33 AVIATION LAW

Alaska statutes recognize the need to promote and support aviation. The Alaska Department of Transportation has the authority to regulate many areas relating directly to aviation and airports in the state, provided the Department's regulations do not conflict with federal law or regulations.[1] For example, the Department issues airport-area zoning regulations, and can enforce no-obstruction regulations on property adjacent to airports.[2] Careless or reckless operation of an aircraft is a criminal offense.[3]

Under state law, the pilot of a light aircraft must carry minimum survival equipment, including "one pistol, revolver, shotgun or rifle, and ammunition for same."[4]

Intrastate for-hire air carriers of either passengers or cargo must carry at least $150,000 per-seat limits of insurance and a surety bond, and must file proof of compliance with the Department.[5]

Civil cases involving aviation accidents are governed by the provisions of AS 09.17.080. The statutory term "fault" found in AS 09.17.080 includes any acts which are negligent, reckless, or intentional, or that would subject any person to strict liability.[6] The old doctrines of joint-and-several liability and contribution have been abolished in Alaska. Instead, under the newest form of the statute the trier of fact determines the "fault" of each plaintiff, defendant, or third-party in a lawsuit, as well as the fault of every other person at fault even if *not* named as a party in the suit. The fault of each such party or person is expressed in numerical terms totaling 100%. The trier of fact then decides the amount of damages, and each responsible party or person is severally liable for only its own fault (the product of its percentage of fault times the total damages).[7]

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[1] *See* AS 02.15.010; AS 02.15.030.

[2] *See* AS 02.25.010 and AS 02.25.060.

[3] See AS 02.30.030; AS 02.30.040.

[4] *See* AS 02.35.110(a)(1)(D).

[5] *See* AS 02.40.010.

[6] *See* Tabs 7 and 8 for additional discussion on this issue.

[7] *See* AS 09.17.080; AS 09.17.900.

Some early air accident cases which sought to apply the statutory rules of comparative fault had unusual results.[8] Later rulings by the Alaska Supreme Court seem to suggest, but do not yet confirm, that there should be a single trial involving all potentially at-fault persons or entities involved in a loss.[9] The court in *Grinnell* discussed Alaska's comparative fault scheme and held that "third parties must be joined for purposes of allocating fault, or not at all."[10] Although no court has had an opportunity to consider the impact of *Grinnell* on third-party claims, it appears that third-party claims are now mandatory.[11]

The above unsettled state of the law covering necessary "parties" to a lawsuit, and how some suits may be bifurcated as to parties or issues, has been further complicated by the most recent revision of the comparative fault statute. In 1997, the state Legislature purported to overrule the *Benner v. Wichman* case. According to the 1997 revisions (applicable to cases accruing on or after August 7, 1997), statutory fault is to be allocated by the trier of fact to every person who is shown to be at fault – whether or not that person has been made a party to the suit. However, in order for fault to be allocated to a person who is not a party, the parties must have had "sufficient opportunity to join" that person, defined as meaning the person is within the jurisdiction of the court, subject to suit, and "reasonably locatable." The Alaska Supreme Court has yet to pass on the constitutionality of this newest version of state law, or otherwise interpret it.

Cap On Non-economic Damages[12]

In 1997, the Alaska Legislature amended the statutory cap on non-economic damages, defined to include pain and suffering, loss of enjoyment of life, loss of consortium, and disfigurement. In cases not involving "severe permanent physical impairment" or "severe disfigurement," non-economic damages are capped at $400,000 or the injured person's life expectancy in years times $8,000, whichever is greater. Where severe permanent physical impairment or severe disfigurement is involved, non-economic damages may not exceed the greater of $1 million, or $25,000 times the years of life expectancy. These changes apply only to cases accruing on or after August 7, 1997.

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[8] *See, e.g., Borg-Warner v. Avco*, 850 P.2d 628 (Alaska 1993) (claims arising from a single accident were bifurcated by the trial judge – original claims by plaintiff pilot's estate would be heard in a bench trial; then defendant/third-party plaintiff float manufacturer's fault-allocation claims would be decided in a later jury trial "if necessary").

[9] *Benner v. Wichman*, 948 P.2d 484 (Alaska 1997) (empty-chair defensive fault allocation held improper – in order to have fault allocated against it, a person or entity needs to be served and made a "party" before the court); *see also General Motors Corp. v. Farnsworth*, 965 P.2d 1209 (Alaska 1998) (comparative fault of the plaintiff may be asserted by a defendant in a product liability case).

