

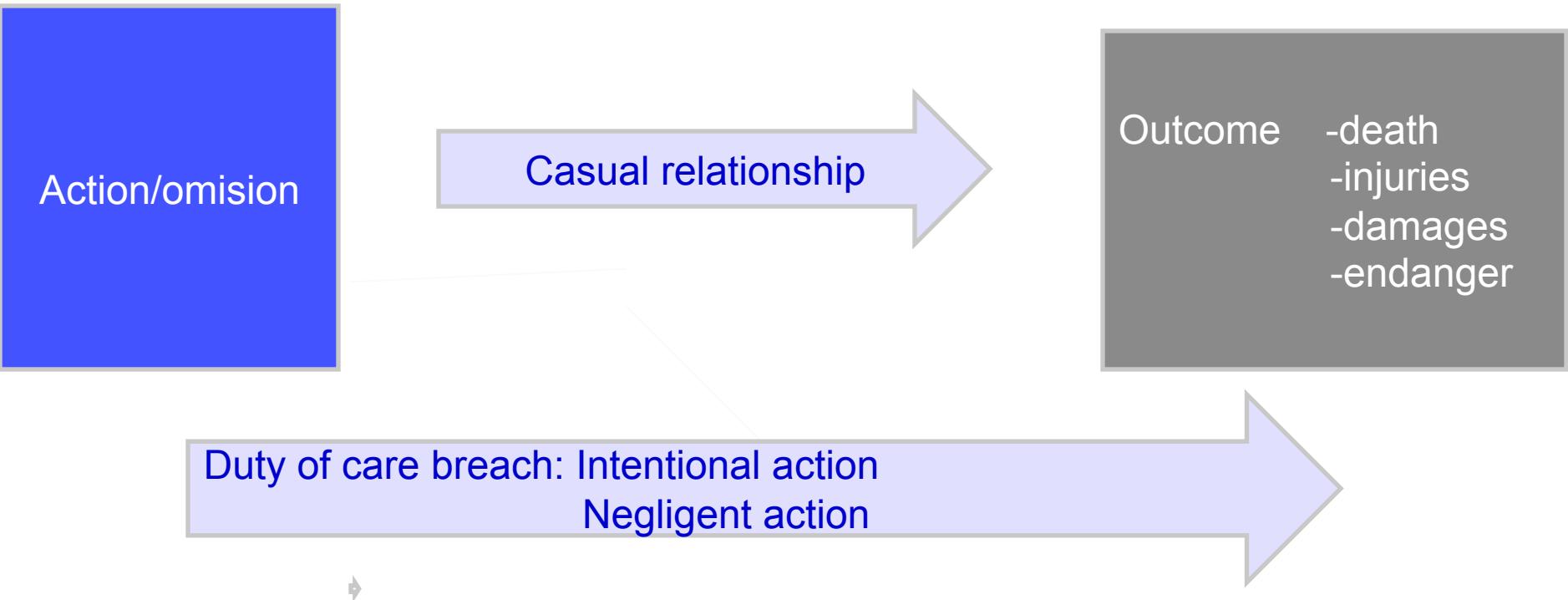
Judicial system and Just Culture

**FLORENTINO-GREGORIO
RUIZ YAMUZA. Senior Judge,
Spain.**

**Barcelona, Spain, 24-26 May
2017.**



1.1 The context. Extra-contractual liability



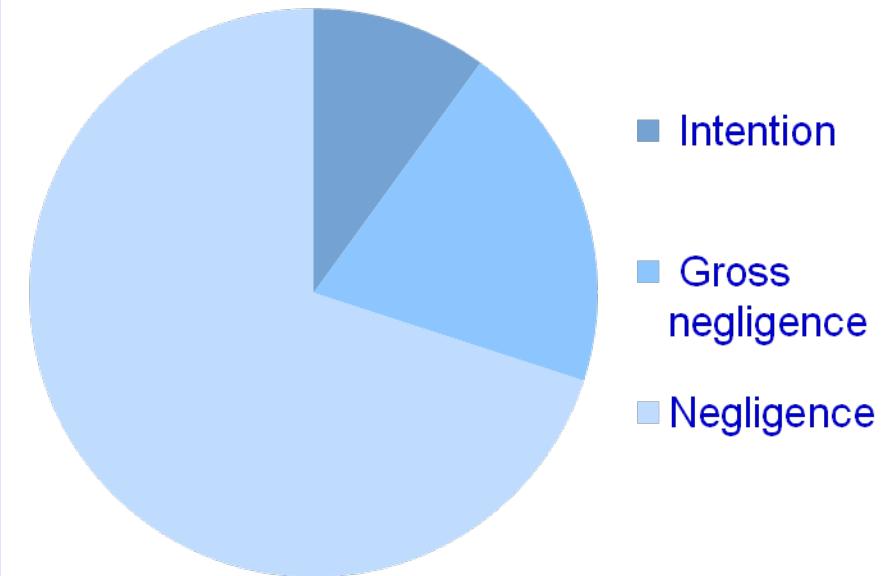
Objective liability.

