

Prevention is better than legal liability

(Tim Scorer, London)

BIRD STRIKES

PREVENTION IS BETTER THAN LEGAL LIABILITY

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The terms of reference of BSCE are necessarily predicated on the detection and prevention of the bird hazard to aircraft. In the search for increased safety in the air and on the ground considerable effort and expense is involved each year by airport authorities, aircraft manufacturers, aircraft operators and others in attempting to eliminate bird strikes. The effort and expense involved in bird control can also be justified when the safety objective has not been achieved and a bird strike takes place. When this occurs an airport operator may face a hazard of a different type in the form of a claim for compensation for death, injury or damage to property. While there have fortunately been comparatively few legal liability cases arising from bird strikes, the consequences of such a claim can have serious financial consequences to an airport operator and his insurers. This paper addresses those legal liabilities and how they may be avoided by the adoption of effective, efficient and well documented bird control procedures.

PRESENTATION

19TH MEETING BIRDSTRIKE COMMITTEE EUROPE

MADRID - 23-27 MAY 1988

When we last met in May 1986 at your 18th meeting I understood that there were one or two delegates who felt uneasy about having a lawyer present at your proceedings. As a result I came away from that meeting feeling a little bit like the "black sheep" of the family. I had accepted a very kind invitation to attend your meeting because at that time I was in the middle of some complex and expensive Court proceedings which had been taken against the British Airports Authority and the British Civil Aviation Authority arising out of a bird strike incident in Scotland. To some of you, I had explained that my purpose in attending your meeting was to be able to gather some of the considerable knowledge and experience among your delegates. I felt sure that this would be of assistance in connection with the defence of the Airport Authority in the Court proceedings.

I am very happy to report that my theory was correct and my efforts were not in vain. Towards the end of last year, the Claimants, a Swiss airline, who claimed about U.S.\$350,000 from the Airport Authority and the CAA for repayment of the cost of repairing damage to the engines on their Learjet aircraft, eventually decided that the defence we had put up looked such that they would be unlikely to succeed in the case. Accordingly they filed Notice of Discontinuance of their action. Not only that, but we were able to recover a small contribution towards the legal fees incurred in fighting off this claim.

First therefore, I must express my very sincere gratitude to all of you for the words of wisdom which you handed directly and indirectly to me during that meeting in Copenhagen. The papers which I obtained, the presentations which I heard and the discussions which I had with many of you proved to be immensely valuable in presenting what was a formidable defence to the claim, assisting me to establish, I think beyond reasonable doubt, that the system of bird control at BAA Airports on that occasion had been totally satisfactory and as much as anyone could reasonably expect. The litigation itself taught me a great deal. I remember with great affection spending two dawn inspection trips in a Landrover on a very cold winter's morning in Scotland, seeing bird control in action and finding out about how to minimise the risk of birds causing serious damage to aircraft or worse still injury or death to the aircraft occupants. In the course of my enquiries I visited a number of other airfields, particularly two military airfields operated by the Royal Air Force (thanks to Crawford Turner) where they had engaged an independent bird control contractor whose knowledge, efficiency and system of bird control very much impressed me and was, from the results obtained, most satisfactory in its execution. Also may I express again my sincere thanks to all of you who completed the questionnaire about the law and practise in your various countries concerning legal claims arising from bird strikes.

Now, as a Director myself of an Airport Authority, I am now faced with a new case involving considerable damage to a turbo prop aircraft as a result of a bird strike. In contrast to the international BAA Airport, I am now dealing with a small provincial airport with grass runways, one scheduled service operating four times each day, and many small aircraft engaged in flying instruction, club touring and private and business flying at the lighter end of the scale. The requirements for bird control are very different to the international airport and mainly because of the speed of aircraft using the small airfield, and the fact that they are not jet aircraft, the risk of bird strikes causing serious damage, injury or death, is that much less. But the technique is just the same and the

