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# CARRIER'S LIABILITY FOR DEATH OR INJURY TO PASSENGERS: A STUDY OF DANA CRASH COMPENSATION

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## INTRODUCTION

The airplane, no doubt, has helped mankind to conquer distance and facilitate the emergence of the new world usually described as a global village. Today, Airbus A380 seats up to 853 passengers flying at incredible heights over a range of 8,300 nautical miles.<sup>1</sup> One major challenge that mankind has faced with the emergence and growth of air transportation is that of safety. Safety in the air, sometimes at the height of over 50000 feet above sea level, is certainly more a delicate issue than safety on the land or even in the seas. The safety concern has led to a firm regulation of air transportation at international and national levels. This regulation, among other things, is aimed at ensuring fitness of aircraft and related facilities and competence of its crew to enhance the safety of passengers. There is provision for compensation of passengers and even non passengers injured or killed in aircraft accidents. Nigeria has experienced about 13 plane crashes since 1973<sup>2</sup> but not much has been heard about compensation of the victims or their families. There has however been much clamour for the compensation of families of the latest Dana plane crash of 3rd June, 2012. This paper examines the compensation for the families of the 154 passengers and ground victims of the Dana Plane crash against the background of international law relating to carrier's liability for injury or death of passengers.

## LEGAL AND REGULATORY FRAMEWORK FOR CARRIER'S LIABILITY FOR INJURY OR DEATH OF PASSENGERS

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, otherwise called the Warsaw Convention of 1929, was the first instrument adopted to govern carrier's liability internationally. The Warsaw Convention was signed by 23 countries on 12 October 1929, and came into effect 90 days after the deposit with the government of Poland of the fifth instrument of ratification. The key objectives of the regime were the protection of infant airlines by imposing a limitation on liability, the creation of a presumption of liability against the airline in favour of passengers and the achievement of some measure of uniformity in international transportation of passengers, baggage and cargo.

The Warsaw Convention was amended by The Hague Protocol of 1955, the Guadalajara Convention of 1961, the Guatemala City Protocol of 1971 and the Montreal Protocols (Protocol 1, 2, 3 and 4) of 1975. The latest amendment to the Warsaw Convention is the Convention for the

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<sup>1</sup> Associated Press "World's largest passenger plane landing in Honolulu" at <http://www.staradvertiser.com/news/breaking/182730591.html?id=182730591>. Accessed: 15/01/13

<sup>2</sup> Osarcmen, E. "List Of Plane Crashes In Nigeria Since 1973" at <http://nigeriafilms.com/news/17717/20/list-of-plane-crashes-in-nigeria-since-1973.html>. Accessed: 15/01/13

Unification of Certain Rules for International Carriage by Air (the Montreal Convention, 1999) signed at Montreal on 28 May 1999. The Montreal Convention modernized and consolidated the Warsaw Convention and related instruments; it introduced a uniform and harmonized legal framework to govern air carrier's liability in the event of damage caused to passengers, baggage or goods during international journeys. Consequently, the Montreal Convention in its application has priority over the Warsaw Convention and the amendments thereof.<sup>3</sup> This Convention came into force on 4<sup>th</sup> November, 2003 and currently has 103 parties.<sup>4</sup> Nigeria ratified the convention on 10<sup>th</sup> May, 2002<sup>5</sup> and domesticated it vide the Civil Aviation Act, 2006.<sup>6</sup> Section 48 (1) of the Act makes the Montreal Convention as set out in the Second Schedule to the Act and as may be amended from time to time applicable to international carriage by air to and from Nigeria.

The Montreal Convention as modified and set out in the Third Schedule to the Civil Aviation Act and as may be amended from time to time has been given the force of law to govern non international carriage by air within Nigeria, irrespective of the nationality of the aircraft performing the carriage.<sup>7</sup> It is important to note that the Montreal Convention deals only with issues of carrier's liability to passengers, baggage or goods during international journeys. It does not govern carrier's liability to third parties.

