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LIABILITY OF AIR CARRIERS FOR INJURIES TO PASSENGERS RESULTING FROM DOMESTIC HIJACKINGS AND RELATED INCIDENTS

BRAD KIZZIA

I. INTRODUCTION*

During the late hours of January 24, 1980, a twenty-eight year old Atlanta man successfully smuggled a .25 caliber handgun aboard a Delta Air Lines Lockheed L-1011, when he, his wife and two children boarded the aircraft at Hartsfield Airport in Atlanta, Georgia. The Delta airliner was en route to New York City from Los Angeles, California, with fifty-three passengers and twelve crewmen when it was diverted to Havana, Cuba, on the orders of the hijacker. Four hours later the plane landed at Jose Marti Airport in Havana. While the hijacker negotiated for eleven hours in an attempt to secure another aircraft to fly to Tehran, Iran, one passenger was overcome by the emotionally tense situation and was allowed to leave the plane. For the remaining passengers, the ordeal ended when the hijacker surrendered to Cuban authorities after the passengers managed to sneak off the aircraft.

* Editor's Note: Since this comment went to print, there have occurred at least five additional seizures of American airliners, bringing the number of such events subsequent to January, 1973, to 50 and raising the 1980 U.S. skyjacking figure to 15. Four of these five most recent hijackings resulted in successful diversions of American jetliners to Cuba. Four out of five involved seizures of domestic flights. All apparently were perpetrated by homesick Cubans who threatened to ignite flammable liquids which they claimed to have smuggled on board the aircraft.

1 Dallas Morning News, Jan. 26, 1980, at 1, col 1; N.Y. Times, Jan. 27, 1980, at 18, col. 5. Federal Aviation Administration officials subsequently stated that security mechanisms used at the airport were operating satisfactorily at the time of the hijacking. The hijacker apparently also claimed to have a bomb, but he did not. Dallas Morning News, Jan. 26, 1980, at 1, col. 1.

2 Dallas Morning News, Jan. 26, 1980, at 1, col. 1. A nonscheduled diversion of a domestic flight outside the United States or to another country does not invoke the jurisdiction of the Warsaw Convention for international flights. See notes 21, 25, infra.

3 Dallas Morning News, Jan. 26, 1980, at 1, col. 1. The passenger suffered what was described as a "nervous convulsion." Id. at 14, col. 6.

4 In 1973 the United States and Cuba entered into an agreement whereby
through a food service elevator while the hijacker was in the cockpit and his family was asleep. The passengers finally reached their New York destination at 10:30 p.m. on January 25. The January 24 hijacking of a Delta airliner was the first attempted hijacking of an American air carrier in 1980. While hijacked aircraft (or vessels) and passengers would be returned to the country of origin and the hijackers would either be prosecuted or returned. See Memorandum of Understanding on Hijacking of Aircraft and Vessels and other Offenses: Hearings before the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 93rd Cong., 1st Sess. 3-4 (Feb. 20, 1973). The agreement was allowed to lapse on April 15, 1977, after Cuban President Castro accused the United States, and particularly the C.I.A., of sabotaging a Cuban airliner that crashed in the Barbados in 1976. However, Castro indicated that Cuba would unilaterally abide by the basic provisions of the agreement. See New York Times, June 12, 1979, at 13, col. 5.

* Id. The flight had been delayed more than eighteen hours.
* "Hijacking" has been defined as "the unlawful seizure and diversion of aircraft to unscheduled destinations." United States v. Cyzewski, 484 F.2d 509, 511 (5th Cir. 1973). For purposes of this comment, "skyjacking" and "hijacking" will be considered synonymous and will be used interchangeably. The same will apply to "skyjacker" and "hijacker." For purposes of criminal prosecution, "air piracy" is defined as a "seizure of control, by force or violence or threats of force or violence, or by any other form of intimidation" of an aircraft. 49 U.S.C. § 1472(i)(2) (1976).

This includes commercial operators engaging in intrastate common carriage covered by the Code of Federal Regulations Title 14, Part 121.7, 14 C.F.R. § 121.7 (1980). A common carrier holds its services out to the general public to carry for hire at a uniform rate all persons who apply, so long as there is room on board. See Jackson v. Stancil, 116 S.E.2d 817 (N.C. Sup. 1960). A private carrier does not offer its services to the general public and reserves the right to refuse carriage to anyone. See Slezy v. Lang, 102 N.W.2d 435 (Neb. Sup. 1960). See also M. McClintock, AIRCRAFT HIJACKING: ITS CIVIL AND CRIMINAL RAMIFICATIONS 65 (1971) [hereinafter cited as McClintock]; McClintock, Skyjacking: Its Domestic Civil and Criminal Ramifications, 39 J. AIR L. & COM. 29, 42-43 nn. 56-57 (1973) [hereinafter cited as Skyjacking].

Three days earlier on January 21, 1980, an extortionist, who had previously left a fake bomb aboard a United Airlines DC-8, phoned United headquarters in Los Angeles demanding money and claiming that the bomb would detonate if the aircraft dropped to an altitude below 5,000 feet. The airliner was diverted to Colorado Springs Municipal Airport in Colorado because, at 6,172 feet, it is the highest airport in the United States at which a DC-8 can land. A box of simulated dynamite was discovered aboard. N.Y. Times, Jan. 23, 1980, at 12, col. 1. Since the January 24, 1980 hijacking of the Delta jetliner, there have been at least nine other seizures of American commercial airliners by hijackers, eight of which involved domestic flights. See Miami Herald, Aug. 17, 1980, at 1, col. 5 (reporting 3 hijackings which occurred on August 16, 1980); N.Y. Times, Aug. 15, 1980, at 12, col. 5; Wash. Post, Aug. 14, 1980, at 5, col. 1; Wash. Post, Aug. 11, 1980, at 11, col. 5; Wash. Post, July 13, 1980, at 6, col. 2; Wash. Post, May 3, 1980, at 6, col. 3; Wash. Post, April 10, 1980, at 11, col. 3 (each article reporting a hijacking that occurred on the day prior to the article).
it was only the second successful hijacking of a U.S. airliner to Cuba since 1972, it constituted the fifth successful hijacking of an American air carrier during the same period. Furthermore, the

10 N.Y. Times, June 12, 1979, at 1, col. 1. On June 11, 1979, a former Cuban Air Force pilot, who had ten years earlier been granted political asylum when he defected to the United States by piloting a Soviet-made MIG-17 jet to Florida, succeeded in hijacking a Delta Airlines Lockheed L-1011 Tristar jumbo jet (en route from New York to Ft. Lauderdale, Florida) to Havana, Cuba. The act constituted the first effective hijacking of an American airliner to Cuba since 1972, and it was accomplished when the hijacker forced his way into the cockpit, claiming to possess a bomb and demanding transport to Havana. The bomb threat proved false and the hijacker was taken into custody by Cuban authorities. Id.; see also N.Y. Times, June 13, 1979, at 22, col. 3; N.Y. Times, June 13, 1979, at 23, col. 3. From 1968 through July 1971 seventy-five percent of all attempted hijackings of American aircraft were intended for Cuba. J. AREY, THE SKY PIRATES 320-24 (1972) [hereinafter cited as AREY]. Since the January, 1980 hijacking of the Delta airliner to Cuba, there have been at least eight additional hijackings of U.S. jetliners to Cuba. See Miami Herald, Aug. 17, 1980, at 1, col. 5 (reporting 3 hijackings to Cuba that occurred on August 16, 1980); N.Y. Times, Aug. 15, 1980, at 12, col. 5; Wash. Post, Aug. 14, 1980, at 5, col. 1; Wash. Post, Aug. 11, 1980, at 11, col. 5; Wash. Post, July 23, 1980, at 6, col. 2; Wash. Post, April 10, 1980, at 11, col. 3 (each article reporting a hijacking of a U.S. airliner to Cuba).

11 According to the Federal Aviation Administration (FAA), a "successful" hijacking is one in which the perpetrator forces an American aircraft to make an unscheduled landing in another country. See Department of Transportation, Federal Aviation Administration, Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, January 1-June 30, 1979 (1979), submitted pursuant to the Federal Aviation Act, 49 U.S.C. § 1341 (1976), as amended Pub. L. No. 93-366 (1974) [hereinafter referred to as 1979 FAA Report]. When making reference to a "successful" hijacking, this comment utilizes the FAA definition of such incidents. However, whether or not a skyjacker diverts an aircraft to a non-scheduled stop in a foreign country is not determinative of the air carrier's liability for injuries that may have been incurred by its passengers.

12 In addition to the ten previously mentioned successful hijackings of U.S. airliners to Cuba (see notes 1-6, 10, supra, and accompanying text), there have been a minimum of 3 other "successful" skyjackings involving American air carriers since 1972. See N.Y. Times, Nov. 1, 1979, IV, at 20, col. 6; N.Y. Times, June 22, 1979, at 3, col. 3 (reporting two successful hijackings to Cuba that occurred in 1979 in addition to the June 11, 1979 hijacking cited in note 10 supra). Prior to the three successful 1979 hijackings and the nine successful 1980 hijackings, the last successful act of air piracy perpetrated against an American airliner, and the only successful skyjacking since 1972 that did not involve a diversion to Cuba, occurred on September 10, 1976, when five Croatian nationalists faked possession of explosives and succeeded in hijacking to Paris, France, a Trans World Airlines Chicago-to-New York flight. Eighty-five passengers and seven crewmen were held for 32 hours and threatened with death. See United States v. Busic, 592 F.2d 13, 16-19 (2d Cir. 1978). See also N.Y. Times, Sept. 11, 1976, at 1, col. 5. Although eight successful skyjackings occurred in 1972, no successful hijackings of United States air carriers occurred in 1973, 1974 or 1975. 1979 FAA Report, supra note 11, at 20 (Exhibit 1).
January 24 Delta hijacking marked the thirty-sixth time that a hijacking has been attempted on board an American airliner since the U.S. Civil Aviation Security Program was fully implemented in January, 1973. Yet, the most significant aspect of this first hijacking of 1980 was the fact that it was the only hijacking of a U.S. carrier since prior to January, 1973 that involved a real firearm or highly explosive device passing undetected through the pre-boarding screening system.

The liability of air carriers for injuries to passengers on international flights to, from, or stopping over in the United States is governed by the Warsaw Convention as modified by the so-called Montreal Agreement. The Warsaw Convention contains specific

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13 See 1979 Report, supra note 11, at 20 (Exhibit 1). According to that report the FAA had recorded 31 such attempted hijackings of United States air carriers between January 1, 1973, and July 1, 1979. Since the report was written, at least 14 more hijackings have been tried in which American airliners have been involved, ten of which have occurred in 1980 and have previously been mentioned. See note 9 supra; see also, N.Y. Times, Nov. 25, 1979, at 17, col. 1; N.Y. Times, Nov. 1, 1979, IV, at 20, col. 6; N.Y. Times, Aug. 24, 1979, at 12, col. 1; N.Y. Times, Aug. 17, 1979, at 11, col. 1 (reporting 4 other hijacking attempts aboard U.S. domestic airliners since July 1, 1979). The 45 recorded hijacking attempts perpetrated against United States air carriers since January, 1973, do not include incidents in which persons who may have intended to attempt hijackings were prevented from doing so by detection of weapons or explosives in the pre-boarding screening procedures. Only those incidents where the would be skyjacker manages to board the aircraft are categorized as attempted hijackings. See 1979 FAA Report, supra note 11, at 4.

14 See 1979 FAA Report, supra note 11, at 1; see also note 1 supra. While it remains a fact that no other hijacking of a U.S. airliner since January, 1973, has involved the use of an actual firearm or bomb that was smuggled through airline screening mechanisms, since the January, 1980, Delta hijacking, Cuban refugees in the United States have managed to hijack four U.S. jetliners to Cuba by threatening to ignite gasoline that was carried aboard the planes undetected. See Miami Herald, Aug. 17, 1980, at 1, col. 5 (reporting two such incidents); N.Y. Times, Aug. 15, 1980, at 12, col. 5; Wash. Post, Aug. 14, 1980, at 5, col. 1.

15 49 U.S.C. § 1502 (1976). The Warsaw Convention is officially entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air," opened for signature October 12, 1929, declaration of adherence by the United States deposited at Warsaw, Poland, July 31, 1934, proclaimed October 29, 1934, 49 Stat. 3000-26 T.S. 876 (1934) [hereinafter cited as Warsaw]. The Convention creates both a presumption of liability on the part of the carrier for injury or death arising out of international transportation (subject to certain defenses) and a concomitant limitation of liability (subject to certain exceptions) to 125,000 Poincare francs (about $8,300) per passenger. See Dunn v. Trans World Airlines, Inc., 589 F.2d 408, 410 (9th Cir. 1978).

16 On May 14, 1966, the United States announced the approval by the Civil Aeronautics Board, Dept. of State Press Release Nos. 110, 111, 54 Dept. State Bull. 955 (1966), of the arrangement, known as Agreement CAB 18900, which provides, inter alia, that the parties thereto agree to include in their tariffs to
articles which attempt to regulate liability of international air carriers in a uniform manner by establishing a presumption of liability,\textsuperscript{17} by limiting liability,\textsuperscript{18} and by establishing defenses against liability.\textsuperscript{19} The Montreal Agreement, which became effective on May 16, 1966, provided two major modifications to the Warsaw scheme of air carrier liability by raising the carrier's limitation of liability for the death, wounding or other bodily injury of a passenger and by imposing a system of absolute liability.\textsuperscript{20} While hijackings of international flights\textsuperscript{21} have given rise to a number of lawsuits by passengers to recover damages for injuries suffered,\textsuperscript{22} be filed with the CAB a "special contract" by which the carrier would waive its defense of due care provided by Article 20(1) of the Convention and also raise its limitation of liability under the Convention to $75,000. \textit{See} 31 Fed. Reg. 7,302 (1966); \textit{See also} Day \textit{v.} Trans World Airlines, Inc., 528 F.2d 31 (2d Cir. 1975), \textit{cert. denied}, 429 U.S. 890 (1976); Karfunkel \textit{v.} Compagnie Nationale Air France, 427 F. Supp. 971 (S.D.N.Y. 1977). Together, the Agreement (signed by each airline), the requisite tariff, filed pursuant to the Agreement on May 16, 1966, the Notice to Passengers included within the ticket informing the passenger of the change in the regime of the Warsaw Convention (and of its applicability), and the CAB order, constitute what has been called the "Montreal Agreement." I L. KREINDLER, \textit{AVIATION ACCIDENT LAW}, §§ 12A.01-12A.07 (1978). The Montreal system has not changed the text of the Warsaw Convention, but rather "impose[s] upon international aviation involving the United States a . . . system of liability that is essentially contractual in nature." \textit{Id.} at § 12A.01. \textit{See generally}, Lowenfeld & Mendelsohn, \textit{The United States and the Warsaw Convention}, 80 \textit{HARV. L. REV.} 497 (1967). Hereinafter, the Warsaw Convention as modified by the Montreal Agreement will be referred to as the "Warsaw System."

