Subrogation in aviation matters in the aftermath of BGE 144 III 209

Aviation Workshop 2019

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Overview

- The Gini/Durlemann ruling at BGE 80 II 248
- Consequences of the Gini/Durlemann ruling
- The new practice of the Supreme Court in BGE 144 III 209
- Consequences in aviation

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Gini/Durlemann (BGE 80 II 248)

Peroni
Cottage owner

Contract for work and labour

Gini
Owner / employer

Fire insurance

Cover

Recourse

Employment contract

La Neuchâteloise
Fire insurer

Recourse

Durlemann
Employee of Gini

Subrogation under the ICA

Art. 72 of the Insurance Contract ACT («ICA»)

Right of recourse of the insurer

1 The claim for compensation arising out of tortious acts which the claimant is entitled to claim from third parties, is transferred to the insurer insofar as it indemnified its insured.

Gini/Durlemann BGE 80 II 248

Claims of Peroni

Peroni

Claim in tort

Claim under the contract for work and labour

Claim for indemnity

Durlemann

Gini

La Neuchâteloise

Legal basis

Art. 50 sections 1 und 2 of the Code of Obligations ("CO"):
Multiple liable parties / in tort

1 Where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party.

2 The court determines at its discretion whether and to what extent they have right of recourse against each other.

Art. 51 CO:
Multiple liable parties / on different legal grounds

1 Where two or more persons are liable for the same loss or damage on different legal grounds, whether under tort law, contract law or by statute, the provision governing recourse among persons who have jointly caused damage is applicable mutatis mutandis.

2 As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation.

Consequences of Art. 50 and 51 CO

A) If several persons are liable to the aggrieved party for the same damage based on different legal grounds, these persons shall be jointly and severally liable to the aggrieved party.

B) For the internal recourse amongst the liable parties, the damage shall then be compensated in the following order:

- primarily by the person who caused it by its own negligence (for juristic persons, companies, negligence of the upper senior management is relevant);
- secondly by the party liable in contract (without fault); and
- finally, by a person whose liability is based on causality only (i.e. strict liability without a contract and without negligence).

C) If one liable party makes an internal recourse claim against another liable party being on the same level, the court applies ist descretionary power.

Gini/Durlemann BGE 80 II 248

Claims of Peroni

Durlemann

Peroni

Claim in tort

Claim under the contract for work and labour

Gini

Claim for indemnity

La Neuchâteloise

In the present matter:
Top level Durlemann
2nd level La Neuchâteloise and Gini

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Consequences of Gini/Durlemann

- By exercising its discretion, the Federal Supreme Court ruled that a property insurer cannot take recourse against other contractually liable parties, if they or their auxiliaries caused the damage only through slight negligence.
- There is no solidarity in internal recourse proceedings, even if the property insurer takes recourse against parties liable in tort with negligence.
- The Gini/Durlemann jurisprudence has, in principle, been applied to all non-life insurers (excluding liability insurers).
- The liability insurer does not fall under this jurisdiction. When applying art. 51 CO, the liability insurer steps into the shoes of the insured person.

Consequences of Gini/Durlemann

- Consequences for strictly liable parties:
  - Recourses against strictly liable parties were not possible at all; art. 72 ICA was considered not to be applicable.
  - The doctrine and the courts intepreted art. 72 ICA to mean the following:

    "The claim for compensation arising out of tortious acts which the claimant is entitled to claim from **negligent** third parties, is transferred to the insurer insofar as he indemnified its insured."
- Long-standing practice
- In BGE 137 III 352 of 7 June 2011 the Supreme Court still held that an insurer is not entitled to take recourse against a strictly liable party.

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The new BGE 144 III 209

- Facts:
  - While taking the bus, Passenger X (elderly lady) falls because the driver was making a rough manoeuvre. The bus is operated by Bus Company C.
  - X has supplemental accident insurance with A Ltd governed by the Insurance Contract Act («ICA»).
  - Bus Company C has motor liability insurance with Mutual B.
  - Fault of bus driver is not established.
  - A Ltd takes recourse against motor liability insurer B Mutual pursuant to art. 58 section 1 in connection with art. 65 section 1 Road Traffic Act (RTA; ie. Bus Company C is strictly liable without fault; right of direct action of Passenger X against Mutual B).

