

PILOTS C

Criminalizing aviation accidents not only is unfair to flight crews and other aviation professionals, it threatens to seriously impair efforts to improve aviation safety.

By Jan W. Steenblik, Technical Editor

The Gol/ExcelAire midair collision over Brazil in September 2006 brought into sharp focus the disturbing trend during the last several years toward criminalization of aviation accidents (see "ALPA, IFALPA Help Free ExcelAire Pilots"). The Brazilian affair was only the latest in a long list of sobering cases of pilots' facing criminal prosecution after being involved in an accident or incident.

Capt. Lindsay Fenwick (Northwest), chairman of the ALPA Accident Analysis Group and IFALPA executive vice-president for technical standards, says, "We must do everything in our power to remove all roadblocks to improving aviation safety, and criminalization is beginning to appear as our most pressing global priority in this regard. All of us, whether pilots, controllers, investigators, mechanics, engineers, regulators, or the traveling public, will certainly suffer if we choose to ignore this growing crisis."

Fenwick points out that after an accident, "airline pilots are vulnerable on five fronts: In addition to and quite apart from the physical and emotional consequences, they face potential loss of current employment, loss of license that usually compromises their future employment, and potential loss of freedom—incarceration or restrictions on their mobility."

ALPA, IFALPA Help Fr

On Sept. 29, 2006, came the bad news: Gol Airlines Flight 1907, a B-737 with 154 persons aboard, had disappeared from air traffic control radar over the jungles of Brazil, and an Embraer Legacy corporate jet, just delivered to ExcelAire Services, Inc., of Ronkonkoma, N.Y., and on its way back to the United States, had made an emergency landing at a Brazilian military strip after suffering wing damage at FL370.

None of the seven persons aboard the Legacy was injured.

The B-737 wreckage was found—no survivors—in the dense Amazonian jungle.

Very soon, the Brazilian authorities announced that the pilots of the Legacy—Joseph Lepore and Jan Paladino—were being detained for questioning and investigation for possible criminal charges.

After languishing—passportless—for 2 months, the two U.S. pilots were finally allowed to leave Brazil and return to the United States on Dec. 10, 2006, after what amounted to house arrest. ALPA and IFALPA played roles in putting

Cases from Around the World

1974

1974: Lufthansa B-747 crashed in Nairobi, allegedly because leading-edge devices were not correctly positioned; flight engineer tried for negligent homicide, but acquitted.

1977

1977: SATA Super Caravelle crashed at Madeira, Portugal, killing 36; check pilot aboard failed to maintain proper altitude on approach and crashed; check pilot and captain charged with criminal negligence; check pilot convicted, 2 years in prison; captain convicted, sentenced to 1.5 years in prison (not served).

1979

Oct. 7, 1979: Swissair DC-8 crashed at Athens while landing on a wet runway, killing 14; captain and first officer charged with criminal negligence; both convicted, sentenced to 5 years; on final appeal, first officer acquitted, captain's sentence reduced to 3 years.

1982

Feb. 9, 1982: Japan Airlines DC-8 crashed during landing at Tokyo, killing 24; captain charged and confined for psychiatric tests; based on tests, charges dropped; police opened investigation into doctors who had examined captain before flight and his supervisory pilots.

CON TRIAL

And, in some foreign countries, they also face criminal prosecution and drastic sentencing possibilities.

North America vs. the rest of the world
In the United States and Canada, pilots historically have been prosecuted for intentional misconduct, such as using an aircraft to violate drug laws or flying while intoxicated. In

a few cases, "reckless" flying has been prosecuted under state or provincial laws.

Regarding involvement in accidents and incidents, however, when professional flight crews have acted in what they believed was the best interest of the flight, they were not subjected to criminal prosecution (though they still have faced FAA enforcement action, disciplinary action by the

See ExcelAire Pilots

pressure on the Brazilian government to release the two pilots.

On Nov. 16, 2006, IFALPA issued a statement (which ALPA supported and further publicized) that urged the Brazilian government to expedite an independent technical investigation of the accident and release the two U.S. pilots.

