

Aviation Liability 2021

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Aviation Liability

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Contributing editor**Andrew J Harakas**

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Aviation Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew J Harakas of Clyde & Co US LLP, for his continued assistance with this volume.



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APPLICABLE TREATIES

Major air law treaties

1 | To which major air law treaties related to carrier liability for passenger injury or death is your state a party?

The Warsaw Convention 1929 was extended to Nigeria by the British colonial government via an order known as the Carriage by Air (Colonies, Protectorates and Other Trust Territories) Order 1953. This Order was repealed by section 77(1)(a) of the Civil Aviation Act 2006 (CAA 2006). Prior to its repeal, the applicability of the Warsaw Convention as the basis for determining air carrier liability was upheld in a plethora of Nigerian cases. The Warsaw Convention has, however, ceased to apply in Nigeria.

In post-colonial Nigeria, international treaties are not directly effective in Nigeria when they are signed or acceded to. The Nigerian constitution requires the treaty to be incorporated into local law to make it effective.

Nigeria ratified or acceded to the Hague Protocol (1955) and the Guadalajara Convention. However, these treaties were not domesticated or incorporated into Nigerian law in compliance with Nigerian constitutional requirements and are therefore not effective in Nigeria.

Nigeria did not ratify or accede to the Montreal Protocols Nos. 1–4, the Guatemala City Protocol (1971) and the Rome Convention (1952).

Nigeria ratified the Montreal Convention (1999) and section 48(1) of the CAA 2006 incorporated the Montreal Convention into Nigerian law in compliance with Nigeria constitutional requirement. The Montreal Convention is, therefore, effective in Nigeria.

INTERNATIONAL CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

Montreal Convention and Warsaw Convention

2 | Do the courts in your state interpret the similar provisions of the Montreal Convention and the Warsaw Convention in the same way?

We are not aware of any decision of the superior courts of record in Nigeria (the State and Federal High Courts, the Court of Appeal and the Supreme Court) where the question of the liability for passenger injury or death under the Montreal Convention regarding international carriage have been decided. However, it is envisaged that when such questions arise in the future, the courts will likely follow the interpretation of similar provisions decided under the earlier Warsaw Convention because the Nigerian legal system recognises and applies the principle of judicial precedent.

3 | Do the courts in your state consider the Montreal Convention and Warsaw Convention to provide the sole or exclusive basis for air carrier liability for passenger injury or death?

Earlier cases decided under the Warsaw Convention did not provide a definite position on the exclusivity of the Warsaw Convention for liability arising for passenger injury or death as the question of exclusivity did not arise in those cases. In the decisions involving other convention claims (claims other than for passenger injury or death), the Supreme Court and the Courts of Appeal in Nigeria have held that the Warsaw Convention (which is the Convention upon which most of the cases are based) should provide the sole basis for air carrier liability. It is envisaged that claims for passenger injury or death that will be considered under the Montreal Convention will not depart from this position.

Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

Nigerian courts have not made a definitive consideration of who is a 'carrier' under the Montreal or Warsaw Conventions. It is important to note, however, that the first rule applied in Nigeria in interpreting statutes is the literal rule (ie, that words should be given their literal and ordinary meaning within the context of a statute). It is envisaged that the court will apply the literal rule where it has to make a determination of who is a 'carrier' under both Conventions.

Carrier liability condition

5 | How do the courts in your state interpret the conditions for air carrier liability – 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' – for passenger injury or death in article 17(1) of the Montreal Convention and article 17 of the Warsaw Convention?

The questions of what constitutes 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' have not each been specifically considered in the cases where carrier liability for damages for death or passenger injury have been adjudicated on. In the case of *Harka Air Services (Nig) Ltd v Keazor*, the plaintiff suffered bodily injury on a domestic flight as a result of the crash-landing of the aircraft. On further appeal to the Supreme Court, although the question of what acts constitute an 'accident' was not in issue, the apex court seized the opportunity and 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' was not considered and will therefore be determined as more cases dealing with the issue are decided by the courts.

The concept of what will be considered as 'serious injury' as it relates to the applicability of article 17 of the Montreal Convention is yet to be determined by Nigerian courts. Given that Nigeria has a common law background, the courts will look to see how other common law countries have decided the question and this will provide persuasive authority whenever the court is called upon to determine the question.

No negligence defence

6 | How do the courts in your state interpret and apply the 'no negligence' defence in article 21 of the Montreal Convention, and the 'all reasonable measures' defence in article 20 and the 'wilful misconduct' standard of article 25 of the Warsaw Convention?

The ambit of articles 21 and 20 of the Montreal Convention have not yet been tested in the Nigerian courts.

