

# Reducing the hiring risk

This is the second of two papers describing the legal challenges and risks involved in hiring pilots by Diane Damos who is joined as co-author by David Norton. This article deals with the liability that a carrier may incur by hiring substandard pilots.

Every air carrier must ask: What are the legal ramifications arising from an accident or incident involving its aircraft that leads to property damage, injury, or even death? In discussing some of the possible

answers to this question, we will focus on legal liabilities that may arise out of a pilot's actions, thus excluding accidents arising out of other causes such as mechanical failure. Furthermore, the discussion will use the general rules that apply to the law of negligence in the United States, realizing that there are fifty such bodies of rules, each of which differs slightly from the other. The basic body of law that applies to an accident or incident in which people are harmed or property is damaged is the law of negligence, sometimes called tort law. There are four necessary elements to any claim for negligence: duty, breach, cause, and harm.

## Defining the four elements liability

First, the element of duty asks whether or not the entity who is being sued had any duty to the person who was harmed. Although airlines are not considered the "insurers of safety" of their passengers, such carriers do have a very high—if not the highest—duty to transport their customers safely from one point to another.



Because no system is perfect, a few applicants will be hired who are less competent and unable to function well at an air carrier. If such a pilot becomes involved in an accident or incident, the carrier may be at risk for direct negligence.

Once a duty is established, the next element is breach. The basic question under this element is whether the carrier did, or even failed to do, something such that it did not meet the standards of the duty of safety that is imposed upon it by the

law—did it breach the duty?

If the element of breach has been established, the analysis moves to the third element—cause. Here, the question is whether that breach actually caused the harm that is complained of. Said another way, there must be a "causal link" between the bad or negligent act of the carrier and the harm suffered by the customer before a claim for negligence can be established.

Finally, the fourth element—harm—means that only a

person who has actually suffered some type of harm recognized by the law can bring a lawsuit. For example, all jurisdictions recognize actual physical harm as "actionable," but not all jurisdictions consider various form of intangible harm, such as mental distress, as actionable harm.

If all four elements are present—there was a duty, the carrier breached that duty, that breach caused harm to the defendant, and the harm is one that is recognized by the law—then the carrier will be liable to the person who has filed suit for some amount of damages. Damages typically consist of direct or compensatory damages, such as

medical costs experienced by the plaintiff, and if the particular action was sufficiently egregious (gross negligence), the carrier may also face punitive damages. Punitive damages can be many times more expensive than the compensatory damages incurred—total damages could potentially rise to the tens, if not hundreds, of millions of dollars.

### Pilots represent two kinds of liability

With this in mind, airlines face at least two different types of negligence liability with respect to the selection, hiring, and supervision of their pilots. The most common type is indirect, or “imputed” negligence. Causes of action arising out of imputed or indirect negligence are based on the concept of “respondeat superior.” Under this doctrine the negligent actions of an employee who is acting within the scope of his or her employment is simply imputed to the employer. In other words, if an air carrier’s pilot is acting negligently with respect to his or her operation of the aircraft, that negligence will simply be imputed to the carrier, making the carrier liable for those actions.

The second possible type of cause of action that a carrier may face, a “direct” cause of action, arises out of the concept of negligent hiring or supervision, which is available to plaintiffs in many jurisdictions. The basic concept here is that the person who has been harmed can move directly against the carrier by claiming that the carrier acted negligently in the hiring, training, or overall supervision of the person who actually caused them harm—in this case the pilot. Because the imputed cause of action discussed above is almost always available after an accident, there have been few cases where negligent hiring was the primary claim asserted against the air carrier. In fact, this type of action would typically be used in a situation in which a pilot specifically harmed a passenger under a theory of assault, such as when the pilot was overly aggressive in removing a person from the aircraft.

### Negligence and Hiring

How could a carrier increase its likelihood of being sued for direct negligence in hiring and training? The second author believes that three common practices increase a carrier’s risk of this type of legal action.



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### Failure to screen properly

Failing to screen an applicant properly is the first way a carrier increases its risk of direct negligence. A carrier may fail to check employment references, verify educational records, or disregard a history of driving under the influence (DUI). Recently, individuals involved in screening and hiring pilots seem to be minimizing or disregarding a pilot’s history of DUIs. Such disregard is particularly serious given recent publications linking DUI convictions with an increased risk of aircraft accidents <sup>1/2</sup>. Although the results of such studies are not

conclusive, any carrier that ignores these studies may increase its risk of legal action.

