

Flying Training Organisation Liability

NORTON WHITE

Overview

Liability

- Training accident liability - Liability of FTOs and their instructors to trainee pilots in training accidents
- Flight Examiner liability – Liability for negligent pilot assessment causing subsequent accidents

Protection measures

- Insurance/indemnity
- Contractual Limitation of Liability
 - Exclusion Clauses
 - Interaction with Australian Consumer Law and Civil Liability Act
 - Worked examples of clause wordings

Training Accidents - Negligence Claims

- The tort of negligence under common law.
- Negligence under the Civil Liability Act 2002 (NSW) – Part 5A applies to any claim for damages resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
- The essential element of negligence is the existence of a *duty of care*.

Duty of Care in Flight Training Accidents

Campbell v Hay [2014] NSWCA 129

Facts

- Campbell claimed for injuries he sustained as a result of a forced landing (due to engine failure) incident during a training flight with instructor Hay.
- Campbell alleged Hay was aware of 2 occasions of engine vibration on the training flight and despite this, negligently failed to ensure the aircraft was only flown in areas close to suitable landing strips.

Duty of Care

- At trial, the issue was Mr Hay's duty in respect of the supervision/control of the aircraft.
- On appeal, the Court it was agreed the flying instructor was highly experienced and had exercised reasonable care and skill by waiting to see if the second set of vibrations corrected themselves before taking control and looking for a landing strip.

Negligence claims in other jurisdictions

Overseas cases have seen claims brought in negligence for:

- Flight instructor accidents during instructional flight
- Claiming negligence against a flight school that knew a student pilot was unqualified, but let him take plane for solo flight anyway
- Claiming negligence against a flight school in allowing a student pilot to take-off airline while controls were locked in place.



Negligence claims in other jurisdictions

- General standard – an instructor pilot’s duties to others is to act as a reasonable prudent pilot would during a training flight.

McWilliams Et Al v The Thunder Bay Flying Club (Ontario Supreme Court, 1950) – the instructor was not negligent in directing the trainee to carry out a simulated forced landing as instructors are required to direct a student to carry out such sequences.

- In determining duty of care, courts may also look at the FARs to determine the pilot’s duties (ie requirement for dual control aircraft for flight instruction).

Flight Examiner Liability

- Liability in negligence for subsequent accidents caused by inadequate assessment
- No known claims in Australia

For Immediate Release

**Deliberate Crash of Germanwings Flight 4U9525:
Federal Lawsuit Filed on Behalf of 80 Victims' Families Against Suicide Pilot's Flight
Training School, a Lufthansa Company**

New York, NY, April 13, 2016 . . . A federal wrongful death lawsuit was filed today in Phoenix, AZ, by the law firm [Kreindler & Kreindler LLP](#), along with co-counsel from law firms in Germany, Holland and the United Kingdom,¹ on behalf of 80 families of victims of the March 24, 2015, Germanwings Flight 4U9525 pilot-suicide disaster in the French Alps that took 150 lives. The defendant in the case is the Airline Training Center Arizona, Inc. ("ATCA"), a company of the Lufthansa global airline organization. The lawsuit was filed in the United States District Court for the District of Arizona.

Brian Alexander, a Kreindler partner and military-trained pilot who represents the plaintiffs, said, "Andreas Lubitz, the suicidal pilot, should never have been allowed to enter ATCA's commercial airline pilot training program. ATCA was one of the most important gateways or checkpoints in Lubitz's desire to become a Lufthansa commercial pilot. ATCA was not just negligent, but also careless, and even reckless, in failing to apply its own well-advertised 'stringent' standards to discover the history of Lubitz's severe mental illness that should have kept Lubitz from admission to ATCA's flight school. The company missed several readily-apparent red flags, including that Lubitz's German medical certificate had a restricting legend on

¹ The Kreindler team of attorneys consists of Dr. Elmar Giemulla, Germany; Dr. Marcus Backes and Dr. Christof Wellens of Dr. Backes + Partner, Germany; Maya Spetter of Spetter Advocaat & Mediator, The Netherlands; Evert Wytema of Van Wassenaer Wytema, The Netherlands; and Jim Morris of Irwin Mitchell LLP, United Kingdom.

Claims against FTOs are rare but when they do occur they can be *catastrophic*.

Protection Measures

- Insurance/Indemnity
- Contractual protections

Insurance Coverage

FTOs use insurance as the primary means of protection.

Training flight accidents

- Insurance coverage is linked to aircraft and any loss or damage flowing from accident

Negligent Examination

- Coverage is limited and expensive
- Low cover limits
- High premium linked to individual examiners

Indemnity - CAAP Admin 1 Changes

- **Prior to September 2014** – CASA indemnified holders of delegations against any liability of loss arising from the exercise of powers or the performance of functions carried out on behalf of CASA.
- **Post September 2014** - Approved Testing Officer delegations issued by CASA were replaced with the grant of flight examiner ratings under Part 61 of CASR.

EFFECT = Flight examiners now conduct flight tests under the authority of their rating, rather than as delegates of CASA and will no longer be covered by CASA's indemnity insurance.

Contractual Protections – Exclusion of liability – sample clause

“I waive any and all claims I have or may have in the future against the supplier of services, its directors, employees, agents, suppliers, contractors and insurers and release, indemnify and hold them harmless from any and all liability, actions, claims and demands of whatever nature however caused and by whomever brought as a result of or arising out of or connected with the activity including but not limited to claims in negligence, contract or for breach of a statutory duty or statute”

Effectiveness of Clause?

