

## Strict Liability and Other Legal Issues in Aviation

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*The way to be boring is to say everything*

- Voltaire

1. **Some Basics – so what is the problem?**  
***Our Concept of ‘Fault’ is inconsistent***
- 1.1. The world is an unusual place. And New Zealand with its quaint solitude is no different.
- 1.2. Our fragmented and inconsistent view, and approaches, to fault are part of what makes us quaint. Where else would:
  - 1.2.1. Socially engineer the **removal** of fault from the determination of liability for “personal injury by accident” and replace it with an insurance scheme that imposed no right on the insurer to take up the victim’s cause;
  - 1.2.2. **Extend the removal of fault** to medical practitioners so that medical misadventure was no longer subjected to the scrutiny of a negligence trial;
  - 1.2.3. Simultaneously **reverse** hundreds of years of barristerial immunity;
  - 1.2.4. **Condone** a judiciary who at the same time as removing the immunity from those appearing before them **affirms** the existence of **judicial immunity**, so that in the same court a barrister pays for his or her negligence or wilful default, but an overworked jovial judge does not.
- 1.3. Where else would:
  - 1.3.1. a white collar criminal be afforded the luxury of not having his statement to the Serious Fraud Office revealed to the jury unless he contradicted it in Court;  
**but**
  - 1.3.2. a pilot or air service operator enjoy the privilege of everything they said in the interests of safety being replayed to a judge or jury determining his or her guilt.

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- 1.4. It is a rich tapestry woven from disparate threads of different colour and different fibre. Unfortunately it risks bringing us into disrepute – it is interests based law making.

*Our Ability to Analyse Events is Imperfect*

- 1.5. Life as a barrister involves daily interaction with a system preoccupied with the attribution of responsibility. There are constructive sides but generally the focus is on whether **conduct** should trigger the application of **rules** by a Court to impose **consequences** (whether those are convictions, damages, injunctions or the like). In this industry, we must acknowledge that truth and justice only come together sometimes.
- 1.6. Like safety issues, it is a study in human frailty and foibles. For instance, pride, education, intelligence, communication and linguistic skill. This is complicated by questions of recall and memory. All of these contribute to inaccuracies in the determination of fault.
- 1.7. As an example only, a recent study on memory highlights just some of the complications that both lawyers and safety investigators have to deal with:
- 1.7.1. Memories are records of experiences of events and are not a record of the events themselves. In this respect, they are unlike other recording media such as videos or audio recordings, to which they should not be compared.
- 1.7.2. Memories are mental constructions that bring together different types of knowledge in an act of remembering. As a consequence, memory is prone to error and is easily influenced by the recall environment, including police interviews and cross-examination in court.
- 1.7.3. Memories are always incomplete, time-compressed fragmentary records of experience. Accounts of memories that do not feature forgetting and gaps are highly unusual.
- 1.7.4. Detailed recollection of the specific time and date of experiences is normally poor, as is highly specific information such as the precise recall of spoken conversations.
- 1.7.5. Recall of a single or several highly specific details does not guarantee that a memory is accurate or even that it actually occurred. In general, the only way to establish the truth of a memory is with independent corroborating evidence.
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- 1.7.6. People can remember events that they have not in reality experienced. This does not necessarily entail deliberate deception.
- 1.8. These are not just the foibles of the parties and the witnesses, they are foibles of prosecutors, regulators and all aspects of the Courts as well.

2. **Other Parts of the Problem**

*Absence of a Unified View*

- 2.1. New Zealand has a very unclear view of what the objectives of the law should be in the area of “fault”. I do not just mean the law in the area of aviation offences, I mean the law generally. Should it be:
- 2.1.1. Deterrence;
- 2.1.2. Correction;
- 2.1.3. Predictability.

*Lack of Philosophical Underpinning and a Desire for Immediacy*

- 2.2. Life tells us to use our mistakes and weaknesses to our advantage. But that is something society (New Zealand society at least) does not always do or tolerate in the areas of safety and law. Unfortunately we have descended into a world that demands not only accountability, but **rapid** “accountability”, without knowing what accountability actually is, what it achieves, or even why it is a good thing.
- 2.3. Are some things not better left unsaid? (Sydney Dekker recounts stories with which we are all familiar of some sorts of industry “Omerta” – conscious decisions to not report problems because to do so is perceived as unfair, uncollegial, or even dangerous). Aren’t the best employees the ones who have made mistakes and recognise it?

