Australian Parachute Federation

Instructor ‘A’ Candidate

THESIS

Sports Parachuting & the Law

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Executive Summary

I have been skydiving for 15 years and have completed over 10,000 jumps. Within this time, I have owned and operated a full-time commercial skydiving company on the Gold Coast for the past 9 years and have personally logged over 5,000 tandem skydives. Since its inception, my company and the Tandem Masters who work for and subcontract to it, have taken approximately 12,000 students tandem skydiving. Within the last 9 years, we have never sustained injury to ourselves and/or our students. While skydiving is my business, it is also my sport, passion and for many years has been a way of life for me. I am appalled by any form of discrimination and/or restrictions imposed upon participants within skydiving activities for reasons other than safety. I believe that all sporting participants be afforded equal opportunities and thus I fully support our Anti-Discrimination Legislation and the principles it strives to uphold.

In July 2002, I refused to take an individual for a Tandem Skydive on their 21st Birthday. My decision to deny this individual's participation in tandem skydiving was 100% safety based. The individual's weight / height ratio and their resultant inability to lift their legs while suspended in a Tandem Student Harness,[1] placed them into a category that I considered as a 'high-risk of injury' student. Subsequently, a complaint was made against me and my organisation by this individual, alleging that I unfairly treated them and denied their participation in tandem skydiving based upon discriminative grounds. While I am under an obligation not to disclose any details concerning this case, it is suffice to say that I succeeded in my own defence with a finding of not guilty.[2]

Taking people tandem skydiving is my livelihood. I have taken the elderly, people with disabilities and I have taken people from all walks-of-life from around the world. I have also refused to take some people based on many varying factors; but always for the same underlying reason – safety, not discrimination! There is no sense in turning away students

[1] Tandem Students must demonstrate their practical ability to raise their legs for landing while suspended either from the Tandem Master or a frame designed for the purpose. See Australian Parachute Federation (APF) – Training Operations Manual. (T.O.M), Dec, 2003, 4.1.4.

[2] By virtue of Subsection 8 of the Conciliation Agreement as signed between the parties under the *Anti-Discrimination Act* 1991 (Qld).

who are prepared to pay me to take them skydiving, unless I feel there is an obvious risk of injury to their person and my legal duty of care owed to them.

I have never claimed it would have been an absolute certainty that the claimant as mentioned above, would have been injured should I have elected to take them for a skydive. However, they may have and we would only know that answer for sure by conducting the skydive. In that case, it would obviously be too late if they were injured. I feel strongly that if I had taken them for a skydive and were in fact injured on landing, I would have had to prepare a defence and submission to a court of law explaining why I breached my duty of care - possibly facing substantial damages being awarded against me through negligence. Instead, I faced the Anti Discrimination Commission of Queensland having to justify my actions. You can get to thinking that '*you're damned if you do and you're damned if you don't!*'

While skydiving has and is increasingly becoming a popular and an exhilarating activity for the young and old alike, the reality is that there does exist serious risks to participants if Tandem Masters do not follow the rules and use their discretion appropriately. Unfortunately, among our skydiving operations that conduct Tandem Skydives around the country,[3] we see a significant number of landing injuries to tandem students each year.[4] While these injuries include minor bruises and sprains, the majority of these injuries are broken legs and ankles.[5] Although it cannot be supported in writing, it is a well known industry fact that these statistics are predominately made up of overweight men and women who fail or are unable to lift their legs upon the landing phase of their skydive.[6]

I am sure that many Tandem Masters may have experienced the situation where a group of potential students arrive at your operation to find that one individual within this group

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[3] See Susie McEvoy, "*Drop Zone Directory – APF Database*", Australian Skydiver Magazine (ASM) – Issue 20: 2/2004, pp. 66-67.

[4] Statistics provided by the APF www.apf.asn.au – Incident Reports 'Q Tandem Injuries' between 11th May 1986 to 17th July 2004 - Kim Hardwick: KimH@apf.asn.au (Technical Officer).

[5] Ibid.

[6] The APF can only provide statistics based on the APF Incident Report Forms as supplied to them according to Operational Regulations (Op Regs), Dec, 2003, 7.6. These reports may not include information and/or details that indicate the physical characteristics of the injured Tandem Students.

is clearly unsuited for the activity due to their weight / height ratio. In spite of the obvious pressure to take them for a skydive or the latent concern to avoid a potential discrimination complaint made against you or the company - if there is any doubt regarding a student's (*or your*) ability to successfully complete a tandem skydive without injury, "the prudent course of action would be to decline the jump."[7] The alternative can be extremely expensive if you are forced to pay compensation to a student for injuries they sustained.

Tandem Masters across Australia can benefit from having some insight into the law of negligence and a sound understanding of liability in terms of skydiving activities and the duty of care obligations imposed upon them. Liability waivers, disclaimers, exclusion clauses, consent and release forms may not protect a Tandem Master and/or the skydiving operation for which they work, from tortious or even criminal liability in circumstances where injury is sustained to a predisposed 'high-risk of injury' student. By virtue of denying a student's participation in Tandem Skydiving; whether it be an appropriate use of discretion or not, aggrieved students may seek legal redress through enacted Anti-Discrimination Legislation particular to their case.[8] Therefore, Tandem Masters also need to be mindful of the different types of discrimination, the enacted legislation that works against it and the process by which one must defend themself before an Anti-Discrimination Commission.

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[7] See APF 'Tandem Master's Study Guide' Section Two – Student Preparation & Training. Section 2 – 1. www.apf.asn.au

[8] There is different legislation that deals with differing forms of discrimination i.e. the *Racial Discrimination Act* 1975 (Cth) & *Racial Hatred Act* 1995 (Cth), *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 (NSW), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) and *Anti-Discrimination Act* 1991 (Qld).

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Introduction

In Australia, it has only been over the past 30 years or so that liability in sport has been an issue of concern. Sporting codes, such as parachuting, have traditionally approached what has transpired in the '*heat of battle*' and the subsequent injuries caused and sustained, by the expression '*what happens on the field stays on the field*'. Aggrieved participants "limped on, or off, but very rarely to the courts".[9] As an example, in days gone by pre-industrial football was a riotous affair, there were no referees, no rules, injury and death were common and the law stood on the sidelines.[10] Until quite recently, if an injury occurred it was seen merely as '*all in the sport*' and any action for legal redress was equated with bad sportsmanship. Less than 20 years ago, the NSW Court of Appeal defined the '*recognised risks*' of a sport to encompass practically any conduct, even if contrary to the rules, that might be expected to occur. By engaging in these sports, "…participants may be held to have accepted risks which are inherent in that sport…"[11]

Today it is a very different story indeed. In respect to sports parachuting, from the introduction of the Static-Line Training Table on round parachutes, the onset of Accelerated Freefall (AFF) training, to the advent of Tandem Skydiving and high performance 9 cell elliptical Zero Porosity (ZP) canopies, the parachuting industry has seen, together with an increase in participant numbers, an increase in both the potential and actual liability cases being pursued by experienced and first-time tandem students alike. Between our 63 skydiving operations that conduct Tandem Skydives in Australia,[12] we have seen an average of 57.35 landing injuries to tandem skydiving students per year.[13]

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9 G. Kelly, "Sport and the Law – An Australian Perspective", Brisbane: LBC Information Services, 1987. p. 149.

10 Id at p. 7.

11 As per Barwick CJ in *Rootes v. Shelton* (1968) ALR 33.

12 Susie McEvoy, "*Drop Zone Directory – APF Database*", Australian Skydiver Magazine (ASM) – Issue 20: 2/2004, pp. 66-67.

13 Statistics provided by the APF www.apf.asn.au – Incident Reports 'Q Tandem Injuries' between 11th May 1986 to 17th July 2004 - Kim Hardwick: KimH@apf.asn.au (Technical Officer).

Competitive contact sport regularly brings ruthless players before the courts to face criminal trial and/or civil suit.[14] While parachuting is not a contact sport as such, beyond that of the protection afforded to APF members, where injury is suffered by a participant, the individual(s) who caused the injury, whether it be intentionally or recklessly committed, can also be found tortiously and even criminally liable – possibly having to provide compensation to the plaintiff in the form of damages. As social standards have evolved, public policy arguments have been developed to outweigh the value of public interest in sports where the harmful effects of reckless and/or intentional disregard for the rules exist.