The Civil Aviation Act, 2006 is silent on the liability of third parties. Although Nigeria is a party to the Convention on Compensation for Damage Caused by Aircraft to Third Parties which was signed in Montreal in 2009, the Convention is not yet in force having been ratified by only 11 states.<sup>8</sup> This Convention is an amendment and consolidation of the Rome Convention of 1952 and its amending Montréal Protocol of 1978 which Nigeria is not a party to.<sup>9</sup> A detailed discussion on carrier's liability to third parties is beyond the scope of this paper.

The International Civil Aviation Organization (ICAO) regulates air transportation at the international level while the Nigerian Civil Aviation Authority (NCAA) regulates air transportation in Nigeria.

## CARRIER'S LIABILITY FOR INJURY OR DEATH OF PASSENGERS UNDER THE MONTREAL CONVENTION

It is important to note before delving into the issue of liability in international air transportation that the Montreal Convention is a self-contained regime. It is an exclusive regime that prescribes the conditions and limits of liability in international air transport accidents leaving no room for bringing an action in this area under the common law, whether in contract or tort.

In *El Al Israel Airlines v. Tseng*,<sup>10</sup> the United States Supreme Court held that the Warsaw Convention (now consolidated in the Montreal Convention) provides the exclusive right of action against carriers for accidents that occur in international transportation. If recovery for injury or death

<sup>3</sup> Article 55 of the Montreal Convention, 1999 Available online at [dgca.nic.in/int\\_conv/Chap\\_XXI.pdf](http://dgca.nic.in/int_conv/Chap_XXI.pdf). Accessed 10/01/2013

<sup>4</sup> See the ratification status of the Montreal Convention, 1999 at [http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl199\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl199_EN.pdf). Accessed: 14/01/13

<sup>5</sup> Ibid.

<sup>6</sup> Cap 63 Laws of the Federal Republic of Nigeria, 2010.

<sup>7</sup> S. 48 (2), Civil Aviation Act, 2006

<sup>8</sup> The Convention requires 35 instruments of ratification to come into force. See Article 23 of the convention available online at <http://www.avg.aero/assets/docs/GRC%20-%20Final.pdf>. Accessed: 12/01/13. See also the ratification Status of the Convention at [http://www2.icao.int/en/leb/List%20of%20Parties/2009\\_GRC\\_en.pdf](http://www2.icao.int/en/leb/List%20of%20Parties/2009_GRC_en.pdf). Accessed 12/01/13

<sup>9</sup> See ratification status of the Rome Convention and its amending Montreal Protocol at [http://www.icao.int/secretariat/legal/List%20of%20Parties/Rome1952\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Rome1952_EN.pdf) and [http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtlpr78\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtlpr78_EN.pdf) respectively. Accessed: 14/01/13

<sup>10</sup> 119 S Ct 662 (1999)

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suffered aboard an aircraft during international transportation is not allowed under the Convention, then no recovery is available to the plaintiff.<sup>11</sup> Article 17 of the Montreal Convention dealing with carrier's liability to passengers provides in paragraph 1 thereof that:

*The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.*

It is obvious from this Article that the ingredients for liability are as follows:

- a. There has been an accident involving a carrier's aircraft
- b. Passengers suffered death or bodily injury
- c. The accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking

A proper understanding of the three requirements for liability in international air transportation would require the appreciation of the concepts "carrier", "passenger", "accident", "death or bodily injury" and the time when an aircraft is said to be "on board or in the course of any of the operations of embarking or disembarking".

### WHO IS A CARRIER?

The term "carrier" may mean the operator of aircraft. In this sense, the term is ambiguous. It could mean the pilot or the body that owns the aircraft. Air carriers have also been defined as legally constituted public bodies or private companies that undertake transportation by air.<sup>12</sup> By this definition, any organized body of persons, private or public, which provides services needed by passengers in air transportation, is a carrier.

