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RECENT CASES

Excuse Me, I have the Window Seat, No Accident

The County Court of Victoria did not find that a passenger's injuries suffered whilst stepping over a seat armrest to enter a row of seats to access his allocated window seat, were caused by an "accident". This is another useful decision where the County Court reviewed the international authorities on passenger accidents to find in favour of the airline, although the plaintiff has now filed an Appeal in the Victorian Court of Appeal.

The plaintiff claimed damages for injuries sustained while travelling on a flight from Melbourne to Adelaide on 20 May 2008 and alleged that as he was attempting to access his window seat on a Boeing 737-800 aircraft, he was "forced" to step over an aisle seat arm rest due to "physical contact" with other passengers. As his right foot landed on the floor, his ankle rolled causing him to fall and twist his right knee.

The plaintiff gave evidence at the trial that he walked down the central aisle of the aircraft and when he reached his allocated row, he discovered that two female passengers were already seated in the middle and aisle seats. To assist the plaintiff in accessing his window seat, the two female passengers stood up and moved into the aisle, thereby joining a group of passengers in the aisle in the proximity of the plaintiff. The plaintiff alleged that the central aisle was now congested and he was forced to step backwards, away from his allocated row. The plaintiff gave evidence that the only way to access his seat was therefore to make an elongated step over the aisle seat armrest.

In the course of making this elongated step, the plaintiff alleged he received physical contact from one or more of the other passengers standing in the aisle (primarily one of the female passengers who had been seated in his allocated row) which in turn caused him to lose balance, roll his ankle and twist his right knee, resulting in the alleged injuries.

The plaintiff was subjected to extensive cross-examination as to the exact circumstances of the incident and the precise nature of the alleged "physical contact" which was largely inconsistent with the many earlier descriptions of the incident provided to his numerous doctors, claim for workers' compensation, and Answers to Interrogatories.

The relevant law which applied to the plaintiff's claim was section 28 of the Civil Aviation (Carriers' Liability) Act 1959 (Cth) which mirrors Article 17 in the International Conventions for passenger injury on an aircraft.

The airline submitted that on the balance of probabilities, no physical contact was made to the plaintiff either before, during or after making the elongated step over the aisle seat armrest, and the injury likely resulted from a mere fall by the plaintiff. In addition if the Court accepted there had been physical contact, such circumstances were not sufficient to constitute an "accident" within the meaning of the Act so as to give rise to liability on the part of the airline as it was not unusual or unexpected for passengers to make such contact in an aircraft aisle during normal crowding at the time of boarding. Detailed reference to the international jurisprudence concerning the interpretation of "accident", including the seminal case of Air France v Saks in the Supreme Court of United States and the leading authority in Australia, Povey v Qantas Airways Ltd and it was argued that the circumstances of the incident described by the plaintiff, whether encompassing the alleged physical contact or not, did not amount to an "accident" when assessed by reference to how this term has been defined by the courts.

The Court accepted the plaintiff's evidence on the circumstances of the incident, namely that as the plaintiff stepped over the aisle seat armrest in order to access his

seat, there was physical contact between the plaintiff and other passengers present in the aircraft aisle which caused him to lose his balance and thereafter twist his right knee. However, The Court did not accept that this physical contact was unusual, untoward or unexpected so as to amount to an 'accident' within the meaning of Section 28 of the Civil Aviation (Carriers' Liability) Act 1959. Rather, Court found that the physical contact was clearly an incident of the large number of passengers in a confined space attempting to board the aircraft, which is a usual and expected occurrence in air travel. The Court held the airline was not liable for the plaintiff's injuries and the claim was dismissed.

The plaintiff has now filed an Appeal in the Victorian Court of Appeal and the hearing of the Appeal will likely occur in late 2011 or early 2012.

Matthew Brooks, Partner, HWL Ebsworth Lawyers

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Heli-Aust Pty Limited v Cahill [2011] FCAFC 62 (11 May 2011)

Prosecution of Air Operator under State work safety legislation held to be invalid

New South Wales is known to have one of the most onerous workplace safety legal regimes in the world. Employers have strict obligations to workers with substantial penalties if there is a breach. Prosecutions of employers are incredibly difficult to defend. In addition, the NSW Occupational Health and Safety Act 2000 (OH&S Act), somewhat unusually, gives unions and other industrial organisations representing employees the right to prosecute breaches of the OH&S Act. The union is also entitled to half of any penalty imposed on an employer.

Landmark decision on the right to prosecute Aircraft Operators for Civil Air Accidents

On 11 May 2011, the Full Court of the Federal Court of Australia held that Commonwealth legislation regulated civil aviation in flight to the exclusion of the NSW OH&S Act. The effect of this decision is that airlines and aircraft operators, although still required to meet the safety standards imposed by Commonwealth legislation, cannot be prosecuted under State work safety legislation in connection with civil aviation accidents during flight.

The Facts

On 22 November 2004, a helicopter struck a wire and crashed whilst performing locust spotting operations. Last year, charges were brought against the operator of the helicopter for breaches of the OH&S Act. In summary, the charges laid under the OH&S Act alleged a failure to ensure that the work premises (in this case, the helicopter) were safe and without risk to health and also that people entering the premises were not exposed to risks to their health or safety. The charges were particularised to allege failures to conduct sufficient planning and failures to provide particular safety equipment for the helicopter and its occupants.

The Full Court Decision

The Full Court unanimously held that the Commonwealth civil aviation legislation covered the field with respect to the safety of civil aviation in flight. Moore and Stone JJ delivered a joint judgment, and found:

The Commonwealth regime for the regulation and the safety of civil aviation in flight in Australia is comprehensive and exclusive, it is not supplementary or cumulative on State law or Commonwealth law. There is a direct conflict between the State and Commonwealth legislative schemes. A State law, to the extent of the inconsistency, is invalid.

Flick J, in a separate judgment, essentially reached the same conclusion.

Impact of Decision

The decision of the Full Court means that the OH&S Act, and by extension corresponding legislation in other States and Territories, insofar as they purport to apply to matters concerning the safety of civil aviation in flight, are invalid. Occupational health and safety laws continue to apply to matters occurring in or around aircraft that are not strictly related to the operation of the aircraft. Despite this limitation, the judgment represents a significant victory for airlines and aircraft operators insofar as it permits certainty about the standards to which they are required to operate and eliminates exposure to the significant penalties under State work safety legislation in the event of civil air accidents.

It is not known at this point whether there will be an application for special leave to appeal to the High Court.

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Jones v Civil Aviation Safety Authority **[2011] FCA 632 (6 June 2011)**

"*Keeping up with the Jones*" was a 10 part "docudrama" series which aired on Channel Ten in late 2010 depicting the daily life of the Mr Jones, the Applicant, and his family in the Northern Territory, on their cattle property Coolibah Station. Mr Jones is a pilot and the owner of the large helicopter operator North Australian Helicopters. The program was made by television production company WTFN Entertainment Pty Ltd ("WTFN").

The public notoriety of the program captured the eye of an investigator from the Civil Aviation Safety Authority ("Mr Haslam"), who viewed several episodes from the Channel Ten websites identify possible breaches of the Civil Aviation Act ("the Act") and Civil Aviation Regulations. Mr Haslam contacted WTFN for access to raw data from the taping of the series and in response, WTFN indicated that it would make available the requested data on 2 x DVDs at its lawyers office if CASA obtained the relevant order from the Court.

