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## Aviation Law

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Small airplanes and helicopters operated under the general aviation rules in the United States are 82 times more likely to be involved in a fatal crash than major commercial aircraft airlines according to a recent report prepared by researchers at Johns Hopkins.<sup>1</sup> (Editor's Note: Online subscription to the Journal of the American Medical Association required to view report.)

They found that most aviation accidents and deaths arise in general aviation aircraft and concluded that the general aviation accident rates of 1.31 fatal crashes per 100,000 flight hours presents a public safety problem. They urged the Federal Aviation Administration and the National Transportation Safety Board to act to address the problem.

Victims of general aviation accidents face daunting challenges in obtaining compensation for their injuries. Federal law does not require general aviation pilots or mechanics to carry liability insurance and many are effectively "judgment-proof" for that reason.

The General Aviation Revitalization Act, a major piece of federal tort reform, protects general aviation manufacturers from liability in many cases. The government, which has important aviation safety responsibilities, enjoys sovereign immunity for its policy decisions. As a result, victims are often thwarted in attempt at civil recovery.

### General Aviation Safety Problem

General aviation refers to all aviation activities except for commercial and military carriers.<sup>2</sup> It includes recreation, emergency medical services, corporate, sightseeing, flight training, traffic reporting, search and rescue, fire-fighting, crop dusting and logging. General aviation aircraft include small propeller airplanes, helicopters, corporate jets, gliders and amateur-built aircraft, among others.

There are approximately 228,000 active private pilots and 220,000 registered general aviation aircraft in the United States.<sup>3</sup> Thousands of general aviation airplanes and helicopters operate in the New York area.

The Johns Hopkins study found that general aviation accounted for an annual average of 1,685 crashes and 583 deaths between 2002 and 2005, making up 91 percent of all U.S. aviation crashes and 94 percent of all aviation deaths.<sup>4</sup>

The difference in fatal crash rates between commercial and general aviation has persisted over 20 years according to the Johns Hopkins' researchers. During that period, the share of deaths attributable to commercial aviation disasters has fallen from 16 percent to six percent.<sup>5</sup>

Many factors contribute to the high accident rates in general aviation starting with the flying environment. Some general aviation pilots fly difficult emergency medical services (EMS) aviation, for example, which is among the most dangerous type of flying. EMS crews are often asked to fly at night and in poor weather conditions to rescue victims of accidents. EMS crash rates have dramatically increased in recent years from 1.7 per 100,000 hours in 1996 to 1997 to 4.8 in 2003 to 2004.<sup>6</sup>

On the whole, pilots flying commercial flights are much more experienced than pilots flying under general aviation rules. To obtain a private pilot certificate for "airplane, single-engine, land" (the most common certificate) a pilot needs to be at least 17 years old, fluent in written and spoken English, hold a third-class medical certificate from an aviation medical examiner, pass an aeronautical knowledge test, accumulate between at least 35-40 hours of flight time in training and receive a check ride.<sup>7</sup>

The equipment and mechanical condition of many general aviation aircraft also contribute to the higher crash and death rates. Many general aviation aircraft do not have avionics systems that help pilots avoid bad weather. Small airplanes and helicopters are generally not crashworthy. For example, most do not have advanced g-force absorbing seats to cushion impact forces. Their fuel cells and lines are usually not sufficiently crash resistant and may rupture during a crash. This increases the risk of a post-crash fire, a leading cause of death in general aviation crashes.<sup>8</sup> Finally, general aviation aircraft may not receive the same quality of maintenance as commercial aircraft. While many general aviation mechanics and maintenance companies are professional and safety conscious, applying the rigorous standards appropriate to the nature of the work others are fly-by-night operations.

The Johns Hopkins researchers conclude that general aviation crashes are a public safety problem that must be addressed by the FAA and NTSB:

To improve the safety of general aviation, interventions are needed to improve fuel system integrity and restraint systems, enhance general crash worthiness of small aircraft, and reduce weather-related crashes through pilot training and aviation technology. The FAA and the National Transportation Safety Board should place high priority on reducing general aviation crashes and allocate adequate resources for developing and implementing effective intervention programs.

### Difficulties Faced by Victims

General aviation crashes are usually caused by a combination of the following: pilot error, aircraft or component failure due to design or manufacture defects, aircraft or component failure because of poor maintenance, or errors by the FAA (e.g., air traffic control). No matter who was at fault in a general aviation accident, a victim faces significant practical and legal challenges.

#### **a. Pilot and Maintenance Error**

Pilot error has always been a leading cause of general aviation accidents.<sup>9</sup> Pilots bear a heavy responsibility for the safe operation of their aircraft. In fact, the pilot-in-command is the "final authority" regarding aircraft operation.<sup>10</sup>

Pilots are responsible for using reasonable care in the operation of an airplane and must follow all applicable Federal Aviation Regulations, which among other things, prohibit the careless or reckless operation of aircraft.<sup>11</sup>

Victims face a difficult problem because pilots are not required to carry aviation liability insurance and many do not have insurance. The responsible pilot who does take out insurance usually only carries a \$100,000 per seat policy. Unless the pilot or the pilot's estate has significant assets, a victim in a pilot negligence accident may have little or no course for recovery.

