MITIGATING THE AGONY OF THIRD PARTY CLAIMANT UNDER THE NIGERIAN AVIATION LAW

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ABSTRACT

The aviation industry's age has not in any way contributed to making knowledge of its operations widely known. This is a result of the industry's technological character. Although the hazards connected with its operation are obvious given the significant losses in terms of lives and property result, the regulations have not adequately addressed the issue of compensation in all circumstances where it is required. Although there are laws that provided for compensation in the event of accidents, these provisions do not apply across board. Mindful of the fact that laws exist which address the issue of remedies for victims of air accident such as passengers, this article interrogates the legal frameworks for compensation of victims, to ascertain the extent if any, to which they protect victims other than passengers. Substantial part of the Nigerian aviation laws, which are parented by international treaties, conventions, agreements, and protocols, as well as literatures, are examined in this study using the doctrinal research approach. The result *reveals* a *lacuna in* the legal frameworks which has left the victim with no alternative than to pursue claims for compensation for injuries sustained by resorting to common law tort of negligence among others, the burden of which is better imagined.

Key-words: Mitigating, Agony, Third Party, Claimant, Aviation, Industry.

1. INTRODUCTION

We examine any rights, if any, that may accrue to a party other than a passenger under the Nigerian legal framework governing the aviation sector. In order to accomplish this, the study adopts doctrinal research methodology by focusing the legal framework that govern the actors in the aviation industry To this extent, the study will examine the Warsaw Convention's

provision, as well as subsequent attempts at modifying same through protocols like The Hague Protocol of 1955, the Guatemala Protocol, the Montreal Agreement, the Guadalajara Convention, and the most recent Montreal Convention of 1999, including the Civil Aviation Act hereinafter referred to 'CAA', to which the provisions of the Warsaw Convention is annexed as schedules. The study also urges that judges be purposeful in interpreting the provisions of these Instruments. The paper attempts to provide a broad overview of the origin and development of aviation law, some key international principles that have impacted the aviation industry, national regulations for the aviation sector, and the influence of the international community on these regulations. The paper climaxed at an examination of the provisions of the law for passengers who are victims of air accidents. This led to the issue of whether a person who suffers injury in an airplane disaster, not being a passenger has any legal protection under the present state of the aviation law, and if not, what options are available to them. This is obvious from a close examination of Nigeria's aviation legislation which reveals that a third party is not protected from harm that could result from an accident that causes damage to his person or property. The research concludes with recommendations and suggestions that the National Aviation Laws need to be rethought in order to include intentional clauses that accommodate a third party who may sustain injuries in an aircraft accident without being subjected to the uncertainty of litigation with the associated burden of proof hurdles.

2. THE EMERGENCE OF AVIATION LAW

The French government believed that it would be important for safety reasons for the two countries to attempt to come to a resolution after the Wright Brothers' successful engine-powered flight in 1903 with a focus on the German balloon flights done repeatedly above French territory.[i] This gave birth to the first diplomatic conference convened in Paris on May 10, 1910, to consider regulation of flights. International flights were unregulated prior to the conference. Free balloons floated away from one state and landed in another. Over 25 aviators, half of whom were German commanders,[ii] were aboard at least ten German balloons that crossed the border and landed in France between April and November of 1908.

At the end of the conference, it was decided that each state enjoyed complete authority over the airspace over its territorial waters and national lands. It was also decided that any zone-based demarcation of airspace or flying latitude is superfluous and impracticable. A general

right of international transit for aircraft of other states via such territorial flight space was also discussed and provided for in the stated in the resolution. The conference concluded that international agreements granting entry privileges according to their terms and conditions were the only viable legal means of governing international flights.[iii] Therefore, the conference favoured adopting state sovereignty on the air space over their respective territories as opposed to general freedom of the air.[iv] As a result, the Nicaragua case brought before the international court recognized and decided that the norms of international law which preserves States Sovereignty apply to the airspace as it is to the land.[v]

The Chicago Convention's[vi], current recognition of the idea of sovereignty in public international air law which derived from the Latin maxim *cuius est solum, eius usque ad caelum et ad interos,*[vii] was founded on of this principle, even though the Paris Conference of 1910 did not result in a policy declaration, it served as a precursor to the subsequent Conference of 1919, from which the Paris Convention emerged.

The issue of national security is at the heart of the notion of full sovereignty over the air space. A well-established tenet of customary international law is the idea of total and exclusive sovereignty[viii] over one's own country's airspace. However, it has been modified by a number of global and bilateral agreements that allow aircrafts to fly over and land on the territory of the signatory governments.[ix] The deployment of military aircraft in the First World War in 1914 sparked the development of the Convention's principle of States total and exclusive sovereignty over its airspace.

The meeting took into consideration presentations and arguments from France, Germany, Australia, Belgium, and Britain. While the majority of presentations supported territorial sovereignty over airspace, France was more in favor of taking a stance that supports free air navigation with the *caveat* that adjacent states reserve the right necessary for self-preservation to ensure their own security and that of people and property in their habitation.[x]

The representatives of the governments participating at the Paris conference in 1910 demonstrated tacit but actual agreement in the following terms;

i. that each state has complete control over the airspace over its territorial waters and national lands.
ii. that any zone-based demarcation of such territorial flight area was superfluous and impracticable.
iii. that foreign aircrafts do not generally have the right to transit or conduct international business through such territorial airspace.

