THE LAW IN AUSTRALIA RELATING TO NEGLIGENCE OF AIRCREW AND ENGINEERS

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1. Introduction

In today's increasingly litigious society, care has to be taken in all walks of life to avoid accidents which may cause injury or damage to others. This is now particularly so in the case of those voluntarily exercising a professional skill for reward - including professional pilots and engineers - who are burdened with particular responsibility to act at least in accordance with the standards of the reasonable person following the same professional calling.

This paper will explain the background and elements of the law of negligence with particular reference to aircrew and discuss the exposure of engineers to tort claims in the areas of the giving of negligent advice and products liability.

2. The Tort of Negligence

According to Professor Fleming[1], the word "tort" derives from the Latin "tortus" which means "twisted or crooked" but was used in common English as a synonym for "wrong". It has now disappeared from all but legal English usage.

A tort is often described in law schools as "an actionable wrong". This tells the lay observer very little. Tort liability exists primarily to compensate the victim of civil (as opposed to criminal) wrongdoing by compelling the wrongdoer to pay for the damage he has done. It is today principally concerned with unintended harm such as accidents and (on a more philosophical level) with distributing the costs of losses which are part of modern life so as to "adjust these losses and afford compensation for injuries sustained by one person as a result of the conduct of another".[2]

Professor Fleming distinguishes tort law from other areas by reference to its object of the compensation of losses[3]. He also considers there are three bases on which liability has to lie: intentional interference with the interests of another; negligence; and strict liability (liability without fault). This paper principally addresses the second of these categories.

In order to succeed in an action for negligence in tort, the injured party or plaintiff must prove the following:

(a) the defendant owed him or her a duty of care; that is, that the defendant should reasonably have foreseen injury, damage or loss and is in some way in such proximity to the plaintiff that the law recognises that the defendant must act carefully towards the plaintiff. See **Caltex Oil (Aust.) Pty. Ltd. v. The Dredge "Willemstad"** (1976) 136 CLR 529 and **Shirt v. Wyong Shire Council** 54 ALJR 283 (obiter). The duty of care was discussed in the leading judgment of Lord Atkin in **Donoghue v. Stevenson** (1932) AC 562. His Lordship suggested that it was difficult to find in the English authorities statements of general application

defining the relations between the parties which give rise to a legally recognised duty of care, primarily because the Courts are concerned with particular relations which come before them in actual litigation. He continued:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay."

Recognising fault as the basis for liability under English law, Lord Atkin went on to discuss the extent and limitation of the duty in this way:

> " But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, 'who is my neighbour' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." (page 580).

For a modern English consideration of the duty of care, see **Caparo Industries Plc v. Dickman** [1989] 2 WLR 316.

(b) a breach of that duty of care. It must be shown that the defendant was "careless" in that he or she failed to measure up to the standard of care which the law sets in respect of the defendant's particular activity. See **Vacwell Engineering Ltd.** v. **B.D.H. Chemicals Ltd.** (1971) 1 QBD 88.

(c) a causal connection between the defendant's carelessness and the plaintiff's damage. See **Dooley v. Cammell Laird & Co. Ltd.** (1951) 1 Lloyd's Rep. 271, **Griffths v. Arch Engineering Ltd.** [1968] 3 All ER 217;

(d) foreseeability of an ordinary person in the defendant's position that the defendant's carelessness would inflict on the plaintiff the kind of damage which occurred. See **The Wagon Mound No. 2** (1967) AC 617, **Shirt v Wyong Shire Council** 54 ALJR 283 - for an event to be foreseeable

legally, it does not have to be likely to occur and can be unlikely.

There has recently been a series of new cases in which the Australian courts have grappled with the question of duty of care: see **Caltex Oil Australia Pty. Ltd. v. The Dredge "Willemstad"** (1976) 136 CLR 529, **Jaensch v. Coffey** (1984) 155 CLR 549, **Sutherland Shire Council v. Heyman** (1985) 60 ALR 1, **San Sebastian Pty. Ltd. v. Minister Administering Environmental Planning and Assessment Act** (1986) 162 CLR 340 and **Hawkins v. Clayton** (1988) 164 CLR 539. Although the above cases highlight that the judges themselves cannot agree on the criteria to be applied, the following propositions of law can be derived from them:-

(i) the criteria to be applied depend on an assessment of the nature of the loss suffered by the plaintiff (whether it be personal injury, damage to property or pure economic loss) and the nature of the breach of duty (if any) by the defendant which led to the loss (whether it be a negligent act or omission or negligent misstatement);

(iii) the High Court of Australia has held that the test of foreseeability should be limited by reference to the proximity of the parties. Proximity is determined in part by considering (a) the assumption of responsibility by the alleged tortfeasor and (b) the reliance placed by the plaintiff on the defendant ;

(iv) certain judges of the High Court, such as Brennan J., take the view that, in established categories of claim, the historically established manner of determination of a duty of care should not be disturbed. Others, such as Gaudron J., consider the test should be based on the reasonable expectation of the plaintiff and there appears to be some support for this view developing in England (see, for example, **Harris & Anor v. Wyre Forest District Council & Anor** [1988] 1 All ER 691).

