

CHAPTER NINE

LIABILITY OF PASSENGERS WITH DISABILITIES IN THE CONTRACT OF CARRIAGE BY AIR

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9.1 INTRODUCTION

International Convention,¹ Committee² and Manual,³ National Laws⁴ and Regulations⁵; and Scholarly pieces on the rights of the disabled in the modern-day

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¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/106, available at: <https://www.refworld.org/docid/45f973632.html> [accessed 7 June 2023]. It was adopted on 13th December 2006 at the United Nations Headquarters in New York and opened for signature on 30th March 2007 but entered into force on 3rd May 2008. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and 1 ratification of the Convention. See United Nations Department of Economic and Social Affairs: Convention on the Rights of Persons with Disabilities (CRPD) <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>; See also ICAO, Annex 9 to the Convention on International Civil Aviation, Fifteenth Edition, October 2017, retrieved from https://www.icao.int/WACAF/Documents/Meetings/2018/FALIMPLEMENTATION/an09_cons.pdf.

² The Committee on the Rights of Persons with Disabilities monitors States parties' compliance with the Convention on the Rights of Persons with Disabilities which to date has 185 States parties. The Committee is made up of 18 members who are independent human rights experts drawn from around the world, who serve in their personal capacity and not as representatives of state parties. See United Nations Human Rights: Office of the High Commissioner: UN disability rights committee publishes findings on Bangladesh, China, Indonesia, Japan, Korea, Lao, New Zealand, Singapore and Ukraine 09 September 2022, <https://www.ohchr.org/en/press-releases/2022/09/un-disability-rights-committee-publishes-findings-bangladesh-china-indonesia>

³ ICAO, Manual on Access to Air Transport by Persons with Disabilities, First Edition, 2013, <http://www.passepartouttraining.com/uploads/2013/03/ICAO-Manual-Doc-9984-1st-Edition-alltext-en-published-March-2013.pdf>.

⁴ For examples see Air Carrier Access Act, 1986, 49 U.S.C SS 41310, 41501, 41702, 41705 (Supp. IV 1986); The U.K Equality Act, 2010, <http://www.opsi.gov.uk/acts/acts2010/ukpga-20100015-en-1>; Nigeria Discrimination against Persons with Disabilities (Prohibition) Act, 2018, Vol. 106 No. 10, Gov. Notice 21, A97-122.

⁵ U.S Department of Transportation Regulation 14 C.F.R Part 382, Subpart A (1988).

transportation system have been published length and breadth of the world.⁶ The adoptions and publications have widened the knowledge of what rights are available to disabled passengers when accessing the air transport system on the one hand and improved the status of disabled passengers as human beings on the other hand. However, none of the literature on disability rights assessed the liabilities of various passengers with disabilities in a contract of carriage by air.⁷

Contract of carriage by air is not peculiar to normal persons, people with different disabilities can be a party directly or indirectly. Their disabilities and unwanted conditions, "people with disabilities⁸ cannot preclude them from entering into a contract of carriage by air or from any other contract. Defining disability is problematic as there is no specific definition attached to it.⁹ However, the International Classification of Functioning, Disability, and Health states that "Disability is defined as problems in the body function or structure such as a significant deviation or loss, a reduction, an increase, or an excess".¹⁰ Annex 9 to the Chicago Convention, 1944 defines a person with disabilities as "Any person whose mobility is reduced due to a physical incapacity(sensory or locomotor), an intellectual deficiency, age, illness or any other cause of disability when using transport and whose situation needs special attention and the adaptation to the person's needs of the services made available to all passengers".¹¹ According to the United Nations (UN), Convention on the Rights of Persons with Disabilities, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may

⁶ For example, see Akimova T, 'Improvement Access to Air Travel for Disabled Persons' (2013) 2 (18) *Science-Based Technologies*, 220; da Silva T.N.R et. al., 'Passengers with Disabilities in the Brazilian Air Transport: Different Actors and Similar Perspectives' (2016) 24 (1) *Gest. Prod., Sao Carlos*, 136-147; Adya Paramita Prabandari, Elfia Farida, and Rahayu, 'The Legal Protection of the Rights of Person with Disabilities in International Civil Aviation' (2020) 47(7), *Advances in Social Science, Education and Humanities Research*, 26-29; Mitra, S, 'The Capability Approach and Disability'. *Journal of Disability Policy Studies* (2006) 16(4), 236-247, <http://dx.doi.org/10.1177/10442073060160040501>; Darcy, S, 'Flying with Impairments: Improving Airline Practices by Understanding the Experiences of People with Disabilities' (2016) *Travel and Tourism Research Association: Advancing Tourism Research Globally*, 11, <https://scholarworks.umass.edu/ttra/2007/> presented Papers/47.

⁷ For the definition of Contract of carriage by air, see Videla Escalada, *Aeronautical Law* (USA: Sijthoff & Noordhoff, 1979) 361; Ismail Adua Mustapha and Joannah Kolo-Manma, 'Rights of passengers in the contract of carriage by air: a critical approach under the Nigerian civil aviation law' (2018) 6 (1) *African Nazarene University Law Journal*, 1.

⁸ da Silva T.N.R et. al., n. 6 above; Adya Paramita Prabandari, Elfia Farida, and Rahayu, n. 6 above, 26.

