

THE USE OF AVIATION ACCIDENT INVESTIGATION REPORTS AS EVIDENCE IN COURT

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Abstract

Air transport is an essential part of the international society, constituting a liaison between people and continents and an important contributor to the world economy and globalization. Aircraft operation has grown in complexity needing for a safety level to be maintained and constantly grown. Along with the development of the aviation industry, the legal system in the aviation field has registered significant challenges, one of them being the claims related to air crashes which are contested. The investigation process of an accident or incident has become not only important for the safety of operations but also to the establishment of legal fault and blame. The article proposes to present the principles of conducting and accident and incident investigation, the value of the report and new developments in relation to the recent case law on the use of the accident investigation report in Court.

Keywords: *accident, incident, Annex 13, ICAO, report.*

Introduction

Considered to be the safest form of mass transportation, civil aviation is not free of risks and unfortunate events, such as incidents or accidents occur, shocking the civil society, traumatizing the passengers and putting a huge pressure on the authorities dealing with investigating such events and in charge of taking the appropriate safety measures. Since the Second World War, aviation safety has significantly increased the level of safety and managed to dramatically reduce the accident rate. The international society, through the International Civil Aviation Organization¹ has also developed an investigation process, thoroughly describe by Annex 13 – Accident and Incident Investigation to the Chicago Convention². According to the provisions of Annex 13, the sole objective of the investigation of an accident or an incident is the prevention of such events to occur and not to apportion blame or liability.³ The same approach is reflected by the process of conducting an

investigation and by the process of occurrence reporting, described by the EU regulations.⁴

This approach existing in the international legal framework, considering the accident or incident investigation report as a mean of improving safety generates a love/hate relationship between the authorities in charge with the administration of justice and the authorities responsible for the safety investigation. One, on the one hand, is concerned with preserving justice by identifying those responsible for the damage and bringing them on front of justice and one, on the other hand, with the sole purpose of enhancing aviation safety through independent investigation and reporting.⁵

The investigation process, "as important as it is to the safety of the flying public, has unintentionally also become important to the establishment of legal fault and blame"⁶. The idea of separating the investigation process from the judicial one is desirable and there is a clear intention on the side of the authorities to follow such a separation. However, due to the importance of one process to the other, in practice, it has become of practical utility to use the

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¹ The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation. For more information please visit www.icao.int.

² Convention on International Civil Aviation (Chicago Convention) signed on 7 December 1944. The Convention establishes the principles governing civil aviation and sets forth the purpose of ICAO.

³ ICAO Annex 13 – Aircraft Accident and Incident Investigation, Ninth Edition, July 2001 point 3.1.

⁴ Regulation (EU) no. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC and Regulation (EU) no. 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation, amending Regulation (EU) No 996/2010 of the European Parliament and of the Council and repealing Directive 2003/42/EC of the European Parliament and of the Council and Commission Regulations (EC) No 1321/2007 and (EC) No 1330/2007.

⁵ Kevin Humphreys, "Just Culture – Can there be a Just Culture in Aviation Safety Occurrence Reporting Systems", paper presented at ISASI 2014 Seminar, October 2014, Adelaide, Australia, pag. 3.

⁶ Liam P. Sarsfield, William L. Stanley, Cynthia C. Lebow, Emile Ettegdgi, Garth Henning, *Safety in the Skies – Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume*, Institute for Civil Justice, RAND, pag. 81.

final accident report in civil litigation. This is a natural consequence of the mere fact that the final report is considered to be a "roadmap to liability"⁷.

2. Regulatory Framework

2.1. International Regulatory Framework – ICAO Annex 13

In accordance with art. 37 of the Chicago Convention, ICAO can adopt Standards and Recommended Practices (SARPs)⁸ in order to achieve "the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation"⁹. SARPs are published by ICAO in the form of Annexes to Chicago Convention. SARPs do not have the same legal binding force as the Convention itself, as they are international treaties. However, States agreed to collaborate in securing uniformity in the implementation of SARPs and each Contracting State has the obligation under the Chicago Convention to notify the ICAO Council of the differences between SARPs and national regulation and practice.¹⁰ ICAO regularly verifies compliance with SARPs through audits of state oversight systems and means of continuous monitoring.