*Education*

- 2.4. Little time is actually devoted to the tolerance and handling of mistakes. A great deal more time appears to be devoted in lower and middle education to measurement and detection of “outlier” circumstances.
- 2.5. It is not devoted to equally important human virtues of prediction, and more importantly, adaptation of conduct to surrounding (unexpected) circumstances.
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*We all Make Mistakes*

- 2.6. There is no person who believes that they could not have done a better job on a given day – if they were given the chance again. Simply put we all make mistakes. As Sydney Decker points out, vocational mistakes and accidents did not exist until the technological revolution. The outcome was the outcome. There was general acceptance in aviation that it was highly technical and mistakes did happen without fault and without it being necessary to blame others.

3. **Aviation Offences and Aviation Safety**

- 3.1. With these issues in mind, I turn to what are called strict liability offences in the context of aviation and aviation safety. There are various aviation offences, but I am concerned with the New Zealand offences which impose criminal liability on aviation professionals who may not really be at fault (in the moral sense).

*Place to start*

- 3.2. The first stated purpose of New Zealand’s Civil Aviation Act 1990 is:
- To establish rules of operation and divisions of responsibility within the New Zealand civil aviation system in order to promote aviation safety...
- 3.3. Section 43 of the Civil Aviation Act 1990 says that:
- “Every holder of an aviation document commits an offence who, in respect of any activity or service to which the document relates, does or omits to do any act or causes or permits any act or omission, if the act or omission causes unnecessary danger to any other person or to any property.”
- 3.4. It adds that committing such an offence makes an individual liable to **imprisonment** for a maximum term of **12 months** or a fine not exceeding \$10,000. The liability for a corporation for the same offence is a maximum fine of \$100,000.
- 3.5. Similarly, section 43A of the same Act says that every person commits an offence who operates any aircraft in a careless manner. Individuals are liable up to \$7,000, and corporations, up to \$35,000.
- 3.6. Section 44 of that Act makes it is an offence:
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...to [operate, maintain, service or do any other act] in respect of any [aircraft, aeronautical produce or aviation related service] in a manner which causes unnecessary danger to any other person or to any property.

The liability for this is up to **12 months imprisonment** or \$10,000 fine for an individual and up to \$100,000 for a corporation.

3.7. Section 156 of the Crimes Act provides that persons in charge of dangerous things which in the absence of precaution may endanger human life are under a legal duty to take reasonable precautions to avoid such danger and are criminally responsible for the consequences of omitting without lawful excuse to discharge that duty. Under s160(2)(b), one can be liable for murder or manslaughter if they omit to observe a legal duty. This duty applies to those in charge of an aircraft *R v Nicholson* (1991).

3.8. Section 8(a) of the Sentencing Act 2002 requires the sentencing court to take into account the degree of culpability of the offender. Section 39 of that act suggests that there is a presumption in favour of a fine where the Courts can impose a fine instead of imprisonment – one of the reasons for this is the stigma that is attached to imprisonment. Stigma arises from being dragged through court processes and being punished. Society rarely invests time in understanding the *precise* nature of the offending – it assumes that punishment is deserved, is in response to something “wrong” the offender has done, and that the offender has transgressed societal norms.

#### 4. **Strict Liability**

##### *These Offences Are Unusual*

4.1. Now it will be obvious that the wording of these offences is at least noteworthy. They contain no words that imply that the offender must have *intentionally* caused the unnecessary danger. More importantly, there is nothing in the words or the statutes that create a defence out of “doing the best that you can” or “taking reasonable steps”.

4.2. *Civil Aviation Department v MacKenzie* is the first in a line of cases to say that such offences fall into a category offences known as “strict liability”. The case draws a distinction between truly criminal charges and public welfare regulatory offences.

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*However, again we have confusion*

- 4.3. Is this is a distinction without a difference? In other words, we have here a set of offences that are recognised as public welfare regulatory offences where it is possible to be imprisoned for up to 12 months. That alone suggests it is a crime and should be treated as entitling the accused to all protections that would usually arise in a criminal law setting.