"Thus far, only contradictory facts, rumor, and unsupported allegations have been forthcoming from Brazilian government officials," IFALPA said. "To date, there has been no indication from the Court, which has retained the passports of the ExcelAire pilots, that it has made any objective assessment of the circumstances surrounding the event.

"Furthermore, the Federation notes that there are internationally agreed-upon procedures enshrined by treaty that allow countries to pursue appropriate criminal prosecutions against citizens of another state if sufficient evidence can be presented to show that an internationally recognized crime has been committed.

"Therefore, there is no valid reason for the continued

detention of the two ExcelAire pilots. As a result, the Federation demands that the Brazilian authorities immediately return the passports of the ExcelAire pilots and that these pilots be allowed to return to their homes forthwith."

ALPA noted, "The action by the Brazilian authorities reflects a disturbing trend in worldwide aviation to impose criminal sanctions on individuals who are involved in aviation accidents. Criminal prosecution [of pilots involved in aviation accidents] is rare in the United States. It is unfair and unwarranted in all but a very few extremely egregious cases. More importantly, it works against the public interest in preventing future accidents because it inhibits the free flow of information that is crucial to uncovering the causes of accidents and taking corrective measures."

On Dec. 4, 2006, Capt. Dennis Dolan, president of IFALPA and then ALPA first vice-president, wrote to the president of Brazil to complain that the ExcelAire pilots "are being detained in Brazil without being charged with any crime." The two pilots, *(continued on page 16)*

1983 **January 1983:** B-727 crashed at Ankara, Turkey; captain and first officer tried and convicted.
Nov. 3, 1983: Avensa DC-9 crashed at Barquisimeto, Venezuela; both pilots convicted despite the fact that investigation revealed the cause was technical factors; sentenced to 8 years and eventually pardoned by president.

1985 **Aug. 12, 1985:** Japan Airlines B-747-SR crashed into mountain; prosecution of those involved in manufacture; charged with professional negligence; no conviction.

1987 **July 31, 1987:** B-737 cargo flight crashed at Mexico City, killing 41 people on the ground; flight crew was detained for criminal investigation of pilots; no reported conviction.
Oct. 15, 1987: ATR 42 crashed in the Italian Alps, killing all 37 aboard; investigation indicated aircraft stalled because of icing conditions; both pilots charged posthumously with murder and convicted; first officer's conviction overturned on appeal. The regulator was also charged.

1988 **June 26, 1988:** A320 crashed at Mulhouse, France; investigated for criminal prosecution; captain convicted, sentenced to 20 months in prison and served 10 months.

airline, and civil liability). No airline pilot has suffered criminal prosecution in the United States to date—although some military and general aviation pilots have.

Outside the United States, the situation is more threatening: Criminal prosecution of pilots, including commercial and airline pilots, has a long history. Prosecution is more likely in Africa, the Middle East, Asia, and “civil law” countries (see “Where You *Really* Don’t Want to Have an Accident or Incident,” page 17).

Such practices may be associated with a belief that regulators are not adequately protecting essential interests of society and may be intended to address the public’s demand that punishment be meted out to wrongdoers.

Why are pilots the ones most frequently singled out?

“Unfortunately,” Fenwick says, “to a large degree, pilots are targets of opportunity. Because the pilots are typically the last individuals in the event chain who might be able to

alter the outcome, the simplistic reasoning presumes that if an incident or accident does occur, it must be the flight crew’s fault. In addition, by virtue of their worldwide travel and the fact that they always end up at the scene of the mishap, pilots are physically accessible.”

Punishment doesn’t work

A common misperception holds that pilot associations participate in incident and accident investigations to absolve the flight crew of any wrongdoing.

“In fact,” Fenwick emphasizes, “absolving crew ‘A’ of any wrongdoing instead of fixing the system does nothing to prevent crew ‘B’ from repeating the very same sequence of events, and causing yet another accident. It is clearly in everyone’s best interest to fix the system, not to apportion or absolve blame.”

