Journal of Air Law and Commerce

Volume 48 | Issue 3 Article 8

1983

# Domestic Airline Passenger Remedies

Wallace C. Magathan III

Victoria A. Franks

# DOMESTIC AIRLINE PASSENGER REMEDIES

WALLACE C. MAGATHAN, III*
VICTORIA A. FRANKS**

The infrequent airliner crash in the United States is a major disaster that receives worldwide attention and always produces personal injury and wrongful death claims involving large sums of money. Legal analysis of passenger claims naturally tends to focus on such disasters, with the result that the more common events that cause problems for passengers receive much less attention. The purpose of this article is to provide an overview of the typical problems that confront United States' domestic passengers,[1] including a brief discussion of punitive damages as applied in domestic passenger cases.[2]

The most common domestic passenger claims, other than those arising out of air crashes, can be grouped into four gen-

---

* Wallace C. Magathan, III practices law in Washington, D.C. with the law office of John J. Tigert VI. He has previously held positions as a trial attorney with the U.S. Department of Justice Aviation Section and with the Litigation Division of the Federal Aviation Administration Chief Counsel's Office. He graduated with honors from the George Washington University Law School. Mr. Magathan holds ATP, FE, CFI, and CFII certificates and began his aviation career by serving a tour in Vietnam as an Army helicopter pilot. He currently is an Aircraft Commander with the Air Force Reserve and flies C-5A Galaxies worldwide. He also flies light, fixed wing aircraft and helicopters for business and relaxation.

** Victoria A. Franks was a law student at American University Law School in Washington, D.C., and has been a law clerk with the Law Offices of John J. Tigert VI for the past year. She previously clerked for a year with the Aviation Section of the U.S. Department of Justice. Ms. Franks graduated in May 1983.

[1] The international passenger is subject to the provisions of the Warsaw Convention which has its own assortment of issues that generate much legal paperwork. *See* Warsaw Convention of 1929, 49 Stat. 3000, T.S. No. 876.

[2] *See infra* notes 61-68 and accompanying text.

eral areas: (1) baggage claims; (2) claims arising from unannouced schedule changes; (3) claims arising from instances of denied boarding; and (4) personal injury claims arising from accidents occurring in or around the airplane or terminal area.

Federal and state law, Civil Aeronautics Board (CAB) Regulations, and Passenger Rules Tariffs all play a role in fashioning the passenger's rights and remedies in the first three areas. The fourth area, personal injury claims, normally do not involve the application of any aviation-related federal statutes and routinely are treated as ordinary torts under applicable state laws. The Airline Deregulation Act of 1978,[3] which provides for the elimination of all tariffs as of January 1, 1983[4] and for the dissolution of the CAB on January 1, 1985,[5] will have a substantial impact on the resolution of these domestic claims.

## I. Baggage Claims

Claims for lost, damaged, or pilfered luggage occur more frequently than any other type of claim and are the most thoroughly regulated. At the time of this writing, each carrier is required to file tariffs that specify, among other things, "all classifications, rules, regulations, practices and services" followed by the carrier.[6] These federal tariffs constitute the contract of carriage between the airlines and their passengers and govern the rights and liabilities of each.[7] The CAB is empowered to reject any tariff filed by a carrier, and any such rejected tariff is void.[8] The CAB permits tariffs that limit a carrier's liability for baggage claims, requiring only that the limit be no lower than $750.[9] The CAB regulations require that no-

---

[3] Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 18, 26, 49 U.S.C.).

[4] 49 U.S.C. § 1551(a)(2)(A) (Supp. III 1979).

[5] *Id.* § 1551(a)(4).

[6] 49 U.S.C. § 1373(a) (1976); 14 C.F.R. § 221.3(a) (1982).

[7] *See* Tishman & Lipp, Inc. v. Delta Airlines, Inc., 413 F.2d 1401 (2d Cir. 1969) (holding that tariffs filed with the CAB if valid are conclusive and exclusive; rights and liabilities between the parties are governed thereby); Mao v. Eastern Airlines, 310 F. Supp. 844 (S.D.N.Y. 1970) (holding that tariffs filed with the CAB constitute the exclusive contract of carriage between airlines and their passengers).

[8] 49 U.S.C. § 1373(a) (1976); 14 C.F.R. § 221.180 (1982).

