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THE ÜBERLINGEN CASE

Legal scenarios after Barcelona Court of Appeal judgement

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THE ACCIDENT

- 1 July 2002 over Überlingen, Germany, a mid air collision occurred between a Tupolev TU-154 M aircraft chartered to operate as Bashkirian Airlines (BAL) travelling from Moscow to Barcelona and a Boeing 757-200 freighter operated as DHL Airways Flight 611, travelling from Bergamo to Brussels;
- 69 died on the Tupolev (57 passengers, most of whom were children and young adults and 12 crewmembers) and both 2 crew members on the DHL aircraft;
- Instructions of the Automated Traffic Alert and Collision Avoidance System (TCAS) on board in both aircraft;
- Conflicting instructions to TCAS from ATCO on duty at the time of accident.



IN THE AFTERMATH..

- Media attention and the Swiss government actions;
- The BFU Safety Investigation and its final report (May 2004);
- The “**immediate**” causes of the accident (excerpt of BFU report)
 - Separation infringement not noticed by ATCO in time;
 - Late instruction of ATCO ;
- The “**systematic**” causes of the accident (organizational weaknesses) .
 - Lack of standardization of operational and procedural instructions of the TCAS;
 - Working praxis during low traffic time;
- February 2004, the ATCO was killed by a relative of the victims.



THE CRIMINAL JUDGEMENT

- Criminal investigation on Skyguide after the publication of the BFU report (May 2004);
- Criminal Swiss prosecutions for **negligent homicide and negligently disturbing public transport** against 8 Skyguide employees (August 2006) ;
- Requisition: - 6 to 15 months imprisonment; - Suspended sentences with a probation period of 2 years;
- Outcome. District Court of Bulach judgment (September 2007):
 - 3 ATCOs managers convicted to be guilty of gross negligence, giving each a one-year suspended sentence
 - 1 employee sentenced to a suspended financial penalty
 - 4 employees acquitted
- **Judges did not find intentional criminal activity, but pointed out that the convicted employees had an opportunity to remedy known safety deficiencies, and failed to do so;**
- No party appealed.



CONSIDERATIONS

- The BFU report makes 19 recommendations of which 11 refer to systematic and organizational deficiencies of the ATC provider Skyguide;
- An example of a company's management liability
 - current shift from the historic precedence of placing criminal blame on individuals closest to the accident toward the corporate level which emphasizes the importance of organizational aspects in maintaining safety ;
 - air navigation service as a highly complex system;
- A case of liability deriving from the misconduct performed not by the employees but by the company's management
 - Failure of the corporate board to provide and supervise an adequate safety/critical system;
 - Insufficient information available to the ATCO's about ongoing maintenance work on ATM equipment and its operational consequences.



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Omissive action as a common element between the 2 judgments

CRIMINAL JUDGMENT



Omissive Action



CIVIL JUDGMENT



THE CIVIL JUDGMENT

First Instance Court of Barcelona n. 34 - 3 March 2010

- Defendants Honeywell and ACSS, both manufacturers of TCAS.
- From U.S.A. to Spain through *Forum Non Conveniens* dismissal (FNC)

FNC is a (mostly) common law legal doctrine whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties.

The change of forum generally is driven by the significant impact that the outcome of FNC motion has upon a plaintiff's recoverable damages.

Legal tactics of plaintiffs and defendants in terms of recovering maximization and exposure minimization.



THE CIVIL JUDGMENT

First Instance Court of Barcelona n. 34 - 3 March 2010

- Controversial issue: defective nature of the product (TCAS) and appliance of the Hague Convention (2 October 1973) on the Law Applicable to Products Liability.
- 2 alleged defects of TCAS **not proven**: **1)** the alleged fault in the RA Reversal System; **2)** the alleged existence of a new version of TCAS software available to correct the claimed problems of the earlier version.
- **HOWEVER, proven a third alleged defect**: the TCAS II Pilot's Guide failed to clearly set forth the priority of TCAS advisories over conflicting air traffic control orders
- Plaintiffs award: 10.459,810,50 dollars in damages for the deaths of 30 persons (an average of 348,660,35 per decedent).
What about if the case had remained in the U.S.A.?



THE CIVIL JUDGMENT

Court of Appeal of Barcelona n. 230 - 7.05.2012

- **The Court** reverse in part the judgement issued by the Court of First Instance and **declares U.S. corporations Honeywell and ACSS, manufacturers of TCAS, exclusively and fully liable for the collision**
 - Defendants grounds responsibility and TCAS defective nature (reverse RA).
 - Pilot Manual for the TCAS incomplete, inadequate and contrary to the rules.
 - Such defects were known to the defendants and yet not made it necessary to remedy the problems.
 - The product and its defects are directly linked and **are the cause final and effective of the plane crash**
- Full application of the US law and compensations for damages of at least 3 million US dollars per passenger, for a global award of 66,5 million US dollars.
- **The practical importance of the decision is that a defendant can no longer assume that a plaintiff recoverable damages will be less than what U.S. jury would award if FNC is granted in favor of an European jurisdiction.**



CONSIDERATIONS

Different actors and causae petendi

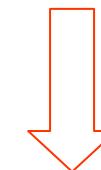
Different conclusions

criminal judgment



organizational weaknesses
of the Provider

civil judgment



malfunction of the TCAS

Common element

Failed exercise of the duty to supervise, inform and act in order to remedy to the known failures of the system



CONCLUSIONS

- To each “function” corresponds a “duty of acting”;
- “Position of guarantee” and “responsibility for lack of organization”;
- **Not to prevent an event that is a legal obligation to prevent is equivalent to causing it;**
- Duty of acting concerns everyone, also the subjects not considered *strictu sensu* front line operators;
- Global risk society and right to safety;
- **Responsibility for risk created.**



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Thanks for your kind attention!

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