AVIATION INCIDENTS AND THE EARTH-BASED VICTIMS
a Review of Anglo-Canadian Tort Law

by

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A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfilment of the requirements
for the degree of
MASTER OF LAWS

Institute of Air and Space Law
McGill University
Montréal, Canada

July 1991

For my wife and her mother-in-law:

Sharon and Nnenze.

Abstract

The dawn of aviation may have been universally ushered in on 4 June 1783 when two French brothers - Joseph and Etienne Montgolfier - in a pioneering effort, publicly flew their self-made hot-air balloon (built with linen and paper) up to about 1,830 metres: but for many centuries before then, English law had regulated the delictual relations of its subjects in England and its other realms beyond the Seas, including Canada.

With the ever-changing circumstances of the World, engendered particularly by developments in science and technology, as by inconstancy in the socio-political disposition of Mankind, the adaptability of the said regulatory scheme assumes a perennially major focal point within the legal systems concerned.

This thesis reviews the *modus operandi* of the adaptation of Anglo-Canadian tort law to the uses of aviation, in the context of associated damages occasioned to persons and property on the Earth-surface.

Résumé

Le 4 juin 1783, l'histoire de l'aviation prenait naissance avec deux frères français - Joseph et Etienne Montgolfier - qui, faisant oeuvre de pionnier, volèrent publiquement à une hauteur de 1830 mètres à bord d'une montgolfière construite de papier et de cordages. D'autre part, déjà quelques siècles auparavant, le droit anglais réglementait les relations délictuelles de ses sujets en Angleterre, mais aussi au delà des mers et notamment au Canada.

Compte tenu des modifications constantes du monde, ayant des implications dans le domaine des sciences et des technologies, ainsi que l'évolution permanente des relations socio-politiques de l'humanité, l'adaptabilité dudit schéma réglementaire aura été un fil conducteur au sein des systèmes juridiques concernés.

Cette thèse analyse le *modus operandi* de l'adaptation du droit de la responsabilité délictuelle Anglo-Canadienne au regard de l'aviation et, en particulier des dommages subis sur la terre.

Acknowledgments

I'll need a book to thank them all whose help I've had to come this far. But special thanks must needs be said here to each of them from whom I got very special help. They include - but are not restricted to - Prof. Martin Boodman, Mr Ike Eboe-Osuji, Prof. Peter Haanappel, Mr Austin Iwuoha, Ms Alice Kubicek, Mr and Mrs Stanley Kuzminski, Dr Nicolas Mateesco Matte, Mr Patrick Opara, Marc Rochefort Esq., Prof. David Stevens, Mrs Ginette Van Leynseele and Ms Catherine Zuzak. The multifarious assistance of my wife and of my parents will always be taken for granted ... as usual.

With particular regard to the preparation of this thesis, my very special thanks must go to my supervisor, Dr Ram S. Jakhu, who, among other things, seemed not to have noticed that my conduct at times was capable of getting on his nerves. And, to my very good friend, Dr Egya Sangmuah, for his superb proof-reading job, done for just one bagel. For the avoidance of doubts, Egya was neither interested in redefining the common law of contracts doctrine of sufficiency of consideration, nor was he being cheap; he was simply indulging my sometimes brassy sense of humour, in his usual easy-going manner.

And most of all, I thank God for all these friends ... for the health ... for the inspiration ... for the fortitude ... for everything.

Responsibility for all errors and omissions in this work is, of course, hereby accepted.

C.E.-O.

Abbreviations

ALI	American Law Institute.
ALJ	Australian Law Journal.
Annals ASL	Annals of Air and Space Law.
ATC	Air Traffic Controller.
Bl. Comm.	Blackstone, *Commentaries on the Laws of England.*
Borrie	Borrie, 'Product Liability in the EEC' (1987) 9 *The Dublin Univ. L.J.* 82.
Buckley	Buckley, *The Law of Nuisance* (1981).
Bunker	Bunker, *Canadian Aviation Finance Legislation* (1989).
Camb. LJ	Cambridge Law Journal.
Clerk and Lindsell	Clerk and Lindsell, *Torts* (16th edn, 1989).
Cross	Cross, *Statutory Interpretation* (1987).
Dias and Markesinis	Dias and Markesinis, *Tort Law* (1984).
Di Castri	Di Castri, *Occupiers' Liability* (1981).
Fleming	Fleming, *The Law of Torts* (7th edn, 1987).
Gagné	Gagné, *Annex 18 to the Chicago Convention and the Safe Transport of Dangerous Goods by Air* (McGill DCL Thesis, 1989).
ICAO	International Civil Aviation Organization.
ICLQ	International and Comparative Law Quarterly.
IFR	Instrument Flight Rules.
Linden	Linden, *Canadian Tort Law* (4th edn, 1988).
LQR	Law Quarterly Review.
Manops	Manual of Operations.
McLaren	McLaren, 'Nuisance in Canada', in Linden (ed.) *Studies in Canadian Tort Law* (1968).
McNair	McNair, *The Law of the Air* (3rd edn, 1964).
OLA	Occupiers' Liability Act
Osgoode Hall LJ	Osgoode Hall Law Journal.
Ox. JLS	Oxford Journal of Legal Studies.
Prosser	Prosser, 'Transferred Intent' (1967) 45 *Tex. L. Rev.* 650.
RSA	Revised Statutes of Alberta.
RSC	Revised Statutes of Canada.
RSM	Revised Statutes of Manitoba.
RSNB	Revised Statutes of New Brunswick.
RSNS	Revised Statutes of Nova Scotia.
RSO	Revised Statutes of Ontario.
Salmond and Heuston	Salmond and Heuston, *The Law of Torts (19th edn, 1987).*
SARPs	Standards and Recommended Practices (of ICAO).
Sasseville	Sasseville, *Liability of Air Traffic Control Agencies* (McGill LL.M. Thesis, 1985).
SC	Statutes of Canada.

Shawcross and Beaumont	Shawcross and Beaumont, *Air Law* (4th edn, 1987, re-issue 1989).
SPEI	Statutes of Prince Edward's Island.
Street	Street, *Torts* (8th edn, 1988).
Tex. L. Rev.	Texas Law Review.
Trindade	Trindade 'Some Curiosities of Negligent Trespass to the Person - A Comparative Study' (1971) 20 *ICLQ* 706.
Trindade and Cane	Trindade and Cane, *The Laws of Torts in Australia* (1985).
ULA	Uniform Law Annotated.
UOLA	Uniform Occupiers' Liability Act.
VFR	Visual Flight Rules.
Winfield and Jolowicz	Winfield and Jolowicz, *Torts* (12th edn, 1984).

Table of Cases

(In this table, the heavy type indicates where report or extended discussion of case has been done)

A.-G., B.C. *v.* Haney Speedways Ltd. 88
A.-G. *v.* P.Y.A. Quarries 86
A.-G., Ontario *v.* Orange Productions Ltd 86, 88
A.-G., Manitoba *v.* Adventure Flight Centres Ltd 87
Adams Estate *v.* De Cock Estate 98
Addie & Sons *v.* Dumbreack 147
Aikman *v.* George Mills & Co. Ltd 78
Alaica *v.* City of Toronto 142
Albert *v.* Lavin 63
Allan *v.* New Mount Sinai Hospital 10
Allen *v.* Gulf Oil Refining Ltd 79
Amstad *v.* Brisbane City Council 64
Anglo-Celtic Shipping Co. *v.* Elliot and Jeffrey 121
Arnsaon *v.* Northway Aviation Ltd 98

Ball et Uxor *v.* Axten 15
Bamford *v.* Turnley 72
Barton *v.* Armstrong **32**
Beaudesert Shire Council *v.* Smith **55**, 56, 57
Belisle *v.* Canadian Cottons Ltd 77
Bell Canada *v.* The Ship Mar-Tirenno 62
Benjamin *v.* Storr 89
Bernstein of Leigh (Baron) *v.* Skyview & General Ltd . 37, **44, 63, 157**, 161, 193
Bettel *v.* Yim 10, 24
Billings *v.* Reed 97, **104**
Billingsgate Fish Ltd *v.* B.C. Sugar Refining Co. Ltd 78
Birch *v.* N.B. Command Canada Legion 145
Bird *v.* Holbrook **53**, 54
Bishop *v.* Arts & Letters Club of Toronto 140
Blankley *v.* Godley 179
Blyth *v.* Birmingham Waterworks Co. 92
_____ *v.* Topham **53**
Bottom *v.* Ontario Leaf Tobacco Co. 74
Bourhill *v.* Young 96
Boyd *v.* White 196, 197
Brady *v.* Schnatzel **28**
Brew Bros Ltd *v.* Snax (Ross) Ltd 76
Bridges Brothers Ltd *v.* Forest Protection Ltd **41, 69**
Brown *v.* B. & F. Theatres Ltd 13
Bruce, *et* al *v.* Martin-Marietta Corp. and Ozark Airlines, Inc. 124
Bunyan *v.* Jordan 12, 15
Butchard *v.* Barnett 25

Campbell *v.* Royal Bank of Canada 140, 144
Cariss *v.* Buxton 136
Cayzer *v.* Carron Co. 96
Chic Fashions (West Wales) Ltd *v.* Jones 2
Churchill Falls (Labrador) Corp. Ltd *v.* Page 113, 115
_____ *v.* R. 99
_____ *v.* The Queen **113**, 115, 116
Coldwell *v.* St. Pancras Borough Council 74
Commuter Air Service *v.* Poitras 97, 98
Condon *v.* Basi 108
Constantine Line *v.* Imperial Smelting Corp. 172
Cope *v.* Sharpe (No. 2) 61, 62
Corbett *v.* Hill 37
Cosgrave *v.* Busk 140
Costello *v.* Calgary 90
Couch *v.* McCann 134
Creed *v.* Qualico Developments Ltd 134

Daniels and Daniels *v.* White & Sons Ltd 122
Darowany *v.* R. 85
Davie *v.* New Merton Board Mills Ltd 123
Demers *v.* Desrorier **50**
Denn d. Bulkley *v.* Wilford 184, **185**
Didow *v.* Alberta Power Ltd 45
Diplock *v.* CNR 129
Dominion Natural Gas Co. Ltd *v.* Collins and Perkins 109
Donoghue *v.* Stevenson 84, 92, **95**, 110, **112**, **118**
Dowell *v.* Burford 18
Dugal *v.* People's Bank of Halifax 71
Duncan *v.* Branten 150
Dunn *v.* Campbell 179

Eccles *v.* Bourque 63
Edgington *v.* Fitzmaurice 9
Egg Marketing Board (NSW) *v.* Cassar 64
Eisener *v.* Maxwell 90
Ellis *v.* Loftus Iron Co. 37
Epp *v.* Ridgetop Builders Ltd 148
Evans *v.* B.C. Electric R. Co 49
Everitt *v.* Martin **50**
Farrugia *v.* G.W. Railway 96
Fink *v.* Greenians 108
Fosbroke-Hobbes *v.* Airwork Ltd 97, 102, 107, 130, 196
Fouldes *v.* Willoughby 50
Fowler *v.* Lanning 90
Francis *v.* Cookrell 129, 136

Gallant *v.* Boklaschuk **96**
Gambriell *v.* Caparelli 25, 26
Garrat *v.* Bailey 15
Gebbie *v.* Saskatoon 129
Gee *v.* Metropolitan Railway 101
Gifford *v.* Dent 44
Goldman *v.* Hargrave **71**
Good-Wear Treaders Ltd *v.* D. & B. Holdings Ltd 118, **119**
Gorely *v.* Codd 67
Graham *v.* K.D. Morris & Sons Pty Ltd **45**
Grandel *v.* Mason 83
Gregory *v.* Piper **40**, 41
GTR *v.* Barnett 129
Gutschenritter *v.* Ball 37

Hagen *v.* Goldfarb 71
Hagerman *v.* City of Niagara Fall 107
Halsey *v.* Esso Petroleum Co. Ltd 74
Hancock *v.* Baker 64
Hanes *v.* Kennedy 142
Harcourt *v.* Minister of Transport 45
Harris *v.* James 76
Harrison *v.* Vincent **107**
Hart *v.* A.-G. for Tasmania, and Pasco 67
Haynes *v.* C.P.R. 147
Herrington *v.* British Railways Board 111, 147, 149
Hickey *v.* Electric Reduction Co. of Canada Ltd 88
Hill *v.* J. Crowe (Cases) Ltd 122
Hillman *v.* MacIntosh 139, 140
Home Office *v.* Dorset Yacht Co. Ltd 92
Hooper *v.* Rogers 74

Impress (Worchester) Ltd. *v.* Rees 110, 125
Indermaur *v.* Dames **139**, 144

James *v.* Campbell 15
Johannesson *v.* Rural Municipality of West St. Paul 130, 135, **194**, **195**
Johnston *v.* Sentineal 138
Jones *v.* Festiniog Rly Co. 196
Jorgenson *v.* North Vancouver Magistrates 194

Kelsen *v.* Imperial Tobacco Co (of Great Britian and Ireland) Ltd 44
Kent *v.* Dominion Steel & Coal Co. Ltd 78
King *v.* Northern Navigation Co. 129
Kirk *v.* Gregory 61
Kranabetter *v.* City of Kelowna 150

Lacroix *v.* R. **45**, 63, 193
Lagan Navigation Co. *v.* Lamberg Bleaching, Dyeing & Finishing Co. 82
Lampart *v.* Eastern Omnibus Co. Ltd 188
Langdon *v.* R.C. Bishop of Edmunston 140
Lawson *v.* Wellesley Hospital 66
Leakey *v.* National Trust 71
Letang *v.* Cooper **2, 19**, 51, 90
Lewis *v.* Town of St. Stephen **83**
Liebel *v.* Rural Municipality of Qu'Appelle 90
Lochgelly Iron and Coal Co. *v.* M'Mullan 92
Logdon *v.* D.P.P. 31
London Grawing Co. Ltd *v.* Horton 140, 146
Lonrho *v.* Shell (No. 2) 56

MacDonald *v.* Goderich 134
MacGibbon *v.* Robinson 85
Mackenan *v.* Segar 136
MacMillan *v.* Stephens and Mathias **47**
Mahal *v.* Young 10
Maitland *v.* Twin City Aviation Corp. 85
Mallet *v.* Dunn 188
Malone *v.* Laskey 74
_____ *v.* Metropolitan Police Commissioner 161
_____ *v.* T.C.A. 98, 102
Maron *v.* Baert 92
Marschler *v.* Msser's Garage 126
Martin *v.* Shoppee 26, 29, 30, 32
Mason *v.* Clarke 39
Mazur *v.* Sontowski 138
McCallum *v.* Corporation of District of Kent 78
McGhee *v.* National Coal Board 94, 100
McInneray *v.* McDougall 97, 98
McKenna *v.* Greco (No. 2) **142**
Mclean *v.* Lutz 98
Meier *v.* Qualico Developments Ltd. 133
Metropolitan Asylum District *v.* Hill 78, 79
Mint *v.* Good 76
Morgan *v.* Airwest Airlines Ltd 98
Morin *v.* Blais 100
Morris *v.* Mardsen 66
Murray *v.* MacMurchy 61
Musgrove *v.* Pandelis 196
Mussett *v.* Reitman's (Ontario) Ltd 71

National Coal Board *v.* J.E. Evans & Co. (Cardiff) 51, **59**
Nicholls *v.* Ely Beet Sugar Factory 38
Nova Mink Ltd *v.* Trans-Canada Airlines 83, **84**
Nowsco Well Service Ltd. *v.* Cdn Propane Gas & Oil Ltd 94

O'Brien *v.* Shire of Rosedale 64
Ontario Central Airlines Ltd *v.* Gustafson 97
Oropesa, The 109

Pattison *v.* Prince Edward Region Conservation Authority 78
Peech *v.* Best 38
Pekowski *v.* Wellington City Corp. 129
Penfolds Wines Pty Ltd *v.* Elliot 58
Powell *v.* US 46
Preston *v.* Canadian Legion, Kingsway Branch No. 175 148
Pringle *v.* Prince 138

R. *v.* Chapin 13
_____ *v.* Coleman 99
_____ *v.* Gayle Air Ltd 99
_____ *v.* Reid 99
_____ *v.* Schwerdt 89
_____ in right of Canada *v.* Saskatchewan Wheat Pool 100
R.D. Lindsay Funeral Home Ltd *v.* Pryde 140
Rafuse *v.* T. Eaton Co. (Maritimes) Ltd 141
Rattray *v.* Daniels **82**, 85
Re Regulation and Control of Aeronautics in Canada 194
Read *v.* Coker 26
Rockland Airways *v.* Miller **99**, 100, 102
Rodrigues *v.* Ufton 38
Roswell *v.* Prior 76
Rudko *v.* R. 148
Russell Transport Ltd *v.* Ontario Malleable Iron Co. 77
Ryan *v.* Young 60
Rylands *v.* Fletcher **196**

Saguenay Peat Moss Co. *v.* R. 97
Schenck *v.* The Queen 77
Scholtes *v.* Stranaghan 150, 151
Schwella *v.* The Queen **194, 195**
Scott *v.* Shepherd 15, **20**, 41
Sedleigh-Denfield *v.* O'Callaghan **70**
Sexton *v.* Boak **112**, 115, 116
Shawinigan Carbide Co. *v.* Doucet 101
Shelfer *v.* London Electric Lighting Co. 81
Sherrin *v.* Haggerty 62

Sinclair *v.* Hudson Coal & Fuel Oil Ltd 137
Smith *v.* A.-G., Ontario 121
_____ *v.* Inglis Ltd 121
_____ *v.* Lewis 67
Snitzer *v.* Becker Milk Co. Ltd 140
Somback *v.* Trustees of Regina R.C. Separate High School District of Saskatchewan 140
Southgate *v.* Commonwealth of Australia **175**, 187
Southport Corp. *v.* Esso Petroleum Co. Ltd **40**, 60, 74
Southwark London Borough Council *v.* Williams 61
St. Lawrence Rendering Co. Ltd *v.* Cornwall 89
St. Helens Smelting Co. *v.* Tipping 69
Staden *v.* Tarjanyi 45
Steel-Maitland *v.* British Airways Board 174, **175**
Stein *v.* Gonzales 89
Stennett *v.* Hancock and Peters 118
Stephens *v.* Myers 26, 29, 30
Stuart *v.* R. in right of Canada 141
Stuckless *v.* R. **138**
Sturges *v.* Bridgman 77

Taplin *v.* Jones 161
The Queen *v.* The Sun Diamond 88
Thomas *v.* NUM 29
Tillander *v.* Gosselin **67**
Topham *v.* Okanagan Buildes Land Dev. Ltd 79
Trott *v.* T.A. Saul 106, 107
Trottier *v.* Canada 98, 115
Turtle *v.* Toronto 89

Uhryn *v.* B.C. Telephone Co. Ltd 97

Vanderpant *v.* Mayfair Hotel Co. 89
Vaughan *v.* Taff Vale Railway Co. 90
Vaughn *v.* Halifax-Dartmouth Bridge Commission 74
Vaughn *v.* Baxter 33

Wandsworth District Board of Works *v.* United Telephone Co. Ltd 44
Weedair (N.Z.) Ltd *v.* Walker 153, **173**, 174
Weld-Blundell *v.* Stephens 125
West *v.* Bristol Tramways Co. 196
Wheat *v.* E. Lacon and Co. Ltd **131**, 132, 133, 134, 137
Wiebe *v.* Funk's Supermarket 148
Wilchick *v.* Marks and Silverstone 76
Wilson *v.* Blue Mountain Resorts Ltd 108
Wooldrige *v.* Sumner 106

Woollerton and Wilson Ltd *v.* Richard Costain Ltd 44, **45**

Yokton Agriculture and Industrial Exhibition Society *v.* Morely 67
York *v.* Canada Atlantic SS. Co. **138**
Yukon Southern Air Transport *v.* R. 98, 102

Zerka *v.* Lau-Goma Airways Ltd 98, 102

Table of Legislation

CANADA

Dominion

Aeronautics Act, RSC 1985, c.A-3 99
s.3(1) 168, 170
s.6(4) 99
s.12 170

Air Regulations, CRC, c.2 ..... 99, 168

Constitution Act 1867
s.91 ..... 130, 135, 194
s.92(13) 193, 195
s.132 194

Constitution Act 1982
s.52(1) 130, 135

Criminal Code 65, 88
s.212(b) 13

National Transportation Act, SC 1987, c.34
s.276 170

Navigable Water Protection Act 47

Uniform Occupiers' Liability Act (prepared by the Uniform Law Conference of Canada) 132

Alberta

Occupiers' Liability Act, RSA 1980, c.0-3 ..... 129, 130
s.1(c) 132
s.1(d) 129
s.3 148
s.11 151
s.12 ..... 148, 149

British Columbia
Families Compensation Act, RSBC 1960, c.138 112
Occupiers' Liability Act, RSBC 1979, c.303 129
s.1 . . . . . 129, 132
s.3 148
s.5 151

Manitoba
Fatal Accidents Act, RSM 1970, c.F50 96

Occupiers' Liability Act, RSM 1987, c.0-8 129
s.(1) 129, 132
s.3 148
s.5 151

Trustee Act, RSM 1970, c.T160 96

New Brunswick
Easements Act, RSNB 1973, c.E-1
s.1 77

Nova Scotia
Easements Act, RSNS 1967, c.168
s.31 77

Ontario
Limitations Act, RSO 1980, c.240
s.30 77

Occupiers' Liability Act, RSO 1980, c.322 129
s.1(a) 132
s.1(b) 129
s.3 148
s.6 151

Prince Edward's Island
Occupiers' Liability Act, SPEI 1984, c.28 129
s.1(a) 132
s.1(b) 129
s.3 148
s.6 151

UNITED KINGDOM

Air Navigation (Aeroplane and Aeroplane Engine Emission of Unburned Hydrocarbons) Order 1988 155

Air Navigation (Aircraft and Aircraft Engine Emission) Order 1986 156

Air Navigation (Noise Certification) Order 1987 ..... 155, 156

Air Navigation Order 1985 155

Air Navigation Order 1989
art. 106(4), Sch. 1, Pt.A 168

Civil Aviation Act 1920
s.9 153

Civil Aviation Act 1949 80
s.40 153
s.41(2) 73

Civil Aviation Act 1982
s.62 154
s.76 ..... 153, 154, 161, 165
s.76(1) ..... 154, 155, 156, 157, 158 .... 161, 164, 165
s.76(2) ..... 157, 161, 163, 164, 165 169, 170, 171, 172, 173 174, 175, 176, 177, 178 179, 181, 182, 183, 184 185, 186, 187, 188, 189 ..... 196, 197
s.76(3) 161
s.76(4) 188
s.77(2) 73, 80
s.81 154
s.100 169
s.105(1) 162, 163, 176, 177

Consumer Protection Act 1987 ..... 124, 126

Harbours Act 1964
s.57 184

Interpretation Act 1978
Sch. I 184

Land Drainage Act 1976
s.116(1) 184

Law Reform (Contributory Negligence) Act 1945 . . . . . 48, 187

Occupiers' Liability Act 1957 . . . . . 129, 134, 148
s.1(2) 132

Occupiers' Liability Act 1984 129

Personal Injuries (Emergency Provisions) Act 1939 105

Port of London (Consolidation) Act 1920
s.2 48

Rules of the Air and Air Traffic Control Regulations 1985
r.5 . . . . . 155, 156

Torts (Interference with Goods) Act 1977 51

COMMONWEALTH

Australia

Commonwealth of Australia

Civil Aviation (Damage by Aircraft) Act 1958 153

Law Reform (Miscellaneous Provisions) Act 1965 187

New South Wales

Damage by Aircraft Act 1952
s.2(1) 153
s.2(2) 176

Tasmania

Damage by Aircraft Act 1963
s.3 153

Victoria

Wrongs Act 1958
s.30 153

Western Australia

Damage by Aircraft Act 1964
s.4 153

India

Aircraft Act 1934
s.2(1) 167, 170
s.17 153

New Zealand

Civil Aviation Act 1948
s.2 170

Civil Aviation Act 1964 73
s.23 153

Nigeria

Civil Aviation Act 1964
s.9 153
s.10(2) 73, 80

OTHERS

The European Community

Dir.85/374/EEC of 1985 . . . . . 124, 126

United States of America

Federal Aviation Act 1958
§1301(5) 170

Uniform Aeronautics Act (prepared by the American Commissions on Uniform State Laws) 1922
§4 192
§5 . . . . . 192, 197

INTERNATIONAL

Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (The Hague Convention)
art. 3 177

Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 (Warsaw Convention) 130, 133
art. 1 131

Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface 1952 (Rome Convention) 192
art. 1(1) 182, 189
art. 1(2) 177, 178, 179, 181, 182
art. 11 191

1978 Montreal Protocol amending the Rome Convention 191

Convention on International Civil Aviation 1944 (Chicago Convention) 166
art. 54(1) 167

Annex 6 to the Chicago Convention 166

Annex 7 to the Chicago Convention 166, 168, 170

Convention on Offences and other Acts committed on board Aircraft 1963 (Tokyo Convention)
art. 3 177

International Convention on Air Navigation 1919 (Paris Convention) 167

Contents

Abstract iii
Résumé iv
Acknowledgments v
Abbreviations vi
Table of Cases viii
Table of Legislation xv

INTRODUCTORY: AVIATION USES AND THE REALM OF TORTS 1

CHAPTER

1. AVIATION-DERIVED TRESPASS 5

I. TRESPASS TO THE PERSON 6
a. ***The State of mind in trespass to the person*** 7
(i) Direct Intention 8
(ii) Indirect Intention 11
Constructive intention 12
Transferred intention 13
b. The acts of trespass to the person 17
(i) Battery 17
The element of directness 19
Direct intention - of act and consequences thereof 22
(ii) Assault 25
Direct threat 26
Reasonable apprehension 27
Imminent contact 32
Assaults through aviation 32

II. TRESPASS TO PROPERTY 35
a. ***Trespass to Land*** 36
(i) The subject matter of trespass to land 37
(ii) The plaintiff's standing in action in trespass to land 38
(iii) The offensive action 40
Directness 40
Intention 42
TRESPASS ABOVE THE SURFACE 43

b. Trespass to Goods 49
(i) The plaintiff's interest 49
(ii) The defendant's act 50
Tresspass to goods in aviation uses 51

III. ACTION ON THE CASE FOR DAMAGES 52
a. In relation to personal injury 53
b. In relation to property damage 55
(i) Land 55
(ii) Goods 57

DEFENCES TO AVIATION-DERIVED TRESPASS 58
(i) Inevitable accident 59
(ii) Act of God 60
(iii) Necessity 61
(iv) Lawful authority 63
(a) Common law authority 63
(b) Statutory authority 64
(v) Incapacity 66
(a) Insanity 66
(b) Infancy 67

2. AVIATION-DERIVED NUISANCE 68

I. PRIVATE NUISANCE 68
Unreasonable interference by way of material damage 70
Unreasonable interference with the use or enjoyment of land 72
Proper parties 74
a. The plaintiff 74
b. The defendant 74
Defences to aviation nuisance 77
(i) Prescription 77
(ii) Consent 78
(iii) Statutory authority 78
(iv) Aviation legislation 79
Remedies for nuisance 80
(i) Injunction 80
(ii) Damages 81
(iii) Abatement 82
PECULIAR SENSITIVITIES AND AVIATION NUISANCE 82
II. PUBLIC NUISANCE 85
Locus standi in public nuisance 88

3. AVIATION-RELATED NEGLIGENCE IMPACTING ON THE EARTH-SURFACE 90

Connotations of Negligence 90
THE TORT OF NEGLIGENCE 92
Causation and remoteness 93
(i) The aircraft operator 94

Rules of the air and negligence 99
Res ipsa loquitur *and contemporary aviation* 100
Res ipsa loquitur *and aviation-terrorism* 103
Negligent trespass 104
Aerobatic accidents 105
(i) The interferer 109
(ii) The Air Traffic Controller 111

4. AVIATION PRODUCTS LIABILITY AND THE EARTH-BASED VICTIM OF PLANE-CRASH 117

General 117
Defences 121
(i) Safe delivery 121
(ii) Warning and intermediate examination 122
(iii) Exercise of reasonable care 122
(iv) Unintended use 123
(v) 'State of the art'? 123
(vi) Components 124
(vii) Novus actus interveniens 125
Progressive developments in the United Kingdom 126

5. OCCUPIER'S LIABILITY FOR INJURIES RESULTING FROM AVIATION PREMISES 128

Premises 129
Occupier 131
The duty 134
a. Common Law 134
(i) Contractual entrants 136
(ii) Invitees 138
(a) Unusual danger 140
(b) Reasonable care 141
(iii) Licensees 145
(iv) Trespassers 146
b. The Occupiers' Liability Acts 148

6. EARTH-SURFACE TORTS AND AVIATION LEGISLATION 152

Introduction 152

I. DOMESTIC LEGISLATION 152
Immunity from certain types of torts 154
a. '[A]height .. .which ... is reasonable...' 155

b. '[T]he ordinary incidents of ... flight ...' 158
Strict liability for certain types of damage 161
a. Nature of injury 162
Compensability of non-material damages 164
The trespass notion of actionability *per se* 164
b. Causation 166
(i) '[A]n aircraft' 166
(ii) '[A]n article' 173
Vibrations, sonic booms and Wind disturbances 174
(iii) '[I]n flight, taking off or landing' 176
(iv) '[A]ny person or property on land and water' 182
(v) Contributory negligence 187
(vi) The defendant 188
(vii) Indemnity 189
II. INTERNATIONAL LEGISLATION 189

CONCLUSION: A STRICT LIABILITY TO CANADIAN AVIATION-INCIDENT VICTIMS ON THE SURFACE? A RECOMMENDATION . 192

Selected Bibliography 200

Introductory

Aviation Uses and the Realm of Torts

Aviation uses have been fostered, as a matter of common knowledge, by the remarkable progress made by modern society in the field of technology. This, in turn, reflects the dynamism of an ever-evolving world. The impact of the state of nascence here p rtrayed is not limited to the ability of society to research, develop and consume the produce of science and technology, but also the willingness of society to fully integrate these new developments into its collective psyche. The process of this integration would essentially involve adjustments in all relevant institutions in order to accommodate the said developments. The process contemplated here is seen in no less an area than in the relationship between common law of torts and developments in aviation uses. This is most aptly reflected

in the dictum of SALMON, L.J.,[1] in *Chic Fashions (West Wales) Ltd* v. *Jones* to the effect that:

> [T]he common law is not static ... it is a growing organism which continually adapts itself to meet the changing needs of time.[2]

In the following chapters, attempt shall be made to review how Anglo-Canadian law has come to make some aspects of the adaptation contemplated by SALMON, L.J., in the above quotation. This shall be done not only from the perspective of common law, but also from that of domestic legislation, and, possibly, from the angle of the influence of international law (private and public) on Anglo-Canadian law as well.

The approach to be taken is essentially that of a practical review of important principles of common law and legislation relating to the law of torts, particularly against the background of injuries or interferences occasioned the Earth-surface-based victims of aviation related-incidents.

By aviation related incidents, the work will proceed according to the assumption that the term 'aviation', having been derived from the Latin *avis* [bird] coupled with -ATION, does not only denote aerial navigation by means of an aeroplane, but also - and more broadly - relates to the act of 'flying'[3] by the use of any air faring craft.

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1 As he then was.

2 [1968] 2 QB 299 at 319.

3 See The *Oxford English Dictionary*.

Therefore the injuries envisaged in this project may come in varied modes. From the deliberate but unauthorized landing of a flight instrumentality (including balloons and dirigibles) on the land of somebody else; to the terror-bombing of an aircraft which comes crashing to the ground, to the injury of a hapless victim; and, even the sudden seemingly dangerous near-surface manoeuvre undertaken by the aerobat to the severe apprehension of personal injuries in the minds of his spectators. For all these and more, attempt shall be made to explore in chapter 1 the position of the tort law of trespass.

The law of nuisance has taken a stand on certain types of conduct of members of society in relation to one another: the bottom line is 'live and let live'. But how does this figure in a situation of disturbance suffered by the man on the ground as a result of sonic booms, vibrations, substance emissions, etc., from an aircraft or an agglomeration of them? Is there any legal protection whatsoever for the woman who is unusually sensitive to aircraft operation and is prone to suffer as a result? These are some of the issues to be dealt with in chapter 2.

Back to the aerobat who makes the scary swoop on his spectators: what if the result goes beyond apprehension of personal injuries in their minds, and actually does involve a crash into them? How does the law view the bird-hunter who shoots at a bird sandwiched in the airspace between the hunter and a hot-air balloon, with fatal results to the balloonist and his craft who come crashing onto somebody else on the ground? What about the aviation terrorist who plants a time-bomb in an aircraft, hoping to blow only the aircraft and its occupants out of the sky, but his machinations work to the added detriment of the earth-based victim whose property

or person is damaged from the resultant crash: is there any jural connexion between the terrorist and this last victim of his act? Will an air traffic controller be held liable for the injury suffered by the earth-based victim who is injured by an arguably incompetent traffic direction which caused or contributed to a crash, hence the said injury? The law of negligence has some answers to these questions, and those answers will be reviewed accordingly in chapter 3 which deals with the general principles of negligence.

Similarly, the question shall be explored in chapter 4 as regards the liability of the manufacturer, repairer or maintenanceman of an aircraft for the injuries caused the earth-bound victims of a crash, for instance, associated with such manufacture, repair or maintenance. And so will the question of liability of an airport operator for such incidents as terrorist attacks on his premises, which attacks victimized people thereon. This is the subject of chapter 5. And finally, chapter 6 and following will review the role of legislation in the matter of liability associated with operation of aircraft.

Because the work is inspired mostly by practical issues of law, a major emphasis will be placed on caselaw with due consideration, of course, being had to academic opinions.

And, as the title suggests, the work will focus mainly on legal developments in Canada and the United Kingdom. Necessary comparative analyses will, however, be made with regard to some kindred jurisdictions of law around the World.

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Aviation-derived Trespass

The protection of personal[4] and proprietary integrity of people from wrongful violation has always been a primary concern of the common law. Tort law of trespass is one of the ways by which this protection is achieved. Originally, 'trespass' signified no more than 'wrong',[5] and such issues were mostly dealt with in local courts.[6] However, a trespass which was also a breach of the king's peace was dealt with appropriately by the king's courts, and with time the mere allegation that the

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4 Physical and mental.

5 Milsom, *Historical Foundations of the Common Law* (2nd edn, 1981), p. 244; Milsom, 'Trespass from Henry III to Edward III' (1958) 74 *LQR* 195, at pp. 407 and 561.

6 Winfield and Jolowicz, *Torts* (12th edn, 1984) p. 53.

trespass was committed *vi et armis*[7] acquired usage as a common form of preservation of the jurisdictional propriety of an action brought in the king's courts.[8] In its present form, common law of torts recognizes the broad bi-categorization of this type of wrong into trespass to the person and trespass to property.[9]

Trespass to the person is further subdivided into: assault, battery, and false imprisonment.[10] Whereas trespass to property is, for its part, further subordered into: trespass to land, and trespass to chattels.[11]

The following discussion in this chapter will attempt to review the various aspects of the Anglo-Canadian tort law in a manner relevant to interferences occasioned persons and property on the Earth-surface, as incidents of aviation usage.

I. Trespass to the Person

This category, as has been observed earlier, consists of assault, battery and false imprisonment. Our discussion, however, shall be restricted to assault and battery, considering that false imprisonment in relation to aviation uses is not of so much relevance to injuries sustained on the ground as it is to wrongs suffered aboard an aircraft; and as the latter is outside the scope of this work, so is an in-depth

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7 [With force and arms] a phrase formerly used in declarations for trespass, and in indictments: See Mozley & Whiteley's Law Dictionary (10th edn, 1988).

8 *Ibid.*

9 *Ibid.*

10 Trindade and Cane, *The Law of Torts in Australia* (1985) p. 20.

11 See e.g., Linden, *Canadian Tort Law* (4th edn, 1988) p. 33.

discussion on false imprisonment.

