England and Wales High Court (Queen's Bench Division) Decisions

Neutral Citation Number: [2013] EWHC 1409 (QB)
Case No: HQ12X01837

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
23/05/2013

B e f o r e :

MR JUSTICE LEGGATT

Between:

(1) Julia Mary Rogers **(2) Jade Nicola Lucinda Rogers**	**Claimants**
- and -	
Mr Scott Hoyle	**Defendant**

John Kimbell (instructed by Stewarts Law LLP) for the Claimants/Respondents
Timothy Marland (instructed by Clyde & Co.) for the Defendant/Applicant

Hearing date: 21/02/2013

HTML VERSION OF JUDGMENT

Mr Justice Leggatt :

Introduction

1. The issue raised by this application is whether a report produced by the Air Accident Investigation Branch of the Department for Transport ("the AAIB") is admissible as evidence in civil proceedings.

2. I am told that (save for one case in 2008 known to counsel but of which there is no report or transcript) this issue has not come before the High Court before. I have been referred to a number of reported cases in which reports of the AAIB were admitted in evidence. In none of these cases, however, was the admissibility of the AAIB's report contested. In the present case the objection is taken that the report constitutes inadmissible opinion evidence. To determine whether this objection is well founded, it is necessary to consider the nature and relevance of the report together with the basis and scope of the rule of law which excludes opinion evidence.

The Claim

3. The claimants bring this action as executors on behalf of the estate and as dependants of Mr Orlando Rogers, claiming compensation for his death. Mr Rogers died on 15 May 2011 when a Tiger Moth aircraft in which he was a passenger crashed near Witchampton in Dorset. The claimants allege that the accident was caused by the negligence of the defendant, Mr Hoyle, who was the pilot of the aircraft.

4. The claimants' case, in brief, is that Mr Hoyle agreed to take Mr Rogers and another acquaintance, Mr Diamond, on a short pleasure flight in a vintage Tiger Moth propeller bi-plane manufactured in 1940. The aircraft had room for only one passenger. Mr Diamond went first. During the first flight, two loops were performed – one at an altitude of 1200 ft and one at 1600 ft.

5. For the second flight, Mr Rogers replaced Mr Diamond as the passenger in the aircraft. The claimants say that Mr Hoyle intended to give Mr Rogers the same experience as Mr Diamond by performing aerobatic loops. They allege that in the course of the flight Mr Hoyle pulled up into a loop at an altitude of about 1400 ft but lost control of the aircraft, which entered into a spin from which Mr Hoyle was not able to recover. The aircraft crashed into a field and Mr Rogers suffered fatal injuries. Mr Hoyle survived the crash.

6. It is the claimants' case that Mr Hoyle was negligent in that he attempted to perform a loop (a) when he had no or no sufficient training and expertise in aerobatic flying or spin recovery and (b) at a dangerously low altitude such that there was insufficient airspace to recover from a spin.

7. The defendant's case is that he was not attempting to perform a loop when the accident occurred. He says that the rudder pedals jammed and that he was not able to prevent the aircraft from stalling and flipping over into a spin from which, because the pedals were jammed, he could not recover.

The AAIB

8. The AAIB is part of the Department for Transport. It is the official body charged with the investigation of accidents and serious incidents involving aircraft which occur in or over the United Kingdom.

9. The powers of the AAIB are contained in the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996 ("the Regulations") made under sections 75 and 102 of the Civil Aviation Act 1982. The Regulations were made to implement the EU obligations of the United Kingdom under Council Directive 94/56/EC of 21 November 1994 ("the Directive") and to carry out Annex 13 to the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 ("the Chicago Convention").

10. Alongside the Regulations there is now a parallel regime established by Regulation (EU) 1996/2010 ("the EU Regulation"). The EU Regulation, which has direct effect in Member States, came into force on 2 December 2010. There is a substantial overlap between the EU Regulation and the Regulations. However, the Regulations have not been repealed. For present purposes it is sufficient to outline the statutory scheme for the investigation of air accidents established by the Regulations without also referring to the corresponding provisions of the EU Regulation.

The Regulations Governing Air Accident Investigations

11. The Regulations provide for the appointment of Inspectors of Air Accidents who, as a body, are known as the AAIB: reg 8. When an accident occurs in or over the United Kingdom, the Chief Inspector must appoint one or more inspectors to carry out an investigation: reg 8(3). The Regulations give these inspectors a series of powers to enable them to carry out their investigations. In particular, for the purpose of enabling him to carry out an investigation into an accident or incident in the most efficient way and within the shortest time, an investigating inspector is authorised by regulation 9(1) to:

> "(a) have free access to the site of the accident or incident as well as to the aircraft, its contents or its wreckage;
>
> (b) ensure an immediate listing of evidence and controlled removal of debris, or components for examination or analysis purposes;
>
> (c) have immediate access to and use of the contents of the flight recorders and any other recordings;
>
> (d) have access to the results of examination of the bodies of victims or of tests made on samples taken from the bodies of victims;
>
> (e) have immediate access to the results of examinations of the people involved in the operation of the aircraft or of tests made on samples taken from such people;
>
> (f) examine witnesses; and
>
> (g) have free access to any relevant information or records held by the owner, the operator or the manufacturer of the aircraft and by the authorities responsible for civil aviation or airport operation."

12. For these purposes, investigating inspectors also have powers to summon and examine witnesses, to require anyone to answer questions or produce documents, to take witness statements signed with a declaration of truth, to inspect any place or aircraft and to take measures for the preservation of evidence: reg 9(2).

13. The sole objective of the investigation of an accident or incident under the Regulations is the prevention of accidents. It is not the purpose of such an investigation to apportion blame or liability: see reg 4, which reflects para 3.1 of Annex 13 to the Chicago Convention and art 4(3) of the Directive.

14. On completion of an investigation, the inspector must prepare a report and submit it to the Secretary of State: reg 11(1)+(4). The report must state the sole objective of the investigation and, where appropriate, contain relevant safety recommendations: reg 11(3). A safety recommendation "shall in no case create a presumption of blame or liability for an accident": reg 11(5).

15. If in the opinion of the investigating inspector the report is likely to affect adversely the reputation of any person, then that person (or, if the person is dead, whoever appears to represent best the interest of the deceased person) must be given the chance to comment on the relevant parts of the report in draft before it is published: reg 12.

16. The AAIB's report of an investigation must be made public. This must be done within the shortest time possible and, if possible, within 12 months of the date of the accident: reg 13.

17. The records of an investigation (other than those included in the report) may not be disclosed for any purpose other than accident investigation without a court order: reg 18. A court may order such disclosure only if satisfied that the interests of justice in the proceedings or circumstances for which the relevant record is required outweigh any adverse impact which disclosure may have on that or any future accident investigation: reg 18(4)(b).

The AAIB Report

18. The report of the AAIB's investigation into the accident with which these proceedings are concerned (the "AAIB Report") was published on 14 June 2012. The AAIB Report follows what I understand to be the standard format of such reports. Its contents include: a narrative history of the flight; information about the weather conditions, the aircraft and the pilot; a description of the wreckage found at the accident site and conclusions drawn from a detailed examination of the wreckage; information derived from a post-mortem examination of the deceased passenger, from radio transmissions between the pilot and air traffic control, from recordings of radar and GPS data and from interviews with witnesses (including the pilot); and analysis of the information obtained in the investigation leading to conclusions about the cause of the accident.

The Claimants' Reliance on the AAIB Report

19. When the particulars of claim in these proceedings were settled on 11 May 2012, the AAIB Report had not yet been published. The claimants' statement of case was therefore pleaded without reference to it. However, by the time the claimants came to serve their reply on 3 July 2012 the AAIB Report was available, and in pleading the reply extensive reference has been made to the report.