\textsuperscript{17} \textit{See} Warsaw, \textit{supra} note 15, at arts. 17, 18, 19.

\textsuperscript{18} \textit{Id.} at arts. 22, 24.

\textsuperscript{19} \textit{Id.} at arts. 20, 21.


\textsuperscript{21} International transportation is "any transportation in which according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation . . . are situated . . . within the territories of two High Contracting Parties . . ." to the Warsaw Convention. Warsaw, \textit{supra} note 15, at art. 1(2). The Warsaw Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Warsaw, \textit{supra} note 15, at art. 1(1).

A domestic flight of an American carrier is one that is scheduled to begin and end in the United States. FAA statistics normally do not distinguish domestic and international flights because screening procedures and security measures mandated by the FAA do not differentiate between domestic and international flights. \textit{See generally} 1979 FAA Report, note 11 \textit{supra}.

\textsuperscript{22} Under the Warsaw system, a "hijacking" is within the term "accident" as used in Article 17 of the Warsaw Convention, and is sufficient to raise the presumption of liability under Article 17. Karfunkel \textit{v.} Compagnie Nationale
only one hijacking of an American domestic flight has resulted in a reported court decision\textsuperscript{23} despite the fact that the majority of hijackings involving American carriers, at least during the last two years, have occurred on domestic flights.\textsuperscript{24}

This comment is concerned with the liability of an airline for injuries to its passengers resulting from an incident of domestic air hijacking (or related crime) like the above mentioned Delta hijacking,\textsuperscript{25} since the full screening of passengers and their carry-


\hspace{1cm} 23 National Airlines, Inc. v. Edwards, 336 So. 2d 545 (Fla. 1976). \textit{Cf. Karfunkel v. Compagnie Nationale Air France}, 427 F. Supp. 971 (S.D.N.Y. 1977) which was brought in New York against the defendant airline to recover for damages suffered by passengers during a hijacking on the common law theories of negligence and false imprisonment. The court held that the subject flight was in international transportation and subject to the provisions of the Warsaw Convention. The case was dismissed for lack of subject matter jurisdiction because under the Warsaw Convention, New York was not one of the locations that suit could be brought against Air France to recover for damages incurred on the Tel Aviv-to-Paris flight. Article 28(1) of the Warsaw Convention provides in part that an action for damages must be instituted in a court "of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination." Warsaw, \textit{supra} note 17, at art. 28(1).


\hspace{1cm} 25 The fact that a domestic flight is diverted out of the United States does not make it an international flight.

Whether a particular flight is "international transportation" to which the Convention applies is determined solely by reference to the "contract made by the parties" (Article 1(2)). If, according to the contract, the place of departure and place of destination are within the territories of two High Contracting Parties, the Convention applies.

Whether a flight actually reaches its planned destination is thus irrelevant. In choosing the contract as the basis for determining
on items was instituted in 1973. Analysis is focused on current airline security measures, particularly the pre-boarding screening system, and the duty of air carriers to prevent weapons from penetrating that system. In addition, a portion of this article is devoted to the issue of airline liability for mental or emotional injuries suffered by passengers during skyjacking or related incidents on domestic flights, as this will be a crucial issue to be resolved in cases arising out of recent and future domestic airline hijackings.

II. CURRENT AIRLINE SECURITY MEASURES

Present FAA regulations with regard to the pre-boarding passenger screening procedures\(^{26}\) were promulgated pursuant to the Air Transportation Security Act of 1974,\(^{27}\) which directs the administrator of the FAA to prescribe "reasonable regulations requiring that all passengers and all property intended to be carried in the aircraft cabin in air transportation . . . be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier . . . prior to boarding the aircraft for such transportation."\(^{28}\) Mandatory inspection of all passengers of uniform treatment under the Convention.


\(^{26}\) See 14 C.F.R. § 121.538(b) (1980), which requires all commercial common carriers to adopt and put into use a screening system, acceptable to the FAA, that is "designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carry-on baggage or on or about the persons of passengers . . . and the carriage of any explosive or incendiary device in checked baggage." Id.

The regulations do not describe the specific anti-hijacking procedures to be followed. The air carriers have been informed through unpublished directives what provisions would be "acceptable." See United States v. Davis, 482 F.2d 893, 900 n.20 (9th Cir. 1973). Each carrier must file its own security program with the FAA, and the Administrator has the authority to direct amendments to the programs submitted for acceptance. 14 C.F.R. § 121.538(g)(1) (1980).


\(^{28}\) Id. Approved airline security programs pursuant to the required pre-boarding passenger screening system have been implemented by 77 U.S. air carriers and 91 foreign air carriers at 426 American and 270 foreign airports. These air carriers operate more than 15,000 scheduled and chartered passenger flights each day, and over 860,000 passengers with more than 1.3 million carry-on items are screened daily. 1979 FAA Report, supra note 11, at 21 (Exhibit 12). The FAA is authorized to require foreign air carriers serving U.S. airports to implement approved passenger screening systems. 49 U.S.C. § 1356 (1976).
sengers and their carry-on items was instituted in January, 1973.\textsuperscript{29} The security devices currently utilized at screening checkpoints consist primarily of walk-through weapon detectors supplemented by hand-held equipment for individual passengers, and x-ray inspection systems for carry-on items at high volume stations.\textsuperscript{30} While an air carrier may be required to maintain a number of law enforcement officers adequate to support its security program,\textsuperscript{31} each of whom must be armed and have completed a training program,\textsuperscript{32} the former rule requiring that the officers be permanently stationed at screening stations has been relaxed so that in certain instances the law enforcement officers supporting the passenger screening system may patrol the public areas away from the screening checkpoint.\textsuperscript{33}

The effectiveness of the passenger screening system currently in general use has been demonstrated by the fact that no hijacking between January 1, 1973, and December 31, 1979, involved a real

\textsuperscript{29} 1979 FAA Report, supra note 11, at 9.

\textsuperscript{30} Id. The early security system consisted primarily of the use of a "hijacker behavior profile," a magnetometer to deter the presence of metal or a prospective passenger who meets the "profile," and a search of the carry-on baggage and/or person of any such prospective passenger who activates the magnetometer. The profile was formulated by the FAA with behavioral characteristics determined to be common to all hijackers in order to alert airline personnel to potential hijackers. Those embarking passengers who were determined to match the behavioral profile ("selectees") were then subjected to an electronic examination with the magnetometer. See generally McGinley and Downs, Airport Searches and Seizures—A Reasonable Approach, 41 Ford. L. Rev. 295, 294-97 (1972) [hereinafter cited as McGinley]; Abramovsky, Compensation for Passengers of Hijacked Aircraft, 21 Buff. L. Rev. 339, 340-41 (1972) [hereinafter cited as Abramovsky]; Blumenthal, Security Aloft: Screen Below, N.Y. Times, Jan. 15, 1978, § 10, at 1, col. 1 [hereinafter cited as Blumenthal]; Mauer, Skyjacking and Airport Security, 39 J. Air L. & Com. 361, 367-69 (1973) [hereinafter cited as Mauer].

While the employment of armed "sky marshalls" to accompany planes with the assignment of apprehending any would-be hijacker on board, was formerly a major feature of the FAA mandated airline security program, Abramovsky, supra at 341, they are no longer utilized on a widespread or routine basis. 1979 FAA Report, supra note 11, at 14. The primary reasons that this approach to hijack prevention has been phased out are that better ground security measures have been developed and that the airlines have disfavored the use of armed security personnel in flight. Blumenthal, supra.

\textsuperscript{31} American air carriers may only be required to provide security forces in airports which are not required to do so, see 14 C.F.R. § 121.538(1) (1980), and in areas of the air terminals in exclusive control of the airline. See 14 C.F.R. § 107.13(b) (1980).

\textsuperscript{32} 14 C.F.R. § 107.17(a)(3)-(4) (1980).

\textsuperscript{33} 1979 FAA Report, supra note 11, at 11.
firearm or high explosive smuggled through a screening checkpoint. In fact, from January, 1973 to June 30, 1979, more than 18,000 firearms were detected by the security measures implemented through the pre-flight passenger screening system resulting in over 6,400 related arrests.

III. THE SKYJACKING THREAT SINCE JANUARY, 1973

In 1973, the first year of mandatory screening of all passengers and their carry-on baggage, the number of attempted hijackings of air carriers in the United States dropped to one from twenty-seven in 1972. Furthermore, during the six-year period from January 1, 1973, through December 31, 1978, there were a total of twenty-five hijacking attempts perpetrated against U.S. carriers as contrasted with the twenty-seven hijacking attempts in 1972, the last year prior to implementation of the 100 percent screening system.

34 Id. at 1. See note 14 supra, and accompanying text.

The fact that 6,400 arrests were made during the 6½-year period between January, 1973 and June 30, 1979, does not necessarily indicate that that many hijackings were thwarted by the pre-flight passenger screening system. The FAA has determined that of these arrests, 79 were incidents in which it appeared that persons intended to commit crimes against civil aviation but were prevented from doing so by the screening procedures. 1979 FAA Report, supra note 11, at 4, 9. Of the firearms detected, approximately 85 percent were discovered through the x-ray inspection of carry-on items, 10 percent through the screening of individuals by weapon detectors, and 5 percent by physical search of carry-on items. See 1979 FAA Report, supra note 11 at 9; 2d 1978 FAA Report, supra note 24 at 8; 1st 1978 FAA Report, supra note 24, at 13.

36 1979 FAA Report, supra note 11, at 20 (Exhibit 1).
37 Id. Although there were 31 hijackings of American airliners during the 6½-year period between January, 1973, and June 30, 1979, none involved real firearms or high explosives smuggled through the passenger screening system. Id. at 1. By contrast, of the 46 hijackings of foreign air carriers that occurred during the 30-month period between January 1, 1977 and June 30, 1979, at least 31 of the incidents occurred because of inadequate passenger screening employed by foreign airlines in countries outside the United States which per-
Of those 25 attempted skyjackings of U.S. carriers between 1973 and 1978, only one was successful, compared with the eight successful hijackings in 1972 alone.\textsuperscript{88}

Viewing the post-January, 1973 period as a whole, it would appear that the institution of a mandatory pre-boarding passenger screening system that is applied to all passengers and their carry-on items, using sophisticated metal detecting devices and x-ray machines or physical searches, has directly resulted in the occurrence of four related phenomena: (1) a decrease in the number of attempted hijackings of U.S. commercial air carriers; (2) a decline in the successfulness of any skyjackings that are attempted; (3) a virtual halt in the number of firearms or high explosives that pass undetected onto airliners with boarding passengers; and (4) a concomitant reduction in the number of passengers suffering bodily injury or death as the result of being assaulted by skyjackers of U.S. air carriers.\textsuperscript{9}

It is not certain whether this success was accomplished primarily through deterrence of potential hijackers or through detection of the weapons carried by would-be hijackers.\textsuperscript{40}

\textsuperscript{88} During the same 6-year period there were 110 hijacking attempts lodged against foreign airliners outside the United States, 1979 FAA Report, supra note 24, at 21 (Exhibit 2), of which at least 44 were successful, 1st 1978 FAA Report, supra note 24, at 3. This great disparity in the number and successfulness of hijackings perpetrated against foreign air carriers as opposed to American air carriers was not present prior to 1973. 1979 FAA Report, supra note 11, at 21 (Exhibit 2).

\textsuperscript{9} Fewer bodily injuries to or deaths of passengers of American airliners arising out of skyjackings would seem to be the likely result of fewer hijackings and more importantly, fewer armed hijackers. By contrast, deaths and bodily injuries due to worldwide criminal incidents involving civil aviation have not decreased substantially since January, 1973. See 1979 FAA Report, supra note 11, at 27 (Exhibit 8).

\textsuperscript{40} It has been posited that the fundamental purpose of an elaborate pre-flight passenger surveillance system is one of deterrence of potential hijackings. See, e.g., United States v. Cyzewski, 484 F.2d 509, 511, 514 (5th Cir. 1973); McGinley, supra note 30, at 304; Arey, supra note 10, at 234-42. On the other hand, it has also been asserted that the real objective of pre-boarding screening procedures is not necessarily to keep out the skyjacker, but rather to keep out any weapons or explosives he might attempt to take on board. See, e.g., Clyne,
Nevertheless, the ostensible impressiveness of post-January, 1973 statistics with regard to skyjacking of American airliners should not be utilized to veil or downplay a legitimate and substantial threat to the physical safety and mental well-being of passengers on U.S. commercial air carriers.41 Since the system of screening all embarking passengers and their carry-on baggage was instituted in January, 1973, there have been at least 45 attempted hijackings of U.S. air carriers in domestic and international flights, thirteen of which have proven successful.42 With the exception of 1976, every year has seen the number of hijackings

AN ANATOMY OF SKYJACKING 128 (1973) [hereinafter cited as CLYNE].

This writer would submit that any successful preboarding passenger screening system should be designed both to deter and disarm potential hijackers. See United States v. Bell, 464 F.2d 667, 675 (2d Cir.) cert. denied, 409 U.S. 991 (1972). In the first place, a very effective screening system that detects virtually all weapons or explosives that embarking passengers might attempt to carry through screening checkpoints will undoubtedly be the best deterrent. Secondly, while conventional deterrents may be effective against “sky bandits” who try so-called “Jesse-James skyjackings,” or crimes committed for money, see, e.g., Northwest Airlines, Inc. v. Globe Indemnity Co., 225 N.W.2d 831, 832-34 (Minn. 1975) (plaintiff airline recovered under a blanket crime policy from defendant insurer $200,000.00, which was paid to a skyjacker [D. B. Cooper] who parachuted out rear of aircraft after receiving money), conventional deterrents are of little use against hijackers seeking political escape, since they are normally desperate, and of probably no use against hijackers who are lunatics, or against political terrorists who are more concerned with media coverage than the consequences of apprehension. See CLYNE, supra note 78, at 121-26; E. MCWHINNEY, THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 8-13 (1975) [hereinafter cited as McWHINNEY]. On the other hand, a screening system aimed at disarming would-be hijackers may not stop the “bluff-artist” who has no weapon at all, but relies on the air carrier's unwillingness to take chances. CLYNE, supra note 78, at 121. FAA statistics indicate that there were at least 79 potential hijackings during the 6-year period between January, 1973, and June 30, 1979, that were not deterred, but were thwarted by the preboarding screening system. 1979 FAA Report, supra note 11, at 4.

