

CHAPTER FIVE PILOT, OWNER & BAILMENT

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"I would like to die in my sleep like my father did, not in screaming terror, like his passengers..."

Pilots

The duty of care of a reasonable person applies to an aircraft pilot not carrying passengers for hire. Under federal regulations, the pilot in command is directly responsible for, and the final authority as to, the operation of the aircraft. Fagerquist v Western Sun Aviation, Inc. (1987, 4th Dist) 191 Cal App 3d 709, 236 Cal Rptr 633

A pilot operating under visual flight rules has a duty to safely operate and navigate the aircraft and to provide separation from obstructions, and a continuing duty to be aware of location and the elevation of terrain over which the pilot is flying. McDaniel v United States (1982, ND Cal) 553 F Supp 910 (applying California law) It is negligence for an airplane pilot, for example, to fail to yield a right_of_way when required, to ignore weather information, or to disregard obvious unsafe conditions. Spaulding v United States (1972, CA9 Cal) 455 F2d 222 The pilot of a small craft landing at a large airport during a busy time of day, rather than the air traffic controller, may be held liable for a crash caused by wake turbulence, depending on the facts of the case. See, for example, Richardson v United States (1974, ND Cal) 372 F Supp 921 (pilot negligence proximately caused crash)

Both the airplane operator and the landowner who hires a cropduster can be liable for negligence that damages a neighbor's property. Cropdusters must use due care to perform the operation under conditions that will not cause injury to others. Parks v Atwood Crop Dusters, Inc. (1953) 118 Cal App 2d 368, 257 P2d 653

Pilots are liable for accidents on the ground as well as in the air. See, for example, Johnson v Central Aviation Corp. (1951) 103 Cal App 2d 102 (student pilot was held liable for negligent crash while taxiing)

A bailee of an airplane has a duty to exercise ordinary care to prevent damage to it and is liable for any injury to the plane resulting from failure to exercise due care. Odle v Dunbar (1954) 129 Cal App 2d 466, 277 P2d 418. People who can be liable for damage to an airplane in their possession include:

- (1) The operator of a hanger where planes are left for storage or repair. Downey v Martin Aircraft Service, Inc. (1950) 96 Cal App 2d 94, 214 P2d 581.
- (2) The renter of an airplane. Hall v Osell (1951) 102 Cal App 2d 849, 228 P2d 293
- (3) A student pilot. Ambassador Airways, Inc. v Frank (1932) 124 Cal App 56, 12 P2d 127.
- (4) The owner of property where a forced landing occurs, if the landowner refuses to permit the removal of the airplane until damages are paid. Gordon H. Ball, Inc. v Parreira (1963, 5th Dist) 214 Cal App 2d 697, 29 Cal Rptr 679

Owners

Every owner of an aircraft is vicariously liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft by any person using or operating the aircraft with the owner's express or implied permission. Pub Util C §21404. An owner can be liable:

- (1) Under **vicarious liability** for negligence of a pilot, up to statutory limits Nachsin v De La Bretonne (1971, 4th Dist) 17 Cal App 3d 637, 95 Cal Rptr 227 (vicarious liability); see also Boyd v White (1954) 128 Cal App 2d 641, 276 P2d 92 (plane rental did not make owner liable for ground damage by renter's student); for discussion of statutory limits on liability,
- (2) On a theory of **negligent entrustment** Johnson v Central Aviation Corp. (1951) 103 Cal App 2d 102, 229 P2d 114
- (3) Under the theory of **nondelegable duty** for the negligent maintenance of an aircraft by an agent see Maloney v Rath (1968) 69 Cal 2d 442, 71 Cal Rptr 897, 445 P2d 513, 40 ALR3d 1 (automobile brake failure)
- (4) Under **statute**, such as for damages caused by a forced landing Pub Util C §21403(a)

The owner can be held liable directly for failure to provide an airworthy aircraft under the applicable federal regulations.

It is arguable that an owner has a duty to review the pilot's certificate, log book, and medical certificate to make sure that the pilot is qualified for the proposed flight. In addition, the owner's insurance policy may require a rental pilot to be checked out on that particular plane. The pilot's deficiencies may invalidate insurance coverage.

While ownership of an aircraft is determined under California statutes, the common law governing ownership of chattels, and ordinary contract law, the FAA maintains the exclusive means of registering title to, and claims upon, aircraft. Filing with the FAA provides constructive notice (Note: this means that the law implies that you know about competing ownership claims, whether you actually do or not.) to all persons that you claim an interest in the aircraft. Cummins v Sky Cruisers, Inc. (1976, 2nd Dist) 59 Cal App 3d 983, 130 Cal Rptr 897 (sale and leaseback of plane)

Where security interests in aircraft are involved, the federal aircraft title recordation statute (49 U.S.C., §1403) preempts inconsistent state law. In Dowell v. Beech Acceptance Corp., plaintiff purchased a new airplane in the ordinary course of business from an authorized

dealer. Unknown to plaintiff, the plane had been delivered to the dealer pursuant to a conditional sales contract with the distributor prohibiting sale without the distributor's consent. The distributor's assignee filed the conditional sales contract and assignment with the Federal Aviation Administration prior to plaintiff's purchase. Held, judgment awarding plane and damages to plaintiff reversed. If state law had applied, plaintiff, as a buyer in the ordinary course of business, would have prevailed, since he had no knowledge of the security agreement violated by the sale to him. But under the controlling federal law, the secured party had a superior interest to the extent of his investment. The court declared that the federal act "provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft titles and to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated and subsequent purchasers in California will cavalierly decline to investigate title so as to avoid 'actual notice' under Commercial Code section 9307." International Atlas Services v. Twentieth Century Aircraft Co. (1967) 251 C.A.2d 434, 440, 59 C.R. 495, supra, §55.)

