

Why is it necessary to criminalise negligent behavior?

by **Sara Panelli and Massimo Scarabello**

Approaching the complex topic of the relationship between incident or accident safety investigations and the justice system from the opposite standpoints of the professionals involved, the observer could easily reach the conclusion that the two domains live in parallel universes and that no communication between them is possible.

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If one considers the subject just from the point of view of aviation professionals, it is tempting to think that the justice system should not take any interest in aviation incidents or accidents, provided that nothing more than an “honest mistake” is involved in the process that led to that outcome.

To be intentionally provocative, let's think of a system where the State decides not to punish negligent behaviour at all. Is this a safer system because all the individuals involved are focused on safety and do not have to worry about the “legal” consequences of their conduct? Do we seriously believe that all the people who could be possibly involved in the causation of an event will act in a better (i.e. safer) way just because the applicable rules of conduct are not enforced by law? In other words, is it acceptable to society as a whole that some areas of human activity where misconduct could lead to disastrous consequences are not controlled by the law? The answers to these questions, in our view, are negative and the reason for this will be more easily understood if we try to go through the process of criminalising such non-intentional behaviour.

It is definitely much easier to understand the reason why a State is interested in pursuing, and punishing, criminal behaviour such as willful vio-

lation than why, in some cases, negligent conduct is considered criminal, even if the penalty is less severe because the offence is considered less severe. So we will look first at the fundamentals involved in criminalising negligence. When society becomes industrialised, a lot of practical benefits are achieved, but at some cost. We consider that reliance on technology and system complexity generate an increased risk of carelessness and thus the criminal law, through the legislative framework behind it, must decide whether it is necessary to adjust rules of conduct and the criminal response to negligent behavior in order to protect societal interests.

This is the reason why some argue that the role of criminalizing negligence is deterrence. This can be referred to specific deterrence (for the individual who committed the crime) or general deterrence (to serve as an example to others). Critics have argued that deterrence is useful in the case of willful conduct but not for negligent behavior. The subject in the latter case is not aware of the consequences of their conduct and so he cannot be persuaded by the punishment of others not to do what he thinks it is not harmful. But it is generally accepted that punishing someone's misbehavior encourages external conformity to a rule. Thus, punishing careless conduct will

reinforce the notion that society dislikes such conduct and will encourage people to take precautions to lessen the risks accompanying inadvertent behavior.

However, the point at issue is "must all negligent conducts be punished?" When does the State pull the trigger of a criminal prosecution against someone? It is up to the legislative system in place to guide the determination of this point. Some systems require gross negligence, others permit punishment for ordinary negligence whenever such conduct harms or prejudices substantial and primary interests. A fundamental role may be played in such cases by interpretations given by the Judiciary. In the Italian system, for example, different types of negligence are defined based on the state of mind of a person in respect of their awareness of the consequences of their action – 'mens rea' in legal language. If a person was inadvertently careless in doing something and didn't comply with generic or specific rules appropriate to the matter involved, there is the simplest type of negligence. What if a person could envisage and predict the consequences of their behavior? They still do not want that event to occur, but they act nevertheless, because they are sure they will be able to avoid the harmful outcome. This behavior is punished more severely. And when a person acts carelessly and is aware that a harmful outcome may occur as a consequence of their action, it is considered willful conduct.

This said, it's time to examine the system of procedural rules that, in Italy, may lead to a conviction and punishment in negligence cases. What is the Italian legal framework with regard to



"accidents" and "serious incidents"? A Public Prosecutor may be faced with two scenarios:

■ **An accident with victims and/ or injured people**

In this case our law contemplates the crime of manslaughter (Article 589 of the Criminal Code punishable with a sentence of 6 months to 5 years imprisonment, increased up to three times in the case of death of several people) and culpable injuries (Article 590 *ibid* punishable with an alternative sentence or up to three months imprisonment or of a fine, excepted the case of serious injuries punishable with a heavier penalty).

■ **An accident without victims or injured people, but nevertheless endangering public safety¹**

In this case, our law contemplates the crime of culpable aviation disaster (Art. 449 para. 2 *ibid*, punishable with a sentence of 2 to 10 years imprisonment).

If a crash causes the death of the passengers and also endangers public safety, for example, because it overflies a populated area and crashes there, manslaughter and disaster charges will be brought concurrently.

Even though these may be negligent crimes, because the Italian State has established significant penalties – albeit to be precisely determined by the Court taking into account the facts of a case – there is no option for a prosecutor but to open a case and investigate.

The Italian system is based upon the principle of mandatory prosecution whenever there is evidence of crime. Thus, the prosecutor is obliged to investigate any case where they become aware that a crime may have been committed, there is no discretion. And as soon as possible, the names of those suspected of committing the crime to be investigated will be recorded. The purpose of the investigation is to look

¹ for example, because the crash takes place near a town or a village

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for evidence of a crime and to seek who is responsible for that. In brief, given that a crime is comprised of an objective element which usually involves three components – conduct, event and causality and a subjective element which refers to a determination of willful conduct or negligence, the prosecutor will have to search for evidence of each of these elements in order to validate the existence of the crime.