On 1 March 2011, Mr Haslam applied for and obtained a warrant under section 32AF of the Act to search for and seize from the premises of WTFN any items. In the application to the Court and based on Mr Haslam's observation of the television series outline in his supporting affidavit, it was alleged that Mr Jones had breached various sections of the Act when acting as the pilot in command of Robinson R22 and/or R44 helicopters he:

1. he towed a person underneath and behind the helicopter on a water ski endangering the person;
2. performed commercial operations (collection of crocodile eggs) for which a commercial helicopter licence is required when he was only the holder of a private helicopter licence;
3. consumed alcoholic liquor within 8 hours of the departure of the aircraft; and
4. on a number of occasions, left the engine running and rotors turning when there was no pilot at the controls.

Late in the day on 1 March 2011, Mr Jones applied to the Court to stay the execution of the Warrant but by the time the parties had concluded their appearances, the Warrant had been issued.

On 2 March 2011, Mr Haslam collected the DVDs and in compliance with the Court order placed the material in a sealed envelope which CASA was not to inspect and to deliver to the chambers of the docket judge.

On 27 May 2011, the Federal Court was reconvened to consider Mr Jones application in which he sought the following relief:

1. an injunction against CASA, under s 39B of the *Judiciary Act 1903* (Cth) to prevent CASA from viewing any of the images on the DVDs;
2. an order that the seized material be returned to WTFN; and

3. a declaration that there were no reasonable grounds for the issuing of the Warrant and that the Warrant be set aside.

Under section 32AF of the Act, there is only a requirement for a reasonable ground for the suspicion as to the commission of an offence and not to the belief as to the occurrence of an offence.

In determining whether the Magistrate had properly rendered the warrant within this context, Marshall J considered whether the Magistrate had "*sufficient facts* [in the form of Mr Haslam's affidavit] *to found the reasonable suspicion and the reasonable belief*" (on the basis of the principals in *George v Rockett* (1990) 170 CLR 104 at 114). Relevantly, Marshall J stated [at 24]:

> "*In the current context, it is only necessary to consider whether the Magistrate had a sufficient basis to form a reasonable suspicion that the DVDs may afford evidence of a civil aviation offence. All that was required was the holding of "a slight opinion, but without sufficient evidence" but nonetheless an "actual apprehension" created in the mind of a reasonable person that the thing sought to be seized may (not will), afford evidence of the commission of a civil aviation offence.*"

In dismissing Mr Jones' application, the Court agreed with CASA's submissions finding that "*Mr Haslam's affidavit contained sufficient material to enable the Magistrate to have reasonable grounds for suspecting that the DVDs may afford evidence of offences against the Act and the Regulations*" [at 25].

Marshall J acknowledged that some of the footage Mr Haslam had viewed may have involved "*poetic licence by WTFW*" but until there is a full viewing of the material the subject of the Warrant it remains the case the "*there are real, prima facie grounds for concern that safety legislation has been flouted*" [at 28].

Nicholas Humphrey and Dr Vernon Nase, Editors.

Lambert Leasing Inc & Anor v QBE Insurance Australia Ltd &Ors **[2011] NSWSC 745**

Background

This litigation relates to the 2005 crash of a Fairchild Metro 23 aircraft, an Aero Tropics flight, on approach to Lockhart River. Lambert Leasing (Lambert) had originally sold the aircraft to Partnership 818, a joint venture domiciled in Queensland. The aircraft was then leased to Lessbrook Pty Ltd t/as Transair which operated the aircraft mainly for flights within Australia. The crash resulted in the deaths of both pilots and 13 passengers. The Australian proceedings involved the first plaintiff (Lambert) and the second plaintiff (Saab Aircraft Leasing Inc. or SAL) (collectively, the Australian plaintiffs), the first defendant (QBE) and the second and third defendants (Partnership 818).

The Illinois Proceedings

In 2007, the dependants of 12 of the 13 passengers and two pilots (Relatives), all Australian residents, commenced proceedings in Illinois, USA against Lambert Leasing, SAL and Partnership 818.

In 2008, the Court dismissed the Illinois Proceedings on terms that did not include an order that the Relatives pay Lambert Leasing's and SAL's costs (Illinois Proceedings Legal Costs). In the Australian Proceedings Lambert Leasing and SAL claimed indemnity from Partnership 818 for those costs pursuant to Article 7.01 of the Purchase Agreement.

The Missouri Proceedings

In 2008 the Relatives (58 Australian residents) commenced proceedings against Lambert and Partnership 818 in Missouri. In May 2009 Partnership 818 filed a motion to dismiss forlack of jurisdiction and *forum non conveniens* on the basis that the matter ought to be heard in Australia. In 2009, Lambert filed a similar application. However, these applications were dismissed. Consequently, the Missouri proceedings remain on foot with

Lambert and Partnership 818 continuing to maintain the inappropriateness of the forum. The matter was expected to be tried in December 2014. The Relatives' legal representatives expected the Missouri Proceedings to ultimately result in a settlement.

The Australian Proceedings – Lambert Leasing's Claim v Partnership 818 and QBE

The Indemnity Issue

Relying on Article 7.01 of the Purchase Agreement Lambert claimed indemnity from Partnership 818 for the Missouri Proceedings Legal Costs and claimed indemnity for any liability it may have to the Relatives. Article 7.01 provided that Partnership 818 were to indemnify for losses resulting from their "possession, maintenance, modification, use or operation of the Aircraft." Lambert argued that the Partnership used and operated the aircraft by leasing it to Transair to conduct passenger flights in Australia.

The Insurance Issue

On this issue Lambert pointed to Article 7.02 of the Purchase Agreement which obliged Partnership 818 to effect aircraft liability insurance on behalf of Lambert and SAL.

An insurance policy was effected with QBE and the Australian plaintiffs were insured under the Policy. However, QBE declined to indemnify the Australian plaintiffs for the U.S. costs and any liabilities to the Relatives. Lambert and SAL argued that, if the Australian plaintiffs were not covered by the policy for the Illinois legal costs, the Missouri legal costs and liabilities to the Relatives, then Partnership 818 had breached Article 7.02 by failing to maintain the requisite insurance.

QBE

Lambert and SAL in the Australian proceedings alleged that QBE wrongfully denied indemnity and sought damages and declaratory relief. Policy endorsement in the QBE policy had provided that the insurance was "subject to Australian law and practice."

The Issue – to stay proceedings

The matter in this case was to be decided under Section 67 of the *Civil Procedure Act 2005* which confers the Court with the discretion to stay proceedings. In determining the 'stay' issue the court noted the following "applicable principles:"

- A party who has regularly invoked the jurisdiction of a competent court has a prima facie right to insist upon its exercise and to have his claim heard and determined;
- The onus lies on the applicant to establish a reason why this prima facie right should be displaced. The generally accepted relevant considerations are set out by Lockhart J in *Sterling Pharmaceuticals Pty Ltd v Boots & Co (Aust)* (1992) 34 FCR 287;
- An important concern of the Court is to prevent a situation of issue estoppel, where two Courts may be asked to determine the same matter; and,
- There is a reluctance to stay matters in the commercial list as per Einstein J in *Rexam Australia Pty Ltd v Optimum Metallising Pty Ltd &Anor* [2002] NSWSC 916 where His Honour observed at [29]-[30] that "*...the continued stay of the Commercial List proceedings over an extended period of time, comprise as it seems to me, an overwhelming consideration in favour of not justifying the stay*."

In its analysis of issues, the Court observed that, contrary to the submission of the applicant, the Missouri proceedings and the New South Wales proceedings concerned two distinct issues and do not give rise to issue estoppel. In His Honour's words, "*the New South Wales proceedings turn on whether under the sale agreement the plaintiffs are indemnified. This will not be an important issue in the Missouri proceedings, which will concern the liability of each party to the families. No cross claims have been raised and therefore no issue about indemnity will arise*."

