

HANS EPHRAIMSON-ABT

ANNA KONERT



SWISSAIR 111 CRASH  
– CRISIS MANAGEMENT COOPERATION  
WHERE THERE IS NO CONTINGENCY PLAN

## 1. Introduction

At 22:31 on 2 September 1998, Swissair Flight 111 from New York JFK to Geneva crashed into the sea, five miles from the shores of St. Margaret's Bay – near Peggy's Cove, Nova Scotia, within the territorial waters of Canada. The cause of the crash was an electrical fire. The plane carried 229 passengers and crew from 16 countries, all of which were fatalities, as well as precious cargo. Rescue and recovery operations were started immediately during the night by local fishermen followed by the Canadian Coast Guard and the Navy. Over a period of two years more than two millions pieces of wreckage and body parts were recovered – brought to a Hangar at Shearwater for sorting, storage and processing. Lastly, a giant ship the *Queen of the Netherlands* was chartered to suck up a part of the ocean floor. Recovery tanks were used to sort out the silt. Aside from passengers and crew, Swissair flight 111 – which was dubbed “The UN Shuttle” – carried cargo including artworks, gold, diamonds and jewellery. Several years later the insurers applied for a treasure trove license because of missing valuables (diamonds). This operation came to the attention of the media and of the families. The treasure trove license was denied at that time by the Provincial Government of Nova Scotia<sup>1</sup>.

## 2. The immediate aftermath of the tragedy – investigation

Since the tragedy occurred within the territorial waters of Canada the investigation into the crash was conducted by the Transportation Board of Canada

---

<sup>1</sup> See Stephen Kimber, *Flight 111, The Tragedy of the Swissair Crash*, Seal Books, Toronto 1999.

2/2014

which reached out to interested parties (under the Chicago Convention) to contribute their expertise, including the US NTSB, the FAA, the British AAIB, the Boeing Corporation, Pratt & Whitney (engine manufacturer) and certain other third parties retained as experts. During the investigation the cockpit was reconstructed from the debris.

Flight 111 was operated by Swissair in code share with Delta Airlines (there were 53 Delta ticket holders on the plane). Swissair had an alliance with Delta Airlines – which included mutual assistance in case of an accident. Swissair – Delta: Under an Alliance Agreement with Swissair Delta Airlines activated its “Go” team and flew it first from Atlanta to New York – to establish a Crisis Management Center at JFK airport. The same day Delta flew the “Go” Team to establish a Crisis Management Center in an Office Building as well as at the nearby Lord Nelson Hotel, to house the families who were flown to Halifax. Swissair established crisis management centres in Zurich, Geneva and Halifax.

Mandatory incident crisis management plans were first mandated to be developed by carriers in 1997, after the TWA 800 crash when the United States Congress passed passenger assistance legislation – (creating the Office of Passenger Assistance at the US NTSB), followed in 2000 by the ICAO Circular 285-An/166 – Guidance On Assistance To Aircraft Accident Victims And Their Families<sup>2</sup>.

Starting in 1995 certain airlines (beginning with Continental, followed by American Airlines, United and Delta in the US, Swissair and Air France) – had voluntarily developed crisis management programmes, with the participation of survivors or family members of prior tragedies.

The crisis management plans were not merely written guidebooks – the operators actually conducted training operations of airline volunteers and management.

This was the first time that the management of an airline had invited victims families to participate and advise long term on any level in post crash resolutions (followed by the management of Air France in the Concorde crash in 2000).

### 3. Regulation on liability towards passengers

The first international convention governing the rules relating to international air travel (officially referred to as the Convention for the Unification of Certain Rules Relating to International Transportation by Air<sup>3</sup>), called Warsaw Convention was the result of two international conferences (in Paris 1925 and in Warsaw 1929) and of work done by the Comité International

---

<sup>2</sup> See H. Ephraimson-Abt, A. Konert, *New Progress And Challenges In The Air Law – Air Crash Victims Families Protection*, Warszawa 2014.

<sup>3</sup> Signed at Warsaw on 12 October 1929.

Technique d'Experts Juridiques Aériens (CITEJA)<sup>4</sup> created by the Paris conference. The first idea came from a Polish proposal made on the general session of Commission Internationale de Navigation Aérienne (CINA) in Stockholm in 1924<sup>5</sup>. However, the official proposal was submitted by France at the 1925 Paris Conference. Sixty years later, in 1989 civil air transportation had matured and spanned the world. The 1929 rules and regulations needed to be modernized. It has been revised and amended multiple times:

- the Hague Protocol of 1955,
- the Guadalajara Supplementary Convention of 1961,
- the Guatemala City Protocol of 1971,
- the Montreal Protocols 1, 2, 3 and 4 of 1975.

