



THE CORONAVIRUS (COVID-19) PANDEMIC

- The Liability of Air Carriers

INTRODUCTION

The Coronavirus Disease 2019 (COVID-19) formally declared as a pandemic on March 11, 2020 by the World Health Organisation (“WHO”), has caused unprecedented disruption to economic and social activities globally.

Air Carriers in particular as potential vectors of the disease between and within countries, have been badly hit by the almost complete and indefinite suspension of commercial flights, on account of a disease that currently has no cure. Consequently, several countries have closed their land borders, airports, ordered citizens to stay at home and observe social distancing as much as possible during this pandemic.

Beyond the obvious financial impact, putting the survival of many airlines at risk, there may be issues of potential liability for unwittingly transporting the virus from one country to another through infected passengers.

In this article, we intend to address the following questions: what are the duties of Air Carriers regarding the health and safety of their passengers? What recourse do passengers have against an airline for denying boarding, or in respect of flight cancellations or suspensions for public safety considerations? Most importantly, can a passenger successfully sue an airline claiming that they had contracted COVID- 19 from being exposed to an infected passenger on board the aircraft? How much responsibility does the law attribute to such a passenger?

LEGAL REGIME

Air Carrier's liability in the course of air transportation is an extensive and continually evolving subject.

Liability often arises as a result of bodily injury or death sustained on board an aircraft in an accident. Liability can also arise in a variety of other circumstances.

Nigeria is signatory to certain International Conventions including the Convention for the Unification of Certain Rules Relating to

International Transportation by Air (Warsaw Convention) 1929 (as modified) and the Montreal Convention 1999 which was incorporated into Nigerian law through section 48(1) of the Civil Aviation Act, 2006. This established a two-tier unlimited liability system for damage sustained in case of death or bodily injury of passengers; and other specified damage. It thus became the basis for establishment of Air Carriers' liability for international carriage from, or to Nigeria specifically making the Carrier

"... liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." See, Article 17(1) of the Montreal Convention.

This provision also introduced a requirement that the death or bodily injury must have arisen from the occurrence of an "accident"; and that the accident must have occurred on board the aircraft or during the course of embarkation or disembarkation.

SAFETY STANDARDS AND MINIMUM HEALTH REQUIREMENTS

Before considering the legal issues concerning the spread of COVID-19 through air carriers it might be helpful to briefly review the minimum safety and health standards and requirements for airlines.

The International Civil Aviation Organisation ("ICAO") works closely with WHO and other international health and aviation bodies to assist in containing the spread of communicable disease in aviation. The ICAO has developed Standards and Recommended Practices ("SARPs") to ensure a coordinated response.

The aviation sector's primary role is to minimize travel of individuals who have contracted a communicable disease outside the area of an outbreak through travelers' screening procedures. These are performed at airports and through the presentation of health certificates or the famous "yellow card" indicating vaccinations against certain communicable diseases where mandated.



Air Carriers in conjunction with the health and aviation authorities in Contracting States implement the guidelines issued by the ICAO. The 1944 Convention on International Civil Aviation (the Chicago Convention), recognizes plague and other communicable diseases such as cholera, typhus (epidemic), smallpox, yellow fever, etc, stipulating that ratifying States must specifically take steps to prevent it from spreading by means of air navigation. This Convention makes it mandatory for Air Carriers to comply with the pertinent provisions of the International Health Regulations (2005) of the World Health Organization.

Specifically, Article 8.15.1 of the SARPs stipulates that *“when a public health threat has been Identified, and when the public health authorities of a Contracting State require information concerning passengers’ and/or crews’ travel itineraries or contact information for the purposes of tracing persons who may have been exposed to a communicable disease, that **Contracting State should accept the ‘Public Health Passenger Locator Form’ reproduced in Appendix 13 as the sole document for this purpose.**”*

Contracting States including Nigeria therefore have the primary responsibility to set up regulations for the prevention of the spread of infectious diseases by air navigation.

The airlines’ legal duty thus appears to be limited to collaborating with Contracting States to determine whether any passenger’s condition poses a direct threat to public safety relying on directives issued by public health authorities (e.g. Nigerian Centre for Disease Control or Public Health Service; and the equivalent agencies in other countries; and the WHO, in cases of a global pandemic such as COVID-19). In making this assessment, the airline must consider whether the disease can be readily transmitted by casual contact in an aircraft cabin environment.

Locating or tracing of passengers after flights to enable airlines to ascertain those likely exposed to risk is complicated as passengers on disembarkation would have dispersed widely. In the projected two to fourteen days’ incubation period before the COVID-19 may fully manifest, the airline may not have sufficient or even correct data of passengers to give to airline medical staff and health authorities.