### THE MEANING OF PASSENGER

A passenger has been defined as "a rider who has paid a fare on a train, bus, airline, taxi, ship, ferry, automobile or other carrier in the business of transporting people for compensation."<sup>13</sup> According to Sachdeva,<sup>14</sup> a passenger is a person who has taken a place in a public conveyance by virtue of a contract for the purpose of being in consideration for a fare or its equivalent. This definition overlooks the fact that a person boarding an aircraft on a pass is also regarded as a passenger. Although the Montreal Convention does not define the term "passenger" the definition of the term can be gleaned from Article 1 of the Convention which provides thus:

*This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.*

<sup>11</sup> See also *Morris v. KLM Royal Dutch Airlines* (2002) 2 WLR 578, *Powermatic-Apcom Systems Pte Ltd v. Concord Express (Singapore) Pte Ltd* (1994) 4 SLR 626 at 642.  
<sup>12</sup> Sachdeva, G.S. *International Transportation, Law of Carriage by Air* (Deep and Deep Publications, New Delhi, 1987) p.115  
<sup>13</sup> Uselegal "Passenger Law and Legal Definitions" at <http://definitions.uslegal.com/p/passenger>. Accessed: 14/01/13  
<sup>14</sup> *Ibid*

It is obvious from this article that a passenger is anybody who undertakes to travel by air transportation whether for valuable consideration or free on a pass.

## WHAT CONSTITUTES AN ACCIDENT?

The meaning of term "accident" in arial navigation has proved to be somewhat slippery. In *Air France v. Saks*,<sup>15</sup> the term "accident" was defined by the United States' Supreme Court as an unexpected and unusual incident or occurrence external to the passenger, which cannot arise from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft. In that case, Saks had claimed she suffered permanent damage to her inner ear as a result of pressure changes in an aircraft that was about to land at Los Angeles. The court disagreed and held that the injury was the result of an internal or pre-existing condition.

The reasoning of the United States' Supreme Court in *Air France v. Saks* seems to have been adopted in the Dutch case of *Ypma v. Martinair*.<sup>16</sup> In this case, passenger Ypma suffered injury, when another passenger, while trying to put hand luggage in the overhead storage bins, dropped a suitcase which caused injury to Ypma. Ypma sued Martinair for the suffered damages. The Court considered that the only relation between this event and the carriage by Martinair was formed by the circumstance that the accident took place on board of an aircraft of Martinair. Considering the object of Article 17 of the Warsaw Convention and EC Regulation 2027/97, a causal link needs to exist between the cause of the accident and the operation of the aircraft to establish an "accident" as defined in Article 17 of the Convention. The court therefore held that, Martinair was not liable in damages.

In another Dutch case, *Passenger X v. Martinair*,<sup>17</sup> passenger X claimed damages in summary proceedings for whiplash trauma that she alleged to have suffered as a result of turbulence during a flight with Martinair. The court held that if a passenger suffered such violent body movements as a result of turbulence that a whiplash-injury must be attributed to it, it can be considered an "accident" as defined by Article 17 of the Warsaw Convention. Whether the trauma was caused by the turbulence, however, required further expert examination, for which summary proceedings were not deemed suitable.

If an accident took place in the sense of Article 17, the question must be answered whether Martinair took all necessary measures to avoid injury (Article 20). The passenger argued in vain that Martinair should have postponed departure until the thunderstorm had passed or alternatively the pilot should have tried to avoid the storm when in the air. The court held that Martinair could not have taken measures to avoid the turbulence and neither could it have taken other measures to avoid the accident than to warn the passengers. Recent cases however appear to expand the meaning of "accident" as adumbrated in the cases above. "Accident" has been broadly defined to include injuries caused by turbulence, terrorist attacks, assaults by fellow passengers, boarding ramp falls; burns from flight attendant's spilling scalding water, wet stairs and floors within airports, and the failure or delay of the airline to provide medical aid or attention to a sick passenger.<sup>18</sup> In *Wallace v. Korean Air*,<sup>19</sup> the Second Circuit reversed the

<sup>15</sup> 470 US 392 (1985)

<sup>16</sup> (28 August 2003), Culled from kernkamp "Air Carrier Liability in the Netherlands" available at <http://www.kernkamp.nl/en/services/transport-and-international-trade/air-carrier-liability-in-the-netherlands/> Accessed: 14/01/13

<sup>17</sup> Ibid

<sup>18</sup> Kernkamp, op.cit.

