



Universiteit
Leiden
The Netherlands

The right to travel by air of persons with disabilities

Kovudhikulrungsri, L.

Citation

Kovudhikulrungsri, L. (2017, November 16). *The right to travel by air of persons with disabilities*. s.n., S.l. Retrieved from <https://hdl.handle.net/1887/60260>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/60260>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/60260> holds various files of this Leiden University dissertation.

Author: Kovudhikulrungsri, L.

Title: The right to travel by air of persons with disabilities

Issue Date: 2017-11-16

5 Remedies for persons with disabilities in respect to air travel

5.1 INTRODUCTION

When an air carrier or an airport operator has duties as explained in Chapter 4, the implication is that a person with disabilities (PWD) has rights in relation to them and where there is a right, there should be a remedy – *ubi jus ibi remedium* being the basic principle.¹ Accessibility standards in Chapter 4 concern public law, while the contract of carriage by air provides another remedial channel through private law. Strictly focusing on international carriage by air, remedies may fall under the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929 (Warsaw Convention of 1929),² and the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 (Montreal Convention of 1999)³ which govern the liability of air carriers.⁴ The Montreal Convention of 1999, forms the basis for this discussion, because the EU Member States and the EU,⁵ the US⁶ and Canada⁷ have ratified the Montreal Convention of 1999,⁸ so it prevails

1 Jonathan Law, *A Dictionary of Law*, (8th ed., Oxford University Press, 2015) <http://www.oxfordreference.com/view/10.1093/acref/9780199664924.001.0001/acref-9780199664924-e-4078?rskey=oW0xsh&result=4422> (accessed 23 May 2017).

2 Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 12 Oct. 1929), T.S. 876, (Warsaw Convention of 1929).

3 Convention for the Unification of Certain Rules for International Carriage by Air, (Montreal, 28 May 1999), ICAO Doc 9740, (Montreal Convention of 1999).

4 Both Conventions apply to all international carriage of persons, luggage or goods performed by aircraft for reward subject to the condition that the place of departure and the place of destination are situated in the territories of two States Parties or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. See Warsaw Convention of 1929, art. 1; Montreal Convention of 1999, art. 1.

5 In the EU, the Montreal Convention of 1999 was implemented by Regulation 2027/97, as amended by Regulation 889/2002. Regulation 889/2002 extends the scope of application of the Montreal Convention of 1999 to carriage by air within a single Member State. See Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ L 140, 30.5.2002, p. 2-5, (Regulation 889) art. 1.

6 On 5 September 2003, the US was the 30th State to deposit its instrument of ratification of the Montreal Convention of 1999 so the Montreal Convention of 1999 entered into force sixty days later. Domestic baggage liability in the US is subject to 14 CFR Part 254.

over the Warsaw Convention of 1929, under the conditions laid down in Article 55 of the Montreal Convention of 1999.⁹ Nevertheless, a reference to the Warsaw Convention of 1929, is inevitable when its contents are relevant to the discussion. This Chapter puts forward two questions: (1) how remedies to PWDs under these two regimes support each other or are in conflict and (2) whether such remedies are in line with the right to an effective remedy as discussed in Chapter 3.

7 Canada incorporated the Warsaw Convention of 1929 and the Montreal Convention of 1999 into the Carriage by Air Act. See *Carriage by Air Act*, R.S.C., 1985, c. C-26. However, the CA Agency has an authority to determine the applicability of the principles of the Montreal Convention of 1999 to a domestic tariff provision on a case-by-case basis. See Canadian Transportation Agency, Decision No. 313-C-A-2010, (27 June 2010); Canadian Transportation Agency, Decision No. 309-C-A-2010, (21 July 2010); Canadian Transportation Agency, Decision No. 483-C-A-2010, (24 Nov. 2010); Canadian Transportation Agency, Letter Decision No. LET-C-A-129-2011, (2 Dec. 2011); Canadian Transportation Agency, Decision No. 249-C-A-2013, (26 June 2013).

8 International Civil Aviation Organization, Current lists of parties to multilateral air law treaties, <http://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx> (accessed 25 May 2017).

9 Montreal Convention of 1999, art. 55.

This Convention shall prevail over any rules which apply to international carriage by air:

1. between States Parties to this Convention by virtue of those States commonly being Party to

- a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

- b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);

- c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

- d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

- e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by The Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or

2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

5.2 REMEDIES UNDER INTERNATIONAL, REGIONAL, AND NATIONAL ACCESSIBILITY STANDARDS WITH RESPECT TO AIR TRAVEL

5.2.1 Scope of this Section

Containing procedural and substantive aspects, an effective remedy should provide both administrative and judicial mechanisms, and compensation may be a suitable option when no other restitution is possible. This Section explores the abovementioned elements in accessibility standards published by the International Civil Aviation Organization (ICAO), the EU, the US and Canada.¹⁰

5.2.2 Procedural aspects of an effective remedy in selected jurisdictions

In relation to procedural factors, complaint processes are different among EU Member States,¹¹ the US and Canada. In the US, a PWD must file a complaint within six months, which is relatively shorter than comparable provisions in other US laws.¹² Conversely, there is no limitation period for the filing of applications to the Canadian Transportation Agency (CA Agency), but a PWD has to contact a transportation service provider and allow a 30-day response as a pre-condition.¹³ Another difference is that the US DOT complaint process is not judicially reviewable.¹⁴ On the contrary, the CA Agency is a quasi-judicial tribunal, so its decisions are enforceable as rulings of the Federal Court of Canada.¹⁵

With regard to judicial mechanisms, international flights are subject to any applicable conventions.¹⁶ In the seminal case of *Stott v. Thomas Cook Tour*

¹⁰ See Section 1.3.3, Chapter 1 for the selection of comparisons.

¹¹ See European Commission, *Evaluation of the application of Regulation 1107/2006* by Steer Davies Gleave on the application and enforcement of the regulation concerning the rights of disabled people and persons with reduced mobility when travelling by air, http://ec.europa.eu/transport/sites/transport/files/themes/passengers/studies/doc/2010_06_evaluation_regulation_1107-2006.pdf (accessed 13 Jan. 2017), chapter 5.

¹² Raina Urton, *Trouble in the Skies: The ACAA's Failure to Protect Passengers with Disabilities*, 21:2 Law & Ineq. J., 437, 460-461 (2013).

¹³ Canadian Transportation Agency, Decision No. 335-AT-A-2007, (29 June 2007).

¹⁴ Stuart A. Hindman, *The Air Carrier Access Act: It is Time for an Overhaul*, 9:2 Issues Aviation L. & Pol'y, 365, 372 (2010).

¹⁵ Hence, the decisions are subject to an appeal process and, once they are final, those who do not comply with the decisions will be subject to administrative monetary penalties. See *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244, schedule item 13.1; *Canada Transportation Act*, S.C. 1996, c. 10, ss 40-41; Canadian Transportation Agency, *Accessible Transportation Complaints: A Resource Tool for Service Providers*, (Oct. 2012), 26-27.

¹⁶ ICAO, *Manual on Access to Air Transport by Persons with Disabilities*, ICAO Doc 9984 (2013), foreword, (PWD Manual), para. 10.5; Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and

Operators Ltd.,¹⁷ the UK Supreme Court decided that compensation for injury to PWDs comes under the rules of applicable international law.¹⁸

In the US, three circuit courts view that a PWD cannot bring the case to court under the Air Carrier Access Act (ACAA)¹⁹ and other state laws because the ACAA provides no private right of action and the ACAA as a federal law preempts other state laws on the same subjects.²⁰ On the contrary, the Ninth Circuit Court, in *Gilstrap v. United Air Lines, Inc.*, ruled that state-law remedies were not preempted by the ACAA even when state-law accessibility standards were preempted by the ACAA.²¹ Scholars and NGOs have proposed adding the private right of action to deter any further discriminatory practices by air carriers for a number of reasons.²² Congress has not integrated this in the ACAA.²³ Despite the lack of a private right of action, the Nondiscrimination on the Basis of Disability in Air Travel (Part 382) confirms and elaborates upon the liability of air carriers concerning mobility aids, and in the case of an international flight, compensation is calculated in accordance with any applicable international law.²⁴

In Canada, the Air Transport Regulations govern only domestic services, so no international convention is referred to. As a result, in the case of compensation in international air services, reference is made to any applicable international conventions in Section 5.3.

persons with reduced mobility when travelling by air, OJ L 204, 26.7.2006, p. 1-9 (Regulation 1107), art. 12. See Section 5.3.

17 [2014] UKSC 15. (Stott). See Section 5.3.2.

18 *Ibid.*, paras 20-21.

19 49 U.S.C. § 41705 (1986).

20 See *Love v. Delta Airlines*, 310 F.3d 1347, 1359 (11th Cir. 2002); *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1265 (10th Cir. 2004); *Lopez v. Jet Blue Airways*, 662 F.3d 593, 596 (2d Cir. 2011). Before the US Supreme Court decided in *Alexander v. Sandoval*, several Circuit Courts opined that the ACAA provided an implied private right of action. See *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566 (8th Cir. 1989); *Shinault v. American Airlines, Inc.*, 936 F.2d 796 (1991); *Squire v. United Airlines, Inc.*, 973 F. Supp. 1004, 1006 (D. Colo. 1997); *Segalman v. Southwest Airlines Co.*, 603 Fed.Appx. 595, (9th Cir. 2015); *National Federation of the Blind v. United Airlines Inc.*, No. 11-16240, (9th Cir. 2016). On the contrary, the Ninth Circuit Court ruled that state law remedy was not preempted by the ACAA even when accessibility standards were preempted. See *Gilstrap v. United Air Lines, Inc.*, 709 F.3d 995 (9th Cir. 2013).

21 *Gilstrap*, *ibid.*

22 National Council on Disability, *Position Paper on Amending the Air Carrier Access Act to Allow for Private Right of Action*, 7, http://www.ncd.gov/rawmedia_repository/eec5d1a8_daeb_4a65_bd8b_4399a40c5496.pdf (accessed 13 Jan. 2017); Urton, *supra* n. 12, 451-457.

23 Carol J. Toland, *Overview of the Air Carrier Access Act*, Congressional Research Service, 8, <http://research.policyarchive.org/19925.pdf> (accessed 13 Jan. 2017).

24 Nondiscrimination on the Basis of Disability in Air Travel, 73 FR 27614, 27656, 13 May 2008.

In the EU, Directive 2013/11/EU on Alternative Dispute Resolution for Consumer Disputes,²⁵ adds an option for a PWD to settle a dispute arising from EU Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air (Regulation 1107) by an alternative dispute resolution (ADR) provider.²⁶ However, there are different levels of development of ADR in relation to the aviation sector among EU Member States.²⁷ In the UK, the ADR applies to national and foreign air carriers whose flights arrived or departed from an airport on its territory on a voluntary basis while Germany requires all air carriers operating from or to a German airport to join the ADR.²⁸ Moreover, in the UK, air carriers cannot review the ADR decisions but passengers can, so air carriers may not give consent to using ADR.²⁹

5.2.3 Substantive aspects of an effective remedy in selected jurisdictions

In relation to substantive elements of an effective remedy,³⁰ several types of measures are provided under the accessibility standards in the EU, the US and Canada.

5.2.3.1 Compensation for personal injury

Theoretically, compensation schemes may be applied on domestic routes or international routes, since the latter come under any applicable international

25 Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), OJ L 165, 18.6.2013, p. 63–79.

26 Tom van der Wijngaart & Sarah Pearson, *Alternative Dispute Resolution for Aviation Consumer Claims – UK Update*, 13, http://www.clydeco.com/uploads/Files/Newsletters/Aviation_Newsletter_June_2016.pdf (accessed 13 Jan. 2017). See Luftverkehrsgesetz (LuftVG) v. 01.08.1922, BGBl. I S. 698, § 57b(1); UK Civil Aviation Authority, Information for ADR entities approved by the CAA (including guidance on regulatory and additional information requirements), (CAP 1390), 6.

27 Naomi Creutzfeldt & Christof Berlin, *ADR in Aviation: European and National Perspectives*, 35:2 C.J.Q., 148, 161 (2016).

28 See UK Civil Aviation Authority, *Alternative Dispute Resolution*, <https://www.caa.co.uk/Passengers/Resolving-travel-problems/How-the-CAA-can-help/Alternative-dispute-resolution/> (accessed 18 May 2017); Swiss Re and University of Oxford, *Consumer Dispute Resolution – Implementing the Directive*, https://www.law.ox.ac.uk/sites/files/oxlaw/conference_report.pdf (accessed 18 May 2017).

29 US Department of State, *Eighteenth Meeting of the U.S.-EU Joint Committee Record of Meeting April 19, 2016*, <https://www.state.gov/e/eb/rls/othr/ata/e/eu/264796.htm> (accessed 13 Jan. 2017).

30 See Section 3.3.2.2, Chapter 3.

convention in order to avoid the exclusivity principle discussed in Section 5.3. On an international route, if either the Warsaw Convention of 1929, or the Montreal Convention of 1999, is applicable, compensation is considered under such convention. For example, in *Soltesz*, the plaintiff and his late wife booked a round-trip flight from New York to Budapest via Amsterdam operated by KLM, but booked and purchased through Delta.³¹ On a return trip from Budapest, the wife, who was a wheelchair user due to her health issues was unable to maneuver from her wheelchair into her assigned seat because the backs of two seats in her row were broken; as a result, she was disembarked from the flight, and air carriers were unable to accommodate her on other flights.³² Thereafter, she passed away.³³ The plaintiff did not allege any breach of Regulation 1107 or the ACAA, but he referred to the Montreal Convention of 1999.³⁴ Later the parties agreed to settle and the court dismissed the case.³⁵

Among EU Member States, only the UK allows compensation to a PWD including compensation for injury to feelings.³⁶

Across the Atlantic, the US DOT does not compel air carriers to retribute any damages suffered by a PWD on both domestic and international flights.³⁷ Yet, some courts follow *Gilstrap* and generously apply a State law to compensate PWDs and this issue will be discussed in Section 5.5.1.1.³⁸ The CA Agency is authorized to award compensation to a PWD for any expenses arising from an undue obstacle, and it does not differentiate authority between domestic and international routes;³⁹ however, for damage to feelings or pain,

31 *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 2014 WL 2452488 (S.D.N.Y.), paras 16-17.