If take the case of an aircraft crash resulting in the death or injury of passengers, the death and injuries constitute the event of the crime of manslaughter or injuries. First of all, the investigation will focus on ascertaining the causes of the death in order to understand what has happened. It is often the case that the prosecutor will requires an autopsy on each of the victims. Such a procedure may establish useful details not only about the cause of death, but about how the accident/incident occurred. For instance, it may emerge that the passengers and the pilot became aware of a problem prior to the crash of the aircraft because the autopsy reveals fractures in their limbs caused because they threw out of the aircraft in a desperate attempt to save themselves. The autopsy may also reveal the weight of the bodies, which along with that of the victims equipment (e.g., ski equipment in case of heli-skiing activities) can support the safety investigation by helping to understand if the maximum transportable weight had been exceeded or if there was an improper weight and balance as a result of the loading of the aircraft. We believe that it is therefore clear how the criminal investigation can provide useful information to help reconstruct the accident and consequently, the safety investigation could benefit from it. The cooperation between judicial and safety investigations could and should enrich both the relevant areas of competence.

Usually, the prosecutor does not have the technical skills to reconstruct what led to the crash of an aircraft. He will therefore appoint and rely on experts to carry out all necessary examinations and analysis.

Once the facts of the event are known, the prosecutor will have to identify the dynamics of the accident in order to understand the nature of the conduct which has caused the crash of the aircraft. In order to do that, they will first need to examine the various different components of the wreckage. Both for the prosecutor and for the safety investigator, it is fundamental to ensure

that there is no interference with the site of the accident so as to preserve relevant evidence and control any access to it.

The prosecutor may therefore seize, as evidence, the area and the wreckage, in order to proceed to recover its components and understand the causes of the event. This seizure to prevent tampering with the site and aircraft components, is useful also to the safety enquiry when they do not (as in Italy) have their own powers of accident site control.

Usually, the prosecutor does not have the technical skills to reconstruct what led to the crash of an aircraft. He will therefore appoint and rely on experts to carry out all necessary examinations and analysis. In accordance with EU Regulation No. 996/2010, appropriate exchange of information shall occur between the judicial and the safety authority during the entire period during which Court-appointed experts are involved, in order to ensure joint participate in the examination of the parts of the aircraft. We believe that





the exchange of information and opinions between experts will lead to more reliable conclusions about the dynamics of an occurrence and the identification of the type of behaviour which has given rise to it so that the judicial authority can make a proper assessment of the subjective element – in the aviation domain, the extent of culpability

An analysis of Article 12 of EU Regulation No. 996/2010, discloses not only the need for the "coordination" of investigations as set out in its title, but also an invitation to "co-operate". Indeed, in the third paragraph of the article, it is stated that "Member States shall ensure that safety investigation authorities, on the one hand, and other authorities likely to be involved in the activities related to the safety investigation, such as the judicial, civil aviation, search and rescue authorities, on the other hand, cooperate with each other through advance arrangements". Cooperation is certainly easier to achieve when both authorities understand the complexity of the matter and the mutual implications of their work.

Therefore, notwithstanding the use of appointed experts, it will certainly be useful to inform and train members of the judiciary in the technical aspects

of the aviation domain, so that when dealing with a plane crash case, they are aware how to engage with other investigation activity. Similarly, we consider that those involved in aviation could benefit from knowing the approach used in any judicial system they might encounter after an aircraft accident. On the one hand, this will help them understand when they could be held liable for certain events and on the other to be better prepared, if necessary, to become experts acting in support of a prosecutor or a Court judge.

How advantageous is this exchange of information can be demonstrated by the conclusions from recent Just Culture seminars, where the two specialist areas, aviation and the judiciary, had the opportunity to compare their points of view. The joint conclusions were that:

- 1) On the one hand, it is not possible to think that Just Culture grants a kind of immunity from criminal investigation to aviation professionals;
- 2) On the other hand, given that the activity in the aviation field is extremely complex, the judiciary must be very careful in its evaluations.

These conclusions were reached following a debate about a specific case (Uberlingen) where, from a criminal point of view, it emerged that rather than a failure of front line operators to deliver on their responsibilities, it was shortcomings in the organisational system which were to blame and therefore liability lay with the management.

In the end, whilst all these technicalities may clarify 'how' we – the judiciary – work and possibly interact with the aviation domain, they do not clarify 'why'. It is perhaps time to stop being too focused in our own domain and begin considering the common interest, the one that derives directly from the origin of the modern society. In doing so, let's try to look at the two systems as means to pursue the same goal, which is a safety and a protective context, where all those involved, not only those who undertake professional duties but ordinary people who are subject to the behaviour of others, can rely on professionalism and be sure that if something goes wrong, they are not left alone and that the State, with the same, required, professionalism of those in charge of the investigations, will carry out all the necessary activities to find out if there is someone to blame for the unwanted result. 5