

# THE CORONAVIRUS AND AIRLINE LIABILITY: WHAT HAS CHANGED SINCE SARS?

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**THE OUTBREAK OF THE CORONAVIRUS COINCIDES WITH THE LUNAR NEW YEAR. AIRLINES MUST PREPARE FOR THE RISK OF TRANSMISSION AT A TIME OF SIGNIFICANTLY INCREASED PASSENGER TRAFFIC BOTH TO AND FROM CHINA AND WITHIN ASIA.**

This creates a favourable environment for the disease to spread widely and quickly. This is not the first time airlines have had to deal with such a threat. In this article, we consider the similarities to the response to SARS and how the issues in relation to and threats from coronavirus differ from SARS.

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## LIABILITY FOR CONTAGIOUS DISEASES

Airlines are likely to be the primary means of transmission of the disease within a country and across its borders and should take steps to be prepared to deal both with the risks of transmission as well as the consequences.

## LEGAL LIABILITY

Most international air carriage is subject to the Montreal Convention (1999) which makes airlines prima facie liable for death or bodily injury which is caused by an accident on board an aircraft or during embarkation or disembarkation. An accident is typically defined as an unexpected or unusual event or happening which is external to the passenger. In addition, the internal reaction of a passenger to the usual, normal and expected operation of an aircraft will not constitute an accident

and as a result, would not trigger the liability of an airline. However, it is important to note that it is not necessary for the symptoms or conditions to manifest during the flight. Following the DVT claims litigation, the English courts will consider whether one step in a sequence was an unusual or unexpected event and whether this would appear to constitute an accident, triggering the liability of an airline. The key issue is the ability of a passenger to demonstrate that the bodily injury was sustained during the flight or during embarkation or disembarkation and that this constitutes an accident.

If the bodily injury is the transmission of an infectious disease during the flight or during embarkation or disembarkation, it may be difficult for a passenger to sufficiently clearly isolate an event or events during this period which would constitute an accident. This is where a passenger had other opportunities for human contact when the disease could have been transmitted, including using public transport to reach the airport, using airport check-in desks, security screening and immigration facilities, as well as airport retail and food and beverage offerings. Even where a passenger was able to isolate such events to embarkation, disembarkation or during the flight, it would then be necessary to demonstrate that these were unexpected or unusual events. This may also be difficult to achieve where there is widespread media coverage of the disease and its transmission and steps are taken by governments and organisations such as the World Health Organization (WHO) to raise awareness of the disease, the risk of transmission and steps to identify infected individuals and to reduce the risk of transmission. In such circumstances, passengers should be aware of the risk and be taking their own precautions. Whilst this will not absolve airlines of liability, it does make it more difficult for a passenger to claim that transmission was an unexpected or unusual event.

Under Thai law, liability for death and bodily injury is governed by the International Carriage by Air Act (2015), which gives effect to the Montreal Convention (1999) in Thai law. The absence of decided and reported Thai Supreme Court decisions on the definition of an accident and the reluctance of Thai courts to follow or apply the decisions of courts in other jurisdictions has resulted in ambiguity and uncertainty for airlines.

In assessing the liability of an airline, there is an increasing focus on the steps taken by airlines to reduce known risks and to offer alternatives to reduce such risks, particularly in circumstances where public awareness of the risk of transmission is high. If a passenger is identified during a flight with the symptoms of the coronavirus or the suspected symptoms, crew should be trained to isolate the passenger, ensure that appropriate medical care is provided on board and on arrival and that the remaining passengers are offered a medical examination. Airlines should also ensure that aircraft are equipped with the appropriate medical equipment and supplies in suitable quantities and that the air quality on board is appropriate and does not aid the risk of transmission. The prevalence of high-density seating on aircraft and the use of yield management to ensure that as many seats are sold as possible may complicate steps to isolate passengers.

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A critical issue is whether the public focus on the coronavirus, proactive intervention by governments and wide dissemination of steps to reduce the risk of transmission creates a higher standard of preparedness and response among airlines.