In fact the Controllers on the ground knew nothing of this until many minutes later when the aircraft, which had by then reached a height of about 11,000 feet en route to Geneva, radioed that it had an engine problem and the pilot said he suspected that a bird strike had taken place. The Captain was asked if he was aware of any damage to his aircraft. His reply to the Controller was "I don't know but there is a funny smell of burning chicken"! The aircraft returned to Prestwick and certainly showed signs of bird damage on the leading edges and around the engines. Inside the engines some of the turbine blades and compressors were also badly damaged leading to a total repair bill of about U.S.\$350,000. The aircraft insurers subsequently issued a claim against the Prestwick Airport Authority alleging that it had failed to properly carry out its bird control function and that if it had done so then the bird strikes would not have occurred. A claim was also made against the U.K. Civil Aviation Authority that its Controllers had cleared the aircraft when it was not safe to do so and that they should have detected the birds which were in the vicinity of the runways and should have warned the pilot that it was unsafe to take off.

The origin of the flock of plovers was in some doubt although it was not in doubt that they had hit the aircraft. Where had they come from? The pilot in his initial comments to the Airport and in the filed occurrence report did not seem to have seen them at any stage or even to have been aware that his aircraft had suffered a bird strike. In the occurrence report completed by the pilot after seeing the remains of the birds in his engines, he actually stated that the strike had involved gulls not plovers. If he had been aware of the bird strike, why had he not immediately reported it over the radio and returned straight back to the airfield? To continue his en route climb to 11,000 feet with no report surely indicated that he was not aware of the strike. However in the Court papers that followed two years later, AeroLeasing claimed that the pilot had actually seen a flock of plovers rise up from the grass at the edge of the runway on his left, had watched them hesitate as they flew away from him but then had seen them return swooping low over the runway in that classic plover style and across the path of the rotating aircraft.

The Air Traffic Controllers saw no birds near the runway and both they and the Airport Authority said that it was quite likely that the birds had actually been loafing in a field outside the perimeter fence about 100 metres away from the runway area where the aircraft rotated. The evidence for the Airport Authority therefore centered on the following questions:-

- 1) Would it have been likely that a flock of plovers would be loafing or feeding by the side of a runway that was in use regularly by light aircraft even though most of them would have rotated and been airborne well before the point where the Learjet rotated? Or was it more likely that the plovers had been airborne for some time from a point much further from the runway and had coincidentally been flying low over the runway just at the moment when the aircraft was there?
- 2) If the plovers were loafing/feeding in the grass should or could they have been seen by the Air Traffic Controllers and/or the Manoeuvring Area Safety Unit (MASU) of the Airport Authority who were out in their landrover on general duties ensuring the safety of the airfield and its users? If the plovers were flying towards the runway and the aircraft, should/could ATC have seen them and if so what could they have done to prevent the aircraft hitting them?
- 3) What was the system of bird control used by the Airport Authority and was it adequate? What vehicles, equipment and manpower were available to carry out bird control and how much time was spent on that activity?

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In other words, it is desirable that it operate, but it is that an airfield exercised those provisions strike on that an airfield operator responsibility, with

A further factor international air transportation with the liability with flights on which Agreement of 1959 required by U.S.A. effect that the limited to a sum Kingdom CAA required contracts with the equivalent of 100, obviously every cap limit is provided that country is a of 1929 usually a Protocol also pro passengers. The p to ensure uniform passengers travelling is not very large U.S.\$20,000. It in any more detail

The point of what dependants to recover passenger is killed airline has not been or handling of the greater sum from the to which the passenger these limits is considered a very substantial level only applied manufacturer, an Air is not unreasonable passengers will be If the injury or death bird strike has occurred adequate bird control reasonable steps to face litigation

environment, will render the airfield operator liable under civil law to make compensation to those who suffer loss as a result of the airport operator's failure.

In other words, in the context of bird control, it could be said that not only is it desirable that there should be a safe environment in which aircraft can operate, but it is in fact essential, if civil liability at law is to be avoided, that an airfield operator adopts certain procedures and can demonstrate that he exercised those procedures at or before the time when an aircraft suffers a bird strike on that airfield. A failure to exercise proper care will expose the airfield operator to liability. The fact that he thinks he has carried out his responsibility, will not assist him in the event that a Court of law disagrees.

