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TAKING EXIT ROW SEATING SERIOUSLY

WENDY GERWICK*

I. INTRODUCTION

S AVVY AIR travelers frequently request emergency exit row seating in an effort to enjoy a more comfortable flight. Travelocity.com, for example, describes an emergency exit row as "a safe haven for those who prefer a kid-free flight experience, as children are not allowed to occupy these seats." It further recommends emergency exit rows because they "provide more leg room and often have fewer seats than a regular row." Most exit row passengers, however, after requesting to be seated in an exit row, "do not read the safety information provided to assist them in understanding the tasks they may need to perform in the event of an emergency evacuation."3

Current emergency exit row seating regulations are not sufficient to educate exit row passengers on safety information. To combat this problem as well as compensate historically undercompensated injured air travelers, exit row passengers should be held liable for injuries resulting from their inadequate attention to safety instructions. Although various complicated issues are involved, a negligence cause of action appears to be a viable way of imposing this liability. Hopefully, aviation

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2 Id.; see also FreeTravelTips.com, which recommends: "If you fear being seated next to children, you might want to check out the emergency exit row. Emergency exit row seats also have more legroom and often have an overhead compartment, but the seats may not recline." FreeTravelTips.com, Airline Tips: Picking Your Seat, at http://www.freetraveltips.com under Travel Tips (last visited June 1, 2003).

attorneys will use this article as a guide to litigating of this new cause of action.

II. CURRENT REGULATIONS RELATING TO EMERGENCY EXIT SEATING ON COMMERCIAL AIRLINES

The airline is responsible for determining "the suitability of each person it permits to occupy an exit seat." An exit row passenger must be capable of performing the following applicable functions:

1) Locate the emergency exit;
2) Recognize the emergency exit opening mechanism;
3) Comprehend the instructions for operating the emergency exit;
4) Operate the emergency exit;
5) Assess whether opening the emergency exit will increase the hazards to which passengers may be exposed;
6) Follow oral directions and hand signals given by a crewmember;
7) Stow or secure the emergency exit door so that it will not impede use of the exit;
8) Assess the condition of an escape slide, activate the slide, and stabilize the slide after deployment to assist others in getting off the slide,
9) Pass expeditiously through the emergency exit; and
10) Assess, select, and follow a safe path away from the emergency exit.

Among the reasons why a passenger might be unable to perform the necessary functions are: (1) a lack of physical mobility or strength, (2) an age of less than 15 years, (3) an inability to read and understand instructions, and (4) a lack of sufficient visual or aural capacity.

The airline is further required to include passenger information cards at each seat informing the passenger of the applicable functions and the selection criteria. These cards must include a request that a passenger identify himself for reseating if he does not meet the selection criteria, cannot perform or does not want to perform the applicable functions, or may suffer bodily injury as a result of performing one of those functions. An ap-

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5 14 C.F.R. § 121.585(d) (2002).
6 14 C.F.R. § 121.585(b) (2002).
8 Id.
propriate crewmember must refer to the cards during the oral briefing of the passengers, and mention that the cards include the emergency exit row passenger selection criteria and the functions to be performed by the exit row passenger. The crewmember must also orally request that emergency exit row passengers identify themselves for reseating if they do not meet the criteria or if they cannot or do not wish to perform the functions listed on the card.

Prior to takeoff, an appropriate crewmember must also orally inform all passengers of the location of emergency exits; however, an oral explanation of the emergency functions is not required. Rather, the crewmember must merely refer exit row passengers to printed cards containing “[d]iagrams of, and methods of operating, the emergency exits.” The emergency exit operating handles must also be marked with instructions for opening, the specifications of which depend on the type of exit.

Despite the extensive regulation of the qualifications necessary to sit in an exit row, the exit row passenger is not required to actually read and understand the printed card containing instructions on how to operate the emergency exits. Rather, the passenger is merely required to possess the ability “to read and understand instructions.” Since an oral briefing of the instructions is similarly not required, an exit row passenger could feasibly wait until an emergency situation arises before attempting to understand the operation of the emergency exits.

9 14 C.F.R. § 121.585(h) (2002).
13 14 C.F.R. § 121.571(b) (2002).
14 14 C.F.R. § 121.310(e) (2002).
15 “Although regulations require passengers to be screened for exit row seating, according to the information obtained from this study, the screening does not guarantee that the passenger has read the safety briefing card or understands how to open or stow Type III overwing exit hatches after reading the card.” NTSB, Safety Recommendation, A-00-72 through -91, at 5 (July 14, 2000), available at http://www.ntsb.gov/Recs/letters/2000/A00_72_91.pdf.
III. POLICY REASONS FOR HOLDING UNINFORMED EMERGENCY EXIT ROW PASSENGERS LIABLE FOR RESULTANT INJURIES

The rationale behind tort law accomplishes two basic social goals: deterring injurers from perpetrating social harms and compensating victims for individual harms.\(^7\) Thus, tort liability addresses the problems of exit row passenger inattention to safety information and of undercompensation of injured international air travelers. Specifically, holding exit row passengers liable for damages resulting from their inattention to safety materials would deter exit row passengers from ignoring safety information and compensate those victims harmed as a result of exit row passengers’ inattention.

