11.4 The Darker Side of "Reasonable": Pan Am 103

The reasonable person test seems simple and logical, doesn't it? Now allow me to take the gloves off and knock you around for a minute. I want you to imagine what might happen if you fail to do what could be considered reasonable. Suppose you did not conduct a thorough risk analysis, leaving your company vulnerable to risks you should have foreseen. Or maybe you did start to work on a preparedness plan. You identified possible new controls for the areas in which your plans were weak. But then for some reason – cost or lack of commitment from management – you did not follow through and put these new controls in place.

Then, an event you could have foreseen comes to pass – with devastating consequences.

What kind of grilling would you get in court from a plaintiff attorney pursuing a liability claim, if the attorney can show that you knowingly allowed the disaster to occur?

For an answer to this question, I talked personally with James Kreindler. He served as plaintiff attorney in suits arising from such high profile airline disasters as TWA 800, Swissair 111, Egyptair 990, and Pan Am 103 – which blew up over Lockerbie, Scotland, in 1988, after taking off from Frankfurt. "The best example is Pan Am 103," says James Kreindler, partner in the law firm Kreindler and Kreindler.

"Every airline has an Air Carrier Standard Security Procedure, that sets forth the rules for their security system, whether they do it themselves or hire outside contractors," according to Kreindler in our interview. "Pan Am's ACSSP required the positive match of passengers to baggage for interline passengers – those connecting to Pan Am from another airline – at extraordinary security airports, which included Frankfurt. Positive match means making sure that a passenger who has actually gotten on the airplane accompanies each bag.

"The regulation said, 'When you find an unaccompanied bag, the airline must either not carry it, or carry it only if it can be opened and physically inspected.'

"Pan Am, during the time of the Lockerbie explosion, was losing money and cutting costs, "explained Kreindler. "The emphasis in every department was to cut costs. They purchased a few X-ray machines and started X-raying interline bags. Pan Am's security manager in London wrote to corporate headquarters in New York, and said, 'The rules require positive match. We're X-raying interline bags. Do we still have to match them?' And corporate headquarters wrote back, 'No, just load them and go,' thus saving all that

money from the cumbersome passenger match." Note that this practice did not pass the reasonable person test that we've been discussing.

Kreindler continued, "So it was this corporate decision that caused the Lockerbie disaster, because the bomb was in an unaccompanied interline bag transferred to the Pan Am plane, in Frankfurt, from Air Malta. That is probably the clearest, classic example of how cutting corners with security or safety is going to cause a disaster. And in fact, in Pan Am's bankruptcy petition in 1990, the first reason they cited for the bankruptcy was the Flight 103 case," and the likelihood that the airline would have to pay enormous damages. Note again that companies that are not crisis prepared are more likely to go out of business after serious critical situations occur.

If you're the plaintiff attorney in a case like this, Kreindler says, "In court, you just rip them to pieces." If you had been in charge of the airline's security during this incident and were cross-examined in court, you would never want to be asked to justify the failure to X-ray the baggage – in a courtroom or by the media. The jury and public would hate you. And what about discussing, but not implementing, a possible control that turns out to have been needed? "That's what makes it intentional wrongdoing or willful misconduct," says Kreindler. "It's that kind of intentional disregard that exposes you to punitive damages."

According to Kreindler, here's how it might go:

Attorney: "You're in charge of security, and that means following the ACSSP to prevent hijacking and bombing?"

Defendant: "Yes."

Attorney: "And those rules are there to help prevent disasters such as Lockerbie?"

Defendant: "Yes."

Attorney: "And prevent the deaths of all your passengers?"

Defendant: "Yes."

Attorney: "And you didn't do a positive match, did you?"

Defendant: "No."

Attorney: "The reason you didn't provide the ACSSP required baggage check is because it was too expensive, correct?"

Defendant: "Yes."

◗ Know the executive landscape by focusing on:

❑ Annual report.

❑ Enterprise risk manager.

❑ Internal auditor.

❑ Case histories.

❑ National Association of Corporate Directors (NACD) and other professional associations.

❑ Magazines and articles.

❑ History.

❑ Budget.

❑ Communications.

❑ Benchmark.

❑ Government

❑ Insurer.

❑ Consultants and security professionals.

❑ Public relations.

❑ Books.

◗ Have you built in mechanisms to make sure new controls are properly implemented and monitored?

Chapter 11 – Questions for Further Thought and Discussion

1. What organizational strengths could be accentuated by incorporating new crisis preparedness controls?

2. In your opinion, what are the top three methods to efficiently learn about new controls from external resources?

3. If a potential, but needed, new crisis control creates a significant conflict between internal staffers (e.g., legal vs. communications, or sales vs. production), what are effective methods to resolve the resistances?

4. How often should your existing, enhanced, and new controls be reevaluated? What is a rationale for why they should be reevaluated at shorter or longer intervals?

5. In establishing a crisis planning committee (CPC) to brainstorm existing controls and the implementation of enhanced and new controls, which of the combinations is best in your opinion:

    a. Establish a CPC where there is general agreement among members to increase the likelihood that the crisis planning process will run smoothly toward implementation?

    b. Enlist CPC members who are likely to disagree and throw roadblocks into the crisis preparedness process, but possibly make the program stronger in the process?

    c. How do you build on the strengths of each and overcome weaknesses of each?

6. What are the most likely failure points if crisis response is not integrated among involved staff positions internally? What about with external stakeholders, as well?

7. Where are integration "disconnects" or resistance points for each level between the executive team, managerial team and operational/tactical teams?

8. What are the roles of the executive team during crisis response? What are the pitfalls that can arise?

9. What are the roles of the managerial team, during crisis response?

    a. What are the pitfalls that can arise?

10. What are the roles of the various operational/tactical teams (listed below) during crisis response? What are the pitfalls that can arise?

    a. IT disaster recovery.

    b. Insurance.

    c. Accounting and finance.

    d. Regulatory/compliance.

    e. Communications.

    f. Human resources.

    g. Benefits.

    h. Emergency response.

    i. Business continuity.

    j. Other.