Contrary to common public perception, tort and sometimes even criminal laws are operative in the sporting context. For example, somebody who breaches the rules or code of conduct and subsequently injures another participant (or spectator) – may attract tortious liability if, 'on the balance of probabilities', their act caused the damage complained of.[15] Almost all sports attract some form of risks to them and this was recognised by the High Court in *Rootes v. Shelton,*[16] where Barwick CJ said, "by engaging in a sport…the participants may be held to have accepted risks which are inherent in that sport…" Different sports will naturally attract varying degrees of risk; some more than others. (Eg. skydiving, boxing and football as compared to lawn bowls). The potential for injury to tandem students or damage to their property is always present and it is not limited to the participants themselves. It can include spectators beside the landing area, as well as those who might live in the vicinity of a landing area where parachuting is conducted or simply passers by who are injured by a landing parachutist. In *Castle v. St Augustines Links Ltd and Another,*[17] a taxi driver successfully sued a golf club when a golfer's tee shot smashed one of the windows of his cab resulting in the loss of the plaintiff's eye.

A relatively recent development, which is probably attributable at least in part to the growth of commercialism in sport such as ours, has been the significant increase in

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14 P. David, '*Sport and the Law – A New Field for Lawyers?*', (1992) NZ Recent Law Review, p. 83.
15 W. Pengilley & J. McPhee, "Law for Aviators", Sydney: Legal Books, 1994. p. 151.
16 [1968] ALR 33
17 [1992] 38 TLR 615

participants who have been injured and who have turned to the law for a remedy. The reluctance in the past by participants not to turn to the law for a remedy on the basis of '*what happens on the field stays on the field*' mentality is disappearing. It is no longer the case that participants injured while participating in adrenalin sporting activities, will be prepared to accept their injury as an integral part of the sport – regardless of whether or not they were suitable for its participation.[18] If they are injured because of someone else being at fault, whether it be personal injury and/or loss of income, they will want a remedy and therefore seek compensation.

On the other hand, holding firm to your duty of care obligations and denying a student's participation in Tandem Skydiving; whether it be an appropriate use of discretion or not, aggrieved students may seek legal redress through enacted Anti-Discrimination Legislation particular to their case.[19] The purpose of this Thesis is to examine the issue of participant liability in today's sports parachuting context,[20] provide a cursory examination of the Anti-discrimination laws, its overall legal structure, its implication to us and the process by which one must defend themself before a respective State or Federal Anti-Discrimination Commission. Regarding the law of negligence, which is the most relevant area of liability to students and Tandem Masters,[21] the author[22] will focus on the elements to the tort of negligence, the possible defences and mitigating factors that may be employed by defendants (i.e. Tandem Master and/or Owner/Operators), in the overall calculation of damages.[23] Due to the intended scope of this Thesis, exclusion

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18 This meaning they may possess an unsuitable physical characteristic, be pregnant, carry a disease or be disabled in some way, as the case may be to preclude them from skydiving activities.

19 There is different legislation that deals with differing forms of discrimination i.e. the *Racial Discrimination Act* 1975 (Cth) & *Racial Hatred Act* 1995 (Cth), *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 (NSW), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) and *Anti-Discrimination Act* 1991 (Qld).

20 It must be noted that this Thesis is a non-exhaustive examination of the areas of law as mentioned above and in no way does it claim and/or purport to be a legal authoritative tool to be used in ones own legal defence upon any subsequent claims made against them. Readers must seek their own independent legal advice on such matters.

21 D. Healey, "Sport and the Law", 2nd Ed., Sydney: UNSW Press, 1996. p. 104.

22 The author is an owner/operator of a commercial skydiving operation (Tandem Skydive Gold Coast Pty Ltd www.goldcoastskydive.com.au) who has approximately 10,000 logged jumps to his credit; covering a broad aspect of disciplines within this industry.

23 J.Fleming, "The Law of Torts", 9th Ed., Sydney: LBC Information Services, 1998. p. 35. The term defendants would naturally include fun-jumpers, instructors and their students, Tandem Masters and their students, operators and their staff, even aircraft operators and their pilots.

clauses, vicarious liability, criminal liability and the methods by which our industry professionals should work within the laws will be briefly examined.

While focusing primarily on Tandem Masters and Drop Zone operators, this Thesis is not limited to our industry professionals – the legal implications to be discussed apply to all skydiving participants within all facets of our sport. Despite of the possibility of being exposed to litigation on the grounds of discrimination, the overall objective of this Thesis is to encourage Tandem Masters, who owe a duty of care to their respective students, to exercise their discretion wisely when deciding whether or not to take particular predisposed 'high-risk of injury' students skydiving. If there are any doubts in this regard, the only prudent course of action is to decline the jump![24]

[24] See APF 'Tandem Master's Study Guide' Section Two – Student Preparation & Training. Section 2 – 1. www.apf.asn.au

Discrimination in Sport

Through the years, I have had the privilege of taking paraplegics, amputees, multiple scoliosis and cancer patients, the blind, pregnant women and the elderly for their first skydiving experience. Unfortunately, however, I have also refused to take many potential tandem students for various reasons, but always for the same underlying reason – saftey! There is no business sense to turn away students who are willing to pay me good money for a skydive. However, in light of my duty of care obligations owed to them, I am not willing to jeopardise their safety for the prospect of any financial gain. For this reason, I have always felt well justified by my discissions not to take certain students. I certainly never expected that I would one day need to defend these types of discissions before an Anti-Discrimination Commission.

As mentioned earlier, I refused an individual's participation in tandem skydiving based on my belief that they were a 'high-risk of injury' student. Subsequently, a complaint was made against my organisation and myself by this individual under the *Anti-Discrimination Act* 1991 (Qld), alleging that I unfairly treated them and denied them participation in Tandem Skydiving based upon discriminative grounds. The Anti-Discrimination Commission Queensland (ADCQ) accordingly directed me to respond in writing within 28 days and take part in a Conciliation Conference with the complainant. Due to a contractual obligation I am unable to disclose the terms and specific settlement details of this case. I will say, however, that I succeeded in my own defence with a finding of not guilty.[25] The basis of my defence was grounded in the law of negligence and the steadfast adherence to my duty of care obligations. Naturally, this does not suggest that a Tandem Master and/or Drop Zone operator would always succeed against a discrimination allegation using a similar defence. Typically, each case must and will be decided on its own merits. Regardless of the reasons, by virtue of excluding particular people from our sport, can and will attract potential Anti-Discrimination claims made against Tandem Masters and/or Drop Zone operators. Therefore, we all need a general

[25] By virtue of Subsection 8 of the Conciliation Agreement as signed between the parties under the *Anti-Discrimination Act* 1991 (Qld).

understanding or at least an awareness of the Anti-Discrimination Laws that will govern such claims.[26]

The Commonwealth, State and Territory governments of Australia all have Anti-Discrimination laws to counter such discriminatory practices.[27] The law can be different depending on what State or Territory you live in. It is important to check in your State or Territory to see what types of discrimination are against the law.[28] The Commonwealth Government Anti-Discrimination body is called the Human Rights and Equal Opportunity Commission. In some States and Territories, the local and Commonwealth laws on discrimination are handled by the same body (e.g. in Victoria the Equal Opportunity Commission is the agent for the Commonwealth Human Rights and Equal Opportunity Commission). In other States and Territories, like New South Wales, there is a Human Rights and Equal Opportunity Commission as well as a State Anti-Discrimination Board.[29]

In general terms, discrimination is any practice that makes distinctions between individuals or groups so as to disadvantage some and advantage others.[30] Anti-Discrimination Legislation establishes certain areas of life in which discrimination is prohibited, as well as detailing the attributes on the basis of which discrimination is prohibited. To decide whether discrimination has occurred involves a comparison

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26 Healy, D. "Sport and the Law", Sydney: NSW University Press, 1989. p. 106.

27 The *Racial Discrimination Act* 1975 (Cth) & *Racial Hatred Act* 1995 (Cth), *Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 (NSW), *Sex Discrimination Act* 1984 (Cth), *Disability Discrimination Act* 1992 (Cth) and *Anti-Discrimination Act* 1991 (Qld).

28 See Federal Human Rights and Equal Opportunity Commission (HREOC) at http://www.hreoc.gov.au, the Australian Capital Territory (ACT) Human Rights Office at http://www.hro.act.gov.au, the Northern Territory Anti-Discrimination Commission at http://www.nt.gov.au/adc, the Queensland Anti-Discrimination Commission at http://www.adcq.qld.gov.au, the South Australian Equal Opportunity Commission at http://www.eoc.sa.gov.au, the Anti-Discrimination Commission Tasmania at http://www.justice.tas.gov.au/adc, the Victorian Equal Opportunity Commission at http://www.eoc.vic.gov.au and the Western Australian Equal Opportunity Commission at http://www.equalopportunity.wa.gov.au.