A. Potential Liability Would Deter Emergency Exit Row Passengers From Ignoring Emergency Instructions

Emergency exit row passengers are not currently motivated to read and understand emergency instructions. In 1999, the Federal Aviation Administration, recognizing that “motivating people, even when their own personal safety is involved, is not easy,” issued an Advisory Circular suggesting ways to make passenger briefing cards more interesting and attractive.\(^8\) For example, the FAA suggested that “the card should have an eye-catching title or symbol identifying itself as safety or emergency instructions . . . a multicolored card which has pictures and drawings will be picked up and read more often than a black and white printed card.”\(^9\) Despite efforts by the FAA to motivate exit row passengers, a 2000 NTSB safety study found that the majority of passengers seated in exit rows do not read the safety instructions containing information on how to operate emergency exits and that many passengers continue to ignore preflight safety briefings.\(^20\)

Exit row passengers’ inattention to safety briefings is dangerous. In compiling its 2000 Safety Study, the NTSB studied in

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\(^8\) Briefing Cards, supra note 13, at app. 1.

\(^9\) Id.

\(^20\) NTSB, Safety Recommendation, supra note 16, at 23.
detail four cases involving evacuations using overwing exits. The NTSB expects that these exits will be opened primarily by passengers. In three of those four cases, passengers had difficulty opening the exits, "unnecessarily causing passengers to wait to use the exits." Although no additional injuries resulted from the unnecessary delays in these three cases, the NTSB recognizes that "there exists the potential that future difficulties could result in injuries."24

As an example of potential injury resulting from passenger difficulty in opening emergency exits, the NTSB cites the 1985 evacuation of an aircraft in Manchester, England. The aircraft, carrying 131 passengers and six crew members on a charter flight, began accelerating down the runway at Manchester International Airport. About thirty-six seconds later, prior to lifting off, the left engine "suffered an uncontained failure, which punctured a wing fuel tank access panel. Fuel leaking from the wing ignited and burnt as a large plume of fire trailing directly behind the engine." After the commander stopped the aircraft, smoke entered the cabin and then a fire developed inside the cabin. The United Kingdom Air Accidents Investigation Branch's report on this accident questioned passenger delay in exiting the burning aircraft:

Perhaps the most striking feature of this accident was the fact that although the aircraft never became airborne and was brought to a halt in a position which allowed an extremely rapid fire-service attack on the external fire, it resulted in 55 deaths. The major question is why the passengers did not get off the aircraft sufficiently quickly.29

21 Id. at 5.
22 Id. at 4.
23 Id. at 5.
24 Id.
25 Id.
27 Report on the accident to Boeing 737-236, supra note 27, at synopsis.
28 Id.
29 Id. at 2.7 (emphasis added).
One of the reasons that passengers did not evacuate sufficiently quickly was passenger difficulty in opening an overwing hatch in the center cabin. It took three passengers over 45 seconds to open the right overwing escape hatch (compared to six seconds for the upper cabin exit). The window exit passenger first pulled on the handle of the seat adjacent to the exit. Another passenger then "reached over the window exit passenger and pulled on the release handle. The exit hatch fell inward, trapping the passenger next to the exit." The passenger was finally freed when a third passenger lifted the hatch and placed it on a seat. Only twenty-seven survivors escaped through this right overwing exit, out of "the 76 passengers from the rear of the aircraft for whom this was the first available exit, and the 100 for whom it was the nearest."

The NTSB Safety Study further found that exit row passengers, in addition to having difficulty opening the exits, had trouble assessing the conditions outside the exit and deciding whether to open the exit. For example, in one case, a passenger unwisely opened an emergency exit, allowing smoke to enter the cabin. After recognizing the numerous difficulties encountered by exit row passengers during evacuation, the NTSB concluded: "[O]ne reason for these difficulties was passenger inattention to the safety materials provided."

In response to the NTSB Safety Recommendation, the FAA issued its own recommendations about how air carriers should handle exit row seating. To specifically combat the problem of passenger inattention to safety materials, the FAA recommended that flight attendants individually brief exit row passengers on their exit seat responsibilities. In response to this recommendation, however, airlines argued "that increasing flight attendants' responsibilities for briefing passengers in exit seats during the boarding phase of flight would be less effective

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30 Id. at 2.7.1.
31 NTSB, Safety Recommendation, supra note 16, at 5.
32 Id.
33 Id.
34 Report on the accident to Boeing 737-236, supra note 27, at 2.7.1.
35 Id.
36 NTSB, Safety Recommendation, supra note 16, at 6-7.
37 Id. at 7.
39 Id.
than all passengers hearing the announcements about exit seats, that additional briefings would repeat information provided in predeparture announcements and exit-seat briefing cards, and that the potential for delay of flights would increase." Even if the airlines instigated individual briefings of exit row passengers, it remains to be seen whether exit row passengers would be motivated to pay attention to the instructions.

In contrast, the threat of potential liability for inattention to safety materials would motivate exit row passengers to read and understand exit row safety procedures, thus ameliorating the current dangerous situation.

B. EXIT PASSENGER LIABILITY WOULD COMPENSATE INJURED INTERNATIONAL AIR TRAVELERS WHO ARE HISTORICALLY UNDERCOMPENSATED FOR THEIR INJURIES

Injured international air travelers are historically undercompensated for their injuries as a result of limitations on air carrier liability. The Warsaw Convention, an international treaty to which the United States is a signatory, applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire." Article 17 of the Warsaw Convention subjects the air carrier to strict liability "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The Warsaw Convention limits this liability, however, to 125,000 French francs (which is the equivalent of about $8300) per passenger, unless the carrier and passenger agree to a higher limit by special contract.

