



LANDMARK ENGLISH COURT OF APPEAL DECISION UPHOLDS ADMISSIBILITY OF ACCIDENT INVESTIGATION REPORTS IN CIVIL PROCEEDINGS

In a landmark case, the English Court of Appeal has affirmed the High Court's decision in *Rogers v Hoyle* that accident reports prepared by the UK's Air Accidents Investigation Branch (AAIB) are admissible as evidence in civil proceedings.

The admissibility of AAIB reports in English civil cases has historically been something of a grey area, there being no prior judicial guidance on the point. Such uncertainty has been fuelled, in part, by the clear conflict between the requirements underpinning accident reports, which dictate that their sole purpose be the prevention of accidents and must not be to apportion blame or fault for an accident, and the desire of claimants to use such reports as a route map for claims against persons potentially responsible for accidents.

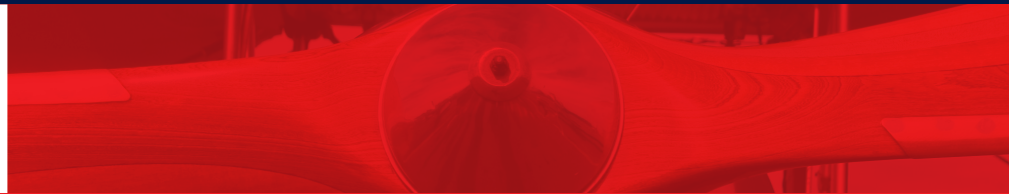
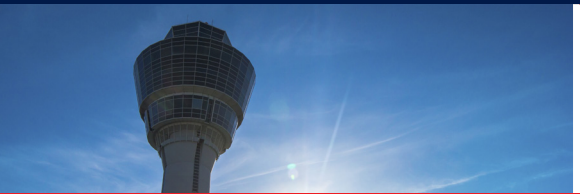
Such conflicting interests came to a head in *Rogers v Hoyle*. The case arose out of a fatal accident in May 2011. Mr Rogers was a passenger in a vintage Tiger Moth bi-plane piloted by the defendant, Mr Hoyle, which crashed into the ground. Mr Rogers was killed and Mr Hoyle was seriously injured but survived. An AAIB report into the accident was published in June 2012 noting, amongst other things, that a loop manoeuvre “*was carried out at too low a height for the pilot to be able to recover from the subsequent spin*” and, further, that as the pilot

“did not have sufficient knowledge or training on the Tiger Moth's correct spin recovery technique, it is probable that he would not have been able to recover from an unintentional spin, especially given the limited height available”.

A claim was brought by the dependents of Mr Rogers against Mr Hoyle, seeking to append the AAIB report in support of various matters, including that immediately before the crash the aircraft was observed pulling up into a loop, a point denied by the defendant. This prompted the defendant to make an application for:

- An order that the parts of the claim relying on the report be struck out.
- A declaration that the report was inadmissible in the proceedings.

At first instance, Mr Justice Leggatt, sitting in the High Court, held that the AAIB report was admissible as evidence in civil proceedings, both as evidence of the facts stated in the report and as expert opinion evidence. Any question as to the evidential weight to be given to the report was a matter for the Court.



Leggatt J was not persuaded by the defendant's arguments that the report should be excluded on grounds, inter alia, that it was not reliable and was incapable of being properly tested, for example, owing to the lack of identification of the report's writers.

The defendant appealed Leggatt J's decision to the Court of Appeal on three main grounds, namely:

1. The AAIB's report was rendered inadmissible in proceedings by operation of a rule of common law, established by the 1940's case of *Hollington v Hewthorne & Co Ltd*, that judicial and quasi-judicial findings of fact cannot be admitted as evidence of fact in later civil proceedings, in order to prevent the later proceedings being unduly influenced. The defendant sought to argue that the AAIB report, as a document containing findings of fact based on an evaluation of evidence, fell within the scope of this rule.
2. The AAIB report, in so far as it contained expert evidence, was inadmissible pursuant to rules of court on expert evidence (CPR Part 35), on grounds that the AAIB report did not meet a number of the requirements laid down for such evidence.
3. Alternatively, if the AAIB report was found to be admissible, the first instance court had failed to properly take into account policy considerations when failing to exercise its discretion to exclude the report from evidence, including the prejudice that might be caused to future air accident investigations as a result of the use of AAIB reports in civil proceedings.

The third ground of appeal was supported by both the Department for Transport (DFT), representing the interests of the AAIB, and the International Air Transport Association (IATA), who both intervened in

the appeal proceedings to make representations that the report should in any event be excluded from evidence, as a matter of the Court's discretion, in light of the prejudice that admission of the report would otherwise cause to future accident investigations.