29 On 2nd Jan 1969, Australia became a signatory to the *International Convention on the Elimination of All Forms of Discrimination*. The legislation above is aimed at discrimination in Australia and was enacted to give legislative effect to the provisions of the Convention. The Acts are administered by the Human Rights and Equal Opportunities Commission which has the power to delegate its duties to the Equal Opportunities Commissions of the various States.

30 Many ethicists believe that each person should enjoy the maximum degree of freedom consistent with not harming another person or constraining another person's liberty. See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

between how the person has been treated and how another person without that 'attribute' or with a different attribute is treated.[31] There are generally two types of discrimination recognised by law: direct and indirect discrimination.

(i) Direct discrimination: occurs when the discriminator treats a person obviously less favourably than another where the circumstances are the same or not materially different.

(ii) Indirect Discrimination: deals with conduct which, while not differential on its face, has a different impact according to status or private life and is not reasonable.[32]

More specifically, discrimination is based on the following legislative framework to help people who encounter discrimination:

***Racial Discrimination Act* 1975 (Cth) & *Racial Hatred Act* 1995 (Cth)**

(i) race;
(ii) colour;
(iii) descent;
(iv) national origin; and
(v) ethnic origin.

***Sex Discrimination Act* 1984 (Cth)**

(i) gender / sex;
(ii) pregnancy;
(iii) potential pregnancy;
(iv) family responsibility; and
(v) marital status.

***Disability Discrimination Act* 1992 (Cth)**

(i) disability;
(ii) HIV;
(iii) disease; and
(iv) illness.

***Anti-Discrimination Act* 1991 (Qld)**

(i) discrimination in sport.

***Transgender (Anti-Discrimination and Other Acts Amendment) Act* 1996 (NSW)**

(i) transgender

As an example, under Queensland law you or your company would only hear about a complaint of discrimination as lodged against you, if it is accepted as a legitimate complaint by the Queensland Anti-Discrimination Commission (ADCQ) and that the allegations are deemed to be covered by its respective legislation. The ADCQ will send you a copy of the complainant's written complaint. You, as the respondent, have 28 days to respond in writing. Copies of your response need to be sent to the ADCQ and the

[31] See http://www.adcq.qld.gov.au/main/faq
[32] *Public Transport Corporation v. Water* [1992] 1 VR 151

complainant to see if they are satisfied with your response. The ADCQ will also set a time for a Conciliation Conference which is a compulsory meeting between the parties to talk about the complaint and assist the parties in reaching an agreement. If an agreement is reached, its terms, conditions and settlement details will be drawn into a Conciliation Agreement and be signed by the parties to make it legally binding. If no agreement can be achieved, the complainant has the opportunity to have their complaint decided by the Anti-Discrimination Tribunal.[33] The Anti-Discrimination Tribunal operates in a similar way to a Court and provides a legal judgement of the complaint after hearing all the relevant evidence. Judgements are final and, among other outcomes, may involve making an apology and/or providing compensation to the Complainant.[34]

Despite these Federal and State efforts to legislate to the contrary, various forms of discrimination still and possibly should occur in appropriate circumstances. Beyond any specific legislative exclusions to discriminative practices, a plethora of reasons spring to mind as to why a Tandem Master would potentially deny ones participation in skydiving. Obvious examples would include some paraplegics and other such 'high risk of injury' people to whom a duty of care is owed. On a day-to-day basis, Tandem Masters are often confronted with some not so obvious examples.

Section 28 (1) of the *Disability Discrimination Act* 1992 (Cth) provides that, "it is unlawful for a person to discriminate against another person on the ground of the other person's disability or a disability of any of the other person's associates by excluding that other person from a sporting activity." A Tandem Student who is suffering from a symptomless infectious disease, such as HIV, is considered to have a disability for the purpose of the preceding Act. Unless deemed necessary for safety reasons, any exclusion from participation in tandem skydiving by an individual with HIV could very well be seen as discriminatory and be difficult to prove otherwise. The 1989 *Consensus Statement from Consultation on Aids and Sports* developed by the World Health Organisation and the International Federation of Sports Medicine holds that "there is no

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[33] See the Anti-Discrimination Commission Queensland (ADCQ) '*Responding to a Complaint*' Information Brochure. http://www.adcq.qld.gov.au

[34] See the ADCQ '*FAQ (Frequently Asked Questions)*' http://www.adcq.qld.gov.au/main/faq.html #tribunal

medical or public health justification for testing or screening for HIV infection prior to participation in sports activities". The *Infectious Disease Policy* of the Australian Sports Medicine Foundation (ASMF) support the right of a sporting participant not to be subjected to discrimination on the grounds of HIV or Hepatitis infection where the infected individual has consented to other participants being informed.[35] Despite all this and my possible ignorance, I would personally feel uncomfortable to knowingly take a student with this 'disability' tandem skydiving. As improbable as the case may be, I say this for fear of contracting the disease through a possible transfer of saliva and/or any bodily fluids in freefall or upon injuries sustained to us both after a heavy landing.

Freedom from discrimination on the grounds of sex, pregnancy or potential pregnancy is protected by legislation at the Federal, State and Territory level. Specifically, Section 7 of the *Sex Discrimination Act* 1984 (Cth) expressly prohibits discrimination on the basis of pregnancy or potential pregnancy and makes it unlawful to discriminate against pregnant women in the provision of goods, services and facilities. Additionally, blanket bans imposed on pregnant participants may also be discriminatory and contravene the *Trade Practices Act* 1974.[36] I have taken numerous pregnant women tandem skydiving; all of whom were, to my knowledge, early in their pregnancy. The point at which I would deny a pregnant woman's participation due to the risk of injury and protection of her unborn child is difficult to determine as I am not medically trained or qualified. However, you do not need to be a doctor to know that opening shock, hypothermia, stress of freefall or hard landings may all possibly contribute to the injury of a mother and her unborn child.[37] You can never predict the outcome of any skydive; the risk of injury to pregnant students and their foetuses or unborn babies is a serious concern and raises many liability and discrimination issues.[38]

Should I deny her participation in the best interests of her unborn child and possibly contravene the federal *Sex Discrimination Act 1984* (SDA), similar State or Territory

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35 Healy, D. "Sport and the Law", Sydney: NSW University Press, 1989. p. 202.

36 See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

37 Interview with Dr Robin Bell, who has developed guidelines on pregnancy in sport for 'Sports Medicine Australia', ABC Radio National, *The Sports Factor*, 9th May 1997.

38 Robinson, M. '*Pregnancy in Sport*', paper submitted at the Third Annual ANZSLA Conference, 3rd December 1993.

laws and expose the company to prosecution under those laws? A legal tension presently exists between the laws of negligence and anti-discrimination laws. If a pregnant student is injured and her unborn foetus is damaged, there is the real possibility that the child will sue its mother for negligence. In the case of *Lynch v Lynch* (1991), a child successfully sued her mother for prenatal injury, claiming that her mother's actions were negligent. The court said that the mother did owe a duty of care to the unborn child and that this duty could be breached by prenatal neglect or carelessness that causes injury.[39] In certain circumstances, if a Tandem Master was aware of the pregnancy and encouraged the woman to participate in the sport and had given advice outside his area of expertise, he too could potentially be sued by the child.[40] Although children cannot sue until they are born, they can then sue retrospectively for injuries that occurred while in the womb.[41]

Even if Tandem Masters and parachuting organisations advise potential pregnant students that there are 'theoretical risks' involved in participating while pregnant, advise them to obtain independent medical advice about whether or not to participate and have them sign a release of liability agreement - an unborn child cannot consent to the risks of the activity and cannot sign a release. Mothers also may not give that release or consent on behalf of their unborn children. Sporting organisations, such as ours, are in a situation in which they presently have to weigh up the greater financial risks of one law against the other. If a Tandem Master and/or Drop Zone operator become aware that a student is pregnant, the least hazardous and most prudent approach may be to deny that student from participating in skydiving. This will possibly expose them to litigation on the grounds of discrimination, but will be a relatively more cost-effective avenue than the catastrophic implications of a negligence action if something unfortunately does go wrong.[42]

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39 See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

40 Healy, D. "Sport and the Law", Sydney: NSW University Press, 1989. p. 203.

41 See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

42 Ibid.

The Law of Negligence in Sport

It is impossible to eliminate all risk from our lives. Many activities, recreational or otherwise, involve some element of danger or risk. In most cases, participants choose to live with and accept these risks as a part of the challenge of participating in the activity. However, carelessness can cause injuries to participants, officials, spectators, organisers and the general public. It is important for Tandem Masters and Drop Zone operators to understand that there is no automatic legal protection and that they can be held legally responsible for injuries that occur in the conduct of activities under their control. One particular area of concern is negligence. Where skydiving activities are concerned, the law of negligence is an appropriate action for an injured student to use to recover compensation for any injuries that they may have received from an act of negligence.

