

# Use and abuse of accident investigation reports

Accident investigation reports are available to be used in civil and criminal trials. Sean Gates, ERA's Legal Counsel, advises on protecting one's own interests and taking an active role during investigations

// The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability". (S.3.1, Annex 13, Chicago Convention 1944). "The sole objective of safety investigations should be the prevention of future accidents and incidents without apportioning blame or liability". (EU Regulation 996/2010). These statements represent a clear view by the legislators of the importance of insulating the accident investigation, and implicitly the investigation process, from the judicial processes to determine responsibility.

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## Self-incrimination

Investigators need unfettered access to evidence and witnesses, and witnesses must be able to give their evidence without fear of self-incrimination. Article 11 of the Regulation empowers investigators to compel witnesses to testify. Article 3(2) insulates the investigator's independence from any

other party or entity with a conflicting interest such as the prosecutorial authority. Article 14 attempts to protect witnesses from self-incrimination by prohibiting the publication of statements of sensitive data. However, this is subject to Article 14(3) which expressly permits the release of such information if ordered by the relevant judicial authority after it conducts a balancing exercise between the damage which disclosure will do to the interests of future safety investigation on the one hand, and such benefits as disclosure of the information may afford on the other. With this uncertainty, those at risk must assume the worst and act accordingly. The provision clearly recognises this by stating that disclosure will damage future safety investigations by making it clear to witnesses of future accidents that "anything they say will be taken down and may be used against them".

Hearteningly, two recent decisions in the UK High Court rejected attempts by the police and the coroner respectively to procure production of statements made in the course of investigations. In one judgment, Mr Justice Singh said that he could hardly conceive of circumstances in which statements made to the AAIB could properly be the subject of an order for disclosure because: "first, there would be a serious and obvious 'chilling effect' which would tend to deter people from answering questions by the AAIB with the candour which is necessary when accidents of this sort have to be investigated by it. This would seriously hamper future accident investigations and the protection of public safety by the learning of lessons which may help to prevent similar accidents ... and secondly, it would be unfair to require such disclosure ... because the powers of the AAIB, unlike the ordinary police, are such



as to permit the compulsion of answers to questions ... there is no clear practice ... of giving a caution to the person interviewed ... this contrasts markedly with the purpose of a police interview which is to elicit evidence which may be capable of being used at a subsequent criminal trial".

## Greatest expertise

The courts in these cases refused access to witness statements but, nevertheless, observed that "there can be little doubt but that the AAIB, as an independent state entity, has the greatest expertise in determining the cause of an aircraft crash .... In the absence of credible evidence that the investigation into an accident is incomplete, flawed or deficient, a coroner ... should not consider it necessary to investigate again the matters covered or to be covered by the independent investigation of the AAIB". There can be little doubt that this logic would also be followed by courts dealing with civil or criminal claims (see, for example, *Rogers v. Hoyle*), and experience shows that courts routinely accept the opinions of official investigators charged with preventing accidents to determine probable cause, responsibility and blame. This is so even though Article 17 prohibits the creation of a presumption of blame or liability for an accident on the publication of any safety recommendation by the investigator.

TOP TWEETS

**Protecting interests**

While it is recognised that the report should not be used to allocate responsibility; and that statements and evidence which are sensitive should not be published; courts routinely treat official accident reports as being reliable independent statements by experts of their views as to what has happened, creating a high burden for defendant or accused to overcome. There is a long-standing principle in criminal law that a man should not be convicted in absentia; but those who may be prosecuted as a result of an accident where the prosecutor relies on the official report have no right to be represented in the investigation and little or no right to challenge the findings of the investigation. Since accident reports are available for use in civil and criminal trials, individuals and companies involved in investigations should take any opportunity in the course of the accident investigation to protect their liberty and assets, at a minimum by exercising their right to refuse to incriminate themselves, just as they would if they were being sued or prosecuted. Sadly, experience shows that some commercial organisations misuse the process for brand protection and consideration must also be given to this aspect in formulating the correct approach to the investigation. This undermines the protection of public safety, but until the accident investigation material is completely immune from production in civil and criminal proceedings, and investigators are sufficiently funded not to have to rely on external organisations in their work, individuals and corporations would be well advised to proceed with circumspection to protect their own interests, at least by exercising their right to refuse to incriminate themselves. ■



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