

Aviation Liability & Air Navigation Services

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canso  The Global Voice of ATM



Good morning everyone... I am not a lawyer, but it is nice to see so many friends and former colleagues among you. I would like firstly to thank the McGill Institute of Air & Space Law for the invitation to speak at this Conference on International Aviation Liability & Insurance here in Montreal.

Ladies and gentlemen, allow me to quickly introduce CANSO – the Civil Air Navigation Services Organisation. A relatively young organisation, founded in 1997 and based in Amsterdam, we are the global Trade Association for air navigation services providers.



CANSO is an Association open to all aviation industry stakeholders with an interest in air traffic management and today our membership consists of 53 Full Members – the air navigation services providers - and 48 Associate Members who mostly consist of the manufacturers and suppliers to the industry.

Still a growing association, in 2008 CANSO Member ANSPs served 71% of world airspace, controlled 84% of world air traffic – illustrated in the lighter blue colours - and handled 44 million flights.



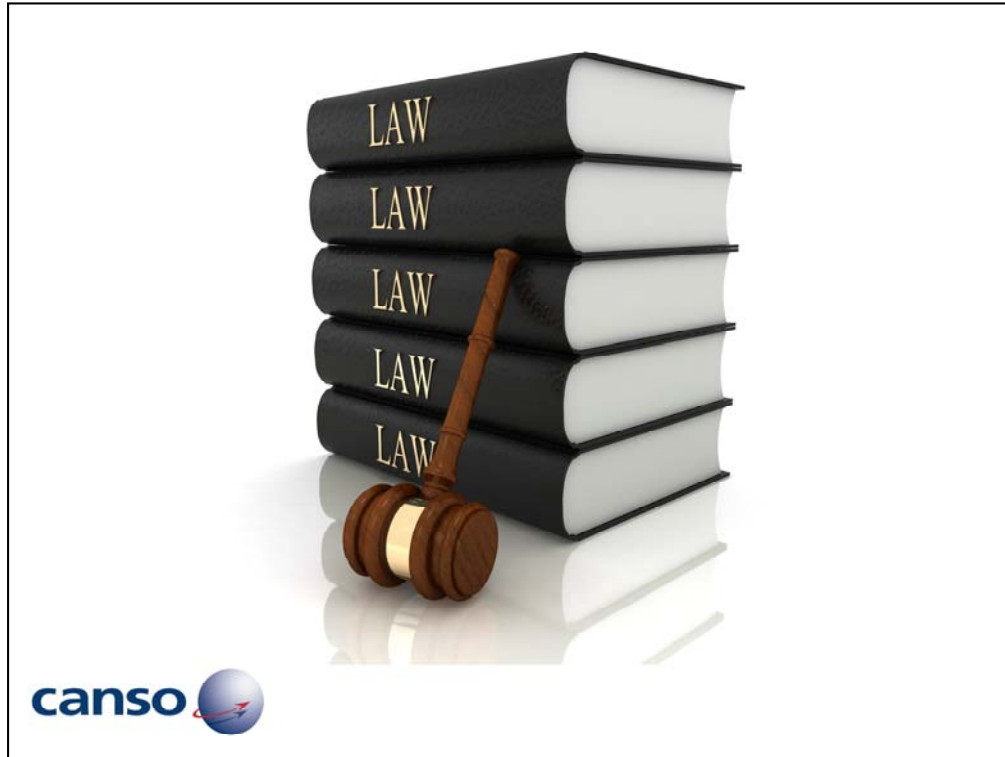
This panel is to review recent developments in aviation liability and I am to present the ANSP perspective. Well, I am happy to report that most countries have never experienced a case of ATC liability. ATC case law is very sparse, and in many countries the legal regime remains untested and a matter of speculation.

In the case of ATC, standard practice has been that the State will accept liability under the same conditions as a legal entity providing services to a third party. And, according to ICAO surveys, the number of States that claim sovereign immunity for ATC failure is extremely low. I personally don't know of any.

Except for the United States where the number of ATC claims is higher than anywhere else, due primarily to its litigious legal culture, the absolute number of claims against ATC is very low due to the fact that the number of accidents where ATC was found to be a proximate cause remains very low.

