

The Exclusion of Liability for Emotional Harm to Passengers in the Warsaw and Montréal Convention: Moving Away from Floyd, Siddhu and Pienaar to the *Stott* Case?

R de Gama*



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Author

Rafia de Gama

Affiliation

University of South Africa,
South Africa

Email dgamar@unisa.ac.za

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Abstract

This contribution focuses on the transport of passengers on international routes and the legal regime set down by the Warsaw Convention of 1929 and reinforced by the Montréal Convention of 1999. These Conventions regulate commercial aviation by detailing a set of minimum standardised procedures for flight safety, such as standards for air navigation systems, amongst others, to ensure safe and efficient air travel.

The legal regime also regulates the possible claims that may be made against airlines for the death of or harm to passengers, as well as relating to damage to and loss of baggage. The regime not only limits claims temporally and by location, but it also excludes the application of national legal regimes. With regard to claims of harm to dignity the regime disallows such claims to be brought within the restrictions placed by the legal regimes or on any other basis.

The contribution does not address the full coverage of these Conventions, only the exclusion of mental / emotional injuries. The Convention excludes emotional harm from the definition of death and physical harm. However claimants have brought claims to undermine the main exclusion of claims with regard to compensation for emotional harm. This contribution explores the exclusion of claims in the Warsaw and Montréal Conventions and thereafter analyses two court decisions in common law countries where this exclusion of claims was challenged and the challenge failed.

Keywords

Dignity; strict liability; limitation of liability

.....

1 Introduction

In the first half of the 20th century, due to outbreak of the First and Second World Wars and the use of aircraft for military purposes, innovations took place in plane design, which changed the nature of military and civil aviation. The improvement in plane design meant that carrying capacity increased. Countries could transport passengers and mail across longer distances, allowing for cross-continental flights. This contribution focuses on the transport of passengers on international routes and the legal regime set down by the *Warsaw Convention* of 1929 and reinforced by the *Montréal Convention* of 1999. These Conventions regulate commercial aviation by detailing a set of minimum standardised procedures for flight safety, such as standards for air navigation systems, amongst others, to ensure safe and efficient air travel.

The legal regime also regulates the possible claims that may be made against airlines for the death of or harm to passengers, as well as relating to damage to and loss of baggage. The regime not only limits claims temporally and by location, but it also excludes the application of national legal regimes. With regard to claims of harm to dignity the regime disallows such claims to be brought within the restrictions placed by the legal regimes or on any other basis.

The above restrictions and exclusions may be simply illustrated thus. John and Thabo are travelling from Johannesburg to Shanghai and John had asked for a vegetarian meal. John is told his meal option is not available. John feels mental anguish. Thabo, on the other hand, gets bumped by the food trolley, and his hand is slightly injured. As they disembark in Shanghai, John hurts his leg as the aerobridge is not secured closely enough to the airplane. Upon their return to Johannesburg, both John and Thabo would like to sue for the harm they suffered. Thabo will be told by his lawyers that he has a case against the airline. John will have a case for the leg injury against the airport authority in Shanghai, but no case against the airline. The food mix-up and the bump by the trolley both occurred on the plane, while both passengers travelled on an international flight. John's claim is excluded, and he may further not put forward a delictual claim.

The contribution does not address the full coverage of these Conventions, only the exclusion of mental / emotional injuries. The Convention excludes emotional harm from the definition of death and physical harm. However claimants have brought claims to undermine the main exclusion of claims with regard to compensation for emotional harm. This contribution

explores the exclusion of claims in the *Warsaw* and *Montréal Conventions* and thereafter analyses two court decisions in common law countries where this exclusion of claims was challenged and the challenge failed. However the *obiter dictum* in the cases does indicate a change in the attitude towards the ethical validity of the exclusion. The judicial mood and tone in the judgements sets up the conclusion of this contribution, which endeavours to clarify the possible way forward in decision-making with respect to the exclusion.