Art. 106 Spanish Constitution. Administration. Normal or abnormal functioning of public services.

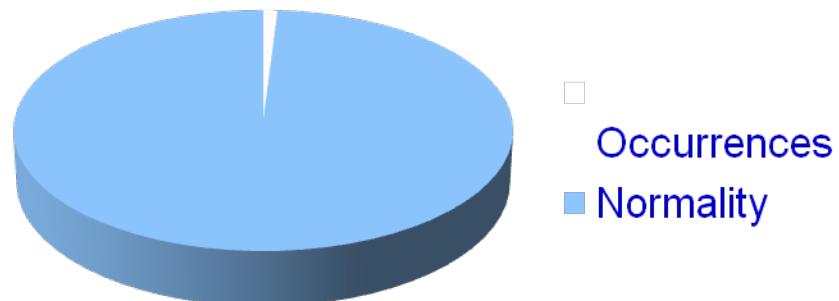
Regulation (CE) 889/2002

1.2 The context. Frequencies

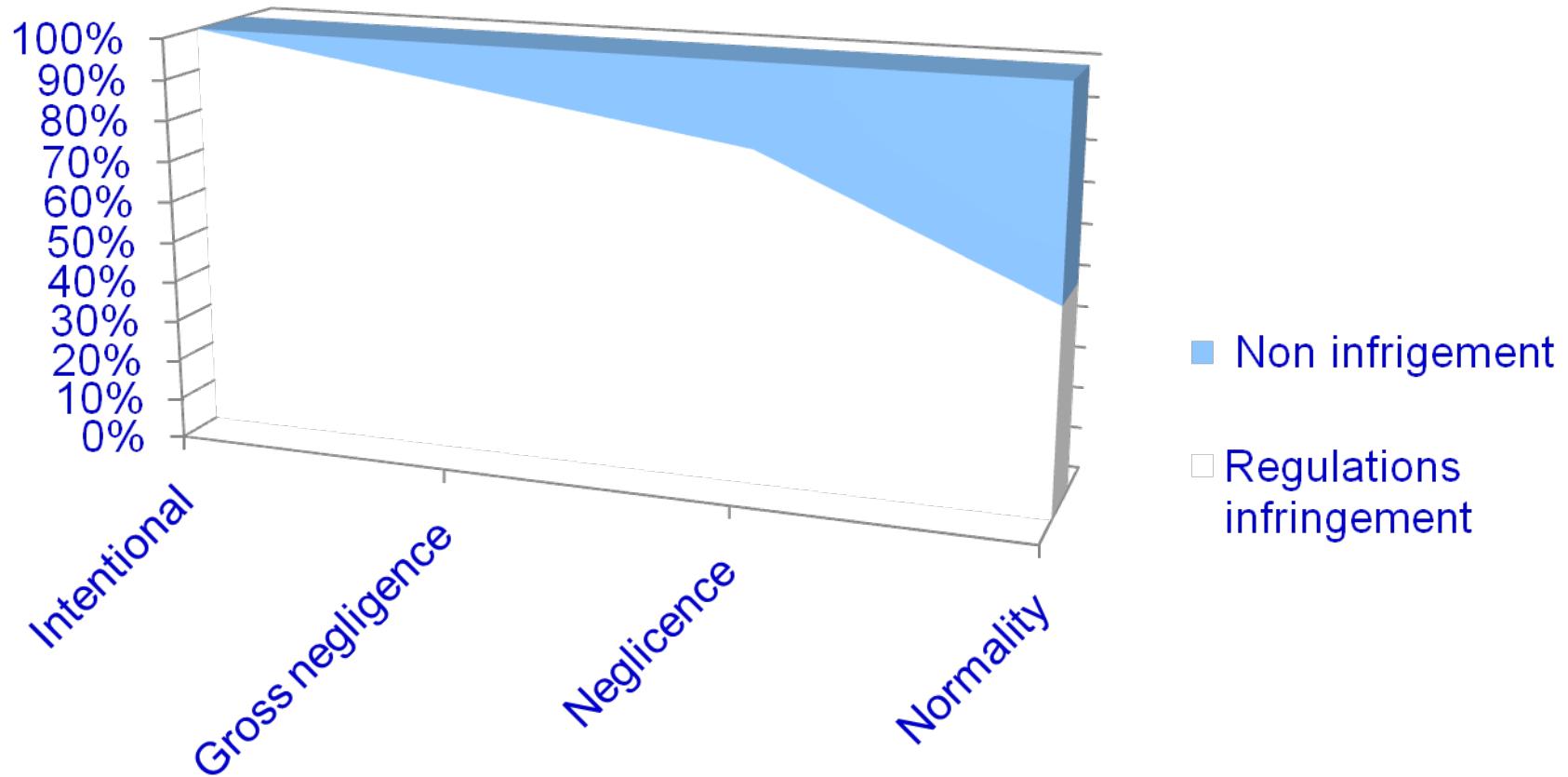
Extracontractual liability occurrences



Occurrences vs. Normality



1.3 The context. Infringement of regulations



1.4 The context. The negligence-outcome equation



2. Just Culture concept and aims

Concept. 'Just culture' means a culture in which front-line operators or other persons are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but in which gross negligence*, wilful violations and destructive acts are not tolerated; (Art. 2 Regulation 376/2014)

Aims. -Protect reported information

(confidentiality and appropriate use only)

- Enhance reporting confidence
(prosecution fear)
- Improve aviation safety
- Not creating an impunity area
- Limit the acts that may give raise to a prosecution

* Negligence: failure to take proper care over something.

Legal: breach of a duty of care which results in damage.

2.2 Just Culture, legal systems and Judicial Culture

Just Culture	Concept Goals Expected benefits	Aviation professionals, pilots, ATCs, industries, users	Legal and theoretical background. Social/ Technological approach.
Legal systems	Features Goals Diversity. National Limbs	Lawmakers, lawyers, society	Very different theoretical backgrounds and social causes
Judicial Culture	Judicial procedures Restorative Justice ADR	Judges, prosecutors, lawyers, defendants, victims, Insurance companies	Compensation factor Offender rehabilitation Offender punishment Victims restoration Community safety

2.3 Just Culture reflected in Law

Regulation (EU) No 376/2014 of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (I)

Preamble

34 and 36 Protection of occurrence reports and JC  improving safety