32 *Ibid.*, paras 24-29.

33 *Ibid.*, para. 42.

34 *Ibid.*, paras 44-47.

35 *The Estate of Vilma Soltesz et al., v. Delta Air Lines, Inc. et al.*, 1:14-cv-03893-RJS, (S.D.N.Y. dismissed 4 Apr. 2016).

36 Steer Davies Gleave, *supra* n. 11, para. 5.28; Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007, SI 2007/1895, reg. 9. It is repealed by Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014, SI 2014/2833. See Section 5.3.2.

37 See Department of Transportation, Order 2013-12-4, Docket OST 2013-0004, (6 Dec. 2013). The complainant's wheelchair was loaded incorrectly and on his way home he was thrown face first out of the wheelchair and sustained physical injury. The US DOT ordered American Airlines to pay civil penalties but not compensation.

38 *Adler et al v. WestJet Airlines, Ltd.*, 31 F.Supp.3d 1381 (S.D.Fla. 2014). In *Gilstrap*, *supra* n. 20, the claimed damage happened at an airport but the court did not examine whether it happened within a temporal scope of the Montreal Convention of 1999 or not.

39 *Canada Transportation Act*, *supra* n. 15, s. 172(3). See Canadian Transportation Agency, Decision No. 108-AT-A-1998, (19 Mar. 1998). The flight was from Toronto to Halifax; Canadian Transportation Agency, Decision No. 635-AT-A-1998, (22 Dec. 1998). The flight was from Thunder Bay to Ottawa via Toronto; Canadian Transportation Agency, Decision No. 246-AT-A-1999, (17 May 1999). The CTA ruled that the additional cost to travel with another air carrier has to be compensated (round trip between Calgary and Regina); Canadian Transportation Agency, Decision No. 312-AT-A-1999, (4 June 1999). A flight was

it has no jurisdiction.⁴⁰ According to the Canada Transportation Act Review Panel Report in 2001, compensation for loss of dignity or hurt feelings arising from discrimination in the transportation system should be under the review of the CHRC.⁴¹ In sum, each jurisdiction deals with monetary compensation differently.

5.2.3.2 Penalties for personal injury

Penalties for breach of duty to ensure access to PWDs are stipulated in regulations of the EU Member States, the EU, the US and Canada.⁴² The monetary penalties are in line with Article 9(2)(a) and (b) of the Convention on the Rights of Persons with Disabilities (CRPD) as well as the Committee on the Rights of Persons with Disabilities (CRPD Committee) General Comment, which recommends that States impose sanctions on those who fail to apply accessibility standards.⁴³ The ICAO Manual on Access to Air Transport by Persons with Disabilities (PWD Manual) is silent on penalties. By way of comparison to compliance to safety-related SARPs, ICAO leaves each State discretion on the amount of a penalty.⁴⁴

between Toronto, Ontario and Deer Lake, Newfoundland and the costs of the tickets were not an expense incurred by a PWD as a result of an undue obstacle; Canadian Transportation Agency, Decision No. 560-AT-A-2004, (22 Oct. 2004). A flight was from Toronto, Ontario to Deer Lake, Newfoundland, compensation which is irrelevant to undue obstacle to a PWD cannot be given; Canadian Transportation Agency, Decision No. 426-AT-A-2003, (23 July 2003). A flight was from Vancouver, Canada to London, England but the air carrier had compensated already.

40 See Canadian Transportation Agency, Decision No. 106-AT-A-1999, (16 Mar. 1999). No award is rendered for lost enjoyment; Canadian Transportation Agency, Decision No. 452-AT-A-1999, (29 July 1999). No award is rendered for loss of dignity and independence; Canadian Transportation Agency, Decision No. 675-AT-A-1999, (2 Dec. 1999). The CTA cannot award for humiliation suffered.

41 David Baker & Sarah Godwin, *ALL ABROAD!: The Supreme Court of Canada Confirms that Canadians with Disabilities Have Substantive Equality Rights*, 71 Sask. L. Rev., 39, 74 (2008).

42 Regulation 1107, art. 16. See Department of Transportation, Order 2016-4-7, Docket OST-2016-0002 (14 Apr. 2016); Department of Transportation, Order 2016-4-8, Docket OST-2016-0002 (14 Apr. 2016); Department of Transportation, Order 2016-4-9, Docket OST-2016-0002 (14 Apr. 2016). In April 2016, three foreign air carriers, Lufthansa, Air France and British Airways, were fined in an amount ranging from 150,000-200,000 US dollars due to not adequately responding to complaints filed by PWDs between 2012-2015.; *Canadian Transportation Agency Designated Provisions Regulations*, *supra* n. 15, schedule items 100-124; Canadian Transportation Agency, Decision No. 127-AT-A-2002, (20 Mar. 2002).

43 Convention on the Rights of Persons with Disabilities, (24 Jan. 2007), U.N. Doc. A/RES/61/106, art. 9(2)(a)(b), (CRPD); Committee on the Rights of Persons with Disabilities, General Comment 2, Art. 9 (Eleventh session, 2014), U.N. Doc. CRPD/C/GC/2, para. 28.

44 ICAO, *Safety Oversight Manual*, ICAO Doc 9734 AN/959, Part A, The Establishment and Management of a State's Safety Oversight System, (2nd ed. 2006) para. 3.3.

In the EU, there are great variations in the amount of penalties among the Member States because the economic level of each Member State is dissimilar.⁴⁵ This brings up the question of how the European Commission evaluates the effectiveness of such sanctions. Similarly, the CRPD Committee is concerned about variations in practice of NEBs and urges the EU to monitor and harmonize these differences to ensure the rights of PWDs.⁴⁶ In my view, a more important factor than variations in the sum of a penalty is its effectiveness in discouraging any wrongdoers from non-compliance with accessibility standards. The elements in Article 16 of Regulation 1107 have already provided an answer, stating that penalties should be effective, proportionate and dissuasive.⁴⁷ Thus, the European Commission should monitor the EU Member States on this matter.

The civil penalty in the US can amount to more than thousands of US dollars.⁴⁸ But the US DOT allows an air carrier to partially offset the civil penalty – a financial penalty imposed by a government agency to enforce regulations – by measures to improve services or facilities to meet the needs of PWDs in the future.⁴⁹

5.2.3.3 Remedial measures

Remedial measures in the EU also vary among its Member States according to the two reports submitted to the European Commission by Steer Davies Gleave and by Philippe & Partners.⁵⁰

The remedial measures ordered by the US DOT range from an order to compel compliance to a fine, or even revocation of an air carrier's certificate.⁵¹ The CA Agency not only requires the respondent in question to accommodate a PWD in that case, but it also proactively orders appropriate corrective measures including amendments to the air carrier's policy or training to accommodate PWDs in other similar situations.⁵² In this respect, the orders

45 European Commission, *Report on the assessment on rules on penalties applicable to infringements to Regulation (EC) 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by air, prepared by the law firm Philippe & Partners*, para. 151, https://ec.europa.eu/transport/themes/passengers/air/european_case_law_en (accessed 13 Jan. 2017).

46 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of the European Union, CRPD/C/EU/CO/1, 2 October 2015, paras 52-53.

47 Regulation 1107, art. 16. The CRPD Committee also provides similar criteria on penalties. See Section 3.3.1, Chapter 3.

48 Department of Transportation, Order 2006-8-7, Docket OST 2006-23528 (7 Aug. 2006); Department of Transportation, Order 2016-1-3, Docket OST-2016-0002, (7 Jan. 2016).

49 *Ibid.*

50 See Steer Davies Gleave, *supra* n. 11, paras 27, 5.16-5.18, 5.25-5.28, 8.19; Philippe & Partners, *supra* n. 45, paras 150-151.

51 Urton, *supra* n. 12, 446.

52 For a decision on peanut buffer zone, see Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013).

of the US and Canada are in line with the meaning of effective remedy under human rights law concerning the prevention of future discrimination. Yet, their effect to create a systemical change is dubious since the orders solely bind the parties in the case and not third parties; therefore, a PWD has to challenge each air carrier in order to correct the same policy among a number of air carriers.⁵³

An example of different sanctions is illustrated in a case concerning an air carrier's rigid policy to prohibit persons with specific types of impairment from travelling alone. The Spanish court ordered the air carrier to change the discriminatory flight operation manual and to compensate PWDs according to their request for a symbolic amount of one euro.⁵⁴ In France, a similar case was considered as a criminal case and an air carrier was fined for a discriminatory act.⁵⁵

The CA Agency orders an air carrier to correct its action and inform its staff about an assessment procedure for self-reliance which must provide an opportunity for a person to self-determine their independence and 'must be based on a reasonable, non-discriminatory safety standard'.⁵⁶

These judgements and decisions are proof of a non-systemical change because a careful look at selected tariffs shows that some air carriers, which

53 For decisions on peanut buffer zones to different air carriers, see Canadian Transportation Agency, Decision No. 228-AT-A-2011, (16 June 2011), on Air Canada; Canadian Transportation Agency, Decision No. 134-AT-A-2013, (28 Mar. 2013), on Air Canada Jazz, Jazz and Jazz Air.

54 Steer Davies Gleave, *supra* n. 11, para. 4.19; Alldeaf, *Deaf passengers refused on board a plane to be compensated by Iberia*, <http://www.alldeaf.com/showthread.php?p=1346346> (accessed 13 Jan. 2017).

55 The French courts have decided several times on a discrimination claim against Easyjet's accompanying person policy. The TGI Bobigny and Paris Court of Appeal decided in *Gianmartini et al vs. Easyjet* that Easyjet's policy on an accompanying persons discriminated against PWDs and fined Easyjet 70,000 Euro. In 15 December 2015, the Criminal Chamber of the Court of Cassation affirmed the ruling. See Cass.crim., 15 décembre 2015, Bull crim. 2015, n° 286., <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000031658282> (accessed 14 Mar. 2017). In 19 January 2017, it was reported that the Criminal Court in Bayonne (*Tribunal correctionnel de Bayonne*) fined Easyjet 60,000 Euro for discrimination against a wheelchair user who was refused to board without an accompanying person. See French court fines easyJet over refusal to let disabled passenger board, <https://www.theguardian.com/business/2017/jan/20/french-court-fines-easyjet-over-refusal-to-let-disabled-passenger-board> (accessed 14 Mar. 2017).

56 Canadian Transportation Agency, Decision No. 354-AT-A-2015, (16 Nov. 2015) paras 9-11. Remarkably, this decision is different from a very similar CA Agency case in 2005. See Canadian Transportation Agency, Decision No. 435-AT-A-2005 (8 July 2005); *Canadian Transportation Agency v. Morten*, [2010] F.C. 1008; *Canadian Human Rights Commission v. Canadian Transportation Agency*, [2011] F.C.A. 332 (under the review).

operate flights to Spain, France or Canada, still disallow persons with specific type of impairments from solo flying.⁵⁷

5.2.3.4 Remedial measures for mobility aids

The US and Canada differentiate between domestic and international routes. In domestic services, an air carrier cannot limit its civil liability to the current value of mobility aids and other assistive devices.⁵⁸ US law is more elaborative because it explains that calculation is based on the original purchase price of the device, while Canada is silent in this area.⁵⁹

In international services, again, under EU Regulation 1107 and US Part 382, compensation is calculated in accordance with any applicable international law, which will be discussed in Section 5.3.6.3.⁶⁰

Canada takes an opposite approach. According to the report of the European Commission, Canada exercises its exclusive sovereignty over the airspace above its territory as a condition, so foreign air carriers landing on its territory have to break the liability ceiling under the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶¹ However, a review of selected tariffs of foreign air carriers operating to or from Canada does not reveal any consistent practice on liability for mobility aids.⁶²

57 Cathay Pacific, ANA and KLM require an accompanying person for a person with vision and hearing impairment without specifying the self-reliance criteria while Qatar differentiates between self-reliant and non self-reliant ones. See Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999); All Nippon Airways Company, *International passenger rules and fares tariff*, rule 21 (2 Apr. 2010); KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 57 (5 July 2013); Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014).

58 14 C.F.R. § 382.131 (2009); Air Transportation Regulations, s. 155(3)(b).

59 14 C.F.R. § 382.131 (2009). See Section 5.5.3.2.

60 Regulation 1107, art. 12; *supra* n. 24, 27656.

61 Commission of the European Communities, *Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air*, 7.8.2008, COM (2008) 510 final, 8. See Canada Air Transportation Regulations, SOR/88-58, s. 111. This application to foreign air carriers triggers a question on jurisdiction, see Section 4.6.1, Chapter 4; This may not be the case for the EU Community air carriers since the ASA between the EU and Canada contains a clause on accessibility measures that air carriers have to comply. See Agreement on Air Transport between Canada and the European Community and its Member States, (2009), art. 10.

62 Airlines following Canada's initiative are Qatar Airways and Cathay Pacific. The rest do not explicitly say so. See Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014); Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999). For further discussion, see Section 5.3.6.3 and Section 5.4.2.3.