It does not take a great deal of imagination or skill to determine that, in most common cases, on any test professional aircrew owe a duty of care to, for example, their passengers. The duty owed by engineers in the aviation industry is in many cases almost as clear. If that duty is breached, the causal connection between the breach and the injury or loss suffered will also generally be abundantly clear. Accordingly, the principal matter for determination will be whether the pilot or the engineer has, in fact, been careless and breached his or her duty.

Airline aircrew and practising engineers are professionals. In the present context, the important consideration is that the courts have held that professionals are liable to those to whom they owe a duty of care if they fail to exercise due care skill and diligence in work done in pursuit of their profession. A professional is not required to have an extraordinary degree of expert skill, merely the standard degree of competence common to his profession. In **Bolam v. Friern Hospital Management Committee** [1957] 2 All ER 118, Justice McNair stated:

"where you get a situation which involves the use of some special skill or competence [in that case, of a doctor] then the test as to whether there has been negligence or not is not the test of the (reasonable man) because he has not got this special skill. A man need not possess the highest of expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art" (at page 121).

See also **Voli v. Inglewood Shire Council** (a case involving an architect) (1963) 110 CLR 74, **The Bywell Castle** (a ship's captain) (1879) 4 P.D. 219, **Phillips v. Whiteley** (a jeweller) [1938] 1 All ER 566 , **Saif Ali v. Sydney Mitchell & Co.** (a barrister) [1980] AC 198 and **Caparo Industries Plc v. Dickman** (an auditor) [1989] 2 WLR 316.

3. Aircrew[4]

It is important to remember the above extract from the judgment of McNair J. in **Bolam v. Friern Hospital Management Committee.** In the more recent case of **Saif Ali v. Sydney Mitchell & Co.**, [1980] AC 198 Lord Diplock stated (at p.220) that:

> "No matter what profession it may be the common law does not impose on those who practise it any liability for damage resulting from what .... turn out to be errors of judgment, unless the error was such as no reasonably well informed and competent member of that profession could have made."

As will be seen from the following, it may be that that statement does not always necessarily hold true in the case of professional aircrew.

The elements of duty relevant here are the existence of a duty of care (it being almost axiomatic that aircrew have a duty of care to their passengers), the standard of care owed by the crew and whether that duty has been breached. While the usual standard of care required is that of the "reasonable man", in the case of airline aircrew the standard is that of the reasonable professional pilot. In a discussion of an analogous profession in **The Bywell Castle** (1879) 4 P.D. 219, it was held that "Captains of ships are bound to shew such skill as persons of their position with ordinary nerve ought to shew under the circumstances"[5].

It appears from the cases and learned articles that the degree of professional skill and duty required of pilots is high and probably higher than that required of many professions. Accordingly, errors of pilots will amount to negligence more readily than errors by those in other occupations. The leading statement of the duty of care owed by aircrew is found in the English case **Taylor v. Alidair Limited** [1976] IRLR 420 and, on appeal to the Court of Appeal, [1978] IRLR 82. That case was an unfair dismissal action in which a Captain appealed against his dismissal following a heavy landing which led to an uncorrected

bounce and the collapse of the nosewheel assembly of the Viscount aircraft he was flying. It was held that:

> "there are activities in which the degree of professional skill which must be required is so high and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal".[6]

The Court of Appeal agreed with this statement. Shawcross & Beaumont[7] consider it at least arguable that "the risks of negligent flying are so great that a duty to remove can arise at the first clear sign of inefficiency on the pilot's part".

In Australia, Mason J (as he then was) in **Australian National Airlines Commission v. The Commonwealth of Australia and Canadian Pacific Airlines**[8] considered that the standard of care to be expected of a pilot is that of a reasonable pilot, being a reasonable man but having the additional quality or skill of airmanship. He also considered the pilot's responsibility increases with the number of lives for which he is responsible.

It is important in this discussion to consider the role of "airmanship" mentioned in the above case.