37 Encourage individuals to report safety-related info, not excluding responsibility

41 Those evaluating reports should not be prosecuted for erroneous or ineffective decisions but which, when they were taken and on the basis of the information available at that time, were proportional and appropriate.

43 Reporting should not be the subject of disciplinary, administrative or legal proceedings, unless where otherwise provided by applicable national criminal law. However, the rights of third parties to institute civil proceedings should not be covered by this prohibition and should be subject only to national law.

44 Member States should retain the option of extending the prohibition on using occurrence reports as evidence against reporters in administrative and disciplinary proceedings to civil or criminal proceedings.

45 Cooperation between safety authorities and judicial authorities  arrangements respecting the various public interests at stake which should cover access to and the use of occurrence reports contained in the national databases

2.3 Just Culture reflected in Law

Regulation (EU) No 376/2014 of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (II)

Mandatory reporting → significant risk to aviation safety (Art.4)

Voluntary reporting (Art. 5)

Information: (Artis. 4 to 16)

- Quality
- Collection and Path (European Central Repository)
- Exchange (proceedings)
- Occurrence analysis and follow-up (national and EU levels)
- Confidentiality and protection

2.3 Just Culture reflected in Law (II)

Regulation (EU) No 376/2014 of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (III)

Article 15 Confidentiality and appropriate use of information

1. Member States and organisations, in accordance with their national law, and the Agency shall take the necessary measures to ensure the appropriate confidentiality of the details of occurrences received by them pursuant to Articles 4, 5 and 10.

