The Duty to Warn in Aviation Law: A New Tort Theory in the Aftermath of Pan American Flight 103

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I. INTRODUCTION

I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes which are my own, not by causes which affect me, as it were, from outside. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for his choices and able to explain them by reference to his own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.¹

On December 21, 1988, the world was devastated by the news that Pan American Airlines Flight 103, en route from London to New York, had exploded over Lockerbie, Scotland.² The 259 passengers comprised a microcosm of America.³ There were college students, Wall Street executives, a director of a prestigious women’s college, a United Nations diplomat, mothers, fathers, and children.⁴ Prior to December 21, 1988, passengers of Pan American Flight 103 were not privy to any of the relevant terrorist-related information known by the United States

* This Note is in memory of my parents, Helen and Andrew Dokas, and the passengers of Pan American Flight 103.


³. Id.

The passengers were victimized by an aviation system which placed more value on classifying information than on providing important information to travelers. The United States asserted it was providing for the common defense of airline travelers, although in fact it did not.6

The bombing of Flight 103 has been termed "the worst security-related disaster in U.S. civil aviation history."7 The severity of the Flight 103 disaster mandates a response from the American legal system by restructuring aviation laws. The premise of this Note is not that the government and the airlines have an affirmative duty to warn passengers of terrorist activities or threats. That notion could be defeated by the government's right to classify information for national security purposes.8 Similar to psychiatry and areas of the law such as drug products liability and informed consent, the airline passenger has a right to know the potential dangers to which he or she is subjecting him or herself.9 This right to know should not depend on the level of sophistication of present day airline security. Rather, the duty should be a constant, a right of every American airline traveler to know about credible sabotage threats regarding his or her flight. As a result, an airline traveler could make an informed decision whether to continue with his original flight plans or opt for another mode of transportation. Failure to warn by the government and/or airlines should be considered an allowable claim under existing tort law. An American traveler's rights under the Constitution and the law of the land should not end at the airport gates.

6. See id. at A16, col. 4.
7. President's Commission on Aviation Security and Terrorism, Report to the President 14 (May 15, 1990) [hereinafter Commission].
8. See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). "It is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy." Id. at 728 (Stewart, J., concurring); see also Cheh, Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information, 69 Cornell L. Rev. 690, 691 (1984).
9. See Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972) ("True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.").
II. PAN AMERICAN FLIGHT 103

On December 21, 1988, Pan American Flight 103 originated in Frankfurt, West Germany, on a Boeing 727. The flight later transferred to a Boeing 747 at London's Heathrow Airport where it departed at 6:25 p.m. At 7:03 p.m., Flight 103 exploded 31,000 feet in the air over the Sherwood Crescent section of Lockerbie, Scotland. An explosion tore through the lower fuselage in front of the left wing of the plane and resulted in the deaths of 259 people aboard as well as 11 on the ground.

The history of the bombing of Pan Am Flight 103 can be traced back to October 1988. It was at that time that West German police raided a camp of the Popular Front for the Liberation of Palestine-General Command, a Middle Eastern terrorist group. While detaining fourteen members of the Popular Front and seizing some explosives, the police discovered a Toshiba "Boombeat" Model 453 radio-cassette player packed with explosives and a barometric triggering device. Armed with this information, the West Germans held a meeting in early November 1988, in which security experts from many European countries received information explaining the construction of a Toshiba radio-

12. COMMISSION, supra note 7.
13. Whitney, supra note 2, at A16, col. 5; see COMMISSION, supra note 7; see also Jetliner Carrying 258, supra note 4, at A16, col. 1 (statement of retired policeman, Bob Glaston) ("There was a ball of fire 300 ft. into the air, and debris was falling from the sky.")
14. British Conclude, supra note 10; see COMMISSION, supra note 7 (there were 259 fatalities although there was a discrepancy in earlier reports as to whether the fatalities totaled 258 or 259).
16. Id. at 53.
17. Id. at 54.
19. Id.
cassette bomb and warnings about the potential uses of such bombs.\textsuperscript{20} The Hessen State Authority which controls Frankfurt airport sent a telex to United States airlines that specifically detailed the Toshiba bomb device.\textsuperscript{21} The telex also cautioned that such a device was probably designated for airplanes.\textsuperscript{22} In addition, the Popular Front had previously used such a device to sabotage airplanes.\textsuperscript{23} Therefore, it was presumed that they would act similarly in the near future.\textsuperscript{24}

On November 18, 1988, the Federal Aviation Administration (FAA) issued an Aviation Security Bulletin to airlines cautioning about explosives which could be hidden in cassette recorders.\textsuperscript{25} It contained a detailed configuration of the Toshiba bomb device and a warning that it would be difficult to detect with an ordinary airport X-ray machine.\textsuperscript{26} Because the bomb could easily slip by airport security, the bulletin strongly suggested that airlines increase their security procedures.\textsuperscript{27} In particular, it emphasized implementing measures for tighter controls on matching baggage with passengers.\textsuperscript{28} What was not accounted for was a method to verify which airlines had been alerted to the information contained in the bulletin.\textsuperscript{29} On November 22, 1988, the British issued a similar warning to their airlines and airports.\textsuperscript{30}

On December 5, 1988, at 11:45 a.m., an anonymous caller phoned the American Embassy in Helsinki, Finland, and warned that within the next two weeks, there would be an attempt to bomb a Pan American plane flying from Frankfurt, West Germany, to the United States.\textsuperscript{31} On December 7, 1988, the United States embassy in Helsinki

\begin{enumerate}
\item \textsuperscript{20} COMMISSION, \textit{supra} note 7, at 7.
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.; see} \textit{Hearings 1, supra} note 15, at 54.
\item \textsuperscript{26} COMMISSION, \textit{supra} note 7, at 7.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} Smolowe, \textit{supra} note 18; \textit{see} Carriers Were Warned of Cassette bomb; FAA Requires Approval of Foreign Plans, \textit{AIR SAFETY L. \& TECH.}, Mar. 21, 1989, at 3.
\item \textsuperscript{31} \textit{See, e.g.,} Primetime Live: Pan American Flight 103 (ABC television broadcast, Nov. 30, 1989) [hereinafter \textit{Primetime Live}].
\end{enumerate}
sent a cable to the State Department informing them of the threat.\textsuperscript{32} In turn, the FAA issued FAA security bulletin ACS 88-22.\textsuperscript{33} Upon receiving this unclassified bulletin, members of the Moscow embassy recognized that the warning was specific as to the carrier, route, and time period.\textsuperscript{34} Therefore, on December 13, 1988, the Moscow embassy deviated from customary practice and posted the warning prominently at the embassy.\textsuperscript{35} The traditional United States policy was not to warn the general public, but to instead alert security officials in the airline industry and embassy officials.\textsuperscript{36} On December 9, 1988, the Department of State

\begin{quote}
32. \textit{Aviation Security: Hearing Before a Subcommittee of the Committee on Appropriations, United States Senate,} 101st Cong., 1st Sess. 23 (1989) [hereinafter \textit{Hearings 2}] (statement of the State Department); \textit{see} \textit{COMMISSION, supra note 7, at 9.}