[10] *Alaska General Alarm, Inc. v. Grinnell*, 1 P.3d 98, 104 (Alaska 2000).

[11] *Alaska Gen. Alarm, Inc.*, 1 P.3d at 104.

[12] *See also* Tab 14 -- General Damages.

The Alaska Supreme Court has yet to address the constitutionality of the new cap on noneconomic damages in any aviation or mass-tort cases, but has found it constitutional in another tort context.[13] There is little guidance as to what constitutes a "severe permanent physical impairment" under the statute. Given the court's past treatment of statutes which purport to limit common-law damages claims, litigants should probably not assume that the new noneconomic damages cap is the "safe harbor" it may seem.

Releases

In aviation cases (as in other lawsuits involving personal injury), Alaska courts have construed waivers or releases of potential claims very strictly.[14] In *Kissick*, three civilian passengers and their active-duty Air Force pilot were killed in the crash of a light aircraft owned by the Elmendorf Air Force Base Aero Club. The passengers' estates sued the pilot's estate.

Air Force regulations required that, before the flight, each of the three passengers sign a "covenant not to sue." All three did so. The covenant form in use at the Elmendorf Aero Club and signed by each of the passengers before the accident purported to bar any claims by "myself, my heirs, administrators, [and] executors" against:

> [T]he US Government and/or its officers, agents or employees, or Aero Club members ... for any loss, damage, or injury to my person or my property which may occur from any cause whatsoever.[15]

The defendant pilot's estate sought to dismiss the claims by the passengers' estates, contending they were barred both by the plain language of the covenant and the federal preemption doctrine.

The Alaska Supreme Court disagreed. First, it found no showing of Congressional intent to occupy the state tort field. The mere fact that Congress authorized the Secretary of the Air Force to promulgate regulations pertaining to Aero Clubs was deemed insufficient.[16]

Second (and more troubling for those who would rely on a waiver or release in Alaska), the court ruled the covenant did not prevent the wrongful death claims by the passengers' estates, because the word "death" was nowhere to be found in the written release form. The court declined to construe a waiver of claims for "injury" as necessarily including a waiver of claims for "death." Similarly, the *Kissick* majority

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[13] *See C.J. v. State of Alaska*, 151 P.3d 373 (Alaska 2006)(Court found the $400,000 cap constitutional for the negligent supervision of a parolee).

[14] *Kissick v. Schmierer*, 816 P.2d 188 (Alaska 1991).

[15] *Id.* at 189

[16] *Id.* at 190.

opinion did not address the fact that the language of the covenant seemed to bar claims by "heirs" and "executors."

Insurance Coverage Issues

Alaska's state courts have given insurance policies some of the broadest possible constructions in order to find coverage.[17]

Aviation-related cases are no exception to this general rule.[18] In one case, the State of Alaska leased airport real estate to a freight forwarder, who then subleased some of the warehouse space to United Airlines. As a condition of the State's original lease, the forwarder had to procure liability coverage naming the State as an additional insured. When a motorcyclist was injured in a collision with a United Airlines baggage train on a public road, away from the insured warehouse premises, the motorcyclist named the State of Alaska as a defendant, alleging negligence, improper road design, and other claims. The trial court granted summary judgment that the insurer owed no duty to defend or indemnify the State.

The Alaska Supreme Court reversed, finding that the insurer did owe the State a defense. First, the court noted the policy's strangely broad wording: the only relevant limits on covered personal-injury claims were that they must occur in the United States, during the policy period.[19]

Second, the court agreed with the insurer that a literal construction of the policy would lead to unfair results (covering all actions by the State of Alaska anywhere in the country, for example). However, the court nonetheless found that any claims which "arise out of or are incidental to uses of the premises under the lease" would be covered – apparently regardless of *whose* use was at issue.[20] Accordingly, the State was owed a defense by the insurer on the majority of the claims, notwithstanding the fact that the accident involved a baggage train operated by United Airlines away from the insured premises.

One decision involving insurance coverage in the aviation context demonstrates the lengths the Alaska Supreme Court is willing to go to find coverage.[21] In *Stewart-Smith Haidinger*, an Alaska "mom-and-pop" corporation (Avi-Truck) decided to purchase a rare military surplus twin-engine transport, the Chase YC-122. Avi-Truck then leased the plane to Trans-Northern Aleutian, Inc. (TNA). The lease required TNA to insure the aircraft hull for $60,000.

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[17] *See* Tab 18 Insurance Policy Interpretation & Construction; and Tab 19 Insurance Bad Faith.

