DISCRIMINATORY REFUSAL OF CARRIAGE IN NORTH AMERICA

by

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ABSTRACT

This study is concerned with the situation in which a passenger holding a valid airline ticket and a confirmed reservation is nevertheless refused carriage.

The categories of travellers which are examined are "bumpees" i.e. victims of the airlines' overbooking practices; the handicapped, with special emphasis placed on the situation of pregnant women; the elderly and children; smokers and drunks; racial minorities; and those passengers whose characteristics fit the so-called hijacker profile.

Of these, the handicapped, including expectant mothers, emerged as the passengers most often subjected to detrimental discrimination; the treatment of unaccompanied children was also unnecessarily restrictive, whilst overbooking and security screening were recognised to be necessary evils for modern aviation.

The analysis concludes with a survey of the recourses available to passengers who have been denied boarding together with some suggestions aimed at overcoming the problems which underlie the airlines' reasons for refusing carriage.

R E S U M E

Cette étude analyse la situation du passager qui se voit refuser le transport bien qu'il détienne un billet d'avion valide et une réservation confirmée.

Les catégories de passagers faisant l'objet de ce travail constituent cette portion de la clientèle en proie à la pratique de la survente des compagnies aérienne, savoir, les handicapés, une attention particulière étant accordée au sort reservé aux femmes enceintes, les personnes âgées et les enfants, les fumeurs et les ivres, les membres de minorités raciales et les passagers dont les caractéristiques correspondent au prototype du pirate de l'air.

L'analyse démontre que les handicapés, y compris les femmes enceintes, sont les victimes les plus fréquentes d'une discrimination négative et qui le traitement des enfants voyageant seuls est inutilement restrictif. Par ailleurs, la survente et la fouille de sécurité sont reconnus comme étant un mal nécessaire dans le cadre de l'aviation moderne.

La conclusion comporte un inventaire des recours dont les passagers empêchés de monter à bord peuvent se prévaloir de même qu'un éventail de suggestions visant à résoudre les problèmes qui sont à l'origine du refus de transporter des compagnies aériennes.

To Bertram and Eileen Copping

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Those mentioned above all played a part in the production of this thesis, but in conformity with the University's regulations, I wish to state that I am solely responsible for the content of this study and, in all other respects, for its preparation.

ABBREVIATIONS

AA	American Airlines, Inc.
ACTH	Advisory Committee on Transportation of the Handicapped.
ADIZ	Air Defence Identification Zone.
AK	Altair Airlines, Inc.
AL	USAir, Inc. (formerly, Allegheny Airlines, Inc.).
ANSI	American National Standards Institute
AP	Aspen Airways, Inc.
AS	Alaska Airlines, Inc.
ATAC	Air Transport Association of Canada.
BN	Braniff Airways, Inc.
CAB	Civil Aeronautics Board.
CAMI	Civil Aeromedical Institute.
CCAG	Connecticut Citizens Action Group.
CE	Cardinal/Air Virginia.
CFR	Code of Federal Regulations.
CM	Coleman Air Transport Corporation.
CIA	Central Intelligence Agency.
CO	Continental Air Lines, Inc.
CTC	Canadian Transport Commission.
CTC(A)	Canadian Transport Commission (Air Transport Committee).
DBC	Denied Boarding Compensation.
DL	Delta Air Lines, Inc.
DOT	Department of Transport.
DP	Cochise Airlines.
DPFI	Domestic Passenger-Fare Investigation.
EA	Eastern Airlines.
EEZ	Exclusive Economic Zone.
ER	Economic Regulations.
FAA	Federal Aviation Authority.
FBI	Federal Bureau of Investigation.
FL	Frontier Airlines.
FR	Federal Register.
FREMEC	Frequent Traveller's Medical Card.
FX	Mountain West Airlines, Inc.
FY	Metroflight Airlines.
GG	Golden Gate Airlines.
GQ	Big Sky Airlines.
GW	Golden West Airlines, Inc.
HA	Hawaiian Airlines, Inc.
HEW	Health, Education and Welfare (Department of).
HHS	Health and Human Services (Department of).
HY	Metro Airlines.

IATA	International Air Transport Association.
ICAO	International Civil Aviation Organization.
II	Imperial Commuter Airlines, Inc.
JB	Pioneer Airways, Inc.
JC	RMA, Inc.
JT	Air Oregon, Inc.
KLM	Koninklijke Luchtvaart Maatschappij.
KN	Air Kentucky and Owensboro Aviation.
KS	Nevada Airlines, Inc.
LS	Marco Island Airways, Inc.
MEDIF	Medical Information Form for Air Travel.
ML	Midway Airlines.
MO	Medical Officer.
NA	National Airlines, Inc. (now merged with Pan American World Airways, Inc.).
NE	Air New England, Inc.
NW	Northwest Airlines, Inc.
NY	New York Airways, Inc.
OC	Air California.
OO	Sun Aire Lines
OZ	Ozark Air Lines, Inc.
PA	Pan American World Airways, Inc.
Pan Am	Pan American World Airways, Inc.
PI	Piedmont Aviation, Inc.
PS	Pacific Southwest Airlines.
PSA	Pacific Southwest Airlines.
QC	Sky West Airlines and Lake Powell Air Service.
QH	Air Florida, Inc.
RC	Republic Airlines, Inc.
RP	Precision Airlines.
RSC	Revised Statutes of Canada.
RV	Reeve Aleutian Airways, Inc.
RW	Hughes Airwest.
SC	Statutes of Canada.
SI	Statutory Instruments.
SOR	Standing Orders and Regulations.
TAP	Transportes Aereos Portugueses.
THY	Turk Hava Yollari.
TI	Texas International Airlines, Inc.
TS	Aloha Airlines, Inc.
TW	Trans World Airlines, Inc.
TWA	Trans World Airlines, Inc.

UA	United Air Lines, Inc.
UK	United Kingdom.
UMTA	Urban Mass Transportation Act of 1964.
UN	United Nations.
UNO	United Nations Organization.
US	United States.
USA	United States of America.
USC	United States Code.
UR	Empire Airlines.
WA	Western Air Lines, Inc.
WC	Wien Air Alaska, Inc.
WCHR	Wheelchair for Ramp.
WCHS	Wheelchair for Steps.
WI	Swift Aire Lines, Inc.
XV	Mississippi Valley Airlines.
YS	San Juan Airlines, Inc.
ZV	Air Midwest, Inc.
ZW	Air Wisconsin, Inc.

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I N D E X

It's so easy to say
That I'll travel by day
And by night just to see you again,
But if they won't let me on,
Or the flight is long gone,
It's much slower by boat and by train.

Now don't be downhearted
That the plane has departed
With only my luggage on board,
I'll swim or I'll hike,
Even pedal my bike,
For first-class I just can't afford.

They denied me my right
To embark on that flight
But my love travels free as a bird.
So in six months or more,
Meet me down by the shore,
Our rendezvous merely deferred.

INTRODUCTION

This study is directed at the situation in which a passenger holding a valid airline ticket and a confirmed reservation is refused carriage by a carrier.

The scope of this enquiry will be confined to scheduled carriers serving continental North America and the categories of passengers chosen for examination are "bumpees" i.e. victims of the airlines' overbooking practices; the handicapped, with special emphasis placed on the situation of pregnant women; passengers at the extreme ends of the age scale; smokers and drunks; racial minorities; and those persons whose characteristics fit the so-called hijacker profile.

The legislative and regulatory sources of authority relating to this area will be examined for both Canada and the United States and any material distinctions will be analysed. With respect to the problems of acceptance for travel of expectant mothers and newborn babies, a survey of the airlines will be carried out. The case law which appertains to denied boarding will be discussed with a view to discovering the reasons underlying each refusal of carriage incident and to evaluate whether such refusal was justified or was, in fact, discriminatory.

The study will conclude with an examination of the types of action which a passenger may have recourse to in the event of being refused carriage.

The subject matter covered by this study has never before, to the author's knowledge, been the subject of an academic thesis, and, this being so, the work in its entirety should be considered as a contribution to original knowledge.

CHAPTER 1

THE AIRLINE AS A COMMON CARRIER

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THE OBLIGATION TO CARRY A PASSENGER

In North America, in common with other Anglo-Saxon legal systems, a distinction is made between a private carrier and a common carrier. A common carrier is one that "holds itself out and undertakes to carry the goods of all persons indifferently, or of all who choose to employ it and one that invites the custom of the public indiscriminately."[1] The only conditions attached to the carriage are that the goods are of a type usually carried, that the carrier's reasonable charges will be paid, and that there is room for the goods.

It has been questioned whether a person whose regular employment is the carriage of goods by air is *a priori* capable of being regarded as a common carrier or not.[2] But the fact that a particular mode of transport was unheard of (and generally not dreamed of) when a legal rule was laid down, is no reason for excluding it from the operation of that rule, provided that it otherwise is within the scope of the principle embodied in the rule. This reasoning has been upheld in English,[3] Canadian[4] and American[5] cases.

As far as passengers are concerned, there was a considerable body of authority for the proposition that a person or company which professed to exercise the public occupation of carrying passengers, becomes, at common law, subject to the obligation to carry all who

apply, so long as there is room, and who are willing to pay the fare and comply with the carrier's terms, there being no lawful excuse for refusal.[6] This proposition also has found judicial support in the United Kingdom[7] and North America,[8] in addition to doctrinal concurrence. Professor Zollman, for example, considers that "a service through the air which runs on schedule, for which tickets can be bought by a proper person who has the price and the inclination and which gets the occupants from one place to another is as much to be classed as a common carrier as is the passenger service maintained by railroads, street-cars, boats and motorbuses".[9] Thus, charter flights do not engender common carrier obligations.[10]

Liability for the carriage of goods and passengers

The common carrier of goods incurs an unusually heavy degree of liability (exceeding that of the ordinary bailee for reward) which makes him responsible for any loss or damage occurring to the goods which cannot be proved to have resulted from an act of God, Her Majesty's enemies, an inherent vice or defect in the goods, or the negligence of their owner. Because of the heavy burden of responsibility, common carriers of goods have been referred to as "virtual insurers".[11]

When one turns to the liability of the carrier towards his passengers once he has accepted them, in England and in Canada the analogy of the common carrier of goods does not hold up, in that

the liability of a common carrier of passengers is more limited than that of a common carrier of goods. The obligation of the carrier of passengers is not as stringent since he only has to carry with due care.[12] One reason for the distinction is related to the fact that a carrier of goods is a bailee of the goods which he carries, whereas a carrier of passengers is not a bailee of his passengers.[13] In the United States of America this is not the case. An airline which is a common carrier must use the utmost care and diligence for the safe carriage of its passengers[14] but is not liable for unforeseen events, inevitable accident or acts of God such as highly inclement weather.[15]

Since this study is not concerned per se with the degree of care to be taken during carriage but rather with the liability incurred for refusing to carry, the difference between the Anglo-Canadian and the American interpretation is not a major obstacle. What can be concluded from the above discussion is that airlines are common carriers as far as the common law obligation to carry all who apply is concerned, and historical precedents derived from surface carriage are applicable unless proven otherwise.

REGULATORY AUTHORITY

Since airlines are common carriers and are, therefore, obliged to carry all who apply for transportation, any refusal must have

justification. However,

> "A carrier of passengers not only has the power, but it is its duty to adopt rules and regulations as will enable it to perform its duties to the travelling public with the highest degree of efficiency, and to secure to its passengers all possible convenience, comfort and safety."[16]

The rules had, of course, to be reasonable, and whether they would be judged to be so would depend upon the circumstances. If the rules were directed at the convenience, comfort, safety and health of the travelling public in general and the circumstances rendered rejection of a passenger expedient, a court would probably find the regulations appropriate. A carrier's duty to other passengers cannot be lost sight of in observing the rights of an individual traveller.[17] In addition, a carrier has always been entitled to exclude a passenger who intends to violate its reasonable regulations.[18] When one considers that airline passengers are far more restricted in their movements, when on board, than passengers on any other type of carrier, and when one reflects on the potential for total disaster should the safety regulations not be observed, then the need to supervise passenger behaviour, which in turn involves the right to refuse carriage to certain members of the travelling public, is obvious.[19]

Before embarking on the study of which passengers can be justifiably rejected and in what circumstances, it would be wise to examine the sources of authority for refusal of carriage. The most obvious guide to the location of such sources is the passenger ticket which forms the contract between the passenger and the airline. The "Conditions of Contract" are printed on the ticket and they state that the carriage and other services performed by each carrier are subject to the provisions contained in the ticket, the applicable tariffs, and the carrier's conditions of carriage and related regulations, which are incorporated by reference.[20]

The ticket itself has only one reference to the right to refuse carriage and that is couched in the form that the carrier reserves the right to refuse carriage to any person who has acquired a ticket in violation of applicable law or the carrier's tariffs, rules or regulations. The applicable tariffs are those filed by the carrier with the aviation authorities: in the United States - the Civil Aeronautics Board;[21] in Canada - the Air Transport Committee of the Canadian Transport Commission.[22] As was mentioned above, the terms of the tariffs are incorporated by reference and the passenger is deemed to have constructive knowledge of their contents.[23]

Outside North America, the carrier's conditions of carriage referred to in the ticket would most probably be those issued by the International Air Transport Association (I.A.T.A.).[24] The I.A.T.A.

Conditions of Carriage are not applicable in North America but have been accepted by most of the major western airlines, although modifications have been made to them, for example, in the case of overbooking.[25]

In Canada and the United States of America, the carriers' conditions of carriage are found in their tariffs. Those of Air Canada and CP Air, which are on file with the Canadian Transport Commission, deal directly with the problem of refusal of carriage in their sections on Limitations of Carriage.[26] Air Canada's tariff[27] reads as follows:

LIMITATIONS OF CARRIAGE

(A) REFUSAL, CANCELLATIONS OR REMOVAL

(1) Carrier will refuse to carry, cancel the reserved space of, or remove enroute any passenger when:

(a) such action is necessary for reasons of safety;

(b) such action is necessary to prevent violation of any applicable laws, regulations or orders of any state or country to be flown from, into or over;

(c) the conduct, status, age or mental or physical condition of the passenger is such as to:

(i) require special assistance of carrier; or

(ii) cause discomfort or make himself objectionable to other passengers; or

(iii) involve any hazard or risk to himself or to other persons or to property;

(d) the passenger fails to observe the instructions of Carrier.

(e) the passenger refuses to permit search of his person or property for explosives or a concealed, deadly or dangerous weapon or article.

(2) If the question arises of any aircraft's being overloaded, carrier shall decide which passengers or articles shall be carried.

(B) RECOURSE OF PASSENGER

Any person so refused carriage or removed enroute for any reason specified in the foregoing paragraph, shall be refunded the value of the unused portion of his ticket from the carrier so refusing or removing, as provided.

(C) CARRIAGE OF UNACCOMPANIED CHILDREN

(1) General. Children under 5 years of age will not be accepted for carriage unless accompanied from origin to destination by a fare-going passenger at least 12 years of age.

(2) Children over 5 years of age but under 12 years of age, will be accepted for carriage unaccompanied at specified rates . . . . . provided:

(a) Advance arrangements have been made with the carrier.

(b) They are accompanied to the airport at the time of departure by a parent, guardian or responsible adult who shall remain with the child until enplaned, and evidence is presented that the child will be met at the airport of stop-over or destination by another parent, guardian or responsible adult upon deplaning.

(c) The flight on which space is held is not expected to terminate short of, or by-pass the destination due to weather conditions.

(d) Space has been confirmed to point of stop-over or destination.

(e) No change of planes enroute unless provision is made to meet and/or care for the child at transfer points.

(3) The carrier will not accept any financial or guardianship responsibilities beyond those applicable to an adult passenger.

(4) The age limit referred to in this rule shall be the age of the child at the date of commencement of carriage. Carrier may require satisfactory evidence establishing the child's age.

(5) A child shall be considered unaccompanied if not accompanied by a fare-going passenger at least 12 years of age.

(D) CARRIAGE OF INFANTS

Each child under one year of age must be accompanied by an adult at least 12 years of age.[28]

For carriage wholly within Canada or transborder transportation between Canada and the U.S.A., the following additional tariff regulation applies: Carrier will refuse to transport or will remove at any point, any passenger -

> Proof of Identity - Who refuses on request to produce positive identification. Note: Carrier shall have the right, but shall not be obligated, to require positive identification of persons purchasing tickets and/or presenting a ticket(s) for the purpose of boarding aircraft.[29]

With the exception of the treatment of unaccompanied children, the above guidelines are necessarily vague since they apply to a multiplicity of situations. The lack of specificity does, of course, lend itself to arbitrariness in interpretation and increases the possibility of unequal treatment being meted out. Section 1 has a number of possible meanings. Subsection (1)(c) could refer to those individuals which fit the so-called "hi-jacker

profile", or it could refer to passengers travelling on crutches or those using canes. The various criteria enumerated in subsection (1) (c) could cover passengers in wheel chairs, on stretchers, the blind, the deaf, the mentally handicapped or many senior citizens. And how special is "special assistance"? (paragraph (i)); passengers with bare feet or, worse, smelly feet, passengers who suffer from body odour, or who are drunk, cigar smokers or incontinent (paragraph (ii)); passengers who suffer from contagious diseases or, again, smokers, or even someone with a leg in a cast that protrudes into the aisleway, or a pregnant woman (paragraph (iii)).

The regulation concerned with proof of identity may be aimed at discouraging potential hi-jackers or merely at preventing certain types of fraud, such as one passenger who is entitled to certain discounts or privileges purchasing a ticket on behalf of another passenger who is not so entitled.[30] Whatever the reason may be, the documents which would constitute "positive identification" have been left unspecified.[31]

If the Canadian tariffs err on the side of generality, those of the United States' carriers overcompensate on the side of specificity, and, whereas the appropriate sections of the Canadian tariffs occupy two pages, their counterparts south of the border have regulations covering refusal of carriage which run to eighteen pages of a similar type![32]

The Local and Joint Passenger Rules Tariff, no. PR-7[32a] which, for U.S. carriers, covers transportation wholly within the United States and trans-border transportation between Canada and the U.S.A. in both directions, reads as follows on the subject of refusal of carriage:

Rule 35 REFUSAL TO TRANSPORT (Applicable to AA, AK, AL, AP, AS, BN, CE, CH, DL, DP, EA, FL, GG, GQ, GW, HA, II, JC, JT, KN, LS, ML, NA, NE, NW, NY, OC, OO, OZ, PA, PI, PS, QG, QH, RP, RW, TI, TS, TW, UA, UR, WA, WC, WI, XV, YS, ZV, and ZW only.)*
Carrier will refuse to transport or will remove at any point, any passenger:

(A) GOVERNMENT REQUEST OR REGULATIONS - Whenever such action is necessary to comply with any government regulation, or to comply with any governmental request for emergency transportation in connection with the national defense, or whenever such action is necessary or advisable by reason of weather or other conditions beyond its control (including but without limitation, acts of God, force majeure, strikes, civil commotions, embargoes, wars, hositilities or disturbances) actual, threatened or reported;

(B) SEARCH OF PASSENGER OR PROPERTY - Who refuses to permit search of his person or property for explosives or a concealed, deadly or dangerous weapon or article.

(C) PROOF OF IDENTITY - Who refuses on request to produce positive identification.
NOTE: Carrier shall have the right, but shall not be obligated, to require positive identification of persons purchasing tickets and/or presenting a ticket(s) for the purpose of boarding aircraft.

(D) PERSONS IN CUSTODY - (Applicable to US Air and San Juan Airlines only.) Who is in the custody of law enforcement personnel unless the number of law enforcement escorts exceeds the number of persons in custody by at least one.

*For an explanation of the abbreviations, see the list at the beginning of this study.

(E) ACROSS INTERNATIONAL BOUNDARIES - Who is travelling across any international boundary if:

(1) the travel documents of such passenger are not in order;

(2) for any reason, such passenger's embarkation from, transit through, or entry into, any country from, through, or to which such passenger desires transportation would be unlawful;

(3) such passenger fails or refuses to comply with the rules and regulations of the carrier.

(F) COMFORT AND SAFETY

(1) Not applicable[33]

(2) (Applicable to AA, AL, AS, CE, DP, HA, OC, OZ, PA, PS, RW, UA and WA only.)* In the following categories where refusal or removal may be necessary for the comfort and safety of themselves or other passengers:

(a) persons whose conduct is disorderly, abusive or violent.

(b) (Not applicable to Hawaiian Airlines) persons who are barefoot.

(c) persons who are unable to sit in the seat with the seatbelt fastened.

(d) persons who appear to be intoxicated or under the influence of drugs.

(e) persons who are known to have a contagious disease.

(f) persons who have an offensive odor, such as from a draining wound.

(g) (Not applicable to Ozark Air Lines or US Air) persons who are mentally deranged or mentally incapacitated. However, the carrier will accept escorted mental patients under the following conditions:

(i) the requesting medical authority furnishes assurance, in writing, that an escorted mental patient can be escorted safely.

(ii) only one escorted mental patient will be permitted on a flight.

(iii) request for carriage is made at least 48 hours before scheduled departure.

(iv) acceptance is for online travel only.

(v) (Not applicable to American Airlines, Hawaiian Airlines, Hughes

*For an explanation of the abbreviations, see the list at the beginning of this study.

Airwest or Pacific Southwest Airlines) the escort must accompany the escorted passenger at all times.

(vi) (applicable to American Airlines, Hawaiian Airlines, Hughes Airwest and Pacific Southwest Airlines only)

(aa) The escort assures that:

1. The escorted passenger will be accompanied at all times.
2. The escorted passenger does not possess or have access to articles that could be used as deadly or dangerous weapons.
3. The escort has adequate restraining devices if needed.

(bb) The following specific procedures for the transportation of escorted mental patients must be complied with:

1. Escorted mental patients will be boarded first and deplaned last. They will be seated in the rear-most available seats with the escort seated between the escorted passenger and the aisle. Escorted mental patients will not be seated in a row with, behind, or forward of a window exit, or in a row with or opposite of a door exit.
2. Escorted mental patients will be restrained from moving about aloft or on the ground. The passenger will not be allowed to smoke and escort must ensure that all matches are removed from the passenger before boarding.
3. No food, beverage or metal eating utensils will be provided the escorted passenger unless specifically

authorized by the escort. Neither the escort nor the escorted passenger will be served, nor will they drink, alcoholic beverages while on board the aircraft.

(h) persons who wear or have on or about their persons concealed or unconcealed deadly or dangerous weapons, provided however, that carrier will carry passengers who meet the qualifications and conditions as established.

(i) manacled persons in custody of law enforcement personnel or persons who have resisted or may reasonably be believed to be capable of resisting escorts.

(j) (Applicable to Ozark Air Lines and US Air only) unaccompanied passengers (adult or children) with known mental disorders who may create a disturbance or impair the safety of the flight. However, the carrier will accept escorted mental patients under the following conditions:
  (i) acceptance is for online travel only.
  (ii) the escort must accompany the escorted passenger at all times.

(k) (Applicable to Cochise Airlines, Hawaiian Airlines, Ozark Air Lines, Pacific Southwest Airlines and US Air only) passengers requiring constant oxygen or other life support equipment.

(l) (Applicable to Cochise Airlines, Hawaiian Airlines, Ozark Air Lines and US Air only) unaccompanied passengers unable to care for themselves during flight, and/or are unable to care for their lavatory needs during flight.

(m) (Applicable to Alaska Airlines, Cochise Airlines, Hawaiian Airlines, Pacific Southwest Airlines, United Air Lines, US Air only) unaccompanied passengers who are both blind and deaf.

(n) (Applicable to American Airlines, Pacific Southwest Airlines and United Air Lines only) Persons who would require an unusual amount, unreasonable type of assistance or medical treatment enroute, confirmed by carrier physician, unless accompanied by a ticketed passenger capable of

giving necessary assistance. Carrier personnel are not permitted to give hypodermic injections.

(o) (Applicable to American Airlines only) Persons who have an illness that may become obnoxious aloft, which has been confirmed by an American Airlines physician.

(p) (Applicable to American Airlines, Pacific Southwest Airlines and Hawaiian Airlines only) Persons who have misrepresented a condition which becomes evident upon arrival at the airport, and the condition is unacceptable for passage.

(3) (Applicable to Air New England, Aloha Airlines, Big Sky Airlines, Eastern Air Lines, Piedmont Aviation, Republic Airlines, Texas International Airlines and Trans World Airlines only)

(a) Who, in the reasonable judgment of a responsible carrier employee, is apparently under the influence of intoxicating liquors or drugs (except a medical patient under proper care); or

(b) Whose conduct or condition is or has been known to be abusive, offensive, threatening, intimidating, violent, or otherwise disorderly and there is a possibility in the prudent judgment of a responsible carrier employee that such passenger would cause disruption or serious impairment to the physical comfort and safety of other passengers or carrier's employees, interfere with a crew member in the performance of his duties aboard carrier's aircraft, or otherwise jeopardize safe and adequate flight operations.

(4) (Applicable to Air Florida, Delta Air Lines, Piedmont Aviation and Republic Airlines only)

(a) (Not applicable to Piedmont Aviation or Republic Airlines) Whose conduct is disorderly, abusive or violent.

(b) (Not applicable to Piedmont Aviation or Republic Airlines) Who appears to be intoxicated or under the influence of drugs.

(c) (Not applicable to Piedmont Aviation or Republic Airlines) Who attempts to interfere with any members of the flight crew in the pursuit of their duties.

(d) (Not applicable to Piedmont Aviation) Who

is known to have a contagious disease,

(e) (Not applicable to Piedmont Aviation) Who has an offensive odor, such as from a draining wound,

(f) (Not applicable to Republic Airlines) Who is mentally deranged,

(g) (Not applicable to Piedmont Aviation) Who is unable to sit in a seat with the seat belt fastened,

(h) (Not applicable to Piedmont Aviation or Republic Airlines) Who is unescorted and is incapable of taking care of his physical needs in flight.

(i) (Applicable to Piedmont Aviation and Republic Airlines only)* Who is barefooted.

(G) (Applicable to Cardinal/Air Virginia, Cochise Airlines, Pacific Southwest Airlines, Republic Airlines and Swift Aire Lines only) Who requires the attachment of any device to an aircraft.

(H) PASSENGER'S CONDUCT OR CONDITION Except as provided in Rule 90 (PRE-PLANNED OXYGEN SERVICE), Rule 370 (PASSENGERS ON STRETCHERS), and Rule 380 (PASSENGERS REQUIRING INCUBATORS AND LIFE SUPPORT SYSTEMS)

(1) (Not applicable to AA, AL, DP, FL, KS, OC, PI, PS, RW, TI, or TW.)* Carrier will refuse to transport or will remove at any point, any passenger whose conduct, status, age, mental or physical condition is such as to render him incapable of caring for himself without assistance unless:

(a) (Not applicable to New York Airways) he is accompanied by an attendant who will be responsible for caring for him enroute and

(b) (Not applicable to New York Airways) with the care of such attendant, he will not require unreasonable attention or assistance from carrier personnel.

(2) (Applicable to Piedmont Aviation, Texas International Airlines and Trans World Airlines only) Carrier will refuse to transport or will remove at any point, any passenger whose conduct, status, age, or mental condition is such as to render him incapable of caring for himself without assistance, unless:

(a) he is accompanied by an attendant who will be responsible for caring for him enroute, and

(b) with the care of such attendant he will not require unreasonable attention or

*For an explanation of the abbreviations, see the list at the beginning of this study.

assistance from carrier personnel.

(3) (Applicable to Air California, American Airlines, Cochise Airlines, Hughes Airwest, Marco Island Airways, Pacific Southwest Airlines and US Air only) Carrier will refuse to transport or will remove at any point, any passenger whose:

(a) Mental or physical condition is such as to render him incapable of caring for himself without assistance or medical treatement enroute, unless:

(i) he is accompanied by a ticketed attendant who will be responsible for caring for him enroute and

(ii) with the care of such attendant he will not require unreasonable attention or assistance from carrier personnel.

(b) In the case of pregnant passengers, carrier will not transport a passenger expecting delivery within seven days, unless it is provided a doctor's certificate, dated within 72 hours of departure that he has examined and found her to be physically fit for transportation from (place) to (place) and that the estimated time for birth of the baby is (date).

EXCEPTION: Cochise Airlines and RMA Inc. will not transport a passenger expecting delivery within 30 days without the certificate mentioned above.

(c) (Not applicable to Cochise Airlines or US Air) Infants aged seven days or less.

(d) (Applicable to Cochise Airlines and US Air only) Infants aged 7 days or less or infants requiring incubator or other life support systems.[34]

50 ACCEPTANCE OF CHILDREN

(A) (1) Accompanied. (Applicable to AK, AL, AP, CH, DP, FL, FX, GQ, GW, HA, II, JC, JT, ML, NE, NY, OO, OZ, PA, PI, PS, GQ, RC, RV, TI, TS, UR, XV, ZV, and ZW only)* Children under 12 years of age are accepted for transportation when accompanied by a passenger at least 12 years of age.

*For an explanation of the abbreviations, see the list at the beginning of this study.

(2) (a) Accompanied. (Not applicable to AK, AL, AP, CH, DP, FL, FX, GW, HA, II, JC, JT, NE, NY, OO, OZ, PA, PI, PS, QG, RC, RV, TI, TS, UR, XV, ZV, or ZW)* Children under 12 years of age are accepted for transportation when accompanied on the same flight and in the same compartment by a passenger at least 12 years of age.

(b) Seating Restriction (Via Continental Airlines) Children 5 years of age or less will not be permitted to occupy seats in emergency exit rows immediately in front of 727 emergency exit windows.

(B) (1) Unaccompanied.* (Applicable to AK, AL, AP, CH, DP, FL, GQ, GW, HA, II, JC, JT, ML, NE, NY, OO, OZ, PI, PS, QG, RC, TI, TS, UR, XV, ZV, and ZW only) Children under 12 years of age not accompanied on the same flight and in the same compartment by a passenger 12 years of age or over are accepted for transportation under various conditions.[35]

Apart from an understandable concern with potential passengers who are drugged, drunk, suffer from contagious diseases[36] or (questionably[37]) bare feet, together with the wish to avoid transporting violent and disorderly persons, there seems to be a disproportionate emphasis on the refusal to carry handicapped (both mentally and physically) travellers. Attempts are made to justify these prohibitions against the handicapped in terms of safety requirements, (for example, the problem of blocking exits) but they are still blanket provisions without regard to the extent of the incapacity of the individual passengers. Although less general than their Canadian equivalents, phrases such as "he [the passen-

*For an explanation of the abbreviations, see the list at the beginning of this study.

ger will not require unreasonable attention or assistance" (emphasis added) still prevail.

NON-DISCRIMINATORY PROVISIONS

Discrimination, or rather the absence of it, is basic to the concept of the common carrier. Not only was a carrier obliged to accept goods for transportation[38] but it was a breach of the common carrier's duty not to treat all alike under substantially similar conditions[39] and afford the owners equal opportunity to market their product.[40] Discriminatory treatment by carriers was recognised to be a problem early on but the concern at the turn of the century was mainly directed at unequal freight rates.[41] The concern with freight has been developed to the point that, although a right to refuse carriage has been established, a right to discriminate against particular passengers does not exist.[42] In the United States, this philosophy has been enshrined in section 404(b) of the Federal Aviation Act of 1958:[43]

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

This section has been invoked to provide redress for injury caused

by discrimination, disadvantage, or undue preference regardless of whether it was racially, religiously or economically motivated.[44] In addition, the Act, (unchanged by the Airline Deregulation Act of 1978)[45] states that the availability of a variety of adequate, economic, efficient, and low price services by air carriers without unjust discriminations, undue preferences or advantages, or unfair or deceptive practices, is in the public interest and in accordance with public convenience and necessity.[46]

The existence of section 404(b) of the Federal Aviation Act has given the plaintiffs in discrimination cases launched against the airlines, a statutory cause of action[47] which, as will be shown later in this study, is frequently invoked. In Canada, there is no equivalent of the requirement of non-discrimination by airlines and thus an equivalent statutory action does not exist.[48]

FOOTNOTES

1. Merchants Parcel Delivery v. Pennsylvania Public Utility Commission 150 Pa. Super. 120; 28 A 2d. 340 at 344 (1967) (Stadtfield J. for the court, Keller P.J. dissenting). See also Halsbury, Words and Phrases Legally Defined (2d ed.), London, Butterworths, 1969, vol. I, p. 285 and the Interstate Commerce Act of 1887, s. 1(4); 49 U.S.C. s. 1(4) (1976).

2. A.D. McNair, The Law of the Air, (3d. ed.) M.R.E. Kerr and A.H.M. Evans, eds., London, Stevens and Sons, 1964, p. 138.

3. In Aslan v. Imperial Airways, Ltd. (1933) 45 Ll.L.R. 316 (K.B.) MacKinnon J. (as he then was) was clearly of the opinion (although expressed in an obiter dictum) that an air carrier might fall within the category of a common carrier.

> "I see no reason why a man who carries goods by a machine that travels through the air should not be a common carrier or assume the liabilities of a common carrier if he acts in a certain way . . . . If a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out ready to carry for any who wished to employ him so far as he had room in his airship or aeroplane for their goods, very likely he would become a common carrier or be under the various liabilities of a common carrier." (p. 322)

4. Nystead and Anson v. Wings, Ltd. (1942) 3 D.L.R. 336 (Manitoba K.B.) (Dysart J.).

5. Law v. Transcontinental Air Transport, Inc. 1931 U.S. Av. R. 205 (E.D. Pa.) (Kirkpatrick D.J.).

6. The obligation not to refuse carriage is rooted in the feudal economic and social conditions which prevailed in mediaeval England. The roads were almost impassable. In most cases they were little more than footpaths over which caravans of horses travelled carrying goods and passengers. The thieves and robbers also travelled in groups making travel in general, but especially by night, exceedingly dangerous. Hence it was essential that well-guarded caravans (or convoys) carry the goods of merchants who could not afford to undertake the journeys individually. Few caravans travelled the highways at any one time so the merchant was at the mercy of the carrier should he need his goods transported. It was therefore decided very early on (1683), that the carrier would be liable in damages for refusing to accept goods for carriage from a merchant. This was in keeping with the

political philosophy of the time that the people existed for the government and where the welfare of the public was dependent upon a certain trade to such an extent that individual suffering (and thus public harm) would result from a refusal to serve all fairly and reasonably, then those that practiced this trade became so impressed with the public interest that they were obliged to devote their services to all and sundry. See Jackson v. Rogers 2 Show. 327 (1683) (Jeffries J.C.) and F.E. Quindry, Airline Passenger Discrimination, 3 J.A.L.C. (1932) p. 479 at pp. 481-484. See also C.H.S. Fifoot, History and Sources of the Common Law, London, Stevens and Sons, 1949, pp. 157-160.

7. Clarke v. West Ham Corporation [1909] 2 K.B. 858; 79 L.J.K.B. 56; 101 L.T. 481; 73 J.P. 461; 25 T.L.R. 805; 53 S.J. 731 (Farwell and Kennedy L. JJ.). In holding that a municipal corporation operating a tramway under statutory power was under a common law obligation to carry passengers, the Lords Justice were following the opinion expressed by Holt C.J. in 1701 that:

> "Wherever any subject takes upon himself a public trust for the benefit of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him."

Lane v. Cotton 12 Mod. 472 (K.B. 1701) (Holt C.J.) at 484.

8. In Canada: Ludditt v. Ginger Coote Airways, Ltd. [1947] A.C. 233; [1947] 2 D.L.R. 241 (P.C.) (Wright L.J.). In the U.S.A.: Pearson v. Duane 4 Wall (71 U.S.) 605; 18 L. Ed. 447 (1866) (Davis J.); Law v. Transcontinental Air Transport, Inc. cited supra footnote 5; Lazar v. Banas 114 Pa. Super. 425; 174 A. 817 (1934) (James J.).

9. C. Zollman, Aircraft as Common Carriers, 1 J.A.L.C. (1930), p. 190 at p. 196.

10. N.M. Matte, Traite de droit aérien-aéronautique, (3rd. ed.), Paris, Pedone, 1980, p. 162.

11. Halsbury, Words and Phrases, cited supra footnote 1.

12. In England: Aston v. Heaven (1797) 2 Esp. 533 (Eyre C.J.); Christie v. Griggs (1809) Court 2 Camp. 79; 11 R.R. 666 (Comm. Pl.) (Mansfield C.J.); Readhead v. Midland Ry. Co. (1869) L.R. 4. Q.B. 379; 9 B. & S. 519; 38 L.J. Q.B. 169; 20 L.T. 628; 17 W.R. 737 (Exch. Ch.) (Smith J.). See also P. Martin, J.D. McClean, E. de Montlaur Martin, J. Bristow, J.L. Brooks eds., Shawcross and Beaumont on Air Law, London, Butterworths, 1977, para. 384. In Canada: Ludditt v. Ginger Coote Airways, Ltd. cited supra footnote 8.

13. Luddit v. Ginger Coote Airways cited supra footnote 8, at 243.

14. Allison v. Standard Air Lines, Inc. 1930 U.S. Av. R. 292 (S.D. Cal.) (Cosgrove J.). The common carrier's contractual obligation to

transport its passengers in a non-negligent manner is not bargained for by the respective parties but is imposed by law. See Henry v. C.P.R. (1902) 5 Terr. L.R. 420; 4 C.R.C. 474 (N.W. Terr.) (Prudhomme C.J.) and Ryckman v. Hamilton Electric R.W. Co. (1905) 10 O.L.R. 419; 4 C.R.C. 457 (Ont. C. of A.) (Osler J.A.). See also Scott v. Eastern Airlines, Inc. 264 F. Supp. 673 (E.D. Pa. 1967); aff'd. 399 F. 2d. 14; 10 Avi. 17,979 (3rd. Cir. 1968) (Staley C.J.); cert. den'd. 393 U.S. 979; 89 S.C.R. 446; 11 L. Ed. 2d. 439.

If the aircraft is merely a single engine aircraft carrying two passengers, as long as the owner of the aircraft acts as a common carrier and the plane is piloted by the owner's agent, then both the owner and the pilot owe a duty of exercising the highest degree of care towards their two passengers. Hunziker v. Schiedemantle 543 F. 2d. 489; 1976 U.S. Av. R. 234 (3d. Cir. 1976) (Garth C.J.); other proceedings 518 F. 2d. 829; 1975 U.S. Av. R. 360 (3d. Cir. 1975) (per curiam).

15. Law. v. Transcontinental Air Transport, cited supra footnote 5.

16. Brumfield v. Consolidated Coach Corp. 40 S.W. (2d.) 356 (Ky. 1931) (Richardson J. for the Court) at p. 361.

17. Ibid. See also Chesapeake & Ohio Railway Co. v. Spiller 157 Ky. 222; 162 S.W. 815; 50 L.R.A. (N.S.) 394 (1914) (Turner J.) at 816 of 162 S.W. 815.

18. Renaud v. N.Y., N.H. & M.R. Co. 210 Mass 533; 97 N.E. 98; 38 L.R.A. (N.S.) 689 (1911) (Rugg C.J.) at 100 of 97 N.E. 98.

19. The close personal proximity of the passengers to one another has also been stressed as a reason why provision of convenience and comfort are more essential on an aircraft than on surface carriers. Casteel v. American Airways 261 Ky. 818; 88 S.W. 2d. 976; 1 Avi. 594 (Ky. C.A. 1935) (Stanley Comm.).

20. Air Canada, Passenger and Baggage Check, Conditions of Contract, paragraph 3. The full text is as follows:

> "3. To the extent not in conflict with the foregoing [the possible application of the Warsaw Convention] carriage and other services performed by each carriers are subject to: (i) provisions contained in this ticket, (ii) applicable tariffs, (iii) carrier"s conditions of carriage and related regulations which are made part hereof (and are available on application at the offices of the carrier), except in transportation between a place in the United States or Canada and any place outside thereof to which tariffs in force in those countries apply"

The Warsaw Convention is not applicable to the subject matter of this study since if a passenger is refused carriage he is not participating in carriage by air as defined by article 17:

> "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis added.)

Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929.

For further discussion of whether the Convention is applicable see infra the sections of this study on overbooking and the carriage of the handicapped.

21. The Civil Aeronautics Board was created by the Federal Aviation Act of 1958 49 U.S.C. ss. 1301 - 1542 (1976). The powers and duties are stated in s. 204; 49 U.S.C. s. 1324 (1976):

> "s.1324. General powers and duties of the Board
>
> (a) Performance of acts; conduct of investigations; orders, rules, regulations, and procedure
>
> The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter.
>
> (b) Cooperation with State aeronautical agencies
>
> The Board is empowered to confer with or to hold joint hearings with any State aeronautical agency, or other State agency, in connection with any matter arising under this chapter within its jurisdiction, and to avail itself of the cooperation, services, records, and facilities of such State agencies as fully as may be practicable in the administration and enforcement of this chapter.
>
> (c) Exchange of information with foreign governments
>
> The Board is empowered to exchange with foreign governments, through appropriate agencies of the United States, information pertaining to aeronautics.
>
> (d) Report of proceedings and investigations; publication; evidence

> Except as may be otherwise provided in this chapter, the Board shall make a report in writing in all proceedings and investigations under this chapter in which formal hearings have been held, and shall state in such report its conclusions together with its decision, order, or requirement in the premises. All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation. The Board shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by it under this chapter in such form and manner as may be best adapted for public information and use. Publications purporting to be published by the Board shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Board therein contained in all courts of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof."

The requirement for air carriers to file their tariffs with the C.A.B is stated in s. 403; 49 U.S.C. 1373 (1976).

22. The Canadian Transport Commission was constituted by the National Transportation Act R.S.C. 1970, c. N-17, Part I, s. 6 et seq. The power for the C.T.C. to make regulations comes from the Aeronautics Act R.S.C. 1970, c. A-3, Part II, s. 14.

> "14. (1) The Commission may make regulations
>
> (a) establishing the classification and form of licences to be issued under this Part, the terms upon which and the manner in which they shall be issued and renewed, the conditions and restrictions to which they shall be subject and the issue of duplicate licences;

(b) prescribing the terms and conditions to which licences issued under this Part shall be subject;

(c) prescribing forms of accounts and records to be kept by air carriers, and providing for access by the Commission thereto;

(d) requiring air carriers to file with the Commission returns with respect to their assets, liabilities, capitalization, revenues, expenditures, equipment, traffic, employees and any other matters to which this Part applies relating to the operation of commercial air services;

(e) requiring any person to furnish information respecting the ownership or any existing or proposed control, transfer, consolidation, merger or lease of commercial air services or of any air carrier;

(f) requiring copies of agreements respecting any control, transfer, consolidation, merger or lease referred to in paragraph (e), copies of contracts and proposed contracts and copies of agreements affecting commercial air services to be filed with the Commission;

(g) excluding from the operation of the whole or any portion of this Part or any regulation, order or direction made or issued pursuant thereto any air carrier or commercial air service or class or group of air carriers or commercial air services;

(h) prescribing fees for licences issued under this Part and requiring applicants for such licences to furnish information respecting their financial position, their relation to other common carriers, the nature of the proposed routes,

the proposed tariffs of tolls and such other matters as the Commission may consider advisable;

(i) providing for uniform bills of lading and other documentation;

(j) governing minimum insurance requirements and the filing of bonds and certificates of insurance with the Commission;

(k) establishing classifications or groups of air carriers or commercial air services;

(l) prohibiting the change of control, transfer, consolidation, merger or lease of commercial air services, briefing air carrier except subject to such conditions as may by such regulations be prescribed;

(m) respecting traffic, tolls and tariffs and providing for
  (i) the disallowance or suspension of any tariff or toll by the commission,
  (ii) the substitution of a tariff or toll satisfactory to the Commission, or
  (iii) the prescription by the Commission of other tariffs or tolls in lieu of the tariffs or tolls so disallowed;

(n) respecting the manner and extent to which any regulations with respect to traffic, tolls or tariffs shall apply to any air carrier licensed by the Commission or to any person operating an international air service pursuant to any international agreement or convention relating to civil aviation to which Canada is a party;

(o) prescribing penalties, enforceable on summary conviction, for
  (i) contravention of or failure to comply with any regulation or any direction order made by the Commission pursuant to this Part or such regulations,

(ii) making any false statement or furnishing false information to or for the use or information of the Commission, or

(iii) making any false statement or furnishing false information when required to make a statement or furnish information pursuant to any regulation, direction or order of the Commission,

but such penalties shall not exceed a fine of five thousand dollars or imprisonment for a term of six months, or both;

(p) designating persons as examiners to carry out investigations on behalf of the Commission in respect of matters related to the operations of commercial air services and providing for the making of reports thereon and for other matters deemed necessary in connection with such investigations; and

(q) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Part."

The requirement for air carriers to file their tariffs with the Air Transport Committee of the Canadian Transport Commission is found in the Air Carrier Regulations, Consolidated Regulations of Canada (1980), c. 3, Part VI, s. 112.

23. For example, in the United States: Mao et al v. Eastern Airlines, Inc. 310 F. Supp. 844; 11 Avi. 17,400 (S.D.N.Y. 1970) (Croake D.J.) and Wilhelmy v. North East Airlines, Inc. (W.D. Wash. 1949) (Bowen C.J.); in Canada Stratton v. Trans-Canada Air Lines (1961) 27 D.L.R. (2d.) 670; aff'd. (1962) 32 D.L.R. (2d.) 736 (B.C.C.A.) (opinion of Norris J.).
Tariff rules have the force of law:
Crosby & Co. v. Compagnie Nationale Air France 76 Misc. 2d. 990; 352 N.Y.S. 2d. 75; 12 Avi. 17,963 (N.Y.S.C. 1973) (Asch J.); aff'd. without opinion 42 A.D. 2d. 1050; 348 N.Y. S. 2d. 957 (N.Y.S.C. App. Div. 1973); app. den'd. 33 N.Y. 2d. 521; 353 N.Y.S. 2d. 1025; 309 N.E. 2d. 141 (N.Y.S.C. App. Div. 1974); cert. den'd. 416 U.S. 986; 94 S. Ct. 2390; 40 L. Ed. 2d. 763 (1974); Mao et al v. Eastern Airlines, Inc. cited supra. And in the United States where the Federal Aviation Act of 1958 s. 403 (b)(1); 49 U.S.C. s. 1373 (b)(1) (1976) expressly prohibits the carrier from deviating from those terms in its contracts with its passengers, courts have generally recognized that the contractual rights and liberties of the carrier and its passengers are "conclusively and exclusively" governed by the provisions of the tariff. Tishman & Lipp, Inc. v. Delta Air Lines, Inc. 275 F. Supp. 471 (S.D.N.Y. 1967); aff'd. 413 F. 2d. 1401; 11 Avi. 17,152 (2d. Cir. 1969) (Smith C.J.) and Slick Airways, Inc. v. United States 292 F. 2d. 515; 7 Avi. 17,515 (Ct. Cl. 1961) (Durfee J.).

In Canada, a Quebec small claims court decision has cast doubt on whether tariffs do, indeed, have the force of law. See Hendler v. Iberia Airlines of Spain (unreported) September 20, 1979 (Hadjis J.). This case is discussed in the chapter on overbooking. The better opinion was expressed in Ocean Accident and Guarantee Corporation v. Air Canada [1975] R.P. 193 (Que. C. of A. 1973) (Rivard and Deschênes JJ.) that tariffs are indeed binding.

24. International Air Transport Association, General Conditions of Carriage (Passenger), January 1, 1981, Recommended Practice 1724 (formerly 1013).

25. See infra the section on overbooking. Article VII of the I.A.T.A. Conditions of Carriage addresses itself to the subject of refusal of carriage as follows:

" - REFUSAL OF CARRIAGE

1. Carrier will refuse carriage or onward carriage, or will cancel the reservation of any passenger when, in the exercise of its reasonable discretion, Carrier decides:

   a) that such action is necessary reasons of safety; or

   b) that such action is necessary to prevent violation of any applicable laws, regulations, or orders of any state or country to be flown from, into or over; or

   c) that the conduct, age, or mental or physical state of the passenger is such as to

      i) require special assistance of Carrier; or

      ii) cause discomfort or make himself objectionable to other passengers; or

      iii) involve any hazard or risk to himself or to other persons or to property; or

   d) that such action is necessary oweing to the failure of the passenger to observe the instructions of Carrier.

2. The sole recourse of any person so refused carriage or whose reservation is cancelled for any reason specified in the preceding paragraph shall be recovery of the refund value, in accordance with Article XI Paragraph 3(b), of the unused portion of his ticket from the Carrier so refusing, or cancelling. In cases falling under Paragraph 1(c) (ii) or 1(d) of this Article the refund will be subject to deduction of any applicable service charge.

3. If the aircraft's weight limitations or seating capacity would otherwise be exceeded, Carrier shall decide in its reasonable discretion which passengers or articles shall not be carried.

4. Children will be accepted for carriage subject to the provisions of and compliance with the requirements of Carrier's Regulations."

The marked similarity between the I.A.T.A. Conditions of Carriage and the Canadian carriers' tariffs (see text infra) is obvious. Although not directly applicable in North America, the I.A.T.A. Conditions of Carriage are the model for the Air Traffic Conference of America's Trade Practice Manual which was reissued October 1, 1958, and has been updated as necessary. There is no equivalent section, as such, on refusal of carriage in the Trade Practice Manual. There are, however, resolutions that concern the acceptance of prisoners (resolution 10.05) and the carriage of the physically handicapped (resolution 10.06) which will be discussed infra in the sections of this paper which deal with these two topics.

26. There are no specific regulations on this subject, except the requirement that the carrier file these conditions in its tariff on file with the C.T.C. (A) and to file with Transport Canada a Procedures Manual illustrating the carrier's ability to operate flights in safety.

27. This version of the tariff regulations is taken from the International Passenger Rules Tariff no. PR-1, Rule 3 and International Passenger Rules Tariff no. IPR-1, rule 3. (The PR-1 Tariff covers international transportation to and from points in Canada, to and from points outside North America. The IPR-1 Tariff covers international transportation outside North America: it is used where the transportation originates and/or terminates in the United States and travel is via a point in Canada. Other carriers with whom Air Canada has interline agreements participate in these tariffs and Air Canada files the rules on their behalf under the authority of powers of attorney.) The CP Air tariff, Local and Joint International Passenger Rules Tariff no. 2, Rule 8 is substantially similar to that of Air Canada; there is, however, no comparable regulation in CP Air's tariff to Rules nos. A (1)(e), C(2)(a), C(5) or D of Air Canada's tariff. In addition, CP Air tariff no. 2, Rule 8 (C):

"Conditional Acceptance for Carriage (see note) If a passenger whose status, age

> or mental or physical condition is such as to involve any hazard or risk to himself is carried, it is on the express condition that carrier shall not be liable for any injury, illness or disability or any aggravation or consequences thereof, including death, caused by status, age, or mental or physical condition.
>
> NOTE: Except to the extent provided . . . rules affecting liability of carriers for personal injury or death are not permitted to be included in tariffs filed pursuant to the laws of the United States."

has no counterpart in Air Canada's tariff IPR-1.

The CP Air tariff was supplied through the good offices of Ms. Catherine MacDonald of the Fares, Rates and Services Division for the Director, Operations Branch, Air Transport Committee, since CP Air was completely unforthcoming with any of the information requested by the author of this study at various times. This attitude was a complete contrast to that of Mr. R.S. McDonald, Supervisor of Passenger Claims at Air Canada's Head Office, Montreal, who could not have been more helpful.

28. For carriage in North America, CP Air and Pacific Western Airlines specify that "Only one child under three years of age will be accepted for carriage with each fare paying passenger at least 12 years of age occupying the same or adjacent seat occupied by the child." (Emphasis added.) Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195, Rule 50 (A)(2). This tariff covers transportation wholly within Canada, wholly within the United States, and Canada-U.S.A. trans-border traffic.

29. Ibid., Rule 30 (A)(4).

30. The carrier is entitled to verify that infants travelling for free are indeed less than twenty-four months old at the time of the flight or at the time of the outward bound leg of a round trip. See Flores v. Pan American World Airways, Inc. 259 F. Supp. 402 (D.P.R. 1966) (Cancio D.J.).

31. Credit cards or a Canadian driver's licence (which does not have a photograph attached) are not always accepted as proof of identity since they could have been stolen along with the passenger ticket. A passport is usually acceptable but would

not normally be carried by a passenger on a domestic flight. Passenger agents have been known to demand both a passport and a credit card bearing the passenger's address for means of identification.

32. The extra length can be partially explained by the larger number of carrier's covered by the American tariffs.

32a. Cited supra footnote 28.

33. See infra the discussion on the carriage of the handicapped and of pregnant passengers for the reasons why rule 35 (F)(1) is inapplicable to United States' carriers.

34. Rule 35 (H) of the tariff continues with a list of conditions under which physically handicapped and non-ambulatory passengers will be carried, the definitions of these two categories of passengers, and the maximum number of physically handicapped and/or non-ambulatory passengers permitted on each type of aircraft. These regulations will be dealt with infra on the section dealing with handicapped passengers.

35. Rule 50 of the tariff continues with the conditions under which unaccompanied children are accepted for transportation. These will be dealt with infra in the discussion of the acceptance for carriage of the very old and the very young.

36. One is forced to wonder if people with evil-smelling, draining wounds do, in fact, fly on commercial airlines. Surely such an unfortunate person would be confined to a hospital bed or, if rich enough, would charter a private plane to transport them if it were absolutely necessary to travel.

37. Are bare feet sui generis with draining wounds which emit an offensive odour?

38. See supra footnote 1.

39. Kentucky Traction & Terminal Co. v. Murray 176 Ky. 593; 195 S.W. 1119 (Kentucky A.C. 1917) (Settle C.J.), Montreal Park and Island Ry. v. Montreal 43 S.C.R. 256; 11 C.R.C. 254 (Fitzpatrick C.J.C. and Girouard J).

40. Cox v. Pennsylvania Railroad Co. 240 Pa. 27; 87 A. 581 (Pa. S.C. 1913) (Stewart J.).

41. Scofield v. Lake Shore & M. S. Ry. Co. 43 Ohio St. 471; 3 N.E. 907 (Ohio S.C. 1885) (Atherton J.); Lowry v. Chicago, B. & Q. R. Co. 46 F. 83 (Ne. Cir. 1891) (Caldwell J.). See generally sections 2 and 3 of the Interstate Commerce Act 49 U.S.C. ss. 2-3 (1976) American Trucking Assns., Inc. v. Atchinson, Topeka & Santa Fe Ry. Co. 244 F. Supp. 955 (N.D. Ill. 1965); rev'd. 387 U.S. 397 (1967) (Fortas J.). In Canada, see C.P.R. and Can. Nor. R.W. Co. v. Regina Bd. of Trade 11 C.R.C. 380 (1910); aff'd. 45 S.C.R. 321; (1911) 1 W.W.R. 474; 13 C.R.C. 203 (Fitzpatrick C.J.C.) and Scott v. Midland Ry. of Canada (1873) 33 U.C.Q.B. 580 (Ont. C.A.) (Morrison J.). In the United States, see also Atchinson, Topeka and Santa Fe Ry. Co. v. State 85 Okl. 223; 206 P. 236 (Okl. S.C. 1922) (Miller J.):

> " "Discrimination" is a term well understood in the nomenclature of transportation over railroads. It implies to charge shippers of freight, as compensation for carrying the same over railroads, unequal sums of money for the same quantity for equal distances; more for a shorter than a longer distance, more in proportion of distance for a shorter than a longer distance; more for freights called local freights than those designated otherwise; more for the former in proportion to distance such freights may be carried than the latter."

42. Trailways of New England, Inc. v. C.A.B. 412 F. 2d (5th Cir. 1969) (Aldrich Ch. J., Staley, C.J. dissenting.)

> "We must also have in mind the fact that not only is the right to be treated fairly and nondiscriminatorily by a common carrier an expression of the pervasive precept of fairness between government and governed that runs through American jurisprudence, it is one derived from the common law of common carriers."

Aldrich Ch. J. at 931.

43. 49 U.S.C. 1374 (b) (1976). This section is virtually a reenactment without substantive changes of s. 404 (b) of the Civil Aeronautics Act of 1938. 49 U.S.C.A. s. 484 (b). The language of s. 404 (b) also parallels the anti-discrimination provision of the Interstate Commerce Act of 1887 49 U.S.C. s. 3 (1) (1976), which was aimed primarily at discriminatory rates and practices which favoured one shipper or one geographic area over another. The roots of that Act are found in the U.K. Railway and Canal Traffic Act, 1854, s.2. See also the Federal Aviation Act of 1958 s. 104 (49 U.S.C. s. 1304 (1976)) whereby;

> "There is recognised and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

44. Valentine v. Eastern Airlines, Inc. 365 A. 2d. 475; 144 N.J. Super. 305 (1976) (per curiam).

45. P.L. 504; 92 Stat. 1705.

46. S. 102 (a) (3); 49 U.S.C. 1302 (a) (3) (1976).

47. See infra the chapter of this study on overbooking for a discussion of the various types of actions available to a plaintiff.

48. The nearest equivalent to s. 404 (b) of the Federal Aviation Act of 1958 found in the Canadian legislation is s. 3 (d) of the National Transportation Act R.S.C. 1970, c. N-17, as amended, which declares with respect to the objectives of Canada's national transportation policy that:

> "(d) each mode of transport, so far as practicable, carries traffic to or from any point in Canada under tolls and conditions that do not constitute
>
> (i) an unfair disadvantage in respect of any such traffic beyond that disadvantage inherent in the location or volume of the traffic, the scale of operation connected therewith or the type of traffic or service involved,"

CHAPTER 2

OVERBOOKING

OVERBOOKING

BACKGROUND

Overbooking, or overselling,[1] is a practice common to all airlines. The Civil Aeronautics Board (C.A.B.), defines[2] deliberate overbooking as "the practice of knowingly confirming reserved space for a greater number of passengers than can be carried in the specific class of service on the flight and date for which confirmation is given." It is a response to the problem of "no-shows" - those people who reserve seats but neither use nor cancel their reservations. The reasons for this are varied: passengers, fearing being denied boarding (or "bumped") or, unsure of their travel plans, make multiple reservations; then either no-show completely or honour only one reservation without cancelling the others. Another source of this problem stems from over zealous travel agents, who, in hope of collecting their commission, report that reservations are confirmed when in fact the passengers are only wait-listed. Additional causes of no-shows arise from airline arrival and departure delays that abort connection schedules as well as the omission of carriers to cancel down-line reservations when an initial reservation is missed or cancelled.

Efforts to combat this substantial problem[3] have included[4] ticketing time limits, reconfirmation requirements and the imposition of service charges, but although these schemes reduced the number of no-shows, they fostered the growth of customer ill-will to such an extent

that they were abandoned in favour of the current flexible system which leaves airline customers the maximum freedom in the making, changing and honouring of airline reservations and which allows them to recover their full value if the reservation is not used.[5]

The practice of overbooking is condoned,[6] it would appear, because of the economic losses caused by flying with empty seats and the pressure being exerted for fuel conservation in the face of steeply rising prices for imported oil. Judicial decisions in Canada,[7] the United States[8] and the United Kingdom[9] have held it to be a sound business practice.

The bumping of passengers has the potential for being discriminatory if the selection process is arbitrary or capricious. In the United States the C.A.B. has promulgated[10] Boarding Priority Rules,[11] the intent of which is to prevent unlawful discrimination in the determining of priorities among ticket holders who are to be prevented from enplaning by providing a method for ascertaining which passengers will board first. The C.A.B. regulations specifically require carriers to establish and maintain boarding priority rules.[12] These rules need not be fair or just: so long as adherence can be demonstrated to established and non-discriminatory policies, they are legitimate. There is no prescribed pattern, thereby, the airlines are allowed a degree of flexibility while still providing some measure of protection for the passenger. In Canada, the Canadian Transport Commission

(C.T.C.), does not have specific regulations concerning the overbooking practices of airlines. Instead, the C.T.C. has accepted the filing of tariffs by the air carriers providing for boarding priority rules and the payment of denied boarding compensation. Thus in both Canada and the United States[12] the amount of denied boarding compensation and method of payment is included in the carrier's tariff[14] and until recently the passenger was on constructive notice[15] of their remedy in the event that they are bumped since airline tickets are sold subject to tariff. However, mainly as a result of the holding of the Court in Nader and the Connecticut Citizen Action Group v. Allegheny Airlines, Inc.,[16] the C.A.B. promulgated a rule,[17] effective April 3, 1977, requiring carriers to post prominently and distribute the following notice in order to notify the public[18] that air carriers overbook reservations:

> "NOTICE - OVERBOOKING OF FLIGHTS
>
> Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation. If the flight is overbooked, no one will be denied a seat until airline personnel first ask for volunteers willing to give up their reservation in exchange for a payment of the airline's choosing. If there are not enough volunteers the airline will deny boarding in accordance with its particular boarding priority. With few exceptions persons denied boarding involuntarily are entitled to compensation. The complete rules for the payment of compensation and each airline's boarding priorities are available at all airport ticket counters and boarding locations."[19]

THE UNITED STATES' POSITION

Types of actions

Perhaps this is the opportune time to refer to the Locus Classicus of airline discrimination cases - Fitzgerald et al v. Pan American World Airways, Inc.[20] It is the leading case because it established the existence of a new cause of action: a remedy based on the anti-discrimination provision, section 404 (b), of the former Civil Aeronautics Act of 1938.[21] The Court of Appeals in the Fitzgerald case determined that an actionable civil wrong could be implied from a statute providing only criminal penalties.[22] Although the Civil Aeronautics Act prohibited unjust discrimination, it prescribed only criminal penalties and procedures to compel future compliance but no provision enabling a party injured by its breach to recover monetary damages. The Court, however, was not deterred:

> "Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal."[23]

Thus, in the United States, there are three distinct actions open to an airline traveller holding a confirmed reservation[24] who has been denied boarding: a breach of contract action; a statutory action

for the tort of discrimination; and since the Nader case - a tort action for fraudulent misrepresentation.[25] The difference between the first two was clarified by the Court in Mortimer v. Delta Air Lines, Inc.[26] Speaking of the discriminatory action the Court stated:

> "The basis of this action is not breach of contract of carriage which is the basis of denied boarding compensation, but rather violation of the anti-discrimination and preference section of the Federal Aviation Act. Denied boarding compensation is payable to a passenger regardless of whether he has been the victim of discrimination or undue preference."[27]

A passenger may, therefore, elect the C.A.B. remedy of denied boarding compensation - but if accepted, until recently, it constituted liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space.[28] Likewise, the compensation was limited to the amount listed in the carrier's tariff.[29]

If a passenger considers that, in the process of being denied boarding he or she was unjustly discriminated against, then s. 404 (b) of the Federal Aviation Act is applicable, and the aggrieved passenger, who does not accept denied boarding compensation, can sue for punitive as well as compensatory damages.[30] Thus the C.A.B. remedy does not preempt the statutory remedy: they are distinct causes of action giving rise to different types of compensation.

It was the Nader v. Allegheny Airlines[31] case which brought the remedy of fraudulent misrepresentation to the fore despite a final holding on the issue of fraudulent misrepresentation in this case not being rendered until 1980.[32] Meanwhile, in Smith v. Piedmont Aviation, Inc.,[33] the plaintiff had claimed inter alia common law fraud and violation of the Texas Deceptive Trade Practices Act.[34] The District Court, however, found that the failure of the carrier and its agent to disclose the possibility of the oversale of confirmed reservations did not constitute common law fraud and was outside the scope of the Deceptive Trade Practices Act.[35] It must be borne in mind that this case predates the C.A.B. rule requiring the notification to passengers of the practice of overbooking.[36]

In the Nader case, the District Court, on remand, reaffirmed its opinion that Allegheny had a duty to disclose the existence of its overbooking practice and its failure to do so subjected it to liability for the common law tort of misrepresentation. The Court found that:

> "Allegheny's non-disclosure of the existence of its overbooking practice was the result of a conscious and deliberate policy the intent of which was to deprive passengers of material information in order not to distinguish Allegheny from its competitors . . . Allegheny wantonly implemented its policy of non-disclosure and misrepresentation in conscious, deliberate and callous disregard of the effect of its policy on its passengers."[37]

The Court was not deterred that the practice of overbooking was ubiquitous. "The mere fact that a fraudulent practice is commonplace[38] in a particular industry in no way deprives that practice of its outrageous character."[39] In addition, the adoption by the C.A.B. of the ruling requiring disclosure of all airlines' overbooking practices did not vitiate the deterrent effect of an award of punitive damages, since it would serve to deter future fraudulent misrepresentations with respect to reservation practices or other business matters.[40]

On appeal, the D.C. Circuit[41] reversed the finding of fraudulent misrepresentation. Robb C.J., speaking for the Court, found that the evidence did not support the conclusion that the failure of an airline to inform a passenger holding a confirmed reservation of its overbooking practices was motivated by deceit, nor was a finding of a desire to deprive a passenger of information supported by the evidence either since the practice of overbooking was carried on openly and, therefore, the airline was entitled to believe that a much-travelled passenger (one who had been bumped twice in the previous six months) would know of the practice. Mr. Nader could not be said to have relied on the confirmed reservation as a guarantee of passage, in view of his then recent experiences.

An award of punitive damages against the airline for its overbooking practices could not stand because the airline was conforming to practices that the Civil Aeronautics Board had found to be in the public interest.[42]

Due to the fact that the element of reliance must be present for an action for fraudulent misrepresentation to be successful but that the overbooking practices of airlines are well publicized, it appears that the action for fraudulent misrepresentation may no longer be a viable option for a bumped passenger.

Since this paper is concerned with instances of discrimination, the actions for breach of contract and fraudulent misrepresentation will have to be put to one side, and the discriminating action alone will be analysed.

The burden of proof

In differentiating the discriminatory action from the breach of contract action, the Mortimer Court came up with a useful definition of exactly what constitutes the basis for a statutory action for discrimination based on s. 404 (b) of the Federal Aviation Act of 1958.

> "This remedy is not equivalent to or an expansion of denied boarding compensation under the regulations. It provides redress for the injury caused by discrimination, disadvantage or undue preference whether racially, religiously or economically

> motivated or that results from the carrier's disregard for its own priority rules or from the fact that those rules themselves are in themselves discriminatory . . . The denied boarding compensation . . . was not intended to be the exclusive remedy."[43]

Thus a violation of the carrier's boarding priority rules will in itself serve as the basis for liability, as will adherence to the rules, if the court finds that the rules themselves were unjust or unfair. However, there are other grounds for such an action which are quite independent of the boarding rules, i.e. any instance of unjust discrimination being shown against a particular passenger: as long as the discrimination is demonstrated to be unjust, its nature is irrelevant.

Discharging the burden of proof, is of course, a prerequisite for a successful action. In the case of unjust discrimination encountered in a bumping incident, the burden of proof has been virtually reversed.

In order to constitute a prima facie case, actual discrimination or preference must be shown,[44] or to put it another way, it must be alleged and proven that the plaintiff's right to fair, equal and non-discriminatory treatment had been violated.[45] One would be forgiven for thinking that when it came to actually proving violation of a carrier's boarding rules, the plaintiff faces an uphill struggle. Boarding priorities used to be based, in the vast majority of cases,[46]

on the time that the reservation was confirmed. This system has been transformed into an across the board "first come, first served" priority scheme based on the time of check-in.[47] Nevertheless, the carrier is still the only party who has full knowledge of the situation. The carrier has the computer record of reservation confirmation times and check-in times. A plaintiff has to commence an action and subpoena the records before he is placed on an equal footing as regards essential evidence. In Canada, when the contingency fee system does not prevail, a plaintiff is virtually gambling on an award of punitive damages.[48]

The virtual reversal of the burden of proof was achieved gradually. The cases of Wills v. Trans World Airlines, Inc.[49] and Stough v. North Central Airlines, Inc.[50] indicate that overselling by the airlines per se does not give rise to a statutory action and that bumping which is outwardly discriminatory and preferential may be legitimated by proof that the airline adhered to its established policy, that procedures were applied uniformly to all passengers, and that the policy is reasonable. It was not the Court's job to determine the most appropriate operating procedures.[51]

The tables began to be turned in the plaintiffs favour with the holding in Archibald v. Pan American World Airways, Inc.[52] The Court realised that not only did the passenger have no information concerning the airline's bumping process, the boarding priority

policy "is within the peculiar knowledge of the airline, which is most able to present evidence justifying the selection of one passenger over another. The passenger cannot reasonably be expected to divine at the gate, or discover later, what the airline's policy is and whether it has been obeyed."[53] In view of the preferential position the Court was willing to hold that all the passenger must do is "prove that he possessed a confirmed reservation and a resultant right to a seat, and that this priority was not honoured. This suffices to establish that a preference or discrimination has occurred."[54] The burden of proof then shifts to the airline to rebut the prima facie case and presumption of discrimination which has been established. "It is not unreasonable then to place upon the airline the burden of proving that the discrimination or preference was reasonable by demonstrating company policy and why, in each particular case, one passenger was chosen over another."[55]

The fact that it is now the airline which faces an uphill task in discharging its burden of proof is well illustrated by the reasoning in the Nader case. The Court simply decided not to believe the carrier's witnesses who testified that the appropriate boarding procedures were actually carried out.

Plaintiff Nader held a confirmed reservation on Allegheny's flight from Washington, D.C. to Hartford, Connecticut. The appropriate priority rule to be applied on this gate check-in flight was as follows:

> "If the oversale is not known until the flight is being boarded, (this applies particularly where gate check-in is used) the last passenger to arrive at the gate is the oversale and is not permitted to board. Selection is automatic. Do not delay the flight seeking a passenger who would be least inconvenienced."[56]

The plaintiff was one of the last arriving passengers, and thus the above rule would appear to lock up game, set and match for the defendant. Not so, said the Court. Allegheny's boarding priority rules required, in addition that its ticket agents board all passengers holding tickets with an "O.K." written in the status column, which signified that the ticket holders had confirmed reservations regardless of what the computer print-out indicated. If the ticket lacked an "O.K." but their confirmed status could be ascertained from the computerised Passenger Name List, then that passenger was also to be boarded.[57] Under no circumstances were agents to remove confirmed reservation passengers who had already been boarded. The plaintiff relied on another section of the manual which required that if the oversale could be determined "in advance", the agent should bump the passengers who would be least inconvenienced. The Appeal Court concluded that the trial judge's findings did not resolve the question of whether Allegheny's manual was sufficiently clear to establish its priority rules within the meaning of 14 C.F.R. s. 250.3.[58] This is an understatement since all oversales are known in advance of the aircraft's actual departure.

The plaintiff's reservation was undeniably dishonoured and thus he had established a prima facie statutory violation. The burden of proving the priority rules and compliance therewith shifted to the carrier.[59] The Court chose not to believe the defendant's witnesses. "Neither creditable nor trustworthy"[60] was the verdict on the Allegheny gate agent's testimony. The agent could not have inspected the status of all the tickets for the flight in the short time available and under the pressures existing at the time.[61] Two internal Allegheny memoranda were produced which indicated that at least two persons were boarded who held a lower priority than the plaintiff: one was wait-listed; the other had been previously cancelled as a "no-show". The defendant pleaded these passengers' tickets had an "O.K." status due to a ticketing error - the court was not persuaded. "Accordingly the Court finds that the defendant Allegheny has failed to sustain its burden of proving that it complied with its boarding priority rules."[62]

Based on the judicial reasoning in the above case, it appears that no matter how flexible the boarding priority rules, one proven violation - such as a wait-listed passenger being accorded priority - and the Court will not listen to exculpatory evidence.[63]

The case law

There seems to be no consistent theme to, or development in, the decisions concerning discriminatory bumping. The cases abound with

accusations of humiliation and outrage but on the issue of whether or not punitive damages should be awarded, there are no concrete precedents, since each case is apparently decided on the particular facts and circumstances. The cases in which damages have been discussed have been analysed chronologically for want of a unifying criteria.

The precedents for denied boarding actions are to be found in the railway cases dealing with wrongful ejection, and recent airline judjments[64] have cited extensively from Cowen v. Winters[65] which was decided in 1899. The case concerned an action taken against a railroad company[66] for the wrongful ejection, from one of its trains, of a passenger who held a valid ticket, owing to the selling of a number of bogus tickets by one of the railroad's authorised agents. The Court found that the passenger was subjected to "humiliation".[67] The defendant railroad company was found to have acted with a "high-handed determination . . . without the least consideration for the rights of the public."[68] The contemptuous disregard for the rights of innocent holders of such tickets constituted "that degree of reckless disregard for public and contractual obligations as to justify the imposition of exemplary damages by way of punishment."[69] These findings seem to provide the basis for contemporary denied boarding actions and phrases such as "the entire want of care"[70] and "the reckless indifference to the rights of others is equivalent to an intentional violation of them"[71] are echoed in the reasons for judgment in modern aviation cases.

The case of Wills v. Trans World Airlines, Inc.[72] was decided in 1961, before the promulgation of the C.A.B. rules with respect to denied boarding.[73] The plaintiff held a confirmed reserved seat aboard a T.W.A. connecting flight from St. Louis, Missouri to Los Angeles, California, but was bumped, along with another tourist class passenger, in favour of two first class passengers who were accommodated by being placed in the tourist section of the aircraft. The defendant's practice with respect to oversold flights had been to solicit volunteers, to remove those passengers who would be least inconvenienced, to deny boarding to local passengers, i.e. those boarding for the first time and without continuing reservations, or to those whose prior reservations were in doubt due to lack of reconfirmation. The plaintiff, however, had reconfirmed his connecting flight in compliance with the defendant's Passenger Rules Tariff.

The airline, the Court concluded, took the plaintiff's seat "arbitrarily and capriciously"[74] and had thus unjustly and unreasonably discriminated against him. Nevertheless, the Court took pains to point out that all airline passengers need not be treated precisely alike, perhaps to discourage frivolous litigation if one passenger received an extra drink or an extra pillow. The plaintiff was entitled to compensatory damages - these amounted to the princely sum of $1.54, the cost of a telephone call to his wife in Los Angeles to explain his delayed arrival.[75] Mr. Wills' hurt feelings were incapable of being gauged and, therefore, not susceptible of compensation.

> "While actual damages for violation of a person's right to travel as a passenger aboard an interstate air carrier may include compensation for plain and blatant instances of humiliation and outrage suffered . . . when as here the extent and nature of injury to one's feelings by public outrage cannot be established, an award of actual damages for such injury should not be granted."[76]

It would have been a sad day if, after winning his case, the plaintiff went home, with a mere $1.54 in his hand, but the Wills case has achieved prominence because of the Court's award of punitive damages against the defendant airline. The violation of the plaintiff's rights as a passenger and the need to protect the rights of every air passenger from future encroachment warranted the assessment of damages over and above the passenger's actual injury.[77] Following an analysis of oversales for, and removals from, T.W.A.'s domestic flights during the latter half of 1959, the Court held that these were strong indications that the defendant wantonly precipitated the very circumstances which necessitated discriminatory removal of the excess confirmed passengers from its flights.[78] Exemplary damages were awarded in the amount of $5,000,[79] deemed necessary in view of the prior occurring violations of the Act.

The next case which merits analysis was decided in 1972, five years after the C.A.B.'s overselling rules became effective. In Archibald v. Pan American World Airways, Inc.,[80] the husband and wife plaintiffs held tickets and confirmed reservations on a flight

from Tokyo to Guam. In spite of checking in nearly an hour early and receiving seat assignments they were barred from boarding, whereas three passengers were permitted to board who had made their reservations after Mr. and Mrs. Archibald made theirs. On remand from the reversal of a directed verdict for the airline, the plaintiffs recovered punitive damages of $10,000.[81] Unfortunately there is no reported discussion on the judicial reasoning behind the award, but following on the Wills award, the amount on a per plaintiff basis, would not appear to be out of line.

The case of Kaplan et al. v. Lufthansa German Airlines[82] is a decision in which the Court appears to have balked at awarding punitive damages but went about as far as it could in awarding compensatory damages. Dr. and Mrs. Kaplan held confirmed first class tickets for a flight from Lima, Peru to New York City, New York. When they arrived at Lufthansa's departure desk there was only one first class seat remaining. Since the plaintiffs were husband and wife and because of Mrs. Kaplan's history of air sickness, the plaintiffs declined to be separated and did not take the flight. As in the Archibald case discussed above, the evidence revealed that three people had been permitted to board who had received confirmed reservations after the plaintiffs had made theirs, in violation of the airline's policy to give priority to passengers in the order in which the reservations were confirmed.

In this instance, unlike the Wills decision, the Court decided that there was some objective measure of the plaintiff's hurt feelings and sense of outrage. When Dr. Kaplan "discussed" the failure to honour the reservations with the defendant's agent Mr. Geiser, the latter "addressed Dr. Kaplan in a hostile manner, using offensive language, causing great embarrassment, humiliation, acute emotional and psychological distress to both Dr. and Mrs. Kaplan."[83] In addition, the plaintiffs experienced anxiety in regard to their predicament of being in Lima without hotel accommodations. There were, however, other consequences of the plaintiffs' treatment. As a result of the hostile and offensive language and manner of Mr. Geiser, together with the uncertainty of travel arrangements, Dr. Kaplan experienced headaches which only abated four days later after receiving a painful injection. Not only did the offensive language cause headaches, but it also led to the reactivation of Dr. Kaplan's recently quiescent ulcer which required two weeks treatment.[84]

This physical pain and suffering was worth $1,500. Moreover, the embarrassment, humiliation, acute emotional and psychological distress was, unlike the Wills case, quantifiable at $1,000 for each of the plaintiffs. But there was more to come. In addition to the $10.00 spent on taxi-cab fares looking for a hotel and the $32.00 hotel charge, Dr. Kaplan, an orthopaedic surgeon, was held to be entitled to recover the fees he lost due to missing a day's work. By being forced to cancel scheduled appointments, the plaintiff suffered a loss of billing of $1,030. which he would never be able to recover.[85]

It is hard to believe that orthopaedic surgeons are incapable of working overtime and that those lost appointments could not have been rescheduled.

The Court appears to have gone overboard in its award of compensatory damages - perhaps because, unlike the Wills case again, the plaintiffs did not establish a course of tortious conduct which could be characterised as "wanton, oppressive and malicious,"[86] and thus punitive damages could not be awarded. One cannot help but suspect that the fact that it was a foreign airline and that the offensive agent was a Peruvian citizen had some bearing on the lengths the Court was prepared to go to in order to compensate the plaintiffs.

In Smith v. Piedmont Aviation, Inc.,[87] the plaintiff was to be a participant in the wedding of a close friend and was required to attend the wedding rehearsal the day before. He was booked on a Piedmont flight from Atlanta, Georgia to Bluefield, Virginia. The flight was oversold and had been boarded on a first come, first served basis in violation of Piedmont's boarding priority rules which stated that oversold flights were to be boarded according to the time and date of the booking of their reservation.

Mr. Smith was bumped, but his luggage made it onto the flight. Unfortunately for the plaintiff he had packed all his money in his bags. A Piedmont supervisor, Mr. Griffitts, refused to remove his

luggage from the aircraft. Upon requesting a private flight, the plaintiff was treated rudely and was insulted by Mr. Griffitts.[88] He suffered a great deal of emotional distress and humiliation, and added to the rude and discourteous treatment by Piedmont's employees was the conscious disregard for his rights that Piedmont exhibited by its conduct.[89] The beleaguered Mr. Smith stood his ground and did not accept the proferred denied boarding compensation cheque and partial refund cheque even though all his money was by that time on its way to Bluefield, Virginia. He managed to rent an automobile with a credit card. Alas, he arrived too late for the wedding rehearsal and, worse still, he missed a part of the rehearsal dinner that followed.

According to the District Court, non-attendance at wedding rehearsal dinners obviously merits the same attention as the cancellation of patients' appointments, for Mr. Smith was awarded not only compensatory damages comprising $51.80 actual damages for the cost of renting an automobile plus $1,000 for emotional distress and humiliation but also punitive damages of $1,500 were awarded against Piedmont on account of its knowing and continuing violation of its boarding priority rules.

The Court of Appeal, however, modified the judgment.[90] The testimony had revealed that when Mr. Smith had requested three times that Piedmont arrange a charter flight for him to take him to his

destination, the Piedmont Agent had said: "I don't know when you're going to get it through your thick head we're not going to rent any airplanes or charter you a flight."[91] This statement was found to be rude and insulting by the District Court, but the Appeal Court found that the "thick head" comments would only support an award of nominal damages and they had already been adequately covered on the compensatory side. Although the airlines had failed to follow their priority rules, overall the Court found that they were "unable to distil evil motive, actual malice, deliberate violence or oppression from this episode"[92] and reversed the judgment for punitive damages. It is interesting to note that in this case, as in the Kaplan case, the Court came up with an objective measure of the plaintiff's hurt feelings and sense of outrage, which was used to compensate the plaintiff, rather than revert to the use of punitive damages.

On remand, the District of Columbia District Court in the Nader v. Allegheny Airlines, Inc.[93] case reaffirmed in 1978[94] the main part of the judgment they had handed down in 1973.[95] Ralph Nader had agreed to address a meeting of the Connecticut Citizen Action Group on April 28, 1972. He held a confirmed reservation on Allegheny's flight from Washington, D.C. to Hartford, Connecticut. He was bumped from the flight and as a result of his non-appearance the size of the meeting (and also the number of potential contributors) diminished considerably. The plaintiff was awarded $10

compensatory damages[96] on account of Allegheny's violation of section 404 (b) of the Federal Aviation Act. An award of $15,000 in punitive damages was also made, not on the basis of discrimination but based on the defendant's fraudulent misrepresentation to the plaintiff that he had a confirmed reservation. On Appeal, the D.C. Circuit overturned the finding of fraudulent misrepresentation, finding that it was not supported by the evidence. The Court found that plaintiff Nader was "an extraordinarily knowledgeable passenger, an able lawyer and a famous and distinguised advocate of consumer rights, including the rights of airline passengers."[97] Somehow one gets the feeling that the phrase "smart Alec" was not far from Robb C.J.'s mind. In its wisdom, the Court of Appeal reversed not only this plaintiff's award of $15,000.00 punitive damages but also his award of $10.00 compensatory damages. Sic transit gloria mundi.

At the time of writing, it is unclear whether the case will be returned to the United States Supreme Court. It should be remembered that the Supreme Court merely adjudicated on a procedural matter, namely, whether, under the doctrine of primary jurisdiction, the C.A.B. ought to be allowed to determine whether failure to disclose the practice of overbooking was deceptive within the meaning of section 411 of the Federal Aviation Act of 1958, before the issue of the plaintiff's common law claim for fraudulent misrepresentation was pursued. The Supreme Court reversed the order of the Appeal Court which had granted a stay to

give the C.A.B. the opportunity to act.[98]

Although the Court has not passed judgment on the substance of the case, in view of the two other Appeal Court decisions on overbooking which are discussed below, it would appear unlikely that the D.C. Circuit's conclusion will be overruled.

At first instance, the Connecticut Citizen Action Group (C.C.A.G.) had also been awarded punitive damages for their reliance on Allegheny's fraudulent misrepresentation that plaintiff Nader had a confirmed reservation despite the fact that the C.C.A.G. was not a direct party to the transaction in issue.[99] On appeal, the Court of Appeals reversed this holding on the ground that the plaintiff C.C.A.G. was too remote from the transaction to be owed a duty by the defendant; in the absence of such a duty, a plaintiff may not recover even if all the elements of the common law tort of fraudulent misrepresentation had been proved.[100]

On remand, the C.C.A.G. proved that their director had telephoned Allegheny to confirm that Mr. Nader had a reservation on the flight but evidence was not produced that the director had identified himself to Allegheny, his organization or his reason for calling. Thus Allegheny had no special reason to know of the C.C.A.G's reliance, or even of its existence.[101] This dismissal of the C.C.A.G.'s action was obviously warranted, otherwise third parties such as the orthopaedic patients in the Kaplan[102] case or the wedding party in the Smith[103] case might also have been in a position to sue,[104] and what

started out as a sound business practice, might end up as an invitation to financial disaster.

Perhaps it is difficult to sympathise with the plaintiffs in these discrimination cases. Wills,[105] Mortimer[106] and his co-plaintiff Hoffman, and Nader[107] are lawyers the latter also being a self-styled consumer advocate. Kaplan[108] is an orthopaedic surgeon; Fitzgerald is the so-called First Lady of Jazz. All can well afford to come to court, win or lose. But what of the everyday housewife? It is gratifying to be able to claim for the lost billing of patients but how does a Court assess a homemaker's lost time?

In Karp v. North Central Air Lines, Inc.[109] the plaintiff had purchased two airline tickets from Milwaukee, Wisconsin to Lansing, Michigan, for herself and her two infant children aged twenty-one months and ten months, the latter travelling on her lap. The plaintiff had obtained confirmed reservations for two seats, but when she presented herself for boarding she was told there was only one remaining available seat on the aircraft. Despite the information that the younger child had recently undergone surgery in Milwaukee and needed to return home to Michigan with as little delay as possible, the defendant's agents refused to allow the plaintiff and her children to board. The only concession made was that the plaintiff's baggage containing her child's medication was unloaded which involved recalling the aircraft to the ramp. The oversold flight was scheduled to depart at 5:35 p.m.; the defendants offered an alternative flight at 6:30 p.m. but this involved a change of planes and the

defendant would not guarantee assistance to the plaintiff and her minor children and their baggage which was heartless in the extreme. Another alternative flight was offered at 9:00 p.m. but this was refused because it was too late for the children.

Owing to the proferring of alternative flights and the retrieval of the baggage, the Court could not impute any wanton or evil motive to the agent, however, the airline's instructions to determine priorities in violation of its own priority rules amounted to conduct in wanton disregard of the plaintiff's rights.[110] Compensatory damages were awarded to the tune of $3.00 and punitive damages in the amount of $2,000 were awarded due to the unreasonable discrimination demonstrated against the plaintiff.[111] The inconvenience and hardship suffered by Ms. Karp would appear to have been worth less than that suffered by Ralph Nader. In all probability, a mother with two infant children, one of whom is in poor physical condition, is in a far worse plight than a guest speaker who will not be on time for his speaking engagement. Denying boarding to a woman with two children appears to be the antithesis of the philosophy of denying boarding to those passengers who would be least inconvenienced. It appears that the District Court in the Karp case was parsimonious in its awarding of punitive damages.

On appeal, events took a decided turn for the worse as far as the plaintiff was concerned. The Seventh Circuit (per curiam)

reversed the award of punitive damages and left Mrs. Karp only with her award for actual damages - the princely sum of $3.00 U.S.! The airline had unjustly discriminated against her in violation of its priority rules as set forth in its filed tariff, hence the award of actual damages. But failure to follow priority rules, while constituting a technical violation of the statute's requirements as interpreted by the Board, is not an act aggravated by evil motive, actual malice, deliberate violence or oppression,[112] at least when the unwritten rule that is being followed does not invidiously discriminate against the plaintiff.

The Court also noted, obiter, that the flight was oversold due to negligence on the part of a travel agency due to its failure to inform the airline of the issuance of tickets to an independent party of four. However, since only the defendant airline had violated section 404 (b), the District Court dismissed the third-party complaint against the Marsilje Agency.[113] It would appear that the arguments concerning the fault of the third party travel agent have no bearing whatsoever on the question of whether the airline unjustly discriminated against the plaintiff.

The Appeal Courts in Karp,[114] Nader[115] and Smith[116] are either attempting to create a distinction without difference or they are making policy decisions. When is discrimination aggravated by

evil motive, actual malice, deliberate violence or oppression, or when is it merely discriminatory, [illegible] the context of bumping incidents? The District Court in Nader[117] found that Allegheny "wantonly implemented its policy of '. . . misrepresentation in conscious, deliberate and callous disregard of the effect of its policy on its passengers" and the "mere fact that a fraudulent practice is commonplace in a particular industry in no way deprives the practice of its outrageous character." The Court of Appeals (D.C. Circuit) overturned the finding of fraudulent misrepresentation, but the principle remains that what is wanton and outrageous as regards one plaintiff should also be callous and fraudulent as regards another, or bumping incidents are devoid of malice and reckless disregard for the rights of others. The fact that the Courts are no longer willing to give out Nader-type awards indicates not only their condonation of the practice, but also their satisfaction with the amounts of denied boarding compensation which must be paid and the alternative travel arrangements which must be made, by the airlines on behalf of the bumped passenger.[118] Although it appears that North Central acted callously towards Mrs. Karp and her children, and any airline worth its salt would have deplaned a healthy unaccompanied male (even Mr. Nader, if necessary) using various monetary inducements if an appeal to his chivalry went unheeded, in the United States today accepting the proffered compensation, alternative transportation, apologies, and as many free drinks as possible, might well be the wisest course of action that a bumped passenger can take.[119] Nader-type awards reached their zenith in the Allegheny Airlines, Inc. District Court decision in 1973, nothing like it has been seen since or is likely to be seen again.

THE CANADIAN POSITION

The carriers' tariffs

In Canada, as has been mentioned before, the Canadian Transport Commission does not have specific regulations concerning the overbooking practices of airlines, unlike the C.A.B.'s Economic Regulation 250. Instead the C.T.C. has accepted the filing of tariffs by the carriers, providing for denied boarding compensation to be paid in some situations. The Passenger Rules Tariff filed by Air Canada, CP Air and the regional airlines[120] are very similar, with Air Canada's tariff serving as a model for the others.[121]

A copy of Air Canada's denied boarding compensation rules, applicable from points in Canada to Bermuda, the Bahamas and points in the Caribbean and Europe, between points in Canada and points in the United Kingdom, and from Antigua, the Bahamas, Barbados, Guadeloupe, Haiti and Martinique to points in Canada is included in the appendices. As there is no similar provision to section 404 (b) of the Federal Aviation Act of 1958 in Canada, tariffs such as these are the sole source of rule-making relating to denied boarding. However, as was demonstrated in the Hendler v. Iberia Airlines of Spain[122] case, the tariffs are not necessarily binding on the passenger.[123]

The tariff rules are somewhat similar to the C.A.B. regulations. Compensation is based on 100 per cent the value of the remaining flight coupons to the next stopover, or if none, to the destination,

with maxima and minima which vary according to the country concerned.[124] Acceptance of the denied boarding compensation relieves the carrier from any further liability.[125] The boarding priority rules are clearly spelt out. Volunteers are first sought and if there are insufficient number forthcoming then passengers are denied boarding involuntarily, beginning with the last passenger to arrive at the ticket lift point.[126] A slight bias exists in favour of passengers travelling due to the death or illness of a member of the passenger's family, aged passengers or unaccompanied children.[127] (These categories of unbumpable passengers are discussed more fully below along with their United States' counterparts.)

The case law

The Canadian case law on the subject is very sparse; what there is reflects the contractual nature of bumping and no mention is made of discrimination as such. Two Quebec decisions are noteworthy, if for no other reason than for the extremely small amounts which were awarded as damages.

In Line Aecherli v. Air Canada,[128] the plaintiff and her two minor daughters were bumped from an Air Canada flight from Montreal to Nassau. In this case the three passengers were not denied boarding in the usual sense, since they were ordered to disembark, having

already received boarding passes, duly boarded the aircraft and seated, were awaiting their departure. Not only were all three of them publically humiliated and were forced to incur expenses since their luggage was not returned to them for several days, but also, because this was a "package tour", they lost their holiday. There was no question of them being put on the next flight, the three of them never reached Nassau.

Air Canada had obviously violated its boarding priority rules[129] which deny boarding on a first come, first served basis. However, no other reference was made to the carrier's tariffs and the whole tenor of the decision gives the impression that the Court was marching to a different drummer.[130] The plaintiff was awarded $939, which she had paid to Voyages Europa Travel for the holiday. This had been the package price covering not only the flight but also the hotel accommodation. Thus in this instance, the air carrier had to reimburse more than the value of the flight coupons. When it came to awarding compensation for the plaintiff's loss of face, loss of baggage and loss of holiday, (which, when compared with the facts in the Kaplan[131] and Nader[132] cases, would appear to warrant a substantial award) the Court was not as generous. "Le préjudice réel subi personnellement par la demanderesse est assez difficile à évaluer."[133] Nevertheless, the learned judge concluded that the injury done to the plaintiff was only worth a miserly $200. Missed vacations obviously do not rank alongside missed wedding rehearsal dinners!

The Aecherli case was one which involved a charter flight and is thus not strictly comparable to the incidents involving common carrier, scheduled services. It should also be kept in mind that charter flights are paid for well in advance, so there would appear to be no need to overbook such flights, since no-shows forfeit their fares.

Decary J. obviously felt no need to take into account the trend in jurisprudence which has developed in England in connection with "holiday" cases. As opposed to the long held judicial view that damages cannot be recovered for breach of contract if no real physical inconvenience results but merely "disappointment of mind"[134] or "inconvenience such as annoyance and loss of temper or vexation or for being disappointed in a particular thing which you have set your mind upon,"[135] a line of authority has arisen in recent years which challenges the basic maxim that injured feelings per se do not justify an award of damages. The English courts have been raising the issue of whether, if the circumstances of a particular contract are such that breach by one party could clearly be expected to lead to distress on the part of the other, this should not serve as grounds for compensation.

In Jarvis v. Swan's Tours,[136] Lord Denning M.R. explored this area of damages arising from a contract for a pleasurable purpose, to wit, an invigorating and amusing winter ski holiday at a "House Party

Centre" in Morlialp, Central Switzerland, which was advertised in a Swan's Tours brochure. In August 1969, Mr. Jarvis, relying on the promises made in the brochure, booked a two-week ski vacation covering the Christmas holiday period. Alas! The lively house parties of the first week were very diluted and in the second week the plaintiff found there was no house party at all since he was the only resident of the hotel. The skiing facilities, food and entertainment also all fell far short of what the beguiling brochure had described.

The Ilford County Court found that:

> " During the first week he got a holiday in Switzerland which was to some extent inferior . . . and, as to the second week, he got a holiday which was very largely inferior."[137]

and awarded the luckless Mr. Jarvis a refund of 50% of the tour operator's charge on the basis that the holiday provided was inferior to that warranted and paid for. On appeal, the Court of Appeal increased the award to £ 125 (approximately twice what the plaintiff had paid) reasoning that Mr. Jarvis was entitled to be compensated for his disappointment and distress at the loss of the entertainment and facilities offered.

In reaching this conclusion, Lord Denning pointed out that just as damages could be recovered in tort for nervous shock, so were mental distress and vexation a proper head of claim for breach of a contract whose primary objective was entertainment and enjoyment.[138] While there was no attempt to define exclusively what contracts fell into this category, a contract for a holiday was certainly one in which it was within the contemplation of the parties that inadequate performance could cause distress.

It appears that the Jarvis decision is being seized on to justify awards of damages for various types of injuries to feelings in holiday-related cases. Thus in Webster v. Johnson,[139] the Pakistani plaintiff was refused accommodation by a landlady which as a result spoilt his holiday. In addition to recovering the extra costs incurred in obtaining alternative accommodation at short notice, the plaintiff was awarded £ 25 for hurt feelings. Along the same lines, in Askew v. Intasun North,[140] a disastrous family holiday in Tenerife which resulted from a different hotel than that booked being made available, led to damages of £ 300 being assessed for "assault on feelings".

Lord Denning M.R. and the Court of Appeal have reiterated the theme of the Jarvis judgment in the Jackson v. Horizon Holidays

Ltd.[141] decision. This case also involved a hotel which had been advertised, in a brochure issued by the defendant travel agency, as having all the facilities for an enjoyable holiday in Ceylon. Upon arrival, however, it was found that there was no connecting door between the children's and parents' rooms (which had been specifically requested) and, in any event, the children's room was unusable because of mildew and fungus on the walls; the private bath, shower and lavatory were also dirty; the food was distasteful; and the advertised mini-golf, swimming pool and beauty and hairdressing salons were non-existant.

In an action for breach of contract it was held that the plaintiff was entitled to damages,[142] not only for the value of the holiday and the discomfort, vexation and disappointment which he himself had suffered, but also for the discomfort, vexation and disappointment suffered by his wife and children.

Quebecers it would seem are made of sterner stuff for under the civil law, one cannot claim for solatium doloris in the event of a death,[143] nor injury to feelings on account of a holiday that was not merely "very largely inferior" to the one contracted for, but was, in fact, completely non-existant.[144]

The Kecherli case was cited in the 1979 case of Stephen Hendler v. Iberia Airlines of Spain.[145] The plaintiff had been bumped from a Madrid - Montreal flight due to overbooking practices. No amount of pleading concerning his father's age and serious heart condition would dissuade the defendant and all he encountered was "three hours of unpleasantness." Mr. Hendler was refused the use of the airline's telephone and the defendant airline claimed it was only liable to the plaintiff for a maximum of $50, the amount specified in article XVII 3 (i)[146] of the General Conditions of Carriage prepared by the International Air Transport Association (I.A.T.A), which had been incorporated into Iberia's own conditions of carriage.[147] Hadjis J. reasoned that although delay is a typical risk of air carriage, an airline could not plead the $50 limitation if it refused to receive a passenger who had shown up in due time and the flight was performed on schedule.[148] Moreover, for carriage between Canada and other countries the relevant regulations are not those of I.A.T.A in view of the fact that Canada has adopted her own regulations;[149] there is nothing in the Canadian regulations to indicate that the filing with the Canadian Transport Commission of a statement of limited liability for overbooking binds the passengers who are subsequently denied boarding. The statement regarding the liability caused by delay is nothing more than an offer for settlement of a claim.

Even though the Court cited the award of damages in the Kaplan[150] case, the quantum of damages awarded was $188.50 (an amount equal to

the price of the return portion of the ticket) plus $11.00 for admitted disbursements, plus $10.00 court costs.

It would appear that this was not an instance of deliberate overbooking, since the flight in question was a pre-paid charter flight with travel restricted to the day appearing on the flight coupon, and it was admitted that due to a mistake the plaintiff's name did not appear on the passenger list.[151] If this is so, then denying boarding to Mr. Hendler was purely discriminatory. However, there was to be no compensation for the three hours of unpleasantness he experienced. On the other hand he was awarded more than Air Canada offers its passengers who are denied boarding.

THE UNBUMPABLES

Before leaving this discussion of the discriminatory methods by which airlines have denied boarding to passengers, one should note in passing that the carriers' regulations also stipulate which passengers will be the last to be denied boarding[152] can be viewed as equally unfair. Most airline tariffs include the guideline that the carrier will not deny boarding to those passengers to the extent that any failure to carry them would, in the carrier's opinion, cause a severe hardship. Into this category fall the physically handicapped (and their required attendants), unaccompanied children under twelve years of age, and the aged and the infirm (usually in that order).

To the class of passengers mentioned above are sometimes added passengers travelling for emergency reasons[153] such as death or illness in the passenger's family.[154] Although accompanied children under twelve years of age are normally included in the same category as the accompanying passenger, American Airlines and Aspen Airways specify that accompanied children and the accompanying adults will be among the last to be denied boarding. The mentally handicapped,[155] passengers who have paid the first class fare[156] and travellers who have to take connecting flights[157] (priority being given to international flights) and even connecting ship or inter-city passenger train or bus journeys,[158] are also added by some carriers to this privileged class.[159]

Piedmont Aviation also accords priority to a number of different categories of passenger which the other airlines appear to ignore: aliens travelling without a visa; persons who do not speak or understand English; government and military couriers; U.S. government officials for whom space has been requisitioned; passengers being transported for purposes of deportation; persons who have been denied space on an earlier flight. It seems a little peculiar that people travelling on official business should be specifically included in the class of passengers which will be the last to be bumped, since one of the reasons which render a passenger ineligible for denied boarding compensation is government requisition of space. The last category of passengers, those who have been denied space on an

earlier flight, should, in the author's opinion, be given the same ranking as the sick, the aged and travelling for emergency reasons!

