

## IMPRESSIONS OF A COURT CASE

### The story of a tail strike

#### The case

This article will give an impression of a court case related to an incident that happened in January 2003, when a Boeing 737 was about to depart from a regional airport in the Netherlands. During the take-off roll the nose wheel lifted at a speed of 41 knots (just under 80 km/h). The proper speed for the rotation of this aircraft at that moment would have been around 145 knots (almost 270 km/h). The flight crew initiated a rejected take-off by pulling back the power levers. Within 10 seconds the nose wheel contacted the runway again and the crew decided to taxi back to the apron in order to investigate what might have happened. Investigations started: one by the Dutch Investigation Board for Safety (in Dutch “Onderzoeksraad voor Veiligheid”, hereafter AAIB) and one by the Dutch Aviation Police on behalf of the public prosecutor.

Investigation learned that errors were made in giving the passengers a seat during the check in: all passengers for this part of the flight (leading to an intermediate stop at another airport for the embarkation of new passengers) were made by an employee of the handling agent while the airline itself did not have a seating arrangement for the aircraft.

The information as it is given in this article represents the facts given during the court case for the Court of Appeal and personal impressions during the court case.

#### Some issues about aviation

For those who are not familiar with aviation and flying an aircraft: a certain speed is needed before one is able to rotate an aircraft and to lift it off the runway. The speed (known as  $V_r$  or rotation speed) is calculated based on certain conditions. In this case, the premature lift off of the nose wheel 100 knots below the calculated speed, is an obvious indication that something is wrong. The normal reaction will be to pull back the power levers and discontinue the take-off.

Another issue is the distribution of persons and baggage in an aircraft, which is directly related to this incident. There is a certain point in the longitudinal axis of an aircraft where all weight and balance comes

together and this point can be calculated as well. It all depends on the distribution of persons and baggage along this longitudinal axis. It is not that difficult: if there are too much persons in the front of the aircraft you have too much weight on the nose wheels and it becomes difficult to rotate the aircraft and to take-off. If it is the other way around and most of the persons are in the back of the aircraft, it will be a premature nose wheel lift off.

## The reasons for this article

The main reason for this article is to express my concerns about incidents and accidents in complex environments in general and in aviation in particular which are followed by a judicial investigation, a court case and a conviction. The article is written to make the reader think about the consequences of this way of dealing with incidents and accidents and whether we are heading in the right direction to come to a safer society.

## The subpoena

The subpoena in this case is related to several articles in several parts of the Dutch legislation. In short sentences the subpoena stated the following articles:

- Article 169 of the Penal Code that states that punishable is the person who was negligent and is to blame for the damage to an aircraft,, and this person can be punished if danger for the life of another person might exist;
- Article 5.3 of the Aviation Act that states that it is forbidden to be a part of air traffic in such a way that persons or property are brought into danger of can be brought into danger;
- Article 3.8 of the Aviation Act that states that it is forbidden to fly with an aircraft that it not airworthy.

## The timeline of the court cases

I did not visit all court cases but started following this case some time before it was handled by the Court of Appeal in Amsterdam. And during the first day in court I learned that there were two suspects who had received a subpoena: the captain of the flight (although he was not the pilot flying as the steering of the aircraft itself was done on this flight by his co-pilot) and the handling agent (that is the organisation and not the person who handled this flight).

When the case was first brought to the district court in Haarlem it took a long time for the court to come to a decision. The prosecutor at the Court of Appeal gave an overview of the case when she gave the court the reasons for the prosecution and the time it took to come to have the appeal court come to a decision. After the first investigation by the police there was a deeper investigation which was performed under the jurisdiction of a judge of instruction. These judges have more legal power to investigate and are used when either this legal power or the complexity of the case requires their presence. The prosecutor is usually the authority to apply for the judge of instruction to investigate. Then there were transferrals of the case within the district court.

I will assume that she was right about the time frame and that there were no other reasons why the case took so long to come to a conclusion.