2 Warsaw and Montréal Convention limitations and exclusions

The *Montréal Convention*, formally known as the *Convention for the Unification of Certain Rules for International Carriage by Air*, was meant to unify the rules pertaining to the minimal rules adhered to by carriers when undertaking the international carriage of passengers, baggage and goods.¹ This Convention was entered into by 152 of the 191 possible countries² and follows the *Warsaw Convention* (1929)³ and its antecedent protocols. For the purposes of this case discussion it is imperative to set out the following: firstly, that any claim arising from international carriage howsoever founded can be brought before a court only within the confines of the rules set down in the *Warsaw* and *Montréal Conventions*.⁴ Secondly, that the liability of the carriers is strict. There is no need to assert or purpose in asserting that no fault on the part of the carrier or its staff occurred.⁵ Thirdly, there is exclusion to any claim of a harm of an emotional nature, as harm is limited to bodily injury.⁶

It is necessary to set out that in the two aforementioned Conventions the limitations and exclusions are the same.⁷ For the purposes of this

* Rafia de Gama. LLB LLM (University of Pretoria). Lecturer, University of South Africa (UNISA). Email: dgamar@unisa.ac.za.

¹ Section II of the *Convention for the Unification of Certain Rules for International Carriage by Air* (1999) (*Montréal Convention*) deals with the consignment of goods while Chapter III deals with liability for harm to passengers or damage to luggage.

² Anon Date Unknown <http://tinyurl.com/hbas4r2>.

³ *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (1929) (*Warsaw Convention*).

⁴ The *Warsaw Convention* specifically provided this in a 24 and the *Montreal Convention* in a 29.

⁵ In the *Warsaw Convention* according to a 21 the carrier could raise the defence that the injured passenger caused or contributed to the injury, and could thus be exonerated in part or wholly. The *Montreal Convention* states the same in a 20.

⁶ In the *Warsaw Convention*, a 17; also in the *Montreal Convention*, a 17.

⁷ In this contribution I will provide the correlating article in the *Warsaw Convention* in footnotes.

contribution, therefore, reference will be made to the articles contained in the *Montréal Convention* only, namely article 29,⁸ which is the basis of all and any claims in a court of law, and which must be read with article 21(1),⁹ which deals with compensation for injury or death.

In article 29¹⁰ of the *Montréal Convention* the basis of any and all claims is limited to the Convention only.

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 ...

Article 21¹¹ sets out further limitations on the compensation for strict liability and fault liability by specifically stating:

For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.¹²

Article 21(2)¹³ does allow for a liability which exceeds the 100,000 Special Drawing Rights the carrier may bring into fault liability. It is important to note that this is allowed from the point where the damages exceed 100,000 Special Drawing Rights.

The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

⁸ Article 24 of the *Warsaw Convention* limits any claims to the working of the Convention only, taking away the possibility of application of other customary international law rules or other conventions.

⁹ Article 21(1) of the *Montreal Convention*.

¹⁰ Article 29 of the *Montreal Convention*.

¹¹ Article 22 of the *Warsaw Convention* limits the claims as follows: "in the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability ..."

¹² Created in 1969 by the International Monetary Fund (IMF) to supplement a shortfall of preferred foreign exchange reserve assets, namely gold and the US dollar, the value of an XDR (SDR) is defined by a weighted currency basket of four major currencies: the US dollar, the Euro, the British pound, and the Japanese yen.

¹³ Article 21(2) of the *Montreal Convention*.

Article 17(1)¹⁴ of the *Montréal Convention* deals with the liability of the airline for death and injury to passengers and states:

The carrier is liable for damage sustained in case of the death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17(1) is the article that has been thought questionable as passengers feel that they should be allowed to claim for indignity or emotional harm suffered while having suffered minimal or no physical injury. A claim of this nature can be brought only by using the *Montréal Convention* and only if the death or bodily injury occurred during the operation of the aircraft or embarkation or disembarkation. The limits are severe. The limitations on liability are bolstered by the limitations on the compensation. These limits were the result of careful negotiations to incorporate strict liability.¹⁵

To illustrate: If the following three passengers, Tom, Mary, and Peter were booked on an international flight, and Peter fell on the moving walkway on the way to board the plane, he would not have a claim. If Tom, once seated and in flight, asked for coffee that was then spilled on him, he would have a claim. If Mary, once seated, nervously asked for her fourth drink and was called a "slut" by an airhostess, she would have no claim.

