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PROSECUTING PROFESSIONAL PILOTS IN THE UNITED KINGDOM AFTER NOVEMBER OSCAR: REFLECTIONS ON THE LAW AND POLICY†

Mervyn E. Bennun*

TABLE OF CONTENTS

I. BACKGROUND AND INTRODUCTION ............ 332
II. EVIDENTIAL MATTERS .................................. 338
III. THE CASE OF NOVEMBER OSCAR ............... 341
IV. PROSECUTION POLICY ............................. 346
V. THE SAMPLE ........................................ 349
VI. CONCLUSION ....................................... 358

† Certain U.K. sources cited in this Article were unavailable to Law Review staff and were verified by the author.

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331
I. BACKGROUND AND INTRODUCTION

In the November Oscar case,\(^1\) which will be considered in greater detail below,\(^2\) the Civil Aviation Authority (CAA) brought a prosecution against the commander of a Boeing 747 who made a deflected bad-weather approach while attempting to land at London’s Heathrow Airport. The aircraft descended to seventy-five feet over buildings and roads outside the airport perimeter before reversing its descent. Charges were brought against the commander, Capt. Glen Stewart, under what are now Articles 55 and 56 of the Air Navigation Order 1995,\(^3\) and he was convicted on one charge and acquitted on the other. The prosecution was controversial and raises serious questions about the policy underlying the decision to institute it.

The term “professional pilot,” as used in this paper, means, broadly, a person engaging in such flying as makes it necessary that he or she should hold an airline transport pilot’s license (ATPL) or a commercial pilot’s license.\(^4\) The intention is to exclude from the discussion the holder of a private pilot’s license (who is generally prohibited from flying for payment)\(^5\) and the holder of an ATPL who happens to be flying on a particular occasion under circumstances in which a private pilot’s license would be adequate (for example, someone on a recreational flight or a flight on personal business). Within this paper, therefore, discussion is limited to pilots whose occupation is flying on scheduled or chartered services.

So defined, the prosecution of a professional pilot in the United Kingdom is a rare event. This paper examines questions of procedure and evidence in English criminal law which the case appears to raise with regard to such proceedings. An attempt is made, as well, to determine the policy underlying such prosecutions.

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\(^1\) November Oscar refers to the last two registration letters of the aircraft involved in the incident, G-AWNO. Since the case is unreported, this paper relies on what is probably the fullest generally available account of the case, an article by Stephen Wilkinson, *The November Oscar Incident*, PILOT, Feb. 1994, at 32.

\(^2\) See infra Part III.

\(^3\) S.I. 1995, No. 1038 (Eng.) [hereinafter Air Navigation Order 1995]. Articles 55 and 56 of Air Navigation Order 1995 repealed and replaced, in identical terms, articles 50 and 51 of the Air Navigation Order 1989, S.I. 1989, No. 2004. All references are to the current Order, as the wording of relevant articles is unaltered though the numbering is different.


\(^5\) See *id.* at art. 118 and sched. 8.
PROSECUTING PILOTS

Three provisions of law are significant in this examination of the potential liability of pilots and aircraft owners for unsafe operations of aircraft. The first, subsection 81(1) of the Civil Aviation Act of 1982, provides as follows:

Where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water, the pilot or the person in charge of the aircraft, and also the owner thereof, unless he proves to the satisfaction of the court that the aircraft was so flown without his actual fault or privity, shall be liable on summary conviction to a fine not exceeding [level 4 on the standard scale$^6$] or to imprisonment for a term not exceeding six months or to both.$^7$

The second and third relevant provisions, Articles 55 and 56 of the Air Navigation Order 1995, read:

55. A person shall not recklessly or negligently act in a manner likely to endanger an aircraft, or any person therein.

56. A person shall not recklessly or negligently cause or permit an aircraft to endanger any person or property.$^8$

The first of these three provisions would be difficult to enforce in respect of incidents taking place outside the United Kingdom against foreign defendants,$^9$ and it is, in any event, of more restricted application than Articles 55 and 56 of the Air Navigation Order 1995, which are framed in wider terms. Subsection 81(1) was in fact not used in the November Oscar case. It is not applicable extra-territorially, and it would have been unavailable in at least one of the incidents in the sample below even assuming that its terms might otherwise be held to have covered the incident concerned. Accordingly, this paper will concentrate on the two offences created by the Air Navigation Order 1995.

The law in the two articles bears examination, for its meaning is not entirely clear, especially in view of the interpretive problems concerning the words “recklessly or negligently,”

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$^6$ Following the Criminal Justice Act, 1982, § 37 (Eng.), the maximum fines which may be imposed by a magistrate’s court are fixed by reference to standard scales in most post-1982 legislation which creates summary offences. This enables the Home Secretary to vary the scales in line with the changing value of money. In 1995, level 4 was a maximum of £2,500. There is no limit on the fine which the Crown Court may impose.

$^7$ Civil Aviation Order Act, 1982, § 81(1) (Eng.).


$^9$ I CHRISTOPHER SHAWCROSS & K. M. BEAUMONT, AIR LAW, ISSUE 58, § IV, ¶ 106 (Peter Martín et al. eds., 4th ed. 1995).
which will be discussed below. Further, it is hard to ascertain a consistent policy or pattern underlying any decision to prosecute under the two articles.

A point worth noting is that the articles do not make actual harm to property or persons a prerequisite for criminal liability. It appears that these matters would be covered by the Criminal Damage Act 1971, which makes it an offence (1) to intentionally or recklessly destroy or damage the property of another without lawful excuse,10 or (2) to destroy or damage any property "intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered."11 In addition, the usual body of law governing various forms of homicide and lesser offences would doubtless apply.

As a practical matter, there is a significant overlap between the two articles in the Air Navigation Order 1995.12 It is likely that a situation in which any person or property is endangered would also involve danger to an aircraft or to any person therein. It is difficult, therefore, to see how one could contravene either one of the articles without contravening the other. The key difference between the two articles would seem to be that one refers to acting in a manner likely to endanger an aircraft, while the other uses the phrase "cause or permit any person or property to be endangered."13 It is suggested here that the latter phrase is apposite to the situation where the aircraft itself is used as the tool or device whereby danger is caused, though not a great deal appears to hang from this distinction.

The real difficulty in interpreting the articles, however, stems from their use of the words "recklessly or negligently," as noted. These terms have been the source of very great difficulty in English law for years, and their meaning has become highly technical. Unfortunately, the meanings derived in the other contexts in which the words have been considered do not carry over easily into the interpretation of the Air Navigation Order 1995.

One might think that driving a motor vehicle and piloting an airplane are sufficiently analogous that legislation regulating bad driving and bad flying would be similar. In fact, this is not so, despite the fact that some legal reasoning concerning driving

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10 Criminal Damage Act, 1971, § 1(1) (Eng.).
11 Id. § 1(2)(b).
13 Id. at art. 56.
a motor vehicle is relevant to the interpretation of Articles 55 and 56. The Road Traffic Act 1988 defines the offence of dangerous driving in the following terms: “A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.”14 It should be noted that the language contains no reference to any particular state of mind; on the face of the statute, the fact that the driving is dangerous suffices for a conviction. But in fact, it is not as simple as that because one must consider whether the section should be interpreted to penalize someone whose vehicle is the cause of danger in the absence of any blameworthy state of mind on the part of the driver. In other words, one must ask whether the offence described in the Act is one of strict or absolute liability.

Section 2A of the Road Traffic Act 1988 offers a definition of dangerous driving which goes a long way toward answering that question as pertains to that section. In summary, it states that driving is to be regarded as dangerous if it “falls far below what would be expected of a competent and careful driver” and “it would be obvious to [such a] driver that driving in that way . . . [or] driving the vehicle in its current state would be dangerous.”15 Moreover, in determining whether the driving is dangerous, the section instructs that “regard shall be had to circumstances shown to have actually been in the knowledge of the accused and not only to the circumstances of which a competent and careful driver would have been aware.”16 The effect is to ensure that the defendant’s state of mind is to be tested subjectively and not objectively.