- January 12<sup>th</sup> 2003: the date of the incident
- March 2003: the start of an investigation by the judge of instruction
- March 2004: end of the investigation by the judge of instruction
- November 2004: the subpoena were handed to the suspects
- December 2004: start of the first court case for a single seating judge
- As this judge decided that the case was too complicated for a single seating judge the case was transferred to the same court with three judges, but there was a delay
- April 2005: three judges start with this case and hear witnesses
- May 2005: the case is held by the court, deciding on a request by the lawyer for the defence of the handling agent who wants to wait for the report of the AAIB;
- December 12<sup>th</sup> 2005: continuation of the court case for the district court in Haarlem, where the prosecutor required the punishment for the captain of the flight as well as for the handling agent;
- December 23<sup>rd</sup> 2005: the court came to the conclusions that there was no relation between what had happened and the persons who were brought to court;
- The public prosecutor appealed against this decision
- August 2006: the Dutch Laboratory for Aerospace (NLR) came up with an additional report
- August 2007: the file was available for the Court of Appeal
- December 2007: the Court of Appeal held a meeting to establish the way it would be handled, based on the requests of the prosecutor and the lawyers for the defence
- June and October 2007: the Court of Appeal handles the case for its' contents

The prosecutor at the Court of Appeal stated that there were two years between the incident and the first sentence by the district court, so the terms set in the Rome Convention on Human Rights were not surpassed. In the end she stated that she used the period between the incident and the sentence of the Court of Appeal to reduce her requirement for a sentence (a reduction of 10%).

In the end the Court of Appeal would give their verdict on November 19<sup>th</sup> 2008 and after this the case went to the Dutch Supreme Court. This last Court gave a verdict on May 11<sup>th</sup> 2010, which closed the case. Seven years and four month after the event, the case was closed .... in a judicial way. In the safety environment the case will not end for the coming years.

### **The decision of the district court**

On December 23<sup>th</sup> 2005 the district court decided that neither the captain nor the handling agent were to blame and released them of all charges (ref. Rechtbank Haarlem, parketnummer 15/390005-04). The court motivated this sentence by stating that there was no proof of a causal relation between the seating of the passengers leading to a balance that was too far behind and outside the limits and that this was leading for a tail strike. To establish causality between these more calculations had to be performed including more factual data and variables. There was no legal and convincing evidence, for this court, that the captain of the flight was to blame for all charges.

As the prosecutor disagreed with this decision, he appealed and the case had to be brought to the Court of Appeal.

## Human Error

“Errare humanum est” or humans do err. It is hardly impossible not to err. That is irrespective of what they do in their professional life: whether one drives a train or puts bolts and nuts together, whether one is a prosecutor or a pilot. Every human being makes mistakes and does err every now and then. So does one of the prosecutors in this case.

## The subpoena and the appeal

As mentioned earlier the district court ruled that there was no reason for the pilot in command and/or the handling agent to be convicted but the prosecutor disagreed and appealed against this decision. But the sentence itself was given on December 23<sup>rd</sup> and this is the beginning of the Christmas holiday season. Should not be a problem, one would think, as the prosecutor can use a form and files the appeal in this period: there are some days that one can work. And given the fact that there is 14 day period to appeal and the prosecutor felt the urge to appeal the decision, he had to do something. So within this period of 14 days the prosecutor appealed for the sentence against the captain as well as against the handling agent... at least: that is what they thought they had done.

But what did this prosecutor do? He used a form to withdraw an appeal instead of a form that must be used to appeal. He also signed this form to withdraw the appeal. Interesting, was my first thought: a prosecutor who is erring, using the wrong form. The prosecutor at the Court of Appeal told this Court that it really was the intention of the prosecutor at the district court to appeal and that “the form to withdraw the appeal should be seen as the form to appeal, as the forms were quite similar”.

Yes, sure, this can be the case. Strange was however that this was only applicable for the appeal against the verdict for the handling agent. This mistake was not made for the captain’s verdict. And the appeal in both cases had to be made within the same period.