### Lowering application standards

A carrier also may open new avenues for legal action by arbitrarily lowering the application standards. Carriers typically require a minimum number of hours in different categories of flight. They also usually require a certain level of education, a First Class medical certificate, and specific licenses and type ratings. When the pool of applicants shrinks, however, a carrier may lower some of its application standards. If the carrier does not modify the selection and training processes to account for the change, it may inadvertently hire pilots who are less qualified in other respects.

For example, a carrier may drop its requirement for a college degree from an accredited school to increase the pool of qualified applicants. Such a change, however, may permit individuals who differ from the carrier’s traditional population to be hired. Some of the applicants may have lower verbal skills that will affect how well they can communicate with other crew members. Others may have lower quantitative skills that will give increase their difficulties in interpreting and using aircraft performance data or may have learning disabilities that will affect the rate at which they can master new material. If a carrier lowers its educational requirements, it should either add tests to its selection battery to obtain a more complete picture of an applicant’s strengths and weaknesses, change its training to account for any differences in the relevant academic

background of the new hires, or accept a higher failure rate in initial training, probation, and potentially in upgrade and transition training. If the carrier fails to change its selection and training systems, it may increase the probability of hiring a less competent pilot who has an increased risk of an accident. Such hiring may open a new avenue of liability.

### Failure to Use a Best Practice Selection System

Although the level of “best practice” has changed over the years, pilot selection systems have been described in many books and articles since Thorndyke’s 1949 “Personnel Selection.”

Thus, legal defense of a carrier that does not use a “best practice” system is difficult. As noted in many of these articles (*see the Damos and Juarez article in the Fall 2003 Approach*), all best practices systems must have a criterion and selection tests. The criterion is the performance that the selection system is designed to predict. Many modern pilot selection systems are designed to predict several criteria, such as time (or cost) to complete initial training, probability of successfully completing probation, and average score on proficiency checks in the first 4 years of operational flying. Selection tests include interviews, simulator evaluations, and computerized or written tests.

One of the most frequent shortcomings of a carrier’s selection system is the use of tests that are not adequately validated, i.e. the relation between scores on the test and performance on the criteria (time to complete initial training, probability of successfully completing probation, etc.) is unknown. For each selection test (including interviews), the carrier must know how well scores on the test relate to scores on the selection system criteria. Failure to establish this relation may mean that the carrier is selecting less than the best pilots.

### Marginal Performance

One of the major purposes of a section system is to identify applicants who will not perform well as operational pilots. Because no system is perfect, a few applicants will be hired who are less competent and unable to function well at an air carrier. These individuals should

be identified and removed from the flight line during training or probation. Unfortunately, such individuals

often are permitted to complete their initial training and probation. These individuals frequently continue to demonstrate marginal performance throughout their career. If such a pilot becomes involved in an accident or incident, the carrier may be at risk for direct negligence.

A carrier has two methods for identifying marginal pilots during training or probation. The first again relies on an element of a best-practices selection system, the feedback loop. This loop is designed to determine how well the selection system is predicting performance on the

criteria. Because the feedback loop requires the carrier to keep and analyze scores from training and (often) from probation, marginal pilots are identified relatively easily.

The second method relies on a mathematical model of a pilot’s performance. This model calculates the likelihood that a newly hired pilot will reach some specified level of performance in a given amount of time. These models are used to identify those marginal trainees who will fail training, probation, or continue to demonstrate weak performance during their career. These models normally are used to help management make informed decisions on termination during initial training and probation.

### Conclusion

In summary, whether, in the aftermath of a crash, a plaintiff sues an air carrier alleging that it was indirectly negligent based on the actions of a pilot or directly negligent for hiring that pilot in the first place, it is the air carrier that will face the financial consequences for negligent or willful action that pilot takes. In other words, an air carrier is possibly betting its very existence on each take-off and landing its pilots make, so it behooves the carrier to take great care in selecting, hiring, and training them.

1. McFadden (1998). "Driving while intoxicated (DWI) convictions and job-related flying performance--a study of commercial air safety." *Journal of the Operational Research Society* 49: 28-32.

2. McFadden, K. L. (2002). "DWI convictions linked to a higher rate of alcohol-related aircraft accidents." *Human Factors* 44(4): 522-529.



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