It is interesting to note the fact that many of the airlines[160] actually state that business commitments will not, of themselves, constitute a hardship. It is easy to see why Ralph Nader's plea[161] of a speaking engagement fell on deaf ears.

Not only do the airlines have a list of passengers who will only be bumped as a last resort, they also have a category of high risk travellers. A number of carriers will deny boarding first of all to those passengers who are travelling on discount (such as advance booking and "charter-class") fares.[162] Thus buying a ticket at a cheap rate may not prove to be such a bargain after all. Presumably this policy safeguards the airlines' profits, but if cheap flights are meant to entice the middle income traveller away from his Winnebago, this first-to-be-bumped status will have the opposite effect. The other category of high risk bumpees are travel agency and cargo sales agency personnel travelling at reduced fares.[163]

It would appear that if a passenger is a healthy adult travelling coach class for non-emergency reasons on a reduced fare ticket, that individual stands a much greater chance of getting bumped off an oversold flight than any other passenger. The airlines' priorities can be regarded as humane but they are certainly not fair - a random

selection of the passengers to be deplaned is the only statistically just method. The cases on discriminatory bumping serve to illustrate the point - witness the case of Mrs. Karp and her two infant children one of whom was sick[164] - that the carriers do not even keep to their own biased rules.

ALTERNATIVE APPROACHES

In the report of the Executive Committee of I.A.T.A presented to the twenty-third General Assembly,[165] it was noted that during the past years, more and more governments have required that carriers establish compensation for the passengers who are denied boarding due to overbooking. Given the repercussions of an international character of these plans, I.A.T.A. has attempted to elaborate an international programme for the adoption of such plans. This tentative scheme has not been well received. Various reasons, principally because the airlines will not accept the proposition without the counterpart of a sanction against passengers who do not present themselves or who make multiple reservations.[166] One author considers that a possible solution would be the introduction of the concept of "guaranteed reservation" whereby the passenger would obtain a ticket with the knowledge that failure to be present without prior cancellation would result in the loss of the entire cost of the flight: the airline, on the other hand would not be able to oversell any guaranteed seats.[167]

Some countries already charge a "no-show" fee. In I.A.T.A, traffic conference area 2, a service charge may be made against any passenger who:

a. Fails to appear for departure (provided that the carrier operating the flight does not receive notice of cancellation of the reservation before flight departure)

or

b. Fails to arrive at the airport by the time fixed by the carrier and, consequently, does not use the space reserved

or

c. Appears improperly documented and not ready to travel on the flight for which space has been reserved for him.

The service charge, if made, is collected when the passenger presents his ticket for a refund. The charge will be 25% of the one way fare to the first point where a stopover of more than six hours duration is scheduled, (or if none, to the destination), with a maximum of U.K. £ 29.20 and a minimum of U.K. £ 2.35. (If the full fare is less than £ 2.35, the full fare is charged.).[168]

Eastern Airways have introduced a class of conditional reservations which have proved popular with the public. The holders of these reservations are the first passengers to be bumped if the

flight is oversold and, in return for their comparatively precarious status, should they be denied boarding Eastern will reimburse them the full cost of their flight and will put them on the next flight of Eastern or any other carrier.

It is a condition for receiving denied boarding compensation that the:

> "Passenger holding a ticket for confirmed reserved space presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedure, and being acceptable for transportation under carrier's tariff;"[169]
>
> (Emphasis added.)

Each airline has its own rules governing what is the appropriate time at which a passenger must present himself for boarding. This should not be confused, however, with the check-in time, the latter being usually only a recommended period to facilitate baggage handling and to allow time for security formalities.[170] The "passenger acceptance deadlines" are not particularly onerous; Air Canada, for example, insists that in order to be eligible for denied boarding compensation passengers must present themselves at the boarding point five minutes before scheduled departure time for flights in Canada or the U.S.A. and ten minutes for all other flights. Nevertheless, those of us who tend to be tardy will not only be selected for bumping but may well be disqualified from receiving compensation. Punctuality, as with virtue, will be its own reward.

CONCLUSION AND RECOMMENDATIONS

Overbooking is a sound commercial practice which is here to stay. Denied boarding compensation has usurped the role that punitive damages or compensation for mental distress and vexation might have played. Overbooking has become institutionalised; it has become both acceptable and respectable. Unfortunately, it sometimes produces highly undesirable results, such as those in the Karp[171] case.

There have been some limited attempts at mitigating the impact of the practice which is all the more harsh because, usually, it is completely unexpected; the basic problem, however, remains.

The cases which have been litigated in the last decade have achieved two things. Firstly, they have publicised the practice. Passengers can now protect themselves by making double or even triple bookings but this engenders a vicious circle for multiple bookings lead to a higher percentage of "no-shows" which in turn will lead to a higher ratio of overbookings to available seats. Secondly, the airlines have been virtually forced to abandon the priority system based on the time the reservations were made (which only the airline computer was aware of) to a more "public" first come - first served, basis. Thus, the new boarding priority rules discriminate against latecomers.

The dilemma presented by the practice of overbooking does not appear to be insoluble, since one section of the airline industry has already tackled the problem of full capacity. Charter flights,

have to be booked in advance and paid in full shortly after the reservation is made. Discount fare tickets on scheduled flights ("charter class" fares) are available for passengers who are willing to book them well in advance and pay for them shortly after making the booking, often within seven days. These tickets cannot be used on any flight other than the one shown on the tickets, and since the pre-booking period is frequently lengthy, the possibility looms large of some event, such as sickness or injury, occurring which will prevent the ticket holders taking that particular flight. The insurance companies[172] have seized upon the opportunity to fulfil a need by offering to reimburse these charter passengers the cost of their tickets if they miss their flight, for a premium of approximately one per cent of the fare.[173]

At the present time, sickness, injury or a death in the family are the only acceptable reasons to justify reimbursement by the insurance company. However a premium must exist which would allow cancellation for reasons other than medical emergencies and acts of God. With such a scheme of insurance in place, tickets on scheduled services would then have to be paid for when the reservation is made (the widespread ownership of credit cards would facilitate telephone bookings), and the purchase price would be non-refundable. The corollary to this plan is that the airlines would not be permitted, by law,[174] to overbook, especially in view

of the fact that the raison d'être of overbooking, i.e. the existence of "no-shows", will have been removed since all reservations will have been paid for in full.

The incentive for passengers to make multiple bookings to hedge against the risk of being bumped will also have disappeared[175] and the vicious circle of multiple booking -- no-show -- overbooking will have been broken. The airlines' public relations problem could be converted into a profitable venture for the insurance companies.

FOOTNOTES

1. The two terms are used interchangeably. The number of accepted reservations is determined by a booking curve which is based on the historical correlation between the number of reservations made and the actual number of ticket holders who show up for a particular flight. Thus overbooking is a deliberate attempt to combat "no-shows", whilst overselling is the unexpected result of an erroneous booking curve prediction or accidental failure to keep check of the actual inventory of available seats, and is not deliberately planned. On attempts to distinguish the terms see also S.L. Tice, Overbooking of Airline Reservations in view of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box, 43 J.A.L.C. (1977), p. 1 at p. 5.

2. 14 C.F.R. 250.1 (1979)

3. The number of no-shows per flight varied from 21.2 per cent in December 1972 to 24.7 per cent in December 1973 according to a survey reported in C.A.B. Initial Decision, Emergency Reservation Practices Investigation, June 10, 1974, Docket 26,253, Appendix B, p. 1. (39 F.R. 823 (1974)). On the other side of the coin, in fiscal 1977, the number of passengers denied confirmed space due to oversales on U.S. carriers was approximately 130,000 for domestic operations (a ratio of 6.6 per 10,000 enplanements) and 12,000 for international flights (a ratio of 7.8 per 10,000 enplanements which was an increase from the 7.4 ratio recorded in the previous year). C.A.B. E.R. - 1050 (43 F.R. 24,277 (1978)) Amendment 9, p. 2, footnote 5 and p.5, footnote 11. In addition, an estimated 15,000 passengers were denied boarding on U.S. bound flights of foreign carriers, C.A.B. E.R. 1090, Amendment 14, p.2. In 1979, 266,345 passengers or 9.1 per 10,000 enplaned, were bumped either involuntarily or voluntarily from the flights of U.S. trunk and local service carriers. See infra footnote 29.

4. Comment, Federal Preemption of State Law: The Example of Overbooking in the Airline Industry, 74 Michigan Law Review. (1977), p. 1200 at p. 1201.

5. "The successful growth and development of air transportation has been aided significantly by the flexibility of the industry's reservation practices and procedures which made airline services easily available to the public. The airline passenger has substantial freedom of choice to make reservations at carriers' offices or through agents and to cancel them by telephone or in person. Also should a ticketed passenger have a change of plans, he is free in most situations to use his ticket on flights of other carriers without endorsement." C.A.B. Initial Decision, cited supra footnote 3, pp. 8-9.

6. The fact that the C.A.B. has promulgated rules governing denied boarding, which includes the amounts to be paid as denied boarding compensation, is indicative of their condonation. For an administrative overview, see: G. S. Sherman, C.A.B. Regulation of Airline Reservation Oversales: An Analysis of Economic Regulation 1050, 44 J.A.L.C. (1978), p. 773.

7. Stephen Hendler v. Iberia Airlines of Spain. An unreported judgment of the Small Claims Division of the Quebec Provincial Court (Hadjis J.), September 20, 1979.

8. Archibald v. Pan American World Airways, Inc. 460 F. 2d. 14; 1972 U.S. Av. R. 655 (9th Cir. 1972). (Choy, C.J.).

9. British Airways Board v. Taylor (1975) 3 All E.R. 307 (Q.B.); aff'd. on other grounds (1976) 1 All E.R. 65 (H. of L.).

10. 14 C.F.R. 250 was issued as E.R.-503; 32 F.R. 11939 (1967) and became effective on October 17, 1967. Part 250 - Oversales has been subsequently amended by the following regulations which are still in force:

    E.R. - 588; 34 F.R. 14281 (1969), in force October 10, 1969.
    E.R. - 880; 39 F.R. 38087 (1974), in force December 28, 1974.
    E.R. - 897; 40 F.R. 4410 (1975), in force January 27, 1975. [Correction: 40 F.R. 6347 (1975)],
    E.R. - 1050; 43 F.R. 24277 (1978), in force September 3, 1978.
    E.R. - 1078; 43 F.R. 50164 (1978), in force January 18, 1979.
    E.R. - 1086; 43 F.R. 59829 (1978), in force January 8, 1979.
    E.R. - 1090; 44 F.R. 2165 (1979), in force February 5, 1979.

11. 14 C.F.R. 250.3 Boarding priority rules

    "(a) Every carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight in the event that an insufficient number of volunteers come forward. Such rules and criteria shall reflect the obligations of the carrier set forth in ss. 250.2a [Policy regarding denied boarding] and 250.2b [Carriers to request volunteers for denied boarding] to minimize involuntary denied boarding and to request volunteers, and shall be written in such manner as to be understandable and meaningful to the average passenger. Such rules and criteria shall not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

12. The rules apply to all carriers subject to regulation by the C.A.B. (14 C.F.R. 250.2). The boarding priority rules must be incorporated into the carriers' tariffs and filed with the C.A.B. [Ibid. ss. 250.3(b),(c)] . See also supra footnote 11.

It appears that the C.A.B. also has jurisdiction to regulate the bumping practices of foreign airlines at foreign air terminals involving airline tickets purchased or confirmed within the U.S.A. C.A.B. v. Deutsche Lufthansa Atkiengesellschaft (D.D.C. 1978); aff'd. 591 F. 2d. 951; 1979 U.S. Av. R. 327 (3d. Cir. 1979)(per curiam). For C.A.B. Economic Regulations regarding foreign carriers, see the following amendments to C.F.R. part 250: E.R. - 880 amendment 6, 39 F.R. 38087; E.R. - 890 amendment 7, 39 F.R. 44197; E.R. - 897 amendment 8, 40 F.R. 4410, correction: 40 F.R. 6347; E.R. - 1078 amendment 11, 43 F.R. 50164; E.R. - 1084 amendment 12, 43 F.R. 57243; E.R. - 1090 amendment 14, 44 F.R. 2165.

13. 14 C.F.R. 250.4

14. A carrier's tariff is meant to be available for public inspection at all airline ticket counters.

15. Since the tariffs provide compensation for bumped passengers, there is ample authority for the contention that the public is on notice as to the practice of bumping thus satisfactorily discharging the airlines' duty to the public. See P.B. Meister, Discriminatory Bumping, 40 J.A.L.C. (1977), p. 533 at p. 542. For example, the case of Wilhelmy v. North East Airlines, Inc. 86 F. Supp. 565 (W.D. Wash. 1949)(Bowen C.J) stands for the proposition that the passenger is on notice of the contents of the airline companies' tariffs. However the holding of Bernard v. U.S. Aircoach et al 117 F. Supp. 134 (S.D. Cal. 1953) (Tolin D.J.) maintains that the tariff must be based on a statutory requirement; it cannot constitute a hidden trap.

16. 365 F. Supp. 128; 12 Avi. 18,146 (D.D.C. 1973); rev'd. 512 F. 2d. 527; 13 Avi. 17,750; 167 U.S. App. D.C. 350 (D.C. Cir. 1975); rev'd. and rem'd. on other grounds 426 U.S. 290; 96 S. Ct. 1,978, 48 L. Ed. 2d. 643; 14 Avi. 17,148 (1976); on rem'd. 445 F. Supp. 168; 14 Avi. 18,312 (D.D.C. 1978) (Richey D.J.); rev'd. 626 F. 2d. 1,031; 15 Avi. 18,179 (D.C. Cir. 1980) (Robb C.J.).

17. See C.A.B. Re-examination of Board Policies Concerning Deliberate Overbooking and Oversales. The rule was originally issued as 14 C.F.R. 221.177 (1977); E.R. - 987, Amendment 32 to 221.177; 42 F.R. 12,420 (1977). As of September 3, 1978 it has become 14 C.F.R. 250.11 (1979).

18. The District Court found that the information concerning overbooking was insufficiently disseminated by the filing of tariffs and that the practice itself was actively concealed, 365 F. Supp. 128 (D.C. 1973).

19. In Canada, there is no requirement for a notice of this kind to be posted, but for tickets sold on flights to the United States,

the notice appears on the ticket folder.

20. 132 F. Supp. 798 (S.D.N.Y. 1955); rev'd. and rem'd. 229 F. Supp. 499; 1956 U.S. Av. R. 85 (2nd. Cir. 1956) (Frank C.J.).

21. The Civil Aeronautics Act of 1938, 52 stat. 933, s. 404 (b); 49 U.S.C.A., s. 484 (b). See supra the chapter on the airline as a common carrier for the text of s. 404 (b) of the present Federal Aviation Act of 1958.

22. Fitzgerald cited supra footnote 20, at p. 501.

23. Idem. The Court was quoting from Reitmaster v. Reitmaster 162 F. 2d. 691 (2d. Cir. 1947) (Hand C.J.) at 694.

At least two authors (S.M. Speiser and C.F. Kraus, Aviation Tort Law, Rochester N.Y., Lawyers Co-operation Publishing Co., 1978) appear to consider that the Fitzgerald case is confined to the holding that a private remedy under s. 404 (b) of the Federal Aviation Act is only implied if the air carrier has engaged in racial discrimination against an actual or potential passenger. This does not appear to be the intention of the Second Circuit in Fitzgerald, and the two authors cited supra admit that even if s. 404 (b) does not meet the requirements, laid down by the United States Supreme Court in Cort v. Ash (a non-aviation case) for the existence of a private remedy based on a Federal statute, the Courts have implied that a private right of action exists for a variety of acts by the carrier (p. 454). See also on this point Valentine v. Eastern Airlines, Inc. 365 A. 2d. 475; 144 N.J. Super. 305 (1976) (per curiam) in which there is dicta to the effect that s. 404 (b) provides redress for injury caused by discrimination, disadvantage, or undue preference, whether racially, religiously or economically motivated.

In Cort v. Ash (E.D. Pa. 1973); rev'd. 496 F. 2d. 416 (3d. Cir. 1974); rev'd. 422 U.S. 66; 95 S. Ct. 2080; 45 L. Ed. 2d. 26 (1975) (Brennan J. for a unanimous court); for prior proceedings see 350 F. Supp. 227 (E.D. Pa. 1972) off'd. 471 (F. 2d. 811 (3d Cir. 1973), the Supreme Court laid down four tests to be considered when assessing the existence of a private remedy. First, is the plaintiff one of the class for whose especial benefit the statute was enacted; that is, does the statute create a federal right in favour of the plaintiff.

Second, is there any indication of legislative intent, explicit or implicit either to create such a remedy or to deny one. Third is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff. Finally is the cause of action one 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. 422 U.S. 66 at 78.

Air travellers are clearly covered by the first Cort test, for they are members of a class that the section was designed to protect. Whether or not the other three Cort tests can be applied in such an affirmative manner is open to question. (See Speiser and Kraus cited supra pp. 452 - 455.) Nevertheless, in such cases as Polansky v. Trans World Airlines, Inc. (N.J.D.C. 1974); aff'd. 523 F. 2d. 332; 13 Avi. 17,947; 1975 U.S. Av. R. 323 (3d. Cir.) (Hunter C.J.) and Wills v. Trans World Airlines, Inc. 200 F. Supp. 360; 7 Avi. 17,903; 1961 U.S. Av. R. 387 (S.D. Cal. 1961) (Mathes D.J.), plaintiffs, who based their claims on s. 404 (b), were found to be members of the proper class and entitled to pursue a private remedy. (The latter case is discussed more fully later in this section of the study.)

A private remedy does not exist, however, for all alleged violations of the Federal Aviation Act, witness the fate of the plaintiffs' claim in Wolf v. Trans World Airlines, Inc. and Flying Mercury, Inc. 544 F. 2d. 134 (3d. Cir. 1976) (Hunter C.J.) cert. den'd. 430 U.S. 915; 97 S. Ct. 1327; 51 L. Ed. 2d. 593 (1977), which involved an action based on s. 403 (b) of the Act.

24. The other requirements that a passenger must fulfil are that they must present themselves at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff. 14 C.F.R. 250.6 (a).

25. The written explanation of denied boarding compensation with which carriers are required to furnish passengers ends with the statement: However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner." One wonders what "some other manner" refers to. Judging from the reported cases, it appears to come down to threatening to perpetrate a physical assault on the airline's passenger agent.

26. 302 F. Supp. 276 (N.D. Ill. 1969). (Napoli D.J.).

27. Ibid. at p. 281.

28. 14 C.F.R. 250.4 (1979). See also Roman v. Delta Air Lines Inc. 441 F. Supp. 1160; 15 Avi. 17,147 (N.D. Ill. 1977); (Leighton D.J.). According to C.A.B. E.R. - 1175 (amendment No. 15 to Part 250, effective May 7, 1980), it is not longer mandatory that the denied boarding compensation draft includes a statement on the back to the effect that if a passenger signs the draft and cashes it within thirty days, the airline is released from all further liability that might result from the bumping. For the former position with regard to acceptance of alternative transportation, see Christensen v. Northwest Airlines, Inc. 455 F. Supp. 492 (D. Haw. 1978); aff'd. 15 Avi. 18,536 (9th Cir. 1980) (per curiam), Rousseff v. Western Airlines, Inc. 13 Avi. 18,391 (C.D. Cal. 1976) (Hauk D.J.) and Wasserman v. Trans World Airlines, Inc. 15 Avi. 18,309 (W.D. Miss. 1980) (Oliver C.J.).

29. In Canada, the amount of denied boarding compensation is equal to 100 per cent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover, or if none, to their destination with a maximum payment of $200.00 and a minimum of $50.00. If the passenger is denied boarding in the United Kingdom the maximum and minimum limits are £ 100 and £ 10 respectively. Air Canada, International Passenger Rules Tariff, No. PR-1, effective July 1st, 1980, p. 48. For a complete list of how much denied boarding compensation is payable and in what circumstances, see Air Canada Publication No. 303, Arranging Service for Inconvenienced Passengers, c. 3, pp. 14 - 19 which is included in the appendices. In the United States, denied boarding compensation is paid at the rate of 200 per cent of the values of the remaining flight coupons up to the passenger's next stopover, or if none, to his destination, with a $400 maximum and a $75 minimum. If the carrier arranges for comparable alternative transportation, then the compensation is reduced to one-half the amount described above with a maximum and minimum limit of $200 and $37.50 respectively. 14 C.F.R. 250.5 (1979). The regulations are in substitution for Article XVIII (3) (i) of the I.A.T.A. General Conditions of Carriage. In the United States, in 1979, 155,108 passengers were bumped involuntarily from trunk and local service carriers, and 111,620 of them were eligible for compensation, see supra footnote 3. The breakdown of denied boarding compensation payments was as follows:

Denied Boarding Compensation
Paid by U.S. Carriers 1979

TRUNKS

Airline		No. of Psgrs. Denied Boarding Involuntarily	No. of Psgrs. Receiving Compensation	No. of Psgrs. Volunteering For Bumping	Compensation Paid to: Psgrs. Receiving Alternate Transportation	Psgrs. Not Receiving Alternate Transportation	Psgrs. Volunteering For Denied Boarding
American							
Domestic		20,134	7,329	36,148	$ 446,785	$ 1,119,188	$ 4,996,157
Int'l.		1,509	579	2,000	49,406	67,241	357,109
	Total	21,643	7,908	38,148	496,191	1,186,429	5,353,266
Braniff Int'l.							
Domestic		12,327	11,398	5,588	230,507	1,719,953	751,264
Int'l.		3,961	2,670	187	73,710	676,036	30,371
	Total	16,288	14,068	5,775	304,217	2,395,989	781,635
Continental							
Domestic		9,837	4,728	3,693	771,001	58,166	351,459
Int'l.		41	39	107	5,076	504	10,018
	Total	9,878	4,767	3,800	776,077	58,670	361,477
Delta							
Domestic		13,258	12,415	5,608	2,033,108	199,716	508,614
Int'l.		1,068	1,063	78	147,781	8,592	5,960
	Total	14,326	13,478	5,686	2,180,889	208,308	514,574

Denied Boarding Compensation
Paid by U.S. Carriers - 1979 continued

TRUNKS cont'd Airline	No. of Psgrs. Denied Boarding Involuntarily	No. of Psgrs. Receiving Compensation	No. of Psgrs. Volunteering For Bumping	Compensation Paid to: Psgrs. Receiving Alternate Transportation	Psgrs. Not Receiving Alternate Transportation	Psgrs. Volunteering For Denied Boarding
Eastern						
Domestic	7,438	5,889	3,625	$ 176,312	$ 721,041	$ 333,643
Int'l.	1,323	1,196	405	39,103	122,794	42,943
Total	8,761	7,085	4,030	215,415	843,835	376,586
National						
Domestic	3,095	2,345	752	84,678	323,222	108,597
Int'l.	13	10	0	3,905	1,200	0
Total	3,108	2,355	752	88,583	324,422	108,597
Northwest						
Domestic	4,875	3,412	1,156	215,466	543,733	87,379
Int'l.	64	64	159	8,400	4,650	1,800
Total	4,939	3,476	1,315	223,866	548,383	89,179
Pan Am						
Domestic	503	503	22	15,676	105,898	2,763
Int'l.	3,063	3,063	365	158,577	651,911	60,812
Total	3,566	3,566	387	174,253	757,809	63,575

Denied Boarding Compensation
Paid by U.S. Carriers - 1979 continued

TRUNKS cont'd Airline	No. of Psgrs. Denied Boarding Involuntarily	No. of Psgrs. Receiving Compen-sation	No. of Psgrs. Volunteering For Bumping	Compensation Paid to: Psgrs. Receiving Alternate Trans-Portation	Psgrs. Not Receiving Alternate Trans-Portation	Psgrs. Volunteering For Denied Boarding
TWA						
Domestic	9,522	8,086	9,327	$ 346,541	$ 1,077,595	$ 1,179832
Int'l.	1,441	1,321	682	97,631	306,812	171,044
Total	10,963	9,407	10,009	441,172	1,384,407	1,350,876
United						
Domestic	18,351	9,260	25,669	207,370	1,207,287	2,625,066
Int'l.	234	172	247	6,700	20,049	26,308
Total	18,585	9,432	25,916	214,070	1,227,336	2,651,374
Western						
Domestic	8,485	7,455	3,285	233,946	709,900	341,537
Int'l.	631	499	57	14,541	71,094	8,470
Total	9,116	7,954	3,342	248,487	780,994	350,007
Trunk Domestic	107,825	72,820	94,873	4,761,390	7,785,699	11,286,311
Trunk Int'l.	13,348	10,676	4,287	604,830	1,930,883	714,835
Trunk Total	121,173	83,496	99,160	$ 5,366,220	$ 9,716,582	$ 12,001,146

Denied Boarding Compensation
Paid by U.S. Carriers - 1979 continued

LOCALS Airline	No. of Psgrs. Denied Boarding Involuntarily	No. of Psgrs. Receiving Compen-sation	No. of Psgrs. Volunteering For Bumping	Compensation Paid to: Psgrs. Receiving Alternate Trans-Portation	Psgrs. Not Receiving Alternate Trans-Portation	Psgrs. Volunteering For Denied Boarding
Allegheny (U.S. Air)	8,247	7,269	3,597	$ 854,556	$ 0	$ 186,350
Frontier	2,475	2,143	1,014	182,939	72,902	58,193
Hughes Airwest	3,012	3,009	1,932	369,137	0	222,822
Republic	10,636	8,921	2,690	180,155	910,750	204,320
Ozark	3,012	2,168	195	76,176	170,997	8,697
Piedmont	2,659	1,824	926	27,833	210,552	59,423
Texas Int'l.	3,894	2,790	1,723	169,625	111,933	107,612
Local Total	33,935	28,124	12,077	$ 1,860,421	$ 1,477,134	$ 847,417
Total Domestic	141,030	100,296	106,651	6,548,192	9,253,819	12,098,712
Total Int'l.	14,078	11,324	4,586	678,449	1,939,897	749,851
GRAND TOTAL	155,108	111,620	111,237	$ 7,226,641	$11,193,716	$ 12,848,563

Air Transport World, May 1980, p. 145.

30. See the discussion infra of situations in which punitive damages have been awarded.

31. Cited supra footnote 16.

The decision handed down by the District Court at first instance on October 18, 1973 (365 F. Supp. 128) was in favour of plaintiff Nader's claim of fraudulent misrepresentation, but was vacated and the District Court was directed by the U.S. Court of Appeals (D.C. Cir.) to reconsider the issue of fraudulent misrepresentation in light of the opinions of the Supreme Court and the Court of Appeals (U.S. Court of Appeals amended judgment on November 10, 1976). On remand the District Court reaffirmed its opinion in favour of plaintiff Nader's claim (1978) but the Appeal Court reversed the decision (1980).

33. 412 F. Supp. 641 (N.D. Texas 1976); modified 567 F. 2d. 290; 1978 U.S. Av. R. 1027 (5th Cir. 1978) (Coleman C.J.). Reh'd. den'd.

34. V.T.C.A., Bus. & C. 17.01 et seq.

35. 412 F. Supp. 641 at 643. The holding regarding common law fraud was not modified in the appeal judgment.

36. 14 C.F.R. 221.177, effective April 3, 1977, now 14 C.F.R. 250.11 as of September 3, 1978. In 1976, in England, the House of Lords had held (obiter) in British Airways Board v. Taylor (1976) 1All E.R. 65 that it was a violation of the Trade Descriptions Act, 1968, s. 14 (1) (a) to confirm a reservation to a passenger when the carrier knows there is a possibility that the passenger might be bumped. The violation of the Act incurs criminal responsibility on the part of the carrier, (the action, however, was dismissed on other grounds). Unfortunately, it is not entirely clear from their Lordships' opinions as to what constitutes "confirmation." The plaintiff held a return ticket, an advance purchase "Earlybird" certificate (a reduced-fare coupon which restricted travel to specified dates) and a letter of confirmation. On balance it appears that the existence of the latter constituted the required acknowledgement. As a result of the Taylor case, the aeronautical licensing authorities have ordered that all carriers operating in and into the United Kingdom must pay compensation to passengers who are denied boarding because of overbooking.

37. 445 F. Supp. 168 (1978) at 178.

38. For example, Eastern Airlines' company manual instructed its employees never to use the word "oversale" in a conversation within hearing distance of anyone other than Eastern employees. Similarly, the American Airlines' manual stated that if "a passenger asks the reason for oversale, tell him the reason will be known only after an investigation has been conducted and all the facts are revealed." 74 Michigan Law Review (1976) p. 1200 at p. 1202 citing Nader v. Allegheny Airlines, Inc. 512 F. 2d. 527 (D.C. Cir. 1975), Brief for Appellee, p. 30, footnote 13.

On Allegheny's affirmative policy of instructing its employees to avoid mentioning their overbooking practice, see Allegheny Passenger Service Manual, August 15, 1970 at p. 4.

39. 445 F. Supp. 168 at 178.

40. Idem.

41. 626 F. 2d. 1,031 (1980).

42. Ibid. at 1,035.

43.

44. Flores v. Pan American World Airways, Inc. 259 F. Supp. 402 (D.P.R. 1966) (Cancio D.J.) at 404. This case did not concern overbooking but the necessity to prove the age of a twenty-three-month-old infant in order that it might fly free of charge.

45. Mortimer, cited supra footnote 26 at p. 281 these remarks were obiter since the case dealt with jurisdictional issues.

46. For example see Nader v. Allegheny cited supra footnote 16; Kaplan et al. v. Lufthansa German Airlines 12 Avi. 17,933 (E.D. Pa. 1973) (Green D.J.) discussed infra; Archibald et al v. Pan American World Airways, Inc. cited supra footnote 8 discussed in this section with respect to the burden of proof.

47. See Passenger Rules Tariff PR-7, Airline Tariff Publishing Company. Washington D.C., Section VI: Refunds and Reroutings Rule 245: Denied Boarding Compensation. Allegheny's priority is based on the order in which passengers present themselves for check-in at the ticket lift point (s. C. (9)); Braniff's priority is in order of earliest check-in time at the boarding point; Air Canada's and CP Air's boarding rules award priority in order of arrival at the ticket lift point (ss. C. (3), (5)).

48. See the discussion infra of various awards of damages.

49. 200 F. Supp. 360; 7 Avi. 17,803; 1961 U.S. Av. R. 387 (S.D. Cal. 1961) (Mathes D.J.). This case is discussed more fully infra.

50. 55 Ill. App. 2d. 338; 204 N.E. 2d. 792; 1965 U.S. Av. R. 75 (1965) (Kluczynski J.). The holding was recently reaffirmed in Maheney v. Air France 474 F. Supp. 532; 15 Avi. 17,665 (S.D.N.Y. 1979) (Pierce J.).

51. Ibid. at 797 of N.E. 2d.

52. Cited supra footnote 8.

53. Ibid. at 16.

54. Idem.

55. Ibid. at 17.

56. 445 F. Supp. 168 at 172, quoting from the then current Allegheny Passenger Service Manual, paragraph 5.

57. Idem.

58. 512 F. 2d 527 at 541.

59. 445 F. Supp. 168 at 172.

60. Ibid. at 173.

61. Idem.

62. Idem.

63. The plaintiff's burden can be eased if, as in the trial proceedings of Karp v. North Central Air Lines, Inc. 437 F. Supp. 87 (Wis. 1977); 14 Avi. 18,386, the defendant airline's traffic administration manager testifies that the airline had not followed the rules in a particular case and was not in the habit of following the boarding priority rules in oversale situations. That witness is doubtless employed elsewhere.

64. For example, Wills v. Trans World Airlines, Inc. cited supra footnote 49.

65. Cowen v. Winters 96 F. 929 (6th Cir. 1899). (Lurton C.J.).

66. The Cincinnati, Jackson and Mackinaw Railroad Company.

67. 96 F. 929 at 932.

68. Ibid. at 934.

69. Idem.

70. Idem.

71. Ibid. at 334-5.

72. Cited supra footnote 49.

73. The C.A.B. rules became effective as of October 17, 1967.

74. 200 F. Supp. 360 at 365.

75. Ibid. at 366.

76. Ibid. at 366-67.

77. Ibid. at 367.

78. Ibid. at 368.

79. Even though the Act's general criminal provisions with respect to knowing and wilful violation prescribed fines not in excess of $2,000 (49 U.S.C.A. s. 1472 (a)), this limitation was not seen as a bar to a larger award of exemplary damages.

80. Cited supra footnote 46 and discussed supra in the section on the burden of proof.

81. D. Guam, Feb. 7, 1973 Civil No. 111-68 (Duenas J.).

82. Cited supra footnote 46.

83. 12 Avi. 17,933 at 17,934.

84. It is interesting to ponder the fact that a doctor experienced two sources of pain and discomfort which have relatively few physical manifestations and whose existence is, therefore, difficult to contest.

85. 12 Avi. 17,933 at 17,934.

86. Ibid. at 17,936.

87. Cited supra footnote 33 and discussed supra in the section on different actions.

88. 412 F. Supp. 641 at 643.

89. Idem.

90. 567 F. 2d. 290 (5th Cir. 1978). Reh'd. den'd.

91. Ibid. at 291.

92. Ibid. at 292.

93. Cited supra footnote 16 and discussed extensively in the section on different actions.

94. 14 Avi. 18,312.

95. 12 Avi. 18,146.

96. This covered the $7.00 spent on long distance telephone calls and $3.00 for the extra cost of a ticket to Boston.

97. 15 Avi. 18,179 at pp. 18,183 - 18,184.

98. 426 U.S. 290; 14 Avi. 17,148; 1976 U.S. Av. R. 951 (1976).

99. 365 F. Supp. 128 at 132 - 33.

100. 512 F. 2d. 527 at 549.

101. Idem. The Court of Appeal was quoting from Prosser, Misrepresentations and Third Persons. 19 Vand. L. Rev. (1966) p. 231 at p. 251. According to Prosser, the line of duty is definitely drawn where the plaintiff is unidentified and the defendant has no special reason to expect that he may act in reliance.

102. Kaplan et al. v. Lufthansa German Airlines, cited supra footnote 46.

103. Smith v. Piedmont Aviation, Inc. cited supra footnote 33.

104. In Roman v. Delta Air Lines Inc. cited supra footnote 28, the plaintiff missed a family reunion because of being bumped from one of the defendant's flights. The plaintiffs' parents had claimed compensation, as incidental beneficiaries, for Delta's misrepresentation to their daughter. The Illinois District Court ruled the plaintiff's parents were too remote to be eligible to recover from the defendant for to hold that they "were among the class of persons who could recover from Delta would extend potential liability to a class virtually as large as the public. Potential liability . . . would thus be expanded to include an unlimited class of persons, far removed from the transaction or incident, who rely on defendant's advertising representations in making social plans with any of the defendant's potential passengers" 15 Avi. 17,147 at 17,153.

105. Wills v. Trans World Airlines, Inc.

106. Mortimer and Hoffman v. Delta Air Lines, Inc.

107. Nader v. Allegheny Airlines, Inc.

108. Kaplan v. Lufthansa German Airlines.

109. Karp v. North Central Air Lines, Inc. v. Marsilje Agency, Inc. 437 F. Supp. 87; 14 Avi. 18,386; 1978 U.S. Av. R. 674 (E.D. Wis. 1977) (Warren D.J.); rev'd. in part 583 F. 2d. 364; 15 Avi. 17,355; 1978 U.S. Av. R. 669 (7th Cir.) (per curiam).

110. Ibid. at 18,388.

111. The direct cause of the oversale had been the fault of the third party defendant (the travel agent) which had typed into the reservations terminal the wrong flight date for a party of four.

112. The failure to file the "first come, first served" rule with the C.A.B. was found not to be "wanton, oppressive or malicious," as required in order to support punitive damages, in Smith v. Piedmont Aviation, Inc., on appeal to the Fifth Circuit 567 F. 2d. 290 at 292. The fact that this is at least the second case brought against North Central Air Lines (c.f. Stough v. North Central Air Lines, Inc. cited supra footnote 50), indicating consistent disregard of its filed priority rules, was not mentioned by either the District Court or the Court of Appeal.

113. This dismissal was not challenged by North Central Air Lines, Inc. on appeal.

114. 567 F. 2d. 290; 1978 U.S. Av. R. 1027.

115. 512 F. 2d. 527; 13 Avi. 17,750; 1975 U.S. Av. R. 921; 167 U.S. App. D.C. 350 and 15 Avi. 18,179.

116. Cited supra footnote 112.

117. 14 Avi. 18,312 at p. 18,318.

118. Ibid. at p. 18,181 - 18,182. The wheel thus appears to have turned full cycle and United States case law on discriminatory bumping is back to approximately the position where it stood in 1950. In that year, in National Airlines, Inc. v. Allsopp, 182 F. 2d. 483; 3 Avi. 17,186 (5th Cir. 1950) (Hutcheson C.J.) a case involving denied boarding and alleged discrimination, the Fifth Circuit reversed a verdict in the passenger's favour for actual ($91.30) and exemplary ($4,908.70) damages and held, without discussion of the statutes involved, that such a passenger was only entitled to any actual damages arising from breach of the contract of carriage.

Additional support is lent to this hypothesis by a recent (November 1980) case involving bumping (Christensen v. Northwest Airlines, Inc. cited supra footnote 28). The "rude and discourteous" conduct of the carrier's agents and employees was described as merely causing the passenger to suffer "anger and embarrassment" when she was engaged in an argument over who was at fault for her missed flight: the whole of which was further characterised as "minor claims". 15 Avi. 18,536 at 18,537.

119. Taking the matter into one's own hands does not appear to be an appropriate alternative course of action, based on the events in Kalish v. Trans World Airways, Inc. 55 Ohio (2d.) 73; 362 NE. (2d.) 994; 14 Avi. 17,809 (Ohio S.C. 1977) (per curiam). On being informed by the agent at the boarding gate

that all of the seats on a T.W.A. flight from Philadelphia were occupied, Mr. Kalish boarded the flight on his own initiative and refused seven requests to leave the aircraft. Remaining adamant in his refusal, he was arrested, handcuffed and escorted from the plane by law enforcement officers.

120. Eastern Provincial Airways (1963) Limited, Nordair Ltd., Pacific Western Airlines Ltd., Quebecair, Transair Limited.

121. This is according to R.S. McDonald, Supervisor of Passenger Claims at Air Canada's Head Office in Montreal. There are three official tariffs which Air Canada is required to use which are defined as follows: PR-7 is commonly referred to as an "industry tariff covering North America". It is issued on behalf of the carriers by the Airline Tariff Publishing Company of Washington, D.C. and the rules contained in the tariff have been filed with and approved by both the Civil Aeronautics Board and the Canadian Transport Commission (Air). The tariff covers three areas of operation:

1) Transportation wholly within the United States;
2) Transportation wholly within Canada;
3) Trans-border transportation between Canada and the United States in both directions, including Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands.

PR-1 is an Air Canada tariff. It is issued to cover international transportation to and from points in Canada, to and from points outside North America. The rules contained in this tariff are on file with the Canadian Transport Commission only. Carriers with whom Air Canada has interline agreements participate in the tariff and Air Canada files the rules on their behalf under authority of powers of attorney.

IPR-1 is also an Air Canada tariff issued to cover international transportation outside North America, however it is filed both with the C.T.C. (Air) and the C.A.B. It is used when the transportation originates and/or terminates in the United States and travel is via a point in Canada. Similar to the PR-1 tariff, other carriers participate and the rules are also filed on their behalf by Air Canada under power of attorney.

122. An unreported judgment of the Small Claims Division of the Quebec Provincial Court September 20, 1979, Hadjis J. presiding.

123. It should also be pointed out that where international flights are concerned, the tariffs cannot derogate from the provisions of the Warsaw Convention which regulate the regime of liability for transportation by air between High Contracting Parties.

124. Passenger Rules Tariff PR-1, Rule 22, Section 6 - Reroutings and Refunds, paragraph E (5)(b).

125. Ibid., paragraph E (6).

126. Idem. Air Canada Publication No. 303, Arranging Service for Inconvenienced Passengers, states under the heading Services, Allowance and Arrangements for Involuntary Deplaned Revenue Passengers:

> "Extend every possible service, a long distance telephone call using Company tie-lines whenever possible and/or sending a telegram. The attitude displayed when extending these services is very important; much of the goodwill lost can be regained if the deplanee is served with the utmost courtesy and with genuine sincerity and understanding." (Ch. 3, p. 14, s. 12)

Obviously this carrier tries to be as humane as possible in both its selection and treatment of its deplaned passengers. As will be demonstrated in the analysis of the case of Hendler v. Iberia Airlines of Spain, this is not always the case with other carriers. The full text of Air Canada's manual dealing with involuntarily deplaned passengers is reproduced in the appendices.

127. Idem.

128. (1976) C.P. 299 (Que. Prov. C.) (Decary J.).

129. Although the tickets had been purchased from a tour operator (Voyages Europa Travel) and it was a representative of another tour operator (Key Vacation Tours Ltd.) who requested that the plaintiff and her two daughters disembark. The court found that Mme. Aecherli had a cause of action against the air carrier because, under the terms of Air Canada's passenger charter contract with Tourinter Inc., as far as delivery of the tickets was concerned, the tour operator was to be considered as the agent of the carrier. It was fortunate for the plaintiff that a lien de droit was found to link Air Canada to the co-defendants, since by the time the action was instituted all three tour operators (Voyages Europa Travel, Key Vacation Tours Ltd. and Tourinter Inc.) had gone out of business and the directors and principal shareholders of Voyages Europa were being sought by the Montreal Police. (1976) C.P. 299 at 301.

130. For instance, the Court was not convinced that overbooking was a common commercial practice (p. 303) and Décary J. found gross negligence on the part of Air Canada for issuing more tickets than there were available seats.

131. Kaplan v. Lufthansa German Airlines.

132. Nader v. Allegheny Airlines, Inc.

133. P. 303.

134. Hamlin v. Great Northern Railway Co. (1856) 1 H. and N. 408; (1856) 26 L.J. Ex. 20 (Pollock C.B.) at 411.

135. Hobbs v. London & South Western Railway Co. (1875) L.R. 10 Q.B. 111 (Cockburn C.J.) at 122.

136. [1973] 1 All E.R. 71; [1973] Q.B. 233; [1972] 3 W.L.R. 954 (C.A. 1973) (Denning M.R.).

137. Ibid. p. 237.

138. Ibid. p. 237 - 238.

139. Leeds County Court, (November 28, 1979) (Nevin J.). Reported in N.R. McGilchrist, Denial of Boarding to Airline Passengers, Ll. M.C.L. (Feb. 1981), p. 93 at p. 95.

140. Ashby de la Zouch County Court (August 3, 1979). Reported in N.R. McGilchrist, cited supra, at p. 95.

141. (Q.B. 1973); aff'd. [1975] 3 All E.R. 92 (C.A. 1974) (Denning M.R.).

142. The plaintiff was awarded £ 1,100. The charge for the air fares for himself, his wife and their two young children, plus four weeks accommodation in the advertised hotel, had amounted to £ 1,200. (The family had been moved to a different hotel for the last two weeks of their vacation.) The defendant's unsuccessful appeal was directed at the amount of the damages.

143. Suprenant v. Air Canada (C.S. 1971); aff'd. [1973] C.A. 107 (Que. C.A.) (Temblay Ch. J.). In an English case, Preston v. Hunting Air Transport, Ltd. [1956] 1 All E.R. 443 (Q.B.) (Ormerod J.), the court awarded solatium dolores on the grounds that article 17 of the Warsaw Convention permitted it. See G. Miller, Compensable Damages under Article 17 of the Warsaw Convention, 1 Air Law (1976), p. 210.

144. See Aecherli v. Air Canada cited supra footnote 128.

145. Cited at footnote 7.

146. "On failure of a Carrier . . . to provide space in the class of service for which a reservation has been duly made . . . Carrier shall be liable for damages sustained by the passenger as the result of such failure; provided the Carrier's liability for such failure shall be limited to reimbursement of the reasonable expenses of the passenger for accommodation, meals, communications and ground transport to and from the airport and to

> compensation for any other such damages sustained by the passenger at a rate not exceeding U.S. $50 per day or part thereof up to the time when Carrier is able to provide such space either on another of its own services or on the services of another carrier."

The complete text of the I.A.T.A. General Conditions of Carriage (Passengers), Recommended Practice 1724 (formerly 1013), is included in the appendices.

147. Iberia had also, somewhat surprisingly, claimed that its liability for causing delay was limited by the Warsaw Convention (in fact Spain and Canada have both ratified the Warsaw Convention (1929) as amended by the Hague Protocol (1955) and it is this instrument which would have governed the flight). It is true that article 22 of the Warsaw Convention limits the carrier's liability for delay to approximately U.S. $16,000, but since the plaintiff was only claiming $500 the limit was irrelevant.

148. In addition the "delay" referred to in article 19 and 22 of the Warsaw Convention does not refer to the repercussions of denied boarding, since the incident does not occur in the time period between the acts of embarkation and disembarkation as required by article 17 of the Convention. Unfortunately, there still exists, in the reported decisions, some ambiguity concerning the relationship between the "delay" mentioned in article 19 of the Warsaw Convention and a passenger's resulting late arrival at his destination due to being bumped from his originally intended flight. In Maheney v. Air France 474 F. Supp. 532; 15 Avi. 17,665 (S.D.N.Y. 1979) (Pierce D.J.), it was held that the Warsaw Convention's two-year statute of limitations barred a passenger's claim for the transportation delay suffered when she was bumped from an oversold flight but was inapplicable to a claim that she was bumped in a discriminatory fashion. Although confined to the limits of the procedural motion the Court, regretfully, did nothing to sever the link between delay and bumping and the District Court's holding could be interpreted as acknowledging that delay caused by denied boarding was a ground for a claim under article 17.

In another New York case, McMurray v. Capitol International Airways (N.Y. Small Cl. Ct. 1980) (Steinberg J.), reported in the New York Law Journal, January 1980 and discussed in Denial of Boarding to Airline Passengers cited supra, footnote 139, pp. 97 - 98, Mr. McMurray and his wife held tickets for the return leg of Capital's New York - Brussels - New York charter flight on July 12, 1979. The flight was cancelled due to engine trouble which effectively stranded the plaintiffs in Brussels

since Capitol alleged that they were unable to find the McMurrays alternative transportation. The McMurrays made their own way back to New York on a scheduled Air France service and sued for not only a refund on the Capitol tickets, but also the cost of the Air France tickets. The airline did not dispute the claim for a refund but asserted that under its tariff filed with the C.A.B. it was exempted from any further liability arising from flight cancellations. (See also in this regard 14 C.F.R. 250.6 (b)(2) in which the carrier is exempted from the obligation to pay denied boarding compensation if

> "The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of:
>
> . . .
>
> substitution of equipment of lesser capacity when required by operational or safety reasons;"

This section presumably covers flight cancellation for operational or safety reasons. Steinberg J. argued that the airline could not expect the Court to sanction the stranding of passengers in a foreign country as an acceptable practice; moreover, since the Warsaw Convention applied to the journey and article 19 established liability on the part of carriers for, inter alia, delay, any conflict which existed with the airline's tariffs had to be settled in favour of the Convention.

The learned judge concluded that Capitol could be no less liable for outright cancellation without alternative arrangements being made, than it could for a mere delay, and awarded both the refund and the reimbursement requested. The Court did not directly address the issue of the relationship between article 19 and article 17 which prescribes the period of carrier responsibility for injury or damages and limits it to occurrences "on board the aircraft or in the course of any of the operations of embarking or disembarking". Obviously, the McMurrays had not commenced the embarking process. The shabby treatment they received at the hands of Capitol i.e. the failure to find them transportation home and their consequent stranding in a foreign country, was obviously a matter which required compensation; but to base the award on the Warsaw Convention was plainly an error. Even for return journeys, once the process of disembarkation has been completed with regard to the first leg of the flight, then the carrier is no longer responsible for the traveller until they have commenced the process of embarkation for the next stage of their journey. See in this regard Maugnie v. Compagnie Nationale Air France 549 F. 2d. 1256; 14 Avi. 17,534; 1977 U.S. Av. R. 130 (9th Cir. 1977) (Richey D.J.); cert. den'd. 431 U.S. 974 (1977) and also the discussion infra, in the section of this paper dealing with the handicapped, of the Adamsons v. American Airlines, Inc. case.

149. Canadian Transport Commission, Air Carrier Regulations, Consolidated Regulations of Canada, 1978, c. 3, as amended.

150. Kaplan v. Lufthansa German Airlines.

151. Testimony of Iberia's Montreal office manager.

152. See, for example, Airline Tariff Publishing Company, Agent, C.A.B. No. 352, C.T.C. (A) No. 195, Rule 245 (c).

153. Air California, Aloha Airlines, Cardinal/Air Virginia, Frontier Airlines, Hughes Air, Norcanair.

154. Air Canada, Piedmont Aviation.

155. Eastern Provincial Airways, Great Lakes Airlines, Pacific Western Airlines, Quebecair.

156. American Airlines.

157. Air Florida, Aspen Airways, Piedmont Aviation, Texas International, US Air.

158. Texas International.

159. The burden of proving incapacity varies with the problem involved, for example, the aged and the handicapped can easily be classified as such but proof of illness in the family or the after effects of surgery may be difficult to establish: witness the bumping incident reported in The Gazette, October 24, 1980, p. 60, involving a woman who had had surgery five months previously on her feet and claimed to suffer discomfort when walking.

160. Air California, Alaska Airlines, Aloha Airlines, Braniff Airways, Continental Air Lines, Frontier Airlines, Hughes Air, Nordair, Northwest Airlines, Pacific Southwest Airlines, Piedmont Aviation, United Air Lines, Western Air Lines.

161. Nader and the Connecticut Citizen Action Group v. Allegheny Airlines, Inc. cited supra footnote 16.

162. American Airlines, Cochise Airlines, Continental Air Lines, Eastern Provincial Airways, Great Lakes Airlines, Nordair, Quebecair, Western Air Lines.

163. Cardinal/Air Virginia, Eastern Provincial Airways, Great Lakes Airlines, Norcanair, Pacific Southwest Airlines, Pacific Western Airlines, United Airlines, Western Air Lines.

164. Karp v. North Central Air Lines, Inc. v. Marsilje Agency, Inc. cited supra footnote 109.

165. Held at Madrid, November 8 - 11, 1977.

166. Reported in E. Mappeli, Point de vue practique sur l'overbooking, 1979 Annals of Air and Space Law (vol. IV) p. 213 at p. 219-220, footnote 11. This article is a translation of El "Overbooking" o exceso de reservas de plazas en el transporte aéro, Revista de Derecho y Economia des Transporté, Madrid, 1977, and reprinted in E. Mapelli, Trabajos de Derecho Aeronautico y del Espacio, Coleccion de Estudios Juridicos (vol. II), Madrid, Instituto Iberoamericano de Derecho Aeronautico y del Espacio y de la Aviacion Commercial, 1978, p. 471.

167. Ibid. p. 225.

168. The service charge shall not be assessed if the passenger was unable to occupy space for any of the following reasons:

(a) flight cancellation;
(b) lack of ability to provide previously confirmed space;
(c) missed connection caused by carrier;
(d) flight delay;
(e) omission of a scheduled stop;
(f) cancellation of confirmed space by carrier;
(g) medical reasons supported by a doctor's certificate.

Carriers shall not bill each other for these service charges but this rule does not preclude carriers from billing each other by mutual agreement.

The Resolution only applies to tickets for carriage originating, terminating and performed wholly within area 2 (Europe, the Middle East and Africa).

See, International Air Transport Association, Passenger Services Conference Resolutions Manual, Traffic Services Office, Montreal 1981, Resolution 769.

169. Air Canada, International Passenger Rules Tariff no. PR-1, Rule 22 (E)(5)(a)(i).

170. For example, Air Canada recommends that passengers check-in thirty minutes before the departure time of Canadian domestic flights, forty-five minutes beforehand for travel to or from the United States, and sixty minutes beforehand for other international travel. Air Canada passenger ticket folder, document No. ACF530 (11-79). Some check-in times are compulsory, see for example I.A.T.A. Air Travel Tariff, General Rules

p. 77. In this case the check-in period must be regarded as defining the "appropriate" time and failure to comply with this provision will also render the passenger ineligible for denied boarding compensation.

171. Cited supra footnote 109.

172. The "Travel Sure" policy which is underwritten by the INA Insurance Company of Canada.

173. For a Montreal - Los Angeles return trip costing $339, the insurance premium was $4.00.

174. Making overbooking a criminal act, along the lines of fraud, with the accompanying imposition of heavy fines would probably prove a sufficient deterrant.

175. The only possible detraction from this Utopia would be accidental overselling by the airline.

CHAPTER 3

THE HANDICAPPED

THE HANDICAPPED

BACKGROUND

The United Nations' General Assembly proclaimed, at its 1976 meeting, that 1981 would be the "International Year for Disabled Persons". This was in response to rising demands for recognition of the handicapped's entitlement to equal enjoyment of basic human rights.[1] It should be borne in mind that in order to take a full part in the community, and to live independent lives with dignity, handicapped persons must, amongst other things, be permitted to get on or off a bus, to fly in an aircraft and to enter and exit from a building.[2] As a result of the U.N. Declaration, programmes and plans of action were put in motion in many countries and at various levels of implementation.

In Canada,[3] with regard to the specific problem of transportation of disabled persons, the Canadian Transport Commission held a public meeting on November 26 - 27, 1979 (the Dubé Hearings[4]) to hear submissions from interested parties on the problems of the handicapped with regard to public transportation under Federal jurisdiction.[5] Transport Canada set up a Special Advisory Committee on Transportation of the Handicapped (the A.C.T.H.) in 1980 and it has heard a number of presentations such as that made by the Air Transport Association of Canada (the A.T.A.C.) on September 24, 1980.

In the United States,[6] the Department of Transportation issued, in 1978, a notice of proposed rulemaking under the authority of the Rehabilitation Act of 1973.[7] The new regulations require all federally-funded airports to take specified measures to aid handicapped travellers. All new terminals must be designed in accordance with standards established by the American National Standards Institute,[8] and must provide jetways or passenger lounges or lifts or ramps for boarding,[9] telephones with volume control,[10] teletypewriters for communication with the deaf,[11] vehicular loading and unloading areas,[12] baggage handling assistance,[13] accessible parking space[14] and accessible toilets[15] and drinking fountains.[16] Existing terminals were given three years to make the necessary structural changes.[17] In addition, the Federal Aviation Authority published a guide[18] to the facilities currently available for the disabled in two hundred and twenty airport terminals in twenty-seven countries. It gives details of parking, interior and exterior circulation, arrival and departure facilities, elevators, stairs and ramps, doors, aircraft boarding, rest rooms, telephones and other services.[19]

As regards the carriage of handicapped passengers by the airlines, there have been two recent waves of reform undertaken by the Civil Aeronautics Board. In 1977, both the F.A.A. and the C.A.B. issued a series of regulations which were in response to the large volume of letters to the Board which criticised the treatment of handicapped passengers by the air carriers.[20] The regulations were adopted

with the aim of ensuring that the handicapped would be denied carriage only in the interest of air safety.[21]

Again, in 1979, the Civil Aeronautics Board issued a Show Cause Order,[22] this time concerning the cancellation of the air carriers' rules governing refusal of service on the basis of conduct, status, age or pregnancy, due to their being unjustly discriminatory. This was followed by a Notice of Proposed Rulemaking[23] entitled "Non-Discrimination on the Basis of Handicap," which resulted in an Order adopted by the C.A.B. in November, 1979 which cancelled those tariff rules which permitted the carrier to refuse transport to passengers for reasons unrelated to flight safety.

Both these waves of reform will be analysed in depth.

DEFINITIONS

Before continuing with this analysis, it would be wise to define the term "handicapped" in order to identify precisely the category of air traveller with which we are dealing. But therein lies the rub. Those who draft regulations frequently encounter the problem of defining the precise group which is to be protected, and the task of lending precision to the concept of a handicapped person has not proven to be an exception to this rule.

Definitions of the terms "disabled", "handicapped", and "incapacitated" range from all-encompassing generalities[24] to highly specific descriptions.[25] The problem encountered in defining these terms is that they cover such a wide variety of conditions, some of a temporary, some of a permanent nature, and some mental, some physical, but all of which merit sympathetic consideration in contrast to such impairments as those caused by alcoholism[26] or drugs.[27]

The F.A.A. has defined handicapped passengers in terms of the safety factor. If the real problem connected with having these travellers on board is not that they need individual attention for emplaning, deplaning, during flight or during ground handling,[28] nor that there is anything inherently wrong from a moral standpoint (no longer are the sins of the father considered to be visited on the children) with being disabled, then it must lie in the fact that disabled persons are a potential threat to the safety of a flight. The Federal Aviation Authority regulations, therefore, define a handicapped passenger as "a person who may need the assistance of another person to expeditiously move to an exit, in the event of an emergency evacuation."[29] (This definition was criticised by former Senator John Tunney as being "so vague and general that anyone from one's grandmother to a skier with a broken ankle could be classed as handicapped."[30]) There is no equivalent to the F.A.A. definition in the Canadian Air Carrier Regulations issued by the Canadian Transport Commission.[31]

In 1932, one commentator[32] stated that safety was the most important factor in analysing the rights and duties of airlines in relation to passengers. Nearly fifty years later this is still the case. The concern with flight safety is still an overriding consideration and is reflected in the current airline regulations at a time when economic regulations would appear to have achieved preeminence.[33]

In its Notice of Proposed Rulemaking,[34] the Civil Aeronautics Board has proposed a multiplicity of definitions but which link once more the needs of the handicapped to the requirements of flight safety. The proposal would define a "handicapped person" in functional terms as a person who either has a physical or mental impairment that substantially limits one or more major life activities or who is regarded as having such an impairment, whereas a "qualified handicapped" person means a handicapped person who has satisfied all the conditions for receiving air transportation services that are required of non-handicapped persons: the conditions referred to include the

> "absence of any indication that air transportation of the passenger will jeopardize flight safety, and the absence of any indication that the passenger is unwilling or unable to comply with reasonable requests of airline personnel."[35]

Some commentators[36] prefer the definition given in the Urban

Mass Transportation Act of 1964.[37] This act defines a handicapped person as

> "any individual who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, is unable without special facilities and special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected."[38]

The definition is more specific in its identification of those who are to be protected rather than those to be discriminated against. The definition looks at this group of persons in terms of their characteristics in relative, rather than absolute, terms. The Urban Mass Transportation Act definition also places the blame - if blame for the inconvenience is what is really implied - not on the handicapped person's condition but on the state of existing facilities. The call for action on the part of planners and designers is loud and clear.[39]

In the tariff rules which the airlines have adopted pursuant to D.O.T., C.A.B. and F.A.A. regulations,[40] carriers have further classified disabled passengers into two categories: non-ambulatory and physically handicapped.

According to United States' carriers, non-ambulatory passengers are those persons -

> "who are unable to walk or need the support of another person to walk, but who are otherwise capable of caring for themselves without assistance throughout the flight. If a passenger can walk without the aid of another person, the passenger is not considered to be nonambulatory, regardless of degree of impairment. If a passenger uses a wheelchair for convenience, the passenger is not considered to be nonambulatory. A child is not considered a nonambulatory passenger unless the child has a restricting physical handicap other than age."[41]

Physically handicapped passengers are those persons

> "with any impairment or physical disability which would cause such person to require special attention or assistance from carrier personnel."[42]

The Air Transport Association of Canada[43] defines handicapped in a broader way which specifies both mental and physical impairment. The A.T.A.C. considers passengers as handicapped

> "when their physical, medical or mental condition requires individual attention on emplaning, deplaning, during flight, in an emergency evacuation or during ground handling which is normally not extended to other passengers."[44]

The category is then subdivided into ambulatory and non-ambulatory, self-reliant and non-self-reliant. Non-ambulatory passengers are

those handicapped passengers who are not able to move about within the aircraft cabin unassisted. Non-self-reliant passengers are those handicapped passengers who are incapable of self-care during the flight; they depend upon another person to look after their physical needs. Thus the non-self-reliant passenger always requires a personal attendant.[45]

THE CONVENIENCE ARGUMENT

The numerous definitions, categories and descriptions of what does or does not constitute a handicapped passenger obviously serves to confuse not only booking agents and check-in staff but also those persons who might fall into the classifications, if only they knew which one to apply. Those persons who are considered to be non-ambulatory by U.S. carriers fall into the category of physically handicapped/self-reliant for Canadian carriers. More importantly, the way in which handicapped passengers are classified of itself gives rise to one of the many types of discrimination practised against this category of people. The Canadian carrier's definition of ambulatory does not confine itself to the aspect of safety;[46] the convenience of carrier personnel is also reflected in the concern over whether passengers will require extra attention during embarkation and disembarkation or during flight. While an argument can be, and has been made[47] on behalf of convenience, that is, as a common carrier, an airline owes a duty to provide a convenient service; any condition

that might call for an unscheduled landing should, therefore, be avoided, especially if such a forced landing was likely to be hazardous. This reasoning, of course, obscures the major motivating factor of the costs of making an unscheduled landing in terms of extra fuel consumption and landing fees which amount to, for example, approximately $6,000 in the case of a DC-10 making an unscheduled landing at Winnipeg Airport,[48] and the fact that the above comment was written by an airline executive.[49]

The argument in favour of providing a convenient service is surely directed at the convenience of the passengers and not of the cabin crew.[50] A little extra assistance, be it help with cutting up extra tough meat or guidance to the washroom, is surely not above and beyond the call of duty for a flight attendant. Otherwise, one wonders what their functions are, and whether the airlines will be lobbying for regulations whereby passengers are strapped into their seats for the duration of the flight and are neither fed nor "watered".

The Civil Aeronautics Board's proposed rulemaking[51] has tried to clarify the position of non-ambulatory passengers or, more specifically, those who need assistance for "personal care" as the airlines euphemistically refer to it. Those travellers who cannot feed themselves unassisted or who cannot use the washroom unassisted would have the explicit option of declining food, and/or making alternative arrangements for the independent disposal of bodily wastes,

such as visiting the bathroom prior to takeoff for short flights. If these options are adopted, non-ambulatory travellers cannot be refused carriage whether attended or unattended.[52]

WAIVER OF LIABILITY

The economic dilemma, touched on above, which confronts carriers who may wish to make their flights accessible to handicapped passengers is the fear, real or imaginary, that the flight may have to be interrupted should that passenger's condition worsen. But one must ask, what is the likelihood of such an occurrence and are there not ways which the carriers can protect themselves against such incidents? The position for common carriers was stated at the beginning of the century in the case of Mathew v. Wabash R. Co.. Smith P.J. decided that if a common carrier accepted a passenger suffering from certain ailments (with or without knowledge of the condition) and an accident occurs for which the carrier is responsible, then the carrier is liable for any additional injuries inflicted.[55]

A recent example of a passenger becoming ill in flight and the aircraft having to make an emergency landing is the case of State of Florida v. Southwell.[56] The facts of the case were that a passenger became unconscious during a Miami - New York flight causing the aircraft to make an emergency landing at Jacksonville, Florida. The passenger's appearance and behaviour had been quite normal when he

presented himself for check-in but was found to be suffering from the effects of over-indulgence in cocaine. The aircraft was landed after a stewardess checked the defendant's pockets for a medical alert tag or medicine and discovered instead a plastic bag containing a white substance, and a doctor on board the flight had examined the passenger and advised an immediate landing.[57] Thus a drug addict is not challenged on check-in even though, as the Southwell case demonstrates, he can cause exactly the same problems that it is feared a handicapped person will cause - the latter type of person being constantly subjected to scrutiny and frequent and permissible refusal of carriage.

The carriers' response to this situation has been in the past, on domestic flights, to insist on a waiver of liability form being signed.[58] Canadian airlines have agreed that a waiver of liability will no longer be required for disabled passengers[59] whereas, in the United States, the C.A.B. has proposed that the carriage of the handicapped should not be conditioned on any special waiver of liability for personal injury or for damage to equipment such as wheelchairs,[60] but a carrier would be permitted to insist on a waiver of liability for injury that occurs, either despite the exercise of reasonable care by carrier personnel, or results from a handicap, travelling with which presents an extraordinary hazard. The latter exception to the prohibition against a waiver of liability is designed to make air transportation available to persons who might otherwise present too great a risk, e.g., those persons afflicted with bone cancer who may have bones so

brittle that ordinary air turbulence would subject them to an extraordinary risk. The Board believes that in that case the traveller should assume the risk.[61] In no case, however, should a carrier be permitted to avoid liability for injury resulting from negligent or careless treatment of such a passenger.[62]

On international flights it's difficult to see how a stipulation requiring a waiver of liability could be reconciled with the requirements of the Warsaw Convention,[63] in particular article 23 which states that:

> "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention." (Emphasis added.)

The liability referred to is based on rebuttable presumption of fault, found in article 17 of the Convention, that the carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered due to an on board accident or in the course of the operations of embarking or disembarking. The presumption of fault was changed to absolute liability[64] in the 1966 Montreal Agreement[65] (which did away with the carrier's defence that he had taken all necessary measures to avoid the damage or that it was

necessary for him to take such measures), but it is not strict liability in the sense that life insurance companies use the word since the defence of contributory negligence remains.[66]

A waiver of liability is surely an attempt to fix a lower limit of liability, but the need for such a device would not appear to be so pressing since the courts have recognised what could be characterised as an "inherent defect" in the passenger i.e. that an injury suffered by the passenger was caused solely by the passenger's state of health. Absent this proviso, the carrier would be liable if a passenger with a history of heart attacks suffered another one on board without any external cause[67] or if a husband and wife started to argue in mid-air and the husband subsequently strangled his wife.

Thus in Scherer et al. v. Pan American World Airways, Inc. and Trans World Airlines, Inc.,[68] it was held that no "accident" had occurred to a passenger who developed thrombophlebitis which resulted merely from the act of sitting on board a Pan American flight from Tokyo to California and which was allegedly aggravated on a connecting T.W.A. flight to New York City, and in Gallin v. Delta Air Lines, Inc.[69] the Court did not find the carrier liable when a passenger who habitually used a crutch, but was otherwise independent, fell whilst deplaning from an L-1011 at Fort Lauderdale Airport.[69]

Along similar lines, there have been a number of cases involving

loss of hearing during a flight due to routine changes in the pressurization of the aircraft following takeoff and in preparation for landing. Loss of hearing in a plaintiff who was at the time of the flight suffering from a respiratory infection and who had a history of ear trouble (including an operation thirteen years earlier to combat the effects of calcification of the middle ear bones) was judged not to be an accident under the provisions of the Warsaw Convention.[70] (The Court took note of the fact that there was no hearing loss reported by any of the passengers who did not have a history of ear troubles.)

Proof that an ear injury was proximately caused by the high altitude decompression of a flight is a precondition to a finding of liability on the part of the air carrier.[71] Furthermore, testimony is required in addition to indicate that the aircraft's pressure change was the result of some unusual or unexpected happening, before an ear injury could be characterised as an accident for the purposes of the Warsaw Convention.[72] On the other side of the coin, loss of hearing suffered by a passenger who experienced both emotional and mental anguish and was also trampled by frightened passengers in their efforts to evacuate an aircraft that had made an emergency landing due to an engine being on fire, is compensable under the Convention.[73]

The specific concept of an "inherent defect" in the passenger was incorporated into article IV[74] of the 1971 Guatemala Protocol,[75]

and although it does not appear in the unamended Warsaw Convention or in The Hague Protocol, the Courts appear to be more than willing to rely on it. The concept closely parallels that of contributory negligence, but the problem with introducing the concept of contributory negligence into the area of responsibility for accepting handicapped passengers for carriage is that many jurisdictions do, as the Common Law did, treat contributory negligence as a complete defence to an action: it not only impinges upon the plaintiff's right to recover, it defeats it entirely.[76] Although the harshness of the Common Law has been abrogated by such doctrines as that of the last opportunity or (in Canada and the U.S.A.) the last clear chance,[77] the exception suffers from the same flaw as the rule it qualified, that is, it offers only an all-or-nothing option. Legislation has been required to secure apportionment of responsibilities in accordance with the parties degree of fault.[78]

Two incidents which were recently reported in the press deserve a mention as illustrations of passengers who were not handicapped, who were in fact perfectly healthy when they checked-in[79] (thus neither of them were at any time likely to be refused carriage), but both of whom became ill during the flight. In the first incident,[80] Ms. Lynda Carter (known for her role as Wonder Woman in the television series of the same name) was on a British Airways New York - London Concorde flight, when her husband started "bellowing about emergency stops, demanding the services of any doctor on board, screaming about

his wife's pain, etc." There was no doctor on board and the pilot could not find any places to stop mid-Atlantic so the flight continued to London. The captain did, however, radio ahead for an ambulance to meet the aircraft which whisked the ailing Wonder Woman to hospital. The cause of the medical emergency turned out to be something in her eye.

In a second incident,[81] shipping magnate Casey Carmel had an attack of back trouble, that doubled him over in pain, whilst on a Trans World Airlines New York - Los Angeles flight. Actress Maud Adams (known for her role in the movie U Turn) was travelling in the same cabin and she "laid him out across several seats, gave him a thorough massage and even walked across his back." The pain is reported to have disappeared and the grateful magnate promised to name a ship after her.

Since illness can attack seemingly robust passengers without the resulting inconvenience of diverting the aircraft or making an emergency landing, one wonders why airline companies appear to think that when an obviously handicapped passenger is taken ill this will necessarily result in a diversion and/or a non-scheduled landing. No doctors were available in either of the two "emergencies" discussed above and yet the situations were handled in a manner whereby neither serious injury resulted nor were the rest of the passengers inconvenienced involuntarily to any great extent. One is left with the impres-

sion that either such medical emergencies can only be handled by the cabin attendants (and fellow passengers) in the first class compartment, or a double standard has emerged which unfairly and uncessarily restricts the carriage of physically disabled passengers.

MEDICAL CERTIFICATES

Handicapped passengers are discriminated against from the outset of their journey because the carrier reserves the right to require the handicapped person to produce a medical certificate indicating their fitness to travel from either their own doctor or they may have to satisfy the airline's medical authority regarding their medical condition.[82]

The question of whether the requirement for the presentation of a medical certificate is in itself discriminatory was raised in the case of Heumann v. National Airlines, Inc.[83] The plaintiff was attempting to travel as an unaccompanied paraplegic but was removed from National's plane at Kennedy Airport because she did not possess a medical certificate to the effect that she was able to travel by air. The plaintiff did not claim that National acted out of malice or other improper motive, but that the tariff was discriminatory in that the company rule had not always been observed. The District Court found that the tariff rule was reasonably related to the enforcement of a lawful tariff and thus the argument that it was not always applied

failed. The decision appears to be flying in the face of the early overbooking cases[84] in which the Courts found that a violation of the carrier's boarding priority rules will per se serve as the basis for liability as will adherence to the rules, if the court finds that the rules were unjust or unfair.[85]

The District Court in the Heumann case based its judgment on the first appeal decision in Nader v. Allegheny Airlines, Inc.[86] which fashioned a broad rule of primary jurisdiction applicable in such situations which foreclosed common law remedies for injuries arising out of a carrier's reasonable compliance with its approved tariff rules, thus leaving the remedy to administrative rule-making and other procedures. This being so, the only issue for the Court to decide was whether the medical certificate rule was reasonable and they found that this was a very complicated question, was being examined by the Federal Aviation Authority, and until they had produced a new regulation covering medical certificates, it was the subject of administrative rule-making and claims were barred by the doctrine of primary jurisdiction.

The U.S. Supreme Court[87] ruled in the Nader case that the Federal Aviation Act's savings clause preserved common law remedies since the field had not yet been pre-empted by Congress,[88] and thus state common law claims could be pursued notwithstanding C.A.B. remedies. Had the Heumann case based itself in the alternative on common law

grounds, by virtue of s. 1106 of the Act, it might have gone to appeal where the outcome may well have been different. Requiring a medical certificate from some handicapped passengers rather than from others, or consistently ignoring the requirement and thus leading passengers to believe that a medical certificate would not be required, is negligent use of the carrier's discretion which it is permitted under the tariff.

RESTRICTION BY NUMBERS

Handicapped persons wishing to travel by air are discriminated against by the restriction on the numbers of disabled persons which are allowed on any one flight.[89] The total number of non-ambulatory passengers which are acceptable on a per-flight basis is supposedly limited to the number of handicapped persons who would not impede an expeditious emergency evacuation and varies with the following factors: the type of aircraft used; the number of floor level exits that can be used for emergency evacuation; the number of flight attendants;[90] and whether the passengers are accompanied by an attendant, or not.[91] For Canadian air carriers, a somewhat simplified table can be drawn up as follows:

Aircraft Type	Number of Non-Ambulatory* Passengers allowed unattended	Additional Number of Passengers allowed if attended
B-747	12	12
B-747 Comb.	10	10
L-1011	10	10
DC-10	10	10
DC-8-5	8	8
DC-8	4	4
B-727	4	4
B-737	4	4
DC-9	2	2

* This category only covers self-reliant passengers. It does not include passengers on a stretcher who will always require an attendant nor non-self-reliant passengers who are also non-ambulatory since this type of passenger must also be accompanied by an attendant and non-self-reliant, non-ambulatory passengers are limited to two per flight.[92]

The table[93] for the United States' carriers is as follows:

Aircraft Type	Number of Non-Ambulatory* Passengers allowed unattended	Carriers
B-747	14	American Airlines (with 10, 12 or 14 flight attendants)
	10	American Airlines (with 8 flight attendants) Northwest Airlines Trans World Airlines United Air Lines
	5	Pan American World Airways
B-747 - SP	4	Pan American World Airways

Aircraft Type	Number of Non-Ambulatory* Passengers allowed unattended	Carriers
L-1011	8	Delta Air Lines Eastern Air Lines
	6	Trans World Airlines
DC-10	8	American Airlines Continental Air Lines Northwest Airlines United Airlines
	6	American Airlines (with 8 flight attendants)
	5	American Airlines (with 7 flight attendants)
	4	American Airlines (with 6 flight attendants) Pan American World Airways
	3	American Airlines (with 3 flight attendants)
DC-8	4	United Air Lines
DC-8 - 51	5	Delta Air Lines
	4	Braniff Airways
DC-8 - 61	8	United Air Lines
	5	Delta Air Lines
DC-8 - 62	6	United Air Lines
	4	Braniff Airways
B-707	4	American Airlines Trans World Airlines
	3	Republic Airlines
	2	Air Florida Pan American World Airways
B-707 - 320 - C	5	Northwest Airlines
B-727	4	Continental Air Lines Northwest Airlines Piedmont Aviation Republic Airlines United Air Lines
	1	Pan American World Airways
B-727 - 31/023	3	American Airlines Trans World Airlines

Aircraft Type	Number of Non-Ambulatory* Passengers allowed unattended	Carriers
B-727 - 100	2	Alaska Airlines Braniff Airways Eastern Airlines US Air
B-727 - 200/231/ 232/295	4	Alaska Airlines American Airlines Braniff Airways Delta Air Lines Eastern Airlines Trans World Airlines
B-727 - 222/s	6	Northwest Airlines United Air Lines
B-737	18	Aloha Airlines
	4	Piedmont Aviation United Airlines
	3	Air Florida
B-737 - 100/200	3	Air California
B-737 - 200/C	3	Wien Air Alaska (with 112 passenger seats)
	2	Wien Air Alaska (with 74 passenger seats)
	1	Wien Air Alaska (with 26 passenger seats)
DC-9	2	Eastern Airlines Trans World Airlines
	1	Coleman Air Transport Midway Airlines
DC-9 - 31/50	2	US Air
DC-9 - 32	3	Delta Air Lines
A-300	8	Eastern Airlines
BAC-1 11	2	American Airlines
L-188	3	Eastern Airlines Sun Aire Lines
YS-11	3	Piedmont Aviation

Aircraft Type	Number of Non-Ambulatory* Passengers allowed unattended	Carriers
FH-227	2	Air New England
DHC-7	2	RMA Inc.
	1	Air Wisconsin
DHC-6/TO	1	Air New England Golden West Airlines US Air

* This does not include passengers on a stretcher who will always require an attendant. Passengers who are both blind and deaf are not regarded as ambulatory[94] and certain carriers will only accept one escorted mental patient per flight.[95]

Other small aircraft such as the Beechcraft 99[96] and the Swearingen Metroliner[97] allow one non-ambulatory passenger per flight. Other airlines solve the problem of regulating the number of non-ambulatory passengers allowed on small aircraft by pleading the carrier's inability to use the boarding apparatus normally used on large aircraft. Thus, if the passenger cannot board the aircraft it is presumed that he or she would not be able to evacuate the aircraft in a hurry.

The arbitrariness of the numbers of non-ambulatory passengers permitted by the various airlines on particular types of aircraft is obvious from the tables. The International Air Transport Association has included in a Recommended Practice the prayer that carriers should endeavour to standardize as soon as possible any numerical limitations by aircraft type for non-ambulatory and incapacitated passengers, and

the I.A.T.A. Safety Advisory Committee has been asked to publish guidelines regarding the limitations on acceptance of incapacitated passengers by aircraft type.[98]

The carriers regard the figures in the tables as concessions made to non-ambulatory passengers. Trans World Airlines, for example, states that in general it will refuse to transport any passenger whose physical condition is such that he or she may need the assistance of another person to move expeditiously to an exit in the event of an emergency, unless the passenger is accompanied by another person who is capable of assisting such passenger in expeditiously moving to an exit; at least one such person is required for every two such handicapped passengers. (Emphasis added.) Regardless of whether passengers satisfy the above criteria, private demonstrations may be required of handicapped passengers to indicate their ability to move from one chair to another and their capability of moving expeditiously to an exit:[99] these demonstrations are yet another indignity that the non-handicapped do not have to suffer. Other carriers[100] emphasize that although they will make every effort to accommodate non-ambulatory passengers in excess of the maximum number shown in the tables, they are not obligated to do so.[101]

The question must be asked, is it fair to limit the number of passengers in this way? Additionally, is there any factual basis to the hypothesis that handicapped persons will be a hindrance in an emergency

evacuation? The corroborating evidence is sparse.

The F.A.A. had, at one time, made specific proposals concerning the proper seat locations for disabled passengers.[102] They were not to sit in the two seats nearest to an exit and if they sat in a row adjacent to an exit, they were required to sit in the farthest seat from the exit in that row. The Civil Aeromedical Institute (the C.A.M.I.) was employed to carry out tests and evaluate the proposed regulations.[103] The results indicated that with regard to non-ambulatory persons, the proposed regulations would not be appropriate.[104] Rigid rules were inappropriate due to the variety of design in aircraft interiors: the same "model" of aircraft has a custom built interior dictated by the carrier.

The C.A.M.I. also examined carrier accident files for the years 1961 to 1976 and found no reference to significant delays in evacuations created by handicapped persons.[105] Thus the seating requirements per se were eliminated from the regulations as adopted, but some carriers[106] still require that passengers accept the seat designated by the carrier if it is in the so-called interest of the safety of other passengers.[107] Studies of air crashes with survivors have also revealed that it is women, children and the old who are particularly at risk, not the handicapped as such. Mothers do not scramble for the exits but pick up their children and carry them with them. Elderly couples wait around to help each other.[108]

If the aim of the regulations is to ensure there are no obstacles to a speedy evacuation, they might as well stipulate that family members must not travel together as to stipulate that only a strictly limited number of handicapped passengers are permitted to travel on any flight. The need for such restrictions are not supported by the facts.

The seating arrangements for handicapped persons obviously inconveniences some passengers who would prefer to sit in either a smoking or a non-smoking section but, due to the positioning of exits or bulkheads, find themselves in the wrong section. It appears that the seating requirements take priority over the requirement to provide non-smoking seats for all that request them.[109] Thus disabled passengers who also have breathing problems may be forced to inhale other passenger's expelled cigarette smoke on account of the F.A.A. safety regulations; which is more hazardous to their health is a matter for debate.

Unless these seating arrangements have a legitimate basis, they are unjustly discriminatory. For example, if lack of body (or arm strength in particular) is the reason for not seating a particular type of handicapped person next to a window or a door exit, then a small child should not, for reasons of safety, be permitted to occupy such a seat. The only carrier, however, which has filed in its tariff a seating restriction for young children is Continental Air Lines which

does not permit children under five years of age to occupy seats in emergency exits rows immediately in front of 727 emergency exit rows.[109a] Passengers who are otherwise incapacitated but can use their arms for propelling themselves along seat rows and aisles cannot fairly be regarded as likely to delay an emergency evacuation. The general tenor of the proposed C.A.B. rules[110] would require seat policies to be applied consistently to both handicapped and non-handicapped passengers so that decisions are made on the basis of functional ability rather than technical status. The proposed rule would prohibit seating policies that are not reasonably necessary to ensure safety or to accommodate the handicapped passenger.[111] This means that a person with his leg in a cast would be seated in an aisle seat because this would afford him a little extra-leg room rather than because the seat is the farthest from the window exit: the result is the same but the underlying intention will have changed.

SEAT BACK POSITIONS

An issue related to the problem of seating limitations is the position of the seat back occupied by a handicapped passenger. Previously, the Federal Aviation Authority regulations had required that seat backs be in an upright position at the time of takeoff and landing.[112] When the F.A.A. proposed to amend its regulations in 1977,[113] it recognised that so long as a seat back which was placed in a reclining position at takeoff and landing, did not obstruct any passen-

gers access to the aisle or to an emergency exit, it would not present a safety hazard. Thus the new regulations permit persons unable to sit erect due to medical reasons, to place their seat backs in a reclining position during takeoff and landing.[114] This effectively limits the number of such disabled persons which can be carried per flight on an aircraft carrying a full complement of passengers to the number of seats in the rows directly in front of a partition.[115]

Although the F.A.A. regulations became effective on May 16, 1977, according to the tariff rule which went into effect on April 7, 1980, nineteen carriers, including National Airlines and US Air, will refuse to transport a passenger who is unable to occupy a cabin seat in an upright position.[116] This tariff rule is a blatant example of illegal discrimination practised against the handicapped which limits their access to flights in a totally unnecessary manner; although contacted, none of the airlines would comment on why they did this.

THE BLIND AND THE DEAF

Passengers with impaired vision and hearing are treated as a special class by the carriers. One reason for this is that the normal means of communication on board the aircraft are foreclosed to these categories of travellers; the blind cannot read the illuminated signs in the aircraft or the safety features booklet, and the deaf

cannot hear the announcements made over the public address system. Athough normally regarded as self-reliant,[117] these two groups are accorded special but discriminatory treatment.

Blind and deaf passengers are often accompanied by guide dogs when then their degree of impairment is sufficient to render the passenger dependent upon the dog. The dog is carried free of charge,[118] but is required to be properly harnessed at all times and remain at the owner's feet. Since it travels free of charge, it is not permitted to occupy a seat even if one should be vacant. Carriers try to place the blind passenger in a bulkhead seat so that the dog will have more room to stretch out and a window seat is also recommended so that other passengers will not have to step over or step on the dog to reach the aisle.[119]

Thus the seating of passengers accompanied by dogs on which they are dependent is dictated by the carrier although only a few carriers explicitly mention this fact in their tariffs.[120] Air Canada (and, therefore, the other Canadian carriers as well) restricts the number of blind persons per flight by stating that not more than two dogs trained to lead the blind or assist the deaf may be carried in the cabin of the same aircraft, although the carrier will accept four such dogs in the cabin of the same aircraft provided advance arrangements have been made with the carrier.[121] Presumably Air Canada et al are afraid the dogs would fight or, even worse, mate whilst in flight

even though guide dogs are usually neutered and have their fighting tendencies trained out of them. This regulation appears to be merely an unnecessary restriction on the carriage of the blind and the deaf, using the presence of their dogs as an excuse.

Pre-flight briefing

The blind and the deaf belong to those categories of passengers which receive pre-flight briefing. In Canada,[122] the carrier trusts the passengers will of their own volition mention that they have a hearing difficulty or vision impairment even though the airlines acknowledge that many handicapped passengers are reluctant to draw attention to their situation.[123]

The ticket agent marks the airline portion of the boarding pass and the passenger is pre-boarded and briefed as to the safety factors. The cabin attendant is then personally responsible to ensure that the passenger receives and understands all measures.[124] The legal content of the personal responsibility is not, however, spelled out.

In the United States, the F.A.A. briefing regulations are directed at the safety of the handicapped passenger, and flight attendants brief handicapped passengers on the proper route to the exits and the time to move, and the attendants are instructed as to

the most appropriate manner of assisting the passenger so as to prevent pain and further injury.[125]

Advance booking requirements

The blind and the deaf are, in common with other handicapped passengers, subject to the advance booking requirement. The disabled passenger is normally required to book at least twenty-four hours in advance, advising the carrier as to the nature of their handicap and assistance (if any) required.[126]

The reasoning in the case of Levy et al. v. American Express, Delta Air Lines, and Trans World Airlines[127] suggests that informing the travel agent from whom the ticket was purchased does not necessarily constitute notice to the airline of the nature of the handicap nor of the special assistance required. This, in turn, suggests that handicapped people are further discriminated against since they do not have the option of booking their flight through a travel agent but must deal directly with the airline.

Although carriers state that they will make every reasonable effort to accommodate passengers who fail to comply with the stipulated advance booking period, they are not obligated to do so.[128] The proposed rulemaking[129] states that the advance notification required by the carrier would have to be reasonably related to the carrier's

need for it, and in any event, could not exceed forty-eight hours. Modest forms of additonal assistance that would require only a reasonable amount of time from carrier personnel and no special equipment or additional expense such as simple boarding assistance or help in locating connecting flights (which the blind or deaf would require) would not be considered extensive assistance and thus, although the carrier can refuse to carry passengers who require extensive additional service or equipment but who have not notified the carrier forty-eight hours in advance that assistance will be necessary, this permission to refuse carriage does not apply to passengers requiring modest forms of additional assistance.

Special assistance notification

The requirement to inform the airline with respect to any special assistance required has been strictly interpreted by the courts. The New York Supreme Court[130] has gone as far as saying that there was no special duty on the part of airline employees to either foresee that special assistance would be required or to render such assistance to a partially disabled person who used an elbow crutch and who displayed a slight limp, but little more. Since neither the injured passenger in the case, nor her husband requested help from the carrier's personnel, no special obligation on the part of the airline's employees arose.[131]

On the other side of the coin, in a contemporaneous decision by the same court,[132] it has been held that on perceiving a disabled passenger, the airline's ground personnel had the duty to gather the necessary information in order to exercise a reasonably informed and intelligent discretion with regard to, amongst other things, the degree of stewardess assistance that would be required. Perhaps there are different obligations encumbent upon ground personnel and cabin crew regarding the making of enquiries aimed at determining whether special assistance will be required or not. It seems that asking a person the question directly and abiding by their decision would be a simple method of solving this particular conundrum.

Safety-related considerations

The attitude of the airlines towards blind and deaf persons has at least demonstrated a marked improvement over what it was fifty years ago. A commentator writing in 1932[133] stated that a major reason for excluding blind people from aircraft was that aboard an aircraft

> "it might become exceedingly uncomfortable to other passengers if an unattended blind person became ill and unable to locate the facilities supplied for passengers in that condition."[134]

In addition, it was stated that in boarding or alighting from an air-

craft, there is imposed on the agents of a carrier, a greater degree of responsibility to keep a blind person from placing themselves in danger,[135] (Fifty years ago this comment was probably more apt due to the possibility of a blind person walking near the aircraft's propellers; the jet engine and covered passenger boarding ramps have erased this particular hazard.) It was further suggested that the exclusion of blind persons should be permitted as a general rule.[136]

In the 1980's, rather than being excluded, the blind and the deaf are the target of a number of changes in airport facilities aimed at making communications at the check-in counter easier.[137] It was viewed as a break-through, however, when, as the result of a question posed on a radio "hot line" show, Nordair began to provide specialised services for the blind, and in so doing, became the first airline in Canada to provide such service. With the collaboration of the Montreal Association for the blind, Nordair has obtained booklets which explain airline comfort and safety features in braille. The airline has also initiated a training programme to teach its flight attendants, ticket counter and ramp personnel the particular requirements of people who cannot see.[138]

The proposed C.A.B. rulemaking[139] would require carriers to provide deaf passengers[140] with necessary information by use of written material, signs, placards, flashing signal lights or other means, and to make available for blind passengers[141] in Braille the information

that is provided to other passengers on printed emergency cards.

Stowage of canes

Another problem associated with the treatment of blind passengers is the on-board storage of their white canes. (These remarks also apply to the stowage of crutches.) The F.A.A. regulations proposed in 1974, required that these devices be stowed where they would be readily accessible.[142] The Civil Aeromedical Institute reseach[143] indicated, however, that the use of a cane or a crutch could lead to delay and that handicapped passengers in the simulated evacuations moved faster using seatbacks for support. In addition, canes and crutches were found to damage evacuation slides,[144] and they can become dangerous projectiles in severe turbulence.[145] This same line of argument applies to food trays but the airlines have not prohibited their use. There is also the supposed danger of their being used as a hijack weapon.

The proposed regulation was, therefore, abandoned, and canes and crutches (despite vociferous protests to both the D.O.T. in Canada and the F.A.A. in the United States) are stowed in the same way as other carry-on luggage.[146] Blind passengers continue to point out that they feel far more secure with their own cane close at hand than they do with them stored in the overhead luggage containers, but their primary source of self-help is removed from them, ironically by the very air-

lines which balk at rendering special attention or assistance to handicapped passengers. Even the proposed new rulemaking in the United States,[147] although permitting canes and crutches to be available to blind and crippled passengers to the maximum extent permitted by the F.A.A. rules,[148] would not allow blind passengers to keep their white canes next to them during takeoff and landing.

This issue is being addressed by the Federal Aviation Authority which has invited public comments on a petition by the National Federation of the Blind for an amendment of the F.A.A. rules.[149] One proposal would allow readily accessible storage of travel canes carried by blind passengers while on board, for example, in overhead racks, under rows of seats or under window passenger seats, as long as they do not protrude into an aisle or block an exit row.[150] In Canada, the Air Transport Association of Canada is trying to resolve the problem with the co-operation of the Department of Transport.[151] Perhaps a solution as simple as a two-sided adhesive strip which could be attached to the side of the blind passenger's seat (or the back of the seat of the row in front) could be utilised to secure the cane.[152] Of course, should the blind traveller decide to hijack the flight, their "weapon" would be all that much more to hand!

THE DISEASED, THE SICK AND THOSE REQUIRING MEDICAL ATTENTION

In a special category are those passengers carrying contagious diseases.[153] The carrier is not only permitted to, but owes a duty to its passengers to protect them from the dangers inherent in the carriage by air and to avoid placing anything among them that might injure them.[154] The quarters are relatively crowded aboard an aircraft (even in the wide-bodied jets), the passenger being confined most of the journey to a particular area of the aircraft and being unable to disembark at will, so that the opportunities for contamination are greater then on board a ship or a train.

Seventy years ago in the case of Bogard's Admin. v. Illinois Central R. Co.,[155] an action was brought on account of the death of an infant from measels allegedly caught from a fellow passenger on a train. It was held that the carrier was not liable for failure to exercise ordinary care to ascertain that the passenger did not have a contagious disease, but was only bound to exercise ordinary care to protect the decedent from contagion after the affliction of such fellow passenger had been discovered or called to the attention of the carrier's conductor.[156] Any other ruling would have decreed that passengers are to be subjected to on the spot medical examinations which would defeat the very essence of air travel, namely the speed at which passengers can move from place to place.

Fifty years ago, it was suggested that passengers rendered repulsive by diseases should be refused transport.[157] Hopefully, nowadays, with modern medical treatment of elephantiasis, leprosy, smallpox and the visible effects of venereal disease,[158] this is no longer a common occurrence. It should be noted though, that in the proposed regulations of 1973, there was a statement to the effect that airlines would not accept passengers with gross disfigurements;[159] the proposal was not adopted. The malodorous draining wounds prohibition still applies in North America,[160] and the I.A.T.A. Standard Medical Information Form has a section devoted to passengers who are offensive by way of smell, conduct or appearance.[161] There appears to be an extremely unenlightened, not to mention intolerant, attitude prevailing within the airline industry if they are refusing to fly people who are ugly, especially if such disfigurement results from causes beyond the passenger's control.

Invalids (those who are infirm of body and/or who may require some type of in-flight medical assistance), cannot ordinarily be excluded by carriers if they are able to care for themselves or if they are travelling with an attendant and the medical assistance required can be administered either by the passenger or by the attendant.[162] Should the passenger be taken ill on board, or should their condition worsen considerably, then the carrier has the right to make an unscheduled landing and terminate such a passenger's carriage; but the right to terminate the transportation of a passenger

cannot be exercised inhumanely.[163]

If a carrier does accept a passenger without an attendant whose inability to care for themselves due to mental or physical factors is apparent, then the carrier must render the special care and assistance required by the passenger and the airline would be negligent if the assistance was not afforded.[164] It should be kept in mind that, in the case of airlines, "accepting" a passenger includes the situation in which an airline offers an invalid a company wheelchair in the airport parking lot.[165] The requirement to render special care and assistance appears to run from that moment onwards.

THE INSANE

In the past, insane persons could probably be grouped according to whether they were violent or harmless; with modern medication[166] all mentally ill persons can be rendered harmless for the period required for transportation by air. And yet, as will be discussed below, many of the American carriers' tariffs read as if insane persons were akin to wild animals and the only stipulation not made is that they be transported in a cage!

On Canadian carriers, mentally ill patients and persons suffering from nervous conditions are acceptable with Company Medical Officers, approval and are regarded as ambulatory.[167] The M.O. will

make the decision on the issue of self-reliance and, thus, if the mentally ill passenger requires an escort and, if so, the qualifications required of the escort. The general rule[168] is that if a mentally retarded person is accompanied and appears well behaved and unlikely to be objectionable to other passengers, they are acceptable for transportation. Unaccompanied, mentally retarded passengers capable of self-care are accepted for carriage and are regarded and handled as unaccompanied children.[169] The subjective elements in this assessment are only too obvious.

Once a carrier accepts a mentally ill passenger with knowledge of their condition, it was established at an early date that such care in addition to that given to the ordinary passenger must be given to such a traveller and that this additional care is that which may be reasonably necessary for their safety.[170]

Of the United States' carriers, three state in their filed tariffs that they will not accept a patient who is mentally deranged, whether escorted or not.[171] A number of airlines insist that a mentally ill passenger have an escort to care for them so that they will not require unreasonable attention or assistance from carrier personnel.[172] Other carriers[173] will only accept escorted patients who are mentally deranged or otherwise mentally incapacitated if an assurance is furnished that the passenger can be transported safely; the request for transport must be made forty-eight hours in advance

and acceptance is for on-line travel only and is further restricted to one such passenger per flight.[174]

In addition to the above requirements, American Airlines, Hawaiian Airlines, Hughes Airwest and Pacific Southwest Airlines insist that the escorted passenger be accompanied at all times; that the escorted passenger does not possess, or have access to, articles that could be used as deadly or dangerous weapons, and that the escort has adequate restraining devices, if needed.[175] Furthermore, such escorted mental patients will be restrained from moving in flight and they are not permitted to smoke and all matches will be removed from their possession. No food, beverage or eating utensils will be provided the escorted passengers unless specifically authorized by the escort. Neither the escort or the escorted passenger will be served, nor will they be permitted to drink, alcoholic beverages whilst on board.[176]

Escorted mental patients are subject to specific boarding policies (they are boarded first and deplaned last) and they have to be seated in the rear-most available seats with the escort seated between the escorted passenger and the aisle; such patients will not be seated near window exits or opposite a door exit.[177]

There are more restrictions on the carriage of mental patients than there are on the transportation of prisoners.[178] They

are treated as if they were mad dogs and it is surprising that they are not ordered to travel in the baggage compartment, confined to a cloud kennel! The potential for harm represented by mental patients (sedated if necessary) is far less than that represented by a passenger who becomes inebriated in flight and decides to pick a fight with a fellow passenger or a member of the crew, or is even just merely obnoxious. Nowhere do the tariff regulations require that drunks be escorted or that they cannot lurch around the aircraft or that they are not permitted to smoke. Overall, it seems less than fair, if not highly discriminatory, that with all the restrictions and safeguards obligatorily imposed upon insane persons, that their numbers should be limited to one per flight[179] and that in some cases, they are denied carriage altogether.[180]

WHEELCHAIR PASSENGERS: CRUTCHES[181] AND CASTS

Passengers whose legs are afflicted in some way are often completely self-reliant due to some artificial aid such as a cane, crutch or wheelchair. Unfortunately, these aids do not lend themselves to speedy evacuations and can damage evacuation chutes[182] and thus, in assessing the potential threat to airline safety represented by a crippled passenger, individual arm strength should be the controlling factor. Alas, blanket regulations and restrictions are applied to this group of passengers.

Persons who are incapacitated due to their reliance upon a wheelchair or a crutch or who have one of their lower limbs encased in plaster, are subject to all the regulations governing other categories of handicapped passengers,[183] such as advance reservations, certificates of good health, the services of an attendant if necessary, and limited numbers and restricted seating arrangements away from emergency exits.

Those persons requiring a wheelchair merely for boarding and deplaning assistance (i.e. a ground wheelchair as opposed to an aisle chair) in addition to assistance in travelling the distance to the mobile lounge, are regarded as ambulatory and self-reliant. They are in a different position from those passengers who cannot move unaided from their cabin seat to the washroom, and from those who require a personal attendant during all phases of the journey.[184] It is the non-ambulatory passengers with which the airline tariffs are concerned.

Consideration has been given to the idea of making the aisles in aircraft wide enough to accommodate wheelchairs,[185] but it was turned down on the ground that it would be prohibitively expensive in terms of fewer seats being possible per row, and that it would only bring very limited benefits since a handicapped person could not utilise their own wheelchair during a flight due to the inability to secure the wheelchair to the cabin floor, the absence of approved seat belts to

secure the passenger to the wheelchair, and the blockage of the aisle that this would constitute. Instead, the narrow "Washington" chair, which is capable of negotiating stairs and aisle widths is used to transport those passengers who are completely dependent on wheelchairs, to and from their cabin seats for the purposes of embarking and disembarking only.

The issue of control (domestic flights)

The jurisprudence suggests, that once a carrier agrees to provide a ground wheelchair for an unaccompanied, disabled passenger, the passenger is then regarded as having submitted their body to the control of the airline and the passenger as being a virtual captive of the carrier, regardless of how long in advance of boarding the aircraft the wheel chair is supplied. In the case of Suarez et al. v. Trans World Airlines, Inc. et al,[186] Sprecher J. held (for a divided Seventh Circuit Court) that if a common carrier knows that a passenger is affected by a physical or mental disability which increases the hazards of travel, a degree of attention should be bestowed on their safety "beyond that due to an ordinary passenger."[187] Not to give them this degree of attention, once promised, is as discriminatory as refusing to carry the passenger in the first place.

In the Suarez case, the airline had been informed that the passenger had just been released from hospital following an angina

attack, and that she required a wheelchair to take her from her automobile to the check-in counter and thence to the aircraft. It was found that the passenger was wholly subject to, and in complete reliance upon, the actions of the carrier for transportation to the aircraft and for interim care, even while in the lobby of the airport terminal building awaiting the outcome of a ticketing controversy caused by a dispute involving the method of payment for her ticket. The would-be traveller was a passenger of the carrier and as such was entitled to the highest degree of care[188] and should not have been subject to abusive treatment by the ticketing personnel, nor have been left to sit alone in a wheelchair in the crowded noisy lobby of O'Hare Airport for almost two hours not knowing what her status as a passenger was.[189]

After having been abandoned for two hours, Mrs. Suarez was informed that the ticketing controversy was solved but that she had missed her flight, whereupon she promptly had a heart attack. Such gross want of care, or even kindness, as was demonstrated by the facts in the Suarez case may unfortunately be illustrative of the general attitude of, at the very least, the ground personnel of the air carriers, towards handicapped persons.