41 Between 1974 and June 30, 1979, worldwide criminal acts against civil aviation resulted in 755 deaths and 689 injuries, with 116 deaths and 120 injuries involving U.S. civil aviation. See 1979 FAA Report, supra note 11, at 9, 27 (Exhibit 8).

of U.S. airliners increase from the preceding year since the dramatic reduction between 1972 and 1973.\(^3\) Furthermore, of the 45 times that a skyjacking has been tried aboard American airliners during the 7½-year period since January, 1973, more than half (28) have occurred since the beginning of 1978,\(^4\) and more hijacking attempts were perpetrated against U.S. air carriers in 1979 (10) than in any year since 1972.\(^5\)

The airline industry’s previously unblemished record as to preventing firearms or high explosives from passing undetected through pre-boarding passenger screening checkpoints was recently stained by the aforementioned hijacking of a Delta airliner to Cuba in which the skyjacker succeeded in smuggling a handgun on board the aircraft.\(^6\) Furthermore, since January, 1973, there have been seven attempted hijackings of U.S. air carriers in which knives or other weapons (not firearms or explosive devices) penetrated the preboarding passenger screening and were carried on board by the skyjacker.\(^7\) Hence, the security devices utilized in the passenger

\(^3\) 1979 FAA Report, supra note 11, at 20 (Exhibit 1).

\(^4\) See 1979 FAA Report, supra note 11, at 20 (Exhibit 1); see also notes 9 and 13 supra, and hijackings cited therein. 22 of these 28 hijackings involved domestic flights. See note 24 supra.

\(^5\) See 1979 FAA Report, supra note 11, at 20 (Exhibit 1). Twenty-seven hijacking incidents involving U.S. air carriers occurred in 1972 which the FAA considers the last of the “peak” hijacking years. 2d 1978 FAA Report, supra note 24, at 2. With ten hijackings having already occurred during the first eight months of 1980, see note 9 supra, it is likely that the trend of annual increases in hijackings of U.S. airliners will continue.

\(^6\) Dallas Morning News, Jan. 26, 1980, at 1, col. 1; see notes 1-6 supra, and accompanying text. Furthermore, it has previously been noted that four recent hijackings of U.S. airliners involved incidents where the hijackers smuggled glass containers containing gasoline aboard the aircraft. See note 14 supra.

\(^7\) See 1979 FAA Report, supra note 11, at 1; see also notes 12 and 13 supra, and hijackings cited therein. The most recent attempted hijacking in which a knife was utilized occurred on November 24, 1979, when a hijacker, armed with a Bowie knife and demanding to be flown to Iran, seized control of an American Airlines Boeing 727 jetliner bound for Los Angeles from San Antonio. After the hijacker held some of the passengers and crew for four hours, he was captured when F.B.I. agents rushed the plane. N.Y. Times, Nov. 25, 1979, at 17, col. 1. No attempted hijacking since January, 1973, where a weapon other than a firearm or explosive device was smuggled through screening stations has proven successful. See note 12 supra, and hijackings cited therein. In twenty-one of the thirty-two U.S. hijacking incidents since January 1, 1973, in which the hijacker passed through normal screening procedures, no weapon at all was utilized despite the hijacker’s claims of possessing a weapon or explosive device. See 1979 FAA Report, supra note 11, at 1; see also notes 9 and 13 supra, and hijackings cited therein.
screening system and/or the people who operate them are manifestly not infallible.

Not every hijacking of an American air carrier has resulted from a penetration of an airline's pre-boarding screening system. Fourteen of the 45 hijacking incidents involving American air carriers since January, 1973, have involved circumstances in which the hijacker in some way circumvented the pre-boarding screening stations or forced his way on board the aircraft with his weapon already drawn.46 It must also be recognized that pre-boarding passenger screening systems are not designed to detect weapons or explosive devices that might be smuggled aboard airliners in checked baggage,49 nor to guard against criminal attacks on passengers at the airport before or after boarding.50 Indeed, to the ex-

46 See 1979 FAA Report, supra note 11, at 1; see also notes 9 and 13 supra, and hijackings cited therein. In addition, see 1979 FAA Report, supra note 11, at 3, describing an incident that occurred in April, 1979, in which a man armed with a knife took a woman hostage at a screening point in the terminal at the Sydney, Australia International Airport and forced his way past officials and on to Pan American World Airways 747 airliner where he demanded flight to Moscow. The would-be hijacker was shot and killed by police when he tried to ignite a can of gunpowder he had in his possession. One policeman was injured and the hostage received minor throat lacerations.

49 Although in 1978 and 1979 no U.S. commercial aircraft received damage due to an explosive device, there have been 10 such explosions aboard American commercial aircraft since January, 1973, a figure that represents no decline from the pre-1973 period. See 1979 FAA Report, supra note 11, at 26 (Exhibit 7). During the 6½-year period between January 1, 1973, and June 30, 1979, U.S. commercial aircraft received 9,455 bomb threats, 222 of which were considered extortion attempts, and eight explosive devices were discovered on board the aircraft. Id. at 24, 26.

On March 25, 1979, a bomb contained within a piece of checked luggage exploded before it was loaded on to the Trans World Airlines aircraft for which it was destined at JFK Airport in New York City. Four baggage handlers were injured and other baggage was seriously damaged. N.Y. Times, Mar. 26, 1979, at 1, col. 2.

As for weapons concealed in checked baggage, it should be noted that the 1972 Japanese terrorists who attacked passengers at the Lod Airport in Tel Aviv, Israel extracted their weapons from the checked baggage prior to the attack, after transporting the weapons from Japan. See Hernandez v. Air France, 545 F.2d 279, 281 (1st Cir. 1976); see note 94 infra. However, a passenger may transport an unloaded weapon in his checked baggage if he declares its presence to the air carrier. See 49 U.S.C. § 1472 (1976); 14 C.F.R. § 121.585(b)-(c) (1980).

50 Pre-boarding screening of passengers is seen as "incapable of deterring terrorists who enter a terminal undetected and indiscriminately attack waiting passengers." Comment, Deterring Airport Terrorist Attacks and Compensating the Victims, 125 U. Pa. L. Rev. 1134 n. 3 (1977). On the other hand, many airlines have resorted to extending security areas by "sterilizing" airport concourses, i.e. doing the screening farther away from the boarding gates to de-
tent that aircraft themselves are rendered less vulnerable targets because of effective airline security measures, passengers in airport terminals may be in greater danger than before the advent of strict airline security.\(^5\)

Thus, in a recent report to Congress, the FAA declared that:

The threat of aircraft hijacking and aviation sabotage persists. It is compounded by increasing terrorist activities worldwide and the continuing resort to explosives in the commission of crimes. Aviation remains an attractive and, because of its very nature, a vulnerable target for the mentally deranged, the criminal as well as the political terrorist. The security measures in place are generally effective and provide cornerstones and basic procedures which can be expanded . . .\(^3\)

Because of this persisting threat, one that is apparently increasing at least in view of the recent skyjackings,\(^4\) it can be expected that airline passengers will continue to face the risk of a harrowing experience in which their lives and property are placed in actual jeopardy, or in the case in which the presence of a weapon or explosive device is faked, in perceived jeopardy. While in theory a passenger who has suffered serious physical and/or emotional

crease the area in which unscreened persons are walking around. See Blumenthal, \(supra\) note 30.

\(See\ also\ Evangelinos v. Trans World Airlines, 550 F.2d 152 (3d Cir. 1977)\) and \(Day v. Trans World Airlines, 528 F.2d 31 (2d Cir. 1975), cert. denied, 429 U.S. 890 (1976)\) both ruling that passengers wounded in the August 5, 1973, attack by members of the Black September terrorist organization on the Hellenikin Airport in Athens, Greece, could recover damages under Article 17 of the Warsaw Convention, as modified by the Montreal Agreement, which creates an irrebuttable presumption of air carrier liability for injuries sustained while embarking or disembarking. Cf. \(In re Tel Aviv, 405 F. Supp. 154 (D.P.R. 1975), aff'd sub. nom., Hernandez v. Air France, 545 F.2d 279 (1st Cir. 1979),\) which denied recovery to passengers wounded on May 30, 1972, in an attack on the Lod International Airport in Tel Aviv, Israel, by terrorists of the Japanese Red Army. The decision was predicated on grounds that the passengers were attempting to retrieve baggage in the airport terminal and were no longer in the course of disembarking. 405 F. Supp. at 158.

\(1979\ FAA Report, \(supra\) note 11, at 19.\) What was once considered the crime of "homesick Cubans," psychotics, and extortionists is now frequently utilized as a tool of the sophisticated political terrorist. See Blumenthal, \(supra\) note 30. It has been estimated that two-thirds of air hijackings are politically motivated. See, e.g., McGinley, \(supra\) note 30, at 297.

\(1979\ FAA Report, \(supra\) note 11, at 20 (Exhibit 1); see also notes 44 and 45 \(supra,\) and accompanying text.
damage as result of an attempted or successful hijacking or act of sabotage could bring a tort action against the hijacker or saboteur, in reality such a suit would not be worthwhile in the vast majority of cases. Normally, hijackers do not have recoverable assets. Furthermore, if the hijacking is successful, the perpetrator may no longer be subject to the jurisdiction of American courts. In the case of sabotage, the saboteur may never be known.

A suit against the United States government for injuries arising out of a domestic skyjacking incident would likely prove equally fruitless, not because of the inability to recover upon a judgment awarded, but because of an inability to state a claim upon which relief can be granted. In the first place, the duty to screen passengers for weapons has expressly been placed on the airlines. Additionally, an action for intentional infliction of mental distress or false imprisonment might lie against a hijacker. See, e.g., Karfunkle v. Compagnie Nationale Air France, 427 F. Supp. 971, 977 (S.D.N.Y. 1977).

Abramovsky, supra note 30, at 342; see also Barrett, Terrorism and the Airline Passengers, 128 New L.J. 499 (1978) [hereinafter cited as Barrett]; Comment, Aircraft Hijacking: Criminal and Civil Aspects, 22 U. Fla. L. Rev. 72, 90 (1969). The same would seem applicable to saboteurs. Those that are apprehended and are not completely destitute are further subject to the expense of defending against a criminal prosecution which may likely result in imprisonment.

Abramovsky, supra note 30, at 342; Skyjacking, supra note 8, at 40; McWhinney, supra note 40, at 29-30. However, the United States is party to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, T.I.A.S. No. 7192 (1970) which provides for the mandatory punishment or extradition of all skyjackers taken into custody in a signatory state. See McGinley, supra note 30, at 296. While 85.4 percent of skyjackers escaped prosecution in 1969, only 28.1 percent did so in 1972. Clyne, supra note 40, at 175.

Eighty-four percent of serious bomb threats made against U.S. aircraft during the first six months of 1979 were transmitted telephonically. 1979 FAA Report, supra note 11, at 7.

An argument in favor of Government liability might be an analogy to principles of law concerning government liability for the negligent operations of its air traffic controllers. See McClintock, supra note 8, at 80; Skyjacking, supra note 8, at 51-53; see generally Comment, Government Liability—Air Traffic Controllers—Duty of Care, 33 J. Air L. & Com. 185 (1967). For a study of the plaintiff's right to bring an action against a governmental entity for injuries arising out of an airport attack, see Comment, Deterring Airport Terrorist Attacks and Compensating Their Victims, 125 U. Pa. L. Rev. 1134 (1977).

brought under the Federal Tort Claims Act, which does not apply to a claim "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation" nor to a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty" on the part of a government agency or employee. Both of these limitations would pose significant barriers to actions by airline passengers against the federal government to recover damages due to injuries received in the process of a hijacking or act of sabotage because the federal role in preventing hijackings is primarily regulatory. The regulatory functions of government agencies are the types of activity exempted by the foregoing exceptions. On the other hand, if a federal officer (not involved in policy formulation), such as an FBI agent, assumes an operational role in a particular emergency situation, like a hijacking, the employee's negligent handling of the situation may result in government liability for resulting injuries, as was the result in *Downs v. United States*.

For the passenger who is injured on a U.S. domestic flight, an

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62 Id.
63 The current federal role in the airline security program embodied in the Air Transportation Security Act of 1974, 49 U.S.C. § 1356 (1976), has been one of regulation, assistance, and enforcement. The United States Supreme Court has decided that immunized discretion of federal employees "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations, [footnote omitted] where there is room for policy judgment and decision there is discretion." Dalehite v. United States, 346 U.S. 15, 35 (1953).
64 See, e.g., *Downs v. United States*, 522 F.2d 990, 996 (6th Cir. 1975). See also *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978) (courts will defer to discretion granted the FAA by Congress to determine the type and scope of air safety rules, even if on its own the court may have adopted different standards).
65 522 F.2d at 997. The *Downs* case would appear to be limited to an incident in which a government agent intervenes, on behalf of the Government, in a hijacking already in progress. In case of the agent's negligence, the airline may be jointly liable for resulting injuries to passengers. In *Downs* only a small passenger airline was involved. Id. at 994. A Pacific Southwest airliner was involved in an attempted hijacking on July 5, 1972, where one passenger was killed and two wounded in an exchange of gunfire between two hijackers, who were subsequently killed, and FBI agents. *N.Y. Times*, July 5, 1972, at 1, col. 5. It is not known whether any claims or lawsuits resulted from this incident although none were located through research.
alternative to suit against the hijacker or against the federal government is an action for negligence against the airline involved. It is the position of this writer that in certain circumstances an injured passenger could recover in such a suit against an airline, particularly if the principles of negligence per se or res ipsa loquitur were applied.

IV. AIRLINE LIABILITY

Because the Warsaw system operates as a treaty, and therefore the supreme law of the land, it preempts local law and provides the exclusive, though virtually certain, relief available to injured passengers on international flights where it applies. 66 On the other hand, in the absence of a statute establishing a different rule, negligence on the part of an airline must be established in order to hold the airline liable for damages incurred as a result of a hijacking or related crime perpetrated against a domestic flight. 67

66 United States v. Belmont, 301 U.S. 324 (1937); Burnett v. Trans World Airlines, 368 F. Supp. 1152 (D.N.M. 1973); Husserl v. Swiss Air Transport Co., 351 F. Supp. 702, 706 (S.D.N.Y. 1972), aff'd, 485 F.2d 1240 (2d Cir. 1973); Bradfield v. Trans World Airlines, Inc., 88 Cal. App. 3d 681, 684, 152 Cal. Reprt. 172, 175 (1979); Schedlmayer v. Trans International Airlines, 416 N.Y.S.2d 461, 463 (1979). In Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1246 (S.D.N.Y. 1975) the court stated that under Article 24 of the Warsaw Convention "[a]ny action, however founded, seeking recovery for injuries comprehended by Article 17 [bodily injuries] and caused by an accident occurring in a place specified by Article 17 [on board the aircraft or in the course of embarking or disembarking] can be brought only subject to the conditions and limits established by the Warsaw system. To this extent at least . . . the treaty provides for the exclusive relief available for injury sustained in international transportation." Id. at 1246. Those types of injury not comprehended by the Warsaw system "should be governed exclusively by the substantive law which would be applicable if the treaty did not exist." Id. at 1247. The Warsaw system limits only those claims for injury comprehended by Article 17. Id. at 1248.