However, the court decisions where the question of 'wilful misconduct' has been considered suggest the application of a subjective standard in determining whether an act or omission will be considered as 'wilful misconduct'. In the case of *Harka Air Services (Nig) Ltd v Keazor*, the apex court upheld the findings of a Federal High Court and the Court of Appeal that the airline was guilty of wilful misconduct for taking off for flight during bad weather. The Supreme Court upheld the necessity for the existence of the mental element in allegations of wilful misconduct and opined that the court, in determining the question of wilful misconduct 'is not entitled to attribute to one pilot, the knowledge which another pilot has in assessing whether the first pilot is or is not guilty of wilful misconduct'.

Advance payment for injury or death

7 | Does your state require that advance payment be made to injured passengers or the family members of deceased passengers following an aircraft accident?

Yes, the Civil Aviation Act 2006 provides in section 48(3) that in the case of an aircraft accident resulting in death or injury of passengers a carrier should make advance payments of at least US\$30,000 to the natural person or such natural persons who are entitled to claim compensation in order to assist such people to meet immediate economic needs. Such advance payments do not constitute recognition of liability and may be set off against any sums subsequently paid as damages by the carrier.

Deciding jurisdiction

8 | How do the courts of your state interpret each of the jurisdictions set forth in article 33 of the Montreal Convention and article 28 of the Warsaw Convention?

Nigerian courts have not considered the question of jurisdiction for airline liability under article 33 of the Montreal Convention and article 28 of Warsaw Convention. However, in general litigation practice before the courts, the doctrine of forum non conveniens is recognised by the Nigerian courts and the courts will consider the circumstances of each particular case in recognising or refusing to recognise a particular jurisdiction.

Period of limitation

9 | How do the courts of your state interpret and apply the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention?

Case law on the two-year limitation period stipulated in article 29(1) of the Warsaw Convention has been applied strictly. In one of the cases decided in the Court of Appeal, the Court stated that 'the limitation

period laid down in article 29(1) cannot be suspended or interrupted, even by agreement of the parties'.

Liability of carriage

10 | How do the courts of your state address the liability of carriage performed by a person other than the contracting carrier under the Montreal and Warsaw Conventions?

The questions relating to liability for code-share and similar arrangements have not arisen in the Nigerian courts.

DOMESTIC CARRIAGE – LIABILITY FOR PASSENGER INJURY OR DEATH

Governing laws

11 | What laws in your state govern the liability of an air carrier for passenger injury or death occurring during domestic carriage?

Section 48(2) of the Civil Aviation Act 2006 provides that the Montreal Convention as modified and set out in the third schedule to the Act, as amended from time to time, will from the commencement of the Act have the force of law and apply to non-international carriage irrespective of the nationality of the aircraft performing the carriage. The modified Convention will, subject to the provisions of the Act, govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons.

Some of the terms modified in the text applicable to domestic carriage include:

- the monetary limit for injury and death is specifically indicated in the text of articles 21 and 22 in US dollars (\$100,000);
- stipulating a seven-year timeline for the review of the limits; and
- providing for advance payment of US\$30,000 for injury and death of passengers under article 28.

Nature of carrier liability

12 | What is the nature of, and what are the conditions for, an air carrier's liability?

An air carrier's liability under domestic carriage is as stipulated in the modified version of the Montreal Convention made applicable to domestic carriage. It is based on the 'strict liability' of the carrier and subject to the terms of the Montreal Convention regarding exoneration and limitation of limits of liability.

Liability limits

13 | Is there any limit of a carrier's liability for personal injury or death?

For death or injury of passengers, the monetary limit for which the carrier shall not be able to exclude or limit its liability is set at US\$100,000 – article 21 of the Montreal Convention as modified. It is envisaged that the courts will uphold this limit subject to the ability of a plaintiff to rebut the defences open to the carrier in article 21(2).

We are unaware of any liability limits for personal injury or death incorporated by notice or contractual agreement.

Main defences

14 | What are the main defences available to the air carrier?

The defences available to the air carrier are the defences set out in the Montreal Convention. With respect to personal injury or death, the two main defences available to the carrier are: the defence that the damage

was not due to the negligence or other wrongful act of the carrier or its servants or agents and the defence that the damage was solely due to the negligence or other wrongful act or omission of a third party.

Damages

15 | Is the air carrier's liability for damages joint and several?

The air carrier liability for passenger injury or death under the modified version of the Montreal Convention is as circumscribed in articles 17 and 21 and a plaintiff's claim against the air carrier for damages in this regard must come squarely under the Convention. The liability is not joint and several.

Rule for apportioning fault

16 | What rule do the courts in your state apply to apportioning fault when the injury or death was caused in whole or in part by the person claiming compensation or the person from whom the right is derived?

The question of contributory negligence for air carrier liability has not yet been considered before the Nigerian courts. However, under general law in Nigeria, the effect of a successful plea of contributory negligence is the apportionment of blame between the parties and consequently an apportionment of liability. We are not aware of any case in which the doctrine of comparative negligence has been considered and applied in Nigeria.

