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BRIEFING

AIRLINES & SOCIAL MEDIA:
THE
WEB IS MIGHTIER THAN THE SWORD?
FEBRUARY 2019

- IN TODAY'S DIGITAL WORLD ACCESS TO WI-FI IS DEMANDED BY MOST PASSENGERS, BUT ARE AIRLINES UNWITTINGLY PUTTING THEMSELVES AT RISK BY PROVIDING SUCH AN ON BOARD SERVICE?



In this era of constant communication, airlines are responding to passenger demands and expectations for online connectivity during flights.

In this briefing, we consider why on board Wi-Fi may be the most dangerous thing on an aircraft.

Unruly passengers

In the summer of 2018, IATA, the UK Government, the UK Airport Operators' Association and UK Retail Travel Forum launched the 'One Too Many' campaign in the UK, intended to highlight the consequences of intoxicated passengers. This is one manifestation of the increasing prevalence of unruly passengers.

Until the Montreal Convention (2014) comes into force, airlines face varying and differing regimes for the prosecution and conviction of unruly passengers. This is addressed further in our August 2015 briefing on offences on board aircraft. However, the Montreal Convention does not address the role of social media in dealing with unruly passengers.

Unruly passengers are not a new phenomenon but the ability of passengers to use on board Wi-Fi to share live images of unruly fellow passengers is a relatively new development and one which requires real time responses; airlines no longer have the luxury of the remaining flight time to investigate and respond. In addition the nature and effectiveness of the response will have an impact on any subsequent investigation or litigation.

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Passengers who share images of unruly passenger incidents often question why the airline allowed an intoxicated passenger to board or continued to serve them alcohol. When such material is posted to a social media channel, this not only has an immediate and negative impact on the brand and reputation of the airline but it can also lead to investigations into airline policies and procedures by aviation regulators and consumer organisations.

Images of part of an incident can create a false impression of the actual situation. However, with the immediacy of online media platforms an airline will have limited time to assess the facts and respond appropriately. In the age of ‘trial by media’, it is critical that airlines respond effectively to damaging posts and before an incident gets blown out of proportion and causes greater damage to the airline.

Airlines may need to consider damage limitation strategies, including whether responding directly to posts on the social media channels or instead with an official statement by the CEO, senior executive or external counsel is the appropriate course of action. The nature and source of the response can be critical to the perception of how the airline has handled a situation. The airline’s response can also have implications for any regulatory investigations and where official complaints or proceedings are filed against the airline.

When faced with such scenarios, airlines must be prepared to address in real time the issue of passenger safety and whether to restrain unruly passengers and/or to divert the flight. The costs consequences of a diverted flight are significant even where an airline is able to pursue a claim against an unruly passenger. Although the right of an airline to pursue claims against passengers for the cost of diverted flights has not been limited and is unaffected by the Montreal Convention, airlines will typically have to consider the impact of such proceedings. The primary issue is whether the passenger has sufficient assets against which such a claim can be enforced. Given the current costs of a diversion, few passengers may have sufficient assets against which a judgment could be enforced. An airline must then consider whether the cost of such litigation provides deterrent value through the publicity of a trial and whether such litigation will have a positive or negative effect on the image and brand. The likely duration of a trial and the prospects of a successful claim will play a key role in this assessment.

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A further step is for the airline to ban unruly passengers. Although the enforceability of such restrictions varies between jurisdictions, carriers should ensure that their conditions of carriage reserve the right to refuse carriage and to deal with unruly passengers by banning them from future flights. However, the rise of online travel agents and the use of consolidators has complicated efforts by airlines to enforce such bans. Codeshare flights provide a further complication. For example, Airline A bans a passenger. The passenger buys a ticket on a flight marketed by Airline B but operated by Airline A. Ironically, Airline A may not be aware that it has accepted the banned passenger until the passenger shares a post on social media from the flight it is operating.

Airlines also need to be prepared to respond to investigations by regulatory organisations, including those with responsibility for aviation security, safety oversight and consumer rights. The need to establish the facts as quickly and accurately as

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possible and ensure that passengers and crew are able to provide statements to the airline is critical. Longer term steps such as banning passengers and commencing litigation can assist airlines later on, but the steps taken in the immediate aftermath often have a bigger impact on regulatory investigations.

Privacy and passengers

Live or still images of unruly passenger incidents will often be sufficient to identify the individual concerned. Regardless of the basis for their misconduct, unruly individuals have privacy rights under the laws of a number of jurisdictions. Where such images are shared on an airline social media channel, airlines will need to deal promptly with any potential claim that they have violated the privacy rights of such passengers.

Although airlines do not have the ability to control passengers sharing images on third party social media channels and sites, the sharing of such images can pose issues for brand protection and airlines must quickly assess their ability to have such images removed or redacted.