3 Provenance of the assault

With the exponential increase in air travel since the *Warsaw Convention*, the limitations have been questioned in the last two decades. Initially the need to protect the fledging air transport sector was instrumental in making agreement on the limitations possible, and later the involvement of public monies may have played a role.¹⁶ The protection of the fledging aviation industry was a initially priority,¹⁷ especially as it was accepted that there was a need to severely limit emotional damage in the same manner

¹⁴ Article 17 of the *Warsaw Convention* sets out exclusions as follows: "The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking".

¹⁵ Cunningham 2008 *Vanderbilt J Transnat'l L* 1048; *Siddhu v British Airways Plc / Abnett (known as Sykes) v British Airways Plc* 1997 1 All ER 193 (further referred to as *Siddhu*).

¹⁶ Cunningham 2008 *Vanderbilt J Transnat'l L* 1047.

¹⁷ Cunningham 2008 *Vanderbilt J Transnat'l L* 1047.

as the other damages were limited.¹⁸ The adherence to this position in the 1999 *Montréal Convention* is controversial, however, as the initial *ratio* for the limitation has fallen away.¹⁹

The negotiation of *Montréal Convention* specifically points to this controversy.²⁰ The purpose of the Convention was to modernise the regulation of an industry that was well established.²¹ As the proceeding cases will show, the limitations in place under the *Warsaw Convention* were very restrictive. There are limitations on what kind of harm is claimable and on the amounts claimable. The *travaux préparatoire* clearly show a discussion specifically on the exclusion of claims for mental injury by the majority of the state parties. In fact, nearly all states agreed that the exclusion was no longer necessary.²² It was clear to the chairman of the conference that the delegates had agreed to broaden the ground for claims.²³ The only vocal critic was the IATA observer.²⁴ The issue for the delegates was really only how to word the inclusion of mental injury. There were divergent proposals as to how the provision should be formulated.²⁵ In fact the retention of the wording employed in Warsaw is actually surprising if one reads the discussion that occurred over the 18 days of the convention. The wording as retained allows for claims for mental (inclusive of emotional) harm if it flows from physical injury.

The two possible issues that would give rise to the ethical questionability are; one that emotional harm claims are excluded altogether not only under the Convention but through the use of any other laws. Second, even if allowed under very limited circumstances there are limitations on the amount claimable. This case note sets out the recent case law on the former. The cases deal with the possibility of claiming outside of the purview of the Convention which allows for claims for bodily harm only.

¹⁸ Cunningham 2008 *Vanderbilt J Transnat'l L* 1047.

¹⁹ Cunningham 2008 *Vanderbilt J Transnat'l L* 1052.

²⁰ The drafting and redrafting of a 17 in the pre-*Montreal* days, trying to modernise the *Warsaw Convention* piecemeal through many amendments, give credence to this statement. Abeyratne 2000 *J Air L & Com* 226-227.

²¹ This sentiment is expressed in the preamble thus "RECOGNIZING the need to modernize and Consolidate the Warsaw Convention and related instruments ...".

²² Chouest 2009 *IALP* 165.

²³ Chouest 2009 *IALP* 165.

²⁴ Chouest 2009 *IALP* 167.

²⁵ Chouest 2009 *IALP* 167.

