

RECONCILING CRIMINAL LAW ENFORCEMENT WITH JUST CULTURE

The Netherlands is often held up as a beacon of good practice when it comes to Just Culture in the judiciary. **Katja van Bijsterveldt** and **Aco Verhaegh** describe how Just Culture features in Dutch prosecution aviation cases.

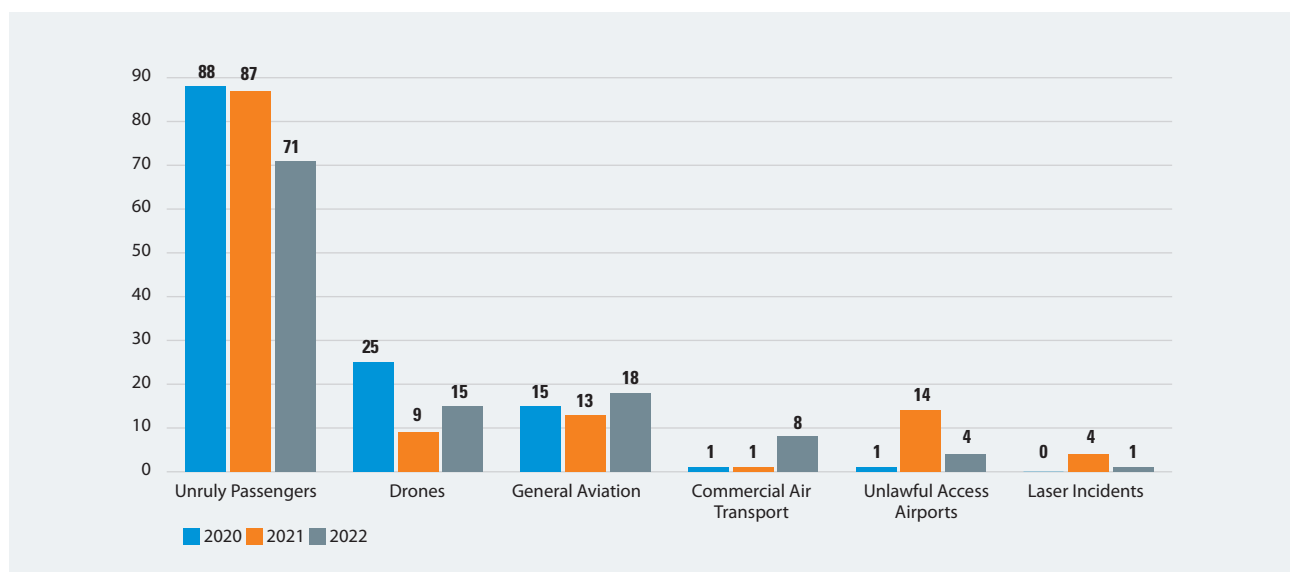
“Being a suspect is not compatible with Just Culture!” This remark came from a member of the audience following the presentation by the Dutch aviation police at a safety meeting at the airport in Breda in March 2023. This was not the first time we observed that the remit and actions of the police and the Public Prosecution Service (PPS) are unclear. We understand the confusion and aim to clarify. It was for this reason that we previously launched a roadshow at the ‘Aviation safety network day’, organised by the Ministry of Infrastructure and Water Management in September 2022.

During the meeting in Breda, our presentation elaborated on a presentation by the aviation police. In the process, the tension between criminal investigation and Just Culture was discussed extensively. After this, understanding seemed to improve. In this article, we hope to explain further how Just Culture features in Dutch prosecution aviation cases.

Criminal Investigation and Prosecution in The Netherlands

The PPS covers all Dutch criminal investigations relating to civil aviation with one national coordinating aviation public prosecutor. As well as investigations concerning manned aviation, which we address in this article, these include investigations into drone violations, laser incidents, unlawful access to airports, and unruly passengers (see Figure 1). The aviation prosecutor is involved from the outset and may order the aviation police to start a criminal investigation. These experienced police officers know about aviation legislation and regulations, have personal experience flying aircraft, and are trained to investigate aviation accidents. They follow the same training programme as that of the Dutch Safety Board investigators.

