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Child Custody Rights: Should Airlines Be Allowed to Interfere

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CHILD CUSTODY RIGHTS: SHOULD AIRLINES BE ALLOWED TO INTERFERE?

JENNIFER RAUCH*

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I. INTRODUCTION

WITH THE United States Supreme Court's recent denial of the petition for *writ of certiorari* in the matter of *Pittman v. Icelandair, Inc.*,¹ the question of whether the conduct of an airline or an airline's employee can ever render an airline liable for interference with a child custody order appears to have been resolved in favor of the airline industry. But should this be the case? With estimates of intra-family child abductions in the United States alone reaching upwards of 350,000,² should common carriers who facilitate the wrongful removal of children against court orders, specifically in the situation of international abductions, be able to escape liability? This Comment will address the issue of what an airline's liability and/or duty should be to ensure that passengers, specifically children, are not traveling in violation of court orders. To date, there has been little analysis of this issue, and, as a result, I will frame my discussion within the unique context of *Pittman v. Grayson*.³ I will begin with a thorough analysis of the facts involved in the case, followed by a detailed examination of the procedural history, focusing on the claims and defenses raised at each stage of the litigation. To culminate my discussion, I will draw on existing legal principles and case law in an effort to demonstrate why—on both public policy and legal grounds—the original jury ver-

¹ 120 S. Ct. 59 (1999). *Pittman* involves a mother's wrongful removal of a child from the United States, in violation of a joint-custody order, using a ticket bearing a false name, and allegedly with the assistance of an Icelandair employee. A more in-depth discussion of the facts and legal issues raised in *Pittman* will be presented later in the Comment.

² See Patricia E. Apy, *Managing Child Custody Cases Involving Non-Hague Contracting States*, 14 J. AM. ACAD. MATRIMONIAL L. 77 (1997). This estimate is for the year 1988, but, as a result of scarce empirical data, it is difficult to assess what the exact current figures might be. This is especially true for statistics on international abductions, although it has been estimated that these figures would be even greater than those of intra-family abductions in the United States.

³ 149 F.3d 111 (2d Cir. 1998).

dict⁴ should have been allowed to stand, and why the district⁵ and appellate⁶ courts erred in allowing Icelandair to escape liability for its role in the wrongful abduction of Elizabeth Pittman.

II. THE FACTS OF *PITTMAN*⁷

In 1991, Frederick Pittman (plaintiff) sought sole custody of his daughter, Elizabeth Pittman. At the time he shared custody of his daughter with his ex-wife Erna Eyjolfsson (defendant), a citizen of Iceland who at the time was residing in Florida with Elizabeth and Anna Nicole Grayson, her other daughter from a subsequent marriage. Erna testified at her deposition during the custodial proceedings that she did not intend to remove the girls from Florida. The court, however, issued a temporary injunction prohibiting Erna from removing Elizabeth from the territory encompassed by the First Judicial Circuit of Florida.⁸ Meanwhile, Brian Grayson, the father of Erna's other daughter Anna, obtained a court order prohibiting Erna from removing Anna from northwest Florida. Grayson also arranged to have Erna and the two girls' passports removed as a precautionary measure, fearing that Erna might flee to Iceland before the custodial proceedings concerning Anna were resolved.

Despite the two court orders prohibiting the removal of the girls, Erna made arrangements to take the girls to Iceland. In March of 1992, Erna obtained provisional passports through the Icelandic Consul in Florida, presumably by claiming the passports had been lost. Sometime in the first part of April, Erna's boyfriend at the time, Helgi Hilmarsson (also named as a defendant in the original lawsuit), made arrangements with Icelandair for a May 2, 1992 flight from Florida to John F. Kennedy Airport in New York and then from New York to Keflavik Airport in Iceland. On April 10, three additional reservations for the same flight were made for passengers Ms. S. Hilmarsson, Child

⁴ The jury originally rendered a \$15 million verdict in favor of the plaintiff (the father of the child who was removed from the U.S. against a court order) against Icelandair. *See id.* The district court judge subsequently set aside the verdict and the U.S. Court of Appeals for the Second Circuit affirmed. *See id.*

⁵ *See Pittman v. Grayson*, No. 93 CIV. 3974 JSM, 1997 WL 370331 (S.D.N.Y. July 2, 1997).

⁶ *See Pittman v. Grayson*, 149 F.3d 111 (2d Cir. 1998).

⁷ These facts are taken from the proceedings at both the district and appellate court level. *See Pittman v. Grayson*, 149 F.3d 111 (2d Cir. 1998); *Pittman v. Grayson*, No. 93 CIV. 3974 JSM, 1997 WL 370331 (S.D.N.Y. July 2, 1997); *Pittman v. Grayson*, 869 F. Supp. 1065 (S.D.N.Y. 1994).

⁸ On May 4, 1992, Pittman was awarded sole custody of Elizabeth.

"A" Hilmarsson, and Child "B" Hilmarsson. These reservations were paid for by a credit card registered to Erna's stepfather, Gudmundur Karl Jonsson (also named as a defendant).

During the weekend of April 17-19, Grayson realized Erna and the two girls had disappeared. Suspecting that Erna might attempt to take the two girls to Iceland, Grayson notified Pittman and tried to prevent Erna from leaving the country. Grayson called the Baltimore-Washington and Orlando offices of Icelandair on April 20, informing Icelandair representatives⁹ that Erna might attempt to leave the country with the girls against court orders. Grayson asked if there were any reservations under the names of Erna Eyjolfsdottir or Pittman or Grayson, Etta or Ron Matlack, Elizabeth Jeanne Pittman, or Anna Nicole Grayson. He was told that there were not any reservations under those names. Grayson also gave physical descriptions of Erna and the girls, informing the representatives that Erna would probably be traveling under an assumed name.

Four days after Grayson's phone calls to Icelandair representatives, the original reservations were changed. The names on the reservations were changed from Hilmarsson to the name Karlsson, and the Florida to New York flights were cancelled, with the departures rescheduled to take place from JFK Airport on May 1.¹⁰ Erna arrived with the two girls on May 1 at JFK Airport and Icelandair representatives allowed her to board although she held passports in their true names, tickets in the name of Hilmarsson, and reservations under the name Karlsson. The plaintiffs presented evidence that the original tickets, issued under the name Hilmarsson, were nontransferable. However, new tickets were never issued in the name Karlsson. Despite the fact that Icelandair's customer service manual required employees to ensure that the name on the passport matched the name on the ticket, Erna and the girls were allowed to board a flight for which the names on their passports matched neither the names on their reservations nor their tickets.

The plaintiffs presented further evidence to suggest that Olav Ellerup, the senior passenger supervisor for Icelandair at JFK Airport, altered the passenger manifest by making false entries on the weight and balance code¹¹ so it appeared the party con-

⁹ Later at trial, Grayson was unable to identify the name or the title of the representatives with whom he spoke to on that day.

¹⁰ This date was moved up from the originally scheduled May 2nd departure.

¹¹ A weight-and-balance check-in is required of all passengers and is used in assessing the weighting and balancing of the aircraft.

sisted of a male, female, and child, instead of a female traveling with two children. Ellerup, who checked in Erna and the children,¹² stated at trial that the quickest way for someone to determine and locate a woman traveling alone with two children would in fact be to check the weight-and-balance column of the passenger manifest. Related evidence presented by the plaintiffs demonstrated that Jonsson, Erna's stepfather whose credit card was used to purchase the tickets, was the chief of the duty-free store at Keflavik Airport, and was well known to Icelandair executives.¹³

On February 3, 1993, the Supreme Court of Iceland awarded Erna sole custody of Elizabeth, and on May 2, 1993, almost a year after a Florida court had awarded Pittman sole custody of his daughter, the Icelandic Committee of Child Protection issued an order proclaiming that there were no grounds to interfere with Erna and her daughters' relationship. On February 15, 1993, the same court that awarded Frederick Pittman sole custody of his daughter issued a warrant for Erna's arrest. In early 1993, a team from Corporate Training Unlimited (CTU)¹⁴ failed in its attempt to retrieve the girls due to intervention by the Icelandic police. Elizabeth Pittman was ten years old when she was taken by Erna to Iceland in 1992. Her father has not seen her since that time.

III. PROCEDURAL HISTORY

A. ORIGINAL LAWSUIT AND ICELANDAIR'S MOTION TO DISMISS

In 1993, Frederick Pittman filed a lawsuit in state court¹⁵ in New York on behalf of himself and as the legal representative of his daughter Elizabeth. Pittman brought the action against

¹² Ellerup's initials were on the passenger manifest next to the Karlsson reservations, indicating that he had checked them in. See *Pittman*, 149 F.3d at 116. At trial, however, he testified that his normal duties did not consist of checking in passengers and that he must have forgotten to log off from the computer system, thereby allowing someone else to check in passengers under his name. See *id.* Notably, Icelandair admitted that Ellerup "ha[d]checked-in thousands of passengers as a check-in supervisor." *Id.*

¹³ A witness at the trial who was on a 1993 Icelandair flight with Erna and Elizabeth testified that the two were given noticeable preferential treatment, which a flight attendant attributed to Icelandair employees' relationships with Elizabeth's grandfather.

¹⁴ CTU is an organization developed to recover children involved in international custody cases.

¹⁵ The case was later removed to federal court by Icelandair as a result of diversity jurisdiction.

Erna, Hilmarsson, Jonsson, and Icelandair on the theory that they had conspired to remove Elizabeth from the United States in violation of his custody rights. The individual defendants did not answer or appear, so the plaintiffs proceeded with the action against Icelandair. Plaintiffs' claims against the airline consisted of (1) intentional interference with parental custody, (2) intentional infliction of emotional distress, and (3) false imprisonment.

In response, Icelandair brought a motion to dismiss on the grounds that either (1) there was lack of subject matter jurisdiction based on the Warsaw Convention,¹⁶ or (2) section 1305(a)(1) of the Federal Aviation Act¹⁷ (FAA) preempted plaintiffs' state law claims of intentional interference with custodial rights, intentional infliction of emotional distress, and false imprisonment, or alternatively, (3) on the basis of forum non conveniens. The court rejected Icelandair's first argument¹⁸ that the forum limitations of Article 28¹⁹ of the Warsaw Convention applied because the plaintiffs' claims arose from "international transportation."²⁰ The court determined that Article 17²¹ of the Warsaw Convention was the only applicable liability provision, and that it first needed to be determined if this provision of the Warsaw Convention applied to the plaintiffs' claims.²² Relying on case law and the legislative history of the Warsaw Convention, the court found that Icelandair's conduct did not qualify as an "accident" as is intended under Article 17 of the Warsaw Convention.²³ Therefore, the plaintiffs' state law causes

¹⁶ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

¹⁷ 49 U.S.C.A. § 1305(a)(1) (West Supp. 1994) [hereinafter FAA].