5.2.4 Sub-conclusions

On domestic routes, remedial measures differ between the EU, the US and Canada particularly in relation to compensation. Compensation is in accordance with the Community law and national law.⁶³ The penalty amount is not uniform. The US and Canada also fine and revoke an air carrier's license if they fail to comply with accessibility standards.

For international flights, judicial mechanisms and compensation, both of which are indispensable for an effective remedy, are subject to the scope of international conventions, namely, the Warsaw Convention of 1929, as amended, and especially the Montreal Convention of 1999, as further explained in Section 5.3 below.

5.3 REMEDIES UNDER INTERNATIONAL CONVENTIONS ON INTERNATIONAL CARRIAGE BY AIR

5.3.1 Purpose and scope of international conventions

One shared objective of the Warsaw Convention of 1929, and the Montreal Convention of 1999, to establish uniformity of law governing liability of air carriers precludes other claims which fit into the temporal scope and substantive scope of their application. However, when a cause of action for compensation falls within these scopes of the Conventions, it does not automatically guarantee that a passenger will receive the claimed amount of damages. Compensation is subject to types of damages and limitation of the amount.

5.3.2 The application of the exclusivity principle

The exclusivity principle is enshrined to preside over any action for damages under any other law when a person can establish a recourse within a temporal scope and a substantive scope of the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶⁴ This exclusive cause of action is affirmed by the Supreme Court in the UK, the US and Canada as well as other jurisdictions.⁶⁵

63 See Regulation 1107, art. 12. For the implementing law of the EU, the US and Canada, see Section 5.1.

64 Warsaw Convention of 1929 art. 24; Montreal Convention of 1999, art. 29.

65 See *Sidhu v. British Airways Plc.* [1997] AC 430; *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* 525 US 155 (1999); *Thibodeau v. Air Canada*, [2014] SCC 67; George N. Tompkins, Jr., *Summary of MC99 Judicial Updates 2013*, 39 Air & Space L., 91, 92 (2014).

5.3.2.1 *The exclusivity principle in relation to the rights of persons with disabilities*

The basis of claims by PWDs is non-discrimination on the basis of disability or failure to provide accessible air travel in compliance with the accessibility standards mentioned in Chapter 4. Both are rooted in human rights law. The key issue is whether a claim on human rights is barred by the Warsaw Convention of 1929, and the Montreal Convention of 1999.

In *Stott*, the plaintiff claimed damages for discomfort and injury to feelings as a result of a breach of the UK Disability Regulations, which implemented EU Regulation 1107. There was no dispute that the defendant had breached its obligations to accommodate a seat as requested by the plaintiff, who was a permanent wheelchair user. Since the plaintiff's claimed injury occurred on board an aircraft, the defendant argued that the exclusivity principle in the Montreal Convention of 1999, preempted this claim.⁶⁶ The UK Supreme Court examined cases dealing with this principle in the UK and other jurisdictions and regrettably affirmed that the plaintiff's claim under the UK Disability Regulations was barred since the case had occurred within the temporal scope of the Montreal Convention of 1999.⁶⁷ In short, the uniformity of liability of air carriers under international law is more crucial than human rights values.

Similar to *Stott*, most of the private claims made under the ACAA and state laws are preempted by either the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁶⁸ They follow the complete preemption, a binding precedent in *Sidhu v. British Airways Plc.*,⁶⁹ and *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*,⁷⁰ both of which were decided under the Warsaw Convention of 1929. The judgments of some lower US courts which deviate from the mainstream view will be further explored in Section 5.5.1.1.

5.3.2.2 *The exclusivity principle and other claims on human rights*

Not only the rights of PWDs based on domestic law are preempted by the Conventions, but also other rights recognized in domestic law but not incorpor-

⁶⁶ *Stott*, *supra* n. 17, para. 60.

⁶⁷ *Stott*, *ibid.*, para. 61. See Section 5.3.3.

⁶⁸ *Brandt v. American Airlines*, 2000 U.S. Dist. LEXIS 3164; *Waters v. Port Authority of New York & New Jersey*, 158 F. Supp. 2d 415 (D.N.J. 2001); *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001), as plaintiff lost Xanax, to help her cope with her fear of flying. The state-law claim is preempted. See *Fazio v. Northwest Airlines, Inc.*, Not Reported in F.Supp.2d (2004), a plaintiff claims on the failure of airline to provide a wheelchair to the boarding area is barred by the time prescription under the Warsaw Convention of 1929; *Duay v. Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2010), a state-law claim on damage to wheelchair is preempted by the Montreal Convention of 1999.; *Ramos v. American Airlines, Inc.*, Not Reported in F.Supp.2d (2011), the defendant let the plaintiff sit down in the wheelchair and caused her to fall on the floor.

⁶⁹ *Sidhu*, *supra* n. 65.

⁷⁰ *Tseng*, *supra* n. 65.

ated in the Conventions are precluded, such as protection against racial discrimination in *King v. American Airline Inc et al*,⁷¹ and language rights in *Thibodeau v. Air Canada*.⁷² However, all of these assertions are based on domestic laws so they should not be interpreted to conflict with a State's obligation to observe international law, in this case the Warsaw Convention of 1929, or the Montreal Convention of 1999.⁷³

As a consequence, one might ask, if the holding would have been different had the claim in *Stott* based on the CRPD, would the judgment be different? In *Sidhu*, the plaintiff's argument for the ECHR as another basis for a claim was rebutted since not all the parties to the Warsaw Convention of 1929, were party to the ECHR.⁷⁴ Despite no reference to the Vienna Convention on the Law of Treaties (VCLT), the House of Lords implicates that the treaty that can become the 'relevant rules of international law' for interpretation must be applicable between all of the parties to the Warsaw Convention of 1929. An analogy from *Sidhu* renders a similar result because the parties to the CRPD are not the same as the parties to the Montreal Convention of 1999.⁷⁵

5.3.2.3 The exclusivity principle in relation to obligations *erga omnes*

Interestingly, if a claim were to be based on an obligation *erga omnes*, would the result be different because all States are bound by this obligation? No case has ever challenged the exclusivity principle by raising an obligation *erga omnes* as another competing value. Lady Hale noted in *Stott* that protection against racial discrimination as a peremptory norm voids any conflicting provision in any treaty.⁷⁶ Even though a central basis of the claim in *King* is racial discrimination, the plaintiff claimed under domestic law, despite protection from racial discrimination being an obligation *erga omnes*.⁷⁷

This obligation binds a State as an actor in international law,⁷⁸ so Lady Hale further placed an obligation only on State airlines.⁷⁹ While Lady Hale's

71 *King v. American Airline Inc et al*, 284 F.3d 352 (2002). See *Gibbs v. American Airlines*, 191 F.Supp.2d 144 (2002). Section 2.4.2.2, Chapter 2.

72 *Thibodeau*, *supra* n. 65.

73 Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331 (VCLT), art. 27.

74 *Sidhu*, *supra* n. 65. See Section 1.3.2.1.B.

75 See Table 4 The US, Ireland, Tonga, Belarus, etc. signed the CRPD but ratified the Montreal Convention of 1999. Botswana and Equatorial Guinea did not sign the CRPD but ratified the Montreal Convention of 1999.

76 *Stott*, *supra* n. 17, para. 68.

77 *King*, *supra* n. 71; See *Gibbs*, *supra* n. 71. Both cases happened after the ICJ had ruled that protection from racial discrimination is an obligation *erga omnes* in 1970. See Section 6.3, Chapter 6.

78 *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Judgment, I.C.J. Rep. 1970 (5 Feb. 1970), paras 33-34.

79 *Stott*, *supra* n. 17, para. 70.

obiter dictum provides a solution to racial discrimination carried out by State airlines, it creates different results for other types of discrimination as well as for racial discrimination done by private airlines.⁸⁰

In relation to transport, the Committee on the Rights of the Child (CRC Committee) expressly affirms States obligations even when transport services are privatized.⁸¹ This *obiter dictum* also contradicts views rendered by all UN human rights treaty bodies concerning private sector discrimination.⁸² The opinion of the Committee on the Elimination of Racial Discrimination (CERD Committee) states that protection from racially discriminatory practices obliges States to adopt measures to inhibit such acts by private entities.⁸³ Thus, applying the CERD Committee's viewpoint to Lady Hale's *dictum*, a State must curb private entities, in this case, air carriers and their agents, from carrying out racial discrimination.

5.3.3 Temporal scope of application international conventions on international carriage by air

5.3.3.1 Application of conventions in international carriage by air

Both Conventions apply to a journey between two Contracting States or within a Contracting State if there is an agreed stopping place within the territory of another State.⁸⁴ However, the Conventions do not apply once a contract of carriage has been formed, but only when the situation takes place in a specified temporal scope as dealt with under case law.

80 Mark Andrew Glynn, *Case Comment Stott v. Thomas Cook Tour Operators Ltd* [2014] UKSC 15 & *Thibodeau v. Air Canada* [2014] SCC 67, 39 *Annals Air & Space L.*, 683, 692 (2014).

81 Committee on the Rights of the Child, General Comment 16, State obligations regarding the impact of the business sector on children's rights (Sixty-second session, 2013), U.N. Doc. CRC/C/GC/16, paras 15, 33. See Section 2.2.5, Chapter 2. For the argument on human rights obligation of States when a public function is privatized in case of the UK, Palmer gives examples of cases in the UK argues that governments should not contract out human rights obligations by privatization. See Stephanie Palmer, *Privatization and Human Rights in the United Kingdom*, 233 in *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Tsvi Kahana & Anat Scolnicov, Cambridge University Press 2016).

82 Wouter Vandenhoe, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, 85, 213, 230, 246, (Intersentia 2005); Committee on the Rights of Persons with Disabilities, *Nyusti and Takács v. Hungary* (Communication no.1/2010), CRPD/C/9/D/1/2010. See Section 1.5.3.2, Chapter 1, Section 3.3.2.2 B. a., Section 3.3.5 Chapter 3.

83 Committee on the Elimination of Racial Discrimination, General Recommendation XXVII, Discrimination against Roma (Fifty-seventh session, 2000), U.N. Doc. A/55/18, Annex V, paras 12-16.

84 Warsaw Convention of 1929 art. 1; Montreal Convention of 1999, art. 1.

5.3.3.2 Persons with disabilities

For a passenger to claim damages, the locational requirement is that an accident takes place 'on board the aircraft or in the course of any of the operations of embarking or disembarking'.⁸⁵ The term 'on board the aircraft' is not as debatable as 'in the course of any of the operations of embarking or disembarking'. The US Court of Appeals for the Second Circuit adopted the criteria to examine embarking or disembarking, namely, the activity of passengers at the time of the accident, the air carrier's control or restrictions of movement, the imminence of passengers' actual boarding and the physical proximity to the gate.⁸⁶

In the case of PWDs, especially those requiring assistance after check-in, their control over their own movements may be limited by airport or airline staff who assist them at the airport. Case law reveals that the control aspect is not a standalone factor in assessing the temporal scope, but courts tend to take other aspects such as location and type of activity, into account.⁸⁷

In *Phillips v. Air New Zealand Ltd.*, the case involved personal damage to a person in a wheelchair on a moving escalator going to the departure gate.⁸⁸ The UK Queen's Bench Division adjudicated that there might be a number of operations of embarkation and the process of embarkation did not have to be a continuous one, so embarkation is not limited only to the point close to a departure gate, but it also includes other points such as security checks.⁸⁹ The same holds true in the case of disembarkation. A passenger who falls in a corridor in the terminal while being escorted by airline staff to the customs area is in the course of disembarkation.⁹⁰ However, this is inconclusive since case law provides different interpretations on whether an injury to a wheelchair

⁸⁵ Warsaw Convention of 1929 art. 17; Montreal Convention of 1999, art. 17(1).

⁸⁶ *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (1975).

⁸⁷ *Dick v. American Airlines, Inc.*, 476 F.Supp.2d 61 (2007); *Pacitti v. Delta Air Lines, Inc.*, Not Reported in F.Supp.2d (2008), the plaintiff fell down from a wheelchair between Gate 3 and 4 approximately ninety to ninety-five yards away from Gate 9. The Court decided that the case happened in a common area of the terminal used by various airlines for both domestic and international flights, and was not engaged in an activity that was imposed by Delta as a condition of embarkation; *Fazio, supra* n. 68, the defendant breached the contract by failing to provide wheelchair within an airport so the plaintiff's husband suffered a serious and significant fall and injury in the course of trying to transport himself through the terminal. The injury happened during an operation of embarking.

⁸⁸ *Phillips v. Air New Zealand Ltd.*, [2002] C.L.C. 1199 (2002), para 1.

⁸⁹ *Ibid.*

⁹⁰ *Lyons v. American Trans Air, Inc.*, 647 N.Y.S. 2d 845 (N.Y.A.D. 2d Dep't 1996); *Gabra v. Egyptair*, 27 Avi. 18,119 (S.D.N.Y. 2000) cited in George N. Tompkins, Jr., *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States*, 190 (Kluwer Law International 2010).

user during a transfer from one gate to another gate falls within the category of embarkation or not.⁹¹

When a gravamen happens outside the temporal scope such as a passenger being refused to check-in,⁹² and a passenger whose ticket has been cancelled,⁹³ such passenger can claim under local laws since it is not preempted by the Conventions.