The Conference agreed that International Agreements allowing for the granting of entry privileges subject to the terms and conditions therein provided were the only realistic and legal means of controlling international flight.[xi]

3. HISTORY OF AVIATION IN NIGERIA

Nigerian aviation activity began in 1920, or around 17 years after the Wright Brothers' first flight, which took place in 1903.[xii]. It took place as part of a military mission carried out by British Royal Air Force planes that landed in Maiduguri. The two main modes of transportation in Nigeria prior to the development of aviation are human portage and water transport. The TV, Jukun, Nupe, Igala, Biron, Idoma, and other riverine dwellers of the River Niger and Benue, as well as the Ijaws and Itsekiris people of the Niger Delta regions of Southern Nigeria, preferred using water transportation.[xiii]

After the Royal Air Force planes touched down in Maiduguri in 1920, there was a rise in aviation activity throughout Africa, and by 1925, the British government had a squadron stationed in Sudan. The British commander then requested permission from the colonial authority in England to run regular internal flights from Khartoum to Maiduguri, Nigeria.[xiv] By 1930, private and military aircraft were transporting people across borders and landing in cities including Sokoto, Kano, Lagos, Bauchi, Mina, and Oshogbo. In the end, Lagos and Accra served as the center for flights going to the Middle East and India, as British Imperial Airways continued to transport people and postal services.[xv]

Later, the Royal Air Force expanded its operations to other African nations, including Takoradi, Portlami, and Cairo. This also occasioned the construction of aerodromes, shops, and staff housing that would house pilots for the night.

Following the Second World War, Europe had an economic downturn that forced a migration of Europeans to West Africa, which served as the primary supplier of raw materials for European industries. It would be easier to envision the ensuing expansion of the raw material market and subsequent economic boom. Nationalist movements for independence in the four former British colonies of West Africa—Nigeria, the Gold Coast (Ghana), the Gambia, and Sierra Leone—also occurred at the same time. [xvi] In order to create a joint company and an air services transport authority to take over the air services previously run by the Royal Air Force, Nigeria and the Gold Coast met on May 15, 1946. The goal of the meeting was to find effective solutions to the problem of transportation and communication between the British Isles and the colonies. As a result, the Colonial administration issued an Order-in-Council in 1946 that established the West African Airways Corporation (WAAC).[xvii] The British Overseas Airways Corporation (BOAC) and Elder Dempster Lines and the colonies eventually came to an arrangement (both companies had monopolized the air and sea transport respectively). In order to expand air transportation services in West Africa, the colonies established WAAC, a public enterprise. BOAC was required to supply technical and commercial staff as per the agreement.[xviii] The airline that was created as a result of the agreement began operations with £65,000 in colonial-sourced funding. West Africa Air Transport Authority oversaw it (WAATA) .[xix] The WAATA was tasked with monitoring all significant air issues that might have an impact on aviation within the borders of member states. [xx]

Until 1956, the Royal Aviation Force established the main air routes in West Africa, which WAAC took over. When Ghana became independent in 1957, Kwame Nkrumah withdrew his country from WAAC in order to launch Ghana Airways. Chief Samuel Ladoke Akintola, the then Minister of Communication and Aviation, was inspired to address parliament on the necessity to form Nigerian Airways when Ghana withdrew from WAAC. This came to pass on October 1, 1958, when the West African Airways Corporation changed its name to WAAC (Nig.) Ltd., preserving the joint ownership of its shares with the British Airways Corporation, Elder Dempster, and the Nigerian Government.[xxi]

Nigeria formally and effectively took over the WAAC (Nig.) Ltd, on May 1st 1961 by purchasing the shares and renamed it Nigeria Airways and up till the early 1980s the history of civil aviation in Nigeria was essentially the history of the Nigeria Airways and the Nigerian flag carrier started operations under the name Nigeria Airways Ltd. using the National Colour of green-white-green on all its crafts, vehicles and equipment.[xxii]

4. MEANING AND NATURE OF AVIATION LAW

International Air Law contains a significant portion of aviation law. Finding an accurate definition of air law is a challenge. However, the following was offered as a working definition: A set of regulations governing the use of airspace and its advantages for aviation, the general public, and the nations of the world is known as "air law." [xxiii]. The term "Air law" has been used in place of "Aviation Law," which many authors believe to be outdated. While some authors prefer the term "Air transportation Law," critics argue that it has the disadvantage of being too specific because it refers to just one area of air law, giving an interpretation that is too limited. [xxiv]

Aeronautical law, also known as *droit aeronautique and droit aerien*, has been declared as a subject of civil law jurisdiction. [xxv]. The words "Air Law," "Aeronatic Law," and/or "Civil Aviation Law" all refer to the same thing in a legal sense, it is therefore acceptable to say. Glass and Cashmore[xxvi] in their book, agree and adopted the definition of Air Law as stated by Diederiks-Verschoor.