⁹ Adya Paramita Prabandari, Elfia Farida, and Rahayu, n. 6 above.

¹⁰ Soemitro R.H, 'Metodologi Penelitian Hukum dan Jurimetri' (1990) Cetakan 4, *Jakarta: Ghalia Indonesia*, 228.

¹¹ Chicago Convention 1944, Annex 9.

hinder their full and effective participation in society on an equal basis with others.¹²

Generally, persons with disabilities, who need different kinds of special assistance are classified into: (a) a seriously ill passenger; (b) an ill passenger on a stretcher; (c) a deaf unaccompanied passenger; (d) a blind passenger with a guide dog; (e) unaccompanied blind and/or deaf passenger¹³; (f) a passenger with limited excursion.¹⁴ The article, therefore answers the query: Are there liabilities of passengers with disabilities in the contract of carriage by air? The chapter is therefore divided into three sections. Section one introduces The chapter to the readers. Section two attempts to provide an answer to the question: are there liabilities for passengers with disabilities in the contract of carriage by air? This is examined to know whether or not disabled passengers are immune from liabilities. Consequently, the section is subdivided into two to wit: Contractual/Civil liability, and Criminal liability. Section three presents the conclusion.

9.2 ARE THERE LIABILITIES OF PASSENGERS WITH DISABILITIES IN CARRIAGE BY AIR CONTRACT?

Academic scholars have written about the rights of passengers with disabilities in contractual relationships with airlines, at the moment, there is a dearth of academic works addressing the issues of liabilities of passengers with disabilities in a contract of carriage by air. Previous works examined the legal protection of rights of persons with disabilities in international civil aviation; and their experiences whenever they fly from one destination to another. Just as the air carrier may be liable to the Passengers with disabilities so also disabled passengers may be contractually or civilly and/or criminally liable to airlines, co-passengers and airport operators. Britannica dictionary defines "Liability" as 'the state of being legally responsible for something or the state of being liable for something' or 'someone or something that causes problems'.¹⁵ It has also been interpreted as 'the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility'.¹⁶ A passenger with a disability may be liable where he/she is legally responsible or bound to something, thus a somebody that causes

¹²Convention on the Rights of Persons with Disabilities, 2006.

¹³ He is under the care of the carrier in a contract of carriage by air. See Akimova T, n.6, 220.

¹⁴His ability to move around is limited when using an air transport and/or whose condition demands that air carrier should provide special attention when being serviced. See Akimova T, n. 6, 220.

¹⁵The Britannica Dictionary <https://www.britannica.com/dictionary/liability>.

¹⁶The Law Dictionary: LIABILITY Definition & Legal Meaning <https://thelawdictionary.org/liability/> ; See also *Wood v. Currey*, 57 Cal. 209; *McElfresh v. Kirkendall*, 36 Iowa, 225; *Benge v. Bowling*, 100 Ky. 575, 51 S. W. 151; *Joslin v. New Jersey Car-Spring Co.*, 36 N. J. Law, 145.

problems. Consequently, persons with various forms of disabilities may be contractually/civilly or criminally liable to the air carrier or airport operators.

9.2.1 Contractual/Civil liabilities

Liability may arise as a result of a passenger with a disability not doing what is legally required of him/her to do in a contract of carriage by air. Thus, the failure of disabled passengers to act by the terms and conditions of carriage will qualify as contractual liability of a person with a disability. Hereunder are the various ways a passenger with a disability can be civilly or contractually liable.

i. Failure to give Advance Notice of Disability

The International Civil Aviation Organization (ICAO) Recommended Practices Relating to Persons with Disabilities ATTACHMENT 2 recommended that when persons with disabilities are travelling, they should be provided with special assistance such as the offering of information and directions in media that can be understood by travellers with cognitive or sensory disabilities to ensure that they receive services traditionally available to the general public.¹⁷ In addition, persons with disabilities should be allowed to decide on whether or not they require escorts and 'to travel without the requirement for medical clearance'.¹⁸ This assistance or lifting is subject to a mandatory advance notice from persons with disabilities to the air carrier or airport operator.¹⁹ It is submitted that the essence of advance notice is in two folds: (1) for the air carrier to adequately prepare and render the assistance required of her in compliance with the ICAO Recommendation Practice; and (2) for the persons with disabilities to institute an action for the breach of terms and conditions as contained in a separate contract of carriage by air agreement.

The application and effect of the doctrine of "Advance Notice" are fundamentally different in the United States of America and European countries respectively. On one hand, European Regulation 1107/2006 requires persons with disabilities to give advance notice of assistance and lifting within 48 hours before the performance of the contract of carriage by air. However, failure to give will not invalidate the contract, the air carrier and airport operator are encouraged to do their best to meet disabled needs without that notice but not guaranteed. On the other hand, the requirement to give advance notice is unnecessary under US

¹⁷See ICAO Recommended Practices relating to Persons with Disabilities ATTACHMENT 2 (as contained in Chapter 8 of Annex 9 - Facilitation to the Convention on International Civil Aviation), Recommended practice 8. 22.

¹⁸Ibid; Recommended Practice 8.37.