These acts together with the Convention create the **Warsaw System *sensu stricto***. There were also a great number of unilateral initiatives, and national and private law measures:

- the Montreal Agreement 1966,
  - the Malta Agreement 1974,
  - the decision of the Constitutional Court in Italy 1985 and the Italian Law 274 of 7 July 1988,
  - the Japanese Initiative 1992,
  - the New Zealand proposal 1995,
  - the IATA Inter Carrier Agreement on Passenger Liability (IIA) 1995,
  - the Agreement on Measures to Implement the IATA Inter Carrier Agreement (MIA) 1996,
  - the EC Regulation 2027/97 on air carrier liability in the event of accidents amended by Regulation (EC) 889/2002,
  - various national laws,
- which all create the **Warsaw System *sensu lato***.

Since the Warsaw System no longer fulfilled the goal of uniformity and did not meet the requirements of a modern air transport system, which was no longer weak and did not need any special protection, there was a need to update and modernize the private international air law by creating a new treaty. After several years of discussion and negotiations, this new treaty was ratified and

---

<sup>4</sup> J. Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts CITEJA* (1933), JALC (1932).

<sup>5</sup> L. Babiński (Polish delegate on the Warsaw conference in 1929), *Miedzynarodowa unifikacja prawa przewozu lotniczego na tle Konwencji Warszawskiej* [International unification of law on air transport in the light of the Warsaw Convention], *Studia Prawnicze* 1968/18.

formally took effect as the Convention for the Unification of Certain Rules Relating to International Carriage by Air on 28 May 1999<sup>6</sup>.

The Montreal Convention introduces a number of changes, creating an air carrier's objective liability system without the monetary caps on damage claims exciding SDR 100,000 and for the damaged not exciding this amount a fault based liability system (Article 21), advance payment for air crash victims families (Article 28), mandatory insurance coverage of the carrier (Article 50), the "fifth jurisdiction" in which claims and disputes could be adjudicated (increasing the choice of forums for a claimant in a death or injuries action) (Article 33), modernized documentation requirements<sup>7</sup>, among others<sup>8</sup>.

#### 4. The first week and thereafter

Some of the issues discussed with Swissair were the immediate financial needs of the victims families. This need arises because the surviving families require death certificates to probate wills to settle estates. Meanwhile bank accounts are frozen, credit cards blocked – while on-going financial obligations have to be met: mortgage/rent payments, instalment payments, daily expenses, utilities, telephone bills, children's education – post crash expenses – recoveries, funerals etc.

At the time of Swissair 111, there was no statutory requirement for the airlines/insurers to make advance payments.

Although mandated post crash crisis management programmes do not provide for advance payment, certain carriers, nevertheless, make such gestures voluntarily for competitive and public relation purposes<sup>9</sup>. However, such payments vary substantially as to their amount and conditions<sup>10</sup>.

The occurrence of several major air crashes in the 1980s and 1990s – as well as the efforts to modernize the 1929 Warsaw Convention – advance payments

---

<sup>6</sup> A. Konert, *International Court Of Civil Aviation – The Best Hope For Uniformity?* Indian Journal of International Law, vol. No. 5/2012. See also P. Dempsey, M. Milde, *International air carrier liability: The Montreal Convention of 1999*, Montreal 2005; E. Giumulla, R. Schmid, *Montreal Convention*, Kluwer Law International, Hague 2006; M. Żylicz, *Nowe prawo międzynarodowego przewozu lotniczego (system warszawsko-montrealski)* [New law on international air transport (Warsaw–Montreal system)], PiP 1999/9.

<sup>7</sup> Chapter II of the Convention.

<sup>8</sup> See A. Konert, *International Court Of Civil Aviation...*, *op. cit.*

<sup>9</sup> This kind of voluntary advance payments has been made to 163 families of the Swissair 111 crash's victims (1998). They received SDR 15,000. Total advance payment was SDR 100,000. Switzerland accepted the EC Regulation 889/2002 in 1999.