In relation to its application to sport, Kitto J in *Rootes v. Shelton*[43] stated that, "I cannot think that there is anything new or mysterious about the application of the law of negligence to a sport or a game. Their kind is older than the common law itself." There is an underlying duty that the law imposes on all persons, whether involved in the participating of sport, or in a support role, not to cause injury to others or their property. As the word 'injury' is used here, it includes both physical and economic injury. A non-delegable duty of care arises in special circumstances where one party is responsible for the care or safety of another.[44] Over the past 30 years, the courts have handed down several interesting judgments where sporting participants have been held liable in negligence. In *Rootes v. Shelton*,[45] the application of the law of negligence to sport was definitively embedded in Australian law. Barwick CJ said:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the

43 (1967) 166 CLR 383 at p. 387.
44 *Kondis v. State Transport Authority* (1984) 154 CLR 672.
45 Id at p. 383.

> other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances."[46]

The case of *Frazer v. Johnston*,[47] is another important case to negligence law in Australia. This case confirms that participants owe fellow participants a duty of care and sets out a simple test for determining whether a participant has breached the duty of care owed in particular circumstances.[48] It is important to note that once the duty of care is established, the person being sued must take the injured person as she or he finds him or her. Therefore, even if the injured student is particularly susceptible to the injury sustained, it does not help the defendant when damages are awarded.[49]

The law of negligence can be complicated. An action generally depends on establishing that:

(i) a 'duty of care' was owed to the injured person;
(ii) providing that damage resulted from a breach of that duty of care;
(iii) that this failure or breach of the duty of care caused the injury; and
(iv) that the damage suffered was not so remote from the claimed cause that those owing the duty of care could not have reasonably foreseen the occurrence.[50]

To be successful in an action of negligence, the plaintiff must also establish:

(i) that the plaintiff was within the class of people to whom the defendant ought reasonably to have contemplated when acting or omitting to act;[51]
(ii) that it was unreasonable for the defendant not to have foreseen their conduct as involving risk of injury to the plaintiff;[52] and
(iii) that a causal connection existed between the defendant's negligent act and the plaintiff's injury.[53]

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46 Id at 385.
47 (1990) 21 NSWLR 89.
48 D. Healey, "Sport and the Law", 2nd Ed., Sydney: UNSW Press, 1996. p. 105.
49 BLEC, "Sport and the Law", Melbourne: Longman Business Law Education Centre, 1994. p. 155.
50 D. Healey, "Sport and the Law", 2nd Ed., Sydney: UNSW Press, 1996. p. 100.
51 As per Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562 at 580.
52 *Wyong Shire Council v. Shirt* (1980) 146 CLR 40.

The onus is on the plaintiff to establish on the balance of probability that the defendant has infringed their rights.[54] If the plaintiff fails to establish any of these above elements then their action must fail altogether. Each of these elements operates to limit the defendant's liability for their careless acts or omission. If the plaintiff is able to satisfy all of these elements, then consideration must be given to whether the defendant has any defences. The defences for negligence; that is contributory negligence and voluntary assumption of risk, place emphasis on the conduct of the claimant.

A duty of care depends on establishing some relationship between the parties. If an injury occurs, the courts will ask whether the relationship between the parties was such that the defendant should have foreseen that his or her negligent act would lead to the damage suffered by the participant. The standard of care is flexible and will vary from situation to situation.[55] Determining an appropriate standard of care where the plaintiff and the defendant are engaged in a sporting activity causes difficulty. Sporting rules have no determinative value, although they have evidentiary value in establishing what an appropriate standard is.[56] A duty of care will be held to have been breached if the defendant's conduct falls below that of a reasonable person. The law judges whether a duty of care has been breached by assessing what a 'reasonable' person might do in the circumstances of the case. In sporting activities, the court will also consider the special relationship between the defendant and the plaintiff. The breach will be measured against that of a reasonable sportsperson with knowledge and expertise in the sport in which the breach has occurred.[57] According to the law:

> ".. a reasonable person is someone of normal intelligence who is credited with such perception of the surrounding circumstances and such knowledge of other pertinent matters as a reasonable person would possess. If a person professes to have a particular skill, they are required to show the skill normally possessed by persons professing such a skill. The law requires the person to show such (reasonable) skill

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53 *March v. E & MH Stramere* (1991) 171 CLR 506.
54 See Gibbs J in *TNT Management Pty Ltd v. Brooks* (1979) 53 ALHJR 267 at 269.
55 *Cook v. Cook* (1986) 162 CLR 376; *McHale v. Watson* (1966) 115 CLR 199.
56 *Rootes v. Shelton* (1967) 166 CLR 383.
57 D. Healey, "Sport and the Law", 2nd Ed., Sydney: UNSW Press, 1996. p. 106.

> as any ordinary member of the profession or calling to which they belong would normally show."[58]

An error of judgment or lapse of skill can possibly be sufficient to support a charge of negligence."[59] In respect of harm inflicted in the normal course of the sport, a participant can be held liable for an error of judgment that a reasonable participant of the sport, would not have made. Ultimately, each case is going to turn on its own particular facts. For example, the standard may vary depending upon the type of activity, age and ability of the participant, Tandem Master's level of experience and so forth.[60] Consideration will also need to be given to the level of risk involved, the purpose of the activity, the cost, the practicability of precautions and the social utility of the sport.[61]

To show causation in an action for damages in negligence, the plaintiff must prove that on the balance of probabilities that an action or omission by the person they are suing was negligent causing or materially contributing to their injury sustained.[62] It is not necessary for the plaintiff to prove that the defendant's negligence was the only cause of their injury, as it is sufficient that it was a causally relevant factor.[63] A causal contribution by the defendant is material, even where the evidence shows the causal factor not to be negligent.[64] A plaintiff will fail in their action if they can only show that the defendant's negligence might have caused their injury.[65] Mere proof of negligence followed by injury does not establish that the negligence caused the injury.[66] In practical terms, the requisite causal connection will be established if it appears that the plaintiff would not have sustained their injury had the defendant not been negligent.[67] Despite being an important resolution of the question of causation, the 'but for' test must be tempered by a 'common sense' test which involves the making of value judgements and the infusion of policy

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58 *Condon v. Basi* [1985] 2 All ER 453.
59 Goodhart, A. '*The Sportsman's Charter*', (1962) 78 LQR 490 at 494.
60 See '*Negligence – Duty of care*' on http://www.srq.qld.gov.au/negligence.cfm
61 Id at 496.
62 *Tubemakers of Australia v. Fernandez* (1976) 50 ALJR 720 at 724 per Mason J (with whom Barwick CJ and Gibbs J agreed).
63 *Chapman v. Hearse* (1961) 106 CLR 112 at 120 per Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ.
64 *Western Australia v. Watson* [1990] WAR 248 at 286.
65 *Australian Iron & Steel Ltd v. Connell* (1959) 102 CLR 522 at 531-2 per Taylor J.
66 *St George Club Ltd v. Hines* (1961) 35 ALJR 106 at 107.
67 *March v. E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 514.

considerations.[68] Other persuasive arguments can be developed to encourage the court to draw a favourable inference despite not being able to conclusively prove an absolute causal connection.[69] If a defendant's negligence increased the risk of injury, then the negligence is a cause or can at least be said to have materially contributed to that injury.[70] Therefore, a court need only be satisfied of the causal connection on the balance of probabilities and that according to the course of common sense and the probable inference from the evidence, the injury arose from the defendant's negligence.[71]

Additionally, the law says that the damage suffered by the person making the claim must not be so remote (for instance, in terms of time) from what is being claimed as the cause that it is difficult to make the connection between the two things. People are only expected by the law to foresee to a reasonable extent whether something that they do may later cause harm to others.[72] The test for remoteness of damage is whether the plaintiff's injury was too remote to be reasonably foreseeable; the rarity of the injury can not deny its foreseeability.[73]

Upon any tandem skydiving accident / incident, all these elements can be easily established to define a duty of care relationship between the Tandem Master and their student. Knowing the risks involved, any time a Tandem Master takes an unsuitably predisposed individual for a tandem skydive and inevitably injures them on landing, there is often a very real chance that the Tandem Master has breached their duty of care owed to their student and is therefore potentially liable to litigation. Depending upon your employment status, your Drop Zone operator may also be held vicariously liable and forced to pay compensation for any negligent actions on your part without any wrongdoing of their own.

