The Liability of Air Traffic Control Agencies
- The Ueberlingen Midair Collision Case Study

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Outline

Liability of air traffic control

Introductory remarks

Trends

Facts of the case

Civil liability aspects

Criminal responsibility aspects
Possible legal proceedings following an accident

- **Civil litigation**
  - Aims at compensating a damage unlawfully caused to third parties
  - Generally non-punitive, with exceptions (punitive damage)
  - In ATC, normally against ATC organisations rather than against individuals

- **Administrative proceedings**
  - Aims at sanctioning behaviours deemed incompatible with the special prerogatives granted to an individual by a public authority (e.g. licence suspension, cancellation)
  - Not intended as a punishment

- **Criminal prosecution**
  - Aims at punishing individuals for behaviours which are deemed to be contrary to social values protected by law
  - General no compensation purpose
Difficulties

- Complexity of the subject
- Little judicial experience
- The privatization trend
From focused liability to shared liability

- The early days of aviation:
  - Air carrier as principal defendant

- Other possible defendants:
  - ATC agencies
  - Airports
  - Aircraft manufacturers

- The multiplication of actions
  - Direct actions
  - Parallel actions
  - Recourse actions
The insurance factor

- In the days of governmental agencies, States were self insured
- Adequate insurance coverage was a pre-requisite for corporatisation/privatisation
- The insurance factor has fundamentally modified the approach to ATC liability
Trends

- The multiplication of actions
  - Direct actions
  - Parallel actions
  - Recourse actions
- From individual to systemic/organisation failures
- From accident related damage to delay related damages
- The impact of the US factor
- Criminalisation of aircraft accidents
- Claims for ATC delays
- Judicial proceedings vs. out of court settlement
  - The insurance factor
FACTS

The facts of the case will be presented in the class
Overview

1.7.2002 Ueberlingen Collision

Immediate Response
Communication
Crisis Management


Safety investigation

Compensation: Out of court settlement

Civil Proceedings

Skyguide ATCO murdered

Communication Crisis Management

ATCO murderer’s trial

Skyguide employees' Criminal Trial

1.7.2002
Ueberlingen
Collision
The "Swiss Cheese Model"
Immediate causes:

- Imminent separation infringement not noticed by ATC in time. Instruction for TU154M to descend given at a time when prescribed separation to the B757-200 could not be ensured anymore.
- TU154M crew followed ATC instruction to descend and continued to do so even after TCAS advised to climb. Manoeuvre performed contrary to the generated TCAS RA.
Causes (BFU Safety Investigation Report)

Systemic causes:

Integration of ACAS/TCAS II into aviation system was insufficient and did not correspond with system's philosophy.

Regulations concerning ACAS/TCAS published by ICAO and as a result, regulations of national aviation authorities, operational and procedural instructions of TCAS manufacturer and the operators not standardised, incomplete and partially contradictory.

Management and quality assurance of ANS company did not ensure that during the night all open workstations were continuously staffed by controllers.

Management and quality assurance of ANS company tolerated for years that during times of low traffic flow at night only one controller worked and the other one retired to rest.
Interests’ management

- Lawyers
- Insurance
- Corporate image
- Board/Management
- Employees
- Government
Current Regime

- The absence of an international conventional liability regime
- The long lasting efforts of ICAO
- The application of national laws
- The absence of any ad hoc national law
- The application of the general state's liability law
  - The case of corporatized agencies
  - The questionable adequacy of the system
ATC Liability vs. Air Carrier Liability

The basis of the liability
- contractual
- extra contractual
- the case of corporatized agencies

The nature of the liability
- "civil liability"
- "public liability"

Consequences
- Different jurisdictions (local/material)
- Limited possibilities for forum shopping
- Difficult to merge all claims in a single case
Applicable Regime

- "The King can do no wrong"
- From the States' sovereign immunity to the full compensation of damages caused by civil servants
The Defendant

- An individual agent
- The State
- A foreign State?
- A private corporation
- An international organization
Air Navigation Facilities and Standard Systems

"Each contracting state undertakes, so far as it may find practicable, to:

provide, in its territory, airport, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this convention;

...
State Liability under Chicago Convention Art. 28

[Diagram showing relationships between States A, B, C, D, and E with arrows indicating interactions.]
States' responsibilities

**Regulatory function (Executive)**
- Definition of the detailed regulatory framework
- Definition of compliance criteria