20. At paragraph 3 of the reply, the claimants have given notice pursuant to section 2 of the Civil Evidence Act 1995 of their intention to rely on the contents of the AAIB Report as hearsay evidence at trial. Paragraph 4 of the reply summarises findings contained in the AAIB Report and states the claimants' intention to rely on the report in support of their case that the defendant was negligent. Paragraph 4 continues:

> "For the avoidance of doubt, the claimants will not contend that the court is in any way 'bound' by the findings of the AAIB. The claimants simply rely on the AAIB Report for the admissible factual evidence and the admissible expert evidence which it contains."

The remainder of the reply contains further references to the AAIB Report including several quotations from it.

The Defendant's Application

21. In response to these statements of intention to rely on the AAIB Report, the defendant issued this application to contest its admissibility. On this application, the defendant seeks (1) an order that those parts of the claimants' statements of case which refer to the AAIB Report be struck out, and (2) a declaration that the report is inadmissible in the current proceedings.

22. On 11 December 2012 Master Fontaine gave directions for the application to be heard by a High Court Judge.

The Defendant's Arguments

23. On behalf of the defendant, Mr Marland does not contend that there is any provision of the legal regime governing AAIB investigations and reports which prevents such reports from being used as evidence in court proceedings. His argument is based on the general law of evidence. Mr Marland submits that the AAIB Report consists of inadmissible opinion evidence and that this extends to all 'findings of fact' contained in the report, since findings of fact are statements of opinion. In support of this argument Mr Marland relies on authorities (which I will consider later in this judgment) in which findings of another court, a coroner, a wreck inquiry, a disciplinary tribunal and an inquiry commissioned by the Bank of England into its supervision of the Bank of Credit and Commerce International ("BCCI") have all been held inadmissible in civil proceedings. He submits that there is no material distinction between such findings and the findings contained in a report of the AAIB following an air accident investigation.

24. Mr Marland's primary contention is that the AAIB Report is inadmissible in these proceedings as a matter of law so that the court has no power to receive it. Alternatively, he contends that, if that is wrong and the court has a discretion in the matter, it would be unsafe and undesirable to allow the report to be admitted in evidence.

The Claimants' Arguments

25. On behalf of the claimants, Mr Kimbell argues that the AAIB Report contains statements of fact as well as statements of opinion. He accepts that the statements of fact are hearsay but points out that this is no longer a ground on which evidence can be excluded in civil proceedings. In so far as the report contains statements of opinion, Mr Kimbell submits that this evidence is admissible at common law because the opinions are those of duly qualified experts. He further

submits that the authorities relied on by Mr Marland can all be distinguished as they reflect a specific rule (commonly referred to as "the rule in Hollington v Hewthorn" after the leading authority for it) which is confined to findings made in judicial proceedings and does not apply to a report of an investigation into an accident such as a report of a shipping surveyor, a factory inspector or the AAIB. In support of that contention, he enlists the support of Phipson on Evidence (17th Edn) at para 33-25.

26. Mr Kimbell agrees with Mr Marland that the decision whether the AAIB Report may be received in evidence does not involve an exercise of discretion. His primary contention is that the report is admissible in these proceedings as a matter of law and that the court has no power to exclude it. Alternatively, Mr Kimbell contends that, if the court has a discretion, it is in the interests of justice to allow the report to be admitted in evidence.

Relevance

27. Before examining these competing arguments, it is logical to consider first what relevance (if any) the AAIB Report has to the issues in this case. In the modern law of evidence relevance is the paramount consideration. The primary rule is that evidence is admissible only if it is relevant – that is, if it tends to prove or disprove, in the sense of making more or less probable, any fact in issue in the proceeding: see Phipson on Evidence (17th Edn) at paras 7.08–7.09; DPP v Kilbourne [1973] AC 729, 756. Conversely, evidence that is relevant (or of more than minimal relevance) is generally admissible. In former days when facts in civil as well as criminal cases were found by juries and there was fear that more weight would be given to certain kinds of evidence than they deserved, rules were developed to exclude reliance on evidence notwithstanding its relevance. The rule against hearsay is the classic example. The tendency of the law has been and continues to be towards the abolition of such rules. The modern approach is that judges (and, increasingly, juries) can be trusted to evaluate evidence in a rational manner, and that the ability of tribunals to find the true facts will be hindered and not helped if they are prevented from taking relevant evidence into account by exclusionary rules.

28. The emphasis on relevance is not new. In Hollington v Hewthorn [1943] 1 KB 587, 594, a case that I have mentioned already and will come back to, the Court of Appeal said that:

> "nowadays, it is relevance ... that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded."

29. The proper starting-point, as it seems to me, is therefore to identify what, if any, relevant evidence the AAIB Report contains.

Relevance of the AAIB Report

30. The AAIB Report contains statements of fact and statements of opinion. The statements of fact include observations made by the AAIB inspectors who attended the site of the accident. In particular, the report describes exactly where different parts of the wreckage were found and the nature and extent of the damage which the aircraft was seen to have sustained.

31. The AAIB Report also records statements of fact made by the pilot and other witnesses. A key factual issue in this case is whether the aircraft was performing a loop when it went into a spin. Mr Hoyle denies that he was attempting a loop. The AAIB Report refers to the evidence of a

number of eye witnesses to the activity of the aircraft in the period just before the accident. In particular, the report states that two witnesses, one of whom was a retired professional pilot, saw the aircraft at some distance away carry out a steep turn and then shortly afterwards commence a loop. It is reported that they did not see the conclusion of the manoeuvre but one was sufficiently concerned by the low level of the manoeuvre to express this to the other. Another witness who was in his garden is reported as having seen the aircraft do aerobatics before watching it spiral down. A fourth witness, said to have been the closest to the accident site (at some 350m distance), is reported as having watched the aircraft reach the top of a loop before entering a spin.

32. The pilot, Mr Hoyle, was asked about his recollections of the flight and also about his knowledge of spin recovery. The report records that, when asked what the recovery actions from a spin should be, the pilot omitted to mention several of the crucial elements of correct spin recovery technique for the Tiger Moth aircraft. He did not recall entering a loop but reported that he had encountered a restriction with the rudder pedal. He recalled the aircraft being in spin to the left and that, although he pushed hard on the right rudder pedal, it would not move.

33. All this evidence is of obvious relevance. Moreover, it would remain so even if the claimants' representatives were able to identify all the eye witnesses and call them to testify at the trial and whether or not Mr Hoyle gives evidence. Oral testimony can be tested by cross-examination, but the statements made to the investigating inspectors have the advantage of immediacy and for that reason could be thought more reliable than recollection at a trial which may not take place until several years after the accident.

34. As well as such factual evidence, the AAIB Report contains evidence of the opinions of experts on technical matters. The AAIB use in-house and third party experts in fields which include aeronautical engineering, wreckage analysis, meterology, pathology, analysis of flight data, and the piloting of aircraft. The opinions of such experts are incorporated in the report.

35. In some cases the report identifies the expert whose opinion it records by description (although not by name). For example, the report states that an expert in aviation pathology carried out a post-mortem examination on the passenger (Mr Rogers) and states the pathologist's main findings. Similarly, the report gives the results of an analysis of the recorded meterological data carried out by the Met Office to obtain an estimate of the wind and temperature profile in the area of the accident.

36. In other instances the person whose opinion is reflected in the report is not described. For example, the report states that the aircraft engine and structure appeared to have been in serviceable condition prior to the accident. Although these opinions are unattributed, it is reasonable to assume that they are those of an inspector who is an experienced aeronautical engineer. Likewise it is clear that someone with the relevant expertise must have performed the analysis presented in the report of data extracted from flight track logs recorded by a Global Positioning System carried on board the aircraft and recovered from the accident site by the AAIB. Each log recorded the time, position and altitude of the aircraft at intervals ranging between 1 and 13 seconds during the flight, as well as the track angle and average groundspeed between each point. From this information (i) a diagram has been prepared showing the altitude of the aircraft at each recorded point on each of the two flights and (ii) the track followed by the aircraft on each flight has been plotted on a map.

