

In the Alberta Court of Justice

Citation: R v Sailer, 2023 ABCJ 90

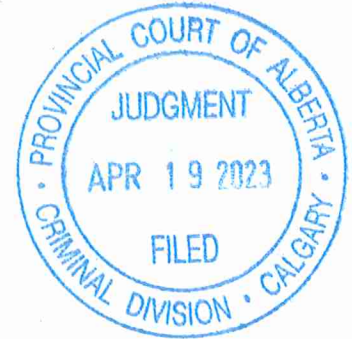
Date: 20230419
Docket: 210790564P1
Registry: Calgary

Between:

His Majesty the King

- and -

Courtney Douglas



Decision of the Honourable Justice L.W. Robertson

Introduction

[1] On July 20, 2021, Courtney Douglas Sailer (the accused), was a passenger aboard a commercial flight between Toronto and Calgary. Masking requirements were in place as a public health measure to combat the COVID-19 pandemic. Although Mr. Sailer boarded the aircraft wearing a mask, he removed it near the end of flight. The accused was charged with breaching s 602.05(1) of the *Canadian Aviation Regulations* which is an offence under s 7.3(3) of the *Aeronautics Act*. For the reasons that follow, I find Mr. Sailer not guilty of that offence.

Legislation

[2] Mr. Sailer was charged with violating s 602.05(1) of the *Canadian Aviation Regulations*, SOR/ 96-433. That regulation reads as follows:

“Every passenger on board an aircraft shall comply with instructions given by any crew member respecting the safety of the aircraft or of persons on board the aircraft.”

[3] The *Canadian Aviation Regulations* are enacted pursuant to the *Aeronautics Act*, RSC 1985, c. A-2. Section 7(3) of the *Aeronautics Act* makes it an offence to contravene those regulations:

“Except as otherwise provided in this Part, every person who contravenes a provision of this Part or any regulation, notice, order, security measure or

emergency direction made under this Part is guilty of an offence punishable on summary conviction.”

[4] Section 7(4) of the *Aeronautics Act* provides that those contravening *Aeronautics Regulations*, of the kind the accused is charged with, are liable to a fine of up to five thousand dollars.

Global Pandemic Conditions Affecting Air Travel (March 2020-October 2022)

[5] Medical facemasks are not normally required during commercial air travel. The background to these events included a global pandemic of an infectious respiratory virus, now known to the world as SARS-CoV-2 or COVID-19 (the “virus”). The virus is still with us today. Variations evolved from the original virus continue to be prevalent. The virus spreads quickly and causes a range of respiratory illness. Most people contracting the virus are affected with moderate illness. However, serious illness and death can also occur.

[6] One method the disease spreads is through transmission of respiratory droplets from an infected person. These droplets can linger in the air and transfer the disease through normal respiration (Canada.ca Health, COVID-19: Prevention and risks).

[7] Conditions of the pandemic caused widespread disruption of the airline industry. Measures put in place to limit the health risks to air travelers included passenger masking during commercial flights.

1. Evidence of Dr. Tyler Brooks

[8] The evidence of Dr. Tyler Brooks was very helpful to the Court. Dr. Brooks gave expert opinion evidence regarding the management of the COVID-19 pandemic for air travellers. Dr. Brooks is a pilot and a medical doctor. He is the current director of civil aviation medicine for Transport Canada. He was amply qualified to give expert opinion evidence in the disciplines of general medicine, aviation medicine and the policies and standards of Transport Canada pertaining to civil aviation. He also provided insight into the safety of travelers aboard civil aircraft and Transport Canada’s responses to the COVID-19 pandemic. These responses were coordinated with the Public Health Agency of Canada. The following paragraphs have been distilled from the expert opinion evidence provided by Dr. Brooks.

