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F. Lee Campbell

AIRLINES' RESPONSIBILITIES TO PASSENGERS: RECENT THEORIES AND EXTENSIONS

F. LEE CAMPBELL*

As technological developments continue to shrink the globe, and air transportation becomes increasingly available to substantial numbers of people, the problems inherent in a rapidly developing, consumer-oriented industry expand proportionately. Recent headlines have described diverse air transportation disputes ranging from the advisability of landing the Anglo-French Concorde in the United States to the feasibility of a space shuttle system. Other less sensational stories, however, have had more substantive impact on air transportation in general and on the relationship between the air carrier and its passengers in particular.

The scope and effect of recent decisions affecting the air carrier-passenger relationship have been widespread and far reaching. Some of these decisions have not factually involved the air industry; however, they will likely have a profound impact on the field of transportation.[1] Other decisions have involved issues of law which have long been the subject of controversy within the industry.[2] Still others have involved new problems.[3]

* J.D., University of Washington, 1950. Mr. Campbell is Past President of the Washington Association of Defense Counsel and former Chairman of the Aerospace Committee of Defense Research Institute. Mr. Campbell is currently involved in general aviation legal work and is President-Elect of the Seattle-King County Bar Association.

[1] For example, the recognition of the tort of negligent infliction of mental distress by some courts constitutes an expanded theory of liability which will affect the aviation industry. *See, e.g.*, Hunsley v. Giard, 87 Wash. 2d 424, 553 P.2d 1096 (1976); Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

[2] Cases continue to arise in which tariffs are summarily upheld. *See, e.g.*, Randall v. Frontier Airlines, Inc., 397 F. Supp. 840 (W.D. Ark. 1975); Kapner v. KLM Royal Dutch Airlines, 13 Av. Cas. 18,228 (N.Y. Sup. Ct. 1976). This rule is not without exception, however, and occasionally courts hold that tariffs amount to an impermissible exculpation from liability. *See, e.g.*, Rodriguez v. American Airlines, Inc., 386 F. Supp. 78 (D.P.R. 1974); Davis v. Northeast

Because of the number of air industry-related cases and the limitations of space and time, this article will not explore the ramifications of all such decisions. Rather, it will focus principally upon two areas which pose among the most profound and immediate concerns for the aviation industry regarding passenger relations. First, it will examine the many implications of the various decisions in *Nader v. Allegheny Airlines, Inc.*[4]—the "bumping" opinions. The *Nader* case, as it progressed from federal district court to the United States Supreme Court, presented a myriad of issues with potentially far-ranging repercussions. Because of the number and breadth of these topics, the *Nader* decisions will serve as a springboard for discussion of other opinions which involve related issues, especially the question of private remedies under the Federal Aviation Act (the "Act").[5] Second, this article will examine a number of recent decisions involving extensions of the duty of air carriers to passengers beyond the confines of the aircraft. These cases, under both the common law and the provisions of the Warsaw Convention, portend a continued expansion, or at least a refinement, of the duty of air carriers to their passengers.

I. THE NADER DECISION, OVERSALES, AND DENIED BOARDING COMPENSATION

Over the years, air carriers have utilized a number of approaches attempting to minimize the losses resulting from booked but unoccupied seats.[6] At present, the industry engages in calculated over-

Airlines, Inc., 116 N.H. 429, 362 A.2d 208 (1976). *See generally* Pratt, *Tariff Limitations on Air Carriage Contracts*, 29 J. AIR L. & COM. 14 (1963).

[3] An interesting example of a new problem which tangentially involves carrier-passenger relations is Condit v. United Airlines, Inc., [1976] 3 AV. L. REP. (14 Av. Cas.) (CCH) 17,343 (E.D. Va. 1976). The *Condit* court rejected a claim of sex discrimination in a Title VII action brought by a stewardess who was grounded because she was pregnant. The court upheld the airline's requirement as reasonable because it constituted a bona fide occupational qualification and was justified because of the air carrier's duty to provide the highest possible degree of care for its passengers.

[4] 365 F. Supp. 128 (D.D.C. 1973), *rev'd*, 512 F.2d 527 (D.C. Cir. 1975), *rev'd*, 426 U.S. 290 (1976).

[5] Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

[6] This problem of "oversales" can result from a number of causes: (1) the substitution of a lower capacity aircraft; (2) personnel errors made by the car-

booking based upon statistical analysis of past experience.[7] In the main, this flexible booking system has advantages for both the carriers and their passengers: the former can realize the economic consequences of full-boarding, while the latter can recognize greater flexibility by shifting travel plans without penalty.[8] The danger of such overbooking based upon statistical analysis, however, is manifest—not every flight accurately reflects its statistical projection, and an oversales situation can occur.[9] Thus, passengers with confirmed reservations sometimes cannot be accommodated. They are "bumped."

In seeking to balance the interests of air carriers with those of their passengers, the Civil Aeronautics Board (the "CAB"), pursuant to its rulemaking authority, has recognized the viability of oversales. It has also established a denied boarding compensation procedure to recompense the bumped passenger.[10] These rules provide, *inter alia*: (1) each air carrier must establish written priority

rier or travel agent; (3) breakdowns or defects in communications, computers, and other equipment used in processing reservations; (4) reservation practices such as "free sales" or "blocked ticketing"; (5) no shows. *See* 34 J. AIR L. & COM. 127 (1968). On a number of occasions the CAB has implemented programs to alleviate the problem, including penalties, service charges, ticketing time limits, and reconfirmation requirements. Problems with passenger resentment and enforcement have necessitated abandonment of these programs. *See* Nader v. Allegheny Airlines, Inc., 512 F.2d at 534. *See generally* 34 J. AIR L. & COM. 127 (1968).

[7] *See* Priority Rules, Denied Boarding Compensation Tariffs, and Reports of Unaccommodated Passengers: Notice of Proposed Rule Making, 32 Fed. Reg. 459 (1967); Nader v. Allegheny Airlines, Inc., 512 F.2d at 533-34.

[8] This was recognized by both the Court of Appeals and the Supreme Court in *Nader*. *See* 12 F.2d at 534; 426 U.S. at 294.

[9] In statistical terms, the number of oversales is small—6.0 passengers denied confirmed space per 10,000 enplanements in fiscal year 1975. *See* Priority Rules, Denied-Boarding Compensation Tariffs And Reports Of Unaccommodated Passengers: Re-examination of the Board's Policies Concerning Deliberate Overbooking and Oversales, 41 Fed. Reg. 16,478 (1976). As both the Court of Appeals and the Supreme Court noted, however, the absolute number of passengers is substantial: 82,000 passengers in 1972, and 76,000 passengers in 1973 were bumped. 512 F.2d at 534; 426 U.S. at 294. It should be noted that the discussion herein does not involve bumping resulting from government acquisition of space or other operational or safety reasons. 14 C.F.R. § 250.6(a) (1977). *See* Stough v. North Central Airlines, Inc., 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965). Additionally, the focus is not on claimed damages arising from bumping where the airline acts on the basis of an FBI report, Williams v. Trans World Airlines, Inc., 509 F.2d 942 (2d Cir. 1975), or on denied seating because the passenger's proffered check cannot be negotiated because of insufficient funds, Marshall v. Delta Airlines, Inc., 13 Av. Cas. 18,164 (D.D.C. 1975).

[10] 14 C.F.R. Part 250 (1977).

rules and criteria for determining which passengers holding confirmed reservations shall be denied boarding on an oversold flight; (2) the carrier must file a tariff providing for compensation to such passengers; (3) pursuant to the filed tariff, the carrier must tender "denied boarding compensation" in a prescribed amount to those denied passage as well as a written explanation of the terms, conditions, and limitations of the compensation; and (4) the carrier must file a report with the CAB specifying the number of passengers boarded and the number not accommodated.

The existence of the CAB procedure, however, has not solved the oversales problem. For many years courts have been confronted with claims of passengers who refused the proffered compensation and thereafter sued for damages. While acceptance of denied boarding compensation or alternative routing constitutes liquidated damages,[11] cases have recognized a right to recover compensatory and, in some cases, punitive damages where the regulatory remedy was rejected.[12] These decisions raised important questions regarding the bases and scope of such relief. Many of these questions have been addressed by the opinions involved in the *Nader v. Allegheny Airlines, Inc.* litigation. Following a brief summary of the facts underlying the controversy, this article will examine these issues and their effect on airline-passenger relations.

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[11] 14 C.F.R. § 250.7 (1977) provides that appropriately tendered denied boarding compensation which is accepted by the passenger constitutes liquidated damages. Section 250.6(b) provides that the arrangement of comparable air transportation which is accepted by the passenger precludes eligibility for denied boarding compensation. In Rousseff v. Western Airlines, Inc., 409 F. Supp. 1262 (C.D. Cal. 1976), the court held that the acceptance of alternative transportation which gets the passenger to his destination within two hours of his originally scheduled flight, as required by § 250.6(b), leaves him with no remedy at law because it constitutes liquidated damages.