33. \textit{Hearings 2, supra note 32.}

34. Cushman, \textit{supra} note 5; \textit{COMMISSION, supra note 7, at 9.}

35. \textit{Primetime Live, supra note 31, at 5 (Karen Decker, Consular Assistant at the United States Embassy in Moscow, commented on the Dec. 13, 1988, posting of the warning) ("There was a real push in the Embassy community to make sure that everybody was aware that there had been a terrorist threat made, and that people flying Western carriers going through such points as Frankfurt should change their tickets."); \textit{see also} Cushman, \textit{supra note 5.}

Text of the posted security bulletin:

\textbf{TO:} All Embassy Employees

\textbf{SUBJECT:} Threat to Civil Aviation

Post has been notified by the FAA (Federal Aviation Administration) that on December 5, 1988, an unidentified individual telephoned a U.S. diplomatic facility in Europe and stated that sometime within the next two weeks there would be a bombing attempt against a Pan American aircraft flying from Frankfurt to the United States.

The FAA reports that the reliability of the information cannot be assessed at this point, but the appropriate police authorities have been notified and are pursuing the matter. Pan Am has also been notified.

In view of the lack of confirmation of this information, post leaves to the discretion of individual travelers any decisions on altering personal travel plans or changing to another American carrier. This does not absolve the traveler from flying an American carrier.

\textit{COMMISSION, supra note 7, at 10.}

36. \textit{See Primetime Live, supra note 31, at 14.}
forwarded the security bulletin to all European diplomatic posts,37 and the Department of Defense transmitted it to security units worldwide.38

III. FEDERAL AVIATION ADMINISTRATION

The FAA is the governmental agency responsible for airline security.39 Under the Air Transportation Security Act, the Administrator of the FAA prescribes rules to protect persons and property aboard aircrafts.40 The Act permits the Administrator to prescribe regulations that prohibit disclosure of information that would be detrimental to the safety of airline passengers.41 The purpose of the Air Transportation Security Act is to protect passengers against criminal violence and aircraft terrorism while also balancing the public's interest in the promotion of safe air transportation.42

The FAA Office of Civil Aviation Security and the FAA Intelligence division decipher terrorist information gathered through

37. Id. at 8.
38. COMMISSION, supra note 7, at 8 ("By conservative estimate, thousands of U.S. Government employees saw the Helsinki threat information."); British Conclude, supra note 10.
40. Id. § 1357(a)(1) ("The Administrator of the Federal Aviation Administration shall prescribe such reasonable rules and regulations requiring such practices . . . as he may deem necessary to protect persons and property aboard aircraft operating in air transportation or intrastate transportation against acts of criminal violence and aircraft piracy.").
41. Id. § 1357(d)(2).
   Notwithstanding section 552 of title 5 relating to freedom of information, the Administrator shall prescribe such regulations as he may deem necessary to prohibit disclosure of any information obtained or developed in the conduct of research and development activities under this subsection if, in the opinion of the Administrator, the disclosure of such information . . . (C) would be detrimental to the safety of persons traveling in air transportation.

Id.
42. Id. § 1357(a).
intelligence channels. After consulting with intelligence agencies, the FAA determines whether to formulate a security bulletin. These FAA security bulletins are received by FAA officials, security officials at United States airlines and targeted personnel at United States embassies. The State Department then transmits security cables to foreign embassies and posts affected by the security threat. In turn, officials at these headquarters coordinate and aid United States airlines in acquiring the assistance of the host government to heighten security in the affected areas. To date, regulations have not been implemented to apprise the public of such security bulletins.

43. Hearings 2, supra note 32, at 14; see 49 U.S.C. app. § 1357(d)(2) (the information gathered through the intelligence channels falls within the purview of this section).
44. Id.
45. Id.
46. Id. at 15.
47. Id.

Provisions of this act require the government to warn the public of credible threats in civil aviation. Id. § 2(8), 104 Stat. 3067. Guidelines for assessing such threats would be based upon the following:

1. the specificity of the threat;
2. the credibility of intelligence information related to the threat;
3. the ability to effectively counter the threat;
4. the protection of intelligence information sources and methods;
5. cancellation, by an air carrier or the Administrator, of a flight or series of flights instead of public notification;
6. the ability of passengers and crew to take steps to reduce the risk to their safety as a result of any notification; and
7. such other factors as the Administrator considers appropriate.

Id. § 321(e), 104 Stat. 3079.

Despite Congress' attempt to list factors for assessing credible threats, the Aviation Security Act of 1990 does not have any clause which states that every American citizen has a right to know about threats to commercial air flight which affects his or her well-being. The above mentioned factors are subject to multiple interpretations over the
IV. PUBLIC NOTIFICATION

Despite the passage of the Aviation Security Improvement Act of 1990, the United States' policy to date has not implemented specific guidelines for public notification of terrorist threats to commercial air flights. The government defends its policy with the following rationales: 1) warning passengers of terrorist threats would compromise American security by disclosing to terrorists the extent of the authorities' knowledge; 2) publicizing the threats might induce "copy cat" threats, escalating the problem of terrorism to an even higher degree; 3) warning the public might cause mass cancellations and cripple the airline industry, regardless of the validity of the threat; and 4) informing the public of numerous threats makes them less inclined to give the credible threats credence.49

There are approximately 30 FAA security bulletins a year that are classified as credible security threats.50 If a threat to the aviation industry is deemed to be "specific and credible,"51 and the government concludes that no measure could be taken to prevent the attack, then the flight may be cancelled.52 If it is not an American flight, the years. Therefore, Congress must make a statement which reaffirms an air traveler's right to self-determination while flying.

49. Cushman, supra note 5, at A16, col. 4; Cushman, Flying Blind with Few Sources on Security Threats, N.Y. Times, Apr. 30, 1989, § 5, at 3, col. 4 [hereinafter Flying Blind].

Airline passengers recently exercised their right of self-determination when they were warned of a threat against their airplane. A bomb threat was made against Northwest Flight 51 flying on December 30, 1988, from Paris to Detroit. Northwest gave the 130 passengers the option of selecting an alternate flight without any ramifications. Only 22 passengers stayed aboard. In fact, those passengers who chose other flights, "thanked Northwest officials for giving them a choice." Ott, U.S. Court Confirms Airline Liability Limits, AVIATION WEEK & SPACE TECH., Jan. 8, 1990, at 52.