So when a person makes a mistake it all depends on his position in the court case whether it is an allowable mistake or not. And whether the mistake is allowable is to be decided by the organisation where this person works. Quite odd, I thought. And a bit strange in court when you are prosecuting a person for an error: you make a mistake, just say so and accept the consequences. What the prosecutor at the Court of Appeal wanted the Court to do is to continue the prosecution of the handling agent and disregard the error.

But this mistake with the form has consequences for the case: the Court of Appeal ruled as expected and stated that the appeal was not made in time and therefore there was no reason to continue the trial against the handling agent.

But it left just the captain in the Court of Appeal.

A sidestep to international regulations in the form of an Annex to the Chicago Convention and the obligations of States that have signed this Convention.

## The Chicago Convention and its Annexes

The Chicago Convention is an international agreement, signed by States who want to be a member of this Convention, the Netherlands being one of these States. Being a member gives the State an obligation to follow the international rules coming from this Convention in Annexes, and adapt these to the maximum extends in national legislation. This is true for the majority of the issues stated in the Annexes: all items

that are mentioned as a standard have to be taken up in national legislation. There also are recommended practices and the recommendations are to be followed to the maximum extent as possible, but States are allowed to deviate from the recommendations.

If and where a State is not following the standards of Annexes, that State has the obligation to inform the International Civil Aviation Organisation (ICAO) of this difference and to publish this in the national Aeronautical Information Publication of that State. This gives pilots, operators and other people in aviation the opportunity to be informed about national differences.

## Annex 13

One of the Annexes is Annex 13, which deals with accident and incident investigation. Article 5.12 of Annex 13 holds regulations concerning the purpose of an investigation by the national AAIB and what is not the goal of an investigation:

The State conducting the investigation of an accident or incident shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in the State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations:

- all statements taken from persons by the investigation authorities in the course of their investigation;
- all communications between persons having been involved in the operation of the aircraft;
- medical or private information regarding persons involved in the accident or incident;
- cockpit voice recordings and transcripts from such recordings, and
- opinions expressed in the analysis of information, including flight recorder information.

Article 5.12.1 states furthermore:

These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the records not relevant to the analysis shall not be disclosed.

A note related to this article states:

Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.

## The transposition of Annex 13 in Dutch Law

Annex 13 was transposed in the Dutch Law viz. the Act on the Investigation Board for Safety (in Dutch: Rijkswet Onderzoeksraad voor Veiligheid). In a specific article (nr. 69) the rules state the following:

The following is not to be used in a criminal, administrative or civil proceeding as evidence nor as a disciplinary measure, an administrative sanction or an administrative measure:

- a. statements of persons, given within the course of the investigation of the board, unless the person giving the statement gives an explicit permission;
- b. communication between persons who are involved in the function of a means of transport and this communication has been logged with technical means;
- c. medical or private information gathered by the board about the persons involved in an incident or accident that is investigated by the board, unless the person giving the information gives an explicit permission;
- d. data extracted from the flight data recorder, the cockpit voice recorder or maritime data recorder and the transcripts of these recorders;
- e. opinions as expressed for the analysis of the investigation material;
- f. documents made by the board.

This article furthermore states that these statements, data and documents cannot be required to be extradited or confiscated.

I checked the intention of this article as it was expressed during the handling in Dutch Parliament (Kamerstuk 28 634 part 3) before it became law. The intention of this article was to hold regulations preventing the use of information that was gathered during the course of an investigation by the AAIB against the person giving this information against this person. It was to promote the gathering of information from those involved in an incident or accident to the board.

These regulations also referred to the (at that moment) standing law where the same level of protection was given and referred to article 5.12 of Annex 13, although item f here above was added. Practice had proven that these documents of the board could find their way to the criminal courts.

An exemption was made for the final report of the AAIB as far as it concerns the information stated in items a up to and including e. What could be used were the findings of the board that were based on their own observations.

This article therefore also followed the Saunders judgment of the European Court of Human Rights (European Court of Human Rights, Saunders vs. the United Kingdom – Rep. 1996-VI, fasc. 24 (17.12.96). In this decision the Court ruled: “The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms.”

