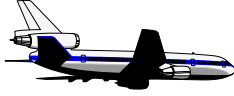


Terror In The Skies: Security Aboard Airplanes and in Airports



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I. Introduction

Crime prevention in aviation and transportation, much like anywhere else, is principally a matter of anticipating risks and providing a reasonable level of security commensurate with the risks. Removing or reducing the opportunity prevents crime. Like other inadequate security cases, aircraft and airport security liability is based on foreseeability and negligence, coupled with causation (preventability). The negligence is circumscribed by the degree and extent of foreseeability. That is, the nature and frequency of foreseeability may give rise to a greater duty, hence creating negligence by the failure to meet that duty.

In no other area is the need for careful evaluation of foreseeable criminal events so critical. Hundreds or thousands of lives may be at stake. An airline cannot legitimately claim a lack of notice simply because its aircraft have not been the subject of a threat or terrorist attack. The air carriers must give credence to all airlines' incidents, as well as those at airports around the world. They must seek out threats

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and potential risks. Their most important function is to provide safe transportation, and this function is not limited to the mechanical airworthiness of the aircraft.

A. Original Purpose

The airport **security in force** in the United States up until the last year did a **pretty good job accomplishing what it was designed for – stopping airplane hijackings to Cuba.** Beyond that the system is weak and vulnerable. Security is provided by those with an economic interest in spending the least -- the airlines themselves -- who subcontract that out to minimum wage, poorly trained contract laborers.

B. Current Conditions

In the past many have felt that the threat of terrorism in the air was limited to the Mideast, Europe and third world countries. Today the United States is on heightened alert for criminal acts on aircraft and in airports. On September 5, 1996 three Muslim extremists (including Ramzi Yousef, an alleged mastermind of the World Trade Center bombing) were convicted of conspiring to blow up a dozen U.S. airliners.

Following the explosion of TWA flight 800 in July 1996, the government initiated another immediate evaluation of United States air safety. Vice President Gore was appointed by the President to head a blue ribbon commission to address these needs, and soon thereafter unveiled new initiatives to bolster aviation security. Chairman of the Joint Chiefs of Staff Gen. John Shalikashvili told the Senate Armed Services Committee on July 9 of this year that the United States can expect more terrorist incidents. The General aptly noted that “Terrorism will always seek the weak link...”

C. Current Measures In Effect

For flights inside the United States, basic security measures involve the use of walk-through metal detection for passengers and x-ray screening for carry-on baggage. Additional measures can be added based on risk assessments.

The FAA has required more stringent security measures for international flights. Presently all international flights must comply with the International Civil Aviation Organization (ICAO)[United Nations organization that develops standards and recommended practices for aviation and security] standards, including inspection of carry-on baggage and passenger bag matching. The FAA also mandates additional measures such as interviewing passengers who meet certain criteria and screening all checked baggage at all airports in Europe, the

Middle east and many airports elsewhere.

Following the Pan Am 103 bombing in 1988, a Presidential Commission on Aviation Security and Terrorism was created. The conclusion of the Commission was that the current security at airports was seriously flawed and did not provide adequate protection for the public. The traditional x-ray screening has limitations on its ability to protect against a moderately sophisticated explosive device. And metal detectors fail to screen passengers for explosives.

II. Security Techniques

A. *Bomb Detection:*

- ◆ State-of-the-art bomb detection devices and missile defenses
 - but the only approved bomb sniffing machines are \$1 million each
 - CTX-5000 by Invision Technology
 - In use SFO, ATL, JFK
 - only process 125 bags per hour...450 per hour are needed to avoid delays.
- FAA gave new contract in Oct. 1996 to Thermedics, Inc for \$700,000 to develop explosives detection system which will be more portable.