A further factor that compounds the problem comes about in this way. Most international air transportation and a sizeable amount of domestic air transportation within the boundaries of the same State, are subject to limits on the liability which faces an aircraft operator who operates public transport flights on which passengers are carried. For example, under the Montreal Agreement of 1959 a non U.S. air carrier operating to or from the U.S.A. is required by U.S.A. law to enter into a special contract with passengers to the effect that the liability of the airline in the event of injury or death is limited to a sum of U.S.\$75,000 inclusive of legal fees. Similarly the United Kingdom CAA requires that U.K. registered airlines should enter into special contracts with their passengers providing compensation to a minimum level of the equivalent of 100,000 Special Drawing Rights. Although this is a minimum limit obviously every carrier restricts their liability to that sum. Where no specific limit is provided by the legislation of a country, then the prospects are that that country is a signatory or has notified its adherence to the Warsaw Convention of 1929 usually as amended by the Hague Protocol of 1955. This Convention and Protocol also provide minimum (maximum) limits for air carriers towards their passengers. The purpose of the Convention and Protocol were of course originally to ensure uniformity of compensation across the world as between airline passengers travelling between different States. The limit provided for passengers is not very large by modern standards being in most cases a maximum equivalent to U.S.\$20,000. It would take the duration of this Conference to look at the matter in any more detail but I hope this summary will suffice.

The point of what I am saying is this. If the entitlement of a passenger or his dependants to recover damages from an airline operating an aircraft in which the passenger is killed or injured, is limited to a specific sum then provided the airline has not been guilty of wilful misconduct or recklessness in the piloting or handling of the aircraft, the passenger or his dependants can recover no greater sum from the airline. Of course in most cases, the level of compensation to which the passenger or the dependants would ordinarily be entitled to but for these limits is considerably higher than the limits. This means there is usually a very substantial shortfall in the compensation level. Because the compensation level only applies to the airline and not to any other body, such as a manufacturer, an Airport Authority, an Air Traffic Control Unit or anyone else, it is not unreasonable to suppose that injured passengers or the dependants of dead passengers will be looking for someone else to sue to recover more compensation. If the injury or death occurs as a result of a bird strike to an aircraft and that bird strike has occurred because of a lack of proper procedures, a lack of adequate bird control or a failure on the part of the Airport Authority to take reasonable steps to prevent the bird hazard, then that Airport Authority is liable to face litigation from and on behalf of passengers.

The message that I want to put over to you therefore in this short presentation is this. As someone who has been acting for Airport Authorities both in the U.K. and abroad for some time now, it is becoming increasingly clear that proper bird control at airfields is not only desirable from the point of view of the safety of the air travelling public - a very good reason in itself - but is also a potentially serious financial liability on the Airport Authority and Air Traffic Control services. Unless there exists a situation where the Airport Authority and Air Traffic Control services enjoy some form of immunity from legal action, then they are liable to face claims for substantial compensation by those who are injured or killed as a result of the failure to maintain a proper system of bird control. They may of course also face claims for property damage, such as the U.S.\$50 million loss of the jumbo jet if it suffered a total loss.

From time to time responsible Airport and Air Traffic Control Authorities seek guidance as to how they might best fulfill their functions and be able to demonstrate that the bird control system in operation at a particular airfield at a particular time when a bird strike takes place is a safe and satisfactory system and one which demonstrates that insofar as it is possible in all the circumstances, the Airport Authority took every possible step to eliminate the bird hazard.

In England in 1979 we had a major case (Fred Olsen Air Transport Limited v. Norwich City Council and Norfolk County Council, High Court, Queens Bench Division (unreported)) involving Norwich City Airport against whom a claim was made by the insurers of a charter aircraft which was seriously damaged when its take off had to be aborted and it landed in a field beyond the airfield with considerable damage resulting. The Judgment issued in the High Court in England following that claim provided useful guidelines as to the steps which should be taken by a competent and responsible Airport Authority to prevent the bird hazard. Some of you may be aware of the facts of this case but for those who are not perhaps I can give a brief outline.