The owner's identity can be determined from the aircraft's registration with the Federal Aviation Administration (FAA). A purchaser of an aircraft must check the "chain of title" by obtaining a "title report" from the FAA through one of the many private title services. Any purchaser of an aircraft is deemed to have checked the current title.

Bailment

An owner, bailee of an owner, or personal representative of a decedent is not liable for punitive damages imposed on the operator of the aircraft, but can be liable for punitive damages for his or her own wrongful conduct. Pub Util C §21404.1(b).

A written contract can limit a bailee's liability for negligent damage to an aircraft. Ambassador Airways, Inc. v Frank (1932) 124 Cal App 56, 12 P2d 127 (exclusion of damages for loss of use); Talei v Pan American World Airways (1982, 2nd Dist) 132 Cal App 3d 904, 183 Cal Rptr 532 (notice of claim limit in shipping contract). However, such so-called "exculpatory contracts" are disfavored and strictly construed against the party seeking to be released.

A bailee who is unable to redeliver a plane to its owner in the same condition must not only show that the plane was lost, stolen, or destroyed, but go further and show that the loss occurred without negligence on the bailee's part. Downey v Martin Aircraft Service, Inc. (1950) 96 Cal App 2d 94, 214 P2d 581.

Care Required .

A bailee for hire is not an insurer of the safety of the goods. He must use ordinary care, i.e., such care as an ordinarily prudent person exercises with respect to his own property of a similar description. The standard varies, of course, with the time and place, and is influenced by the custom and usage of business.

In Boyd v. White, (1954) 128 C.A.2d 641, 651, 276 P.2d 92, the court approved the modern rule: "Properly handled by a competent pilot exercising reasonable care, an airplane is not an inherently dangerous instrument, so that in the absence of statute the ordinary rules of negligence control, and the owner (or operator) of an airship is only liable for injury inflicted

upon another when such damage is caused by a defect in the plane or its negligent operation." Defendant L, operator of a flying school, leased a plane from defendant W and rented it to G, a student flyer. G crashed, causing property damage to plaintiff. The court held that dismissal of the lawsuit was properly granted as to W (lessor_bailor); the legislative refusal to adopt statutory absolute liability leaves applicable the general law of bailments and negligence. The court also rejected the argument of entrustment of a dangerous instrumentality to an incompetent person on the ground that a student pilot is not per se incompetent, reckless or inexperienced.

Members of Joint Enterprise

The mere fact that two or more persons have certain interests in common, as where they fly together in a private airplane for pleasure, is insufficient ground upon which to impute liability to one for the negligence of another. The necessary elements of a joint enterprise which will justify the imputation of liability are (a) a community of interest in the object of the undertaking, and (b) an equal right to control, i.e., to direct and govern the conduct of each other with respect thereto. Shook v. Beals (1950) 96 C.A.2d 963, 968, 103 P.2d 175.

In Shook v. Beals, plaintiff leased an airplane to B and four others for a fishing trip. The plane was damaged by the negligence of B, the pilot. Held, all five were liable. (a) A community of interest was shown by the common purpose and sharing of expenses. (b) The necessary control was shown by the joint hiring; i.e., where the parties themselves, or through their authorized agent, jointly own or hire an automobile or airplane, this, as a matter of law, gives each the right of control. "Each, legally, had the right of control over the plane and the driver, if he were their agent in operating the plane for them. It was not necessary to establish the fact that some one or all of the defendants, excluding Beals, personally knew how to pilot the plane themselves."

Case 1

Cummins v. Sky Cruisers, Inc. (1976) 59 CA3d 983

MAJORITY OPINION

Thomas Cummins died on June 21, 1969, in the crash of a Piper Cherokee Six airplane piloted by Wiley Gilreath and rented from Sky Cruisers, Inc. Cummins' wife Dorothy brought this action for wrongful death against Sky Cruisers for vicarious liability as owner of the airplane for the negligence of Gilreath in the operation of the airplane. The trial court found Gilreath negligent but nevertheless found in favor of Sky Cruisers. Cummins has appealed.¹

Public Utilities Code section 21404 provides: "Liability of the owner or pilot of an aircraft carrying passengers for injury or death to the passengers is determined by the rules of law applicable to torts on the land or waters of this state, arising out of similar relationships. Every owner of an aircraft is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner."²

Sky Cruisers once owned the ill_fated aircraft but before the accident sold it to Jack Roberts in a sale and lease back plan to avoid financial default. Sky Cruisers remained the

registered owner of the airplane on the rolls of the Federal Aviation Administration.

The sole issue on this appeal is whether Sky Cruisers was the "owner" of the Piper Cherokee Six within the meaning of Public Utilities Code section 21404 simply because it was listed as owner on federal aircraft registration records.³ The evidence is clear and the trial court found that Roberts had legal title to the aircraft at the time of the accident.

