



## Appraising the concept of liability under nigeria's aviation industry

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### Abstract

This paper that is aimed at appraising the concept of liability as it affects the Nigeria Aviation industry. It employs the doctrinal research methodology which in the main, examine the laws establishing the National Institution charged with the responsibility of administration of the Industry. The paper also considers common law concepts or principles of liability as relevant to the Aviation Industry. These include product liability of the aircraft manufacturer and other stakeholders in the distribution chain. This at common law was not consumer friendly. The defences available to the Defendant were also ex-rayed. Other concept of liability existing in the industry that were considered include, Nuisance and Trespass. It was the conclusion in this paper that most of these liabilities of the carrier which existed at common law need to be activated by statutory provision so as to make them readily available to the injured without the stress of incurring the burden of proof, which if not successfully discharged, leaves the claimant without remedy notwithstanding the degree of injury. This is borne out of the fact that aviation claims by require sophisticated evidence of technical nature to establish, which is not readily available to Nigeria citizens considering the standard of living and development.

**Keywords:** appraise, concept, liability, aviation, industry

### Introduction

Liability in law presupposes the quality or state or condition of being legally obliged or accountable. A legal responsibility to another or society, enforceable by civil remedy or criminal punishment<sup>[1]</sup>. Liability can also be seen as the bond of necessity that exist between the wrong doer and the remedy of the wrong which pertain to the sphere of 'ought' but to that of 'must'<sup>[2]</sup>.

The concept of liability envisages that one must atone for injuries caused to another in the realm of the Law of torts. Liability may arise in tort through trespass, negligence, nuisance, defamation deceit, passing off etc. Liability may be strict or dependent on proof by the claimant. In either case, the law may decree payment of damages or specific performance. Specific performance as opposed to damages is awarded where in the view of the court, damages will not serve to assuage the injuries suffered by the claimant<sup>[3]</sup>. Liability is strict where the defendant is liable for damage caused by his act, irrespective of any fault on his part or where a man acts at his peril and responsible for accidental harm, independently of the existence of either wrongful intent or negligence<sup>[4]</sup>.

In lieu of the above, this paper will examine the concept of liability in terms forms, product liability in aviation with particular reference to the Nigerian Aviation Industry including an examination of the defences available to the defendant under the law on the subject.

### Forms of liability

The doctrine of strict liability was illustrated in the *locus classicus* case of *Rylands v Fletcher*<sup>[5]</sup>. The import of the rule is that any person who for his own purposes brings on his land and collect and keeps there anything likely to do mischief if it escapes must keep it at his peril and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. The rule in strict liability cases does not arise from the fault or wrongful act of the defendant which occasions the injury suffered by the claimant but the defendant's act simpliciter in bringing

the thing that is likely to do the mischief if it escapes and the fact of its escape.

The 'thing' is not limited to inherently dangerous materials such as explosive, gas, petrol or chemicals but also relatively harmless things which only become harmful when accumulated in large quantities<sup>[6]</sup>.

Liability for negligence on the other hand arises not only from failure to do what occasioned the injury, which the defendant has a duty to do, but also the claimant must show that the defendant owes him that duty of care in ensuring that the harm does not occur and that he suffered losses from the harm or injury. Accordingly, in order to attribute liability to the defendant in negligence, the claimant must show that;

- a. The defendant owed him a duty of care
- b. The duty of care was breached
- c. The claimant suffered damages arising from the breach<sup>[7]</sup>.

In both tort and criminal law, strict liability comes to light when a defendant is liable for committing an action, regardless of what his or her intent or mental state was when committing the action. In the realm of criminal law, strict liability is generally related to minor offences. It is classified as one of five possible *mantes reae*.<sup>[8]</sup> In tort laws, there are two broad categories of activities for which a defendant may be held liable i.e. abnormally dangerous activities. These include activities that are either not of common usage or that which creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised. A person who found by a court to have carried on an abnormally dangerous activity will be subject to strict liability for physical harm resulting from the activity<sup>[9]</sup>.

The other category is the tortious act arising from product liability. This arises where a defective product for which an appropriate defendant holds responsibility causes injury to the plaintiff.

### Product liability in nigeria's aviation industry

Product liability has been defined as liability resulting from damage caused by defective products <sup>[10]</sup>. It has also been broadly defined as liability a manufacturer, processor or seller incurs for injury to a person or property of a buyer or third party that is caused by a product which has been sold.

