

Battling Accident Criminalization

BY KENNETH P. QUINN



The Joint Resolution Regarding Criminalization of Aviation Accidents became fact Oct. 17, 2006, when Flight Safety Foundation (FSF) announced that it had achieved consensus with the Royal Aeronautical Society (RAeS) in London, the Académie Nationale de l'Air et de l'Espace (ANAE) in Paris and the Civil Air Navigation Services Organisation (CANSO) in Geneva (see page 13). This resolution was the culmination of a tremendous effort by many individuals in these organizations, based on consultation with leading experts in aviation accident investigation.

That effort began at the May 18, 2006, meeting of the FSF Board of Governors. Board members discussed a growing tendency of prosecutors and judges to seek criminal sanctions in the wake of aviation accidents, even when the facts do not appear to support findings of sabotage, criminal negligence or willful misconduct.

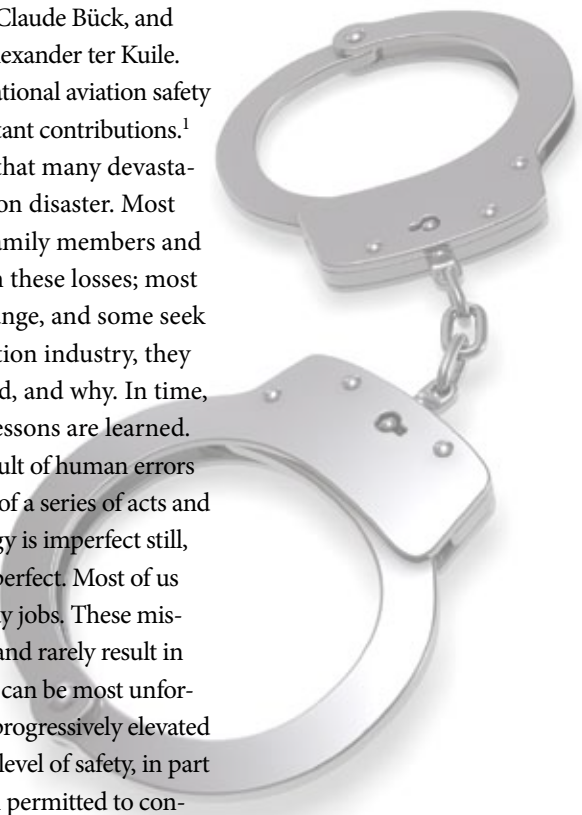
In response, FSF Chairman Edward W. Stimpson formed the Criminalization Working Group to look into the matter and report findings and recommendations. As group chairman, I quickly realized that the problem was quite complex. The apparent increasing tendency to turn aviation accidents into potential crime scenes is so widespread globally that no one person or group could deal effectively with the problem. We immediately saw an expanding net of potential defendants: air traffic controllers, regulators, pilots, designers, airport directors and corporate managers. Cases arose in Athens, Greece; Milan, Italy; Zurich, Switzerland; Miami; Colmar, France; and Sao Paulo, Brazil. For five months, we reviewed these cases and the traditional legal standards associated with "corporate manslaughter" and other charges.

We were assisted by an assortment of international experts, led by our new Foundation CEO and President William R. Voss, our past President and CEO Stuart Matthews, RAeS CEO Keith Mans, ANAE President Jean-Claude Bück, and CANSO Secretary General Alexander ter Kuile. Other members of the international aviation safety community also made important contributions.¹

From the start we knew that many devastations occur in a single aviation disaster. Most importantly, lives are lost. Family members and friends of the victims mourn these losses; most seek answers, many seek change, and some seek revenge. Like the entire aviation industry, they want to know what happened, and why. In time, and with hard work, many lessons are learned.

Most accidents are the result of human errors and often arise in the context of a series of acts and omissions. Aviation technology is imperfect still, and individuals are even less perfect. Most of us make mistakes in our everyday jobs. These mistakes normally go unnoticed and rarely result in real harm. Aviation, however, can be most unforgiving. For decades, we have progressively elevated the system to its current high level of safety, in part because the industry has been permitted to conduct thorough investigations and collect complete information about the causes of accidents.