¹⁸ See *Pittman*, 869 F. Supp. at 1071.

¹⁹ Article 28 of the Warsaw Convention provides that actions are brought: (1) "in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business," (2) "where he has a place of business through which the contract has been made," or (3) "before the court at the place of destination." Warsaw Convention, *supra*, note 16.

²⁰ International transportation is defined by Article 1(2) of the Warsaw Convention, *supra*, note 16.

²¹ Article 17 states that "[t]he carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Warsaw Convention, *supra*, note 16.

²² See *Pittman*, 869 F. Supp. at 1068-71.

²³ See *id.* at 1071.

of action remained viable because they did not fall under the provisions of the Warsaw Convention.²⁴

As for Icelandair's claim that section 1305 of the FAA preempted the plaintiffs' state law claims,²⁵ the court noted "that actions in which plaintiffs invoke traditional elements of tort law—suing for personal injuries sustained in airport terminals, during flights, or at the hands of airline employees or fellow passengers—overwhelmingly incline against federal preemption."²⁶ The court also cited to case law that supported the proposition that a state claim should be evaluated not only as it relates to services, but also as to what its impact is on the economic competitiveness of airlines.²⁷ The court's view was that "allowing plaintiffs' suit to go forward would not frustrate the ADA's²⁸ economic deregulation of the airlines nor would it significantly impact the Airline's competitive posture."²⁹ Furthermore, the court agreed with the plaintiffs in that "the ADA is not intended to be a safe harbor for airlines from civil prosecution for the civil analogues of criminal offenses."³⁰

Icelandair's final argument under their motion to dismiss was that the action should be dismissed on the basis of forum non conveniens, and that Iceland was an adequate alternative forum.³¹ The court found that Icelandair had failed to demonstrate its claim, noting that the Supreme Court of Iceland had chosen to disregard the Florida court order awarding sole custody of Elizabeth to Pittman, as well as the order for Erna's ar-

²⁴ See *id.*

²⁵ Section 1305(a) (1) of the FAA prohibits states from enforcing any law "relating to rates, routes, or services of any air carrier." FAA, *supra*, note 17. Icelandair relied on the Fifth Circuit's decision in *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), where the court defined services as including "ticketing [and] boarding procedures," arguing that the plaintiffs' claims arose out of the reservation, ticketing, and boarding of Elizabeth. Pittman, 869 F. Supp. at 1072. The court noted that in a parallel action brought against Icelandair by Grayson (Anna's father), the District Court for the Northern District of Florida held that Grayson's state law claims were preempted by the ADA [The Airline Deregulation Act]. *Grayson v. Icelandair*, Order of Dismissal, March 4, 1994. However, the court stated that "[n]evertheless, based upon our reading of Hodges itself and the treatment of ADA preemption by our sister courts in this Circuit we respectfully disagree with the holding of Grayson." Pittman, 869 F. Supp. at 1073, n.11.

²⁶ Pittman, 869 F. Supp. at 1072.

²⁷ See *id.*

²⁸ The Airline Deregulation Act (ADA) amended the FAA in 1978. See Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

²⁹ Pittman, 869 F. Supp. at 1074.

³⁰ *Id.*

³¹ See *id.* at 1074-75.

rest and the two orders prohibiting Erna from removing the girls from northwest Florida.³² In doing so, the court stated that “Icelandair’s failure to address the most formidable barrier to plaintiffs’ opportunity to be heard in an Icelandic forum—that the Supreme Court of Iceland has granted custody to [Erna] Eyjolfssdottir—renders its motion for dismissal based on *forum non conveniens* fatally deficient.”³³

B. THE JURY VERDICT AND THE DISTRICT COURT’S SUBSEQUENT SET-ASIDE OF THE VERDICT

In light of the district court’s rulings on Icelandair’s motion to dismiss, the plaintiffs in *Pittman* appeared to have a strong and valid case against the airline on their claims of intentional interference with custodial rights, intentional infliction of emotional distress, and false imprisonment. In fact, a jury found for the plaintiffs, awarding \$15 million in compensatory and punitive damages.³⁴ Icelandair moved to set aside the jury verdict, asking, in the alternative, for a judgment as a matter of law or a new trial.³⁵

While acknowledging that the jury was entitled to find that Ellerup had processed Erna and the girls’ tickets despite the discrepancies in the names on the passports, reservations, and tickets, and that the jury was also entitled to find that Ellerup falsified the entries on the weight-and-balance codes of the passenger manifest, the judge found “that the evidence was not sufficient to justify imposing liability on Icelandair for its role in transporting the plaintiff’s daughter out of the country.”³⁶ The judge also noted that even if the evidence had been sufficient to show that Icelandair conspired with Erna, the jury charge “was in error in articulating the theory on which the defendant could be held liable to the plaintiffs.”³⁷

The judge began his analysis by addressing the motion for new trial, finding that the first part of the charge was proper.³⁸

³² See *id.* at 1075.

³³ *Id.*

³⁴ The jury awarded \$7.5 million in compensatory damages plus \$2.5 million in punitive damages to Frederick Pittman, as well as \$2.5 million in compensatory damages plus \$2.5 million in punitive damages to Elizabeth.

³⁵ *Pittman v. Grayson*, No. 93 CIV 3974 JSM, 1997 WL 370331 (S.D.N.Y. July 2, 1997).

³⁶ *Id.* at *2.

³⁷ *Id.*

³⁸ See *id.*

The first part of the charge stated that in order to find Icelandair liable, the jury "must find that Icelandair knew that Erna Pittman had no right to take Elizabeth to Iceland and that by some wrongful act of its own aided or assisted her in removing the child from the United States."³⁹ The judge noted that had he submitted only this portion of the charge, it may have been appropriate. However, the charge did not end there, and he found that the following portion rendered the charge improper:

Ordinarily, an airline has no obligation to determine whether a child traveling on one of its planes with a parent is under a court order that prohibits that travel. However, if an airline has actual notice that there is a court order prohibiting the parent from transporting the child to the place that is the plane's destination, it would be wrongful for the airline to transport the child.⁴⁰

The judge stated that the second sentence of the above quoted portion of the jury charge was incorrect, since "[e]ven if one were to assume that Icelandair had been told that there was an order preventing Erna Pittman from taking the children to Iceland, that alone would not provide a basis for imposing liability on Icelandair."⁴¹ The judge found that if an airline had a duty to refuse transportation to individuals that it had reason to believe were traveling in violation of a court order, this would also give airlines the right to deny someone the right to travel on the basis of a *suspicion* that a court order existed restricting that individual's travel.⁴² The judge's opinion goes on to state that an "[a]irline does not, however, have an unfettered right to decide who should or should not travel."⁴³ The judge determined that an airline differs from other third-parties that could be held liable for assisting one parent in depriving another par-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Pittman*, 1997. No. 93 Civ. 3974 JSM, WL 370331 at *2.

⁴² *See id.*

⁴³ *Id.* To support this proposition, the court cited *Semon v. Royal Indem. Co.*, 179 F. Supp. 403, 405 (W.D. La. 1959), *aff'd* 279 F.2d 737 (5th Cir. 1960) (quoting as a general rule that "a common carrier of passengers is bound to receive for carriage, without discrimination all proper persons who desire and properly offer to become passengers . . ."). What the court did not note is the previous statement by the *Semon* court, that "[t]he distinction between a public or common carrier of passengers and a special or private carrier of the same is that it is the duty of the former to receive all who apply for passage, so long as there is room and *no legal excuse* for refusing . . ." *Semon*, 179 F. Supp. at 405 (emphasis added). It should also be acknowledged that the court was concerned with common carriers discriminating on the basis of race and color. *See id.* at 406.

ent of their custodial rights. The difference involves the fact that other third-parties do not have an obligation to assist the parent, whereas in this instance Icelandair "had a duty to transport anyone who sought to use its services and was not free to refuse to transport . . . simply because Mr. Grayson stated that there was a court order prohibiting [Erna] from removing [the girls] from Florida."⁴⁴ The judge acknowledged that an airline has the right to "refuse to transport someone who may pose a risk to himself or other passengers," but that "the statutory exception is narrowly drawn."⁴⁵

The court also alluded to the notion that an airline's refusal to transport a paying passenger could run afoul of the Fifth Amendment by restricting an individual's freedom to travel.⁴⁶ While the Fifth Amendment is not applicable to Icelandair because it's a private actor, the judge cautioned that "the importance of the right to travel in our society strongly suggests that the Court should be wary of imposing any obligation on a common carrier that might interfere with that aspect of an individual's liberty."⁴⁷ Based on the foregoing analysis, the judge reasoned that Icelandair was "at a minimum" entitled to its motion for a new trial.⁴⁸

The court next addressed Icelandair's motion for judgment as a matter of law.⁴⁹ Acknowledging that the record established more than just the fact that Icelandair transported Erna and the girls to Iceland, the judge examined Olav Ellerup's role, focusing on the question of "whether Ellerup's actions are sufficient to establish that Icelandair joined in a conspiracy with Erna Pittman to deny her ex-husband his lawful right to the custody of his child."⁵⁰ Referring to section 700 of the RESTATEMENT (SECOND) OF TORTS (1977), the court recognized the tort of interference with parental rights.⁵¹ In conjunction with section 876 of

⁴⁴ *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *2.

⁴⁵ *Id.* (citing 49 U.S.C.A. § 41310 (West 1997)).

⁴⁶ *See Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *3.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.* at *3-6.

⁵⁰ *Id.* at *3.

