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link that allows the drone to retrace its planned route back to takeoff if communication with the operator is lost; no-fly-zone geofencing systems that detect off-limits airspace and prevent drones from taking off near it or entering it; in-flight minimum safe altitude warnings; and even parachute releases to terminate a flight.

Another consideration is marketing: Manufacturers' representations sometimes seem extreme. They may claim that a drone is safe for indoor and outdoor use, offers the best control or is the most user-friendly, or—my favorite—is “the world’s safest drone.” There is a lot of fodder in the advertising, which can be used to make a claim of negligent misrepresentation when an end user has relied on false or misleading representations. Some jurisdictions allow for strict liability when a manufacturer makes a public statement about the safety of a

product—known as tortious misrepresentation.²⁷ Such advertising also may constitute a breach of warranty or failure to warn.


Finally, if the drone was equipped with a camera, it may have been filming during the incident and recorded valuable evidence. Find the footage: It may be stored in the device’s cache, as well as on the SD card of the camera or phone being used with the drone. You can download this video to a computer using a USB cord or a memory card reader. If you do not have access to the drone, immediately send a preservation of evidence letter to the owner or operator asking that the video and associated data be preserved.

What’s Next?

Drones are just the beginning. For example, people-carrying drones, some of which are known as VTOL (Vertical Take

Off and Landing), are aircraft capable of taking off and landing without runways, using small launch pads instead.²⁸ They run on battery power for short-range and low-altitude operations. Some VTOL aircraft are fully autonomous drones while others can be piloted.²⁹

Uber has plans to harness VTOL taxis in densely populated and heavily trafficked areas.³⁰ The city of Dubai is already testing VTOL taxi operations with German firm Volocopter’s unmanned people-carrying drone, which can fly for up to 30 minutes.³¹

NASA has described VTOL as the dawn of a new era in aviation.³² But the law is having difficulty keeping pace with current drone technology, let alone with what’s on the horizon. Plaintiff attorneys must ensure that consumers’ voices are heard and that manufacturers and operators act safely as drones and other technology fill our skies. 

CHARTING A SAFE COURSE

Thomas Demetrio has been handling aviation cases for more than 40 years. Trial spoke with him about changes in airline safety and how the growing public interest in passenger rights may impact the future of aviation practice.

Interview by Mandy Brown

You represented Dr. David Dao, the United Airlines passenger whose forcible removal from a plane in Chicago in April 2017 was captured on a cell phone video that went viral. How did an airline passenger rights case like this one become part of your practice?

Until 2017, airline passenger rights cases were not part of my practice. I have always worked hard on behalf of those families who lost loved ones or those who were injured in catastrophic crashes, and I think that’s how Dr. Dao ended up on my doorstep—not because I’m necessarily recognized as a guy who protects passengers mistreated by airlines, but because I’m known as a

plaintiff aviation trial attorney.

My first airplane crash case involved singer-songwriter Jim Croce, who was killed in a small aircraft crash in Louisiana in 1973. While the Croce case settled, I eventually had to try the case involving his assistant, who also perished in the crash.

Since that case, I’ve handled many high-profile airplane crash cases, including American Airlines Flight 191 at O’Hare [all 271 passengers and crew members killed after the plane’s left engine separated and fell from the aircraft]; United Airlines Flight 232 in Sioux City, Iowa [111 passengers killed and 172 injured in a crash landing after the hydraulic system failed]; USAir Flight 427 in Pittsburgh [all 132 passengers and crew members killed after a mechanical failure]; American Airlines Flight 965 in Colombia [159 passengers and crew members killed when the pilots flew into a ridgeline while attempting to land]; and others.

How did your previous experience influence your representation of Dr. Dao?

Not much, because I couldn’t rely on past experiences. I didn’t have any cases with that specific fact pattern, and I don’t know

of any lawyer who has.

In contrast to the ordinary duty of care that you and I owe each other, an airline owes its passengers the highest duty of care, and I simply applied that to Dao’s case. So when an airline physically harms a passenger who is minding his own business and sitting where he was authorized to be sitting, that’s an easy case to argue. It’s Torts 101. [Dao reached a confidential settlement with United Airlines in late April 2017—18 days after the event.]

Today, stories of passengers mistreated by airline crews and representatives are prevalent in the media. Are you aware of other incidents that have sparked litigation?

I have not heard of another comparable one, and before Dao, I had never heard of a passenger being bumped and forcibly removed after boarding a plane. This was just an extraordinary situation.