Elements of Trespass to the Person

The tort category of trespass to the person comprises, on a broad level, of certain elements that justify the existence of those several component torts in that class. The said elements include the requirements of: (a) a wrongful state of mind, and (b) a direct wrongful act. In criminal law parlance, these elements would be called *mens rea*[12] and *actus reus*,[13] respectively.

a. The state of mind in trespass to the person

The liability of an alleged tortfeasor in trespass to the person cannot be founded without the establishment of either his intention to commit the tort or his negligence thereof.[14] With regard to state of mind however, ever since the revolutionary dictum of Lord DENNING, M.R., in *Letang* v. *Cooper*[15] stating that:

> [I]f one man intentionally applies force to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person.... If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care[,][16]

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12 [A guilty mind or intent].

13 [The wrongful act].

14 See Street, *Torts* (8th edn, 1988), pp. 21, 25 and 28.

15 [1965] 1 QB 232.

16 *Ibid.*, at p. 239.

there appears to be at least an issue - even if not settled - that negligent trespass is no longer a tenable tort action.[17] In view of this development, negligent trespass shall be addressed in the discussion on negligence much later in this work.[18] The discussion in this section shall therefore be restricted only to the element of intention. And for the purposes of this discussion, intention shall be examined from the direct and indirect angles.

(i) Direct intention

An act is said to be intentional if the actor had *consciously* set out to effectuate his act with a positive desire for its consequences.[19] This is, perhaps, the simplest statement of the doctrine of intention; and it seldom happens that a case goes to court where the consciousness of the defendant to produce the unpleasant consequences is so unambiguous. In practice, therefore, the Courts have not found the ascertainment of a tortfeasor's intention an easy affair. The main reasons for this are first, the imperceptibility, in most cases, of what might be construed as the intention of a wrongdoer. Just as BRIAN, C.J., observed centuries ago: 'It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man',[20] being the legal equivalent of Shakespeare's

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17 *Cf.* Street, p. 21; Trindade and Cane, p. 20; Trindade, 'Some Curiosities of Negligent Trespass to the Person - A Comparative Study' (1971) 20 *ICLQ* 706-31.

18 See p. 104, *infra.*

19 This, in other words, means that the defendant voluntarily - and with forethought - engaged in the bodily movement for which he is being held liable. See Trindade and Cane, p. 30.

20 Year Book Pasch. 17 Edw. 4, fol. 2, [cited in Winfield and Jolowicz, p.44.]

'There's no art to find the mind's construction in the face'.[21] Hence the Courts have had no choice but to infer a wrongdoer's intention from his general conduct, as is apparent in his speeches and actions.[22] This deductive function of the Court is imperative notwithstanding the inherent difficulties of such an assignment. The insidious nature of *mala fide* intentions of the tortfeasor in most cases is no excuse for the Court to hedge this duty, for, in spite of the furtive bad intentions of men, BOWEN, L.J., insisted that 'the state of a man's mind is as much a fact as the state of his digestion'.[23] Secondly, the definition of intention oscillates between two extreme connotations: (a) that the wrongdoer *desired* the consequences of his act which he *knew* were certain to follow, and (b) that the perpetrator simply realized that there was a risk that the injurious consequences would result from his action.[24] For two main reasons, however, these definitional difficulties have not been as acute in tort adjudication as they have been in criminal cases.[25] First, since the abolition of the forms of action, which now permits a possible overlap between negligence and trespass, the plaintiff will generally be able to fall back on the broader principle of liability for negligence, in the event of lack of confidence in an action for trespass.[26]

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21 Shakespeare, *Macbeth*, I.iv.7.

22 Winfield and Jolowicz, p. 44.

23 *Edgington* v. *Fitzmaurice* [1885] 29 Ch.D at p. 483.

24 Sometimes described as recklessness: Winfield and Jolowicz, p. 44. This connotation of intention will be discussed further under the section on 'Indirect Intention'; see p. 11, *infra*.

25 *Ibid.*

26 *Ibid.*

For instance, if an airshow-pilot in his bid to impress his spectators decides without warning to swoop down on them, at an altitude of, say, under two meters, the question whether he intended any resultant trespass on the person[27] will be of little practical importance if a reasonable man would have foreseen the possibility of colliding with people or causing them a great deal of apprehension of collision at that altitude. Secondly, while criminal law generally requires that the defendant's intention must comprehend all the consequences of his act making up the elements of the crime, the tort law often separates the initial interference with the victim from the consequences of that interference, and while intention or foresight may be required as to the former it may not be as to the latter.[28] Thus, if A (a practical joker) drops a piece of cream pie from his air-borne balloon onto the bald head of V intending only to draw a humorous reaction from onlookers, but V instead suffers - unlikely though - a cranial fracture because of his unusually thin skull, A will be responsible for this eventual harm. This responsibility follows from the rule that a tortfeasor is required to 'take his victim as he finds him.'[29] So on a broader consideration of intentional trespass to the person from aviation uses, the waggish balloonist would be said to have directly intended the fact of the piece of pie striking

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27 This could be battery or assault by accidentally colliding with people or scaring them out of their wits, respectively.

28 Winfield and Jolowicz pp. 44-45.

29 *Ibid.*; see also, *Bettel* v. *Yim* (1978) 20 OR (2d) 617 at pp. 628-29 (*per* BORINS, C.C.J.); *Allan* v. *New Mount Sinai Hospital* (1980) 28 OR (2d) 356 at p. 365 (*per* LINDEN, J.); 33 OR (2d) 603; *Mahal* v. *Young* [1986] 36 CCLT 143 (B.O.S.C.).

his victim.[30]

But unfortunately, real life would not restrict incidents of aviation facilitated Earth-surface wrongs to such escapades. Deleterious substances, bullets, bombs, aircraft or their exploding debris, etc., often turn out to be substances that injure persons on the Earth-surface - with grave consequences - as a result of use of aviation rightly or wrongly by people whose foul intentions are not easily discernible.

(ii) Indirect intention[31]

Where a defendant makes use of any aviation facility with the obvious desire to interfere with the earth-bound plaintiff, the interference will be seen as directly intentional if in fact it occurs according to the apparent desires of the defendant.[32] But, as has already been observed, in most cases there is no apparent desire on the part of the wrongdoer to engender the eventual harm. But that notwithstanding, the law is seen as unwilling to assume absence of wrongful intention for the mere reason that there is no apparent intention. To ascertain the requisite intention, the legal system has developed the notion of indirect intention which may be either constructive or transferred.

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30 Ignoring for a moment the 'thin skull' problem.

31 See Trindade and Cane, pp. 30-36 for a very instructive discussion on intentional trespass to the person, generally.

32 Linden, p. 31.

Constructive intention[33]

The law treats a tortious act as constructively intentional if, while not desiring its consequences, the eventual injuries are 'known to be substantially certain to follow'[34] or that the superinducing conduct is so egregious in its circumstances that any ensuing injuries cannot go uncompensated for by the party responsible.[35] For example, where A plants, in a piece of luggage, a time-bomb set to go off forty-five minutes after Air X Flight 123 has taken off from the very busy Urbania International Airport. In the event of a one-hour delay in the take-off of Flight AX 123 wherein the bomb explodes at Urbania Airport injuring the airport's cargo handlers, A could argue correctly that since he only planned to blow up Flight AX 123 and crew 45 minutes outside Urbania Airport, he intended neither the explosion in Urbania Airport nor the resultant injury caused its employees. Strictly speaking, this seems to be quite a plausible argument. However, since the law would not tolerate any perpetrator being dealt with more leniently on such facts, an intention to produce the factual result would be imputed to him. The imputed intention here is sometimes said to be 'constructive' intention.[36] The same conclusion would seem to follow, had the explosion in the illustration occurred according to plan, but the

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33 See Linden, p. 32. See also Prosser, 'Transferred Intent' (1967) 45 *Tex. L. Rev.* 650; *Bunyan* v. *Jordan* [1937], 57 CLR 1 (High Court of Australia).

34 See Linden, p. 32.

35 *Ibid.*

36 Note that the aerial showman exemplified earlier would, depending on the school of thought, be held liable to either constructive intentional trespass to the person or negligence. This is not unlike the dilemma of Schylla and Charybdes, since for practical purposes neither of the two constructs of liability will substantially alleviate his situation.

explosion takes place over a town in which the sabotaged aircraft subsequently crashes with resultant bodily injuries to persons on the ground.[37]

The rationale for the imputation of intention in these circumstances appears to be that since injuries are known to substantially follow from such unlawful conducts,[38] the identity of the victim is not as important a consideration as the fact that the unlawful occasioning act was in fact contemplated and carried out.[39]

Transferred intention

Besides imputation, it is also possible to found intent indirectly in a defendant by way of transfer. This doctrine is analogous to the parallel criminal law doctrine whereby wrongful intent is often transferred from one person to another[40] and from one type of crime to another.[41] In tort, intention could also be transferred either from one person to another or from one inchoate tort to another consummate, but different, tort.[42]

Transfer of intent between persons is possible when the act of one person is imputable to another; here the requisite intent needed to make such act delictual is

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37 See Linden, p. 33.

38 Such as aircraft sabotage. See also Trindade, 'Intentional Torts: Some Thoughts on Assault and Battery', (1982) 2 *Ox. JLS* 211 at p. 228.

39 See Linden, p. 33.

40 *R.* v. *Chapin* [1909] 22 Cox CC 10; see also s.212(b) of Canada Criminal Code.

41 See generally, Linden, p. 33.

42 *Ibid.*

transferred to the nominal tortfeasor where such intent is found in the actual tortfeasor. This is the essence of vicarious tort liability.[43] From this hypothesis, therefore, it seems, for example, that where A sponsors B to sabotage aircraft, and B carries out any such act, B's intention in respect of any resultant tort will be transferred to A.

As between types of tort, intention could also be transferred from one intentional tort to another.[44] For instance, where the defendant intends to shoot the plaintiff from an aircraft in flight but misses and frightens him instead, there might be sufficient intention on the defendant's part to ground assault in the circumstances.[45] This is because the intention needed to constitute assault will be imported from his designs to shoot his victim which would have constituted battery had he produced that result.[46]

Similarly, transfer of intent to establish trespass to the person as a result of aviation activities can occur where the defendant has, for example, set out to only bomb a building which he knows is occupied and located in a business or a densely populated area, and his bomb injures persons in the area or gives them cause for apprehension of harm. Here the defendant's original intention to only bomb the

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43 See Clerk and Lindsell, *Torts* (16th edn, 1989), §§ 3-01 *et seq.*

44 See Linden, p. 33. See also, the 'thin skull' analysis p. 10, *supra.*

45 See *ibid.*

46 See pp. 17 *et. seq.*, for details of battery and assault.

house, which, as we shall see later,[47] constitutes trespass to property, could be transferred to the resulting trespass to the person.

Notwithstanding the foregoing discussion, it must be noted, however, that the concept of transferred intention to commit trespass to the person is still in a state of flux in Anglo-Canadian tort law,[48] unlike in American tort law where the doctrine has acquired a more definite form.[49]

The existence of the doctrine in Anglo-Canadian tort law has been disputed[50] as much as acknowledged.[51] The reasons for the reluctance in its acceptance include, first, the issue of the dimensions of the transfer. Prosser submits, presumably from an American perspective, that among the five trespass actions of battery, assault, false imprisonment, trespass to land and trespass to chattels, intent will be transferred from one to another.[52] But Linden, for his part, has cautioned that:

> It may be that the Canadian courts would not wish to transfer intent indiscriminately from any of these torts ... to all of the others, regardless of their comparative severity. Perhaps they should be reluctant to transfer intent from a minor wrong to a more serious one, for the wrongful intent may be trivial in comparison with the result achieved. The courts could always fall back and consider the loss from the perspective

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47 See p. 42, *infra.*

48 See Linden, p. 33; Street, p. 22.

49 ALI, *Restatement of the Law (Second) Torts* § 32; Prosser, *loc. cit.* (n. 33); *Garrat* v. *Bailey* [1955] 279 P. 2d 1091 (Supreme Court of Washington).

50 Linden, p. 33; Street, p. 22.

51 Winfield, in a note at (1935) 83 *University of Pennsylvania L.R.* 416, n. 15; *Bunyan* v. *Jordan supra, Livingstone* v. *Ministry of Defence* [1985] 15 NIJB, (CA); *Scott* v. *Shepherd* [1773] 2 Wm Bl 892 at p. 899; Winfield and Jolowicz, p.45, n.16; Street, p. 18; *James* v. *Campbell* [1832] 5 Car. & P. 372; *Ball et Uxor* v. *Axten* [1866] 4 F & F 1019.

52 Prosser, *loc. cit.* (n. 33).

of negligence liability, which might be a more balanced approach in some situations.[53]

A second reason for disputing the doctrine stems from the analogous relationship of the doctrine with criminal law.[54] It has been argued, in this connexion, that it is at least not clear as to what extent criminal cases are relevant in tort.[55] Thirdly, the existence of criminal injuries compensation schemes in Britain and Canada is a further reason for reluctance in accepting the doctrine of transferred intent.[56] Under this scheme, the Court would order perpetrators of criminal acts to compensate their victims. This factor deserves a brief comment at this point.

The criminal injuries compensation scheme appears to have a lot of shortcomings which make it inappropriate as a substitute for traditional civil actions such as actions in trespass to the person. For instance, the award can only be made on conviction of the accused person, therefore where a conviction was impossible,[57] the victim of a possible case of battery could go without remedy. And the incidence of this cannot be overstressed, considering the disparate standards of proof between crimes and civil wrongs. Secondly, as in criminal sentencing, it is usual for criminal injuries compensation orders to be influenced towards lesser awards, or even withheld, in view of 'the conduct of the applicant before, during or after the events

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53 Linden, p. 33.

54 See p. 13, *supra*.

55 Street, p. 22.

56 Other countries with such schemes include Australia and New Zealand. See Trindade, p. 214.

57 Such as where a criminal defence which is not recognized in tort is successfully pleaded.

giving rise to the claim or to his character and way of life...'.[58]

b. The acts of trespass to the person

Unlike the state of mind element of trespass to the person which is essentially uniform in all the different torts in the category, an understanding of the acts of trespass to the person would require an individual exposition of each of the component torts (*viz.*, assault, battery and false imprisonment) which comprise the category.[59]

(i) Battery

By way of a definition, Professor Street concisely describes the tort of battery as follows:

> The form of trespass to the person known as battery is any act of the defendant which directly and either intentionally or negligently causes some physical contact with the person of the plaintiff without the plaintiff's consent.[60]

The above definition encapsulates the essential elements of the wrong: a conscious or negligent state of mind, physical contact with the victim, and his lack of consent to be so physically touched.[61]

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58 See Trindade, pp. 214-216 for details of the criticism.

59 As has been said earlier, false imprisonment is outside the scope of this work.

60 Street, p. 21.

61 See generally, Clerk and Lindsell, §§ 17-03 *et seq.*

Thus, once the wrongful state of mind has been found, any direct application of physical force to the person of another may amount to battery.[62] According to Clerk and Lindsell, 'anything that can be called a blow, whether inflicted with hand, weapon, or missile is a battery.'[63] It could also be battery to throw water on somebody, spit on his face,[64] or directly cause other deleterious substance like fume[65] to touch him in offensive circumstances. It has even been held that a defendant who struck a horse, which the plaintiff was riding ,was liable to damages on account of battery as such blow was found to have caused the horse to throw the plaintiff resulting in his injuries.[66] And riding a horse at a person has been held to amount to a battery.[67]

All these instances involve a very important element of the physical contact constitutive of battery, which element is reiterated in Professor Street's definition provided above: the *directness* of the act.

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62 *Ibid.*, § 17-03.

63 *Ibid.*

64 *Ibid.*

65 See Winfield and Jolowicz, p. 55.

66 *Dodwell* v. *Burford* [1670] 1 Mod. 24.

67 See Winfield and Jolowicz, p. 54.

The element of directness

For an act to amount to battery, it must be direct.[68] However, the importance of this ingredient appears to have been thrown into a confused state in view of recent developments in modern Anglo-Canadian tort law on the one hand, and American tort law, on the other. First, the American *Restatement (Second) of Torts* (1965) indicates that in the United States, the element of *directness* is no longer necessary for any of the torts of trespass to the person;[69] and, accordingly, Prosser writes that 'the shift was a gradual one and the Courts seem to have been quite unconscious of it.'[70] Secondly, in the Anglo-Canadian context, Lord DENNING, M.R., stated in *Letang* v. *Cooper* that:

> [I]nstead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally.[71]

Perhaps, it was this dictum coupled with the American development that informed Linden's suggestion that 'a battery can be committed by intentionally causing physical harm, however *indirectly* it is brought about.'[72]

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68 This ingredient is also required in assault and false imprisonment; see eg. Trindade and Cane, pp. 28-30.

69 Trindade, p. 217.

70 Prosser, *The Law of Torts*, (4th edn, 1971) p. 30.

71 [1965] 1 QB 232 at p. 239.

72 [Emphasis added]; Linden, p. 41.

Nevertheless, the requirement of *directness* remains necessary as ever in Anglo-Canadian tort law.[73] The real question, therefore, is: What does this 'directness' entail? According to Trindade, the concept of directness is not limited to acts of immediate contact such as the plaintiff being hit by an object thrown at him by the defendant: it also includes any 'act which set in motion an unbroken series of continuing consequences, the last of which ultimately caused contact with the plaintiff'.[74] Thus, as NARES, J., observed in *Scott v. Shepherd* - a *locus classicus* on the topic - to set a mad ox loose in a crowd makes the perpetrator liable in trespass for any contact with the plaintiff by the ox.[75] In that case, the defendant was held liable for battery on the plaintiff who was injured by an exploding squib which was lit by the defendant in a market-place and thrown onto B's stall whereupon E, to avoid injury to himself picked it up and threw it across the market-house upon the stall of C who, to save his wares, picked up the squib and threw it to another part of the market-house where it struck the plaintiff, exploding and blinding one of his eyes. The injury was held to have arisen as a result of the direct act of the defendant regardless of the chain of hands through which the squib went before touching the plaintiff.

Based on the principles distilled from the foregoing discussion, some scenarios will be examined briefly for the validity of an action founded in direct battery by a

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73 Trindade, p. 217.

74 *Ibid.*

75 [1773] 2 W.BI. 892.

party injured on the ground as a result of aviation uses. First, an aircraft operator launches an air-to-surface projectile at a human target on the ground. The operator will be liable for injuries caused his target as a result of direct hit on his target by the projectile itself or - where applicable - by parts of it. 'Projectile' is broadly employed here to include any object capable of physically interfering with the personal comfort of any person it comes in contact with. In this regard, even the airborne operator himself could, in appropriate circumstances, qualify as a projectile. He will similarly be liable for any other physical contact made with the plaintiff by any object set in motion in an 'unbroken series of continuing consequences' initiated by the projectile. For example, where the defendant drops a bomb which explodes on or near a construction or a tree causing it to fall on the plaintiff.

Second, where the defendant sabotages an aircraft which crashes, producing similar results as the projectile examplified above, it is submitted that he should be liable as having directly produced the eventual injuries to persons on the ground on the reasoning that his initial act 'set in motion an unbroken series of continuing consequences' which ultimately injured the plaintiff.[76]

Third, where the defendant releases from his airborne vehicle any other substance besides projectiles, which is capable of causing injurious interference with any person on the ground, the defendant ought to be liable for direct battery notwithstanding the viability *vel non* of nuisance[77] action in the circumstances. The

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[76] See *supra,*

[77] See discussion on nuisance, (ch. 2) *infra.*

substances contemplated here would include, liquids, fumes, gusts of wind, etc.

Fourth, an act of sabotage which causes the release of such injurious substances, as part of an unbroken chain of events, again ought to involve the liability of the saboteur in direct battery for any harmful personal interference with the plaintiff.

Direct intention - of acts and consequences thereof

The confusion of the two intentions - i.e., intention to commit an act and intention to produce consequences of such act - seems to have become commonplace in discussions of the intention to commit trespass. Very often, one comes across authors who, in speaking of trespass to the person, do suggest that a 'conduct is intentional if the actor *desires* to produce the *consequences* that follow from his *act*.'[78] Linden, for example, followed up his introduction of the subject along this line with the following commentary:

> Thus, if one person swings his fist at another, hoping to strike his nose, and succeeds in connecting with it, the result has been intended. On the other hand, if someone shoots at a tree, but accidentally hits a person, he has not intended to hit the person even though he has intended to hit the tree. He will bear no responsibility for the intentional infliction of harm to the person, even though he may be made liable on another theory. *Intention, therefore, is a concept which connects conduct with its result.*[79]

The foregoing exposition is apt to confuse because of its lack of clarity as to what the relevant *act* is, as opposed to its *consequences*. In other words, what constitutes the act itself on the one hand, and the results on the other? Where should the line

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78 [Emphases added]; see Linden, p. 31.

79 [Emphasis added]; *ibid.*, pp. 31-32.

between what is seen as an act be drawn so as to separate it from the consequences? And which of the two notions should anchor the element of intention? Or should intention bestride both? It is submitted that this clarification must needs be made in order to give a clearer focus on the rather traditionally imprecise element of intention necessary to establish trespass to the person.

Take, for instance, the illustration of fist swinging employed by Linden. There will always be a question regarding whether the term 'act' is limited, in its employment, only to the swinging of fist, or whether it does pertain comprehensively to the activity of striking the plaintiff's nose which has both subjective and objective elements - *viz.* swinging one's fist and hitting another's nose, respectively.

Similarly, the notion of 'consequences' is not spared this problem. Does it mean to describe the fact that the nose was hit? If so, does it mean only to describe that fact, or would it also refer to the fact that the victim was outraged by the blow, or an apprehension of a would-be blow, as the case may be?

If the issues involved here are not clarified, the question of intention to commit trespass to the person will suffer an avoidable confusion, especially in the face of such propositions as a 'conduct is intentional if the actor desires to produce the *consequences* that follow his *act*', for these concepts are susceptible of broad and narrow interpretations depending on the circumstances of their usage. The prankster who drops an apple-pie on the head of a thin-skulled man intended a joke, but his victim got a fractured skull. Now, adopting a restrictive approach, it could be argued that the 'act' of the man was nothing more than dropping the pie, and that the consequences which he 'desired' was nothing more than the pie making contact with

his victim's bald-head. That he did not 'desire' a broken cranium as a 'consequence' of his 'act', and therefore he could not be held liable. Yet, this does not reflect the position of the law since a man will be held to intend the consequences of his act.[80]

To avoid this confusion, it is submitted that with regard to intentional trespass, more emphasis should be laid on the act rather than on consequences of the act, for the reasons that, first, trespass is actionable *per se* - i.e., without proof of damages.[81] 'Damages' here entail consequences of the act. Secondly, the law of torts - with special reference to the doctrine of trespass - deals with 'interferences' and 'consequences' of such interferences on different considerations, and intention to trespass is seen as relevant only to the interference itself, not the consequences thereof.[82]

From this hypothesis, 'the act' must be seen to comprise both the subjective deed of the actor's body movement and the objective one of interference with another person. The two ought not be distinguished as an act and a consequence or as a 'conduct' and a 'result' as that would detract from the essence of trespass. Hence, the definition of intention to commit *trespass to the person* should relate that a person is liable accordingly if he intended his *act* to interfere with another.

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80 See p. 9, *supra.*

81 See eg. Street, p. 24.

82 See p. 10, *supra*. Note that the test of *foreseeability* which especially relates to 'consequences' is relevant only in negligence and not trespass; see *Bettel* v. *Yim* (1978) 20 OR (2d) 617 at pp. 628-29 (*per* BORINS, C.C.J.).

(ii) Assault

One of the most concise definitions of assault is that furnished by Trindade and Cane stating that:

> An assault is any *direct threat* by the defendant which places the plaintiff in *reasonable apprehension* of an *imminent contact* with his person either by the *defendant or by some person* or *thing within the defendant's control.*[83]

Even though cases of assault are usually founded on intentional conduct, reckless, careless[84] or negligent[85] conducts resulting in such apprehensions are not, however, precluded from qualifying as assault.

The tort of assault is sometimes confused with that of battery - even by judges[86] - with the result that it is not unusual to come across a description of a notion as 'assault and battery' or simply as an all-embracing *assault* where a more accurate description as either assault or battery would have been more apposite.[87] In their strict and proper senses, assault and battery are two distinct types of tort concepts. *Assault* is the threat of force to the person of another causing him reasonable apprehension of contact; while *battery* is the actual application of that

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83 [Emphases added] Trindade and Cane, p. 41.

84 *Ibid.*

85 Street, p. 25.

86 See e.g. the Australian case of *Butchard* v. *Barnett* [1980] 86 LSJS 47 at p. 53 where the judge found that a wrongful kick in the head amounted to 'assault'. See also the Canadian case of *Gambriell* v. *Caparelli* (1975) 54 DLR (3d) 661 at p. 664 where the judge opined that:

> [T]he distinction between assault and battery had been blurred, and that when we now speak of an assault, it may include battery.

87 See Trindade and Cane, p. 41; Winfield and Jolowicz, p. 54.

force.[88] In other words, assault is the threat of battery. In a great number of cases, conducts involving trespass to the person graduate from assault to battery. Nevertheless, it is possible to commit battery without committing assault.[89] But committing assault without battery is the more common of these phenomena.[90]

Having made these preliminary observations, the elements of assault will now be examined in the context of our discussions.

Elements of Assault

Direct threat

Usually threats which constitute assault involve combination of words and acts.[91] However, there need not be words for certain acts to be seen as assaults. Where a given conduct of the defendant gives the plaintiff good reason to fear that the defendant is going to make offensive contact with him, then there could be good case for assault notwithstanding that the defendant had been mute all the time.[92]

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88 See Trindade and Cane, *ibid.*

89 In *Gambriell* v. *Caparelli*, for instance, where the defendant swiftly and silently crept up to the plaintiff and struck him, it was held that since the latter neither saw nor heard the former come up to him, there was no immediate apprehension of violence and therefore the only action that could be maintained in the circumstances was battery, not assault: see *supra* (n. 86) p. 664.

90 See e.g. *Martin* v. *Shoppee* [1828] 3 C & P 373; *Read* v. *Coker* [1853] 13 CB 850; in *Stephens* v. *Myers* [1830] 4 C & P 350 it was resolved in a parish meeting by the majority of the attendants to eject the rowdy defendant who, as a result, threatened violence against the plaintiff chairman. Defendant's threatening advance toward the plaintiff was held to amount only to assault and not battery since the defendant had been prevented by the church warden from carrying out his threats of violence.

91 E.g. in *Stephens* v. *Myers, supra.*

92 See Trindade and Cane, p. 42.

Therefore, as has been observed by Trindade and Cane:

> [T]he only threats which can be classified as *direct threats* for the purposes of the tort of assault are first, those threats which by some *act alone* or by some act coupled by words place the plaintiff in *reasonable apprehension* of an imminent and direct bodily contact, and secondly those threats by words alone which lead the plaintiff reasonably to apprehend an imminent and direct contact to his person by the defendant or by some person or thing within the defendant's control.[93]

When considering the nature of threats for purposes of assault, it would seem accurate to assert that much more than the medium of conveyance of the threat, the overriding factor should be whether the threat did reasonably engender the apprehension of an imminent and direct bodily contact on the part of the plaintiff.[94] Where it is found that such apprehension was indeed aroused, then an assault would have been committed regardless of whether the threat was by deed, by deed and words, or by words alone.[95]

Reasonable apprehension

The authorities appear unanimously agreed[96] that the standard for determining the soundness of a case for assault is whether there was a *'reasonable apprehension* of imminent contact'. Nevertheless, the conception of the phrase remains an issue in any discussion of the subject. The notion immediately under review seems to be hinged upon the word: 'apprehension'. Therefore, the term must first be construed

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93 [All emphases, except the first, added]; *ibid.*, p. 43.

94 *Ibid.*, p. 44.

95 *Ibid.*, p. 44.

96 See Clerk and Lindsell, § 17-12; Street, p. 25; Linden, p. 43; Trindade and Cane, pp. 41, 45-46.

and thereafter put into its proper perspective for the concept to be understood.

By way of definition, the *Oxford English Dictionary* furnishes two meanings of *apprehension* which are relevant to this discussion: (a) '[t]he representation to oneself of what is still future; anticipation; *chiefly* of things adverse'; and (b) '[f]ear as to what may happen; dread'.[97] For purposes of the tort of assault, however, the complainant need not experience the emotion of fear or fright of possible contact - or of harm for that matter. For him to have grounds for a case of assault, all he needs have had is an anticipation that an unpleasant contact was possibly going to be made with him.[98] CHUBB, J.'s opinion in the criminal assault case of *Brady* v. *Schatzel* reflects the legal position accordingly:

> In my opinion, it is not material that the person assaulted should be put in fear ... if that were so, it would make an assault not dependant on the intention of the assailant, but upon the question whether the party assaulted was a courageous or timid person.[99]

Apart from CHUBB's reasoning, the immateriality of fear in the consideration of assault can be justified on the ground that the slightest offensive contact would constitute battery,[100] and since assault is reasonable apprehension of battery, it follows that *resentment*, rather than *fear*, should be the relevant emotion in the determination of assault cases.

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97 *The Oxford English Dictionary*, entries 11 and 12, respectively, of 'apprehension'.

98 Trindade and Cane, p. 45.

99 [1911] St. R. Qd. 206 at 208.

100 See pp. 17 *et seq., supra.*

However, not all apprehension of contact is assault. The perspectives required to make the apprehension assault-oriented are: that the apprehension must be *reasonable* in the circumstances, and that the contact anticipated must be *imminent*. Generally, the operative consideration here is whether the reasonable man in the circumstances of the plaintiff would be apprehensive of unpleasant contact with him. The answer will depend mostly on how much it could be said that the defendant at the time of the threat appeared to possess the immediate capability to make that contact[101] - without any knowledge of the plaintiff to the contrary.[102]

The foregoing position has spawned a line of authorities the consistency of some of which, though, appears questionable. Notably, it has been observed that where the intervention of the police, or other *protective measures*, ensure that the violence and abuse (as threatened) cannot be carried out by the defendant, there may be no case for assault.[103] On the other hand, there is said to be an assault in a case where the defendant makes a rush at the plaintiff so that a blow would almost immediately have reached him, but is stopped before he is near enough to deal the blow.[104] This seeming contradiction deserves an attempt at reconciliation here.

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101 See Trindade and Cane, p. 45.

102 See Clerk and Lindsell, § 17-12.

103 See Street, p. 26; for instance in the case of *Thomas* v. *NUM* [1985] 2 All ER 1 at p. 24, where working miners were bussed into their collieries with police guards, the threats yelled at them by strikers were *held* not to constitute assaults.

104 Clerk and Lindsell, § 17-12. This proposition is founded on *Stephens* v. *Myers*, *supra*; in *Martin* v. *Shoppee*, *supra*, the defendant pursued the plaintiff with an uplifted whip intending to strike him, it was *held* to be assault even though the plaintiff was able to escape before the defendant could strike him.

If it is understood that, for purposes of reasonable apprehension of imminent contact, there is a difference between a *standby* protective measure *known* to the plaintiff to have been undertaken as security against the nature of the contact in question, on the one hand, and a *spontaneous* effort to avoid or prevent such contact, on the other, the perception of contradiction as indicated above would lose much of its merit. In the former scenario, the standby security measure has a greater prospect of the efficacy to forestall any apprehension from forming on the mind, thereby subtracting from the reasonableness of any apprehension that persists in forming. But where the prevention or avoidance of imminent contact depends on a spontaneous reaction of the plaintiff[105] or a bystander[106] rather than on a known standby measure, the apprehension might either be prone to form before the said reaction becomes effective, or the efficacy of the reaction may not be trusted enough to soothe the apprehension since the reaction may not readily be seen as a measure designed and tested to the purpose of preventing the imminent contact in question. In other words, the crucial question becomes one of psychology. For instance, the knowledge that one is standing behind a thick sheet of bullet-proof glass is more likely than not to induce a feeling of security against the shotgun-wielding assailant threatening to shoot from the other side. Chances of reasonable apprehension in this case would be really slim, in view of the knowledge that one is well protected by the bullet-proof glass and is confident in its ability as a device which has been designed,

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105 As in *Martin* v. *Shoppee, supra.*

106 As in *Steppens* v. *Myers, supra.*

built and tested as a shield against bullets. This is quite unlike the emotion likely to be experienced when the one is standing unprotected within the range of a gun-wielding assailant as somebody suddenly jumps the assailant from nowhere and manages to wrest the gun from him. Here, there appears to be a greater potential for reasonable apprehension because it may not have been known that the assailant was going to be jumped in the first place; secondly, even as the rescuer struggled with the assailant, there may have been no way of knowing that the latter would be subdued; and thirdly, chances are that the apprehension of danger might even be exacerbated by such spontaneous intervention which could be botched for one reason or another, thus reducing the chances of even talking the assailant out of the threatened act.

From the foregoing discourse therefore, the relevance of knowledge of the plaintiff in the determination of reasonable apprehension of imminent contact cannot be overstated. The knowledge of the plaintiff, it must be emphasized, however, is not limited in importance to the capability or not of the defendant to execute his threat.[107] It also extends to the fact of making of the threat at the time it was made.[108] According to Trindade and Cane:

> As you cannot fear an imminent bodily contact unless you know about it, the knowledge of the plaintiff of the threat is essential for the tort of assault. Subsequently knowledge of the threat will not avail a plaintiff because then there would not be an apprehension of imminent contact.[109]

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107 In *Logdon* v. *DPP* [1976] Crim. LR 121 showing a toy pistol to the complainant in threatening circumstances and informing her that it was loaded was *held* to amount to assault since she did not know that it was unloaded, and, above all, a toy replica.

108 Trindade and Cane, p. 46.

109 *Ibid.*

Imminent contact

It has been said that for assault to be reasonably founded, the contact apprehended must be *imminent*. On a broader level, it could be said that this requirement of imminence is a factor in the determination of the reasonableness of the apprehension. But more specifically, the question that arises is: What constitutes imminence? In the opinion of TAYLOR, J., in the Australian case of *Barton* v. *Armstrong*:

> [T]he answer is[:] it depends on the circumstances. Some threats are not capable of arousing apprehension of violence in the mind of a reasonable person unless there is an immediate prospect of the threat being carried out. Others can create the apprehension even if it is made clear that the violence may occur in the future, at times unspecified and uncertain. Being able to immediately carry out the threat is but one way of creating the fear of apprehension, but not the only way. There are other ways, more subtle and perhaps more effective.[110]

This leaves the question of timing rather open-ended. However, there is no doubt that the more immediate the circumstances the stronger the case for assault.

Assaults through aviation

Having reviewed the principles, it seems appropriate now to mention a few more instances where assault had been seen to have been committed, which instances would be more specifically relevant to Earth-surface torts resulting from aviation. They include the riding after a plaintiff by a defendant who was brandishing a whip threateningly, whereupon the plaintiff was compelled to escape into his garden to avoid being struck;[111] the chase of a plaintiff by a defendant using

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110 [1969] 2 NSNR 451 at p. 455.

111 *Martin* v. *Shoppee, supra.*

a car;[112] the tailgating of another car, intentionally putting the other driver in fear of an imminent collision.[113]

In view of the foregoing exposition, the tort of assault can be committed in any of a variety of manner that instrumentalities of aviation [114] could be put to repugnant use. For example, flying after somebody as if to crash into him or make other offensive contact with him from the aircraft. However, some interesting questions could arise as to the reasonableness of the apprehension, where the circumstances of the particular case would seem gravely perilous to the tortfeasor. For instance, where the show pilot engages in an unannounced dangerous near-Earth-surface-manoeuvre which arouses apprehension in the mind of the plaintiff on the ground. The questions here are (a) considering that no reasonable person would risk his life and property in order to commit battery to another, could the plaintiff be allowed then to claim reasonable apprehension had the manoeuvre been successfully executed? The answer, it is submitted, will be in the affirmative particularly considering the occasional human tendency to do unusual things - including engaging in suicidal efforts - in order to injure others. The notorious World War II Japanese *kamikaze* pilots would clearly exemplify this tendency. Secondly, besides simply doing unusual things, there is the possibility that the potential tortfeasor could be a certifiable lunatic unable to appreciate his actions,

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112 *Vaughn* v. *Baxter* [1971] 488 P. 2d 1234.