From this fact, there may be an artful pleading to argue that a cause of action occurring within the temporal scope can be traced back to a poorly-executed operation or miscommunication during the booking stage, check-in or any period before the applicable temporal scope. A PWD whose hip broke during a transfer from a wheelchair to a seat on board by a flight attendant may argue that it resulted from lack of training or from the management of the airline, which is not a part of the embarkation process. If a court finds this argument reasonable, then a uniformity purpose of the two Conventions will be jeopardized. This reason is affirmed by the Supreme Courts of the UK and of Canada because they must focus on the time when the accident occurred.⁹⁴

5.3.3.3 Checked mobility aids and service animals

The Warsaw Convention of 1929, and the Montreal Convention of 1999, do not contain any specific provisions on mobility aids and service animals. In my view, they can be considered as baggage.⁹⁵ An air carrier is liable when checked baggage is in the charge of an air carrier, while it is fault-based for unchecked baggage.⁹⁶

91 *Dick*, *supra* n. 87, a person was injured during transfer from an arrival gate to a departure gate is not close to the physical activity of getting on the aircraft. So a person can claim a state law negligent claim; *Seidenfaden v. British Airways* 83-5540 (N.D. Cal. 1984) cited in *The Twentieth Annual Journal of Air Law and Commerce Air Law Symposium*, A-18. http://smulawreview.law.smu.edu/getattachment/Symposia/Air-Law/Collected-Air-Law-Symposium-Papers/Complete_Volume_1986.pdf (accessed 13 Jan 2017), a passenger injured while being pushed in a wheelchair by personnel employed by the carrier to another terminal for purposes of departing on a domestic flight is in the course of the operations of embarking or disembarking; *Moss v. Delta Airlines, Inc., et al.*, No. 1-04-CV-3124-JOF (N.D. Ga. 2006), falling down from a wheelchair van was in a process of disembarkation.

92 *Aquino v. Asiana Airlines Inc.*, 105 Cal.App.4th 1272 (CAApp. 2003).

93 Canadian Transportation Agency, Decision No. 170-AT-A-1998, (16 Apr. 1998). Compensation is granted to a passenger who was refusal to carry in an international flight.

94 *Stott*, *supra* n. 17, para. 60; *Thibodeau*, *supra* n. 65, paras 83-85.

95 For an example of application on the Montreal Convention of 1999 on baggage to mobility aids, see *Steer Davies Gleave*, *supra* n. 11, para 8.45. However, it does not mention anything about service animal.

96 Warsaw Convention of 1929 art. 18; Montreal Convention of 1999, art. 17(2); *Dillon v. United Air Lines, Inc.*, 162 F.Supp.2d 380 (2001), a wheelchair was damaged while in the control of the air carrier; *Kabbani v. International Total Services*, 805 F. Supp. 1033, 1039 (D.D.C. 1992); the defendant is liable for theft carry-on baggage when it was temporarily in charge of the carrier's agent in the terminal.

5.3.4 Substantive scope of application international conventions on international carriage by air

In the case of baggage, the substantial scope of liability is less problematic than that of passengers. It covers an event within the temporal scope.⁹⁷

Where passengers are concerned, the Warsaw Convention of 1929, and the Montreal Convention of 1999, cover an 'accident' that happened within the abovementioned temporal scope, but neither Convention defines the term 'accident'.⁹⁸ The US Supreme Court in *Air France v. Saks*,⁹⁹ interpreted Article 17 of the Warsaw Convention of 1929, and held that injury itself cannot be an accident; rather, an accident must be 'an unexpected or unusual event or happening that is external to the passenger' and 'should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries'.¹⁰⁰ Hence, Saks, who lost her hearing in one ear after a normal operation of an aircraft, cannot recover under this provision since it was the result of an internal reaction in her, which therefore could not constitute an accident.

The phrase 'external to the passenger' brings to bear an issue concerning PWDs because a combination of a normal operation of an aircraft with an impairment of a PWD may trigger an injury solely to a PWD. This is the reason that special adjustments are made, in order to meet PWD's needs. This concern about external factors was raised in the Montreal Conference to draft the Montreal Convention of 1999. The last sentence of Article 16 of the draft text, which would be Article 17 of the Montreal Convention of 1999, excludes an air carrier's liability from any injury due to the passenger's health, and reads 'the carrier is not liable if the death or injury resulted solely from the state of health of the passenger'.¹⁰¹ However, this text was opposed by delegates from Norway and Sweden because the text was detrimental to PWDs and contrary to the draft's objective to protect consumers.¹⁰² Hence, this sentence was deleted. Yet, if *Saks*' interpretation is strictly adhered to, PWDs will not be able to make a claim for their injury.¹⁰³

Almost twenty years after *Saks*, the US Supreme Court interpreted the phrase 'external to the passenger' under the same Warsaw Convention of 1929. In *Olympic Airways v. Husain*, Dr. Abib Hanson, who was allergic to smoke,

97 Warsaw Convention of 1929, art 18; Montreal Convention of 1999, art 17(2).

98 Warsaw Convention of 1929, art .17; Montreal Convention of 1999, art.17(1).

99 *Air France v. Saks*, 470 U.S. 392, 405 (1985).

100 *Saks*, *ibid*.

101 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. II, 18.

102 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. I, 86; ICAO Doc 9775 Vol. II, *ibid.*, 76-77.

103 See *Hipolito v. Northwest Airlines, Inc.*, 15 Fed.Appx. 109 (2001). Asthma attack was not an accident as it was not caused by an event external to a passenger. Airline's failure to provide a full bottle of oxygen is not the type of external, unusual event.

and his wife, Rubina Husain, asked to be seated far away from the smoking section but a flight attendant repeatedly refused, even though there were free seats available.¹⁰⁴ Two hours into the flight, Dr. Hanson fell ill and later he passed away. The US Supreme Court expanded the meaning of ‘accident’ and concluded that the inaction of a flight attendant could be considered as one of the injury-producing events that constitute an accident.¹⁰⁵ Although the causes of death and loss of hearing in *Husain* and *Saks* are both internal to the passengers, *Husain* differs from *Saks* in that a flight attendant’s thrice refusal in *Husain* was an unexpected and unusual event in light of an industry standard which was an external factor, while there is no unexpected external factor in *Saks*.

Husain’s broad meaning of accident is not free from controversy, however. In his dissenting opinion, the late Justice Scalia relied on the uniformity of law and rebutted the majority view, because the reasoning that an inaction cannot be an accident deviates from the interpretation in the UK and Australian jurisdictions.¹⁰⁶ Dempsey, furthermore, finds *Husain*’s holding troubling for airlines.¹⁰⁷ When the reasoning in *Husain* is applied to the case governed by the Montreal Convention of 1999, a strict liability regime will lead to air carriers having to insure a higher amount for compensation to passengers.¹⁰⁸ On a positive note, the insertion of duty of care encourages air carriers to keep up with industry standards,¹⁰⁹ and invest in training its cabin crew.¹¹⁰

In relation to cases concerning PWDs, although the *Husain* case does not apparently involve disability,¹¹¹ its reasoning in assessing an unexpected and unusual event using the industry standards can be applied to the case of PWDs. As evidenced in judgments rendered by lower courts in the US and Canada, if an air carrier has duties to provide accessible travel and not to discriminate against PWDs, the air carrier’s inaction or failure to provide

¹⁰⁴ 540 U.S. 644 (2004) (*Husain*).

¹⁰⁵ *Husain*, *ibid.* Other cases concerning smoking on board were not brought under the Warsaw Convention of 1929. In Australia, Qantas Airways Limited was sued under the Trade Practices Act 1974. See *Leonie Cameron v Qantas Airways Limited* [1995] FCA 1304; (1995) 41 FTR 417 (1995) 55 FCR 147 (16 June 1995). In the US, the Supreme Court of IOWA decided on a State law since the dispute happened in a domestic route. See *Ravreby v. United Airlines, Inc.*, 293 N.W.2d 260 (1980).

¹⁰⁶ *Husain*, *ibid.*, 663. See *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005; *Qantas Ltd. v. Povey*, [2003] VSCA 227.

¹⁰⁷ Paul Stephen Dempsey, *Olympic Airways v. Husain: The US Supreme Court Gives the Term ‘Accident’ a Whole New Meaning*, 28 *Annals of Air and Space L.* 333, 341 (2003).

¹⁰⁸ Andrei Ciobanu, *Saving the Airlines: A Narrower Interpretation of the Term “Accident” in Article 17 of the Montreal Convention*, 31 *Annals of Air and Space L.* 1, 25 (2006).

¹⁰⁹ Ann Cornett, *Air Carrier Liability under Warsaw: The Ninth Circuit Holds that Aircraft Personnel’s Failure to Act in the Face of Known Risk is an “Accident” When Determining Warsaw Liability – Husain v. Olympic Airways*, 68 *J. Air L. & Com.* 163, 169 (2003).

¹¹⁰ George Leloudas, *Risk and Liability in Air Law*, 119 (Informa, 2009).

¹¹¹ See Section 1.4.1, Chapter 1 for a discussion on allergy and disability.

accessible travel for a PWD will constitute an accident.¹¹² Yet, when an air carrier is not legally bound to provide accommodation, not doing so does not trigger an accident.¹¹³

5.3.5 Compensation for damages to persons with disabilities

Both the Warsaw Convention of 1929, and the Montreal Convention of 1999, allow for compensation for 'bodily' injury.¹¹⁴ With the term 'bodily', the question is whether purely emotional distress, with no connection to bodily injury, is recoverable.

5.3.5.1 The term 'bodily injury' under the Warsaw Convention of 1929

Exclusion of mental injury may have been practiced in the early days of the commercial airline industry in order to foster acceptance for the new airline industry.¹¹⁵ The Chairman of the First Meeting of the Montreal Conference accepted that pure psychological injury had not been contemplated during the drafting history of the Warsaw Convention of 1929.¹¹⁶

Remarkably, international conventions and legislation for other modes of transportation adopt the expression 'personal injury' instead of 'bodily injury', so their scope is broader than that of air transport.¹¹⁷ There were attempts

112 *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001), the lack of crew training and responsiveness after the onset of a stroke is an accident.; *Prescod v. AMR*, 383 F.3d 861, 868 (9th Cir. 2004), an air carrier's failure to comply with a health-based request also triggered an accident under the Warsaw Convention of 1929.; *Bunis v. Isair GSA, Inc.*, 511 F.Supp.2d 319 (2007), failure to provide a wheelchair as request is an unusual or unexpected event.; *Balani v. Lufthansa German Airlines Corp.*, 2010 ONSC 3003, 2010 CarswellOnt 8357, failure to provide a wheelchair as requested by a passenger who was later fell down leading to an accident.

113 *Dogbe v. Delta Air Lines, Inc.*, 969 F.Supp.2d 261 (E.D.N.Y. 2013), 272, an air carrier was not obligated to allow a plaintiff to sit in the empty seat even if plaintiff's leg pain constitute a disability because no law prescribes such duty.; *Tinh Thi Nguyen v. Korean Air Lines Co., Ltd.*, 807 F.3d 133 (2015), an air carrier did not refuse requested wheelchair and an air carrier was not required to give personalized instructions in passenger's native language. Airline's failure to identify passenger as wheelchair passenger did not constitute unexpected or unusual event leading to accident under Warsaw Convention of 1929.

114 Warsaw Convention of 1929, art. 17; Montreal Convention of 1999, art. 17.

115 Andrew Field, *Air Travel, Accidents and Injuries: Why the New Montreal Convention is Already Outdated*, 28 Dalhousie L.J. 69, 96 (2005).

116 ICAO Doc 9775 Vol. I, *supra* n. 102, 110.

117 See Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, (Athens, 13 Dec. 1974) (Athens Convention); Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 (1 Nov. 2002), art. 3; Convention concerning International Carriage by Rail, (3 June 1999), Uniform Rules concerning the Contract of International Carriage of Passengers by Rail, Appendix A, art. 26 (COTIF); Regulation (EU) No 181/2011 of the European Parliament and of the Council

to change the term to 'personal injury' such as the Guatemala City Protocol of 1971 in order to cover mental injury, but none was successful.¹¹⁸ The report of the Rapporteur on the Modernization and Consolidation of the Warsaw System evidently proves that a claim for discrimination would be allowed by the term 'personal injury' and States did not want to incorporate this term because it reads:

'The expression 'personal injury' would open the door to non-physical personal injuries such as slander, libel, *discrimination*, fear, fright and apprehension and this would clearly be neither desirable nor acceptable.'¹¹⁹

5.3.5.2 The term 'bodily injury' under the Montreal Convention of 1999

The Montreal Conference charged with drafting the Montreal Convention of 1999 differed from the drafting process of the Warsaw Convention of 1929 because the delegates at the Montreal Conference acknowledged the possible preclusion of purely emotional injury by the expression 'bodily injury'. Concern about mental injury and possible claims arising from discrimination were raised by the delegate of Namibia, who relied on constitutional guarantees of non-discrimination on the basis of *inter alia* status and asked whether this exclusion would be constitutionally permissible in a number of jurisdictions.¹²⁰

Apart from this point, during the long discussion on mental injury, the delegates did not consider mental injury in discrimination claims. Even though the delegates of Norway and Sweden pointed out that the potential lack of remedy for mental injury would amount to discrimination among victims, their intention was to protect young passengers who may not easily overcome trauma.¹²¹

The delegate of France affirmed the statement of the delegate of Germany that the expression '*lésion corporelle*' in the authentic text of the Warsaw Con-

of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 OJ L 55, 28.02.2011, p. 1–12, art. 7. The House of Lords in *King v. Bristow Helicopters Ltd.*, compared this term in the Warsaw Convention of 1929 and in the COTIF. See *King v. Bristow Helicopters Ltd.*, [2002] UKHL 7, para. 17.

