DISRUPTIVE PASSENGERS - SOME LEGAL ASPECTS

[Capt.R.F.Kane]

He and She

For conciseness, "he" and "his" and "she" and "hers", rather than "he\she" and "his\hers", are used throughout the text. Where appropriate, "she" and "her" should be added to, or substituted for, "he" and "his" and vice versa.

In short, as romantic Victorian lawyers liked to say "He" embraces "she". Romantic ? ... Lawyers ?

Introduction

In researching this paper I have been struck by the number of occasions, in conference presentations, articles, guidelines and operations manuals, where errors were made in interpreting the provisions of the Tokyo Convention of 1963. This multi-lateral treaty deals with "Offences and Certain Other Acts Committed on Board Aircraft" and has been adopted by some 170 countries. Since the "Certain Other Acts" are defined as :

"acts which, whether or not they are offences, may or do jeopardise the safety of the aircraft or of persons or property therein or which jeopardise good order and discipline on board",

the Convention is the base on which any discussion of the law in relation to disruptive and unruly behaviour on board aircraft must be founded. Furthermore, its provisions must be accurately and clearly understood when procedures for the guidance of aircrew and others are written. Therefore, while I have dealt before with its contents, and some of its shortcomings, in a paper of mine, written in 1993 and entitled "Time to put Teeth into Tokyo ?", it is perhaps worthwhile again briefly to outline its core content.

Jurisdiction

Jurisdiction is the right of a State to affect the rights of persons by legislation, by executive decree or by the judgement of a court - in short, to enforce its laws.

The Convention establishes that the State of Registration (note, not the State of the Operator) is competent to exercise jurisdiction over offences and acts committed on board. It then requires each contracting State to take all necessary measures in its laws to establish its jurisdiction as the State of Registration over offences committed on board its aircraft. Thus the contracting States *must* establish jurisdiction over offences committed on board and *may* establish jurisdiction over the "jeopardising" acts. While the Convention does, as we have seen, define the "jeopardising" acts, it is left to the individual State to determine what are or are not criminal acts on board its aircraft.

The Convention applies in respect of offences or the jeopardising

acts only when the aircraft is "in flight, or on the surface of the high seas or of any other area outside the territory of any State". For the purpose of jurisdiction, "in flight" is defined as being "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends".

Thus, if, for example, one passenger assaults another on board a German registered aircraft while it is taxying at London Heathrow Airport, the only law applicable will be that of the United Kingdom which has jurisdiction because the offence has been committed within its territory. If, however, the offence is not committed until the aircraft has commenced its take-off run, then both States will have jurisdiction, the United Kingdom, while the aircraft remains within its territory and airspace, and Germany, through the operation of the Tokyo Convention. The territorial jurisdiction is the superior jurisdiction and thus the U.K. would, as it were, have first option on prosecuting the offender. It is suggested that this is an option which, in most cases, the territorial State is unlikely to exercise.

Powers of the Commander

To deal with what may be described as the immediate and practical problems which arise when an offence or, more particularly, a "jeopardising" act occurs on board, the Convention gives the aircraft commander certain powers to take action without exposing himself to subsequent criminal or civil liability. These amount in a sense to limited police powers, especially in relation to arrest and restraint.

What is frequently missed in translating this chapter of the Convention into procedures for the guidance of airline personnel is that the definition of "in flight", for the purpose of establishing the period during which the Commander may exercise his Tokyo powers, differs from that which applies to the coming into effect of the jurisdiction of the State of Registration. The powers are given to the commander "from the moment when all external doors are closed following embarkation until the moment any such door is opened for disembarkation". [Provision is made for the forced landing situation.] The practical effect of this is that the commander, faced with disruptive and unruly behaviour on board his aircraft, need not concern himself with which State shall subsequently have jurisdiction. Once that final external door is closed following embarkation he acquires his Tokyo powers and retains them until the first external door is opened for the purpose of disembarkation at the end of the flight.