The Suarez case raises the issue once again of when does a traveller attain passenger status. On international flights, Article 17 of the Warsaw Convention contains the guidelines that for the

carrier to be liable, an injury must be suffered "on board the aircraft or in the course of any of the operations of embarking or disembarking." Although this statement was meant to be a rule, the litigation it has sparked (discussed below in this section of the study in connection with the Adamsons case) demonstrates that it serves merely as a guide.

The principle that payment of the fare is not a prerequisite to acquiring the status of a passenger of a common carrier was reaffirmed by the Illinois Supreme Court in 1972.[190] Therefore, since the plaintiff in the Suarez case had, immediately preceding her heart attack, been informed of the pre-paid ticket arrangement, there was presumably no barrier to her attaining passenger status on the grounds that the treatment of Mrs. Suarez which contributed to her heart attack took place before the issue of the method of payment for her ticket had been settled.

In the absence of payment of the fare being the controlling factor, the following criteria have been developed to determine the status of a traveller vis-a-vis a common carrier: firstly, place (a place under the control of the carrier and provided for the use of persons who are about to enter the carrier's conveyance); secondly, time (a reasonable time before the time to enter the conveyance); thirdly, intention (a genuine intention to take passage upon the carrier's conveyance); fourthly, control (a submission to the directions,

express or implied, of the carrier); and fifthly, knowledge (a notice to the carrier either that the person is actually prepared to take passage or the persons awaiting passage may be reasonably expected at the time and place).[191] The first, third and fourth criteria are approximately parallel to the tri-partite test of location, activity and control used in Warsaw Convention cases,[192] the main difference, however, would appear to lie in the application of the test, for the reasoning of the Seventh Circuit suggests that as long as one of the criteria is satisfied or is "underscored heavily", the traveller will be accorded passenger status even if the other elements of the test are not met. Mrs. Suarez's situation did not meet with the criteria of place or of time since she was in the airport's public lobby one and three-quarter hours before the departure time of her missed flight and an even longer time before the next unspecified T.W.A. flight to her destination. In contrast to this attitude demonstrated when dealing with domestic flights, when deciding whether a passenger was engaged in the acts of embarking or disembarking, the Warsaw Convention cases insist on all three criteria of location, activity and control being satisfied.[193]

The Suarez case extends the period of the carrier's responsibility for the embarkation of passengers on domestic flights to the time when the carrier, T.W.A., placed Mrs. Suarez in a T.W.A. wheelchair i.e. when the T.W.A. skycap brought a wheelchair to the passenger's automobile which was parked in O'Hare Airport's public parking lot.

This would appear to be a dangerous precedent in the treatment and handling of disabled passengers, since it presents the airlines with an additional basis for practising discrimination against this group of travellers. A non-disabled traveller would not be regarded as within the carrier's control from the moment they step out of their automobile into the airport parking lot, but yet Chief Justice Swygert concurred[194] in the opinion that Mrs. Suarez "had submitted her body to the control of T.W.A.",[195] and the element of control made her a passenger and entitled her to the highest degree of care.

This period of control over disabled persons thus appears to be far more elastic and extensive for disabled persons than it does for able-bodied passengers on either domestic or international flights, both before embarkation and also after a passenger has missed a flight; for an argument could be made that once an able-bodied passenger has failed to board an aircraft on time, then the carrier relinquishes the element of control over that person's actions. Should air carriers wish to limit their responsibility towards the travelling public, the decision in the Suarez case gives them a reason not to agree to carry wheelchair-bound passengers at all.

Carriage of batteries

Wheelchairs in themselves present problems for carriage, especially, as of late, in Canada. The recently enacted Transportation

of Dangerous Goods Act[196] adopted and imposed the International Air Transport Association's Restricted Articles regulations.[197] Under the regulations wheelchairs driven by dry cell batteries or non-spillable types of batteries may be accepted for carriage as checked baggage with their batteries,[198] whereas wet storage batteries must be removed and packed and cannot be accepted for carriage in a passenger aircraft,[199] due to their potentially corrosive capabilities, unless the wheelchairs with wet cell spillable batteries can be carried in the baggage compartment with the battery installed but with the connections disconnected and taped, and provided that the wheelchair can be securely fastened in an upright position and can be protected against contact with other articles so as to prevent short circuits.[200] It should be noted that only in wide-bodied jets can a wheelchair be loaded in the upright position so that this provision is of little practical use.[201] The exclusion of the wheelchair as baggage, will frequently result in the exclusion of the disabled person as a passenger.

A similar position prevails regarding the U.S. carriers,[202] since they are subject to the Department of Transport regulations for the transportation of hazardous materials.[203]

The Civil Aeronautics Board can offer no solution to the problem of spillable wet cell batteries.[204] In their proposed rulemaking, they do not require modification of aircraft whose cargo areas are too

small to carry wheelchairs in an upright position, rather, on aircraft which are large enough to accommodate wheelchairs in an upright position, they would make it the carrier's responsibility to ensure that wheelchairs can be adequately secured.[205] The proposed rule would allow the on-board carriage of folding wheelchairs provided that they did not block aisles, impede flight attendants in their duties or violate the Federal Aviation regulations[206] or the Department of Transport regulations for the transportation of hazardous materials.[207]

Inability to use the washroom

Perhaps one of the greatest problems presented by passengers who cannot walk unassisted (ranking only after the difficulties encountered in emergency evacuations) is their inability to use the washroom. The case of Levy et al v. American Express, Delta Air Lines, and Trans World Airlines,[208] spotlighted this whole issue. The facts in the case, however, would appear to reinforce the carriers' determination to exclude persons who cannot attend to their own toilet needs, since in this particular situation the airline personnel went to great lengths to accommodate the passenger and were repaid for their efforts with a law suit for not doing more.

In the Levy case, the plaintiff had fractured her leg in a skiing accident in Yugoslavia which necessitated her return home by air to New Orleans via Rome and New York. Her brother, a doctor,

purchased a first class ticket for her, at an American Express office in Naples, to fly to New York with T.W.A. and to take a connecting Eastern Airlines flight to New Orleans. At the time of purchasing the ticket, her brother requested that the airlines provide some type of toilet facility, such as a bed pan, or an attendant to carry her to the bathroom. In addition, extra attention would be required at Kennedy Airport during the layover in the form of a wheelchair and prompt attendants, but it appears that those specific requests were not communicated to T.W.A.

Since Mrs. Levy's leg had been placed in a long leg cast, she was placed in a wheelchair to carry her to the door of the aircraft and was then carried to her seat in the cabin. Whilst the aircraft was still on the ground the plaintiff used the aircraft toilet facilities with the assistance of her brother who was overseeing her departure, and two male employees of T.W.A., who carried her to the toilet and seated her upon it. Her brother held up her broken leg which extended out of the toilet due to the long leg cast. When the plaintiff had been carried back to her seat, the attendants lowered the back of the seat in front of her and propped up the broken leg on pillows. The carrier's personnel repeatedly pointed out that they doubted Mrs. Levy's ability to make the eight hour trip to New York without great discomfort and their doubts were only allayed by assurances from Mrs. Levy's doctor-brother.

During the flight, Mrs. Levy found that she had to relieve herself and upon informing the stewardesses of the problem, the latter removed all the other passengers from the first class compartment, surrounded Mrs. Levy with a screen of blankets and furnished diapers to absorb the urine. The Louisiana Supreme Court found that the assistance provided for Mrs. Levy was not performed with anything less than "propriety, dignity and courtesy, under the circumstances."[209]

During the flight it was apparent that the connection with the Eastern flight would not be made and the T.W.A. personnel arranged for Mrs. Levy to be booked on a Delta flight to New Orleans. Delta, like T.W.A., did not have advance notice of Mrs. Levy's condition. Upon arrival at Kennedy Airport, T.W.A. ground personnel removed Mrs. Levy from the aircraft and took her on a wheelchair to Delta's waiting room where the plaintiff was assisted once more in the use of the toilet facilities.

The New York - New Orleans leg of the journey consisted of only a two-hour flight but Mrs. Levy informed the stewardess that she needed to urinate. The stewardess, however, informed Mrs. Levy that it was not possible to move her into a washroom during the flight. This resulted in the plaintiff being forced to "void upon herself."[210]

The plaintiff charged T.W.A., inter alia, with breach of

an express contract to providing the type of toilet facilities requested, and that she was not properly cared for during the layover in New York. She also claimed that she was caused unnecessary embarassment, and was not treated with dignity and courtesy, by being required to use diapers. Delta was charged with causing her discomfort and embarrassment by not furnishing her with some sort of toilet facilties. But the Court found that the plaintiff had acquiesed in the use of the diapers and had been aware of the lack of bedpans (and the fact that she could not be transported to the bathroom during the transAtlantic flight) before takeoff. In addition, the Court held that there was not enough evidence to hold that the repesentation or agreements made by the Italian travel agent in selling a first class ticket to the plaintiff's brother could result in liability on the part of either airline to furnish some type of toilet facilities. There was, in fact, a complete failure of proof that T.W.A. or Delta had violated any contractual or delictual obligation to Mrs. Levy.[211]

As has been mentioned before, the reasoning in this case casts substantial doubt on whether informing the travel agent, from whom the ticket is purchased, of the nature of a passenger's handicap and any special attention required would be regarded as adequate notice to the airline as required by the tariff.[212]

Mrs. Levy's misadventures raise two other, subsidiary

questions. Firstly, is it only in the first class cabin that flight attendants (and fellow passengers) will do their utmost to accommodate the needs of a crippled passenger? Secondly, since at least T.W.A. has demonstrated that it was willing to cope with the need for alternative toilet facilities - even to the extent of shooing away the other passengers - for this particular passenger, why cannot the airlines do this for disabled passengers in general? Organised bathroom breaks with those who can walk being sent to the washrooms at the rear of the aircraft and those who are non-ambulatory attending to their needs in situ may sound bizarre, but in comparison with the alternative i.e. refusing to carry this category of persons on trans-oceanic flights, it seems to be a reasonable and efficient solution to the problem.

IN-FLIGHT OXYGEN SERVICE

Although there are facilities for providing in-flight oxygen in pressurized aircraft should the cabin pressure drop, facilities for providing individual oxygen service for passengers requiring sustained access to additional oxygen supplies as, for example, people suffering from congestive heart failure, angina or severe emphysema, are not standard on many airlines. If in-flight oxygen service is not available, the carriers refuse to accept those passengers which might require it.[213]

The airlines which are willing to provide this service on board have developed a set of practical rules which are reasonably required in the circumstances plus a couple of regulations which appear unnecessary.

On the practical side, passengers requiring oxygen will either not be allowed to sit in the smoking compartment[214] or they must sit at least ten feet (3 rows of seats) from the smoking section.[215] A letter from the passenger's physician certifying the need for in-flight oxygen, the maximum usage per hour and the oxygen flow rate per minute are normally also required.[216]

On the obstructive side, passengers requiring in-flight oxygen service are restricted to certain seats i.e. they cannot sit in a row with, behind, or forward of an emergency window exit.[217] Since the requirement for oxygen is usually related to high altitutde flying, one wonders why oxygen use should be a factor in an emergency evacuation. Perhaps the regulation is concerned with the presence of the equipment (which might prove an obstacle) rather than lack of arm strength for opening window exits, but the need for this restriction is not clear.

The carriers have obviously not agreed amongst themselves on a policy covering who should operate the oxygen equipment. Some airlines will permit a qualified passenger to operate the equipment, or insist

that the passenger be escorted and that the escort be the operator.[218] Other airlines insist that the passenger's or their attendant's qualifications to operate the equipment must be attested to in a note from their attending physician.[219] The I.A.T.A. guideline would only permit flight attendants to operate the equipment.[220] This stipulation appears not to be at all in the best interests of this group of passengers, for it gives the airlines yet another reason for limiting the number of such passengers per flight.

Passengers using in-flight oxygen equipment will not as a rule be boarded in the first-class compartment,[221] although American Airlines and US Air will allow pre-planned oxygen service in the first class compartment of a Boeing 747 or a DC-10.[222] Thus, it appears to be acceptable to surround passengers using oxygen by harassed parents and fractious children travelling on bargain family fares, but oxygen users must be screened from the eyes of the first class business traveller. It is extremely doubtful if safety considerations were a factor when this regulation was drafted.

In the C.A.B.'s proposed rulemaking,[223] no clarification of the existing regulations is offered nor is there any insistence that all pressurized aircraft carry equipment for in-flight oxygen service as a standard feature. Rather, the provision of oxygen for individual on-board use (as with the provision of wheelchairs and mechanical boarding lifts) is characterised as extensive special assistance:[224]

under the proposed rules, if extensive additional assistance is required, the carrier has the right to refuse carriage of the handicapped passenger unless the carrier has been notified at least forty-eight hours in advance.[225]

STRETCHER PATIENTS

Facilities for passengers confined to stretchers are also not always available, for example, Eastern Airlines will not accept stretcher patients.[226] The carriers which will accept passengers confined to stretchers insist, however, that the passenger have at least one able-bodied attendant.[227] The fares charged by the airlines for the carriage of stretcher passengers and their attendants vary enormously from a low of two normal adult full fares plus the applicable adult fare for the class of service used by the attendant,[227] to a high of an incredible nine adult fares plus a rental charge of $125 (U.S.) for the stretcher.[228] The extra charges involved must often prove an effective barrier to air travel for this type of handicapped person,[229] and in view of the fact that, at most, a stretcher will occupy five seats, a charge of nine full adult fares appears to be blatant economic discrimination, more especially since wheelchairs, walkers, canes and crutches are carried free of charge in addition to the passenger's regular baggage allowance.[230]

Occasionally, however, an airline will bend all the rules to

help out a family in distress. A recently reported story in a Montreal newspaper[231] tells of how a Montreal resident, while holidaying in Daytona, Florida, slipped on the stairs of his motel and struck his head. He fractured his skull and lost consciousness and remained in that state. His family was faced with either refusals from the airlines to fly a passenger on a stretcher (who also required oxygen and intra-venous feeding) or being charged four adult fares[232] for the stretcher case plus extra charges for medical personnel who were required to accompany the passenger. Nordair Ltd., which flies charters to Orlando, Florida, made arrangements with the Montreal Neurological Institute to admit the passenger on his return from Florida, and with the tour company to allow a stretcher passenger on board. Nordair then flew the patient's daughter-in-law (a registered nurse) to Florida to attend her father-in-law on his return flight. Two rows of three seats were folded down to accommodate the stretcher and extra flight attendants were assigned to help out with the care of the patient. Nordair did not charge the family for this service. A company spokesman commented, "What the hell, they've been through enough!"

It would be unreasonable to expect all air carriers to lavish the same care and attention on every stretcher patient, but Nordair's response to the situation makes the flat refusal by some airlines to carry passengers confined to stretchers seem very unreasonable. At least those airlines which charge exorbitant fares to carry stretcher

patients do not discriminate against them entirely. An economic trade-off must exist in which the airlines are not losing revenue (seat sales) by carrying stretcher patients. The trade-off price may well include the services of a flight attendant full time but, even if it does, if the passenger is willing to pay the applicable fare, the carriers should be compelled to accept such a passenger unless the configuration of the aircraft is such that the carriage of a stretcher would prove a hazard.

Attendants

The issue of requiring attendants[233] or escorts for handicapped passengers has been for a long time a matter of controversy. Passengers confined to stretchers always require attendants as do passengers who are both blind and deaf, and those who cannot take care of their lavatory needs. In addition, some passengers who require constant oxygen and some mental patients also are required to be escorted.[234]

The Civil Aeronautics Board's proposed rulemaking[235] would prohibit carriers from requiring attendants for disabled passengers unless such persons would need substantial assistance to deplane in an emergency, and the structure of the aircraft makes it physically impossible to seat them where they would not obstruct the emergency deplaning of other passengers. Persons who need such substantial assist-

ance would thus be allowed to assume the risk of travelling without an attendant[236] as long as they presented no risk to their fellow passengers.

Although, on the surface, this sounds like a great step forward with regard to the acceptance and treatment of the handicapped, it is difficult to see exactly who is envisioned by this category of disabled persons. Perhaps the relaxing of the requirement for an attendant only refers to personal care i.e. the passenger cannot feed himself and is willing to go without food and risk starvation!, or perhaps it refers to passengers who require medical attention at specific times, such as injections, and who are willing to forgo them.

Both Transport Canada and, in particular, the Advisory Committee on the Transportation of the Handicapped have voiced their concern over the additional expenditure required for the seats occupied by attendants.[237] As has been mentioned before, the monetary barriers raised (especially in stretcher cases) can be formidable.

The Air Transport Association of Canada has defended its policy of charging extra fares for attendants on the basis of its members' precarious economic position; if the airlines had to absorb the loss of revenue produced by allowing attendants to travel for free it would impose serious problems on the airlines

> "who are very hard put to obtain the wherewithal to purchase the extremely expensive new inventories of aircraft with the improved designs for better accommodation of the needs of the disabled."[238]

Ignoring the self-serving nature of this statement, it presents a reasonable point of view if the airlines are not in the business of providing a social service. The alternative courses of action (as opposed to the present position whereby the disabled passenger pays for the additional seats) are that the costs should be borne by the rest of the travelling public or that they should be underwritten by society as a whole. Needless to say, Canadian carriers favour the latter alternatives.[239]

In the United States, an amendment[240] to subsection 403 (b) (1) of the Federal Aviation Act of 1958[241] requires that the Civil Aeronautics Board to allow carriers to establish space-available, reduced fares for the transportation of handicapped passengers and any required attendants. Even though this represents another step in the right direction, the idea of having handicapped travellers and their attendants hanging around airports waiting to fly on a standy-by basis is obviously not a perfect solution.

The C.A.B.'s proposed rulemaking[242] would allow carriers in general to charge handicapped passengers for additional services should they request them, as long as other passengers requesting the same

services are also charged for them. The additional charges should be cost-based and comments were invited on the costs to carriers of administering such a programme of additional charges for these services.[243] The charges would apply, not only to major services such as the provision of in-flight oxygen, but the Board also raised the spectre of charging for assistance by ground personnel. The point was also made that a carrier could not discriminate against handicapped travellers by charging them for an escort service between connecting flights if the same service is offered free to young children, elderly people or simply harried travellers.[244]

It appears that the C.A.B. is moving towards a "pay your way" philosophy to try and undermine the present discriminatory refusal of carriage policy which prevails amongst the airlines. Unfortunately what it is promoting is economic discrimination against the handicapped, especially patients who require stretchers and/or attendants. The cure may be easier to tolerate than the disease, but not markedly so.

HOW THE SITUATION DIFFERS FOR CANADIAN AND U.S. CARRIERS

One of the most important differences between the rules governing the carriage of handicapped persons in Canada and the United States is that for Canadian carriers a general tariff regulation[245] prevails which allows scheduled carriers to refuse to transport passengers

whose conduct, status, age[246] or mental or physical condition makes them unable to care for themselves without assistance rendering refusal to carry them necessary for the reasonable safety or comfort of other passengers, or presents any unusual hazard or risk to himself or to other persons (including in cases of pregnant passengers,[247] unborn children) or to property. This tariff regulation had been applicable to United States' scheduled carriers until November 1979 when the Civil Aeronautics Board adopted an order cancelling these rules for U.S. certified carriers.[248]

In cancelling the above general tariff regulation, the Board acknowledged the need for this type of rule, since there were many individual situations in which the rule might properly be applied, but it felt that on the whole, the rule allowed carriers an almost unfettered discretion to refuse carriage which was unlawfully vague, overbroad and unjustly discriminatory.[249] The discretion was clearly much greater than was required in the interest of safety, or even of the mystical concept of "reasonable comfort".[250]

The Board also questioned the standards on the grounds that even though they might not be blatantly discriminatory, they were so broad and ambiguous that there existed the potential for abuse, and the tariff rules was capable of unlawful application. The word "status" was left undefined. If the reasonable comfort of other passengers was a sufficient standard for exclusion, it might permit an air carrier to

refuse service on the basis of appearance, manner of dress, apparent economic class or even race. "Conduct" was also vague since it could potentially cover far more than abusive, inebriated or violent conduct (people who complain about the food, for example),[251] but most importantly, the tariff rules as they stood for U.S. carriers, and as they still stand for Canadian carriers authorize unnecessary and unjust discrimination on the basis of factors unrelated to flight safety. The carriers' legitimate interests could be protected using more narrowly defined criteria.

The very vagueness of the rules, together with the fact that the evidence indicated that they were invoked infrequently, added to the discriminatory impact on the occasions when they were invoked, and the Board did not agree that

> "a demonstration of extensive abuse by carriers of the overbroad discretion provided by these rules is necessary to justify our action here. A tariff rule that permits unreasonable or unfair conduct is dangerous and unlawful even if carriers do not frequently avail themselves of the opportunity to act unreasonably. . . . the consequences to an individual who is the object of such unfair conduct may be very great. We believe that prevention of such an occurrence is sufficiently important to warrant our action even if the situation does not arise very frequently."[252]

As can be seen from an examination of the recent case law, discussed above, with respect to the handicapped and, in particular, in the case of Adamsons v. American Airlines, Inc.,[253] discussed below, the consequences to an individual can be devastating.

As a result of the C.A.B.'s ruling, the vague generalisations of the former regulations have been replaced by the excessive specificity demonstrated in the current tariffs,[254] no doubt in response to the Board's plea for narrower criteria. And yet, the title of Rule 35[255] still mixes comfort and safety on an apparently equal footing.

The rules which the Board cancelled for the United States' carriers are still in force for Canadian carriers. In Canada, a person's status as a handicapped passenger per se is enough to limit the numbers of such passenger's per flight and thus deny carriage to any passengers in excess of that number. Also, in Canada the limitation on the numbers of handicapped passengers is not defined in terms of making an expeditious exit (since the term handicapped is not defined in relation to flight safety) but is still defined in terms of requiring extra attention by the cabin crew. Canadian carriers appear intent on minimising service to their passengers, perhaps this is a reflection of the non-competitive position within the Canadian air transport industry.[256]

If the C.A.B.'s proposed rulemaking[257] does come into effect in the U.S.A., the position of the handicapped will have been advanced

theorectically and, hopefully, in practice as well.

Two general tenets underlie the proposals: firstly, that all passengers, regardless of handicap, should be given reasonable access to commercial air transportation; and, secondly, that regardless of any special programmes, activities or procedures designed to meet the needs of handicapped persons, the handicapped should be given a reasonable opportunity to use the ordinary unaltered services of the carriers.[258] What this amounts to can best be described as a reversal of the burden of proof, for, rather than categorise a passenger as handicapped and demand such passenger perform certain physical tests, the proposed rules provide that handicapped people will be presumed to be fit to travel unless there is clear evidence to the contrary.

The requirement for the presentation of a recent medical certificate testifying to the passengers ability to endure the flight without making an undue or disproportionate nuisance of themselves would only be invoked in cases of real dispute i.e. in the limited number of instances in which a handicapped person insisted that no additional services would be necessary whilst the carrier believed that they were, or when the handicapped person insisted that they could withstand the rigours of the flight but the carrier remained unconvinced. The proposed rules would establish the principle that handicapped individuals must be transported unless there is a "substantial, verifyable reason for refusing service".[259] The Board has tentatively concluded that in

disputed situations, presentation of a recent medical certificate should satisfy all but the most conclusively supportable carrier doubts with respect to an individual's ability to fly.[260] The new rules would finally separate the requirements of comfort from those of safety, with only the latter needing to be satisfied.

RECOURSE OF THE PASSENGER

The sole recourse of the passenger, if refused carriage or even if removed en route for any reason covered by the tariff rules under discussion, is the refunding of the value of the unused portion of their ticket by the carrier who refuses or who removes the passenger.[261] Tariff regulations, however, in the face of alleged discrimination have never been a bar to action, as has been amply illustrated in the overbooking cases.[262] A recently decided case, Adamsons v. American Airlines, Inc.,[263] underscores the fact that in cases of negligence a carrier cannot hide behind its tariff rules.

The case arose from an incident which occurred in 1972 and concerned an American sociologist who was taken ill while pursuing studies in Haiti. Local doctors were baffled by the nature of the illness, the symptoms of which included progressive paralysis of the lower limbs. Because of their bewilderment, plans were made to fly the patient to a hospital in New York City. The plaintiff was issued with a first class ticket on an American Airlines flight and was taken

by ambulance to the airport for boarding. She was literally part way up the gangway, being carried in a wheelchair, when she was refused carriage. The next available flight was a Pan American World Airways flight two days later and in the interim Dr. Adamsons' condition worsened seriously. When she eventually arrived in New York, a haematoma of the spinal column was diagnosed and removed.

The plaintiff was left with total paralysis of her lower limbs and complete destruction of her voluntary urinary and bowel functions. Expert medical opinion was offered that these catastrophic consequences (although not all ensueing impairments) would, with reasonable medical certainty, have been avoided if the two day delay in surgical intervention had not been forced upon the plaintiff.[264]

At first instance, Dr. Adamsons was awarded $525,000 (U.S.) damages by the trial jury. Upon a motion to set aside the verdict or, in the alternative, to limit it to the amended Warsaw Convention[265] limit of $75,000 (U.S.), American Airlines further argued that the case should not have been submitted to a jury since the airline's tariff permitted it to refuse carriage. The applicable tariff then in force allowed the airline to refuse to carry a passenger when "such action is necessary for reasons of safety . . . or the . . . physical condition of the passenger is such as to require special assistance or . . . involve any hazard or risk to himself or . . . other persons."[266]

The New York Supreme Court demolished the argument put forward that the airline was within its rights and was merely acting in accordance with its absolute discretion under the tariff and Wallach J. asserted that the defendant's actions were outside the scope of its rights under the tariff since the airline's ground personnel at the Port au Prince Airport in Haiti had been negligent in the manner in which they exercised their discretion, to wit, they "failed to gather the necessary information, so as to exercise a reasonably informed and intelligent discretion."[267] This holding puts an entirely new complexion on the requirement of, firstly, providing the carrier with a recent medical certificate and, secondly, informing the carrier as to the nature of the traveller's handicap and the type of special assistance required. As was discussed earlier in this section of the study, the requirement of giving notice of a handicapped passenger's condition has been strictly interpreted[268] and notice to the agent selling the ticket was held to be not necessarily notice to the airline.[269]

The trial court found that American Airlines had been negligent in failing to ascertain the true facts, i.e. that her condition was not contagious, that she was fully capable of making the flight with reasonable assistance from a stewardess which would be within the contemplation of a first class passenger, and that the airline failed to telephone the Port au Prince Hospital to confer with the doctor who was treating the plaintiff should there have been the need for further

information or corroboration. If the carrier had made such enquiries it might well have been further appraised of the far graver risks incumbent upon a refusal to transport Dr. Adamsons. If Wallach J.'s characterisation of the issue is correct, as not being a matter of second guessing the pilot or the airline's station chief who were responsible for the decision, but to decide whether the defendant had been negligent in not gathering up the information, then it would seem that once a passenger has received a boarding pass, the burden of proving the patient's inability to travel shifts to the carrier. This is obviously an unsatisfactory situation from both the legal and the practical points of view.

The other argument used by the defendant airline was that since Dr. Adamsons was a passenger who suffered an accident which caused the injury in the course of embarkation, then the $75,000 (U.S.) limit of the amended Warsaw Convention had to apply to the award of damages. The Court dismissed this agrument firstly, because the plaintiff could not be considered a passenger since American Airlines had deliberately cancelled the contract before any carriage took place (this was sufficient to render the Warsaw Convention defense invalid), and secondly, no accident had occurred since the rejection of Dr. Adamsons was no accident, for the "volitional character of the acts of American's personnel cannot be regarded as "accidental" within the purview of article 17".[270]

The learned judge may well have reached the right decision for the wrong reasons. On the question of whether the contract of carriage no longer existed between the plaintiff and the defendant, the real answer to this is surely that regardless of the existence of the contract, the defendant was estopped from using the terms of the Convention as a defence in view of the airline's attempt to unilaterally cancel the contract.

The issue of control (international flights)

The Adamsons case also raised once again the issue of when is a passenger a passenger within the terms of article 17 of the Warsaw Convention, i.e. were her injuries suffered whilst she was "on board the aircraft or in the course of any of the operations of embarking or disembarking".

As opposed to the approach of the French Courts which have adopted the "exposure to the risks inherent in air travel" test,[272] the United States' courts have adopted a tri-partite test based on the notions of activity and control as well as location. In the tri-partite test, the activity that the passenger was engaged in as well as the degree of control exercised by the carrier over the passenger's movements at the time of the accident are analysed in addition to the location of the passenger at the time of the accident.[273]

The American cases have suggested that passengers leave the carrier's control more quickly than they enter into it, thus ending the airline's responsibilities after a shorter period of time for disembarkation than for embarkation.[274] On the question of embarkation, the element of control seems to prevail: if the flights have been called and the passengers are lined up waiting to board the aircraft they have been judged to have commenced the operation of embarkation,[275] whilst if they have not received their boarding passes or are merely waiting in a public area (the departure lounge)[276] they have been held not to be under the carrier's control.

In the Adamsons case, the injury to the plaintiff took place at the moment when the aircraft left the tarmac at Port au Prince Airport without Dr. Adamsons on board and, based on the tri-partite test of activity, control and location, the element of control did not exist since at the time of the injury "the airline had relinquished control of Dr. Adamsons to the medical personnel at the Port au Prince Hospital; indeed American had done all it could to repudiate any control over Dr. Adamsons' movements subsequent to their refusal to honour her ticket".[277] With no control there was to be no Warsaw Convention applicable; with no Convention there could be no $75,000 limit on American's liability.[278]

Although the catastrophic effects of this airline's either too casual or too arrogant approach[279] to a customer's rights to board obviously cried out for compensation, it should be borne in mind that a

dual standard appears to have developed as to the concept of control over a passenger's movements in cases concerning domestic and international flights. In the Suarez case,[280] a wheelchair-bound passenger was held to be in the control of the carrier from the moment she submitted her body to the airline's proffered wheelchair. This being so, an argument could be made that Dr. Adamsons was in a similar situation, i.e. she was being carried up the boarding ramp by airline personnel when she was refused carriage, and, to extend the comparison, Dr. Adamsons was also in a wheelchair supplied by the carrier. Although Mrs. Suarez had not been issued a boarding pass she was held to be under the control of the carrier, whereas, even though the flight had been called[281] and Dr. Adamsons was in the act of boarding complete with boarding pass, she was held not to have engaged in the process of embarkation. The legal rules appear to be being bent in order that justice could be done in both cases; compensation was required for the surly treatment in the Suarez case and the arrogant behaviour in the Adamsons case.

In the United States, the existence of s. 404 of the Federal Aviation Act of 1958[282] gives a focus for legal action to sick or handicapped passengers who feel they have been unfairly treated. Not only may one who feels that the Act is being violated seek an order from the C.A.B. compelling future compliance,[283] but, as was determined in the Fitzgerald case[284] an actionable civil wrong can be implied from this statute.[285]

Failure to enforce the discrimination provisions of the Act results in the preference of one class of passengers to the prejudice of others and harms the travelling public in general and, thus, since a person seeking review of the C.A.B. action in allowing discriminatory refusal of transport would be acting in the public interest for the protection of a public right, standing to sue would be conveyed on both an individual[286] and a collective basis.[287] Utilizing this reasoning, an organization created to benefit the handicapped would also have standing to challenge discriminatory denial of transportation which would ease the problem of the costs of litigation when a prospective order compelling future compliance is sought rather than individual damages.

Whether such an association could bring a successful action to force carriers to redesign their aircraft to accommodate handicapped passengers is doubtful in view of the results of the forays made by the handicapped against the non-implementation of the Urban Mass Transportation Act of 1964.[288] If those cases are a reliable guide, then success is not ensured. In Snowden v. Birmingham-Jefferson County Transit Authority,[289] the Court rejected out of hand any equal protection claim[290] based on the right to travel, and although the U.M.T.A. provided that "special efforts"[291] be made toward making mass transportation services available to all persons, a rational basis existed for discrimination resulting from procurement, operation and financing of buses not designed and equipped to accommodate passengers

confined to wheelchairs. Round one to the carriers.

Rounds two and three were awarded to the handicapped. In Lloyd v. Regional Transport Authority,[292] the Seventh Circuit found that s. 504 of the Rehabilitation Act of 1973[293] placed affirmative duties on the mass public transportation systems in a region and a group of handicapped persons in that region had standing to seek declaratory and injuctive relief under s. 504 and the regulations issued thereto. Moreover, United Handicapped Federation v. Andre[294] held that the plaintiffs had standing to bring a private action and plaintiffs were entitled to relief in view of recent administrative definitions and guidelines.[295]

The wording of the C.A.B.'s proposed new rulemaking[296], if passed in its present state, is not as affirmative as that of the Urban Mass Transportation Act, and "special efforts" are not required.[297] Self-evaluation of policies and practices is all that is required of the carriers coupled with a "reasonable effort" to consult with, and obtain the view of, handicapped persons and experts on "handicapping conditions".[298] Thus purchase of only new equipment which has wheelchair accessible washrooms until, for example, one half of the fleet is wheelchair accessible, appears to be out of the question,[299] as does forcing the carriers to redesign their aircraft interiors to accommodate the passage of standard wheelchairs.[300]

There is also the problem of the standing of the F.A.A. regulations, i.e. are they merely declaratory of national policy or are they administrative guidelines? The refusal by some carriers to accept any passengers who cannot occupy a cabin seat in an upright position despite the F.A.A. regulation to the contrary,[301] is an indication that the regulations lack teeth.[302]

Under the proposed rulemaking, a complaint resolution plan would be adopted.[303] If a carrier fails to comply with the rulemaking the Board may order suspension or termination of, or refuse to grant or continue, Federal financial assistance or may use any other means authorized by law to ensure compliance.[304] Since the Board extends direct Federal subsidies only to a small number of air carriers, these enforcement provisions are unimpressive.[305]

In Canada, there is no statute covering discrimination in the provision of air transport services, and the administrative body to which complaints should be taken is not clearly defined. Transport Canada claims to have responsibility for the provision of facilities for passengers, including handicapped people, at federally-operated terminals,[306] but the jurisprudence suggests that although the land and buildings at an airport fall squarely under federal competence,[307] the people who work in the airport building such as baggage handlers and those providing passenger lounge services may be provincially controlled.[308] Thus the provision of accessible washrooms and

ramps may lie in the hands of Transport Canada, but ensuring adequate parking,[309] baggage handling and meal services for intransit handicapped passengers may not be their job, and, although the Canadian Air Transportation Administration developed a policy in 1973 which spells out the intention to make all federally owned and operated airports accessible to handicapped people,[310] this may be a far more elusive goal than the similar policy in the United States which is based on such specific legislation as the Architectural Barriers Act of 1968[311] and the Rehabilitation Act of 1973.[312]

In Canada there is also the problem of the division of responsibility between the Federal Government and the carriers, which appears to be much more vague than the division of powers in the United States between the Federal Aviation Authority and the Civil Aeronautics Board.[313] For example, Transport Canada's authority used to end at the doors of the terminal building leading to the aircraft; air carriers were responsible for passengers beyond that point. The issue of loading bridges has, however, called that demarcation into question. The carriers own the loading bridges but are under no obligation to provide them, hence differing levels of service from the various carriers has resulted.[314] Even if loading bridges are provided on a uniform basis, stairglides to lift wheelchair passengers up the access stairs to the loading bridge are installed at the discretion of the carrier. The situation is further complicated by the fact that access to the loading bridge is often provided by Transport Canada.[315]

CONCLUSION AND RECOMMENDATIONS

The policy of forewarned is forearmed would appear to be the most logical answer to the problem of the carriage of handicapped passengers. Publication of such rules as those concerning the limitation of the numbers of handicapped persons per flight[316] is needed as is the development of a universally acceptable medical pass which gives details of the passenger's condition, their medical requirements and an assurance by their attending physician of their fitness to travel, e.g. that they have the required arm strength or leg strength for evacuating the aircraft in a hurry. A standarized document would lead to both uniformity and a minimum standard in the airlines' approach to acceptance of handicapped travellers. Along these lines, the International Air Transport Association has developed the Frequent Traveller's Medical Card (FREMEC)[317] to facilitate air travel by regular passengers who are permanently or chronically incapacitated. Unfortunately, the wording on the card is vague and it relies on the card holder to report all changes in their handicap or incapacitation and/or the deterioration in their physical or medical condition. The problem of the duration of the validity of the pass for each type of illness or handicap is left unsolved as is the corollary problem of differences of opinion between the ticket agent and the passenger as to whether the passenger's condition has deteriorated or not.

I.A.T.A. has also developed the Standard Medical Information

Form for Air Travel (MEDIF)[318] which is used for specified air journeys. The form contains questions concerning a passenger's pertinent medical requirements, but the problems of discovering its existence, picking one up and getting one's attending physician to co-operate and fill it in before attempting to check-in, are obvious. A completed form cannot be produced like a rabbit from a hat at the check-in counter and, thus, they are unsuitable for the traveller in a hurry.

Ultimately, the decision, in a disputed case, on whether to carry a handicapped passenger or not is left to the pilot in command of the aircraft, for the possible safety hazard is being carried on "his" plane.[319] The re-education of pilots is not the answer to the dilemma since they cannot be expected to undertake on the spot medicals in borderline cases. The re-education of aircraft designers and a change in the attitudes of flight attendants from "minimum service unless you are travelling first class" to a "we are here to help you" posture[320] would be positive and progressive steps down the road leading to accommodation of the handicapped. Rising fuel prices would seem to militate against the acceptance of these suggestions: maximum passenger capacity, minimum aisle widths and minimum numbers of in flight carrier personnel are the order of the day. The concept of the medical card which is constantly updated is probably the only acceptable solution which remains. (A decision would also have to be reached concerning whose responsibility it is to inform handicapped

persons wishing to travel by air that they require such a card.) As far as the handicapped are concerned, it would prove bothersome and a discriminatory imposition, but it is, no doubt, well within the bounds of "administrative needs".[321] Meanwhile, public soul searching, such as that conducted by the C.A.B.[322] and the C.T.C.,[323] is probably the best method available for identifying the particular problems faced by the handicapped in connection with air travel.

FOOTNOTES

1. In 1977, an Ontario Human Rights Commission made note of the fact that over the years many of the physically disabled have, in one way or another, been segregated from the rest of society. However well intentioned this practice may have been, the result has often been a denial of the human rights of disabled people and the loss to society of the contributions these people could have made. P. Carlyle-Gordage, No Handicap to Success, Today, January 10, 1981, p. 4.

2. Kellogg and McGee, The Next Minority, Newsweek, December 20, 1976, p. 74 quoted in E.G. Thornburg, The Next Minority Takes to the Air: The FAA and CAB Regulations for Air Transportation of the Handicapped, 44 J.A.L.C. (1979), p. 611.

3. In Canada, there is no specific country-wide anti-discrimination legislation to protect the handicapped or to make public transportation available to them. Recently however, a seven-member House of Commons Committee was appointed to examine the situation of the disabled and the handicapped. Their report was tabled in the Commons in February, 1981 and, although its emphasis is on the limited employment prospects for the handicapped (the report suggests that large companies be forced to hire handicapped workers if they want government contracts), the report also urged that public buildings and housing be made more accessible to the disabled in particular, and in general that the Federal Human Rights Act s.c. 1976-77, c. 33 be amended to end discrimination against the handicapped. See The Gazette, February 18, 1981, p. 10.

   Section 3 of the Act reads:

   > "For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination." (Emphasis added.)

   Some of the provinces have implemented legislation to protect the handicapped, for example, in Quebec the Loi assurant l'exercice des droits des personnes handicapées S.Q. 1978, c. 7, provides, in section 67, that public transportation companies are required to submit a plan for making their transportation facilities accessible to the handicapped. This section, of course, only applies to organizations or public bodies incorporated in Quebec. In Ontario, last year, Bill 188, which proposed the abolition of discrimination against the handicapped, was introduced into the legislature but was defeated by a coalition of organizations of the

handicapped that did not want a separate bill dealing with them as a special group; instead, they wished to be included in the Ontario Human Rights Code R.S.O. 1970, c. 318, since they viewed themselves not as a group apart, but as integral members of society.

In Manitoba, the handicapped's rights have been recognized and included in the Manitoba Human Rights Act S.M. 1974, c. 65 as amended by S.M. 1977, c. 46.

4. Named after Yves Dubé, Vice-President of Research, at the C.T.C.

5. The constitutional problems involved in the administration of airport-related services are discussed in the conclusion to this part of the study.

6. In the 1960's and 1970's, Congress passed a series of laws requiring that certain facilities be made accessible to the handicapped. The Architectural Barriers Act of 1968 42 U.S.C. ss. 4151-4152 (1976) requires public facilities built, after 1968, with Federal funds, to be accessible to the disabled. The Rehabilitation Act of 1973 29 U.S.C. ss. 793-794 (1976) provides that

> "no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance." (s. 794),

and section 793 prohibits employment discrimination, based on handicap, by Federal contractors. The regulations requiring the enforcement of these Acts were signed into law on April 28, 1977, by the Secretary of Health, Education and Welfare 42 F.R. 22, 676 (1977); the regulations took effect on June 1, 1977, some years after the Acts were passed.

7. 43 F.R. 25,016 (1978). The regulations were proposed in 43 F.R. 25,022 (1978) at pp. 25,027-28, and codified under the authority of 44 F.R. 31,468 (1979).

8. American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped, published by the A.N.S.I., Inc. (A.N.S.I. A-117.1 - 1961 (R 1971)).

9. 49 C.F.R. s. 27.71 (2)(v).

10. Ibid. s. 27.71 (2)(vi).

11. Ibid. s. 27.71 (2)(vii).

12. Ibid. s. 27.71 (2)(viii).

13. Ibid. s. 27.71 (2)(iv).

14. Ibid. s. 27.71 (2)(ix).

15. Ibid. s. 27.71 (2)(xii).

16. Idem.

17. Ibid. s. 27.71 (4).

18. Access Travel: Airports (3rd. ed.), Washington, D.C., 1979.

19. Pages 20 and 21 are reproduced below, and show the conditions at eighteen American and 5 Canadian airports, including Malton Airport at Toronto.

EXPLANATORY NOTES:

A - Avis. H - Hertz. N - National Car Rental. CW - Covered Walkway. EL - Elevator Available. GD - Godfrey Davis Co. NA - Not Applicable. S - In Some Locations, But Not All. 2 - All areas except satellite where handicapped persons will require escort ramp in golf cart type vehicle. 3 - In building but not garage. 4 - Elevator on duty. 5 - All gates except Boston and Washington shuttle. 6 - Special van with ramps. 7 - Advance notice required; preferably two weeks. 8 - On call. 9. First aid only.

	SARASOTA FL	SASKATOON SASK	SAVANNAH GA	SEATTLE WA (KING COUNTY)	SEATTLE/TACOMA WA	SHANNON IRELAND	SHREVEPORT LA	SINGAPORE	SIOUX FALLS SD	SOUTH BEND IN	SPOKANE WA	SPRINGFIELD IL	SPRINGFIELD MO	STOCKHOLM SWEDEN (ARLANDA)	STOCKTON CA	SYDNEY AUSTRALIA	TAMPA FL	TERESINA BRAZIL	THUNDER BAY ONT	TOLEDO OH	TOPEKA KS	TORONTO ONT (TERMINAL 1)	TORONTO ONT (TERMINAL 2)	TULSA OK	TUCSON AZ	VANCOUVER BC	VENICE ITALY	VICTORIA BC	VITORIA BRAZIL	WAIMEA HI	WARWICK RI
PARKING																														
PARKING SPACES RESERVED FOR HANDICAPPED	6		●		●		●			●	●	●	●	●	●	●	●	●		●	●				●				S	●
DIRECTIONAL SIGNING TO RESERVED SPACES	S		●			NA		NA			●	●	●	●										NA				NA	●	●
SPACES LEVEL AND AT LEAST 12 FEET WIDE	S		●		●	NA	●	●		●	●	●	●	●			●	●		●	●			NA		●		NA	●	●
SPACES WITHIN 200 FEET OF TERMINAL ENTRANCE	●		●		●	●	●	●		●	●	●	●	●	●	●	●	●		●	●			NA	●	●		NA	●	●
SPACES PROTECTED FROM WEATHER	S				●			●						●			●							NA		●		NA		
PARKING METERS AND TICKETS ACCESSIBLE TO DRIVER	●		NA		●	●	●	●		●	●	●	●	●	●	●	●	NA		●	●	●	●	●	●	●		NA	●	●
LEVEL OR RAMPED PATH FROM PARKING TO ENTRANCE	●		●	●		●	●	●		●	●	●	●	●	●	●	●	●		●	●		●	●	●	●		NA	●	●
EXTERIOR CIRCULATION																														
VEHICULAR AND PASSENGER TRAFFIC SEPARATED		●	●	●	●	S	●	●		S		●		●			●			●	●	●	●			●	●			
ALL WALKWAYS AT LEAST 5 FEET WIDE	S	●	●	●	●	S	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●		●	●	●	●	●	●
STAIRS AND RAMPS AT ALL CHANGES OF LEVEL	●		●	●		●	●	●	NA		●	NA	●	●		●	NA		NA	NA				NA		NA		NA	NA	NA
HANDRAILS ON ALL RAMPS AND STAIRS	S			●			●	S	NA	●	●	NA	●	●	NA	●	NA		NA	NA			S	NA	●	NA		NA	NA	NA
CURB CUTS AT ALL PEDESTRIAN CROSSINGS	NA	●		●	●	●		S	S	●	●	●	S	●	●	S	●		●	●	●	●	●	●	●	●	NA		●	
ALL RAMPS AT LEAST 5 FEET WIDE	S	●	●	●			●	●		●	●			●	●		NA	NA	●	●				NA	●	NA	NA	NA	NA	NA	NA
ALL RAMP SLOPES 8.3% OR LESS	●	●	●	●	●	●		S		●	●	●	●	●	●	●	NA	NA	●	●			●	NA	●	NA	NA	NA	NA	NA
ALL RAMPS INDICATED BY ACCESSIBILITY SYMBOL	●		●				●		●	●				●	●		NA	NA						NA		NA	NA	NA	NA	NA
ALL RAMPS PROTECTED FROM SNOW AND ICE	NA		NA	●	●		●	NA		●				●		●	NA	NA						NA	●	NA	NA	NA	NA	NA
ALL RAMP SURFACES NON SLIP	●		●	●	●	●	●	●						●		●	NA	NA		●				NA		NA	NA	NA	NA	NA
RAMPS OVER 30 FEET LONG HAVE LEVEL REST LANDINGS	NA	NA	NA	NA	●	NA	NA	S	NA	NA	●	NA	NA	●	NA	NA	NA	NA	NA	NA	NA			●	NA	NA	NA	NA	NA	NA	NA
RAMPS HAVE LEVEL LANDINGS AT TURNS	NA	NA	NA	NA	●	NA	NA	●	NA	NA	●	NA	NA	●	NA	●	NA	NA	NA	NA	NA			●	NA	NA	NA	NA	NA	NA	NA
RAMPS HAVE HANDRAILS ON BOTH SIDES						NA	●	S	NA	NA	●	NA	NA	●			●	NA	NA	NA	NA			S	NA		NA	NA	NA	NA	NA
ARRIVAL AND DEPARTURE																														
LEVEL VEHICLE LOADING/UNLOADING AREAS CLOSE TO BLDG ENTRANCES	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
LOADING UNLOADING AREAS PROTECTED FROM WEATHER	S	●		●	●		●	●		S		●	●	●	●	●	●			●	●					●		●	●	●
INTERIOR CIRCULATION																														
BUILDING ENTRANCES AND EXITS LEVEL WITH AUTOMATIC DOOR	●	●	NA		●	●	●	●	●		●	●	●	●	●	●		●	●	●	●	●	●	●	●		●	NA	NA	●
PUBLIC AREAS IN BUILDING ACCESSIBLE BY LEVEL/RAMPED ROUTE	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
PUBLIC CORRIDORS AT LEAST 5 FEET WIDE AND OBSTRUCTION FREE	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	NA	●	●	●	●	●	●	●	●	●	●	NA	●	●
ELEVATORS																														
PUBLIC ELEVATORS ACCESSIBLE ON LEVEL PATH	●	NA	NA	NA	●	●	●	NA	●	NA	●	NA	●	NA	●	●	NA	NA	●	NA	●	●	●	●		NA	NA		NA	NA
PUBLIC ELEVATORS TO ALL FLOORS INCLUDING GARAGE	●	NA	NA	NA	●	●	●	NA	●	NA	NA	NA	●	●	NA	●	NA	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	NA
ELEVATORS AT LEAST 5 BY 5 FEET INSIDE MEASUREMENT	●	NA	NA	NA	●		●	NA	●	NA	●	NA	●	NA	●	●	NA	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	NA
ELEVATOR DOOR OPENING AT LEAST 3 FEET	●	NA	NA	NA	●	●	●	NA	●	NA	●	NA	●	NA	●	●	NA	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	NA
ELEVATOR DOORS HAVE AUTOMATIC SAFETY REOPENING DEVICE	●	NA	NA	NA	●	●	●	NA	●	NA	●	NA	●	NA	●	●	NA	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	NA
ELEVATOR CONTROLS NO MORE THAN 4 FEET ABOVE FLOOR	●	NA	NA	NA		●		NA	●	NA	●	NA	●	NA	●	●	NA	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	NA
ELEVATOR CONTROLS HAVE RAISED LETTERING		NA	NA	NA			●	NA		NA		NA		NA	●		NA	NA		NA	●	●			●	NA	NA	NA	NA	NA
STAIRS																														
RAMP OR ELEVATOR AVAILABLE AS ALTERNATE TO STAIRS OR ESCALATORS	●	NA	●		●	●	●	S	●		●	NA	●	●		●		NA	●	NA		●	●	●	●	NA	NA	NA	NA	NA
STAIRWAYS FREE OF PROJECTING NOSES	●	NA	●	●			●	S	●		●	NA	●	●		●		NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	●
STAIRWAY RISER HEIGHT 7 INCHES OR LESS	●	NA	●	●	●	●	●	S	●	●	●	NA	●	●	●	●	●	NA	●	NA	●	●	●	●	●	NA	NA	NA	NA	●
HANDRAILS ON BOTH SIDES	S	NA	●		●	●	●	S	●	●	●	NA	●	●	●	●	●	NA	●	NA	●	●	●	●		NA	NA	NA	NA	●

Continued

	SARASOTA FL	SASKATOON SASK	SAVANNAH GA	SEATTLE WA (KING COUNTY)	SEATTLE/TACOMA WA	SHANNON IRELAND	SHREVEPORT LA	SINGAPORE	SIOUX FALLS SD	SOUTH BEND IN	SPOKANE WA	SPRINGFIELD IL	SPRINGFIELD MO	STOCKHOLM SWEDEN (ARLANDA)	STOCKTON CA	SYDNEY AUSTRALIA	TAMPA FL	TERESINA BRAZIL	THUNDER BAY ONT	TOLEDO OH	TOPEKA KS	TORONTO ONT (TERMINAL 1)	TORONTO ONT (TERMINAL 2)	TULSA OK	TUCSON AZ	VANCOUVER BC	VENICE ITALY	VICTORIA BC	VITORIA BRAZIL	WICHITA KS	WARWICK RI
INTERIOR RAMPS																														
AT LEAST 5 FEET WIDE	●	NA	●	●	●	NA	NA	●	NA	NA	●	NA	NA	NA	●	●	NA	NA		●	NA	NA	NA		●	●	NA	NA	NA	NA	NA
SLOPES 8.3% OR LESS	NA	NA	●	●	●	NA	NA	S	NA	NA	●	NA	NA	NA	●	●	NA	NA		●	NA	NA	NA	●	●	●	NA	NA	NA	NA	NA
RAMP APPROACHES INDICATED BY ACCESSIBILITY SYMBOL	NA	NA				NA	NA		NA	NA	●	NA	NA	NA	●		NA	NA			NA	NA	NA				NA	NA	NA	NA	NA
LEVEL AREA AT LEAST 5 BY 5 AT TOP & BOTTOM OF RAMPS	NA	NA	●		●	NA	NA	●	NA	NA	●	NA	NA	NA	●	●	NA	NA		NA	NA	NA	NA	●	●	●	NA	NA	NA	NA	NA
RAMPS OVER 30" LONG HAVE LEVEL REST LANDINGS	NA	NA		NA	●	NA	NA	S	NA	NA	●	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA		●	NA	NA	NA	NA	NA
LANDINGS AT TURNING POINTS	NA	NA	NA	NA	●	NA	NA	●	NA	NA	●	NA	NA	NA	NA	●	NA	NA		●	NA	NA	NA	NA	●	●	NA	NA	NA	NA	NA
HANDRAILS ON BOTH SIDES	NA	NA				NA	NA	S	NA	NA	●	NA	NA	NA	●		NA	NA	●		NA	NA	NA			●	NA	NA	NA	NA	NA
DOORS																															
LEVEL PASSAGES AT LEAST 5 FEET BETWEEN ADJACENT DOORWAYS	●	●	●		●	●	●	●	●	●		●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	NA	●	NA
DOORS HAVE CLEAR OPENING AT LEAST 3 FEET	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	S	●	●	●	●	●	●	●	●
THRESHOLDS LEVEL WITH FLOOR	S	●	●	●	●	●	●	●	●		●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
LEVER HANDLES INSTEAD OF KNOBS	●		●	S		S	●	S	●	●	●	●	●	●		S		●	●	●	●	●	●		NA	●	●	●		●	●
WALL MOUNTED PAGING PHONES NOT OVER 3 FEET ABOVE FLOOR	NA						●		NA		NA	NA	NA	●				NA	●		NA									●	NA
BOARDING																															
RAMP OR LEVEL LOADING BRIDGES TO AIRCRAFT		●	●	●	●	●	●	NA	S		●	●		●		●	●			●		S	S	●		●		NA		NA	
ACCOMMODATIONS																															
SPECIAL TRANSPORTATION TO OTHER AIRPORT BUILDINGS		NA	NA		●	NA	●		●	NA	NA			●		●	●	NA	NA		NA				●		●	●		NA	●
CAR RENTAL AGENCIES WHICH CAN PROVIDE HAND CONTROLLED CARS					H7 A7		H7 A7			H7 A7	A		●				H7 A7			A7 N7					H				H A		A7
ACCESSIBLE HOTEL ACCOMMODATIONS IN AIRPORT COMPLEX			●			●					●	●	NA			●	●			●		●		NA	●				●		●
VENDING MACHINE CONTROLS IDENTIFIED WITH RAISED LETTERING	NA																														
DINING TABLES HAVE AT LEAST 29 INCH CLEARANCE ABOVE FLOOR	●	●	●		●	●	●	S	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●		NA		●
DRINKING FOUNTAINS ACCESSIBLE TO/USEABLE BY HANDICAPPED	●		●		●	●	●		●	●		●	●	NA		●	●	●	●	●				S	●					●	
REST ROOMS AND TOILETS																															
ACCESSIBLE REST ROOMS AND TOILETS AVAILABLE	●	●	●	●	●	●	●	●	●	●	●	●	●	●		●	●	●		●	●	●	●	●	S	●		NA	●	●	●
WITH 5 BY 5 FEET TURNING SPACE		●	●	●	●	●	●	●	●	●	●	●	●	●		●	●	●		●	●	●	●	●	●	●		NA	●	●	●
WITH AT LEAST ONE STALL 3 FEET WIDE	●	●	●		●	●	●	●	●	●	●	●	●	●		●	●	●	●	●	●	●	●	NA	●	●			●		●
WITH AT LEAST ONE STALL 4 FEET 8 INCHES DEEP	●	●	●		●	●	●		●	●	●	●	●	●		●	●			●	●	●	●	NA	●	●			●		●
WITH AT LEAST ONE STALL WITH OUT-SWINGING 32 INCH DOOR	●	●	●		●	●	●		●	●	●	●	●	●		●	●			●	●	●	●	NA	●	●			●		●
WITH GRAB BARS	●		●		●	●	●		●	●	●	●	●	●		●	●			●	●	●	●		●	●			●		
WITH 29 INCH CLEARANCE UNDER LAVATORIES		●				●	●		●		●	●	●	●	●	●		●	●	●	●	●	●		●	●		●	●		
WITH MIRRORS, TOWELS, ETC. NOT OVER 40" ABOVE FLOOR	●	●			●	●	●		●		●	●	●		●			●	●	●	●	●	S		●	●	●		●		●
PHONES																															
PHONE WITH COIN SLOT NOT OVER 48" HIGH IN EACH PHONE BANK	●	●	●		●	●	●		●		●		●	●	●					●	●			S			●			●	●
PHONE WITH AMPLIFIER AVAILABLE IN EACH BANK OF TELEPHONES			●							S			●	●			●									●					
RAISED LETTERING ON TELEPHONE OPERATING INSTRUCTIONS					●														●										●		
TELECOMMUNICATIONS EQUIPMENT DEVICES (TTY) FOR DEAF PEOPLE																															
SERVICES																															
BROCHURES AVAILABLE ON FACILITIES FOR HANDICAPPED PERSONS	NA																					●	●		●						
MEDICAL SERVICES AVAILABLE	●	●	●	●	●	●		●	●	●	●	●				●	●	●		●		●	●	●	●	●	●	●		●	●
ESCORT SERVICE AVAILABLE FROM AIRPORT OR AIRLINES	●	●	●		●	●	●		●	●	●	●		●		●	●	●		●	●	●	●	●	●	●	●	●		●	●

20. C.A.B. Docket no. 23,904, August 9, 1974, p. 1. The C.A.B. regulations went into effect September 30, 1977; the F.A.A. regulations (42 F.R. 18,392 (1977)) were issued on March 25, 1977 and went into effect May 16, 1977.

21. C.f. 39 F.R. 24,668 (1974).

22. Order no. 79-1-70 (Docket 34,435) dated January 11, 1979.

23. S.P.D.R. - 70 (Docket 34,030) 44 F.R. 32,401 (1979) dated May 31, 1979. According to Mary C. Fowler of the C.A.B.'s Bureau of Consumer Protection and Information Liaison Officer on the proposed rulemaking, the Board had not, as of April 30, 1980, issued final regulations on the carriage of the handicapped, and some unspecified changes were anticipated in the proposed rules.

24. See, for example, C.A.B. E.R. - 1070, amendment no. 4 to part 233, (Docket 32,160) (1978), p. 6.

25. See, for example, the Air Transport Association of Canada, Presentation made by H.M. Pickard, Executive Vice-President and Secretary of the A.T.A.C., to the Advisory Committee on Transportation of the Handicapped, in Ottawa on September 24, 1980, pp. 3-6, hereinafter cited as the A.T.A.C. Presentation. Also, the Human Rights Act of Manitoba S.M. 1974, c.5 as amended by S.M. 1977, c.46, s. 1.

26. Austin v. Delta Air Lines, Inc. 246 S. 2d. 894; 11 Avi. 18,245; 1971 U.S. Av. R. 401 (La. C.A.) (Price J.); reh'g. den'd. 1971.

27. State v. Southwell 369 S. 2d. 371; 1979 U.S. Av. R. 497 (Fla. D.C. App. Div.) (Melvin J.).

28. See the International Air Transport Association Resolution 700 (previously 400). I.A.T.A. Resolutions do not have binding force in North America but, apart from some minor modifications, substantially the same text has been adopted for Canada and the U.S.A. as new Recommended Practice 1700 (previously 1401). See also the I.A.T.A. Incorporated Passengers Handling Guide, Montreal, I.A.T.A. Traffic Services, 1980, p. 2.

29. 14 C.F.R. ss. 121.571 (a) and 221.38 (a)(8) (1980).

30. Quoted in J. Achtenberg, "Crips" Unite to Enforce Symbolic Laws: Legal Aid for the Disabled, 4 U. San. Fern. V. L.R. (1975), p. 197.

31. Consolidated Regulations of Canada, 1978, c. 3.

32. F.E. Quindry, Airline Passenger Discrimination, J.A.L.C. 1932, p. 479 at p. 488 et seq..

33. See the Aeronautics Act R.S.C. 1970, c. A-3, ss. 6(1) and 16(5); and the Federal Aviation Act of 1958 ss. 601 et seq., 701 et seq. and s. 1111(a) (49 U.S.C. ss. 1421 - 1432, 1441 - 1443, 1511(a) (1976)). For an international perspective, see the Convention on International Civil Aviation, signed at Chicago on December 7, 1944 (the Chicago Convention) articles 25, 26, 28, 32, and 37 and 69.

34. S.P.D.R. - 70 cited supra footnote 23.

35. Proposed 14 C.F.R. 382.3, see 44 F.R. 32,401 p. 11.

36. For example, Achtenberg cited supra footnote 30 and Thornburg cited supra footnote 2.

37. 49 U.S.C. s. 1612 (1976).

38. Idem.

39. The C.A.B. produced another definition of handicapped in response to the amendment made to subsection 403(b)(1) of the Federal Aviation Act of 1958 by section 8a of P.L. 95-163;91 Stat. 1281 (enacted November 9, 1977), which required the Board to allow carriers to establish space-available reduced fares for, amongst others, the handicapped and any required attendants. Section 8a stated that a "handicapped person" is "any person who has severely impaired vision or hearing, and any other physically or mentally handicapped person, as defined by the Board, . . ." (Emphasis added.) E.R.-1070, amendment no. 4 to part 223 (Docket 32,160) (1978). For the purposes of the reduced rate fares, the C.A.B.'s Economic Regulations define a handicapped person as one who has a physical or mental impairment (other than drug addiction or alcoholism), which substantially limits one or more major life activities. 14 C.F.R. 223.1. This definition is very similar to that of the Rehabilitation Act of 1973 29 U.S.C. s. 706(6) (1976).

For a definition that tries to delimit the term "physical handicap" precisely, but ends up suffering from the "grandmother to a skier with a broken ankle" syndrome, see An Act to Amend the Human Rights Act S.M. 1977, c. 46, s.1, which states that a physical handicap is:

> "a physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect, or illness and includes epilepsy, but is not limited to, any degree of paralysis, amputation, lack

> of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog, wheel chair or other remedial appliance or device;"

Presumably people with protruding ears are covered by this definition!

40. See infra the section of this study on the airline as a common carrier for the sources of authority which empower the airlines to file tariff rules.

41. Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195, Rule 35 (H), Exception 2. (Hereinafter cited as Tariff no. PR-7.) This definition applies to: Air Midwest; Air Oregon; Air Wisconsin; American Airlines; Coleman Air Transport; Empire Airlines; Golden West Airlines; Imperial Commuter Airlines; Mississippi Valley Airlines; R.M.A. Inc., Sky West Airlines; Sun Aire Lines; and Western Air Lines. It is almost identical with that of United Airlines. Frontier Airlines defines a non-ambulatory passenger as one "who is unable to board or deplane from (an) aircraft without being carried or without the use of wheelchairs or air-stair chairs". Tariff no. PR-7, Rule 32(a).

42. Tariff no. PR-7, Rule 35 (H), Exception 2. This definition applies to: Air California; Alaska Airlines; Aloha Airlines; Altair Airlines; Aspen Airways; Hawaiian Airlines; Hughes Airwest; Ozark Air Lines; Piedmont Aviation; Wien Air Alaska. Frontier Airlines utilises the C.A.B. definition for offering reduced fares to handicapped passengers (supra footnote 39) namely, that a physically handicapped passenger means "a passenger who has a physical impairment (other than drug addiction or alcoholism) which substantially limits one or more major life activities." Tariff no. PR-7, Rule 32 (A).

43. The membership of the Air Transport Association of Canada accounts for ninety-five per cent of the dollar volume of passenger traffic originating in Canada and includes all the transcontinental and regional carriers. A full list of members is included at the end of this study as an appendix.

44. A.T.A.C. Presentation, p. 3. This definition is similar to that found in I.A.T.A. Resolution 700 (previously 400) and Recommended Practice 1700 (previously 1401).

45. A.T.A.C. Presentation, p. 3. Blind passengers and deaf passengers are normally regarded as self-reliant, ibid. p. 5, but passengers

who are both blind and deaf need to be escorted. See, for example, Tariff no. PR-7, Rule 35 (F)(2)(m).

46. Compare this with the United States' regulations (14 C.F.R. s. 121. 571 (a)(3)(1980)), discussed supra.

47. F.E. Quindry, Airline Passenger Discrimination, cited supra footnote 32.

48. See the report of an unscheduled landing made by a Laker Airways jumbo jet at Winnipeg in The Gazette, January 6, 1981, p. 8.

49. Apart from being a member of the Chicago Bar, a First Lieutenant with the U.S.A. Air Corps Reserve, and formerly a pilot with the First Pursuit Group, Selfridge Field, F.E. Quindry was also, at the time of writing the article, the District Manager of Braniff Airways, Inc.

50. Frontier Airlines, R.M.A. Inc. and Texas International Airlines, however, emphasize the priority given to not incoveniencing the cabin crew. Tariff no. PR-7, Rule 35 (H), Exception 1 states that:

> "as a condition of carriage, physically handicapped passengers will be accepted for transportation only on the basis that the carrier will be under no obligation to provide special or additional inflight personnel over and above the normal crew complement or to have special equipment, supplies or food on board to meet the needs of such passengers, and passengers will also be responsible for their own lavatory needs."

The way this is worded it would appear that Kosher or baby food are never supplied by these three airlines. On the last stipulated requirement (i.e. the lavatory needs), see the case of Levy v. American Express, Delta Airlines and Trans World Airlines 274 S. 2d. 857; 1974 U.S. Av. R. 620 (La. C.A. 1973); aff'd. 287 S. 2d. 784; 1974 U.S. Av. R. 615 (La. S.C. 1973) (Dixon J.). See also Tariff no. PR-7, Rule 35 (F)(2)(b) which provides that Cochise Airlines, Hawaiian Airlines, Ozark Air Lines and US Air will refuse to carry passengers who are unable to care for their inflight lavatory needs and Rule 35 (H), Exception 2(a)(ii)(bb)(3) whereby American Airlines will only carry a passenger whose in flight needs can be met without assistance, or passenger agrees to being unable to visit the lavatories.

51. S.P.D.R.-70, cited supra footnote 23.

52. Ibid. p. 5, proposed new part 14 C.F.R. 382.10.

53. For example, hypoxia is a condition in which the amount of oxygen reaching the tissues is lowered. This occurs at high altitude to a certain extent in spite of pressurization of the aircraft cabin. Healthy persons are affected to an insignificant extent but in a variety of medical conditions (for example heart and lung conditions and severe anaemia), the mild degree of hypoxia experienced at high altitude may well be sufficient to cause adverse effects. These effects can, however, often be overcome by the use of supplementary oxygen in flight. The effects of hypoxia were referred to in Friends of all Children v. Lockheed Aircraft Corp. 16 Avi. 17,233 (D.D.C. 1980) (Oberdorfer D.J.).

54. 115 Mo. App. 468; 78 S.W. 271 (Mo. C.A. 1903) (Smith P.J.); aff'd. 199 U.S. 605; 50 L. Ed. 329 (1903).

55. In the Mathew case, the plaintiff was riding in the defendant's railway car and was unaware that she was suffering from internal female ailments. In coupling the cars, the one in which the plaintiff was riding was severely jolted which jolted and disarranged her internal organs to such an extent that her condition was aggravated severely and major surgery (a colostomy and the removal of the ovaries) had to be performed which resulted in irremediable damage to the plaintiff. It was held that the railway company had been negligent in coupling the cars and was liable in damages for the plaintiff's increased injuries.

The concern with increasing already existing injuries is reflected in the F.A.A. regulation on the briefing of handicapped passengers which talks of preventing pain and further injury (emphasis added), 14 C.F.R. 121.571 (a) 3 and 4 (1980).

56. 369 S. 2d. 371; 1979 U.S. Av. R. 497 (Fla. D.C. App. Div. 1979) (Melvin J.).

57. The bag of cocaine was held to be admissible evidence in the passenger's subsequent trial for the unlawful possession of a controlled substance.

58. See Air Canada International Passenger Rules Tariff no. PR-1, Rule 3(c) and CP Air Local and Joint International Passenger Rules Tariff no. 2, Rule 8(c): Conditional Acceptance of Carriage, which provides that:

> "If a passenger whose status, age or mental or physical condition is such as to involve any hazard or risk to

> himself is carried, it is on the express condition that carrier shall not be liable for any injury or disability or an aggravation or consequences thereof, including death, caused by such status, age or mental or physical condition."

The CP Air Rule has a note to the effect that this provision cannot be included in the tariffs which CP Air files pursuant to the laws of the United States.

59. A.T.A.C. Presentation, p. 6.

60. Proposed regulation 14 C.F.R. 382.15.

61. S.P.D.R. - 70, cited supra footnote 23, p. 6.

62. See the discussion, in the following section of this paper, on pregnancy and the attitude of the carriers towards waivers of liability with respect to expectant mothers.

63. Convention for the Unification of Certain Rules relating to International Transportation by Air signed at Warsaw on October 12, 1929.

64. Article 1 (2) paragraph 1 of the 1966 Montreal Agreement cited infra.

65. C.A.B. Docket no. 18,900, approved by the Civil Aeronautics Board on May 13, 1966.

66. Article 1 (2) paragraph (2). The concept of contributory negligence which is envisioned by the Warsaw Convention is laid down in article 21:

> "If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability."

This defence has been preserved by the second paragraph of article 1 (2) of the 1966 Montreal Agreement and, in a slightly altered form, by article VII of the 1971 Guatemala Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955) signed at Guatemala City on March 8, 1971.

The limit referred to in article 23 is that found in article

22 of the Convention, namely 125,000 gold francs, which was subsequently increased to 250,000 gold francs in The Hague Protocol (Protocol to Amend the Convention for the Unification of certain rules relating to International Carriage by Air signed at Warsaw on October 12, 1929) signed at The Hague on September 28, 1955, and was further increased to $75,000 (U.S.) inclusive of legal fees and costs or $58,000 (U.S.) exclusive of legal fees and costs in article 1 (1) of 1966 C.A.B. Agreement.

67. In Salomon Ex'x. v. K.L.M. 1950 U.S. Av. R. 505 and 1951 U.S. Av. R. 378 (N.Y.S.C.) (Hecht J.), a breach of contract to provide a pressurized aircraft cabin was claimed. It was alleged that a passenger suffered a heart attack whilst on a flight from Gander to Idlewilde caused by the failure to maintain air pressure in the cabin of the aircraft or, alternatively, by failure to fly at a low altitude. This issue was not litigated because, under New York law, a passenger's claim for a breach of contract did not survive the passenger's death.

68. (N.Y.S.C. 1975); aff'd. 14 Avi. 17,410 (N.Y.S.C. App. Div. 1976) (per curiam).

69. 16 Avi. 17,238 (N.Y.S.C. 1980) (Lerner J.). This case is discussed more fully infra in connection with the requirement to give advance notification of the type of handicap and any special assistance required.

70. Warshaw v. Trans World Airlines, Inc. 442 F. Supp. 400; 14 Avi. 18,297 (E.D. Pa. 1977) (Fogel D.J.). The learned judge stressed the fact that an injury which was proximately caused during the normal operation of a properly functioning aircraft, on an otherwise uneventful and ordinary flight, is not an accident for which a carrier is liable under article 17 of the Warsaw Convention.

71. Mathias v. Pan American World Airways 12 Avi. 17,270; 53 F.R.D. 447 (W.D. Pa. 1971) (McCune D.J.) and Morris v. Boeing Co. and El Al Israel Airlines, Ltd. 15 Avi. 17,241 (S.D.N.Y. 1978) (Lasker D.J.).

72. De Marines v. KLM Royal Dutch Airlines 433 F. Supp. 1,047; 14 Avi. 18,212; rev'd. and rem'd. 15 Avi. 17,294 (3rd. Cir. 1978) (Rosenn C.J.) and Warshaw v. Trans World Airlines, Inc. cited supra footnote 70.

73. Kalish v. Trans World Airlines 89 Misc. 2d. 153; 14 Avi. 17,936 (N.Y. Civ. 1977) (Hentel J.). This case elaborates the holding in Rosman v. Trans World Airlines, Inc. 12 Avi. 17,304 (N.Y.S.C. 1972); rev'd. 12 Avi. 17,634 (N.Y.S.C. App. Div. 1972); rev'd. and rem'd. 34

N.Y. 2d. 385; 13 Avi. 17,231 (N.Y.C.A. 1974) (Rabin J.). In Rosman it was decided that mental injury (in that case the psychic trauma suffered on board a hijacked aircraft) with no observable bodily, as distinguished from behavioural, manifestations, unaccompanied by palpable, conspicuous physical injury is not connoted by the term "bodily injury" in article 17 of the Warsaw Convention.

74. The amended article 17 (1) would contain the following sentence:

> "However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger."

75. Cited supra footnote 66. The Guatemala Protocol was regarded as a dead letter but the European nations are attempting to revive interest in it. See, Centre for Research in Air and Space Law, The Legal, Economic and Socio-Political Implications for Canadian Air Transport, Montreal, McGill University, 1980, p. 377 et seq.

76. Butterfield v. Forrester (1809) 11 East 60; 103 E.R. 926 (K.B.) (Lord Ellenborough C.J.). See generally on this topic J.G. Fleming, The Law of Torts (5th ed.), Sydney, The Law Book Company Ltd., 1977, pp. 251 - 77, and C.A. Wright and A.M. Linden, Canadian Tort Law, (6th ed.), Toronto, Butterworths, 1975, pp. 502 - 516.

77. Davies v. Mann (1842) 10 M. & W. 546; 12 L.J. Ex. 10, 152 E.R. 588 (Exchequer) (Parke B.). See also M.M. MacIntyre, The Rationale of the Last Clear Chance, 18 C.B.R. (1940), p. 665.

78. It was first introduced into England by way of maritime law in the Maritime Conventions Act, 1911, which enacted the Brussels Collisions Convention (International Convention for the Unification of Certain Rules of Law in Regard to Collisions, signed at Brussels on September 23, 1910), and in 1945 England adopted The Law Reform (Contributory, Negligence) Act, 8 & 9 Geo. VI, c. 28. In Canada, all the common law provinces have adopted legislation similar to the Ontario Negligence Act R.S.O. 1970, c. 296 (originally passed in 1930 as the Contributory Negligence Act S.O. 1930, c. 27) which makes provision for contributory negligence and apportionment of damages. In the United States, until recently, comparative negligence legislation was enacted only in a handful of states, but now in excess of twenty states have done so. In Florida and California comparative negligence has been adopted by judicial legislation. See, Hoffman v. Jones 280 S. 2d. 431 (Fla. S.C. 1973) (Adkins J.) and Li v. Yellow Cab Co. of California 13 Cal. 3d. 804; 532 P. 2d. 1226; 92 Cal. Rptr. 858 (Cal. S.C. 1975) (Sullivan J.); also, J.G. Fleming, Comparative Negligence at Last, 64 Cal. L.R. (1976), p. 239.

In Quebec, the Civil Law system of apportionment of responsibility has existed in the jurisprudence since the turn of the

century (Price v. Roy (1899) 8 B.R. 170; (1899) 29 R.C.S. 494 (Que. Q.B.) (Langelier J.A.) and Nicholls Chemical Co. of Canada v. Lefebvre (1909) 36 C.S. 535; (1910) 42 R.C.S. 402 (Que. S.C.) (Loranger J.)), and is referred to as faute commune although doctrinal writers such as J.-L. Beaudoin, La Responsabilité Civile Délictuelle, Montreal, Montreal University Press, 1973, paras. 222 - 228, states that it is an improper use of the term faute commune to apply it to a situation in which the victim is partly responsible for his injuries. The Quebec system of apportionment was recognised by the Privy Council in the case of C.P.R. v. Frechette (1914) 23 B.R. 511 (Que. K.B. App. Div.); rev'd. 1915 A.C. 871; (1915) 24 B.R. 459 (P.C.) (Lord Atkinson). See also P.B. Mignault, Le Code Civil de la Province de Quebec et son Interprétation, 1 U. of Toronto L.J. (1935), p. 104.

79. C.f. State of Florida v. Southwell cited supra footnote 56.

80. Reported in The Gazette, September 12, 1980, p. 3.

81. Reported in The Gazette, April 11, 1981, p. 4.

82. See, for example, the International Air Transport Association, Recommended Practice 1700 (formerly 1401), sections B and C, and Tariff no. PR-7, Rule 31 (I). The problems presented by the requirement of presentation of a recent medical certificate are analysed in greater depth in the next section of this study dealing with pregnancy, where the problem is more pressing.

83. 13 Avi. 17,912 (D.D.C. 1975) (Gesell D.J.).

84. Such as Mortimer v. Delta Air Lines, Inc. 302 F. Supp. 276 (N.D. Ill. 1969) (Napoli D.J.).

85. Ibid. pp. 280 - 281.

86. 512 F. 2d. 527; 13 Avi. 17,750; 167 U.S. App. D.C. 350 (D.C. Cir. 1975).

87. 426 U.S. 290; 14 Avi. 17,148.

88. 426 U.S. 290 at 298.

89. Tariff no. PR-7, Rules 35 (H) Exception 2(b) and 35 (I).

90. The number of flight attendants is a controlling factor with American Airlines on their DC-10 flights. Hence the importance of whether pregnant stewardesses are able to carry out their duties

effectively discussed infra in the section on pregnancy.

91. Or, as United Airlines puts it: "The maximum number of escorted and unescorted nonambulatory passengers will be determined . . . by subtracting the number of emergency exit rows from the total number of seating rows in the aircraft and multiplying by the number of aisles". Tariff no. PR-7, Rule 35 (H), Exception 2(b) (iii).

92. A.T.A.C. Presentation, p. 7.

93. This table was constructed from data found in Tariff no. PR-7, Rules 31, 35 (H) and 35 (I).

94. This stipulation applies to Aloha Airlines, Altair Airlines, Hawaiian Airlines, Hughes Airwest, Piedmont Aviation, R.M.A., Inc., US Air, Wien Air Alaska.

95. This restriction applies to Air California, Alaska Airlines, American Airlines, Cardinal/Air Virginia, Cochise Airlines, Hawaiian Airlines, Hughes Airwest, Pacific Southwest Airlines, Pan American World Airways, United Air Lines, Western Air Lines.

96. Altair Airlines, Mississippi Valley Airlines and US Air.

97. Air Midwest, Air Oregon, Air Wisconsin, Empire Airlines and Sky West Airlines.

98. Recommended Practice 1700 (b) (formerly 1403).

99. Tariff no. PR-7, Rule 35 (I).

100. Aloha Airlines, Aspen Airways, Eastern Airlines and Piedmont Aviation.

101. In addition, the total number of non-ambulatory passengers on any given flight will not exceed the limitation of one non-ambulatory passenger per aisle. Tariff no. PR-7, Rule 35 (H), Exception 2(b) (ii) and (iii).

102. Proposed 14 C.F.R. 121.584 (b)(2), see 39 F.R. 24,667 (1974) at p. 24,669.

103. See Thornburg cited supra footnote 2, at p. 621.

104. Idem.

105. 42 F.R. 18,392 (1977) at p. 18,393.

106. Air Midwest, Air Oregon, Air Wisconsin, Altair Air Lines, Empire

Airlines, Hawaiian Airlines, Imperial Commuter Airlines, Mississippi Valley Airlines and Sky West Airlines.

107. Tariff no. PR-7, Rule 35 (H), Exception 2(a)(ii)(cc). Alaska Airlines, Aloha Airlines, Coleman Air Transport, Midway Airlines and United Air Lines stipulate that the carrier will determine where passengers and escorts will be seated for the safety and comfort of other passengers. Two non-ambulatory passengers will not be seated across the aisle from each other in the same seating row. Tariff no. PR-7, Rule 35 (H), Exception 2, (a)(ii)(dd)(2). American Airlines, Hawaiian Airlines, Hughes Airwest and Pacific Southwest Airlines stipulate that escorted mental patients will be seated in the rear-most available seats with the escort seated between the escorted passenger and the aisle. Escorted mental patients will not be seated in a row with, behind, or forward of a window exit, or in a row with or opposite to a door exit. Tariff no. PR-7, Rule 35 (F)(2)(g)(vi)(bb)(1).

108. A T.W.A. Boeing 747 hit a roller at Rome Airport and ruptured a fuel line. Although there was no noticeable impact, the aircraft rapidly went up in flames. Of the passengers, thirty-two out of thirty-seven young men escaped from the aircraft but only fifteen out of thirty-six women, children and the elderly. B. Moynihan, Airport Confidential, New York, Simon and Schuster, 1980, excerpted in The Gazette, Aug. 4, 1980, p. 6.

109. The regulations covering the provision of non-smoking seats is discussed infra in the section of this study concerning smoking and drinking.

109a. Tariff no. PR-7, Rule 50(A)(2)(b).

110. S.P.D.R. - 70 cited supra footnote 23.

111. Ibid. p. 7, and proposed new rule 382.5 (b).

112. 14 C.F.R. 121.311 (d) (1980).

113. 42 F.R. 18,392 (1977).

114. 14 C.F.R. 121.311 (d) (2) (1980).

115. See, for example, Tariff no. PR-7, Rules 32 (B)(3) and 35 (H), Exception 1, whereby Frontier Airlines and Texas International Airlines stipulate that physically handicapped passengers requiring a reclined seat during takeoff and landing may be accommodated in seats which have a bulkhead behind them, or in any other seat row if other passengers are not seated in the row behind the passenger and the row behind the passenger is not an emergency exit row.

116. Tariff no. PR-7, Rule 35 (H), Exception 2(a)(ii)(aa). The other recalcitrant airlines are: Air Midwest, Air Oregon, Air Wisconsin; Alaska Airlines; Aloha Airlines; Aspen Airways; Empire Airlines; Golden West Airlines; Hawaiian Airlines; Hughes Airwest; Imperial Commuter Airlines; Mississippi Valley Airlines; Ozark Air Lines; Piedmont Aviation; RMA, Inc.; Sky West Airlines; and Wien Air Alaska.

117. A.T.A.C. Presentation p. 5. Passengers who are both blind and deaf must be accompanied on Alaska Airlines, Cochise Airlines, Hawaiian Airlines, Pacific Southwest Airlines, United Air Lines and US Air.

118. This appears to be the situation, as regards the blind, for all Canadian and United States' carriers. As regards the deaf, all Canadian carriers will carry a guide dog for free but in the United States, this concession is only granted by the majority of scheduled air carriers; it is not granted, for example, by National Airlines. See, for example, A.T.A.C. Presentation p. 5; International Passengers Rules Tariff no PR-1, Rule 20 (E)(5) and Tariff no. PR-7, Rule 55 (A) and (E).

119. Letter from J.E. Martin, Vice-President, Legal, and Secretary, Quebecair, dated October 31, 1979. See also, the Incapacitated Passengers Handling Guide, cited supra footnote 28, pp. 30 - 31, and I.A.T.A. Recommended Practice 1700 (c) (formerly 1404), paragraph 2(a). For reasons best known to themselves, Aloha Airlines, Altair Airlines, Cochise Airlines, Pan American World Airways, Reeve Aleutian Airways and Wien Air Alaska require that a dog trained to lead the blind be properly muzzled, but only Altair Airlines and Pan American World Airways require that a dog trained to assist the deaf be properly muzzled. Tariff no. PR-7, Rule 55 (A) and (E).

120. These carriers are: Air California; American Airlines; Delta Air Lines; Metro Airlines; Metroflight Airlines; Pacific Southwest Airlines, R.M.A. Inc. and United Air Lines. American Airlines is particularly specific concerning the seating of blind persons. Non-smoking passengers will be seated in a window seat in the first row of seats following the class/zone dividers or partitions in either cabin on all aircraft, whilst smoking passengers will be seated, where possible, in a window seat in the rearmost part of the cabin. (The concept of seating the blind next to the windows verges on a sick-joke.) Neither the blind nor the deaf will ever be seated in a row with, forward of, or behind a window exit, or in a row with an emergency door exit over the wing of a wide-body aircraft. Tariff no. PR-7, Rule 60.

121. International Passenger Rules Tariff no. PR-1, Rule 20 (E)(5)(a).

122. A.T.A.C. Presentation, p. 6.

123. Compare this with the pious hopes expressed in I.A.T.A. Recommended Practice 1700 (formerly 1401) that the requirement for individual attention (on emplaning and deplaning, during flight, in an emergency evacuation or during ground handling) which is normally not extended to other passengers

> "will become apparent from special requests made by the passengers and/or their family or by a medical authority or from obvious abnormal physical or mental conditions observed and reported by airline personnel or industry-associated persons (travel agents, etc.)"

See also the Incapacitated Passengers Handling Guide, cited supra footnote 28, p. 2.

124. A.T.A.C. Presentation, p. 6.

125. 14 C.F.R. 121.571 (a) (3) and (4) (1978). Passengers who have been briefed on a previous leg of the flight need not be re-briefed as long as the flight attendants on duty have been informed as to the most appropriate manner of assisting the handicapped passenger. 14 C.F.R. 121.571 (a) (4) (1980). This is an improvement on the regulation as it was originally proposed, for in its former state it called for non-specific briefings concerning the procedures to be followed in the event of an emergency evacuation regardless of whether the handicapped passenger had been briefed on a previous leg of the flight. 39 F.R. 24,667 (1974).

126. Tariff no. PR-7, Rule 35 (H), Exception 2(a)(i)(aa). Air California and American Airlines require forty-eight hours, ibid., Exception 2(a)(i)(cc) and (dd); Coleman Air Transport and United Air Lines require seventy-two hours notice, ibid, Exception 2(a)(i)(bb); Northwest Airlines require seventy-two hours notice for passengers on stretchers, ibid., Exception 2(a)(i)(aa).

127. 274 S. 2d. 857; 1974 U.S. Av. R. 619 (La. C.A. 1973); aff'd. 287 S. 2d. 784; 1974 U.S. Av. R. 615 (La. S.C. 1973) (Dixon J.).

128. Tariff no. 35 (H), Exception 2(a)(i)(aa) and (dd).

129. S.P.D.R. - 70 cited supra footnote 23, p. 4.

130. Gallin v. Delta Air Lines, Inc. 16 Avi. 17,238 (N.Y.S.C. 1980) (Lerner J.).

131. It is quite likely that the Gallin case will go to appeal, not on the issue of the failure to offer special assistance, but on the duty of care owed by the carrier to deplaning passengers. There was a suggestion that Mrs. Gallin was hit on the back of the leg by a piece of luggage being carried off the aircraft by the passenger following her to the exit. The carrier personnel may have permitted an unduly large piece of luggage to have been carried on board, or perhaps a higher court will find that the cabin crew should, from common sense, hold back deplaning passengers who are following directly behind a disabled passenger to allow the latter to progress unhurriedly without getting flustered or having impatient fellow passengers jostle them from the rear.

132. Adamsons v. American Airlines, Inc. 16 Avi. 17,195 (N.Y.S.C. 1980) (Wallach J.). This case is discussed more fully infra in this section of the study.

133. F.E. Quindry cited supra footnote 32.

134. Ibid. at p. 495.

135. Idem.. In a couple of railway cases involving blind passengers (Denver & R.G.R. Co. v. Derry 47 Colo. 584; 108 P. 172; 27 L.R.A. (N.S.) 761 (S.C. Colo. 1910) (Campbell J.) and Ill. C.R. Co. v. Allen 28 Ky. L. Rep. 108; 89 S.W. 150 (Ky. C.A. 1905) (Barker J.)). the general rule had been laid down that a common carrier was justified in refusing to sell a ticket to a helpless passenger travelling without an attendant. If a carrier accepted such a person for carriage, it assumed an additional duty of care towards such a passenger commensurate with their needs which includes using at least reasonable care and diligence for their safety.

136. F.E. Quindry cited supra footnote 32, p. 495.

137. Quebecair, however, insists that a deaf passenger be accompanied to the airport by someone who can communicate verbally with the airline's agent for checking in and boarding procedures. Letter from J.E. Martin, Vice-President, Legal, and Secretary, Quebecair, dated October 31, 1979.

138. Via Nordair Newsletter, November 1980, and The Gazette, November 10, 1980, p. 48.

139. S.P.D.R. - 70, cited supra footnote 23.

140. Ibid. proposed new part 14 C.F.R. 382.11(a).

141. Ibid. 14 C.F.R. 382.11(b).

142. Proposed 14 C.F.R. 121.589(d); 39 F.R. 24,667 (1974) at 24,669.

143. See supra footnote 103.

144. 42 F.R. 18,392 (1974) at 18,394.

145. I.A.T.A. Incapacitated Passengers Handling Guide, cited supra footnote 28, p. 28.

146. 14 C.F.R. 121.589(a) (1980).

147. S.P.D.R. - 70 cited supra footnote 23, p. 6.

148. 14 C.F.R. part I.

149. 44 F.R. 25,869 (1979).

150. 45 F.R. 75,138 (1980).

151. A.T.A.C. Presentation, p. 11.

152. Until a solution to the problem of stowage of canes is found, the best practical suggestions for dealing with blind and deaf passengers are the following found in the I.A.T.A. Incapacitated Passengers Handling Guide, cited supra footnote 28, pp. 29 - 30:

> Blind Passengers
>
> - If the passenger wishes to take his guide dog along, check as to whether the dog will be permitted into the countries to which the passenger will be going. Some countries require special permits or quarantines for dogs. Destinations such as Hawaii, the United Kingdom, New Zealand and Australia have strict quarantine regulations, which effectively prohibit a blind person from taking his guide dog. When making reservations, be sure to advise the airlines that the passenger is taking his guide dog along.
> - When escorting a blind person, let him take hold of your arm. He will naturally walk slightly behind you so that he can anticipate a directional change or a step up or down. If there is a particularly high step or a flight of stairs, you should mention this.

- Unless a blind person has requested a wheelchair, do not offer to provide one as this could cause resentment.
- Do not take hold of a blind person by the arm and attempt to steer him, as he may feel that he is being pushed and this may confuse him, whereas he will prefer to follow where you lead.
- When showing a blind person to a chair, merely put his hand on the arm or the back of the chair. He will be able to seat himself very easily.
- When giving directions to a blind person, be sure to say "right" or "left" according to the way he is facing.
- Always remember that a blind person cannot see you approach and if there are other people around he may not realise that you are addressing him so preface your remarks by name or touch him lightly on the arm.
- Never ask others present a question that blind persons can answer themselves such as "would they like a cup of tea?"
- Most blind persons can cope with meals normally and independently, but such dishes as unfilleted fish or the leg or wing of chicken should have the bones removed before being served. Tell the blind passenger what is being served and where each item is located on the tray. Also tell the passenger when his cup or glass is being refilled, especially when hot drinks are being served.
- It will assist a blind person when he is served a meal if only the cutlery necessary is laid as each course is served.
- If unaccompanied, a blind person may wish to remain on board at transit

stops. If so, the chief flight attendant must be advised so that this can be arranged.

- Blind persons who are also deaf or mute, require an able bodied travel companion.
- The blind person will need a briefing explaining the layout of the aircraft, especially the location of the emergency exits in relation to where he is sitting.
- Guide dogs, which are carried free, but are subject to the usual quarantine regulations, will curl at their owners feet, so a bulkhead seat is preferable, as it gives a little more room for the dog; a window seat will prevent other passengers from stepping on the dog. Avoid putting guide dogs on escalators or moving walkways as their paws might get damaged. Remember that the dog's collar and leash contain metal which will activate security search apparatus.

Travellers With Impaired Hearing

- Be patient and speak clearly, but only raise the tone of your voice if the person indicates it would be helpful.
- Use hand and facial gestures to help get the message across if the person does not appear to comprehend.
- Write down all the details of the travel arrangements, in case the client might have misunderstood.
- Inform the airlines and hotels that the reservation is for a person with impaired hearing, in case there is a change in departure time or there is an emergency while the traveller is in the hotel room.

Deaf and Mute Passengers

The same guidelines apply to guide dogs, as for blind passengers. Deaf passengers, like

> blind ones, need very little assistance, and obviously you should use as much visual communication as possible. Most deaf people can lip read, don't exaggerate your speech, speak slowly.
>
> Deaf and mute children under the age of 15 should preferably be escorted by someone who is known to them.

153. See tariff no. PR-7, Rules 31(B)91)(b), 35 (F)(2)(e) and 35(F)(4)(d). (American Airlines has the unusual stipulation that persons who have an illness that may become obnoxious aloft can be refused travel. Tariff no PR-7, Rule 35(F)(2)(0). It is difficult to imagine such a disease, but perhaps something akin to hypoxia (which at high altitudes affects those with heart and lung conditions and severe anaemia) is contemplated by this rule. Compare these tariff regulations with the International Air Transport Association, Recommended Practice 1700, s. 3(b)(ii).

154. Thus in the case of Casteel, Adm'r. v. American Airways, Inc. 1 Avi. 594 (Ky. C.A. 1935) (Stanley Comm.) it was held that although an airline is a common carrier and had agreed to transport a person afflicted with tuberculosis in the reasonable belief that they were able to make the journey from El Paso, Texas to Louisville, Kentucky, when, en route, that passenger became so sick that not only his life and health were endangered, but the convenience, comfort and health of other passengers were also imperilled, then the carrier had the duty and the right to remove the passenger from the aircraft. At the trial for damages for permanent impairment to health due to the prolonged transportation (the tubercular patient and his wife were carried over the Fort Worth, Texas - Louisville, Kentucky leg of the journey by train which represented a delay of twenty-nine hours), humiliation, exposure and mental and physical distress and discomfort, a local doctor expressed the opinion that the experience had hastened the patient's death (Mr. Casteel died within two weeks of arriving in Louisville), but confessed that he had no personal knowledge of air travel! Time has changed both the prevalence of tuberculosis and medical practitioners' lack of familiarity with the inside of aircraft.

In recognition of the remote location of certain communities served by Quebecair, provisions have been made for limited transport of such passengers in specific circumstances and under the following conditions:

> 1. Only the physician in charge of the case may give assurances concerning the acceptance of the passengers and what precautionary measures are to be observable prior to, during and after

their carriage.

2. The patient must be seated at the first row of the aircraft.

3. The patient must be seated at the window seat.

4. The adjacent seat, not row, is to be left vacant unless an attendant accompanies the patient in which case such attendant shall occupy the adjacent seat and the aisle seat (if a row of three) will be left vacant.

Letter from J.E. Martin, Vice-President, Legal, and Secretary Quebecair, dated October 31, 1979.

155. 144 Ky. 649; 139 S.W. 855; 36 L.R.A. (N.S.) 337 (Ky. C.A. 1911) (Settle J.).

156. "A common carrier, independently of the contractual relation, is under a general obligation to receive and carry upon its trains all proper persons who apply for transportation and offer to pay the regular fare for such service. By the term "proper persons" is meant persons whose status or condition apparently entitle them to be carried as passengers. On the other hand, the carrier has the right to refuse to carry as passengers improper persons; that is persons whose condition or conduct is such from intoxication, disorderly conduct, contagious diseases, or other things, as to make their presence on the train dangerous to the lives or health of other passengers. Likewise if the condition or conduct of a person, after being received as a passenger, becomes such as to endanger the lives or health of other passengers, or to unreasonably annoy or offend them, it is the right and duty of the carrier's servants in charge of the train, upon receiving notice thereof, to eject such offending person from the train; but in doing so they must also exercise due care to protect his health and person from danger or unnecessary discomfort."

139 S.W. 855 at 857.

The latter part of the quotation emphasizes the even greater problem presented by diseased passengers travelling on aircraft, since the opportunities to eject the passenger are strictly limited. See also the I.A.T.A. Incapacitated Passengers Handling Guide cited supra footnote 28, p. 31, which contains the prohibition that passengers

> "who have contagious and transmittable diseases, including the more serious types e.g. smallpox, typhus, cholera, yellow fever and the less serious types e.g. dyptheria, scarlet fever, tuberculosis, and measles cannot be accepted for air travel until the risk to other passengers has ceased to exist."

157. F.E. Quindry cited supra footnote 32.

158. See Pullman Co. v. Krauss 145 Ala. 395; 40 S. 398; 4 L.R.A. (N.S.) 103 (Ala. S.C. 1906) (Denson J.), where a passenger who was suffering from the "contagious and loathsome disease" syphilitic eczema, and who had skin eruptions resulting from the disease visible on his body, was refused a ticket for a berth in a sleeping car. One wonders if the court understood how syphilitic eczema is transmitted, and if so, was the fact that the passenger wanted a berth in a sleeping car significant?

159. 38 F.R. 14,757 (1973) at 14,758.

160. Tariff no. PR-7, Rules 31 (B)(1)(b) and 35 (F)(4)(e).

161. Recommended Practice 1700, Attachment A, Part II.

162. C.f. Conners v. Cunard Steamship Co. 204 Mass. 310; 90 N.E. 601; 26 L.R.A. (N.S.) 171 (Mass. S.C. 1910) (Loring J.), where a woman who might have required simple gynaecological treatment was refused passage on a transAtlantic crossing.

163. See Conolly v. Crescent City Ry. Co. 41 La. Ann. 57; 5 S. 259; 6 S. 526; 3 L.R.A. 133; 17 Am. St. Rep. 389 (S.C. La. 1889) (Fenner J.), in which a passenger stricken with apoplexy and vomiting was taken off a street car and placed in the gutter, on a bleak December day.

164. Croom v. C.M. & St. P. Ry. Co. 52 Minn. 296; 53 N.W. 1128 (Minn. S.C. 1893) (Mitchell J.).

165. Suarez et al. v. Trans World Airlines, Inc. et al. 13 Avi. 17,138 (7th Cir. 1974) (Sprecher J.). This case is discussed more fully

later in this section of the study dealing with passengers in wheelchairs.

166. The advent of mind and mood controlling drugs has probably rendered obsolete the holdings of such cases as Meyer v. St. Louis, I.M. & S. Ry. Co. (E.D. Ark.); rev'd. 54 F. 116 (8th Cir. 1893) (Shiras J.). In that case an insane passenger shot and killed a fellow passenger. The Appeal Court decided that:

> "The law imposes upon a common carrier the duty of exercising a very high degree of care and foresight for the safe transportation of the passengers who intrust themselves to him for that purpose; and in the performance of this duty, which the carrier cannot evade or escape, the carrier certainly has the right to exclude from his vehicle any one whose condition is such that a possibility of danger may be thrown upon the other passengers if he is admitted as a passenger. It would cast an unjust burden on the carrier to hold, on the one hand, that he must exercise the highest degree of care and caution for the protection of his passengers, and on the other hand, to hold that he has not the right to exclude from his vehicle one whose condition is such that he may cause danger to other passengers, simply because, at the moment he offers himself as a passenger, he is quiet, well-behaved, or apparently harmless."

At 120. Only undiagnosed, acute schizophrenics would, nowadays, fall into the category referred to in the quotation.

167. A.T.A.C. Presentation, p. 4.

168. Ibid., pp. 5 - 6.

169. Ibid., p. 6. The rules regarding the acceptance of unaccompanied children are discussed infra in another section of the study.

170. Chicago R.I. & G. Ry. v. Sears 210 S.W. 684 (Texas Ap. Comm. 1919) (Strong J.).

171. Air Florida, Delta Air Lines and Piedmont Aviation. Tariff no. PR-7, Rule 35 (F)(4)(f). It would appear from conversations with Delta Air Lines' booking agents that they will accept persons who are only borderline cases of retardation as long as arrangements have been made to escort them to the point of departure and meet them at their destination and then only for online travel.

172. Air California, American Airlines, Cochise Airlines, Continental Airlines, Hughes Airwest, Marco Island Airways, Ozark Air Lines, Pacific Southwest Airlines, Piedmont Aviation, Texas International Airlines, Trans World Airlines, US Air. Tariff no. PR-7, Rules 31 (B)(2), 35 (F)(2)(j) and 35 (H)(2) and (3).