This interpretation has not been extended explicitly to the Air Navigation Order 1995,17 and the question which arises is whether the words “recklessly or negligently” can be interpreted similarly in order to achieve the same effect. Article 111(2) offers some help; it states:

If it is proved that an act or omission of any person which would otherwise have been a contravention by that person of a provision of this Order or of any regulations made thereunder was due to any cause not avoidable by the exercise of reasonable care

15 Road Traffic Act, 1988, § 2A.
16 Id.
by that person the act or omission shall be deemed not to be a contravention by that person of that provision.\textsuperscript{18}

But as Articles 55 and 56 require recklessness and negligence, one must ask whether this means that a defendant who exercises reasonable care would not be guilty of an offence. Further, Article 111(1) imposes liability for contraventions on the operator or commander of an aircraft unless it is proved that the act or omission occurred without consent or connivance and that "all due diligence to prevent the contravention" was exercised.\textsuperscript{19}

The flavour of the provisions seems to be that the exercise of reasonable care or of all due diligence to prevent the contravention is inconsistent with recklessness or negligence in Articles 55 and 56. Certainly, from the meaning given to recklessness in manslaughter cases, this interpretation seems to be reasonable. In the most recent authority, \textit{R. v. Adomako},\textsuperscript{20} Lord Mackay LC referred with approval\textsuperscript{21} to the judgment of Lord Atkin CJ in \textit{Andrews v. DPP},\textsuperscript{22} in which the latter said that recklessness suggests an indifference to risk.\textsuperscript{23} \textit{R. v. Adomako} compresses the rather fuller statement in \textit{R. v. Caldwell}\textsuperscript{24} by Lord Diplock:

"Reckless" as used in the new statutory definition of the mens rea of these offences\textsuperscript{25} is an ordinary English word. It had not by 1971 become a term of legal art with some more limited esoteric meaning than that which it bore in ordinary speech, a meaning which surely includes not only deciding to ignore a risk of harmful consequences resulting from one's acts that one has recognised as existing, but also failing to give any thought to whether or not there is any such risk in circumstances where, if any thought were given to the matter, it would be obvious that there was.\textsuperscript{26}

This interpretation has been confirmed in subsequent cases. It is now established that "reckless" covers both cases where the defendant disregards recognised risks and cases where "a reasonable man, in the defendant's position, performing the very

\begin{thebibliography}{99}
\bibitem{18} Id. at art. 111(2).
\bibitem{19} Id. at art. 111(1).
\bibitem{21} Id. at 86.
\bibitem{22} [1937] 2 All E.R. 552 (1937).
\bibitem{23} Id. at 556.
\bibitem{25} The House of Lords was considering the Criminal Damage Act, 1971, and it is submitted that the word would now carry the same meaning in any statute for all practical purposes.
\bibitem{26} Caldwell, [1981] 1 All E.R. at 966.
\end{thebibliography}
The act which the defendant intentionally performed, would have realised that he was exposing another or others to an appreciable risk of injury or damage to property.”

The meaning of the expression “a reasonable man... would have realised” is significant. This is an objective test, and it raises the question of how one determines what a reasonable man would have recognised. This is not something which is amenable to evidence, and, in practice, it is left to the jury which constitutes, in theory at least, a random sample of individuals which can conclude what is and what is not reasonable.

Recklessness is, however, not a state of mind which hangs in the air as an abstract matter; it can only be considered in a particular context, and it is worth noting that, in the cases noted, all of the judges had to explain themselves by reference to the actual case at hand or to hypothetical situations. *Caldwell* was a case of arson under the Criminal Damage Act 1971, and Lord Diplock was referring specifically to it when he used the words quoted; *Adomako* was a case of manslaughter; and *Reid* was a case of causing death by reckless driving. It should be noted that the Road Traffic Act 1991 abolished both this offence and that of reckless driving, and not only replaced them with the offences of “dangerous driving” and “causing death by dangerous driving,” but at the same time stated how the term “dangerous driving” is to be understood.

The offences in Articles 55 and 56, however, may also be committed “negligently.” This must presumably carry a different meaning from “recklessly.” Once again, English law is uncomfortable with the term. The view taken by Smith and Hogan in the latest edition of their authoritative text is that, as with recklessness, negligence involves a failure to comply with an objective standard of conduct. They offer the following succinct definition:

Negligence is *conduct* which departs from the standard to be expected of a reasonable man. This is not to say that a person’s state of mind is always irrelevant when negligence is in issue. He may, for example, have special knowledge which an ordinary person would not possess. The question then is, whether a reasonable man, with that knowledge, would have acted as he did.

29 Road Traffic Act, 1988, § 2A.
31 Id. (emphasis in original).
This brings the meaning of the term very close to that of reck-
less. The special knowledge is that of the defendant, and the
test becomes subjective. For all practical purposes, it is sug-
gested, the effect of the defence provided by Article 111(2)\(^{32}\) is
to merge the concepts of recklessness and negligence where
they occur in Articles 55 and 56. It is hard to visualise any situ-
tion where there has been a failure to exercise reasonable care
that could not be fairly described as either recklessness or negli-
gence as considered above.

II. EVIDENTIAL MATTERS

The effect of the offences created by the Air Navigation Order
1995\(^{33}\) is to make it likely that expert evidence will be required
in cases where recklessness or negligence are at issue. This is so
because the piloting of an aircraft is a skilled activity outside the
experience of most persons who will constitute the tribunal of
fact. The concepts of recklessness and negligence do not exist
in vacuo, and therefore, where the test is that of a reasonable
man in the defendant’s position, that test must, in airline cases,
refer to a reasonable pilot so situated. Further, the burden is on
the defendant to prove that either all due diligence\(^{34}\) or reason-
able care\(^{35}\) was exercised. Inevitably, these questions are likely
to involve technical matters on which expert testimony will be
required.

As a general rule, English law is reluctant to admit opinion
evidence on the ultimate issue—that is, the very matter which
the court must decide. It is possible, however, that such evi-
dence may be allowed, and where an expert gives evidence, care
may need to be taken in its presentation. In a critical review of
this exclusionary rule, Keane explains, “The justification of the
rule is that in so far as such evidence might unduly influence the
tribunal of fact, it prevents witnesses from usurping the function
of the court: witnesses are called to testify, not to decide the
case.”\(^{36}\) But he adds that “the rule is often of no more than
semantic effect,” and he makes the rather cynical observation
that, provided the opinion of the expert witness is expressed in

\(^{32}\) Air Navigation Order 1995, supra note 3, at art. 111(2).
\(^{33}\) Id. at arts. 55, 56.
\(^{34}\) Id. at art. 111(1).
\(^{35}\) Id. at art. 111(2).
terms different from those which will be used when the matter is subsequently adjudicated, the testimony is admitted.\textsuperscript{37}

In fact, the matter is rather simpler and clearer than Keane seems to admit. Richard May notes that there are, in fact, good reasons for allowing an expert to express an opinion on the ultimate issue and summarises the reasons thus: it may be artificial for the witness not to express an opinion, for the opinion may have been obvious from the expert's evidence; and the defence may be hampered if the expert cannot be asked about the issue "in the most direct way."\textsuperscript{38}

In \textit{R. v. Turner},\textsuperscript{39} Lawton LJ said:

\begin{quote}
An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary.\textsuperscript{40}
\end{quote}

The court explained that the purpose of the expert's opinion evidence is to supply information which is not within the knowledge of the court but which it is necessary to know for the purpose of determining guilt.\textsuperscript{41}

However, it must be understood that Turner's case was one involving expert psychiatric evidence. There is force in the argument that the acceptability of the opinion of a particular expert should be considered in light of the public's view of the status of the body of knowledge concerned, and this was a factor that has influenced decisions on admissibility in \textit{Turner} and subsequent cases. If the rule in \textit{Turner} is taken to be the second sentence in the passage quoted above, then in cases in which the question is simply whether a normal person has behaved normally, an expert's opinion is unlikely to be allowed.\textsuperscript{42} However, in the case of prosecutions under Articles 55 and 56 of the Air Navigation Order 1995, it seems probable that an expert opinion on the ultimate question, namely whether or not a defendant pilot was reckless, will now routinely be admitted.

