BIRD STRIKES AND THE COURTS: THE GENOA CASE

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Abstract

There have not been many Court cases, be it criminal or civil, concerning accidents, or even compensation for damages, following bird strikes. Generally, those involved prefer to reach an agreement out of Court.

The first Court sentence in Italy on this subject was pronounced by the Civil Court of Genoa in 2001. The carrier had sued a number of entities (Ministry of Transport, Airport Operator, Air Traffic Control Agency) for damages resulting from a multiple impact between a BAE 146 and a flock of gulls that occurred on the 7th June 1989 at Genoa Airport. On that occasion the aircraft managed to return to the parking stand, severely damaged and with three engines out of order.

This presentation describes the positions of the parties concerned and the judges' conclusions – conclusions that might obviously be modified following an appeal. An interesting topic to discuss.

Key words: liability, regulations, legislation, damage compensation

The following paper is the English translation of some crucial points and paragraphs of the Genoa Court decision regarding a claim for compensation for bird strike damage.
It is not, therefore, the entire decision but only part of more than 60 pages of the original paper in Italian. Moreover, it is not a literal translation, as in most cases interpretations and explanations have been adopted in order to present domestic legal concepts to an international audience. It has been prepared for study and flight safety purposes only and, of course, for private use.

The facts

In 1996 T.N.T., the cargo airline, sued the Aeroporto di Genova s.p.a. (AdG), the Consorzio Autonomo del Porto (CAP), the Ministry of Transport, and ENAV (ATC State Agency) claiming compensation for damage caused to their aircraft (G-TNTS Bae 146-2000 QT), due to the incident that occurred at Genoa Airport on the 7th of June 1989.

At approximately 10.55 p.m. LT the above-mentioned aircraft was preparing for take-off from RWY 11, bound for Köln. Immediately after rotation a large flock of gulls, which had settled on the runway out of sight of the pilots due to darkness, flew off and collided with the aeroplane at take-off; a huge number of birds were ingested by the engines which consequently suffered a great deal of damage. In particular #2 engine which immediately stopped functioning following a burst of flame.

The captain started emergency procedures and succeeded in landing safely a few minutes after take-off. #1 and #4 engines were shut down immediately after touch-down and only #3 went on working until the aircraft reached the parking stand.

TNT requests

The carrier drew attention to the renowned bird strike hazard, especially at airports very close to the sea, as Genoa is. As for liability, TNT recalled that airport safety had to be guaranteed by the airport operator, which had been CAP up until 1985; but following a formal act on sub-contracting in 1986, AdG had since been in charge of Genoa Airport. TNT also recalled that the Ministry of Transport itself had assessed AdG action regarding the issue of bird strike prevention, defining it as "poor".

According to TNT, liability was not limited to AdG but was also extended to CAP, which was responsible for running and maintaining the airport up until three years ago (including safety and other operational issues).

The carrier identified both CAP and ADG as being co-responsible, due to the lack of application of preventative measures. Above all, they argued, an appeal for the case to be considered accidental could not be made, as the risk was largely foreseeable.

The Airport Director (local Ministry representative) could also be identified as being responsible as he omitted to comply with his duties of control and vigilance for flight safety purposes, as established in the Navigation Code.

Finally, even TWR controllers were responsible, if visibility of the flock from the TWR was proved.

AdG defence

AdG recognised that the incident was due to a flock of birds. The problem was to determine whether the flock had settled on the runway, was flying above it, or was even attracted by the aircraft lights. Bird presence, and subsequent potential danger, is renowned: AdG had therefore set up continuous runway inspection procedures (every 30 minutes.). The Airport Director used to issue birdtams and when the incident occurred a birdtam was actually in force. Finally, it was almost impossible for the pilots not to have seen the birds, unless they had performed a negligent pre-flight control.

CAP defence

CAP, having granted airport management to AdG, declined all liability.

Ministry of Transport defence

When the incident occurred visibility was more than 10 Km and the precautional landing that followed was not as dramatic as the plaintiff claimed. On the day of the incident there were all the weather conditions necessary to favour the presence of numerous birds on the field.

The Public Counsel for the Defence (Civil service lawyers) rejected in particular the Airport Director's liability, arguing that the airport organisational powers and capacities had been transferred to the airport operator (AdG), and that bird harassment was just one of the airport services to be guaranteed by the operator, and not by the Civil Aviation Authority. The Airport Director's only duty was to issue a birdtam, as he properly did.