Public Utilities Code section 21404, manifests a legislative intent to impose vicarious liability for permissive use on the owner of an aircraft to the same extent that such liability is imposed on owners of automobiles or watercraft. It applies to a determination of liability based upon established relationships and does not address the question of the establishing of those relationships.

California has its own systems for registration of motor vehicles and watercraft, and in the case of motor vehicles and watercraft, within the statutory scheme for registration, ownership liability is tied directly to compliance with ownership registration procedures rather than to rules of law governing ownership of chattels and is in derogation of common law rules of liability.

Vehicle Code section 5602 provides: "An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of the vehicle so as to be subject to civil liability for the operation of the vehicle thereafter by another when the owner in addition to the foregoing has fulfilled either of the following requirements: (a) When he has made proper endorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code. (b) When he has delivered to the department or has placed in the United States mail, addressed to the department, either the notice as provided in Section 5900 or Section 5901 or appropriate documents for registration of the vehicle pursuant to the sale or transfer."

Vehicle Code section 9905 has similar provisions for watercraft. There is no similar provision tying aircraft registration to aircraft ownership liability. The simple explanation for these omissions is that the state has no aircraft ownership registration system. Section 1403 of 49 United States Code Annotated creates a federal system of aircraft ownership and financing registration and recordation which has preempted all comparable state systems. Pope v. National Aero Finance Co., 236 Cal.App.2d 722, 723.)

Public Utilities Code section 24237 which, for the purposes of the Aircraft Financial Responsibility Act, section 24230 et seq. provides: "'Owner' means any of the following persons who may be legally responsible for the operation of an aircraft: (a) A person who holds the legal title to an aircraft. (b) A lessee of an aircraft. (c) A conditional vendee, a trustee under a trust receipt and a mortgagor or other person holding an aircraft subject to a security interest."

Vehicle Code section 460 defines the owner of an automobile inter alia as "... a person having all the incidents of ownership, including the legal title ... the person entitled to the possession of a vehicle as the purchaser under a security agreement; ..."

Thus as to either aircraft or automobile the definition of "owner" is generally identical. The only real difference is that language in Vehicle Code section 5602 which imposes on the transferor of an automobile the obligation of endorsing and delivering to the Department of Motor Vehicles the certificate of registration. As to aircraft the California law contains no such

additional requirement.

We find nothing in the Public Utilities Code nor in the Vehicle Code to suggest that in the case of aircraft the Legislature intended that the question of who is or is not the "owner" should be determined by reference to the federal registration records.

Even though the federal registration system preempts the area of required registration it does not prevent the states, if they so desire, from imposing vicarious tort liability on persons registered on the federal rolls as owners of aircraft. It would have been a simple matter for the Legislature to so provide if indeed that was what it intended. For this court to take that step would be the rankest kind of judicial legislation. To so hold would be to create a cause of action against a new and separate class of persons. Plaintiffs already have their remedy against the "owner" Roberts. Since any extension of this liability is in derogation of the common law, it should not be as facily undertaken as the dissent advocates. Clearly the federal statutes do not themselves create any form of tort liability. The intent of Congress was quite different. "The purpose of this legislation [49 U.S.C.A. § 1403] is to facilitate the leasing or separate financing of propellers and aircraft ... fleet." The system is designed to give notice of security interests in aircraft.

The federal law differs significantly from California's automobile and watercraft registration system. Under the federal system there is no "certificate of ownership" issued to registered owners. Further, unlike California law, the burden is on the purchaser of an aircraft to record or register the transfer.

In summary then we conclude that while the owner of an aircraft may be subjected to vicarious liability in the same fashion as is the owner of an automobile, the identification of the "owner" of an aircraft is determined according to California statutes and the common law governing ownership of chattels and not by the contents of the federal registry.

The judgment is affirmed.

Dissent.

Liability of the owner of an aircraft for injury or death to passengers is governed by "the rules of law applicable to torts on the land or waters of this State, arising out of similar relationships." In my view this provision assimilates to aircraft not only the substantive liability of an owner to passengers but the rules for determining who shall be liable and for how long a period. Basic to these rules is the system of registration of ownership of motor vehicles and watercraft set out in Vehicle Code sections 5600, 5602, 9900, and 9905. Under these sections the registered owner of a motor vehicle or watercraft remains the owner of the vehicle or craft for purposes of tort liability until title has been properly transferred to the new owner and appropriate steps taken to register the transfer.

In 1958 the federal government established a national system of mandatory registration for aircraft with the Federal Aviation Administration and thereby preempted the field of aircraft registration. An individual state, therefore, has no need to establish a separate system of registration in order to identify and record aircraft ownership. Hence, absence of state registration of aircraft is a poor argument for dispensing with any requirement for registration,

state or federal, as a means for terminating the owner's liability to passengers on transfer of title.

Absent some system of registration, a passenger has no way to know and no way to discover the true owner of the aircraft, as the facts of the present case illustrate. Here, all public documents identified Sky Cruisers as the owner of the aircraft. The only identification of Roberts as owner was a typewritten lease in his possession, a document never filed, never recorded, never made a public record, in any place at any time. Under such a loose system the possibilities of fraudulent manipulation of ownership are unlimited. In my view, an injured passenger is entitled to rely on current registration of the aircraft in determining its ownership, and he is not required to conduct discovery proceedings to unearth unrecorded documents, if such exist, in order to smoke out an undisclosed owner of the aircraft.