Figure 1: General overview of civil aviation cases registered by the PPS



The reasons for a criminal investigation are not always well understood. First, a prosecutor has a legal obligation to start a criminal investigation on becoming aware of a criminal offence (whether it is a misdemeanour or felony). Second, a concerned party may provide the impetus by filing a report or an alert to the police or the PPS, which raises a reasonable suspicion of culpability that a criminal offence had been committed (the threshold for a criminal investigation). Furthermore, such a suspicion can also arise from findings during a routine inspection of the aviation police. In exceptional cases, an occurrence report, filed pursuant to Regulation 376/2014, may instigate an investigation. This follows from the advanced administrative arrangements between the Civil Aviation Authority (CAA) and the PPS (see more about that in the text box below).

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The PPS does not have access to these occurrence reports. The Analysis Bureau of Aviation Occurrences (ABL) of the Dutch CAA – the reporting centre in The Netherlands – is designated as the gatekeeper. Whenever the ABL sees cause to suspect intent or gross negligence in a report, the ABL communicates this to the aviation prosecutor, so that the cause of suspicion can be investigated. This agreement has been made with a view to striking a fair balance between the need for proper administration of justice, on the one hand, and the necessary permanent availability of safety information on the other. Regular consultations are held between the ABL and the PPS for coordinating the application of the selection criteria. This happens together with representatives from the sector to enhance mutual understanding and trust. See 3.1 of the Instruction with regard to criminal investigation and prosecution of civil aviation occurrences (hereafter also referred to as the Instruction) in SKYbrary: <https://www.skybrary.aero/sites/default/files/bookshelf/5855.pdf>.

The aviation prosecutor sets the priorities and leads the investigation. This investigation is aimed at ascertaining the truth about a suspicion of criminal offence(s), which can be committed by persons or legal entities. This focus is not present in a safety investigation of an accident or serious incident by the Dutch Safety Board, which can take place in parallel with the criminal investigation. This safety investigation is also aimed at truth finding, but not in the context of possible blame or liability. There can be misunderstanding that a criminal investigation is limited because of its context. A criminal investigation goes as far as necessary to obtain a clear impression of the event, in the interest of taking a sound decision. Especially when it comes to the attribution of

consequences, an in-depth investigation can take place. It is generally viewed as a burden, but also serves the interest of a suspect. The investigation may place the event in a different light from that which may initially have existed. If nothing or very little may be blamed on the suspect, this needs to be explained to possible victims and surviving relatives. They also have a strong interest in the most extensive but expeditious investigation possible into what happened, especially to come to terms with a severe incident.

Like any other public prosecutor in the Netherlands, the aviation prosecutor has discretionary powers. This means that the prosecutor determines whether or not prosecution is appropriate after the criminal investigation has been concluded. In doing so, public prosecutors consider the general interest. This is a term for factors such as the seriousness of the offence, the interest of (flight) safety, personal circumstances of the suspect, and the resources of the judicial system. Based on those factors, an assessment is made as to whether prosecution may serve society as a whole. During presentations, we therefore stress that a criminal investigation does not have to lead to prosecution. All facts and circumstances, and the context of the occurrence, are considered in the ultimate decision. Although a suspect always has the right to remain silent, this person's account has proven especially important in decisions in aviation cases.