[9] C.A.B. Order No. 77-2-9, *reprinted in* 72 C.A.B. 822 (1977).

tice of the liability limitations be placed on each ticket and posted at the ticket counter.[10] On January 1, 1983, however, all tariffs governing domestic air transportation will no longer be effective under the terms of the Airline Deregulation Act.[11] Recognizing the void that would occur in its consumer protection measures by the expiration of the tariffs, the CAB has been moving forward in several areas to promulgate federal regulations that are intended to provide continuing protection to consumers in those areas. One of these areas concerns baggage claims. New CAB Regulation Part 254, which took effect on January 23, 1983, shortly after the tariffs expired, provides for a minimum liability limit of $1,000 and requires that notice of any such limit be placed on the passengers' ticket.[12] Significantly, the claim-filing deadlines and the statutes of limitations, now found in the tariffs, are not codified in the new CAB Regulation Part 254.

An issue that has been litigated frequently and will continue to be litigated in the future is the adequacy of the notice provided to the passenger concerning the limitation of the carrier's liability. Even before 1971, when the CAB required that the carriers provide notice of limitations of liability, the courts ruled in favor of the carriers. Following a line of old railroad cases, courts held that the tariff limitations applied without regard to whether notice of the limitations was embodied in the transportation documents.[13]

Notwithstanding that line of cases, the CAB later promulgated a regulation requiring that the tariffs provide for notice on the passengers' tickets,[14] which has naturally strengthened the carriers' position on this issue. The majority of court decisions continue to reject claims of lack of notice or the inade-

---

[10] 14 C.F.R. § 221.176(a), (b) (1982).

[11] 49 U.S.C. § 1551(a)(2)(A) (Supp. III 1979).

[12] Domestic Baggage Liability, 47 Fed. Reg. 52990 (1982) (to be codified at 14 C.F.R. § 254).

[13] *See, e.g.*, VogelSang v. Delta Airlines, Inc., 302 F.2d 709 (2d Cir. 1962). *See also* Tishman & Lipp, Inc. v. Delta Airlines, Inc., 413 F.2d 1401 (2d Cir. 1969); Mao v. Eastern Airlines, 310 F. Supp. 844 (S.D.N.Y. 1970).

[14] 14 C.F.R. § 221.176 (1982).

quacy of notice.[15] At least one case has held, however, that the notice was inadequate[16] because it was insufficiently conspicuous. The new regulation,[17] replacing the tariff provisions regarding notice, does not set forth the language and type-size of the notice specified for tariffs in the later CAB regulation.[18]

While the cases to date would provide some support for the carriers' continuing their present notice practices, the fact that the new regulations will not constitute part of the "contract of carriage" suggests that a wiser course for the carriers may be to display the notice of liability limits more prominently than is done at this time.

Until now, plaintiffs have litigated without much success the issue of whether the claim filing deadlines and statutes of limitations set forth in the tariff are superseded by state statutes of limitations for contract actions in those cases in which plaintiffs have missed the tariff deadline but are within the state law deadlines. Citing the "principle of uniformity" of treatment that acts to avoid preferential treatment by establishing a national equality of rates and services, the courts have held that the tariff provisions are the "sole and exclusive" remedy available,[19] and that the tariffs, therefore, "occup[y] the field to the exclusion of state law."[20] Any claim brought after the tariff's limitation period must, therefore, be dismissed.[21] The new provisions of Part 254 have no time limitation provisions, however, so state law will control in each case. This change promises to cause problems for the airlines, who may be faced in the future with baggage claims, large and small, brought years after the fact.

---

[15] *See* United States v. Edwards, 602 F.2d 458 (lst Cir. 1979); N. Am. Phillips v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978).; Shea v. National Airlines, Inc., 16 Av. Cas. (CCH) 17,822 (Mass. Sup. Ct. 1981).

[16] Greenberg v. United Airlines, Inc., 98 Misc. 2d 544, 414 N.Y.S. 2d 240 (Kings County Ct., N.Y. 1979).

[17] 14 C.F.R. § 254.4 (1982).

[18] 14 C.F.R. § 221.176(b) (1982).

[19] *See* Tishman & Lipp, Inc. v. Delta AirLines, Inc., 413 F.2d 1401 (2d. Cir. 1969); Mao v. Eastern Airlines, 310 F. Supp. 844 (S.D.N.Y. 1970).

[20] North Am. Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 234 (2d Cir. 1978).

[21] Shea v. National Airlines, Inc., 16 Av. Cas. (CCH) 17,822 (Mass. 1981).