It is cliché to say that international law includes aviation law. Its guiding principles and standards, which are a part of international law, regulate relations between governments in connection with the execution of international air transportation[xxvii]. When it comes to the legal and physical application in international air transportation, they specify the rights and responsibilities of states, but domestic state laws directly control the rights and responsibilities of each of these individuals.

The main sources of air law are multilateral conventions. Aircraft can travel quickly over the airspace of numerous nations, each of which has its own national laws and conventions, due to

the nature of how they operate. Because of this, it moves from one legal domain to another. The exclusive sovereignty of states over the airspace above their territories is a recognized fundamental principle of international law, as it is general knowledge. The Paris Convention acknowledged this principle.[xxviii] The first international aviation law document was the Paris Convention. 32 countries approved ratification of it. The Paris Convention has certain technical annexes that deal with issues like the airworthiness, standard and crew members competency certificates among others, in order to achieve a certain level of standardization. The agreement also creates the CINA (*Commission International de la Navigation Aeriene)* Commission.[xxix] The Commission was given extensive regulatory authority over technical issues. Other duties include collecting and disseminating data on air navigation and giving counsel on issues brought up by member states.

When it became apparent that the Convention [xxx] was no longer in line with the circumstances of the time, it was superseded by the Chicago Convention in 1944. The Chicago Convention reaffirmed the principle that each state has exclusive control over the airspace over its territory, but it did not alter the definition of a "aircraft," which is defined as any device that may get support in the atmosphere through the action of the air. This definition was retained as a working definition until 1967 when ICAO (International Civil Aviation Organisation)[xxxi] brought out a new definition which is considered an extension of the definition handed down by the Paris Convention. Any device that can obtain support in the atmosphere through an air reaction other than an air reaction against the surface of the earth was defined as a "air craft" under this definition. [xxxii]

It is significant to note that all attempts to define air law or aviation law reveal characteristics such as the following: air law is a body of rules and regulations that has municipal elements, or internal law of a state, and international law, which together seek to set conditions, guideline, and framework by which both local and international flight operations could be conducted.[xxxiii] This has the implication that the idea of air law, or aviation law, is an amalgamation of both local laws and international law, which includes conventions, protocols, and treaties. Uwakwe noted,[xxxiv] that it is impossible to evaluate Nigerian air law without also emphasizing international sources.

5. THE DEVELOPMENT OF NATIONAL AVIATION LAW

Before Nigeria adopted federalism in 1954, the Governor-General oversaw legislation for the entirety of the country, including the colony of Lagos and the Southern and Northern Protectorates. The Governor-General was given the authority to issue commands, rules, and regulations on particular topics by local legislation.[xxxv] The Governor-General [xxxvi] was given the authority to issue regulations for Nigeria with regard to air navigation under the terms of the Civil Aviation Act, 1949 of England, which was made relevant to Nigeria by virtue of Article 3 of the Colonial Civil Aviation Order, 1952. In accordance with this clause, the Governor-General declared the United Kingdom's Air Navigation (Nigeria) Regulation of 1954 and the Air Navigation (Radio) Regulation of 1954 applicable in Nigeria. [xxxvii] As a result, Nigeria had to abide by the aviation laws that were in force at the time being in England. The General Regulation and Radio Regulation of the United Kingdom's Air Navigation Order of 1954 and the Air Transport (Licensing) Regulations, 1958, made in accordance with Section 13 [xxxviii] of the same order, respectively, were other laws that England made applicable in Nigeria as a result of the powers conferred on the Governor-General.[xxxix] The British Settlement and Foreign Jurisdiction Act of 1887, which gave the King of England the authority to issue an order in council establishing the West African Air Transport Authority, is deserving of notice. The Authority was created to ensure the growth of effective air transportation services in West African areas. It is a body corporate with perpetual succession, a common seal, and the ability to sue and be sued. [xl]

Thus, the rapid global expansion of the aviation business in the early 1900s led to the development of the universal International Aviation Code. As a result of the widespread use of airplanes, the first world war saw the need for an aviation code to ensure the safety of pilots, the security of borders, and the protection of each nation. A joint European Committee of experts was formed after the War to codify already-existing aviation legislation. Despite being engaged in the process of creating an internal uniform set of Federal law from the preexisting state laws, the United States was not invited to participate in this colloquium.

The first country to consider the potential of governmental regulation of aircraft production and transportation was Great Britain in 1909. When the first cross-channel flight in 1909

jeopardized British national security, the British statute was put into effect.[xli] The inaugural International Conference on Aviation took place in Paris that year under the sponsorship of Great Britain and addressed a variety of aviation issues, including airspace sovereignty and the transmission of infectious diseases. Despite the fact that no laws were proposed at the meeting, it was obvious that the first aviation law would eventually pass. Aerial Navigation Acts were subsequently passed by parliament, limiting the entry of foreign aircraft into British sovereign airspace. [xlii] To coordinate civic and commercial air transportation trade, Britain established the Civil Aerial Transportation Committee in 1917. The group advocated for the regulation of all domestic and international aviation in the United Kingdom.