⁵¹ Section 700 states that "[o]ne who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent." RESTATEMENT (SECOND) OF TORTS § 700 (1977).

the RESTATEMENT (SECOND) OF TORTS (1977),⁵² the court acknowledged that an individual who assists a parent in the removal of a child from a country in order to interfere with another parent's custodial rights can be held liable to the parent with whose rights they have interfered.⁵³

To find that Ellerup's actions were sufficient for a determination that Icelandair conspired with Erna, or aided and abetted Erna in depriving Pittman of his parental custody rights to Elizabeth, the court stated that two things must be established:⁵⁴ (1) Ellerup was aware of the wrongful nature of Erna's conduct, and (2) Ellerup performed some act to further the unlawful purpose.⁵⁵ Referring to the standard jury charge for membership in conspiracy,⁵⁶ the court found the evidence presented was insufficient to establish that Ellerup was aware of Erna's "unlawful purpose to deprive her ex-husband of his lawful custody rights."⁵⁷ The court also found that by proving that Ellerup allowed Erna and the girls to leave despite the difference in the names on the passport, reservations, and tickets, and that Ellerup falsified the weight-and-balance codes, plaintiffs only established that Ellerup assisted Erna in secretively leaving the country. This alone was insufficient to establish liability.⁵⁸ To

⁵² Section 876 states that:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

⁵³ See *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *4.

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ The charge cited to by the court was as follows:

[T]he fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of a[t] least some of the purposes or objects of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

Id. (citing to LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 19-41 (Matthew Bender 1996) (Conspiracy Instruction 19-6); see *id.* at 11-3 (Aiding and Abetting Instruction 11-2)).

⁵⁷ *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *4.

⁵⁸ See *id.*

establish liability, the court found that it was necessary to prove that Ellerup knew Erna was attempting "to avoid detection because she was violating the custody rights of her ex-husband by taking his child out of the country."⁵⁹ The court noted that there was no evidence suggesting Ellerup was aware of the telephone calls between Grayson and Icelandair at the Baltimore and Orlando offices.⁶⁰ The court likened Erna's behavior to that of a woman "fleeing from an abusive and dangerous ex-husband" and noted that Ellerup could very well have thought "he was being a Good Samaritan" as opposed to knowing he was taking part in a conspiracy.⁶¹ The court also found that while it was possible for the jury to conclude from the evidence that Ellerup lied at trial, there were "a number of possible reasons that might cause him to lie, even though his conduct on May 1, 1992 was entirely blameless."⁶² Therefore, the court concluded that "[i]t is too great a leap to go from the conclusion that he [Ellerup] testified falsely to the conclusion that he was aware of the existence of a valid court order that Erna was violating by taking the children to Iceland," and summarily granted Icelandair's judgment as a matter of law.⁶³

C. PITTMAN'S APPEAL TO THE SECOND CIRCUIT

In response to the judge's setting aside of the jury verdict, Pittman appealed to the U.S. Court of Appeals for the Second Circuit.⁶⁴ In response to the district judge's notion that Ellerup may have assisted Erna as a result of being under the impression that she was fleeing an abusive ex-husband, Pittman's brief contended that "Icelandair never suggested, much less testified, that this was the reason it engaged in its improper conduct."⁶⁵ Pittman argued that "[t]he District Court thus impermissibly invaded the exclusive province of the jury to select among competing, reasonable inferences, by substituting its view of the matter for that of the jury."⁶⁶

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Id.* at *5.

⁶² *Id.* The court hypothesized that Ellerup could have lied as a result of the fact that his employer was a defendant in a lawsuit where substantial monetary damages were being sought.

⁶³ *Id.*

⁶⁴ *See Pittman v. Grayson*, 149 F.3d 111 (2d Cir. 1998).

⁶⁵ *Plaintiffs Say Judge Erred in Vacating Verdict on Child Custody Conspiracy*, 1997 ANDREWS AVIATION LITIG. REP. 25228, November 11, 1997.

⁶⁶ *Id.*

Pittman also claimed that his rights were prejudiced by the district court's exclusion of a flight attendant's testimony that Icelandair had smuggled Erna and the children out of the country.⁶⁷ Pittman also contended the court should have given the jury a negligence charge, "because Icelandair's conduct was an extreme departure from its own rules and airline industry norms."⁶⁸ Pittman dismissed the argument presented by Icelandair that it would unduly burden the airline industry to impose liability on an airline for transporting a passenger in violation of a court order. Pittman's response was that "[t]here is nothing burdensome about imposing liability on an airline that boards passengers under phony names . . . knowingly enters false passenger information on its own internal flight documents . . . (and) doctors its own weight and balance codes to disguise its passengers' identities."⁶⁹

The U.S. Court of Appeals for the Second Circuit affirmed the district court's set aside of the jury verdict.⁷⁰ The court summarily rejected the plaintiff's contention that Icelandair's Rule 50(a)⁷¹ motion for judgment as a matter of law was inadequate as a result of a lack of specificity.⁷² The court, noting that it did not need to decide the issue, briefly discussed Icelandair's claim that New York courts would not recognize a cause of action against Erna.⁷³ In doing so, the court found that the state of the law in New York regarding claims based on interference with parental custody was decidedly unclear and also noted that there was little authority to support the idea that Elizabeth could maintain a claim of interference with custodial rights.⁷⁴

Turning to the issue of whether Icelandair had sufficient notice, the court stated that to impose liability for "acting in concert with the primary tortfeasor," either under the Restatement's definition⁷⁵ or that of New York law,⁷⁶ "the defendant must

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See* FED. R. CIV. P. 50 (a).

⁷² *See Pittman*, 149 F.3d. at 119.

⁷³ *See id.* at 120-22.

⁷⁴ *See id.*

⁷⁵ RESTATEMENT (SECOND) OF TORTS, § 876, *supra*, note 52.

⁷⁶ The elements of concerted-action liability under New York law are "(1) an express or tacit agreement 'to participate in a common plan or design to commit a tortious act,' (2) tortious conduct by each defendant, and (3) the commission by one of the defendants, in pursuance of the agreement, of an act that consti-

know the wrongful nature of the primary actor's conduct."⁷⁷ The court agreed with the district court on this matter, stating that "knowledge that conduct is clandestine does not necessarily include knowledge of its motivation or legality."⁷⁸ The court found that the question "was whether the airline had been given adequate notice to cause it to know that Erna was committing a tort because her travel to Iceland with Elizabeth was prohibited by court order."⁷⁹ The court noted that the only evidence regarding Icelandair's knowledge was the phone calls by Grayson to the Baltimore and Orlando offices, and went on to state:

More significant, however, is what Grayson did not do. He did not, for example, contact the airline's New York offices, where Icelandair's senior United States employees were located, or ask to speak with a high-ranking office. He did not make any request of, or give any information to, Icelandair in writing. And he did not provide Icelandair with certified copies (or indeed any copies) of the court orders restricting Erna's travel with her daughters.⁸⁰

The court also noted that Icelandair had a general duty to receive and transport paying passengers since they were a common carrier. The court therefore rejected the idea that the oral representations were sufficient to relieve the airline of that duty.⁸¹ In summary, the court decided:

[R]egardless of whether the other elements of concerted-action liability are proven, and whatever authenticated type of notice the New York courts might ultimately require in order to impose such liability on a common carrier, we cannot infer that the state courts would find that the knowledge element of such a claim was established by Grayson's telephone calls.⁸²

tutes a tort." *Pittman*, 149 F.3d at 122 (citing *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295, 591 N.E.2d 222 (1992)) (internal quotation marks omitted).

⁷⁷ *Pittman*, 149 F.3d at 123.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* The court went on to say that the only evidence relating to Icelandair's knowledge was:

that two outlying Icelandair offices had received calls from a man whose identity was not documented (who, indeed, was not Pittman and could have been anyone), who spoke to random employees, and who represented orally that Erna's travel with the girls was restricted by court orders as to whose existence and authenticity he provided no proof. *Id.*

⁸¹ *See id.*

⁸² *Id.* at 124.

The court rejected the plaintiffs' argument that if the court found that the evidence was insufficient, the court should remand for a new trial because the district court erred in preventing the introduction of a statement by an Icelandair flight attendant.⁸³ The statement was given to a television news producer, who later described the conversation with the flight attendant in her deposition testimony.⁸⁴ The plaintiffs argued that the statement was a vicarious admission that should have been deemed non-hearsay, and therefore not excluded by the trial court.⁸⁵ The court found that there was no error in the exclusion of the testimony by the trial court.⁸⁶ First, by using a double hearsay analysis (since the flight attendant said that it was a story she had heard from someone else), the court found that it was properly excluded since it contained hearsay.⁸⁷ Secondly, the court decided that even if it did not contain hearsay, the statement still did not prove Icelandair had knowledge that Erna's flight was in violation of a court order, and therefore would not provide a basis for a new trial.⁸⁸ The court found that the reference to Erna and the girls being "snuck" out of the country added very little, since it was already determined that "evidence of surreptitious intent was insufficient since Icelandair had not received legally sufficient notice of the court order. Admission of [the flight attendant's] statement could not have cured that defect."⁸⁹

The plaintiffs' final argument was that if the court determined the evidence to be insufficient to support the jury's verdict, then the court still should remand for a new trial on the basis of Elizabeth's claim of negligence and Frederick's claim of gross negligence, both of which the district court refused to sub-

⁸³ See *Pittman*, 149 F 3d at 124.

⁸⁴ According to the television producer, she was on an Icelandair flight when the flight attendant noticed her reading newspaper articles about the incident. The flight attendant commented on the articles, stating that " 'You know we helped sneak'—snuck or smuggled, I really don't recall precisely— 'them out the back way or service entrance at Dulles Airport.' And I asked her 'Oh, were you involved in that? Do you know about this yourself?' And she said 'No, no, this is just a story that I have heard,' and then she left." The airline admitted that the named flight attendant was on the flight of the television producer, as well as on the flight that Erna and the girls were on. *Id.*

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.*

mit to the jury.⁹⁰ In response, the court noted that under New York law, a plaintiff must demonstrate both that the defendant owed the plaintiff a duty of care and breached that duty in order to establish a negligence claim.⁹¹ The court found that the airline did not owe a duty of care to Frederick since his relationship to the airline was as a member of the general public and no "special relationship" existed between Frederick and Icelandair.⁹² The court did acknowledge the fact that Icelandair owed duties of care to Elizabeth since she was a passenger, but concluded that:

[W]e have seen no authority for the proposition that a common carrier has a duty—either generally or based on oral representations—to ensure that a minor traveling with a custodial parent is not being transported in violation of a court order. As discussed in [previous portion of the opinion] above, the telephone calls by Grayson to Icelandair's Orlando and Baltimore-Washington offices were insufficient.⁹³

With that final statement, the Second Circuit concluded that the district court's dismissal of the case as a matter of law was proper, finding that the arguments presented by the plaintiffs on appeal offered no basis for reversal.⁹⁴

On June 4, 1999, Frederick Pittman filed a petition for certiorari with the U.S. Supreme Court contending that the jury verdict in his favor for Icelandair's "deliberate interference with the parent-child relationship" should not have been overturned by the district court and the Second Circuit.⁹⁵ Pittman argued that the airline was a knowing participant in the wrongful removal of his daughter.⁹⁶ He also asserted that the lower courts erred in their conclusion "that a carrier is *required* to transport a paying passenger, even if the name on the ticket does not match the

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *Pittman*, 149 F.3d at 125. By way of example, the court cited the case of *Johnson v. Jamaica*, 467 N.E.2d 502 (N.Y. 1984). In *Johnson*, a couple sued a hospital for negligent infliction of emotional distress after their daughter was abducted from the hospital nursery. The New York Court of Appeals found that there was no direct duty on the part of the hospital to the parents to prevent the child's abduction.

