



Luftfartstilsynet

A system Safety Perspective of 'Gross
Negligence'

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Høvik, 23. April 2024

Just Culture (jc):

- Origins from an organisational concept.
- Organisational perspective: 'Just culture' is an element of a 'safety cvulture'.
- Organisational – and a legal dimension.
- Organisational jc can point to another direction than the jc from a legal dimension.
- Ambiguous interface between acceptable- and non-acceptable behaviour, which creates (legal) uncertainty.

Jc – milestones:

1. December 1974	TWA514 (Mount Weather)	USA
10. December 1998	DAL 39 (Rejected takeoff)	The Netherlands
8. October 2001	Linate accident	Italy
1. July 2002	Überlingen	Germany/Switzerland
3. April 2014*	Implementation Regulation (EU) 376/2014	EU (*Norway 2016) – Luffartsloven kap. XII
8. November 2018	Collision between KNM Helge Ingstad and Sola TS	Norway

Definisjon jc (Eurocontrol; 376/2014):

‘**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.

Gross negligence (Eurocontrol, 2005):

"Failure to use even the slightest amount of care in a way that shows recklessness or willful disregard for the safety of airspace users and/or staff of ANSPs".

Drafting principles (EU) – General Principles

1

LEGAL ACTS OF THE UNION SHALL BE DRAFTED CLEARLY, SIMPLY AND PRECISELY (*).

- 1.1.** The drafting of a legal act must be:
- > **clear**, easy to understand and unambiguous;
 - > **simple** and concise, avoiding unnecessary elements;
 - > **precise**, leaving no uncertainty in the mind of the reader.

Source: EU

Drafting principles (EU) – Definisjoner

14

WHERE THE TERMS USED IN THE ACT ARE NOT UNAMBIGUOUS, THEY SHOULD BE DEFINED TOGETHER IN A SINGLE ARTICLE AT THE BEGINNING OF THE ACT. THE DEFINITIONS SHALL NOT CONTAIN AUTONOMOUS NORMATIVE PROVISIONS.

Source: EU

EC, 2012:

It is important to clearly set the line which protects the reporter from prejudice or prosecution **by providing a common understanding of the term gross negligence.**

EP, 2012 (1):

It is important to clearly set the line which protects persons involved in the reported occurrence from prejudice or prosecution **by providing a common understanding of the term gross negligence.**

EP, 2012 (2):

Members of staff in the aviation sector should in the future to be able to count on a **uniform interpretation of the key notion of ‘gross negligence’** so as to enjoy the same level of protection throughout the EU.

Suggestion 'Gross negligence' EC (2012):

'Gross negligence' means a manifest and wilful violation of the duty of care directly causing foreseeable damage to a person or to a property, or which seriously lowers the level of aviation safety.

Suggestion 'Gross negligence' EP (2012):

'Gross negligence' means a manifest and wilful violation of the duty of care directly causing foreseeable damage to a person or to a property, or which seriously lowers the level of aviation safety.

Definisjon 'gross negligence' i Artikkel 2, (EU) 376/2014:

Article 2

Definitions

For the purposes of this Regulation the following definitions apply:

- (1) 'reporter' means a natural person who reports an occurrence or other safety-related information pursuant to this Regulation;



‘Gross negligence i (EU) 376/2014’, without the use of ‘gross negligence’ – Political compromise - Art.16.10 (b):