42 Warsaw Convention, supra note 41, at art. 1(1).
43 Id. at art. 17.
45 Warsaw Convention, supra note 42, at art. 22(1).
In 1966, the United States gave notice of denunciation of the Warsaw Convention, "emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers." To placate the United States and prevent the United States' denunciation of the Warsaw Convention, the world's airlines entered into the Montreal Agreement. Under this agreement, the airlines promised to enter into special contracts with all passengers to raise the liability limitation to $75,000 for all international flights originating, terminating or having a connecting point in the United States. This $75,000 limit could only be surpassed if the airline engaged in "willful misconduct." Although this higher liability limit improved upon the Warsaw Convention's limit, injured international passengers were still routinely undercompensated for their injuries.

In 1996, the air carriers executed the IATA Intercarrier Agreement on Passenger Liability, again raising the limit of strict liability for compensatory damages to 100,000 "Special Drawing Rights." Furthermore, an injured passenger can surpass this compensatory damages limit unless the "carrier can show it took all necessary measures to avoid the damage or that it was impossible for them to take such measures." As a result of air carriers' agreements to contract with passengers for higher liability limits, injured international passengers are more likely to be fully compensated for their injuries. These plaintiffs are still constrained, however, in their ability to recover. For example,

47 "The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation." Id.
48 Id.
50 Warsaw Convention, supra note 42, at art. 25.
54 Piamba Cortes v. Am. Airlines, 177 F.3d 1272, 1282 n.5 (11th Cir. 1999).
since the Warsaw Convention limits recovery to damages for "bodily injury,"\textsuperscript{55} damages for mental injuries are not compensable absent "death, physical injury, or physical manifestation of injury."\textsuperscript{56} Additionally, punitive damages are not available under the Warsaw Convention.\textsuperscript{57}

If an international passenger were injured in part because an exit row passenger failed to perform his emergency duties, the ability to seek compensation from that exit row passenger would help offset the undercompensation resulting from the Warsaw Convention's liability limits. Additionally, without the Warsaw Convention's restriction on recovery to "bodily injury,"\textsuperscript{58} plaintiffs could potentially seek compensation for emotional distress to the extent allowed by state law. Finally, unlike under the Warsaw Convention, plaintiffs could potentially seek punitive damages against the exit row passenger, to the extent allowed by state law.\textsuperscript{59}

IV. NEGLIGENCE

If an exit row passenger ignores safety information and subsequently poorly performs his emergency functions (e.g., by taking too long to open the emergency exit), the exit row passenger could plausibly be liable for other passengers' injuries or deaths. An injured passenger could attempt to impose liability with a common law negligence action, and a deceased passenger's beneficiary could attempt to impose liability under a wrongful death statute. Since wrongful death is not recoverable at common law, every state has enacted a wrongful death statute, which extends common law negligence principles to wrongful death actions.\textsuperscript{60} To succeed on a negligence cause of action, the plaintiff must establish four elements: duty, breach, proximate cause, and damages.\textsuperscript{61} Each of these elements must be analyzed to determine if an injured passenger could use this cause of action to hold an exit row passenger liable.

\textsuperscript{55} Warsaw Convention, \textit{supra} note 42, at art. 17.
\textsuperscript{57} See \textit{In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988}, 928 F.2d 1267, 1288 (2d Cir. 1991) [hereinafter \textit{Lockerbie I}].
\textsuperscript{58} Warsaw Convention, \textit{supra} note 42, at art. 17.
\textsuperscript{59} \textit{Lockerbie I}, \textit{supra} note 58, at 1288.
\textsuperscript{60} W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 127 (5th ed. 1984).
\textsuperscript{61} WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (3d ed. 1964).
A. Duty

The Restatement (Second) of Torts § 314 broadly states: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."\(^{62}\) The American Law Institute uses the follow example to illustrate this concept of duty:

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.\(^{63}\)

If this no-duty rule were left to stand alone, it would follow that an exit row passenger does not have a duty to his fellow passengers to inform himself of his emergency functions nor to attempt to perform his emergency functions. This broad statement of non-duty is limited, however, by § 323:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon such undertaking.\(^{64}\)

Based on this provision, it appears that, if B had undertaken to lead the blind man safely across the street, B would have had a duty to exercise reasonable care in performing his undertaking. Consequently, for the exit row passenger to have a duty to perform his exit row functions with reasonable care, he must have undertaken to "render services to another which he should recognize as necessary for the protection of the other's person or things."\(^{65}\)

In making this determination, two interrelated issues must be resolved. First, which exit row functions qualify as "services to another which he should recognize as necessary for the protec-

\(^{62}\) Restatement (Second) of Torts § 314 (1965).

\(^{63}\) Id. illus. 1.

\(^{64}\) Restatement (Second) of Torts § 323 (1965).

\(^{65}\) Id.
tion of the other's person?"\textsuperscript{66} Second, at what point does the exit row passenger undertake to render these services?

