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# AIRPORT NOISE — COMPENSATION OF ADJOINING LANDOWNERS UNDER FRENCH LAW: A REPORT ON A CASE AND SOME FURTHER CONSIDERATIONS

BY RENÉ H. MANKIEWICZ†

The French Supreme Court (hereinafter Cour de Cassation), on 8 May 1968,<sup>1</sup> finally gave a decision on a question on which French legal opinion has been divided for a long time.<sup>2</sup> The question was whether landowners and persons living near an airport could claim compensation from airlines<sup>3</sup> for inconvenience or damages caused by their aircraft while preparing for take-off or landing. And, if so, can they enjoin airlines from future operation of aircraft under similar conditions? The highest civil court in France has given an affirmative but mitigated answer to this question; and while its judgment does not constitute a "binding precedent," one may expect it to be followed in future cases, if for no other reason than that both the trial court and the Court of Appeals had come to like findings.<sup>4</sup>

The decision turns on the interpretation of, and interrelationship between, articles 17, 18 and 36 of the French Civil Aviation Code of 1955, which have become articles L.131-1, L.131-2 and L.141-2 in the 1967 revision of that Code.<sup>5</sup>

Article L.131-1 (formerly article 17) provides that "aircraft may fly freely over French territories . . ." (Les aéronefs peuvent circuler librement au-dessus des territoires français . . .). However, under article L.131-2 (formerly article 18) "the right for an aircraft to fly over private land shall be exercised in such a manner as not to interfere with the exercise of the rights of the landowner." (Le droit pour un aéronef de survoler les propriétés privées ne peut s'exercer dans des conditions telles qu'il entraverait l'exercice du droit du propriétaire). The last of the three articles concerned, article L.141-2 (formerly article 36), establishes absolute lia-

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<sup>1</sup> *Compagnie Air-France v. Société E.R.V.E.*, [1968] *Revue française de droit aérien*, 327; [1968] *Revue générale de l'air et de l'espace*.

<sup>2</sup> See Mankiewicz, *Some Aspects of Civil Law Regarding Nuisance and Damage Caused by Aircraft*, 25 *J. Air L. & Com.* 44, at 49 (1958).

<sup>3</sup> *Id.* at 46.

<sup>4</sup> Judgment of Dec. 9, 1964, 1965 *REVUE FRANÇAISE DE DROIT AERIEN* 234 (Tribunal de Grande Instance de Nice); Judgment of Feb. 17, 1966, 1966 *REVUE FRANÇAISE DE DROIT AERIEN* 230 (Cour d'appel, Aix-en-Provence).

<sup>5</sup> All these Articles are already found, with the same wording, in the first French aviation law of 1924. Since action judgments and writings on the subject under discussion, which are quoted or referred to in these footnotes, antedate the consolidation of the French air legislation in the 1955 Code (Code de l'Aviation civile et commerciale). It should be noted that articles 17, 18 and 36 of that Code are identical with articles 1, 18 and 53 of the laws of 31 May 1924.

bility of the aircraft operator for damage caused at the surface.<sup>6</sup> It provides in paragraph 1: "The operator of an aircraft is liable *ispo jure* for damages caused to persons and things on the surface by the maneuvers of the aircraft or by objects falling therefrom." (L'exploitant d'un aéronef est responsable de plein droit des dommages causés par les évolutions de l'aéronef ou les objets qui s'en détacheraient aux personnes et aux biens situés à la surface). Paragraph 2 specifies that "the operator's liability can not be diminished or eliminated except if negligence (*faute*) on the part of the victim is proved." (Cette responsabilité ne peut être atténuée ou écartée que par la preuve de la faute de la victime).

It follows from these articles that the freedom of flight over French territories is limited by the obligation of the aircraft operator to use that freedom in such a way as not to adversely affect the rights of landowners. Legal writers<sup>7</sup> have argued that that condition is fulfilled whenever the aircraft complies with the air navigation rules and regulations in force. Any other interpretation of articles L.130-1 and L.130-2 would, for all practical purposes, abolish the freedom of flight. Although article L.141-2 provides for strict liability in case of surface damage, the argument is that it cannot apply when the aircraft is complying with the said rules and regulations. Indeed if these regulations provide a flight pattern which results in neighboring landowners suffering inconvenience or damage from aircraft noise, the operator of the aircraft would be obliged to compensate such landowners for the reason that he adhered to prescribed rules. It appears unjust that a behavior which does not violate, but, quite to the contrary, strictly observes established rules and regulations should give rise to a damage action.<sup>8</sup> It is for this very reason that Justice Black in a forceful dissent in *Griggs v. County of Allegheny*<sup>9</sup> has argued that the government, and not the airport or aircraft operators, should be liable for damage caused by the noise of aircraft operating in conformity with the air navigation rules and regulations.<sup>10</sup> Consequently, the opinion has been expressed that article L.141-2 applies only if there has been a violation of the applicable air navigation rules and regulations.<sup>11</sup>