"Airmanship" is an "indefinable quality" or a "nebulous art" which is closely akin to seamanship. Captain H.A. Hopkins, formerly of British Airways considers "airmanship" to be "compounded of training and experience, catalysed by basic suitability and character" and as "the proper conduct of the normal flight to avoid creating hazard"[9] . Captain Burridge of Monarch Airlines described it in the following terms:

> "The word "airmanship" is used by most of us in the operations side of the industry although I suspect that few of us would care to define it. It is most often used to describe an intuitive faculty, concerning what is right or wrong about the operation of an aircraft, which seasoned airmen acquire with their experience and which is, perhaps, the final polish upon their ability to do their job safely and well."[9A]

Whilst aircrew may exhibit poor airmanship in a given set of circumstances (for example, failure to question the premises on which a computer generated flight plan is based, assuming without checking that the operator had obtained diplomatic overflight clearance, failure to ensure that equipment required for a flight is carried and serviceable or flying in such a way as to give passengers an avoidably uncomfortable ride) it does not necessarily mean they have been negligent, although the distinction may come perilously close in many cases. It may be that in the operation of today's large, sophisticated multi-engine 400 plus passenger jet aircraft, the law recognises that the cockpit crew and/or commander cannot and is not expected to personally check everything, whereas a failure to personally check a piece of equipment which malfunctions or to obtain information

which becomes necessary could still be regarded as poor airmanship. As long as the failure to check the equipment or obtain the information is one which is not expected of the ordinary professional pilot, the pilot concerned may not have acted negligently.

However, many will recall the crew of Boeing 767 C-GAUN who executed an outstanding "glider" approach and landing at Gimli, Manitoba, Canada, in 1983 after both engines flamed out due to fuel exhaustion. Even though the error resulting in the loading of insufficient fuel was not essentially made by the crew, the Captain was considered technically responsible for it and was penalised by being demoted to First Officer for a short period. Like the sea is said to be, aviation is (and must be) unforgiving.

The Gimli incident is probably best categorised as a breach of good airmanship by the cockpit crew rather than negligence on their part. However, had the incident not ended as it did but rather with bodies spread over a large area, there is little doubt that the airline would properly had been regarded as negligent and that it is likely the aircrew would have been cast in the same light. Does this mean that categorisation of an act as negligent depends partially on the result of the act?

Professional aircrew (unless otherwise indicated) have been found to have been negligent in the **Australian National Airlines Commission** case (one aircraft misinterpreting an unclear ATC instruction, backtracking on an active runway and being struck by another aircraft which continued its takeoff after becoming aware of the first; liability apportioned 30% to each aircraft commander and 40% to ATC), **Keenan v Martin** (1975) 13 Avi. Cas. 18037 (private pilot failed to flight plan properly or check the weather), **American Airlines v. United States** (1969) 9 Avi. Cas. 17166 (crew persisting with approach in the face of forecast and actual adverse weather conditions), **Steinbock v. Schwiewe (1964)** 330 F.2d. 510 (private pilot departing without adequate fuel), **Vigderman v. United States** 175 F. Supp. 802 (military crew stalling aircraft during low level turn towards a dead engine) and **Behling v. United States** (1987) 20 Avi. Cas. 18,135 (failure to execute missed approach at decision height). Findings of negligence appear to be implicit in the following unfair dismissal cases: **Taylor v. Alidair Ltd.** (heavy landing), **British Midland Airways Ltd. v. Gilmore**, 23rd March 1982, EAT 173/81, (heavy landing causing tyre burst preceded by non-standard procedures throughout the flight), and **Wood v. British Airways Board** [1974] ITC 10308/74[10] (junior VC10 pilot consistently flaring the aircraft too high and too fast). In **Blount Bros. Corp. v. Louisiana** ((1971, ED La) 333 F. Supp. 327, 12 Avi. Cas. 17222) the crew of an aircraft who failed to consult NOTAMs were held to be negligent.Similarly (and somewhat unreasonably) a third party safety pilot was held to have some liability in negligence when he failed to stop or object to a second attempt at a manoeuvre which the candidate undergoing an FAA flight inspection had failed at the first attempt: **Hayes v. U.S.A.** (1990) 22 Avi. Cas 18,119.

Conversely,[11] it is clear that there was no breach of duty by the Captain of a BOAC Boeing 707 who elected to deviate from the

normal route (with ATC clearance) and fly over Mt. Fuji, Japan, for public relations purposes. The aircraft broke up in mid-air due to unforecast localised severe turbulence, the possible existence of which was unknown to the airline and the crew. There was no breach of duty and no lack of airmanship but the position may have been different if the risk of severe turbulence had been known to the crew.[12]

Whilst on the subject, it is worth considering and distinguishing between the duties (in a tortious sense) of the captain and first officer of a commercially operated aircraft.