The first set of international aviation regulations, which were based on British Aviation laws, were drafted during the Paris Conference in 1919 by the Aeronautical Commission, a legal subcommittee.

Despite being a global power, the United States had no influence over the code created by the Aviation Mission since it did not want to participate in any other countries' laws outside its own. Due to this, the United States government established a fact-finding committee to address American aviation issues in the same year that the convention was initiated. The committee's goals were to stay up with European aviation growth and develop a comprehensive aviation legal framework. Around the same time that the Aeronautical Commission presented their proposed law at the Paris Peace Conference, the American Aviation Mission delivered their conclusions to Congress in July 1919. [xliii]

6. THE LAW AS IT STANDS FOR A THIRD PARTY CLAIMANT

The Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome on October 7, 1952, sometimes known as the "Rome Convention," governs air carriers' responsibility to third parties who are victims of air accidents or disasters. The Montreal Protocol, sometimes known as the "Montreal Protocol," was adopted and signed in Montreal on September 23, 1973, and it amends the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface.

The Rome Convention addresses harm that an aircraft registered in a foreign contracting state directly causes to people and property on the ground in a contracting state. The Montreal Protocol, which modified the Rome Convention, did not make any additional provisions except by increasing the existing liability limit and switching the currency [xliv] from Special Drawing Rights (SDRs) to Gold Francs. 2009 saw the ratification of the Convention on Compensation and two more conventions. For Damage caused by aircrafts to Third Parties[xlv] Resulting from Acts of Unlawful Interference involving Aircrafts

Experience has shown us that when an aircraft accident occurs, people who are not passengers or crew members are also negatively impacted in terms of loss of lives and property. This is evident [xlvi] when individuals who appear to be unrelated to the conflict lose, either via death, injury, or property destruction.[xlvii] Injuries caused by aircraft to people, property, and other aircraft when taxying or landing are also possible. These have also happened when two airplanes collide while in the air, causing injury to people on board and damage to nearby property.

As a result, there are three categories in which harm caused by aircraft to people or property involved in air transportation can be divided.

i. Damage done to people or property in the air by airplanes while they are in flight.
ii. Surface-based damage caused by flying aircraft to people or property.

6.1 Damage Caused by Aircraft in Flight to Persons or Property in the Air

As of right now, it appears that there is no international convention in existence to address aerial crashes. As a result, conflict of law principles must be used to resolve the difficulties. [xlviii] It is proposed that the domestic legislation of the country where the collision occurs may be used as the *lex loci delicti.* [xlix] But in the event of a high sea collision, it's possible that the law of the state with the strongest ties to the provision of air traffic services for the involved aircraft will take precedence. [l] It has been recommended that the law of the state of registration should apply in the case that the collision involves aircraft inside the state of registration. [li]

There are no laws in Nigeria that address harm done to people or property in the air as a result of an aerial collision between two aircraft that are registered in Nigeria and are flying within Nigerian airspace. The common law tort of negligence would have to be resorted to in this regard. This places a burden on the claimant having regard to S.131(1) of the Evidence Act, 2011, which states that "anyone seeks any court to render judgment as to any legal right or liability based on the existence of facts which he assets shall prove that those facts exist," Nigerian domestic law imposes a strong burden of proof on the claimant.

6.2 Damage to Persons or Property on the Surface caused by Aircraft in Flight

The Rome Convention, sometimes known as the "Rome Convention," which was signed on October 7, 1952, addresses damage caused by foreign aircraft to third parties on the surface. On March 6, 1970, Nigeria ratified the Convention. Nevertheless, on May 10, 2002, Nigeria issued an instrument of denunciation of the Convention, which became effective on November 10, 2002. According to the denunciation, the Convention will not govern liability in cases when an aircraft, whether Nigerian or foreign, causes damage a third party on the surface of Nigeria. This also means that the claimant would have to resort to claiming under common law, the effect of which is that a heavy burden will be placed on a defenseless claimant which can be excruciating. This is especially true given that Nigerian law offers no statutory protection for harm to third parties resulting from damage caused by airlines. While there are legal measures covering compensation for passengers and cargo consignees, there are none that ensure reimbursement for third parties. S.49(2) of the Civil Aviation Act, states that in cases where an object or a person in or falling from an aircraft causes harm, loss, or damage to any person or property on land or in water while the aircraft is in flight, taking off, or landing, then, without limiting the law on contributory negligence, damages for the injury, loss, or damage shall be recoverable without establishing negligence, intent, or any other cause of action, just as if the owner of the aircraft had committed a willful act, negligence, or default that resulted in the injury, loss, or damage. It is also not clear whether an entire aircraft that crashed and caused injury to a person or property can be likened to ‘an object or a person in or falling from an aircraft’ falling from an aircraft within the meaning of the provision of s.49(2) CAA, so as to be beneficial to a third party who is killed or suffers damage to property by an air crash. The canon of interpretation is that the express mention of one thing excludes the other law.[lii]