*The Difference Created by The Legislature and The Courts*

- 4.4. Criminal offences carry considerable stigma – the social reaction to imprisonment for a criminal conviction is to conclude that the defendant did something reprehensible. It is recognised by the Courts that in all but the most extreme cases, there should therefore be some *mens rea*. This is a mental element involving an intention (recklessness or gross negligence such as crimes of omission) to carry out the proscribed conduct. The need to establish intention is **presumed** to exist so as to avoid convicting a defendant who is not at fault at the time of the harm (that is, a defendant who did not intend the harm).
- 4.5. As mentioned, there are however, some offences where no such mental element is required. The Courts infer that if a lack of this mental element was a defence, the purpose of the offence would be defeated. This class of offences is known as public welfare regulatory offences, and for such offences, there is no need for the prosecutor to prove that the individual “wanted to”, for example “cause unnecessary danger”. All that must be proven is that there was in fact unnecessary danger caused, beyond reasonable doubt.
- 4.6. The legal justification for these offences is suggested to be that the need to protect the public outweighs the harm in convicting individuals when they are not at fault. This dovetails in with my earlier criticism of a somewhat primitive need for **urgent** “accountability” as it really achieves very little and indeed may achieve undesirable outcomes. It renders individuals “responsible” in circumstances where they may in fact not be responsible and it does not identify true causes.
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*Defences to Strict Liability*

- 4.7. Strict liability is often mistaken for absolute liability (a very rare legal phenomena). The defendant in a strict liability case **does** have a defence available to him (or her). The defendant can prove that there was **total absence of fault** – this means that the behaviour of the defendant did not fall below the reasonable level of care expected. The defendant must prove that s/he was blameless on the balance of probabilities (i.e. it is more likely that his/her behaviour was reasonable than not).

*Arguments For and Against Strict Liability – “Beatings will Continue Until Morale Improves”*

- 4.8. Naturally there are some arguments to support the imposition of strict liability in certain contexts. It is contended that such offences are for the greater good for society as a whole, particularly when imposed in specialist areas which require a high standard of care. The argument proceeds:
- 4.8.1. People subject to this standard usually have training and expertise so – the argument goes - should be held accountable for their behaviour because the nature of the occupation is such that incompetence could have disastrous results.
- 4.8.2. The threat of liability motivates people to adopt precautions which may not have otherwise been taken. These offences do not accompany heavy social stigma like the stigma that may accompany murder.

*Against*

- 4.9. However, while there may be arguable benefits to imposing strict liability, there are many arguments against, particularly in aviation:
- 4.9.1. The maintenance and furtherance of safety standards in aviation is dependent upon there in fact being no industry “omerta” as mentioned earlier. Yet the imposition of strict liability – even when no harm was suffered – will impede disclosure.
- 4.9.2. The factors affecting safety in aviation are manifold and they arise simultaneously. Identifying dominant causes is almost impossible when mechanical, human and meteorological factors
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work together. And in any event, should dominant cause be the test?

- 4.9.3. In transport related cases, the defendant usually has an enormous amount to lose – frequently their life or a major asset. The cases proceed on a fiction that the defendant would voluntarily or recklessly risk their own safety, which is simply unsustainable.
- 4.9.4. While strict liability offences like this exist, the focus of accountability studies is individuals or companies. While the law focuses its attention at that level, far wider issues are likely to be relevant to the public and therefore “the greater good of society”.
- 4.9.5. The trauma of a court proceeding against a highly trained individual is likely to be their loss to the industry. The subtle distinctions between criminality and other liability are lost on most of us including the defendants who suffer greatly.
- 4.10. The counter to many of these arguments is that there are two “safety valves”. The first is (1) prosecutorial discretion; and the second is (2) sentencing. In my view these are inadequate for reasons discussed below.

#### *Other Possibilities*

- 4.11. The creation of danger in these settings may be better dealt with in the form of civil sanctions so that there are no connotations that accompany criminal convictions attached to a defendant. The moral authority of criminal law is undermined by having these seemingly non-criminal offences a part of it. The distinction between serious criminal offences and public welfare offences may be difficult to draw.