### **The prosecutor and Annex 13**

The day wasn't over yet when the Court of Appeal decided that the handling agent could not be prosecuted. The prosecutor at the Court of Appeal held another card in her sleeve: she stated that the Court of Appeal should add the official report of the AAIB to the file, claiming that Annex 13 gave the possibility to do so. The motivation of the prosecutor was that the Court of Appeal had to form its' own opinion about the inclusion or exclusion of the AAIB report and that she wanted a decision with arguments concerning inclusion or exclusion. The AAIB report was seen as “of importance to the case”.

The chairman of the Court of Appeal gave an instant reaction: the Court has no knowledge about the contents of the report of the AAIB.

Just to be clear: the prosecutor did not state that the report could be used or had to be used as evidence in the court case. But the consequence of adding the report to the file held the implication that the Court of Appeal had to read it and was therefore influenced by the contents. She referred to the goals of the investigations of the AAIB and the police with the commonality in finding the truth and to investigate. The final report of the AAIB can therefore not be used as evidence but the Dutch law is more strict about what to use and what not to use than Annex 13 while Annex 13 gives the judge a discretionary space based on article 5.12. The prosecutor at the Court of Appeal held the opinion that the part of the AAIB report dealing with causality ought to be a part of the criminal file, as it is an open source and the prosecutor held the opinion that it was of importance for the Court of Appeal to have the knowledge about the causality.

The lawyer of the captain reacted with a brief statement: the legislation had gone through Parliament with lots of deliberations, it has only recently come into law, aggressive prosecution and safety are contrary to each other, the prosecutor has to produce its' own investigation with the relevant facts and the prosecution does not want to see the facts and the negative outcomes of their way of working. Safety cannot be guaranteed because of the way of working by the prosecution.

I could only say that the lawyer was correct but got the impression that those people representing the prosecution and police completely disagreed with the lawyer.

The Court of Appeal suspended the session for deliberations and returned with a decision:

- the prosecutor wants an opinion of the Court of Appeal but it is questionable what should be regarded as the opinion of the Court;
- what is the intention of article 5.12 of Annex 13 and what is the relation with article 69 of the Act on the Investigation Board for Safety;
- there is a reasonable chance that criminal proceedings will block information for the investigation of accidents and incidents,
- so the Court wanted the motivations of the prosecutor.

She presented the following motivation:

- the judge is entitled to consider whether the report can be added to the case;
- this entitlement is based on article 5.12 of Annex 13 as the judge is mentioned as the "appropriate authority";
- article 5.12 of Annex 12 and the Chicago Convention are regulations of a higher degree than national law;
- a broad perception on the legislation leads to admissibility of the report;
- this is prevalent to article 69 of the Act on the Investigation Board for Safety;
- the report is added value to consider the case at hand;
- the worries within the aviation community concerning the willingness to report incidents should not be seen as stated;
- article 162 of the Act for Criminal Proceedings (in Dutch "Wetboek van Strafvordering") holds a duty to report crimes;
- the Court can use the knowledge in the report and come to conclusions about causality.

## To report or not to report

The willingness to report in relation to prosecution should not be seen as a worry? Where did we hear or read this before?

When in December 1998 a runway incursion happened at Schiphol Airport a police investigation was the start of the prosecution of three employees of air traffic control and the prosecutor held the opinion that it would not affect the willingness to report.

This motivation was also used when the European Directive on occurrence reporting (2003/42/EC) was transposed into Dutch law. Concerns were expressed by representatives of aviation organisations towards members of Parliament that the reports would be used to prosecute persons.

And those of us of read scientific publications<sup>1</sup> can see recurrence after recurrence of prosecution in several areas: people to want to add their share of information to safety and safety improvements but do not want to be prosecuted (whether in criminal or in civil court) when they are doing their daily work. The other side: everybody sees that abuse of alcohol and drugs or intent in safety work has to be prosecuted as this is unacceptable behaviour.

What the prosecutor did here felt like bending the rules, the second time this day. The person representing the organisation that must hold the rules firm and also has to work according to the rules, is bending the rules as it seems necessary to save the case.