The Court decision

First of all, the liability examined by the Court only concerned compensation for damages: no criminal or administrative negligence was considered. The Court then appointed an independent expert (a former airline pilot) in order to gain essential technical information.

1st question: Where were the gulls ? According to the expert, the birds were resting at an intersection between the runway and the parallel taxiway, in a position not within the sight of the pilots or the TWR controllers. Another important factor to be considered is the behaviour of the gulls and the STOL features of a Bae 146. They interacted, amplifying the damage (gulls are supposed to move upwards when scared).Many carcasses were found in the centre of the runway and as gulls are supposed not to fly in the dark, they were undoubtedly resting on the field. They were not in flight before the strike, as they would have been observed by pilots, ATC etc...

2nd question: Who should have done what? The Court examined international law (mainly ICAO Annex 14 and DOCS) bearing in mind that the problem is world-wide and that many prevention and bird harassment means are in use all over the world. At Genoa Airport the only means was a team of custodians with rifles patrolling the runway (and sometimes shooting) about every 30 minutes. However the incident occurred during a shift change, when no patrol was in service.
The Court considered this means as poor, when related to the high danger level at Genoa Airport regarding bird strikes. The airport is flanked by the sea on three sides out of four, and it should be defined as a sea-airport rather than a coastal one. Furthermore, the airport is close to the biggest regional landfill, attracting birds and gulls. Another risk factor is the

season during which impacts occur, when young birds are inexperienced and unfamiliar with aircraft. The presence of birds was not an absolute novelty, as some studies carried out by the local University showed that it was quite a well-known fact. Moreover, the grass on the field had been cut short, in order to achieve better financial benefits from the sale of the grass, rather than increase prevention. The list of harassment means was well known to the Authorities and the operators who, however, failed to put them to use. This is indisputable as it transpires that the Airport Director asked the operator to adopt more efficient means; means which were, however, adopted only after the incident.

3rd question: Who is responsible for what ? Operating an airport can be defined as a dangerous activity (most accidents occur during take-off and landing), and in the case of a coastal airport it is much more dangerous. According to Italian law, this means that the operator must prove he has adopted all suitable means to avoid accidents. In this case the expert stated that the use of even simple means like propane cannons would have avoided the damage with a high degree of probability (even if not 100%). Instead of improving its prevention devices in accordance with ICAO provisions, AdG left the harassment systems as they were in 1974, when the patrol service was set up for the first time. Therefore, AdG is responsible for not having adopted suitable harassment means (*The Court doesn't consider a patrol service a suitable means –Author's Note).*

As for the other defendants, CAP and the Ministry, it must be assessed whether the contracting or sub-contracting of an airport by the State to a public organisation (CAP), and from this to a private one (AdG), also implies the removal of liability from the subject who was previously responsible. The Court thinks that in safety issues full substitution cannot exist, especially if the former operator (CAP) omitted to provide technical directives to the new one (AdG) about matters relevant to bird strike risks.

This is also true for the Ministry of Transport: the public role of the State in safety and security matters implies powers and duties of co-ordination, direction, control and vigilance over the sub-contractor's activities.

In this case a lack of central organisation in bird strike prevention services has also been found, such as biological and technical studies, a tight control over local airport organisation of the airport, and so on: only in 1993 was a BSCI actually set up.

As Italy did adhere to the Chicago Convention, the Government had to set up administrative and operational structures which would comply with international commitments in flight safety issues. Responsibility for negligence (the lack of application of Annexe 14 Standards and Recommendations) could even be considered as a powerful stimulus to adopt suitable preventative means. Furthermore, the availability of public powers over private operators leads to the conclusion that the Government cannot ignore the existence of international technical rules to be applied by public or private airport operators, even if it is not responsible for airport operations.

Negligence on the part of the Ministry can also be identified in the lack of control over its peripheral structures (Airport Authorities) and in the lack of action by these in respect of the airport operator. This means that the legal relationship and the acts of concession between State and private operators do neither eliminate nor attenuate the responsibilities of the local branches of the Ministry. Thus Government administration and the private contractor are responsible for negligence in respect of the safety co-ordination issues and for the lack of actual control.
No responsibility is attributed to the TWR controllers in service, as the possibility of the flock being seen has not been proved. No responsibility can be attributed to the flight crew, who could not see the gulls on the field; furthermore, they were not obliged to know the procedures adopted by the operator, while they had the right to expect from the said operator

all main international prevention procedures and harassment devices. No blame can therefore be placed on the airline.

