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Seminar Notes

The use of safety information in judicial proceedings – a treasure trove or pandora’s box.

Safety related information including accident investigations are critical for the prevention of accidents but can be sought for use in criminal prosecution, civil litigation and coronial proceedings. Participants will receive first-hand information with practical illustrations on the key judicial principles applicable to the proper use and disclosure of safety information.

1. As we all know it is a fundamental principle of an air accident and incident investigation that:
 - a. The sole objective of such investigations is the prevention of accidents and incidents; and
 - b. Their purpose is not to apportion blame or liability;
2. Consistent with that principle much of the material gathered by accident investigators is protected from disclosure. Precise drafting of para 5.12 of Annex 13 to the Chicago Convention has varied between editions, but the principle remains that the specified categories of documents are protected from disclosure for purposes other than accident or incident investigation unless the competent authority determines that disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations. In England and Wales the “competent authority” is the High Court.
3. That principle is in tension with the reality that air accident investigations and reports identify a wealth of information that is directly and indirectly relevant to issues in civil,

criminal and coronial investigations arising from air accidents. In this short talk, I will explore how the courts in England and Wales have addressed this tension.

4. Material potentially relevant to these types of legal proceedings includes:
 - a. Protected material such as cockpit voice recordings, witness statements and expert analysis of information; and
 - b. The final report of the investigation, which is a public document.

Civil Claims in Negligence arising from air accidents

5. Mr Rogers was killed when the vintage biplane in which he was a passenger crashed. His estate bought a claim in negligence against the pilot. They sought to adduce in evidence the report of the AAIB: see *Rogers v Hoyle* [2015] QB 265. That is to say in a civil claim for damages, the purpose of which is to determine liability, rely on a report whose purpose is not to apportion blame or liability.
6. At first instance the application to adduce the report in evidence was contested between the parties to the proceedings only. Mr Justice Leggatt held that the report was admissible with it being a matter for the trial judge to determine what use and weight to attach to it. Although the judge noted the statutory provisions specifying the sole objective of the investigation that did not greatly influence the decision.
7. The judge gave a careful and detailed judgment which I cannot do justice to in this short talk but in essence, he concluded that the AAIB report was public, that there was no statutory restriction on the use of the report (as distinct from the records of the investigation which were protected from disclosure in the absence of a court order and as distinct from reports of the Marine Accident Investigation Branch) and that its contents were relevant. He observed:

“Given that the AAIB has great experience in investigating the causes of air accidents and has plainly carried out a thorough investigation in this case, any rational person who wants to find out what caused the accident would regard the AAIB's views as relevant to that question”.

And

“Overall, the AAIB report contains a wealth of relevant and potentially important evidence which bears directly or indirectly on the issues in this action, including the central issue of whether Mr Rogers's death was caused by negligence on the part of Mr Hoyle ...

If any non-lawyer was told that the law does not permit a court to have regard to the AAIB report when deciding how the accident was caused, I am sure that he or she would express astonishment at the suggestion. Unless the court is prevented from doing so, it would be foolish and blinkered to ignore such a valuable resource.”

8. The judge accepted that much of the evidence could in principle be obtained from other sources, but that would involve considerable time and cost. In so far as material could only be obtained from the AAIB that would require a court order.

9. The decision was appealed to the Court of Appeal, who agreed:

“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. There is, thus, no realistic possibility of their report being slanted so as to support or refute a claim that any individual or corporation is, or is not, at fault. ...**

10. So for the court, the fact that the AAIB is not itself able to attribute blame or responsibility adds to the value of their report.

11. For the appeal the Secretary of State for Transport intervened and filed evidence from the Chief Inspector to the effect that admitting the report in evidence would likely delay or prejudice the AAIB's ability to discharge its statutory functions because. In essence it was submitted that the same balancing exercise required for disclosure of protected material should be undertaken in respect of admission of the report. Those submissions were rejected.

12. Therefore, the settled position in civil proceedings for damages is that an AAIB final report is a treasure trove of potentially relevant evidence admissible in evidence for the judge to weigh together with other evidence in the case.

Criminal Proceedings

13. On 22 August 2015, a former military Hawker Hunter aircraft crashed onto a main road during an air display at the Shoreham Airshow at Shoreham Airport, killing 11 people and injuring 16 others. The aircraft, failed to complete a loop manoeuvre and crashed, hitting vehicles on the A27 road adjacent to the airport. The pilot was very seriously injured, but survived.

14. In addition to the AAIB investigation, the police investigated and in due course charged the pilot with 11 counts of manslaughter by gross negligence. It was accepted that that the AAIB report was not admissible in evidence at a criminal trial. But, in the course of the police investigation they made an application to the High Court for disclosure of protected material, see *Chief Constable of Sussex Police v Secretary of State for Transport* [2016] EWHC 2280 (QB):

- a. Statements made by the pilot to the AAIB. This was rejected by the Court. Singh LJ said:

“In my view it is almost inconceivable that statements made to the AAIB could properly be subject to an order for disclosure when the appropriate balancing exercise is done by this court”

The reasons included the “chilling effect” which would deter people from answering questions honestly and promptly and because the AAIB has power to compel answers.

