



(Bray Fire near author's cabin from helispot author worked on in 1960s and 1970s on Helitack and Hotshot crew. Bray Fire stopped by Ed Hollenshead's Team, 1990)

FIRE LAW

Mike Johns¹

Mike Johns, Assistant U.S. Attorney, District of Arizona mike.johns@usdoj.gov

¹Views expressed are my own and not the official position of the Department of Justice or the U.S. Attorney for the District of Arizona.

In: Butler, B.W and Alexander, M.E. Eds. 2005. Eighth International Wildland Firefighter Safety Summit: Human Factors - 10 Years Later; April 26-28, 2005 Missoula, MT. The International Association of Wildland Fire, Hot Springs, SD

Fire Law

Mike Johns

BACKGROUND

When a firefighter is killed on a fire, investigations will result from a variety of sources, each with its own mission (not a bad thing). After Action Reviews and Accident Reports will generate findings and recommendations to improve safety. Causal factors will include policy violations or equipment shortcomings regardless of whether there is “legal cause” sufficient for a criminal prosecution, as long as safety can be improved. Similarly, OSHA has a mission to improve workplace safety, advocacy groups have their own mission, along with Congressional interests, the victims, the public and the media.

STANDARD OR BURDEN OF PROOF AMONG REPORTS

The purpose of accident or incident reports is to provide timely recommendations back to the field to avoid future accidents, and is fulfilled by the exercise of professional judgment. The purpose of OSHA reports includes making the workplace safe and supporting findings and abatement orders. Substantial evidence must support OSHA’s action but there can be substantial evidence to the contrary and the findings will withstand judicial review (no judicial review as to Federal agency employers). Civil liability determines fault and compensation and requires a preponderance of admissible evidence decided by a neutral judge or jury. Criminal liability requires admissible evidence and proof of all elements of the crime beyond a reasonable doubt.

IMMUNITY FROM TORT LIABILITY

Federal employees enjoy absolute immunity from suit for common law negligence claims for acts or omissions committed within the scope of employment, and the United States can be substituted as the defendant by the U.S. Attorney. Federal employees enjoy qualified immunity for alleged violations of clearly establish Constitutional or statutory rights, and the defense is measured against an objective standard of what a similar official would do under similar circumstances (rather than a subjective standard as to what the defendant did in the case at hand).

DEFENSE OF MANSLAUGHTER CASES BY DOJ

In the Ruby Ridge case, *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001)(later vacated as moot when Idaho voluntarily dismissed the charges) the State brought criminal charges for manslaughter and the Department of Justice provided the successful defense, which has been our traditional role in the past. In the Cramer Fire matter, the United States Attorney for the District of Idaho was presented with evidence requiring him to decide whether to prosecute.

U.S. ATTORNEY'S ROLE AS PROSECUTOR

The following is a description of the U.S. Attorney's role as prosecutor according to the Supreme Court:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Justice Sutherland speaking for the Court in *Berger v. United States*, 295 U.S. 78, 88 (1935)

OFFICE OF INSPECTOR GENERAL (OIG), DEPARTMENT OF AGRICULTURE

Public Law 107-203 (2002) requires the OIG to investigate all burnover or entrapment fatalities of a Forest Service employee and to report the results to the Secretary and the Congress. The OIG also routinely sends a report to the U.S. Attorney for the District where the incident occurred regardless whether the report supports a criminal charge. The OIG doesn't recommend whether to prosecute or not.

ELEMENTS OF INVOLUNTARY MANSLAUGHTER

Title 18 United States Code Section 1112 provides:

(a) **Manslaughter is the unlawful killing of a human being without malice.** It is of two kinds:

Voluntary--Upon a sudden quarrel or heat of passion.

Involutary--In the commission of an unlawful act not amounting to a felony, or **in the commission** in an unlawful manner, or **without due caution and circumspection, of a lawful act which might produce death.**

(b) **Within the special maritime and territorial jurisdiction of the United States,** Whoever is guilty of voluntary manslaughter, shall be fined under this title or imprisoned

not more than ten years, or both; (The sentence is probation eligible).