Article 16

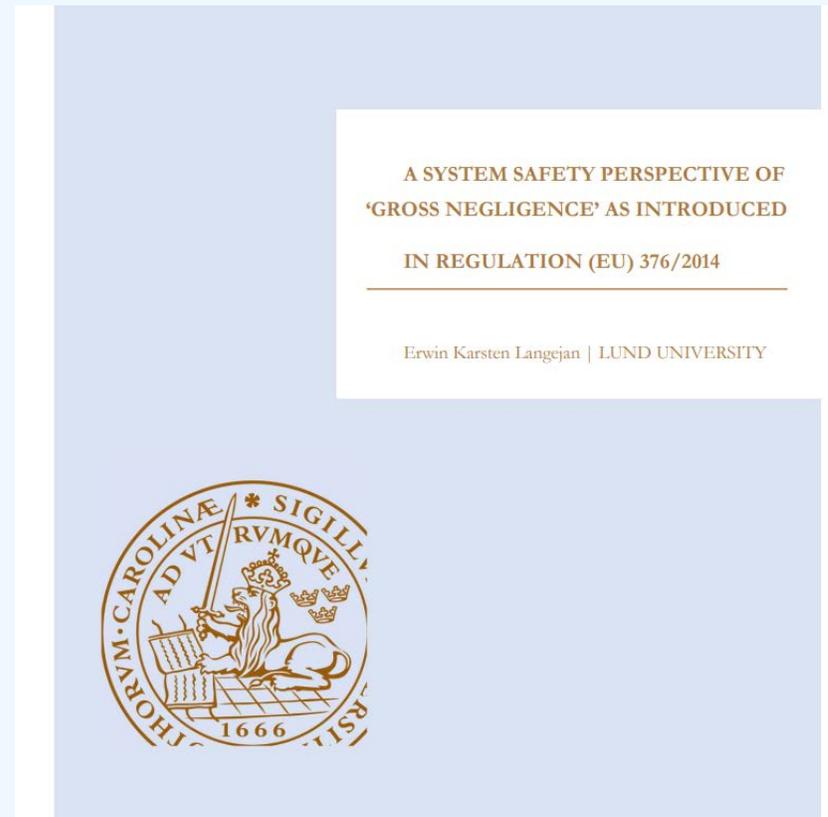
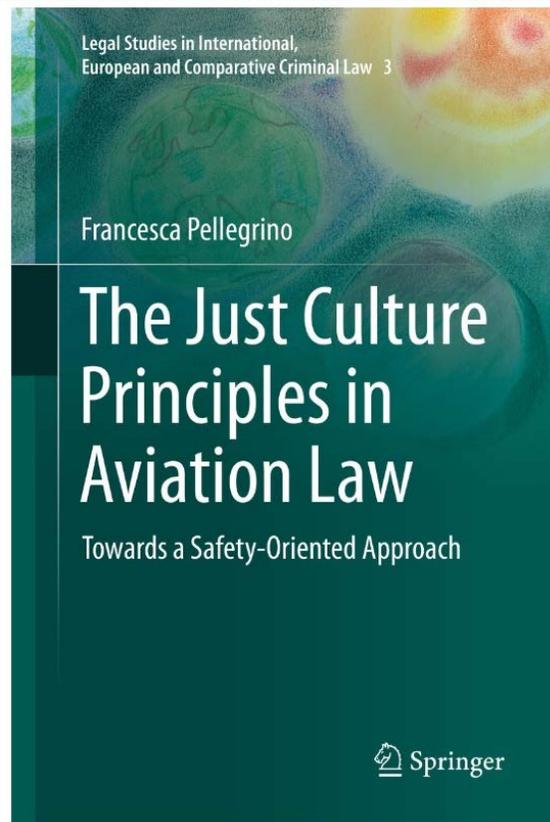
Protection of the information source

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.

For mer bakgrunnsinformasjon om 'gross negligence' i 376/2014:



HFSS – Human Factors and Systems Safety:

- Human Factors from a systems perspective.
- Human as part of a complex system.
- System performance is influenced by, amongst other, goal conflicts and uncertainty .

Complex system – systems perspective?

- Impossible to get a complete overview of all interactions and mutual dependencies.
- Emergence – Total performance of the system is larger than the sum of the individual components.
- Incidents are unavoidable because complexity creates performance variation.

Human Factors:

Factors which affect human performance (examples):

- Competence
- Complexity
- Physiological processes
which limit cognitive
capacity
- Trust in 'the system' –
Legal certainty