Passengers seeking recovery for injuries received during hijackings of American carriers engaged in international transportation must generally bring their actions under the provisions of the Warsaw Convention as amended by the Montreal Agreement. See notes 15, 16 supra. Article 17 of the Warsaw convention provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury
This would generally require that the plaintiff passenger prove that the airline was under a duty to exercise care towards him, that by acting, or failing to act, in a certain manner the duty was breached by the airline, that the breach of duty was the proximate cause of the plaintiff passenger's injuries, and that as a result of those injuries the plaintiff passenger suffered certain identifiable damages. Some jurisdictions would also require a showing that the plaintiff passenger was not guilty of contributory negligence.

A. Scope of Duty and Determination of Breach

In the context of a domestic flight, the duty of an airliner to its passengers is defined by state law. An airline is a common carrier, and like all common carriers, it bears a very high standard of care as to its passengers. In characterizing the scope of this duty, 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.


See generally W. PROSSER, LAW OF TORTS § 65, at 416 (4th ed. 1971) [hereinafter cited as PROSSER]; see also Abramovsky, supra note 35, at 343. In the context of international flights and the governing Warsaw system, the Article 20(1) provision that the "carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures" has been waived by carriers flying to and from the U.S. under the Montreal Agreement. See Warsaw, supra note 15, at art. 20(1); Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 975 (S.D.N.Y. 1977); see note 16 supra.

See, e.g., Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 597 (1954). Although federal law [49 U.S.C. §§ 1421-32 (1976)] governs the operation, control and safety of carriers, see Manfredonia v. American Airlines, Inc., 15 Av. Cas. 17,368 (N.Y. Sup. Ct. 1979), citing City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 638 (1973), the federal regulatory statute provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1976).

See, e.g., Delta Airlines v. Gibson, 550 S.W.2d 310, 312 (Tex. Civ. App. 1977—El Paso, no writ); see also PROSSER, supra note 69, § 34, at 180-81.
courts have held that a carrier's duty to its passengers requires the exercise of the "highest degree of care,"" the "highest degree of vigilance, care, and precaution,"" "utmost care," and a "high degree of care."

The high risks of air travel and the control exercised by the airline are viewed as justification for the higher standard. The feeling is that "[a]irline passengers are completely at the mercy of the carrier and are entitled to assume that the highest degree of care is being taken for their safety." On the other hand, it has been consistently held that a common carrier

Congress has recognized this policy. 49 U.S.C.A. § 1421 (1976) provides in part:

(a) [t]he Administrator [of the Federal Aviation Administration] is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time [various standards, rules and regulations] (6) . . . as the Administration may find necessary to provide adequately for national security and safety in air commerce.

(b) [i]n prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest . . .

Id. (emphasis added). Cf. 49 U.S.C. § 1421 (1976) which uses "[t]he Secretary of Transportation" instead of "[t]he Administrator." Some states, e.g., New York, have abandoned the duty of high degree of care in favor of a standard of reasonable care under the circumstances. See McClintock, supra note 8 at 66.


See McClintock, supra note 8, at 66; Skyjacking, supra note 8, at 43. It is a traditional principle that the greater the danger, the greater the care required. See e.g., Tom v. Days of '47, Inc., 16 Utah 2d 386, 401 P.2d 946 (1965); Ziser v. Colonial Western Airways, Inc., 162 A. 591 (N.J. 1932). However, arguably the greater amount of care is only what is reasonable care under the circumstances. The primary rationale for the higher standard of care imposed on common carriers is the degree of control exercised over the passenger during the transportation. Comment, Deterring Airport Terrorist Attacks and Compensating the Victims, 125 U. Pa. L. Rev. 1134, 1159 (1977).

is not an insurer of the safety of its passengers. 78

At common law the general rule in tort is that a private person has no duty to protect other persons from the criminal acts of third persons. 79 Hence, a party's nonfeasance does not normally result in liability being imposed upon him. 80 An exception has long existed in tort law where certain special relationships combined with special conditions and circumstances have resulted in the imposition of liability for failure to undertake protective measures to prevent harm from befalling another due to the criminal act of a third person. 81 Thus, the special relationship which exists between a common carrier and its passengers has been held to impose a duty upon the carrier to protect its passengers from the harmful acts of third persons, including employees, other passengers, and strangers. 82

However, even "where the highest degree of care characterized the relationship, the criminal acts of third parties imposes no liability unless there are present special circumstances that create in the minds of reasonable men an apprehension of danger." 83 A carrier will generally be held liable for the injuries to a passenger which are caused by the assault or other misconduct of a third person only where the carrier has reason to anticipate the incident, i.e., where the danger is known to the carrier or should have been known to the carrier, but the carrier nevertheless fails to exercise a degree of care and vigilance practicable under the circumstances to prevent the injury. 84 In Quigley v. Wilson Line of Massachusetts,


79 See Prosser, supra note 69, § 56, at 340.

80 Nonfeasance, the failure to undertake measures to protect another from harm, is distinguished from misfeasance, active misconduct causing positive injury to another. Id. at 339.

81 Id. at 341.


84 See Kenan v. Houston, 150 Fla. 357, 7 So. 2d 837, 838 (1942); McCoy v.
the Massachusetts Supreme Court declared that a carrier's liability rests upon the duty which is imposed by law "to anticipate that which is reasonably foreseeable and to prevent that which is reasonably preventable in the way of violent injury to its passengers." 

In *Bullock v. Tamiami Trail Tours, Inc.*, the federal appellate court applied Florida law and held that "[i]f the injury could have been reasonably anticipated in time to have prevented its occurrence, the carrier is subjected to the highest degree of care to its passengers either to protect him from or to warn him of the danger." 

In this regard, the Restatement (Second) of Torts provides in section 302B, comment e, that there are situations which arise when one party is under a special responsibility toward another, such that he is required, as a reasonable person, to anticipate and guard against the criminal misconduct of others. Section 314A states that because of the special relationship, a common carrier is under a duty to take reasonable action to protect its passengers against unreasonable risk of physical harm.

Despite some state court decisions that have indicated that a carrier's liability for criminal attacks on its passengers might be predicted only on some action or conduct of the particular assailant that gave advance notice to the carrier of the probability of danger, it is highly unlikely that an argument by a defendant airliner that a hijacking incident was not an anticipated danger would succeed in precluding its liability for resulting injuries to its passengers.

It has been held that it is knowledge of the "conditions" which are likely to result in danger to a passenger, or it is the "nature" of

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86 Id. at 80.
87 266 F.2d 326 (5th Cir. 1959).
88 Id. at 331.
89 RESTATEMENT (SECOND) OF TORTS, § 302B, comment e (1965).
90 RESTATEMENT (SECOND) OF TORTS, § 314A(1)(a) (1965).
91 See, e.g., Cornpropst v. Sloan, 528 S.W.2d 188, 193 (Tenn. 1975).
92 For one thing, use of the hijacker behavioral profile should alert airline personnel to potentially dangerous individuals. See note 30 supra.
93 See Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497, 503 (1943);
the threat which should be anticipated, as opposed to the particular threat of a particular offender, that gives rise to the duty on the part of the carrier to prevent the criminal assault. Additionally, knowledge of prior criminal assaults or violence has been held to invoke the carrier's duty to act to prevent potential assaults or acts of violence. Comment f to section 344 of the Restatement (Second) of Torts states that "[i]f the place or character of [a party's] business or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against [such conduct]..."

As has been previously noted, there have been 45 attempted hijackings of U.S. air carriers since January, 1973, 28 of which have occurred since the beginning of 1978, and at least 79 potential hijackings have been thwarted at the passenger screening stations since January, 1973. There have also been over 1500 serious bomb threats lodged against American air carriers. The frequency of attempted skyjackings and related criminal acts along with the fact that extensive pre-flight screening of all passengers is conducted, as required by law, leaves little doubt that hijacking attempts and similar acts of crime are to be reasonably anticipated. Furthermore, skyjacking and sabotage are viewed as "inevitable corollaries to modern techniques of air transport."
(1) Pre-flight Screening

From the foregoing it can be concluded that American commercial air carriers have a common law duty to protect their passengers against attempted hijackings and similar threatening acts by implementing security measures designed to prevent such criminal activity. The duty aspect of the plaintiff passenger's action in negligence is further enhanced by the fact that the United States Congress has expressly placed the obligation to screen embarking passengers and their carry-on items for weapons upon the air carriers. The express purpose was "to protect persons and property aboard aircraft operating in air transportation . . . against acts of criminal violence and aircraft piracy." Pursuant to the legislative mandate, the FAA has promulgated regulations, one of which generally prohibits an air carrier from allowing "any person to have . . . a deadly or dangerous weapon, either concealed or unconcealed, accessible to him while aboard an aircraft being operated by" the air carrier. In light of this regulation and the clear intent and purpose of the Air Transportation Security Act of 1974 (to protect passengers in engaging in commercial air travel from hijacking and similar crimes), it is submitted that a passenger who has suffered injuries arising out of a hijacking incident, in which the hijacker managed to smuggle a weapon on board, can present a colorable claim for imposition of negligence per se upon the airline involved.

part of terrorism that is "a risk which accompanies international air travel." Id. at 159.

102 49 U.S.C. § 1357 (1976). For the view that the responsibility for detecting potential hijackers and their weapons should be delegated to experienced law enforcement officers funded by the federal government and not the business of airlines, see McGinley, supra note 30, at 320.
103 14 C.F.R. § 121.585(a) (1980). Cf. 14 C.F.R. § 121.585(b) (1980) which provides that an air carrier may not "knowingly permit any passenger to carry . . . , while aboard an aircraft being operated by the [air carrier], in checked baggage, a loaded firearm." Id.
105 See, e.g., Chumney v. Nixon, 615 F.2d 389 (6th Cir. 1980) (existence of the right to maintain civil action for damages due to assault aboard aircraft may be implied from a federal criminal statute designed to protect airline passengers). See also, Galella v. Onassis, 353 F. Supp. 196, 227 (S.D.N.Y. 1972); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); Tompkins, supra note 67, at 386; RESTATEMENT (SECOND) OF TORTS, § 288B (1965). On the other hand, section 288A of the Restatement recog-
In *Manfredonia v. American Airlines*, it was recently held that a breach of a federal statute or regulation may provide grounds for a cause of action for damages in a state court arising from injury sustained thereby. The case involved an airline passenger who was assaulted in flight by an intoxicated fellow passenger. While on the issue of common law negligence the defendant airline was determined not to be liable for failing to exercise proper care in protecting the plaintiff passenger from injury, the appellate court remanded after ruling that a cause of action on behalf of the injured passenger is implied for violation of the FAA regulation which forbids the service of alcoholic beverages to an intoxicated person. The court declared that a breach of a statute may provide a basis for action for damages if: "(1) the regulation was intended to protect a particular class of persons; (2) there was an intention to create or deny a private right; (3) the right would be consistent with the goal of the statute; and (4) the cause of action is one traditionally left to state law."

Assuming that a commercial air carrier has a duty to protect its passengers from the threat of skyjackings and related criminal acts of third parties by preventing potential skyjackers and saboteurs from taking aboard its aircraft weapons and explosives or incendiary devices, it follows that the air carrier's failure to detect such criminal instruments during the pre-boarding screening procedures would constitute a breach of that duty.

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100 *15 Av. Cas. 17,638 (N.Y. App. Div. 1979).*

101 *Id.* at 17,642. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

102 *15 Av. Cas. 17,638 (N.Y. App. Div. 1979).*


110 *See Virginia v. United Airlines, Inc.*, 248 S.E.2d 124, 130 (Va. 1978); *In Airline Motor Coaches, Inc. v. Carver*, 226 S.W.2d 830, 833 (Tex. 1950),
National Airlines, Inc., a state appellate court in Florida held that a cause of action upon which relief could be granted was stated by a passenger who, in a claim based in part upon negligence, alleged consequential damages arising out of a 1971 hijacking of a domestic flight to Cuba. The hijackers were armed, and the plaintiff contended that the airline as a carrier breached its duty to take extreme precautions to prevent hijackings by screening its passengers for weapons and explosives.

Whether the penetration of the screening system was due to a failure to utilize recognized measures or equipment or to an inadequate search or inspection of the hijacker's person and apparel or of his carry-on baggage, or due to a malfunction of the mechanical or electronic detection devices, the airline would be culpable.

It has been held that:

[A] passenger who pays his fare to a common carrier expects safe transportation to his destination and a carrier is required

the Texas Supreme Court stated in a portentous decision that:

it could well be negligence to permit a passenger to bring in with him what is obviously an open can of gasoline, or an uncrated dog. Even when the luggage admitted is legitimate, negligence may arise . . . where the luggage somehow comes to create a dangerous situation of which the carrier's agents knew or would have known if they had fulfilled their duty . . . of properly inspecting or policing the vehicle.

In Herman v. Trans World Airlines, Inc., 40 A.D.2d 850, 337 N.Y.S.2d 827 (1972), rev'd on other grounds, 34 N.Y.2d 385, 358 N.Y.S.2d 97 (1974), the lower court considered a claim by a passenger for damages due to extreme fright and emotional injury arising out of a hijacking of an international flight. Although the decision was based on the provisions of the Warsaw system, the common law duty of air carriers to protect their passengers from assaults was noted. 337 N.Y.S.2d at 830.

111 307 So. 2d 244 (Fla. App. 1974), rev'd on other grounds, 336 So. 2d 545 (Fla. 1976).

112 Id. The ruling of the appellate court was subsequently reversed by the Florida Supreme Court because the injuries alleged were too remote. National Airlines, Inc., v. Edwards, 336 So. 2d 545 (Fla. 1976). See note 236 infra, and accompanying text.

113 336 So. 2d at 546.