113 Linden, p. 43.

114 Including craft and objects and persons carried on board.

with the result that he appears very capable of an attempt to crush his would-be victim(s) with even a Boeing 747-400/F. Thirdly, the aircraft may simply be out of control and therefore could hit the plaintiff on the ground, in fortuitous circumstances.

(b) In view of the second and third considerations mentioned above, one may then ask whether the apparent lack of intention to commit the tort of battery in the circumstances would not vitiate the formation of reasonable apprehension in the mind of the plaintiff. The answer in these cases should be that reasonable apprehension could be formed nevertheless, because, what matters here is that at the time of the incident the plaintiff be in apprehension that there was going to be contact with him by the defendant or something under the control of the defendant. The state of mind of the defendant, as it occurs to the plaintiff, should be immaterial at that point, insofar as the imminence of contact with him is seen to exist. The unavailing intention of the defendant, as the case may be, could be ascertained later to vitiate the trespass action.

(c) The last question that arises is: Where the plaintiff is apprehensive that the defendant would only cause contact to be made with him by some other object not under the control of the defendant, could there be a case for assault? Say, for example, the plaintiff is in a house[115] as he watches the defendant make a manoeuvre very close to the house, wherefor the plaintiff gets apprehensive that the defendant's aircraft will collide with the house which would come crashing on him (the plaintiff).

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115 Or some other enclosure.

Would there be assault here since the contact apprehended would not be a direct one by the defendant? Again, the answer would be in the affirmative since a battery will be held to have been committed by the defendant if he directly sets in motion a series of events which culminate in a contact with the plaintiff.[116] And since assault involves reasonable apprehension of battery, the configuration of the battery apprehended in the given situation would appear to be irrelevant.

II. TRESPASS TO PROPERTY

So far, our discussion has been centered around the protection of the common law of torts against direct and intentional aviation related interference with the integrity of persons on the ground. Focus will now be shifted to similar protection accorded interests of persons in property on the ground. This protection of proprietary interests against direct and intentional interference is addressed in law of torts under the broad heading of trespass to property.

As has been indicated earlier,[117] the tort of trespass to property is more specifically treated under the subheadings of trespass to land and trespass to chattels, discussion of the subject shall therefore be subordered accordingly.

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116 See p. 20, *supra*.

117 See p. 6, *supra*.

a. Trespass to Land

Trespass to land has, in the words of Professor Street, been defined as:

> Intentionally or negligently entering or remaining on, or directly causing any physical matter to come into contact with, land in the possession of another.[118]

The only addition to be made to this otherwise very apt definition is that such entry or stay is one lacking the authorization of the person in possession of the land.

The tort of trespass to land is the oldest tort at common law.[119] It is also known as trespass *quare clausum fregit*[120] because words of the writ from which the tort is derived traditionally ordered the defendant to show cause why he had 'broken and entered the close' of the plaintiff.[121] According to Blackstone:

> Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field.[122]

The action of trespass to land is the appropriate form of action for a plaintiff against a defendant who interferes directly and intentionally (or negligently[123]) with the plaintiff's exclusive possession of land either by entering on or by causing objects

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118 Street, p. 65.

119 Trindade and Cane, *op. cit.*, p. 65.

120 See Street, p. 65.

121 Trindade and Cane, p. 77.

122 Bl. Comm., vol. 3, p. 209, and see Clerk and Lindsell, § 23-01.

123 See Street's definition, above; see also discussions on negligence, (ch. 3), *infra*.

under his control to intrude upon the land in the plaintiff's possession.[124] The plaintiff in this instance need not establish any actual damage in order to succeed. In other words, trespass to land is actionable *per se,*[125] and the slightest interference is sufficient to found the action.[126]

(i) The subject matter of trespass to land

For purposes of the tort of trespass to land, it must be noted that 'land' is a term of art which includes not only the face of the Earth, but everything under it, or over it. This notion which is traceable to Blackstone[127] is founded on the maxim *cujus est solum ejus est usque ad coelum et ad inferos.*[128] In this regard, land incorporates everything permanently attached to it naturally[129] or artificially.[130]

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124 Trindade and Cane, pp. 77-78.

125 *Ibid.* However, establishment of actual damages will naturally affect in relative degrees the quantum of awards claimable.

126 As COLERIDGE, CJ., stated in *Ellis* v. *Loftus Iron Co.* [1874] LR10 CP10 at p. 12,

> If the defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.

127 Bl. Comm., vol. 2, pp. 16-19.

128 This maxim, said to have been coined by Accursius in Bologna in the 13th century, translates into 'whosoever is the owner of the earth surface is also the owner of the soil beneath as well as the heavens above'. See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] QB 479 at p. 482 (per GRIFFITHS, J.); *Corbett* v. *Hill* [1870] LR 9 Eq. 671; *Gutschenritter* v. *Ball* [1925] SCR 68 (Canada).

129 Such as trees, grass, minerals and other natural resources; see Trindade and Cane, p. 80.

130 Such as buildings, structures etc.; *ibid.*

(ii) The plaintiff's standing in trespass to land

Before an action in trespass to land can succeed, the plaintiff must establish any of the following exclusive interests in the land: exclusive possession of the land or exclusive rights to easements or rights in the nature of *profits à prendre.*[131] Although the latter rights refer to 'incorporeal hereditament,' they are, nevertheless, described as 'land' for purposes of trespass to land.[132]

It must be emphasized, however, that what entitles the plaintiff to sue is exclusive *possession* rather than ownership.[133] Therefore, in a land[134] lease situation, for instance, not only may the lessor landlord be denied standing to sue third parties in trespass for unlawful interferences[135] with the land, but, quite curiously, he could be sued, himself, by the lessee vested with exclusive possession, if the landlord happens to be the one doing the unlawful interfering. The only cause of action left for the landlord against third parties is an action on the case for damage to his reversionary interest, where any such third party causes a permanent damage to the

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131 *Profit à prendre* is an incorporeal hereditament which entails the right to enter another's land and take something off it; and such rights in certain circumstances - such as exclusive rights to fishery (see *Nicholls* v. *Ely Beet Sugar Factory* [1931] 2 Ch. 84), gaming (see *Peech* v. *Best* [1931] 1 KB 1), timber - will confer a standing in the holder to sue for trespass to land.

132 See Trindade and Cane, p. 80.

133 See the observation of HODGES, J., in *Rodrigues* v. *Ufton* [1894] 20 VLR 539 at pp. 543-4 to the effect that 'an action of trespass is an action for the disturbance of possession, and ... the persons who can maintain it are those whose possession is disturbed'.

134 'Land' is used here in the special sense indicated above; see p. 37, *supra.*

135 Such as unlawful entry, remaining, throwing or placing things on the land the subject of the lease.

leasehold, such as destroying trees, cratering the land,etc.[136]

With regard to entitlement to sue, it must be noted however, that sometimes one parcel of land is capable of accommodating several potential plaintiffs, based on their holding of various types of exclusive rights arising from the same land. This situation is perhaps best explained by the *layer cake* theory which goes thus:

> [L]and is very much like a layer cake with each layer representing different proprietary interests, and that though the owner is usually in actual possession of all the layers (airspace, buildings, surface soil, *profits à prendre*, sub-soil, etc.), he is able to grant to others the right to exclusive possession of any of those layers. This right to exclusive possession is a sufficient interest to bring an action for trespass to land.[137]

In this connexion, the holder of one type of interest in the land may sue the holder of another type of interest in the same land with regard to any interference of the one holder in the sphere of interest of the other.[138]

The exclusive possession in question must not only be held by way of entitlement, it must further be actually or constructively held by the plaintiff, in order for an action in trespass to land to succeed.[139]

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136 See Trindade and Cane, p. 81.

137 *Ibid.*

138 See *ibid.*; see also *Mason* v. *Clarke* [1955] AC 778 where the plaintiff, a holder of the right of *profit à prendre* in the nature of an exclusive right to enter upon a certain farm land and hunt rabbits, was able to bring an action for trespass to land against the defendant for interfering with and damaging the plaintiff's traps, notwithstanding that the defendant was the holder of an exclusive tenancy of the farm.

139 For detailed discussion on this topic, see Trindade and Cane, p. 81 *et seq.;* Clerk and Lindsell, §§ 23-08 *et seq.*

(iii) The offensive action

The act of the defendant must be seen as both direct and intentional otherwise the plaintiff will not succeed in an action for trespass to land.

Directness

As in trespass to the person, the act complained of in trespass to land must be a - direct, not consequential - act of the defendant.[140] The difficulty involved sometimes in distinguishing between what is 'direct' and what is 'consequential' is illustrated in the comparative decisions of *Southport Corporation* v. *Esso Petroleum Co. Ltd*[141] and *Gregory* v. *Piper*.[142] In the former case, DENNING, L.J., (as he then was), held in the Court of Appeal[143] that discharge of oil from ship, which discharge was then carried onto the plaintiff's foreshore by tide, did not amount to trespass by the defendant because the interference with the plaintiff's land was consequential rather than a direct act of the defendant. A problem of reconciliation thus arises in view of the earlier case of *Gregory* v. *Piper* where it was held that a trespass had occurred where rubbish which was placed near the plaintiff's land, upon drying, rolled onto the land.

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140 See Street, p. 65; see also *Southport Corporation* v. *Esso Petroleum Co. Ltd.* [1954] 2 QB 182 at p. 195.

141 *Ibid.*

142 [1829] 9 B. & C. 591.

143 Supported by Lord RADCLIFFE and Lord TUCKER [1956] AC 242 at p. 244.

Attempts have been made to reconcile the principles underlying both cases,[144] but the more persuasive explanation appears to be that found in the opinion of MORRIS, L.J.,[145] to the effect that if a defendant deliberately employs the force of natural elements[146] to cause a thing to go onto the plaintiff's land, the act would be sufficiently direct to constitute trespass. The principle here is comparable to the principle espoused by NARES, J., in *Scott* v. *Sheppard*[147] - the *locus classicus* on the element of directness in trespass to the person.

In the Canadian case of *Bridges Brothers Ltd* v. *Forest Protection Ltd*[148], the defendant had used its aircraft in aerial spraying of forests with insecticide for the purpose of protecting the forests (which were in the immediate vicinity of the plaintiff's blueberry field) from spruce budworm. As a result, the number of pollinating bees for the plaintiff's fields were reduced. In an action for trespass, the Court held the defendant not liable because the basis of the plaintiff's case was the effect of the spraying on pollination. Such effect, the Court held, was merely an indirect consequence of the defendant's spraying. This seems a rather curious case, considering that the Court was willing to award judgment to the plaintiff on a nuisance claim based on the escape of the insecticide into the plantiff's field. One

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144 See Trindade and Cane, p. 86.

145 *Gregory* v. *Piper, supra*, p. 204.

146 Such as wind, tide, etc.

147 *Supra*, p. 20. Recall NARES, J.'s hypothesis that he who sets a mad ox loose is answerable in trespass for whatever contact the ox might make with persons.

148 (1976) 72 DLR (3d) 335.

would have thought that notwithstanding the effect of the spraying on pollination, that to cause an escape of a noxious substance into the land of another person would entail liability in trespass.

Intention

Again, as in the tort of trespass to the person, for the plaintiff's action to succeed, any alleged act of trespass to land must be seen as an intentional[149] act of the defendant. Intention here entails a variety of circumstances, such as deliberation or wilfulness of the defendant in engaging in the interference,[150] or substantial certainty that the wrongful interference in question would follow from the defendant's act.[151] Thus, where a defendant, as a result of aviation use, wilfully causes an object to enter the land of the plaintiff (either by way of unauthorized deliberate landing of a relevant instrumentality, or by a deliberate dropping of an object from such an instrumentality) such defendant no doubt would be said to have intended the resultant trespass to land.

In the same vein, if the defendant had, say, planted a bomb in an aircraft timed to go off at such a time that the said aircraft was flying over land, the defendant would be held liable for intentional trespass to the plaintiff's land in the event of the aircraft or the debris of its explosion falling onto the plaintiff's land.

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149 It is also possible for trespass to be committed negligently but we shall deal with that much later.

150 Trindade and Cane, p. 87.

151 *Ibid.* See also Shawcross and Beaumont, *Air Law* (4th edn, Re-issue, 1989) issue 36, VII/131B.

This is because the defendant must have realized that an aircraft which is blown up while in flight would come crashing to the surface; and if the aircraft crashed over land located on its usual route, the defendant should be imputed with the knowledge that by virtue of the time he gave the bomb to go off he ought to have known that the explosion will occur over land and not water. And since the physical law of gravity requires the aircraft to crash, it could be said that there was substantial certainty that the interference with the plaintiff's land would follow from the defendant's act,[152] which in this case is the act of sabotage. In these circumstances, barring collusion and the possible negligence of the operator with respect to, *inter alia*, access to the aircraft by the saboteur, the operator would generally not be liable at common law for trespass since he would have been lacking in the intention to commit the trespass. One way or the other, the above hypothesis does illustrate an idea of intention to commit trespass to land, either as that of an indirect (i.e., constructive or transfered) intention,[153] or as the state of mind necessary to ground negligent trespass[154] to land.

TRESPASS ABOVE THE SURFACE

It has been seen that, at common law, *cujus est solum ejus est usque ad coelum et ad inferos* [he who owns or possesses the surface of the land also owns or possesses

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152 See p. 9, *supra.*

153 See pp. 11 *et seq., supra.*

154 See ch. 3, *infra.*

the airspace above and the earth beneath].[155] Thus, it is possible to maintain an action in trespass for intrusions into such airspace. This does not necessarily mean, however, that common law would find trespass in all cases of entry into the airspace above the plaintiff's land: not especially where such entry is as a result of aviation.[156] Much depends on the circumstances of the intrusion, bearing in mind the need to strike a balance between the rights of the general public to take advantage of developments in science and technology on the one hand, and the right of the exclusive owner or possessor of the subjacent land to enjoy his property *ad coelum*. Mindful of this need for a balance, the Court held in *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd*[157] that the defendant was not liable in trespass when its aircraft flew several hundreds of feet above the plaintiff's land to take aerial photographs of his house. GRIFFITHS, J., in rejecting the notion that a landowner's rights in the airspace above his property extended to an unlimited height, held that the rights of a landowner in the airspace above his land is restricted to such height as is necessary for the ordinary use and enjoyment of his land and the structures thereon, and that beyond such height the landowner has no greater rights in the

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155 See p. 37, *supra*.

156 It should perhaps be noted that most of the reported cases of note where the courts found trespass as per intrusion into airspace did not involve aviation uses E.g., *Wandsworth District Board of Works* v. *United Telephone Co. Ltd.* [1884] 13 QBD 904 (telephone line), *Gifford* v. *Dent* [1926] WN 336 (intruding sign), *Kelsen* v. *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.* [1957] 2 QB 334 (intruding sign), *Woollerton and Wilson Ltd.* v. *Richard Costain Ltd.* [1970] 1 All ER 483 (intruding jib of crane).

157 [1978] QB 479.

airspace above his land than any other member of the public.[158] The same reasoning has been applied in Canada: for it was held in *Lacroix* v. *R*[159] that air and space are not susceptible of ownership, because they fall into the category of *res omnium communis*. The owner of land has limited right in the airspace over his property - i.e., to so much of it as he can possess or occupy for the use and enjoyment of his land.

Having in a sense reduced the question of the rights of the landowner over the superjacent airspace to the issue of altitude, one would then ask: What height is necessary for the ordinary use and enjoyment of plaintiff's land and structures thereon? There is, as yet, no categorical answer to this question in terms of linear measurement. The Courts appear generally reluctant to proffer such an answer.[160] However, a few decided cases might illustrate how the issue has been dealt with in the past. In *Wollerton and Wilson Ltd* v. *Richard Costain Ltd*,[161] for example, the defendant was held liable in trespass when the jib of its tower crane swung over the plaintiff's premises and into the superjacent airspace at a height of 15 metres[162] above roof level. Also, trespass was found in the Australian case of *Graham* v. *K.D. Morris*

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158 See *ibid.*, p. 141; *Staden* v. *Tarjanyi* [1980] 78 LQR 614 at p. 621.

159 [1954] Ex CR 69; [1954] 4 DLR 470. See also *Didow* v. *Alberta Power Ltd.* [1988] 5 WWR 606; *Harcourt* v. *Minister of Transport* [1973] FC 1181.

160 See Shawcross and Beaumont, V/127.

161 *Supra.*

162 I.e., about 50 feet.

& Sons Pty Ltd,[163] where the jib of the defendant's crane swung over and was suspended 19 metres[164] above the roof of the plaintiff's house.

With regard to aviation, there tends to be a general agreement, especially among American courts, that the flight of aircraft below the 'navigable airspace' could amount to trespass into the superjacent airspace of somebody's land.[165] The problem with this formulation, however, lies mainly with the definition of 'navigable airspace'.[166] In this regard, the US Court of Claims, influenced, no doubt, by many a set of air navigation regulations, declared that the 'general rule [is] 500 feet above ground level in uncongested areas'.[167]

Noting the above difficulty, therefore, it is submitted that a major factor in the determination of what height the operator of the flight instrumentality in question could manoeuvre without committing trespass at common law is the existence of rules and regulations of operation and/or generally accepted customs and usages of air navigation.

Another interesting issue with regard to trespass to property is whether the plaintiff's right to claim against the aircraft operator could be adversely affected by the fact that the status of his property was shrouded in illegality as at the time of the

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163 [1974] Qd.R.1.

164 I.e., about 62 feet.

165 Shawcross and Beaumont, V/127.

166 *Ibid.*

167 *Powell* v. *US* 17 Avi.Cas. 17, 988 (US Ct. of Claims, 1983).

alleged trespass or damage. It was held in the Canadian case of *MacMillan* v. *Stephens and Mathias*[168] that in determining the liability of an aircraft operator for damages caused to property on the ground or water, the Court must consider whether the owner of the property owns the ground or has the right to put his property on it, and whether the aircraft has a right to be over the particular ground or water. Hence, where a seaplane damaged a power-line suspended above the water of a lake between a mainland and an island, the power-line, being a 'work' within the Navigable Water Protection Act,[169] not having a permit from the Department of Transport for its erection, the owner was held to be at fault in erecting it, and therefore could not claim damages for trespass.

It must be noted, however, that this rule contemplates more than the question of legality of the plaintiff's position: it contemplates, in addition, the legality of the aircraft's position. In other words, the rule is bifurcated: for the aircraft owner to avail himself of this defence of circumstantial illegality of the plaintiff's interest in the property the object of trespass, such aircraft owner must show that his aircraft's presence in the place of damage was not in breach of any law.

The question then arises: What if both parties are tainted with the illegality contemplated in this principle? For example, where the plaintiff is erecting a highrise building in an area in violation of a valid zoning law which forbids such buildings, can he maintain an action against an operator whose aircraft is flown, to

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168 [1952] 4 DLR 804; [1952] OWN 697.

169 RSC 1927.

the plaintiff's damage, in the area below the minimum height prescribed for such area? The issue might boil down to a contest between the doctrine of contributory negligence[170] and the doctrine represented in the equitable maxim: 'he who comes into equity must come with clean hands.'[171] In the latter case, it may not be possible to apportion responsibility with the view to allowing the plaintiff some marginal claim,[172] whereas in the former case there is such a possibility especially under some relevant statutes.[173]

It seems that contributory negligence rather than the 'clean hands' doctrine of Equity will govern the situation envisaged here, considering that the equitable doctrine seems to be more relevant in the context of transactions between parties wherein the record of their dealings in the past in relation to the given transaction will be examined in order to determine whether or not they come with unclean hands. This seems to take the doctrine out of the context of tort actions where the parties, prior to the damnifying incident, would have been jural strangers to one another.

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170 See Clerk and Lindsell, §§ 1-139 *et seq.* for details of contributory negligence.

171 See Snell, *Principles of Equity* (28th edn, 1982) p. 32 *et seq.* for details of this doctrine.

172 *Ibid.*, p. 33.

173 E.g., the UK Law Reform (Contributory Negligence) Act 1945.

b. Trespass to Goods

Before discussing the law of trespass to goods and its significance in aviation uses, it is perhaps best to examine briefly what is meant by 'goods'. At common law, the primary meaning of the term includes movable property, whether animate or inanimate.[174] That this definition is of general acceptation is underscored in its incorporation in a variety of statutory provisions. For example, the Port of London (Consolidation) Act 1920 defines 'goods' as including 'live stock, minerals and merchandise of all descriptions'.[175]

At common law, an action in trespass may be brought for a direct interference with the plaintiff's possession of goods or chattels. The issues in trespass to chattels, may broadly be viewed from (a) the nature of the plaintiff's interest, and (b) the nature of the defendant's act.

(i) The plaintiff's interest

As in the case of trespass to land, the interest which the law seeks to protect here is the plaintiff's possession. Thus, the plaintiff must be shown to be in actual possession of the goods at the time of the interference, if he is to succeed in his action in trespass to such goods.[176] The exceptions to this rule include: a trustee's action against third party interferences with property in actual possession of the

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174 See *Evans* v. *B.C. Electric R. Co.* [1914] 7 WWR 121.

175 Section 2.

176 This is unlike in an action for conversion where a right to possession (even without actual possession) is sufficient to maintain the action: see Clerk and Lindsell, §§ 22-01 *et seq.* for details of principles of trespass to goods.

beneficiary, the action of an executor or administrator against interferences with estate chattels prior to grant of probate or letters of administration, action of franchise owner against persons interfering with object of the franchise (e.g., wreck, treasure trove, etc.) before he could seize it, and, the action of a bailor to sue third parties who interfere with objects of bailment determinable at will.[177]

(ii) The defendant's act

The interference must be of a *direct* nature. Despite the technical label 'trespass *de bonis asportatis*', asportation[178] is not essential.[179] Whereas a mere touch is enough to maintain the action where such touch has resulted in damage,[180] it is not clear, however, that trespass to chattels is as actionable *per se* as is trespass to land: in other words, whether mere touching without damaging will sustain an action against the defendant. There appears to be a division of opinion among academic and judicial authorities on this point. For instance, it was stated in *Everitt* v. *Martin*[181] that a mere interference without asportation or damage is not actionable even though the interference is intentional. But the earlier *Demers* v. *Desrorier*[182] had

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177 *Ibid.*

178 [Of goods carried away].

179 Dias and Markesinis, *Tort Law* (1984) p. 208.

180 See the dictum of ALDERSON, B., in *Fouldes* v. *Willoughby* [1841] 8 M & W 540 at p. 549 that 'Scratching the panel of a carriage would be a trespass.'

181 [1953] NZLR 298, at p. 302-303.

182 [1929] 3 DLR 401.

decided the contrary. Modern text writers seem to favour actionability *per se* especially in consideration for precious chattels such as *objets d'art*.[183] Nevertheless, with regard to negligent or inadvertent contact, it seems more clear that Courts tend to require proof of special damage.[184]

In addition to the requirement of *directness* of the interference, there must be a mental attitude on the part of the defendant in relation to the interference. He must either have intended it or at least have been negligent about it.[185]

In the United Kingdom, the law on trespass to goods is currently covered, to a large extent, in the Torts (Interference with Goods) Act 1977.[186]

Trespass to goods in aviation uses

Trespass to goods can, therefore, be committed against the interests of a person on the surface of the Earth by use of an aircraft such as where a crashing aircraft causes damage to the earth-bound goods of the plaintiff or where an object dropped - including a projectile fired - from an aircraft touches and/or damages such goods. Here, so long as the elements of directness and intention or negligence are

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183 See Dias and Markesinis, p. 208; Street, p. 34; Winfield and Jolowicz, p. 477.

184 See *Letang* v. *Cooper, supra*, especially at pp. 244-245; Dias and Markesinis, p. 208.

185 See *National Coal Board* v. *J.E. Evans & Co. (Cardiff)* [1951] 2 KB 861 where defendants were held not liable in trespass for accidentally damaging an underground cable which the plaintiff's predecessors had laid in the ground without notification to the land owners.

186 See Clerk and Lindsell, §§ 22-01, 22-09 *et seq.* for discussion of the Act in relation to trespass to goods

fulfilled,[187] the plaintiff can always claim at common law. But with regard to plane crashes, especially those not involving sabotage, the plaintiff might find it difficult to establish his claim, since the mental element will almost always be absent except perhaps where the crash itself was due to negligence of the defendant. As will be seen later, efforts have been made in various Commonwealth jurisdictions to regulate this topic by statute, nevertheless, the foregoing common law principles remain good for those cases where the relevant statute law is inapplicable for one reason or another.[188]

III. ACTION ON THE CASE FOR DAMAGES

Considering that the tort of trespass is reserved for interferences which are both *direct* and *intentional*[189], interferences which are the consequential or indirect results of a tortfeasor's act do not come within the purview of trespass even though the act may have been done intentionally.[190] Nevertheless, the aggrieved party is not totally left without remedy: he may bring an action on the case against the alleged tortfeasor for damages for personal injury[191] or interference with property.[192]

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187 See the discussion on mental element pp. 7 *et seq., supra.*

188 See discussion in ch. 6, *infra*; see also McNair, *The Law of the Air* (3rd edn, 1964) pp. 99 *et seq.*

189 See p. 7.

190 See Trindade and Cane, p. 57.

191 This ranges from physical injury to nervous shock and mental distress; see Trindade and Cane, pp. 57-76.

a. In relation to Personal Injury

A notable instance of judicial recognition of this principle, in relation to personal injury, is the case of *Bird* v. *Holbrook*.[193] The defendant's tulips had been stolen from his garden, as a result of which he set a spring gun in the garden with the aid of another man. The spring gun was set to go off, without warning, at any person who intruded into the summer-house or unto the tulip beds all of which were in the said garden. A neighbour's peahen subsequently escaped into the garden and at the request of the neighbour's maid servant, the plaintiff climbed over the walled fence into the garden to retrieve the peahen, and in the process he unwittingly tripped off the spring gun which discharged a large swan shot into him causing him serious physical injury. In an action for damages, the Court of Common Pleas found for the plaintiff. In his judgement, BEST, C.J., was clearly of the opinion that 'he who sets spring guns, without notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer'.[194] However, his Lordship, seemed to have emphasized that the fact of the defendant placing the spring gun for the express purpose of injuring somebody, apart from the fact of his act being intentional, was of major importance in the decision to hold him liable. This seems consistent with the legal position on the point, for in *Blyth* v. *Topham*[195]

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192 This includes damages for interference with land (see *ibid.*, p. 99) to damages for interference with goods or chattels (see *ibid.*, p. 139).

193 [1828] 4 Bing. 628.

194 *Ibid.*, at p. 641.

195 [1607] 1 Rol. Abr. 88 Cro. Jac. 158.

(which was also referred to in *Bird* v. *Holbrook*) the defendant was held not liable on the case for digging a pit into which the plaintiff's mare had fallen. The defendant had dug the pit for the necessary cultivation and enjoyment of his property, and not for the purpose of interfering with the interests of others.

Underscored above is one of the major distinctions between action for trespass to the person and action on the case for personal injury, as regards the element of intention. While both are actions for intentional acts, the former requires no more than an intention to do the act which caused the harm, whereas the latter requires not only the intention to do the act, but also an intention to cause the harm, as well as that the plaintiff must in fact have suffered that harm.[196]

The proposition of this principle of tort law in relation to aviation, therefore, would be that whosoever manipulates circumstances intentionally, in order to do an indirect harm to persons on the surface by use of an aviation instrumentality, would be liable on the case for damages suffered by his victims. For example, where a person at the air traffic controls intentionally guides an aircraft, relying on him for safe landing in difficult conditions, into the airport arrival lounge, such person would to be held liable for resultant injuries caused persons waiting in that lounge if his action was motivated by a desire to injure people in the lounge at the time, regardless of the fact that such defendant was not at the controls of the aircraft that more directly occasioned the injuries.[197].

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196 For a more comprehensive exposition of the law in this area see Trindade and Cane, pp. 57 *et seq.*

197 See discussion of the liability of the air traffic controller (ch. 3), *infra.*

Another virtue of action on the case in relation to aviation torts is that it could be used as an alternative head of claims against a person who sabotages an aircraft, setting it up to explode, say, over a densely populated area with the intention that people on the ground be injured as a result. In such instances, an action on the case could pre-empt any argument of lack of directness in relation to a trespass action.

b. In relation to Property Damage

As with all legal discussions on property, the action could be in relation to land or in relation to goods.

(i) Land

In *Beaudesert Shire Council* v. *Smith,*[198] the Australian High Court held that quite apart from trespass, negligence or nuisance, a person who suffers a harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other in an action on the case.[199] That case involved the appellant Council removing a large quantity of gravel from a river in the vicinity of the respondent's farm and destroying, thereby, the natural water hole from which the respondent had a license to draw water for the irrigation of his farm. The High Court awarded the respondent damages for the loss of crop

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198 [1966] 120 CLR 145.

199 *Ibid.*, 156.

he had suffered in the process. This decision, however, has been the subject of a great deal of controversy in both the academic[200] and judicial[201] circles, with the result that the principle of the case may have been so emasculated that it may not be of any real impact especially in the area that the most attempts have been made to put it to use: protection of business interests.[202] Among the criticisms[203] of the case is that its elements are obscure and possibly too wide to be acceptable, considering especially that it contemplates award of damages to the plaintiff if his injury is seen as an 'inevitable consequence of the unlawful, intentional and positive acts' of the defendant. This seems inconsistent with the settled principle of action on the case - at least with regard to personal injury[204] - which requires that the defendant be shown to have intended the injury caused the plaintiff.[205]

Notwithstanding the predicaments of the *Beaudesert* case, it has been rightly submitted that where there is intentional interference with land in such a manner as may not be remedied by any of the nominate tort actions,[206] action on the case might

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200 The leading academic criticism of the decision is contained in Dworkin, G. and A. Harari, 'The *Beaudesert* Decision - Raising the Ghost of an Action upon the Case' (1967) 40 *ALJ* 296 and 347: whereas a lead defence of it can be seen in Sadler, R.J., 'Whither *Beaudesert Shire Council* v. *Smith?*' (1984) 58 *ALJ* 38.

201 The principle of *Beaudesert* was considered and expressly rejected by the House of Lords in *Lonrho* v. *Shell (No. 2)* [1982] AC 173.

202 Sadler, *loc. cit.*, p. 48.

203 See e.g., *ibid.*, p. 38 for detailed consideration of the criticisms.

204 By the analogy of which the High Court decided the case: see [1966] 120 CLR 145 at p. 152.

205 See p. 54, *supra.*

206 Such as trespass, nuisance, negligence, etc.

be available as a remedy.[207] And the *Beaudesert* case in this connexion - with all its imperfections - serves the purpose of at least retaining[208] the common law notion of action on the case in respect of unlawful intentional interference with land as an available form of action in contemporary law of torts.

In relation to aviation related damages on the ground, action on the case will be a valuable legal tool for persons who have been injured by use of an aviation instrumentality in such a manner as might not entail the application of other tort remedies. For example, V, whose farm has been razed by bush-fire started by an exploding aircraft intentionally sabotaged by the defendant, could experience problems with *directness* which he needs to establish between the defendant's action and his loss in order to succeed in an action in trespass. He can however bring an action on the case for the damage if he can prove either that his loss was intended by the defendant or was the inevitable consequence[209] of the defendant's unlawful and intentional conduct.

(ii) Goods

An action on the case would enure against a defendant for intentional and indirect, but permanent, damage to the plaintiff's goods.[210] Unlike in cases of

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207 See Trindade and Cane, p. 100.

208 Contrary to the suggestion of novelty, the *Beaudesert* decision entails an 'application of time-honoured judicial criteria': see Sadler, *op. cit.*, p. 40.

209 Based on the *Beaudesert* case, *supra.*

210 Trindade and Cane, *op. cit.*, p. 139.

trespass to goods, the plaintiff need not show that he had actual or constructive possession, or immediate possession, or immediate right to possession of the goods.[211] Since the damage must be permanent, it suffices for the plaintiff to show that his reversionary right in the goods has been adversely interfered with.[212] It appears that the principal use of this mode of action is to escape the *actual possession* handicap imposed by law for purposes of trespass to goods, besides the need to redress victims of indirect intentional injurious actions of others. Obviously, its value in relation to aviation related incidents cannot be overemphasized as a result.

DEFENCES TO AVIATION-DERIVED TRESPASS TO EARTH-BOUND INTERESTS

The following discussion will review circumstances in which the Court could refuse judgment to the plaintiff in spite of a defendant's conduct which would normally qualify as trespass to either person or property.[213] In the discussion, only defences relevant to aviation related trespass to earth-bound interests will be reviewed, and only to the extent that they are so relevant.

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211 *Ibid.*

212 *Ibid.*, see also *Penfolds Wines Pty Ltd.* v. *Elliot* [1946] 74 CLR 204 at p. 230.

213 Land or goods.

(i) Inevitable Accident

This defence vitiates the mental element which is a prerequisite of trespass. All that the defence entails is that even though the complained act of wrongful interference was done against the plaintiff, there was no intention, no negligence, and no carelessness on the part of the defendant.[214] In *National Coal Board* v. *J.E. Evans & Co (Cardiff) Ltd*,[215] COHEN, L.J., succinctly stated the position thus: 'where the defendant was entirely without fault, he would have a good defence in an action in trespass'.[216]

One notable instance where this defence would apply in the context of aviation related trespass to earth-bound interests is the 'ice-thaw incidents.' These involve the phenomenon whereby, during a flight through high-altitudes of extreme cold temperature, an aircraft gathers ice on its panels and upon re-entry (usually during landing) into the lower regions of the atmosphere with warmer temperature, the thawing ice falls off the aircraft, sometimes possibly injuring people and/or damaging property on the ground. Considering that this process entirely entails no fault of the operator,[217] it would be a perfect case of inevitable accident.[218]

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214 See Trindade and Cane, p. 226.

215 *Supra.*

216 *Ibid.*, at p. 874.

217 See the observation of COHEN, L.J., above.

218 Or act of God.

It appears, though, that for the defendant to benefit from the defence of inevitable accident, he 'must plead inevitable accident.'[219] However, whereas this defence is generally available in Canada, its availability in the United Kingdom and most Commonwealth jurisdictions has been greatly hampered by force of legislation.[220]

(ii) Act of God

This defence is essentially based on the same principles as the defence of inevitable accident, one of the few differences being that act of God refers to the operation of natural forces.[221] Thus, where, for example, the solo-pilot of an aircraft in flight collapses at the controls as a result of a heart attack, following which the aircraft crashes into somebody's property, the defence of act of God would operate to absolve him - if he survived the experience - from any liability in trespass.[222] Similarly, the defence will generally be available in incidents resulting from other vagaries of nature such as lightening, tornadoes, etc., where such events were unforeseeable.

As with the defence of inevitable accident, the act of God defence has been almost rendered inapplicable in the United Kingdom and most of the

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219 See *Southport Corporation* v. *Esso Petroleum Co. Ltd.* [1953] WLR 773 at p. 781 *per* DEVLIN, J.

220 See generally discussions in ch. 6, *infra.*

221 See Dias and Markesinis, p. 381.

222 See *Ryan* v. *Young* [1934] 1 All ER 522.

Commonwealth except Canada.[223]

(iii) Necessity

The defence of necessity absolves from tortious liability a defendant who intentionally interferes with a given person or item of property in a bid to avert an imminent harm from the person or property of another. It must be emphasized that the imminent harm or damage sought to be averted need not be as a result of the fault of the party whose property or person has been interfered with.[224]

Elements of this defence include, first, that it must have been reasonably *necessary* to engage in the interference in view of threat of a grave danger to the person or property sought to be protected:[225] mere *convenience* would not do.[226] Secondly, there must have been an urgent situation of imminent peril resulting from the said threat.[227] Thirdly, there must have been *actual* existence of such peril beyond the mere belief of the defendant.[228] And, fourthly, that the means taken to avert the threatened harm must have been reasonable in the circumstances;[229] in other words, the good sought to be done must not pale in comparison with the harm

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223 See discussion in ch. 6, *infra.*

224 See Fleming, *The Law of Torts* (7th edn, 1987) p. 86; Linden, p. 75.

225 See *Kirk* v. *Gregory* [1876] 1 Ex.D.55.

226 See *Murray* v. *McMurchy* [1949] 2 DLR 442 at p. 445.

227 See *Southwark London Borough Council* v. *Williams* [1971] 1 Ch. 734 at p. 746.

228 See *Cope* v. *Sharpe (No. 2)* [1912] 1 KB 496 at p. 508.

229 Fleming, p. 87.

likely to ensue from the interference.[230]

In relation to aviation uses, it has been specifically decided in *Pentz v. R*[231] that where an aircraft is forced to land as a result of engine trouble, in order to avoid a crash, it is justified in landing wherever such landing can be safely made. But, it would appear that the assessment of whether the landing can be safely made will not be done from hindsight, for it has been held that it is not necessary for a defendant to establish that the means adopted to preserve life or property in an urgent situation of imminent peril did actually succeed in so doing.[232] Necessity will not avail the defendant, however, if the emergency was occasioned through his own fault or negligence.[233]

Whereas the defence of necessity seems unquestionably appropriate for a defendant aircraft operator in the event of trespass to land, its usefulness seems extremely doubtful in cases of trespass to the person which especially results in personal injury.[234] Except, perhaps, in the unlikely event that the injured person may have been attempting to stop the aircraft from landing, by standing in its way, whereof the aircraft pilot as a last resort would have committed personal trespass on the plaintiff, the more prevalent instances of trespass to the person probably would

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230 See *Sherrin* v. *Haggerty* [1953] OWN 962 at p. 964.