“I waive any and all claims I have or may have in the future against the supplier of services, its directors, employees, agents, suppliers, contractors and insurers and release, indemnify and hold them harmless from any and all liability, actions, claims and demands of whatever nature however caused and by whomever brought as a result of or arising out of or connected with the activity including but not limited to claims in negligence, contract or for breach of a statutory duty or statute”

However, total exclusion of liability clauses may be held to be void

Why might total exclusion of liability clauses be held to be void?

- **Australian Consumer Law**
- Application of Australian Consumer Law:
 - Amount paid did not exceed \$40,000; or
 - the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.
- Implied terms:
 - Section 60 – Guarantee as to due care and skill of services
 - Section 61 – Guarantee as to fitness of purpose of services
- Section 64 - *“A term of a contract (...) is void to the extent that the term purports to exclude, restrict or modify..... the application of all or any of the provisions of this Division [the guarantees]”*

Limitation of liability rather than exclusion of liability

- **Australian Consumer Law**
- Cannot exclude liability but can limit liability in certain situations
- s64A:

“(2) A term of a contract for the supply by a person of services other than services of a kind ordinarily acquired for personal, domestic or household use or consumption is not void under section 64 merely because the term limits the person’s liability for failure to comply with a guarantee to:

(a) the supplying of the services again; or

(b) the payment of the cost of having the services supplied again.

- Applies to training services for commercial pilot licence (if less than \$40k) rather than private pilot licence (i.e. personal use).
- Qantas vs Avarco

Exclusion of liability under the Civil Liability Act

- **Civil Liability Act 2002 (NSW)**

- Recreational Activity and Dangerous Recreational Activity

- Section 5L – “No liability for harm suffered from obvious risks of dangerous recreational activities”

“(1) A person.... is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was made aware of the risk.”

- Campbell v Hays

- Note defence to negligence but does not prevent liability arising other than in negligence such as for a breach of statutory duty

Exclusion of liability under the Civil Liability Act

- **Civil Liability Act 2002 (NSW)**

- Section 5M – “No duty of care for recreational activity where risk warning”

“(1) A person.... does not owe a duty of care to another person who engages in a recreational activity to take care in respect of a risk of the activity if the risk was the subject of a risk warning.

- Timing – prior to entry into contract – Alameddine v Glenwroth Valley Horse Riding Pty Ltd [2015] NSWCA 219
- Incapable persons?
- Reasonably likely to result in people being warned of the risk before engaging in the recreational activity
- Not required to establish that the person received or understood the warning

Exclusion of liability under the Civil Liability Act

- **Civil Liability Act 2002 (NSW)**
- Section 5N– “Waiver of contractual duty of care for recreational activities” [in negligence]
- *“(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill”*
- s5N Civil Liability Act vs s64 Australian Consumer Law
- s139A Australian Consumer Law

Exclusion of liability under the Australian Consumer Law

- **S 139A**

“(1) A term of a contract for the supply of recreational services to a consumer by a person is not void under section 64 of the Australian Consumer Law only because the term excludes, restricts or modifies, or has the effect of excluding, restricting or modifying [the guarantees]”

Requirements for exclusion of liability for recreation services

- **Must be recreation services – private pilots licence/commercial pilots licence?**
- **The exclusion, limitation or modification must be limited to liability for death, or a physical or mental injury - Motorcycling Events vs Kelly 86 NSWLR 55 (2013)**
- **Does not apply if the injury is caused by reckless conduct of the supplier s139A**

Examples of limitation and exclusion clauses

[Insert name of flying school] PTY LTD (ACN #)

WARNING, ASSUMPTION OF RISK, WAIVER AND RELEASE PLEASE READ CAREFULLY

Full Name of Participant: Date of Birth: Male/Female.....

Occupation: Home Address:

Telephone: (home)..... (mobile) Email Address:.....

NATURE OF ACTIVITY

Flying training and associated activities.

RISK WARNING

THE ACTIVITIES ARE HAZARDOUS AND DANGEROUS ACTIVITIES AND THERE IS AN INHERENT AND SIGNIFICANT RISK OF PHYSICAL HARM OR PERSONAL INJURY INCLUDING PERMANENT DISABILITY AND/OR DEATH AS A RESULT OF PARTICIPATION IN SUCH ACTIVITY.

➡
Initial here *I acknowledge that I am/the Participant is about to engage in a hazardous and dangerous activity and I have been warned of the risks. I know that there are obvious risks involved in participation in the Event which could lead to death or injury.*

YOU MUST NOT PARTICIPATE WITHOUT READING AND SIGNING THIS DOCUMENT

SIGNED BY PARTICIPANT:

I have read carefully and understand this warning, assumption of risk, waiver and release, and having done so, I sign voluntarily:

➡ Signature of Participant

➡ Signature and Name of Witness

➡ By ticking this box I indicate it is not my intention to attempt Inverts (or indicate that I do not consent to the Participant who is a minor attempting Inverts).

Examples of limitation and exclusion clauses

“I waive any and all claims I have or may have in the future against the supplier of services, its directors, employees, agents, suppliers, contractors and insurers and release, indemnify and hold them harmless from any and all liability, actions, claims and demands for personal injury or death however caused and by whomever brought as a result of or arising out of or connected with the activity including but not limited to claims in negligence, contract or for breach of a statutory duty or statute.

This clause does not apply to any liability, actions, claims and demands caused by the reckless conduct of the supplier.”

Examples of limitation and exclusion clauses

- In the case of a guarantee or warranty implied pursuant to Australian Consumer Law or any other guarantee or warranty which cannot be excluded, the liability shall be limited to the cost of resupplying the services or at the option of the supplier, paying the cost of resupplying the services.

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