(a) Duty of the Commander[13]

It is incontrovertible that the final responsibility for the safe operation of an aircraft lies with the commander. Paragraph 4.5.1 of Annex 6 of the Chicago Convention 1944 provides that:

> "The pilot-in-command shall be responsible for the operation and safety of the aeroplane and for the safety of all persons on board, during flight time."

This statement of responsibility is reflected in the Air Navigation Act and/or Orders of most aviation nations: see, for example, Regulation 224 of the Australian Civil Aviation Regulations, British Air Navigation Orders 1985 Article 32, U.S. Federal Aviation Regulations FAR 91.3(1), and Regulation 59 of the New Zealand Civil Aviation Regulations 1953.

Further, the British Air Navigation Orders, for example, requires that the commander of an aircraft registered in the United Kingdom shall satisfy himself, inter alia "that the flight can safely be made, taking into account the latest information available as to the route and aerodromes to be used ... and any alternative course of action which can be adopted in case the flight cannot be completed as planned" (Article 32(1)) and that sufficient fuel, with margins, is carried (Article 32(e)). Similar provisions are found in Part VIII Division 3 of the Australian Civil Aviation Orders.

Captain Norman Price[14], comments that Article 31 (now Article 32) of the British Air Navigation Orders "lists requirements with which any pilot with a sense of good airmanship would natually comply. Failure to comply now becomes more than poor airmanship; it becomes a crime and renders the pilot liable to prosecution".[15] In New Zealand it has been held that the pilot-in-command, being responsible for the safety of the aircraft, is under a strict obligation to ensure that all parts of the equivalent Regulation are complied with and he cannot delegate this duty to any other person (for example, a despatcher): **McNeill v. Palmer**[16].

It is clear that the aircraft commander has final responsibility for the planning and the conduct of the flight. He is not absolved from liability for negligence if he acts upon information from a despatcher or an air traffic controller, especially if he has reason to question that information.[17].

It follows, of course, that if the commander is not satisfied with, for example, the standard of operational flight planning or any other safety matter, he "may refuse to execute the flight without being held liable in any way by the operator".[18] In Canada, it has been held that a flight crew who refused to accept a flight plan on safety grounds were not in contempt of a court order requiring them to work: **Air Canada, Canadian Pacific Airlines Ltd. and Eastern Provincial Airways (1963) Ltd. v. Maley, McKinnon and Canadian Airlines Pilots Association**[19].

(b) Duty of the First Officer

Captain Price,[20] considers that the "primary duty of a co-pilot is to monitor the flight, assess any wrongful operation and, if necessary, query the command. If, when told to raise the flaps at the wrong speed, he unquestioningly does so, he must share the blame for any resulting accident".

Shawcross and Beaumont[21] summarise the position of professional aircrew in the following terms:

> "Not every error of judgment by a pilot constitutes negligence. Similarly not every negligent act by a pilot will place the airline under a positive duty to dimiss him. But the airline may have to to justify its decision not to dismiss in proceedings arising out of any accidents attributable to further errors by the same pilot."

It must be borne in mind that, in an aviation context, the need for determinations of negligence in actions arising from death or injury of passengers or damage to or loss of baggage or cargo, has largely been supplanted by legislation.[21] The Warsaw Convention 1929 and that Convention as amended at The Hague 1955 (both of which are given force of law in Australia by the (Commonwealth) **Civil Aviation (Carriers' Liability) Act 1959** as amended ("the Act") provide for limited but almost strict liability of airlines in such cases in respect of the international carriage by air to which they apply. Part IV of the Act and corresponding state legislation apply similar provisions (with a present limit of $A100,000 in respect of death or injury of passengers but not extending to cargo) to domestic carriage by holders of airline, supplementary airline and charter licences and to limited categories of international carriage. The Conventions and the Act extend their limited liability provisions to claims brought directly against the servants and agents (clearly including aircrew) of the relevant carriers.

Negligence of aircrew can remain relevant, however, in respect of third party, insurance and employment disputes arising from major accidents and incidents. It is clearly relevant to accidents to which the Conventions and/or the Act do not apply.

4. Engineers

The standard of care applicable to professional engineers is the same as those discussed in earlier sections of this paper (although it is arguable that it is not as onerous as that applicable to professional aircrew) and in a large number of reported cases.[23].

That being so, this section of this paper will principally discuss (in an aviation context), the two areas of tort liability with which engineers and the organisations for which they carry out their work are most commonly faced - negligent giving of advice and products liability.