There are no statutory provisions that specifically set out principles for courts to adhere to in apportioning fault or the damages recoverable where there has been a successful plea of the defence of contributory negligence. Case law suggests that it is within the ambit of a court's discretionary powers, which must be exercised judicially and judiciously in line with the evidence led before the court. In a specific case for recovery of damages for injury caused to a motor cyclist by a vehicle, the trial court found that the accident was caused by the negligence of the motor cyclist but proceeded to apportion the damages between the plaintiff and the defendant. The Supreme Court overruled the decision and held that the defendant ought not to pay any damages given the finding that the plaintiff was solely liable.

There is a dearth of Nigerian case law on the application of the principle of contributory negligence to minors and persons with reduced mental capacity. In line with the practice of Nigerian courts to look to decisions of other common law jurisdictions as persuasive authority on undecided issues, these decisions will provide some direction as to how these questions will be decided. For children, a review of case law in England suggests that the age of the child is a key factor in any finding whether the child is or is not liable for contributory negligence. As suggested in *Fleming v Kerry County Council*, there must be some age up to which the child cannot be guilty of contributory negligence. In other words, there is some age up to which a child cannot be expected to take any precautions for his or her own safety. In cases where contributory negligence is alleged against a child, it is the duty of the trial judge to rule, in each particular case, whether the plaintiff, having regard to his or her age and mental development, may properly be expected to take some precautions for his or her own safety and consequently be capable of being guilty of contributory negligence. Having ruled in the affirmative, it becomes a question of fact for the jury, on the evidence, to determine whether he or she has fallen short of the standard that might reasonably be expected from him or her having regard to his or her age and development. In the case of an ordinary adult person, the standard is what should be expected from a reasonable person. In the case of a child, the standard is what may reasonably be expected, having regard to the age and mental development of the child and the other circumstances of the case.

Statute of limitations

17 | What is the time within which an action against an air carrier for injury or death must be filed?

An action against an air carrier for injury or death must be filed within the two-year limitation period stipulated in article 35 of the Montreal Convention. The cases determined under the Warsaw Convention in Nigeria recognised and upheld the time limit set in article 29 of the Warsaw Convention and it is envisaged that question on limitation arising under the Montreal Convention will follow the precedent laid down in these cases. The time limit is not subject to tolling.

In Nigeria, an action is deemed to have been instituted or commenced against a party on the date the originating process is filed in court. In this regard, for the purpose of determining whether the action was commenced within the time limit stipulated under any limitation law, the courts will usually look at the pleadings of the plaintiff to ascertain the date of the accrual of the cause of action as averred by the plaintiff and compare that with the date of the filing of the originating process. If the time between these two periods is more than the period limited for bringing the action before the courts, the suit is held to be statute barred and will be dismissed.

THIRD-PARTY ACTIONS

Seeking recovery

18 | What are the applicable procedures to seek recovery from another party for contribution or indemnity?

Order 9 Rules 17-25 of the Federal High Court Rules (the rules that stipulate procedural conditions and requirements for cases undertaken in the Federal High Court), which is the court vested with jurisdiction to hear aviation-related claims, stipulate procedures that enable a defendant to join a third party for contribution or indemnity in a suit against the defendant. The defendant may, where he or she conceives that he or she is entitled to contribution or indemnity from a third party seek leave via an ex parte application or a summons on notice from the court to issue a third-party notice. The court may give leave to the defendant to issue a third-party notice upon such ex parte application or upon the hearing of a summons filed and served on the plaintiff.

Where the court grants leave for the issuance of the third-party notice, the notice is served on the third party within the time limited for the delivery of defence (30 days) or reply (14 days) where there is a counterclaim. All other originating processes (statement of claim, writ of summons and any other pleading filed in the suit) are also served on the third party, who from the time of the service on him or her of these processes become a party in the suit with the same rights in respect of his or her defence against any claim made against the third party.

A third party duly served with the court processes who defaults in entering an appearance or filing any pleadings will be deemed to admit any claim stated in the third-party notice and will be bound by the judgment given in the action. Where a contribution or indemnity is claimed in the third-party notice, the third party is deemed to admit the liability in respect of the contribution or indemnity and the defendant is entitled to ask a court to enter judgment against the third party to the extent of any contribution or indemnity claimed in the third-party notice after satisfaction of the judgment against him or herself or with leave of court, before satisfaction of the judgment.

The rules also stipulate that the defendant may seek 'third-party directions' that entail a consideration of the third-party application and that can result in a finding of liability of the third party to the defendant before any judgment is entered in favour of the plaintiff against the

defendant in the suit. Third-party liability may also be decided after the trial of the suit and a judge may enter such judgment for or against any of the parties or between them as the nature of the case requires.

Time limits

19 | What time limits apply?