37. A further category of evidence contained in the AAIB Report consists of findings of the AAIB inspectors based on the information collected in their investigation. Thus, the report contains a narrative history of the flight and a description of surrounding circumstances such as the local weather conditions at the time of the flight. Much of this description is unlikely to be controversial or indeed controvertible. It may, however, be useful in filling gaps in the story which a party is presenting to the court and thus has 'narrative relevance': see Phipson on Evidence (17th Edn) at para 7.10.

38. Other findings of the AAIB are potentially more controversial. In particular, the report contains the AAIB's analysis and conclusions as to the probable causes of the accident. Given that the AAIB has great experience in investigating the causes of air accidents and has plainly carried out a thorough investigation in this case, any rational person who wants to find out what caused the accident would regard the AAIB's views as relevant to that question.

39. Although the three categories of evidence which I have mentioned are a convenient classification, they are by no means neat. The distinction between statements of fact, which report the direct observations of a witness, and statements of opinion is not always easy to draw and may be a question of degree. That is certainly so in this case. For example, the statements in the AAIB Report of the inspectors' observations of the accident site and wreckage are intermingled with statements of opinion based on the inspectors' observations such that the two are hard to separate. To give one example:

> "The rear fuselage, which was intact, was aligned at approximately 25° to the ground marks made by the spinner and cowling which gave strong evidence that there was rotation about a vertical axis with the aircraft rotating to the right when the aircraft struck the ground. This direction of rotation was further corroborated by ground marks made by the tail skid dragging to the left (ie in the direction of the aircraft nose to the right)."

It can be seen that this passage combines statements reporting the location of the ground marks and wreckage which the inspectors observed with inferences drawn from those observations. Many similar examples could be given.

40. Other statements of what might be called mixed fact and opinion include reports of experiments which the AAIB carried out to test or exclude particular hypotheses. For example, to investigate the possibility that a camera carried by Mr Rogers during the flight might have interfered with the rudder or other aircraft controls, an assessment of the control movement was made with an occupant in the front seat of similar height and build to Mr Rogers wearing a similar flying jacket and carrying a similar camera in a similar position to him. The findings from this experiment are reported.

41. There is equally no clear line between the statements of fact and statements of opinion on technical matters contained in the AAIB report and the inspectors' findings of fact. That is not surprising given that the inspectors made relevant first hand observations and have technical expertise in aeronautical engineering and aircraft operations which is inevitably reflected in their analysis. The passage quoted above in which the inspectors found that the aircraft was rotating to the right when it hit the ground illustrates this.

42. The analysis in the report also reflects experience accumulated by the AAIB from other investigations. In some places this is explicit. For example, the report mentions that the AAIB

has investigated several accidents where pilots have carried out aerobatics with either insufficient training and/or at lower than recommended heights. A number of possible reasons are given which could account for such behaviour, although it is said that the reasons are not well understood. Irrespective of the reasons, it seems to me that the fact that such behaviour is in the AAIB's experience not uncommon may itself be relevant to the central issue in the present case of whether or not the defendant was in fact attempting to carry out an aerobatic manoeuvre when the accident occurred.

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

44. No doubt much of this evidence – or evidence to similar effect – could, in principle, be obtained from other sources. The claimants could attempt to trace and interview the eye witnesses to the accident, could summon an AAIB inspector who attended the scene of accident to give evidence and could instruct experts in all the different disciplines consulted by the AAIB. However, the fact that the AAIB's investigation was carried out immediately after the accident when the evidence was fresh gives it an advantage which no subsequent investigation can replicate. In any case the fact that a matter which evidence tends to prove can be proved by other means does not make the evidence irrelevant. Furthermore, collecting from disparate sources all the evidence required to prove the matters contained in the AAIB Report would involve substantial time and cost. In so far as some of the evidence could only be obtained from the AAIB, it would also require a court order.

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

Use of AAIB Reports in Previous Cases

46. The relevance and usefulness of AAIB reports in civil proceedings can also be seen from cases where such reports have been relied on without this being a matter of controversy.

47. In Lambson Aviation v Embraer Empresa Brasileira de Aeronautica SA (2001) unreported (QBD), one of the issues in dispute was whether an aircraft crash had been caused by negligent handling of the aircraft by the pilots during the flight in question. In reaching his conclusion on this issue, the trial judge (Tomlinson J) referred to and placed reliance on various findings and information contained in the AAIB's report into the crash, observing at paragraph 54 of the judgment that the AAIB's "expertise in this field is of course very considerable." It is clear that Tomlinson J regarded the report as containing both factual and opinion evidence on which he was entitled to rely and against which he was entitled to test other evidence in the case.

48. In Bristow Helicopters Ltd v Sikorsky Aircraft Corp [2004] 2 Lloyd's Rep. 150 an application was made to strike out or stay a claim arising out of a helicopter crash in British territorial waters on the ground that it was more appropriate for the claim to be tried in the United States. In dismissing the application, Morison J accepted that one of many factors which made England the most obvious and convenient forum was that "the report of the AAIB which is likely to feature largely in the litigation is to be published in England." It does not appear to have been disputed that the AAIB report was likely to contain relevant and important evidence nor to have

occurred to those acting for the applicants to suggest that the report would not feature in the litigation at all as it was inadmissible.

49. In Budden v Police Aviation Services Ltd [2005] PIQR P23 it was agreed between the parties that the contents of the AAIB report into a helicopter crash could be admitted in evidence at the trial of a fatal accident claim arising out of the crash, with the parties being free to accept or dissent from any conclusions in the report. The central issue in the case was whether or not the crash had been caused by a mechanical problem. The judgment of Douglas Brown J makes extensive reference to the findings of the AAIB which he clearly regarded as an important source of evidence to be considered in conjunction with the evidence of the factual and expert witnesses called by the parties.

50. As the AAIB report was admitted in the Budden case by agreement, that case (like Lambson and Bristow) is not an authority on the issue of admissibility. But the judgment illustrates very well the considerable assistance which such a report may provide to a court which has to resolve a dispute about the cause of an aircraft accident and the extent to which courts would potentially be handicapped in seeking to establish the true facts if the law does not allow such reports to be relied on in the absence of agreement.

No Statutory Restriction

51. There is nothing in the legislation governing the investigation of air accidents which restricts the use that may be made of a report of the AAIB once the report has been published. In particular, there is nothing which prevents or limits the use of a report as evidence in court proceedings. This is in contrast to the AAIB's records of the investigation which, as mentioned earlier, will only be made available for the purpose of court proceedings if the court makes an order for disclosure after being satisfied that the interests of justice in the proceedings outweigh any adverse impact which disclosure may have on accident investigation.

52. There is also a contrast in this regard between AAIB reports and reports of marine accident investigations. Regulation 14(14) of the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 has the effect that any part of a report of a marine accident investigation based on information obtained under sections 259 and 267(8) of the Merchant Shipping Act 1995 (which give inspectors powers to enter premises and board ships) "shall be inadmissible in any judicial proceedings whose purpose or one of whose purposes is to attribute or apportion liability or blame unless a Court or tribunal ... determines otherwise". There is no equivalent provision which restricts the admissibility of any part of the report of an air accident investigation.

Hearsay Evidence

53. It would once have been a bar to the admission of the AAIB Report that it is hearsay evidence. Indeed, in so far as the report records statements made by witnesses to the AAIB inspectors, it contains 'double hearsay'. However, the rule against hearsay has been abolished in civil proceedings by the Civil Evidence Act 1995.

