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ATTORNEYS USE OF ACCIDENT INVESTIGATION MATERIALS

BY LAWRASON DRISCOLL†

I. INTRODUCTION

THE USE of accident investigation material has a purpose of obtaining the most favorable result in the case which is in trial, *i.e.*, to give the trier of fact, be it jury or judge, one's side of the case. But, particularly in the aviation case, one must also attempt to impart perspective and to educate the trier of fact. This is difficult because of two major factors which may or may not be involved in other cases, but which are usually present in the aviation case. These are the technical and scientific aspects of the case, as well as, generally, the magnitude of the presentation. Aviation cases are generally tried with experts and generally never take less than a week. More likely than not a battery of experts on either side testify; probably several weeks are consumed in trial. Normally, the above is exclusive of the evidence on damages. Thus, an intelligent and imaginative use of accident investigation materials is more necessary in aviation cases than in others. Since the defense is usually faced with a totally innocent claimant or decedent, the defense must be well organized, and, moreover, presented in an interesting and clear manner.

II. EVIDENTIARY MATERIALS AVAILABLE

Apart from the things such as depositions and the other routine discovery tools, in aviation cases we almost always have such things as photographs, various types of documentary evidence, tape recordings, physical evidence, reports of investigation, witnesses' statements (usually taken early by government personnel) and transcripts of hearing testimony. All of these are often included in the evidence and exhibits forming part of the official investigative report, but many of them are found separate from the report. The sheer volume of the available material sometimes presents problems, and this will undoubtedly enter into one's decisions in using some items as evidence.

Photographs are probably one of the most useful accident investigation materials available in aviation cases. Great care, however, must be exercised in their use. Photographs are almost always available as a result of an official investigation, but the litigant should not rely upon them exclusively. One of the cheapest investigative tools available, after conclusion of the official investigation, is a commercial photograph of the accident area. The photographs may be invaluable in leading the jury to the perspective that the advocate strives to convey. The federal authorities often have available

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topographical survey photographs of the accident area; these pictures can be very useful in illustrating a given version of what happened at the crash site. In addition to site photographs, the use of photographs of parts of the aircraft should not be neglected.

Problems involved in the use of photographs are obvious. Distortion is common; because of it, search for a perspective may be blocked by lack of actual photographic perspective in the picture itself. Therefore, a careful choice of the photographs to be used is required. It may be useful for the attorney to request a professional photographer to assist in determining which photograph to use. The professional photographer can also be employed to testify against the other side if it uses misleading photographs. The use of photographs should be carefully weighed against their possible inflammatory effect. One should be careful of an over eager photographer who might take pictures which emphasize the more grisly aspects of the crash. The attorney must not forget the preliminary foundation to be laid for the use of photographs as evidence. This usually does not present much of a problem, but it should be considered in every case when photographs are to be used, especially when they are likely to be crucial to the case. There is no substitute for having the photographer in court to testify for establishing a foundation. In the case of official investigative photographs, the same result can be accomplished by deposition prior to the trial. Generally, foundation can be stipulated, and it usually is.

Documentary evidence covers a broad scope. It ranges from such things as the title documentation of a particular aircraft, to the pilot's and aircraft's flight record and log, to the business records kept by a corporation, either manufacturer, carrier, or fixed-base operation. It extends to the records of the federal authorities which are made more easily available by virtue of the Freedom of Information Act.¹ Before trial, the attorney should be aware of, and thoroughly familiar with, every sort of documentary evidence that can be used, or that can be used against him. Often the very bulk and variety of the material gives rise to arguments that can be made by *either* side. A mass of paper work is required by governmental authorities and generated by the business enterprise itself. All of it must be obtained and reviewed for preparation of the case, if the attorney wishes to avoid surprise. The search for records and documents should be extremely thorough before the time of trial.

The use of documents involve problems both as to foundation and as to relevancy. Foundation can usually be satisfied by a number of methods. Obviously, the Uniform Business Records Act (which is in effect in most jurisdictions²) is available to solve the problem. In the case of such things as documents of title, certified copies may be available; there should be no difficulty with reference to admissibility of such copies. One of the more acute problems in the use of documentary evidence is that in the aviation case the accident itself may bring about a destruction of the most important documents. A log book carried in the aircraft may be burned in a fire

¹ 81 Stat. 54, 5 U.S.C. § 552 (Supp. 1967), *amending* 5 U.S.C. § 552 (Supp. 1966); see the excellent discussion in 33 J. AIR L. & COM. 490 (1967).