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68 Id at 516.
69 *McGhee v. National Coal Board* [1973] 1 WLR 1 per Lord Wilberforce.
70 Id at 6.
71 *Luxton v. Vines* (1952) 85 CLR 352 at 358 per Dixon CJ, Fullarar and kitto JJ.
72 See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp
73 *Nader v. Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501 at 536.

Vicarious Liability

The general principle of vicarious liability is that an employer, such as a Drop Zone operator, may be responsible for the negligent actions of their employees, such as Tandem Masters, if they cause an injury to a 3rd party (i.e. tandem students) in the course of their employment. The law about the meaning of the concepts of 'employee' and 'course of employment' is complex. Liability (being strict liability without proof of fault), arises by reason of the special relationship between the parties and is stated in terms of liability, not duty. It is important to note that the vicarious liability of the employer is additional to the 'primary' liability of the employee for negligence. Both are liable - 'jointly and severally'. It follows then that a Drop Zone operator who is an employer can be vicariously liable for the acts of its Tandem Masters if they are employees without any wrongdoing on their part.[74] In terms of personal responsibility, the most widely accepted justification for vicarious liability is that, because the employer takes the benefit of the business being conducted, the employer should also be required to bear risks attendant on the business.

The advantage for the plaintiff in such an action is that it potentially provides them with a larger source of money and therefore, a much better chance of recovering damages. In order for a plaintiff to found a claim of vicarious liability, they will need to begin by answering the following two questions:

(i) was the Tandem Master an employee; and
(ii) was she or he acting in the course of their employment when they injured the 3rd party?

The Tandem Master must be an employee and not an independent contractor. However, this can often be difficult to determine. There are a number of factors to consider in determining whether a Tandem Master is an employee or an independent contractor, with no one factor necessarily conclusive. Tandem Masters and Drop Zone operators need to examine their contractual relationship to determine their relative liability status. A key

[74] *Bugden v. Rogers* (1993) ATR ¶81-246.

factor in deciding if a Tandem Master is an employee or an independent contractor is the degree of control that can be exercised over them by the Drop Zone operator. If the operator has the right to direct how, when, where and who is to perform the work, the Tandem Master is likely to be an employee. Other key factors to consider are whether the Tandem Master:

(i) is paid for results achieved;
(ii) provides all or most of the necessary equipment to complete the work;
(iii) is free to delegate the work to others;
(iv) has freedom in the way the work is done;
(v) provides services to other operators;
(vi) is free to accept or refuse work; and
(vii) is in a position to make a profit or loss.[75]

If the answer is 'yes' to the above considerations, the Tandem Master is possibly an independent contractor. Some of the criteria that our courts have used include:

(i) weekly, fortnightly, monthly and lump sum payments;
(ii) deduction of income tax;
(iii) hours of work;
(iv) the degree of control one party has over the other;
(v) the freedom of selection of labour by the employer;
(vi) the freedom to work for other employers; and
(vii) the power of dismissal.[76]

A corollary of the general rule that employers are vicariously liable for the negligence of employees is that an employer is not vicariously liable for the negligence of independent contractors. The way the law distinguishes between employees and independent contractors is very complex – just because a Tandem Master quotes an ABN on their

[75] See '*PAYG withholding guide no 2 – How to determine if workers are employees or independent contractors*' at http://www.ato.gov.au/print.asp?doc=/content/4540.htm.
[76] *Humberstone v. Northern Timber Mills* (1949) 79 CLR 389; *Zuis v. Wirth Bros Pty Ltd* (1955) 93 CLR 561*; Stevens v. Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

invoice, does not mean they are automatically an independent contractor. To assist in this determination of status, one can obtain more detailed information regarding this issue by downloading the *Taxation Ruling TR 2000/14* from Australian Taxation Office at www.ato.gov.au.[77]

The liability of a Drop Zone operator depends on whether the Tandem Master did the negligent act in the course of their employment. This is a question of fact and depends on all the circumstances of the contractual engagement in place. The act has to be "within the scope of the servant's authority either as being an act which he was employed actually to perform or as being an act which was incidental to his employment."[78] In certain circumstances, a Drop Zone operator may also seek indemnity from an employed Tandem Master, by arguing that she or he was in breach of a term of their contract of service by failing to act competently.

[77] See '*PAYG withholding guide no 2 – How to determine if workers are employees or independent contractors*' at http://www.ato.gov.au/print.asp?doc=/content/4540.htm.

[78] Per Latham CJ in *Deatons Pty Ltd v. Flew* (1949) 79 CLR 370 at 379. See also In *Bugden v. Rogers* (1993) ATR ¶81-246.

Criminal Liability

Legal actions against Tandem Masters and Drop Zone operators in negligence are a likely result for injuries sustained to a student. While criminal charges being made against our industry professionals are unlikely, it certainly is not inconceivable. It is one thing to take a predisposed 'high risk of injury' student for a skydive, but another to recklessly execute a dangerously low 'hook turn' on the landing phase of their jump[79] or deliberately breach an APF Operational Regulation with that action causing injury. Regardless of a student's suitability or physical disposition, evidence may suggest that the Tandem Master's actions were in fact criminal, causing assault to the student as opposed to mere negligence.

Negligence law is primarily concerned with compensation for damages for civil wrongs suffered as a result of another's acts or omissions. The civil wrong arises as a result of breach of a duty imposed by law. The emphasis on a negligence as a civil wrong distinguishes it from a crime. Like negligence, a crime is a breach of duty imposed by law. However, unlike negligence, a crime is considered a 'community' wrong. A crime therefore does not generally entitle the victim to an individual right of compensation as such. It rather involves the imposition of punishment by the community against the wrongdoer. Criminal law is therefore concerned primarily with punishing a wrongdoer for wrongful acts. On the other hand, the law of negligence is concerned largely with compensating the person injured or damaged by a wrongful act or omission. Because both crimes and negligence arise from breaches of duties imposed by law, it is possible for a particular breach to be both negligence and a crime.

[79] The definition of a safe landing approach method for tandem canopies will naturally differ among our industry professionals. In my opinion, any approaching turn initiated to build up speed that requires an immediate application of brakes for the purpose of avoiding 'the corner' is unnecessary and, in many cases, will increase the chances of exposing students to a risk of injury in the event they land before their Tandem Masters do. I am unaware of any tandem canopy manufacturers who claim that their parachutes must be 'turned' in order to generate enough airspeed to land safely! See APF '*Elliptical Parachutes and Canopy Control*', Taken from notes and lectures by John LeBlanc of Performance Designs - Produced by the APSC for the APF, 1997. p. 8.

By virtue of s.246 of the *Criminal Code Act* 1899 (Qld), an assault is unlawful and constitutes an offence unless it is authorised, justified or excused by law.[80] Concerning an incident of assault in a skydiving activity, a defendant will most likely raise and attempt to substantiate a defence that the assault to the other participant was unintentional.[81] This line of defence for a defendant would be likely to fail because even if the assault was unintentional, it would still constitute recklessness.[82] The notion that participants in a sport "do not recognise that there can be any tortious act on the part of one of their co-participants who is an unintentional infringer of the rules"[83] was eliminated in the case of *Rootes v. Sheldon.*[84] It was stated by Miles CJ that while intent is conventionally regarded as an ingredient of assault, an assault may still be committed without the intent to cause injury, as long as the act causing injury is reckless or dangerous.[85] If actions are outside the rules and/or dangerous, being deliberately or recklessly executed, they posses the character of unlawful assaults.[86]

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80 J.Fleming, "The Law of Torts", 9th Ed., Sydney: LBC Information Services, 1998. p. 31-32. Properly described as an "assault and battery."

81 *Sibley v. Milutinovic* (1990) ATR ¶81-013 at 688. "Such Australian authority as there is suggests that…all defences in the law of torts must be raised and substantiated by the defendant."