<sup>10</sup> In PAA 103 (Lockerbie) and in TWA800, the two carriers lost \$250 m and \$800 m in ticket sales respectively with a minimal or wanting post crash crisis management including no advance payments versus Swissair 111, AF4590 (Concorde) and Alaska Air 261 which, partially against insurers' advice, decided on advance payments to all entitled parties in the amount of Article 21 limit of liability (*op. cit.*) [Egyptair 990 paid advances of 50% of the first offer). In contrast, six months after the AF4590 (Concorde) crash, Singapore Airlines paid in SQ006 only \$25,000 in advances.

were discussed both within the European Civil Aviation Conference<sup>11</sup> and a work group that was formed at the National Economic Council in 1994<sup>12</sup>. Neither the IATA Inter-carrier Agreement nor its two implementing resolutions (MIA and IPA) included a requirement for advance payments<sup>13</sup>. However, the advance payment requirements were adopted in the 1999 Montreal Convention as matter of principle, subject to the laws of the Member States<sup>14</sup>. Subsequently, the European Union mandated the advance payments in their Order 889/2002<sup>15</sup>. The United States included the advance payments in their Post 11September 2001 Victims Compensation Plan regulations<sup>16</sup> and the Air Transport Association of America (ATA) introduced an Implementing Provisions Agreement to the 1999 Montreal Convention (IPA)<sup>17</sup> including an advance payment provision. The International Union of Aviation Insurers (IAUA) published Post Accident Recommended Best Practices<sup>18</sup>.

The consensus reached by the negotiators of the 1999 Montreal Convention in the language of Article 28 reflects the substantial differences in the socio-economic environment among the 189 ICAO member countries, but – nevertheless – recognizes the immediacy of the need for advance payments of air crash victims families. The EU Regulation 889/2002 reflects the formalistic/legal need of the victims recovery and its identification, required to issue a death certificate to install or appoint a legal representative over the decedents' estate to make advance payments (Article 5 of the EC Regulation 889/2002). ATA/IPA establishes its own criteria whether advance payments are made (*at its own discretion*) which is tantamount to subverting the language and intent of Article 28

<sup>11</sup> ECAC is an international organization with close ties to the United Nations, the ICAO, the Council of Europe and the institutions of the EU (for instance, Eurocontrol or Joint Aviation Authorities). ECAC was founded in 1955 in order to *promote the continued development of a safe, efficient and sustainable European air transport system by harmonis[ing] civil aviation policies and practices amongst its Member States [and promoting] understanding on policy matters between its Member States and other parts of the world.*

<sup>12</sup> NEC is a U.S. government agency in the Executive Office of the President. Created in 1993 by President Bill Clinton. Its functions are to coordinate policy-making for domestic and international economic issues, coordinate economic policy advice for the President, ensure that policy decisions and programmes are consistent with the President's economic goals, and monitor implementation of the President's economic policy agenda.

<sup>13</sup> IATA Inter-carrier Agreement on Passenger Liability (IIA) endorsed by the 51<sup>st</sup> IATA General Meeting on October 30–31, 1995 with the Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA) and the Air Transport Association of America (ATA) Provisions implementing the IATA Inter-carrier Agreement to be included in Conditions of Carriage and Tariffs (IPA).

<sup>14</sup> Article 28 of the Montreal Convention.

<sup>15</sup> Regulation (EC) No 889/2002 of the European Parliament and of the Council of May 13 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

<sup>16</sup> Victims Compensation Plan is a unique Programme created in the aftermath of the tragic events of 11September 2001.

<sup>17</sup> "Provisions implementing the IATA Inter-carrier Agreement to be included in Conditions of Carriage and Tariffs (IPA).

<sup>18</sup> Post Accident Recommended Best Practices, November 2005, IUAI/PP1/05.  
H. Ephraïmson-Abt, A. Konert, *New Progress And Challenges...*, *op. cit.*

of Montreal and the implicit *immediate* needs of the victims' next of kin. Those very substantial gaps in Article 28 interpretation reflect philosophical and practical differences that exist among the various parties<sup>19</sup>.

Inasmuch as the families' damages resolution generally takes more than one year – Swissair decided to pay the entire “strict liability” SDR 100,000 as advances. This decision was taken unilaterally by Swissair management against the initial opposition of their insurers. Actually, Swissair paid families \$3,000 then \$20,00 and the remainder thereafter. Advances were later deducted from the final damages settlement amount.

For the first time (and also against the advice of their insurers), Swissair decided to encourage the formation of a Family Association. The rationale of that decision was that the leadership of such association speaks for the families on all issues of common concern – creating a better mutual understanding, wider dissemination of answers to everybody, and faster resolution of problems. Swissair invited the families early on to meet in Geneva to organize and to discuss all open issues.