<sup>6</sup> E.g., Judgment of Jan. 6, 1955, 1955 REVUE FRANCAISE DE DROIT AERIEN 79, [1966] D.S. Jur. 281 (Cass. crim.).

<sup>7</sup> [1965] D.S. Sér. 222; [1966 D.S. Jur. 281]; Mageau-Timc, t. II., No. 1374, 1385. These arguments were, indeed, used and amplified by Air France in their defence against the action in the instant case.

<sup>8</sup> It should be noted that the Common Law standard of "foreseeability" which limits the ambit of civil liability does not apply under French law in the case of absolute liability (as provided, for instance, in the case of article L. 141-2). The causal relationship between the maneuvers of the aircraft and the actual damage suffices. E.g., D.S. Jur., *supra* note 7.

<sup>9</sup> 82 S. Ct. 531 (1962).

<sup>10</sup> In this connection it is interesting to know that governments readily accept liability for damage caused by the sonic boom of their military supersonic aircraft and that the government of the United Kingdom has set aside public funds to be used for the insonorization of buildings near the newly created Heathrow Airport. With respect to the French law, see *De Roverie de Cabrières v. Agent du Trésor*, 1964 REVUE GENERALE DE L'AIR ET DE L'ESPACE 157 (Ct. of Appeal of Montpellier).

<sup>11</sup> This was out of the opinion expressed by the Procureur de la République, expressing the views of the French government, in his submission to the Trial Court, which reads in part as follows: ". . . Consequently one cannot construe article 36 [L.141-2] . . . without regard to all the articles entitled 2 particularly of article 17 [L.131-1] . . . the latter article established a real legal easement ("servitude") on behalf of over-flight—an easement created in the general interest

In opposition to this view it has been argued that the strict, or absolute, liability established by article L.141-2 would become in fact a liability based on fault, an inadmissible situation under the present law.

In the case before the Cour de Cassation, one of the plaintiffs—a building corporation known as Société E.R.V.E.—had built two high-rise apartment buildings near the Nice airport. Apartments had been, and were to be, sold to future “tenants,” but it became difficult, if not impossible, to sell apartments in one of the buildings because of the noise created by the jet aircraft of the French airline, Air France, when warming-up, taking-off and landing. Another plaintiff, Mr. Vomoro, the owner of one of these apartments, alleged that he was inconvenienced and disturbed in his daily life by the noise, and that he had been unable to rent his apartment or find a buyer willing to pay the normal price. A third party to the proceedings, Mrs. Bodnar, had built five apartments near the airport and claimed that they were unsaleable for the same reasons. Finally, an association for the protection of the interests of people living in the area adjoining the airport joined the action. Plaintiffs asked both for compensatory damage and for an injunction to prevent Air France from using the airport in a manner which interfered with their rights.

Air France, the defendant, wanted to join other airlines using the Nice airport; however, the joinder of other airlines was refused by all three courts because plaintiffs claimed indemnities only for the damage caused by Air France’s aircraft and accordingly, if Air France lost the case, it would be entitled neither to recourse against the other airlines, nor to contribution from them.