Perhaps it is worthwhile to mention just one instance of the type of confusion which has occurred as it has, I believe, led to consequential errors in operator's manuals and guidelines. It may also serve as a proof of the truth of the old adage that even Homer nods as it is present in the procedures for dealing with unruly or violent passengers published in 1993 by the U.K CAA, an organisation which is seldom in error and whose publications provide invaluable resource material for anyone involved in the operation of aircraft. In these we find, in a note under the sub-heading "Legal Considerations", the following statement :

"Under UK law the commander has the power to restrain a passenger only if the passenger becomes unruly whilst the aircraft is airborne (see section 94(2) of the 1982 Act)[my emphasis].

Here the author has translated the term "in flight" used in sub-section (2) as "whilst the aircraft is airborne", overlooking sub-section (8) of the same S.94 which makes it clear that the "doors open - doors closed" definition applies to all the powers of the commander, including restraint.

Powers of the Commander

The powers of the aircraft commander under the Convention are as follows :

1. What may be described as the power to restrain

An aircraft commander who has reasonable grounds for believing that a person has committed, or is about to commit, on board his aircraft, an offence against the penal law of the State of Registration of the aircraft or a "jeopardising" act, may impose on that person such reasonable measures, including restraint, as are necessary :

(a) to protect the safety of the aircraft or of persons or property on board;

(b) to maintain good order and discipline on board; or

(c) to enable him to disembark that person or to deliver him to the appropriate authorities. [As will be seen, both disembarkation and delivery are provided for under the Convention].

Restraint can be continued after landing until such time as the competent authorities arrive.

Restraint may be continued beyond the point of landing only in the following circumstances :

(a) if the person restrained agrees to onward carriage under restraint; or

(b) if the point of landing is in a State which is not party to the Convention and that State refuses, as it is entitled to do since it is not bound by the Convention, to permit disembarkation; or

(c) if the State in which the aircraft has landed is not party to the Convention, restraint may also be continued where it has been imposed to permit delivery of the individual into the hands of authorities competent to receive him.

[The circumstance of a forced landing is also covered.]

Commanders who intend to use this power of restraint should be aware that there must be reasonable grounds for it, that it must be necessary in the circumstances and that they must ensure,in so far as is possible, that only such force as is reasonably necessary is used.

Two further points should be made, the first being the answer to the query frequently raised by pilots as to whether a person under restraint must be released when the cabin is being prepared

for a normal or even an emergency landing. Commonsense would suggest that these would be occasions on which the last thing that is required is a disruptive or unruly individual loose in the aircraft. A reading of the Convention confirms that it envisages that the restraint will be continued at least until the first external door is opened for the purpose of disembarkation.

The second point is that there is a danger of fixation on the power of restraint. The Convention speaks of "reasonable measures including restraint" so that such actions as the confiscation of alcohol or cigarette lighters, or the requirement that a person move to another seat, are fully within the scope of the commander's authority and covered by the Convention.

It should also be noted that the commander's powers exist in respect of all persons on board his aircraft and not merely in respect of passengers.

2. What may be described as the power to seek assistance

An aircraft commander may authorise or require a crew member, and may authorise or request (but note, not require) a passenger to assist in imposing such restraint or other measures. The significance of the inclusion of this provision in the Convention, which otherwise merely restates a power which the commander already has in his capacity as pilot in command, is that it ensures that such assisting crew members or passengers benefit from the same immunity from suit as that given to the aircraft commander. In the light of this it does seem rather unfair that, where airlines instruct their captains not to request assistance from passengers but permit them to accept such assistance when it is afforded, they do not also instruct them to authorise this assistance and so provide the good Samaritan passenger with the Convention immunity.

Perhaps other crew members and security personnel will have a special interest in the legal position of a person on board who acts in response to a situation in the cabin without the specific authorisation of the commander. This is also provided for in the Convention. It states that any crew member or passenger may take reasonable preventive measures without authorisation when he has reasonable grounds for believing that such action is immediately necessary to protect the safety of the aircraft or of persons or property therein.