The action was for the recovery of the value of the hull of a Dassault Fanjet Falcon when it was damaged beyond repair after the forced landing on 12th December 1973. Shortly after take off the aircraft encountered a large number of gulls some of which were ingested into both engines causing them both to stall. The Plaintiffs alleged that the gulls had risen up from the runway or its adjacent areas into the flight path of the aircraft very shortly after take off. They said that for many years up to 1973 it was universally recognised that birds were a serious hazard to jet aircraft. They alleged that the Airport Authority had a defective system for discovering the presence of gulls on the airfield and dispersing them, that the Air Traffic Controller allowed the take off when it was unsafe to do so because of the gulls, that substantial parts of the airfield were invisible to an observer in the control tower, and that because of the time of day, the state of the weather and the condition of the windows in the control tower, the Air Traffic Controller could not have had a proper view of the airfield.

Much of the evidence involved the types of devices available to airport owners to dispel birds, the tendency of gulls to congregate at Norwich Airport particularly in bad weather when they came in from the North Sea and of course whether the gulls actually came from within the airport or without. The Airport Authority in defence alleged that the flight crew had failed to see and avoid the birds. The Judge found that in 1973 there was a reasonably foreseeable risk of damage to aircraft from the presence of gulls at Norwich Airport. It was reasonable that the Air Traffic Controllers, who were employed by the airport, should keep a proper look out for the presence of gulls which might cause a risk to aircraft and that the duty to keep a look out continued not only up to the time when the

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aircraft was given clearance to take off, but at least until it started its take off roll. In this case a period of about 1½ minutes had elapsed between the giving of the clearance and the commencement of the take off roll.

The Judge also found that at the time of the accident, visibility from the control room was affected by condensation inside the windows and water droplets on the outside and that these factors were aggravated by the approach of darkness. It was also clear from the evidence that an observer in the control room could not properly see the surface of the runway and in particular the area at the western end. Since the only way round this problem was resiting the control tower, this placed an additional burden on the Airport Authority rather than giving them an excuse, because it was even more essential that they should have an effective system for discovering the presence of gulls on or near the runway and for dispersing them. The Court also heard that the U.K. Bird Impact Research and Development Committee had been set up in 1965 and had published a booklet in 1969 entitled "Bird Control on Aerodromes". This publication, together with official statistics of bird strikes which had been reported since the inception of a reporting scheme in 1966, indicated that there was a well recognised risk of injury and damage to aircraft due to bird strikes particularly in the case of ingestion of birds into jet engines.

The booklet "Bird Control on Aerodromes" had contained a list of recommendations to airport operators. These included:-

- a) Growing long grass to discourage the presence of gulls
- b) Detection of birds by reference to preferred areas at times of day and night when bird movement and congregation could be expected.
- c) Maintenance of a continual watch from the control tower, supplemented as necessary by continual patrols of the operational area.
- d) The publication also said "An inspection of the runway should always be made before each take off or landing if more than 15 minutes had elapsed since the previous aircraft movement or since the previous inspection".
- e) The use of a bird distress call system (SAPPHO) and the use of shell crackers.
- f) The maintenance of a bird action log recording the daily movements of birds.

The Judge found that the rate of bird strikes at Norwich was sufficiently high for the airport to have appreciated that there was a serious problem from the presence of birds at the airport. He commented "Had the Defendants followed the recommendations they would have discovered the presence of the gulls and would have dispersed them and this accident would have been avoided." The Judge accepted the Plaintiff's allegations that the system in use at Norwich Airport was "haphazard and lax". Had the Defendants adopted a more vigorous approach to the problem their employees would have realised that it was of the utmost importance to survey the airfield for gulls before giving clearance and permitting an aircraft to start its take off roll. An essential part of the duty to exercise reasonable care was that the airport authority would carry out inspections when there were conditions of bad visibility.

On the other hand the Judge did not think that the pilots could be blamed for not having seen the gulls. The time of a take off roll is a time of intense preoccupation by the flight crew and given the speed at which the aircraft was

moving forward, the state of the light and the weather, the colour of the runways and the size and colour of gulls, the flight crew could not have been expected to see them. They had received no warning even of a general nature about the particular hazard at Norwich and the Judge condemned the Airport Authority for failing to exhibit a notice calling attention to the bird hazard. The Judge doubted whether in all the circumstances the crew could or should have abandoned the take off if they had seen the gulls and accordingly the crew were not found to be negligent. Judgment was given against the Airport Authority.