As previously stated, reference is made to cases decided in common law jurisdictions only. *Stott*²⁶ was heard in an English court (the House of Lords), and *Pienaar*²⁷ was heard in a South African court. The cases of *Sidhu*²⁸ and *Floyd*²⁹ are the foremost authority³⁰ for the interpretation of the presence of exclusion and the possibility of raising a claim under legislation or under national law in a common law jurisdiction. In the most recent case the minority Lord, Lady Hale, refers not only to the inequity of the exclusion but to the possibility of utilising other rules such as the *ius cogens* rule³¹ against torture in international law to circumvent the Convention. This pronouncement comes as greater rule-making in national and regional laws occurs to protect human rights to dignity, including emotional stability.³²

The similar exclusions provided for in the *Montreal Convention* have already been challenged in the Court of Justice of the European Union (CJEU).³³ According to the CJEU the *Montreal Convention* was not to have exclusive application in a case of delayed passengers and passengers could claim using the Regulation 261/2004.³⁴ This shows an understanding on the part of CJEU that regional regulation such as the 261/2004 may allow the making of certain inroads into the hitherto forbidden land of psychological harm.

3.1 *Siddhu and Floyd*

Though these cases are 20 years old and were decided under the *Warsaw Convention*, a short foray into the reasons for the decisions is necessary. Both cases dismissed claims for psychological injury that was not linked to any physical injury or to the physical injury actually suffered.

²⁶ *Stott v Thomas Cook Tour Operators Limited* 2014 UKSC 15 (further referred to as *Stott*).

²⁷ *Potgieter v British Airways Plc* 2005 3 SA 133 (C) (further referred to as *Potgieter*).

²⁸ *Sidhu v British Airways Plc / Abnett (known as Sykes) v British Airways Plc* 1997 1 All ER 193.

²⁹ *Eastern Airlines, Inc v Floyd* 499 US 530 (1991) (further referred to as *Floyd*).

³⁰ Radošević 2013 *Air & Space Law* 98.

³¹ A fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted.

³² Chouest 2009 *IALP* 162; Radošević 2013 *Air & Space Law* 96.

³³ *Nelson v Lufthanza C* 581/10 and *TUI Travel v Civil Aviation Authority C* 629/10. These were then followed in a court in Illinois in the case of *Giannopolous v Iberia SA* 2012 WL 5383271 (ND Ill 2012)

³⁴ Radošević 2013 *Air & Space Law* 100.

In dismissing the *Siddhu* claim, the House of Lords was unanimous. Lord Hope³⁵ found that the wording of articles 17, 18, 19, and 24 of the *Warsaw Convention*³⁶ gave no grounds to look outside of the Convention where the limitations and exclusions as set out in the Convention applied. This was discerned from the wording,³⁷ the *travaux préparatoire*,³⁸ and the specific Act³⁹ that promulgated the Treaty into English law.

In the *Floyd* case, great mental trauma was suffered by the passengers when the engines of the plane failed, they were told that there would be an emergency landing in the Atlantic Ocean, but the engines were eventually restarted and the plane landed at Miami Airport, the airport of departure.⁴⁰ The Supreme Court in United States ruled that there was no claim and it, too, based its decision on the Convention and the *travaux préparatoire*.⁴¹

It was noted in the *Siddhu* decision that even though the Convention refers in its title to "certain rules", the first article specifically states that the Convention applies to all international air carriage.⁴² Secondly, it is necessary to note that the Convention is a harmonisation of particular rules, and therefore those set down are the only agreed rules for that specific situation.⁴³

In *Floyd*, too, the Supreme Court found that mental injury was not a consideration⁴⁴ and that the emphasis in the drafting of the Convention had been on protecting a fledgling industry.⁴⁵

The meaning of the phrase "however founded" and the exclusion to be found therein were the main focus of the judgment. The wording of the English translation was compared with that of the initial French wording "*à quelque titre que ce soit*", as found in article 24.

1. Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et

³⁵ Speaking on the behalf of all the Lords.

³⁶ This case dealt with the *Warsaw Convention*. As stated above, the rules regulating the transport of passengers by air have not changed in essence with the advent of the *Montreal Convention*.

³⁷ *Siddhu* 438-440.

³⁸ *Siddhu* 442.

³⁹ *Siddhu* 442.

⁴⁰ *Floyd* 499.

⁴¹ *Siddhu* 448.