<sup>19</sup> 121 S Ct 1079 (2001)

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lower court's finding of no 'accident' where a passenger was sexually assaulted by a fellow passenger during an international flight. The Second Circuit further held that the 'characteristics of air travel' (sitting in a confined space, adjacent to strangers, in a dimly lit, unsupervised location) increased the plaintiff's vulnerability to an assault and thus constituted an Article 17 accident.<sup>20</sup> Also in *Lahey v. Singapore Airlines*,<sup>21</sup> the court relied upon Wallace to find that a passenger who was injured when a fellow passenger threw a food tray at her in an altercation relating to a reclining seat was injured in an Article 17 accident.

It is submitted that the broadening of the meaning of Article 17 accident as in the last two cases is too much in favour of the passenger. One is only left to wonder where the carrier's fault lies in having Wallace "cramped into a confined space beside two men she did not know, one of whom turned out to be a sexual molester," having regard to the fact that the aircraft was a public one. It has already been observed that compared to the Warsaw Convention, the Montreal Convention is in favour of the passenger<sup>22</sup> and so the overly liberal definition of the term "accident" in Article 17 of the Convention, it is submitted, is an undue accentuation of the disequilibrium.

### THE MEANING OF DEATH OR BODILY INJURY

Liability under Article 17 of the Montreal Convention only lies where the passenger dies or sustains bodily injury. The courts have consistently insisted that psychic or psychosomatic injury does not qualify as bodily injury; there must be some physical manifestation of injury.

In *King v. Bristow Helicopters Ltd*<sup>23</sup> and *Morris v. KLM Royal Dutch Airlines*,<sup>24</sup> the House of Lords held that psychiatric harm could not be considered as 'bodily injury' under Article 17 of the Convention or the Warsaw/Hague Convention and is, therefore, not claimable. In *King*, the claimant was a passenger on board a helicopter that had suffered engine failure shortly after lifting off and landed heavily on the rig. Mr. King sustained no physical injuries, but in the action in Scotland, he claimed that he had developed post-traumatic stress disorder. He further claimed that a pre-existing peptic ulcer had deteriorated and that this deterioration had been caused by the psychological/mental injuries he had sustained.

In *Morris*' case, an unaccompanied 15-year-old female passenger aboard an aircraft was indecently assaulted. She suffered mental, but no physical, injury and claimed damages against the airline under the Convention. It was held that assault was a special risk inherent in air travel, and damages would be recoverable for any bodily injury. No claim lies where there is no physical injury and since the plaintiff did not suffer any such injury, no damages could be awarded.

The House of Lords' decision is consistent with that of the United States Supreme Court in *Eastern Airlines Inc. v. Floyd*<sup>25</sup> and *El Al Israel Airlines Ltd. v. Tseng*,<sup>26</sup> which followed *Floyd*. It reiterated that without bodily injury there could be no recovery under Article 17 for solely psychic or psychosomatic injury. In *Kotsambasis v. Singapore Airlines Ltd.*,<sup>27</sup> the New South Wales Court of Appeal also followed *Floyd* and held that bodily injury in Article 17 does not include purely psychological injury.<sup>28</sup>

<sup>20</sup> culled from Boon, F.K. "Airline Liability in Singapore" at <http://www.lawgazette.com.sg/2002-5/Mav02-focus2.htm> Accessed: 15/01/13

<sup>21</sup> 115 F 2d 464 (2000, SDNY)

<sup>22</sup> *Byrd v. Comair, Inc. (In re Air Crash at Lexington, Ky.)*, 501 F. Supp. 2d 902, 907 (E.D. Ky. 2007), reproduced in UseLegal "Montreal Convention and Warsaw Convention" at <http://aviation.uslegal.com/civil-liability-for-injuries-from-operation-of-aircraft/montreal-convention-and-warsaw-convention/>. Accessed: 14/01/13

<sup>23</sup> (2001) 1 Lloyd's Rep 95, Available at <http://www.i-law.com/ilaw/doc/view.htm?id=150701>. Accessed: 13/01/13

<sup>24</sup> (2001) EWCA Civ 790, (2001) 3 WLR 351, Cited in Kernkamp, op.cit.