The new BGE 144 III 209

Facts

X
Passenger

Owner's
strict liability
(art. 58 RTA)

C
Bus company

Supplemental
accident insurance
under ICA

Indemnification

motor liability
insurance

A Ltd
Accident insurer

Recourse
(art. 65
section1
RTA)

B Mutual
Liability insurer

The new BGE 144 III 209

- The Supreme Court decided to significantly change the previous practice.
- It considered that any statutory liability (inclusive of strict liability) is covered by the notion of "obligation in tort" under art. 72 (1) ICA, even if there is no fault.
- Art. 51 (2) CO on the internal recourse among multiple liable parties would no longer apply to a recourse action of the insurer against the person causing the loss or damage and being liable under strict liability provisions.
- The Supreme Court recognised that an indemnity insurer is not liable but perfoms its contractual obligations and art. 51 CO does not fit.
- It also recognised that the social insurer should no longer have a wider right of recourse under art. 72 section 1 ATSG.

The new BGE 144 III 209

- In BGE 144 III 209 the Supreme Could only dealt with art. 72 ICA which applies to recourses against liable parties in tort.
- What happens to recourse claims against contractually liable parties?
- No Supreme Court Judgment on this issue yet, but judgment of the Commercial Court of Zurich in HG160139 of 2 October 2018 confirmed wider application also to contractual claims.
- The Gini/Durlemann ruling is no longer justified because:
  - Supreme Court held that the insurer was not liable but performed its contractual obligations under the insurance policy (similar to BGE 126 III 521 in connection with an employer paying for daily allowances under an employment contract).
  - As a consequence, the indemnity insurer falls outside the scope of art. 51 section 2 CO.
  - Since the Supreme Court allowed recourse against a strictly liable party (on 3rd level), there are no reasons not to allow recourse against a contractually liable party which stands on 2nd level.
  - See also Commercial Court of Zurich in HG160139 of 02.10.2018, consid. 2.4.2.2.

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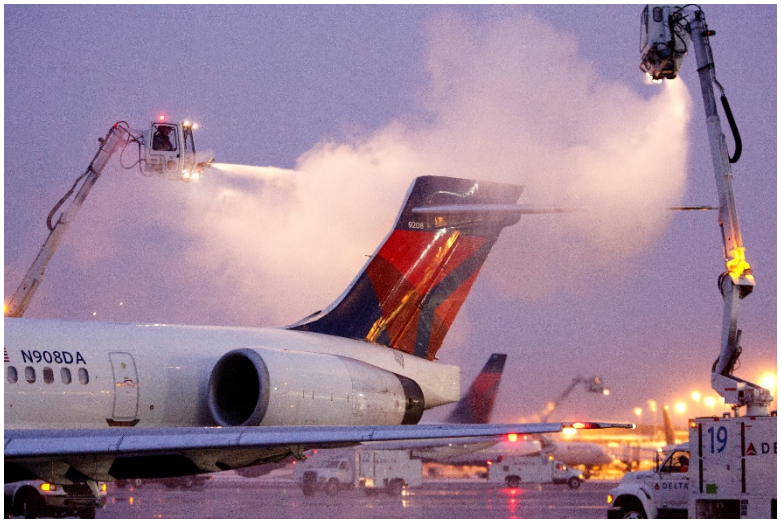
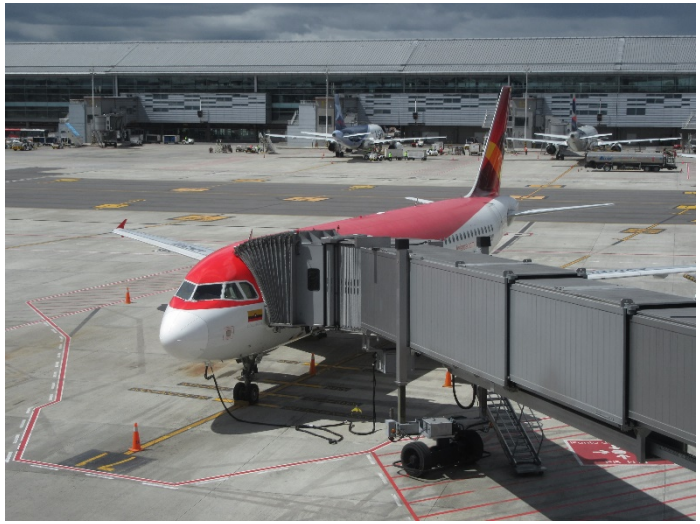
What are the consequences in aviation?