⁹³ *Pittman*, 149 F.3d at 125.

⁹⁴ See *id.*

⁹⁵ *Plaintiff Seeks High Court Review on 'Parental Rights' Verdict*, 17 No. 3 ANDREWS AVIATION LITIG. REP., July 13, 1999; see also *Pittman v. Icelandair Inc.*, 149 F.3d 111 (2d Cir. 1998), *petition for cert. filed*, 67 USLW 3758 (U.S. June 4, 1999) (No. 98-1940).

⁹⁶ See *id.*

passport or other identification, and even with other indications that a surreptitious and possibly illegal departure is being attempted.”⁹⁷ Pittman further stated that:

This novel and remarkable doctrine of law—used in this case to upset a substantial jury verdict in favor of a father and a daughter who, in violation of explicit court orders, have been illegally cut off from any contact with each other—is directly contrary to federal aviation law, which negates any such duty.⁹⁸

Despite Pittman’s further arguments that the ruling of the courts “endangers international air travel” and assists “parental abductions in violation of federal law and international treaties” the U.S. Supreme Court denied Pittman’s petition for certiorari on October 4, 1999.⁹⁹

IV. RELATED CASE LAW

As noted in the Introduction, there has been little analysis of the issue of a common carrier’s liability in situations where abducted children are wrongfully removed in violation of court orders. I have focused on the *Pittman* case because it is so unique and because it deals specifically with the liability of airlines, which appear to be the most accessible, easiest, and quickest mode of international transportation. Research has failed to turn up anything close to the situation found in *Pittman*, although international parental abductions have become a growing epidemic, with most of these children being transported overseas by way of airplanes.¹⁰⁰

One other case also touches on the issue of liability of common carriers for interference with child custody as in *Pittman*, only in a domestic setting. *Hyatt v. Trans World Airlines, Inc.* deals with the failure of TWA to comply with an “Unaccompanied Minor Child Care Services Request.”¹⁰¹ In *Hyatt*, Anthony Anderson purchased two tickets for his children to fly from the home of his ex-wife Tina Marie Hyatt in Florida to St. Louis where he and his wife lived. He notified the airlines that he

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*; see also 120 S. Ct. 59 (1999).

¹⁰⁰ See, e.g., Apy, *supra* note 2; Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief – Can Something More Be Done?*, 8 N.Y. INT’L L. REV. 95 (1995); Susan Kreston, *International Parental Kidnapping*, 32 APR PROSECUTOR 20 March/April (1998).

¹⁰¹ 943 S.W.2d 292 (Mo. Ct. App. 1997).

would pick up the children from the airport.¹⁰² The flight was arranged so that the children would be arriving in St. Louis on December 18, 1992.

Tina Marie modified the flight arrangements, taking the children out of school early, and without notification to Anthony, paid TWA an additional \$50.00 to change the children's flight so that they would arrive in St. Louis on December 16. Tina Marie filled out an "Unaccompanied Minor Child Care Service Request" form authorizing the airline to release the children to their grandfather, Frank Porzenski. Anthony became aware of the change in the children's flight and met the children at the airport accompanied by his wife and two St. Louis police officers. The police officers turned the children over to their father Anthony, and not to their grandfather.

Tina Marie and her father Porzenski sued TWA, Anthony, Anthony's wife Mary Anderson, the City of St. Louis, and the two police officers for fraud, breach of contract, intentional infliction of emotional distress, false imprisonment, and tortious interference with contract.¹⁰³ TWA moved to dismiss the fraud¹⁰⁴ claim for failure to state a claim. The trial court granted TWA's motion to dismiss the fraud claim and also granted a motion for summary judgment in favor of TWA on Tina Marie's breach of contract claim.¹⁰⁵ The trial court granted Anthony and his wife Mary's motions for summary judgment on the claims for tortious interference with contract and intentional infliction of emotional distress.¹⁰⁶ The trial court also granted summary judgment in favor of the City and the two police officers on the claim of false imprisonment.¹⁰⁷

Tina Marie and her father appealed the trial court's ruling. First, they contended that the trial court erred in granting TWA's motion to dismiss the fraud claim. In her petition to the trial court, Tina Marie alleged that she purchased two tickets

¹⁰² According to the parent's dissolution decree, the children were to spend the entire Christmas break with their father. *Id.* at 294.

¹⁰³ Specifically, Tina Marie brought claims of fraud and breach of contract against TWA and claims of tortious interference with contract against the two police officers and Anthony Anderson and his wife. Tina Marie and Porzenski sought damages from the City of St. Louis and the two police officers for false imprisonment and sought damages for intentional infliction of emotional distress from Anthony and his wife. *See Hyatt*, 943 S.W.2d at 292, 294-95.

¹⁰⁴ This included related punitive damage claims. *See Hyatt*, 943 S.W.2d at 295.

¹⁰⁵ *See id.*

¹⁰⁶ This included a dismissal of related punitive damages claims. *See id.*

¹⁰⁷ This included a dismissal of related punitive damages claims. *See id.*

from TWA and that the airline agreed that children would only be permitted to leave the gate with their grandfather Porzen-ski.¹⁰⁸ Further allegations in Tina Marie's petition included:

That at the time of entering into the aforementioned contract, [TWA's] agents and employees made certain statements to [mother] of a material nature, to wit:

a. That [TWA] would only release the minor children to the person or persons identified on the contract entered into between the parties.

b. That [TWA] would require the individual to present a photo I.D. to confirm their identity before releasing the minor children.¹⁰⁹

The Missouri Court of Appeals, upon a review of the elements of fraud,¹¹⁰ found that the trial court did not err in dismissing Tina Marie's claim of fraud against TWA.¹¹¹ They found that Tina Marie's petition did not plead facts to establish that the representation made by TWA was false at the time it was made or that TWA intended at the time the airline made the representation to act inconsistently with its representation. Further, the court found that the airline's statements were not "misrepresentations of then existing fact" because the facts pleaded did not "indicate the falsity of TWA's representations *at the time they were made*."¹¹² The court stated that "at best" the statements made by TWA could be considered a promise, and there was no cause of action for fraud created by the breach of a promise.¹¹³

In a second point of error, Tina Marie contended that the trial court erred by granting TWA's motion for summary judgment on her claim against the airline for breach of contract.¹¹⁴ She argued that there was a genuine issue of material fact con-

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ The court listed the elements of fraud as "(1) a representation, (2) the falsity of the representation, (3) the materiality of the representation, (4) the speaker's knowledge of the falsity of the representation or ignorance of its truth, (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of the falsity of the representation, (7) the hearer's reliance on the truth of the representation, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximately caused injury." *Id.* (citing *Empire Bank v. Walnut Prod., Inc.*, 752 S.W.2d 404, 406 (Mo. Ct. App. 1988)).

¹¹¹ See *Hyatt*, 943 S.W.2d at 296.

¹¹² *Id.* at 295.

¹¹³ See *id.*

¹¹⁴ See *id.* at 296.

cerning whether a contract existed between her and the airline under which the airline had agreed to turn over custody of the children to their grandfather Porzenski at the gate upon their arrival in St. Louis.¹¹⁵ Reviewing the elements of a contract,¹¹⁶ the court noted Tina Marie's contention that legal consideration, mutuality of agreement, and mutuality of obligation were the only elements at issue related to validity of the contract.

Upon reviewing Tina Marie's second point of contention, the court found that there had been no dispute before the trial court as to who purchased the original tickets for the children's travel from St. Louis to Florida since Tina Marie admitted that she had not purchased these tickets. As a result, the contract was between Anthony and TWA since he provided consideration for the ticket and informed the airline that he was the only person to whom the airline should release the children upon their arrival in St. Louis. Tina Marie, therefore, was not a party to this contract.¹¹⁷

Tina Marie's argument on appeal was that a separate agreement existed with TWA concerning the release of custody of the children because of the \$50.00 she paid the airline to change the children's flight arrangements. The court noted that Tina Marie did not originally plead evidence of a separate contract, but in fact at first alleged that she was the original purchaser of the tickets from TWA. Looking to Tina Marie's deposition testimony, the court also found that she indicated that she understood the purchase to be only for a change in the departure date of the children's flight. As a result, no issues of material fact existed as to whether there was a separate contract between Tina Marie and the airline, so the trial court properly granted summary judgment in favor of TWA.¹¹⁸

In light of this, the court summarily dismissed Tina Marie's third point of contention—that the trial court erred in granting Mary Anderson's motion for summary judgment on Tina Marie's claim of tortious interference with her contract with TWA. An essential element of tortious interference with a contract is the existence of a contract, the breach of which is caused

¹¹⁵ See *id.*

¹¹⁶ The court listed the elements as "(1) competency of the parties to contract; (2) subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Id.* (citing *Shapiro v. Butterfield*, 921 S.W.2d 649, 652 (Mo. Ct. App. 1996)).

¹¹⁷ See *Hyatt*, 943 S.W.2d at 296.

¹¹⁸ See *id.* at 296-7.

by the defendant's interference. This element could not be established since the court had already found that no contract existed between Tina Marie and TWA.¹¹⁹

Tina Marie and Porzenski next asserted that the trial court erred by granting Mary Anderson summary judgment on the claim of intentional infliction of emotional distress.¹²⁰ The court noted that Missouri recognizes the tort of intentional infliction of emotional distress¹²¹ and that the plaintiffs asserted on appeal that the standard for negligent infliction of emotional distress¹²² in Missouri had been incorrectly expanded to encompass cases addressing intentional infliction of emotional distress.¹²³ The court decided not to address the plaintiffs' argument on this point, focusing instead on whether Tina Marie and Porzenski established a claim for intentional infliction of emotional distress, specifically, whether "extreme and outrageous" conduct on the part of Mary Anderson was demonstrated.¹²⁴

The allegations made by both plaintiffs against Mary Anderson were as follows:

That on or about December 16, 1992, Defendant, Mary Anderson, did intentionally seize and take custody of the minor children from Lambert Field when [she] had no entitlement to do so.