Arising out of this case and the guidelines mentioned in the Judgment, the U.K. Civil Aviation Authority published CAP 384 entitled "Bird Control on Aerodromes". This publication appeared shortly after the publication of DOC9137-AN-898 by the International Civil Aviation Organisation entitled "Airport Services Manual - Part 3 Bird Control and Reduction". This latter publication recited the principles of Annex 14 of the ICAO provisions by which it was stated that there is a need for States to adopt measures as necessary for discouraging the presence on or in the vicinity of an Airport of birds constituting a hazard to aircraft operations. The purpose of the Manual was to provide assistance to States in ensuring that adequate measures were taken to overcome potential bird hazards. I am sure that you are all familiar with this Manual but perhaps I might be permitted to draw your attention to certain specific facts which really bear out what I have said above.

In a perfect world, if an Airport Authority faced with a bird strike is able to point to the Manual and say in all honesty that they complied with all the recommendations and advice in the Manual, then it is highly unlikely that they would face any exposure to legal liability. However unfortunately we do not live in a perfect world and the day to day practicalities of financial constraints, shortage of manpower, human error, a sound previous record and other factors all militate against the adoption of the Manual and its recommendations on a 100% basis. I am sorry to say that, on a number of occasions, when asking how it was that certain advice in the Airport Services Manual or in the CAA publication CAP 384 had not been followed, I have been told that it would be financially ruinous for the Airport Authority were it to adopt all the recommended measures. By way of last resort, the Airport Authority points to the fact that up to the time when the bird strike in question took place, the airport had a good record with no significant bird strikes and no previous problems. Bird control is rather like making a last Will and Testament. You do not have to have it but if you leave this earth without having made a proper Will you should not be surprised if your Estate is distributed in a way that was contrary to your real wishes and was carried out in a somewhat haphazard way. With bird control, the effective organisation and implementation of the system often does not become apparent until a bird strike has taken place.

In the case in which I was involved at the time of Copenhagen, the facts were these. On 4th November 1983 at Prestwick Airport, Scotland, a Learjet was taking off from runway 21. This was the minor of the two runways - the other being 31/13 which was the main ILS runway. Due to the configuration of the runways, it was possible for both to be used almost simultaneously. So since the airfield had a mix of traffic, some large international flights and a lot of training and light aircraft flights, on this day, due to the wind direction, smaller aircraft were using 21 and larger aircraft 31. The Learjet operated by Aeroleasing SA of Switzerland needed an expedited departure so the Controller cleared the aircraft to use 21 instead of 31 which was awaiting the arrival of a transatlantic flight. After clearance the Learjet started its take off roll. As it reached rotation speed, a flock of golden plovers appeared in front of it and it flew through them suffering a multiple bird strike.

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criteria are just as important. Bearing in mind the budget of the airfield operator, the nature of the traffic using the airfield, the geographical position of the airfield and the available resources, what reasonable steps can be taken to prevent birds being on the airfield where they might present a hazard to aircraft using that airfield?

For a moment may I digress from the theme that I am building up? It was very clear to me at Copenhagen that the overriding themes of the meeting were:-

- 1) how to prevent birds becoming a hazard to aircraft; and
- 2) how to reduce the impact in financial terms of a bird strike which takes place.

Let me give you an example. In the case of military airfields owned by the Government, operating military aircraft that are flying on behalf of the Government, the principal criteria are:-

- a) avoiding injury and loss of life to highly trained military pilots and other personnel on the military airfield; and
- b) avoiding the loss of highly expensive, technologically advanced aircraft which form part of the strategic defences of a country.

The theme continues into the civilian world. Birds on airfields can represent a hazard to civil aviation and all who use it. When a bird strike occurs to an aircraft, it threatens the safety of that aircraft and the safety of the passengers and crew within it. Injury to life and limb are something on which it is impossible to place a monetary price. Therefore any steps that can be taken to preserve life and avoid injury are steps well taken and are steps which should be taken by every competent and responsible Airport Authority throughout the world.