The injunction to prevent future flights operated in a like manner was refused by the trial court and the Court of Appeals. The reason was that such injunction would constitute an interference by the judicial courts with the application and enforcement of the administrative acts relating to the establishment and operation of the airport and to the air navigation rules and regulations in force. If an injunction were granted, the courts

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and the inconvenience of which must be accepted by the landowners for they are inherent to the over-flights under normal conditions . . . the liability established by article 36 can only be invoked if the over-flight is more than the simple exercise of the right established by article 17; for if it were not so, the slightest inconvenience suffered by a person on the surface would suffice to establish liability of the aircraft operator . . . this sensible interpretation [of the articles in question] leads to the conclusion that the mere over-flight of an aircraft does not fall within the category of flights (“évolutions”) contemplated by article 36 and capable of resulting in the operator’s liability . . . hence it must be admitted that the application of the said article 36 is conditioned by a flight of an abnormal character . . . an abnormal flight capable of resulting in civil liability [of the aircraft operator] is a flight executed in violation of the air navigation regulations specified in title 2 of the Code of Civil and Commercial Aviation, having regard to the fact that article 34 established the general principle that the pilots must obey the regulations relating to the policing of air navigation, to flight rules, etc., and to take all necessary measures to avoid damage . . . [in the instant case] the aircraft maneuvers are controlled by the orientation of the runways as well as by the air navigation regulations relating to approach and take-off, and nobody has claimed or proved any irregularity of the flights complained of.” In its defence of the action, Air France added the following not necessarily legal arguments, according to the recital in the judgment of the Court of Appeals. “If Air France, under article 36 [L.141-2] was to pay for the damage resulting from the operation of its aircraft, its operation costs would increase considerably and Air France would be compelled by irresistible reasons to discontinue to have its jet aircraft flying into Nice airport.” The Appeals Court dismissed this argument as “devoid of seriousness”; in addition, it referred to the possibility of Air France to obtain at least partial reimbursement.

would overstep their jurisdiction under French law. This finding, which is in line with the law of the United States, was not challenged in the appeal to the Cour de Cassation.

As to the merits of the damage action against Air France, the Cour de Cassation agreed with the findings of both lower courts that the freedom of flight established by article L.131-1 is limited by the requirement of article L.131-2 that the rights of the landowners must be respected. Therefore, whenever the overflight, through inconvenience created by noise, does in fact damage the property or, for that matter, diminishes its value, or interferes with the peaceful life to which the owner or tenant of an apartment is entitled, then article L.141-2 makes the operator absolutely liable, whether or not the aircraft complied with established rules of the air and air navigation regulations.<sup>12</sup>

All three courts have limited the impact of the above ruling by holding that the only damage recoverable is that caused by a noise level exceeding that normally encountered in that section of the city, which any landowner or inhabitant must tolerate. No damage action lies where the inconvenience complained of is usual and normal, having regard to the conditions prevailing in the neighborhood.<sup>13</sup> For this reason a distinction was made by the present judges between the plaintiffs who had acquired property before jet aircraft (the cause of the noise) were known to use the Nice airport, and those plaintiffs who came later.<sup>14</sup> For the same reason plaintiffs can claim compensation, if any, only for that damage which is caused by noise above the "normal" level in the neighborhood concerned.<sup>15</sup>

Another finding of the courts presents a future limitation. In line with the judgments of the lower courts, the Cour de Cassation has further circumscribed the impact of their interpretation of articles L.131-1, L.131-2 and L.141-2 by deciding that the landowner was negligent within the meaning of paragraph 2 of article L.141-2<sup>16</sup> and, hence, cannot fully

<sup>12</sup> The Court of Appeals deals with that problem in the same way when it declares that the suggestion to replace "absolute liability" (*responsabilité objective*) by "subjective liability" based on "negligence, abuse or abnormal use of the right of over-flight . . . is a very appealing suggestion because it may possibly permit it to reconcile the requirements of modern aviation and of the aircrafts of the future with the rights of third parties on the surface, but it is an unacceptable suggestion because it is contrary to the principle established by article 36 [L.141-2]." *Supra* note 2.

<sup>13</sup> This is a normal limitation of the rights of landowners under the general law relating to landownership and neighboring rights. *E.g.*, *Encycl. Dalloz, Repicio, Propriété* No. 162; *Mageau-Tunc, t.I, No. 593; Chauveau, No. 504.*

<sup>14</sup> The Supreme Court, by this ruling, rejects the thesis of certain writers that the rule of contributory (comparative) negligence is applicable only when the "victim" had been involved in air navigation, *i.e.*, shared the "risk of air navigation" which is the basis of the air liability régime in French law; *e.g.*, *D.S. Jur., supra* note 7. Nothing in article L.141-2 (2) seems to justify this approach which was not even discussed by the Cour de Cassation.