Criminal Cases in Commercial Air Transport

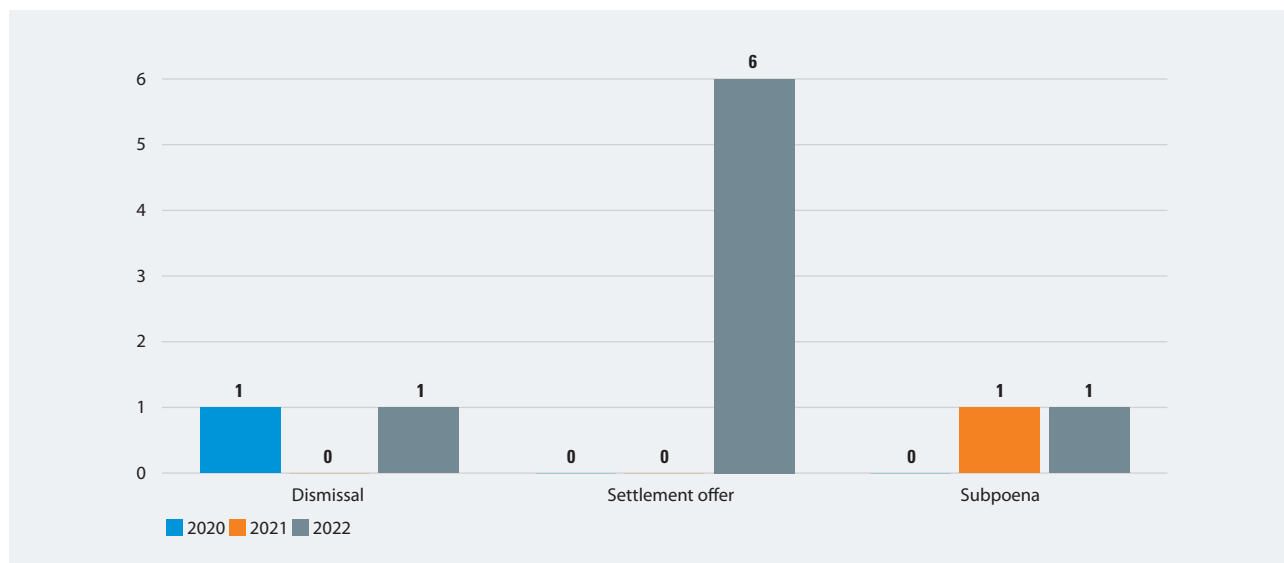
The PPS has adopted a very reticent prosecution policy concerning the behaviour of so-called major parties in commercial air transport, such as airlines and air traffic control, and their employees. Prosecution takes place only in the event of an accident, serious incident or endangerment, or persistent violations, caused by intent or gross negligence (see 4.1 of the Instruction). This policy derives from general trust of the PPS in the professionalism of persons and organisations in major commercial air transport. Organisations have a comprehensive safety management system to curtail risks as much as possible. In addition, the air traffic control organisation in the Netherlands (LVNL) notifies the PPS in the case of accidents and serious incidents. If LVNL is involved, the conclusions and recommendations resulting from their internal investigation are also shared with the PPS.

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This policy is reflected in the practice of criminal law. Consumption of alcohol by pilots and crew are the main factor in criminal cases in major commercial air transport. Such conduct is punished (see Figure 2). When a worrisome trend is observed, we will also take other action. For example, the PPS and the aviation police have called a meeting with a foreign airline because its crew was relatively often found to be under the influence of alcohol during alcohol

inspections. In several cases, the inspection was prompted by remarks from co-workers about excessive drinking. Such

Figure 2: Major Commercial Air Transport case outcomes



a notification of the aviation police reveals that safety is paramount: *“No aircraft takes off if crew members are under the influence of alcohol.”* We wanted to work with the airline to see how we could influence conduct. This does not alter the fact that alcohol infractions will be punished, but we do strive to prevent those infractions.