In dismissing the application for a stay, the Court found that Partnership 818 had not discharged its onus of demonstrating that the Australian Proceedings ought to be stayed. This was especially so in light of the presumption that the Australian plaintiffs had a prima facie right to insist upon the exercise of competent jurisdiction which has regularly been invoked by the commencement of proceedings in the Commercial List.

Dr Vernon Nase & Nicholas Humphrey, Editors.

QBE Insurance (Australia) Limited v Cape York Airlines Pty Ltd [2011] QCA 60 (1 April 2011)

Election Requirements under an Insurance Policy

Following on from the decision reached by the Queensland Supreme Court in Cape York Airlines (2010) QSC 313 (as reported in our Newsletter of September 2010), the Queensland Court of Appeal allowed the first instance decision to stand and reiterated the requirements necessary for "a valid election" to be made by an insurer under a policy.

First Instances

Cape York Airlines Pty Limited (CYA) held an insurance policy (policy) with an insurer protecting against damage to the insured's Cessna 208 Aircraft with coverage of up to $1.8 million. On 8 February 2004, CYA's Cessna suffered engine failure and was recovered after having sustained significant damage. The policy allowed the insurer to elect to pay for the loss, or repair the damage to the aircraft, or pay for the repair of the aircraft.

CYA requested payment for the loss as it did not believe the aircraft could be repaired to its previous condition. The insurer sought to make the repairs election under the policy and argued at first instance such election had been made through three letters it had sent to CYA. The first letter enclosed the estimated costs of repair and authority to repair to be sent to the repairer with instructions to proceed. The second letter advised of the increase in repairs costing including freight and reiterated the contents of the first letter. The third letter sought to address concerns with regards to the alleged inadequacy of the repairs process.

Daubney J of the Queensland Supreme Court found that none of the insurer's letters amounted to a valid election and were no more than an offer which mandated repair of the aircraft in accordance with the repair estimate. CYA was awarded the agreed value of the aircraft of $1,800,000.00, its recovery expenses of $7,367.88, the loss of income suffered due to the failure to provide payment under the policy and interest up to the date of the decision giving a grand total of $3,171,886.80.

Court of Appeal

The insurer argued that a valid election had been made insofar as the first letter sent advising YCA that the insurer intended to repair the aircraft, and that the first instance judge failed to recognise that the requests made in the insurer's letter simply required CYA to cooperate in the repair process.

His Honour Muir JA found that none of the three letters sent to YCA amounted to a valid election, as a valid election requires an unequivocal and unqualified communication by the insurer under the policy.

However the Court of Appeal found that the award made by the Supreme Court regarding the loss of use of the aircraft for $175,000 was incorrectly ordered as this amounted to a double recovery for YCA who was already recovering the agreed value of the aircraft. The Court of Appeal reduced the award accordingly.

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***QBE Insurance (Australia) Limited v Gregory Robert Hotchin and Ors* [2011] NSWSC 681 (23 June 2011)**

Background

This proceeding relates to the Lockhart River aircraft accident of 7 May 2005 which is also the subject accident in the *Lambert Leasing Inc* case reported earlier in this edition of Aviation Briefs in which 13 passengers and two pilots were killed.

The plaintiff, QBE Insurance (Australia) Limited ("QBE") was the insurer of the aircraft under an Aircraft Insurance Policy ("'the Policy") and the defendants are the administrators of estates of the deceased pilots Gregory Hotchin and Timothy Langdon Down ("the Defendants").

Chronology

In 2007, the Defendants, together with the estates for all but one of passengers, commenced proceedings in the United States including in Cook County, Illinois and Greene County, Missouri against various companies claiming damages "*in respect of the manufacture of the aircraft instruments and other equipment*" which they claim caused or contributed to the accident. Subsequently, counterclaims were brought against the Defendants in the Illinois proceeding by Hamilton Sundstrand Corp., Honeywell International, Inc., M7 Aerospace, LP and Jeppesen Sanderson, Inc. and by Jeppesen Sanderson, Inc. in the Missouri proceeding.[1]

On 18 May 2011, the Defendants filed a Summons in the Circuit Court of Cook County which essentially seeks an indemnification from QBE under the Policy *inter alia* the "Pilot Cover" section which provides:

> *"11. Sections 2 and 3 of this Policy extend to indemnify jointly and severally with the Insured any pilot approved in accordance with the terms of this Policy provided such pilot observes and fulfils the conditions and is subject to the exclusions of the Policy. In the event of an award being made both against the Insured (or his estate) and against the pilot (or his estate), the named Insured shall to the extent of his liability be entitled to priority in respect of any indemnity payable by the Company."*

In the Defendants' bold attempt to invoke Illinois as the most convenient jurisdiction to deal with this matter they pleaded in the Summons that "*this cause of against arises, at least in part, from [QBE's] transaction of business in Illinois in insuring plaintiffs against liability arising from a suit brought against plaintiffs in Illinois*."

On 15 June 2011, QBE filed a Summons and Notice of Motion in the Supreme Court of New South Wales seeking declaratory relief and consequential orders, akin to an anti-suit injunction, to restrain the Defendants from continuing the Cook County proceedings against QBE.

On 22 June 2011, in a last ditched attempt to thwart QBE's claim, the Defendants' solicitor foreshadowed the filing of "emergency motion" before the Circuit Court of Cook County seeking to restrain QBE from bringing this action. However, it appears that the "emergency motion" had not been filed or decided on before this matter went before Bergin CJ in Eq on 23 June 2011.

On 23 June 2011, this matter came before Bergin CJ in Eq of the Supreme

[1] This decision does not identify the basis or grounds for the counterclaims but presumably it relates to a claim that the pilots were negligent.

Court of New South Wales. Counsel for QBE submitted that the proceeding by the Defendants against QBE in Cook County is vexatious because they involve the same issues in this proceeding. One of the "serious issues to be tried" is QBE's claim that the Defendants have not become entitled to indemnification under the Policy because the co-pilot did not hold endorsement for instrument landing which was required on the accident flight. It would appear from Her Honour's judgment that the endorsement issue was raised by QBE to the Court on the day of the hearing and not previously.

The law

The Court was referred to the leading authorities on anti-suit injunctions including the High Court decision of *CSR Limited v Cigma* (1997) 189 CLR 345 and *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724. Relevantly, in *Ace Insurance* Brereton J found:

> "*[78] In my view, given the choice of law, the jurisdiction clause (even if it be non-exclusive), the location of the parties, where they made their contract, and the very faint connection with California, the invocation of Californian jurisdiction for the purpose of securing a supposed legal advantage which on the evidence before me does not exist is unconscionable, vexatious and oppressive in the relevant sense. In other words, California is a clearly inappropriate forum for the resolution of this dispute.*"

The decision

In granting the anti-suit injunction in favour of QBE on a limited basis, Bergin CJ found:

> *"20. Having regard to the complaint filed in the Circuit Court of Cook County against QBE, it is inappropriate for two courts to be deciding the very same issue. The American proceedings are vexatious in that regard, grounding a basis for an anti-suit injunction.*
>
> *22. If QBE is correct in its proposed claim in relation to the need for the co-pilot's endorsement that would seem to put an end to any litigation against QBE by the present defendants. It is difficult, however, in this preliminary hearing to be certain that this would be the case. However presently on the balance of probabilities it would appear to be the case.*
>
> *23. The choice of law of the Policy is Australia. The geographical cover of the Policy is Australia and surrounding countries. The parties to the Policy of insurance are within the jurisdiction. It is true that there is no jurisdiction clause in the Policy but that seems to me to be a neutral factor in my consideration of whether to grant the orders sought by QBE in its Notice of Motion."*

Her Honour directed the parties to prepare for argument on an urgent basis and provided an expedited timetable for the proceeding.