[12] In several early decisions prior to the promulgation of the denied boarding compensation regulations, the passenger's claims were predicated on breach of contract, and recovery was limited to compensatory damages, *i.e.*, ticket price plus any excess baggage charge paid. *See, e.g.*, National Airlines, Inc. v. Allsopp, 182 F.2d 483 (5th Cir. 1950); Trammell v. Eastern Airlines, Inc., 136 F. Supp. 75 (W.D.S.C. 1955); Jones v. Northwest Airlines, Inc., 22 Wash. 2d 863, 157 P.2d 728 (1945). In Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961), the first decision recognizing a private cause of action under § 404(b) in favor of the bumped passenger, the court awarded punitive damages. In Mortimer v. Delta Air Lines, 302 F. Supp. 276 (N.D. Ill. 1969), the court specifically held that the existence of the CAB regulations did not preclude a private action, including a claim for punitive damages. For a more thorough discussion of the punitive damages issue, *see* Part I C *infra*.

A. *Background of the Nader Controversy*

In April 1972, the well-known consumer advocate Ralph Nader booked passage on an Allegheny Airlines flight from Washington, D.C. to Hartford in order to make appearances on behalf of a Connecticut public interest group (CCAG). Nader made a confirmed reservation three days before the scheduled departure and obtained his ticket from a travel agent on the morning of the flight. Arriving five minutes before the scheduled departure, he and two other confirmed passengers were informed that the flight was full. The two others accepted alternative connections arranged by Allegheny, but Nader refused. He then flew to Boston and drove to Connecticut, missing one of his two scheduled appearances. As a result of his failure to obtain a seat, Nader and CCAG brought suit in the federal district court in Washington, D.C., seeking compensatory and punitive damages under two theories: violation of section 404 of the Federal Aviation Act[13] and common-law misrepresentation. The trial court found for plaintiff Nader and awarded him nominal compensatory damages plus $25,000.00 punitive damages. The court dismissed plaintiff CCAG's claim for lost contributions resulting from Nader's absence as too speculative; however, it awarded nominal compensatory damages and $25,000.00 punitive damages to the group.[14]

The district court's resolution of the issues presented in *Nader* raised the spectre of a quantum extension of airline liability in the case of a bumped passenger. The court was asked to resolve a number of potentially far-reaching questions—the exclusivity of the CAB denied boarding compensation procedure, the viability of a private common-law remedy pursuant to section 404 of the Act, the efficacy of actions by nonpassengers, and the right to recover both compensatory and punitive damages for bumping. On each

[13] Section 404(b), 49 U.S.C. § 1374(b) (1970), provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[14] Nader's award was based on Allegheny's culpability both for violation of § 404(b) and common-law misrepresentation. CCAG's award apparently was premised only on the basis of the common-law claim. 365 F. Supp. at 132-33.

issue, the trial court responded in favor of the plaintiffs.[15]

The shock attendant to the trial court's determination in *Nader* has been ameliorated somewhat by the subsequent decisions of the United States Court of Appeals for the District of Columbia and the United States Supreme Court. It is this subsequent evolution in the *Nader* controversy and other recent related decisions which this article now will examine.

B. *The Section 404(b) Remedy for the Bumped Passenger*

1. *Existence of the Private Remedy*

The Federal Aviation Act does not prescribe private remedies for violations of its provisions. Nevertheless, on several occasions appellate courts have found that a private damage action can exist for a passenger denied boarding while holding a confirmed reservation on the basis that this constitutes unjust discrimination under section 404(b).[16] Indeed, in the court of appeals decision, the *Nader* court stated that this conclusion is "well settled."[17]

The summary conclusion that a private cause of action exists, while consistent with the opinions cited by the *Nader* court, deserves more attention than it was given by the district court. While precedent exists for the conclusion, it is not patently supported by the provision itself or the legislative history behind it. Section 404 is entitled "Rates for Carriage of Persons and Property," and it is contained within Subchapter 4 of the Act, entitled "Air Carrier Economic Regulation." In one of the early decisions regarding the existence of a private remedy under this provision, a federal district court noted that the pivotal language, "unjust discrimination" and "undue or unreasonable prejudice or disadvantage," are not explained in the Act or by the congressional debates.[18] Thus, there is nothing to suggest that Congress intended anything other

[15] For a discussion of the effect of the *Nader* district court decision on discriminatory bumping, *see* 40 J. AIR L. & COM. 533 (1974).

[16] *See, e.g.*, Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499 (2d Cir. 1956); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961); Mortimer v. Delta Airlines, 302 F. Supp. 276 (N.D. Ill. 1969); Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (9th Cir. 1972); Kaplan v. Lufthansa German Airlines, 12 Av. Cas. 17,933 (E.D. Pa. 1973). This conclusion does not mean, however, that all provisions of the Act create private remedies. *See* Part II *infra*.

[17] 512 F.2d at 537.

[18] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 363 (S.D. Cal. 1961).

than the proscription of rate differentials between persons under this section.[19] A snowball effect, however, has resulted in the recognition of a private remedy in the context of oversales.[20]

2. *The Prima Facie Case and the Burden of Proof*

The conclusion that a remedy exists under section 404 does not lead inexorably to a plaintiff's recovery. The plaintiff must still establish the requisite elements of a violation. The determination of these elements and the appropriate allocation of proof have proved bothersome problems for the courts.

Examining the requirements of a prima facie case, the court of appeals in *Nader* followed the example of the Ninth Circuit in *Archibald v. Pan American Airways, Inc.*,[21] and concluded that intentional overbooking does not constitute a per se violation of section 404(b) so as to entitle the claimant to an automatic judgment. Conversely, the *Nader* court's rejection of the per se violation approach did not exculpate the airlines. The trial court had indicated that the determinative factor in justifying bumping was the reasonableness of the airlines' action.[22] The court of appeals, however, rejected this position, and indicated that the determinative considerations are whether the airline's priority rules con-

[19] 41 J. AIR L. & COM. 119, 121 (1975).

[20] The first decision to imply a private remedy under § 404(b) in an oversales situation was Wills v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961). The *Wills* court looked to the purpose of the Act and concluded that judicial intervention was necessary to redress past violations of the Act inasmuch as the provisions themselves provided only prospective relief under the CAB's auspices and inasmuch as state remedies were inadequate. The court indicated that refusing to imply such relief would mean that the rights of the affected passenger would be "robbed of vitality." *Id.* at 364. The court reflected its underlying attitude in stating that the judiciary in such circumstances must be alert to adjust remedies to redress invasions of federally protected rights even where the applicable provisions do not provide a private remedy. *Id.* at 364-65. Compare this attitude and language with the criteria enumerated by the United States Supreme Court in Cort v. Ash, 422 U.S. 66 (1975), as applied in Polansky v. Trans World Airlines, Inc., 523 F.2d 332 (3d Cir. 1975), Wolf v. Trans World Airlines, Inc., 544 F.2d 134 (3d Cir. 1976), and Mason v. Belieu, 543 F.2d 215 (D.C. Cir. 1976). Cases subsequent to the *Wills* decision dealing with oversales have summarily concluded that a private cause of action exists, usually by mere citation. *See* cases cited at note 16 *supra.*

[21] 460 F.2d 14 (9th Cir. 1972).

[22] 365 F. Supp. at 132. The broad reasonableness standard utilized by the *Nader* trial court conformed to the approach utilized by the Ninth Circuit Court of Appeals in Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14, 16-17 (9th Cir. 1972).

form to the requirements of the CAB regulations and whether they were followed.[23]

The court of appeals in *Nader* went one step further. It indicated that the plaintiff must go forward with evidence showing that the carrier failed to honor his priority.[24] The court held that the burden of proof then shifts to the carrier to establish its priority rules and compliance therewith.[25] Thus, the court attempted to resolve the evidentiary problems by shifting the burden of proof to the airline regarding an issue presumably within its sphere of knowledge.

This legal resolution simplifies the articulation of the appropriate rule, but it remains to be seen whether it resolves the preexisting confusion. This allocation of the burden of proof by the court of appeals, which was not reviewed by the Supreme Court, appears to leave the passenger in a position where he must still show more than merely being bumped. He apparently must also demonstrate that he had a particular priority which was not honored before the court will shift the burden of proof regarding priority rules and their compliance to the air carrier. In order to know whether or not a person with a lower priority was in fact boarded, the claimant must necessarily determine what the rules were.[26] Thus, from a practical standpoint, he must show a violation of the rules before the burden shifts. This fact suggests that the *Nader* court's resolution of the evidentiary problem is illusory.

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[23] The court of appeals noted that the trial court had made no reference to the priority rules. 512 F.2d at 539.

[24] The court of appeals defined the elements of the cause of action for bumping as: (1) possession by the plaintiff of a designated priority, and (2) boarding of persons with a lower priority by the carrier. *Id.* at 538.

[25] The court stated: "Once the plaintiff proves that the carrier failed to honor his priority, the burden of proving the priority rules and compliance therewith shifts to the carrier." *Id.* In reaching this conclusion, it is not clear whether the court intended to shift the burden of proof regarding the second element of the prima facie case or whether it shifted the burden following proof of the prima facie case so that compliance constitutes an affirmative defense. The context of the court's discussion suggests the former conclusion; the above-quoted language suggests the latter.