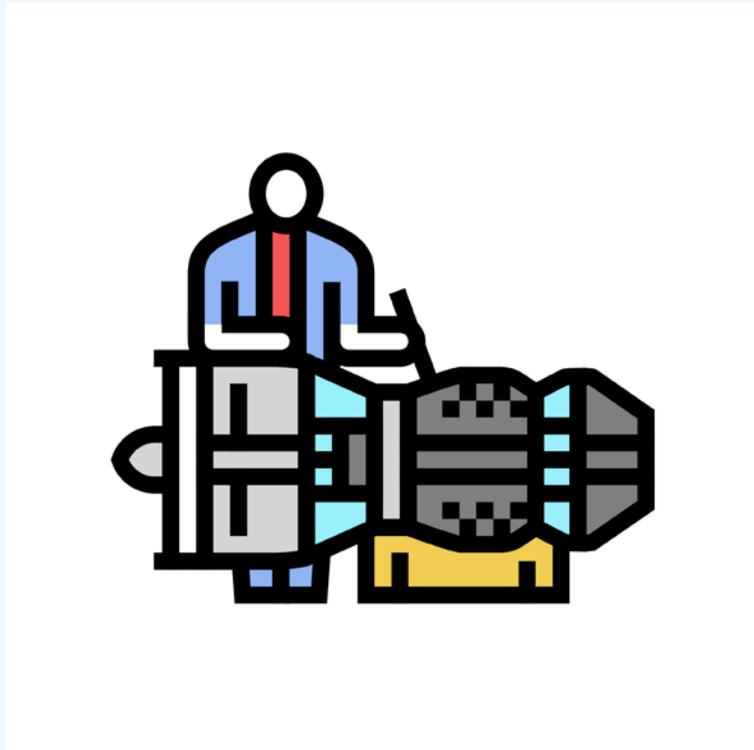
Source: Mostphotos.com

Example of a definition of competence:

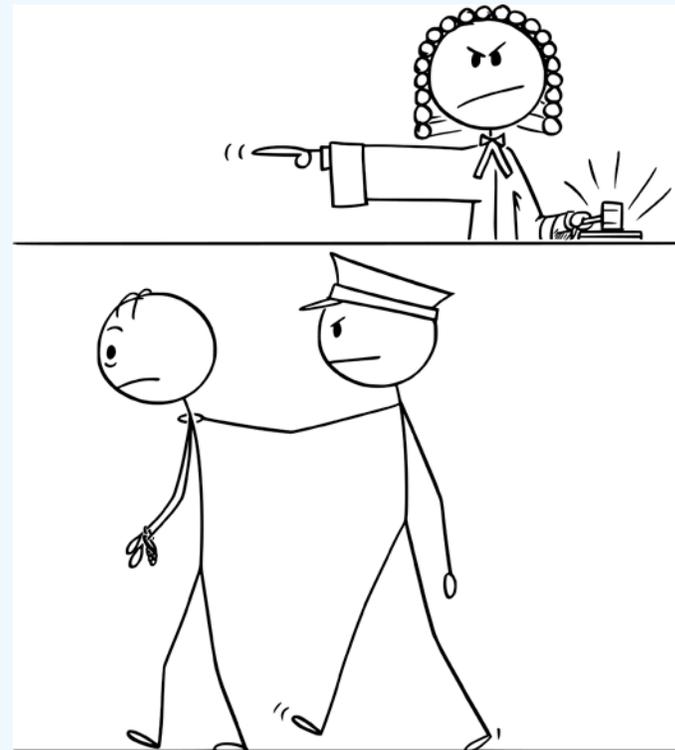
Competency. A dimension of human performance that is used to reliably predict successful performance on the job. A competency is manifested and observed through behaviours that mobilize the relevant knowledge, skills and attitudes to carry out activities or tasks under specified conditions.

Source: EASA

Human performance– Humans contribution to system performance



Source: Mostphotos.com



Source: Mostphotos.com

Performance variation. Undesirable outcomes (accidents) are a consequence of (temporary) reduced system performance (1):



Source: Skybrary.aero



(Foto: Gorm Kallestad/NTB)

Frifinnelsen av Viggo Kristiansen er også en dom over juristprofesjonen

Vi må som profesjon erkjenne at jurister – med Høyesterett i spissen – er ansvarlige for justismordene i NAV- og Baneheia-sakene.

Kommentar



Johan Giersten
Professor i rettsvitenskap, UIB

Source: Rett24.no

Performance variation. Undesirable outcomes (accidents) are a consequence of (temporary) reduced system performance (2):



Government of the Netherlands



[Home](#) > [Latest](#) > [News](#) >

Targeted support offered to victims of the childcare benefits scandal with children taken into care

News item | 18-09-2023 | 17:00

Source: [government.nl](https://www.government.nl)

Performance variation. Undesirable outcomes (accidents) are a consequence of (temporary) reduced system performance (3):

United Kingdom

What is Britain's Post Office scandal?

By Sachin Ravikumar

January 10, 2024 11:11 PM GMT+1 · Updated 3 months ago

WHAT IS THE POST OFFICE SCANDAL?