173. Air California, American Airlines, Aspen Airways, Cardinal/Air Virginia, Cochise Airlines, Hawaiian Airlines, Hughes Airwest, Ozark Air Lines, Pacific Southwest Airlines, Pan American World Airways, United Air Lines, US Air, Western Air Lines.

174. Tariff no. PR-7, Rule 35 (F)(2)(g) and (j).

175. Ibid., Rule 35 (F)(2)(g)(vi)(aa).

176. Ibid., Rule 35 (F)(2)(g)(vi)(bb).

177. Idem.

178. Discussed infra in the section of this study dealing with the hijacker profile.

179. See supra, footnote 174.

180. See supra, footnote 171.

181. The remarks which were made supra in this section of the study dealing with blind persons' canes are also applicable to crutches.

182. Because of the problem with emergency escape chutes, early common carrier cases, such as Hogan v. Nashville 131 Tenn. 244; 174 S.W. 1118; Ann. Cas. 1916 C. 1162 (Tenn. S.C. 1915) (Williams J.), where it was held that a passenger who used two crutches, but was able to take care of himself, could not be excluded from a train car on the basis of his disability, are no longer directly applicable to modern aviation cases.

183. See supra this section of the study dealing with the blind and the deaf, and the section dealing with restriction by numbers.

184. See A.T.A.C. Presentation, p. 4 and I.A.T.A. Recommended Practice 1700, Section A (2) for the various degrees of confinement to a wheelchair. See also The Gazette, January 15, 1981, p. 4, for a report on the course Nordair flight attendants are taking which deals with the problems of handicapped passengers, with special emphasis on the situation of passengers in wheelchairs. The attendants were reported to have been surprised by the attitude of the handicapped passengers who considered that they could handle

themselves quite adequately if left alone, and would rather prove their independence than receive help. One cerebral palsy victim stated that he did not wish to be supplied automatically with a wheelchair (as is Nordair's policy) since he would rather board the aircraft without one unless he was in a hurry.

185. A.T.A.C. Presentation, p. 10.

186. Cited supra footnote 165.

187. Ibid. at pp. 17,140 - 17,141.

188. It should be borne in mind that in Canada, the duty of care owed by a common carrier to its passengers is to carry with due care and not, as in the United States, to carry with the utmost care and diligence. The distinction in the degree of care owed does not, however, make the holding in this particular case inapplicable to Canada since the lack of care shown towards the plaintiff hardly fulfilled the criterion of even due care. See supra the section of this study dealing with the airline as a common carrier.

189. 13 Avi. 17,138 at 17,139.

190. Katamay v. Chicago Transit Authority 53 Ill. 2d. 27; 289 N.E. 2d. 623 (S.C. Ill. 1972) (Goldenhersch J.)

> "We hold that the plaintiff was not required to be in physical contact with defendant's train in order to occupy the status of passenger. She was standing on the platform provided for boarding and alighting from defendant's trains and was engaged in the "act of boarding" if, with intent to board the standing train and pay the required fare, she moved toward it for that purpose."

53 Ill. 2d. 27 at 32; 289 N.E. 2d. 623 at 626. The Katamay decision reaffirmed the principle in Peterson v. Elgin A. & S. Traction Co. 238 Ill. 403; 87 N.E. 345 (S.C. Ill. 1909) (Vickers J.).

191. Zorotovich v. Washington Toll Bridge Authority 80 Wash. 2d. 106; 491 P. 2d. 1295 (Wash. S.C. 1971) (Wright J.) at 1297 of 491 P. 2d.

192. See infra in this section of the study the discussion of the Adamsons case.

193. Idem.

194. In dissent, Fairchild C.J. could not find an obligation on the part of the carrier to exercise the highest degree of care in its ticket-selling operations at an airport and that a finding of contributory negligence on the part of Mrs. Suarez for travelling in her condition was justified.

195. 13 Avi. 17,138 at 17,140.

196. S.C. 1980, c. 36, assented to July 17, 1980.

197. Resolution 745 (b) (formerly 308 (b)), Acceptance of Power Driven Wheelchairs as Checked Baggage.

198. Ibid., s. 1.

199. Ibid., s. 2(a).

200. Ibid., s. 2(b).

201. A.T.A.C. Presentation, p. 8.

202. See, for example, Tariff no. PR-7, Rules 31 (E) and 32 (D).

203. 49 C.F.R., parts 172, 173 and 175 (1979).

204. S.P.D.R. - 70 cited supra footnote 23.

205. Ibid., p. 7, and proposed new part 14 C.F.R. 382.13 (d).

206. 14 C.F.R. part I.

207. See supra footnote 203.

208. 274 S. 2d. 857; 1974 U.S. Av.R. 619 (La. C.A. 1973); aff'd. 287 S. 2d. 784; 1974 U.S. Av.R. 615 (La. S.C. 1973) (Dixon J.).

209. 1974 U.S. Av.R. 615 at 618. The Louisiana Court of Appeal had stated in an earlier judgment that, even if there had been an express contract to furnish a bedpan in flight, the substitution of diapers constituted reasonable performance of the obligation and not bad faith or derisive performance. 1974 U.S. Av.R. 620 at 621.

210. 1974 U.S. Av.R. 615 at 619.

211. Idem.

212. Tariff no. PR-7, Rule 35 (H), Exception 2(A)(1).

213. Tariff no. PR-7, Rule 35 (F)(2)(k), applicable to Cochise Airlines, Hawaiian Airlines, Ozark Air Lines, Pacific Southwest Airlines and US Air.

214. This is also the I.A.T.A. guideline, see the Incapacitated Passengers Handling Guide, cited supra footnote 28, p. 28.

215. Tariff no. PR-7, Rule 90 and 14 C.F.R. 135.91 (b) (1980) for the F.A.A. regulations.

216. Idem. A charge of $30 (U.S.) for inflight oxygen service is usually levied. Idem.

217. Ibid., Rule 90 (J) (8)

218. Air Canada, for example, see International Passenger Rules Tariff no. PR-1, Rule 15 (A) (5).

219. Tariff no. PR-7, Rule 90, see also 14 C.F.R. 135.91 (c) and (d) (1980) for the F.A.A. regulations.

220. Incapacitated Passengers Handling Guide, cited supra footnote 28, p. 28.

221. See, for example, Air Canada International Passenger Rules Tariff no. PR-1, Rule 15 (A) (4).

222. Tariff no. PR-7, Rule 90 (A), Exception 1 and 90 (J) (6).

223. S.P.D.R. - 70, cited supra footnote 23.

224. Ibid., p. 4, and see also proposed new part 14 C.F.R. 382.14 (b).

225. Idem.

226. See Tariff no. PR-7, Rule 370 which lists those carriers which will accept passengers on stretchers.

227. Air Canada, Tariff no. PR-7, Rule 370 (L) and Reeve Aleutian Airways, Tariff no. PR-7, Rule 370 (F).

228. Western Airlines on Boeing 707 and 727 equipment, Tariff no. PR-7, Rule 370 (c). These fares include at least one attendant carried free of charge; on 720 and 737 equipment, one additional attendant may be carried free of charge and on 707 and 727 equipment an additional two attendants may be carried free of charge. Idem.

The various charges for stretcher patients made by the other airline companies are as follows:

The number of seats occupied by the stretcher and attendant times the normal coach fare

- Alaska Airlines and Wien Air Alaska. Tariff no. PR-7, Rule 370 (B) and (N).

3 adult fares plus the applicable fare for the attendant

- CP Air and Eastern Provincial Airways. Tariff no. PR-7, Rule 370 (J).

4 adult fares which includes 2 attendants

- Delta Air Lines, National Air Lines, Northwest Airlines and Trans World Airlines. Tariff no. PR-7, Rule 370 (D)(G)(H) and (K). (T.W.A. only allows 1 attendant fare to be included if the equipment is not a Boeing 747 or a DC-10. T.W.A. will not carry stretcher passengers on its DC-9 equipment.)

4 adult fares which includes 1 attendant

- Pan American World Airways, Quebecair, United Air Lines. Tariff no. PR-7, Rule 370 (A) (O) and (P).

4 adult fares plus the applicable fare for the attendant

- Nordair and Pacific Western Airlines. Tariff no. PR-7, Rule 370 (I)

6 adult fares which includes 2 attendants.

- Aloha Airlines and Hawaiian Airlines. Tariff no. PR-7, Rule 370 (E).

229. See The Gazette, February 18, 1981, p. 10.

230. A.T.A.C. Presentation, p. 5, Air Canada International Passenger Rules Tariff no. 1PR-1, Rule 19 (E) and Tariff no. PR-7, Rules 31 (E), 32 (D) and 220.

231. Reported in The Gazette, April 9, 1981, p. 3.

232. See the table supra footnote 228.

233. A personal attendant is someone physically capable of assisting the handicapped person to an exit and of providing the necessary assistance required to a handicapped passenger, including any assistance necessary for personal hygiene requirements.

234. See, for example, Tariff no. PR-7, Rules 35 F(2)(j), (k), (l) and (m) and 35 (H)(1), (2) and (3).

235. S.P.D.R. - 70, cited supra footnote 23, p. 4.

236. See supra this section of the study which deals with waiver of liability. In Canada, airports which are not operated by Transport Canada allow non-passengers to escort handicapped passengers to the aircraft. For passengers who can manage for themselves once on board, and who only need assistance walking to the aircraft and embarking, this service could save them the cost of the airfare of an attendant. Letter from J.R. Kilgour, Manager Air Services, Ontario Northland Transportation Commission, to Ms. C. MacDonald, Operations Branch, Air Transport Committee, Transport Canada, dated September 2, 1980.

237. Letter from L.G. Potvin, Director General, Policy Planning and Programming - Air, Transport Canada to H.M. Pickard, Secretary, Air Transport Association of Canada, dated August 18, 1980.

238. A.T.A.C. Presentation, p. 9.

239. Ibid., p. 11. When passengers travel by air on stretchers within Ontario, the cost is normally covered by the Ontario Health Insurance Plan. Letter from J.R. Kilgour, cited supra footnote 236.

240. Section 8(a) of P.L. 95-163, 91 stat. 1281.

241. 49 U.S.C. 1373 (1976): the anti-discrimination provisions.

242. Cited supra footnote 23, pp. 7 - 8.

243. Ibid., p. 8.

244. Idem.

245. Air Canada International Passenger Rules Tariff no. PR-1, Rule 3 (A)(1)(c); CP Air Local and Joint Passenger Rules Tariff no. 2, Rule 8 (A)(1)(c); Tariff no. PR-7, Rule 35 (F) (1).

246. The situation of the very young and the very old dealt with is infra in another part of this section of the study.

247. The problems associated with pregnant women are dealt with in the next section of this study.

248. C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979 which cancelled Airline Tariff Publishing Company, Agent, Tariff C.A.B. no. 352, C.T.C. (A) no. 195, Rules 30 (A)(2), 31 (B)(1)(b) and 35 (F)(1) and Air Tariffs Corporation, Agent,

Tariff C.A.B. no. 55, Rules 15-(A)(1)(c) and 15 (B)(1)(c) for U.S. certified carriers. The cancellation followed the issue of Show Cause Order 79-1-70, (Docket 34,435) dated January 11, 1979.

249. C.A.B. Order 79-1-70, p. 1.

250. Idem.

251. The C.A.B. also called attention to the fact that grounds were given for refusal to carry the elderly on the basis of age alone without regard to their physical condition, or other restrictions could be placed on children apart from those already included in the regulations covering the carriage of children: indeed, unaccompanied children could be virtually excluded by these provisions. See supra footnote 246.

252. C.A.B. Order 79-11-48, p. 4. The tariff rules 35 (F) and 35 (H) (Tariff no. PR-7) which have been analyzed in this discussion of U.S. carrier regulations were filed in response to Order 79-11-148 and became effective, on average, four to five months after the Order was adopted.

253. 16 Avi. 17,195 (N.Y.S.C. 1980) (Wallach J.).

254. For the complete text of Tariff no. PR-7, Rules 35 (F) and 35 (H), see supra the section of this study dealing with the airline as a common carrier.

255. Idem.

256. See, for example, Centre for Research of Air and Space Law, Legal, Economic and Socio-Political Implications for Canadian Air Transport, Montreal, McGill University, 1980, Chapter V.

257. S.P.D.R. - 70, cited supra footnote 23. Although dated May 31, 1979 (with comments requested by September 4, 1979) as of writing this paper, the proposed rulemaking was not yet in force.

258. Ibid., p. 4.

259. Ibid., p. 5.

260. Idem. This proposal is probably the answer to the "highly technical, policy question" referred to in Heumann v. National Airlines, Inc. 13 Avi. 17,912 (D.D.C. 1975) (Gesell D.J.) at 17,912.

261. See Air Canada International Passenger Rules Tariff no. IPR-1,

Rule 3 (B), CP Air Local and Joint International Passenger Rules Tariff no. 2, Rule 8 (D) and Tariff no. PR-7, Rule 35 (J).

262. See supra the section of this study dealing with overbooking.

263. Cited supra footnote 253. The decision was handed down on October 31, 1980.

264. Ibid., at 17,196.

265. The Warsaw Convention of 1929 as amended by the C.A.B. Montreal Agreement of 1966.

266. This tariff rule, along with other similar tariff provisions, was cancelled by C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979, due to its use of vague and uncertain terminology. See the discussion supra in this section of the study of the reasons given by the C.A.B. for the cancellation.

267. 16 Avi. 17,195 at 17,197.

268. Gallin et al. v. Delta Air Lines, Inc. cited supra footnote 69.

269. Levy et al. v. American Express, Delta Air Lines, and Trans World Airlines cited supra footnote 50.

270. 16 Avi. 17,195 at 17,196.

271. Ibid. at 17,197. See also the cases of Scherer et al. v. Pan American World Airways, Inc. and Trans World Airlines, Inc. cited supra footnote 68 and Warshaw v. Trans World Airlines, Inc. cited supra footnote 70 discussed in connection with the subject of waiver of liability.

272. Maché c. Air France (1967) R.F.D.A. 343 (C.A. Rouen 1966); aff'd. (1970) R.F.D.A. 31 (C.C.). More recent cases, such as Air-Inter c. Sage (1976) R.F.D.A. 266 (C.A. Lyon) and Zaoui c. Aéroport de Paris, Cie Air Algérie (1976) R.F.D.A. 394 (C.C.), although not in contradiction to the location principle, appear to be broadening this test.

273. Day v. Trans World Airlines, Inc. 393 F. Supp. 217; 13 Avi. 17,647 (S.D.N.Y. 1975); aff'd 528 F. 2d. 31 13 Avi. 18,145 (2d. Cir. 1975) (Kaufman C.J.); cert. den'd 429 U.S. 890; 97 S. Ct. 246; 50 L. Ed. (2d.) 172 (1976), Evangelinos v. Trans World Airlines, Inc. 396 F. Supp. 95; 13 Avi. 18,051 (W.D. Pa. 1975); rev'd. and rem'd. 14 Avi. 17,101 (3d. Cir. 1976); reh'g. 550 F. 2d. 152; 14 Avi. 17,612 (3d. Cir. 1977) (Van Dusen C.J.) and Upton v. Iran National Airline Corporation 450 F. Supp. 177; 15 Avi. 17,101 (S.D.N.Y. 1978) (Metzner D.J.); aff'd. 503 F. 2d. 215. (2d. Cir. 1979)

(without reasons). See also W. Hiller, An Interpretation of the "Embarking" and "Disembarking" Requirements of Article 17 of the Warsaw Convention, 16 Col. J. Transm. L. (1977), p. 105.

274. Hernandez v. Air France 13 Avi. 18,166 (D.P.R. 1975); aff'd. 14 Avi. 17,421 (1st Cir. 1976); MacDonald v. Air Canada 439 F. 2d. 1402; 11 Avi. 18,029 (1st Cir. 1971) (Aldrich Ch. J.); and Maugnie v. Air France 549 F. 2d. 1,256; 14 Avi. 17,534 (9th Cir. 1977) (Richey D.J.); cert. den'd. 431 U.S. 974; 97 S. Ct. 2,939; 53 L. Ed. 2d. 1072 (1977).

275. Day v. Trans World Airlines, cited supra footnote 273 and Evanelinos v. Trans World Airlines cited supra footnote 273.

276. Upton v. Iran National Airline Corporation cited supra footnote 273.

277. 16 Avi. 17,195 at 17,198.

278. The damages in the case were reduced to $500,000 (U.S.) because the jury verdict had exceeded the damages sought. Although this case was not fought on the basis of the anti-discrimination provisions of the Federal Aviation Act of 1958 49 U.S.C. s. 1374 (b) (1976), the result would in all probability have been the same since to deny boarding for insufficient reason is to deny carriage in a discriminatory fashion.

279. See N.R. McGilchrist, Denial of Boarding to Airline Passengers, Ll. M. C. L. 1981, p. 93.

280. Cited supra footnote 165, and discussed earlier in this section of the study dealing with passengers confined to wheelchairs.

281. See Day v. Trans World Airlines, Inc. and Evangelinos v. Trans World Airlines, Inc. cited supra footnote 273.

282. 49 U.S.C. s. 1374 (1976).

283. 49 U.S.C. s. 1482 (a) and (c) (1976). The order would be prospective in nature only, idem.; if the order were unsatisfactory, a handicapped passenger may seek review in a federal court of appeals, 49 U.S.C. s. 1486 (1976).

284. Fitzgerald et al. v. Pan American World Airways, Inc. 132 F. Supp. 798; rev'd. and rem'd. 229 F. Supp. 499 (2nd Cir. 1956) (Frank C.J.).

285. This was found to be so even though the statute provides only criminal penalties. Ibid., p. 501.

286. Transcontinental Bus System, Inc. v. C.A.B. 383 F. 2d. 466 (5th Cir. 1967) (Gewin C.J.); cert. den'd. 390 U.S. 920; 88 S. Ct. 850; 19 L. Ed. 2d. 979 (1968).

287. N.A.A.C.P. v. Alabama 265 Ala. 349; 91 S. 2d. 214 (Ala. S.C. 1956); rev'd and rem'd. 357 U.S. 449 (1958) (Harland J.), Sierra Club v. Morton 433 F. 2d. 24 (9th Cir. 1970); aff'd. 405 U.S. 727 (1972) (Stewart J., Douglas J. dissenting), and United States v. S.C.R.A.P. 346 F. Supp. 189 (D.D.C. 1972); rev'd. and rem'd. 412 U.S. 669 (1973) (Stewart J.).

288. 49 U.S.C. ss. 1601 et seq. (1976).

289. 407 F. Supp. 394 (N.D. Ala. 1975) (Guin D.J.); aff'd without reasons 551 F. 2d. 862 (5th Cir. 1977).

290. U.S.A. Constitution, Amendment XIV. It was held that the plaintiff could not "credibly maintain that access to public transportation facilities is a "fundamental right" ", 407 F. Supp. 394 at 398.

291. > "Elderly and handicapped persons have the same right as other persons to utilize mass transportation facilities; that special efforts shall be made in the planning and design of mass transportation facilities and services so that the availability to elderly and handicapped persons of mass transportation which they can effectively utilize will be assured; and that all Federal programs offering assistance in the field of mass transportation (including the programs under this chapter) should contain provisions implementing this policy."

49 U.S.C. 1612 (1976).

292. (N.D. Ill. 1976); rev'd. 548 F. 2d. 1277 (7th Cir. 1977) (Cummings C.J.).

293. 29 U.S.C. 794; for text of this section see supra footnote 6.

294. 409 F. Supp. 1297 (D.C. Minn. 1976); rem'd. 558 F. 2d. 413 (8th Cir. 1977) (Lay C.J.); reh'g. den'd. (1977).

295. See 49 C.F.R. 609.1 - 609.25 and 613.204 (1980) for the regulations; 23 C.F.R. 450, subpart A (1980) for guidance on the meaning of special efforts; 49 C.F.R. Part 613, subpart B (1980) for examples of what affirmative duties will satisfy special

efforts requirements; and 45 C.F.R. 84.4 (1980) for the Health, Education and Welfare Department's regulations indicating what a recipient of federal assistance may not do.

296. S.P.D.R. - 70, cited supra footnote 23.

297. See supra footnote 291.

298. Proposed new part 14 C.F.R. 382.22. The syntax is unfortunate and sounds more applicable to a race-track.

299. United Handicapped Federation v. Andre cited supra footnote 294 at 416.

300. S.P.D.R. - 70, cited supra footnote 23, p. 3.

301. 14 C.F.R. 121.311 (d) (198)) and 42 F.R. 18,392 (1977).

302. When the C.A.B. defined the term "handicapped" for the purposes of reduced rate standby fares, Section 8(a) of P.L. 95 - 163, 91 stat. 1281; E.R. - 1070, Amendment no. 4 to part 233 (Docket 32,160) amending subsection 403 (b)(1) of the Federal Aviation Act of 1958, the regulation contained the proviso that:

> "A carrier's rules need not entitle all passengers falling within the Board's definition of "handicapped" to reduced fares, if the differences between the Board's definition and the scope of the carrier's rules are reasonably related to the carrier's administrative needs."

The existence of this catch-all "administrative needs" bodes ill for any quiet revolution.

303. Proposed new part 14 C.F.R. 382.24.

304. Ibid. 382.26 (a) (emphasis added). The other means authorized by law include the issuance of an order of compliance, assessing civil penalties, or seeking injuncture relief from a court.

305. The Civil Aeronautics Board provides financial assistance to air carriers for the carriage of mail (section 406 of the Federal Aviation Act of 1958) and for supplying essential air service to small communities (section 419).

There is also a problem of feet dragging by the Department of Health, Education and Welfare (now named the Department of Health and Human Services): the proposed rulemaking is dated May 31, 1979, and two years later it is still not in effect.

306. Canadian Transport Commission, Information Circular accompanying Notice of Meeting on November 26-27, 1979, Ottawa, topic: Problems of the Handicapped with Regard to Public Transportation under Federal Jurisdiction (the Dubé Hearings).

307. Johannesson v. The Rural Municipality of West St. Paul [1949] 3 D.L.R. 694 (Man. K.B.); aff'd. [1950] 3 D.L.R. 101 (Man. C.A.); rev'd. [1952] 1 S.C.R. 292; [1951] 4 D.L.R. 609; 69 C.R.T.C. 105 S.C.C. 1951 (Kellock, Kerwin and Locke JJ.). This case also confirmed (but on different grounds) the general proposition that the Federal Government has competence over all matters appertaining to aeronautics which was laid down in In Re Regulation and Control of Aeronautics in Canada, [1930] S.C.R. 663; [1931] 1 D.L.R. 13 (S.C.C. 1930); rev'd. [1932] 1 D.L.R. 58; 1932 A.C. 54; 1931 3 W.W.R. 625; 39 C.R.C. 108 (P.C. 1931) (Sankey L.C.). See also Montreal Flying Club v. City of Montreal North [1972] C.S. 695 (Que. S.C.) (Bélanger J.). and Re Orangeville Airport Ltd. and Town of Caledon (Ont. Div. Ct. 1975); aff'd. (1976) 66 D.L.R. (3d.) 610 (Ont. C.A. 1975) (MacKinnon J.A.).

308. See Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board (1967) 62 D.L.R. (2d.) 270; (1967) 2 O.R. 25 (Ont. H. Ct.); aff'd. on other grounds (1967) 2 O.R. 243 (Ont. C.A.) (Aylesworth J.A. for a divided court), which held that the operation of a limousine service was not reasonably required for the operation of an airport, and Murray Hill Limousine Service Ltd. v. Batson et al. (Que. S.C. 1962); aff'd. 1965 B.R. 778 (Que. C.A.) (Taschereau J. and Montgomery J. for a divided court), in which baggage handlers and porters were found not to be necessarily incidental to airport activities and it was decided that their activities did not relate sufficiently closely to aeronautics to take them outside the scope of provincial legislation. Based on the Murray Hill case and in Re United Association of Journeymen et al. and Vipond Automatic Sprinkler Co. Ltd. 1976 67 D.L.R. (3d.) 381 (Alta. S.C.) (Cavanagh J.), if the provision of services in an airport is by an independent sub-contractor, then the people providing these services are not under federal jurisdiction. For contra arguments see Okanagen Helicopters Ltd. v. Canadian Pacific Ltd. [1974] 1 F.C. 465 (F.C. Trial Div.) (Mahoney J.). and Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers [1975] F.C. 590 (F.C.A.) (Hyde D.J.).

309. In the Re Colonial Coach Lines case cited supra the argument that the limousine service used specially constructed parking bays which allowed the limousines to park close to where the passengers embarked and disembarked did not serve to bring this acitivity under Federal competence.

310. See C.T.C. Information Circular cited supra footnote 206, at p. 2.

311. 42 U.S.C. ss. 4151 et seq. (1976).

312. 29 U.S.C. ss. 701 et seq. (1976). The Aeronautics Act R.S.C. 1970, c. A-3, is the principal Federal statute regulating transport by air in Canada. It contains no stipulations dealing specifically with the handicapped, but some sections of this Act could indirectly be related to the provision of special services for the handicapped. Part I deals with the powers of the Minister of Transport, specifically:

section 3(K), Duties of the Minister;

> "It is the duty of the Minister . . . to investigate, examine and report on the operation and development of commercial air services within, or partly within Canada . . ."

section 6 (1)(e), Regulation of Minister;

> "Subject to the approval of the Governor in Council the Minister may make regulations to control and regulate air navigation over Canada . . . . and, without restricting the generality of the foregoing, may make regulations with respect to:
>
> (e) the conditions under which goods, mails and passengers may be transported in aircraft and under which any Act may be performed in or from aircraft."

Part II deals with the regulation of carriers by the Canadian Transport Commission (C.T.C.), specifically:

section 12, Investigation and Surveys, C.T.C.:

> "Subject to the directions of the Minister, the Commission (CTC) shall make investigations and surveys relating to the operation and development of commercial air services in Canada and relating to such other matters in connection with civil aviation as the Minister may direct."

313. See the Federal Aviation Act of 1958 49 U.S.C. ss. 1301 et seq. (1976).

314. The Canadian Transport Commission has engaged in negotiations to establish a new policy for the ownership of loading bridges.

315. The loading bridge at Ottawa Airport, for example, was provided by the Carrier and the access to it was provided by Transport Canada. One stair-glide has been installed by CP Air, whilst Air Canada monitored the CP Air operation for sometime before reaching a decision on whether to install such a device at their loading bridges. C.T.C. Information Circular cited supra footnote 306.

316. See the International Air Transport Association, Recommended Practice 1700 (b) (formerly 1403). See also I.A.TA. Recommended Practice 1700 (e) (formerly 1406), Publication in Airline Guides of Rates and Conditions Related to Incapacitated Passengers' Travel, which covers such matters as whether oxygen and/or incubator serivce is supplied and whether stretcher patients are accepted and, if so, the respective charges for these services.

317. I.A.T.A. Recommended Practice 1700, Section C, para. 1.2, and Attachment B. A copy of the FREMEC is included in the appendices.

318. I.A.T.A. Recommended Practice 1700, Section C, para. 1.1, and Attachment A. A copy of the MEDIF is included in the appendices.

319. This situation is somewhat analogous to that of a jockey who is given the final say on whether or not a horse should be withdrawn from a race if the condition of the horse is in question. Neither jockey nor pilot are particularly qualified to make such a decision but this delegation of authority is in line with the powers given to the aircraft commander in the Tokyo Convention (Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on September 14, 1963), The Hague Convention (Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on December 16, 1970), and the Draft Convention on the Legal Status of the Aircraft Commander drawn up in February 1947.

320. Training flight attendants as nurses is not being specifically advocated, but it is interesting to note that the carriers claim that their flight personnel are trained to deliver babies. See the following section of this study on the acceptance of pregnant women.

321. See supra footnote 302.

322. For example, following the issuance of the C.A.B.'s Show Cause Order (no. 79-1-70 Docket 34,435) dated January 11, 1979 regarding the cancellation of various tariff rules appertaining to the carriage of the handicapped, the Board received input from,

amongst others, the American Coalition of Citizens of the Blind, the City of Chicago Mayor's Office for Senior Citizens and the Handicapped, the Disability Rights Center, the Paralyzed Veterans of America, and the Urban Elderly Coalition of Washington, D.C. C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979, p. 2.

323. The Dubé Hearings cited supra footnote 4.

C H A P T E R 4

P R E G N A N C Y

PREGNANCY

BACKGROUND

Both United States' and Canadian carriers expanded upon the I.A.T.A guideline[1] that carriage can be refused to passengers whose physical state is such as to involve any hazard or risk to themselves or to other persons or to property, to include specifically[2] the possibility of damage to the unborn children of pregnant passengers. Thus pregnant women as a class have been singled out for exceptional treatment and the rule as it is written (or was written for U.S. certified scheduled service carriers[3]) allows airlines to refuse carriage, should they so wish, during the whole term of a woman's pregnancy.

The basis for the reluctance to fly pregnant women is the same as that put forward for flying handicapped persons,[4] namely that in an emergency situation, their decreased agility[5] could lead to blocking of escape exits, or that their condition might become precarious and require an unscheduled landing. Emergency landings, as has been mentioned above, are expensive for the carrier. But it is obviously a vast over-simplification to say that every pregnant woman, regardless of the state of her pregnancy, will prove a hindrance on the flight.

Pregnant stewardesses

The fears underlying the airlines' attitude have been revealed recently in a series of cases involving flight attendants. American Air Lines,[5a] Eastern Airlines,[6] National Airlines[7] (later merged with Pan

American World Airways), Pan American World Airways,[8] and United Air Lines[9] have all had their policies of requiring female flight attendants to take mandatory maternity leave as soon as a flight attendant discovers she is pregnant, challenged. The practice of requiring the stewardesses to take a leave of absence was objected to as being in violation of Title VII of the Civil Rights Act of 1964,[10] whereas the airlines considered it as a bona fide[11] occupational qualification since a stewardess who continues to fly while pregnant is potentially dangerous to the safety of firstly, the passengers; secondly, the fetus; and thirdly, herself.

On the first criterion (dangerous to the passengers) the fears are based on the flight attendants supposed decrease in strength and agility. The most important and demanding emergency situation in which the flight attendant plays a role is in what has been euphemistically referred to as the "unplanned evacuation of an aircraft."[12] The duties of the stewardess include "opening manually inoperable or partially inoperable doors, exerting substantial force if necessary."[13] (It requires seventy to one hundred pounds of force to open the door of a Boeing 727 when it is fully operational[14]). In addition, the attendants have to be able to inflate a one hundred and twenty-five[15] or one hundred and thirty[16] pound life raft, pulling it from its overhead compartment, and deploy evacuation slides at aircraft exits, (involving gripping, pulling and tying actions). The stewardess has to assume a leadership role in the evacuation procedure, directing

passengers away from unusable exits and blocking those exits if necessary. Performing first-aid and more strenuous duties such as carrying children, pulling, pushing or dragging passengers and/or crew from the vicinity of the aircraft may all be called for[17] as part of her emergency duties. These actions must all be performed rapidly, since the Federal Aviation Administration requires that an aircraft be evacuated in ninety seconds.[18]

Should a flight attendant suffer a miscarriage[19] in flight, she would obviously be disabled and would become part of the emergency and not part of its management, and would require that other crew members be diverted from their duties in caring for her. The members of the crew available to attend to the passengers' needs would consequently be diminished which could, in an emergency, be a potentially dangerous situation. The onset of a miscarriage is, however, usually predictable. Many spontaneous abortions are preceded by several hours or days of cramping and bleeding although others occur with only a few hours warning or less.[21] A flight attendant experiencing these symptoms could, of course, take herself off the flight either before departure or at the first stopping place. If no substitutes were available, the number of attendants on that particular flight would be reduced by one, but no additional crew members would be diverted from their duties.[22]

On the second criterion, (if a pregnant flight attendant continued flying it could be dangerous to her fetus), the argument put

forward in favour of grounding the stewardesses was that if they continued to fly it would lead to an increase in the number of spontaneous abortions (miscarriages) as well as in the number of defective babies.[23] The District Court of Florida found the evidence presented on this point to be in conflict. Data compiled on Western Air Lines flight attendants had indicated an increase in the spontaneous abortion rate and other complications, but at the time of the trial the data was incomplete.[24] On the other hand, the experience of the two thousand, five hundred pregnant stewardesses employed by Northwest Airlines revealed no fetal abnormalities.[25] It has also been suggested that fetal problems can result from lower oxygen levels, radiation and trauma to the flight attendant. These hypotheses do not appear to command widespread support. Due to the anaerobic metabolism and fluid sack protection, the fetus may be able better to survive low oxygen or trauma than the mother. Dangers, such as from radiation emitted by the microwave ovens in the galley, are at present speculative.[26]

On the third criterion (to continue flying would constitute a danger to the flight attendant herself), the airlines have argued that the pregnant stewardesses suffer from swollen feet and fatigue, but these are also experienced by non-pregnant flight attendants on long runs. In common with all expectant mothers, flight attendants are subject to balance problems, edema, urinary frequency, backstrain, and varicosity. Nausea and vomiting are usually worse in the morning

but sometimes continue throughout the day.[27] Although most nausea is not seriously disabling, two additional factors aggravate the nausea/vomiting problem. Firstly, aircraft turbulence and the stress of emergency or even routine duties are more likely to convert nausea into vomiting.[28] Secondly, common medications for nausea which are suggested as effective by some doctors are not recommended for flight attendants within twenty-four hours of their flight.[29]

If a spontaneous abortion should occur, it can, as has been mentioned above, be only slightly disabling, but it can be accompanied by severe hemorrhaging. At the end of the second and at the beginning of the third trimester, a badly positioned or insecurely attached placenta can rupture and become detached from the wall of the uterus.[30] The breakage of the blood vessels which accompanies the conditions of placenta previa and placenta abruptia would, if the woman were at home, require a rapid trip to the emergency room of a hospital.

The case law

The decisions are split four-to-two on the question of whether stewardesses should be allowed to continue working as flight attendants during the first twenty weeks of their pregnancies. The two decisions which would not allow them to work are from the same appeal court, namely, the Fourth Circuit; but even their once intransigent stance appears to be wavering.

In the first United Airlines case, (the Condit case[31]) it was held that the first criterion (a pregnant flight attendant constitutes a potential danger to passengers) was valid. The judges of the Fourth Circuit reached the same conclusion as the District Court which found, on conflicting expert testimony, that:

> "Pregnancy could incapacitate a stewardess in ways that might threaten the safe operation of aircraft. It [the District Court] therefore concluded that United's policy of refusing to allow stewardesses to fly from the time they learned they were pregnant was consistent with a common carrier's duty to exercise the highest degree of care for the safety of its passengers."[32]

An en banc decision of the Fourth Circuit partially overturned this judicial finding[33] when in a six-to-three decision they held that Eastern Air Lines' mandatory pregnancy leave policy for flight attendants during the first thirteen weeks of pregnancy violated the female flight attendants' Title VII civil rights, but in a five-to-four decision they maintained that the airline's mandatory leave policy for flight attendants after the thirteenth week of pregnancy was legitimately established as a business necessity to enhance passenger safety.[34]

The consolidated cases of Mortimer and Rosenfeld[35] are of importance because they were also brought against United Airlines,

> "In a normal, healthy, doctor-supervised pregnancy, the risk of an unpredictable (by which is meant notice in time to advise the airline of the incapacity without disruption to the business of the airline) threatened or actual spontaneous abortion, or incapacitating nausea, vomiting, fatigue and somnolence, backache, dizziness, fainting, and urinary frequency, while theoretically possible, is so remote as to be negligible."[38]

In addition, on the subject of spontaneous abortion and the placing of the flight attendant and her unborn child in jeopardy, the Court concluded:

> "A substantial number of pregnant female flight attendants are desirous and physically capable of continuing work, at least through the 26th week of pregnancy without any risk of of a disabling event in the course of the pregnancy which could occur during flight and would prevent her from performing her safety duties or could expose the mother or fetus to substantial harm."[39]

The four courts concurred in the opinion, that if a flight were of less than six hours duration and that the flight did not involve flying for considerable distance over water where the

availability of alternative points of landing is much reduced, then there is no reason why a flight attendant who is less than twenty weeks pregnant should have to cease working.

In Canada, the discriminatory aspect of CP Air's rule that flight attendants could not work after their thirteenth week of pregnancy has also been tested in court. In 1976, CP Air stewardesses brought an action claiming that the rule constituted discrimination on the basis of sex and was, therefore, contrary to the Human Rights Code of British Columbia Act.[41]

Arguments concerning the agility of, or danger to, pregnant flight attendants were not raised but rather whether the provisions of a Provincial Human Rights Code are applicable to stewardesses when they are employed in a federal undertaking.[42] However, CP Air recently dropped its pregnancy policy (after the flight attendants union filed a complaint of sexual discrimination) and the airline will now allow them to fly until they are six and a half months pregnant.[43]

PREGNANT PASSENGERS

If the decisions of the four United States lower courts correctly

describe pregnancy as a non-incapacitating condition (at least during the first half of the term) for flight attendants, surely the case is so much stronger for pregnant passengers who are not required to inflate life rafts and open emergency exits etc. but who merely have to sit in their seats and, perhaps, make frequent use of the bathroom? The airlines are allowed to refuse carriage to pregnant women as a class but this permission appears to have been awarded irresponsibly. Not only are the arguments that were advanced above in favour of allowing flight attendants to continue working, valid, but also many of the symptoms experienced by pregnant women during the first trimester are not dissimilar to those experienced by women during menses, and no airline is known to ground their flight attendants during these periods nor does any airline refuse to fly menstruating passengers. If concern for the health of a pregnant passenger in case of a spontaneous abortion is the motivating force behind the tariff regulation, there should also be a provision for refusing carriage to women for six weeks after they have given birth when the potential exists for the serious problem of post-partum hemorrhage to occur. The wording of the regulations as they stand suggest that whoever drafted the rules did not understand women. Since no expectant mother would wish to hurt the child she is carrying and would, without fail, consult with her obstetrician before embarking on a journey by air if there were a possibility of complications arising on the journey, surely the decision whether or not a pregnant

passenger should fly be left to the woman and her doctor and this should not be a subject for regulation by the carriers.

The discretion to refuse to carry pregnant women is all the more unfortunate since many obstetricians recommend flying (as long as the aircraft cabin is pressurized[44]) as the preferred method of transportation to their patients, especially in their last trimester of pregnancy.[45]

AIRLINE SURVEY RESULTS

Since the airlines have such broad discretion in this area, the author conducted a survey to discover the regulations adopted by the major airlines serving North America. The Canadian transcontinental and regional carriers were surveyed as well as the major United States' carriers, and a sample of foreign carriers who serve North America was also taken.[46]

The letter which was sent to the forty airlines[47] requested information on their policies regarding the carriage of expectant women. Did they require an obstetrician's letter and, if so, at what stage of the pregnancy was it required? Was there some period of gestation beyond which they would refuse carriage? Was the responsibility of drawing attention to the passenger's medical state that of the passenger or that of the carrier? If a passenger went into labour in flight, would the pilot divert the aircraft to the nearest airport or would he proceed to the original destination?

The airlines' record of inflight births was also requested.

Of the forty airlines which were surveyed in October 1979, eighteen replied. However, the response by CP Air merely stated that it refused to give any information on its policies since this was an area of potential future litigation and it would be "inadvisable to discuss the matter in detail, either privately or publically at this time".[48]

With the exception of Eastern Airlines,[49] Air France,[50] KLM Royal Dutch Airlines[51] and Qantas Airways,[52] the airlines did not require a letter from the passenger's doctor stating that the passenger was in good health and that no complications were anticipated, as long as the woman was less than eight months (thirty-five weeks) pregnant. Although, by and large, women whose pregnancy is not in an advanced stage are not subjected to special treatment, five out of the seventeen major airlines which replied discriminated against expectant mothers as a class.[53]

The medical and legal precedents referred to above,[54] established the opinion that if air travel can be hazardous to pregnant women, this is highly unlikely to be the case in the early stages of pregnancy and thus the policy of requiring medical authorization for all female passengers who are expecting a child, regardless of how advanced the pregnancy is, is clearly in violation of section 404 (b) of the Federal Aviation Act of 1958.[55] An alcoholic is not required

to present a doctor's certificate stating that he or she is not likely to present a problem to flight attendants or other passengers simply because he is an alcoholic. There is, therefore, no reason to demand medical authorization for a pregnant woman in her first or second trimester.

When a woman's pregnancy is more advanced, the airlines' policies tend to coalesce. In the ninth month (or after thirty-five weeks) policies range from requiring from the passenger a certificate from her own doctor stating that she is in good health,[56] to requiring the approval of the carrier's company medical officer,[57] stipulating that the pregnant passenger must be escorted[58] (one airline required that the escort be a qualified doctor or nurse[59]) and signing a waiver of liability in favour of the airline,[60] to not allowing them on the flight.[61]

The necessity for a medical certificate from the passenger's own doctor raises two problems in particular. Firstly, the certificate is normally required to be less than seventy-two hours old. If the passenger is going to be away for four days, the authorization will be out of date for the return journey. Secondly, the requirement for a doctor's letter can only be viewed as reasonable if sufficient warning has been given to potential passengers. What would happen in the situation in which a pregnant passenger presents herself at the check-in desk without the required authorization? The airlines do

not keep a company doctor on call at all times and it would be next to impossible to contact the woman's obstetrician, after office hours, at short notice. The carriers have the right to refuse carriage to the expectant mother. If the airlines are going to enforce this type of regulation, they should be obliged to inform all passengers who make reservations, of it, in case it affects them or one of their party. Due to the inventive names that parents give to their children and the range of voices which people possess, it is often difficult to tell the sex of a caller on the telephone making a seat reservation. Thus all potential passengers must be informed of the rules for pregnant passengers. The tariff must not constitute a "hidden trap".[62] As the Civil Aeronautics Board has remarked, affording notice to passengers of the terms of service is not the primary purpose of tariffs; in fact such publications are not well suited to that purpose.[63]

If a medical certificate is required to state that the baby is due to be born within five weeks but that no complications[64] are foreseen, the corollary to this is that a pregnant passenger who is less than thirty-five weeks pregnant would have to carry a doctor's letter attesting to that fact. It would seem that once a passenger's pregnant condition is apparent, she is under suspicion and that the burden is on her to convince the airline that she is fit to travel.

When the baby is due within five days, only eight of the seventeen

airlines which replied to the questionnaire would allow an expectant mother on board.[65] Eastern Provincial Airways, Eastern Airlines, United Air Lines, US Air, KLM Royal Dutch Airlines and Swissair would all allow it with a doctor's certificate and approval by the airline's medical officer. TAP required, in addition, that the passenger be escorted by a qualified doctor or nurse. Delta Air Lines stands alone in that it has neither requirements nor regulations concerning the transportation of pregnant passengers.[66]

If the replies to the questionnaire reflect accurately the situation in the airline industry generally, less than fifty per cent of the major carriers were prepared to accept woman as passengers when they were within five days of their confinement. But why? Of the airlines which replied to the question on their diversion policies[67] (i.e. would the aircraft land at the nearest available airport or would it continue to its original destination) only four carriers - Air Canada,[68] Delta Air Lines,[69] Finnair[70] and Swissair[71] - stated they would divert to the nearest airport and, in the latter two cases, only if there was not a doctor on board the flight. Other airlines rely on a mixture of the aircraft commander's discretion, based on the opinions of the flight attendants, who receive obstetrical training in order to cope with just such occurrences, and the doctor, if there is one on board. Qantas Airways, however, was quite blunt in stating that "the aircraft would normally continue to its scheduled destination unless there

was a good reason for a diversion and a normal birth could not be classed as such."[72]

Both Air France[73] and KLM[74] have experienced in-flight births. Air France reported that two passengers have given birth on board its aircraft. (One birth occurred on a Concorde flight fron Paris to the Far East, and the passengers passed the hat and collected $1,200 for the newborn infant!) KLM has recorded births on its long-haul flights but a diversion was not called for in any of the situations. In all the instances the flight attendants coped adequately with the incidents.

Thus why pregnant woman should be treated any differently from other bona fide passengers is difficult to comprehend. Yet, ticket agents (or passenger agents) are authorized and obliged to make enquiries concerning a woman's pregnancy at the check-in,[75] and, moreover, one airline[76] actually posts "spotters" near the airline's gate to maintain surveillance and spot any unreported cases of pregnancy and inform a ground hostess who then makes enquiries of the passenger.[77] Pregnant women are then not only likely to be refused carriage, but they also may be subjected, publically, to embarrassing personal and medical enquiries. The possibility also obviously exists that a woman who is somewhat overweight may be suspected of being pregnant and thus could also be cross-examined.

THE I.A.T.A. RULES

In April 1979, the International Air Transport Association, adopted a Passenger Traffic Resolution[78] in an attempt to standardize the treatment of pregnant women. The Recommended Practice appears to be a large step backwards in the non-discriminatory treatment of pregnant travellers. The resolution commences courageously enough with the statement that expectant mothers as such should not be regarded as incapacitated passengers. However from thereon in the spirit of enlightenment deteriorates. The Resolution continues:

> "Nevertheless, the following general rules should be applied:
>
> (1) It should be discretely suggested to expectant mothers to volunteer information about uncertainty of progress of pregnancy, time of confinement, expected complications in delivery, or previous multiple births. If from such information it appears that the expectant mother is in normal health and with no pregnancy complications, she shall normally be accepted without medical clearance, except as provided in (2) below.
>
> (2) Medical clearance shall be required if from such information it appears that:
> (a) confinement may be expected in less than 4 weeks; or
> (b) there is uncertainty of progress of pregnancy or time of confinement, or that there were previous multiple births, or that complications in delivery may be expected;
> Such clearance should be issued within 7 days prior to commencement of travel.
>
> (3) . . .
>
> (4) Air travel is not recommended for:
> (a) women within the last seven days prior to confinement and within the first seven days after delivery;"[79]

If there is anything to be said of the new policy, it is that at least there is no point blank refusal to carry a pregnant woman. But, every pregnant passenger is to be subjected to an inquisition. There is no mention of where the discrete enquiries should be carried out and by whom. Since the airline wishes the woman to obtain medical clearance in advance of her appearance at the check-in counter, the enquiries will be undertaken by a reservation agent - possibly male - on the telephone. The expectant mother will no doubt be too embarrassed to answer these questions over the telephone if she is working in a crowded office, and, in any case, she will not welcome being interrogated by a stranger as to her biological functions.

The suggested rule also does nothing to remedy the situation which occurs if a pregnant passenger's relative or friend makes the booking and does not inform the reservation agent that the passenger is pregnant. Discrete suggestions will be called for at the crowded check-in desk, and how discretion can be maintained during such a public interrogation is hard to imagine. The Resolution calls for medical clearance if the pregnancy is expected within four weeks. As with all airline regulations which require this type of authorization it presents a problem if a passenger arrives at the check-in desk without a medical certificate stating her fitness to travel, since such certificates cannot be produced at short notice.

The I.A.T.A Resolution does not recommend, rather than ban,

travel for women within the last seven days prior to confinement. This is a stricter rule than the five days invoked by many airlines.[80] Carriage is also not recommended for women within the first seven days after delivery. This is probably an attempt to cope with the problem of past-partum hemorrhage. But, since, as has been pointed out above, the possibility of this condition persists for six weeks, it is difficult to see why travel by air is not recommended for seven days.

THE NORTH AMERICAN TARIFFS

As of November 1979, the position in the United States was changed regarding the flight worthiness of pregnant women.[81] The Board had noted that under the prevailing rules, airlines could refuse to carry pregnant women at any stage of pregnancy and that the discretion was clearly much greater than is required in the interest of safety or even of "reasonable comfort."[82] In addition, the members of the Board found that the carrier' present rules governing refusal of service in interstate and overseas air transportation on the basis of pregnancy was unjustly discriminatory, contrary to the Board's rules (which specify that all rules and regulations shall be stated in clear, explicit and definite terms, and that ambiguous or indefinite terms or language shall not be used[83]), unlawful and, therefore, should be cancelled.[84]

The C.A.B. found that there was no need to preserve the carriers' unfettered discretion to refuse to carry women in any

stage of pregnancy.[85] Moreover the Board took note of the fact that no commentator in the proceeding had advanced an argument that the discretion was necessary.[86] In addition, section 1111 of the Federal Aviation Act of 1958[87] which preserves the carrier's right to refuse to carry passengers or property when transported "would or might be inimical to the safety of the flight" cannot protect a tariff rule broad enough on its face to permit refusal of service on grounds that cannot possibly endanger flight safety, such as the early stages of pregnancy. Thus the U.S. certified carriers were invited to file new rules.[88]

Canadian carriers serving the United States can still invoke tariff provisions which allow the carrier to refuse carriage to any passenger "whose conduct, status, age or mental or physical state is such as to involve any usual hazard or risk to himself or to other persons (including in cases of pregnant passengers, unborn children) or to property."[89] Canadian carriers on domestic flights are also free to invoke this provision and, as was revealed in the survey, they do, in fact, subject pregnant women to discriminatory treatment. In the United States, the carriers are now governed by a tariff regulation which states:

> "In the case of pregnant passengers, carrier will not transport a passenger expecting delivery within seven days, unless it is provided a doctor's certificate, dated within 72 hours

> of departure that he has examined and found her to be physically fit for transportation from (place) to (place) date and that the estimated time for birth is (date)."[90]

This provision is a vast improvement on the International Air Transport Association Resolution, since it is only advanced pregnancy cases who will be subjected to "special" treatment. However, it does not solve the problem of how a passenger whose pregnancy is in an advanced stage, but not in the last seven days, proves that she does not need a doctor's letter. Catch 22 is present in this situation, as everywhere. Apart from the caveats mentioned above, the new tariff regulation is a definite forward step in the treatment of pregnant passengers. No longer can they be flatly refused carriage due to their condition at any stage of their pregnancy. Bearing in mind that a woman who takes a flight within seven days of her date of delivery usually has a very good reason for doing so, the rule leaves the decision to the woman and her doctor without regulatory interference.

BIRTH ON BOARD AIRCRAFT

Citizenship

If a pregnant passenger should give birth whilst on board an aircraft, the question asked by the mother, once the state of health of her off-

spring has been established, is always concerning the nationality of the child.[91] In trying to determine the citizenship of a baby born in flight, it is tempting to make a comparison with the situation of birth on board a ship.

A ship has the nationality of the country of the port at which it is registered.[92] Moreover, persons who are, and events which happen, on board a ship are to a large extent governed by the "law of the flag" of that ship, i.e. the law of the state whose flag the ship carries, sometimes exclusively as in the case of state ships, sometimes concurrently with other legal systems.[93] Thus, a ship may be treated, for certain purposes, as analogous to the territory over which the law of its flag prevails - in other words a piece of floating territory -[94] and a baby born on a ship would, in all probability, take on the nationality of the port of registration.[95]

But must the legal status of aircraft be assimilated to that of ships? It is true that, like the latter, aircraft must be registered[96] and they take the nationality of the state in which they are registered.[97] However, at least one prominent author, Lord McNair in The Law of the Air,[98] considers that although there has been a judicial tradition of speaking of ships and aircraft in the same terms, the relationship has yet to be cemented. The use of such nautical terms as "airship", "aircraft" and "aerial navigation" may have induced a line of thought which assimilates aircraft to ships which would have been less tempting if aircraft terminology had been confined to terms such as "flying

machines" or "aeroplanes". The vocabulary of aviation also contains many other maritime references such as "pilot", "logbook", "charts" and "port and starboard" which reinforce this tendency. Moreover, the courts have frequently referred to the law relating to ships by way of analogy when dealing with aircraft cases.[99] Thus one wonders if it would be correct to invest aircraft with what Lord McNair calls "the characteristic legal panoply" belonging to a ship.[100] That author thinks not, but rather:

> "Because carriage by sea often involves a lengthy and exclusive connection with a particular ship, and, above all, because ships predominantly operate on the high seas which have for centuries been considered outside the exclusive jurisdiction of any state, or equally subject to the jurisdiction of all, there has been a degree of assimilation of a ship to the territory of the country of its registration. As has been noted, this application of the "law of the flag" has by now become deeply and ineradicably ingrained in our law, and ships have even acquired a kind of "legal personality". But these considerations cannot be said to apply to aircraft to anything like the same extent. The essence of carriage by air as compared with carriage by sea is speed and shortness of duration, and aircraft do not predominantly operate over the high seas but may travel within the territory of states by flying through the air above them. There is therefore, it is submitted, much less connection between persons and goods aboard an aircraft and the country of its registration than in the case of a ship."[101]

For the purposes of this paper, it will be assumed that, as opposed

to the law of the flag which governs the *locus* of acts or events taking place on board a ship, this is not the case for acts or events occurring on board an aircraft, and where the latter are concerned, their position *vis-a-vis* the subjacent territory appears to be the controlling factor. The legal status of the air space[102] above a state's territory and territorial waters has, without question, been assimilated to that of the subjacent state.[103] Pursuing this line of thought, the air space above the high seas may be treated in the same way and assimilated to the high seas themselves.[104] Thus, if a child is born on board, the aircraft's position could be above its state of registration or its territorial waters, above the territory of a foreign country or over the high seas. Since it has been assumed that there is no "law of the flag" for aircraft,[105] then if the aircraft is on or over the territory of any country, the *locus* of events occurring in the aircraft will be that country and not the country in which it is registered. If the birth occurs on or over the high seas, the *locus* of events will be the high seas, and common law or maritime law would apply.[106]

Thus a child born above a sovereign state would take the nationality of that state. The *jus soli* would be that of the subjacent state, based on the close connection between a sovereign state and the air space above its territory; it should be borne in mind that the declaratory principles of the *Chicago Convention* apply also to non-contracting states since the contracting parties recognise the "complete and exclusive sovereignty of *every* state"[107] and not just of the contracting

states. Also, the territorial waters adjacent to the land area of a sovereign state are deemed to be a part of that state's territory (as are inland waterways) and this applies regardless of whether the territorial waters are three nautical miles wide or two hundred nautical miles wide.[108]

Above the high seas, the jus sanguinis (the law of the place of of a person's descent or parentage) will apply unless a state has expressly legislated otherwise.[109]

This method of granting citizenship may appear rational, but it is inappropriate to modern jet aircraft. A McDonnell Douglas DC-10 has a cruising speed of five hundred and seventy miles per hour (nine hundred and seventeen kilometres per hour)[110]; A Boeing 747 cruises at six hundred and eight miles per hour (nine hundred and seventy-eight kilometres per hour)[111]; the Concorde cruises at mach 2.05.[112] These aircraft fly over countries which have exceedingly small geographical areas, such as Lichenstein, Luxembourg, Monaco, San Marino, and Swaziland and, therefore, it would often be extremely difficult to stipulate which sovereign state owned the air space in which the aircraft was flying at the precise moment of the baby's birth.[113] The same problem is encountered with numerous small islands having close proximity, for example, in the Caribbean, where the islands are owned by France, the Netherlands, the United Kingdom and the United States of America. The problems which would be encountered differentiating between neighbouring islands (and their

territorial seas) and the high seas, are obvious. A further set of questions is raised by the fact that the aircraft is in flight above a particular territory when the child is born and may have no contact with the sovereign state, apart from with their air traffic control services. The overflown state may not be willing to accept the newborn infant as a citizen. If a European flight strayed into Soviet air space due to inclement weather, would the U.S.S.R. accept the baby as a Soviet national with all the appurtenance that citizenship carries? It seems unlikely.

The above regime with regard to nationality would not apply if a state had specifically legislated with regard to birth occurring on board aircraft registered in that state. In the United States, no such legislation has been passed. Indeed, the sections of the U.S. Code dealing with citizenship and nationality omit not only the situation of birth on board an aircraft registered in the U.S.A. but also of birth aboard a ship registered in the United States.[114]

Canada, on the other hand, grants citizenship to infants born on board Canadian registered aircraft. The Canadian Citizenship Act[115] had considered that a person was a natural born Canadian only if they were born in Canada or on a Canadian ship.[116] However, the subsequent Citizenship Act[117] provides that:

> "Subject to this Act, a person is a citizen if

> (a) he was born in Canada after the coming into force of this Act;"[118]

and

> "For the purposes of this Act,
> (a) a person shall be deemed to be born in Canada if he is born on a Canadian ship as defined in the Canada Shipping Act, or on an air cushion vehicle registered in Canada under that Act or on an aircraft registered in Canada under the Aeronautics Act and regulations thereunder;"[119]

Thus a child born in a Canadian registered aircraft after February 15, 1977,[120] regardless of whether it is flying to or from Canada or whether or not the aircraft was over Canadian territory at the time of the birth, is entitled to take Canadian nationality. (This of course is not necessarily a mutually exclusive conferment and the child can claim the nationality of its parents if the relevant legislation permits the jus sanguinis to apply or if it permits a citizen to hold dual nationality.) Contrariwise, a child born in a United States aircraft can only claim American nationality if the birth occurred whilst the aircraft was above United States territory or the adjacent territorial waters.

For babies born on international flights (other than from Canada to the United States and vice-versa), the question of whether the infant will be permitted to claim the nationality of the state of

registration will be answered by the laws of that state. For example, a baby born after January 1, 1949 on a flight from Canada[121] or the United States[122] to the United Kingdom[123] on British Airways (or on a Laker Airways flight from New York or Los Angeles to London) will be entitled to citizenship of the United Kingdom and Colonies. Section 32(5) of the British Nationality Act, 1948 provides that for the purposes of this Act:

> "a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country."

The wording of the British Act is far broader in its application than that of the Canadian Citizenship Act[124] since the former Act awards not only British citizenship to babies born in a British registered aircraft but states that a baby born on foreign registered ships will, as far as the United Kingdom and colonies are concerned, have the nationality of that foreign state. Since there is no way in which the awarding of such a foreign nationality could be enforced by the British authorities, what the Act does ensure, is that babies born on foreign registered aircraft which are flying in British air space will not ipso facto have citizenship of the United Kingdom and colonies conferred upon them. Although the Canadian Act does not expressly deny Canadian citizenship to infants born in foreign registered aircraft flying in

Canadian air space, this conclusion necessarily follows from the fact that such an aircraft is not included in the locations deemed to be "in Canada".

In summary it would appear that in North America, births occurring on board aircraft registered in Canada produce new Canadian citizens whether the aircraft is in Canadian or United States air space, whilst birth occurring on board aircraft registered in the U.S.A. will produce new American citizens only if the aircraft is in United States air space and will produce new Canadian citizens if the aircraft is in Canadian air space.

Other legal problems

In his article on miscellaneous problems in air law,[125] Enrique Mapelli states that one of the major legal difficulties encountered in an on board birth is the absence of the documents required by an international traveller.[126] Both Canada and the United States require a non-immigrant, i.e. a visitor, to obtain a visa before he appears at a port of entry.[127] In addition the United States legislation specifically requires the non-immigrant to be in possession of "a passport valid for a minimum period of six months from the date of the expiration of the initial period of his admission a contemplated initial period of stay authorizing him to return to the country from which he came or to proceed to and enter some other country during such period . . .".[128] As far as the question of a

passport is concerned, children under the age of sixteen years do not require a separate passport since their names can be entered on the passport of an accompanying parent. Although the name of the new born infant could not be unofficially and hurriedly entered on the mother's passport,[129] the absence of this document can obviously be officially remedied, without unduly burdening diplomatic channels, utilising the entry made in the aircraft commander's log book.[130]

The above discussion would probably prove to be academic since both mother and child would be rushed to the nearest hospital at the point of landing without questions being asked as to the state and validity of their documentation. The question as to whether they should be permitted to remain would be raised at a later time when both were medically fit and able to travel.

A more serious legal obstacle which will be encountered with an on board birth is the lack of a ticket representing the contract between the air carrier and the passenger. The Warsaw Convention[131] would be applicable to the baby, on a Canada - U.S.A. international flight, even though it is being carried without having paid any fare, since the Convention is also applicable to "gratuitous transportation by aircraft performed by an air transportation enterprise".[132] The Convention is emphatic that the airline must deliver a passenger ticket to each passenger[133] and that

> "the absence, irregularity, or loss of

> the passenger ticket shall not affect the existence on the validity of the contract of transportation, which shall nonetheless be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability."[134]

Failure to deliver a ticket, either actually or constructively,[135] has led to the carrier's liability in the case of personal injury being unlimited. Arguments could be put forward to the effect that the carrier has not "accepted" an infant born in flight as a passenger and, therefore, the Warsaw Convention is wholly inapplicable to the carriage of the infant. Not only is there arguably no contract of carriage between the infant and the carrier, the latter may be only subject to a very limited duty in tort as regards the former, if the infant is regarded as a type of stowaway.[136] A stowaway is a trespasser and the duty of care owed by an occupier to a trespasser[137] is based purely on considerations of humanity. The question of the liability of an occupier towards a trespasser is assessed by reference to what a conscientious humane man with his knowledge, skill and resources could reasonably be expected to have done or refrained from doing. However, the courts have been noted for their lenient treatment of infant, as opposed to adult, trespassers.[138] According to Shawcross and Beaumont, there appear to be no authorities applying these principles in an aviation case, but the possibility of such a case exists, in theory at least,[139] and the occurrence of an in flight

birth might be such a case. Does then the carrier only have a negative duty not to deliberately harm the new-born infant by such actions as lowering the cabin pressure by a deleterious amount or refusing to allow the child the use of an oxygen mask, or does the aircraft commander have a positive duty to land at the nearest airport so that the baby can be taken to a hospital? The better opinion seems to be that humanitarian considerations would dictate an emergency landing if the baby was experiencing medical problems.

The characterising of the in flight birth as a stowaway situation does not, upon reflection, seem apt, since a nine-month pregnant woman cannot be said to be concealing the potential freeloader, to the contrary, his presence could not be much more obvious. The airlines take the attitude that if the mother has concealed her pregnant condition from the carrier's ground personnel, then the woman bears all the risks which may attend an in flight birth, including any risks that the baby may be subjected to.[140] Obviously the problem of the absence of a ticket is not considered to be an item to be taken into account. If the woman reveals her physical condition, either the necessary releases are signed (on European airlines) or the carrier can refuse to carry the passenger (in the absence of the required medical certificate). If the carrier accepts the passenger, then the airline is under a positive duty to aid both passenger and offspring.

Even the above is an oversimplification. To say that the mother bears all the risks of a birth on board an aircraft would not be an

accurate statement in the face of wilful misconduct (or such default which is considered to be equivalent to wilful misconduct) or an act or omission done with intent to cause damage (or recklessly and with knowledge that damage would probably result) done by the carrier or his servants and agents acting within the course of their employment. Just as these actions render a carrier liable for unlimited damages under the Warsaw Convention[141] and The Hague Protocol[142] respectively, in the same way they would render the carrier liable to some degree regardless of any releases signed or the doctrine of volenti non fit injuria. What is really at issue is the question of contributory negligence, a defence preserved by not only the Warsaw Convention,[143] The Hague Protocol[144] and the Guatemala Protocol[145] but also the 1966 Montreal Agreement[146] which, apart from the carrier's defense of the negligence of the injured party, can be described as an absolute or strict liability regime. A pregnant woman who decides to fly is aware that she might be putting herself in an undesireable birth situation. Although no airline would be so crass as to charge the mother for the additional landing fees and the fuel consumed and the costs of the ensuing delay if an aircraft had to make an emergency landing,[147] it is understandable that the carriers feel that they should not be liable for possible injuries connected with the ad hoc delivery of a baby born in flight. The fact that the airlines train their stewardesses to handle such an emergency and that the cabin personnel try and ascertain whether or not there is a doctor on board in order to obtain his assistance, demonstrate that the carriers try

to minimize any injuries or ill effects of such a situation. To then hold them liable for any harm sustained by the mother or baby, pleading the strict liability of the 1966 Montreal Agreement, would appear to be placing them in double jeopardy.

CONCLUSION AND RECOMMENDATIONS

There are no justifiable grounds for refusing carriage to pregnant passengers in general. If a woman is in her last week of pregnancy, it is not unreasonable to require her attending physician to supply a letter attesting to her fitness to travel but the onus is on the airlines to inform all passengers at the time they make their reservations that this requirement exists. Since the vast majority of carriers would not divert and make an unscheduled landing if a passenger went into labour, the justification for refusing carriage even to women in their last week of pregnancy is somewhat sparse; on short haul flights it is non-existant.

The legal, as opposed to the medical, problems associated with on-board births are mainly concerned with documentation, and, as such, are the province of the bureaucrats and not the carriers. The only major area of concern is that of injury to the mother and child, especially in North America where the 1966 Montreal Agreement with its strict liability regime governs transborder flights. The notion of the "inherent defect" in a passenger (which was discussed in the

previous section of this study on the carriage of handicapped passengers), or the concept of contributory negligence (also discussed in the previous section) should suffice to allay the fears of North American airlines that the acceptance of pregnant passengers could result in crippling law suits for possible injuries connected with the baby's birth.[148]

FOOTNOTES

1. International Air Transport Association, Recommended Practice 1724 (formerly 1013), General Conditions of Carriage (Passenger), article VIII 1 (c)(iii).

2. For example: Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195 (hereinafter cited as Tariff no. PR-7), Rules 30 (A)(2), 31 (A), 31 (B)(1)(b) and 35 (F)(1); Air Tariffs Corporation, Agent, Tariff C.A.B. no. 55, Rules 15 (A) (1)(c) and 15 (B)(1)(c); see also Canadian Transport Commission, Air Carrier Regulations, Consolidated Regulations of Canada, 1978, c. 3, Schedule XIII, s. 11 (1).

3. C.A.B. Order 79-11-148 (Docket 34,435) dated November 21, 1979, cancelled U.S. certified carriers' broad discretion with respect to refusal of carriage of pregnant women. See infra this section of the study for a discussion of the current situation in this regard in the United States.

4. Pregnancy differs from a handicap in that, it is a voluntarily assumed and temporary condition.

5. The supposed decrease in agility is due to changes in weight and girth. Up to twenty weeks, the changes in girth are not particularly noticeable, with little or no change in the muscle or skeletal system. But during the second trimester of pregnancy the top of the uterus will have left the bony pelvis and by the twentieth week will be at the level of the navel. After that the womb either moves up to halfway between the umbilicus and the midline of the chest cage or, if the abdominal wall is relaxed, the uterus may fall forward contributing significantly to the increase in girth. In re National Airlines, Inc. cited infra footnote 7, p. 264. In a DC-10, the galley is situated below the main cabin deck and has a narrow escape-hatch (up a ladder) leading to the main deck aisleway. The Court in the National Airlines case noted that it required both agility and trim girth to make a quick exit.

5a. Maclennan v. American Airlines, Inc. 440 F. Supp. 466 (E.D. Va. 1978) (Bryan D.J.).

6. Burwell v. Eastern Airlines, Inc. 458 F. Supp. 474 (E.D. Va. 1978), rev'd. in part 633 F. 2d. 361 (4th Cir. 1980) (en banc).

7. In re National Airlines, Inc., Maternity Leave Practices and Flight Attendant Weight Program Litigation 434 F. Supp. 249 (S.D. Fla. 1977) (Roeltger D.J.) and 434 F. Supp. 266 (S.D. Fla. 1977) (Roeltger D.J.).

8. Harriss v. Pan American World Airways, Inc. 437 F. Supp. 413 (N.D. Cal. 1977) (schwarzer D.J.).

9. Condit v. United Airlines, Inc. 13 F.E.P. 689; 1976 U.S. Av. R. 725 (E.D. Va.); aff'd. 558 F. 2d. 1176; 15 F.E.P. 676; 1977 U.S. Av. R. 399 (4th Cir.) (per curiam); cert. den'd. 435 U.S. 934; 98 S. Ct. 1510; 55 L. Ed. 2d. 531 (1978). Related Proceedings 631 F. 2d. 1136 (4th Cir. 1980) (field S.C.J.). United Air Lines, Inc. v. State Human Rights Appeal Board on the complaint of Linda Mortimer 1978 U.S. Av. R. 683 (N.Y. Exec. Dept. 1977); aff'd. 402 N.Y.S. (2d.) 630; 1978 U.S. Av. R. 680 (S.C. Appel. Div.) (per curiam); app. den'd. 44 N.Y. 2d. 648; 407 N.Y.S. 2d. 1027; 379 N.E. 2d. 596 (1978); cert. den'd 439 U.S. 982; 99 S. Ct. 571; 58 L. Ed. 2d. 653 (1978). United Air Lines, Inc. v. State Human Rights Board on the complaint of Miroslawa Rosenfeld 1978 U.S. Av. R. 693 (N.Y. Exec. Dept. 1977); aff'd. 402 N.Y.S. 2d. 630; 1978 U.S. Av. R. 680 (S.C. Appel. Div.) (per curiam); app. den'd. 44 N.Y. 2d. 648; 407 N.Y.S. 2d. 1027; 379 N.E. 2d 596 (1978); cert. den'd. 439 U.S. 982; 99 S. Ct. 571; 58 L. Ed. 2d. 653 (1978).

10. Section 701 et seq. as amended, 42 U.S.C. 2000 et seq. (1976). For other discriminatory aspects based on this section see C. Weinlein, Flight Attendant Weight Requirements and title VII of the Civil Rights Act of 1964, 45 J.A.L.C. (1979-80), p. 483. Specifically, section 703(a)(1) of the Civil Rights Act provides that:

> "(a) It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or . . ."

section 703(a)(2) provides that:

> "(a) It shall be an unlawful employment practice for an employer -
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex or national origin."

11. The elements of the test for establishing whether a non-pregnant condition is a bona fide occupational qualification for flight attendants are contained in a number of fifth circuit cases. Diaz v. Pan American World Airways Inc. 311 F. Supp. 559 (S.D. Fla. 1970); rev'd. and rem'd. 442 F. 2d. 385 (5th Cir. 1971) (Tuttle C.J.) requires that the job qualifications which the employers invokes to justify his discrimination must be reasonably necessary for the essence of the business. The greater the

safety factor required (measured by the likelihood of harm and the probable severity of that harm in case of an accident) the more stringent may be the job qualifications.

If the criteria of reasonable necessity and safety factors were met then the two-pronged test of Weeks v. Southern Bell Telegraph and Telephone Co. 277 F. Supp. 117 (S.D. Ga. 1967); rev'd. in part and rem'd. 408 F. 2d. 228 (5th Cir. 1969) (Johnson D.J.) is applied. The company must have reasonable cause i.e. a factual basis for believing that all or substantially all of a certain class of persons would be unable to perform safely and efficiently the duties of the job involved or whether it would be impossible or impractical to deal with such persons on an individual basis.

The Appeal Court in Usery v. Tamiami Trail Tours, Inc. (S.D. Fla.1975);aff'd. 531 F. 2d. 224 (5th Cir. 1976) (Brown C.J.) enlarged upon the concept of reasonable job qualifications in the light of the safety risk:

> "We believe that courts must afford employers substantial - though not absolute - discretion in selecting specific safety standards and in judging their reasonableness." (p. 236, footnote 30.)

The significance of the safety of passengers and members of the public were considered and the Court was of the opinion that the employer:

> ". . . must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must, of course show a reasonable basis for its assessment of risk of injury/death." (p. 238)

The Diaz case considered whether it was necessary to be female to be a flight attendant; the Weeks case, whether it was necessary to be male to be a switchman; the Usery case, whether people aged between forty and sixty-five could safely drive passengers by bus.

12. Testimony of T.J. Townsend, Pan American World Airways, Inc. Staff Vice-President Operations Liaison, reported in Harriss v. Pan American cited supra footnote 8, p. 420. Although on average, a stewardess should be involved in an accident only once every five years, one flight attendant had to evacuate two burning DC-10's in seven weeks. S.M. Hall, Teacher, People, September 22, 1980, p. 45.

13. Harriss v. Pan American World Airways, Inc. cited supra footnote 8, at 420.

14. In re National Airlines, Inc. cited supra footnote 7, at 260. Apparently doors which have become stuck on impact frequently present a problem. The evidence in the Harriss case included a National Transportation Safety Board report dated March 31, 1976, which appeared in Cross-Check, September - October 1976. On page 9 were printed the following excerpts:

> "At exit L5, the door handle would not rotate more than two-thirds, but after putting all her weight on the handle, a flight attendant managed to operate the door.
> . . .
> At exit R5, two flight attendants had difficulties rotating the handle but managed to open the door."

Reported in Harriss v. Pan American World Airways, Inc. cited supra footnote 8, at 420.

15. Pan American World Airways, Inc.

16. National Airlines, Inc.

17. Burwell v. Eastern Airlines, Inc. cited supra footnote 6, at 366; Harriss v. Pan American World Airways, Inc. cited supra footnote 8, at 420-21; In re National Airlines, Inc. cited supra footnote 7, at 259-264.

18. 14 C.F.R. s. 25 (803(c).

19. Eighty-five to ninety per cent of miscarriages occur during the first thirteen weeks of pregnancy, Harriss v. Pan American World Airways, Inc. cited supra footnote 8, at 423.

20. Some early spontaneous abortions may involve no more disability than a heavy menstrual period, as pregnancy advances the disabling consequences of an abortion become more serious. Ibid.

21. Ibid.

22. The policy of Northwest Airlines, Inc. was to try and limit the number of pregnant stewardesses on any one flight to a maximum of one. Reported in In re National Airlines, Inc. cited supra footnote 7, at 261. Obviously Northwest did not ground its flight attendants as soon as they discovered they were pregnant.

23. In re National Airlines, Inc. cited supra footnote 7, at 259.

24. Idem.

25. Idem.

26. Harriss v. Pan American World Airways, Inc. cited supra footnote 8, at 422, footnote 13.

27. Ninety per cent of women experience some degree of nausea in the first trimester, fifteen per cent do so in the second trimester.

28. Testimony of Doctors Goetsch, Winter and Zuspan, expert witness called by Pan American World Airways, Inc. in the Harriss case cited supra footnote 8, at 423.

29. Ibid. Testimony of Doctors Cooper, Creasey, Goetsch, Scholten, Winter and Zuspan.

30. Ibid. Testimony of Doctors Cooper and Goetsch.

31. Condit v. United Air Lines, Inc. cited supra footnote 9. Condit was tried at first instance in 1976, the other two cases involving United Air Lines were first tried in April and June of 1977.

32. Ibid. at 1176.

33. Burwell v. Eastern Air Lines, Inc. cited supra footnote 6.

34. The three Circuit Judges in the Condit v. United Air Lines, Inc. decision, Butzner, Hall and Winter, did not change their positions in the Burwell appeal decision.

35. Cited supra footnote 9.

36. See infra footnote 43 for limitations on this right to continue working.

37. Condit v. United Airlines, Inc. 631 F. 2d. 1136 (1980) (Field S.C.J.) at 1137, footnote 1.

38. 440 F. Supp. 466 at 471.

39. Idem. For an independent medical practitioner's point of view, see A. Guttmacher, Pregnancy, Miscarriage and Abortion, New York, New American Library Corp., 1973, p. 380. Dr. Guttmacher concludes that there is no evidence than an airplane trip in a pressurized cabin during an early pregnancy has ever damaged a human fetus.

40. Re Culley et al. and Canadian Pacific Air Lines et al. (1976) 72 D.L.R. (3d.) 449 (B.C.S.C.) (MacDonald J.).

41. 1973 B.C. (2nd Sess.) c. 119, s. 8. (Renamed Human Rights Code of British Columbia by 1974 B.C., c. 87, s. 8). Section 8 of the Code provides:

> "8(1) Every person has the right of equality of opportunity based upon bona fide qualifications in respect of his occupation on employment. . .
>
> (a) no employer shall refuse to employ or to continue to employ, or to advance or promote that person, or to discriminate against that person in respect of employment or a condition of employment;
>
> unless reasonable cause exists for such refusal or discrimination.
>
> (2) For the purpose of subsection (1),
>
> (a) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency;"

42. The Counsel for the Province argued that section 8 was not labour law legislation and did not interfere with a federal undertaking but was, instead, a provincial law of general application bestowing statutory rights which people carry with them when they work in federal undertakings. MacDonald J. held that although some of the sections of the Code did not cover the employer-employee relationships, certain sections did and, moreover, they duplicated prohibitions enacted in the Canadian Labour Code R.S.C. 1970, c. L-1. Thus Section 8 of the British Columbia Code was, in fact, legislation respecting employer and employee relations and thus it could not apply to persons employed by a federally regulated airline. On the question of federal competence over Canadian Civil aviation, see Centre for Research of Air and Space Law, The Legal, Economic and Socio-Political Implications for Canadian Air Transport, Montreal, McGill University, 1980, pp. 49-121.

43. Reported in the Editorial, The Gazette, April 26, 1980, p. 2. It should be noted that this new policy is in line with the decisions of the Courts in the Harris, Maclennan and National Airlines cases which agreed that flight attendants should cease to work in the last trimester of pregnancy. The State of New York, Appellate Division, Second Department were more specific concerning when and why a pregnant stewardess should cease flying.

". . . in the first five months or twenty weeks of pregnancy, the expectant stewardess presents no greater risk than the non-pregnant stewardess, that the twentieth to twenty-eighth week of pregnancy is a "gray" area in which the individual condition of the pregnant stewardess has to be considered, and that it would be not unreasonable for an airline to require all pregnant stewardesses to discontinue flying at the twenty-eighth week."

1978 U.S. Av. R. 688 and 697.

Consequently:

"Respondent shall permit pregnant stewardesses to work until their twentieth week of pregnancy provided that said stewardesses, if requested to do so, obtain from their doctor a semi-monthly statement confirming that their continued employment as a stewardess is not a health or safety hazard.

From the twentieth to the twenty-eighth week of pregnancy, Respondent may disqualify a pregnant stewardess from further flight duty should it find, as a result of its own medical examination, that said stewardess can no longer perform her duties without risk to her health or the safety of the passengers and crew, or both.

During and after the twenty-eighth week of pregnancy Respondent may disqualify a pregnant stewardess from further flight duty without regard to her physical disability."

1978 U.S. Av. R. 692 and 699.

44. See comments supra which suggest the fetus may not be affected if its mother experiences decreased oxygen levels.

45. See, for example, A. Guttmacher, Pregnancy, Miscarriage and Abortion, cited supra footnote 39, p. 381.

46. AIRLINES SURVEYED

	Replied	Did Not Reply
Canadian		
Air Canada	x	
CP Air	x	
Eastern Provincial Airways (1963) Ltd.	x	
Nordair Ltd.	x	
Pacific Western Airlines Ltd.		x
Quebecair	x	
Responses: 5 out of 6		
American		
American Airlines, Inc.		x
Braniff Airways, Inc.		x
Continental Air Lines, Inc.		x
Delta Air Lines, Inc.	x	
Eastern Airlines, Inc.	x	
National Airlines, Inc.		x
North West Airlines, Inc.		x
Pan American World Airways, Inc.		x
Trans World Airlines, Inc.		x
United Air Lines, Inc.	x	
US Air	x	
Responses: 4 out of 11		
Foreign International		
Aer Lingus Teo-Irish International Airlines		x
Aeroflot (Soviet Air Lines)		x
Aerolineas Argentinas		x
Aeronaves de Mexico S.A. (Aeromexico)		x
Air France	x	
Alitalia		x
British Airways	x	
Caribbean Airways		x
Ceskoslovenske Aerolinie (C.S.A.)		x
Compagnie Nationale de Transports Aeriens (Royal Air Maroc)		x
EI Al Israel Airlines Ltd.		x
Empresa Consolidada Cubana de Aviacion (Cubana)		x
Finnair Oy	x	
Iberia, Lineas de Espana S.A.	x	
KLM Royal Dutch Airlines	x	
Lufthansa German Airlines	x	
Olympic Airways S.A.		x
Polski Linie Lotnicze (LOT)		x
Qantas Airways Ltd.	x	

Foreign International cont'd	Replied	Did Not Reply
Sabena Belgian World Airways		x
Swissair	x	
TAP - Transportes Aereos Portugueses	x	
Varig S.A.		x

Responses: 9 out of 23

Total Responses: 18 out of 40

47. See Appendices for the full text of the letter.

48. Letter from Pauline L. Maughan, Law Department, Canadian Pacific, dated April 15, 1980.

49. Letter from Richard P. Magurno, General Attorney, Eastern Airlines, Inc., dated November 28, 1979.

50. Letter from D. Mandefield, Division des Affairs Juridiques et du Contentieux, Air France, dated January 3, 1980.

51. Letter from L.W. Mooyaart, Legal Affairs Bureau, KLM Royal Dutch Airlines, dated November 7, 1979, the certificate to be less than one month old.

52. Letter from Graham Miner, Principal Legal Officer, Qantas Airways, dated November 9, 1979.

53. Air France, in addition, used to require that a pregnant passenger sign a waiver form covering any liability claim against the company, throughout the whole period of pregnancy. The waiver was found to be useless and is no longer required. Letter from D. Mandefield cited supra footnote 50. Unfortunately the letter did not state why the waiver was "useless". Presumably the airline would be held responsible if it did not take reasonable care of a pregnant passenger and if acted in such a way as to jeopardise, knowingly, the health of a pregnant woman or her unborn child, no pre-printed waiver would constitute a reliable legal defence. See also the discussion infra of other legal problems associated with birth on board an aircraft.

54. The Harriss, Maclennan and In re National Airlines cases.

55. 49 U.S.C. 1301-1542 (1976). The text of s. 404(b) is reproduced in the chapter on the airline as a common carrier, supra.

56. Air Canada(after thirty-five weeks the passenger would only be allowed to fly North American routes); Eastern Provincial Airways (1963) Ltd.; Nordair Ltd.; Quebecair; United Air Lines, Inc.;

US Air; British Airways (requires the medical certificate after twenty-eight weeks); Finnair Oy; Swissair (medical certificate only required in the last two weeks for short-haul flights; Transportes Aereos Portugueses (TAP).

57. KLM Royal Dutch Airlines and TAP.

58. Iberia, Lineas de Espana S.A.

59. TAP.

60. Braniff Airways, Inc., Iberia and TAP. As was noted supra in footnote 44, Air France used to require a waiver of liability. For a woman to fly on TAP who was more than thirty-five weeks pregnant, she would require her own doctor's written approval, the authorization of TAP's medical officer, she must sign an indemnity in favour of TAP and be escorted by a qualified doctor or nurse. Memorandum from W.E. Abraços, Public Relations, TAP, undated, received May, 1980.

61. Air Canada (on Atlantic and Southern services); Quebecair; Eastern Airlines, Inc. (but if absolutely necessary, pregnant passengers in their ninth month will be allowed on board with a doctor's letter which must be less than forty-eight hours old); Air France; British Airways (if the flight is longer than four hours duration, the pregnant passenger is not allowed on board after thirty-five weeks: if the flight is less than four hours duration, the pregnant passenger is not allowed on board after thirty-six weeks); Lufthansa German Airlines; Qantas Airways Ltd; TAP (after thirty-two weeks if expecting a multiple -twins or more - birth).

62. Barnard v. U.S. Air Coach et al. 117 F. Supp. 134 (S.D. Cal. 1953) (Tobin D.J.).

63. C.A.B. Order 79-11-148,p. 4.

64. Twins or any other type of mutiple birth are viewed as a complication.

65. According to C.E. Butler, then Vice-President of Air New England, commuter airlines solve the problem of whether or not to fly pregnant passengers by the fact that their aircraft (for example the nineteen-seat Twin Otters) have no stairs leading to the aircraft's entrance, instead the aircraft door folds down to form a stair-case. If a pregnant woman is able to climb into the aircraft, Air New England is willing to fly her. (It should also be noted that the Twin Otters are not pressurized). This policy is in line with that of Frontier Airlines, R.M.A., Inc. and Texas International Airlines, which will not make exceptions to their rules regarding non-ambulatory passengers on their DHC-6-300 Twin Otters due to the inability to use boarding apparatus normally used on larger aircraft.

66. Letter from James A. Clarke, General Offices, Delta Air Lines, Inc., dated November 6, 1979.

67. Air Canada, Nordair Ltd., Delta Air Lines, Inc., Eastern Airlines, Inc., United Airlines, Inc., Air France, British Airways, Finnair Oy, KLM Royal Dutch Airlines, Qantas Airways, Swissair.

68. Letter from Guy Delisle, Solicitor, Air Canada, dated November 8, 1979.

69. Letter from James A. Clarke cited supra footnote 57.

70. Letter from Heikki Amperla, Traffic Inspector, Finnair dated April 1, 1980.

71. Letter from V. Citterio, Passenger Relations, Swissair, dated November 15, 1979.

72. Letter from Graham Miner cited supra footnote 52.

73. Letter from D. Mandefield cited supra footnote 50.

74. Letter from L.W. Mooyaart cited supra footnote 51.

75. British Airways, KLM Royal Dutch Airlines, Qantas Airways.

76. TAP.

77. Memorandum from W.E. Abraços cited supra footnote 60.

78. Passenger resolution new 401 produced Recommended Practice no. 1402, effective November 1, 1979. Swissair stated that they would adopt the Resolution as of January 1, 1980. Letter from V. Citterio cited supra footnote 71.

79. The International Air Transport Association published its first edition of its Passenger Services Conference Resolutions Manual in January, 1981. In the new manual, Resolution no. 401, cited supra footnote 78, has become Resolution 700 and Recommended Practice no. 1402, cited supra idem., has become Recommended Practice no. 1700a. The resulting I.A.T.A. guidelines for the acceptance of pregnant women are shown on the following chart:

CATEGORY	TIME OF EXPECTED BIRTH	ACCEPTANCE	EQUIPMENT
EXPECTANT MOTHERS in normal health, no previous multiple birth, no complication in delivery expected, progress of pregnancy certain.	4 weeks or more after date of travel	ACCEPTED without restrictions. Medical clearance not required	If needed, supply WCHR or WCHS
EXPECTANT MOTHERS otherwise 'incapacitated', or with complications in delivery expected, or with progress of pregnancy uncertain	4 weeks or more after date of travel	ACCEPTED only after positive medical clearance. Medical Information Form (MEDIF) to be issued within seven days before commencement of travel. Escort if/as required by Medical Clearance. IATA Resolution 401/ RP 1401 applies	As specified by medical department/ advisor
EXPECTANT MOTHERS, any condition/case history	Within 4 weeks after date of travel		
EXPECTANT MOTHERS, any condition/case history	Within 7 days after date of travel	NOT RECOMMENDED. Medical clearance required	
NEW MOTHERS, normal, premature, or with complications	Within 7 days after birth	NOT RECOMMENDED. Medical clearance required	

Note: MEDIF = Standard Medical Information Form
RP = Recommended Practice
WCHR = Wheelchair for Ramp
WCHS = Wheelchair for Steps

Source: Traffic Services Publications, Incapacitated Passengers Handling Guide, Montreal, I.A.T.A., 1980, Appendix C.

80. Air Canada, Nordair Ltd. and Quebecair, for example.

81. C.A.B. Order ~~no.~~ 79-11-148 (Docket 34435) dated November 21, 1979, which followed C.A.B. Order to Show Cause, Order 79-1 70 (Docket 34435) dated January 11, 1979. The Order cancelled, for example, Tariff no. PR-7, C.A.B. no. 352, C.T.C.(A) no. 195, Rules 30(A)(2), 31(A), 31(B)(1)(b) and 35(F); C.A.B. no. 294, Rule 16(F); Air Tariff Corp. Agent, C.A.B. no. 55, Rules (15)(A)(1)(c) and 15(B)(1)(c) for United States certified carriers.

82. C.A.B. Order 79-1-70, p. 1.

83. 14 C.F.R. 221.38(e).

84. C.A.B. Order 79-1-70,p. 2.

85. C.A.B. Order 79-11-148, p. 3.

86. Idem.

87. 49 U.S.C. s. 1511 (1976).

88. C.A.B. Order 79-11-148, p. 5.

89. Tariff no. PR-7, Rules 30(A)(2)(c) and 35(F)(1)(b) for example,

90. Ibid. Rule 35 (H)(3)(b). The exceptions to this regulation are Cochise Airlines, Inc. and Rocky Mountain Airways, Inc. which will not transport a passenger expecting delivery within 30 days without the certificate referred to. Idem.

91. Letter from D. Mandefield cited supra footnote 50.

92. The Gaetano and Maria (1882) 7 P.D. 137; 46 L.T. 835; 30 W.R. 766; 4 Asp. M.C. 470 (Court of Appeal) (Opinion of Brett L.J.). In addition, a ship has a quasi-legal personality in that actions can be brought against it in rem, in a court having Admiralty jurisdiction, J.H.C. Morris, Dicey and Morris on the Conflict of Laws (9th ed.), London, Stevens and Sons Limited, 1973, Rule 27, p. 212 et seq.

93. Ibid. Rule 158, p. 825 et seq. and Rule 181, p. 1012 et seq.

94. R v. Keyn 1876 Ex. D. 63 (opinion of Lindley L.J.); Canadian National Steamship Co. v. Watson [1939] 1 D.L.R. 273 (S.C.C.) (opinion of Duff C.J.C.); R v. Gordon Finlayson [1941] 1 K.B. 171 (opinion of Humphreys J.). For an example of the assimilation of an aircraft to the territory of the State of the flag

see the Rome Convention of 1952 (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface signed at Rome on October 7, 1952). Paragraph 20(2) states:

> "For the purposes of this Convention a ship or aircraft on the high seas shall be regarded as part of the territory of the State in which it is registered". (Emphasis added)

95. This would not appear to be the case for vessels registered in the United States of America, see infra footnote 114.

96. Under the terms of the Convention on International Civil Aviation signed in Chicago on December 7, 1944 (hereinafter referred to as the Chicago Convention). As of September 1980, one hundred and forty-three states were contracting parties to this Convention.

97. Article 17 of the Chicago Convention reads:

> "Aircraft have the nationality of the State in which they are registered."

Article 18 reads:

> "An aircraft cannot be validly registered in more than one state, but its registration may be changed from one state to another."

98. M. R.E. Kerr and A.H.M. Evans eds., (3rd ed.) London, Stevens and Sons, 1964, p. 261 et seq.

99. Aslan v. Imperial Airways Ltd. (1933) 45 Ll.L.R. 316; 4 T.L.R. 415; 77 S.J. 337; 149 L.T. 276; 38 Comm. Cas. 227 (K.B.) (Mackinnon J.) - fitness to carry cargo. Watson v. R.C.A. Victor Co. Inc. (1934) 50 Ll.L.R. 77 (Aberdeen Sheriff Court) (Sheriff Morton) - salvage. Polpen Shipping Co. Ltd. v. Commercial Union Assurance Co. Ltd. [1943] K.B. 161; 112 L.J.K.B. 198; 168 L.T. 143; 59 T.L.R. 106; 87 S.J. 129; [143] All E.R. 162 (Atkinson J.) - marine insurance. See also N.M. Matte, Traité de droit aérien - aéronautique (3rd ed.), Paris, ed. Pedone, 1980, p. 71 et seq. for other examples of the sea-air analogy and pp. 78-79 for arguments against the use of this analogy.

100. McNair cited supra footnote 98, p. 262.

101. Ibid. p. 263, footnotes omitted. McNair cites J.M. Spaight, Aircraft in Peace and the Law, London, Longmans, 1919, in support of his conclusions. Although Spaight wrote before the Paris Convention of 1919 had been drafted, thus predating the immense

progress that aviation has accomplished in the last sixty years, his views on the sea-air analogy still remain valid:

> "It is absurd to say . . . that an aeroplane is a 'movable object pure and simple', and strictly analogous to a piano! An aircraft is sui generis and something midway between an automobile and a ship; to assimilate it entirely to the latter, and to assign it that full nationality which historical reasons have attributed to vessels; so that, in French law and to some extent in British, a ship is a floating part of the national territory, would seem to the writer to be going too far." (p. 17).

Again, in a paragraph headed "The Essential Difference between Air and Sea Travel," he wrote:

> "For the present, at any rate, the usual view held is that aircraft should be assimilated to seacraft, and that the law of the flag should govern acts done on board. Simple and logical at first sight, this assimilation will be found on closer examination, the writer suggests, to be neither the one nor the other. The conditions of sea travel and air travel, similar in some respects, are entirely dissimilar in those which are of importance here. A ship is a floating home; an aircraft is essentially a locomotive vehicle, a mechanical magic carpet in which one never settles down, and in which it is impossible to forget that the journey is a brief, passing interlude between ordinary life and business at one place and ordinary life and business at another. The passenger's connection with the flying machine is more casual and transitory than with a ship; in an overland journey, at any rate, he is to the aircraft, very much in the same relation as the pedestrian is to the motor-car which gives him a lift. . . There is, in fact, more similarity between a flying machine and an automobile than between it and a ship; the analogy is obviously far from perfect, but for the writer's immediate purpose it is a more helpful comparison than the other." (pp. 115-116) (footnotes omitted).

102. For the reasons why the term 'air medium' should be used rather than the term 'air space' see N.M. Matte cited supra footnote 99, p. 68.

103. Article 1 of the Chicago Convention states:

> "The contracting States recognise that every State has complete and exclusive sovereignty over the air space above its territory."

Article 2 states:

> "For the purposes of this convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection, or mandate of such State."

104. McNair cited supra footnote 98, p. 266.

105. Even a seaplane cannot be assimilated to an aeroplane, see Polpen Shipping Co. Ltd. v. Commercial Union Assurance Co. Ltd. cited supra footnote 99.

106. If the maritime law applicable to the situation stipulates that aircraft are subject to the law of the flag, then births occurring on board an aircraft over the high seas bestow the citizenship of the State of registration on the newborn baby. But the question of which state has jurisdiction when a criminal act occurs in an aircraft over the high seas has been answered to the effect that, in the absence of specific legislation, it is not the state where the aircraft is registered. In United States v. Cordova and Santano (1950) U.S. Av. R. 1 (E.D.N.Y.) (Kennedy D.J.) it was held that federal statutes relating to crimes (in this case a violent assault) committed on board vessels on the high seas cannot be applied to crimes committed in aircraft flying above the high seas. The same conclusion was reached in R. v. Martin (1956) 2 Q.B. 272; [1956] 2 W.L.R. 975; 120 J.P. 255; 100 S.J. 323; [1956] 2 All E.R. 86 (Devlin J.) where it was held that being in possession of drugs on a British aircraft outside the United Kingdom was not contrary to regulation 3 of the Dangerous Drugs Regulations, 1953, since it only created an offence if the act constituting the offence was committed in England. In addition, section 62(1) of the Civil Aviation Act, 1949, which states that "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for time being be", did not create offences but merely provided the place where an act which was already an offence if committed on a British registered aircraft.

outside England might be tried. However in R. v. Naylor (1962) 2 Q.B. 527; [1961] 3 W.L.R. 898; 125 J.P. 603; 105 S.J. 892; [1961] 2 All. E.R. 932 (Lord Parker C.J.), the defendant had been charged with larceny committed on board a British aircraft. In that case it was held that section 62(1) of the Civil Aviation Act, 1949 made any act or omission which would constitute an offence if done in England, an offence if committed on a British aircraft unless the offence in question was clearly one of domestic application only, in which case section 62(1) did not apply.

In the United States, the jurisdictional gap was closed by the Crimes and Criminal Procedure Act of 1948 18 U.S.C. s. 7(5) (1976): for a commentary, see E.G. Brown, Jurisdiction of United States Courts over Crimes in Aircraft, 15 Stanford L.R. (1962) 45. In Canada, the relevant legislation is found in the Criminal Code, R.S.C. 1970, c. C-34, s. 6 and the Aeronautics Act, R.S.C. 1970, c. A-3, s. 6(6): for commentary see Centre for Research of Air and Space Law, Legal, Economic and Socio-Political Implications for Canadian Air Transport, Montreal; McGill University, 1980, pp. 455-499.

The Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on September 14, 1963, specifically states (in article 3) that the state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board. (It is arguable whether this was enshrining customary law or creating new law.) The jurisdiction was expanded in the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on December 16, 1970 (article 4) and in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on September 23, 1971 (article 5), but the state of registration retained its jurisdictional competency in both of the subsequent Conventions.

107. Article 1 of the Chicago Convention, emphasis added.

108. Fifty-eight states claim a territorial sea of twelve miles; twenty-five states claim three miles; ten states claim six miles; nine states claim two-hundred miles; all other territorial sea breadths (four, ten, fifteen, eighteen, fifty, one hundred, one hundred and thirty and one hundred and fifty nautical miles) are claimed by one to four states; seven states do not make any precise claims. See R. Churchill, M. Nordquist, S.M. Lay, eds. New Directions in the Law of the Sea, Dobbs Ferry, New York, Oceana Publishing Inc. / London, The British Institute of International and Comparative Law, 1977, Documents vol. VI, p. 845 at pp. 881-882. Although the Convention on the Territorial Sea and the Contiguous Zone signed at Geneva on April 29, 1958, does

not specify the breadth of the territorial sea but states merely that:

> "The Sovereignty of a coastal state extends to the airspace over the territorial sea as well as to its bed and subsoil."

Article 3 of the Informal Composite Negotiating Text of the United Nations Conference on the Law of the Sea declares that:

> "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles measured from the baselines determined in accordance with the present Convention." (Document A/Conf. 62/WP. 10 Rev. 1, 28 April 1979, as rev'd. by A/Conf. 62/91, 19 September 1979.)

A territorial sea of twelve miles breadth would appear to be the norm, but at present, there is no uniform rule on the seaward extension of national airspace.

If the legal status of the territorial waters can be assimilated to that of the adjacent land was, the exclusive economic zone (E.E.Z.) cannot be said to be part of a state's territory. See article 56 of the Informal Composite Negotiating Text cited supra, on the rights, jurisdiction and obligations of the coastal state in the exclusive economic zone:

> "1. In the exclusive economic zone, the coastal State has:
>
> a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds:
>
> b) jurisdiction as provided for in the relevant provisions of the present Convention with regard to:
>
> i) the establishment and use of artificial islands, installations and structures;
> ii) marine scientific research;
> iii) the preservation of the marine environment;

c) other rights and duties provided for in the present Convention.

2. In exercising its rights and performing its duties under the present Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States, and shall act in a manner compatible with the provisions of the present Convention.

3. The rights set out in the article with respect to the bed and subsoil shall be exercised in accordance with Part VI of the present Convention."

(Twenty-five states claim an exclusive economic zone of two-hundred miles, while sixteen states claim twelve miles. New Directions in the Law of the Sea cited supra p. 882).

In addition to the E.E.Z., there is the contiguous zone (twelve miles wide: see article 24 of the Convention on the Territorial Sea and the Contiguous Zone) and the ADIZ (Air Defence Identification Zone) which extends for up to two-hundred miles, (see J.A. Martial, State Control of the Air Space over the Territorial Sea and the Contiguous Zone, 30 C.B.R. (1952), p. 245). The twelve miles of the contiguous zone and the two-hundred miles of the ADIZ are based on one hour's cruising time from the shore for a ship and an aeroplane, respectively. On the general problem of the delimitation of the air medium with respect to the law of the sea see N.M. Matte, De la mer territoriale à l'air "territorial", Paris, ed. Pedone, 1965.

109. See infra.

110. J.W. R. Taylor ed., Jane's pocket book of Commercial Transport Aircraft, New York, Macmillan Publishing Co., Inc. 1976, p. 189.

111. Ibid. p. 63.

112. Ibid. p. 21.

113. According to the Civil Aviation (Births, Deaths and Missing Persons) Regulations 1948, S.I. 1948 no. 1411, (made under s. 43 of the Civil Aviation Act, 1946 and preserved by s. 70(2) of the Civil Aviation Act, 1949), Appendix A, the form on which returns are made in the case of a birth on board an aircraft for the purposes of section 55 of the Civil Aviation Act, 1949 (inserted by S.I. 1972 no. 323), for "place of birth" the approximate position must be given e.g. "40 miles west of Lisbon," "over Dieppe", "over Northern France". With the advent of the Concorde, it is suggested that it would be extremely difficult to

state the aircraft's position with the precision that "40 miles west of Lisbon" requires.