The legislation establishing federal regulation of aircraft ownership (49 U.S.C. § 1403(c)) reads in part: "No conveyance ... shall be valid ... against any person ... until ... recordation" To my mind this declaration protects passengers with claims against the owner arising out of the operation of the aircraft, and they are entitled to rely on public documentary evidence of ownership until registration of the aircraft has been changed by a procedure comparable to that set out in Vehicle Code sections 5602 and 9905. Whether the old owner or the new owner effects the change in registration is immaterial, for each has an interest in timely registration, the old owner to terminate civil liability, the new owner to protect his property interest in the aircraft. To my mind federal registration serves both purposes.

I would reverse the judgment in favor of Sky Cruisers.

Appellant's petition for a hearing by the Supreme Court was denied October 28, 1976. Mosk, J., was of the opinion that the petition should be granted.[Cummins v. Sky Cruisers, Inc. (1976) 59 Cal.App.3d 983, page 990]

FOOTNOTE 1. Heirs of other persons who died in the crash, and whose suits are still pending, appear as amici curiae in support of Cummins' appeal. Gilreath also appealed the judgment, contending the evidence did not support the judgment and, in any event, that workers' compensation was Cummins' exclusive remedy. A week before oral argument Gilreath notified the court that the case would be settled and his appeal dismissed.

FOOTNOTE 2. An owner's liability is limited by Public Utilities Code section 21404.1:
"(a) The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by Section 21404 and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars (\$15,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars (\$30,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars (\$5,000) for damage to property of others in any one accident."

FOOTNOTE 3. Amici curiae also contend Sky Cruisers was the owner of the Piper Cherokee Six because in the sale and lease-back arrangement with Jack Roberts, Sky Cruisers retained all the incidents of ownership. This theory was not urged or considered in the trial court and cannot be raised for the first time on appeal.

Case #2
HOLT v. DEPARTMENT OF FOOD & AGRICULTURE
(1985) 171 Cal.App.3d 427

Facts

This proceeding resulted from an incident which occurred on the morning of May 15, 1980. At that time Holt was an employee of Sutter Butte Dusters, Inc., and he held a certificate entitling him to engage in the aerial application of pesticides. On May 15, 1980, Holt was assigned to apply parathion to a rice field belonging to Sam Anderson. Holt had flown that particular field many times so the only surveillance he made was a visual inspection as he approached the field to commence the application.

On the morning in question, three county workers were working in the vicinity of the Anderson rice field. They were cleaning brush and vegetation from the sides of the Live Oaks Canal and were in the process of burning the debris with diesel oil. Their fire was located approximately 187 feet from the Anderson rice field. After Holt made his first pass over the rice field he flew over the workers. All three workers reported being hit by parathion spray from Holt's aircraft. Holt made several more passes over the field, and the workers reported that mist from the spraying made contact with them during these passes. The spray felt oily, and the workers were covered by a sufficient amount that they could feel it wipe off on their hands. At least two of the workers reported suffering symptoms consistent with parathion poisoning.

Based upon this incident Holt was criminally charged with a violation of Food and Agricultural Code section 11791, subdivision (b), a misdemeanor. That section provides that it is unlawful for a crop duster to operate in a faulty, careless, or negligent manner. The jury returned a not guilty verdict. Thereafter an administrative accusation was filed on January 13, 1982, before the Director of the Department of Food and Agriculture. The accusation jointly charged Holt and Sutter Butte with misconduct arising out of the May 15, 1980, incident. Count I alleged that Holt violated Food and Agricultural Code section 11791, subdivision (c), and California Administrative Code, title 3, section 3093, subdivisions (a) and (b). Count II alleged that Holt violated Food and Agricultural Code section 11791, subdivision (b), and California Administrative Code, title 3, section 3091, subdivisions (d) and (i). Count III charged Sutter Butte with the same violations alleged against Holt in count I and asserted that it was subject to discipline because it was responsible for any violation committed by its employee acting within the course and scope of his employment. Count IV charged Sutter Butte with the same violation as count II against Holt. The basis of that charge was that Sutter Butte acted negligently because it took insufficient preapplication precautions, failed to instruct its pilots properly and failed to establish safe procedures. The matter was heard by an administrative law judge, who prepared a proposed decision which was adopted by the director. The director found that all the charges were true, that both Holt and Sutter Butte were subject to discipline, that Holt's certification should be suspended for 15 days, and that Sutter Butte's license should be suspended for 10 days.

Holt and Sutter Butte petitioned for a writ of administrative mandate. The trial court found that the director had failed to make findings resolving the contention of unreasonable delay in filing the accusation, and remanded to the director with directions to make appropriate findings. The director issued a new decision incorporating findings on the question of delay, and otherwise adhering to the prior decision. Holt and Sutter Butte filed a second petition for a writ

of administrative mandate. The trial court denied the petition, and Holt and Sutter Butte appeal.

Discussion

Food and Agricultural Code section 11791 provides, in relevant part, that it is unlawful for a pest control operator to: "(b) Operate in a faulty, careless, or negligent manner. (c) Refuse or neglect to comply with any provision of this division, or any regulation issued pursuant to it, or any lawful order of the commissioner."