First, reference should be made to an Australian engineering case with a message for all professionals. In **Howell and Anor v. R.M. Herriott and Associates Pty. Ltd. & Ors.**[24], Olssen J of the Supreme Court of South Australia sounded a clear warning to professional engineers to maintain currency with and keep up to date with all state of the art developments in their profession as they run a significant risk of being regarded as negligent if they do not. In that case, although many engineers gave evidence that they would have designed footings in the same way as the defendant had, the court held that the duty of care had been breached as for some years technical papers had been published and seminars given with clear warnings which put the profession on notice as to the state of the art regarding the error made in respect of the relevant footings.

(a) Negligent Advice

This is a branch of the law relating to negligence which was first established in the landmark case **Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.** [1964] AC 465. That case opened the door to successful actions for even financial loss caused by negligent advice by a person or organisation holding itself out as qualified to give such advice even where there is no contractual relationship between the parties. (Although the case was not concerned with engineers, its principles apply equally to the activities of engineers). Such claims are actionable as a breach of the duty of care in tort. Unlike contract, liability in tort is not limited to claims by a person who is the purchaser of, for example, a design although, as indicated earlier, the law relating to the exact extent of liability in such cases in Australia and to whom a duty of care is owed has been the subject of a series of recent cases in which the judges themselves cannot agree on the criteria to be applied: see, for example, **Hawkins v. Clayton** (1988) ATR 80-163.

The **Hedley Byrne v. Heller** principle would clearly be applicable to advice given by professional engineers - for example, if they represented that it was safe for purchasers of a design, modification or aircraft and others (and the class of "others" is constantly expanding; see **Caparo Industries Plc. Dickman & Ors.** [1989] 2 WLR 316, **Shaddock v. Parramatta City Council** (1981) 55 ALJR 713 and **Rutherford v. Attorney-General** [1967] 1 NZLR 403) to utilise the design or the modification or operate the aircraft.

Clearly, if the design, modification or aircraft proved to be defective, the person giving such advice may be liable to persons killed or injured as a result.

(b) Products Liability

Unlike other jurisdictions, (notably the United States), products liability is not a separate head of law in Australia. Liability for death, injury or loss caused by defective products is determined by reference to the law of negligence in this country or, if the parties are in a contractual relationship, the law of contract.

The basic rule of law concerning liability in negligence for defective products was laid down in England by the House of Lords in **Donoghue v. Stevenson** (1932) AC 562 and has remained materially unaltered since that time.

In **Donoghue v. Stevenson**, Stevenson manufactured gingerbeer and bottled it in an opaque bottle with a sealed cap. In the normal course of business, the bottle was delivered to a retailer from whom a friend of Donoghue purchased it and gave it to Donoghue. When Donoghue drank from the bottle, it was discovered that it contained a decomposed snail and Donoghue suffered illness as a result of drinking the gingerbeer with the remains of the snail in it and from the shock of discovering that she had done so. It was alleged that the snail was introduced into the bottle at the time of manufacture and so the action was commenced against Stevenson in negligence. The plaintiff succeeded.

As originally formulated in **Donoghue v. Stevenson**, the basis of liability is:

> "A manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care". (Lord Atkin at page 599).

The **Donoghue v. Stevenson** principle was enshrined in Australian law by the Privy Council decision on appeal from the High Court of Australia in **Grant v. Australian Knitting Mills** (1936) AC 85.

A plaintiff must prove that the defendant manufacturer breached its duty in either the manufacture (**Grant v. Australian Knitting Mills**) or the design of the product: see **Hindustan S.S. Co. v. Siemens Bros. & Co. Ltd.** (1955) 1 Lloyds L.R. 167. The determination of whether a manufacturer breached its duty with respect to the design of a product is basically a question of whether the product as designed is unreasonably dangerous for the purpose for which it was intended. Of course, this depends on the facts of each case but it will always entail a balancing of the gravity of the risk involving a particular design with the benefit

derived from the use of the product. Regard must also be had to the cost and practicability of reducing the risk and to the exchanges which must often be made between the safety of a product, on the one hand, and the use to which it is to be put, on the other[25]. In an aviation context, it is fair to say that emphasis will be placed on safety and a high standard of safety will be required.

It should be noted that the law regards manufacturers as having a substantial (although not strict liability) burden not to market a defective product.

The third element of a cause of action of negligence, i.e. causation, requires the plaintiff to prove on the balance of probabilities that his injury was caused or contributed to by the defect in the manufacturer's product (**Dooley v. Cammell Laird & Co. Ltd.** (1951) 1 Lloyds Rep 271 at 277). The defect may be one of design or specification, materials or workmanship, but irrespective of the kind of defect alleged, it must be shown that the product was defective from the time it left the manufacturer's control[26].