Generally, a claim for indemnity or contribution is an equitable remedy and most state statutes exempt a period of limitation for equitable reliefs. There are no specific statutory provisions on a limitation period in respect of a claim for indemnity or contribution for aviation-related claims.

LIABILITY FOR GROUND DAMAGE

Applicable laws

20 | What laws apply to the liability of the air carrier for injury or damage caused to persons on the ground by an aircraft accident?

The common law claims available in tort for bodily injury or wrongful death will apply against an air carrier in claims for injury or damage to persons on the ground. Nigeria is not a signatory to the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface signed in Rome in 1952. There is no specific statute specifying liability for air carriers for damages caused to third parties on the ground.

Nature and conditions of liability

21 | What is the nature of, and what are the conditions for, an air carrier's liability for ground damage?

The liability of air carriers for ground damage is governed by common law. It is fault-based and the general principles of establishing a tortious claim in negligence will apply.

Liability limits

22 | Is there any limit of carriers' liability for ground damage?

There is no limit to carrier's liability for ground damage. Damages are at large where liability is established for ground damage. Recoverable damages are, however, subject to the rules applicable in determining the quantum of damages in each case.

Main defences

23 | What are the main defences available to the air carrier in a claim for damage caused on the ground?

Available defences will include defences available to a defendant in a negligence claim. This will include the defence of contributory negligence; *volenti non fit injuria*; inevitable accident; statutory defence such as limitation of action; and the doctrine of necessity.

LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

Applicable laws

24 | What laws apply to the liability of the air carrier for injury or death caused by an unruly passenger or a terrorist event?

There are no statutes creating a separate liability regime for injury or death of a passenger caused by an unruly passenger or a terrorist event and no case law involving injury and death of passenger has considered this question. It is possible that arguments will be raised on the strict

liability of an air carrier under the Montreal Convention and the questions will revolve on whether the event that caused the injury or death is an 'accident' within the contemplation of the Convention as well as the application of the defences available to the air carrier in such cases.

Nature and conditions of liability

25 | What is the nature of, and what are the conditions for, an air carrier's liability for injury or death caused by an unruly passenger or a terrorist event?

This issue is yet to be considered and decided by Nigerian courts.

Liability limits

26 | Is there any limit of liability for injury or death caused by an unruly passenger or a terrorist event?

This issue is yet to be considered and decided by Nigerian courts.

Main defences

27 | What are the main defences available to the air carrier in a claim for injury or death caused by an unruly passenger or a terrorist event?

If the air carrier is sued under the Montreal Convention, then the main defences available to the air carrier in this case will be all the defences available under the Montreal Convention. Where, however, the air carrier is joined in a suit against the unruly passenger, the available defences will be those usually applicable in a tortious claim.

LIABILITY FOR HARM CAUSED BY DRONES

Applicable legislation

28 | Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

There are currently no laws or regulations that provide for liability for injuries or damage caused by drones in Nigeria. In the absence of any such legal regime, the principles governing liability in general negligence claims will apply to determine liability for injuries or damage caused by drones.

CONSUMER PROTECTION AND PASSENGER RIGHTS

Applicable legislation

29 | Summarise aviation-related consumer-protection laws or regulations related to passengers with reduced mobility, flight delays and overbooking, tarmac delay and other relevant areas.

The Civil Aviation Act 2006 empowers the Nigerian Civil Aviation Authority (NCAA) to make regulations 'as to the conditions under which passengers and goods may be carried by air'. Regulation 19 issued by the NCAA deals with consumer protection and covers issues such as no-show, overbooking, denied boarding, long delay and flight cancellation.

Regulation 19 is largely modelled on EU Regulation No. 261/2004, which deals with compensation and assistance to passengers in the event of denied boarding, flight cancellations or long delays of flights. Its sphere of applicability is for carriage of passengers between two airports within Nigeria; carriage of passengers from an airport outside Nigeria to an airport in Nigeria unless the passengers received compensation or assistance at the point of departure in the case of a Nigerian air carrier and non-stop flight segments originating at a point in Nigeria (foreign air transportation).

Regulation 19.10.1 stipulates that an air carrier, when starting the boarding of an oversold flight, should give priority to persons with reduced mobility, unaccompanied minors and families (two adults) where at least one child is under five. In the case of long delay, cancellation or denied boarding, the carrier should provide to persons with reduced mobility the assistance provided in the regulation, which includes a meal, transport between the airport and place of accommodation (hotel or other accommodation), refreshment, accommodation and free calls, SMS or email.

The regulation also stipulates certain obligations of air carriers to passengers for delay. For domestic flights, the carrier is expected to provide the following assistance to passengers where it is anticipated that a scheduled flight will be delayed:

- a delay of up to 1 hour – refreshment, telephone call, SMS or email;
- two hours and beyond – reimbursement; and
- between 10pm and 4am – hotel accommodation, meal and transport plus refreshment, free calls, SMS or email.

