criteria, that Seifert was chargeable with wilful misconduct, as a matter of law.

IV

If the aggregate of circumstances did not cumulatively establish wilful misconduct, still the doctrine of *res ipsa loquitur* applies. The applicable conditions for applying the doctrine here were met. An inference of negligence arose, imposing upon the defendant the obligation of going forward to rebut the inference, by (1) a satisfactory explanation of cause of the accident, in which no element of negligence of Seifert inhered; or (2) such case in all possible respects which would necessarily lead to the conclusion that the accident could not have happened from want of care, but was due to some unpreventable cause, though the exact cause is unknown. Such rebuttal must be by substantial evidence appealing to a fair and reasonable mind. The explanation must offer a definite cause for the accident in which the pilot's negligence does not inhere apart from mere speculation or conjectural evidence. (13) "Where [as here] the *res ipsa loquitur* inference is properly drawn, an appellate court will set aside a defense verdict if there is no substantial evidence to rebut the inference." Evidence of specific negligent acts or omissions does not deprive the plaintiffs of the benefit of the inference, so long as they do not rebut the inference, i.e., as long as the *res ipsa loquitur* inference still may be drawn. The inference of negligence raised by *res ipsa loquitur* may coexist with presumptions of negligence arising from evidence of Seifert's violation of regulations which have the force of law. The defendant had the burden of showing that what Seifert did might have been expected of a person of ordinary prudence, who desired to comply with the law.

Under these tests, defendant has not rebutted the inference of negligence arising under *res ipsa loquitur* nor the presumptions of negligence arising from violation of the FAA regulations; but in considerable degree, defendant's own witnesses established such negligence.

In order to meet the charge of wilful misconduct defendant's position was, that resolving all conflicts in Seifert's favor, pilot Seifert exercising ordinary care, under visual flight regulations, not under instrument flight regulations, could have safely flown over the mountains to Palo Alto; despite deficiencies in training, despite his physical, fatigued condition, despite the night, despite the weather, and despite any violation of FAA regulations.

The sad fact, is, that he did not. The inference is fully supported.

V

Thus, we conclude that the inference of negligence under the doctrine of res ipsa loquitur was not rebutted; and that the undisputed evidence of the expert witnesses for defendant, and for the plaintiffs, reinforce the inference; and if contrary to our conclusion the evidence did not establish wilful misconduct as a matter of law, there is no substantial evidence to support a verdict that Seifert's negligence was not a proximate cause of the death of himself and his passengers.

The trial court erred in denying appellants' motion for a directed verdict on the issue of liability, and for judgment as to liability notwithstanding the verdict.

The judgment is reversed, with directions to the trial court to enter its minute order establishing defendant's liability, and thereafter, to proceed to try the remaining issue of damages, instructing the jury accordingly.

Shoemaker, P. J., concurred.

USAIR INC. v. U.S. DEPT. OF NAVY
14 F.3d 1410 (9th Cir. 1994)

A Navy employee's briefcase fell from an airplane's overhead storage compartment when a flight attendant opened it, hitting a passenger on the head. The passenger sued USAir in state court and recovered. USAir now appeals from a district court decision denying it indemnity and/or contribution under the Federal Tort Claims Act against the United States Department of the Navy.

FACTS AND PROCEDURAL BACKGROUND

On October 26, 1984, in San Diego, California, Stephen Zodrow, a civilian employee of the Department of the Navy, boarded Pacific Southwest Airlines ("PSA") Flight 535 to San Francisco. Zodrow's travel was within the scope of his Navy employment. He was one of the last passengers to board, with three carry-on items. He put two of them in an overhead compartment, wrapping a garment bag around his briefcase. He stated that the briefcase "probably was unstable" when he closed the overhead bin door. No flight attendant helped Zodrow stow his baggage.

Prior to takeoff, a PSA flight attendant walked down the aisle, looking for a bin with space to stow a bag. She opened the bin containing Zodrow's items, using one hand. His briefcase fell out, hitting passenger Natan Huffman on the head.

Although the flight attendant remembered that she was looking toward the bin, Huffman testified that she never faced it and Zodrow stated that she was looking toward the front of the plane.

Huffman sustained a concussion and cervical disc injuries, incurring \$92,700 in medical expenses.

Huffman and his wife sued USAir, successor by merger to PSA, in San Diego County Superior Court. A jury found USAir liable, and USAir settled with Huffman and his wife for \$550,000. USAir then brought this action in the federal district court against the United States Department of the Navy for indemnity and/or contribution under the Federal Tort Claims Act, 28 U.S.C. 2671-2680 (1988). USAir asked for \$712,179.85: the \$550,000 it paid Huffman plus USAir's legal fees of \$162,179.85 for defending the state court action.