◆ Bomb sniffing dogs

- trained canine can detect explosive odor at several hundred yards
- trained dogs can search 400-500 bags per half hour
- cost of dog and training is about \$20,000 each

B. *New Proposals from Presidential Commission on Aviation Security and Terrorism:*

- ◆ Hiring more FBI agents
- ◆ Vulnerability studies of all US airports
- ◆ Criminal background checks for airport staff
- ◆ Matching passengers with bags
- ◆ Use of computer profiles

C. *Bomb tracing:*

Taggants are fingerprints for explosives

- ◆ Microscopic chemical agents— they are mixed with the explosive agent
- ◆ Mandatory in Switzerland – helped police solve over 500 bombing cases

The use of taggants in the United States is still prohibited.

WHY?

Manufacturers of explosives claim that they are **afraid of lawsuits by victims!**

The N.R.A. thinks any such law would inevitably lead to the government **taking their guns away.** (Their public claim is that it destabilizes gunpowder, which has been scientifically disproven) Congress has failed to stand up to this.

D. *Bomb Proofing Cargo Holds in Aircraft:*

There are airline baggage containers available that are strong enough to limit the explosive forces of many bombs used by terrorists.

- ◆ 1st considered after Pan Am 103 bombing in 1988
- ◆ Federal Aviation officials did not push issue
- ◆ Was urged by presidential aviation commission established after Pan Am.
- ◆ 1990 law on security ordered FAA to study the issue--little research done

Limitations:

- only effective against checked baggage
- Only works on wide body jets -- others don't use baggage containers (but wide bodies usually favored for international flights)

E. Computer Profiling:

- ◆ Looks at travel histories and criminal records of passengers to identify potential terrorists
- ◆ Recommended by the most recent aviation security commission

The need to improve airport security was known for years before the Yousef arrest and the TWA explosion

– The National Transportation Safety Board (NTSB) has made repeated recommendations to fix the flaws.

F. Costs

Inertia is based on cost disputes

- Estimated \$6 billion over the next 10 years
- Airlines now pay for it – this is the reason why it is stalled
- may have to share costs among the government and airlines

III. Theories of Liability

- A. Failure to adequately screen passengers**
- B. Failure to adequately screen baggage**
- C. Failure to provide adequate security at airports**
- D. Misrepresentation/False and Misleading Advertising**
- E. Failure To Use Available Safety Equipment (bomb proofing)**

IV. Litigation History

A. *In re Air Disaster at Lockerbie, Scotland on 12-21-88*, 37 F.3d 804 (2d Cir. 1994)

On 12/21/88, a bomb exploded in flight on Pan Am flight 103 over Scotland, killing all **243 passengers and 16 crewmembers**. Cases were brought against Pan Am and Alert, a Pan Am affiliate that provided security services in London and Frankfurt, where the flight originated.

Plaintiffs contended at trial that the bomb **entered the aircraft on an unaccompanied bag through willful misconduct**. The Defendants failed to inspect and detect. The **bomb was hidden in radio cassette player packed in a Samsonite suitcase**, which traveled from Malta to Frankfurt where it was transferred to flight 103 without being x-rayed. **Plaintiffs claimed that the baggage handling procedures violated the requirements in the Air Carrier Standard Security Program XV.C.1.(a)**, which ensured that **bags matched passengers** and that unaccompanied bags are physically inspected.

The trial lasted 13 weeks. The jury found that but for Pan Am's inadequate terrorist prevention techniques and deliberate indifference shown to the passengers and overt acts of willfulness, the bombing would not have occurred.

Damages were awarded to families in the first 3 cases of \$9,225,000, 9,000,000, and 1,735,000.

In order to **defeat the \$75,000 cap imposed by the Warsaw convention**, the plaintiffs had to establish that Pan Am's conduct was **willful**.

Evidence demonstrated that:

- In 1983 a **Pan Am flight from Rome to NY was the target of a bomb planted in an unaccompanied suitcase**. Turkish authorities conducted a passenger/bag check and discovered it. But by now the airline knew of the sabotage threat and how important bag/passenger matches were.
- In 1985 a bomb inside a radio and packed in an unaccompanied bag destroyed an Air India 747 over the North Atlantic, killing all on board. These incidents helped lead to the adoption of Safety Standards and placed Pan Am on notice of this threat.