It’s my firm belief that any future passenger rights case will progress to litigation only if the airline unreasonably prevents its passenger from getting to his or her destination safely. Dao was not



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NOTES

1. Fed. Aviation Admin., *2017 FAA Aerospace Forecast*, www.faa.gov/data_research/aviation/aerospace_forecasts/. For example, the FAA announced a settlement with Skypan International, Inc., of \$200,000 for 65 unauthorized drone photography flights over two years in congested airspace (the original proposed fine was \$1.9 million). Press Release, *FAA and Skypan International, Inc., Reach Agreement on Unmanned Aircraft Enforcement Cases* (Jan. 17, 2017), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=21374.
2. Press Release, Fed. Aviation Admin., *FAA Registered Nearly 300,000 Unmanned Aircraft Owners* (Jan. 22, 2016), www.faa.gov/news/press_releases/news_story.cfm?newsId=19914; Fed. Aviation Admin., *You & UAS*, FAA Safety Briefing, at 10 (May/June 2017), www.faa.gov/news/safety_briefing/2017/media/mayjun2017.pdf.
3. On May 25, 2017, several senators introduced a bill, The Drone Federalism Act, to allow local governments to create drone-specific rules for their communities. The FAA claims authority to regulate airspace from the ground up. 49 U.S.C. §40103.
4. Press Release, Fed. Aviation Admin., *FAA Announces Small UAS Registration Rule* (Dec. 14, 2015), www.faa.gov/news/press_releases/news_story.cfm?newsId=19856. A comprehensive compilation of the rules from 14 C.F.R. pt. 107 applicable to drones is available in Fed. Aviation Admin., *Small Unmanned Aircraft Systems*, Advisory Circular 107-2 (June 21, 2016).
5. *Id.*
6. Fed. Aviation Admin., *Registration and Marking Requirements for Small Unmanned Aircraft*, 80 Fed. Reg. 78593 (Dec. 16, 2015).
7. 14 C.F.R. pt. 107.
8. *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017).
9. *Id.* at 1091, 1093. The act defines “model aircraft” as “an unmanned aircraft that is—(1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes.”

10. Fed. Aviation Admin., *Fly for Fun Under the Special Rule for Model Aircraft*, www.faa.gov/uas/getting_started/fly_for_fun/.
11. Fed. Aviation Admin., *Unmanned Aircraft Systems—Getting Started*, www.faa.gov/uas/getting_started/.
12. Press Release, Air Line Pilots Ass’n, Int’l, *ALPA Statement on Federal Court Decision Blocking FAA from Requiring Recreational Drone Registration* (May 24, 2017), www.alpa.org/news-and-events/news-room/2017-05-24-statement-federal-court-decision-blocking-faa-requiring-drone-registration.
13. Joshua Berlinger & Aaron Cooper, *2 Airliners Fly Within 100 Feet of Drone Above New York*, CNN (Aug. 3, 2015), www.cnn.com/2015/08/01/us/drone-airliner-jfk/.
14. Frank Jackman, *Nearly Half of Commercial Jet Accidents Occur During Final Approach, Landing*, Flight Safety Found. (Nov. 4, 2014), <https://flightsafety.org/asw-article/nearly-half-of-commercial-jet-accidents-occur-during-final-approach-landing/>.
15. Bard College Ctr. for the Study of the Drone, *Drone Sightings and Near Misses*, <http://dronecenter.bard.edu/drone-sightings-and-near-misses/>.
16. Advisory Circular 107-2, *supra* note 4; 14 C.F.R. pt. 91 (Dec. 7, 2017).

allowed to get to Point B safely. He was unceremoniously removed from a plane. Nothing before or after that incident has given airlines the authority to physically remove a seated passenger, whether with the force of local police or their own employees. When a passenger is unruly or a threat to the safety of others, physical force can and should be used. Again, the airline has the highest duty of care to protect the other passengers on that plane.



an incentive to the airlines to keep bumping to a minimum.


There is also a bill pending in Congress regarding airline passenger rights. After Dao’s incident, a hearing was held in early May 2017 before the Senate Subcommittee on Aviation Operations,

Safety, and Security where the committee grilled major airlines’ CEOs on customer service. The committee’s members recounted their own tales of travel woe. The same thing happened later at a hearing before the House Transportation and Infrastructure committee.

Nobody has been immune from airline missteps. If you fly often enough, you’re going to have a bad experience and walk away from it with the attitude that the airline doesn’t really care about you. And that’s the attitude that has to change. Passengers pay a lot of money to get from Point A to Point B—and we shouldn’t be mistreated.

How do passenger rights cases fit within the changes you’ve seen in aviation practice over the past four decades?

Over my career, I have not seen a major improvement in airline safety or service that did not result from deaths or serious injuries. Unfortunately, it usually takes a horrible event for change to happen. For example, if shrinking airline seats one day hampers an evacuation or results in serious injury during turbulence, a rough landing, or some other event, then that could be the subject of litigation.

What I have seen over that time, thankfully, is a great improvement in airline safety. We’ve also seen significant improvement in aircraft maintenance, and I think pilot training has become state of the art. These are all reasons a major air disaster hasn’t occurred in the United States in some time, and that’s a good thing. I hope we never witness another one. 

What positive changes have come out of this case?

United Airlines has changed its official policies and training for passenger removal, and according to news reports, since Dao’s incident the rate of airlines bumping passengers is way down. That’s a good start. Those who do get bumped from their flights today are being better compensated. It’s an incentive to the traveling public to take things in stride and



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