

# 'Crash' Course

EASS attendees got an inside look at the world of aviation accident criminalization.

BY RICK DARBY | FROM BUCHAREST

For an industry at risk from the trend toward criminal prosecution following aircraft accidents (*ASW*, 3/08, p. 12), the best defense is safety management systems with ongoing risk analysis and corrective responses, according to members of a discussion panel at the 20th annual Flight Safety Foundation European Aviation Safety Seminar (EASS) and meeting of the European Regions Airline Association in Bucharest, Romania, March 10–12.

Panelists included Simon Foreman, Soulez Larivière & Associés, Paris; Gerard Forlin, barrister, Gray's Inn Square, London; Sean Gates, solicitor, Gates and Partners, London; Robert MacIntosh, chief advisor, international affairs, U.S. National Transportation Safety Board (NTSB); Capt. Andreas Mateou, head of flight safety, Cyprus Airways; Daniel Soulez Larivière, Soulez Larivière & Associés; and Roderick van Dam, head of legal services, Eurocontrol.

Kenneth P. Quinn, FSF general counsel and a partner at Pillsbury Winthrop Shaw Pittman, as moderator opened the discussion, saying, "Pilots, controllers, engineers, boards of directors, managers, regulators — lots of folks are in the cross-hairs these days.

Some of you [in the audience] may not know it, but you can be."

A hypothetical accident for which Quinn supplied the "facts," including victims, crew-members, operators and manufacturers of different nationalities as well as multi-national involvement in the investigation, showed how blame — legal or otherwise — and criminal jurisdiction — if any — can be ambiguous. The evidence in the scenario suggested that several parties had made errors. But were they unintentional and excusable? Reckless behavior? Criminal negligence?

"We have not seen a strong move toward criminal prosecutions in the United States based on the facts of accident investigations," MacIntosh said. "Litigants prefer to pursue civil suits and monetary compensation."

Soulez Larivière works within a legal system that is very different from the Anglo-American one. "There are 10 French citizens involved [in the imaginary accident]," he said. "You have immediately a criminal investigation with an investigating judge in charge. Any accident is a criminal case in France."

Gates, who as legal counsel specializes in aerospace insurance, civil liability and disaster management, said he would defer to Forlin on the criminal aspects of the accident, but added, "The U.K. prosecutors would be investigating, but probably a little slower out of the box."

Referring to a law effective April 6, 2008, in the United Kingdom, Forlin said, "If you ask me now, I would say they would be slower out of the box. In four or five weeks' time, they'll be out of

#### Criminalization and safety discussion

panelists: Sean Gates, Gates and Partners; Daniel Soulez Larivière, Soulez Larivière & Associés; and Simon Foreman, Soulez Larivière & Associés.



Criminalization and safety discussion panelists: Andreas Mateou, Cyprus Airways; Roderick van Dam, Eurocontrol; Robert MacIntosh, U.S. National Transportation Safety Board; and Gerard Forlin, Gray's Inn Square.



the box faster than gazelles. The main reason is that, because of a littering of carcasses of failed major corporation manslaughter cases in the last 15 years, the prosecution have now got their way. One reason they failed in the past is that they had to find a controlling or directing mind in the aviation organization, airline or manufacturer who himself or herself was guilty of manslaughter — impossible.

“[Under the new law] the prosecution will only have to show that there’s been senior management failure falling far below what’s reasonably expected. The danger to the organizations is this: For the first time in law, [prosecutors] will be able to look at the corporate culture, including previous convictions, and also they’ll see how far they fell short of any approved codes of practice, any market norms, any industry norms, any health and safety laws, etc.”

Flight crewmembers involved in accidents have sometimes had their passports taken away or even been jailed pending the outcome of criminal investigations. Foreman, asked about crewmembers’ right to remain silent, said that in France there is such a right, but that the authorities are under no compulsion to inform them of it. “They put a lot of pressure on you, tell you that if you don’t talk, it will go against you, your colleague has already

spoken,” he said. “It’s a really tough game. Perhaps in training crews, they should be informed what can happen and that they have a right not to talk.”

Van Dam said, “We don’t think a controller could reasonably refuse to answer questions. We would strongly guide them, and we would make sure that they would hire excellent counsel or do it for them ourselves.”

Prosecutors increasingly try to “flip” a pilot or controller by promising immunity in exchange for testimony against the head of the flight department, head of quality assurance or corporate officers, Forlin said. “Fifteen years ago, it was completely the other way around. Now, the police mindset is very much that other than cases of gross deviancy, these people are actually the victims of the crime, and this is board and management responsibility. So the police now look at the front line operator as the main prosecution witness, a way of going up the command chain.”

Among the most controversial issues is to what extent flight data obtained through flight data management or flight operational quality assurance programs must be disclosed for criminal prosecutions. Unlike most civil aviation regulations, criminal procedures differ among European states. “In a criminal case [in France], the investigating judge has all the power;

he can take any documents he wants,” Foreman said. “The families [of the victims] have status within the criminal proceedings. They are a party to the proceedings. They have a statutory right to ask the investigating judge to go after the documents.”

