

GUEST COLUMN

The role of the NTSB in aircraft accident litigation

The crash of American Eagle Flight 5342 and an Army Black Hawk over the Potomac River underscores the importance of pilot training, aircraft reliability, and communication, with the NTSB's thorough investigation set to determine causes and recommend safety changes, though it may take years to complete.

By Roger W. Clark

The recent collision of American Eagle Flight 5342 with an Army Black Hawk helicopter over the Potomac River tragically reminds us how much our flying safety relies on the training, skill and concentration of the pilots and air traffic controllers, the reliability of the aircraft systems, the weather, and adequate and effective communications, among other factors. In the Jan. 29 accident, it would seem that mere feet and seconds made the difference between an uneventful landing on a clear winter night and a shocking end to a routine flight.

If only the American CRJ 700 had stayed on approach to Runway 01 instead of being switched over to Runway 33. If only the Black Hawk were 100 feet lower. If only the Black Hawk were hugging the shoreline of the river instead of a half mile away over the river. If only the air traffic controller had observed the closure between the two aircraft and aggressively ordered either aircraft to change heading or altitude. If only . . . if only!

A major commercial aircraft accident is often the result of multiple human, mechanical and system flaws, missteps and failures. And the public wants answers immediately. The media is filled with experts who opine on possible reasons



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that disaster struck at 8:47 p.m., on Jan. 29, 2025. We want to throw the blame somewhere.

But the National Transportation Safety Board (NTSB) - steady and methodical and frustratingly slow - steps in and assumes control of the investigation, including, as in this case, accidents involving both military and civil aircraft (with the participation of the appropriate military authorities).

If the NTSB, in consultation with the Department of Justice, suspects an accident may be the result of a

criminal act, the investigatory priority is relinquished to the FBI. This happened following the TWA 800 accident in 1996 when a Boeing 747 departing John F. Kennedy International Airport was initially believed to have been brought down by a surface-to-air-missile.

NTSB's mission

The NTSB is not in the blame game. It is in the cause game. Its mission is to determine the causes and contributing factors that led to an accident and make recommendations

to the Federal Aviation Administration (FAA) for regulatory changes to prevent another such accident from happening.

The "preliminary report" comes out rather quickly, sometimes in a matter of weeks. But the preliminary report typically contains only basic information about the location of the accident, the aircraft involved, the time of the accident, the nature of the flight, the weather, and so on. It can be two years or more before the NTSB reaches its conclusions and issues its all-im-

portant final and probable cause reports.

An independent U.S. government agency, the NTSB was created in 1967 to investigate aviation accidents and incidents, ship and marine accidents, pipeline incidents, bridge failures, some highway crashes, and railroad accidents. The NTSB is independent of the Department of Transportation and the FAA, an agency of the DOT, in order to avoid conflicts. The NTSB is responsible for investigating accidents and, if appropriate, recommending changes in how the FAA and DOT handle their jobs to enhance transportation safety.

Unlike the FAA, the NTSB does not have rulemaking authority; it can only make safety recommendations. Unless Congress decides to take legislative action, the FAA ultimately decides which recommendations to mandate and enforce, and it sometimes decides not to adopt the NTSB's recommendations.

A waiting game

It may take years for the NTSB to reach its probable cause determination, but civil litigants - particularly in high-profile cases - are anxious to quickly move their cases forward. This creates inherent tension because the parties cannot get their hands on important evidence until the NTSB has concluded its investigation.

The aircraft wreckage, logs, maintenance records, data from the cockpit voice recorders and the flight data recorders, are not available to civil litigants until the NTSB completes its investigation and issues its final reports. Some information may be released beforehand; an accident such as the one over the Potomac River will see much public and political pressure to release data early.

Preliminary investigation

The NTSB "go-team" is prepared to be at the scene of an accident on 24 hours' notice. It typically consists of the NTSB investigator-in-charge, as well as experts in structures and metallurgy, airplane systems and operations, human performance, survival, power plants, and other relevant areas. The NTSB designates accredited party representatives when those organizations may lend additional expertise.

For the Potomac River accident investigation, the NTSB has des-

ignated representatives from the airline, the U.S. Army, the FAA, the engine and aircraft manufacturers, the National Air Traffic Controllers Association, the Air Line Pilots Association, and other organizations.

But private attorneys representing the decedents' families will not be permitted to participate on the investigation team. Courts have upheld this policy despite challenges that claimants suffer irreparable harm when engine and structure tear-downs spoil evidence. (*Graham v. Teledyne*, 805 F.2d 1386 (9th Cir. 1986)). The reasoning is that the NTSB statutory function is to determine probable cause, not to determine civil liability. Private lawyers are, however, allowed to participate in public hearings that the NTSB holds after a major aviation accident.

Access to evidence

Private lawyers will ultimately obtain the NTSB factual materials under the Freedom of Information Act. And 49 U.S.C. 1114 mandates that the NTSB disclose its investigative records and information, except for privileged materials. The final accident report and probable cause report will be a matter of public record.