82 *Sibley v. Milutinovic* (1990) ATR ¶81-013.

83 G.Kelly, '*Negligence Actions between Sports Participants: The Measure of Liability*', (1992) The Australian Law Journal, Vol 66. p. 329.

84 (1967) 116 CLR 383.

85 Id at 686.

86 Id at pp. 249-250.

Defences / Mitigating Factors

There are two main defences to an injured student's claim of negligence. These are:

(i) *volenti non fit injuria*, otherwise and more commonly known as, voluntary assumption of risk in a negligence action; and
(ii) contributory negligence.

A voluntary assumption of risk defence is raised by the defendant in circumstances where the person making the claim is shown to have understood the risks involved yet continued to participate, accepting the risks and absolving other parties of their duty of care and liability. However, injuries can result from risks that are not a regular part of the sport concerned; such as careless and reckless hook-turns. It would be hard to show that a participant assumed such risks when participating.[87] Voluntary assumption of risk arises where the plaintiff assumes the risk and in doing so, absolves the other party from their duty of care and consequent liability to pay compensation. The plaintiff must have fully appreciated the risk and accepted it willingly in advance.[88] The plaintiff consents not only to the risk of injury, but also the lack of care producing the risk with the legal burden of proof resting on the defendant.[89] It appears from Australian authority that the defence of voluntary assumption of the risk is subsumed by the duty enquiry.[90] Voluntary assumption operates to exonerate a defendant from liability for what would otherwise be an actionable breach of duty of care. The defence will not succeed if negligence can be proved on the part of the defendant.[91]

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87 See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp.
88 See *Wooldridge v. Sumner* above.
89 *Wooldridge v. Sumner* (1963) 2 QB 43 at 69. Although in this case the English Court of Appeal appears to have decided on the basis that there had been no breach of duty by the defendant than voluntary assumption by the plaintiff.
90 *Rootes v. Shelton* (1967) 116 CLR 383. Where the court held that voluntary assumption of the risk operated to exclude the duty of care.
91 *White v. Blackmore and/ors* (1972) 2 QB 651.

In the area of assault, the important considerations are whether the act that caused the injury was intentional[92] and whether the plaintiff consented to the injury.[93] In *Sibley v. Milutinovic,*[94] Miles CJ said "…although the defence of voluntary assumption of risk is appropriate to an action for negligence, it is, strictly speaking, not appropriate to an action for assault where the party sued wishes to raise a defence of consent."[95] Additionally, if the proposition in *Rootes v. Shelton*[96] is accepted as correct, then in the majority of sporting cases, contributory negligence may be a more appropriate defence for the defendant to plead where a sports parachuting injury case is involved. However, it is likely that a defendant would claim that the plaintiff failed to act in accordance with their instruction and use this fact to mitigate damages.

Contributory negligence is the failure by the plaintiff to take reasonable care for their own safety and that this failure to take care, together with the defendant's default, contributes to the accident which caused the damage. Contributory negligence must be placed by the defendant and the burden of proof rests with them. If the court finds contributory negligence, the damages the plaintiff would have received is reduced accordingly, based on a comparison of the plaintiff's degree of lack of care from the standard of a reasonable person. Thus, the claimant may recover a proportion of their loss, depending on the percentage which the court thinks they were to blame.[97] An example of this situation could involve a suitably predisposed student who, in spite of receiving adequate training and instruction, succumbs to ground-rush and reaches for the ground before their Tandem Master does upon landing.

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92 Not withstanding Miles CJ judgment in *Sibely v. Milulinovic*, that in the absence of intention it can still be assault if the act is reckless.
93 BLEC, "Sport and the Law", Melbourne: Longman Business Law Education Centre, 1994. p. 158.
94 (1990) ATR ¶81-013.
95 Id at 687.
96 (1967) 116 CLR 383.
97 *Wilkinson v. Joyceman* (1985) 1 Qd R 567.

Compensation / Damages

In negligence law, a defendant would be required to pay damages or compensation for the injuries of a plaintiff only if that defendant is found to be responsible for the cause of the plaintiff's injury. Where the defendant is so responsible, he or she is said to be liable. Since a crime is considered as a wrong against the community, criminal proceedings are, in theory, a contest between the State (i.e. the community) and the defendant in which the injured person merely becomes a witness for the State. On the other hand, since negligence is a 'private wrong', in negligence proceedings the injured person or victim, as plaintiff in their private capacity, sues the defendant for compensation. In spite of the differences between negligence and criminal law, it is important to note that there are some similarities between the two areas of law. For instance, even though negligence law is primarily concerned with compensation, in some circumstances it may permit the imposition of punitive damages against a defendant. Similarly, under the criminal injuries compensation statutes in Australia, it is possible for a victim of crime to be awarded some limited compensation.[98]

Compensation is a monetary award made to a person who has suffered a wrong or injury. Compensation granted to an injured person is normally also referred to as damages. 'Damages' in this sense simply means money. Damages may be real, nominal or punitive. Actual damage is an award that reflects the actual loss sustained by the injured person. Where an injured party does not suffer any loss from the conduct of the wrong-doer, a court may award the injured party only nominal damage in recognition of his or her breach of right. By its nature, nominal damage is usually small or modest. The objective of compensation is not to enrich the injured party; it is to as far as practicable, return the injured person to the position in which he or she was in before the injury. However, punitive or exemplary damages are awarded in circumstances where the defendant's conduct is so gross or outrageous that it calls for a degree of punishment. The object of punitive damages is to punish and deter.[99]

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[98] Prof. S. Blay, 'The nature of negligence liability', 4th Ed, Sydney: LBC, 1999.
[99] Ibid.

The case of *Uren v. John Fairfax & Sons Pty Ltd*,[100] affirmed that in actions for negligence, exemplary damages may be awarded for conduct of a sufficiently reprehensible kind. This approach was emphasised in *XL Petroleum (NSW) Pty Ltd v. Caltex Oil (Aust) Pty Ltd*,[101] where Brennan J said that exemplary damages are intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter them from committing like conduct again.[102] Aggravated damages, in contrast to exemplary damages, are compensatory in nature being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like.[103] Tandem Masters and Drop Zone operators need to be aware that, in certain cases their conduct can and will attract compensatory damages which include general damages for pain, suffering and loss of amenities,[104] together with aggravated and exemplary damages all being awarded against them in the overall calculation of damages.[105]

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100 (1966) 117 CLR 118.

101 (1985) 155 CLR 448.

102 Id at 471.

103 In the joint judgment of Mason CJ, Brennan, Deane, Dawson and Gaudron JJ in *Lamb v. Cotogno* (1987) ATR ¶80-124; (1987) 164 CLR 1 at 7-8.

104 See *Canterbury Bankstown Rugby League Football Club Ltd v. Rogers; Bugden v. Rogers* (1993) ATR ¶81-246, were a

105 J.Fleming, "The Law of Torts", 9th Ed., Sydney: LBC Information Services, 1998. p. 35.Ibid. Aggravated damages can be awarded for "the emotional impact of the plaintiff's realisation that he or she had been the public victim of a deliberate assault and its contribution to his or her frustration…" p. 540. Exemplary damages as punishment to deter the defendant from any such proceeding for the future. p. 53. Also see H. Nicholas, '*Sports & the Law – Liability of sporting participants after Bugden's Case*', (1993) The New South Wales Law Society, pp. 1-15, for some background on this case.

Exclusion Clauses / Indemnity Forms

Exclusion, exemption, limitation clauses, disclaimers, consent forms, waivers and release forms are employed by persons and organisations that owe a duty of care to participants of sporting and leisure pursuits to protect them from tortious liability. Even if a student is assessed as suitable and a Tandem Master takes every possible precaution during their skydive, there are still factors that can lead to injury that you must indemnify yourself against. Such as, but not limited to, landing with students that have passed-out, students succumbing to 'ground-rush' who reach for the ground and encountering 'sink' upon landing.

An exclusion clause is a clause in a contract seeking to exclude, restrict or qualify the rights a party may have against another party to the contract. An exclusion clause:

(i) must only operate for the benefit of one party to the contract;
(ii) defines a party's contractual rights, duties and obligations under the contract; and
(iii) provide defences to a party against possible actions for breach of contract or negligence by other parties to the contract.

