No noise is nice

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The problem of aircraft noise became acute with the advent of jet travel and its effect on those living near airports has been the subject of much argument throughout the industrialised world in the last twenty years. The impending introduction of the supersonic jet to commercial flights on a world scale once more brings to the fore — perhaps with even greater urgency this time — the underlying conflict of priorities between short-term development in technology, trade and communication on the one hand, and the long-term exigencies of preserving a physical environment favourable to human survival on the other. These problems are here discussed in the light of the French and New Zealand laws relating to aircraft noise.

At a time when landing rights for the Concorde is a subject of court action, public protect and diplomatic embarrassment, and increasing aircraft noise[1] a matter of contention in a number of New Zealand cities,[2] it may be of some practical interest to cast back a decade to see how the French fared in their battle over Concorde's baby brother, the Caravelle. This battle culminated in the first case of aircraft noise to come before a civil court in France, Société E.R.V.E. *C.* Air France.[3] There the courts developed a formula which has been followed ever since.

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1. The phenomenon of the sonic bang will not be covered in this paper. It differs from the problem of aircraft noise at airports both in the nature of the damage caused and the population affected. Sonic bangs occur in the wake of a supersonic aircraft at all times when it is travelling faster than the speed of sound and not just at the instant when it breaks the sound barrier. The effect is felt by all those within the 'sonic carpet' along the aircraft's flight path — typically an area 30 to 130 kilometres wide. The population affected is potentially larger and situated well away from airports. Sonic bangs cause damage — the most frequent being shattered glass and cracked plaster — which is different in nature to the property devaluation suffered by inhabitants near airports. See U.S. Environmental Protection Agency *Report to the President and Congress on Noise* (Washington, February 1972) I-60; and J. Causse et R. Combaldieu, "Les 'bangs supersoniques' et leurs effets nocifs" D.1967 Chron. 65.
2. E.g. recent discussions about noise abatement regulations for Paraparaumu Airport *Evening Post* Wellington, 2 August 1977, p. 10.
3. Trib. grande inst. de Nice, 9 déc. 1964, D. 1965.221, note Derrida; J.C.P. 1965.II.14074, note de Juglart. Cour d'appel d'Aix, 17 fév. 1966, D. 1966, 281, note Derrida; J.C.P. 1966.II.14755, note Villeneuve. Cour de cassation 2e Ch. civ., 8 mai 1968, D. 1968.609; J.C.P. 1968.II.15595, note de Juglart et du Pontavice.

This paper will discuss that decision in the context of the French Code of Civil Aviation and the relevant principles of general French tort law. Then, by way of comparison, the Common Law and statutory remedies available under New Zealand law in a similar case will be evaluated.

I. SOCIETE E.R.V.E. *C.* AIR FRANCE

A. The circumstances

The case arose in Nice where the problem of aircraft noise was particularly acute because the airport was only six kilometres from the heart of the city. The airport was built on a strip of land jutting out into the sea with the runway almost parallel to the shore and the mountains, so that aircraft landing and taking off did not have to fly over residential areas; they were in fact forbidden to do so. However, the proximity of the airport to the city meant that the runway was only a few hundred metres from the nearest dwellings.

Everything had been done to reduce the effect of aircraft noise on nearby inhabitants. Pilots were under orders to fly out to sea as quickly as possible and to reduce engine throttle to the minimum consonant with safety. On the other hand, it was impossible to insulate nearby dwellings completely against the noise and in any case to do so would have augmented building costs in a region where they were already exorbitant.

B. The parties

The principal plaintiff in E.R.V.E. *C.* Air France was a builder who bought land bordering on Nice airport for the purpose of building two blocks of apartments for sale. All the apartments in the first block were sold prior to completion in September 1958. The second block was nearing completion when Air France introduced the medium-range jet Caravelle into Nice.[4] The builder claimed that as a result of the intense noise made by these jets on landing and take-off he was unable to dispose of the apartments except for one sold in August 1960. He sued the airline for 2 million francs.

Three other parties joined the builder as plaintiffs. They were the purchaser of the only apartment sold from the second block, the owner of five other apartments nearby, and the neighbourhod residents' association. The association claimed only one franc as symbolic damages and sought an *astreinte*[5] to prohibit

4. The report of the case does not say these were the first commercial jets on the airport but this may be inferred from the Court of Appeal's order that inquiries be made as to whether the extension to the airport runway to accommodate jet traffic was envisaged at the time the plaintiff built his apartments.
5. The *astreinte* serves a function similar to that of contempt of court which is unknown in French law. It is a discretionary device created by the courts to induce compliance with court orders and consists of a fine for each specified period of time — usually a day — the execution of the court order is delayed. The amount of the fine is fixed according to the means of the party against whom it is made and the degree of his bad faith in resisting execution of the principal order. It is payable to the plaintiff in addition to damages. For a detailed discussion, see B. Starck *Obligations* II (Paris, 1972) 764-774; and Peter Herzog *Civil Procedure in France* (The Hague, 1967) 560-564. The *astreinte* is now enshrined in statute, Loi no. 72-626 du 5 juillet 1972: see V. Chabas "La réforme de l'astreinte" D. 1972 Chron. 271.

overflight of the neighbourhood at low altitude by Air France's Caravelles, on pain of a fine of 500 francs for each infringement.

While Air France was only one of several airlines flying jets into Nice it was responsible for over half the total commercial jet air movements into the airport for both 1963 and 1964.

C. *The problem of jurisdiction*

The case took over six years to work its way up to the supreme court of France, the Court of Cassation. Much of the delay in the initial stages was caused by the airline's attempt to plead jurisdictional issues relying on the French system of separate sets of courts: one, the civil courts,[6] dealing with disputes between subject and subject, and another, the administrative courts,[7] adjudicating between subject and State.

When the action was begun in the Commercial Court, a special civil court of first instance,[8] Air France invoked a decree[9] which conferred exclusive jurisdiction on the ordinary civil courts for all cases concerning delictual liability for damage of any nature caused by any vehicle. Accepting Air France's submission, the Commercial Court held on 23 March 1962 that an aircraft was a vehicle within the broad terms of the decree and declared itself incompetent to hear the case.