114. 8 U.S.C. ss.1401, 1408 (1976). There are however regulations with respect to a birth occurring on board a maritime vessel to the extent that a birth must be recorded in the ship's log book:

> "Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice-versa, shall have an official log book; and every master of such vessel shall make, or cause to be made therein, entries of the following matters, that is to say:
> . . .
> Seventh. Every birth happening on board, with the sex of the infant, and the names of the parents." (46 U.S.C. s. 201 (1976)).

115. R.S.C. 1970, c. C-19.

116. Ibid., ss. 4-5.

117. S.C. 1974-75-76, vol. II, c. 108.

118. Ibid., s. 3(1). The Act came into force on February 15, 1977 (Canada Gazette 1977, Part I, vol. III, p. 880.).

119. Ibid., s. 2(2)

120. The date of the coming into force of the Act, see supra footnote 118.

121. E.g. from Toronto, Montreal or Calgary.

122. E.g. from New York, Boston or San Francisco.

123. E.g. to London, Manchester or Glasgow.

124. Cited supra footnote 117.

125. E. Mapelli, Miscelanea Juridico-Aeronáutica, Revista General de Derecho, Valencia (España), 1977, reprinted in E. Mapelli, Trabajos de Derecho Aeronáutico y del Espacio, Colección de Estudios Juridicos (vol. II), Madrid, Instituto Iberoamericano de Derecho Aeronáutico y del Espacio y de la Aviación Comercial, 1978, p. 434.

126. For the purposes of this discussion, birth on board domestic flights will not be considered.

127. In Canada: the Immigration Act S.C. 1976, c. 52, s. 9(1). A child born on a Canadian registered aircraft on a flight from the U.S.A. to Canada should according to the argument advanced supra in the text, need neither a passport nor a visa since the child has been born a Canadian citizen and thus has a right to enter or to remain in Canada. See the Immigration Act, s. 4(1). In the United States: 8 U.S.C.s.s. 1182 (26) (1976). Bilateral air transport agreements between the two countries require that passport and visa regulations of both countries be respected.

128. 8 U.S.C. s. 1182 (26) (1976).

129. Although they are not applicable in North America, it should be noted that in the General Conditions of Carriage, published by the International Air Transport Association, Article III (d) mentions that a ticket is not transferable and this was held to be the case in Whale v. British Airways 15 Avi. 18,122 (N.Y. Civ. Ct. 1980), a case involving lost baggage. Thus the idea of writing in "plus infant" on the mother's ticket and thus transferring its applicability to the baby would be untenable.

130. A log book is required to be carried on board an aircraft at all times, see Chicago Convention, 1944, articles 29(d) and 34. See also the Draft Convention on The Legal Status of the Aircraft Commander of 1947, prepared by the International Civil Aviation Organization (as revised in Paris by the legal ad hoc committee), article 7. See also the Civil Aviation (Births, Deaths and Missing Persons) Regulations 1948 cited supra footnote 23, which require that the person in command of the aircraft must record in the journey logbook the particulars of any such birth or death and make such record available to the owner as soon as practicable. "Person in command" of an aircraft means, in a case where a person other than the pilot is in command of the aircraft, that person, and in any other case, the pilot. Regulation 2(5). The Spanish solution to this problem is found in article 30 of their Civil Code whereby to have civil effects a fetus is only considered to have been born which has lived for forty-eight hours outside the womb. Thus for any flight of less than forty-hours duration, a baby born on board would not be required to be in possession of any documents since it would not be considered a person for such purposes. See E. Mapelli, Miscelanea Juridico-Aeronautico, cited supra footnote 125. The Spanish Civil Code appears to have adopted a unique position even among civil law countries. The Code Napoléon (article 725) and the Quebec Civil Code (article 608) tie the issue of legal personality in with the

qualities required to inherit, namely, the child must be conceived and born viable. The Revised Quebec Civil Code (article 28) removes the issue of legal personality from the regime of successions and applies it generally. However, it maintains the requirement for an infant to be born viable in order for it to be capable of acquiring legal rights. The German Civil Code (article 1) grants the capacity to have legal rights to a child when its birth has been completed on the other hand, according to the laws governing successions (article 1923) in order to be capable of inheriting, a child already conceived is considered to have been born before the devolvement of the succession. Thus the Spanish solution could not be utilised in other jurisdictions.

131. The Convention for the Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw on October 12, 1929. As far as the carrier's defences and limits of liability are concerned, the Civil Aeronautics Board Agreement signed in Montreal on May 4, 1966 (C.A.B. docket 18,900) will apply.

132. Ibid. article 1(1). Children under two years of age on flights between the United States and Canada travel free of charge provided that they are accompanied by a fare-paying passenger and that they are not allocated a seat.

133. Ibid. article 3(2). See Grey et al. v. American Airlines, Inc. 95 F. Supp. 756; 3 Avi. 17,404 (S.D.N.Y. 1950); aff'd. 227 F. 2d. 282; 4 Avi 17,811 (2d. Cir. 1955) (Medina C.J.); cert. den'd. 350 U.S. 989. Regardless of the requirement to issue each passenger with a separate ticket, it is standard industry procedure to issue one ticket to the accompanying adult and simply endorse it "& IN" to indicate that an infant will be travelling with the adult, that the infant is being carried at no charge, and that the infant is not entitled to occupy a seat. See Resolution 20.10 of the Trade Practices Manual issued by the Air Traffic Conference of America. The Manual is the North American carriers' equivalent of the International Air Transport Association's Conditions of Carriage.

Although it is obviously the custom and practice for North American airlines not to issue a separate ticket to the infant, in case of injury the airline would be liable for unlimited damages for its failure to deliver a ticket on behalf of the infant. Many airlines (e.g. Air Canada) also issue a joint ticket on which a husband and wife may travel at a reduced fare. It is strongly suggested that in the event of injury, one of the conjugal pair could claim unlimited damages from the carrier. The Guatemala Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955) signed at Guatemala City

on March 8, 1971 would amend this article so that individual or collective documents of carriage could be delivered. However in the situation of an on board birth, it is unlikely that an individual ticket could be converted to a collective ticket ex post facto. In addition, it is unlikely that the Guatemala Protocol will ever enter into force due to its entry being implicitly conditional upon its ratification by the United States, unless it enters into force via the indirect route by way of Additional Protocol no. 3 (Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955 and by the Protocol done at Guatemala on 8 March 1971) signed at Montreal on September 25, 1975, becoming effective. The I.A.T.A. Conditions of Carriage defines a passenger as "any person, except members of the crew, carried or to be carried in an aircraft with the consent of Carrier." (Emphasis added).

134. Warsaw Convention article 3(2).

135. The desire by the courts in the United States to avoid the imposition of the low limits of liability contained in the unamended Warsaw Convention has led them to bring various legal devices to bear. The first concept espoused was that of inadequate delivery. Two cases involving The Flying Tiger Line (Warren v. The Flying Tiger Line, Inc. 234 F. Supp. 223; 9 Avi. 17,621 (S.D. Cal. 1964); rev'd. 352 F. 2d. 494; 9 Avi. 17,848 (9th Cir. 1965) (Hamley C.J.); subsequent proceedings 9 Avi. 18,295 (N.D. Cal. 1966) and Mertens v. The Flying Tiger Line, Inc. 8 Avi. 18,023 (S.D.N.Y. 1963); 9 Avi. 17,187 (S.D.N.Y. 1963); aff'd. 341 F. 2d. 851, 9 Avi. 17,475 (2d. Cir. 1965) (Marshall C.J.); cert. den'd. 382 U.S. 816; reh'd. den'd. 382 U.S. 933) stand for the proposition that the ticket must be delivered to the passenger in sufficient time to enable him to read the conditions printed on the ticket and to obtain additional flight insurance. The delivery of a ticket to a serviceman after he had boarded the aircraft or at the foot of the boarding ramp was not adequate delivery as required by article 3(2) of the Warsaw Convention. The principle of inadequate or insufficient delivery was established by these two cases. It had been pleaded previously in the case of Ross v. Pan American Airways, Inc. 2 Avi. 14,556 (N.Y.S.C. 1948); aff'd. 299 N.Y. 88; 85 N.E. 2d. 880; 2 Avi 14,911 (N.Y.C.A. 1949); cert. den'd sub. nom. Froman v. Pan American Airways, Inc. 349 U.S. 947; 4 Avi. 17,682 (1955) but was not upheld. However the Ross case is distinguishible because the ticket which contained the plaintiff's name and all particulars as to the intended route as well as a reference to the carrier's liability limitation under the Warsaw Convention, had been laid before the plaintiff on a table at the airport of departure.

The second notion adopted was that of constructive non-delivery. The leading case in this area is that of Lisi v. Alitalia - Linee Aeree Italiane s.p.A. 9 Avi. 18,120 (S.D.N.Y. 1966); aff'd.253 F. Supp. 237; 9 Avi. 18,374 (2d. Cir. 1966) Kaufman C.J., Moore C.J. dissenting); aff'd. by an equally divided court 390 U.S. 455 (1968). MacMahon D.J. of the District Court held that the delivery of an air travel ticket which contained the printed notice of the applicability of the Warsaw Convention's exculpatory provisions in such small type as could be described as having the notice

> "camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' . . . Indeed the exculpatory statements on which the defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting colour, or anything else. The simple truth is that their presence is concealed." (253 F. Supp. 237 at 243),

failed to give the passenger the required notice that the liability limitation provisions of the Convention were applicable to the flight and thus constructive non-delivery of the ticket was in evidence.

In the United States, this decision has been followed in a number of cases, amongst them Egan v. Kollsman Instrument Corp. et al. 9 Avi. 17,280 and 17,789 (N.Y.S.C. 1964); 9 Avi. 18,247 (N.Y.S.C. Appel. Div. 1966); rev'd.287 N.Y.S. 2d. 160; 10 Avi. 17,651 (N.Y.C.A. 1967) (Fuld C.J.).

In Canada, with respect to the Warsaw Convention, the requirement of readable print has not been endorsed by the courts. See Ludecke v. Canadian Pacific Air Lines Ltd. 12 Avi. 17,191 (Que. S.C. 1971); rev'd.13 Avi. 17,454 (Que. C.A. 1974); aff'd.26 N.R. 302 (S.C.C. 1979). With respect to The Hague Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929) of 1955 which requires the passenger ticket to include "notice" to the effect that the Warsaw Convention may be applicable and, if so, the Convention limits the carrier's liability (article III). The Canadian courts have concurred in the requirement of readable print. See Montreal Trust Company v. Canadian Pacific Airlines Ltd. 12 Avi. 17,197 (Que. S.C. 1971); rev'd. 13 Avi. 17,456 (Que. C.A. 1974); rev'd. 1977 2 Ll. R. 80; 14 Avi. 17,510; 1976 U.S. Av. R. 469 (S.C.C. 1976) (Ritchie J., Judson J. dissenting).

It should be noted that the C.A.B. Agreement of 1966

stipulates that the notice concerning limited liability must be in at least ten point modern type and in an ink which contrasts with the ticket stock (article 2).

136. According to the U.K. Rules of the Air and Air Traffic Regulations 1976, S.I. 1976 No. 1983, r. 5(1)(d), a stowaway is a person who has not the consent of an authorized person to his being carried on an aircraft or who hides on it with the intent of being carried. According to Black's Law Dictionary (4th ed.), St. Paul, Minnesota, West Publishing Co., 1968, a stowaway is one who conceals himself aboard an out-going vessel for the purpose of obtaining free passage. U.S. ex rel. Candreva v. Smith, (N.D. Ill.); aff'd. 27 F. 2d. 642 (7th Cir. 1928) (Alschuler C.J.).

137. British Railways Board v. Herrington [1971] 1 All E.R. 897 (C.A.); aff'd. on other grounds [1972] A.C. 877; [1972] 1 All E.R. 749 (H. of L.) (Lord Reid). Veinot v. Kerr Addison Mines Ltd. (1973) 31 D.L.R. (3d.) 257 (Ont. C.A.); rev'd. in a 5 to 4 decision (1975) 3 N.R. 94 (S.C.C.) (Dickson J.).

138. Vienot v. Kerr Addison Mines Ltd. (1975) 3 N.R. 94 at 97.

139. P. Martin, J.D. McClean, E. de Montlaur Martin, J. Bristow, J.L. Brooks (eds.), Shawcross and Beaumont on Air Law, London, Butterworths, 1977, para. 383, p. 378. According to the editors, the possibility exists due to the incidence of persons stowing away in the wheel bay and other parts of the aircraft.

140. For example, the letter from Dr. Horst H. Renemann of Deutsche Lufthansa Akteingesellschaft dated January 30, 1980.

141. The Warsaw Convention article 25.

142. The Hague Protocol article XIII amending article 25 of the Warsaw Convention.

143. Article 21. On contributory negligence, see the chapter on the handicapped supra.

144. Article 21 was not amended by The Hague Protocol.

145. Article VII amending article 21 of the Warsaw Convention but maintaining the defence and making it generally applicable and not dependent upon the lex fori.

146. Article 1(2).

147. There has been at least one case in which the passenger has had to compensate the carrier for the costs of an unscheduled landing for safety reasons, in that case the presence of a highly inflammable material carried onto the aircraft by a passenger. Deutsche Flugdienst v. Hüetzen 1961 Z.L.W. 205 (Court of 1st. Instance Frankfort).

148. None of the airlines which replied to the questionnaire had ever been involved in a law suit in connection with the carriage of pregnant women, any resultant miscarriages, or on-board births.

CHAPTER 5

THE OLD AND THE YOUNG

THE OLD AND THE YOUNG

THE ELDERLY

Background

The supposed problem of discrimination practiced against elderly passengers was one of the mainsprings of the C.A.B. Show Cause Order[1] which led to the cancellation[2] of various tariff rules[3] which permitted U.S. certified carriers to refuse to transport passengers "whose conduct, status, age or mental or physical condition is such as to make such refusal or removal necessary for the reasonable safety or comfort of other passengers or involves any unusual hazard or risk to themselves . . ."[4]

The Board considered it inherently discriminatory that age should be a criterion for refusal of service.

> "And there is no other circumstance which age, standing alone, can possibly justify a refusal of service. Elderly persons who are infirm may be refused service, if warranted, on the basis of their condition. Those who are not have the right to service as any other passenger."[5]

The basic problem with being old is (if a problem exists at all) that air carriers appear to automatically associate advanced age with

infirmity and they are mindful of the fact that if they voluntarily accept an elderly and infirm passenger they will be required to render the special care and assistance necessary.[6] As has been commented upon in the section of this study dealing with the handicapped, the airlines do not show any willingness to render special services to passengers in general, and by characterising an elderly passenger (who may be somewhat slow in eating their meal or unsteady on their feet whilst progressing down the aisle to reach the washrooms) as infirm gives the airlines the right to limit the numbers of such persons per flight for reasons of safety in that they would require the assistance of another person to make an expeditious evacuation of an aircraft.[7] By being characterised as infirm, the whole array of restrictions and regulations concerning handicapped travellers, such as advance reservations and notification of disability, production of recent medical certificates and accompaniment by attendants[8] could be imposed on the elderly. Dismayed that under the then current tariff provisions an airline had been granted unrestrained authority to refuse service to any elderly traveller, even one in perfect health, on the basis of an agent's opinion that the passenger's age alone might present some hazard, the C.A.B. published a notice of proposed rulemaking stating that it intended to add a new part to the regulations dealing with "Non-Discrimination on the Basis of Age".[9]

United States' proposals

The proposed rulemaking seems to be a solution looking for a problem; as will be discussed later in this chapter, the only discrimination practiced with regard to elderly persons appears to be beneficial, that is, they are eligible for reduced fares. The Government policy makers, however, are obviously not convinced that there is no problem regarding the treatment of elderly people by the airlines, and the proposed new regulations have their roots in Congress' enactment of the Age Discrimination Act of 1975.[10] The Board has commented upon the fact that age discrimination does not appear to be a real problem, both in its comments to the public and to the government authorities, and the sole reason for publishing the proposed rulemaking is to comply with the provisions of the Age Discrimination Act.[11]

Whether fulfilling a present need or not, the proposed rulemaking is a "cop out". On the fundamental issue of structural modification, the rulemaking would not require air taxis or the operators of other small aircraft to alter their aircraft to accommodate the elderly or small children. The H.E.W. implementing regulation indicates that a carrier may take an action that excludes some people from, or denies them benefits of, air travel if that action "is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages";[12] such an action would be justified if it bore a direct and substantial relationship to the normal operation of

the carrier. Since small aircraft are used extensively to provide service to small communities and for taxi services, their size is directly and substantially related to their normal operations and, thus, renders them exempt from modification requirements. Any possible objections which remain to this status quo approach are fobbed off with reference to the proposed rulemaking on non-discrimination against the handicapped[13] which, as was revealed in the earlier discussion on that subject, contains no directives regarding structural modification aimed at facilitating the access to, or accommodation within, aircraft for disabled persons in general, or the elderly in particular.[14]

The applicability of the rulemaking is not limited to the coverage of the H.E.W. implementing regulation[15] and would apply to all air carriers not merely those receiving Federal financial assistance.[16] But, discrete as always, the proposal is framed in the alternative and could be made to apply merely to the recipients of Federal funds.[17] If the rulemaking were accepted in this form its impact would be approximately zero, given the discretion afforded to air carriers by the H.E.W. implementing regulations discussed above.

Apart from the application provisions, the Board's proposal follows the H.E.W. implementing regulation and prohibits air carriers from excluding any persons from participation in, denying them the benefits of, or otherwise subjecting them to discrimination in, the provision of air transportation or related services,[18] whilst permitting

four specified exceptions to this general prohibition.[19] The burden of proving that a discriminatory action falls within one of these exceptions would be on the carrier.[20]

The rulemaking calls for carriers to complete written self-evaluations of compliance with the Age Discrimination Act,[21] and it seems that a dispute over whether recipients of Federal financial assistance should be required to submit self-evaluations[22] has arisen which appears to be the stumbling block in the path of ratification of the proposed rulemaking.[23]

Discount fares - past policy

One area in which discrimination definitely is practiced towards the elderly is in the area of discount fares, but in this respect the treatment is purely preferential. Needless to say, the Age Discrimination Act of 1975 did not affect the special discounts which airlines offer to senior citizens.[24]

The Civil Aeronautics Board extensively examined the concept of discrimination in pricing during Phase 5 (Discount Fares) of the Domestic Passenger Fare Investigation: January 1970 to December 1974.[25] That proceeding followed the judicial disapproval, in the cases of Transcontinental Bus System, Inc. v. C.A.B.[26] and Trailways of New England, Inc. v. C.A.B.,[27] of the Board's dismissal, without hearing, of complaints against the then-existing "youth", "young adult" and "family" fares.

Following protracted litigation, the Board ultimately held such rates to be unreasonably discriminatory and directed their cancellation. The C.A.B. rejected contentions that such discounts were cost-based or that the stimulation of traffic which they promoted benefitted all passengers by permitting the utilization of more efficient capacity and lower unit costs.[28] All discount fares were held to "burden the fare level when viewed over the long run".[29] The Board concluded that any benefits derived were insufficient to warrant departure from the "rule of equity", requiring like price for like service. That rule, as was noted by the Board, has been described as "the very core and essence of the fare structure in the transportation industry"[30] and as such it deserves a better fate than to be rendered a meaningless phrase by the use of spurious justifications for unjustly discriminatory rates.

Discount fares - a new approach?

In light of the Airlines Deregulation Act of 1978[31] which creates wide zones within which carriers may offer most domestic passenger fares free of Board interference as to their reasonableness,[32] the Board is proposing:

> "to clarify and modify its policies relating to discrimination, prejudice, and preference in pricing, so as to interfere with carriers' marketing judgments only on a persuasive showing

> that interests worthy of protection are imperiled and that consumer's welfare can be better served through achievable alternatives to the challenged fare."[33]

Invidious (such as racial, religious or sexual) or predatory discrimination will not be tolerated, and the Board has reserved the power to intervene should a carrier patently abuse the ample discretion the Board allows.[34]

Although the Airline Deregulation Act spared until 1983 ss. 403 (b) and 404 (b) of the Federal Aviation Act of 1958,[35] the C.A.B. is now giving serious consideration to permitting "status fares" i.e. discount fares which can only be taken advantage of if a person has a certain status, such as youth, student, senior citizen or family fares. These fares are obviously discriminatory though the Board attempts to rationalise this new approach by reference to the obiter remarks of Crompton J. in the early English case of Garton v. Bristol & Exeter Ry. Co.[36] that "charging other people too little is not charging you too much,"[37] and its philosophy takes refuge in such pious statements as:

> "Price discrimination in the presence of substantial market power can also be advantageous from the standpoint of economic efficiency; by permitting the carriers to segment markets and offer a wide variety of low price options, as opposed to forcing them to offer a single price substantially above their costs, we maximize the ability of all consumers willing to pay the marginal costs of service to find an acceptable fare."[38]

The C.A.B. is aware that the appearance of fairness can be as important as the reality. Given the egalitarian norms which pervade society today, consumers who are foreclosed from utilising a low fare because of their status will likely perceive a harm to their interests.[39] The perceived harm is well illustrated by the Gallagher v. Alitalia-Linee Aeree Italiane, S.p.A. case.[40] The plaintiff in that case, then aged twenty-seven, attempted to purchase a ticket from the defendant for an international flight to Italy at the youth fare of $202. Because Alitalia's youth fare only applied to travellers aged between twelve and twenty-five, the plaintiff was not allowed the discount and was charged the regular fare of $707, whilst her twenty-three year old sister was charged the lower fare. It was subsequently discovered that this youth fare and others had been sold prior to the date on which the carrier's Youth Fare tariff was to come into effect, and Alitalia was subsequently fined for its illegal conduct. Sibling rivalry had, however, reared its head and the "charging other people too little is not charging you too much" adage notwithstanding, the elder sister brought a class action, under s. 404 (b) of the Federal Aviation Act of 1958, for damages suffered.

The District Court found that the plaintiffs had not been damaged since no actual harm was caused by Alitalia's admittedly illegal conduct. In order to recover damages, a plaintiff has to show they were actually harmed by the defendant's unlawful conduct and, where the legal injury is of an economic character, "the injured party is to be

placed, as near as may be, in the situation he would have occupied if the wrong had not been committed".[41] Since Ms. Gallagher, in paying the higher fare, had paid the legal filed tariff, and since the carrier could not de jure have charged the plaintiffs a lower fare, damages were not recoverable. The elder sister had not claimed that the youth fare was discriminatory per se, its illegality merely lay in its timing, but she obviously suffered from an acute feeling of lack of equality of treatment.

If the Civil Aeronautics Board values public confidence in the fairness of its policies then the retention of the ban on status discount fares may well be advisable on policy, as well as legal, grounds.

Space-available fares

In order to supplement the "transport related factors and competition exemption,"[42] Congress amended[43] s. 403 (b)(1) of the Federal Aviation Act of 1958[44] and required the Board to allow carriers to establish space-available reduced fares for the transportation of, amongst others, persons who are at least sixty years old and retired, and all people who are at least sixty-five years old.[45] Examples of space-available senior citizen fares are those offered by Air Florida, American Airlines, Braniff Airways, Empire Airlines, Northwest Airlines, Trans World Airlines, United Air Lines, US Air and Western Air Lines.[46]

Empire Airlines, US Air and Western Air Lines insist on passengers carrying proof of age (a passport, birth certificate, resident alien card, driver's licence, medicare card, etc. which contains the passenger's birth date) only at the boarding point or at any point en-route,[47] whilst the other listed carriers insist that proof of age also be presented at the time of the ticket purchase.[48] Reservations are permitted and can be made one calender day before the day of departure,[49] either directly with the carrier or through an authorized travel agent.[50] Interline reservations, however, will not be accepted,[51] and reservations can be refused on certain flights which, in the judgment of the carrier, are likely to operate at or near capacity.[52] Tickets may be purchased up to one hour before departure.[53]

Aloha Airlines and Hawaiian Airlines offer senior citizen fares for Hawaiian travel and, in addition to the requirements previously mentioned, specify that a special identification card issued by the airlines must be carried.[54] Air Midwest and Continental Air Lines offer senior citizen standby fares[55] which obviously require that tickets can only be purchased immediately prior to departure[56] and that advance reservations are not permitted.[57] Air Midwest requires that a special identification card be carried in addition to other forms of proof of age.[58]

Canadian policy

In Canada, age in itself is still a reason for refusing to accept a passenger for transportation,[59] and passengers have neither the benefit of, nor are they restricted by, a statutory equivalent of section 404 (b) of the Federal Aviation Act.[60] Thus, Canadian carriers[61] are able to offer special fares on "normal" flights within Canada.[62] Reservations are permissible and tickets may be picked up at any time. The senior citizen discount can be obtained on first class as well as economy fares,[63] and all that is required is that a document containing proof of age be shown when the ticket is purchased and at the boarding point.[64] Nordair extends its offer of senior citizen discount fares to all passengers who are over sixty years old.[65]

In the area of discount fares for elderly passengers, the situation in Canada compared with that in the United States is one of less legislative protection leading to more de facto benefits. The problem, however, remains (in theory at least) that elderly passengers, because of their age alone, may not be allowed to board the aircraft and, thereby, would be deprived of the enjoyment of their discount fares. As in the United States, discrimination against the old because of their age per se does not appear to be a problem. Perhaps the Canadian authorities are spending their time wisely by not searching for a solution to a problem which does not appear to exist.

CHILDREN

Background

Children have always been the subject of special regimes both in civil and in criminal law which stems from a belief that they are imperfect actors and are not capable of taking full responsibility for their actions[66] or, as the criminal law views them, since they are not fully mature they can not be all bad.[67]

As far as air travel is concerned, children are both discriminated against, under the regulations governing newborn infants and unaccompanied children, and are the subject of favourable treatment in the matter of discount fares. It should be recalled that the tariff regulations which were cancelled for U.S. carriers at the end of 1979[68] were concerned with, inter alia, "conduct, status and age"; the C.A.B., in its turn, was concerned that these regulations could be used as an excuse to refuse service to unaccompanied children, thus usurping the authority of the tariff rules which deal with this topic.[69] On a broad interpretation, one could perceive such regulations as an excuse to deny carriage to children altogether, for what harried parent will guarantee the "conduct" of their child, whether accompanied or unaccompanied.

Newborn infants

From the moment that a child is born,[70] they will be regarded with suspicion should they wish to participate in air travel. Newborn infants are treated as extensions of very pregnant women travellers[71] (which of course they are), as if by some metaphysical symmetry the problems encountered by expectant mothers in their last week of pregnancy are reflected in the physical condition of their offspring in their first week of life. In order to ascertain the precise attitude of the airlines regarding the acceptance for carriage of newborn babies, a survey was conducted of a random sample of the major airlines serving North America, both domestically and internationally.[72]

Four of the airlines surveyed did not recommend air travel for infants less than seven days old,[73] whilst two[74] refused to accept newborn infants for carriage if they were less than a week old.[75] The reason for the refusal or the reluctance to accept newborns was often not stated by the airlines in their replies, but would appear to be based on the belief that the cardio-respiratory system of newborn infants does not stabilise for ten days. Medical journal reports in the last two years have, however, cast doubt on the validity of this view and there is now "more acceptance for the belief that neonates travel by air extremely well."[76]

The other airlines which replied to the survey either stated

that there were no age restrictions on the carriage of infants,[77] or stated that they required a doctor's certificate of fitness to travel if less than seven days old.[78]

Thus, of the fifteen airlines which replied to the questions concerning newborn infants, approximately fifty per cent preferred not to accept them or refused to accept them for carriage. The reasons for so doing seem as ill-considered as those used for refusing transportation to expectant mothers.[79] If the problem (if there is a problem) lies with immature respiratory systems,[80] and if the British Airways Medical Service is to be believed,[81] not only is a seven day ban ineffective since it takes ten days for the respiratory system to stabilise, but it may also be quite unnecessary in view of the recent medical journal reports.[82]

Babies with medical problems

A number of the airlines did state their willingness to fly babies of any age for urgent medical reasons,[83] whereas others, such as US Air, refuse to fly infants requiring incubators or other life support systems. Fortunately, US Air's attitude is not ubiquitous, for other carriers[83] will accept infants in incubators providing the life-support systems are self-contained and self-powered and a trained attendant accompanies the infant.[84] As with stretcher passengers,[85] the charges for the transportation of infants in incubators vary widely, with

Quebecair charging one hundred and fifty per cent of the adult fare for the incubator[86] (the attendant paying the normal fare), and Northwest Airlines charging for the incubator only if it occupies a passenger seat[87] (in addition to the attendant's fare).

Premature babies

Infants who were born prematurely, but who do not suffer from additional medical problems in addition to those normally associated with prematurity, are not accepted, after they are seven (or ten) days old, without restriction. It appears odd to place them in a special category since their respiratory systems stabilise in the same time period as full-term infants. (Premature infants who are confined to incubators should be treated as a separate category, i.e. as incubator cases.) Otherwise-healthy, premature infants are treated, however, as if they were invalids; they require medical certificates from their attending paediatrician and, in some cases, the approval of the airline company's own physician.[88] The argument that their condition might deteriorate in flight would appear to have no firmer foundation than the arguments discussed above in relation to full-term newborns, and the problems of blockage of the eustachian tubes which can occur due to pressure changes on take-off or landing, can be alleviated successfully by breast or bottle-feeding at the appropriate times.

As with pregnant passengers,[89] the decision to travel by air with

an extremely young child should be left to the person responsible for that child in consultation with their paediatrician. Carrier regulations have no role to play apart from the right to require a certificate of fitness to travel. Parents and guardians do not undertake air travel with newborn babies, either full-term or premature, unless it is absolutely necessary that they do so. Premature infants travelling in incubators would usually be travelling for emergency medical reasons where humanitarian considerations should prevail, not discretionary airline tariffs.

Facilities for children

Once a child has passed the "newborn" stage, it enters the area of lack of facilities. This stage seems to span the seven-days-old-to-toilet-trained epoch. Anyone who has tried to change a baby's diaper in an aircraft washroom can wax lyrical over the non-existence of the most rudimentary aids. The lack of facilities means that diapers have to be changed and breast feeding has to be performed at the passenger's seat to the possible discomfort and embarrassment of surrounding passengers. (The one notable exception to this deficiency rule is the European-built A-300 Airbus which has diaper changing facilities in its lavatories.)

The problem is not confined to aircraft where there is admittedly great pressure to conserve space, even in the washrooms.

Airports are also unresponsive to the needs of the younger jet set. For example, Logan Airport, which handles 13.5 million passengers and 250,000 aircraft per year, did not have, until recently, such minimal facilities as a table on which to change an infant nor a chair on which a nursing mother could sit and feed her baby.[90] In the Federal Aviation Administration publication Access Travel: Airports[91] there is no listing of facilities for nursing or changing babies, and the Architectural Barriers Act of 1968[92] which requires public facilities built, after 1968, with Federal funds, to be accessible to the disabled, appears to have had no impact in this particular area. A recent survey[93] revealed that at Kennedy International Airport in New York, there is a nursery with a "privacy partition" for breast feeding in the international arrivals building which is operated by the New York Port Authority itself.[94] The facilities offered by the tenant airlines, however, vary considerably. The British Airways terminal has a nursery with a kitchenette, two cribs, a high-chair and an examination table - the British always did prize motherhood! The T.W.A. terminal has a nursery adjacent to the women's restroom, and the United Air Lines terminal has a diaper changing area and a couch in the women's room on the lower level. No special facilities are available, on the other hand, for infants in the terminals operated by American, Eastern and Northwest Airlines. Pan American Airways and National Airlines closed their nurseries at Kennedy Airport because of vandalism and needing the area for other operations, respectively.[95] Perhaps if the carriers which cater to babies advertised their facilities more aggressively, they might find that travellers,

given the choice, would prefer to be processed through those terminals which boast baby-care facilities, with the concomitant switch in travel plans in favour of those airlines.

Once airborn, the airlines will supply milk, but not formula, strained baby food,[96] but not a seat, since infants under two years old travel for free in the United States and Canada.[97] Requests for bulkhead seats can be made at the time of reservation to provide room for a bassinet (supplied by the airline) to be placed on the floor in front of the accompanying passenger. Some airlines provide in-flight carriers which can be attached to the overhead luggage racks.[98] With either type of carrier, however, the infant has to be held on an adult's lap during take-off and landing. Even if reserved in advance, it has been the author's experience that these in-flight baby carriers are always unavailable, for some reason or another, at check-in time.

Unaccompanied children

Children travelling unaccompanied are subject to a variety of restrictions which give the impression that the airlines regard young children as mentally handicapped and, therefore, require an "attendant" at all times. All carriers seem to regard a child who has reached the age of twelve years as an adult, both for the purposes of paying the full fare[99] and from the point of view of travelling unaccompanied.[100] Whereas European carriers will accept unaccompanied children under four years of age, the minimum age for acceptance by

North American carriers is five years.[101]

All the major Canadian and U.S. carriers will, in general, accept unaccompanied children aged five, six or seven years of age on direct flights, flights via an intermediate point (on-line transportation) or flights which involve making connections (interline transportation or interchange flights). There are, however, a number of practical regulations[102] concerning the handling of unaccompanied youngsters. A child's unaccompanied status should be reported at the time of making the advance reservation[103] and the airline enters this information into its computer information system which will then maintain a record of such details as the name and telephone number of the person who will meet the child at the destination. The child must be brought to the airport of departure by a parent or responsible adult who remains with the child until it is boarded and who must furnish the carrier with "satisfactory evidence" that the child will be met by another parent or responsible adult upon disembarkation at his destination. What constitutes satisfactory evidence is unclear, but P.S.A. and T.W.A. require such evidence to be in writing and that the child carry a duplicate copy with them.[104] A form giving such details as flight times and numbers, seat assignments and, once again, the details of the person who will meet the child is signed by both the accompanying adult and the accepting agent at the point of departure. A button is pinned on the child identifying them as unaccompanied minors.[105] At the departure gate, the airline takes over, but if the flight is delayed,

the carrier will ask the accompanying adult to stay around until the flight departs.

The carrier will not accept an unaccompanied child if the flight on which the child holds a reservation is expected to terminate short of, or bypass its destination due, for example, to weather conditions.[106] This stipulation makes good sense, since there is no point in insisting that someone be at the airport to meet the child if the plane is not going to land at that airport. If a connecting flight is involved, the child is kept under close escort by an airline employee whilst some carriers insist that the person responsible for the child makes provision for someone to meet the child and take care of them at the transfer point.[107] The requirement would obviously raise enormous obstacles to air travel by unaccompanied minors, so the practice has evolved whereby the airlines assumes responsibility for the child at transfer points.

At the destination, the child is escorted off the aircraft by an attendant and is turned over to the named "accepting parent or guardian" who signs for them. (The airlines have no wish to be a party to a kidnapping in these days of contested custody cases.) If for some reason the responsible person for meeting the child is not there, the airline will attempt to locate the individual, but if unsuccessful, the airline reserves the right to return the child to the airport of departure at the family's cost.[108]

Although all the carriers are adamant that they will assume no financial or guardianship responsibility for unaccompanied children beyond that applicable to an adult passenger,[109] it is unlikely, in practice, that the airlines would stand on the letter of the law. The carrier is not going to abandon a child at an airport, whether or not the child is carrying a written statement assigning responsibility for its care to some named adult who was supposed to meet it at its destination. In the case of a minor travelling alone who has not been met on his arrival, the carriers are compelled (purely on humanitarian grounds if for no other reason) to extend that level of extra care and special assistance which they do not appear to be willing to extend to the handicapped or to the elderly.

The above are the general rules; the exceptions are all aimed at ensuring that the child does not get lost changing planes or in the dark. A number of carriers[110] restrict the acceptance of unaccompanied children on flights with intermediate stops to those on which through service is performed without a change of aircraft. Other airlines restrict young passengers travelling alone to daytime travel.[111] Once children reach the age of eight years old, almost every carrier, large or small, will accept them unaccompanied,[112] but with various restrictions on changing aircraft and nighttime travel.[113]

The incidence of minors travelling unaccompanied is apparently becoming increasingly common due to the rising divorce rate.[114] Following the breakdown of the marriage, the husband frequently requests that

his company transfer him to another part of the country. Custody rights over the children may well be shared, with the children spending alternate vacation periods, if not weekends, with each parent. Often no adult relative or friend is available to travel with the child and, even if one were available, the cost of a return flight raises a barrier, thus the child travels alone. Other oft encountered reasons why children travel alone involve travelling to and from boarding school, summer camps, or visiting relatives and friends.

Although for flights confined to the western hemisphere, North American airlines will not accept unaccompanied children under five years old, the carriers will provide a hostess service on trans-Atlantic and transPacific flights for very young travellers. European carriers are quite willing, as a matter of routine, to assign an additional flight attendant to act as hostess for one or several children.[115] TAP goes as far as stipulating in its tariffs that they will allow a maximum of two unaccompanied children under four years of age per flight, without the assignment of an additional flight attendant, provided that the seating occupation rate is less than fifty per cent and among the other passengers there are no handicapped or invalid persons requiring special care from the cabin personnel.[116] Obviously this airline takes the attitude that if the cabin personnel have no particular demands on their time then they are available to look after unaccompanied children. This attitude of general helpfulness appears to be the antithesis of that of the North American carriers; the latter have much to learn from the former.

Apart from banning completely children under five from their planes, there is also some indirect limitations on the numbers which will be permitted per flight by the carriers. For example, Air Canada only allows one child under one year old per accompanying adult[117] and CP Air[118] and Pacific Western Airlines[119] only allow one child under three years old per accompanying adult.

If an adult has more than one child, in the specified age range, accompanying them, the second child is considered to be unaccompanied and, therefore, will be refused carriage. Presumably the airlines consider that an adult can only cope with one extremely young child, either in an emergency or during the flight. If this were so the world would be full of only children! As it is not so, it is merely a means of discriminating against them unnecessarily.

Children's fares

Children under twelve, as with senior citizens, are the subject of beneficial discrimination, in that they are charged reduced fares by the airlines. Reduced fares for children under twelve should be distinguished from "Youth Fares"; the latter (encompassing various discounted reserved and standby plans for ages twelve through twenty-one) were held to be unjustly discriminatory in the Transcontinental Bus System case.[120] The former have never been seriously questioned principally because of their historical antiquity.[121] These "time-honoured

fares" occupy a special status both in air and surface transportation and they have become "part of the basic passenger-fare structure."[122] Time-honoured or otherwise, these reduced fares are a boon to parents.

Children under two years of age travel for free in North America[123] as long as they do not occupy a seat.[124] Outside of North America they are charged ten per cent of the applicable adult fare.[125] Only one child per adult (over twelve years of age) is allowed to travel for free; each additional child under two, or if a seat is reserved for a child under two, pays the fare applicable to a child aged over two but under twelve years of age;[126] such fares vary according to the carrier concerned and the route served. For example, fifty per cent of the applicable fare is charged by Aloha and Hawaiian Airlines and by Nordair and Pacific Southwest Airlines for local transportation.[127] The other carriers charge either two-thirds or three-quarters of the adult fare.[128]

Trans World Airlines and United Air Lines extend the discount fare privilege to young adults under eighteen years of age. United charges three-quarters of the adult fare,[129] whilst T.W.A. has a completely unique fare structure. Accompanied children under eighteen years of age travel for free on Tuesdays, Wednesdays and Thursdays, if they are the first accompanying child, and for $36.57 on other days. Additional accompanying children (aged between two and twelve) travel for seventy-five per cent of the adult fare.[130]

For unaccompanied children aged over five and less than twelve, almost all of the carriers charge the applicable adult fare.[131]

CONCLUSION AND RECOMMENDATIONS

At one end of the age scale, elderly passengers do not appear to be in need of protection against any arbitrary and discriminatory actions taken by the airlines; at the other end of the scale, children, especially very young children, are regulated to an excessive degree and the potential exists for unjust discriminatory treatment vis-a-vis other categories of passengers. There seems to be no valid reason to ban unaccompanied children from North American flights until they are five years old. Once a child is toilet-trained (usually before they are four years old) it should be considered for unaccompanied travel. The hostess system, utilised on transoceanic flights and by the European carriers, should be introduced on flights in the continental United States and Canada for those children who are either too young and/or incapable of travelling alone. Other regulations, such as allowing only one very young child to travel per accompanying adult should be repealed in view of the increasing number of single parent families - not to mention the incidence of twins! Refusing carriage to an adult accompanied by two infants is unwanted discrimination. On the other hand, there is a basis for imposing a rule to the effect that young children, whether accompanied or unaccompanied should not be seated next to emergency exits,[132] since they most probably do not have the

arm strength necessary to operate the exits, even though this regulation might lead to a late-arriving, unaccompanied child being refused carriage if only seats adjacent to exits were unoccupied and the other passengers refused to swap places.

The practice of offering discounted prices to senior citizens and children is embedded in most areas of social activity and thus it should be in the air transport industry. Reduced fares for these two groups of travellers should be offered on an unrestricted, reservation basis. It is to be hoped that the current competitive climate in North America does not lead to the elimination of this preferential treatment of the old and the young.

FOOTNOTES

1. Order no. 79-1-70 (Docket 34,435) dated January 11, 1979.

2. C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979.

3. See footnote 2 of the previous section of this study on pregnancy for a list of the tariff rules which were cancelled.

4. Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195, Rule 35 (F)(1), (hereinafter referred to as Tariff no. PR-7).

5. Order no. 79-1-70 (Docket 34,435) dated January 11, 1979, p. 2.

6. Croom v. C.M. & St. P. Ry. Co. 52 Minn. 296; 53 N.W. 1128 (Minn. S.C. 1893) (Mitchell J.). The case concerned an eighty-year-old man, feeble and infirm in mind and body who fell off the platform of a train, and it held that if the need for special care and attention is apparent, then the carrier would be negligent if the assistance were not afforded, and the degree of care to be exercised would be that which is reasonably necessary for the safety of the passenger in view of his mental and/or physical condition. In Canada, see Colpitts v. R. (1908) 5 E.L.R. 446 (Exch. Ct.) (Cassels J.).

7. 14 C.F.R. 121.571 and 221.38 (a)(8). See also supra the section of this study dealing with the handicapped which discusses the limitations on the numbers of disabled persons carried per flight.

8. Ibid. the sections of the chapter on the handicapped dealing with the subjects referred to.

9. S.P.D.R. - 74 (Docket 36,639) 44 F.R. 55, 383 (1979) dated September 30, 1979, which proposes new part 14 C.F.R. 378, (hereinafter referred to as S.P.D.R. - 74).

10. 42 U.S.C. ss. 1601 et seq. (1976). The Act was aimed at prohibiting unreasonable discrimination based on age in programmes and activities receiving Federal financial assistance and, following a report by the Commission on Civil Rights, Congress amended the Act (P.L. 95-478 (1978)) to strike the word "unreasonable" from the statement of purpose clause. The Health, Education and Welfare (now the Department of Health and Human Services) regulations bringing into effect the Age Discrimination Act were published on June 12, 1979 44 F.R. 33,768 (1979).

11. 45 C.F.R. 90.34 (1980). In a letter from Marvin S. Cohen, Chairman, Civil Aeronautics Board, to the Hon. Patricia A. Harris, Secretary, Health, Education and Welfare, dated December 31, 1979, it was

reported that there was a complete lack of evidence of such discrimination being practiced.

12. 45 C.F.R. 90.15 (1980).

13. S.P.D.R. - 70 (Docket 34,030) 44 F.R. 32,401 (1979) dated May 31, 1979.

14. Ibid. p. 3.

15. S.P.D.R. - 74, p. 3.

16. The Federal Aviation Act of 1958 provides that Federal subsidies are payable for the carriage of mail (s. 406) and for the provision of air services to small communities (s. 419).

17. S.P.D.R. - 74, p. 3 and proposed 14 C.F.R. 378.2.

18. Proposed 378.4.

19. Proposed 378.5:

"Exceptions to the prohibition against age discrimination

An air carrier may take an action that is otherwise prohibited by s. 378.4 in any of the the following cases:

(a) The air carrier is providing special benefits or discounts to the elderly or to children.

(b) The air carrier is applying an age distinction that is established by a Federal, State, or local statute or ordinance that -

(1) Provides benefits or assistance to persons based on age;

(2) Establishes criteria for participation in age-related terms; or

(3) Describes intended beneficiaries or target groups in age-related terms.

(c) The air carrier's action is based on a factor other than age, even though that action may result in reduced services or benefits to a particular age group. This exception applies only if the factor bears a direct and substantial relationship to the normal operation of the air carrier or to the achievement of an objective of a program or activity expressly stated in a Federal, State, or local statute or ordinance.

(d) The air carrier's action reasonably takes into account age as a factor necessary to its normal operation or to the achievement of an objective expressly stated in a Federal, State, or local statute or ordinance. An action reasonably takes into account age as a factor if -

(1) Age is being used as a measure or approximation of some other characteristic;

(2) The other characteristic must be measured or approximated in order for the carrier's normal operation to continue, or to achieve the statutory objective;

(3) There is a close relationship between the other characteristic and age; and

(4) The other characteristic cannot be directly measured on an individual basis."

20. This approach is in line with the new policy outlined in S.P.D.R.-70, where the burden of proving that a handicapped person is unfit to travel falls on the carrier. Ibid. p. 4.

21. Proposed 378.7:

"Air carrier self-evaluations.

(a) Each air carrier employing the equivalent of 15 or more full-time employees shall complete a written evaluation of its compliance with this part within 18 months after the effective date of this part.

(b) Each carrier's self-evaluation shall identify and justify each age distinction that the carrier imposes in its program or activities.

(c) Each carrier shall make its self-evaluation available on request to the Board and to the public for a period of 3 years after its completion.

(d) Each air carrier shall take corrective and remedial action whenever a self-evaluation indicates a violation of this part."

22. The participants in the dispute are the Department of Health and Human Services and the Office of Management and Budget. Letter from Richard B. Dyson, Associate General Counsel, Rules and Legislation, C.A.B., dated September 24, 1980.

23. Idem.

24. S.P.D.R. - 74, p. 2, and proposed 378.5 (a).

25. Opinion and Order 72-12-18, dated December 5, 1972; Supplemental Opinion and Order 73-5-2, dated May 1, 1973; Supplemental Opinion and Order on Reconsideration 73-8-55, dated August 10, 1973. Published in Civil Aeronautics Board, Domestic Passenger - Fare Investigation: January 1970 to December 1974, Washington, D.C., U.S. Government Printing Office, 1976, pp. 226 - 357, (hereinafter referred to as D.P.F.I.).

26. 383 F. 2d. 466 (5th Cir. 1967) (Gewin C.J.); cert. den'd. 390 U.S. 920; 88 S. Ct. 850; 19 L. Ed. 2d. 979 (1968).

27. 412 F. 2d. 926 (5th Cir. 1969) (Aldrich Ch. J., Staley C.J. dissenting).

28. P.S.D.R. - 58 (Docket 35,253) 44 F.R. 21,816, dated April 6, 1979, p. 4 (hereinafter referred to as P.S.D.R. - 58). The arguments that raised the contentions were based on the finding in the Transcontinental Bus case that:

> "In those cases where the Board has found rate differentials not unjustly discriminatory it has done so on the basis of transportation related factors and competition, and not solely on the promotional aspects of the tariff."

383 F. 2d. 466 at 490.

29. Opinion 72-12-18, p. 51; D.P.F.I., p. 252.

30. Transcontinental Bus System, Inc. v. C.A.B. 383 F. 2d. 466 at 485. Cited in Opinion 72-12-18, pp. 62 - 63, and D.P.F.I. p. 257. For other decisions on discount, domestic passenger fares, see, for example, Aloha Airlines, Inc. v. C.A.B. 598 F. 2d. 250; 194 U.S. App. D.C. 331 (D.C. Cir. 1979) (Robb C.J.), which held that an illegal fare rebate was being offered when an air carrier made payments to a car rental firm of the amount by which the latter discounted rentals to carrier's passengers. Car hire rentals were not in the same category as such promotional devices as the provision of meals and drinks and in-flight movies since such promotional devices related to services supplied by airlines in connection

with air transportation alone.

A differential in air fares may be shown to be not unduly discriminatory if it is one that normal coach passengers can take advantage of and bring themselves within the favoured class such as a bargain fare (below fully allocated costs) for economy class seats. But if the bargains are available only to a minority, either because they are, for example, restricted to those with personal resources or business means (first class service) or to the young (Youth Fares), then the issue of discrimination arises. See Continental Air Lines, Inc. v. C.A.B. 551 F. 2d. 1293; 179 U.S. App. D.C. 334 (D.C. Cir. 1977) (Leventhal C.J.).

31. P.L. 95-504; 92 Stat. 1705.

32. Section 38 (a) of the Airline Deregulation Act amending s. 1002 (d)(4) of the Federal Aviation Act of 1958 49 U.S.C. s. 1482 (d)(4).

33. P.S.D.R. -58, p. 1.

34. Ibid., p. 11.

35. 49 U.S.C. ss. 1373 (b) and 1374 (b) (1976).

36. 30 L.J.R. (N.S.) C.L. 273 (1861 Q.B.) (Cockburn C.J.). Referred to in P.S.D.R. - 58, p. 9.

37. Ibid. at 292.

38. P.S.D.R. - 58, pp. 11 - 12.

39. Ibid., p. 12.

40. 361 F. Supp. 1097; 12 Avi. 18,189 (S.D.N.Y. 1973); and 13 Avi. 18,348 (S.D.N.Y. 1976); reh'g. 14 Avi. 17,284 (S.D.N.Y. 1976) and 16 Avi. 17,342 (S.D.N.Y. 1980) (Stewart D.J.)

41. Wicker v. Hoppock 12 Fed. Cas. 525 (Ill. Cir. 1866); aff'd. 6 Wall. (73 U.S.) 94 (1867) (Swayne J.) at 6 Wall. 99.

42. See supra footnote 28.

43. Section 8 (a) of P.L. 95-163; 91 Stat. 1281, enacted November 9, 1977.

44. 49 U.S.C. s. 1373 (b)(1) (1976).

45. See also ER - 1070, Amendment 4 to part 223 (Docket 32,160) 43 F.R. 38,378.

46. Tariff no. PR-7, Rule 320.

47. Ibid., Rule 320 (A)(3).

48. Ibid., Rule 320 (A)(4).

49. Ibid., Rule 320 (B)(1).

50. Ibid., Rule 320 (B)(4).

51. Idem.

52. Ibid., Rule 320 (B)(3).

53. Ibid., Rule 320 (B)(2).

54. Tariff no. PR-7, Rule 325. The card is obtainable for $5.00.

55. Tariff no. PR-7, Rule 330.

56. Ibid., Rule 330 (B)(2).

57. Ibid., Rule 330 (B)(3).

58. The card is obtainable for $10.00. Carriers which require special age identification cards will recognise such cards which are issued by other airlines.

59. Air Canada International Passenger Rules Tariff no. PR-1, Rule 3 (A)(1)(c); Tariff no. PR-7, Rule 35 (F)(1).

60. For the full text of this section, see supra the chapter on the airline as a common carrier.

61. Air Canada, CP Air, Eastern Provincial Airways (1963) Ltd., Great Lakes Airlines, Nordair, Pacific Western Airlines, and Quebecair.

62. Tariff no. PR-7, Rule 340.

63. Pacific Western Airlines only offers the senior citizen discount on economy class flights. Tariff no. PR-7, Rule 340 (A)(2).

64. Ibid., Rule 340 (B)

65. Ibid., Rule 340 (A). Compare this with the position in the United States where, in order to qualify for the reduced fares, the passengers must be over sixty and retired. See supra footnotes 43 and 45.

66. For the tests and standards applied to children in civil cases see, for example: Dellwo v. Pierson 259 Minn. 452; 107 N.W. 859 (Minn. S.C. 1961) (Loevinger J.); Heisler v. Moke (1972) 25 D.L.R. (3d.) 670 (Ont. H.C. 1971) (Addy J.); McEllistrum v. Etches (1954) 4 D.L.R. 350 (Ont. C.A.); rev'd. in part [1956] S.C.R. 787; (1956) 6 D.L.R. (2d.) 1 (Kerwin C.J.C.), and Dobie v. C.P.R. 35 C.R.C.

302; [1929] 2 D.L.R. 901 (B.C.S.C.); aff'd. [1930] 1 W.W.R. 6; 42 B.C.R. 30; 36 C.R.C. 200; [1930] 1 D.L.R. 790; (B.C.C.A. 1929); rev'd. [1931] S.C.R. 277; 37 C.R.C. 385; [1930] 3 D.L.R. 856 (1930) (Newcombe J.).

67. As an example of the protection afforded children under the criminal law, a system of juvenile courts exists to shield young offenders from exposure to the media, in particular, and the public, in general. See the Juvenile Delinquents Act R.S.C. 1970, c. J-3, applicable to persons under sixteen years at the time when the crime was committed, and the Federal Youth Corrections Act 18 U.S.C. ss. 5001 et seq., applicable to persons under twenty-two years of age.

68. C.A.B. Order no. 79-11-148 (docket 34,435) dated November 11, 1979, cancelling Tariff no. PR-7, Rule 35 (F)(1).

69. Tariff no. PR-7, Rule 50. See infra this chapter of the study for a discussion of this subject.

70. For a discussion of some of the problems encountered should a child have the misfortune to be actually born on an aircraft in flight, see supra the section of this study on pregnancy.

71. The I.A.T.A. Recommended Practice 1700 (a) (formerly 1402) covers both expectant mothers and newborn babies.

72. This is the same survey referred to supra in the chapter on pregnancy; the airlines surveyed are listed ibid. footnote 46.

73. Delta Air Lines, Finnair, Nordair and Swissair.

74. British Airways will not fly infants less than ten days old and Qantas "preferred them to be several weeks old". Letter from G. Miner, Principal Legal Officer, Qantas Airways Limited, dated November 9, 1979.

75. The ban on flying babies less than seven days old is in line with the I.A.T.A. guidelines for the acceptance of newborn babies found in Traffic Services Publications, Incapacitated Passengers Handling Guide, Montreal, International Air Transport Association, 1980, Appendix C, but is contradicted by the terms of Recommended Practice 1700 (a) (formerly 1402), paragraph 4 (b), which is couched in terms of recommendations and not refusals.

76. Letter from R.L. Green, Principal Medical Officer (Air), British Airways, dated November 30, 1979.

77. Air Canada, Air France, Delta Air Lines, Eastern Airlines, KLM, Quebecair and TAP.

78. US Air.

79. See supra the chapter on pregnancy.

80. Both British Airways and Nordair cited this as the reason for their reluctance to fly newborns.

81. Letter from R.L. Green cited supra footnote 76.

82. Idem.

83. Letter from G. Miner cited supra footnote 74, which stated that it was not unusual for Qantas to fly a day-old baby several thousand miles because of congenital abnormality. One wonders why it is then that Qantas prefers its healthy infant passengers to be several weeks old. Quebecair also regularly performs "mercy" flights in recognition of the remote location of certain communities served by the airline. Letter from J.E. Martin, Vice-President, Legal, and Secretary, Quebecair, dated October 31, 1979.

83. Finnair, Quebecair and Northwest Airlines, for example.

84. Medical certificates indicating fitness to travel and advance notification are also required. See tariff no. PR-7, Rule 380 (B).

85. See supra the section of this study dealing with the handicapped.

86. Letter from J.E. Martin cited supra footnote 83.

87. Tariff no. PR-7, Rule 380 (c).

88. Letter from V. Citterio, Passenger Regulations, Swissair, dated November 15, 1979, and I.A.T.A. Recommended Practice 1700 (a) (formerly 1402).

89. See supra the chapter on pregnant passengers for conclusions with regard to the acceptance for travel of expectant mothers.

90. New York Times, July 13, 1980, s. T, p. 8.

91. Access Travel: Airports (3rd. ed.), Washington, D.C. 1979.

92. 42 U.S.C. ss. 4151 - 4152 (1976).

93. The information was reported in the New York Times, July 13, 1980, s. T, p. 8, and was provided by Mr. B. Schroeder, Aviation Consumer Services Supervisor, New York Port Authority.

94. The Port Authority has overall responsibility for the operation of

Kennedy, La Guardia and Newark Airports, although most of the passenger terminals are operated or supervised by the tenant airline. Idem.

95. La Guardia Airport has a nursery inside the lower level women's restroom in the central terminal building. Newark Airport has nurseries in Terminal B (operated by Eastern Airlines) and in the North Terminal (which is used by overseas charter flights and World Airways). Terminal A (operated by United Air Lines) has little besides a diaper-changing shelf in the women's room. Idem.

96. If requested at least twenty-four hours in advance.

97. The fare for infants and two years old is ten per cent of the applicable adult fare on international flights, but they are still not entitled to a seat. See the discussion infra in this chapter on children's fares.

98. New York Times, July 13, 1980, s. T, p. 8.

99. See the discussion infra in this chapter on children's fares.

100. Tariff no. PR-7, Rule 50 (B). The reason for refusing carriage to unattended children is that they place an added responsibility on the carrier. Yazoo v. M.V.R. Co. v. O'Keefe 88 S. 1 (Miss. S.C. 1921) (Ethridge J.) and Bishop v. Can. Nat. Elect. Rys. (1931) 39 O.W.N. 408 (Ont. C.A.) (Mulock C.J.O.).

101. Idem. Greyhound and Trailways buses will also not accept unaccompanied children under five years of age. Amtrak (which controls most of the long distance passenger rail service in the United States) will not accept an unaccompanied child under eight years of age, whereas VIA rail in Canada will not accept them under twelve. Unaccompanied children aged over eight but under twelve years of age are accepted on Amtrak only for daylight travel, with no transfers involved, and only after a personal interview has indicated that the youngster is capable of making the trip alone. New York Times, July 20, 1980, s. T., p. 12. The possibility of an unaccompanied (and thus unsupervised) child making an unscheduled exit through one of a train's many doors appears to account for the reluctance to accept them for travel by rail.

102. Tariff no. PR-7, Rule 50 (B).

103. Air Canada, International Passenger Rules Tariff no. IPR-1, Rule 3 (C)(2)(a).

104. Tariff no. PR-7, Rule 50 (B).

105. The European carriers, in line with the I.A.T.A. guidelines, provide a special distinctive wallet where all the travel documents (ticket, baggage tags, certificates, etc.) are carried and on the outside cover of which are shown the child's name, the language spoken, the final destination, the flight numbers and any intermediate transfer points. The wallet also has a very large UM (standing for "unaccompanied minor") stamped on the exterior. See TAP Tariff Rule, Restrictions on Acceptance: Unaccompanied Children, ss. 4.3.6. and 4.3.7. (June 15, 1976), and also I.A.T.A. Recommended Practice 1739 (formerly 1201), Interline Handling Procedure for Unaccompanied Minors.

106. Tariff no. PR-7, Rule 50 (B); CP Air Local and Joint Passenger Rules Tariff no. 2, Rule 8 (D)(1)(c); Air Canada, International Passenger Rules Tariff no. IPR-1, Rule 3(C)(2)(b).

107. Ibid., Rule 3 (C)(2)(e). See Also CP Air Local and Joint Passenger Rules Tariff no. 2, Rule 8 (D)(1)(a) and Tariff no. PR-7, Rule 50 (B), with reference to Aspen Airways, Braniff Airways, Frontier Airlines and RMA Inc.

108. New York Times, July 20, 1980, s. T, p. 12.

109. Tariff no. PR-7, Rule 50 (D).

110. Air California, Air North, Altair Airlines, American Airlines, Big Sky Airlines, Coleman Air Transport, Continental Air Lines, Delta Air Lines, Hughes Airwest, Midway Airlines, Northwest Airlines, Ozark Air Lines, Pacific Southwest Airlines, Sun Aire Lines, Swift Aire Lines, Texas International Airlines and US Air.

111. Frontier Airlines and RMA Inc. require that the transportation not begin before 5.00 a.m. nor terminate after 8.30 p.m. of the same day. Tariff no. PR-7, Rule 50 (B) (2). Aloha Airlines stipulates that if the journey is being completed on one of their flights then the arrival must be scheduled before 9.00 p.m. Other restrictions include not accepting unaccompanied children under eight years of age for interline travel (Air California, Air Oregon, Air Wisconsin, Aspen Airways, Coleman Air Transport, Golden Gate Airlines, Golden West Airlines, Imperial Commuter Airlines, Pacific Southwest Airlines, San Juan Airlines and Trans World Airlines) and restricting the type of equipment on which they may be carried, e.g. RMA Inc. will not accept children under eight years of age for on-line travel or interline travel on DHC-6 equipment and Golden Gate Airlines will not accept them on CV-580 or DHC-7 equipment.

112. The only exceptions appear to be Reeve Aleutian Airways and Soonair Lines which will not accept unaccompanied passengers under twelve years old. Tariff no. PR-7, Rule 50 (B)(3).

113. See supra footnote 111 for the regulations of Aloha Airlines, Frontier Airlines and RMA Inc. concerning the timing of flights for unaccompanied children. Air California, Air Midwest, Aspen Airways, Cascade Airways, Coleman Air Transport, Golden West Airlines, Metroflight Airlines, Midway Airlines and Pacific Southwest Airlines will not allow unaccompanied children under eight years of age on interline flights.

114. New York Times, July 20, 1980, s. T, p. 12.

115. TAP Tariff Rule, Restrictions on Acceptance: Unaccompanied Children, s. 2.1. (June 15, 1976). The same would appear to be true of Air India. Following the Hindu custom, a woman should give birth at her parents home; if the expectant mother has happened to emigrate from India (to the United States, for example) she is still required to return home for the birth. As soon as she is able she rejoins her husband, leaving the infant with its grandparents. As soon as the baby is three months old (the minimum age for unaccompanied travel on Air India), the grandparents send the child to the parents. In such a case, an Air India hostess will be assigned to hold the infant in her arms for the whole journey. New York Times, July 20, 1980, s. T, p. 12.

116. TAP Tariff Rule cited supra, s. 2.1, Note 1. In this case TAP would not levy its normal surcharge of fifty per cent of the applicable adult fare for the services of the hostess.

117. International Passenger Rules Tariff no. IPR-1, Rule 3 (C)(5).

118. Tariff no. PR-7, Rule 50 (A)(2)(a).

119. Idem, Rule 50 (A)(1)

120. Cited supra footnote 26.

121. P.S.D.R. - 58, p. 4, footnote 12.

122. Opinion and Order 72-12-18, pp. 7 - 8; D.P.F.I., pp. 230 - 232 and 262 footnote 91; Transcontinental Bus System, Inc. v. C.A.B. 383 F. 2d. 466 (1967) at 488 - 489.

123. For the purposes of these fares, the term "North America" is comprised of the Bahamas, Canada, Cuba, the Dominican Republic, Haiti, Jamaica, Mexico, Puerto Rico and the continental U.S.A.

124. Tariff no. PR-7, Rule 290 (A)(1).

125. Air Canada International Passenger Rules Tariff, Rule 15 (A)(2).

126. Tariff no. PR-7, Rule 29 (A)(2).

127. Ibid., Rule 290 (B)(1)(b).

128. For example, Air Canada charges two-thirds of the adult fare whereas CP Air charges two-thirds for local and joint transportation between points in Canada, on the one hand, and points in the continental United States, Alaska and Hawaii, on the other hand. American Airlines charges three-quarters of the adult fare for all local and joint transportation except between Chicago, Dallas/Fort Worth, Houston, Los Angeles, San Francisco and Montreal, Toronto and between New York and Toronto on which two-thirds of the adult fare is charged. Tariff no. PR-7, Rule 290 (B)(1)(b).

129. Ibid., Rule 290 (B)(4).

130. Ibid., Rule 290 (B)(3). According to this tariff, a thirteen year-old travelling alone would have to pay the full adult fare (since T.W.A. still regards twelve years of age as the age of maturity as far as unaccompanied, full-fare travel is concerned), and a thirteen year-old travelling mid-week with his eighteen year-old brother would be charged the full adult fare whilst his older brother travelled for free. Coleman Air Transport also extends its range of discount children's fares and charges half the applicable adult fare to children aged over two and under sixteen years. Ibid., Rule 290 (B)(2).

Various joint fares also include discount rates for children. Air Canada, American Airlines, Braniff Airways, CP Air, Delta Air Lines, Eastern Airlines, National Airlines, Pan American Airways and Western Air Lines charge accompanied children under twelve years of age half the adult fare for transportation within the United States and/or Canada when the passenger's trip includes transportation to and from points outside Canada, the United States, Puerto Rico and the Virgin Islands. Ibid., Rule 290 (B).

For journeys into, out of and within California, special discounts exist: half the adult fare is charged by American Airlines for transportation between Los Angeles and San Diego when the transportation between these points is part of a trip to or from points outside the state of California; by Northwest Airlines, Pan American Airways and Western Airlines for transportation between points in California when such transportation is part of a trip to or from points outside California; by Delta Airlines, Pan American Airways, Trans World Airlines and Western Airlines for transportation wholly within California; and by Trans World Airlines for travel between Reno and San Francisco. Ibid., Rule 290 (B).

131. The exceptions are Big Sky Airlines and North Canada Air which

charge two-thirds of the adult fare and Frontier Airlines which charges three-quarters for travel which commences after 5.00 a.m. and terminates before 8.30 p.m. Ibid., Rule 290 (C).

Pan American Airways only charges half the adult fare for children under twelve for transportation within the United States when the trip includes transportation to and from points outside the U.S. Ibid., Rule 290 (C), Exception 1. Northwest Airlines charges only seventy-five per cent of the adult fare for flights between Anchorage, Fairbanks and Chicago, Los Angeles, Minneapolis, St. Paul, New York, Portland, San Francisco, Seattle. Ibid., Rule 290 (C), Exception 2.

132. See Continental Air Lines tariff regulation, Tariff no. PR-7, Rule 50 (A)(2)(b).

CHAPTER 6

SMOKERS AND DRUNKS

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SMOKERS

Background

Smoking and drinking are being analysed together, if for no better reason than they are both regarded as bad habits by those who do not practice either. One could also argue that the airlines actively encourage these bad habits on international flights due to the duty-free alcohol and tobacco allowance which can be purchased for international flights. If the carriers are guilty of promoting smoking and drinking then they are at least the co-authors of their own misfortunes, for in the last couple of years, fights between smoking and non-smoking passengers and assaults by drunken passengers have become almost as great a problem for the airlines as have rising fuel prices and hijackers.[1]

The adherents to the anti-smoking campaign tend to be extremely vociferous and have been observed to resort to violence on occasion. Instead of handling this situation with the delicacy it deserves, the Civil Aeronautics Board (ever eager to jump on a bandwagon) has aggravated the problem by, firstly, throwing its full support behind the non-smoking faction, and then threatening to withdraw it completely two years later.

Regulatory history in the United States

The C.A.B.'s Bureau of Consumer Protection found that during 1978 it was receiving roughly two smoking-related complaints per day, a far higher number than in the previous five-year period. Passengers were finding smoking anything from a nuisance to extreme physical discomfort[2] and on an aircraft one cannot, at will, step out into the fresh air. The Board had previously adopted Federal regulations governing the Provision of Designated "No-Smoking" Areas Aboard Aircraft Operated by Certificated Air Carriers in 1973,[3] following its finding that in order to provide "adequate service"[4] and to establish "reasonable practices",[5] carriers were required to provide segregated seating for smokers and non-smokers, since providing adequate service to smokers does not include a right to impose smoke on the many people adversely affected by it.[6]

Because of the record number of complaints, the regulations were amended to reflect provisions which would segregate cigar and pipe smokers[7] and would compel carriers to undertake such other procedures as might be necessary to avoid exposing persons seated in a no-smoking area to smoke from cigars and pipes.[8] In order to ensure that non-smoking passengers are not unreasonably burdened by breathing smoke, a non-smoking section must be provided for each class of service[9] consisting of a minimum of two rows of seats,[10] and smoking is banned altogether whenever the ventilation system is not fully functioning.[11]

To these ends each carrier is to take such action as is necessary to ensure that smoking is not permitted in no-smoking areas and to enforce its rules with respect to the segregation of passengers in smoking and no-smoking areas.[12]

The seeds of discontent were sown with the requirements that there was to be a sufficient number of seats in the no-smoking areas of the aircraft for all persons who wish to be seated there[13] and that specific provision had to be made for the expansion of no-smoking areas to meet passenger demand.[14]

Segregation and discrimination

Questions arise as to whether the segregation of smokers from non-smokers is discriminatory and whether the refusal of carriage to a passenger who expresses his intention to smoke when only seats remain in the no-smoking section, is justified. On the issue of on-board segregation, since smoking causes annoyance and discomfort to non-smokers to a great extent, then the degree of physical inconvenience warrants separate placement of smokers.[15] The C.A.B. considered the issue of segregation and discrimination at the time of the enactment of part 252, but dismissed it out of hand for the reason outlined above.[16] The Board considered that the segregation of smokers from non-smokers (rather than a complete ban on smoking) strikes an equitable balance allowing neither smokers nor non-smokers to infringe on the rights of others.

As regards the issue of either refusing carriage to a smoker or insisting that he does not smoke if seated in a no-smoking section, smokers often refer to their "right" to smoke. This right has been upheld judicially,[17] usually in cases in which an absolute ban on smoking in commercial aircraft has been sought such as the Nader v. F.A.A. case.[18] The court in the Nader case commented that the "freedom to smoke in commercial aircraft had been enjoyed by millions of passengers since the advent of commercial aviation."[19] Just as the attitude of many smokers appears insensitive to the rights of non-smokers to be relieved of the annoyance and discomfort caused by smoking, so does the attitude of many non-smokers appear insensitive to the rights of smokers. Smoking is a lawful activity, and requiring smokers to abstain totally on flights would cause many of them severe discomfort. However, in the Nader case, it was observed that the smokers freedom to smoke "may have to give way to the freedom of others to be unannoyed by smoke,"[20] and it is this latter freedom which serves as the basis for refusing carriage to persons who declare their intention to smoke when only no-smoking seats are available.

Practical results

No matter how justifiable is the basis for segregating smokers (and refusing them carriage), the way in which it is done in the United States results in havoc. Under the C.A.B. regulations[21] the no-smoking section can never be full, no matter how late a non-smoker arrives at

the check-in counter. Smokers may be seated for take-off thinking they are free to light up, when a non-smoker is seated beside them and the whole row is instantly transformed into a no-smoking area. Since access to a seat in the no-smoking area is not dependent on the point of boarding, an extremely burdensome musical chairs routine can be instituted on multi-stop flights.

So much for the theory, in practice[22] the instant transformations are not going so smoothly. A bizarre example occurred in December 1979 when an Eastern Airlines pilot, Larry Kinsey, was forced to land his Boeing 727 at Baltimore Airport shortly after the shuttle left Washington bound for New York. The cause of the emergency landing was euphemistically described as an "insurrection" but was in fact a fist fight. It started when one Richard Lent (a Washington tax lawyer) found all the no-smoking seats filled and he demanded to be given one. An offer of a seat on the next flight was refused and none of the passengers seated in the no-smoking section would exchange their seat with him. Mr. Lent was seated in what had been classified as the smoking section of the aircraft and which was then declared to be a no-smoking area. His fellow passengers, however, decided to disregard both the reclassification and the pilot's orders not to smoke in that section, and did so. Lawyer Lent decided to assert what he believed were his rights and a free-for-all broke out. Smoking on board aircraft had now become a safety hazard,[23] and the pilot made an unscheduled landing.[24]

Eastern Airlines had been previously involved in another, well publicised, smoking-related incident,[25] this time involving Civil Aeronautics Board member Elizabeth E. Bailey. The setting was the same as in the occurrence described above: a late-arriving, non-smoker checks in only to find that the smoking/no-smoking boundaries have been drawn up and they are issued with a seat in the smoking section of the aircraft. Once on board, Ms. Bailey made a fuss. The carrier claimed that the flight attendant tried to accommodate member Bailey's request that her row be rezoned as a no-smoking area, whereas Ms. Bailey claims she was issued an ultimatum to either sit in the smoking section or to deplane. The carrier also denies that the flight attendant called Ms. Bailey "a witch" although the luckless attendant was reprimanded for her welcoming statement: "It's sure nice to have you all on board, except that lady in the back".[26] (One hopes she would have also been taken to task for making such a statement to a common mortal and not purely because it was made to a member of the travelling public holding the exalted rank of Board member.)

The non-smoking Ms. Bailey rode in the smoking section of the aircraft from Atlanta to Tallahassee where, rather than take a swing at the offending stewardess, she showed her a draft of a report on the incident and identified herself as a C.A.B. member. The revelation of identity brought an apology from Eastern's President, Frank Borman.[27] Apart from member Bailey's wrath, Eastern and Mr. Borman faced the possibility of a $500 fine if the breach of the regulations were not

contested, whereas a conviction results in a $1,000 fine; for the airline industry this probably has the same impact as does a parking ticket on a motorist.

The Canadian approach

In Canada, the protective arms of the Civil Aeronautics Board's Bureau of Consumer Protection are not tightly entwined around the passenger. If the rows permanently designated as the no-smoking area are full, then the section is full. There are no last minute reclassifications.

Neither the C.A.B. nor Canada's Department of Transport attempt to impose their smoking regulations on foreign carriers but other remedies are at hand. For example, Iberia Airlines of Spain was ordered to pay $50 in damages to a passenger[28] for failing to give him a seat in the aircraft's no-smoking section, on a Montreal - Mexico City flight, as had been previously agreed.[29] The Montreal Small Claims Court[30] made the award on the basis of the agreement entered into between the airline and the passenger before he boarded the aircraft. Although the passenger was seated in the no-smoking section he realised soon after take-off that it had been invaded by smokers, and complained to a stewardess who delivered a warning to the smokers that the section was reserved for non-smokers. The warnings, however, merely brought forth clouds of tobacco smoke and threats (in Spanish).[31]

The breach of contract approach appears a sensible approach to the "to smoke or not to smoke" dilemma. The $50 fine in the case discussed above amounted to a rebate on the price of the disconcerted and discontented passenger's ticket. The solution to the problem would appear to lie in offering a passenger a rebate before he boards the flight rather than in an award of damages after the journey's completion. In this way both smokers and non-smokers who cannot be accommodated in the section of their choce could be offered an inducement to refrain from starting a fight!

A smoke-free cabin

Although the C.A.B. regulations provide for segregated seating, they do not guarantee a smoke-free cabin.[32] The recent case of Ravreby v. United Airlines, Inc.[33] held that the defendant did not breach its duty of care to a passenger in the no-smoking area of the aircraft by allowing passengers in the smoking section to smoke, even though the defendant claimed that the first class cabin (on a flight from Des Moines, Iowa to Reno, Nevada) was completely filled with smoke. The likelihood of injury to the non-smoking passenger was remote, notwithstanding the fact that in this case Dr. Ravreby[34] complained that the smoke-filled cabin caused him "extreme nausea, hoarseness and irritation to the eyes and throat."[35] His discomfort was exacerbated by hay fever and a heart condition which made him extra-sensitive to air pollutants. This plaintiff's medical condition appears to be a clear

case of an "inherent defect" in the passenger[36] being a major contributory factor to his injury or, as in this case, his predisposition to discomfort. The Court held that the air carrier had a duty to preserve the comfort of its smoking passengers as well as its non-smoking passengers, and a ban on all smoking in the first class cabin would have caused the former great discomfort. Moreover, an air carrier assumed no contractual duty to assure that a passenger was exposed to less smoke by the fact that the passenger was asked whether he preferred to be seated in a smoking or a no-smoking section; the only contractual relationship is to provide a seat in that particular section. There is, presumably, also a duty to use reasonable care in the performance of its services including, in the case of the subject matter at hand, prohibiting smoking when the ventilation system is not working,[38] and ensuring that passengers do not smoke whilst the no smoking sign is lighted.[39]

If the Ravreby case is good law, the furore and fracas that has been caused by the C.A.B. regulatory requirement that airlines establish no-smoking sections large enough to accommodate all the passengers who express a desire for a no-smoking seat, are all to no avail. Cigarette smoke will descend upon and irritate the non-smokers wherever they sit. Perhaps the Ravreby case is good law but it is dealing with a pollutant-sensitive individual in a smoke-filled situation which is unlikely to be encountered in modern aircraft, so that is implications are not so unreasonable. There are obviously no guarantees attached

to the provision of a seat in the no-smoking section, but a reasonable expectation does exist that the occupant of that seat will be breathing comparatively unpolluted air.[40]

Recent policy

At the beginning of this year, the Civil Aeronautics Board decided to allow the airlines to experiment with their own aircraft no-smoking section plans.[41] This provisional measure was in anticipation of oral arguments (heard on May 13) on the way in which, if at all, the Board should alter its existing regulations. The major options open to the Board were either to propose a complete ban on smoking on commerical aircraft (and thus discriminate completely against nicotine addicts), or to rescind all Federal regulations dealing with smoking on board aircraft, or to leave things as they stood. As it turned out, the C.A.B. decided to adopt none of these options, and the decision handed down on June 25 merely changed the rule under which late-arriving passengers were guaranteed a no-smoking seat. A passenger who loses a confirmed seat reservation because of their late arrival at the check-in counter will also lose the right to demand a no-smoking seat if still able to board the aircraft.[42] This change in the regulations should be sufficient to ensure no more last-minute redesignation of rows as no-smoking areas and no more fist fights. Partitions enclosing the smoking section might also add to the peace of mind of both passengers and crew.

The current feeling among the airlines is that the regulations as they stood and as they still stand "provide a backbone for the non-smokers to act obnoxiously",[43] but even if the government should in the future abandon its rules on the subject, the U.S. airlines would continue to offer passengers both smoking and no -smoking sections on flights, since any carrier that eliminated the no-smoking area would be at a competitive disadvantage. If free market forces are allowed to operate to the full extent envisioned by the Airline Deregulation Act of 1978,[44] the practice of segregating smokers from non-smokers would, in all likelihood, continue without any rules. Unprotected by the C.A.B. regulations, the expandable no-smoking section concept would probably disappear giving way to the fixed boundaries found on Canadian airlines.[45] Reservation of a no-smoking seat would become similar to reserving a window seat: checking-in early would be the only way of guaranteeing either.

CONCLUSION AND RECOMMENDATIONS

Although the anti-social conduct of an individual who insists on smoking in a no-smoking area cannot be detected at the time of checking-in, it seems to be a prime example of a case in which removal of the passenger would be justified under the Canadian tariff rules, since their conduct is definitely impinging on the comfort of other passengers.[46] The C.A.B., in its rush to impose equity on all and sundry, has deprived the U.S. carriers of this discretionary right.[47] Perhaps the well-publicised carrying out of such Draconian measures (which have been used

on inebriated passengers[48]) on a few occasions would be all that is required to discourage anti-social behaviour.

Failing the above, there seems to be no reason why non-accommodation in the smoking/no-smoking area of a passenger's choice cannot be regulated in the same way as denied boarding compensation is regulated.[49] Monetary compensation could be offered either if boarding is denied because there are no seats left in the section[50] that the passenger requires, or because they agree to take a seat in the inappropriate section and suffer the ensueing discomfort of either not being able to light up, or of being surrounded by nicotine enthusiasts. Compensation would be justified since the carriers are as much at "fault" for the discomfort caused, because they decide on what percentage of rows should be designated as the no-smoking area, as they are for their overbooking practices which result in the inconvenience of being kept waiting around an airport for the next flight. What price incovenience? What price discomfort?

DRUNKS

Background

The problem of the drunken passenger is one which the airlines have helped to create with free drinks in the first class cabin, free drinks on charter flights, and drinks served to the passenger in

his seat which circumvents the annoyance of having to line up at a bar.

The intoxicated passenger[51] is a problem not only to himself, but also to his fellow passengers when he feels ill, becomes over friendly or, most commonly, decides to act belligerently. In the latter case the drunken passenger has become a safety hazard.

Tariff regulations in the United States

The difficulties presented by drunks were well understood by the Civil Aeronautics Board when they cancelled those tariff rules which could be construed as allowing the carrier a too wide discretion to refuse transportation to particular types of persons applying for carriage.[52] Both the Show Cause Order,[53] the Order itself[54] and the Notice of Proposed Rulemaking on Non-Discrimination on the Basis of Handicap[55] specifically allows the carriers to refuse carriage to intoxicated persons even though the carriers, should the proposed rulemaking become effective, would be prohibited from discriminating against handicapped persons in general.[56] Intoxicated persons are also exempted specifically from the definition of "handicapped persons" for the purposes of offering reduced fares on a space-available basis.[57] With the cancellation of the general tariff rule permitting refusal of carriage, new tariff provisions have been specifically drafted to replace this rule with respect to drunks.[58]

Tariff regulations in Canada

In Canada, carriers retain the discretionary right to refuse carriage to, or remove enroute, any passenger whose conduct or physical conditon is such as to make refusal or removal necessary for the reasonable safety or comfort of other passengers or involves any unusual hazard or risk to himself or to property.[59] With reference to enroute removals, the powers of the aircraft commander to make emergency landings for safety reasons have been recognised both domestically and internationally.[60]

Judicial background

Judicial authority for common carriers to refuse to transport intoxicated passengers was established early on by the U.S. Supreme Court,[61] although once a carrier had admitted an intoxicated person to the carrier's vehicle he cannot be expelled unless he misbehaves during the journey.[62] Drunkenness on board per se is not a reason for removal en route. Drunken and insane passengers were usually classified together in early common carrier cases[63] as both were viewed as violent and dangerous. Nowadays, the problems presented by drunks are well summed up in a tariff provision (although not directly related to intoxication) which states that a passenger may be refused carriage if their

> "conduct or condition is or has been known to be abusive, offensive, threatening, intimidating, violent, or otherwise disorderly and there is a possibility in the prudent judgment of a responsible carrier employee that such a passenger would cause disruption or serious impairment to the physical comfort and safety of other passengers or carrier's employees, interfere with a crew member in the performance of his duties aboard carrier's aircraft, or otherwise jeopardise safe and adequate flight operations."[64]

This regulation covers both of the possibilities that a drunk can become either belligerent or amorous (and sometimes belligerent and amorous) and that either of these types of behaviour can be just as disconcerting to fellow passengers and flight personnel.

Refusal of carriage

Although, in theory, the carriers have entrenched discretionary authority to refuse carriage to someone who is drunk, in practice it can be very difficult to identify precisely the symptoms. Slurred speech may be due to oral deformities or lack of familiarity with the language. An unsteady gait may be the result of a permanent physical handicap or recent injury; the influence of medication could also account for either of these symptoms.

A clear example of the carrier's dilemma was brought out in the case of Austin v. Delta Airlines,[65] in which the revered Dean

of Southern University in Shreveport was refused carriage on a Delta Airlines flight between Shreveport and New Orleans on the grounds that he did not appear to be in the proper condition to travel,[66] i.e. that he was drunk. The reasons for such a decision were based on the observation of the ticket agent that the plaintiff was leaning on his two companions who had brought him to the airport, that he walked in a "shaky" manner, that his speech was slow, and, perhaps the most damning piece of evidence, when the plaintiff introduced himself and requested his ticket, he placed his elbow on the counter for support and allowed it to slip, barely avoiding a fall. Thus, although the plaintiff was not actually staggering, nor was his speech actually slurred, Dr. Austin was informed that he would not be issued a ticket for the flight.[67] The Dean filed suit against Delta, seeking damages for embarrassment, humiliation and injury to his professional reputation caused by the allegedly unjustifiable refusal of carriage and accusation of drunkenness.[68]

The Louisiana Court of Appeal found that in order to assume the reasonable safety and comfort of the passengers, the airline personnel must be given "much" discretion[69] in determining a person's physical suitability for the intended flight and although their conclusions will not always be correct when viewed in retrospect,

> "If, however, their determination is made in good faith based on observation of personal appearance, actions or conduct which would reasonably lead the

> airline employees to believe that person presenting himself for passage was not in proper physical or mental condition to adequately care for himself in an emergency or who might cause annoyance to other passengers because of his condition then no liability should attach even if the conclusion later proved to be erroneous."[70]

The evidence of the plaintiff's mannerisms was sufficient to lead Delta's employee to suspect that Dr. Austin was under the influence of alcoholic beverages even though they resulted, in fact, from a physical weakness following a period of convalescence from a haemorrhage and, possibly, as a result of the medication he was taking in treatment thereof. In short, Delta's agents were found not to have exceeded their discretion.[71]

If the case had been decided subsequent to the cancellation of the discretionary tariff rules respecting refusal of carriage,[72] the result may well have been the same. However, the case of Adamsons v. American Airlines, Inc.[73] presents a caveat since in that case a carrier was held negligent in that it refused a passenger carriage without first taking steps to ascertain the facts concerning the passenger's condition. There is no evidence in the Austin case that enquiries were made of Dr. Austin's two companions or of himself as to the reason for his inebriated mannerisms.

A much publicised refusal of carriage on the grounds of

intoxication occurred when Maurice Gibb of the popular singing group the "Bee Gees" was refused passage on the London to New York British Airways Concorde.[74] The Heathrow Airport police described the condition of the singer as "unsuitable for travelling" following his ninety minute sojourn in the airport's celebrity lounge.[75] The lounge offers free champagne to all its patrons which is another example of the encouragement of alcoholic consumption by the air travel industry.

On-board incidents

Once on board, the air carriers fear that the inebriated individual will either act belligerently causing, at the very least, a nuisance and, at the most, physical harm to the other passengers, or will make amorous advances at either his fellow passengers or the flight crew. At best, the unruly passenger may be restrained and confined to his seat, at worst, the pilot would have to make an emergency landing with the concomitant expenses and red tape.

In case this line of argument is considered to be too hypothetical, the following reported incident should suffice to dispel that impression. In January this year, a British engineer, John Waddington, had been drinking heavily aboard a Laker Airways London - Los Angeles flight, and when he was refused another drink he became violent, screaming and kicking both passengers and the pilot.[76] His conduct was such

that he was restrained by his fellow passengers and tied to his seat. The aircraft made an unscheduled landing at Winnipeg Airport so that Mr. Waddington could be removed, whereupon he continued to behave in a violent manner, smashing a policeman's watch and hitting airport guards.[77]

It was estimated that the cost of making the unscheduled landing would amount to approximately $6,000 (Canadian) for increased fuel consumption and landing fees. These unforeseen expenses must have been particularly burdensome for Laker Airways since the carrier specialises in low cost fares for "no frills" service.[78] To add insult to injury, Laker ended up paying the unwanted passenger's fare back to London. Engineer Waddington had been on his way to Los Angeles to start a new job but had lost the position when he failed to arrive on time. Stranded in Winnipeg, without the money for the return fare or a visa to work in Canada, Laker Airways agreed to pay his fare home to London on an Air Canada flight. (Mr. Waddington's behaviour on the return flight went unreported and was, therefore, presumably unremarkable.) It should be noted that the recalcitrant passenger has not had the temerity to sue Laker for breach of contract, loss of employment opportunity and income therefrom or for false imprisonment either in his plane seat or in a foreign country or anything else along similar lines.[79]

An issue which must be faced in relation to on-board drinking

is the question of who should pay the financial costs of this type of emergency landing. Was it reasonable in the Laker Airways incident that the carrier had to absorb the additional costs of the unscheduled landing or should Laker have been entitled to bring suit against Mr. Waddington to recover its outlays? There has been at least one judicial decision in which the passenger was ordered to pay the costs of an unscheduled landing,[80] a case invplving an emergency landing made following the discovery that a passenger was carrying a highly inflammable substance.

One commentator[81] is adamant that, should a passenger be responsible for the aircraft making an unscheduled landing then that passenger should be made to compensate the airline for damages suffered in terms of additional fuel consumption, landing fees and any additional refreshments served to the passengers if the delay in reaching the original scheduled destination results in missed connections and the carrier offers the stranded passenger a meal whilst awaiting alternative connecting flights. In such circumstances, the intoxicated passenger would be held financially responsible, irrespective of any criminal liability, to indemnify the carrier for the damages suffered.[82]

Another example of an allegedly drunken passenger becoming amorous at first and then violent was the case of Manfredonia et al. v. American Airlines, Inc.[83] The plaintiff, Linda Manfredonia, alleged

that on a flight from New York to Dallas she was seated across the aisle from a young man who was served several alcoholic drinks by the defendant's flight attendants and who became increasingly intoxicated and abusive. Not only did he make sexual advances to her, when she did not respond to these overtures he suddenly punched her in the eye.

On a charge that the defendant was guilty of common law negligence in serving alcoholic beverages to the assaultive passenger or in failing to exercise proper care toward Mrs. Manfredonia to protect her from injury and humiliation, the jury found in favour of the defendant. It is unfortunate that the jury's reasons for this decision were not stated; perhaps they feared that to find the carrier liable in this instance would be the first step towards making all flights strictly teetotal.

On a charge of a breach of the Dram Shop Act[84] by selling intoxicated beverages to the offending passenger whose intoxication had contributed to the plaintiff's injury, the New York Supreme Court (Appellate Division), found the Act could not be applied to an air carrier in interstate flight. As the beverages were served during the flight i.e. whilst the aircraft was travelling through air space, both the sale of the liquour and the injuries occurred beyond the limits of the State of New York. Since the statute reflected public policy to curb the "evils and injuries"[85] arising from the sale of intoxicating

beverages in the State, the purpose of the statute would not be furthered by enforcing it against sales not made within the State. Hopkins J. found that in addition:

> "to enforce the statute for the benefit of any passenger embarking on a flight from New York to an out of state destination would cause chaotic and irreconciable results springing from the uneven protection afforded to passengers boarding the flight from States not having the benefits of the dram shop act".[86]

The Court in the Manfredonia case found that Mrs. Manfredonia and her husband (who had pleaded a derivative cause of action for loss of services) had a claim against the carrier, however, under the Federal Aviation Authority regulations[87] which have forbidden the sale of alcoholic beverages to an intoxicated person.[88] It will be interesting to see the amount of damages, if any, the jury in the new trial awards, although it appears it would be much to the advantage of American Airlines if they settled this claim out of court.

A proposed solution

In Canada, the Canadian Air Line Flight Attendants' Association want the discretion they have to refuse to serve drinks to passengers whom they regard as having had enough, extended so as to become legal limits.[89] Although they have the same rights as their counterparts

in the United States to refuse to serve intoxicated passengers.[90] they, as with the U.S. flight attendants, will most often just pour the extra drink to avoid a confrontation. The Association has petitioned the Federal government to set legal limits on the number of drinks that may be served to a passenger since the attendants would prefer to be able to say "sorry but these are the rules" and apply them indiscriminately to all passengers - drunk or sober. The reasoning behind the request is that if a passenger knew ahead of time that only so many drinks could be served, they would be less likely to take their wrath out on the staff.

The editorial writer who commented on the flight attendants' petition considered that the setting of such rules was too minor a matter to bring to bear the full weight of the Federal Government, and that the airlines, (who own the planes where the drinking is taking place) should shoulder the responsibility and set the necessary rules.[91] To characterise this matter as "minor" reveals more about the writer of the editorial than it does about the merits of the flight attendants' requests. Obviously the writer has never been a flight attendant and has probably never witnessed an in-flight intoxication incident. The editorial predated the Laker Airways episode by six months - no doubt its tone would have been different had it been written after the Laker escapade occurred.

CONCLUSION AND RECOMMENDATIONS

The suggestion that the airlines set their own rules on the number of drinks served to passengers is similar to the idea the C.A.B. is currently toying with, that is, to allow the U.S. carriers to decide individually the composition of the no-smoking sections aboard their aircraft.[92] Although competition on routes within Canada is not as fierce as it is on routes within the United States, the dictates of the market would probably ensure that aircraft in neither Canada nor the United States would ever fly "dry": Drinking and flying have gone hand-in-hand for too long in the public's mind.

If the airlines are not going to refrain from serving alcohol on board, the question arises as to whether it is fair to refuse carriage to intoxicated persons but allow passengers to drink themselves insensible during the course of the flight. It would all appear to come down to a matter of timing: what is unacceptable behaviour at the check-in counter is condoned, if not actually encouraged, in the cabin seat. The selection and refusal of inebriates before take-off is obviously discriminatory if all those who have rendered themselves intoxicated during the flight are not "removed" from the aircraft at the first available stopover point. But such an argument ignores the immensely sensible reasons behind the exclusion of persons who apply for transportation and are already drunk by the time they present themselves at the check-in counter. A more practical and less discriminatory

solution would be to impose a two drink limit on flights under two hours duration, for example, and a more generous limit on longer flights, whilst maintaining the ban on the acceptance for carriage of inebriated persons. So long as the airlines are willing to ply their passengers with intoxicating refreshments, they will have to accept the financial consequences of making emergency landings to remove passengers who have become violent due to their alcoholic intake. This latter proposition may be viewed as an application of the principle of volenti non fit injuria.[93]

FOOTNOTES

1. See infra the chapter dealing with the hijacker profile.

2. The precise figures were that during the first ten months of 1978, the Bureau received 561 complaints (Aviation Week and Space Technology, January 15, 1979, p. 26) whilst in the 1973-77 period the totals had been 229, 291, 125, 225 and 369 respectively. E.R. - 1091, Amendment 1 to part 252 (44 F.R. 5071 (1979)), p. 4.

3. 14 C.F.R. 252 was issued as E.R. - 800; 38 F.R. 12,207 (1973) and became effective on July 10, 1973: it was the response to the notice of proposed rulemaking E.D.R. - 231; 37 F.R. 19,146 (1972). Part 252 has been subsequently amended by the following regulations which are still in force:

   E.R. - 1091; 44 F.R. 5071 (1979), in force February 23, 1979.
   E.R. - 1122; 44 F.R. 28,657 (1979), in force May 10, 1979.
   E.R. - 1124; 44 F.R. 30,080 (1979), in force January 22, 1979.

   E.R. - 1124 changed the title of this part to read: Provision of Designated "No-Smoking" Areas Aboard Air Carriers. The full text of part 252 is reproduced in the appendices.

4. Section 404 (A)(1) and (2) of the Federal Aviation Act of 1958 49 U.S.C. s. 1374 (a)(1) and (2) (1976).

5. Idem.

6. E.R. - 800; 38 F.R. 21,207 (1973).

7. 14 C.F.R. 252. 1a. In 1976, The Interstate Commerce Commission adopted a rule which imposes special restrictions on private sleeping cars and on cars which have been designated as smoking areas in their entirety. 49 C.F.R. 1124.21 (b)(4); 41 F.R. 34,260 (1979).

   The H.E.W. study cited infra footnote 15, which was based on interviews with 12,000 adults, revealed that of the men interviewed, 18% smoked cigars and 12% smoked pipes.

   In a retrograde move it was reported that the C.A.B. has endorsed a proposal that would allow cigar and pipe smokers to sit anywhere in the smoking section. This decision was in response to the fact that many airlines had chosen to ban cigars and pipes entirely, rather than listen to complaints from smokers who did not want to sit at the back of the aircraft. See The Wall Street Journal, June 26, 1981, p. 6.

8. The carbon monoxide generated by one cigar is said to be double that of three cigarettes smoked simultaneously. Epstein, The Effects of Tobacco Smoke Pollution on the Eyes of the Non-Smoker, Paper

presented to the Third World Conference on Smoking and Health, New York, U.S.A., June 4, 1975, p. 2. While fewer tests have been run on pipe-smoking, several authorities place pipes and cigars in the same category with respect to the relative production of pollution. Idem. See also E.R. - 1091; 44 F.R. 5071 (1979), pp. 7 - 13.

9. 14 C.F.R. 252.2 (a).

10. 14 C.F.R. 252.2 (b).

11. 14 C.F.R. 252.2 a.

12. 14 C.F.R. 252.3.

13. 14 C.F.R. 252.2 (c).

14. 14 C.F.R. 252.2 (d).

15. The Department of Health, Education and Welfare's study on the Adult Use of Tobacco published in June 1976, revealed that in 1975, 70% of the 12,010 persons interviewed (and more than 50% of the interviewees who smoked) expressed a desire for additional smoking restrictions in public places. The comparable figure for 1970 had been 57% of the total respondents. Those persons who were bothered by smoking rooted their complaints in perceived physical discomfort (rather than in moralistic judgments) stating that tobacco smoke in the aircraft cabin bothered their eyes, nose, throat and chest. E.R. - 800; 38 F.R. 12,207 (1979). In National Association of Motor Bus Owners v. United States 370 F. Supp. 408 (D.D.C. 1974) (Parker D.J.), the Interstate Commerce Commission's action in requiring segregation of smokers and non-smokers, and in confining smokers to 20% of the capacity of buses was upheld. (This figure was subsequently raised to 30%.)

16. Idem.

17. E.g. Ravreby v. United Airlines, Inc. 15 Avi. 18,235 (Iowa S.C. 1980) (Uhlenhopp J.) and Nader et al. v. Federal Aviation Administration 440 F. 2d. 292 (D.C. Cir. 1971) (Smith Ch. D. J.).

18. In the Nader case, cited supra, it was held that since smoking on board did not represent a safety hazard, the situation did not warrant the imposition of an emergency ban.

19. 440 F. 2d. 292 at 294 - 5. The H.E.W. survey cited supra footnote 15, showed that in 1975, 39% of adult (over 21) males and 29% of adult females were smokers.

20. Ibid., at 295, footnote 4.

21. 14 C.F.R. 252.2,(c) and (d).

22. In the period covering 1973 - 78, only two out of sixty-four smoking-related cases had been settled, the other sixty-two were dismissed. In January 1979 there were seventy-four docketed complaints for C.A.B. hearings. Aviation Week and Space Technology, January 15, 1979, p. 27. The complaints fall into two categories: failure to accommodate a request to be seated in a no-smoking section and failure to enforce the rules in a no-smoking section.

23. See supra footnote 18.

24. Reported in The Gazette, December 6, 1979, p. 1. R.S. McDonald, Supervisor, Passenger Claims, at Air Canada's Head Office in Montreal, revealed that the story did not end in Baltimore. It was discovered that the aircraft was too heavy to take off from the runway at the Baltimore Airport. Accordingly, some of the passengers were put on other flights to New York, but others had to be taken back to Washington by bus. The flight apparently contained a number of lawyers who missed court appearances to the detriment of their clients, and who are taking action against Eastern. The two protagonists are taking action against each other and against the airline which in its turn, forced to strip the aircraft in order to get it airborne, is seeking compensation from the pugilistic passengers. If Eastern is successful, then it would not be the first time that an airline has been awarded compensation for a passenger's misdeeds. See, for example, Deutsche Flugdienst v. Hüetzen 1961 Z.L.W. 205 (Court of 1st Instance Frankfort).

25. Reported in Aviation Week and Space Technology, April 23, 1979, p. 28.

26. Eastern Airlines would have done well to reprimand the flight attendant for her abuse of the English language!

27. Mr. Borman is a former United States astronaut.

28. Quebec City lawyer Andre Sirois; the North American legal profession seems to be particularly virulent on the subject of non-smokers' rights.

29. Reported in The Gazette, May 24, 1980, p. 8.

30. Laganière J. presiding.

31. Because of his discomfort on the outward bound flight, the plaintiff decided to return home via CP Air which "forced" him to spend three more days in a Mexican hotel. The Court refused to award damages for the enforced stay holding that the passenger should have made sure that the no-smoking regulations would not be enforced before switching to another airline for the return flight. How a passenger accomplishes this is extremely difficult to comprehend especially (as was the case in the Montreal - Mexico City flight) since the non-enforcement of the regulations only materialised after take-off.

32. The ventilation systems in aircraft cabins are meant to be very effective in changing cabin air. In modern jets, for example the DC-10, the air is replaced at least every three minutes, and even faster in the Boeing 727 - 200. C.A.B. E.R. - 1091; 44 F.R. 5071 (1979). Continental Air Lines' claim that a study it undertook in 1973 showed that any forward or aft smoke is limited to a maximum of one row forward or aft of the smoking passenger, may have been somewhat biased. The efficiency of the ventilation systems do vary with the make of the aircraft. Some Boeing 747 ST models are reported to fly with less than total ventilation capacity to conserve energy. Older models of the Boeing 747 often require that the ventilation systems be turned off in order to permit take-off within acceptable distance limitations. Idem. Section 252.2a of the C.A.B. regulations prohibits smoking when the ventilation systems are not fully functioning.