231 [1931] Ex. CR 172.

232 See *Cope* v. *Shorpe, supra*, p. 502.

233 *Bell Canada* v. *The Ship Mar-Tirenno* (1974) 52 DLR (3d) 702.

234 Authorities are not clear as to what extent necessity may be pleaded to escape liability for personal injury or loss of life: see Fleming, p. 88; Linden, p. 77.

not yield to the defence of necessity.

(iv) Lawful Authority

This involves situations where the law specifically allows the defendant to do that which otherwise would have been wrongful. The lawful authority could be either derived from the common law or from statute.

(a) Common law authority. A very notable instance of where common law allows an aircraft to commit what would traditionally have been trespass to land is implicit in the principle enunciated in *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.*[235] The principle is that in spite of the ancient *ad coelum* doctrine of ownership of land, a realty owner can only bring actions in trespass against aircraft operators for interfering with that portion of the airspace that is reasonable for the full enjoyment of his property.

The matter of crime prevention and apprehension of crime suspects and criminals is another instance that involves the defence of lawful authority. Generally, at common law, every member[236] of society has the right to stop and detain another person who is either committing an offence or reasonably believed to be doing so.[237] Occasionally, this would involve trespass to the person; nevertheless, the authority

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235 *Supra*; see also *Lacroix* v. *R., supra.*

236 Private persons or police officers.

237 This general rule has been reaffirmed by the House of Lords in *Albert* v. *Lavin* [1982] AC 546 at pp. 564-5; *Eccles* v. *Bourque* (1974) 41 DLR (3d) 392 affirmed by the Supreme Court of Canada in 27 CRNS 325.

given by the law for such detention absolves the defendant from liability.[238] Collaterally to this power of arrest and/or detention, the common law equally authorizes a police officer or citizen to enter into premises and, if necessary, forcibly.[239]

Therefore, an aircraft operator who, for instance, would have had to fly his helicopter over and into the property of another person in order to prevent a crime or apprehend a crime suspect can generally rely on this defence.

(b) Statutory authority.

In most of the Commonwealth jurisdictions there exist pieces of legislation which specifically forbid certain actions to be brought against aircraft owners/operators. Those legislation are reviewed elsewhere.[240]

A further instance of where a defendant would rely on a statutory authority to commit trespass to land, is where a local authority or statutory body is authorized by legislation to enter upon private land in order to accomplish an act.[241] Thus where a municipal authority is empowered by a statutory instrument to spray chemicals in the area in order to prevent the spread of a human, livestock, or crop disease, the Authority or its servants acting within said powers would appear to be

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238 See generally, Linden, pp. 78 *et seq.*; Trindade and Cane, pp. 234 *et seq.*

239 See *Handcock* v. *Baker* [1800] 2 Bos. & 260; for more detailed discussion see Fleming, p. 92 *et seq.*, Winfield and Jolowicz, p. 369, *et seq.*

240 See ch. 6, *infra.*

241 See *Egg Marketing Board (N.S.W.)* v. *Cassa.* [1978] NSWLR 90; see also *O'Brien* v. *Shire of Rosedale* [1969] VR 645 and *Amstad* v. *Brisbane City Council (No. 1)* [1968] Qd.R.334.

generally immune to (a) lawsuits resulting from flights reasonably embarked upon for the purpose, as well as (b) lawsuits arising by virtue of the spray-substance touching the property and person of an aggrieved party.

Finally, the power to preserve the peace is another instance of where statutory authority may be relied upon to avoid liability for trespass. Attempts have been made in various Commonwealth jurisdictions to codify the instances where persons discharging the duty of peace preservation would be absolved from liability.[242] Whether or not this type of legislation is in furtherance or derogation of the common law principles examined earlier will in each case depend on a close examination of a given statute.

In Canada, the most notable legislation on the subject is the Criminal Code of Canada.[243] But with regard to judicial efforts in incorporating the various police-immunity provisions of the Code into tort law, it has been observed that the applicability of those provisions in the area of tort law is not very clear since the power to legislate in respect of private tort rights is generally believed to belong to the provinces, not the Dominion Parliament which enacted the Criminal Code.[244] However, as will be seen later,[245] given that all matters of aviation are within the exclusive legislative competence of the Parliament, it would appear that extending

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242 See Trindade and Cane, pp. 237 for a fuller treatment of the legislation in Australian jurisdictions.

243 See Linden, pp. 79 *et seq.* for a more detailed discussion.

244 *Ibid.*

245 See pp. 193 *et seq., infra.*

such immunity to tort cases involving police use of *aviation* may not be as problematic as in other instances.

(v) Incapacity

Since the tort of trespass is one that requires intention, incapacity on the part of the defendant would vitiate that mental element thereby exonerating the defendant from liability. Incapacity could arise by reason of either insanity or infancy.

(a) Insanity

Where a defendant by reason of insanity is incapable of appreciating the nature and quality of his acts, he would not be held liable for trespass because he would be perceived as neither having acted voluntarily nor was he capable of forming the necessary intention.[246]

This test of capacity to appreciate the nature and quality of the tortious act, rather than the test of knowledge of wrongdoing, is the operational test to determine the liability of a defendant who pleads insanity.[247] Thus, a mentally infirmed person may not be found liable for trespass committed with or from an aircraft if it is found that he was incapable of appreciating the nature and quality of his wrongful act.

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246 See *Lawson* v. *Wellesley Hospital* (1976) 61 DLR (3d) 445 at p. 452.

247 *Morris* v. *Mardsen* [1952] 1 All ER 925 at p. 928 *per* STABLE, J.; this decision was followed in *Lawson* v. *Wellesby Hospital*, above.

(b) Infancy

Generally in law of tort, there is no defence of infancy as such and a minor is just as liable for his wrongful acts as an adult would be.[248] However, where the defendant is very young, he may be absolved from liability for his act, depending mostly on his chronological age.[249] A thirteen-year-old boy has been held liable for trespass to the person;[250] and so has a five-year-old.[251] But in the Canadian case of *Tillander* v. *Gosselin*,[252] the defendant infant just under three years of age was held not liable in negligence or assault for pulling another child out of its pram and dragging it about on the ground, thereby causing it serious injury. GRANT, J., held that in view of the 'defendant's tender age at the time of the alleged assault ... he cannot be said to have acted deliberately and with intention when the injuries were inflicted upon the plaintiff.'[253] Therefore, a very young child may escape liability for trespass committed with or from an aircraft. But the adults whose duty it is to mind the child may not readily escape liability in negligence.[254]

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248 See *Gorely* v. *Codd* [1967] 1 WLR 19; Linden, p. 36.

249 See *Yokton Agriculture and Industrial Exhibition Society* v. *Morley* (1967) 66 DLR (2d) 37.

250 *Smith* v. *Leurs* [1944] SASR 213.

251 *Hart* v. *A.-G. for Tasmania, and Pasco* cited in Fleming, p. 22 n. 58.

252 [1967] 1 OR 203; [affirmed on appeal: see 61 DLR (2d) 192].

253 *Ibid.*, at p. 210.

254 See discussions on negligence (ch. 3), *infra*.

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Aviation-derived Nuisance[255]

Actionable nuisance in the Commonwealth jurisdictions generally falls into two[256] alternative categories: private nuisance and public nuisance. The subject will be discussed accordingly in this chapter.

I. PRIVATE NUISANCE[257]

Private nuisance is any substantial and unreasonable interference with the plaintiff's land or any right over or in connexion with its enjoyment.[258] The law is not

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255 The major text on the law of nuisance is Buckley, *The Law of Nuisance* (1981); see also McLaren, 'Nuisance in Canada', in Linden (ed.) *Studies in Canadian Tort Law* (1968) p. 325.

256 Statutory nuisance has sometimes been recognized as a category of nuisance. But since it is generally not actionable, because it is invariably a criminal offence created by statute, it is generally not treated as a category of tort. See Salmond, p. 61; Buckley, part III.

257 See generally, Gearty, 'The Place of Private Nuisance in a Modern Law of Torts' (1989) 48 *Camb. LJ* 214.

258 See Dias and Markesinis, p. 224.

as concerned with the unreasonableness of the defendant's conduct as it is with the unreasonableness of the result of such conduct to the plaintiff, even though in most cases the former is a factor in the determination of the latter.[259]

The interference could take any mode from interference with servitude and similar rights over plaintiff's land, to affecting his use or enjoyment of it, or causing material impact thereon.[260] Only the last two modes of interference would be discussed here since the first mode is more in the province of real property than in tort.

A notable case of aviation nuisance is the Canadian case of *Bridges Brothers Ltd* v. *Forest Protection Ltd*[261] where the Court held the defendant liable in private nuisance for its use of aircraft in aerial spraying of forests with insecticides which entered the plaintiff's land. According to STEVENSON, J.,:

> A nuisance is created by the discharge of a deleterious substance from an aircraft if that substance is wrongfully caused or allowed to escape onto the land of another.[262]

Naturally, the plaintiff's case is stronger where there is material damage to his land than in a case of mere interference with his enjoyment thereof.[263] Nevertheless, this should not be as a suggestion that a strict dichotomy exists between the two modes at law considering, especially, that proof of material damage

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259 *Ibid.*, p. 225.

260 *Ibid.*

261 (1976) 72 DLR (3d) 335.

262 At p. 341.

263 See eg. *St. Helens Smelting Co.* v. *Tipping* [1865] 11 HLC 642 at p. 650, *per* Lord Westbury, LC.

to property may not be sufficient to establish actionable nuisance, and that whereas certain cases will clearly fall into one or the other mode, others may tend to bestride both modes thereby causing some problems with strict dichotomy. For instance, whereas sonic boom *per se* may constitute interference with enjoyment of the land of an airport neighbour, devaluation of his property as a result of the sonic boom becomes a more difficult issue. Nevertheless, the distinction between the two modes of nuisance remains useful, if only for the purpose of determining the question of 'unreasonableness' of the interference.[264]

Unreasonable Interference by way of Material Damage

The most obvious case of nuisance is where the defendant is responsible for the act which interferes with the plaintiff's interest: such as where he generates intolerable noise in the neighbourhood while operating a machine. But, the law recognizes also that nuisance could arise from the omission of the defendant to deal satisfactorily with an injurious incident occurring on his property through no fault of his but which he is aware of, where the effect of such incident spills over and injures the interest of the plaintiff. Two classic cases may be instructive in this regard. In *Sedleigh-Denfield* v. *O'Callaghan*,[265] the defendants had failed to take reasonable steps to deal with a blockage caused by a trespasser in the drainage system on their land. They were held liable in nuisance as a result of the eventual flooding in the

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264 See Dias and Markesinis, p. 227.

265 [1940] AC 880.

plaintiff's land, since they were aware of the cause of the flooding. Similarly, the defendant was held liable in *Goldman* v. *Hargrave*,[266] when he had failed to extinguish a fire in a tree on his land which fire was eventually spread to plaintiff's land by wind. The fire had been caused by lightening striking the tree. That the defendant had merely felled the tree without extinguishing the fire, believing that it will burn out, was not enough to absolve him from liability.

Following these authorities, it can thus be asserted confidently that there exists a general duty to abate potentially injurious occurrences on one's land regardless of whether such occurrences arose out of artificial or natural circumstances. This duty, though, is happily qualified by the prerequisite of awareness of the occurrence and the standard of care stipulated for the defendant whose fault is not implicated in the cause of the incident on his land. His standard of care regarding the abatement duty is not that of a reasonable man. It is rather measured according to his abilities and resources.[267]

This notion of nuisance, will doubtless be of particular relevance in aviation incidents where. for instance, a landowner fails to take reasonable care to extinguish fire caused on his land by a crashing or exploding aircraft, which fire eventually spills over into the plaintiff's land.

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266 [1967] 1 AC 645; see also *Leakey* v. *National Trust* [1980] QB 485; *Hagen* v. *Goldfarb* (1961) 28 DLR (2d) 746 (NSSC). See on the other hand *Dugal* v. *Peoples Bank of Halifax* (1899) 34 NBR 581 (CA); *Mussett* v. *Reitman's (Ontario) Ltd* [1955] 3 DLR 780 (Ont. HC) where courts held the defendants not liable upon absence of proof of knowledge of faulty situations.

267 See Dias and Markesinis, p. 230.

Unreasonable Interference with Use or Enjoyment of Land

The most common ways of interfering with the plaintiffs enjoyment of his land include the agencies of noise, odour, and obstruction of light or air or view. In determining whether an unreasonable interference has occurred, the Court will usually attempt to strike a balance between the competing interests of the defendant and of the plaintiff from the point of view of their respective use or enjoyment of their property. Where the defendant's activity is seen to constitute more of an unreasonable interference with the plaintiff's use or enjoyment of the plaintiff's land than of reasonable use or enjoyment of the defendant's property, the Court will most likely find nuisance.[268] Otherwise, the plaintiff will have to learn to live with the ordinary incidents of 'give and take' which the law recognizes as part of living in a modern society,[269] without which development in technological amenities of life will be seriously hampered. In striking the said balance in each case, the Court will consider the particular circumstances of that case taking into account a variety of factors which primarily include the type and severity of the interference, its duration, the sensitivity of the plaintiff's use, the character of the neighbourhood and the utility of the defendant's activity.[270]

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268 See Fleming, pp. 387-388.

269 See *Bamford* v. *Turnley* (1962) 3 B & S 66 at pp. 83-84; 122 ER at pp. 32-33 *per* BRAMWELL, B.

270 For detailed discussions of these factors, see, Dias and Markesinis, pp. 232-238; Fleming, pp. 388-392; Linden, pp. 501-510.

Activities related to aviation are particularly susceptible of actions for nuisance because of their rather remarkable propensity to interfere with other uses and enjoyment of the land. The manner in which such interferences occur usually include air or noise pollution, vibrations and harassing surveillance, resulting from the use of aircraft.[271] It would also seem possible to seek action in nuisance against an aerodrome or airport operator for allowing such offensive activities to be carried on out of his land.[272]

As regards noise and vibrations, however, many Commonwealth jurisdictions, excluding Canada, following the pro-forma of s.41(2) of the UK Civil Aviation Act of 1949, have enacted provisions to the following effect:

> No action shall lie in respect of nuisance by reason only of the noise and vibration caused by aircraft on an aerodrome...[273].

It has been rightly submitted that this immunity is limited to noise and vibration caused while the aircraft is *on* an aerodrome, and so does not extend to noise and vibration caused by an aircraft *in flight*.[274]

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271 See Fleming, p. 43.

272 See *ibid.*, n. 67.

273 S.77(2), UK Civil Aviation Act 1982; see also s.10(2), Nigerian Civil Aviation Act 1964; s.23(2), New Zealand Civil Aviation Act 1964.

274 See Fleming, p. 43, n. 67.

Proper Parties

a. The Plaintiff

Only persons with interest in land[275] are qualified to sue in private nuisance. These include freehold owners,[276] tenants in possession[277] and even reversioners where they can prove permanent injury to the property.[278] Mere visitors or licensees, or the possessory occupants' spouses or relatives, who have no proprietary or possessory interests of their own in the land, may not sue.[279]

b. The Defendant

Traditionally, nuisance-generating activities would arise from the defendant's use of his land and the proper defendant would be the owner or occupier.[280] Yet in the less frequent occasions where the cause of the interference had arisen out of use of the public highway[281] or sea,[282] the Courts did see fit to find nuisance. However,

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275 Even though the primary aim of the tort of nuisance is the protection of interests in land, damages to goods on the land are also recoverable. See, *Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 WLR 683.

276 See, *Hooper* v. *Rogers* [1975] Ch. 43.

277 *Vaughn* v. *Halifax-Dartmouth Bridge Commission* (1961) 29 DLR (2d) 523.

278 *Coldwell* v. *St. Pancras Borough Council* [1904] 1 Ch. 707.

279 See e.g., *Malone* v. *Laskey* [1907] 2 KB 141 (cf. *Bottom* v. *Ontario Leaf Tobacco Co* [1935] 2 DLR 699.

280 See, Dias and Markesinis, p. 240.

281 E.g., *Halsey* v. *Esso Petroleum Co. Ltd., supra.*

282 E.g., *Southport Corp.* v. *Esso Petroleum Co. Ltd.* [1953] 3 WLR 773.

there seems to be some disagreement as to whether such cases should be seen as public or private nuisance.[283] Whatever the outcome of this disagreement, there appears to be no dispute, however, that where the event complained about had arisen out of aircraft flights, for instance, that an action in nuisance may be maintained notwithstanding that the operator would not have been making use of 'land'. At any rate, an airport operator would always seem an eligible defendant in an action for nuisance arising out of the use of his airport which would essentially constitute 'land'.

The basis of the defendant's liability is his control over the property and occurrences thereon.[284] An occupier of land would always be liable for the nuisance of his servants committed in the course of their employment. But, with regard to the nuisance of his independent contractors, an occupier would be liable only insofar as he had been careless in the selection of a competent contractor.[285]

The greater problem in relation to the determination of the proper party to sue arises in connexion with landlords and tenants as regards nuisance resulting to neighbours. Generally, the tenant is the proper defendant in private nuisance. But this rule is replete with exceptions which will render the landlord liable, notwithstanding that he is not the occupier. For the purposes of this discussion,

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283 See Dias and Markesinis, p. 241.

284 See Trindade and Cane, p. 529 *et seq.*

285 See Dias and Markesinis, pp. 241 *et seq.* for further instances of liability of occupier for the nuisance of an independent contractor.

these exceptions include the landlord's authorization of the nuisance,[286] his actual[287] or constructive[288] knowledge of the nuisance as at the time he let the property, his reservation of the right to enter and inspect the property,[289] and the existence of an implied right in him to enter and inspect.[290]

The above review will not only have apposite significance in relation to nuisance arising, in proper circumstances, out of use of aircraft in an airport environment, but also, it is submitted, where the nuisance complained about arose out of flight of aircraft over the property of a plaintiff. In these cases, it may not be a surprise to discover that the aircraft in question is subject of a lease, charter or interchange of aircraft, thus raising the question of the proper party to sue. It is submitted that, in the absence of statute, appropriate analogy will be drawn *mutatis mutandis* from the state of the law in cases of landlord and tenant. Here generally, it is the person in possession of the tortious property - *viz.* the occupier - that is held liable as the proper party.[291] Thus, the person in possession of the aircraft as at the time the cause of action in nuisance arose, would appear to be the proper defendant in the case.

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286 *Harris* v. *James* [1876] 45 LJQB 545.

287 *Roswell* v. *Prior* [1701] 12 Mod. 635; 88 ER 1570.

288 *Brew Bros Ltd* v. *Snax (Ross) Ltd.* [1970], QB 612 at 636 and 644.

289 *Wilchick* v. *Marks and Silverstone* [1934] 2 KB 56.

290 *Mint* v. *Good* [1951] 1 KB 517.

291 Clerk and Lindsell, §§ 13-01 *et seq.*

Defences to Aviation Nuisance Action

There are many defences to the law of nuisance, but only those that are relevant to aviation incidents will be considered in the following discussion.[292]

(i) Prescription

Common law generally permits a prescriptive right to be acquired to commit nuisance without liability if the nuisance has continued in relation to the plaintiff for 20 years or more without the plaintiff suing for redress.[293] Since nuisance is essentially viewed from the perspective of the plaintiff rather than the defendant, prescription time is calculated from when the defendant starts interfering with the plaintiff's user rather than when the defendant started his act.[294]

Some Canadian provincial legislation seem to have altered the common law doctrine of prescription in some significant respects. In some provinces, the basic prescription period has now been enlarged to 30 years subject however to common law rules of defeasibility, provided that the prescriptive right not granted or consented to in writing may not be defeasible after 60 years.[295]

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292 For more defences see Salmond and Heuston, *The Law of Torts* (19th edn, 1987), pp. 78-84, Clerk and Lindsell, §§ 24-36 - 24-47.

293 *Russell Transport Ltd.* v. *Ontario Malleable Iron Co* [1952] OR 621 (Ont. HC); *Schenck* v. *The Queen* (1981) 20 CCLT 128.

294 *Sturges* v. *Bridgman* (1879) 11 Ch. D. 852; *Belisle* v. *Canadian Cottons Ltd.* [1952] OWN 114.

295 See Limitations Act, RSO 1980, c.240, s.30; compare Easements Act, RSNB 1973, c.E-1, s.1; Easements Act, RSNS 1967, c.168, s.31. For a more detailed discussion on the subject see Fridman, *The Law of Torts in Canada* (1989) vol. 1, pp. 151 *et seq.*

(ii) Consent

A defendant could escape liability in nuisance by showing that the plaintiff consented to the carrying on of the activity which resulted in the nuisance.[296] Consent in this regard must go beyond mere passivity or knowledge of the existence of a nuisance-generating state of affairs.[297] It has been held that the plaintiff may not be stopped from suing in nuisance without active consent, not even where he had been passive about the nuisance-generating situation and has benefitted from such situation too.[298]

(iii) Statutory authority

Where the action of the defendant is expressly, or by necessary implication, authorized by statute, the plaintiff may not be given judgment against the defendant as a result of any alleged nuisance arising from such action of the defendant.[299] Statutory authority includes powers granted by subordinate legislation made under provisions of an Act of Parliament.[300]

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296 *Pattison* v. *Prince Edward Region Conservation Authority* (1984) 23 DLR (4th) 201 at pp. 207-208: plaintiffs' consent to construction of dam estopped them from claiming against the defendant when flooding occurred during heavy rainfall as a result of the dam. See also *McCallum* v. *Corporation of District of Kent* [1943] 3 WWR 849 at 495.

297 *Billingsgate Fish Ltd.* v. *BC Sugar Refining Co. Ltd.* [1933] 1 WWR 530.

298 *Kent* v. *Dominion Steel & Coal Co. Ltd.* (1965) 49 DLR (2d) 241 at pp. 260-261.

299 See *Metropolitan Asylum District* v. *Hill* (1881) 6 App. Cas. 193; Linden, 'Strict Liability, Nuisance and Legislative Authorisation' (1966) 4 *Osgoode Hall L.J.* 196; Fridman, vol. 1, pp. 157-160.

300 *Aikman* v. *George Mills & Co. Ltd.* [1934] OR 597.

The question thus arises as to whether a licence granted to an aircraft operator under an Act of Parliament will amount to statutory authority, hence absolving the operator from liability in nuisance. It appears not. First, a conception of statutory authority in that manner will have the potential effect of erasing the concept of aviation nuisance since every aircraft operator presumably operates under a licence. Secondly, the caselaw that developed this doctrine invariably arose out of situations where the authority in question was conferred directly by statute or by delegated legislation made under a parent statute.[301] Therefore, it seems that the defence of statutory authority in aviation nuisance will only arise where an enactment directly confers the requisite authority to the defendant, not when he merely operates under a licence granted pursuant to an authority conferred by statute.

(iv) Aviation Legislation

In England and most Commonwealth countries, except Canada, enactments exist which bar action in nuisance by mere flight of aircraft or ordinary incidents of such flights where such flight is reasonable in the circumstances. Such legislation will be discussed in further detail later.[302]

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301 See e.g., *Metropolitan Asylum District* v. *Hill, supra; Topham* v. *Okanagan Builders Land Developments Ltd* (1976) 71 DLR (3d) 102; *Allen* v. *Gulf Oil Refining Ltd* [1981] AC 1001.

302 See discussion in ch. 6, *infra.*

Remedies for Nuisance

(i) Injunction

The Court, in its capacity as a Court of Equity, may grant an injunction to the plaintiff who has successfully sued for it in nuisance. Depending on the suit of the plaintiff and the circumstances of the case, the injunction may be interlocutory or permanent, prohibitory (as in where the Court *forbids* the aircraft operator from further engagement in the offensive flight) or mandatory (i.e., where the Court positively requires the defendant to do something in order to avoid the nuisance, such as where the Court orders the airport authority to install muffling devices so as to attenuate the effect of sonic boom[303] on the neighbouring land occupiers).[304]

Injunction, however, is not invariably granted the plaintiff who has a valid case in nuisance. As nuisance action is wont to entail a balancing of competing interests of the plaintiff and the defendant, the Court is motivated accordingly to consider the position of a defendant who would rather pay damages than be enjoined to cease his activity or to do something else which will jeopardize such activity. In this case, the Court would once again attempt to balance the competing inclinations, i.e., plaintiff's desire for injunction versus the defendant's preference to pay damages

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303 Note however that in some Commonwealth jurisdictions actions in nuisance arising from noise and vibration are statute-barred: see s.77(2), UK Civil Aviation Act 1982; s.10(2), Nigerian Civil Aviation Act 1964; as well as other national statutes modelled after the UK Civil Aviation Act 1949.

304 For a comprehensive discussion on injunctions, see generally, Sharpe, *Injunctions and Specific Performance* (1983).

instead.[305] Of chief consideration in this process is the factor of public benefit deriving from the defendant's activity - as in the aviation enterprises. However, it appears that the Courts may not subjugate the private rights of the plaintiff to the convenience of the public in the absence of legislation.[306] *A fortiori*, the selfish interests of the defendant as founded upon possible injunction-generated economic hardship may not, therefore, generally prevail over the plaintiff's claim to injunction.[307]

Nevertheless, in exceptional cases, damages may be granted instead of injunction. The usual cases are where (a) the plaintiff's legal interest interfered with is negligible as compared with the oppression which will result to the defendant should injunction be ordered against him, and (b) the plaintiff's inconvenience is finally assessable and monetary compensation amounts to a fair remedy.[308]

(ii) Damages

Apart from award of damages in lieu of injunction as seen above, the plaintiff may also be awarded damages in addition to injunction, or he may simply be awarded damages where such is all he sued for.

Award of damages is not dependant upon establishment of physical injury.

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305 A more detailed discussion of this procedure and its inherent difficulties are discussed by Dias and Markesinis, pp. 247-252.

306 See Linden, p. 519. *Quaere*: whether the maxim *salus populi suprema lex esto* [the welfare of the people is the highest law] has no application in this context.

307 Linden, *ibid.*

308 See *Shelfer* v. *London Electric Lighting Co.* [1895] 1 Ch. 287 at pp 322-323.

It suffices to establish substantial interference with the comfort, convenience and other sensibilities, as well as loss of commercial profits, of the plaintiff.[309]

(iii) Abatement

This is a self-help remedy whereby the plaintiff is entitled to remove the cause of the nuisance without recourse to court, using a means which is reasonably proportional to the inconvenience suffered.[310] Even though this is a traditional defence at common law, the Courts do not generally encourage resort to it.[311] But, even without this judicial attitude, it is difficult to imagine the applicability of the abatement remedy in aviation nuisance situations.

PECULIAR SENSITIVITIES AND AVIATION NUISANCE

The law of nuisance is, as has been noted above, mainly concerned with balancing the competing interests of two parties. In this regard, the peculiar sensitivities of a given plaintiff may not be allowed to unduly weigh in on the scale. This disposition of the common law is particularly illustrated in the 'mink cases'. In *Rattray* v. *Daniels*,[312] for instance, the noise of the defendant's bull-dozing operations,

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309 Linden, p. 521.

310 Dias and Markesinis, p. 252; Linden, p. 521.

311 *Lagan Navigation Co.* v. *Lamberg Bleaching, Dyeing & Finishing Co.* [1927] AC 226 at pp. 244-245.

312 (1959) 17 DLR (2d) 134.

during mink whelping season, frightened the minks in the neighbouring mink farm thereby causing them to devour their young. In an action for nuisance,the Court held the defendant not liable because the law of nuisance does not protect the peculiar sensitivities of the plaintiff.

This case has enormous implications in aviation cases because of the sonic boom phenomenon which has been known to cause similar mink reactions.[313]

Apart from the mink cases, there have been other instances where courts have demonstrated a reluctance to award damages to plaintiffs because of peculiar sensitivities. For instance, in *Lewis* v. *Town of St. Stephen*,[314] spray airplanes operating out of a municipal airport flew low over a house, and thereby terrified a 15-year old girl, as a result of which she developed a phobia for aircraft. The trial Court awarded plaintiffs - the girl and her parents - judgment for nuisance. On appeal, the judgment was reversed upon the finding that the girl's reaction to the aircraft activities was unusual; therefore, in accordance with the principle that the law of nuisance does not protect extraordinary or special sensitivities of plaintiffs, they were not entitled to judgment in this case.[315]

It is hoped, however, that the validity of this rule be restricted to nuisance actions. Outside of nuisance, it seems that the 'thin skull' plaintiff may yet be redressed for injury associated with his special sensitivity especially in negligence

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313 See *Nova Mink Ltd* v. *Trans-Canada Airlines* [1951] 2 DLR 241.

314 (1981) 34 NBR (2d) 508.

315 See also *Grandel* v. *Mason* [1953] 3 DLR 65.

where the defendant was in a position to have reasonably contemplated such injury. In other words, where the defendant knew or ought to have known that the plaintiff had 'thin skull' and therefore was vulnerable to injury as a result of the defendant's action, a duty of care would have arisen in such circumstances on the part of the defendant. This conclusion is specifically borne out by the *neighbour principle* enunciated by Lord ATKIN to the effect that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'; your neighbour being 'persons who are so closely and directly affected by [your] act that [you] ought reasonably to have them in contemplation as being so affected when [you are directing your mind] to the acts or omissions which are called in question'.[316]

But even closer to the point is *Nova Mink Ltd* v. *Trans-Canada Airlines*[317]. The trial Court had held the defendant liable in negligence for failing, while operating its aircraft, to maintain a proper look-out necessary to avoid exciting whelping minks in the subjacent ranch into destroying their young. The defendant was found to have been notified about the existance of the farm by virtue of an information circular which also warned aircraft operators about the hazards of aircraft noise to fur farms. The trial Court also imputed the defendant with knowledge of whelping season, as well as of the effect of noise on whelping minks, all of which information were contained in the circular. On appeal, the Nova Scotia

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316 See *Donoghue* v. *Stevenson* [1932] AC 562 at p. 580; see discussion on 'negligence' and 'products liability' chapters 3 and 4, *infra.*

317 *Supra.*

Supreme Court, in reversing the trial Court, held, *inter alia,* that there was no evidence in the case to suggest that 'keeping of the sharpest look-out would have been effective in enabling the defendant to avoid the ranch'.[318] On the whole, it appears that the decision of the appellate Court had more to do with insufficient evidence for the plaintiff's case than with juridical validity of the action in negligence.

Thus, the aircraft operator who ought to know that the whelping season for minks is between February and June,[319] that agitation causes whelping minks to devour their young, that noise agitates minks, and that a subjacent spread of property is a mink farm, may not readily escape liability for low flight over the farm as a result of which whelping minks destroyed their young. The aircraft operator may very well be liable in negligence on proper evidence.[320] And since liability in negligence depends on reasonable care, the Court will take into consideration a variety of factors including the right of the operator through the airspace, the availability of alternative air trajectories for the operator, the altitude at which he operated, the necessity of the flight,[321] etc.

II. PUBLIC NUISANCE

Public nuisance is a term applicable to a rather endless variety of socially

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318 *Ibid.*, at p. 244 *per* ISLEY, CJ.

319 See *ibid.*; see also *Darowany* v. *R.* [1956] Ex. CR 340.

320 See *Maitland* v. *Twin City Aviation Corp.* 37 NW 2d 74 (Wisc. 1949); *MacGibbon* v. *Robinson* [1953] 2 DLR 689.

321 See *Rattray* v. *Daniels* (1959) 17 DLR (2d) 134.

offensive conducts.[322] Such conduct must be one which jeopardizes the life, health, property, morals, comfort, enjoyment of rights, etc., of members of the public. The said conduct thus amounts to an offence at common law.[323] Not every member of the public need be equally affected by the conduct: effect on a class or section of the population will suffice. However, whether such class or section could qualify as 'public' is a question of fact for the Court to decide.[324]

By way of definition, perhaps the dictum of DENNING, L.J., (as he then was), appears to be one of the better definitions which capture the gist of public nuisance. He put it thus:

> [A] public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken as the responsibility of the community at large.[325]

However, notwithstanding this definition which suggests deviation presumably from private nuisance, it has been submitted that the similarity between private nuisance and the cornucopia of aberrations which may be described as public nuisance, perhaps goes no further than the common denominator 'nuisance'.[326] Perhaps this might be an overstatement of the differences for there is no doubt that the basic

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322 See Clerk and Lindsell, § 24-02; Dias and Markesinis, p. 254. For a more comprehensive treatment of this topic see Spencer, 'Public Nuisance - a Critical Examination' (1989) 48 *Camb. L.J.* 55.

323 See Archbold, *Criminal Pleadings and Practice* (43rd edn, 1988) para. 27-44.

324 See Clerk and Lindsell, § 24-02; Linden, p. 496.

325 *A.-G.* v. *P.Y.A. Quarries* [1957] 2 QB 169, at p. 191; see also *A.-G., Ontario* v. *Orange Productions Ltd.* (1973) 21 DLR (3d) 257.

326 See Dias and Markesinis, p. 254.

element of annoyance or inconvenience is common to both private nuisance and public nuisance.[327] There are, nevertheless, some fundamental distinctions between the two. These start with the nature of public nuisance as a criminal or quasi-criminal offence which involves actual or potential interference with public convenience or welfare.[328] Whereas this may give rise to civil liability in favour of any person especially affected by it, such liability in most cases could be more appropriately described as arising from breach of statutory duty, as opposed to private nuisance which is simply a tort developed at common law. Private nuisance will only afford protection against interferences arising from land whereas public nuisance is not so restricted.[329] For a conduct to be said to amount to public nuisance, the ensuing interference must be seen as affecting the public at large or a significant section thereof.[330]

In *A.-G., Manitoba* v. *Adventure Flight Centres Ltd*,[331] it was held that the use of a field for light aircraft flights which disturbed local residents amounted to public nuisance. But besides this, other instances of aviation related public nuisance at common law would include the emission of aircraft noise beyond what is reasonable

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327 See Clerk and Lindsell, § 24-02.

328 McLaren, p. 321; see also Archibold, *loc. cit.*

329 See Dias and Markesinis, pp. 254-255.

330 See Fridman, vol. 1, p. 168.

331 (1983) 25 CCLT 295 (Man. QB).

in the circumstances;[332] as well as the discharge of deleterious matter into the air, water or earth by the use or as a result of aviation.[333] These are analogies drawn from the diverse variety of instances where conducts have been held to amount to nuisance at common law.[334] Apart from common law, it is most probable that these conducts would fall into class of conducts forbidden by the statutes[335] (including the Criminal Code[336]) as public/statutory nuisance.

Locus Standi *in Public Nuisance*

The Attorney-General is the person in whom the right of action in public nuisance generally lies.[337] Since public nuisance is primarily a crime, this means that the Attorney-General's action is often by way of criminal prosecution.[338] But, even in the case of civil proceedings, the Attorney-General still retains the general prerogative of action.[339]

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332 See *A.-G., Ontario* v. *Orange Productions Ltd.* (1973) 21 DLR (3d) 257; *A.-G., B.C.* v. *Haney Speedways Ltd.* (1963) 39 DLR (2d) 48.

333 See *Hickey* v. *Electric Reduction Co. of Canada Ltd.* (1970) 21 DLR (3d) 368; *The Queen* v. *The Sun Diamond* (1983) 25 CCLT 19.