The case then went before the *tribunal de grande instance* in Nice. There Air France joined as a third party the Nice Chamber of Commerce, licensed operator of the airport, holding it responsible for siting the airport so close to the city that Air France's jets caused damage to the plaintiffs. When the Chamber of Commerce claimed that since the action concerned the use of a public work, it should be brought under the jurisdiction of the administrative courts, Air France resiled from its own previous submission before the Commercial Court and adopted the same stand. Despite a *déclinatoire de compétence*[10] in the same terms lodged

6. Within the civil courts structure, there are several types of courts at first instance. The ordinary court of first instance, and the most important, is the *tribunal de grande instance.* This is somewhat akin to the New Zealand Supreme Court at first instance. There are a total of 172 *tribunaux de grande instance,* one in each *département* with additional ones where the workload is heavy. The *tribunal d'instance* hears cases involving small claims. There are a total of 455, one in each *arrondissement.* These courts may be considered the equivalent of Magistrate's Courts in New Zealand. In addition, there are courts dealing exclusively in specialised areas, for example, the commercial and labour courts. Appeals from all these courts are heard in the 27 regional courts of appeal; judgments are reviewed on appeal on points of law by the Court of Cassation in Paris. See Herzog, op. cit., 137-169.
7. Headed by the Conseil d'Etat.
8. There are some 230 commercial courts created where needed by government decree. The judges are businessmen elected indirectly by their peers. Each commercial court consists of one presiding judge elected for a term of three years and two or more associate judges, plus a number of alternates. The judges must be at least thirty years of age and have been in their business occupation for five years. Each case is heard by at least three judges. Herzog, op. cit., 144-146.
9. Décret no. 58-1285 of 22 December 1958.
10. A positive conflict of jurisdiction arises "whenever the administration objects to a case proceeding in one of the ordinary courts on the ground that the latter lack jurisdiction. The prefect of the *département* in which the court sits must lodge with the court a formal 'déclinatoire de compétence' calling upon it to withdraw; if it refuses to do so, the prefect may proceed to 'raise the conflict' before the Tribunal des Conflits." L. Neville Brown and J. F. Garner *French Administrative Law* (London, 1967) 73.

by the Prefect of the *département* of Alpes-Maritimes, the *tribunal de grande instance* rejected this claim and declared itself competent to proceed with both the principal action against the airline and the third party action against the Chamber of Commerce.

However, a conflict over jurisdiction having been raised by the Prefect of Alpes-Maritimes, the case came before the court set up solely and specifically to settle such disputes, the "Conflicts Tribunal", made up of equal numbers of judges from the Court of Cassation and the Conseil d'Etat. That body ruled, on 27 January 1964, that the principal action against Air France should proceed before the courts of civil jurisdiction but that the airline's action against the Chamber of Commerce should be heard in an administrative court.

On the eve of the hearing before the *tribunal de grande instance* in Nice, Air France joined as parties thirteen of the twenty-six other French and foreign airlines which also flew jets into Nice.

The *tribunal de grande instance* delivered its judgment on 9 December 1964. This decision was confirmed, with certain variations, by the Court of Appeal in Aix on 17 February 1966. Finally, on 8 May 1968, the decision of the Court of Appeal was upheld by the Court of Cassation.

D. The judgments

1. *In the court of first instance*

The *tribunal de grande instance* disallowed Air France's joinder of the other airlines as co-defendants on the ground that the plaintiffs were seeking a remedy only against Air France's jets for whose activity the other airlines were not answerable. It then proceeded to hold Air France liable under section 36 of the Code of Civil Aviation[11] for all damage caused by noise made by its Caravelles which was in excess of the normal noise level in the plaintiffs' neighbourhood, damages to be reduced to the extent the plaintiffs themselves might have been at fault.

Under article 36 the operator of an aircraft is "liable *ipso jure* for damage caused by the movements of the aircraft or by objects falling therefrom to persons or things on the surface. This liability can be attenuated or displaced only by proof of fault of the victim."

The court interpreted this legislation as imposing on aircartf operators an "absolute and objective" liability which could not be displaced either by act of God, act of a stranger, or proof of absence of fault. The airline had argued that article 17 of the Code of Civil Aviation allowing all aircraft freedom of circulation over French territory[12] in effect created an air easement to which surface owners must submit as long as flight procedures were normal and in accordance with civil aviation regulations, and that consequently liability under article 36 should only attach where the flight was abnormal. The court rejected this submission as an attempt to import the notion of fault, which an "abnormal"

11. Promulgated by Décret no. 55-1590 of 30 November 1955. The Code was revised by Décret no. 67-333 of 30 March 1967. Article 36 is now article L.141-2.
12. This article, renumbered L.131-1 since the revision of 30 March 1967, is in derogation of article 552 of the Civil Code which gives the surface owner ownership of what lies above and beneath his land: "La propriété du sol emporte la propriété du dessus et du dessous."

flight implies, into an area of law from which the legislature had expressly excluded it. It held that proof of a causal link between the aircraft and damage was sufficient to establish liability.

Accordingly, the court commissioned a panel of experts to measure from the plaintiffs' apartments the frequency, duration and intensity of the noise made by Air France's Caravelles and to determine whether and to what extent that noise affected health and living conditions.

The airline appealed.

2. *In the Court of Appeal*

The Court of Appeal confirmed the judgment against Air France but added that inasmuch as it had been common knowledge for some time that traffic on busy airports caused annoyance to the population nearby, the airline would succeed in proving fault on the part of the plaintiffs, in total or partial exoneration of its liability, if it were found that the plaintiffs failed to make inquiries about foreseeable developments in the use of the airport, and accordingly to plan the disposition, insulation and construction of the apartments in such a way as to reduce aircraft noise as much as possible to a level tolerable to a person of normal health. The court held that to the extent the plaintiffs failed to take such precautions, they committed a fault and accepted a risk by voluntarily exposing themselves to the injury of which they complained.[13]

It therefore ordered that the lower court's commission to the panel of experts be altered to include inquiries as to whether the price paid by E.R.V.E. for the land was the normal market price or a lower price which took into account its proximity to the airport and whether at the time the plaintiffs built or bought their apartments, the extension to the airport's runway to accommodate jet traffic was already envisaged.

Finally, the Court of Appeal dismissed the neighbourhood association's request for an *astreinte,* holding that a civil judge had no jurisdiction over the operation of a public utility under government regulation, and thus could not ban jet aircraft from Nice airport.[14]

Both Air France and E.R.V.E. appealed.

13. ". . . dans la mesure où les demandeurs d'indemnité ont négligé de prendre de telles précautions, ils auraient commis une faute et accepté un risque en s'exposant volontairement à subir tout ou partie du préjudice dont ils se plaignent . . . ." D. 1966.282. The Court of Appeal seemed to imply there was an element of *volenti* as well as contributory negligence in the notion of "fault". This has misled several commentators as to the ground on which the fault was based, post p. 173. But cf. Court of Cassation's definition of fault, post p. 170.

14. It may be of interest to note that there is a similar remedy under Japanese law. In the Osaka International Airport noise pollution trial in which 272 residents sued the government (there is no equivalent of a class action in Japanese law) for mental distress and physical injury to health caused by aircraft noise, the Osaka High Court ordered the government to pay 11,000 yen per month to each plaintiff for damage which might be inflicted in the future until the night curfew imposed by the court was observed, and 6,600 yen per person per month until the residents and the state reached agreement on restrictive measures, including a reduction in the number of flights. These sums were payable in addition to 1,328,000 yen per plaintiff for past suffering. The damages were ordered pursuant to article 2 of the Tort Claims against the State Act (Kokka Baishō Hō) 1947 c. 125 which provided for compensation for damage arising from the maladministration of government establishments. See H. Tanaka (ed.) *The Japanese Legal System* (Tokyo, 1976) 443.

3. *In the Court of Cassation*

In the Court of Cassation the plaintiff argued that it should be compensated for any loss caused by noise which exceeded the normal disturbances in the neighbourhood regardless of which of the parties was first established there, that the sole fact of building near the airport did not constitute a fault, and that acceptance of risk by the victim could not exonerate the operator.