The lawyer of the captain reacted as could be predicted: the problem can be found in the use of the report and not whether it is a part or all of the report. Legislation was made in 2004 and Parliament and government agreed about the present contents. One certain outcome: the Investigation Board could stop working if the report was added to the file, not just for aviation but also for other areas where the Board is working.

## Publication of reports

Boards like the AAIB usually finish an investigation with a report that can be used by anyone who reads the report. There is of course one limitation in the use of the report: it is the result of an investigation that started with the following objective (stated in article 3.1 of Annex 13): the sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability.

One can see a viper hidden in the grass: the items that were mentioned earlier and which are not to be used for other purposes than an investigation of an AAIB, like recorder information or communication, are also incorporated in the final report. By making a U-curve, cherry picking in the rules and presenting this as a motivation the prosecutor is bending the same international regulations that she sees as a higher degree of regulation than national law which should allow the Court of Appeal, in her opinion, to use. Wasn't this proof enough that the prosecutor acted against the rules? And not just for Dutch law: a note added to article 5.12 in Annex 13 states the following:

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<sup>1</sup> Some references: 1) Sidney Dekker "The Field Guide to Human Error Investigations" (Ashgate 2002); 2) Sidney Dekker "Ten Questions about Human Error" (Ashgate 2005); 3) Virginia A. Sharpe (ed) "Accountability - Patient safety and policy reform" (Georgetown University Press 2004); 4) mr. J. Meyst-Michels en mr. S.F. Tiems "Veilig incident melden bestaat niet" in Medisch Contact 2008 pagina 187-189.

*Information contained in the records listed above, which includes information given voluntarily by persons interviewed during the investigation of an accident or incident, could be utilized inappropriately for subsequent disciplinary, civil, administrative and criminal proceedings. If such information is distributed, it may, in the future, no longer be openly disclosed to investigators. Lack of access to such information would impede the investigation process and seriously affect flight safety.*

Different rules for different moment during the prosecution?

What could be the next step? Summon the investigators of the AAIB to court to give evidence? Article 69 of the Dutch Act on the Investigation Board for Safety also stated that an investigator cannot be called to court to give evidence, whether as a witness or as an expert. Previous information, given by one of the investigators of the Dutch Board before this court case, revealed that the prosecutor had done this already but that it stopped on this article. After that the prosecutor tried to summon a secretary (as this function is not mentioned in the legislation) but the Board disagreed on this as well.

## Prosecution rules

Dutch legislation also holds rules regarding criminal investigation and prosecution. The prosecutor stated that according to article 162 of the Act for Criminal Proceedings (in Dutch “Wetboek van Strafvordering”) there is a duty to report crimes. But is this valid for any person?

How far does one want to bend the rules? This article states that public organisations and civil servants who have knowledge about crimes, which do not fall under their enforcement, must inform the prosecutor for certain crimes and that they must give all information they have.

Not all crimes are to be reported by them:

- corruption and abuse of power are to be reported, but not aviation crimes and offences
- not every organisation in aviation is a public organisation
- lots of persons in aviation are employed outside government so they do not fall within the limitations of civil servants
- and it is questionable whether those who are civil servants have the knowledge whether an incident is a crime to be reported.

Even when one wants a broad interpretation of what the prosecutor should like to see, there is no relation with aviation in general.

## How the prosecutor handles this

Despite working in law enforcement for some 28 years I felt ashamed about the way this case was handled. How can one explain a case like this and try to achieve that we have faith in the judicial system? Does Lady Justice hold a blindfold? Or is she blind for her own mistakes? How do we explain this case and the way the prosecutor handles the case? How can an environment where safety is paramount and where people do their utmost come to improvements if the prosecutor disregards international regulations that she first has brought to light as being more important than national rules? What must be done to show the prosecutor that their proceedings are counter-productive for safety?

I was thinking for a few moments of all those cases that would not be reported. There would be serious incidents that could not be investigated. And what when the policy makers in the prosecutorial offices

were the victims of their policy, by being the victims of an accident that could be prevented? Or was this too far from their office to think about? Would this risk also be a part of the consideration for this Court of Appeal?

