Pakistan Journal of Criminology
Vol. 16, No. 02, April—June 2024 (133-144)

The Joint Responsibility of the Air Carrier Established in accordance with International Conventions on the Status of Air Terrorism

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Abstract

In the varying opinions on the legal groundwork and impact of aviation obligations, this paper review analyses the airline's responsibility and its part in ensuring the security of the passengers when they board the aircraft. In nations without any aviation regulations, the issue gets worse. In these situations, the obligation for instances of air terrorism is established with relevance to principles of general obligation. This is inconsistent, given the nature of air travel and the accidents that occur in this context. Why, if at all, is the air carrier responsible for the harm that terrorist attacks bring to the passengers? The article is to urge global legislators to relieve the airline of its responsibilities.

Keywords: Terrorist, Airline, Aviation Conventions

Introduction

Air terrorism is one of the most controversial issues. The forms of terrorism to which air navigation might be exposed, are diverse some of which are what follows: A- Hijacking of Aircraft: Hijacking an aircraft or the illegal appropriation of it is the most common terrorist act due often to political motives. (Karber, 2000). B- Destruction of Aircraft: Acts of vandalism and destruction are considered to be one of the most significant and serious threats to the security of air navigation than the illegal appropriation of aircraft due to the human and physical damages resulting therefrom such as destruction of aircraft and killing the crew and passengers. (Boueida, 2013). C- Recent Threats of Air Terrorism: These threats are represented by the events of September 11th, 2001, in the United States of America through the hijacking of four domestic passenger airplane flights and using them in suicide attacks against the World Trade Towers in New York.

The issue of determining the liability of the air carrier for the accidents of air terrorism has raised a lot of controversy due to the role of the air carrier in the security of passengers. Is the air carrier liable for the damages caused to them because of terrorist acts or not on one hand? On the other hand, the most significant obligation of the air carrier arising from carriage by air contract is to

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ensure the safety of passengers. Therefore, there is a question raised can the air carrier exclude his liability for the accidents of air terrorism to exempt him from this liability to the passenger?

The Warsaw Convention of 1929, in Article 20, outlines that a carrier is not liable if it can demonstrate that all necessary measures were taken to avoid the damage or that such measures were impossible. While this article establishes the carriers defines, it also presents challenges for passengers seeking compensation for damages resulting from terrorist acts, as carriers can utilize similar facilities to exclude liability.

Therefore, the key question arises regarding the conditions that must be met for an air carrier to be held liable for damages arising from air terrorism incidents. Before addressing this, it is essential to understand the foundation of the air carrier's vicarious liability in such situations. This section can be divided into two subsections:

Section One
Vicarious Liability as A Basis of Liability of Air Carrier for Accidents of Air Terrorism:

Some jurisprudence has defined the wilful fault as a basis of the liability of the air carrier as a wilful act or omission by the carrier or one of its servants to cause damage or with recklessness coupled with knowledge and perception that the damage will result from this act or he is not concerned with knowing whether this act or omission leads to damage or not (Tosi, 1978). Another side of jurisprudence has stated that the wilful fault is that the will of the carrier is connected with the physical act even if his intention is not connected with causing the damage either by not expecting the damage or this expectation was not sufficient for preventing the occurrence of the act (Jung, 1997).
From these two definitions, it gets clear that the wilful fault of the air carrier in connection with the accidents of air terrorism is represented by the default that leads to the occurrence of the accident of terrorism or by not doing what is necessary for preventing the occurrence of the accident of terrorism on board the aircraft.

Several conditions are required some conditions for the air carrier to be liable for the accidents of air terrorism based on wilful fault and these conditions are as follows: A-It is necessary that the will of the air carrier is connected with carrying out the physical act of the fault whether by working for the occurrence of the act or omitting to do the work that prevents the occurrence of the act. The expectation by the air carrier of the probability of the occurrence of the accident of terrorism and as a result the occurrence of the damage. But despite this, he has

carried out the flight. Some U.S. judicial decisions have emphasized the conditions and cases of the existence of wilful fault by the air carrier where Massachusetts State Court, has decided that there is an obligation lying on the air carrier towards the passengers to do the utmost care for preventing the occurrence of the aggressions during the air transport process as well as the obligation to raise the awareness of passengers about the risks that might face the flight. (Mark Quigley v. Wilson Line of Massachusetts, 1958) , In case he did not do so, he is considered to have committed a wilful fault.