¹⁹Ibid.

law.²⁰ It is therefore submitted that the doctrine of constructive notice is in operation under US law while the actual notice is required in European countries. Also, the failure of the passenger with a disability to give advance notice in the US will not render him liable while failure in EU countries will render him liable for assistance and lifting may not be guaranteed. A challenge to the US position on the advance notice is that it creates confusion between US passengers with disabilities who are conversant with the law but travel through any of the European countries whose law requires advance notice. It is therefore submitted that giving advance notice is more assistance-oriented than that of the US.

Furthermore, it is the responsibility of a person with a disability to pay a discounted fee if the presence of an escort is required as recommended by the ICAO when it appealed to the Contracting States to encourage the airlines to offer discounts for the carriage of that accompanying person.²¹ Failure to pay a discounted fee may lead to a denial of the right to an escort.

ii. Liability for an unpaid ticket

Although the Convention for the Unification of Certain Rules for International Carriage by Air²² did not address the issue of liability of passengers, whether disabled or not in respect of air tickets, rather the Convention expressly provides that failure of the air carrier to issue air tickets will not invalidate the contractual relationship between the carrier and the passenger including passengers with disabilities. However, it is doubtful whether the carrier will issue a ticket to an intending passenger with a disability who has refused to make payment for an air travel ticket or that of his/her escort. However, where a ticket is issued on credit, the passenger has a responsibility to pay for such a ticket within the stipulated time. It needs to be noted that a passenger who has no ticket will be denied boarding. This is because an air ticket is evidence of the contract of carriage of passengers by air. It is on the ticket that the conditions of carriage of passengers by air are stated.

iii. Contributory Negligence

Contributory negligence is an available defence to prove that passengers with disabilities have a percentage of negligence as one of the causes that result in damage or loss to them. Even though the Montreal Convention did not define

²⁰ Frye, A, Air passenger rights for disabled people. Conference Paper delivered at the 12th International Conference on Mobility and Transport for Elderly and Disabled Persons (TRANSED) held in Hong Kong on 2-4 June, 2010.

²¹ ICAO Recommended Practices relating to Persons with Disabilities ATTACHMENT 2 (as contained in Chapter 8 of Annex 9 - Facilitation to the Convention on International Civil Aviation), Recommended practice 8. 37 and 38 respectively.

²² Convention for the Unification of Certain Rules for International Carriage by Air [Herein after referred to as "Montreal Convention 1999] May 28, 1999, Doc 9740.

contributory negligence, however, in the law of tort, the doctrine of contributory negligence encapsulates conduct by the claimant that "falls below the standard to which he should conform for his protection".²³ It recognizes an act or inaction by passengers with disabilities that falls below the required standard to which they should conform for their safety.²⁴

The Law Reform (Contributory Negligence) Act 1945 defines "Contributory Negligence" to mean 'Where any person suffers damage as the result partly of his fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated because of the fault of the person suffering the damage...'²⁵ The Act interprets "Fault" as 'negligence or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence'.²⁶ The "objective standard of reasonableness" in any case, is the determinant factor the court will adopt to reduce damages to such extent as it thinks just and equitable having regard to the claimant's fault that contributes to the damage suffered by him.²⁷ This section is therefore not concerned about how damages should be apportioned²⁸, but what makes a claimant action that contributed to the damage he suffered. Consequently, in determining whether damage has been caused by the action or inaction of the defendant air carrier or airline operator, it is necessary to know whether the damage is caused by the act or inaction of the defendant.

Depending on the nature of the claim and the applicable law of where the complaint is made,²⁹ the Airline that wishes to rely on contributory negligence must establish that the passenger with a disability caused the negligence. Therefore, proof that a passenger with a disability's wrongful conduct caused the airline's alleged damage is a material factor in the determination of a blameworthy act of the airline. For example, if a passenger with a disability would not have fallen if he had been escorted at the airport but for the failure of the passenger with a disability to request an escort then, he is said to be a cause of damage. However, if the complaint of a passenger with a disability would have been caused if he had requested the escort and so granted and available, the act of the

²³Rowe E.A, 'Contributory Negligence, Technology, and Trade Secrets' (2009) 17 *Geo. Mason L. Rev.* 1 available at <http://scholarship.law.ufl.edu/facultypub/89>.

²⁴ Kenneth S. Abraham, *The Forms and Functions of Tort Law* 144 (3d ed. 2007).

²⁵ The Law Reform (Contributory Negligence) Act, 1945, Chapter 28, sec.1 (1). For a full critical analysis of the Act, see Williams, G.L. 'The Law Reform (Contributory Negligence) Act, 1945' (1946) 9 *The Modern Law Review*, 105-136.

²⁶ The Law Reform (Contributory Negligence) Act, 1945, sec. 4.

²⁷Restatement(second) of Torts § 464(1) (1965). See also Rowe E.A, n. 23.

²⁸For apportionment of damage, see Payne, D. (1955) 'Reduction of Damages For Contributory Negligence' (1955) 18 *The Modern Law Review*, 344-355.

²⁹Elizeberth A. Evans 'Damages Theories and Causation Issues. In Roman L. Well, Daniel G. Lentz' and Elizeberth Evans, *Litigation Services Handbook: The Roles of the Financial Expert* (2017).

passenger with a disability would not amount to contributory negligence because he might not be able to avoid the damage.

