# TRIAL Lawyer

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## Ships, trains & planes

# AIR CRASH

## The steps of investigation and litigation

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Aviation cases are highly specialized, fiercely fought, expensive and time consuming. The risks are great, but so are the rewards. You will often be helping individuals dealing with either catastrophic injury or death. Recently, the authors of this article had the opportunity to collaborate on a case involving the crash of a single engine aircraft. The case took two years to investigate and prosecute to a successful conclusion. Through it, we can show the typical manner in which an aviation case takes its course.

On October 15, 2005, our clients — a flight instructor and a student pilot — leased a Piper single engine airplane from a local fixed base operator (FBO). There were favorable winds that day, so the instructor decided to have his student practice crosswind landings. At the start of his downwind leg in the landing pattern, at approximately 600 feet above the ground, the engine suddenly failed. Emergency procedures were followed, but the engine would not restart. The instructor, having taken over the controls, attempted a "power-off" landing. As the airplane was making its base turn to the airport, the pilot was forced to attempt to sustain enough altitude to make it over a building. He lost a substantial amount of airspeed while he successfully navigated over the building, resulting in an aerodynamic stall and crash landing in a small field adjacent to the approach end of the airport. The vertical forces on the pilot and student crushed their vertebrae, paralyzing both of them.

**All the components**

Investigating an aviation case can be extraordinarily complicated. On one hand, the accident, by law, is initially investigated by the National Transportation Safety Board (NTSB). The NTSB will assign an investigator who is mandated to determine the probable cause of the crash. Unfortunately, all too often, the NTSB will not conduct as thorough of an investigation as you would if you were in charge. The NTSB has limited resources. More troubling is the fact the NTSB uses party representatives from the aircraft, engine and other component parts manufacturers to assist them with the investigation. In essence, you have the fox guarding the hen house. The

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reason for the party system, of which the victims of the crash do not get to participate, is that the NTSB investigators are not experts in relation to all aircraft and rely upon the party representatives for expertise with their respective aircraft and/or component parts. Therefore, the NTSB has to rely upon the party representatives to provide it with data, testing protocols and other valuable information. There is obviously an incentive for the party representative to be less than interested in helping the NTSB pin blame on his/her employer. Additionally, we have had situations where the party representative recommends or acquiesces to protocols, which would or could destroy very important evidence.

The NTSB's witness investigations are often very limited, and they may miss identifying key witnesses. In some situations, the NTSB does not even send one of its investigators and assigns a Federal Aviation Administration (FAA) representative to act as the NTSB investigator (which happened in our case). This is problematic on numerous levels, mostly because the FAA representative does not have the experience or in-house resources of the NTSB. Further, the FAA stand-in is more likely to be subject to manipulation by party representatives.

Although there are situations where the NTSB does a fantastic job with its investigation, the fact that victims have no involvement in the investigation and cannot access the wreckage until after the NTSB and FAA release the data is inherently problematic. In some instances, the NTSB will take over two years to conduct its investigation. This can present issues involving a statute of limitations defense or the compromising of evidence which has been deteriorated, lost or destroyed. As a result of these inherent problems, it is incumbent upon counsel to get started with its investigation (as much of it as can be done) as soon as possible — even while the NTSB investigation is still proceeding.

*A flight instructor and his student were paralyzed when the plane they rented crashed following takeoff. The culprit was determined to be a malfunctioning carburetor that had not been maintained in over 10 years.*

In our case, getting information was limited due to the serious physical and brain injuries our clients sustained. We started by obtaining the local emergency responder reports and talking with some of the eyewitnesses who were identified in those reports. Additionally, we contacted the owner of the aircraft and were given the contact information of the adjuster for the aircraft's insurer. Fortunately the insurer was receptive to allowing us to conduct a visual, non-destructive inspection of the wreckage as soon as the NTSB released it. This professional courtesy was extended due to the long-term relationship between one of our counsel and the insurer for the FBO. Based upon the data that we collected, we brought a well respected engine expert to the inspection. With the combined knowledge of the engine expert and the significant aviation background of counsel, we were able to determine there was a strong likelihood of a problem with the fuel system, with the carburetor as the main suspect.

Ascertaining the probable cause(s) of an aircraft crash must be done systematically. Most investigators use the "man, machine, environment" approach — ruling in and ruling out what may or may not be an issue. We were able to rule out the environment rather easily. As far as the machine was concerned, we knew that the engine quit — the question was why. In essence, there are three main areas to look at when determining what could cause an engine to fail: mechanical problems, electrical problems and fuel/air problems. Based upon our initial inspection and review of the maintenance records and logbooks, we were able to rule out everything else, except for the fuel system. The fuel system in this particular aircraft was rather simple and all roads led to the carburetor. Specifically, we were able to see signatures of fuel leakage around the bowl and what appeared to be signatures of the float hitting the inside of the bowl.