**Certification function**
- Verification that an operator meets the requirements for the performance of a regulated function

**Supervisory function**
- Verification of compliance with the regulatory framework

**Audit function**
- A specific certification/supervisory methodology
- Verification of compliance with defined compliance criteria
Different liability doctrines

Primary State Liability

Subsidiary State Liability
The Swiss System

ANS delegated by law from State to private company:
- Radio-Suisse, Swisscontrol, Skyguide

Private companies providing sovereign functions on behalf of the State: same liability as State

ANSP sole defendant
- Subsidiary State liability

No action possible against individual ATCO
- Only recourse in case of gross negligence
 Liability of corporatised agencies

Germany (Deutsche Flugsicherung – DFS)
- State retains primary liability
  - All claims against the State
  - No direct claim possible against service provider
- Agreement between State and Service provider:
  - Recourse action possible against the service provider, in case of gross negligence
  - Service provider to carry liability insurance
Cross border liability:
The Territorial State Doctrine
Cross border liability:
The Effective Provider Doctrine

Delegating State

Provider State

ATC Agency

Victim
Claimants

An ATS user

Third parties
- A crew member
- A passenger
- A cargo owner
- An aircraft owner
- A third party on the surface
Competent Courts / Applicable Law

- Domestic Court of the ATC Agency
- A foreign court?
- Multiple actions
- Settlement
- Domestic Law
- International Law
Conditions for Liability

The rule: fault based liability

- a damage is proven;
- a breach of duty of a State agent is demonstrated;
- the breach of duty must be a proximate cause of the damage. In other words there must be a causality relationship between the breach of duty and the damage;
- negligence or fault of the defendant is demonstrated. In most cases, the burden of the proof of negligence is on the side of the claimant.
Conditions for Liability

- The exception: strict liability
- Mixed regimes
Compensation for Damage

- Absence of liability limitation
- Damage following an accident
  - Physical damage
  - Damage to property
- Air traffic delay related damage
Responsibilities of ATC

- The Chicago Convention
- Annex 2 (Rules of the Air)
- Annex 11 (Air Traffic Services)
- Procedures for Air Navigation Services - Rules of the Air and Air Traffic Management (Doc 4444-PANS-ATM)
- Regional Supplementary Procedures (Doc. OACI 7030)
- Technical Operation of Aircraft (Doc OACI 8168/OPS, vol. 1 et 2)
Applicable Regulations

- The PANS are approved by the Council and recommended to Contracting States for worldwide application
  
  ICAO doc 4444 PANS/ATM, Foreword, § 3.1

- The implementation of procedures is the responsibility of Contracting States; they are applied in actual operations only after, and in so far as, States have enforced them. However, with a view to facilitating their processing towards implementation by States, they have been prepared in language which will permit direct use by ATS personnel and others associated with the provision of ATS to international air navigation.

  ICAO doc 4444 PANS/ATM, Foreword, § 4.1
Possible criminal offences

- Following an accident
  - Manslaughter
  - Personal injury
  - Damage to property

- Following an incident
  - Endangering public safety
  - Breach of operational procedures
Possible criminal offences

"Criminal prosecutions also have been for violations of regulations prohibiting such things as unlicensed aerial advertising reckless flying, or endangerment of passengers or those on the ground… "in addition, there is a provision for general criminal penalties for violations of certain federal air commerce and safety statutes and regulations for which no specific penalty is otherwise provided"

Conditions for criminal responsibility

- Action or omission resulting in a breach of legal duty
- Causal relationship between the action/omission and the safety occurrence (and its result, where required)

Objective qualification:
- Does the investigated behaviour qualify as a criminal offence?
- Breach of duty

Subjective/behavioural qualification
- Consciousness
- Will

Absence of justification
- e.g. self defence, act under duress
Conditions for criminal responsibility

"...in the large majority of responding States, ATM staff, directly or indirectly involved in an accident or even in an incident, may be held partially or totally liable. The circumstances resulting in liability either under civil or criminal law may vary from unintentional breach of law or negligence".

"Legal Constraints to Non-punitive ATM Safety Occurrence Reporting in Europe", EUROCONTROL Performance Review Commission
Negligence

"In cases where the evidence suggests that the accident was caused by nothing more than negligence, including mere pilot error, or a mechanic's mistake, one necessary prerequisite to a criminal investigation is simply not present."

"The statute requires that the violator acted both knowingly and wilfully in connection with the offence charged."

