

A disaster waiting to

Failure to fully engage with their insurers and prepare a disaster management response in the case of an accident can ruin an airline's reputation, according to Sean Gates, ERA's legal counsel

An airline's reputation is its lifeblood. After a major accident, that reputation is in play. Studies show that an effective response can improve an airline's reputation. Experience tells that a poor response can destroy it. Management should take account of this by preparing for the event. Part of that preparation should include dialogue before an accident with the insurers who will assume the financial responsibilities of the airline towards the passengers, their families and third parties, and agreement as to their respective roles and responsibilities. However, such dialogue is not always undertaken; particularly where regional carriers are involved and this has had adverse and sometimes existential consequences.

Where a European airline is involved in an aircraft accident, the airline is strictly liable to victims (excluding crew) and their families. That liability is notionally limited to 100,000 special drawing rights (SDRs) unless the carrier can prove the accident was not caused by its negligence. Opportunities to prove no negligence are infrequent although have arisen, for example, in relation to mid-air collisions. The Regulation also provides for advance payments "as may be required to meet

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immediate economic needs on a basis proportional to the hardship suffered" of a minimum amount of 16,000 SDRs per passenger. (16,600 SDRs is currently equivalent to just under US\$23,400.00).

Victims and families

Airlines are compelled to insure their liability to victims and their families. Insurers routinely require that airlines give full control of claims to the first of the several insurers which will be involved in the policy (the lead insurer). The claims department of the lead insurer will then manage the claim and routinely does so by appointing a firm of lawyers to handle the claims on its behalf.

While these arrangements have worked tolerably well in the past to ensure that claims are settled with reasonable speed and at a moderate cost, recent accidents have highlighted some issues suggesting the need for airlines to adequately prepare for the possibility of an accident and the need for improved communications with insurers in a number of areas. This would take greater account of the need for protection of the airline's brand while respecting the fact that insurers need to handle the liability claims efficiently and economically.

Montreal system

Before the age of social media and the development of 24-hour news channels an airline could reasonably leave the handling of claims to its insurers. Given that until 1999 an airline's liability was limited to a comparatively low amount which could only be exceeded in the event that the passenger's representatives could prove that the accident was caused by the wilful misconduct of the airline or its employees; the control of all communications between an airline and the families of its passengers demanded intense oversight by specialist lawyers to prevent any misstatements which might give rise to claims over the



limit of liability. The arbitrary limit on liability and the contrast between it and the sums available by way of compensation particularly in the US but also in some European Courts where there was no limit tended to give rise to protracted and hard fought litigation which, inevitably, cast airlines in an unfavourable public light. Largely as a consequence of this, airlines not only acquiesced but even encouraged through IATA the development of the Montreal system which removed the limit of liability in all but the most extreme cases. Although at one time IATA also lobbied to remove claims control from insurers, that attempt never progressed and the pre-1999 system of insurance claims control continues to apply.

This can have undesirable consequences from the point of view of airlines. In a recent major accident, the lawyers for the insurers demanded that no social media statement should be released without their approval delaying any response by more than 24 hours. In a post Montreal world, such considerations should have long since been swept away.

Insurer's expertise

There are other recent instances of over reliance by airlines on insurers' expertise in the area of disaster response. In the

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TransAsia and Malaysian accidents, the same lead insurer mandated advance payments in relation to the families of flight MH370 of double the amount authorised in relation to TransAsia's accident. Living standards in the two countries were not so wildly different as to justify such an approach; and there has been some very awkward commentary in the press about the comparatively less generous approach adopted by TransAsia.

Personal experience in respect of smaller European carriers involved in major accidents makes it clear that, notwithstanding the exposure to brand damage, smaller airlines are sometimes less focused on the need for disaster preparation. It is not unusual for an accident to be the first trigger for a meeting between the claims department of a lead insurer and its designated lawyer with the airline concerned. Given the, perhaps unfair but nevertheless often expressed, fear that insurers are exclusively focused on minimising or excluding their liabilities after the event, an airline in respect of the accident of which I was appointed by insurers, instructed its own lawyers to attend the initial meeting and those lawyers recommended the airline not to co-operate with insurers for fear that insurers would discover facts which would entitle them to avoid their obligations. The ensuing friction delayed decisions regarding the management of the families by at least two weeks. The airline ceased to exist, in part as a consequence of hostile publicity. This should have been an object lesson for airlines and insurers on the need for improved communication. The important messages are that in an unlimited liability environment, the demands of social media and a media-focused response to disasters in the name of brand protection require enhanced communication between insurers and airlines; a recalibration of the claims control provisions to take account of the demands of brand protection; and, as ever, a need for all airlines, large and small, to prepare for the worst while hoping for the best. ■



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