As Fenwick points out, “Corrective actions generated by

ALPA, IFALPA Help Free ExcelAire Pilots *(continued from page 15)*

he said, “have had their passports confiscated by the Government of Brazil, which effectively denies them the ability to return to their homes in the United States. There do not appear to be any substantiated allegations which would justify this detention under recognized international procedures.

“This type of conduct by Government agencies against pilots involved in aircraft accidents or incidents,” Dolan continued, “is unacceptable to the world’s pilots. These actions by their nature seem to presume that because a pilot survives an accident, he or she is automatically guilty of some crime. This presumption is clearly contrary to the Just Culture approach endorsed by the ICAO Assembly, the Directors General of Civil Aviation Conference of ICAO, and provisions of ICAO Annex 13, Attachment E.

“This situation is being followed very closely by pilots at the international level,” Dolan noted, “with many of them very concerned about the lack of judicial fairness being shown to these pilots and about the possibility that they could find themselves in a similar situation.

“In any democratic country, it is a fundamental tenet that

individuals are entitled to a presumption of innocence until proven guilty. In this case there is no evidence that Mr. Lepore and Mr. Paladino have done anything wrong, and they should be released forthwith.”

At the request of Capt. John Prater, then ALPA’s president-elect, ALPA senior attorney Russ Bailey, who specializes in international aviation issues, began to work closely with lawyers for ExcelAire and LePore and Paladino to urge the U.S. State Department to aggressively seek the pilots’ release. The State Department responded positively to these efforts, and ultimately State’s intervention with Brazilian authorities was instrumental in achieving the pilots’ release.

The parting shot: Brazil’s federal police formally accused the ExcelAire pilots of flying in a manner that endangered aircraft. Their lawyer characterized the police proceeding as falling short of a full criminal indictment, adding that he did not expect Brazilian authorities to seek their return for a court appearance. The charge, however, carries a maximum sentence of 12 years in prison. 🌐

Cases from Around the World

1989

July 1989: Korean Air DC-10 crashed short of runway in Libya, killing 78; pilots were charged with accidental homicide, convicted, and jailed.

Nov. 21, 1989: British Airways B-747 captain made first approach to landing at Heathrow and did not execute missed approach until 125 feet, which should have been done at 1,000 feet; second approach was successful; charged with endangering aircraft and passengers; convicted, fined £1,500, but no prison time.

1995

June 9, 1995: Ansett DHC-8 crashed at Palmerston North, New Zealand, while attempting to land, killing four; captain was criminally charged, with CVR used against him, but was acquitted of all charges.

1997

June 8, 1997: Japan Airlines MD-11 pitch upset in turbulence caused deaths and injuries; prosecution used accident report to prosecute captain for professional negligence; a district court, and the Nagoya High Court on Jan. 9, 2007, found pilot innocent (see “Mailbag,” page 4).

1999

Sept. 14, 1999: Britannia Airways B-757 hard landing caused no serious injuries; the pilots, criminally charged with negligence, were not convicted.

Where You *Really* Don't Want to Have an Accident or Incident

Numerous countries in Europe, Asia, Latin America, and Africa have a history of subjecting flightcrew members to criminal investigation, prosecution, and in some cases, long prison sentences for their alleged roles in aviation accidents.

What should you do if you're flying internationally? Same thing you should do anywhere: Make sure you have your ALPA "orange card" with you whenever you're on a trip—and quickly call the numbers on it if you ever need to do so.

And what's the "orange card"? It's the wallet-sized card that tells you how to reach and use the ALPA Worldwide Accident/Incident Hotline, which the Association has had in place for many years to handle time-critical safety and security needs of ALPA members. Someone is standing by to answer a call to the Hotline every minute of every day, and the service accepts collect calls from anywhere in the world.

The ALPA Worldwide Accident/Incident Hotline number is 202-797-4180; the backup number is 703-892-4180. Collect calls are accepted at both numbers.