Actual emergency functions, such as assessing whether it is prudent to open the emergency exit\textsuperscript{67} and operating the emergency door,\textsuperscript{68} would most likely be classified as "services to another which he should recognize as necessary for the protection of the other's person."\textsuperscript{69} Operating an emergency door is comparable to other services that have been classified as this type of service. For example, undertaking a Coast Guard rescue operation,\textsuperscript{70} putting salt onto an icy parking lot,\textsuperscript{71} and offering to help a customer lash his merchandise to his truck\textsuperscript{72} are all services that, once undertaken, impose a duty of care on the performer. It is less clear, however, whether simply agreeing to be an exit row passenger would qualify as performing a service "to another which he should recognize as necessary for the protection of the other's person."\textsuperscript{73}

If actual emergency functions are the only exit row activities that qualify as "services to another which he should recognize as necessary for the protection of the other's person,"\textsuperscript{74} then there are two lines of authority that fix different points in time as the moment that the exit row passenger undertakes to render these services.\textsuperscript{75} This is relevant because it is only upon undertaking to perform these services that the exit passenger assumes a duty of care.\textsuperscript{76}

Under the traditional distinction between tort and contract law, a defendant's promise to render services does not qualify as an undertaking to render those services.\textsuperscript{77} Rather, it is only upon actually entering into performance of these services that he undertakes to render them.\textsuperscript{78} Under this concept, the exit

\textsuperscript{66} Id.
\textsuperscript{67} 14 C.F.R. § 121.585(d)(5) (2002).
\textsuperscript{68} 14 C.F.R. § 121.585(d)(4) (2002).
\textsuperscript{69} RESTATEMENT (SECOND) OF TORTS § 323 (1965).
\textsuperscript{73} RESTATEMENT (SECOND) OF TORTS § 323.
\textsuperscript{74} Id.
\textsuperscript{75} Id. cmt. on caveat (d).
\textsuperscript{76} Id.
\textsuperscript{77} Id. cmt. on caveat (d); see also Keeton, supra note 61, at § 56.
\textsuperscript{78} RESTATEMENT (SECOND) OF TORTS § 323 cmt. on caveat (d); see also Keeton, supra note 61, at § 56.
row passenger would not undertake to render emergency functions until actually beginning to perform them. As a result, the duty to exercise reasonable care in performing these services would only arise when the passenger begins to perform them. Consequently, the passenger's failure to exercise reasonable care in reading and understanding the safety information cards would have occurred prior to the passenger's duty to exercise reasonable care.

The modern law, however, blurs the distinction between promising to render services and undertaking to render services. Under this view, the exit row passenger's implied promise to perform emergency functions would qualify as an undertaking of those services, and the passenger's duty to exercise reasonable care would have arisen prior to his failure to exercise reasonable care in reading and understanding the safety information.

On the other hand, if simply being an exit row passenger who is "on call" in case of an emergency qualifies as a service "to another which he should recognize as necessary for the protection of the other's person or things," then the distinction between a promise to perform services and performance of those services is irrelevant. By sitting in an exit row, the exit row passenger would have begun performance of those services. As a result, the duty to exercise reasonable care would be imposed at this point in time, prior to the exit row passenger's failure to exercise reasonable care in reading and understanding the safety information.

Consequently, the plaintiff has two alternative arguments for imposing a duty on the exit row passenger to read and understand the safety cards. First, the plaintiff could attempt to classify the act of being an exit row passenger as one who is "on call" in case of an emergency as a service "to another which he should recognize as necessary for the protection of the other's person." In making this argument, the plaintiff could emphasize that overwing exits are expected to be opened by passengers and that the exit row passengers are orally requested to identify themselves for reseating if they do not want to perform the emergency exit functions or may suffer bodily injury as a

70 Restatement (Second) of Torts § 323 cmt. on caveat (d); see also Keeton, supra note 61, at § 56.
80 Restatement (Second) of Torts § 323 cmt. on caveat (d); see also Keeton, supra note 61, at § 56.
result of performing one of those functions. The plaintiff could plausibly argue that this oral request should alert an exit row passenger that, by agreeing to sit in an exit row, the passenger is performing a service necessary to the safety of his fellow passengers. In response, the defendant may argue that since emergency exit rows are not required to be occupied, the defendant's merely being an exit row passenger does not qualify as a service "necessary for the protection" of his fellow passengers. This argument is weak, however, because it is the act of being "on call" that is a necessary service, not the actual occupation of the exit row. If the exit row is unoccupied, the flight attendant undertakes the service of being "on call." As a result, the absence of a requirement that the exit row be occupied means that sitting in the exit row and being "on call" in the case of an emergency is a necessary service for the protection of others.

If, however, the act of merely being an exit row passenger does not qualify as a service "to another which he should recognize as necessary for the protection of the other's person," the plaintiff has an alternative argument for imposing a duty to read and understand the safety cards. Since the actual emergency functions are likely classified as services "to another which he should recognize as necessary for the protection of the other's person," the plaintiff could argue that these services were undertaken when the exit row passenger agreed to occupy an exit row, and which operated as an implied promise to perform these functions. Thus, since the passenger would already have assumed a duty to use reasonable care in performing the emergency functions, the passenger would have a derivative duty to educate himself on the proper performance of these functions.

If both of these alternative arguments fail, the plaintiff is constrained to a late-arising duty of care that would only arise once an actual emergency situation exists. As a result, at the time that the passenger ignored the safety information, he would not have been under a duty to inform himself.