## II. Claims Arising From Unannounced Schedule Changes

When a scheduled flight is delayed, diverted, or cancelled for whatever reason, ticketed passengers are obviously inconvenienced, and some passengers bring suit against the airline at fault. Damages recoverable in these situations are often limited by several factors. Such limiting factors include the carriers' federal tariffs, applicable state and federal statutes, CAB regulations, exculpatory provisions printed on tickets, and normal problems of proof.

Currently, in the event of a flight cancellation, applicable tariffs require the airline to make alternative arrangements on its next available flight. If arrangements acceptable to the passenger cannot be made, the airline is obligated to try to make alternate arrangements with another airline. The final alternative is to make an involuntary refund to the passenger. Many airlines' tariffs also provide that the carrier will be responsible for providing the passenger with certain amenities including meals, lodging, phone calls and ground transportation.[22]

Until 1979, a passenger whose flight was cancelled, was limited solely to those remedies set forth in the tariffs. Rule 380 (predecessor to current Rule 240), paragraph H, provided that "[e]xcept to the extent provided for in this rule, no carrier shall be liable for failing to operate any flight according to schedule or for changing the schedule of any flight, with or without notice to passengers."[23] On September 20, 1979, the CAB issued an order cancelling Rule 380(H), finding it to be unlawful.[24] The cancellation of Rule 380(H) gave passengers the right to pursue common law remedies for flight cancellations in addition to those set forth in Rule 380 (now Rule 240). The cancellation of Rule 380(H), however, does not appear to have precipitated a flood of litigation by passengers seeking common law remedies against airlines for the inconvenience and disruption of their travel plans. In the actions that

---

[22] CAB No. 352, Passenger Rule Tariff No. PR-7, Rule 240.

[23] *See* CAB Order No. 79-9-129, *reprinted in* 83 C.A.B. 927 (1979).

[24] CAB Order No. 79-9-129, *reprinted in* 83 C.A.B. 927 (1979).

are initiated, passengers stumble into several roadblocks that continue to limit the carriers' liability.

Since most airlines' tariffs obligate the airlines to at least refund a passenger's ticket in the event of a flight cancellation and often to pay the passenger a minimal amount to defray expenses if he is stranded, most passengers bringing legal actions seek, in addition to their out-of-pocket expenses, damages for mental distress and punitive damages. The bases for the recovery alleged vary but have included breach of contract, breach of the common carrier's common law duty of carriage, and misrepresentation. Depending on the applicable state law, the passenger often has problems not only with proving the amount of damages, but also with proving the elements of the underlying cause of action.

Some of the more recent cases in which passengers have sought damages for cancelled flights reflect several of these problems. In *Kutner v. Eastern Airlines*,[25] passengers sued for damages for "great mental anguish and severe shock" suffered when their flight was diverted from its destination because of weather. They allegedly received no assistance from the carrier and decided to rent a car and drive in icy conditions and fog to their original destination.[26] Plaintiffs sued under Pennsylvania law, which allows for recovery in tort for negligent infliction of emotional distress and for recovery for emotional harm by breach of contract.[27] The court in Pennsylvania denied recovery under the tort theory because plaintiffs were within no "zone of danger" of harm from physical impact, denied recovery for emotional harm on the contract theory because there was no physical impact, and entered summary judgment for the airline.[28]

The laws of the various states differ as to what kind of damages may be sought under various theories of recovery. In some states, as seen in *Amon v. Eastern Airlines*,[29] mental

---

[25] 514 F. Supp. 553 (E.D. Pa. 1981).

[26] *Id.* at 554.

[27] *Id.* at 557-58.

[28] *Id.* at 559.

[29] 16 Av. Cas. (CCH) 17,919 (D.C. Ore. 1981).

suffering and punitive damages are not recoverable in actions sounding in contract. That court noted, however, that Oregon observes the common law duty of a carrier to properly serve passengers and a plaintiff could, therefore, bring an action in tort to recover those damages.[30]

Even if the applicable state law allows recovery for the type of damages sought by the passenger, he may yet be denied recovery by reason of tariffs and ticket provisions. In *Johnson v. Northwest Orient Airlines,*[31] an air carrier was found not liable for lost wages allegedly resulting from the passenger's late arrival at his destination after the flight was cancelled because of poor weather. The Montana Supreme Court cited Rule 240(H) of the Passenger Rules Tariff, which provides for cancellations when "necessary" and found the carrier to be acting within its legal authority in cancelling the flight.[32]