In *United States v. Keith*, 605 F.2d 462, 463 (9th Cir. 1979) the court held that an indictment alleging only the statutory language was insufficient. **In addition, “the Government must prove: (1) that the defendant acted with "gross negligence," defined as "wanton or reckless disregard for human life;" and (2) that the defendant had actual knowledge that his conduct was a threat to the lives of others, or had knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others.”**

Special maritime and territorial jurisdiction includes reserved lands such as National Forests and Parks, 18 U.S.C. Section 7. Elsewhere, state or local prosecutors would have jurisdiction rather than the U.S. Attorney.

EXAMPLES OF MANSLAUGHTER PROSECUTIONS

The following examples show antisocial behavior of the kind which the criminal law is designed to deter and punish. In *United States v. LaBrecque*, 419 F.Supp. 430 (D. N.J. 1976) the grossly negligent captain of a pleasure craft was held to stand trial for involuntary manslaughter where the rigging on the vessel was loose and the hull was in a state of disrepair. The defendant had been advised by persons who had sailed the New Jersey coast many times not to travel those waters in January. Further, the three young men who made up the crew were not experienced sailors but college volunteers. Although the defendant had been advised of the critical importance of having a ship-to-shore radio on board, and although he had promised the father of one of the crew that a radio would be on board, he made the voyage without a radio. When the ship sank he was unable to radio for help. The Coast Guard could have reached the vessel in one hour. Defendant also made the crew stay in the water so the life raft wouldn't sink, while he kept his dog in the life raft. The court noted that certainly the evidence concerning the absence of a radio is sufficient, by itself, to take the case to the jury on the issue of gross negligence. In *Arizona v. Charles Long*, (January 3, 2005) the operator of a tough-love boot camp for troubled teens was convicted of reckless manslaughter in the death of a 14 year old who had symptoms of severe dehydration which were not properly cared for. He was also found guilty of aggravated assault for threatening to slit the throat of another teen. The jury deadlocked on 8 other counts of child abuse related to forcing kids to sit in the desert sun without water as discipline. In *United States v. Wood*, 207 F.3d 1222 (Tenth Circuit 2000) a physician at a VA hospital was charged with murder but convicted of involuntary manslaughter for administering an overdose of a toxic medicine used in the euthanasia of animals in violation of the hospital's protocol and despite being warned by the nurse not to do so.

PRETRIAL DIVERSION

If a prosecutor decides that probable cause exists and that a jury is likely to

convict, the prosecutor then considers whether there are adequate non-criminal alternatives to prosecution. In Cramer, the U.S. Attorney decided that pretrial diversion was appropriate. Prosecutors will consider non-criminal means of accountability, acceptance of responsibility, and similar factors in deciding whether pretrial diversion is appropriate.

Pretrial diversion is a non-criminal alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.

The major objectives of pretrial diversion are:

To prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services.

To save prosecutive and judicial resources for concentration on major cases.

To provide, where appropriate, a vehicle for restitution to communities and victims of crime.

WILLFULNESS FINDINGS BY OSHA

According to the Cramer Fire OSHA Briefing Paper, acts and omissions met their definition of "willfulness":

"There was a complete failure of key personnel and management to follow the Ten Standard Fire Orders and mitigate many of the Watch Out Situations evident in the hours and even days leading up to these fatalities. It is the wholesale failure of such core safety principles that points most directly to the "conscious disregard" and/or "plain indifference" to the dangers of a fire under widely recognized extremely hazardous conditions."

According to the Cramer Fire OSHA Briefing Paper, the willful acts and omissions were not directed at the IC but at the entire fire management staff:

"The alleged willful violations of the Fire Orders are not meant to point blame at the Incident Commander. As with most safety problems, it is with the lowest level of supervision where the "rubber meets the road." Higher-level fire program managers and line officers did not provide oversight or direction, and did not make critical decisions. Not only were the increasing complexities and hazardous conditions apparent to leadership at the fire, at several times information was provided (or should have been provided) to the Zone Duty Officer, the District Ranger, the Central Idaho Dispatch

Manager, the Forest FMO, and the Forest Operations Staff Officer about the hazardous conditions, uncontrolled fire growth, and perceived inability of the IC to competently handle the situation.” OSHA Briefing Paper.