[18] *See, e.g., State v. State Farm Fire and Cas. Co.*, 939 P.2d 788 (1997).

[19] *Id.* at 792-93.

[20] *Id.*

[21] *Stewart-Smith Haidinger, Inc. v. Avi-Truck, Inc.*, 682 P.2d 1108 (Alaska 1984).

TNA contacted an Alaska insurance broker about getting insurance for the plane. Although the parties later disputed the contents of these conversations, they agreed that the broker was told the aircraft was a YC-122, and that the broker viewed the aircraft.

In addition, it was undisputed that the question of whether the YC-122 had an airworthiness certificate was never discussed as the broker did his pre-binder inspections and interviews with TNA.[22] The broker seems to have assumed – incorrectly – that the aircraft did in fact have an airworthiness certificate, and that TNA owned the plane.[23] The broker next contacted Lloyd's, and the YC-122 was eventually listed as a covered aircraft on a fleet policy issued to TNA.

The aircraft crashed on its second flight. An Alaska bank sued Avi-Truck to collect the money the bank had loaned the mom-and-pop company to purchase the plane. Avi-Truck then filed cross-claims against the London insurers, claiming that Avi-Truck was entitled to the proceeds of the TNA insurance policy. The insurers contended that Avi-Truck had no standing to bring its claim for the insurance proceeds, since it was not a named insured. In addition, the insurers noted that the policy expressly excluded coverage for any aircraft that did not have an airworthiness certificate. Finally, the insurers pointed out that TNA's crew members did not have the type ratings required if the YC-122 was to haul commercial passengers and cargo.

The trial court brushed aside all these defenses, and granted summary judgment awarding Avi-Truck the $60,000 insurance proceeds.

The Alaska Supreme Court affirmed on appeal. First, the court noted that neither the broker nor the insurers were even aware of Avi-Truck's existence when they wrote the coverage. According to the court, this meant that Avi-Truck was not "technically" a third-party beneficiary of the insurance contract, since the contracting parties could not have intended to create a benefit for a third-party of which they were unaware.[24] Nonetheless, the court upheld the trial court's determination that a third-party beneficiary contract should be implied at law. The court thought it important that the risk the insurer undertook – namely, the possible loss of the YC-122 – was the same regardless of which parties might be implied as insureds.[25]

Second, the court found that the trial court had properly stricken the insurance policy's airworthiness certificate exclusion to accommodate what the court saw as the actual intent of the parties. The exclusion stated that the coverage would not apply "while the aircraft is in flight unless its airworthiness certificate is in full force and effect." The court reasoned that the clear intent of the parties was to insure a YC-122; and "as a practical matter," no YC-122 could have been granted an airworthiness certificate.[26]

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[22] This omission is somewhat glaring, in view of the fact that a "Y" prefix designates experimental or pre-production military aircraft.

[23] *Id.* at 1110.

[24] *Id.* at 1112.

[25] *Id.* at 1113.

[26] This *force majeure* reasoning may have been more persuasive if it had been based on actual facts.

Therefore, according to the court, the policy's exclusion could not have reflected the parties' intent, and the exclusion was properly "reformed" out of existence by the trial court. The court also opined that "the burden was on the insurers to inquire about the use to which the plane would be put, as well as its possession of an airworthiness certificate." Because nothing was concealed regarding the nonexistence of the certificate, the insurers were found not to have carried out their duty to ascertain the facts. The court took particular interest in the "unusual nature of the airplane", suggesting that this alone should have alerted the insurers to investigate the risk they were insuring.[27]

Third, the court found that the policy's type-ratings exclusion also did not defeat coverage. The exclusion provided that no coverage would be provided while the aircraft was being operated "by any ... person in violation of the terms and limitations of his ... Pilot's Certificate." At the time the YC-122 crashed, it was being flown by a pilot-in-command who was not type-rated in the aircraft, and by a copilot who did not have the minimum number of takeoffs and landings required by federal regulation. Nonetheless, the court again resorted to what it called the "reasonable expectations" of the aircraft operator, TNA. The court found that before the accident, TNA had spoken with "representatives of the FAA, including its legal counsel," who told TNA that no type ratings were required for the YC-122. In addition, the court apparently found it important that the temporary insurance binder issued by the insurers had "approved" the pilot who was in command of the YC-122 at the time of the crash.[28]

Wrongful Death Claims

Some aviation claims involve fatal injuries. In Alaska, wrongful death claims are covered by AS 09.55.580, Alaska's wrongful death statute.[29]

Appendices:

AS 02.15.010	AS 02.30.030	AS 09.17.080
AS 02.15.030	AS 02.30.040	AS 09.17.900
AS 02.25.010	AS 02.35.110	
AS 02.25.060	AS 02.40.010	

The Court itself admitted in a footnote that surplus military aircraft had been granted airworthiness certificates – for a high price. *Id.* at 1115, n. 8.