Although Rule 240(H) was not cited, the question concerning whether a carrier's decision to skip a scheduled stop was based on "necessity" is seen in *Amon v. Eastern Airlines.*[33] In *Amon* the following language was written on the ticket issued to the passenger, "Carrier . . . may . . . omit stopping places shown on the ticket in case of necessity."[34] The court in Oregon denied Eastern's motion for summary judgment, as it concluded there was a genuine issue of material fact as to whether Eastern's decision to skip a stop was based on necessity. Implied in the ruling was that "necessity" is a defense upon which carriers may rely.

In *Vick v. National Airlines,*[35] the airline diverted a nonstop New Orleans to Miami flight into Pensacola, Florida to discharge and pick up passengers, a point that the flight had overflown for weather reasons while enroute to New Orleans. The court found the airline's diversion was for business reasons, a breach of contract not justified by operational neces-

---

[30] *Id.* at 17,920.
[31] 642 P.2d 1067 (Mont. 1980).
[32] 642 P.2d at 1068.
[33] 16 Av. Cas. (CCH) 17,919 (D.C. Ore. 1981).
[34] *Id.* at 17,920.
[35] *Id.* at 17,921.

sity.[36] Plaintiffs, as a result, missed their connecting international flight and, consequently, their planned vacation, for which the court awarded $2,500 each for their "pain and suffering, mental anguish, [and] inconvenience . . . ." [37]

It appears that if an airline has a valid safety or operational reason for delaying or diverting a flight, the passenger will have difficulty recovering for his inconvenience. The defense is likely to remain a good one after expiration of other tariffs, provided the carriers provide adequate notice on their tickets, as in *Amon*. After the tariffs expire, however, the carriers will no longer be required by the CAB to provide compensation and amenities to stranded passengers. At the time of this writing, the CAB has made no plans to regulate this area, as it has done in the area of oversales and baggage claims. After January 1, 1983, the passengers' remedies for delayed flights may depend greatly on the choice of carrier.

## III. Claims Arising from Instances of Denied Boarding

Most instances of denied boarding occur when an airline has "oversold" or "overbooked" a flight and there is an insufficient number of seats on the aircraft to accommodate all passengers who hold tickets for the flight. Less frequently, litigation will arise when a handicapped or disabled person who is holding a ticket is not allowed to board the aircraft at the gate for some reason. Since 1967, the CAB has regulated the area of overbooking, but the CAB has promulgated no regulations to alleviate potential boarding problems involving handicapped or disabled persons.[38]

Part 250 is an unusual federal regulation, in that it has been generally well received by the affected public. The regulations set the amount of denied boarding compensation the carriers must pay passengers, as well as the exceptions to eligibility for denied boarding compensation.[39] Part 250 also requires that the carriers give notice of their policy of overbooking flights at

---

[36] 16 Av. Cas. (CCH) 18,404 (La. Ct. App. 1982).
[37] *Id.* at 18,405.
[38] 14 C.F.R. § 250 (1982).
[39] *Id.* §§ 250.5, 250.6 (1982).

their ticket desks and on each ticket,[40] and that they establish their own boarding priority rules.[41] Another provision requires that the carriers make these priority rules known to passengers in an overbooking situation.[42] In overbooking situations, carriers are required to make known to the affected passengers the denied boarding compensation that the carriers are required to offer and to first ask for "volunteers" before denying boarding to any person against his will.[43]

The regulations require that carriers offer a passenger who is denied boarding involuntarily an amount equal to twice the value of the ticket he holds to his destination, up to a maximum of $400.00, but in no case less than $75.00.[44] Thus, a carrier who overbooks a flight from Richmond to Washington, D.C. may prefer to deny boarding to persons whose final destination is Washington, D.C., as opposed to those persons who may be flying on to Los Angeles. It is that sort of discrimination that the boarding priority rules required by title 14, section 250.3 of the Code of Federal Regulations are designed to prevent, which, if violated, may give rise to a cause of action under the anti-discrimination provisions of the Federal Aviation Act.[45] A carrier may reduce its offer by one-half if it is able to arrange for "comparable air transportation" that gets the passenger to his destination within two hours of schedule.[46]