VIOLATION OF FIRE ORDERS AND FAILURE TO MITIGATE WATCHOUTS

OSHA acknowledged the ongoing debate about the 10 SFO’s and 18 Watchout Situations:

“According to several off-the-record statements, it is accepted by many firefighters that at least one or more of the Standard Fire Orders must be violated in order to successfully suppress most if not all fires.” OSHA Briefing Paper.

Ted Putnam’s article “The Ten Standard Fire Orders: Can Anyone Follow them?” for example, takes a critical look at the 10 Standard Fire Orders and the 18 Situations That Shout Watchout in the context of human psychology and real fire experience. He concludes that it is impossible to follow the 10 Standard Fire Orders and still fight the fire. He also opines that the 10 and 18, along with Zero Risk Tolerance, are top-down management rules used more to protect management than firefighters. He makes constructive suggestions about re-writing and reinforcing these safety concepts to be more effective. Whether the 10 and 18 can provide evidence sufficient to support a criminal conviction is undercut by this and similar arguments published by experts within the wildland fire community, but each case will depend on its own facts. Sometimes the violations of SFOs and failures to mitigate the 18 Watchouts are so obvious that a conviction could be supported regardless of criticism of these standards. Some of them have also gained recognition as critical to safety regardless of other factors, such as LCES, which is not so difficult for people to implement.

CAUSAL FACTORS

The Cramer Fire Management Report cited as “causal factors” a variety of policy departures (acts and omissions) by both line officers and staff on the fire. Whether a “causal factor” would constitute legal cause of a death in a criminal case, beyond a reasonable doubt, requires close scrutiny. Whether a policy departure constitutes reckless disregard also requires close scrutiny. Would preparation of a WFSA have actually changed the outcome? One has to perform an analysis in real time. An example is if the analysis would have lead to a Type II Team being ordered, possibly changing the outcome. The usefulness of such findings varies among getting the safety messages back out to the field, considering management actions, disciplinary actions and policy changes, and evaluating possible criminal behavior.

The U.S. Attorney’s Office did not base its decision to pursue a criminal investigation on any one, or a few acts or omissions. The prosecutors looked closely at

the whole management picture and at all the people involved in making their prosecution decisions.

DELEGATIONS OF AUTHORITY FROM AGENCY TO INCIDENT COMMANDERS

How does delegation of responsibility for a fire affect personal liability? Delegations of responsibility/authority are common in the civil law context which would include disciplinary issues.

For example, FSM 5131.04 provides that “Line officers are responsible for all aspects of fire management, including financial oversight of a wildland fire incident. Unlike other responsibilities, financial oversight cannot be delegated.”

However, despite delegation of responsibilities, the FSM is replete with retained oversight responsibilities even after responsibility for an incident is delegated. For example, FSM 5130.43(7) requires Forest Supervisors and District Rangers to conduct an initial Complexity Analysis at size-up “**and thereafter, as appropriate**, to assure the qualifications of the Incident Commander are commensurate with the complexity of the incident.”

Prosecutors will look for acts or omissions which caused the death, and compare them to the elements of involuntary manslaughter. Charges could be brought against an immediate supervisor or co-worker (FSM 5135.04 assigns a duty to all) all the way up the chain of incident command and organizational responsibility.

TRANSITION TO INCIDENT COMMAND TEAM CAPABLE OF HANDLING MORE COMPLEX INCIDENTS

Transition from initial attack to extended attack must be treated as a potentially life-threatening event, FSM 5130.3(4). During transitions the pre-existing forces will remain subject to liability for their acts and omissions as long as there remains proximate cause between those acts or omissions and a fatality, despite the fact that the fire has already been determined too complex for those forces. The incoming forces will be subject to liability for consequences proximately caused by their own acts or omissions, including reckless failure recognize and to mitigate whatever they were left with by the outgoing forces.

