

industry



CRIMINALIZATION OF AVIATION ACCIDENTS

STORY BY LINDSEY MCFARREN

A CHILL ON JUST CULTURE

An aviation accident or incident involving your company is a traumatic experience. In addition to dealing with the immediate aftermath of an aviation-related crisis, could you be held criminally liable? How does the threat of criminalization fit with the aviation industry's ongoing efforts for a just culture and safety management?

Pilots, mechanics and managers of aviation organizations must be aware of risk of criminal charges for aviation accidents or incidents and the impact criminalization can have on safety programs that encourage self-reporting and just culture.

"When a state criminalizes aviation accidents and incidents, it puts a big chill on the aviation industry's efforts to share safety data and mitigate risks," said Kent Jackson, founding manager of JetLaw, a Washington, D.C.-based law firm. "Successful safety management relies on self-reporting with the expectation of a nonpunitive outcome. Criminalization delivers the opposite message."

Examples of criminal prosecution following aviation accidents

Although criminalization is more common internationally, it is not unheard of in the United States. The 1996 crash of ValuJet Flight 592 over the Everglades in Florida killed 110 passengers and crewmembers. SabreTech, which had provided ValuJet with cargo for transportation, and some of its employees were charged for conspiracy to falsify records, several hazmat violations, and placing a destructive device on an aircraft.

These charges resulted in 110 counts of third-degree murder and 110 counts of manslaughter. The criminal charges were later dropped in exchange for a \$500,000 donation to aviation safety causes.

The ValuJet case was important for two reasons. First, it established a framework for prosecuting aviation accidents in the U.S. Second, it demonstrated that not just the operator may be held liable for an aviation accident.

In 2008, a Wisconsin man was jailed for a 2004 aircraft accident resulting in the fatality of the sole passenger, becoming the first U.S. pilot operating in U.S. airspace to be found criminally liable and be sentenced to jail time. The pilot was conducting short flights in a Stearman at a charity event (although these flights were not officially connected to the event). The aircraft struck power lines and landed inverted in water. The pilot pled no contest to negligent operation of a motor vehicle and disorderly conduct. He served 30 days in jail, followed by house arrest, fines, court costs, and two years of probation from flying.

Internationally, criminalization of aviation accidents is somewhat more common.

In a high-profile case in Brazil in 2007, an Embraer business jet collided with a GOL Airlines Boeing, resulting in the fatalities of all aboard the GOL aircraft. The Embraer's pilots and four air traffic controllers were charged with "exposing an aircraft to danger." The pilots, who happen to be American, were sentenced to four years, four months in prison, but their terms were eventually commuted to community service to be served



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in the U.S. One controller also was sentenced to a prison term of three years, four months, but was eligible to do community service in Brazil.

In 2012, a Fokker 100 overshot a runway in France. The accident was determined to be caused by loss of control from ice contamination on the wings. The aircraft's landing gear hit a truck, killing the truck's driver. The pilot in command was charged with homicide and unintentional injuries and received a six-month suspended sentence. The airline was charged a €20,000 fine.

These are only a few examples of criminal prosecution related to aviation accidents. Dozens of accidents have resulted in criminal prosecution worldwide, including some cases where the criminal charges are incidental to the accident and not necessarily causal.

Collateral criminal proceedings

For example, two brothers and another company official were sentenced to jail time following the 2005 crash of a Challenger 600 at Teterboro Airport, convicted of endangering the safety of an aircraft, defrauding the Federal Aviation Administration, and filing false flight logs.

In 2015, an executive at a helicopter operation was sentenced to nearly 13 years in jail following a crash during a 2008 forest fire in California. The accident

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killed seven firefighters and two pilots. The executive was convicted of conspiracy to commit mail and wire fraud and of making false statements in defrauding the U.S. Forest Service in procuring helicopter firefighting contracts.

According to the National Transportation Safety Board, these events, which involved what the agency calls “collateral criminal proceedings,” and others like it generally have less impact on safety efforts, as most well-intentioned, rule-following aviation professionals would agree fraud and other intentional acts are indeed criminal and the criminal acts were not directly causal in the accidents.

Purpose of investigations

For the NTSB and most other safety boards around the world, the primary focus is safety. The purpose

of an investigation is to determine the cause and propose means for preventing future similar events, often in the form of recommendations to regulators or industry.

ICAO Annex 13 states, “The sole purpose of the investigation of an accident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.”

The NTSB will lead any aviation accident with a presumption the accident was caused by inadvertent error and was not a criminal or intentional act. If a criminal or intentional act is suspected, the Federal Bureau of Investigation will take over as the lead investigative agency.

In the U.S., when the FBI shows up to an accident investigation along with the NTSB, even with the NTSB as the lead and the FBI as a secondary agency, the perception among parties involved is often that the investigation’s goal changed from improving safety to gathering evidence for prosecution. FBI

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presence alters the dynamic of the investigation and cooperation from parties involved.

Further, a criminal investigation often requires a Miranda warning (“you have the right to remain silent”) for parties potentially subject to criminal charges.

“If parties to an aviation accident have the right to remain silent, it significantly impairs the FAA and NTSB’s ability to investigate,” Jackson said. “Even if an individual is confident they committed no crime or even inadvertent error, the discussion will not be as open and transparent after a Miranda warning.”

Leaders of prominent aviation associations and organizations were outspoken following criminal charges against the pilots in the Brazil case, arguing criminalization of the investigation into the tragic accident could have a negative impact on aviation safety worldwide and the focus should instead be on the root cause of the accident and mitigation of future risks.

Even prior to the 2007 accident in Brazil, the Flight Safety Foundation and other groups, including representatives from air traffic control, maintenance, and safety investigator organizations, signed a joint resolution encouraging states to conduct accident investigations to “determine the probable cause of and contributing factors in the accident, not to punish criminally flight crews, maintenance employees, airline or manufacturer management executives, regulatory officials, or air traffic controllers.”


The joint resolution further stated, “Criminal investigations can and do hinder the critical information gathering portions of an accident investigation, and subsequently interfere with

successful prevention of future aviation industry accidents.”

Criminalization of aviation accidents is completely contrary to the concepts most of the worldwide aviation industry is nurturing through safety

management programs. Aviation professionals from all disciplines in the industry should be aware of the risks of criminalization and actively oppose criminalization of accidents in their state. □

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