The district court heard oral argument but the parties presented no witnesses or evidence. Based on stipulated facts, the court found that Zodrow did not act negligently, and that even if he did, USAir's negligence superseded his negligence. The court ruled in favor of the Department of the Navy.

DISCUSSION

This court reviews de novo a district court's finding of a duty of care. Vollendorff v. United States, 951 F.2d 215, 217 (9th Cir. 1991). We review its finding of breach and proximate cause for clear error. *Id.*

This is an exception to the general rule that mixed questions of law and fact are reviewed de novo. A finding of negligence requires testing particular facts against a standard of conduct. The existence and extent of the standard of conduct are questions of law, reviewable de novo, but issues of breach and proximate cause are questions of fact, reviewable for clear error.

Id. (citations omitted).

Suits brought under the Federal Tort Claims Act are to be decided "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b) (1988). Accordingly, California tort law applies.

I. Negligence

In order to establish negligence under California law, a plaintiff must show that the defendant had a legal duty to use due care, that the defendant breached that duty, and that the breach was a legal or proximate cause of plaintiff's injury. Ting v. United States, 927 F.2d 1504, 1513 (9th Cir. 1991).

In general, an individual owes to others a duty of ordinary or reasonable

care, "care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence." Maddox v. City of Los Angeles, 792 F.2d 1408, 1416 n. 2 (9th Cir. 1986). "[A]ll persons owe a duty of care to avoid injury to others unless public policy clearly requires that an exception be made." Lipson v. Superior Court, 31 Cal.3d 362, 182 Cal.Rptr. 629, 636, 644 P.2d 822, 829 (1982). Zodrow thus had a duty of ordinary care. There is no public policy reason to exempt Zodrow from his duty to avoid injury to the other passengers by stowing his luggage in the overhead compartment properly.

We next must determine whether the district court clearly erred in finding that Zodrow was not negligent. Whether Zodrow breached his duty of care to other passengers, and thus was negligent, hinges largely on Stipulated Fact 55: "Zodrow was aware the briefcase probably was unstable in the bin." This statement indicates that Zodrow stowed the briefcase precariously. The district court found that this was not negligent because the airline failed to assist Zodrow in stowing his luggage, and because Zodrow reasonably could rely on a flight attendant to correct any imbalance in the compartment. Yet Zodrow easily could have avoided any possibility of injury by summoning a flight attendant, or simply by attempting to stabilize his briefcase before closing the bin. He sought no assistance, nor is there any indication that he made an effort to stow the briefcase more safely. Regardless of whether he sought or received assistance, he had a duty to use care in placing his luggage, and he breached that duty. We hold that the district court clearly erred in finding that Zodrow was not negligent.

II. Superseding Cause

The district court also held that even if Zodrow had acted negligently, the flight attendant's actions were so unforeseeable and so negligent that they were a superseding cause of Huffman's injuries, cutting off Zodrow's liability. We must determine whether the district court clearly erred in holding that the flight attendant's actions were a superseding cause.

To recover damages for negligence a plaintiff must prove that the defendant's conduct was a proximate or legal cause of his injuries. Causation in fact is one necessary element of proximate cause. Maupin v. Widling, 192 Cal.App.3d 568, 237 Cal.Rptr. 521, 524 (Ct.App. 1987). Zodrow's actions were clearly a cause-in-fact of Huffman's injuries, as his placement of the briefcase in the overhead compartment was a necessary antecedent to its falling out and striking Huffman. See *id.* (causation in fact asks whether negligent conduct was necessary antecedent to the injury without which the injury would not have occurred).

The "larger, more abstract question" is whether Zodrow's actions were a

proximate cause, that is, whether he should be held liable for negligently causing Huffman's injuries. *Id.* If the flight attendant's actions were a superseding cause that cut off Zodrow's liability, Zodrow's placement of his briefcase was not a proximate cause of the accident, and he should not be held liable for his negligence. *Id.* See also White v. Roper, 901 F.2d 1501, 1506 (9th Cir. 1990).

California has adopted sections 442-453 of the Restatement of Torts, which define when an intervening act constitutes a superseding cause. Ewart v. Southern Cal. Gas Co., 237 Cal.App.2d 163, 46 Cal.Rptr. 631, 635 (1965). The Restatement defines a superseding cause as "an act of a third person . . . which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement (Second) of Torts 440 (1965). A superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct. Earp v. Nobmann, 122 Cal.App.3d 270, 175 Cal.Rptr. 767, 780 (1981). Moreover, even if the intervening act is negligent, it is not a superseding cause if the first actor should have known that a third person might so act. See Restatement (Second) of Torts 447(a); Earp, 175 Cal.Rptr. at 780.