Along time, civil aviation was contested by public opinion after serious incident or accidents had occurred. The manufacturers and states specialists made considerable efforts to improve the safety and performance of the air carriers, telecommunications, airports, the personnel training with the purpose to

continuously increase the level of safety of air transport.

In order for a uniform process and mechanism of incident/ accident investigation to be put in place in all ICAO Member States, the ICAO Council adopted Annex 13 in 1951¹¹.

The provisions of this annex regulate all the measures, actions and processes that States must take and follow when such an unfortunate event has taken place. The provisions of Annex 13 complement Article 26¹² of the Chicago Convention providing for procedures to be applied in an investigation instituted under the requirement of Article 26 and also in the event of any aircraft accident falling within the provisions of Annex 13.

Several aspects need to be considered from a legal perspective in the context of Annex 13. According to Annex 13, in the aftermath of an accident, authorities (specialized in accident investigation) are involved in the investigation of the event. The accident investigation authorities have the obligation to coordinate with the judicial authorities¹³. However, Annex 13 stipulates that the investigation authorities shall have full independence in the conduct of the investigation¹⁴. Moreover, Annex 13 strongly recommends that „any judicial or administrative proceedings to apportion blame of liability should be separated from any investigation under the provisions of this Annex."¹⁵ Hence, the sole purpose of the accident or incident investigation is the prevention of future accidents and incidents and not to apportion blame or liability.¹⁶ This is the sole purpose of the accident report as well.

Furthermore, Annex 13 provides that certain types of record which are collected by the safety

⁷ *Idem* pag. 82.

⁸ According to Assembly Resolution A36-13, Appendix A (ICAO Doc 9902) a *Standard* is defined as - any specification for physical characteristics, configuration, material, performance, personnel or procedures, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention. *Recommended Practices* is defined as - any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which Contracting States will endeavour to conform in accordance with the Convention.

⁹ Michael Milde, *International Air Law and ICAO*, Eleven International Publishing, 2008, pag. 52.

¹⁰ Article 38 of the Chicago Convention – "Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the differences which exists between one or more features of an international standard and the corresponding national practice of that State."

¹¹ ICAO Annex 13 – Aircraft Accident and Incident Investigation.

¹² Article 26 of the Chicago Convention – "In the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State."

¹³ Standard 5.10 of Annex 13.

¹⁴ Standard 5.4 of Annex 13.

¹⁵ Recommendation 5.4.1. of Annex 13.

¹⁶ Standard 3.1. of Annex 13.

investigation authorities should not be disclosed¹⁷ and that each State is required to establish a mandatory incident/accident reporting system to facilitate the gathering of information on safety deficiencies.¹⁸

An interesting feature of Annex 13 is that the State of Occurrence (the State responsible for conducting the investigation), has the possibility to “delegate the whole or any part of the conducting such investigation to another state by mutual arrangement and consent”¹⁹. An example in this matter is the recent case of the flight MH 17 struck down by an anti-aircraft missile above the territory of Ukraine. The Ukrainian authorities delegated the accident investigation to the specialized authorities from Holland (the Dutch Safety Board) who also made the final Accident Investigation Report. This is a clear statement of State cooperation and compliance with the provisions of ICAO Annexes and the Chicago Convention.

2.2. European Regulatory Framework

Recognizing the importance of accident investigation in civil aviation, the European Union adopted in 1980 Directive 80/1266/EC on cooperation and mutual assistance between Member States in the field of accident investigation. This Directive was replaced by Directive 94/56/EC, which transposed into the EU legislation a number of principles contained in ICAO Annex 13.