At the time in question, title 3 of the California Administrative Code, section 3091 provided in relevant part that persons performing pest control operations shall "(d) Perform all pest control work in a safe, good and workmanlike manner." and "(i) Exercise reasonable precaution to avoid contamination of the environment." Section 3093 of that title provided in relevant part that no pesticide was to be applied under circumstances in which "(a) When the pesticide will not be substantially confined to the area to be treated; (b) Persons not involved in the application process are within the area to be treated or are so nearby that there is a hazard of drift of the pesticide onto them."

Plaintiffs contend that these statutory and regulatory requirements are unconstitutionally vague. They rely upon this court's decision in Wheeler v. State Bd. of Forestry (1983) 144 Cal.App.3d 522. There a registered professional forester was disciplined for "gross incompetence." We noted that competence has to do with ability, qualifications and fitness to perform a prescribed duty. The record, however, contained no statute, rule, regulation, or implied standard by which to measure competence and thus failed to provide what is prescribed. Under such circumstances we found no ascertainable standard of conduct and held that the board could not rely upon "gross incompetence" as a basis for discipline.

Plaintiffs contend that this case is controlled by the Wheeler decision. We disagree. Here, unlike Wheeler, the statutes and regulations provide sufficiently clear standards to give fair notice of the proscribed conduct. We have twice so held when we considered and rejected the identical contention made by appellants here. In Wingfield v. Fielder (1972) 29 Cal.App.3d, the contention was made that the phrases "faulty, careless or negligent manner," "circumstances where injury is likely to result to plants ... through drift," and "reasonable precautions ... to confine the material applied substantially" to the intended area, were unconstitutionally vague. We rejected the contention, stating: "The operator is given sufficiently definite notice as to the proscribed conduct when measured by common understanding and practice and in the light of the potential for harm involved in the use of pesticides by aerial application." The standards were "not at all vague but are sufficiently definite and certain to anyone associated with crop dusting or spraying by air."

Ten years after the decision in Wingfield, the contention was made again. In Medlock Dusters, Inc. v. Dooley (1982) 129 Cal.App.3d 496, the plaintiff recognized our decision in Wingfield, but contended that a change in the regulatory language left the department's regulations unconstitutionally vague. The language at issue included the terms "hazard of drift," "reasonable possibility of damage by drift," and "substantially confined to the area to be treated." We again rejected the contention, stating: "In this case the purpose of the statute and the regulation is clear, to protect against damage to persons, animals, crops, and property through aerial application of pesticides. In view of this legislative purpose we hold, as we held in Wingfield v. Fielder, that the statute and regulation are not void for vagueness."

The argument raised by the plaintiffs here is identical to the arguments we rejected in Wingfield and Medlock Dusters. Those decisions are controlling here and we therefore reject plaintiffs' argument.

Plaintiffs contend that the acquittal of Holt in the prior criminal proceedings should bar the administrative proceedings through the application of the doctrine on res judicata. Once again, we disagree. The rule is well established otherwise. Although People v. Sims (1982) 32 Cal.3d 468, held that an administrative decision could be accorded collateral estoppel effect in a subsequent criminal prosecution, that effect cannot conversely be accorded in an administrative hearing. In a criminal case the burden of proof is higher and different and consequently the issue decided in the criminal proceeding is not identical to the one to be litigated in the subsequent administrative hearing. The reason that an administrative adjudication may be given collateral estoppel effect in a subsequent criminal action, even though the standards of proof remain different, is because if the administrative agency "fails to prove its allegations by a preponderance of the evidence at the [administrative] hearing, it follows a fortiori that it has not satisfied the beyond a reasonable doubt standard." Since the converse is not true, the doctrine of res judicata does not apply.

Plaintiffs contend the evidence does not support the decision. This is an appropriate case for the exercise of the trial court's independent judgment on the evidence and the trial court specifically applied that test. The appropriate scope of review on appeal is the substantial evidence test.

The trial court found that on the morning in question Holt sprayed parathion beyond the boundaries of the Anderson rice field and onto the three county workers, who were 187 feet outside the field. The administrative decision, approved by the trial court, found Holt operated in a faulty, careless, negligent and unsafe manner "by reason of his failure to substantially contain the Parathion within the rice field caused by his failure to shut off the spraying device at or before the boundary of the field in order to contain the spray within the boundaries of the field." Plaintiffs contend that the evidence is not sufficient to support the finding that Holt sprayed beyond the confines of the field.

Initially, we note that the evidence is overwhelming in support of the finding that the three county workers were hit with spray from Holt's aircraft. All three workers so testified. In addition one of the workers, Mr. Terry, had experience in the application of parathion and he recognized the feel and scent of the pesticide when he was sprayed. Two of the workers reported suffering from symptoms of parathion poisoning shortly after the incident. The amount of spray that contacted the workers was sufficient in quantity that they could feel it rub off their faces and onto their hands. This evidence supports the finding that the workers were hit with the spray.