<sup>25</sup> 499 US 530 (1991)

<sup>26</sup> 525 US 155 (1999)

<sup>27</sup> (1997) 42 NSWCR 110

<sup>28</sup> For further reading on this subject, see McKay Cunningham, M. "The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?" at <http://www.vanlerbijl.edu/jol/manage/wp-content/uploads/cunningham.pdf>. Accessed: 14/01/13

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It can be deduced from the list of authorities above that Nigerian courts are most likely to reason the same way if faced with such a case.

## “ON BOARD” AND “IN THE COURSE OF ANY OF THE OPERATIONS OF EMBARKING OR DISEMBARKING”

It is not every accident that happens around the airport that qualifies as an accident under Article 17 of the Montreal Convention. The accident has to occur when the passengers are “on board” or “in the course of any of the operations of embarking or disembarking.” Passengers are said to be “on board” when they are on the plane and/or in transit. This has not posed any problem. There has however been some confusion as to the meaning of “in the course of any of the operations of embarking or disembarking.” In *MacDonald v. Air Canada*,<sup>29</sup> the elderly plaintiff inexplicably fell in the baggage collection area of the terminal. The First Circuit held alternately that no “accident” had occurred within the meaning of Article 17 and that the plaintiff had disembarked. With reference to the latter ground of its holding, the court apparently interpreted the scope of Article 17 by looking to the passenger’s location at the time of injury, and indicated that liability does not exist when a passenger “has reached a safe point within the terminal.”

In *Day v. Trans World Airlines, Inc.*<sup>30</sup> the Second Circuit affirmed a district court holding “that passengers injured during a terrorist attack within an airport terminal were “embarking” as the term is used in Article 17. At the time the attack occurred, the plaintiffs had completed all the steps necessary for boarding except the mandatory physical search of their persons. The court of appeals rejected the argument that it is when the passenger steps through the terminal gate that he or she can be said to be embarking and took the view that “the issue . . . is not where (the plaintiff’s) feet were planted when the killing began, but, rather, in the activity he was engaged”. The court refused to construe Article 17 as defining “embarking” solely by reference to a passenger’s location and approved the district court’s development of “a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction) and location . . .” These two cases show that whether a passenger is in the process of embarking and disembarking is a question of fact to be determined having regard to the particular circumstances of each case.

## THE TWO-TIER COMPENSATION SCHEME UNDER THE MONTREAL CONVENTION

The Montreal Convention provides for two-tier compensation scheme thus:

1. For damages arising under paragraph 1 of Article 17 not exceeding 100000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100000 Special Drawing Rights if the carrier proves that:
  - (a) Such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
  - (b) Such damage was solely due to the negligence or other wrongful act or omission of a third party.<sup>31</sup>

<sup>29</sup> 439 F.2d 1402 (1st Cir. 1971), cited in Causin J. “view point- Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal” at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2241&context=flr>

<sup>30</sup> 393 F. Supp. 217 (S.D.N.Y.), aff’d, 528 F.2d 31 (2d Cir. 1975), cert. denied, 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354). Available online at <http://openjurist.org/528/f2d/31/day-v-trans-world-airlines-inc-kerscn>. Accessed 12/01/13.

<sup>31</sup> Article 21 of Montreal Convention, 1999



The first tier of the carrier's liability which is 100000 Special Drawing Rights, an equivalent of \$135,000.00, is a strict liability for proven damage while the second tier liability which may be in excess of 100000 Special Drawing Rights lies upon failure of the carrier to prove that the accident was not due to its negligence or was attributable to the negligence of a third party. The onus of proof is on the carrier.