Such crew member or passenger will therefore also benefit from the immunity granted by the Convention. However, it should be noted that this power to intervene is considerably more limited than that given to the commander. It must relate to safety, and to safety only, it must be preventive and it must be immediately necessary - requirements which the commander does not necessarily have to satisfy before taking or authorising action.

3. The power to disembark

If it is necessary for safety reasons or for the maintenance of good order and discipline, an aircraft commander is entitled to disembark a person who he has reasonable grounds for believing has committed, or is about to commit, an act which may or does jeopardise safety or which jeopardises good order and discipline on board. Most importantly, all States which are party to the Convention undertake to allow the commander to disembark any such person.

From a practical point of view, this is the power most likely to be exercised by a commander as it permits him to rid his aircraft of a potentially violent or unruly passenger. By the same token, it is the most likely to be opposed, by design or through ignorance, by local authorities.

4. The power to deliver into custody

An aircraft commander may deliver into the hands of the competent authorities of any contracting State in which the aircraft lands, any person who he has reasonable grounds for believing has committed on board his aircraft an act which is, in his opinion, a serious offence according to the law of the State of Registration.

Again, states party to the Convention undertake to take delivery of any such person.

It will be seen that the power of delivery is given in relation to serious offences only and does not extend to the "jeopardising" acts covered by the Convention. There is of course nothing to stop a State's authorities from taking any individual committing such an act into custody in accordance with its own laws, but the power of delivery, as of right under the Convention, is given only in respect of serious offences.

In this context, it may be useful to note that, under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, one of the offences which the States party to it undertake to make punishable by severe penalties is "perform(ing) an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft". An attempt to perform such an act of violence, or being an accomplice of a person who performs or attempts to perform such an act, is also an offence.

A serious assault (battery) or an attempted assault on a pilot would almost certainly constitute such an offence and an attack on a member of the cabin crew who has duties in connection with the safety of the aircraft, may very well also come within the scope of this offence.

Duties of the Commander under the Convention.

If the commander places any person on his aircraft under restraint or intends to deliver any person on board into the hands of the authorities, he is required to notify the authorities of his action or intention and of the reasons for it. This must be done as soon as is practicable and if possible before landing. Similarly, he must report any disembarkation under the Convention to the authorities of the State in which the individual is disembarked, again giving the reasons for his action. In relation to any person delivered to the competent authorities, the commander is additionally required to provide these authorities with any evidence and information which, under the law of the State of Registration, is lawfully in his possession.

Failure to comply with any of these requirements is likely to be punishable under the domestic law of the State of Registration - which may also detail requirements additional to those outlined above.

Responsibilities of States.

As has been mentioned, all States party to the Convention undertake to permit disembarkation of any person when the commander considers that this is necessary to protect the safety of the flight or for the maintenance of good order and discipline on board. States also commit themselves to take delivery of any person the commander reasonably believes has committed a serious offence on board. In this case, when they have taken delivery, they must make an immediate inquiry into the facts of the matter and report the findings to both the State of Registration and to the State of which the person delivered is a national. Where the State considers the circumstances warrant such action, it shall take custodial or other measures, in accordance with its laws, to ensure that the person delivered to it remains available while the inquiry is conducted. Such measures may be continued for a reasonable time to permit criminal or extradition proceedings to be instituted when such proceedings follow from the inquiry.

Immunity under the Convention

To quote the Convention :

"For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken".

It would appear therefore that, in order that this immunity in respect of civil proceedings or criminal prosecution exists, it must be shown that the actions were in fact taken in accordance with the Convention. It is suggested that it will therefore be necessary to show that :

a) the actions were taken within the time-frame covered by the Convention, i.e. doors closed - doors open;

b) the commander had reasonable grounds for his belief that the person had committed, or was about to commit, an offence or a jeopardising act on board his aircraft;

c) that the measures were necessary to protect the safety of the aircraft or of persons or property on board, or to maintain good order and discipline on board, or to enable him to disembark or deliver the offender; and

d) that the degree of force used, if any, was reasonable in the circumstances.