[9] As has now become abundantly clear, the COVID-19 pandemic caused many public health challenges. There were also numerous challenges faced by air travelers and the passenger airline industry. At the beginning of the pandemic there was limited scientific knowledge regarding COVID-19’s transmission mechanisms. As scientific knowledge lagged, mitigation of the virus’s spread was a key priority for public health officials. It soon became clear that one method of the virus spreading was through respiration, a basic human function. A difficult problem was that those who may have appeared asymptomatic were nevertheless capable of shedding the virus and transmitting the disease to others. Rapid relocation of infected individuals could easily introduce the virus to other areas of the country and the world.

[10] Dr. Brooks testified that aircraft have excellent air filtration systems capable of mitigating the spread of respiratory diseases. However, these systems are not always operating at optimum capacity. The filtration systems, complete with sophisticated HEPA filters, are powered

by the aircraft's engines. An aircraft's engines are turned off, or working at greatly reduced capacity, when boarding and deplaning procedures take place. Air travel also tends to congregate individuals in close proximity as they navigate airport terminals before and after travel. These locations might be unfiltered-air environments.

[11] In response to these unprecedented challenges Transport Canada, and similar transportation agencies around the world, adopted a multi-layered suite of measures to contain the spread of the virus. In Canada, numerous civil aviation orders were temporarily enacted, authorized under the regulatory provisions of the *Aeronautics Act*. These orders, which were regularly reviewed for their currency and necessity, were in place from mid-April of 2020 to October 1, 2022. The orders were coordinated with similar procedures in other countries.

[12] The Restrictions created by these regulatory orders were in effect the day Mr. Sailer took his mask off, mid-flight. Amongst other measures, the following restrictions were in place on the day of Mr. Sailer's travel:

- i. Prevention of air travel by those obviously ill with disease, or those who had tested positive for the disease;
- ii. Pre-boarding health screening tools to detect those who were positive with the virus;
- iii. Some instances of flight bans. These included restriction of travel to Canada from countries known to have severe outbreaks of the disease;
- iv. Distancing requirements for travelers prior to and following boarding procedures;
- v. Specialized sanitation efforts;
- vi. Vaccination requirements and/or pre-travel medical testing for the virus, and proof of same; and
- vii. Masking requirements in indoor areas, including before, during and after flight.

[13] Dr. Brooks testified that no single measure to reduce the spread of the virus could be considered infallible. A strategy of imposing multiple, simultaneous measures, in a coordinated approach, was the most effective method of rising to the health challenges of the pandemic. Masking of all individuals was a key measure. This was because the scientific and medical community eventually agreed that one major method of disease transmission was simple human respiration. The act of breathing allowed viral infected droplets to escape into the air. The virus spreads rapidly when those droplets are breathed in by a person near an infected individual. Dr. Brooks testified to something that eventually became widespread knowledge throughout the course of the pandemic, masks are effective in reducing disease transmission. Use of masks reduces the spread of viral infected droplets in two ways. First, there is "*source control*" when an infected person sheds much less of the virus while wearing a mask. Second, inhalation of the virus by others is reduced when they too are wearing a mask.

[14] The passenger masking strategy was an early measure imposed by the regulatory orders. It was still in place the day Mr. Sailer traveled, under the authority of Civil Aviation Interim Order 34, (*Interim Order Respecting Certain Requirements for Civil Aviation Due to COVID-19, No. 34*), made pursuant to the *Aeronautics Act*. Order number 34 was made exhibit 4 in these proceedings.

2. Instructions "Respecting the Safety of the Aircraft or Persons Onboard the Aircraft"

[15] An essential element of the offence before the Court is the interconnection between non-observance of the masking regulation and the safety of the aircraft or its occupants.

[16] Even an obvious or blatant disobedience of crew member instructions will not constitute an offence under the *Aeronautics Act* if it does not affect the safety of the aircraft or its occupants (*R v Buller*, 2000 ABPC 19).