The position of Williams when he postulated that: "In determining whether damage has been caused by the negligence of the defendant it is necessary to determine whether it has been caused by that feature of the defendant's conduct which is held to be negligent"³⁰ is also shared in this article on the ground that the contribution of the passenger with a disability must be material to harm him in one way or the other, and must not be too remote.

To be more specific and direct, the Montreal Convention 1999 states that a passenger including a passenger with a disability will be liable for contributing to the damage occasioned to him during the operation of the aircraft. For example, the carrier will not be liable if the damage caused to the property of the passenger was a result of "inherent defect, quality or vice of the baggage"³¹. Article 20 of the Convention 1999 expressly provides for the partly exoneration of the carrier when it succinctly provides that:

If the carrier proves that the damage was ... or contributed to by the negligence... or... omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be... 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.

This section is therefore not concerned about how damages should be apportioned³² but what makes a claimant action that contributed to the damage he suffered.

It is necessary to measure the action or inaction of the disabled passengers to know whether his activity is worthy of being blamed for the damage he has suffered. The reasonable man test is to put his undoing on the scale and weigh with the effect of knowing whether or not the pendulum will swing in favour or against the disabled passengers or air carriers. Where the air carrier can lay his facts to the extent that the pendulum swung against the disabled passengers, then it can be said that the disabled conduct constitutes that feature of the defendant's which can be held to be negligent.³³ For instance, if the failure to reserve a seat on board an aircraft is contested and a disabled passenger instituted

³⁰William G.L, n. 25.

³¹Montreal Convention, 1999, art. 17.

³²For apportionment of damage, see Payne, D. (1955) 'Reduction of Damages For Contributory Negligence, (1955) *The Modern Law Review*, 18: 344-355.

³³See Williams, G.L, n. 25, 112-113.

an action against the air carrier for this failure. The fact that a disabled passenger refused to give an Advance Notice as to his status is a cause for non-reservation of the disabled seat on board an aircraft. This would not have occurred but for the occurrence of an antecedent of non-disclosure of his status as a disabled person. This instance explained the application of the European Regulation 1107/2006 in the United Kingdom where persons with disabilities are required to give advance notice of assistance and lifting within 48 hours before the performance of the contract of carriage by air. But failure to give will advance notice not invalidate the contract. However, the air carrier and airport operator are encouraged to do their best to meet disabled needs without that notice but if their best cannot meet the wants of the disabled passenger, then he has contributed to it for his failure to give an advance notice of his status. It is therefore very correct and agree that: "Every event has several causes, and each of these causes in turn, has several causes, so that, as already said, every event is the result of a cone of causation stretching back in time".³⁴

It must be noted that the mere fact that a person with a disability's negligence caused the damage does not make him liable, for the negligence may in law be too remote a cause, or, in the alternative, may not be proximately sufficient.³⁵ The best example of this is provided in article 17 of the Montreal Convention 1999 which states that an air carrier will be exonerated of any blame if it is found that the damage caused to the property of a passenger was a result of "inherent defect, quality or vice of the baggage". Therefore, where there is a negligent package of the passenger's goods into inherently low-quality baggage that results in damage during the baggage screening by the Aviation Security Screener. When being loaded into the aircraft baggage compartment, the baggage was damaged again by the negligence of another, the second damage has nothing to do with the first damage except for the fact that the second damage would not have occurred had it been the baggage already damaged before it was screened for uploading into the aircraft compartment. Here, the initial negligence package is a cause of Passenger baggage damage, for but for that negligence the second damage would not have occurred. But it is too remote a cause to be considered by the law, and thus air carrier will not be liable for the second injury.

The rule, therefore, is that the injurer is liable to the victim for the full amount of the victim's damage, but only when the injurer is found to have behaved negligently and the victim is found to have behaved none negligently".³⁶ It is therefore submitted that by the rule of contributory negligence, one needs to concede that a passenger would not be allowed to seek redress and receive

³⁴Ibid.

³⁵Ibid; 113-114

³⁶Michelle J. White, 'An Empirical Test of the Comparative and Contributory Negligence Rules in Accident Law' (1989) 20(3) *The RAND Journal of Economics*, 308-330 at 308; see also Batra J.C 'Modernization of the Warsaw System - Montreal 1999' (2000) 65 J. AIR L. & COM., 439.

indemnity for his act.³⁷ Consequently, a passenger shall bear the liability for an act caused by the fault of his.

9.2.2 Criminal liabilities

Civil aviation stakeholders including airlines, governments, and passengers are growing concerns at the rate at which crimes of different nature have been committed against civil aviation in general. Offences such as hijacking, sabotage, and hostage-taking amongst others, because of their destructive characteristics, have constituted crimes of terrorism³⁸ against the international community.³⁹ Unruly passenger⁴⁰ behaviours such as violence against crew and passengers, harassment, and failure to comply with security and safety and at many times public health instructions, may be termed as minor crimes, thus committed against individual passengers and/or other stakeholders.