Three grounds exist for proceeding against the defendant for product liability. These include;

1. Defective design
2. Defective construction
3. Inadequate instruction for handing a product put on market for sale.

Wherever a product turns out to be defective after sales, two remedies are available against the defendant. These are breach of warranty and damages in tort. Liability for product defect that causes injury exists with all sellers of the product in the distribution chain The rationale for this is that the law expects that a product satisfies the ordinary expectations of the consumer. Accordingly, where a product possesses an unexpected defect, the product cannot be said to meet the ordinary expectations of the consumer. Three types of defects in products can arise that might give rise to injury that may cause liability to the manufacturer or supplier. These are design defects, manufacturing defects and marketing Defects.

It is necessary to point out that to succeed in an action for breach of warranty, the claimant must establish privity of contract by being the direct purchaser. An action for product liability in tort on the other hand is available to a third parties who may acquire the defective product at later stage <sup>[11]</sup>. This was illustrated in the case of *Maynard v Stinson Aircraft* <sup>[12]</sup>. In that case, the manufacturer was held liable to have been negligent in the design of the airplane on the ground that the exhaust stacks were too short to discharge the hot exhaust gases free and clear from the body of the airplane and that the carburetor drain design was such that gasoline escaping from it was capable or accumulating on the under body of the plane where it ignited the exhaust gases.

The whole essence of the principle of product liability is the allocation of cost between the manufacturer of the product and the consumer of the product for injuries caused by defect in the product <sup>[13]</sup>. The law has concerned itself with evolving principles for allocation of this liability. This has given birth to the emergence of the principle of *caveat emptor*, negligence, breach of warranty and off course that of strictly liability in tort. At common law, the guiding principle concerning product liability is that losses should be borne primarily by the person incurring them unless there exists some good reasons for shifting them to another. The doctrine of *caveat emptor* <sup>[14]</sup> is formed on this principle. The modern position is that product liability proclaims the departure from the doctrine of *caveat emptor* which was more concern at protecting the economic preoccupation of industrialization of the 19<sup>th</sup> century which placed the interest of industrial and commercial development of economy weightier than the interest of the those injured by the industries and that too much burden must not be placed upon it if the industrial advancement must not be impeded <sup>[15]</sup>.

The subsequent theory of negligence which developed through judicial activism was therefore a departure from the doctrine of *caveat emptor* and was therefore received with

consternation among the manufacturing class. Under the doctrine of negligence, manufacturers are required to exercise reasonable care to ensure that the products he sells does harm the buyer. It was this imposition of duty of care that occasioned a radical departure from *caveat emptor*. Over time, this duty of care that was expanded to encompass products sold that were inherently dangerous. Accordingly a duty was therefore imposed on manufacturers to exercise the care of reasonable men to ensure that his products cause no harm <sup>[16]</sup>. Another legal effort that emerged in limiting the effect of the doctrine *caveat emptor* is development of Warranty Law. A warranty, though, not a fault concept, but a contractual agreement which arises wherever any seller has reason to know the particular purpose for which the product is to be used and that the purchaser is relying on the seller's skill and judgment to select suitable goods. A particular purpose differs from the general or ordinary purpose for which goods are used in that it envisages a specific use by the purchaser which is peculiar to the nature of his business or undertaking, as distinct from the ordinary purpose for which goods are used, are those envisaged in the concept of merchantability.

Another legal intervention targeted at limiting the doctrine of *caveat emptor* is the evolution of strict liability in tort. One of the first judicial decisions to suggest the theory of strict liability was in *Greenman v Yuba Power Product* <sup>[17]</sup>. In that case, the court held that a manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. The plaintiff is only required to prove the relationship of the product with the defendant coupled with the fact that the injury or damage resulted from a defective condition of that product, which is an unreasonably dangerous one and which existed at the time the product left the manufacturer's or seller's control.

The principle allows a purchaser to recover from all the sellers in the distribution chain without regard to privity of contract. Accordingly, a person who is not a purchaser but a consumer of the product can recover from the manufacturer. In recent time, a new dimension was introduced into the doctrine to the effect that the manufacturer or seller could be liable even where there is no defect in the product, if it is likely to cause injury when used within the range of ordinary anticipated uses and the manufacturer or seller failed to give notice of this likelihood of injury to the consumer or user <sup>[18]</sup>. Thus the burden of proving that the defendant was negligent was effectively removed from the shoulders of the claimant.