[27] *Id.* at 1116.

[28] *Id.* at 1118.

[29] *See* Tab 12, Wrongful Death Claims for additional details.

Sec. 02.15.010. Purpose. The purpose of this chapter is to

(1) *[Repealed, § 14 ch 56 SLA 2001.]*

(2) encourage and develop aeronautics and the establishment and operation of a state system of airports through cooperation with municipalities, and otherwise, including cooperation with the federal government and acceptance and utilization of federal funds allotted for this purpose. (§ 2 ch 123 SLA 1949; am § 14 ch 56 SLA 2001)

Sec. 02.15.030. Conformity to federal law. The department may not adopt a regulation, order, or standard that is inconsistent or contrary to any act of the Congress of the United States or regulations promulgated or standards established. A regulation, order, or standard may not be adopted that duplicates any current rules or regulations issued by a federal agency, or that applies to aircraft, airports, or air navigation facilities owned or operated by the federal government. (§ 4 C, D ch 123 SLA 1949)

Sec. 02.25.010. Airport zoning regulations. A person may not erect or permit to grow an airport hazard on land adjacent to the end of a runway of a public airport without a permit issued by the department. The area upon which these hazards are prohibited is the width of the runway, and extends from the airport boundary at the end of the runway, away from the runway in a direction parallel to its centerline for a distance equal to the length of the runway. An obstruction situated in an area not previously designated as an airport hazard area by the department is not a hazard if its height does not exceed five feet for each 200 feet distance from the boundary of the airport. The vertical measurement of the structure starts on the same plane as the surface of the runway. (§ 2(1) ch 12 SLA 1951)

Sec. 02.25.060. Permits for removal of nonconforming structures or trees. Where advisable to facilitate the enforcement of zoning regulations adopted under this chapter, permits may be granted to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes or substantial repairs. Before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the department authorizing the replacement, change or repair. A permit may not be granted allowing the structure or tree to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted. If the department determines that a nonconforming structure or tree is abandoned or more than 80 per cent torn down, destroyed, deteriorated, or decayed, (1) a permit may not be granted allowing the structure or tree to exceed the applicable height limits or otherwise deviate from the zoning regulations; and (2) whether application is made for a permit under this section or not, the department may, by appropriate action, compel the owner of the nonconforming structure or tree, at the owner's own expense, to lower, remove, reconstruct, or equip the object to conform to the regulations. If the owner of the nonconforming structure or tree neglects or refuses to comply with the order within 10 days after notice, the department may proceed to have the object lowered, removed, reconstructed, or equipped, and the cost and expense is a lien upon the object and the land on which it is located. Unless the account is paid within 90 days from the service of notice on the agent or owner of the object or land, the sum bears interest at the rate of eight per cent a year until paid, and shall be collected by foreclosure in the manner provided for the foreclosure of mortgages. (§ 3(1) ch 12 SLA 1951)

Sec. 02.30.030. Reckless operation. (a) A person may not operate an aircraft in the air or on the ground or water in a careless or reckless manner so as to endanger the life or property of another. In a proceeding charging careless or reckless operation of aircraft in violation of this section, the court, in determining whether the operation was careless or reckless, shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics.

(b) A person may not operate an aircraft occupied by a crew member or passenger who is obviously under the influence of intoxicating liquor or a controlled substance.

(c) *[Repealed, § 14 ch 56 SLA 2001.]*

(d) *[Repealed, § 14 ch 56 SLA 2001.]* (§ 5 ch 128 SLA 1949; am § 1 ch 117 SLA 1982; am §§ 7, 8, 14 ch 56 SLA 2001)

Effect of amendments. — The 2001 amendment, effective September 27, 2001, in subsection (a), deleted "violation of AS 28.35.030, nor operate an aircraft in the air or on the ground or water in" preceding "a careless or reckless manner" in the first sentence; in subsection (b), substituted "a controlled substance" for "habit-forming drugs" at the end; and repealed subsections (c) and (d).

Collateral references. — 8 Am. Jur. 2d, Aviation, § 76 et seq.

2A C.J.S., Aeronautics and Aerospace, § 136 et seq.

Take-off, negligence in operation of aircraft on. 74 ALR2d 615.