<sup>15</sup> This is the reason why the experts appointed by the Court of Appeals (*infra* note 19) who enlarged the terms of reference specified by the Trial Court were instructed to inquire and establish, *inter alia*, whether at the time of the acquisition by the Société E.R.V.E. and Mrs. Bodnar of the lands on which the buildings were to be erected, "the (future) extension of the runways was decided upon and use of jet aircraft contemplated"; and whether Mr. Vomoro, when buying his apartment "could normally have known or anticipated the damage complained of and thus could have taken into account the risk inherent to the place"; whether the price paid by the Société E.R.V.E. was "the normal price, at that time, for similar land in other sections of the city or whether account had been taken, in establishing the (sales) price, of the nearness of the airport and of the inconvenience resulting therefrom."

<sup>16</sup> This conclusion was reached by the three courts in the instant case in line with the accepted doctrine and case-law on a neighbor's interference with the enjoyment of land ownership; *see* note

recover if he has not taken all appropriate measures to limit the damage—for instance, by adopting appropriate building plans, by providing for insonorization and so forth.<sup>17</sup> The Court stated in particular that “it was an elementary duty of foresight for the plaintiff before they started the building, to inquire, on the present and normally foreseeable conditions of operation of the airport and to plan the building so as to minimize possible inconvenience resulting from aircraft noise . . . to reduce the noise level in the apartments to a degree acceptable for a normal human being.”<sup>18</sup> The trial court requested experts to determine whether and to what extent such measures might have been taken by the plaintiffs.<sup>19</sup> The appeal went to the Cour de Cassation before these experts had started their work and delivered their report. The purpose of the appeal was to have the action rejected and thereby to dispense with such expertise. In upholding the decision of the Appeals Court, the Cour de Cassation stated that “if the [building society] has not taken the precautionary measures described above they have committed a fault by exposing themselves voluntarily to the damage for which they now claim compensation and that fault may diminish or even exclude the liability of the defendant for the damage caused.”

This decision calls for some critical comments. First of all, it will be noted that on the basis of the judgment reported, not only would Air France be liable for aircraft noise, but also any other airline operating into, or from, the Nice airport with aircraft creating a like or higher noise level. The question then would arise as to the amount of contributions to be imposed on the various airlines. The courts have skirted that issue by assuming, when rejecting the joinder, that the damage caused by each airline is distinct and separable. The unavowed reason for that assumption is clearly the finding that “there are [at that airport] more

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13 above for references. However, Professors Dereida (D.S. Jur., *supra* note 7) and de Juglart, *Juris Classeur Périodique* (La Semaine Juridique) 1965, II, No. 14074 express the opinion that article L.141-2 is a *lex specialis* which makes the aircraft operator liable for any damage (interference with ownership rights), small as it may be.

<sup>17</sup> It has been observed that the cost of such insonorization and, possibly, of the required change of the building places would also constitute a compensable damage if the land had been acquired before the extension of the runway and the use of the airport by jet aircraft were known or “in the air”; see, D.S. Jur., *supra* note 7. However, it is submitted that these investments would have contributed to diminishing or eliminating the future damage, with the result that the application of the principle of “comparative negligence” would lead to only partial compensation of the landowner having, however, regard to his additional outlay. This seems to be the time taken by the Court of Appeals—and implicitly approved by the Cour de Cassation, as evidenced by the terms of reference of the experts, which are recited at the end of note 19, *infra*.

<sup>18</sup> The judgment of the Cour de Cassation deals only with the action of the building society since the other plaintiffs had not appeared against the judgment of the Court of Appeals. See *infra* note 20.

<sup>19</sup> See note 15 *supra*, for part of the terms of reference of the experts. They were also instructed: (2) To measure the frequency, duration and intensity of the noise created in the apartments concerned by those aircraft which are operated by Air France; (3) to indicate at which hours the noise occurs and to what extent it is likely to cause an inconvenience (*gêne*) above that which is caused by noise which is usual in this section of the city during the same hours; (3) to state whether “the noise is of such a nature as to really affect the normal living conditions of a healthy person or to affect his physical and mental health”; (8) to give their estimate of “the extent of the damage (suffered by the various plaintiffs) which is a direct result of the aircraft operated by Air France” and “to state whether this damage could be diminished or avoided, wholly or partially, by insonorization or any other means or procedure, and to state the cost thereof.”

flights of jet aircraft operated by Air France than by all the other airlines together."