[17] The argument of the Crown is that by removing his mask, the accused increased the likelihood of transmitting the COVID-19 virus to others through respiration droplets. He thereby endangered the safety of all the other persons onboard the aircraft when he refused to replace his mask. If wearing a mask *reduces* the transmission of the harmful COVID-19 virus, by controlling infected droplets at their source, it follows that not wearing a mask *increases* the danger of infection.

[18] I accept the evidence of Dr. Brooks that the COVID-19 virus was a dangerous and deadly disease. Great loss of life occurred in Canada, and around the world, for many who contracted the illness. Even many of those who survived the disease saw their lives placed in great danger. Some were dependent on artificial ventilation and other extraordinary measures, provided by hospital intensive care units, for their very survival. Official statistics estimate the total deaths in Canada, caused by the virus as of July 17, 2021, three days before Mr. Sailer's flight, to have reached 26,275 https://health-infobase.canada.ca/covid-19/current-situation.html?stat=num&measure=deaths_total&map=pt#a2. At present, April 19, 2023, those same statistics declare 52,121 deaths have occurred in Canada, from COVID-19. To place these figures in context, total deaths from COVID-19 have easily exceeded Canadian fatalities attributed to World War II (estimated at between 42,042 and 44,090). The difference in the war death figures depend on if you accept the figures provided by the Government of Canada, military heritage: <https://www.bac-lac.gc.ca/eng/discover/military-heritage/second-world-war/second-world-war-dead-1939-1947/Pages/files-second-war-dead.aspx> or the Canadian War Museum, which is managed by a Crown Corporation, https://www.warmuseum.ca/cwm/exhibitions/newspapers/canadawar/casualties_e.html.

[19] Dr. Brooks confirmed that air travel increased the rate at which the virus spread across the nation and the world. The virus was also introduced to some sparsely populated areas through infected travelers. It especially threatened areas where medical infrastructure was weaker or less able to cope with hospitalization requirements for severe illness.

[20] Even if Dr. Brooks had not testified to these dangers, I would find it proper to take judicial notice of the existence of the virus and the obvious health risks it poses for the population. These two facts are so notorious that they are beyond reasonable dispute.

[21] Courts across the country have come to this same conclusion in too many cases to recount here. However, I am grateful for the excellent summary describing the existence of COVID-19 and the analysis of the concept of judicial notice, provided in *Lucien Khodair v Attorney General of Canada*, 2022 FC 44.

[22] In summary, I accept that there was a serious public health crisis, unprecedented in modern times, that served as a backdrop to the events of July 21, 2021. Health and transportation policy was necessarily adjusted to meet the demands of this crisis. Interim civil aviation orders were enacted to cope with the pandemic and the serious threats it posed to air travelers, and the

public in general. Order number 34 included masking requirements. This was part of a multi-layered approach. Masking was a key measure to ensure the safety of passengers and crew aboard civil aircraft within Canada. With these conditions in mind, failing to comply with an instruction to wear a mask would normally constitute an offence under the *Aeronautics Act*.

[23] Based on the expert evidence before me, and the well-established health dangers of the COVID-19 virus, I acknowledge that the Crown has demonstrated that the accused jeopardized the safety of his fellow travelers, as well as the crew members on board the aircraft. By refusing to obey the command to re-apply his mask, he did not comply with a crew member's instruction. I accept that this was an instruction regarding the safety of those on board the aircraft.

Evidence of Mr. Sailer's Refusal to Reapply His Mask

[24] Many of the facts about the accused's mask removal are not in dispute. It was common ground that the accused boarded the aircraft properly wearing a mask. He kept the mask on for a significant portion of the flight. Eva Gomes and Sylvia Schaefer were part of the air crew aboard the Air Canada Toronto to Calgary flight which Mr. Sailer was on. They are experienced service directors, having performed those duties for 22 and 30 years respectively. Besides Mr. Sailer, there were 174 other passengers on the 3 ½ hour flight.