Many passengers who share such images do so to ensure that the unruly passengers are prosecuted and that airlines take steps to prevent further unruly behaviour. However, an unintended consequence of sharing images, may be to complicate prosecution and reduce the prospects for conviction. The sharing of images, particularly where this attracts reporting by the media, may give rise to claims that an unruly passenger may not receive a fair hearing. It is not inconceivable that defence lawyers would seek to have the images dismissed on the basis that they are prejudicial, inaccurate and/or do not provide a full and objective record of the events on board.

Given the close proximity of passengers, the inclusion of other passengers in images appears largely unavoidable. Where passengers can be identified from images shared on an airline social media channel, this may also give rise to issues in relation to privacy. Airlines should ensure that their conditions of carriage and data privacy policies have been reviewed to ensure that such situations are addressed.

Privacy and cabin crew

Airline policies for the responsible service of alcohol are widespread and often form part of the pre-take off safety instructions. Ensuring that cabin crew stop serving alcohol to intoxicated passengers is more complex and is frequently part of the grievances of those passengers who are witness to, or are affected by, the behaviour of an unruly passenger. The dissatisfaction and anger of such passengers towards the cabin crew will typically manifest in live and still images of the crew, including where the crew continue to serve alcohol to intoxicated passengers. Although this may be done with the best of intentions, as noted above, this may complicate prosecution of the unruly passenger.

Despite regulations, passengers regularly consume duty free alcohol on board. Where the crew are observed serving alcohol to such passengers, it can be unclear whether they became intoxicated on alcohol served by the airline or on their own alcohol. This highlights the need to establish the actual facts as quickly as possible, particularly the testimony of the cabin crew. Where more than one crew member has served alcohol to an unruly passenger, this also creates additional challenges in establishing the facts and can test the credibility of the cabin crew.

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To mitigate the risks in this area, it is important to ensure that cabin crew terms of employment address this growing issue, particularly where they are required to give statements to police and other investigating authorities. Cabin crew can be reluctant to cooperate, particularly where the outcome of such an investigation may be that they failed to comply with responsible service of alcohol policies and the impact on their career progression. Cabin crew unions are increasingly involved in such situations and the conflict between the rights and obligations of their members under the law of their employment and the law governing the investigation is likely to pose greater issues and challenges in the future.

A further issue to address is the identification of members of the cabin crew in such images and comments and the extent to which this breaches their right to privacy. This will typically be governed by the law of their employment agreement. This raises issues in relation to conflicting privacy regimes.

Accident investigation

Where an incident is investigated by a regulatory body, such as the National Transportation Safety Board or the Thai Aircraft Accident Committee, the ability of an airline to disclose information can be restricted and subject to the approval of the investigating organisation. This can have a direct impact on the ability of an airline to respond to content and images of the incident shared via social media and to ensure that a more balanced narrative of the events is shared and disseminated. Where the inability of an airline to respond is misinterpreted as an unwillingness to do so, an airline can face considerable negative comment and publicity. The silence of an airline can be viewed as acceptance of the narrative on social media.

In addition to the impact on an airline’s brand and reputation, if the incident results in an investigation or litigation, passengers and their lawyers can misuse the absence of an airline response. This is often to ensure that governments are pressured into involving as many agencies as possible in the investigations. For the passenger lawyers, this is a useful basis to seek instructions from as many affected passengers as possible and to press for immediate compensation from the airline. This has also been the basis to assert claims for punitive damages against airlines.

The absence of an airline response can be used to challenge the position of an airline in the investigation or litigation. Airlines would then need to rely on the investigating organisation or court accepting that they were prevented from responding by the powers of the air safety investigating organisation. This can be less certain in subordinate courts and consumer protection organisations, particularly where an airline is able to respond once the official investigation is completed but was unable to do so while the investigation was ongoing.

Service issues

The widespread use of social media to document experiences includes sharing comments on and images of food, beverages, interiors and the experience. Airlines make extensive use of social media channels to promote, develop and enhance their reputation, brand and image and to promote fares, new routes, new aircraft and their service. Passengers will also make use of these social media channels to share their experiences – good and bad. This includes dissatisfaction with the appearance and cleanliness of cabins, the appearance and taste of on board food and beverages and unfriendly or unhelpful cabin crew. Many of these posts reflect a divergence between passenger expectations and the reality of modern air travel.

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Regardless of the substance and accuracy of such posts, airlines have little alternative but to dedicate increasing resources to responding to such posts and to protecting their image, brand and intellectual property. As noted above, images of and comments on other passengers and crew members raise issues of data privacy.

Mitigating risk

Whilst many passengers welcome the ability to access Wi-Fi on board flights, airlines need to ensure that they are protected and that their Wi-Fi doesn't become the most dangerous thing on the aircraft. Apart from the pointers above, airlines should consider the conditions on which on board Wi-Fi is provided and the extent to which an airline can disable it for an entire flight or for specific passengers. Airline conditions of carriage in relation to unruly passengers should also be reviewed to ensure that their response to them includes the ability to suspend their access to on board Wi-Fi.

FOR MORE INFORMATION

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