General Aviation Law

Third Edition

Jerry A. Eichenberger

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PREFACE

In the years since I began practicing law, the United States aviation industry has been at the center of many of the rapid and significant developments in the American legal system.

I occasionally have the privilege to speak to groups of pilots, fixed-base operators, mechanics, and FAA personnel. Everywhere I present these talks, some of the topics covered in this book draw a good deal of interest. Everyone seems, at the same time, to be mystified by, frustrated by, and angry at the law as each person perceives it, as well as at the lawyers whom all people want to hold responsible for everything that is seen as wrong with the system.

Without doubt there are injustices and errors in the workings of the law. So are there in all the other systems and mechanisms that civilization has developed. But the best way to be equipped to deal with the law is through a working knowledge of the parts that affect each person directly, whether it be in his vocation or avocation. That is what this book is about.

There is certainly no intent in these pages to make lawyers of readers. Many would lay the book down immediately if that were the goal, not wanting to join such ranks even if they could. The point of this work is to pass along some working information to those who hold the same affection for flying as do I.

Physicians often have it easy in one respect. Patients usually know when they are sick and go to see the doctor before it is too late. Lawyers often do not share that luxury. Our clients generally do not recognize the onset of a legal problem before serious compromises in their position have occurred, some nigh irreparable.

Inevitably, these folks eventually do find their way to an attorney, who is naturally expected to turn back the clock, ignore all the unfavorable facts, and save their skins. If she does not, she is considered to be incompetent, while at the same time the system is seen as so perverted that no honest person can get a fair result.

Rather than fit into that class of individuals, it is hoped that the reader will know what basic problems to avoid in the first place, and when to seek the counsel of an aviation lawyer—before it is too late.

People pay tens of thousands of dollars for an airplane, yet some rebel at the thought of spending less than an additional $100 for a title search to get some

reasonable degree of comfort that they will end up owning the dream machine for which they have just paid so much.

Others have no real concept of what insurance coverages they do and do not have. So long as you have a million or so worth of total liability coverage, good enough, right? We shall see.

Since the late 1980s, many aviation pundits have blamed product-liability litigation for the precipitous decline in the American general aviation industry. There is no doubt that lawsuits against manufacturers have had some effect upon our industry, but we'll take a deeper look at the subject, including analyzing just how much effect the litigation really had, and what has been done recently to lessen the courtroom burden on manufacturers of general aviation products.

What do you do when confronted with a letter from the FAA informing you that an investigation is in progess, concerning a flight you recently made, to see if you violated any Federal Air Regulation (FAR)? The letter invites, even encourages you, the pilot, to respond within a relatively short time so that the person making the investigation will have the benefit of your side of the story. Of course, you do not want to ignore the writer. What next?

Flying is a wonderful way to earn a living, and one of the most enjoyable forms of transportation that there is. It is a hobby that gives untold thousands of hours of relaxation and sport to many aviators each year. The regulatory burden need not be a backbreaking toll. The fear of a minor accident does not have to haunt a pilot's every flight, if he is properly insured. Likewise, pilots live through scrapes with the FAA over alleged violations of the FARs in the same way you probably did with your last encounter with the highway patrol.

This book is not intended to drive anyone away from aviation with its stories. It is simply designed to make each reader a little wiser and more sage in the workings of a system that affects each of us and what we all hold so dear.

Jerry A. Eichenberger

CHAPTER 1

The American Legal System

At first sight, the American legal system can appear to be a maze that has no particular path through it. Lawsuits have results that seem to be incredible. Millions of dollars are reported as being awarded on claims that appear to be frivolous when viewed from the outside, without a thorough and working knowledge of the facts or the law of those particular cases. To the uninitiated, the workings of the law, courts, and lawyers can be mysterious. There is no question that our system is built upon rules that are not easily, if ever, thoroughly understood.

In the past, law students learned of the principle known as *stare decisis,* which means the "law of the binding precedent." Our system developed around the concept that judges would find and apply particular law to particular cases. Then, once decided, those cases could be used in analogous future situations as authority for what the law is. Supposedly, lawyers in practice and judges in courtrooms would then apply that law decided in the former case to the determination of the case presently before them.

This concept of legal precedent began hundreds of years ago and served us well for a long time. The problem today is that as fast as the law is changing and evolving to meet the needs of an even faster-changing society, the value of *stare decisis* has diminished because the courts are growing more reluctant to simply declare that what once was a proper outcome of a particular controversy is fit for present application.

In many areas of our legal system—the first two of which come to mind are the criminal and civil rights arenas—the law changes extremely fast. In many cases, it

ought to. To hold today to the principles that permitted the lack of civil rights just a few decades ago would not be acceptable to many of us. Yet in the areas of business and accident law, even though the technologies are developing daily, the legal principles are not. There is not that much difference between a broken wagon wheel and a broken landing gear, as far as the necessity arises to apply the law to an accident caused by that failure. Yet so many writers and practitioners within our legal system seem to think that we need to change the principles that guide us to keep pace with the development of scientific and engineering technology. Perhaps some change is in order in these old areas of the law, but I for one feel that change, simply for the sake of change, is a poor practice.