¹¹⁹ See *id.* at 297. While this claim was also brought against the father, Anthony Anderson, the plaintiffs did not pursue it or any of their other claims against him on appeal since he was discharged in bankruptcy.

¹²⁰ See *id.*

¹²¹ The court listed the four elements of intentional infliction of emotional distress as: "(1) the defendant must act intentionally or recklessly; (2) the defendant's conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe emotional distress." *Id.* (citing *Boes v. Deschu*, 768 S.W.2d 205, 207 (Mo. Ct. App. 1989)).

¹²² This standard was established by *Bass v. Nooney Co.*, and requires that emotional distress "must be of sufficient severity so as to be medically significant" to establish a cause of action for negligent infliction of emotional distress. See *Hyatt*, 943 S.W.2d at 297 (quoting *Bass v. Nooney Co.*, 646 S.W.2d 765, 772 (Mo. 1983)). It seems that this standard was often construed by the courts to dismiss claims where medical treatment was not sought by the plaintiff on the basis that they did not satisfy the "medically significant" standard. See *Hyatt*, 943 S.W.2d at 297.

¹²³ See *Hyatt*, 943 S.W.2d at 297.

¹²⁴ See *Hyatt*, 943 S.W.2d at 297-8. The court defined the test for "extreme and outrageous" conduct as conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 298 (quoting *Rooney v. National Super Markets Inc.*, 668 S.W.2d 649, 651 (Mo. Ct. App. 1984)).

That after obtaining custody of the minor children from the airport . . . , Mary Anderson, then took the minor children to whereabouts unknown to Plaintiff and further prevented Plaintiff or anyone in Plaintiff's family from contacting the minor children for three weeks.¹²⁵

The court looked to these allegations and found that the plaintiffs' pleadings lacked the essential "extreme and outrageous" element.¹²⁶ Even if the plaintiffs had pleaded the element, the court concluded that the conduct described within the facts of the pleading would not qualify as "extreme and outrageous."¹²⁷ Therefore, the court ruled that the plaintiffs did not establish the elements for intentional infliction of emotional distress, and as a result the trial court's granting of Mary Anderson's motion for summary judgment was proper.¹²⁸

Tina Marie's and Porzenski's final contention on appeal was that the trial court erred in granting the motion for summary judgment presented by the police officers and the city of St. Louis.¹²⁹ The relevant claims were Tina Marie's allegations against the police officers for tortious interference with her contract with TWA, claims made by Tina Marie on behalf of the children for false imprisonment against the police officers and the city, and Porenski's charge against the police officers and the city for false imprisonment.¹³⁰ In accordance with the court's prior ruling that no contract existed between Tina Marie and TWA, the court found the granting of summary judgment in favor of the city and police officers on the tortious interference with a contract claim proper.¹³¹

Turning to the false imprisonment claim¹³² raised by Porzenski against the police officers and the City of St. Louis, the court found that while the police officers had Porzenski remain in the airport waiting area and prevented him from speaking with or approaching the children until they were in their father's cus-

¹²⁵ *Hyatt*, 943 S.W.2d at 298.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See Hyatt*, 943 S.W.2d at 298.

¹³² The court defined false imprisonment as occurring "when the plaintiff is confined by the wrongdoer without legal justification" and the elements consisting of "the detention or restraint of the plaintiff against his or her will and the unlawfulness of the detention or restraint." *Id.* at 299 (citing *Desai v. SSM Health Care*, 865 S.W.2d 833, 836 (Mo. Ct. App. 1993)).

today, they did not employ any physical force or threaten Porzenski.¹³³ In order to qualify as false imprisonment, the court reasoned that Porzenski must establish that he was completely restrained and not just prevented from going wherever he wanted to go.¹³⁴ Since Porzenski was permitted to have contact with the children after they were in their father's custody, and because the police were there solely as peace keeping agents, the court found that Porzenski's restraint was not complete and therefore did not qualify as false imprisonment.¹³⁵

Evaluating Tina Marie's claim of false imprisonment on behalf of the children, the court stated that in order for a cause of action to be established, the children would have had to be restrained without legal justification.¹³⁶ Since the children were placed in the care of their father, in accordance with Tina Marie's and Anthony's dissolution decree indicating Anthony had custody at that time, the court found that the actions of the police were legally justified.¹³⁷ Since Tina Marie could not recover against the police officers, she was prevented from recovering against the City of St. Louis since her cause of action was based on respondeat superior.¹³⁸ Therefore, the court found that the trial court properly granted summary judgment in favor of the police and the city of St. Louis on Tina Marie's claims of false imprisonment.¹³⁹ With this final ruling, the judgment of the trial court was affirmed on all of the plaintiffs' points of error.¹⁴⁰

Hyatt serves as a good example of the difficulty of maintaining a cause of action involving interference with child custody rights. While the fact situation differs from that presented in *Pittman*, it illustrates the difficulty and complications involved in ensuring and asserting child custody rights even in a domestic forum. Despite the mother's completion of the "Unaccompanied Minor Child Care Service Request" form, the father was still able to assert custody of the children, and the airline allowed them to be removed in spite of the mother's request. While local police were present in this situation, one must ques-

¹³³ See *Hyatt*, 943 S.W.2d at 299.

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *Hyatt*, 943 S.W.2d at 299.

¹³⁹ See *id.*

¹⁴⁰ See *id.*

tion whether the father did actually have custody of the children at that time. After all, they were removed from school early so that they were able to fly to St. Louis early and visit with their grandfather. The father's custodial rights did not occur until Christmas Break. In any event, it is evident from the case that child custody issues are complicated, and while they are difficult to manage from state to state, the degree of difficulty and chance of not recovering custody of the children only increases when dealing with international situations. *Hyatt* drives home the point that is certainly demonstrated by *Pittman*—guidelines and remedies are needed for handling situations where airlines are involved with the interference with child custody rights. The following section will revisit *Pittman* and the legal issues raised at each stage of the proceedings, with an examination of the implications of decisions such as *Pittman* and *Hyatt* in situations where a child is wrongfully removed from a parent's custody and an airline stands as a possible party to the abduction.

V. WHY THE COURTS IN *PITTMAN* WERE WRONG

A. THE DISTRICT COURT

1. *The Role of the Factfinder*

In its decision to overturn the jury's verdict in favor of Frederick Pittman, the court acknowledged on numerous occasions that various facts could give rise to the inference that Olav Ellerup knew he was aware that he was violating a court order by assisting Erna out of the country with the children.¹⁴¹ These include:

(1) Olav Ellerup allowing Erna and the children to leave when the names on the tickets, passports, and reservations all differed;

(2) Ellerup's falsification of the weight and balance codes, so that it appeared that a male, female, and a child were traveling instead of a woman and two children;

(3) that Ellerup lied at trial, denying that he processed Erna and the children at Kennedy National Airport; and

(4) the evidence that Erna's father was well known by and well connected to Icelandair.

According to the court, there were two things that had to be established in order to find Icelandair liable through the actions

¹⁴¹ See *Pittman v. Grayson*, No. 93 CIV. 3974 JSM, 1997 WL 370331 (S.D.N.Y. July 2, 1997).

of its employee in the aiding and abetting of Erna in depriving Frederick Pittman's legal right to custody of his child. These requirements included: "(1) that [Ellerup] was aware of the wrongful nature of [Erna's] conduct and (2) that [Ellerup] performed some act to further that unlawful purpose."¹⁴² Despite the evidence presented, the court concluded that this was still not enough to establish that Ellerup knew Erna was trying to leave the country undetected so as to remove her children from their father's legal custody.¹⁴³ What is most disturbing about the court's action is not that it disregarded findings and inferences it conceded the jury could have made, but that the court proceeded to place itself in the role of the factfinder, displacing the role of the jury. According to the Federal Rules of Civil Procedure and the U.S. Supreme Court, "[f]indings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility."¹⁴⁴ "Rule 52 (a) applies to findings of fact, including those described as 'ultimate facts' because they may determine the outcome of the litigation."¹⁴⁵ The findings of fact that were made by the jury in *Pittman* appear to be "ultimate facts" upon which the outcome of the trial rested and which presumably should be subjected to a clearly erroneous standard.

The court went so far as to come up with other possible inferences, almost excuses, as to why Ellerup could have behaved in the manner that he did. The court brought up the fact that Ellerup may have thought that he was acting as a "Good Samaritan," rescuing Erna from an abusive situation and therefore ignoring the inconsistency in the names on the passports, tickets, and reservations.¹⁴⁶ Yet in raising this inference the court fails to point to any evidence presented (or even any arguments made) that support this conclusion. The court ignores the surrounding circumstances that support the conclusion that the jury ultimately reached—that Ellerup was aware of his participation in a conspiracy to transport the children against court orders. Why else do it so surreptitiously?

The court also speculated as to why Ellerup may have lied on the stand when he denied that he was the one who processed

¹⁴² See *id.* at *4.

¹⁴³ See *id.*

¹⁴⁴ FED. R. CIV. P. 52 (a); see also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498 (1984).

¹⁴⁵ *Bose*, 466 U.S. at 501.

¹⁴⁶ See *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *5.

Erna and the children, finding that "there are a number of reasons that might cause [Ellerup] to lie, even though his conduct . . . was entirely blameless."¹⁴⁷ Once again, the court does not point to any evidence or arguments supporting its conclusion that Ellerup may not have lied to cover up his involvement in knowingly aiding Erna in her covert abduction of the children. Instead of allowing the jury to determine Ellerup's credibility, the court dismissed the inference made by the factfinder and found that because there are possible alternate reasons behind Ellerup's actions, a credibility determination cannot be made one way or the other. As Frederick Pittman argued, the court truly did "impermissibly [invade] the exclusive province of the jury to select among competing, reasonable inferences, by substituting its view of the matter for that of the jury."¹⁴⁸

2. *The Jury Charge*

The court observed that the jury charge would have been appropriate if it had read that to find Icelandair liable, the jury "must find that Icelandair had no right to take Elizabeth to Iceland and that by some wrongful acts of its own aided or assisted her in removing the child from the United States."¹⁴⁹ The court ruled inappropriate the section of the jury charge instructing that if Icelandair had notice of the court order, it would be wrongful for the airline to transport the child,¹⁵⁰ acknowledging that notice alone was not a basis to find the airline liable.¹⁵¹ However, the section of the jury charge deemed appropriate by the court would appear to support the jury's finding. It is not focused on whether Icelandair had actual notice (as a result of Grayson's phone calls), but instead on whether Ellerup knew that Erna had no right to take Elizabeth to Iceland, and whether he committed a wrongful act (ignoring the discrepancies in the names, altering the weight and balance codes, and secretly boarding the girls through an alternate entrance). While a portion of the jury charge may be inappropriate as a result of its reference to actual knowledge of the airline,¹⁵² the appropriate

¹⁴⁷ *See id.*

¹⁴⁸ *Plaintiffs Say Judge Erred in Vacating Verdict on Child Custody Conspiracy*, 1997 ANDREWS AVIATION LITIG. REP. 25228, November 11, 1997.