In recent years, however, prosecutors and willing judges around the world have turned the powerful weapons of criminal prosecution against what are simply tragic accidents, the result of mistakes, not willful actions. In some cases, the prosecutions dragged on for more than a decade, causing enormous damage to reputations, careers and finances. Prosecutions turned into persecutions and chilled the free admission of mistakes — even the direct testimony of witnesses or



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participants. “Guilty by investigation” wreaked unnecessary havoc on lives.

We recognized that in extreme cases — rising to the level of willful misconduct or particularly egregious reckless conduct, or intentional acts such as terrorism or sabotage — criminal investigation, and even prosecution, are appropriate.

More often than not, however, we found that criminal prosecutions occurring around the globe were not responses to intentional, malicious acts. Instead, we saw verdict-hungry prosecutors pursuing actions against members of the aviation community based on nothing more than their involvement in unfortunate accidents. Without accountability through administrative remedies, such as civil penalties and license suspensions or revocations, or civil justice/tort remedies, usually in the form of compensation, one might argue that criminal prosecution in some situations would be reasonable. However, administrative and civil remedies nearly always exist, and we found almost no adequate basis, other than willful misconduct, for punishing individuals and companies further by subjecting them to the risk of imprisonment or the equivalent of a corporate death sentence, particularly in an industry where safety reputations mean everything.

Recognizing the value to international aviation safety of a complete and thorough accident investigation, our team rapidly reached consensus: “Increasing safety in the aviation industry is a greater benefit to society than seeking criminal punishment for those ‘guilty’ of human error or tragic mistakes.”

Certainly, it is human nature to crave retribution when innocents are killed or seriously injured. However, when considering the chilling impact the threat of prosecution can and does have on safety investigations, it becomes clear that the future of aviation

safety depends on unhindered communication between investigators, witnesses and those involved in accidents.

In several countries, individuals are being prosecuted in criminal courts many years after an aviation accident. Several of these examples are outlined in the joint resolution. If those with information to explain the “what” and “why” of an accident are discouraged from speaking openly to investigators because they fear the threat of criminal prosecution, investigators may have difficulty gathering pertinent facts. When determining causation, complete disclosure is imperative to prevent future incidents. The best way to honor victims of tragedy is to make sure we obtain all relevant information that might prevent future accidents. If individuals are not helpful to investigators out of fear of being prosecuted and sentenced to jail, investigators may never discover the truth.

Stated differently, we found that the risk that the threat of criminal prosecution places on the future safety of air travel greatly outweighs any societal benefit in satisfying the inherent human desire for revenge or punishment in the wake of a terrible loss.

Shortly after adoption of our joint resolution, the French court in the Air Inter crash cited in the resolution rendered its verdict: All six individuals were acquitted, but the aircraft manufacturer and airline were required to pay damages. Without expressing an opinion about whether the civil liability aspects of the case were right or wrong, we applaud the French court for at least seeing the wisdom of avoiding criminal sanction and punishment in this case.

Hopefully, this case represents a watershed event, after which prosecutors and judges will exercise restraint about bringing criminal investigations. Perhaps our joint resolution will persuade eager

prosecutors to step back and see the wisdom in preserving an existing aviation safety system that has worked remarkably well in reducing aviation accidents.

As we stated, the paramount consideration in a safety investigation should be finding the facts and determining the causal factors of the accident, not criminally punishing those who made errors of judgment or mistakes that may have produced tragic consequences. We are very grateful to the many aviation professionals who took part in the preparation of this joint resolution and look forward to engaging in a dialogue with other groups and individuals on this topic in the months and years ahead. ●