Nicholas Humphrey & Dr Vernon Nase, Editors

FOCUS ON THE UNITED STATES

In re Air Crash Over the Mid-Atlantic on June 1, 2009, 3:10-md-02114 (N.D. Cal. June 15, 2011)

U.S. Litigation Arising Out of the Air France Flight 447 Accident Dismissed on *Forum Non Conveniens* Grounds for a Second Time: Another Significant Victory for Defendants

The June 15, 2011 decision by the U.S. District Court for the Northern District of California in *In re Air Crash Over the Mid-Atlantic on June 1, 2009*, 3:10-md-02114 (N.D. Cal. June 15, 2011) is the second *forum non conveniens* ("FNC") dismissal of the U.S. litigation arising from the June 2009 accident involving an Airbus 330 aircraft operated as Air France Flight 447. The decision has dealt a substantial blow to an emerging tactic by U.S. plaintiffs' counsel to attempt to defeat FNC dismissal, i.e., challenging the jurisdiction of a foreign court to attempt to avoid FNC dismissal.

By way of background, Flight 447 was flying from Brazil to France when it crashed in the Atlantic Ocean, killing all 228 passengers and crew on board. The plurality of the passengers and crew were French citizens or residents; only two of the passengers were U.S. citizens. Initial lawsuits brought by the plaintiffs (both foreign and two U.S. citizens) were consolidated by the Judicial Panel for Multidistrict Litigation and sent to the U.S. District Court for the Northern District of California for pre-trial purposes. The consolidated defendants included Airbus S.A.S. and numerous component manufacturers, including Honeywell, Intel, and General Electric. (Air France was named as a defendant only by the U.S. plaintiffs.) Last October, the same court granted the defendants' FNC dismissal in favor of litigation in France.1

In December 2010, plaintiffs filed a motion for reconsideration of the October 2010 FNC dismissal after re-filing new, narrower actions comprised only of non-U.S. plaintiffs and voluntarily restricting their claims to U.S. defendants. The plaintiffs openly advised the district court that they sought to defeat the earlier FNC ruling by restructuring the case so that there would be no European Union domiciliary defendants. According to the plaintiffs, France would not be an adequate alternative forum because French courts would not have jurisdiction over a case brought by non-French plaintiffs against non-French defendants. As a result, in the plaintiffs' view, the litigation would need to continue in the U.S. Furthermore, the plaintiffs contended that if the re-filed actions were to proceed in the U.S., all of the original lawsuits should proceed in the U.S. as well.

The American component manufacturing defendants moved to dismiss the re-filed actions on FNC grounds and argued that the court should deny the plaintiffs' motion for reconsideration of the original FNC decision. The district court granted the FNC motion and denied the motion for consideration.

The court stated that a party should not be permitted to "*assert the unavailability of an alternative forum when the unavailability is a product of* [the party's] *own purposeful conduct*." The court found that the plaintiffs had impermissibly attempted to make France an unavailable forum by omitting French defendants from re-filed lawsuits – the very defendants that the plaintiffs had previously asserted were liable and still seemed to allege were at least partially responsible for the accident. The court also found that the plaintiffs had failed to litigate in the foreign forum in good faith after FNC dismissal as required. In so finding, the court rejected the argument that plaintiffs generally are free to frame their complaints as they wish, stating that the plaintiffs had improperly "engaged in pleading practices deliberately designed to defeat jurisdiction in the foreign forum and circumvent" the FNC order.

The court concluded that the plaintiffs could not render France unavailable through "*unilateral jurisdiction defeating pleading, at least where, as here, (1) a fair reading of those pleadings and common sense shows that French entities are proper Defendants; (2) Plaintiffs already sued French parties and dropped them only after a forum non conveniens dismissal; and (3) the Court*

has not been presented with any new facts that developed after the original dismissal but before the filing of the new actions that plausibly provide a reason for why Plaintiffs removed the French Defendants, other than a desire to defeat the Court's original forum non conveniens Order and render France an unavailable forum for the new actions."

Alternatively, the court found that even if it were required to determine the availability of France anew, the French courts still are an available alternative forum and, therefore, FNC dismissal remains appropriate. The court noted that availability does not turn on the ability of the plaintiffs to bring the exact suit that was filed in the U.S. in the foreign forum. Instead, availability turns on the existence of a remedy for the plaintiffs' losses. The court stated that a remedy was available in France because the plaintiffs could have re-filed the originally dismissed lawsuits in France or re-filed the new lawsuits in France and added one or more French defendants to the lawsuits.

Further, because the defendants had agreed not to contest jurisdiction in France and the court found that plaintiffs, "*as a condition of forum non conveniens dismissal, are obligated as a matter of American law not to contest jurisdiction in France*," the only way in which the jurisdictional issue could be raised is if a French court could do so *sua sponte*. After reviewing relevant French law and considering the testimony of French law experts, the court concluded that French trial and appellate courts could not raise the jurisdictional issue *sua sponte*. As such, France was, in fact, available to resolve the case.

This decision will significantly limit a plaintiff's ability to effectively employ an emerging tactic to avoid FNC dismissal, i.e., challenging whether a foreign forum can exercise jurisdiction over the litigation after FNC dismissal. Variations of this tactic have been employed recently in the Flash Airlines litigation (challenging the French court's jurisdiction after FNC dismissal) and the West Caribbean Airways litigation (challenging the French court's jurisdiction in opposition to the FNC motion). If this decision is followed by other U.S. courts, successful challenges to a foreign court's jurisdiction should be limited to countries in which the foreign court sua sponte can raise jurisdictional issues. This decision also significantly decreases the likelihood that plaintiffs will try to restructure their lawsuits post-FNC dismissal by dropping defendants to attempt to prevent a foreign court from exercising jurisdiction. As a result, plaintiffs in future litigation may be forced to refrain from naming potentially liable foreign entities as defendants if they wish to avoid FNC dismissal of U.S. litigation arising out of foreign major aviation accidents.

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Lavergne v. Atis Corporation, **_ F. Supp. 2d _, 2011. WL 723393 (D. P.R. 2011)**

Passengers Travelling Gratuitously on Private Aircraft Not Entitled to Recover Under Montreal Convention

On February 8, 2009, four friends in the Dominican Republic boarded a private aircraft headed for San Juan, Puerto Rico. The plane encountered severe weather and plummeted into the ocean, killing all aboard. The passengers had not paid for the transportation but were transported as a favor to a friend of the owners of Atis Corporation, the operator of the flight. The families of the four passengers sued the operator for the wrongful death of their decedents, alleging liability under the Montreal Convention, which establishes the liability of commercial air carriers engaged in international flights. Atis moved to dismiss, citing lack of jurisdiction and contending that the Montreal Convention was not applicable to the case inasmuch as the flight was a private undertaking for the purpose of transporting friends and that the deceased passengers did not pay for their transportation. The District Court in Puerto

Rico agreed and dismissed the suits. *Lavergne v. Atis Corporation*, ___ F. Supp. 2d ___, 2011 WL 723393 (D. P.R. 2011).

At issue was the language of Article 1(1) of the Montreal Convention, which makes the Montreal Convention applicable "to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking". Defendants argued that the wording of Article 1(1) made it applicable only to air transport undertakings performed by aircraft for reward. Since Atis was not undertaking air transport in the sense that it was not an air carrier and since the passengers did not pay for their transportation, defendants argued that the case should be dismissed.