After giving some thought to revoking Part 250 altogether as part of its "pre-sunset" examination of consumer protection rules, the CAB elected to continue it with minor changes. One of the changes, that took effect January 23, 1983, is that carriers are no longer required to offer compensation to passengers for whom the carrier can arrange comparable air transportation that gets the passenger to his destination

---

[40] *Id.* § 250.11 (1982).
[41] *Id.* § 250.3 (1982).
[42] *Id.* § 250.9 (1982).
[43] *Id.*
[44] *Id.* § 250.5 (1982).
[45] 49 U.S.C. § 1374(b) (1976). *See, e.g.*, Miuccio v. Alitalia Linee Aeree Italiane, 16 AV. CAS. (CCH) 17,898 (S.D.N.Y. 1981).
[46] 14 C.F.R. § 250.5 (1982).

within one hour.[47]

Interestingly, Part 250 only requires the carriers to *offer* passengers compensation for denied boarding. Passengers may reject the offer and pursue their common law remedies. Passengers who accept the offer are entitled to receive payment on the same day,[48] and that payment constitutes liquidated damages for all damages incurred by the passenger as a result of the denied boarding.[49]

There are several exceptions to the compensation provisions of Part 250. The passenger is not entitled to compensation unless he presents himself at the "appropriate time and place having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures . . . ."[50] Another exception is if the passenger is accommodated in a section of the aircraft other than is specified on his ticket. In the latter case, a passenger with a first class ticket accommodated in the tourist section would be entitled to a refund of the difference in ticket price.[51] A third exception, pertaining to government requisitioned space, will no longer be applicable after January 23, 1983.[52]

Passengers seeking compensation in court have proceeded under a variety of theories, but most often upon the anti-discrimination provision of the Federal Aviation Act.[53] That section, 49 U.S.C. § 1374(b), which provides that no air carrier shall give unreasonable preference or advantage to any person or subject any particular person to any unjust discrimination, was designed to protect consumers of interstate air transportation from discriminatory practices.[54]

Depending upon the state, passengers suing under the anti-

---

[47] 47 Fed. Reg. 52,980 (1982).

[48] 14 C.F.R. § 250.8 (1982).

[49] *Id.* § 250.4(b) (1982); *See* Wasserman v. Trans World Airlines, Inc., 632 F.2d 69 (8th Cir. 1980).

[50] 14 C.F.R. § 250.6(a) (1982).

[51] *Id.* § 250.6(c)(1982).

[52] 47 Fed. Reg. 52,980 (1982).

[53] 49 U.S.C. §1374(b) (1976).

[54] *See* Kodish v. United Airlines, Inc., 463 F. Supp. 1245, (1979) *aff'd*, 628 F.2d 1301 (10th Cir. 1980); Kalison v. Trans World Airlines, 50 Ohio St. 2d 273, 362 N.E.2d 994 (1977).

discrimination section for "bumping" in a discriminatory fashion can recover "purely nominal compensatory damages . . . including an award for humiliation and hurt feelings when the facts warrant."[55] Punitive damages may also be recovered under the Act.[56]

While overbooking by itself does not violate the section, several courts have found a carrier's failure to follow its own boarding priority rules in an overbooking situation to be in violation of § 1374(b).[57] In *Miuccio v. Alitalia-Linee Aeree Italiane,*[58] the passenger brought an action alleging violation of 49 U.S.C. § 1374(b) when she was bumped from a flight from New York to Rome. The plaintiff-passenger asserted that other passengers had been permitted to board in order of their check-in at the ticket counter even though the carrier's priority rules gave her priority over those who made reservations and purchased tickets after she did. The District Court for the Southern District of New York held that she had stated a cause of action under 49 U.S.C.§ 1374(b) and that it was the carrier's burden to explain why each passenger was boarded before her.[59]

Basing one's cause of action upon violation of § 1374(b) is not necessarily a guaranteed route to recovery. The primary problem plaintiffs have had in relying upon the statute is that § 1374(b) does not expressly authorize a private right of action to enforce its provisions. In determining whether a private remedy exists, courts consider the following facts:

1. Whether plaintiff is one of the class for whose special benefit the statute was enacted;
2. Any indication of the intent by the legislature, explicit or implicit, to create such a remedy or to deny one;
3. Whether it is consistent with the underlying purposes of the

---

[55] Mahaney v. Air France, 474 F. Supp. 532, 535 (S.D.N.Y. 1979) (quoting Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14, 16 (9th Cir. 1972).

[56] Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 46 (E.D. Tenn. 1978).

