The Attorney's Role in Accident Investigation

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By ROBERT REED GRAY†

I. INTRODUCTION

THE QUESTION of the attorney's role in aircraft accident investigation is a novel one. This puts me in an enviable position since I trust none of you will be able to cite any authorities to contradict me. It also means that my printed paper will contain no footnotes. I hope, however, that these remarks will provoke thought and discussion, and that the discussion will provide footnote material for those who may write on the subject in the future. Also, I hasten to add that my remarks are my own and are not, to my knowledge, specifically supported by any group or organization.

II. THE POLICY IN ACCIDENT INVESTIGATION

As an initial matter, I wish to make it clear that it is my belief that the role of an attorney in accident investigation—and I stress accident investigation rather than litigation—is to assist in the determination of probable cause and not to establish fault. I am aware that this position may raise cries of outrage from negligence counsel on behalf of plaintiffs and defendants alike. But it seems to me that we must get straight at the outset what the reason is for accident investigation. It is a governmental function participated in by airline operators, various unions, aircraft manufacturers, and the FAA, to determine what happened—not for the purpose of placing blame, but rather to prevent another accident from occurring.

In this connection you should be aware that the regulations of the National Transportation Safety Board look specifically to this type of approach. Section 431.2 of the NTSB's regulations reads as follows:

Aircraft accident hearings are held by the Board as a part of the investigation of accidents involving aircraft in order to determine the facts, conditions, and circumstances relating to each accident and the probable cause thereof and to ascertain measures which will best tend to prevent similar accidents in the future. It is purely a fact-finding procedure, and there are no formal pleadings or issues and no adverse parties. During the course of the hearing, no objections to any matter will be entertained from any party to the investigation or any other person. Aircraft accident hearings are not subject to the provisions of sections 4, 5, 7, 8, or 10 of the Administrative Procedure Act.

Note that the regulation states that hearings involving aviation accidents are to determine "probable cause" and to ascertain measures "to prevent similar accidents in the future." It is also noteworthy that the regulation states specifically that the procedure is strictly fact-finding, and there are no adverse parties. In aid of this approach, Section 431.16(b) provides:

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No Party to the Investigation shall be represented by any person who also represents claimants or insurers. Failure to comply with this provision shall result in loss of status as a Party to the Investigation.

Finally, at the hearing itself, the Chairman of the Board of Inquiry generally reiterates these policies and cautions that while spokesmen for designated parties may question witnesses, the questioning may not be in the nature of cross-examination.

Having stated this really high-minded purpose, I will be the first to admit it is far from as simple as it sounds. In particular, when does questioning by a spokesman for a party crossover from the area of bringing out relevant facts to the area which might be called adversary examination, i.e., cross-examination. Obviously some questions are quite clearly designed to bring out factual data as such. Equally obvious, some questions are designed to harass and confuse the witness. Valid as these latter techniques may be in the trial of a negligence suit, I am fully in accord with the NTSB's policy that such questions do not necessarily establish facts that will be helpful. Most importantly, they certainly do not encourage witnesses to come forward and participate voluntarily in the determination of probable cause.

Here in the United States our accident investigation procedures are designed to encourage participation by operators, crew members, manufacturers, traffic controllers, and the like in trying to find out what happened. But a witness, whether he be an eye witness, dispatcher, component designer, or tower operator, will be less than enthusiastic about offering assistance if he knows that at the time of the hearing he may be subjected to extensive and bitter adversary examination. There are a number of other jurisdictions, and I believe our neighbor to the north, Canada, is among them, where the investigation is held on an adversary basis. Quite candidly, there are a number of people who believe that this type of investigation gives better results. We can probably argue both sides of that question all day and never resolve it. In my opinion, however, cooperation rather than the adversary process brings the best results in the long run. Putting it another way, inquiry rather than inquisition brings the greatest cooperation—and cooperation is essential in order to bring the best brains and professional talent into the investigation.

III. Problems of Reporting

The purpose of an investigation, of course, is to get to the truth. This is so in terms of the investigation of an accident or incident by the NTSB, but it is equally so in terms of getting information on what we may call non-reportable incidents which may prevent an accident from occurring in the future. It is in this area, if no other, where the scales are tipped towards non-adversary accident investigation rather than adversary. Let me give you an example of what I mean.

