

AIRCRAFT ACCIDENT INVESTIGATIONS DONE FOR LITIGATION

Enhancement of Aviation Safety is the stated purpose for governmental agencies to be empowered to investigate aviation accidents. The concept is to investigate thoroughly enough to determine probable cause of an accident and all contributing factors. As a result the safety board will form opinions, conclusions and make recommendations concerning safety.

This is true of both the N.T.S.B. investigation and military investigations. The factual portions of these investigations are releasable to the public. The final reports that include the findings of probable cause by the N.T.S.B. are releasable but are prevented by statute from being utilized in litigation proceedings as evidence. A lawyer is advised that the N.T.S.B. rules only preclude the usage of the final report as issued by the actual Board in Washington D.C.

In major accidents, this report is signed by the members of the board, including dissents and is easily recognized in its format that is a small 8 1/2 by 11 booklet. In general aviation accidents the full safety board does not usually make the probable cause determinations. Instead the aircraft investigator in charge submits his factual accident investigation to the board for approval. Once approved it is released and the board issues (has issued) a one to two page computer print out with probable cause and contributing factors. These are called accident briefs. It is only these BOARD REPORTS and ACCIDENT BRIEFS that include probable cause that are excluded from evidence by federal statute.

The statutory exclusion is different from a privilege since anyone may assert it and a judge will take judicial notice to enforce the exclusion. The remainder of an N.T.S.B. investigation is admissible in its entirety except for the normal objections provided by the legal Rules of Evidence. In many cases the objections may be overcome through the standard exceptions to the exclusionary rules because the investigation is deemed:

1. Trustworthy
2. Conducted by a disinterested expert party.
3. Constitutes an official government document and business record of a duty routinely conducted in a prescribed manner..

The military conducts its investigations differently. They conduct two separate investigations simultaneously. One is conducted by a Safety Board whose sole stated purpose is to enhance aviation safety. They investigate accidents, gather factual information, take unsworn statements, utilize manufacturers to help them, they include blatant hearsay, they encourage opinions, finally they assign probable cause and contributing factors. Further the board makes recommendations for future changes based on their findings. These boards reports are privileged and the public is denied access to them if the military asserts its legal privilege.

This harsh privilege has been tested in the courts and has been upheld in the most part except as to the factual portions of such reports. Now teardown reports done by other than the manufacturer and photographs and factual data may be released routinely. The statements, opinions, conclusions, and recommendations for safety are

withheld under the privilege. Today most boards' cooperate with the other accident investigation and release such factual data to them for inclusion in their report. There is always the possibility that some portions of a military report may involve another restriction of National security.

The other report is being compiled by another group of investigators, and it is releasable to the public. It is a report done under the auspices of the Staff Judge Advocate and its purpose is to document fact. It includes factual investigation performed by them as well as released factual data from the safety board. Sworn statements are including. It is devoid of opinion, conclusion and recommendations for safety. It is designed to preserve factual evidence for usage in litigation and the media.

The privileged portion of the Safety Board's report will be excluded from release or evidence if the military initiates the privilege. Another attorney for a litigant other than the military can not claim the privilege since it is alone the military's to assert. The military privilege is waived if it can be shown that the military has released the report to the public or to aid a party to the litigation. Unauthorized leaking of the privileged safety report has severe penalties for government employees.

An investigation conducted by an investigator for a litigator is for a different purpose and encompasses a wider range of investigative resources.

First: A lawyer's main purpose is not to enhance aviation safety. It is to detect breaches in duties of care relating to aviation safety and to find defect's that were detrimental to aviation safety.

Second: A lawyer's investigator must reduce those findings to the form of credible, probative evidence, sufficient to meet the legal rules of evidence. It's not what you know, but what you can prove. This standard is far higher than the level that the government routinely operates an investigation.

Third: The lawyer's purpose is to prove fault and assess recoverable legal damages and possibly retribution when warranted in the form of punitive damages.

Fourth: Aviation safety is always enhanced when the true cause of an accident is proven.

Accident investigators for an attorney always have more information than the government's on scene investigators and always have less information than the government or the manufacturer.

This is true because the legal investigator retrieves all the government factual data from their investigators factual report. Thus the legal investigator begins where the government stopped. The arguments for and against privilege and immunity are International in concern from both the professional investigators viewpoint and from the Aviation litigators. The debate is hot and heavy:

" I know that General Smokey Caldera, the founder of the Air Force Safety Center would agree with me that it would be better if lawyers were not involved with aviation accident

investigations" Introduction to lawyers speeches at I.S.A.S.I. Symposium, Washington D.C. 1976 by the M.C.

Quoting Olaf Fritsch, Chief ICAO accident investigator and president of I.S.A.S.I.

*"Once investigations are misused for the legal blame seeking process, everybody wants confidentiality for the wrong purpose. The judicial system must not take a free ride on the investigators back." ***

I.R.A. Rimson, Former Navy Safety Specialist and currently a Forensic engineer speaking on the military system.

*"Unfortunately, even that system is not foolproof, (speaking of confidentiality) In the Navy, for instance, we encourage total candor for the sake of safety, but obviously, we could not withhold facts from the second, the quasi legal inquiry " ***

Gerrard Bruggink, Former N.T.S.B. Investigator and a recognized world expert.