After conducting a comprehensive review of the EU legislation in the field of accident investigation, the EU adopted in 2010 Regulation (EU) no. 996/2010 on the investigation and prevention of accidents and incidents in civil aviation. The Regulation applies to safety investigations into accidents and serious incidents which occur:

- within the EU;
- outside the EU but involve aircraft registered in an EU country or operated by an undertaking established in an EU country;
- in territories where an EU country may appoint a representative or has a special interest as a result of, for example, fatalities or series injuries to its citizens.²⁰

Member States must ensure that safety investigations are conducted or supervised by a permanent national civil aviation safety investigation authority. This regulation also establishes an obligation for each EU country to

investigate every accident or serious incident which occurs on its territory and involving an aircraft.²¹

The sole objective of the investigation is to prevent future accidents and incidents in civil aviation and not to apportion blame or liability. The Regulation moreover provides that a national safety investigation authority from one EU country may request the assistance of other EU national safety investigation authorities.²²

2.2. National Regulatory Framework

Romania is an EU Member State, therefore, when investigating an accident or serious incident which occurred on its territory, has the obligation to comply with the provisions of Regulation (EU) no. 996/2010.

At national level, the Civil Aerial Code of Romania establishes the general framework for accident and serious incident investigation in Chapter XIII – Technical Investigation of Incidents and Accidents in Civil Aviation. According to this chapter, is clearly established that the sole purpose of the investigation and of the investigation report, is to contribute to the improvement of safety and not to apportion blame or liability.²³ Furthermore, Article 89 of the Code provides that the technical accident investigation is completely independent from any judicial or administrative investigation. Identifying the person responsible for the accident or serious incident lays with the competent judicial authorities.

The national civil aviation safety investigation authority is the Civil Aviation Safety Investigation and Analysis Center (CIAS) established by Government Ordinance no. 26/2009 on the establishment, organization and functioning of CIAS.

3. The Accident Report

3.1. General remarks

The key to identify the causes of accidents or incidents and to increase the level of safety is the Accident Report. The report is a detailed document where all factors that led to the occurrence of the accident are identified and presented.

Annex 13 provides that the civil aviation investigation authorities have the obligation to conduct an investigation and draw up an investigation report. When conducting an investigation, the authorities involved (from different states if it is the case, as well as judicial authorities) need to maintain a close cooperation,

¹⁷ Standard 5.12 of Annex 13.

¹⁸ Standard 8.1. of Annex 13.

¹⁹ ICAO Annex 13.

²⁰ Article 3 of Regulation (EU) no. 996/2010.

²¹ Article 4 of Regulation (EU) no. 996/2010.

²² Article 1 of Regulation (EU) no. 996/2010.

²³ Article 88 Civil Aerial Code.

without affecting the investigation or the independence of the investigation authorities.

The Final Accident Report must follow a clear structure as indicated by Annex 13, namely it should present the a) Factual Information; b) Analysis of the situation; c) Conclusions and d) Safety recommendations, very important for fulfilling the objective of the investigation report, to increase the level of safety in air transport.

3.2. Legal value of the accident report

The purpose of the Accident Investigation Report is to contribute to the improvement of safety and not to apportion blame or liability, as it could be observed from the above presented provisions of Annex 13 and Regulation (EU) no. 996/2010. The Accident Investigation Report constitutes safety information, which according to Attachment E of Annex 13, should be protected from inappropriate use in order to ensure the continued availability, since the use of safety information for other than safety related purposes may inhibit the future availability of such information, leading to an adverse effect on aviation safety. The term „inappropriate use” refers to the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for disciplinary, civil, administrative and criminal proceeding against operational personnel, and/or disclosure of the information to the public.²⁴ However, according to point 2.1 of Attachment E of Annex 13, it is not the purpose of protecting safety information to interfere with the proper administration of justice. Furthermore, it is stipulated that national laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety and the need for the proper administration of justice.²⁵

Taking into consideration the above, the Accident Investigation Report, as it is a safety information, is not used in Court as evidence, as it constitutes a technical analysis of the causes of the accident and does not intend to apportion blame or liability. So far in practice, the report has been brought before the Courts as a benchmark for all parties involved in the trial and had an advisory role.