[57] Miuccio v. Alitalia-Linee Aeree Italiane, 16 Av. Cas. (CCH) 17,989 (S.D.N.Y. 1981).

[58] *Id.*

[59] *See* Archibald v. Pan American World Airways, Inc., 460 F.2d 14, 17 (9th Cir. 1972).

> legislature to imply a remedy; and
> 4. Whether the cause of action is traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law.[60]

Plaintiffs have been denied a private right of action most frequently for failure to satisfy points one and four of the four-point test presented above. Courts have usually required that the plaintiff must have been the actual passenger who sustained the injury in order to be considered a member of the class for which the statute was intended. In *Roman v. Delta Air Lines, Inc.*,[61] a district Court in Illinois held that parents of a passenger who was unable to attend a family reunion because he had been bumped from an overbooked flight were in a position too remote to recover under § 1374(b). Similarly, in *Mason v. Belieu*,[62] the Circuit Court for the District of Columbia dismissed a wife's suit for emotional distress, allegedly caused by the airline's unjustified denial of transportation to her husband, because she was not within the protected class of the anti-discrimination provisions of the statute. If there are adequate state remedies, some federal courts have been reluctant to grant a federal private remedy under § 1374(b). Where the conduct allegedly committed by the airlines may constitute one or more violations of state law, "only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy exists." [63]

An additional theory of recovery, based on common law misrepresentation, is illustrated by the well-known case of denied boarding involving consumer-activist Ralph Nader. In *Nader v. Allegheny Airlines, Inc.*,[64] the Supreme Court held

---

[60] *See*, Wolf v. Trans World Airlines, Inc., 544 F.2d 124 (3d Cir. 1976); Kutner v. Eastern Airlines, Inc., 514 F. Supp. 553, 555 (E.D. Pa. 1981).

[61] 441 F. Supp. 1160 (E.D. Ill. 1977).

[62] 543 F.2d 215 (D.C. Cir. 1976).

[63] Kutner v. Eastern Airlines, Inc., 514 F. Supp. 553, 557 (E.D. Pa. 1981); Wolf v. Trans World Airlines, Inc., 544 F.2d 134, 138 (3d Cir. 1976) (quoting Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 337 (3d Cir. 1975)).

[64] 426 U.S. 290 (1976).

that Mr. Nader, who was denied boarding despite having a confirmed seat, could litigate a claim for common law misrepresentation. Mr. Nader's claim was based on a total absence of disclosure concerning the likelihood that his confirmed ticket might not be honored. At trial he received a small compensatory award and a $25,000 award for punitive damages.[65] The award for punitive damages was reversed on appeal, however, because the appellate court found that Allegheny's policy of non-disclosure of its booking practices was not "willful and wanton".[66]

Another case involving misrepresentation was *Angel v. Pan American World Airways*.[67] In that case the passenger alleged that Pan Am unlawfully refused to board him, a handicapped individual, because he was traveling without an attendant.[68] Plaintiff alleged that the agent who sold him the ticket assured him that he would be permitted to fly alone without an attendant.[69] When the plaintiff arrived at the airport, however, he was denied boarding pursuant to Pan American's tariffs which prohibited transportation of such a passenger without an attendant.[70] The District Court for the District of Columbia held that the plaintiff could not proceed on a misrepresentation theory because there could be no misrepresentation regarding a provision of a filed tariff since the passenger and the airline are both bound by the terms of the tariff and have constructive notice of it.[71] The court distinguished the *Angel* case from *Nader* on the grounds that *Nader* did not involve a tariff provision.[72]

After Mr. Nader's incident, the CAB in 1978 promulgated a regulation[73] requiring that the airlines bring to the attention of their passengers the practice of overbooking.[74] This re-

---

[65] *Id.* at 295.
[66] Nader v. Allegheny Airlines, Inc., 626 F.2d 1031 (D.C. Cir. 1980).
[67] 519 F. Supp. 1173 (D.D.C. 1981).
[68] *Id.* at 1175.
[69] *Id.* at 1176.
[70] *Id.*
[71] *Id.* at 1182.
[72] *Id.*
[73] 14 C.F.R. § 250.11 (1982).
[74] *Id.*

quired notice makes it difficult for today's passenger to prevail on a misrepresentation theory against a carrier. Moreover, as the circuit court noted in the *Nader* decision,[75] the practice of overbooking in the air transportation industry has become public information, openly discussed by the carriers, the Board, and publications of national circulation.[76] In light of these developments, the *Nader* theory of misrepresentation for recovery in overbooking cases is probably stillborn.