The TSB was in charge of the post crash investigation. For the first time, the Chairman of the TSB and the chief investigator reached out to the families directly and through the Family Association to keep them informed about the progress of the investigation and being available to provide answers to many questions asked. This created a relationship of mutual trust – and reduced the uncertainty raised by self-appointed experts that disseminated publicly all sorts of divergent, often sensational opinions, as to the causes of the crash. The TSB also gave the families controlled access to the Hangar in Shearwater especially during and in connection with annual memorial services, for them to see in real time the enormity of the destruction – and understand the difficulties encountered by the investigation – as well as the many problems that had to be resolved.

At the first family meeting in Geneva the TSB had organized a (at that time very expensive) TV conferencing link through which the families present there were informed of the status of the investigation – and all questions from the floor were answered in person, visually.

After the Swissair 111 tragedy, the Governor empanelled the Government of Nova Scotia Coordinating and Planning Secretariat presided over by former Chief Justice Lorne Clarke with Mr Ronald Morrison, the executive director – to plan the construction of a Memorial and organize first year Memorial services. The Secretariat included representatives of the Swissair Families Group<sup>20</sup>.

---

<sup>19</sup> *Ibid.*

<sup>20</sup> See also A. Konert, *Plan pomocy rodzinom ofiar wypadków lotniczych – Sprawozdanie z konferencji Narodowej Rady Bezpieczeństwa Transportu w Waszyngtonie (28–29.03. 2011)* [Plan of assistance to air accident victims' families – Report on the conference of National Transportation Safety Board in Washington (28–29 March 2011)], *Ius Novum* 2001, No. 4.

## 5. Legal issues

Several legal issues had to be resolved. First of all, it was a problem of jurisdiction. Although the tragedy occurred off the Coast of Canada, the appropriate courts for damages actions under the Warsaw Convention would be one of four alternatives – among them the country/court where the tickets were purchased and/or the last stop of a journey. (Example: NY – Geneva – New York (US), NY – Geneva – no return trip (Switzerland), Geneva – NY – Geneva (Switzerland)). The second problem related to the Death On the High Seas legislation. The Death On The High Seas Act of 1920 limits recoveries of damages if the tragedy occurs 3 miles (1988 and FAA 12 Miles) from the US shores. Canada is more than 12 miles from US shores. Chief Judge Giles ruled that the limitations of DOHSA apply which had been modernized by law in 2000, retroactively to 1996 (TWA800).

The proceedings were also facilitated when Swissair insurers and the other parties' insurers involved agreed early on a distribution of their respective contribution to the negotiated and/or adjudicated damages.

Damages proceedings in Switzerland were conducted before a Justice of the Peace in Kloten (airport/Zurich, Switzerland).

## 6. Lessons learned and consequences

Investigation and post-crisis management of Swissair 111 crash gave us the following lessons:

- The early formation of a Victims Families Group gave the carrier, the investigator and the authorities a liaison to all families to discuss as well as to decide issues of common interest (except the resolution of damages that were handled by the individual families legal advisors);
- Instead of confronting each other through the media – questions were answered, information was circulated and problems were solved through direct contacts;
- The prepayment of the SDR 100,000 strict liability limit put the victims families into a comfortable financial position to whether the period between the time they lost their provider until the final settlement of the material damages<sup>21</sup>;
- Instead of angry confrontation – especially through the media – a relationship of mutual trust was created between the victims families, the Investigators, and the carrier;

---

<sup>21</sup> H. Ephraïmson-Abt, A. Konert, *New Progress And Challenges In The Air Law...*, *op. cit.*



---

2/2014

- The Investigators could conduct their fact finding without constant public pressure;
- No material losses were inflicted on the carrier vs. the loss of ticket sales in previous air crashes<sup>22</sup>.

## 7. Conclusion: What remains to be done?

Many airports are already holding crisis management drills – a few of them have even developed comprehensive programmes – like Duesseldorf International, in the aftermath of their airport fire. Airline alliances worldwide should convince all of their partners to coordinate and unify their crisis management programmes – as well as their implementation, which would make management more meaningful and cost effective. There is a need to harmonize the varying language and cultural differences among the existing programmes – while still respecting cultural diversity. It is imperative that States ratify and implement already existing treaties to restore the intended uniformity – such as:

- the 1999 Montreal Convention,
- the 2001 ICAO Guideline 285 – post-crash crisis management,
- adherence to the IATA Intercarrier Agreement (IIA) of 1996.

It should be more generally realized that post-incident crisis management is not only the responsibility of individual, non-related, but involved entities. Therefore, wide-ranging and inclusive effective cooperation among all possibly involved parties is necessary – including joint training. It is a necessity that senior management on all levels – including governmental authorities – be involved in post-accident crisis management development, pre-incident determination of chain of command – and seamless interchanges when an incident happens as well as pre-incident training – and hands on representation.