However, those reports cannot, pursuant to 49 U.S.C. Section 1154 (b), be admitted into evidence in a trial seeking the recovery of monetary compensation. The probable cause report will not prevent private litigants from alleging and proving in civil litigation that the cause of the accident was different than the conclusion reached by the NTSB.

Court decisions have limited the application of that section to determinations issued by the NTSB, including the probable cause report of an accident. Factual reports of individual NTSB investigators are outside the purview of the statute. (*See In re Jacoby Airplane Crash Litigation*, Civ. No. 99-6073 (HAA) (D.N.J. Sep. 18, 2007))

Because of privacy concerns, the NTSB cannot publicly disclose any part of a cockpit voice or video recording or a transcript of oral communications. It may, however, release part of a transcript that it decides is "relevant to the accident." A private litigant is thus under a heavy burden to obtain the remainder of any transcript. The court will conduct an in-camera review and will allow discovery only if it

is satisfied that the transcript parts released by the NTSB do not provide sufficient information for the party to receive a fair trial. The actual recording is not discoverable unless a court concludes that the transcript alone is inadequate for the party to receive a fair trial.

Whenever a transcript or recording is ordered produced, a protective order will be entered to prohibit release to any person who does not need access for the proceeding. If the transcript or recording is received in evidence, the court must place the exhibit under seal.

Testimony

Once the final factual report has been issued and after the NTSB's public hearing (in the case of major accident investigations), private litigants may depose individual NTSB investigators by writing to and obtaining the permission of the General Counsel of the NTSB. The scope of the testimony is strictly limited so that Board employees do not become "entangled" in civil lawsuits.

For this reason, current NTSB employees may only testify as to the factual information they obtained during the course of an investigation, including factual "evaluations" contained in their accident reports. A deponent may not testify regarding the reports of other NTSB employees or other types of documents such as safety recommendations, safety proposals and reports. Each employee's deposition may be taken only once, and the employee cannot be compelled to appear at trial.

Liability

Unlike the NTSB, private lawyers are in the blame game; they will be relying, in part, upon the investigatory factual findings of the NTSB to establish or defeat civil liability. Aviation accident litigation invariably triggers a complex web of laws.

Claims against the United States - either because of the alleged fault of the Black Hawk aircrew or the air traffic controllers - will be brought in U.S. District Court under the Federal Tort Claims Act (FTCA). Subject to a number of important exceptions, including the discretionary function exception, the FTCA waives federal sovereign immunity for death and personal injury to the extent the United States would be liable "in the same manner and to the same extent as a private individual under like circumstances." But

jury trials are not allowed and no punitive damages are recoverable.

Claims against the airline for alleged operational in-flight air safety shortcomings of the flight crew would probably be subject to a federal standard of care. (*See Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999); 14 C.F.R. 91.13(a)). Claims against aircraft and component part manufacturers alleging design flaws would probably be subject to a state standard of care, unless the state standard is preempted by federal law (*See Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018)) or unless state claims for alleged design flaws in the Black Hawk are subject to the federal government contractor defense. (*See Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988).)

Disasters spawn changes

It is a sad truism that major changes in aviation practices and procedures only seem to come about when there are catastrophic disasters. The last major disaster, Colgan Air Flight 3407 from Newark to Buffalo in February 2009, triggered profound changes in commercial aviation. The NTSB concluded the probable cause was the pilot's inappropriate response to stall warnings. Congress then passed the Airline Safety and Federal Aviation Administration Extension Act of 2010. The FAA revised pilot fatigue rules, requiring both the captain and first officer to hold Airline Transport Pilot certificates (increasing the minimum experience for first officers from 250 to 1,500 hours of flight experience), and it strengthened airlines' authority to investigate pilot applicant backgrounds.

The wintery January 1982 Air Florida crash, also into the Potomac but on departure from National Airport (now Reagan National), triggered major changes to aircraft deicing procedures, as well as reforms in pilot training. A 1956 mid-air collision over the Grand Canyon between a United Airlines DC-7 and a TWA Super Constellation led to the passage of the Federal Aviation Act of 1958 that created what is now the Federal Aviation Administration. The FAA was given complete authority over U.S. airspace, including military operations, and mid-air collisions gradually became less frequent. As the recent tragedy demonstrates, however, not eliminated.

Conclusion

What recommendations will the NTSB make as a result of the Jan. 29 accident, and will the FAA act upon those recommendations? In response to this latest air disaster, will Congress pass remedial legislation? We can only speculate.

One change has already occurred, and the FAA did not wait for a recommendation from the NTSB. It has restricted helicopter use of the Route 4 VFR corridor, which the Black Hawk was using to transit through the crowded "Class B" air-

space around Reagan National Airport. Are more changes to come?

Administrative claims are already being filed with the FAA and the Army, necessary precursors to suit under the FTCA. Suit against the United States may be brought after the administrative claim has been denied in writing, or if six months pass after the claim is filed and the Government has not made a final disposition of the claim. The NTSB will be under heightened political and public pressure to complete its investigation quickly. And no

doubt the NTSB will give this investigation priority. But if history is a prelude, the NTSB will not be rushed to judgment. Congress made the NTSB independent for a reason.

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