For international flights:

- two to four hours – refreshment, telephone call, SMS or email; and
- four hours or more – hotel accommodation, meal and transport between the airport and place of accommodation (hotel or other accommodation) plus refreshment, free calls, SMS or email.

When the reasonably expected time of departure is at least six hours after the time of departure previously announced, the carrier should provide hotel accommodation and transport to and from the airport.

There is no provision for 'tarmac delay'. Regulation 19 also contains provisions for assistance and compensation for denied boarding and cancellation and is the only aviation-related consumer protection law.

LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS

Relevant laws

- 30 | What laws apply to the liability of the government entities that provide services to the air carrier?

The Nigerian Airspace Management Agency (NAMA) and the Federal Airports Authority of Nigeria (FAAN) are the two government entities that provide services to air carriers. NAMA provides air traffic control services while FAAN provides airport services. Both NAMA and FAAN are creatures of statutes that imbue them with legal personality, and they can be sued for acts or omissions arising from the performance of their statutory roles. Other than actions in breach of a statutory obligation, these statutory agencies may be liable for damages occasioned by their negligence or the negligence of their officials under general common law of tort.

Nature and conditions of liability

- 31 | What is the nature of, and what are the conditions for, the government's liability?

Whether the claim is made pursuant to a statute or under general tort law, the liability of the government entity is fault-based, and evidence must be led by the plaintiff with facts that establish the liability of such entity.

Most legislation that establish the statutory entities operating in the aviation sector in Nigeria have provisions that require a notice of claim prior to the institution of an action against such an entity or their employees and other officers or joining such persons in an already existing action. This notice is referred to as a 'pre-action notice' and the Nigerian courts have consistently upheld the necessity of the issuance of a pre-action notice as a condition precedent to the institution of an

action. For NAMA, the pre-action notice is to be issued to a member of the board, the managing director, officer or employee of the agency and is one month's notice, while for FAAN it is a three-month notice to be issued to the Authority.

Liability limits

- 32 | Are there any limitations to seeking recovery from the government entity?

No, there are no limitations such as immunity or public policy that seek to curtail the right of a passenger from seeking recovery from relevant aviation government entities. It is important to know, however, that in Nigeria there is a time limitation within which a plaintiff must commence an action against a public officer and in some cases against particular government entities. Limitation periods in this regard range from three months to 12 months.

CRIMINAL PROCEEDINGS

Responsibility for accidents

- 33 | Can an air carrier be criminally responsible for an aviation accident?

The law on criminal liability of corporate entities is unclear and it is, therefore, not improbable that an air carrier will be held criminally responsible for an aviation accident. The question of criminal liability of an air carrier has, however, not been decided by the Nigerian courts.

The Criminal Code, which establishes the bulk of criminal offences in Nigeria, does not make any distinction between liability of persons as individuals or persons as corporate entities (the Nigerian Interpretation Act defines the word 'person' to include any body of persons corporate or unincorporate) and some Nigerian statutes impute criminal liability on a company in certain circumstances. In the few cases where a company has been found to be criminally liable, knowledge has been imputed to the company for acts by its officers done with knowledge or perceived knowledge that liability is likely to arise. The Civil Aviation Act 2006 also creates offences such as dangerous flying and endangering safety, destroying or damaging an aircraft in flight. In such instances, it is the individual involved who is criminally liable.

Effect of proceedings

- 34 | What is the effect of criminal proceedings against the air carrier on a civil action by the passenger or their representatives?

This has not been tested in Nigeria. Any allegation of a crime in a civil suit has the same standard of proof – which is proof beyond reasonable doubt – as that required to ensure a conviction of the same charge in a criminal action.

Compensation

- 35 | Can claims for compensation by passengers or their representatives be made against the air carrier through the criminal proceedings?

No, all claims by passengers or their representatives against the air carrier for compensation are to be made via the provisions of the Montreal Convention in a separate civil suit.

EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

Liability

36 | What is the legal effect of a carrier's conditions of carriage or tariffs on the carrier's liability?

Most domestic airlines in Nigeria incorporate their conditions of carriage into the contract with the passenger and these conditions form part of the contract of carriage that the court can consider and enforce in claims involving any issue covered in the said conditions of carriage. In addition, some tariffs may be subject to certain terms and conditions and to the extent that a passenger is informed of the said terms and conditions, such a passenger will be held to be bound by them within general legal limits. Other than these scenarios, neither the conditions of carriage nor the tariffs affect the carrier's liability under the Montreal Convention.

DAMAGES

Damage recovery

37 | What damages are recoverable for the personal injury of a passenger?

The measure of damages recoverable for bodily injury is as set down by a plethora of case law from negligence claims. Several heads of damages can be awarded in personal injury cases and these include:

- loss of earnings;
- loss of the amenities of life;
- pain and suffering;
- nervous shock; and
- medical expenses.