1. Not Taking by Air Carrier of Security Measures Necessary for Preventing Occurrence of Accidents of Air Terrorism:

The liability of the air carrier is vicarious in the sense that the passenger is not bound to give evidence for the existence of some fault by the carrier unless he and his servants have proved that they have taken all the measures necessary to avoid the occurrence of the damage or it was impossible for them to take such measures (UAE has joined Warsaw international Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 under a federal law No 13 of 1986,, 1986) Based on the above, in case it is proved that the air carrier or one of his servants knew of the probability of the occurrence of one of the accidents of air terrorism on board the aircraft and they did not take all the necessary measures for preventing its occurrence, the air carrier incurs the liability for this accident in this case (Mohammadein, 2012).

Montreal Agreement of 1966. (Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929) in connection with the unification of some rules of international air transport. applied has provisions emphasizing the vicarious liability of the air carrier where it has made the liability of the air carrier strict and based on the notion of risks and incurring the consequences. Montreal Agreement has provided in Article 2 that (the air carrier cannot exclude his liability by whichever means determined by Article 20 of the Warsaw Convention).

As an application of this provision, the air carrier is liable by force of law for the damages caused to the passenger in an absolute way. Therefore, he is liable in case of not taking the measures necessary to prevent the occurrence of the terrorist act. For example, in case the air carrier knew of the existence of risks that might face the flight before carrying it out such as the existence of terrorist groups in the country that is the destination of this flight, the weakness of the security services in it or areas in the itinerary of the flight. Or the flight has been carried out without taking the air carrier the security measures necessary for protecting the aircraft. As a result, he is liable for this terrorist act based on the existence of a

wilful fault on his part not based on the existence of negligence on his part. This is because although the air carrier knew of the existence of the danger and the probability of the occurrence of damage, he was reckless. And he meant to carry out the flight despite this. This case is the materialization of the notion of wilful fault.

Montreal Convention of 1999 has emphasized the possibility of the liability of the international air carrier for the accidents of air terrorism based on wilful fault. This is understood in the sense of contrary to the provision of Article 17 of the convention which has provided that (the carrier is not liable in case he proves the following: A- This damage did not result from negligence, fault, or omission on the part of the carrier, his servants, or agents). This provision clarifies that the Montreal Convention of 1999 has determined the liability of the international air carrier for the accidents of air terrorism where it has made the liability of the carrier in this case personal based on vicarious liability (El-kandari, 2000) As for the judicial decisions, many of them have determined the possibility of the liability of air carrier for the accidents of terrorism in case of not taking the measures necessary for preventing the occurrence of the terrorist act. Therefore, his liability for the accident is established based on the existence of wilful fault. Some of the most prominent decisions are as follows:

The decision of South New York Court. (Greta HUSSERL, Plaintiff, v. SWISS AIR TRANSPORT COMPANY, Ltd, 1975) has rejected the plea by the Swiss Air Transport Company and upheld the claim by Mrs. Husserl the plaintiff. The facts of the case are summarized as follows: during the flight of the Swiss aircraft going to New York, an armed group forced the captain of the aircraft to land in the desert of Jordan and held the passenger's hostage. After the end of being held hostage, Husserl filed an action for claiming compensation from the Swiss company for the damages caused to her as a result of false imprisonment and kidnapping.

The court has upheld the claim by the plaintiff (Husserl) and reasoned its decision on grounds that fairness requires that the Swiss Air Transport Company incurs the consequences of risks of air terrorism about injured passengers due to its ability to protect against these risks and to control them based on Montreal Agreement of 1966 that has determined that the air carrier incurs the consequence of vandalism caused to the aircraft and also that the Swiss Company is more able to protect the aircraft and avoid the accidents of air terrorism through taking the measures necessary for preventing the occurrence of these accidents. The decision of Benghazi Court of Primary Jurisdiction. (A decision rendered , 1976) in Libya has upheld the claim for compensating the plaintiffs against Libyan Arab Airlines

Company and decided the liability of the airline company based on the satisfaction of the elements of wilful fault on the part of the company.