118 Bin Cheng, *A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999)*, 53 Int'l & Comp. L.Q., 833, 850 (2004); Michael Milde, *The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws... and the New "non-Warsaw" Convention of 28 May 1999*, 24 Annals Air & Space L., 155, 177 (1999); Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 Air & Space L., 12, 17 (2000); Pablo Mendes De Leon & Werner Eyskens, *The Montreal Convention: Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66 J. Air L. & Com., 1155, 1167 (2000-2001).

119 ICAO, *International Conference on Air Law*, ICAO Doc 9775 Vol. III, 65. emphasis added

120 ICAO Doc 9775 Vol. I, *supra* n. 102, 72.

121 ICAO Doc 9775 Vol. I, *ibid.*, 71; ICAO Doc 9775 Vol. II, *supra* n. 101, 97.

vention of 1929, covers both physical and mental injury, so the problem lies on the English term usage.¹²² A proposal to add 'mental injury' in the draft Article 16 (Article 17 of the Montreal Convention of 1999) by the delegate from Sweden was fully supported by the delegates from Chile, Denmark, the UK and the Dominican Republic.¹²³ Yet, the debate continued on whether to include mental injury only in certain cases, such as mental injury significantly impairing the health of the passenger, but none was relevant to the discrimination claim.¹²⁴

The fear that allowing mental injury would lead to fraudulent claims and impact the cost of insurance was raised by the observer from the International Union of Aviation Insurers.¹²⁵ The balance between passenger protection and air carrier's liability was expressed by the Chairman in the "Friends of the Chairman" Group that the issue of mental injury could not be viewed alone but rather considered in the whole picture of the draft Convention.¹²⁶ However, this Group comprised a selected and limited group of delegates so its view may not reflect the entire views of the other delegates at the Montreal Conference.¹²⁷

In the end, the Montreal Conference conceded that under certain circumstances, some States included damages for mental injuries under the 'bodily injury' umbrella, and that 'jurisprudence in this area is developing'.¹²⁸

5.3.5.3 The term 'bodily injury' in case law under the Montreal Convention of 1999

The courts in the UK and the US follow the interpretation of this term under the Warsaw Convention of 1929, so purely emotional distress from damage to PWDs is not recoverable.¹²⁹ From this line of reasoning, a PWD who is discriminated against and who sustained only emotional distress cannot get

¹²² ICAO Doc 9775 Vol. I, *ibid.*, 68.

¹²³ ICAO Doc 9775 Vol. I, *ibid.*, 67-68.

¹²⁴ ICAO Doc 9775 Vol. I, *ibid.*, 167, 175-176.

¹²⁵ ICAO Doc 9775 Vol. I, *ibid.*, 69.

¹²⁶ ICAO Doc 9775 Vol. I, *ibid.*, 111.

¹²⁷ *Ehrlich v. American Airlines Inc.*, 360 F.3rd 366 (2nd Cir. 2004).

¹²⁸ ICAO Doc 9775 Vol. I, *supra* n. 102, 243.

¹²⁹ See *Morris v. KLM Royal Dutch Airlines*, [2002] UKHL 7; *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991); George N. Tompkins, Jr., *Summary of MC99 Judicial Decisions 2012*, 38 Air & Space L., 123, 133 (2013); George N. Tompkins, Jr., *2015 Summary of MC99 Court Decisions*, 41 Air & Space L., 129, 134 (2016). The Advocate General in *Simone Leitner v. TUI Deutschland GmbH & Co KG*, reviewed the term 'damage' in the Warsaw Convention of 1929 including other international conventions on transport to support the claim on compensation for non-material damage from the Package Travel Directive and opined that the Warsaw Convention of 1929 does not preclude non-material damage. It is uncertain whether the Advocate General intended to cover purely emotional distress or not since the plaintiff in the case suffered physical injury too. See Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co KG* [2001] ECR, I-2631, Opinion of Advocate General Tizzano, para. 39.

any compensation under both Conventions.¹³⁰ In other words, even though courts interpret ‘accident’ as covering an air carrier’s failure to perform a duty under accessibility standards, mental anguish alone is non-compensable.

The courts in *Stott* and *Thibodeau* follow the reasoning in *King*, which was decided under the Warsaw Convention of 1929, and all concurred that there are other possible means of enforcement.¹³¹ In *Stott*, Thomas Cook was not prosecuted, but it was found guilty of an offense with a possible maximum fine of 5,000 Pound Sterling.¹³²

Similarly, in *Thibodeau*, Air Canada failed to provide service on board in French, but the majority ruling granted no financial compensation for moral damage under the quasi-constitutional Official Language Act. In this five-to-two decision, the majority observed that overlapping remedial provisions between the Official Language Act and the Montreal Convention of 1999, did not conflict since they had different purposes and aspects.¹³³ Furthermore, the majority viewed that an appropriate and just remedy must not violate Canada’s international obligations, i.e. the Montreal Convention of 1999, so the declaration, apology and cost of the application without monetary compensation fitted with appropriate and just remedies.¹³⁴ By way of comparison to the CERD Committee’s reasoning in *L.A.*, determination of remedial measures is a matter of national law unless the national decision is manifestly arbitrary or amounts to a denial of justice.¹³⁵ The *Thibodeau* judgment perfectly follows the line of reasoning in *L.A.* to award other remedial measures. However, it appears that both *Stott* and *Thibodeau* disregard the opening for developing a concept for the term ‘bodily injury’ concluded at the Montreal Conference.

5.3.6 Compensation for damage to mobility aids and service animals

5.3.6.1 Scope of compensation

For PWDs, damaged or lost mobility aids amount to a loss of independence and dignity.¹³⁶ The same holds true for service animals since PWDs rely on their assistance. Substitution of mobility aids and service animals is not as simple as that of clothing or general baggage because of price, specification and familiarity; therefore, this Section examines unique limitations for com-

¹³⁰ See *Stott*, *supra* n. 17.

¹³¹ *Stott*, *ibid.*, para. 64; *Thibodeau*, *supra* n. 65, paras 110, 132; *King*, *supra* n. 71, para 38.

¹³² *Stott*, *ibid.*, para. 12.

¹³³ *Thibodeau*, *supra* n. 65, paras 98-100.

¹³⁴ *Thibodeau*, *ibid.*, paras 110, 132.

¹³⁵ Committee on the Elimination of Racial Discrimination, *L.A. et al. v. Slovakia* (Communication no. 49/2011), U.N. Doc. CERD/C/85/D/49/2011, para. 7.1. See Section 3.3.2.2.C., Chapter 3.

¹³⁶ Commission of the European Communities, *supra* n. 61, 2.

pensation related to mobility aids and service animals under the general regime.

5.3.6.2 Types of compensable damage

Neither the Warsaw Convention of 1929, nor the Montreal Convention of 1999, define the expression 'damange'. Whether compensation for damage to baggage includes non-material damage or not is decided upon in an inconsistent way by courts. Damage to baggage in the US also excludes emotional distress damages.¹³⁷

On the other hand, in *Walz v. Clickair* the European Court of Justice (ECJ), referred to by the Barcelona Court, ruled that under the Montreal Convention of 1999, damages for baggage covered both material and non-material damage.¹³⁸ The European Commission further interpreted *Walz* to cover claims pertaining to checked wheelchairs or other mobility equipment or assistive devices as defined in Regulation 1107.¹³⁹

A Brazilian court also generously acknowledges compensation for moral damage to baggage, but the reasoning is based on its Constitution.¹⁴⁰

5.3.6.3 Limited amount of compensation

In domestic air services, US and Canada spell out unlimited liability for mobility aids as mentioned in Section 5.2.3 of this Chapter.

In the case of international services, the Warsaw Convention of 1929, and the Montreal Convention of 1999, limit recovery for checked baggage, except where it concerns willful misconduct of the air carriers.¹⁴¹ The ceiling of baggage liability is considerably below the value of typical baggage. Similarly, in the case of PWDs, the cost of mobility aids could reach 20,000 Euro, which

¹³⁷ 2015 Summary of MC99 Court Decisions, *supra* n. 129, 134.

¹³⁸ Case C-63/09 *Walz v. Clickair SA* [2010], para. 40. Abeyratne and Bokareva commented on the authority of the ECJ to interpret substantive provisions of the Montreal Convention of 1999 without any concern on the application of the EU law. See Ruwantissa Abeyratne, *Rulemaking in Air Transport: A Deconstructive Analysis*, 164, (Springer International Publishing 2016); Olena Bokareva, *Air Passengers' Rights in the EU: International Uniformity versus Regional Harmonization*, 41 *Air & Space L.*, 3, 15 (2016). The CJEU also interpret 'damage' in Regulation 261 in accordance with *Walz* to cover the non-material damage in case of flight cancellation. See Case C-83/10 *Aurora Sousa Rodríguez and Others v Air France SA* [2011].

¹³⁹ European Commission, *Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council*, OJ C 214, 15.6.2016, p. 5–21.

¹⁴⁰ See Section 5.3.6.3.

¹⁴¹ Warsaw Convention of 1929, arts 22, 25; Montreal Convention of 1999, art. 22.

is far higher than the maximum limited amount of 1,131 SDR or around 1,450 Euro under the Montreal Convention of 1999, for checked baggage according to the European Commission.¹⁴²

Article 20 of the CRPD ensures PWDs access to mobility aids at an affordable cost, and the CRPD Committee interprets this provision as covering repaired mobility aids.¹⁴³ Both the Warsaw Convention of 1929, and the Montreal Convention of 1999, allow passengers to make a special declaration with additional payment to break a limited liable amount.¹⁴⁴ In practice, it is not common for air carriers to offer a special declaration and passengers have to arrange insurance themselves for lost or damage to baggage.¹⁴⁵ A review of selected tariffs shows that some airlines limit a maximum amount which passengers can declare.¹⁴⁶ This holds true in case of PWDs and their mobility aids according to the survey by the advocate group.¹⁴⁷

It is questionable how this provision can be implemented when PWDs are unable to receive the full amount of compensation from the actual damage. Thus, to guarantee full compensation in the case of damage to mobility aids, PWDs have to pay an additional fee. The extra payment seems to be indirectly discriminatory against PWDs because while this practice appears to be neutral, it disadvantages PWDs who have to pay more for their mobility aids, which they have to depend on, to reach an equal level of mobility as that of other passengers.

While moral damages for baggage can be claimed in, for instance, Spain and Brazil, the Spanish and Brazilian courts differ on the reasoning. As the Spanish court respects the limit of liability of the Montreal Convention of 1999,

142 European Commission, *Minutes of the Making Regulation 1107/2006 a success: 1st NEB meeting*, 3 Dec. 2008, 4. See Section 5.4.2.3.

143 CRPD, art. 20(b); Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Report Submitted by Mongolia*, (Thirteenth session, 2015), U.N. Doc. CRPD/C/MNG/CO/1, para. 33. See Section 3.3.2.2.B., Chapter 3.

144 Warsaw Convention of 1929, art. 22(2); Montreal Convention of 1999, art. 22(2); Paul Stephen Dempsey & Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999*, 197 (McGill University, 2005).

145 Dempsey & Milde, *ibid.*, 197.

146 KLM and United Airlines limit the maximum amount of declared baggage unless special arrangement has been made in advance. See KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rules 55(C), 115(A)(8)(a), 115(B)(9) (5 July 2013); United Airlines, *Contract of Carriage Document*, rule 23(C)(9) (17 Feb. 2017).

147 Airlines do not publish information about special declaration on their website. From a random review of airline's website, CityJet mentions about this special declaration in its webpage. See Roberto Castiglioni, *Airlines Drop The Ball On Wheelchair Insurance*, <http://www.reducedmobility.eu/20140704481/The-News/airlines-drop-the-ball-on-wheelchair-insurance.html> (accessed 1 Mar. 2017); CityJet, *Special Assistance*, <https://www.cityjet.com/flying-with-us/travel-information/special-assistance/> (accessed 1 Mar. 2017).

material and non-material damages, as a whole, must not exceed such a limit.¹⁴⁸ Conversely, because in Brazil the right for non-material compensation in proportion to the offense is upheld in the Constitution, the court adheres to this provision and not to the Warsaw or the Montreal Convention of 1999, and does not cap the liable amount.¹⁴⁹ Although Brazil's approach renders passengers proportional redress, its observance of a treaty is doubtful since it invokes a domestic legal provision to depart from a treaty provision.

5.3.7 Liable parties

Broadly speaking, when PWDs sustain damage from an action or inaction by airport operators or ground handlers, if the damage falls outside the temporal scope of the Conventions, it falls under national tort law because they have no contractual relationship to each other.¹⁵⁰ On the other hand, when the damage occurred within a temporal scope of the Conventions, a person cannot escape from the Conventions by claiming that the damage was caused by airport operators or ground handlers, because they may be held liable as an agent of an air carrier under the Conventions when they perform part of an air carrier's duty.¹⁵¹

The situation becomes more problematic because of the diverse interpretations on the temporal scope of application and the different responsible persons among jurisdictions. The temporal scope for PWDs who in particular are also accompanied by airport staff at the airport is construed differently.¹⁵² Moreover, duties to assist PWDs at airports are not always provided by air carriers.

148 International Law Office, *Court rules on moral and material damages for missed flights and lost baggage*, <http://www.internationallawoffice.com/Newsletters/Aviation/Spain/Ura-Menn-dez/Court-rules-on-moral-and-material-damages-for-missed-flights-and-lost-baggage> (accessed 1 Mar. 2017).

