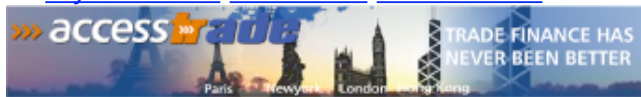


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Dana Crash: What the Law Says...

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Dana Air Office

SEBASTINE HON, SAN calls for a criminal inquiry into the Dana Plane crash of June 3

Nigeria is still mourning the loss of close to 200 precious lives in the Dana Air crash, which occurred on June 3, 2012, at a location about four nautical miles to the Murtala Mohammed International Airport, Lagos. Nigerians, being currently under gruelling economic and security challenges and a broken down social order, are finding it very difficult to overcome the shock occasioned by this air accident, which I will label a

national calamity.

As is usual with Nigeria – and painfully so – there is much buck passing as to who is liable or who is to be held accountable for the colossal losses in terms of human and material capital. However, while the valuable souls lost in the crash cannot be brought back to life, an attempt is hereby made to enlighten Nigerians, especially relations of the victims, on the applicable law and the remedies available to them.

It must first be noted that liability in civil aviation accidents is regulated by the combined provisions of the Civil Aviation Act, Cap. C13, Laws of the Federation of Nigeria, 2006; the Warsaw Convention on Carriage by Air, 1929, which was domesticated by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953 – itself domesticated and contained in Vol. X1 of the Laws of the Federation of Nigeria, 1958; and the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations, U.K. Statutory Instrument No. 279B of 1996.

The ready question that comes to mind on the continued applicability of the Warsaw Convention of 1929 and the British Colonial Order of 1953, in view of the existence of Laws of the Federation of Nigeria since 2004, has been answered by the Supreme Court in *IBIDAPO v LUFTHANSA AIRLINES* (1997) 4 NWLR (Pt. 498) 124, where it was argued that the 1958 Laws of the Federation of Nigeria that domesticated the said Order had been repealed by implication. In overruling that submission, the Supreme Court held thus: “An important international convention like the Warsaw Convention cannot be said to be impliedly repealed when the country is still taking advantage of its provision and has not promulgated similar enactment to replace it. The Convention is so important to this country both domestically and internationally to be avoided. A vacuum of such magnitude cannot be tolerated in our legal system. It is a notorious fact that all air tickets, whether domestic or international, contain notices alluding to the provisions of the Warsaw Convention being referred to in this case as the 1953 Order. The 1953 Order can certainly be taken judicial notice of under section 74(1)(a) of the Evidence Act (Cap. 112), Laws of the Federation of Nigeria, 1990.”

Under Rule 2(1) of the U.K Statutory Instrument of 1996, an aircraft accident is an occurrence associated with the operation or running of an aircraft, which happens between the time a person boards the aircraft with the intention of flying till the time such a person disembarks but during which time he suffers a fatal or serious injury as a result of being in the aircraft.

On liabilities of an aircraft carrier when an accident occurs, section 48(3) of the Civil Aviation Act, 2006 provides in very mandatory terms thus: “(3) In any case of aircraft accident resulting in death or injury of passengers, the carrier shall make advance payments of at least US \$30, 000 (Thirty Thousand United States Dollars) within 30 (Thirty) days from the date of such accident, to the natural person or such natural persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons and such advance payments shall not constitute recognition of liability and may be off set against any amounts subsequently paid as damages by the carrier.”

The managers of Dana Airline should, therefore, immediately establish contact with the relations of all the persons that lost their lives as passengers, with a view to effecting the payment of at least 30,000 US Dollars for each soul that was lost in that accident as “advance payment,” to enable those relations meet their “immediate economic need.”

It must be noted, however, that by Article 22 of the Warsaw Convention of 1929, the liability of an airliner in an accident involving a passenger carrier is limited to the sum of 125,000 Francs. But the provisions of Article 22 are circumscribed by Article 25 of the same Convention, which provides that the carrier shall not be entitled to avail itself of the provisions limiting or excluding its liability if the damage is caused by the “willful misconduct” of the Airline or of its agent who is acting within the scope of his employment.

Although case law on claims in aircraft accidents are spatial in Nigeria, the few decisions on the issue, coupled with a consideration of few others from other jurisdictions, will be sufficient for this piece.

In the English decision of *HORABIN v BOAC* (1952) 2 All ER 1006, “willful misconduct,” contained in Article 25 of the 1929 Convention, was described as follows: “Misconduct is misconduct which the will is a party and it is wholly different from mere negligence or carelessness, however gross that negligence or carelessness may be.... To be guilty of willful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be”

See, also, *GOLDMAN v THAI AIRWAYS INTERNATIONAL LTD.* (1983) 3 ER 693 – adopted in *OSHEVIRE v BRITISH CALEDONIAN AIRWAYS LTD.* (1990) 7 NWLR (Pt. 163) 489.