- The new practice applies to all losses (that have not been settled yet) irrespective of the date of loss (cf. Commercial Court Judgment in HG160139 of 02.10.2018, consid. 2.4.2.1).
- (Non-binding) recommendation of the Head of Claims Conference dated 28.05.2018
- Huge impact on recourse claims of property insurers (such as hull insurers).
- Before BGE 144 III 209:
  - A recourse against a contractually liable party required gross negligence
  - A recourse against a strictly liable party was not possible at all, if negligence could not be proven.
- After BGE 144 III 209 and HG160139:
  - the property insurer steps into the shoes of the insured:
  - A recourse against a contractually liable only requires what the contract or the contract law requires.
  - A recourse against a strictly liable party is possible without the need of proving negligence.

What are the consequences in aviation?

- Typical contractually liable parties in aviation
  - Third parties performing services on an aircraft (maintenance, baggage services, fueling, catering, moving of aircraft, de-icing etc.)
  - Third parties performing passenger services for the airlines (check-in, embarking, disembarking etc.).





What are the consequences in aviation?

- Mind the exclusion of liability clauses, e.g. Art. 8.5 of the SGHA Main Agreement:

  > "8.5 Notwithstanding Sub-Article 8.1(d), the **Handling Company shall indemnify** the Carrier against any physical loss of or **damage to the Carrier's Aircraft** caused by the Handling Company's negligent act or omission provided always that the Handling Company's **liability shall be limited** to any such loss of or damage to the Carrier's Aircraft **in an amount not exceeding the level of deductible under the Carrier's Hull All Risk Policy** which shall not, in any event, exceed USD 1,500,000 except that loss or damage in respect of any incident below USD 3,000 shall not be indemnified."

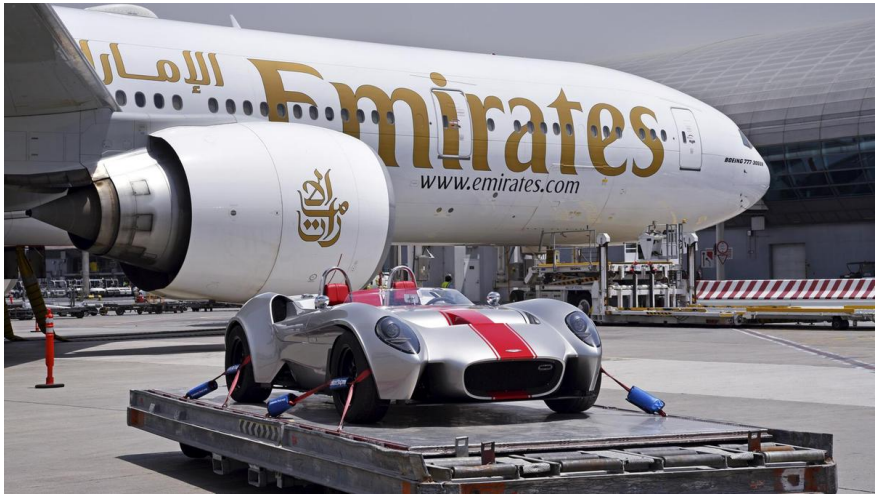
- Pursuant to Art. 8.5 the liability of the Handling Company is limited to direct damages to the aircraft up to deductible under the Carrier's hull insurance policy alone.
- For further damages the Carrier has to prove that the Handling Company caused the loss through willful misconduct or intent (pursuant to Art. 8.1).