33. Cited supra footnote 17. The case was decided on June 15, 1980.

34. The plaintiff was both a physician and a member of the Iowa bar.

35. 15 Avi. 18,235 at 18,235.

36. See supra the discussion of inherent defects in passengers in the chapter of this study on the handicapped.

37. This case seems to provide an answer to the question posed in the section of this study supra on the handicapped, as to whether passengers who travelled in the first class cabin were more solicitous of each other's health than were passengers travelling in the rear of the plane. At one point during the journey, Dr. Ravreby had requested all the passengers in the first class cabin to stop smoking, but they had all refused to comply with his request.

38. See 14 C.F.R. 252.2a. See also Ravreby v. United Airlines, Inc. cited supra footnote 27, at 18,239 - 18,240.

39. 14 C.F.R. 121.317 (b). For a violation of this regulation the passenger is liable for a fine not exceeding $1,000 for each

violation. 49 U.S.C. s. 1471 (a)(1) (1976). See United States v. Duffy 14 Avi. 17,743 (9th Cor. 1977) (per curiam). All carriers ban smoking in the toilets due to the presence of the various paper products supplied for the passengers use. The necessity for this rule was brought home with the accident on July 11, 1973 involving a Varig Airlines Boeing 707 near Paris, France. An on-board fire resulted in a forced landing which, although successful, was too late to save 116 out of the 117 passengers who died of smoke inhalation. The cause of the fire was attributed to a burning cigarette left unattended in one of the aircraft's washrooms. International Civil Aviation Organization, Aircraft Accident Digest, no. 21; 1977, I.C.A.O. Circ. 132 - AN/93, p. 68. See also I.C.A.O., Operation of Aircraft: Annex 6 to the Convention on International Civil Aviation, s. 6.2.2.1 (d) (iii) and I.A.T.A. Recommended Practice 1781 (formerly 1400): Smoking in Aircraft.

40. The Ravreby case touches on the issue of the "point of contact" between the smoking and the non-smoking rows. 15 Avi. 18,235 at 18,239. The C.A.B. have never commented on the problem of cigarette smoke from the first row of the smoking section drifting forward into the last row of the non-smoking section (see the Continental Air Lines survey discussed supra footnote 32), but has merely stated that a no-smoking area must consist of at least two rows of seats since a section of only one row could not constitute an adequate no-smoking "area". E.R. - 1091; 44 F.R. 5071 (1979), p. 15

41. The plans would still require Board approval before they could be implemented. Aviation L.R. no. 723, January 13, 1981, p. 1.

42. This lack of choice will also apply to stand-by passengers, see The Wall Street Journal, June 26, 1981, p. 6, and The Gazette, June 26, 1981, p. 16.

43. The Gazette, May 14, 1981, p. 22.

44. P.L. 95-504; 92 Stat. 1705.

45. The fixing of the size of the no-smoking section is left to the discretion of the individual airlines in Canada. There are no requirements similar to the C.A.B.'s Economic Regulations part 252 to be found in the Canadian Air Carrier Regulations, Consolidated Regulations of Canada 1979, c. 3.

46. Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195, Rule 35 (F)(1) (hereinafter referred to as Tariff no. PR-7).

47. This tariff regulation and others similar to it were cancelled for U.S. carriers by C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979, on the grounds that the wording of the tariff rule was too vague and the potential for its abuse by the carriers existed. One wonders if Air Florida, Delta Air Lines and Republic Airlines could invoke their tariff stipulation that they will remove at any point a passenger who has an offensive odour (Tariff no. PR-7, Rule 35 (F)(4)(e)) to justify the removal of an intransigent smoker.

48. See the following part of this chapter which discusses the subject of drunks.

49. See supra the chapter of this study on overbooking and Tariff no. PR-7, Rule 245.

50. This argument presupposes that the boundaries of the smoking and no-smoking sections will be fixed and no instantaneous enlargements of either section will be allowed.

51. Airline regulations in the United States usually classify the drunk and the drugged passenger together unless, of course, the latter type of passenger has been prescribed drugs as part of a course of professional medical treatment. Many of the remarks, therefore, relating to intoxicated passengers will also be appropriate to passengers affected by drugs. See, for example, E.R. - 1070, Amendment 4 to part 223; 43 F.R. 38,378 (1978). Out of deference to female chauvinism, intoxicated passengers will be referred to throughout this discussion as male, but the author acknowledges that female passengers do, on occasion, imbibe to excess and may even become obstreperous.

52. C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979 cancelling Tariff no. PR-7, Rule 35 (F)(4) for U.S. certified carriers and other tariff provisions similar to it. See footnote 2 of the chapter of this study supra on pregnancy, for a list of the tariff rules which were cancelled. The cancellation and Order followed Show Cause Order no. 79-1-70 (Docket 34,435) dated January 11, 1979.

53. Ibid., p. 1.

54. Cited supra footnote 52, p. 3.

55. S.P.D.R. - 70 (Docket 34,030) 44 F.R. 32,401 (1979) dated May 31, 1979, p. 4, and proposed new part 382.12.

56. Proposed new part 382.4. See also 14 C.F.R. 121.575 (c) (1980) which prohibits intoxicated persons to board the aircraft of U.S.

certified carriers.

57. E.R. - 1070 cited supra footnote 51.

58. Tariff no. PR-7, Rule 35 (F)(2)(d) applicable to Air California, Alaska Airlines, American Airlines, Cardinal/Air Virginia, Cochise Airlines, Hawaiian Airlines, Hughes Air West, Ozark Air Lines, Pacific Southwest Airlines, Pan American World Airways, United Air Lines, US Air and Western Air Lines; Rule 35 (F)(3) applicable to Air New England, Aloha Airlines, Big Sky Airlines, Eastern Airlines, Piedmont Aviation, Texas International Airlines and Trans World Airlines; and Rule 35 (F)(4)(b) applicable to Air Florida and Delta Air Lines.

Escorted mental patients and their escorts are not allowed to drink alcoholic beverages whilst on board. Tariff no. PR-7, Rule 35 (F)(2)(g)(vi)(bb)(3) applicable to American Airlines, Hawaiian Airlines, Hughes Airwest and Pacific Southwest Airlines.

59. Air Canada International Rules Tariff no. PR-1, Rule 3(A) and Tariff no. IPR-1, Rule 3(A); CP Air Local and Joint International Passenger Rules Tariff no. 2, Rule 8; Tariff no. PR-7, Rule 35 (F)(1).

60. See the 1944 Chicago Convention (Convention on International Civil Aviation signed at Chicago on December 7, 1944), the 1963 Tokyo Convention (Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on September 14, 1963), and the 1971 Montreal Convention (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on September 23, 1971). See also the Draft Convention on the Legal Status of the Aircraft Commander drawn up in 1947.

61. Pearson v. Duane 4 Wall. (71 U.S.) 605; 18 L. Ed. 447 (1866) (Davis J.).

62. Ibid., 4 Wall. 605 at 615.

63. Idem. See also two cases involving the St. Louis Iron Mountain and Southern Railway Company: Meyer v. St. Louis I.M. & S. Ry. Co. 54 F. 116 (8th Cir. 1893) (Shiras D.J.); and Price v. St. Louis I.M. & S. Ry. Co. 75 Ark. 479; 88 S.W. 575; 112 Am. St. Rep. 79 (Ark. S.C. 1905) (Wood J.). It was permitted to refuse carriage to either intoxicated or insane passengers if the persons so affected were either without an attendant to look after them (the Price case), or if their presence on the carrier's vehicle might cause injury or substantial discomfort to the other passengers (the Meyer case).

64. Tariff no. PR-7, Rule 35 (F)(3)(b) applicable to Air New England,

Aloha Airlines, Big Sky Airlines, Eastern Airlines, Piedmont Aviation, Republic Airlines, Texas International Airlines and Trans World Airlines.

65. 246 S. 2d. 894; 11 Avi. 18,245; 1971 U.S. Av. R. 401 (La. S.C. 2d. Cir. 1971) (Price J.).

66. A tariff rule similar in wording to tariff no. PR-7 referred to above (footnote 52), namely, Local and Joint Passenger Rules Tariff no. PR-5, C.A.B. no. 117, was in effect at the time which specified that the carrier could refuse transportation to a passenger who was incapable of caring for himself and was not accompanied by an attendant responsible for caring for him enroute.

67. The plaintiff immediately went to the Braniff Airways ticket window where he was given a seat on a flight which departed approximately one hour later.

68. The damages sought were $10,000 for the embarrassment and humiliation and $20,000 for injury to the plaintiff's professional reputation. The trial judge awarded Dr. Austin $500 on account of the fact that the evidence did not disclose he was drunk at the time and taking into account the fact that Braniff Airways accepted him for passage immediately thereafter. Both sides appealed.

69. 11 Avi. 18,245 at 18,247.

70. Idem.

71. The Court also took into account the fact that the Delta flight departed with empty seats and thus it would have been to the financial advantage of the carrier to have issued the ticket. This ex post facto observation should not have been taken into account when assessing good faith: firstly, because the ticket agent observing a passenger's mannerisms cannot know whether other passengers would arrive at the last minute to fill up the plane; and secondly, if the aircraft departed with a full complement of passengers, the burden of proof to be discharged by the airline would (according to the reasoning of Price J.) be heavier. A fortuitous event, such as aircraft departing with a full complement of passengers, should not be the cause of an increase in the burden of proof.

72. See supra footnote 52.

73. 16 Avi. 17,195 (N.Y.S.C. 1980) (Wollach J.).

74. Reported in The Gazette, October 16, 1980; p. 66.

75. According to the newspaper report, Mr Gibb is a noted non-teetotaler. The airport police were acting in accordance with the United Kingdom's Air Navigation Order, S.I. 1976 No. 1783, art. 46 (1) which forbids a person who is drunk to enter or be in an aircraft registered in the United Kingdom wherever it may be or any aircraft within the United Kingdom. See P. Martin, J.D. McClean, E. de Montlaur Martin, J. Bristow, J. L. Brooks eds. Shawcross and Beaumont on Air Law, London, Butterworths, 1977, para. 239, p. 245.

76. Reported in The Gazette, January 6, 1981, p. 8.

77. Engineer Waddington received an absolute discharge on a charge of creating a disturbance, a six-month conditional discharge for assaulting one of the arresting officers and was ordered to pay $30.00 restitution for the broken watch. The Gazette, January 20, 1981, p. 7.

78. "No frills" service excludes in-flight stereo headsets, movies and food but not, apparently, alcoholic beverages.

79. With respect to false imprisonment, see J.G. Fleming, The Law of Torts (5th ed.), Sydney, The Law Book Company, 1977, pp. 26 - 29, and W.L. Prosser, Handbook of the Law of Torts, (4th ed.), St. Paul, Minn., West Publishing Co., 1971, pp. 42 - 49. False imprisonment has been pleaded before in airline cases, for example, Williams v. Trans World Airlines, Inc. 369 F. Supp. 797; 12 Avi. 18,231; 1975 U.S. Av. R. 526 (S.D.N.Y. 1974); aff'd. 509 F. 2d. 942; 13 Avi. 17,482; 1975 U.S. Av. R. 513 (2d. Cir. 1975) (Anderson C.J.).

80. Deutsche Flugdienst v. Hüetzen cited supra footnote 24.

81. E. Mapelli, Miscelanea Juridico-Aeronáutica, Revista General de Derecho, Valencia (España), 1977, reprinted in E. Mapelli, Trabajos de Derecho Aeronáutico y del Espacio, Colección de Estudios Juridicos (vol. II), Madrid, Instituto Iberoamericano de Derecho Aeronáutico y del Espacio y de la Aviación Commercial, 1978, pp. 440 - 443. The hypothetical situation discussed in this article relates to a passenger making a nuisance of themselves by way of making amorous advances to a stewardess. The comments, however, with respect to the passenger's financial responsibility apply also to drunkards.

82. Ibid., p. 443. Señor Mapelli bases his argument on section 1902 of the Spanish Civil Code which is similar to article 1053 of the Quebec Civil Code of 1866 which states that:

> "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill."

It should also be borne in mind that inebriation is no defense in a civil case.

83. 15 Avi. 17,638 (N.Y.S.C. Appel. Div. 1979) (Hopkins J.).

84. New York General Obligations Laws, s. 11 - 101:

> "Any person who shall be injured in person, property, means of support, or otherwise by an intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages."

85. 15 Avi. 17,638 at 17,641.

86. Idem. This practical consideration must also have been in the minds of the Supreme Court of Canada when they decided that the Province of Manitoba was not entitled to levy Provincial Retail Sales Tax on, inter alia, services, meals and liquor consumed on Air Canada flights whilst they flew through the Province's air space or which landed temporarily in the Province from outside points before proceeding out of Manitoba. Province of Manitoba v. Air Canada [1977] 3 W.W.R. 129 (Man. Q.B.); aff'd. [1978] 2 W.W.R. 694 (Man. C.A.); aff'd. (1980) 32 N.R. 244 (Laskin C.J.C.). For a case comment see 1978 Annals of Air and Space Law, vol. III, p. 642. On rights of ownership in air space see Lacroix v. The Queen [1954] Ex. C.R. 69 (Excl. Ct.) (Fournier J.). and N.M. Matte, Treatise on Air-Aeronautical Law, Toronto, The Carswell Co. Ltd., 1981, pp. 53 - 69.

87. The authority for making the regulations stems from the Federal Aviation Act of 1958 (49 U.S.C. s. 1421 (a) (1976)), and a breach of this act may ground a private cause of action for damages arising from injury sustained thereby if the tests enumerated in Cort v. Ash 496 F. 2d. 416 (3d. Cir. 1974); rev'd. 422 U.S. 66; 95 S. Ct. 2080; 45 L. Ed. 2d. 26 (1975) (Brennan J.) are fulfilled. The text of the Cort tests is reproduced in full supra in the chapter of this study on overbooking at footnote 23 there of. See also Fitzgerald v. Pan American Airways 132 F. Supp. 789 (S.D.N.Y. 1955); rev'd. and rem'd. 229 F. Supp. 499 (2d. Cir. 1956), (Frank C.J.) for confirmation of a private right of action based on a breach of s. 404 (b) of the Federal Aviation Act of 1958

irrespective of the Cort tests.

88. 14 C.F.R. 121.575 (1980) states in part:

> (b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft who -
>
> (1) Appears to be intoxicated;
>
> (c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.

89. The Gazette, June 14, 1980, Editorial.

90. Air Regulations, SOR/61-10, as amended by SOR/77-307, s. 820A (3).

91. The Gazette, June 14, 1980, Editorial.

92. See the discussion supra in this chapter of the study. Such a scheme was not adopted in the Board's decision on June 25, 1981.

93. It could also be viewed as an example of contributory negligence except that serving a modest amount of alcoholic refreshments would probably not be viewed nowadays as common law negligence. See supra the discussion of the Manfredonia v. American Airlines, Inc. case. On the issue of voluntary assumption of risk, see J.G. Flemming cited supra footnote 79, pp. 278 - 291 and W.L. Prosser cited supra footnote 79, pp. 439 - 457.

CHAPTER 7

RACIAL DISCRIMINATION

RACIAL DISCRIMINATION

HISTORICAL BACKGROUND IN THE UNITED STATES

In the 1980's it is hard to visualise racial discrimination as constituting a problem in air travel; indeed, living in Canada it is difficult to realise that discrimination was ever a pressing problem.[1] The opposite is true of the United States.[2]

Prior to the Civil War,[3] the negro's rights were so limited that public service companies seldom troubled themselves with the problem of discrimination on account of colour.[4] There were a great many free negroes in both the north and south of the United States before the Emancipation Proclamation,[5] but since the courts had held that a man of African descent (whether slave or freeman) was not and could not become a citizen of a State or of the United States,[6] and since an individual's rights depended to such an extent upon his being a citizen, these free negroes were subject to being discriminated against without legal redress.

After the Civil War, the Thirteenth Amendment[7] prevented slavery but the onerous position of the negroes remained unchanged,[8] and the effect of the Dred Scott decision was unaltered. The Fourteenth Amendment[9] removed the effect of this case for it placed coloured persons in the same position as any other person rightfully claiming

to be a citizen with all the concomitant legal remedies for relief against infringement of their rights. The Fourteenth Amendment went further, however, in that it provided that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."[10] (Emphasis added.)

Since the word "person" is broader than the word "citizen", an alien is protected and cannot be discriminated against by a common carrier under protection of a state law.[11]

Segregated transportation

In answer to the requirement of non-discrimination on the basis of colour, the doctrine of "separate but equal" soon dominated the transportation industry, and "Jim Crow" laws, which required that white and coloured passengers be segregated, were enacted for the railroads by the various Southern States.[14] (The decision in Hall v. De Cuir[15] had deterred state action in passing "Jim Crow" statutes applicable to interstate commerce.) Before the enactment of the "Jim Crow" laws, carriers operating in the south already had regulations requiring the separation of white and coloured passengers,[16] and the laws were intended to legalize the existing custom.

The early "Jim Crow" laws were enacted with particular reference to railroads and did not include city street car lines nor the buses which replaced them.[17] Many states, however, authorized city ordinances which required the separation of passengers of these vehicles.[18] Only one "Jim Crow" statute included steamboats.[19]

The aircraft was, of course, not contemplated at the time of the enactment of the "Jim Crow" laws, and thus the requirement for separate accommodations did not apply to them. This did not prevent one commentator,[20] writing in the early Thirties, concluding that the airlines should separate coloured and white passengers, irrespective of status and regardless of whether they are travelling interstate or intrastate, because close contact between persons of opposite race might endanger the security of all passengers and also the plane in which they are riding.[21] It was even suggested that an airline should have the discretionary power to refuse to accept a person for passage after another person of opposite race and colour had reserved a seat on the same plane. Such an action would be reasonable provided the circumstances justified it on the grounds of safety, comfort and convenience and these circumstances were said to exist in most sections of the south.[22]

It is possible that the statement above reflected the truth of the situation in the southern sates in the early 1930's, however, it cannot be said to represent the general rule in the United States

today and segregating airline passengers on the basis of colour and race would have been unacceptable even before the cancellation by the Civil Aeronautics Board of those tariff rules which allowed the carrier the discretionary right to refuse carriage based on a passenger's conduct, status or condition,[23] under which it was within the realm of possibility that the word "status" could have been interpreted as racial group.

Discrimination in interstate commerce is explicitly forbidden by section 3 of the Interstate Commerce Act.[24] The material language of this section, which has been in this statute since its adoption in 1887,[25] has also been held to render the "separate but equal" doctrine unlawful in this area.[26]

Carriage by air

As far as aviation is concerned, air carriers are subject to the provisions of the Federal Aviation Act of 1958[27] if they are engaged in interstate, overseas or foreign air commerce; in addition, certain provisions also apply to intrastate carriers. The Airline Deregulation Act of 1978, however, generally forbids state regulation of routes, rates or services of carriers having federal authority under Title IV of the Federal Aviation Act of 1958, and while there is a theoretical area of jurisdiction left to states - airlines

without federal authority - as a practical matter, few airlines remain under state jurisdiction. All airlines operating aircraft with more than fifty-six seats now have federal certificates under Title IV, including those airlines previously regulated by the states. For example, Air California, Air Florida, Pacific Southwest Airlines and Southwest Air Lines all now have federal certificates. Airlines with less than fifty-six seats are guaranteed federal authority through the statutory commuter exemptions and Civil Aeronautics Board's air taxi regulation if they comply with a few relatively non-burdensome requirements with respect to, inter alia, liability insurance.[28] Carriers having federal authority are subject to the provisions of section 404 (b) of the Federal Aviation Act of 1958 which maintains that:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever or subject any particular person . . . to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever."[29]

The case law

This anti-discrimination provision has been held, as does section 3 of the Interstate Commerce Act, to prohibit not only discrimination but also the "separate but equal" doctrine.

The leading case on this point is Fitzgerald v. Pan American World Airways[30] which concerned Ella Fitzgerald, the internationally acclaimed jazz singer, her pianist, her secretary and her agent/manager. All four are negroes. Three of the four had held tickets for first-class transportation from San Francisco, California to Sydney, Australia. The fourth member of the party joined them in Honolulu, Hawaii and was to accompany them to Sydney. At Honolulu Airport, Pan American's agents refused to let the palintiffs to reboard the aircraft and continue to Sydney in their assigned seats.

The plaintiffs sued under the anit-discrimination provisions of the Act,[31] claiming that the refusal of carriage was wilful and malicious and was motivated by prejudice against the plaintiffs because of their race and colour. (At first instance, the district judge dismissed the complaint for want of federal jurisdiction.[32]) The Fitzgerald case is noteworthy because of its finding that a violation of this section of the Act gives rise to a private right of action which may be maintained by any person who has been harmed by the violation.[33] Moreover, in the absence of contrary implications, the Court held that a criminal statute which is enacted for the protection of a specified class, creates a civil right in members of the class, even though the only express sanctions are criminal.[34]

The Second Circuit was unimpressed with the remedy for a violation of the Act[35] which was an order compelling compliance.

Since such an order could only look to the future.

> "For, whatever may be true of the flight of a plane, undeniably (outside of fiction or "pure" physics) the flight of time - despite the poet Hood's earnest prayer - is always, alas for us mortals, irreversible. Indeed, Aristotle remarked that "Agathon is right in saying 'For this alone is lacking even to God, To make undone things that have once been done' ". At any rate, no order of the Board can compel the defendant in 1956 to permit the plaintiffs to board defendant's plane on July 19, 1954."[36]

There speaks a practical man!

The Second Circuit reversed the decision of the lower court and remanded the case. Unfortunately the amount of damages paid was never made public due to the defendants making an out of court settlement for "public relations considerations."[37]

There have been attempts in other cases to plead racial discrimination as a ground for damages, but these attempts have not met with success. For example, in Williams v. Trans World Airlines, Inc.,[38] T.W.A. refused to transport a passenger based on F.B.I. information that the passenger was a fugitive from an indictment on a kidnapping charge, that he was armed and considered dangerous, and that there was the possibility of a demonstration upon his arrival.

The court held that this action was reasonable under s. 1111 of the Federal Aviation Act of 1958[39] which authorizes refusal of transport when the transportation of a passenger "would or might be inimical to the safety of the flight."[40] Furthermore, the Court found that there was no evidence to show that the carrier's action in refusing passage to Mr. Williams was "motivated in the slightest degree to do so because of race prejudice or discrimination".[41] The evidence indicated that T.W.A. would have taken the same action "even if Williams had belonged to the yellow, white or brown races".[42]

> "Accepting as true all of the appellant's testimony concerning the harsh and corrosive circumstances of his early life and his later efforts to protest and correct them, his conflict with state authority and his experiences and activities as a fugitive, there is no evidence that T.W.A. was at any time influenced by race prejudice or discrimination in the slightest."[43]

In the Williams case, the carrier obviously had enough reasons for refusing to let the passenger on board without resort to racial prejudice.

Discrimination on the grounds of race was also pleaded in the case of Marshall v. Delta Air Lines v. American Security and Trust Company.[44] Delta refused to transport an intending passenger when it was ascertained that there were insufficient funds in his bank account

to cover his cheque for his ticket. As it was standard practice to contact a passenger's bank when a ticket was purchased at the airport with a cheque, there was no proof of racial discrimination, indeed, in this particular incident, there was no evidence to show that the airline official who made the decision to refuse carriage to the passenger was even aware that the plaintiff was black.[45]

The non-discrimination provisions of the Federal Aviation Act of 1958 apply also to facilities at airport terminals, since the operators of the facilities are "air carriers"[46] and "citizens"[47] within the meaning of the Act. Thus in United States v. City of Montgomery,[48] the District Court of Alabama held that the action of a city in providing at an airport terminal separate waiting rooms, water fountains, restaurant and toilet facilities for white and negro travellers who utilised the facilities whilst engaged in interstate commerce, was violative of s. 404 (b) of the Federal Aviation Act and such state-imposed racial discrimination was also violative of the commerce clause[49] of the United States Constitution.

THE SITUATION IN CANADA

In Canada, the Canadian Bill of Rights[50] does not address itself to the subject of discrimination in transportation, rather it is directed at the fundamental liberties and freedoms to be experienced

in a democratic society, such as freedom of speech, freedom of assembly and equality before the law. The Canadian Human Rights Act[51] prohibits discrimination on the grounds, inter alia, of race, national or ethnic origin or colour,[52] and states that:

> "It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination."[53] (Emphasis added.)

Presumably transportation in general and air travel in particular are included within the scope of the term "services". If so, then in Canada, as in the United States, racial discrimination is explicitly prohibited in air travel. Canadian transportation was never subject to the "separate but equal" doctrine and yet one wonders if Air Canada's "Connoisseur Service" and CP Air's "Empress Service", whereby full-fare passengers on the airlines' major business routes are curtained off from the other non first-class passengers and are given a few extra facilities and a little more attention,[54] are merely a polite method of segregating the harried business travel from the worst of all travelling companions, namely, small children!

CONCLUSION AND RECOMMENDATIONS

It is very doubtful if, nowadays, an airline would discriminate against a passenger on the blatantly unlawful basis of colour or race. Should a carrier wish to exclude a traveller from their aircraft, then even after the abolition (for U.S. certified carriers) of the vaguely-worded tariff rules which permitted the exclusion of passengers on account of their conduct, status or condition,[55] there would still appear to be sufficient grounds provided in the current tariffs[56] to render it unnecessary for an airline to resort to racial discrimination as the basis for refusing to transport a particular person. The situation in Williams v. T.W.A.[57] is a case in point.

The only recommendations which come to mind is that the prohibition on discrimination and segregation in air travel should be extended de jure to intrastate air carriers rather than have it exist merely de facto.[58] Along similar lines, the Canadian Human Rights Act[59] could be amended to specify more explicitly that racial discrimination is prohibited in all forms of public transportation.

FOOTNOTES

1. There are, of course, some exceptions to this sweeping generalisation, especially on Canada's west coast which has a large oriental population. See, for example, Union Colliery Co. v. Bryden [1899] A.C. 580 (P.C.) (Watson L.J.) and Cunningham and A.-G. B.C. v. Tomey Homma and A.-G. Can. [1903] A.C. 151 (P.C.) (Halsbury L.C.).

2. In 1970, according to the Bureau of the Census, the population of the U.S.A. numbered 203.2 millions; of these 177.8 millions (or 87% were white and 22.6 millions (or 11%) were black.

3. April 12, 1861 to April 9, 1865.

4. F.E. Quindry, Airline Passenger Discrimination, J.A.L.C. 1932, at p. 499.

5. January 1, 1863.

6. Dred Scott v. Sanford 19 How. (60 U.S.) 393 (1854) (Taney Ch. J.)

7. U.S. Constitution, Amendment XIII was proclaimed in force December 18, 1865. Section 1 provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

8. Slaughter House Cases 16 Wall. (83 U.S.) 36; 21 L. Ed. 394 (1873) (Miller J.)

9. Proclaimed in force on July 28, 1868.

10. U.S. Constitution, Amendment XIV, s. 1, reads in full as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

11. Yick Wo v. Hopkins 118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220 (1886) (Matthews J.).

In furtherance of its endeavours to protect the rights of coloured persons, Congress enacted a series of Acts with a fifth, the Civil Rights Act of March 1, 1875, 18 Stat. 335, culminating the series. This latter Act provided:

> "1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other place of public amusement; subject only to the conditions established by law, and applicable alike to citizens of every race and colour, regardless of any previous conditions of servitude.
>
> 2. That any person who shall violate the foregoing section . . . shall, for every such offense, forfeit and pay the sum of $500 to the person aggrieved thereby . . . and shall be deemed guilty of a misdemeanor." (Emphasis added.)

But the Civil Rights Cases 109 U.S. 3; 3 S. Ct. 18; 27 L. Ed. 835 (1883) (Bradley J.), declared the foregoing sections to be invalid as an extension of power by Congress not authorized by the Fourteenth Amendment, which merely prohibited discriminatory action by the States. In addition, the Act sought to inflict a penalty for violation of a right belonging to a citizen of a State and not for violation of a right of a citizen of the United States.

12. The term "Jim Crow" was not meant to refer to the colour of the negroes; rather it was a name given to one of the early popular negro minstrel songs, and, around 1841, was used to designate a negro coach on a railroad in Massachusetts.

13. Quindry, cited supra footnote 4, p. 504.

14. They were enacted by Tennessee in 1881; Florida in 1887; Mississippi in 1888; Texas in 1889; Louisiana in 1890; Alabama, Arkansas, Georgia and Kentucky in 1891; South Carolina in 1898; North Carolina and Virginia in 1899; and Maryland in 1904. Ibid., p. 505. The Alabama statute was fairly typical and provided that:

> "All railroads carrying passengers in this state, other than street railroads, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by partitions, so as to

secure separate accommodations."
Penalties were provided for violation of this law against the company, the conductor of the train, and the passenger. Code of Alabama 1923, s. 9968.

15. 95 U.S. 485; 24 L. Ed. 547 (1877) (Waite Ch. J.).

16. Idem.

17. Brumfield v. Consolidated Coach Corp. 240 Ky. 1; 40 S.W. 2d. 356 (Ky. C.A. 1931) (Richardson J.).

18. Corporation Commission v. Transportation Committee of North Carolina Commission on International Co-operation 198 N.C. 317; 151 S.E. 648 (N.C.S.C. 1930) (Clarkson J.).

19. Laws of North Carolina 1899, pp. 539 - 540.

20. F.E. Quindry, cited supra footnote 4.

21. Ibid., pp. 513 - 514.

22. Idem.

23. C.A.B. Order no. 79-11-148 (Docket 34,435) dated November 21, 1979 cancelling Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, C.A.B. no. 352, C.T.C. (A) no. 195, Rule 35 (F)(1) (hereinafter cited as Tariff no. PR-7) for U.S. certified carriers, and provisions in other tariffs of a similar nature. See footnote 2 of the chapter of this study on pregnancy for a list of the tariff rules which were cancelled.

24. 49 U.S.C. ss. 1 et seq. Section 3(1) of this Act makes it unlawful for a railroad engaged in interstate commerce "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever".

25. 24 Stat. 380.

26. Henderson v. United States 269 I.C.C. 73; 80 F. Supp. 32 (D.C. Md. 1948); rev'd. 339 U.S. 816; 70 S. Ct. 843; 94 L. Ed. 1302 (1950) (Burton J.), and Mitchell v. United States 313 U.S. 80; 61 S. Ct. 873; 85 L. Ed. 2d. 1201 (1941) (Hughes Ch. J.).
Thus the prohibition of segregation using Congress' power to regulate Commerce (under article 1, s. 8, cl. 3 of the U.S. Constitution) was in force for public transport far earlier than for public accommodations. Segregation in the latter area was not eliminated until the passage of the Civil Rights Act of

1964 P.L. 88 - 352; 78 Stat. 241; 42 U.S.C. ss. 1981 et seq. (1976), which strengthened voting guarantees, and prohibited discrimination on the basis of race, sex or national origin in public accommodations and facilities and federally assisted programmes. The Act also prohibited discrimination by employees and unions. The accommodation provisions of the Civil Rights Act of 1964 were upheld in Heart of Atlanta Motel v. United States 231 F. Supp. 393 (N.D. Ga. 1964); aff'd. 379 U.S. 241; 855 S. Ct. 348; 13 L. Ed. 2d. 258 (1964) (Clarke J.), for both interstate and intrastate operations based on the power of Congress to regulate commerce. (No major legislation had been passed in the field of civil rights following the decision in the Civil Rights Cases, cited supra footnote 11, in 1883, until the Civil Rights Act of 1957 P.L. 85 - 315; 71 Stat. 634 was enacted. This Act prohibited any action to prevent persons from voting in federal elections. It was followed by the Civil Rights Act of 1960 P.L. 86 - 449; 74 Stat. 86, which strengthened the provisions of the 1957 Act, but neither the 1960 Act, nor its predecessor, had addressed themselves to the problem of segregated accommodations.).

27. 72 Stat. 731 as amended; 49 U.S.C. ss. 1301 et seq.

28. See the Airline Deregulation Act of 1978 P.L. 95 - 504; 92 Stat. 1705 which adds s. 105 to the Federal Aviation Act of 1958 49 U.S.C. s. 1305. On the subject of intrastate aviation (or what remains of it), see J.W. Freeman, State Regulation of Airlines and the Airline Deregulation Act of 1978, 44 J.A.L.C. (1979), p. 747.

One of the major advantages of being characterised as an intrastate carrier was the ability to offer low fares; after the passage of the Airline Deregulation Act of 1978 this advantage disappeared.

Congress also have the power to regulate intrastate activities if they affect commerce in general. See United States v. Darby 312 U.S. 100; 61 S. Ct. 451; 85 L. Ed. 2d. 609 (1941) (Stone C.J.) at 118.

In Canada, aviation is federally regulated regardless of whether it is intraprovincial or interprovincial because it is an activity which from its inherent nature concerns the Dominion as a whole and which as attained such dimensions as to go beyond local or provincial concern. See In Re Regulation and Control of Aeronautics in Canada [1930] S.C.R. 663; [1931] 1 D.L.R. 13 (S.C.C. 1930); rev'd. [1932] 1 D.L.R. 58; [1932] A.C. 54; [1931] 3 W.W.R. 625; 39 C.R.C. 108 (P.C. 1931) (Sankey L.C.) and Johannesson v. The Rural Municipality of West St. Paul [1949] 3 D.L.R. 694 (Man. K.B.); aff'd. [1950] 3 D.L.R. 101 Man. C.A.); rev'd [1952] 1 S.C.R. 292; [1951] 4 D.L.R. 609; 69 C.R.T.C. 105 (S.C.C. 1951) (Kellock, Kerwin and Locke JJ.). See also B. Reukema, Constitutional Issues

in Canadian Civil Aviation, paper prepared for the Institute of Air and Space Law, McGill University, Montreal, 1979, pp. 2 - 13, and B. Reukema, The Air Canada Acts - the reasons for change, LL.M. thesis presented to the Institute of Air and Space Law, McGill University, Montreal, 1979, part I.

29. 49 U.S.C. s. 1374 (b) (1976). This section is the successor to s. 404 (b) of the Civil Aeronautics Act of 1938 52 Stat. 973; 49 U.S.C.A. s. 484 (b). The section does not apply to the few remaining intrastate carriers.

30. Fitzgerald v. Pan American World Airways, Inc. 132 F. Supp. 798 (S.D.N.Y. 1955); rev'd and rem'd. 229 F. Supp. 499 (2d Cir. 1956) (Frank C.J.).

31. S. 404 (b) of the Civil Aeronautics Act of 1938; 49 U.S.C.A. s. 484 (b).

32. 132 F. Supp. 798 (S.D.N.Y. 1955) (Bicks D.J.).

33. 229 F. 2d. 499 at 501. The Court held that the Act created a new federal right and a suit based on a federal statute is one "arising under" a law of the United States so that a federal district court has jurisdiction. Ibid., at 502.

34. Idem. There was nothing expressed in the opinion of the Second Circuit to confine the holding of the case to incidences of racial discrimination. The Fitzgerald case predates that of Cort v. Ash 422 U.S. 66; 95 S. Ct. 2080; 45 L. Ed. 2d. 26 (1975) (Brennan J.), in which the U.S. supreme Court laid down various tests to be considered when assessing the existence of a private right of action based on a Federal statute.

35. 49 U.S.C.A. s. 642, now 49 US.C. s. 1482 (1976).

36. 229 F. 2d. 499 at 502.

37. Letter from Randel R. Craft, Jr., Attorney, Haight, Gardner, Poor & Havens (counsel representing Pan American World Airways, Inc.), dated May 29, 1980. The defendants maintained that they actually went out of their way to accommodate Ms. Fitzgerald and her group after an initial booking error, and Pan American's lawyers recommended against the settlement because "they believed the facts that would subsequently be demonstrated in the District Court after the remand would reveal the absence of any discrimination." Idem.

The finding in the Fitzgerald case that no federal common law of torts exists was overruled in Prescription Plan Service Corp. v. Franco 552 F. 2d. 493 (2d. Cir. 1977) (Oakes C.J.) which held that in appropriate cases, the federal courts may recognise, or even create, common law torts; but see Miree v. DeKalb County,

Georgia et al. 526 F. 2d. 679 (5th Cir. 1976); reh'g. en banc aff'd. District Court 538 F. 2d. 643 (5th Cir. 1976); vac'd. and rem'd. 433 U.S. 25; 97 S. Ct. 2,490; 53 L. Ed. 2d. 557; 14 Avi. 17,853 (1977) (Rehniquist J. and Burger C.J.). The principle of the Fitzgerald case discussed above with respect to discrimination in air travel remains undisturbed by the Franco decision.

38. 369 F. Supp. 797; 12 Avi. 18,231; 1975 U.S. Av. R. 526 (S.D.N.Y. 1974); aff'd. 509 F. 2d. 942; 13 Avi. 17,482; 1975 U.S. Av. R. 513 (2d. Cir. 1975) (Anderson C.J.).

39. 49 U.S.C. s. 1511 (1976).

40. S. 1111 (a)(2); 49 U.S.C. s. 1511 (a)(2) (1976).

41. 509 F. 2d. 942 at 947.

42. Idem.

43. Ibid., at pp. 947 - 8.

44. 13 Avi. 18,164 (D.D.C. 1975) (Gesell D.J.).

45. Ibid., at 18,165.

46. 49 U.S.C. s. 1301 (1976).

47. Ibid.

48. 201 F. Supp. 590 (N.D. Ala. 1962) (Johnson D.J.).

49. Article 1, s. 8, cl. 3. The provisions of s. 404(b) can thus apply to non-passengers.

50. 8 - 9 Elizabeth II, c. 44, amended S.C. 1970 - 71 - 72, c. 38, s. 29. R.S.C. 1970, Appendix III.

51. 25 - 26 Elizabeth II, S.C. 1976 - 77, c. 33.

52. Ibid., s. 3.

53. Ibid., s. 5.

54. For example, a separate check-in counter, first choice of business magazines, and an additional six inches of room between the rows of seats. Unfortunately, Air Canada has overlooked the need to lengthen the arms of the chairback trays by the same amount, and travellers in the Connoisseur Class are eating their meals with their food trays placed on their laps.

55. Tariff no. PR-7, Rule 35 (F)(1). See supra footnote 23.

56. See, for example, Tariff no. PR-7, Rule 35 (F)(2).

57. Cited supra footnote 38.

58. See supra footnote 28.

59. Cited supra footnote 47.

CHAPTER 8

HIJACKERS

HIJACKERS

HISTORY OF HIJACKING ATTEMPTS

On February 21, 1931, a Panagra Ford Trimotor flown by Captain Byron Rickard landed at Arequipa, Peru. He and his aircraft were seized by army rebels who, following an unsuccessful coup against the Lima government, demanded to be flown to Arica in Chile.[1] This was the first recorded hijacking, the trend-setter for an event which became so fashionable that one man reportedly seized a United Air Lines plane and ordered the pilot to fly to Detroit; the aircraft was already on a scheduled flight to Detroit.[2]

Between July, 1947 and March, 1953 there were sixteen attempted hijackings, fourteen of which succeded. The successful hijackings all involved refugees fleeing from Eastern European countries.[3]

A new series of air piracy began in 1958 and continued through 1960. During this period there were eleven successful and five unsuccessful attempts, most of which involved Cubans fleeing from the Castro regime to the United States.[4] In 1961, the U.S.A. began offering free transportation to persons who gained permission to leave Cuba,[5] and, perhaps, because of this the Cuba-United States traffic ended.

After 1961, this traffic was reversed and the "take me to Cuba" hijacking attempts reached their peak in 1969 when, out of eighty-seven worldwide hijacking attempts, seventy represented attempted hijackings to Cuba.[6] Restrictions on travel to Cuba seem to have been a primary cause of these hijackings.[7] Their decline began after reports reached the United States describing the hijackers lot in Cuba. According to these reports, almost all of the hijackers had expressed extreme disillusionment with their chosen refuge.[8]

A fourth phase in the hijacking saga began in 1970 with the extortion hijackings and the seizure and sabotage of aircraft by terrorists in connection with hostilities in the Middle East.

In the former category, there were thirty-five attempts on U.S. aircraft between November 24, 1971 (when a man calling himself D.B. Cooper hijacked a Northwest Orient Airlines Boeing 727 en route from Portland, Oregon to Seattle, Washington, and made history as the only successful parachute extortionist), and December 5, 1972 when the Federal Aviation Authority imposed its strict security regulations.[9]

In the latter category, the starkest demonstration of terrorist hijacking began on September 6, 1970, when terrorists hijacked a T.W.A. Boeing 707 on a flight from Frankfurt to New

York City. On the same day, Palestinian guerrilas hijacked a Swissair DC-8 outward bound from Zurich, and a Pan American Boeing 747 out of Amsterdam. Three days later, a B.O.A.C. VC-10 was hijacked. The Pan-American plane was flown to Cairo by way of Beirut where it was blown up on September 7. The other three aircraft were ordered to fly to Dawson Field, Jordan. Almost five hundred passengers suffered through six days of confinement in the desert heat until they were removed by bus. All three aircraft were then blown up.[10]

The latest phase in hijacking is the return of the "take me to Cuba" deviations which recommenced in 1980.[11] This upsurge in air piracy was a direct result of the Cuban exodus which began in April 1980 and the United States' open door policy which President Jimmy Carter put into effect for these Cuban refugees. The resultant rash of hijackings was foreseen by the F.A.A.'s Office of Civil Aviation Security[12] and was only curbed by the announcement on September 16, 1980 by the Cuban Government that future hijackers would be subject to drastic penal measures or returned to the United States for prosecution.[13]

The political terrorist hijackings have also returned, but the arena has changed. Early this year, the Pakistan Government acceded to the demands of the hijackers of a Pakistan International Airways B-727. This was soon followed by the mid-air seizure of a Garuda Indonesian Airways DC-9, (later retaken by storm), and the hijacking of a THY flight by persons seeking the release of political prisoners (the hijackers were overpowered and badly beaten by the passengers.).[14]

GOVERNMENT REACTION

In the United States

Whereas, the first hijacking incident involving a U.S. aircraft was regarded as a freak,[15] the second one which occurred less than three months later[16] caused an uproar. Congress amended the Federal Aviation Act of 1958[17] to make hijacking a federal crime punishable by death, with a minimum sentence of twenty years' imprisonment,[18] and to authorise the airlines to refuse transportation to passengers who, in the airline's opinion were "inimical to safety of flight".[19]

Between 1961 and 1967 there were relatively few hijacking attempts and the F.A.A. used its rulemaking authority only once to issue a regulation directed at the problem which required that the cockpit doors be closed and locked during flight.[20]

In January 1969, under the influence of the flood of hijackings to Cuba, President Richard Nixon directed the Federal Aviation Authority to research all aspects of aircraft hijacking and to create a defense to the problem.[21] As a result of the Presidential directive, the F.A.A. Task Force on Deterrance of Air Piracy was formed in February 1969. It was faced with the serious problem that millions of passengers use air transportation, and any procedure put into effect would have to permit maximum access to

aircraft with minimal inconvenience and embarrassment to passengers, and almost no delay in the operations of the airlines.[22]

The Task Force study encompassed motivational and behavioural characteristics of hijackers, the weapons used, and an analysis of the origin and intended destination of hijacked flights. The most significant achievement of the Task Force was the development of a psychological profile for the skyjackers.[23] This behavioural profile was a check list of about a dozen characteristics of past hijackers,[24] and was to be used together with a magnetometer, a metal sensitive device for detecting weapons,[25] to help the airlines identify potential hijackers before they boarded the plane. Passengers who matched the profile were designated "selectees" and if they also activated the magnetometer were required to produce satisfactory identification;[26] if they could not do so they were requested to submit to a voluntary search i.e. a frisk.[27] Depending upon the results of the physical search, the selectee was either permitted to board or was detained for further investigation. Those who refused to be frisked were denied boarding, and it is this category of passengers with which this section of the study is concerned.

On September 28, 1971, the F.A.A. issued notices of proposed rulemaking for extensive revisions of airport and airline security measures. One notice proposed the issuance of a part 107 to the F.A.A. regulations to place on airport operators the

responsibility for the provision of protection against unauthorized access to air operations. The second notice proposed a new section, part 121,[29] which would require each scheduled[30] carrier to develop and implement a security programme designed to prevent or deter the carriage aboard aircraft of sabotage devices or weapons, and unauthorized access to aircraft. It also attempted to assure that passenger baggage would be checked in by a representative of the carrier, and that neither cargo nor checked baggage would be loaded aboard aircraft unless it had been cleared in accordance with the carrier's security procedures. Certain notifications and security inspections were to be required in the event of a bomb threat or suspected acts of air piracy.

The proposals were popular with the public but not with the carriers and airport operators due, amongst other things, to the costs involved.[31]

Following two hijackings of Pacific Southwest Aircraft on successive days (July 5 and 6, 1972), all carry-on items were to be searched, passengers were required to show two forms of personal identification before boarding and those who could not were to be screened by a metal detector. These measures proved insufficient for two violent "fleeing felon" hijackings took place on October 29 and November 10, 1972, which left one ticket agent dead and a ramp serviceman and a co-pilot wounded in their wake.[32]

Emergency regulations were issued on December 5, 1972.[33] The order effective January 5, 1973, required electronic screening of one hundred per cent of air passengers and their carry-on luggage.[34] As a result of the electronic screening, Eastern Airlines, the carrier which pioneered the use of the behavioural profile in 1969, stopped using it,[35] and the profile was not used by the airlines in general for six years. Its use, however, was revived in 1980 when it was discovered that electronic screening devices can not detect such devices as plastic laundry detergent bottles filled with gasoline, such as was used to hijack an Air Florida Boeing 737 to Cuba on August 13, 1980.[36]

In Canada

The Canadian response to the hijacking threat was somewhat slower than in the United States. The problem of air piracy was never as acute in Canada; as of January 1, 1981, only nine hijackings involving Canada have been reported.[37] The paucity of occurrences has been attributed to the differences between the Canadian and American character and the prohibition on owning, and attendant difficulties in obtaining, handguns in Canada.[38]

The Canadian Criminal Code[39] was amended in 1972 to create and define the criminal offence of hijacking which carries a life imprisonment sentence.[40] These amendments, together with section 6 (which establishes jurisdiction[41] for offences committed

on board Canadian aircraft), were to fulfil Canada's obligations under the three international anti-hijacking conventions.[42]

The small number of hijacking incidents in Canada precluded the development of a Canadian hijacker profile,[43] but during the early 1970's, Canadian air carriers used the F.A.A. profile method of screening passengers on selected international and transborder flights. In 1973, however, this method was replaced for the most part by a security system which required all passengers and carry-on baggage to be inspected by detection devices or physical means. Bill C-128,[44] (amending the Aeronautics Act and passed on July 27, 1973[45]), provided the authority for security measures to be taken at airports, including the search of persons and property. Up until that time, selected passengers had been searched under the provisions of the air carrier's tariff rules.[46]

Pursuant to the amendment of the Aeronautics Act, the Civil Aviation Security Measures Regulations were enacted,[47] which specify the security measures required at airports for surveillance and search of passengers, baggage and cargo and the prevention of unauthorized access to aircraft and various locations within the airport.[48]

The international response

On the international front, three major anti-air terrorism

agreements are in force. The Tokyo Convention[49] of 1963 created and defined certain offences against aircraft in flight to which the Convention was to apply. It also established the jurisdiction of the various states involved in the incident and the powers of the aircraft commander.[50] The Hague Convention of 1970[51] extended the period in which the aircraft is considered to be in flight and added to the applicable jurisdictions. The Montreal Convention of 1971[52] included offences perpetrated against aircraft on the ground or airport installations within the scope of the anti-hijacking conventions.

In none of the Conventions is air piracy made an explicit extraditable offence, but The Hague Convention deems it to be included as an extraditable offence in existing extradition treaties.[53]

Canada was instrumental in the issuance of the Bonn Declaration on Hijacking of July 17, 1978. The Declaration was the result of an Economic Summit Conference held in West Germany at which the seven most powerful Western nations[54] issued a statement of their commitment to intensify joint efforts to combat air terrorism. The Bonn Declaration states that where a country refuses extradition or prosecution of those who have hijacked an aircraft, or if the country does not return the aircraft, the seven nations would initiate action to cease all flights to that country and to halt all incoming flights from that country (or from any other country) by the airlines of the country concerned.[55] (The seven countries reiterated their stance

in the Ottawa Declaration on Hijacking of July 20, 1981.)

THE HIJACKER PROFILE

Development and application

As was referred to above, the initial efforts of the F.A.A. Task Force on Deterrance of Air Piracy were devoted to a study of hijackers' habits including the embarkation points and the destinations of the hijacked aircraft to determine whether any pattern was revealed. An F.A.A. psychologist studied the backgrounds and behaviour characteristics, to the extent possible, of individuals who had carried out or attempted hijackings to see if they exhibited a discernible behavioural pattern. Among the findings were that hijackers were generally not highly motivated and resourceful but they did, indeed, share certain characteristics markedly distinguishing them from the general travelling public.[56]

Eastern Airlines was selected for testing the proposed anti-hijacking programme probably because its East Coast flights had been particularly hard hit by hijackers seeking passage to Cuba. Eastern had experienced nineteen such attempts between September 1968 and March 1969.[57] Following sampling tests at various locations, a relatively large field test was put into effect at a single Eastern Airlines' gate at terminals in six cities, beginning in October 1969.

From that time up until February 1970, there were no hijacking incidents aboard Eastern flights.[58] In the February, a single hijacking occurred but this was on a flight which had been emplaned through an unprotected gate. It was later determined that the hijacker fitted the profile, and follow-up research discovered that of subsequent hijackings, eighty to ninety per cent of the hijackers fitted the profile.[59]

Between June 1969 and September 1971, Eastern denied boarding to six hundred and fifty persons. Law enforcement personnel detained or arrested about two hundred and fifty of these persons of whom two hundred and thirty-six were detained for violations of Federal law and fourteen were mental patients who were turned over to the authorities for treatment.[60]

As was also mentioned earlier, although initially successful as a compromise between an Israeli-type system and not holding up individual flights for hours, the profile was dropped in 1974 in favour of mechanical screening methods which removed the human factor, considered to be the weak link in the chain.[61] The hijacker profile was revived in 1980 as hijackers became more ingenious and devised weapons which could not be picked out by the magnetometer.

Profile characteristics

Thus far the genesis and the practical success of the profile have been described without stating what it is. The reason for

this is that its details are never released to the public[62] for it would be relatively simple for a prospective hijacker to fabricate a different profile and avoid the initial designation, were any of the norms employed to become known generally.[63] To ensure its secrecy, the ticket agents are told about the elements of the profile orally, it is never written down.[64] It is passed on from supervisor to agent and treated confidentially. The Courts have helped maintain this confidentiality, for example, United States v. Lopez[65] and United States v. Bell,[66] in which the disclosure of the elements of the profile in an in camera proceeding was approved. In both cases, the defendant was excluded from the in camera proceeding but the defence counsel was permitted to participate.

This stand was altered somewhat in United States v. Clark[67] which held it an unconstitutional denial of the defendant's Sixth Amendment right of confrontation to exclude him from any part of a suppression hearing except that part which specifically involved disclosure of elements of the profile.

Despite this closed-mouth approach, elements of the profile have leaked out. The Federal Aviation Authority was willing to concede that the profile was based on "the passenger ticketing process and other considerations,"[68] and Transport Canada admitted that it was based on "behavioural rather than physical characteristics".[69] The Lopez[70] case described the profile as being based

on objective criteria and on appropriate statistical, sociological and psychological data, which does not discriminate against any group on the basis of religion, origin, political views or race.

None of the above definitions is, understandably, particularly illuminating. However, members of the press corps can usually be relied on to throw caution to the winds, and one columnist has stated that the hijacker profile identifies males, between the ages of fifteen and fifty-five, who are travelling alone, who purchase a one-way ticket and pay in cash.[71] This description accords in general with another published finding[72] that hijackers book on roundabout routes without stop-overs and often can give no good reason why they are in a country or why they are flying to their destination. They appear to be poor but travel first class[73] and they pay in cash. It should be noted, that the first definition relies heavily on physical characteristics rather than behavioural characteristics referred to by Transport Canada. The elements of the profile may, therefore, be a better kept secret than one realises.

In Canada, they have experienced a particular problem with jokes and hoaxes, and anyone overheard making threats regarding the possession of a bomb, whether or not these threats are made in a jocular manner or not, are subject to close examination.[74] Leaving a message on the washroom mirror stating that there is a bomb on board can lead to the same consequences in terms of unscheduled

landings, delays and tension, if not panic, amongst passengers and crew whether or not the threat is made in earnest.[75]

The F.A.A. Task Force on Deterrance of Air Piracy compiled a list of twenty-five to thirty characteristics in which hijackers differed significantly from the air travelling public,[76] but there appears to be only about a dozen characteristics which comprise the profile.[77] This suggests that the F.A.A. is keeping a large number of characteristics in reserve.[78] Whether a passenger has to fit all of the elements of the profile to be designated a "selectee" is a matter of dispute,[79] and the better opinion seems to be that a passenger does not have to match all of the dozen or so characteristics otherwise, if the published reports of hijacker characteristics were correct, then the profile would never identify female "selectees", which the evidence suggests it does, in fact, do.

The case of United States v. Riggs[80] suggests that the cash payment criterion is highly suggestive.[81] In that case a young female Negro wearing a brilliant orange coat and large hoop earrings and carrying no luggage, bought air plane tickets for herself and two Negro males, with cash from a brown paper bag filled with money. She was described by the Court as having fitted the hijacker profile.[82] Since she was neither male nor travelling alone, those two particular characteristics obviously are not sine qua non for designation as a "selectee".

Even when the profile does correctly identify a potential hijacker, they may still permitted to board and do indeed hijack the aircraft. The two Palestinians, who hijacked a Pan American World Airways Boeing 747 out of Amsterdam on September 6, 1970, and blew it up in Cairo the next day, had initially tried to purchase tickets on an El Al flight. The El Al agents found the Palestinians could give no satisfactory reason for being in Europe, let alone for wanting to fly to South America via New York on El Al when a direct route was available; they offered to pay cash and, despite their scruffy appearance, they insisted on first-class tickets. El Al refused them carriage since they exhibited at least four profile characteristics and the Palestinians booked onto a Pan American flight instead. The Pan Am pilot was so suspicious that, despite their status as first class passengers, he insisted on searching them personally before take-off. Unfortunately, he neglected to check their hand luggage stowed under their seats. Ten hours later they blew up the aircraft.[83]

What can be deduced from the cases is that unusual nervousness,[84] or a demonstration of apprehensive concern over a prominent bulge in someone's clothing,[85] together with more concrete suspicions, such as a tip regarding a bomb in an easily identifiable shopping bag[86] or pretending not to know an individual when the person under suspicion has been seen previously talking to, or sitting with, that individual,[87] are all behavioural characteristics which are not inconsistent with the hijacker profile.[88]

Does the profile discriminate?

According to the Federal Aviation Administration's profile, hijackers follow certain psychological patterns and display certain specific characteristics no matter whether their motivation is financial, political, et cetera. The air carrier personnel working at the airport are trained to be aware of these characteristics and the observation of passengers for these specific traits takes place primarily at the check-in counter.[89]

If an agent has grounds for suspecting that a particular passenger is a potential hijacker, that passenger is designated as a "selectee" and anyone accompanying that passenger automatically becomes a "selectee" also.[90] The "selectee" will be required to produce identification, but when an "ID check" is made for one passenger the agents will also check the identification of a couple of unsuspected passengers to protect the secrecy of the behavioural profile and to prevent a passenger from interpreting the agent's action as being discriminatory based on race, colour, ethnic origin or political or religious beliefs.[91]

If race, religion, et cetera, were elements of the profile,[92] then it could be attacked as being discriminatory per se and that it denies the constitutional rights of equal protection[93] and due process.[94] But rather than having a discriminatory base, the courts have found that the profile was developed by the use of appropriate

statistical, sociological and psychological data and techniques and was precisely designed to select only those who present a high probability of being dangerous.[95] Moreover, it has proved to be very effective in isolating potential hijackers from the air travelling population as a whole,[96] even though it identifies other types of undesirables as well.

The hijacker profile is revised when new data becomes available[97] and is constantly being re-evaluated in light of new hijackings and trends in hijacking. As long as it is the professionally constructed profile that is being applied in an approved fashion there is no discrimination being practiced; but should an airline official undertake to update the profile by eliminating one of the fundamental psychological characteristics and introducing, for example, an ethnic element, for which there was no experimental basis, or introducing any criterion calling for an act of judgment on the part of airline employees, then this would in effect "destroy the essential neutrality and objectivity of the approved profile"[98] and render the behavioural screening system unconstitutional. Any denial of boarding based on an arbitrarily constructed profile would also be discriminatory. A devil's advocate might well claim that there are ethnic elements in the profile (and hence the cloak of secrecy) and that the Courts are quick to claim that this is not the case, purely because profile screening is an effective tool to deal with an unpleasant situation.

This author is not persuaded by this line of argument, and the concern which the judiciary, especially in the United States, has demonstrated over individual freedom in its many forms[99] militates against the truth of such a proposition.

Constitutional problems in the United States

Even if the profile's application does not constitute discrimination on racial, religious or political grounds, its use does create a number of Constitutional problems in the United States.[100] One of them has already been discussed, i.e. the right to a public trial which is guaranteed by the Fifth and Sixth Amendments.[101] A further set of Constitutional problems is raised based on the Fourth Amendment's right to privacy. Although the profile does not intrude in the usual Fourth Amendment sense upon the expected privacy of the individual since its use does not involve restraint of the individual and it measures only those characteristics that the traveller has exposed either to general public view, or to the particular scrutiny of the airline personnel, when he purchased a ticket. The Constitutional question presented by the use of the behavioural profile is, rather, whether it can be used to support a finding of probable cause to search a traveller.

In Terry v. Ohio,[102] the United States Supreme Court authorized the stopping of a suspect when there were "specific and articulable facts"[103] sufficient to support a reasonable belief

that the action is warranted, and held that a frisk of the suspect was permissible when a law enforcement officer could reasonably believe that the suspect was armed and dangerous.[104]

The profile cannot be said to provide specific and articulable facts although its introduction in 1969 does appear to have been effective in reducing hijacking incidents. Moreover, the profile is capable of constant refinement and, as the number of reported hijackings increases, the size of the hijacker population available for statistical analysis increases.[105] But the accuracy of the profile for pinpointing hijackers obviously leaves a lot to be desired since, as was pointed out in the Lopez case, in a sample of half a million passengers, 1,406 satisfied the profile but only 283 were ultimately searched and of those only 20 (or about 1 in 14) were denied boarding having failed all the steps in the screening process.[106] Thus the profile casts a wide net and not all "selectees" are potential hijackers, in fact only 1.42% of "selectees" were denied boarding, and then not necessarily for carrying a weapon or explosive device.[107] However, if the decline in hijacking incidents is a reasonable indicator, then either most hijackers are "selectees", or the screening system is a good deterrent.

The District Court in the Lopez case also emphasized the argument that frisks of suspected hijackers are not sought to be justified on mere statistical information generated by the hijacking

cases. Weinstein D.J. realised that if

> "reliable statistics were available that in a given community one person in fifteen (6%) regularly carried concealed weapons the police would not be justified in arbitrarily stopping and frisking anyone in the street. Such harassment by police without more objective evidence of criminal activity or a legitimate investigative purpose is proscribed by the Fourth Amendment. . . . The Court is charged with the duty of balancing the competing interests of the individual and the society in each case presented. No single percentage figure can provide a test for constitutional legitimacy."[108]

The Court balanced the limited nature of a frisk against the harm of hijacking and concluded that where the risks of hijacking to passengers and crew and to the viability of the entire industry are so great, on balance, the use of the system cannot be said to be imprudent;[109] in light of the Government's substantial interest in preserving the integrity and safety of air travel, a 6% danger of arms suffices to justify a frisk.[110]

This line of reasoning was echoed in United States v. Bell[111] in which Chief Justice Friendly, in a concurring opinion, argued that when the risk involved is the jeopardy to hundreds of human lives and millions of dollars of property, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage,

and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.[112]

U.S. Supreme Court decisions such as Terry v. Ohio[113] and Katz v. United States,[114] have made it clear that only in a few specifically established and well delineated situations can a warrantless search be justified. As a practical matter, warrants are not obtained for searches in anti-hijacking cases, being precluded by the exigencies of time. The anti-hijacking system depends upon being able to sift out swiftly potential hijackers for closer scrutiny while permitting all passengers, including "selectees", to board unless weapons are discovered.

The patting down (frisking) of a person and the investigatory stop have, however, been legally differentiated from an arrest and full-blown search for evidence of crime.[115] What appears to be required in the former cases is a showing of some appreciable probability of danger created by someone with a weapon.[116]

CONCLUSION AND RECOMMENDATIONS

Because of the air carriers' reliance on the profile, the situation exists in which perfectly innocent passengers can be denied boarding because they do not want to be subjected to a pat-down or frisk. Matching the profile is in itself a reason for

physically searching a passenger ever since the phenomenon of explosives in plastic containers has emerged. In addition, any piece of metal on one's clothing which activates the magnetometer gives grounds for a request for identification and/or frisking. In this regard, it should be borne in mind that completely harmless items such as the metal in the collars and leashes of guide dogs, or that in the frame of wheelchairs or babies' strollers can activate the metal detector. Refusal to comply with the request to be physically searched entitles the airlines to deny boarding to the passenger who so refuses.

Boarding agents insist babies, sleeping or awake, are removed from their strollers in order to verify whether it is in fact merely the metal frame which has activated the magnetometers. Many mothers would prefer not to wake a sleeping child. A blind passenger will be parted from his dog while the dog is examined separately to ascertain if its collar and leash which are registering on the metal detector. For the many other non-hijackers who have the misfortune to fit the profile characteristics, being "patted down" may, to them, constitute a gross invasion of their privacy, equal in psychological trauma to bodily assault. Husbands may well not wish their wives or daughters to be frisked; unmarried, elderly ladies in general, and nuns in particular, may well rather be refused carriage than consent to the indignity of a physical search. Presumably there are passengers from countries whose religious customs do not permit their women folk being

touched by a strange man. White-knuckle fliers exhibiting nervous tendencies may find themselves designated "selectees" and thus incur a tangible basis for their fear of flying. The words of the Fourth Circuit in the Epperson[117] case probably sum up the feelings of most air travellers with regard to physical searches, when they stated that, unlike frisking the use of the magnetometer could not possibly be "an annoying, frightening, and perhaps humiliating experience".[118]

In defence of the present security screening system, it must be admitted that the behavioural profile and the associated security measures appear to work well, given that in the United States alone half a million passengers per day and over a million pieces of luggage are emplaned on fifteen thousand flights at nearly five hundred airports,[119] and the massive delays experienced on January 5, 1973 (the day on which 100% screening was first introduced) are not known any more. The vast majority of the travelling public i.e. the 99.5% who do not fit the hijacker profile, appear to approve of the measures, witness the tolerance displayed when 100% screening was first introduced and the public outcry that erupted in mid-1973 when remarks by a F.A.A. official were misinterpreted to imply that the F.A.A. was contemplating relaxation of the stringent security measures.[120]

Like overbooking, pre-flight screening is a necessary evil and appears to be here to stay. On balance, the risk to

the air travelling public in general outweighs any indignity or invasion of privacy incurred from an unnecessary search -- but try explaining that to the parents of a sleeping child in a metal stroller.

PRISONERS, DEPORTEES AND OTHER UNDESIREABLES

Passengers who fit the hijacker profile are only under suspicion of not being wanted on a flight; there are other categories of passengers whose presence on board the airlines would rather do without; these types of passengers will be discussed briefly as the final category of passengers to whom the carriers have discretion to refuse carriage.

In the United States, section 1111 of the Federal Aviation Act of 1958[121] permits carriers to deny boarding to anyone when such transportation would or might be inimical to flight safety, and it serves as a basis for excluding undesireables; thus the airlines are given a wide discretion to refuse carriage to deportees who are known to be violent, prisoners travelling under guard, etc.[122]

The early case of Pearson v. Duane[123] established the principle that a common carrier may properly refuse carriage to a person if the landing of such a passenger could give rise to difficulties, but this refusal must precede the commencement of the journey. Once the passenger has been accepted for a journey, and

having behaved themselves during the journey, the carrier has no right either to order the passenger off the carrier or return him to his point of embarkation, regardless of how humane the motives of the carrier might be based on fear for the passenger's safety.[124]

A case on similar lines was decided one hundred and ten years later. In Mason v. Belieu,[125] Pan American World Airways had refused carriage, on a flight from Miami to Panama, to Irving Mason who had been forcibly deported from the Panama Canal Zone that morning. A Pan American employee informed the plaintiff that he remained unacceptable as a passenger until the carrier could confirm that the Panamanian authorities would permit him to enter the country.[126] The necessary confirmation was not forthcoming and the flight departed without the plaintiff.[127]

Mr. Mason was awarded damages, under section 404 (b) of the Federal Aviation Act of 1958,[128] of $1,000, on account of the carrier's discriminatory refusal of carriage.

Non-discrimination and third parties

The Mason v. Belieu case is of especial interest because Mrs. Mason had also sued Pan American under s. 404 (b), and had been awarded $200 damages at trial. Not knowing that her husband had been refused carriage, Mrs. Mason arrived at the airport in time

to meet the Pan American flight, but when he failed to arrive on the flight the carrier's representative refused to explain the reason for his absence. Mrs. Mason's action was grounded on two types of claim: a derivative claim for mental distress caused because her husband did not disembark from the flight; and a direct claim for the failure of the carrier's representatives at Tocumen Airport to explain her husband's absence.[129] Pan American appealed against the award of damages to Mrs. Mason claiming that she was not within the class of persons covered by section 404 (b).

The Court observed that nothing in the statute requires the absolute exclusion of all injured parties except passengers from the remedial provisions of the anti-discrimination section of the Act, due to the all-encompassing definition of "person" found in s. 101 of the Act.[130] Thus travel agents have been found to be shielded under s. 404 (b) against unjust application of rates[131] and non-passengers may not be subjected to racially segregated restaurants and rest rooms in airports.[132]

But this attempt to protect all persons from unjust practices does not mean that all injuries traceable by some direct line of causation to airline discrimination, no matter how distant or minute, are compensable under s. 404 (b).[133] Non-passengers must be included within the class of persons covered by the Act and the injury for which they seek recovery must be an interest protected

by the statute. Mrs. Mason's indirect claim, although "directly and foreseeably"[134] caused by the carrier's action, did not bring her injury - mental distress caused because someone else was denied transportation - within the class of interest sought to be protected by the statute.[135] This reasoning applies equally to persons waiting for "bumped" passengers who cannot claim either under this section. In this regard see the fate of the claim of the Connecticut Citizens Action Group in Nader v. Allegheny Airlines, Inc.[136] Consumer advocate Ralph Nader was to have addressed a fund raising rally sponsored by the C.C.A.G. and even though his non-appearance lowered attendance and, consequently, potential contributors the organization was held to have no standing.[137] Similarly, the parents of a passenger who was denied boarding (missing a family reunion as a consequence), and who claimed compensation under s. 404 (b) as incidental beneficiaries,[138] were held to be too remote to be eligible to recover. To hold that they

> "were among the class of persons who could recover from Delta would extend potential liability to a class virtually as large as the public."[139]

On the question of Mrs. Mason's direct claim based on the failure of the airline to answer Mrs. Mason's questions concerning her husband's absence, it could be argued that the airline breached its duty of non-discriminatory treatment of all persons using its public facilities. It had already been established

that a private remedy does not exist for all alleged violations of the anti-discrimination provisions,[140] and since the primary objective of the Federal Aviation Act of 1958 is to promote

> "adequate, economical and efficient service by air carriers at reasonable charges, without unjust discriminations, undue, preferences or disadvantages, or unfair or destructive competitive practices",[141]

the Court found that assuring persons waiting for passengers that they will be assisted courteously at information counters was too remote from the evils intended to be remedied by section 404 (b).[142]

The argument that passengers have no right to be treated courteously by airline employees might have put paid to many an overbooking case before it saw the appeal stage. The claims made by the plaintiffs in those cases regarding the humiliation and outrage they had suffered at the hands of surly and uncivil airline employees[143] would have all been dismissed as constituting only minor matters.[144]

CONCLUSION AND RECOMMENDATIONS

Section 1111 of the Federal Aviation Act of 1958[145] was originally enacted by Congress as part of a comprehensive programme aimed at combatting hijackings and other criminal acts committed on

board aircraft.[146] It has since been used as a catch all to refuse carriage, not only to those persons with known criminal records whose presence on board the carrier wishes to avoid, but also in attempts to deny boarding to handicapped persons.[147]

Fortunately the courts have interpreted the phrase "might be inimical to safety of flight"[148], restrictively, and subject to good behaviour, those persons deemed to be undesireable purely in the carrier's opinion have as much right to travel by air as anyone else. There seems to be no wish on the part of the courts to extend this protection to relatives or friends of prisoners, deportees, etc. who are denied boarding either under s. 1111 or under s. 404 (b) of the Act. This tendency is however in line with cases dealing with the incidental beneficiaries of passengers who have been denied boarding for other reasons such as overbooking. The desire not to make s. 404 (b) a catch-all for grounding claims against airlines made by the public in general is a laudable one.

FOOTNOTES

1. The aircraft and its crew survived unharmed. Captain Richard was hijacked again thirty years later flying a Continental Air Lines Boeing 707 from Phoenix, Arizona to El Paso, Texas; he now lives in retirement in California. Editorial, Flight International, April 11, 1981.

2. B. Moynahan, Airport Confidential, New York, Simon and Schuster, 1980, excerpted in The Gazette, August 5, 1980.

3. The countries involved were Bulgaria, Czechoslavakia, Poland, Rumania and Yugoslavia. The halt to this type of hijacking may have been the result of intensified security measures, including travel restrictions, in those countries. See N. Aggarwala, Political Aspects of Hijacking, 585 Int'l. Conciliation (1971), p. 7, at p. 8.

4. Ibid., pp. 8 - 10.

5. 45 U.S. State Bull. 238 (1961). The flights continued until the Cuban missile crisis in October 1962. 48 U.S. State Bull. 983 (1964).

6. Worldwide Reported Hijacking Attempts, Summary as of January 1, 1981, prepared by Civil Aviation Security, Transport Canada. Of the forty attempts made on United States aircraft in 1969, thirty-seven were of the "take me to Cuba" variety. Idem. The summary is as follows:

WORLDWIDE REPORTED HIJACKING ATTEMPTS - SUMMARIZATION - AS OF JAN 1/81

	1939-67	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	T O T A L
CANADA Successful					1(1)								1 [1]		2[1] (1)
Unsuccessful		1(1)			2	2 *	1 **	1							7[0] (1)
Sub-Total		1(1)			3(1)	2 *	1 **	1					1 [1]		9[1] (2)
USA Successful	7(6)	18(8)	33(31)	18(14)	12(10)	10(6)	1(0)	3(1)	4(0)	1[0](0)	0[0] (0)	2[2] (0)	6[2](2)	13[0](13)	128[4] (101)
Incomplete ***	1(1)	1(1)	1(1)	5(1)	9(1)	14(0)	1(0)	2(0)	3(1)	1[1] (0)	1[0] (0)	6[2] (2)	5[0](3)	3[0](0)	55[3] (11)
Unsuccessful	4(2)	3(0)	6(5)	4(0)	6(3)	7(1)		2(0)	5(0)	2[1](0)	3[1] (0)	5[1] (1)	2[0](1)	6[1](4)	55[4] (17)
Sub-Total	12(9)	22(9)	40(37)	27(15)	27(14)	31(7)	2(0)	7(1)	12(1)	4[2](0)	6[1] (0)	13[5] (3)	13[2](6)	22[1](17)	238[11] (129)
OTHER COUNTRIES Successful	52(5)	11(8)	37(27)	37(17)	9(2)	13(3)	10(2)	5(1)	3(0)	6[0] (0)	16[0] (0)	8[1] (1)	7[1](0)	9[1](1)	225 [4] (68)
Unsuccessful	15(2)	1(0)	10(6)	19(4)	19(6)	16(1)	9(2)	13(1)	10(1)	8[1] (0)	10[1+](0)	10[0] (0)	6[0](0)	9[1](2)	162[2;1+] (26)
Sub-Total	67(7)	12(9)	47(33)	56(21)	28(8)	29(4)	19(4)	18(2)	13(1)	14[1] (0)	26[1+] (0)	18[1] (1)	13[1](0)	18[2](3)	387[6;1+] (94)
WORLD Successful	59(11)	29(16)	70(58)	55(31)	22(13)	23(9)	11(2)	8(2)	7(0)	7[0] (0)	16[0] (0)	10[3] (1)	14[4](2)	22[1](14)	353[8] (169)
Incomplete *** (USA)	1(1)	1(1)	1(1)	5(1)	9(1)	14(0)	1(0)	2(0)	3(1)	1[1] (0)	3[0] (0)	6[2] (2)	5[0](3)	3[0](0)	55[3] (11)
Unsuccessful	19(4)	5(1)	16(11)	23(4)	27(9)	25(2)	10(2)	16(1)	15(1)	10[2] (0)	11[1,1+]	15[1] (1)	8 [0] (1)	15[2](6)	217[6,1+] (43)
TOTAL	79(16)	35(18)	87(70)	83(36)	58(23)	62(11)	22(4)	26(3)	25(2)	18[3] (0)	32[1,1+]	31[6] (4)	27[4](6)	40[3](20)	625[17,1+] (223)

( ) Represents attempted hijackings to Cuba

[ ] Represents attempted hijackings of General Aviation aircraft and a figure with a "+" within the bracket refers to large aircraft charter flights

* Figures include attempted hijacking of Air Canada aircraft on the ground at Frankfurt Airport, West Germany - Hijacker shot by police.

** Represents attempted hijacking prior to aircraft becoming "in flight".

*** An incomplete USA hijacking is one in which the hijacker is apprehended/killed during hijacking or as a result of "hot pursuit"

7. 45 U.S. State Bull. 108 (1961).

8. The reports mentioned, inter alia, armed reception committees; months of interrogation and imprisonment; riots; suicides, guards emptying their weapons into occupied cells; injections; and a house in Havana where about one-third of the American hijackers were kept under close arrest. K.C. Moore, Airport, Aircraft and Airline Security, Los Angeles, Security World Publishing Co. Inc., 1976, p. 4.

9. D.M. Krauss, Searching for Hijackers: Constitutionality, Costs and Alternatives, 40 U. of Chicago L.R. (1972 - 3), p. 383, at pp. 384 - 5. D.B. Cooper was not the first to extort money. On June 4, 1970, an American, Arthur B. Berkely, had demanded unsuccessfully that he be paid $100,000. Ibid., p. 389. Nor was Cooper the first to attempt to make a parachute getaway. A Scot, Paul J. Cini, had demanded $1.5 million but was captured when he put down his gun to strap on his parachute on an Air Canada flight over Alberta, on November 12, 1971. See Hijacking Incidents Involving Canada, Summary as of January 1, 1981, prepared by Civil Aviation Security, Transport Canada. Dan Cooper did, however, get the most publicity because of the apparent success of his mission. Of the $8,712,000 extortion demands in that period, $5,355,000 was actually paid, but all of the money has been recovered except the $200,000 paid to the missing Mr. Cooper. Since there had been no sign of either Cooper or of any of the marked money for nearly ten years, speculation had arisen that he had been killed either during his jump or shortly thereafter. In 1980, some of the marked notes was discovered in the mud of a river bank which added support to the theory that he did not live to enjoy his ill-gotten gains.

   The parachute jump via the rear exit of a Boeing 727 type of hijacking ended with the F.A.A. proposal that aircraft with ventral or tail cone exits be modified so that they could not be opened in flight. 37 F.R. 12,507 (1972) and 37 F.R. 25,354 (1972). See also Krauss, cited supra footnote 9, p. 390.

10. K.C. Moore, cited supra footnote 8. For a case arising out of this series of hijackings see Rosman v. Trans World Airlines, Inc. 12 Avi. 17,304 (N.Y.S.C. 1972); rev'd. 12 Avi. 17,634 (N.Y.S.C. App. Div. 1972); rev'd. and rem'd. 34 N.Y. 2d. 385; 13 Avi. 17,231 (N.Y.C.A. 1974) (Rabin J.).

   For other terrorist-hijacking cases see, for example, Day v. Trans World Airlines, Inc. 393 F. Supp. 217; 13 Avi. 17,647 (S.D.N.Y. 1975); off'd. 528 F. 2d. 31; 13 Avi. 18,145 (2d. Cir. 1975) (Kaufman C.J.); cert. den'd. 429 U.S. 890; 97 S. Ct. 246; 50 L. Ed. 2d. 172 (1976) and Evangelinos v. Trans World Airlines, Inc. 396 F. Supp. 95; 13 Avi. 18,051 (W.D. Pa. 1975); rev'd. and rem'd. 14 Avi. 17,101 (3d. Cir. 1977); reh'g. 550 F. 2d. 152; 14 Avi. 17,612 (3d. Cir. 1977) (Van Dusen C.J.).

11. Twenty out of forty worldwide reported hijackings and seventeen out of twenty-two U.S. reported hijackings represented attempted hijackings to Cuba. Worldwide Reported Hijacking Attempts, cited supra footnote 6.

12. The Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, January 1 - June 30, 1980, prepared by the F.A.A. Office of Civil Aviation Security, p. 8, states that:

> "there is concern that some of these refugees may become homesick and disenchanted in the United States, and desperate to return to Cuba. Their only means of returning may be to attempt a hijacking, thus increasing the potential threat to a level similar to that of the Cuban refugee situation of 10 - 11 years ago."

13. The announcement was in response to pressure exerted by the United States Government on Premier Castro. Conversation with John M. Hunter, Chief, Air Operations Security Division, Office of Civil Aviation Security, F.A.A., December 4, 1980. The United States quickly took advantage of Cuba's offer to return hijackers and the two persons involved in the hijacking of a Delta Air Lines aircraft to Cuba on September 17, 1980 were returned to the U.S.A. where they were subsequently charged with air piracy. Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, cited supra footnote 12.

The "take me to Cuba" hijackings have not ceased completely, the latest occurring on July 10, 1981, when an Eastern Airlines flight en route from Chicago to Miami made a forced detour via Havana. The Gazette, July 11, 1981, p. 13.

14. Editorial, Return of the Hijackers, Flight International, April 11, 1981.

15. It occurred on May 1, 1961 and was referred to as the "Cuban incident" and described in terms of a "forced detour" rather than in terms of a "hijacking". New York Times, May 2, 1961, p. I.

16. July 24, 1961.

17. 49 U.S.C. ss. 1301 et seq. (1976), amended by P.L. 87-197; 75 Stat. 466.

18. Section 902 (i) of the Act; 49 U.S.C. s. 1472 (i) (1976). See 49 U.S.C. s. 1472 (i) - (n) and s. 1473 (c).

19. Section 1111 of the Act; 49 U.S.C. s. 1511 (1976).

20. 29 F.R. 6,003 (1964) adopting 14 C.F.R. 40.373. Regulations

prohibiting admission of passengers to the cockpit had been in effect for some time prior to the adoption of this rule, and doors with locks had been required equipment on most aircraft. D.M. Krauss, cited supra footnote 9, at p. 386, footnote 31.

21. K.C. Moore, cited supra footnote 8, at pp. 8 - 9.

22. United States v. Lopez 328 F. Supp. 1,077 (E.D.N.Y. 1971) (Weinstein D.J.). The airlines did not wish to negate the image they had sought to build up of air travel as a completely safe and pleasurable experience. M.J. Fenello, Technical Prevention of Air Piracy, 585 Int'l. Conciliation (1971), p. 28 at p. 29.

23. It was developed by Dr. H.L. Reighard of the Medical Branch of the Federal Aviation Administration and Dr. J.T. Dailey, an F.A.A. psychologist. For a psychological analysis of the case histories of the various hijackers see J.A. Arey, The Sky Pirates, New York, Charles Scribner's Sons, 1972, and D.G. Hubbard, The Skyjacker: His Flights of Fantasy, New York, The MacMillan Company, 1971.

24. M.J. Fenello, cited supra footnote 22, at pp. 30 - 31. The Task Force did, in fact, compile a list of twenty-five to thirty characteristics in which hijackers differed significantly from the rest of the air-travelling public. United States v. Lopez cited supra footnote 22, at 1086. The profile was first utilised by Eastern Airlines in October 1969 (D.M. Krauss, cited supra footnote 9). Trans World Airlines introduced a profile/magnetometer system in December 1969 (U.S. Dept. of Transportation, News, 69-135, December 10, 1969), and Pan American World Airways joined them in implementing the profile in January, 1970 (U.S. Dept. of Transportation, News, 70-41, May 6, 1970).

25. The early magnetometers could not tell the difference between a camera and a gun. The flux-gate magnetometers are set to flash a warning light when metal equal to or greater than an average .25 caliber gun is carried by. On the workings of flux-gate magnetometers see United States v. Lopez cited supra footnote 22, and M.J. Fenello cited ibid., at p. 31.

26. Identification is not a foolproof deterrant. In the United States a ramp agent demanded proof of identity from a suspicious-looking passenger. The man indicated he was deaf and dumb. Pressed further he produced a valid commercial pilot's licence. He was allowed on board and hijacked the aircraft. Nobody on the airline staff had asked how a deaf and dumb person could get a pilot's licence. B. Moynahan, cited supra footnote 2.

In October 1972, a hijacking at Houston of an Eastern Airlines flight was led by a ranking employee of the Department of Commerce, a man who earned a good salary, travelled extensively in his work and had no police record. It is certain that no carrier or

government agency would have refused his credentials. K.C. Moore cited supra footnote 8, at p. 7.

To complete this trilogy of hijackers with impeccable credentials, in May this year, a Dublin to London Air Lingus flight was hijacked by a defrocked Trappist Monk. The Gazette, May 5, 1981, p. 70.

27. If at any time the passenger chooses not to proceed with the boarding process the searching must stop. United States v. Bell 335 F. Supp. 797 (E.D.N.Y. 1971); aff'd. 464 F. 2d. 667 (2d. Cir. 1972) (Mulligan C.J.) and United States v. Meulener 351 F. Supp. 1,284 (C.D. Cal. 1972) (Ferguson D.J.). The passenger may be searched constitutionally under the Fourth Amendment only if he is advised he has the right to refuse to be searched if he consents not to board the aircraft., Idem. In Canada, the ability to prevent a search being carried out by choosing not to board the aircraft also exists. See S.C. 1973-4, c. 20, s. 4 (7).

It should be mentioned that frisking can be a highly effective search technique. In three months at London's Heathrow Airport, British Airways passengers alone were relieved of nineteen revolvers, several shot guns, three hundred pounds of ammunition, eight hundred pellets, one hundred and sixty antique and replica firearms and four hundred knives. There was also an assortment of axes, bayonets, cut throat razors and the Peruvian naval attaché's dress sword. B. Moynahan, cited supra footnote 2.

The District Courts in both Lopez, cited supra footnote 22, and Meulener, rejected the contention that because notices are placed in boarding areas and on passengers' tickets warning that persons and belongings are subject to search, attempting to board an aircraft constitutes implied consent to an airport search.

The inspection of the contents of a passenger's carry-on luggage by electronic followed, if deemed necessary, by manual methods is definitely a search, and the extent of the intrusion is not minimal. The contents of a person's brief case or other personal belongings clearly represents items towards which he may harbour a reasonable expectation of privacy. See the discussion below of the Fourth Amendment's application to airport searches, and Katz v. United States cited infra footnote 114. In the Katz and Terry v. Ohio (cited infra footnote 102) cases, the Court stated that the Fourth Amendment protects people not places, and the Katz Court drew a distinction between "what a person knowingly exposes to the public" and "what he seeks to preserve as private, even in an area accessible to the public." 389 U.S. 347 at 351 - 2.

The argument that since carry-on luggage will not be searched if stowed in the cargo hold of the aircraft, a person

implicitly consents to have at least his carry-on luggage searched when he attempts to board, was not considered by either the Bell, Lopez or Meulener Courts. If this implicit consent argument is valid, then air travellers are agreeing to forego their Fourth Amendment rights if they prefer to maintain personal control over their property during flight in order to ensure that their belongings are not lost or stolen whilst being loaded, unloaded or transferred to connecting flights.

28. 14 C.F.R. 107.

29. 14 C.F.R. 121, issued on January 31, 1972, 37 F.R. 2,500 (1972).

30. This was later extended to domestic, flag or supplemental air carriers when they engage with large aircraft in scheduled or public charter operations. 14 C.F.R. 121.538 (a) (1980).

31. K.C. Moore, cited supra footnote 8. Total screening on all flights had not been ordered but rather the minimum use of both profile and detection systems were required on certain designated flights which were considered to be more prone to aerial piracy than others; on the remaining routes screening was essentially voluntary. The screening system established by the carriers had to be "acceptable to the administrator" which led to charges of vagueness and lack of uniformity. See D.M. Krauss, cited supra footnote 9, pp. 389 - 390.

32. See K.C. Moore cited supra footnote 8, pp. 13 - 14, and D.M. Krauss, cited supra footnote 9, p. 391, footnote 7.

33. U.S. Dept. of Transportation, News, 103-72, December 5, 1972.

34. In a related action, the F.A.A. required airport operators to provide armed law enforcement officers at all boarding gates during the boarding process. 37 F.R. 25,934 (1972). See also Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, Rule 35 (B) and (C) (hereinafter cited as Tariff no. PR-7), which gives carriers the right to search passengers and property and demand proof of identity.

Security screening on embarkation has proved to be a most effective measure. In the United States between 1976 and 1978, more than 1,400 million airline passengers were screened and, in the process, more than 8,000 firearms were detected. Editorial, Flight International, April 11, 1981.

35. D.M. Krauss, cited supra footnote 9, p. 392, footnote 72.

36. Conversation with John M. Hunter, Chief, Air Operations Security Division, Office of Civil Aviation Security, F.A.A., December 4,

1980. See also Aviation Week and Space Technology, August 18, 1980, p. 17, and Aviation Week and Space Technology, Aug. 25, 1980, p. 21. The Federal Aviation Authority were said to be studying areas as "mundane as gerbils and as exotic as neutron-exciting devices" to detect carry-on explosives. Aviation Week and Space Technology, August 18, 1980, p. 17.

One other aspect of the anti-hijacker system which deserves a mention was the sky marshall programme. This programme was established in response to the multiple hijackings and destruction of $40 million-worth of aircraft, discussed supra in the text, by Palestinian guerrillas in September 1970. The concept called for a permanent force of incognito sky marshalls to ride in the aircraft flying routes that had proved most vulnerable to hijacking attempts. 63 U.S. State Bull. 341 (1970).

The first five hundred sky marshalls were a temporary force recruited from the F.A.A., U.S. Customs, the Secret Service (Treasury), the F.B.I. and the C.I.A.. Eight hundred military men were added to the group later and these thirteen hundred men were subsequently replaced by a civilian corps of fifteen hundred men recruited and trained by the Treasury's Bureau of Customs (now the U.S. Customs Service), who were assigned to the F.A.A. under the direction of Lt.-Gen. Benjamin O. Davis (U.S.A.F. Ret.) the Director of Civil Aviation Security. See M.J. Fenello, cited supra footnote 22, at pp. 37 - 38; D.M. Krauss, cited supra footnote 9, at p. 387, footnote 40; K.C. Moore, cited supra footnote 8, at p. 9, and Aviation Week and Space Technology, February 7, 1972, p. 25.

While the sky marshall programme enjoyed some success, it also had its embarrassing moments, such as when a hijacking took place on a flight carrying both a sky marshall and and F.B.I. agent (K.C. Moore, idem.) and, although the marshall did not identify himself as such to anyone but the crew, and dressed and acted as if he were a businessman, since he was not allowed to drink, sleep, or watch the in-flight movie, and was armed with a revolver, blackjack and handcuffs, he probably stood out like a sore thumb.

The airlines were critical of the sky marshall programme both because coverage was too sparse (at the time there were fourteen thousand flights per day and only one thousand, five hundred marshalls), and from concern with the possibility and consequences of a mid-air shootout at 35 - 40,000 feet, the cruising altitude of large aircraft; although the sky marshalls' guns were specially adapted for use inside a plane, those of the sky pirates could not be guaranteed to be the same. On the whole, the marshalls were seen as more of a threat to the

passengers' safety than were the hijackers.

The sky marshall programme was more or less closed down once one hundred per cent screening proved effective. The programme ultimately failed because Congress did not vote the necessary funds. Krauss idem. Emphasis was shifted away from concentration on the in-flight hijacking deterrant to the ground prevention programme. See Aviation Week and Space Technology, February 7, 1972, p. 25 and Aviation Week and Space Technology, January 10, 1981, p. 30.

The sky marshall programme was reinstituted in 1980 to deal with the wave of attempted hijackings to Cuba. The security employees have retrained as sky marshalls annually at the F.B.I. academy at Quantico, Virginia. Aviation Week and Space Technology, August 25, 1980, p. 21. The number of marshalls is still only adequate to provide coverage on a small percentage of flights, but the programme was revived as a security measure because sky marshalls are considered to be effective in "cases which involve either non-weapons or unconventional weapons". Idem.

37. Worldwide Reported Hijacking Attempts. Summary as of January 1, 1981, prepared by Civil Aviation Security, Transport Canada. See supra footnote 6. An analysis of the reported Canadian hijacking attempts is included in the appendices.

38. Conversation with Paul B. Sheppard, Director, Civil Aviation Security Branch, Transport Canada, January 27, 1981.

39. R.S.C. 1970, c. 34, as amended by S.C. 1972, c. 13, s. 6.

40. Ibid., ss. 76.1 - 76.3.

41. For other problems connected with jurisdiction on board aircraft, see supra the chapter of this study dealing with pregnancy and, in particular, the section dealing with birth on board aircraft.

42. The Tokyo Convention of 1963, The Hague Convention of 1970 and the Montreal Convention of 1971. These agreements are discussed infra in this chapter.

43. Letter from Paul B. Sheppard, Director, Civil Aviation Security Branch, Transport Canada, dated November 13, 1980.

44. Bill C-128 amended the Aeronautics Act R.S.C. 1970, c. A-3, by adding section 5.1.

45. S.C. 1973 - 74, c. 20.

46. Letter from Paul B. Sheppard, cited supra footnote 43. See Air Canada, International Passenger Rules Tariff no. IPP-1, Rule 3 (A)(e) giving carriers the right to deny boarding to persons who refuse to be searched or have their property searched and Tariff no. PR-7, Rule 30 (A)(4) which gives carriers the right to refuse carriage to persons who cannot produce identification if requested so to do. See also the Air Regulations, SOR/61-10 as amended by SOR/77-307, wherein s. 820 B prohibits weapons on board aircraft.

47. SOR/74-226 (April 2, 1974), Canada Gazette, Part II, vol. 108, no. 8; SOR/74-227 (April 4, 1974), Canada Gazette, Part II, vol. 108, no. 8; SOR/74-666 (December 11, 1974), Canada Gazette, Part II, vol. 108, no. 24.

48. For a description of the Canadian system of defense against hijacking and air terrorism, see Centre of Research of Air and Space Law, ~~Legal~~, Economic and Socio-Political Implications of Canadian Air Transport, Montreal, McGill University, 1980, pp. 455 et seq.

Neither the Canadian nor the United States' anti-hijacking security systems are as stringent as that established by El Al Israel Airlines. All El Al passengers are frisked and all carry-on baggage is searched. If there is any suspicion, all baggage destined for the cargo hold is also opened and searched otherwise non-carry-on baggage may be mechanically searched. Passengers are taken by bus to the aircraft which are parked in the airfield, not at the terminal, since this provides better security for the aircraft. These measures are used in addition to pre-boarding surveillance programmes. M.J. Fenello cited supra 22, pp. 34 - 35. Armed security guards ride aboard all El Al international flights, and these guards have been successful in preventing takeovers of the aircraft. D.M. Krauss, cited supra footnote 9, p. 387, footnote 40.

El Al follows these procedures worldwide and, at Lod Airport in Tel Aviv, all other airlines must also comply with them. M.J. Fenello, idem. An Israeli-type system is not envisioned for North American airlines due to the fear of slowing down the entire air transportation system. Aviation Week and Space Technology, Aug. 25, 1980, p. 21.

49. Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on September 14, 1963.

50. See also the Draft Convention on the Legal Status of the Aircraft Commander drawn up in February 1947, article 2.

51. Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on December 16, 1970.

52. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on September 23, 1971.

53. Article 8 (1). The Convention may also be used as the legal basis for extradition if a contracting state makes extradition conditional on the existence of a treaty. Article 8 (2).

For the background to the skyjacking conventions see A.E. Evans, Aircraft Hijacking: Its Cause and Cure, 63 A.J.I.L. (1969), p. 695, and G.F. Fitzgerald, The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft, 1963 Canadian Yearbook of International Law (vol. I), p. 230. For an assessment of how the conventions work in practice, see G.F. Fitzgerald, Toward Legal Suppression of Acts Against Civil Aviation, 585 Int'l. Conciliation (1971), p. 42.

54. Canada, France, Germany (Federal Republic), Italy, Japan, the United Kingdom and the United States.

55. See the Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, cited supra footnote 12, and W. Schwenk, The Bonn Declaration on Hijacking, 1979 Annals of Air and Space Law (vol. IV), p. 307.

Although many countries have ratified and adhered to the three anti-hijacking conventions (according to P. Martin, D. McClean and E. de Montlaur Martin, Shawcross and Beaumont on Air Law (vol. II), 4th ed., Issue 7, London, Butterworths, 1980, as of September 1, 1980, one hundred and four states were parties to the Tokyo Convention of 1963, one hundred and one states were parties to The Hague Convention of 1970 and one hundred and one states were parties to the Montreal Convention of 1971), not all countries are willing to carry out their obligations. An illustration of this problem can be found in the lack of international cooperation which surrounded the hijacking of an Iberian Airlines flight on March 14, 1977. (The incident probably was allowed to commence due to the fact that in Spain security screening took place only on a few randomly selected flights.) The Moroccan authorities refused any assitance to the flight and denied it landing rights within their territory although the Captain insisted that he was low on fuel. The aircraft was also refused fueling at Turin, Italy and, although the Swiss authorities permitted the flight to land at Zurich, the Captain was refused fueling there also. Permission to disembark several passengers that the hijacker had agreed to release was denied by the Swiss authorities as well. Following the hijacker's announcement that his intended destination was Moscow, the Spanish Government requested permission to enter U.S.S.R. airspace and land in Moscow. Permission was denied and the aircraft was held over Warsaw until the fuel

situation forced the aircraft to land at Warsaw. The aircraft returned to Zurich where the hijacking was ended by the use of armed intervention without the Captain's knowledge.

The International Federation of Airline Pilots Associations described the failure to assist an aircraft in dire distress as "highly repugnant and most reprehensible". See Air Line Pilot, May 1977, pp. 59 - 60.

At the time of the incident, all the countries involved were parties to all three conventions with the exception of the U.S.S.R., which was not a party to the Tokyo Convention of 1963, and Switzerland, which had not at that time acceded to the Montreal Convention of 1971, but did so subsequently.

56. See supra footnote 23. Studying psychological traits to detect possible law breakers is by no means a revolutionary development. Traffic officers have found for years a considerable number of stolen cars by checking on suspicious drivers, such as those who keep stalling or screeching to a halt. M.J. Fenello, cited supra footnote 22, at p. 31.

57. See D.M. Krauss, cited supra footnote 9, at p. 388, footnote 47, and K.C. Moore, cited supra footnote 8, at p. 8.

58. Idem.

59. Ibid., at pp. 8 - 9, and M.J. Fenello, cited supra footnote 22, at p. 29.

60. Another sample consisting of 500,000 screened passengers showed that only 1,406 satisfied the profile (0.28%). Of these, approximately half were permitted to board because they did not activate the magnetometer. Of the 712 who were interviewed, only 283 were frisked. Thus, ultimately only 0.05% of the sample were subjected to a preventative weapons search. Twenty persons were denied boarding as a result of the frisk of which 16 were arrested. In summary, 99.86% of the half million passengers passed through the boarding process without interruption of any kind, and 99.95% boarded without being physically searched. United States v. Lopez cited supra footnote 22, at 1,084.

62. Letter from John M. Hunter, see supra, dated October 30, 1980; letter from Paul Sheppard, Director, Civil Aviation Security Branch, Transport Canada, dated November 13, 1980; letter from James Ott, Transport Editor, Aviation Week and Space Technology, dated November 11, 1980.

63. See United States v. Bell cited supra footnote 27, at 670.

64. M.J. Fenello, cited supra footnote 22, p. 31.

65. Cited supra footnote 22.

66. Cited supra footnote 27. In the Lopez case, the Court took note of the fact that the evidence revealed that the defendant was a narcotic addict or a dealer in narcotics, or both, who

> "would feel no compunction about telling what he knew to all who would lend an ear in prison or out".

328 F. Supp. 1,077 at 1,086. Under these circumstances the District Court has no choice but to exclude him, and the defendant's pleas that he be admitted to the in camera investigation in which the details of the profile were to be discussed, but be enjoined not to reveal the profile, fell on deaf ears.

67. 475 F. 2d. 240 (2d. Cir. 1973) (Mansfield C.J.) and 498 F. 2d. 535 (2d. Cir. 1974) (Oakes C.J.). The defendant's argument that the profile was no longer actively in use was found not to be sufficient grounds to allow him to attend the hearing in which its details were revealed, since there was no evidence that the profile had been abandoned forever as a weapon to combat air piracy. 498 F. 2d. 537 at 538. As events transpired, this was a fortuitous ruling by the Circuit Judge.

68. Conversation with John M. Hunter cited supra footnote 36.

69. Letter from Paul B. Sheppard cited supra footnote 62.

70. Cited supra footnote 22.

71. Killian, Profile of a Potential Skyjacker, Chicago Tribune, December 3, 1972, s. 1-A, p. 5.

72. B. Moynahan cited supra footnote 2.

73. Presumably to be seated as near to the cockpit as possible.

74. Conversation with Paul B. Sheppard cited supra footnote 38.

75. An example of this sort of thing (although not one which involved a Canadian aircraft) occurred when Anthony Andrews star of television series Danger UXB (based on the World War II experiences of the Royal Engineering Corps with unexploded bombs) tried to board a flight from London to New York, in order to publicise the series in North America. The actor was carrying a mock bomb with him as part of the publicity arrangements, and when questioned by security personnel at Heathrow Airport as to what the object was he replied "just an unexploded bomb" ! Mr. Andrews was not permitted to board

that particular flight but after lengthy explanations and demonstrations he was allowed to board two flights later. Reported in The Gazette, January 21, 1981, p. 73.

76. United States v. Lopez, cited supra footnote 22, at 1,086.

77. M.J. Fenello, cited supra footnote 22, at p. 31.

78. Krauss cited supra footnote 9, p. 397, footnote 106.

79. Idem.

80. 347 F. Supp. 1,098 (E.D.N.Y. 1972); aff'd. 474 F. 2d. 699 (2d. Cir. 1973) (Friendly Ch. J.).

81. Criminals and other undesireables presumably do not carry valid credit cards and cheque-ratings and thus identity can be verified with the passenger's bank. See Marshall v. Delta Air Lines v. American Security and Trust Company 13 Avi. 18,164 (D.D.C. 1975) (Gesell D.J.). This case is discussed supra in the chapter of this study dealing with racial discrimination.

