

# A-302

## Personal Responsibility & Liability



### Participant Workbook



Prepared by Office of Aviation Services Training Division  
and Interagency Aviation Training Partners  
Revised November 8, 2013

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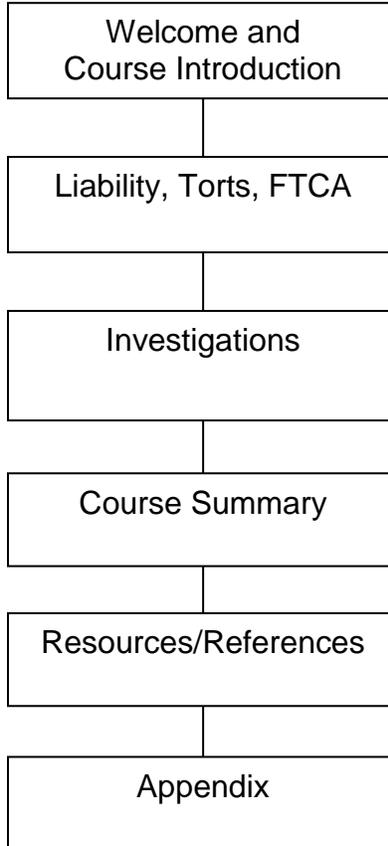
**A-302**  
**Personal Responsibility & Liability**

**Version Control**

<b>Version</b>	<b>Description</b>	<b>Date</b>
1.00	Original Materials	November 8, 2013

## **A-302 Personal Responsibility & Liability**

### **Course Map**





## Welcome to Course and Introduction

### Get to Know Your Classmates

Be prepared to share:

- Your name?
- Your position?
- How long have you been involved in aviation operations?

### Objectives

The purpose of this course is to help you understand personal and organizational responsibility and liability in aviation program operations.

At the conclusion of this course, you should be able to:

1. Understand tort law and the Federal Tort Claims Act.
2. Understand employee responsibilities and roles.
3. Recognize criminal law issues.

## Liability, Torts, FTCA

Notes

### Objectives

1. Understand Tort Law and Federal Tort Claims Act
2. Recognize Criminal Law Issues

### One occurrence could give rise to up to three different types of liability:

- Civil Judicial Claims (Tort)
- Administrative Proceedings
- Criminal Charges

### Tort Definition

“A civil wrong or injury for which a remedy may be obtained, usually in the form of damages.”

*Black’s Law Dictionary, 7<sup>th</sup> Edition*

### Elements of Negligence

- Existence of legal duty to plaintiff
- Breach of that duty
- Proximate Causation
- Injury/Damages

### Causation

But for the act, or the failure to act, the injury would not have occurred

### Duty of Care

Person is held to a standard of care commensurate with that normally possessed by a person with the same training and experience in the same profession or field.

### Tort Damages

- Compensatory
- Punitive

### Compensatory Damages

Compensate the injured person for their loss and “make the person whole”

**Personal Injury***Notes*

- Medical Costs
- Loss of Earnings
- Pain and Suffering
- Wrongful death

**Property**

- Personal
  - Car
  - Airplane
- Real
  - Building
  - Land

**Punitive Damages**

FTCA bars award of punitive damages against Federal government where FTCA applies.

Ways to calculate:

- Multiple of compensatory damages award 3 times.
- Amount person saved by not fixing or redesigning the item (product liability situation).
  - *Example: Ford Pinto Exploding Fuel Tank Cases. Ford allegedly knew there was a problem with the fuel tank but calculated it would be cheaper to pay claims for exploding tanks than to fix the problem – court used these “savings” for the whole fleet of Pintos as a measure of the amount of punitive damages.*
- Punitive damages not available in FTCA cases against United States.

**Federal Tort Claims Act (FTCA)**

28 U.S.C. Sec. 2671 – 2680

FTCA waives the sovereign immunity of the United States. It waives some, **but not all**, tort claims against United States.

**FTCA covers negligent or wrongful act or omission of a Federal employee acting within the scope of his/her office or employment**

**Scope of Employment:***Notes*

- Government is not liable for actions taken by employees which are outside their duties or that the employee was not authorized to take.
- Court determines scope of employment by looking at relevant **state's** *respondeat superior* doctrine.