114 See Virginia v. United Airlines, Inc., 248 S.E.2d 124, 130 (Va. 1978); McClintock, supra note 8, at 69-70; Skyjacking, supra note 8, at 42; Barrett, supra note 55, at 502. See also 49 U.S.C. § 1374 (1976), which imposes a duty upon every air carrier to provide safe and adequate service, equipment, and facilities in connection with air transportation. In Southeastern Airlines v. Hurd, 355 S.W.2d 436 (Tenn. 1962) it was decided that an air carrier owes its passengers the highest degree of care with respect to service and maintenance of its equipment. Id. at 446.
to do all that human care, vigilance and foresight can reasonably do to transport its passengers safely, consistent with its mode of conveyance and the practical operation of its business.\textsuperscript{118}

Because of the high standard of care which an air carrier owes its passengers, and given the carrier’s duty to prevent weapons or explosive devices from being taken aboard its aircraft by embarking passengers, one approach would be to find the airline negligent if it could have prevented the skyjacking but failed to do so.\textsuperscript{119} In at least one jurisdiction, the trial court would, upon a showing by a plaintiff-passenger of the occurrence of a skyjacking or related crime, shift the burden to the air carrier to prove that the incident was not the result of its negligence.\textsuperscript{117}

This shifting of the burden of going forward with the evidence is similar to the rebuttable presumption of breach of duty owed that is used by some jurisdictions when a negligence claim is based on the doctrine of \textit{res ipsa loquitur}.\textsuperscript{118} Although the theory of \textit{res ipsa loquitur} generally may not be applicable to cases involving the liability of common carriers for injuries to their passengers inflicted by third parties, an argument can be put forth that the principle of \textit{res ipsa} should be available to an injured passenger in a hijacking case, at least in the context of determining whether an airline is negligent for allowing weapons or explosive devices to be taken aboard its aircraft.\textsuperscript{119} For instance, in the recent hijack-


\textsuperscript{118} \textit{Res ipsa loquitur} is utilized in cases where the mere fact that a particular harm has occurred may itself tend to establish a breach of duty owed. See, e.g., Ten Ten Chestnut St. Corp. v. Quaker State Bottling Co., 186 Pa. Super Ct. 585, 142 A.2d 306 (1958); Coca Cola Bottling Co. of Helena v. Mattice, 219 Ark. 428, 242 S.W.2d 15 (1951); Johns v. Penn R. Co., 226 Pa. 319, 75 A. 408 (1910). The majority of American courts regard \textit{res ipsa loquitur} merely as one form of circumstantial evidence which permits an inference of negligence. Bell & Koch, Inc. v. Stanley, 375 S.W.2d 696 (Ky. 1964); Gardner v. Coca Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 557 (1964); See generally PROSSER, supra note 69, § 40 at 228-29.

\textsuperscript{119} See generally PROSSER, supra note 69, § 39, at 24, setting out three con-
ing of the Delta airliner to Cuba, the method used by the hijacker to get the firearm through the screening checkpoint has not been determined. Under *res ipsa* the mere fact that the handgun was taken aboard the aircraft would tend to establish a breach of the duty of high care owed by the airline to its passengers. In the first place, because it is mandatory today that all passengers and their carry-on items be screened by the air carriers, and in light of the sophisticated mechanisms available to detect such firearms, it would seem that an incident of this type would not normally occur in the absence of the carrier's negligence. Secondly, the passenger screening station and the detecting devices employed may have been in the exclusive control of Delta at the time that the hijacker passed through on his way to board the aircraft with the handgun.

In *Husserl v. Swiss Air Transport Co.*, the court held that injuries to a passenger sustained during a hijacking of an international flight are compensable under the Warsaw system and stated that "the carrier is best qualified initially to develop defensive mechanisms to avoid such incidents, since it physically controls

ditions usually necessary for application of the principle of *res ipsa loquitur*: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary act or contribution on the part of the plaintiff." *Id.* See also *Goldin, The Doctrine of Res Ipsa Loquitur in Aviation Law*, 18 So. Cal. L. Rev. 15, 124 (1945); *Restatement (Second) of Torts* § 328D (1965).

Speculation has suggested that the handgun was concealed in a baby's metal seat carrier. See *N.Y. Times*, Jan. 27, 1980, at 18, col. 5.

See *Shaw v. Pacific Greyhound Lines*, 50 Cal. App. 2d 153, 323 P.2d 391 (1958); *Southeastern Aviation v. Hurd*, 355 S.W.2d 436 (Tenn. 1962); *Newberger v. Pokrass*, 33 Wis. 2d 569, 148 N.W.2d 80 (1967). According to Prosser, "[a]ll that is needed is evidence from which reasonable men can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not." *Prosser, supra* note 69, § 39, at 218. On the other hand, the airline might attempt to prove that it has done everything possible to avert such an occurrence.

To establish exclusive control by the defendant, it is enough to show that the defendant has the right or power of control and the opportunity to exercise it, or that the defendant is under a duty which cannot be delegated to another, or that the defendant shares the duty and the responsibility at the time of the negligence. See *Prosser, supra* note 69, § 39, at 220.

the aircraft and access to it." Thirdly, it does not appear likely that any passenger on the recently hijacked Delta flight, who may have suffered severe traumatic damages resulting from the incident, would have contributed to his injuries by his own conduct. Thus, the three essential elements to the invocation of res ipsa loquitur would appear to be present in a skyjacking incident like the recent Delta hijacking where a hijacker succeeded in penetrating the airline’s pre-flight screening system with a firearm.

In addition to the use of devices designed to detect firearms and other weapons, an air carrier has the authority to refuse transportation to a would-be passenger when in the reasonable judgment of the carrier, the passenger might endanger the flight. Nevertheless, even given the existence of this authority and the availability of sophisticated weapon detecting devices, the airlines may maintain that it does not necessarily follow that the fact of an armed hijacker on board a commercial aircraft is due to the air carrier’s negligence. The law certainly does not require air carriers to exercise all care that is within the human mind’s conceptual capabilities

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124 Id. at 707.
126 While res ipsa loquitur is not applicable against multiple defendants where it is inferable that only one has been negligent, in the case of joint tortfeasors, e.g., where an injured passenger brings suit against the airline and the skyjacker, res ipsa may be applied in favor of a passenger in his action against an air carrier while not applied against the hijacker. Capital Transit Co. v. Jackson, 149 F.2d 839 (D.C. Cir. 1945); Pickwick V. Stages Corp. v. Messinger, 44 Ariz. 174, 36 P.2d 168 (1934).
127 See 49 U.S.C. §§ 1111, 1511 (1976). While generally every citizen has the public right of transit through navigable airspace, 49 U.S.C. §§ 104, 1304 (1976), the passenger’s right to demand air transportation is qualified by the duty of the air carrier to observe proper safety standards. See, e.g., Aller v. Chicago & S. Air Lines, Inc., 4 CAB 113, 117 (1943). An air carrier must refuse to transport a person who does not consent to a search of his person and luggage. 14 C.F.R. § 121.538(k) (1980). The fact that a carrier can exclude a passenger who might be inimical to the safety of the other passengers does not alter its status as a common carrier. Ziser v. Colonial Western Airway, Inc., 162 A. 591 (N.J. Sup. 1932); McClintock, supra note 8, at 65; Skyjacking, supra note 8, at 43 n. 57. See Williams v. Trans World Airways, 369 F. Supp. 797 (S.D.N.Y. 1974), holding that an airline is authorized to refuse transport to an individual who was a fugitive from justice and considered dangerous. See also Mason v. Belieu, 543 F.2d 215 (6th Cir.), cert. denied, 429 U.S. 852 (1976).
or that will free passengers from all possible dangers.\textsuperscript{128} The airline may be bound only to undertake action which is "practicable"\textsuperscript{10} or that is "compatible with the normal prosecution of its business."\textsuperscript{129} Hence, if the minimum prescribed security measures and screening devices are the fullest extent of what is practicable for a particular airline, then the fact that an offender is able to circumvent the screening system employed,\textsuperscript{130} or that screening devices that are developed do not have the capabilities to detect certain types of weapons or explosives,\textsuperscript{128} may not render the airline negligent.

There are indications that the mechanisms presently utilized for screening passengers and their carry-on items are effective and that any breakdowns in the system are due primarily to the carelessness of personnel at passenger screening checkpoints.\textsuperscript{132} As previously noted, since 100 percent screening was instituted in January, 1973, only one firearm has been carried by a skyjacker through a screening station.\textsuperscript{134} Although knives or other weapons (not firearms or explosives) were employed in seven attempted hijackings since January, 1973,\textsuperscript{135} knives are capable of being discovered on a would-be passenger's person by the metal detector\textsuperscript{136} and in the passenger's carry-on luggage by the x-ray machine.\textsuperscript{137} Furthermore, the x-ray machines in current use have the capacity to permit detection of explosives carried in luggage.\textsuperscript{138} Therefore, screening

\textsuperscript{128} See Kasanof v. Embry-Riddle Co., 26 So. 2d 889 (Fla. 1946).
\textsuperscript{130} Virginia v. United Airlines, 248 S.E.2d 124, 130 (Va. 1978).
\textsuperscript{131} See notes 51, 52 supra, and accompanying text.
\textsuperscript{132} The weapon detectors designed to react to metal fail to detect non-metallic weapons, such as explosives, acids, plastic, or glass. See McGinley, \textit{supra} note 30, at 314.
\textsuperscript{133} FAA officials have pointed to human error as the primary reason for security slip-ups. See Arey, \textit{supra} note 10, at 270; Blumenthal, \textit{supra} note 30. The converse is not true, i.e., the carrier may not be absolved from liability by ineffective screening mechanisms if more sophisticated devices are available.
\textsuperscript{134} See note 14 \textit{supra}, and accompanying text.
\textsuperscript{135} See note 47 \textit{supra}, and accompanying text.
\textsuperscript{136} See United States v. Flum, 518 F.2d 39 (8th Cir. 1975).
\textsuperscript{137} See 1979 FAA Report, \textit{supra} note 11, at 5.
\textsuperscript{138} See Clyne, \textit{supra} note 40, at 129; Barrett, \textit{supra} note 55, at 502. With the exception of the gasoline recently smuggled aboard four U.S. airliners, see note 14 \textit{supra}, no high explosive device has penetrated the pre-flight passenger screening system since the system's implementation. Five explosive or
mechanisms in current use will probably detect most instrumentali-
ties intended to effectuate skyjackings if those devices are properly
employed at pre-boarding check points.

Nevertheless, even if it were to be conceded that the screening
mechanisms presently deployed are less than adequate to meet the
newly rising threat of hijackings and related crimes, it has been held
that an air carrier has the “duty to exercise such means as were
available to it to avoid or minimize the danger to its passengers,”
and that “[a] failure to do anything which could have been done . . . to prevent the injury renders the carrier liable.” The fact
that an air carrier has complied with FAA regulations will not
absolve it of negligence if the high standard of care would require
greater precautionary measures. There are four new types of
explosive detection mechanisms that have recently completed de-
velopment or are in the final stages of evaluation. The FAA has
made specially-trained explosive detection dog teams available to
airlines at twenty-nine airports across the country. It has been
proposed that all embarking passengers be submitted to the “snif-
fer” dog test in addition to the metal-detecting device to prevent
explosives from being carried onto aircraft on the persons of sky-
jackers. Screening of checked luggage has also been advocated
to reduce the possibility that bombs will be smuggled aboard air-
craft in that manner. Hence, a plaintiff-passenger may be able to

inciendiary devices were detected at screening stations in 1977, three in 1978,
and three during the first half of 1979. See 1979 FAA Report, supra note 11, at 1,
28 (Exhibit 9).


140 Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326, 330 (5th Cir. 1959).
142 The basic characteristics of the devices are x-ray absorption, thermal
neutron activation, nuclear magnetic resonance, and vapor characterization. See
1979 FAA Report, supra note 11, at 34 (Exhibit 15).
143 Id. at 12. In recent evaluations, the “K-9” teams maintained a level of
explosive detection surety of approximately 98% and a false alert rate of about
4%. Id.
144 See CLYNE, supra note 40, at 174.
145 Id.
146 Id. at 128. Eight explosive devices were discovered on board commercial
aircraft during the 6-year period between January 1, 1973 and June 30, 1979.
1979 FAA Report, supra note 11, at 26 (Exhibit 7). Although an air carrier is
required to submit an acceptable plan to the FAA designed in part to prevent
“the carriage of any explosive or incendiary device in checked baggage,” see
establish a breach of the air carrier's duty to detect weapons and explosives, despite the deficiencies of the particular devices or measures utilized by the airline, by showing that more sophisticated mechanisms or more reliable procedures were available to the airline.\footnote{14} If the air carrier in the exercise of its high degree of care could not have prevented a particular strategem employed by an offender to get weapons or explosives on board an aircraft, then there was no breach of duty, no negligence, and, at least in the context of a domestic flight, no liability on the part of the air carrier.

The high duty of care imposed on air carriers may require the deployment of armed security guards at screening check points, boarding areas, and/or aboard the aircraft. Such actions might be necessary to prevent a potential hijacker from forcing his way through or around passenger screening stations and onto waiting aircraft,\footnote{148} and to satisfy the airline's duty to exercise all available means to minimize danger to its passengers in some jurisdictions\footnote{144} or to exercise all means practicable in other jurisdictions.\footnote{150} Current federal regulations as put forth by the FAA require only that an airline "as part of its security program, provide for law enforcement support . . . to assist passenger screening operations" for flights at certain airports which are not required to maintain security forces.\footnote{151} It has been held that a common carrier normally has no duty to provide armed guards to protect its passengers.\footnote{152} A carrier is not required to furnish a security force sufficient to prevent all violence or danger posed by other passengers or strangers when such threats are not reasonably expected.\footnote{153} On

\begin{itemize}
  \item \footnote{14} An assumption is made that some screening devices may be better and some security measures safer or more reliable than those minimally required by the FAA.
  \item \footnote{148} See note 48 supra, and accompanying text.
  \item \footnote{144} See, e.g., Ness v. West Coast Airlines, 90 Idaho 111, 410 P.2d 965, 968 (1965).
  \item \footnote{151} See 14 C.F.R. § 121.538(1) (1980). See also 14 C.F.R. § 107.13(b) (1980).
  \item \footnote{153} Dilley v. Baltimore Transit Co., 39 A.2d 469 (Md. C.A. 1944).
\end{itemize}
the other hand, a carrier is required to furnish a force of security guards sufficient to protect its passengers from foreseeable assaults by other passengers or strangers. Nevertheless, the fact that a carrier has taken such steps to increase security is not enough to preclude its liability as a matter of law. In light of the carrier's high standard of care, it may be held liable for injuries to passengers resulting from the negligence of law enforcement officers hired by the carrier where the officer's negligence constituted a breach of the carrier's duty to protect its passengers. In independent contractor cases, the general rule of tort law is that one who employs an independent contractor is not liable for the negligent conduct of the latter, even if the independent contractor's negligence occurs while it is acting within the scope of the contract. However, an exception to this no-liability rule is recognized in the context of non-delegable duties. If the obligor's duty is non-delegable as a matter of law, e.g., where the specific obligation is imposed upon the specific party, or its class, by statute, the employer cannot relieve himself from liability by hiring an independent contractor to perform the obligation. In Quigley v. Wilson Line of Massachusetts, where the defendant carrier employed security officers to patrol its station to deter criminal activity, the court declared that "[e]ven if the hired police officers . . . were acting as independent contractors . . . the defendant common carrier was not thereby relieved from its liability for the negligence of those officers in not adequately protecting the plaintiff against a foreseeable risk." A very significant issue that may arise in hijacking-related suits for damages by passengers against air carriers is the question of the liability of airlines for the emotional injuries suffered by pas-

154 Id.
157 See generally PROSSER, supra note 69, § 71 at 468.
160 Id. at 80. It has been held that the duty of a carrier to transport its passengers in safety is non-delegable. Eli v. Murphy, 39 Cal. 2d 598, 248 P.2d 756 (1952).
sengers resulting from hijackings in which the skyjacker who claims possession of a bomb, or wields a toy pistol that appears to be real, but is in fact not armed. This question is particularly relevant since the implementation of a pre-boarding screening system, applicable to all passengers and their carry-on items, has proven highly effective in preventing firearms and explosive devices from being carried aboard commercial aircraft.\(^1\) Since January 1, 1973, there have been at least thirty-two U.S. hijacking incidents in which the hijacker passed through normal screening procedures.\(^2\) Of these thirty-two, twenty-one involved unarmed skyjackers who, once aboard, feigned possession of a weapon or explosive device.\(^3\) An issue antecedent to the problem of damages is whether there is a breach of a duty owed in a case where an unarmed skyjacker seizes control of an air carrier by claiming possession of an explosive device or weapon and threatens to kill someone on board or detonate the explosive device if his demands are not met.\(^4\) Even if it can be concluded that an air carrier’s duty to exercise a high degree of care to protect its passengers from hijackings and similar crimes imposes upon it the obligation to prevent weapons and explosive devices from being taken aboard its aircraft, it does not necessarily follow that all hijackings manifest a breach of this duty. Exercising “extraordinary care and diligence”\(^5\) may not prevent a hijacking in which the offender forces

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\(^1\) According to the FAA, only one firearm and no explosive device has penetrated the pre-flight screening system since the system’s institution in January, 1973. See note 14 supra, and accompanying text.