While the 1978 CAB regulation requiring notice of overbooking may have extinguished the misrepresentation theory for some passengers, the expiration of the CAB tariffs on January 1, 1983, may have cleared the way for handicapped persons, such as the plaintiff in the *Angel* case, to bring suit on a misrepresentation theory when denied boarding.

In another case involving a handicapped plaintiff,[77] a deaf woman won a $25,000 jury verdict from Texas International Airlines for breach of contract when she was not allowed to board her flight with her hearing guide dog.[78] The carrier's tariffs provided for transportation of hearing guide dogs in the passenger cabin, but the ticket agent in Baltimore was unfamiliar with the provision and as a result the plaintiff missed her flight.[79] Although the jury awarded her compensatory damages, it denied her claim for punitive damages. At this writing, the trial judge has not yet decided any of the post-trial motions. After expiration of the tariffs, handicapped persons in this type of case may be forced to rely on a § 1374(b) action, with less chance of success.

## IV. Personal Injury Claims

From a review of the recent case law regarding passenger suits against airlines for personal injuries, not including

---

[75] 512 F.2d 527 (D.C.Cir. 1975), *rev'd*, 426 U.S. 290 (1976).

[76] *Id.* at 533-35.

[77] Behrens v. Texas International Airlines, Inc., No. 81-273-JH (D.C. Md. Feb. 19, 1982).

[78] *Id.*

[79] *Id.*

wrongful death or other injuries sustained in a crash, it appears that the bulk of the suits in which liability is disputed involve incidents occuring during the period immediately before and after the flight. The absence of reported cases involving inflight incidents suggests that the carriers rarely dispute liability in such cases. CAB regulation 14 C.F.R. § 221.38(h) makes explicit that carriers may not rely upon any CAB regulation as a basis for the filing of a tariff limiting recovery for personal injury or death.[80] Similarly, the CAB has never accepted a tariff setting a limit on recovery for personal injury or death.

The extent to which the airline was exercising control over the area where the injury occurred and the nature of the passenger's activity when injured are the relevant considerations in determining airline liability for personal injury to the passenger.[81] The issue of control arises frequently where a passenger is injured before or after his flight, away from the actual physical presence of the aircraft, such as on an escalator in the airport, in the baggage area, or in the parking lot at the airport. In these cases, unless the passenger brings forth evidence that the airline exercised control over the area in which the accident occurred, the airline will not be held liable for the passenger's injuries.[82] The absence of applicable federal law and the CAB's express withdrawal from regulatory effort in this area leave such cases to be brought under the provisions of the applicable state's tort law as a typical personal injury case.

## V. Punitive Damages

Frequently, passengers filing suit for the reasons discussed above will claim punitive as well as compensatory damages. Indeed, it may be necessary to prevail on the punitive claim in order to recover the cost of bringing these types of suits. In most cases in which punitive damages are sought, the plaintiff

---

[80] 14 C.F.R. § 221.38(h) (1982).

[81] Hernandez v. Air France, 545 F.2d 279, 282 (1st Cir. 1976), *cert. denied* , 430 U.S. 950 (1977).

[82] Powell v. Delta Airlines, Inc., 16 Av. Cas. (CCH) 17,741 (N.Y. Civ. Ct. 1981).

must prove willful, wanton and deliberate conduct on the part of the defendant. In cases involving an alleged violation of the anti-discrimination provision of the Act, 49 U.S.C. § 1374(b), meeting this proof requirement has proved difficult even in cases where the court allows the plaintiff to proceed under the statute and to recover compensatory damages.[83]

The first bumping case in which a plaintiff received punitive damages was *Wills v. Trans World Airlines, Inc.*[84] The plaintiff was awarded $5,000 in exemplary damages when he was bumped from a flight by the carrier who gave his tourist seat to a first class passenger contrary to the airline's priority seating procedures.[85] The punitive damage award was based on the court's finding that the airline deliberately practiced overbooking,[86] a fact that is now much more widely known and for reasons stated above[87] would probably not be the basis for recovery today. In a more recent denied-boarding case, *Kluczynski v. Delta Airlines*[88], the Cook County, Illinois Circuit Court reduced a combined $200,000 punitive damage awared to $5,000 for the two plaintiffs. The court ruled that the jury had correctly found that Delta had been willful and wanton for its failure to follow its priority boarding rules in allowing airline employees to remain on the aircraft while the plaintiffs were bumped.[89] The court, however, reduced the $8,000 compensatory damage award to $2,000, finding the jury's award excessive.[90]

