sending States, and the denial of immunity by receiving States. It provides that while jurisdiction is, subject to exceptions[34], concurrent, the service courts shall have the primary right to exercise jurisdiction in certain circumstances, and in all other circumstances the courts of the local State shall have the primary right, but that each State shall notify the other if it intends to take no action.[35]

Thus the Agreement recognises the concurrence of jurisdiction although its effect is to preclude the local courts from exercising jurisdiction in certain cases where action has been taken by a service court[36]. To this extent a degree of immunity is accorded to members of visiting forces which is not recognised as necessary under international law. This immunity is not, however, as extensive as that granted to the United States in the second World War, and on the other hand the agreement has the advantage of ensuring that in all cases some action will be taken against an offender either by the service courts or the local courts. Further, it has the advantage of being a uniform system applying among all the countries Parties to it[37], which has hitherto been lacking in a great number of conflicting local agreements[38].

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DAMAGE BY AIRCRAFT ACT 1952 (N.S.W.)

Though not new to aviation law in other countries[1], the provisions of this short Act[1a] are new in Australian legislation, both Commonwealth and State.

Section 2 provides:

> (1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an 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, or the ordinary incidents of such flight, so long as the provisions of the Air Navigation Regulations are duly complied with.
>
> (2) Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage shall be

[34] In cases where the offence is triable by the law of one State only that State has of necessity exclusive jurisdiction, Art. VII (2) (Visiting Forces Act, 1952, s. 3 (2)).

[35] Article VII (3).

[36] Article VII (3) and (8). The position under the Visiting Forces Act, 1952, ss. 3 and 4, is the same.

[37] The Visiting Forces Act, 1952, and the Canadian ratifying Act apply also to the other British Commonwealth countries. Similar Commonwealth legislation would be valid if limited to time of war, but in peace time it may not be valid under the Defence Power (Constitution s. 51 (vi)). But if a treaty were concluded with the State to whose forces it was desired to extend immunity, the legislation so far as it applied to those forces would probably be valid under the external affairs powers given by placitum xxix of s. 51 of the Constitution.

[38] The Anglo-Libyan Treaty (29 July 1953, *supra* n. 10) follows this Agreement to a certain extent in granting to the British forces immunity from the local criminal jurisdiction in similar circumstances to those which would, under the Agreement, give the service authorities the primary right to exercise jurisdiction.

[1] Civil Aviation Act 1949 (Eng.) (12, 13 & 14 Geo. 6 c. 67) s. 40 which repealed s. 9 of the Air Navigation Act 1920 (10 & 11 Geo. 5 c. 80) where these provisions were first enacted. There is similar legislation in New Zealand and the United States.

[1a] No. 46 of 1942.

recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect or default of the owner of the aircraft.

Section 2 also gives the owner of the aircraft a right to be indemnified by any person who is legally liable to pay damages in respect of any loss or damage caused by the aircraft, and also makes a hirer and not the owner liable where the aircraft causing the damage has been hired out for a period exceeding fourteen days.

Broadly, therefore, the Act attempts to settle the law in respect of trespass and nuisance committed by aircraft and imposes an absolute liability on an owner for damage caused by his aircraft. The owner, however, has in addition to a right of indemnity two defences, that is, contributory negligence on the part of the plaintiff and the hiring out of the aircraft for a period exceeding fourteen days.

Though the Act raises social and economic problems, for example, the wisdom of imposing absolute liability without a compulsory insurance scheme, and also constitutional points[2], the major problem of the Act is one of interpretation. The problem is whether s. 2 (1) and s. 2 (2) are independent so that they apply to two different types of situation or whether they are sometimes both applicable to the same situation.

It could be argued that the two provisions overlap in their application, and that in such cases a cause of action exists under s. 2 (2). This conclusion could be reached by arguing either that s. 2 (1) is to be read subject to s. 2 (2) or that s. 2 (1) is to be read as forbidding only actions framed in trespass and in nuisance, and that it leaves unaffected the action for breach of statutory duty imposed by s. 2 (2). The problem is rendered clearer by instancing the facts of an actual case. In the *Canadian Nova Mink Case*[3], the owner of a mink farm sued an airline company for damages. His complaint was that his female mink devoured their young as a result of fright induced by the noise of an aircraft which was flying overhead. The flight was both at a reasonable height and in compliance with the regulations. It has been suggested by implication that under the Act the plaintiff in the *Nova Mink Case*[4] would recover[5]; and this would be correct if, firstly, a noise nuisance causing actual loss falls within the scope of s. 2 (2), and, secondly, the operation of s. 2 (1) in such circumstances either is excluded or only prevents an action framed in trespass or nuisance. But it will be submitted, though not with complete assurance, that s. 2 (2) does not apply to actual loss caused by a noise nuisance, because it deals only with actual loss caused by contact, and that the plaintiff's remedy would be barred by the operation of s. 2 (1).