The facts of the case are summarized as follows: during the flight of the Libyan Airlines Company going to Cairo Airport, it went astray and entered Sinai occupied by the Israeli army and it was downed by this army. This led to the destruction of the aircraft and the death of its passengers. Therefore, the heirs claimed from the court to oblige the company to pay compensation for what their bequeaths were exposed to. The court upheld this claim and reasoned its decision that the element of fault was met on the part of the company (Defendant) where the investigations done by the Civil Aviation Organization proved that the aircraft was not equipped with light signals, and this resulted in the non-responding by the captain of the aircraft with the signals done by the planes of the Israeli army to land according to the instructions in a military base of the Israeli army. But he took off once more when the signals of the Israeli army disappeared in a way that led to the downing of the aircraft.

The court saw that the taking off by the captain of the plane once more was deemed to be a cause for exposing the aircraft to the danger of being downed despite the knowledge of the captain that this was likely to occur as a result of his act.

The decision of the court obliging the airline company (Air Inter) to pay compensation relied on the legal basis of the probability of the occurrence of the terrorist act considering the repeated accidents in air navigation. The air carrier is interested in the security and safety of the plane and passengers can expect these accidents. Thus, the air carrier should have taken all the measures necessary to avoid such accidents. This was clear to the court that the terrorist did not pass through the electronic inspection device equipped with an infrared ray system. The occurrence of the accident is deemed to be a wilful fault on the part of the airline company and as a result, it is liable for compensating the injured plaintiff for the damages caused to him.

The taking by air carrier of measures necessary for preventing the occurrence of accidents of air terrorism is measured according to a substantive standard that is the standard of the careful carrier in the same circumstances and efficiency of the reasonable air carrier where it is presumed that the air carrier knows of the probability of the occurrence of the accidents of terrorism in case the reasonable air carrier in the same circumstances and efficiency should have known that (Alasiuity, 1996). So, it is the standard that the substantive standard is the just and prevailing one for determining the liability of the air carrier for the accidents of air terrorism due to a few justifications as follows:

1-The international conventions concerned with air transport such as (the Montreal Agreement of 1966) do not make a difference about the liability of the air carrier for compensating the passengers for the damages caused to them between the wilful fault and non-wilful fault in a way that gives a substantive trend far from the subjective and personal circumstances of the carrier.

2-Following the substantive standard looks fair and logical due to its reliance on a predetermined fixed standard that is the standard of the careful person in the same circumstances and efficiency of the carrier in a way that leads to the unification of treatment with all carriers specially that the accidents of terrorism are characterized to be international.

3-The harmony of the substantive standard with the general trend of the national and international legislations that support the broadening of the scope of the acts that constitute a wilful fault of the air carrier and therefore make his liability heavier especially as for the accidents of air terrorism that require from the carrier to exert more diligence to avoid their occurrence.

This trend is supported by a set of judicial decisions that relied on the substantive standard for determining the liability of the air carrier for the terrorist acts and some of the most prominent decisions are as follows:

The decision of the U.S Court of Appeals determined that the judge has the discretion about assessing the measures on whose basis the fault of the air carrier in cases of accidents of air terrorism and this regard, he must observe the extent of measures carried out by the carrier in a way that matches with the air terrorist act. Therefore, the reasonable measures that must be conducted by the air carrier cannot be determined since they do not match with the size and nature of the operations of air terrorism. (LeROY v. SABENA BELGIAN WORLD AIRLINES, 1965)

1.2- Knowledge by Air Carrier of Probability of Occurrence of Air Terrorist Act on Flight and Not Warning Passengers:

This form occurs in case the air carrier knew of the probability of the occurrence of the terrorist act and did not take the necessary measures to protect the passengers from the danger or in case he did not tell the passengers about the probability of the occurrence of air terrorist act. This has been stated by some jurisprudence. Dokas (1990) states that there is a necessity to inform the passengers of the probability of the occurrence of one of the air terrorist acts whether the flight is domestic or not because this relates to a danger threatening their life.

Moreover, the U.S Federal Aviation Administration has issued many decisions that oblige airline companies to warn of the risks of terrorism and it recommended the establishment of security offices for offering security help to the airline companies if needed as well as the establishment of information offices that receive the threats to examine and ascertain them (El-banna, 1992).