- b. Film Footage from a camera installed by the pilot for his own use. Disclosure was permitted on strict terms for the purposes of the criminal proceedings only. In due course that footage was played in court but later applications for disclosure to the coroner and media were refused.
- c. Expert tests and reports obtained by the AAIB. Refused, save in so far as they appeared in the final report and were capable of being obtained by the police independently of the AAIB.

15. Therefore, the settled position in criminal proceedings is that:

- a. An AAIB final report is not admissible in evidence at trial; and
- b. The Court will take a strict line on disclosure of protected material.

Inquests

16. In England and Wales, and I suspect in many other common law jurisdiction any unnatural death, which most certainly includes those arising from air accidents are subject to an Inquest undertaken by a Coroner and, sometimes a jury. An inquest is a factual inquiry to determine reliable answers to 4 questions: who was the deceased, when, where and how did they come by their death. An inquest is not a trial. The Inquest Rules provide that an inquest must not determine or appear to determine civil or criminal liability on the part of a named person.

17. On 13 March 2014 an Augusta Westland helicopter crashed, resulting in the deaths of four men. The AAIB investigated and produced a report. An inquest was held before the Senior Coroner for Norfolk. The coroner sought disclosure of protected material, specifically the cockpit voice data recorder and/or a full transcript of the recordings, see *R (on the application of the Secretary of State) v HM Senior Coroner for Norfolk* [2016] EWHC 2279 (Admin). The Divisional court confirmed that the jurisdiction to grant disclosure was reserved to the High Court and, importantly that:

- a. (Singh J at paragraph 49):

‘Finally, in my view, it is important to emphasise that there is no public interest in having unnecessary duplication of investigations or inquiries.’

- b. The Lord Chief Justice at the time, went further to state:

There can be little doubt but that the AAIB, as an independent state entity, has the greatest expertise in determining the cause of an aircraft crash. In the absence of credible evidence that the investigation into an accident is incomplete, flawed or deficient, a Coroner conducting an inquest into a death which occurred in an aircraft accident, should not consider it necessary to

investigate again the matters covered or to be covered by the independent investigation of the AAIB ...

It should not, in such circumstances, be necessary for a coroner to investigate the matter *de novo*. The coroner would comply sufficiently with the duties of the coroner by treating the findings and conclusions of the report of the independent body as the evidence as to the cause of the accident ... where there is no credible evidence that the investigation is incomplete, flawed or deficient, the findings and conclusions should not be reopened ...

18. Subsequent decisions of the High Court have emphasised that establishing an evidential basis that an AAIB (or other AIB) investigation (not just report) is incomplete, flawed or deficient is a high bar. It requires an obvious deficiency which must be apparent on the face of the report.
19. Therefore, the settled position in *Inquests* is that the AAIB report is not only admissible but is determinative of the cause of the accident unless, which will be rare, it can be demonstrated that the AAIB's investigation was incomplete flawed or deficient.
20. In practice, that means that the principal evidence at any air accident inquest will be from the AAIB inspectors.
21. This creates a new tension: although inquests must not determine or appear to determine civil or criminal liability on the part of a named person and, to that extent fulfil a similar and overlapping role to the AAIB, they can return conclusions which imply blame.
22. It is, for example, open to a coroner or inquest jury to return on the civil standard of proof (balance of probabilities) a conclusion of unlawful killing or narrative conclusion that makes findings of fact that are critical. Although no person may be named, anyone familiar with the facts of the case will know whose conduct has been criticised.
23. It follows that AAIB reports may form the evidential foundation for inquest conclusions which imply blame.

Case Studies

Shoreham Air Crash

24. The AAIB final report contained detailed findings including that the G experienced by the pilot during the manoeuvre was probably not a factor in the accident.
25. The pilot stood trial at the Old Bailey. The AAIB report was inadmissible. The prosecution and defence obtained expert evidence that was deployed in the trial. That included evidence on behalf of the defendant that, contrary to the AAIB's finding, he suffered some form of cognitive impairment because of the G experienced during the manoeuvre which may well have been a cause of his loss of control of the aircraft.
26. The jury acquitted the pilot. The correct legal analysis must be that the prosecution failed to prove to the criminal standard (beyond a reasonable doubt) that the pilot was grossly negligent. It is likely they failed to do so because the defence evidence relating to cognitive impairment caused the jury to have a reasonable doubt.
27. Subsequently an inquest was held. Following the decision in *Norfolk* the coroner and the pilot applied to the High Court for disclosure of protected material. The Coroner sought disclosure in order to assess whether there was credible evidence that the AAIB report was incomplete flawed or deficient in light of the evidence relied upon at trial by the pilot. The application was rejected (see *HM Senior Coroner for West Sussex v Secretary of State for Transport and others* [2022] EWHC 215 (QB):
- “However, to seek disclosure, and then new expert opinions, merely because an Interested Person in the Inquests ... has identified an individual who takes a potentially different view from the AAIB, would amount to precisely the reinvestigation cautioned against in *Norfolk* ...”
28. Thus, at the Inquest the evidence as to the cause of the accident came exclusively from the AAIB. Although the AAIB was prohibited from apportioning blame or liability the Coroner was at liberty to form her own assessment of the gravity of the conduct found by the AAIB to have occurred. She was bound to accept the AAIB conclusion that the G experienced by the pilot during the manoeuvre was probably not a factor in the accident and overall she was satisfied to the civil standard (balance of probabilities) that a finding of unlawful killing was appropriate.