Courts interpret an exclusion clause as a question of construction, investigating the intention of the parties at the time they signed the contract. In determining the intention of the parties, the courts may consider the 'reasonableness' of the clause and will read an exclusion clause strictly in the context of the contract as a whole. Courts will first determine whether a party is liable for breach of negligence before looking at whether the particular liability is excluded by the exclusion clause. In commercial contracts like those employed by skydiving organisations, the courts will attempt as far as possible to give effect to the 'ordinary and natural meaning' of the exclusion clause taking into account the allocation of risks which the parties have agreed.[106]

[106] Roger Quick, Robert Riddell, Andrew Denehy, Jim Demack and Nick Pope, '*e-update: Exclusion Clauses – are you excluded?*', Sydney: Gardens Lawyers, October 2001.

Section 74 of the *Trade Practices Act* 1974 (Cth) contains an implied warranty in relation to the supply of services to a consumer that the services will be rendered with due care and operates concurrently with the law of negligence. Section 68 of the *Trade Practices Act* 1974 (Cth) is currently enacted to prevent contracting out of terms implied by the Act and renders void any provision of a contract that purports to exclude restrict or modify the application of the consumer warranties in Part V, Division 2 of the Act. The conduct of a corporation in the supply of services that falls short of the standard of care imposed by the common law may give rise to liability in negligence. However, as an initiative to moderate increasing insurance premiums, as from the 19th December 2002, Section 68B of the *Trade Practices Amendment (Liability for Recreational Services) Act* 2002[107] permits a corporation involved in the supply of 'recreational services' to include as a term of a contract to exclude, restrict or modify their liability for breach of warranties implied by s74 of the Act, in so far as the exclusion, restriction or modification limits liability for personal injury or death.[108]

The case of *Palmer and Jamieson t/as Byron Bay Skydiving Centre v Griffin*[109] exemplified the effectiveness of a properly drafted waiver which is a case involving an injured parachutist and shows that in certain circumstances an appropriately drafted waiver / indemnity can effectively protect skydiving organisations from potential liability that may arise from conducting their activities. Such clauses are not litigation proof and do not necessarily negate the duty of care owed to participants - their limitations must be acknowledged. Gross negligence cannot be excluded by contractual agreement.[110] It is important to realise that waivers are not an excuse or protection for people or organisations that act in a negligent manner. The obligation to take reasonable care to prevent participants being injured or harmed cannot be removed and agreements of this

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107 Ray Steinwall, **'***Submission to the Committee Reviewing the Law of Negligence***',** Faculty of Law, University of NSW: August 2002, p. 2. Further, the s68B permits such a clause within its terms and accordingly, permits a party to a contract to include a provision which excludes or limits liability for both negligence and for s74. Section 68B therefore has the effect of expanding legal protection for a corporation involved in the supply of services. There is accordingly a corresponding diminution in the legal protection afforded to consumers.

108 Kevin Gilchrist, '*Exclusion Clauses: Amendment to Trade Practices Act in relation to the provision of 'Recreational Services*', Adelaide: March 2003, pp. 1-2.

109 [2002] NSWCA 100.

110 Michael Rowe and Selina Ross, '*Sports Update – Waiver / Release and Indemnities*', Victoria: Issue 5 2002, pp. 1-2.

sort cannot always protect the organisation or its administrators. A waiver does not relieve your organisation from its duty of care to whoever signs it. A waiver is valid only if all the possible foreseeable risks have been fully explained and that everything has been reasonably done to eliminate, minimise or control the risk - taking a 'high risk of injury' student certainly does not minimise the risk of injury! A waiver works only to cover inherent risks and does not cover negligence or excuse a person or organisation's failure to act when it could or should have. This area is a legal minefield in itself and waivers tend not to hold much credence in courts.[111]

Where such clauses are used, the courts will determine their effectiveness in reducing or excusing the possible defendant from liability by examining what the document purports to do and how effective it has been in achieving its objective. For this reason, it is essential that the wording of such documents be clear and unambiguous.[112] In the context of risk management, all skydiving organisations must implement waivers / releases and indemnities in their daily operations. Whilst it is essential to consider developing and implementing these legal documents, it is also essential to acknowledge their potential limitations.[113] Operators may not be able to take all possible steps to avoid causing injury but the law requires them to take all reasonable steps. In either case, it does make people think twice about suing if they have signed something saying that they were aware that they are participating in an activity and have been made aware of all the possible risks that activity could possibly entail.

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[111] The OurCommunity Team, '*Treating Risk in Your Organisation*', Victoria: Our Community Pty Ltd, 2001.

[112] See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

[113] Michael Rowe and Selina Ross, '*Sports Update – Waiver / Release and Indemnities*', Victoria: Issue 5 2002, pp. 1-2.

Working within the Law

Australia has some of the highest and most stringent certification requirements in obtaining the various skydiving licenses and ratings afforded to us in the world. Typically, a Tandem Master's experience continually evolves with time in our sport and the number of skydives completed. One can legally apply for and achieve a Tandem Masters' Endorsement upon their Instructor Rating within Australia once achieving a total number of 500 skydives.[114] While this may sound like a lot to someone with low jump numbers, in my opinion this number of skydives renders a Tandem Master as relatively inexperienced. Unfortunately there is no way within our sport to simulate a tandem skydive. Once you have achieved your certification, the only way for an individual to increase their experience level is to 'jump' straight into the 'deep end' by taking live students. It is for this reason that Drop Zone operators with more experience will usually use their discretion when assigning a student to a Tandem Master - the inexperienced Tandem Master will usually get the lighter weight, fitter students. While a young and enthusiastic Tandem Master may be eager to please and grow in our sport, she or he may not posses the adequate experience when applying his or her discretion to potential students. Perhaps this is why we still see an unfortunate number of statistics involving student injuries and the resultant litigation in Australia and worldwide.

The legal tension that exists between the laws of negligence and anti-discrimination, potentially places our sporting organisation in a situation where we have to weigh up the greater financial risks of one law against the other. Tandem Masters and Drop Zone operators need to determine the least hazardous and most prudent approach in relation to 'high risk of injury' student participation in skydiving. This can possibly expose them to litigation on the grounds of discrimination, but will be relatively more cost-effective than the catastrophic implications of a negligence action if something unfortunately does go wrong.[115]

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[114] APF Operational Regulations (Op Regs), Dec, 2003, 9.2.A.1 & 9.2.A.4.

[115] See Australian Sports Commission – Women & Sport – Policy, '*Pregnancy in Sport – Guidelines – The Law*' http://www.ausport.gov.au/women/preglawn.asp

There is strong community support for actions to be taken and changes to be made by all levels of the Government to ensure our system of compensation for injuries is balanced and does not contribute to a 'culture of blame'. Australians generally believe that some of the payouts awarded to injured plaintiffs from our courts, are too excessive and want balance restored to our system. Plaintiffs who are most able to frame a legal action arising from their misfortune are often able to receive compensation which is much higher than others who have suffered a similar fate. The proposed changes are about reforming a system which has become unaffordable and meeting the expectations of the community while balancing the interests of those who are injured with those of the community at large. The Commonwealth and all States and Territories, are now grappling with ways of implementing responsible reform which will take the pressure off insurance premiums while providing adequate protection for consumers. The *Review of the Law of Negligence* provides a range of significant proposals and outlines a principled approach to reforming negligence law, which impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves.[116]

Until such proposals have legislative effect, it is the Common Law doctrine of precedent by which our Courts shall administer and ultimately determine actions in negligence. It is common knowledge that the potential for serious injury in our sport is very real. The warnings are clear that our courts will not tolerate negligent and/or reckless behaviour towards other participants and are quite prepared to award punitive, compensatory and exemplary damages to plaintiffs where the injury or assault is found to be negligent, deliberate or reckless. Tandem Masters and Drop Zone operators should take heed of these warnings, as the monetary amounts that can and will be awarded to plaintiffs can be very large - especially since our courts will be reflecting society's ever-increasing abhorrence of negligent and reckless conduct.

It is plainly obvious in the light of the abovementioned case law that the courts are not willing to tolerate any level of negligence in sport that goes beyond the ordinary rules and practices – even if it is '*all in the sport*'. Yet, we still see an annual *reported* statistic of

[116] See '*Minister welcomes final negligence review report*', C106 / 022 October 2002 at http://revofneg.treasury.gov.au.

Tandem Student injuries each year.[117] Whether these injuries are due to the careless, reckless and dangerous actions or decisions on the part of Tandem Masters, by virtue of the current system, one can never know as the circumstances behind reported accidents / incidents are not often made available to the APF. It is these types of injuries that necessitate the need for strict rules, regulations and above all, the need for Tandem Masters, as individuals, to use and apply their own discretion to each potential student to whom they owe a duty of care.