[25] Ms. Gomes recalled being approached by other passengers because the accused had removed his mask. She said they informed her that they felt unsafe sitting next to him. Ms. Gomes had no specific memory of when, in the progress of the flight, this occurred. She approached Mr. Sailer and asked him to reapply his mask. Initially, he ignored her and refused to comply with her request. When she touched his shoulder to get his attention he said "*don't touch me.*" Ms. Gomes did not recall another incident which played a prominent part of Mr. Sailer's account of the flight. I am referring to the medical emergency for a passenger sitting directly behind him. I will speak more about this later.

[26] Ms. Schaefer provided greater detail of these events. Where Ms. Gomes and Ms. Schaefer differ in their evidence, I prefer the evidence of Ms. Schaefer.

[27] Ms. Schaefer agreed that she was informed by Ms. Gomes that the accused had removed his mask and was refusing to reapply it. She estimated this occurred near the end of the flight, about 40 minutes before landing in Calgary. Like Ms. Gomes, Ms. Schaefer approached Mr. Sailer and tapped him on the shoulder to get his attention. She also reported the accused saying "*Do not touch me*". When she asked him to reapply his mask, he said something like "*.... No, I'm not wearing it.*"

[28] Ms. Schaefer *did* recall the medical incident in the row behind the accused. She confirmed that a male passenger had an epileptic seizure. She said the man lost consciousness. Ms. Schaefer said the passenger was provided first aid, by members of the flight crew. She also said that a medical doctor aboard the flight helped them care for the passenger. Ms. Schaefer estimated this happened near the beginning of the flight, within the first 30 minutes after the take-off. She agreed that the incident was a reasonably significant medical emergency.

[29] The accused also gave evidence about the emergency and how it affected him. Ms. Schaefer and Ms. Gomes were recalled later in these proceedings to specifically address the accused's evidence on that point. Ms. Schaefer once again agreed the medical emergency in the

row behind Mr. Sailer occurred. She testified that she and Ms. Gomes assisted that passenger. Ms. Gomes did not recall that medical situation at all.

[30] Mr. Sailer agreed that he boarded the flight wearing a mask. He agreed that he took his mask off "... *a few hours into the flight*" (Transcript October 17, 2022, at p. 77). Mr. Sailer testified that he suffers from asthma and anxiety. Like Ms. Schaefer, he testified that there was a serious medical emergency in the seat directly behind him. He described a man having a seizure and recalled that the passenger's eyes rolled back into his head. Mr. Sailer described the incident as greatly increasing his anxiety. In particular he testified that numerous flight attendants crowded around his seat to attempt to aid the distressed passenger experiencing the seizure. One or more of the crew leaned on his seat while this happened. Mr. Sailer said he soon began struggling to breathe. He later removed his mask to help himself recover. He also asked the flight attendants not to lean on his seat as they helped the other passenger.

[31] Mr. Sailer testified that he was approached to reapply his mask. He said that he told one of the flight attendants he was having trouble breathing. However, he said that she dismissed his concern and insisted he put his mask on. Mr. Sailer did not know which crew member he said this to. After that he said he simply focused on staying calm and tried to get his breathing under control. He agreed that he may have appeared to be ignoring subsequent flight attendant requests to reapply his mask because of this.

[32] Mr. Sailer introduced into evidence a prescription for Cipralex for the control of his anxiety and a prescription for Ventolin HFA inhaler for control of his asthma (exhibit 5 collectively). Medical records indicated that he had sought treatment for both conditions (exhibit 2). He agreed that he had no medications with him on the plane. Those medications, including his inhaler, were in his checked luggage. He also conceded that he saw several medical doctors before these events to obtain a medical exemption from mask wearing due to his asthma but was unsuccessful. Dr. Brooks confirmed in cross examination, that Mr. Sailer's prescriptions were to treat the medical conditions that Mr. Sailer described.