The interpretation that makes the two subsections independent would be based on the argument that s. 2 (1) relates to a flight without mishap to the aircraft (for a mishap could not be regarded as an ordinary incident of a flight), while in contrast s. 2 (2) relates to flights with mishaps to the aircraft.[6] Reference to the Parliamentary Debates (if that were permissible) would support the "mishap" theory, for the reason for imposing absolute liability was that the doctrine of *res ipsa loquitur* did not adequately surmount the difficulties of proving negligence when an accident occurred.[7] Consequently, damage caused by noise would be outside the scope of s. 2 (2) so that the plaintiff in the *Nova*

[2] S. 2 (4) binds the Crown.

[3] *Nova Mink Ltd.* v. *Trans-Canada Airlines* (1951) 2 D.L.R. 241.

[4] *Ibid.*

[5] J. Baalman in (1951-52) 25 *A.L.J.* 191, implies that because negligence is unnecessary, the plaintiff would recover under s. 2 (2). He referred, in fact, to the English Air Navigation Act 1920, (10 & 11 Geo. 5 c. 80) s. 9 now repealed.

[6] And to the case where an object has been deliberately released from the aircraft. See later.

[7] The situation envisaged was a major disaster causing considerable damage to members of the public. Reports of Parliamentary Debates (1952) vol. 20, 1046.

[8] *Nova Mink Ltd.* v. *Trans-Canada Airlines* (1951) 2 D.L.R. 241.

Mink Case[8] would again fail — noise being most certainly an ordinary incident of flight and not a mishap.

Secondly, the phraseology of the two subsections would support the interpretation that two different types of situation were envisaged. The immunity of s. 2 (1) is given in respect of "the *flight* of an aircraft" or "the ordinary incidents of such *flight*". The liability of s. 2 (2) is incurred for damage caused by "an *aircraft* while in flight, etc." It is submitted that the distinction is between a material object, i.e. an aircraft, in s. 2 (2), and an act abstracted from that material object, i.e. a flight, in s. 2 (1). Thus, it may be argued that damage by contact only was envisaged in s. 2 (2), for a material object of itself can cause no damage to another material object (including a person) except by contact.[9] In the *Nova Mink Case*[10], what caused the damage was not "an *aircraft* in flight", but the *noise created* by the *flight* of an aircraft. There is an obvious difference—though the end result may be the same—between damage caused by noise to young mink and damage caused by an aircraft crashing into the mink farm and thereby killing the young mink.

But if s. 2 (2) is limited to damage caused by contact, then damage through nervous shock would be excluded — whether the nervous shock be suffered by humans or female mink. Likewise damage caused by vibration would be excluded, such as the displacement of roof-tiles or the shattering of window panes caused by aircraft breaking the "sound barrier". Damage caused by insecticide sprayed by aircraft — a technique that is now used in Australia — presents rather a special problem. In America, livestock[11] and bees[12] have been known to have been poisoned by aerial spraying; and for our purposes the question is whether such damage falls within s. 2 (2). It certainly is damage by contact, the contact being between the insecticide and the person or thing damaged. It may be argued, however, that insecticide is not "an article", nor does it "fall" — it is deliberately released — so that damage caused by insecticide is not caused by "an article falling". It is submitted, however, that while there may be a distinction between damage caused by things falling of their own accord and things being thrown or released by a human agency, the latter category, that is, damage caused by things being thrown or released by a human agency, is included within damage caused by "a person in an aircraft". This is not inconsistent with the theory put forward above, that the damage must be caused by contact. Damage by insecticide released from an aircraft is within s. 2 (2) because this kind of damage 'by a person in an aircraft' still pertains to damage by contact, that is, between the thing thrown or released with the person or thing damaged.

Turning now to the exemption from liability under s. 2 (1), it is not clear from the Act what is meant by a flight or the ordinary incidents of such flight. Certainly the words "by reason only of a flight" immediately suggest that what is meant is the gradual ascent after the aircraft has lost contact with the ground to a height at which most of the journey is traversed and then the gradual descent until the time when contact again is made with the ground. If this was meant, then the insertion of some such word as "normal" or "ordinary" flight would have put the matter beyond doubt. Indeed, "only" does limit the protection to a "flight"; but it is submitted there are many kinds of flight, and that the protection of s. 2 (1) was intended only for a normal or ordinary flight, such as one usually (if not always) observes when attracted by the whirring sound of an aircraft overhead. However, as it stands, a "flight" can include a sharp nose-dive[13], or for that matter "looping the loop", or even the vertical movement or

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[9] Shawcross and Beaumont on *Air Law* (Supp. (1952) to 2 ed. 1950)) also suggest (para. 472) that s. 2 (2) refers to damage by contact. However, they come to this conclusion by interpreting "material" as meaning "caused by contact".