There is but a single reported English case of a prosecution for these two offences, and the trial seems to have proceeded

\textsuperscript{37} Id.
\textsuperscript{38} \textsc{Richard May}, \textsc{Criminal Evidence} 159 (3d ed. 1995).
\textsuperscript{39} 1975 \textsc{Q.B.} 834 (1974) (Eng. C.A.).
\textsuperscript{40} Id. at 841.
\textsuperscript{41} Id.; see also \textsc{May}, supra note 38, at 162.
without the issue having been expressly canvassed. In *R. v. Warburton-Pitt*\(^4\) the defendant had been taking part in a flying display with a microlight aircraft; on becoming airborne he had to bank to avoid some trees, and the microlight stalled and came down into a crowd of people, killing one and injuring several more. No mechanical defect was found to explain what had occurred. Under cross-examination, one of the prosecution’s expert witnesses said that the defendant “had been reckless in not aborting his take-off” under the particular circumstances of his proposed display flight then prevailing:

This is a strong case, for the remarks which the Court of Appeal made about the expert evidence were addressed to the submission by appellant’s counsel that the trial judge had dealt inadequately with the material. It appears from the report that no objection was taken against the expert evidence *per se*. Indeed, it is clear that it was generally regarded as quite proper, and the Court of Appeal seems to have implicitly accepted this to be so when it rejected the criticism of the trial judge’s treatment of it:

Having read with care the transcript of the summing-up, we have come to the view that there is nothing in this criticism . . . . [T]he judge made it quite clear to the jury that it was their decision, and theirs alone, and nobody else’s in the case. He had already advised them to bear in mind the criticisms made by counsel on either side about the evidence given by the witnesses. We have no doubt that these criticisms had been fully developed in counsel’s speeches to the jury immediately before the summing-up. In our view the learned judge dealt adequately with the evidence given by the experts, and there is nothing in this ground of appeal.\(^4\)

One must conclude that the case confirms what appears to be established practice: in prosecutions under Articles 55 and 56 of the Air Navigation Order 1995, an expert will be permitted to state an opinion on the ultimate issue, and the trial judge must deal with this by making it clear to the jury that, notwithstanding that the expert has expressed an opinion on a particular matter, this is nonetheless one for the jury to decide. In other words, on charges of reckless flying under Articles 55 or 56 of the Air Navi-

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\(^4\) *Id.* at 142.
gation Order 1995, expert witnesses may properly be asked whether, in their opinions, the defendant was reckless or negligent even though these are the very issues which the jury must determine.

It is worth noting, in passing, that in the Eleventh Report of the Criminal Law Revision Committee\(^4\) consideration was given to the role and admissibility of expert evidence. The Committee drew attention to the point that such evidence, where it included an opinion on the ultimate issue before the court, was strictly inadmissible on the grounds that the expert is thereby usurping the function of the court or jury, and it noted the tension that had developed between this rule and current practice, which tends to admit the evidence much more freely than in the past. The Committee observed:

This is natural, because it would often be artificial for the witness to avoid, or to pretend to avoid, giving his opinion on a matter merely because it is the ultimate issue in the case and because his opinion on the ultimate issue may be obvious from the opinions he has already expressed.\(^6\)

The Committee concluded that the restriction on expert evidence probably no longer existed in the context of criminal proceedings, and in its draft bill proposed its final abolition.

III. THE CASE OF NOVEMBER OSCAR\(^7\)

The law reviewed above is of some significance in view of comments which have been made following what appears to be the rare prosecution in the United Kingdom of a professional pilot. This is an unreported case which came to trial in 1991. A British Airways Boeing 747-100 was attempting to make a Category II landing in thick fog at London’s Heathrow Airport and deviated from the centre-line of the runway; the airplane made a go-around after descending to seventy-five feet outside the airport fence, which was parallel to a busy road, and was flying just five feet higher than a nearby hotel. The captain was subsequently prosecuted under both Articles 55 and 56 of the Air Navigation

\(^4\) Criminal Law Revision Committee, Eleventh Report: Evidence (General), 1972, CMND 4991.

\(^6\) Id., ¶ 268, at 155.

\(^7\) As explained supra note 1, the November Oscar case is unpublished, and this paper relies on what is probably the fullest published account generally available: Stephan Wilkinson, The November Oscar Incident, PILOT, Feb. 1994, at 32; see also Geoffrey Cooper, Safety and the Criminal Law, AEROSPACE, July 1991, at 14 (summarising instructions by the trial judge to the jury).
Order 1995. Paradoxically, he was convicted (by a majority of ten against two of the jury) only of recklessly endangering the aircraft (Article 55) and was acquitted on the charge of endangering people on the ground (Article 56). The case for the prosecution was essentially that the captain failed to initiate the go-around expeditiously, and much of the defence was based on evidence of what one might call cockpit resource management problems; amongst other factors, the Instrument Landing System (ILS) equipment on the aircraft was troublesome, and the first officer was both ill and too inexperienced to assist in a Category II landing (despite having been given a special dispensation to do so). There were other factors as well, such as the holding fuel state and the conduct of the air traffic controller.

The case has caused a great deal of comment, both at the time it was tried and since. One of the issues raised at that time was that the use of a lay jury and a judge who was not experienced and au fait with the technical issues was an unsatisfactory feature of such trials. For example, in his account of the November Oscar trial, Wilkinson draws attention to the fact that the trial judge asked where the flight engineer sits on a Boeing 747. In letters to the press after the trial, the defendant made the same point and added that a British court is not the correct forum for a technically immensely complex case.

The case has caused a great deal of comment on other matters as well: opinions were deeply divided about the outcome, and the jury’s paradoxical verdicts probably reflect its members’ unease with the liability issue. Further unease has been expressed about the implications of the prosecution for safety, with attention being drawn to the need to preserve the confidence of pilots and others in the voluntary reporting scheme operated by aircrew and Air Traffic Control staff, which relies on strict anonymity. Further, the prosecution policies of the Civil Aviation Authority have been questioned, a point considered below.

The issue of whether ordinary courts are a suitable forum for such cases should be considered in the context of the nature of expert evidence and the role in practice of the judge and jury in a British criminal trial. The point has been made in other con-

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48 Wilkinson, supra note 1, at 33-34.
49 Id. at 34.
50 Id. at 37.
texts that certain types of cases, by virtue of the technical issues involved, are unsuited to trial by jury. The matter was considered by the Royal Committee on Criminal Justice, which drew attention to the evidence which it heard in this regard:

We were told by forensic scientists and other expert witnesses that in their view the trial process was ill-suited to the objective presentation of expert evidence. The process of examination and cross-examination is, according to this view, sometimes exploited by skillful counsel in such a way as to give to the evidence a slant that is neither objective nor scientific. Some of the forensic science respondents... were critical of the fact that counsel for the prosecution were sometimes ill-prepared.... Some also expressed the view that defence lawyers frequently appeared to lack sufficient understanding of scientific evidence to enable them to subject it to adequate scrutiny or to highlight its limitations....

The Royal Committee did not accept these views. It made it clear that its response and recommendations on these and other matters applied just as much to other fields of expertise as to forensic science.

