

**Note from the Attorney General's Office:**

1950 Op. Att'y Gen. No. 50-2532 was overruled in part by 1973 Op. Att'y Gen. No. 73-029.

2532

1. PILOT, STATE — CRASH — OPERATION, STATE OWNED AIRCRAFT ON OFFICIAL BUSINESS — NOT LIABLE IN DAMAGES TO PARTY, PASSENGER OR OTHER PERSON, WHO SUSTAINED PERSONAL INJURY OR PROPERTY DAMAGE—CRASH, ACT OF GOD OR SOME OTHER CAUSE NOT INVOLVING NEGLIGENCE.
2. “PILOT ERROR”—NO SIGNIFICANCE IN LAW.
3. STATE PILOT WHO CRASHES WHILE OPERATING STATE OWNED AIRCRAFT ON OFFICIAL BUSINESS — LIABLE IN DAMAGES TO PARTY, PASSENGER OR OTHER PERSON, WHO SUSTAINED PERSONAL INJURY OR PROPERTY DAMAGE—CRASH DIRECT AND PROXIMATE RESULT OF NEGLIGENCE OF PILOT.
4. DUTY, STATE PILOT OF STATE OWNED AIRCRAFT TO USE ORDINARY CARE IN OPERATION OF AIRCRAFT.
5. STATE PILOT—IF AS INDIVIDUAL SUBJECTED TO SUIT FOR DAMAGE OR INJURY AS RESULT OF CRASH OF STATE OWNED AIRCRAFT, OPERATED ON OFFICIAL BUSINESS, NO AUTHORITY FOR STATE TO FURNISH COUNSEL TO REPRESENT HIM.
6. PUBLIC FUNDS OF STATE—MAY NOT BE EXPENDED TO INSURE AGAINST LIABILITY FOR PERSONAL INJURY OR PROPERTY DAMAGE—PASSENGERS OR OTHER PERSONS, INCLUDING PROPERTY OWNERS — NEGLIGENT OPERATION OF STATE OWNED AIRCRAFT BY STATE PILOTS.

## SYLLABUS:

1. A state pilot who crashes while operating a state-owned aircraft on official business is not liable in damages to a party, whether such party is a passenger or other person, who has sustained personal injury or property damage as the result thereof, where such crash is caused by an act of God, or some other cause not involving negligence of the pilot.

2. The term "pilot error" has no significance in law.

3. A state pilot who crashes while operating a state-owned aircraft on official business is liable in damages to a party, whether such party is a passenger or other person, who has sustained personal injury or property damage as the result thereof, where such crash is the direct and proximate result of the negligence of such pilot.

4. It is the duty of a state pilot of a state-owned aircraft on official business to use ordinary care in the operation thereof.

5. If a state pilot in his individual capacity is subjected to a suit instituted by a party damaged or injured as the result of the crash of a state-owned aircraft being operated on official business there is no authority for the state to furnish counsel to represent him in such action.

6. Public funds of the state may not be expended to insure against liability for personal injury or property damage sustained by passengers or other persons, including property owners, resulting from the negligent operation of state-owned aircraft by state pilots.

Columbus, Ohio, November 22, 1950

Hon. C. E. A. Brown, Director, Ohio Aviation Board,  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"As you are aware, it is necessary for certain agencies of the state to use aircraft in certain of their respective functions. The Department of Highways uses planes for aerial photographic work and also in connection with their Highway Patrol work. The Forestry Division of the Department of Natural Resources uses aircraft for fire patrol and other work. The Aviation Board uses aircraft in its various inspection and investigation functions. There possibly are other agencies of the state using planes presently and undoubtedly there will be a wider use of aircraft by the state in the future.

"In connection with the use of these planes, I have contacted the above mentioned departments and find that we are all equally interested in the matter of the personal liability of the personnel of the state who are engaged in flying these aircraft in the pursuit of their various official duties.