149 Air France appeals to the Supreme Court on the issue whether the Warsaw Convention of 1929 preempts the national law. Because of the general repercussion, the effects on this case will be applied to every future case including ones awaiting judgment. See RExt. 636.331, STF, em 24.06.2016, https://www.jusbrasil.com.br/diarios/documentos/355588629/andamento-do-processo-n-636331-recurso-extraordinario-29-06-2016-do-stf?ref=topic_feed (accessed 1 Mar. 2017); Ap. 2007.001.42990, 11a. Câmara Cível do TJ/RJ, em 2007, <http://www1.tjrj.jus.br/gedcacheweb/default.aspx?UZIP=1&GEDID=00035829E8729D280C86783A06165E0C3165389FC35D0A4F> (accessed 1 Mar. 2017); RExt 127.720-9, STF, em 06.02.96; Constituição Federal de 1988, artigo 5(V), (X), (XXXII).

150 Commission of the European Communities, *supra* n. 61, 6. See Guisepppe Guerrieri, *Airport Operator as Independent Contractor – Clear Guidelines from the Court of Cassation*, 28 Air & Space L., 97, 99 (2003); Parliamentary questions, P-1331/2008, 31 March 2008, OJ C 291, 13/11/2008; Berin Riðanoviæ, *Legal effects and Review of Regulation 1107/2006 (disabled persons and persons with reduced mobility when travelling by air)*, XVI:1 Aviation & Space J., 53, 72-73 (2017).

151 Warsaw Convention of 1929, arts 20, 25; Montreal Convention of 1999, arts 17(2), 19, 30; European Commission, European Commission, *supra* n. 139, 19.

152 See Section 5.3.3.2.

As discussed in Chapter 4, the EU legislator also assigns these tasks to airport operators. In practice, air carriers sometimes contract out their duties to airport operators or ground handlers. Therefore, a liable person for a damaged wheelchair may differ from route to route even though the fact of a case is similar. In the case of a wheelchair that can be stored in a cabin, a PWD may choose to use his or her wheelchair until reaching an aircraft door.¹⁵³ For a journey within the EU, an airport operator is responsible for storing baggage on the aircraft, so a wheelchair is not the responsibility of an air carrier.¹⁵⁴

On the contrary, for a domestic route in the US or a trip from the EU to the US, the applicable US law, namely Part 382 assigns a duty to an air carrier. Even though an airport employee performs this service, a liable person is an air carrier since a wheelchair is under its control. Accordingly, the applicable law for civil liability differs.

5.3.8 Sub-conclusions

The Warsaw Convention of 1929, and the Montreal Convention of 1999, provide an exclusive cause of action when a case happens within the temporal scope of these Conventions. The interpretation of liability regime for air carriers and their agents or remedial measures for passengers is not wholly uniform pertaining to non-material damage and a limited amount of compensation. Nevertheless, the majority view of case law in the Warsaw Convention of 1929, and the Montreal Convention of 1999, interprets the term ‘bodily injury’ as excluding moral damage to passengers. Both Conventions limit liability to baggage unless air carriers waive such limit.

5.4 AN EFFECTIVE REMEDY

5.4.1 Procedural aspect

A combination of remedies in public and private laws yields administrative mechanisms and judicial mechanisms. Nevertheless, the EU Member States, the US and Canada do not have a harmonized view on which option leads to compensation.

While the ACAA grants no monetary compensation, the CA Agency authorizes ordering reimbursement for damage from undue obstacles faced by PWDs but not for moral damage. On top of this, the compensation awarded to PWDs, including injury to feelings, is excluded under UK law by the Montreal Conven-

¹⁵³ The PWD Manual allows PWDs to use own wheelchairs to move to and from an aircraft door if possible. See PWD Manual, *supra* n. 16, para. 7.4.

¹⁵⁴ Regulation 1107, Annex I.

tion of 1999. The various practices bring up the question of the effectiveness of the substantial aspect of remedies in Section 5.4.2.

5.4.2 Substantial aspect

Before analyzing the effectiveness of remedial measures under the Montreal Convention of 1999, I must refute arguments of States to restrict their obligation as a State to protect. In Section 3.3.2, Chapter 3, the freedom of contract and the private autonomy to waive one's right are two claims for States to refrain from intervening in the private contractual relationship. It is permissible when two parties possess roughly equal bargaining power. However, in relation to liability in international carriage by air, I am skeptical on the freedom of passengers to negotiate the matters which will be elaborated from Section 5.4.2.2 to Section 5.4.2.4, since the liability regime has been set by the international convention which was negotiated among States and trade associations in relation to civil aviation.¹⁵⁵

5.4.2.1 The term 'accident'

Obstacles in the substantial aspect are related to compensation for PWDs and their mobility aids because of the application of either the Warsaw Convention of 1929, or the Montreal Convention of 1999. As indicated in the Core Principles on Consumer Protection (Core Principles), adopted by the ICAO Council, national and regional accessibility standards should be consistent with the Warsaw Convention of 1929, and the Montreal Convention of 1999. Also, domestic laws should observe international laws.¹⁵⁶

Following the broad interpretation by the US Supreme Court in *Husain*,¹⁵⁷ the term 'accident' covers any failure to perform a duty under the accessibility standards;¹⁵⁸ otherwise, the claim will be precluded by the exclusivity principle. However, the types and amounts of compensation are circumscribed as discussed in Section 5.3.5 and Section 5.3.6.

5.4.2.2 Moral damage for discrimination claims

In Section 3.3.2.2.C., Chapter 3, States can exercise their margin of appreciation on remedial measures. In order to exercise their discretion, the first condition is that there should be several measures available to choose from. Measures to inhibit discrimination and measures to ensure enforcement or an effective

¹⁵⁵ ICAO Doc 9775 Vol. I, *supra* n. 102, 5-35.

¹⁵⁶ VCLT, art. 27.

¹⁵⁷ *Husain*, *supra* n. 104, 654. See Section 5.3.4.

¹⁵⁸ See *supra* n. 112.

remedy may overlap but they are not identical. Penalties can be a remedial measure and an enforcement mechanism, while raising awareness prevents discrimination but does not deal with remedies directly. Invariably, exclusion of purely emotional damage under the Montreal Convention of 1999, also means that States, either courts or other competent bodies, cannot exercise their discretion to choose financial compensation for moral damage regardless of how outrageous the discrimination is against PWDs.

Monetary compensation of moral damage is outstanding because other possible remedies for victims of human rights violation can be found under administrative mechanisms and do not provide any monetary compensation to them.¹⁵⁹ Moreover, even though the preclusion of compensation to moral damage neutrally applies to all passengers, damage based on failure to reach accessibility standards or non-discrimination on the basis of disability may be emotional distress without any bodily injury.¹⁶⁰ Accordingly, this gives rise to questions whether a law lacking compensation for moral damage and a preclusion of claims under other laws ensure effective remedy and whether this *status quo* is equal to discrimination or denial of justice.

The objective of the Montreal Convention of 1999, has shifted from the Warsaw Convention of 1929, to protecting consumers and ensuring equitable compensation based on the principle of restitution.¹⁶¹ An indication in the *travaux préparatoires* that an interpretation of the term 'bodily injury' is open to further development means that courts can take subsequent technical, economic or legal developments into account and that it is a State obligation to develop a meaning.¹⁶² Thus, with due respect, it appears to me that the exclusion of moral damage to PWDs lies in a treaty interpretation, not a treaty itself.

5.4.2.3 *Reparation or replacement of mobility aids and limited compensation*

The Warsaw Convention of 1929, and the Montreal Convention of 1999, do not contain a specific provision on mobility aids and service animals but Canada and the EU require the repair or replacement of delayed, damaged or lost mobility aids accepted for carriage on international flights.¹⁶³ This can conflict with the exclusivity principle and a limited amount for compensa-

¹⁵⁹ See Section 3.3.2.2.C., Chapter 3.

¹⁶⁰ See Stott, *supra* n. 17.

¹⁶¹ Montreal Convention of 1999, Preamble; Whalen, *supra* n. 118, 14.

¹⁶² International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission. A/CN.4/L.702 (18 July 2006) para. 23.

¹⁶³ Canada Air Transportation Regulations, *supra* n. 61, s. 155; Regulation 1107, Annex I.

tion in the Warsaw Convention of 1929, and the Montreal Convention of 1999, unless air carriers waive the limit.¹⁶⁴

In Canada, remarkably, unless an air carrier raised an issue of limited liability, the CA Agency, when reviewing a complaint on accessible air travel, has not mentioned the Warsaw Convention of 1929, or the Montreal Convention of 1999.¹⁶⁵ Reasons include that the amount did not reach the limit,¹⁶⁶ and air carriers have waived such limit.¹⁶⁷ In one case even though the replacement costs of the prosthetic device exceeded the limits of liability of a foreign air carrier at that moment, the air carrier agreed to reimburse the full replacement cost according to the invoice.¹⁶⁸ Normally, air carriers agree to pay the full amount of expenses.¹⁶⁹

In the EU, Regulation 1107 also obliges airport operators to provide temporary replacement of damaged or lost mobility equipment.¹⁷⁰ The European Commission correctly declared that the Montreal Convention of 1999, does not deal with PWDs but Regulation 1107 involves determining the person

164 Warsaw Convention of 1929, art. 22; Montreal Convention of 1999, arts 22, 25; Regulation 889, *supra* n. 5, art. 1(4).

165 See Canadian Transportation Agency, Decision No. 123-AT-A-2003 (6 Mar. 2003); Canadian Transportation Agency, Decision No. 653-AT-A-2003 (21 Nov. 2003). A flight was operated by KLM and Air Transat respectively. Canadian Transportation Agency, Decision No. 295-AT-A-2006, (19 May 2006). The delayed delivery of a powered wheelchair between Denver and Ottawa via Toronto operated by Air Canada.

166 Canadian Transportation Agency, Decision No. 386-AT-A-2009, (10 Sept. 2009), para. 47. The case is in relation to compensation to a damaged wheelchair in a flight between Montreal and Cancun, Mexico operated by Air Canada in an amount of CAD\$286.10.

167 Airlines follow Canada's initiative are Qatar Airways and Cathay Pacific. The rest do not explicitly say so. See Qatar Airways, *Airline Tariff International Passenger Rules and Fares*, rule 21(B) (15 Oct. 2014); Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 20(B) (16 Oct. 1999). See Section 5.2.3.

168 Canadian Transportation Agency, Decision No. 387-AT-A-2003, (30 June 2003). The case is about compensation to loss of prosthetic device contained in checked baggage in a flight between Glasgow, Scotland and Toronto, Canada operated by KLM. KLM states that it will reimburse in full, including the replacement cost of the prosthetic device (USD\$1162.00) and other items. At that time of the case, the Netherlands and the EU did not ratify the Montreal Convention of 1999. However, KLM tariff does not waive the limit. See KLM, *Published fares, charges and related terms and conditions of carriage applicable to air services of KLM*, rule 55(C) (5 July 2013).

169 See Canadian Transportation Agency, Decision No. 63-AT-A-2003 (12 Feb. 2003). Canadian* issued a cheque in the amount of \$127.50 to cover the cost of the repair and delivery and offered Mr. Leger a travel credit in the amount of \$150 as a gesture of goodwill. Canadian Transportation Agency, Decision No. 3-AT-A-2004 (5 Jan. 2004) in the matter of Decision No. 542-AT-A-2001 dated October 25, 2001- Air Transat A.T. Inc. Air Transat subsequently confirms that a cheque in the amount of E\$2,047.22 was sent to Rebecca Rehaili on behalf of Faycal Fedjkhi. This amount represents the expenses incurred for the repair of the wheelchair and the additional transportation costs for the return trip to France.

170 Regulation 1107, Annex I.

responsible for dealing with mobility equipment.¹⁷¹ Yet, there is an interaction between these two regimes because Regulation 1107 does not deal with civil liability but the Montreal Convention of 1999, does.¹⁷² Hence, the Core Principles call for consistency. Anyhow, as stated in Section 5.3.7, an airport operator can become an agent of an air carrier when it performs part of an air carrier's duty within the temporal scope of the Warsaw Convention of 1929, or the Montreal Convention of 1999. This appears to be a defect on compliance with Regulation 1107.

The UK Equality and Human Rights Commission reported that in October 2015, because an electric wheelchair worth over 25,000 Pound Sterling was damaged and London City Airport failed to provide the wheelchair user with a temporary replacement, the air carrier offered to pay the maximum damage for checked baggage set forth by the Montreal Convention of 1999.¹⁷³ Thereafter, the air carrier paid up the amount after there had been legal proceedings.¹⁷⁴ In addition to non-compliance to Regulation 1107, this event shows that an air carrier strictly follows the Montreal Convention of 1999, instead of a voluntary waiver of the limited amount as suggested by the European Commission. Remarkably, under Regulation 1107, the duty of an airport operator is to offer a 'temporary' mobility aid, not a permanent one, so this cannot be considered as the full compensation amount under the Warsaw Convention of 1929, or the Montreal Convention of 1999.

In Canada and the UK, the lawsuit seems to be a strategy for claimants to gain full compensation; otherwise, an air carrier relies on the limited liability for baggage.¹⁷⁵ Perhaps, the existing limited amount is not in line with a remedial measure that would be able to render a change in the behavior of people who discriminate against PWDs.