Situated within the context of the recent Dana Air mishap, therefore, if there is evidence that the Airline officials knew or had reason to know that the ill-fated aircraft was faulty or needed to be worked on; or if they knew or had reason to know that the said aircraft was too old to still be flown but persisted in flying it, then their liability to pay more than 125,000 francs to each passenger will not be limited or excluded by Article 22 of the Warsaw Convention of 1929.

The Supreme Court was, in the recent case of *HARKA AIR SERVICES (NIG.) LTD. v KEAZOR* (2011) All FWLR (Pt. 591) 1402, called upon to determine the liability of Harka Airline, whose aircraft had crash landed at the Lagos Airport, resulting in fire outbreak that caused the plaintiff personal injuries and loss of luggage. The appeal by the Airline to the Supreme Court was against the award of \$11,000 against it by the Court of Appeal. In dismissing the Appeal, the Supreme Court agreed with the lower Court that the pilot was guilty of willful misconduct, because:

- (a) The Airline operated the flight when others had cancelled their flights due to bad weather conditions;
- (b) The aircraft in question was not given clearance to land at the threshold because it was at a height above the normal and regular height; and
- (c) The pilot did not respond to the air traffic controllers’ questions about the landing mode.

Adekeye, JSC, who delivered the lead judgment, held on page 1423 thus: “Knowledge would be imputed where the nature of the damage would ordinarily flow from the reckless conduct of the pilot. In other words, from the foregoing prevailing circumstances and especially the pleadings of the respondent..., it is glaring without more that the learned trial Judge was right in holding that the defendant/appellant was guilty of misconduct as provided in section 25 of the Warsaw Convention of 1929.”

Rhodes-Vivour, JSC, in his concurring judgment, held at page 1437 tersely thus: “Willful misconduct is a deliberate wrong... by a pilot, airline staff, or its agent which gives rise to a claim for damages by passengers.”

If, therefore, investigations or facts reveal that either the management or staff of Dana Airlines were guilty of willful misconduct, substantial damages will inevitably inure to the relations of the passengers of the ill-fated flight, the limiting provisions of Article 25 of the Warsaw Convention of 1929, notwithstanding.

Similarly, all persons who incurred losses when the aircraft rammed into them or their buildings are entitled to damages, payable by the Dana Airline owners or management. Their right to such compensatory damages is covered by section 49(2) of the Civil Aviation Act, 2006, which provides as follows: “(2) Where injury, loss or damage is caused to any person or property on land or water by an article or a person in or falling from an aircraft while in flight, taking off or landing, then, without prejudice to the law relating to contributory negligence, damages in respect of the injury, loss or damage shall be recoverable without proof of negligence or intention or any other cause of action, as if the injury, loss or damage had been caused by the willful act, neglect or default of the owner of the aircraft.”

Although section 49(2) has some provisos, they are not relevant here. Suffice it to say, however, that the provisions of the subsection have made it easy for persons who have suffered injury while still on the ground to claim damages from a defaulting Airline. Also, the phrase “any other cause of action” in the provision means that apart from the cause of action created under the subsection, claims could also be made by such persons under other laws.

In conclusion, however, I hereby sternly suggest that a very strong criminal enquiry be conducted by the Federal Government into the recent Dana Air crash. The haste with which the management of the Airline is churning out press statements is very suspicious. Rather than show remorse, for instance, they have not only claimed that the ill-fated aircraft was airworthy the day of the incident, but have also claimed they are losing over N50 million daily! One begins to wonder whether their only concern now under this period of deep-seated national grief is what they are losing financially. If that is how much they are earning daily, what are they still doing with aircraft that are over twenty years of age?

The searchlight of such criminal inquiry should also be beamed on Nigerian Civil Aviation management authorities, with a view to not just removing persons from office, but also sending them to jail, where criminal negligence has been established against them.

Adieu, beloved victims of Dana Air crash.

•**HON, SAN writes from Abuja**

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- Mr. Sebastien, SAN, Thank you for this insight!! To all those who might be involved in the investigation, pls shun any kind of gratification because BLOOD of our dear

brothers, sisters, mothers, fathers, children etc are involved! And to DANA, shame for not having a good public relation unit that would have advised you on how to go about this calamity created

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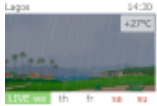
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