¹⁴⁹ *See Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *2.

¹⁵⁰ *See supra* Part II.B.

¹⁵¹ *See Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *2.

¹⁵² The "inappropriateness" of this is also questionable, and will be further discussed in the next section.

section of the jury charge alone could still support a finding in favor of the plaintiffs. Thus, rendering a new trial would seem to be a more appropriate remedy than granting Icelandair's motion for judgment as a matter of law.

3. *The Knowledge and Duty to Transport Required of Icelandair*

In its discussion of the jury charge, the court mentioned that even if Icelandair had knowledge that a court order existed explicitly preventing Erna from taking the children to Iceland, this would not be enough to provide a basis for imposing liability on the airline.¹⁵³ The court then discussed how an airline is a common carrier and therefore must transport all those who seek its services. The court distinguished airlines from third parties who assist parents in the wrongful abduction of their children from the parent who holds legal custody.¹⁵⁴ The court considered other third parties to be acting out of gratuity, whereas Icelandair was bound to transport Erna and the children.¹⁵⁵ The court noted that an airline does, however, have the right to refuse transportation to an individual who may pose a risk to himself or to fellow passengers.¹⁵⁶ The court went so far as to state that it "should not lightly impose a duty on an airline to refuse to transport a passenger who can pay for a ticket."¹⁵⁷

The court did not consider the fact that while an airline cannot turn away passengers indiscriminately, it can turn them away if they have a legal basis for doing so, especially if the passenger is considered a security risk.¹⁵⁸ While most statutory provisions regarding security measures are focused on threats posed by hijackers or terrorists,¹⁵⁹ arguably Erna's ability to travel in spite of

¹⁵³ See *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331 at *2.

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at *3.

¹⁵⁸ See e.g., 8A AM. JUR. 2D *Aviation* §73 (1999) (addressing security measures for screening passengers and removing passengers who are a perceived security risk, stating in part that a removed passenger would not have a cause of action "even if the passengers were not in fact a risk, as long as the airline had well founded suspicions." While the airline is required to act reasonable when removing a passenger, "[r]easonableness is to be tested on the information available to the airline at the moment a decision is required and *does not include a duty to conduct an in-depth investigation.*") (emphasis added). See *id.*

¹⁵⁹ See, e.g., 49 U.S.C.A. § 44904 (West 2000) (outlining security requirements for assessing threats and assessing security); Wendy Giebler, *Reclaiming the Skies From Terrorism: The Aviation Security Improvement Act of 1990*, 16 SETON HALL LEGIS. J. 757 (1992); Laurie M. Mcquade, *Tragedy as a Catalyst for Reform: the American*

erroneous and inconsistent documentation posed a risk to the security of the flight. A suspicion that a child is wrongfully being transported against a court order should be sufficient reason alone to refuse transport, considering the fact that the child is a passenger whose safety must be ensured. Inconsistent documentation should most assuredly qualify as a "reasonable" reason for refusing transport to a passenger. While the court proffers that Erna could have been fleeing an abusive home, it does not consider the fact that allowing such a reason to serve as an excuse for allowing a passenger, especially a passenger traveling with minor children, can have dangerous ramifications. Erna could have been a stranger who had kidnapped the children and was trying to flee the country by way of the airline. The potential threat of a child's safety or well-being, and the possibility that a court order is being violated, should serve as a reasonable legal basis for refusing transport to a passenger—regardless of whether that individual has paid for his or her ticket. The court overlooks the safety of the children as fellow passengers, as well as the potential volatile situation that could arise from allowing individuals to board airplanes in spite of the possibility that they are fleeing the country against a court order.

B. THE SECOND CIRCUIT

1. *The Issue of Notice*

The first issue the court addressed in its opinion was the issue of notification. But the court's opinion leaves unclear how much notification is enough to impute knowledge to the airline. As the Second Circuit noted:

The [district] court found that while there was sufficient evidence to establish that Icelandair, through its agent Ellerup, had knowingly assisted Erna in her attempt to leave the country surreptitiously, the evidence was not sufficient to establish that Ellerup was aware that Erna's conduct violated Frederick's custody rights or a court order restricting her travel with Elizabeth.¹⁶⁰

The court seemingly states that in order for Icelandair to have "knowledge," Ellerup or Icelandair needed to have actual knowledge that they were violating a specific court order forbidding

Way?, 11 CONN. J. INT'L L. 325 (1996) (examining security regulations in the United States and internationally, specifically in the aftermath of the Lockerbie tragedy).

¹⁶⁰ *Pittman*, 149 F.3d at 117.

that specific act. While the opinion tells us that the phone calls may have sufficed to establish knowledge on behalf of the airline had Grayson made them to the New York office instead of the Orlando and Baltimore offices, it does not tell us what would have established knowledge on the part of Ellerup. It appears that this determination would have been made by the jury upon evaluation of Ellerup's actions and the surrounding facts, but as previously noted, the credibility determinations and inferences made by the jury were subsequently disregarded by the district court.

Is it not enough that Ellerup disregarded company policy, that he altered the weight and balance codes, that he lied on the stand about his involvement, and that there was a strong relationship between Erna's father and the airline? Apparently not. So what more would it take? A statement by Ellerup that he was aware in fact of the court order? Perhaps a statement to the same effect by one of the flight attendants who "fawned" over Erna and the girls during their flight would suffice (this probably would not be sufficient since the flight attendant's statements supporting Pittman's claims were excluded from evidence at trial). Realistically speaking, the chances that such evidence would ever be available in this type of case are slim. There appears to be no standard established as to what would constitute sufficient notice, making it almost impossible to gauge whether a successful cause of action would ever be possible.

This is not a situation where the unwary customer holds the door open for a departing individual as he makes his way into the bank, only to learn later that the individual had just robbed the bank and was fleeing the scene of the crime. In that instance we would not think of holding the customer liable under a concerted action liability theory for facilitating the bank robber's escape. But that is not the situation presented here. One can imagine that Icelandair and Ellerup were aware of why Erna needed to flee the country so secretively—because she had lost custody of her children and wanted to take them to Iceland where she would find a favorable court system (as evidenced by the Supreme Court of Iceland awarding her custody and all but ignoring the court orders in the United States). Even if it was believed that Erna was a battered wife trying to escape her husband (an argument never made at trial and first introduced by the district court judge in his set aside of the jury's verdict), this would still render her actions illegal. Unless the airline or El-

lerup were aware that Erna in fact had full custody of the children, then any travel to Iceland in which it was apparent that she was trying to escape detection would fall under the premise of illegal activity, and would establish concerted action liability on the part of Icelandair. The requirement calls for knowledge of wrongdoing—not knowledge of the specific nature of the wrongdoing. It is reasonable to conclude that the airline and possibly Ellerup knew they were participating in aiding Erna in her wrongdoing (the inconsistent documentation and secretive nature of the departure would indicate this), even if they were not aware of the specific court order.

It is also interesting to note that Ellerup altered the weight and balance codes to disguise Erna and the girls so that it appeared that a women, man, and child were traveling. But who would use this information to detect Erna's travel? Presumably it would not be an abusive ex-husband (it is doubtful that he would have access to this information), but in fact it would be law enforcement officials. Why try to hide Erna's actions from law enforcement officials if Ellerup and the airline were not aware of the wrongful nature of Erna's conduct?

The court also spoke to what Grayson failed to do when he attempted to notify the airline that he suspected his ex-wife was trying to flee the country with the children against court orders.¹⁶¹ The court criticized Grayson for only calling the Baltimore-Washington and Orlando offices, implying that a call to the New York offices of the airline and a request to speak to higher ranking officials would have provided more of a basis for finding knowledge on the part of the airline.¹⁶² But why the New York offices? It seems logical that he would contact the Orlando office since it was probable that Erna would have made her flight arrangements through the Florida branch of the airline. As for the call made to the Baltimore-Washington office, according to the airline's web site, Baltimore is the North American Headquarters for Icelandair.¹⁶³ Consequently, the headquarters for the airline would appear to be the proper place to call, not the New York office. Although while the court criticized Grayson for not asking to speak to high ranking officials, one has to wonder why those employees with whom he did

¹⁶¹ See *id.* at 123.

¹⁶² See *id.*

¹⁶³ See *Icelandair Offices & Agents in North America*, (visited Feb. 19, 2000) <www.icelandair.com> (other offices in North America include Boston, Ft. Lauderdale, New York, and Halifax).

speaker did not forward his phone call on to a more senior officer of the company, or at least instruct Grayson as to what was necessary in order for the airline to take any action on Grayson's claim. Yet there is no indication that these actions were taken by the airline. And if these actions had been taken would that qualify as notice on the part of the airline? Presumably, Grayson did not jump through enough hoops, or even the right ones for that matter, to ensure that proper notification was received by the airline and that the children were not wrongfully taken by Erna to Iceland.

2. *The Dismissal of the Negligence Claims*

As Frederick Pittman argued, a negligence charge should have been given to the jury "because Icelandair's conduct was an extreme departure from its own rules and airline industry norms."¹⁶⁴ While this claim was dismissed because the court felt that the airline owed no duty of care to Frederick since he was only a member of the general public,¹⁶⁵ the court recognized that the airline did owe some duty of care to Elizabeth as a passenger, but refused to recognize that such a duty included ensuring that a minor was traveling with a custodial parent.¹⁶⁶ Arguably, the court misconstrued the issue. It is not whether the airline had a duty to ensure that the children were traveling with a custodial parent, and were not being transported against a court order, but whether the airline had a duty not to facilitate the illegal travel. Icelandair made a departure from its own company policy both in the boarding of Erna and the children even though the names on their *non-transferable* tickets did not match the names on their reservations or their passports, and in altering the weight and balance codes. In doing this, Icelandair did more than simply fail to ensure that the children were not traveling against a court order; they facilitated the illegal act. According to Section 448 of the Restatement Second of Torts:

The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent

¹⁶⁴ See *Plaintiffs Say Judge Erred in Vacating Verdict on Child Custody Conspiracy*, 1997 ANDREWS AVIATION LITIG. REP. 25228, November 11, 1997.