Similarly, the Airline Passengers Association of North America, which has approximately 110,000 frequent flyers from over 175 countries as members, advocates warning the flying public about sabotage threats so they can make an informed decision. R. Livingston, We Would Rather Know 4-5 (unpublished manuscript available through the Airline Passengers Association in Virginia).

50. Hearings 1, supra note 15, at 10 (statement of Senator Alfonse D'Amato).

51. The State Department is the source of information for any security threats. Hearings 2, supra note 32, at 49 (statement of the State Department). The FAA with the assistance of the intelligence agencies, decides whether or not a threat is specific and credible. If so, they issue a security bulletin. Id.

52. Id. at 9 (statement of Secretary of Transportation Samuel K. Skinner).
government simply advises the flight to be cancelled.\textsuperscript{53} If the flight is not cancelled, the State Department would warn embassies, the press, and the travelling public of the threat.\textsuperscript{54} It is questionable what kind of threat the government would deem specific and credible. Secretary of Transportation Samuel K. Skinner testified that he did not believe that the information surrounding Flight 103 was credible enough to warrant its cancellation.\textsuperscript{55} In addition, there were no travel advisory bulletins warning Pan American Flight 103 passengers of the threat.\textsuperscript{56} Therefore, it is obvious that the definition of "specific and credible" must be reconsidered in order to insure proper passenger safety. In addition, when the government does not mandate warnings, there remains the possibility that selective notification will occur.\textsuperscript{57} Some passengers might be deprived of knowing the existence of a threat if airlines take it upon themselves to warn passengers on a discretionary basis.\textsuperscript{58} Lastly, relying solely on the airlines to warn passengers is very idealistic given their financial concerns.\textsuperscript{59} The government, as an independent third party, must mandate and implement the duty.

\section*{V. Right to Travel}

The freedom to travel forms the foundation of democracy. As a concept borrowed from the Magna Carta, the right to travel assured that

\begin{itemize}
\item \textsuperscript{53} Hearings 1, supra note 15, at 51-52 (statement of Clayton E. McManaway, Jr.).
\item \textsuperscript{54} Id. at 52.
\item \textsuperscript{55} Id. at 50 (statement of Secretary of Transportation Samuel K. Skinner).
\item \textsuperscript{56} Id.
\item \textsuperscript{57} If the government maintains such a stringent benchmark for "specific and credible" threats, the possibility exists that embassy employees or government workers at diplomatic posts will be privy to information simply because of their employment position. Hearings 2, supra note 32, at 51. This leaves open the possibility that future relatives of air travelers could ask the same question as a child who lost his brother in Pan Am Flight 103: "Why did the State Department think that their people were more important than my brother?" Kreindler, The Pan Am 103 Atrocity, N.Y.L.J., Feb. 6, 1989, at 3, col. 1.
\item \textsuperscript{58} Cushman, Airlines Urged to Hide Bomb Threats, N.Y. Times, Jan. 19, 1990, at A15, col. 4 [hereinafter Airlines Urged].
\item \textsuperscript{59} In response to Northwest warning its passengers of the threat against Flight 51, Mr. Billy Vincent, former FAA security chief, commented: "I don't know if other airlines would follow Northwest, given that so many passengers left the flight." Ott, supra note 49, at 53.
\end{itemize}
a person may safely enter and exit his or her homeland without forsaking allegiance to his or her country. The right to travel is directly linked to our right of self-determination because in order for a person to enjoy self-determination, he or she must be "left to shape his own life as he thinks best, do what he pleases, go where he pleases." The Supreme Court in Shapiro v. Thompson declared the right to travel to be fundamental. The Court stated that as citizens of a common community, we must enjoy the "right to pass and repass through every part of it without interruption." The constitutional right of interstate travel has become virtually unqualified. Similarly, international travel has overarching social ramifications. Air travel is no longer a luxury, but rather an instrument of social, political, and economic existence. Accordingly, in Kent v. Dulles, the Supreme Court stated that the freedom to travel outside of one's country is inherent in the fifth amendment's due process clause. To facilitate international travel, the United States government issues passports. This document is a formal recognition of an individual's American citizenship and acts as a United States request to foreign governments to enable its citizens to

61. Id. at 126 (quoting Edwards v. California, 314 U.S. 160, 197 (1941)).
64. Shapiro, 394 U.S. at 630.
66. Students study abroad, diplomatic ties are advanced, and scientific knowledge is shared. See Kent, 357 U.S. at 126-27 (quoting Edwards, 314 U.S. at 195-96).
67. Many American companies such as General Motors instructed their employees to travel only when it is essential. Cushman, IBM Caution on Travel Angers US Airlines, N.Y. Times, Apr. 4, 1989, at D2, col. 4.
68. 357 U.S. 116 (1957).
69. Id. at 126-27; see also Aptheker v. Secretary of State, 378 U.S. 500 (1964). But see Zemel v. Rusk, 381 U.S. 1 (1965) (Court held that claimant, a United States citizen, did not have a constitutional right to travel to Cuba).
travel safely and freely between and within foreign countries.  

However, because of the escalation in aviation terrorism, a passport is no longer a guarantee of safe passage. The President's Commission on Aviation Security noted that between 1948 and 1958 there were 97 people killed in airline explosions and 849 passengers killed between 1979 and 1988. This increase in aviation terrorism has dramatically affected the fundamental right to travel. Americans will only be able to fully enjoy this fundamental right if it is insulated with a duty to warn passengers of credible terrorist threats.

VI. RESTRUCTURING THE DUTY TO WARN IN AVIATION LAW

The Restatement (Second) of Torts states that "(1) A common carrier is under a duty to its passengers to take reasonable action (a) to protect them against unreasonable risk of physical harm." A carrier's duty to protect its passengers from acts of third parties is not contingent upon that carrier's capability to control the third party, but rather on its special relationship with the passenger. Therefore, a carrier must exercise the highest degree of care under the circumstances.

70. 22 U.S.C. § 2705 (1988); see also Haig, 453 U.S. at 292-93 (quoting Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 698 (1835)). Airline travel has become the "lifeblood" of America. In fact, in 1987 there were approximately 1,095,600,000 air travelers in the United States. This means that on average, every American flew about four trips a year. United States v. $124,570 U.S. Currency, 873 F.2d 1240, 1242 (9th Cir. 1989).