This speaks of the safety record of the air traffic management system, and I believe our Member ANSPs deserve credit for that.

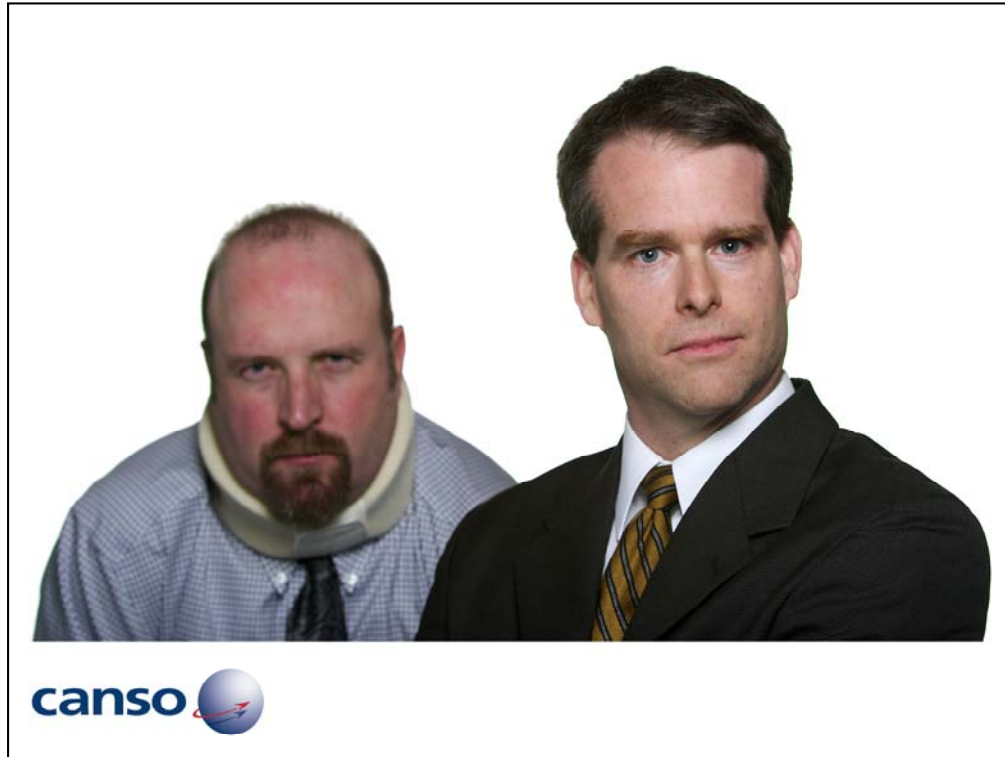
However, we have witnessed an increase in other kinds of claims against ATC that have nothing to do with an accident or a degradation of safety levels. These have more to do with the changes in societal behaviour. The result has been that, while the safety record of ANS is good and only improving, the number of liability cases is however increasing. This is due to a number of factors.



Aviation law was largely focused on the aircraft operators, and ANSPs were rarely involved in litigation. Since the 1980s, however, aircraft operators and their insurers have increasingly been trying to recover the compensation they have had to pay to claimants, from other parties who were potentially involved.

This has generated an increasing number of recourse actions against ANSPs. Further, the victims, or their representatives, often only get partial compensation from the airlines. So they too will seek compensation from other parties who may have contributed to the occurrence of an accident. This has resulted in direct actions against ANSPs, either as successive claims, or as parallel claims, to the primary claims filed against the aircraft operator.

The trend is both a multiplication of claims, and a broadening of the scope of these claims. ANSPs are gradually being implicated in claims which, because of the remoteness of any practical involvement of ANS, would never have been brought against them in the past.



Some of the claims are borderline what one would consider “nuisance claims”. It appears that if there is even a remote chance that an ANSP may have a hand in the sequence of events, the ANSP will be implicated and brought to court.

While most claims have so far almost exclusively been related to accidents, we can also expect to see claims related to other kinds of damages such as those arising as a result of air traffic delay or flight cancellation, even aircraft noise and emissions.