The Tenth Circuit, applying Restatement principles, found no superseding cause in a case with facts similar to those before us. In Sutton v. Anderson, Clayton & Co., 448 F.2d 293 (10th Cir. 1971), the defendant company improperly loaded bales of cotton into a box-car, failing to provide barricades to prevent the bales from falling out when the door was opened. An employee of the mattress company where the cotton was shipped tried and failed to open the door, and enlisted the help of a forklift operator. The door opened suddenly and a bale of cotton fell out, killing the employee. *Id.* at 294.

On appeal, the company contended that the forklift operator's negligence was a superseding cause of the death. The court of appeals disagreed, holding that the forklift operator's actions were "a normal consequence of a situation created by the defendant's antecedent negligence which continued up to the very moment the cotton bale tumbled out of the railroad car." *Id.* at 296. Under Restatement 447(a), the defendant should have foreseen that loose cotton bales would jam against the door, the someone would try to force the door open, and that a cotton bale would fall out. *Id.* at 297.

The same reasoning is persuasive here. When Zodrow stowed his briefcase in what he admitted was an unstable position, he should have foreseen that it might fall out. The likelihood that someone subsequently would open the overhead compartment was not only foreseeable but inevitable. That someone might do so negligently, causing the unstable luggage to fall out, was a normal consequence of

Zodrow's earlier negligence. See Restatement (Second) of Torts 443. The negligent intervening act was not a superseding cause because Zodrow, at the time of his negligent conduct, should have realized that a third person, whether or not a flight attendant, might open the bin and cause the luggage to fall. See *id.* at 447.

Our analysis is not affected by USAir's status as a common carrier. Common carriers "owe their passengers a duty of utmost care and the vigilance of a very cautious person. Common carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under the . . . circumstances." Orr v. Pacific Southwest Airlines, 208 Cal.App.3d 1467, 257 Cal.Rptr. 18, 20 (1989) (quoting Acosta v. Southern Cal. Rapid Transit Dist., 2 Cal.3d 19, 84 Cal.Rptr. 184, 187, 465 P.2d 72 (Ct.App. 1970)). USAir suggests that this duty had not begun when the accident occurred because the airplane had not taken off. We reject this claim. USAir's duty to its passengers was in force when Huffman went to the site of departure and USAir accepted him as a traveller. Squaw Valley Ski Corp. v. Superior Court, 2 Cal.App. 4th 1499, 3 Cal.Rptr.2d 897, 901-02 (1992), (quoting Orr, 257 Cal.Rptr. at 21). The flight attendant's actions breached the common carrier's duty of utmost care, and were also in violation of USAir's written policy regarding the duty to secure overhead luggage, as recorded in the flight attendant manual.

Nevertheless, because the probability that someone would open the overhead compartment was one of the hazards that made Zodrow's storage of the briefcase negligent, it does not matter whether the attendant's actions were "negligent, intentionally tortious, or even criminal." Earp, 175 Cal.Rptr. at 780. The degree of her negligence may affect the airline's degree of liability, but it does not entirely exonerate Zodrow.

Brosnahan v. Western Air Lines Inc., 892 F.2d 730 (8th Cir. 1989), cited at length by the Department of the Navy, does not recommend a different result. A passenger struggling to stow his carry-on luggage in an overhead compartment dropped the bag on Brosnahan's head. In the district court, a jury found the airline liable. The district judge granted Western's motion for judgment notwithstanding the verdict, ruling that its negligence in failing adequately to supervise the boarding process was not a proximate cause of Brosnahan's injuries. *Id.* at 732. Reviewing the evidence in the light most favorable to Brosnahan, the court of appeals found there was evidence in the record upon which a jury could find that the airline's negligence caused Brosnahan's injuries. *Id.* at 733-34.

Brosnahan's analysis does not relieve Zodrow of liability. The Brosnahan court found that the act of the passenger (who was not a party to the suit) was not a superseding cause relieving the negligent airline from liability. *Id.* at 733-734 n. 3. Although the positions of the parties are reversed in this case, the same analysis

leads to a conclusion that USAir's negligence did not exonerate Zodrow. The case before us is one of concurrent or contributory causation, where both wrongful acts were necessary conditions of the harm. See Douppnik v. General Motors Corp., 225 Cal.App.3d 849, 275 Cal.Rptr. 715, 725 (1990). That there was more than one proximate or legal cause of the accident is important only for the district court's apportionment of damages. See *id.*, 275 Cal. Rptr. at 725-26.

The flight attendant's negligence thus does not excuse Zodrow from liability, and the district court clearly erred in finding that it was a superseding cause.

CONCLUSION

We hold that the district court clearly erred in finding that Zodrow was not negligent and that USAir's actions were a superseding cause of Huffman's injuries. In finding that the Navy cannot entirely escape liability for the negligence of its employee, we do not diminish the responsibility of USAir for its flight attendant's negligent act.

We remand this case to the district court for an apportionment of damages between USAir and the Department of the Navy as concurrent causes of Huffman's injury, keeping in mind USAir's elevated standard of care.

REVERSED AND REMANDED.