71. The following list includes only a few of the recent aviation terrorist tragedies:
   1974: TWA - explosion over the Ionian Sea; 88 killed.
   1979: Indian Airlines - explosion over Madras, India; 8 casualties.
   1986: TWA - explosion near Athens, Greece; 4 people killed and 9 injured.
   1987: Korean Air - explosion in flight; 115 people killed.
   1988: Pan American Flight 103 - explosion over Lockerbie, Scotland; 259 people aboard and 11 on the ground killed.
   1989: UTA - explosion over Sahara, Niger; 171 killed.
   1989: Avianca - explosion near Bogota, Colombia; 107 killed.

See COMMISSION, supra note 7, at 164-66.

72. Id. at 114.

73. RESTATEMENT (SECOND) OF TORTS § 314A(1)(a) (1965).


75. See generally Britain v. Piedmont Aviation, 254 N.C. 697, 120 S.E. 72 (1961); Muratore v. M/S Scotia Prince, 845 F.2d 347, 353 (1st Cir. 1988) (bareboat charterer liable for infliction of emotional distress imposed by cruise ship photographers on passenger).
degree of care required is proportionate to the risk. Admittedly, a common carrier is not an absolute insurer of a passenger’s safety, but the carrier must warn passengers of those risks which are not apparent to the passenger. Therefore, courts have held that if a carrier has knowledge of dangerous people or activities which may confront the traveler at the point of arrival, it must warn the passenger of such dangers.

The duty to warn has not been expanded to include terrorist threats because federal law grants the FAA the responsibility of deciding what security information the passenger should be told. The Administrator of the FAA has the power to pass regulations which prohibit the disclosure of information when it "would be detrimental to the safety of persons traveling in air transportation." The Air Transportation Security Act is ironic because its intended purpose is to classify information to protect passengers, yet as evidenced by Pan Am Flight 103, it is this very classification of information which places an unknowing passenger at risk. In Fleming v. Delta Airlines, Judge Lasker recognized that an airline bears the ultimate responsibility of whether or not a flight is safe while the decision to fly belongs to each passenger. The airline "owes its passengers the duty to share with them information . . . so that they can choose for themselves whether they are physically and emotionally capable of undertaking the trip and wish

76. Muratore, 845 F.2d at 348.
77. Luby v. Carnival Cruise Lines, Inc., 633 F. Supp. 40, 41 n.1 (S.D. Fla. 1986) (cruise ship had no duty to warn about the existence of a condition that was not inherently dangerous). This duty to warn is escalated if a reasonable passenger could not have anticipated the danger. See Werndli v. Greyhound Corp., 365 So. 2d 177, 178 (Fla. Dist. Ct. App. 1978); see also Tietz v. International Ry., 186 N.Y. 347, 78 N.E. 1083 (1906) (carrier obliged to employ the highest degree of foresight and prudence to recognize such dangers for its passengers).
78. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1381 (5th Cir. 1980); see also Werndli, 365 So. 2d at 178 (carrier obliged to warn passengers that not only was the bus terminal in a dangerous area, but it would also be locked upon arrival). The Fifth Circuit established that airline passengers do consent to certain risks of flight, such as changes in flight patterns. See Eastern Airlines v. Silber, 324 F.2d 38, 39-40 (5th Cir. 1963). Yet, if the airline knows or should know of the possibility of turbulence prior to flight, the airline has the duty to warn its passengers. Id.
80. Id. § 1357(d)(2)(C).
81. Id. § 1357(a)(1).
83. Id. at 341.
to do so." In essence, Judge Lasker recognized an airline passenger's right of self-determination.

VII. SELF-DETERMINATION IN AVIATION LAW

Despite its absence in aviation law, self-determination has been universally recognized elsewhere. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights specify, "[a]ll people have the right of self-determination . . . [to] freely pursue their economic, social, and cultural development." Self-determination is rooted in ideals of individual integrity and freedom of choice. There is a general premise that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person."

A competent individual's right to autonomy has been recognized in many areas of the law such as those laws involving health and welfare. Courts have adopted the common law rule that a competent patient's right to privacy and to control his or her own destiny will

84. Id.
85. See, e.g., Comment, Self-Determination in Hong Kong: A New Challenge to an Old Doctrine, 22 SAN DIEGO L. REV. 839 (1985). "What is freedom? Freedom is the right to choose: the right to create for yourself the alternatives of choice. Without the possibility of choice and the exercise of choice a man is not a man but a member, an instrument, a thing." Id. at 839 n.1.
89. See generally Cruzan v. Harmon, 760 S.W.2d 408, 416 (Mo. 1988) (en banc), aff'd sub nam. Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990) (a competent person's decisions have been accorded substantial weight in the area of the health and welfare of the individual). John Stuart Mill held the right to self-determination as one of the basic values of human existence. J.S. MILL, ON LIBERTY 271 (1952) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").
consistently outweigh the state's interest in preserving life. It is only when incompetent patients are involved that many courts employ the concept of substituted judgment. In re Quinlan held that substituted judgment insured an incompetent person's right to privacy in life and death decisions. The incompetent's right is simply exercised through a third party who must then determine as accurately as possible the decision that the patient would have made if he or she were competent.

If there is no such evidence, the courts acting as parens patriae have employed an objective test measuring whether the burden on the patient's life with treatment is greater than the benefits which the patient gains from life.

Whether a person is competent or incompetent, courts have utilized every available means to make the outcome reflect the patient's right of self-determination. In In re Peter, the New Jersey Supreme Court stated:

Medical choices are private, regardless of whether a patient is able to make them personally or must rely on a surrogate. They are not to be decided by societal standards of reasonableness or normalcy. Rather, it is the patient's preference -- formed by his or her own

90. M. PERLIN, MENTAL DISABILITY-CIVIL AND CRIMINAL 599 (1989). In Cruzan, the Missouri Supreme Court stated that the balance between the state's interest and the individual's right to privacy shifts in favor of the latter as the degree of bodily invasion increases. Cruzan, 760 S.W.2d at 413; see also In re Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981) (the right to refuse treatment is based on the common law right to informed consent).

91. The Supreme Court stated that an incompetent person is unable to make an informed and voluntary choice to exercise a hypothetical right; such a right must be exercised for her by an individual who assumes the role of "substituted judgment." Cruzan, 110 S. Ct. at 2852.