We were very familiar with the carburetor — an MA-3A. Just like similar models, it had a long history of problems, one being that an internal float tended to stick and interfere with the fuel flow to the engine. There had been considerable litigation related to this design, with which we were intimately familiar.

Based upon our prior experience with this carburetor and a review of the maintenance records of the airplane, we determined that the recommended overhaul on the carburetor was not con-

ducted in accordance with the manufacturer's overhaul manual. As a result, we were comfortable identifying as defendants the owner/operator, the last maintenance facility that worked on the carburetor and the carburetor manufacturer. At this point, there was nothing more that we could do without filing suit and conducting formal discovery and sophisticated testing and analysis.

**At the controls**

In many aviation cases, a choice may be made as to proper forum. Should the case be filed where the defendant resides or in the state in which the incident occurs? Should it be filed in federal or state court? There are obviously pros and cons as to each location. In our case, we chose Multnomah County because we had both in-state and out-of-state defendants, and we had the opportunity to avoid the more costly and difficult expert discovery rules in the other forums. Plus, the state court required only nine of 12 jurors to prevail, not unanimity, as required in federal court.

Our theories of liability were basic. The manufacturer was liable for its defective design and failure to recall and warn, *inter alia*. The repair facility was liable in negligence for the failure to properly service and repair the carburetor. And the FBO was liable in product liability and negligence for leasing a defective and non-airworthy airplane and for failing to properly maintain the aircraft.

**Prior to trial takeoff**

Right from the beginning, the motion practice was aggressive on both sides and ultimately very rewarding to us. Both sides filed the typical Rule 21 motions, and we filed several motions to compel. Eventually, there were motions for summary judgment.

The first significant aviation related motion involved the General Aviation Revitalization Act (GARA). Passed by Congress in 1994, GARA is a federal

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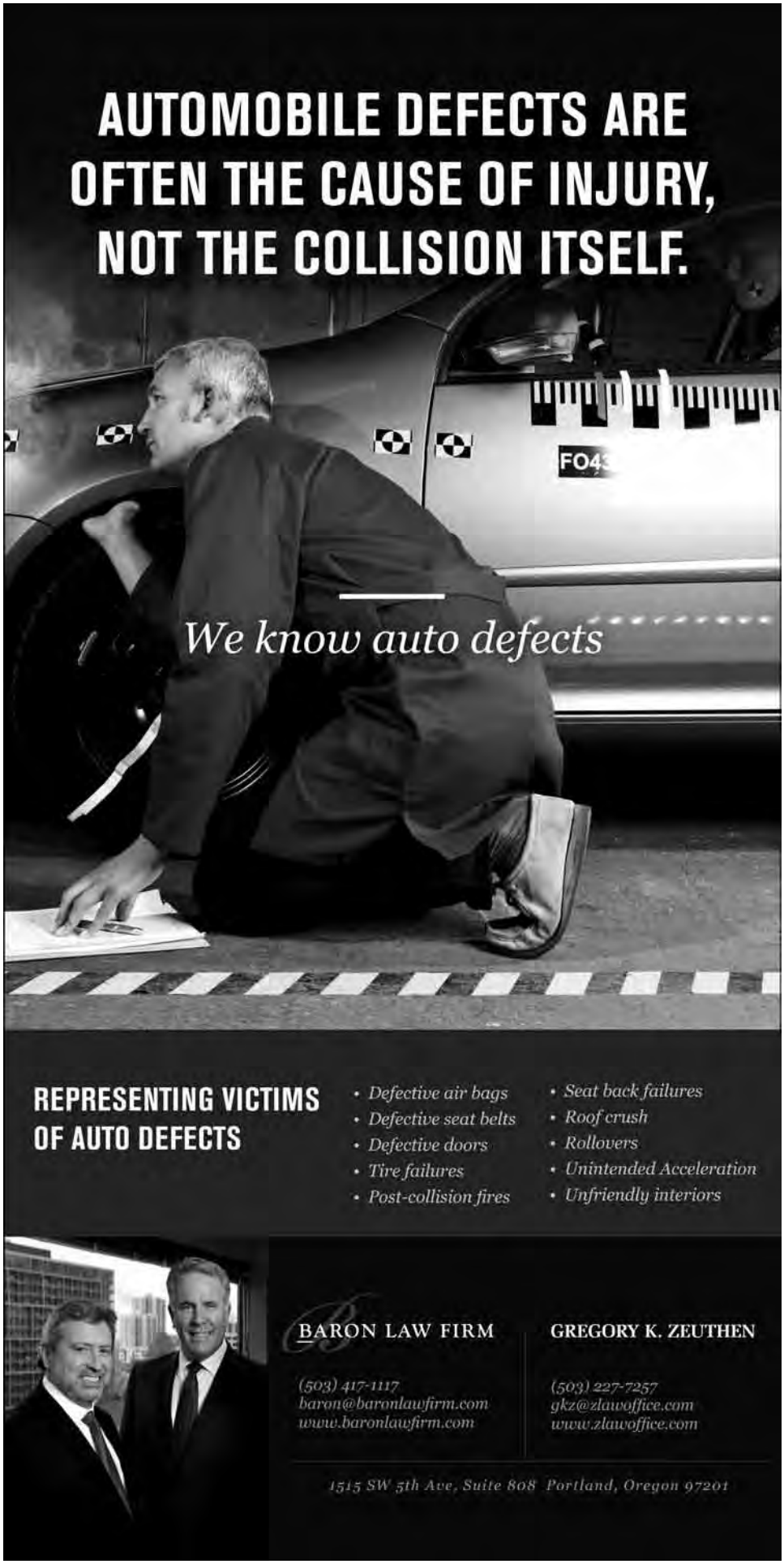