2. Without prejudice to the provisions relating to the protection of safety information in Articles 12, 14 and 15 of Regulation (EU) No 996/2010, information derived from occurrence reports shall be used only for the purpose for which it has been collected.

Member States, the Agency and organisations shall not make available or use the information on occurrences:

- (a) in order to attribute blame or liability; or*
- (b) for any purpose other than the maintenance or improvement of aviation safety*

2.3 Just Culture reflected in Law

Regulation (EU) No 376/2014 of 3 April 2014 on the reporting, analysis and follow-up of occurrences in civil aviation (IV)

Article 16 Protection of the information source

...6. Without prejudice to applicable national criminal 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 pursuant to Articles 4 and 5.

The first subparagraph shall not apply in the cases referred to in paragraph 10. Member States may retain or adopt measures to strengthen the protection of reporters or persons mentioned in occurrence reports. Member States may in particular apply this rule without the exceptions referred to in paragraph 10...

10. The protection under paragraphs 6, 7 and 9 of this Article shall not apply to any of the following situations:

(a) in cases of wilful misconduct;

(b) where there has been a manifest, severe and serious disregard of an obvious risk and profound failure of professional responsibility to take such care as is evidently required in the circumstances, causing foreseeable damage to a person or property, or which seriously compromises the level of aviation safety

2.3 Just Culture reflected in Law (II)

Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC

Article 14 protects sensitive safety information from being made available or used other than as permitted under its provisions

“Protection of sensitive safety information

...

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”

3.1 Just culture challenges. General issues.

- 1** How to facilitate a dialogue between those different areas?
- 2** How to compatibilize different approaches and goals?
- 3** Making the most from the lessons learnt from each area?
- 4** The interest of Justice/the interest of safety. Justice and safety. Is Justice important for safety and is safety important for Justice?
- 5** Is not an aim of the legal system to find out whether there is a guilty one
- 6** Is not the approach of the victim seeking for revenge
- 7** The legal background. Civil proceedings
- 8** Frontline operators (what shall we understand as FLO?/ Does JC apply for the rest of them)
- 9** The money factor

3.2 Just culture challenges (II). Technical issues.

10 Gross negligence: unusual behavior/usual circumstances vs. usual behavior/ unusual circumstances.

11 Cause/effect relationship: human factor/consequences
all causes/consequences

12 Relations between negligence and consequences (not all the time a gross negligence or deliberate act causes serious victims and serious damages, and the other way round)

13 Who is to determine whether we are facing gross negligence?
It seems to be a up to the Judiciary to establish it ultimately
The '*lex artis ad hoc*'

14 The 'dangerous' press approach

3.3 Just culture challenges (II). Technical issues.

Some cases from real life (I)



Sources: ESRI, TeleAtlas, FlightAware, FAA, Associated Press

3.4 Just culture challenges (II). Technical issues.

Some cases from real life (II)

Helios Flight 522. 14 August 2005

3.2 Causes 3.2.1 Direct Causes 1. Non-recognition that the cabin pressurization mode selector was in the wrong position

procedure; 2. Inadequate crew resource management (CRM) and communication

warnings and alerts were not acknowledged by the crew

passenger oxygen masks were not deployed

climb. 3. Inadequate crew resource management (CRM) and communication in the flight management system (FMS) and impact of the flight management system (FMS) in the organization of the flight

in numerous flight crews, there was a lack of organization and coordination in the flight crew, leading to errors in the organization of the flight

in numerous flight crews, there was a lack of organization and coordination in the flight crew, leading to errors in the organization of the flight

oversight regarding the use of the FMS and its impact on the organization of the flight