Assume an operator or manufacturer comes across some operating problem or design defect before any accident has occurred. Although a real safety item would be corrected immediately, anything less would be subject to a concern that voluntary exchange of this information—in terms of re-
vised operating procedures or recommended modifications—may come back to haunt him if an accident occurs prior to the time the change is put into effect. And we lawyers have certainly contributed to that concern. Or take an airline captain who makes a mistake and gets himself into a dangerous situation—but he "lucks out" with no injuries to himself, the passengers or the airplane. It may even be the sort of thing of which only the captain and not the co-pilot is aware. If he reports this situation, he may open himself to disciplinary action or criticism. Thus, very often his tendency is to just keep his mouth shut. On the other hand, if he reports his error, it may well alert the operator or manufacturer to a situation which, up until then, had not been considered inherently dangerous. In such a case, the operator or manufacturer would then be able to take corrective action and hopefully prevent one or more future accidents. Reports such as these should, of course, be encouraged.

Insofar as incident reporting is concerned, there have been several recent suggestions concerning protection for such reports—both from disciplinary action and from use in negligence proceedings. That is yet another subject; so I must refer you to some remarks in this area by your luncheon speaker, Harold Caplan. They appear in the *Journal of the Royal Aeronautical Society* for November, 1967, and I commend them to your reading.

I have digressed somewhat to this area of accident prevention through incident reporting only because I think it ties in quite closely with the problems of accident investigation. It seems to me that the philosophy of encouraging reports to prevent accidents is the very same philosophy which encourages full cooperation in accident investigation to prevent similar accidents. As things stand now, the air carrier or manufacturer who does cooperate fully may later have to take his lumps in a negligence case because of data voluntarily released or developed in connection with the investigation. Even if the data are not usable directly in a court of law, certainly they may give negligence counsel excellent leads to areas of inquiry which may pay off in terms of recovery. I shall have more to say about this in my conclusion, but would like to turn now to what might be called the attorney's role during the investigatory period of an accident investigation.

IV. THE ATTORNEY AND HIS FUNCTION IN THE INVESTIGATION

Mr. Allen of NTSB has already covered in some detail the organization and conduct of aviation accident investigations. The role of the attorney for a designated party to the investigation at this stage of things, it seems to me, is one of advising and helping to coordinate the activity of his client in aid of the investigation. He also has a function in the analysis of the progress of the investigation and the suggestion of possible additional lines of inquiry. There are those who say that a lawyer has no business in this stage of the investigation—I might agree, if all the lawyer does is run around to try to establish negligence or fault. But, if he, in fact, analyzes materials as they are developed, and suggests further lines of inquiry, then
I think he performs a useful function. As lawyers we are trained to analyze masses of materials and come up with the thread that runs through that mass of material. This is what accident investigators do, at least from the technical standpoint, and I believe that they can be assisted by the legal mind.

When a company or organization is designated as a party to an NTSB investigation, it is because that party has a particular interest or expertise which will be of assistance to the investigating team. If you are counsel for a party, one of your functions should be to encourage your client to participate in as many aspects of the investigation as possible. In this way, your client will give the maximum assistance and will have first hand access to as much of the information being developed as possible. Also, as a practical matter, you will be in a better position to assess how the investigation is going. By this I mean that if it appears the investigation is taking an adversary turn, you can suggest lines of inquiry, testing and the like which may set-to-rest improper suggestions of fault.

While I have suggested the "ideal" in terms of the attorney's role in accident investigation, in many investigations, the "ideal" is far from met. In such a case, a party to the investigation must have advice as to how to meet the turn of events. Helping keep things under control when the investigation tends to become adversary, calls for much tact and restraint. The initial reaction of most parties is to make counter-charges of fault and the whole investigation degenerates into a cat and dog fight. This is a delightful turn of events for plaintiff's counsel, but I doubt that it contributes to the investigation of probable cause itself. One thing parties to an investigation must keep in mind is that they or their company may be in for a rough time as a result of the probable cause finding. I think that this possibility, or the unwillingness to face up to the possibility, is the biggest culprit in creating an adversary climate in an accident investigation. As counsel for a party, a major part of your job may be to educate your client to this possibility. I believe most strongly that the willingness of a party to admit that maybe, just maybe, he or his employees erred is the greatest aid to establishing the credibility of his evidence or analysis. I do not mean to imply that a party to an investigation should roll over and play dead when a suggestion of error is made; rather he should bend every effort to investigate the possibility with an open mind and submit the results of an honest investigation.