334 See Clerk and Lindsell, § 24-02; Fridman, vol. 1, p. 168.

335 See Buckley, *loc. cit.*; see also *Encyclopedia of Environmental Law and Practice*; Garner, *Control of Pollution Encyclopedia.*

336 See Fridman, vol. 1, p. 168.

337 See Fridman, p. 169; Linden, p. 498.

338 *Ibid.*

339 *Ibid.*

In exceptional cases, however, an individual may be accorded standing to sue. Some of the notable instances of private right of action in public nuisance include where: the individual suffers special injury over and above that suffered by the public in general;[340] a statute confers the right to sue on the individual;[341] and, the interference with public right also involves an interference with a different right of the individual.[342]

The civil remedies include injunction, damages and abatement, as in private nuisance.[343]

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340 *Benjamin* v. *Storr* (1874) LR 9 CD 400; *Vanderpant* v. *Mayfair Hotel Co.* [1930 1 Ch. 138; *St Lawrence Rendering Co. Ltd.* v. *Cornwall* [1951] 4 DLR 790; *Smith* v. *A.-G., Ontario* [1924] SCR 331; *Turtle* v. *Toronto* [1924] 56 OLR 252. For full discussion on the topic see Kodilinye, 'Public Nuisance and Particular Damage in the Modern Law' (1986) 6 *Legal Studies* 182.

341 Fridman, vol. 1, p. 170; Linden, p. 499 n.36.

342 See Linden, *ibid*; see also *Stein* v. *Gonzales* (1984) 14 DLR (4th) 263 at p. 266 *per* McLACHLIN, J. (BC SC). For instances where private individuals may conduct criminal prosecutions see *R.* v. *Schwerdt* [1957] 23 WWR 374, Canada Law Reform Commission, *Private Prosecutions* (Working Paper 52, 1986).

343 See pp. 80 *et seq., supra*; Fridman, vol. 1, p. 171.

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Aviation-related Negligence impacting on the Earth-surface

The connotations of negligence

In Anglo-Canadian tort law, negligence connotes two ideas: first, the state of mind of a wrongdoer inasmuch as he failed to exercise the care necessary in the circumstances.[344] The exercise of that care would have made the wrong *non*-intentional. This connotation is particularly important with regard to those interferences which require a mental element to qualify as actionable torts, for example, trespass.[345] Thus, the airborne balloonist who drops an object onto the

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344 See *Costello* v. *Calgary* [1943] 2 WWR 327; *Liebel* v. *Rural Municipality of Qu'Appelle* [1943] 2 WWR 277 at p. 293; *Vaughan* v. *Taff Vale Railway Co.* (1860) 5 H & N 679 at p. 688.

345 See *Letang* v. *Cooper* [1965] QB 232; *Fowler* v. *Lanning* [1959] 1 QB 426; *Eisener* v. *Maxwell* [1951] 1 DLR 816 affirmed [1951] 3 DLR 345: an act does not amount to trespass unless it is done deliberately or negligently.

land of a plaintiff could have done so either intentionally, unintentionally, or negligently. It is intentional if he drops the object desiring it to fall on the land. It would be unintentional if, for instance, he had experienced wind turbulence as a result of which the object dropped off his hand accidentally. But it would have been negligently done if he had dropped the object desiring it to fall into a lake beneath without actually looking down to see if he really was navigating above the lake at the material time.

The second connotation of negligence is that of an independent tort with specialized rules and principles which will be reviewed in further detail in this chapter.

Given the above well accepted[346] dual connotations of 'negligence', one finds it somewhat difficult to appreciate the assertion of some commentators to the effect that calling negligence a tort 'has no practical significance, for there is no feature which characterises "separate torts" '.[347] Granted that negligence of sorts may be an element of other wrongs, that would not however suffice to justify the assertion that depicting negligence as a separate tort has no practical significance, for, as will be seen in this chapter, the tort of negligence has come of age with its set of rules which operate to confer right of action to wronged persons regardless of the non-availability of that right under any other head of tort, and *vice versa*. For example, whereas no

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346 See Fridman (vol. 1) pp. 231-232; James, *Introduction to English Law* (12th edn, 1989) p. 380.

347 See Clerk & Lindsell, § 10-01.

other tort would readily confer a right of action for omission, negligence does:[348] and whereas a claim will fail under an action in *negligence* if the object dropped by the balloonist resulted to no damage, an action in *trespass* may succeed if it is shown that the balloonist had negligently dropped the object. This is because unlike the pure action in negligence which, as shall be seen shortly, requires proof of damage, trespass is actionable *per se* even though such trespass resulted from a negligent state of mind.[349]

THE TORT OF NEGLIGENCE

Negligence consists in a breach of a legal duty of care which results in damage to another person.[350] Thus, the broad construct of the tort have been accepted as follows :

a) the defendant owed the plaintiff a legal duty to take care not to injure the plaintiff;

b) the defendant breached that duty by failing to observe the standard of care necessary in the circumstances; and

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348 See the famous neighbour principle by Lord ATKIN in *Donoghue* v. *Stevenson* [1932] AC 562 at p. 580; see also *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] AC 1004 (HO held liable for damage done by borstal boys who were left on their own by prison officers); according to ALDERSON, B., [n]egligence is the *omission* to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do: *Blyth* v. *Birmingham Waterworks Co.* (1856) Ex. at p. 784.

349 See p. 24, *supra*

350 See *Maron* v. *Baert* (1982) 126 DLR (3d) 9 at p. 18; *Lochgelly Iron and Coal Co.* v. *M'Mullan* [1934] AC 1 at p. 25.

c) that the plaintiff suffered some damage which was caused by the defendant's breach of his duty toward the plaintiff.[351]

The commonest defendants and circumstances of aviation incidents which may involve negligence against the earth-bound party include: the aircraft operator whose operation of the aircraft may have caused the incident which in turn resulted in injury to the plaintiff; a third party but for whose interference with the aircraft the plaintiff would not have been damaged by the aircraft; the air traffic controller whose negligence may have been responsible for a given incident; the manufacturer, repairer, etc., whose poor handiwork may have been faulty thus causing a plane-crash; and the occupier of aviation premises which may have been dangerous for persons on the premises.

Except for the liabilities of the manufacturer, etc., and the occupier, which will be reviewed under separate chapters, the liabilities of some of the various other potential defendants will be reviewed in the course of this chapter. But, before that, a brief comment about causation and remoteness of damage is perhaps appropriate at this juncture.

Causation and Remoteness

Since damage is a vital element of the negligence construct, the onus is on the plaintiff to establish that the damage he suffered was caused by the defendants breach of his duty of care. This proof, however, can be accomplished on a balance

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351 See Clerk and Lindsell, ch. 10; and Fridman (vol. 1), ch. 9, for details.

of probabilities.[352] The basic test for causation is the 'but for' test: would the plaintiff have suffered the damage but for the breach of duty by the defendant? If the answer is in the affirmative, then the defendant would be absolved,[353] otherwise he would be found liable, of negligence.[354] Therefore, the victim ot an aviation incident would maintain a successful claim against the defendant if the conduct of the latter could be implicated as the predominant factor leading to the injury of the former.

However, a qualification is necessary here: from the point of view of the defendant, the damage caused the plaintiff must not be too remote. A defendant is only liable in negligence for a damage caused by his conduct only if the damage was reasonably foreseeable in the circumstances.[355]

I. THE AIRCRAFT OPERATOR

In every aviation incident which causes injury to a person on the Earth-surface, the main focus of liability is usually on the operator of the aircraft. The term 'operator' here is used in an all-embracing sense to include the owner of the aircraft or the entrepreneur of the air transport business who also will generally be

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352 See *McGhee* v. *National Coal Board* [1972] 3 All ER 1008 at p. 776 *per* Lord SALMON; *Nowsco Well Service Ltd.* v. *Canadian Propane Gas & Oil Ltd.* (1981) 122 DLR (3d) 228.

353 See *Barnett* v. *Chelsea and Kensignton Hospital Management Committee* [1969] 1 QB 428.

354 See Clerk and Landsell, §§ 1-105 and 1-106.

355 See Fridman (vol. 1) p. 328; Clerk and Lindsell, §§ 1-129-1-132.

vicariously liable for the torts of his pilot.[356]

Whether or not the aircraft operator will be liable will normally depend on whether it could be established that he owed the defendant a legal duty to take care, and that he breached the duty, as a result of which the plaintiff suffered the injury for which the action is brought. The classic legal statement of duty of care was made by Lord ATKIN in the famous case of *Donoghue* v. *Stevenson.* A friend of the plaintiff had bought her a bottle of ginger beer at a café. As the bottle was opaque, the plaintiff could not see through it with the result that she drank some of the content which included decomposing remains of a snail. In her negligence action against the manufacturer of the ginger beer for the illness that she suffered from the experience, the House of Lords held that the manufacturer ought to have foreseen the likelihood that a person in the position of the plaintiff would consume his product, and therefore he owed her a duty of care to ensure that the bottle came free of the rivetting substance in it. And insofar as the manufacturer did not ensure this, he did breach the duty of care and so was liable to the plaintiff for negligence.

In order to establish the requisite duty of care, Lord ATKIN made the following statement which is now regarded as the modern statement of the principle:[357]

> The liability for negligence ... is no doubt based upon a general moral sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the

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356 See details of 'vicarious liability', in Clerk and Lindsell, §§ 3-01 *et seq.*; Fleming, pp. 339 *et seq.*

357 See Clerk and Lindsell, § 10-05.

> lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[358]

Following this principle, it appears to have been unanimously agreed that the operators of transport vehicles generally owed a duty of care to other persons who are likely to sustain injuries as a result of incidents arising out of the operation of the craft.[359] And this surely includes operators of aircraft.[360]

An increased amount of judicial activity has been witnessed in the area of aviation negligence over the last two decades, especially in Canada.[361] Some of these cases establish that the duty of care of an aircraft operator can be breached in various circumstances during take-off, flight and landing. For instance, in *Gallant* v. *Boklaschuk*,[362] the plaintiff had sued the defendants for damages under the Trustee Act[363] and the Fatal Accidents Act[364] for wrongful death. The defendant had been engaged by the plaintiff to aerial-spray the plaintiff's farm. The defendants' aerial crop spraying method required that the plaintiff and his 13-year old son act as human

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358 [1932] AC 562 at p. 580.

359 *Farrugia* v. *G.W. Railway* [1947] 2 All ER 565 (train) *Bourhill* v. *Young* [1943] AC 92 (motor-vehicle) *Cayzer* v. *Carron Co.* [1884] 9 App.Cas. at p. 882 (marine vessel).

360 See Clerk and Lindsell, § 10-119, McNair, *The Law of the Air* (3rd edn, 1964), p. 72.

361 See generally the *Canadian Encyclopedic Digest* (Western) (3rd edn) vol. 2.

362 (1979) 90 DLR (3d) 370.

363 RSM 1970, c.T160.

364 RSM 1970, c.F50.

field markers so as to facilitate the spraying. However, the defendants, during the spraying flew the aircraft so dangerously low that the plaintiff's son was struck and killed by the aircraft. The defendant pilot admitted during testimony that he knew the victim was in position and there was nothing to obstruct his vision, but he had no explanation for failing to see the victim until the last moment. And that even though he was worried that he could not see the victim as he approached the victim's position, he did not, nevertheless, change his flight pattern until it was too late. The defendant's were held negligent.[365]

Operators had been similarly found negligent in the following instances: low flying jet causing fire on land;[366] pilot taking off in bad weather and causing damage to property during the resultant emergency landing;[367] crash resulting from non-maintenance of proper flying speed;[368] taxiing to dock with nose pointed in the air thus preventing look-out and causing collision with motor launch whose helmsman was found to be contributorily negligent;[369] crashing onto a telephone line while flying below regulation altitude and at high speed in a hazardous environment;[370] air transporter's failure to provide adequate docking procedures or assistance as a result

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365 See also *Billings* v. *Reed* [1944] 2 All ER 415 at p. 417.

366 *Saguenay Peat Moss Co.* v. *R.* [1966] Ex. CR 33.

367 *Commuter Air Service* v. *Poitras* (1972) 4 NBR (2d) 238.

368 *McInnerny* v. *McDougall* [1937] 3 WWR 625 approving *Fosbroke-Hobbes* v. *Airwork Ltd.* 1 All ER 108.

369 *Ontario Central Airlines Ltd.* v. *Gustafson* (1957) 8 DLR (2d) 584.

370 *Uhryn* v. *B.C. Telephone Co. Ltd.* [1974] 4 WWR 609.

of which a passenger ran into moving propeller of airplane while trying to help moor the aircraft at a dock operated by the air transporter;[371] pilot's refusal to declare emergency in order to receive special assistance from control tower, which caused the plane to crash;[372] pilot's attempt at continuing flight toward city in spite of adverse conditions which rsulted in the plane's crash;[373] and collision of plane in motion with stationary plane on the ground without any good reason.[374]

One very notable principle seems to have emerged from some of these cases, especially where the aircraft would have caused damage upon a crash resulting from dangerous conditions. The emergent principle seems to be that where the pilot puts himself in a position of danger from which he could not have escaped, any damage ensuing from a consequential crash will be attributed to his negligence if the exercise of reasonable care on his part would have put him in a position of safety instead.[375]

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371 *Arnason* v. *Northway Aviation Ltd.* [1980] 4 WWR 228, approving *Morgan* v. *Airwest Airlines Ltd.* [1974] 4 WWR 472, 48 DLR (3d) 62.

372 *Trottier* v. *Canada* [1987] 9 FTR 94.

373 *Adams Estate* v. *DeCock Estate* (1987) 49 Man. R (2d) 91, affirmed 55 Man. R. (2d) 190.

374 *Yukon Southern Air Transport Ltd.* v. *R.* [1942] Ex. CR 181.

375 See *Zerka* v. *Lau-Goma Airways Ltd.* [1960] OWN 166 at p. 167 (pilot's altitude too low to make the turn he needed to clear a ridge); see also *McLean* v. *Lutz* [1952] 1 DLR 770 (altitude too low to clear a ridge); *Malone* v. *TCA* [1941] OWN 238; *Adams Estate* v. *DeCock Estate, supra; McInnemy* v. *McDougal, supra; Commuter Air Service* v. *Poitras, supra; Trottier* v. *The Queen* [1987] 9 FTR 94.

Rules of the Air and Negligence

Very often the question arises as to how far the omission to abide by a statutory requirement is able to bear upon a consideration of negligence.[376] This situation is of immense significance to aviation incidents in view of the fact that air navigation is roundly regulated by an array of rules made under statutes.[377]

It appears settled that a violation of an air regulation is a summary offence[378] and there is strict culpability thereof.[379] But it is not very certain that such violation will give rise to a definite conclusion of negligence. In *Rockland Airways* v. *Miller*,[380] an aircraft crashed in the course of taking off. The plaintiff's case hinged mainly upon the allegation that the defendant pilot had violated Air Regulations by taking off crosswind (instead of into the wind) thus subjecting the aircraft to danger. The Court held that even if the allegation was credible, the mere violation of Air Regulations would not, *ipso facto,* constitute negligence.[381] In other words, the plaintiff must still discharge the burden of establishment of causation despite the fact that the defendant had violated an air regulation in the circumstances under which

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376 See Linden, p. 183.

377 See Part V, Canada Air Regulations, CRC, c.2 made under the Aeronautics Act, RSC 1985, c.A-3.

378 See s.6(4), Aeronautics Act.

379 See *R.* v. *Reid* [1979] 19 Nfld & PEIR 520; *R.* v. *Gayle Air Ltd.* [1974] 28 CRNS 114; *R.* v. *Coleman* [1974] 3 WWR 367.

380 [1959] OWN 343.

381 *Ibid.*, at p. 345; see also *Churchill Falls Corp* v. *R.* [1974] 13 Avi. 18, 442 (breach of Air Regulations and Manuals held to amount to a breach of duty of care, but did not cause crash).

the plaintiff suffered injury.[382] The importance of this principle will perhaps be best appreciated against the background of the 'but for' test of causation.[383] Hence, if there is a chance that the plaintiff would have suffered the injury regardless of the defendant's breach of the statutory regulation, then it would not be just to conclusively damn the defendant for negligence against the plaintiff, just because the defendant had breached the regulation.

However, a breach of the regulation may provide an enormous impetus to the plaintiff with regard to his establishment of negligence.[384] This is particularly so if the injury suffered by the plaintiff is a direct result of the incident which a regulation was designed to prevent; a breach of the regulation in the circumstances will raise a presumption of negligence against the regulation-violating defendant.[385]

Res ipsa loquitur and contemporary Aviation

Normally, the onus of proof of negligence is on the plaintiff. This onus is ordinarily discharged by establishing, on a preponderance of probabilities, that the defendant acted without due care. But considering that under certain circumstances the plaintiff may not be in a position to adduce the requisite evidence, even though somebody may have damaged him out of negligence, common law judges established

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382 This principle was categorically affirmed by the Canadian Supreme Court in *R. in right of Canada* v. *Saskatchewan Wheat Pool* [1983] 1 SCR 205.

383 See Clerk and Lindsell, §§ 1-105 - 1-106; p. 94.

384 See *R. in right of Canada* v. *Saskatchewan Wheat Pool, supra.*

385 See *Monn* v. *Blais* [1977] 1 SCR 570 at pp. 579-580; see also *McGhee* v. *National Coal Board, supra,* pp. 6-7; *Rockland Airways* v. *Miller, supra,* p. 345.

the doctrine of *res ipsa loquitur* [the thing speaks for itself].[386] The circumstances of its application are perhaps best summarized in the following classic dictum of ERLE, C.J., in *Scott* v. *London and St. Katherine Docks*:[387]

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[388]

Therefore, the plaintiff's obligation to establish his claim of negligence will be discharged 'if the circumstances are beyond the knowledge of the plaintiff and the evidence which explains it, if it exists at all, is in the possession of the defendant.'[389]

There seems to be no better use for this doctrine than in cases where an earth-based party is injured by a crashing aircraft or by an object coming out of an aircraft in flight. Here, the cause of the crash is almost invariably beyond the knowledge of the plaintiff and the only person who can explain it, if indeed there is any explanation for it, is almost always the operator of the aircraft under whom the control and management of the aircraft would naturally be. Based on this realization, therefore, the Courts have not hesitated to apply the doctrine in

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386 See Clerk and Lindsell, § 10-135; Fridman (Vol. 1), p. 309.

387 (1865) 3 H & C 596.

388 *Ibid.* at p. 601; see also *Shawinigan Carbide Co.* v. *Doucet* (1910) 42 SCR 281 at p. 330 *per* DUFF, J.; *Gee* v. *Metropolitan Railway* (1873) LR 8 QB 161 at p. 175.

389 Fridman (Vol. 1), p. 309.

appropriate cases of injuries on the ground.[390]

It has been suggested, however, that the Court might be reluctant to apply the maxim where a crash took place in extremely adverse flying conditions, or while the pilot was endeavouring to make a forced landing due to circumstances not caused by negligence on the part of the operator or crew.[391] While not suggesting that the maxim is invariably applicable in all circumstances of injuries resulting from aircraft to earth-based parties, it would seem that there is no reason why the maxim should not apply in the instances indicated above. In the first suggested instance (i.e., crash in extremely adverse flying conditions) it would still seem that inasmuch as the conditions in question are weather conditions, the operator is the best person who can establish either that he had not been forewarned of those conditions, or that he was not in a position to have been so warned, prior to his commencement of flight. And in view of the advancement and ready availability of meteorological technology and services, either of these propositions could be very difficult to sustain in court. Moreover, it would seem that the mere flying of an aircraft in extremely difficult weather conditions, may of itself amount to negligence. Therefore, the only person who can explain absence of negligence in that regard is the operator. Hence, *res ipsa loquitur* applies.

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390 See *Fosbroke-Hobbes* v. *Airworks Ltd., supra; Rockland Airways* v. *Miller* [1959] OWN 343; *Malone* v. *T.C.A.* [1941] OWN 238; *Yukon Southern Air Trans. Ltd.* v. *R.* [1942] Ex. CR 181; *Zerka* v. *Lau-Goma Airways Ltd.* [1960] OWN 166; see also McNair, pp. 76-80.

391 See McNair, pp. 79-80.

The second proposition (that the maxim would not apply where a crash took place while the pilot was endeavouring to make a forced landing due to circumstances not caused by negligence on the part of the operator or crew), it seems, could be tantamount to either begging the question or saying nothing really. Obviously, the *res ipsa loquitur* doctrine does not apply in circumstances not suggesting negligence. And the *raison d'être* of the doctrine is in its desirability to help a plaintiff who does not know what caused the injurious incident.[392] It follows therefore that the maxim is intrinsically incompatible with existence of evidence of what caused the incident.[393] That being the case, where the plaintiff admits a *prima facie* knowledge of a non-negligent cause of the incident, then there is simply no case for negligence, hence the question of applicability of *res ipsa loquitur* does not arise.

Res ipsa loquitur *and aviation terrorism*

Considering that the main element of the doctrine is that the injurious accident 'is such as in the ordinary course of things does not happen if those who have the management use proper care',[394] it would seem appropriate therefore to ask if the phenomenon of aviation terrorism should deter courts from applying *res ipsa loquitur* in plane-crashes. The question seems reasonable in view, especially, of the fact that aviation terrorism accounts for a significant portion of all plane-crashes in

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392 Reliance on the maxim is in effect a confession by the plaintiff that he has no affirmative evidence of negligence: Clerk and Lindsell, § 10-135.

393 *Ibid.*, § 10-136.

394 See p. 101, *supra.*

the contemporary era.[395]

Nevertheless, it is submitted that even if the assertion is plausible, it would still not effect the applicability of *res ipsa loquitur*. First, the doctrine is not a rule of liability but a rule of evidence which merely raises a presumption of negligence against the defendant.[396] Secondly, except perhaps for reports and speculations in the Press after the fact, the plaintiff may not be in a position to know if the incident was caused by aviation terrorism or negligence of the operator; the latter is the party more able to show that *mala fide* interference, rather than his negligence, was the cause of the incident. Therefore, it would serve the interests of justice better to accord the plaintiff the benefits of this presumption.

Negligent Trespass

In addition to claim in negligence against the aircraft operator, a party victimized on the ground may also be able to succeed in a claim in trespass.[397] Thus, in *Billings* v. *Reed*,[398] the plaintiff's wife was killed when the defendant flew an aircraft at six feet above the field where she was working. In an action brought by the husband for negligence and/or trespass, Lord GREEN, M.R., held that the circumstances of the case warranted that the action may have succeeded on both

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395 See ICAO, *Annual Report of the Council* (1989) pp. 26-27 and 101.

396 See McNair, pp. 78-79.

397 Trespass to person and to land.

398 *Supra.*

heads but for the Personal Injuries (Emergency Provisions) Act 1939 which denied damages for 'war injury'.[399]

It must be emphasized, though, that negligent trespass in the circumstances is subject to any defences available to the defendant of a general trespass action.[400] This appears to be because the element of negligence is of more significance to the state of mind of the defendant (which is a direct element of trespass) than to the independent tort of negligence. This is yet another substantiation of the distinction between negligent torts and the tort of negligence as discussed above.[401]

Aerobatic accidents

Every once in a while an aircraft pilot engaged in aerobatic show makes that crucial error of judgment which results in injuries and fatalities to spectators. This naturally warrants questions as to the liability of aircraft operators in the circumstances.

The determination of liability in this situation is a particularly difficult task, given especially the state of the law in analogous situations, the peculiarities of the particular incident which take into account the speed of aerobatic aircraft, and the fact that the pilot is likely to die thus removing a major source of evidence as to the exercise of reasonable care.

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399 *Ibid.*, at pp. 417 and 420.

400 See McNair, p. 75.

401 See pp. 90-91, *supra.*

In the first place, at common law, a participant in a game or competition who, amidst the excitement of the moment, makes a miscalculation will most likely be absolved from negligence.[402] For example, in *Wooldridge* v. *Sumner,*[403] a horseman in a competitive equestrian event had negotiated a corner so fast that his horse swung off the arena and injured the plaintiff photographer. It was held that the horseman was not negligent as the incident arose out of pure misjudgment of the speed of the horse. On this principle, therefore, it would appear that since aerobatic aircraft will usually be capable of more speed than will a horse, an aerobatic pilot will more readily be accorded the benefit of this sporting defence than will be a horseman. However, considering the radical differences between a horse and an aircraft, that conclusion becomes less assured in all cases. Whereas a horseman is likely to misjudge the speed of his horse, the same may not be true of a pilot *vis-à-vis* his aircraft: because unlike the horseman, the pilot has the benefit of a speedometer, an altimeter, and other instruments which make it more difficult for him to miscalculate various aspects of his undertaking without being negligent. And notably in this connexion, it appears that the operator/pilot may blame faulty instruments as cause of the accident only if it could be established that the malfunctioning occurred in the process or after the fateful manoeuvre which immediately preceded the incident and that the manoeuvre could not be aborted or disengaged thereafter. This submission follows from a reasonable extension of the

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402 See Clerk and Lindsell, § 10-69.

403 [1963] 2 QB 43; cf *Trott* v. *T.A. Saul, The Times*, 3 December 1963.

principle laid down in *Harrison* v. *Vincent*[404] to the effect that the *Wooldridge* principle was not applicable where the perilous circumstances that caused a racing accident should have been rectified prior to the race. In aerobatic incidents, it seems only reasonable that the *Harrison* principle be extended to not only prior inspection and discovery of malfunctioning instruments in the aircraft prior to commencement of the flight, but also to in-flight malfunctioning which could be discovered by reasonable inspection before the aircraft could be put through any further risky manoeuvre.

A second principle which may absolve an aerobat from liability is the perception of the incident as a normal risk associated with the sport. In that case the injured spectator may not be able to recover in negligence.[405] But the major assignment in this regard is the establishment of the proposition that crashes are normal risks associated with aerobatics, thus making the sport a dangerous undertaking to be involved in either as a participant or as a spectator.

It must be noted, at this juncture, that an *aircraft* is not recognized by law as inherently dangerous.[406] But that notwithstanding, it is submitted that the *use* to which an aircraft is put could be patently hazardous,[407] and aerobatics would seem to belong in this category of hazardous usage of a normally innocuous object. The hazards of aerobatics include aerial collisions between participating aircraft which

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404 *The Times*, 17 March 1981.

405 See *Hagerman* v. *City of Niagara Falls* (1980) 29 OR (2d) 609, 114 DLR (2d) 184.

406 See *Fosbroke-Hobbes* v. *Airwork Ltd.* [1937] 1 All ER 108 at p. 112.

407 See McNair, p. 84.

result in crashes, as well as crashes unrelated to aerial collisions. Many a time, spectators are injured in the incidents. Therefore these amount to normal risks associated with the sport.

It is further submitted, beside the foregoing reasoning, that whether or not any sport may be regarded as risky, will not solely be dependent upon whether the history of the sport is replete with accidents, but rather on whether there is a reasonable likelihood that accidents may occur, coupled with instances of such occurrences.

Finally, where the spectator attends a sporting event in full awareness of the risks involved, there is some authority to preclude him from claims for injuries resulting from the foreseen risk.[408]

However, to all these principles of absolution of a sportsman from negligence, there is a proviso to the effect that he must be seen to have acted reasonably in the given circumstances.[409] The essence of this is that the standard of care required to meet what is reasonable will depend on the peculiarities of the given sport.[410] Thus, in an aerobatic incident, the Court will take into account the speed of aircraft, the instrumentation associated with it, the rules of the air, etc., in the determination of whether or not the pilot has been negligent.

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408 See Fridman (Vol. 1), p. 366.

409 See *Fink* v. *Greenians* (1973) 2 OR (2d) 541; *Wilson* v. *Blue Mountain Resorts Ltd.* (1974) 4 OR (2d) 713.

410 See *ibid;* see also *Condon* v. *Basi* [1985] 1 WLR 866.

II. THE INTERFERER

Every so often, aircraft crashes are attributed to the acts of third parties who have little or nothing to do with the legitimate operation of the aircraft in question. The circumstances of such interference are various but they include: terrorism, bird-hunting, aerial collision (with an unlit high-rise structure or with another aircraft in flight), etc.

In all these cases, the question arises as to whether a party who is damaged by the falling debris or wreckage of the aircraft may be able to sue the third party whose act was largely responsible for the crash in the first place. This question becomes particularly significant given that the operator who would have been primarily liable in negligence to the plaintiff would escape liability by effectively anchoring the defence of *novus actus interveniens*[411] on the act of the third party.

While an earth-bound plaintiff may experience some degree of difficulty in maintaining an action for trespass against a third party whose interference with an aircraft caused it to wrongfully touch the person or land of the plaintiff, and whereas this difficulty stems mainly from the requirement of directness as a crucial albeit nebulous element of trespass, it may be that the plaintiff may not find it as difficult to establish negligence against such intervenor if only it can be shown that the intervention of the third party was the overwhelming if not the only reason for the

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411 [A new intervening act or cause]. This is an act or event which breaks the causal connexion between an act of the defendant and subsequent happenings, thus relieving the defendant from responsibility for these happenings: see *Dominion Natural Gas Co Ltd.* v. *Collins and Perkins* [1909] AC 640; *The Oropesa* [1943] p. 32.

crash which resulted in damage to the earth-bound plaintiff.[412] This is because the establishment of the act of the stranger as the primary cause of the crash will, it is submitted, put his conduct onto review for negligence in relation to the party who would have been claiming successfully against the operator of the aircraft. Causation having been established, the remaining questions will be as to whether the stranger owed the plaintiff a duty of care and whether that duty was breached.[413]

The test of duty of care will then rest on whether any reasonable person could have foreseen that the plaintiff was within the category of persons who are likely to be injured as a consequence of the conduct of persons in the position of the stranger.[414] Thus, if what the defendant did was, say, set a time-bomb to go off while the aircraft was in flight, the question then becomes: Is it reasonably foreseeable that upon the explosion of an aircraft, its wreckage or debris would obey the law of gravity and in so doing, might cause damage to somebody on the ground? Alternatively, is it foreseeable by a person in the position of a bird-hunter that shooting a high-calibre round in the direction of a light aircraft, or a balloon, could interfere with its operation and thus either disable the aircraft or its pilot thereby causing a crash which could in turn result to damage to persons on the ground? Could a person in the position of an operator of a telecommunications facility foresee that by erecting a high mast without proper lighting, an aircraft may collide

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412 See *Impress (Worcester) Ltd.* v. *Rees* (1971) 115 SJ 245.

413 See p 92, *supra.*

414 See *Donoghue* v. *Stevenson, supra.*

against it at night thereby crashing and causing damage to persons on the ground? Likewise, the aircraft operator who operates his aircraft so recklessly that he collides with another aircraft: is it foreseeable that in such circumstances the second aircraft may crash and injure people on the ground?

In all these cases, the respective answers will appear to be in the affirmative. And so, there seems no doubt that a person who interferes with the operation of an aircraft, is a very likely defendant in an action for negligence arising from injuries to the earth-bound person. However, as is generally the case with the tort of negligence, whether or not such a stranger will be liable in negligence will depend on the particular facts of each case.[415] No *a priori* hypothesization will seem good enough to determine the cases prospectively. It is only sought to emphasize here that parties interfering with the operation of aircraft may very well be worth consideration as defendants to an action in negligence by an earth-based party the victim of the consequences of any such interference.

III. THE AIR TRAFFIC CONTROLLER

Under proper circumstances, the party injured as a result of the negligence of the air traffic controller (ATC) would be in a good position to claim against the ATC. The success of such a claim will depend more on causation and remoteness than on duty of care; because, as we have seen from the 'neighbour' principle in

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415 See *Herrington* v. *British Railways Board* [1972] AC 877 at pp. 877, 899, 920-921, 941-942, *per* Lord REID, Lord WILBERFORCE and Lord DIPLOCK respectively.

Donoghue v. *Stevenson*,[416] duty of care is owed to whomsoever is objectively foreseeable as a likely victim of a given conduct. Thus, the question then becomes: Is it likely that somebody on the ground would be injured or have his property interfered with, by an aircraft crashing as a result of the negligent conduct of the ATC towards the pilot of the aircraft? The answer would seem to be in the affirmative. However, from caselaw, the obstacle to the plaintiff's case will be two-fold: causation and remoteness.

In order to establish his case, the earth-based victim would have to prove that the conduct of the ATC was the overriding or contributing cause of the plane-crash. Although there is a dearth of caselaw directly on the point, there is enough Canadian jurisprudence on passenger- or pilot-claims against ATCs to demonstrate the problem of causation as indicated above. But even here, the quantity of judicial decisions is far too low.[417]

In *Sexton* v. *Boak*,[418] an Aztec had crashed into the water, off the Vancouver International Airport, while lining up for landing. The light aircraft had gone out of control when it flew into air turbulence caused by wing-tip vortices left by a Boeing 707, a huge aircraft which had just landed ahead of the Aztec. The plaintiffs brought an action under the Families Compensation Act[419] against one of the ATCs, for

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416 *Supra.*

417 See Sasseville, *Liability of Air Traffic Control Agencies*, (McGill LL.M. Thesis, 1985) pp. 106-107.

418 [1972] 4 WWR 176.

419 RSBC 1960, c.138.

negligently directing the Aztec into a place behind the Boeing 707 in the landing sequence when the entire runway would be engulfed in vortices. In dismissing the action against the ATC, SEATON, J., held that the negligent party instead was the deceased pilot whose estate was the first defendant as well as the suppliant against the ATC in a third-party action. The evidence showed that the pilot, who was on visual flight rules (VFR), had manoeuvred the Aztec into a position behind and below the Boeing, and it was common knowledge in 1968 that in view of wing-tip vortices such a manoeuvre was hazardous. With regard to the ATC's liability, the Court held that 'the separation of distance between two aircraft was not the concern of the control tower prior to landing clearance when visual flight rules are in effect, and that the controller in selecting a runway need not anticipate that the light aircraft will leave an inadequate separation.'[420]

In another case, *Churchill Falls (Labrador) Corp. Ltd* v. *The Queen*,[421] all on board died when a small twin-engine executive aircraft crashed at Wabush, Labrador, after colliding with a sheer vertical rock face in an open pit mine. In an action for loss of the aircraft and for indemnity with respect to claims by the estates of the passengers, the plaintiffs alleged the negligence of the relevant ATCs at the Moncton Area Control Centre. An ATC at the Centre had given the aircraft a landing clearance based on an instrument flight rules (IFR) procedure that had been cancelled six months earlier, thus violating Regulations and Manual of Operations

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420 *Ibid.*, at p. 189.

421 And *Churchill Falls (Labrador) Corp. Ltd.* v. *Page* [1974] 2 FCR 415.

(Manops). It was held that even though the defendant ATCs had erred in giving the landing clearance in the said circumstances, the negligence of the pilots rather than the said error of the ATCs was responsible for the crash. According to the Court, a pilot has a discretion to override the clearance of an ATC under normal conditions. Therefore, insofar as a pilot was not in a condition of emergency or difficulty, he - not the ATC - will be responsible for the outcome of his operation of the aircraft. In this case, the Court found that not only were the pilots not in emergency or difficulty, their conducts in the circumstances were the 'real, substantive or effective cause or contributing cause of the crash'.[422] The said negligent conducts included flying to the Wabush Airport for the first time on IFR and at night without familiarizing themselves with the features and layout of the airport and the various procedures thereat; as well as accepting an approach clearance to runway bearing on a beacon the plate for which they did not have, and having accepted the clearance, they continued their flight and adopted an unreasonable method of approach which caused them to miss the runway and crash into the mine.

Commenting further on the duty of the ATC, KERR, J., stated that he 'did not think that the ATC was under a duty to monitor [the aircraft's] descent to the runway or its course after the pilots accepted the clearance to land, other than for purposes of providing separation between airplanes.... Separation of airplanes was

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422 *Ibid.*, at p. 428.