82. Ms. Riggs was in fact not a potential sky pirate but merely a narcotics traffiker. There appears to be a distinct correlation between the behavioural abnormalities demonstrated by narcotics addicts and traffikers and those of suspected hijackers. The Bell (cited supra footnote 27), Legato (cited infra footnote 86), Lopez (cited supra footnote 22), Moreno (cited infra footnote 85) and Riggs (cited supra footnote 80) cases were all instances of persons who were initially selected as potential hijackers and whose subsequent physical search revealed large quantities of heroin. The Skipwith cited infra footnote 116) and Slocum (cited infra footnote 110) cases involved cocaine; the Clark case (cited supra footnote 67) involved heroin and cocaine; and the Meulener case (cited supra footnote 27) involved the discovery of marijuana.

In addition to its affinity for drug dealers, the profile also appears to identify persons fleeing to avoid legal prosecution and individuals who are absent without leave from the military services. M.J. Fenello, cited supra footnote 22, at p. 33. The criterion of nervousness would, therefore, appear to be one of the elements of the hijacker profile.

83. It is quite likely that their explosives would have fooled even a modern magnetometer and only a manual search of their carry-on luggage would have revealed the explosives. Frisking would not have produced the evidence either.

One wonders if the profile was in use on the flight that D.B. Cooper took (see supra footnote 9) and, if so, would it have identified him. According to one writer, Mr. Cooper was looking particularly unnoticeable when he boarded Northwest Orient's Flight 305 at Portland, Oregon, on November 24, 1971. The only reports of his appearance are to the effect that he was wearing a dark topcoat to protect him from the Oregon winter and that he looked like any businessman on a flight. K.C. Moore cited supra footnote 8, p. 3.

84. United States v. Skipwith cited infra footnote 116.

85. United States v. Moreno (W.D. Tex.); aff'd. 475 F. 2d. 44 (5th Cir. 1973) (Gewin C.J.); reh'g. den'd. April 10, 1973.

86. United States v. Legato (S.D. Fla.); aff'd. 480 F. 2d. 408 (5th Cir. 1973) (Gewin C.J.).

87. United States v. Legato supra and United States v. Riggs cited supra footnote 80.

88. There also seems to be some reverse psychology at work in that narcotics traffikers appear to call attention to themselves by utilising bright colours: Riggs was wearing a brilliant orange coat, Legato was carrying a bright orange shopping bag. The underlying hypothesis seems to be that anyone who has a reason for wishing to avoid notice would not call attention to themselves in so obvious a manner. On the other hand, perhaps the utilization of bright colours is the method by which drug pedlars identify themselves to their contacts.

A brief summary of the hijacking attempts involving U.S. scheduled and general aviation aircraft, which occurred between July 1, 1979 and June 30, 1980, together with details of the person or persons involved, is included in the appendices.

89. Airline check-in personnel responsible for the application of the profile are themselves screened for any personality traits that might work against their impartial application of the profile. M.J. Fenello, cited supra footnote 22, p. 31.

90. Idem.

91. Idem.

92. The Lopez case, stated specifically that the profile was not based on racial, religious or political elements. 328 F. Supp. 1,077 at 1,086.

93. U.S. Constitution, Amendment XIV.

994. Ibid., Amendment V.

95. United States v. Lopez, cited supra footnote 22, at 1,086 - 1,087.

96. Ibid., at 1,084.

97. D.M. Krauss, cited supra footnote 22, p. 397.

98. United States v. Lopez, cited supra footnote 22, at 1,101.

99. See, for example, Terry v. Ohio 392 U.S. 1; 88 S. Ct. 1,868; 20 L. Ed. 2d. 889 (1968) (Warren Ch. J.). and the associated cases dealing with the Fourth Amendment which are discussed later in this chapter.

100. See D.M. Krauss cited supra footnote 9; A. Abramovsky, The Constitutionality of the Anti-Hijacking Security System, 22 Buffalo L.R. (1972-3), p. 123; and Comment, Airport Security Searches and the Fourth Amendment, 71 Columbia L.R. (1971), p. 1039.

101. See the Bell (cited supra footnote 27), Clark (cited supra footnote 67) and Lopez (cited supra footnote 22) cases and the text accompanying footnote 65-67.

102. Cited supra footnote 99.

103. 392 U.S. 1 at 21-22.

104. Ibid., at 24. The facts are to be measured against an objective, reasonable man standard, not by the subjective impressions of the particular officer; anything less "would invite the intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches". Idem.

105. Up to the end of 1968 there were 35 attempted hijackings and there were 87 to the end of 1969. Worldwide Reported Hijacking Attempts, cited supra footnote 6. With some of the hijackers being fugitives in other lands, and many using aliases, and their true identities remaining unknown, it seems unlikely that a statistically reliable list of a dozen characteristics could be distilled from such a limited sample. See D.M. Krauss, cited supra footnote 9, p. 398, the end of 1980, there had been 625. Worldwide Reported Hijacking Attempts, supra.

106. United States v. Lopez, cited supra footnote 22, at 1,084.

107. It should be kept in mind that the vast majority of persons brought to trial who had initially attracted the attention of law enforcement personnel because they matched the hijacker profile, were charged, not with an offense relating to their potential hijacker status, but with the possession of narcotics revealed in the search of the defendant's person or baggage which followed their designation as a "selectee".

108. United States v. Lopez, cited supra footnote 22, at 1097-1098.

109. Ibid., at 1,084.

110. Ibid., at 1,097. In the pre-one hundred per cent electronic screening days when only those who satisfied both the behavioural profile and activated the magnetometer were designated as selectees, the question was raised as to whether the behavioural profile could be used to justify the limited intrusion of scanning with a magnetometer; this question was rendered moot when one hundred per cent screening was made compulsory. The courts had, however, found an overwhelming interest in preventing hijackings and that this justified the routine subjection of passengers to magnetometer searches.

In United States v. Epperson (E.D. Va.); aff'd. 454 F. 2d. 769 (4th Cir. 1972) (Craven C.J.), the Court found that a search for the sole purpose of discovering weapons and pre-criminal events fully justified the minimal invasion of personal privacy by magnetometers. The use of the device, unlike frisking, could not possibly be "an annoying, frightening, and perhaps humiliating experience". Ibid., at 771. (The Fourth Circuit may have been feeling somewhat self-righteous since a .22 calibre pistol was discovered in the defendant's possession.).

The Third Circuit in United States v. Slocum (N.J.D.C.); aff'd. 464 F. 2d. 1,180 (3d. Cir. 1972) (Seitz Ch. J.), added to the above holding, that reasonableness was the ultimate standard in determining whether Fourth Amendment guarantees were violated. Ibid., at 1,182. Both the Epperson and Slocum Courts appear to have resolved the issue of reasonableness by giving conclusive weight to the Government's interest in protecting air passengers from the potential consequences of hijackings.

111. Cited supra footnote 27.

112. Ibid., at 675.

113. Cited supra footnote 102.

114. 369 F. 2d. 130 (9th Cir. 1966); rev'd. 389 U.S. 347; 88 S. Ct. 507; 19 L. Ed. 2d. 576 (1967) (Stewart J.).

115. See Terry v. Ohio cited supra footnote 102, and Sibron v. New York 18 N.Y. 2d. 603; 219 N.E. 2d. 196 (N.Y.C.A. 1966); rev'd. 392 U.S. 40; 88 S. Ct. 1889; 20 L. Ed. 2d. 917 (1968) (Warren Ch. J.).

116. See Sibron v. New York supra, and United States v. Lopez cited supra footnote 22. The United States v. Moreno case (cited supra footnote 35) established that searches of certain persons in the general airport area are to be tested under a case by case application of the reasonableness standard. The Court in United States v. Skipwith 482 F. 2d. 1,272 (5th Cir. 1973) (Clark C.J.) held that those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to a search based on mere or unsupported suspicion. Ibid., at 1,276.

117. Cited supra footnote 110.

118. Ibid., at 771.

119. K.C. Moore, cited supra footnote 8, p. 18.

120. Ibid., p. 15.

121. 49 U.S.C. s. 1511 (1976).

122. See the Air Traffic Conference of America, Trade Practice Manual, Resolution 10.05, s. 3, which states that:

> "A member may refuse to accept prisoners at any time, if in the judgement of the accepting Member, such acceptance would jeopardize the safety and comfort of other passengers."

The Air Traffic Conference of North America is the trade association for North American carriers and provides those services which the International Air Transport Association provides for non-North American carriers. It should be noted that objections to the comfort of other passengers suffices as a reason for refusal.

See also Tariff no. PR-7, Rule 35 (D), whereby San Juan Airlines and US Air will refuse carriage to persons in custody of law enforcement personnel unless the number of law enforcement escorts exceeds the number of persons in custody by at least one.

123. 4 Wall. (71 U.S.) 605; 18 L. Ed. 447 (1866) (Davis J.).

124. Pearson had taken ship at Acapulco bound for San Francisco from which he had been forcibly expelled, and was under threat of death if he returned.

125. Mason v. Belieu 13 Avi. 17,114 (D.D.C. 1974); rev'd. in part 543 F. 2d. 215; 117 U.S. App. D.C. 68; 13 Avi. 18,405 (D.C. Cir. 1976) (Tamm C.J.); cert. den'd. 429 U.S. 952; 97 S. Ct. 144; 50 L. Ed. 2d. 127 (1976).

126. The carrier presumably wished to avoid an unpleasant situation upon its arrival in Panama, or to accept the responsibility (and cost) of returning Mr. Mason to Miami. Outside North America, see I.A.T.A. Resolution 701 (formerly 140), Inadmissible Passengers and Deportees.

127. The plaintiff later obtained passage on an Air Panama flight. On his arrival at Tocumen Airport, Mason and his wife were met by Canal Zone and Panamanian officials, and considerable confusion ensued. Mr. and Mrs. Mason decided to seek asylum in Panama, but by that time the Panamanian Government offices were closed for the day and the Masons were taken into police custody until their request for political asylum was granted the following day. The Mason's considered that Pan American's conduct in refusing Mr. Mason transportation, had caused them mental distress, severe inconvenience and had resulted in their seeking asylum. 543 F. 2d. 215 at 218.

128. 49 U.S.C. s. 1374 (b) (1976). For the text of this section see supra the chapter of this study on the airline as a common carrier.

129. Mason v. Belieu, cited supra footnote 125, 543 F. 2d. 215 at 220.

130. 49 U.S.C. s. 1301 (1976).

> " "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof."

131. William Becker Travel Bureau, Inc. v. Sabena Belgian World Airways 13 Avi. 17,770 (S.D.N.Y. 1975) (Gagliardi D.J.).

132. United States v. City of Montgomery 201 F. Supp. 590 (N.D. Ala. 1962) (Johnson D.J.). The case is discussed supra in the chapter dealing with racial discrimination.

133. Mason v. Belieu, cited supra footnote 125, 543 F. 2d. 215 at 219.

134. Ibid., at 220. Other cases (see the discussion below) which have denied compensation to persons awaiting the arrival of passengers have usually categorised them as unforeseeable plaintiffs.

135. Idem. See also the first of the tests laid down in Cort v. Ash (E.D. Pa.); rev'd 496 F. 2d. 416 (3d. Cir. 1974); rev'd. 422 U.S. 66; 95 S. Ct. 2,080; 45 L. Ed. 2d. 26 (1975) (Brennan J.), for deciding whether a private right of action can be derived from a Federal statute. The tests are stated supra in footnote 23 of the chapter on overbooking.

136. 365 F. Supp. 128; 12 Avi. 18,146 (D.D.C. 1973); rev(d 512 F. 2d. 527; 13 Avi. 17,750; 167 U.S. App. D.C. 350 (D.C. Cir. 1975); rev'd. and rem'd. on other grounds 426 U.S. 290; 96 S. Ct. 1,978; 48 L. Ed. 2d. 643; 14 Avi. 17,148; on rem'd. 445 F. Supp. 168; 14 Avi. 18,312 (D.D.C. 1978); rev'd. 15 Avi. 18,179 (D.C. Cir. 1980) (Robb C.J.). In particular the first decision by the D.C. Circuit Court.

137. See ~~P.B.~~ Heister, Discriminatory Bumping, 40 J.A.L.C. (1974), p. 533 at p. 545, which says of C.G.A.C.'s claim: "a statute that was designed to protect a particular class of persons from a particular risk or harm creates no duty with respect to another class or risk".

138. Roman v. Delta Airlines, Inc. 441 F. Supp. 1,160; 15 Avi. 17,147 (N.D. Ill. 1977) (Leighton D.J.).

139. Ibid., 15 Avi. 17,147 at 17,153.

140. See, for example, Polansky v. Trans World Airlines, Inc. (N.J.D.C. 1974); aff'd. 523 F. 2d. 332; 13 Avi. 17,947 (3d. Cir. 1975) (Hunter C.J.). The Court held that, based on the criteria of the tests laid down in Cort v. Ash (cited supra footnote 135) a private remedy does not exist for all alleged violations of the anti-discrimination provision and refused to recognise a cause of action under the Act for persons claiming that the first class ground accommodations promised in a tour sponsored by a regulated air carrier were inferior to tourist class services.

141. 49 U.S.C. s. 1302 (e) 1976.

142. Mason v. Belieu cited supra footnote 125, 543 F. 2d. 215 at 221.

> "... we do not believe that preventing every discourtesy or lack of attention is a primary objective of the Federal Aviation Act's avowed purpose to provide adequate transportation

without unreasonable preferences. As such it was not therefore a goal requiring a private remedy not expressly granted by Congress."

Idem. Because of the above holding, the claim did not fulfil the third test laid down in Cort v. Ash (cited supra footnote 135).

143. See, for example, Smith v. Piedmont Aviation, Inc. 412 F. Supp. 641 (N.D. Texas 1976); modified 567 F. 2d. 290 (5th Cir. 1978) (Coleman C.J.).

144. A further example of the use of s. 1111 of the Act to refuse transportation for fear of a demonstration upon arrival is found in Williams v. Trans World Airlines, Inc. 369 F. Supp. 797; 12 Avi. 18,231; 1975 U.S. Av. R. 526 (S.D.N.Y. 1974); aff'd. 509 F. 2d. 942; 13 Avi. 17,482; 1975 U.S. Av. R. 513 (2d. Cir. 1975) (Anderson C.J.). In the Williams case, T.W.A. refused to transport a black revolutionary leader (from London, England to Detroit, Michigan) who was considered to be armed and extremely dangerous. In addition, the plaintiff had been a fugitive from justice and was returning to the United States to surrender to the law enforcement authorities.

The plaintiff brought an action against the carrier claiming that the latter's adverse and hostile treatment was motivated by racial prejudice. The evidence, however, did not uphold this contention and the refusal of carriage per se was held to be justified under s. 1111 and non-discriminatory.

This case is discussed in greater detail supra in the chapter of this study dealing with racial discrimination.

145. 49 U.S.C. s. 1511 (1976).

146. See 1 U.S. Code, Cong. & Ad. News, 87th Cong., 1st Sess., 520 - 522 (1961), and 2 U.S. Code, Cong. & Ad. News, 87th Cong. 1st Sess. 2,563 - 2,582 (1961).

147. See supra the chapter of this study dealing with the handicapped.

148. 49 U.S.C. s. 1511 (a)(2) (1976).

CHAPTER 9

REMEDIES

REMEDIES

THE SITUATION IN CANADA AND THE UNITED STATES DISTINGUISHED

As far as individual recourse[1] by airline passengers on account of alleged instances of discriminatory refusal of carriage is concerned, there are two major differences between the positions of the Canadian and the United States' carriers.

Firstly, there exist in Canada tariff regulations which permit the airlines at their discretion to refuse carriage to persons based on their "conduct, status, age or mental or physical condition".[2] The applicability of these vaguely-worded rules was cancelled for U.S. carriers in November, 1979.[3] Secondly, in the United States, a right of action can be sustained based on the anti-discrimination provisions found in section 404 (b) of the Federal Aviation Act of 1958.[4] Not only do these provisions apply in limited cases to non-passengers as well as to passengers, but they create a statutory right of action in addition to that provided by the common law remedies of breach of contract and the torts of negligence and fraudulent misrepresentation. Litigation on the subject of discriminatory refusal of carriage might be in far greater abundance if similar protective measures were extended to the passengers of Canadian air carriers.

Under the terms of the Airline Deregulation Act of 1978,[5]

the authority of the Civil Aeronautics Board with respect to s. 404 (b) will cease to be in effect as of January 1, 1983.[6] The Act is unclear as to what will happen to the C.A.B.'s consumer protection and information functions.[7] There have been suggestions that these functions will be transferred to the Federal Trade Commission,[8] or the Department of Transportation or that they will be handed over to state and local consumer agencies in order that air carriers are treated in the same way as other industries.[9] This latter idea appears ill-suited to the extra-territorial nature of the airline industry. But, since with the abolition of Title II of the Federal Aviation Act of 1958 by January 1, 1985 at the latest,[10] the enabling legislation supporting all the Board's consumer-oriented efforts in the past[11] will also cease to be in effect, the sooner this vacuum is filled, the better the protection afforded to passengers on United States' carriers.

OTHER RECOURSES AVAILABLE

A passenger who has been bumped due to the airlines' overbooking practices is entitled to denied boarding compensation[12] and recent cases suggest that this is in fact an exclusive remedy. Elsewhere, in the absence of regulatory relief or statutory anti-discrimination provisions, common law remedies may be pursued such as breach of the contract to carry or negligence for failure by the carrier to ascertain the necessary information to use its discretion in an enlightened manner.[13]

If all air carriers would refuse to carry a passenger for the same reason, he is probably merely entitled to a refund of the price of the unused portion of his ticket,[14] and the question of engaging substitute transport of another type is not relevant. If, however, another airline agrees to carry the passenger, then the questions of substituted transportation[15] and of delay[16] arise and the consequential damages awarded will attempt to redress the injury suffered on account of the passenger's late arrival.

Damages for delay are usually comprised of hotel and taxi expenses[17] if an overnight stay is involved and the cost of telephone calls[18] to inform the passenger's family or friends of his forthcoming late arrival. But just as the courts are tending to ignore the humiliation and outrage claimed in overbooking cases,[19] they are unlikely to be sympathetic towards claims for mere inconvenience (or loss of consortium) caused by an overnight delay.[20]

The loss of customers due to the failure to keep appointments or the absence from shows at which one's goods are being displayed or presented, or the loss of a job due to failure to arrive on time for the interview, are all speculative losses and would not normally be allowed by the courts.[21] If, however, it can be shown that the late arrival was the cause of the loss of previously guaranteed income, this would be taken into account in the damages awarded for consequential losses. For example, a speaker at a conference whose fee depended upon their presence and participation

at the meeting would be entitled to compensation for having forfeited their fee or honorarium if the forfeiture was due to their late arrival.[22] Since 1981 is the "International Year of the Disabled" it is not beyond the realm of possibility that a speaker, who was himself handicapped, would be denied boarding by a particular airline on his way to address a convention concerned with the plight of the disabled, and thereby incur a loss of income.[23]

The most prominent case encountered in this study which deals with the consequences of delay caused by denied boarding is that of Adamsons v. American Airlines, Inc.[24] The plaintiff in that case was suffering from a spinal haematoma and the two day delay in surgical intervention incurred by the defendant airline's unlawful denial of boarding left the plaintiff with total paralysis of her lower limbs and incontinent. Half a million dollars in damages were awarded to Dr. Adamsons - a not overly generous award in the circumstances. Normally, the delay engendered between being denied boarding on one airline and securing passage with an alternative carrier would not result in the catastrophic consequences which befell Dr. Adamsons, the case serves, however, as a caveat for all airlines which continue to refuse carriage without sufficient justification.

FOOTNOTES

1. An order to compel future compliance would also be obtainable but affords no monetary compensation to the plaintiff.

2. See, for example, Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7, Rule 35 (F) (1) (hereinafter cited as Tariff no. PR-7).

3. C.A.B. Order 79-11-148 (Docket 34,435) dated November 21, 1979.

4. 49 U.S.C. s. 1374 (b).

5. P.L. 95-504; 92 Stat. 1705 which adds a new title, TITLE XVI - SUNSET PROVISIONS, to the Federal Aviation Act of 1958.

6. Ibid., s. 1601 (a)(2)(B); 49 U.S.C. s. 1551 (a)(2)(B).

7. Aviation Week and Space Technology, March 9, 1981, pp. 191-193.

8. According to the original Airline Deregulation Act of 1978, certain functions of the Board will be transferred to the Departments of Justice and Transportation. Section 1601 (b)(1); 49 U.S.C. s. 1551 (b)(1). However, the Sunset Bill (the Civil Aeronautics Board Sunset Act of 1981) discussed infra footnote 10, provides that the authority of the C.A.B. (and thus the authority of the Department of Transport in consultation with the Department of State under the Airline Deregulation Act) to investigate alleged unfair or deceptive practices or unfair methods of competition would be eliminated, and carriers engaged in international competition would fall within the authority of the Federal Trade Commission to investigate and prohibit unfair methods of competition. See G.N. Tompkins, The Potential Impact of the United States Antitrust Law in International Air Transportation, paper presented to the International Civil Aviation Conference no. 3, Paris, France, June 1981, pp. 11-12.

9. Aviation Week and Space Technology, March 9, 1981, pp. 191-193.

10. Because of the general lack of specificity with respect to the transfer or elimination of its functions, and the confusion and disruption in the wake of this, the early demise of the Board is being promoted. The C.A.B. was originally scheduled to be abolished as of January 1, 1985 (s. 1601 (a)(4); 49 U.S.C. 1551 (a)(4)), but under the terms of the Sunset Bill, Congress would require its abolition no later than October 1, 1983.

11. The primary souce of rulemaking authority is s. 204 (a) of the Federal Aviation Act of 1958; 49 U.S.C. s. 1324 (a).

12. Tariff no. PR-7, Rule 249.

13. The tort of fraudulent misrepresentation seems to have fallen by the wayside, together with awards of punitive damges which were once awarded to passengers who were denied boarding due to the carrier's overbooking practices. See in this regard the two judgments by the Appeals Court in Nader v. Allegheny Airlines, Inc. 365 F. Supp. 128; 12 Avi. 18,146 (D.D.C. 1973); rev'd. 512 F. 2d. 527; 13 Avi. 17,1750; 167 U.S. App. D.C. 350 (D.C. Cir. 1975); rev'd. and rem'd. on other grounds 426 U.S. 290; 96 S. Ct. 1,978; 48 L. Ed. 2d. 643; 14 Avi. 17,148 (1976); on rem'd. 445 F. Supp. 168; 14 Avi. 18,312 (D.D.C. 1978) (Richey D.J.); rev'd. 626 F. 2d. 1,031; 15 Avi. 18,179 (D.C. Cir. 1980) (Robb C.J.), and the discussion supra in chapter 2.

14. Tariff no. PR-7, Rule 35 (J) and Air Canada, International Passenger Rules Tariff no. IPR-1, Rule 3(B).

15. See, for example, Romulus Films v. Dempster [1952] 2 Ll. R. 535 (Q.B.) (McNair J.) where the cost of the substitute aircraft was reimbursed, and Buckmaster v. Great Eastern Railway Co. (1870) 23 L.T. 471 (Exch.) (Martin B.) where the cost of hiring a substitute train was reimbursed. But see also McMurray v. Capital International Airways (N.Y. Small Cl. Ct. 1980) (Steinberg J.), reported in the New York Law Journal, January 1980, and discussed in N.R. McGilchrist, Denial of Boarding to Airline Passengers, Ll. M. C. L. (Feb. 1981) p. 93 at pp. 97-98, in which both the cost of the airline tickets on a cancelled flight and the cost of the tickets on the substituted carrier were awarded as damages.

    It should be borne in mind that even if a passenger is discriminatorily denied boarding, chartering a substitute plane would not always be the most appropriate method of mitigating one's damages. Witness the fate of the plaintiff's request in Smith v. Piedmont Aviation, Inc. 412 F. Supp. 641 (N.D. Texas 1976); modified 567 F. 2d. 290; 1978 U.S. Av. R. 1,027 (5th Cir. 1978) (Coleman C.J.), that another aircraft be provided when he had been bumped from a scheduled flight: the suggestion was met with derision and abuse.

16. It should be emphasized once again that refusal of carriage is a clear case of non-performance which, on international flights, would not be governed by artilce 19 of the Warsaw Convention of 1929 nor the rules derived therefrom for cases of delay. See G. Miller, Liability in International Air Transport, Deventer, The Netherlands, Kluwer, 1977, p. 159.

    In cases of non-performance, the carrier cannot plead the conditions of contract printed on the passenger ticket which attribute a purely indicative value to timetables, thus:

> "Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable

dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of the contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections."

See also I.A.T.A. Resolution 724 (formerly 275 (b)), Passenger Ticket - Conditions of Carriage, s. 9.

Cases of damages for delay involving goods are not comparable because the issues of spoilage and a quantifiable loss of profits, resulting from the loss of market, arise. See, for example, The Ardennes (1950) 84 Ll. R. 340 (K.B.) (Lord Goddard Ch. J.) in which the market price of mandarine oranges had fallen and the import duty had risen; Bart v. British West Indian Airways Limited (1967) 1 Ll. R. 239 (Guyana C. A. 1966) (Stoby L. Ch. and Luckoo J.A.) in which the late arrival of football coupons invalidated the plaintiffs claim to prize money; and Bianchi v. United Air Lines 15 Avi. 17,426 (Wash. C. of A. 1978) (Swanson J.) where late delivery of a document led to the loss of profits on the sale of a house due to the devaluation of the peso.

17. See Cranston v. Marshall (1850) 5 Ex. 395 (Pollack C.B.); Hanlin v. Great North Railway Co. (1856) 1 H. and N. 408; (1856) 26 L.J. Ex. 20 (Pollack C.B.); Kaplin v. Lufthansa German Airlines 12 Avi. 17,933 (E.D. Pa. 1973) (Green D.J.); and Souillac c. Air France (1965) 28 R.G.A.E. 15 (T.G.I. Seine 1964).

18. For example Wills v. Trans World Airlines, Inc. 200 F. Supp. 360; 7 Avi. 17,803; 1961 U.S. Av. R. 387 (S.D. Cal.) (Mathes D.J.).

19. See for example Smith v. Piedmont Aviation, Inc., cited supra footnote 15.

20. On the topic of vexation and inconvenience, see Halsbury's Laws of England, (4th ed.), London, Butterworths, 1974, vol. 12, para. 1,188, pp. 471-2.

21. But see Kaplan v. Lufthansa German Airlines, Inc. cited supra footnote 17, in which an orthopaedic surgeon whose return home was delayed by one day was compensated for his loss of income for having to cancel all his patients' office appointments for that day. See also Buckmaster v. Great Eastern Railway Co. cited supra footnote 15, in which a corn merchant was compensated for his loss of business suffered when he arrived approximately one and one-half hours late for the opening of the Corn Market due

to the breakdown of a train. The loss of business was held to be a reasonable and natural consequence of the defendant's action in not providing a train.

See also British Columbia Saw Mill Co. v. Nettleship (1868) L.R. 3. C.P. 499 (Bovill C.J.) in particular the rhetorical dicta of Willes J. at 510, as to whether a barrister en route for the Calcutta bar (to the knowledge of the shipping company taking him there) could possibly recover in respect of lucrative briefs lost through delay in arrival.

22. See in this connection Robert-Houdin c. Sté. La Panair do Brasil (1961) R.G.A. 285 (T.G.I. Seine, 1960). The plaintiff in this case had been promised a fee of 500,000 French francs (5,000 N.F.) for staging a "Son et Lumière" spectacle at the Monastère de Jeronimos near Lisbon in the presence of the President of Portugal and various other dignitaries. The plaintiff forfeited his fee because his connecting flight from Rome, Italy to Lisbon, Portugal, had been postponed until the following day and he was unable to catch any other flight that would have taken him to Lisbon in time to stage the spectacle. The plaintiff was awarded his fee in full plus all incidental expenses of his unplanned stopover.

23. This point was never argued in Nader v. Allegheny Airlines, Inc. cited supra footnote 13. Either the Connecticut Citizens Action Group paid Mr. Nader his promised fee or there was no fee involved.

24. 16 Avi. 17,195 (N.Y.S.C. 1980) (Wollach J.).

CONCLUSIONS AND RECOMMENDATIONS

Discriminatory refusal of carriage is actively practiced by North American airlines. Although, in Canada and the United States, airlines are common carriers and, as such, are subject to common carrier obligations, they have discriminated in the past, and they continue to discriminate, against certain classes of persons without just cause. Safety factors should be the major, if not the only, consideration appropriate for refusing carriage but the comfort of other passengers (explicitly) and the convenience of cabin personnel (implicitly) have been accorded equal prominence.

Of the categories of passengers examined, only refusal of carriage motivated by racial prejudice appears to be no longer in evidence. Both airline passengers and non-passengers i.e. those persons using the public facilities of airports, are protected against discrimination on the basis of race, colour or ethnic origin.

Two classes of passengers are likely to be subjected to discriminatory refusal of carriage, but the reasons for denying them boarding may be viewed as necessary evils inherent in air travel: the first reason has an economic basis, that is, overbooking; the second a safety-related basis, that is, hijacking.

In the former category, the practice of overbooking the number of seats available on a flight is currently economically

unavoidable because of the incidence of "no-shows". The early cases exposed that the practice existed and that it was discriminatory. The regulatory response was to institutionalise the practice via the creation of denied boarding compensation and the imposition of new boarding priorities, which only penalise latecomers. The judgments which awarded large sums for punitive damages are a thing of the past. Passengers who are denied boarding because the flight has been oversold can save themselves a great deal of mental suffering, humiliation and outrage (not to mention wasted breath spent arguing) by accepting graciously the airline personnel's apologies and proffered alternative transportation and denied boarding compensation.

The fundamental underlying cycle of multiple bookings -- no-shows -- overbooking has been questioned and a solution involving non-refundable tickets which, in turn, are covered by trip cancellation insurance, merits consideration.

The other category of passengers whose refusal of carriage can be viewed as a necessary evil are those persons whose characteristics fit those of the hijacker profile. Air Piracy is a real and present menace, with an ever increasing amount of violence being perpetrated on the hostages. Security screening of all travellers is requisite and those who match the profile will be denied boarding unless they consent to the invasion of their privacy to the extent of being asked for identification and having their belongings

searched and, possibly, being subjected to a physical "pat down" or frisk. The overwhelming importance of the safety and integrity of commercial aviation justifies these measures.

In the area of unjustified refusal of carriage, the most conspicuous form of discrimination is practiced against disabled persons. The handicapped are denied equal access to air transportation by limitations on their numbers per flight and by such requirements as advance booking, attendants, medical certificates and the often prohibitive additional charges for special facilities when they are offered by the carriers. Where carriage of the handicapped is concerned, the risk of inconveniencing cabin personnel rather than an individual's ability to make an emergency evacuation, appears to be of paramount importance.

The Civil Aeronautics Board is currently trying to remedy the situation of the handicapped, and would place the burden of proving the inability of the passenger to withstand the rigours of the journey without requiring undue assistance from cabin personnel, on the airline and not on the disabled passenger.

But it is a fundamental change of attitude which is required. No longer must this type of passenger be treated as a nuisance to be avoided. The difference in attitude would ideally spread not only to airline personnel but also to airline passengers in general and, ultimately, to aircraft designers and manufacturers. This particular Utopian dream will not be realised, at least in

this century, so a "band-aid" approach will have to suffice. The implementation of suggestions such as using adhesive tape to secure canes and crutches in order that they remain at hand but cannot become projectiles during air turbulence, or agreeing to board non-ambulatory passengers on condition they agree to forego the use of washroom facilities, would not be unreasonable. With regard to the disabled, advance warning in the form of publication of the array of regulations appertaining to the carriage by air of the handicapped is urgently required.

Although the Montreal Agreement of 1966 imposes quasi-strict liability on carriers for accidents occurring during carriage by air, and some of the suits brought by handicapped persons against airlines have placed an added burden of responsibility on the carriers which they would not have encountered with non-handicapped passengers, the judiciary have recognised the concept of an "inherent defect" in a passenger. By so doing, the courts have avoided giving the airlines supplementary reasons for denying boarding to the handicapped by holding that carriers are not liable for damages solely attributable to a passenger's susceptibility to that particular type of injury.

The sector of the handicapped which suffers the most from the discriminatory treatment meted out to it is that of pregnant women. All air carriers claim that their female flight attendants are trained to cope with on-board births and yet the possibility of

a woman giving birth in flight is viewed as a threat to the lives and safety of the entire complement of passengers and crew. Although babies do not pop out like champagne corks, on both long haul and short haul flights, pregnant women who are near their delivery dates are required to present obstetrical confirmation of not only their ability to travel, but also of the fact that the baby is not due to be born until a week after the aircraft has landed at its destination! Since air travel would only be undertaken during this period for emergency reasons, the decision as to whether a pregnant woman should be permitted to travel by air should be left to the passenger's own doctor without regulatory interference.

Of the two remaining classes of passengers which were examined i.e. they very old and the very young, and smokers and drunks, the former category appears to be the recipient of beneficial discrimination in the form of reduced fares. However, travel with young children is discouraged by the lack of facilities for changing and nursing babies and the regulations governing the number of children which may accompany each adult. The regime appertaining to the carriage of unaccompanied children is unnecessarily restrictive and in this respect the North American carriers would do well to learn from their European counterparts. The introduction of the hostess system for unaccompanied children on continental flights in Canada and the United States is strongly advocated.

The remaining class of passengers who are subject to discriminatory treatment comprises those persons who indulge in the vices of smoking and drinking. This is an area in which the practice of discrimination could well be increased to the benefit of the rest of the travelling public.

Smokers and non-smokers (each defending what they considered were their entrenched rights) have started fist fights in flight, which on at least one occasion have led to an aircraft having to make an emergency landing. The C.A.B. regulation which guaranteed a seat in a no-smoking row to all non-smokers, even last minute check-ins, was conceivably the worst solution possible to a difficult problem. Fixed smoking/no-smoking areas with late-comers losing their option to choose appears to be a workable compromise, possibly combined with a rebate on the ticket price for failure to accommodate the passenger in the section of his choice. The boundaries between the sections might also be reinforced with partitions similar to those used to separate the first-class passengers from the hoi polloi.

As far as inebriates are concerned, a friendly drunk is soon converted to an obnoxious and/or aggressive drunk and is a potential menace to every one on board the aircraft. The blame lies with the airlines and the lack of restraint with which they dispense alcoholic beverages. The carriers must retain their discretion to refuse carriage to inebriated travellers, but, in

addition, the imposition of a limit on the number of drinks to be served per passenger according to the length of the flight should be accomplished without delay.

If this study, at the very least, makes those categories of air travellers who are most likely to be the target of discriminatory refusal of carriage, aware of their situation, then it will have served its purpose. Forewarned remains forearmed.

TABLE OF CASES

Burwell v. Eastern Air Lines, Inc. 458 F. Supp. 474 (1978); rev'd. in part 633 F. 2d. 341 (1980).

Butler Aviation of Canada Ltd. v. International Association of Machinists and Aerospace Workers [1975] F.C. 590.

Butterfield v. Forrester (1809) 11 East. 60; E.R. 926.

Canadian National Steamship Co. v. Watson [1939] 1 D.L.R. 273.

C.P.R. v. Canadian Northern R.W. Co. v. Regina Board of Trade 11 C.R.C. 380 (1910); aff'd. 45 S.C.R. 321; (1911) 1 W.W.R. 474; 13 C.R.C. 203.

C.P.R. v. Frechette (1914) 23 B.R. 511; rev'd [1915] A.C. 871; (1915) 24 B.R. 459.

Candreva v. Smith 27 F. 2d. 642 (1928).

Casteel v. American Airways 26 Ky. 818; 88 S.W. 2d. 976; 1 Avi. 594 (1935).

Chesapeake and Ohio Railway Co. v. Spiller 157 Ky. 222; 162 S.W. 815; 50 L.R.A. (N.S. 394) (1914).

Chicago R.I. and G. Ry. v. Sears 210 S.W. 684 (1919).

Christiansen v. Northwest Airlines, Inc. 455 F. Supp. 492 (1978); aff'd. 15 Avi. 18,536 (1980).

Christie v. Griggs (1809) 2 Camp. 79; 11 R.R. 666.

C.A.B. v. Deutsche Lufthansa Aktiengesellschaft 591 F. 2d. 951; 1979 U.S. Av. R. 327 (1979).

Civil Rights Cases 109 U.S. 3; 3 S. Ct. 18; 27 L. Ed. 835 (1883).

Clark v. West Ham Corporation [1909] 2 K.B. 858; 79 L.J.K.B. 56; 101 L.T. 481; 73 J.P. 461; 25 T.L.R. 805; 53 S.J. 731.

Colonial Coach Lines Ltd. and Ontario Highway Transport Board, Re. (1967) 62 D.L.R. (2d.) 270; (1967) 2 O.R. 25; aff'd. (1967) 2 O.R. 243.

Colpitts v. R. (1908) 5 E.L.R. 446.

Condit v. United Air Lines, Inc. 13 F.E.P. 689; 1976 U.S. Av. R. 725; aff'd. 558 F. 2d. 1176; 15 F.E.P. 676; 1977 U.S. Av. R. 399; cert. den'd. 435 U.S. 934; 98 S. Ct. 1510; 55 L. Ed. 2d. 531 (1978).

Connolly v. Crescent City Ry. Co. 41 La. Ann. 57; 5 S. 259; 6 S. 526; 3 L.R.A. 133; 17 Am. St. Rep. 389 (1889).

Connors v. Cunard Steamship Co. 204 Mass. 310; 90 N.E. 601; 26 L.R.A. (N.S.) 171; 134 Am. St. Rep. 552; 17 Ann. Cas. 1051 (1910).

Continental Air Lines, Inc. v. C.A.B. 551 F. 2d. 1293; 179 U.S. App. D.C. 334 (1977).

Corporation Commission v. Transportation Committee of North Carolina Commission on International Co-operation 198 N.C. 317; 151 S.E. 684 (1930).

Cort v. Ash 496 F. 2d. 416 (1974); rev'd. 422 U.S. 66; 95 S. Ct. 2, 080; 45 L. Ed. 2d. 26 (1975).

Cowan v. Winters 96 F. 929 (1899).

Cox v. Pennsylvania Railroad Co. 240 Pa. 27; 87 A. 581 (1913).

Cranston v. Marshall (1850) 5 Ex. 395.

Croom v. C.M. and St. P. Ry. Co. 52 Minn. 296; 53 N.W. 1128 (1893).

Crosby and Co. v. Compagnie Nationale Air France 76 Misc. 2d. 990; 352 N.Y.S. 2d. 75; 12 Avi. 17,963 (1973) aff'd. 42 A.D. 2d. 1050; 348 N.Y.S. 2d. 957 (1973); app. den'd. 33 N.Y. 2d. 521; 353 N.Y.S. 2d. 1025; 309 N.E. 2d. 141 (1974); cert. den'd. 416 U.S. 986; 94 S.C.R. 2390; 40 L. Ed. 763 (1974).

Culley and Canadian Pacific Air Lines, In re (1976) 72 D.L.R. (3d. 499).

Cunningham and A. - G. B.C. v. Tomey Homma and A. - G. Can. [1903] A.C. 151.

Davies v. Mann (1842) 10 M. and W. 546; 12 L.J. Ex. 10; 152 E.R. 588.

Day v. Trans World Airlines, Inc. 393 F. Supp. 217; 13 Avi. 17,647 (1975); aff'd. 528 F. 2d. 31 13 Avi. 18,145 (1975) cert. den'd 429 U.S. 890; 97 S. Ct. 246; 50 L. Ed. (2d.) 172 (1976).

Dellwo v. Pierson 259 Minn. 452; 107 N.W. 859 (1961).

Denver and R.G.R. Co. v. Derry 47 Colo. 584; 108 P. 172; 27 L.R.A. (N.S.) 761 (1910).

De Marines v. KLM Royal Dutch Airlines 433 F. Supp. 1047; 14 Avi. 18,212 (1974); rev'd. and rem'd. 15 Avi. 17,294 (1978).

Deutsche Flugdienst v. Hüetzen 1961 Z.L.W. 205.

Díaz v. Pan American World Airways, Inc. 442 F. 2d. 385 (1971).

Dobie v. C.P.R. 35 C.R.C. 302; [1929] 2 D.L.R. 901; aff'd. [1930] 1 W.W.R. 6; 42 B.C.R. 30; 36 C.R.C. 200; [1930] 1 D.L.R. 790 (1929); rev'd. [1931] S.C.R. 277; 37 C.R.C. 385; [1930] 3 D.L.R. 856 (1930).

Dred Scott v. Sanford 19 How. (60 U.S.) 393 (1854).

Egan v. Kollsman Instrument Corp. 9 Avi. 17,280 and 17,789 (1964); Aff'd. 9 Avi. 18,247; rev'd. 287 N.Y.S. 2d. 160; 10 Avi. 17,651 (1967).

Evangelinos v. Trans World Airlines, Inc. 396 F. Supp. 95; 13 Avi. 18,051 (1975); rev'd. and rem'd. 14 Avi. 17,101 (1976); reh'g. 550 F. 2d. 152; 14 Avi. 17,612 (1977).

Fitzgerald v. Pan American World Airways, Inc. 132 F. Supp. 798 (1955); rev'd. and rem'd. 229 F. Supp. 499; 1956 U.S. Av. R. 35.

Flores v. Pan American World Airways, Inc. 259 F. Supp. 402 (1966).

Friends of all Children v. Lockheed Aircraft Corp. 16 Avi. 17,233 (1980).

Gaetano and Maria, The (1882) 7 P.D. 137; 45 L. T. 835; 30 W.R. 766; 4 Asp. M.C. 470.

Gallagher v. Alitalia-Linee Aeree Italiane, S.p.A. 361 F. Supp. 1097; 12 Avi. 18,189 (1973); and 13 Avi. 18,348 (1976); reh'g. 14 Avi. 17,284 (1976) and 16 Avi. 17,342 (1980).

Gallin v. Delta Air Lines, Inc. 16 Avi. 17,238 (1980).

Garton v. Bristol and Exeter Ry. Co. 30 L.J.R. (N.S.) C.L. 273 (1861).

Grey v. American Airlines, Inc. 95 F. Supp. 756; 3 Avi. 17,404 (1950); aff'd. 227 F. 2d. 282; 4 Avi. 17,811 (1955).

Hall v. DeCuir 95 U.S. 485; 24 L. Ed. 547 (1877).

Hamlin v. Great Northern Railway Co. (1856) 1 H. and N. 408; (1856) 26 L.J. Ex. 20.

Harriss v. Pan American World Airways, Inc. 437 F. Supp. 413 (1977).

Heart of Atlanta Motel v. United States 231 F. Supp. 393 (1964); aff'd. 379 U.S. 241; 85 S. Ct. 348; 13 L. Ed. 2d. 258 (1964).

Heisler v. Moke (1972) 25 D.L.R. (3d.) 670.

Henderson v. United States 269 I.C.C. 73; 80 F. Supp. 32 (1948); rev'd. 339 U.S. 816; 70 S. Ct. 843; 94 L. Ed. 1302 (1950).

Hendler v. Iberia Airlines of Spain, unreported, Quebec Small Cl. Ct. (1979).

Hernandez v. Air France 13 Avi. 18,166 (1975); aff'd. 14 Avi. 17,421 (1976).

Heumann v. National Airlines, Inc. 13 Avi. 17,912 (1975).

Hobbs v. London and South Western Railway Co. (1875) L.R. 10 Q.B. 111.

Hoffman v. Jones 280 S. 2d. 431 (1973).

Hogan v. Nashville 131 Tenn. 244; 174 S.W. 118; Ann. Cas. 1916 C, 1162 (1915).

Hunzikeæ v. Scheidemantle (W.D. Penn. 1972); rev'd. and rem'd. 543 F. 2d. 489; 1976 U.S. Av. R. 234 (1976).

Illinois C.R. Co. v. Allen 28 Ky. L. Rep. 108; 90 S.W. 150 (1905).

Jackson v. Horizon Holidays Ltd. 1975 3 All E.R. 92 (1974).

Jackson v. Rogers [1973] Q.B. 233; [1973] 1 All E.R. 71; [1972] 3 W.L.R. 954 (1973).

Johannesson v. The Rural Municipality of West St. Paul [1949] 3 D.L.R. 694; aff'd. [1950] 3 D.L.R. 101; rev'd. [1952] 1 S.C.R. 292; [1951] 4 D.L.R. 609; 69 C.R.T.C. 105 (1951).

Kalish [Esther] v. Trans World Airlines, Inc. 89 Misc. 2d. 153; 14 Avi. 17,936 (1977).

Kalish [Justin] v. Trans World Airlines, Inc. 55 Ohio (2d.) 73; 362 N.E. (2d.) 994; 14 Avi. 17,809 (1977).

Karp v. North Central Air Lines, Inc. v. Marsilje Agency, Inc. 437 F. Supp. 87; 14 Avi. 18,386; 1978 U.S. Av. R. 674 (1977); rev'd. in part 583 F. 2d. 364; 15 Avi. 17,355; 1978 U.S. Av. R. 669 (1978).

Kaplan v. Lufthansa German Airlines 12 Avi. 17,933 (1973).

Katamay v. Chicago Transit Authority 53 I U 2d. 27; 289 N.E. 2d. 623 (1972).

Katz v. U.S. 369 F. 2d. 130; rev'd. 389 U.S. 347; 88 S. Ct. 507; 19 L. Ed. 2d. 576 (1967).

Kenny v. C.P.R. (1902) 5 Terr. L.R. 420; 4 C.R.C. 474.

Kentucky Traction and Terminal Co. v. Murray 176 Ky. 593; 195 S.W. 1119 (1917).

Lacroix v. The Queen [1954] Ex. C.R. 69.

Lane v. Cotton 12 Mod. 472 (1701); 1 Salk 17; 1 Ld. Raym. 6, 46.

Lazar v. Banas 114 Pa. Super. 425; 174 A. 817 (1934).

Law v. Transcontinental Air Transport, Inc. 1931 U.S. Av. R. 205 (Pa. E.D.) (Kirkpatrick D.J.).

Levy et al. v. American Express, Delta Air Lines, and Trans World Airlines 274 S. 2d. 857; 1974 U.S. Av. R. 619 (1973); aff'd. 287 S. 2d. 784; 1974 U.S. Av. R. 615 (1973).

Li v. Yellow Cab Co. of California 13 Cal. 3d. 804; 532 P. 2d. 1226; 92 Cal. Rptr. 858.

Lisi v. Alitalia - Linée Aeree Italiane S.p.A. 9 Avi. 18,120 (1966); aff'd. 253 F. Supp. 237; 9 Avi. 18,374 (1966); aff'd. 390 U.S. 455; 88 S. Ct. 1, 1933; 20 L. Ed. 2d. 23 (1968); reh'g. den'd. 391 U.S. 929; 88 S. Ct. 1, 801; 20 L. Ed. 2d. 671 (1966).

Lloyd v. Regional Transport Authority 548 F. 2d. 1277 (1977).

Lowry v. Chicago, B. and Q.R. Co. 46 F. 83 (1891).

Ludditt v. Cinger Coote Airways Ltd. [1947] A.C. 233; [1947] L.J.R. 1067; 177 L.T. 394; 63 T.L.R. 157; [1947] 1 All E.R. 328; [1947] 2 D.L.R. 241.

Ludecke v. Canadian Pacific Airlines Ltd. 12 Avi. 17,191 (1971); rev'd. 13 Avi. 17,454; aff'd. 26 N.R. 302 (1976).

Maché c. Air France (1967) R.F.D.A. 31.

Maclennan v. American Airlines, Inc. 440 F. Supp. 466 (1978).

Mahaney v. Air France 474 F. Supp. 532; 15 Avi. 17,665 (1979).

Manfredonia et al. v. American Airlines, Inc. 15 Avi. 17,638 (1979).

Mao et al. v. Eastern Airlines, Inc. 310 F. Supp. 844; 11 Avi. 17,400 (1970).

Marshall v. Delta Air Lines v. American Security and Trust Company 13 Avi. 18,164 (1975).

Mason v. Belieu 13 Avi. 17,114 (1974); rev'd. in part 543 F. 2d. 215; 177 U.S. App. D.C. 13 Avi. 18,405 (1976); cert. den'd. 429 U.S. 852; 97 S. Ct. 144; 50 L. Ed. 2d. 127 (1976).

Matthew v. Wabash R. Co. 115 Mo. App. 468; 78 S.W. 271 (1903); aff'd. 199 U.S. 605; 50 L. Ed. 329 (1903).

Matthias v. Pan American World Airways 12 Avi. 17,270; 53 F.R.D. 447 (1971).

Maugnie v. Air France 549 F. 2d. 1,256; 14 Avi. 17,394; 1979 U.S. Av. R. 130; cert. den'd. 431 U.S. 974; 97 S. Ct. 2,939; 53 L. Ed. 2d. 1,072 (1977).

McEllistrum v. Etches (1954) 4 D.L.R. 350; rev'd. in part [1956] S.C.R. 787; (1956) 6 D.L.R. (2d.) 1.

McMurray v. Capital International Airways, unreported, N.Y. Small Cl. Ct. (1980).

Merchants Parcel Delivery v. Pennsylvania Public Utility Commission 150 Pa. Super. 120; 28 A. 2d. 340 (1967).

Mertens v. The Flying Tiger Line, Inc. 8 Avi. 18,023 and 9 Avi. 17,187 (1963); rem'd. 341 F. 2d. 851; 9 Avi. 17,475 (1965).

Meyer v. St. Louis I.M. and S. Ry. Co. 54 F. 116 (1893).

Miree v. DeKalb County, Georgia 538 F. 2d. 643 (1976); vac'd. and rem'd. 433 U.S. 25; 97 S. Ct. 2,490; 53 L. Ed. 2d. 557; 14 Avi. 17,853 (1977).

Mitchell v. U.S. 313 U.S. 80; 61 S. Ct. 873; 85 L. Ed. 2d. 1201 (1941).

Montreal Flying Club v. City of Montreal North [1972] C.S. 695.

Montreal Park and Island Ry. v. Montreal (1910) 43 S.C.R. 256; 11 C.R.C. 254.

Montreal Trust Company v. Canadian Pacific Airlines Ltd. 12 Avi. 17,197 (1971); rev'd. 13 Avi. 17,456 (1974); rev'd. 1977 2 Ll. R. 80; 14 Avi. 17,510; 1976 U.S. Av. R. 469.

Morris v. Boeing Co. and El Al Israel Airlines, Ltd. 15 Avi. 17,241 (1978).

Mortimer v. Delta Air Lines, Inc. 302 F. Supp. 276 (1969).

Murray Hill Limousine Service Ltd. v. Batson et al. [1965] B.R. 778.

Nader et al. v. Federal Aviation Administration 440 F. 2d. 292 (1971).

Nader v. Allegheny Airlines, Inc. 365 F. Supp. 128 (1973); 12 Avi. 18,146; rev'd. 512 F. 2d. 527; 13 Avi. 17,750; 167 U.S. App. D.C. 350 (1975); rev'd. and rem'd. 426 U.S. 290; 96 S. Ct. 1978; 48 L. Ed. 2d. 643; 14 Avi. 17,148; on rem'd. 445 F. Supp. 168; 14 Avi. 18,312 (1978); rev'd. 626 F. 2d. 1,031; 15 Avi. 18,179 (1980).

National Airlines, Inc. Maternity Leave Practices and Flight Attendant Weight Program Litigation, In Re, 434 F. Supp. 249 (1977).

N.A.A.C.P. v. Alabama 265 Ala. 349; 91 S. 2d. 214 (1956); rev'd. and rem'd. 357 U.S. 449; 78 S. Ct. 1,163; 2 L. Ed. 2d. 1,488 (1958).

National Association of Motor Bus Owners v. U.S. 370 F. Supp. 408 (1974)

National Airlines, Inc. v. Allsopp 182 F. 2d. 483; 3 Avi. 17,186 (1950).

Nicholls Chemical Co. of Canada v. Lefebvre (1909) 36 C.S. 535; (1910) 42 R.C.S. 402.

Nystead and Anson v. Wings, Ltd. [1942] 3 D.L.R. 336.

Ocean Accident and Guarantee Corporation Ltd. v. Air Canada [1975] R.P. 193 (1973).

Okanagan Helicopters Ltd. v. Canadian Pacific Ltd. [1974] 1 F.C. 465.

Orangeville Airport Ltd. and Town of Caledon, Re 66 D.L.R. (3d.) 610 (1975).

Pearson v. Duane 4 Wall. (71 U.S.) 605; 18 L. Ed. 447 (1866).

Peterson v. Elgin A. and S. Traction Co. 238 Ill. 403; 87 N.E. 345 (1909).

Polansky v. Trans World Airlines, Inc. 523 F. 2d. 332; 13 Avi. 17,947 (1975).

Polpen Shipping Co. Ltd. v. Commercial Union Assurance Co. Ltd. [1943] K.B. 161; 112 L.J.K.B. 198; 168 L.T. 143; 59 T.L.R. 106; 87 S.J. 129 [1943] All E.R. 162.

Prescription Plan Service Corp. v. Franco 552 F. 2d. 493 (1977).

Preston v. Hunting Air Transport, Ltd. [1956] 1 All E.R. 443.

Price v. Roy (1899) 8 B.R. 170; (1899) 29 R.C.S. 494.

Price v. St. Louis I. M. and S. Ry. Co. 75 Ark. 479; 88 S.W. 575; 112 Am. St. Rep. 70 (1905).

Province of Manitoba v. Air Canada [1977] 3 W.W.R. 129; aff'd. [1978] 2 W.W.R. 694; aff'd. (1980) 32 N.R. 244.

Pullman Co. v. Krauss 145 Ala. 395; 40 S. 398; 4 L.R.A. (N.S.) 103 (1906).

Pavreby v. United Airlines, Inc. 15 Avi. 18,235 (1980).

Readhead v. Midland Ry. Co. (1869) L.R. 4 Q.B. 379; 9 B. and S. 519; 38 L.J. Q.B. 169; 20 L.T. 628; 17. W.R. 737.

R. v. Gordon Finlayson [1941] 1 K.B. 171.

R. v. Keyn 1876 Ex. D. 63.

R. v. Martin 1956 2 Q.B. 272; [1956] 2 W.L.R. 975; 120 J.P. 255; 100 S.J. 323; [1956] 2 All E.R. 86.

R. v. Naylor [1962] 2 Q.B. 527; [1961] 3 W.L.R. 898; 125 J.P. 602; 105 S.J. 892; [1961] 2 All E.R. 932.

Regulation and Control of Aeronautics in Canada, In Re [1931] S.C.R. 663; [1931] 1 D.L.R.; rev'd. [1932] 1 D.L.R. 58; [1932] A.C. 54; [1931] 3 W.W.R. 625; 39 C.R.C. 108 (1931).

Reitmaster v. Reitmaster 162 F. 2d. 691 (1947).

Renaud v. New York, N.H. and H.R. Co. 210 Mass. 533; 97 N.E. 98; 39 L.R.A. (N.S.) 689 (1911).

Robert-Houdin c. Sté. La Panair do Brasil (1961) R.C.A. 285 (1960).

Roman v. Delta Air Lines, Inc. 441 F. Supp. 1160; 15 Avi. 17,147 (1977).

Romulus Films v. Dempster [1952] 2 Il. R. 535.

Rosman v. Trans World Airlines, Inc. 12 Avi. 17,394 (1972); rev'd. 12 Avi. 17,634 (1972); rev'd. and rem'd. 34 N.Y. 2d. 385; 13 Avi. 17,221 (1974).

Ross v. Pan American Airways, Inc. 2 Avi. 14,556 (1948); 299 N.Y. 88; aff'd. 85 N.E. 2d. 880; 2 Avi. 14,911 (1949).

Rousseff v. Western Airlines, Inc. 13 Avi. 18,391 (1976).

Ryckman v. The Hamilton, Grimsby and Beamsville Electric R.W. Co. (1905) 10 O.L.R. 419; 4 C.R.C. 457.

Saloman Ex'x. v. K.L.M. 1950 U.S. Av. R. 505 and 1951 U.S. Av. R. 378.

Scherer v. Pan American World Airways, Inc. and Trans World Airlines, Inc. 14 Avi. 17,410 (1976).

Scofield v. Lake Shore and M. S. Ry. Co. 43 Ohio St. 471; 3 N.E. 907 (1885).

Scott v. Eastern Airlines, Inc. 264 F. Supp. 673 (E.D. Pa. 1967); aff'd. 399 F. 2d. 14; 10 Avi. 17,979 (1968); cert. den'd. 393 U.S. 979; 89 S. Ct. 445; 11 L. Ed. 2d. 439.

Scott v. Midland Ry. of Canada (1873) 33 U.C.Q.B. 580.

Sibron v. New York 18 N.Y. 2d. 603; 219 N.E. 2d. 196 (1966); rev'd. 392 U.S. 40; 88 S. Ct. 1,889; 20 L. Ed. 2d. 917 (1968).

Sierra Club v. Morton 433 F. 2d. 24 (1970); aff'd. 405 U.S. 727; 92 S.C. 1,361 31 L. Ed. 636 (1972).

Slick Airways, Inc. v. U.S. 292 F. 2d. 515; 7 Avi. 17,515 (1961).

Smith v. Piedmont Aviation, Inc. and Delta Air Lines, Inc. 412 F. Supp. 641, 1975 U.S. Av. R. 1196 (1976); modified 567 F. 2d. 290, 1978 U.S. Av. R. 102 (1978).

Snowden v. Birmingham Jefferson County Transit Authority 407 F. Supp. 394 (1975); aff'd. 551 F. 2d. 862 (1977).

Souillac c. Air France (1965) 28 R.G.A.E. 15 (1964).

State of Florida v. Southwell 369 S. 2d. 371; 1979 U.S. Av. R. 497 (1979).

Stouch v. North Central Airlines, Inc. 55 Ill. App. 2d. 338; 204 N.E. 2d. 792; 1965 U.S. Av. R. 95.

Stratton v. Trans-Canada Air Lines (1961) 27 D.L.R. (2d.) 670; aff'd. (1962) 32 D.L.R. 2d. 736.

Suarez v. Trans World Airlines, Inc. 13 Avi. 17,138 (1974).

Suprenant v. Air Canada [1973] C.A. 107.

Terry v. Ohio 392 U.S. 1; 88 S. Ct. 1,868; 20 L. Ed. 2d. 889 (1968).

Tishman and Lipp, Inc. v. Delta Air Lines, Inc. 275 F. Supp. 4071 (1967); aff'd. 413 F. 2d. 1401; 11 Avi. 17,152 (1969).

Trailways of New England, Inc. v. C.A.B. 412 F. 2d. 926 (1969).

Transcontinental Bus System, Inc. v. C.A.B. 383 F. 2d. 466 (1967); cert. den'd. 390 U.S. 920; 88 S. Ct. 850; 19 L. Ed. 2d. 979 (1968).

United Air Lines, Inc. v. State Human Rights Appeal Board on the Complaint of Linda Mortimer 1978 U.S. Av. R. 683 (1977); aff'd. 402 N.Y.S. (2d.) 630; 1978 U.S. Av. R. 680; app. den'd. 44 N.Y. 2d. 648; 407 N.Y.S. 2d. 1027; 379 N.E. 2d. 596 (1978); cert. den'd. 439 U.S. 982; 99 S. Ct. 571; 58 L. Ed. 2d. 653 (1978).

United Air Lines, Inc. v. State Human Rights Appeal Board on the Complaint of Miroslawa Rosenfeld 1978 U.S. Av. R. 693 (1977); aff'd. 402 N.Y.S. 2d. 630; 1978 U.S. Av. R. 680; app. den'd. 44 N.Y. 2d. 648; 407 N.Y.S. 2d. 1027; 379 N.E. 2d. 596 (1978); cert. den'd. 439 U.S. 982; 99 S. Ct. 571; 58 L. Ed. 2d. 653 (1978).

United Association of Journeymen et al. and Virond Automatic Sprinkler Co. Ltd., Re., (1976) 67 D.L.R. (3d.) 381.

United Handicapped Federation v. Andre 409 F. Supp. 1297 (1976); rem'd. 558 F. 2d. 413 (1977).

Union Colliery Co. v. Bryden [1899] A.C. 580.

U.S. v. Bell 335 F. Supp. 797 (1971); aff'd. 464 F. 2d. 667 (1972).

U.S. v. Clark 475 F. 2d. 240 (1973) and 498 F. 2d. 535 (1974).

U.S. v. Cordova and Santano (1950) U.S. Av. R. 1.

U.S. v. Derby 312 U.S. 100; 61 S. Ct. 451; 85 L. Ed. 2d. 609 (1941).

U.S. v. Duffy 14 Avi. 17,743 (1977).

U.S. v. Epperson 454 F. 2d. 769 (1972).

U.S. v. Legato 480 F. 2d. 408 (1973).

U.S. v. Lopez 328 F. Supp. 1,077 (1971).

U.S. v. Meulener 351 F. Supp. 1,284 (1972).

U.S. v. Moreno 475 F. 2d. 44 (1973).

U.S. v. Riggs 347 F. Supp. 1,098 (1972); aff'd. 474 F. 2d. 699 (1973).

U.S. v. S.C.R.A.P. 346 F. Supp. 189 (1972); rev'd. and rem'd. 412 U.S. 669; 93 S. Ct. 2,405; 37 L. Ed. 2d. 254 (1973).

U.S. v. Skipwith 482 F. 2d. 1,272 (1973).

U.S. v. Slocum 464 F. 2d. 1,180 (1972).

Upton v. Iran National Airline Corporation 450 F. Supp. 177; 15 Avi. 17,101 (1978); aff'd. 503 F. 2d. 215 (1979).

Usery v. Tamiami Trail Tours, Inc. 531 F. 2d. 224 (1976).

Valentine v. Eastern Airlines, Inc. 365 A. 2d. 475; 144 N.J. Super. 305 (1976).

Veinot v. Kerr Addison Mines Ltd. (1973) 31 D.L.R. (3d.) 257; rev'd. (1975) 3 N.R. 94.

Warren v. The Flying Tiger Line, Inc. 234 F. Supp. 223; 9 Avi. 17,621 (1964); rev'd. 352 F. 2d. 494; 9 Avi. 17,848 (1965).

Warshaw v. Trans World Airlines, Inc. 442 F. Supp. 400; 14 Avi. 18,297 (1977).

Wasserman v. Trans World Airlines, Inc. 15 Avi. 18,309 (1980).

Watson v. R.C.A. Victor Co., Inc. (1934) 50 Ll. R. 77.

Webster v. Johnson, unreported, Leeds Co. Ct. (1979).

Weeks v. Southern Bell Telegraph and Telephone Co. 408 F. 2d. 228 (1969).

Whale v. British Airways 15 Avi. 18,122 (1980).

Wicker v. Happock 12 Fed. Cas. 525 (1866); aff'd. 6 Wall. (73 U.S.) 94 (1867).

Wilhelmy v. North East Airlines, Inc. 86 F. Supp. 565 (1949).

William Becker Travel Bureau, Inc. v. Sabena Belgian World Airways 13 Avi. 17,770 (1975).

Williams v. Trans World Airlines, Inc. 369 F. Supp. 797; 12 Avi. 18,231; 1975 U.S. Av. R. 526 (1974); aff'd. 509 F. 2d. 942; 13 Avi. 17,482; 1975 U.S. Av. R. 513 (1975).

Wills v. Trans World Airlines, Inc. 200 F. Supp. 360; 7 Avi. 17,803; 1961 U.S. Av. R. 387 (1961).

Wolf v. Trans World Airlines, Inc. and Flying Mercury, Inc. 544 F. 2d. 134 (1976); cert. den'd. 430 U.S. 915; 97 S. Ct. 1327; L. Ed. 2d. 593 (1977).

Yazoo v. M.V.R. Co. v. O'Keefe 88 S. 1 (1921).

Yick Wo v. Hopkins 118 U.S. 356; 6 S. Ct. 1064; 30 L. Ed. 220 (1886).

Zaoui c. Aéroport de Paris, Cie. Air Algérie (1976) R.F.D.A. 394.

Zorotovich v. Washington Toll Bridge Authority 80 Wash. 2d. 106; 491 P. 2d. 1,295 (1971).

BIBLIOGRAPHY

BOOKS

Arey, J.A., The Sky Pirates, New York, Charles Scribner's Sons, 1972.

Beaudoin, J.-L., La Résponsabilité Civile Délictuelle, Montreal, Montreal University Press, 1973.

Centre for Research of Air and Space Law, Legal, Economic and Socio-Political Implications for Canadian Air Transport, Montreal, McGill University, 1980.

Churchill, R., Nordquist, M., Lay, S.H., New Directions in the Law of the Sea, Dobbs Ferry, New York, Oceana Publishing Inc./London, The British Institute of International and Comparative Law, 1977, vol. VI.

Fifoot, C.H.S., History and Sources of the Common Law, London, Stevens and Sons, 1949.

Fleming, J.C., The Law of Torts (5th ed.), Sydney, The Law Book Company, 1977.

Guttmacher, A., Pregnancy, Miscarriage and Abortion, New York, New American Library, 1972.

Halsbury's Laws of England (4th ed.), London, Butterworths, 1974, vol. XII.

Hubbard, D.G., The Skyjacker: His Flights of Fantasy, New York, The MacMillan Company, 1971.

Mapelli, E., Trabajos de Derecho Aeronáutico y del Espacio, Colección de Estudios Jurídicos, Madrid, Instituto Iberoamericano de Derecho Aeronáutico y del Espacio y de la Aviación Comercial, 1978.

Martin, P., McClean, J.D., de Montlaur Martin, E., Bristow, J., Brooks, J.L., (eds.), Shawcross and Beaumont on Air Law (4th ed.), London, Butterworths, 1977, vols. I and II.

Matte, N.M., De la mer territoriale à l'air "territorial", Paris, ed. Pedone, 1965.

Matte, N.M., The International Legal Status of the Aircraft Commander, Paris, ed. Pedone, 1975.

Matte, N.M., Traité de droit aérien-aéronautique (3rd ed.), Paris, ed. Pedone, 1980.

Matte, N.M., Treatise on Air-Aeronautical Law, Toronto, The Carswell Co. Ltd., 1981.

McGregor, H., McGregor on Damages, (14th ed.), London, Sweet and Maxwell, 1980.

McNair, A.D., The Law of the Air (3rd ed.), Kerr, W.P.J., Evans, A.H.M. (eds.), London, Stevens and Sons, 1964.

Miller G., Liability in International Air Transport, Deventer, The Netherlands, Kluwer, 1977.

Moore, K.C., Airport, Aircraft and Airline Security, Los Angeles, Security World Publishing Co. Inc., 1976.

Morris, J.H.C., Dicey and Morris on the Conflict of Laws (9th ed.), London, Stevens and Sons, 1973.

Moynihan, B., Airport Confidential, New York, Simon and Schuster, 1980.

Prosser, W.L., Handbook of the Law of Torts (4th ed.), St. Paul, Minnesota, West Publishing Co., 1971.

Spaight, J.M., Aircraft in Peace and Law, London, Longmans, 1919.

Speiser, S.M., Kraus, C.F., Aviation Tort Law, Rochester, New York, Lawyers Co-operative Publishing Co., 1978.

Taylor, J.W.R. (ed.), Jane's pocket book of Commercial Transport Aircraft, New York, MacMillan Publishing Co. Inc., 1976.

Wright, C.A., Linden, A.M., Canadian Tort Law (6th ed.), Toronto, Butterworths, 1975.

ARTICLES

Abramovsky, A., The Constitutionality of the Anti-Hijacking Security System, 22 Buffalo L.R. (1972-3), p. 123.

Achtenberg, J., "Crips" Unite to Enforce Symbolic Laws: Legal Aid for the Disabled, 4 U. San Fernando Valley L.R. (1975), p. 197.

Aggarwala, N., Political Aspects of Hijacking, 585 Int'l. Conciliation (1971), p. 7.

Brown, E.G., Jurisdiction of United States Courts over Crimes in Aircraft, 15 Stanford L.R. (1962), p. 45.

Carlyle-Gordge, P., No Handicap to Success, Today (The Montreal Gazette), January 10, 1981.

Evans, A.E., Aircraft Hijacking: Its Cause and Cure, 63 A.J.I.L. (1969), p. 695.

Fenello, M.J., Technical Prevention of Air Piracy, 585 Int'l. Conciliation (1971), p. 28.

Fitzgerald, G.F., The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft, 1963 Canadian Yearkbook of International Law, (vol. I), p. 230.

Fitzgerald, G.F., Toward Legal Suppression of Acts Against Civil Aviation, 585 Int'l. Conciliation (1971), p. 42.

Fleming, J.G., Comparative Negligence at Last, 64 California L.R. (1976), p. 239.

Freeman, J.W., State Regulation of Airlines and the Airline Deregulation Act of 1978, 44 J.A.L.C. (1979), p. 747.

Gibson, K.K., $21 Million Paid to Bumped Passengers in 1979, Air Transport World, May, 1980.

Hall, S.M., Teacher, People, September 22, 1980.

Heister, P.B., Discriminatory Bumping, 40 J.A.L.C. (1977), p. 533.

Hiller, W., An Interpretation of the "Embarking" and "Disembarking" Requirements of Article 17 of the Warsaw Convention, 16 Col. J. Transr. L. (1977), p. 105.

Kellogg and McGee, The Next Minority, Newsweek, December 20, 1976.

Killian, Profile of a Potential Skyjacker, Chicago Tribune, December 3, 1972.

Krauss, D.M., Searching for Hijackers: Constitutionality, Costs and Alternatives, 40 U. of Chicago L.R. (1972-3), p. 382.

MacIntyre, M.M., The Rationale of the Last Clear Chance, 18 C.B.R. (1940), p. 665.

Mapelli, E., El derecho del transportista a la ro admission de pasajeros a bordo, Revista Aerosintesis de los Andes, Santiago de Chile, 1977.

Mapelli, E., El "Overbooking" o exceso de reservas de plazas en el transporte aéro, Revista de Derecho y Economia des Transporte, Madrid, 1977.

Mapelli, E., Miscelánea Juridico-Aeronáutica, Revista General de Derecho, Valencia, España, 1977.

Mapelli, E., Point de vue practique sur l'overbooking, 1979, Annals of Air and Space Law (vol. IV), p. 213.

Martial, J.A., State Control of the Air Space over the Territorial Sea and the Contiguous Zone, 30 C.B.R. (1952), p. 245.

McGilchrist, M.R., Denial of Boarding to Airline Passengers, Ll. M. C.L. (1981), p. 93.

Mignault, P.B., Le Code Civil de la Province de Québec et son Interprétation, 1 U. of Toronto L.J. (1935-6), p. 104.

Miller, G., Compensable Damages Under Article 17 of the Warsaw Convention, 1 Air Law, (1976), p. 210.

Prosser, W.L., Misrepresentation and Third Persons, 19 Vand. L.R. (1966), p. 231.

Quindry, F.E., Airline Passenger Discrimination, 3 J.A.L.C. (1932), p. 479.

Schwenk, W., The Bonn Declaration on Hijacking, 1979 Annals of Air and Space Law (vol. IV), p. 307.

Sherman, G.S., CAB Regulation of Airline Reservation Oversales: An Analysis of Economic Regulation 1050, 44 J.A.L.C. (1978), p. 773.

Thornburg, E.G., The Next Minority Takes to the Air: The FAA and CAB Regulations for Air Transportation of the Handicapped, 44 J.A.L.C. (1979), p. 611.

Tice, S.L., Overbooking of the Airline Reservations in view of "Nader v. Allegheny Airlines, Inc.": The Opening of Pandora's Box, 43 J.A.L.C. (1977), p. 1.

Weinlein, C., Flight Attendant Weight Requirements and Title VII of the Civil Rights Act of 1964, 45 J.A.L.C. (1979-80), p. 483.

Zollman, C., Aircraft as Common Carriers, 1 J.A.I.C. (1930), p. 190.

Case Comment, Air Canada v. Province of Manitoba, 1978 Annals of Air and Space Law (vol. III), p. 642.

Comment, Airport Security Searches and the Fourth Amendment, 71 Columbia L.R. (1971), p. 1,039.

Comment, Federal Preemption of State Law: The Example of Overbooking in the Airline Industry, 74 Michigan L.R. (1977), p. 1,200.

LEGISLATION

Canada

Federal

Act to Amend the Aeronautics Act S.C. 1973-4, c. 20.

Aeronautics Act R.S.C. 1970, c. A-3.

Canada Labour Code R.S.C. 1970, c. L-1.

Canadian Bill of Rights S.C. 1970-71-72, c. 38; R.S.C. 1970, Appendix III.

Canadian Citizenship Act R.S.C. 1970, c. C-19.

Canadian Human Rights Act S.C. 1976-77, c. 33.

Citizenship Act S.C. 1974-75-76 (vol. II), c. 108.

Criminal Code R.S.C. 1970, c. C-34.

Immigration Act S.C. 1976, c. 52.

Juvenile Delinquents Act R.S.C. 1970, c. J-3.

National Transportation Act R.S.C. 1970, c. N-17.

Canada

British Columbia

Human Rights Code of British Columbia 1974 B.C., c. 87.

Human Rights Code of British Columbia Act 1973 B.C. (2nd. Sess.) c. 119.

Manitoba

Act to Amend the Human Rights Act S.M. 1977, c. 46.

Human Rights Act S.M. 1974, c. 65.

Ontario

Contributory Negligence Act S.O. 1930, c. 27.

Negligence Act R.S.O. 1970, c. 296.

Ontario Human Rights Code R.S.O. 1970, c. 318.

Quebec

Civil Code of Lower Canada 1866.

Loi assurant l'exercice des droits des personnes handicappées S.Q. 1978, c. 7.

France

Civil Code of France (Code Napoléon) of 1804.

Germany

Civil Code of Germany (Burgerliches Gesetzbuch) of 1896.

Spain

Civil Code of Spain (Codigo Civil) of 1888.

United Kingdom

British Nationality Act, 1948, 11 and 12 Geo. 6, c. 56.

Civil Aviation Act, 1949, 12, 13 and 14 Geo. 6, c. 67.

Civil Aviation Act, 1962, 10 and 11 Eliz. 2, c. 8.

Law Reform (Contributory Negligence Act), 1945, 8 and 9 Geo. 6, c. 28.

Maritime Conventions Act, 1911, 1 and 2 Geo. 5, c. 57.

Railway and Canal Traffic Act, 1854, 17 and 18 Vict., c. 31.

Trade Descriptions Act, 1968, 16 and 17 Eliz. 2, c. 29.

United States of America

Federal

Age Discrimination Act of 1975 42 U.S.C. ss. 1601 et seq. (1976).

Airline Deregulation Act of 1978 P.L. 95-504; 92 Stat. 1705.

Architectural Barriers Act of 1968 42 U.S.C. ss. 4151 et seq. (1976).

Civil Aeronautics Act of 1938 49 U.S.C.A. ss. 401 et seq.

Civil Rights Act of 1875 18 Stat. 335.

Civil Rights Act of 1957 P.L. 85-315; 71 Stat. 634.

Civil Rights Act of 1960 P.L. 86-449; 74 Stat. 86.

Civil Rights Act of 1964 P.L. 88-352; 78 Stat. 241; 42 U.S.C. ss. 1981 et seq. (1976).

Crimes and Criminal Procedure Act of 1948 18 U.S.C. ss. 1 et seq. (1976).

Federal Aviation Act of 1958 P.L. 85-726; 72 Stat. 731; 49 U.S.C. ss. 1301 et seq. (1976) as amended by P.L. 87-197; 75 Stat. 466 and P.L. 95-163; 91 Stat. 1281.

Federal Youth Correction Act 18 U.S.C. ss. 5001 et seq. (1976).

Immigration and Nationality Act of 1952 8 U.S.C. ss. 1101 et seq. (1976).

Interstate Commerce Act of 1887 49 U.S.C. ss. 1 et seq. (1976).

Rehabilitation Act of 1973 29 U.S.C. ss. 701 et seq. (1976).

Urban Mass Transportation Act of 1964 49 U.S.C. ss. 1601 et seq. (1976).

United States' Constitution of 1787.

United States of America

Alabama

Code of Alabama 1923.

New York

Dram Shop Act New York General Obligations Laws, s. 11-101.

North Carolina

Laws of North Carolina 1899.

INTERNATIONAL AGREEMENTS

Brussels Convention, 1910.

Chicago Convention, 1944.

Draft Convention on the Legal Status of the Aircraft Commander, 1947.

Geneva Convention, 1958.

Guatemala Protocol (to the Warsaw Convention), 1971.

The Hague Convention, 1970.

The Hague Protocol (to the Warsaw Convention), 1955.

Montreal Additional Protocol no. 3 (to the Warsaw Convention), 1975.

Montreal Agreement, 1966.

Montreal Convention, 1971.

Tokyo Convention, 1963.

Warsaw Convention, 1929.

GOVERNMENT REGULATIONS

Canada

Air Regulations SOR/61-10 (1961) as amended by SOR/77-307 (1977).

Air Carrier Regulations, Consolidated Regulations of Canada (1978), c. 3 as amended.

Civil Aviation Security Measures Regulations SOR/74-226 (1974) as amended by SOR/74-227 (1974) and SOR/74-666 (1974).

United Kingdom

Air Navigation Order, S.I. 1976, No. 1783.

Civil Aviation (Births, Deaths and Missing Persons) Regulations 1948, S.I. 1948, No. 1411 as amended by S.I. 1972, No. 323.

Dangerous Drugs Regulations, 1953.

Rules of the Air and Air Traffic Regulations, 1976, S.I. 1976, No. 1983.

United States of America

Civil Aeronautics Board Regulations

Domestic Passenger-Fare Investigation: January 1970 to December 1974, Washington, D.C., U.S. Government Printing Office, 1976.

Initial Decision, Emergency Reservation Practices Investigation, June 10, 1974, 39 F.R. 823 (1974).

Re-examination of Board Policies Concerning Deliberate Overbooking and Oversales, E.D.R. 296; 41 F.R. 16,478 (1976).

Opinion and Order 72-12-18, dated December 5, 1972.

Supplemental Opinion and Order 73-5-2, dated May 1, 1973.

Supplemental Opinion and Order on Reconsideration 73-8-55, dated August 10, 1973.

Order 79-1-70, dated January 11, 1979.

Order 79-11-148, dated November 21, 1979.

P.S.D.R. - 58, dated April 6, 1979, 44 F.R. 21,816 (1979).

S.P.D.R. - 70, dated May 31, 1979, 44 F.R. 32,401 (1979).

S.P.D.R. - 74, dated September 20, 1979, 44 F.R. 55,383 (1979).

E.D.R. - 221; 37 F.R. 19,146 (1972).

E.R. - 588; 34 F.R. 14,281 (1969).

E.R. - 800; 38 F.R. 12,207 (1973).

E.R. - 880, Amendment 6 to part 250; 39 F.R. 38,087 (1974).

E.R. - 890, Amendment 7 to part 250; 39 F.R. 44,197 (1974).

E.R. - 897, Amendment 8 to part 350; 40 F.R. 4,410 (1975), correction 40 F.R. 6,347 (1975).

E.R. - 1050, Amendment 9 to part 250; 43 F.R. 24,277 (1978).

E.R. - 1070, Amendment 4 to part 223; 43 F.R. 38,378 (1978).

E.R. - 1078, Amendment 11 to part 250; 43 F.R. 50,164 (1978).

E.R. - 1084, Amendment 12 to part 250; 43 F.R. 57,243 (1978).

E.R. - 1086, Amendment 13 to part 250; 43 F.R. 58,829 (1978).

E.R. - 1090, Amendment 14 to part 250; 44 F.R. 2,165 (1979).

E.R. - 1091, Amendment 1 to part 252; 44 F.R. 5,071 (1979).

E.R. - 1122, Amendment 2 to part 252; 44 F.R. 28,657 (1979).

E.R. - 1124, Amendment 3 to part 252; 44 F.R. 30,080 (1979).

Extracts from the Code of Federal Regulations

14 C.F.R. part 25 (1980).

14 C.F.R. part 40 (1980).

14 C.F.R. part 107 (1980).

14 C.F.R. part 121 (1980).

14 C.F.R. part 223 (1980).

14 C.F.R. part 250 (1980).

23 C.F.R. part 450 (1980).

45 C.F.R. part 84 (1980).

45 C.F.R. part 90 (1980).

49 C.F.R. part 609 (1980).

49 C.F.R. part 613 (1980).

49 C.F.R. part 1124 (1979).

GOVERNMENT PUBLICATIONS

Canada

Civil Aviation Security, Transport Canada, Worldwide Reported Hijacking Attempts, Summary as of January 1, 1981.

Canadian Transport Commission, Information Circular accompanying Notice of Meeting held on November 26 - 27, 1980 at Ottawa, topic: "Problems of the Handicapped with Regard to Public Transportation under Federal Jurisdiction".

United States of America

Federal Aviation Authority, Access Travel: Airports (3rd. ed.), Washington, D.C. 1979.

Federal Aviation Authority, Office of Civil Aviation Security, Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, July 1 - December 31, 1979.

Federal Aviation Authority, Office of Civil Aviation Security, Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, January 1 - June 30, 1980.

Department of Health, Education and Welfare, Adult Use of Tobacco - 1975, Washington, D.C., Government Printing Office, 1976.

U.S. Dept. of Transportation, News, 69-135, December 10, 1969.

U.S. Dept. of Transportation, News, 70-41, May 6, 1970.

U.S. Dept. of Transportation, News, 103-72, December 5, 1972.

1 U.S. Code Cong. and Ad. News, 87th Cong., 1st Sess. (1961).

2 U.S. Code Cong. and Ad. News, 87th Cong., 1st Sess. (1961).

45 U.S. State Bull. 108 (1961).

45 U.S. State Bull. 238 (1961).

48 U.S. State Bull. 983 (1964).

63 U.S. State Bull. 341 (1970).

PRIVATE ORGANISATION PUBLICATIONS

Air Traffic Conference of America, Trade Practice Manual, Washington, D.C., Air Transport Association of America, 1958, as amended.

Air Transport Association of Canada, Presentation made to the Advisory Committee on Transportation of the Handicapped, Ottawa, Ontario, September 24, 1980.

International Air Transport Association, Incapacitated Passengers Handling Guide, Montreal, I.A.T.A. Traffic Services, 1980.

International Air Transport Association, Passenger Services Conference Resolutions Manual, Montreal, I.A.T.A. Traffic Services, 1981.

International Civil Aviation Organization, Aircraft Accident Digest, no. 21, 1977.

International Civil Aviation Organization, Operation of Aircraft: Annex 6 to the Convention on International Civil Aviation, part I, (3rd ed.), 1972.

United Nations Organization, Informal Composite Negotiating Text of the Law of the Sea Conference 1977, April 1979 as amended in September 1979.

AIRLINE TARIFFS AND PUBLICATIONS

Air Canada, International Passenger Rules Tariff no. IPR-1.

Air Canada, International Passenger Rules Tariff no. PR-1.

Air Canada, Publication no. 303, Arranging Service for Inconvenienced Passengers, 1979.

Airline Tariff Publishing Company, Agent, Local and Joint Passenger Rules Tariff no. PR-7.

CP Air, Local and Joint Passenger Rules Tariff no. 2.

Nordair, Via Nordair Newsletter, November, 1980.

PAP, Tariff Rule, Restrictions on Acceptance: Unaccompanied Children, 1976.

NEWSPAPER REPORTS

The Gazette (Montreal)	July 18, 1981
The Gazette (Montreal)	July 11, 1981.
The Gazette (Montreal)	June 26, 1981.
The Gazette (Montreal)	May 14, 1981.
The Gazette (Montreal)	May 5, 1981.
The Gazette (Montreal)	April 11, 1981.
The Gazette (Montreal)	April 9, 1981.
The Gazette (Montreal)	March 11, 1981
The Gazette (Montreal)	February 5, 1981.
The Gazette (Montreal)	January 21, 1981.
The Gazette (Montreal)	January 20, 1981.
The Gazette (Montreal)	January 15, 1981.
The Gazette (Montreal)	January 6, 1981.
The Gazette (Montreal)	November 10, 1980.
The Gazette (Montreal)	October 24, 1980.
The Gazette (Montreal)	October 16, 1980.
The Gazette (Montreal)	September 12, 1980.
The Gazette (Montreal)	August 5, 1980.
The Gazette (Montreal)	August 4, 1980.
The Gazette (Montreal)	June 14, 1980.
The Gazette (Montreal)	May 24, 1980.
The Gazette (Montreal)	April 26, 1980.
The Gazette (Montreal)	December 6, 1979.
The New York Times	July 20, 1980.
The New York Times	July 13, 1980.
The New York Times	May 2, 1961.
The Wall Street Journal	June 26, 1981.

PERIODICAL REPORTS

Air Line Pilot	**May, 1977**
Air Transport World	**May, 1980**
Aviation Week and Space Technology	March 9, 1981.
Aviation Week and Space Technology	January 10, 1981.
Aviation Week and Space Technology	August 25, 1980.
Aviation Week and Space Technology	August 18, 1980
Aviation Week and Space Technology	April 23, 1979.
Aviation Week and Space Technology	January 15, 1979.
Aviation Week and Space Technology	April 17, 1972.
Aviation Week and Space Technology	February 7, 1972.
Flight International	April 11, 1981.

THESES AND PAPERS

Epstein, The Effects of Tobacco Smoke Pollution on the Eyes of the Non-Smoker, Paper presented to the Third World Conference on Smoking and Health, New York, U.S.A., 1975.

Reukema, B., Constitutional Issues in Canadian Civil Aviation, Paper prepared for the Institute of Air and Space Law, McGill University, Montreal, 1979.

Reukema, B., The Air Canada Acts - the reasons for change, LL.M. thesis presented to the Institute of Air and Space Law, McGill University, Montreal, 1979.

Tompkins, G.N., The Potential Impact of the United States Antitrust Law in International Air Transportation, Paper presented to the International Civil Aviation Conference no. 3, Paris, France, 1981.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

RECOMMENDED PRACTICE 1274 (previously 1013)

GENERAL CONDITIONS OF CARRIAGE (PASSENGER)

PSC1(01)1724 (except from/to the USA and/or Canada)
PSC2(01)1724
PSC3(01)1724

RECOMMENDED that Members use the following General Conditions of Carriage (Passenger) for international air transportation, except from/to the USA and/or Canada:

GENERAL CONDITIONS OF CARRIAGE (PASSENGER)

OUTLINE

ARTICLE I: DEFINITIONS

In these Conditions, except where the context otherwise requires or where it is otherwise expressly provided, the following expressions have the meanings respectively assigned to them, that is to say

BAGGAGE means such articles, effects and other personal property of a passenger as are necessary or appropriate for wear, use, comfort or convenience in connection with his trip Unless otherwise specified, it shall include both checked and unchecked baggage of the passenger.

BAGGAGE CHECK means those portions of the Ticket which provide for the carriage of passenger's checked baggage.

BAGGAGE TAG means a document issued by Carrier solely for identification of checked baggage, the baggage (strap) tag portion of which is attached by Carrier to a particular article of checked baggage and the baggage (identification) tag portion of which is given to the passenger.

CARRIER includes the air Carrier issuing the ticket and all air Carriers that carry or undertake to carry the passenger and/or his baggage thereunder or perform or undertake to perform any other services related to such air carriage.

CHECKED BAGGAGE means baggage of which the Carrier takes sole custody and for which Carrier has issued a baggage check.

CONJUNCTION TICKET means a ticket issued to a passenger in conjunction with another ticket which together constitute a single contract of carriage.

CONVENTION means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12 October 1929, or the Warsaw Convention as amended at The Hague, 1955, whichever may be applicable to the carriage under the contract of carriage.

DAMAGE includes death, injury, delay, loss or other damage of whatsoever nature arising out of or in connection with carriage or other services performed by carrier incidental thereto.

DAYS means calendar days, including Sundays and legal holidays; provided that, for the purpose of notification, the day upon which notice is despatched shall not be counted; and that for purposes of determining duration of validity the day upon which the ticket is issued, or flight commenced, shall not be counted.

FLIGHT COUPON means that portion of the ticket that bears the notation 'good for passage' and indicates the particular places between which the coupon is good for carriage.

FRENCH GOLD FRANCS means francs consisting of 65½ milligrams of gold with a fineness of nine hundred thousandths; provided that sums mentioned in terms of French gold francs in these Conditions shall be converted into national currencies, in the absence of any applicable national law governing such conversion, as follows:

> One French gold franc shall be deemed to be one-fifteenth of one Special Drawing Right as defined by the International Monetary Fund, and any sum so arrived at in terms of the Special Drawing Right shall then be converted into national currencies according to the value of such currencies in terms of the Special Drawing Right. The value of a national currency, in terms of the Special Drawing Right, of a State which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund for its operation and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State which is not a Member of the International Monetary Fund shall be calculated in a manner determined by that State. Any carrier which is a national of a State which is not a Member of the International Monetary Fund and whose law does not permit the application of the preceding provisions may, in its regulations, substitute the Special Drawing Right by a monetary unit in accordance with Article II, Paragraph 4, of the Convention as amended by Additional Protocols No. 1 and No. 2 signed at Montreal on 25 September 1975.

INTERNATIONAL CARRIAGE AS DEFINED BY THE WARSAW CONVENTION means carriage in which according to the contract made by the parties the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two High Contracting Parties to the Warsaw Convention one or both of which have not ratified The Hague Protocol or within the territory of a single High Contracting Party not having ratified The Hague Protocol if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another Power even though that Power is not a High Contracting Party

INTERNATIONAL CARRIAGE AS DEFINED BY THE WARSAW CONVENTION AS AMENDED AT THE HAGUE 1955 means carriage in which according to the agreement between the parties the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of States both of which have ratified The Hague Protocol or within the territory of a single State which has ratified The Hague Protocol if there is an agreed stopping place within the territory of another State even if that State has not ratified The Hague Protocol.

NORMAL FARE means the highest fare established for a first or economy/tourist class service during the period of applicability.

PASSENGER means any person, except members of the crew, carried or to be carried in an aircraft with the consent of carrier.

PASSENGER COUPON means that portion of the ticket which is so marked and which ultimately is retained by the passenger.

SPECIAL FARE means a fare other than the normal fare.

STOPOVER which is equivalent to a break of journey, means a deliberate interruption of a journey by the passenger, agreed to in advance by carrier, at a point between the place of departure and the place of destination.

TICKET means the document entitled 'Passenger Ticket and Baggage Check' issued by or on behalf of the carrier and includes the Conditions of Contract and notices and the flight and passenger coupons contained therein.

UNCHECKED BAGGAGE means any baggage of the passenger other than checked baggage.

ARTICLE II: APPLICABILITY

GENERAL

1. These Conditions are the Conditions of Carriage referred to in the ticket and, except as provided in Paragraphs 2, 3, 4, 5 and 6 of this Article, apply to all carriage of passengers and baggage, including services incidental thereto, performed by carrier for reward.

NOT APPLICABLE TO USA AND CANADA

2. These Conditions do not apply to carriage between places in the United States or in Canada or between a place in the United States or in Canada and any place outside thereof to which tariffs in force in those countries apply The tariffs applicable to such carriage are available for inspection at the offices of carrier.

GRATUITOUS CARRIAGE

3 These Conditions also apply to gratuitous carriage except to the extent that Carrier has provided otherwise in its Regulations or in the relevant contracts, passes or tickets.

CONDITIONS SUBJECT TO CHANGE — EFFECTIVENESS

4. These Conditions and Carrier s regulations, fares and charges are subject to change without notice; provided that no such change shall apply after the carriage hereunder has commenced The fares and charges applicable to the carriage are those in effect at the date of commencement of carriage covered by the first flight coupon of the ticket except as otherwise provided in Carrier's regulations

CHARTERS

5. Carriage performed pursuant to a charter agreement with Carrier shall be subject to the charter regulations (if any) of Carrier applicable thereto, and these Conditions shall not apply except to the extent provided in the said charter regulations. Where Carrier has no charter regulations applicable to such carriage, these Conditions shall apply to such carriage except as far as Carrier has in the said charter agreement, or tickets issued in connection with it, excluded the application of all or any part of them. In case of any inconsistency between these Conditions and the provisions contained or referred to in the said charter agreement, the latter shall prevail The passenger, by accpeting the carriage pursuant to the said charter agreement, whether or not concluded with the passenger, agrees to be bound by the applicable provisions of such agreement.

OVERRIDING LAW

6. Insofar as any provision contained or referred to herein may be contrary to anything contained in the convention, laws, Government regulations, orders or requirements which cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the contract of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not have the effect of invalidating any other provision.

CONDITIONS PREVAIL OVER REGULATIONS

7. Save as provided herein, in the event of inconsistency between these Conditions and carrier's regulations, these Conditions shall prevail.

ARTICLE III: TICKETS

TICKET PRIMA FACIE EVIDENCE OF CONTRACT

1. (a) the ticket constitutes prima facie evidence of the contract of carriage between carrier and the passenger The Conditions of Contract contained in the ticket are a summary of some of the provisions of these Conditions of Carriage.

REQUIREMENT FOR TICKET

(b) a person shall not be entitled to be carried on a flight unless he presents a ticket valid and duly issued in accordance with carrier's regulations and containing the flight coupon for that flight and all other unused flight coupons, and the passenger coupon A passenger shall furthermore not be entitled to be carried if the ticket he presents is mutilated or if it has been altered otherwise than by Carrier or his authorized Agent

LOSS, ETC., OF TICKET

(c) in case of loss or mutilation of a ticket, or part thereof, or non-presentation of a ticket containing the passenger coupon and all unused flight coupons, Carrier may at the passenger's request replace such ticket or part thereof by issuing a new ticket without further charge on receipt of proof satisfactory to Carrier that a ticket valid for the flights in question was duly issued; provided that the passenger undertakes in such form as may be prescribed by carrier to pay to carrier the fare applicable to the new ticket in the event, and to the extent, that the lost or missing ticket or the missing flight coupons are used by any person, or that refund in respect thereof is made to any person.

TICKET NOT TRANSFERABLE

(d) a ticket is not transferable If a ticket is presented by someone other than the person entitled to be carried thereunder or to a refund in connection therewith, Carrier shall not be liable to the person so entitled if in good faith it provides carriage or makes a refund to the person presenting the ticket.

(e) each flight coupon will be accepted for carriage in the class of service specified therein on the date and flight for which accommodation has been reserved. When flight coupons are issued without a reservation being specified thereon, space will be reserved on application subject to availability of space on the flight applied for.

PERIOD OF VALIDITY

2. (a) a ticket issued at the normal fare is valid for carriage for one year from the date of commencement of flight or if no portion of the ticket is used, from the date of issue thereof. A ticket issued at other than the normal fare is valid for carriage or for refund only for the period and subject to the conditions prescribed in Carrier's regulations or in the ticket itself.

EXTENSION OF VALIDITY

(b) if a passenger is prevented from travelling within the period of validity of his ticket because Carrier:

(i) cancels the flight on which the passenger holds a reservation, or

(ii) omits a scheduled stop, being the passenger's place of departure, place of destination or place of stopover, or

(iii) fails to operate a flight reasonably according to schedule, or

(iv) causes the passenger to miss a connection, or

(v) substitutes a different class of service, or

(vi) is unable to provide space that has been reserved,

the validity of such passenger's ticket will be extended until Carrier's first flight on which space is available in the class of service for which the fare has been paid,

(c) when a passenger holding a normal fare ticket, or a special fare ticket which has the same validity as a normal fare ticket, is prevented from travelling within the period of validity of his ticket because at the time such passenger requests reservations carrier is unable to provide space on the flight, the validity of such passenger's ticket will be extended until carrier's first flight on which space is available in the class of service for which the fare has been paid, but not for more than seven days.

(d) when a passenger after having commenced his journey is prevented from travelling within the period of validity of his ticket by reason of illness, Carrier will extend, provided such extension is not precluded by Carrier's regulations governing the fare paid by the passenger, the period of validity of such passenger's ticket until the date when he becomes fit to travel according to a medical certificate, or until Carrier's first flight after such date from the point where the journey is resumed on which space is available in the class of service for which the fare has been paid. When the flight coupons remaining in the ticket involve one or more stopovers, the validity of such ticket will be extended for not more than three months from the date shown on such certificate in the case of a normal

fare ticket or a special fare ticket having the same validity as a normal fare ticket, and for not more than seven days in any other case In such circumstances, Carrier will extend similarly the period of validity of tickets of other members of his immediate family accompanying an incapacitated passenger

COUPON SEQUENCE AND PRODUCTION

3. Carrier will honour flight coupons only in sequence from the place of departure as shown on the passenger coupon. The passenger coupon and all unused flight coupons not previously surrendered to carrier shall be retained by the passenger throughout his journey and shall be produced and the applicable flight coupons surrendered to Carrier at Carrier's request

NAME AND ADDRESS OF CARRIER

4. Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's regulations or timetables; Carrier's address shall be the airport of departure shown opposite the first abbreviation of Carrier's name in the ticket.

ARTICLE IV: STOPOVERS AND AGREED STOPPING PLACES

WHEN STOPOVERS PERMITTED

1. In the case of a passenger holding a ticket issued at the normal fare stopovers within the period validity of the ticket will be permitted at any scheduled stop (subject to Paragraph 2 below) unless Government requirements or Carrier's Regulations or timetables do not permit such stopover In the case of passengers holding tickets at special fare, stopovers are in addition subject to the limitations or prohibitions on stopovers as provided in carrier's regulations. Additional charges for stopovers will be payable as provided in carrier's regulations.

ADVANCE ARRANGEMENTS REQUIRED

2. Stopovers will be permitted only if arranged with carrier in advance and provided for in the ticket.

AGREED STOPPING PLACES

3. For the purposes of the convention and of these Conditions the agreed stopping places (which may be altered by carrier in accordance with Article X) are those places, except the place of departure and the place of destination, set forth in the ticket or as shown in Carrier's timetables as scheduled stopping place on the passenger's route.

ARTICLE V: FARES, CHARGES AND ROUTINGS

GENERAL

1. Fares apply only for carriage from the airport at the point of origin to the airport at the point of destination. Fares do not include ground transport service between airports and between airports and town centres, unless Carrier's regulations provide that such ground transport will be furnished without additional charge.

APPLICABLE FARES

2. Applicable fares for carriage governed by these Conditions are those published by carrier or, if not so published, constructed in accordance with Carrier's regulations except as otherwise provided in carrier's regulations, the applicable fare is the fare for the flight or flights in effect on the date of commencement of the carriage covered by the first flight coupon of the tickets When the amount that has been collected is not the applicable fare the difference shall be paid by the passenger, or, as the case may be, refunded by Carrier, in accordance with Carrier's regulations.

PRECEDENCE OF FARES

3. Unless otherwise provided in Carrier's regulations, a published fare takes precedence over the combination of intermediate fares applicable to the same class of service between the same points via the same routing.

ROUTING

4. Unless otherwise provided in Carrier's regulations, fares apply in either direction and only to routings published in connection therewith. If there is more than one routing at the same fare, the passenger, prior to issue of the ticket, may specify the routing; if no routing is specified, carrier may determine the routing.

CURRENCY

5. Subject to applicable law, fares and charges are payable in any currency acceptable to Carrier. When payment is made in a currency other than the currency in which the fare is published, such payment will be made at the rate of exchange established for such purpose by Carrier, the current statement of which is available for inspection by the passenger at Carrier's office where the ticket is purchased.

PAYMENT OF FARES AND CHARGES

6. Carrier shall not be obliged to carry, and may refuse onward carriage of a passenger or his baggage, if the applicable fare or any charges or taxes payable have not been paid, or if credit arrangements agreed between carrier and the passenger (or the person paying for the ticket) have not been complied with. On refusal by carrier to carry the passenger or his baggage in accordance with the provisions of this Paragraph, Carrier's sole liability shall be to refund any amount that may be payable under Article XI Paragraph 3(b) of these Conditions.