[26] This problem may be circumvented if the *Nader* decision is read as adopting the approach of the Ninth Circuit Court of Appeals in Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (1972), which the court cited as the basis for its decision. Under *Archibald*, bumping is not a per se violation of § 404(b), it is a prima facie violation, *i.e.*, evidence of bumping is sufficient to shift the burden of proof. The language quoted from the *Nader* Court of Appeals decision in note 25 *supra*, however, appears to require proof that the carrier boarded persons with a lower priority.

From the air carrier's standpoint, the prescription of the *Nader* decisions is clear regarding denied boarding procedures. First, the airline must submit procedures to the CAB which provide a workable mechanism to allocate priorities. Second, and most important, this procedure must be disseminated to those engaged in boarding passengers and who are responsible for placating nonboarding ticketed customers. To the extent that this two-step process is followed, liability under *Nader* for violation of section 404 can be avoided, and the putative plaintiff must pursue the alternative course of attacking the priority system before the Civil Aeronautics Board.[27]

C. *Bumping and Common-Law Tort Remedies*

In *Nader*, the plaintiffs did not attack the adequacy of the proffered compensation, nor did they seek a private remedy under section 411[28] by contending that the airline engaged in a deceptive and unfair practice. Rather, they sued for the common-law tort of misrepresentation in addition to the remedy discussed above. The trial court found that Allegheny had affirmatively misrepresented to Nader that he had a guaranteed seat.[29] Further, the court allowed both Nader and CCAG to recover because it found that both had relied upon the representation to their detriment.[30]

The court of appeals reversed, finding that there was no evidence regarding affirmative misrepresentation on the part of Allegheny. In contrast, the court stated that "the gravamen of appellees'

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[27] The court of appeals, in rejecting the broad reasonableness test utilized by the district court, stated: "It is beyond dispute that the reasonableness, *vel non*, of Allegheny's priority rules must be determined, in the first instance, by the Civil Aeronautics Board." 512 F.2d at 539. This conclusion reflects the doctrine of primary jurisdiction. *See* note 35 *infra*.

[28] Section 411, 49 U.S.C. § 1381 (1970), provides in pertinent part:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof.

No court has recognized an implied private remedy under this section. *See* notes 87-88 and accompanying text *infra*.

[29] 365 F. Supp. at 132.

[30] *Id.* at 131. The trial court indicated that Nader knew by previous experience that airlines overbooked, but that such general knowledge did not make either plaintiff aware of the practice with respect to the defendant in the case at bar.

complaint is *nonrepresentation* rather than misrepresentation."[31] Furthermore, the court found that the determinative question was whether Allegheny had a duty to disclose its procedures to the plaintiff.[32]

Having reached this conclusion, the court of appeals took a curious detour. It indicated that determining whether a duty to disclose exists depends upon whether the conduct constitutes a deceptive practice under section 411 of the Act.[33] The conclusion that failure to disclose constitutes such a deceptive act means that a positive duty to disclose exists and that the failure to meet that duty gives rise to common-law liability.

This connection between section 411 and the determination of a common-law duty by the court of appeals raised two important, interrelated questions. First, the court had to determine whether the existence of the CAB's power under section 411 precluded common-law remedies for acts which would constitute unfair or deceptive practices.[34] Second, even if such a common-law action could be maintained, the court had to determine whether the claim should remain in abeyance pending the CAB's administrative determination as to whether the particular practice constituted a deceptive or unfair act pursuant to the primary jurisdiction doctrine.[35]

The court of appeals' resolution of the first of these questions presaged its action on the second. The court initially indicated, analogizing to section 5 of the Federal Trade Commission Act,

[31] 512 F.2d at 542 (emphasis added by the court).

[32] *Id.*

[33] *Id.*

[34] Allegheny and the CAB as amicus curiae argued that the CAB's power was exclusive and precluded common-law remedies. *Id.* at 542.

[35] The doctrine of primary jurisdiction is aimed at maintaining the proper relationship between the judiciary and administrative agencies charged with particular regulatory duties. United States v. Western Pac. R.R., 352 U.S. 59 (1956). The doctrine determines whether a court or an agency should make the initial decision on a particular issue. This allocation is necessary in order to utilize the expertise of the agency on a particular question, but more importantly, it is aimed at coordinating the work of the agencies and courts. As the Supreme Court stated in Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498-99 (1958): "The holding that the Board had primary jurisdiction, in short, was a device to prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to those particular circumstances." *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT Ch. 19 (1959).

that Congress did not intend to eliminate common-law remedies for fraud and deceit by incorporating section 411 into the Act.[36] The court further noted, however, that unlike the Federal Trade Commission Act, the Federal Aviation Act involved the regulation of a system of limited competition and included substantial rate-making power. As a result, the court concluded that Congress did intend the Act to affect common-law actions.[37] Based upon this conclusion, the court held that the availability of common-law remedies was coextensive with violation of section 411, *i.e.*, only if the CAB determined that a practice was unfair or deceptive could an individual seek a common-law remedy.[38]

Having reached the conclusion that a common-law remedy presupposes finding a violation of section 411, the court found that the doctrine of primary jurisdiction mandated that the CAB first ascertain whether the conduct in issue in fact violated the section.[39] In effect, the court indicated that the CAB could determine whether a particular practice which might give rise to common-law liability could be permitted in the aviation industry. Thus, while recognizing that section 411 did not eliminate private remedies for common-law torts, the court limited their scope to violations of that provision as determined by the CAB.

This issue of the interface between common-law remedies and the Federal Aviation Act was the only aspect of the *Nader* controversy reviewed by the United States Supreme Court.[40] In its decision, the Court rejected the equation prescribed by the court of appeals' majority and, in essence, agreed with the position of Justice Fahy in his separate opinion.[41] The Supreme Court flatly

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[36] 512 F.2d at 542-43.

[37] *Id.* at 543-44. The court cited Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), a case under the Interstate Commerce Act, for the proposition that § 1106 of the Federal Aviation Act, the savings clause which provides for the preservation of common-law remedies, should not be read literally to allow actions inconsistent with the purpose of the Act itself.

[38] The court stated: "Thus, if the Board properly finds that a practice is not deceptive, a common law action for misrepresentation must fail as a matter of law." *Id.* at 544.

[39] *Id.*

[40] 426 U.S. 290 (1976).

[41] 512 F.2d at 552 (Fahy, J., concurring in part, dissenting in part). Judge Fahy pointed out that § 1106 specifically states that the Act is not intended to abridge or alter common-law remedies. Thus, he disagreed with the court's hold-

rejected the lower court's conclusion, by stating: "[A] violation of § 411, contrary to the Court of Appeals' conclusion, is not coextensive with a breach of duty under the common law. . . . No power to immunize can be derived from the language of § 411."[42] Thus the Supreme Court severed the connection created by the court of appeals.

Having reached this conclusion, the Court found that the standards to determine fraud and misrepresentation were derived from the common law and were not, therefore, within the peculiar expertise of the CAB.[43] The highest court reversed and remanded the case for determination on the merits of the plaintiffs' misrepresentation claims. In so doing, the Court did not express an opinion regarding the merits of these claims, but it stated that compliance with agency regulations is not sufficient to exempt the carrier automatically from common-law liability.[44]

The Supreme Court consequently left bumped passengers with a double-barreled remedy. First, because the Court did not examine the viability of a private claim under section 404(b), a plaintiff can sue the air carrier and recover damages if he can establish violation of the priority rules. As discussed above, however, evidentiary problems involved in this cause of action remain. Second, the passenger can sue for any common-law remedy which may be available, even if the airline's priority rules were not violated. As a practical matter, this will probably involve intentional or negligent misrepresentation, although the infliction of mental distress also is a possible claim. If agents of the carrier in fact represent that a seat has been guaranteed the passenger, and he is subsequently bumped, the requisite elements for establishing a prima

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ing regarding that provision, and he argued that the majority authorized precisely such abridgement.

[42] 426 U.S. at 301-02.

[43] The Supreme Court stated:

> Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge" . . . of the Board. . . . The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

Id. at 305-06.

[44] *Id.* at 308 n.19.

facie case of misrepresentation should be relatively easy to establish. If, however, there is no representation, the more typical problem of showing a duty to disclose exists. Certainly, the issue as to the existence of this duty will emerge as a focal point in future disputes regarding bumped passengers.

D. *Recovery By Third Persons*

In many situations in which a passenger is bumped from a flight and thereby sustains legally compensable demages, a third party who relies upon the passenger's arrival at a specific time likewise suffers inconvenience and potentially demonstrable damages. The possibility of recovering damages for bumping, not only by the passenger, but also by a stranger, poses a substantial hidden danger to the air carrier.

This latent danger certainly became patent when the trial court in *Nader* awarded CCAG compensatory damages and $25,000.00 punitive damages. The basis for the district court's conclusion represented a stunning practical expansion of an airline's vulnerability in oversales situations. The court held that CCAG could recover because it was a plaintiff who foreseeably and reasonably relied upon the misrepresentation to Nader and was injured thereby.[45] Further, because the court found sufficient intent to warrant punitive damages vis-a-vis Nader, it awarded a similar amount to CCAG.[46]

In reaching these conclusions, the court almost summarily established that the airlines could foresee injury to CCAG. The court justified this conclusion on two grounds. First, the court stated that the airline has a legal duty to the public as a licensed carrier. Additionally, the court found that its conclusion was justified because the carrier was in a better position to prevent the problem of oversales by fully disclosing its practices.[47]

Acceptance of the district court's view would mean potentially unlimited liability to unknown plantiffs who had made plans based upon a bumped passenger's travel arrangements.[48] This approach was rejected by the court of appeals; however, in so doing, the

[45] 365 F. Supp. at 132-33.