Both motions of appeal were dismissed. On the plaintiff's motion, the Court of Cassation held that since its case was based solely on Air France's liability *ipso jure* founded on the notion of risk without invoking any fault on the airline's part, the Court of Appeal was justified in ruling that to the extent the plaintiff failed to take reasonable precaution, it committed a fault in voluntarily exposing itself to the damage for which it sought compensation.[15]

E. The basis of the decisions

To better appreciate the courts' decisions, it is necessary to take a brief excursion into the general law of tort in France and more particularly into the principles on which the courts based their rulings.

1. *Article 1384 alinea 1 of the Civil Code*[16]

Article 1384, *al.* 1 of the Civil Code[17] governing liability for damage caused by things in one's custody is one of the two pillars of French tort law, the other being articles 1382 and 1383 which impose liability for loss or damage caused by one's own fault, negligence or imprudence.

When article 1384, *al.* 1 was drafted it was intended as nothing more than a general introduction to the specific provisions spelt out in the subsequent paragraphs governing vicarious liability and in articles 1385 and 1386 imposing liability without proof of fault for damage caused by an animal and by a building in disrepair. At the end of the nineteenth century the courts seized on this paragraph to give compensation to the increasing numbers of victims of work accidents in which machines were involved but for which it was often impossible to prove fault on the part of employers. In a famous judgment in 1896,[18] the Court of Cassation declared article 1384, *al.* 1 to be a substantive rule in its own right: "Everyone is liable for damage caused by things in his custody." Thereafter a victim of an accident in which a "thing" was involved could succeed in claiming damages without proving the defendant's fault even if he could not bring himself within the scope of articles 1385 or 1386.

15. "Attendu que . . . la cour d'appel a pu . . . déduire que dans la mesure où la Société E.R.V.E., qui se prévalait d'une responsabilité de plein droit fondée sur la notion de risque et n'invoquait aucune faute contre la Compagnie Air-France, aurait négligé de prendre de telles précautions, elle aurait commis une faute en s'exposant volontairement à subir le dommage dont elle demandait réparation . . . ." D. 1968.610. It is clear from this definition that the plaintiff's fault lies not in acceptance of risk but contribution to the risk involved.
16. For the sake of brevity and uniformity with standard practice, the French form of citation will be used for this article and paragraph, i.e. article 1384, al. 1.
17. "One is liable not only for damage caused by one's own acts, but also for damage caused by persons for whom one is responsible, and by things which are in one's custody."
18. L'affaire *Teffaine,* Civ. 16 juin 1896: D.97, 1, 433, note Saleilles, concl. Sarrut; S. 97, 1, 17, note A. Esmein.

Early attempts to confine the scope of article 1384, *al.* 1 to things of certain description — for example, to "inherently dangerous things" or "things not activated by the hand of man" — were swept aside by the Court of Cassation in 1930[19] when it declared the provision to have general application. Article 1384,*al.* 1 applies to any object, from a moving car to an inert lettuce leaf left lying on the ground. Once causality is established between the thing and the loss or damage suffered, the custodian's liability can only be shifted by proof of an act of God or an unforeseeable and unavoidable act of a third party or of the victim. As Lawson observed,[20] a literal interpretation of the article "undoubtedly gives a result comparable to — or rather more far-reaching than — that in *Rylands* v. *Fletcher.*"

There has been and continues to be considerable discussion and doctrinal disagreement over the theoretical basis of this head of liability. On the one hand, there are those who maintain that article 1384, *al.* 1 raises a presumption of fault: the very fact that the object caused damage is strongly suggestive of some fault or negligence on the part of the custodian. The difficulty in this approach is that the courts have consistently held that proof of absence of fault does not exonerate the custodian. Other writers hold that article 1384, *al.* 1 imposes strict liability and that the exonerating factors go to rebut not a presumption of fault but a presumption of causality: the custodian shifts his liability by proving *novus actus interveniens* between the act of the thing in his custody and damage to the plaintiff.[21]

The Court of Cassation has never come down on one side or other of the debate, but it has been pointed out that its Second Chamber to which most cases of this nature are referred has recently dropped the formulation "presumption of liability" which it has used since the 1930s in relation to article 1384, *al.* 1 in favour of "liability *ipso jure*", the same term doctrinal writers use for objective liability or liability without fault.[22]

2. *Article 36 of the Code of Civil Aviation*

Inasmuch as article 36 imposes liability *ipso jure* for loss or damage caused by the movements of an aircraft, it can be said to be a particularised application of article 1384, *al.* 1 in a special code. There are, however, important differences.

First, while article 1384, *al.* 1 imposes liability on the custodian of a thing, article 36 is concerned with the operator of an aircraft. It has been suggested that the basis of the former's liability is the power of control he has over the object by virtue of which he could be held to guarantee the safety of those who come into contact with it, whereas the latter's liability is more properly regarded as being based on the principle that he who profits from the utilisation of an aircraft should bear the risks associated with that utilisation.[23]

19. L'affaire *Jand-heur*, Cour de cassation, Ch. réun. 13 fév. 1930: D.1930, 1, 57, concl. Matter, note Ripert.
20. F. H. Lawson *Negligence in the Civil Law* (Oxford, 1950) 44. See also B. Starck, op. cit., 25-27; and A. Tunc, "The twentieth century development and function of the law of torts in France" (1965) 14 I.C.L.Q. 1089, 1095.
21. *Encyclopédie Dalloz, Droit Civil VI,* Paris, Ch. Larroumet, "Responsabilité du fait des choses inanimées", 1975, pp. 9-13, nos. 73-118.
22. Ibid., p. 8, no. 7.
23. Ibid., pp. 63-64, nos. 690-691.

Both the Court of Appeal and the Court of Cassation referred to Air France's liability as "founded on the notion of risk". Thus any argument Air France might have raised, as was done by another airline in a recent similar case,[24] that its pilots not only did but had to obey instructions from the control tower on landing and take-off and were therefore not in control, would not have availed its case since liability for the risks involved was attributable under article 36 on the basis of profit and not on the basis of power of control.

Secondly, the exonerating factor is much more restrictive in article 36. Unlike the custodian in article 1384, *al.* 1 who exonerates himself by proving a break in the chain of causation, the aircraft operator is exonerated only because the victim has been guilty of blameworthy conduct and it is felt protection should be withheld from him by way of sanction. Thus, liability is "attenuated or displaced only by proof of *fault* of the victim" — a blameless act, however unforeseeable and unavoidable, will not do.

As to what constitutes "fault" in article 36, there seems to be general agreement among doctrinal writers that the plaintiff must have committed a fault or imprudence associated with the risks of aviation itself.[25]

3. *The principle of liability for excessive neighbourhood disturbances*

French courts have consistently held that everyone is expected to put up with the normal inconveniences of living in a community. On the other hand, liability is imposed on anyone who causes his neighbour a greater amount of annoyance than he should normally and reasonably be expected to bear in that particular locality. Such a person will be liable even where his act is perfectly lawful and nothing can be done to reduce its harmful effect on his neighbour.[26]

The courts have used this principle to limit damage even when compensation is sought under other heads of liability, such as article 1382 for damage caused by a person's fault or article 1384, *al.* 1 for damage occasioned by things, wherever the relationship between plaintiff and defendant is one of neighbours.[27] In such cases damage below the threshold of normal neighbourhood annoyances will generally not give rise to compensation.[28]

Generally speaking the Court of Cassation has rejected arguments by the defendant based on the notion of "pre-occupation" — that because of his prior installation the plaintiff must be taken to have knowingly accepted the risk of disturbance.[29] Lower courts, however, have sometimes reduced the amount of damages on this ground.