As noted, several issues are involved. First, in the November Oscar case the fact that the judge presiding over a trial by jury asked where the engineer sat on a Boeing 747 is not evidence of a flaw in the procedure, even if it does suggest that the trial judge might know little about airplanes. The respective functions of the judge and jury are such that the judge may feel that, regardless of whether he or she knows the answer to a question, it may be necessary to ask it in order to ensure that the point is clarified for the jury. The judge controls the admission of evidence, and it lies within the discretion of the judge to conclude that particular issues need to be clarified. In their authoritative study of the English criminal justice system, Sanders and Young write:

In an adversarial system, the decision makers are meant to be passive. It is no part of the jury's role to investigate matters for itself away from the courtroom. Jurors can ask questions but rarely do so.... It follows that juries must reach their verdicts on the material that is placed before them by counsel for the prose-

53 Id. ¶ 70.
54 Id. ¶ 80.
It is not material, in other words, whether or not the judge knew where the engineer sits in a Boeing 747, or understood how the complex ILS and other equipment functioned. What is important is that the jury should have sufficient understanding of these to reach a conclusion, and the difficulties involved in elucidating these matters are no more a barrier to justice than in any other criminal trial involving complex technical matters.

No convincing evidence exists that trials conducted by skilled practitioners are generally unsuited to dealing with difficult issues of fact. This claim, however, must not be read to mean that there is no other possible procedure or that the British system cannot be improved. Nothing more is being said than that a court consisting of either a Bench of magistrates or a competent judge with a randomly-selected lay jury, serviced by skilled and ethical advocacy, comprises in principle an efficient engine for presenting, testing, and reaching a conclusion on evidence. The truth of this statement depends on the whole system described being located securely in the British culture of criminal justice. One cannot dispel from consideration that those who use the paradoxical outcome of the November Oscar case as evidence to the contrary would not make their point had there been an acquittal on both charges.

Indeed, one may well argue that the November Oscar verdict is evidence not of the weakness of the procedure involved, but rather of its strength. Notably, experienced commentators appear to be divided about the case. For example, in his authoritative analysis of the facts, Wilkinson describes very fairly his own doubts about the case. That Wilkinson had such doubts demonstrates that the contradictory verdicts reached by the jury could indeed accurately reflect peer opinion.

It is unfortunate that the matter was not taken on appeal. The contradictory verdicts do not reflect a satisfactory situation, but we must be clear where the problem lies: the decision to expose an individual to the hazards of a criminal trial must be based on sound and consistent policy. This theme will be developed below.

Certainly, the evidence in the November Oscar case was undoubtedly complex, and various expert witnesses contributed to

57 Wilkinson, supra note 1, at 38.
it. The issues involved the operation, use, and reliability of an ILS; cockpit procedures; and numerous highly detailed and technical matters relating to the operation of a large and extremely complex jet aircraft—all in the context of a Category II\(^ {58} \) landing at one of the world's busiest airports, which required the utmost in skill and concentration from two suitably trained and qualified pilots. The crucial question for the jury was, as stated by the trial judge, whether the defendant acted improperly in the manner in which he instituted a go-around:

The criticisms of Capt. Stewart in terms of negligence were that he did not respond to a series of cues warning him that it was necessary to go round, and that after the warning lights came on he took an unreasonably long time, 17 seconds, to switch to manual and then another seven seconds to stop the aircraft from descending.\(^ {59} \)

It is simply not possible here, nor would it be proper, to attempt to criticise the jury's conclusion that Capt. Stewart was guilty of endangering his aircraft for the reasons stated. The issue under consideration here is no more than whether the matter should have been tried in a court differently constituted. It is submitted that there is simply no case for suggesting that, because the case is immensely technical and involves the evaluation of expert evidence, a pilot charged under the Air Navigation Order 1995 should be prosecuted under a different form of procedure than usual. The problems of designing such a separate system would be overwhelming. One difficulty becomes immediately apparent when one considers those occupations where practitioners are in fact regulated by their peers. There is no professional association charged with enforcing discipline over pilots (such as those existing in the medical or legal professions). Characteristically, such professional associations are charged with the duty of examining those who wish to enter the

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58 These categories relate to the required precision of an instrument landing system under different conditions of visibility. A “Category II” landing is one in which an aircraft is allowed to land when the minimum runway visibility range is as low as 400 metres, and the decision height (at which the attempt to land must be discontinued if the runway cannot be seen) is 100 feet. A “Category III” landing is one where the decision height is zero feet, and the visibility may be 200 metres or less. In a “Category IIIc” landing, the aircraft may land without seeing the runway at all, and require guidance for the landing roll. See ICAO, Convention on International Civil Aviation Annex 14, International Standards and Recommended Practices: Aerodromes, vol. 1, Aerodrome Design and Operations, at 2 (2d ed. 1995).

59 Cooper, supra note 47, at 14.
profession, admitting those deemed to be properly qualified, and exercising disciplinary control over those who are found to have acted unprofessionally. No such structures or procedures currently apply to pilots in the United Kingdom. Altering the mode of trial to involve peer group evaluations, such as those in other professions, would therefore seem to require improbable and far-reaching structural changes in the profession.

IV. PROSECUTION POLICY

As argued above, one must be reluctant to criticise the outcome of the November Oscar case with regard to the findings of fact implicit in the jury's verdict. This, however, is not to say that we can be at ease with the case, for it raises disturbing questions about the policy underlying the decision to prosecute. A proper question to ask is whether the case should have been tried in the first place.

One must bear in mind that once the decision was taken to prosecute Capt. Stewart, he was then exposed to the inevitable uncertainties of criminal litigation. Even with the clearest conscience in the world, there remains an element of the unpredictable looming over the defendant: if one knows beforehand how a court will decide a case, then what would be the point of proceeding to a trial? Sanders and Young write:

The rhetoric of English criminal justice is that priority is given to protecting the actually innocent from wrongful conviction over bringing the actually guilty to justice. . . . But even at this rhetorical level the system can claim no more than to afford priority to protecting the innocent. It cannot offer any guarantee against miscarriage of justice occurring. The only way to guarantee this would be not to prosecute anybody at all.60

The conclusion is that the decision to prosecute is a grave one, fraught with potentially far-reaching consequences. It is not one to be taken lightly, and it must be based on the clearest policy considerations. It is instructive to consider the matter a little further.

Prosecutions in England are generally undertaken by the Crown Prosecution Service (CPS). Recognising the gravity of the decision involved, the CPS has observed that "[t]he decision whether or not to carry on a prosecution is a challenging responsibility. It can have a profound effect on the lives of individ-

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60 Sanders & Young, supra note 56, at 3.
uals, victims and their families and the public at large. The conduct of a case is equally important.\textsuperscript{61}

Referring to the reasons why a prosecution may not proceed, the CPS noted that a prosecution is less likely to be needed if, amongst other factors, the offence was committed as a result of a genuine mistake or misunderstanding\textsuperscript{62}—though this must be balanced against the seriousness of the offence—or if the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgment.\textsuperscript{63}

The Civil Aviation Authority (CAA), however, has not articulated any specific policies, but considers that it complies with the Code for Crown Prosecutors referred to above.\textsuperscript{64} The CAA states that it tends towards a compliance rather than a deterrence strategy.\textsuperscript{65} Considering the policies of regulatory agencies such as the CAA \textit{vis-a-vis} the CPS, it is worth noting Professor Andrew Ashworth’s remarks, bearing in mind that he was addressing the point in the context of the earlier 1992 Code for Crown Prosecutors. He observed that it seems that the role of CPS in reviewing cases cannot be transferred directly to the regulatory agencies:

They bring relatively few prosecutions, and it is assumed that considerations of public interest have already been taken into account by the reluctance to prosecute save in clear and necessary cases. However, those who have conducted research into these agencies have pointed out that some prosecutions are brought readily, in response to a single incident that has received publicity (perhaps through deaths, serious injuries, or an outbreak of food poisoning) and that has revealed failure to comply with legal standards. Such prosecutions could be examples of a form of public interest reasoning \ldots: that, where serious harm has resulted, it is important to have a public airing of the issues and a decision taken in a public forum about the appropriate disposal of the case. On the other hand, they also demonstrate the dan-


\textsuperscript{63} \textit{Code for Crown Prosecutors}, \textit{supra} note 62, at 10.