[the ATC's] primary concern and responsibility ....'[423]

While the consonance of this case with the *Sexton* case before it is all too apparent as regards how far the conduct of a pilot will, from the perspective of causation of a crash,[424] insulate the ATC from liability; it appears, however, that the two cases have left unclear what the real duties of the ATC are. Granted that it is arguable that in denying the existence of a duty on the ATC to ensure separation between aircraft, the *Sexton* case purports to limit that principle to the period 'prior to landing clearance when visual flight rules are in effect',[425] thus ostensibly warranting that *Churchill Falls* be distinguishable on the argument that it affirms the primacy of the duty of ATC to separate aircraft only when instrument flight rules are in effect.[426] Nevertheless, this is an analysis that could not be made with full confidence, and, therefore, will require the blessing of a judicial pronouncement considering, especially, that the Court in the *Churchill Falls* decision does not appear to have adverted its mind to the earlier *Sexton* case.

However, despite criticisms of both cases by which Canadian courts have been portrayed as being rather lenient on ATCs,[427] it seems that the Courts would not hesitate to hold ATCs liable where their conducts really do *cause* damage to persons

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423 *Ibid.*, at p. 429.

424 See also *Trottier* v. *The Queen* [1987] 9 FTR 94.

425 *Sexton* v. *Boak, supra,* at p. 189.

426 See *Churchill Falls (Labrador) Corp. Ltd.* v. *The Queen*; and *Churchill Falls (Labrador) Corp. Ltd.* v. *Page, supra,* at p. 429.

427 See Sasseville, p. 114.

who are reasonably foreseeable as likely victims of such wrongful conducts. In this regard, it must be observed that SEATON, J., had stated obiter in *Sexton* that 'if controllers *see* a dangerous situation they may be under a duty to warn...'.[428] And for his part KERR, J., similarly observed in *Churchill Falls* that the ATC would be under a duty to warn pilots of 'apparent' dangers which the latter are unable to appreciate, and that failure to so warn which causes a crash would amount to negligence on the part of the ATC.[429]

The requirement that the danger be apparent to the ATC and not the pilot is seemingly in line with the pilot's overriding sagacity over the ATC's instructions. This seems a just principle since it will be palpably unfair for the ATC to be saddled with liability for incidents arising mostly from circumstances over which somebody else has more direct and effective control.

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428 Emphasis added.

429 See *Churchill Falls (Labrador) Corp. Ltd.* v. *The Queen, supra*, at p. 429.

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Aviation Products Liability and the Earth-based Victim of a Plane-crash

General

The common law of products liability is essentially a special branch of the law of negligence as concentrated on the liability of manufacturers and suppliers[430] for personal injuries and property damage resulting to other people from defectively manufactured products.[431] The basis of liability here is the 'foreseeability of damage to *members of the public*' through such products.[432] That the essence of this area of

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430 See Dias and Markesinis, p. 99; see also Linden, p. 524.

431 See *A Concise Dictionary of Law* (2nd edn, Oxford Reference, 1990).

432 See Clerk and Lindsell, § 12-04.

the law is negligence is evident in its acknowledged origin,[433] to wit, *Donoghue* v. *Stevenson*[434] which is the *locus classicus* of modern law of negligence. As will be recalled, Lord ATKIN had stated his famous 'neighbour' principle in that case as follows:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour.... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemptation as being affected when I am directing my mind to the acts or omissions which are called in question.[435]

In the words of Clerk and Lindsell, with the foregoing statement, 'the House of Lords released the law of torts from the shackles of the privity of contract fallacy and left it free to evolve along its own line of foreseeability of harm...'.[436]

In the area of aviation incidents, it would take little imagination to extend this concept of foreseeability of harm to the jural relationship between the party damaged on the ground by a defective aviation instrumentality manufactured or distributed by another party.[437] For it is now settled that, not only is liability owed to ultimate consumers of the product, the manufacturer or supplier will equally be liable to

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433 Dias and Markesinis, p. 99.

434 [1932] AC 562.

435 *Ibid.*, at p. 580.

436 Clerk and Lindsell, § 12-04.

437 *Stennett* v. *Hancock and Peters* [1939] 2 All ER 578 (pedestrian); *Good-Wear Treaders Ltd.* v. *D & B Holdings Ltd.* (1980) 98 DLR (3d) 59 (occupants of another vehicle). See also Fridman, (vol. 2) pp. 16 *et seq.*

anyone whom he could reasonably foresee would come in contact with the product.[438] Depending on the circumstances of a given incident, therefore, the foreseeability of damage ensuing to an earth-bound party from an aviation incident, it seems, may not entail stretching the doctrine. Simply stated, a manufacturer or distributor of a defective aircraft can easily expect that a consequent crashing of the aircraft could very well cause personal injury or property-damage to persons on the ground.

But, whether or not there could be liability on the manufacturer of a product which was used in unlawful interference with aircraft, as a result of which a person on the ground is damaged, is a more difficult question to answer. It is very unlikely that there would be such liability because in the first place the chain of causation would have been at least one link too remote: manufacture of a product (say explosive) that is used in unlawful interference with an aircraft which crashes as a result and damages the plaintiff. There is no direct link, in this case, between the manufacturer and the plaintiff. Secondly, the illegitimate purpose for which the product was used may very well be one purpose out of many legitimate ones for which the product was manufactured.

In this regard, therefore, the decision in *Good-Wear Treaders* v. *D. & B. Holdings Ltd*[439] deserves some comments. It was held in that case that where the supplier of a product knows that the user intends to put it to use in a manner that will endanger third parties, such supplier would owe a duty to those third parties not

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438 *Ibid.* See also Linden, p. 544; Fridman, (vol. 2) p. 16.

439 (1980) 98 DLR (3d) 59.

to supply the product. If he does supply, he would be liable to any injuries caused a third party, notwithstanding that the supplier had warned the user as regards the dangers of the intended use. The facts of the case were that the seller of a retreaded tyre had warned the buyer that the tyre was unsuitable for the truck on which, to the seller's knowledge, the buyer had intended to install it, but still went ahead and sold the tyre to the buyer. Upon an injury resulting to a third party from an accident caused by the tyre, the Court held the seller of the tyre liable.

This case is particularly instructive for two significant principles: it further consolidates the principle that liability arising from injuries caused by products is not restricted to buyers or users of that product, and that a warning given to the buyer or user does not absolve the seller or manufacturer from liability to third parties who are not privy to that warning. On the whole therefore, it is a sound authority on the general law of negligence in relation to the liability of manufacturers for injuries arising from their unsafe products. However, to the extent that the authority is purported to be one for the specialized tort of products liability,[440] there appears to be a good deal of potential for confusion. 'Products liability' is a term of art denoting the liability of the manufacturer for his *defective*[441] product. Where a product is not 'defective' in the strict sense of the word, but rather purposively used to cause injury to third parties in deliberate or reckless circumstances, it does not appear that a valid case of products liability could be maintained by any such third

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440 See Clerk and Lindsell, § 12-15, n. 65; Linden, p. 539, n. 161.

441 See *A Concise Dictionary of Law*, *supra*; Clerk and Lindsell, § 12-01; Linden, p. 523; Fleming, pp. 461 and 464.

party against the manufacturer or supplier who would have delivered the product even in full knowledge of the likelihood of its use to the injury of the third party.[442] The only cause of action which the third party plaintiff can still maintain against the manufacturer or supplier is the traditional action in negligence for supplying an 'unsafe' product which ultimately caused injury to the plaintiff.[443] In other words, it would amount to torture on language to argue that the purposive use of a product to ill effects would for that reason make the product defective.

Therefore, the manufacturer or supplier of the explosives used in the bombing of an aircraft may not be sued successfully by the party damaged on the ground by the exploding aircraft on the basis of a damage caused by a defective product. He may however be sued in negligence if it can be shown that he was, or ought to have been, aware of the injurious use for which the explosives were intended.

Defences to Products Liability Actions

(i) Safe delivery

The manufacturer or distributor would be absolved from liability if he can show that the product was not in a defective condition at the time he put it into circulation and there was no reason for him to expect a defect in it.[444]

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442 See Linden, p. 559; cf *Anglo-Celtic Shipping Co.* v. *Elliot and Jeffrey* (1926) 26 TLR 297.

443 *Ibid.*

444 *Smith* v. *Inglis Ltd.* (1978) 83 DLR (3d) 215. See Clerk and Lindsell, § 12-17.

(ii) Warning and intermediate examination

The manufacturer would not be liable where there was a probability of an intermediate examination and the manufacturer had given either express or implied warning that the product must be examined or tested before being put to use. Here, the intermediate handler of the product would be held liable for any damage caused by the product.[445]

(iii) Exercise of reasonable care

Where the defendant shows that he has exercised all reasonable care, he would not be liable.[446] While a manufacturer who proves the existence of foolproof process in his manufacturing system would not have conclusively established exercise of reasonable care throughout the entire process of manufacture (given that employee-error is always possible however perfect the system[447]), showing a foolproof process will always be a factor in the determination of reasonable care,[448] if not presumptive of it.[449] This is yet another indication that the law of products liability is essentially the law of negligence as is particularly relevant to manufacturers and products distributors.

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445 See Clerk and Lindsell, § 12-17.

446 *Ibid.*

447 *Hill* v. *J. Crowe (Cases) Ltd.* [1978] 1 All ER 812.

448 Dias and Markesinis, p. 105.

449 See *Daniels and Daniels* v. *White & Sons Ltd.* [1938] 4 All ER 258 where it was stated that the establishment of the existence of a foolproof system would absolve the manufacturer from liability.

(iv) Unintended use

It does not seem likely that a court will hold a manufacturer liable for damage caused as a result of the use of the product for a purpose for which it was not intended.[450] This defence, it appears would cover not only where the product is put to a radically different use (as in where a strictly transport aircraft is used for aerobatics), but also where the product is stretched beyond what is recommended and reasonable even in its use for an intended purpose. For instance, where an aircraft is overloaded, flown in bad weather condition, or put to a longer distance (without requisite fuelling or maintenance) than it was designed to endure at any given time, it is submitted that an unintended use would have ben made of such an aircraft.

(v) 'State of the art'?

The manufacturer or supplier may be availed a defence if he can establish that the state of scientific and technological knowledge at the material time was not such that he could reasonably be expected to have appreciated the defect. It appears that the United Kingdom is the only Commonwealth jurisdiction that has

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450 See *Davie* v. *New Merton Board Mills Ltd.* [1957] 2 QB 368 at p. 379 *per* ASHWORTH J, reversed on another ground [1959] AC 604.

unequivocally recognized this defence.[451] Its applicability in Canada and other parts of the Commonwealth is not entirely clear. However, its applicability would not seem entirely inappropriate because even if not applied as a separate defence, the fact that a product was manufactured according to the state of the art standards prevailing at any given time would seem to always be a factor in the manufacturer's defence that he exercised all reasonable care in the product's manufacture.[452]

(vi) Components

Under UK law, it appears that the fact that the components of a given product were manufactured by different manufacturers could make a difference in the attribution of liability, where component-defect was specifically implicated in the incident which caused the damage.[453] This is of particular significance to aircraft manufacturer's liability since the aircraft is notorious for its composition of parts from different manufacturers. But, the tort laws of Canada and other Commonwealth jurisdictions do not appear to have taken a clear position on this matter. Whatever the position, however, it would seem that the manufacturer of the finished product will be the chief target of liability since he is the last person in the

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451 This defence has been statutorily enacted in the UK in virtue of the Consumer Protection Act 1987 which was enacted pursuant to the 1985 Directive 85/374 of the EEC. For a discussion of this Directive and its effect on the law see Borric, 'Product Liability in the EEC' (1987) 9 *The Dublin Univ. L.J.* 82 especially at p. 86. The 'state of the art' defence is now a part of American jurisprudence; see *Bruce, et al* v. *Martin-Marietta Corp. and Ozark Airlines, Inc.* (1976) 14 Avi 17,472, see also UK Royal Commission on Civil Liability and Compensation for Personal Injury (1978), ch. 22.

452 See p. 122, *supra.*

453 See Clerk and Lindsell, §§ 10-39 and 12-26.

chain of production, and, above that, he is the one who put the finished product into circulation. This would place a heavy duty of care on him emanating mainly from the reasonable expectation of him to have sufficiently tested the product before putting it into circulation. Thus, it appears that rather than absolve him from total liability, his position will make him at least a contributor of negligence even where the defective component was supplied by another manufacturer.

At any rate, for an earth-bound plaintiff suffering from damage caused by a crashing aircraft, it seems that a component manufacturer might just be too insulated by the crashing aircraft to be within the reach of the plaintiff, considering that it is most likely that the physical impact on the plaintiff's person or property would not have been caused by the component, except in the unlikely event that the defective component (such as the engine) would have made the said impact in addition to having caused the crash.

(vii) *Novus actus interveniens*

This could very well be an extension of the 'safe delivery' defence. All it entails is that the intervention of another person or factor, rather than the fault of the manufacturer or supplier, would have caused the defect. The major caveat, however, is that the intervening factor would have been so overwhelming or unreasonable as to have eclipsed the wrong - if any - of the manufacturer.[454]

In aviation incident situations, a notable instance of plausible *novus actus*

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454 See *Impress (Worcester) Ltd.* v. *Rees* (1971) 115 SJ 245; *Weld-Blundell* v. *Stephens* [1920] AC 956 at p. 986 *per* Lord SUMNER: see also generally, Clerk and Lindsell, §§ 1-117 *et seq.*

interveniens defence would be where a repair or maintenance procedure done by a third party would have been the cause of the crash which damaged the earth-bound plaintiff.[455] In that case, such repairer would be liable to the injured third party.[456]

PROGRESSIVE DEVELOPMENTS IN THE UNITED KINGDOM

A major shortcoming of the common law of products liability is its continued basis on fault.[457] This no doubt is the side effect of its negligence connexion. In the United Kingdom, however, some progress has been made here by way of legislation.[458] No doubt this is owing to the impact of the EEC law on contemporary British legal system.

Under the Consumer Protection Act 1987 which was enacted in furtherance of EEC law,[459] the liability of the manufacturer or supplier of a defective product is no longer dependent on fault, such liability is now strict.[460] This is of remarkable importance to aviation incidents - where the complex manufacturing process of an aircraft, for instance, would often entail difficulty on the usually less sophisticated

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455 See Clerk and Lindsell, § 12-13.

456 See *Marschler* v. *G. Masser's Garage* (1956) OR 328, 2 DLR (2d) 484.

457 See *ibid.*, para. 12-18.

458 See the Consumer Protection Act 1987.

459 See Dir. 85/374/EEC.

460 See Borric, generally. The regime of products liability in the US is also strict: see generally, Prosser, 'The Fall of the Citadel (Strict Liability to the Consumer)' (1966) 50 *Minn. L. Rev.* 791.

plaintiff who would be faced with a defendant manufacturer for whom it is easier to disprove fault than it is for the plaintiff to prove it. Unfortunately for the Canadian plaintiff, he would still have to endure this hardship given that the liability for defective products is not strict in Canada[461] where the old common law regime of fault liability still reigns.[462]

Here, the doctrine of *res ipsa loquitur* may not be of much help since the defendant must be shown to be the one in control of the object of harm at the time of the incident.[463] The manufacturer usually is not in such control.

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461 See Linden, p. 538. Although there is strict liability in Australia, it is of little or no benefit to the plaintiff in the circumstances under analysis here. They benefit only the *consumer* of goods of limited value, and not just anybody who was injured by the defective product: Fleming, pp. 464-5; Trindade and Cane, p. 479.

462 See Linden, p. 538.

463 See p. 101, *supra*.

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Occupier's Liability for Injuries resulting from Aviation Premises

This is the liability of an occupier of land or premises, including structures thereon,[464] for damage[465] sustained by persons on the land as a result of the failure of the former to take steps to make the land or premises safe or to warn against dangers not created positively by him.[466]

At common law, the level of liability facing the occupier depends on the legal status of the visitor which could be any of a contractual entrant, an invitee, a

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464 See Winfield and Jolowicz, p. 201.

465 Both personal injury and property damage: see Fleming, p. 420.

466 See Trindade and Cane, p. 440. The leading works on this area of tort law are Di Castri, *Occupiers' Liability* (1981); and North, *Occupiers' Liability* (1971).

licensee, or a trespasser.[467] Dissatisfied with the results of this categorization, the legislature in England enacted the Occupiers' Liability Act 1957[468] (OLA) which merged all the duties into a common duty of care in respect of all types of visitors. Similar legislation have been enacted in several jurisdictions in Canada[469] and Australia,[470] as well as by Ireland,[471] New Zealand[472] and Scotland.[473]

Premises

As has been indicated at the beginning of this chapter, 'premises' connotes not only land, but also structures affixed to it,[474] as well as movable objects.[475] To a large extent, these common law rules have been statutorily confirmed and even exceeded in Canada[476] as the respective conceptions of 'premises' tend to be

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467 See Clerk and Lindsell, § 13-01.

468 As amended by the Occupiers' Liability Act 1984.

469 See RSA 1980, c. 0-3 (Alberta); RSBC 1979, c.303 (British Columbia); RSM 1987, c.0-8 (Manitoba); RSO 1980, c.322 (Ontario); SPEI 1984, c.28 (Prince Edward's Island).

470 See Occupiers' Liability Acts of Victoria (1983) and Western Australia (1985)

471 See Occupiers' Liability Act 1972.

472 See Occupiers' Liability Act 1962.

473 See Occupiers' Liability (Scotland) Act 1960.

474 *Francis* v. *Cockrell* (1870) LR 5 QB 510; *Perkowski* v. *Wellington City Corporation* [1959] AC 53, *Hillman* v. *MacIntosh* [1959] SCR 384.

475 See *King* v. *Northern Navigation Co.* [1913] 27 OLR 79 (Ship), *GTR* v. *Barnett* [1911] AC 361, *Diplock* v. *CNR* [1916] 53 SCR 376 (trains); *Gebbie* v. *Saskatoon* [1930] 4 DLR 543 (street cars)

476 See s.1(d); s.1, s.1(l), s.1(b) and s.1(b) of OLA Alta., B.C., Man , Ont., and P E I , respectively

inexhaustive.[477] One significant difference, though, between the common law definition and statutes is that whereas the latter include aircraft as premises only if they are not in operation (and the Alberta OLA does not include aircraft[478] at all), it appears that common law does not, for its part, make such differentiation in its inclusion of aircraft as 'premises'.[479] It would appear, though, that the extension of these provincial OLAs to aircraft in particular and aviation in general does raise a constitutional problem as regards the validity of those provisions.[480]

From the foregoing, therefore, it seems quite clear that airports, aerodromes and similar facilities, as well as structures found in them, appear to be generally regarded as 'premises' for the purposes of occupier's liabilities both at common law and in the various OLAs. And noting the above-mentioned differences between common law and statutes, it seems, in addition, that aircraft are generally regarded to be premises also - at least at common law. This is of particular significance to injured persons who are not able to claim under the liability regime of the Warsaw Convention for one reason or another, e.g., because they are not persons embarked

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477 See Di Castri, p. 13; Fridman, (vol. 2) p. 61.

478 The OLA Alta. also excludes all vehicles (except railway locomotives and cars, and ships), portable derricks or other movable things except stagings and similar structures or trailers used or designed as homes, shelters or offices.

479 See *Fosbroke-Hobbes* v. *Airwork Ltd. & British American Air Services Ltd.* [1937] 1 All ER 108.

480 It was held in *Johannesson* v. *Rural Municipality of West St. Paul* [1952] 1 SCR 292; [1954] 4 DLR 609 that the whole subject of aeronautics is within the exclusive jurisdiction of the Parliament of Canada under the residuary power to legislate for peace, order and good government of Canada (s.91, Constitution Act 1867). Therefore any provincial statute which purports to encroach upon such power would be null and void *pro tanto*: see also s.52(1), Constitution Act 1982.

upon international transport,[481] or because they were not injured while *on board* the aircraft or in the course of any of the operations of embarking or disembarking.[482]

Occupier

An occupier is any person in whom is vested the power to exercise control over the premises in question. He need not have complete or exclusive control, neither need he have ownership interest in the premises. The classic statement of the test of occupation can be found in the case of *Wheat* v. *E. Lacon and Co. Ltd.*[483] The defendants, owners of a public-house, had entrusted it to a caretaker under a service agreement which required him to, among other things, sell the defendants' drinks on the ground floor of the building. The agreement allowed the caretaker to live on the upper floor and to take in lodgers. There was no direct access between the two floors which had separate entrances. A lodger sustained fatal injuries while descending a defective and unlit staircase on the upper floor. On his widow's suit, the House of Lords was seised with the question of occupation of the dangerous part of the building which was on the upper floor. Construing the agreement, their Lordships held that the defendants did not give up occupation of any part of the building, that two persons could be joint occupiers of the same premises and as such would jointly owe duty of care to visitors. In that regard, Lord DENNING proffered

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481 Art. 1 of the Warsaw Convention limits applicability of the Warsaw Convention System to '[I]nternational carriage of persons, luggage or goods performed by aircraft for reward It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.'

482 See *ibid.*, art. 17.

483 [1966] AC 552.

the following famous principle:

> In order to be an 'occupier' it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be 'occupiers'. And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control.[484]

This common law rule on who an 'occupier' is continues to apply in England by the sanction of the English OLA,[485] whereas in Canada the definition of an 'occupier' is now largely provided by statutes in those jurisdictions that have enacted them.[486] Nevertheless, it appears that the Canadian jurisdictions which still rely on the common law of occupiers' liability will follow the *Wheat* principle[487] which is the standard modern authority on occupation in the Commonwealth jurisdictions.[488]

For the Canadian legislative regimes, the definitions of an occupier are fairly similar as are most other rules provided for in the different statutes. This appears to stem largely from the wide-spread inspiration which was presumably derived from a draft Uniform Occupiers' Liability Act (UOLA) prepared by the Uniform Law Conference of Canada.[489] Under those statutes, therefore, there generally are two alternative tests of occupation: physical possession of the premises, or control over

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484 *Ibid.*, at p. 578.

485 See s.1(2).

486 See s.1(c), s.1, s.1(1), s.1(a), s.1(a), respectively of the Occupiers Liability Acts of Alberta, British Columbia, Manitoba, Ontario and Prince Edward's Island.

487 See Di Castri, p. 7.

488 See, Fleming p. 451, n.89; Trindade and Cane, pp. 440-442.

489 Consolidation of Uniform Acts 1978, c.32-1: see Di Castri, p. 188. Besides the UOLA, the English OLA had a tremendous influence on the Canadian OLAs: *ibid.*, p. 13.

activities undertaken on the premises and over entry thereinto.[490] As in the *Wheat* principle, the statutes do recognize that there may be more than one occupier for the same premises.[491] And it is apparent that to all intents and purposes, the Canadian statutory definitions of an occupier approximate a rehash of Lord DENNING's dictum to like effect in the *Wheat* case.

In aviation situations the issue of occupiers' liability would primarily arise in circumstances of injuries sustained in airports, aerodromes and similar facilities used for aviation purposes; as well as in aircraft.[492] And thus, the question arises as to who would qualify as an occupier.

Following the review of the law so far, it appears that in relation to injuries sustained in (i) the *aircraft*: operators would be the sole occupiers notwithstanding that the land upon which their aircraft are stationed would have been under the control of other persons. This is for the simple reason that the operators are the persons ordinarily in control of aircraft. Aircraft operators are generally always in possession as long as aircraft are operational, they also exercise control over conditions of aircraft and activities carried on in it, as well as control entry into it. Therefore, to the extent that the Authorities of the airport are seen to have little or no role in these matters, they may not qualify as occupiers.

(ii) The *airport*, etc. For injuries sustained in the airport and other similar

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490 See n. 486, *supra.*

491 *Ibid; Meier* v. *Qualico Developments Ltd.* [1982] 40 AR 493, reversed on other grounds [1985] 1 WWR 673 (Alta. CA).

492 Where the Warsaw Convention is inapplicable by virtue of either the plaintiff's status or the operational status of the aircraft at the material time: see p. 130, *supra.*

facilities, depending on the circumstances[493] and locale of the incident within the airport, the airport Authorities would be either the sole occupiers, or joint occupiers with other persons such as operators of an aircraft, a shop, etc. The sole occupation of the airport Authorities would naturally relate to the areas the management of which are in no other hands but theirs. Whereas their joint occupation will arise where the material locale is under the management of some such other person as aircraft operator, a duty-free shop operator, etc. It appears, at any rate, that the airport Authorities could never escape the principle of occupation enunciated in the *Wheat* case in such situations.[494]

The duty

Occupiers' duty to visitors will be examined variously at common law and under the OLAs since both legal regimes vary in their approach to the said duty.

A. COMMON LAW

As has been noted earlier, the occupier's duty to visitors on his premises differs according as such visitors fall into any of the categories of: contractual entrants, invitees, licensees and trespassers.[495] Despite that some Canadian Provinces have enacted OLAs (following the OLA 1957 of England) which merged all the

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493 *Creed* v. *McGeoch & Sons Ltd.* [1955] 1 WLR 1005 at p. 1009.

494 See also *Couch* v. *McCann* (1977) 77 DLR (3d) 387; *MacDonald* v. *Goderich* [1949] 3 DLR 788.

495 See *supra*.

various category-based common law duties into one common duty of care, it is submitted that for the purposes of civil aviation torts, such legislation may not necessarily translate into a dimunition of the relevance of the common law principles in Canada. First, the common law still regulates the law of occupiers' liability in those provinces which do not as yet have the OLAs, as well as in federal territories. Secondly, it seems that the applicability of the provincial OLAs, as regards airports, aerodromes, aircraft and other aviation 'premises', is not yet certain. Since it is within the exclusive jurisdiction of the Parliament of Canada and not provincial legislatures to legislate in all matters pertaining to aeronautics[496] (in virtue of the peace, order and good government clause of the Constitution Act 1867[497]), it is arguable, therefore, that the provincial OLAs will be null and void to the extent[498] that they are purported to govern occupiers' liability in aviation or aeronautic premises. And since there is no federal OLA as yet, the common law rules will continue to apply accordingly. Having said that, the duties of the occupier towards the various categories of visitors will now be examined.

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496 *Johannesson* v. *Rural Municipality, West St-Paul, supra.*

497 See s.91 Constitution Act 1867.

498 See s.52(1), Constitution Act 1982.

(i) Contractual entrants

These are persons who enter the premises pursuant to a contract between them and the occupier for a mutually contemplated purpose.[499] Where such a contract stipulates the duty of the occupier regarding the safety of the premises, the stipulation will of course determine the liability of the occupier according to the normal rules of the law of contract.[500] Where the contract is silent on the question of the occupier's obligation for safety of the premises, it appears the law will imply such terms as seem reasonable and just according to the circumstances of the case. For this purpose, there seems to be no laid down and immutable rules for the Court to follow.[501] But the commonest rule appears to be that the occupier must ensure that the premises are at least as fit for the purpose of the contract[502] as reasonable care and skill on the part of anyone can make it.[503]

The most significant aviation situation where occupier's liability will be governed by the common law principles of duty to contractual entrant, would be in situations of air transport contracts. For the most part, it seems that the obligations of the carrier for safe carriage is usually provided for in the contract of carriage. And insofar as the person or object is in the airport for the purposes of the contract

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499 See Di Castri, p. 15; Fleming, p. 421.

500 See Fleming, *ibid.*

501 *Ibid.*, Fridman (vol. 2), p. 34.

502 See *Carriss* v. *Buxton* [1958] SCR 441 at p. 471.

503 *Mackenan* v. *Segar* [1917] 2 KB 325 at p. 333; *Francis* v. *Cockrell* (1870) LR 5 QB 501; *Brown* v. *B & F Theatres Ltd.* [1947] SCR 486.

of carriage, any damage resulting from breach of this contractual obligation will sound in occupier's liability. The particulars of the breach will here depend on the terms of the contract in each case.

Of course, there is always the possibility of a contract of carriage without any stipulation as to the obligation of the carrier with regard to safety. In this case, however, it is submitted that the Court will imply the obligation according to the dictates of justice.

A very interesting case may arise in situations where the injured party is a person operating a secondary enterprise in an airport pursuant to a contract with the operators of the airport: for example, a duty-free shop owner. It will be recalled that it was stated in the *Wheat* case that a landlord who lets premises by way of lease to a tenant may not be treated as an occupier since he would have parted with control, even though he still has obligation for repairs.[504] But this, it is submitted, will have little relevance to the contractual entrant since the contract between the parties would govern their relationship and liability to each other.[505] That being the case, it is further submitted that the operator of a secondary enterprise will be covered by either express stipulations in the contract, or implied obligations of the landlord with regard to injuries sustained at the airport.

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504 See *Wheat* case, ***supra*** at p. 579.

505 See *Sinclair* v. *Hudson Coal & Fuel Oil Ltd* (1966) 56 DLR (2d) 484

(ii) Invitees

These are people who come onto the occupier's premises with express or implied permission not under a contract but in view of a material mutual interest shared with the occupier. In other words, the visitor's purpose of visit bears a direct or indirect connexion with the operations or business of the occupier. No doubt, a passenger at an airport or a similar facility comes under this category. In *Stuckless* v. *R*,[506] for instance, the defendant occupier was held liable for the injury sustained when the plaintiff slipped on an icy ramp in front of the defendant's air terminal after leaving an aircraft.

Since an indirect mutual interest also suffices to bring a person under this category, there seems to be no dispute that a third party with a *bona fide* interest in somebody with whom the occupier has a business relationship will fall into the category. Thus, in *York* v. *Canada Atlantic SS. Co.*,[507] the plaintiff who was injured while on the defendant's wharf to meet passengers on the defendant's ship was held to be an invitee of the defendant.[508] Therefore, it would seem that a person at the airport terminal for the purpose of either meeting or seeing off a passenger would qualify as an invitee of the airport operator, beside that of the aircraft operator. It would also appear that business visitors of airport based enterprises (such as customers of duty-free shops, airport bars, etc.) would qualify as invitees of the

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506 (1975) 63 DLR (3d) 345.

507 (1893) 22 SCR 167.

508 See also *Mazur* v. *Sontowski* [1952] 5 WWR (NS) 332; *Johnston* v. *Sentineal* (1977) 17 OR (2d) 354; *Pringle* v. *Price* (1971) 20 DLR (3d) 229.

airport operator, as well as of the proprietors of such businesses.[509]

Having seen who the occupier's invitees might be, the next question becomes: What is his duty to them under common law rules? The occupier's duty to his invitee is best outlined by WILLES, J., in *Indermaur* v. *Dames* in the following statement:

> [W]e consider it settled law, that he [the invitee], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined... as a matter of fact.[510]

Thus the liability of the occupier toward his invitee will turn on the following basic questions: (a) Did the damage to the invitee ensue from an unusual danger[511] on the occupier's premises[512] the existence of which the occupier knew or ought to have known? (b) Did the occupier use reasonable care to prevent damage to his invitee from the unusual danger? and, (c) Did the invitee exercise reasonable care on his own part so as to avoid injury to himself?[513] With all due respect, it is submitted that the last criterion seems to have added nothing new to the law as it is only a restatement of the defence of contributory negligence which will always avail an occupier in this area of the law which is only a special branch of the law of

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509 See *Hillman* v. *MacIntosh* (1959) 17 DLR (2d) 705.

510 *Ibid.* at p. 288.

511 For a fuller discussion of this, see Di Castri, pp. 41 *et seq.*, Fridman (vol. 2), pp. 41-43.

512 The danger must be localized within the occupier's premises: see Trindade and Cane, p. 449.

513 See Fridman (vol. 2), p. 41.

negligence.[514] And as such, that criterion will not be given any extended discussion in this chapter.

(a) Unusual danger

Attempt has been made to define it as a danger not usually found in the undertaking of the invitee at the material time.[515] However, what amounts to unusual danger is better appreciated according to the circumstances of the case, than defined by any statement of principle.[516] Some of the facts held to have constituted unusual dangers include: uneven steps,[517] malfunctioning automatic door-closing contraption,[518] ice on the grounds,[519] a glass panel in the doorway,[520] water formed from snow and slush marched into premises by patrons,[521] etc.[522] There is no doubt that generally these cases will be relevant to appropriate instances in civil aviation

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514 See Di Castri, p. 1.

515 See *London Graving Dock Co. Ltd.* v. *Horton* [1951] AC 737.

516 See Fridman (vol. 2) p. 42; Di Castri, p. 41 citing *Hillman* v. *MacIntosh* [1959] SCR 384 at p. 391-392.

517 *Snitzer* v. *Becker Milk Co. Ltd.* (1976) 75 DLR (3d) 649.

518 *Bishop* v. *Arts & Letters Club of Toronto* (1978) 83 DLR (3d) 107.

519 *R D. Lindsay Funeral Home Ltd.* v. *Pryde* (1986) 71 NSR (2d) 169.

520 *Somback* v. *Trustees of Regina R.C. Separate High School District of Saskatchewan* [1969] 72 WWR 92 affirmed [1971] 1 WWR 156 (Sask. C.A)

521 *Campbell* v. *Royal Bank of Canada* [1964] SCR 85; see also *Langdon* v. *R.C. Bishop of Edmunston* (1984) 62 NBR (2d) 61 (water and slush): cf *Cosgrave* v. *Busk* (1967) 59 DLR (2d) 425.

522 See generally, Di Castri, pp. 45-47; Fridman (vol. 2), pp. 41-42.

situations beside some more specific instances where decisions have been rendered on aviation derived incidents, as in where the design of an airport parkade was held to present an unusual danger.[523]

The other arm of this test is the *knowledge of the occupier.* If he knew - or ought reasonably to have known - about the presence of the danger, then provided that the other elements of the duty are equally present he will be held liable.[524]

(b) Reasonable care

If the danger is unusual and the occupier knows or ought to know about it, then there is a duty on him to exercise reasonable care in order to prevent damage resulting to his invitees from the danger. In the absence of contributory negligence, it seems, any breach of this duty will involve the occupier's liability to his invitee.[525]

Now beside the ordinary scenarios wherein the injuries to visitors result from structural defects in the premises, or from inanimate objects brought[526] or found in the premises (all of which generally are of direct significance in an aviation setting), there is also the more curious case of malicious injury by third parties to persons in an airport, for example, attacks by terrorists[527] or other criminals at airports. What

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523 *Stuart* v. *R. in right of Canada* (1988) 45 CCLT 290.

524 See Fridman (vol. 2), pp. 43-44.

525 See *ibid.*, p. 44.

526 See *Refuse* v. *T. Eaton Co. (Mantimes) Ltd.* (1957) 11 DLR (2d) 773 at pp. 778-779.

527 Such as happened in Rome and Vienna airports in 1985.

would be the applicability of the common law rules of occupier's liability to his invitees who are injured in such instances? A relevant case here is *McKenna* v. *Greco (No. 2)*.[528] Here, the plaintiff invitee was assaulted and injured by the first defendant while in the bar of the second defendant's hotel. It was held that, even though the second defendant was the occupier of the premises, he was not liable to the plaintiff because the first defendant had not displayed any dangerous tendencies in the past and was not known to constitute an unusual danger to invitees as a result. Thus, the second defendant had no reason to expect the assault on the plaintiff from the first defendant. The harm was simply unforeseen.[529] Had it been foreseen, the second defendant would have been in a reasonable position to avert it because, as the Court found, the bar and hotel were adequately and reasonably staffed.

Now, the implications of this to attacks at airports are that foresight, expectancy and preventive measures are extremely important in the consideration of whether the occupiers of the airport (i.e., the airport authorities) should be held liable for such attacks.

Foresight. Whether or not the airport Authorities ought to have foreseen the attack will, it is submitted, depend on a variety of factors some of which are: tendency of airports to be terrorist targets, and a particular reason for the likelihood of the attack. Doubtless, airports have been known to be a favoured choice of attack

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528 (1985) 52 OR (2d) 55: cf *Hanes* v. *Kennedy* [1941] SCR 384.

529 See also *Alaica* v. *City of Toronto* (1976) 74 DLR (3d) 502.

by terrorists as some notable incidents have shown.[530] And the political atmosphere of the times will particularly affect the likelihood of such attacks. For instance, in the event of an impending or actual war pitting one State against another that threatens - or is known - to use terrorism as an instrument of policy, there is no gainsaying that airports are particularly endangered.

But that would not really be determinative of the issue. The next question is: Even in the event of this realization which satisfies the element of foresight, must the occupiers of the airport be held liable for any terrorist attack on invitees at the airport? The final answer to this question will entail the consideration of the elements of unusual danger and the reasonable care of the operators of the airport.

