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# Clauses Excluding Aviation Injury and Death as Risks Not Assumed in Life or Accident Insurance Policy

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CLAUSES EXCLUDING AVIATION INJURY AND DEATH AS  
RISKS NOT ASSUMED IN LIFE OR ACCIDENT  
INSURANCE POLICY

BYRON K. ELLIOTT\*

The risk of death or injury from aeronautics, like the risk incident to underwater navigation, was for many years too indeterminable and costly to be included in the average life, health or accident insurance policy at the regular premiums. Therefore, many insurance companies sought to exclude

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<sup>67</sup> Day v. Woodworth, 13 How. (U. S.) 371.

<sup>68</sup> Western Union Telegraph Co. v. Bierhaus, 8 Ind. App. 563.

<sup>69</sup> Moyer v. Gordon, 113 Ind. 282. This case involved an action for forcible entry. The court held that no exemplary damages could be recovered, but that the jury might take into consideration the bodily and mental suffering, injury to pride and social position and the shame and humiliation at having his wife and family turned out in street. See also Nossaman v. Rickert, 18 Ind. 350.

<sup>70</sup> Bass v. Railway Co., 36 Wis. 450, 39 Wis. 636, 42 Wis. 654.

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it from the coverage of their contracts, and frequently made use of a clause somewhat as follows:

"No benefit shall be payable under this policy for injury or death while insured is engaged in aeronautic or submarine operations."

As aviation developed and travel by regularly established airlines became a common experience, the courts supplied authorities construing these older clauses. New phraseology followed to meet the new conditions and the decisions on the older forms. A later and widely used clause today is the following:

"Death as a result of service, travel or flight in any species of aircraft, except as a fare-paying passenger, is a risk not assumed under this policy; but if the insured shall die as a result, directly or indirectly, of such service, travel or flight, the company will pay to the beneficiary the reserve on this policy."

Under the varying phraseology used to indicate that death or injury from an aviation accident was not a risk covered by the policy, it becomes material to ascertain the exact facts surrounding the accident. The object of the flight, the part taken in it by the insured and the manner of injury are all to be considered. For this reason, it is more convenient to classify the authorities by the circumstances surrounding the injury than it is to group them under any particular phraseology contained in a policy.

### I. *Crash Instances—Passengers*

The most familiar distinction is that between "engaging in" aviation activities and "participating" therein. The courts have frequently held that a passenger who does nothing towards operating the plane is not "engaged in" aviation or aeronautics or aeronautic operations or expeditions, although he may be "participating in" some form of aeronautics.

The Indiana Supreme Court has had such a case before it. In *Masonic Accident Insurance Company v. Jackson*<sup>1</sup> an accident insurance policy contained, in part, the following clause:

"Indemnity under this policy shall not be payable for any death or disability that may be caused or contributed to, wholly or in part by any of the following causes: \* \* \* while engaged in aviation or ballooning \* \* \*"

The insured, passenger in an airplane, was killed in a crash. The court found no error in overruling a demurrer to the complaint, saying:

"Thus it may be observed that the phrase 'engaged in aviation' denotes and suggests permanency, or continuity, or frequency of action, and does not aptly describe a single isolated act of riding in an airplane as a passenger."

The United States Circuit Court of Appeals for the Eighth Circuit, in *Goldsmith v. New York Life*<sup>2</sup> reviews the various authorities and comes to the following "fairly definite conclusions" upon clauses which seek to exclude aviation deaths:

"(1) The words, 'participating as a passenger or otherwise in aeronautics or aviation,' 'participating as a passenger or otherwise in aeronautic activity,' or 'participating as a passenger or otherwise in aeronautic expeditions,' cover a passenger in an airplane.

"(2) The words, 'engaged in aviation or aeronautics,' 'engaged in aeronautic operations,' 'engaged in aeronautic activity,' or 'engaged in aeronautic expeditions,' do not cover the ordinary passenger in an airplane."

<sup>1</sup> (1929) 200 Ind. 472, 164 N. E. 628, 61 A. L. R. 840.

<sup>2</sup> (1934) 69 F. (2d) 273.

The court had before it a clause excepting from the double indemnity benefit death resulting "from engaging as a passenger or otherwise, in submarine or aeronautic expeditions." The company paid the face of the policy, and was freed from liability for double indemnity (accidental death benefit), the court saying:

"While both the word 'participate' and the word 'engage' mean, among other things, to take part in, it is held that 'engage' is ordinarily understood to refer to an occupation or employment or continued activity, so that, in reading a policy which denied coverage to one engaged in aeronautics, it might properly be construed as not excluding a mere casual passenger in an airplane, but as referring to one who made aeronautics his vocation or took some active part in the operation of the plane. It cannot be denied, however, that one may temporarily engage in taking a short trip or in writing a letter or in casual conversation, so that the meaning or scope of the word 'engaged' may be made entirely clear by its association with other words."