Airlines and their ground staff should also exercise a higher level of prudence in dealing with passengers during check-in and embarkation and this should include adequate training to identify the symptoms of the coronavirus and how to deal with passengers with suspected symptoms during check-in, embarkation and disembarkation. Airlines must also be prepared to deal with passengers who are mistakenly identified as having these symptoms or who are subsequently found to not have the coronavirus, particularly where the passenger cannot travel as intended. Airlines should also understand the extent to which local laws and regulations permit them to require a passenger to submit to a medical examination or to deny carriage to passengers suspected of being infected. Regardless of the legal position, airlines must also deal with the reality that their actions will be broadcast on social media and that public perception of their response and treatment of passengers is more likely to be determined by social media.

## WHAT HAS CHANGED SINCE SARS?

### The WHO and other regulations

In 2007, the WHO introduced international health regulations which were prompted, in part, by the experience with SARS. These regulations require UN member states to comply with mandatory guidelines on the control, prevention and detection of communicable diseases. Airlines must comply with these regulations and they are responsible for ensuring that they are familiar with the regulations, their application at airports they serve and specific local laws on infectious diseases. There are likely to be differences between the laws, regulations and measures implemented at foreign airports and those of the country or territory of registration of the aircraft and airlines should ensure that their airport and aircraft personnel are briefed on these differences.

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## SOCIAL MEDIA AND PR IMPACT

The rapid proliferation of social media platforms, airport and onboard Wi-Fi and the widespread use of social media by the travelling public will ensure that steps taken by airlines and airports will take place in the glare of social media. Efforts to identify passengers with potential symptoms, to deny boarding to passengers suspected of being infected and to quarantine or remove passengers suspected of being infected from aircraft are likely to be filmed, recorded and disseminated instantly and widely. This is likely to pose additional risks and impose additional pressure on ground staff and aircraft crew. Airlines should ensure that they have clear procedures for ground staff and aircraft crew to deal with passengers who are suspected to be infected.

Footage shared on social media may not provide a true, accurate or balanced account of events. This is likely to be exacerbated by fear of infection, the emotional and psychological impact of passengers being identified as being potentially infected and passengers being denied boarding or being quarantined on board or removed from an aircraft. Recent experiences demonstrate that airlines will have to balance the need for objectivity and ensuring that an accurate and balanced account of events is disseminated with the need to demonstrate that they are dealing with their passengers sympathetically and humanely.

A further concern in relation to the sharing of such footage on social media is how this could result in public pressure on governments to prevent the spread of the coronavirus by banning airlines from their airports.

## Compensation for denied boarding and cancelled flights

Flights departing from EU airports and those operated system-wide by EU carriers are subject to EU Regulation 261/2004, which requires the payment of compensation for cancelled flights and where a passenger is denied boarding unless there are 'extraordinary circumstances'. Arguably cancellation of flights to and from highly infected areas may constitute such 'extraordinary circumstances', although this will depend on the reasons for the cancellation and particularly whether the cancellation was as a result of government intervention, regulations or other factors outside the control of the carrier. For passengers who are denied boarding, the extent to which they are entitled to compensation pursuant to EU Regulation 261/2004 will depend, in significant part, on the extent to which the carrier can demonstrate that the denial of boarding was reasonable and took into account the risk of transmission of the infection during the flight. A further critical factor will be the extent to which the carrier proactively took steps to rebook the passengers and assisted them in obtaining medical treatment, meals and accommodation.

## Data privacy

The EU GDPR is one of a number of data privacy and protection regimes introduced since SARS.

Airlines will need to balance data privacy concerns with the requirement to disclose passenger details to airport, health and public safety authorities. Where disclosure is made in response to an official request from such authorities, it should fall within an exception to restrictions on the use of personal data. Passenger manifests should be retained and airlines should be prepared for requests to provide these to airport, health and public safety authorities. Upgrades at boarding and seat changes during the flight should be recorded on the manifest.

However, where the personal details of passengers who are suspected to be infected are disclosed or the identities of passengers are generally disclosed, airlines should be prepared to deal with claims of breaches of data privacy regardless of whether the passengers are infected and regardless of whether the disclosure fell within an exception to data privacy regulations.

Airlines must also be prepared to deal with claims of invasion of privacy by ground staff and aircraft crew where their faces, images and other personal data are disseminated through social media, particularly in footage of ground staff and aircraft crew involved in the denial of boarding, refusal of carriage or steps to quarantine passengers.

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