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A Mechanic's Liability

If your mechanic seems overly cautious and self-protective in his approach to maintaining your airplane, he has good reason.

MECHANICS HAVE ALWAYS been subject to FAA sanctions: certificate suspension or revocation, fines, warning notices, letters of correction, and remedial training. But during the 1960s and 1970s—the heyday of piston general aviation—such enforcement actions against GA mechanics were exceedingly rare. That's no longer the case.

In 1978, the FAA added a new rule (FAR 43.12) making it a violation for any mechanic to “make, or cause to be made, any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part [of the FARs].”

In plain English, 43.12 makes it a violation for a mechanic to “auto-graph a lie”—to “pencil whip” a logbook entry, maintenance release, yellow tag, etc. If a mechanic signs a logbook entry stating that some airworthiness directive (AD) was complied with or some other inspection or repair was performed and the FAA discovers that the work wasn't actually done as documented, the mechanic is toast.

The penalties for violating 43.12 are extraordinarily severe. An individual mechanic accused of violating it almost certainly faces revocation of all his FAA certificates and will likely be looking for a new career. A repair station can face daunting fines up to \$250,000 per violation and/or revocation of its repair station certificate.

That said, it's not all that difficult for a mechanic to avoid getting in hot water with the FAA. The regulations that govern GA mechanics (Part 43) are vastly more concise and understandable than the ones that govern GA pilots and aircraft owners (Parts 91 and 135). In fact, Part 43 contains just 13 rules, and they're remarkably straightforward.

Reduced to its bare essentials, Part 43 simply requires that a mechanic:

- Perform work “by the book” per manufacturer's instructions or FAA guidance.
- Use the proper tools per manufacturer's recommendations or industry practice.
- Do all work in such a fashion that the aircraft is safe to fly, conforms to its type design, and complies with all applicable ADs and airworthiness requirements.
- Record all his work in the aircraft maintenance records accurately.
- Operate under supervision when he does work that he's never done before.

Pretty commonsense stuff, right? A mechanic who makes a good-faith effort to follow these basic rules is very unlikely to get in trouble with the friendlies.

CIVIL LIABILITY

But a mechanic who follows the FARs to the letter isn't out of the woods. If an aircraft he works on winds up in an accident, the mechanic may easily find himself hauled into court as a defendant in a civil lawsuit, accused of negligence for allegedly performing improper maintenance,

and facing ruinous money damages and legal expenses.

Under tort law, there's no need to show that a mechanic violated a regulation in order to find him negligent. It is only necessary to convince a jury that he "failed to exercise such care as would be reasonably expected of a prudent person under similar circumstances," either by doing something a prudent mechanic would not do or by failing to do something a prudent mechanic would do. It's unnecessary to prove this "beyond a reasonable doubt," but only by "a preponderance of the evidence"—in other words, the jury need only conclude that it's more likely than not that the mechanic acted negligently.

This "prudent mechanic" standard can be mighty fuzzy. Suppose, for example, the plaintiff attorney representing the widow of an air crash victim alleges that a mechanic who worked on the aircraft was negligent because he failed to comply with a mandatory service bulletin. We all know that there is no FAA requirement for a Part 91 owner to comply with SBs (even so-called mandatory ones) unless the SB is explicitly mandated by an AD. In fact, most Part 91 operators don't comply with most SBs.

Can a mechanic be found negligent if he doesn't comply with a SB? Would a prudent mechanic have complied with the SB? What if the mechanic recommended that the SB be complied with, but the aircraft owner said no? How would a jury of citizens who have no background in aviation, aircraft maintenance, or FARs decide these questions?

If you're an A&P, this is the stuff that keeps you awake at night.

THE GARA EFFECT

In the salad days of piston general aviation, lawsuits against GA mechanics and shops were rare because few GA mechanics and shops had enough assets to make them worth suing. Manufacturers like Beech, Cessna, and Piper had deep pockets and insurance, so they were the primary targets of air crash litigation. Even if the cause of the crash seemed unrelated to the hardware (as is usually the case), the manufacturer would be sued anyway and would often wind up settling rather than incur the costs of going to trial.

