

The Aftermath of Germanwings

By: Shaun Foster, Associate, Aviation Practice

On March 24, 2015, Germanwings Flight No. 9525 departed from Barcelona at 9:30 a.m. The aircraft was bound for Dusseldorf, but never reached its destination. After take-off, the aircraft reached its cruising altitude of 38,000 feet and was in contact with the Marseille en-route control centre.

Shortly after takeoff, the Captain left the cockpit and instructed the co-pilot, Andreas Lubitz, to take over radio communications. Almost immediately, the aircraft began a descent and the speed of both engines increased. Despite their efforts, neither the air traffic controller nor the Marseilles control centre were able to contact the aircraft. The flight crew's efforts to enter the cockpit failed. The plane crashed in the French Alps. All 148 passengers and crew members were killed.

Mr. Lubitz, who appeared to initiate the controlled descent, was a 27-year old German citizen. He began his flight training in Germany in September 2008, but suspended his training in November 2008 due to medical reasons. The BEA, the French Aviation Investigation Authority, published an investigation report which revealed that Mr. Lubitz began to suffer from a severe depressive episode without psychotic symptoms in 2008. During this depression, he made several "no suicide pacts" with his treating psychiatrist and he was hospitalized. He undertook anti-depressive medication between January and July 2009. By July 2009, his psychiatrist stated that he had fully recovered. He then completed a component of his flight training at the Airline Training Centre Arizona ("ACTA") from November 2010 to March 2011. Following that training, he returned to Germany to obtain his commercial pilot's licence.

The BEA investigation revealed that, in February 2015, Mr. Lubitz attended a private physician who diagnosed him with a psychosomatic disorder and an anxiety disorder. In March 2015, he was diagnosed with possible psychosis. A psychiatrist prescribed him anti-depressant and sleeping aid medications. However, none of the aforementioned health care providers, nor Mr. Lubitz, informed any aviation authority, nor any other authority, about Mr. Lubitz' mental state.

Reporting of medical conditions

The BEA's report identified several reasons why medical certification and self-reporting of mental disorders failed in these circumstances. In the author's opinion, the most notable of these concerns related to the potential financial consequences Mr. Lubitz would have faced if he had been "grounded" during treatment, and a lack of clear guidelines in German regulations with respect to a physician's obligation to report pilots' medical issues.

In Germany, there was no clear obligation imposed on doctors to report detected illnesses in pilots to the relevant authorities. The BEA's report suggested that Lubitz' doctors may have feared negative consequences in the event that they breached doctor-patient confidentiality. In Canada, the law is much

clearer. Section 6.5 of the *Aeronautics Act* (the “Act”) requires that any physician who believes on reasonable grounds that a patient is a pilot who has a medical condition that is likely to constitute a hazard to aviation safety, must inform a medical adviser designated by the Minister forthwith. Section 6.5 also requires that pilots inform each physician that they attend that they are the holder of a Canadian aviation document. Further, the Act explicitly states that no legal, disciplinary, or other proceedings lie against a physician for anything done by him or her in compliance with that section.

The author notes that section 404.06 of the *Canadian Aviation Regulations* (the “CARs”) requires a pilot to “ground” him or herself if he or she suffers from an illness, injury, or disability that could impair his or her ability to exercise his or her flying privileges. The practical consequence of this for commercial pilots is that they must self-report any serious conditions to their employer and to a physician (in order to obtain medical documentation to justify an absence from work).

Accordingly, in Canada, a framework already exists to encourage and mandate self-reporting of illnesses which may affect aviation safety. The author also notes that major Canadian airlines appear to have in place support programs to assist pilots who suffer from psychological disorders.

Ongoing evaluations

The BEA investigation noted that from 2010 to 2014, Mr. Lubitz revalidated and renewed his class 1 medical certificate, which contained a limitation related to his past depressive episode. However, it does not appear that any of Mr. Lubitz’ aeromedical examinations contained robust follow-up or monitoring of his past condition. The BEA report stated that it may be useful to regularly evaluate the mental health of pilots who have an identified history of mental illness.

Two persons in the cockpit

As a result of the Germanwings incident, the European Aviation Safety Agency (“EASA”) published a Safety Information Bulletin (“SIB”) recommending that airlines ensure that at least two crew, including at least one qualified pilot, are in the cockpit at all times throughout the flight. This was recommended to address the risks associated with flight crew members leaving the cockpit during certain phases of flight. In its report, the BEA acknowledged the potential safety benefits of the “2-person in the cockpit” rule (the “Rule”), although it noted that the security risks and training needs for the staff performing the tasks of that second person in the cockpit would have to be carefully addressed. The EASA conducted a survey of stakeholders one year after issuing the SIB. The survey appeared to confirm the BEA’s security and operational concerns. The EASA subsequently issued a new SIB, recommending that carriers evaluate their internal policies with respect to the rule.

In Canada, almost immediately following the Germanwings crash, an Interim Order was released requiring operators to implement the Rule in certain circumstances. The current Interim Order, which has been modified in certain respects, is valid until June 16, 2017. The author expects that Transport Canada will be closely monitoring the recommendations and investigations published by the EASA to determine how to best implement the Rule in Canada following the expiry of the current Interim Order.

Lawsuits following Germanwings

In July 2016, 147 plaintiffs (the family members of the passengers killed in the crash) filed a lawsuit in Arizona (the "Claim"). It is likely that the plaintiffs commenced the lawsuit in the United States due to the possibility of higher damages awards than they might otherwise expect to receive in Germany.

The Claim alleges that ACTA, the US flight school that Mr. Lubitz attended in 2010 to 2011, was negligent in failing to properly screen Mr. Lubitz when he applied for admission. The plaintiffs allege that proper screening would have revealed a history of depression, suicidal ideations, hospitalization on account of mental disorders, and his dishonesty and untrustworthiness. The plaintiffs further allege that ACTA failed to properly monitor Mr. Lubitz for symptoms of psychological abnormalities, reactive depression, and personality disorders, and failed to disqualify him from continuing training when he displayed such symptoms. The Claim states that ACTA ought to have known that his mental disorders or lack of trustworthiness created unreasonable risk.

In response, ACTA has filed a motion to dismiss the Claim. ACTA argues that there is no support for the allegation that it knew or should have known about Mr. Lubitz' medical history. In any event, the episode of depression (before attending ACTA) was meaningless because it did not disqualify Mr. Lubitz from flight training. The FAA and its German equivalent, the LBA, authorized Mr. Lubitz to undergo flight training with full knowledge that he had been previously treated for depression. Further, the BEA investigation revealed that Mr. Lubitz suffered a recurrence of his mental health issues four years after he left ATCA.

Additionally, ACTA argues that Arizona is not the most appropriate forum for the litigation of the dispute. It argues that the plaintiffs and decedents were not US citizens and have no connection to the US Court. All the witnesses and evidence are located in Germany. ACTA states that it agrees to litigate in German Courts, and it notes that Germanwings has agreed not to contest liability for full compensatory damages for the claims in connection with the deaths of the passengers.

At the time of writing, the Arizona Court has not scheduled a date for the hearing of ACTA's motion to dismiss.

Summary

In the aftermath of Germanwings flight No. 9525, the commercial aviation world began a comprehensive review of its policies and procedures to monitor pilots' mental health issues and to implement policies to reduce risks due to pilot incapacitation or suicide. Canada already has a strong framework in place for monitoring and reporting pilots' health conditions, and the Canadian Aviation authorities are almost certainly evaluating the best way to implement new rules to prevent incidents like Germanwings.

We will continue to monitor the progress of the regulatory changes in Canada and worldwide.