F. The decision in perspective

It can now be seen that the decision in E.R.V.E. *C.* Air France combined two heads of delictual civil liability, that imposed on aircraft operators for loss

24. Cour de cassation 2e Ch. civ., 17 déc. 1974, D. 1975.463 (T.W.A. *C.* Commune de Villeneuve-le-Roi).
25. D. 1965.226; *Rev. trim. dr. civ.* 1966, p. 813, obs. de Durry.
26. D. 1965.229; *Encyclopédie Dalloz, Droit Civil I,* Paris, A. Pirovano, "Abus de droit", 1970, p. 5, no. 63.
27. Pirovano, op. cit., p. 5, nos. 53-61.
28. See, for example, Cour de cassation, Ch. civ., 21 juillet 1953, D. 1953-.573.
29. Cour de cassation, 2e Ch. civ., 22 oct. 1965, D. 1965.344, note Raymond; D. 1965.230; Cour de cassation, 1e Ch. civ., 20 fév. 1968, D. 1968.350.

or damage caused to members of the public on the ground and liability for excessive neighbourhood disturbances. First the court held Air France liable *ipso jure* under article 36 of the Code of Civil Aviation; then it used the principle of liability for excessive neighbourhood disturbances to determine whether in fact there was damage, the airline to pay compensation only if and to the extent that the noise made by its Caravelles exceeded the normal noise level in the neighbourhood.

The judges' systematic application of article 36 of the Code of Civil Aviation to include damage caused by aircraft noise has been almost universally approved by commentators.[30] More controversial was the use of the principle of neighbourhood disturbances in determining whether and to what extent damages were payable. On the one hand it has been hailed as a "judicious application" of the principle which would preclude vexatious claims and which was in line with several doctrinal writers in whose opinion the effect of airport noise on nearby inhabitants was a problem in the regulation of neighbourhood relations.[31] On the other hand, there are those who maintain that since article 36 itself speaks of no minimum, all damage however minimal should be compensated. To these writers, the introduction of the concept of neighbourhood disturbances unjustifiably limited the amount of compensation to which the plaintiffs were entitled.[32] Indeed, one commentator went as far as suggesting that the unwarranted use of this rule was indicative of the peculiar insensitivity of Mediterranean judges to noise, accustomed as they were to the racket created by summer vacationists for several months each year![33]

Equally contentious was the Court of Appeal's definition of what would amount to fault on the part of the plaintiffs, justifying a reduction in the indemnity payable to them. There appears to be some confusion among commentators as to whether this fault relates to article 36 of the Code of Civil Aviation or to the principle of neighbourhood disturbances. Thus some writers have interpreted the Court of Appeal as saying that since the airport had been functioning at that site for many years, unless there was evidence to the contrary, by building near the airport the plaintiffs must be taken to have accepted the risk of having to suffer the foreseeable inconveniences.[34] They see this as a return to the notion of "pre-occupation" which the Court of Cassation has rejected consistently in recent years. It can also be seen that the plaintiff's unsuccessful appeal to the Court of Cassation was based on this contention.

Other writers point out that traditionally the only fault justifying a diminution in damages under article 36 was a fault committed in connection with the actual physical movements of the aircraft,[35] which was clearly not the case here.

With respect, it is submitted that neither criticism is tenable. While the court used the theory of neighbourhood disturbances to determine what level of damages was payable, it does not necessarily follow that the plaintiff's fault should also be defined in that context. In fact the theory was not mentioned at all in the

30. E.g. Derrida, Durry, and other commentators mentioned in D. 1975.442, note Larroumet.
31. Derrida, D. 1965.229.
32. De Juglart et du Pontavice, J.C.P. 1968.II.15595.
33. *Rev. trim. dr. com.*, 1968, p. 444, obs. de Juglart et du Pontavice.
34. Pirovano, op. cit., p. 6, no. 65; *Rev. trim. dr. com.*, 1969, 301 no. 26, obs. de Juglart et du Pontavice.
35. Derrida, D. 1965.230: "une faute en relation causale avec les évolutions de l'aéronef"; Durry, op. cit., p. 813: "une faute commise dans le cadre de la navigation elle-même".

judgment of the Court of Appeal which spelt out in some detail what constituted fault, and the Court of Cassation only gave it a passing mention, placing the weight of its judgment on confirming the lower court's interpretation of article 36 and its definition of fault. At no time did either court relate fault to the notion of "pre-occupation" or to the principle of neighbourhood disturbances.

On the other hand, because fault was defined in the context of article 36, it does not mean that the court was unjustified in extending it beyond acts directly connected with aerial navigation. It may be true that when the provision was first enacted in 1924, the legislature had in mind damage caused by aircraft crashes. But that was because at the stage of technology then prevailing, air crashes and objects falling from aircraft comprised the major, if not the only, risks associated with aviation. It does not mean that these should remain the only risks against which those on the surface should be protected no matter what new risks have been created by advances in technology.

To the extent that the operator's liability is based on risk, the plaintiff's conduct must be evaluated in the light of his contribution to the risk from which he is seeking protection. If that risk is noise generated by aircraft movements on an airport, then surely he must be considered to have contributed to it — that is, committed a fault or an imprudence within the meaning of articles 1382 and 1383 of the Civil Code — by building near the airport without taking precautions against the foreseeable consequences.

Perhaps the most penetrating critcism of the judgment was made in a note to the recent case when the Commune of Villeneuve-le-Roi near Paris, in much the same circumstance and with much the same result, took Air France, Pan American Airways and T.W.A. to court for jet noise at Orly Airport.[36] The learned writer of the note voiced his disapproval of judicial policy which, in the fight against environmental pollution in all its forms, has turned the airlines into scapegoats for the problem of airport jet noise on the pretext that they profit from their business, despite the fact that many of them are heavily subsidised by their governments. He considered that issues concerning aircraft noise should not be brought within the ambit of article 36 at all, since the provision covers risks associated with flying, and noise, being a normal and known effect of aerial navigation and therefore not a risk, should more properly be dealt with under the principle of liability for excessive neighbourhood disturbances. There is also merit in the view that since aircraft are required by law only to land on and take off from aerodromes which are established in accordance with regulations, the real culprit was the airport authority who brought trouble to the neighbourhood by siting the airport there. According to this commentator, aircraft operators have been wrongly penalised because the search for the real cause of disturbance has been conducted at too superficial a level.

With the greatest respect to this commentator's perspicacity, this was precisely the argument put forward by Air France in the court of first instance when it joined the Chamber of Commerce, licensed operator of the airport, as third party to the action. This was also the basis for the *déclinatoire de compétence* lodged by the Prefect of Alpes-Maritimes claiming administrative jurisdiction over the case.[37] It would seem unlikely that the point was overlooked; it seems more likely that it was deliberately avoided. The whole decision must be seen in the

36. D. 1975.441 note Larroumet.

37. Ante, p. 167.

light of what it was that the courts were being asked to do. They were put in the position of having to make priority choices which belonged in the political rather than the judicial arena. All the courts could do was to mount a rearguard holding action pending resolution by the legislature of what is in essence a conflict of fundamental values. As such their tactics were most successful. While seeming to make far-reaching pronouncements of law, they in fact merely held the status quo.