The following brief reference to other cases shows in quotations the point of the exclusion clause involved in the decision, and indicates the court's holding:

*Padgett v. Metropolitan Life*<sup>3</sup> "that death shall not have resulted from bodily injuries sustained while participating in aviation or aeronautics, except as a fare-paying passenger \* \* \*." Double indemnity denied on policy of insured who paid no fare to ride with his employer who held a private pilot's license not authorizing transportation for hire.

*First National Bank of Chattanooga v. Phoenix Mutual*<sup>4</sup>: "directly or indirectly, wholly or partly, \* \* \* from participation in aeronautic \* \* \* operations." Double indemnity denied on policy of president of aircraft company who, against advice of a licensed pilot his company regularly employed, directed that trip be made so he could see sick wife. Insured had interposed his own judgment.

*Head v. New York Life*<sup>5</sup> "participation as a passenger or otherwise in aviation or aeronautics." Passenger, with pilot, has a part in flying in the air and is participating.

*Provident Trust Co. v. Equitable Life Assurance Society*<sup>6</sup> "if death shall \* \* \* be the result of or be caused directly or indirectly by \* \* \* engaging as a passenger or otherwise in \* \* \* aeronautic expeditions." Double indemnity awarded on policy of fare-paying passenger on regularly scheduled flight.

*Missouri State Life v. Martin*<sup>7</sup> "participation in aviation or submarine operations." Double indemnity allowed where insured, as invited guest of friend, was on his first flight. On rehearing, the court rejected difference between "engaged" and "participation," emphasizing the word "operations."

*Martin v. Mutual Life Insurance Co. of New York*<sup>8</sup> Same accident as *Missouri State v. Martin*. "Participation in aeronautics." Invited guest entitled to double indemnity, court declining distinction between "participate" and "engage."

*Gibbs v. Equitable Life Assurance Society*<sup>9</sup> "engaging as a passenger or otherwise in submarine or aeronautic expeditions." Court thought that

<sup>3</sup> (N. C., 1934) 173 S. E. 903.

<sup>4</sup> (U. S. S. C. A., 6th Circ., 1933) 62 Fed. (2d) 681.

<sup>5</sup> (1930, U. S. C. C. A., 10th Circ.) 43 Fed. (2d) 517.

<sup>6</sup> (Pa., 1934) 172 A. 701.

<sup>7</sup> (Ark., 1934) 69 S. W. (2d) 1081.

<sup>8</sup> (Ark., 1934) 71 S. W. (2d) 694.

<sup>9</sup> (1931) 256 N. Y. 208, 176 N. E. 144, reversing 246 N. Y. S. 560.

when policy was issued in 1924, all air trips were considered expeditions, and denied recovery.

*Flanders v. Benefit Association of Railway Employees*:<sup>10</sup> "while engaged in aeronautics." Passenger in ship piloted by friend. "Engaged" held to mean more than a single trip and recovery allowed.<sup>11</sup>

## II. *Propeller and Other Accidents Before or After Flight*

With immense crowds gathering at airports and hundreds of thousands of people flying, it is not surprising to find injuries resulting from contact with the propeller or another part of the ship while it is on the ground. Such an accident could hardly be excluded by the usual clauses unless it constituted some step incident to use of the ship.

In *Blonski v. Bankers Life Co.*<sup>12</sup> the insured, preparing to take a flight as a passenger, is injured when he steps up and spins the propeller. His disability benefits are not payable for injury while "engaging or participating as a passenger or otherwise in aviation or aeronautics." The court held his acts to be within this clause.

In *Murphy v. Union Indemnity Company*<sup>13</sup> an accident policy excepted injuries while "in or on any vehicle \* \* \* for aerial navigation." Recovery was denied where insured was struck by a revolving propeller while attempting to board a seaplane.

Insured was part owner of the airplane involved in *Pittman v. Lamar Life Insurance Co.*<sup>14</sup> He alighted from the plane and walked into the propeller. His death was held to have occurred "while participating or as a result of participation in any submarine or aeronautic expedition or activity, either as a passenger or otherwise \* \* \*," the court saying:

"The term 'aeronautic activity' is broad enough to cover what is ordinarily incident to an airplane trip. The aeronautic activities of one who takes such a trip do not begin or end with the actual flight, but include his presence or movements in or near to the machine incidental to beginning or concluding the trip."

A passenger, in *Tierney v. Accidental Life Ins. Co.*<sup>15</sup> stepped from the ship into the propeller. The California Supreme Court here held the company liable, although the policy covered no injury received "while participating or in consequence of having participated in aeronautics."

