CASE NOTES

Full reports of all cases listed are available at www.apil.org.uk/apil-casebook

Rogers v Hoyle [2014] EWHC Civ 257

Liability: fatal aviation accident

A Court of Appeal decision on the admissibility of an accident report prepared by the Air Accident Investigation Branch of the Department of Transport (the AAIB) as evidence in civil proceedings.

On 15 May 2011, Orlando Rogers was a passenger in a vintage Tiger Moth propeller bi-plane manufactured in 1940 of which the appellant, Scott Hoyle, was the pilot. During the flight, the aircraft crashed to the ground, and Orlando was killed. Scott Hoyle was seriously injured but survived. A civil claim has been brought by the mother and sister of the deceased, as executors on behalf of his estate and as dependants. They are seeking damages for his death, which they allege was caused by Scott Hoyle's negligence.

The claim being advanced is that Scott Hoyle was negligent in attempting to perform a loop when (a) he had no or insufficient training in aerobatic flying or spin recovery, and (2) at a dangerously low altitude, such that there was not enough airspace to recover from a spin. Scott Hoyle's case is that he was not attempting to perform a loop when the accident occurred. He says that the rudder pedals jammed, and he was not able to prevent the aircraft from stalling and flipping over into a spin from which - because the pedals were jammed - he could not recover.

The AAIB investigated the accident and published a report on 14 June 2012. The sole objective of the investigation under the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 is the prevention of accidents, not to apportion blame or liability. Information in that report

included that the aircraft 'was seen by observers on the ground to pull up into a loop and during the manoeuvre it entered a spin from which it did not recover. The manoeuvre started at 1,500 feet agl (above ground level) and there was insufficient height for the pilot to recover from the subsequent spin'.

The respondents sought to rely on the report, and in response, the appellants issued an application contesting the admissibility of it, seeking orders from the High Court that (1) those parts of the statements of case referring to the AAIB report be struck out, and (2) a declaration that the report was inadmissible as evidence in the civil proceedings.

When the application came before Mr Justice Leggatt in May 2013, he found that the AAIB report contained statements of fact as well as statements of opinion. On any view, the factual evidence was admissible, as the evidence was relevant, and the fact that it was hearsay was not a ground for exclusion - nor was there any other rule of law which prohibited its inclusion. The opinion evidence was also admissible, insofar as the opinions stated were those of qualified experts on subjects involving special expertise. Many of the opinions stated in the report - on subjects including aeronautical engineering, the piloting of aircraft, meteorology, pathology and the interpretation of GPS data - clearly fell into that category. In relation to the findings in the report, as they involved inferences drawn from the facts, they fell into the category of opinion evidence, though not of a lay person. In summary, Mr Justice Leggatt said: 'The AAIB report contains a wealth of relevant and potentially important evidence which bears directly or indirectly on the issues in dispute, including the central issue of whether Mr Rogers' death was caused by negligence on the part of Mr Hoyle.'

Consequently, although the report contained analysis and conclusions, given that the AAIB had great experience in investigating the causes of air accidents, any rational person would regard their view as relevant, and would be astonished if told the law did not permit a court to have regard to the report. Mr Justice Leggatt gave a declaration in favour of the claimants, and concluded that

'unless the court is prevented from doing so, it would be foolish and blinkered to ignore such a valuable resource'.

The appellants appealed on the basis (a) that the admission of the report would offend the rule in *Hollington v Hewthorn* [1943]; (b) that insofar as the report contains expressions of expert opinion, it does not comply with the mandatory provisions of CPR Part 35 and should be excluded on that ground as well; and (c) that if the report is potentially admissible, it should be excluded, as a matter of discretion under CPR Part 32 and the judge was wrong to decline to do so. In relation to (c), the Secretary of State for Transport and the International Air Transport Association were given leave to intervene, and made representations as to the approach the court should take.

The Court of Appeal found that, insofar as the report consists of statements or reported statements of fact, it is *prima facie* admissible; the trial judge must decide for himself on the evidence he receives, and in the light of the submissions on that evidence made to him. *Hollington v Hewthorn* [1943] recognises that different considerations apply to scientific or expert witnesses, but the Court of Appeal considered the expressions of opinion contained in the report as ones to which a court is entitled to have regard, saying that 'it is open to an expert, that is to say someone who has the appropriate special expertise, to express an opinion based on the facts as he understands, or assumes, them to be, if and insofar as his conclusion is informed by, or a reflection of, that expertise. This includes matters such as the causation of an accident'. In relation to CPR Part 35, the court found that the expert evidence in the report does not fall within Part 35, as the AAIB was not instructed by, and is wholly independent of, any of the parties. Consequently, the claimants did not require the permission of the court to adduce it.

In so far as discretion goes, Mr Justice Leggatt had discretion under Part 32 to exclude evidence that would otherwise be admissible. He declined to do so. The defendants had relied upon two submissions as to why it should be excluded: (1) that the nature of the report made it an unacceptable and unsafe piece of evidence in that it was an anonymous document; and (2) that if information in the report were allowed to be used in litigation, this would deter people from assisting in the investigation of air accidents in future, which would hinder the AAIB's effectiveness - and as a result, jeopardise air safety. The Court of Appeal heard submissions from the interveners on this ground. The court considered that the report is of particular potential value on account of (i) the independence of the AAIB; (ii) the fact that its reports will be the product of an impartial investigation into the causes of the accident by experts who are

Obtain the very best outcome for ***your*** client

Dorset Orthopaedic's legal services helped Christopher become the first client in the UK fitted with the innovative Michelangelo® Hand.