Blame and liability, however, cannot be attributed in equal parts. They have been calculated according to the “qualified” responsibility of each of the subjects involved. For example, CAP operated the airport for 30 years, while AdG had only be responsible for 3 years. However, while AdG had the duty to ensure that the airport complied with ICAO standards, it preferred to maintain the unsuitable patrol service already in use. Therefore, the Court recognised 50% liability on the part of the Ministry of Transport, 30% to AdG and 20% to CAP with compensation for damages of about US$ 1 million to be paid by the Ministry of Transport, US$ 600.000 by AdG and US$ 400.000 by CAP.

Conclusions and comments

A few general statements can be made about the sentence passed by Genoa Court which have their own intrinsic value, regardless of the variety of legal systems and bodies of legislation that exist:

The Court’s decision was based almost exclusively on the opinion of the independent expert. In this particular case a former airline pilot was chosen who, incidentally, was highly polemical in dealing with the Italian aeronautic authorities. Though it does not seem that this expert had much knowledge of zoology or of the effectiveness of ways of preventing the presence of birds or getting rid of those present, as certain statements made on this topic leave one, frankly, perplexed. For example, it is now well known that seagulls fly at night, as is the fact that a patrol system is usually considered more effective than propane cannons, which the technology of the moment could provide. Moreover, the statement that seagulls react to danger by flying upwards is open to discussion. The defence could, of course, have presented just as many reports of the opposite kind (i.e. by experts chosen by the defence, clashing with those of the prosecution and the Court). This, however, did not happen, and it is generally accepted that the sentence was the result of certain elements of the trial (which also had no precedent) being underestimated, or insufficient defence.

Whereas, in an abstract sense, the sentence is acceptable as far as liability is concerned, it is legitimate to wonder whether someone has been unjustly omitted. Was it right, for example, to completely absolve the pilots? Shouldn’t the fact that the bird strike problem is so well known, especially at coastal airports, have encouraged the pilots to be more cautious before taking off? Moreover, can we entirely exclude those who designed the airport and located it in a coastal area where bird strike risk was high? Could the presence of a landfill in the neighbourhood have been considered a partial cause of the event? Couldn’t the TWR controllers – knowing the continuous patrol service had been temporarily suspended – have requested greater caution before take-off?
The Italian Court adhered to the fundamental principle of the need to safeguard people and goods by adopting every effective method of prevention that science and technology had to offer. It therefore identified a time sequence within the chain of events leading to the disaster and attributed varying degrees of responsibility, the greatest of which belonged to the State. According to the Court, the State must always have the interests of its citizens at heart, but here it had omitted to carry out any kind of research/distribution of information on bird strike prevention means and had not set up a board for this specific purpose until 1993, when the BSCI was formed.

While drawing your attention to these remarks, I would like to point out an initial fundamental point : the sentence caused a sensation in Italy. The large sums of compensation that the Court ruled would be paid by the Government and the airport operator prompted a sudden increase in interest in the bird strike issue at various levels. Several airports suddenly began

nature study projects relating to the presence of birds, and others began to enforce, or are now about to enforce, the current regulations issued by the Civil Aviation authorities. Genoa Airport itself could be defined today as a model example of bird strike risk prevention as, with the support of the local university and official naturalist associations, they have also set up a plan for selective, controlled elimination to enhance effectiveness of the humane systems installed.

Practically all Italian airports now regularly send details of the bird strikes that occur to the BSCI, while Committee experts are called more and more frequently to hold updating and training seminars all over the country. Court action and sentences are becoming a more efficient deterrent than many of the initiatives to scientifically inform or spread information in a traditional manner.

And here we come to the point and purpose of my presentation: if this last fact is so, then knowledge must be spread generally of the legal consequences that can ensue when airports neglect to adopt preventive and safety systems for bird strike phenomena. The decisions taken in Italy should apply to all countries with a similar legal system rooted in Roman law, but could also be considered a precedent for international law and be valid in international courts.

A strong signal can also be sent by this Conference to Governments and States, that they carry out permanent projects and exercise strict control over airport operators, with drastic measures too, such as the withdrawal of certification in clear cases of neglect.

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