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82 14 C.F.R. § 121.585(i) (2002).
83 While FAA regulations require a carrier to determine the suitability of an exit row passenger, FAA regulations do not require the exit row to be occupied.  
85 RESTATEMENT (SECOND) OF TORTS § 323.  
86 Id.
If the plaintiff successfully argues that the exit row passenger has a duty to exercise reasonable care upon agreeing to sit in an exit row seat, then the breach of that duty is relatively simple to establish. In assessing the standard of reasonable care to determine whether that standard has been breached, a risk-utility analysis is helpful. The risk-utility analysis was quantified by Judge Learned Hand in what has become known as the “BPL Formula”:

\[ \text{probability \ of \ event} \times \text{gravity \ of \ injury} \times \text{burden \ of \ adequate \ precautions} \]

Applying the “BPL Formula” to an exit passenger’s inattention to safety materials is relatively straightforward. The probability (P) of an exit passenger’s being required to perform his emergency exit functions is relatively low. The burden (B) of his reading the safety information is also low, requiring only a few minutes of attention. The gravity (L) of the injury resulting from an emergency exit passenger’s failure to perform his duties, however, is extremely high, and includes physical injury and death. Applying the “BPL Formula,” it is likely that B is less than PL. Thus, if the exit row passenger fails to inspect the safety card after having been notified that an exit row passenger must be able to perform certain functions and that the safety card explains these functions, the passenger has probably breached his duty of care.

However, if the plaintiff is only successful in arguing that the duty to exercise reasonable care arises upon the passenger’s performance of emergency functions such as opening the emergency exit, a breach of that duty will be much more difficult to establish. Since the passenger’s failure to read and understand the safety information occurred prior to the imposition of a duty to exercise reasonable care, it would not qualify as a breach of that duty. Rather, only those actions by the exit row passenger after the start of the emergency situation would be subject to a

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87 U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).
88 14 C.F.R. § 121.585(h) (2002).
89 Id.
duty of reasonable care. Without a prior duty to inform himself of his emergency functions, a passenger opening the emergency exit door too slowly or unwisely deciding to open the exit, is unlikely to be found negligent because the confusion and panic of the emergency situation would be factored into the determination of breach.

At common law, the inclusion of emergency circumstances in determining breach was accomplished by instructing the jury on the “sudden emergency doctrine.” The American Law Institute articulates this doctrine as follows: “In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action.” This doctrine is a special application of the standard articulation of duty as the conduct of a “reasonable man under like circumstances.”

Modern cases have increasingly criticized the instruction of juries on the “sudden emergency doctrine” because, rather than explaining to the jury that emergency circumstances are a factor in determining the reasonableness of the defendant’s actions, the instruction has a “tendency to elevate its principles above what is required to be proven in a negligence action.” These cases hold that, because the “existence of an emergency is simply one of the circumstances contemplated by the normal standard of care,” a “reasonable care” instruction is sufficient to take into consideration the excitement and confusion that normally accompany an emergency situation.

Regardless of whether the jury is instructed on the “sudden emergency doctrine” or merely on “reasonable care,” the jury would probably be reluctant to second-guess the defendant’s slow opening of the exit or unwise decision to open the exit. As a result, if the plaintiff is unsuccessful in arguing that the duty to exercise reasonable care arises prior to the passenger’s actual performance of emergency functions, a breach of that late-arising duty will be very difficult to establish.

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91 Restatement (Second) of Torts § 296(1).
92 Restatement (Second) of Torts § 296 cmt. b (1965) (referring to § 283).
93 See, e.g., Knapp v. Sanford, 392 So.2d 196, 198 (Miss. 1980).
94 Id. at 199.
C. Proximate Cause

Once duty and breach have been established, the plaintiff must show that the breach proximately caused his injury. Establishing the element of proximate cause is multi-faceted. Most states require (1) that the breach be an actual cause of the injury and (2) that the injury be a foreseeable consequence of the injury. Actual cause is typically determined with the “but for” test, which asks whether, more likely than not, the same result would have occurred if the actor had not breached his duty. The element of foreseeability encompasses a policy-based inquiry into whether the defendant should bear the burden of compensating the plaintiff. The Wisconsin Supreme Court has identified six public policy reasons for denying recovery:

1. The injury is too remote from the negligence; or
2. The injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or
3. In retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or
4. Because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or
5. Because allowance of recovery would be too likely to open the way for fraudulent claims; or
6. Allowance of recovery would enter a field that has no sensible or just stopping point.

Notably, there may be multiple proximate causes of an injury; thus, a plaintiff is not forced to choose among multiple tortfeasors. Applied to this case, the exit row passenger need not be liable to the exclusion of the airline and the manufacturer.

If the plaintiff establishes that the passenger had a duty to read and understand the emergency instructions and that the passenger breached this duty, then a “but for” chain of causation must be shown between the passenger’s failure to inform himself and the plaintiff’s injury. This chain requires the showing of two links: (1) that, but for the exit passenger’s inattention to the safety materials, he would have performed his emergency functions properly; and (2) that, but for the exit passenger’s improperly performing his emergency functions, the plaintiff would not have been injured.