93. Id. at 41, 355 A.2d at 664.

94. M. PERLIN, supra note 90, at 577-79.


96. M. PERLIN, supra note 90, at 577-79 (some considerations regarding the removal of life sustaining treatment include whether there was some evidence that the patient would have refused such treatment if he was competent and the level of inhumanity imposed by continuing life support).

personal experiences — that should control. 98

In *Cruzan v. Director, Missouri Department of Health*, 99 the United States Supreme Court stated that "the right of self-determination should not be lost merely because an individual is unable to sense a violation of it." 100 Because the FAA has the discretion to warn airlines and their passengers about terrorist threats on an ad-hoc basis, travelers will be ignorant of most credible threats against their particular flight. 101 By analogy, this is the type of ignorance to which the *Cruzan* Court addressed, and which results in the airlines practicing a form of "substituted judgment." However, even though substituted judgment has only been exercised when a person is incompetent, it is still important to ascertain what the patient would have desired. 102

Assuming the passengers on Pan American Flight 103 were competent, they were entitled to the right of self-determination. Yet, they were not even afforded the basic rights under the law of an incompetent person. 103 There was never a concern to ascertain the subjective intent of each Pan American Flight 103 passenger as to whether they wished to fly given the terrorist information. 104 Instead, both the airlines and the government substituted their judgment for the judgment of the passengers aboard this flight. Therefore, they were all deprived their right to self-determination.

VIII. INFORMED CONSENT AS APPLIED TO AVIATION LAW

Self-determination is the premise behind the doctrine of informed consent. 105 The reasoning behind informed consent is that "[e]very

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98. *Id.* at 373, 529 A.2d at 423; *see also* M. PERLIN, *supra* note 90, at 592.
100. *Id.* at 2848.
102. *See, e.g.*, *Cruzan*, 110 S. Ct. at 2852; *Conroy*, 98 N.J. at 360, 486 A.2d at 1229; *Quinlan*, 70 N.J. at 41-42, 355 A.2d at 664.
104. *Id.*
human being of adult years and sound mind has a right to determine what shall be done with his own body."106 Informed consent in medical procedures not only safeguards a patient from unconsented touching but also imposes standards for medical competency.107 Since the physician has a monopoly on the information in the traditional doctor-patient relationship, nondisclosure becomes equivalent to completely removing the decision from the patient.108

Over the past few decades the medical community has become more sensitized to the emergence of patient autonomy.109 Prior to the imposition of informed consent, the patient's only decision was to submit himself to the doctor's care while all subsequent decisions and control fell upon the physician.110 The medical profession determined that doctors should make all medical decisions because patients could not adequately comprehend the technical sophistication of the medical procedure.111

Under the doctrine of informed consent, physicians must warn patients of material risks associated with a procedure.112

Simply stated, the doctrine of informed consent imposes on a physician, before he subjects his patient to medical treatment, the duty to explain the procedure to the patient and to warn him of any material risks or dangers inherent in or collateral to the therapy, so as to enable the patient to make an intelligent and informed choice about whether or not to undergo such treatment.113


108. See id. at 235.

109. Id. Advances in medical technology have greatly expanded the options available to the patient. The choices now made by the patient often depend on factors that transcend professional training and knowledge, i.e., values, religion, and philosophy. Id.

110. Id. at 221 n.6.

111. Id. at 221.

112. Id. at 228.

Different courts have disagreed on the precise standard in determining if a risk is material. Jurisdictions which follow the professional standard rely upon the physician's discretion in deciding which information he should disclose. The professional standard disclosure test is whether a reasonable physician in the same or similar circumstances would have disclosed the relevant information. It is thought that only the physician can assess which risks the patient should be told. In order to disprove the physician's judgment, a patient must present expert testimony from the medical community.

Other jurisdictions follow the Canterbury v. Spence model of informed consent which emphasizes a patient's autonomy in decision-making. The doctor's duty to warn is measured by a societal rather than a professional standard. These jurisdictions allow the patient's right of self-determination, not the level of sophistication of medical technology, to shape the boundaries of the duty to warn. Under Canterbury, any risk which is material to the patient's ultimate decision must be disclosed. A risk is material if "a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk . . . in deciding whether or not to forego the proposed therapy." Since materiality is judged from the perspective of the reasonable patient and not the reasonable physician, there is no need to bring in expert testimony.

A doctor is not obligated to obtain informed consent from a patient in the following circumstances: 1) if a patient is in need of emergency care; 2) if the patient waives his right to make such decisions; 3) if a person is incompetent; or 4) if a person would suffer emotionally.

114. Id. at 292.
115. Id. at 293.
116. Id. at 293-94.
117. Id.
118. Britain, supra note 87, at 372.
120. Id.
121. Id. at 787; see also Salis v. United States, 522 F. Supp. 989, 998 (M.D. Pa. 1981).
122. Canterbury, 464 F.2d at 787.
123. Id. at 786-87.
124. Id. at 787.
125. Id.
from disclosure of information. Similarly, aviation law does not require passengers to give informed consent before boarding the airplane. Therefore, an aviation system without a mandatory "duty to warn" can never result in informed consent from its passengers. A person can only give true consent if he is allowed to make an informed choice "that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." From the perspective of consumer protection, there are few differences between aviation and medical law. The airline-passenger relationship, like the doctor-patient relationship, is contractual in nature. There is a high degree of reliance by the subordinate party (patients and air passengers) to the dominant party (physicians and airlines). It becomes the duty of the dominant party to impart information which the subordinate party has "every right to expect." A physician is not allowed to remain silent simply because supplying the patient with information may prompt him not to elect such medical procedure. Yet, the airlines are told not to disclose sabotage threats against the airlines because it "would throw the international aviation system into a state of chaos." It is clear that the medical community respects an individual's right to make his or her own medical choices. The aviation community does not similarly respect the rights of their passengers. With the introduction of the Aviation Security Improvement Act of 1990, aviation law should ideally be restructured to adopt the goals of the medical field. Every passenger should be allowed to give informed consent to fly unless it were an emergency, the passenger waived his right to know, would suffer emotionally from such knowledge, or was incompetent. There are two reasons why aviation law should adopt the Canterbury standard of "informed consent rather than the professional standard. First, informed consent is solely for the airline passenger's

126. Salis, 522 F. Supp. at 998; see also Meisel, The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decision Making, 1979 Wts. L. Rev. 413, 431-70; Shultz, supra note 107, at 223 n.16.
127. Canterbury, 464 F.2d at 780 (footnote omitted).
128. Shultz, supra note 107, at 223.
129. Canterbury, 464 F.2d at 782 (footnote omitted).
130. Id. at 789.
133. See Salis, 522 F. Supp. at 998.
benefit. Therefore, the aviation community cannot be in the position to scrutinize and determine what should be told to the passenger. Rather, the focus should be on what the reasonable air traveler should be told. Secondly, in order for the passenger to prevail under a professional standard, he "would be required to present expert testimony concerning the normal level of disclosure in a given situation." Within the aviation community, this could create a "community of silence." In order to avoid paralyzing the aviation industry, the airlines would agree upon a minimal uniform level of disclosure of information.