ARTICLE VI: CHANGES TO TICKET OR SCHEDULES, MISSED CONNECTIONS

CHANGES REQUESTED BY PASSENGER

1. Changes to the ticket requested by the passenger will be subject to Carrier's regulations.

CANCELLATION CHANGES OF SCHEDULE, ETC.

2. If Carrier cancels a flight, fails to operate reasonably according to schedules, substitutes a different type of equipment or different class of service, is unable to provide previously confirmed space, or causes a passenger to miss a connecting flight on which he holds a reservation, Carrier, with due consideration to the passenger's reasonable interests, shall:

(a) carry the passenger on another of its scheduled passenger services on which space is available; or

(b) reroute the passenger to the destination indicated on the ticket or applicable portion thereof by its own scheduled services or the scheduled services of another Carrier, or by means of surface transportation. If the fare, excess baggage charges and any applicable service charge for the revised routing is higher than the refund value of the ticket or applicable portion thereof as determined under Article XI Paragraph 3(b), Carrier shall require no additional fare or charge from the passenger, and shall refund the difference if the fare and charges for the revised routing are lower; or

(c) make a refund in accordance with the provisions of Article XI Paragraph 3(b).

ARTICLE VII: RESERVATIONS

RESERVATION REQUIREMENTS

1. (a) A reservation of space on a flight shall not be effective and binding on carrier unless (a) a ticket for that flight has been duly issued to the passenger and the reservation entered on the appropriate flight coupon by carrier or its authorized Agent, or (b) the passenger has made a deposit in the amount and within the time limit prescribed in Carrier's regulations A reservation that does not comply with one or other of these requirements may be cancelled by Carrier at any time without notice;

(b) on failure of Carrier to provide space in the class of service for which a reservation has been duly made in accordance with Subparagraph (a) and Paragraph 6 hereof, Carrier shall be liable to the extent provided in Article XVII, Paragraph 3(i).

NO PARTICULAR SPACE GUARANTEED

2. Carrier does not undertake to provide any particular seat in the aircraft The passenger agrees to accept any seat that may be alloted to him on the flight in the class of service for which his ticket has been issued.

TIMELY ARRIVAL AT CHECK-IN

3. The passenger shall arrive at the Carrier's check-in location at the airport or other point of departure at the time fixed by carrier, or, if no time is fixed, sufficiently in advance of flight departure to permit completion of Government formalities and departure procedures If the passenger fails so to arrive in time at the Carrier's check-in location at such airport or other point of departure, or appears improperly documented and not ready to travel, Carrier may cancel the space reserved for him Departures will not be delayed for passengers who arrive at the Carrier's check-in location at airports or other points of departure too late in Carrier's opinion for such formalities to be completed before scheduled departure time. Carrier is not liable to the passenger for loss or expense due to passenger's failure to comply with the provisions of this Subparagraph

SERVICE CHARGE WHEN SPACE NOT OCCUPIED

4. A service charge in accordance with Carrier's regulations shall be payable by any passenger who fails to arrive at Carrier's check-in location at the airport or other point of departure by the time fixed by carrier (or if no time is fixed, sufficiently in advance of flight departure to permit completion of Government formalities and departure procedures) or appears improperly documented and not ready to travel, and as a consequence thereof does not use space for which a reservation has been made for him, or who cancels his reservation later than the time limit for cancellation prescribed in Carrier's regulations. The service charge shall not be payable if the passenger's failure to cancel his reservation or to arrive in time is due to a flight delay or cancellation, or omission of a scheduled stop, or failure to provide reserved space, or to medical reasons supported by a doctor's certificate.

COMMUNICATIONS EXPENSES

5. The passenger will be charged for communications expenses incurred by Carrier as the result of a request by the passenger in connection with his reservation or journey other than communication expenses incurred in securing his original reservation on a flight.

RECONFIRMATION OF RESERVATIONS

6. Any onward or return reservation shall be subject to the requirement to reconfirm the reservation in accordance with and within the time limits specified in Carrier's regulations Failure to comply with any such requirement will entitle carrier to cancel the onward or return reservation

CANCELLATION OF ONWARD RESERVATIONS MADE BY CARRIER

7. If a passenger fails to occupy space that has been reserved for him on a flight, Carrier shall be entitled to cancel or to request cancellation of any onward or return reservations that Carrier has made or procured for the passenger.

ARTICLE VIII: REFUSAL OF CARRIAGE

RIGHT TO REFUSE CARRIAGE

1. Carrier will refuse carriage or onward carriage, or will cancel the reservation of any passenger when, in the exercise of its reasonable discretion, Carrier decides:

   (a) such action is necessary for reasons of safety; or

   (b) such action is necessary to prevent violation of any applicable laws, regulations, or orders of any state or country to be flown from, into or over; or

   (c) the conduct, age, or mental or physical state of the passenger is such as to:

      (i) require special assistance of carrier, or

      (ii) cause discomfort or make himself objectionable to other passengers, or

      (iii) involve any hazard or risk to himself or to other persons or to property, or

   (d) such action is necessary owing to the failure of the passenger to observe the instructions of carrier.

RECOURSE WHEN CARRIAGE REFUSED

2. The sole recourse of any person so refused carriage or whose reservation is cancelled for any reason specified in the preceding Paragraph shall be recovery of the refund value, in accordance with Article XI Paragraph 3(b), of the unused portion of his ticket from the carrier so refusing, or cancelling. In cases falling under Paragraphs 1(c)(ii) or 1(d) of this Article the refund will be subject to deduction of any applicable service charge.

WEIGHT OR SEATING LIMITATION

3. If the aircraft's weight limitations or seating capacity would otherwise be exceeded, carrier shall decide in its reasonable discretion which passengers or articles shall not be carried.

CARRIAGE OF CHILDREN

4. Children will be accepted for carriage subject to the provisions of, and to compliance with, the requirements of Carrier's regulations.

ARTICLE IX: BAGGAGE

ARTICLES UNACCEPTABLE AS BAGGAGE

1. (a) the passenger shall not include in his baggage:

   (i) articles which do not constitute baggage as defined in Article I hereof,

(ii) articles which are likely to endanger the aircraft or persons or property on board the aircraft, including (but without limitation) explosives, compressed gases, corrosives, oxydizing radioactive or magnetized materials, materials that are easily ignited, poisonous, offensive or irritating substances, and liquids (other than liquids in the passenger's unchecked baggage for his use in the course of the journey),

(iii) articles the carriage of which is prohibited by the applicable laws, regulations or orders of any state to be flown from, to or over,

(iv) articles which in the opinion of carrier are unsuitable for carriage by reason of their weight, size or character,

(v) live animals, except that dogs, cats, household birds and other pets will be accepted for carriage subject to the provisions of Paragraph 10 of this Article;

(b) if the passenger is in possession of, or if his baggage includes any arms or munitions, he shall present them to Carrier for inspection prior to commencement of carriage. If Carrier accepts such articles for carriage it may require them to be delivered to and remain in its custody until the passenger's arrival at the airport building at the place of destination

RIGHT TO REFUSE CARRIAGE

2. Carrier may refuse carriage as baggage of any articles described in Paragraph 1 of this Article and may refuse further carriage of any baggage on discovering that it consists of or includes any such articles.

RIGHT OF SEARCH

3. Carrier may request the passenger to permit a search to be made of his person and his baggage, and may search the passenger's baggage in his absence if the passenger is not available for such permission to be sought, for the purpose of determining whether he is in possession of or whether his baggage contains any article described in Paragraph 1(a) above or any arms or munitions which have not been presented to Carrier in accordance with Paragraph 1(b) above If the passenger is unwilling to comply with such request Carrier may refuse to carry the passenger or his baggage and in that event carrier shall be under no liability to the passenger except to refund to him in accordance with the provisions of Article XI Paragraph 3(b) of these Conditions

4. If Carrier accepts as baggage articles which do not constitute baggage as defined in Article 1 hereof, the carriage thereof shall nevertheless be subject to the charges, limitations of liability and other provisions of these Conditions applicable to the carriage of baggage.

CHECKED BAGGAGE

5. (a) upon delivery to Carrier of baggage to be checked Carrier shall take custody thereof Carrier will thereupon make an appropriate entry on the ticket which act shall constitute the issue of the baggage check. Baggage (identification) tags that may be issued by the Carrier in addition to the baggage check are for identification purposes only

(b) Carrier may refuse to accept baggage as checked baggage unless it is properly packed in suitcases or similar containers to ensure safe carriage with ordinary care in handling

(c) the passenger shall not include in his checked baggage fragile or perishable articles money, jewellery, precious metals, silverware, negotiable papers, securities or other valuables, business documents, passports and other identification documents or samples

(d) checked baggage will be carried on the same aircraft as the passenger unless Carrier decides that this is impracticable, in which case Carrier will carry the checked baggage on Carrier's next preceding or subsequent flight on which space is available.

FREE BAGGAGE ALLOWANCE

6. Passengers may carry free of charge baggage as specified and subject to the conditions and limitations in Carrier's regulations. Where two or more passengers, travelling as one party to a common destination or point of stopover by the same flight, present themselves and their baggage for travelling at the same time and place, they shall be permitted a total free baggage allowance equal to the combination of their individual free baggage allowances.

EXCESS BAGGAGE

7. A passenger shall pay a charge for the carriage of baggage in excess of the free baggage allowance at the rate and in the manner provided in Carrier's regulations.

EXCESS VALUE DECLARATION AND CHARGE

8. (a) a passenger may declare a value for checked baggage in excess of 250 French gold francs (US equivalent approximately $20.00) per kilogram for checked baggage. If the passenger makes such a declaration he shall pay the applicable charges in accordance with Carrier's regulations.

(b) except as otherwise provided in Carrier's regulations, excess value charges shall be payable at the point of origin for the entire journey to final destination; provided that if at a stopover en route a passenger declares a higher excess value than that originally declared, additional excess value charges for the increased value from such stopover to final destination shall be payable.

(c) nothing contained herein shall entitle the passenger to declare such excess value for baggage in connection with carriage over Carrier's route in relation to which the Carrier's regulations do not provide for such declarations unless the carriage over such route forms a part of carriage by successive Carriers including routes in respect to which such declarations are provided for by the regulations of the carriers concerned.

COLLECTION AND/DELIVERY OF BAGGAGE

9. (a) the passenger shall collect his baggage as soon as it is available for collection at places of destination or stopover.

(b) Carrier shall deliver checked baggage to the bearer of the baggage check upon payment of all unpaid sums due to carrier under the contract of carriage. Carrier is under no obligation to ascertain that the bearer of the baggage check is entitled to delivery of the baggage and Carrier is not liable for any loss, damage, or expense arising out of or in connection with its failure so to ascertain. Delivery of baggage will be made at the destination shown in the baggage check.

(c) if a person claiming the baggage is unable to produce the baggage check and identify the baggage by means of a baggage (identification) tag, if one has been issued, Carrier will deliver the baggage to such person only on condition that he establishes to Carrier's satisfaction his right thereto, and if required by Carrier, such person shall furnish adequate security to indemnify Carrier for any loss, damage or expense which may be incurred by Carrier as a result of such delivery.

(d) acceptance of baggage by the bearer of the baggage check without written complaint at the time of delivery is prima facie evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage.

PETS AND SEEING-EYE DOGS

10. (a) dogs, cats, household birds and other pets, when properly crated and accompanied by valid health and vaccination certificates, entry permits, and other documents required by countries of entry or transit will be accepted for carriage, subject to Carrier's regulations

(b) the weight of accompanied pets including the weight of containers and food carried shall not be included in the free baggage allowance of the passenger but shall be charged to and paid by the passenger at the rate applicable to excess baggage.

(c) 'seeing-eye' dogs together with containers and food will be carried free of charge in addition to the normal free baggage allowance, subject to Carrier's regulations.

(d) acceptance for carriage of pets or 'seeing-eye' dogs is subject to the condition that passenger assumes full responsibility for such pet or dog. Carrier shall not be liable for injury to or loss, delay, sickness or death of such pet or dog or in the event that it is refused entry into or passage through any country, state or territory.

ARTICLE X: SCHEDULES CANCELLATION OF FLIGHTS

TIMES AND SCHEDULES NOT GUARANTEED

1. (a) Carrier undertakes to use its best efforts to carry the passenger and his baggage with reasonable dispatch. Times shown in the ticket, timetables or elsewhere are not guaranteed and do not form part of the contract of carriage and Carrier assumes no responsibility for making connections.

(b) schedules are subject to change without notice Carrier may when circumstances so require alter or omit stopping places shown on the ticket or in schedules and may without notice substitute alternate Carriers or aircraft.

(c) Carrier will not be liable for errors or omissions in timetables or other publications of schedules or in statements or representations made by employees, agents or representatives of carrier as to the dates or times of departure or arrival or as to the operation of any flight.

RIGHT TO CANCEL POSTPONE, ETC.

2. When circumstances so require Carrier may without notice cancel, terminate, divert, postpone, or delay any flight, and in any of these events Carrier shall with due consideration to the passenger's reasonable interests carry, reroute, or make a refund to the passenger as provided in Article VI Paragraph 2 but shall be under no further liability to him.

ARTICLE XI: REFUNDS

GENERAL

1. On failure by Carrier to provide carriage in accordance with the contract of carriage, or on voluntary change of his arrangements by the passenger, refund for an unused ticket or portion thereof shall be made by Carrier in accordance with the following Paragraphs of this Article and the further provisions relating to refund contained in Carrier's regulations.

PERSON TO WHOM REFUND WILL BE MADE

2 (a) except as hereinafter provided in this Paragraph, Carrier shall be entitled to make refund either to the person named in the ticket or to the person who has paid for the ticket.

(b) if at the request of the person paying for a ticket, being a person other than the passenger named in the ticket, Carrier has indicated on the ticket at the time of issue that there is a restriction on refund, Carrier shall make refund only to the person paying for the ticket or to his order.

(c) except in the case of lost tickets refunds will only be made on production to Carrier of the passenger coupon and surrender of all unused flight coupons.

(d) a refund made to anyone presenting the passenger coupon and all unused flight coupons and holding himself out as a person to whom refund may be made in terms of Subparagraphs (a) or (b) of this Paragraph shall be deemed a refund to such person.

(e) a refund made to a person in accordance with this Paragraph shall discharge carrier from liability to refund and no other person shall be entitled to claim further refund.

AMOUNT OF REFUND

3. (a) the amount of any refund payable by the Carrier in respect of an unused ticket or portion thereof shall be determined in accordance with Carrier's regulations.

(b) if the passenger is prevented from using the carriage, or part thereof, provided for in his ticket because of cancellation of a flight, or postponement or delay of a flight, or omission of a stop provided for in the ticket, or inability of Carrier to provide previously confirmed space, or substitution of a type of aircraft or class of service other than that for which the fare has been paid, or because Carrier causes the passenger to miss a connecting flight on which he holds a reservation, or because of removal of or refusal to carry the passenger in accordance with Article V Paragraph 6, or Article VIII Paragraph 1, or Article IX Paragraph 3, the amount of the refund shall be calculated in accordance with Carrier's regulations relating to refunds described therein as 'involuntary refunds'. Carrier will furthermore refund to the passenger any communications expenses paid by the passenger in accordance with Article VII Paragraph 5.

(c) in cases other than those set out in Subparagraph (b) of this Paragraph the amount of the refund shall be calculated in accordance with Carrier's regulations relating to refunds described therein as 'voluntary refunds'.

REFUND ON LOST TICKET

(d) if a ticket or portion thereof is lost, refund will be made on proof of loss satisfactory to Carrier; provided that the lost ticket or portion thereof has not been used or previously refunded or replaced free of charge, and provided further that the person to whom the refund is made undertakes in such form as may be prescribed by Carrier to repay to carrier the amount refunded in the event and to the extent that the lost ticket or portion thereof is used by any person or that refund thereof is made to any person

RIGHT TO REFUSE REFUND

4 (a) Carrier may refuse refund when application therefore is made later than 30 days after the expiry of the validity of the ticket.

(b) Carrier may refuse refund on a ticket which has been presented to Carrier or to Government officials of a country as evidence of intention to depart therefrom, unless the passenger establishes to the Carrier's satisfaction that he has permission to remain in the country or that he will depart therefrom by another Carrier or another means of transport

CURRENCY

5. All refunds will be subject to Government laws, rules and regulations or orders of the country in which the ticket was originally purchased and of the country in which the refund is being made Subject to the foregoing provision, refunds will be made in the currency in which the fare was paid, or, at the option of Carrier in the currency of the country of the Carrier making the refund or of the country where the refund is made or of the country in which the ticket was purchased, in an amount equivalent to the amount due in the currency in which the fare or fares for the flight covered by the ticket as originally issued was collected

BY WHOM TICKET REFUNDABLE

6. Refund will be made only by the Carrier which originally issued the ticket. When a ticket is issued by an authorized Agent of Carrier such Agent may make refund to the passenger on behalf of Carrier in accordance with carrier's regulations

ARTICLE XII: GROUND TRANSFER SERVICE

GENERAL

1. Unless otherwise provided in carrier's regulations, Carrier does not maintain, operate or provide ground transfer services between airports or between airports and town centres Carrier is not liable for the acts or omissions of the operator of such ground transport services and shall not be liable therefore by reason of anything done by an employee or Agent of carrier in assisting the passenger to avail himself of such services

CONDITIONS AND REGULATIONS APPLY

2. In cases where Carrier itself maintains and operates for its passengers ground transfer service, these Conditions, and Carrier's regulations shall be deemed applicable to such ground transfer services. Charges for the use of ground transfer services maintained and operated by Carrier itself shall be payable by the passenger in accordance with Carrier's regulations No portion of the fare shall be refundable if such ground transfer services are not used by the passenger.

ARTICLE XIII: SERVICE IN AIRCRAFT AND GROUND ARRANGEMENTS

MEALS, ETC., IN AIRCRAFT

1. Meals served in the aircraft will be free of charge except as otherwise provided in Carrier's regulations Liquor, and the provision of in-flight entertainment, will be charged for in accordance with Carrier's regulations.

HOTEL EXPENSES AND MEALS ON GROUND

2. Hotel expenses and meals other than meals served in the aircraft, are not included in the fare and are payable by the passenger, except as otherwise provided in Carrier's regulations.

ARRANGEMENTS BY CARRIER

3. In making arrangements for hotel accommodation or the provision of other board or lodging for passengers, or for excursion trips on the ground or other similar arrangements, whether or not the cost of such arrangements is for the account of Carrier, Carrier acts only as Agent for the passenger and carrier is not liable for loss, damage or expense of any nature whatsoever incurred by the passenger as a result of or in connection with the use by the passenger of such accommodation or arrangements or the denial of the use thereof to the passenger by any other person, company or agency.

ARTICLE XIV: TAXES

Any tax or change imposed by Government or by municipal or other authority, or by the operator of an airport, in respect of a passenger or the use by a passenger of any services or facilities will be in addition to the published fares and charges and shall be payable by the passenger, except as otherwise provided in Carrier's regulations.

ARTICLE XV: ADMINISTRATIVE FORMALITIES

GENERAL

1 The passenger shall comply with all laws, regulations, orders, demands and travel requirements of countries to be flown from, into or over, and with Carrier's rules and instructions. Carrier shall not be liable for any aid or information given by any agent or employee of Carrier to any passenger in connection with obtaining necessary documents or complying with such laws, regulations, orders, demands, and requirements, whether given in writing or otherwise, or for the consequences to any passenger resulting from his failure to obtain such documents or to comply with such laws, regulations, orders, demands, requirements, rules or instructions.

TRAVEL DOCUMENTS

2. The passenger shall present all exit, entry, health and other documents required by laws, regulations, orders, demands or requirements of the countries concerned Carrier reserves the right to refuse carriage of any passenger who has not complied with applicable laws, regulations, orders, demands or requirements or whose documents are not complete Carrier is not liable to the passenger for loss or expense due to the passenger's failure to comply with the requirements of this Paragraph.

REFUSAL OF ENTRY

3. Subject to applicable laws and regulations, the passenger agrees to pay the applicable fare whenever Carrier, on Government order, is required to return a passenger to his point of origin or elsewhere owing to the passenger's inadmissibility into a country, whether of transit or of destination. Carrier may apply to the payment of such fare any funds paid to carrier for unused carriage, or any funds of the passenger in the possession of Carrier. The fare collected for carriage to the point of refusal of entry or deportation will not be refunded by Carrier.

PASSENGER RESPONSIBLE FOR FINES, ETC.

4. If Carrier is required to pay or deposit any fine or penalty or to incur any expenditure by reason of the passenger's failure to comply with laws, regulations, orders, demands and travel requirements of the countries concerned or to produce the required documents, the passenger shall on demand refund to Carrier any amount so paid or deposited and any expenditure so incurred.

CUSTOMS INSPECTION

5. If required, the passenger shall attend inspection of his baggage, checked or unchecked, by customs or other Government officials. Carrier is not liable to the passenger for any loss or damage suffered by the passenger through failure to comply with this requirement

6 Carrier is not liable if it determines that what it understands to be applicable law, Government regulation, demand, order or requirement requires that it refuse and it does refuse to carry a passenger.

ARTICLE XVI: SUCCESSIVE CARRIERS

Carriage to be performed under one ticket or under a ticket and any conjunction ticket issued in connection therewith by several successive carriers is regarded as a single operation

ARTICLE XVII: LIABILITY FOR DAMAGE

1 Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention unless such carriage is not international carriage to which the Convention applies In international carriage as defined by the Warsaw Convention the liability of the carrier for each passenger is limited to the sum of 125,000 French gold francs or its equivalent (US equivalent approximately $10,000) and in international carriage as defined by the Warsaw Convention as amended at The Hague, 1955, the liability of the carrier is limited to 250,000 French gold francs or its equivalent (US equivalent approximately $20,000).

(For Members who are parties to Montreal Agreement)

Special Agreement applicable to carriage to, from or with an agreed stopping place in the United States of America (see applicable US tariffs).

SPECIAL AGREEMENT

The Carrier shall avail itself of the limitation of liability provided in the Convention. However, in accordance with Article 22(1) of the Convention (name of issuing carrier . . . . .) and certain other carriers agree that as to all international carriage by such carriers to which the Convention applies and which according to the Contract of Carriage includes a point in the United States of America as a point of origin, a point of destination or agreed stopping place:

(a) the limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of US$75,000 inclusive of legal fees and costs except that, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, the limit shall be the sum of US$58,000 exclusive of legal fees and costs;

(b) such Carriers shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger, avail themselves of any defence under Article 20(1) of the Convention.

Nothing herein shall be deemed to affect the rights and liabilities of such Carriers with regard to any claim brought by, on behalf of, or in respect of, any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger.

The names of Carriers party to the agreement referred to in this Paragraph are available at all ticket offices of such Carriers and may be examined on request Each of such Carriers has entered into the said agreement solely on its own behalf and with respect to carriage performed by it and has not thereby imposed any liability on any other carrier with respect to the portion of the carriage performed by such other carrier or assumed any liability with respect to the portion of the carriage performed by such other Carrier.

2. In carriage which is not international carriage to which the Convention applies:

(a) Carrier shall be liable for damage to a passenger or his checked baggage only if such damage has been caused by the negligence of Carrier. If there has been contributory negligence on the part of the passenger Carrier's liability shall be subject to the applicable law relating to contributory negligence

(b) the liability of Carrier in respect to each passenger for death, wounding, or other bodily injury shall be limited to the sum of 250,000 French gold francs or its equivalent (US equivalent approximately $20,000); provided that if in accordance with applicable law a different limit of liability is applicable such different limit shall apply.

(c) with respect to delay, Carrier shall be under no liability except as provided in these Conditions of Carriage

3 To the extent not in conflict with the foregoing and whether or not the Convention applies:

(a) Carrier is liable only for damage occurring on its own line A Carrier issuing a ticket or checking baggage over the lines of another Carrier does so only as agent for such other Carrier Nevertheless, with respect to checked baggage the passenger shall also have a right of action against the first or last Carrier.

(b) Carrier is not liable for damage to unchecked baggage unless such damage is caused by the negligence of Carrier If there has been contributory negligence on the part of the passenger Carrier's liability shall be subject to the applicable law relating to contributory negligence.

(c) Carrier is not liable for any damage arising from its compliance with any laws or Government regulations, orders or requirements, or from failure of the passenger to comply with the same.

(d) the liability of the Carrier in the case of damage to checked baggage shall be limited to 250 French gold francs or its equivalent (US equivalent approximately $20 00) per kilogram and in the case of damage to unchecked baggage is limited to 5,000 French gold francs or its equivalent (US equivalent approximately $400) per passenger unless, in the case of checked baggage, a higher valuation is declared as provided in Article IX Paragraph 8. In that event the liability of carrier shall be limited to such higher declared value.

In the event of delivery to the passenger of part but not all of his checked baggage, or in the event of damage to part but not all of such baggage, the liability of the Carrier with respect to the undelivered or damaged portion shall be reduced proportionately on the basis of weight, notwithstanding the value of any part of the baggage or contents thereof.

(e) Carrier's liability shall not exceed the amount of proved damages Carrier shall furthermore not be liable for indirect or consequential damages.

(f) Carrier is not liable for damage to a passenger's baggage caused by property contained in the passenger's baggage. Any passenger whose property causes damage to another passenger's baggage or to the property of carrier shall indemnify carrier for all losses and expenses incurred by Carrier as a result thereof.

(g) Carrier is not liable for damage to fragile or perishable articles, money, jewellery, precious metals, silverware, negotiable papers, securities, or other valuable, business documents, passports and other identification documents, or samples which are included in the passenger's checked baggage.

(h) if a passenger is carried whose age or mental or physical condition is such as to involve any hazard or risk to himself, Carrier shall not be liable for any illness, injury or disability, including death, attributable to such condition or for the aggravation of such condition.

(i) on failure of Carrier, otherwise than in circumstances beyond the control of carrier or in the circumstances referred to in Article VIII, to provide space in the class of service for which a reservation has been duly made, in accordance with Article VII Paragraphs 1 and 6 hereof. Carrier shall be liable for damages sustained by the passenger as the result of such failure: provided that Carrier's liability for such failure shall be limited to reimbursement of the reasonable expenses of the passenger for accommodation, meals, communications and ground transport to and from the airport, and to compensate for any other damages sustained by the passenger at a rate not exceeding US$50 per day or part thereof up to the time when carrier is able to provide such space either on another of its own services or on the services of another Carrier.

(j) any exclusion or limitation of liability of Carrier shall apply to and be for the benefit of agents, servants and representatives of Carrier and any person whose aircraft is used by Carrier and such person's agents, servants and representatives The aggregate amount recoverable from Carrier and from such agents, servants, representatives and person shall not exceed the amount of Carrier's limit of liability

4. Unless so expressly provided nothin herein contained shall waive any exclusion or limitation of liability of Carrier under the Convention or applicable laws.

ARTICLE XVIII: TIME LIMITATION ON CLAIMS AND ACTIONS

NOTICE OF CLAIMS

1. No action shall lie in the case of damage to baggage unless the person entitled to delivery complians to the Carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt; and in the case of delay, unless the complaint is made at the latest within 21 days from the date on which the baggage has been placed at his disposal Every complaint must be made in writing and dispatched within the times aforesaid.

LIMITATION OF ACTIONS

2. Any right to damages shall be extinguished if an action is not brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped The method of calculating the period of limitation shall be determined by the law of the court seized of the case.

ARTICLE XIX: MODIFICATION AND WAIVER

No Agent, servant or representative of Carrier has authority to alter, modify or waive any provision of these Conditions of Carriage or of Carrier's regulations.

ARTICLE XX: MARGINAL HEADINGS

Marginal headings are for ease of reference only and are not part of these Conditions of Carriage.

NAME OF CARRIER .....

ABBREVIATION OF NAME .....

Note: Members may wish to attach a current list of countries which are included in the Warsaw Convention and The Hague Protocol This list is available on application to IATA.

PART 250—OVERSALES

(Issued as ER-503 effective Oct 17, 1967)

As amended by the following regulations which are still in effect as of 8/13/80.

Section(s) affected	Regulation No	Date effective
250 1	ER-568	10-10-67
Do	ER-880	12-28-74
Do	ER-1050	9-3-78
Do	ER-1086	1-8-79
250 2	ER-697	1-27-75
Do	ER-1090	2-5-79
250 2b	ER-1050	9-3-78
250 3	Do	Do
250 4	Do	Do
250 5	Do	Do
250 6	Do	Do
250 7	Do	Do
250 8	ER-1175	5-7-80
250 9	Do	Do
250 10	Do	Do
Do	ER-1175	5-7-80
Do	ER-1189	8-13-80
250 11	Do	Do
250 12	ER-1078	1-18-79
Do	ER-1090	2-5-79

Sec.

§ 250.1 Definitions.

For the purposes of this part:

"Airport" means the airport at which the direct or connecting flight, on which the passenger holds confirmed reserved space, is planned to arrive or some other airport serving the same metropolitan area that is served by the former, provided that transportation to the other airport is accepted (i.e., used) by the passenger.

"Carrier" means (a) an air carrier, except a helicopter operator, holding a certificate issued by the Board pursuant to sections 401(d)(1), 401(d)(2), 401(d)(5), or 401(d)(7) of the Act, authorizing the transportation of persons, or (b) a foreign route air carrier holding a permit issued by the Board pursuant to section 402 of the Act authorizing the transportation of persons.

"Comparable air transportation" means transportation provided by air carriers or foreign air carriers holding certificates of public convenience and necessity or foreign permits issued by the Board.

"Confirmed reserved space" means space on a specific date and on a specific flight and class of service of a carrier which has been requested by a passenger and which the carrier or its agent has verified, by appropriate notation on the ticket or in any other manner provided therefor by the carrier's tariff, as being reserved for the accommodation of the passenger, except that "confirmed reserved space" shall not include verifications of reserved space on flights or portions of flights of foreign air carriers which originate outside the United States, its territories or possessions, to the extent that such verifications are only made outside the United States, its territories or possessions

"Deliberate overbooking" means the practice of knowingly confirming reserved space for a greater number of passengers that can be carried in the specific call of service on the flight and date for which confirmation is given.

"Stopover" means a deliberate interruption of a journey by the passenger, scheduled to exceed 4 hours, at a point between the place of departure and the place of destination.

"Sum of the values of the remaining flight coupons" means the sum of the applicable one-way fares, including any surcharges and air transportation taxes, less any applicable discounts.

§ 250.2 Applicability.

(a) This part applies to every carrier, as defined in § 250.1, with respect to its operation of flights originating or terminating at, or serving, a point within the United States or its territories or possessions, insofar as it denies boarding to a passenger on a flight or portion of flight, for which he holds confirmed reserved space and which is covered by a flight coupon naming any such point: *Provided, however,* That this part shall not apply to intra-Alaskan service conducted with aircraft whose maximum takeoff weight is 12,500 pounds or less.

(b) The requirements of this part, other than §§ 250.10, 250.11, and 250.12, do not apply on a mandatory basis to flights from a foreign country to the United States by foreign air carriers. For these flights, only §§ 250.10, 250.11 and 250.12 are mandatory.

§ 250.2a Policy regarding denied boarding.

In the event of an oversold flight, every carrier shall ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily.

§ 250.2b Carriers to request volunteers for denied boarding.

(a) In the event of an oversold flight, every carrier shall request volunteers for denied boarding before using any other boarding priority. A "volunteer" is a person who responds to the carrier's request for volunteers and who willingly accepts the carrier's offer of compensation, in any amount, in exchange for relinquishing his confirmed reserved space. Any other passenger denied boarding is considered for purposes of this part to have been denied boarding involuntarily, even if he accepts denied boarding compensation.

(b) If an insufficient number of volunteers come forward, the carrier may deny boarding to other passengers in accordance with its boarding priority rules. However, the carrier may not deny boarding to any passenger involuntarily who was earlier asked to volunteer without having been informed that he was in danger of being denied boarding involuntarily and the amount of compensation to which he would have been entitled in that event.

§ 250.3 Boarding priority rules.

(a) Every carrier shall establish priority rules and criteria for determining which passengers holding confirmed reserved space shall be denied boarding on an oversold flight in the event that an insufficient number of volunteers come forward. Such rules and criteria shall reflect the obligations of the carrier set forth in §§ 250.2a and 250.2b to minimize involuntary denied boarding and to request volunteers, and shall be written in such manner as to be understandable and meaningful to the average passenger. Such rules and criteria shall not

make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(b) Every carrier shall file in its tariff its boarding priority rules and criteria, including a copy of its written statement explaining denied boarding compensation and boarding procedures, as described in § 250.9.

(c) Every carrier shall file with the Chief, Tariffs Section, Bureau of Pricing and Domestic Aviation, that portion of its currently effective company manual instructing employees on boarding procedures and priorities in the event of an oversold flight. Any revision of that portion of the manual must be filed within 15 days of its adoption by the carrier.

§ 250.4 Pr[illegible]ed boarding compensation tariffs, liquidated damages.

(a) Every carrier shall file tariffs providing compensation for passengers holding confirmed reserved space who are denied boarding involuntarily from an oversold flight that departs without those passengers. The tariffs shall incorporate the amount of compensation described in § 250.5 and the exceptions to eligibility for compensation described in § 250.6.

(b) The tariffs shall specify that the carrier will tender, on the day and place the involuntary denied boarding occurs, the appropriate compensation, which, if accepted by the passenger, shall constitute liquidated damages for all damages incurred by the passenger as a result of the carrier's failure failure to provide the passenger with confirmed reserve space.

§ 250.5 Amount of denied boarding compensation for passengers denied boarding involuntarily.

Subject to the exceptions provided in § 250.6, the tariffs required by § 250.4(b) shall provide for compensation to be paid a passenger denied boarding involuntarily from an oversold flight at the rate of 200 percent of the sum of the values of the passenger's remaining flight coupons up to the passenger's next stopover, or if none, to his destination, with a $75 minimum and a $400 maximum. However, the compensation shall be one-half the amount described above, with a $37.50 minimum and a $200 maximum. If the carrier arranges for comparable air transportation or other transportation accepted (i.e., used) by the passenger, which, at the time either such arrangement is made, is planned to arrive at the airport of the passenger's next stopover, or if none, at the airport of the passenger's destination not later than 2 hours after the time the direct or connecting flight on which the confirmed space is held is planned to arrive, in the case of interstate and overseas air transportation, or 4 hours after such time in the case of foreign air transportation.

§ 250.6 Exceptions to eligibility for denied boarding compensation.

A passenger denied boarding involuntarily from an oversold flight shall not be eligible for denied boarding compensation if:

(a) The passenger does not present himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in, and reconfirmation procedures and being acceptable for transportation under the carrier's tariff; or

(b) The flight for which the passenger holds confirmed reserved space is unable to accommodate him because of: (1) Government requisition of space; or (2) substitution of equipment of lesser capacity when required by operational or safety reasons; or

(c) The passenger is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge, except that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund.

§ 250.7 [Reserved]

§ 250.8 Denied boarding compensation drafts.

(a) Every carrier shall tender to a passenger eligible for denied boarding compensation, on the day and place the denied boarding occurs, except as provided in paragraph (b), a draft for the appropriate amount of compensation provided in § 250.5.

(b) Where a carrier arranges, for the passenger's convenience, alternate means of transportation that departs before the draft can be prepared and given to the passenger, tender shall be made by mail or other means within 24 hours after the time the denied boarding occurs.

§ 250.9 Written explanation of denied boarding compensation and boarding priorities.

(a) Every carrier shall furnish passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space, immediately after the denied boarding occurs, a written statement explaining the terms, conditions, and limitations of denied boarding compensation, and describing the carrier's boarding priority rules and criteria. The carrier shall also furnish the statement to any person upon request at all airport ticket selling positions which are in the charge of a person employed exclusively by the carrier, or by it jointly with another person or persons, and at all boarding locations being used by the carrier.

(b) Prior to furnishing such statement to any person, each carrier shall file a copy of the statement or any revision thereof in its tariff, as provided in § 250.3. The language of the statement or revision must have the prior approval of the Board unless its text is as prescribed below. (Applications for alternative wording of the statement shall be filed with the Director, Bureau of Pricing and Domestic Aviation.)

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on [name of air carrier], you are probably entitled to monetary compensation. This notice explains the airline's obligations and the passenger's rights in the case of an oversold flight, in accordance with regulations of the U.S. Civil Aeronautics Board.

VOLUNTEERS AND BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his will until airline personnel first ask for volunteers who will give up their reservation willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involu-

untarily, in accordance with the following boarding priority of [name of air carrier]: [In this space carrier inserts its boarding priority rules or a summary thereof, in a manner to be understandable to the average passenger.]

COMPENSATION FOR INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless: (1) you have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's tariff filed with the CAB; or (2) you are denied boarding because the flight is canceled; or (3) you are denied boarding because of Government requisition of space or because a smaller capacity aircraft was substituted for safety or operational reasons; or (4) you are offered accommodations in a section of the aircraft other than that specified in your ticket, at no extra charge. (A passenger seated in a section for which a lower fare is charged must be given an appropriate refund.)

AMOUNT OF DENIED BOARDING COMPENSATION

Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face values of their ticket coupons, with a $37.50 minimum and $200 maximum. However, if the airline cannot arrange 'alternate transportation' (see below) for the passenger, the compensation is doubled ($75 minimum, $400 maximum). The 'value' of a ticket coupon is the one-way fare for the flight shown on the coupon, including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

'Alternate transportation' is air transportation (by an airline licensed by the C.A.B.) or other transportation used by the passenger which, at the time the arrangement is made, is planned to arrive at the passenger's next scheduled stopover (of 4 hours or longer) or destination no later than 2 hours (for flights within U.S. points, including territories and possessions) or 4 hours (for international flights) after the passenger's originally scheduled arrival time.

METHOD OF PAYMENT

The airline must give each passenger who qualified for denied boarding compensation, a payment by check or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours.

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft within 30 days) relieves [name of air carrier] from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

§ 250.10 Reports of unaccommodated passengers.

Every carrier shall file, on a monthly basis, the information specified in CAB Form 251. The reporting basis shall be all flights originating or terminating at, or servicing, a point within the United States or its territories or possessions. The reports are to be submitted within 30 days after the month covered by the report. "Total Boardings" on line 7 of Form 251 shall include only passengers on flights for which confirmed reservations are offered. For international flights, "Total Boardings" shall include only passengers on flight segments to or from the United States that are subject to Part 250, and for which confirmed reservations are offered.

§ 250.11 Public disclosure of deliberate overbooking and boarding procedures.

(a) Every carrier shall cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is in the charge of a person employed exclusively by it, or by it jointly with another person, or by any agent employed by such air carrier or foreign air carrier, to sell tickets to passengers a sign, located so as to be clearly visible and clearly readable to the traveling public, which shall have printed thereon the following statement in bold-face type at least one-fourth of in inch high:

NOTICE—OVERBOOKING OF FLIGHTS

Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation. If the flight is overbooked, no one will be denied a seat until airline personnel first ask for volunteers willing to give up their reservation in exchange for a payment of the airline's choosing. If there are not enough volunteers the airline will deny boarding to other persons in accordance with its particular boarding priority. With few exceptions persons denied boarding involuntarily are entitled to compensation. The complete rules for the payment of compensation and each airline's boarding priorities are available at all airport ticket counters and boarding locations.

(b) Every carrier shall include with each ticket sold in the United States the notice set forth in paragraph (a) of this section, printed in at least 12-point type in ink contrasting with the stock. The notice may be printed on a separate piece of paper, on the ticket stock, or on the ticket envelope.

(c) It shall be the responsibility of each carrier to ensure that travel agents authorized to sell air transportation for that carrier comply with the notice provisions of paragraphs (a) and (b) of this section.

(d) Any carrier that wishes to use a disclosure notice of its own wording, but containing the substance of the language prescribed in paragraph (a) of this section, may substitute a notice of its own wording upon approval by the Board. Applications for such approval shall be filed with the Director, Bureau of Pricing and Domestic Aviation.

§ 250.12 Disclosure by foreign air carriers on inbound flights.

(a) Any foreign air carrier engaged in foreign air transportation that does not have on file with the Board tariffs conforming with §§ 250.3 and 250.4 of this part for inbound traffic to the United States shall include the following statement at the end of the notices required by paragraphs (a) and (b) of § 250.11:

[*Name of carrier*] does not offer these consumer protections on inbound flights to the United States.

(b) The statement required by this section shall be printed in type at least 2 points larger than that of the notices required by section 250.11, and in ink contrasting with both the stock and the section 250.11 notice.

(c) It shall be the responsibility of each such carrier to ensure that travel agents authorized to sell air transportation for that carrier comply with this section.

NOTE.—The reporting requirements contained in sections 250 3 and 250 9 have been approved by the U.S General Accounting Office under No. B-180226 (R0073).

AIR CANADA INTERNATIONAL PASSENGER RULES TARIFF no. PR-1, RULE 22 (E) - DENIED BOARDING COMPENSATION.

CTC (A) No. 8

AIR CANADA
INTERNATIONAL PASSENGER RULES TARIFF NO. PR-1

6th Revised Page 47
Cancels 5th Revised Page 47

RULE	SECTION 6 - REROUTINGS AND REFUNDS
22	REVISED ROUTINGS, FAILURE TO CARRY, MISSED CONNECTIONS AND DENIED BOARDING COMPENSATION (Continued)

(E) DENIED BOARDING COMPENSATION

▲ (Applicable from points in Canada to Bermuda, the Bahamas, and points in the Caribbean and Europe served by Air Canada, between points in Canada and points in the United Kingdom served by Air Canada, also from Antigua, Bahamas, Barbados, Bermuda, Guadeloupe Haiti and Martinique to points in Canada.)
When carrier is unable to provide previously confirmed space due to more passengers holding confirmed reservations and tickets on a flight than there are available seats on that flight, such carrier will:

(1) Make a request for persons who are willing to voluntarily relinquish their confirmed reserved space in which case those persons would receive compensation in an amount determined by the carrier and onward carriage arranged by the carrier in accordance with sub-paragraphs (3) and (4) below. The request for volunteers and the selection of such persons to be denied space shall be in a manner determined solely by carrier. Provided, however, that carrier will not later deny boarding to a passenger involuntarily if that passenger was earlier asked to volunteer without having been informed that he was in danger of being denied boarding involuntarily and the amount of compensation to which he would have been entitled in that event.

(2) If the number of persons willing to voluntarily relinquish confirmed reserved space is insufficient to provide space to all remaining persons holding confirmed reserved space, other passengers may be denied boarding involuntarily, beginning with the last passenger to arrive at the ticket lift point, except passengers travelling due to death or illness of a member of the passenger's family, aged passengers or unaccompanied children.

(Continued on next page)

ISSUED: May 17, 1980 **EFFECTIVE:** July 1, 1980

Correction No 309

AIR CANADA
TERNATIONAL PASSENGER RULES TARIFF NO. PR-1

6th Revised Page 48
Cancels 5th Revised Page 48

RULE

SECTION 6 - REROUTINGS AND REFUNDS

22 REVISED ROUTINGS, FAILURE TO CARRY, MISSED CONNECTIONS AND DENIED BOARDING COMPENSATION (Continued)

(E) DENIED BOARDING COMPENSATION (Continued)

(3) Carrier causing the passenger to be delayed will transport persons who are denied confirmed reserved space, whether voluntarily or involuntarily, on its next flight on which space is available, at no additional cost to the passenger regardless of class of service; or

(4) If the carrier causing such delay is unable to provide onward transportation acceptable to the passenger, the carrier will provide such transportation on the services of any other carrier or combination of carriers in the same class of service as passenger's outbound flight or in a different class of service at no additional cost to the passenger and subject to the availability of space and acceptance by the passenger providing such flights will be used without stopover and will provide an earlier arrival time at the passenger's destination or next point of stopover or transfer point; and

(5) When passenger who is delayed has not voluntarily relinquished confirmed reserved space in accordance with (1) above, carrier causing such delay will compensate such passenger for carrier's failure to provide confirmed space as follows:

(a) Conditions for Payment of Compensation

Subject to the exceptions in this subparagraph, carrier will tender to the passenger the amount of compensation specified in subparagraph (b) when:

(i) Passenger holding a ticket for confirmed reserved space presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedure, and being acceptable for transportation under carrier's tariff; and

(ii) the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

▲ EXCEPTION 1: The passenger will not be eligible for compensation if the flight on which the passenger holds confirmed reserved space is unable to accommodate him because of government requisition of space.

EXCEPTION 2: The passenger will not be eligible for compensation if he is offered accommodations or is seated in a section of the aircraft other than that specified on his ticket at no extra charge, except that a passenger seated in a section for which a lower fare applies shall be entitled to an appropriate refund.

(b) Amount of Compensation Payable

▲ (i) Subject to the provisions of paragraph (5)(a) of this rule, carrier will tender liquidated damages in the amount of 100 percent of the sum of the values of the passenger's remaining flight coupons of the ticket to the passenger's next stopover, or if none, to his destination, but not less nor more than the amounts shown below against each country:

	Not less than:	Not more than:
Antigua (Eastern Caribbean dollars)	110	450
Bahamas (Bahamian dollars)	45	170
Barbados (Barbadian dollars)	85	335
Bermuda (Bermudian dollars)	45	170
Canada (Canadian dollars)	50	200
Guadeloupe/Martinique (French francs)	180	715
Haiti (Haitian gourde)	210	840
United Kingdom (U.K. pounds)	10	100

Such tender, if accepted by the passenger and paid by carrier, will constitute full compensation for all actual or anticipatory damages incurred or to be incurred by the passenger as a result of carrier's failure to provide passenger with confirmed reserved space.

(Continued on next page)

NO CHANGE ON THIS PAGE

CTC (A) No. 8

AIR CANADA
INTERNATIONAL PASSENGER RULES TARIFF NO. PR-1

4th Revised Page 48-A
Cancels 3rd Revised Page 48-A

RULE	SECTION 6 - REROUTINGS AND REFUNDS
22	REVISED ROUTINGS, FAILURE TO CARRY, MISSED CONNECTIONS AND DENIED BOARDING COMPENSATION (Concluded)

(E) DENIED BOARDING COMPENSATION (Continued)

(5) (b) Amount of Compensation Payable: (Continued)

(ii) For the purpose of this rule, the value of the remaining flight coupons of the ticket shall be the sum of the applicable one way fares or fifty percent of the applicable round trip fares, as the case may be, including any surcharges and air transportation taxes, less any applicable discount.

(iii) Said tender will be made by carrier on the day and at the place where the failure occurs, and if accepted will be receipted for by the passenger. Provided, however, that when carrier arranges, for the passenger's convenience, alternate means of transportation which departs prior to the time such tender can be made to the passenger, tender shall be made by mail or other means within 24 hours after the time the failure occurs.

(6) Carrier shall furnish all passengers who are denied boarding involuntarily from flights on which they hold confirmed reserved space a copy of the following written statement:

COMPENSATION FOR DENIED BOARDING

If you have been denied a reserved seat on Air Canada, you are probably entitled to monetary compensation. This notice explains the airline's obligations and the passenger's rights in the case of an oversold flight.

VOLUNTEERS AND BOARDING PRIORITIES

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his will until airline personnel first ask for volunteers who will give up their reservations willingly, in exchange for a payment of the airline's choosing. If there are not enough volunteers, other passengers may be denied boarding involuntarily, beginning with the last passenger to arrive at the ticket lift point, except passengers travelling due to death or illness of a member of the passenger's family, aged passengers or unaccompanied children.

COMPENSATION FOR INVOLUNTARY DENIED BOARDING

If you are denied boarding involuntarily, you are entitled to a payment of "denied boarding compensation" from the airline unless (1) you have not fully complied with the airline's ticketing, check-in, and reconfirmation requirements, or you are not acceptable for transportation under the airline's tariff filed with the CTC; or (2) you are denied boarding because the flight is cancelled; or (3) you are denied boarding because of government requisition of space or (4) you are offered accommodations in a section of the aircraft other than that specified in your ticket, at no extra charge. (A passenger seated in a section for which a lower fare is charged must be given an appropriate refund).

(Continued on next page)

ISSUED: May 17, 1980

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CTC (A) No. 8

AIR CANADA

TERNATIONAL PASSENGER RULES TARIFF NO. PR-1

4th Revised Page 38-B
Cancels 3rd Revised Page 38-B

RULE	SECTION 6 - REROUTINGS AND REFUNDS

22 REVISED ROUTINGS, FAILURE TO CARRY, MISSED CONNECTIONS AND DENIED BOARDING COMPENSATION (Concluded)

(E) DENIED BOARDING COMPENSATION (Continued)

(6) (Continued)

AMOUNT OF DENIED BOARDING COMPENSATION

▲ Passengers who are eligible for denied boarding compensation must be offered a payment equal to the sum of the face value of their ticket coupons with a minimum or maximum amount as listed below against each country:

	Minimum	Maximum
Antigua (Eastern Caribbean dollars)	110	450
Bahamas (Bahamian dollars)	45	170
Barbados (Barbadian dollars)	85	335
Bermuda (Bermudian dollars)	45	170
Canada (Canadian dollars)	50	200
Guadeloupe/Martinique (French francs)	180	715
Haiti (Haitian gourde)	210	840
United Kingdom (U.K. pounds)	10	100

The 'value' of a ticket coupon is the one way fare for the flight shown on the coupon, including any surcharge and air transportation tax, minus any applicable discount. All flight coupons, including connecting flights, to the passenger's destination or first 4 hour stopover are used to compute the compensation.

METHOD OF PAYMENT

The airline must give each passenger who qualifies for denied boarding compensation a payment by check or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the airline arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours.

PASSENGER'S OPTIONS

Acceptance of the compensation (by endorsing the check or draft within 30 days) relieves Air Canada from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

PART 252—PROVISION OF DESIGNATED "NO-SMOKING" AREAS ABOARD AIR CARRIERS

(Issued as ER-800 effective July 10, 1978.)

As amended by the following regulations which are still in effect as of 6/6/79.

Section(s) affected	Regulation No.	Date effective
252.1	ER-1091	2-23-79
Do	ER-1124	6-22-79
252.1a	Do	Do
252.2	Do	Do
252.2a	Do	Do
252.3	Do	Do
252.4	ER-1122	5-10-79

Sec.

§ 252.1 Applicability.

This part establishes rules for the smoking of tobacco aboard aircraft. It applies to each direct air carrier that holds a certificate of public convenience and necessity authorizing the transportation of persons, issued under Section 401 of the Act and to commuter air carriers registered under Part 298 of this chapter in that part of their operations using aircraft designated to have a passenger capacity of more than 30 seats (hereinafter called "carriers"). Nothing in this regulation shall be deemed to require such carrier to permit the smoking of tobacco aboard aircraft.

(ER-1124, 6-22-79)

§ 252.1a Special segregation of cigar and pipe smokers.

Carriers shall adopt and enforce rules providing for special segregation of cigar and pipe smokers, and for such other procedures as may be necessary to avoid exposing persons seated in no-smoking areas to smoke from cigars and pipes.

§ 252.2 No-smoking areas.

Carriers shall ensure that non-smoking passengers are not unreasonably burdened by breathing smoke and to that end shall provide at a minimum:

(a) A no-smoking area for each class of service and for charter service;

(b) A no-smoking section of at least two rows of seats;

(c) A sufficient number of seats in the no-smoking areas of the aricraft for all persons who wish to be seated there;

(d) Specific provision for expansion of no-smoking areas to meet passenger demand; and

(e) Special provisions to ensure that if a no-smoking section is placed between smoking sections, the non-smoking passengers are not unreasonably burdened.

§ 252.2a Ban on smoking when ventilation systems not fully functioning.

Carriers shall adopt and enforce rules prohibiting the smoking of tobacco whenever the ventilation system is not fully functioning. A ventilation system shall be considered fully functioning only when all parts are in working order and operating at the capacity designed for normal service.

§ 252.3 Enforcement.

Each carrier shall take such action as is necessary to ensure that smoking is not permitted in no-smoking areas and to enforce its rules with respect to the segregation of passengers in smoking and no-smoking areas.

§ 252.4 Manual containing company rules for smoking by passengers aboard aircraft.

Each air carrier subject to this part shall maintain an employee manual containing company rules for smoking by passengers aboard aircraft. Two copies of such manual shall be filed with the Bureau of Consumer Protection, and revisions and amendments shall be filed within 15 days following adoption by the company.

§ 252.5 Board may modify manual rules to conform them to the provisions of this part.

If the Board finds that any company rule set forth in the manual is at variance with any provision of this part, the Board may by order modify such company rule to the extent necessary to conform the rule to the provisions of the part.

AIR CANADA PUBLICATION no. 302
ARRANGING SERVICE FOR INCONVENIENCED PASSENGERS (1979), pp. 14-19

Arranging Service for Inconvenienced Passengers

5 Normal Arrangements for Deplaned Passengers

.10 Selecting the Passenger for Deplanements: Deplaned passengers in accordance with procedures in Publication 105, Airport Passenger Service.

.11 Compensation for Revenue Passengers Volunteers (Air Canada and U.S. Plans): Volunteers to be denied boarding are paid according to the value of coupons (tax included) remaining to on-line or interline destination or next stopover point. (Not applicable to industry reduced rate passengers.)

- Coupon value less than $100 - pay $50

- Coupon value equal to or greater than $100 - pay $100

.12 Services, Allowance, and Arrangements for Involuntary Deplaned Revenue Passengers: Extend every possible service, a long distance telephone call using Company tie-lines whenever possible and/or sending a telegram. The attitude displayed when extending these services is very important; much of the goodwill lost can be regained if the deplanee is served with the utmost courtesy and with genuine sincerity and understanding.

NOTE: Under normal conditions no expenses (other than a telephone call or sending a telegram) are paid to deplaned passengers but there may be exceptional circumstances when expenses may have to be absorbed.

.13 Denied Boarding Compensation for Involuntary Deplaned Passengers: It is Air Canada's policy to compensate passengers who have been denied boarding involuntarily in accordance with the terms and conditions outlined in the following subsections.

There are three compensation plans in existence. They are outlined in published tariffs and they govern the rights of passengers denied boarding. These plans are:

Prise en charge des passagers touchés par une irrégularité

5 Prise en charge des passagers refusés

.10 Refus de passage - Sélection des passagers: Se reporter aux instructions de la publication 105, Service aux passagers à l'aéroport.

.11 Dédommagement des passagers payants qui renoncent volontairement à leur réservation (E.U. et réglementation Air Canada): Toute personne qui renonce à sa réservation reçoit une indemnité proportionnelle au prix de la portion restante de son voyage jusqu'à destination intracompagnie ou intercompagnies, taxes y compris. (Ne s'applique pas au personnel de compagnies aériennes qui voyage à tarif réduit.)

- Si la valeur du coupon est inférieure à $100, l'indemnité est de $50.

- Si la valeur du coupon est égale ou supérieure à $100, l'indemnité est de $100.

.12 Refus de passage - Prestation et services: Offrir au passager le plus grand nombre de services possible: un appel téléphonique interurbain, si possible par ligne directe, ou l'envoi d'un télégramme. L'attitude du personnel est primordiale, un passager refusé, mais traité avec courtoisie, sincérité et compréhension, sera plus enclin à nous conserver sa clientèle en dépit des inconvénients qu'il aura subis.

REMARQUE: Normalement, on n'accorde aux passagers débarqués aucune prestation autre que celles décrites ci-dessus, toutefois, il peut y avoir des circonstances exceptionnelles où les dépenses engagées sont à la charge de la Compagnie.

.13 Indemnité pour refus d'embarquement: Air Canada a pour politique d'indemniser les passagers à qui on a refusé l'embarquement, conformément aux dispositions des articles suivants.

Il existe trois réglementations de dédommagement. Elles figurent dans les tarifs publiés et régissent les droits des passagers refusés à l'embarquement.

Arranging Service for Inconvenienced Passengers

5 Normal Arrangements for Deplaned Passengers (cont.)

.13 Denied Boarding Compensation for Involuntary Deplaned Passengers: (cont.)

1 AIR CANADA PLAN: Applicable to passengers denied boarding in Canada, except as described in 2 (U.S. Plan), to all destinations served by Air Canada. (Includes Canada, the United States, Bermuda, the Bahamas, Caribbean and Europe).

2 UNITED STATES (CAB) PLAN: Applicable to passengers denied boarding in the United States or to passengers who originated their journey in the United States and are denied boarding to an onward connecting flight in Canada.

3 UNITED KINGDOM PLAN: Applicable to passengers denied boarding in the United Kingdom. (London and Prestwick).

--4 AEA PLAN: (Association of European Airlines) Applicable to passengers denied boarding in: Germany, France, Switzerland, Denmark.

-- Denied Boarding Compensation will not apply to passengers boarding in Continental Europe, except as noted in (4) above, Bermuda, the Bahamas and the Caribbean as there is no bilateral agreement with these countries. Where compensation does not apply for this reason or due to exemptions (subsection .15), then full expenses apply.

.14 Passengers Eligible for Denied Boarding Compensation: To be eligible for compensation the following conditions must apply:

1 Passenger must hold a valid ticket for confirmed reserved space (Refer Publication 105, chap. 5, Section 5.11 "Establishing a Passenger's status as confirmed") on a flight which is unable to accommodate him and which departs without him, regardless of whether or not he is delayed upon arrival at destination or next stopover.

2 Passenger must have complied with ticketing, reconfirmation and check-in procedures as applicable.

3 Passenger must consent to undergo an airport security check and to obey the lawful instructions of Air Canada.

Prise en charge des passagers touchés par une irrégularité

5 Prise en charge des passagers refusés (suite)

.13 Indemnité pour refus d'embarquement: (suite)

1 RÉGLEMENTATION D'AIR CANADA: Passagers refusés au Canada, quelle que soit leur destination sur le réseau (Canada, États-Unis, Bermudes, Bahamas, Antilles et Europe), à l'exception des passagers visés par les dispositions décrites en 2 ci-après.

2 ÉTATS-UNIS - RÉGLEMENTATION DU CAB: Passagers faisant l'objet d'un refus de passage aux États-Unis ou passagers dont le voyage commence aux États-Unis et qui font l'objet d'un refus de passage pour un vol de correspondance au Canada.

3 ROYAUME-UNI: Passagers refusés au Royaume-Uni (Londres et Prestwick).

--4 RÈGLEMENTATION DE L'ACENA: (Association des compagnies aériennes de navigation aérienne) Passagers faisant l'objet d'un refus d'embarquement en Allemagne, en France, en Suisse ou au Danemark.

-- L'indemnité ne s'applique pas aux passagers embarquant en Europe continentale, (à l'exception des pays susmentionnés), aux Bermudes, aux Bahamas et aux Antilles, faute d'accords bilatéraux avec ces pays. Lorsque pour cette raison ou par suite des exceptions décrites à l'article .15, aucun dédommagement n'est accordé, le remboursement de tous les frais est alors applicable.

.14 Passagers ayant droit: Pour bénéficier de l'indemnité pour refus d'embarquement, les passagers doivent:

1 Être en possession d'un billet valable avec réservation confirmée (voir publication 105, chapitre 5, Article 5.11, "Réservation confirmée") pour un vol sur lequel on ne peut les embarquer et qui de fait part sans qu'ils soient à bord, que le passager subisse le retard à son prochain arrêt ou à l'arrivée à destination.

2 Avoir rempli toutes les formalités de billetterie, de reconfirmation et d'enregistrement appropriées.

3 Se soumettre aux contrôles de sécurité des aéroports et à toute directive d'Air Canada conforme à la loi.

Arranging Service for Inconvenienced Passengers

5. Normal Arrangements for Deplaned Passengers (cont.).

.14 Passengers Eligible for Denied Boarding Compensation: (cont.)

4 Passenger must be acceptable for transportation with respect to health, behaviour, etc., in accordance with Air Canada's published tariff.

.15 Situations that Exempt Air Canada from Payment of Denied Boarding Compensation: (cont.)

REASONS	AIR CANADA PLAN	U.S. PLAN	U.K. PLAN	A.E.A. PLAN
1. GOVERNMENT REQUISITION OF SPACE	X	X	X	X
2. PASSENGER IS UPGRADED OR DOWNGRADED	X	X	X	X
3. SUBSTITUTION OF EQUIPMENT (Ex. change of Aircraft from 747 to L1011 due to unserviceability) SEE NOTE 1 AND NOTE 2.		X	X	X
4. RESTRICTION OF CAPACITY (Ex. Load restriction on Aircraft because of additional fuel requirement SEE NOTE 2.			X	X

NOTE 1: Seating variations on B747 do not exempt Air Canada from payment of compensation as all 747's are sold as Y403. When operating in the Y389 configuration (AC302,303,304,305)-we consider the flight overbooked by 14.

NOTE 2: When required by operational and/or safety reasons.

Arranging Service for Inconvenienced Passengers

5 Normal Arrangements for Deplaned Passengers (cont.)

.16 Involuntary Denied Boarding Compensation Payable: (cont.)

EXAMPLE 3: If it is an excursion or charter class fare, and there is no equivalent fare on the deplaned sector, compensation will be based on the regular published economy fare.

NOTE: The term STOPOVER means a deliberate interruption of a journey by the passenger, scheduled to exceed four hours, at a point between the place of departure and the place of destination.

.17 Notice to Passenger Explaining Denied Boarding Compensation: Provide passengers who are involuntarily denied boarding a written statement explaining the terms, conditions and limitations of denied boarding compensation. This statement must be provided immediately after the denied boarding occurs. Use ACF520-2 (11-78) Notice of Denied Boarding Compensation - US when the CAB rule is applicable and use ACF520-3 (11-78) Air Canada Notice of Denied Boarding Compensation when the Air Canada plan is applicable.

.18 Application to Airline Employees or Dependents Travelling on Reduced Fare Positive Space who are Deplaned Involuntarily: These passengers are paid either denied boarding compensation under the applicable plan, or locally decided expenses, whichever is the greater. The "value" of coupons to calculate compensation is the actual one-way fare paid or 50% of the actual round trip fare paid.

Protection is to be arranged for these passengers at no cost to the passenger.

.19 Form of Payment - Involuntary or Voluntary Denied Boarding Compensation: On the day and place denied boarding occurs pay compensation to the passenger in the amount specified above by means of Draft ACF122.

1 On the reverse side of the draft, print INVOLUNTARY DENIED BOARDING COMPENSATION or VOLUNTARY DENIED BOARDING COMPENSATION and record FLIGHT/DATE/FROM/TO.

2 Attach a copy of the Passenger Name Record (PNR) to Winnipeg Accounting copy of the ACF122 draft.

Prise en charge des passagers touchés par une irrégularité

5 Prise en charge des passagers refusés (suite)

.16 Montant de l'indemnité pour refus d'embarquement: (suite)

EXEMPLE 3: S'il s'agit d'un tarif excursion ou Nolisprix et si ce type de tarif n'existe pas pour le tronçon qui fait l'objet du refus d'embarquement, on utilise, pour calculer l'indemnité, le plein tarif économique publié.

REMARQUE: Par ARRÊT, on entend une interruption volontaire du voyage par le passager, devant durer plus de quatre heures, en un point situé entre le point de départ et la destination.

.17 Avis d'indemnité pour refus d'embarquement à remettre au passager: Remettre aux passagers refusés, immédiatement après le refus d'embarquement, une déclaration écrite indiquant les conditions et limites du dédommagement. Utiliser un imprimé ACF520-2 (11-78) (Avis d'indemnité de refus d'accès à bord - États-Unis) pour les refus régis par la réglementation du CAB et un imprimé ACF520-3 (11-78) (Avis d'indemnité de refus d'accès à bord - Canada) pour les refus régis par la réglementation d'Air Canada.

.18 Application de l'indemnité pour refus d'embarquement aux employés de compagnies aériennes et à leurs personnes à charge voyageant avec un billet à tarif réduit avec privilège de réservation: Ces passagers ont droit soit à l'indemnité prévue aux termes de la réglementation applicable soit au remboursement des frais autorisés par la direction locale, la formule la plus avantageuse pour le passager étant retenue. La valeur considérée pour le calcul de l'indemnité est le tarif aller payé ou 50% du tarif aller-retour payé.

On doit prendre les mesures nécessaires pour offrir à ces passagers un transport de suppléance jusqu'à destination, sans frais de leur part.

.19 Mode de paiement - Indemnité pour refus d'embarquement et indemnité accordée aux passagers qui renoncent volontairement à leur réservation: À l'aide de l'imprimé ACF122, dédommager le passager à concurrence des montants indiqués ci-dessus, le jour et à l'endroit mêmes où se produit le refus d'embarquement.

1 Inscrire en majuscules au verso de la traite INDEMNITÉ - NON-EMBARQUEMENT INVOLONTAIRE ou INDEMNITÉ - NON-EMBARQUEMENT VOLONTAIRE ainsi que le numéro, la date, l'origine et la destination du vol.

2 Joindre un exemplaire à la copie du dossier passager (PNR) et envoyer le tout à la Comptabilité de Winnipeg.

Arranging Service for Inconvenienced Passengers

5 Normal Arrangements for Deplaned Passengers (cont.)

.16 Involuntary Denied Boarding Compensation Payable:

Prise en charge des passagers touchés par une irrégularité

5 Prise en charge des passagers refusés (suite)

.16 Montant de l'indemnité pour refus d'embarquement:

PLAN/RÈGLEMENTATION	TIME CONSTRAINTS/ DÉLAIS	VALUE PAID AS COMPENSATION/ MONTANT DE L'INDEMNITÉ
AIR CANADA PLAN/ RÈGLEMENTATION D'AIR CANADA Value based on all coupons remaining, including applicable tax, to destination or next stopover/ Proportionnel à la valeur de tous les coupons restants, y compris les taxes applicables, jusqu'à destination ou au prochain arrêt volontaire	No delay limits/ Néant	100% Min. $50/Max. $200
U.S. PLAN/ RÈGLEMENTATION DES É.-U. Value based on all coupons remaining, including applicable tax, to destination or next stopover/ Proportionnel à la valeur de tous les coupons restants, y compris les taxes applicables, jusqu'à destination ou au prochain arrêt volontaire	If under 4 hrs./ Moins de 4 hr If over 4 hrs./ Plus de 4 h	100% Min. $37.50/Max. $200 200% Min. $75/Max. $400
AEA PLAN (SEE NOTE)/ RÈGLEMENTATION DE L'A.C.E.-N.A. (VOIR REMARQUE) Value based on first remaining flight coupon/ Proportionnel à la valeur du premier coupon de vol restant	If under 6 hrs./ Moins de 6 h If over 6 hrs./ Plus de 6 h	Nil/néant 50% Min. £10/Max. £100 *PLUS FULL EXPENSES* / *PLUS TOUS LES FRAIS*
U.K. PLAN/ RÈGLEMENTATION DU R.-U. Value based on first remaining flight coupon/ Proportionnel à la valeur du premier coupon restant.	If under 4 hrs./ Moins de 4 h If over 4 hrs./ Plus de 4 h	Nil/néant 100% Min. £10/Max. £100

NOTE: AEA Plan (The Association of European Airlines): Applicable to passengers denied boarding in: Germany, France, Switzerland, Denmark.

REMARQUE: Règlementation de l'A.C.E.N.A. (Association des compagnies européennes de navigation aérienne). S'applique aux passagers faisant l'objet d'un refus d'embarquement en Allemange, en France, en Suisse ou au Danemark.

The term "value" as used above means either the applicable one-way fare or 50% of the applicable round trip fare. It includes tax and any surcharge less any applicable discount.

EXAMPLE 1: If the applicable excursion round trip is $200. "Value" will be $100.

EXAMPLE 2: If the applicable one-way fare is $200, and the applicable discount is 80%, "Value" will be $40.00.

La "valeur" considérée pour les indemnités ci-dessus est soit le prix du billet aller, soit 50% du billet aller-retour. S'il y a lieu, on y ajoute les taxes et surtaxes applicables, mais on tient également compte de toute réduction éventuelle.

EXEMPLE 1: Si le tarif excursion aller-retour applicable est $200, la valeur considérée est $100.

EXEMPLE 2: Si le tarif aller applicable est $200 et si le passager bénéficie d'une réduction de 80%, la valeur considérée est $40.

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V8J 3P6
Tel: 604 - 627-1341
Tel-Tex: 047-89129
Weldon Walberg, *President & General Manager*

TRANS QUEBEC HELICOPTERS LTD.
1215 Montee Pilon
Les Cedres, Quebec
J0P 1L0
Tel: 514 - 637-5524
Telex: 05-822659
Andre Lachapelle, *Président*

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Peterborough, Ontario
K9J 6Z4
Tel: 705 - 745-0451
Telex: 06-962-809
John P. Gillespie, *President*

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Sechelt, B.C.
V0N 3A0
Tel: 604 - 885-2214
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U.S. AIR, INC. (A)
Washington National Airport
Hangar #12
Washington, D.C. 20016
U.S.A.
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Telex: 89-2645
William N. Seitz, *Asst. Vice President, Community Affairs*

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Sidney, B C.
V8L 3S6
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Tel-Tex: 049-7101
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P O. Box 130
North Sydney, N S.
B2A 3M2
Tel. 902 - 539-1246
Telex. 019-35229
Earle O Tubrett, *General Manager*

VIKING HELICOPTERS LIMITED
P.O Box 5104, Station F
Ottawa, Ontario
K2C 3H4
Tel 613 - 257-4660
Telex. 053-3659
Larry R. Camphaug, *President*

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CFB North Bay
Hornell Heights, Ontario
P0H 1P0
Tel: 705 - 476-1750
Max Shapiro, *President*

WARDAIR CANADA (1975) LIMITED
2201 Toronto Dominion Tower
Edmonton Centre
Edmonton, Alberta
T5J 0K4
Tel: 403 - 423-4466
Telex. 037-2057
Tom L. Spalding, *Executive Vice-President*

WEST COAST AIR SERVICES LIMITED
5180 Airport Road
International Airport South
Richmond, B C.
V7B 1B4
Tel: 604 - 278-8431
Telex: 043-55616
Al Michaud, *President*

WESTERN AIRLINES (A)
P.O. Box 92005
World Way Postal Centre
Los Angeles, California 90009
U S.A.
Tel 213 - 646-2323
Telex: 664-361
Hugh C. Earley, *Director — Public Affairs*

WHITE'S AIRCRAFT SERVICES LTD.
R.R. #3
St Andre Avellin, Quebec
J0V 1W0
Tel: 819 - 983-7909
Norman R. White, *President*

WHITEHORSE FLYING SCHOOL LTD.
Hangar E, Whitehorse Airport
Whitehorse, Yukon
Y1A 3E4
Tel: 403 - 668-5596
Telex: 036-8340
Stefan Kleczkowski, *President*

WON-DEL AVIATION LTD.
6200 Airport Road
Saint-Hubert, Quebec
J3Y 5K2
Tel: 514 - 861-8403
Tel-Tex. 055-60663
Marshall H Lambert, *Vice President, Operations*

INTERNATIONAL AIR TRANSPORT ASSOCIATION

PART 1

To be completed by SALES OFFICE/AGENT

M E D I F

STANDARD MEDICAL INFORMATION FORM FOR AIR TRAVEL

Answer ALL questions Put a cross (x) in YES or NO boxes
Use BLOCK LETTERS or TYPEWRITER when completing this form

A N A M E INITIALS / TITLE

B PROPOSED ITINERARY (airline(s) flight number(s) class(es) date(s) segments(s), reservation status of continuous air journey)

Transfer from one flight to another often requires LONGER connecting time

C NATURE OF INCAPACITATION

MEDICAL CLEARANCE REQUIRED? No ☐ Yes ☐

D IS STRETCHER NEEDED ON BOARD? (All stretcher cases MUST be escorted) No ☐ Yes ☐

Request rate if unknown

E INTENDED ESCORT (Name sex age professional qualification segments if different from passenger) If untrained state 'TRAVEL COMPANION'

For blind and/or deaf state if escorted by trained dog

F WHEELCHAIR NEEDED? No ☐ Yes ☐

Categories are WCHR WCHS WCHC

Wheelchair Category

	OWN wheelchair	Collapsible	Power driven?	Battery Type (spillable?)
No	☐	☐	☐	☐
Yes	☐	☐	☐	☐

Wheelchairs with spillable batteries are restricted articles and are permitted on passenger aircraft only under certain conditions, which can be obtained from the airline(s). In addition certain countries may impose specific restrictions

G AMBULANCE NEEDED? No ☐ Yes ☐

To be arranged by AIRLINE
No ☐ → specify Ambul Company contact
Yes ☐ → specify destination address

Request rate(s) if unknown

H OTHER GROUND ARRANGEMENTS NEEDED No ☐ Yes ☐

If yes SPECIFY below and indicate for each item (a) the ARRANGING airline or other organisation (b) at whose EXPENSE and (c) CONTACT addresses/phones where appropriate or whenever specific persons are designated to meet assist the passenger

1 Arrangements for delivery at airport of DEPARTURE — No ☐ Yes ☐ specify

2 Arrangements for assistance at CONNECTING POINTS — No ☐ Yes ☐ specify

3 Arrangements for meeting at airport of ARRIVAL — No ☐ Yes ☐ specify

4 Other requirements or relevant information — No ☐ Yes ☐ specify

K SPECIAL IN-FLIGHT ARRANGEMENTS NEEDED such as special meals special seating leg-rest extra seat(s) special equipment, etc (See 'Note' at the end of PART 2 overleaf) No ☐ Yes ☐

If yes DESCRIBE and indicate for each item (a) SEGMENT(s) on which required (b) airline ARRANGED or arranging third party and (c) at whose expense Provision of SPECIAL EQUIPMENT such as oxygen etc always requires completion of PART 2 overleaf

L DOES PASSENGER HOLD A FREQUENT TRAVELLER'S MEDICAL CARD™ VALID FOR THIS TRIP? (FREMEC) No ☐ Yes ☐

If yes add below FREMEC data to your reservation requests. If no (or if additional data needed by carrying airline(s)) have physician in attendance complete PART 2 hereof

FREMEC (FREMEC Number) (issued by) (valid until) (sex) (age) (incapacitation)

(incapacit. cont.) (Limitations)

PASSENGER'S DECLARATION

I HEREBY AUTHORIZE

(name of nominated physician)

to provide the airlines with the information required by those airlines' medical departments for the purpose of determining my fitness for carriage by air and in consideration thereof I hereby relieve that physician of his/her professional duty of confidentiality in respect of such information and agree to meet such physician's fees in connection therewith.

I take note that if accepted for carriage my journey will be subject to the general conditions of carriage/tariffs of the carrier concerned and that the carrier does not assume any special liability exceeding those conditions/tariffs.

I am prepared at my own risk, to bear any consequences which carriage by air may have for my state of health and I release the carrier its employees' servants and agents from any liability for such consequences.

I agree to reimburse the carrier upon demand for any special expenditures or costs in connection with my carriage.

(Where needed, to be read by/to the passenger dated and signed by him/her or on his/her behalf)

Place	Date	Passenger's Signature

APPENDIX "A" — MEDIF FORM
Resolution 401
Recommended Practice 1401 — Attachment "B"

(Text may be modified by the airline issuing the MEDIF, to comply with local law)

PART 2	MEDIF - MEDICAL INFORMATION SHEET	(for official use only)
To be completed by ATTENDING PHYSICIAN	This form is intended to provide CONFIDENTIAL information to enable the airlines MEDICAL Departments to assess the fitness of the passenger to travel as indicated in PART 1 hereof. If the passenger is acceptable, this information will permit the issuance of the necessary directives designed to provide for the passenger's welfare and comfort. The PHYSICIAN ATTENDING the incapacitated passenger is requested to ANSWER ALL QUESTIONS (Enter a cross "x" in the appropriate yes or no boxes and/or give precise concise answers). COMPLETING OF THE FORM IN BLOCK LETTERS OR BY TYPEWRITER WILL BE APPRECIATED.	The form must be returned to: (Carrier's Designated Office)

Airlines Ref Code MEDA01	PATIENT'S NAME INITIAL(S) SEX AGE		
MEDA02	ATTENDING PHYSICIAN Name & Address		
	Telephone Contact	Business	Home
MEDA03	MEDICAL DATA - DIAGNOSIS in details (including vital signs)		
	Day/month/year of first symptoms		Date of diagnosis
MEDA04	- PROGNOSIS for the trip		
MEDA05	- Contagious AND communicable disease?	No ☐ Yes ☐ Specify	
MEDA06	Is patient in any way OFFENSIVE to other passengers? (smell appearance conduct)	No ☐ Yes ☐ Specify	
MEDA07	Can patient use normal aircraft seat with seatback placed in the UPRIGHT position when so required?	Yes ☐ No ☐	
MEDA08	Can patient take care of his own needs on board UNASSISTED * (including meals, visit to toilet etc.)?	Yes ☐ No ☐ If not, type of help needed	
MEDA09	If to be ESCORTED, is the arrangement proposed in PART 1/E hereof satisfactory for you?	Yes ☐ No ☐ If not, type of escort proposed by YOU	
MEDA10	- Does patient need OXYGEN ** equipment in flight? (If yes, state rate of flow)	No ☐ Yes ☐ Litres per Minute	Continuous? Yes ☐ No ☐
MEDA11	- Does patient need any MEDICATION * other than self administered, and/or the use of special apparatus such as respirator incubator etc. **?	(a) on the GROUND while at the airport(s) No ☐ Yes ☐ Specify	
MEDA12		(b) on board of the AIRCRAFT No ☐ Yes ☐ Specify	
MEDA13	- Does patient need HOSPITALISATION? (If yes indicate arrangements made or if none were made indicate "NO ACTION TAKEN")	(a) during long layover or nightstop at CONNECTING POINTS en route No ☐ Yes ☐ Action	
MEDA14		(b) upon arrival at DESTINATION No ☐ Yes ☐ Action	
MEDA15	- Other remarks or information in the interest of your patient's smooth and comfortable transportation	None ☐ Specify if any**	
MEDA16	- Other arrangements made by the attending physician		

NOTE (*): Cabin attendants are NOT authorized to give special assistance to particular passengers to the detriment of their service to other passengers. - Additionally they are trained only in FIRST AID and are NOT PERMITTED to administer any injection, or to give medication.

IMPORTANT: FEES IF ANY RELEVANT TO THE PROVISION OF THE ABOVE INFORMATION AND FOR CARRIER-PROVIDED SPECIAL EQUIPMENT (**) ARE TO BE PAID BY THE PASSENGER CONCERNED.

Date	Place	Attending Physician's Signature

INTERNATIONAL AIR TRANSPORT ASSOCIATION

SIZE - Minimum 85 x 125 mm (3.35 x 4.92 inches)
Maximum 95 x 145 mm (3.75 x 5.91 inches)

FORMAT: - plasticised card - front and back - foldable (optional), or in multilingual booklet form (optional)

FREQUENT TRAVELLER S MEDICAL CARD (FREMEC)

Honouring instructions The data contained in the shaded fields MUST always be transmitted with any reservation request. Journeys requested but not authorised by this Card, require completion of the Standard Medical Information Form (MEDIF)

~~FREMEC~~ Number _____ (Airline s Code Number) _____ (Serial Number) Issued by _____ (Airline s Medical Dept s Telex Code) Valid until _____ (day/month/year)

The holder of this Card _____ (Surname) _____ (Init.) _____ (Title) _____ (Sex) _____ (Age)

_____ (Permanent Address) _____ (Phone)

has the following permanent/chronic incapacitation _____

_____ _____ (Code, if any example BLND DEAF WCHC etc.)

_____

The holder is authorized by the Medical Department issuing this Card to travel by air within the validity of this Card, subject to: (a) the Conditions stated on the reverse, (b) no worsening of the Holder's present health conditions, and (c) full observance of all carrier rules, regulations and instructions, and with the following LIMITATIONS

_____

_____

_____

(Insert limitations, including any permanent dietary requirements)

(2)

CONDITIONS OF ISSUE

1. Cardholders are responsible to REPORT ALL CHANGES in their present handicap or incapacitation, and/or the deterioration in their physical or medical condition, to the airline representative or agent with whom they are in contact
2. Subject to all terms and conditions stated on this Card, the authorisation for air travel is valid only up to the date stated on the front.
3. This Card is not transferable and must be produced, together with proof of the cardholder's identity, on every occasion whenever airline reservations are made for the cardholder, at time of ticket issuance, and when so requested by the airlines or their agents or representatives
4. Cardholders are reminded that arrangements for travel should be made as much in advance as possible. They should also allow sufficient time for check-in formalities.

Date and Place of Issue _____

Passenger's Signature _____

(Legal guardian or Passenger's witness may sign if passenger is physically unable to do so)

TEXT OF LETTER USED IN AIRLINE SURVEY

McGill University
Institute of Air and Space Law - Institut de droit aérien et spatial

Dear Sir/Madam:

I am a post-graduate student at the Institute of Air and Space Law and am interested in discovering your airline's policy on flying pregnant women and newborn infants, as I understand this is a discretionary matter for the airline concerned.

Is it your policy to accept all expectant women for transportation or do you require that after so many months' pregnancy they show a doctor's letter certifying that the flight will not endanger the mothers? Is there a company rule to the effect that when a woman is a certain number of months' pregnant you will not accept her as a passenger whether she has a doctor's letter or not?

With regard to customer relations, how do you decide which female passengers will be asked questions about their physical condition? A woman might look pregnant but be, in fact, merely overweight, which could lead to much embarassment for all concerned. If a woman says she is only a few months pregnant, do you ask her to prove it, and who is responsible for challenging the passenger - the ticket agent, before boarding, or the flight attendant, after boarding?

.../2

Postal address: 3690 Peel Street, Montreal, PQ, Canada H3A 1W9

HIJACKING ATTEMPTS ON CANADIAN AIRCRAFT

As of January 1, 1981

	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	TOTAL
SUCCESSFUL				1(1)								1***		2(1)
UNSUCCESSFUL	1(1)			2	2 *	1**	1							7(1)
SUB-TOTAL	1(1)			3(1)	2 *	1**	1					1***		9(2)

NOTE : ( ) represents attempted hijackings to Cuba

* - Includes attempted hijacking of an Air Canada aircraft on the ground at Frankfurt Airport, West Germany. Hijacker shot by Police.

** - Hijacking attempted prior to aircraft becoming "in flight".

*** - Helicopter was hijacked

PREPARED BY:

Civil Aviation Security,
Transport Canada

HIJACKING INCIDENTS INVOLVING CANADA
(US AND CANADIAN AIRCRAFT)
AS OF 1 JANUARY 1981

DATE	HIJACKER(S)	AIRLINE TYPE AIRCRAFT	FLIGHT PLAN	DEMANDS	WEAPONS	SYNOPSIS
11/09/68	C. Beasley	Air Canada Viscount	Saint John - Toronto	Cuba	Handgun	The hijacker, a fugitive from Texas, USA, surrendered to police during stop at Montreal and asked for asylum. Sentenced to 6 years 10 December 1968 after pleading guilty to charges of kidnapping, assault and public mischief. Deported to USA 25 March 1971 where he was subsequently sentenced to 10 years for bank robbery.
25/02/71	C.S. Paterson	Western B-737	San Francisco - Seattle	Cuba Vancouver	None Alleged bomb	Surrendered to RCMP at Vancouver. Deported to USA 8 March 1971. Sentenced to 10 years for interference with flight crew member.
13/04/71	G.G. Rusk L.J. Lamirande J.M. Houdle	Transair-Midwest Navajo	Dauphin - Winnipeg	Yorkton	Sharpened toothbrush	Three juvenile delinquents destined for a Detention Home in Winnipeg, travelling without escort, attempted to divert the aircraft in order to escape. Arrested by RCMP as soon as aircraft landed at Winnipeg. No charge laid as they had already been committed to the Detention Home.
10/10/71	D.L. Thomas	Wein Consolidated B-737	Anchorage - Bethel	Cuba Vancouver	Handgun	Surrendered to RCMP at Vancouver. Deported to USA 19 October 1971. Sentenced to 20 years for air piracy 12 May 1972.
12/11/71	P.J. Cini	Air Canada DC-8	Calgary - Toronto - Ireland - Great Falls, Montana	$1½ million	Sawed-off shotgun Dynamite	Pilot forced to make two landings at Great Falls Airport. Cini received money during first stop and later recovered checked baggage containing a parachute. Overpowered by crew members before he was able to parachute from aircraft in flight with extorted money. Aircraft landed at Calgary and injured hijacker turned over to police. On 12 April 1972 received concurrent life sentences on charges of kidnapping, kidnapping (hold for ransom), mischief and interference with transportation facilities. Also sentenced to 14 years for extortion and 5 years concurrently on possession of explosives and possession of weapons charges.

DATE	HIJACKER(S)	AIRLINE TYPE AIRCRAFT	FLIGHT PLAN	DEMANDS	WEAPONS	SYNOPSIS
10/09/76 11/09/76	Z. Busic J. Busic P. Metavic F. Pesut M. Vlasic	TWA 727	New York - Chicago	Europe	None Alleged explosives and weapons	Aircraft made stops at Mirabel, Gander and Keflavik, Iceland before hijackers surrendered at Charles de Gaulle Airport, Paris. Hijackers returned to USA to face air piracy and murder charges 20 July 1977. J. Busic and Z. Busic sentenced to life. Others received 30 years. (Considered terrorist hijacking of US aircraft).
18/11/76	J.R. Boutin	Eastern 727	New York (LaGuardia) - Montreal (Dorval)	Cuba	None Alleged bomb	During final approach to Dorval, note was found in galley indicating plane was to go to Cuba or it would be blown up. All passengers deplaned including Boutin, a deportee under escort. Follow-up police investigation resulted in prosecution for Attempted Hijacking. Boutin found guilty and sentenced to 7 years on 20 April 1979.
27/08/78	D.L. Benson	United DC-8	Denver - Seattle	Vancouver	None Alleged bomb	Benson left note in galley indicating "Bomb aboard - proceed to Vancouver". Aircraft diverted to Vancouver. Benson, who appeared to be mentally ill, was arrested by RCMP and later deported to USA. No explosives were discovered. No charges were laid due to mental incompetency.
23/02/79	R. Shayne M. Dubiel	Olympic Helicopters Bell 206B Jet Ranger Helicopter	Montreal - Quebec and return	Bank Locations in Montreal	Machinegun Handgun	Hijackers rented a helicopter and then forced pilot to fly to several Montreal shopping centres in search of a bank to rob. A "Police" decal was put on the helicopter. After robbing a bank, hijackers required pilot to fly to a subway station where they got off and fled. Arrested by Montreal Urban Police on 3 March 1979. Shayne sentenced to 12 years for kidnapping, conspiracy and armed robbery. Dubiel sentenced to 5 years following conviction on charges of forcible confinement and possession of prohibited weapon.

DATE	HIJACKER(S)	AIRLINE TYPE AIRCRAFT	FLIGHT PLAN	DEMANDS	WEAPONS	SYNOPSIS
14/12/72	L.M. Stanford	Quebecair BAC-11	Wabush - Montreal	Vancouver	22 Calibre Rifle	Stanford threatened the airline station manager with the rifle to gain access to aircraft. Once on board he ordered station manager and approximately 15 passengers to return to ATB. Pointed rifle at flight attendant and handed her an envelope addressed to RCMP Wabush which contained the words, "Help, help, help". Letter handed over to RCMP through cockpit window. Hijacker persuaded to land at Montreal and disembark passengers. Proceeded to Ottawa before returning to Montreal to await arrival of father and doctor before surrendering to police. On 20 April 1973 hijacker sentenced to 20 years on charge of hijacking under Section 76(1)(d) C.C. and 10 years concurrent on charge of possession of offensive weapon aboard an aircraft.
04/01/73	C.K. Nielson	PWA Convair 640	Aircraft on ground	North Vietnam $2 million	None Alleged hand-gun and remote con-trolled bomb	Hijacking attempted while aircraft on ground at Vancouver. Passengers released. Hijacker overpowered by RCMP. Committed to mental institution. Later declared fit to stand trial on charge of Hijacking under Section 76(1) C.C. Was found NOT GUILTY by reason of insanity by a BC court on 17 April 1974. Nielson committed to mental institution for further treatment.
29/11/74	N. Djemal	CP Air B-737	Winnipeg - Edmonton	Cyprus	Knife served with meal	Djemal attacked flight attendant with knife from meal tray, inflicting cuts to her forehead and throad while shouting he wanted to go to Cyprus. Agreed to land at Saskatchewan for fuel and surrendered to the pilot who turned him over to RCMP. On 5 February 1975 sentenced to 7 years on charge of Hijacking under Section 76(1)(d) C.C. (causing aircraft to deviate from its flight plan).

DATE	HIJACKER(S)	AIRLINE TYPE AIRCRAFT	FLIGHT PLAN	DEMANDS	WEAPONS	SYNOPSIS
26/12/71	P.D. Critton	Air Canada DC-9	Thunder Bay - Toronto	Cuba	Handgun Hand grenade Alleged bomb	Prior to landing at Toronto, hijacker handed flight attendant a note indicating he was armed and wanted to go to Cuba. He went to cockpit and threatened pilot with weapon and hand grenade. Aircraft landed at Toronto for fuel and disembarkation of passengers prior to continuation of flight to Cuba. Critton charged with kidnapping, armed robbery and extortion by Mississauga Police. No response to request for extradition. Hijacker still in Cuba.
18/08/72	F.M. Sibley	United B-727	Reno - San Francisco	Vancouver $ 2 million	Shotgun	Aircraft landed at Vancouver before returning to Seattle where hijacker was shot and captured by FBI. Convicted 18 October 1972 for air piracy and sentenced to 30 years 28 February 1973. Reconvicted in new trial on 3 February 1978 and sentended to 30 years.
10/11/72 11/11/72	H.D. Jackson L.D. Cale M.C. Cale	Southern DC-9	Birmingham - Montgomery	Cuba $10 million 10 parachutes	3 Handguns 3 Hand grenades (dummies)	Fugitives landed at Toronto and also made stops at several US airports and Havana, Cuba before finally terminating at Havana. Co-pilot shot and wounded. Jackson and L. Cale sentenced in Cuba to 20 years. M. Cale received 15 years 27 September 1973.
24/11/72	V. Widera	Air Canada DC-8	Frankfurt - Toronto	Release of Czeck hijackers held in West Germany	Handgun	Hijacking attempt initiated on the ground at Frankfurt, Germany. Flight attendant taken hostage. Widera, shot and killed aboard aircraft by police marksman. No evidence that Air Canada aircraft was a planned target. Subject considered deranged.

RECENT HIJACKING ATTEMPTS INVOLVING U.S. AIRCRAFT

July 1, 1979 - December 31, 1979.

July 20, 1979, While a United Air Lines B-727 aircraft was en route from Denver to Omaha, a man claiming he had plastic explosives demanded to go to Cuba. The aircraft landed at Omaha and the passengers and flight attendants were allowed to deplane. During the course of negotiations FBI agents overpowered the hijacker. He did not have any explosives or other weapons. The man was charged with aircraft piracy but was found not guilty by reason of insanity at the time of the incident and underwent further mental evaluation.

August 16, 1979, Shortly after an Eastern Air Lines B-727 aircraft took off from Guatemala City, Guatemala, en route to Miami, a man claiming he had a bomb concealed in a radio and threatening a flight attendant with a pen knife demanded to go to Cuba and from there to Russia. Subsequently, the hijacker was overpowered and subdued by the crew with the assistance of several passengers. The flight then continued to Miami where the hijacker was taken into custody. He did not have a bomb, his only weapon being a small pen knife. The man was charged with aircraft piracy.

August 22, 1979, A United Air Lines B-727 aircraft was hijacked while en route from Portland to Los Angeles by a man claiming he had a bomb in his briefcase. He demanded that the aircraft return to Portland. The aircraft was allowed to land at San Francisco to refuel and then proceeded to Portland. After some negotiation, the passengers and flight attendants were released. Further negotiation resulted in the hijacker's surrender and he was taken into custody. He did not have any explosives or other weapons. He has been charged with aircraft piracy.

October 30, 1979, A Pacific Southwest Airlines B-727 aircraft was hijacked while en route from Los Angeles to San Diego when a man told a flight attendant that he had a plastic bomb and demanded to be flown to Mexico City. When the flight landed at Tijuana, Mexico, for refuelling the hijacker deplaned and was taken into custody by Mexican authorities. He had no bomb or other weapon. On November 1, 1979, the hijacker was deported to the United States and has been charged with aircraft piracy.

November 12, 1979, An American Airlines B-727 aircraft, during a scheduled stop at El Paso, was hijacked by a man who held a flight attendant at knifepoint and demanded to be flown to Iran. The hijacker also claimed to have dynamite in a satchel and on his person. After several hours he was taken into custody by FBI agents. A search of the

hijacker and the aircraft revealed no explosives and no weapons other than a hunting knife. He has been charged with unlawful interference with a crewmember.

The following are summaries of the two general aviation hijackings which occurred during this reporting period:

October 16, 1979, A woman armed with a pistol and accompanied by her son, age 10, hijacked a Piper Cherokee aircraft at Pierce Field, Lower Lake, California. Over Napa the hijacker told the pilot to land and the woman and her son deplaned. She was apprehended while still on the airport and has been charged with assault with a deadly weapon and kidnapping.

December 12, 1979, A man hijacked a Cessna Model 172 operated by the Island City Flying Service, Kew West, Florida, while on an extended picture-taking and sightseeing tour of the Key West area. Shortly after takeoff the man pointed a small handgun at the pilot and told him to fly to Cuba. Upon landing in Havana the hijacker was taken into custody by Cuban authorities. Later in the day the pilot was allowed to fly the aircraft back to Key West. Neither the identity of the hijakcer nor his status in Cuba are yet known.

In addition to recording the number of actual hijackings, the Federal Aviation Administration (FAA) has attempted to identify and record those incidents in which it appeared that an individual intended to commit a crime against aviation but was prevented from doing so by the security procedures in effect. One incident of this kind occurred during this period, raising the total number of hijackings or related crimes believed prevented to 80 since 1973. The incident is summarized below:

November 25, 1979, X-ray inspection revealed the outline of a handgun in a passenger's handbag. The male passenger denied the presence of a gun. However, physical inspection disclosed a .25 caliber pistol concealed in a box designed to hold hair coloring. Ammunition for the gun was discovered in a thermos bottle and in the battery compartment of a portable radio. The man was arrested and charged with carrying a concealed firearm. He was found guilty, placed on 2 years probation and deported to Mexico as an illegal alien.

January 1, 1980 - June 30, 1980

January 25, 1980, A Delta Air Lines L-1011 aircraft was en route from Atlanta, Georgia, to New York City when a man claiming to have a bomb and displaying a handgun demanded to be flown to Cuba. After landing in Havana the hijacker would not let Cuban officials aboard and demanded to be

flown to Iran. During negotiations, the hijacker remained in the cockpit and the flight attendants and most of the passengers escaped through a hatch in the rear of the aircraft. After learning of the passengers' escape the hijacker demanded that the aircraft take off. He was convinced that this was not possible and with his wife and two daughters he deplaned and surrendered to Cuban authorities. He did not have any explosives. The hijacker's wife and children returned to the United States on February 11.

April 9, 1980, As an American Airlines B-727 aircraft was being prepared for a flight from Ontario, California, to Chicago, Illinois, a man armed with a pistol scaled an airport fence, boarded the aircraft, and demanded to be flown to Havana. No passengers were aboard. He did not give any reason for his action. The aircraft landed at Dallas-Fort Worth Regional Airport and was refueled. It then flew to Havana where the hijacker surrendered and was taken into custody by Cuban authorities.

April 14, 1980, While a Continental Air Lines B-727 aircraft was boarding passengers for a flight from Denver, Colorado, to Ontario, California, a man boarded, brandished a knife, entered the cockpit, and demanded the aircraft take off immediately. Flight attendants observed what was occurring and began helping passengers deplane. After some delay, the hijacker dropped the knife in an apparent act of surrender and was taken into custody. He has been convicted of aircraft piracy and is undergoing further psychiatric evaluation prior to being sentenced.

May 1, 1980, Armed with a pistol a man scaled an airport fence and boarded a Pacific Southwest Airlines B-727 aircraft as it was being prepared for a flight from Stockton to Los Angeles, California. No passengers were aboard. Just after the hijacker boarded all of the crew except the flight engineer escaped. The hijacker demanded flight to Iran and press coverage to present his views on Iran and the holding of U.S. hostages. During the course of negotiations he was allowed to read a statement to the press via the aircraft radio. With the pistol in his waistband, the hijacker turned his back to the flight engineer who disarmed him. The flight engineer deplaned and the hijacker surrendered. During subsequent search of the aircraft a smoke grenade was found in a knapsack which the hijacker had carried aboard. He has been charged with aircraft piracy.

May 15, 1980, Armed with a pistol and a rifle a man approached a group of maintenance personnel of Chalks International Airlines (a commuter airline) at a seaplane dock, Port of Miami,

Florida. The man pointed his pistol at one of the maintenance men and forced him to board a Grumman Mallard (G-73) aircraft which the maintenance personnel had been preparing for flight. Upon learning that the maintenance man could not fly the aircraft, the hijacker demanded that a pilot be provided to fly him to Capetown, South Africa. After several hours of negotiation he was persuaded to surrender and was taken into custody. He has been charged with aircraft piracy.

The number of hijackings or other crimes against civil aviation which have been prevented by airline and airport procedures cannot be determined with certainty. However, the Federal Aviation Administration (FAA) has attempted to identify and record those incidents in which it appeared that an individual intended to commit a crime against civil aviation but was prevented from doing so by the security procedures in effect. Three incidents of this kind occurred during this period, raising the total number of hijackings or related crimes believed prevented to 83 since 1973. The incidents are summarized below:

February 15, 1980, A woman caused the weapon detector to alarm as she walked through. During physical inspection of her coat a fully loaded pistol was located and additional ammunition was found in her shirt pocket. In addition, she was found to be carrying a large amount of money on her person. A short time prior to being screened the woman had asked a member of the airport police department various questions concerning the airport and had inquiried as to the way to transport a weapon aboard an aircraft. She was told a weapon could not be carried aboard and she was given instructions in the proper procedures for carrying a weapon in checked baggage. She disregarded the officer's instructions and attempted to carry the weapon through screening. She was arrested and charged with carrying a concealed weapon.

March 9, 1980, What appeared to be two weapons were detected by x-ray in a small trunk which the owner intended to carry aboard a flight. When the trunk was inspected a false botton was located beneath wich a pistol, a sawed-off shotgun, and ammunition for both weapons were discovered. The male passenger who owned the trunk and his two male companions all denied knowledge as to how the weapons came to be in the trunk. A record check revealed that charges were pending against the owner of the trunk for previous weapons offenses. The man was arrested and charged with carrying a concealed weapon and possession of a sawed-off shotgun.

March 13, 1980, An item was detected by x-ray which caused a screening employee to conduct a physical inspection of a man's carry-on bag. While searching the bag the screener felt the

barrel of a handgun. Before it was identified the screener asked the man what the item was and was told it was a piece of machinery. When the screener determined that the item was in fact the barrel of a handgun, the law enforcement officer was notified. Further inspection of the man's carry-on items revealed, in a second bag, a handgun trigger assembly and a clip of ammunition. At this point, the man claimed no knowledge of the presence of the handgun items. He then stated he had decided not to fly and at his request, contrary to procedure, the inspection process was stopped and his bags returned. He was released and left the terminal. It was later determined that the man was reportedly dying of cancer. Corrective action was taken to prevent the future release of persons found to be attempting to carry weapons through screening.

Source: Semiannual Report to Congress on the Effectiveness of the Civil Aviation Program, July 1 - December 31, 1979 and January 1 - June 30, 1980, prepared by the F.A.A. Office of Civil Aviation Security.