Landing, negligence in operation of airplane in. 74 ALR2d 628.

Validity, construction, and application of state criminal statute prohibiting reckless operation of aircraft. 89 ALR3d 893.

Sec. 02.30.040. Penalties. A person violating a provision of this chapter is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $1,000. (§ 7 ch 128 SLA 1949; am § 2 ch 117 SLA 1982; am § 9 ch 56 SLA 2001)

Sec. 02.35.110. Emergency rations and equipment. (a) An airman may not make a flight inside the state with an aircraft unless emergency equipment is carried as follows:

(1) the following minimum equipment must be carried during the summer months:

(A) rations for each occupant sufficient to sustain life for one week;

(B) one axe or hatchet;

(C) one first aid kit;

(D) an assortment of tackle such as hooks, flies, lines, and sinkers;

(E) one knife;

(F) fire starter;

(G) one mosquito headnet for each occupant;

(H) two small signaling devices such as colored smoke bombs, railroad fuses, or Very pistol shells, in sealed metal containers;

(2) in addition to the equipment required under (1) of this subsection, the following must be carried as minimum equipment from October 15 to April 1 of each year:

(A) one pair of snowshoes;

(B) one sleeping bag;

(C) one wool blanket or equivalent for each occupant over four.

(b) However, operators of multi-engine aircraft licensed to carry more than 15 passengers need carry only the food, mosquito nets, and signalling equipment at all times other than the period from October 15 to April 1 of each year, when two sleeping bags, and one blanket for every two passengers shall also be carried. All of the above requirements as to emergency rations and equipment are considered to be minimum requirements which are to remain in full force and effect, except as further safety measures may be from time to time imposed by the department. (§ 32-6-13 ACLA 1949; am § 2 ch 128 SLA 1949; am § 10 ch 56 SLA 2001)

Sec. 02.40.010. Air carrier financial responsibility. (a) A person who carries passengers or freight for commercial purposes intrastate in an aircraft shall procure and maintain security in the following minimum amounts:

(1) $150,000 per seat for bodily injury or death in a single occurrence; and

(2) $100,000 for property damage in a single occurrence.

(b) Evidence of security required under (a) of this section shall be filed with the department and must be

(1) a policy or certificate of insurance issued by an insurer acceptable to the department;

(2) a bond of a surety company licensed to write surety bonds in the state;

(3) evidence accepted by the department, showing ability to self-insure; or

(4) other security approved by the department.

(c) The department may authorize department personnel to enforce this section and may adopt procedural regulations necessary to implement this section. Upon finding a violation the department may issue a stop use order.

(d) A policy of insurance, surety bond, or other form of security may not be canceled on less than 30 days' written notice to the department. This requirement must be clearly stated in the policy or endorsement for an insurance policy submitted as proof of financial responsibility under AS 02.40.020(a)(1). The 30-day notice period is measured from the date on which the department receives notice.

(e) A person who violates this section is guilty of a class A misdemeanor and is punishable by a fine of not less than $1,000 or more than $5,000 for each day of violation but not to exceed $10,000 for each violation. (E.O. No. 98 § 2 (1997))

Sec. 09.17.080. Apportionment of damages. (a) In all actions involving fault of more than one person, including third-party defendants and persons who have settled or otherwise been released, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and

(2) the percentage of the total fault that is allocated to each claimant, defendant, third-party defendant, person who has been released from liability, or other person responsible for the damages unless the person was identified as a potentially responsible person, the person is not a person protected from a civil action under AS 09.10.055, and the parties had a sufficient opportunity to join that person in the action but chose not to; in this paragraph, "sufficient opportunity to join" means the person is

(A) within the jurisdiction of the court;

(B) not precluded from being joined by law or court rule; and

(C) reasonably locatable.

(b) In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each person at fault, and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in accordance with the findings and enter judgment against each party liable. The court also shall determine and state in the judgment each party's equitable share of the obligation to each claimant in accordance with the respective percentages of fault as determined under (a) of this section. Except as provided under AS 23.30.015(g), an assessment of a percentage of fault against a person who is not a party may only be used as a measure for accurately determining the percentages of fault of a named party. Assessment of a percentage of fault against a person who is not a party does not subject that person to civil liability in that action and may not be used as evidence of civil liability in another action.

(d) The court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault. (§ 1 ch 139 SLA 1986; am §§ 15, 16 ch 14 SLA 1987; am 1987 Initiative Proposal No. 2, § 1; am §§ 11 — 13 ch 26 SLA 1997)