This business of accident investigation is real detective story stuff, and every avenue must be explored—even possible error on the part of your client! If parties to the investigation all took that approach, the process of investigation towards the real probable cause would proceed much more smoothly and expeditiously. Having participated in accident investigations for several years, I can say from experience that the attitude of the parties to the investigation is all important. Of course, most major accident investigations result in a hearing. The hearing is in aid of the investigation so it, too, is concerned with determination of probable cause and not fault or liability in the legal sense. But take it from me, if you think things can
get touchy as between parties to the investigation during the investigatory phase, the hearing stage is when they can really get hot. The hearing is, in a sense, the public display of the attitudes and approaches of the parties to the investigation. Again, the attitude of each of the parties is all important. I have seen hearings when a party has voluntarily supplied testimony that would in all likelihood be used against him in a negligence action based on the accident. I have also seen hearings where the parties engaged to a great extent in a trial to determine fault, not what happened.

Unfortunately, there is no easy rule or answer to the adversary or non-adversary problem in a hearing. The role of the attorney, as spokesman for a party, however, is to see to it that the facts necessary to a determination of probable cause are made part of the record. This can and should be done in such a way as to avoid name calling. But again, as in the investigatory phase, the attorney as spokesman for a party must be on guard that his client is not unjustly accused. If a certain line of questioning of a witness seems to point to a certain area as a possible cause of an accident, the attorney has a responsibility, not only to his client, but to the investigation itself, to delve into matters which properly bear on the possibility or likelihood of that area in fact being the probable cause. It is at this point that the presiding officer at the hearing really has his work cut out for him since he must rule as the propriety of questions in terms of cross-examination.

It is also at the hearing that an attorney—preferably one educated in the technical aspects of aviation matters—can do a great deal for his client. As an attorney, he is practiced and skilled in asking questions and getting to the meat of the matter. When a factual matter is at stake, he can and should be better able to bring the facts out through questioning than can most technicians who are far more skilled in electronics, aerodynamics or traffic control than questioning. The lawyer's ability includes the skill of asking questions properly, i.e., phrasing them for really factual answers and not in an argumentative fashion. Indeed, the most important thing is to get the facts into the record, since it is on this record that the final phase of his role is based.

The phase of which I speak now, is that of preparing an analysis of the facts of record to be submitted in accordance with Section 431.20 of the NTSB's regulations. It is in this document—really in the nature of a brief—that the most valuable aid can be given. This consists of analysis of the record and stating clearly and succinctly the reasoning which leads the party to the investigation to such conclusions as it may have reached. Also, I believe that the best comments are those that are dispassionate and consider all the evidence, both pro and con. A comment which ignores facts of record as if they will thereby go away, is of no use whatsoever. Remember, the intent of the whole investigation and hearing process is to reach a reasoned determination as to probable cause and so to prevent future accidents. Again, the ideals are easy to state, but their accomplishment is often very difficult.
This brings me to the suggestion that I would like to leave with you. The suggestion is not mine, but that of Charles McErlean of United Air Lines, made last December at the Flight Safety Foundation International Air Safety Seminar at Williamsburg, Virginia. Mr. McErlean recognized, as I think we all must, that a major problem of exchange of safety information and real cooperation in accident investigations, is the fear of litigation. His suggestion was, basically, that liability without fault be imposed on air carriers. This would leave for litigation only the question of the amount of damages and would certainly be in the interest of plaintiffs themselves since the matter of liability would be fixed and the only question would be "how much?" Recently, the aviation trade press reported a Department of Justice proposal to set up a federal trust fund to pay survivors of victims of accidents on United States airlines. This, as I understand it, would involve payments without a court ruling on liability. It seems that this is similar to Mr. McErlean's suggestion, but would apply only to the government. I suggest the possibility of carrying this idea one step further and make provision that payments from a national or international fund would release all possible parties to an accident. In such a case the fund could be supported actuarially by airlines, air frame, engine and component manufacturers, the government and maybe even by some of the airline unions. The advantage, I suggest, is that the parties would have less reason to fight among themselves on the matter of fault and could turn their whole energies to investigating accidents and exchanging safety information for the purpose of preventing accidents. After all, isn't that our ultimate goal?