\(^2\) 1979 FAA Report, supra note 11, at 1; see also notes 9 and 13 supra, and hijackings cited therein.

\(^3\) Id.

\(^4\) At least three seizures of American commercial airliners this year have involved such circumstances. See Miami Herald, Aug. 17, 1980, at 1, col. 5; Wash. Post, Aug. 11, 1980, at 11, col. 5; Wash. Post, July 13, 1980, at 6, col. 2. Six such incidents occurred in 1979. See 1979 FAA Report, supra note 11, at 2-4; see also note 13 supra, and hijackings cited therein. Two other hijacking incidents on U.S. air carriers in 1979 involved skyjackers who threatened to destroy the aircraft they were on with explosives or incendiary devices that they did not actually possess. One had in his possession a pocket knife, the other wielded a bottle of rum. See 1979 FAA Report, supra note 11, at 2-4. The question as to which a passenger on a hijacked airliner can recover for emotional or mental damages in a negligence action against the airline is discussed infra, at notes 217-36 and accompanying text.

his way through the screening station with weapon drawn. The same would seem to be true in the context of an unarmed skyjacker where no amount of pre-flight searching would necessarily prevent the crime.\textsuperscript{166}

On the other hand, an argument could be made that the proper use of the hijacker behavioral profile could detect these "bluff-artists"\textsuperscript{167} who are nonetheless hijackers despite the fact that they possess no real weapon. Furthermore, although the metal detector may not be activated by a toy pistol or an artificial explosive device, the x-ray machine or a thorough physical search could discover such items. Of course, these latter measures would not be effective against a potential hijacker who does not even possess a simulated weapon or device. Nevertheless, it is plainly not ridiculous to consider that an air carrier, in the exercise of a high degree of care, could detect potential skyjacker and therefore prevent skyjackings perpetrated by those who carry no weapon or explosive on board the aircraft with them.

(2) \textit{Protective Measures after Boarding}

The carrier's duty to exercise a high degree of care to protect its passengers is obviously not limited in its applicability to the measures utilized by the airline to prevent passengers from boarding its aircraft with weapons or explosive devices. The high standard of care also defines the scope of the air carrier's obligation to its passengers after everyone has boarded and while the aircraft is in flight. The carrier may be "required to exercise the 'highest degree of care, foresight, prudence, and diligence reasonably demanded at any time by the conditions or circumstances then affecting the passenger and the carrier.'"\textsuperscript{168} It is necessary, therefore, to donate some attention to the conduct or actions taken by airline personnel during the course of a skyjacking or similar crime. Of course, if an air carrier is found to be negligent for allowing the hijacking to occur in the first instance, \textit{e.g.}, by permitting a weapon to penetrate the screening system, then the exercise of even extraordinary care by the airlines during the course of the crime

\textsuperscript{166} See \textit{Clyne}, \textit{supra} note 40, at 121.

\textsuperscript{167} Id.

would not absolve its liability for the initial negligence. In this regard, it should be noted that a pilot in command is given wide discretion in an emergency situation to make decisions and take whatever action he deems necessary under the circumstances.\footnote{See 14 C.F.R. § 121.557(a) (1980).} Under the doctrine of sudden emergency, the pilot of an air carrier is not required by law to exercise a higher standard of care than "ordinary care"—that of a reasonably prudent man under similar circumstances.\footnote{McClintock, supra note 8, at 74; contra, Massato v. Public Serv. Coordinated Transp., 71 N.J. Super. 39, 176 A.2d 280, 284 (1961) (carrier's duty of high care is not diminished in case of sudden emergency).} Thus, a pilot or a crew member generally is not chargeable with negligence, and an airline is not liable, if he acts in an emergency situation according to his best judgment even if, in retrospect, his actions were not the most reasonable\footnote{See, e.g., Chapman v. United States, 194 F.2d 974 (5th Cir.), cert. denied, 344 U.S. 821 (1952).} or constituted an error in judgment, so long as the error was not positive negligence.\footnote{See, e.g., Jackson v. Stancil, 116 S.E.2d 817 (N.C. 1960); Murphy v. Neely, 179 A. 439 (Pa. 1935).} However, if the situation of emergency arises because of the negligence of the airline or one of its employees, e.g., where an armed hijacker slips through a screening checkpoint undetected, the doctrine of sudden emergency is inapplicable and the airline's liability is not shielded by the circumstances of imminent danger.\footnote{522 F.2d 990 (6th Cir. 1975).}

Additionally, in Downs v. United States,\footnote{Id. at 1002.} it was held that the extent to which "an actor will be excused for errors in judgment under [emergency] circumstances, is qualified by the training and experience he may have, or be expected to have, in coping with the danger or emergency with which he is confronted."\footnote{See, e.g., Jackson v. Stancil, 116 S.E.2d 817 (N.C. 1960).} In Downs survivors of two victims of an aircraft hijacking brought suit against the United States alleging that the negligent handling of the situation provoked the hijacker to kill his hostages. The court decided that where one trained to handle dangerous situations, as was the F.B.I. agent in that case, is required "to make a judgment which may result in the death of innocent persons, he is required to
exercise the highest degree of care commensurate with all facts within his knowledge." Because U.S. airline flight crews are required to take part in an FAA program to learn in-flight and ground antihijack procedures and antihijack defensive tactics, the standard articulated in *Downs* may provide a second limitation on the sudden emergency doctrine as it is applicable to airline personnel during a hijacking incident.

It has been suggested that an air carrier may be negligent for failing to resist the hijacker, *i.e.*, for passively acquiescing to the offender's demands. It is conceded that there may arise circumstances where it would not be consistent with the air carrier's high duty of care to automatically accede to the dictates of a skyjacker, *e.g.*, where the airline personnel know or should know that he is not armed. It is conceded further that there is case law to sup-

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176 Id. at 1003.
178 See McClintock, *supra* note 8, at 70. For the air carrier's employees to assume that a hijacker is in fact armed with a dangerous weapon or explosive device is tantamount to an assumption that the airline has been negligent in allowing the hijacker to penetrate the screening system. Although it may seem inequitable that an air carrier should escape liability by assuming its own negligence, this is an argument for imposition of strict liability. In light of the grave risk, that of the loss of a large number of lives, it would not seem unreasonable to accede to demand of a skyjacker who may very well possess a bomb. So long as the [airline] industry, our government and the vast majority of people in our country place the value of human life over property, there can be no certain and final solution to the skyjacking problem . . . . Short of playing Russian roulette with each psychotic hijacker, we must deal with each problem as it arises, within certain acceptable parameters. Mauer, *supra* note 30, at 380.

179 Perhaps an airline's employees should be required to demand some proof from the skyjacker that he is in fact in possession of a dangerous weapon or explosive device. The purpose of such a requirement would be to detect those would-be hijackers who do not even possess a simulated weapon or bomb. Six of the ten attempted hijackings perpetrated aboard U.S. air carriers in 1979 involved hijackers who claimed to possess an explosive or incendiary device. Five of these hijackers had nothing even resembling such a device in their possession, yet two succeeded in diverting airliners out of the United States. See 1979 FAA Report, *supra* note 11, at 2-4; see also notes 9 and 13 *supra*, and hijackings cited therein. One recent hijacker successfully forced an Air Florida jetliner to Cuba by claiming a bar of soap in a box was a bomb. Wash. Post, Aug. 11, 1980, at 11, col. 5.

It is also arguable that just because the skyjacker possesses some weapon does not necessarily mean that he should not be resisted. For instance, would it be reasonable for an air carrier to divert its passengers to a distant region of the globe because of the demands of a hijacker armed only with a nail file or a bottle of rum? Two attempted hijackings in 1979 involved these respective
port the position that a person has no duty to his business invitees to acquiesce to the criminal demands of a third party intruder in order to protect the business invitee from physical harm or death. However, to acknowledge that there may be no duty to acquiesce is distinguished from asserting that it constitutes negligence to acquiesce. Furthermore, it is submitted that any cases holding that a businessman need not accede to the criminal demands of an intruder in order to save the lives of business invitees, do not arise out of the special legal relationship between the common carrier and its passengers. Moreover, the contention that an air carrier is negligent where it acquiesces to the demands of a hijacker is inconsistent with the general principle of law that a common carrier must always choose the course of action least likely to expose its passengers to harm. In *Downs v. United States*, the court ruled that a person trained to handle dangerous situations is "under a duty in a hijacking situation, to choose a course of action which would maximize the hostages' safety and to attempt a capture of the hijacker only if possible by means compatible with circumstances. In the former case the would-be hijacker was apprehended by FBI agents when the aircraft landed on a scheduled stop. In the latter case, the offender was overpowered by crewmen and passengers while the aircraft was in flight. See 1979 FAA Report, *supra* note 11, at 3-4.

180 See, e.g., *Boyd v. Racine Currency Exch., Inc.*, 56 Ill. 2d 95, 306 N.E.2d 39 (1973); *Noll v. Martan*, 347 Pa. 213, 32 A.2d 18 (1943); contra, *Genovay v. Fox*, 50 N.J. Super. 538, 143 A.2d 229, *rev'd on other grounds*, 29 N.J. 436, 149 A.2d 212 (1959); *Sinn v. Farmers Deposit Savings Bank*, 300 Pa. 85, 150 A. 163 (1930); see also *RESTATEMENT (SECOND) OF TORTS §§ 75, 83* (1965), which state the principle that a person defending himself or his property may be liable for harm to third persons if his acts create an unreasonable risk of harm to such persons.

181 In *Boyd v. Racine Currency Exch., Inc.*, 56 Ill. 2d 95, 306 N.E.2d 39 (1973), a wrongful death action was brought by the widow of a customer killed by an armed robber when a teller at a currency exchange refused to comply with his demands for money even though the robber threatened to kill the customer if his demands were not met. The court found no duty to accede to the robber's demands. *Id.*

182 See, e.g., *Spalt v. Eaton*, 118 N.J.L. 327, 192 A. 576, 578 (1937); *Harpell v. Public Serv. Coordinated Transp.*, 20 N.J. 309, 120 A.2d 43, 47 (1956). This rule may be limited by holdings in other cases to the effect that common carriers owe their passengers the "highest degree of care consistent with the practical operation of the plane." *Southeastern Aviation v. Hurd*, 209 Tenn. 639, 355 S.W.2d 436, 446 (1962). Thus, an air carrier may be justified, despite a hijacker's demands, in refusing transport to Iran if the aircraft were incapable of transoceanic flight.

183 522 F.2d 990 (6th Cir. 1975).
the greater interest . . . . [T]he means employed to effect any capture should be consonant with that which would provide the maximum assurance possible that hostages would not be harmed as a result. 184 Applying this standard, the F.B.I. agent was held to have been negligent for choosing to use force when there did exist "a better-suited alternative to protecting the hostages' well-being. That choice was not to intervene forcibly but to continue the 'waiting game.' 185

Hence, unless some opportunity presents itself that would allow for the hijacker to be subdued without exposing the passengers to a greater risk of danger, it would seem that most circumstances surrounding an air hijacking or related incident would suggest that acquiescence to the hijacker's demands would constitute the course of action least likely to expose its passengers to danger. It has been held that a carrier has no obligation to physically intervene in an assault on one passenger by another. 186 If an airline's employees take action to physically overpower a hijacker, although they are privileged to do so, the airline may be held to be negligent if its other passengers are exposed to harm, 187 and it will be liable for any injuries incurred by innocent passengers. 188

184 Id. at 1001-02.
185 Id. at 1002. While the Downs court announced that a "waiting-game" is preferable to use of force in a hijacking situation, it left open the question of whether, in a case where a "waiting game" is not an option, full acquiescence to the hijacker's demands is preferable to use of force.
187 See, e.g., Watson v. Chicago Transit Auth., 52 Ill. 2d 503, 288 N.E.2d 476, 478 (1972); Spalt v. Eaton, 118 N.J.L. 327, 192 A. 576, 578 (1937). This reasoning would probably not apply to an incident where a bomb has been placed on an air carrier. In such case, the carrier's duty to protect its passengers would require the carrier to act to inspect any package that it reasonably believes to contain explosives. See State v. Morris, 42 Ohio St. 2d 307, 329 N.E.2d 85, 93-94 n. 1 (1975).
188 See Miller v. Mills, 257 S.W.2d 520 (Ky. 1953). Where one undertakes an act which he has no duty to perform, the act generally must be performed with ordinary care. Northwest Airlines v. Glenn L. Martin Co., 224 F.2d 120 (6th Cir. 1955). Of the ten skyjacking incidents involving U.S. air carriers in 1979, seven were thwarted when the hijacker was physically subdued, five times by F.B.I. agents or police and twice by airline personnel with the assistance of passengers. One hijacker was shot and killed by Sidney, Australia, policemen. See 1979 FAA Report, supra note 11, at 2-4; see note 13 supra, and hijackings cited therein.
B. Proximate Cause

Assuming that a plaintiff-passenger can establish that by its actions or omissions the airline has breached a duty owed to the passenger, before liability can be imposed it must be shown that the air carrier's negligence was the proximate cause of the injuries incurred by the plaintiff-passenger. The basic issue in this regard is whether the hijacker's criminal acts break the chain of causation so completely as to supersede the air carrier's negligence as the proximate cause of the injury to the passenger.\footnote{See generally Prosser, supra note 69, § 44, at 270.}