MacIntosh said, “The NTSB strikes a ‘delicate balance,’ to pursue a thorough technical investigation and at the same time to provide factual information to the public through the media and to the victims and families through family assistance programs. It’s also important that we allow other agencies such as those for justice, environment and customs to proceed with their investigative responsibilities under applicable law.”

Mateou said, “There is a European directive that all airlines must have an occurrence reporting system. That is part of the SMS [safety management system]. If you don’t take the appropriate action [in response to internal reports], if you don’t do a proper risk assessment, if you don’t have an effective, well-practiced emergency response plan, from now on that can be part of a criminal case.”

The discussion was concluded with panelists’ thoughts about avoiding, or at least minimizing, the risk of liability.

“If you’ve done proper risk assessment [before the accident], you might stop the prosecutors from coming after you, and even if they do and you have

## Differentiating Aviation Safety Education

**A**eroSafety World talked with Dennis O’Leary, manager, communications and marketing, Civil Aviation Safety Authority (CASA), Australia, who spoke at the European Aviation Safety Seminar about “A New Look for Australia’s Approach to Aviation Safety Education.”

**ASW:** How would you characterize traditional aviation safety education?

**O’Leary:** Traditionally, bland, lengthy education materials with limited design interest have been made available. Their existence is then not effectively promoted. The audience almost needs to know they’re available, and once the materials are obtained, they’re not easily consumed, not surprisingly.

**ASW:** When did CASA undergo a conversion?

**O’Leary:** I came into the organization in 2006, and we started to change the approach from then. We took a marketing approach to aviation safety promotion.

**ASW:** What was that?

**O’Leary:** Two crucial first steps. One, collecting demographic information to understand our audience, their age profiles, their locations, all that sort of stuff. Having identified the audience, the next step was to undertake social research employing qualitative and quantitative techniques with a large sample, to understand how they see safety as an issue. How important is it to them versus other key issues? The expected first answer is, “It’s very important, the most significant thing I do.” If you push further, you might find them saying something else, “Well, economic factors can come in, etc.” We

also looked at the issues they believed should be addressed. We explored their views on our current communication tools and how they would prefer to be communicated with in terms of message tone and style and the communication media used. We then reshaped our communication strategies and materials in line with the research findings.

**ASW:** Did you come up with basic demographic categories for your audience?

**O’Leary:** We took the age profile or generational cohort approach — the baby boomers, generation X, generation Y. We know, and we also researched this further, that different generations like their information delivered in different ways.

**ASW:** How do you define boomers, X and Y? What are their respective preferences?

**O’Leary:** People cross categories, as in anything. But to generalize, baby boomers are aged 45 and up. They tend to prefer face-to-face communication, so they like workshops, seminars and conferences.

Generation X is aged from about 25 or 30 to about 45, they’re computer-savvy, they’re the “me” generation so they like information targeted at them, and they want it available when they want it. They prefer it in short, easily consumed chunks. They like images, and expect things to get right to the point.

Generation Y, aged 15 to around 25 to 30, is the most technologically literate, although generation X is as well. Generation Y tends to communicate via e-mail, blogs, podcasts. They’re used

to an advertising-marketing environment, they like their information very sharp, very pointed. Interestingly, generation Y doesn’t even much care for PowerPoint, a so-called essential communication tool for many people.

**ASW:** So generation Y is used to bite-sized information, blogs, text messages, all that. But isn’t a lot of aviation safety information highly complex? How far can you boil it down?

**O’Leary:** Fair point. I think anything can be distilled to its essence. What you have to do is restructure the way the information is presented. Of course, you can encounter something that’s technically complex. But you don’t have to get to it in a wordy, convoluted and tiresome way. You can cut straight to the essence of it and importantly provide links or references to other information that expands on the matter.

**ASW:** Have you measured the results of the new style?

**O’Leary:** We’ve set a benchmark on people’s attitudes, awareness and reported behaviors. We will go back and measure against those benchmarks.

**ASW:** So you’ll measure actual absorption of information, not just whether the recipients like the format?

**O’Leary:** Yes. If people say they like the format, that’s all very good, but has it been effective? So we’re going to go back in a year or more to see how that’s gone. That’s the reason for the benchmarks. We’ll look at awareness on a whole range of aviation safety issues, attitudes on particular issues and reported behaviors.

— RD

to plead guilty on a minor basis, the fact that you’ve done a root-and-branch internal audit is massive mitigation before a sentencing judge,” said Forlin.

Gates said, “You have to have a safety culture embedded in the

organization, have that culture supported by the chief executive, have a safety management system that you practice, and do all that you can to operate safely.”

“Safety managers must do everything in their power to advise the board

in order that the board can take the necessary action,” Mateou said. “You should be able to show that you are actively managing safety all the time, minimizing the risks and performing the proper [internal] investigations.” ●