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

National Transportation Safety Board
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