Plaintiffs take issue with the finding that Holt "sprayed" the parathion beyond the boundaries of the field, and they assert the spray could have been drift. One of the workers, Mr. Inay, signed a declaration after the incident in which he stated that he was hit by direct spray once and by drift three times while Holt sprayed the field. At the administrative hearing Inay had difficulty communicating his perceptions. He testified that the spray was shut off as the airplane began to climb, which was closer to the workers than to the edge of the field. But he was confused as to the exact point the spray was shut off. The other workers testified that the spray hit them as the airplane passed over them, but could not precisely state when the spray was

shut off. Plaintiffs argue that this testimony cannot support a finding that Holt sprayed beyond the boundaries of the field. We disagree. When the workers observed the airplane coming at them at a low altitude spraying a pesticide they perceived it as a danger to themselves and took evasive action. It is not surprising that they could not specifically recall the precise point the spray was shut off. But the fact that the spray made contact with them at the instant the airplane passed them supports a finding that the spray was not turned off at the field's border 187 feet away.

In any event, the basis for discipline was not dependent upon a finding that Holt continued spraying after he passed the border of the rice field. Discipline was imposed because he failed to confine the spray to the field by failing to shut off the spray at or before the field's boundary. There was expert testimony that in order to prevent an aerial application of pesticide from affecting areas substantially outside the field of application a pilot should shut off his spray before reaching the edge of the field. One of plaintiffs' experts estimated he would shut off the spray approximately 50 feet before the edge of the field. Another expert testified the spray should be shut off one or two spray widths from the edge. In view of the evidence that the three workers were hit with substantial spray at a distance of 187 feet from the edge of the field, the finding that Holt failed to substantially confine the spray to the field by shutting it off at an appropriate time is supported by the evidence.

Holt was also found to have acted in a faulty, careless, and negligent manner by failing to adequately survey the rice field and surrounding areas before applying the parathion. The administrative decision noted that plaintiffs "established that the usual custom and practice among agricultural pilots in this area, when making an aerial application of a commercial pesticide onto a field which such pilots have sprayed previously and which is some distance from human habitation, did not involve flying around the perimeter of the field to determine whether any persons were in or near the field. It was established that the usual custom and practice was to simply look over the field from the air as the pilot approached the field prior to the first application of the spray. It was also established that the custom and practice of the agricultural pilots in the area did not involve flying the perimeter of the field to be sprayed even with the presence of automobiles or fires near the rice fields. It was established that respondent Holt's conduct on this occasion was consistent with the custom and practice of most agricultural pilots in the area. However, it is also found that the custom and practice set forth hereinabove is inconsistent with ordinary standards of due care. It is noted in this regard that it was established that the time required to fly the perimeter of the field here in issue would have been approximately one to one and one_half minutes."

Holt's testimony was consistent with this finding. He explained that he has flown the Anderson rice field many times and so when he approaches it the only survey he makes is on his approach for his first application of pesticide. The pesticide is applied at an extremely low altitude and the approach is also made while dropping altitude. On such an approach a pilot would not necessarily be able to see whether any persons were in the vicinity of the field. It appeared the pilot's major concern would be potential hazards to the pilot. Plaintiffs contend that since this practice conforms to that of most agricultural pilots, it cannot be a basis for discipline.

We reject this contention. Evidence of the custom or general practice in the same trade or occupation is relevant but not conclusive on the question whether the actor utilized due care. Conformity with the general practice or custom will not excuse conduct which is not consistent

with due care. "When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense every precaution be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others." The care to be exercised must be in proportion to the danger to be avoided and the consequences which might follow. The standard of care required in dealing with dangerous articles or fluids is so great that a slight deviation therefrom will constitute negligence.

The uncontroverted evidence established that parathion is an extremely potent poison which can be fatal to human beings in small dosages. The range between doses which will cause a reaction and which will be fatal is very narrow. Parathion is a restricted use chemical. It is on the order of 200 times more potent than the commercially sold malathion. Under such circumstances, and with the established potential for drift of an aerially applied pesticide, a high degree of care must be demanded in such applications to insure that persons lawfully on adjoining property are not exposed to the pesticide. Holt made his application without sufficient surveillance of the rice field to determine whether persons were in the area and thus in danger. Regardless of how many agricultural pilots would do the same thing, this did not conform to the standard of care required in handling such a dangerous material.

Sutter Butte was found to be subject to discipline for its failure to take preapplication precautions in the application of parathion, and for failing to instruct its pilots in the necessity for preapplication precautions. It is uncontroverted that Sutter Butte did not instruct Holt in the safeguards he should follow in applying parathion. Sutter Butte contends that the finding against it is unsupported for the same reasons Holt raises. For the same reasons we reject this contention. Moreover, the duty to operate safely in the aerial application of pesticides is nondelegable and Sutter Butte is responsible for the failure of its employee to operate in a safe manner.

Plaintiffs finally contend that the sanctions imposed by the director amount to an abuse of discretion. It will be remembered Holt's privilege to act as an agricultural pilot was to be suspended for 15 days, and Sutter Butte's license was to be suspended for 10 days.

The general rule is that the propriety of a penalty imposed by an administrative agency is a matter of discretion and its decision will not be disturbed unless there is a clear abuse of discretion. The agency's decision will be regarded as an abuse of discretion only if it is not one which could have been made by a reasonable person. Plaintiffs insist, without acknowledging their right to petition the director to be allowed to pay a monetary fine in lieu of their suspensions, that their suspensions will put them out of business. In view of the serious potential for disastrous results from human contact with parathion, and plaintiffs' insistence that they need only exercise minimal care, the decision of the agency cannot be regarded as a clear abuse of discretion.

The judgment is affirmed.