54. The hearsay rule was developed in an age when comparatively little information was written down or otherwise recorded and the best evidence of disputed facts was generally the evidence of eye witnesses stating their recollection of events in court. A statement made out of court, if tendered as evidence of its truth, had the disadvantages that it was not first hand and could not

be tested in cross-examination. However, in the modern age when vast amounts of information are recorded, the best evidence of relevant events in most civil cases is hearsay evidence. Notes, memoranda, transcripts, photographs, emails, text messages and many other forms of recording provide contemporaneous or more nearly contemporaneous and generally more reliable evidence than the recollections of witnesses testifying in court, often several years after the events in question.

55. Section 1 of the Civil Evidence Act 1995 provides that in civil proceedings evidence "shall not be excluded on the ground that it is hearsay". Section 4 of the Act directs a court in estimating the weight (if any) to be given to hearsay evidence to have regard to "any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence". That is no more or less than a court would be bound to do in any event in estimating the weight to be given to any evidence. The Act goes on to mention, in section 4(2), some particular considerations to which "regard may be had". These include:

> "(a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness;
>
> (b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;
>
> (c) whether the evidence involves multiple hearsay;
>
> ... [and]
>
> (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; ..."

56. Mr Marland highlighted features of the AAIB Report which he says give rise to concern: in particular, the fact that none of the statements of fact or opinion which it contains are attributed to any named individual; and that the report is based on an exercise in evaluating and discarding evidence which is not disclosed and where any unused material is not disclosed. I shall have to consider these points in the context of the argument that the report should be excluded from evidence as a matter of discretion. However, as Mr Marland accepted, they are all matters which go to the question of what weight (if any) should be given to the contents of the AAIB Report. They do not provide any basis for contesting its admissibility.

Opinion Evidence

57. I come then to the central issue on this application of whether the AAIB Report is inadmissible on the ground that it consists of statements of opinion.

58. As a general rule, evidence that a person holds an opinion on a relevant matter is not admissible to prove that the opinion is true. A reason often given for this rule is that opinion evidence is irrelevant. But the admissibility of an opinion does not depend simply on whether it is likely to be reliable and therefore logically probative. The main justification for excluding opinion evidence lies not in its irrelevance but in the nature of the judicial role.

59. A central part of a judge's task in a civil case is to evaluate the evidence adduced by the parties and to decide what conclusions may properly be drawn from that evidence. It is a cardinal

principle, and an essential ingredient of the right to a fair trial before an impartial and independent tribunal, that in carrying out this task judges must form their own opinions by making their own evaluation of the evidence and must not defer to the opinion of anyone else. In the great case of Carter v Boehm (1766) 3 Burr 1905, 1917, in holding that the opinion of a broker was evidence to which the jury "ought not to pay the least regard" Lord Mansfield explained the reason as follows:

> "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness."

60. There are important limits to this principle. In particular, it is proper that a judge should have regard to the opinion of a person who is better placed to form that opinion than is the judge. The obvious example is the opinion of an expert on a subject involving specialised knowledge.

61. Even where the subject matter is not one in which the witness has any special expertise, a witness may be in a privileged position to express an opinion because of his or her observation of the relevant events. For example, a witness may from observation give evidence of a person's age or the speed at which a car was travelling. These are strictly matters of inference and therefore opinion, but they are inferences which the witness is peculiarly well placed to draw and cannot reasonably be expected to separate from the observed facts. Another example is evidence of what the witness would have done in a hypothetical situation – e.g. if a particular misrepresentation had not been made. Such a question is not one on which there is any observed fact of the matter – since by definition the situation did not occur – but a person may through self-knowledge not possessed by any third party be better able than others to form an opinion of what he or she would have done.

62. Unless, however, the person expressing an opinion is in a significantly better position than the court to evaluate the facts on which the opinion is based and to draw conclusions from those facts, evidence of the opinion itself is not admissible.

The Status of the AAIB Report

63. What then is the status of the AAIB Report? I will need to examine the authorities which are said to show that all or much of the report is inadmissible. But considering the question first purely as one of principle and without reference to authority, I see the position as follows.

64. First of all, as I have described, the report contains statements of fact as well as statements of opinion. On any view, the factual evidence in the report is admissible since, as discussed earlier, the evidence is relevant and fact that it is hearsay is not a ground for its exclusion, nor is there any other rule of law which prohibits its reception.

65. Second, the opinion evidence in the report is also in principle admissible in so far as the opinions stated are those of qualified experts on subjects involving special expertise. Many of the opinions stated in the report on subjects such as aeronautical engineering, the piloting of aircraft, meterology, pathology and the interpretation of flight track logs and other data clearly fall into this category.

66. The main thrust of the defendant's objection to the report is directed to the AAIB's findings – consisting of the summary and analysis of information obtained in the investigation and the

AAIB's conclusions about the causes of the accident. Mr Marland is right to say that as all these findings involve inferences drawn from facts they fall into the category of opinion evidence. The opinions expressed, however, are not those of a lay person. The AAIB is a body which is specifically established by statute and charged with responsibility for the investigation of air accidents and in consequence has very considerable experience and expertise in determining the circumstances and causes of such accidents. The findings in an AAIB report are therefore informed (whether explicitly or not) by knowledge gained from past investigations as well as the general aeronautical knowledge of the inspectors and the inspectors' own observations in carrying out the particular investigation. That knowledge and experience gives the findings in the report a special value as opinions of experts who are, moreover, entirely independent of the parties to the litigation.

67. Looking at the matter in principle and apart from authority, therefore, I would consider that the (whole) AAIB Report is admissible in these proceedings.

The Argument from Authority

68. That, however, is not sufficient to decide the issue because Mr Marland is able to point to a substantial body of authority demonstrating that findings of tribunals and inquiries are not admissible in subsequent proceedings (unless they give rise to an issue estoppel). Judicial findings are statements of opinion, and yet it may be thought that they are a peculiarly authoritative kind of opinion with considerable probative value. Nonetheless, the common law excludes such evidence. That being so, Mr Marland submits, findings of the AAIB must by parity of reasoning be inadmissible.

69. The authorities cited by Mr Marland include several cases where, as in the present case, there had been a previous investigation into the cause of an accident resulting in death or injury, and yet the findings of that investigation were held to be inadmissible in subsequent civil proceedings in which compensation for the death or injury was claimed.

Findings at Inquests

70. The first of these cases is Bird v Keep [1918] 2 KB 692, where the question arose whether the finding of a coroner's jury that a workman had died from suffocation by smoke was admissible as evidence of the cause of his death in later compensation proceedings brought by his widow. Between the time of the inquest and the hearing of the workman's compensation claim the doctor who had examined the body and had given evidence at the inquest had himself died and therefore could not be called as a witness. In these circumstances the claimant sought to put in evidence the deposition of the doctor's evidence before the coroner and the coroner's inquisition in order to prove the cause of death. The judge rejected both items as inadmissible but nevertheless, from other evidence, reached the same conclusion as the coroner that the cause of death was suffocation by smoke.

71. On appeal the judge's factual conclusion was upheld. It was therefore unnecessary for the Court of Appeal to decide whether the judge had been right to rule that the doctor's deposition and the coroner's inquisition were inadmissible. But two members of the Court (Swinfen Eady MR and Bankes LJ, with Neville J preferring to express no opinion) gave their view that the ruling was correct. The doctor's deposition did not fall within any exception to the hearsay rule, and the argument that it should have been admitted was not pressed. As for the coroner's inquisition, Swinfen Eady MR said (at p.699):

> "I am of opinion that the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as prima facie evidence against any person of the facts found by the jury."

72. Mr Marland submits that, by analogy, the findings of the investigation conducted by the AAIB are not admissible in these proceedings as evidence of the facts found by the AAIB.