Let us examine from where our legal system came from, how it is applied to aviation cases, and some common myths about it.

Heritage of the English Common Law

The United States had its beginning in the original 13 English colonies, which were quite developed in both their economic and judicial systems at the time of the American Revolution, and by the 1770s, the *English common law* was the legal system in use. Then, as now, most of the politicians and political writers of the day were either practicing lawyers or people with a legal education.

After the American Revolution, the framers of the new nation saw no reason to deviate from many of the institutions that they had inherited from the mother country. Other than changing the monetary system from the English pound to the Spanish dollar, virtually all other customs, mores, and principles of the new society remained the same as when the colonies were British possessions. Because courts had existed for well over 100 years before the revolution, and the merchants, lawyers, and judges were familiar with the workings of the English system, which appeared to be accomplishing the purpose of settling disputes, there was no reason to change.

Hence, the concept of a common law system, in which judges sitting deciding cases are responsible for a great measure of the legal principles that guide and govern us, was so deeply ingrained in society that it survived any emotional desire to change it simply because it was English, and has persevered throughout the 200 years of our nation's existence.

Naturally, the American common law system has evolved somewhat differently than the pure English workings upon which it is based. But to a surprisingly great degree, American law today, particularly the judge-made law, is not significantly different from that in Great Britain, or any of its former colonies or possessions such as Canada, India, South Africa, or Australia.

State Law versus Federal Law Relating to Aviation

Aviation is a unique industry and endeavor in more ways than one. First of all, as industries, activities, and economic systems go, it is a newborn. Because it has been only slightly more than 100 years since the Wright brothers first gave us powered flight, only a short moment of time has passed, as the legal system defines "time" in terms of how long it takes to work changes in the law.

The American legal system is basically composed of two competing subsystems of law. First and foremost, the *law of the various states* in which we live and do business controls the lion's share of our daily activities. It is state law, not federal law, that governs most of the day-to-day business transactions with which we deal; it is state law that prohibits us from taking our neighbor's property or life, that regulates how we drive our automobiles, and that deals with what happens when accidents do occur in terms of who is at fault or liable to compensate another.

Yet we have a system of *federal law* that pervades the nation and emanates from our capital. Unlike the English system previously discussed, our American legal system has created a dichotomy between those areas over which the federal government has jurisdiction, which come from the United States Constitution, and the rest of the activities of society, which are governed and controlled by state law.

Because aviation is obviously a highly mobile undertaking, it quickly came to be viewed as an area appropriate for federal intervention and the application of federal law. There have been several attempts on the part of the federal government to regulate aviation, and the *Federal Aviation Act of 1958,* as amended, is the current general statute passed by Congress that in a comprehensive sense governs and regulates aviation. We will see in Chapter 8 that Congress passed a law in 1994, which gives a substantial amount of relief from product-liability lawsuits to general aviation manufacturers.

However, there is still a large area of the law affecting flying that is purely the law of the various states. For instance, when an accident does occur, it is generally state law, not federal law, that decides if someone is to be at fault or is to be held liable to another, the conditions under which that liability occurs, and the amounts and types of compensation to be paid to the aggrieved parties. If a manufacturer is subject to suit, state law still determines the outcome of the case, once a plaintiff gets past the limitations of federal law, and gets into the courthouse.

Therefore, aviation lawyers are constantly dealing with federal law as well as with the law of the state in which they practice and where the particular accident or transaction occurred, or, in many instances, they are dealing with the law of another state where such happened. When another state is referred to as a *foreign*

jurisdiction, the use of that phrase does not indicate a foreign country, but rather simply another state.

Because the 50 states are just that—separate states, each with its own laws, legislature, and courts—it is recognized that they are, in fact, foreign one to the other. For instance, the law of Ohio in many situations is quite different from the law of New York or the law of California. Should a particular accident or business transaction occur in any of those states, a person must be thoroughly familiar with the law of the state that will control the eventual outcome of the controversy.

Quite often, a lawsuit is tried in one state and the law of another state is used to decide either the entire litigation or certain steps of it. The question of which law to apply to a given situation is called *conflicts of laws* and is an entire subject matter itself, with complex rules devised to decide the issue of which state's law is to govern and resolve the dispute that is before the court.

The Functions of Judge and Jury

One of the most inviolate principles of the English common law system that we inherited is that of *trial by jury.* The English long ago realized that they wanted their disputes resolved, to the degree possible, by laypersons rather than by judges who would apply legal technicalities to often subvert concepts of common sense. Hence, the jury system is used in all 50 state legal systems and in the federal courts as well.

Although there are a few types of cases that are not subject to jury trial in most states—domestic relations proceedings are an example—in many states, virtually all the lawsuits that arise from aviation accidents and business transactions will be subject to trial by jury. Therefore, it is necessary that we gain an initial understanding of what it is the jury does in the courtroom setting, and what functions are performed by the judge.

Basically, the jury is impaneled to hear the evidence that is presented in a lawsuit and determine questions of fact. This means it is the jury who decides what happened, by or to whom, and generally under what circumstances. It is the jury who decides whether the pilot or operator of the aircraft was operating in accordance with good operating practices, or if the pilot was negligent. It is the jury who has the duty to determine if a product is defective when it does not live up to the standards that the normal consumer would expect of it.