The Concept of Reasonable Force

It may be said that it has always been the case that where reasonable force is used in preventing the commission of a crime or in effecting or assisting in a lawful arrest, the person using that force would not be liable in any civil action or criminal proceeding. A court in considering what is reasonable force will, in the words of the Criminal Law Revision Committee of the UK in the nineteen sixties, "take into account all the circumstances, including in particular the nature and degree of force used, the seriousness of the evil to be prevented and the possibility of preventing it by other means".

To take the extreme case, it is likely therefore that even killing may be justified if it was necessary in the circumstances to prevent an evil so great that a reasonable man might consider himself justified in taking another's life to prevent it, e.g. unlawful killing, grievous bodily harm or, of course, a major hazard to flight safety. The question for the jury in cases where the use of reasonable force is an issue will be, in the words of Lord Diplock :

"Are we satisfied that no reasonable man (a) with knowledge of such facts as were known to the accused or believed by him to exist (b) in the circumstances and time available to him for reflection (c) could be of the opinion that the prevention of the risk of harm to which others might be exposed if the suspect were allowed to escape, justified exposing the suspect to the risk of harm to him that might result from the kind of force that the accused contemplated using".

This standard takes account of the nature of the crisis leading to the use of force as, in what the law terms "the agony of the moment", even the most reasonable man cannot be expected to judge with fine accuracy the minimum force required. In the words of another English judge, in a case involving obstruction of the highway by a violent and abusive driver, "in the circumstances one did not use jewellers' scales to measure reasonable force".

There is evidence that the courts are increasingly aware of the special circumstances which surround violent and unruly behaviour on board aircraft and of the hazard to safety that these may represent. They may therefore be expected to take note of the statement of the Court in R. v. Oliver [1998] when, referring to offences committed on board aircraft, it said : "A relatively small incident might have catastrophic consequences which might not always be foreseen".

The Tokyo Convention in the Law of the United Kingdom

I am of the opinion that it is rather a pity that effect is now given in English law to the Tokyo Convention by wrapping it up in a few sections of the consolidating Civil Aviation Act of 1982. Access to the Convention itself would be simpler if it was attached as a schedule to a separate act giving it effect in the law of the UK and including the additional provisions which Parliament has seen fit to enact. It is only by referring to the unadorned Convention that interested parties, such as operators and aircrew, can see exactly what other nations, and sometimes the UK itself, have agreed to and what privileges, such as disembarkation, they are prepared to permit.

For example, the very significant immunity afforded for actions taken under the Convention is not specifically stated in the Act and is believed to be included by the rather opaque wording of S.94 (1) : "The provisions of sub-sections (2) to (5) below [dealing with the commander's powers] shall have effect for the purposes of any proceedings before any court in the United Kingdom". Furthermore, without reference to the original Convention, the extension of jurisdiction to British controlled aircraft, rather than simply British registered aircraft as in the Convention, may lead to a lack of appreciation of the complications which may arise where a leased aircraft remains on its national register. Yet again, the very welcome extension of jurisdiction to permit of prosecution of offences committed on board aircraft inbound to the UK, may lead operators and particularly commanders to expect to find a

willingness on the part of other States to prosecute in similar circumstances when in fact only a tiny minority is yet prepared to do so.

The law of the UK also places an additional reporting requirement on the commander in that when he disembarks or delivers any person, he must additionally report the fact of, and the reasons for, that disembarkation or delivery to the appropriate diplomatic or consular office of the country of nationality of that person.