Consequently, the Nigerian Civil Aviation Authority early in March 2020 (prior to the travel restrictions), accordingly ordered all airlines operating International and Regional flights into Nigeria to issue Health Declaration Forms (passengers self-reporting forms) to their passengers including crew members before arriving Nigerian airports. These are to be submitted to and evaluated by the personnel of Port Health Services. The Airlines were requested to elicit from passengers their addresses and phone numbers and other personal details to enhance contact tracing in case a need arises.

On arrival, strict adherence to the passenger tracing protocols become especially important when an immediate medical examination may be both impracticable and futile because the disease may not manifest at that early stage. If they ignore passengers that look unwell or ignore passengers who report other passengers who look unwell, they may be exposed to penalties or passenger claims.

Thus a failure to follow prescribed regulatory protocols to screen passengers when boarding would predispose an airline to liability for an “accident” on board, if proved to have occurred.

FLIGHT CANCELLATION LIABILITY FOR REFUSAL OF EMBARKATION

These international regulations also give airlines the right to deny embarkation of any passenger in the interest of public health and safety on reasonable grounds such as prima facie evidence of symptoms of an infectious disease, during passenger screening. Airlines may also delay flights due to the imperatives of flight operations covered by the general exclusion of liability clauses stipulated as part of the contract of carriage. Compliance with lawful orders of National governments to suspend flights indefinitely or border closures which impact flights would also certainly exclude Air Carrier liability.

SPREAD OF COVID-19 BY AIR CARRIERS

It would also be extremely difficult for a passenger to prove that they contracted the COVID-19 on board the aircraft or while embarking or disembarking. The burden of proving that he did not contract the disease at any other place before or after the flight in question, would be on the passenger. Furthermore, as it relates to asymptomatic passengers, it would be even more difficult for the airlines to even assess the risk. This is why where the Air Carriers have taken all reasonable measures by complying with all the prescribed health procedures/protocols and a passenger is infected by a fellow passenger who has COVID-19 but is asymptomatic, the passenger would not be able to sustain a claim that the Air Carrier is liable for the transmission of COVID-19 to him.

The United States Supreme Court in **Air France v Saks** 105 S. ct 1338,470 U.S. 392, 84 L. Ed. 2d 289 (1985) held that the term "accident" in Article 17 of the Warsaw Convention (or Article 17(1) of the Montreal Convention) is "an unexpected or unusual event or happening that is external to the passenger". According to the court, its intent in framing the definition of "accident" was to encompass the cause of an injury, rather than solely the injury or occurrence by itself.

The key issue is the ability of a passenger to demonstrate that the bodily injury, which for this purpose includes the transmission of an infectious disease, occurred during the flight or during embarkation or disembarkation and that this constitutes an "accident".

This further highlights the difficulty of proof in the requirement of a passenger to sufficiently clearly isolate the transmission of an infectious disease during a flight or during embarkation or disembarkation as would constitute an accident for which the airline could incur liability in a claim for damages by a passenger or his or her Estate or next of kin in the event of the death of the passenger.

Circumstantial evidence may of course be relied on where for example it is established that all or several passengers in a cluster around a particular passenger with apparent symptoms who is subsequently found to have been infected, also contracted the disease. Even in this situation liability could be subject to the legal principles pertaining to the voluntary assumption of risk, discussed later in this article.

In Nigeria, the question of what constitutes 'accident', 'bodily injury', 'in the course of any flight or of the operations of embarking or disembarking' have not been specifically considered in the cases where Air Carrier liability for death or passenger injury have arisen. In **Harka Air Services (Nigeria) Ltd v Emeka Keazor Esq** (2011) 13 NWLR (Pt 1264) 320 at 364, the plaintiff suffered bodily injury on a domestic flight as a result of the crash-landing of the aircraft. The Supreme Court defined 'accident' as 'an occurrence associated with the operation of an aircraft which takes place between the time any person boards an aircraft with the intention of flight until such time as all such persons have disembarked in which a person suffers a fatal or serious injury as a result of being in the aircraft'.

The question of what will constitute ‘an occurrence or what the words ‘associated with the operation of an aircraft’, mean was not explained. They would however seem to exclude bodily injury that is not associated with the ‘operation’ of the aircraft and would suggest the exclusion of a disease. This may yet arise for consideration, as cases directly dealing with the issue of contracting an infectious disease on board an aircraft as an aviation accident, are decided by the courts.

Meanwhile in specific response to the claim of lack of a direct causal link of Article 17 of the Montreal Convention to communicable diseases, it was held in the US case of **Dias v Transbrasil Air** 26 Avi. 16,048 (S.D.N.Y. 1998), that a passenger who died from pneumonia she had contracted, was as a result of the poor quality of the aircraft cabin air during a flight from Brazil to New York City, causing the passenger to develop a fatal respiratory disease, fell within the requirements of Article 17 of the Montreal Convention.