[46] *Id.* at 133.

[47] *Id.*

[48] *See* 40 J. AIR L. & COM. 533, 544-46 (1974).

court failed to prescribe clear guidelines regarding the extent of the resultant vulnerability. The court of appeals quickly recognized the danger of vastly expanded liability inherent in the lower court's opinion and indicated that a more circumscribed approach to liability was required.[49] The court, therefore, rejected the suggestion that liability inheres merely because the airline reasonably could have foreseen injury to CCAG.

The test enumerated by the court of appeals for recovery by nonpassengers for misrepresentation is not as far-reaching as that of the district court, but its parameters are not well-defined. The court acknowledged that privity of contract is not required for recovery.[50] In seeking to define who then can recover, the court quoted the Restatement of Torts and Dean Prosser to the effect that mere foreseeability is insufficient to establish liability for misrepresentation to unidentified plaintiffs.[51] The court indicated that Nader could recover as a member of an identifiable class of third persons—potential passengers. CCAG, however, could not recover because it was merely a member of a vast indeterminate class that could be equated with the public at large.[52]

The scope of the carrier's liability to third persons was also recently examined by the Court of Appeals for the District of Columbia in *Mason v. Belieu*.[53] The trial court in *Mason* had allowed a wife whose husband had been bumped from a flight to recover under section 404(b) for the emotional distress allegedly suffered as the result of her husband's unexplained delay.[54] This conclusion meant that the court allowed a third person to recover for discrimination against another.

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[49] The court of appeals stated:

> [F]oreseeability is not the test to be used in determining the class of third persons who may recover; otherwise, liability in a case such as this could become indeterminate. To hold that CCAG is within the class of persons who may recover would mean that virtually any plaintiff, no matter how far removed from the transaction or incident, can recover the full amount of his damages. We are unwilling to extend liability that far . . . .

512 F.2d at 549.

[50] *Id.* at 547.

[51] *Id.* at 548.

[52] *Id.* at 548-49.

[53] 543 F.2d 215 (D.C. Cir. 1976).

[54] 13 Av. Cas. 17,114 (D.D.C. 1974). *See* 41 J. AIR L. & COM. 119 (1975).

In reversing the trial court's disposition, the court of appeals held that section 404(b) should not be used to imply a private cause of action in favor of third persons. The implication of a remedy in this circumstance, the court contended, would expand unjustifiably the purpose of the Act, especially in light of adequate state remedies available to Mrs. Mason.[55] The court declined to comment on the credence of plaintiff's claim based upon these remedies and remanded the case to the trial court for their disposition.

The *Mason* court's resolution of the nonpassenger's claim should reduce the potential of third party actions in oversales situations based upon the Act.[56] The decision, however, does not affect the issue presented in *Nader* of liability to nonpassengers based upon common-law grounds. The court of appeals' prescription in *Nader* regarding such claims will pose problems; the distinction between an identifiable class of potential passengers who can recover and the indeterminate class constituting the public at large may be illusive. In light of the absence of a privity requirement and the relative ease of showing reliance, it is likely that the airlines will be forced to confront claims by nonpassengers based upon the bumping of a ticket holder.[57]

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[55] 543 F.2d at 219. The *Mason* court utilized the criteria enumerated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), in reaching this conclusion. *See* Part II *infra*.

[56] This conclusion is not clearcut, however. It is possible that a court could conclude that a private remedy should be inferred in favor of a nonpassenger in order to effect the goal of reducing substantial oversales. The recent actions of the CAB give some credence to this argument. *See* Part I-E *infra*.

[57] The court of appeals in *Nader* stated that Allegheny had no "special reason" to know of CCAG's reliance or even of its existence. 512 F.2d at 548. This language is derived from Dean Prosser's analysis of the problem of third party liability for misrepresentation. *See* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 251-52 (1966). According to Prosser, an unidentified third person can recover for a fraudulent misrepresentation if the defendant has a special reason to expect a member of his class to be reached and influenced by it. In the context of air travel, knowledge of inconvenience and potential damages on the part of third persons, especially close relatives, arguably can be inferred each time a person is bumped. Based upon *Nader*, future plaintiffs in similar circumstances will certainly maintain that airline defendants have special reason to know of their alleged plights. If courts reject this argument on the ground of potentially indeterminate liability, plaintiffs may be able to argue that a passenger's explanation of a particular need to obtain a seat constitutes sufficient notice to create the requisite knowledge of a special reason. Adoption of this argument would also pose serious problems for air carriers. Certainly, determining when a "special reason" exists sufficient to create liability to third persons will be an issue soon facing the courts.

E. *Punitive Damages*

Another of the potentially startling results of the trial court's decision in *Nader* was the award of punitive damages, apparently under both the statutory and common-law theories.[58] The lower court indicated in reaching its conclusion that it intended to "punish" the tort-feasor for an "outrageous act." Its holding amounted to such punishment—in essence the court found that failure to disclose overbooking practices per se constitutes a sufficient basis to award punitive damages.[59] Again, the court of appeals reversed the trial court determination, but the prospect of potential punitive damages remains. Additionally, given the viability of common-law and statutory remedies, differing standards for the applicability of punitive damages exist.

Although it reversed the award of punitive damages for violation of section 404(b), the court of appeals did acknowledge that they can be awarded if the requisite elements under the federal common law are met, *i.e.*, evidence of intentional wrongdoing or conscious disregard of the passenger's rights.[60] As a practical matter, however, the court indicated that a circumscribed approach should be taken. In part, this circumscribed attitude toward punitive damages vis-a-vis the statutory claim under section 404(b) is attributable to the court's rejection of the deterrent value of punitive damages relied upon the district court.[61]

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[58] Only Nader recovered on both theories. 365 F. Supp. at 132.

[59] The trial court stated in its conclusions of law:

> Since the Defendant herein intentionally engaged in substantial over-selling, and intentionally did not inform the public of this practice and the attendant risks, and intentionally sought to conceal such information from all its passengers and particularly from the victims of this practice, it is clear that the Defendants acted not only wantonly but with malice. They are, therefore, liable to both plaintiffs for punitive damages for their misrepresentation.

Id. at 133.

[60] 512 F.2d at 549-50. The determination as to whether exemplary damages can be assessed for violation of § 404(b) depends not on local law but on general federal common law. Lakeshore & M.S.R. v. Prentice, 147 U.S. 101 (1893). On the other hand, where a common-law claim is made, the *Erie* doctrine suggests local law should be utilized to determine if punitive damages should be awarded. *See generally* C. McCORMICK, HORNBOOK ON THE LAW OF DAMAGES § 3 (1935).

[61] The court of appeals indicated that punitive damages serve a twofold purpose: punishment for outrageous conduct and deterrence from engaging in the same or similar acts. 512 F.2d at 549.

The court of appeals repudiated the trial judge's approach because such an award was seen as an interference with the primary jurisdiction of the CAB. The court indicated that the award of punitive damages in such circumstances constitutes implicit regulation by the judiciary, a regulation which is contrary to congressional delegation to the regulatory agency.[62] Moreover, the court expressly rejected the interpretation of some previous decisions which suggested that the existence of substantial oversales per se demonstrates malice.[63]

Similarly, the court rejected the award of punitive damages based upon misrepresentation. Significantly, it did not accept the inference of the trial court that because the airline was a common carrier, a fiduciary duty of full disclosure was created, the breach of which gives rise to the conclusion that the airline willfully disregarded the interests of the passenger.[64] The court did not preclude, however, the possibility of exemplary damages if malice is demonstrated.[65]

The continued potential for punitive damages resulting from the bumping of a passenger is amply demonstrated by the recent

[62] *Id.* at 550-51.

[63] Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 367-68 (S.D. Cal. 1961), had declared that deliberate overselling constituted malicious or willful and wanton conduct sufficient to justify an award of punitive damages. Subsequent decisions have indicated that overbooking per se does not justify punitive damages, but substantial overselling is evidence of malice. *See, e.g.*, Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14 (9th Cir. 1972).

[64] The trial court had stated:

> The Defendant Allegheny Airlines is a common carrier which is licensed or authorized to do business by the Civil Aeronautics Board, as hereinbefore stated, and is the holder of a certificate of public convenience and necessity. As such it has a public duty and an especially large and high fiduciary obligation to make its policies known to all of its customers with regard to its intentional overbooking. The fact that it conceals such practices in its advertising and otherwise, and, by virtue of its failure and refusal to take reasonable steps to avoid harm to the Plaintiffs herein is tantamount to willful and wanton misconduct which gives rise to and provides a proper basis for each of the Plaintiffs' claims for damages.

365 F. Supp. at 132. The court of appeals in rejecting this approach stated: "[W]e cannot accept the notion that air carriers *ipso facto* become fiduciaries and are held to a standard of full disclosure to the public merely because they possess a certificate of public convenience and necessity." 512 F.2d at 551.