statute of repose that bars all claims based on aviation products installed in an aircraft first delivered to a customer more than 18 years before the accident. In our case, the carburetor was 26-years-old at the time of the crash. In response to our complaint and a lengthy set of requests for production, the manufacturer raised GARA as an affirmative defense, moving to dismiss the claims against it and refusing to provide any discovery.

However, we were well aware that GARA is not an absolute defense. It does not shield a manufacturer who misrepresents and conceals safety information from the FAA. Moreover, when new parts are defective and are incorporated into an older device, this restarts the 18-year clock on the older device. We responded to the manufacturer's motions by asserting all the exceptions to GARA. The trial court agreed that if we could prove our allegations, GARA would fail, and so the case proceeded.

Multiple motions focused on inspection and testing of the carburetor. Inspection and testing are not unique to aviation cases — they are a common concern in all types of product cases. Testing has to be approached carefully, with an eye to assuring that the product is not altered and that results are not manipulated.

We led off the series of motions with a motion to inspect the carburetor and the defense countered with a motion to bench test the device. Experts on both sides contributed ideas on the best methods of inspecting and testing the device, while at the same time steering clear of altering or destroying evidence. Multiple protocols were exchanged, and, ultimately, the court permitted us to inspect first and defendants to test next. Precautions were put in place to minimize the possibility of damage to the carburetor. All sides were permitted to be present and videotape the inspection and tests.

The Florida laboratory where most of the inspections were done was like something out of a James Bond movie. Q would have been envious. Measurements were made that allowed us to make a transparent, plastic, fully operational duplicate carburetor. High-powered microscopes identified scratches on the inside of the bowl, consistent with the float hanging up. These traits were indicative of several defects, including the very defect we alleged.

Additionally, testing proved to be invaluable. During the defendants' requested testing, the carburetor flooded as Stoddard fuel (a test fuel) ran through the device. And, much to the defendants' displeasure, a video captured it all.

Claiming that the inspection and testing proved nothing, the defense pushed ahead. It brazenly proposed to place the carburetor in an exemplar airplane in order to conduct a test flight. The goal was to prove that the carburetor was airworthy. Secretly it approached the local FAA Flight Services District Office (FSDO) and actually got permission for the test.

Once the defense announced its intention, we countered quickly. A motion was filed to block the test and calls were placed to the FAA headquarters in Washington, DC to seek cancellation of the flight. We contended the flight not only presented a real threat to the pilot and a danger to the public, but also was illegal under various FAA regulations. The trial judge begged off the issue, finding the matter to be within the jurisdiction of the FAA. However, the judge agreed to enjoin the test, pending an FAA ruling. At our request, he also granted a motion to order the defendants to cease and desist *ex parte* contacts with the local FSDO about the pending FAA decision. Then, the FAA Washington, DC office stepped in and vacated the local FSDO order, agreeing that the flight was illegal. In the end, the defendants were permitted to conduct a test, but only on the ground. They installed the subject carburetor and ran the plane up and down a runway. The test was meaningless because the carburetor defect only manifests itself in flight at certain pitch and power settings.