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in Article 21 of the Convention or to no limits of liability whatsoever.<sup>32</sup> The Special Drawing Rights is a monetary unit devised by the International Monetary Fund for international accounting purpose. It fluctuates and its value in terms of national currencies is calculated in accordance with the method of valuation applied by the International Monetary Fund<sup>33</sup> As earlier mentioned, the Montreal Convention has been domesticated in Nigeria and it governs intentional air navigation in the country. So the compensation discussed above applies to Nigeria where internal carriage by air is involved. The Modifications to the Convention for the Unification of Certain Rules Relating to International Carriage by Air as set out in the Third Schedule to the Civil Aviation Act, 2006 governs domestic air transportation in Nigeria. It is a reproduction of the Montreal Convention with relevant modifications. Article 21 of the Third Schedule to the Civil Aviation Act, 2006 is an adoption of the compensation scheme of Article 21 of the Montreal Convention discussed above with the exception that the Third Schedule to the Civil Aviation Act used United States Dollars and not Special Drawing Rights. So passengers who lose their lives or sustain bodily injuries in accidents on domestic flights are entitled to \$100000 for each case of proven damage. This sum can be converted to Naira at the existing official exchange rate.<sup>34</sup> The Minister of Aviation acting on the advice of the Nigerian Civil Aviation Authority is empowered to review the limits of liability under the Act at seven-year intervals, the first such review to take place at the end of the seventh year following the date of entry into force of the Act.<sup>35</sup>

In any case of aircraft accident resulting in death or injury of passengers, Carriers are obligated to make advance payment of at least US \$30,000 (thirty thousand United States dollars) within 30 (thirty) days from the date of such accident, to the 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 offset against any amounts subsequently paid as damages by the carrier.<sup>36</sup>

### DANA PLANE CRASH COMPENSATION

Nigeria recorded another plane crash on June 3, 2012 when a Dana Air plane flying from Abuja to Lagos crashed in Iju-Ishaga area of Lagos, about four nautical miles from the Murtala Mohammed Airport and caused the death of all 153 passengers and crew members on board and 10 people on the ground. On board the plane were some foreign nationals. The Accident Investigation Bureau said the crash was due to dual engine failure.<sup>37</sup> Out of the 153 people that died on board, 146 were passengers while 7 were crew members. The

<sup>32</sup> Ibid, Article 25

<sup>33</sup> Ibid, article 23. See also <http://www.imf.org/external/np/tre/sdr/sdrbasket.htm>

<sup>34</sup> Article 23 of Third Schedule to the Aviation Act, 2006

<sup>35</sup> Ibid, Article 24

<sup>36</sup> Aviation Act 2006, S. 48 (3). See Also article 28 Montreal Convention

<sup>37</sup> Mikairu, L. and Etegehe, D. "DANA PLANE CRASH: How Captain Battled with Failed Engines Mid-air-Report" at <http://www.vanguardngr.com/2012/07/dana-plane-crash-how-captain-battled-with-failed-engines-mid-air-report/>. Accessed: on 13/01/13.

airline gave assurances that it would pay the \$100000 compensation to families of the victims as required by law<sup>38</sup> but many Nigerians did not take the company seriously. However, about six months after the crash, the payment of compensation began. The Head of Corporate Communications of Dana Air, Tony Usidamen, disclosed that the compensation is being paid to each of the families by the airline's insurance company, Prestige Assurance Limited.<sup>39</sup> The company had earlier paid the advance payments of 30,000 dollars (about N4.7 million) to over 80 families, and is in the process of paying the balance of 70,000 U.S. dollars to affected families. Payment of the compensation is made upon presentation of Grant of Probate or Letter of Administration from the Probate Registry.<sup>40</sup> The compensation is also being paid in respect of victims who were minors upon presentation of Letters of Guardianship by the parents or guardians of the minors.<sup>41</sup>