Marine Accident Inquiries

73. The next case is Waddle v Wallsend Shipping [1952] 2 Lloyds Rep 105 where the plaintiff claimed compensation for her husband's death following a ship wreck. For the purpose of the civil claim the court had to determine the cause of the wreck. That question had already been the subject of an inquiry before a wreck commissioner assisted by two naval architects and a ship's captain as assessors. It was common ground, however, that the report of the wreck inquiry was not admissible in the subsequent civil action. Devlin J said (at p.131):

> "Frequent references have been made during the course of the trial before me to the evidence given at the Inquiry. The report has not been tendered and I have not been told what conclusion was reached about the cause of the loss. I think this is strictly correct; the report is not admissible and the parties are entitled to have the matter considered and determined afresh."

74. Devlin J nonetheless went on to observe that it "will not be very satisfactory if I arrive at a different result from that reached by a very experienced Commissioner assisted by skilled assessors," and recommended that:

> "... the competent authorities might consider whether the useful purposes that Wreck Inquiries serve would not be increased if the report was made available to any court which had to determine the cause of the loss. It is not necessary that the findings of fact made in the report should be treated as binding. The opinion of the Commissioner based on the facts he finds has at least as high a value as that of an expert based on the facts which he assumes to be proved; and it has the advantage of being quite independent of either side."

75. Thirty-four years later this recommendation was repeated and endorsed by Steyn J in The European Gateway [1987] QB 206. In that case too there had been a formal investigation (as a wreck inquiry is now known) into a collision between two ships. In a later action for damages brought by the owners of one of the two ships against the owners of the other, a preliminary issue was tried to determine whether the findings of the court of formal investigation gave rise to an issue estoppel. Steyn J held that they did not as the court of formal investigation was not a court of competent jurisdiction on the question of the owners' civil liability. Reference was made in argument to old decisions of the Admiralty Court in which the reports of such investigations had been treated as inadmissible and therefore necessarily incapable of founding an issue estoppel. Although Steyn J did not attach great weight to those authorities in relation to the question which he had to decide, he expressed no doubt as their correctness. He concluded his judgment by drawing attention to Devlin J's recommendation in Waddle v Wallsend Shipping, quoted above, and said (at p.221):

> "What is needed is a statutory provision enabling a judge hearing the [later] action to make such evidential use of the report as a whole as he thinks fit."

76. Twenty-seven years after Steyn J repeated and endorsed Devlin J's recommendation, however, and sixty years after the recommendation was originally made, the law has not been changed. Mr Marland submits that these authorities demonstrate that, without legislation enabling AAIB reports to be used as evidence in civil proceedings, reports of air accident investigations by the AAIB are likewise inadmissible.

The BCCI Inquiry

77. Another more recent authority on which Mr Marland strongly relies is Three Rivers District Council v Governor of the Bank of England (No 3) [2003] 2 AC 1. This was an appeal to the House of Lords from a decision striking out a claim by former depositors of BCCI against the Bank of England on the ground that it had no realistic prospect of success. The Treasury and the Bank of England had previously instituted an independent inquiry to review the adequacy of its supervision of BCCI, presided over by Bingham LJ (as he then was). Although they disagreed as to whether regard could be had to the Bingham report in determining what allegations had a realistic chance of being proved, all the members of the Appellate Committee were in agreement that the findings and conclusions in the report would not be admissible at any trial of the action. Thus, Lord Steyn said (at p.238, para 5) that, although the report was "self-evidently an outstanding one produced by an eminent judge," such use of the report was ruled out "by settled principles of law." Other law lords expressed similar views.

78. Those same settled principles of law, Mr Marland submits, rule out the use of the AAIB Report by the claimants in the present case.

Hollington v Hewthorn

79. The leading authority for the rule of law of which the cases cited by Mr Marland are all illustrations is Hollington v Hewthorn [1943] 1 KB 587.

80. That case concerned a road traffic accident in which the plaintiff's car was damaged and his son (who was driving the car) was injured in a collision with the defendant's car. The plaintiff and his son claimed damages on the ground that the collision had been caused by the defendant's negligent driving. However, before the action came to trial the son died and the father had no other witness who could give evidence of how the accident had happened. To prove that the defendant had driven negligently, the father sought to rely on (a) the defendant's conviction in the magistrates' court for careless driving at the time and place of the collision and (b) a statement made by the son to the police after the accident.

81. At the trial the defendant called no evidence and submitted that there was no case to answer. The judge ruled that both the defendant's conviction and the son's statement were inadmissible but nevertheless gave judgment for the plaintiff on the basis that the defendant's negligence could be inferred from the position and condition of the two vehicles after the accident. On appeal, the Court of Appeal reversed that finding but held that the judge had been right to exclude evidence of the defendant's conviction and of the son's statement. As a result, the appeal was allowed and the claim failed for want of proof.

82. The son's statement was held to be inadmissible because it was hearsay and did not fall within any of the settled exceptions to the hearsay rule. That was also one reason given by the Court of Appeal for holding that the defendant's conviction for careless driving was inadmissible. But the main reason was that the finding of the criminal court was said to be irrelevant. Goddard LJ,

who gave the judgment of the Court, stressed the question of relevance saying (at p.596) that "it is relevancy that lies at the root of objection to the admissibility of the evidence."

83. The central passage in the Court's reasoning is the following (at p.595):

> "It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant."

Subsequent History of Hollington v Hewthorn

84. Hollington v Hewthorn has always been a controversial case. The actual decision – that a conviction by a criminal court is not admissible in civil proceedings as evidence that the offence was committed – has been reversed by statute: see s.11 of the Civil Evidence Act 1968. That change in the law was made on the recommendation of the Law Reform Committee in its Fifteenth Report ("The Rule in Hollington v Hewthorn", Cmnd 3391, 1967). In that report the Committee was scathing of both the decision and the reasoning in the case:

> "Rationalise it how one will, the decision in this case offends one's sense of justice. ... It is not easy to escape the implication in the rule in Hollington v Hewthorn that, in the estimation of lawyers, a conviction by a criminal court is as likely to be wrong as right. It is not, of course, spelt out in those terms in the judgment of the Court of Appeal, although in so far as their decision was based mainly upon the ground that the opinion of the criminal court as to the defendant driver's guilt was as irrelevant as that of a bystander who witnessed the accident, the gap between the implicit and the explicit was a narrow one. It is in a sense true that a finding by any court that a person was culpable or not culpable of a particular criminal offence or civil wrong is an expression of opinion by the court. But it is of a different character from an expression of opinion by a private individual."

85. The Law Reform Committee went on to point out some of the material differences between an expression of opinion by a private individual and by a court, including the fact that courts are aided by a procedure designed to ensure that the material needed to enable them to form a correct opinion is available. The Committee continued:

> "We approach the rule in Hollington v Hewthorn from the premise ... that any material which has probative value upon any question in issue in a civil action should be admissible in evidence unless there are good reasons for excluding it. Our further premise is that any decision of an English court upon an issue which it has a duty to determine is more likely than not to have been reached according to law and to be right rather than wrong. It may therefore constitute material of some probative value if the self-same issue arises in subsequent legal proceedings."

86. Despite these premises and its recommendation that the rule in Hollington v Hewthorn should be abolished in relation to criminal convictions, however, the Law Reform Committee did not recommend the abolition of the rule as regards findings made in earlier civil proceedings.

87. In so far as the rule in Hollington v Hewthorn continues to apply to such findings, it has attracted further criticism. In Hunter v Chief Constable of the West Midlands (sub nom McIlkenny v Chief Constable) [1980] QB 283 at 319, Lord Denning MR (who had been counsel for the unsuccessful appellant in Hollington v Hewthorn) said:

> "Beyond doubt [Hollington v Hewthorn] was wrongly decided. It was done in ignorance of previous authorities. It was done per incuriam. If it were necessary to depart from it today, I would do so without hesitation."