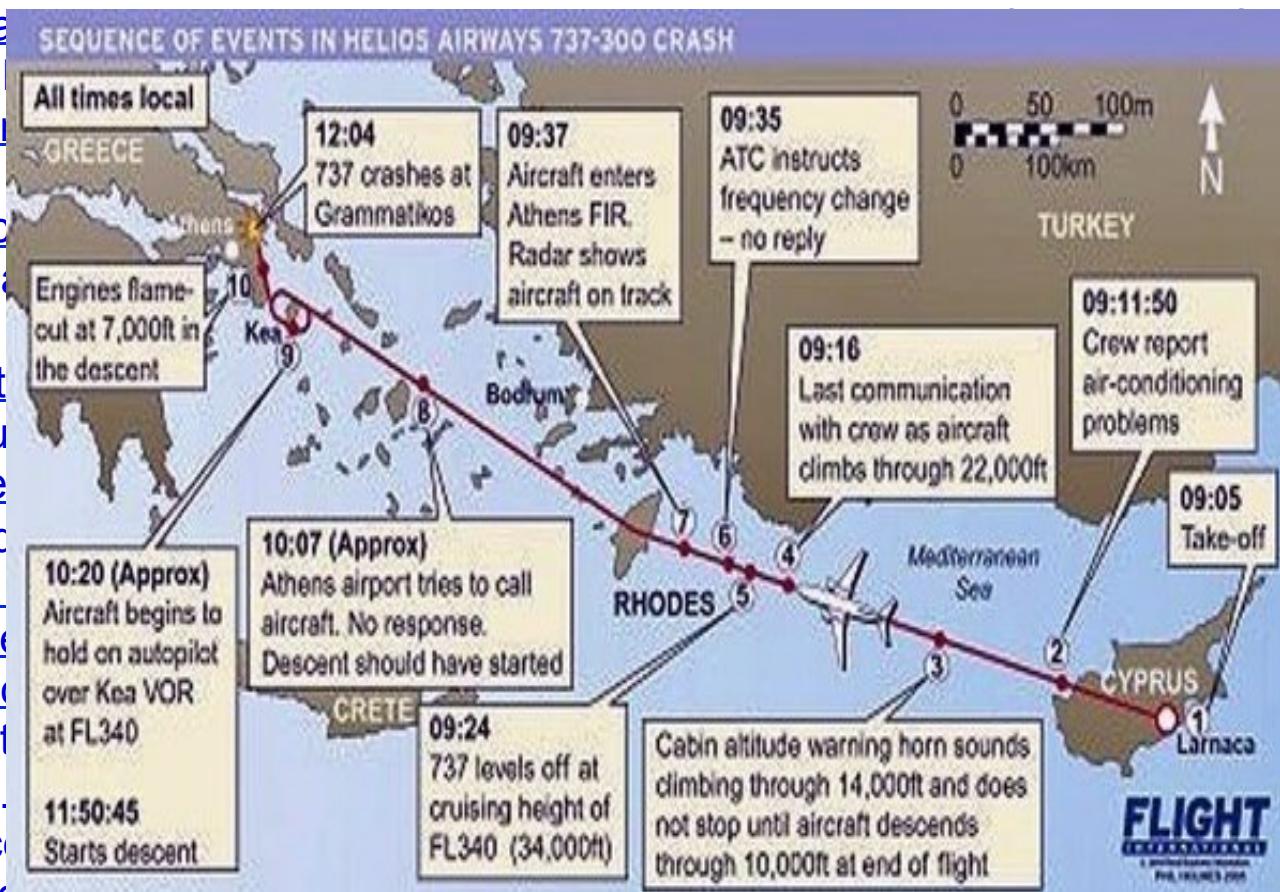
and its inaccuracy in the organization of the flight

Inadequate crew resource management (CRM) and communication in the organization of the flight

Ineffectiveness of the cabin pressurization mode selector in the organization of the flight

aircraft system failure in the organization of the flight

Accident 1. Inadequate crew resource management (CRM) and communication in the organization of the flight



deployment, and continuation of the aircraft ascent (climb). 3. Ineffectiveness of international aviation authorities to enforce implementation of corrective action plans after relevant audits.

3.5 Just culture challenges (II). Technical issues.

Some cases from real life (I)



Two planes nearly collide over Valencia

Shanghai



Barcelona. Two planes 'nearly' collide. Sky news.

3.6 Just culture challenges (III). Looking forward.

15 Asking “what” is responsible might not always be enough.

Backward/forward looking accountability.

16 Restorative Justice could be ideal to avoid criminal proceedings (but not to prevent the injured party from seeking the enforcement of civil liability)

17 The victims’ position.

18 Colliding interests between stakeholders.

19 Creation of international a Scale of assessment.

20 National Legal changes to decriminalise less serious negligence.

21 Supranational legal framework changes

4.1 Spain. The perfect battlefield

Features of the Spanish legal and judicial system:

Diversity of jurisdictions: civil/judicial review/criminal

Different actions: civil/criminal

Civil liability claim can be embedded in criminal proceedings (civil action is by default included in criminal proceedings)

Legality principle (opportunity principle)

UK Full code test ◊ evidential stage/public interest to prosecute

Private prosecution 'popular prosecution' and public prosecution

Parallel criminal and administrative investigations

4.2 Civil Code

Art. 1902

A person who, as a result of an action or omission, causes damage to another through his fault or negligence shall be obliged to repair the damage caused.