**Navigation**

Coinciding with our motion practice was our use of depositions. Often depositions are delayed until there is a full exchange of written discovery. However, in this case, with our considerable knowledge about the history of the MA-3A carburetor, we thought it best to take depositions of the flight mechanics as early as possible. We intended to catch the defendants before they were prepared.

During the depositions, we were able to establish that the subject carburetor was overdue for an overhaul. Pursuant to the manufacturer's overhaul manual, the subject carburetor was supposed to be overhauled every 10 years. When the service repair facility last did its work, 10 years and 3 months had elapsed since the carburetor had last been overhauled. The repair facility failed to recognize the carburetor was beyond its time between overhaul (TBO) and erroneously signed off the carburetor as airworthy.

The repair facility's failure to follow the mandates of the overhaul manual violated 14 CFR § 43.13, which states in relevant part:

> (a) Each person performing maintenance, alteration, or preventive maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques and practices prescribed in the current manufacturer's maintenance manual or Instructions for Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the Administrator, except as noted in § 43.16

Indeed, even the repair facility, through its designated representative, conceded its mistake at an ORCP 39C(6)

deposition. Initially, the corporate representative admitted that a carburetor date stamped more than 10 years before the current maintenance job (which was our situation) needed to be overhauled:

> Q. And if a float — if you were doing work — if [an aircraft owner] had sent you that carburetor to do work — to do the service that you did on this particular carburetor, and you saw on that float it said 1984, what would you recommend to [the aircraft owner] to do?
> A. That we put, minimum, the minor repair kit in, but they should overhaul it.
> Q. And the reason they should overhaul it, because it can be assumed, due to the fact that it's 1984 stamped on there, that it's been over 10 years since that carburetor was overhauled. Correct?
> A. Correct.

Ultimately, the corporate representative could not explain why the floats in the subject carburetor were not replaced when the repair facility serviced the carburetor in 2000:

> Q. Do you have any explanation for why the float was not replaced on this particular subject carburetor in October 2000 by your facility?
> A. No, I do not.

An important part of our case was the deposition of fact witnesses. During the litigation, we identified numerous witnesses. Deposing these witnesses provided insight into some of the key areas of dispute, including the location of the aircraft when it first encountered engine trouble and the final flight path of the aircraft. The defendants had witnesses that identified a flight path, possibly consistent with pilot error. However, these witnesses, being business lessees of the FBO, were arguably biased. These witnesses were thoroughly crossed during their respective depositions, where we highlighted the inconsistencies and weaknesses in their stories. On the other hand, as a result of canvassing the entire accident neighborhood by our investigator, we located several disinterested eyewitnesses, who gave a different description of the flight path, a description that was consistent with our clients' recollection and which led us to the truth.

**Smooth landing**

By the time we completed our investigation, pre-trial motions and depositions, the case was in a settlement posture. From the outset, our prospects for settlement were hopeful, because we knew we had a great case to take to trial. Early on, we hired a life care planner to prepare a report of the clients' needs. We also hired a video producer to meet and interview witnesses, family members and doctors. A college professor, who specializes in storytelling, was hired to contribute to a script. And day-in-the–life videos were made of both clients. The end result was a dramatic and compelling movie, worthy of a 20/20 or 60 Minutes spot!

As a final measure, we used a medical expert to put together a multi-media presentation, discussing all aspects of the terrible injuries suffered by the clients. We ordered 3-D rotating images of the damaged spines. The life care plan was reviewed and economic damages were calculated.

In the opinion of both sides, the case demanded an experienced mediator — one with a history of settling complex cases, including aviation cases. We agreed on a retired Associate Justice of the Su-

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preme Court of the State of California based out of San Francisco, who flew to Oregon for the mediation.

At the mediation, we presented both our video and our multi-media presentation. Our medical expert was there to put on the damages component. Basically, we presented our case. The defense took notes. Eventually the case was resolved to the satisfaction of our clients.

Plainly, the work we did in this case was not unique. But it does show that there are advantages to knowing the subject matter thoroughly. It was essential that we knew the history of the subject carburetor and the litigation surrounding it. Additionally, a seasoned knowledge of the FAA regulations along with an understanding of the deficiencies in the NTSB reports helped immensely.

We are gratified that, in the end, we made an enormously beneficial difference for our clients and their families. Due to incredible strength of character and intelligence, both clients continue to work, doing their best to maintain a normal life. However, there is no denying the limitations of a wheelchair bound existence. To this end, both used their settlement funds to make new living arrangements. One bought an entirely new home and installed a lift elevator. The other modified his home, catching the attention of the Oregonian, which did a long story about the renovations, complete with photographs. Looking at the changes, one cannot help but feel that, at least in this case, some justice was done to redress a terrible wrong.

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