Unusual danger. That airports are targets of terrorist attacks - especially during some periods of international tension - is arguably common knowledge. But would this common knowledge suffice to make the danger *usual* so as to absolve the occupier from liability on that account? Subject to the discussion on *reasonable care* in the next paragraph, it can be submitted here that such common knowledge or apprehension, without more, may not constitute presence of actual danger. In this connexion, it is submitted further that there must be a distinction between danger the presence[531] of which the occupier knows or ought to know, and a mere apprehension in relation to a danger the possibility of which the occupier should expect. As the occupier's liability is ultimately dependent on his exercise of

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530 Note especially the 1985 shootings at Rome and Vienna airports and bombing at Narita airport, Tokyo.

531 See Di Castri, p. 49.

reasonable care to prevent harm to the invitee, the reasonableness of an airport operator's preventive measures in terrorist attack scenarios, it is submitted, must take into account this distinction between existence of a known danger and reasonable apprehension of possible danger.

Reasonable care. Where the danger is known to exist, a determination of whether reasonable care has been taken by the occupier will depend on the circumstances of the case.[532] An important factor in this regard is the relative ease by which the occupier may have avoided the harm. If the occupier could have avoided the danger by economical and easy precautions, then his non-avoidance of it would amount to a breach of duty.[533]

One notably easy precaution is warning; and while not always equating reasonable care, warning will always be a valuable factor - if not totally exculpatory - in the determination of whether reasonable care has been exercised.[534] Therefore in airport terrorism, warning will be of particular significance where the airport operators have received information regarding an impending attack either by way of secret notice from State security agencies or by way of what suspectedly may be 'crank' telephone calls from unidentified persons. An argument could be made here to the effect that it is unreasonable to expect aviation operators to publicize every threat of terrorist attack they receive, as that might jeopardize their operations by

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532 *Ibid.*

533 See *Campbell* v. *Royal Bank, supra* at p. 351.

534 See *Indermaur* v. *Dames, supra*, at p. 287; see also Di Castri, p. 49.

scaring away would-be patrons. But, it is submitted that there seems to be a need to at least publicize the fact that such threats, if any, were indeed made, while emphasizing, as a rider, that the threats were unverifiable, etc., and could therefore be capricious communication. Having done that, the element of warning would have been satisfied by the operators.

Beside warnings, it seems to be incumbent on the airport operators to ensure that they have reasonable security arrangements in place to prevent terrorist attacks at airports. Here again what is reasonable will depend on the circumstances of the case, especially, taking into account the relative economic prowess of the airport operator, as well as progress in and availability of aviation security systems and technology. It must be noted, at this juncture, that delegation of the task of ensuring safety of the premises to an independent contractor does not absolve the occupier from liability should such contractor be found to have been negligent.[535]

Barring the foregoing circumstances, the operators of an airport may not be held liable for acts of terrorism at the airport where the operators had no reason to anticipate any harm in that regard and had taken all reasonable steps to prevent injury.[536]

(iii) Licencees

A licensee is a visitor who enters the premises of an occupier with the express

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535 See Fridman (vol. 2), p. 47.

536 See *Birch* v. *N.B. Command Canada Legion* (1972) 29 DLR (3d) 361 at p. 363 one guest shot another at a social club.

or implied permission of the latter for a purpose solely of interest to such visitor.[537] The said permission of the occupier is limited to the purpose of the visit and going beyond such limit may cost the visitor his status as a licensee; he may thus be rendered a trespasser, and this is certainly the case with regard to the extent of such excess.[538] Similarly, an invitee may lose his status as such upon violation of the original terms of his visit: here he will become a mere licensee (or even a trespasser) if he does something to jeopardize the essence of mutuality of his interest and that of the invitor.[539]

Until recently, the duty of the occupier towards the licensee had been limited to only warning the licensee of any concealed danger or trap of which the occupier actually knew; beyond that the licensee was to take the premises as he found it.[540] But, it is all but settled now that there is no distinction between the duty owed an invitee and that owed a licensee, by the occupier.[541] Thus, that makes the analysis[542] of the occupier's duty to an invitee equally pertinent here.

(iv) Trespassers.

A trespasser is a person who lacks permission of any sort to be on the

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537 See Di Castri, p. 71.

538 See Fridman (vol. 2), p. 47.

539 See *ibid.*, p. 48.

540 See *ibid.*, p. 49; *London Graving Deck Co.* v. *Horton, supra.*

541 See Fridman (vol. 2), p. 52.

542 See pp. 138 *et seq., supra.*

premises, and is there generally against the will of the occupier.[543]

Originally, the occupier owed trespassers no duty beside refraining from intentionally[544] or recklessly[545] injuring them. But again in this area, the law has undergone a significant evolution to impose a duty of 'common humanity'[546] on an occupier in behalf of trespassers to his land. Generally, this 'common humanity' duty involves '(a) requiring occupiers to foresee more forcefully the possibility or likelihood that trespassers may be present, where formerly they were not obliged to worry over much whether or not a trespasser would be on their land, and (b) imposing on occupiers a much more onerous duty with respect to the safety of trespassers, even though it does not go as far as the duty that is owed towards lawful visitors, whether licensees or invitees.'[547]

As noted earlier, the regime of occupiers' liability is now primarily governed by legislation in many a Province of Canada following the lead in England. These enactments were largely responsive to the confusion and inadequacies in the law resulting from the common law categorization of the duties of the occupier towards his visitors. How far the statutory regime has corrected deficiencies is best seen by an examination of the OLAs.

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543 See *Addie & Sons (Collieries)* v. *Dumbreack* [1929] AC 358 at p. 371.

544 *Ibid.*, at p. 365.

545 See *Haynes* v. *C.P.R.* (1972) 31 DLR (3d) 62.

546 See *British Railways Board* v. *Herrington* [1972] AC 877.

547 Fridman (vol. 2), p. 55.

B. *THE OCCUPIERS' LIABILITY ACTS (OLAs)*

With minor exceptions, the various Canadian OLAs are largely patterned after the English OLA 1957. It is in recognition of this fact that, in their adjudication of Canadian OLA cases, Canadian courts have generally followed the English OLA caselaw.[548] Thus, the duty of the occupier towards his visitors under the various OLAs will be generally synthesized in the following analysis: significant differences will of course be duly discussed.

The most important accomplishments of these OLAs appear to be, first, the merger of all the duties owed by the occupier to his visitors[549] into a common duty to take care to make the premises reasonably safe for all his visitors,[550] having regard to the circumstances of each case[551]. Secondly, it also seems that dangers need not be unusual for the occupier's liability to arise under the Acts. An occupier is simply liable under OLA for injuries arising from any danger which he was - or ought to have been - aware of.[552] Thirdly, except for Alberta, it appears that duty on the occupier to make the premises safe is for all purposes, rather than for only the

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548 See *Epp* v. *Ridgetop Builders Ltd.* (1978) 94 DLR (3d) 505 at p. 511; see also generally, Fridman (vol. 2), p. 60.

549 The OLA, Alta. does however provide for a different duty with regard to trespassers· see s.12.

550 s.5, s.3, s.3, s.3, s.3 of the OLAs Alta., B.C., Man., Ont., and P.E.I., respectively; see also *Preston* v. *Canadian Legion, Kingsway Branch No. 175* (1981) 123 DLR (3d) 645.

551 See *Rudko* v. *R.* (1984) 28 Alta. LR (2d) 350 at p. 367.

552 See *Preston* v. *Canadian Legion, Kingsway Branch 175, supra*, at p. 649; cf *Wiebe* v. *Funk's Supermarket* [1980] 19 BCLR 227.

purpose of the visit.[553]

In the final analysis, it appears that what the OLAs have accomplished is an omnibus imposition of the general principles of negligence on the occupier with regard to his liability for injuries to his visitors while in the occupier's premises. And the details of the duty underlying this liability will generally depend on the circumstances of each case.[554]

In Alberta, however, the trespasser is not owed the same standard of duty as is owed a lawful visitor.[555] The occupier's duty to a trespasser seems to be limited only to the duty not to indulge in a conduct which he could reasonably foresee as injurious to a trespasser.[556] This duty is thus limited to the duty not to wilfully or recklessly harm the trespasser: which was essentially the state of the common law on the matter before the *Herrington* case which developed the 'common humanity' duty. This, therefore, seems to amount somewhat to retrogression in the Alberta law.

Under the OLAs therefore, it seems that there is a duty on the airport operator to take reasonable care so as to prevent any harm to all manner of visiting persons at airports from *any sort* of danger in circumstances which any reasonable person would have foreseen. Granted that the expansion of the genre of dangers outside 'unusual dangers' would appear to involve a greater burden on the airport

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553 See Fridman (vol. 2), p. 63.

554 *Ibid.*, p. 64.

555 See s.12 OLA, Alta.

556 *Ibid.*

operator, it would still seem, however, that there is no injustice to him whatsoever. This is because there is no duty on him to make the premises perfectly safe,[557] he is only obliged to take the care that is reasonable in the circumstances so as to make the premises reasonably safe for visitors. And since economics is an important consideration in the determination of whether reasonable care has been taken,[558] it will appear that the airport operator might not be unnecessarily burdened after all. Airport terrorism being such an amorphous incubus,[559] so to speak, on aviation operators, it seems that the Courts will not require of the operators any more than reasonable precaution by way of modern security technology and systems - given their inherent limitations[560] - are able to offer. Part of the said inherent limitations include the quick-pace of pro-terrorism technology (both legitimate and underground), the non-availability of the security devices in relation to the needs for them, the high cost of acquisition, etc.[561] Thus, it is very unlikely that the Court will make the airport operator the scape-goat of the circumstances. In order to avoid that outcome, it is submitted that the foregoing limitations will be taken into account

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557 See *Kranabetter* v. *City of Kelowna* [1987] 40 CCLT 292 affirmed (1989) 13 ACWS (3d) 382; *Scholtes* v. *Stranaghan* [1981] 26 BCLR 190; *Duncan* v. *Branten* [1980] 21 BCLR 369 at p. 372.

558 See Fridman (vol. 1), p. 240.

559 See *Aviation Week & Space Technology*, 20 November 1989, pp. 67-70.

560 See *ibid.*

561 See *ibid.* See also generally, Milde, 'Draft Convention on the Marking of Explosives' (1990) 15 *Annals A.S.L.* 155.

by the Court.[562]

Furthermore, as in the case of an occupier's duty to his invitees under common law, an occupier will not be liable for damage resulting from the negligence of an independent contractor insofar as such occupier had acted reasonably in the circumstances in engaging the contractor and had taken reasonable care in selecting a competent one.[563] Thus, considering that it appears doubtlessly reasonable to engage independent experts to handle security matters at airports, it would seem that any negligence in the operations of those security contractors which results in infiltration by terrorists and subsequent attack by them may not entail the liability of the airport operator inasmuch as the airport operator can show that he took reasonable care to select whom he had good reason to believe was a competent security expert.

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562 In *Scholtes* v. *Stranaghan, supra*, the operator of a refuse dump in a game park was held not liable to the plaintiff who was attacked by a bear at the dump.

563 See s.11, s.5, s.5, s.6 and s 6 of the OLAs of Alta., B.C , Man , Ont. and P.E.I respectively.

6

Earth-Surface Torts and Aviation Legislation

Introduction

This chapter will review the attempts made by relevant legal systems to deal with the issue of Earth-surface torts arising from aviation. Relevant legal systems include domestic jurisdictions of the Commonwealth of Nations as well as the international community.

I. DOMESTIC LEGISLATION

In most Commonwealth jurisdictions, legislative attempts have been made to regulate tort actions arising from aviation uses. An examplar of the legislative provisions in question is s.76 of the Civil Aviation Act 1982 of the United

Kingdom,[564] which shall thus be taken as a case study for discussion in this chapter, with, of course, necessary comparative reference to similar provisions in other Commonwealth countries. As shall be seen in the following discussion, the provision represents an attempt at a *quid pro quo* whereby legal action is barred in respect of mere technical torts arising from the incidence of aviation, whereas strict liability is imposed on the owner of an aircraft in the event of real loss or injury arising from air navigation.

Apart from the United Kingdom, the legislation in question may be found in the statute books of Australia,[565] India,[566] New Zealand[567] and Nigeria,[568] among other Commonwealth countries.[569] The provision is, however, notably absent in Canadian statutory law. While the general thinking that the competence to legislate on private tort rights is outside Federal legislative jurisdiction[570] would explain the absence of a Federal statute on the matter, it is difficult to appreciate why the provinces who

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564 This section succeeds the earlier s.40 of the Civil Aviation Act 1949, and the original s.9 of the Civil Aviation Act 1920 after which similar provisions in other Commonwealth countries were modelled.

565 See generally Civil Aviation (Damage by Aircraft) Act 1958 of the Commonwealth of Australia, s.30, Wrongs Act 1958 of Victoria; s.2(1) Damage by Aircraft Act 1952 of New South Wales; s.3, Damage by Aircraft Act 1963 of Tasmania; and s.4, Damage by Aircraft Act 1964 of Western Australia.

566 See s.17, Indian Aircraft Act 1934.

567 See s.23, Civil Aviation Act 1964.

568 See s.9, Civil Aviation Act 1964.

569 See the observation of CLEARY, JCA, in *Weedair (N.Z.) Ltd.* v. *Walker* [1961]NZLR 153 at p. 156.

570 See Linden, p. 79.

presumably have the power, have neglected the importance of this legislation.[571]

The provisions of s.76,as has been observed above, could be said to have a dual purpose: facilitation of civil aviation by prescribing conditions of immunity from certain traditional common law torts and imposition of strict liability in some cases of surface damage.[572]

Immunity from certain types of torts

Certain types of torts which would have been traditionally actionable at common law have been barred from redress by the legislation under consideration. The prototype provision, which consists in s.76(1) of the UK Act, provides:

> No action shall lie in respect of trespass or nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight so long as the provisions of any Air Navigation Order and of any orders under section 62 above[573] have been duly complied with and there has been no breach of section 81 below.[574]

From the foregoing, certain significant catch-phrases and words would require constructional review, and this shall be done in the following discussions.

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571 See further discussion of this issue, in the concluding chapter, *infra.*

572 See Shawcross and Beaumont, v/131A.

573 S.62 deals with 'Control of aviation in time of war or emergency'.

574 S 81 provides against the crime of 'dangerous flying'.

(a) ***'[A] height ... which ... is reasonable ...'***

The provision affords immunity from actions in trespass to the relevant defendant if the height at which the aircraft traversed the airspace is 'reasonable'. Traditionally, the Courts have always held that what would satisfy the requirement of 'reasonableness' in any given case would depend on the facts of that case. S.76(1) plainly re-enacts this traditional disposition of the Courts while giving some examples - wind and weather - of the factors which the judge must consider in his determination of the reasonableness of the height. Undoubtedly, those factors[575] are not exhaustive.

However, the benefit of this immunity is made conditional upon compliance with certain aviation statutory instruments indicated in the subsection. The instruments in question deal with situations involving activities which may give rise to trespass or nuisance. In the United Kingdom, for instance, these instruments include the Rules of the Air and Air Traffic Control Regulations 1985, which is mostly a trespass regulating instrument[576] with a collateral nuisance value;[577] and the Air Navigation Order 1985 which has more general implications. On the mostly nuisance regulation side, there are such instruments as the Air Navigation (Aeroplane and Aeroplane Engine Emission of Unburned Hydrocarbons) Order 1988; the Air Navigation (Noise Certification) Order 1987; the Air Navigation

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575 Wind and weather.

576 See r.5 which forbids low flying in various situations.

577 This value derives from the fact of the noise emission resulting from low flights

(Aircraft and Aircraft Engine Emissions) Order 1986. Considering the various implications of the breach of some of these instruments as being potentially actionable either in trespass or nuisance, the question therefore arises: If the operator of the aircraft violated the provisions of an instrument relevant only to the one head of tort, does that leave him vulnerable to the other head of tort which he would have been immune to had he complied with all the instruments as required by s.76(1)? For instance, assuming that pilot Joe Blow complied with the provisions of r.5 of the Rules of the Air and Air Traffic Control Regulations 1985 by not engaging in low flights within the meaning of the regulation, but then he had been flying an aircraft which did not meet the standards prescribed in the Air Navigation (Noise Certification) Order 1987, would this warrant John Dow to sue Joe in trespass since he had not complied with one of the instruments referred to by s.76(1)?

It seems that the scenario will effectively deprive the operator of the protection of s.76(1) on a plain construction of the subsection as it simply makes the protection conditional upon compliance with provisions of '*any* Air Navigation Order...'. In spite of any argument to the contrary, it is submitted that the phrase, in its proper context, imports the need to obey any air navigation order made by the relevant authorities as a pre-condition to the immunity therein guaranteed. The word 'any' as used in the context is, it is submitted, synonymous with 'every'. Therefore, non-compliance with any Order vitiates the operation of s.76(1) in providing immunity from any of the causes of action[578] mentioned therein,

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[578] Trespass, for instance.

notwithstanding that the given cause of action may have no relationship with the Order[579] which was violated. Thus, John Dow could sue Joe Blow in the instance given above regardless of s.76(1).

However, this may not be the end of the matter. All that happens is that s.76(1) will not operate, that means that the matter will go back to square one at common law, in which case the Courts will then determine if the defendant is liable to trespass in accordance with caselaw. At this point the ratio of *Bernstein of Leigh* v. *Skyviews and General Ltd* and similar cases will thus operate to govern liability,[580] unless the plaintiff is able to establish that he had suffered 'material loss' in the circumstances upon which s.76(2) will govern the determination of strict liability therein provided.[581]

On the other hand, the primary point of the foregoing analysis could be denied based on a contrary interpretation of s.76(1). It could be argued that since the subsection speaks of '*any* Air Navigation Order', compliance with one, at least, of the numerous Air Navigation Orders contemplated in the provision, is enough to import the immunity envisaged in the subsection. This argument seems implausible, however, not only because of the earlier interpretation given the subsection, but also because this contrary interpretation suggests an ambiguity in the provision. The ambiguity derives from, first, the incredulity behind the proposition that the

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579 For instance, where the violated Order has significance only in nuisance, e.g., the Air Navigation (Noise Certification) Order.

580 See pp. 44 *et seq*, *supra*.

581 See pp. 161 *et seq*., *infra*.

legislature could have intended that an operator of an aircraft complied with, say, the Noise Certification Order and still remain immune to action in trespass and nuisance, even though he had flown in breach of the Rules of the Air Regulations and Engine Emissions Order as well as of other relevant statutory instruments. Secondly, even the fact of acceptance of the plausibility of this contrary interpretation entails the ambiguity of s.76(1) inasmuch as it is susceptible of the earlier interpretation.

In view of the said ambiguity, therefore, the rule of statutory interpretation which calls for a strict interpretation of statutes which purport to alter the common law[582] will operate in favour of the interpretation of s.76(1) which is more favourably disposed towards the traditional rights of action to even the technical torts which the subsection tends to bar.

(b) *'[T]he ordinary incidents of such flight...'*

Discussion here is of more significance to the tort of nuisance than trespass. S.76(1) will protect an aircraft operator against maintenance of action 'by reason only of the flight ... or the *ordinary incidents* of such flight.'[583] Apart from the trespass oriented discussion which has been done above, this would mean that so long as the cause of the action is an incident which could be perceived as ordinary to the flight, no action in nuisance or trespass could be brought against the operator of the

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582 According to this rule, 'it is to be presumed that a statute alters the common law as little as possible', see Cross, *Statutory Interpretation* (2nd edn, 1987) p. 169.

583 Emphasis added.

aircraft. Beyond this general formulation, the meaning of the phrases under consideration is not clear. The problem rests mainly with the meaning to be ascribed to the phrase 'ordinary incidents' of a flight. What 'incident' would qualify? And how 'ordinary' need it be? It seems that the required answer would depend on the facts of each case.

However, from the ground, some notable incidents associated with aircraft flights, apart from passage through the airspace, include sonic booms, engine substance emissions, vibrations, slipstreams and propeller races. What level of any of these in any particular case would be considered ordinary would, it is submitted, depend on how reasonable it is and this will in turn depend on the facts. But what is reasonable in any case will take due account of any rules or regulations including generally accepted customs and usage having any relevance to such incident. A violation of any relevant regulation would jeopardize the reasonableness of the incident and this, it is submitted, will in turn undermine its ordinariness, hence foreclosing the applicability of s.76(1). It must be particularly emphasized in this regard that the subsection itself categorically recognizes part of the content of this proposition by making immunity conditional upon compliance with air navigation orders and other orders. It must be noted, however, that the provision does not appear to stress the importance of sundry rules of custom and usage,[584] in the determination of the ordinariness of incidents relating to operation of aircraft. Nevertheless, it is submitted that even in the absence of statutory regulations, a

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584 Some of which may be contained in operators manuals or manuals issued by employers.

breach of a known rule of usage which could have attenuated - or even obviated - the injurious consequences of a given characteristic incident of a flight will detract from the ordinariness of such incident within the meaning of the subsection.

Furthermore, it must be submitted that 'ordinary incidents' contextually should be construed to relate to only such incidents which emanate from the invariable characteristics of an aircraft without which the 'flight of an aircraft' will not be possible. In this connexion, it is submitted further that, the use which the flight is being put to does not define the flight of an aircraft because s.76(1) was designed to facilitate the flight of aircraft without hinderance on account of technical tort actions, it does not purport to facilitate other activities which have little or nothing to do with the act of flight of aircraft. This is more so where other areas of the law would regulate such other transactions in view of the possible attendant conflicts of interests. It must be borne in mind that the provision bars action in trespass or nuisance 'by reason *only* of the flight of an aircraft ... or the ordinary incidents' of such flight. It therefore follows that, first, where something was added to the flight, such as a peculiar use of the aircraft which infringes, say, the right of the property over which the flight was made, one cannot argue in the circumstance that *only* flight of an aircraft had been made. Secondly, the subsection does not contemplate extinction of rights of action in other types of tort apart from trespass and nuisance. Thus where invasion of privacy is a recognized cause of action in the given jurisdiction,[585] or where the action being brought is defamation, a s.76(1) type

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[585] In *Bernstein of Leigh* v. *Skyviews and General Ltd, supra,* the action was dismissed in trespass because the flight was at a reasonable height. And the alternative claim of invasion of privacy could not have been maintained either, because English law does not recognize such a tort. See

provision would not *prima facie* - bar the action.

No doubt, physical contact with the property or person of somebody on the ground or the dropping of substances on the surface in a manner which is not usual with the flight of an aircraft, would not qualify as 'ordinary incidents' of flight.[586] Therefore, action in trespass *per se* would seem viable in such an instance.

Strict liability for certain types of Damage

S.76 does attempt to make it up to the surface victim of aviation incidents by providing for liability of the owner of the aircraft for certain injuries occasioned such victim. Within the meaning of the section, any appropriate liability will be strict, for subsection 76(2) provides:

> Subject to subsection (3) below,[587] where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article, animal or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft.

This is a provision with a great deal of implications some of which will be examined presently.

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also *Taplin* v. *Jones* [1865] 11 HLC 290 at pp. 305, 311, 317. Note that in spite of the recognition of the right to privacy in the European Convention on Human Rights, it was still held in the recent case of *Malone* v. *Metropolitan Police Commissioner* [1980] QB 49 that invasion of privacy is not a tort in English law.

586 See Shawcross and Beaumont, v/133.

587 Subsection (3) establishes the right of the innocent owner to be indemnified by some other person who was actually legally liable in accordance with subsection (2).

a. Nature of injury

For any claim to be well founded under the subsection it must be based on 'material loss or damage'. Apparently, this stringency in provision means that not only is the plaintiff barred from bringing action where there is no loss or damage, but also that the loss or damage must be 'material'. What then is meant by *material* loss or damage? The statute does not define it. However, it has been suggested that by 'material', the provision means *physical*.[588] To the extent that this submission relates to damage to property it merits little controversy, because the alternative legal connotation of the term 'material' - as meaning *relevance* - will in any case be inapplicable since the traditional tort doctrine of remoteness of damage[589] will operate to check the extent of claims permissible. However, with regard to injuries to the person, the submission that '*material* loss or damage' relates to *physical* injuries becomes debatable. The main reason for this controversy stems from the fact that s.105(1) of the same Act defines 'loss or damage' as including, in relation to persons, 'loss of life and personal injury'. This would appear to suggest that any injury to the person - from pain and suffering to mental infirmity - becomes a strong contender as a basis of damages under the subsection notwithstanding that such injury is *not* physical. It would have been a different matter if s.105(1) has used the phrase 'bodily injury' rather than 'personal injury'.

Nevertheless, this counterpoint might not be so strong in all its ramifications

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588 See Shawcross and Beaumont, v/134.

589 For detail discussion of the concept, see Fridman (vol. 1), pp. 325 *et seq.*; Clerk and Lindsell, §§ 1-129 *et seq.*

if the relationship between the definition of 'loss or damage' in s.105(1) and the phrase 'material loss or damage' as used in s.76(2) is put in its proper context. The said provision of s.105(1) furnishes an unqualified definition of 'loss or damage' in relation to persons, whereas the term *material* in s.76(2) qualifies the phrase 'loss or damage' as used in the provision. Therefore, in accordance with the opening caveat of s.105(1) which makes the definitions furnished under the subsection applicable '... except where the context otherwise requires...', it is submitted that the context of s.76(2), which emphasizes 'material' in the employment of the phrase 'loss or damage', requires that injury to the person must be seen as *material* for the plaintiff to succeed under the subsection. This will then leave open the issues of what non-corporeal injury is being put forth as a *material* loss or damage and whether such injury could be construed as material within s.76(2).

Non-corporeal personal injuries include mental distress, pain, suffering, loss of services and consortium, loss of education, loss of earnings, loss of capacity to earn, loss of sundry expectations of life, mental infirmity, psychological or emotional injuries, etc. Legal authorities have demonstrated a greater tendency to classify, as compensable, those non-corporeal injuries which are physically manifested than those which are not.[590] Apparently, this is based on the understanding that those injuries are material at common law. It is submitted that this ought to inform the Court's interpretation of s.76(2) in relevant instances.

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590 See e.g., Clerk and Lindsell, §§ 10-07 *et seq.*, p. 385.

Compensability of non-material damages

Even where the damage is non-material, it may not necessarily mean that the plaintiff would go without remedy. He may lose the privilege of s.76(2) with regard to strict liability of the defendant. But so long as he can point to any relevant damage (albeit non-material) recognized by tort law, it appears that he could always seek redress at common law. He will not be barred by s.76(1) since he will not be seen as bringing action by 'reason only of flight of an aircraft...'.

What is the place of the notion of actionability per se *of trespass?*

Since the provision emphasizes the importance of material loss or damage, does it then displace the idea that trespass is actionable without proof of damage? The answer would depend on the context of the claim. It is submitted that if the plaintiff is desirous of the benefits of the strict liability provided for in the s.76(1), then he must establish damage or material loss. Otherwise, it appears that nothing in the provision would deny a plaintiff his common law right to sue in trespass without proof of damage, as long as he is willing to discharge the traditional burden of proof on him in that regard, including proof of intention to commit the trespass. It must be emphasized, though, that this proposition remains valid in spite of s.76(1) which prohibits action in respect of 'trespass ... by reason *only* of the flight of an aircraft over ... property at a *height above the ground which ... is reasonable'*, and which conditions this prohibition on the beneficiary's compliance with all air navigation orders, among other things. Therefore, insofar as nothing in s.76 could

be said to expressly[591] deny the traditional right to general claims for trespass *per se* at common law,[592] it appears that such claims will succeed in spite of s.76 in the following circumstances:

(a) where the wrong complained of constitutes of more than a mere flight of an aircraft over property, albeit with no resultant material loss or damage. For example, where the aircraft actually landed, or objects were dropped therefrom, into Joe Blow's property without incident;

(b) where the flight was at a height which is not reasonable, so that the defendant's aircraft was flown across the airspace which the plaintiff needed for a reasonable enjoyment of his property;[593] and,

(c) where the defendant had flown his aircraft in violation of any air navigation order or some other conditions prescribed in s.76(1), thereby precluding himself from the protection of that subsection.[594]

In each of these cases, general damages may be claimed for the trespass *per se* aspect of the case.

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591 Noting the rule of statutory interpretation which requires that unclear statutory provisions may not be construed to override common law: See Cross, *loc. cit.*

592 As opposed to claims of strict liability under s 76(2).

593 See discussion on pp. 44 *et seq., supra.*

594 See discussion on pp. 155 *et seq., supra.*

b. Causation

Naturally, the subsection imposes on the plaintiff an onus of proof of causation as a prerequisite to claiming thereunder. This onus, on close examination, entails a combination of various proofs. First, the material damage or loss must be proven to have been caused by any of: (a) an aircraft, (b) a person in an aircraft, (c) objects (such as person, animal or article) falling from an aircraft.

Secondly, it must be proven that the aircraft was in *flight, taking off* or *landing* at the material time. Some problems that might arise from the foregoing will be examined at this juncture.

(i) 'An aircraft'. The main problem here involves the definition of an aircraft. There could be two definitions: one from international law, and the other from domestic law.

In international law, the term 'aircraft' currently lacks any authoritative definition. This is mainly because neither the Chicago Convention[595] nor any other multilateral air law convention in force provides a definition. Some Annexes[596] to the Chicago do, however, define an aircraft as:

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595 The Convention on International Civil Aviation signed at Chicago on 7 December 1944.

596 E.g., Annex 6 - 'Operation of Aircraft - International Commercial Air Transport', and Annex 7 -Aircraft Nationality Registration Marks'.

> Any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface.[597]

Beyond this guideline the documents recognize balloons, airships, gliders, gyroplanes, helicopters and or nithopters, as types of aircraft. This is perhaps an attempt to de-emphasize the need for a contraption to be seen as a 'machine' for it to qualify as an aircraft as described in the definition. This definition, as clear as it may seem, is of questionable authority since the so-called 'annexes' to the Chicago Convention are not, *stricto sensu*, annexes to that Convention. They are separate standards and recommended practices (SARPs) which are made by the International Civil Aviation Organization (ICAO) and are called 'annexes' for 'purposes of convenience'.[598] But, on the other hand, it has been submitted that the definition of aircraft as contained in those Annexes now do form part of customary international law,[599] no doubt because it is the controlling definition on the international scene.[600]

On the domestic scene, it has been observed, many countries have incorporated into their legislation the definition of aircraft as is found in the Annexes to the Chicago Convention.[601] Canada is one example of States with a tendency to

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597 This is partly derived from the definition provided in the Paris Convention 1919 (the defunct predecessor of the Chicago Convention) which defined 'aircraft' as: 'Any machine that can derive support in the atmosphere from the reactions of the air.'

598 See article 54(l) of the Chicago Convention.

599 See Shawcross and Beaumont, V/1.

600 *Ibid.*

601 *Ibid.* Even though many of them have not adopted the exclusionary part of the definition E.g., s.2(1) of the Indian Aircraft Act 1934 defines aircraft as '[A]ny machine which can derive support in the atmosphere from reactions of the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machine'.

define 'aircraft' in the said manner. For instance, s.3(1) of the Aeronautics Act[602] provides that under the Act an aircraft means:

> (a) until the day on which paragraph (b) comes into force, any machine capable of deriving support in the atmosphere from reactions of the air and includes a rocket, and
>
> (b) on and after the day on which this paragraph comes into force,[603] any machine capable of deriving support in the atmosphere from reactions against the earth's surface of air expelled from the machine, and includes a rocket. .

Nevertheless, not every State has displayed a tendency to furnish a statutory technical definition of an aircraft.[604] What one is likely to find in English statute books is a table of general classification of aircraft which includes: balloons (whether free or captive), airships, gliders, kites, rotocraft (i.e., helicopters and gyroplanes), powered lifts (tilt rotor) and aeroplanes (i.e., landplanes, seaplanes, amphibians and self-launching motor gliders).[605] It must be mentioned, however, that this practice of classifying aircraft is not peculiar to England. The ICAO[606] and many countries including Canada[607] also do have systems of aircraft classification. The difference is that whereas these other countries - following the leadership of ICAO - have incorporated into their statutes a basic technical definition of aircraft designed to

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602 RSC, c.A-3: see Bunker, *Canadian Aviation Finance Legislation* (1989) 186.

603 The paragraph shall come into force on a date to be fixed by proclamation upon notification: see *ibid.*

604 Shawcross and Beaumont, V/2.

605 See art. 106(4), Sch. 1, Pt.A of Air Navigation Order 1989, SI 1989/2004.

606 See e.g., Annex 7 to the Chicago Convention.

607 See the definitions applying to the various types of aircraft in Air Regulations, CRC, c.2: in Bunker, p. 221.

exclude hovercraft,[608] England has not only abstained from any such incorporation but has specifically legislated to include hovercraft within the contemplation of its Civil Aviation Act 1982[609]. However, it appears that to the extent that the ICAO definition can be seen as part of customary international law, the English courts will be persuaded to follow it in the application of s.76(2), save, of course, insofar as a hovercraft is concerned.

The significance of a definition of aircraft to the question of liability under s.76(2)-type provision can be appreciated from two angles at least. First, can the contraption in question be seen as generically falling into the *aircraft* category? For instance, while in the application of the laws of a country following the ICAO definition which expressly excludes machines which derive support in the atmosphere from 'the reactions of the air against the earth's surface', a hovercraft being a 'vehicle or craft supported by air ejected downwards against the surface (of land or sea) just beneath it',[610] would apparently be disqualified from importation of the strict liability contemplated under a s.76(2)-type provision, this conclusion could not be confidently made with respect to England.

Secondly, could that which used to be an 'aircraft' have ceased to be such at the time of the damage, thus inviting an assertion that s.76(2) is inapplicable? This question will require a look at an important element of the definition.

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608 Shawcross and Beaumont, V/1.

609 See e.g., s.100. For a more detailed review of UK legislation pertaining to hovercraft, see Kovats, *The Law of Hovercraft* (1975).

610 See *The Concise Oxford Dictionary of Current English* (7th edn, 1988 reprint).

The ICAO definition as legislatively followed by several countries including Canada, India and New Zealand, seem to suggest that an aircraft must be *able* to fly for it to qualify be seen as an aircraft. This conclusion is based on the following illustrative definitions of aircraft:

1. 'Any machine that *can* derive support in the atmosphere...',[611]
2. '[A]ny machine *capable* of deriving support in the atmosphere...',[612]
3. '[A]ny machine which *can* derive support in the atmosphere...'.[613]

It follows, therefore, that if what caused the damage could be proved to had, as at the time of the damaging impact, lost its *ability* or *capability* to derive support in the atmosphere from reactions of the air, it cannot be called an 'aircraft' within the definition under consideration. This argument has the same force as the analogous argument that a 'human being' loses his status as such when he loses his life. And this will, in turn, mean that s.76(2) cannot be applied to a determination of any damage or loss caused by this object which *used to be* an aircraft.[614] For example, let us say that for any of a variety of reasons including sabotage, Utopiair Flight 123

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611 [Emphasis added]. Annex 7, to the Chicago Convention, (p. 167 - 168) *supra.*

612 [Emphasis added]. S.3(1), Canada Aeronautics Act.

613 [Emphasis added]. S.2(1), Indian Aircraft Act, see also s.2 of the New Zealand Civil Aviation Act 1948.

614 This assertion may not be tenable in America where an aircraft has been defined as 'any contrivance now known or hereafter invented, used, or *designed* for navigation of or flight in the air': see §1301(5) of the US Federal Aviation Act of 1958, 49 USCS Appx §§1301 *et seq.*; See also a somewhat similar definition in s.12 of Canada Aeronautics Act (now repealed by s.276 of the National Transportation Act 1981) which defined aircraft as 'any machine used or *designed* for navigation of the air but does not include a machine designed to derive support in the atmosphere from reactions against the earth's surface of air expelled from the machine': [emphases added].

suffers a disabling impairment while in flight at 13:13:13 hours as a result of which it free falls and hits Joe Blow's property on the surface of the Earth at about 13:16:01 hours. Following the foregoing analysis, it would appear that Joe Blow could not sue under s.76(2) since what presumably damaged his property at 13:16:01 hours is the *wreckage* of a former aircraft, and not an aircraft within the meaning of the legal definition, since the object lost its essence as an aircraft (i.e., its *capability* to derive support) at 13:13:13 hours. This position will have a far reaching systemic effect on the subsection in the sense that if this loss of capability to derive support at any material point could be established with regard to this erstwhile aircraft, any damage caused by a person in it or by an object (such as person, animal or article) falling from it after this point cannot be subject of determination on the basis of s.76(2).