And this does not specifically have to be related to aviation: other high risk environments might anticipate the same problems. Like in the medical world where a surgeon makes a mistake like wrong side amputation. It could have been prevented if the information about previous cases would have led to improvements, but on a certain day the judge was the victim of his own ruling. There was no necessity for an AAIB like organisation if the prosecutor got things her way and the final AAIB report was to be added to the file.

### **What were the ideas of the Court of Appeal?**

The Court of Appeal came with a decision: the importance of the Dutch Act on the Investigation Board for Safety on one hand and the information in the presented file up to that moment on the other hand were sufficient for the Court of Appeal to not-add the final AAIB report to the file.

I applauded this outcome, but very soft.

### **The court case continued**

This was not the end of this court case. What followed were the statements of experts for the defence i.e. a professor in human factors and system safety and a test pilot who flew aircraft for certification, the expert for the prosecutor who tried to prove the risks for this case in comparison to other cases that were dissimilar, and the pleas of the prosecutor and lawyer.

The prosecutor concluded that the crew could be blamed for their behaviour and that the captain had to bear the responsibility. The fact that the airline took measures (in this case a seating arrangement) was proof to show the court that it was a serious case. The environment around the airport (build up areas and a highway) were sufficient to prove that danger for others, next to the passengers, was present, although the expert for certification stated that the aircraft could never have become airborne. The risk was foreseeable for the crew and the preparation of the flight was insufficient. The degree of negligence was sufficient to come to gross negligence and the context described by the expert in human factors was pushed aside by the prosecutor as this expert had more or less described the captain as a moral hero.

The lawyer in her plea stated that reasonable periods for prosecution were not met because of the way the prosecutors handled the case and the investigation was not speedy enough. Experts for the prosecution were asked to come with their opinion when the case was almost out of date, there was no reasonable balance of the different interests, safety is more important than prosecution, the captain was prosecuted but not his airline where the system failure was to be found and much more reasons why the Court of Appeal should stick to the decision of the district court.

In the end of all this and on November 19<sup>th</sup> 2008 the Court of Appeal ruled (verdict 8134/06) that the captain had not satisfied himself before the flight that the passenger seating was correct and within weight and balance limitations, leading to damage to the aircraft and therefore took part in aviation in a

dangerous way. The Court of Appeal also stated that punishing the captain would not be reasonable, so no punishment was given.

The prosecution did not accept this and brought the case to the Dutch Supreme Court. This Court rule on May 11<sup>th</sup> 2010 upheld the decision of the Court of Appeal.

### What might the future be?

One may only hope that a case like this will add to the wisdom of the prosecutors that bringing people to court is not a solution for errors and their own errors might help in establishing this wisdom. Any operator, whether this is a pilot of an aircraft, an air traffic controller, a train driver, a surgeon or a prosecutor can and will make mistakes.

Errare humanum est.

### Reference List

- Annex 13 (Aircraft Accident and Incident Investigation, edition 10) to the Chicago Convention
- Dutch Aviation Act (in Dutch: Wet Luchtvaart)
- Dutch Penal Code (in Dutch: Wetboek van Strafrecht)
- European Court of Human Rights, Saunders vs. the United Kingdom – Rep. 1996-VI, fasc. 24 (17.12.96)
- Gerechtshof Amsterdam (Amsterdam Court of Appeal), arrestnummer 8134/06, date of verdict November 19<sup>th</sup> 2008;
- Hoge Raad der Nederlanden (Dutch Supreme Court), date of verdict May 11<sup>th</sup> 2010, nr. 08/05132 (LJN: BL2853, Hoge Raad , 08/05132);
- Kamerstuk 28 634 deel 3 (Instelling van een Onderzoekraad voor veiligheid (Rijkswet Onderzoeksraad voor Veiligheid) Memorie van toelichting)
- Rechtbank Haarlem (Haarlem district court), sector Strafrecht, meervoudige kamer, parketnummer 15/390005-4, date of verdict December 23<sup>rd</sup> 2005
- Rijkswet Onderzoeksraad voor Veiligheid (Dutch Act on the Investigation Board for Safety