Although it might seem that the provision opened up a window for a third party to sue for damages for losses or injuries, there is no assurance that such a third party will be able to recover any money. There also is no mention of how the severity of the injuries or the degree of damage to property will affect the amount of compensation. The degree or possibility of recovery will be a function of standard of proof demonstrated by the claimant. This is because, the law is particulars of special damages must be pleaded and proved. In *British Airways v. Mr. P.O. Atoyebi,*[liii] that, unlike general damages, exceptional or special damages must be specifically claimed and strictly proven. The risk associated with this legal position is that a third party air accident victim who cannot establish his claims in accordance with the legal standard would suffer loss. If the Aviation law regime includes provisions that outline the recoverable damages by third party victims of air tragedies, such a situation can be avoided. Since Nigeria did not ratify the Montreal Protocol, even though both Conventions are solely applicable to international air carriage, the nearly savaging situation that developed in 1970 when Nigeria accepted the Rome Convention on March 6, 1970, was not entirely avoided. The fact that Nigeria signed an instrument of denunciation of the Rome Convention on May 6, 2002, effectively ending Nigeria's participation in the Convention, made the Nigerian government's efforts in all of these areas even more futile. This indicates that, in the lack of domestication of the same prior to the denunciation, no third party in Nigeria could have been in a position to benefit from the provisions of the Convention, were the Convention sufficient to serve the interest of the third party victim of aviation disasters.

This is especially true given the technical nature of aviation claims, which necessitate the use of experts in order to satisfy the burden of proof. An ordinary applicant might not be able to afford this easily. To this sense, an intentional legislative intervention that broadens the application of the Civil Aviation Act's provisions to third parties will be justified. In this regard, S. 48(3) of the Civil Aviation Act [liv], sometimes known as the "CAA," should be expanded to cover all claims, including passengers and third-party victims of air accidents.

In any event where an aircraft accident results in a passenger's death or injury, according to S. 48(3). Within 30 days of the accident, the carrier must give the natural person or persons who are eligible for compensation an advance payment of at least US $30,000 (Thirty Thousand United States Dollars) in order to cover their urgent financial needs. In addition to the US

$30,000 (Thirty Thousand United States Dollars) stipulated for payment in the event of death not being sufficient in light of the current economic climate, the law did not make provisions in the Act to ensure prompt payment as there are also no measures to compel timely adherence by the carriers with the provision of S. 48(3), as admirable as it may appear.

S. 49(2) of the CAA is another provision that might have helped a third party victim of an aviation accident, but it is sadly not detailed enough to cover aircraft accidents in this situation. According to Section 49(2), damages for injuries, losses, or damage to property on land or water caused by an article or person in or falling from an aircraft while it is in flight, taking off, or landing may be recovered without proving negligence, intention, or any other cause of action, just as if the owner of the aircraft had committed a willful act, negligence, or default that resulted in the injury, loss, or damage.

It is somewhat alarming because S.49(2) CAA only mentions damage brought on by objects or people getting into or falling out of airplanes while they are in flight, leaving out damage brought on by the aircraft itself. Contrary to S.49(2), Article 1 of the Rome Convention specifically mentions damage caused by an aircraft in flight or by anyone or anything falling from it.

When referring to damage that happens "because of the aircraft, engine or propellers or the flight of or an object falling from the aircraft engine or propeller," a comparison of an equivalent provision of United States law in section 49 U.S.C. S. 441112(b) reveals a more elaborate provision that affectively accommodates the third party victim of an aircraft accident. According to the author, the exclusion of "damage caused by aircraft itself" from S.49(2) of the CAA is evidence of the legislative dishonesty that characterizes some English laws passed prior to October 1, 1960 and applied to Nigeria by the imperialist British government in an effort to exploit the Nigerian people through the use of legal means. S. 49(2) should be changed to include a "accident caused by aircraft itself" for this reason.

During the process of taxing, taking off, or landing, an aircraft may injure someone or damage property on the ground by colliding with people, animals, other aircraft, airport vehicles, equipment, or structures.[lv]

In this situation, claims arising therefrom may be governed by either common law or legislation. The aircraft itself is not legally liable in Nigeria for damages [lvi] brought on by items or people falling into or out of an aircraft during takeoff or landing. [lvii] This seems to be a result of the Act's phrasing, which did not extend liability to the aircraft where the object or person is or is falling from. According to others, this leaves a gap that needs to be filled by amending the relevant part of the Act.

6.3 Legal Remedies Available to Third-Party Air Accident Victims

Due to the lack of statutory protection, a victim of an accident or injury under S.49(2) of the Act would have to turn to the tort of negligence[lviii] to seek damages for their injuries. According to our legislation, the claimant would have to fight the burden of proof in order to succeed.[lix] In order to prove that the aircraft was negligent and caused the accident that resulted in the damage, the claimant must present reliable and admissible proof. Under tort law, negligence is a civil actionable offense. According to Lord Wright in *Lochgelly Iron & Co v Mulbin*, 'negligence [lx] includes more than heedless or careless behavior, whether by omission or commission; it properly connotes the complex idea of obligation, breach and damage consequently experienced by the person to whom the duty was owing'.