Negligence

Negligence

"the failure to exercise the standard of care that a reasonable prudent man would have exercised in a similar situation."

Simple negligence

"the failure to use ordinary care" and will often only be punishable if explicitly foreseen in the law. Indeed, "typically, simple negligence or carelessness is insufficient to establish the level of intent required for a criminal conviction."

Gross negligence

"a conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences to another party, who may typically recover exemplary damage."

Criminal negligence

"Gross negligence so extreme that it is punishable as a crime"
Negligence

"...a conviction for involuntary manslaughter requires a showing of gross negligence in the form of conduct that amounts to wanton or reckless disregard for human life; simple negligence is not enough"

Negligence

- The objective criteria for negligent manslaughter are met when the author has caused the death of the victim by breaching his/her duty of care;

- The act/omission is negligent when the author, on the basis of the circumstances and his/her knowledge and competence should have recognised that he/she was endangering the protected legal interests of the victim, but nevertheless crossed the threshold of the admissible risk.

- Negligence is measured against 2 main criteria:
  - Predictability
  - Natural causality
Legal exposure in an organisation

- Board of directors
- Executive management
- Middle management
- Front line operators

Tactical Organisational
Corporate liability

Two possible forms:
- Prosecution of executives occupying management positions
- Prosecution of a company, as a legal independent entity, as opposed to any specific employee of the corporation, facing criminal liability.

Executive or corporate liability assumes that a company's management may be held accountable, should it fail to implement the proper working environment, including appropriate internal regulations and working processes, to ensure safe operations. The company can also be held liable for failure to exercise adequate supervision over working practices.
Trends

Recent court cases highlight a number of trends in the criminalisation of aviation occurrences:

- Criminalisation of safety occurrences: increase in numbers
- Broadening of the scope of professionals involved: all categories of aviation professionals concerned
- Liability is leaving the front line operators and climbing the corporate ladder
- Extension of the criminalisation trend also to the regulator
- Individual faults vs. organisational failures
- Extension of judicial proceedings beyond aviation accidents > incidents without physical damage and even for cases without the existence of a concrete danger (hypothetical danger)
Trends

Various sources have reported a gradual increase of criminal prosecution related to aviation safety occurrences. This trend, however, does not reflect a substantial change of national criminal laws, but much more an evolution of judicial practices reflecting a growing sensitivity of the general public regarding safety matters. In addition, "the decision by a prosecutor to pursue criminal charges also may be fuelled by the intense media attention that surrounds an aviation accident."

The use of safety investigation material for criminal proceedings

"The purpose of aircraft accident investigation is the prevention of accidents. It is not the purpose of the aircraft accident investigation and the investigation report to apportion blame or to assign responsibility."

ICAO Annex 13, § 3.1
The use of safety investigation material for criminal proceedings

"The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation…".

The use of safety investigation material for criminal proceedings

- "Both practitioners and courts recognize that NTSB reports contain valuable evidence" *(John F. Easton, "The Rights of Parties and Civil Litigants in an NTSB Investigation" (2003) 68(2) J. Air L. & Com ).*

- The fact that investigation reports are not meant to allocate blame or liability does not, in itself, imply that they do not include any material which may help determine liability allocation. With few reported exceptions, criminal authorities will normally use the report from the safety investigation board to build their own case, instead of conducting their own factual enquiry, mainly because they lack the ability, resources and expertise to establish
The Safety investigation dilemma

Criminal Authorities

Civil Liability Proceeding

Safety investigation

Recordings

Investigation report

Insurance

Media / General Public
The use of safety investigation material for criminal proceedings

Issues

- Impact on safety improvement
- Self incrimination

"...in the majority of States, the appropriate authority for the administration of justice (i.e. the competent judicial or administrative authorities) has access to ATM related accident or serious incident information collated during a technical investigation... Furthermore, the judicial authorities have full powers to conduct their own investigation at any stage of the technical investigation and to collect any relevant information. Such information is usually obtained from the entity conducting the technical investigation."

