# Accident Investigation, Aviation law, and effects on Safety…

## Can legal liability make aviation safer?

By Myron Papadakis

The answer to this question is arguable.

In negligence actions and pilot error actions resulting in a finding of liability for the negligence may result in either F.A.A. punitive Certificate Actions and in large civil litigation damage awards.

In Product liability actions a verdict of defect will result in large damage awards.

Do such damage awards and punitive actions make aviation safer?

By and of themselves the answer is no. Just as no one hears a tree fall in a forest, there is no reaction towards safety from a punitive action or damage award that is not well advertised and recognized in the community that operates aviation equipments. Conduct will not improve in the community if the accident and the resulting punishment is not known to the aviation community. Too often such a civil legal victory is reported in legal journals and not disseminated effectively to the aviation community where another similar accident is likely to occur.

When the word is out that you break an altitude you may lose your license to fly then that is a deterrent. When a maintenance facility learns that another has lost a million dollar lawsuit because it did not inspect oil hoses properly during an annual then safety may be enhanced. It is learning from the accident that enhances safety and such knowledge begins in the investigative phases of incident and accident investigations. The results of those investigations will do nothing to enhance safety unless the data is disseminated to the aviation community. An enlightened community may react to correct deficiencies based solely on such information.

When there is a known punitive aspect that affects the economics of a company or an individual there is motivation to avoid those consequences and compliance for safety is enhanced. Again the only way for safety knowledge to be acted upon is to insure the aviation community has learned of the consequences. It is not a deterrent to conduct if the law and potential punishment is understood by the community.

The Federal Aviation Regulations, for the most part set out rules that are to be complied with. These rules have the effect of law. Breaking those results in the potential of fine, reprimand or license suspension or revocation. For the most part the rules set out minimum standards to be met and rules to be followed. Most of the

Aviation Community has knowledge of the rules that affects their facets of operation.

Most of the rules are in place to facilitate operations and to standardize procedures. For the most part they enhance aviation safety. None is written with the intent of being detrimental to safety. It is said that a pilot must be part lawyer to venture out in the aviation community. A violation of the rules is negligence per se in a civil suit for damages. Of course, a violation of F.A.R.s is only important to an aviation civil lawsuit if it has a causal or contributing connection to a accident.

These rules and regulations have a beneficial effect on safety. The spectra of punishment acts as a deterrent to unsafe conduct. This is true when a pilot knows of the existence of the law, and most in the aviation community are knowledgeable of both the Rules and the punishment for violating them. There is a rebuttable presumption in the law that applies to pilots. A pilot would be presumed to be following the F.A.R.s if he knew the rules. This presumption suggests that the existence of the rules and the punishment for violating the rules is for the most part successful in getting the aviation community to comply. If this is the case then Safety is enhanced by the existence of law.

In civil litigation the standard of care for aviation negligence may be entirely different than the F.A.R. standard for Negligence per se. The F.A.R. s only set minimum standards of conduct. In civil litigation Conduct for aviation may be determined in areas where the F.A.R. s are silent or may impose higher standards than those imposed by the F.A.R.s.

It is recognized in the law that standards of conduct for persons vary within the profession that they are plying and the role they are playing. Each state may define these duties differently based on statute and their case law. Generally the more hazardous the occupation the higher the duty of care .Generally a profession that entices customers for profit the higher the duty of care. Generally the test is whether or not the actor met a reasonable and prudent standard of care expected of an operator employed in the same or similar occupation under same or similar conditions. Thus negligence law recognizes that human error is not always human negligence. Mistakes are not always negligence as failed products are not always defect.

Since aviation is a specialized field the conduct tests to determine negligence as applied to the aviation community are specialized to the degree necessary to determine what conduct is expected within that community. Just as in engineering negligence, medical malpractice, CPA malpractice, ship handling and a myriad of other professions the tests for expected conduct standards are tailored to define the conduct expected within that field. Pilots can not be expected to know or predict the outcome of legal litigations in the field. Therefore civil legal negligence findings in the aviation community can not effectively act as a deterrent to conduct unless those results are disseminated to the ultimate operators within the community. For the most part the results of legal litigations are not effectively disseminated to pilots or companies with resultant enhancements for safety. On the other hand, numerous enhancements for

safety have come as a direct result of negligence findings. When this occurs safety is enhanced.

Examples of safety changes made as a result of litigation allegations and verdicts may be found in:

a. Flight manual rewrites of warnings and cautions.
b. Equipment modifications.
c. Operational policy changes

The problem is to specifically identify such changes as resulting from litigation rather than a company making changes as a result of lessons learned from an accident investigation. One would hope that enlightened companies and manufacturers would initiate such changes for safety at the earliest recognition of defect or negligence. Such often is not the case for megalith companies often do not like to admit to mistakes even when safety is a consideration. For an example of this remember Ford and the Pinto filler cap. It took litigation and exposure of the memoranda to get Ford to change the cap design.

Some argue that litigation often is a detriment to safety since a company may actually be afraid to make changes for safety since such change would be an admission against interest in the court case. There is a general rule in negligence cases that subsequent remedial fixes for safety by a company can not be entered into evidence on the issue of corporate conduct. However such changes invariably get entered through other evidentiary exceptions. Thus some unenlightened companies may indeed hesitate to make such changes during the pendency of a lawsuit believing such change will be used against them .If this is the case then aviation safety may be jeopardized during the pendency of such a lawsuit.

On the flip side most plaintiff's lawyers know that if a company has notice of negligence or defect and fails to correct the error resulting in many subsequent accidents then the companies conduct in failure to act may be considered egregious grounds for punitive damages. When an enlightened company has discovered error or defect, it is better to correct the problem as quickly, effectively and cheaply as possible. He should settle the case and move on. Plaintiff's lawyers relish a case where management has notice of error and defect and has done nothing.

Litigation and accident investigations that pinpoint cause and blame can only enhance safety if the information derived is disseminated and acted upon. When this occurs aviation, safety will be enhanced. Whether such information is derived from a field investigation or in litigation, the result is meaningless unless either the F.A.A. or the manufacturer or operator acts to rectify the condition.

In strict Product Liability in Tort subsequent Remedial fixes for Safety are generally admissible in litigation. This is because of two reasons:

1. Company conduct is not an issue -Defect is

   And

2. Negligence uses a foresight test (was the manufacturers conduct reasonable at the time of manufacture based on what he knew or should have known) from the date of design, manufacture or warning. S.P.L.I.T. uses a hindsight test as of the date of the accident.

Thus in pure 402a Split the question is does the product constitute an unreasonable risk of harm. The very existence of a fix for safety suggests that it is defective.

Under the consumer expectation test a remedial fix is some evidence relating to what a consumer should be able to expect and under the Risk versus utility test the remedial fix for safety will be relevant if it could have been adopted at the time of manufacture in a cost effective manner with improvement to safety and no deleterious effect to other aspects of safety.