In bringing the issue of product liability to aviation, manufacturers of aircraft may be held liable for negligence in breach of express or implied warranty. The aircraft manufacturer may be liable in negligent design, or fabrication of the final product <sup>[19]</sup>. The trend of liability of the manufacturer may also include failure to warn users of the aircraft of dangerous propensity which duty will live long after the sale of the aircraft. This implies that it is not sufficient for the manufacturer to satisfy the standard of the industry without meeting the standard of due care in the circumstances in which his product will be employed <sup>[20]</sup>. This position will raise an issue as to whether or not the licensing or certification authority should take a share or assume total liability for the defect in the aircraft which may occasion the injury to the claimant. In Nigeria, it is the

responsibility of the Civil Aviation Authority (CAA) to issue licenses, permits, air worthiness certificates to aircrafts<sup>[21]</sup>. Under the regulations, no aircraft will be issued a license, permit or airworthiness, unless it was certified to have met the requirements for certification, licence or airworthiness undertaken by the Authority. It is our view in this research that there will be no legal justification to leave the licensing authority (CAA) which gave a clean bill to the Aircraft and saddle the manufacturer solely with liability for the defect in the aircraft that occasion the accident that injured the claimant.

Another knotty area of the law as it affects product liability is the issue of conflict of law. It is common knowledge that an aircraft could be manufactured in united states with parts produced in China by sub-contractors in four other states and purchased by a dealer in Japan. If the aircraft crashes in the middle of navigable water that separate two states, the aircraft manufacturer may be sued in another state which may be where the aircraft was incorporated or in which it does a considerable portion of its business. Thus the applicable law pertaining to negligence, contract, breach of warranty, privity, limitation of action could be in any of the above mentioned states whose laws on the above stated legal concept may differ.

On the issue of strict liability, the principle dictates that even if a product was designed safely, met manufacturing standards and contain appropriate warning, the manufacturer or retailer may still be liable for injuries resulting from use of the product simply because the product caused the injury<sup>[22]</sup>.

It is important to note that in the past air passengers were not in a position to maintain an action against manufacturers. They could only sue the carrier and such claims must be based on one of the International Conventions on air law, with the imposed limitations on the extent of liability for compensations<sup>[23]</sup>. Contrary to the previous position where the claimant must prove negligence of the manufacturer, he only need to prove that the aircraft was defective at the time it left the domain of the manufacturer and that the defect was the direct cause of the damage. The manufacturer will still be liable even if he proves that he has taken all necessary precautions to avert the damage<sup>[24]</sup>.

#### **Product liability defences in aviation claims**

Defendants in product aviation liability claims will invariably include the manufacturer, distributors, maintenance, repair and overhaul operators including the carrier that may be named in the claim.

1. One of defenses available in product liability claims is that the claimant has not sufficiently identified who supplied the product that caused the injury. The claimant must be able to link the product with the party responsible for the manufacturing or supply. There exists an exception to this defence in what the plaintiff fails to identify which of the many stakeholders in the manufacturing of the aircraft is responsible for the defect that caused the accident occasioning the injury, each of the manufacturer of the components of the aircraft will be liable according to the percentage sales in the aircraft<sup>[25]</sup>.
2. Another defence a manufacturer might raise is that the claimant substantially altered this product after it left the manufacture's control or that the claimant misused

the product and did not keep to operational manual in use hence the accident that caused the injury. The manufacturer will invariably be relieved of liability if;

- a. The product was substantially altered after it left the manufacturer's control.
  - b. The modification or alteration were not foreseeable to the manufacturer.
  - c. The changes to the product were a superseding cause of the user's injury.
3. The manufacturer may also take benefit of the traditional defenses in tort unless precluded under the theory of strict liability as well as other unique product liability claims<sup>[26]</sup>.

#### **4. Defence of limitation of action.**

The defence of limitation of action is a general defence recognized statutorily in Nigeria. Products may not always be as safe as they ought to be just as defective products occasions injuries to users. Injured parties by defective products have the right under the law to pursue claims and recover damages, however, such claims must be pursued within legal time frame. Where such claims are pursued in accordance with the time frame provided for by law, the defendant has a defence of limitation of time. Statutes of limitation prescribe periods within which a person must file law suit to pursue a claim founded on injury from use of defective product.