On appeal to the House of Lords in the same case Lord Diplock (with whose speech the other members of the Appellate Committee agreed) echoed this view, saying that Hollington v Hewthorn "is generally considered to have been wrongly decided:" see Hunter v Chief Constable of the West Midlands [1982] 1 AC 529, 543.

88. However, Hollington v Hewthorn has not been over-ruled and, since these comments were made, the pendulum seems to have swung back some way. In Three Rivers, as already mentioned, the rule in Hollington v Hewthorn was treated as settled law. In Secretary of State for Trade and Industry v Bairstow [2004] Ch 1, the Court of Appeal held that, even if Hollington v Hewthorn could originally have been confined to cases where the earlier decision was that of a criminal court, it had stood for over 60 years for a much broader proposition and establishes that factual findings in earlier civil proceedings are not admissible as evidence of the facts so found. That decision was followed in Conlon v Simms [2008] 1 WLR 484, where the Court of Appeal held that the rule in Hollington v Hewthorn applied to render inadmissible in later civil proceedings findings made by a solicitors' disciplinary tribunal.

89. In Calyon v Michailaidis [2009] UKPC 34 reliance was placed in proceedings in Gibraltar on a judgment of a Greek Court which had found that the claimants were the lawful owners of an art collection. The defendant in the Gibraltar proceedings had not been a party to the Greek proceedings. The Gibraltar Court of Appeal nevertheless held that the Greek judgment was conclusive of the question of ownership. On appeal to the Privy Council the Board held, following Hollington v Hewthorn, that, far from being conclusive, the Greek judgment was not admissible as evidence at all.

90. Thus, unless and until it is reconsidered by the Supreme Court, the rule in Hollington v Hewthorn must, except in so far as it has been reversed by statute, be taken to represent the law.

The Justification for the Rule

91. Some at least of the criticism which Hollington v Hewthorn has attracted may be attributable to the way in which the Court of Appeal explained its decision in that case. As I have indicated, the main reason given for holding that the defendant's conviction for careless driving was inadmissible was that it represented the magistrates' opinion and that on the subsequent trial of the issue in the civil court that opinion was irrelevant.

92. If that proposition is taken at face value, it is absurd. It amounts to saying that the fact that a criminal court was satisfied (to the criminal standard of proof) that the defendant drove

carelessly is no reason to think it any more probable that he in fact drove carelessly. Courts, of course, are far from being infallible. Yet even the most cynical commentator on the legal system would surely baulk at the suggestion that the decision of a criminal court is no more likely to be right than wrong. The Law Reform Committee found this implication in the judgment of the Court of Appeal not easy to escape. But I do not find it conceivable that a future Lord Chief Justice and the other distinguished members of the Court of Appeal in Hollington v Hewthorn actually intended to assert and base their decision upon such a proposition.

93. When the Court of Appeal described the opinion of the criminal court as "irrelevant", I therefore do not think that the term was being used in the sense defined earlier to denote evidence which is not logically probative. What I believe they meant is that the opinion of another court, like the opinion of a bystander, is not a matter to which a court required to decide the issue ought to have regard. The underlying rationale in my view, albeit not clearly spelt out in the judgment of the Court of Appeal, is the rationale to which I referred earlier for the exclusion of opinion evidence in general: namely, that it is the duty of a court to form its own opinion on the basis of the evidence placed before it; and that it would not be proper for the court in forming that opinion to be influenced by the opinion of someone else, however reliable that person's opinion is likely to be. In so far as the evidence before the later court is the same as the evidence before the earlier court, the later court is in as good a position to draw inferences and conclusions from the evidence. In so far as the evidence is different, the opinion of the earlier court does not assist the court's task.

94. Reasoning of this kind, again expressed in terms of "relevance", is to be found in Bird v Keep [1918] 2 KB 692, the case mentioned earlier in which a coroner's inquisition was held not to be admissible in later civil proceedings. Thus, Swinfen Eady MR said (at p.701) that the inquisition:

> "merely amounted to the opinion of the coroner's jury as to the cause of death upon the evidence adduced before them. This is irrelevant to the issue involved in the present proceedings, and the cause of death has to be determined for the purpose of this arbitration upon the evidence adduced before the county court judge."

Similarly, Bankes LJ said (at p.704):

> "In my opinion the finding of the coroner's jury as to the cause of death was not relevant to any issue which the learned county court judge had to determine. He had to decide upon the evidence before him what the cause of death was. It cannot be relevant to that inquiry that he should be informed what a coroner's jury thought of the matter upon materials which were before them but which were not and could not be placed before the county court judge."

95. As the cause of death was the key issue which the county court judge had to decide, the notion that the finding of the coroner's jury was not relevant to that issue is, if taken literally, again impossible to credit. It would amount to saying that the finding of an inquest is no more reliable a guide to the cause of a person's death than spinning a coin. As in Hollington v Hewthorn, I cannot suppose that this is what the Court of Appeal meant to suggest. Once again, the point that I believe the distinguished judges were intending to make was that the finding of the coroner's jury was not a matter which the county court judge ought properly to take into account

for the reason that it was his duty to reach his decision as to the cause of death solely on the basis of the evidence adduced in the civil proceedings.

96. Furthermore, the reference by Bankes LJ to the fact that the materials which were before the coroner's jury "could not be placed" before the judge reflects the fact that in the context of the later proceedings the record of the evidence given in the coroner's court was hearsay and hence (as the law then stood) inadmissible in the civil proceedings. Indeed, along with the coroner's inquisition, the applicant had tried to put in evidence in the county court the doctor's deposition which was held to be inadmissible for just that reason. In circumstances where the evidence on which the coroner's jury had reached their conclusion was inadmissible, it would seem illogical that an opinion based on that evidence should be admitted.

97. The same point applied in Hollington v Hewthorn. The plaintiff's son had given evidence in the magistrates' court, but any note of that evidence would have been inadmissible in the later civil proceedings because it was hearsay – as indeed the son's statement to the police after the collision was held to be. Again, it would seem illogical to treat the finding of the magistrates as admissible when the evidence on which the finding was based was not admissible in the later proceedings.

98. Apart from the question of whether it is right in principle to treat an opinion as admissible if the evidence underlying it is not, to do so would cause serious practical difficulties. If evidence was adduced in the later proceedings to contradict the finding, it is difficult to see how the court could rationally decide what weight to give to the finding of the earlier court without considering the evidence on which the finding was based. But if that evidence is inadmissible, then such consideration is not permissible.

99. Some of these difficulties are alluded to in Hollington v Hewthorn and formed an additional strand of the Court of Appeal's reasoning. Thus immediately before the passage quoted earlier in which the finding of the criminal court was said to be irrelevant, Goddard LJ said (at p.595):

> "It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result.

Goddard LJ returned to this point when stating that the same rule as renders criminal convictions inadmissible in later proceedings also applies to judgments of civil courts. He said (at p.596):

> "If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as evidence of a fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case."

100. Now that the hearsay rule has been abolished in civil proceedings, a record of the evidence given in an earlier case is in principle admissible in later proceedings. Hence it can no longer be an objection to admitting the findings of the earlier court to say that the evidence on which the findings were based is not admissible. For example, if Cox was decided today, the doctor's deposition and other evidence which was before the coroner's court would be admissible in the

subsequent civil proceedings. So it would no longer be true that the materials which were before the coroner's jury could not be placed before the later court.

101. It might be said that in these circumstances there is no benefit to be gained by treating the finding of the earlier court as itself admissible and arguably no justification for doing so given that, if the validity of the finding is challenged, the only way of determining what weight should be attached to it is to examine the evidence on which the finding was based. It may be, indeed, that this was the point that Goddard LJ was making in the somewhat elliptical passages quoted above. On one reading the thinking underlying those passages is that the magistrates' opinion could have no weight over and above the strength of the evidence on which it was based. This may also explain why Goddard LJ went on, as part of the same chain of reasoning, to say that the magistrates' opinion was irrelevant and why he seems to have thought that the impossibility of determining what weight should be given to their opinion without considering the evidence on which it was based was another way of making the same point. If the weight which ought to be given to the earlier court's finding is entirely dependent on the weight of the evidence on which the finding was based, then it may be said that all that ultimately counts is the evidence adduced at the first trial and that the court's opinion should be left out of account.