Art. 1903

The obligation imposed pursuant to the preceding Article shall be enforceable not only as a result of one's own actions or omissions but also of those for whom one is liable...

Likewise, the owners or managers of an establishment or company shall be liable for damages caused by their employees, in the service in which they are employed or in the performance of their duties...

The liability provided in the present Article shall cease if the persons mentioned therein were to provide evidence that they acted with all the diligence of a *bonus pater familias* to prevent the damage.

Art.1904

The person who pays damages caused by his employees may recover from the latter the amount paid....

4.3 Criminal Code (I)

General provisions

Art. 5 No punishment whatsoever shall be imposed in the absence of either *mens rea* or negligence

Art. 12 Negligent deeds or omissions shall only be punished if specifically provided by the Law

Art. 31 bis. Corporate criminal liability

Art. 116 All persons held criminally liable for a criminal offence shall also be held liable under Civil Law if the deed gives rise to damages or losses.

Art. 120 The following persons shall also be held civilly liable, failing those held criminally liable:

3. Natural or legal persons, in cases of criminal offences committed in the establishments they own, when those that manage or administer them

4. Natural or legal persons dedicated to any kind of industry or commerce, for criminal offences their employees or assistants, representatives or managers may have committed in the carrying out of their obligations or services;

Art. 121 The Public Administration shall be subject to subsidiary liability for damage caused by those criminally liable for malicious or negligent criminal offences, when these are authorities, agents and employees of those bodies, or civil servants

4.4 Criminal Code (II)

Manslaughter

Art. 142 Whoever causes the death of another due to gross negligence shall be convicted of manslaughter and sentenced to prison.

Whoever causes the death of another due to less serious negligence shall be punished with a fine

An individual may only be prosecuted for the crimes provided for in this section if the injured party or his legal representative files a formal criminal complaint

When the manslaughter is committed due to professional negligence, the punishment of special barring from exercising the profession, trade or post shall also be imposed, for a period of three to six years.

4.5 Criminal Code (III)

Bodily harm and damages.

Art. 152

1. Whoever causes a bodily harm foreseen in the preceding Articles due to gross negligence shall be punished, taking into account the risk caused and the outcome
2. Whoever causes the bodily harm outlined in Art. 149 and 150 due to less serious negligence shall be punished

An individual may only be prosecuted for the criminal offences provided for in this Section if the injured party or his legal representative files a formal complaint.

Art. 267

Damage caused due to gross negligence, in an amount exceeding 80,000 euros, shall be punished

The criminal offences to which this Article refers shall only be pursuable when reported by the person offended or his legal representative. .

4.6 Criminal Procedure Act

Art. 100

All offences and misdemeanours give rise to criminal proceedings to punish the guilty party and may also give rise to civil action for the return of things, repair of damages and compensation for damages caused by the punishable act.

Art 101

Criminal proceedings are public.

Art. 105

The Public Prosecution Service shall initiate all criminal proceedings that they consider appropriate, whether or not there is a private prosecutor in the cases, except for those which the Criminal Code reserves exclusively for private lawsuits.

Art. 108

Civil action must be scheduled by the Public Prosecution Service together with the criminal action, whether or not there is a private prosecutor to the proceedings; except the aggrieved party expressly waives their right to restitution, repair or compensation.

Arts. 109-111.

Criminal and civil action are considered to have been brought jointly unless expressly stated otherwise by the injured party.

4.7 Other relevant Acts.

Air Traffic Act (48/1960), 21 of July, 1960

Crimes against the security of the aircraft

Crimes against air traffic

Inexperience, imprudence and negligence

◊ grievous lack of skill/negligence

◊ actual recklessness (simple form of negligence)

Risk crimes

Act of Air Safety 2003

Art. 18 confidential nature of information

Art. 19. Transfer or communication of the information “*1. The information referred to in article 18.1 may only be disclosed or communicated to third parties in the following cases: a) When required by the judicial bodies or by the Public Prosecutor to investigate and prosecute offences...*”

Art. 43 Administrative offences. Risks and incident causation.