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97 Peters v. Menard, 589 N.W.2d 395, 405 (Wis. 1999).
98 Restatement (Second) of Torts § 447 (1965).
Although the first link in this chain seems clear on its face, the exit row passenger can make a plausible argument that, even if he had read the safety materials, he would not have performed better because the materials are inadequate. In support, the defendant can cite a 2000 NTSB Safety Recommendation which states: "[D]espite guidance in the form of FAA advisory circulars, many air carrier safety briefing cards do not clearly communicate safety information to passengers. Therefore, the Safety Board believes the FAA should require minimum comprehension testing for safety briefing cards." This NTSB recommendation, based on two 1997 studies which found passenger comprehension of safety cards to be low,

casts doubt on whether the exit row passenger's inattention would be classified as a "but for" cause of his poor performance. Furthermore, the second link in the chain of causation would require an even more difficult showing since the necessity of an exit row passenger's performing any emergency functions would not arise outside the context of an emergency. It would be very difficult to show that, more probably than not, the exit row passenger's performing his functions competently would have prevented the plaintiff's injuries.

If the "but for" chain of causation fails, the plaintiff could, however, attempt to establish actual cause with a showing of "loss of chance." This controversial causation theory is conceptually founded on the American Law Institute's articulation of cause in the Restatement (Second) of Torts section 323. Under section 323, a plaintiff can meet the burden of showing actual cause by establishing one of two prongs: (1) that "his failure to exercise such care increase[d] the risk of such harm" or (2) that "the harm [was] suffered because of the other's reliance upon the undertaking." Essentially, a "loss of chance" theory allows the plaintiff to establish actual cause "by showing a 'sub-

100 In the first study, 113 subjects were asked the meaning of 36 pictorials taken randomly from 50 safety briefing cards: 12 of 36 pictures were understood by more than 67 percent of the subjects whereas 20 of the 36 pictures were understood by less than 50 percent of the subjects. In the second study, 120 subjects were shown a briefing card... and were asked the meaning of the 40 pictorials. Two-thirds (67 percent) of the subjects understood the meaning of only half (21) of the 40 pictures. Id.
102 RESTATEMENT (SECOND) OF TORTS § 323.
stantial possibility' that the harm would have been averted had the defendant acted in a non-negligent manner."  

Blinzler v. Marriott International, Inc., an example of the "loss of chance" theory applied in a rescue context, is instructive on the possible use of this theory by the plaintiff. In Blinzler, a hotel guest, upon her husband's sensing the onset of a heart attack, called the hotel operator, who agreed to call an ambulance. The operator did not call an ambulance until at least fourteen minutes later. In the meantime, the wife watched her husband die. A renowned cardiologist testified that his death would have been forestalled had the paramedics reached the scene ten minutes earlier. The Court of Appeals found that there was sufficient evidence for a reasonable jury to "conclude that the defendant's omission negated a substantial possibility that the rescue efforts would have succeeded."  

If the plaintiff successfully establishes actual cause with the "but for" test or the "loss of chance" theory, the plaintiff must then establish that his injury was a foreseeable result of the exit row passenger's breach. Undeniably, it is foreseeable that an exit row passenger's inattention to safety information could result in his poor performance of his safety functions, which could result in injuries to other passengers. Additionally, strong policy arguments support the imposition of liability on exit row passengers for their inattention to safety information. Imposition of liability would deter exit row passengers from ignoring emergency instructions and compensate injured air travelers.  

If the plaintiff is only able to establish a late-arising duty of care that arises once an actual emergency situation exists, then, because of the "sudden emergency doctrine," it is unlikely that the plaintiff could establish that the defendant breached his duty. If, however, the plaintiff were able to establish the element of breach, then the causation analysis would be very similar to the one discussed above, except less complex. Instead of a two-part chain of causation, however, only one link would have to be established. Specifically, the plaintiff would have to show that, but for the defendant's incompetent performance of his

\[\text{References:}\]

103 Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1152 (1st Cir. 1996).
104 Id.
105 Id. at 1150.
106 Id. at 1152.
107 Id.
108 See supra text accompanying notes 18-60.
109 See supra text accompanying notes 91-96.
emergency functions, the plaintiff would not have been injured. As above, if this showing is not possible, then the plaintiff could attempt to establish actual cause with a "loss of chance" theory. Additionally, it is foreseeable that the plaintiff's incompetent performance of his emergency functions would result in injury to a fellow passenger.

D. Damages

Recovery under the voluntary undertaking doctrine is typically limited to cases of physical harm. Since a passenger injured as a result of an exit passenger's inattention would likely suffer physical harm, this element would be met.

E. Potential Defenses

1. Warsaw Convention

If the accident occurred on an international flight, an exit row passenger could argue that (1) he was acting as an agent of the air carrier when he breached his duty to exercise reasonable care and (2) the protections of the Warsaw Convention extend to a carrier's non-employee, non-contractual agents. If the exit row passenger were to prevail on both of these arguments, a plaintiff could not recover from the passenger and the air carrier together "a sum greater than that recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols." As a result, in a case governed by the Warsaw Convention, one of the primary motivations of suing the exit row passenger as opposed to merely the carrier (i.e., to bypass the Warsaw Convention's liability limits) would disappear. The plaintiff, however, has strong counter-arguments to the exit row passenger's asserted defense.

Although the exit row passenger is neither an employee nor an independent contractor of the airline, he has a colorable argument that he was acting as an agent of the carrier when he performed his emergency exit functions. An agent-principal relationship "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."  