These are the general types of damages recognised under Nigerian law, which follows English law. Nigerian courts recognise that the damages awarded to a plaintiff in personal injury cases have two elements:

- that intended to compensate for financial loss both present and future suffered by the plaintiff; and
- that intended to compensate for non-financial loss – which is usually subdivided into two, namely pain and suffering caused by the injury and loss of amenities of life occasioned by the deformity or impairment caused by the accident.

Financial loss would take into consideration such matters as loss of future earning capacity. Where the heads of damages are not specific, and facts are not pleaded to justify the figures sought in the action, the damages awarded are usually general damages, which are discretionary and based on the judge's assessment of the injury or damage suffered. In line with the provisions of the Montreal Convention, punitive, exemplary or any other non-compensatory damages will not be recoverable.

For personal injury claims, the person who has the standing to sue is the injured passenger. If the passenger is a minor or person with any legal disability, the action can be filed by the victim's guardian or next of kin. The rules of court, however, stipulate that before the name of a person is used in an action as next friend of an infant or other party, or as realtor, that person should sign a written authority for that purpose, which should be filed at the registry of the court.

38 | What damages are recoverable for the death of a passenger?

Where the accident results in death, an action is brought on behalf of the immediate family by virtue of the provisions contained in the Fatal Accidents Law of several states in Nigeria. Here, the recoverable

damages will be similar to those awarded by the courts in fatal accidents claims and are usually calculated by:

- first ascertaining the earnings of the deceased before his or her death; and
- deducting an amount that the deceased would normally have spent on him or herself for his or her personal needs from the first amount.

There is no statute that prescribes a definite percentage of what can be deducted as likely expenditure by the deceased on him or herself and the courts will likely consider the evidence brought before it as well as precedents set in other common law jurisdictions such as England. Punitive damages are not allowed.

The action is brought for the benefit of the immediate family of the deceased passenger by and in the name of the executor or administrator of the deceased person (where the deceased person is not subject to a system of customary law). Where the deceased person was prior to his or her death subject to a system of customary law as regards estates, the action will be brought by a person, who the court is satisfied is entitled to bring such an action under customary law on behalf of the deceased person.

Immediate family includes, for a person not subject to customary law – wife or wives, husbands, as the case may be, parent and any child. For persons subject to customary law who are non-Muslims, beneficiaries include all the aforementioned persons as well as brothers and sisters of the deceased and includes step-brothers and step-sisters. Lastly, for Muslims subject to customary law, immediate family means the 'person entitled to share in the award of diya prescribed by Islamic law for involuntary homicide'.

The Federal High Court Rules empowers a court to appoint a person to represent the estate of a deceased person where in the course of the proceedings, it appears that any deceased person who was interested in the proceedings has no legal representative. Any order made in such proceedings, which will include a recovery against an air carrier, is binding on the estate of the deceased.

ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

Investigatory authority

39 | Who is responsible in your state for investigating aviation accidents?

The entity responsible for investigating aviation accidents and serious incidents is the Accident Investigation Bureau established under section 29 of the Civil Aviation Act 2006 (CAA 2006).

Disclosure restrictions

40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information or cockpit voice recordings in litigation.

Pursuant to section 29(12) of the CAA 2006, the sole objective of the investigation of an accident or serious incident under the Act is for the prevention of future occurrences and not for the purpose of apportioning blame or liability. Section 29(14) further stipulates that the contents of an accident investigation report will not be admissible as a basis of liability in any civil or criminal court proceedings. We are, however, aware of a case where an airline sued the airport authority for damages on the destruction of their aircraft. The presiding judge admitted the accident investigation report despite the argument that it was inadmissible. The appeal lodged against the subsequent judgment was discontinued when the parties settled the dispute and the Court of Appeal did not have the opportunity to pronounce on the issue of the legality of the admission of the investigation report.

The CAA 2006 does not contain any specific restriction on the disclosure and use of flight data recorder information or cockpit voice recordings in litigation. Section 6 of the Civil Aviation (Investigation of Accidents) Regulations stipulates the persons who shall have access to an aircraft involved in an accident (police officers or officers of the Nigeria Customs Service). Pursuant to section 8 of the Civil Aviation (Investigation of Accidents) Regulations, the Inspector of Accidents who investigates any accident has powers to examine any aircraft and for that purpose may require any aircraft part or equipment to be preserved and unaltered pending examination. The question of the availability of such flight data recorder information being available to a litigant is still untested in the Nigerian courts.

Relevant post-accident assistance laws

41 | Does your state have any laws or regulations addressing the provision of assistance to passengers and their family after an aviation accident?