This brings me to my second point – the impact of ANS corporatisation. Separation of service provision from the State regulatory function has resulted in ANSPs being set up as autonomous or corporatised entities funded by user charges. For the most part, this institutional and organisational change has not impacted the legal regime ruling ANS liability. With the exception of the UK, Canada and a few other countries that have subrogated ANS liability to the corporatised or privatised entity, ANS liability remains to a large extent a State liability, regardless of the legal status of the ANSP.

Corporatisation has, however, dramatically changed the way ANS liability cases are managed. In the old days of State-provided ATC, the common practice was to bring all cases to court for a judicial decision. Court decisions were taken on the basis of the principles of aviation law.

One of the conditions for the separation of functions is that the corporatised ANSP must now carry sufficient insurance coverage to reduce the financial exposure of their State. The involvement of insurance has fundamentally changed case management practices.



The rule has become: out of court settlement.

Court proceedings are known for their high cost, their lengthy duration and their uncertain outcome. A negotiated out of court settlement avoids the pitfalls of a court process. Claims cases are treated more expeditiously and can lead to better results for all parties involved.

However, out of court settlement can also result in significant costs. As ANSPs become more like businesses, they will face the same kinds of predatory legal practices that other industry sectors face.

Here in Canada, the loss of MK Airlines B747 in Halifax 5 years ago and the Air France A340 loss at Pearson International in Toronto a year later offer good examples. In both cases it was patently clear that any objective review of the law would find that NAV CANADA had done nothing wrong. While the MK case has since been dropped, the insurer's legal bills approached USD 750,000.

In the case of Air France, where arbitration has failed to produce a reasonable settlement, legal fees are now projected to be many millions of dollars. As a result, the cost of aviation liability insurance NAV CANADA purchases increased last year by 25%. In addition to the fees paid by the insurers, this case has occupied a significant amount of management time and continues to colour the relationship with the insurance market.

Nevertheless, the trend toward out of court settlement is interesting...



The best proof of the preference being the adoption of the Montreal Convention, which protects passengers by introducing a two-tier liability system and by facilitating the swift recovery of proven damages without the need for lengthy litigations.

The recent adoption of the draft Convention on Compensation for Damage Caused by Aircraft to Third Parties - a.k.a. the “General Risks Convention” that replaces the Rome Convention of 1952 - introduces a similar two-tier liability regime with strict liability for the operator, up to a certain threshold, beyond which the operator may be liable for all damages unless it proves that such damages were not due to its negligence. The draft “Unlawful Interference Convention” creates a three-tier compensation scheme, and also introduces strict liability for the operator, but it is limited.

Is it time that we also consider a limited liability general risks regime for service providers that will offer a satisfactory framework for compensation to victims and avoid the need to go to court? What kind of loss claims should be considered?



At the same time, one also has to bear in mind the closed cost recovery regime that funds most ANSPs. In the case of airline claims, the cost of a claims settlement will need to be recovered through service charges, which introduces the “rob Peter to pay Paul” aspect – the cost of claims paid to one airline will be picked up by all the rest. The cost of claims paid are ultimately recycled through the rest of the airline community.



Finally, the scope of the legal activity in the field of air navigation services has, until recent years, focused on civil litigation following an aircraft accident. It is now expanding to the field of criminal responsibility, to the extent that it has become an acute concern to the CANSO Membership.

For a safety-critical activity such as ATM, safety occurrence reporting is of paramount importance to improving the level of safety. However, the use of safety information as evidence in judicial proceedings is counter-productive to the application of a “Just Culture” that is conducive to the reporting and analysis of aviation safety occurrences.

Thus far, the attention within ICAO has been on the protection of safety data from inappropriate use. However, this is not enough if we are to aspire to increasingly higher levels of safety. We want to encourage more reporting on safety incidents and systemic safety risks, not just protect what is being reported. This matter will be discussed in greater detail in a separate panel.

In conclusion, the number of ANS liability cases remains low, and there has not been a significant build-up of case law that would contribute to consolidating ANS liability law. However, developments are taking place as a result of society’s increasing desire to litigate for damage caused to victims and ANSPs are increasingly being implicated. ANS corporatisation has urged this trend on and one can only imagine the field day the legal profession will have when the FAA ATO ever becomes a separated service provider! I may therefore yet want to become a lawyer!



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Thank You