A further comment arises from the fact that although the noise is actually created by aircraft, and the damage is immediately attributable to the operation of the aircraft, its basic causes are both the decision to establish the airport at that precise location and the government regulations imposing certain flight patterns and altitudes. By using the airport in accordance with the regulations, the aircraft operators are, in fact, "innocent" tortfeasors. However, under French law, the airport cannot be sued by the landowners for damage caused in connection with its operation because its establishment has been preceded by an inquiry aimed at establishing whether or not the implantation of the airport would create a disturbance to neighbors. Once it has been decided that it will not do so and permission for the construction has been given, the airport authority or manager cannot be held liable for damage caused to neighbors through the normal operation of the airport.<sup>20</sup> And one must consider as normal all operations which conform with established government rules and procedures.

If the said inquiry shows that certain landowners will suffer damage, they must be expropriated, wholly or partially, with adequate compensation being paid.<sup>21</sup> Under the judge-made law of the United States, where no prior expropriation has taken place, the inconvenienced landowner will recuperate his damage from the airport under the doctrine of "inverse condemnation."<sup>22</sup>

There remains then the final question of whether the government can be held liable for establishing air navigation regulations and flight patterns which inevitably inconvenience the airport neighbours. Under French law, as under the law of most countries, the establishment of such rules and regulations is an exercise of discretionary executive power, and, as such, cannot be challenged before a judicial court or any administrative tribunal.

If we now turn to the underlying and "real" question, which is one of policy, the present legal and economic situation is as follows: Under French law, as construed and applied by the decision of the Cour de Cassation, if no expropriation has taken place, liability for noise damage lies with the airline. In the United States, in similar circumstances, the airport pays for the damages.<sup>23</sup> In both cases it may be readily assumed that air travelers bear the final burden of the damage through increase of fares and airport taxes

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<sup>20</sup> *Supra* note 2.

<sup>21</sup> See the French Civil Aviation Code of 1967.

<sup>22</sup> *Griggs v. County of Allegheny*, 82 S. Ct. 531 (1962).

<sup>23</sup> *Id.* As to French law, it should be noted that Air France had asked the Chamber of Commerce of Nice to join their side in the instant case for the reason that that Chamber had been granted the right by the government to establish and operate the airport as "concessionnaire"; however, the airport being a "public undertaking" (*ouvrage public*), the Tribunal des Conflicts decided that the Chamber of Commerce can only be sued in an administrative tribunal and cannot be made a party in an action before a judicial court. At present, no French administrative tribunal has rendered a decision on the civil liability, if any, of an airport authority for noise damage. *Préfet des Alpes Maritimes v. Tribunal de grande instance de Nice*. 1964 *REVUE GENERALE DE L'AIR ET DE L'ESPACE* 50.

recuperated by airlines through higher tariffs. On the other hand, if expropriation takes place, or if the governments (local, regional or national) were held accountable for choosing the site of the airport and for prescribing flight patterns and air regulations which inconvenience adjoining landowners or tenants and industrial or commercial establishments, the financial burden of the compensation will fall on the taxpayer. In other words, the question is whether it is a sounder policy to finance modern developments of air traffic from public funds collected through taxes from all citizens or whether that cost should be borne by the airline's customers only.

Air transport having become by now a pattern of all economically-advanced countries and contributing to the general amenities of life, not only because they facilitate communications between people, cities and nations, but also because of the increasing use of aircraft for cargo and mail, it may well be justified to prefer the first alternative and have the direct and indirect cost of the infrastructure<sup>24</sup> being borne by the public at large. This situation already prevails with respect to major airports and other air navigation facilities and services which are financed out of public funds when the taxes levied for their use do not reimburse the total amount of these expenditures. It is time for ending the present state of uncertainty of the law and for choosing among judicial alternatives with respect to the question of who will bear the inconveniences and damages caused by aircraft noise. Instead of leaving it to the judges, as is presently the case, national legislators should have the courage to find solutions to the questions of apportioning the indirect costs attributable to the introduction of noisy aircraft and to the establishment of airports near residential and/or industrial agglomerations.

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<sup>24</sup> The regulations prescribing take-off, landing and flight patterns which result in damaging aircraft noise are the mere consequence of the implantation of the airport at that location. A causal relationship between the making of these regulations and the damage to third persons can only be established if it is proved that it is possible to prescribe less damaging regulations.