When exercising ones discretion in the determination to take a student for a tandem skydive, certain factors must be considered. Perhaps the most important of all are:

(i) the student's weight, physical fitness and health;
(ii) weather conditions;
(iii) type of equipment and aircraft to be used;
(iv) geographical condition of intended landing and surrounding areas; and
(v) Tandem Master's personal physical disposition and experience.

The Australian Parachute Federation (APF) Tandem Master's Study Guide clearly states the physical requirements of your students should ideally be "in a sound physical condition, not excessively overweight…"[118] and that in relation to your student's size and weight - that "these are important considerations especially for the newly qualified Tandem Master. Tandem Masters must be physically able to control the student. A student who is significantly larger and heavier than the Instructor will be harder to manage, it may be almost impossible to get a large or unfit student out of a smaller aircraft. If there is any doubt of the student's (or your) ability the prudent course of action is to decline the jump."[119] Moreover, students must demonstrate their practical ability to raise their legs for landing while suspended either from the Tandem Master or a frame designed for the purpose.[120] Students are to demonstrate this ability for several seconds

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117 See Statistics provided by the APF www.apf.asn.au – Incident Reports 'Q Tandem Injuries' between 11th May 1986 to 17th July 2004 - Kim Hardwick: KimH@apf.asn.au (Technical Officer).
118 APF - Tandem Master's Study Guide. Section Two – Student Preparation & Training. Section 2 – 1. www.apf.asn.au
119 Ibid.
120 See Australian Parachute Federation (APF) – Training Operations Manual. (T.O.M), Dec, 2003, 4.1.4.

and any resultant inability to achieve this, as the acceptable landing position, Tandem Masters must seriously "reconsider whether or not they be allowed to jump. **Inadequate preparation and application of this skill will result in injury!**"[121]

Following these guidelines unfortunately offers no guarantee of an injury free skydive. While you may not be at fault when a student fails to act in accordance with their training and your instructions, with very rare exception, a student will never intentionally injure him or herself. Successfully demonstrating their ability to perform the necessary actions for safe participation in skydiving, students of a 'high risk of injury' disposition can be more susceptible to certain factors that additionally inhibit their ability to lift their legs upon landing. Some of these factors incluce the excessive tightening of their harness caused by opening shock, g-forces endured from spiralling under the canopy and their general movement and shifting within it during extended time in the air. Other reasons why students may drop their legs before the Tandem Master on landing include:

(i) students who become unconscious;
(ii) ground rush;
(iii) students who are instructed to hold up their legs for too long prior to landing;
(iv) students who are physically to unfit;
(v) poor harness adjustment; and
(vi) inadequate instruction, training and preparation.

'Bullet-proof' Tandem Masters (*who take the students that no one else will take*), can benefit from exercising good judgement and adhering to their respective operations' Tandem Student Weight-Limit.[122] One must use their discretion wisely and always be mindful of your duty of care owed to every prospective student. I adhere to a 95 kilogram maximum weight-limit for tandem students. Regardless of their actual weight, I always assess each student's physical fitness, attributes and general circumstance before deciding whether to allow their participation. This method has served me and my company well –

[121] APF - Tandem Master's Study Guide. Section Two – Student Preparation & Training. Section 2 – 2. www.apf.asn.au

[122] Tandem student weight limits will vary between Drop Zones. These are often determined by, but not limited to, the size and type of parachutes used, landing and surrounding areas.

at the risk of sounding arrogant and perhaps jinxing ourselves, within the thousands of tandem skydives conducted, we have never injured one single student. Those who ignore these guidelines and take 'high risk of injury' students will, on the balance of probabilities, eventually injure one of them.

In my opinion, an injured student will fail in an action of negligence, as long as their Tandem Master had:

(i) followed the APF Tandem Master guidelines;
(ii) assessed the student's level of physical fitness and suitability required for tandem skydiving (*as determined by their common sense, company weight-limits, student's successful demonstration of their leg-lifting ability and their own level of experience and capabilities*);
(iii) provided them with adequate training and instruction; and
(iv) made them fully aware of and understand the inherent risks involved in skydiving by having them sign a properly drafted waiver that protects them from liability arising from their activities.

On the other hand, taking a student who is clearly unsuited for the activity for the benefit of financial gain, will most likely be seen as a negligent act and a breach of your duty of care.

Conclusion

In summary of the above, exclusion clauses and indemnity forms do not necessarily negate your duty of care owed to tandem students, as gross negligence cannot be excluded by contractual agreement.[123] Negligent acts may constitute assaults without the intent to cause injury, as long as the acts causing injury are reckless or dangerous.[124] Defences to an actionable breach of duty of care employed by defendants for the exoneration of liability and the mitigation of damages, may not succeed if negligence can be proved on the part of the defendant.[125] A court may find contributory negligence based on a comparison of the plaintiff's degree of lack of care from the standard of a reasonable person. Thus, the claimant may recover a proportion of their loss, depending on the percentage which the court thinks they were to blame.[126] In certain cases, where the defendant is liable, their conduct can and will attract compensatory damages,[127] aggravated and exemplary damages being awarded against them in the overall calculation of damages.[128] Depending upon your employment status, your Drop Zone operator may also be held vicariously liable and forced to pay compensation for any negligent actions on your part without any wrongdoing of their own. Denying unsuitable students' participation will, as I have experienced firsthand, possibly expose you and your organisation to litigation on the grounds of discrimination.

It is not my intention for Tandem Masters who read this Thesis to develop an attitude that 'you're damned if you do and you're damned if you don't!' Equally, I do not suggest that Tandem Masters look for superfluous reasons to deny students' participation for fear of possible litigation – after all, we all need to make a living! Today's legal minefields are often hard to circumnavigate; the purpose of this Thesis, therefore, is merely to provide

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123 Michael Rowe and Selina Ross, '*Sports Update – Waiver / Release and Indemnities*', Victoria: Issue 5 2002, pp. 1-2.
124 *Rootes v. Shelton* (1967) 166 CLR 383 at 686.
125 *White v. Blackmore and/ors* (1972) 2 QB 651.
126 *Wilkinson v. Joyceman* (1985) 1 Qd R 567.
127 See *Canterbury Bankstown Rugby League Football Club Ltd v. Rogers; Bugden v. Rogers* (1993) ATR ¶81-246.
128 J.Fleming, "The Law of Torts", 9th Ed., Sydney: LBC Information Services, 1998. p. 35. Also see H. Nicholas, '*Sports & the Law – Liability of sporting participants after Bugden's Case*', (1993) The New South Wales Law Society, pp. 1-15.

Tandem Masters and Drop Zone operators with a general overview of the legal ramifications regarding our chosen career.[129] Continued education and knowledge regarding these matters, will assist our industry professionals to approach the conduct of their activities and decisions in a common sense and discretionary way for the purpose of limiting their personal liabilities. We need not forget that an average of 57 tandem students are injured each year in Australia. In the time that I have owned and operated my own skydiving company, nearly 600 tandem students have been injured throughout the country. It has been well documented that the APF has struggled with securing an affordable insurance premium to cover its members against personal and vicarious injury claims. The more claims against APF members, especially successful ones, will naturally increase our annual premiums to a point where the APF may no longer be able to sustain such a cover. In this event, individual members and/or Drop Zone operators will be forced to take out individual public liability and professional indemnity insurances – an expensive path I am sure that none of us wish to take!

In light of this legal 'battlefield' and the desire to avoid the foreseeable risk of harm or injury, many organisations (including my own) have developed a risk management plan for their organisation and the activities it conducts.[130] While I may confidently defend myself and my organisation against yet another charge of discrimination for my decision to deny someone's participation in skydiving, it must be noted that each case will be decided on its own merits and circumstances. This Thesis is a non-exhaustive examination and brief overview of the areas of law as discussed above. In no way does this Thesis claim and/or purport to be a legal authoritative tool to be used and relied upon in ones own legal defence pursuant to any subsequent claims made against them. Readers must seek their own independent legal advice on such matters – legal claims and the subsequent recourse thereof must be defended seriously.

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[129] This Thesis is not limited to Tandem Masters and Drop Zone operators alone. The legal implications as discussed above applies to all skydiving participants within all facets of our sport.

[130] See '*Negligence – What steps can I take to avoid the foreseeable risk of harm or injury?*' at http://www.srq.qld.gov.au/negligence.cfm.

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