CASE UPDATE: *HOYLE v ROGERS, ROGERS v SECRETARY OF STATE FOR TRANSPORT, INTERNATIONAL AIR TRANSPORT ASSOCIATION* [2014] EWCA Civ 257

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This case arose from a fatal air crash that occurred on 15 May 2011. Orlando Rogers was a passenger in a vintage 1940 Tiger Moth propeller bi-plane, piloted by the appellant Scott Hoyle. During the course of the flight, the plane crashed, killing Mr Roberts and seriously injuring Mr Hoyle. The claimants in the original action were the mother and sister of the deceased, claiming damages for his death, which they attributed to Mr Hoyle's negligence.

The Air Accident Investigation Branch (AAIB) duly investigated the accident and on 14 June 2012 they produced a report (the Report). The present case centred on whether the trial judge at first instance was right to hold that the Report was admissible in evidence and to decline to exclude it as a matter of discretion.

It was argued on behalf of Mr Hoyle that:

1. The admission of the Report offended the principle in *Hollington v Hewthorn* [1943] KB 857 (see below);
2. Insofar as the report contained expert evidence it did not comply with the mandatory provisions of CPR Part 35 and should be excluded; and
3. That if the Report was admissible it should be excluded, as a matter of discretion, under CPR 32 and that the judge was wrong not to do so.

The respondents sought to rely on the Report, which was written by unnamed AAIB investigators, to establish a number of matters, namely that:

1. Mr Hoyle had no formal training in aerobatic flying;
2. Immediately before the crash the aircraft was observed pulling up into a loop (a controversial point as the appellant denies he was doing so and maintains that prior to this accident the rudder pedals jammed and that this was the beginning of a stall);
3. The loop manoeuvre started at around 1,500 feet above ground level;
4. During the loop the aircraft entered into an unintentional spin to the right from which it did not recover;
5. Mr Hoyle did not have sufficient knowledge or training in the correct spin recovery for a Tiger Moth; and
6. There was insufficient height for the appellant to recover from the spin.

The Report is a mixture of statements of facts and statements of opinion. It includes findings of an aviation pathologist, an analysis of the recorded meteorological data by the Met Office, an analysis of the GPS log and an opinion that the loop manoeuvre was carried out at too low a height to enable recovery. The trial judge observed that the distinction between fact and opinion was not always clear.

The Court of Appeal, constituted of Arden LJ, Treacey LJ and Clarke LJ (Clarke LJ giving judgment) held that the judge was right to admit the Report;

"The potential value of this material to anyone seeking to establish the cause of the accident (and any culpability therefore) is obvious. The inspectors are experienced and expert individuals fulfilling a public duty to investigate air accidents and incidents for the purposes of preventing further accidents or incidents in future. It is no part of their function to attribute blame or responsibility. ... I agree with the judge when he said that a non-lawyer would be astonished that the report of the AAIB was not something to which a court could even have regard". [29]

All of the points raised on behalf of Mr Hoyle, namely that the testimony was unattributed and that it didn't include the context of particular information in some regards, were held to be matters going to weight rather than admissibility. It was held that the Report was admissible evidence:

"It is also 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 not concerned to attribute blame and in whose investigations injured passengers and the 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 likely not otherwise to be available

" ....The circumstances in which it is appropriate to exclude evidence that is admissible and likely to be helpful must be limited. For the judge to be denied sight of a report of this character – authoritative, independent, prompt and detailed – and for any experts called to be unable to refer to it in court, when it is freely available to the public, is difficult to justify."[80]

The Court also held that its inclusion was in keeping with the objective of dealing with cases justly and at proportionate cost.

Hollington v Hewthorn

The Court dealt with *Hollington v Hewthorn*. The rule in that case (in which the Court of Appeal held that the conviction of the defendant in the magistrates' court for careless driving was inadmissible in a subsequent action in which the plaintiff and his son claimed damages on the grounds of negligent driving) was said by the Court to have been 'controversial for years'. Indeed, in relation to criminal convictions being relied upon in subsequent civil proceedings it has been abrogated by statute in the form of the Civil Evidence Act 1968. Whilst it remains in place in civil proceedings, the Court held that the *reasoning* behind it had evolved over the years. One of the original reasons for the rule was to ensure 'best evidence' was obtained (the rule against hearsay) which has now been abrogated itself by the Civil Evidence Act 1995. As the trial judge pointed out, the foundation on which the rule now rests is that findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it and no other. The Court of Appeal agreed with the trial judge that "the foundation of the rule must now be the preservation of the fairness of a trial in which the decision is entrusted to the trial judge alone."

It had been argued by the appellant that the authors of the report were not shown to have the necessary credentials to give evidence or it wasn't possible to tell if they had or not, given that they were not named. The Court found this objection not to be well founded:

"The identity of the principal investigators is known and their expertise must be a matter of public record or at least readily discoverable. The bar to be surmounted in order to count as an expert is not particularly high, the degree of expertise going largely to the weight to be given to the evidence rather than its admissibility." [43]

The Court also rejected the objection to the admission of the Report on the basis that it was the result of a team effort to which several experts contributed, given that "in a field such as this that will inevitably be so."