Things changed dramatically 20 years ago when President Clinton signed into law the General Aviation Revitalization Act of 1994 (GARA), which immunized GA aircraft manufacturers against product liability for aircraft older than 18 years.

There are a few exclusions from this immunity, but for the most part GARA provides the manufacturer with bulletproof immunity against air crash lawsuits.

Taking GA aircraft manufacturers off the hook didn't make air crash lawsuits go away. It simply increased the liability burden for everyone else involved with the accident aircraft, including engine and component manufacturers, aircraft owners, and especially mechanics and maintenance shops. In the wake of GARA, there has been an explosion of civil suits against maintenance folks.

This litigation explosion created another problem: Liability insurance for mechanics and shops has become hard to get. Many underwriters abandoned the maintenance market, leaving maintenance shops with few choices and little competition. Small shops and most individual mechanics are now forced to "go bare," and those lucky enough to be able to find insurance often pay exorbitant premiums for low coverage limits.

NIGHTMARE SCENARIO

To illustrate the risks shops and mechanics face, consider the following hypothetical scenario created by aviation attorneys Stuart Fraenkel and Doug Griffith and derived from a composite of actual air crash lawsuits:

Peter Pilot of Charlie's Charter Service Inc. is flying passengers in a 1979 Flibney 780 on lease-back from Oscar Owner and maintained by Mike Mechanic of Pristine Repair Corp. During an approach in IMC while being vectored by ATC, Peter Pilot is twice observed deviating from assigned altitude and heading and has to be given corrections. Shortly thereafter, the airplane enters a spin and crashes, killing all on board. Witnesses tell NTSB investigators that they heard the engine sputter.

Investigators find that Peter Pilot's medical expired a month before the crash. The toxicology report showed the presence of antihistamine medication in his blood. The airplane's tail section is located about 100 yards from the main wreckage, and its maintenance records indicate that Mike Mechanic of Pristine Repair Corp. had overhauled the

airplane's engine 120 hours prior to the accident, but at the direction of Oscar Owner did not comply with one of the engine manufacturer's mandatory service bulletins.

Eighteen months later, the NTSB issues its probable cause determination: Peter Pilot suffered spatial disorientation while in IMC and lost control of the aircraft. A contributing factor was Mr. Pilot's use of an over-the-counter cold medication.

The families of the deceased passengers file a civil lawsuit. Defendants include the estate of Peter Pilot, Charlie's Charter Service, Mike Mechanic, Pristine Repair Corp., Oscar Owner, Flibney, and the U.S. government (who provided ATC services). In pretrial motions, the judge dismisses the suit as to defendants Flibney (because of GARA) and the U.S. government (because the controller's actions were deemed to be immunized under the "Discretionary Function" exception to the Federal Tort Claims Act).

The plaintiffs demand a jury trial. By law, the findings of the NTSB investigation and the probable cause determination are inadmissible at trial, so the jury never hears about them. The jury returns a judgment for the plaintiffs in the amount of \$10 million, and allocates fault as follows: 10 percent to Peter Pilot and his employer Charlie's Charter Service; 10 percent to Mike Mechanic and his employer Pristine Repair Corp.; and 80 percent to Oscar Owner. Oscar's \$1 million aircraft liability policy is limited to \$100,000 per person.

This does not mean that Mike Mechanic and Pristine Repair Corp. are responsible for only \$1 million, however. State law generally provides for "joint and several liability" for economic damages, which means that all defendants are equally liable to the plaintiffs to satisfy the entire amount of the \$10 million judgment. Conceivably, the plaintiffs could come after Mike Mechanic and Pristine Repair Corp. for the entire \$10 million, and leave it up to them to go after the other defendants for their share.

Is it any wonder that so many A&Ps and shops seem overly cautious and self-protective in their approach to maintenance these days?

THE A&P'S DILEMMA

In the good ol' days before GARA, an A&P's maintenance decisions were guided by two principal concerns: (1) Is it safe? (2) Is it legal under the FARs? Those are precisely the two considerations a mechanic *should* be concerned about.