GARRITY ISSUES

Employees have a Constitutional right not to incriminate themselves, but employers have the right to investigate incidents. Typically, a *Garrity* statement is one made by an officer to an internal affairs investigator under threat of being fired for refusing to make the statement. *Garrity v. New Jersey*, 385 U.S. 493, 497 (1967). If an officer answers questions under an **explicit** threat that the officer will be fired if he or she

invokes the privilege against self-incrimination, the officer's answers cannot be used in a subsequent criminal proceeding. Unless the officer has been given at least use immunity, the officer may not be fired just for invoking his or her Fifth Amendment privilege. If the officer has been given at least use immunity, the officer may be fired if he or she continues to refuse to answer questions that are specifically, directly, and narrowly related to the officer's performance of official duties. Routine incident report statements have been held not to be "compelled" but there is no experience yet regarding wildland fire fatality reporting. The OIG and many Human Resource specialists are trained not to make express threats of firing. A statement following a carefully worded warning to the effect that failure to be interviewed can be taken into account in a subsequent personnel action is generally not considered a compelled statement, therefore the statement can be used in a criminal case. The following warning in a non-custodial (no arrest) setting will probably result in a finding that a statement is not compelled and can therefore be used against the person giving the statement:

"Before I ask you any questions, or request a statement, you must understand your rights, which are:

You have a right to remain silent if your answers may tend to incriminate you.

Anything you say may be used as evidence both in an administrative proceeding or any future criminal proceeding involving you.

If you refuse to answer the questions posed to you on the ground that the answers may tend to incriminate you, you cannot be dismissed solely for remaining silent. However, your silence can be construed in an administrative proceeding for its evidentiary value that is warranted by the facts surrounding your case."

GRAND JURY PRACTICE

Federal grand jury proceedings are secret to the extent that Federal agents and prosecutors cannot disclose such proceedings. Grand juries determine probable cause. They are not assembled to determine guilt or innocence. Grand jury subpoenas can be issued for testimony and documents or other evidence prior to indictment. State laws vary whether there is a requirement to submit exculpatory evidence to a grand jury. Federal law does not require submission of exculpatory evidence but DOJ policy requires that grand jury proceedings be presented fairly and prosecutors with knowledge of substantial evidence which directly refutes guilt should present it to the grand jury. Whether an accident report or an OSHA report would be admissible at trial in light of

potential prejudice (Evidence Rule 403) is an open question.

Targets of an investigation are routinely invited to testify before the grand jury. Whether a target should do so depends on each case and should only be done on advice of counsel. Whether a defense expert will be allowed to present evidence is discretionary with the prosecutor. Hearsay is admissible before a grand jury. Whether routine accident or OSHA reports should be submitted to a grand jury remains an open question as to fairness.

Prosecutors can charge a criminal case without presenting it to a grand jury, but the defendant will then be entitled to a preliminary hearing as to probable cause.

COLLATERAL ISSUES

The Constitution requires separation of powers between the Executive and Legislative branches of government, which makes it inappropriate for legislators to interfere with prosecution decisions. Similarly, attempts to influence witnesses are a crime of obstruction of justice. A lesser known Federal law makes it a felony to try to deprive the public of the honest services of a public official such as a U.S. Attorney, 18 U.S.C. Section 1346. Collateral issues in any investigation frequently involve prosecution for making a false statement, as in the Martha Stewart case.

The Author

MICHAEL A. JOHNS - Assistant United States Attorney, Phoenix, Arizona.

- Payson Ranger District, Tonto National Forest, Helitack and Hotshot Crew Foreman, 1968-1971.
- Bachelor of Science, Biology, University of Arizona, 1971.
- Law Clerk, United States Attorney's Office, Phoenix, Az., 1972-1973.
- Juris Doctor, Arizona State University College of Law, 1974.

Since 1974, he has been an Assistant U.S. Attorney with the United States Attorney's Office in Phoenix, representing all federal agencies in litigation.

His specialties include public land and resources litigation, wildland fire, mineral trespass, water rights, environmental, and wildlife cases.

He has served as First Assistant U.S. Attorney for three presidential appointees , supervising over a hundred attorneys and their support staff.

In 1997 he served as Interim U.S. Attorney between two presidential appointees.

He has been teaching Fire Law for over ten years at the National Advanced Fire & Resource Institute (formerly NARTC) and the BLM National Training Center as well as many other venues, 12 different venues this year.

He will be focusing today on the criminal aspects of manslaughter cases following fatal burnovers.