The evidence presented in connection with the motion to dismiss established that Atis owned two small aircraft, which were operated as general aviation aircraft under Part 91 of the Federal Aviation Regulations, intended for personal and private use, and that Atis was not a commercial operator operating under Part 135 of the FARs.

The District Court noted that, while there was ample law interpreting the Montreal Convention, and its predecessor treaty, the Warsaw Convention, the courts had not yet addressed the particular issue raised under Article 1(1). Based on the fact that Atis was operating its flights under Part 91, that the passengers were not charged for their transportation and that the planes were not being used for commercial purposes, but only to transport family and friends of the owners of the company, the Court found that Atis "did not operate as an air transport undertaking at the time of the accident". Accordingly, it held that the Montreal Convention was not applicable and granted the motion to dismiss the Complaint with prejudice.

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FOCUS ON CANADA

Sakka v Société Air France, 2011 ONSC 1995

Article 29 of Warsaw Convention cannot be tolled by local law rules

In late March 2011 a motions judge of the Ontario Superior Court of Justice followed the majority of international jurisprudence on Article 29 of the Warsaw Convention by holding that claims which are not commenced within the prescribed two-year time limit should be summarily dismissed, notwithstanding provisions in the local law permitting minors and persons under a disability to have the time limit tolled.

Facts

The plaintiff in the case was Marwa Sakka, a 34-year-old woman suffering from cerebral palsy. In May 2003 Sakka was travelling with her mother on a return Air France ticket from Canada to Syria with a stop in Paris. The claim alleges that on arrival in Paris, the plaintiff's mother made several requests for assistance in transferring her daughter from her seat to a wheelchair, through the bridge, to the interior of the terminal where another wheelchair was awaiting.

The claim also alleges that these requests were not fulfilled, so the plaintiff's mother attempted to carry the plaintiff through the bridge herself. While doing so, the mother tripped on the uneven surface where the bridge meets the exit door of the aircraft, causing the daughter to injure her knees.

Sakka retained Jacques Gauthier (Ontario counsel) to seek damages from Air France after the incident, but Gauthier did not commence a claim within two years. In fact, a claim was not commenced until six years after the fall, when Sakka sued Air France for the knee injuries, as well as her former counsel for not bringing an action within the prescribed time.

Air France brought a motion for summary judgment as against it on the basis that the claim was barred by Article 29 of the Warsaw Convention. The plaintiff did not oppose this motion, but Gauthier did. He brought a cross-motion for a declaration that since the accident took place in France, French law applied - and that under French law, the claim could survive given that the Article 29 time limit was tolled because the plaintiff was under a disability.

In arguing this motion, Gauthier filed expert affidavit evidence from a French lawyer to the effect that "in France the 'law is clear' that Article 29 of the Warsaw Convention is a statute of limitations and is capable of being tolled by the minority or disability of the plaintiff pursuant to the French Civil Code". French jurisprudence supporting this statement was also submitted to the Ontario court for consideration on the motion.

As a secondary argument, Gauthier's counsel argued that there was no evidence that the Ontario courts had jurisdiction over the claim in any event because there was no evidence before the court regarding the circumstances in which the ticket was purchased.

Decision

The Ontario court was not persuaded by Gauthier's arguments. It commenced its analysis by citing the well-known jurisprudence standing for the proposition that the Warsaw Convention should be applied in a consistent manner internationally, without reference to the local laws of the high contracting parties. In this regard, the court cited the US Supreme Court's decision in *El Al v Tseng* (119 S Ct 662), as well as the House of Lords' decision in *Sidhu v British Airways* ([1997] 1 All ER 193). On this point, the court also cited Article 31 of the Vienna Convention on the Law of Treaties, which requires that international treaties be interpreted in good faith, in accordance with their ordinary meaning in their context and in light of the object or purpose.

The court went on to consider the fact that Article 32 of the Vienna Convention permits an adjudicator to consider the preparatory work pertaining to a treaty where there is any ambiguity in interpreting the ordinary

meaning of a treaty provision. In this regard, the Warsaw Convention preparatory papers show a clear desire on the part of the drafters to enact a liability regime which is to be applied uniformly in all participating jurisdictions.

The motions judge then turned to the issue of Article 29 more specifically. In this context, he considered the British Columbia Court of Appeal case of *Gal v Northern Helicopters* ((1999), 177 DLR (4th) 249), in which the court found that Article 29 is incapable of bearing more than one interpretation - and that attempts to extend the time to commence an action beyond the prescribed time should fail.

The motions judge noted that the approach in Gal is consistent with the US decisions in *Fishman v Delta Airlines* (132 F 3d (1998) (2nd Cir)) and *Kahn v Trans World Airlines* (443 NYS 2d 79; 82 AD 2d 696 (NYAD1981)). The motions judge observed that the "*overwhelming weight of authorities supports the interpretation of Article 29 advanced by… Air France in the within proceeding*".

In addressing the French law, which seems to contradict the international jurisprudence, the court noted that the Ontario court should "*look to the decisions of courts of other countries for guidance; however, it is not bound to follow any decision of any particular country in interpreting a treaty*".

In the end, with respect to the Article 29 argument, the court followed the reasoning in Gal and held that "*the only matter to be determined… is whether the plaintiffs commenced the action within two years of the date specified in Article 29*". They had not.

With respect to the Article 28 argument, the court found, somewhat questionably, that it was for Air France to challenge the jurisdiction of the Ontario courts, not Gauthier. In any event, on the facts of this case, there could be no question that the Ontario courts had jurisdiction to hear this case on a plain reading of Article 28 and the case law pertaining to the same. *Balani v Lufthansa* (2010 ONSC 3003) was cited on this point (for further details please see "*Lack of wheelchair at aircraft held to be Article 17 'accident'*").

The claim was summarily dismissed as against Air France - leaving the hapless Gauthier to fend for himself.

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***Gudzinski Estate v. Allianz Global Risks US Insurance Company*, 2011 ABQB 283**

Aviation Insurer Decision to Deny Coverage Upheld

On August 19, 2006, Nicholas Gudzinski was killed when he crashed his Cessna Cardinal.

At the time of the accident, he held a private pilot's licence, but his medical certificate had expired. His wife, as executor of his estate, sought recovery for damages to the aircraft from the insurer, Allianz Global Risks US Insurance Company.

Allianz denied coverage on the basis that Gudzinski did not have the requisite authority to operate the aircraft on the fateful day because his medical certificate was invalid. The policy wording provided that "… *insurance applies* [where the insured] *has the required licence or endorsements to fly* [the] *aircraft*." On a motion, the plaintiff's counsel managed to persuade an Alberta Master to apply the contra proferetem rule and conclude that the loss was covered. The policy wording, it was said, required the insured to hold a licence. It did not specify that the medical certificate must be valid. Allianz appealed.

On the appeal, Allianz was permitted to lead new evidence of the wording that

appears on the face of a Canadian private pilot's licence.

In particular, this language states that "[t]*his licence is valid only for the period specified in the Medical Certificate … which must accompany this licence*."

In addition, Allianz was allowed to lead new evidence that the following language appears on an aviation medical certificate in Canada:

> "[t]*his certificate is part of a Personnel Permit or Licence issued under the Canadian Aviation Regulations. It constitutes medical validation and must be carried with the Permit or Licence it validates*".

At the appeal, Allianz argued that the insurance policy must be interpreted within its "factual matrix", in the context of the circumstances in which the contract was entered into. It's position was that there was no ambiguity in the insurance contract, and, as a result, the doctrine of contra proferentem does not apply.