Hundreds of self-employed workers at the state-owned Post Office were wrongly prosecuted or convicted between 1999 and 2015 for false accounting, theft and fraud, because of a glitch in a software system that incorrectly showed money missing from accounts.

Some spent time in jail while others went bankrupt, saw their marriages destroyed and some died before their names were cleared.

Source: reuters.com

Professor Johan Giertsen (Norwegian quote – Consider consequences for institutions and persons in case of miscarriage of justice):

Vi må blant annet se på om det hierarkiske systemet i domstolene og forvaltningen sperrer for den frie tanke og selvstendighet i de lavere instansene, om rettsskandaler bør få konsekvenser for institusjoner og personer som er ansvarlige, og om vi som er på fakultetene kan styrke kandidatenes evne til å se når det er en særlig risiko for å gjøre urett.

Source: Rett24.no

Procedural error in governance,
Norwegian criminal law – ‘gross
negligence’ is the threshold for
prosecution.

§ 172. Grovt uaktsom tjenestefeil

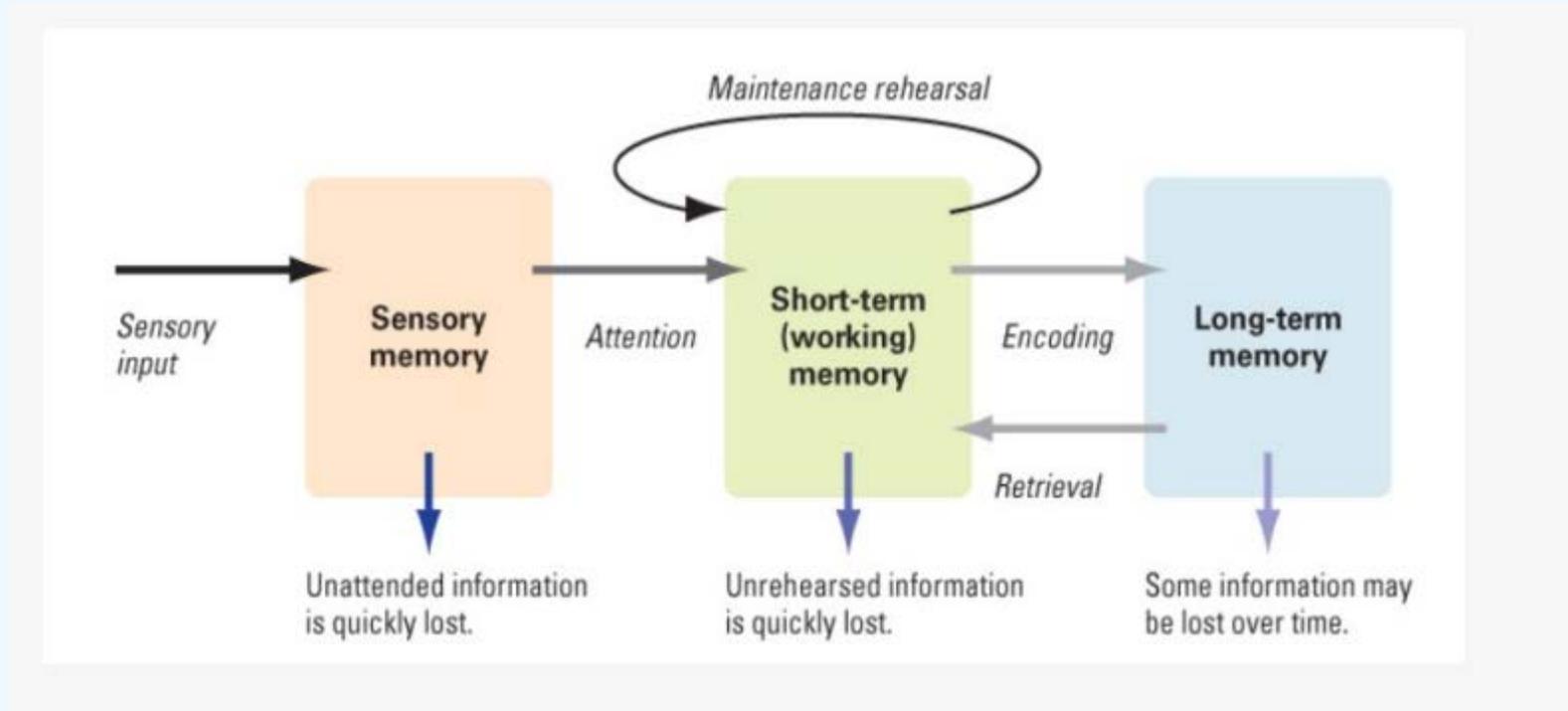
Med bot eller fengsel inntil 1 år straffes grovt uaktsom tjenestefeil.

