



EBOLA CAUSING A HEADACHE FOR AIRLINES

With the rapid spread of the deadly Ebola virus bringing people out in a cold sweat, airlines may be concerned about their potential exposure to claims. Drawing on our experience of previous worldwide health threats, such as Swine Flu, SARS and tuberculosis, we consider the real extent of airlines' exposure.

What is Ebola Virus Disease?

Ebola Virus Disease (or "Ebola" as it is more commonly known), is a severe, often fatal illness in humans. It has an average fatality rate of around 50%, although the rate has been as high as 90% in previous outbreaks.

The first symptoms of Ebola are similar to a common cold/flu and include the sudden onset of fever, fatigue, muscle pain, headache, and a sore throat. However, these symptoms are followed by vomiting, diarrhoea, rashes, symptoms of impaired kidney and liver function, and both internal and external bleeding.

The virus is spread from human-to-human via direct contact (through broken skin or mucous membranes, such as the eye lids) with the blood, secretions, organs or other bodily fluids of infected people, and with surfaces and materials (e.g. bedding, clothing) contaminated with these fluids. An important point for airlines is that Ebola is not currently believed to be airborne, although there is some suggestion that the virus could mutate.

The incubation period for Ebola is 2-21 days (more usually 4-10 days). Importantly, a person is not infectious until they start to show symptoms.

Potential risk factors for airlines

Potential risk factors for airlines could include: (a) failing to deny at check-in boarding to a passenger who has Ebola symptoms; (b) failing to check that passengers are not knowingly infected or have not knowingly been in close contact with someone else who is infected;



(c) failing, in flight, to isolate a passenger who has Ebola symptoms or to await the attendance of medical authorities at destination before disembarking passengers; (d) failing to trace fellow passengers when the airline is notified that a passenger on one of its flights had Ebola.

However, the World Health Organisation (WHO) has not advised any restrictions on normal travel or the closure of borders and a number of significant hurdles need to be overcome by claimants before liability can be established.

Transmission during carriage by air

The most significant hurdle that a passenger claimant has is to establish that he/she has been infected during carriage by air. For the vast majority of claims that are governed either by the Warsaw or Montreal Conventions, or legislation applying similar such provisions to domestic carriage, this means proving that the infection occurred during a flight or during the period of embarkation or disembarkation. Where claims are not governed by these provisions, local law is likely to adopt a common sense approach based on the actual period in which a passenger is under the de facto control or responsibility of a carrier, including the flight itself.

Therefore, a potential claimant would firstly need to prove that he or she contracted the disease during this timeframe, a matter which may well present significant evidential difficulties. Without very clear evidence, it is always arguable that the passenger became infected at some other time, including while at home, at work and on the way to and from airports. In such circumstances, the carrier should not be held liable. This is also likely to be the case if infection takes place in check-in queues, security and immigration check-points, duty free shops and public lounges used by a number of airlines.

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Even if this first hurdle can be successfully negotiated, there is then a further requirement on the passenger to show that the spread of the disease constituted an “accident” for Convention purposes. In many jurisdictions, an “accident” is construed as an unexpected or unusual event external to the passenger.

Whilst clearly external, it is questionable whether the transmission of Ebola from one passenger to another would be regarded as unexpected or unusual. It would be difficult to suggest that the transmission of the common cold virus from one person to another on an aircraft would be unexpected or unusual. One might therefore question why the transmission of Ebola – a virus which just happens to have more serious symptoms – should be regarded as being any different.

Where a passenger exhibits symptoms of Ebola during flight, appropriate steps should be taken to isolate that passenger. Failure to take such steps “in the face of a known and serious risk” (as was the case in *Olympic Airways v Hussein*, where an asthmatic passenger who was sensitive to cigarette smoke died because his repeated requests to switch seats were declined) could constitute an accident.

It is possible that a claimant may try to argue that a failure on the part of the airline to screen passengers amounts to an “accident” for Convention purposes. In such a case, and where there is (currently) no specific obligation on airlines to screen passengers, comparisons could be drawn with the DVT and Air Travel Group Litigation, where it was held that a failure to warn passengers of precautions did not constitute an accident.