In effect, Allianz`s submissions were focused on the fact that the policy wording "*required licence … to fly*" should be interpreted as "*licence to fly required by law*" — and that without the valid medical certificate, Gudzinksi was not able to legally operate the aircraft.

Allianz also argued that it was absurd and contrary to public policy to find that Gudzinksi should be insured for illegal activity, relying on the dicta from *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Company*, [1980], 1 S.C.R. 888, where the Supreme Court of Canada held that:

> *"… the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought, nor anticipated at the time of the contract.*

The Estate`s argument was a simple one. It`s position was that the insurance policy only required that the insured have a licence — and, in this case, he did. There was an attempt to make the distinction between having a licence, and having the ability to exercise the licence. In this regard, the Estate argued, albeit unconvincingly, that the insurer`s main concern was that the insured should have the knowledge and ability to fly. The insurer was not so concerned that the insured should be able to exercise continuously the privileges of his licence. The appellate court was not persuaded. It concluded that the wording on the licence and the medical certificate (which was not available to the Master) was unambiguously an integral link to the private pilot`s licence.

Justice Browne noted that "it stretches the bounds of common sense to find that an invalid licence is still a licence and that insurance coverage is valid".

He went on to note that Gudzinski had been a pilot since 1993 and the owner of an aircraft for some time. In addition, he had obtained medical certificates in the past. He therefore held that it was appropriate to presume some basic knowledge of the requirements of the relevant regulations. In the end, the Court found that the Master hearing the original motion had erred in law, and, as a result, the appeal was allowed.

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BOOK REVIEW

Zang, Hongliang / Meng, Qingfen: ***Civil Aviation Law in the People's Republic of China*, *Eleven International Publishing, 2010, 219 pp. ISBN: 978-90-77596-91-3.***

This book is volume 8 of the series 'Essential Air and Space Law', edited by Benkö, Marietta. This book series set up with the aim of establishing a collection of prominent studies in this particular field of law especially for experienced practitioners (e.g. lawyers, policy makers in governments, national and international organisations and private entities), in addition to scholars involved in the research and study of air traffic and space law.

This book aims at providing a general introduction of civil aviation legal system in China, a summary of Civil Aviation Law, the administrative licenses and approvals occasioned by civil aviation activities in China, and selected practical issues that foreigners (including aircraft manufacturers, lessors, financing parties and investors) may be concerned about.

The characteristic of Chinese civil aviation legal system is summarized in Part I. The main components of Chinese civil aviation legal system are mentioned: 1. the Civil Aviation Law itself; 2. the civil aviation administrative regulations (27 nos); 3. the civil aviation rules of CAAC (Civil Aviation Administration of China) (106 nos); 4. international aviation treaties as concluded by China (30 nos.)

Part II gives us a summary of the Civil Aviation Law (16 chapters). Part III follows with a detailed list of administrative licences and approvals occasioned by civil aviation activities in China (72 nos.). Part IV presents 10 selected practical issues, including nationality registration of civil aircraft, regulations for the import of civil aircraft, rights in civil aircraft, liability of public air transport carriers, foreign investment and domestic investment in the civil aviation industry, establishing a public air transport enterprise or a general aviation enterprise, management of civil airports as well as consolidation, reconstruction and restructuring of civil aviation enterprises and airports.

To learn about the Chinese civil aviation laws and regulations, foreigners may refer directly to the laws and regulations published at CAAC's website. However, only limited official translations of such laws and regulations are available that cannot fully serve the purpose. Part V provides translations of selected Chinese civil aviation laws and regulations, including the Civil Aviation Law itself and 9 secondary civil aviation regulations, covering major civil aviation legislations in China. The translations are made by the authors mainly from a lawyer's perspective, and in line with relevant international conventions in cases where relevant provisions of the laws and regulations originates directly from such conventions.

The very last Part VI is the collection of the original Chinese texts of the law and regulations as found in the English translations of Part V.

Much of practical information can be found in this book, this book is a welcome addition to the literature in the field and should be of interest to anyone dealing with Chinese aviation law.

Details of the authors

Zang, Hongliang is a partner with a leading PRC law firm Global Law Office (http://www.globallawoffice.com.cn) in the firm's office in Beijing, China. His major practice areas include aviation law, corporate and securities law and construction law. He is specialized in aircraft transactions and foreign investment in the civil aviation industries, foreign direct investment, corporate finance, merger & acquisition, arbitration & litigation. He advised both domestic and international clients operating in various industries of civil aviation, energy & resources, telecommunication, manufacturing, hi-tech, shipping, real estate, retail, infrastructure, pharmaceutical, etc. Before he joined the law firm, he had an experience of in-house counsel of Air China from 1994 to 2000.

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CONFERENCE PAPERS

The Confidentiality of Air Traffic Control Recordings?

The Ron Chippindale Address to the Australian and New Zealand Societies of Air Safety Investigators

2011 Regional Air Safety Seminar Wellington, 10-12 June 2011

Introduction

It is a privilege to present the Ron Chippindale Address. Between 1975 and 1989 I was a legal adviser to the New Zealand Office of Air Accidents Investigation when Ron Chippindale was the Chief Inspector of Air Accidents. When the Transport Accident Investigation Commission ("TAIC") was established in 1990 to replace that Office, Ron Chippindale became the Commission's first Chief Investigator.

New Zealand has been very fortunate to have someone of Ron Chippindale's calibre in such a key role. His formidable expertise as an Air Safety Investigator is readily apparent in the hundreds of air accident reports he authored over many years until his retirement in 1999. This is particularly the case with his work on the Air New Zealand DC10 accident in Antarctica on 28 November 1979[2] and the Ansett Dash-8 accident in Palmerston North on 9 June 1995[3]. Both accidents involved controlled flight into terrain. In both cases, Ron Chippindale was the lead investigator and managed the multidisciplinary teams of specialists required to establish the full circumstances and causes of those accidents. His work on both accidents still stands as impressive examples of the type of systemic analysis that has now become standard practice.

Rather than dwell on the detail of those tragedies, I hope it will be of interest if I mention only some aspects of those accidents in passing while addressing a topic of current controversy, namely the confidentiality of air traffic control recordings. To deal with this topic I have to cover some recent history. It is also important to keep in mind the distinction between ATC communications recorded on a CVR and ATC communications recorded by the ATS provider.

Beattie and Others v US Government

To begin, I believe it may not be widely known that the Air New Zealand DC10 accident produced a major liability case in the United States courts on the question of whether any act or omission of the United States Navy air traffic controllers stationed in Antarctica caused or contributed to the accident in any way. The case was brought by the relatives of 16 members of the crew of Air New Zealand flight TE109 who lost their lives in the accident. The case known as *Martin John Beattie and Others v United States of America* went to trial in the United States District Court for the District of Colombia in Washington DC[4]. In a very unusual move, Ron Chippindale gave a deposition at the pre-trial stages of this litigation and then subsequently appeared and gave oral evidence as a witness at the trial. Even more unusually, the official accident report of the Office of Air Accidents Investigation was admitted in evidence at the trial. The resulting judgment of Judge Harold H Greene on 7 July 1988 is probably one of the most impressive aviation judgments I have read. The learned Judge's assessment of the complex flight operations evidence was masterful. After detailed analysis, the learned Judge concluded:

> *"... that the disaster that befell Flight 901 on November 28, 1979 in Antarctica was the fault of Air New Zealand and of the flight crew, and that the Navy air traffic controllers at McMurdo Station bear no responsibility for the event."*

The Judge's analysis of the evidence was compelling and the Court's conclusion undoubtedly correct. There was no appeal.