The Director-General of the Nigerian Civil Aviation Authority, Dr. Harold Demuren confirmed on Friday, 11<sup>th</sup> January, 2013 that compensation has been paid to some families of the victims of the plane crash. According to the Director General, 131 out of the 153 victims' families had so far submitted documents for payment of compensation, adding that families of 12 victims were yet to submit any documents. He added that families of some other two victims were yet to submit full documents<sup>42</sup> The Director-General said documentation for 24 victims is awaiting authentication by the insurers while Letters of Administration for families of 48 victims are still being awaited. He stated that cheques of the initial payment of \$30,000 compensation had been paid for 85 victims, out of which 14 have received full compensation. Dr. Demuren also said families of 53 victims have gone to court inclusive of 23 victims who had collected the initial payment of \$30,000.<sup>43</sup> He also gave assurances that he has been working closely with the National Insurance Commission (NAICOM) to ensure that all concerned are fully compensated and including the ground victims.

As can be seen from the explanations of Dr. Demuren above, there are families of victims of the plane crash that have not even received the initial \$30,000 let alone the balance of \$70,000.<sup>44</sup> Bunmi Awoyemi, one of the Lawyers for the families of 40 victims of the Dana plane crash in Lagos, is quoted to have said financial compensation has been paid in only 80 cases nearly six months after the June 3 crash.<sup>45</sup> He further stated that they have petitioned the Nigerian Senate and as well filed a lawsuit in the United States.<sup>46</sup>

The management of Dana Airline and its insurer certainly need commendation for the effort towards the payment of the stipulated \$100000 to families of victims of the air disaster. History will certainly remember them for being the first to take seriously the provision of law relating to compensation for victims of plane crash. Also worth commending is the effort of the Nigerian Civil Aviation Authority and NAICOM in facilitating the payment of compensation to victims' families. This is commendable. The Nigerian Civil Aviation Authority particularly has the duty of ensuring that carriers maintain adequate insurance covering its liability under the Civil Aviation Act, 2006 and also its liability towards compensation for damages that may be sustained by third parties.<sup>47</sup> The Authority

<sup>38</sup> See Article 21 of the Third Schedule to the Aviation Act, 2006.

<sup>39</sup> Dailypost "Plane crash: Dana begins final round of compensation to victims' families" at

<http://dailypost.com.ng/2012/12/14/plane-crash-dana-begins-final-round-compensation-victims-families>. Accessed: 16/01/13

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Shadare, W., and Goodluck-Ogazi "NCAA Assures On Dana's Payment Of Crash Victims' Families" at

[http://www.ngguardiannews.com/index.php?option=com\\_content&view=article&id=110238:ncaa-assures-on-danas-payment-of-crash-victims-families-&catid=1:national&Itemid=559](http://www.ngguardiannews.com/index.php?option=com_content&view=article&id=110238:ncaa-assures-on-danas-payment-of-crash-victims-families-&catid=1:national&Itemid=559). Accessed: 16/01/13

<sup>43</sup> Ibid

<sup>44</sup> voanews "Lawyers Seek Full Compensation for Nigeria Air Crash Victims" at <http://www.voanews.com/content/nigeria-dana-plane-crash-victims-lawsuit/1554290.html>. Accessed: 15/01/13

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> See S. 74 of the Civil Aviation Act, 2006

must therefore ensure that the insurance cover required under the law is in place and that the insurance is paid at the crystallization of risk.