The Supreme Court of Nigeria defined "negligence" as the failure to take action that a reasonable person, guided by the usual considerations that ordinarily govern human affairs, would take, or the performance of an action that a reasonable and prudent person would not take, in *Mrs. Esther Ighreriniovo v S.C.C Nigerian Limited & Ors.*[lxi] it was held to be a behavior that is below the legal standard for protecting others from irrational risk of harm; a departure from the behavior expected of a reasonable prudent person under similar circumstances; a breach that results in a loss; and strictly a factual issue that must be resolved in the context of its specific facts. In addition to proving a breach of duty of care, the claimant must also allege and present evidence to demonstrate that he was injured as a result of the defendant's negligence. [lxii] In that instance, the Court of Appeal determined that carelessness is a factual rather than a legal issue. Due to the requirement of pleading for the establishment of a negligence claim, the facts must be pleaded and proven.

Accordingly, the tort of negligence may be described as the defendant's breach of a legal duty of care that causes harm to the claimant. [lxiii] Three requirements must be met in order for an aircraft claimant who based his case on the tort of negligence to prevail. A duty of care that the defendant owed to the claimant, a breach by the defendant of that obligation, and harm to the plaintiff as a result of the breach. The applicable standard is that of a reasonable man when deciding whether there has been a breach of the duty of care. It has been established that a reasonable guy in this situation is someone with average intelligence who will exercise reasonable caution. [lxiv]

The criteria used to determine whether the defendant owes the claimant a duty of care is the reasonable foreseeability test. The law was established in the case *Donoghue v. Stevenson.* [lxv] The "neighbor principle," which states that you should love your neighbor and, in law, that you should not harm your neighbor, was established as a result of this case. In that case, the definition of a neighbor was determined to mean people who are so intimately and immediately impacted by the defendant's actions that the defendant should reasonably have them in mind when he devotes his thoughts to the actions or omissions that are under scrutiny. [lxvi] It would seem that a modern standard for determining duty of care has emerged as a result of the *Donoghue v. Stevenson* case and is now based on the foreseeability test. [lxvii]

As a result, in order to prove a case for negligence, the claimant must first plead and present evidence to show that a duty of care exists. See *Hi-Tech Construction Limited v. Patrick Onome Onomuaborigho* for more information on the requirement to plead and lead evidence to prove negligence. [lxviii] See also the following cases on the need for particulars of special damages to pleaded and proved, *Union Bank of Nigeria Plc v Alhaji Adams Ajabule & Anor,*[lxix] *Dr. Dalhatu Araf v Mr. v Onyedin,*[lxx] However, if the claimant cannot demonstrate unique losses, the court may nonetheless award general damages as long as there is proof the claimant has been hurt. [lxxi]

In order to obtain damages, a third party claimant who is not a party to the air carriage contract as defined by Art. 17 of the Convention must prove privity of contract. It will only be necessary for the plaintiff to prove that the defendant owed him a duty of care and that this duty was broken. [lxxii] In the aforementioned case, the Court of Appeal determined that a third party who

suffers harm as a result of a transaction resulting from a contractual connection between two parties may only pursue a negligence claim without demonstrating privity of contract. The plaintiff must establish that the defendant owed him a duty of care and that the defendant's actions were in violation of that duty.

However, it would be difficult for a third party to win in a negligence claim where the cause of action was aviation or the operation of an aircraft. This is so that the claimant in a negligence action can show that the defendant did not act with the degree of care that a reasonable, prudent person would have displayed in a comparable circumstance and that the defendant's actions fell below the legal standard intended to shield others from irrational risks of harm. [lxxiii] It is undeniable that it will be challenging for a third party claimant to demonstrate that an aircraft that crashed and injured him was operated below standard when neither he nor she was inside the aircraft or had any knowledge of the industry standard for operating an aircraft. This is due to the fact that it takes special knowledge or abilities to operate an airplane. The problem of such a claimant becomes even more complicated considering the provision of the law[lxxiv] which barred the admissibility of the Accident Investigation Report (AIR) in court proceedings. The accident cause, which would have been more demonstrative in proving carelessness, is usually determined by the accident investigation report that is typically completed following an air disaster**.**

7. CONCLUSION

Making a case for statutory protection for a third party victim of an air catastrophe is necessary first. The claimant's capacity to argue and prove their entitlement to special damages in a negligence case directly affects their ability to receive those damages. Nigeria continues to steadfastly adhere to the provisions in the Civil Aviation Act, even though the courts in the Western Jurisdictions, from which the Aviation legal regime derives significant parentage, have weakened the prohibition against the admissibility of the Accident Investigation Report (AIR). [lxxv] In this regard, the judicial philosophy in English jurisdictions regarding the admissibility of the Accident Investigation Report, which permits same to be admitted in evidence as expert opinion,[lxxvi] is highly recommended in the absence of any statutory

intervention to comfort an injured third party, who as a last resort can only claim under the tort of negligence, with its attendant vagaries.

Second, as can be clearly seen, there is a pressing need for third-party statutory protection under aviation law. This can be accomplished by immediately expanding the appropriate CAA provision to include the Rome Convention, 1952 provisions, which lost their legal force in Nigeria once the instrument of denunciation was submitted. If the clause in Section 49(2) of the CAA is changed to allow for an entire aircraft to be involved in an accident of any kind that damages a third party's person or property, this can be accomplished. instead to just anything dropping from it. In this manner, a surface accident victim of an aircraft may be entitled to compensation under section 48(3) of the CAA.