[33] In cross-examination Mr. Sailer said his breathing difficulties reduced after he removed his mask (transcript October 17, 2022, at p 83). He conceded that he did not ask for medical assistance. He testified that he did not know that an asthma inhaler could be produced for him. He confirmed that he heard instructions from at least one crew member to reapply his mask.

[34] To summarize his evidence, Mr. Sailer's thought process when he took his mask off was that he was in a desperate situation. He testified that the "high stress situation" of the medical emergency in the seat directly behind him had a significant effect on him. He began to have difficulty breathing almost immediately. He then experienced progressively worsening shortness of breath. He eventually felt as though he could not get enough air in to sustain himself. He felt as though his life was in imminent danger. He testified that he had previously experienced similar breathing difficulty in other settings and only found immediate relief by removing his mask (transcript October 17, 2022, at pp 77-83).

[35] One further fact was conceded by the Crown in their argument. I feel obliged to include it in this portion of my decision. It was unclear from Mr. Sailer's evidence how many crew members assisted the passenger behind him and which of the flight attendants he initially interacted with when he said he was having trouble breathing. Ms. Tedesco -White, on behalf of the Crown, conceded the possibility that other flight attendants may have interacted with Mr.

Sailer, in addition to Ms. Gomes and Ms. Schaefer. The Crown conceded that no other crew members were called to give evidence by the Crown (transcript, February 1, 2023 at p 35).

Legal Framework

[36] Mr. Sailer is facing prosecution for a federal regulatory offence. The regulation is meant to protect public welfare and preserve the safety of those passengers and crew aboard an aircraft. These types of offences fall into a special category of misdeeds referred to as “strict liability offences.” This category of offences was introduced in the landmark Supreme Court of Canada decision *R v City of Sault Ste. Marie*, (1978) 40 CCC 2nd 353. Unlike criminal offences, there is no requirement for the Crown to prove the existence of *mens rea* in the commission of strict liability offences. Instead, once the Crown has proven the *actus reus*, the onus shifts to the alleged offender to avoid liability by proving that he took all reasonable care or due diligence in all the circumstances. The accused must discharge this onus on a balance of probabilities (*R v City of Sault Ste Marie*, supra, *R v Defaria*, ONCJ 687, *R v Ariganello*, 2013 ONCJ 13).

[37] Based on my previous findings, I conclude that the Crown has established the *actus reus*. Mr. Sailer was a passenger aboard an aircraft. A crew member of the aircraft gave him an instruction respecting the safety of other persons on board the aircraft. He did not comply with that instruction. The burden then shifts to Mr. Sailer to establish a defence of due diligence.

[38] Has Mr. Sailer established that he took all reasonable care to avoid the prohibited conduct, on a balance of probabilities? What factors should be considered in assessing “reasonable care?” Finally, does the common law defence of “necessity” or its refined cousin “medical necessity” apply? What requirements are required to advance these common law defences? Refinements to the legal tests announced in *R v City of Sault Ste Marie* have developed in the decades since that decision was released. These have given substance to the factors to be considered in assessing whether reasonable care has been established. Reasonable care is determined by considering various factors.

[39] As observed in *R v Syncrude Canada Ltd*, 2010 ABPC 229 ...“The defence applies in many different situations and so there can be no single comprehensive list of appropriate considerations for all cases” (*R v Syncrude Canada Ltd* supra at para 100). An excellent discussion of the reasonable care concept is delivered in *R v Gonder*, 62 CCC(2d) 326 (YTTC). In *Gonder*, a mine operator was charged with a land use infringement on a public wilderness road. The complaint was that the miner’s heavy equipment train (“cat”), that was using the roadway, had destroyed wildlife traps placed near or on the road. The traps were the property of trappers legally entitled to operate on the same public roadway that the mine utilized.