On the other side of the coin, *the judge's role is to determine questions of law.* The judge decides whether particular items of evidence are admissible under the convoluted and complex rules that govern introduction of evidence. It is the judge who sustains or overrules objections directed to the admissibility of documents or

testimony into evidence at a trial. Likewise, the judge has the job of determining what law governs the particular controversy and instructing the jury on that law, so that when the jury retires to deliberate its verdict, it can apply the law the judge has given to it and, in combination with its own determination of the facts, render a verdict for one side or the other.

Many times the line of demarcation between a question of fact and a question of law becomes quite blurry. However, simply remember that it is the jury who generally decides if someone is telling the truth and, if so, to what degree. It is the role of the judge to control the courtroom—particularly, but not limited to, reigning in the lawyers—and to see that the procedure, as well as the evidence and arguments submitted to the jury, complies with the legal standards in that judge's jurisdiction.

Some Common Myths about Justice

From the time that all of us were youngsters, and in particular beginning with our school years, we have had ingrained in us the principle that the American legal system is a unique engine designed to ferret out the truth and always accomplish justice. While that is without question the aim and goal, all too often it is not the result.

Ours is an *adversary legal system*. This means that it is the job of a lawyer to advocate a client's position within the bounds of the rules of law and the ethical constraints that guide and govern us. The lawyer's job is to find a legally arguable position that supports the result that the client wants. Without question, the client wants to win. The client is not particularly interested, in most cases, in achieving what might be a fair allocation of responsibility because each of us has his or her own definition of what constitutes a fair result.

Therefore, our system has, from its beginnings, held to the proposition that the lawyer is engaged to do battle for a particular client. The lawyer is to advocate that party's position, introduce the evidence in a manner that furthers that goal, and then argue the interpretation and application of that evidence to accomplish the desired outcome, which is always that the client will prevail in the litigation process.

In fact, attorneys in our system have the absolute duty to be zealous advocates, again within the bounds of the law and ethical obligations. Most certainly, the attorney is not engaged to misrepresent the evidence, but simply to present it in a manner that benefits the client to the greatest possible degree.

At the same time, a competent attorney should take a somewhat distant and objective view in counseling clients during the process of litigation, particularly, but not limited to, the settling of a dispute. A lawyer should always advise clients using professional judgment and experience as to the likelihood of success of the client's position.

Lawyers often advocate positions that do not, at first sight, seem to have a great likelihood of victory. Many of our great turning points in the law have been the result of such cases. It is not the attorney's job to decide the outcome of the case, that is left to the court.

Therefore, attorneys are often likened unto actors. The manner of the presentation of the evidence, the rapport that a particular trial lawyer can generate with the jury and, to some degree, the judge, can often have a tremendous impact on the outcome of a trial. While not reduced to a purely theatrical performance, modern-day litigation does put the lawyer in a position of often being seen by the jury as one of many determining factors in the eventual result of the trial. This might not be particularly fair, but humanity has never developed a totally fair or perfect system.

It has been said by at least one prominent commentator on the common law system that it is fraught with injustice and unfair results, but that we have yet to develop a better or more civilized means for settling disputes. And in the end, the legal system exists to settle the disputes of those who come under its jurisdiction. As with any other argument, there is often no perfect solution. No one wants to be injured in an accident; no one wants to undergo such devastating trauma—or to see that happen to a family member—let alone meet an untimely death.

The legal system can never heal unending misery, it cannot bring back those killed in accidents, and it cannot undo maiming. All it can do is provide a measure of compensation, usually measured in money, to the individuals who feel they have been aggrieved at the hands of another.

Therefore, if particular people are so unfortunate as to be injured, let alone have their lives ended in an aviation accident, true fairness can never result because humanity is incapable of accomplishing it. Those who feel that they have been deceived, cheated, or simply mistreated in a business transaction can almost never recover all their real or imagined losses.

The legal system has to be seen for what it is: an imperfect yet constantly evolving and, hopefully, improving method of resolving the inequities that one segment of our society works upon another. It is the lawyer's job to attempt, through the advocacy of his client's position, to remedy those happenings as best he can. But we must all realize that we will never achieve perfection in ourselves, nor in the systems that we develop.

When a particular person is involved in the legal system, whether as *plaintiff* (the one who is bringing the suit) or as *defendant* (the one who is being sued), she must approach her involvement with a realistic eye and pursue realistic goals. To do otherwise, in the arena of civil litigation, will almost guarantee that she will come away frustrated, angry, and irate at lawyers, juries, and the law in general.

In every courtroom across our country, and in every trial, there is a winner and there is a loser. Reasonable people often can, with the assistance of competent counsel, realize the compromising aspects of their relative positions, and eventually settle their own disputes.

But when that is not possible, for a variety of reasons, the system must perform its time-honored function and settle the dispute for them. Simply remember that such a forced resolution seldom will be a pleasant experience. The result similarly will be seldom exactly what either side desired and, for certain, will be a result that at least one side did not desire.