Against this background of evidential problems and lack of legal clarity, it is perhaps not surprising that the threat of major claims connected to the outbreak of Swine Flu and SARS failed to materialise. However, in the absence of a clear precedent precluding Convention claims, they will likely be made and they will have to be defended.

Flight cancellations and denied boarding

On 8 August 2014, the Director General of WHO issued Temporary Recommendations in relation to the ongoing Ebola outbreak. These include exit screening at all international airports, ports and border crossings in Guinea, Liberia, Sierra Leone and Nigeria. The screening should consist of, at a minimum, the following measures: a questionnaire,



a temperature measurement, and, if there is a fever, an assessment of the risk that the fever is caused by Ebola. Any person with an illness consistent with Ebola (whether or not they are in the above-named countries) should not be allowed to travel, unless the travel is part of an appropriate medical evacuation.

In the absence of airport screening, airlines may wish to consider introducing their own passenger checks (e.g. basic questioning during check-in about a passenger's current health and recent travel) in order to afford themselves better protection. The general conditions of carriage of most airlines contain a right to refuse carriage if necessary to comply with government regulations or if carriage endangers the safety and health or comfort of other passengers and the crew. Furthermore, where boarding is denied on reasonable health grounds, the remedies available to passengers arising under EU Regulation 261/2004 will not apply.

However, this creates a clear tension between the rights of the other passengers to be protected from infection and the rights of the individual to be transported as contracted. In reality, unless passengers disclose their medical condition or exhibit clear Ebola symptoms (very difficult at the early stages of Ebola where the symptoms are flu-like) these provisions will be of little benefit to the carrier. There are specific air carriage regulations such as the US Air Carrier Access Act or broader anti-discrimination regulations elsewhere which may prevent refusal of carriage unless there is something more than just a "reasonable belief" that someone has an infectious disease. Strictly speaking, only qualified physicians have the right to impose restrictions on a passenger's travel.

We have already seen cancellation of a significant number of charter flights to Guinea, Liberia and Sierra Leone. Liability for cancellations may be limited if a cancellation is due to government action, but where EU Regulation 261/2004 applies, the carrier will still remain obliged to provide a refund or re-routing, plus care and assistance for the passenger. Liability to pay compensation under the Regulation is unlikely to arise, however, on grounds of "extraordinary circumstances". Where a flight is delayed as a result of a passenger making a joke about having Ebola, as occurred recently when a US Airways flight was grounded for nearly two hours at Punta Cana, it is arguable that this too should be categorised as "extraordinary circumstances", such that compensation will not be payable.

Where physicians are called to examine a passenger but a diagnosis cannot be made without delaying the flight, carriers will need to determine whether to delay the entire flight and provide necessary care and assistance and deal with claims or delay the suspected passenger and deal with any claim for delay and discrimination by that passenger alone.

Public law liability

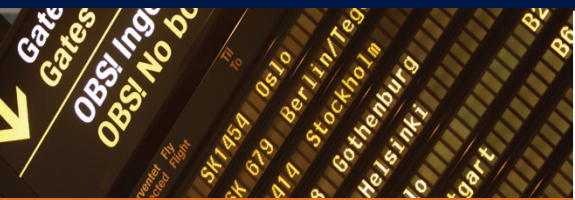
Public law liability is also a possibility - airlines must still comply with international health regulations and the laws of the countries to which they operate services.

Following a series of infections of communicable diseases (tuberculosis, measles) on board aircraft in the 1980s and 1990s, international regulations (ICAO), standards and recommended practices (WHO, IATA) were adopted to help airlines and airports take effective measures to prevent the spread of communicable diseases. Following the SARS outbreak, several governments, including the United

States government, proposed to amend domestic legislation imposing significant fines on carriers which allowed the outbreak of diseases beyond international borders as a result of failing to comply with regulations.

The share prices of a number of airlines have already been affected negatively by the threat of Ebola, but it is too early to determine whether the current outbreak will create a more fundamental problem for airlines, including, above all, a global downturn in the demand for air travel. The media's coverage of the SARS pandemic and the handling of the outbreak by certain governments created pandemonium and panic. It was largely this hysteria, rather than the illness itself, that had a devastating impact on airline finances. Today, airlines and governments are better prepared and claimants continue to face significant hurdles in obtaining damages. In the meantime, we will monitor the progression of the virus and epidemiological investigations and report on any significant claims activity.

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