[40] The Court found that the “...reasonableness of the care is inextricably related to the special circumstances of each case” (*R v Gonder*, supra at para 19). In other words, a variable standard is necessary to adjust the requirements of care to the needs of multiple factual settings. The Court concluded that the degree of care required is governed by the following circumstances:

- i. The gravity of potential harm. The greater the potential for substantial injury the greater the degree of care required.
- ii. Alternatives available to the accused. “Reasonableness” of care is best measured by comparing what was done against what reasonably could have been done.

Reasonableness of the alternatives the accused knew, or ought to have known were available is a primary measure of due diligence. An accused must establish on a balance of probabilities that there were no reasonable alternatives that might have avoided the harm or injury to others.

- iii. Likelihood of harm.
- iv. The degree of knowledge or skill expected of the accused.
- v. The extent that underlying causes of the offence are beyond the control of the accused.

[41] An accused is not required to show that they took all possible or imaginable steps to avoid the prohibited conduct. Nor is an accused required to achieve a standard of perfection or demonstrate that superhuman efforts were made to avoid the prohibited act. The conduct of an accused must be assessed against that of a reasonable person in similar circumstances (*R v Syncrude Canada Ltd* supra at para 99).

[42] Mr. Sailer also bases his defence on the concept of “*necessity*”, or “*medical necessity*.” The defence of necessity is a recognized excuse for committing prohibited acts. It originates from common law. However, it is also officially recognized in s 8(3) of the *Criminal Code*, RSC 1985 c. C-46 (*the Code*), as applying to offences under that Act or “... *Any other Act of Parliament*.”

[43] The defence applies only to circumstances of imminent risk, where the prohibited act is done to avoid a direct and immediate peril (*R v Perka*, [1984] 2 SCR 232). Necessity is a rarely applied legal defence. The courts have held it must be “...*strictly controlled and scrupulously limited to situations that correspond to its underlying rationale* (*R v Perka*, supra at p 250).

[44] There are three essential elements that must be present for the defence of necessity to apply:

- i. There must be imminent peril or danger.
- ii. The accused must have had no reasonable legal alternative to the course of action undertaken.
- iii. There must be proportionality between the harm inflicted and the harm avoided. In other words, the damage caused by performing the prohibited act must not be disproportionate to the harm the accused sought to avoid. (*R v Perka*, supra, *R v Latimer*, 2001 SCC 1)

[45] The first two requirements are to be assessed using a modified objective test. This includes evaluation of what the accused thought or believed at the time of his actions, and the situation, and characteristics applicable to that individual. It must also review whether those beliefs were objectively reasonable for someone in that situation (*R v Latimer*, supra, at para 32-33). The third requirement is judged on an objective test (*R v Latimer*, supra at para 34).

Analysis

[46] Mr. Sailer’s interactions with the flight crew were far from perfect. That said, I am satisfied he has demonstrated that he took all reasonable care, or exercised due diligence, on a

balance of probabilities. I would also find he has demonstrated medical necessity for committing the prohibited conduct.

1. General Findings Regarding Reasonable Care

[47] I begin by accepting the accused's uncontested evidence that he suffered from two pre-existing conditions, asthma and anxiety. Both were supported by medical documents introduced by the accused. Neither condition was in dispute. I also accept that these conditions were severe enough to warrant medication to alleviate them and that they affected him adversely during the flight.

[48] I also accept that Mr. Sailer encountered a situation which greatly aggravated these conditions, the serious medical emergency of another passenger, in the row directly behind him. This encounter was sudden and unexpected. Because of Mr. Sailer's medical condition, he experienced a more serious reaction to that medical emergency than his fellow passengers or the crew members. The reaction was serious enough to inhibit Mr. Sailer's respiration, to the point where he struggled to intake enough oxygen to settle himself.