### **5. Other Jurisdictions**

- 5.1. Other countries including the USA, Canada and the UK obviously have their own approach to aviation safety offences – whether they have similar offences in place and what the penalty they impose is. This is a brief summation of the position understood to exist in those countries.

#### *United States of America*

- 5.2. The US Penal Code provides that the fact that an offence may be penalised by imprisonment should be a conclusive reason against imposing strict
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liability. In contrast, in New Zealand, the offences which are subject to imprisonment remain ones of strict liability.

- 5.3. In the United States the criminal offences are reserved for gross negligence. In practice there are few prosecutions for such behaviour. The typical sanctions are revocation or suspension of licences. Those offences that exist for wilful or intentional endangerment are not offences of strict liability.

*Canada*

- 5.4. In Canada, while similar offences to those of New Zealand exist, they are not criminal offences (like in the USA). The non-criminal offence is one of strict liability and the maximum penalty is up to \$5,000 (Canadian). There is no potential imprisonment for reckless or negligent endangerment of people or property.

*United Kingdom*

- 5.5. Here, flying an aircraft in such a manner as to be the cause of unnecessary danger to people or property is also a criminal offence – it is punishable by a fine or up to 6 months in prison. This system is similar to the system in NZ – and the offences appear to be strict liability offences.

*Building Industry*

- 5.6. The leaky building problems of the last 15 or so years set the scene for the Building Act 2004. That Act has a number of offences which are recognised as offences of strict liability because of the importance to the public.
- 5.7. However, key to that regime is section 388 of the Building Act 2004 which also sets out the defences so that the legislation makes clear the extent and nature of the defences:

**388 Strict liability and Defences**

- (1) Except as otherwise provided in this Act, in a prosecution for an offence of contravening or permitting a contravention of this Act, it is not necessary to prove that the defendant intended to commit the offence.
- (2) It is a defence in any prosecution that is referred to in subsection (1) if the defendant proves—
- (a) that all of the following circumstances apply:
- (i) the action or event to which the prosecution relates was necessary for the purposes of saving or protecting life or health, or preventing serious damage to property; and

- (ii) the conduct of the defendant was reasonable in the circumstances; and
- (iii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred; or

(b) that the action or event to which the prosecution relates was due to an event beyond the control of the defendant, including natural disaster, mechanical failure, or sabotage, and in each case—

- (i) the action or event could not reasonably have been foreseen or been provided against by the defendant; and
- (ii) the effects of the action or event were adequately mitigated or remedied by the defendant after it occurred.

5.8. This step alone would be an *improvement* on the current civil aviation regime, but would not go far enough.

## 6. **The Chicago Convention 1944 - International Civil Aviation Organization – A Few Observations**

6.1. ICAO is the international body formed as a result of the Chicago Convention signed in 1944. The convention governs international laws, standards and guidelines in relation to aviation safety and safety information.

6.2. Annex 13 to the convention relates to aviation safety. This provides (among other things) that safety information – such as information recovered from Cockpit Voice Recorders – should **not** be made available to prosecutors because making such information available for this purpose will prejudice its free flow and lead industry professionals to being reluctant or unwilling to provide it.

6.3. This Annex however, is not mandatory or binding like the rest of the Convention. It is made to serve as a guide. New Zealand has signed a notice of **non-compliance** with that part of the convention that says that such records should not be disclosed. Other international organisations (such as the International Federation of Airline Pilot Association's) stress their opposition to criminalisation of pilots and operators involved in aircraft accidents.

6.4. Despite this international approach, the New Zealand Court of Appeal in *NZ Air Line Pilots' Association Inc v Attorney General* (1997) held that the Chicago Convention is not a part of New Zealand domestic law. New Zealand is not required to give full effect to its provisions until it is enacted into law by Parliament. Thus the choice is not one of the Court, but one of

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Parliament, and there are many examples where Parliament has chosen to adopt international conventions as part of domestic law.