\textsuperscript{64} Personal communication from Gordon Sharp, Head of the Aviation Regulation Enforcement and Investigation Branch of the Civil Aviation Authority (Jan. 4, 1995).

\textsuperscript{65} \textit{Id.}
The result, he continues, could be disproportionate attention to safety rather than occupational health where deaths may be more numerous.  

It is important to note that, quite apart from deciding to commence a prosecution, the CAA has the discretion to revoke, suspend, or vary a pilot's license under the Air Navigation Order 1995. Indeed, it exercised this authority against Captain Stewart in the November Oscar case, for his air transport pilot's license was altered to co-pilot status. These powers are accorded to the CAA by virtue of its role as a regulatory agency, and their exercise may thus be regarded as both alternatives and additional to the power to prosecute.

It is difficult to evaluate the CAA's policies with regard to the prosecution of professional pilots in view of the fact that only one such prosecution, the November Oscar case, appears to have occurred. It is moreover not practical to compare one case or set of facts with another in order to derive conclusions about the relative degrees of blameworthiness involved or to use these conclusions as the basis for drawing further conclusions about decisions whether to prosecute. However, there is a body of material, namely, the reports of the Air Accident Investigation Branch of the Department of Transport (AAIB) in the United Kingdom, where highly authoritative and critical judgments on professional pilots' conduct are sometimes made. Even though it is rare for professional pilots to follow AAIB investigations, an examination of some of the incidents that were examined could provide insight into the CAA's policies.

The sample discussed below is a selection drawn from recent reports of the AAIB in which the AAIB investigators made explicit comments on the conduct of the aircrew in the incidents it had investigated. There is, of course, no point in examining reports where the investigators concluded that the conduct of the pilots had no bearing on the development or outcome of an accident or incident: a case, for example, where the pilot or

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67 Id. at 183.


69 From the outset, Capt. Stewart protested that he was not at fault. He never flew again, and subsequently committed suicide.
crew could not have anticipated mechanical failure or severe weather conditions. This type of incident has been disregarded.

A further point should be carefully noted. There is absolutely no intention to suggest here that the pilots involved in the sample were guilty of criminal conduct or that any of them ought to have been prosecuted—indeed, one can feel little but sympathy for them. This point requires further explanation.

The conclusions of the AAIB investigators were of such a nature that a strict application of the definition of recklessness as considered above might suggest that the basis for a prosecution under Articles 55 and 56 might have existed. In fact, in all the incidents there were factors explicitly referred to by the investigators and sometimes explored in considerable detail which, while seemingly falling outside the definition of recklessness, raise serious doubts nonetheless about the culpability of the pilots. At the same time, the lack of clarity in prosecution policy and the serious problems in the concept of recklessness as considered above become more apparent with examination of the incidents investigated. It is submitted that these two matters are interrelated. That the strict, formal definition of recklessness is inadequate for the sample reveals that there are situations in which a lawyer may think that its standard has been met, and yet a prosecution would be inappropriate. The definition, in other words, must be supplemented by the exercise of prosecutorial discretion; the difficulty, however, is in understanding the rules governing its application.

V. THE SAMPLE

One incident bears a coincidental similarity to November Oscar.70 A Boeing 747-243 twice made a go-around due to a deflected approach when attempting to land at London Gatwick, missing terminal buildings by one hundred feet. The investigators from the AAIB found that, apart from a failure of the Autopilot/Flight Director System to capture and establish the aircraft on the localiser, human error played a role in several ways: first, the aircrew failed to appreciate that the navigational information being presented to them on the flight deck was indeed correct; secondly, when the aircraft did a go-around, the

70 Air Accidents Investigation Branch, Department of Transport, Report on the Incident to Boeing 747-243, N33021 at London Gatwick Airport on 7 February 1993, at 28 (1994) [hereinafter November Two One Incident Report]. The name November Two One is drawn from the aircraft’s registration.
commander failed to appreciate the extent of its displacement from the centre line on its second approach and to take prompt and effective action to regain the correct approach path; thirdly, the radar director failed to appreciate the extent of the aircraft’s displacement from the centre line which caused him to pass misleading information to the aircraft commander; and finally, the commander improperly accepted the azimuth guidance given by the radar director and the ILS glidepath information as adequate references to continue the approach beyond the final approach point (FAP). The inspectors were satisfied that there was no evidence to suggest that the commander deliberately violated rules or procedures; however, they concluded that the decision to continue both the first and second approaches past the FAP, when the aircraft was outside the localiser course sector, was ill-adviced and contrary to company and internationally recognised procedures. The criticisms levelled against the crew and the radar director were detailed and explicit. It is noteworthy that this was an incident where an air traffic controller was included in the AAIB’s critical comments.

Certain comments need to be made about the November Two One incident. As with November Oscar, it involved a precision approach and equipment which was believed to be faulty. This, however, is merely the setting for an important distinction between the November Oscar and the November Two One incidents: in the former there was no AAIB investigation. This appears to have been due to the fact that, at the time of the November Oscar incident, the AAIB’s resources were wholly committed to the investigations into the terrorist bomb-attack on a Boeing 747 over Lockerbie in Scotland and the crash of a Boeing 737 at Kegworth near Manchester. The latter incident is referred to below. In response to the November Oscar incident, there was only a British Airways internal enquiry. The importance of this becomes apparent when one realises that in November Two One there was an opportunity for the AAIB to investigate and to report on aspects of cockpit resource management. It seems reasonable to assume that this influenced the CAA on the question of a prosecution. The lack of an AAIB enquiry meant that no examination of similar aspects of that incident was available with regard to the November Oscar incident, and it can scarcely be

71 Id.
72 Id.
doubted that it featured greatly in the trial. If such evidence is relevant, then it seems reasonable to express unease that the decision to prosecute was taken without the benefit of an AAIB report.

One must, however, understand the position the CAA was in, for it was clearly a victim of circumstances. The public experience of the November Oscar incident clearly called for some expeditious action, and doubtless the CAA felt that the best it could do under the circumstances, with the limited resources available at the time, was to refer the matter to a criminal court.

In another incident at Gatwick,74 a Boeing 737-2Y5A flying from Malta to Gatwick missed the runway altogether and landed on a taxiway. The AAIB found that the pilots did not brief themselves adequately and that, had they done so, they would have had a better chance of avoiding the incident because they would have been better able to differentiate between the runway and taxiway during the final stages of the approach.75 There was evidence (notably, conversations between the pilots recorded by the cockpit voice recorder) indicating that the pilots had been confused by the layout and lighting of the runways at Gatwick. However, the investigators noted that the aircraft had been in a holding pattern, giving the aircrew all the time needed to prepare thoroughly for the landing. As in November Two One, the criticism of the pilots was clear and explicit. If the test of recklessness is as set out above,76 then clearly the CAA interpreted the incident nonetheless as one in which a prosecution would have been inappropriate.

The sample includes two incidents where a flight proceeded without the declaration of an emergency and an urgent landing followed the development of problems. In both incidents, the AAIB investigators were critical of the conduct of the pilots.

In one incident,77 shortly after the Lockheed Tristar involved took off from Frankfurt, Germany, en route to St. Lucia the aircraft developed engine trouble and shed part of its thrust re-

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75 Id.