A passenger with a disability shall be liable if at one time or another involved in any of the crimes against the international community or any of the minor crimes, or unruly behaviour against the crew, airport and passengers. In many cases, crimes against the international community and minor offences against individual passengers, airlines, and crews have resulted in death, destruction of properties, delays, and flight cancellations.⁴¹ The IATA 2014 Annual General Meeting set out

³⁷For full discussions on the theory of contributory negligence, see William Schofield 'Davies v. Mann: Theory of Contributory Negligence' (1890) 3 (6), *Harvard Law Review*, 263-277.

³⁸Terrorism has no specific and generally acceptable definition. Various scholars and academic writers define the term the way they understand it. See Akehurst M, 'Jurisdiction in international law' in Michael Reisman (ed.) *Jurisdiction in international law*, (England: Ashgate Aldershot, 1999) 41-42; Akehurst M, 'Jurisdiction in international law' (1999) 46 *British Year Book of International Law*, 161-162; Dinstein 'Terrorism as an international crime' (1989) *Israel Yearbook on Human rights*, 69-70; Suchakritkul 'International Terrorism and the problem of jurisdiction' (1987) 14 *Syracus Journal of International Law and Commerce*, 171; Oppenheim L, 'International Law' in Jennings R.Y and Watts A. (1964) 9th edn, 470; Bassiouni C, 'Universal Jurisdiction from international crime: Historical perspective and contemporary practice' (2001) 42, *Virginal Journal of International Law*, 82, 125.

³⁹See Ismail Adua Mustapha, *International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria* (Unpublished PhD Thesis, 2014) 117.

⁴⁰ For the definition of an unruly passenger, see IATA: Promotion of the Protocol to Amend the Convention on Offenses and Certain Other Acts Committed on Board Aircraft Done at Montreal on 4 April 2014 (Montreal Protocol 2014) presented by the International Air Transport Association, A 39-WP/139Le 4/8/16, 2. See also Ruwantissa Abyratne, 'The Unruly Passenger. In: Legal Priorities in Air Transport' (2019) *Springer*, Cham. https://doi.org/10.1007/978-3-030-18391-2_7, 103.

⁴¹For example, the 9/11 hijackings have serious effect on the international community in the areas of economic, loss of lives, damage to properties and distortion of international community peace and harmony. See Tunde, B and Lester B.L 'The Economic Implications of Terrorist Attack on Commercial Aviation in the USA, (Draft Create Report, 2005) 4;

the Core Principles and High-level Document to reduce the growing concern over unruly passengers' behaviours in the contract of carriage by air.⁴² The Legal Committee of the International Air Transport Association (IATA) identifies the causative agents of unruly behaviours to include intoxication through narcotic drugs, alcohol and lack of medication that starts before the passenger boarded the aircraft; frustration linked with delay or cancellation; irritation with other passengers on board or hygiene; and long journey. Others are dissatisfaction with customer service and service delivery such as inoperative lavatories, and wheelchairs; inability to smoke or alcohol withdrawal symptoms; restrictions related to the use of portable electronic devices; Mental breakdowns/episodes⁴³; Mental and emotional conditions; and Personality differences between the crew members and passengers or between the passengers⁴⁴. The consequential effects of unruly behaviours include unlawful seizure of aircraft; its sabotage among others as contained in Article 1 of the Beijing Convention 2010 and its 2014 Montreal Protocol. That is why the contracting states are obliged to punish the offender severely⁴⁵.

The criminal liability of any person including a Passenger with a disability whose behaviour is found wanting may be when the aircraft is in flight or service. On one hand, an aircraft is said to be "in flight" at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation; in the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and persons and property on board⁴⁶, on another, it is "in service" 'an aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing; the period of service shall, in any event,

Bamhart, B. 'Market Reopen, Plunge' *Chicago Tribune* (September 17, 2001); Ismail Adua Mustapha, n. 39, 71-79; and Jenkins, B.M The Terrorist Threat to Commercial Aviation (Being a paper presented at the International Seminar on Aviation Security, Herzeliyyat, Israel, February 5-9, 1989, 11.

⁴² IATA: Unruly Passenger, <https://www.iata.org/en/programs/passenger/unruly-passengers/> assessed 20/8/2023.

⁴³ IATA Doc. 10061 LC/36.

⁴⁴ Abeyratne Ruwantissa, n. 40.

⁴⁵ 2010 Convention on The Suppression of Unlawful Acts Relating To International Civil Aviation Adopted in Beijing, China on 10 September 2010, ICAO Doc. 9960; art. 3.

⁴⁶ Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Apr. 4, 2014, 2014 WL 1668702 [hereinafter Montreal Protocol, 2014], available at http://www.icao.int/Meetings/AirLaw/Documents/DCTC_34_en.PDF [perma.cc/D5UE-6FEW], art. II; Nigerian Civil Aviation Act, 2022: sec. 117 (2); 2010 Beijing Convention: art. 2 (a); Jennifer A. U 'The Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft: A Missed Opportunity or A Sufficient Modernization?' (2016) 49 *Indiana Law Review* 718-719.

extend for the entire period during which the aircraft is in flight⁴⁷. What determines whether or not offence(s) is committed on board aircraft is when the external door of the aircraft has been closed until it is opened for disembarkation at a place of destination of the aircraft. Any unruly behaviour of a passenger with a disability within this period shall be punishable as an offence on board an aircraft. Likewise, an offence committed by such a passenger with a disability between the period of pre-flight operation until the aircraft is in flight shall also be considered an offence. The Contracting State is therefore encouraged to initiate appropriate criminal, administrative or any other forms of legal proceedings against any person who commits on board an aircraft an offence or offences against penal law⁴⁸; or acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board⁴⁹.

