

A Coroner may not use protected material from an aircrash investigation that has been deployed in public in a criminal trial

written by Imogen Hildred | 6 February 2022

Senior Coroner for West Sussex v (1) Chief Constable Sussex Police (2) Secretary of State for Transport (3) Mr Hill [2022] EWHC 215 (QB)

The Shoreham Aircrash in 2015, its investigation by the Air Accidents Investigation Branch, (published in 2017) and the ensuing criminal trial (concluding in 2019) have produced a highly unusual, if not unique, set of circumstances with layers of legal complexity when it comes to the conduct of the subsequent coronial investigation.

The *Norfolk*[1] case in 2016 had already established that a coroner would not be entitled to obtain material or statements obtained by the Air Accidents Investigation Branch ('AAIB') for the purposes of a coronial investigation unless there was evidence that the AAIB investigation had been defective in some way.[2] AAIB material is protected from disclosure to anyone by a raft of measures including an international convention given effect by EU and national regulations.[3] The Divisional Court in *Norfolk* was clear: given the AAIB, as an independent state entity, has the greatest expertise in determining the cause of an aircraft crash, there is no public interest in having unnecessary duplication of investigations or inquiries. A coronial investigation need not go over the same ground but should accept the findings in an AAIB report and use these to answer the statutory questions that a coroner must consider as to how an aircrash victim came by their death.

In this recent judgment the High Court has now determined that the strength of the protection of material collected by the AAIB is such that the Senior Coroner was not even entitled to obtain or use material that might elucidate the cause of the crash, even when it had already been deployed in public, in a criminal trial.

Specifically, the Shoreham Aircrash pilot had captured *Go-Pro* video footage of the crash flight on his own camera that he had placed in the plane's cockpit. The footage had been shown to the criminal jury who had acquitted him of gross negligence manslaughter. Even though the pilot himself now wished to rely upon those video images for the purpose of the inquests, the Coroner was not permitted to obtain them. Expert reports produced for the criminal trial that interpreted the video footage were also all off limits to the Coroner. Furthermore, the Coroner was even prohibited from using the official trial transcripts of the evidence given by the defence and prosecution experts at the criminal trial in so far as those transcripts made any reference to the *Go-Pro* video footage.

The background

The Senior Coroner had conduct of the inquest proceedings into the 11 deaths caused in the Shoreham air crash ("the Inquests"). [4] As with all fatal air crashes, the AAIB had investigated the cause of the Shoreham Aircrash, and, as with all AAIB investigations, material seized and expert reports produced in the course of that investigation were protected by law from disclosure for any other purpose.³

To that extent there was nothing unusual about the case. However, where the Shoreham Aircrash differed from most others is that the pilot had survived the crash and had been prosecuted

for (and acquitted of) manslaughter. An issue raised at the criminal trial by the pilot was whether he had suffered some form of cognitive impairment which had led him to fly the aircraft so badly. Evidence addressing that issue had been placed before the criminal jury at the public hearing in open court. This included *Go-Pro* video footage of the crash flight that came from a recording made by the pilot on his own camera which he had voluntarily placed within the cockpit, and expert reports and oral expert evidence relating to the video footage.

To aid their criminal investigation, Sussex Police had obtained that *Go-Pro* footage from the AAIB, having sought the necessary permission of the High Court.[5] The material was then deployed in the prosecution, including it being shown to the jury at the Old Bailey. The bereaved families and the Senior Coroner (who had attended the trial that day) had been able to watch that video footage from the public gallery.

After the pilot's acquittal the AAIB produced a supplementary report in December 2019 in which they considered the theory that the aircraft was flown in the manner that it was because the pilot had suffered a cognitive impairment during the looping manoeuvre. The AAIB concluded "there was no new and significant evidence of cognitive impairment" and that the findings of their original investigation remained valid.

The coronial investigation

Fast forward, to the coronial investigation where the agreed scope of the inquests included: *'The cause of the plane crashing including the extent to which, if any, the pilot suffered a cognitive impairment which affected his flying abilities.'*

In preparation for those inquests, the pilot placed before the Coroner a medical report that he had recently obtained. The doctor who wrote the report had no specific expertise in aviation medicine: he was a paediatric oncologist and a friend of the pilot. That medical report suggested a mechanism of cognitive impairment that the pilot said had not been examined in the course of the AAIB investigation. The AAIB investigation had found that the G-forces experienced on the accident flight were unlikely to have affected the pilot's flying, although it had not ruled out cognitive impairment as a factor in the accident. This new medical report postulated cognitive impairment resulting from a different mechanism - that of cerebral hypoxia during the flight.

The Senior Coroner considered that she should assess whether this doctor's report was indeed new evidence that had not been considered by the AAIB, and if so whether it did amount to credible evidence that the AAIB investigation into the air crash was defective or incomplete. To do this she sought access to the *Go-Pro* footage shown at the criminal trial, the criminal trial expert reports and the trial transcripts (via a part 8 application to the High Court).

The Senior Coroner emphasised that she accepted the decision in *Norfolk*. She was not seeking to re-investigate in any general terms, those matters already investigated and determined by the AAIB. However, she argued that her application involved a stage of coronial investigation that came before the point at which the determination in *Norfolk* might apply. It concerned whether, and if so, how a Coroner is entitled to determine whether there was credible evidence that an AAIB investigation into an air accident was incomplete, flawed or deficient.