However, in the case of potential damage to aircraft, in theory there is no doubt that this should also be avoided but predominantly it has to be avoided because a damaged aircraft obviously affects the safety and security of those within it. An aircraft whose means of propulsion and flight are threatened by a natural phenomenon is a less safe aircraft and one whose passengers are at greater risk of death or injury. From the point of view of the cost of damage or loss of the aircraft itself, ignoring the passengers within it, there is somewhat less concern. After all, anyone owning an asset worth say U.S.\$50 million is clearly going to take reasonable steps to insure that aircraft against loss or damage so as to ensure that they are entitled to be indemnified if the aircraft is damaged or suffers a total loss.

May I now introduce a further very significant factor to you? It was evident from the questionnaire which I sent round at the Copenhagen meeting and to which most of you very kindly replied, that in quite a number of countries an Airport Authority does not necessarily or has never yet had to face a potential liability for claims by an aircraft operator, crew member or passenger, in respect of loss, death or injury suffered as a result of a bird strike on an airfield. The effect of this, is that the airfield operator takes whatever steps he regards as reasonable to prevent bird strikes. Whether those steps do amount to reasonable bird control are never likely to be tested. If the steps the airport takes should be found insufficient, compared to the standards of other airports, then this is of no consequence because that airfield operator does not face an exposure to civil liability as a result of his shortcomings. Unfortunately the same does not apply in countries such as England, Holland and the U.S.A.. In these countries, the failure to exercise proper care in bird control at an airport and its

What did the MASU have to do on the airfield apart from carrying out bird scaring? What training and instruction did the MASU personnel have in relation to bird scaring? What records were kept of bird patrols and bird sightings? What system of inspections was used at Prestwick and how often were they carried out, for what duration and with what result? What steps did the Airport Authority take in relation to particular characteristics of their airfield, such as its proximity to the sea, to a caravan site with a rubbish dump and to a bird sanctuary as well as its position close to a major bird migratory route? How did they deal with birds on the airfield and were their systems up to date and effective? (It is no use having a tape of the warning cry of a starling if you have no cassette player to broadcast it!)

- 4) What did the records show about the level of bird activity and bird strikes at Prestwick compared with other similar airfields in the U.K. and abroad? In fact Prestwick was able to show one of the lowest bird strike rates for movements. This evidence helped to show that their methods were effective especially when the other factors such as location were taken into account.

The potential danger to the Airport in this case was the fact that although the system looked good and appeared to have been properly adhered to there was evidence that at the time of the bird strike the MASU landrover driver was at the far end of runway 31 looking after some contractors who were replacing lights just off the end of that runway. While he was needed there to move the contractors when an aircraft was taking off or landing, the claimants said he should have been patrolling runway 21 to keep it clear of birds so that their Learjet was safe. However since the ATC tower was closer to this runway and a Controller with binoculars was capable of seeing the whole length of runway 21 quite clearly, we said it was not unreasonable that ATC should look after that runway while the MASU looked after the contractors on the other runway.

In most litigation wherever it takes place there is a duty on each side to disclose all those documents which have any bearing on the case whether those are helpful or unhelpful documents. The process is called "discovery" and the extent of it varies from one legal system to another. As a general guide in a case such as ours involving Prestwick, it was necessary to produce general records going back some years and detailed records for the year up to the accident and thereafter. The records included the airfield log books of inspections and patrols, records of earlier bird strikes, annual reports on Prestwick Airport, CAA annual statistics on bird strikes, airport manuals, airport instructions, work rotas, shift rotas, vehicle maintenance records, cartridge purchase invoices, staff training reports, staff assessment reports, movement logs and a whole series of other documents that had long since reached the BAA archives.