The Air/Ground Interface

Much of the debate in the nineteen fifties, prior to the drafting of the Convention, revolved around the rights of the accused and the question of double jeopardy. This may be the reason why we are left with the major problem that the Convention does not really deal with the manner in which the offender should be dealt with after he has been removed from the aircraft. For instance, the Convention creates no obligation to grant extradition. It even fails to make the "offences and certain other acts committed on board" which are its subject matter, extraditable offences. Thus all requests for extradition must be dealt with under existing extradition arrangements. Even where such agreements have been concluded between the two States concerned, this is often a formula for confusion and delay. Furthermore, in any case, many "jeopardising" acts are unlikely to be recognised as forming a basis for extradition. A marked omission from the Convention is that while it creates and defines "jeopardising" acts, it fails to require States to treat these as "serious crimes" - and the Convention procedures in respect of delivery and extradition are applicable only to serious crimes.

Any arrest or other action by a law enforcement officer must be within the scope of his authority. There is frequently what may be termed a serious mismatch between the powers, particularly in respect of restraint, that are given to the commander in flight and the powers of arrest of the law enforcement officers who supervise the disembarkation or accept custody of the offender. For example, in the UK the offences under the Air Navigation Orders, such as those in relation to smoking, drunkenness, endangering an aircraft or any person therein, are not arrestable offences.

To an extent, the Australian Transport Minister summed up the problem, perhaps inadvertently, when he said in parliament in July of this year that : "air rage offences carried the same penalties as similar offences on the ground". This ignores the circumstances and the place in which the offence is committed and the consequences which may result from it. In the Oliver case alluded to above, the Court found that it was correct in principle for courts to impose a relatively severe sentence when dealing with offences committed when travelling on an aeroplane because unforeseen "catastrophic consequences" might well follow from its commission.

The suggestion in the UK that the potential penalty for ANO offences be increased to five years imprisonment might at first sight appear to be in line with this thinking. However, it has been made simply to bring these offences within the scope of arrestable offences under the 1984 Police and Criminal Evidence (PACE) Act. Powers of arrest are given to the police under other statutes, e.g. in respect of road traffic offences, indecent assault of a female, and it might be preferable to seek a statutory power of arrest in respect of defined offences on board aircraft. This would also present an opportunity of progressing further on the path of the recent welcome amendment to the ANO which makes it an offence to use threatening, insulting or offensive behaviour to the crew on board an aircraft.

The International Scene

Disruptive, unruly and violent behaviour on board aircraft is an almost universal problem. While all initiatives at national level to deal with the problem are to be welcomed, it must be solved globally and airlines, through IATA, and air crew through IFALPA and other international bodies, must put pressure on ICAO for a solution either through a protocol to the Tokyo Convention or through the adoption of a completely new instrument.

Dr. Gerald Fitzgerald, the noted Canadian lawyer, wrote on one occasion :

"The legal machinery exists within ICAO for the production of useful conventions on air law .... It is for those using this machinery to ensure that it will produce the best possible products. The aviation community deserves no less."

It is my contention that we do not have "the best possible product" in relation to disruptive behaviour. In view of the industry's comparative success in dealing with hi-jacking, it is interesting and possibly productive to examine how this was achieved.

It is possible that the Tokyo Convention would never have come into effect if it had not been for the phenomenon of hijacking. The legal debate on the subject of crime on board aircraft was focusing on the legal status of aircraft prior to the spate of hi-jackings which occurred mainly in the Caribbean in the late nineteen fifties. This led to the emergence of the Tokyo Convention in its present form in 1963, establishing jurisdiction on board, giving the commander his powers and including an article dealing with States' responsibilities following the unlawful seizure of an aircraft. The Convention was not initially a success. It took no less than six years before the twelve ratifications necessary to bring it into effect were achieved.

By late 1970 only 30 States had ratified. However, another spate of hi-jackings, 80 in 1969, 90 in the first nine months of 1970, changed attitudes. While the Tokyo Convention did not, by any measure, deal adequately with the legal response to a hi-jacking, its provisions being merely an attempt to alleviate the consequences of such an event, it was effectively the only international instrument on crime in aircraft available. There was a sudden rush by States to accede to it and it is now the second most successful aviation Convention with some 170 States party to it.