Under the Canterbury standard, a specific and credible terrorist threat against an airplane would be of such magnitude that a reasonable person would deem it material in forming his or her decision of whether to fly. Ultimately the pain, suffering, expense, and death of the procedure of flying did fall on the passengers of Pan Am Flight 103. Since the purpose of medical disclosure "is to protect the patient against consequences which, if known, he would have avoided by foregoing the treatment," the extension of this doctrine to airline disclosure would undoubtedly save lives and allow passengers to control their own future. Without the imposition of informed consent in aviation law, we will consistently be running the risk of asking in hindsight whether a passenger would have flown had he known of the terrorist threats against his airplane.

IX. Drug Product Liability and Aviation Law

The Food and Drug Administration (FDA) is the federal agency which regulates the drug industry via the Food, Drug, and Cosmetic Act (FDCA). The Act requires premarket testing of all new drugs. Before a drug is marketed for the public's use, the FDA requires "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience

134. Id. at 998-99.
135. Id.
136. Id.
137. Id. at 998.
140. Id. § 355(b), (d).
to evaluate the effectiveness of the drug involved." 141

The duty to warn in drug product liability law is broken down into two categories. 142 First, prescription drug manufacturers are required to warn the prescribing physician of those risks which the manufacturer knows or should have known are associated with the drug. 143 This duty to warn extends to information gained through research, adverse reaction reports, scientific literature, and other sources. 144 The drug manufacturers may be liable if they either disregard evidence which is adverse to their product, or fail to continuously test and research to discover subsequent dangers. 145

Prescription drug manufacturers are not obligated to warn the ultimate consumer if they adequately warn the prescribing physician. 146 The physician then assumes the role of "learned intermediary" and has the duty to warn the ultimate consumer. 147 The "learned intermediary"


142. For prescription drugs, the manufacturer must warn the prescribing physician, but not the consuming public. Comment, supra note 113, at 288. On the other hand, manufacturers of non-prescription drugs and oral contraceptives are obligated to warn the ultimate consumer. Id. The FDCA defines a prescription drug as "[a] drug intended for use by man which . . . because of its toxicity or other potentiality for harmful effect . . . is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . . ." 21 U.S.C. § 353(b).


146. See, e.g., Mauldin v. Upjohn Co., 697 F.2d 644, 647 (5th Cir. 1983).

147. The concept of the learned intermediary is as follows:

As a general proposition in products liability law there is a duty to warn the intended or foreseeable consumer of a product about its dangerous aspects. This duty exists even where there is an intermediary in the chain of distribution who takes some control over the product . . . . An important and sound exception to the requirement that warning be made to the consumer, however, is made in products cases in which the intermediary is not a mere conduit of the product but rather administers it on an individual basis, or
translates highly technical drug information for the patient and advises him or her, thereby allowing the patient to give informed consent to the ingestion of such medicine.\footnote{148} Since a prescription drug is distributed solely on the basis of a physician's authority, the manufacturer has no other way of reaching potential patients.\footnote{149}

On the other hand, manufacturers of non-prescription drugs and oral contraceptives must warn the ultimate consumer directly.\footnote{150} The rationale behind such warnings is that non-prescription drug users, unlike prescription drug users, are actively involved in the process of deciding whether or not to use a given drug.\footnote{151} Also, it is more practical for the

\begin{quote}
recommends it in some way, implying an independent duty to evaluate the risks and transmit relevant warnings to the user.
\end{quote}

\begin{quote}
\end{quote}

In the case of prescription drugs:

\begin{quote}
[T]he doctor is intended to be an intervening party in the full sense of the word. Medical ethics as well as medical practice dictate independent judgment . . . on the part of the doctor. . . . Were the patient to be given the complete and highly technical information on the adverse possibility associated with the use of the drug, he would have no way to evaluate it, and . . . might actually object to the use of the drug, thereby jeopardizing his life.
\end{quote}

\textit{Id.} at 987 (footnote omitted).

\begin{footnote}{148}{The duty of a physician to advise patients of any dangers of proposed treatment is known as the doctrine of informed consent. This doctrine recognizes the fact that although patients generally know little about the medical sciences and therefore rely upon their physician's expertise, it is ultimately the patient's decision whether or not to proceed with any course of therapy. \textit{Comment, supra} note 113, at 290-91; \textit{see supra} notes 105-38 and accompanying text.}
\end{footnote}

\begin{footnote}{149}{Rheingold, \textit{supra} note 147, at 987.}
\end{footnote}

\begin{footnote}{150}{Lindsay v. Ortho Pharmaceutical Corp., 637 F.2d 87, 91 (2d Cir. 1980). Regulations set forth examples of consumer-directed labels. \textit{See} 21 C.F.R. § 310.501 (1986) (oral contraceptives); \textit{id.} § 310.502 (intrauterine devices); \textit{id.} § 310.502(a) (injectable contraceptives); \textit{id.} § 310.515 (estrogens); \textit{id.} § 310.516 (progesterational drug products).}
\end{footnote}

\begin{footnote}{151}{MacDonald v. Ortho Pharmaceutical, 394 Mass. 131, 143, 475 N.E.2d 65, 69 (1985) (distinguishing between patient's minimal involvement in the decision whether to use a prescription drug and the active role of the consumer regarding the use of oral contraceptives which relegates the physician to a relatively minor role).}
\end{footnote}
manufacturer to directly warn the consumer. Armed with such information, the non-prescription user can weigh the risks and benefits before taking the drug.

The modern trend in drug liability is towards warning the actual consumer or patient. With the recognition of the grave risks accompanying drugs, some courts have even required a prescription drug manufacturer to warn the ultimate consumer. The New Jersey Supreme Court in *Feldman v. Lederle Laboratories*, stated that if a manufacturer becomes aware of a new-found risk subsequent to distributing a prescription drug, its responsibility is to take reasonable steps to notify purchasers and consumers. The FDA's goal is to afford both prescription and non-prescription drug users the means to become informed of the risks and benefits associated with a drug. Consistent with this approach, the FDA is constantly creating more effective methods of warning under the circumstances.