76 See supra Part I.

77 AIR ACCIDENTS INVESTIGATION BRANCH, DEPARTMENT OF TRANSPORT, REPORT ON THE ACCIDENT TO LOCKHEED 1011 TRISTAR, 9Y-TGJ, NEAR "KIRN" VOR, GERMANY, ON 9 MARCH 1992 (1993) [hereinafter TRISTAR INCIDENT REPORT].
verser mechanism. The further damage this caused to the left horizontal stabiliser as it fell away was later pointed out by a passenger who had noticed it at the time and considered that it appeared to be getting worse. Instead of declaring an emergency and landing as soon as possible, the commander decided to divert to Heathrow, where the airline had a repair facility. From the discussion captured by the cockpit voice recorder, the AAIB investigators concluded that this unsatisfactory decision was largely based on the inconvenience which the commander and his crew would have experienced had they made an emergency landing, rather than based on the condition of the aircraft. The Heathrow air traffic control officer, however, considered the matter to be so serious that on his own initiative he treated the matter as if an emergency had been declared, and offered London Stansted—a much quieter airport—as a diversion instead. He did so, however, without any explanation to the commander of the disabled plane, who rejected the idea. The air traffic controller had in mind the prospect that a heavily-used runway at Heathrow might be blocked if the landing went awry. The commander, though, thought that there was a fear of allowing the aircraft to pass in its faulty condition over the densely built-up area of London in order to land at Heathrow. This would have been avoided if the aircraft had landed at Stansted. One recommendation made by the AAIB as a result of this incident was that reasons should be given to the commander when alternative airports are offered in order to enable crews in emergency situations to make better-informed decisions.

In the second incident, a Boeing 747-436 operated by British Airways experienced a sharp nose-down change in attitude at a height of one hundred feet while climbing away from Heathrow and raising its undercarriage. This was caused by the uncommanded full down travel of the right elevators, and it required almost full aft control column to counter until, a few seconds later, the controls responded correctly and a normal

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78 It should be noted that the damage was merely the context within which decisions were taken, and there was no suggestion that the conduct of the air crew had caused it. Id.
79 Id.
80 Id.
rate of climb was resumed. The crew decided to continue with the flight. Considering the conduct of the aircrew, the investigators said,

Although they made every possible effort to identify the cause, as no anomalies were displayed either by the engine indicating and crew alerting system (EICAS) or by visual inspection, it was not possible to do so. The crew therefore had to decide whether to take what might be a serviceable aircraft back to Heathrow, thereby delaying the whole schedule and causing severe inconvenience to 389 passengers, or to carry on with a possible defect which, although having apparently cured itself and leaving no indication of its nature, might recur. The commander's initial thought was that it was better to spend some time trying to identify the problem during the en route climb. However, during the climb the crew were unable to discover anything further about the incident and so there seemed to be nothing that they could usefully discuss with the ground engineers.82

In their conclusions, the AAIB investigators found that: “In the absence of information about the source of the disturbance, at the time they were made, the decisions to continue the sector and to continue to operate the aircraft were questionable. It is however recognised, with hindsight, that the associated risk was minimal.”83

These two incidents demonstrate that, if recklessness involves a subjective element, then it is relevant to consider what the pilots knew. In the Tristar incident, the nature of the problem was clearly observed by the crew; in the Lima Yankee incident, as the AAIB investigators noted, the nature and seriousness of the problem were not known.84 It does not seem unreasonable to suggest that the commanders’ decisions formed the basis of allegations that the safety of the aircraft had been endangered and that this might have been avoided by the exercise of reasonable care on the part of the commander by dealing with the matter as an emergency from the outset.

In two other incidents in the sample, routine landing checks and procedures were not followed. In the first,85 the co-pilot

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82 Id. at 31.
83 Id.
84 The cause was subsequently traced with difficulty to a fault in a section of the hydraulic system shared by the undercarriage mechanism and the right elevators.
85 AIR ACCIDENTS INVESTIGATION BRANCH, DEPARTMENT OF TRANSPORT, REPORT ON THE ACCIDENT TO CESSNA 550 CITATION II, G-JETB AT SOUTHAMPTON
breached the procedure required by the Flight Manual by failing to warn the commander as he prepared to land that the fifteen-knot tail wind was outside the maximum allowed by the Flight Manual. The air traffic control officer was recorded as having said, when told of the decision to land, “You’ll be landing with a fifteen knot, one five knot, tail wind on a very wet runway.” This radio transmission was acknowledged by the first officer and heard by the commander. This incident is especially noteworthy as it is one of those in the sample where there was damage arising directly out of the conduct to which the AAIB investigators drew attention: the aircraft skidded off the end of the runway and onto a motorway where it struck several cars and was destroyed in the ensuing fire. There was, remarkably, no loss of life.

In the second incident,86 a BAe 146-300 was landing in a severe cross-wind on a wet runway. The commander was preoccupied with controlling the aircraft’s attitude during the landing and did not deploy the lift spoilers. The first officer reminded the commander of the need to keep the up-wind wing down but did not also alert him, as he was required to do by the Flight Manual, to the need to deploy the lift spoilers. The aircraft overshot and skidded off the runway; it was slightly damaged but there was no harm to the crew or passengers. It was determined in the subsequent investigation that the “spoiler not deployed” warning lights were defective, and that this resulted in the crew not being alerted to their error.

The final incident to be discussed involved the 8 January, 1984 crash of a Boeing 737-40087 operated by British Midland following the failure of one of the plane’s two engines. When the captain asked the first officer which engine had failed, the first officer replied with the wrong information, and on the order of the captain reduced power on the good one and shortly thereafter shut it down entirely. By the time the error was discovered, it was too late to avoid a crash which caused a great loss of life. The first officer, at the enquiry, was unable to explain

86 AIR ACCIDENTS INVESTIGATION BRANCH, DEPARTMENT OF TRANSPORT, REPORT ON THE INCIDENT TO BRITISH AEROSPACE 146-300, G-UKHP, AT ABERDEEN AIRPORT, DYCE, SCOTLAND, ON 31 MARCH 1992 (1993.)

87 AIR ACCIDENTS INVESTIGATION BRANCH, DEPARTMENT OF TRANSPORT, REPORT ON THE INCIDENT TO BOEING 737-400, G-OBME, NEAR KEGWORTH, LEICESTERSHIRE, ON 8 JANUARY 1989 (1990) [hereinafter KEGWORTH INCIDENT REPORT].
why he had made the mistake. A substantial portion of the AAIB’s report relates to the layout of engine instruments, and it is clear that, notwithstanding the criticism made of the pilots, the confusion was possibly related to unsatisfactory features thereof. The AAIB investigators said that one engine was known to be running improperly,

but because the first officer was unable to recall what he saw on the instruments, it has not been possible to determine why he made the mistake of believing that the fault lay with the No. 2 engine. When asked which engine was at fault he half-formed the word “left” before saying “right.” His hesitation may have arisen from genuine difficulty in interpreting the readings on the engine instruments, or it may have been that he observed the instruments only during the 6 second period of relative stability . . . . However, any uncertainty that he may initially have experienced appears to have been quickly resolved because, when the commander ordered him to “throttle it back,” without specifying which engine was to be throttled back, the first officer closed the No. 2 throttle.88

However, when considering further why the error happened, the investigators concluded that in addition to the high workload and other matters which aggravated their problems,

the speed with which the pilots acted was contrary to both their training and the instructions in the Operations Manual. If they had taken more time to study the engine instruments it should have been apparent that the No. 2 engine indications were normal and that the No. 1 engine was behaving erratically . . . . In the event, both pilots reacted to the emergency before they had any positive evidence of which engine was behaving abnormally. Their incorrect diagnosis of the problem must, therefore, be attributed to their too rapid reaction and not to any failure of the engine instrument system to display the correct indications.89

It bears repeating here that no suggestion is being made that the pilots and, in the case of the November Two One incident,90 the radar director, committed any offences in any of the above incidents. It is simply not possible to pass such judgments here. The sole point being made is that, despite the observations of the AAIB, the CAA did not bring any prosecutions in these cases. This, of course, is not to say that the CAA did not use other powers it might have had, or would have used them had it

88 Id. at 97.
89 Id. at 98.
90 See supra note 70 and accompanying text.
had the necessary jurisdiction over the pilots, not all of whom were holders of British licences.