Source: Lovdata.no

Cognition (Gray & Bjorklund, 2018, p.14 and p.15):

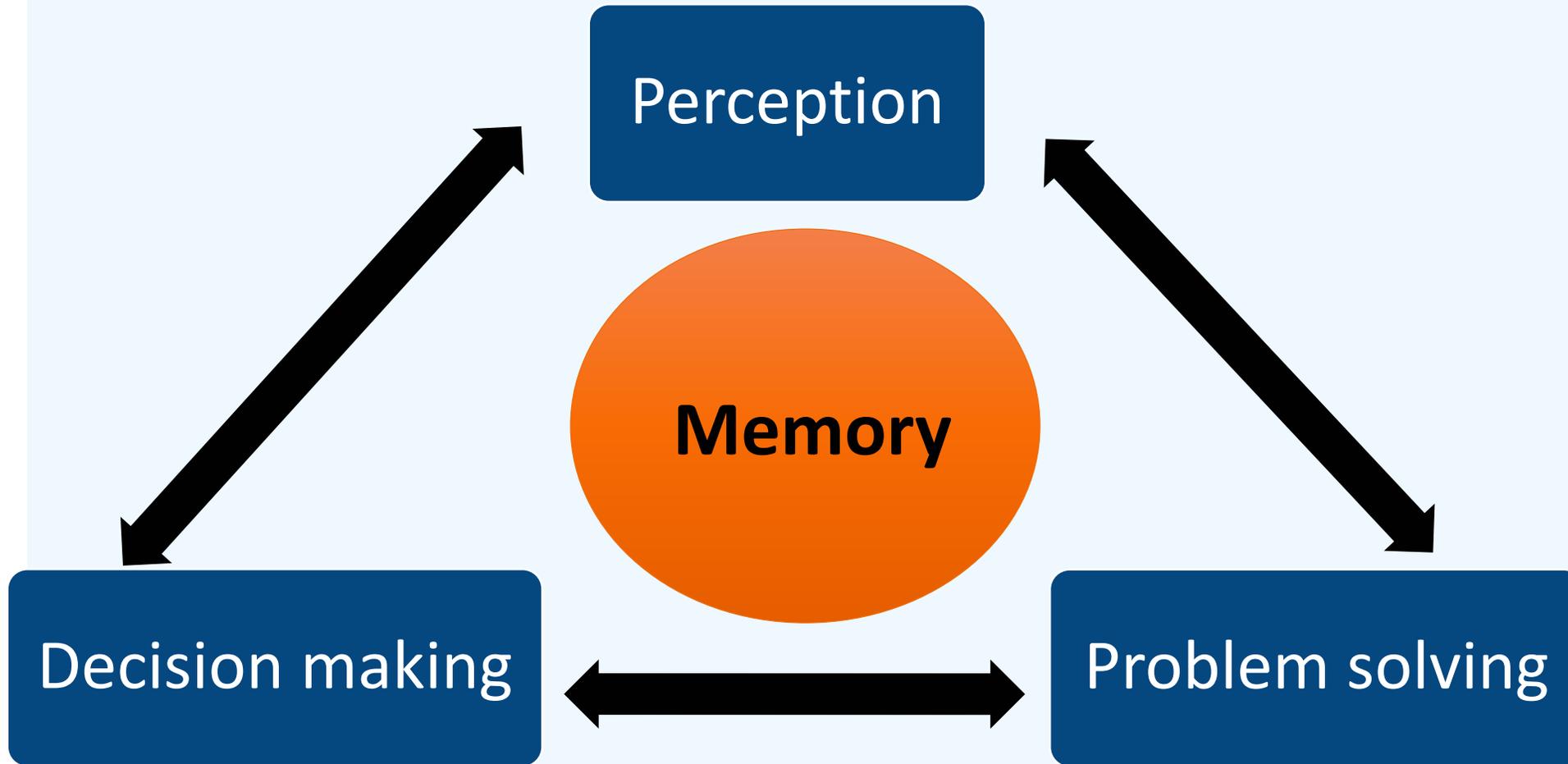
- “The term *cognition* refers to information in the mind – that is to information that is somehow stored and activated by the working of the brain.
- Such information includes thoughts, beliefs, and all forms of memories.
- Some information is conscious, in the sense that the person is aware of it and can describe it, and other information is unconscious but can still influence one’s conscious experiences and behaviour“.