***Respondeat Superior:***

- Where there is a master – servant (employer – employee) relationship, the employer is civilly responsible for the actions of the employee who is acting within the course and scope of his/her employment.

**Scope of employment questions the court may ask:**

- Is the employee's action within the agency's mandate or authority?
- Was the employee directed or delegated to so act?
- Is the action commonly done for the agency by that level or type of employee?
- What is the time, place and purpose of the act?
- Did the agency expect the employee to perform the act?
- Was the act performed with agency equipment?
- Was the act in furtherance of the agency's mission?
- Was the act which was done similar to the act authorized?
- Was there a departure from the normal method of accomplishing the act?
- Pay or grade is of little or no relevance.

**FTCA***Notes*

- Under FTCA the United States has the same liability as a private person under the same circumstances.
- Courts apply the law of the state where the act or omission occurred.
- FTCA is exclusive remedy of all claims against the government and Federal employees for acts or omissions covered by FTCA. 28 U.S.C. Sec. 2679(b)(1).
- FTCA Coverage Limited to Geographic Boundaries of the United States.

**If the Federal government is immune from liability under the FTCA, then in most cases so is the Federal employee even if he or she committed a tort and injured a person or damaged property.**

**Discretionary Function Exception (DFE)***Notes*

- DFE immunizes the government from tort liability for the acts or omissions of its employees exercising discretion when implementing a law, regulation or policy.
- The courts won't second guess or substitute their own judgment for the discretionary policy or budget decisions of executive agency employees.
- DFE is "Jurisdictional."
- This means that if it applies, the court has no jurisdiction over the matter and it will dismiss the case without making a decision on the merits of the claim even if there was negligence and injury.
- DFE not available as a defense when the agency fails to follow safety standards set forth in agency manuals, regulations, fire guides, OSHA requirements, FAA guidelines, etc, or fails to warn the public of known hazards created by the agency.
- The type of training an agency requires is covered under the DFE.
- DOJ is reluctant to assert the defense where the actions of the government may require the exception be narrowed.

**Intentional Torts excluded under FTCA**

- Intentional torts are torts where the person intends the action.
- The FTCA bars recovery for the following Common Law intentional torts: libel, slander, misrepresentation, deceit, and interference with contract rights even when the employee intended to libel or slander the person, etc.

- Examples:
  - Assault\*
  - False Imprisonment\*
  - Battery\*
  - Malicious Prosecution
  - False Arrest\*
  - Abuse of Process\*

*Notes*

\* Unless committed by Investigative or LE Officer in which case both government and employee are liable.

### **Constitutional Rights**

- Assembly
- Privacy
- Unreasonable search and seizure
- Due process
- Freedom from use of excessive force
- Speech

### **Constitutional Torts – “Bivens Claims”**

- You may be held personally liable for violating a person’s constitutional rights.

### **Administrative Claim Adjudication**

- **DOI:** Office of the Solicitor delegated authority to decide administrative claims.
- **Forest Service:** USDA Office of General Counsel (OGC) delegated authority to decide administrative claims.

**FTCA***Notes*

- No Jury Trial
- No Punitive Damages
- Government is the named party in law suit.
- United States Attorney will move to substitute the United States as the named defendant if an employee is named as a party. 28 U.S.C. Sec. 2679(a)
- If in “scope of employment” – Government substituted for you.
- If “outside the scope of employment,” the government WILL NOT be substituted and counsel will NOT be provided.
- Violating constitutional rights are OUTSIDE the scope of your employment.

**Constitutional Torts**

- Individual employee is named defendant
- Punitive damages possible
- Jury Trial
- No government representation
- Individual employee, not government pays the judgment

**Discovery Process**

- FOIAs prior to FTCA administrative claim or law suit
- After law suit filed:
  - Requests for Production
  - Interrogatories
  - Depositions
- There are no secrets. All of the following are discoverable:
  - E-mails
  - Contemporaneous official and personal notes/reports
  - Post event critiques
  - Accident investigation reports and files

## Government Representation

- Department of Justice has discretion to provide personal representation to individuals for civil and criminal cases, and for congressional investigations. 28 CFR Sec. 50.15
- **Provided if:**
  - The Department of Justice deems the employees actions were taken in the course and scope of the employee's official duties; and
  - Representation is found to be in the interest of the United States.
- The Government is not obligated to represent you in a lawsuit if you are sued in your individual capacity.
- You may accept or decline Government representation.
- You may use both government and personal counsel.