"I have explored the possibility of obtaining insurance to cover this situation and I find from information furnished by responsible insurance authorities that the approximate cost to each pilot to protect himself with adequate insurance would be approximately \$135.00 per annum. Since it is possible that as many as ten different pilots might be required in the course of their duties to fly the two aircraft belonging to the Aviation Board, the cost of such protection for the personnel could be as much as \$1,350.00 per annum. It is also my understanding that the personal insurance covering the pilot would in no way protect his immediate superior who might have ordered the trip that resulted in any personal or property damage. On the other hand, if the State were to insure each of these aircraft with adequate coverage, such premium would not exceed \$200.00 per annum for both aircraft. However, it is not possible for the pilots to obtain insurance on these aircraft, since they are owned by the state.

"In addition to the possible liability to be incurred by a pilot from damage to persons or property on the ground, there also exists a possibility of liability to passengers, since I am informed that the so-called Guest Statute (Sec. 6308-6 G. C.) is not applicable to aircraft.

"Your attention is called to the fact that in these cases where there is evidence of pilot negligence, there are presented to the court numerous questions which are not germane to a charge of negligence against the driver of a motor vehicle operating on the ground. I refer to what is commonly called 'Pilot Error.' This term is frequently used by Government Investigators and appears to cover a multitude of sins as well as ignorance. It is extremely difficult for the man on the ground to determine the one or several motivating circumstances which might cause the pilot to do the wrong thing in times of great stress. In this connection might be cited the example of a man who has engine failure over an airport and under ordinary conditions or under simulated conditions might be able to land the ship safely without power. However, certain psychological tests have proven that well trained and responsible pilots, when faced with innumerable decisions which necessarily accompany such a crisis, may be unsuccessful in affecting a safe landing. The same thing might be true of the man who gets involved in adverse weather which results in an accident and yet involves a pilot's judgment of many inter-related factors. During the war, many pursuit aircraft of certain types cracked up one after the other because the pilot's anxiety resulted in his pulling the mixture control instead of the gear retracting knob. This was judged by officials to be pilot error, however, when engineering stepped into the picture and changed the shape of and moved the control knobs to insure greater separation, the accidents due to this unfortunate mishandling immediately stopped.

In view of the foregoing, your formal opinion is respectfully requested on the following questions:

1. What is the personal liability of a state pilot who crashes while operating a state-owned aircraft on official business, which crash results in damage to persons or property on the ground, and which crash is clearly the result of an act of God or some other cause beyond control of the pilot and not the result of the pilot's negligence?

2. What is the personal liability of such pilot where such damage is the result of negligence of 'Pilot Error'?

3. What is the personal liability of such pilot to passengers in such aircraft:

(a) where there is no negligence on the part of the pilot?

(b) where there is negligence of 'Pilot Error'?

4. If such pilot is subjected to suit, will the state furnish counsel?

5. Is it possible for the state to insure state-owned aircraft so as to protect the pilots thereof?"

Pertinent to your first question is the comment in 1 O. Jur. 406, Act of God, Section 3, which section reads in part as follows:

"The rule of liability where a loss or injury is caused by an act of God is crystalized in the maxim, 'no man is responsible for that which no man can control.' In those cases where the super-human cause alone has operated or been effective, the application of the rule is simple; there has been no human agency exerted and no person is liable. But it is not cases of this kind which have perplexed the courts. When an act of God is set up as a defense, the question whether there was a concurring cause, and, if so, the extent to which such cause will be considered, is the one which troubles the judicial conscience. \* \* \*"

It is a general rule of law applicable to all tort actions that there can be no recovery of damages in the absence of some act or omission on the part of the party charged, which act or omission is in disregard of his duty. (39 O. Jur. 222, Torts §6) Within the general classification of tort actions repose the vast array of cases involving injuries to persons or property caused by negligent acts or omissions. Without going into detail on the varying degrees of care required in particular situations it may be stated that a failure of a party to exercise the required care constitutes negligence.