[10] *Nova Mink Ltd.* v. *Trans-Canada Airlines* (1951) 2 D.L.R. 241.

[11] *Hammond Ranch Corporation* v. *Dodson* (1947) U.S. Av. R. 393.

[12] *Lundberg* v. *Bolan* (1950) U.S. Av. R. 291.

[13] Shawcross and Beaumont on *Air Law* (para. 468), taking for granted that "flight" means "normal flight", do not even consider nose-diving and stunting as coming within the

hovering of an helicopter. The essence of a flight by an aircraft is the fact of being airborne.[14] Once this fact is achieved, an aircraft is making a flight irrespective of whether it is nose-diving, looping, or hovering — these being but ways of flying — and hence entitled to protection by s. 2 (1), provided the two prior conditions were fulfilled. Advertising in any form or crop-dusting would be excluded, for they are things essentially different from flying. Crop-dusting is possible without flying, but not so nose-diving.

An incident, in the sense used in s. 2 (1), is a thing which is apt to occur by virtue of the very nature of another thing; it is naturally attaching to or flowing from that other. Hence, it may be argued that all incidents are ordinary. But if any distinction is to be made between ordinary and extraordinary incidents, it would seem that ordinary incidents always occur whereas extraordinary incidents are always liable to occur, but in fact seldom occur. For example, noise is an ordinary incident of flight (and possibly the only ordinary incident), whereas an explosion in mid-air totally wrecking an aircraft would be an extraordinary incident, even of a test flight during which explosions often, but not always, occur. However, the use of "such" does introduce a relative element, indicating that the incident must be ordinary to the flight that actually causes it. Thus, helicopter flights would have different ordinary incidents to jet-flights (they make different types of noises, for example). Hence, an explosion, being the result of the breaking of the "sound barrier", would be an ordinary incident for such explosions always occur when the barrier is broken.

One further important problem remains, i.e., whether the rules of remoteness are applicable in s. 2 (2) either to upset the plaintiff's action or to limit the extent of his damages. The problem is whether the use of the word "caused" introduces the rules of remoteness. The answer seems to lie in the interpretation given to "wilful" in the phrase "as if the loss or damage had been caused by a *wilful* act". If an act is wilful not when it is done with carelessness as to the consequences that might ensue, but only when it is done in order that the actual consequences should ensue[15], then it is submitted that the rules of remoteness are not applicable. For then the damage is deemed to have been intended, and no damage which is the intended consequence of an act is too remote.[16]

In conclusion, though the Act brings air navigation legislation out of the "horse and buggy" stage[17], it is submitted that more attention could have been given to the drafting of the Act instead of closely following an English Act which has not had the advantage of any thorough judicial interpretation.[18] The major difficulty is that the relation between s. 2 (1) which grants immunity, and s. 2 (2) which imposes absolute liability, is obscure so that it is doubtful how the *Nova Mink Case*[19] would be decided in New South Wales. Secondly, it is not clear what freedom a pilot is given under s. 2 (1) by the words "flight or ordinary incidents of such flight". Thirdly, the extent of the absolute liability under s. 2 (2) is not beyond doubt.[20]

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range of "flight", but consider them under "the ordinary incidents of flight". This, it is submitted, is the wrong approach.

[14] Suppose that exemption from income-tax were given to citizens "by reason only of sleep" for the duration of eight hours each night. It is submitted that a violent snorer would be exempt. It would be wrong to say that a snorer was not sleeping. In fact, snoring would probably be the best evidence of sleeping, for you cannot snore before you are asleep. Likewise, you cannot nose-dive before you fly.

[15] Salmond, *Law of Torts* (10 ed. 1945) 30.

[16] *Per* Lord Lindley in *Quinn* v. *Leathem* (1901) A.C. 495, at 537: "The intention to injure the plaintiff negatives all excuses, and disposes of any question of remoteness of damage."

[17] J. Baalmān (1951-52) 25 *A.L.J.* 191.

[18] *Blankley* v. *Godley* (1952) 1 All E.R. 436 seems to be the only reported case referring to the English statute. The case of *Roedean School Ltd.* v. *The Cornwall Aviation Co.* is reported only in *The Times*, July 3, 1926.

[19] *Nova Mink Ltd.* v. *Trans-Canada Airlines* (1951) 2 D.L.R. 241.

[20] Shawcross and Beaumont, *op. cit.* (para. 475), discuss the defences available under s. 2 (2).