¹⁶⁵ See *Pittman*, 149 F.3d at 125.

¹⁶⁶ See *id.*

conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.¹⁶⁷

Allowing someone to travel with improper documentation and altering documents that would allow a passenger to escape detection creates a situation where a "third person," in this case Erna, could avail herself of the situation to commit a tort or a crime. According to the comments accompanying Section 448, the rule "applies when the actor's conduct creates a situation which is utilized by a third person to inflict intentional harm upon another or provides a temptation to do so to which the third person yields, but the actor has no reason to expect that the third person would so act."¹⁶⁸

The comments to Section 448 goes on further to find that:

[I]t is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation that would likely lead to its commission.

This is true although the likelihood that such a crime would be committed might not be of itself enough to make the actor's conduct negligent, and the negligent character of the act arises from the fact that it involves other risks which of themselves are enough to make it unreasonable, or from such risks together with the possibility of crime.¹⁶⁹

So while Icelandair may not owe an affirmative duty to either Pittman or the children in the sense that it did not have a duty to ensure that a court order was not violated by the girls' travel, there seemingly exists a duty not to facilitate, through gross disregard of established company policy, the criminal conduct of a third person. This seems even more obvious in an analogous case cited by the court where the court found that a hospital did not owe any direct duty to parents whose infant was abducted from the hospital nursery—an outcome that appears even more absurd.¹⁷⁰ In *Pittman*, the facts lend themselves to an even stronger claim than mere negligence when considering the deliberate and intentional nature of Ellerup's actions. Taking into account Section 448, it is conceivable that Pittman may have a

¹⁶⁷ RESTATEMENT (SECOND) OF TORTS § 448 (1965).

¹⁶⁸ RESTATEMENT (SECOND) OF TORTS § 448 cmt. a (1965).

¹⁶⁹ RESTATEMENT (SECOND) OF TORTS § 448 cmt. c (1965).

¹⁷⁰ See *Johnson v. Jamaica Hospital*, 467 N.E.2d 502 (N.Y. 1984).

stronger argument than his daughter Elizabeth for a claim of negligence against the airline, even though Elizabeth was a passenger.

While an airline may not have the narrowly construed duty "to ensure that a minor traveling with a custodial parent is not being transported in violation of a court order," at a minimum there is a duty to ensure the safety of a passenger.¹⁷¹ As a common carrier, an airline "owes both a duty of utmost care and the vigilance of a very cautious person towards [its] passengers."¹⁷² Violation of federal safety regulations often constitute some form of negligence: either negligence per se, negligence as a matter of law, a presumption of negligence, or at the very least, evidence of negligence.¹⁷³ As a passenger, the airline had a duty to ensure that Elizabeth was afforded the protection of safety and security procedures, and not to create an opportunity that would place Elizabeth in danger. In a situation such as *Pittman*, where there is in fact a gross deviation from standing operating procedures and policies, the safety of all passengers, not just those directly affected, are put at risk.

VI. THE IMPLICATIONS OF *PITTMAN*

A reading of the series of decisions in *Pittman*, as well as the *Hyatt* decision, leads to the conclusion that the courts were trying to do one thing and one thing only—avoid imposing any duty or responsibility on airlines in situations involving child custody issues. In doing so the courts overlooked what effect this would have on issues of safety and security in the aviation industry, as well as what this would mean for parents who stand to lose their children to international and possibly even domestic abductions. The next section will examine what decisions like *Pittman* and *Hyatt* mean when applied in the context of the real world.

A. SAFETY AND SECURITY ISSUES

The district court referred to the fact that Erna was permitted to travel despite the variances in the names on the tickets, reservations, and passports, and also acknowledged that Ellerup falsified the weight and balance codes.¹⁷⁴ But in doing so the court

¹⁷¹ *Pittman*, 149 F.3d at 125.

¹⁷² *Andrews v. United Airlines, Inc.*, 24 F.3d 39, 40 (9th Cir. 1994). See also 8A AM. JUR. 2D *Aviation* § 118 (1997).

¹⁷³ See 8A AM. JUR. 2D *Aviation* § 114 (1997).

¹⁷⁴ See *Pittman*, No. 93 CIV. 3974 JSM, 1997 WL 370331, at *5.

only addressed the possibility that Ellerup believed he was a “good samaritan,” overlooking the safety and security issues involved in Erna’s and Ellerup’s actions.¹⁷⁵ It begs the question of whether an agent responsible for processing passengers and enforcing airline policies can make a determination as to whether that policy can be violated because the possibility exists that the passenger has a good reason for the inconsistent paperwork and identification.

FAA regulations address falsifications made by individuals responsible for airplane security, including that:

No person may make, or cause to be made any of the following:

(b) Any fraudulent or intentionally *false entry in any record or report that is kept, made, or used to show compliance with this part, or to exercise any privileges* under this part.

(c) Any reproduction or alteration, *for fraudulent purpose, of any report, record, security program, access medium, or identification medium issued under this part.*¹⁷⁶

Presumably, Ellerup’s actions fall under this provision of the FAA regulations because he altered the weight and balance codes that were kept in part as a security measure, and that would have served as a useful tool for law enforcement agents to locate Erna and the children. This is all but overlooked by the courts in their discussion of both the notification element of concerted action liability and the negligence claims. The courts appeared to almost approve of Ellerup’s actions when they referred to him as a possible “good samaritan.” Had this been an instance where a dangerous criminal or a suspected drug dealer were allowed to leave the country under such conditions, one can imagine that the courts would not have come so quickly to the rescue of Ellerup. Presumably there would be some discussion of the danger that was created from such a gross deviation from safety and security regulations, and one in which law enforcement officials’ efforts are possibly thwarted through the alteration of weight and balance codes.

As a common carrier, an airline is “under the duty to exercise either a high or *the highest degree* of care for the safety of its passengers.”¹⁷⁷ But the scope of safety and security provisions is

¹⁷⁵ See *id.*

¹⁷⁶ 14 C.F.R. § 108.4 (2000) (emphasis added).

¹⁷⁷ 8A AM. JUR. 2D § 118 (1997) (emphasis added) (noting, however, that in New York, common carriers owe a duty to exercise reasonable care for the safety

narrowly drawn, focusing mainly on preventing terrorist activity aboard airlines, and preventing airline crashes.¹⁷⁸ Undoubtedly, the checking of identification, and ensuring that names match on passports, tickets, and reservations, is an important step in preventing security risks from occurring, just as are measures ensuring that passengers have not left their bags unaccompanied, or requiring all passengers to pass through metal detectors. So why did the court treat this departure from airline policy so lightly? It is possible that when considering safety and security, the focus is on hijackers and terrorists, and not abductions of children, especially those involving abductions by a non-custodial parent. This may explain why in the court's discussion of the scope of an airline's ability to refuse transport to a passenger, although the exception is based on allowing airlines to refuse transport only when there is a legal excuse, the focus remains on refusing to transport only passengers who pose a threat of committing a criminal act (most likely one involving physical violence) on board the aircraft.¹⁷⁹

It is dangerous to limit these security measures to just those passengers who pose a possible physical threat to other passengers or the operation of the aircraft. By allowing those responsible for enforcing security measures to waive standards on the belief that they are acting as a "good samaritan," the court opens the door to airlines serving as a vehicle, and in a sense an escape device, to those seeking to commit other types of crimes and needing transportation from an airline as a means to accomplishing illegal ends. It gives the airlines the green light to bend their security measures when deemed necessary, and yet not suffer any consequences when their decisions prove incorrect. Ultimately, it also exposes other passengers to safety risks when

of their passengers) (citing *O'Leary v. American Airlines*, 475 N.Y.S.2d 285 (N.Y. App. Div. 1984) (involving an intoxicated passenger who choked while eating)).

¹⁷⁸ See, e.g., 49 U.S.C.A. §§ 44901, 44904 (West 2000); see also 14 C.F.R. §§ 107.13, 108.4, 108.11 (2000).

¹⁷⁹ It has been noted that this trend is changing, and that airlines are using § 1111(a) of the Federal Aviation Act of 1958, 49 U.S.C.A. app. § 1511(a). See Daniel A. Klein, Annotation, *Propriety of Refusal of Airline to Transport Passenger or Property Under § 1111(A) of Federal Aviation Act of 1958*, 75 A.L.R. FED. 212 (1985) (citing cases where airlines refused transport to passengers on the basis that a passenger's physical condition posed a threat to his safety or the safety and convenience of other passengers or the airline and citing a case where the airline received notification from the FBI that a passenger was a fugitive from the law and had been diagnosed as schizophrenic).

security measures and procedures are not uniformly and strictly enforced at every checkpoint.

B. REMEDIES FOR THE UNWARY PARENT

Pittman also deals a harsh blow to the efforts of parents in enforcing and preventing interference with their custodial rights. The remedies for parents whose children have been abducted by a non-custodial parent are limited.¹⁸⁰ One of these remedies includes the Hague Convention on Civil Aspects of International Child Abduction.¹⁸¹ The Hague Convention is a civil remedy, and is designed to "secure the prompt return of children wrongfully removed to, or retained in, a foreign state," and "to ensure that the rights of custody and access under the law of one . . . state are effectively respected in the other foreign states."¹⁸² The Hague Convention is not an extradition treaty, but serves to return children to their "habitual residence" (their residence prior to abduction).¹⁸³ There are several steps that must be met before the provisions of the Hague Convention can be invoked.¹⁸⁴ There are also several exceptions to the Hague Convention, that can thwart a claim even if all the steps have been met.¹⁸⁵ The Hague Convention is not always a reliable

¹⁸⁰ See generally, Barone, *supra* note 100.

¹⁸¹ Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, S. Treaty Doc. No. 11, 99th Cong., 1st Sess. (1985), reprinted in 19 I.L.M. 1501; T.I.A.S. No. 11670 (1980); implemented by the International Child Abduction Remedies Act, 42 U.S.C. § 11601 (West 1999) [hereinafter Hague Convention].

¹⁸² See *id.* at art. 1.