EUROCONTROL Performance Review Commission
Lessons learnt

Criminal focus

Impact on the safety system

Source: F. Schubert, skyguide & J. Bruggen, LVNL
A "Just Culture" is one in which…

…”front line operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated;

COMMISSION REGULATION (EU) No 691/2010 of 29 July 2010 laying down a performance scheme for air navigation services and network functions and amending Regulation (EC) No 2096/2005 laying down common requirements for the provision of air navigation services, Art. 2k) Definitions
Just Culture

- The legitimacy of criminal proceedings
- The use of safety investigation material for the purpose of criminal prosecution
The legitimacy of judicial proceedings

- Just Culture is not equal to a full judicial immunity.
- Although extremely rare, there are situations where a judicial enquiry, or even prosecution, is justified;
- Under a Just Culture model, the following cumulative conditions are to be met:
  a) the occurrence must have resulted in a formal accident, as defined by ICAO. An investigation into an incident should only be considered if there is evidence of a concrete danger and not only of a hypothetical risk;
  b) there must be clear evidence of gross negligence or deliberate criminal intention.
- The ultimate objective of a Just Culture is to ensure that only those very rare occurrences that meet the definition of a criminal offence are treated by the judicial system.
The use of safety investigation material for criminal proceedings

"Without prejudice to the applicable rules of penal law, Member States shall refrain from instituting proceedings in respect of unpremeditated or inadvertent infringements of the law which come to their attention only because they have been reported under the national mandatory occurrence-reporting scheme, except in cases of gross negligence."

"Member States shall, according to their national legislation, take necessary measures to ensure appropriate confidentiality of the information received by them pursuant to Articles 6(1) and 7(1).

"In accordance with the procedures defined in their national laws and practices, Member States shall ensure that employees who report incidents of which they may have knowledge are not subjected to any prejudice by their employer.

European Directive on Occurrence Reporting, art. 8, Protection of Information
The use of safety investigation material for criminal proceedings

Options for judicial authorities:
- Carry out their own investigation
  - Complex and costly
  - Rely on the safety investigation

In some countries, prosecutors are not allowed to rely on material produced in the course of a safety investigation
- If they want to refer to a statement or element, they must be able to trace it to another source than the safety investigation

"Swiss legislation requires that all documents be made available to judicial authorities and aviation authorities".
- Deviation from Annex 13 notified by Switzerland
In New Zealand, "evidence from material gathered by the investigation board ... may be disclosed upon court decision in civil litigation, but cannot be used against flight crews in criminal proceedings, nor can it be used in relation to employment or administrative litigation.\[1\]

The use of safety investigation material for criminal proceedings

"Australia, which similarly provides comprehensive protections against both disclosure and use of cockpit voice records against flight crew in criminal, civil, or disciplinary proceedings"

"In the USA, the majority of courts will consider that "the factual portions of NTSB reports are admissible" in civil litigation."

"This does not imply that pilots may not be prosecuted criminally, however, but only that police and judicial authorities will not be allowed to use investigation board material to build their case." In other words, this "equals a virtual impossibility to prosecute, since the police will lack the possibility to substantiate their case."

The use of safety investigation material for criminal proceedings

The ICAO 11th Air Navigation Conference concluded in effect that "judicial proceedings related to actions by operational personnel should primarily be based on evidence other than that obtained from sources of safety information".

(25) The information provided by a person in the framework of a safety investigation should not be used against that person, in full respect of constitutional principles and national law.
The use of safety investigation material for criminal proceedings

14 3. Notwithstanding paragraphs 1 and 2, the administration of justice or the authority competent to decide on the disclosure of records according to national law may decide that the benefits of the disclosure of the records referred to in paragraphs 1 and 2 for any other purposes permitted by law outweigh the adverse domestic and international impact that such action may have on that or any future safety investigation. Member States may decide to limit the cases in which such a decision of disclosure may be taken, while respecting the legal acts of the Union.

Some Lessons Learned

- An organisation is never prepared to face a major catastrophe, but basic rules, principles and processes can help an organisation through a crisis.

- The adequacy of immediate response is a most critical element:
  - An early communication / crisis management failure cannot be recovered later.

- The tensions must be managed between:
  - Legal and human responsibilities
  - Corporate and individual responsibilities

- The criminalisation of aviation accidents / incidents:
  - All categories of personnel
  - Away from front line operator

- Criminal liability is climbing up the corporate ladder.
Some Lessons Learned

- Clear rules must be defined and agreed with the staff associations, regarding management measures to be taken in case of criminal proceedings, prior to any accident.
- Responsibilities need to be clearly defined and allocated within the organisation:
  - Resources & competences need to be allocated accordingly.
- Need for legal certainty: e.g. delegation agreements
  - And...
- … the short lifespan of the lessons learned…