Section 48(3) of the CAA 2006 provides that in the event of the death or injury of passengers from an aircraft accident, the carrier should make advance payment of at least US\$30,000 to the natural person or such natural persons who are entitled to claim compensation within 30 days from the date of such accident. This is to aid such person or persons to meet immediate economic needs. Such advance payments do not constitute recognition of liability and may be set off against any amounts subsequently paid as damages by the carrier.

INSURANCE REQUIREMENTS

Mandatory requirements

42 | Are there mandatory insurance requirements for air carriers?

Yes, section 74 of the CAA 2006 provides that an air carrier operating air transport services to, from and within Nigeria should maintain adequate insurance covering its liability under the CAA. The carrier is expected to provide quarterly returns to the Nigerian Civil Aviation Authority with evidence that such insurance is maintained and that all conditions necessary to create an obligation on the insurer to provide indemnity in the event of a loss are fulfilled.

LITIGATION PROCEDURE

Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

The court of first instance with jurisdiction to hear aviation liability claims is the Federal High Court. The Federal High Court has country-wide jurisdiction with judicial divisions in the different states that make up the Nigerian Federation. Therefore, a plaintiff can sue the air carrier in the Federal High Court situated within the jurisdiction where the defendant resides or carries on business or in the Federal High Court situate at the place where the cause of action arose.

Any appeal arising from an interlocutory or final decision of the Federal High Court is heard and determined by a Court of Appeal situate within the geographical sphere of the Federal High Court whose decision is being appealed against and zoned to hear appeals emanating from the judicial division of the particular Federal High Court.

A further appeal from an interlocutory or final decision of the Court of Appeal is determined by the Supreme Court. The Supreme Court is the court of last resort and there are no further rights of appeal. The Supreme Court of Nigeria is located in the Federal Capital Territory of Abuja, the nation's capital.

Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

Order 43 of the Federal High Court (Civil Procedure) Rules 2019 contain provisions on discovery by interrogatories and discovery of documents. Interrogatories may be delivered after seven days of close of pleadings stating the questions each party served with the interrogatories are required to answer. For artificial entities with legal personality, the interrogatories may be delivered to any member or officer of such a party. The party served with the interrogatories may raise an objection in his or her affidavit filed in response to the interrogatories on the ground that any questions contained in the interrogatories are scandalous or irrelevant and the court considers the claims as contained in the plaintiff's originating process in determining whether the interrogatories are scandalous or irrelevant.

Where a party served with interrogatories omits to answer a question or answers insufficiently, the court will, on an application, issue an order requiring him or her to answer or provide further responses, as the case may be.

The rules also contain provisions that entitle a party to deliver a request to another party to make discovery on oath of documents that are or have been in his or her possession, custody, power or control. The documents should relate to matters in question between the parties and the party served with the request is to answer 'completely and truthfully'. The affidavit should contain the documents requested except where the party objects to the production of any document. The court has the discretion to refuse to order discovery if satisfied that the documents requested are not necessary for the effectual disposal of the case. The court may also limit the discovery to certain classes of documents that the court considers fit for the hearing of the claim.

Evidence

45 | Does the law of your state provide for any rules regarding preservation and spoliation of evidence?

Some Nigerian statutes contain provisions regarding preservation of documentary evidence for a certain number of years but there are no rules regarding the spoliation of evidence.

Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

Some case law in Nigeria have opined that an award of attorneys' fees is unethical and have stated that it is an affront to public policy to pass on the burden of attorneys' fees to the other party. Nigerian courts therefore do not ordinarily grant a claim by a plaintiff for legal fees to be paid to his or her solicitors. In a recent decision, the Court of Appeal in Nigeria held that a claim for attorneys' fees, which does not form part of the claimant's cause of action, is not one that can be granted and that to succeed on such a claim it must be specifically pleaded as special damages and must be proved by credible and cogent evidence. It therefore appears that if reimbursement of attorneys' fees were pre-agreed and formed part of damages suffered by a plaintiff prior to the institution of the suit, the courts may likely allow the recovery of the fees.

Litigation costs are usually granted as nominal costs and amounts, at the discretion of the courts.

JUDGMENTS AND SETTLEMENT

Pre- and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

The courts recognise that pre-judgment interests can arise under a contract, statute or by virtue of some mercantile usage. Where pre-judgment interest is contractual or statutory, the contract or statute will usually stipulate the rate that will apply or provide the manner in which such interest will be calculated and the court will apply such agreed interest rate. One statute that provides for interest on monies is the Investment and Securities Act 2007, which stipulates that the Commission established under the Act may prescribe the rate of interest payable on such monies, but further stipulates that such interest should not be less than 1 per cent above the Central Bank of Nigeria minimum rediscount rate. It is usual for claimants to seek for pre-judgment interest using the average rates of interest charged by financial institutions on loans granted to borrowers of funds. Prejudgment interest can also be awarded under a principle of equity such as the existence of a fiduciary relationship. In the absence of a contract, statute, mercantile trade or fiduciary relationship providing for or justifying prejudgment interest, the courts will not award prejudgment interest.