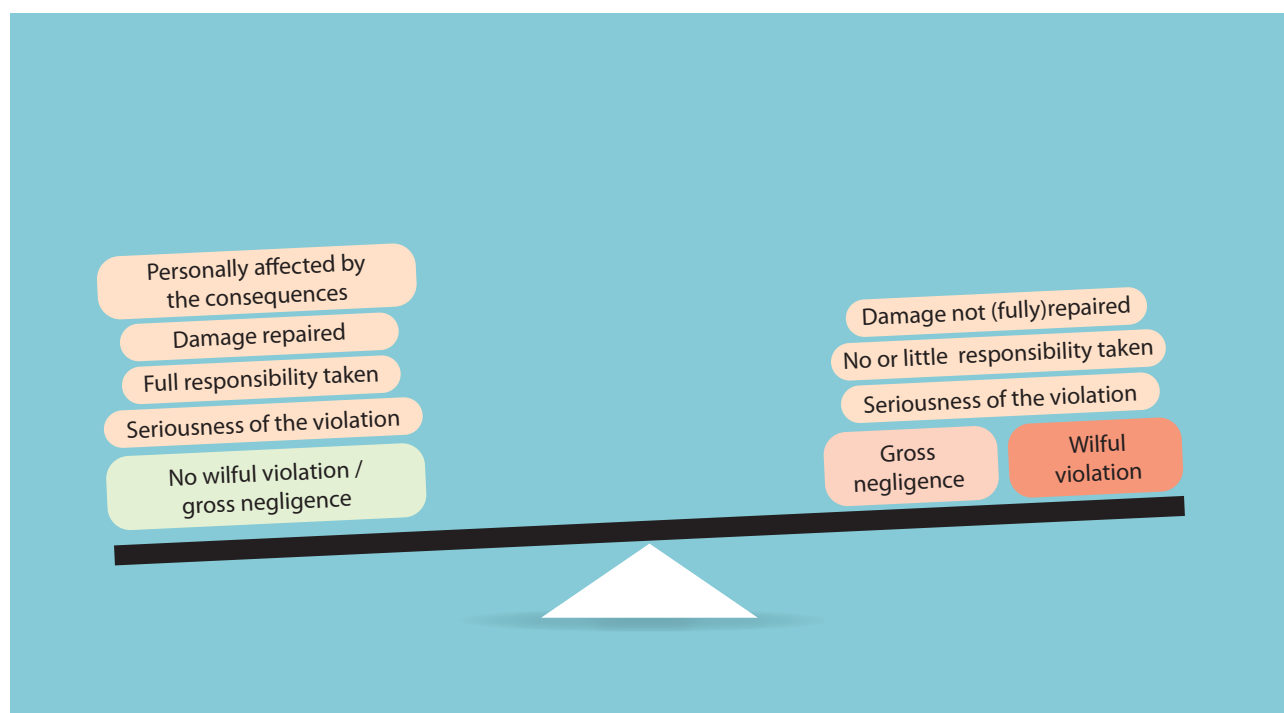
Criminal Cases in General Aviation

In general aviation, a different perspective applies. In this combination of persons and organisations, safety management is less comprehensive than in major commercial air transport. These operations range from small commercial

organisations to private pilots, and from motorised aircraft to glider planes and paramotors. Here too, Just Culture needs to be promoted, but through a different approach. The policy of the PPS stresses protection of the occurrence report (see 4.2 of the Instruction). During the investigation, aspects of Just Culture are also considered so that they can be taken into account (see Figure 3).

The case of a near mid-air collision reveals how circumstances may change the assessment. The way the (accused) captain performed a flyby qualified as grossly negligent. Sentencing was therefore indicated, especially because the pilot had shown no concern for the victim. We found that remarkable,

Figure 3: Illustration balancing factors in civil aviation cases



because the pilot was aware of his culpability. We therefore urged the two to engage in a conversation, and this defused escalation of the event. This example offers important lessons for many people: report the occurrence yourself, learn from it, and show concern for others who are involved. This gave rise to the idea of a safety meeting as a path toward settlement: share your lessons learned at the aero club. This pilot remedied the insecurity and negative sentiment of the victim. For him, the issue was settled ‘among pilots’. Taking responsibility meant that sentencing was unnecessary.