4. Legal Interests

4.1. Aviation Safety vs. Administration of Justice

When it comes to the Accident Investigation Report, there is a controversy as to whether the report should be used as evidence and if it should be taken into consideration in the process of proper administration of justice. There is a clear fear on the side of the aviation personnel involved in the accident since in providing information related to the causes of the accident, a fear of being prosecuted and held accountable for the accident and damages resulted. This is the main reason for which the information gathered in the accident investigation process is protected by the civil aviation investigation authorities, so that reporting is encouraged and safety improved. The fear of criminal proceedings leads to less contribution by aviation professionals in the course of safety investigation and the increase of judicial proceedings lead to less reporting.

Even though the investigation process is crucial to the safety of flying public, over time and through practice it has “unintentionally become important to the establishment of legal fault and blame.”²⁶

Separating the investigation process from the litigation process is “a well-intentioned idea”²⁷ however, in practice it is hard to maintain such balance as the process influence and have an impact one on another. As a consequence, the final accident report of the investigation authority is considered to be a “roadmap to liability”²⁸, therefore, is used in court as evidence.

The most controversial part of the final report is the statement of probable cause. This statement is a cumulus of findings and analysis leading to the cause of the accident and establishing the exact factors that led to the catastrophe.

However, this analysis has a significant impact on the means for establishing legal fault and blame.

Taking into consideration the above rationale, it is important that in the process of identifying aviation safety issues, improving safety and administration of justice, to avoid setting a priority of interests. This can be achieved through a strong cooperation between the civil aviation investigation authority and the judicial authorities, helping them to better understand the consequences a judicial process and the use of safety information have on civil aviation safety.

²⁴ Point 1.5 (c) of Attachment E - Legal guidance for the protection of information from safety data collection and processing systems, Annex 13.

²⁵ Point 2.1 Attachment E - Legal guidance for the protection of information from safety data collection and processing systems, Annex 13.

²⁶ Liam P. Sarsfield, William L. Stanley, Cynthia C. Lebow, Emile Ettegui, Garth Henning, *Safety in the Skies – Personnel and Parties in NTSB Aviation Accident Investigations: Master Volume*, Institute for Civil Justice, RAND, pag. 81.

²⁷ Idem.

²⁸ Idem pag. 82.

4.2. Use of the investigation report in judicial proceedings

As we have stated above, the Accident Report constitutes a „roadmap to liability”, therefore, representing a starting point for lawyers of their own investigation in preparation for the lawsuit. The report suggests areas of inquiry, experts, witnesses, hence helping the lawyers to build the case. It also contains technical aspects that are of great importance to the case.

Even in the context of this situation, where the report constitutes a basis for a litigation preparation, it has been accepted as evidence as such in very few cases, and limited. This has been though changed in recent caselaw.

In the *Rogers vs. Hoyle* case, the English Court of Appeal established that accident reports are admissible as such as evidence in civil proceedings.

The case arose out of a fatal accident which took place in May 2011. Mr. Rogers was a passenger in a vintage Tiger Moth bi-plane piloted by the defendant, Mr. Hoyle, which crashed into the ground. Mr. Rogers was killed and Mr. Hoyle was seriously injured but survived. The Accident Investigation report, published in June 2012, noted that „a loop manoeuvre was carried out at too low height for the pilot to be able to recover from the subsequent spin”²⁹. Furthermore, it stated that the pilot did not have sufficient knowledge or training on the Tiger Moth’s correct spin recovery technique, and it was very much probable that he would not have been able to recover from an unintentional spin, taking into consideration the height available.

The dependents of Mr. Rogers brought a claim against Mr. Hoyle, seeking to submit the Accident Report as evidence. The defendant responded, requesting an order for the parts of the claim relying on the report to be struck out and a declaration that the report was inadmissible in the proceedings.