102. This interpretation of Hollington v Hewthorn is also supported by the opinion of the Privy Council in Calyon v Michailaidis [2009] UKPC 34, where Lord Rodgers said (at para 27):

> "…the essential reasoning is compelling: unless the second court goes into the facts for itself, it cannot actually tell what weight it should properly attach to the previous decision. Which means that the previous decision itself cannot be relied upon."

103. In the case of judgments in previous civil proceedings, I respectfully agree that this reasoning is compelling, once it is recognised that the opinion of a civil court on a question of fact is not as a matter of principle entitled to be treated as authoritative other than as between the parties to the proceedings. (Different considerations apply to criminal convictions, which can be seen as more nearly resembling judgments *in rem*.)

104. As in the case of the rule which excludes opinion evidence generally, therefore, the true justification for the rule in Hollington v Hewthorn, as I see, it is not that the opinion of an earlier court is irrelevant but lies in the requirements for a fair trial. The responsibility of a judge to make his or her own independent assessment of the evidence entails that weight ought not to be attached to conclusions reached by another judge – all the more so where the party to whose interests the conclusions are adverse was not a party to the earlier proceedings. That, I think, was the principle which the Court of Appeal was expounding in Hollington v Hewthorn. In relation to previous judgments of a civil court this approach was, moreover, endorsed by the Law Reform Committee. In explaining why it did not recommend any change to the law with regard to the admissibility of such judgments, the Committee said:

> "As we have already pointed out, in civil proceedings the parties have complete liberty of choice as to how to conduct their respective cases and what material to place before the court. The thoroughness with which their case is prepared may depend upon the amount at stake in the action. We do not think it just that a party to the second action who was not a party to the first should be prejudiced by the way the party to the first action conducted his own case, or that a party to both actions, whose case was inadequately prepared or presented in the first action,

should not be allowed to avail himself of the opportunity to improve upon it in the second."

105. It does not follow that there would be no advantage in a rule which treats findings of an earlier civil court as admissible in later proceedings. The problem of deciding how much weight should be given to such a finding only arises if evidence is adduced at the trial of the later proceedings to contradict it. But that may not happen. It did not happen, indeed, in Hollington v Hewthorn itself where the defendant called no evidence at the civil trial. So if the finding of the magistrates' court had been admissible, the civil claim would have succeeded in that case without any need to examine the evidence on which the finding of the criminal court was based. Even if the finding of the earlier court has no independent weight, therefore, treating the finding as admissible to prove facts found by the earlier court would still serve a useful purpose.

106. On one view at least that is now the position in relation to criminal convictions since Hollington v Hewthorn was reversed by s.11 of the Civil Evidence Act 1968. The question of what weight the conviction has in subsequent civil proceedings when evidence is adduced to prove that the defendant did not in fact commit the offence has not been conclusively resolved. Different views were expressed in Stupple v Royal Insurance Co Ltd [1971] 1 QB 50, where the question was considered. Lord Denning MR expressed the view (at p.72) that the conviction does not merely shift the burden of proof but is a weighty piece of evidence in itself. Buckley LJ disagreed. In his view, proof of the conviction gives rise to a statutory presumption "which, like any other presumption, will give way to evidence establishing the contrary on the balance of probability without itself affording any evidential weight to be taken into account in determining whether the onus has been discharged" (see p.76).

107. There seems to me much to be said for applying Buckley LJ's approach to findings made in previous civil proceedings. It would save needless repetition of evidence without causing any injustice to a party who wishes to adduce evidence to contradict a fact found by the earlier court.

The Scope of the Rule

108. The reason why I have considered the justification for the rule in Hollington v Hewthorn at such length is that it is necessary to identify its justification in order to determine how far the rule extends. The justification for the rule explains why the rule as it is usually stated applies only to previous judicial findings. What characterises a judicial finding for these purposes is that it is an opinion of a court or other tribunal whose responsibility is to reach conclusions based solely on the evidence before it.

109. One aspect of a judge's duty to reach a decision based on the evidence before the court is that a judge is not expected to have, nor strictly permitted to use, technical knowledge of the subject matter of the case. A judge hearing an aviation case, for example, is unlikely to have any relevant knowledge of piloting or aeronautical engineering or any relevant experience of aircraft accidents. If it so happens that the judge has acquired some knowledge of such matters, perhaps from hearing other cases, then such knowledge is not something of which he or she can properly take judicial notice and use to reach or justify findings. Nor (for the same reason) does the fact that the judge has such knowledge or experience entitle his or her findings to any greater weight. There is in this regard a material distinction between judicial findings, which must be based on the evidence adduced by the parties, and the opinions of an expert who is

entitled and indeed expected to reach conclusions by applying his or her previously acquired knowledge.

110. This distinction between judicial findings and expert opinions is confirmed by authority. In Land Securities v Westminster City Council [1993] 1 WLR 286 the court was asked to decide whether an arbitrator's award fixing the market rent for a property in a rent review arbitration was admissible as evidence in another rent review arbitration relating to a comparable property. Hoffmann J held that it was not. It was argued that the rule in Hollington v Hewthorn did not apply because the arbitrator who had made the award was an expert valuer. Hoffmann J rejected that argument stating (at p.289D):

> "Mr. Clark is no doubt an expert valuer but I do not think he gave his award in that capacity. An arbitrator is obliged to act solely on the evidence adduced by the parties. Mr. Clark may, by reason of his expertise, have known about matters which cast doubt on points which went unchallenged in the arbitration. If he had been acting as an expert he would have been able to take this knowledge into account. As an arbitrator he would not."

111. The Land Securities case was distinguished in Glenfield Motor Spares Ltd v Smith [2011] EWHC 3130 (Ch), which also raised a question as to the admissibility of a determination reached on an earlier rent review. In the Glenfield Motor case, however, the earlier dispute had been referred, not to arbitration, but for expert determination. The decision-maker was therefore not obliged to act solely on the evidence adduced by the parties but was able to make use of his own expert knowledge when determining the rental value of the property. On the facts of the Glenfield Motor case Newey J held that the (unreasoned) expert determination relied on in that case was of little if any assistance on the question in dispute in the later proceedings – namely, what was the usable area of the site – and that the county court judge had therefore been wrong to attach substantial weight to the determination. That was a matter of weight, however, and not admissibility.

112. All the cases cited by Mr Marland involve judicial findings. Mr Marland did not identify any authority, and I am not aware of any, in which the rule in Hollington v Hewthorn, or any extension of or analogy with that rule, has been held to apply more broadly. For the reasons given, there is in my view a good explanation for that.

113. The line between judicial findings and expert opinions is not a bright one. One type of case which falls into a grey area is where the court is assisted by assessors. In such a case it is the judge and not the assessors who makes the decision, but in so far as the judge is assisted in the decision-making process by assessors who have special skill and experience, the decision is not based on the evidence in the case alone. This accounts for the difficulty felt by Devlin J and Steyn J as regards the application of the rule in Hollington v Hewthorn to the findings of a wreck inquiry or formal investigation in which the commissioner sits with nautical assessors. Because the decision is ultimately that of the commissioner alone, it is no doubt strictly correct – as Devlin J observed in Waddle v Wallsend Shipping – that the findings are not admissible in later civil proceedings. But because the commissioner is assisted by skilled assessors, the findings have a value comparable to the opinions of an expert. That explains the desire of Devlin J and Steyn J for a statutory provision to enable the judge hearing a later civil action to make evidential use of the findings of the inquiry.

