

MARGARET BJORKMAN AND TOR- ONTO FLYING CLUB LIMITED } (<i>Plaintiffs</i>)	APPELLANTS; ¹⁹⁵⁶ *Jan. 26, 27 *Mar. 2
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AND

THE BRITISH AVIATION INSUR- ANCE COMPANY LIMITED (<i>De-</i> <i>fendant</i>)	RESPONDENT.
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Insurance—Aviation—Personal accident—Insured killed during night flight
—Warranty by insured to abide by regulations issued by air author-
ity—Whether breached.*

This was an action by the beneficiary of an aviation personal accident insurance policy. The deceased, a member of the Toronto Flying Club Ltd., crashed and was killed when flying at night in an aircraft piloted by him and owned by the club. The respondent contested liability under the policy on the ground, *inter alia*, that the insured flying club had breached the warranty in the policy that “all air navigation and airworthiness orders and requirements issued by any competent authority should be complied with in every respect”.

The Department of Transport had issued certificates authorizing this plane to fly by night “for instructional purposes only” and further prohibiting the club from “flying for recreational purposes by night”.

Held (affirming the judgment at trial and of the Court of Appeal): That the appeal should be dismissed. The flight made at night by the deceased was not a training or instructional flight but a recreational one, and as such was prohibited as was the use of the aircraft.

APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the dismissal by the trial judge of an action upon a policy of aviation personal accident insurance.

B. J. MacKinnon for the appellants.

B. V. Elliot, Q.C. and *W. L. N. Somerville* for the respondent.

The judgment of the Court was delivered by:—

ABBOTT J.:—The facts in this appeal can be briefly stated.

The action is one by appellants against the respondent under a policy of aviation personal accident insurance issued by the respondent, and arises out of the death of

*PRESENT: Kerwin C.J., Kellock, Cartwright, Fauteux and Abbott JJ.

(1) [1954] 3 D.L.R. 224.

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Kermit Ernest Bjorkman which occurred during the night of March 31-April 1, 1950, on a flight which he was making from Malton airport to Detroit, Michigan, via Buffalo. After leaving Buffalo at about 9.15 p.m. the deceased apparently encountered bad weather, lost his way, crashed into Lake Huron on the Michigan side, and was drowned.

The deceased was flying a single engine aircraft owned by appellant, Toronto Flying Club Limited, of which he was a member, and he had taken off from Malton airport at about 6.15 p.m. in the evening of March 31, 1950, on a flight which apparently he had planned to make to Wichita, Kansas, and return.

The policy covered "all persons riding in the Club's aircraft excluding Instructors". Unless otherwise provided by special endorsement, the policy excluded from the risk, loss sustained arising out of death or bodily injury while the insured was engaged in night flying, but in fact the policy did contain such an endorsement extending the risk to night flying "provided all such flying is carried out in accordance with the regulations of the Toronto Flying Club Limited".

The respondent contested liability under the policy on the principal grounds (1) that the onus was on the plaintiffs to establish compliance with the regulations referred to in the endorsement and that they had not discharged this onus; (2) that in any event the deceased had not complied with the regulations of the Flying Club respecting night flying as required by the endorsement and (3) that under the terms of the policy, the named insured, the Toronto Flying Club Limited, had "warranted that all air navigation and airworthiness orders and requirements issued by any competent authority should be complied with in every respect", and that this warranty had been breached.

I find it necessary to deal only with this third defence.

On this aspect of the case a vital point to be determined, it seems to me, is whether the flight in question was an "instructional" flight or a "recreational" flight. If it was in the latter category, I do not think the appellants can succeed.

The Certificate of Airworthiness issued by the Department of Transport for the plane flown by the deceased bore the following endorsement:—

Valid for day flying only

Valid for night flying (instructional purposes only) 1/12/48 C.A.B.

The Operating Certificate issued by the Department of Transport to the appellant club contained the following conditions:—

5. Special Conditions

- (1) Operations from Malton Airport are permitted as follows:—
 - (a) By day—with aircraft equipped with a radio receiver capable of receiving radio telephone messages on the Malton Tower frequencies;
 - (b) By night—with aircraft equipped with functioning two-way radio capable of receiving and transmitting radio telephone messages on the Malton Tower Frequencies.
- (2) In addition to The Air Regulations governing night flight, cross-country flights by night are subject to the following conditions:—
 - (a) Authority to carry out Night Flying is to be obtained from the District Inspector, Air Regulations, and prior clearance is to be obtained from the Aerodrome Control Officer where aerodrome control is provided;
 - (b) Night cross-country training flights may only be undertaken if:—
 - (i) the student is accompanied by an instructor holding a valid Public Transport Pilot's Licence;
 - (ii) undeteriorating VFR weather conditions are forecast;
 - (iii) the aircraft is equipped with functioning two-way radio capable of communicating with D.O.T. control towers and radio range stations;
 - (iv) flight plans and arrival reports are filed.
- (3) Flying for recreational purposes by night is not permitted.

After a careful consideration of all the evidence, I have regretfully reached the conclusion that the flight which the deceased made on the evening of April 1, 1950, was not a training or instructional flight, and as such permitted under Condition 5(2) of the Operating Certificate.

The Superintendent of Air Regulations of the Ontario District one D. W. Saunders testified that the type of flight upon which the deceased was engaged at the time of his death was not necessary for the purpose of qualifying him for the advanced certificate for which he had applied, and that he was at the time merely getting more experience. So far, therefore, as the ordinary meaning of the word "recreational" is concerned, the meaning which must be given to it in the certificate the flight on which the deceased was engaged was of a recreational nature.

The appellants tendered in evidence, subject to objection, a circular letter written some six months after the death here in question by the Secretary-Manager of the Royal Canadian Flying Clubs Association, in which he gives

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an interpretation of "recreational flying" which he had obtained from some unnamed officials of the Department of Transport to the effect that the meaning of the term as used in the certificate was "carrying passengers for hire or reward on sight-seeing flights."

The document was, in my opinion, inadmissible for the purpose for which it was tendered. Although Mr. Saunders placed the same meaning upon the term, he admitted that was merely his own interpretation and was not justified by anything in the Air Regulations. In the circumstances, I think the flight in question must be considered as having been a flight for "recreational purposes" which was prohibited under Condition 5(3) of the said certificate, as was the use of the aircraft under the certificate of airworthiness.

On this point I do not think there was any error in the judgment of the Court below and I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Kennedy & Ross.*

Solicitors for the respondent: *Kilmer, Rumball, Gordon & Beatty.*