It was accepted that where the expert did no more than express opinions on disputed issues of fact which did not require an expert knowledge, this would be inadmissible and given no weight. However the Court held that "there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category". They agreed with the trial judge that such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear line dividing them. In such a situation, the proper course is for the whole document to be before the Court and for the judge to take account of the report only to the extent that it reflects expertise and to disregard it insofar as it does not.

Essentially the judge concluded that the whole of the report was admissible, it being a matter for the trial judge to make use of the Report as he or she thought fit. There was no need for an editing exercise.

CPR part 35

A further objection on behalf of the appellant was that the report did not comply with the Civil Evidence Act and CPR 35, which is a comprehensive code regulating expert evidence. The Court dismissed this objection holding that:

"Section 3 of the 1972 Act does not purport to be all embracing or to restrict or alter the position at common law. The expert with whom CPR 35 is concerned is a person 'who has been instructed to give or prepare expert evidence for the purpose of proceedings' ... The expert evidence in the Report does not fall within CPR 35. The AAIB was not instructed by, and is wholly independent of, any of the parties."

It was said that:

"CPR 35 is not a comprehensive and exclusive code regulating the admission of expert evidence. It regulates the use of a particular category of expert evidence. As the authors of *Phipson* observe citing Lord Mansfield in *Folkes v Chad* (1782) 3 Doug 157: 'even at common law the opinions of skilled witnesses were admissible wherever the subject if one upon which competency to form an opinion can only be acquired by special study.'" [63]

Accordingly, in this case, the report was *prima facie* admissible and, since it did not fall within CPR 35, the claimant did not require the permission of the Court to adduce it.

Discretion

The Court went on to hold that the judge was not in error in refusing to exercise his discretion to exclude the Report, even if it was admissible. It was argued on behalf of the appellant that there were a number of reasons for doing so. First, the nature of the Report made it an unacceptable and unsafe piece of evidence (due to the anonymisation of the authors, hearsay reports of witnesses of fact being summarised and unattributed and inadmissible opinion). Second, they argued that if information contained in the Report was allowed to be used as evidence in civil litigation this would deter people able to assist in the investigation of air accidents, which would impede the AAIB's effectiveness and jeopardise aviation safety. The AAIB, intervening in this action, agreed with this submission and invited the Court to consider new evidence in the form of a witness statement from a Mr Conradi outlining how, if AAIB reports were frequently admitted into evidence in litigation, there is a possibility that this would deter some people who were able to assist them from doing so.

The Court rejected those submissions, holding that they did not "regard the admissibility of AAIB reports as so likely to prejudice the interests which the AAIB is there to serve, that they should generally be excluded from consideration in court." [88]

Further, Parliament had not legislated that such reports should not be so used, which it had done in other instances. Further, this would in practice impose an onus on the party seeking to deploy admissible evidence to satisfy the Court that it should be admitted when the onus should be on the party seeking to exclude it. The appeal was accordingly dismissed.

This is an extremely interesting and helpful case looking at the admissibility of expert evidence in civil proceedings. In proceedings before disciplinary panels, even where the civil procedure and/or evidential rules are not said to directly apply, this authority supports the adduction of previous investigations, for example by the employer, the Trust or another regulatory body. The case promotes a common sense and pragmatic approach to the admissibility of expert evidence, where deficiencies/shortcomings go to weight rather than to admissibility. This is arguably another step towards the general theme of decision makers being recognised as well placed to be able to weigh up evidence rather than there being costly and lengthy satellite litigation concerning admissibility or worse, potentially relevant evidence being kept away from the tribunal of fact all together.[1]

Why was the Report needed?

The claimants in this case were seeking to prove the negligence of the defendant – hence the importance of the AAIB report. Given that this was an air accident one might be forgiven for believing that all this was irrelevant. The Montreal Convention has been incorporated into the domestic law of all EU Member States by virtue of Regulation (EC) No 889/2002 On Air Carrier Liability in the Event of Accidents and the Convention imposes strict liability on air carriers in the event of an accident with no need to prove negligence.

1. For a Canadian perspective on the admissibility of the Canadian Transportation Safety Board reports see: http://aviationlawblog.ahbl.ca/2014/05/31/uk-accident-investigation-reports-admissible-in-legal-proceedings-what-about-canada/

However the provisions of the Convention probably do not apply in this case. According to Art.1.1 of the Convention:

"This Convention applies 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."

On the facts of the case this was not carriage 'for reward' nor was it gratuitous carriage performed by an 'air transport undertaking'.[2]

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2. For a US case on this point see: http://www.hklaw.com/publications/Gratuitous-Air-Transportation-Performed-by-Privately-Owned-Corporation-Falls-Outside-the-Scope-of-the-Montreal-Convention-04-15-2011/