Advance decisions should also be made with the insurers, which provide the post-crash funds and represent the affected parties in their damages resolution and – when it occurs – in any accountability procedures.

Where the resolution of Emergency responses and crisis management was successful, the participation by the leadership of victims representatives of past tragedies, in a liaison and advisory capacity, has proved to be of considerable benefit.

---

<sup>22</sup> *Ibid.*



## **SWISSAIR 111 CRASH – CRISIS MANAGEMENT COOPERATION WHERE THERE IS NO CONTINGENCY PLAN**

### **Summary**

On 2 September 1998, Swissair Flight 111 from New York JFK to Geneva crashed into the sea, carried 229 passengers and crew from 16 countries, all of which were fatalities as well as precious cargo. The article reflects the issue of the crisis management after this air crash and shows rescue and recovery operations. The goal is to show what remains to be done in the future regarding the investigation of air crashes.

## **KATASTROFA SWISSAIR 111 – WSPÓŁPRACA W ZAKRESIE ZARZĄDZANIA KRYZYSOWEGO W SYTUACJI, GDY NIE MA PLANU AWARYJNEGO**

### **Streszczenie**

W dniu 2 września 1998 r. lot Swissair 111 z Nowego Jorku JFK do Genewy rozbił się w morzu, przewożąc na pokładzie 229 pasażerów i członków załogi z 16 krajów. Wypadek lotniczy to nieoczekiwane i zazwyczaj katastrofalne wydarzenie. Następnym wypadku lotniczego powinno być uruchomienie systemu zarządzania sytuacją kryzysową oraz stworzenie tzw. planu pomocy rodzinom ofiar. Plan musi uwzględniać między innymi następujące kwestie: poinformowanie rodzin zmarłych, których należy otoczyć opieką i traktować z szacunkiem, zwłaszcza biorąc pod uwagę wyznawaną przez nich religię, zapewnić im natychmiastową pomoc psychologiczną, stworzyć bezpłatną linię telefoniczną, zadbać o przewóz zwłok, pomóc w zorganizowaniu pogrzebów itp. Przedmiotem artykułu jest analiza problematyki zarządzania kryzysowego, ze szczególnym uwzględnieniem sytuacji po katastrofie lotu Swissair 111.

## **LA CATASTROPHE DU SWISSAIR 111 – COOPÉRATION DANS LE CADRE DE LA GESTION DE CRISE AU CAS DE MANQUE DU PLAN D'AVARIE**

### **Résumé**

Le 2 septembre 1998 le vol 111 de provenance de New York (aéroport JFK) à la destination de Genève s'est écrasé dans la mer avec au bord 229 passagers et membres du PNC de 16 pays. L'accident de l'aéronef est un événement inattendu et d'habitude catastrophique. L'accident de l'aéronef doit être suivi par la mise en marche de tout un système de la gestion de la situation de crise et la formation du plan d'aide des familles des victimes (ainsi dite). Ce plan doit prendre en considération entre autres les questions suivantes: informer les familles des personnes mortes et prendre

soin d'eux, c'est-à-dire les traiter avec respect, surtout penser à leur religion, leur assurer une aide immédiate psychologique, former une communication téléphonique gratuite, se charger du transport des dépouilles, aider aux funérailles etc. L'objet de l'article est une analyse de la problématique de la gestion de crise et en particulier, la situation après la catastrophe du vol Swissair 111.

## **КАТАСТРОФА SWISSAIR 111 – СОТРУДНИЧЕСТВО В ОБЛАСТИ КРИЗИСНОГО УПРАВЛЕНИЯ В СИТУАЦИИ, ЕСЛИ НЕТ АВАРИЙНОГО ПЛАНА**

### **Резюме**

2 сентября 1998 г. самолёт линии Swissair 111 из Нью-Йорка JFK в Женеву потерпел крушение в море, имея на своём борту 229 пассажиров и членов экипажа из 16 стран. Катастрофа самолёта – это неожиданное и обычно катастрофическое событие. Реакцией на катастрофу должно быть приведение в действие системы управления кризисной ситуацией, а также создание так называемого плана помощи родным и близким жертв. В плане должны быть учтены, в частности, следующие вопросы: уведомление родственников погибших, которых следует окружить заботой и уважением, особенно принимая во внимание их вероисповедание, обеспечить им необходимую психологическую помощь, создать бесплатные телефонные линии, позаботиться о перевозке тел погибших, помочь в организации похорон и т.д. Предметом статьи является анализ проблематики антикризисного управления, с особым учётом ситуации после катастрофы линии Swissair 111.