Our dedicated team of clinical specialists assist with a comprehensive selection of prosthetic & orthotic legal services including:

- **Prosthetic & orthotic reports**
- **Expert witness reports**
- **UK Cover**
- **Home visits**

Life without limits.....

LEGAL OPEN DAY: "Advances in Prosthetics" - 12th June 2014 - CALL US to register your interest

Please call us on 01425 481743 and find out how we can help your client live *life without limits*

Ringwood | Burton | London | Taunton | Leeds | Newcastle | Glasgow www.dorset-ortho.com

not concerned to attribute blame, and in whose investigations injured passengers and families of deceased passengers do not actively participate; and (iii) the fact that it has a much greater ability than anyone else to obtain and analyse data relating to an accident, which is not otherwise likely to be available, or only with considerable difficulty and at considerable cost.

In his judgment, Lord Justice Christopher Clarke made reference to the overriding objective (to deal with cases justly and at proportionate cost), which he said does not call for the exclusion of evidence of this kind. He said: 'On the contrary, many litigants who would wish to advance claims in respect of dead or injured passengers would find it either impossible or very difficult to access the relevant information such as cockpit voice/flight data recordings, and to finance the gathering of necessary evidence to mount a claim.'

The Court of Appeal considered that there is no good reason why the admissibility of the report should impede the AAIB in their work. Even if the report is not admissible in evidence, it is certainly something which will be available for would-be claimants or those against whom they claim, and can be used as the foundation of a claim or defence. Reports have been used in previous cases without any point being taken on admissibility. In practice, the AAIB reports tend to constitute the principal point of reference and commentary for the parties' experts and legal representatives at trial, and set the parameters within which issues of causation and liability are argued. It is noteworthy that the AAIB has already entered into Memoranda of Understanding (MOU) with the Crown Prosecution Service, the Association of Chief Police Officers and the Coroner's Society, which provides for cooperation and evidence/information sharing. As it is, senior inspectors responsible for the production of reports regularly give evidence of the results of their investigations in public at Coroner's Inquests, where they may be questioned by those affected. It is not apparent that the work of the AAIB has been adversely affected by this, or that the inspectors have become more guarded in their opinions. While the possibility of being a witness or a defendant may have an inhibitory effect, the fact that the report, which is a public document, is also admissible in evidence, is unlikely to change that much – and neither is it likely to affect the willingness of people to give information and assistance to the AAIB. Witnesses interviewed by the AAIB are likely to be interviewed by the Police or Coroner's officer in any event, and the risk of that is likely to be of more concern.

The Appeal was unanimously dismissed on all fronts.

Comment

This legal victory is a real game changer for all claimant aviation cases in this jurisdiction. For the first time, it is now good law that the official accident report prepared by the AAIB is fully admissible in civil proceedings. This means that claimants do not now have to provide independent evidence of accident facts, which can be expensive and very difficult once the immediate aftermath of the accident has passed.

Michael Crane QC of Fountain Court Chambers and John Kimbell of Quadrant Chambers instructed by Sarah Stewart and Scott Phillips, Stewarts Law LLP, for the respondent/claimant.

Robert Lawson QC of Quadrant Chambers and Timothy Marland of Quadrant Chambers instructed by Andre Krausz, Clyde & Co LLP for the appellant/defendant.

Malcolm Sheehan of Henderson Chambers instructed by the Secretary of State for Transport, first intervener.

Akil Shah QC of Fountain Court Chambers instructed by the International Air Transport Association, second intervener.

Dobson v British Telecommunications Plc

Quantum: noise induced hearing loss and tinnitus: atypical features of damage.

Before District Judge Oldham at Sheffield County Court on 26 February 2014

The claimant was born in 1957 and had been employed with the defendant since 1978. Working as a telephone engineer, he used equipment known as oscillators and amplifiers to trace telephone lines and identify faults. The equipment used by the claimant was initially green in colour, with the green equipment later being replaced by a yellow set. To use it, he would place an earpiece on his left ear. The equipment would emit a persistent tonal signal, which increased in volume as the claimant got closer to tracing the line or finding the fault. If the claimant ever caught the probe of the oscillator on the side of the telephone cabinet, this would cause interference and a loud shock or shriek would often come through the headset.

Liability was admitted by the defendant pre-action, and a limitation amnesty was also in place for both this claim and other similar claims pursued against the defendant at that time. The main issue, however, was medical causation. The audiogram included with the medical report, which had been provided by Mr Jack Lancer, consultant ENT surgeon, did not include any notch or bulge features as defined in requirement R3(a) of the 'Guidelines on the diagnosis of noise-induced hearing loss for medicolegal purposes', more commonly known as the Coles Guidelines. However, the claimant's hearing in his right ear was better than expected for his age. The audiogram for the left ear, which is the ear to which the claimant held the earpiece when using the oscillators and amplifiers, showed a hearing loss over and above that expected for his age. Therefore, it was argued