Even where the manufacturer's negligence lies in its failure to give some necessary warning as to the use of the product, the product itself not being defective, or in its failure to take necessary steps to ascertain the dangers which may be inherent in the use of the product, (**Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd.** (1971) 1 QB 88 and **Wright v. Dunlop Rubber Co. Ltd.** [1972] 13 K.I.R. 255, C.A.), the plaintiff must still show the causal connection between his injury and the manufacturer's failure to issue the warning or make the necessary intervention.

The last element a plaintiff must establish is that the type of injury suffered was foreseeable. Since a particular design or method of production may create a potential for harm which may be realised in the most unlikely ways, and which may have a capacity for an endless variety of repercussions, the law has developed a cutoff point which respect to the manufacturer's responsibility under the rubrick of "foreseeability" or "proximate cause". Irrespective of the term used to describe this element of the law, the rule acts to limit the liability of a manufacturer to damage of a type or kind which ought reasonably to have been foreseen by it in respect of the particular design or method of manufacture and which materialised in a manner which could be foreseen. Clearly, death, injury or loss as a result of faulty design or repair of an aircraft or an aircraft component would be foreseeable.

The rule formulated by Lord Atkin in 1932 has been extended and modified by case law since that time to take account of new situations and changing factual circumstances. The 'products' referred to by Lord Atkin have been extended to cover not only consumables such as food and drink but underwear, hairdye, buildings, motor vehicles, lifts, tombstones, bottles and chemicals and, as the list is neither exhaustive nor closed, undoubtedly aircraft and aircraft components.

The case law since 1932 has also recognised new categories of defendants and plaintiffs beyond the fundamental manufacturer and consumer situation. For example, in **Haseldine v. Daw and Son Ltd.** [1941] 2 KB 343 at 279, Goddard LJ pointed out that:

> "...where the facts show that no intermediate inspection is practicable or contemplated, a repairer of a chattel stands in no different position from that of a manufacturer and does owe a duty to a person who, in the ordinary course, may be expected to make use of the thing repaired".

In addition to actions in negligence, in certain circumstances, liability for defective products can be found in the following legislation:

(i) <u>(Commonwealth) Trade Practices Act 1974</u>

This legislation only applies where the entity supplying goods or services is a company and in limited other circumstances where international and interstate trade is involved. The Act includes strict and wide-ranging provisions concerning the supply of goods or services (and even engineering design work would fall within one of these categories, although it is not clear which) and the conduct of corporations engaged or involved in such supply. Part V of the Act provides prohibitions on misleading or deceptive conduct (whether intentional or not and whether anyone was in face misled or not) (section 52) and false representations (section 53) in trade or commerce. Section 71 implies a condition that goods supplied to consumers under certain contracts are of merchantable quality. Other provisions in Part V allow actions against manufacturers of goods for the recovery of compensation by a consumer (as defined) or any person who derives title though a consumer for losses due to the goods (which term can clearly include an aircraft) not being of merchantable quality.

Certain of the provisions of Part V only apply in respect of goods and then only in respect of goods "of a kind ordinarily acquired for personal, domestic use or consumption". Neither aircraft nor even design work would fall within this definition.

However, the Act provides in section 82:

"..A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention."

Clearly, there would be some exposure for a corporation and its employees here in respect of the death or injury of persons resulting from the use of a design, modification or an aircraft sold or provided by such corporation.

(ii) <u>(Victoria) Goods Act 1958</u>

Design work and aircraft would probably be "goods" for the purposes of this legislation (and the equivalent legislation of other states) which imply certain conditions into contracts for the sale of goods. Presently relevant implied terms include that (i) where there is a sale by description, goods will correspond with that description (section 18), (ii) the goods must be reasonably fit for the purpose for which they are supplied (section 19(a)) and (iii) the goods are of merchantable quality. In each case, subject to any question of contributory negligence, the duty of the seller is strict; for example, it is no defence that all possible care was taken.

Statutory limitation periods are provided in respect of most causes of action including negligence. Actions in tort must be brought, in Victoria, within 6 years of the date of damage: **Limitation of Actions Act 1958.** However, there are provisions allowing such time to be extended if the claimant can show that he was not reasonably aware of the event that caused time to begin running. There is a three year time limit on actions pursuant to section 82 of the Trade Practices Act 1974. As will be appreciated, potential actions arising from design and production avtivities could take some years to materialise.