² For example, California Evidence Code §§ 1270-72.

following the accident. Where questions of maintenance, for example, are involved, this brings about a real problem. This initiates a search during discovery stages for secondary evidence and brings about some problems at trial which have to be overcome. Various evidentiary rules will undoubtedly take the attorney into the questions of what secondary evidence is available and sufficient.

Tape recordings, including flight recorder tracings, are perhaps the most important evidence that is peculiar to aviation cases. In addition to the flight recorder which I mentioned, the cockpit voice recorder is now available in commercial aircraft of certain types. Traffic control installations on the ground also make tapes which are available. I need not tell you in how many cases a tape has been the key to the outcome.

Nothing in federal law or in federal regulations prevent the use of any of these things. But the problem of foundation again arises and has two aspects. The first difficulty is whether the tape is an accurate recording of the event in question, be it a voice tape or a flight recorder tape. The use of an expert may be required. The second question is whose voice is involved; this is related to the question of interpretation of the tape. A witness who is familiar with another person's voice can supply the foundation, and an expert can testify with respect to the flight recorder instrument. The voice spectogram, through the use of the Bell Telephone Laboratories in New Jersey, can help supply the answer to the question of whose voice is on the tape and what the voice is actually saying when distortion exists. A tape is a very dramatic piece of evidence, especially if the voice is of a person who perished in the crash. It is immediate, spontaneous and, if properly used, it can be highly effective in swaying a jury. The use of tapes requires the closest attention. As more and more electronic recording of inflight events take place their use will become even more important.

The next category, physical evidence, is based on arbitrary classification. It excludes the other types of evidence mentioned above. It includes, in this analysis, such things as parts of the aircraft, other debris of the crash, and biological materials; it includes, in particular, human remains. The use of any of these materials may be critical. The material is detrimental, if improperly used. The method of handling the materials depends upon the issues in the particular case. Such evidence should never be used without exhaustive consideration of the manner and timing of its introduction. In the category of physical evidence foundation, also, presents problems. Evidence must be presented which shows how these materials were collected and kept. Expert testimony on their identification and on the meaning of the evidence itself is required. The crash itself may have changed the physical evidence so that it appears misleading to the jury. Prudence may dictate that the jury be shown not only the actual physical evidence involved, but also a replica or an actual undamaged part. The use of human remains is not common, but some recent cases hinged considerably on evidence based upon human remains. Here, medical or other expert testimony must be correlated with the destruction which occurred. Destruction of the body may change a medical opinion. The biggest problem, therefore, in

the field of physical evidence is the fact that the evidence itself has been involved in a tremendously distorting accident. Presentation at trial must take the distortion into account, and either reconstruction or expert testimony is required for the jury.

Reports of investigations are quite useful. This includes the use of exhibits to these reports. The final reports of the NTSB are not admissible in evidence.³ If you had an FBI investigation, that is probably not admissible either.⁴ However, many of the exhibits and other parts of the NTSB report (except the final report itself) can be admissible in a given case.⁵ Further, the leads which the report can afford are invaluable.

Statements of witnesses are collected in large numbers as a result of an aviation accident. Whether these statements can and should be used will depend on the particular situation. Usually, one cannot expect to get these into evidence since they are obviously hearsay, and one should, therefore, count on having witnesses available to testify. This applies both to the witnesses and investigators, whether they be private or governmental. In the case of governmental witnesses, a deposition is usually the only thing that can be used. The restrictions on the permissibility of opinion testimony should also be kept in mind.⁶

Witness statements of course can be used in impeachment. These are very often effective for impeachment because they are given most often to a representative of the federal authorities, not to a private investigator. A trier of facts can be considerably impressed by that.

The last type of material is the transcript of hearing testimony from an official inquiry into the accident. I have never had reason to use this directly in a courtroom, but it certainly can be used. Depending upon the rules of evidence in the particular jurisdiction, it probably can be used, even if only for impeachment. It is likely to contain testimony that is helpful to one side because it is testimony taken at a time when the influence of the litigation perhaps has not taken effect. Finally, the use of hearing testimony, if available, is something that should be considered in every case for possible use.

III. CONCLUSION

Many materials are available in aviation litigation but only through a systematic, thorough analysis of the evidentiary materials can the attorney provide the proper perspective and require education to the trier of fact.

³ Federal Aviation Act of 1958, § 701(e), 72 Stat. 781, 49 U.S.C. § 1441(e) (1964).

⁴ See, e.g., *State of North Carolina v. Carr*, 264 F. Supp. 75 (D.C. Ohio 1964).

⁵ See, e.g., *Berquido v. Eastern Airlines*, 317 F.2d 628 (3d Cir. 1963).

⁶ See 14 C.F.R. §§ 435.1 *et seq.*