In the case of *Cleveland City Ry. Co. v. Osborn*, 66 O. S. 45, 63 N. E. 604, the second branch of the syllabus reads as follows:

“Where a passenger on a street railway car was thrown from the car and injured by the sudden stopping of the car in the effort to avoid a collision, and by the shock of a collision which was not brought about by the negligence of the defendant, it is *damnum absque injuria*.”

This case and the numerous negligence actions decided since its rendition are authority for the principal that in the absence of negligence one is not liable in damages to a party who has sustained damage to his person or property.

An airplane is not considered by the courts to be an inherently dangerous instrument, although in flight, when improperly used or when operated by an incompetent pilot, it may be. 99 A. L. R. 184. Hence, in the absence of statute, the common law rules of negligence and due care obtain with respect to the operation of aircraft. 6 Am. Jur. 36, Aviation §60; 17 O. Bar (No. 10) 113. I am apprised of no statute which would alter the application of these rules in Ohio.

An exhaustive search of reported cases and legal treatises pertaining to aviation fails to disclose that the term “pilot error” has been given significance in jurisprudence. The apparent reason for the absence of the term is discernible from the basic theory of negligence actions which permit recovery only in situations where the facts establish a failure of the party charged with a duty to exercise the required degree of care in the performance of that duty, which failure directly and proximately results in loss or injury. In this respect the liability of the party charged is dependent in each case upon the application of the ordinary rules of negligence to the particular factual situation. An airplane pilot is charged with a duty toward a passenger in such plane commensurate with the nature of the instrument employed and with the duty imposed on him by law, even though the owner is not a common carrier. 6 Am. Jur. 40, Aviation §67. It is the duty of such pilot to operate his plane as a reasonably careful and prudent man would operate it under the same circumstances, in other words, it is his duty to use ordinary care, that one riding in the plane might not be injured. *Greunke v. North American Airways Co.*, 201 Wis. 565, 230 N. W. 618, 69 A. L. R. 295. In explaining the degree of care required of a pilot carrying passengers otherwise than for hire, 6 Am. Jur. 36, “Aviation” §60 reads in part as follows:

“\* \* \* The degree of care required of one not carrying passengers for hire is ordinary care, that is, that degree of care

which the great mass of men, or an ordinarily prudent or reasonably careful person, would use under the same or similar circumstances. He is not required to exercise the highest degree of care, although the care which he may be called upon to exercise in the particular instance may be very high under the circumstances. Whether the particular pilot exercised the diligence required of him by law is to be determined by the standard of ordinary care and diligence required of pilots of ordinary skill under the same circumstances and conditions. Things which a pilot operating a plane with that degree of care which is commensurate with the situation and circumstances must consider include the weather conditions, the wind, the visibility, the type of plane, the number of passengers in it, the place where and the altitude at which a turn or descent is attempted, the position of the motor parkway, etc."

Since your inquiry would not involve liability to passengers for hire, I need not go into the degree of care required under such circumstances except to say that it is greater than that required of passengers not for hire. 6 Am. Jur. 34, Aviation, §54, discusses the rules applicable to carriers for hire resulting from accidents, acts of God, acts in emergency and errors of judgment and reads as follows:

"In accordance with the general rule that a carrier of passengers is not responsible for an injury caused by an unforeseen accident against which human care and foresight could not guard, and not in any degree caused by negligence, an airplane carrier of passengers for hire is not liable on account of an injury to, or the death of, a passenger resulting from an unavoidable or inevitable accident, unforeseen events, and the like, not attributable in any wise to any negligence on the part of the carrier. This principle was held not to apply in the case of a crash when an airplane struck a tree while landing at an airport at night. An airplane carrier of passengers for hire is not liable on account of injury to, or the death of, a passenger caused by some overwhelming natural agency over which it has no control, or by an act of God.

"The rule that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence is applicable to injuries resulting from the flying of airplanes, and an airplane carrier is not liable for an error of judgment of its pilot which does not constitute positive negligence on his part in exercising such judgment. However, the rule can have no application when a crash occurred in making a landing not required by an emergency."