- 6.5. In the context of strict liability offending, with the potential of imprisonment, we therefore have an industry out of step with the other countries of the world. Its members are imbued with a high level of responsibility in a setting where safety is seen as a paramount value. However, information obtained in the safety investigation process can be made available to prosecute that or other members.
- 6.6. Further, in what appears to be an oddity to an outsider, there are extensive provisions in section 14A to 14Q of the Transport Accident Investigation Commission Act 1990 (TAIC 90) protecting the dissemination of information obtained from CVR's and witnesses for the purposes of **civil** proceedings but not **criminal**. Anecdotally, there is confusion among many operators who believe that this information is protected from disclosure in criminal proceedings.
- 6.7. Section 14R of TAIC 90 stipulates that nothing in the Official Information Act 1982 (which encourages governmental agencies to disclose information for the purpose of transparency and accountability) applies to safety records. But that appears to leave the question of disclosure of information for criminal proceedings either an open book or subject to the laws that the Official Information Act was enacted to "cure".
- 6.8. There are similarly references in TAIC 90 to the protection of "personal information" under the Privacy Act 1993. However it would be wrong to think that all information obtained in a safety investigation setting is also "personal information" and subject to some protection under New Zealand's privacy laws.

*Possible Reforms?*

- 6.9. As to possible reforms that might be considered, the protection of information obtained in safety information could be treated in the same way that information obtained under section 28(1) of The Serious Fraud Office Act. That is that self-incriminating statements may be used as evidence against the person who made it **only** in a prosecution for an offence where the person gives evidence **inconsistent** with the statement.
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Thus a defendant who maintains their right to silence cannot be confronted with comments made in a safety investigation.

6.10. Another possible enhancement is the imposition of an obligation to warn potential offenders that their evidence may be used against them and that they may remain silent and/or be legally represented.

7. **Prosecution, Prosecutorial Discretion and Accountability of Prosecutors**

7.1. As mentioned earlier, the imposition of strict liability is sometimes answered by its supporters saying that prosecutors will “exercise common sense in appropriate cases”. My own experience has been to the contrary.

7.2. Examples of flaws in the processes by which prosecutorial discretion are exercised abound. For example, while not true of the Civil Aviation Authority, it is common now for territorial authorities to have private law firms conducting all or the major part of their legal business on their behalf. Thus they have an economic incentive to prosecute. And of course if you are a prosecutor, isn't that what you do?

7.3. In New Zealand the Attorney-General has ultimate responsibility over all prosecutions. By convention however, responsibility for prosecutions is given to the Solicitor-General. To this point my Official Information Act requests for information about *actual* oversight and monitoring of prosecutions and prosecutors has not been answered. There are many questions that need to be answered including the level of expertise and experience of those carrying out the prosecutions and more particularly their knowledge of their obligations as prosecutors.

7.4. The high standards of monitoring and safety that are expected of aviators are not reflected by similar checking and assessment of prosecutions. What is relied upon is negative feedback, which is rare.

7.5. The Crown Prosecution Guidelines (3.3.2) say that a major factor to be considered in going ahead with a prosecution is public interest. Among the various determinants for public interest are factors such as the degree of culpability of the offender, the availability of any proper alternatives to prosecution, the prevalence of the offence and the need for deterrence, and

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whether the consequences of the conviction would be unduly harsh and oppressive.

7.6. Further, a recent Supreme Court case – *R v Stewart* – has put the spotlight on prosecutor behaviour. In that case the Court made the point that a prosecutor should not strain for a conviction – his or her role is simply not adversarial in nature. Anecdotally I am told this is not the approach adopted by CAA. While I cannot comment personally, my experience tells me that straining for a conviction is a frequent event.

7.7. In distinction, the Securities Commission and the Commerce Commission have provisions for leniency towards those who cooperate with the relevant authorities when there is a legal issue involved. New Zealand’s Civil Aviation Authority has no such provision (or nothing like that stated explicitly on its website) to encourage people who may be liable to come forward.

## 8. **Ideas for Reform**

8.1. Despite the “public interest” in securing prosecutions and the deterrence value attached to these offences, there is a far greater value in encouraging free flow of this information and improving aviation safety overall.

8.2. The risk of imprisonment should, at the least, be removed. A system similar to that of Canada which classifies similar offences as administrative offences and only imposes a fine as opposed to imprisonment.

8.3. Potential offenders should be cautioned before they provide information.

8.4. Rules of evidence should be reformed or allow exclusion of information obtained for safety purposes, especially in criminal proceedings.

8.5. There should be greater scope for leniency and cooperation as there is with the Securities and Commerce Commissions.

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