[49] I accept that Mr. Sailer has proven, on a balance of probabilities, that he communicated his struggles to a crew member. I find that the crew member he spoke to was neither Ms. Gomes nor Ms. Schaefer. Nevertheless, this crew member's reply communicated to Mr. Sailer that his medical situation, and his struggles with oxygen intake, were not sufficient excuses to remove his mask. Mr. Sailer internalized this response, and he unfortunately came to the conclusion that no further petition to the crew would be of assistance to him. When different crew members also implored him to re-mask (Ms. Gomes and Ms. Schaefer for example), he declined to explain himself further due to his previous crew member encounter. He also did not ask for any assistance, medical or otherwise, assuming it would be pointless to do so. As he had testified, I find that he focused on his breathing to the exclusion of all else. I find that he did this to recover his composure, his faculties and most importantly, his oxygen intake. He was simultaneously attempting to prevent his situation from getting worse.

[50] Mr. Sailer's special circumstances, and the unexpected medical emergency, serve as the factual setting for consideration of the *Gonder* factors. They also affect the modified objective test used to evaluate a defence of necessity for committing the prohibited act.

i. Gravity of the Potential Harm

[51] The gravity of the potential harm was significant. While there was no evidence that the accused was infected with the virus, I accept Dr. Brook's expert opinion evidence that asymptomatic individuals can transmit the disease. Moreover, the safety regulations would be meaningless if proof of infection were required to issue an instruction to mask. Balanced against these considerations is the fact that only "source control" for infected respiratory droplets was put at risk when Mr. Sailer removed his mask. He did not attempt to remove the masks of other persons, only his own. Other passengers and crew were still afforded a measure of protection through their own mask wearing, which the accused did not interfere with. This was despite Mr. Sailer committing the prohibited act. As Dr. Brooks observed, masking might have been a key ingredient, but was only one of a multi-layered suite of protections employed by the Transport Canada.

[52] I also find that Mr. Sailer only removed his mask when the situation became unbearable for him, with about 40 minutes left to go in the flight. I also accept the evidence of Ms. Schaefer that the seizure emergency occurred, at the latest, 30 minutes after takeoff. I therefore conclude that Mr. Sailer endured the building anxiety and breathing difficulties for a considerable time before finally removing his mask. This is not an insignificant factor in the analysis.

ii. Alternatives Available to the Accused

[53] The alternatives available to the accused were few. Further, Mr. Sailer's ability to understand or employ them were very likely compromised by his building anxiety. It goes without saying that breathing is an essential part of human existence. I accept that Mr. Sailer was having great difficulty with this critical task. His inhaler and anxiety medication were not available to him, due to his poor decision to place them in his checked luggage. He must accept some responsibility for this. That said, it is unreasonable to have expected such a serious emergency so close to his seat.

[54] Mr. Sailer's first encounter with a crew member led him to erroneously conclude that he could not himself receive medical assistance or do anything other than remove his mask to improve his situation. I am sure the crew would have helped him had they understood the situation. After all, they did provide medical attention to the seizure passenger. This misunderstanding was partially caused by Mr. Sailer not explaining himself very well. Having said that, perhaps Mr. Sailer was not in a position to understand or properly contextualize this situation. Perhaps his earlier interaction with the unknown crew member, combined with his building anxiety, had reduced his abilities to cope. I accept that he felt his primary concern was to focus on his breathing, as he testified, to the exclusion of all else.

iii. Likelihood of Harm

[55] I agree that the prohibited action of Mr. Sailer generated a possibility of harm to his fellow passengers and the crew. Yet it was only the removal of one layer of protection in the multi-layered approach referred to by Dr. Brooks. Many other layers were still in place. These included the pre-flight screening procedures, vaccination requirements for travellers, the capable air filtration system, and the remaining masks on all others aboard the aircraft. I find that the total harm, or possibility of harm, was reduced by these other measures. These facts places the degree of harm caused by the actions of the accused into proper context.

iv. Degree of Knowledge or Skill Expected of the Accused

[56] I find that the degree of skill expected of Mr. Sailer is not a significant component in the overall equation. Mr. Sailer was a member of the travelling public. He had no special skillset to cope with these circumstances. I find that his abilities had been further reduced by his personal medical circumstances and the unexpected situation regarding the other passenger. This factor does not weigh heavily against him.