Post-judgment interest is usually awarded by the courts pursuant to court rules that permit the award of such an interest. An example is Order 23 Rule 5 of the Federal High Court (Civil Procedure) Rules, which empowers a judge to order interest at any rate not exceeding 10 per cent per annum to be paid on any judgment.

Settlements

48 | Is court approval required for settlements?

Where a claim is already pending before a court, it is usual for parties to have the agreed terms of settlement adopted as judgment of the court. These types of judgments are known in Nigeria as 'consent judgments' and the parties to such a consent judgment cannot subsequently appeal the judgment without the leave of court.

Parties opt to have their settlements approved by the courts as this provides a legal basis for any future contention between the parties on the agreed terms. However, court approval is not a mandatory requirement for settlements either for already pending claims or claims that have not been brought before the courts.

49 | What is the effect of a settlement on the right to seek contribution or indemnity from another person or entity? Can it still be pursued?

A settlement between parties does not foreclose the right to seek contribution or indemnity from another person or entity. A defendant can therefore pursue a claim against another person or entity.

50 | Are there any financial sanctions, laws or regulations in your state that must be considered before an air carrier or its insurer may pay a judgment or settlement?

No financial sanctions apply on an air carrier or insurer on the payment of a judgment or settlement. There are also no laws and regulations to be considered by air carriers or insurers before payment on a judgment or settlement may be made.

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UPDATE AND TRENDS

Key developments of the past year

51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

In the past year, the Civil Aviation Bill 2019 (CA Bill) and the Nigeria Safety Investigation Bureau (Establishment etc) Bill 2019 (NSIB Bill) were introduced at the National Assembly, seeking to amend the Civil Aviation Act 2006 and create a statutory body to be known as the Nigeria Safety Investigation Bureau (NSIB) to replace the Accident Investigation Bureau (AIB). The CA Bill proposes to, among other things:

- provide for express liability for damages caused to persons on the ground by an aircraft whilst taking off or landing or by anything falling from an aircraft;
- empower the Nigerian Civil Aviation Authority (NCAA) to ground any aircraft and to seal the premises of any air transport service provider or provider of allied aviation services and to take any corrective actions in order to implement the findings of accidents and incidents investigations;
- provide for criminal liability for failing to make or keep or damaging or altering reports, accounts, records and memoranda that may impact safety and for interfering with true lights, signals or communications for air navigation; and
- provide for criminal liability for endangering safety of or causing damage to an aircraft in flight and endangering safety of or causing damage to an international airport or aircraft at an international airport.

The NSIB Bill seeks to vest the powers to investigate accidents and serious incidents in the NSIB. The NSIB will have wide discretionary powers of investigation, issue reports and make recommendations where necessary. As with the AIB which it succeeds, the investigative reports will not be admissible in court as evidence.

If passed into law, the foregoing Bills will have recognisable impact on aviation liability in Nigeria.

Coronavirus

52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Immediately following the outbreak of the covid-19 pandemic, the NCAA in January 2020 issued an official notification to all operators within the aviation industry highlighting the symptoms and the status of the spread of the virus, directing a high level of vigilance and setting out the reporting requirements for airlines to mitigate the spread of the virus. On 21 March 2020, all Nigerian airports were closed to all international flights save for essential flights (these include operations relating to aid, medical and relief flights, technical stops and aircraft in state of emergency and cargo flights). Several directives, protocols and measures were subsequently also issued by the NCAA with a view to curbing the spread of the virus and mitigating its effect:

- guidance on management of crew members dated 14 April 2020 which recommends procedures to be followed in handling passengers and their luggage and for the management of passengers or crew members suspected of having covid-19;
- post-covid-19 guidance for airport operators dated 18 May 2020 which recommends procedures for handling parking, terminal operations (including passengers' personal protection), toilet usage, baggage disinfection, air conditioning systems, emergency evacuation, review of airport handling capacity, security screening, staff protection, etc; and
- guidance on facilitating flight operations and protecting crew and passengers during the covid-19 pandemic dated 10 May 2020.

These protocols have been in use following the resumption of flight operations. Airlines are required to ensure strict compliance with public health and safety regulations and directives implicating their contractual obligations to their passengers, including:

- following the health and safety procedures laid down by the NCAA;
- the appointment of a covid-19 compliance officer to act as an interface between the crew and relevant regulatory and public health agencies – this will keep operators abreast of any regulations or directives affecting flight operations during the pandemic;
- prompt reporting of suspected cases of covid-19 onboard to relevant health authorities;
- maintenance and display of a covid-19 safety manual in aircraft; and
- review of the terms and conditions of flight contracts to exempt airlines from liability in cases of covid-19-related breaches.

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