*"Shortcomings can not be identified without also identifying those who are responsible for them. Whether we like it or not that process [investigation] has the inescapable connotation of blame. It is our unwillingness to accept that premise that prompted me to suggest that our thinking about the accident phenomena may need reorientation." ***

** Quotes from "The Final Call " Barclay, Random House 1990, p 73-74.

A lawyer who has a sworn duty to represent his client within the frame work of existing tort law argues the situation in the following manner:

"The rules of aircraft accident investigation effectively and totally preclude my participation in the field investigation. You governmental investigators are the only ones allowed at the scene, and you are working for the taxpayer public. Since you have precluded me from the evidence and prevented my access to the wreckage and teardown evaluations you have a duty to preserve the evidence and to make it all available to me and my client. Anything else is tantamount to a legalized obstruction of justice. Unless a legitimate national security interest is involved all privilege and immunity should not exist. All you are protecting is the pecuniary interests of the industry or party that caused the harm to my client. You are not enhancing safety, you are not furthering truth...you are in fact covering it up by hiding it from public scrutiny.

Whenever the true cause of an accident is revealed be it in the field or in a court room then aviation safety is enhanced. When it is found in a court room then safety and justice will be done. It is wrong to carve some specialty exceptions simply because aviation accident investigation is staffed by prima donnas who don't like their papers graded in the light of public scrutiny"

This argument will not go away for it is fact that the law of the land extends to the

aircraft that fly above it and crash into it.

One very significant advantage a legal investigator may pursue that on scene investigators don't is usage of historical aircraft and component field histories. Legally a defect can be proven by circumstantial evidence and inference. A government accident report is usually devoid of such information since it is requiring opinion and is not entirely focused on the accident at hand.

For instance in a case where a manufacturers component part is suspect as causative the field investigator may limit his investigation to the condition of the part itself in the smoking hole, and the maintenance history of that part in that aircraft. It would be routine for me to go further.

1. I would obtain SERVICE DIFFICULTY REPORTS from the F.A.A. or Military on all such components used in the fleet of aircraft.

2. From the manufacturer I would obtain:

- a. Tech rep field reports.
- b. Development test data.
- c. Certification and verification engineering and test data.
- d. Warranty maintenance work.
- e. Customer complaints.
- f. developmental system safety hazard analysis and fault trees.
- g. Production "lesson learned " data.
- h. Engineering Change Proposals.
- i. Service letters and bulletins.
- j. Correspondence file with N.T.S.B. and F.A.A.
- k. Other accidents.
- l. Other incidents.
- m. Other litigations.

From the government:

- a. Other accidents
- b. Other incidents.
- c. Airworthiness Directives
- d. Certificate data sheets.

It is not to say that the government does a bad job. Often they are very good and it is uniformly true of the N.T.S.B. and F.A.A. they are understaffed and overworked. The quality of investigator ranges from the country's best to rookie initiate. In General, Aviation a single investigator may be single-handedly responsible for 30 investigations or more per year. He investigates airplanes, helicopters and balloons of all varieties and he relies very heavily on manufacturers reps for aid. The neophyte may have little previous investigation or aviation experience and a 6 week school and a one year probation period under training before he is set loose.

The military is little better as many of the chosen investigators have little experience. Again they rely heavily on manufacturer's representatives for advice and testing and teardown. There are very good governmental facilities and often the work

is done there.

The problem is the coordination between the JAG and the Safety Board in sharing information. Often the SAFETY BOARD hides information that is factual and releasable because they believe it might fall under the exclusions provided them by the privilege. Too often the results are different and this leads to the myth that the Air Force is covering up information to protect the manufacturer or to cover their own dirty laundry. Regardless the purpose of an attorney's investigator is to find and prove fault. Anything else loses. Does the government do a good job you ask? The answer is mostly but not always.

The main problem with most investigations conducted by the government is that their scope and focus is small. It is usually limited to the accident at hand and it usually goes only so far as to assign cause. Famed investigator, test pilot M.I.T. graduate and law school graduate C.O. Miller said the problem with the N.T.S.B. was that they hurried to find a probable cause slot to file an accident away in. He said that he felt the N.T.S.B. was like an antique desk with lots of slots and drawers. The investigation was complete the instant an investigator was able to match his accident to a label on a drawer and file it away.

Major questions would usually remain unanswered in the area of why, how and when did the accident occur. What lay behind each accident? If pilot error was the probable cause ...what prompted the pilot to make the mistakes? If it was maintenance error what prompted the error? When it was supervisory error, what could have been done differently? What were others doing differently? When it was machinery defect what caused or allowed the defect to exist? These are the questions a legal investigation will have to answer since in negligence actions we are looking at the standard and duty of underlying care.

If a pilot commits error was it his alone or was it induced by design, was it contributed to by the controller, was it company induced fatigue through scheduling? Was it lack of company training? Was the pilot a known hazard? Was there an incapacitation or medical influence? The answer will only be found through conscientious investigation and often litigation discovery is the ONLY way to ferret out some of these answers.

A Legal investigation starts where the government quits.