[65] The court remanded for a determination of whether Allegheny's practices were deceptive, and if so, whether the airline had a good-faith defense. 512 F.2d at 552. The Supreme Court noted that the disposition of the punitive damages issues was not before it. 426 U.S. at 308 n.19.

opinion of a Texas federal district court in *Smith v. Piedmont.*[66] In *Smith,* the defendant airline denied a seat to the plaintiff and seven others holding confirmed reservations. Following the orders of the local supervisors, the airline's agent disregarded the prescribed priority rules based upon time of booking and loaded the aircraft on a first-come-first-serve basis. Having been denied a seat, the plaintiff was forced to take an alternate flight and thereby missed a rehearsal dinner for a wedding in which he was to participate. Additionally, the court found that the passenger was subjected to discourteous treatment by the airline agents. Plaintiff sued, alleging, *inter alia,* violation of section 404(b). In these circumstances, the court concluded that the plaintiff was entitled not only to compensatory damages but also to punitive damages for the humiliation and mental distress suffered as a result of his treatment at the hands of the agents who acted in knowing disregard of the airline's priority rules.[67]

The prescription derived from these cases is clear. Not only must airlines follow their priority rules, but they must also insure that local agents responsible for their implementation act with courtesy and circumspection in dealing with potential plaintiffs. Punitive damages may be found on both common-law and statutory grounds where the court is able to point to acts which can be labeled "outrageous," and the level of overbooking is a factor in determining if the requisite malice is present. Moreover, the danger of large awards in such circumstances is also exacerbated by the trend of courts toward allowing compensation for the infliction of mental distress. Therefore, the short-sighted and discourteous behavior of an agent dealing with passengers in a boarding area may result in a potentially substantial liability to the air carrier.

F. *The Response of the Civil Aeronautics Board to the Denied Boarding Controversy*

The present denied boarding compensation regulations embodied in 14 C.F.R. Part 250 were implemented in 1967 and represent only the most recent codification of a long history of

[66] 412 F. Supp. 641 (N.D. Tex. 1976).

[67] The *Smith* court found that the defendant had violated § 404(b). It concluded, however, that the failure to disclose the possibility of overbooking did not constitute either common-law fraud or a violation of the Texas Deceptive Practices Act. *Id.* at 643.

CAB concern with the oversales situation.[68] As discussed briefly above,[69] this remedy basically mandates the filing of priority rules with the CAB and the establishment of compensation levels as well as criteria for reimbursement and reporting requirements.

This procedure was designed to eliminate potential abuse in three important ways.[70] First, the rules seek to deter excessive overbooking by providing a monetary remedy to the passenger. Second, the rules establish specific procedures for determining which passengers will board. Finally, they require a written explanation to the passenger in the case of bumping. Additionally, the *Nader* decision itself adds another protection: violation of an airline's priority rules can give rise to a private cause of action under section 404(b).

The cutbacks of service which accompanied the oil crisis in 1973 elicited renewed CAB interest in reservation practices. In January 1974, the CAB gave notice of a proposed rule-making contemplating procedures relating to emergency reservation practices.[71] At the hearing on these practices, an intervener raised the question of the legality of intentional overbooking. In its resulting opinion, however, the CAB indicated that the specific issues before the court in the *Nader* case were not addressed in that CAB proceeding, and it specifically did not determine whether deliberate overselling was a deceptive practice.[72]

In April 1976, the CAB announced a proposed rulemaking proceeding with respect to deliberate overbooking practices.[73] In announcing reexamination of its policy towards overbooking, the CAB's explanatory statement indicated that the quid pro quo for

[68] *See* note 6 *supra. See generally* 34 J. AIR L. & COM. 127 (1968).

[69] *See* text accompanying note 10 *supra.*

[70] 512 F.2d at 536.

[71] The CAB was interested in curtailing the problem of no shows resulting from multiple booking and other abuses by passengers. It proposed establishing ticket time limits to retain confirmed reservations, imposing refund penalties on "no show" passengers, and increasing denied boarding compensation by 300%. Emergency Reservations Practices Investigation; Order Instituting Investigation, Tentative Findings and Conclusions; and Notice of Proposed Rulemaking, 39 Fed. Reg. 823 (1974).

[72] Emergency Reservation Practices Investigation, CAB Order No. 76-4-55, *cited in* 426 U.S. at 297 n.8.

[73] Priority Rules, Denied-Boarding Compensation Tariffs And Reports of Unaccommodated Passengers: Reexamination of the Board's Policies Concerning Deliberate Overbooking and Oversales, 41 Fed. Reg. 16,478 (1976).

the adoption of overbooking rules was the effort of air carriers to curb oversales. The CAB stated that while there had been a dramatic lowering of the rate of oversales following the implementation of the present regulations, recent years reflected a trend toward a higher rate. According to the CAB, this trend necessitated a reevaluation of the established procedures.[74]

In its request for comments, the CAB focused on a number of issues upon which it sought advice. First, it requested comments on whether it should issue a policy statement defining overbooking as an unfair practice under section 411. The CAB recognized that if deliberate overbooking was proscribed, some action must be available to the carriers to cope with the problems of "no shows" and reservation turnovers. In its solicitation of comments, the CAB posited two suggestions: (1) offering conditional reservations to passengers seeking seats on fully booked flights, or (2) guaranteeing reservations for passengers with definite assurance against overbooking at the price of an additional charge or with a "no-show" penalty.[75]

Hypothesizing that overbooking is not found an unfair or deceptive practice, the CAB sought comment regarding the appropriateness of the present procedure. From this premise, the explanatory statement solicited comments as to the appropriateness of an increased level of denied boarding compensation or other changes such as limitation on the interchangeability of tickets between carriers. Additionally the CAB sought comment as to whether carriers should be required to disclose their overbooking practices to passengers.[76]

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[74] According to the data presented in the CAB's Explanatory Statement, the number of persons denied space decreased from a high of 10.0 per 10,000 enplanements in 1968 to 4.6 per 10,000 in 1973. In 1974, the number increased to 5.8 per 10,000, and in 1975 to 6.0 per 10,000. The CAB also noted that the number of complaints received by its Office of the Consumer Advocate reflected a need to reevaluate. *Id.*

[75] *Id.* at 16,479.

[76] In 1965, the CAB had proposed a rule requiring carriers to notify individual passengers of overbooked conditions twelve hours prior to the scheduled departure time. Passenger Priorities and Overbooked Flights: Notice of Proposed Rule Making, 30 Fed. Reg. 13,236 (1965). This proposal was abandoned in 1967. *See* Priority Rules, Denied Boarding Compensation Tariffs, And Reports of Unaccommodated Passengers: Notice of Proposed Rule Making, 32 Fed. Reg. 459, 460-61 (1967). This abandonment, however, does not mean that a notice requirement may not be imposed. The CAB has approved an approach originally

At present these procedures remain speculative and the CAB's process of reviewing alternatives continues.[77] The expanded vulnerability of air carriers to court action based upon section 404(b) of the Act as well as common-law remedies may result in increased pressure upon the CAB to evolve a satisfactory compromise.

II. The Viability of Private Remedies Under the Federal Aviation Act

As discussed above, the court of appeals in *Nader v. Allegheny Airlines, Inc.*, summarily concluded that a private remedy exists pursuant to section 404(b) for a passenger denied boarding while holding a confirmed reservation. This conclusion does not mean, however, that a court will infer a private remedy under section 404 or under provisions of the Act in other factual situations.[78] Indeed, according to a number of recent decisions examining this question, the existence of private remedies under a statutory act involves examination of several criteria undiscussed in the *Nader* opinion. The question of private remedies under the provisions of the Act may well be in the forefront of aviation litigation in the area of carrier-passenger relations within the near future.

On two occasions in the past two years the Court of Appeals for the Third Circuit has examined claimed private remedies for purported violations of sections of the Act. In *Polansky v. Trans World*

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suggested by Eastern Airlines involving the establishment of a third type of ticket—leisure class. *See* Delta Airlines, Inc. v. CAB, 455 F.2d 1340, 1342 (D.C. Cir. 1971) (affirming CAB Order No. 71-6-120). Under this plan the ticket is conditional, *i.e.*, if seating remains after all other persons are aboard, the ticket holder would be accommodated. In its opinion, the Supreme Court also suggested that a notice requirement might be fulfilled if the practice were detailed in the airline's tariff. 426 U.S. 306 n.14.

[77] The CAB deferred consideration of issues concerning past treatment of overbooking raised by the court of appeals in *Nader* until the Supreme Court could examine them. 41 Fed. Reg. at 16,479 n.8. The CAB has also suggested that new regulations be issued regarding overbooking on charter flights. Remedies For Charter Overbooking By Carriers: Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 47,494 (1976).

[78] *See, e.g.*, Mason v. Belieu, 543 F.2d 215 (D.C. Cir. 1976), in which the court reversed a plaintiff's judgment in favor of a nonpassenger who alleged violation of § 404(b) when her husband was bumped from defendant's flight; Moungey v. Brandt, 250 F. Supp. 445 (W.D. Wis. 1966), in which the court refused to imply a private remedy for violation of safety regulations where the plaintiff was injured when the private plane in which he was traveling crashed. *See generally* 34 J. Air L. & Com. 183 (1968).