**The Department of Justice may withdraw representation during the course of representation if your interests are deemed in conflict with that of the Government.**

## Investigations

*Notes*

### Investigation: Types

- Accident Investigations – Agency
- OSHA investigation (if serious injury or death)
- Inspector General (IG) investigation (mandatory if USFS employee death on fire, 7 U.S.C. 2270b and 2270c)
- Licensing agency suspension or revocation of license
  - Example: FAA action on airmen's certificate
- Personnel Action

### Accident Investigations Aircraft

- NTSB accident investigation (includes "public aircraft" 49 U.S.C. 1131(a))
- DOI Aviation Management Directorate accident investigation
- U.S. Forest Service accident investigation
- FAA may investigate on behalf of NTSB
  - FAA both investigates and promotes safety i.e. "Black Hat" versus "White Hat"
  - FAA "709 Confidence ride" pursuant to 49 U.S.C. 44709 after accident

### ACCIDENT AFTERMATH

- NTSB Regulation: § 830.10 – Preservation of wreckage (initially the responsibility of the operator)
- Control access to accident site
- Photograph everything
- ID Witnesses (name, address, phone #)
- Secure crew items

## Agency Investigation

Notes

### Employee Responsibilities

- Employee has an affirmative duty to cooperate in an accident investigation unless criminal proceedings are reasonably feared by employee.
- Employee refusal to cooperate can lead to an adverse personnel action if:
  - Employee was notified of investigation
  - Employee refuses or fails to cooperate with the investigation
  - Refusal or failure is without cause
- Fact specific
  - Court looks to whether the employee had a reasonable belief that he/she could be personally subject to criminal prosecution.
- Garrity Warning
  - Statements cannot be used against employee in a criminal prosecution if employee made statements after being threatened with removal for refusal to answer questions. *Garrity v. New Jersey, 385 U.S. 493 (1967)*

### Other Accident “Investigators”

- Congressional Committee hearing or investigation
- Government Accountability Office (GAO) investigation or report
- Press

### Criminal Liability

- Typical criminal charges against employees coming from investigations:
  - False Statements, 18 U.S.C. 1001
  - Obstruction of Proceeding before a Federal Agency or Department, 18 U.S.C. 1505
  - Obstruction of Criminal Investigation, 18 U.S.C. 1510(a)

**Criminal Liability***Notes***(Federal) Manslaughter 18 U.S.C. Sec. 1112**

- (a) Manslaughter is the unlawful killing of a human being without malice. There are two kinds:
- Voluntary – Upon a sudden quarrel or heat of passion.
  - Involuntary – In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

**Involuntary Manslaughter**

- Gross negligence must be alleged and proven to get a conviction.
- Must prove a willful, wanton, or reckless disregard for human life.
- Simple negligence for civil liability will not support a manslaughter charge.

**Criminal Liability**

- IG statute requires IG to refer evidence of criminal conduct discovered in investigations to U.S. Attorney.
- FBI or agency law enforcement can also refer matters to U.S. Attorney for possible criminal prosecution.

**Federal Employee Immunity from State Criminal Prosecution**

- Federal government is supreme to state governments under Supremacy Clause of the U.S. Constitution.
- Supremacy Clause permits Federal employees to act inconsistent with state or local law.
- Employee's action must be done within the scope of Federal authority.

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**Criminal Liability***Notes*

- Sovereign immunity of the Government does not immunize government employees from prosecution for their own “criminal” acts where the Supremacy Clause is not involved.
- Legal Representation
  - Federal Government will not normally provide representation or reimburse you for legal representation in a criminal matter related to your Federal employment.
  - Example: Vehicular homicide while driving government vehicle

**Professional Liability Insurance**

- What is your position?
- What are the risks in your position?
- Does policy provide needed coverage?
  - Administrative actions?
  - Criminal?
  - Personnel actions?

**REMEMBER!**

- Know duties and responsibilities
- Act within the scope of your job
- Don't violate constitutional rights
- Act reasonably

**Don't Fly When:**

- You would be placed in an unusually dangerous situation (imminent threat of death or injury); and/or
- You would be required to violate the law.