[2] Office of Air Accidents Report No 79-139.
[3] TAIC Report No 95-011

[4] 690 F.Supp 1068 (1988). The DC10 accident was also investigated by a Royal Commission of Inquiry. The resulting report of the Royal Commission by Justice Mahon was the subject of a major administrative law challenge – see *Re Erebus Royal Commission* [1983] NZLR 662 (PC).

For present purposes, the point I want to emphasise however is that my understanding is that the Court was not in any way constrained from receiving in evidence the tapes and transcripts of all the cockpit and air traffic control recorded conversations, even though that material was not recorded for the purpose of determining liability issues in a civil trial. This demonstrates the enormous value of such evidence in order to do justice between the parties involved in a **civil trial** concerning liability issues.

The Ansett Dash-8 Accident

As you know, it was the Ansett Dash-8 crash near Palmerston North that brought this issue into much sharper focus in New Zealand.

That case also produced a civil claim for damages for death and personal injury, this time in the New Zealand courts[5]. However, it was the Police prosecution of the aircraft captain that caused the most controversy. The TAIC proposed to annex a transcript of the CVR recording to its official accident report. This transcript was to include both intra-cockpit communications, as well as air-ground communications captured on the CVR during the final 30 minutes of the flight. NZALPA initiated court proceedings to prevent publication of the transcript and the Police sought to obtain the CVR and transcript by search warrant with a view to a manslaughter charge against the captain.

These issues resulted in a judgment of the Court of Appeal in *NZALPA v Attorney General* in 1997 in which the Court upheld the authority of the TAIC to annex the transcript to its official accident report[6]. The Court also upheld the authority of the Police to obtain the CVR and transcript by search warrant. The Court of Appeal made it clear however that although the Police could **obtain** the CVR and transcript, this was not to say that material was necessarily **admissible** as evidence in any subsequent criminal proceedings.

In due course the Police did proceed with a manslaughter charge against Captain Sotheran in the High Court at Palmerston North. This produced another round of Court argument on the question of whether the CVR and the transcript were admissible as evidence in the trial. Both TAIC and Captain Sotheran applied to the trial judge for a ruling that the CVR was not admissible on the grounds of public interest immunity. They argued that CVRs should not be admitted in evidence because of the **nature** of such evidence in general and because of the CVR **contents** in the particular case.

TAIC's argument relied on chapter 5.12 of Annex 13 to the Chicago Convention, namely that the evidence was not admissible:

> *"... unless the appropriate authority for the administration of justice in that State determines that the disclosure outweighs the adverse domestic and international impact such action may have on that or any further investigations."*

In the circumstances it was the trial judge who was the "appropriate authority" required to determine that issue[7].

Counsel for both TAIC and Captain Sotheran advanced the familiar argument that aviation safety would be undermined if there was any perception that the CVR information might be used for other than safety investigation purposes – in other words, that important safety information might not be freely exchanged or be available in the future. The trial judge found this argument to be overstated and not based on evidence. In particular, as Parliament had moved to amend the TAIC Act to protect the confidentiality of CVR information in the future, this risk would not materialise. To the contrary, the Judge found:

> *"There is a compelling public interest that the administration of justice shall not be frustrated or impeded by the withholding of relevant documents or evidence which must be produced if justice is to be done ..."*

[5] *McGrory v Ansett New Zealand* [1999] 2 NZLR 328 (CA)

[6] *NZALPA v Attorney-General* [1997] 3 NZLR 269 (CA) – see K I Murray, "Cockpit Voice Recorders in the New Zealand Courts" [1998] The Aviation Quarterly 216.

[7] *R v Sotheran* (unreported reasons for Ruling No 13 of Gendall J, 18 May 2001).

The Judge therefore moved on to an assessment of the concrete value of the information in the particular case and concluded:

> *"[27] This CVR for this trial containing the content that it does, ought not be excluded on the grounds of public interest immunity. There is no public interest to be harmed by it being admitted in evidence when viewed against the public interest in the integrity of this criminal trial with the content of the CVR, (being recordings which relate to aircraft operation, ground to aircraft communications, cockpit warning sounds) crucially relevant to assist the jury in considering the guilt or innocence of the accused. Indeed, as I have said, in parts it may assist him to a greater extent than the Crown, depending on the view the jury take of it and all the other evidence. Parts may, it is said, assist the Crown. But admission may be as much for the benefit of the accused as for the Crown. I am not satisfied that there is any risk to the public interest in future investigations of accidents through the admission of this CVR and its transcript. There are no particular references on the CVR, disclosure of which would infringe on privacy considerations, or other matters of public interest. The matter was not argued before me on the basis of privacy principles, but rather on the basis of future jeopardy to investigations and reports on incidents and flight safety in general, but such is totally protected by the Transport Accident Investigation Amendment Act 1999."*

As is well known, the CVR information was admitted in evidence at the trial and Captain Sotheran was acquitted. This case demonstrates the enormous value of such evidence in order to do justice between the Police and the accused in a **criminal trial** concerning guilt or innocence. But this evidence is unlikely to be available to a court in future because the 1999 Amendment to the TAIC Act means that CVRs cannot now be obtained by search warrant or admitted in evidence against flight crew members.

The Current New Zealand Law

All this may be well and good for the protection of intra-cockpit communications between pilots, but the TAIC Act does not protect communications between the flight crew and air traffic controllers or controller-to-controller communications, as recorded by the air traffic services provider[8].

The TAIC Amendment Bill introduced into Parliament initially intended to achieve this but the proposal was dropped when the Bill was considered in the Select Committee. In its report back to the House of Representatives, the Transport and Environment Committee stated:

> *"**Status quo is retained for air traffic control tapes***
>
> *We agree with evidence of some submitters that communications between aircraft and air traffic controllers are of a different character to CVRs. The submission from CAA that they must continue to have access to this information in order to enforce airspace rules was also compelling. We believe that safety is better served by allowing the regulator access to this information, and to use it if necessary to take appropriate enforcement action. Accordingly, we recommend that new sections 14C(2)(a) and 14C(3) be omitted.*
>
> *The legal effect of removing these sections is that ATC recordings (internal and external) will be able to be disclosed freely and admitted in court proceedings or other disciplinary action, as they are at present. Removal of the provision preserves the legal status quo. The protection afforded in the bill as introduced is removed. The amendment proposed will continue to satisfy the Convention."*[9]

Further, during the third reading debate in Parliament, the Minister of Transport argued that air traffic control tapes *"are different beasts"* from cockpit voice

[8] ATS providers certificated under Part 172 of the New Zealand Civil Aviation Rules are required to record all radio and telephone communications as well as all primary and secondary radar and other transponder data – see Rule 172.115.

[9] Report No 252-2.

recordings because they record information that has already been publicly broadcast over the airwaves anyway[10]. This analysis is far too superficial.

For a start CVRs also record information that has been publicly broadcast over the airwaves and, conversely, ATC recordings include material that is not broadcast over the airwaves. What is really sought to be protected on the CVRs is the pilot-to-pilot work place communications. It seems very difficult to argue that controller-to-controller work place communications should not be entitled to the same protection as well. Further, given the fact that both CVR and ATC recordings include broadcast communications, the capturing of those communications by recording them raises important issues about the use such information can then be put to[11].

The end result is that the current New Zealand law is not very satisfactory. The controller-to-controller workplace communications recorded for safety purposes only are also available for use in civil and criminal court proceedings against controllers; and air-ground ATC recordings are still generally available for use in civil and criminal proceedings against both pilots and controllers. Indeed, because the air traffic services provider in New Zealand is a state-owned enterprise, namely Airways Corporation of New Zealand Ltd, the presumption of availability of information under the Official Information Act 1982 applies unless there is good reason for withholding it under section 9 of the Act.