Information processing model, (Atkinson & Shiffrin, 1968):



Sources: Open Universiteit and Grey
& Bjorklund, 2018

Cognitive process (simplified):



Approach of incidents:

	HFSS:	Criminal law
Starting point:	Whan can/do we learn??	Should/ has someone to be punished?
Democratic ligitimacy:	No	Yes
Safety performance is a consequence of:	Emergence/ complex interactions	Cause and effect/ linear 'chain of events'
Role of humans:	Local rationality: Why did the actions make sense to the persons involved?	Counterfactual reasoning: If they had done something differently, the incident could/would have been avoided.

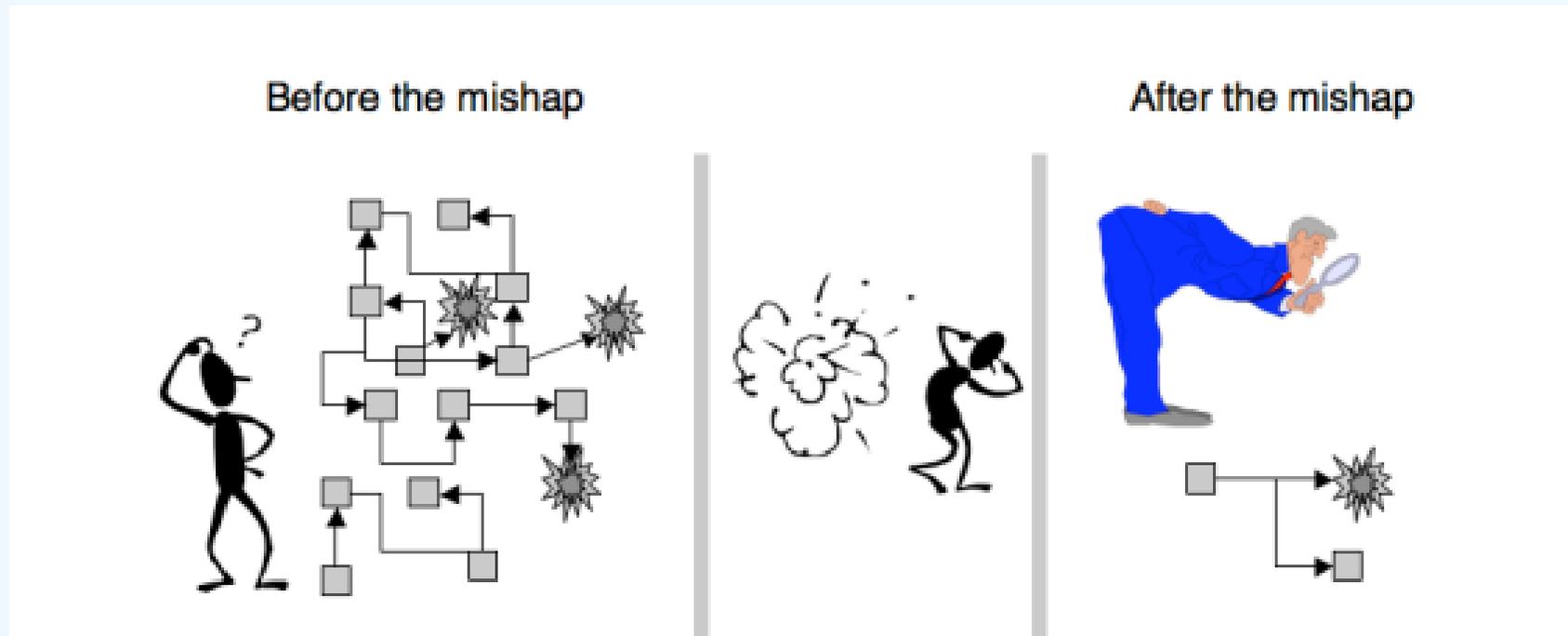
Example ‘counterfactual reasoning’ - quote ‘Tingretten’ – Helge Ingstad (Norwegian):

«Fra Sola TS kom nordover på tilnærmet samme kurs som Ingstad var det over et lengre tidsrom kraftige lyskastere i front, og som var svært godt synlige i flere minutter. At tiltalte ikke tenkte over eller stilte spørsmål til Sola TS da oppkallet fra Sola TS kom, er vanskelig å forstå.