Once again, going by the example of the Utopiair Flight 123 incident, assuming that thirteen seconds *after* the disabling impairment at 13:13:13 hours, the aircraft suffers a huge explosion which tears it open, with the result that passengers, race horses, television sets, etc., being transported therein start falling therefrom and injuring and damaging people and property on the surface of the Earth; liability on the basis of s.76(2) will equally be doubtful in view of an argument that the damages in question were caused by objects falling from the *wreckage* of a former aircraft, not from an aircraft within the meaning of s.76(2).

In all these cases, other relevant principles of delictual redress at common law would resume significance. This, however, will seem to portend a greater burden of proof on the plaintiff, because he may now have to prove intention to commit

trespass, nuisance and negligence (except, perhaps, to the extent that he can take advantage of the *res ipsa loquitur* doctrine[615]). On the defendant's part, there seems little need to mention that he has an enormous burden of proof in order to exclude s.76(2) on the basis of the analysis laid out above. He may not only have to convince the Court as to the fact and time of disability of the aircraft, he also has to prove the time of on-the-surface damage done the plaintiff. This is because he would have been asserting a defensive proposition, and as a result *ei qui affirmat non ei qui negat incumbit probatio.*[616]

Where this attempt to exclude s.76(2) strict liability will run into a greater obstacle, though, is with regard to a claim based on an assertion that the material loss or damage was caused by 'a *person in ... an aircraft* while in flight, taking off or landing...'. Here, despite that what caused the injury would have been the wreckage of a former aircraft, it still could be argued that liability under the subsection would ensue if it is proven that while the contraption was still an aircraft somebody in it had done something to radically undermine its ability to derive support in the atmosphere: thereby turning the aircraft into a delictous mass of scrap falling to cause material loss or damage to hapless people on the surface of the Earth. The person who triggered this misery may be anybody in the aircraft: from a suicidal or bungling terrorist to an erring crew-member.

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615 See pp. 100 *et seq., supra.*

616 [The burden of proof of a fact rests on him who asserts the fact not on him who denies it] see the dictum of Lord MAUGHAM in *Constantine Line* v. *Imperial Smelting Corporation* [1942] AC 154 at 174. For a comprehensive exposition of the law on this subject see Phipson, *The Law of Evidence* (12th edn, 1976) pp. 36 *et seq.*

It must however be submitted, as a proviso, that the theory of loss of ability to derive support may take into account only such impairments as are mechanical or design-oriented, and, at that, radical. It does not contemplate such mere operational vicissitudes as lack of oil, fuel, etc. The distinction stems from the fact that while the latter are normally part of the operational *life* of an aircraft which the makers have made allowances for in their conception of aircraft, the former are not.

(ii) 'An article'. S.76(2) requires that amongst the objects contemplated thereunder as capable of causing material loss or damage is 'an article ... falling from' an aircraft. Whereas the UK Act does not provide any indication as to what an article means, it appears that this will accommodate any*thing*[617] capable of causing material loss or damage. A notable authority on this point is the New Zealand Court of Appeal decision in *Weedair (NZ) Ltd* v. *Walker*[618] which dealt with a similar provision. The respondent had sued in respect of damages caused to his vegetable crops through the escape of a hormone spray from an aircraft owned by the appellant. Having expressed the opinion that the word 'article' as used in the provision 'was intended to apply *comprehensively* to things that might fall from an aircraft,'[619] their Lordships went on to rule that it embraced such substances as

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617 See *The Concise Oxford Dictionary of Current English, op. cit.* which defines 'article' as including a 'thing'.

618 (1961) NZLR 153.

619 Emphasis added.

chemical liquids.[620] But whereas the case could be said to have been decided on the point in issue (i.e., whether or not a chemical liquid could be seen as 'article' within the meaning of the subsection), it is not clear as to what extent the reasoning could be extended to other types of non-solid substances such as radiation or injurious fumes emitted by or from an aircraft. Considering the inclination of the Appeal Court in the *Weedair* case to apply the term article 'comprehensively' to things falling from an aircraft, and considering further that the Court specifically applied it to *chemical* liquid, it would appear, therefore, that the Court may be easily persuaded, in appropriate cases, to apply the term to injurious fumes and radiation. This is more so in view of the deadly potential of some chemical fumes. Is it likely that any court would exclude a toxic gas or nuclear radiation from the scope of s.76(2) liability? Most probably not.

Vibrations, Sonic Booms and Wind Disturbances

Another interesting problem that arises from the subsection is whether a material loss or damage caused by vibrations, sonic booms and wind disturbances could be seen as coming within the purview of the provision. Say, a Concorde jet flies by Joe Blow's house, as a result of which his hearing faculty is impaired and his house collapses, all due to the tremendous noise and vibration generated by the aircraft. Or, say, A's helicopter flies near a building site and the site is reduced to rubble because of the powerful wind-race occasioned by the rotors. Considering

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620 See also *Steel-Maitland* v. *British Airways Board* [1981] SLT 110 where *Weedair* was adopted.

that the loss or damage in each case is material, it would appear that the injured party could be able to succeed under the subsection if only he could prove a link between his material damage or loss, the agent of loss or damage (vibration, noise or wind) and the aircraft. It must be emphasized, however, that the argument is not based on a perception of the agents of damage as 'articles' falling from the aircraft, but rather it is founded on the ground that 'material loss or damage [had been] caused to [a] person or property on land or water *by* ... an aircraft'.[621] The issue of whether material damage occasioned by vibration generated by aircraft is compensable under s.76(2) was favourably reviewed in the Scottish case of *Steel-Maitland* v. *British Airways Board*.[622]

Also of significance to this subhead is the Australian case of *Southgate* v. *Commonwealth of Australia*[623] where it was held that there does not have to be a physical impact between the aircraft and the plaintiff for the purposes of strict liability under the subsection.[624] In that case, the plaintiff was injured when her horse threw her and dragged her some distance as her foot was caught in the stirrup. The horse had been bolting in fright as a result of a Royal Australian Air Force helicopter flying closely by. The Court held the defendants liable on s.2(2) of the

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621 Emphasis added.

622 *Ibid.* The main point of this case though is that a plaintiff could not only claim against an individual operator with specific acts of damage caused by specific incidents, but also against an agglomeration of operators; and that the subsection is not limited to specific acts of damage caused by specific incidents.

623 [1987] 13 NSWLR 188.

624 *Ibid.*, p. 189.

Damage by Aircraft Act 1952 which is identical to s.76(2) of the Civil Aviation Act 1982 of the United Kingdom.

(iii) '[I]n flight, taking off or landing...'

The material loss or damage envisaged by s.76(2) must be established to have been caused while the aircraft was either 'in flight', 'taking off' or 'landing'. Before going to the implication of this requirement, a brief examination of the meaning of those phrases is perhaps most appropriate here.

(a) 'In flight'. S.105(1) of the UK Civil Aviation Act 1982 defines 'flight' as meaning 'a journey by air beginning when the aircraft in question takes off and ending when it next lands'. Shawcross and Beaumont, having submitted that 'in flight' clearly means 'airborne', went on to add that the said definition provided in s.105(1) is inapplicable in the context of s.76(2) of the Act. It would appear that the learned authors are right in their submission with regard to the contextual inapplicability of the s.105(1) definition because the nuance effect of *in* in the phrase 'in flight' as used in s.76(2), for one thing, is not reflected in the s.105(1) definition which is a general definition for the whole Act and Regulations and Orders made under it. It must be noted especially that it is a practice, at least in international civil aviation legal document drafting, to specifically define 'in flight' as such

whenever the phrase is used in specially significant sense.[625] Therefore, the definition in s.105(1) may not account for the especially significant sense in which the phrase 'in flight' appears in s.76(2).

In view of the fact that s.76(2) aims at prescribing liability for damages caused by use of an aircraft, it seems desirable for the Act to have a more exacting definition beyond that which uses such undefined phrases as 'take off' and 'landing'. The need for such more exacting definition cannot be gainsaid considering that the term 'aircraft' has been stated to include such contrivances as are unable to 'take off' either because the phrase 'take-off' is a term of art associated with mechanically powered aircraft or because some of the said contrivances cannot 'take-off' on their own, such as in cases of captive balloons, gliders, etc., or other aircraft which depends on another for its ascension. The fact that this consideration is apparently not envisaged in the s.105(1) definition suggests that the said definition was not meant to cover 'in flight' as used in s.76(2), and so cannot be relied on in any consideration of liability under the subsection.

For this same reason of vagueness it is submitted that the substitute definition furnished by Shawcross and Beaumont cannot be relied on either. The phrase 'airborne'[626] as describing 'in flight', with all due respect, seems to do even more disservice to the construction of s.76(2) than the s.105(1) definition. At least, the

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625 E.g., art. 1(2) of the Rome Convention 1952; *supra*; art. 3 of the Convention on Offences and other Acts committed on board Aircraft (Tokyo Convention) 1963; art. 3 of the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) 1970; etc.

626 See p. 176, *supra.*

latter did attempt to provide some determinants of flight, *viz.* the period between take off and landing. But when is an aircraft said to be 'airborne'? Does 'airborne' begin immediately after the craft or its captor has been detached from the surface? Or does it begin when the aircraft is already well in the air? When does 'airborne' end: at the moment when contact is made with the surface, or when landing run ends?

It is submitted that the better definition of 'in flight' is that provided in art.1(2) of the Rome Convention:

> [A]n aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off, until the moment when the landing runs ends. In the case of an aircraft lighter than air, the expression '*in flight*' relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereof.

Notwithstanding its imperfection in not expressly providing for the meaning of 'in flight' when an aircraft is dependent on another for ascension, this definition serves s.76(2) better than any other so far reviewed. First, it pre-empts the argument that lighter-than-air aircraft do not 'take-off'. Secondly, it furnishes a very specific but broad guide-line of what 'in flight' means: from the moment of application of power for purposes of actual take-off to when landing run ends. The breadth of this concept is consistent with common law presumption of statutory interpretation to the effect that any statute taking away the right of an individual will be strictly construed in such a manner as to resolve any ambiguity against the new dispensation.[627] Therefore, the Courts may be persuaded to follow this interpretation of 'in flight' in

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627 See Cross, pp. 178-180.

the absence of a more apt definition in the Act.

(b) 'Taking off or landing'. If 'in flight' is found to lack any clear meaning within the UK Act, 'taking off' and 'landing' are even more so considering, as already noted, that the Act provides no indication whatsoever of their meaning. Nevertheless, it has been held that 'taking off' within the meaning of the subsection starts when taxiing ends and power is applied for the purpose of take-off, and that 'landing' ends when the aircraft reaches the end of its landing run before commencement of taxiing.[628]

The only shortcoming of the definition is that it leaves out those aircraft who do not taxi. However, since the definition is consistent with the definition in art.1(2) of the Rome Convention, it seems that the Courts will not hesitate to follow the rest of the definition in that article with regard to lighter-than-air aircraft and other aircraft that only have vertical take off and/or landing capabilities.

Having dealt with the issue of definition of the phrase 'in flight, taking off or landing', the question arises as to its implication. Where the aircraft in question was not in flight, taking off or landing, the plaintiff, it seems, may not be able to claim the benefit of s.76(2). What this means is that he may lose recourse to strict liability, it may not necessarily mean that he will go uncompensated. To the extent that he could establish damage, therefore, it appears that he still could bring action at common law or any other relevant statute save the Civil Aviation Act.

Another question that arises from the phrase 'in flight, taking off or landing'

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628 *Blankley* v. *Godley* [1952] All ER 436n. *Cf* an earlier decision that taking-off starts at the commencement of taxiing: *Dunn* v. *Campbell* [1920] 4 Ll.L.Rep. 36.

is whether material loss or damage caused by a crashing or crashed aircraft could be said to have been caused while the aircraft is in flight, taking off or landing. Mindful of the argument that any contrivance which has lost its capability to derive support in the atmosphere from the reactions of the air is not an aircraft,[629] it would appear that the answer to this problem will depend on the circumstances of the case. Some of those circumstances will include where the damage was caused by the aircraft on the way down (e.g., the aircraft crashes into the midsection of a 100-storey skyscraper), the aircraft crashes on the surface causing the damage on impact (e.g., aircraft hits Joe Blow's sunbathing wife while it crashes on the beach), or the aircraft crashes and causes secondary damage to somebody (e.g., an aircraft crash that starts a bushfire that damages Mr X's property). Some of these scenarios will be examined next.

Damage caused on the way down. Given the definition of 'in flight',[630] it is submitted that inasmuch as the aircraft has 'taken off' but has not landed, it is still in flight and therefore the owner of the skyscraper whose midsection was crashed into can clearly claim under the subsection.

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629 See discussion on pp. 166 *et seq.*, *supra.*

630 See p. 178, *supra.*

Damage caused on impact. Since landing as defined above[631] envisages only the normal functional operation of taxiing and use of runways, it would appear that where an aircraft which normally engages in such functions crashes and causes damage on impact, it can technically still be said to be in flight since it has not 'landed' within the meaning of the definition. In that case s.76(2) would still be applicable. But with regard to the non-taxiing type of aircraft, having regard to art. 1(2) of the Rome Convention, the crashing aircraft could still legally be said to have landed the moment it touches the surface notwithstanding that such landing was in fact a crash. The implication of this position is, nevertheless, a seeming inconsistency in that two types of aircraft facing the same predicament are seen as having engaged in different activities. But, the position could be explained in view of the peculiar landing characteristics of those two aircraft types. The one, during crashing, is involved in a radically uncharacteristic behaviour whereas the other is still engaged in its recognized *modus operandi* only this time in a more urgent and/or emphatic manner. Moreover, the said different interpretation of the two events still produce the same legal consequence to wit, applicability of s.76(2).

Damage after the crash. One of the most common types of damage following an aircraft crash is that derived from fire. For example, a Utopiair jumbo-jet crashes in July in a forest adjoining Joe Blow's farm sparking off a bush-fire which ultimately destroys the farm. How does Mr Blow claim? More specifically, can he claim under

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631 See p. 179, *supra.*

a s.76(2)-type provision? A case could be made for him under the subsection arguing that notwithstanding that the damage was, more or less, indirect, Utopiair is strictly liable as provided in accordance with the provision. That on the 'but for' theory of causation[632] the causal link prima facie exists between the damage resulting from the fire and the jumbo-jet. This is more so because the subsection does not require that the damage be caused *directly;*[633] the only requirement in the subsection as to the nature of the loss or damage is only that it be 'material'. And considering that the burning of Mr Blow's farm constitutes material loss or damage, the strict liability under the subsection therefore applies. This argument seems plausible indeed. However, it could be subject to the perception of the damnifying jumbo-jet as an 'aircraft'[634] as at the time it commenced the process of causing the injury, i.e., the time it sparked off the fire. This appears to be the most serious obstacle to arguing that material losses or damages after the crash of aircraft come within the provision of s.76(2) since common sense warrants the conclusion that a crashed aircraft would have lost ability to derive support by the time it spread fire around the crash site.

(iv) '[A]ny person or property on land or water...'

One of the prerequisites of strict liability in s.76(2) is that the material loss

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632 See p. 94.

633 Compare the provision of art.1(1), Rome Convention 1952 which requires that the damage be 'a direct consequence' of the incident giving rise thereto.

634 See pp. 166 *et seq., supra.*

or damage be caused to a 'person or property on land or water'. In construing this requirement, no doubt, the Court will be informed by the settled doctrine that whatever is affixed to the land is part of the land, as is recognized in the maxim *quicquid plantatur solo, solo cedit*.[635] Therefore injury to somebody perched on top of, say, the Big Ben Tower in London by an aircraft would qualify as injury to a person 'on land' since the Tower is affixed to land. A similar reasoning applies in relation to damage to property[636] placed on another property where the latter is affixed to the land and the former is not.

With respect to damages done on water, however, this idea of superimposition runs into a problem. Just like in relation to damages on land, it would appear reasonable to argue that any person or property damnified while on property on water may invite the operation of s.76(2). The problem envisaged here is more acute in relation to situations where the damaged property or injured person was on a floating object than where such person or property was on a structure attached to the water bed: say for instance the plaintiff was injured by an aircraft while he was working on an oil-rig in the North Sea. In the latter instance it may at least be argued successfully as a last resort that the said structure was 'land' - on the *quicquid plantatur* reasoning - considering that it is attached to the waterbed which itself is land. Apparently, this same argument cannot be made where for instance the plaintiff was injured while sunbathing on a cruise ship in the Caribbean Sea. The

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635 For a detailed treatment of this doctrine, see Megarry and Wade, *The Law of Real Property* (5th edn, 1984), pp. 731 *et seq.*

636 Usually movable property.

ship cannot by any imagination be conceived as affixed to land therefore forming part of land as such. On the other hand, one might recall the extended meaning of land which recognizes that land includes everything above and beneath the surface.[637] According to this extended meaning therefore, land would include any body of water above it.[638] However, the applicability of this meaning of land to s.76(2) in relation to the construction of the term 'water' becomes dubious in view of the fact that the subsection expressly mentions 'land or *water*' thereby suggesting a distinction between the two. If they had intended water to be construed into the term 'land', then why would the draftsman go into duplication by making an express reference to water in the subsection? In other words, why did they not simply refer only to 'land' so that the Courts would construe water into the term accordingly? Better still why did the draftsman not make the extra effort of providing expressly that 'land' as used in the subsection includes water? Whereas these queries and the doubt which they serve are very strong, it would not seem that they absolutely rule out the possibility of construing 'land' as used in s.76(2) as including water notwithstanding that an express reference is made to water in an alternative sense.

First, it could be argued that the express reference to 'water' along side 'land' in the subsection may serve to indicate that the draftsman intended to put it beyond

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637 Upon which the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* was based; see p. 37, *supra.*

638 See *Denn d. Bulkley* v. *Wilford* [1826] 8 Dow. & Ry. K.B. 549, *per* ABBOT, C.J., at p. 554. In England this meaning of land as including water has been statutorily incorporated in statutes such as the Interpretation Act 1978, Sch. I; the Land Drainage Act 1976, s.116(i); and, the Harbours Act 1964 s.57. See generally, *Halsbury's Laws of England* (4th edn, 1982) vol. 39 paras. 377-378.

any doubt that the subsection applied to loss or damage suffered on water as well as on land. In which case it may not further be argued that the express mention of 'water' alongside 'land' suggests a derogation from the usual sense in which 'land' is juridically perceived - i.e., as including any superjacent body of water, since all that may have been intended in the former case could only have been the avoidance of doubt. Secondly, the use of 'land' without any qualification in the subsection (or indeed anywhere in the Act) to the contrary cannot exclude the traditional meaning of land as including water. For as ABBOT, C.J., confirmed in *Denn a. Bulkley* v. *Wilford*,

> Nobody will doubt that if the word 'land' merely is used, without any qualification, it would be sufficient to pass meadow and pasture land, and land covered with water....[639]

The foregoing conclusion, it is submitted, is not jeopardized by the fact that an alternative express reference has been made to water since such reference does not amount to a qualification *ipso facto* of the earlier reference to land. Thirdly, the express reference to water besides being open to positive perception as an emphatic way of conveying that the strict liability under the subsection applies equally to material loss or damage suffered on water as on land, is also susceptible of being viewed negatively as being either superfluous or as the handiwork of a draftsman who may have forgotten that the term land includes water.[640]

In view of all these, therefore, it is submitted that material loss or damage

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639 *Supra*, p. 184 (n.638).

640 It must be especially noted that this reasoning is not necessarily contrary to the doctrine behind the maxim: *ut res magis valeat quam pereat* [that the provision (or thing) may rather have effect than be defeated]. For reading land as inclusive of water will not defeat s.76(2).

caused a person or property while on a floating object must be considered from the perspective of the rule that water is part of the land beneath it: thus such damage is done to a person on land. The additional value of this theory is that it brings into the fold of s.76(2) damage done to persons or property while beneath the surface of the water,[641] which otherwise may not be the case since such persons or property may not be said to be 'on ... water' a the time of the damage.

But then even if the Court is minded to determine that the old rule of interpretation requiring reading 'water' into the term 'land' does not apply with regard to s.76(2) so as to hold that whoever is personally injured or whatever property is damaged while on a floating object on water is on land for the purposes of the strict liability of the defendant under the subsection, it may still be possible for the Court to do one or both of two things to yield the desired result. First, the Court may interpret the phrase 'damage ... on ... water' so broadly as to encompass damage suffered by person or property on another property or thing floating on water. This will seem to be the only reasonable interpretation that gives effect to the provision in relation to injury to persons since human beings do not usually stay *on* water except when they are on something else, they usually are *in* water. Secondly, the Cou. t can draw an analogy with the doctrine of *quicquid plantatur solo, solo cedit* and hold that whatever is on a thing on water is on water.

641 E.g., a scuba diver or a submarine.

(v) Contributory Negligence

Apart from the other latent adverse factors reviewed so far, s.76(2) expressly provides that the claim of the plaintiff would be undermined if he caused the damage himself or contributed to the negligence engendering such damage. The question here is: To what extent will the plaintiff's claim be so undermined? There is no doubt that where it is shown that the plaintiff caused the damage all by himself, he will lose his right to claim. But then what if his aberration was only that of contributory negligence? At a glance, the subsection does seem to wipe out the plaintiff's right of claim, on this ground. This is inconsistent with the notion of apportionment of fault under common law and under such statutes as the Law Reform (Contributory Negligence) Act 1945 of the UK.[642] It has been submitted that the apportionment of responsibility as provided in the 1945 Act shall govern the determination of contributory negligence in s.76(2).[643] This submission has the judicial endorsement of the Supreme Court of New South Wales in *Southgate* v. *Commonwealth of Australia*[644] which rejected the contrary view.

With regard to how the contributory negligence of other persons for whom the plaintiff is somewhat responsible, it has been said to be arguable that such could affect the plaintiff.[645] It is submitted that this argument deserves some merit only to

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642 See also Law Reform (Miscellaneous Provisions) Act 1965 (Australia).

643 Shawcross and Beamont, V/137.

644 *Supra.*

645 See Shawcross and Beamont, p. V/137 (note 2 to para. 144).

the extent that the contributory negligence of such other person is justifiable as the plaintiff's own negligence, such as where the plaintiff failed to discharge a duty on him of preventing his charge from contributing to the said negligence. Otherwise, the plaintiff ought not to be affected by such contributory negligence because the plain reading of the subsection cannot accommodate such imputation of contributory negligence.[646]

(vi) The Defendant

Under s.76(2), the right of action shall lie against the owner of the aircraft except where the aircraft that caused the damage has been demised, let or hired out, *bona fides*, to another person by the owner for any period in excess of fourteen days or on a 'bare-craft' basis.[647]

One implication of making the owner of the aircraft liable, is that the plaintiff may have a choice of defendants where the owner is not the same person as the party whose actions or omissions caused the damage - e.g., the pilot, the navigator etc. Such other parties may be sued in negligence,[648] besides the strict liability which s.76(2) envisages for the owner

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646 See *Lampart* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 All ER 719, where the contributory negligence of a servant was imputed to his master the plaintiff. Cf *Mallet* v. *Dunn* [1949] 2 KB 180, where the contributory negligence of a spouse was held not to affect the plaintiff's claim.

647 See s.76(4).

648 See Shawcross and Beaumont, p. V/138.

(vii) Indemnity

The owner or operator who has been held strictly liable under s.76(2) does, however, have a right of indemnity against any other person on whom the legal liability for the damage actually rests. And this is notwithstanding that there had not been a bona fide demise, etc., in excess of fourteen days.[649]

II. INTERNATIONAL LEGISLATION

The Rome Convention 1952[650]

The Convention was motivated by the need to prevent an apprehended hinderance to the development of international civil air transport resulting from unbridled compensation claims by persons who suffer damage on the surface of the Earth as a result of foreign aircraft operation, as well as the need to unify as much as possible the rules governing such claims in various countries.[651]

The main principle of liability in the Convention is stated in art. 1 as follows:

> 1. Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless, there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.

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649 *Ibid.*

650 Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface 1952.

651 See preamble.

> 2. For the purpose of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off, until the moment when the landing run ends. In the case of an aircraft lighter than air, the expression *'in flight'* relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto.

This Convention thus to a larger extent enacts on the international plane that regime of liability which is found in the statute books of many Commonwealth countries as reviewed above.[652] Notably, while it displaces the *ad coelum* doctrine of trespass to land, it imposes strict liability on the operator of the aircraft[653] for any damage caused by, or arising from, his aircraft. And even though it purports to displace the *ad coelum* principle of trespass, it is arguable that such displacement is only insofar as the aircraft is operated 'in conformity with existing air traffic regulations'. However, in jurisdictions where municipal law has so tempered the *ad coelum* principle that it applies only with regard to the airspace which the owner or person in possession of land needs for the reasonable enjoyment of his land,[654] it would not appear to make a difference in the application of the Rome Convention that the aircraft is being operated in breach of existing air traffic regulations so long as the operator does not cause any damage as a result of the operation.

Another notable feature of the Convention is its application only in relation to damage caused while the aircraft is 'in flight'. It is submitted that the reasoning espoused pursuant to the similar notion in the aviation legislation reviewed above

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652 See, *supra.*

653 See art. 2 generally.

654 See e.g. the *Bernstein* case, *supra.*

is of parallel significance here.

However the Convention is of limited application and of little or no relevance from a Canadian perspective. Because of its low limits of compensation,[655] the Convention has been largely unattractive to a great many States including Canada, UK and USA, to mention only a few States where it is not in force. Canada had been a party until 1976 when it denounced the Convention.[656] Not even the 1978 Montreal Protocol of amendment has been able to make the Convention any more attractive.[657]

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655 See art. 11.

656 See ICAO Doc. C-WP/8795 (March 1989), p. 10; Brown, 'The Rome Conventions of 1933 and 1952' (1961) 28 *Journal of Air Law and Commerce* 418 at p. 442.

657 As at 1989, the Protocol had got only 11 signatures and two ratifications: see Gagné, *Annex 18 to the Chicago Convention and the Safe Transport of Dangerous Goods by Air* (McGill DCL Thesis, 1989) p. 419 n. 177. However, the Convention has remained in force for the following common law States as at 16 January 1991:- Australia, Nigeria, Pakistan, Papua New Guinea, Seychelles, Sri Lanka and Vanuatu: see ICAO State Letter of 16 January 1991 re: Notification of acts of signature, ratification or accession.

Conclusion

A Strict Liability to Canadian Aviation Incident Victims on the Surface? A recommendation

As has been shown earlier, most of the Commonwealth jurisdictions have aviation legislation which prescribe conditions of exemption from certain actions in trespass and nuisance, but, on the other hand, go on to impose strict liability in some cases of damage on the surface.[658] This line of legislation, however, is not peculiar to the Commonwealth, for both the Rome Convention,[659] and the Uniform Aeronautics Act[660] prepared by the American Commissions on Uniform State Laws in 1922 (which was adopted in many States), do make comparable provisions.

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658 See ch. 6, *supra*.

659 See art. 1.

660 See §§ 4 and 5: 11 ULA 159.

But Canada is one jurisdiction where no such legislation obtains either by way of municipal federal or provincial enactment, or by the force of the Rome Convention.[661] While the reason for the absence of this legislation in Canada is not clear, one can only think of a number of possible explanations. Those explanations and their plausibility will be reviewed shortly. But before that, it might be useful to point out that as the Anglo-Canadian common law of torts has modified the *ad coelum* principle of land ownership so as to limit ownership of airspace to only as much of it as the owner of the subjacent land would need for the enjoyment of his land,[662] it could then be argued that no special legislative provision is really needed to recognize that legal dispensation. There appears much to be said for this argument. However, it is submitted that the need for greater certainty and clarity of the law does warrant a legislation in relevant respects.

Some possible reasons for the legislative inertia

As regards the type of enactment indicated above, and more especially one that is coupled with the imposition of strict liability on the aircraft operator, lack of certainty as to legislative competence could afford an explanation for the absence of legislation. This stems from the combined effects of s.92(13) of the Constitution Act 1867 which gives the provincial legislatures the exclusive power to make laws in relation to 'property and civil rights in the provinces', and judicial precedents which

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661 Canada denounced the Convention in 1976: see Gagné, p. 419.

662 See *Bernstein* v. *Skyviews & General, R.* v. *Lacroix, supra.*

hold that the Parliament of Canada has exclusive jurisdiction to legislate in relation to the subject of aeronautics.[663] In the latter regard, the Supreme Court of Canada held in *Johanesson* v. *West St. Paul*[664] that under the the Canadian Constitution, Parliament has exclusive jurisdiction to legislate on the entire subject of aeronautics, based on Parliament's power to make law for the peace, order and good government of Canada.[665] As the decision had made no specific reference to the power to legislate on the subject of tort liability arising from aviation, it would have been thought that the provinces would have legislative competence in that regard in virtue of the 'property and civil rights' jurisdiction. But the validity of this thought may very well be in issue in view of the subsequent case of *Schwella* v. *The Queen,*[666] where the Court observed that:

> It lies well within the legislative competence of Parliament in relation to aeronautics to enact laws respecting liability in tort in connection with or arising from aeronautical operations and to provide as well in such cases for both apportionment of fault and liability of one tort feasor to another.[667]

This dictum is no doubt in line with the general principles of *Johanesson*, nevertheless it is submitted that the cases do by no means exclude the jurisdiction

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663 This trend started with the decision of the Privy Council in *Re Regulation and Control of Aeronautics in Canada* [1932] AC 54 which was based on a different constitutional factor i e Canada's obligations to effectuate treaties under s.132 of the 1867 Act as part of the British Empire.

664 [1952] 1 SCR 292.

665 See s.91, Constitutional Act, 1867. See also *Jorgenson* v. *North Vancouver Magistrates* [1959] 28 WWR 265; and generally McNairn, 'Aeronautics and the Constitution' (1971) 49 *Can. Bar Rev.* 411.

666 [1957] Ex.CR 226.

667 *Ibid.*, at p. 233.

of the Provinces to make laws under the property and civil rights power. What may appear to exist therefore could be an instance of concurrent legislative jurisdictions on both the Parliament and the provincial legislatures subject, of course, to the rule of paramountcy of Acts of Parliament over the provincial Acts in the event of a conflict.[668]

On the other hand, it is quite arguable that what exists in the circumstances is a case of exclusive jurisdiction of provincial legislatures, regardless of the overarching aeronautics subject-matter. The ground for this submission is the fact that the residuary jurisdiction of the Parliament upon which the *Johanesson* and *Schwella* decisions were based is conditional on the caveat that the jurisdiction be exercised only 'in relation to all Matters *not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...*'.[669] Thus, the fact that legislative jurisdiction over 'Property and Civil Rights in the Province' has been assigned exclusively to the Provinces by the Act[670] would seem somewhat incompatible with the conclusion that Parliament has *any* - how much more *exclusive* - jurisdiction to make laws regarding tort liability arising from aviation. And this apparent incompatibility jeopardizes, in turn, the certainty with which it could be asserted that the Provinces lack jurisdiction to enact such legislation.

A further possible reason why there is an absence of a Canadian strict liability

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668 For further discussion of the rule of paramountcy, see Hogg, *Constitutional Law of Canada* (2nd edn, 1985) ch. 16.

669 Emphasis added.

670 See s.92(13), Constitution Act 1867.

legislation in the manner under discussion could be because of the very rationale behind strict liability and the wisdom behind its importation into the domain of aviation. At common law, the notion of strict liability as accruing from an event has traditionally been associated with activities which are inherently dangerous or ultra-hazardous: and the leading rule in that connexion is the rule in *Rylands* v. *Fletcher*.[671] Even though the facts of the case are the escape of water from a reservoir, its principle was soon extended to the escape of various other things[672] including motor-vehicles in the early days of the horseless carriage.[673] Thus, it was a matter of course for the law and the Courts to regard aviation *per se* as an ultra-hazardous activity thus warranting the strict liability of the operator to any person damaged as a result.[674] The various common law jurisdictions may have felt the need to enact strict liability provisions in the manner of what is now s.76(2) of the UK Civil Aviation Act 1982, partly out of a probable desire to forstall possible judicial denial of strict liability based, in turn, on change in perception of aviation as inherently dangeorus. But the perception of aviation as an ultra-hazardous activity has, indeed, changed with time and maturity of aviation technology.[675] And in keeping with this trend the American Commissioners for Uniform State Laws reversed themselves in 1943 by

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671 (1868) LR 3 HL 330.

672 *Jones* v. *Festiniog Rly Co.* (1868) LR 3 QB 733 (fire); *West* v. *Bristol Tramways Co.* [1908] 2 KB 14 (poison); *A.-G.* v. *Cork* [1933] Ch. 89 (gipsies).

673 See *Musgrove* v. *Pandelis* [1919] 2 KB 43.

674 See *Boyd* v. *White* 276 P 2d 92 at p. 98 (Cal.)

675 See *Fosbroke-Hobbs* v. *Airwork Ltd.* [1937] 1 All ER 108, at p. 112.

declaring 'obsolete' - and withdrawing therefore - the Uniform Aeronautics Act[676] wherein they had proposed to the States in 1922 that:

> The owner of every aircraft which is operated over the lands or waters of this State is absolutely liable for injuries to person or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft... whether such owner was negligent or not...[677].

Many American States had adopted this provision in one form or another,[678] but with the *volte face* in the perception of aviation as inherently dangerous came a decline in adoption of the above quoted provision.[679] However, the said provision remains popular among Commonwealth countries with the exception of Canada.

The vital question thus arises: Should Canada pass a similar legislation? It is submitted that the answer should be in the qualified affirmative. Qualified, because couching the provision in the language and form of the Uniform Aeronautics Act or in the form of the UK Civil Aviation Act really entails *absolute* liability of the operator since he would be liable in any event except for the contributory negligence of the injured party.[680] This would seem unjust from the point of view of the operator who may have to be held liable for the negligence or wrongful conduct of a third party with whom he may have little or no relationship whatsoever. Although one could argue that the operator could always sue any such third party for

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676 See *Boyd* v. *White, supra.*

677 See §5, Uniform Aeronautics Act, 11 Uniform Law Annotated, p. 159.

678 See 11 Uniform Law Annotated, p. 162.

679 See 6 *Am. Jur. (Rev.)* § 60, p. 36.

680 See Clerk and Lindsell, § 25-59.

indemnity, it still seems that the prospect of indemnity might not always guarantee justice given, for instance, that very often the terrorist involved in an unlawful interference may either have escaped or may have died in the incident. As unfair as this may seem on the victim who ought to be compensated, it would not, however, seem a better justice to encumber the operator with the liability to pay the compensation for a wrong he did not commit simply because no other defendant is available.

On the other hand, not enacting a provision along the lines under consideration would seem unfair to the ordinary plaintiff who will have to bear the burden of proving the negligence of a defendant who is involved in an esoteric - albeit non-inherently dangerous - enterprise the apparatus of which are so technology- and systems-intensive that the cost of proving its malfunctioning could be unbearable for the ordinary plaintiff thus dissuading him from seeking a judicial redress. Again, there may always be something to be said for any argument that the doctrine of *res ipsa loquitur* could be a better alternative in the circumstance. Nevertheless, the doctrine may not guarantee justice in view of the uncertainties about its applicability[681] and effect[682] in aviation cases.

The best solution, it is submitted is to enact a *strict liability* provision, properly so called, entailing a *prima facie* liability of the operator without proof of negligence or intention or other cause of action, for any material damage or loss caused to any

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681 See Shawcross and Beaumont, *Air Law*, (4th edn, 1977) vol. 1 (General text), pp. 79 *et seq.*

682 *Ibid.*, p. 78.

person or property on the surface or from an aircraft. However, liability should be defeated upon proof by the operator that he was not at fault. This will have the effect of shifting the burden of proof in all cases to the operator.[683] Thus, the injustices of absolute liability of the operator and the burden of proof on the plaintiff would have been largely addressed.

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683 This system of liability seems to have worked a fair amount of justice in relation to liability under the Warsaw Convention: Matte, *Treatise on Air-Aeronautical Law* (1981), p. 380.

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