Airlines, Inc.,[79] plaintiffs were members of a European tour sponsored by the defendant airline. The travel agency involved was also named as a defendant. It was alleged that the defendants had falsely advertised so as to fraudulently induce the plaintiffs to participate in a tour during which numerous problems with ground accommodations were encountered.[80] According to the plaintiffs, these wrongs could be redressed by implying private causes of action pursuant to section 404(b) and section 411 of the Act. The trial court dismissed the claims, and the Court of Appeals for the Third Circuit affirmed the dismissal, rejecting the purported claims arising from violations of the Act. The methodology of the court in reaching these conclusions will be important in similar future claims and must be analyzed in light of the *Nader* decision.

In reaching its conclusions, the *Polansky* court focused on the recent decision of the Supreme Court in *Cort v. Ash*.[81] While the *Cort* decision is not factually apposite,[82] the Court enumerated certain prerequisites to implying a private cause of action from a federal statute. According to Justice Brennan, writing for a unanimous Court, four factors must be examined in determining whether a private remedy is implicit in a statute not expressly providing one:[83] (1) whether the plaintiff is a member of the class for whose special benefit the statute was created; (2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a private remedy; (3) whether implication of a private remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the state's, so that it would be inappropriate to infer a cause of action based solely upon federal law.

Applying the *Cort* criteria to the Federal Aviation Act, the

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[79] 523 F.2d 332 (3d Cir. 1975).

[80] Plaintiffs alleged that their "first-class" accommodations were inferior to some tourist accommodations, that arranged travel services were inadequate, that reservations were broken or not honored, and that guides and hostesses were not available as promised. *Id.* at 333.

[81] 422 U.S. 66 (1975).

[82] *Cort* involved a claim for injunctive relief and damages by a stockholder against a corporation based upon a criminal statute prohibiting corporations from contributing to federal elections.

[83] 422 U.S. at 77-80.

Polansky court initially indicated that it would be a mistake to assume that the implication of a private remedy for some categories of conduct ipso facto implies a private cause of action for other types of conduct under the same provisions. Accordingly, determining whether a private remedy exists for a particular conduct is necessarily an ad hoc decision.[84]

The *Polansky* court examined the purported violations alleged by the plaintiffs and found that the Act did not imply a private cause of action through which the plaintiffs could seek redress. First, the court acknowledged that the plaintiffs were air passengers and within a class sought to be protected by the Act. It found, however, that the plaintiffs did not suffer the type of harm that the statute was designed to prevent. The underlying premise of this conclusion was that Congress intended the Act to provide access to air facilities and to proscribe discriminatory interference from such access by the air carrier.[85] Second, according to the court, the legislative history of section 404(b) shed little light on the problem of implying a private remedy, but the overall legislative scheme militated for denying the right in the plaintiff's circumstances. Finally, the court indicated that it would be appropriate to relegate the plaintiffs to the remedies available through state law.[86]

The court also rejected claims of a private remedy based upon violation of section 411 of the Act without even invoking the *Cort v. Ash* analysis. The court noted that private remedies have never been found under section 411 by any court.[87] This can be attributed in part to dicta in *Pan American Airways v. United States*,[88] in which the Supreme Court suggested that section 411, like section 5 of the Federal Trade Commission Act after which it is patterned, does not contemplate a private remedy, but only vindication of public interest. Accordingly, the *Polansky* court held the plaintiffs could not bring suit for violation of section 411.

The Third Circuit Court of Appeals reiterated both its conclu-

[84] The *Polansky* court stated: "In our view, each new category of conduct alleged to violate § 1374(b) must be tested against the standards stated by the Supreme Court in Cort v. Ash, *supra*." 523 F.2d at 335.

[85] *Id.* at 335-36.

[86] *Id.* at 337.

[87] *Id.* at 339.

[88] 371 U.S. 296 (1963).

sions and its methodology a year after *Polansky* in *Wolf v. Trans World Airlines, Inc.*,[89] which involved circumstances analogous to the earlier decision. Plaintiffs in *Wolf* were participants in mini-plans involving flights to European cities, hotel accommodations, and other incidental services. Pursuant to the arrangement, discount cards were issued for participants to stay in certain guest houses. Upon their arrival in Europe the participants discovered that in some cases the guest houses were situated 350 miles from the advertised city. As a result, all the plaintiffs had to forfeit their discount vouchers. The participants in the mini-plans sued the defendant airline, asserting a right to recover under section 403(b)[90] and 411 of the Act.

The *Wolf* court summarily dismissed the claim based upon section 411 of the Act by recitation of the *Polansky* decision.[91] Regarding the claim based upon section 403(b), the court again turned to the *Cort v. Ash* criteria and found that the prerequisites for a private remedy could not be met. The court borrowed substantially from its earlier decision in *Polansky* regarding the purpose of the Act and the availability of state remedies. Additionally, the court concluded that the plaintiffs were not the beneficiaries of the section because it prohibited air carriers from receiving any compensation greater, less, or different from the rates specified in the currently effective tariff, and the putative plaintiffs were only damaged because they paid more than the tariff.[92]

The opinions of the Supreme Court and the Court of Appeals for the District of Columbia in *Nader v. Allegheny Airlines, Inc.*, may have an important effect on the application of the *Cort v. Ash* analysis, as well as the resultant conclusion in fact patterns such as *Polansky* and *Wolf*. The emphasis on the legislative scheme

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[89] 544 F.2d 134 (3d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3600 (Mar. 8, 1977).

[90] Section 403(b)(1), 49 U.S.C. § 1373(b)(1) (Supp. V 1975) provides, in pertinent part:

> No air carrier of [*sic*] foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier . . . .

[91] 544 F.2d at 136.

[92] *Id.* at 137.

underlying the Act which was emphasized by the Court of Appeals for the Third Circuit in these cases contrasts sharply with the summary recognition of a private remedy in *Nader*. While the factual circumstances are distinguishable and the methodologies of the courts differ, they may not be sufficiently disparate to justify the dramatically opposite conclusions. As more courts recognize private remedies, the impact of the second and third *Cort* criteria which focus on legislative background emphasized by *Polansky* and *Wolf* will correspondingly be diluted.[93] Indeed, the court of appeals in *Nader* did not mention the legislative intent of section 404. In light of the apparent narrow original scope of this section, the *Nader* approach and its disregard of legislative intent may portend an expanded view of the section's, and perhaps the Act's, applicability vis-a-vis private litigants.[94]

Similarly, the *Nader* court's recognition of both common-law and private statutory remedies suggests a dilution of the fourth *Cort* criterion, the availability of state remedies. While the Supreme Court did not have to address the issue of the applicability of a statutory remedy, its resolution of the *Nader* case means that plaintiffs can sue under both the Act and common-law theories.

In summary, it appears that the industry can anticipate a proliferation of claims in which a passenger seeks to avail himself of a private remedy under some section of the Act. Given the dicta of the Supreme Court, it is not likely that section 411, potentially the most far-reaching provision, will soon be recognized as implying a private remedy. An evolutionary process, however, leading to an expansion of the statutory bases upon which courts will infer private remedies can be anticipated,[95] as well as a corresponding

[93] Additionally, if courts reached differing results, the need for a common approach to aviation problems will militate for recognition of private remedies and the evolution of uniform law. *See* 34 J. AIR L. & COM. 133, 135 (1968).

[94] *But see* Mason v. Belieu, 543 F.2d 215 (D.C. Cir. 1976).

[95] The potential for a quantum increase in air carrier vulnerability can be appreciated by analogy to the development of private causes of action under the Securities and Exchange Act. In J.I. Case Co. v. Borak, 377 U.S. 426 (1964), the Supreme Court found an implied federal remedy for violation of § 14(a), 15 U.S.C. § 78n(a) (1970), regarding proxy statements and solicitations based thereon. Subsequently, the Court found that the prevailing party in such a statutory action could recover attorneys' fees. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1969). Although the Third Circuit in Polansky v. Trans World Airlines, Inc., 523 F.2d at 337, expressly distinguished J.I. Case Co. v. Borak based upon the differing purposes of the Securities and Exchange Act and the Federal

expansion of the factual situations in which a private remedy will be afforded.

III. THE LIMITS OF AIR CARRIER LIABILITY IN NEGLIGENCE TO ITS PASSENGERS

Despite varying articulations, it is generally recognized that an airline engaged in transporting passengers for hire is a common carrier and owes them a higher degree of care than normally required under traditional tort standards.[96] This does not mean, however, that the carrier is an insurer of the passenger's welfare.[97] Rather, the basis for recovery is negligence.[98] The application of this principle to ascertain common carrier status and to determine

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Aviation Act, the potential for a parallel evolution of private remedies nonetheless exists.

[96] Among the various articulations of an air carrier's duty are: "the highest degree of care consistent with the practical operation of the plane and protection of its passengers from injuries"; the highest degree of practical care and diligence consistent with the mode of transportation and the normal prosecution of its business"; "the highest degree of care, foresight, prudence and diligence reasonably demanded at any given time by the conditions or circumstances then affecting its passengers"; "the highest practical degree of care for their safety." Some states, notably New York, require only a "reasonable standard of care." Others phrase the standard in terms of a high degree of care. *See* 1 L. KREINDLER, AVIATION ACCIDENT LAW § 3.07 (1971). *See also* W. PROSSER, LAW OF TORTS § 34 (4th ed. 1971).