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111 Reed v. Wiser, 555 F.2d 1079, 1093 (2d Cir. 1977).
112 See supra text accompanying notes 42–60.
113 RESTATEMENT (SECOND) OF AGENCY § 1 (1957).
The element of mutual consent is clearly met. The carrier is responsible for determining "the suitability of each person it permits to occupy an exit seat." Similarly, exit row passengers are orally requested to identify themselves for reseating if they do not meet the selection criteria or cannot or do not wish to perform the functions listed on the passenger information cards. Additionally, the defendant could cite the carrier's power to re-seat an exit row passenger as evidence of the carrier's control over him.

Whether the exit row passenger has agreed to act on behalf of the carrier is more complicated. The defendant could probably successfully argue, however, that the exit row passenger, by agreeing to sit in the exit row, has agreed to act on behalf of the carrier. In support, the exit passenger could argue that, in the event that no passengers were willing to occupy the exit row seats, the air carrier's employees would assume the emergency exit duties. In making this argument, however, the defendant would find himself in the odd position of arguing that he did not assume a duty of care upon agreeing to sit in the exit row seat but that he did agree to act as an agent of the carrier upon agreeing to sit in the exit row seat.

Assuming that the defendant were, however, able to successfully straddle these seemingly inconsistent arguments, the second prong of his defense would also be tenuous. It is a question of first impression whether the Warsaw Convention extends to non-employee, non-contractual agents of the carrier. The case law in this area muddies the analysis by seemingly using the word "agent" interchangeably with the words "employee" and "independent contractor." An analysis of the reasoning behind the case law in this area, however, indicates that, while the Warsaw Convention does extend to employees and certain independent contractors of the carrier, it should not extend to non-employee, non-contractual agents.

117 RESTATEMENT (SECOND) OF AGENCY § 1.
The seminal case in this area is *Reed v. Wiser*,\(^{120}\) which extended the Warsaw limits to a corporate officer of the carrier based on two findings. First, "the plain language of the original Convention... tends to support appellants' contention that its liability limits were intended to apply to a carrier's employees."\(^{121}\) Second, "[m]ost carriers, at their employees' insistence, provide their employees with indemnity protection."\(^{122}\) Consequently, to allow "a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits."\(^{123}\) In its discussion, the *Reed* opinion often uses the word "agent" as opposed to "employee;"\(^{124}\) its holding, however, is limited to employees of an air carrier.\(^{125}\)

The subsequent cases of *Julius Young Jewelry Manufacturing Co. v. Delta Air Lines*\(^{126}\) and *Baker v. Lansdell Protective Agency, Inc.*\(^{127}\) extend the holding in *Reed* to contractual agents "performing functions the carrier could or would... otherwise perform itself."\(^{128}\) Other courts have followed *Julius* and *Baker*,\(^{129}\) and some have even extended *Julius* and *Baker* to apply to subcontractors.\(^{130}\) In these cases, courts frequently refer to contractual agents of an air carrier as "agents," without differentiating between contractual and non-contractual agents.\(^{131}\) The Warsaw Convention has never been extended, however, to apply to non-contractual agents of an air carrier.

Absent precedent extending the Warsaw Convention to non-contractual agents of the air carrier, the exit row passenger will have difficulty arguing that the reasoning behind *Reed* applies to

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120 *Reed*, 555 F.2d at 1079.
121 *Id.* at 1087.
122 *Id.* at 1090.
123 *Id.* at 1089.
124 *Id.* at 1082-92.
125 *Id.* at 1093.
128 *Julius*, 414 N.Y.S.2d at 530.
131 *See, e.g.*, *Dazo*, 268 F.3d at 677; *Lockerbie II*, 776 F. Supp. at 714.
this case. Unlike the assumption in Reed that "[m]ost carriers, at their employees' insistence, provide their employees with indemnity protection,"132 principals do not provide their non-contractual agents with indemnity protection. Consequently, allowing a suit for an unlimited amount of damages against an exit row passenger for personal injuries to another passenger would not undermine the purpose behind Article 22.133 It would not permit plaintiffs to recover from the carrier, through the exit row passenger, damages in excess of the Convention's limits.134 Since the reasoning for extending the Warsaw Convention's liability limits to employees and contractual agents does not apply to non-contractual agents, it is unlikely that the exit row passenger would succeed on this issue of first impression.

2. Assumption of the Risk

The exit row passenger may attempt to escape liability by arguing that the plaintiff, by consenting to be a passenger, assumed the risk that the exit row passenger would negligently perform his emergency functions. Under the traditional defense of "assumption of the risk," the defendant may have succeeded in escaping liability. Modern courts, however, have severely limited the defense of "assumption of the risk." As it exists today, this defense would likely fail to curtail the defendant's liability.

The traditional conception of "assumption of the risk" barred a plaintiff from recovering in four situations: (1) where the plaintiff expressly relieves the defendant of the obligation to exercise care for his protection; (2) where the plaintiff, by knowingly yet reasonably entering into a risky situation, impliedly relieves the defendant of the obligation to exercise care for his protection; (3) where the plaintiff, aware of a risk created by the defendant's negligence, voluntarily yet reasonably proceeds to encounter the risk; and (4) where the plaintiff voluntarily and unreasonably encounters a known risk.135

The exit row passenger would probably not succeed in arguing that the first or fourth situation applies. The first situation is inapplicable because the plaintiff, by consenting to be a passenger, did not expressly relieve the exit row passenger of the obli-

132 Reed v. Wiser, 555 F.2d 1079, 1090 (2d Cir. 1977).
133 Cf. id.
134 Cf. id.
135 Restatement (Second) of Torts § 496A cmt. c (1965).
gation to read the safety information. Similarly, the fourth situation is inapplicable because the decision to be a passenger in an airplane whose exit rows are occupied by fellow passengers is not unreasonable.