171 European Parliament, List of Titles of Written Questions by Members of the European Parliament Indicating the Number, Original Language, Author, Political Group, Institution Addressed, Date Submitted and Subject of the Question, E-3184/10 (DA) by Britta Thomsen (S&D) to the Commission (7 May 2010). Mr. Kallas on behalf of the Commission answered in French that La Convention de Montréal n'intervient pas dans la détermination des personnes chargées du traitement des équipements de mobilité. C'est le règlement 1107/2006 qui a créé une répartition des responsabilités juridiques entre les entités gestionnaires des aéroports et les transporteurs aériens concernant l'assistance aux personnes handicapées et à mobilité réduite (PMR) et aussi concernant la prise en charge des équipements de mobilité. Subject: Interpretation of Regulation (EC) No 1107/2006 Answer from the Commission (30 June 2010), OJ C 138 E, 7.5.2011.

172 See Stott, *supra* n. 17; Section 5.3.2.1.

173 Equality and Human Rights Commission, *Pay for damaged wheelchairs, leading Paralympian tells airlines*, <https://www.equalityhumanrights.com/en/our-work/news/pay-damaged-wheelchairs-leading-paralympian-tells-airlines> (accessed 13 Jan. 2017).

174 The Guardian, *How Disabled Travellers Still Face Discrimination by Airlines*, <https://www.theguardian.com/money/2017/apr/24/disabled-traveller-airlines-flying-discrimination-damaged-property> (accessed 27 Apr. 2017).

175 For limited compensation for baggage, see Section 5.3.6.3.

5.4.2.4 Liability regime for service animals

In the case of accommodating service animals in a cabin, an air carrier may be under the same fault-based liability as in relation to unchecked baggage.¹⁷⁶ There is a chance that service animals other than dogs are carried as checked baggage. However, only in Canada, does the CA Agency recommend that air carriers undertake in their tariffs to 'provide expeditiously, and at its own expense, medical care for or replacement of the service animal'.¹⁷⁷

5.4.3 Sub-conclusions

From the review, it is unfair towards a PWD, whose rights under accessibility standards are breached by an air carrier, to receive no compensation if a cause of action does not fit within the scope of the Conventions or to receive a limited amount compared to the actual damage they sustained to their mobility aids and service animals. Hence, the combination of accessibility standards with the provisions of the Warsaw Convention of 1929, or of the Montreal Convention of 1999, yields no effective remedy for PWDs in cases of (1) moral damage and (2) damage to mobility aids and service animals.

5.5 ASSESSING THE POSSIBLE SOLUTIONS TO PROVIDE EFFECTIVE REMEDY

5.5.1 Purpose and scope

In *Turturro v. Continental Airlines*, concerning the exclusion of a private claim under the ACAA by the Warsaw Convention of 1929, the court opined that

'The Convention massively curtails damage awards for victims of horrible acts such as terrorism; the fact that the Convention also abridges recovery for the lesser offense of discrimination should not surprise anyone.'¹⁷⁸

Acceptably, the sole private right of action has been long standing, but the unsurprising feeling should not lead to apathy towards non-recovery from injury. This Section presents and appraises several possible solutions proposed by States, judges, scholars and different stakeholders as well as myself.

¹⁷⁶ Warsaw Convention of 1929, art. 18; Montreal Convention of 1999, art. 17.

¹⁷⁷ Canadian Transportation Agency, *Sample Tariff 2014*, rule 121. From the selected tariffs, Air Canada and Cathay Pacific follow this recommendation. See Cathay Pacific, *International Passengers Rules and Fares Tariff*, rule 56(C) (11 Dec. 2016), Air Canada, *International Tariff General Rules Applicable to the Transportation of Passengers and Baggage*, rule 55(E) (15 Dec. 2016).

¹⁷⁸ *Supra* n. 68.

5.5.2 Solutions for moral damage caused to persons with disabilities

5.5.2.1 Confining the exclusivity principle

As the exclusivity principle aims to standardize rules on the liability of air carriers, it is necessary to maintain this provision in the self-contained Montreal Convention of 1999. Nonetheless, the age of consumer protection and human rights protection has given rise on to how to properly interpret Article 29 of the Montreal Convention of 1999 because both *Sidhu* and *Tseng* were decided under the Warsaw Convention of 1929, and their reasoning is followed by the courts in *Stott* and *Thibodeau*.

One proposal is to weaken the exclusivity and permit a concurrence of claims within the scope of the Montreal Convention of 1999.¹⁷⁹ This proposal is in line with an interpretation of the Montreal Convention of 1999, by the Court of Justice of the European Union (CJEU),¹⁸⁰ and a few US lower courts. The latter distinguish Article 29 of the Montreal Convention of 1999, from Article 24 of the Warsaw Convention of 1929, because the Montreal Convention of 1999, adds a clause which reads:

‘In the carriage of passengers, baggage and cargo, *any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise*, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...’¹⁸¹

Although these US lower courts do not refer to the treaty interpretation technique explicitly, they apply the inter-temporality¹⁸² to interpret the clause ‘any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise’ to mean ‘partial preemption’. They allow a plaintiff to claim under any state law subject to the Convention’s limitations on liability if a plaintiff successfully establishes liability set forth by the Convention.¹⁸³

This reasoning is followed in *Adler et al v. WestJet Airlines, Ltd.*, decided only four months after *Stott*. The US District Court Southern District of Florida found that the Adlers, who were deplaned because a flight attendant felt

179 Ingrid Koning, *The Disabling of the EC Disability Regulation: Stott v. Thomas Cook Tour Operators Ltd in the Light of the Exclusivity Doctrine*, 22 Eur. Rev. of Private L., 769, 785-786 (2014).

180 See Section 5.5.4.1.

181 Montreal Convention of 1999, art. 29, emphasis added; See Whalen, *supra* n. 118, 20; George N. Tompkins, Jr., *Are the Objectives of the 1999 Montreal Convention in Danger of Failure?*, 39 Air & Space L. 203, 207 (2014).

182 International Law Commission, *supra* n. 162, para. 22.

183 See *Constantino v. Continental Airlines, Inc.*, Not Reported in F.Supp.2d (2014); *Summary of MC99 Judicial Decisions 2012*, *supra* n. 129, 137; *Summary of MC99 Judicial Updates 2013*, *supra* n. 65, 91-92, 96; George N. Tompkins, Jr., *2014 Summary of MC99 Court Decisions*, 40 Air & Space L., 147, 158-160 (2015).

uncomfortable with their service animal, could file a state-law claim for being humiliated if their claim was within the scope of the Montreal Convention of 1999.¹⁸⁴ In the *Adler* case, the US District Court nevertheless, referred neither to the CRPD owing to non-ratification to the CRPD by the US nor having any human rights value.

Certainly, the criticism that the total preemption is too broad,¹⁸⁵ can be reduced by this partial preemption. In *Tseng*, Justice Ginsburg argued that if there was no preemption, it would be unfair for a person who sustained a physical injury to be entitled to a limited amount under the Warsaw Convention of 1929, while a person who sustained mental anguish alone is entitled to an unlimited liability scheme under local law.¹⁸⁶ This reasoning can be rebutted by subjecting a compensable amount within the scope of the Montreal Convention of 1999, so that all injured persons are subject to the same limit. Yet, the interpretation in *Adler* goes against the *travaux préparatoires*.¹⁸⁷ Besides, by opening a state-law claim, it is doubtful whether harmonization under the Montreal Convention of 1999, is disrupted because it is likely that a state law grants different types of compensable damage. Consequently, this leads to forum shopping since the plaintiff for claims for damages under the Warsaw Convention of 1929, and the Montreal Convention of 1999, have more than one option on jurisdiction.¹⁸⁸

5.5.2.2 Re-interpreting 'accident' while confining the exclusivity principle

The dissenting opinion in *Thibodeau* also advances another way to interpret Article 29 of the Montreal Convention of 1999. Justice Abella, who wrote the dissenting opinion, observed that while courts typically interpret domestic rules in the light of broader international human rights law, in the *Thibodeau* case, rather contrarily, a commercial treaty was interpreted to diminish human rights protected by domestic law.¹⁸⁹ She applied a treaty interpretation under the VCLT to interpret the shift in language of Article 29 of the Montreal Convention of 1999, and the shift from being objective to becoming consumer-centered and rebutted a restriction to protect passengers.¹⁹⁰ By this interpretation, she reached a similar conclusion that the phrase 'in the carriage of passengers,

184 *Adler et al*, *supra* n. 38, 1389-1390.

185 Ingrid Koning, *Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions*, 33 *Air & Space L.*, 318, 341 (2008).

186 *Tseng*, *supra* n. 65, 171.

187 Tompkins, Jr., *supra* n. 90, 51.

188 Foreign air carriers can become a defendant in a national court of other States. See Warsaw Convention of 1929, art. 28; Montreal Convention of 1999, art. 33

189 *Thibodeau*, *supra* n. 65, paras 134, 170. See Separate opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Rep. 2010 (30 Nov. 2010), p. 758, para. 89. See Section 1.3.2.4.

190 *Thibodeau*, *supra* n. 65, paras 150, 161.

baggage and cargo' under Article 29 restricts the type of action to be brought subject to the Montreal Convention of 1999, only to that for damage incurred in such carriage.¹⁹¹

This dissenting opinion differs from *Adler* on how 'accident' has been interpreted. Instead of applying *Husain's* flexible interpretation to the term 'accident', Justice Abella analyzed that Article 17(1) of the Montreal Convention of 1999, required (1) an accident, (2) which caused, (3) death or bodily injury, and (4) while the passenger was within the temporal scope of the Convention.¹⁹² She further considered that failure to provide service in French was not an accident at all, so she did not discuss the meaning of bodily injury.¹⁹³ Thus, the Montreal Convention of 1999 was not applicable because there was no 'accident' even though the breach happened on board.¹⁹⁴ By this way of interpretation, courts can recognize the moral damage caused by the violation of accessibility standards, but liability for mobility aids still falls under the purview of the Montreal Convention of 1999.

Both *Adler* and *Thibodeau's* dissenting opinions present flaws. Despite the possibility to obtain restitution for PWDs, both interpretations offer no convincing explanation as to why they deviate from the *stare decisis* in the UK, the US and Canada as well as other jurisdictions,¹⁹⁵ and circumvent the uniformity purpose of the Montreal Convention of 1999. The dissenting opinion in *Thibodeau* is persuasive due to the link with human rights and the rules on treaty interpretation. However, the sole cause of action has been acknowledged in the Warsaw Convention of 1929, and followed by the Montreal Convention of 1999. As reasoned in *Sidhu* about the different States Parties between the ECHR and the Warsaw Convention of 1929,¹⁹⁶ it is questionable how a language right trumps over a treaty agreed by more than a hundred States without breaching Article 27 of the VCLT. Unfortunately, the proper way to interpret the Montreal Convention of 1999, is to neither rewrite the law nor to differ from States Parties' expectations, even though the result renders the injured person no compensation because the authority to amend the Convention is a matter for the contracting parties.¹⁹⁷

5.5.2.3 Re-interpreting 'bodily injury'

Another possibility is to interpret the expression 'bodily injury' as covering non-material damage. This interpretation is permissible under the rules of

191 *Thibodeau, ibid.*, paras 141-142, 165.

192 *Thibodeau, ibid.*, para. 175.

193 *Thibodeau, ibid.*, para. 176.

194 *Thibodeau, ibid.*, para. 177.

195 See *Sidhu, supra* n. 65; *Tseng, supra* n. 65; *Thibodeau, ibid.*; *Summary of MC99 Judicial Updates 2013, supra* n. 65, 92.

196 *Sidhu, ibid.* See Section 5.3.2.

197 See *Stott, supra* n. 17, paras 63, 70; *King, supra* n. 71.

treaty interpretation since, according to the drafting history, this term is subject to evolutive interpretation. Supporting reasons are the consumer-oriented policy in the Montreal Convention of 1999, the confirmation from the French delegate in the preparatory draft and support from several States.¹⁹⁸ One author relied on the reasoning in *Walz* because the ECJ, despite not directly ruling on bodily injury, interpreted that ‘damage’ in the whole Chapter III of the Montreal Convention of 1999, must be construed to include both types of damage.¹⁹⁹

One possible argument is that this interpretation will open the floodgates to litigation for moral damage. In reality, this fear can be prevented because courts can exercise their margin of appreciation which is affirmed by the CERD Committee in *L.A.* Moreover, I agree with the statement made by the delegate of Denmark at the Montreal Conference that a passenger must always prove that he or she had been mentally injured due to the accident.²⁰⁰

5.5.3 Solutions for damage caused to mobility aids and service animals

5.5.3.1 Making a special declaration for mobility aids

When damage for mobility aids and service animals is not subject to limitation, it also solves an issue on a different liable party because all liable parties will be under the fault-based regime.

Among several amendments proposed by the European Commission for protecting passengers’ rights, one is to require air carriers to offer a PWD a free-of-charge special declaration when a PWD checks in a mobility aid.²⁰¹ This proposal for a Regulation was approved by Members of the European Parliament with amendments on the first reading in 2014 and the European Commission partially agreed in May 2014.²⁰² From the proposal, this special

198 McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 Vand. J. Transnat’l L., 1043, 1073, 1081 (2008).

199 Walz, *supra* n. 138, para. 29. See Marc McDonald, *The Montreal Convention and the Preemption of Air Passenger harm Claims*, 44 The Irish Jurist, 203, 237 (2010).

200 ICAO Doc 9775 Vol. I, *supra* n. 102, 68.

201 European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM/2013/0130 final – 2013/0072 (COD), 13.3.2013, art. 2(4).