The general rule is that because a common carrier is not an insurer of the safety of its passengers, it is not responsible for the consequences of felonious acts perpetrated by persons not in its employ nor under its control,\footnote{See, e.g., Wing Hang Bank, Ltd. v. Japan Air Lines Co., 357 F. Supp. 94 (S.D.N.Y. 1973); Terre Haute, Indianapolis and E. Traction Co. v. Scott, 197 Ind. 587, 150 N.E. 777 (1926).} even if the carrier's negligence has created a condition which serves to facilitate the subsequent independent criminal acts of the third persons.\footnote{Neering v. Illinois Cent. R.R., 383 Ill. 366, 50 N.E.2d 497, 503 (1943).} However, the subsequent criminal act of a third person does not automatically relieve the party that is guilty of an earlier negligent or wrongful act from responsibility. The general exception to the aforementioned rule is that "the subsequent independent act, in order to break the causal connection, must be one, the intervention of which was not probable or foreseeable by the first wrongdoer. ... [W]hen the intervening cause of an injury is of such nature as could reasonably have been anticipated, ... the earlier negligent act, if it contributed to the injuries may be regarded as the proximate cause."\footnote{50 N.E.2d at 503-04; Werndli v. Greyhound Corp., 465 So. 2d 177, 178 n. 1 (Fla. App. 1978); Kenny v. Southeastern Pa. Transp., 581 F.2d 351 (3rd Cir. 1978); see Prosser, supra note 69, § 44, at 272-75.}

As stated in 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 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.\textsuperscript{193}

Once it has been determined that it is an air carrier's duty to anticipate and guard against hijackings and similar crimes, and this duty is breached, it follows that the occurrence of the very incident that the airline was under a duty to prevent will not supersede the airline's liability.\textsuperscript{194} The point that air carriers are bound by their high standard of care to anticipate and to guard against potential hijackings and related crimes has been made previously in this article.\textsuperscript{195} Moreover, as has also been noted, Congress has expressly placed upon the airlines the duty to screen all passengers and their carry-on items for weapons and explosives to protect passengers and their property against acts of criminal violence and aircraft piracy.\textsuperscript{196} It is submitted, therefore, that an airline may be held liable for injuries suffered by its passengers during a skyjacking, or similar crime, because by its failure to adequately screen the potential hijacker prior to boarding, the air carrier has made a substantial contribution to those injuries even though the injuries would not have occurred but for the hijacker's acts.\textsuperscript{197}

On the other hand, the injuries for which a plaintiff-passenger seeks compensation must not be too remote. In \textit{National Airlines, Inc. v. Edwards},\textsuperscript{198} a passenger on an American airliner that was hijacked to Cuba brought suit against the air carrier to recover for illness and injuries, which resulted in mental and physical disability and loss of wage earning capacity, that the passenger allegedly sustained as a result of being forced to consume Cuban food and drink.\textsuperscript{199} The Florida Supreme Court reversed the appellate court, and reinstated an order of dismissal rendered by the trial court, on the grounds that the damages alleged to be the result of the airline's negligence were too remote as a matter of law in that

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{193}] \textit{RESTATEMENT (SECOND) OF TORTS} § 448 (1965).
\item[\textsuperscript{194}] \textit{Prosser, supra} note 69, § 44, at 275.
\item[\textsuperscript{195}] See notes 83-100 and accompanying text.
\item[\textsuperscript{196}] 49 \textit{U.S.C.} § 1357 (1976).
\item[\textsuperscript{197}] \textit{Prosser, supra} note 69, § 44, at 273.
\item[\textsuperscript{198}] 336 So. 2d 545 (Fla. 1976).
\item[\textsuperscript{199}] \textit{Id.} at 545-46. The plaintiff apparently had to claim that her injuries resulted in part from the consumption of Cuban food because Florida adheres to the impact doctrine in claims for damages due to mental and emotional injuries.
\end{enumerate}
\end{footnotesize}
they were not the natural and probable consequences of the tortious act and did not ordinarily and naturally flow therefrom.\(^{300}\)

(1) **Contributory Negligence**

In some states the defense of contributory negligence may be available to airlines.\(^{301}\) In such a jurisdiction, a passenger suffering injuries during a hijacking or similar incident would be unable to recover if his own negligence proximately contributed to his own injuries because contributory negligence, where applicable, is a complete bar to recovery in a case brought in negligence.\(^{292}\) The question of whether or not a passenger was contributorily negligent might arise where a passenger voluntarily acts to subdue a hijacker and is injured as a result. A plaintiff-passenger who has increased the risk of harm to himself over what the risk would have been had he exercised reasonable care may be held to have exculpated a negligent airline.\(^{293}\) On the other hand, courts have held that where a plaintiff is confronted with imminent peril to himself or to a third person, e.g., another passenger, he may assume extraordinary risks, in attempting to protect himself or a third person from the danger, without being held contributorily negligent.\(^{294}\) An application of this rule to the context of airline hijackings would limit the availability of the contributory negligence defense for the air carriers.

(2) **Assumption of the Risk**

One who becomes a passenger on an air carrier engaged in a

\(^{300}\) *Id.* at 446-47. The court cited *Taylor Imported Motors, Inc. v. Smiley*, 143 So. 2d 66 (Fla. App. 1962) and *Kwoka v. Campbell*, 296 So. 2d 629 (Fla. App. 1974) in support of its opinion.

\(^{301}\) See generally *Prosser*, supra note 69, § 65, at 416.


\(^{303}\) See, e.g., *Northwest Airlines v. Glenn L. Martin Co.*, 224 F.2d 120 (6th Cir. 1955).

domestic flight normally assumes the risks of those perils incident to air travel which cannot be averted even by the carrier's exercise of the highest degree of care. In light of this principle, it has been suggested that an assumption of the risk defense may be asserted by an air carrier in response to an action for injuries resulting from a skyjacking incident. To establish a defense of assumption of the risk, a carrier would have to show that the passenger knew of and appreciated the risk of hijacking before contracting for passage. Thus, the air carrier could probably utilize such a defense only if a hijacking warning were printed on the passenger ticket, which is the contract of carriage between the passenger and carrier. In this way the passenger could be held to have voluntarily entered into the contract of carriage fully knowing and appreciating the risk involved, but still electing to encounter the possible danger by boarding the plane. Without notice and warning, the assumption of the risk defense would fail because the passenger, as one to whom the high duty of care is owed, has a right to assume that it will be performed and is not required to anticipate the airline's negligent acts or omissions. And even if an airline did have an adequate warning of the hijacking danger printed on its tickets, making the determination that the risk of losing passengers is outweighed by the potential liability, any provisions which would exclude or limit liability may be held to be imposed by adhesion and violative of public policy. Furthermore,


See generally Prosser, supra note 69, § 68, at 439.

See McClintock, supra note 8, at 72.

See Restatement (Second) of Torts, § 496 (1965).

See McClintock, supra note 8, at 73; A Toothman, Legal Problems of Skyjacking 251, 257 (1969).


The Warsaw Convention's limitations on air carrier liability are effectuated through the contract between an airline and its passengers as expressed by the ticket. See In Re Air Crash in Bali, Indonesia, 462 F. Supp. 1114 (C.D. Cal. 1978). Article 3(1) of the Warsaw Convention requires that a ticket state that
courts have recognized that in situations where statutes have been enacted to protect a particular class of persons against their own inability to protect themselves, the fundamental purpose of such statutes would be defeated if a member of the protected class was allowed to assume the risk. In such cases, courts have generally held that where a statute has been enacted to protect a particular class of plaintiffs, they cannot assume the risk of violation of the statute, either expressly or by implication.\textsuperscript{1} Therefore, a plaintiff-passenger who suffers injuries arising out of a skyjacking of a U.S. carrier in which the hijacker has carried a concealed weapon or explosive device through the passenger screening station and aboard the aircraft without detection, may not be held to have assumed the risk in light of the protective purpose of the legislation, and regulations pursuant thereto, requiring airlines to “prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carry-on baggage or on or about the persons of passengers.”\textsuperscript{2} On the other hand, an airline’s assumption of the risk defense is more apt to prevail in a case arising out of a hijacking in which the skyjacker was not armed because there would be no violation of statute by the airline in such a case.

V. Compensable Injuries

Since pre-flight screening of all airline passengers and their carry-on items was implemented in January, 1973, there has been only one skyjacking attempt aboard a U.S. air carrier which involved a hijacker armed with a firearm that penetrated the screening system.\textsuperscript{3} While there have been seven incidents in which some

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\textsuperscript{1} See, e.g., Narramore v. Cleveland, C. C. & St. L. R. Co., 96 F. 298 (6th Cir.), cert. denied, 175 U.S. 724 (1899); Susa v. Anaheer Steel Products Co., 180 Minn. 21, 230 N.W. 125 (1930). See also, RESTATEMENT (SECOND) OF TORTS, § 496F (1965). Furthermore some jurisdictions have abandoned assumption of the risk as a bar to recovery in negligence cases. See, e.g., Farley v. M. M. Cattle Co., 529 S.W.2d 751 (Tex. 1975).

\textsuperscript{2} See 1979 FAA Report, supra note 11, at 1; see also N.Y. Times, Jan. 27, 1980, at 18, col. 5.

\textsuperscript{3} See, e.g., ERU 121.538(b) (1980); 49 U.S.C. §§ 1356-57 (1976).
lesser weapon, e.g., a knife, was not detected by the screening measures, the number of passengers who have actually sustained direct bodily injuries at the hands of skyjackers on American airliners since January, 1973, has been small. Thus, the question of whether a passenger on a hijacked, or similarly threatened, airliner can recover from any mental anguish, emotional trauma, nervous shock or fright has become a particularly critical issue since January, 1973.

There is no question that an innocent passenger could recover damages for any bodily injuries proximately caused by an airline’s negligence. By contrast, some objections against permitting recovery for negligently inflicted mental distress have been advanced, among them, that it cannot be measured in terms of money, that it is too remote, and that increased litigation will result. These objections would seem to have no special application to suits arising out of airline hijackings. Furthermore, modern courts have largely dismissed these arguments because “[m]ental suffering is no more difficult to estimate in financial terms, and no less a real injury than ‘physical pain’ . . . . It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied.” The only valid objection to allowance of recovery for mental or emotional injury is considered to be the danger of

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212 See note 47 supra, and accompanying text. Additionally, gasoline was apparently smuggled aboard U.S. airlines in four recent incidents. See note 14 supra.

214 On April 4, 1979, a female hostage received cuts on her throat from the knife of a would-be hijacker. 1979 FAA Report, supra note 11, at 3. No other airline passengers sustained bodily injuries in the course of the 28 hijacking incidents on U.S. air carriers since January, 1978. See 1979 FAA Report, supra note 11, at 2-4; 2d 1978 FAA Report, supra note 24, at 2-4; 1st 1978 FAA Report, supra note 24, at 7-8; see also notes 9 and 13 supra, and hijackings cited therein. On the other hand, between 1974 and June 30, 1979, criminal acts perpetrated against U.S. civil aviation resulted in a total of 116 deaths and 120 injuries, which of course, include persons other than passengers. 1979 FAA Report, supra note 11, at 9. In addition to claiming bodily injuries and mental distress, a plaintiff-passenger might seek to recover for lost work time, delay or substitute travel expenses incurred, loss of business deal or contract, etc. See McClintock, supra note 8, at 57-59; Skyjacking, supra note 8, at 39-40. However, domestic airlines are able to avoid or limit liability for delays in completion of flights in accordance with tariffs filed with and approved by the CAB. 49 U.S.C. § 1373 (1976); See also Tompkins, supra note 67, at 388.

217 See Prosser, supra note 69, at 327; Abromovsky, supra note 30, at 348.

211 See Prosser, supra note 69, at 327-28.
vexatious suits and ficticious claims because mental anguish is viewed as being easily simulated.\textsuperscript{219}

One result of these concerns was the development of the "impact" doctrine,\textsuperscript{220} the theory being that the presence of physical "impact" at the time of the incident giving rise to the psychiatric injury, will insure that the alleged mental distress is legitimate.\textsuperscript{221}

Clearly, where as a result of a defendant's negligence the plaintiff suffers physical injury, courts will order compensation for purely mental or emotional elements of the accompanying or consequential damage, such as fright at the time of the injury.\textsuperscript{222} Moreover, with the recent trend toward the abandonment of the impact requirement in a majority of jurisdictions,\textsuperscript{223} a plaintiff

\textsuperscript{219} Id. at 328.

\textsuperscript{220} Id. at 331.

\textsuperscript{221} Id. See also Purcell v. St. Ry., 48 Minn. 134, 50 N.W. 1034 (1892). With regard to claims for damages due to mental anguish and emotional trauma suffered during hijackings of international flights, see Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152, 1156-57 (D.N.M. 1973) where it was held that mental anguish alone is not compensable under the Warsaw system's provision that the air carrier shall be liable for bodily injuries received by its passengers. However, the court also decided that an injured passenger could recover bodily injuries even though not caused by physical contact and that "emotional distress . . . directly precipitated by bodily injury [is] considered as a part of the bodily injury itself" for which damages are recoverable. Id. at 1158. It was similarly held in Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 358 N.Y.S.2d 97, 314 N.E.2d 848 (1974), that an airline is liable under the Warsaw system for "palpable, objective bodily injuries including those caused by the psychic trauma of the hijacking, and for damages flowing from those bodily injuries [including mental suffering], but not for the trauma as such or for the non-bodily or behavioral manifestations of that trauma." 358 N.Y.S.2d at 110, 314 N.E.2d at 857.

Contrastingly, the more recent decision of Karfunkel v. Compagnie Nationale Air France, 427 F. Supp. 971, 977 (S.D.N.Y. 1977) and Krystal v. British Overseas Airways Corp., 403 F. Supp. 1322, 1323 (C.D. Cal. 1975) have followed Husserl v. Swiss Air Transport Co., 388 F. Supp. 1238, 1250-51 (S.D.N.Y. 1975) in holding that mental injuries suffered by passengers during international skyjackings are compensable under the Warsaw system, even though not precipitated by bodily injuries, if the otherwise applicable substantive law provides an applicable cause of action.

\textsuperscript{222} See, e.g., Baltimore & O.R. Co. v. McBride, 36 F.2d 841 (6th Cir. 1930); Steitz v. Gifford, 280 N.Y. 15, 19 N.E.2d 661 (1939).