Motor trouble forced down the seaplane, involved in *Wendorff v. Missouri State Life Ins. Co.*<sup>16</sup> but no one appeared to be injured until it capsized. Thereafter insured was found dead in the water, his head displaying signs of some injury. The court held the death not covered by an accident policy which excluded injuries sustained "while in or on any vehicle or mechanical device for aerial navigation, or in falling therefrom or therewith \* \* \*"<sup>17</sup> Citing *Meredith v. Business Men's Accident Association*.<sup>17</sup>

<sup>10</sup> (1931) 226 Mo. App. 143, 42 S. W. (2d) 973.

<sup>11</sup> For other cases see *Benefit Association of Railway Employees v. Hayden*, (1927) 175 Ark. 565, 299 S. W. 995, 57 A. L. R. 622, "while engaged in aeronautics or underwater navigation," recovery allowed; *Bew v. Travelers Insurance Co.*, (1921) 95 N. J. Law 533, 112 A. 859, 14 A. L. R. 983, "while participating in or in consequence of having participated in," no liability. (A leading case.)

<sup>12</sup> (1932) 209 Wis. 5, 243 N. W. 410.

<sup>13</sup> (La., 1931) 134 So. 256.

<sup>14</sup> (C. C. A. 5, 1927) 17 F. (2d) 370.

<sup>15</sup> (1928) 265 Pac. 400.

<sup>16</sup> (Mo., 1927) 1 S. W. (2d) 99.

<sup>17</sup> 213 Mo. App. 688, 252 S. W. 976.

An insured passenger leaped from the plane which had scarcely left the ground, in *Gits v. New York Life*.<sup>18</sup> He was granted his double indemnity although his clause excepted death from "engaging in submarine or aeronautic operations."

### III. *Accidents to Pilots*

The pilot is both engaging and participating in aeronautics. This is equally true of an individual operating a glider. In *Irwin v. Prudential Insurance Co.*<sup>19</sup> the insured, pilot and sole occupant of a glider, was held to be engaged in aviation operations.

In several instances, a pilot has sought an advantage from the "in time of war" phrase. He obtained it in *Charette v. Prudential Insurance Co.*<sup>20</sup> where his double indemnity clause excluded death as a result of "having been engaged in aviation or submarine operations or in military or in naval services in time of war."<sup>21</sup>

### IV. *Miscellaneous Decisions*

Louisiana does not recognize an aviation exclusion clause, holding it to be in conflict with the incontestable clause and statute.<sup>22</sup> Other states have held to the contrary.<sup>23</sup>

An airplane is not a "motor drawn car" within the purview of an accident policy listing a series of conveyances.<sup>24</sup> Nor is a ship taking individuals up for short hops "a public conveyance provided by a common carrier," in the same sort of policy listing a series of conveyances.<sup>25</sup> But a corporation providing regular flying service is a common carrier.<sup>26</sup>

## RECOVERY FOR TORTS BETWEEN SPOUSES

BY DONALD J. FARAGE\*

### *Effect of the Marital Status on Contracts and Crimes at Common Law*

A brief survey of the legal attributes surrounding the spouses at common law may be helpful in discussing present problems involving the marital status. One very soon learns that many of the difficulties and concepts which have a role in the field of contracts and crimes, where marital status is involved, also appears prominently in the tort field.

The early concept that, "upon marriage, a man and woman merged, in legal contemplation, and became one, that one being the husband" was so

<sup>18</sup> (C. C. A. 7, 1929) 32 F. (2d) 7.

<sup>19</sup> (1933) 5 Fed. Supp. 382.

<sup>20</sup> (1930) 202 Wis. 470, 232 N. W. 848.

<sup>21</sup> Accord, *Peters v. Prudential Insurance Co.*, (1929) 133 Misc. 780, 233 N. Y. S. 500. Contrary results, on this point, were reached in *Taylor v. Prudential Insurance Co.*, (1931) 253 N. Y. S. 55, and *Price v. Prudential Insurance Co.*, (1929) 98 Fla. 1044, 124 So. 817.

<sup>22</sup> *Leidenger (Bernier) v. Pacific Mutual*, (1932) 139 So. 629.

<sup>23</sup> *Pacific Mutual v. Fishback*, (Wash., 1933) 17 Pac. (2d) 841; *American Home Foundation v. Canada Life*, (1931) 260 N. Y. S. 106 (citing *Metropolitan v. Conway*, (1930) 252 N. Y. 449, 169 N. E. 642, leading case on the point).

<sup>24</sup> *Monroe's Admr. v. Federal Union Life*, (Ky., 1933) 65 S. W. (2d) 680.

<sup>25</sup> *North American Acc. Ins. Co. v. Pitts.*, (1925) 213 Ala. 102, 104 So. 21; *Brown v. Pacific Mutual*, (C. C. C. 5, 1925) 8 F. (2d) 996.

<sup>26</sup> *Curtis-Wright Flying Service v. Glose*, (C. C. A. 3, 1933) 66 Fed. (2d) 710.

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