What can be done to limit exposure in respect of product liability claims? The following matters should be considered:

(a) contractual disclaimer: decisions in the last 5-10 years have made it clear that the parties to a contract are free to determine for themselves what obligations they will accept and, if they have intended to exclude liability for negligence or other default and have made that meaning plain, they are at liberty to do so even if an exclusion clause in a contract is unreasonable: **Photo Production Ltd. v. Securicor Transport Ltd.** [1980] 1 All ER 556, **Clark's Refrigerated Transport Pty. Ltd. v. Ibis Milk Products Ltd.,** Full Court of the Supreme Court of Victoria, unreported; **"The Raphael"** [1982] 2 Lloyd's L.R. 42. A written disclaimer in appropriate terms could be provided to, or even a short contract incorporating such disclaimer be entered into with, customers taking advantage of the services or making purchases. Such disclaimer should, inter alia, exclude any liability for negligence.

However, a disclaimer may not operate to exclude liability to persons who are not direct purchasers from the engineer/manufacturer although it may influence a finding as to whether there was a sufficient relationship of proximity between the parties to establish that a duty of care was owed. In addition, liability under the **Trade Practices Act** cannot be excluded by agreement.

(b) incorporation: as indicated above, it is mainly corporations which attract the provisions of the **Trade Practices Act**. Conversely, if services are provided by

and/or sales made directly by a natural person or by a partnership, liability for any successful claim would be personal and unlimited.

However, except for the liability of a director who personally makes a misrepresentation or is personally negligent (and such liability would arise independently of his directorship of a company), directors of a company are not personally liable in respect of claims against the company which are unable to be met from its own funds. However, in respect of actions pursuant to section 82 of the **Trade Practices Act,** liability has been extended to any person (whether director or employee) involved in the contravention leading to the claimant's damages.

Directors of a company may be liable to the company or others if they exceed the limits of their authority from the company to do any act. At common law, if the company is liable for the negligent act of a director (or an employee) it could bring an action against the director or employee to recover the damages paid out by the company: **Lister v Romford Ice Co.** [1957] AC 555. The entitlement of employers to take such action is now often excluded in employment awards and the entitlement of insurers to do so by way of subrogation is now severely limited by the provisions of the (Commonwealth) **Insurance Contracts Act 1984.**

(c) insurance: appropriate insurance cover could be obtained to protect engineers and their employers in the event of claims of the nature being discussed.

Current Developments in Products Liability Law in Australia[27]

In 1989, the Australian Law Reform Commission presented a report on Australian products liability law and made certain criticisms of the existing state of that law. The principal criticism was that under Australian law a purchaser of a defective product can bring an action against the retailer of the product without proof of negligence, whereas a bystander injured by the same product at the same time has to prove negligence to succeed in a claim. The bystander will probably not be able to prove negligence of the retailer and will have to sue the manufacturer of the product. Any person having to prove negligence has the burden of proving a defect in a product which undoubtedly its manufacturer would understand much better. A simple reform would be to give the same redress to the purchaser and bystander alike and one method to do this would be to enable an action against the manufacturer of any product which causes injury, with the manufacturer being liable unless the it could prove that the injury was not caused by negligence on its part.[28]

Instead, the Australian Law Reform Commission has recommended a most radical reform which will be unique to Australia. By its proposal, any person has a right to compensation if that person suffers loss or damage caused by the way the goods acted with only three defences being allowed, these being:

(a) the development risks defence;
(b) the mandatory standards defence; and
(c) knowledge of the goods.

The requirements for the development risks defence are so severe that it is unlikely that the defence will ever succeed in practice. A development risks defence will only succeed if, at the time of the supply of the goods, it could not have been discovered, using any scientific or other technique then known or in any other way, that the goods could act in the way that they did. The smallest manufacturer of a new product will by this test be assumed to be aware of every available technique known to man.

The mandatory standards defence is so rigorous that it is unlikely to apply. This defence will only apply if the goods acted in the way they did only because they complied with a mandatory standard applicable to the goods. One suspects there will be an absence of such mandatory standards due to the risk that the makers of the standards (often governments) would potentially have to pay damages if a defence of this nature is available to the manufacturer.

The remaining recommended defence would undoubtedly have more application. This provides that there will be no right to compensation if what the claimant knew about the goods before the loss occurred would have enabled a reasonable person to assess the risk that the goods would act in the way that they did. This is a much more severe test on plaintiffs than the existing voluntary assumption of risk defence and its implementation could give rise to grave anomalies, in this case preventing people who up till now have good claims from pursuing those claims.

On present indications, it would appear that the above proposals will not find the necessary acceptance to become law.