29. It follows that at the inquest the AAIB's investigation provided an evidential basis for a conclusion that implied blame, in a case where on different evidence the pilot had been acquitted at a trial.

Croydon Tram Crash

30. Similar considerations arose in a case investigated by the Rail Accident Investigation Branch (RAIB), who operate in a similar manner to the AAIB.

31. On 9 November 2016, a tram in Croydon, south London derailed and overturned on a sharp curve approaching a junction. 7 passengers died and 62 sustained injury. On the approach to the sharp curve the speed limit dropped from 80 km/h to 20 km/h, but the driver did not reduce speed.

32. The RAIB's investigation made detailed findings including that the driver of the tram had lost awareness before the crash, possibly as a result of microsleep. It also criticised the lack of signage in advance of the sudden change in speed limit.

33. At the Inquests the principal evidence came from the RAIB inspectors. The jury was bound to accept the RAIB's evidence and did so finding that:

“The tram driver became disorientated, which caused loss of awareness in his surroundings, probably due to a micro-sleep. As a result of which the driver failed to brake in time and drove the tram towards a tight curve at excessive speed”.

34. Subsequently the driver and two corporate bodies responsible for the operation of the tram and the infrastructure were prosecuted for health and safety offences. The RAIB's conclusions undoubtedly influenced the decision to prosecute. The corporate bodies pleaded guilty, the driver pleaded not guilty. He stood trial at the Old Bailey.

35. The RAIB report was not admissible at trial, but some of the underlying expert evidence was permitted to be adduced. The driver was able to adduce his own evidence. He was acquitted. The judge concluded that:

“However, one important point became clear during that trial. There was very little credible evidence by the close of the trial that [the driver] had fallen asleep at the

controls, a theory that emerged very shortly after the disaster itself and one that has persisted for years. That theory was no longer supported to any appreciable degree by the prosecution experts, and was also contradicted by [other aspects of the evidence at trial ...]”

36. A rather different conclusion to that reached by the RAIB and the Inquest.

37. At the sentencing hearing the corporate defendants sought to rely on the RAIB report.

The judge refused to do so. He held that:

“One specific matter relied upon by the defendants must be specifically addressed. This is that the report into the disaster by Rail Accident Investigation Board (“RAIB”) should be an important part of the exercise to determine culpability. I reject that for two reasons. **Firstly, the RAIB report itself expressly recites that it does not do this**, and that is not the purpose of the report. Secondly, the trial of Mr Dorris heard a great deal of evidence from a large number of experts who did not give evidence to RAIB. As the trial judge, I am in a far better position, having conducted the trial and having seen and heard the witnesses give their evidence, than those who prepared the RAIB report. I have some regard to the contents of the report but take everything into account in assessing culpability, particularly the evidence at the trial.

38. The first reason given applies equally to civil claim, in which as we have seen the Court has reached a different conclusion.

Conclusions

39. Drawing this together, the position in England and Wales is:

- a. In respect of material protected from disclosure by the Chicago Convention (and reflected in domestic legislation) the High Court has demonstrated that it will exercise strict and consistent control. An applicant will have an uphill struggle persuading the Court to permit disclosure and, in the event it does, to impose strict terms as to its use, custody and control;
- b. In respect of the final report of the AAIB the position is more mixed and depends on the nature of the proceedings:
 - i. In inquests, the report it is the evidence on which to base findings of fact and conclusions which may imply blame;

- ii. In civil claims the report is admissible and may be relied on to the extent the judge thinks appropriate when making findings of fact that determine culpability;
 - iii. In a criminal trial the report is inadmissible;
 - iv. What remains untested is the relevance of an AAIB (or other AIB) report in criminal proceedings where there is a plea of guilty and no trial.
- c. The result may be, as the Shoreham and Croydon cases illustrate, the appearance of inconsistent outcomes in different proceedings. However, civil, criminal and inquest proceedings are different in nature. Different public policy considerations apply, which forms the basis for the different approaches to the treatment of the AAIB reports. We may have different views as to whether that provides a satisfactory distinction, but it is a reasoned distinction that falls a long way short of the great misfortune released from Pandora's Box.

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