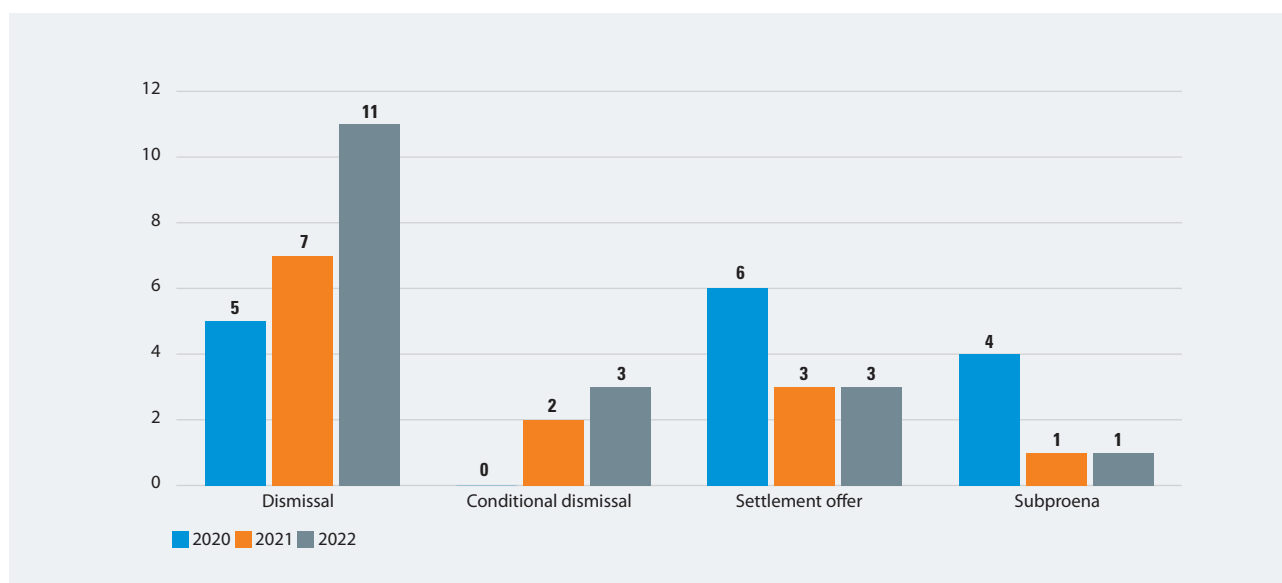
A criminal investigation may be significant in other ways. In the Summer of 2022, we received two reports from the ABL about a disconcerting flight conduct by a 77-year-old pilot. The first report concerned a near miss over a year earlier: the pilot had taken off from the taxiway with two passengers and barely made it over an aircraft with 11 persons on board. The second report mentioned a recent dangerous landing. In the first report, the ABL saw no cause to suspect gross negligence, and PPS was therefore not notified, although the report showed an urgent need for action and the CAA saw no opportunities to intervene. Only after the second report did the ABL see cause for suspicion. Our investigation revealed convincing evidence of a violation regarding the near miss, not regarding the dangerous landing. At first, the pilot did not understand the concerns about his flight conduct. As we did not expect a fine to be effective, we explored ways to alleviate the concerns. We considered the option of voluntarily being examined by an examiner to be designated by the CAA. However, after conferring with his lawyer, the pilot reached a different conclusion: he decided that the time had come to stop flying. We presented him with the option of being

examined, but when he reported that he had turned in his pilot’s licence, the case was dismissed.

In a case involving a collision between two paramotors we convinced a pilot to pay for the damage he caused. He told us during the hearing that he wanted a decision by an independent authority before agreeing to pay for the damage. In a letter, we described the outcome of the investigation and informed him that he should consider the victim, despite the impact of the incident on him personally. The relationship with the victim needed to be restored, starting with compensation for the damage (nearly three thousand euros). We expressed the intention to waive prosecution if he paid the damages, which he did.

In some cases, the PPS considers sentencing to be the appropriate course of action. The clearest example concerns a pilot who refused to be held accountable for his flight path on approach. He responded that the airport operations manager should contact the aviation police, if the manager thought there was a problem (which he promptly did). His demeanour ultimately led the PPS, in addition to imposing a 1,000-euro fine, to issue a suspended disqualification from flying. This emphasised the Just Culture standard, which allows for honest mistakes, but draws a line at gross negligence and according to the PPS implies that the person involved takes responsibility himself by entering into a conversation about the occurrence and trying to learn from it. The court upheld that standard as well, but did so differently, by issuing 2,000-euro fine, of which 1,000 euros was suspended.

Figure 4: General Aviation case outcomes




Sentencing may also be indicated to confirm a rule of the air, if somebody was unaware of it or did not acknowledge it. The same holds true, when, after a previous warning, somebody repeats such conduct.

Concluding Remarks

In the Netherlands, Just Culture is taken into account in criminal justice. The PPS does not sentence every mistake. The narrative of the person concerned and the context are important, and may receive consideration if brought to light by the investigation. We cannot stress that enough. By interacting with other aviation authorities and stakeholders, mutual understanding is enhanced, and that is of great value in assessing future cases.

Further Reading

In his article 'Justice and Safety' in *HindSight* 18, Fred Bijlsma, the aviation public prosecutor at the time, described prosecution as part of the Just Culture equation in Dutch aviation cases. See <https://skybrary.aero/sites/default/files/bookshelf/2576.pdf> 



Ms Katja van Bijsterveldt, Esq., is a senior public prosecutor. Since September 2019 she has been appointed national coordinating public prosecutor for aviation.



Mr Aco Verhaegh, Esq., has been the policy advisor of the PPS on aviation cases since October 2018 and has been working on a PhD thesis about Just Culture and criminal enforcement of aviation law. Since January 2019 he is also the public prosecutor's clerk for the aviation public prosecutor.