It is submitted that such act(s) that physical assault or a threat to commit such assault against a crew member; refusal to follow a lawful instruction given by or on behalf of the aircraft commander to protect the safety of the aircraft or persons or property therein⁵⁰ are examples of unruly behaviours that will jeopardize the safety and security of aircraft. Therefore, a passenger with a disability whose behaviour jeopardizes the safety and/or security of aircraft, passenger or crew members shall be criminally responsible to the extent of his commission of the offence.

It is also submitted that a gap created by the Convention or the 2014 Montreal Protocol is that a fine or penalty for such a criminal is left to the determination of each Contracting State to the Convention. Therefore, a Passenger with a disability who committed any of the offences under Article 1 of the Beijing Convention 2010 or Article 15 bis of the Montreal Protocol 2014 may be prosecuted and punished either by the State where the aircraft is operated or where the aircraft landed⁵¹.

i. Carriage of dangerous goods

Apart from the unruly acts mentioned under the 2014 Montreal Protocol, a passenger with a disability may be criminally liable for the carriage of dangerous goods on board aircraft. According to the Department of Transportation of the United States of America Federal Transportation, a Dangerous Goods, otherwise known is 'any substance or material that is capable of posing an unreasonable risk to health, safety, and property when transported in commerce'. According to

⁴⁷Beijing Convention, 2010: art. 2 (b); Nigerian Civil Aviation Act, 2022: sec. 117 (2); Abeyratne, n. 40.

⁴⁸Convention on Offences and Certain Other Acts Committed Onboard Aircraft 1963 signed at Tokyo on 14th September 1963, 220 U.N.T.S 1969 or ICAO Doc.8369, art. 1.

⁴⁹Ibid; art. 1.

⁵⁰Montreal Protocol, 2014, art. 15 bis.

⁵¹ Ibid; art 3 (1) bis.

Federal Transportation, many of the goods we are very familiar with and use on a regular and daily basis such as lithium batteries, dry ice and aerosol whipped cream are dangerous goods. Accordingly, the 2023-2024 Edition of the ICAO Technical Instructions for the Safe Transport of Dangerous Goods by Air⁵² and the 64th Edition of the IATA Dangerous Goods Regulations (DGR) maintain that batteries that power wheelchairs and mobility aids are dangerous goods when carried by air. However, it can with some other dangerous goods be transported by air subject to adherence to lay down guidance and procedure by the ICAO Technical Instructions and IATA Dangerous Goods Regulations 2023. Therefore, a Passenger with a disability who wishes to carry a battery-powered wheelchair should provide information to that effect to the airline ahead of arrival at the airport, so that their battery-powered mobility aid can be approved and loaded on the aircraft with the minimum delay⁵³. Consequently, a passenger with a disability of any kind must comply with the guidelines, procedures and technical instructions on the carriage of dangerous goods by air failure which may result in prosecution and punishment for illegal carriage of dangerous goods by air. In Nigeria, for example, it is permissible to offer an airline to carry dangerous goods subject to the provision of section 69 (4) of the Nigerian Civil Aviation Act, 2022. However, Technical Guidance and Rules and Procedures for the safe transport of dangerous goods by air must be strictly complied with otherwise the passenger and air carrier would be liable.

ii. Forgery and counterfeiting of travelling document(s)

A passenger with a disability shall be criminally responsible for the crime of forgery or counterfeiting travel documents among others in a contract of carriage by air. None of the Conventions relating to the carriage of passengers by air made mention of forgery. However, recourse shall be made to national law in defining the two terms, forgery and counterfeiting respectively. On one hand, section 1 of the UK Forgery and Counterfeit Act 1981 defines forgery as a person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and because of so accepting it to do or not to do some act to his own or any other person's prejudice'. Section 363 of the Northern Nigerian Penal Code Law defines 'Forgery' as 'Whoever makes any false document or part of a document, with intent to cause damage or injury to the public or any person to support any claim or title or to cause any person to

⁵²ICAO Technical Instructions for The Safe Transport of Dangerous Goods by Air (Doc 9284) <https://www.icao.int/safety/DangerousGoods/Pages/Doc9284-Technical-Instructions.aspx>, accessed 29/8/2023.

Technical Instructions 2023-2024 edition.

⁵³ IATA Dangerous Goods Guidance for Passengers available at <https://www.iata.org/en/programs/cargo/dgr/dgr-guidance-passengers/> assessed 29/8/2023.

part with property or to enter into any express or implied contract or with intent to commit fraud or that may be committed, commits forgery; ...