v. Extent to Which the Underlying Causes of the Offence are Beyond the Control of the Accused

[57] Finally, I find the underlying causes of the offence were only partially in the accused's control. As I observed earlier, Mr. Sailer must bear responsibility for not having his medication at the ready. However, this must be balanced against the unexpected encounter with the medical emergency, and its effect on him, surely a rare event. Mr. Sailer is most responsible for misapprehending the help available to him and for refusing to engage with crew members more meaningfully. I am sure this made him appear rude and uncaring. However, he does not bear this responsibility on his own. I find the situation degraded rapidly as a result of joint failures of communication. These were partially caused by his own reluctance, or inability, to explain himself. However, they were also contributed to by the failure of at least one crew member, probably more, to explore the reasons he removed his mask. This included a failure to question him about his medical situation or engage with him more meaningfully. In the end, the flight crew only communicated the command to re-mask. I find this factor weighs in favor of Mr. Sailer's position.

[58] In summary, I find Mr. Sailer has established, on a balance of probabilities, that he took all reasonable care to avoid the prohibited action. He has established due diligence for attempting to comply with the safety regulations, within the special circumstances that he encountered on that day. To be clear, this constellation of factors should be considered rare.

2. Defence of Necessity

i. Imminent Peril or Danger

[59] I come to the same conclusion regarding his defence of *necessity*. I do not find it necessary to repeat all of my previous reasons in the consideration of this additional defence. However, my earlier analysis applies and is based on the same considerations. I accept that the accused was in imminent peril or danger on a modified objective test. There is ample evidence that he could not control his breathing, an essential bodily function. That concern was objectively reasonable given the unusual circumstances he found himself in. He understandably resorted to the only measure which had provided him immediate relief in the past. Even if I conclude that Mr. Sailer would have ultimately survived the experience, even wearing his mask, that was not at all obvious to him. In any event, he should not be required to suffer a serious respiration issue, or lose consciousness in the process, to prove the point. No reasonable person would require this.

ii. Reasonable Legal Alternatives

[60] The legal alternatives to the accused have been previously discussed. His appreciation of his options was subjectively reduced and warped by his predicament. He did not have his medication. His perception of the "official" aid available to him was similarly distorted by the first crew member he interacted with. He subjectively understood that no further pleas for assistance would be of use in his situation. While this may not have been ultimately accurate it was an understandable assumption based on all the preceding events. The misunderstanding which created the incorrect assumption did not lie exclusively at the feet of Mr. Sailer.

iii. Proportionality Between Harm Inflicted and Harm Avoided

[61] An accused is not required to be placed in a situation of the last resort imaginable before they act (*R v Latimer*, supra at para 30). A realistic person, placed in the situation of Mr. Sailer, would have understood the need for him to remove his mask and breathe.

[62] Finally, Mr. Sailer's actions were objectively proportionate measures to take, in order to avoid the serious harm he was himself experiencing. In the end he removed only his own mask. By stopping at this action, he left all other disease prevention measures in place. His actions were proportionate to the situation. It is unlikely that removing his mask, for a comparatively brief period of time, would have endangered those around him more than the extreme discomfort he was experiencing when he did so.

Conclusion

[63] For the preceding reasons Mr. Sailer is acquitted of the offence of failing to comply with the instructions of a crew member while on board an aircraft. I wish to emphasize that the constellation of facts that brought Mr. Sailer before the Court were rare and unusual. His conduct, while not ideal, has been assessed in that light.

Dated at the City of Calgary, Alberta this 19th day of April 2023.

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a series of loops and a long horizontal stroke extending to the right.

L.W. Robertson
A Justice of the Alberta Court of Justice

Appearances:

O. Tedesco-White
for the Crown

S. Mihalcheon
for the Accused