It follows that where such carriers are relieved of liability under

the circumstances above related, pilots upon whom a lesser degree of care is imposed would likewise be relieved of liability under like or similar circumstances. If, then, damage to property or injury to passengers or other persons directly and proximately results from what you have designated as "pilot error" the liability of the pilot of the aircraft causing such damage or injury is relieved *only* if the same results from an unforeseen accident against which human care and foresight could not guard, or where, in a sudden emergency, the pilot acts according to his best judgment or omits to act judiciously because of lack of time to form a judgment, or where the error of the pilot's judgment does not constitute positive negligence on his part in exercising such judgment.

With respect to your fourth question, your attention is called to Section 333, General Code, which defines the duties of the Attorney General as follows:

"The attorney general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney-general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime."

This section in effect limits the furnishing of counsel by the state to only those cases in which the state is either directly or indirectly interested, and then such representation would be limited to the interests of the state or any of its departments. Conversely, this office would not be authorized to defend suits against officers or employes of the state in their individual capacities.

Coming now to your last question, we may start with the general proposition that no public body is authorized to expend its funds for liability insurance unless there is a potential liability from which it should be protected. See 1948 Opinions of the Attorney General No. 4122 at page 590. The principle of law that the state is not answerable in damages to an individual for injury or damage resulting from negligence of its officers and agents in the performance of their governmental duties is universally established. 2 A. L. R. (2nd) 678; 37 O. Jur. 262, State

of Ohio §37; Board of Trustees v. Green, 113 O. S. 15, 148 N. E. 355. In Hunt v. State, 20 O. C. C. N. S. 111, 41 O. C. C. 154, affirmed without opinion in 88 O. S. 599, 106 N. E. 1062, the court had under consideration the question of liability of the state for an alleged wrongful act of a probate judge in adjudging the plaintiff insane and for acts of violence and mistreatment claimed to have been inflicted upon her by the officers and employes of the institution to which she had been committed, which action was filed pursuant to an act of the legislature authorizing the institution of suit upon her claims. In sustaining a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action against the defendant, the court quoted with approval and adopted the following language from Story, Agency (9th ed.), Sec. 319:

“It is plain that the government itself is not responsible for the misfeasance, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service, for it does not undertake to guarantee to any persons the fidelity of any of the officers or agents whom it employs; since that would involve it in all its operations, in endless embarrassments and difficulties, and losses, which would be subversive of the public interests.”

Although the courts of a few states have permitted recovery for damage to private property caused by the negligence of governmental agents on the theory that such damage constitutes a “taking” of property for public purposes and consequently within the scope of the eminent domain provisions of their constitutions under which a compensation therefor is required to be paid, the courts of Ohio have not subscribed to this theory. Being apprised of no constitutional or statutory provision which would subject the state to liability for accidents resulting from negligence of state pilots in the operation of state-owned aircraft I can only conclude that public funds of the state may not be expended to insure against liability for personal injury or property damage sustained by passengers or other persons including property owners, resulting from the negligent acts of such pilots.

In summary, you are advised in view of the foregoing, that it is my opinion that:

1. A state pilot who crashes while operating a state-owned aircraft on official business is not liable in damages to a party, whether such party is a passenger or other person, who has sustained personal injury or

property damage as the result thereof, where such crash is caused by an act of God, or some other cause not involving negligence of the pilot.

2. The term "pilot error" has no significance in law.

3. A state pilot who crashes while operating a state-owned aircraft on official business is liable in damages to a party, whether such party is a passenger or other person, who has sustained personal injury or property damage as the result thereof, where such crash is the direct and proximate result of the negligence of such pilot.

4. It is the duty of a state pilot of a state-owned aircraft on official business to use ordinary care in the operation thereof.

5. If a state pilot in his individual capacity is subjected to a suit instituted by a party damaged or injured as the result of the crash of a state-owned aircraft being operated on official business there is no authority for the state to furnish counsel to represent him in such action.

6. Public funds of the state may not be expended to insure against liability for personal injury or property damage sustained by passengers or other persons, including property owners, resulting from the negligent operation of state owned aircraft by state pilots.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.