The failure to prosecute, however, simply means that the criminal liability of the pilots was never tested. Had prosecutions been brought, though, there could have been no confident prediction about the outcomes. For example, consider the two incidents above where flights continued after problems had developed.\(^9\) Assuming that evidence were available that the pilots knew that there might be defects in the aircraft which gravely compromised safety, a reasonable jury properly instructed might well conclude that, in these two incidents, the pilots had recklessly endangered the aircraft in failing to declare emergencies and landing. One may recall that in \textit{R. v. Adomako}\(^9\) recklessness was described as suggesting an indifference to risk; and in \textit{R. v. Reid}\(^9\) this was described further as posing the question whether “a reasonable man, in the defendant’s position, performing the very act which the defendant intentionally performed, would have realised that he was exposing another or others to an appreciable risk of injury or damage to property.”\(^9\)

The issue in the case in question, then, would be whether there is evidence to put before the jury as to what a reasonable pilot in the position of the pilots in those incidents would have done; and as considered above, the testimony of other pilots could be used. In the \textit{November Oscar} case, this was done, and a conviction followed. The deeper question, of course, is whether one might wish to prosecute such cases at all. In addressing this, however, one wishes to approach it with consistent and clear policies, and it is necessary therefore to ask what the objectives of prosecuting professional pilots would be.

Let us assume, purely for the purpose of discussion, that in all the incidents in the sample above, sufficient admissible and reliable evidence was considered to be available which would meet the evidentiary test laid down by the Crown Prosecution Service before deciding to proceed: that is, that there is a realistic prospect of conviction. This is “an objective test. It means that a jury or bench of magistrates, properly directed in accordance

\(^{91}\) See \textit{TRISTAR INCIDENT REPORT, supra} note 77 and accompanying text; \textit{LIMA YANKEE INCIDENT REPORT, supra} note 81 and accompanying text.

\(^{92}\) [1994] 3 All E.R. 79 (1994); for discussion, see \textit{supra} notes 20 and 21 and accompanying text.


\(^{94}\) \textit{Id.} at 683.
with the law, is more likely than not to convict the defendant of the charge alleged.\(^9\) Is there then any way we can distinguish between *November Oscar* and the other incidents? If, as the assumption is here, no question exists as to the sufficiency of evidence, then the discriminating factor must be found in the sphere of public policy and public interest.

Certainly, actual damage and loss of life do not appear relevant, as in two of the incidents noted above an aircraft was totally destroyed, and in one of the incidents, a great loss of life occurred as well. Is the discriminating factor the degree of publicity surrounding the incident? This factor was most certainly present in the *November Oscar* case; the account of it by Wilkinson and the accompanying artist's impression leaves little doubt about that. However, though there may have been little press coverage, the unpunished incidents were at least within the knowledge of the public, for there were passengers involved in all but one of them; and in that incident,\(^9\) the aircraft crashed and was destroyed on a busy motorway together with several cars. The *Kegworth* incident\(^9\) was attended by massive press coverage over a protracted period.

A possible discriminant may be the actual or potential harm involved. It is suggested that this is not a convincing analysis either; there was a great death toll in the *Kegworth* incident, and any of the other incidents in the sample might have led to loss of life also. Admittedly, had the *November Oscar* incident culminated in a crash, the probability is that the scale of the disaster would have been comparable to the devastation caused by the crash of an El Al Boeing that occurred in 1992 in a densely-populated area in Amsterdam. The *November Oscar* incident could potentially have been even worse than the El Al crash, because that incident involved a freight plane, while the *November Oscar* incident involved one of the largest passenger aircraft in service which was carrying a full load of passengers. Terrible as the death toll in the *Kegworth* crash was, it also was less than would probably have occurred had the *November Oscar* incident ended in a crash. However, it is unlikely that a government agency would wish to be thought of as measuring the gravity of an incident by counting the number of actual or potential


\(^9\) See *Cessna Citation Incident Report*, *supra* note 85.

\(^9\) See *Kegworth Incident Report*, *supra* note 87.
dead. The scale of harm, whether actual or potential, does not appear to be relevant.

Attention must be drawn, however, to an important criterion which the CPS does take into account when considering the public interest being favoured by a decision not to prosecute. The Code states, in relevant part, “A prosecution is less likely to be needed if . . . the offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence).” It is suggested that herein lies the answer—at least, in part. When examining the technical and other details of the incidents described, it is not difficult to see how matters such as problems of cockpit resource management, the layout of controls, and other factors might have affected the conduct of the pilots. For example, in the Cessna Citation incident the AAIB noted that the commander was effectively the employee of the first officer, yet the latter was a significantly less-experienced pilot who might have felt inhibited from interfering with, and possibly taking control away from, the commander at a critical moment; in the Kegworth crash, the manufacturer’s layout of the engine instruments was the subject of critical comment by the AAIB and might have affected the crew’s judgment; and in the incident involving the BAe 146, the weather conditions were so severe that the first officer’s warning might have been regarded as appropriate and necessary but nonetheless a distraction from other essential procedures that the warning lights would probably have rectified had they not been faulty. It may well be that in the light of these factors the CAA decided that it would be inappropriate to prosecute. However, it is difficult to see any of these as a “genuine mistake or misunderstanding”; a better view is that the CAA was attempting to extend the concept of “recklessness” by importing a subjective element. This point will be considered further below.

VI. CONCLUSION

It is not possible to reopen the November Oscar case, though attention must be drawn to the considerable disquiet which the prosecution evoked in the airline pilots’ profession. It is submitted, however, that the long-term issue which this case raises is that, whether or not one uses the CPS’s guidelines as a yardstick,

98 CODE FOR CROWN PROSECUTORS, supra note 62, ¶ 6.5b.
the CAA's policy for the prosecution of professional pilots is problematic.

This is serious. The customs of the pilots' profession are intensely focused on safety and the prevention of harm. It is this sense of professionalism which seems to drive the Confidential Human Factors Incident Reporting Programme (CHIRP) which is currently operating in the United Kingdom under the aegis of the Defence Research Agency Centre for Human Sciences. It is not usual for those engaged in an occupation to confess their faults and to consent to their publication in the interests of safety, albeit in strict anonymity, and solely among colleagues, as CHIRP does in the newsletter it publishes.99

There are, of course, also mandatory reporting procedures which operate as part of an overall accident prevention policy. The International Civil Aviation Organisation (ICAO) operates an Accident/Incident Reporting System (ADREP) to collect and disseminate what may be characterised as safety-related information as a service to member states;100 and under the Air Navigation Order 1995101 every "reportable occurrence" involving a public transport aircraft102 must be reported to the CAA. This covers:

(i) any incident relating to such an aircraft or any defect in or malfunctioning of such an aircraft or any part or equipment of such an aircraft, being an incident, malfunctioning or defect endangering, or which if not corrected would endanger, the aircraft, its occupants or any other person; and

(ii) any defect in or malfunctioning of any facility on the ground used or intended to be used for purposes of or in connection with the operation of such an aircraft, being a defect or malfunctioning endangering, or which if not corrected would endanger, such an aircraft or its occupants.103

It would appear that these mandatory reports are forwarded into the ICAO's ADREP system.