Faced with this new medical report the Senior Coroner was only seeking access to material already made public at the criminal trial, expecting that this would allow her to assess whether there was anything in the 'cerebral hypoxia hypothesis' or whether she might safely reject the same.

As some of the material[6] was held by Sussex Police, the part 8 claim was brought against the Chief

Constable, who was neutral on the issue. The application was supported by the pilot and the families of some of those who died in the accident.[7] The Secretary of State resisted the application for disclosure from the police on a number of grounds. In particular, it was said that that (i) there was no public interest in re-examination of a matter which the AAIB had already considered, and (ii) the doctor's views expressed in his paper did not present credible evidence to question the AAIB's examination of the cognitive impairment issue. The Secretary of State also argued that disclosure would have a significant potential adverse impact on future safety investigations.

The decision

The Divisional Court considered the EU and UK regulations and emphasised that the courts in the earlier *Sussex* and *BBC* cases[8] (where the disclosure of the same footage to the Sussex Police and the media had been considered) had been correct to proceed on the basis that the *Go-Pro* footage was protected material.

The Court determined that there was no difference in the legislative scheme between footage from cameras which were required to be installed in cockpits, and those which were not, such as the pilot *Go-Pro* camera in this case. No such distinction was to be found in the regulations which applied to all such image recordings, regardless of whether the pilot was required to have installed the image recorder or not. Cockpit image recordings provide significant and unique evidence which could greatly assist in the effective investigation of accidents and the ability to identify measures to prevent reoccurrence. This benefit is the same, as is the risk of discouraging the fitting such devices, regardless of whether the image recording is from a device that was required to be fitted or was fitted voluntarily for any reason.

“There is no public interest in having unnecessary duplication of investigations”

It followed therefore that the footage and the evidential material in the criminal trial which was derived from or which refers to that footage, was protected material that might only be disclosed to the Coroner where the High Court was satisfied,[9] *“that the benefits of the disclosure of the record concerned outweigh the adverse domestic and international impact which the disclosure might have on the safety investigation to which the record relates or any future safety investigation.”*

In weighing up both the harm and the benefit of disclosure of the material the Court went on to distinguish between the high public interest which arises in the context of a criminal trial, and the considerations which arise in a coronial investigation. The Court accepted the evidence on behalf of the AAIB and BALPA that permitting use of the protected material would have a ‘chilling effect’ that may stifle the culture of co-operation with air crash investigations. Further, the court was not persuaded that the new expert report amounted to credible evidence or even credible suggestion that the AAIB report was incomplete. The report of a doctor who did not have the relevant expertise was not a safe basis to argue the AAIB investigation was incomplete. There was, therefore, no public interest purpose served by disclosing the protected material and the Senior Coroner's application must fail.

Comment

The Court's conclusion on this issue may yet seem curious – the material in question had been deployed in public during the criminal trial, with the consequence that the Coroner and some of the

interested persons in the Inquests had already seen it, and all others could have done so had they chosen to attend the criminal trial. However, this case was not about a confidentiality that might be lost by the material having had one public outing. Rather, the court's view was that regardless of the material having already been shown, deployed and discussed in public, any *further* disclosure for a different purpose could still impact on future safety investigations. This was not a risk the Court felt should be taken when the non-expert medical evidence was insufficient to justify the coroner re-investigating the matters the AAIB had already explored.

One bright note from the case is that Lady Justice Sharp who is the President of the QBD recognised the significance of the jurisdiction coroners exercise saying that "coroners' inquests are of great importance";[10] some consolation for those coroners still smarting after having been described as 'lesser judicial officers' by the Divisional Court in *Norfolk*.

Bridget Dolan QC and Alex Dos Santos of Serjeants' Inn represented the Senior Coroner

Footnotes

[1] *Secretary of State for Transport v Senior Coroner for Norfolk* [2016] EWHC 2279 (Admin)

[2] That is 'incomplete, flawed or deficient' in the words of the *Norfolk* judgment at §56.

[3] Retained EU Regulation No 996/2010 (the EU Regulations) and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018 (S.I 2018/321) (the 2018 UK Regulations) and the Convention on International Civil Aviation, signed at Chicago on 7 December 1944 (Treaty Series No. 8 (1953)) (Cmd 8742) (the Chicago Convention) at Annex 13.

[4] Maurice Abrahams, Dylan Archer, Anthony Brightwell, Matthew Grimstone, Matthew Jones, James Mallinson, Daniele Polito, Mark Reeves, Jacob Schilt, Richard Smith and Mark Trussler.

[5] See *Chief Constable of Sussex Police v Secretary of State for Transport, British Airline Pilots Association* [2016] EWHC 2280 (QB) ('the Sussex case');

[6] The Go-Pro footage and the expert reports

[7] Who were joined as interested parties in the claim

[8] *Chief Constable of Sussex Police v Secretary of State for Transport, British Airline Pilots Association* [2016] EWHC 2280 (QB) (the *Sussex* case); and *BBC v Secretary of State for Transport* [2019] 4 WLR 23 (the *BBC* case).

[9] pursuant to regulation 25(5) of the 2018 United Kingdom Regulations:

[10] at §123