

A just culture in aviation – who is an expert?

by Dr Francis Schubert

For many years, the aviation community has been engaged in a passionate campaign in support of a "Just Culture", with limited success to date. Paradoxically, the failure to establish a genuine Just Culture can be partly blamed on the aviation community itself, which has occasionally seemed to be fighting the wrong battle. A recurring attitude has been to object to the very principle of judicial action against aviation professionals on the ground that criminal prosecution does not serve safety.

True as the last part of the argument may be, it misses the point: the obstacle which blocks the establishment of a Just Culture is not that aviation professionals may find themselves subject to criminal prosecution but the fact that they are often prosecuted for matters that do not appear to meet the conditions for such an action.

sufficient for a conviction. In addition to factual criteria a Court will consider the behavioural context, especially in respect of negligence. Demonstration of negligence is a requirement which exists in one form or another regardless of the judicial system in place. Legal text books typically define common negligence as "the failure to exercise the standard of care that a reasonable prudent man would have exercised in a similar situation." Negligence exists in various grades, ranging from simple to gross negligence – the latter being generally described as a conscious, voluntary act or omission in reckless disregard of a legal duty and the consequences for another party. In simple terms, deciding whether the condition of negligence is met in a particular case consists in evaluating whether the behaviour and actions of the individuals involved are acceptable under the specific circumstances of the case. The particular context and environment in which the event under investigation occurred must be taken into consideration. Negligence in respect of aviation safety occurrences must consequently be measured against the standard of care applied by a reasonable air traffic controller or a reasonable pilot, and not by a reasonable person unfamiliar with the realities of the aviation industry. A

behaviour which may seem questionable from the perspective of "the man in the street" will often be reasonably explained and justified, once all the practical elements of the aviation operational context are understood.

In those countries where the applicable legislation permits criminal prosecution not only in the case of an accident, but also in the event of an incident in which a significant risk to safety resulted, the existence of a real danger must often also be demonstrated. Here again, providing evidence of a dangerous situation is a delicate process which requires an extensive understanding and practical experience of the operational and technical reality of the aviation environment. A situation which may appear risky to the layman, will in fact often remain fully under the control of the individuals involved or at least within the margins of the safeguards available to prevent such situations degenerating into genuinely dangerous events. Courts have sometimes concluded that danger existed where aviation practitioners had failed to identify any real risk.

The definition of a Just Culture, which has been developed jointly with the aviation community, does not chal-

At the core of the Just Culture debate lies the subjective evaluation of key legal concepts, such as negligence and the existence or not of a concrete danger.

To qualify as a potential criminal offence, a safety occurrence requires the fulfilment of clearly-defined factual elements such as the death of or serious injury to people as the consequence of an accident. But the demonstration of these factual elements is not



Dr. Francis Schubert
Is Chief Corporate Officer and Deputy CEO, skyguide, Swiss Air Navigation Services Ltd Adjunct professor, Institute of Air & Space Law, McGill University, Montreal

challenge the principle of criminal prosecution. 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". In practice, the overwhelming majority of safety occurrences in aviation do not meet the conditions for gross negligence and few of them even meet the condition for simple negligence. In addition, only a relatively small number of incidents represent real danger. The tension between the judicial system and the aviation community arises from the fact that prosecution – and sometimes conviction – has occurred following events which in the view of aviation professionals did not justify that action. The purpose of a Just Culture in aviation cannot be extended into a judicial immunity for aviation professionals but it can help to ensure that only the tiny minority of cases which reasonable aviation professionals themselves accept are not tolerable are prosecuted.

The question of who draws the line between negligent and acceptable behaviours and between a dangerous and harmless situation has also been debated at length and the answer is clear: that authority belongs in the first instance to the prosecutor and ultimately to the Courts. The goal of

a Just Culture is not to transfer the task of evaluating these legal concepts to the aviation community. But judges and prosecutors will in most cases lack the knowledge and practical experience required to appreciate an aviation safety occurrence from the perspective of a reasonable aviation professional. In order to perform this task,



A just culture in aviation – who is an expert? (cont'd)

they need credible experts who have the ability to objectively evaluate the behaviour of aviation professionals. Of course, the judicial system already relies on aviation experts and these are usually recruited from within the aviation community. Paradoxically, some of the most devastating testimony against aviation professionals comes from their own peers. While the aviation community screams for a just culture, its representatives often provide many of the elements which will support a successful prosecution.

safety occurrences. Such experts need to understand both the practical reality of aviation and the principles that apply to the administration of justice. In respect of ATC, EUROCONTROL and the International Federation of Air Traffic Controllers Associations (IFATCA) have responded to this idea by setting up a training program run by representatives from the judicial system from various countries and aviation specialists. The ultimate objective of this joint initiative is to assemble a list of experts who are capable of provid-

tives from the judicial authorities of various countries. Such participation will certainly increase the ability of the judicial authorities concerned, if not to appreciate the details of an aviation safety occurrence, at least to integrate the need to reconcile the legal reading of a case with the practicalities of the aviation environment.

Second, at the moment the planned list of court experts has yet to be created. Obviously, attending a training program alone will not be sufficient to turn any “subject matter expert” into a more legally aware version of such an expert. The accomplishment of the just culture training program should be a requirement to join the list, but a credible selection process still needs to be developed and implemented. A broad selection panel could be established to achieve that. The participation of representatives from judicial authorities should be a prerequisite to guarantee that the selected candidates not only show a sound understanding of the practical features of the aviation industry, but also the ability to objectively deliver their input.

Finally, the proposed list of court experts remains informal. In order to acquire the level of credibility and authority needed to satisfy judicial authorities, the list of aviation experts will require a higher level of formality – some means of accreditation. One option could be for EUROCONTROL to become, on the basis of a formal decision of its Commission, the repository of the list of court experts. By doing that, the Member States of EUROCONTROL would be taking a major step towards the establishment of a Just Culture in aviation. **S**

Part of the solution to resolve the “just culture deadlock” could be the systematic training of Expert Witnesses...

Part of the tension arises from activity parallel to that which is the responsibility of the judicial system, at the level of the safety investigation which follows a safety occurrence. Since it is not the purpose of safety investigation reports to apportion legal blame and responsibility, these documents are often written from an operational and technical perspective, without any consideration to the conclusions that may derive from reading from the judicial system. Yet in some jurisdictions, the whole of these reports is admissible as evidence in support of criminal proceedings. In the process, prosecutors and the Courts often draw conclusions from these reports that were not necessarily intended by the experts who wrote them.

Part of the solution to resolve the “just culture deadlock” could be the systematic training of Expert Witnesses so that they better appreciate the potential differences between professional and legal readings of the facts surrounding

ing unbiased and balanced advice to the judicial authorities. The availability of such expertise can be valuable to a Court in reaching a decision to convict as well as in deciding how to sentence a convicted person following a criminal trial. But the involvement of such trained experts at the very first stages of a criminal investigation may, at least in civil law jurisdictions, be able to significantly contribute to the establishment of a Just Culture by helping to avoid unnecessary prosecutions.

This program has been successfully tested and has now been run several times with the attendance of a wide panel of participants. Lessons can now be drawn which should help raise the just culture concept to the next level of practical implementation.

First, benefits from the training program can already be anticipated from the fact that the courses were attended not only by aviation expert candidates, but also by representa-