Generally, any action emanating from international carriage must be initiated within two years reckoned from the date of arrival at the destination of the flight or from the date on which the carriage stopped. The claimant right of action automatically extinguished after the period<sup>[27]</sup> and can never be revived. A claimant who might have otherwise have a good cause of action loses the right to enforce the cause of action through judicial process<sup>[28]</sup>. In *Ibidapo v Lufthansa Airline*,<sup>[29]</sup> the appellant was a passenger in the Respondent's airline who he board from Lagos to Frankfurt on 16<sup>th</sup> January, 1987. He lost his typewriter which he claimed he brought at the cost \$1,785. On March 21, 1989, more than two years after the cause of action arose, he initiated an action against the Respondent. The Respondent raised the defence of limitation of action and the trial court dismissed the Appellant's claim. His appeal to the Court of Appeal was unsuccessful whereupon he further appealed to the Supreme Court. In considering the appeal, the supreme court per Ogundare, JSC

...If he had any claim against the defendant, he must bring his action within two years of that date. See Article 29(1) of the Warsaw Convention. As the plaintiff did not commence his action until Mar 21,1989, well outside the two- years period laid down in Article 29(1), the two courts below are right in holding that the plaintiff's action is barred by the said Article.

#### **5. Defence of Contributor Negligence.**

The defence of contributory negligence implies that the claimant is partly responsible for the loss or injury that is giving to the claim maintained by the claimant. The effect of contributory negligence under the law is that the Defendant

does not *ipso facto* escape liability but entitled to reduction of the amount payable as damages for the wrong or injury<sup>[30]</sup>. Where a defendant raises the defence of contributory negligence, the onus is him to prove that the Defendant is under a duty to prove that the claimant owe a duty of reasonable care of protecting himself from getting injured himself<sup>[31]</sup>. In many Western Jurisdictions, strict liability approach is adopted to complement negligent claims in product liability claims. This is a commendable approach in the view of this paper having regard to the Nigeria position where the claimant is under a duty to succeed on the strength of his ability to prove his claim<sup>[32]</sup>.

#### **Liability of carriers in trespass to land under nigeria aviation law**

Trespass has been defined as an unlawful act committed against a person or property of another<sup>[33]</sup>. Trespass to land therefore, is committed when an aircraft enters the land of another without the consent and permission of the owner or a person in possession. It was initially conceived as a remedy against forcible or aggressive entry on land of another but was later extended to encompass any entry wrongful entry whether it is peaceful or not<sup>[34]</sup>. Trespass is Tort against possession. It would therefore, imply that where an aircraft crashes into the land of another, an action will lie in trespass for damages. At common law liability of the carrier is strict dependent on certain considerations which include one sidedness of the activity with regard to benefit that accrues in the creation of the risk, Inherent danger of the activity to others, the possibility of distribution of the enterprise which caused the damage to others as part of those who receive benefits<sup>[35]</sup>. This principle of strict liability is premised on the ground that such crash affects all persons that walk or work on the crash or landing site, outside the designated places of landing. As was held by the court in *Rosher Gas & Electric Co. v Dunlop*,<sup>[36]</sup> persons manning such properly equipped areoplane should be alive to the fact that the possibility exist for such aircraft to crash and injure persons on the ground.

#### **Liability in nuisance**

It is a known fact that aircrafts create a lot of noise when flying over the air space. Liability can also arise from noise pollution when an aircraft flies above the land of other persons. Ironically, in Nigeria, statutory provisions have been made to protect aircrafts from claims arising from air pollution when they fly over air space above the land of other persons<sup>[37]</sup>. Curiously, there is no provision relating to legal consequences where an aircraft flies in violation of the that provision

#### **Conclusion**

The fact that ours is a developing country with literacy level cum technological development at low level, there is the need for statutory intervention to fix liability of the airline in the event of crashes that affect persons or property on the ground. An examination of the legal regime in Nigeria discloses that there is no direct provision to addresses losses or damage that may arise from crashed aircraft. The statutory provisions only addressed the contractual relationship between the carrier and the passenger. The effect of this is that a person who is not a passenger that suffer an injury on account of the operations of the aircraft can only resort to the traditional grievance remedial

mechanisms available in torts, with the attendant burden of proof. This presents a serious challenge to the innocent victims who is not passenger to the aircraft. It is therefore, submitted in this paper that there be statutory provisions prescribing remedies for a third party who suffers injuries to his person or property when there is air crash. In other words, the strict liability laid down in the case of *Rylands v Fletcher*(*supra*) is advocated for the benefit of persons on ground that suffer injuries to their persons or property, from plane crashes

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