Pan Am had even more notice.

- **In September 1986 the carrier received a report from a group of Israeli security experts that its security system was highly vulnerable to terrorist attack.** The report specifically cautioned Pan Am on the use of x-ray machines as a substitute for physical searches.
- **In July 1988 the FAA issued a Security Bulletin** warning that terrorist retaliation from the downing of an Iranian jet was a possibility and that a raid on a terrorist group had revealed a bomb built into a Toshiba radio. The bulletin warned that such bombs were difficult to detect by x-ray.

In what many say was the most outrageous disregard for passenger safety, **in December 1988 Pan Am received from the FAA a Security Bulletin advising that the US Embassy in Helsinki had received a telephone warning that a Pan Am flight from Frankfurt to London and onto New York would be bombed. The warning came 14 days before the December 21 bombing.**

Despite these warnings, Pan Am failed to conduct searches of unaccompanied interline luggage and relied only on x-rays. They even failed to alert x-ray technicians to look for radios. ***Pan Am did not warn pilots about the unaccompanied bags on board for fear that it might make them “jittery”.***

***In a classic move that backfired, after the explosion Pan Am attempted to backdate the FAA Helsinki warning to give investigators the impression that the warning was timely disseminated.**

Misrepresentation:

In May 1986 Pan Am instituted the “Alert” Security Program during a period of sharp decline in international travel due to terrorist attacks. The program was actually a misleading public relations ploy designed to make travelers feel more secure and purchase tickets.

An ad placed in the New York Times read:

Dear Air Traveler:

On June 12, 1986, Pan Am will initiate one of the most far-reaching security programs in our industry, a program that will screen passengers, employees, airport facilities, baggage, and aircraft with unrelenting thoroughness.

The campaign featured **television ads**. A **security surcharge** of \$5 each way on overseas tickets was levied, which generated an additional \$18,000,000 in revenue each year. **At trial evidence revealed that Alert added more security guards only during FAA inspections in order to make it appear that there was more security. The airline also paraded untrained dogs in front of the ticket counters at JFK airport to create an appearance of security.**

The airline sought to exclude evidence of prior misconduct. The Second Circuit affirmed the trial court's ruling that such evidence was relevant as to the issue of Pan Am's willful misconduct and causation.

B. *Stanford v. Kuwait Airways Corp.*, 89 F.3d 117 (2nd Cir. 1996):

- In the Fall of 1983, 4 Hezbollah terrorists boarded a Middle Eastern Airlines (MEA) flight 426 in Beirut, Lebanon. The terrorists connected with Kuwait Airways flight KU221 bound for Pakistan from Dubai, United Arab Emirates. Shortly after takeoff from Dubai, the terrorists hijacked the flight forcing it to turn toward Tehran, Iran. While in Iran, the captors tortured three American diplomats, killing two. The case was brought by the injured survivor and the estates of the two deceased. After a deadlocked jury, the court declared a mistrial. MEA then moved for judgment as a matter of law claiming that no duty was owed to the three diplomats and that MEA's actions were not a proximate cause of the injuries, which the judge granted.
- On appeal the plaintiffs argued that the airline owed them a duty of care to avoid the known risk of hijacking, and that the duty was breached by failing to adequately screen passengers in Beirut. The **Second Circuit agreed, holding that an airline has a duty to protect passengers on the connecting flight from the risks that terrorists would board connecting flights**, and that the question of whether the airline's inaction in allowing

suspicious passengers to board was a proximate cause was for the jury.