ENDNOTES

[i] J. C Cooper, 'The international Air Navigation conference, Paris 1910' (1952) *The journal of Air Law and commerce 19 (2) (*Online*)*< *https://scholar.smu.edu/jalc/vol19/iss2/1 >accessed 1 January,2020.*

[ii] *Ibid. 4.*

[iii] *Ibid. 18.*

[iv] The Freedom of the air are a set of commercial aviation rights which grants a country's airline the privilege to enter and land in another country's airspace. They were formulated as a result of disagreement over the extent of aviation liberalization in the convention on International Civil Aviation, 1944 known as Chicago convention.

[v] *The Republic of Nicaragua v The United State of America. (1986) ICJ 1*. In that case, Nicaragua filed a suit against the United State at the international court of Justice claiming violation of international law by violating its sovereignty among other reliefs. The court found that the United States was in breach of its obligations under customary international law, and awarded reparation to Nicaragua by supporting contras (The contras were the various US backed and funded right wing rebels groups that were active from 1979 to early 1990s in opposition to the socialist Sandinista junta of National Reconstruction Government in Nicaragua*)* <*https://en.m.wikepedia.org*> *assessed*, 1 Jan. 2020.

[vi] Convention on international Civil Aviation, Chicago 1944 also known as Chicago Convention.

[vii] Latin maxim meaning 'For whosever owns the soil, it is theirs up to Heaven and Down to Hell'

[viii] Article 1, Chicago Convention..

[ix] W. Abdulrahim . 'Airspace and outer space law, Private site for Legal Research and studies' *My International Law Studies (In English)* < *https://sites.goggles .com* >assessed, 1 Jan. 2020.

[x] *Ibid. 131.*

[xi] *Ibid. 143.*

[xii] Nigeria Airways Manual, Nigeria Airways Training School (2002) Lagos p.2.

[xiii] M.M Ogbeidi, 'The Aviation Industry in Nigeria: A Historical Overview' (2006*) Lagos Historical Review vol. 6 p. 133 – 147*

[xiv]Ogbeidi, *Ibid. 5 – 6.*

[xv] Ibid. 120

[xvi] Ibid. 120.

[xvii] Ibid. 121.

[xviii] K.M Obitayo 'Aviation Development in Nigeria: What Role for the Financial Sector'? A paper presented at a seminar organized by the league of Airport and Aviation Correspondents (LAAC), Murtala Mohammed Airport Conference Centre, Lagos, June 4, 1998 p 4.

[xix] WAATA had powers to legislate and execute policies. The supreme body consisted of the Governors of the colonies with the Governor of Nigeria as the presiding officer, Ogbeidi Ibid, note 5.
[xx] S. Mahonwu , 'Civil Aviation in Nigeria' *Sky power News, May 1987, 14*. Referenced in Ogbeide, *(n.13) p 121*.
[xxi] *Ibid. 121.*
[xxii] *Ibid. 122.*
[xxiii] *I.H. PH Diederiks – Verschoor. An Introduction to Air Law (1993) 5th ed. Kluwer Law and Taxation, Publishers Deventer. Boston p. I.*
[xxiv] *Ibid, p.3.*
[xxv] A French expression meaning, air law, aviation law. It is used synonymously with *droit aeronautique, diritto areonautico* <*https://www.linguee.com*> accessed 8 Nov.2019.
[xxvi] Glass *D.A and Cashmore C, Introduction to the Law of Carriage of Goods (1989), Sweet & Maxwell, London, p 205.*
[xxvii] *Ibid 3.*
[xxviii] Convention Relating to the Regulation of Aerial Navigation established under the Paris Convention, 13 October, 1919. The Paris Convention was the first international Convention to address the political difficulties and intricacies involved in International aerial navigation. It was established and concluded under the auspices of the International Commission for Air Navigation (ICAN) (a forerunner of ICAO) <*https://www.spacelegalissues.com*> accessed on 8 Nov.2019
[xxix] International Commission for Aerial Navigation, established under Article 34 of the Paris Convention. The Commission had the status of International Commission and was placed under direction of the League of Nations. <*https://scholar.smu.edu*> accessed 8 November, 2019.
[xxx] Convention on International Civil Aviation Chicago, December 7, 1944.
[xxxi] International Civil Aviation Organisation. A specialized agency of the United Nation that codifies the principles and techniques of International air navigation and fosters the planning and development.
of international air transport to ensure safe and orderly growth. 'The role of ICAO & FAA in Aviation April 3, 2017' <*https://beaconlamps.com*> Accessed on 8 November,2019.
[xxxii] *Diederiks-Verschoor op.cit p.*5. See ICAO Lexicon (5th ed. 1980) ICAO Doc. No. 9294 Vol. 11.
[xxxiii] C. E Uwakwe, *An Introduction to Civil Aviation Law in Nigeria* (2006) 1st ed. Aviation Publishing and Consultancy Co. Ltd., Lagos, Nigeria p.3.
[xxxiv] Uwakwe. *Ibid. 4.*
[xxxv] I.I Omoleke, 'Legal policy and Aviation Industry in Nigeria: Constraints to optimal Safety of Air Transportation' *(2019) African Journal of Political Science, vol.13 p. 001 – 014.*
[xxxvi] *Article 58 of the Colonial Air Navigation Order, 1952.*
[xxxvii] *Ibid.*
[xxxviii] Civil Aviation Act, 1949.
[xxxix] Colonial Civil Aviation (Application of Act) Order, 1952.
[xl] *Uwakwe, Op.cit p. 143.*
[xli] Wichita State University. University Libraries Special Collections and University Archives p.2. <*http:specialcolllections.wichita.edu/collections/ms/92-18-A.HTML*>accessed 17 September, 2019.
[xlii] *Ibid. 3.*
[xliii] *Ibid.*
[xliv] Art. 3, Protocol to Amend Convention on Damage Caused by Foreign Aircrafts to Third Parties on the Surface
[xlv] This Convention covers liability for third party damage caused by an aircraft on an International flight, but not as a
result of unlawful interference.
[xlvi] A.O. Adediran 'Current Regulation of Air Carriers' Liability and Compensation Issues in Domestic Air Carriage in Nigeria' (2016) *Journal of Air Law and Commerce Vol. 81 ISS.1 p.9.*
[xlvii] *Ibid 10.*
[xlviii] T Unmack, *Civil Aviation: Standards and Liabilities (1999) 1st ed.Informa Law, London* < *https://www.routledge.com*> *p.365 accessed 22 July, 2021.*
[xlix] This means the law of the place where the tort or other wrong was committed B A Garner, *Black's Law Dictionary, (2004) 10th ed. West Publishing Co. United States p. 1051.*
[l] U. Chioma, 'Understanding the Liability of Aircrafts to Person and Property, not Connected with the Air Carriage'. <*https:llthenigerialawyer.com/understanding-the-liability-of-aircraft-to-persons-and-property-not-connected-with-the-air-carriage*> *p.3 accessed 17 March, 2021.*
[li] *T. Unmack (n.48) p.*365.