Aviation law should be restructured to adopt the standards of drug product liability. There is a gross disparity in warning requirements mandated by the FAA as compared with the FDA. While the FDA imposes requirements upon drug manufacturers to warn of all risks associated with a drug, the FAA holds discretionary power over

152. Id. at 138, 475 N.E.2d at 70.
156. *Id.* at 456-57, 479 A.2d at 388-89.
157. Comment, *supra* note 113, at 283; *see also* Pharmaceutical Mfrs. Ass'n, 484 F. Supp. at 1182 (in enacting the FDCA, Congress "intended patients using prescription drugs, as well as those using over-the-counter drugs, to receive" information directly).
159. According to FDA regulations, "[e]ach applicant shall promptly review all adverse drug experience information obtained . . . from any source . . . including information derived from commercial marketing experience, postmarketing clinical investigations, . . . reports in the scientific literature, and unpublished scientific papers . . . . The applicant shall report to FDA adverse drug experience information." 21 C.F.R. § 314.80(b), (c) (1989) (emphasis added). In addition, "[t]he applicant shall submit information about distributed products . . . to the FDA . . . [including] . . . information concerning any bacteriological contamination, or any other significant . . .
whether to warn airlines and/or passengers of risks of flying.\textsuperscript{160}

The head of the FAA is given the power to formulate rules and regulations for airline security in order to "protect persons and property aboard aircraft . . . against acts of criminal violence."\textsuperscript{161} Accordingly, regulations must be for the "protection of passengers in air transportation . . . and the public interest in the promotion of air transportation."\textsuperscript{162} Regulations must also result in "uniform procedures for the inspection, detention, and search of persons."\textsuperscript{163} It is, therefore, inconsistent that aviation law specifically addresses the lack of a duty to warn.\textsuperscript{164}

Courts have held drug manufacturers to an expert standard in their field.\textsuperscript{165} Since airlines are privy to classified FAA security bulletins,
they also should be held to an expert standard. Drug manufacturers cannot fail to warn of a drug's risks simply because the probability of its occurrence is minimal. 166 Yet, in aviation law, the FAA and the airlines contemplate warning of terrorist threats only if the threat is "specific and credible" and aimed at a particular flight. 167

The relationship between the airline traveler and an airline is analogous to the relationship between the non-prescription drug user and a drug manufacturer. A non-prescription drug user actively chooses whether or not to use a particular medication 168 based in part on information provided by the manufacturer. 169 Similarly, an airline passenger is actively involved in planning his airline flight as a result of receiving information from the airline about special fares, discounts, or even enhanced security. 170 Therefore, since the airline and the government have adequate means of contacting passengers in order to warn them of any new threats, it is feasible to directly warn passengers of terrorist activity prior to departure. 171

166. For example, in Davis v. Wyeth Laboratories, 399 F.2d 121, 130 (9th Cir. 1968), the manufacturer was forced to warn the ultimate consumer even when there was only a 0.9 per million risk of harm from a polio vaccine. See also Givens v. Lederle, 556 F.2d 1341, 1345 (5th Cir. 1977).


168. See MacDonald, 394 Mass. at 143, 475 N.E.2d at 69.

169. See Lindsay, 637 F.2d at 91.

170. See, e.g., Letter from C. Edward Acker, Chairman of the Board and Martin R. Shugrue, Vice Chairman to Pan Am Travelers (June 1986) (available through Pan American World Airways, Inc.).

171. The State Department has at least two potential mechanisms in place by which to warn passengers. First, by dialing (202) 647-5225, the traveler can reach the "Citizens Emergency Center," which alerts citizens to any travel advisories for a given country or geographic region. An example of the type of warning afforded by this service was a travel advisory for Kuwait which stated, "while hostilities have ceased between Iran and Kuwait's neighbor . . . Iraq, there is no formal peace agreement and the potential for terrorist activity exists." To date, this service has not provided detailed information regarding specific terrorist threats. Flying Blind, supra note 49, § 5, at 3, col. 6. Second, the FAA has a toll-free consumer complaint number designed to hear complaints about safety violations. Id. If a traveler calls this number to ask about any threats against his or her airplane, he will receive the following message: "Travelers on U.S. air carriers should be confident that all reasonable precautions are being taken to insure that the highest level of security exists." Id.
X. **TARASOFF AND AVIATION LAW**

Under the common law there is no affirmative duty to control another's conduct or to warn his or her potential victims.\(^{172}\) Imposing such a duty to warn of another human's dangerous propensities is extremely difficult, especially when the relationship is that of a therapist to his patient.\(^{173}\) Yet, because the therapist is in a position to render an opinion about dangerousness based on his patient's history and treatment course,\(^{174}\) courts have adopted the special relationship doctrine to carve out exceptions to the common law rule when a therapist is in a special relationship with either the foreseeable victim or a third party.\(^{175}\)

In *Tarasoff v. Regents of University of California*,\(^{176}\) the California Supreme Court adopted the Restatement (Second) § 315 requirement and imposed a duty upon a psychiatrist to warn intended victims of a crime.\(^{177}\) In *Tarasoff*, the patient had been under outpatient psychiatric care.\(^{178}\) A psychiatrist determined that the patient was a threat to himself, the community at large, and an unnamed, yet

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172. Goodman, *From Tarasoff to Hopper: The Evolution of the Therapist's Duty to Protect Third Parties*, 3 BEHAV. SCI. & L., 195, 207 n.60 (1984). Also, "[i]t appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965) (addressing the absence of an affirmative duty to protect, i.e., to warn); see also Note, *Affirmative Duties in Tort Following Tarasoff*, 58 ST. JOHN'S L. REV. 492, 498 n.21 (1984).


175. *Tarasoff*, 17 Cal. 3d at 425, 551 P.2d at 334, 131 Cal. Rptr. at 14; see also RESTATEMENT (SECOND) OF TORTS § 315 (1965) which provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless:
(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
(b) a special relation exists between the actor and the other which gives to the other a right to protection.


177. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

178. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.
Despite this clinical finding, the girl was never warned by either the police or the therapist of such threats on her life. After the patient killed the girl, her parents sued the psychiatrist for failing to warn their daughter of the patient's threats.

Judge Tobriner articulated a two step test in failure to warn cases. First, when a therapist determines or should have determined that a patient has the capacity to pose a serious danger of violence to others, the therapist has a duty to protect the readily identified victim. Depending on the circumstances, this protection encompasses warning the intended victim(s), notifying the police, or any remaining possibilities which could help avert the consequences. Under this test, a therapist need not concern himself about the identity of any potential victim or victims until he has made a determination that the patient poses a serious danger to others. Only after a determination of dangerousness is made does the therapist have "an obligation to use reasonable care to protect the intended victim against such danger."