[97] A number of recent cases illustrate that an airline will not be found culpable for alleged injuries merely because the plaintiff was a passenger. In National Airlines, Inc. v. Edwards, 336 So. 2d 545 (Fla. 1976), the court rejected plaintiff's claims for injuries allegedly resulting from the consumption of food and beverages in Cuba following a hijacking. The court found that this constituted an intervening cause sufficient to break the requisite chain of causation. Similarly, in Kelly v. American Airlines, Inc., 508 F.2d 1379 (5th Cir. 1975), the court upheld the defendant's judgment on the basis that res ipsa loquitor was inapplicable and plaintiff had failed to sustain her burden of proof that she was injured as a result of defendant's negligence in avoiding or failing to warn of air turbulence. *See also* Freedman v. Transworld Airlines, Inc., 336 So. 2d 323 (Fla. App. 1976), in which the court found no liability on the part of the carrier for assault and false arrest when its agents physically removed an hysterical passenger from the aircraft.

[98] *See* L. KRIENDLER, *supra* note 96, at § 3.06. This rule applies only to passengers for hire. An issue which may see development in the future involves the question of carrier liability under trip passes which routinely include exculpatory clauses. Decisions have upheld such limitations on the basis that the injured parties were gratuitous licensees and that the airline was liable only for willful or wanton injury. *See* Braughton v. United Air Lines, Inc., 189 F. Supp. 137 (W.D. Mo. 1960); Sims v. Northwest Airlines, Inc., 269 F. Supp. 272 (S.D. Fla. 1967). Whether such limitations will be upheld in the future or found to be against public policy as impermissible exculpation of tort liability is an open question.

the requisite standard of care is not a simple task for courts.

The focus here will not be on the broad front of this confrontation, but rather on one particular aspect of it which has seen significant recent development. Specifically, it will pertain to the issue of the extent of the airline's special duty in geographical terms, *i.e.*, when and where does the duty of the air carrier begin, however it is formulated. While it is clear that a passenger injured on board an aircraft, or when actually ascending to or descending from an aircraft, comes under the protective umbrella of the common carrier rule, it is not so apparent when the duty attaches and when it terminates. In examining this issue, cases will be considered which arise in two contexts—under the common law and under the Warsaw Convention.

A. *The Parameters of Common-Law Liability*

The conceptual basis for expanded liability for common carriers is a special relationship imposed by law for protecting individuals who have committed themselves into the hands of the carrier for transportation.[99] Logically, therefore, the determinative factor in ascertaining if a common carrier's duty has arisen is whether passenger status is actually attained. This, however, is not as straightforward an inquiry as it might seem. From a narrow perspective, that relationship is established as a matter of law only when a contract of carriage is agreed upon. Yet courts have long held that the purchase of a ticket is not a prerequisite for establishing the carrier-passenger relationship.[100]

[99] *See, e.g.*, Carroll v. Staten Island R.R., 58 N.Y. 126 (1874). In the present context, it should be noted that this expanded duty encompasses not only potential liability for the acts of agents, but also for the acts of others. Thus, the carrier has a duty to protect passengers from the acts of third parties. *See* RESTATEMENT (SECOND) OF TORTS § 314(a) (1965). *See generally* Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

[100] Historically, the relationship has been broadly defined as contractual, but courts have examined the attainment of passenger status from a variety of perspectives and used a variety of approaches to show the establishment of the relationship. Thus, some cases concluded people waiting to board a common carrier are passengers. *See, e.g.*, Schindler v. Southern Coach Lines, Inc., 188 Tenn. 169, 217 S.W.2d 775 (1948). Other courts have focused on the time when a person puts himself in the care of the carrier. *See, e.g.*, Chicago & E. Ill. R.R. v. Jennings, 190 Ill. 478, 60 N.E. 818 (1901). Other courts have focused on the intent of the potential passenger. *See, e.g.*, Rawlings v. Wabash R.R., 97 Mo. App. 515, 71 S.W. 534 (1903). Other courts have relied on an implied contract theory. *See, e.g.*, Roberts v. Yellow Cab Co., 240 A.2d 733 (Me. 1968).

Even if the duty of a common carrier is not applied, the duty of reasonable

In 1974 the Court of Appeals for the Seventh Circuit applied a different, flexible approach to determining whether passenger status had been obtained so as to invoke the common carrier's duty of care. In *Suarez v. Trans World Airlines, Inc.*,[101] the plaintiff was refused a ticket by the air carrier's agent because the credit card offered for payment bore only her husband's name. Plaintiff, who had recently been hospitalized and was attempting to fly home, was delayed for two hours and allegedly subjected to abusive treatment. She thereafter suffered a heart attack. In the negligence action against the airline, the trial court instructed the jury that the defendant owed the plaintiff a duty of ordinary care. The Seventh Circuit reversed, holding that the plaintiff had obtained passenger status and that under the applicable state law, the carrier owed her the highest duty of care.

In reaching that conclusion, the court enunciated a five-element test, one originally envolved by the Washington State Supreme Court,[102] to determine if the plaintiff was actually a passenger. The elements of that test as recited by the *Suarez* court are as follows:

> The matters to be considered in determining the status as a passenger are: (1) place (a place under the control of the carrier and provided for the use of persons who are about to enter carriers conveyance); (2) time (a reasonable time before the time to enter the conveyance); (3) intention (a genuine intention to take passage upon carriers conveyance); (4) control (a submission to the directions, express or implied, of the carrier); and (5) knowledge (a notice to carrier either that the person is actually prepared to take passage or that person awaiting passage may reasonably be expected at the time and place).[103]

The actual application of these principles by the *Suarez* court has been criticized on the basis that the court in fact examined only

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care may exist so as to impose liability for injuries arising away from the aircraft in the vicinity of the terminal. *See, e.g.*, Delta Air Lines, Inc. v. Millirons, 87 Ga. App. 334, 73 S.E.2d 598 (1952); Crowell v. Eastern Air Lines, Inc., 240 N.C. 20, 81 S.E.2d 178 (1954); Marshall v. United Airlines, 35 Cal. App. 3d 84, 110 Cal. Rptr. 416 (1973).

[101] 498 F.2d 612 (7th Cir. 1974).

[102] Zorotovich v. Washington Toll Bridge Auth., 80 Wash. 2d 106, 491 P.2d 1295 (1971). The Illinois Supreme Court had adopted the *Zorotovich* test in a non-airlines, common carrier situation in Katamay v. Chicago Transit Auth., 53 Ill. 2d 27, 289 N.E.2d 623 (1972).

[103] 498 F.2d at 616.

the control issue.[104] Moreover, the court did not confront the issue of whether the air carrier in fact breached its duty. In the present context, however, the case is significant because it raises the possibility of a substantial extension of liability beyond the physical proximity of the aircraft.[105] Additionally, the utilization of a flexible approach which requires examination of numerous criteria precludes a clear prescription of the potential extent of the carrier's liability. Thus, while some nexus with the aircraft is clearly required, prediction as to whether a special duty exists as to a potential passenger is problematical.

B. *Liability Under the Warsaw Convention*

Recent decisions under the Warsaw Convention[106] likewise suggest the evolution of a flexible approach to determining whether passenger status has been obtained in order to determine whether liability inheres. As in the common-law setting, this evolution has already meant some expansion in carrier liability and portends further expansion. Additionally, such a flexible approach poses problems in predicting results and makes legal recommendations hazardous.

Pursuant to Article 17 of the Warsaw Convention as modified by the Montreal Agreement,[107] an air carrier is absolutely liable to a limit of $75,000.00 per passenger for injuries sustained as the result of an accident. Specifically, Section 17 provides:

> The carrier shall be liable for damage sustained in the event of 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.[108]

Thus, the Convention specifically enumerates the circumstances

[104] *See* 40 J. AIR L. & COM. 723, 729 (1974); *see also* Comment, *The Standard of Care Required of Airlines in Terminals*, 60 IOWA L. REV. 710 (1975).

[105] *Suarez* has subsequently been cited with approval by at least one court. *See* Eastern Airlines, Inc. v. Dixon, 310 So. 2d 336 (Fla. App. 1975).

[106] The correct title is The Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1936).

[107] 44 C.A.B. 819 (1966). *See generally* Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497 (1967).

[108] 49 U.S.C. § 1502 (1970).

in which an air carrier is absolutely liable. A number of cases interpreting this provision have held that accidents to passengers within terminals were not encompassed under this provision.[109] Recently, however, cases involving terrorist attacks within terminal facilities have resulted in a reexamination of the scope of Article 17.[110]

The initial focal point of the cases involving terrorist activity under Article 17 of the Convention involved whether such acts constituted "accidents." That issue appears to have been settled by the decision in *Husserl v. Swiss Air Transport Co.*,[111] which held that a hijacking was an "accident" under the Convention provisions. Since that time, the focus has shifted to the issue of whether the "accident" occurred "in the course of any operations of embarking or disembarking."