\textsuperscript{223} PROSSER, supra note 69, at 332. See RESTATEMENT (SECOND) OF TORTS § 313 (1965). The reason for the retreat from the impact requirement was expressed in Battalla v. State, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729, 740-42 (1961):

It is fundamental to our common-law system that one may seek redress for every substantial wrong . . . . In many instances, just as in impact cases, there will be no doubt as to the presence and
generally may recover for mental and emotional injuries suffered as a result of another's negligence, even where there has been no physical impact, if the party seeking recovery was subjected to fear of physical injury as a direct result of the tortious conduct. It has been held that there may even be recovery for mental or emotional suffering in the absence of the fear of potential physical injury to the person directly subjected to the negligent act of another, provided that the psychic injury is genuine, substantial, and proximately caused by the defendant's negligence. In *Kalish v. Trans World Airlines,* an airline passenger was held entitled to recover for emotional injuries incurred when she was allegedly trampled by other passengers who were trapped in a burning aircraft. The court held that due to the circumstances of the case, the plaintiff-passenger was not required to prove physical impact:

> [A]ny person in plaintiff's predicament would anticipate and be terrified, on a sustained basis, by the possibility of suffering very serious injury or death while a captive in a burning aircraft. Such anticipation, anxiety and anguish would not be suffered in split-seconds, but over a prolonged period of twenty minutes or more which heightened plaintiff's natural horror and the consequential psychic traumatic effects of the situation. Each second was an eternity. This was . . . a real life terror-in-the-sky emergency which, undoubtedly, had an overwhelming, engulfing, terror-stricken impact on plaintiff as a captive passenger. . . . The obvi-

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255 Johnson v. State, 37 N.Y.2d 378, 383-84, 372 N.Y.S.2d 638, 642-43, 334 N.E.2d 590, 593 (1975); but see Mason v. Belieu, 543 F.2d 215 (6th Cir.), *cert denied,* 429 U.S. 852 (1976) (wife held not entitled to recover for mental distress suffered when airline prevented husband from boarding scheduled flight despite airline's failure to give wife valid explanation when husband did not arrive on flight) and Cohen v. Varig Airlines, 62 A.D.2d 234, 405 N.Y.S.2d 44, 49-50 (1978) (plaintiffs were held not entitled to recover for alleged mental and emotional suffering due to lost luggage).


227 390 N.Y.S.2d at 1008-09.
ous mental anguish which all passengers including plaintiff must have suffered over their possibility of being destroyed in a crash or by an explosion in mid-air beggars [sic] normal imagination unless one has actually been the victim of such events. This court concludes that the assault against the plaintiff's emotional senses of these circumstances was so pervasive as to be tantamount to the infliction of physical blows upon her body, and was the same as if she had suffered additional, actual bodily injuries.\footnote{Id. at 1011.}

The reasoning of the court in *Kalish* is very easily applicable to an air carrier hijacking case which is also a “terror-in-the-sky emergency” such that it is “obvious” that passengers would suffer mental anguish and anxiety over the possibility of being destroyed in a crash or by an explosion in mid-air. Under *Kalish* and other similar cases, a passenger on an air carrier that is hijacked may recover, \textit{inter alia}, for any mental anguish, emotional trauma, nervous shock, and fright even without proof of physical injury or impact in a jurisdiction that does not adhere to the “impact” rule.

Furthermore, because courts have determined “impact” to be sufficient in minor contacts with the person that could not be responsible for the real injury, a plaintiff-passenger may be able to recover for mental and emotional injuries arising out of sky-jackings and related crimes even in jurisdictions which follow the “impact” rule. Sufficient impact has been found in a slight blow,\footnote{Spade v. Lynn & B. R.R., 172 Mass. 488, 52 N.E. 747 (1898).} a trivial jolt or jar,\footnote{Zelinsky v. Chimes, 196 Pa. Super. 312, 175 A.2d 351 (1961) (“any degree of physical impact, however slight”); Kasey v. Suburban Gas Heat of Kennewick, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962) (shock explosion); see Boston v. Chesapeake & O. R. Co., 223 Ind. 425, 61 N.E.2d 326 (1945).} a forcible seating,\footnote{Driscoll v. Gaffey, 207 Mass. 109, 92 N.E. 1010 (1910).} inhalation of smoke,\footnote{Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930).} and a fall caused by fainting.\footnote{Comstock v. Wilson, 257 N.Y. 231, 177 N.E. 431 (1931).} Moreover, it has been held that “shocks to the nerves and nervous system” by itself constitutes physical harm that is enough to satisfy the requirement of impact.\footnote{See Vanoni v. Western Airlines, 247 Cal. App. 2d 793, 56 Cal. Rptr. 115 (1967) which allowed recovery for fright due to the negligent operation of the airliner.} Nevertheless, in the absence of an application of the rule in...
Kalish that the circumstances of the injury provide a sufficient guarantee that the claim for mental anguish is genuine, most courts will require evidence of physical consequences or manifestations of the psychiatric injury before damages will be awarded.\(^{235}\) In a jurisdiction that follows the impact doctrine, some physical contact, however slight, will be required before recovery for mental distress will be allowed.\(^{238}\)

Because of the divergent position assumed by numerous states on the issue of compensation for persons suffering mental or emotional injuries, the determination of choice of law questions may be dispositive of current and future suits by passengers of air carriers for injuries resulting from skyjackings.\(^{237}\)

VI. CONFLICT OF LAWS

For choice of law purposes, the ideal case would involve a plaintiff-passenger and defendant airline who are both domiciled in the state in which the hijacker boarded and the plaintiff's injury occurred. In such a case there probably would be no doubt as to which state's substantive law would apply. Should a domestic hijacking result in litigation, however, it is not unlikely that the case would involve a passenger and airline with different domiciles, and a situation where the hijacker boarded the aircraft in one state and the passenger suffered injury in another state.\(^{238}\)

State substantive laws applicable to a passenger's suit for damages arising out of a hijacking of a domestic commercial airliner


\(^{238}\) In Burnett v. Trans World Airlines, Inc., 368 F. Supp. 1152 (D.N.H. 1973) the court rejected an argument that the hijacking itself and the subsequent division of the aircraft constituted bodily injury in spite of the fact that the abduction of the passengers was apparently an actionable interference with the person of the passenger. Id. at 1158.

\(^{237}\) The assumption is made that bodily injuries to airline passengers on hijacked U.S. flights will be the exception and not the rule.

\(^{238}\) In the January, 1980 Delta hijacking, the Atlanta-based air carrier was flying from Los Angeles, California to New York City with passengers boarding in Los Angeles, Dallas, Texas and Atlanta, Georgia, when it was hijacked while in North Carolina's air space. The hijacker smuggled the handgun aboard the aircraft in Atlanta, Georgia. Dallas Morning News, Jan. 26, 1980, at 1, col. 1.
may conflict on several issues in addition to whether persons who have suffered mental or emotional injuries will be compensated: the interpretation of the doctrine of *res ipsa loquitur*; the duty of care owed by air carriers to their passengers; and whether contributory negligence and/or assumption of the risk may be asserted by the air carrier in order to bar the injured passenger's recovery. States even disagree on the choice of law rule that is to be utilized in order to determine the state law that is applicable to the merits of the case. Three frequently employed conflicts theories are: (1) *lex loci delicti*, in which the court applies the law of the jurisdiction where the tort occurred; (2) "significant contacts," which calls for a determination of which state has the most significant relationship to the issue; (3) "government interest," under which the court compares the law of the state involved and the interests of the litigants to determine the law most "appropriately" applicable to the subject issue. In this regard, the former strict *lex loci delicti*, "place of injury," rule has largely been abandoned in favor of one of the more flexible rules which permit analysis of the policies and interests underlying the particular issue before the court.

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241 Douglas, *supra* note 239, at 425. Section 146 of the *Restatement (Second) of Conflict of Laws* provides:

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . with the occurrence and the parties, in which event the local law of the other state will govern.  


Babcock v. Jackson, the court concluded that "[j]ustice, fairness and the 'best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." The United States Supreme Court has indicated apparent approval of the trend to depart from the "place of the injury" rule in order to give consideration to the extent of the interests of the states having contacts with the legal issue and with the parties.

It is submitted that in a suit brought by a passenger who seeks recovery from an airline for injuries received during a domestic skyjacking carried out by a hijacker who succeeded in smuggling a weapon or explosive device aboard, the liability of the airline should normally be resolved by the law of state where the hijacker boarded the aircraft even though the actual injuries may have been sustained while the airliner was within the territorial auspices of another state. This rule would avoid having to deal with the problem of determining over which state's territory the passenger's injury occurred, a problem that would be particularly troublesome in the case of alleged mental or emotional distress because the injury may result from the entire traumatic event which could encompass flight over several states. Furthermore, application of the law of the state where the hijacker penetrated the screening system is consistent with the rule that whether a person has been negligent is normally determined by reference to the law of the state where he acted and the standards of conduct in existence there. Moreover, an analysis of the policies and interests of the respective states with regard to hijackings and their prevention would favor application of the law of the state where the hijacker smuggled his weapon past the pre-flight screening checkpoint. Fed-


245 Id. at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283.

246 Richards v. United States, 369 U.S. 1 (1962). The law of the place where the act or omission occurred was applied even though the injury occurred in another state. Id. at 12-13.

eral regulations prohibit an airline from allowing a passenger to board its aircraft with a dangerous weapon or explosive device, and state courts impose liability upon carriers for failure to protect their passengers from foreseeable harms. Since the federal regulations and the common law duty of protection seek to regulate activity that poses particular danger to the public, the state in which the pre-flight screening procedures are effectuated has a clear interest in their reasonable performance. If the protection afforded the public by the regulation is to be effective, it must be effective at the source of the danger, e.g., the screening checkpoint. Thus, considering the purpose of the regulations, the state where the hijacker boards the aircraft has a greater relation to the occurrence of a hijacking than does a state wherein the actual injury was sustained by the passenger, despite the latter state’s interest in providing compensation to those injured within its boundaries. Accordingly, the law of the state where the aircraft was boarded by the hijacker should normally govern suits for damages brought by passengers against airlines for injuries suffered during in-flight hijackings of domestic carriers. On the other hand, in the case where the issue of the air carrier’s negligence arises solely out of the actions taken by the carrier’s employees during the course of an in-flight skyjacking, e.g., where the hijacker is not armed and the air carrier’s employees take no action to determine such, an analysis of each state’s relation to the occurrence may lead to a different result and an application of the law of the state where the injury, if any, occurred.

VI. CONCLUSION

The Warsaw system, with its imposition of absolute liability on international air carriers for injuries to their passengers, has provided a regime within which passengers who suffer injuries during hijackings of international flights have not infrequently sought

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248 14 C.F.R. § 121.538(b) (1980).
249 Letsos v. Chicago Transit Auth., 47 Ill. 2d 437, 441, 265 N.E.2d 650, 653 (1976); see note 84 supra, and accompanying text.
250 Cf. People ex rel Compagnie Nationale Air France v. Gilberto, 74 Ill. 2d 90, 383 N.E.2d 977, 981 (1978) (applicability of the Warsaw Convention “depends upon the place where the ‘accident,’ rather than the resulting injuries occurred, and the ‘accident’ . . . consisted of the hijacking itself.”)
compensatory relief. By contrast, although the majority of hijacking incidents that have involved American air carriers in recent years have occurred on domestic flights, and even though the airlines are not protected on domestic flights by the limitations on liability applied to international flights, passengers thereon, for whatever reason, have generally not utilized the common law negligence theory to recover damages for their injuries. This article supports the position that a passenger on a domestic flight could, in some circumstances, recover in a negligence action against the airline for injuries resulting from a skyjacking.

An airline has a duty to exercise a high degree of care to protect its passengers from the threat of hijackers. This duty would seemingly require the airline to exercise a high degree of care to prevent any passenger from smuggling a weapon or explosive device aboard its aircraft. While it is unclear as to whether this duty would be breached in the case where a hijacker takes a weapon onto the aircraft by circumventing or forcing his way through the airline’s pre-flight screening station, the airline is likely to be found negligent where it fails to detect a weapon or explosive device that is carried by a hijacker through the airline’s screening checkpoint. If negligence per se is not imposed in the case where a weapon or explosive device has penetrated the airline’s screening system, the burden should be shifted to the airline to show that it was not negligent in that it had taken all reasonably practical measures to prevent such a penetration of its security system. This defense should succeed only in the case of the hijacker who possesses no real weapon, and then only if the simulated weapon, if any, is shown not to be detectable by the airline’s exercise of a high degree of care and only if it is further shown that the hijacker was not subject to detection through utilization of the behavioral profile. In the case of an unarmed hijacker who boards having no instrument in his possession with which to promote the hoax, a plaintiff-passenger would be hard-pressed to show that the airline was negligent in screening the hijacker prior to boarding. However, the carrier’s duty to exercise a high degree of care for the safety of its passengers continues beyond the pre-flight screening station through the entire flight, and at least in the context of the unarmed hijacker, the airline should not readily accede to the hi-
jacker's demands until there is some showing on the part of the hijacker that he is capable of carrying out the threats he has made. Nevertheless, in light of the airline's duty to exercise a high degree of care to provide for the safety of all the passengers on board, an acquiescence to a hijacker's demands on the part of the air carrier could constitute a breach of duty only when it is clearly shown that the carrier's employees knew or plainly should have known that the hijacker was unarmed. Diversion of the aircraft to a foreign country on demand of the hijacker would seem more consistent with the airline's duty to protect its passengers than would taking the risk of death or serious injury to its passengers in order to reach a scheduled destination without delay. Thus, in the context of a hijacking carried out by an unarmed hijacker, a plaintiff-passenger who has nonetheless suffered severe mental distress and anxiety due to the traumatic hijacking experience in which the hijacker was perceived to possess the power to cause the deaths of everyone aboard the aircraft, would not likely be able to prove negligence on the part of the airline, either in failure to detect a weapon at the screening checkpoint or in acceding to the demands of the hijacker who has claimed to possess a bomb. Even if the problem of the impact rule could be overcome in this case, such a plaintiff would not be able to recover from the airline for injuries unless a system that would impose liability without fault were implemented. Those who favor adequate compensation for all injuries might support such a proposal. On the other hand, opponents would consist of those who believe that the function of the law is "to limit the legal consequences of wrongs to a controllable degree" as opposed to establishing a remedy for every wrong.

Furthermore, the allocation of the full costs of hijackings and similar criminal offenses should not be placed upon the airlines without considering the equities of the burden. "Although protection of the injured passengers is assumed, the requirement that airlines bear the expense of attacks which they may well be powerless to prevent could actually lead to a reduction of air service or to an unreasonable drain on the airline's coffers."

251 McClintock, supra note 8, at 70; Skyjacking, supra note 8, at 44.
253 Comment, Deterring Airport Terrorist Attacks and Compensating the
The law should at least impose liability in those cases where
the air carrier possesses the power but failed to adequately pro-
tect its passengers. Since January, 1973, twelve of the 45 attempted
hijackings aboard U.S. carriers have involved a firearm, knife or
other weapon or explosive material passing undetected through
pre-boarding passenger screening systems that the airlines are
obligated to maintain. The airlines may have had the duty and
power to prevent these hijackers from boarding their aircraft while
armed. It is submitted that in most jurisdictions a plaintiff-
passenger would be able to recover in a negligence action against
the airline for any resulting physical or mental injuries arising out
of such hijacking cases.

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describing the high cost of implementing security measures and the deteriorating
economic position of many airlines.

284 See 1979 FAA Report, *supra* note 11, at 1; *see also* notes 14, 47 and 48
*supra*, and accompanying text.