Courts have expanded the Tarasoff ruling in order to protect a larger class of victims. In McIntosh v. Milano, a New Jersey trial court imposed a duty upon a therapist to take measures to protect potential victims of his patient's violence. The court recognized that doctors have an obligation to protect the welfare of the community from potential evil. Similarly, in Hedlund v. Superior Court, the California Supreme Court outlined the boundaries of the class of potential victims who must be warned under Tarasoff. The first group to be warned is the identifiable victim. The second group encompasses anyone who is injured in an attack upon the identifiable victim and whose injuries are

179. Id.
180. Id.
181. Id.
182. Id. at 431, 551 P.2d at 345, 131 Cal. Rptr. at 25.
183. Id.
184. Id.
186. Id.
187. Id. at 489-90, 403 A.2d at 511-12.
188. 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983).
189. Id. at 705-07, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11; see also Note, supra note 172, at 501.
190. Note, supra note 172, at 501.
considered to have been reasonably foreseeable to the therapist.\footnote{191}

In order to insure more protection for potential victims, some courts no longer require a specific victim to be named in order to mandate a Tarasoff warning. In\textit{ Lipari v. Sears Roebuck & Co.},\footnote{192} a mentally ill patient shot and killed persons in a crowded night club.\footnote{193} In\textit{ Lipari}, the court imposed a duty upon a therapist to take those precautions reasonably necessary to protect potential victims of this patient.\footnote{194} Similarly, in\textit{ Peterson v. State},\footnote{195} a therapist was ordered to take precautions "to protect anyone who might foreseeably be endangered by [a patient's] drug-related mental problems."\footnote{196} The court based its expansion of the Tarasoff doctrine on the notion that foreseeable violence may involve a class of persons at risk, and therapists have a duty to take "reasonable precautions to protect anyone who might foreseeably be endangered."\footnote{197}

In assessing whether or not a Tarasoff duty should be imposed, courts have looked at the foreseeability of harm to the victim, the degree of certainty that the harm would occur, the closeness of connection between the doctor's conduct and the plaintiff's injury, and the potential consequences to the community at large.\footnote{198} The Ninth Circuit Court of Appeals even imposed a duty to warn when a patient had not made any specific threats to any specific individuals, but his previous history indicated that he would probably direct his violence against a given individual.\footnote{199} In addition, the court recognized that there would be no great burden in warning potential victims.\footnote{200} Although no one can absolutely predict another's actions, "the risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved."\footnote{201}

There are two elements in aviation terrorism which create an analogy to the Tarasoff line of cases and, therefore, mandate the
imposition of a duty to warn. First, a duty can only be imposed if there is a special relationship within the meaning of the Restatement (Second) Of Torts. 202 The special relationship between an airline and its passengers is founded on the idea that since the carrier is monetarily benefitted by the traveler, it accepts the duty to exercise reasonable care towards its passengers. 203 Similarly, an American airline traveler is in a special relationship with the United States government and its agencies such as the FAA. 204

Secondly, a duty can only be imposed if a dangerous condition exists. In the past twenty years, airline travelers have become the victims of terrorism. 205 Terrorism is most commonly defined as violence against innocent people, by members of a political or military group to further their political or military goals. 206 It is evident that the state or country is the main target of terrorist activity, yet the airlines are attacked because they are seen as an arm of the state. 207 The Fifth Circuit recognized that air piracy exceeds all other crimes in its potential for devastating harm. 208 Airlines and governments are aware that aviation terrorism is an ongoing type of foreseeable violence. 209

The issue then arises whether such a system of warning would compromise the secrecy and confidentiality of national intelligence. In
Tarasoff, the court addressed the issue of privilege and secrecy between a doctor and patient and recognized the level of confidentiality present in the patient-psychotherapist relationship.\textsuperscript{210} The court concluded that "the protective privilege ends where the public peril begins."\textsuperscript{211} Likewise, the court noted that any risk that unnecessary warnings be given is a reasonable price to pay to save the lives of potential victims.\textsuperscript{212} Such reasoning should govern the relationship between the FAA and the airlines and the airline passengers in aviation law.

XI. CONCLUSION

Paternalism has been defined as "a system under which an authority undertakes to supply needs or regulate conduct of those under its control in matters affecting them as individuals as well as in their relations to authority and to each other."\textsuperscript{213} Paternalism clearly is not present in medical-legal issues, yet it rules aviation law and policy. In other words, the medical community is not allowed to substitute its judgment for that of a competent person, while the airline companies have traditionally been granted that right. Death is a possible result of both industries, yet the standard for who makes the decision is drastically different. The medical community respects an individual's right to self-determination. Therefore, courts have imposed the doctrine of "informed consent" by which a patient must give informed consent before ingesting a drug or undergoing a procedure. After a procedure is completed, it is only the patient who suffers the scars of pain, expense, and possibly death which could result from the procedure. The medical community believes it is the right of the patient to decide whether or not to submit to a procedure.

An aviation system without a mandatory duty to warn passengers of credible terrorist threats does not allow for an individual's self-determination. Although there are no significant differences between the airline traveler and the medical patient, the government and the airlines are wary about recognizing an air traveler's right to self-determination in making a decision about whether or not to board an aircraft. In addition, if an airline traveler is to give informed consent to fly, he or she must be

\textsuperscript{210} Tarasoff, 17 Cal. 3d at 441, 551 P.2d at 346, 131 Cal. Rptr. at 26.
\textsuperscript{211} Id. at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27; M. PERLIN, supra note 90, at 140.
\textsuperscript{212} Tarasoff, 17 Cal. 3d at 441, 551 P.2d at 346, 131 Cal. Rptr. at 26.
\textsuperscript{213} WEBSTER'S NEW COLLEGIATE DICTIONARY 862 (9th ed. 1983).
told of any credible terrorist threats involving his flight. It is his or her right to know what dangers he or she may face before subjecting him or herself to air travel. The FAA should adopt the FDA's reasoning for regulation. If a warning is important enough to be included in the physician-directed labeling, then there is no justification as to why analogous warnings of terrorist activity would not benefit the airline passenger. If the government, airlines, or courts admit that an airline traveler possesses this right of self-determination, "failure to warn" of credible terrorist threats can and will become a new tort.

With the increased danger of terrorism, the question becomes whether the airlines and/or government have a duty to predict the conduct of terrorists. Aviation law would not require an application of Tarasoff as stringent as psychiatry does. Airlines would not be expected to predict violent behavior from the terrorists. Rather the FAA would classify threats as credible. The FAA would then disclose such threats to the airlines with the intention that the airlines dispense such threats to the foreseeable class of victims, namely airline travelers of the flight in question.

Until aviation law is restructured to impose a duty to warn passengers of credible terrorist threats, Pan American Flight 103 will symbolize an on-going deprivation of rights faced by all airline travelers. Like medicine and medical procedures, air travel has become a constant in our everyday lives. Not warning a passenger of terrorist threats, is similar to blindfolding a patient in front of a full medicine cabinet. The patient has no sense to what medicine he is subjecting himself, nor is he aware of the possibility of deadly risks. Pan American Flight 103 is a symbol -- a call for the FAA and the airlines to take the blindfolds off the passengers.

Cynthia Dokas