The United States' failure to require liability insurance coverage stands at odds with the rules in other nations. For example, both commercial and private aircraft operators must carry liability insurance coverage to operate in the European Union.<sup>12</sup> The passenger liability coverage is approximately \$151,370 U.S. per passenger on a noncommercial aircraft weighing less than 5,954 pounds (2,700 kg). Aircraft liability insurance is also mandatory in Canada.<sup>13</sup>

Victims face the same practical challenges when a crash is caused by maintenance error. Aviation maintenance companies can be significant entities with assets and insurance, others will simply close down and declare bankruptcy after causing a crash. There is no federal requirement that mechanics carry insurance and many victims are left with no litigation options.

#### **b. FAA Error**

The United States can only be sued to the extent that the nation has waived its sovereign immunity. The Federal Tort Claims Act (FTCA) waives immunity for the negligent acts of government employees, such as air traffic controllers, if a private person would be liable under like circumstances.<sup>14</sup> The FTCA, however, contains a broad exclusion that provides, in relevant part, that the act shall not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion was abused."<sup>15</sup>

Courts have held that the discretionary function exemption protects the government from liability for claims premised on the lack of training, oversight, or qualifications of air traffic controllers. The Supreme Court has stated that discretion is present "[w]here there is room for policy judgment decision" . . . . Cf. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 US 797, 104 S.Ct 2755 (1984) (holding that actions against the FAA for its alleged negligence in certifying aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act.<sup>16</sup> because the FAA's decisions as to the manner of enforcing regulations is plainly a discretionary activity, id. at 819-21, 104 S.Ct 2755).

The FTCA discretionary function exception does not protect the government from the failure of controllers to perform their duties in accordance the applicable rules, as set out in the Air Traffic Control Manual.

Pilots and air traffic controllers have a concurrent duty of care in most situations, but courts have often found that the pilot's duty is "primary," while the controller's duty is "secondary." The government will often not be liable even when its judgments were in error and cause a crash.

#### **c. Manufacturer Error**

Where an aviation product fails because of its design or manufacture, a victim may file a products liability action against the manufacturer. Proving a products liability claim is expensive and challenging, but depending on the age of the product, victims may have little chance of recovery.

In 1994, Congress enacted the General Aviation Revitalization Act (GARA). GARA's goal was to establish a federal statute of repose to protect general aviation manufacturers from liability for older aircraft. It provides aviation manufacturers with protection from lawsuits for aircraft older than 18 years from the date of original production.

The 18-year time period begins to run anew each time a component is added to the airplane where the component causes the accident. GARA contains four exceptions for the defenses it accords general aviation manufacturers. GARA will not afford protection if:

(1) the claimant proves that the manufacturer knowingly misrepresented to the FAA, or concealed or withheld from the FAA, required information that is material and relevant to the performance or the maintenance or operation of the aircraft or a component part;

(2) if the case is brought for a passenger receiving treatment for a medical or other emergency;

(3) if the case involves a person who was not aboard the aircraft at the time of the accident; or

(4) if there was an action brought under a written warranty enforceable under law but for the operation of this act.<sup>17</sup>

GARA is significant because much of the general aviation fleet is more than 18 years old.<sup>18</sup> Some states have adopted statutes of repose more restrictive than GARA. Accordingly, in many general aviation disasters the victims will not have a claim against the aircraft manufacturer even if a product defect caused the crash.

#### Conclusion

General aviation accident rates are higher than acceptable. In addition, the victims of general aviation crashes often have little or no legal recourse against the persons responsible for the crash. Responsible pilots and mechanics already carry insurance. Requiring mandatory minimum insurance for the others would be a positive change that would ensure compensation for victims and their families in general aviation disasters. In the constant tension between cost and protection a balance needs to be struck because at present the scales are often too stacked against victims of general aviation accidents.

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#### Endnotes:

1. Guohua, Li, M.D., Dr.P.H., Susan P. Baker M.P.H., "Crash Risk in General Aviation," *Journal of the American Medical Association*, Vol. 297, 1596 (2007).
2. See Aeronautical Information Manual 2007, Pilot/Controller Glossary's definition of General Aviation.
3. See *supra*, note two.
4. *Id.*
5. *Id.*
6. Baker, S, Grabowski, R, Dodd, D. "EMS Helicopter Crashes: What Influences Fatal Outcome?", *Annals of Emergency Medicine*, Vol. 47 #4, 351 (2006).
7. See 14 CFR §62.209; 14 CFR Appendix B.
8. See *supra*, note two.
9. AOPA Air Safety Foundation, 2006 Nall Report Accident Trends and Favors for 2005, <http://www.aopa.org/asf/publications/06nall.pdf> Accessed May 29, 2007.
10. 14 CFR §91.3.
11. 14 CFR §19.13.
12. OJ L 138, 30.4.2004, p. 4.
13. CAR §606.02.
14. 28 USC §1346(b).
15. 28 USC §2680(a).
16. 467 US 797, 821 (1984).
17. 49 USC §40101 (1994).
18. Best Practices Guide for Maintaining Aging General Aviation Airplanes (2003) [http://www.faa.gov/aircraft/air\\_cert/design\\_approvals/small\\_airplanes/cos/aging\\_aircraft/media/aging\\_aircraft\\_best\\_practices.pdf](http://www.faa.gov/aircraft/air_cert/design_approvals/small_airplanes/cos/aging_aircraft/media/aging_aircraft_best_practices.pdf).