Of course all this is the lawyers' province - or is it? The keeping of proper records is essential to maintaining a proper system of bird control. It has been very clear to me that so much of your work is related to research and analysis of records and statistics. Man cannot control the birds save to a limited extent. But by monitoring their activities on a regular basis and noting seasonal, geographic and demographic changes he can with some reasonable accuracy predict what birds will do and when. It is only by having statistics properly analysed that he can do this. Armed with this information man can then determine trends and tendencies of bird behaviour so that it becomes not a guessing game but more of a scientific probability. Those same records that equip him to fight off the bird hazard also become weapons in the fight before a Court of law. There is no

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doubt that our success in the Prestwick case was substantially due to the fact that we were able to prove a proper system of bird control at Prestwick and a proper adherence to the system by the responsible personnel.

In the final analysis everyone has to accept (a) that it takes only one bird to create a bird strike and (b) that it is impossible to empty the ground and the skies of birds every time an aircraft takes off or lands or flies - they got here first after all! But in this world of legal claims and recovery of compensation, it is no longer enough to leave the birds to roam freely and to put down horrendous aircraft accidents to "an Act of God". Case histories from around the world have now established that it is "An Act (or omission) of man" if he fails to take reasonable steps to ensure that the airfield he operates, and to which he invites visiting aircraft, is as free as possible from the bird hazard and that he has taken all reasonable steps to ensure that when birds fly and man flies, the two do not meet.

For reasons of time and space I have not addressed the liabilities arising from the bird hazard which can rest on flight crews, manufacturers of aircraft or, except in general terms, Air Traffic Controllers. All these bodies have their own potential risks which can impose liability on them. They also have a potential obligation to make financial recompense to those who are injured or killed or who suffer property damage as a result of their negligence. As a simple example, a pilot who is warned of the presence of birds loafing on the runway and asked to hold his take off until a bird run has been carried out, but who nonetheless continues with the take off, cannot be heard to blame the Airport Authority for having an inadequate system of bird control. On the other hand the promulgation in aviation publications, such as the U.K. Air Pilot, of warnings about the bird hazard in relation to certain specific airfields, cannot impose on aircraft operators a total liability for the safety of their passengers without regard to whether or not there is adequate control of birds on the airfield. Such a promulgation can only act as a general warning to make pilots particularly aware of abnormally high risks from the bird hazard. It cannot serve to remove the liability of the airport operator to maintain a proper safe system of bird control.

Finally I have not covered another aspect of the Prestwick case which I believe was quite significant in determining the claimants to withdraw their claim. This is the question of rights and obligations incurred by a contract. It was clear from the evidence that when the Aeroleasing pilot landed his aircraft, he signed a form of agreement to pay landing fees and also on behalf of his company he agreed to be bound by the standard BAA Terms and Conditions of Use of Airports. One of those terms and conditions contains an exclusion of liability on the part of BAA in respect of any damage to aircraft, loss of life or injury which may occur as a result of anything happening to the aircraft in the course of landing, taking off or manoeuvring at the BAA Airports. Conditions such as this are often seen in airport Terms and Conditions of Use. Some have a greater legal effect than others. In the U.K., clauses of this nature are subject to a test of reasonableness before the party against whom the exclusion is claimed can be held to be bound by it. Courts will therefore look at all the circumstances surrounding an incident such as this as well as at the contractual wording and will make a determination as to whether or not it is reasonable that the Airport could exclude its liability to the aircraft operator. In the Prestwick case again we felt that our prospects of the exclusion being upheld were good but it would not necessarily be so in every case. Subject therefore to advice from lawyers as to the application of such a clause in any particular legal jurisdiction, it is generally a helpful provision to insert in a contract between an airport and an aircraft operator because it may give the airport operator a way out of liability that would otherwise rest on him arising from a bird strike. Obviously it is

better that such a clause is in a contract than that there is no such clause. I have to say though that if there was clear evidence that an Airport Authority had taken effectively no steps at all to deal with the bird hazard or had a very lax system that was poorly documented, the fact that they had an exclusion clause in their contract may not assist them and the clause would be held by the Courts to be unreasonable.

I sincerely hope that this short presentation will be useful to you in your activities and will be constructive towards preventing your own authority becoming involved in claims such as those I have mentioned. If what I have said is helpful in any way it cannot be more well received than the hospitality, friendliness and above all wise advice which I received in Copenhagen from many of you. The thanks are all from me - and I am indeed delighted to be able to extend them to you today.

MAY 1988

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