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Note

1. The Criminalization Working Group, gathering facts and seeking ideas, turned to FSF Board of Governors members: Robert T. Francis, former vice chairman of the U.S. National Transportation Safety Board; William G. Bozin, vice president of safety and technical affairs, Airbus; Steven M. Atkins, vice president product integrity, Boeing; Clay Foushee, formerly with FAA and the U.S. National Aeronautics and Space Administration; Carol Carmody, former NTSB vice chairwoman; and Pierre Caussade, vice president of flight operations standards, support and development, Air France. Also sought out for their knowledge were leading aviation and disaster lawyers: Gerard Forlin of Grays Inn Square in London; Sean Gates of Gates and Partners, in London; John Balfour of Beaumont & Son — Aviation at Clyde & Co. in London; and Daniel Soulez-Larivière and Simon Foreman of Soulez Larivière & Associés in Paris. I consulted extensively with my RAeS counterpart, Charles Haddon-Cave, QC, Chairman of the Air Law Group in London.

Joint Resolution Regarding Criminalization of Aviation Accidents

Recognizing the importance in civil aviation accident investigations in securing the free flow of information to determine the cause of accidents and incidents and to prevent future accidents and incidents;

Recognizing the actions taken recently by the International Civil Aviation Organization in promoting amendments to Annex 13 – *Aircraft Accident and Incident Investigations* to the Convention on International Civil Aviation, encouraging contracting states to adopt by November 2006 certain actions to protect the sources of safety information;

Recognizing the importance of preventing the inappropriate use of safety information, including the increasing use of such information in criminal proceedings against operational personnel, managerial officers, and safety regulatory officials;

Recognizing that information given voluntarily by persons interviewed during the course of safety investigations is valuable, and that such information, if used by criminal investigators or prosecutors for the purpose of assessing guilt and punishment, could discourage persons from providing accident information, thereby adversely affecting flight safety;

Recognizing that under certain circumstances, including acts of sabotage and willful or particularly egregious reckless conduct, criminal investigations and prosecutions may be appropriate;

Concerned with the growing trend to criminalize acts and omissions of parties involved in aviation accidents and incidents;

Noting that:

- a. law enforcement authorities in the September 29, 2006, mid-air collision between an Embraer Legacy 600 executive jet and a Gol Linhas Aéreas Inteligentes Boeing 737-800 have opened a criminal investigation and threatened involuntary

manslaughter charges and interrogated pilots, while a magistrate revoked the pilots' passports;

- b. the French Supreme Court on September 20, 2006, rejected a request to dismiss charges in the July 2000 Air France Concorde crash where three people, a former French civil aviation authority official and two former aircraft manufacturing officials, are currently under investigation for criminal charges;

- c. a French court is expected to issue its verdict soon in the 1992 Air Inter crash in Strasbourg, France, wherein the designer of the Airbus A320, two retired Air Inter executives, the former director general of civil aviation, the retired civil servant who was national head of certification, and an air traffic controller were investigated and prosecuted 14 years after the crash and face negligent homicide charges;

- d. Swiss prosecutors in August 2006 charged eight Swiss Skyguide air traffic controllers with negligent homicide arising out of the DHL Boeing 757 mid-air collision with a Bashkirian Tu-154 on July 1, 2002, over Überlingen in Southern Germany;

- e. the Swiss Federal Prosecutor's Office has an ongoing criminal investigation for negligent manslaughter of the former chief executive of Swiss International Airlines, along with the head of Switzerland's Federal Office of Civil Aviation, and the operations chief and chief trainer at Crossair in connection with the November 2001 Crossair plane crash near Zurich, which the Swiss Aircraft Investigation Bureau concluded was the result of pilot error;

- f. an Italian court on July 7, 2006, affirmed the convictions for manslaughter of five aviation officials, including an air traffic controller, the former director of Milan Linate airport, and the chief executive and a former director-general of ENAV, the Italian air traffic control agency, arising out of the October 2001 runway accident between an SAS aircraft and Cessna jet in Milan, where authorities found an inoperative ground radar system contributed to the accident;

- g. an ongoing Greek quasi-judicial investigation exists of the 2005 Helios Boeing 737-300 crash near Athens, Greece, wherein a draft accident report has been leaked and authorities have indicated it will be used directly in a quasi-judicial investigation to determine criminal liability;

- h. U.S. federal and Florida state prosecutors brought criminal charges, including 220 counts of murder and manslaughter, against a maintenance company, several mechanics, and a maintenance manager arising out of the 1996 ValuJet Flight 592 crash in the Florida Everglades, with nearly all charges later dismissed, withdrawn, or dismissed on appeal, and all tried individuals acquitted; and,

- f. Greek prosecutors brought negligent manslaughter, negligent bodily injury, and disrupting the safety of air services charges against the captain and first officer in connection with the 1979 Swissair crash in Athens, with the pilots receiving sentences of four years imprisonment, which was later converted into a fine.