202 EUR-Lex, *Procedure 2013/0072/COD*, <http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52013PC0130> (accessed 1 Mar. 2017). Lord Holmes, the then Disability Commissioner of the UK Equality and Human Rights Commission interviewed that the European Council prevented the proposal becoming law. See Disability News Service, *Airlines have ‘moral duty’ on wheelchair damage*, <http://www.disabilitynewsservice.com/airlines-have-moral-duty-on-wheelchair-damage/> (accessed 1 Mar. 2017).

declaration can be made from the time of booking until when the equipment is handed to the carrier.²⁰³ This proposed provision could be contended as reverse discrimination since it does not waive the fee to other passengers. However, the justification lies on the importance of mobility aids to uphold the personal mobility of PWDs; thus, in my view, it is a lawful measure.

The Montreal Convention of 1999, contains an innovative provision obliging States to require carriers to maintain adequate insurance to cover their liability.²⁰⁴ The free-of-charge special declaration²⁰⁵ may affect the liability amount borne by an air carrier and consequently the amount of insurance which an air carrier has to maintain. However, there is no information on the amount by which the financial burden will be increased if this proposal is passed.

5.5.3.2 *Waiving limit for mobility aids*

Neither the Warsaw Convention of 1929, nor the Montreal Convention of 1999, prevents air carriers from waiving the limit of liability.²⁰⁶ The EU and Canada rely on these legal provisions to solve the low limited liability amount on mobility aids.²⁰⁷

Similar to the Montreal Convention of 1999, The Convention concerning International Carriage by Rail (COTIF) and the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (Athens Convention), do not provide any particular clause on mobility aids and a limit on damages for baggage.²⁰⁸ Conspicuously, the EU, ratifying all of these conventions, only provides full compensation for mobility aids for PWDs when travelling by rail and sea but not by air.²⁰⁹ In the case of road transport in the EU Regulation, compensation also corresponds to the replacement value with no financial limit.²¹⁰

203 European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD), 22.1.2014, amendment 146.

204 Montreal Convention of 1999, art. 50.

205 See Section 5.3.6.3.

206 Warsaw Convention of 1929, art. 33; Montreal Convention of 1999, arts 25, 27.

207 See Section 5.4.2.3.

208 COTIF, *supra* n. 117, Appendix A, art. 34; Athens Convention, *supra* n. 117, art. 8; Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 OJ L 334, 17.12.2010, p. 1–16, art. 15.

209 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ L 315, 3.12.2007, p. 14, art. 25.

210 Regulation (EU) No 181/2011, *supra* n. 117, art. 17.

In air travel, the EU solely encourages air carriers to waive limits, but it is unsettled between air carriers and PWDs whether all air carriers waive the compensation limit in this issue or not.²¹¹ This uncertainty results in a problem on obtaining insurance for mobility aids.²¹² Accordingly, the CRPD Committee in its concluding observation to the EU recommends that the EU harmonizes existing legislation on passenger rights, and the rights of maritime passengers can be taken as a model.²¹³ Probably, the waiver of limit will work when it is combined with the enforcement measure as seen in the case of Canada.²¹⁴

Air carriers may argue that this enforcement interferes with their freedom of contract since the Montreal Convention of 1999, leaves the waiver to the discretion of air carriers with the phrase 'a carrier may stipulate'.²¹⁵ In *Sidhu*, Lord Hope, with whom other members of the House agreed, affirms that limitation clauses are a generic feature in contracts of carriage and thus come under the fundamental principle of freedom of contract.²¹⁶ This defense is rebuttable because the principle of non-discrimination under human rights law can curb the freedom of contract.²¹⁷ *Sidhu* is adjudicated under the Warsaw Convention of 1929, which aims to protect air carriers while the Montreal Convention of 1999, is consumer-oriented; hence, the momentum has switched. Moreover, States have an obligation to protect PWDs so they can, and they should exercise their authority to eliminate all discrimination on the basis of disability by any person, in this case, limited liability by an air carrier.

5.5.3.3 Excluding mobility aids from baggage

Another option proposed by the European Commission is to discuss with ICAO the exclusion of mobility aids from the definition of baggage so that the Montreal Convention of 1999, will not apply to mobility aids.²¹⁸ However, ICAO only urges air carriers to reimburse the full replacement cost of the mobility aids but does not touch upon any issue of definition.²¹⁹

211 Steer Davies Gleave, *supra* n. 11, para 4.55.

212 Steer Davies Gleave, *ibid.*, para 6.16.

213 Committee on the Rights of Persons with Disabilities, *supra* n. 46, para. 53.

214 For a decision by the CA Agency about KLM and the exceeding limit, *see supra* n. 168.

215 Montreal Convention of 1999, arts 25, 27. *See* Dempsey & Milde, *supra* n. 144, 201.

216 *Sidhu*, *supra* n. 65.

217 *See* Section 2.4.2.1.

218 *Supra* n. 142, minutes, 4.

219 PWD Manual, *supra* n. 16, para. 10.5

5.5.4 Solutions for moral damage caused to persons with disabilities and for damage to mobility aids and service animals

5.5.4.1 Distinguishing among types of damage

The then ECJ in *IATA and ELFAA v. Department of Transport* concluded that remedial measures for flight delays in Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Regulation 261), were not precluded by the Montreal Convention of 1999.²²⁰ Its line of cases is that there are two types of damage: standardized damage and individual damage in the case of flight delay.²²¹ The former was identical for every passenger and mentioned in Regulation 261, while the latter was governed by the Montreal Convention of 1999.²²²

Can one argue that moral damage, as in *Stott*, mentioned by the UK Disability Regulations, which implemented Regulation 1107, is also standardized? In the case of *Stott*, the court correctly negated this argument because emotional injury was not standardized and, accordingly, it should be assessed based on the temporal and substantive scope of the Montreal Convention of 1999.²²³

The duty to repair and replace delayed, damaged or lost mobility aids of PWDs may be comparable to the duty of care to passengers in a delayed flight under EU Regulation 261; thus, it is not subject to limited liability. This claim can be supported by the ECJ's observation on standardized damage that the redress will be in 'the form of standardized and immediate assistance or care for everybody concerned'.²²⁴ The 'temporary' replacement of delayed, damaged or lost mobility aids stipulated by the EU and Canada,²²⁵ seems to fit with this line of jurisprudence because PWDs also require immediate

220 Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006].

221 Case C-344/04, *ibid.*, para. 43.

222 Case C-344/04 *ibid.*, paras 43-48. The Advocate General additionally argued that obligations under Regulation 261 constituted public nature and differed from the civil liability under the Montreal Convention of 1999. This argument on types of action for damage is rebutted since the distinguish is rather artificial. See Opinion of Advocate General Geelhoed delivered on 8 Sept. 2005, Case C-344/04, paras 49-51; Leloudas, *supra* n. 110, 99. In the international carriage by sea, there are cases concerning the exclusivity principle in the Athens Convention and the Package Travel Regulations and the UK courts decide differently. See Don Green, *Re-examining the Exclusivity Principle Following Stott v Thomas Cook Tour Operator Ltd*, 6 Travel L. Q., 114, 116 (2014).

223 *Stott*, *supra* n. 17, para. 58.

224 Case C-344/04, *supra* n. 220, para. 43.

225 See Section 5.4.2.3.

replacement of their mobility aids to ensure their independence. It is debatable whether reparation is a standardized measure. In general, reparation is a standard gesture offered to every PWD concerned. Arguably, the reparation type and cost is subject to the damage in each case, so it is individual-based damage.²²⁶ The same holds true in the case of permanent replacement stipulated by Canada.

If the ECJ's view in *IATA* were to be adopted in the case of reparation and temporary and permanent replacement of mobility aids, it would be problematic. The ECJ also concluded that these standardized measures do not prevent passengers from compensation laid down in the Montreal Convention of 1999.²²⁷ By allowing two-way redress, the total amount of compensation in the end may exceed the limit of the Convention.²²⁸ Actually, the distress suffered by PWDs when there is no temporary replacement of mobility aids can also be recouped under the Montreal Convention of 1999. As criticized by noted aviation lawyers and scholars, this reasoning ignores the exclusivity principle.²²⁹ By way of comparison, the reparation and replacement of mobility aids fall clearly under redress measures, which PWDs can claim from air carriers under the Montreal Convention of 1999. In sum, following the *IATA* case to escape from the Montreal Convention of 1999, is not a suitable solution.

5.5.4.2 Modernizing the Montreal Convention of 1999

Scholars and judges suggest amending the Montreal Convention of 1999.²³⁰ Apart from adding the abovementioned solutions in the modernization, the amendment could incorporate a saving clause. Lady Hale in *Stott* noted that some treaties provide for an exception in their application of a provision if it contradicts the fundamental rights protected in a State.²³¹ This saving clause

226 See Thibodeau, *supra* n. 65, para. 81. This is comparable to refund of ticket in case of Regulation 261.

227 Case C-344/04 *supra* n. 220, para. 47.

228 Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, 35 *Air & Space L.* 207, 219-220 (2010).

229 See Pablo Mendes de Leon, *Jurisdiction under and Exclusivity of Private International Air Law Agreements on Air Carrier Liability: The Case of Airbus versus Armavia Airlines* (2013), 270 in *From Lowlands to High Skies: A Multilevel Jurisdictional Approach Towards Air Law: essays in honour of John Balfour* (Pablo Mendes de Leon, Brill 2013); Jorn J. Wegter, *The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention*, 31 *Air & Space L.* 133, 146 (2006); Dempsey & Johansson, *ibid.*, 224; Leloudas, *supra* n. 110, 100.

230 Andrew Field, *International Air Carriage, the Montreal Convention and the Injuries for Which There is no Compensation*, 12 *Canterbury L. Rev.* 237, 252 (2006); Neta Palkovitz, *EL-AL's Liability for Claims Related to Security Services in the Israeli Context: Between Exclusivity and Domestic Policy*, 37 *Air & Space L.*, 213, 230 (2012); *Stott*, *supra* n. 17, paras 63, 70.

231 *Stott*, *ibid.*, para. 67. See Section 1.3.2.4.

creates a hierarchy of law and allows States to strengthen human rights protection.

As evidenced by the ICAO Assembly Resolution encouraging States to become parties to the Montreal Convention of 1999, as soon as possible,²³² this implies neither an intention to denounce the Montreal Convention of 1999, nor any hint at its fragmentation. Modernization of the Montreal Convention of 1999, will inevitably reincarnate the Warsaw system, where there are a number of amendments and not every State becomes a party to all amendments. Nevertheless, if there is an amendment, stakeholders representing passengers not limited to PWDs should be able to participate in the meeting to voice passengers' concerns since there were none at the Montreal Conference to draft the Montreal Convention of 1999.²³³

5.5.4.3 Concluding an *inter se* agreement between States Parties to the CRPD

Another possible option provided in the VCLT is an agreement between certain of the parties to modify the Montreal Convention of 1999.²³⁴ This can be done between States Parties to the Montreal Convention of 1999, and those to the CRPD; nevertheless, one foreseeable limitation is that the US, a large participant in carriage by air,²³⁵ is not a party to the CRPD. Furthermore, this option will repeat the Warsaw system; hence, it is not a viable solution.

5.6 CONCLUDING REMARKS

Remedial measures for PWDs in air travel under public and private laws are equipped with administrative and judicial mechanisms. As Higgins puts it, 'without a remedy, a right may be but an empty shell'.²³⁶ Apart from inconsistencies in a few US lower courts and the Brazilian court, the Warsaw Convention of 1929, and the Montreal Convention of 1999, generate three restraints on PWDs from achieving full recovery of their discrimination claim: (1) exclusivity, (2) purely moral damage to themselves without any physical injury, not to baggage and (3) limited compensable amounts to mobility aids and service animals.

The proposed solutions in Section 5.5 are imperfect, and they have not been implemented globally. There is no international institute to provide a uniform interpretation of the Montreal Convention of 1999.²³⁷ Neither the

232 ICAO, Resolution A39-9, para. 2.

233 ICAO Doc 9775 Vol. I, *supra* n. 102, 5-35.

234 VCLT, art. 41(1)(b).

235 *King v. Bristow Helicopters Ltd.*, *supra* n. 117, para. 7.

236 Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 99 (Clarendon Press, 1994).

237 Koning, *supra* n. 179, 774.

CRPD Committee nor ICAO has pioneered a practical solution to this conundrum. Abeyratne suggested referring any discussion to the Legal Committee of the Council of ICAO and other groups involved in the preparatory draft.²³⁸ This implies that another diplomatic conference should be convened.

The ICJ can only render an advisory opinion on the interpretation of a treaty regarding whether an international law should be interpreted as diminishing human rights value when the UN General Assembly or a specialized agency, namely, ICAO via its Assembly or its Council requests this.²³⁹ Up to May 2017, ICAO has never been referred any question to the ICJ.²⁴⁰

Also, the CRPD Committee missed an opportunity to interpret the exclusivity principle because no communication by Mr. Stott was submitted after the judgment of the UK Supreme Court which, in my opinion, can be considered as an exhaustion of local remedies. National and regional initiatives inevitably lead to a question on extraterritorial application and non-uniformity. It seems that until there is an international solution, increasing the level of compliance with accessibility standards and non-discrimination practice is the answer to preventing any unavailable remedy.

238 Abeyratne, *supra* n. 138, 188.

239 Statute of the International Court of Justice (San Francisco, 26 June 1945), T.S. No. 993, art. 65; Agreement between the United Nations and the International Civil Aviation Organization, (31 May 1948), ICAO Doc 7970, art. X. Osieke viewed that any contracting State may request the matter be submitted to the ICJ for an advisory opinion. See Ebere Osieke, *Unconstitutional Acts In International Organisations: The Law and Practice of ICAO*, 28:1 Int'l & Comp. L.Q., 1, 22 (1979).

240 International Court of Justice, *List of Advisory Proceedings referred to the Court since 1946*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&p3=1> (accessed 1 Mar. 2017).