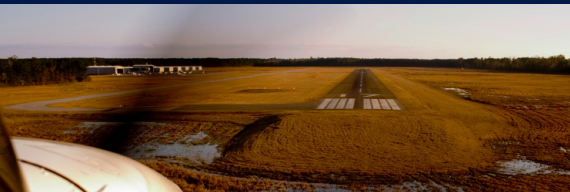
Decision

In a judgment delivered on 13 March 2014, the Court of Appeal (led by Lord Justice Clarke) rejected the appeal on all grounds, confirming the first instance decision that the AAIB report is admissible in evidence, both as to the facts it contains and as expert opinion evidence. In particular:

- The Court rejected the defendant's submissions that the AAIB Report was unsuitable as evidential material. Features of the report, including the unattributed nature of the findings, and the lack of any verbatim reporting of witness evidence, went, in the opinion of the Court, to the weight to be given to the evidence in the report rather than its character.
- Insofar as the report contained statements or reported statements of fact, it was, in the view of the Court, *prima facie* admissible.
- The Court rejected arguments that the AAIB report fell within the scope of the *Hollington v Hewthorn* rule. The Court found that the AAIB was not, in producing its report, acting in a judicial or quasi-judicial role, reaching decisions on disputed issues of fact. The report was instead a document containing expert statements of opinion (which the AAIB was qualified to make) on statements of fact. The report was therefore not rendered inadmissible by the rule.
- The procedural rules for expert evidence of CPR Part 35 did not preclude the admissibility of

the report. The Court held that Part 35 did not purport to be a comprehensive and exclusive code regulating the admission of expert evidence in civil proceedings. Instead it regulated the use of a particular category of expert evidence, namely the evidence of experts who had been "*instructed to give or prepare expert evidence for the purpose of proceedings*". CPR Part 35 did not therefore exclude the admissibility of other expert evidence, such as the AAIB report, prepared for other purposes (e.g. preventing accidents).

- As to the final ground of appeal, concerning the considerations to be taken by the Court when exercising its discretion to admit/exclude the report from evidence, the Court rejected the concerns raised by the defendants (as supported by the DFT and IATA) that admission of the report into evidence would have an adverse impact on future accident investigations. Noting the overriding objective of the Court "*of dealing with cases justly and at proportionate cost*", the "*particular potential value*" of the report tended, in the Court's view, to favour its inclusion in evidence. The Court noted the challenge faced by many litigants to advance claims without access to the relevant information submitted to the investigators, and/or in financing independent evidence. The Court also rejected the notion that the admissibility of AAIB reports was so likely to prejudice the interests which the AAIB serves that its reports should generally be excluded from evidence, noting inter alia that AAIB reports are, on any view, available to litigants and can be used as the foundation for a claim or defence, and this has not had any apparent adverse effect on the AAIB's work.



Impact

So what are the implications of the judgment?

It is true that, prior to the judgment, AAIB reports have often played a role (even if not as direct evidence) in litigation arising out of aviation accidents. Such reports have provided, for prospective claimants, an obvious direction as to the targets for any litigation, and the areas on which to focus evidential and expert inquiries, given the focus of the investigations on the cause of the accident in question. On the other side of claims, prospective defendants will also often make use of the report, for example as a guide to their potential exposures and those of third parties.

However, following the Court of Appeal's judgment, the reliance placed on AAIB reports by claimants and defendants is only expected to increase further. Notwithstanding the Court's efforts to stress that nothing in its judgment *"should be taken to mean that anything in the [AAIB Report] is to be treated as conclusive or prima facie conclusive of anything; or as shifting the incidence of the burden of proof"*, the Court's recognition that the AAIB report can be used as direct evidence in proceedings will tend to ease the evidential burden on claimants seeking to establish the cause of an accident, and therefore the fault of the person(s) responsible, by potentially reducing the need for independent expert evidence. Indeed, the Court of Appeal appears to openly acknowledge in its judgment the potential value of the report in proceedings, citing the independence of the AAIB, the impartial nature of the investigation and the ability of the AAIB to obtain and gather relevant evidence.

Defendants will, of course, also be able to rely upon the AAIB's reports as evidence, albeit they will tend to see less benefit from the decision, given that their involvement in litigation will

often be prompted by unfavourable findings in the AAIB report itself (and, as such, they will often have a reduced interest in relying on the report's findings). The decision may, additionally, prompt defendants to mount positive cases against co-defendants, based on AAIB findings. This would tend to assist claimants in progressing claims and negotiating settlements.

The impact of the Court of Appeal's decision on the work of the AAIB waits to be seen. The AAIB raised various concerns during the appeal as to the adverse effect of the judgment on future investigations, supported by IATA, most notably that participants in future investigations may be less forthcoming with relevant evidence if they believe that such evidence may be used in civil proceedings. This in turn would potentially result in the AAIB having to perform its functions without full disclosure of relevant information. It remains to be seen whether the DFT and AAIB will seek a legislative "fix" to the decision, by an amendment to the applicable air accident investigation regulations so as to exclude the use of reports in proceedings (a precedent for which exists in the equivalent regulations governing marine accident investigations).

The Court of Appeal's decision will not be appealed further and, accordingly, now stands as the most definitive statement on the admissibility of AAIB reports in civil proceedings in England and Wales. It should be expected that the AAIB's reports will now, as a matter of course, be admitted as evidence in litigation arising from aviation accidents.

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