Perhaps the point can be made more clearly by asking the question: What would have happened if the court had decided differently? If it had acquitted Air France, future plaintiffs would sue the airport. If they sued the airport the case would be decided by reference to the theory of excessive neighbourhood disturbances since article 36 only governs the liability of aircraft operators. In an action for excessive neighbourhood disturbances, the notion of "pre-occupation" cannot be used to reduce damages. The airport authority will have to pay the full amount of losses suffered by the plaintiffs. Since most airports in France are managed by public bodies, this could be ruinous for the state coffers, particularly in view of the fact that administrative liability for the compensation of damage caused by the establishment of public works seems to be as "generous" as civil liability for excessive neighbourhood disturbances.[38]

Instead, the ruling that damage caused by aircraft noise at airports was governed by article 36 diverted court actions away from airport authorities. Although Air France's option to pursue the Chamber of Commerce in the administrative courts was kept open at all stages of the case, it appears that its chances of success would have been small in an action against the management of a public utility of which it was itself a user.[39] At the same time, aircraft operators can be protected from crippling compensation payments by a judicious definition of fault which, without violating legal principles, results in considerable reduction in damages. Indeed, the Court of Appeal was able to reassure Air France on this score even before the panel of experts returned with their findings![40]

There remains the problem posed by those who built or bought their homes in the neighbourhood prior to the establishment of the airport. As has been pointed out[41] the corollary of defining fault as failure to take precautions against foreseeable damage is that those who could not possibly have foreseen the likelihood of such damage must be fully compensated. The courts seem to have found a way round this by ruling in the Villeneuve-le-Roi case that those who live in cities and are by this very fact subjected to various inconveniences which they must endure, cannot be more exacting towards an airline than they are toward a user of the public highway.[42] It all depends on who is considered to be "a user" of course, and how close you are to the highway, but if damage from aircraft noise is to be measured by the number of decibels above those generated by some of the monstrous transport lorries that ply the roads in France, the plaintiff may not be greatly consoled by his compensation.

38. D. 1975.445.
39. D. 1965.224; D. 1975.445.
40. D. 1966.283.
41. Derrida, D. 1966.284.
42. ". . . attendu que l'arrêt énonce à bon droit que Duchemin [the plaintiff], qui vit en ville, est soumis par ce seul fait à divers inconvéniences qu'il lui faut subir, et ne saurait se montrer plus exigeant à l'égard d'une compagnie aérienne qu'il ne l'est à l'égard d'un usager de la voie publique . . . ." — D. 1975.442.

II. REMEDIES UNDER NEW ZEALAND LAW

An attempt will here be made to evaluate the chances of success under New Zealand law of someone in the position of the principal plaintiff in E.R.V.E. *C.* Air France. The adequacy of the Common Law remedies for loss or damage caused by aircraft noise will be examined briefly.[43] Then the extent to which these remedies may have been abrogated by statute will be discussed.

A. Trespass

Quite apart from the noise it makes, does the mere entry of an aircraft into the airspace above privately owned land give rise to an action in trespass? It has been often said that whoever owns the soil owns all that lies above it: *cujus est solum, ejus est usque ad coelum.* There is, however, no general agreement on the exact ambit of this maxim. McNair's review of cases and textbooks[44] shows that some judges have regarded it as nothing less than a rule of law, while to others it is a mere presumption. Writers have generally taken a cautious approach. Even those who considered that an invasion of airspace constituted trespass limited their observations to that part of the airspace which was within the occupier's ordinary use or effective control. Until very recently, the cases in which the maxim has been invoked have all dealt with the competing rights of adjacent surface occupiers over such matters as overhanging branches, structural projections, trespassing animals, shooting across the land of another, and telephone or telegraph wires.[45] As Fleming observed,[46] these cases "established no wider proposition than that the air above the surface is subject to dominion in so far as the use of the space is necessary for the proper enjoyment of the surface."

The recent case of *Bernstein* v. *Skyviews & General Ltd.*[47] would appear to support this view of the law. In what seems to be the only English decision in which the maxim was considered in the context of overflight by an aircraft, the owner of a country house brought an action against a company which was in the business of taking aerial photographs of property and offering them for sale to the owners, alleging that in the course of photographing his house without permission the company's helicopter had trespassed in the airspace above his property and invaded his right to privacy. Griffiths J. held that although it was well established that an owner had certain rights in the airspace above his land, there was no support in authority for the view that these extended to an unlimited height. The learned judge saw the problem as one of balancing the owner's rights against those of the general public to take advantage of all that science offered in the use of airspace, and concluded that "the balance was best struck by restricting the owner's rights . . . to such height as was necessary for the ordinary use and

43. For a discussion of Common Law remedies for noise, and New Zealand statutes governing noise generally, see *Noise*, Board of Health Report Series No. 21 (Wellington, 1976); Commission for the Environment *A Guide to Environmental Law in New Zealand* (Wellington, 1976); and G. Curry, "Legal Controls on Noise" [1976] N.Z.L.J. 517.
44. McNair *The Law of the Air* (3rd ed., London, 1964) 31-43.
45. For a detailed discussion of the case law, see J. E. Richardson, "Private property rights in the airspace at common law" (1953) 31 Can. B. Rev. 116.
46. Fleming *Law of Torts* (4th ed., Sydney, 1971) 43.
47. [1977] 3 W.L.R. 136.

enjoyment of his land and structures upon it, and declaring that above that height he had no greater rights in the airspace than any other member of the public."[48] Applying the test to the case before him, Griffiths J. held that no trespass had occurred.

It is submitted that any other view of the law could involve the courts in the impossible task of trying to determine whether there has been an invasion of a particular column of airspace several thousand feet above the ground. This is not to say that an action in trespass may never be available but it would seem that actual overflight must have occurred and at a height which adversely affects the use and enjoyment of the surface.[49] This effectively removes the traditional advantage of a trespass action, which is that no damage need be proved.

Two other factors suggest that a trespass action would not provide adequate remedy for those seeking relief from airport noise. First, it is the people closest to the airport rather than necessarily those directly under the flight paths who suffer the worst effects. Second, the noise may reach an intolerable level well before the criteria for making out a trespass case can be satisfied.

B. Negligence

To succeed in negligence, a plaintiff must establish that the defendant owes him a duty to take reasonable care and that this duty has been breached, causing him damage as a result. As McNair points out,[50] there seems no good reason why an aviator should not owe the same duty of care which is owed by car drivers or maritime navigators to those who would foreseeably suffer damage as a result of their carelessness.

In the context of airport noise, however, it is submitted that there are obstacles to establishing a breach of duty. Although civil aviation legislation[51] stipulates the conditions under which aircraft noise may be made on airports, it does not set any upper limits beyond which noise is prohibited. It thus seems feasible for an aircraft owner or operator to argue first, that he owes no duty to refrain from making noise which is expressly allowed by statute; and second, that since the legislation sets no limit to the amount of noise which may be made, what is reasonable must depend on what is possible, so that he cannot be held to owe a standard of care which cannot be attained in the existing state of technology.