It does not seem unreasonable to expect that those authorities charged formally with the regulation of the profession would have a clear policy when the question of criminal liability

99 The newsletter, Feedback, is circulated only to pilots within the air transport industry.
100 See Shawcross & Beaumont, supra note 9, ¶ VI(41.1).
102 Id. at art. 106 (defining "reportable occurrence") and at art. 118 (defining "public transport aircraft").
103 Id. at art. 106.
arises. In the incidents in the sample, the AAIB investigators were occasionally at pains to set out what they found that the pilots knew about their emergency situations and the implications of this knowledge. At the same time, however, the investigators also drew attention to a matrix of facts within which this knowledge was placed and which could not be disregarded when assessing criminal liability. These fall within the sphere of human factor matters or cockpit resource management, and cannot be excluded.\(^{104}\) For example, in the *Cessna Citation* incident,\(^{105}\) severe weather affected the approach to the runway, but the relationship between the commander and the first officer was sufficiently significant to merit examination as well. The commander was effectively the employee of the first officer, but was in fact older and far more experienced; the investigators clearly were concerned that the first officer felt inhibited about intervening under the circumstances, especially as the commander heard the warning by the air traffic controller. In the *Lima Yankee* incident,\(^{106}\) there appeared to be a momentary, inexplicable, self-curing problem on the one hand and, on the other, enormous pressures on the pilots based on economics and convenience. The human factor problems in the *Kegworth* incident\(^{107}\) have already been noted. What is emerging is that while it is one thing to conclude that, although a pilot knew all that needs to be known to act differently, cognizance has to be taken of those factors which militate against so acting. The definition of recklessness considered above is simply too barren to cope reliably with the social or contextual need.

It is suggested that the definition of recklessness has been worked out in fields which are so different from the context of Articles 55 and 56 of the Air Navigation Order 1995 that, while the definition might be a factor in making the discretionary decision on whether or not to prosecute, it is by itself insufficient. It is based on a concept of pure blameworthiness: if the definition of recklessness has been met, then criminal blameworthiness must follow. The CAA properly appears to follow a different course, and we must assume that in those incidents where, hitherto, the choice has been made not to prosecute, it was possibly made because the CAA considered using and possi-

\(^{104}\) For a recent discussion of this, see David Beaty, *The Naked Pilot: The Human Factor in Aircraft Accidents* (1995).

\(^{105}\) See *Cessna Citation Incident Report*, supra note 85.

\(^{106}\) See *Lima Yankee Incident Report*, supra note 81.

\(^{107}\) See *Kegworth Incident Report*, supra note 87.
bly used its other powers instead with regard to licences.\footnote{108} However, the November Oscar incident is quite inconsistent with this analysis.

Many of the incidents in CHIRP could be used as illustrations in a debate amongst lawyers over the meaning of the term "reckless." The driving force behind CHIRP is the wish that all pilots and Air Traffic Control officers should know about the incidents reported, guard against their reoccurrence, and thereby participate in increasing safety by being alert to the factors which caused them.

It may be a little cynical to note, but pilots obviously have a particular interest in safety. Errors of judgment are markedly less likely to have personal consequences of the same order for surgeons than errors of judgment by pilots who, when things start going wrong, are not in less danger than their passengers. Apart from being what is undoubtedly a significant factor behind the voluntary nature of CHIRP, this healthy self-interest lends itself to sensible exploitation in the interests of the entire airline industry. Concerning the standard for recklessness today, in purely pragmatic terms, conduct is definitively reckless if a properly-instructed jury decides that it is, as this paper reflects. This highlights the importance of clear prosecution policies.

Looking abroad, it seems that there is as much uncertainty as in the United Kingdom on prosecution policy. In an article published in 1985, Phillip J. Kolczynski draws attention to a series of incidents where prosecutions have taken place.\footnote{109} Assuming that the fora have been in the countries where the alleged offences occurred, he reports prosecutions in Egypt, Italy, Taiwan, Yugoslavia, and Greece.\footnote{110} More recently, Holahan and Guibaud cite further instances of prosecutions in France and India, and there can be little doubt that the list can be extended greatly.\footnote{111} Kolczynski states that this is evidence of a greater willingness to prosecute in other countries than in the United States.\footnote{112} It is submitted that this is not necessarily so, nor is it clear what the significance is.

\footnote{108} See supra text accompanying note 67.
\footnote{110} Id. at 5-6 n.23.
\footnote{112} Kolczynski, supra note 109, at 5.
What does emerge, however, is that there is some confusion about policies in prosecuting, and that the United Kingdom is not unique in this regard. It is noticeable that Kolczynski does not distinguish between professional and other pilots. The United States cases to which he refers constitute a heterogeneous collection and suggest some uncertainty on the part of the responsible authorities as to prosecution policies. An interesting comment Kolczynski makes is that “states sometimes react to the nature of the tragedy and the spectacular circumstances of an aviation accident rather than the conduct involved,” and he argues that the determination of culpability should not be governed by the gravity of the harm done. It is respectfully submitted that this latter point is correct. It does, however, raise the question of the adequacy of the definition of recklessness.

When one considers the sheer volume of scheduled and charter airline activity in the United Kingdom, it is apparent that the skill and competence of professional pilots are outstanding, as is their active involvement in, and sensitivity to, safety. A confused prosecution policy does not serve such people well, and an account of one particular incident illustrates graphically the need for clarity. The incident illustrates, firstly, the observation that CHIRP reports frequently seem to describe what lawyers would regard as reckless conduct by pilots; secondly, the need to consider carefully whether every incident should be defined as criminal; and, finally, how to discriminate. Clearly, a determination must be made to decide why one would want to prosecute in the first place.

In this incident, a commercial jet attempting to land had twice been forced to overshoot by poor visibility. While in a holding pattern and planning a diversion, the pilots heard that another aircraft had just landed successfully. This information persuaded them to make a third attempt: they agreed to descend to, and then fly at, decision height until the runway could be seen, and then to land. They did so but then, realising that they had not been able to see the threshold lights, they were forced to carry out a maximum-performance stop an unknown distance down the runway; after which, the reporting pilot said,

\[113\] Id. at 11.
\[114\] Id. at 5.
PROSECUTING PILOTS

1995-1996]

...the cockpit was filled with silence as they realised that they had all been party to an act of "supreme folly."\footnote{\textit{Roger Green, Human Factors in Aircraft Accident Investigation, Address Before the Advisory Group for Aerospace Research & Development (Aerospace Medical Panel) (1992) (on file with author; Mr. Green's address on file with Journal).}}

A lawyer would doubtless have little difficulty in describing the crew's conduct as reckless, but herein lies a conundrum: does this mean that a prosecution is necessarily the proper course to follow? It seems to be clear that the three crew members would have had self-images characterised by words such as experienced, careful, safety-conscious, and competent. Otherwise, why would they have been shocked by their own conduct and reported the incident so as to warn others? One must be clear about what a prosecution hopes to achieve in such a case before proceeding.

It is not intended to offer an answer to this question within the scope of this paper. The key issue seems to be to appreciate that the meaning of recklessness has been sought and defined in a very different context from the Air Navigation Order 1995. The Order, as has been observed above, empowers the CAA to take action on a pilot's license whatever the type, even in the absence of a conviction of an offence. This is a very different matter from the disqualification of offenders from driving, or the suspension of a driving license, which are matters for the criminal court that convicts a person of a driving offence.\footnote{\textit{See generally Road Traffic Act, 1991, § 25; Road Traffic Offenders Act, 1988, § 27; 1 Wilkinson's Road Traffic Offenses (Peter Wallis et al. eds., 16th ed. 1993).}} The other offences in which the concept of recklessness has been considered have generally not been concerned with activities requiring a license. It is suggested that this difference is fundamental.

Conduct is definitively reckless only when a court has finally decided that it is, and it is hard to see how the CAA's view of what constitutes a proper case to prosecute cannot be affected by the CAA's power to deal with a pilot's licence without taking the matter to a criminal trial. This is, it is submitted, a reasonable and proper situation, and is not a matter for criticism. But it does also mean that the November Oscar case raises disturbing issues and does not sit comfortably with what is known about other incidents which have been the subject of full, independent enquiries. Where policies are unclear and contradictory,
the danger is that a lack of confidence will develop in the law and procedure. This cannot be in the interests of safety.