Just culture and American jurisprudence

by Tom Lintner and Tom Dunlap

The importance of operating a just culture in supporting safety occurrence reporting has sometimes been associated with the use of criminal prosecution after human error accidents and serious incidents in European aviation. In contrast, the United States does not often see criminal justice invoked in controversial circumstances after aviation accidents but it does have a unique culture in respect of the resolution of claims of corporate liability for the consequences of aviation accidents in the Civil Courts, where the penalties are primarily financial.

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Whilst there are very significant differences between the two ways of dealing with liability, we believe that there are some interesting comparisons to be drawn between the mechanics of this system and the criminal prosecution of individuals after accidents or mishaps.

How a US Aircraft Parts Manufacturer minimizes legal liability

In the United States anyone can be sued almost any time for almost anything. While the claim may ultimately fail and at times even be frivolous, this does not remove the burden of legal fees incurred from defending a claim from a parts manufacturer or, indeed, any business. Contrary to the situation in many European countries, the United States allows 'contingent fees' which means a lawyer does not have to be paid by a claimant before filing their claim, but can instead legally take a proportion of the recovered amount (typically 33% to 40%). Further, the United States has the so-called "American Rule" for attorney's fees which means that, even if the claim is dismissed, as long as a low minimum threshold of factual pleading is reached, the losing party does not generally owe the successful party's legal fees (unless there is a contract or statute to the contrary). This process is radically different to those seen in European legal systems and makes the bringing of claims much more likely.

When considering legal liability, there are several underlying questions to consider:

1. What legal and thus financial exposure to claims does a business or individual have?
2. What is the legal definition of a "defective" product?
3. How can a claim be defended or the risk of one being made reduced?

Planning for mitigation of legal liability is like drafting a will – it inevitably brings up issues that are not enjoyable, but nevertheless have to be confronted. Time, in either instance, is rarely on your side (despite the admonitions of the Rolling Stones that time in fact "is on [your] side"). Once people

die their heirs are hurt, angry and looking for someone to blame. The more pockets they can reach into to assuage their hurt and loss, the better they and their lawyers feel about a chance of recovery. From this the need to defend yourself and your business well before this happens arises.

In civil litigation the claimant must show that the defendant had a duty to them and that the defendant, as a result of their negligence, caused injury to the claimant. Quite simply, someone who is hurt – mentally, physically, or financially – must prove that it is more likely than not that the actions or omissions of another caused that hurt. Additionally, there are some instances where a parts manufacturer could be held strictly liable, meaning that a claimant need not prove actual negligence because such negligence is automatic as a matter of law. This makes parts manufacturing a particularly challenging arena in which to prepare for the eventuality of litigation.

Applying the foregoing, if a piece of equipment or part failed then, as a practical matter, the manufacturer is liable for any resultant injury unless they can prove that their part did not cause the injury, or that the part involved had been modified or improperly maintained, or that it had advised the user of the risks and limitations of the part which the user had then ignored.

It's important at this point to offer a perspective on 'honest mistakes' in this example. If for example, during the manufacture of a part, or a piece of equipment, there is admissible evidence that someone said, "you know, this might cause a problem," and they are ignored – or worse, someone else says, "nah, impossible," that would be a potential example of gross negligence which would significantly increase the level of damages payable to a claimant.

Once an accident occurs and there is either injury or damage, it falls to the injured party to prove someone or something beyond their control caused the damage. This is the beginning of the "Blame Game."

Ironically, the aviation community has made significant contributions to enhancing the sophistication of the Blame Game with our focus on accident investigations where we claim – correctly – the goal of the investigation is to prevent a similar accident. Unfortunately, we conduct these investigations with a focus on finding who or what failed – because that's the easy part – and we have created a culture that actually supports the Blame Game mentality.

To truly enhance safety, which will entail finding out WHY something happened and WHY someone performed as they did – which is significantly more difficult than discovering WHAT happened – we need to alter our culture to move away from the Blame Game, while acknowledging our contribution in creating it, and further recognizing that playing the Blame Game is counter to the concepts of just culture.