Consequently, the air carrier must inform the passengers of the probability of the flight being exposed to air terrorist acts in case he knows of the probability of the occurrence of such operations on the flight. Therefore, the passenger can decide whether to be on such a flight or not (Mohammadein, 2012). Another opinion of jurisprudence. Dokas (1990) states that such obligation of the air carrier in case of knowing of the probability of the occurrence of air terrorist act to the flight does not exempt him from taking all the measures necessary for encountering the occurrence of terrorist operations and dealing with them. We see that the obligation of the air carrier to inform the passengers and warn them in case of the probability of the occurrence of terrorist operations on a flight can have many justifications some of which are as follows:

a-Passenger's Right to Choose His Destiny:

There is an opinion of jurisprudence stating that the passenger is entitled to choose his flight considering the information he has got from the airline company. Therefore, some of this information must relate to the probability of the occurrence of terrorist operations on the flight (Dokas, 1990). The passenger is entitled to be aware that there is a terrorist danger to which the aircraft he intends to take is exposed to be able to decide whether to continue, change the flight or not to travel at all. The passenger is entitled to choose his destiny considering the available information by the air carrier to assist him in making the right decision (US District Court for the Eastern District of Tennessee, 1978).

b-Existence of Special Relation Between Air Carrier and Passenger:

There is an opinion of jurisprudence Dokas (1990) saying that the air carrier is bound for the passenger to take all the measures that ensure his protection against any terrorist act based on the special relation between the air carrier and the passenger that binds the air carrier to exert the utmost diligence towards the passenger.

Besides, the size of the measures carried out by the air carrier must match with the size of risks to which the flight may be exposed. Therefore, the air carrier is not to guarantee the safety of the passenger. But he is bound to inform him of all the risks to which the flight may be exposed (Dokas, 1990).

There is an exceptional relation of special type between the air carrier and the passenger. Thus, the former is required to exert special diligence in connection with the latter in relation to the risks of the flight specially the risks of air terrorism. The specialty of such a relation is due to the placing by the passenger of himself at the disposal of the air carrier during the flight in a way that justifies the taking by the air carrier of all the precautions to protect the passenger. The most important precaution is to assist the passenger in choosing his destiny in case of the probability of the occurrence of terrorist operations on the flight.

Lockerbie Case (In Re Air Disaster at Lockerbie, Scotland, 1993) is an emphasis on the liability of the air carrier in case of not informing the passengers before the probability of the occurrence of a terrorist act. The facts of the case are summarized as follows: one of the aircraft of Pan American exploded over Lockerbie in Scotland because of a bomb that had one of the passengers. This led to the death of the passengers of the plane, and they were (259) passengers.

It appeared to the court that the U.S Civil Aviation Administration knew prior of the probability of the occurrence of a terrorist act on board one of the planes of Pan American. Also, the German, and English authorities, and the U.S. embassy received information about the probability of the occurrence of a terrorist act on board the planes of Pan American. In addition, the company knew of this information and the probability of the occurrence of air terrorist acts on its flights. However, it did not inform the passengers of this information and of the probability of the flight being exposed to danger. As a result, the families of the injured persons claimed from the court a complete compensation based on the liability of the air carrier for the accident based on committing a wilful fault connected with not informing the passengers of the information of the probability of the occurrence of a terrorist act on the flight.

The company defended itself and pleaded that it took all measures necessary to search the aircraft. Nevertheless, it could not discover the bomb and as a result, it did not prevent the occurrence of the terrorist act on board the plane. Also, it pleaded that although it received information on the probability of the occurrence of terrorist acts on board the aircraft, this information was not certain enough to inform and warn the passengers of traveling on the flight.

However, the court was not persuaded by these pleas and decided that the families of the injured persons were entitled to get a complete compensation due to the establishment of the liability of the air carrier for the air terrorist act as a result of committing a wilful fault through the failure to inform and warn the passengers of the probability of the occurrence of terrorist acts on the flight. The court considered that the accidents of air terrorism are deemed to be exceptional risks and the passengers must be warned to choose their destiny. Pan American

Company appealed this decision, but the Court of Appeals upheld the decision of the Court of First Instance.

