

Civil and Criminal Litigation: Improving Safety?



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Outline

- NTSB Basics
- Criminalization/Enforcement and Safety
- Civil Litigation and Safety



NTSB 101

- Independent federal agency, investigate transportation accidents, all modes
- Determine probable cause(s) and make recommendations to prevent recurrences
- Do not determine blame or liability (*and analysis/report is not admissible in court*)
- Independence
 - Political: Conclusions and recommendations based upon facts and evidence rather than politics
 - Functional: Impartial and unbiased because no “dog in the fight”



Purpose

- Single focus is *SAFETY*
- Primary product: Safety recommendations issued to any entity that has authority to address the problem
- Response to recommendations:
 - > 80% acceptable



Investigation Objectives

- Safety Investigation
 - Determine what caused the accident and how to prevent it from happening again
 - Wrongful intent very rare; almost always inadvertent error
 - If wrongful intent, may not be classified as “accident”
- Compliance Investigation – Administrative or Criminal Enforcement
 - Determine punishment for those who violated applicable laws and regulations
 - If criminal, generally requires wrongful intent



Criminalization

- Systems are getting more complex
- Most accidents involve good people trying to do the right thing under sometimes difficult circumstances
- Human error: Public outcry and political response to ***PUNISH!***
- Issue: Best way to stop error that is *inadvertent?*



Example: Concorde, 2000

– Chain of Events

- Takeoff
- Piece of metal on runway from previous (Continental Airlines) airplane
- Main gear tire shredded after hitting piece of metal
- Fragments from tire hit wing, punctured fuel tank
- Plane caught fire, crashed
- Crash killed all 109 in airplane, 4 on ground
- Involuntary manslaughter charges brought against Continental Airlines, two Continental mechanics



Outcome

- French appeals court cleared Continental Airlines of criminal charges
- Court also dropped charges against the two Continental mechanics



More Recent Example: GOL, 2007

– Chain of Events

- Embraer eastbound, FL 370, per international convention
- Assigned route turned westbound at navigation waypoint
- Go to even thousand (FL 380 or 360)?
- Pilots tried unsuccessfully to contact controllers, so remained at FL 370
- Transponder on “Standby” (for long time), hence
 - Airplane invisible to ATC
 - Airplane also invisible to TCAS in eastbound Boeing
- Airplanes collided, Boeing crashed, fatal to all 154 on board, Embraer landed at nearby airport



Outcome

- Two Embraer pilots and four air traffic controllers charged with “exposing an aircraft to danger”
- Embraer pilots sentenced to 4 years, 4 months in prison, commuted to community service to be served in the US
- One controller sentenced to a prison term of up to 3 years, 4 months, eligible to do community service in Brazil
- Theory: Pilot’s foot on footrest hit transponder “Standby” button, indication that transponder was off not obvious



U.S. Example: ValuJet, 1996

- Airplane crashed after being disabled by cargo compartment fire, killed 110 on board
- Expired oxygen generators were placed in cargo compartment in violation of FAA regulations forbidding transport of hazardous materials in cargo holds
- SabreTech employees indicated on the cargo manifest that the canisters were "empty" (instead of being expired oxygen generators)
- ValuJet employees thought they were empty oxygen canisters
- Federal and state criminal charges against SabreTech, vice president and two mechanics



Outcome

- Federal Court of Appeals reversed SabreTech guilty verdict in part
 - Federal law could not support conviction for mishandling hazardous materials
 - Government did not prove SabreTech intended to cause harm
- Conviction for improper training upheld
 - Eventual \$500,000 fine, three years' probation, no restitution
- State charges against SabreTech for 110 counts of manslaughter, third-degree murder:
 - Settled by plea of no contest to state charge of mishandling hazardous waste, donation of \$500,000 to an aviation safety group and another charity