But in today's litigious climate, the prudent A&P is now forced to worry about a third concern: (3) How will it appear to a civil jury that knows nothing about aviation after being spun in the worst possible light by a skilled plaintiff's attorney? That is a very different standard indeed, and has had a tremendous chilling effect on A&P maintenance decision-making.

Consider this scenario:

An owner brings his Cessna 182 to an A&P, complaining of nose-wheel shimmy. The mechanic investigates and discovers that the cause of the shimmy is that the bolt holes in the nose landing gear trunnion are worn, elliptical, and sloppy. The mechanic must now decide how to fix the problem.

A new trunnion from Cessna costs more than \$5,000. A used serviceable one from a salvage yard is available for half that price. The mechanic also considers the possibility of reaming the worn holes in the original trunnion oversize and installing bushings to restore the holes to their original dimensions; Cessna hasn't approved this repair, but the mechanic believes that it would fix the shimmy and be a minor alteration conforming to acceptable industry practices.

The A&P considers all three repair options to be safe and legal. But he worries what might happen should the airplane ever be involved in a nose-gear collapse and the mechanic finds himself in court. If the mechanic repairs the existing nose strut with bushings, a plaintiff attorney might ask him to explain to the jury why he made a repair that wasn't authorized by Cessna. If he replaces the damaged trunnion with a salvage yard part, a plaintiff attorney might ask him to

explain to the jury why he decided to install an undocumented part from a junkyard.”

If you were the A&P, what would you do?

A&Ps face such dilemmas all the time: What about an engine that is past TBO that the owner wants to continue in service because it's running great? How about a costly SB that the owner doesn't want to comply with? The mechanic may believe that keeping the engine in service or ignoring the SB is both safe and legal, but is understandably worried whether such actions might not appear reasonable and prudent to a jury of aviation-challenged citizens, especially after the plaintiff lawyer makes them sound like capital crimes.

A SOLUTION?

The obvious solution to this dilemma is that aircraft owners shouldn't put their mechanics in situations like this. The decision-making burden should rest with the owner, not with the mechanic.

Here's how this should work: The A&P informs the owner about Flibney Service Bulletin 99-44 that calls for the frammis at the distal end of the portoflan armature to be replaced with an improved part, and explains that compliance with the SB will cost approximately \$2,400. After consulting with a tech rep at the Flibney Owners and Pilots Association, the owner decides he doesn't want this costly SB to be performed. The A&P then presents a signed-and-dated letter to the owner that says:

“I advised the owner of N12345 of Flibney Service Bulletin 99-44. The aircraft is operated under Part 91, and therefore compliance with this SB is not required by regulation. After a thorough discussion of the technical and regulatory aspects of SB 99-44, the owner decided that he did not want this work performed, and instructed me not to do it.”

The A&P asks the owner to countersign a copy of this letter, acknowledging receipt, and keeps the copy in his files. Such a contemporaneous written record would almost certainly go a long way toward convincing a jury that the A&P was not negligent in failing to comply with the SB.

The obvious solution to this dilemma is that aircraft owners shouldn't put their mechanics in situations like this. The decision-making burden should rest with the owner, not with the mechanic.

This doesn't solve all the A&P's liability concerns. Unless he is blessed with 20-20 foresight, the A&P can't anticipate every possible decision that might ultimately be used as a basis for an allegation of negligence. But he certainly can anticipate the obvious ones (like busting TBO or declining SBs and other manufacturer's recommendations), and for those this is an easy and effective antidote.

Some owners just don't want to get involved in the messy business of maintenance decision-making and expect their mechanics to make decisions on their behalf. They might even feel annoyed if their mechanic hands them a “CYA letter” placing the decision-making burden on them. That's fine so long as the owner understands that in today's climate, mechanics and shops can be expected to make decisions that minimize their perceived liability exposure, and that such decisions can be very costly for the owner.

Owners concerned with controlling maintenance costs simply must get involved in the process and be willing to accept responsibility for key maintenance decisions. If you let your mechanic make those decisions for you, you might not be happy with the outcome. *EAA*

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