¹⁸³ See *id.* at art. 3.

¹⁸⁴ First, both states must be signatories to the Hague Convention. See *id.* at art. 35. States that are signatories to the Hague Convention are: Argentina, Australia, Austria, Bahamas, Belize, Burkina Faso, Canada, Chile, Croatia, Denmark, Ecuador, France, Germany, Greece, Honduras, Hungary, Ireland, Israel, Italy, Luxembourg, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States, and Yugoslavia. See *id.* at art. 37. Iceland is noticeably missing from this list, so the Hague Convention would not have been a possible remedy to *Pittman* or *Grayson*. The child abducted must be under the age of sixteen. See *id.* at art. 4. The removal or retention must be "wrongful," i.e. the parent invoking the Hague Convention must provide that he or she has legal custody of the child, and that he or she would have exercised custody over the child had the child not been abducted. See *id.* at art. 3, 5, and 8. The home state, i.e., the state the custodial parent is seeking the child to be returned to, must be the child's "habitual residence." See *id.* at art. 3.

¹⁸⁵ If a child has been removed for over a year and the abducting parent can prove that the child is settled into his or her surroundings, then the court has discretion as to whether it will invoke the Hague Convention. See *id.* at art. 12.

remedy because "there is no iron-clad guarantee that the child will be returned" and the rates of return among those nations that are signatories to the treaty vary greatly.¹⁸⁶ And this remedy is limited to countries who are signatories to the treaty, so if the child has been taken to a non-Hague country (such as Iceland), this remedy cannot be invoked.

In a situation where a child is taken to a non-Hague country, there is little that can be done. The parent can petition the State Department to negotiate for the return of the child. This can be done in conjunction with the International Parental Kidnapping Act (IPKA), which was enacted by Congress in 1993.¹⁸⁷ IPKA is designed to cover situations where the Hague Convention is not applicable,¹⁸⁸ and makes parental child abduction a federal criminal offense where the parent wrongfully retains the child outside the borders of the United States.¹⁸⁹ Through IPKA, if there is an extradition treaty with the country where the abducting parent took the child, the U.S. can request that the abducting parent be surrendered.¹⁹⁰ Since it is a federal criminal offense, the federal government takes a more active role in seeking the abducting parent.¹⁹¹ To be effective, however, there must be an existing agreement between the U.S. and the foreign country.¹⁹² Parents can also attempt to file proceedings in the foreign country to regain custody of the child.¹⁹³ However, many foreign jurisdictions are sympathetic to their own citizens,

The second exception is based on public policy in which a child will not be returned home if doing so "would not be permitted by the fundamental principles of the foreign state relating to the protection of human rights and fundamental freedom." *Id.* at art. 20. The Hague Convention also allows an abducting parent to prevent the return of the child if he or she can show that the removal was not wrongful, or that returning the child would subject the child to a risk of physical or psychological harm. *See id.* at art. 13. A child's return may also be prevented if a child refuses to return home and the court, in using its discretion, finds that the child is of a certain age and maturity level where their view should be taken into consideration. *See id.*

¹⁸⁶ Kreston, *supra* note 100, at *24.

¹⁸⁷ *See* International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (1993) [hereinafter IPKA]. This remedy was also not available in *Pittman*, because as the court noted, Erna's conduct would have had to occur sooner since the statute had not been enacted at the time of the abduction. *See Pittman*, No. 93 CIV 3974 JSM, 1997 WL 370331 at *3.

¹⁸⁸ *See* 1993 U.S.C.C.A.N., 103th Cong. 2d Sess., Pub. L. No. 103-173 at 2424-1.

¹⁸⁹ *See* IPKA, 18 U.S.C. § 1204 (1993).

¹⁹⁰ *See id.*

¹⁹¹ *See* Barone, *supra* note 100, at 99.

¹⁹² *See* IPKA, 18 U.S.C. § 1204 (1993).

¹⁹³ *See* Kreston, *supra* note 100, at *24.

which was demonstrated in *Pittman* when the courts in Iceland awarded Erna custody of the children despite the United States custody orders.

Another possible remedy is to employ a mercenary group, such as CTU, to retrieve the child.¹⁹⁴ These operations are risky, involve illegal acts, and can often place the children in danger during the rescue attempt, as well as risk the lives of the members of the recovery team.¹⁹⁵ While these operations are sometimes successful, often they are not, as was evidenced by CTU's attempt to recapture Elizabeth and Anna from Erna.¹⁹⁶

These remedies all apply after the abduction of the child has occurred. So what is a parent to do if they suspect the abduction may occur, and wish to prevent it like Grayson and Pittman? As *Pittman* demonstrates, phone calls will more than likely not be enough to put an airline on notice. According to one commentator, "most airlines, even the national airlines of non-Hague contracting states, if presented with an order and/or requests from law enforcement, will cooperate, at least, in ascertaining the legal authority of a minor child to be transported from the United States, particularly given current airline security regulations."¹⁹⁷ The key here, and a lesson that can also be taken from *Hyatt*, is to involve law enforcement officials. Unless the standard for notice is relaxed, it is unlikely that anything short of the involvement of law enforcement will be sufficient to bring injunctive relief.¹⁹⁸

While relief exists for a custodial parent whose child has been abducted, the relief is limited. As demonstrated, most of the remedies are not effective until after the child has already been abducted. These remedies can be costly, lengthy, time-consuming, and ultimately ineffective. However, as *Pittman* demonstrated, it is difficult to prevent the abduction unless a parent is

¹⁹⁴ See discussion *supra* Part I, note 14. See also Barone, *supra* note 100, at 114-116.

¹⁹⁵ See Barone, *supra* note 100, at 114-116.

¹⁹⁶ See discussion *supra* Part I, note 14. See also Barone, *supra* note 100, at 114-116.

¹⁹⁷ See Apy, *supra* note 2, at 90-95.

¹⁹⁸ According to Apy, airlines are subject to reasonably injunctive relief, based upon a broad "minimum contact" standard for jurisdiction. See *id.* However, she finds that in order to do so, legal authority and identification of the children and parties involved needs to be presented to the airline in a "timely fashion." See *id.* However, it is unlikely that in most cases a custodial parent is going to become aware of or suspect the abducting parent's plan until the last minute, when it may be difficult to jump through all of the necessary hoops.

aware of, and knows how to jump through, all the hoops necessary to put the airline on notice. The next section addresses what changes in policy and procedures need to take place in order to prevent further abductions.

VII. WHAT CAN BE DONE TO PREVENT FUTURE ABDUCTIONS—THE LESSONS TO BE LEARNED FROM *PITTMAN*

The following is a list of suggestions of what needs to be done in order to prevent further situations like the one in *Pittman* from arising.

A. CHANGES IN POLICY AND PROCEDURES AT AIRLINES

Procedures need to be implemented by airlines, especially those that have international flights, for dealing with situations when they receive a call that a parent may be traveling with minor children out of the country in violation of a court order. Then, if a situation occurs as in *Pittman*, where an unwary parent such as Grayson contacts an airline with his or her suspicion, the airline will have procedures in place to either (1) investigate the claim further and put their branches on notice of a possible abduction, or (2) inform the parent of what steps need to be taken, such as contacting law enforcement or requiring documentation indicating legal custody, in order for the airline to take any further action. Airlines should not be able to claim ignorance in situations where parents contact the airlines but do not jump through all of the necessary hoops.

B. STRICT ENFORCEMENT OF BOARDING PROCEDURES

Airlines should be required to strictly adhere to boarding procedures, especially those designed to enforce security. The need is even greater on international flights. This should include heightened scrutiny of passengers traveling with minor children, particularly when documentation and identification do not match. Any blatant or gross deviation from standard operating procedures should establish negligence per se on the part of the airline.

C. LAW ENFORCEMENT INVOLVEMENT

As was discussed earlier, law enforcement officials should be contacted as soon as a parent becomes suspicious that a non-custodial parent has plans to take a child out of the country

against court orders. As *Hyatt* demonstrated, the involvement of law enforcement officials can be effective, even in the face of a form such as an Unaccompanied Minor Child Care Services Request.

D. EXPAND SAFETY AND SECURITY EFFORTS

The focus should be on more than those harms related to hijackers and terrorists, and should be expanded to include other harms, such as criminals using airlines to escape criminal liability, or as in the case of international parental abductions, preventing children from being taken illegally against explicit court orders. Safety and security regulations should be expanded to include measures to prevent these sorts of harms.

E. STIFFEN PENALTIES AND SANCTIONS FOR AIRLINES AND AIRLINE EMPLOYEES

As one commentator suggested:

[T]he federal government should enact legislation which would place heavy fines or penalties upon anyone who aides or abets an abducting parent. Correspondingly, courts would have to strictly enforce these penalties. It is proposed that two different levels of culpability be assigned to parties who assist kidnappings: intent and willful blindness. It is believed that harsh fines would effectively deter common carriers and individuals alike from assisting a parent in "kidnapping" his or her child. *Particularly effective would be an attack on the most egregious offenders—common carriers who allow a parent to leave the United States with a child who does not have a valid passport. These offenders should be fined most severely* in order to encourage common carriers to adopt preventive measures.¹⁹⁹

Fines should be imposed, and these fines can be used to assist custodial parents' efforts to retrieve their children. Violations, such as the ones that occurred in *Pittman*, should find both the airline and the airline employee(s) strictly liable or establish a standard of negligence per se.

These are just a few suggestions as to what steps need to be taken in order to curb the growing number of international parental abductions. Until the time when there is legislation or procedures in place, parents should rely on their own instincts and the assistance of lawyers and law enforcement officials in

¹⁹⁹ Barone, *supra* note 100, at 119 (emphasis added).

order to prevent their child from becoming a victim of international parental abduction.

VIII. CONCLUSION

In its findings and declarations to the Hague Convention, Congress made the following determinations:

- (1) The international abduction or wrongful retention of children is harmful to their well-being.
- (2) Person should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.
- (3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.²⁰⁰

While Congress recognized the growing problem of international abductions and the resulting harm to children, it stopped short by finding that an international agreement would be enough to curb this phenomenon. Efforts need to be taken to prevent the abduction of children before an abduction takes place, not after it has occurred and the damage has already been done. The first step toward preventing child abductions at the national level, but also at the international level where the stakes are higher and the remedies scarcer, is cutting off the potential abductors before they can leave—that is, by stopping them at the airport.

²⁰⁰ 42 U.S.C.A. § 11601 (West 1999).