A British Law Lord echoed this view in the consolidated decision of **King v Bristow Helicopters & Morris v KLM** [2002] 2 AC 628, where he stated that ‘bodily injury’ which may be compensable includes the *“physical infliction of physical injury during the flight even though not already manifested at the conclusion of the flight, for example a disease or illness contracted upon the aircraft through the contamination of the aircraft’s air supply”*. With particularity, he however further opined that *“contracting an illness may amount to an injury depending upon the degree in which it departs from the normal. Thus, if a passenger caught a mild cold, this may not be deemed to be an injury; however, a passenger that caught a serious disease such as hepatitis, as the result of the deliberate or negligent act of another, may have suffered an injury.”*

It must also be noted that where a passenger is able to prove that they contracted COVID-19 on an aircraft which would constitute an “accident” under the Montreal Convention, the passenger may in certain circumstances not be able to recover any amount in excess of the exclusion of liability limits often highlighted in the contract of carriage and terms contained on the air ticket.

With respect to passenger’s injury and death, the Montreal Convention imposes liability without proof of fault up to 100,000 Special Drawing Rights (approximately US\$136,200), and presumptive liability in an unlimited amount unless the Air Carrier can prove that the damage was not due to negligence or wrongful act or omission on its parts or that of its servants or agents, or that the damage was solely due to the negligence of a third party.

It therefore remains to be seen whether airlines will be exposed to claims from passengers who may have contracted COVID-19 aboard flights and how the issue as to whether such an occurrence constitutes an “accident” in line with the provisions of the Montreal Convention and Nigerian case law will be decided by Nigerian courts.

VOLUNTARY ASSUMPTION OF RISK

Article 20 of the Montreal Convention however provides a defence, where the Air Carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation. In such a case, the Air Carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

Thus even where a passenger is able to isolate the ‘accident’ as occurring while embarking, disembarking or during the flight, it would also be necessary to demonstrate that the risk was unforeseeable. This may be particularly difficult where there is widespread media coverage of the disease, mode of its transmission, steps taken by governments and organizations

such as the WHO to raise awareness of the disease, the risk of transmission/reduction of such risk and steps taken to identify infected individuals. In such circumstances, passengers would certainly be deemed to be aware of the risk and are expected to take their own precautions.

The defence of *volenti non fit injuria*, is based on the concept that no wrong can be done to one who consents. Consequently, where a passenger is deemed to have agreed to assume all the inherent risks involved with flying aboard an aircraft during a pandemic, the Air Carrier may nonetheless be absolved of the responsibility for injuries arising from flying an aircraft.

Given that this defence is a complete bar to recovery of damages, the courts have limited its scope and for it to apply, a plaintiff must show that he has assumed both the physical and legal risk involved in an activity. In that regard, the fact that the plaintiff had knowledge of the risk of injury is not enough, nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. According to the court in *Nettleship v Weston* [1971] 3 WLR 370, the airline must show that the plaintiff expressly or impliedly agreed to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant; or more accurately, due to the failure of the defendant (in this case, the airline) to measure up to standard of care required by law.

This defence was successfully applied in *Morris v Murray* [1990] 3 All ER 801, where the court dismissed the plaintiff's claim for damages following a plane crash in which he was seriously injured when evidence showed that the plaintiff and the defendant pilot of the aircraft had been drinking together prior to their taking a flight in the defendant's light aircraft. The English Court of Appeal held that by accepting a ride in the aircraft from his intoxicated friend, the plaintiff had voluntarily assumed the risks and waived his right to damages.

In a similar vein, where a passenger decides not to heed the advice against traveling and by so doing, contracts the COVID-19 on board an aircraft either before or during embarking or disembarking the aircraft, the express or implied agreement by the passenger to assume both the physical and legal risk may absolve the airline from all future liability claims that may be made by the passenger.

CONCLUSION

Airlines are unlikely to incur legal liability to passengers claiming to have contracted the COVID-19 aboard their aircraft or while embarking or disembarking the aircraft, notwithstanding that the affected passenger is able to show by credible evidence that he/she contracted the disease aboard their aircraft or while embarking or disembarking the aircraft. The Air Carrier would avoid liability if it complied with prescribed SARPs and minimum health/safety guidelines for carrying out pre-flight screening checks of all passengers, in-flight observatory checks and isolatory obligations, as well as compliance with post-flight documentation to enable tracing of passengers as set out by the relevant Conventions Laws and regulations.

The Air Carrier may also be absolved of all liability on the basis that a passenger, who contracted the COVID-19 on board the aircraft, voluntarily assumed the physical and legal risks, whether expressly or impliedly, in boarding a flight during the well-publicized risks of the pandemic.

Air Carriers and passengers are however advised to seek proper legal advice in relation to the matters discussed in this article. It would also be interesting to know the decisions of our courts when they are faced with COVID-19 related matters arising from the operations of air carriers.

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