The Court of first instance accepted the report as evidence, decision that was contested by the defendant. In its decision delivered on 13 March 2014, the English Court of Appeal confirmed the first instance decision, that the Accident Report is admissible as evidence, both as to the facts it contains and as expert opinion evidence. Further, the Court „rejected the defendant’s submissions that the Report was unsuitable as evidential material. Features of the report, including the unattributed nature of the findings, and the lack of any verbatim reporting of witness evidence, went, in the opinion of the Court, to the weight to be given to the evidence in the report rather than its character.”³⁰ It was also

stated that ” the report contained statements or reported statements of fact, it was, in the view of the Court, *prima facie* admissible.”³¹ „Concerning the considerations to be taken by the Court when exercising its discretion to admit/exclude the report from evidence, the Court rejected the concerns raised by the defendants that admission of the report into evidence would have an adverse impact on future accident investigations. Noting the overriding objective of the Court “*of dealing with cases justly and at proportionate cost*”, the “*particular potential value*” of the report tended, in the Court’s view, to favour its inclusion in evidence. The Court noted the challenge faced by many litigants to advance claims without access to the relevant information submitted to the investigators, and/or in financing independent evidence. The Court also rejected the notion that the admissibility of accident reports was so likely to prejudice the interests which the investigation authority serves that its reports should generally be excluded from evidence, noting *inter alia* that the reports are, on any view, available to litigants and can be used as the foundation for a claim or defence, and this has not had any apparent adverse effect on the authority’s work.”³²

5. Conclusions

The *Rogers vs. Hoyle* case could become a landmark decision. Time will tell and show the impact such a decision has in national and international litigation in relation to the use of accident investigation reports as evidence in civil litigation. A fact is obvious, that we face time of change in the approach the Courts have and a new type of balance between the administration of justice and aviation safety.

One must not forget that safety has a sovereign status and such a status needs to be kept throughout the entire judicial proceedings in order for safety information to be available in the future as well and encourage safety reporting without the raising the level of fear of prosecution among aviation professionals.

The *Rogers vs. Hoyle* decision showed a different perspective in relation to accident investigation reports used in civil proceedings and changed the view that accident reports are not to be used in order to apportion blame or liability. The decision emphasized that the report constitutes a relevant evidence of potential value and not taking into consideration the report as evidence, would be contrary to the role and objective of the court, namely to analyze the case justly and proportionate.

²⁹ UK Air Accident Investigation Branch (AAIB) Report of June 2012.

³⁰ *Rogers vs. Hoyle* Case no. B3/2013/1817

³¹ *Idem*.

³² Giles Kavanagh & Mark Waters, „Landmark English Court of Appeal Decision Upholds Admissibility of Accident Investigation Reports in Civil Proceedings”, Aviation issue of Hollman Fenwick Willan, March 2014, pag. 2.

Furthermore, such reports are available for the public, so it would not constitute a violation of Annex 13 or Regulation (EU) no. 996/2010 in terms of protecting safety information. “Even if reports were not admitted, they will undoubtedly be used by would-be claimants when forming their claim”.³³

Even though this decision brings a new approach in relation to evidence presented in civil litigation arising out of aviation accidents, it is not recommended that accident investigation reports be used in civil proceedings as evidence but rather as guidelines for lawyers and judges in the better understanding of the circumstances in which the accident took place and of existing operational and technical conditions at the time of the event. The

accident investigation report should remain a document used strictly for the benefit of aviation safety and not to apportion blame or liability. It is without doubt though that the administration of justice and the aviation safety aspects interconnect, however, a balance and independence should be maintained between the aviation authorities conducting the investigation and the judicial authorities. Taking a different approach, would create a high degree of circumspection in the reporting process and in the activities of the investigating inspectors, knowing that their actions and declarations could lead to “intensive cross-examination in Court”³⁴. Eventually this would cause a decrease in the level of aviation safety.

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³³ Gille Belsham, David McInnes, William Turner & James Hickland, “Aviation Safety in balance?”, INCE&CO International Law Firm Journal, pag. 5.

³⁴ Idem.