## Resources and References

### Citations

#### Discretionary Function Exemption

- 28 U.S.C. 2680

#### FTCA

- 28 U.S.C. Sec. 2679(b)(1)

#### Named employee defendant substitution for U.S.

- 28 U.S.C. Sec. 2679(a)

#### USFS death investigation forwarded to IG for criminal prosecution

- 7 U.S.C. 2270b & 2270c)

#### Public Aircraft Law

- 49 U.S.C. 1131(a)

#### FAA Confidence Ride after accident

- 49 U.S.C. 44709

#### Federal Manslaughter

- 18 U.S.C. Sec. 1112

### Cases Cited

- Kelly v. U.S., 241 F.3d 755 (9th Cir. 2001)
- FDIC v. Meyer, 510 U.S. 471, 478 (1994)
- Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)
- Garrity v. New Jersey, 385 U.S. 493 (1967)
- Wyoming v. Livingston, 443 F.3d 1211 (10<sup>th</sup> Cir. 2006)
- United States v. Dee, 912 F.2d 741 (4<sup>th</sup> Cir. 1990) (Aberdeen Three)
- United States v. Keith, 605 F.2d 462, 463 (9<sup>th</sup> Cir. 1979)

## Resources and References

- Hatton v. U.S., 68 F.3rd 1420 (D.C. Cir. 1995)
  - Plaintiff was a White House chef. The Appeals Court held the chef could not sue the United States for his injuries because the actions (assault) of the government electrician were outside the scope of his employment.
  - Plaintiff sued United States for its “deep pockets.”
  
- Weston v. HUD, 14 MSPR 321 (1983), 724 F.2d 943 (Fed. Cir. 1983)
  - Employee was properly removed when he continued to refuse to answer questions after being informed refusal could lead to removal and that the U.S. Attorney had declined to prosecute.
  
- Angnabooguk v. State, 26 P.3d 447, 457 (Alaska 2001)
  - Although the State is immune from liability for “discretionary functions,” not all firefighting activities are discretionary and some are “operational.” Thus, the State could be held liable for negligently performing firefighting functions during a forest fire. The case was remanded for a determination of which activities, if any, qualified as operational.
  
- United States v. LaBrecque, 419 F.Supp. 430 (D. N.J. 1976)
  - Captain of a ship was specifically warned to take a ship-to-shore radio, he promised to take the radio but chose not to. There was a ship wreck and loss of life. The court found that was sufficient disregard for human safety and life for a jury to decide the case.
  - Same example but one change, had the radio been taken but negligently misplaced there would not have been recklessness and probably no criminal case. Misplacing a radio is negligence, but not a willful, wanton, or reckless disregard for human life.

## Appendix A

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**United States Department of the Interior**  
OFFICE OF THE SECRETARY WASHINGTON, D.C. 20240

PERSONNEL MANAGEMENT BULLETIN NO. 94-38 (870)

SUBJECT Requirement to Notify All Employees That Private  
: Insurance Exclusionary Clauses May Affect Them If  
They Travel in Government Aircraft

At a recent meeting of the Aviation Management Council (AMC), a serious issue was brought to the Council's attention. Many employees are required to travel in Government aircraft (other than regularly scheduled public carriers such as United, Delta, etc.). Many private personal life insurance policies (other than FEGLI) are invalidated as a result of such job related flying requirements.

Exclusionary clauses in private policies often exclude life insurance coverage for aviation, SCUBA diving, skydiving and other hazards. There are a number of Department of the Interior employees who fly as pilots, crew members, or passengers (in other than scheduled air carriers). We want to try to avoid the unfortunate circumstances of families discovering they have no coverage after it is too late.

The purpose of this issuance is to require servicing personnel offices to bring this matter to the attention of new employees during new employee orientations.

In addition, bureaus should add the following statement, where appropriate, to vacancy announcements, employee orientation packages, performance standards and position descriptions: "Travel in Government aircraft may be required which may affect employee's private life insurance policies."

Private, non-government life insurance is a matter strictly between the individual and the provider. Although the Department has no involvement in private insurance policies, we are concerned that employees be fully aware of their coverages. Identification of any exclusionary clauses, however, are solely the responsibility of the employee.

Hastings  
Acting Director of Personnel

INQUIRIES: Ann Meroney, Division of Employee Relations Telephone (202) 208-5284  
BULLETIN EXPIRES: March 31, 1995

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