The first recent decision to examine this clause and expand the scope of its coverage was *Day v. Trans World Airlines, Inc.*[112] *Day* arose as the result of an August 1973 attack at Hellenikon Airport in Athens, Greece, by two Palestinian terrorists, in which grenades and small arms fire were directed into a line of passengers preparing to board defendant's flight to New York City. At the time of the occurrence the passengers had proceeded through check-in counters, deposited their luggage, completed passport and currency inspections, and descended into a lounge for the exclusive use of international boarders. From the lounge in which the attack occurred, passengers gained access to the aircraft by walking outside the terminal, crossing a terrace, and taking a bus to the departure area.

In *Day*, plaintiffs alleged that the defendant was absolutely liable

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[109] *See, e.g.*, MacDonald v. Air Canada, 439 F.2d 1402 (1st Cir. 1971); Klein v. K.L.M. Royal Dutch Airlines, 46 App. Div. 2d 679, 360 N.Y.S.2d 60 (1974); Felismina v. Trans World Airlines, Inc., 13 Av. Cas. 17,145 (S.D.N.Y. 1974).

[110] *See generally* Note, 45 FORDHAM L. REV. 369 (1976).

[111] 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd mem.*, 485 F.2d 1240 (2d Cir. 1973). The finding that terrorist activity is an "accident" under Article 17 should not be extrapolated to the conclusion that anything which happens on an international flight is an accident. In Scherer v. Pan Am. World Airways, Inc., 54 App. Div. 2d 636 (N.Y. 1976), the court rejected plaintiff's claim alleging that a thrombophlebitis condition had flared up as a result of a flight on the grounds that there was no accident.

[112] 393 F. Supp. 217 (S.D.N.Y. 1975), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976).

under the Convention for the injuries sustained by the passengers. In these circumstances, the trial court granted summary judgment on plaintiffs' motion. In doing so, the court explicitly rejected the carrier's contention that the Convention ipso facto did not apply within the terminal. Rather, the court examined the purpose and legislative history of the Convention, in light of the language of Article 17, and concluded as a matter of law that the injuries occurred during the course of embarking.[113]

The Court of Appeals for the Second Circuit affirmed. In so doing, the court noted that the determinative phraseology was cryptic. It emphasized, however, that the purpose of the Warsaw Convention and the history of its negotiation supported what the court labeled the "tripartite" test applied by the district court.[114] Pursuant to this test the court did not exclusively examine the location of the plaintiffs, but rather looked to three factors: (1) activity (what the plaintiffs were doing); (2) control (at whose direction); and (3) location. Reviewing each of these factors, the court of appeals agreed with the lower court that the plaintiffs were in fact engaged in the operation of embarking, and therefore Article 17 was found applicable.

The *Day* opinion's tripartite test was substantially relied upon by the Court of Appeals for the Third Circuit in *Evangelinos v. Trans World Airlines, Inc.*[115] The *Evangelinos* case arose from the same terrorist attack that gave rise to *Day*. In *Evangelinos*, the trial court found that the Warsaw Convention was inapplicable, and it granted the carrier's motion for partial summary judgment. In reversing, the Third Circuit agreed with the assessment of the *Day* court regarding the background and purpose of the Warsaw Convention.[116] The court indicated that it feared an over-emphasis on location would lead to inconsistent results depending upon the fortuitous position of the passenger at the time of his injury. The court also emphasized the need to apply the Warsaw Convention flexibly, consistent with its original purpose, but responsive to changing circumstances.[117] In applying this principle, the court

[113] 393 F. Supp. at 217-20, 223.

[114] 528 F.2d at 33-38.

[115] 396 F. Supp. 95 (W.D. Pa. 1975), *rev'd*, 550 F.2d 152 (3d Cir. 1976).

[116] 550 F.2d at 155.

[117] The court strongly emphasized this point: "To reach any other result would

characterized terrorism as an attendant risk of modern air transportation.[118]

Chief Judge Seitz strongly dissented, disagreeing with the adoption of the approach utilized in *Day*.[119] He scrutinized the negotiations underlying adoption of Article 17, and he concluded that support did not exist for the test articulated by the majority. Rather, he concluded that while location and activity are both important, Article 17 presupposes some close connection with the aircraft before the activity of the passenger should be examined. Because the requisite nexus was not present in the *Evangelinos* setting, in his opinion, Article 17 should not have been applied. A recent decision of the Court of Appeals for the First Circuit reaches a similar conclusion.

Hernandez v. Air France[120] arose from a terrorist attack in the baggage retrieval area of Lod International Airport near Tel Aviv, Israel, on May 30, 1972. Plaintiffs were members of a group of Puerto Rican tourists who had descended movable stairs from the defendant's aircraft to the ground and then rode or walked to the terminal which they entered after a passport inspection. While waiting for their luggage, three Japanese terrorist opened fire with submachine guns and grenades. The plaintiffs subseqeuntly sued, alleging that the airline was absolutely liable pursuant to Article 17 because they were in the operation of disembarking.

In these circumstances the federal district court held that the attack did not occur during disembarkation.[121] On appeal of this decision, the appellants urged reexamination of the trial court's conclusion based on the decisions in *Day* and *Evangelinos*. The First Circuit, however, affirmed the lower court decision and rejected the contention that the attack occurred in the process of disembarkation. In so doing the court specifically stated that it was not rejecting the tripartite test of *Evangelinos* and *Day*. Rather, the court indicated that even under this test the passenger relation-

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be to freeze the Warsaw Convention in its 1929 mold, when air travel was in its infancy, and to ignore current air travel procedures and the special risks created by the type of violence that resulted in this tragedy." *Id.* at 157.

[118] *Id.* at 157.

[119] *Id.* at 158 (Seitz, C.J., dissenting).

[120] 545 F.2d 279 (1st Cir. 1976).

[121] *In re* Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975).

ship had terminated. Plaintiffs' activities were not controlled by the air carrier and their location was substantially removed from the aircraft.[122] Thus, the court distinguished *Day* and *Evangelinos* on the basis that the present plaintiffs, unlike the plaintiffs in those cases, were essentially "free agents." Additionally, the court rejected the notion that terrorist activity could be considered a characteristic risk of air travel in the same manner as skyjacking.[123]

Although the *Hernandez* court paid lip service to the tripartite test of *Evangelinos* and *Day*, its conclusion that this approach would yield a consistent result does not clearly follow. Indeed, given the differing attitudes of the Circuit Courts of Appeal regarding the risk involved in terrorist activity in terminals, it is entirely possible that had *Hernandez* arisen in the Second or Third Circuits the opposite result would have obtained. The First Circuit in *Hernandez* in essence agreed with the dissent in *Evangelinos* that a preliminary showing of some close nexus between the injury and air travel is required.

The differing results among these cases underscore the lack of certainty regarding the applicability of Article 17 of the Warsaw Convention for injuries sustained away from the aircraft itself. Even if courts agree that the tripartite test first invoked in *Day* is appropriate to analyze the scope of liaiblity under Article 17, differing application of the criteria will lead to varying results.[124]

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[122] The *Hernandez* court noted that both *Day* and *Evangelinos* had pointed out that disembarkation was distinguishable from embarkation. 545 F.2d at 282 n.2.

[123] The court stated: "[W]e think the risk of a random attack such as that which gave rise to this litigation is not a risk characteristic of travel by aircraft, but rather is a risk of living in a world such as ours." *Id.* at 284. Thus, the *Hernandez* court agreed with the distinction between hijacking and terrorist activity made by Chief Judge Seitz in dissent to *Evangelinos*. 550 F.2d at 159-60.

[124] Another focal point of litigation under Article 17 involves the viability of claims for mental injuries. Recently, some courts, in dicta, have suggested that Article 17 contemplates compensation for such injuries, absent corresponding physical impairment. *See* Husserl v. Swiss Air Transport Ltd. (*Husserl II*), 388 F. Supp. 1238 (S.D.N.Y. 1975); Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322 (C.D. Cal. 1975). *Compare* Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974) *with* Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.M. 1973). *See generally* Lowenfelds, *Hijackings, Warsaw, and the Problem of Psychic Trauma*, 1 SYRACUSE INT'L L.J. 345 (1973). The issue of compensable injuries under Article 17 will continue to be the source of litigation.

IV. CONCLUDING COMMENTS

Ascertaining a common denominator underlying the cases and trends discussed herein is a hazardous undertaking. Indeed, the complicated legal and factual contexts in which such decisions arose make summation difficult. Nonetheless, it is useful to identify what appears to be a common problem in many aviation cases—the evolution of flexible standards for making determinations regarding the scope of air-carrier liability in varying circumstances. This trend can be seen in the cases dealing wtih bumping, with private remedies under the Federal Aviation Act in general, with the extent of common-law negligence liability, and with the scope of Article 17 of the Warsaw Convention.

The utilization of flexible tests under which courts examine a number of criteria to determine if a basis for liability exists is not necessarily inappropriate. The danger of this approach, however, is that it may lead to result-oriented opinions in which courts find for one party or the other depending on their perception of the appropriate allocation of risk. This conclusion may be speculative. It is clear, however, that the evolution of such flexible tests makes prediction more difficult and opens the door to a substantial expansion of liability. The industry and its counsel must ensure that newly evolved standards are not manipulated, but rather applied justly for the good of the carriers, their passengers, and the public as a whole.