(Appellant's petition for review by the Supreme Court was denied October 30, 1985)

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Reynolds v. Bank of America

The sole question presented on this appeal is whether the owner of personal property which has been wrongfully destroyed is limited in damages to the value of the property at the time of destruction or may also recover for loss of use during the period reasonably required for replacement.

Plaintiff's airplane was abandoned at sea and destroyed as the result of its negligent operation by defendant's testator. In addition to general damages, plaintiff sought special damages for loss of use of the plane until it could be replaced, and he offered to prove that new or used equivalent aircraft were not immediately available, that it would require four or five months to replace the aircraft, that its reasonable rental value was \$1,200 per month, and that the loss of business profits for the period reasonably required for replacement was \$5,000. The offer of proof was rejected on the ground that such evidence was not admissible. A judgment was rendered for plaintiff in the amount of \$30,000, representing the value of the airplane, and he has appealed, claiming that he should have been allowed to prove additional damages for loss of use.

Section 3333 of the Civil Code provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." It is established, under this section, that where a vehicle is injured by the wrongful act of another, the owner is entitled to recover for the damage done to the vehicle and also for the loss sustained by being deprived of its use during the time reasonably required for the making of repairs. There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to "compensate for all the detriment proximately caused" by the wrongful destruction.

Our conclusion is supported by decisions in several jurisdictions and by the Restatement of Torts. The refusal in some jurisdictions to allow damages for loss of use of a totally destroyed vehicle appears to be the result of historical limitations upon the action of trover at common law.

The early case of Butler v. Collins, 12 Cal. 457, 466, relied upon by defendant, is not in point since it did not involve the measure of damages where destroyed chattels are not immediately replaceable. Moreover, the case was decided before the enactment of section 3333 of the Civil Code. The rejection of plaintiff's offer to prove special damages for loss of use requires a limited reversal of the judgment to permit trial of the issues raised by the offer of proof. Insofar as the judgment awards plaintiff the value of the airplane, the determination need not be disturbed, and, if additional special damages are found, they may be added to the amount already awarded by the jury.

The judgment is reversed with directions to try the issues raised by plaintiff's claim of loss of use.

Martin Sch. of Aviation v. Bank of America

(1957) 48 Cal.2d 689, 312 P.2d 251

From a judgment in favor of defendant after trial before the court in an action to recover damages for the destruction of its airplane, plaintiff appeals.

Facts: Plaintiff, Martin School of Aviation, Inc., a corporation, sues as assignee of a

partnership consisting of Floyd R. Martin, Joseph G. Hager and J. W. Martin, Jr., which had been doing business under the firm name of Martin School of Aviation. Defendant is sued as executor of the estate of Charles E. Rhoades, deceased. Hereafter the partnership will be referred to as plaintiff and decedent Rhoades as defendant.

Plaintiff owned an instrument equipped Bonanza airplane which it rented to defendant for a flight to the Imperial Valley. Arrangements were made for defendant by O. A. Kier, an experienced and competent pilot, who acted as pilot of the plane. Within three minutes after the flight commenced the plane crashed. Defendant, the pilot and C. O. Gregg, all occupants of the plane, were killed.

The amended complaint in three counts alleges: (1) that the bailment was made to defendant upon condition that "they would not take, or cause said plane to be taken, off from the ground until after daybreak and unless the weather was clear"; that the plane took off before daybreak and before the weather was clear, and that it was so negligently operated as to cause it to crash to the ground; (2) after incorporating by reference the averments as to the terms of the rental conditions, that defendant "failed to return said airplane to plaintiffs in violation of their said agreement of bailment, and wrongfully breached said agreement of bailment to plaintiffs' damage"; and (3) after incorporating the previous averments of the terms of the bailment, that defendant "promised to return said airplane in good condition and wilfully and negligently failed and refused to return said airplane to plaintiffs and converted the same to his own use."

The trial court found that:

- (a) Defendant and Pilot Kier agreed that they would not take or cause said plane to be taken from the ground if the weather was not good;
- (b) Defendant and Pilot Kier did not agree that the plane would not be taken from the ground "until after daybreak";
- (c) When the flight started "the weather was good at that time";
- (d) The plane was not operated negligently;
- (e) The terms of the bailment were not breached; and
- (f) There was no conversion.

Questions: First. Was there substantial evidence to support the trial court's findings (a), (b), (c) and (d), supra?

This question must be answered in the affirmative, and is governed by this rule: When findings of fact are attacked on the ground that there is not any substantial evidence to sustain them, the power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, that will support the findings of fact. Applying this rule to the present case, a recital of a portion of the evidence with reference to each of the questioned findings discloses substantial evidence to support them:

Findings (a) and (b). John Martin, a man experienced in aviation matters and in investigating accidents with the Civil Aeronautics Authority, on the day of the accident filed a report with the C.A.A. which was received in evidence. The material portion reads: "Mr. Rhoades and Red Kier made arrangements to use our Bonanza N8632A to go to Brawley, California, on a dove hunting trip and wanted to leave and return early in order to get the hunting over before it got too hot in Brawley. Kier told me he would check the weather before leaving and wouldn't go if the weather was not good. I was called at home about 5:45 a. m. by my brother and he said the airport guard called and said that he thought Kier had cracked up. I left at once for the scene of the accident and found it was a complete washout and was not anything left of value. All three persons in the airplane were killed. It is impossible for me to figure out what could have caused this accident as the ship went in at a great speed and nearly straight in. The only information I have is what people in the vicinity had to say." (Italics added.)