In brief, the wilful fault is deemed to be the basis of the liability of the carrier for the accidents of air terrorism in case of doing an act that led to the terrorist accident or the omission to take the measures necessary for preventing the terrorist accident or in case of having information by the carrier of the probability of the occurrence of the terrorist accident and he did not inform the passengers of this information. This wilful fault is deemed to be the vicarious liability of the air carrier and which the passengers needn't prove. But it is a disputable presumption whose contrary can be proved through the negation by the air carrier of this fault.

Section Two
Non-vicarious Liability as A Basis of Liability of Carrier for Accidents of Air Terrorism

Some jurisprudence has defined this type of fault as the negligence on the part of the air carrier and not to exert due diligence of the reasonable careful person (Jung, 1997). That wilful fault is deemed to be the real basis of the liability of the air carrier for the damages of the accidents of air terrorism due to the limited cases of believing of the wilful fault of the carrier in respect with this type of terrorist acts where it is limited to imagine that the air carrier knows of and perceives the probability of the occurrence of such accidents and does not take the security measures for preventing their occurrence. We can clarify the most prominent forms of involuntary faults of the air carrier in connection with the accidents of air terrorism as follows:

a- Not Taking Measures Necessary for Preventing Occurrence of Accidents of Air Terrorism:

Some jurisprudence, Mohammad (2012) says that not taking the air carrier of the security measures necessary for securing the flight from the risks of air terrorism operations is deemed to be a cause for the establishment of his liability for these accidents. Another opinion of jurisprudence, Koch (2006) states that it is possible to establish the liability of the air carrier for the accidents of air terrorism in case of his inability to use the security measures and means available to him for preventing the occurrence of such terrorist acts due to his physical control over the aircraft and what is on board during the flight.

Therefore, in case the air carrier does not take security measures and precautions that must be by the careful person in such circumstances, he is deemed to be in breach of his obligation to secure the aircraft and the flight. As a result,

his liability is established in this case for the accidents of terrorism taking place on the flight.

b-Inability to Treat the Effects of The Accident:

The maltreatment by the air carrier of the occurrence of the accidents of air terrorism and the results arising therefrom might multiply their effects. Some jurisprudence, Koch (2006) states that the liability of the carrier for the accidents of air terrorism is established in case he fails in connection with relief and rescue where the air carrier in such a case must use all the means necessary for rescuing goods, property, and persons or calling out the nearest rescue teams. Otherwise, his liability is established and consequently, he could be liable for compensation for all damages resulting from the accident of air terrorism.

Conclusions

The liability of the air carrier is deemed to be one of the ramifying issues in-laws, international conventions, and jurisprudential opinions. One of the most significant points about which there are different opinions is the legal basis of the liability of the air carrier for the accidents of air terrorism as well as the interpretation of the phrases mentioned in the Warsaw Convention 1929 in connection with the meaning of " embarking and disembarking the aircraft" in addition to the determination of the means of exempting the air carrier from the liability for the damages resulting from the terrorist acts where most of the causes of the accidents of air terrorism are unknown in a way that places a heavy burden on the injured passenger about the evidence of the liability of the air carrier for the accident of terrorism. At the end of the study, we have reached a set of recommendations as follows:

Recommendations

- Providing for that the wilful fault is the basis of the liability of the air carrier for the accidents of air terrorism in case of carrying out an act leading to the terrorist act or the omission connected with not taking the measures necessary for preventing the terrorist act or in case the air carrier has received information in relation to the probability of the occurrence of a terrorist act and he has not informed the passengers of such information.
- Providing in the law and the conventions regulating civil aviation that the air carrier is not liable for compensating the passengers for the procedures taken by the authorities' vis a vis the passengers because of a false threat.
- Providing in the law and conventions regulating the civil aviation that the air carrier is deemed to be liable for the accidents of air terrorism in case

he has not exerted due diligence in connection with avoiding the terrorist acts while being able to do so.

- The study appeals to the air carrier to be exempt from the liability for what might face the flight that he warns the passengers of the terrorist threats to which the flight might be exposed on condition that these threats are detailed in a way referring to their seriousness. But as for the random threats, the airline companies are not bound to warn the passengers of them.
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