Recognizing that the sole purpose of protecting safety information from

inappropriate use is to ensure its continued availability to take proper and timely preventative actions and to improve aviation safety;

Considering that numerous incentives, including disciplinary, civil and administrative penalties, already exist to prevent and deter accidents without the threat of criminal sanctions;

Being mindful that a predominant risk of criminalization of aviation accidents is the refusal of witnesses to cooperate with investigations, as individuals invoke rights to protect themselves from criminal prosecution, and choose not to freely admit mistakes in the spirit of ICAO Annex 13 for the purpose of preventing recurrence;

Considering that the vast majority of aviation accidents result from inadvertent, and often multiple, human errors;

Being convinced that criminal investigations and prosecutions in the wake of aviation accidents can interfere with the efficient and effective investigation of accidents and prevent the timely and accurate determination of probable cause and issuance of recommendations to prevent recurrence;

BE IT THEREFORE RESOLVED, that the below organizations:

1. Declare that the paramount consideration in an aviation accident investigation should be 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. By identifying the “what” and the “why” of an accident, aviation safety professionals will be better equipped to address accident prevention for the future. 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.

2. Declare that, absent acts of sabotage and willful or particularly egregious reckless misconduct (including misuse of alcohol or substance abuse), criminalization of aviation accidents is not an effective deterrent or in the public interest. Professionals in the aviation industry face abundant incentives for the safe operation of flight. The aviation industry every day puts its safety reputation and human lives on the line, and has a remarkable safety record which is due in large measure to the current willingness of operators and manufacturers to cooperate fully and frankly with the investigating authorities. The benefit of gaining accurate information to increase safety standards and reduce recurring accidents greatly outweighs the retributive satisfaction of a criminal prosecution, conviction and punishment. Increasing safety in the aviation industry is a greater benefit to society than seeking criminal punishment for those “guilty” of human error or tragic mistakes.

3. Urge states to exercise far greater restraint and adopt stricter guidelines before officials initiate criminal investigations or bring criminal prosecutions in the wake of aviation disasters. Without any indicia of proper justification for a criminal investigation or charges, the aviation system and air disaster victims and their loved ones are better served by resort to strong regulatory oversight and rigorous enforcement by national and international aviation authorities, and by pursuit of claims through civil justice systems to obtain compensation.

4. Urge states to safeguard the safety investigation report and probable cause/contributing factor conclusions from premature disclosure, and use directly in civil or criminal proceedings. Although use of official accident reports may save

criminal investigators the considerable expense of conducting an entire separate investigation, a considerable and serious risk exists of diverting these reports from their original purpose, as technical causes often cannot be equated to legal causes necessary when establishing either civil or criminal liability. In addition, use of relatively untrained and inexperienced technical “experts” by prosecutorial or judicial authorities, as compared to official accident investigating authorities, can result in flawed technical analyses and a miscarriage of justice, while interfering with the official accident investigation.

5. Urge national aviation and accident investigating authorities to: (i) assert strong control over accident investigations, free from undue interference from law enforcement authorities; (ii) invite international cooperation in the accident investigation under Annex 13; (iii) conduct professional investigations to identify probable cause and contributing factors and develop recommendations in a deliberative manner, avoiding any “rush to judgment;” (iv) ensure the free and voluntary flow of essential safety information; (v) provide victims’ loved ones and their families with full, accurate and precise information at the earliest possible time; and (vi) address swiftly any acts or omissions in violation of aviation standards.

DATED: October 17, 2006

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