

When Is an Aircraft Accident A Crime?

This author cites culture, word definition, and investigation goals as contributing to a determination, but asserts that a mistake made while trying to comply with the law is not a crime.

By Richard H. Wood

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About the author:

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There has always been a gray area in the aircraft accident investigation business. When does an accident stop being an accident and start to become a crime? That depends some-what on your culture and what the word "accident" means to you. It also depends on your goals. What do you expect to result from the investigation? Do you seek the satisfaction of having administered punishment to someone or would you prefer to prevent future accidents?

Presumably, if accident investigators (AI) didn't believe that the primary purpose of investigation was prevention, they wouldn't be in the profession. One can't punish an accident and expect to prevent anything. It doesn't work.

This disagreement between "pre-venters" and "punishers" has always been present, but in the past few years it seems to have gotten out of control. Even the National Transportation Safety Board (NTSB) has noticed it. Jim Hall, the former chairman of the NTSB, stated more than a year ago: "We have seen a slow but steady and growing presence of the law enforcement authorities in our investigations." That's a fairly mild statement and it applies not only to the United States, but also to many countries of the world.

- **Item:** Following the Learjet accident in which golfer Payne Stewart was killed, 50 FBI agents raided the charter company that owned the aircraft and impounded 160 boxes of flight logs and maintenance records, which essentially put the company out of business. They couldn't operate without the records.

- **Item:** Following the accident involving Alaska Airlines Flight 261, FBI agents and government attorneys attempted to interview Alaska employees in apparent violation of a California law barring lawyers and government investigators from directly contacting people represented by counsel.

- **Item:** In Paris following the Concorde accident, a panel was established almost immediately for the purpose of determining the need for criminal prosecution. Whether this impeded the investigation of the accident is not known.

- **Item:** Following the Singapore Airlines accident in Taipei, prosecutors in Taiwan detained the cockpit crew. They were not permitted to leave the country for nearly 2 months and then only after a promise by Singapore that they would return if required.

- **Item:** In the United States, in accidents involving all transportation modes, it has become common for witnesses and company officials to refuse to cooperate with the National Transportation Safety Board. Since witnesses are aware of the

possibility of criminal sanctions, they assert their Fifth Amendment privilege against self-incrimination.

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The problem

Most persons, investigators included, don't really believe that accidents are accidents. Here are a few definitions of an accident. ICAO just calls it an occurrence.

Safety professionals refer to it as an unplanned, unforeseen, and unsought event. Others refer to it as an event occurring by chance or arising from unknown causes. The current dictionary definition is a happening that is not expected, foreseen, or intended.

Now, the common thread among all those definitions is that an accident is not a deliberate act and it is not a crime as defined by our laws. That's the part most people don't really believe. If the event results in injury or damage, a person's instinctive reaction is that someone is at fault and that *someone* must be identified and punished. In some parts of the world, the words "accident" or "safety" or "prevention" do not translate well. Injuries or damage are crimes, and there is no such thing as an accidental crime. Dr. Kay Yong is the managing director of the newly formed Aviation Safety Council of Taiwan. In his opening speech to the 18th Annual Aircraft Cabin Safety Symposium, on Feb.13, 2001, he said that prior to the formation of the Aviation Safety Council, "The sole purpose of aircraft accident investigation was to find the guilty party, not to improve safety." Upon reading that, those of us from the United States may look smug and claim to be above that sort of thing—but we are not. If our official government investigation does not satisfy our urge for punishment, there are other branches of our government, both federal and state, that are fully prepared to prosecute someone for something.

If that doesn't work, some other form of redress will be sought. This is called litigation, and the United States is the world's leader in that field.

The problem with punishment is that we are almost always dealing with errors in judgment or technique.

Deliberately violating a law is a criminal act regardless of the outcome, and punishment may be appropriate if it prevents future violations of that law.

Making a mistake while trying to comply with the law is not a crime, and punishing that mistake isn't going to prevent anyone from making that same mistake in the future. The most useless statement in ICAO Annex 13 (*Aircraft Accident and Incident Investigation*, 8th ed., Section 3.1.), which all AIs "know and love," is the one describing the objective of the investigation: *The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.*

Although the NTSB does not apportion blame or liability in its reports, the news media will always correct that oversight. They will establish blame based on the NTSB report. Why? Because our society demands blame. That's why. Another problem with punishing an accident is that the act of punishing someone makes it difficult to take any other preventive action. At this writing, Dr. Yong's report on the Singapore Airlines accident is not complete. But, in regard to punishment, let me speculate a bit about that accident in Taiwan: the crew attempted to take off on a closed runway. We know that and we can agree, I think, that a bad mistake was made. So far, no one has claimed it was deliberate. Based on what I've read about the accident, though, it appears that the runway was not marked as closed, its lights were on, and the only taxi lines, if followed, led to the closed runway. If

that's true, did those factors contribute to the crew's mistake? If we punish the crew and then correct the airport deficiencies, won't that imply that perhaps punishing the crew was not the correct preventive action? Yes, it will. In the safety business, it's almost a given that if a person is punished for making a mistake, that's the end of it. Nothing else will be done.

The NTSB could learn how to document a scene and preserve evidence. It does not know how to do this now and shows little interest in learning.

The solutions

First, a choice must be made between the long-range benefits of prevention and the short-range satisfaction of punishment.