48. This is in line with the Canadian case of *Lacroix* v. *R.* [1954] 4 D.L.R. 470, although Fournier J. (at 476) based his decision on a slightly different concept: "By putting up buildings or other constructions, [the owner of land] does not take possession of the air but unites or incorporates something to the surface of his land . . . ." Later cases have accepted this view of the law: *Shephard Jr.* v. *R.* [1964] Ex. C.R. 274; *Harcourt* v. *Minister of Transport* [1973] F.C. 1181.

49. This was essentially the test applied by the U.S. Supreme Court in *United States* v. *Causby,* 328 U.S. 256 (1946). The court rejected the claim that a landowner owns the column of airspace above his land but held that overflight by government aircraft so low and frequent as to make the land completely unusable amounted to an unconstitutional "taking" of property within the meaning of the Fifth Amendment. Subsequent decisions confirmed that actual overflight is necessary, as also is a reduction in property value: *Griggs* v. *Allegheny County* 369 U.S. 84. (1962); *Batten* v. *United States* 306 F.2d 580 (10th Cir. 1962), 371 U.I. 955 (1963). See Vincent J. Rossi, Jr., "Inverse condemnation and nuisance: alternative remedies for airport noise damage" (1973) 24 Syracuse L. Rev. 793.

50. Op. cit., 72.

51. Regulation 190A, Civil Aviation Regulations 1953.

Unless a pilot fails to follow flight regulations, therefore — and it would be extremely difficult for a surface occupier to prove all but the most glaring contraventions — it is difficult to see how a negligence action can succeed. What is more, it is unlikely that these obvious breaches will occur so persistently as to enable a land owner to claim that they have caused his property to decrease in value.

It is by no means certain in any case that such devaluation will be recoverable. Economic loss not immediately resulting from physical damage to person or property has generally not been recoverable in negligence actions in England. For example, in *Spartan Steel & Alloys Ltd.* v. *Martin & Co. (Contractors) Ltd.*,[52] while the plaintiff was compensated for damage to his machinery caused by the defendant's negligence and for the value of the metal melt in the machine when the breakdown occurred, loss of the profit he would have made from subsequent melts had the machinery not been damaged was considered too remote. There is some indication that New Zealand courts may take a broader view. In *Bowen* v. *Paramount Builders*[53] the plaintiff claimed a sum representing the depreciation in the market value of the property which would not have occurred had there been no subsidence causing structural damage. The Court of Appeal awarded the sum in addition to the cost of repairs and alterations. Richmond P. held that although in one sense it could be described as economic loss, it was "economic loss directly and immediately connected with the structural damage to the building and as such . . . properly recoverable."[54] However, it is submitted that this is still some distance away from allowing a claim for property devaluation in a negligence action where there has been no physical damage at all.

C. Nuisance

In many respects nuisance would seem to be the most effective action against airport noise.[55] First, it is well established that excessive noise constitutes a nuisance.[56] Secondly, once there is damage, the plaintiff does not have to prove that it was caused by the defendant's fault or negligence.[57] Thirdly, it is no defence that the plaintiff came to the nuisance knowingly.[58] Fourthly, the remedy available is the most appropriate. The courts can in their discretion grant an injunction restraining the continuance of the act or omission causing the nuisance and will generally do so unless this would be unjust or oppressive to the defendant and the plaintiff can be adequately compensated by a small money payment.[59] Fifthly, there is some indication that property devaluation caused by a nuisance is recoverable in damages,[60] although a New Zealand plaintiff may have difficulty proving property devaluation caused by airport noise in the light of two studies undertaken by the Valuation Department both of which concluded

52. [1973] Q.B. 27. 53. [1977] 1 N.Z.L.R. 394. 54. Ibid., 411.
55. For a discussion of noise generally as a nuisance ,see C. S. Kerse *The law relating to noise* (London, 1975) Ch. 2.
56. The leading New Zealand case is *Bloodworth* v. *Cormack* [1949] N.Z.L.R. 1058.
57. *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, 903-904.
58. *Morgan* v. *Khyatt* [1962] N.Z.L.R. 791 (C.A.).
59. *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 322-323 per A. L. Smith, L.J.
60. *Bloodworth* v. *Cormack,* op. cit., 1072; and Kerse, op. cit., 18.

that the introduction of jet aircraft into Wellington airport has not had any "permanent detrimental effect on the prices of houses nearby".[61]

Three courses of action are open to the land owner or occupier disturbed by excessive airport noise. He can sue in private nuisance claiming that in the use of its land the airport authority is depriving him of the use and enjoyment of his land. He should succeed if he can establish serious interference with his comfort according to notions prevalent among ordinary people, and that the interference is unreasonable having regard to the particular locality in which it occurs.[62] Alternatively he can bring an action in public nuisance if he can prove that he suffered special damage over and above that sustained by the public at large. This would normally be difficult to establish for aircraft noise coming from a neighbouring airport.

The third course of action open to him is to seek a fiat from the Attorney-General enabling a relator action to be commenced against the airport authority. In view of numerous overseas studies on the harmful effect of noise on human health, there should in theory be little difficulty in convincing a court that excessive aircraft noise so interferes with the health, convenience and comfort of all persons who come within the sphere of its operation as to constitute a public nuisance.[63]

Nevertheless, a nuisance action, private or public, may fail for two reasons. First, the airport authority may succeed in claiming that since no negligence is involved, "the statutory authority conferred upon a local body to construct and maintain [public] works necessarily . . . includes authority for the creation and existence of . . . necessary nuisances."[64] Secondly, although the social utility of the activity complained of is no defence it is a factor to be taken into account. The Court of Appeal in *Attorney-General* v. *Abraham & Williams Ltd.* was unanimous in holding that an injunction to close certain stockyards declared to be a public nuisance because of smell, flies and noise should not be refused on the ground that an alternative site could not be found and that closing the yard would impose hardship on the farming community and seriously impair the efficiency of the city abbatoirs. Kennedy J. said,[65] "The inconvenience and hardship caused to a defendant if a nuisance is restrained is no ground for permitting its continuance . . . . Neither has the circumstance that the wrongdoer is in some sense a public benefactor . . . ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed." Notwithstanding such strong words, it would be idle to insist that the vastly greater cost in time, effort and money of moving an airport compared to that involved in shifting a stockyard would make no difference in a process in which "the court is in effect determining the relative value of different land uses."[66]

It is submitted that in any case a court is unlikely to grant an injunction in

61. Research Papers 67-1, 1967, and 71-3, 1971, Valuation Department, Wellington. But cf. surveys of depreciation of house values around airports in the United Kingdom and Holland in Organisation for Economic Co-operation and Development *Airports and the Environment* (Paris, 1975) 264-269.
62. *Bloodworth* v. *Cormack,* op. cit.
63. *Attorney-General* v. *Abraham & Williams Ltd.* [1949] N.Z.L.R. 461, 478 and 481.
64. *Irvine* v. *Dunedin City Council* [1939] N.Z.L.R. 741, 755 per Myers, C.J.
65. *Attorney-General* v. *Abraham & Williams Ltd.,* op. cit., 479.
66. Kerse, op. cit., 25, n. 57.

wider terms than the night curfew which already operates in many airports throughout the world, including Wellington.[67]

D. The rule in Rylands v. *Fletcher*

Under this rule a person who for his own purposes and for a "non-natural" use introduces onto his land anything which is likely to do mischief if it escapes is liable without proof of negligence for the consequences of its escape. It does not seem that the rule has ever been applied to noise although there is theoretically no reason against such an application. One major obstacle is the need for the plaintiff to prove that the defendant was using his land in a "non-natural" way. It would certainly be very difficult to establish that operating an airport is a "non-natural" use of land in this day and age in view of Lord Porter's comment in *Read* v. *Lyons & Co. Ltd.*[68] that "all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as dangerous or non-natural may vary according to those circumstances." Further, it was held by the Privy Council in *Rickards* v. *Lothian*[69] that "such a use as is proper for the general benefit of the community" would not bring the principle into play.