In 1970 it was seen that a major problem in dealing with the hi-jacking threat was that offenders could only be charged with coparatively minor offences such as assault or theft, resulting in penalties which did not reflect the seriousness of the crime. Here a direct analogy can be drawn with the problems we are having to-day in respect of unruly and disruptive behaviour. We must press the international community for the same response as they gave to hi-jacking when they swiftly added the 1971 Hague Convention for the Suppression of Unlawful Seizure of Aircraft to the existing Tokyo Convention.

The Hague Convention not only defines the offence of unlawful seizure (hi-jacking), it also requires that it be punishable by severe penalties and provides for commonly agreed methods of dealing with offenders. This, I suggest, is what we require in respect of unruly and disruptive behaviour and what we must seek through ICAO. It can be argued that there are many more instances of "air rage" and more people affected by it than ever were by hi-jacking. We must see to it that our fare-paying passengers are recruited to act as a very considerable pressure group to assist in this campaign and that the subject is not trivialised in the media by a concentration on the more bizarre manifestations of unruliness on our aircraft.

State authorities must be made aware of the extent and seriousness of the problem and of the threat it presents to flight safety and to public confidence in the air transport industry. They must be reminded of their fine words in the Montreal Declaration of 1970, when at an Extraordinary Assembly of ICAO all ninety one of the attending States unanimously agreed (inter alia) :

"solemnly...
(to) deplore acts which undermine the confidence placed in air transport by the peoples of the world and
(to) request concerted actions on the part of all States towards suppressing all acts which jeopardise the safe and orderly development of international civil air transport".

[As an aside, I would hope that the associated problem of the violent deportee would also be addressed in any new international instrument].

More than Statistics Needed

A major contribution to the success of the efforts to reduce the threat of hi-jacking was the profiling of potential hi-jackers, the design and introduction of new security measures and the screening of passengers. These measures emerged from the careful analysis of all the factors involved in each event. This is an approach which we must follow in attempting to deal with disruptive behaviour. It is not enough to simply record each incident or even to categorise it. Each one must be analysed in an attempt to identify what failures in our systems it exposes and also to assist in the profiling of the potentially disruptive personality.

Refusal of Carriage

The first aim of any policy dealing with violent, disruptive or unruly passengers must be to attempt to identify persons with the potential for such conduct and if possible to prevent them boarding our aircraft. A few words on the refusal of carriage may therefore be helpful.

Particular care must be taken where a refusal to carry can be attacked on the grounds that it was discriminatory, e.g. with respect to colour, race, religion, nationality, disability etc., when the provisions of any anti-discrimination legislation will have to be considered.

A refusal to carry can be justified either by reference to the terms of the contract of carriage or to the statutory responsibilities and authority of the operator and the aircraft commander.

With regard to contract, a private, as distinct from a common, carrier is free to decide with whom he will enter into a contract of carriage. However, if the carrier enters into a contract but subsequently refuses to perform the carriage, he will be liable for breach of contract unless he can justify his refusal on the basis of the terms of the contract or through the operation of law.

Airlines try to preserve some freedom under contract to refuse to carry a passenger who has either presented himself for carriage or who has actually checked in and they do this in the following manner.

The passenger is given a ticket which contains conditions of contract. In these, his attention is drawn to the existence of further conditions of carriage as in the following typical paragraph :

"3. To the extent not in conflict with the foregoing *(being references to the Warsaw Convention)* carriage and other services performed by each carrier 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 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 carrier's conditions of carriage referred to here, and which are available on request, are usually the IATA General Conditions of Carriage, Passenger and Baggage. Article VIII of these General Conditions deals with the Refusal of and Limitation on Carriage and reads as follows (the emphasis is mine) :

"1. carrier may refuse carriage of any passenger or passenger's baggage for reasons of safety or if, in the exercise of its reasonable discretion, Carrier determines that :

(a) such action is necessary to comply with any applicable laws, regulations or orders of any state or country to be flown from, into or over; or

(b) 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 or herself objectionable to other passengers; or*

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

(c) such action is necessary because the passenger has failed to observe the instructions of Carrier; or

(d) the passenger has refused to submit to a security check; or ....."