Fra den første ordren om å endre kurs mot babord og helt frem til 38 sekunder før kollisjonen, hadde tiltalte dessuten flere handlingsalternativer. Ingstad holdt høy fart og kunne redusert farten. Dette ville gitt tiltalte og broteamet mer tid til å undersøke hva objektet kunne være. Ingstad kunne også selv kalt opp Fedje VTS for å høre om Fedje VTS hadde informasjon om aktivitet i leden tiltalte ikke kjente eller hadde fått med seg tidligere. Tiltalte kunne videre ha engasjert broteamet sitt, herunder VSuO og VSA og bedt dem se i radar og i kartet for å finne ut hva som lå for nærme eller i kurslinjen forut.»

Source: Rett24.no

Counterfactual reasoning creates 'hindsight bias' (Roese & Olson, 1996):



Source: Onderzoeksraad.nl/ Richard Cook, M.D.

One accident, two perspectives: Goal conflicts are unavoidable



Eksempel på konflikt i offentlig forvaltning (Statens havarikommisjonens versus Politiets perspektiv):

REPORT SL 2018/04



REPORT ON THE AIR ACCIDENT NEAR TURØY,
ØYGARDEN MUNICIPALITY, HORDALAND
COUNTY, NORWAY 29 APRIL 2016 WITH AIRBUS
HELICOPTERS EC 225 LP, LN-OJF, OPERATED BY
CHC HELIKOPTER SERVICE AS

The Accident Investigation Board has compiled this report for the sole purpose of improving flight safety. The object of any investigation is to identify faults or discrepancies which may endanger flight safety, whether or not these are causal factors in the accident, and to make safety recommendations. It is not the Board's task to apportion blame or liability. Use of this report for any other purpose than for flight safety shall be avoided.

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Example goal conflict in governance (Accident Investigation Board and Prosecutor's office):

I juli kom Havarikommisjonen med den siste og endelige rapporten etter ulykken. I denne ble det rettet sterk kritikk både mot helikopterprodusenten Airbus og Det europeiske flysikkerhetsbyrået (EASA).

-Hvorfor har dere ikke funnet grunn til å tiltale Airbus eller EASA i saken?

- Årsaken til ulykken er fastslått i rapporten fra Statens havarikommisjon og vi har tatt en vurdering om det er mulig å etablere eller bevise straffansvar, sier politiadvokat Trygve Ritland ved Vest politidistrikt til TV 2.

-Det rettes jo til dels skarp kritikk mot de to partene i sluttrapporten fra havarikommisjonen...

Ikke avhørt EASA og Airbus

- Jeg kan ikke gå inn på hvem som har fått kritikk og ikke, men med bakgrunn i konklusjonen til SHT er det vanskelig å etablere straffeansvar og det er bakgrunnen til at denne saken er besluttet henlagt som intet straffbart forhold bevist.

-Har dere avhørt EAS og Airbus, som får kritikk i sluttrapporten fra Havarikommisjonen?

- Nei.

-Hvorfor ikke?

- Det er som jeg sier, forklart i pressemeldingen hvorfor vi har kommet til den konklusjonen vi har.

Emergence is a consequence of systemic factors, such as:

- Goal conflicts lead to (political) compromises
- Language use: Translations, application of (normative) adjectives
- Ambiguities
- Interpretation
- Application of the law
- Competence

(Gross) negligence,
Function/ purpose of punishment?

- Prevention?
- Deterrence?
- Retribution/ retaliation?
- Protection?



Source: Mostphotos.com

(Gross) negligence and HFSS:

- (Human) performance is variable. Unpredictability is unavoidable in a complex system.
- Legal system is a complex system.
- 'Negligence' is a complex concept.
- Management of performance variation requires competence about the legal system **and** HFSS on an expert level.

Learn from each other!

Human Factors in Control

23. & 24. April
2024

"Just Culture"

Jakten på læring trumfer jakten på sydebukker

Thank you for your attention