The above definitions are similar in that they both rely on the *actus reus* and *mens rea* to punish the offender(s). Therefore, the intention coupled with the guilty mind in carrying out the act of forgery is material to the conviction of the criminal. A passenger with a disability who intentionally makes false documents or instruments about his carriage from one destination to another is said to have committed the offence of forgery and thus liable to the punishment attached to the offence. On the other hand, the Penal Code defines counterfeit as where a person causes one thing to resemble another thing intending using the resemblance to practice deception or knowing it to be likely that deception will thereby be practiced.⁵⁴ In a contract of carriage by air, a passenger who knowingly forged or counterfeited a document with intent to deceive the air carrier to enter into a contract of carriage by air or to secure approval from the Civil Aviation Authority to do a certain act is said to have committed forgery. For example, in March 2022, an investigative journalist revealed that some tout and airport workers of the Murtala Muhammed International Airport, Ikeja connived to procure and deliver a forged/fake COVID-19 PCR Test result to him without collecting of blood sample or visiting the laboratory.⁵⁵

iii. Damage to Air Navigation Service

A passenger with a disability may also be responsible for any of his acts that result in damage to Air Navigation Services (ANS). The ICAO Manual on Air Navigation Services Economics defines ANS as 'air traffic management (ATM), communications, navigation and surveillance systems (CNS), meteorological services for air navigation (MET), search and rescue (SAR) and aeronautical information services/aeronautical information management (AIS/AIM)'.⁵⁶ Section 117 of the Nigerian Civil Aviation Act 2022 also defines it as any information, direction, and other facilities furnished, that are issued or provided in connection with the aircraft navigation or movement and the control of the movement of vehicles in any part of an aerodrome used for the movement of aircraft. Therefore, damage to any of what constitutes Air Navigational Service amounts to a criminal offence upon which a passenger with a disability shall be prosecuted and punished if he is found wanting by participating or in connivance with others.

⁵⁴Nigerian Penal code, sec. 21.

⁵⁵ Oladipupo, A *Undercover Investigation: With a Fake COVID-19 Certificate, I Travelled from Nigeria to the UK and Back!: Investigative Journalism* (2020) accessed 10 February, 2023, <https://fij.ng/article/undercover-investigation-with-a-fake-covid-19-certificate-i-travelled-from-nigeria-to-the-uk-and-back/>.

⁵⁶International Civil Aviation Organization Manual on Air Navigation Services Economics Fifth Edition, 2013. Doc 9161.

iv. *Offence of aircraft hijacking*

A passenger with a disability would be criminally responsible for, where he participated or conspired to commit the offence of Aircraft Hijacking. Historically, the term gained popularity between 1920 and 1933, an era when bootleggers commandeered truckloads of liquor from each other. Thus, its introduction into civil aviation was in the 1960s when political activists resulted in the act to press home their political ideologies.⁵⁷ At the 1970 Hague Conference, different terminologies such as "air piracy", "aerial piracy", "aerial hijacking or hijacking or unlawful seizure", "skyjacking", and "aerial skyjacking" were suggested but none of these terms was retained⁵⁸. The International Conventions on Aviation Security⁵⁹ adopted the term unlawful seizure of aircraft in place of aircraft hijacking. It is therefore posited that a small degree of threat force or intimidation that will endanger the safety of aircraft will suffice. About the contract of carriage of passenger by air, a passenger with a disability who either by himself or in connivance with the other person hijacks an aircraft will be severely punished as obliged in the Hague Convention 1970.

v. *The offence of damage or causing damage to an aircraft*

Any action or inaction of a passenger with a disability that damaged or caused damage to an aircraft which renders it incapable of flight; or placing or causes to be placed any substance such as an explosive device which is likely to render it incapable of flight is an offence and punishable under the national law of respective ICAO members.⁶⁰ It, therefore, opined that by analyzing the provision of the 2010 Beijing Convention, any damage that did not render the incapability of flight or endanger its safety is outside the scope of the offence but the offender may be punished under another law guiding the criminal activities of a particular country.

vi. *Using aircraft as a weapon of mass destruction*

The Chicago Convention, of 1944 obliges the contracting states to use the aircraft to maintain peace and harmony of the international community as a whole; and

⁵⁷For history of aircraft hijacking, see Ismail Adua Mustapha, n. 39, 41-54

⁵⁸ Gerald, F.F 'Toward Legal Suppression of Act Against Civil Aviation, in Patricia (ed.) *AirHijacking: International Perspective*, (1970-1972) 39 *International Conciliation* 52; Agrawala, S.K. 'Aircraft Hijacking and International Law' (Oceanic Publications, Inc, India) 14; Evans A.E 'Aircraft hijacking: its Causes and Cure' (1969) 63(4) *American Journal of International Law*; Evans A.E 'A proposed Method of Control' (1971) 37 *Journal of Air Law and Commerce*, 171; Evans 'The Law and Aircraft Hijacking' (1972-1993) 1 *Syracuse J. Intl L & Com* 266.

⁵⁹Tokyo Convention, 1963, Hague Convention, 1970, Montreal Convention, 1971, and 2010 Beijing Convention.