Effect on NTSB Transparency

- TWA 800 crashed shortly after takeoff from JFK due to explosion of center-fuselage fuel tank, 1996
- Speculation re shoulder-fired missile
- FBI or NTSB in charge?
 - FBI in charge: No public disclosure of evidence
 - NTSB in charge: Daily public disclosure of evidence
- Difficult to determine validity of missile theory until airplane pieces recovered from ocean and assembled in hangar
- NTSB probable cause: Explosion, due to internal spark of unknown origin, of nearly empty center-fuselage fuel tank heated near flash point



Result: FBI/NTSB MOU

- Presumption: Accident caused by inadvertent error, no criminal or intentional wrongdoing
- NTSB will lead investigation
- If NTSB investigation uncovers criminal activity, NTSB will ask FBI to lead, NTSB will provide technical assistance as requested



Summary of Undesirable Results

– Actual or threatened criminalization:

- Discourages front-line employees from participating in proactive programs to collect and analyze safety data
- Hinders NTSB accident investigations, thereby undermining efforts to prevent recurrences
- Prevents transparency
- Reduces likelihood of identifying and addressing *system* issues that caused or contributed to accident
- Is often a lose-lose because all of the problems listed above occur despite the fact that the criminal proceedings often result in acquittal due to lack of requisite intent



Collateral Criminal Proceedings?

- Teterboro, NJ, 2005
 - Convicted of endangering the safety of an aircraft, defrauding the FAA, and filing false flight logs
- Weaverville, CA, 2008
 - Convicted of conspiracy to commit mail and wire fraud, making false statements in defrauding the United States Forest Service in procuring helicopter firefighting contracts
- Collateral proceedings are generally less harmful to safety improvement efforts



Conclusion, Criminal

- Few would argue against criminalization of intentional wrongdoing
- Overzealous criminalization, however, may adversely affect safety
- Needed: Model Policy, developed collaboratively – but not in the heat of battle – by all who have a “dog in the fight,” regarding how best to address important and sometimes competing interests



Civil Litigation

- Systems are getting more complex
- Most accidents result from several “links in the chain,” often involving interacting action or inaction by more than one person, product, or organization
- Victims are nonetheless entitled to just compensation for injuries and damage
- Issues
 - Compensation from whom?
 - How to ensure just compensation without interfering with safety improvement efforts?



Undesirable Results

– Possibility of civil litigation:

- Discourages proactive programs to collect and analyze safety data for proactive prevention, fear that data may become “ammunition” for litigation
- Undermines trust between the participants
- Discourages innovation and improvement

– Litigation:

- Results in large portion of total compensation not going to victims
- May significantly delay compensation to victims
- Focuses largely on “blame” and compensation rather than prevention



Suggested Alternative

- Victims Compensation Fund?
- No-fault recovery based largely upon formula?
- Contributions to Fund from all participants (compare to insurance?)
 - Airlines
 - Manufacturers
 - Labor Unions
 - Regulator
- International accidents? Worldwide Fund?



Intent to Harm?

- In aviation accidents, intentional action or inaction is common, but intent to harm is very rare
- Who decides whether there was intent to harm?
- If intent to harm:
 - Additional punitive assessment?
 - Refer for criminal prosecution?
 - Both?
- If additional punitive assessment:
 - To victims, as additional compensation? If so, from Fund, or directly from perpetrator(s), as “punishment”?
 - To Fund, from perpetrator(s), as “punishment”?



Conclusion, Civil

- Civil litigation has historically helped improve safety
- As systems become more complex and mishaps result from interactions between several persons, products, and organizations, query re continuing efficacy of civil litigation
 - “Punishes” rather than fixing
 - Fixing effect, if any, often limited and delayed
 - Delayed and reduced compensation to victims
 - Challenging to allocate between defendants



Conclusion (con't)

- No-fault compensation (example: workmen's compensation) may be more efficient way to compensate victims without undermining safety improvement efforts
- As with criminal, suggest Model Policy, developed collaboratively – but not in the heat of battle – by all who have a “dog in the fight,” regarding how best to address important and sometimes competing interests



Thank You

Questions?



National Transportation Safety Board