Conclusion as to the AAIB Findings

114. It is not necessary to hope for legislative intervention, however, where the findings are those of an expert investigator and not a judge. None of the authorities relied on by Mr Marland concerned such findings and, for the reasons given, I consider that the rule in Hollington v Hewthorn does not apply to them. AAIB inspectors do not act as judges whose role is limited to evaluating evidence put before them. As well as the evidence of others, the inspectors are able to take into account their own first hand observations, their own technical knowledge, and their own experience (as well as the collective experience of the AAIB) gained from other accident investigations. Those characteristics give the opinions of the AAIB a value for a court seeking to determine the cause of an air accident which could not and should not in principle be accorded to the opinions of another judge.

115. This is not to say that all the findings in the AAIB Report are of equal significance. To the extent that they reflect or may be taken from their nature to reflect matters of expertise, the court will accord them weight. To the extent that they consist of inferences drawn from factual evidence which involve no special expertise and which the court is equally well qualified to draw, the court will not accord weight to the findings over and above the evidence on which they are based.

116. In this regard the AAIB Report is similar, as it seems to me, to many experts' reports commissioned by parties to litigation. It is common to find in such reports (particularly from experts in certain disciplines) some statements of opinion based on an evaluation of factual evidence of a kind which does not deploy any expert knowledge and which the court is as well placed to make as the author of the report. Such evidence is not helpful and is not evidence to which the court will have regard. It seems to me preferable, however, to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions.

117. Even if some opinions expressed in an expert's report are regarded as inadmissible rather than as simply not entitled to any weight, there is nothing to be gained by seeking to exclude or excise them. Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in Secretary of State for Business Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146 at para 39:

> "It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible."

118. I therefore conclude that the whole of the AAIB Report is admissible as evidence in these proceedings, with it being a matter for the trial judge to make such use of the report as he or she thinks fit. Even if I had concluded that the AAIB Report contains some inadmissible material, I would not have thought it sensible to engage in an exercise of editing out parts of the report.

Even on that view, the whole report should be before the court, with the judge at trial taking into account what is admissible and ignoring the remainder.

Discretion

119. As noted earlier, each party argued as its primary case on this application that the decision whether to admit the AAIB Report as evidence is not one in which the court has a discretion. I have held that the report is in principle admissible in these proceedings. I do not accept, however, that the court has no relevant discretion.

120. I agree with Mr Kimbell's submission that the AAIB Report does not fall within CPR Part 35. Part 35 gives the court both the power and the duty to restrict expert evidence which would otherwise be admissible to that which is reasonably required to resolve the proceedings. However, the term "expert" in Part 35 is confined by r.35.2 to "an expert who has been instructed to give or prepare evidence for the purpose of court proceedings." Thus, even though the AAIB Report includes expert evidence in a general sense, because it has not been prepared for the purpose of court proceedings it is not evidence regulated by Part 35. The claimants therefore do not require the court's permission under r.35.4 in order to adduce this evidence.

121. It does not follow, however, that the court has no relevant discretion. In addition to its inherent jurisdiction to control its own procedure, CPR Part 32 gives the court express powers to control the evidence it will receive. Thus CPR r.32.1 states:

> "(1) The court may control the evidence by giving directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and
>
> (c) the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible."

It is clear from r.32.1(2) that this rule gives the court a discretion to exclude the AAIB Report in whole or in part even though the report is relevant and admissible.

122. On behalf of the defendant Mr Marland submits as a fallback position that if the court has a discretionary power – as I have held that it does – to exclude the AAIB Report, then it should. To support that contention he has advanced two arguments. The first is based on the fact that the AAIB Report is an anonymised document so that the authors of the statements contained in the report not only cannot be questioned but cannot even be identified. In particular, the hearsay reports of the accounts of witnesses of fact summarised in the report are: (a) not verbatim; (b) not attributed to named individuals; and (c) not signed with a statement of truth. Opinions given in the report are: (a) not attributed to any individual, hence there are no credentials; and (b) not given in accordance with Part 35. Further, the findings contained in the AAIB Report are: (a) not attributed to any individual within the AAIB; and (b) based on an exercise in evaluating and discarding evidence which is not disclosed and where any unused material is not disclosed. Mr Marland submits that in these circumstances it would be unsafe for any court to give any weight at all to anything in the AAIB Report and that it should be excluded from evidence as a matter of discretion.

123. The points made by Mr Marland will all be considerations which the trial judge can take into account when assessing what weight should be given to statements contained in the AAIB Report. But in my view they come nowhere near to providing a sufficient reason for excluding the report from evidence. In the first place there are countervailing points, mentioned earlier, which indicate that the report, despite its drawbacks, is likely to be of significant evidential value. Secondly and in any event, the question of what weight should be given to the contents of the report is pre-eminently a matter for the trial judge. That is so (a) because what weight the report has as evidence will depend in part on what other evidence is adduced at the trial and (b) because the responsibility for making that assessment lies with the judge who conducts the trial and whose responsibility it is to judge the facts.

124. The second argument which Mr Marland makes for excluding the AAIB Report is one of policy. He suggests that if information contained in the report were allowed to be used as evidence in litigation this would deter people able to assist in the investigation of air accidents from doing so in future, which would in turn impede the AAIB's effectiveness and jeopardise aviation safety.

125. I can see no reasonable basis for this suggestion. I can understand how people might become less willing to co-operate with accident investigations if they perceive a risk that this could result in them being called as witnesses, or even made defendants, in subsequent proceedings. It is to reduce that risk and allay such concerns that reports of investigations are anonymised and the Regulations do not allow the records of an investigation to be disclosed without a court order. However, I am unable to conceive how the risk of becoming involved in litigation could be, or could be seen to be, increased by allowing the published report of an investigation to be used as evidence in civil proceedings. If anything, the opposite is likely to be true. If the report cannot be used as evidence, there will be a greater need to try to identify and summon to give evidence those who contributed to its contents and a stronger argument that disclosure of relevant records of the investigation is necessary in the interests of justice.

126. The arguments advanced for excluding the AAIB Report as a matter of discretion are therefore in my view without substance.

The Claimants' Statements of Case

127. Although I have held that the AAIB Report is admissible in evidence, I do not consider that all the references made to it in the claimants' reply are appropriate. Two basic rules of pleading are: that a statement of case should plead the material facts which a party avers as part of its case and not the evidence on which the party will rely to prove those facts; and that a reply should plead facts which are relied on to answer a case made in the defence and not facts which form part of the basis for the claim itself.

128. The reply served by the claimants in this case transgresses both these rules. While there can be no objection to the claimants pleading their intention to rely on the AAIB Report, it is not proper practice to plead the evidence which the report contains, and still less to do so in the reply. Nor is it appropriate for the claimants to plead in the reply – as they do particularly at paragraphs 11(6) and 12 – a further statement of their case as to respects in which the defendant was allegedly negligent, especially when this statement is formulated in slightly different terms from the allegations of negligence pleaded in the particulars of claim. The lack of clarity which this engenders is illustrated by the fact that paragraph 12 of the reply is inconsistent with

paragraph 11 of the particulars of claim as regards the altitude at which the defendant allegedly attempted a loop.

129. To comply with good practice, the reply therefore needs to be amended to delete (i) all references to the AAIB Report apart from the statements of the claimants' intention to rely on the report pleaded in paragraphs 3 and 4, and (ii) those allegations which are not matters of reply but particulars of the claim.

Conclusion

130. For the reasons given, I conclude that the AAIB Report is admissible as evidence in these proceedings, and I will make a declaration to that effect. There will be no need to make an order striking out any part of the claimants' statements of case provided that an application to make suitable amendments to the reply is made when matters consequential on this judgment are dealt with after it is handed down.