What are the consequences in aviation?

- Typical strictly liable parties:
  - Liability of principal for its employees for tortious claims; important if subrogating insurer is unable to prove a contract (art. 55 CO)
  - Liability of aircraft holder (art. 64 of the Federal Aviation Act),
  - Damage to aircraft by third parties performing services on the aircraft, i.e. subcontractors (maintenance, fueling, catering, de-icing etc.)
  - Liability of building owner (art. 58 CO)

What are the consequences in aviation?

- Typical strictly liable parties:
  - Motor liability claims (art. 58 RTA) which also arise on the airfield



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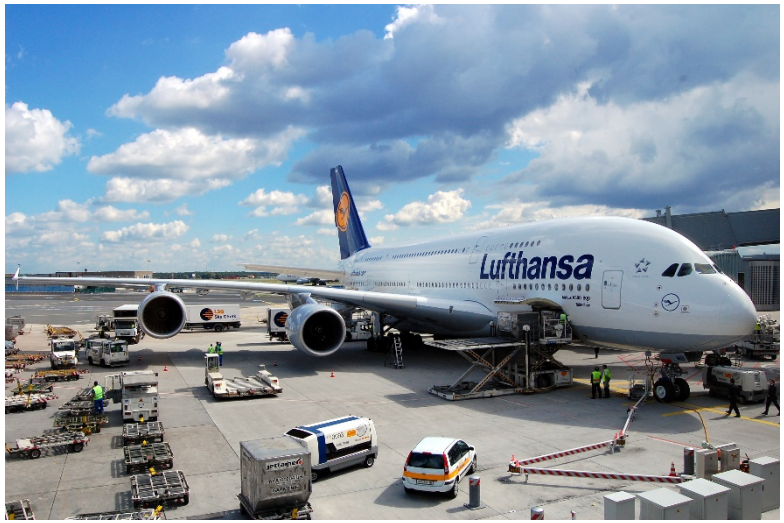

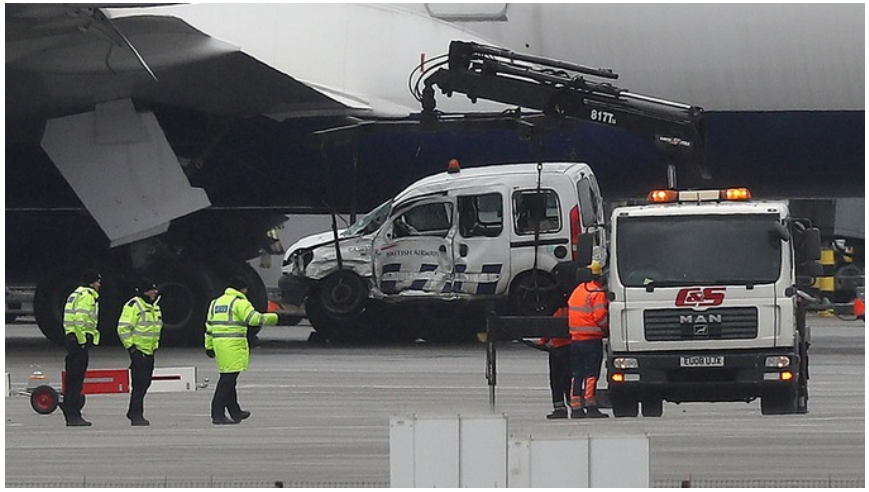

What are the consequences in aviation?

- Mind the subrogating liability insurer which still needs to comply with art. 51 CO:
  - The insured is one of the parties mentioned in art. 51 CO. The liability insurer steps into the shoes of the insured on the same level.
  - E.g. passenger got injured while embarking (crash with a car on the airfield).
  - Airline is contractually liable for the loss under art. 17 (1) MC.
  - Liability insurer of the airline indemnifies the injured.
  - Airline as contractually liable party stands on 2nd level and can only subrogate against the car owner and its liability insurer if it can prove negligence of the car driver.
  - If it cannot, car owner is strictly liable without fault and stands on 3rd level; in that case recourse would not be possible.

Thank you very much for your attention!

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