Being the first serious attempt at compensation of crash victims in Nigeria, it is not surprising that there are some shortcomings in the entire process which need to be pointed out. First, the commencement of payment of compensation nearly six months after the crash fall short of the demand of section 48(3) of the Aviation Act, 2006 which provides that an advance of \$30,000 be made available to victims or their families in advance 30 days after an aircraft accident. Secondly, the complaint of families of some victims who are yet to receive even the advance \$30,000 is serious and regrettable. The airline has always maintained its insurers are ready to pay the required compensation once proper identification of the beneficiaries is done. If truly the delay in payment is due to the inability of the victims' family to provide the necessary documents, one is only left to wonder why some lawyers have resorted to petitioning the Senate and suing the Airline rather than concentrating on the provision of the documents so required. Be that as it may, some 53 families of victims have gone to court. In such a suit, the Airline will have no defence to the claim of \$100000 for every case of proven lost of life in the plane crash. The families seeking compensation might even decide to sue the Airline for negligence claiming damages in addition to the \$100000 per victim. This is more so as there has been allegations of negligence on the part of Dana Airline. It was reported that a staff of the Airline who pleaded anonymity had given an interview indicting the company of negligence as the crashed aircraft was continuously breaking down prior to the accident.<sup>48</sup> Although, the Director of Flight Operations, Captain Wilson roundly denied the allegation,<sup>49</sup> many Nigerians still think the company might have been negligent in flying a defective plane. Femi Falana, for instance, is of the view that the victims' families victim are entitled to more than \$100000 compensation from Dana Airline and the Federal Government:

*"...for gross negligence arising from the plane with defective dual engines and the Federal Government for failure to enforce the relevant regulations, failure to provide emergency landing for the plane and the inexplicable delay in providing the fire service equipment and medical services and other acts of gross negligence which led to the avoidable death of the passengers and the crew".<sup>50</sup>*

If this viewpoint becomes popular and the second tier of damages under Article 21 to the Third Schedule to the Civil Aviation Act, 2006 is sought in court, Dana Airline would be required to prove that it was not negligent to escape liability. Such an action must be brought within two years from the date of the accident<sup>51</sup>

Also worth commenting of is ground victims of the crash. Ten people lost their lives and many others lost their homes. Some of the ground victims have lamented that they lost their homes as a result of the crash but the Airline has been insensitive but to their plight. They added that only a N500, 000.00 has since been leased to them to ameliorate their suffering.<sup>52</sup> The ground victims whose properties were damaged are claiming N500 million each, while some of the relatives of the victims who died in the aircraft are demanding \$150,000 as compensation.<sup>53</sup> Since the Act is silent

<sup>48</sup> Elombah "Management of Dana Aircrash to pay Compensation to crash victims" at <http://www.elombah.com/index.php/latest-news/11307-management-of-dana-airline-to-pay-compensation-to-crash-victims>. Accessed: 14/01/13

<sup>49</sup> Ibid

<sup>50</sup> Falana, F. "Families of Victims of Dana Air Mishap Are Entitled to More than \$100,000" <http://saharareporters.com/article/families-victims-dana-air-mishap-are-entitled-more-100000>

<sup>51</sup> Article 35 of the Third Schedule to the Civil Aviation Act, 2006. Article

<sup>52</sup> Eze, C. "Ground Victims of Dana Crash Demand N500m Compensation Each" at <http://www.thisdaylive.com/articles/ground-victims-of-dana-crash-demand-n500m-compensation-each/136517/>. Accessed: 14/01/2013.

<sup>53</sup> Ibid

on what should be their compensation, the compensation payable may be reached by mutual agreement or the claims may be referred to court for litigation. It is hoped that the provision of the Convention on Compensation for Damage Caused by Aircraft to Third Parties, 2009, when it shall come into force, shall be domesticated to fill the lacuna in the Civil Aviation Act, 2006 relating to compensation of third parties.

## CONCLUSION

The Civil Aviation Act, 2006 has provided for a two-tier compensation scheme for injury or death of passengers in international and domestic air navigations. The Act is however silent about the compensation to be paid to third parties, leaving a lacuna that needs to be filled up. Several domestic plane crashes have occurred in Nigeria with little or no compensation for families of victims. The Dana plane crash of 3<sup>rd</sup> June, 2012, however seems to be setting a new precedence. The Nigerian Civil Aviation Authority, the National Insurance Commission and the Dana Airline together with its insurers are making frantic efforts towards the compensation of victims. The efforts, though slow, it is hoped will culminate in payment of compensation for all concerned including the ground victim.