Plaintiffs will also have problems in recovering punitive damages in cases in which they are seeking such damages from the airline for the specific acts of its employees. Because the punitive and admonitory justifications for the imposition

---

[83] *See, e.g.*, Cordero v. CIA Mexicana De Aviaciod, 512 F. Supp. 205 (C.D. Cal. 1981), *modified*, 681 F.2d 669 (9th Cir. 1982) (court of appeals reversed the district court's dismissal of $1,000 damages but upheld dismissal of $35,000 punitive damages).

[84] 200 F. Supp. 360 (S.D. Cal. 1961).

[85] *Id.* at 362, 368.

[86] *Id.* at 367.

[87] *See supra* text accompanying note 83.

[88] Civil No. 76 L 11915 (Cook County Civ. Ct. Feb. 12, 1982).

[89] *Id.* at 21.

[90] *Id.* at 26.

of punitive damages are sharply diminished in those cases in which liability is imposed vicariously, many courts have required that in order to obtain such recovery certain requirements must be met:

> a) the principal or managerial agent authorized the doing and the manner of the act; or
> b) the agent was unfit and the principal or managerial unit was reckless in employing or retaining him; or
> c) the agent was employed in a managerial capacity and was acting in the scope of his employment; or
> d) the principal or managerial agent of the principal ratified or approved the act.[91]

Courts have differed in their application of the general principles cited. For example, in *Shackelford v. Puerto Rico International Airlines*,[92] punitive damages were found not to be proper in a case involving an airline passenger who allegedly sustained personal injuries during a rough landing.[93] The passenger claimed negligence on the part of the pilot.[94] It was determined that punitive damages could not be sought from the air carrier because the airline did not authorize or approve the manner in which the plane landed, was not reckless in employing or retaining the pilot, and did not employ the pilot in a managerial capacity.[95] Although the pilot exercised total control over the aircraft under his command, he had no decision-making authority within the corporate structure of the airline; he was like any other employee performing routine tasks.[96] His actions could not be said to express corporate policy; therefore, his wrongful acts would not amount to deliberate corporate participation therein.[97]

On the other hand, a Tennessee district court awarded punitive damages in a case in which the conduct of an airline's

---

[91] RESTATEMENT (SECOND) OF TORTS § 909 (1977); *See also* Shackelford v. Puerto Rico Int'l Airlines, 16 AV. CAS. (CCH) 17,259 (D.C.V.I. 1979).
[92] 16 Av. Cas. (CCH) 17,259 (D.C.V.I. 1979).
[93] *Id.* at 17,261.
[94] *Id.* at 17,259.
[95] *Id.* at 17,260-61.
[96] *Id.* at 17,261.
[97] *Id.*

flight attendant and captain in having a passenger removed from the aircraft was at issue.[98] The aircraft was delayed one hour until the police obtained and served an arrest warrant upon the plaintiff for disorderly conduct.[99] The court held that there appeared to be evidence from which the jury might have found that in the instant situation the defendant's agents were acting in managerial capacities.[100] The court did not expound on which evidence led to this assumption.

## VI. CONCLUSION

With the exception of bodily injury claims, CAB regulations have played a significant role in shaping the remedies available to the airline passenger. The expiration of the tariffs on January 1, 1983, as mandated by the Airline Deregulation Act, promises to change the law in ways often not favorable to the passenger. The power of the CAB to revoke an objectionable tariff will no longer be an effective way to preclude airlines from initiating practices unfavorable to passengers. It will be interesting to see what the airlines do to change their compensation policies covering flights that are delayed or diverted for unavoidable reasons. Although the Airline Deregulation Act provides for the dissolution of the CAB on January 1, 1985, the fate of the CAB regulations, including the "consumer protection" provisions, is not addressed. Congress will presumably act sometime before then to specify which agencies, if any, will become responsible for the CAB regulations. The frequent traveler may hope that the members of Congress, as frequent travelers themselves, will not permit those regulations beneficial to passengers to expire.

---

[98] Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 46 (E.D. Tenn. 1978).
[99] *Id.* at 55.
[100] *Id.* at 53.