5. Conclusion

It is clear that professionals have to demonstrate skill in following their calling and that the standard expected of certain professionals (including pilots and engineers) is higher than others and certainly higher than persons not possessed of such skills. This must clearly be so in the world of aviation where very minor errors can lead to catastrophic results. Most aircrew and engineers recognise and accept the high standard required of them and the disastrous potential of their errors. This paper highlights what will inevitably happen to those who fail to do so.

Tony Pyne,
Melbourne,
11th September 1990

FOOTNOTES

1. Fleming, 1983, **The law of torts**, 6th ed., Law Book Co., p 1.

2. Wright, **Introduction to the Law of Torts,** 8 Cam. L.J. 238 (1942) cited in Fleming, p 3.

3. Fleming, supra, p 3.

4. Much of this section of this paper is derived from the update of an advice dated 28th August 1986 by the author to an airline client in Asia.

5. Brett L.J. at page 226.

6. [1976] IRLR 420 at 423, per Bristow J. See also, Marcus Edwards, **"The continued employment of pilots involved in incidents or accidents: the operators' responsibilities and liabilities"** in (1977) Aeronautical Journal p.209 at p.210.

7. Shawcross & Beaumont, **Air Law**, 4th ed., Reissue, vol 1, Butterworths, London, paragraph V(68))

8. High Court of Australia, 1975, reported at (1974-75) 132 CLR 582 on other issues only.

9. **"The dismissal of a pilot for poor airmanship"** in (1977) Aeronautical Journal at p 203.

9A. Capt. A.J. Burridge, **"The dismissal of a pilot for poor airmanship"** in (1977) Aeronautical Journal, p206.

10. Referred to in Price, **Essential Law for Pilots and their Crews**, Oyez, London, 1980 at page 70.

11. See Hurst (ed.), 1976, **Pilot Error**, Granada, London, p 219.

12. See also **Cie d'Assurances Maritimes Aeriennes et Terrestres v. Ste. Laboratoires Goupil** (1987) 41 RFDA 50 (conditions fit for VFR operation on take-off followed by sudden change in weather - no negligence on facts).

13. As to the status and duties of the commander, see also N.M. Matte, **The International Legal Status of the Aircraft Commander**, McGill, 1975, p 34, Videla Escalada, **Aeronautical Law**, Sijthoff & Noordhoff, 1979, pp 210-211, and Speiser & Krause, **Aviation Tort Law**, Lawyers Co-Operative Publishing, 1978, vol 1, p 473.

14. Price, "Legal implications" in **Pilot Error**, supra.

15. Ibid, pp 238-9.

16. Supreme Court of New Zealand, Rotorua, 21st February 1979, unreported, noted in IV (1979) Air Law, p163. Cf, by implication, the findings of the N.Z. Royal Commission into the 1979 Mt. Erebus DC 10 disaster.

17. N.M.L. Hughes, **"Air traffic control and airport authorities - the U.K. viewpoint"** in IX (1984) Air Law p.202 at p.213. A.E. du Perron, **"Liability of air traffic control agencies and airport operators in civil law jurisdictions"** in X (1985) Air Law p203 at p209.

18. Matte, supra, p 38.

19. Federal Court of Canada, 15th July 1976, noted at I (1975-76) Air Law at p301.

20. **Pilot Error**, supra, p 216.

21. Shawcross & Beaumont, **Air Law**, 4th ed., Reissue, vol 1, Butterworths, London, paragraph V(68)

22. See, for example, **Goldman v. Thai Airways International** [1983] 3 All ER 693.

23. For example, the early U.S. case of **Aircraft Sales and Service Co. v. Gautt** 3 Avi. Cas 17,541: screwdriver left by engineer fouled aircraft controls.

24. Unreported, Supreme Court of South Australia, 16 August 1985.

25. Miller and Lovell, **Product Liability** (1977) page 275.

26. Ibid, page 279.

27. I am grateful for the assistance of my former senior partner, Geoff Masel, now a consultant to Phillips Fox Melbourne in the preparation of this section of this paper. Mr. Masel is an Honorary Consultant to the Australian Law Reform Commission in respect of its products liability reference and has made a number of significant submissions to the ALRC on the subject.

28. Another solution would be that adopted by the European Economic Community which has issued a Directive which, simply put, makes manufacturers liable for personal injuries caused by products upon proof that such products contain a defect. The definition of defect is based on community expectations.. Of course, there are presently difficulties in community-wide implementation of this Products Liability Directive (85/374/E.E.C.). See Nicholas Hughes, **"Current developments in aviation law - U.K. and Europe"**, Conference Papers, Aviation Law Association of Australia Inc., 8th Annual Conference, Melbourne, 4-6 November 1989

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