Clearly, the italicized portion of Mr. Martin's statement and the absence of any other evidence as to weather conditions before the plane was taken into the air constituted substantial evidence to sustain the trial court's questioned findings (a) and (b). (3) Conflicting evidence and inferences must, of course, be disregarded by this court.

Finding (c). The evidence established that at the time of takeoff there was a cloud bank above the airfield and surrounding area, with the ceiling being somewhere between 200 and 1,000 feet. The official weather reports placed the ceiling at about 800 feet. Horizontal visibility was estimated at from one to seven miles, and there was no fog. The top of the cloud layer was approximately 2,000 feet, and above that level the skies were clear and visibility unrestricted.

The following Air Traffic Control Regulations (Code of Federal Regulations, tit. 14, pt. 60) apply to intrastate as well as interstate flights and prescribe, among other things, minimum safe altitudes and rules for visual and instrument flights with respect to ceilings and cloud formations:

Section 60.17 prescribes minimum safe altitudes. So far as pertinent here it reads: "Minimum safe altitudes. Except when necessary for take_off or landing, no person shall operate an aircraft below the following altitudes: ... (b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open_air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. ... (c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. ... (d) IFR operations. The minimum IFR altitude established by the Administrator for that portion of the route over which the operation is conducted. ..."

The Visual Flight Rules are prescribed by section 60.30, which read: "Ceiling and distance from clouds. Aircraft shall comply with the following requirements as to ceiling and distance from clouds: (a) Within control zones. Unless authorized by air traffic control, aircraft shall not be flown when the ceiling is less than 1,000 feet, or less than 500 feet vertically and 2,000 feet horizontally from any cloud formation. (b) Elsewhere. When at an altitude of more than 700 feet above the surface aircraft shall not be flown less than 500 feet vertically and 2,000 feet horizontally from any cloud formation; when at an altitude of 700 feet or less aircraft shall not be flown unless clear of clouds."

Ceiling is defined in section 60.72: "Ceiling. The distance from the surface of the ground or water to the lowest cloud layer reported as 'broken clouds' or 'overcast.' "

"IFR" means instrument flight rules (§ 60.82), and "IFR conditions" are defined as: "Weather conditions below the minimum prescribed for flights under VFR." (§ 60.83.) "VFR conditions" are defined as: "Weather conditions to or above the minimum prescribed for flights under VFR." (§ 60.89.)

Section 60.41 reads: "IFR flight plan. Prior to take_off from a point within a control zone or prior to entering a control area or control zone, a flight plan shall be filed with air traffic control. ..."

It is to be noted that there was no evidence that the path of flight was to go through congested areas within the meaning of the Visual Flight Rules. If the ceiling was 800 to 1,000 feet the airplane could fly at an altitude up to 700 feet and still comply with those rules if no control zones or congested areas were involved.

It is not necessary for visual flight conditions to prevail in order that the flying weather be "good." There is a difference between "good" weather and "clear" weather in this regard. "In 'clear weather,' when the pilots can navigate their planes by 'pilotage,' that is, by visual

operation from markings and landmarks along the airways, and can clearly see other aircraft or obstructions in time to avoid collision, flights may be governed by the Visual Flight Rules." It may be "good" flight weather even though it is not "clear" within this definition.

In the instant case the sky was clear above 2,000 feet, there was no evidence of any frontal activity or local turbulence in the air, and the only possibly unfavorable weather condition was the cloud bank of about 1,200 foot depth. The pilot was an experienced instrument flyer, and a bank of stratus at such a ceiling is not bad weather for an instrument-rated pilot in an instrument-equipped plane. Thus, even if visual flying conditions did not prevail, there was no showing that the pilot did not comply with the Instrument Flight Rules or that the weather was not "good" for an instrument flight. Under these circumstances it cannot be said as a matter of law that it was not "good" flying weather, and the foregoing evidence fully sustains the trial court's finding (c).

Finding (d). There is a total absence of any evidence that defendant was negligent, or that the terms of the bailment were breached, or that there was a conversion. The trial court's finding on these points is sustained by Mr. Martin's report to the C.A.A. set forth above, wherein he said, "It is impossible for me to figure out what could have caused this accident as the ship went in at a great speed and nearly straight in."

Second: Did the trial court abuse its discretion in denying plaintiff's motion for a new trial?

No. Plaintiff contends that it was surprised and misled by the court into not introducing certain evidence. During the argument at the close of the trial the judge expressed the opinion that the bailment contract contained a condition as to daylight departure and that the condition was violated. The court then, on its own motion, reopened the case for further evidence on the issue of visibility and the meaning of the word "daylight."

The record shows that plaintiff had ample opportunity to introduce its evidence prior to submission of the case, as the judge made clear his willingness to hear any evidence offered, and additional evidence regarding the terms of the bailment contract was actually introduced. The case was twice continued for further evidence, and after submission the trial court made the findings set forth above.

The findings of fact and conclusions of law constitute the decision, which is the final deliberate expression of the court. Expressions of a judge during the trial cannot be considered for the purpose of contradicting deliberate findings of fact and conclusions of law that he subsequently makes and files.

It thus appears that there was no ground for granting a new trial and that the trial judge's action in denying the motion was correct.

The judgment is affirmed.