As in a nuisance action, the probabilities are that an airport authority will succeed in making out the defence of statutory authority.

E. Civil aviation legislation

In New Zealand the availability of redress against aircraft noise is governed by section 23 of the Civil Aviation Act 1964.[70] Subsection (1) of that section provides for regulations to be made (a) governing the conditions under which noise or vibration may be made by aircraft on aerodromes, and (b) applying subsection (2) to aerodromes where the making of noise and vibration is regulated.

Subsection (2) precludes any nuisance action for noise and vibration caused by aircraft on any aerodrome covered by the regulations mentioned in subsection (1) so long as those regulations are complied with. Subsection (3) provides[71]

> "No action shall lie in respect of trespass, or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather, and all the circumstances of the case is reasonable, . . . so long as the provisions of this Act and of any regulations or Proclamations made thereunder are duly complied with; but where material damage or loss is caused by an aircraft in flight, taking off, landing, or alighting, . . . or by any article . . . falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of the damage or loss, without proof of negligence

67. Jet movements are normally prohibited between midnight and 6 a.m. at Wellington Airport. The curfew was imposed by the Director of Civil Aviation in Civil Aviation Safety Order No. 2 dated 20 October 1975 on the recommendation of the Wellington City Council Town Planning Committee after hearing submissions from interested organisations and individuals.
68. [1947] A.C. 156, 176.
69. [1913] A.C. 263, 280.
70. Taken from ss. 40 and 41 of the Civil Aviation Act 1949 (U.K.). Four Australian states have passed similar legislation: see J. E. Richardson, "Aviation Law in Australia" (1965) 1 Fed. L. Rev 242.
71. Note that the terms of article 36 of the French Code of Civil Aviation are almost identical to the second part of s. 23(3) . . . though the former is expressed with exemplary brevity.

or intention or other cause of action, as if the damage or loss had been caused by his fault, except where the damage or loss was caused by or contributed to by the fault of the person by whom the same was suffered.

There is very little case law on this legislation. The only English case on the section[72] held, obiter, that the immunity of overflight under section 23(3) extended to a helicopter hovering over private land, and the only two New Zealand cases were concerned with the scope of application of the words "article" and "landing".[73]

Four points should be noted about this legislation. First, under section 23(3) only those aircraft which maintain a reasonable height in all the circumstances of the case and comply with all civil aviation regulations are immune. It has been suggested[74] that since the statute exempts aircraft owners from a liability which would otherwise exist, the requirement of compliance should be strictly applied so that immunity is lost even where the breach has no causal connection with the trespass or nuisance complained of, as for example, the omission of a "No Smoking" notice in circumstances required by regulations. Even if the courts were to adopt this interpretation of the statute, only by a rare combination of fortuitous circumstances could a potential plaintiff on the ground hope to prove such a contravention.

Secondly, the aircraft owner is liable only for "material" damage or loss. The word has never been judicially interpreted in the context of section 23(3) but it has been suggested[75] that it should be given the wider meaning of loss measurable in money terms rather than restricted to physical damage. Against this it may be argued that although this would not be a case involving negligence, nevertheless the general principle should be followed of not allowing a claim for purely economic loss unaccompanied by any physical damage to person or property.

Thirdly, since section 23(3) specifies the remedy available — "damages shall be recoverable from the owner of the aircraft . . ." — there is at least an inference that other remedies, such as an injunction, are excluded.

Fourthly, under section 23(6) "fault" is defined as "negligence . . . or other act or omission which . . . would, apart from the Contributory Negligence Act 1947, give rise to the defence of contributory negligence." Contributory negligence has been defined as "failure by a person to use reasonable care for the safety of himself or his property so that he becomes 'an author of his own wrongs'."[76] This combination would in effect enable an airport authority to claim total or partial exoneration if a plaintiff came to the nuisance knowingly; a defence which would not be available in a nuisance action. It will be recalled that Air France's strict liability under article 36 of the French Code of Civil Aviation was considerably attenuated by a similar definition of fault.[77]

The sum of these considerations would suggest that the Civil Aviation Act 1964 affords little comfort to those suffering from the effects of noise from a

72. *Bernstein* v. *Skyviews & General Ltd.*, op. cit.
73. *Weedair (N.Z.) Ltd.* v. *Walker* [1959] N.Z.L.R. 777; [1961] N.Z.L.R. 153; and *Hennessey* v. *Airspread Ltd.* (1964) 11 M.C.D. 396.
74 McNair, op. cit., 111-112.
75. *2 Halsbury's Laws of England* (4th ed.) p. 683, para. 1419, n. 1.
76. *Helson* v. *McKenzies (Cuba Street) Ltd.* [1950] N.Z.L.R. 878, 920 per Gresson J.
77. Ante, pp. 170, 173.

neighbouring airport.[78] At the same time, the Act seems at first glance to abrogate the available Common Law remedies except for negligence, which, it has been suggested above, is by no means easy to establish in this context. There may, however, be loopholes in the legislation.

First, it has been suggested that since neither regulation 190A of the Civil Aviation Regulations 1953 setting out the conditions under which noise and vibration may be made on aerodromes nor any other regulations made pursuant to the Civil Aviation Act 1964 contain words specifically applying section 23(2) to aerodromes as required by subsection (1), subsection (2) is not operative to preclude nuisance actions against aircraft noise on airports.[79]

Secondly, it has been maintained that if the word "on" in section 23(1) is interpreted to mean "supported by or in contact with the surface", then a nuisance action may be taken against the noise and vibration an aircraft makes in landing and take-off operations after it loses contact with the ground.[80]

Thirdly, since subsection (3) precludes trespass and nuisance actions by reason only of flight over any property, it leaves open the question whether a nuisance action brought by a plaintiff whose property is not directly beneath the flight path is also precluded.[81] This line of inquiry, however, could lead to the absurd result that a plaintiff who lies directly beneath a flight path is denied a remedy which may be available to his nextdoor neighbour.

Fourthly, the words in subsection (3) "by reason only of the flight of an aircraft . . ." strictly speaking should not, it is submitted, preclude a nuisance action against the noise made by the aircraft whether or not it flies directly over a plaintiff's property.