- In its opinion, **the Second Circuit noted that MEA, as a member of the International Air Transport Association (IATA) had been alerted about terrorist techniques**, including capitalizing on lax security at one airport to gain access to a more secure airport. The Court also noted that MEA admitted that it knew in December 1984 that the security at Beirut Airport was minimal, and that the x-ray machines were not operating properly and metal detectors were not in use. The Court also found that there was evidence that MEA should have been suspicious of the unusual and improbable itinerary of the terrorists (they bought one-way tickets to Hong Kong by way of several inconvenient layovers and were purchased with cash).
- The Court found that if MEA, in the exercise of ordinary care should have recognized that under these circumstances there was an unreasonable risk of hijacking, then the jury could find that MEA should have implemented secondary screening measures or warned other connecting airlines of a possible threat.

C. In re Hijacking of Pan American World Airways, Inc. Aircraft at Karachi International Airport, Pakistan on September 5, 1986, 920 F.Supp. 408 (S.D.N.Y. 1996)

- Pan Am flight 73 left Bombay on September 5, 1986 on its way to New York with a stop in Pakistan. While on the ground at this intermediate layover, a group of terrorists boarded and assumed control, and opened fire on the passengers. They killed 20 and injured many more. One of the passengers whose children had been injured and wife killed brought an action for wrongful death, personal injury and false advertising against the airline.
- Evidence was offered about Pan Am's 1986 contract with Alert to provide enhanced security measures. After a six week trial in 1994, the jury found that Pan Am's conduct in connection with the Alert Security Program constituted willful misconduct, but that the misconduct was not the proximate cause of the damages claimed.

After trial the plaintiff attempted to transfer the case back to California to litigate the claims not common to other plaintiffs and defendants moved to dismiss. The plaintiff's motion was denied and the defendants' granted, the court concluding that the jury's finding of no proximate cause precluded subsequent claims based on actual reliance on airline misrepresentations.

D. Crash of Ethiopian Airlines flight ETH961, November 23, 1996

- This Ethiopian Airlines flight was on its way from Addis Ababa to Nairobi. It was hijacked by 3 terrorists armed with an axe, a whiskey bottle, fire extinguisher and a device they claimed was a bomb. The hijackers demanded to be flown to Australia. On its approach to Moroni, Comoros Islands for refueling, the Boeing 767 crashed offshore because the plane ran out of fuel and lost power. 127 people died in the crash.

It appears that the hijackers simply raided a fire box that we routinely see in airports past the security checkpoint, helping themselves to an axe and fire extinguisher.

V. Defenses

A. Mistake Of Law

In Lockerbie, Pan Am attempted to prove at trial that they had a verbal exemption by the FAA from ACSSP XV.C.1.(a). The trial court held that the offer of proof was tantamount to a "governmental authorization" defense and denied the defense, which was affirmed on appeal. The appellate court felt that the airline was actually offering the proof to show "mistake of law" defense. The 2nd Circuit held that in a case brought under the Warsaw Convention involving violations of FAA regulations regarding safety, an air carrier may not mount a "mistake of law" defense.

B. Preemption

C. Causation

VI. Security for Other Modes of Transportation

A. Railways

In October 1995 U.S. Transportation Secretary Federico Pena announced that his agency would work with railroads to improve security technology for the nation's rail system. Previously an act of sabotage caused an Amtrak train in Arizona to jump the tracks, killing one and injuring 83.

B. Ships and Cruise Lines

Achille Lauro cruise ship hostage

VII. Tort of the Future?

What can be said about this field other than that it is a growth industry? As long as terrorists, extremists and hate groups flourish, there will be a need for the highest degree of security at airports and aboard airplanes. The sheer cataclysmic disaster that can occur by failure mandates that the industry and government work together to protect the traveling public. Regrettably air carriers, who are in the best position to take action, have economic disincentives to fully protect the public unless they are clearly held accountable for these failures. Civil liability remains the most compelling reason for businesses, including the airline industry, to take precautions to protect travelers.

Given the industry's propensity to over promote its products and services, excellent cases can be made based on fraud, misrepresentation, breach of contract, deceptive and unfair trade practices, and false and misleading advertising.