⁶⁰2010 Beijing Convention, art. 1 (1).

to guide against its misuse in all ramifications.⁶¹ It is therefore submitted that what could amount to misuse of civil aircraft includes: (1) using the aircraft as a weapon of mass destruction; or (2) instrument to release or discharge from an aircraft any biological, chemical and nuclear weapon or explosive which is likely to endanger the safety of an aircraft or cause serious bodily injury or death or damage to the property or environment⁶²; and (3) to transport, causes to be used to transport any prohibited materials that will cause death or serious bodily injury or damage to property or environment⁶³. A passenger irrespective of any form of his disability who got himself involved in any of the acts listed shall be criminally responsible for any of these acts.

vii. Violence against persons at the Aerodrome

Neither the Chicago Convention nor the 2010 Beijing Convention on Aviation Security defines "aerodrome". It has however been defined as a defined area on land or water including any buildings, installations, and equipment intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft⁶⁴. A breach of the peace or unruly behaviour within the aerodrome as defined constitutes violence in the airport. Consequently, a passenger with a disability who perpetrates an act of violence against any person (co-passenger, airport worker, and other employees among others) within the aforementioned designated areas is punishable under the realm of civil aviation law.

viii. Destruction of or damage to the aerodrome or Disruption of the service at the Aerodrome

It is a criminal offence for a passenger with a disability to personally engage or under his directive intentionally and unlawfully destroy an aerodrome or its services or civil aviation operations using any device or substance or weapon that endangered or is likely to endanger the safety at the airport.⁶⁵ 'Civil aviation operations include 'ground handling operations, air operations, aerodrome operations, meteorological services, air traffic control and provision of navigational aids, catering and allied services⁶⁶. For example, a protest by the passenger against poor service or poor execution of the contract of carriage by air that leads to disruption of any of the civil aviation operations or damage to the aerodrome or property is punishable. Also, a passenger who damaged a parked aircraft within an aerodrome is liable to be punished for such unruly behaviour. It is however

⁶¹Chicago Convention, 1944, art. 4.

⁶²2010 Beijing Convention, art. 1 (1) (f).

⁶³2010 Beijing Convention, art. 1 (1) (i) and Nigerian Civil Aviation Act 2022, sect. 84 (1) (a)-(i).

⁶⁴Nigerian Civil Aviation Act, 2022, sec. 117(1).

⁶⁵ 2010 Beijing Convention, art. 1 (2).

⁶⁶Nigerian Civil Aviation Act, 2022, sec. 117.

submitted that the criminal elements *actu reus and mensra* are pivotal to the successful conviction of the offender(s) otherwise it is not an offence.

xi. Assistance to evade investigation prosecution or punishment

A passenger with a disability who unlawfully and intentionally assists the alleged criminal(s) to evade investigation into an alleged crime against civil aviation, or procure him from prosecution or escape punishment shall be criminally responsible, prosecuted and punished severely⁶⁷ Here, such a passenger with a disability must intentionally and unlawfully carry out the act of assistance otherwise this article of the Convention is not applicable, thus he will not be criminally responsible for his act.

x. Assault, Threat and Intimidation of crew member

Issuing a threatening word or assaulting or intimidating a passenger, and crew member is a criminal offence under civil aviation law. Neither 'Assault', 'Intimidation' nor 'Threat' is defined under the Civil Aviation Security Laws. To bridge the gap, recourse shall be made to Penal Code Law to define these crimes. 'Assault' is defined as: 'Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit assault'⁶⁸. By this definition, a passenger with a disability who intentionally or knowingly makes a gesture or preparation to cause apprehension to any crew member or pilot with the use of criminal force to destroy aircraft in service or in flight or commit any offence in the aerodrome or against any person while on board aircraft or at aerodrome is criminally responsible to such an act is guilty of the crime of criminal assault.

Also, the Code defines intimidation as: 'Whoever threatens another with any injury to his person, reputation or property of anyone in whom that person is interested, with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do or to omit to do any act which that person is legally entitled to do as the means of avoiding execution of such threat, commits criminal intimidation'⁶⁹. Therefore, the act of threatening to destroy aircraft in service or in flight or commit any offence against the aerodrome or any passenger or person at the aerodrome amounts to a criminal offence, thus a passenger with a disability is criminally responsible.

⁶⁷2010 Beijing Convention, art. 1 (4).

⁶⁸Nigerian Penal Code Law, sec. 246.

⁶⁹Ibid; sec. 396.

9.3 CONCLUSION

There is no doubt that the rights of a passenger with a disability in the contract of carriage by air have been taken care of at both international and national levels. At the moment, there is no specific law regarding the liabilities of a passenger with a disability in the contract of carriage by air. Consequently, the civil and/or criminal liability of a passenger with a disability is indirectly stated in the various international conventions on the contract of carriage by air and Conventions on aviation security.

From the Convention on the contract of carriage by air, Montreal Convention 1999, a passenger with a disability may be civilly liable for his/her failure to pay ticket fare; contributed to his damage; failure to give relevant information as to the nature of his/her disability, and negligent conduct against the air carrier or airport operator. Criminal liability, on the other hand, stems from the various provisions of the international Conventions on civil aviation security. A passenger with a disability will be convicted for offences of aircraft hijacking; assault; intimidation; forgery and counterfeiting. Other offences are the destruction of air navigation service; helping evade investigation, prosecution, or punishment; Destruction of or damage to the aerodrome or Disruption of the service at the Aerodrome; carriage of dangerous goods; violence at the aerodrome; and destruction of aircraft not in service. It is therefore found that the two criminal elements, *actus reus*, and *mens rea* must exist before an offending passenger with a disability can be convicted and severely punished under the national law of respective ICAO member states. The article therefore maintains that a passenger with a disability of any kind is not immune from civil and/or criminal liabilities in the contract of carriage by air.