It should be noted that the carrier may have to show in court that its decision to offload a passenger was reasonable in the circumstances. This does not require that the court necessarily come to the conclusion that it would have made the same decision in the particular circumstances but it will have to be convinced that there were reasonable grounds for the decision reached by the carrier. An interesting American case in this regard is that of Cordero v Cia Mexicana de Aviacion. At a transit stop Cordero became abusive and organised a petition among his fellow-passengers when the flight was delayed.

The airline refused to reboard him claiming that he had insulted the captain and a flight attendant on a previous leg. Cordero claimed that this was a case of mistaken identity. The Court ruled that although an air carrier has the power to refuse passage, it is not immune from liability if its decision is unreasonable or irrational. It found that there was sufficient evidence to show that the airline had failed to make even "a cursory inquiry" into the plaintiff's situation and held therefore that there was sufficient evidence to conclude that the refusal to reboard him was unreasonable.

Shawcross and Beaumont's Air Law believes that "similar results might well be reached by an English court applying the conditions of carriage, though the reasoning would follow a different route". An airline must therefore be prepared to show that its decision was not only reasonable but also that it was not lightly taken and was taken by persons empowered to make this decision under the company's regulations.

With respect to statutory authority, a very heavy burden is placed by law on the operator of public transport aircraft and his pilot in command. They are required to remove, in so far as possible, all hazards and potential sources of danger not only to the safety of the flight but also to the safety in all respects of all persons on board their aircraft. Violent, abusive and threatening passengers fall within this category of hazard and it can be argued with some certainty that an operator will not only have a right but also a duty to exclude such persons from his aircraft.

While the best grounds for refusal are likely to be safety based, the airline must be careful not to yield to the temptation to use the safety issue as a sham to insulate itself from liability. Furthermore, it should be borne in mind that the test of reasonableness will require a court to look at the facts known by the airline's representatives and the circumstances surrounding the decision at the time they made it, rather than the facts disclosed after the decision was made.

It follows that every attempt should be made by the company's employees to secure the names and addresses of independent witnesses to the events which result in a refusal to carry or a decision to disembark a passenger. Such evidence will most likely bear more weight than that of those involved in the decision.

Post-Event Counselling

Finally, I have been asked to say a few words on this subject. Counselling of crew, especially of cabin crew members, appears at present to be frequently offered on a very wide and liberal basis. It is submitted that on occasion it is offered too freely and may even be counter-productive.

It must also be said that there are of course fundamental questions to be asked in relation to a policy on counselling in the aviation business. In this connection, the following report from the London Daily Mail of the 31st of January, 1996 is of interest :

"During a flight to Malaga, the captain of a Boeing 737 had a fatal heart attack. The plane's first officer took over the controls and the plane landed safely. The crew members were given compassionate leave and offered counselling. Since their training teaches them to deal with death, birth, hijacks, potential crashes and drunken, lecherous passengers, coping with the recent tragedy was surely only part of their job. And if they went to pieces, they certainly should not have been offered counselling. They ought to have been reprimanded or fired."

While this is an obvious and deliberate overstatement, it does raise a fundamental issue, the need for some degree of mental robustness in all categories of air crew. For example, in most, if not all, crisis management courses, the first priority for an airline in the aftermath of an accident, if it is to survive, is given as the continuance of its normal schedule. This is only possible if air crew understand and accept that this is what is required of them and are thus prepared to continue with their normal rostered duties.

It is therefore suggested that post-traumatic counselling for air crew is a matter to be approached with great care and should normally only be made available to individuals who have themselves been personally involved in a traumatic event. It is further suggested that this question of the mental robustness required be first raised at the preliminary interview for all crew so that they are aware of the commitment expected of them if they accept an offer of employment with the airline. Finally, this issue should also be addressed frequently and directly during initial and refresher safety training.