The first point has not been taken up by other writers, who have assumed that regulation 190A has put section 23(2) into effect.[82]

Since regulation 190A allows noise and vibration to be made by aircraft at licensed aerodromes during take-off and landing, the last three arguments depend for their success on the acceptance of a prior contention that regulation 190A is ultra vires section 23(1) which only provides for the regulation of noise on aerodromes. This is not a case where the enabling statute empowers subordinate legislation to modify the application of the statute,[83] but neither is it one of those obvious cases where subordinate legislation is prima facie ultra vires because it is inconsistent with the substantive provisions of the enabling statute.[84]

As the New Zealand legislation is taken almost word for word from the

78. Cf. s. 22(1)(s) of the South Africa Aviation Act 1962 which empowers the Minister of Transport to make regulations relating to "the prevention of nuisances arising out of air navigation or aircraft factories, aerodromes or other aircraft establishments, including the prevention of nuisance due to noise or vibration originating from the operation of machinery in aircraft on or above aerodromes, whether by the installation in aircraft or on aerodromes of means for the prevention of such noise or vibration or otherwise." H. H. E. Schroder, "Noise Control Legislation" (1977) 10 C.I.L.S.A. 67, 77-78.
79. P. P. Heller [1968] N.Z.L.J. 371, 372-373.
80. McNair, op. cit. ,125; Shawcross and Beaumont *Air Law* (3rd ed., London, 1966) 658, n. 10.
81. Halsbury, op. cit., 681, para 1418, n. 3.
82. See Board of Health report, op. cit., 32-33; Commission for the Environment, op. cit., 27; Curry, op. cit., 525-526.
83. *36 Halsbury's Laws of England* (3rd ed.) 401, para. 606.
84. Ibid., 491-492, para 743.

United Kingdom legislation, it may be of assistance to look at the way the latter has been construed. Section 41(1) and (2) of the Civil Aviation Act 1949 (U.K.), like section 23(1) and (2), provides for the regulation of noise and vibration on aerodromes and precludes nuisance actions where such regulations apply. Both that section and regulation 12 of Air Navigation (General) Regulations 1974, the United Kingdom equivalent of regulation 190A, use the word "on" aerodromes. Under the Land Compensation Act 1973 (U.K.), land owners and occupiers have been given a right to compensation for depreciation by physical factors (including noise) caused by the use of public works (including airports).[85] Section 1(5) of that Act provides: "Physical factors caused by an aircraft arriving at or departing from an aerodrome shall be treated as caused by the use of the aerodrome whether or not the aircraft is within the boundaries of the aerodrome . . . ." Since the Act is intended to provide compensation only in cases where land owners or occupiers will not otherwise have a remedy, the implication is that the Civil Aviation Act 1949 precludes nuisance actions for noise and vibration caused by aircraft around as well as on aerodromes.

It is submitted that in view of this and of the important interests at stake in the smooth functioning of the aviation industry, the courts are likely to give the statute "such fair, large and liberation construction . . . as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning and spirit",[86] and to hold that regulation 190A is not ultra vires section 23 of the Civil Aviation Act 1964.

F. Summary

The likely effectiveness of the legal remedies discussed above in providing relief from airport noise may be summarised as:

1. The Civil Aviation Act 1964 provides compensation for "material" damage or loss. What is "material" will probably be a matter of policy (e.g. the floodgate argument);
2. The Act purports to preclude trespass and nuisance actions against the normal overflight of aircraft, and nuisance actions against aircraft noise and vibration at airports. The extent to which it does so depends on how strictly the statute is interpreted, but the courts are unlikely to allow a case through the possible loopholes;
3. A trespass action for invasion of airspace is unlikely to succeed in normal circumstances;
4. The Act does not preclude an action in negligence but this will usually be very difficult to prove. Whether property devaluation without any physical damage is recoverable in negligence is uncertain and would depend on policy considerations;
5. A nuisance action will probably be successfully defended by an airport authority on the ground of statutory authority. Considerations of social utility will also work in its favour;
6. An action under the rule in *Rylands* v. *Fletcher* will also probably fail because of the difficulty in maintaining that an airport is a "non-natural" use of land.

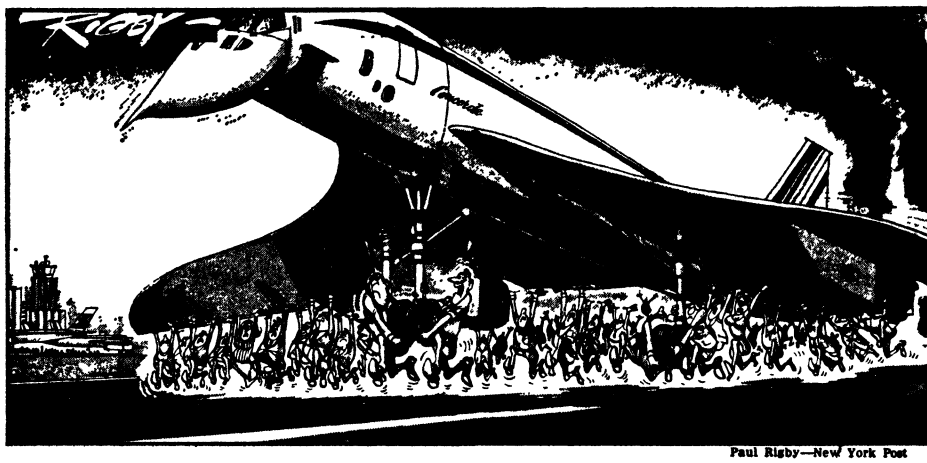
85. Section 1(2) and (3)(b) Land Compensation Act 1973 (U.K.).
86. Section 5(j) Acts Interpretation Act 1924.

III. CONCLUSION

Whether the case in New Zealand is argued at Common Law or as a statutory offence under the Civil Aviation Act 1964, it will involve questions of law which are by no means clear-cut. In such situations a court's interpretation of the law is likely to be influenced by implicit policy considerations. The court will be faced with making a decision which will have policy repercussions of several dimensions, ranging from competing economic interests at the national level to questions of fundamental choices of global concern. There will also be ramifications for New Zealand's international trade, diplomatic relations and regional co-operation. It is submitted that the decision will probably be guided by the narrower rather than the wider policy considerations, simply because the wider concerns will not be immediately at issue and will involve matters which ultimately are not amenable to judicial settlement.

The courts in E.R.V.E. *C.* Air France probably saw themselves as striking a balance between the social utility of commercial air travel and the need to meet the demand for housing in short supply. From an economic viewpoint their decision was clearly right. Since it is possible to build apartments elsewhere than next to an airport, their decision would not discourage housing development in general, whereas a contrary finding could have serious consequences for the development of air traffic and aircraft prototypes.

It should not surprise a New Zealander, therefore, if like his French cousin, he finds the courts reluctant to place his interests unequivocably above those of the aviation industry. Kiwi complacency notwithstanding, he may be driven to the sort of direct action envisaged in this illustration[87] commemorating the recent U.S. Federal court order allowing the Concorde landing rights on John F. Kennedy International Airport . . . .



'Damn the court, DON'T LET IT LAND!!'

87. Reproduced with kind permission from *Newsweek International* May 23 1977, 34.