If you're making a statement—either written or oral—to your airline or a regulatory authority, first get ALPA to review it by calling the toll-free ALPA air safety reporting line, 1-800-424-2470, between 8:30 a.m. and 5:30 p.m. Eastern time, Monday–Friday, or the Hotline at the numbers above.




**ALPA WORLDWIDE
ACCIDENT/INCIDENT HOTLINE
(202) 797-4180 (USA)**

Backup Number: (703) 892-4180 (USA)

Call this number **immediately** if you are involved in an airline accident/serious incident at any place or anytime (collect calls accepted).

For any other non-time-critical safety-related problem, call the ALPA Engineering and Air Safety Department **TOLL FREE** at 1-800-424-2470 (U.S. & Canada).

February 1999.

If you are involved in an accident, arrange for appropriate legal representation, if at all possible, before making any statement—written or oral—concerning the facts of the accident. ALPA can help; call the Hotline, at the number above, or have someone else call on your behalf, to get the process started. If you are compelled to make a statement before you can obtain legal assistance, you can refer to the orange Jepp insert entitled "In Case of Accident or Incident," which has sample statement forms and is available from ALPA's Legal Department at 703-689-4323. 

modern investigative techniques have established an admirable record of meeting society's goal of preventing future catastrophes, while punitive sanctions have simply not been demonstrated to have any similar degree of efficacy, at least in aviation."

As an example, Fenwick says, "Those of us who have been around aviation for a while, especially the military side, remember the days when a gear-up landing would ruin an aviator's career. Despite knowing full well the severity of the

consequences, pilots continued to land gear-up.


"Punishment was an ineffective deterrent against mistakes. Why? Because punishment is effective as a deterrent only against premeditated acts, and even then it has mixed results. Only by implementing appropriate changes in design, operations, training, and the myriad other aspects of aviation will we correct deficiencies and improve safety."

Not only is punishment—or the threat of it—an ineffective deterrent to mistakes, "it has a direct detrimental effect

2000 **Sept. 26, 2000:** Air Glaciers Travel helicopter crashed in Buson, Switzerland; pilots convicted of negligent homicide; captain sentenced to 5 months, first officer to 4 months; both sentences were suspended.

Oct. 31, 2000: Flight crew of a Singapore Airlines B-747 tried to take off on a closed runway and crashed, killing 79; the flight crew was initially detained and criminally charged, but eventually returned to Singapore; public pressure by IFALPA and pilot associations, plus public apology by flight crew, resulted in charges being withdrawn, but SIA fired the captain and first officer.

2001 **Jan. 31, 2001:** A Japan Airlines flight experienced a near miss with another aircraft near Haneda Airport, Japan, injuring 57. Criminal charges were filed against the pilot and two air traffic controllers.

Nov. 24, 2001: A Crossair Avro 146 crashed on approach to Geneva, Switzerland, killing 24, including the pilots. The pilots had exceeded their daily regulatory duty time limit at the time of the crash. Swiss prosecutors launched a criminal manslaughter investigation against the airline's managers under the theory that they must have known that the pilots were exceeding the regulatory limits. 

Goal: Global Agreement to Stop Criminalizing Aviation Accidents

Capt. Lindsay Fenwick (Northwest), chairman of ALPA's Accident Analysis Group and IFALPA executive vice-president for technical standards, has been an active participant in efforts both in the United States and internationally to stem the rising tide of criminalization of aviation accidents.

The solution to this problem, says Fenwick, is "appropriate legislation that ensures the protection of information critical to flight safety." One such protection would prevent any process or effort from subverting legitimate accident investigations into criminal prosecutions or investigations. Another type of protection needed would significantly limit access to critical flight safety data used in proactive safety programs such as FOQA and ASAP.

"We are not asking for freedom from prosecution for willful misconduct or criminal acts," Fenwick stresses. "We are not asking for a 'get out of jail free' card. We are asking for protection from overzealous or misinformed individuals and organizations that, for their own short-term personal, political, or corporate benefit, are trying to cast legitimate human errors as criminal behavior."