Most AIs have already made that choice. That does not necessarily mean that our governments have made the same choice.

If we intend to stay on the prevention side of that argument, we need to provide our investigators with the ability to grant confidentiality if that's what it takes to get the information they need. The second most ignored part of ICAO Annex 13 is the one on disclosure of records (Section 5.12.). Essentially, ICAO provides a list of records that should not be made available for any purpose other than accident or incident investigation. Included on the list are all statements taken from persons by the investigation authorities in the course of their investigation. Few countries follow that, and even the United States has filed a "Notice of Difference" with ICAO stating that it is not possible to do that under existing U.S. laws. That's true. Neither the NTSB nor the FAA can withhold any statement given them. That's part of the problem right there. If the person who knows what happened in the accident chooses not to explain it, there is no power short of torture that will make that person explain it. In the United States, whatever statement the person gives the NTSB, in any form, becomes a public document and can be used against the person in any other action. Knowing that, a pilot involved in an aircraft accident in the United States would be well-advised to bring a lawyer to the interrogation and listen closely to the lawyer's advice on answering questions. Few people are going to answer questions if the answers can be released and used against them in some other action. Back in 1975, I was subpoenaed as a witness in federal court in Los Angeles. We were defending the Air Force's right to withhold certain documents from an aircraft accident report. These included witness statements that had been obtained under a promise that they would not be released or used for purposes other than accident prevention. The witness ahead of me was my boss, Air Force General Chuck Yeager, the first man to break the sound barrier. The case was on appeal and it was tried before a judge, no jury. I don't have a record of Chuck Yeager's exact words, but they are etched in my mind as though they were spoken yesterday: "Judge," he said, "here's the situation. In my flying career, I've had four or five accidents. A couple of them were my fault. I screwed up and I knew it, and I was the only one who knew it. If the accident investigation board had not promised me that my statement would not be released, there is no way in hell I'd have told them what happened and they would never have figured it out for themselves." We won. The United States military has always granted that type of immunity to witnesses involved in aircraft accidents. Until 1984, that had been regularly challenged because the military's right to do that was not based on any statutory law. In 1984, a challenge went to the United States Supreme Court in *United States [v. Weber Aircraft Corp.]*, 465 U.S. 792, 79 L. Ed.2d 814, 104 S. Ct. 1488 (1984)], and the Court upheld the military's right to withhold statements obtained under assertions of confidentiality. The Court vote was nine to nothing, which is a perfect score. It doesn't get any stronger than that. Would not or could not the same logic be

applied to the NTSB? Maybe. Under our existing laws, there is plenty of precedent for granting some degree of immunity if it is necessary to obtain information. That is not a new idea. That would solve the problem of people refusing to cooperate with the NTSB. Suppose that were done. Then the NTSB would encounter another problem. Why? Because it must actually protect the information gained under a promise of confidentiality. I can think of a lot of groups that would be seriously disturbed at the idea of the NTSB withholding information. I recommend the military's standard response. "Here are the names of the witnesses who gave us information. Go talk to them yourself." So, that's the first part of the solution. Grant the NTSB the right to keep information in confidence if that is necessary to obtain it in the first place, and then keep the information in confidence. The second part of the solution is a little sticky. Because we, in the air safety professions, believe that prevention, in the long run, is more important than punishment, we allow our investigative organizations to be in charge of the initial investigation and we give them considerable latitude in how they do that. We cannot, however, ignore the fact that there are other groups who have a legitimate right to also investigate the accident for other purposes. These include law enforcement agencies, insurance companies, and litigants. In the process of conducting the primary investigation, if investigators hinder, obstruct, or defeat any subsequent investigation, they are asking for trouble. Another agency, or even a single lawyer, is likely to be offended and can bring the NTSB's investigation to an abrupt halt.

That has happened.

Is obstruction of future investigations a problem? Yes it is. Many persons have had the experience of trying to reconstruct an accident after the NTSB was finished with it. They found the documentation of the accident scene, including descriptions, diagrams, and photographs, to be terrible. The wreckage no longer resembles that found at the scene, and it is frequently incomplete. The missing parts are usually the good ones. They have found new life as a paperweight on someone's desk or possibly an exhibit in the lab. If the NTSB wants to enjoy investigative primacy, it must change its tactics. I can think of only two ways to do this, and neither is likely to be popular. First, the NTSB could learn how to document a scene and preserve evidence. It does not know how to do this now and shows little interest in learning. One might ask what sort of formal training NTSB investigators have had in any form of investigation. We might say that, as a group, they are well practiced, which is not the same thing as well trained. If that isn't acceptable, then the NTSB must give up the present practice of denying access to those persons who *can* document a scene, already know *how to* preserve evidence, and have a legitimate right to gather facts in support of a future investigation. That might be the easier of the two solutions and might even be helpful. Those are the only two choices I can think of. Either learn how to preserve the evidence or allow others to do it for you. The criminalization of aircraft accidents is the wrong road to take. If the belief that the primary purpose of aircraft accident investigation is to prevent future accidents is to prevail, then investigators must be provided with the tools to obtain the information they need. If this involves keeping confidentially obtained information confident, then it must be kept in confidence. Yet, we cannot ignore the rights of others to also investigate an accident. Hence, investigators cannot be allowed to act in a manner that would violate those rights or inhibit future investigations.