In contrast, the defendant could plausibly argue that the second and third situations, which are characterized as "implied assumptions of the risk," apply. An example of the second situation is a spectator who enters a ballpark. This spectator has impliedly assumed the risk of being hit by the ball, and the ball-players are relieved of the obligation to protect him from the ball. In comparison, perhaps the plaintiff, by agreeing to be a passenger on an airplane, impliedly assumed the risk that an exit row passenger would poorly perform the exit functions in an emergency. As a result, the exit row passenger would be relieved of the obligation to read the safety information.

An example of the third situation is an independent contractor who discovers that his employer has negligently provided him with a machine in dangerous condition. Because the risk of injury is slight compared with the utility of his using the machine despite its condition, the independent contractor who operates the machine does so reasonably and voluntarily. The independent contractor has, however, impliedly assumed the risk of being injured by the machine. In comparison, perhaps the plaintiff observed the exit passenger’s inattention to the safety information and nonetheless chose to remain on the airplane because of the slightness of the risk in comparison to the utility of the plaintiff’s staying on the plane. In so doing, the plaintiff would have impliedly assumed the risk of injury resulting from the exit row passenger’s inattention.

Under the modern conception of "assumption of the risk," however, only the first and fourth situations are still recognized as relieving the defendant from liability. The first situation,

136 Id.
137 Id.
138 Id.
139 "Sixteen states have totally abolished the doctrine of assumption of the risk. In addition, seventeen more states have abolished the use of the implied assumption of the risk defense, thus confining the doctrine to only those extremely rare cases where there was express contractual consent by the plaintiff." Greg Sobo, Look Before You Leap: Can the Emergence of the Open and Obvious Danger Defense Save Diving From Troubled Waters?, 49 SYRACUSE L. REV. 175, 195 (1998); see also RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (2000) ("This Section does not apply when a plaintiff’s conduct demonstrates merely that the plaintiff was aware of a risk and voluntarily confronted it. That type of
now known as a “contractual limitation on liability,” completely bars recovery by the plaintiff when the parties, prior to the injury, entered into a contract absolving the defendant from future liability. The fourth situation is now subsumed by “comparative negligence” and limits and sometimes extinguishes the defendant’s liability. 

The second and third situations, characterized as “implied assumptions of the risk,” no longer limit a plaintiff’s recovery. Consequently, regardless of whether the exit row passenger could successfully argue that the plaintiff impliedly assumed the risk that the exit row passenger would ignore the safety information, the defense of “assumption of the risk” would not bar the plaintiff’s recovery under modern law.

V. CONCLUSION

In conclusion, a negligence cause of action is a viable way to hold an exit row passenger liable for injuries resulting from his inattention to safety information. Although various complicated issues would be involved in this cause of action, an injured passenger would have strong arguments in support of each.

To impose a duty on the exit row passenger to read and understand the safety cards, a plaintiff could classify the act of being an exit row passenger as a service that the passenger should recognize as necessary for the protection of the other passengers. Alternatively, a plaintiff could impose a duty on the exit row passenger to read and understand the safety cards by arguing that, upon agreeing to sit in an exit row, the passenger undertook to perform actual emergency functions.

If the plaintiff establishes that the exit row passenger had a duty to read and understand the safety cards, breach of that duty would be relatively simple to establish with the “BPL Formula.” The exit row passenger’s inattention would most likely qualify as a breach of his duty of reasonable care.

To show that the exit row passenger’s breach proximately caused the plaintiff’s injuries, the plaintiff has several arguments. First, the plaintiff could attempt to establish a “but for” conduct, which is usually called ‘implied assumption of risk,’ does not otherwise constitute a defense unless it constitutes consent to an intentional tort.”).

140 Restatement (Third) of Torts: Apportionment of Liability § 2.

141 Restatement (Third) of Torts: Apportionment of Liability § 3 comment c (2002).

142 “Except as provided in § 2 [contractual limitations on liability], no jury instruction is given on assumption of risk.” Id.
chain of causation between the exit row passenger's inattention and the plaintiff's injury. If this showing fails, however, the plaintiff could attempt to establish actual cause with a showing of "loss of chance." Finally, the plaintiff could use the policy arguments of deterrence and compensation to argue that his resultant injuries were a foreseeable consequence of the exit row passenger's negligence.

Additionally, the plaintiff could combat an exit row passenger's assertion that he is protected by the Warsaw Convention's liability limits by arguing that the passenger is not an agent of the air carrier and that, even if the exit row passenger is an agent of the carrier, the Warsaw Convention does not extend to non-contractual agents of air carriers.

Finally, the defense of "assumption of the risk" as it exists today would fail to shield the exit row passenger from liability. By consenting to be a passenger on the airplane, the plaintiff neither contractually limits the exit row passenger's liability nor acts negligently.

Hopefully, this article will encourage aviation attorneys to litigate this new cause of action. If exit row passengers are held liable for their inattention to safety information, exit row passengers will take exit seating seriously, improving the safety of air travel.