Fenwick continues, "Clearly we need a balance between the accident investigation and legal processes. How do we best strike a balance that can be applied internationally? The legal systems of most nations recognize that intentional or willful misconduct that causes harm constitutes a crime. Most countries are signatories to the Chicago

Convention and have generally agreed to abide by the provisions of ICAO Annex 13. [The International Civil Aviation Organization is the aviation arm of the United Nations.] ICAO language, as well as that of the Warsaw Convention and the U.S. FARs, already recognizes the concept of willful or wanton misconduct."

To that end, ALPA, through IFALPA, has proposed to ICAO that Annex 13 be amended to include a new section and paragraph as follows:

"Proceedings to Impose Sanctions

"5.11 Recommendation—States should not impose criminal sanctions arising out of an aircraft accident against individuals unless there has been an independent judicial determination that the accident or incident was caused in whole or part by such default on the individual's part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to willful misconduct."

Changing ICAO language does not happen overnight, and compliance with Annexes by ICAO's nearly 200 member States is strictly voluntary. Any ICAO member State can exercise the option of declaring that it chooses not to abide by a particular section of an Annex.

Nevertheless, if ICAO amends Annex 13 to include the IFALPA proposal cited above, pilots around the world will have achieved an important next step in turning this onerous situation around. 🌐



on the conduct and quality of accident investigations," Fenwick asserts. And that ultimately hurts flightcrew members and the traveling public, even if the people being indicted and tried are corporate managers, not those directly involved in line operations.

"The aviation community has been extremely successful in obtaining the information needed to reduce the accident rate in spite of the twin deterrents of potential corporate and regulatory disciplinary action," Fenwick observes. "The potential for criminal prosecution casts a dark shadow over the current climate of openness and cooperation."

Three relatively recent events have changed—perhaps forever—the ability of the U.S. National Transportation Safety Board to conduct thorough investigations of accidents with the full cooperation of all involved parties:

- a 1999 pipeline rupture and fire in Bellingham, Wash., that resulted in criminal investigation and prosecution,
- federal criminal investigation and prosecution of SabreTech after the 1996 ValuJet crash in the Everglades, and
- the FBI investigation of Alaska Airlines after the Alaska Flight 261 crash into the Pacific Ocean in 2000.

All three events had a chilling effect on the Safety Board's ability to coax cooperation and testimony from witnesses who feared exposing themselves to criminal prosecution by law enforcement agencies.

"Countries that have demonstrated a willingness to prosecute and incarcerate pilots and controllers tend to have higher [worse] accident rates than those that do not,"

Fenwick points out. "Examples include parts of Latin America, certain European countries, and much of Asia and Africa. This unfavorable correlation does not necessarily imply cause and effect, but that relationship cannot be ruled out, either.

"If a country has a record of minimal responsiveness to legitimate aviation safety deficiencies, the judicial activities and 'solutions' will tend to supplant the technical ones, and safety will tend to stagnate."

What to do?

Jay Wells, an attorney in ALPA's Legal Department, advises that the increasing trend toward criminalizing aviation accidents, in both the United States and other countries, must lead to more mutual assistance and cooperation among pilot associations around the world.

"Pilot unions," says Wells, "need to be ready to help flightcrew members obtain prompt representation for the purpose of preparing any required statements for the police or other authorities as soon as possible after an incident or accident. The unions also need to develop protocols on how to deal with law enforcement agencies in accident investigations. And they need to remind authorities that ICAO Annex 13 recommends that accident investigation be separate from law enforcement."

ALPA and IFALPA will continue to work on both the national and international levels to push back against this disturbing trend of criminalization that threatens not only individual flightcrew members but aviation safety in general.

Perhaps one day the world will realize that, as Fenwick likes to point out, "An accident, by definition, is an occurrence that is not expected, foreseen, or intended. By definition, then, an accident cannot be a crime." 🌐