Just culture and american jurisprudence (cont'd)

"I've had enough of your blame game...
Next time ask Lady Fortune for advice..."

So let's assume there was an accident with an injury and damage to an aircraft. Let's further assume the claimant injured party believes that the accident was caused by a faulty or defective part which that they believe they were not adequately warned about.

To be successful with a legal action the injured party must:

- Prove negligence by the manufacturer or,
- Demonstrate that because there was a defect in the product or with the way it worked as part of a wider entire system, there is strict liability.

When we ask the question "is a product defective," we encounter examples of complexities of legal criteria. In the U.S. liability in the form of breach of duty is generally a matter of State law which, laws which while they vary, have in the past often imposed "strict product liability" on any product that was "unreasonably dangerous" for use by an ordinary consumer. Clearly, a standard that is anything but clear in an industry like aviation where the term "ordinary consumer" is hard to define and the nature of the business, soaring above the clouds in a metal container, is viewed by many as inherently risky.

This confusion in aviation – and a number of other areas – has led the majority of the US States to adopt a more rigourous standard for strict liability which requires that:

- a product "fails to perform as safely as an ordinary consumer would expect when it is used in an intended or reasonably foreseeable manner", and
- does so where the "risk associated with the design of the product outweigh the benefits of the design."

Whilst this new standard helps, there is still significant room for manoeuvre and therefore for legal argument.

Applying this standard in the parts manufacturing arena, the injured party – the claimant – must show that:

- The product/part was defective when it left the defendant's control;
- The product/part was used in the intended manner or in a reasonably foreseeable manner;
- The product/part caused the claimant's injury.

Furthermore, U.S. law generally imposes a duty on a manufacturer to warn an end user of risks. If the claimant believes that they were not warned about the risks of using a product or part or that it is "so complicated that it needs better instructions in order to use it safely" then the manufacturer can be held liable for "failure to warn" in one of two ways, by failing to provide one or both of:

- **General instructions** like operating limits, weight and CG limits, etc.
- **Specific warnings of danger** like emergency procedures, placards in a cockpit, warning labels on equipment, etc.

While representing a tiny fraction of the issues involved in a U.S. civil litigation case, the reader can immediately see how the stage is set to focus on "who did it" and how "they" failed and what must be done to "correct and compensate" for the resulting damage.

While the prospects of litigation are daunting, frightening and, like death and taxes, perhaps ultimately unavoidable, an organisation can mitigate its risk and ultimate financial exposure by

being proactive. We propose that proactive legal review of operational procedures, regulatory compliance and internal quality assurance are the keys to promoting a safety culture and just culture, before an event occurs.

To mitigate the risk of civil litigation in the U.S. we suggest that organisations do the following:

Perform an initial exposure, liability and operational awareness assessment with a qualified U.S. attorney and aviation safety organisation to ensure your aviation business:

- Reports malfunctions, failures or defects in their products internally and to the proper authorities on a timely basis;
- Makes required design changes to preclude unsafe conditions and correct non-compliance when found;
- Complies with state, Federal and other operational audit requirements;
- Develops and maintains a "Continuing Operational Safety Plan";
- Maintains all original certification information, including computation and testing data;
- Strictly observes all corporate legal formalities, including annual meetings, books & records requirements and financial reporting;
- Reviews and audits internal disclaimers and contracts annually to keep up with changes in the law;
- Runs a tight ship.

We invite the reader to see similarities between these suggestions for parts manufacturers and the practices needed in any aviation business in respect of safety management and risk mitigation.

Just Culture, like Safety Culture, is seemingly common sense but it nevertheless often clashes with the all too biased human tendency to fail to prepare in advance and instead to deal with avoiding responsibility and accountability after the fact. Ultimately, successful implementation of just culture requires a behavioural foundation – and the acceptance of responsibility – before an accident occurs. Just culture arguments offered after-the-fact will only appear defensive and be counter-productive to the overall goal of a balanced approach. It can be done but "The longest journey begins with a single step."