[lii] *Expressio unius est exclusion alterius,* in *B. A Garner, Black's Law Dictionary, (2004) 10th Ed. West Publishing Co. p.701 United States.*
[liii] *(2015) All FWLR (Part 766) 442 at 448 Ratio 4.*
[liv] CAP. C13 Laws of the Federation of Nigeria, 2004.
[lv] *Chioma, op. cit (n.51) p.4.*
[lvi] S.49(2) of the Civil Aviation Act provides that a claim for damages can lie where injury, loss or damage is caused to any person or property on land or water by an aircraft or a person in or falling from an aircraft while taking off or landing
[lvii] *Chioma, op. cit (n.51) p.4.*
[lviii] G. *Kodilinye, The Nigerian Law of Torts (1982) 1st ed., (Spectrum Law Publishing, Ibadan Nigeria) p.38*
[lix] S. 135 of the Evidence Act.
[lx] *(1934) A.C p.25.*
[lxi] *(2012) ALL FWLR (PT 700) 1240 at 1243 Ratio 3*
[lxii] *Diamond Bank Ltd. v Mocokonu Nigeria Ltd. (2019) ALL FWLR (1001) 718 AT 725 RATIO 10.*
[lxiii] G. *Kodilinye, (n.57) p.38.*
[lxiv] *Barnett v Chelsea and Kensington Hospital Management Committee (1948)1 ALL ER.106.8*
[lxv] *(1932) A.C p.25.*
[lxvi] *Kodilinye op.cit p.39.*
[lxvii] U.Ezeugwa, *Aviation Law and Practice in Nigeria (2021) Princeton & Associates Publishing Co.ltd. Ikeja Lagos p.250.*
[lxviii] *(2020) ALL FWLR (Pt.1061) 494 At 498 Ration 3.*
[lxix] *(2012) ALL FWLR (PT. 611) 1413 AT 1417 Ratio 4.*
[lxx] *(2012) ALL FWLR (PT. 625)265 AT 273 Ratio 7.*
[lxxi] *David Taylor & Anor. v Edwin Ogheneovo(2012) ALL FWLR (PT. 610) 1358 at 1362 Ratio* .5
[lxxii] *Rotec Engineering Ltd. v Nigeria Agip Oil Company & Anor. (2015) ALL FWLR (PT. 778) 836 at 840 Ratio 6.*
[lxxiii] *Mrs. Felicia Durowaiye v Union Bank of Nig. Plc (2015) ALL FWLR (PT.795) 225 at 228 Ratio 5.*
[lxxiv] S. 29(14) of the Civil Aviation Act.
[lxxv] *Ibid.*
[lxxvi] B. Edokwe 'Admissibility of Aircraft Accident Investigation Reports In judicial Proceedings In Nigeria ' *<https://www.barristerng.com/admissibility-of-aircraft-accident-investigation-reports-in-judicial-proceeding-in-nigeria>* accessed 27 April, 2020.