My understanding is that in practice when media or other requests are made to Airways Corporation for recorded information, the requests are generally declined on the various grounds available under section 9 of the Official Information Act. In particular:

The collective employment agreement between the Corporation and its controllers requires that recorded workplace communications are kept confidential and information only used for safety analysis and investigation purposes;

It is necessary to protect the personal privacy of Airways' controllers;

The release of such information would be inconsistent with chapter 5.12 of Annex 13.

The Christchurch Piper Chieftain Accident

At this point, I need to mention a third serious controlled flight into terrain accident, namely the crash of a Piper Chieftain aircraft registration ZK-NCA on approach to Christchurch International Airport on 6 June 2003, with the loss of eight lives including the pilot[12]. This accident resulted in media requests for the ATC tapes and transcripts of the communications between the controllers and the pilot during the aircraft's final approach. The requests were refused but notwithstanding extensive argument by Airways Corporation the Ombudsman ruled that the information had to be released. The reasoning of the Ombudsman, in summary, was that:

The collective employment agreement recognised that Airways may have to release the information "in accordance with law" and an Ombudsman ruling would be in accordance with law;

The information requested was routine operational information and no issue of the controllers' personal privacy arose;

The Ombudsman was not convinced that the release of such information to the media would be detrimental to aviation safety by affecting the availability of such information in the future;

The fact that Parliament had legislated to protect CVR information but had expressly **not** legislated to protect ATC recorded information was an indication that such information should be publicly available.

Essentially, therefore, the Ombudsman held that ATC recorded information was not able to be withheld on the grounds that it

[10] Hansard 8 September 1999, page 19451.

[11] The disclosure and use of radiocommunications can be an offence in some circumstances – see s133A Radiocommunications Act 1989.

[12] This accident was the subject of two major investigations – see TAIC Report No 03-004 and Christchurch Coroner's Report dated 29 May 2006.

was a class of information that should be protected. The Ombudsman nevertheless recognised that each situation needed to be assessed on its own merits and the Ombudsman's ruling in the Christchurch Piper Chieftain crash case might have been different if the recordings included, for example, particularly disturbing or personal information. In taking this approach, the Ombudsman would no doubt maintain that he was simply applying the current New Zealand law. In other words, ATC recordings should not be entitled to confidentiality as a **class** of information but some recordings might be protected according to their **content**.

Canadian Law

In this respect, the New Zealand law is closely comparable to the law of Canada in which all the relevant issues were litigated in a recent case decided by the Ontario Court of Appeal: *Information Commissioner of Canada v The Canadian Transport Accident Investigation Safety Board, Nav Canada and the Attorney General of Canada*[13]. The key issue in that case was whether the ATC communications were "personal information" under the Canadian Access to Information Act and therefore protected by the Canadian Privacy Act as "information about an identifiable individual that is recorded in any form ...". However, the Court rejected Nav Canada's claim in that regard, finding that:

> *"Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.*
>
> *The information at issue is not 'about' an individual. As found by the application judge (at para. 18 of her reasons) the content of the communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals.*
>
> *The information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not <u>about</u> an individual, considering that it does not match the concept of 'privacy' and the values that concept is meant to protect. It is <u>non</u>-personal information transmitted by an individual in job-related circumstances."*[14]

Australian Law

The position in Australia seems to be that there is extensive legislative protection for cockpit voice recordings but not for ATC recordings[15]. ATC recordings are restricted information in the hands of the Australian Transport Safety Bureau but they are not otherwise specifically protected from public disclosure and use in court proceedings.

Law Reform

The serious question for consideration, however, is whether this *status quo* is acceptable. In particular, the premature public release of ATC recordings can have disastrous consequences. This may have been the case with the mid-air collision that occurred in German airspace near the town of Urberlingen on 1 July 2002 involving the deaths of everyone on board both aircraft. One of the grief-stricken relatives who lost his wife and two children in the accident sought out the identity of the sole Swiss air traffic controller on duty at the time and murdered him outside his home in Zurich on 24 February 2004. Eventually when the full circumstances of the accident were investigated, any failings of the controller were explicable by the numerous

[13] 2006 FCA 15 (1 May 2006.

[14] Judgment of the Court by Desjardins JA at paragraphs 52-54.

[15] Transport Safety Investigation Act 2003 (Cth) and Civil Aviation Act 1988 (Cth).

organisational and systemic failures of the controller's employer[16].

This sad event was followed by a similar occurrence in relation to the runway incursion accident between an MD87 and a Cessna Citation II at Linate Airport, Milan, in 2001. The media evidently managed to obtain the ATC recordings and broadcast a simulated but very simplistic recreation of the accident. This portrayed the controllers in a poor light with the public being provided with no understanding of the complex technical factors involved. According to the controllers, they were routinely working in a highly degraded environment with insufficient safety systems and procedures, and had repeatedly requested the installation of ground radar. Nevertheless, the controllers were put on trial and convicted. After one of the controllers was sentenced to an eight year jail term in April 2004, he was physically attacked by a member of the public[17].

My suggestion is that New Zealand is overdue to revisit the law in this area, not least because as far as I am aware the New Zealand Government has not addressed the significance of the 2006 amendment to Chapter 5.12 of Annex 13. As is well known, that standard deals with the non-disclosure of records and Amendment No 11 to the Annex adopted by the ICAO Council on 3 March 2006 specifically extended the scope of the standard to include "recordings and transcripts of recordings from air traffic control units" as a category of information to be protected[18].

New Zealand has filed a difference with ICAO to this provision which states that:

> *"For investigations conducted by the New Zealand Civil Aviation Authority, no absolute guarantee can be given that the records listed in 5.12 will not be disclosed, but all practical steps will be taken to minimise the extent and occurrence of such disclosures.*
>
> *For investigations conducted by the Transport Accident Investigation Commission, certain records are protected from disclosure, as set out in the Transport Accident Investigation Commission Act 1990,* ***which does not include all those records listed in 5.12****."* (Emphasis added.)

I am not suggesting this is an easy area of the law. However, we need to grapple with the current anomalies. It is not satisfactory that on the one hand Annex 13 creates a presumption of non-disclosure of ATC recordings, whereas the New Zealand Official Information Act creates a presumption of availability of such information.

Secondly, it is not satisfactory that the New Zealand law was amended in 1999 to protect the confidentiality of cockpit recordings but failed to protect analogous ATC recordings. This leaves controllers in an invidious position. Indeed, if controllers become unduly concerned about the disclosure and use of ATC recordings for non-safety purposes, this could seriously reduce the reporting of air safety incidents, the tape recordings of those incidents will not be impounded and systemic failures in the aviation system could go undetected until a preventable accident occurs.

The challenge as always therefore is to strike the correct balance so that justice is able to be done in civil and criminal cases like the examples I have mentioned, while at the same time the availability of pre-accident safety data to safety regulators and air accident investigators is not undermined. There is a growing body of international opinion that domestic legal frameworks that reflect a just safety culture is an important part of the solution to this dilemma[19].

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[16] German Federal Bureau of Aircraft Accidents Investigation Report AX001-1-2/02 May 2004.
[17] IFATCA Press Release, 17 April 2004.
[18] At the same time ICAO guidance material for States was promulgated as Attachment E to Annex 13.
[19] ICAO has recently formed a Safety Information Protection Task Force which held its first meeting in Montreal on 4 and 5 May 2011. The objective of the Task force is to make recommendations for new or enhanced Standards and Recommended Practices including the development of a possible new Annex 19.