⁴² Article 1(1) of the *Warsaw Convention* refers to "all international carriage of persons, baggage or cargo performed by aircraft for reward".

⁴³ This is an important factor in the *Stott* case, which will be discussed below.

⁴⁴ *Siddhu* 448.

⁴⁵ Cunningham 2008 *Vanderbilt J Transnat'l L* 1047; also *Floyd* 499.

limites prévues par la présente Convention. 2. Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent.

The exclusion of any other basis of action, contractual or delictual, if an international carriage by air is undertaken has to be read with the restricted wording of "bodily harm" or *lésion corporelle* as set out in article 17.

... leur transport peut être régi par la Convention de Varsovie qui, en général, limite la responsabilité du transporteur en cas de mort ou de lésion corporelle, ainsi qu'en cas de perte ou d'avarie des bagages.⁴⁶

The cases that are the foremost authority (*régi*) interpreted the term "*en cas*" to cover only cases where a passenger died or where bodily harm occurred during international carriage by air. Lord Hope found that there was no difference in meaning between the official French text and the translated English text and that both meant that the Convention would apply exclusively on matters of international carriage by air, and for cases where harm or injury to passengers had occurred such injury had to relate to a physical injury. The House of Lords stated:

[it] was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.⁴⁷

The impact of the balance, unfair as it may seem, could not be avoided, in that the claim for compensation under any other law, including English law, would fail.

All the obvious cases in which the carrier ought to accept liability were provided for. But, as one of the French delegates to the Warsaw Convention, Mr. Ripert, observed when the definition of the period of carriage was being discussed, there are an infinite variety of cases not all of which can be put in the same formula. No doubt the domestic courts will try, as carefully as they may, to apply the wording of article 17 to the facts to enable the passenger to obtain a remedy under the Convention. But it is conceded in this case that no such remedy is available.⁴⁸

This judgement of the highest court in England set the course for future interpretation.

⁴⁶ The French text of the *Warsaw Convention* is the authoritative text.

⁴⁷ *Siddhu* 442.

⁴⁸ *Siddhu* 442.

The Supreme Court limited its investigation to the meaning of *lesion corporelle* and the exclusion of mental injury. However *Floyd* did allow for a small glimmer.

[W]e express no view to whether passengers can recover for mental injuries that are accompanied by physical injuries.⁴⁹

3.2 *Potgieter*⁵⁰

This case was decided in the South African High Court in the Cape in 2005,⁵¹ where Judge Davis had to decide whether or not to uphold an exception to a claim under *actio iniuriarum*⁵² under South African common law.⁵³ The exception was that the *Warsaw Convention* applied exclusively and that there was no claim under any other law that could be brought.⁵⁴

The incident occurred on a flight from Cape Town to London. The plaintiff was traveling with his mother and his boyfriend. When the announcement that the plane would shortly land at London Heathrow was made he kissed his boyfriend. He was told by the flight attendant to stop, as his action was making other people uncomfortable, and was told again by a senior flight attendant when he ignored the first request. This was a humiliating and traumatising experience. The plaintiff felt hurt and claimed that his dignity had been violated.

The claim was brought under the South African delict *actio iniuriarum*.⁵⁵ *Actio iniuriarum* is defined as

...the action for damages open to a plaintiff who can show that the defendant has committed an intentional wrongful act, which constitutes an aggression upon his person, dignity or reputation.⁵⁶

The plaintiff argued that the Convention had to be interpreted as dealing with certain types of incidents only, and that other incidents should be allowed to be brought under national laws as applicable.

⁴⁹ *Floyd* 552.

⁵⁰ *Potgieter v British Airways Plc* 2005 3 SA 133 (C).

⁵¹ Also known as the Cape High Court.

⁵² An action for delict which "not only seeks to protect an individual's dignity and reputation but also his or her physical integrity".

⁵³ South African common law is a mixed legal system comprising of Roman Dutch law and English law.

⁵⁴ *Radosevic* 2013 *Air & Space Law* 96.

⁵⁵ *O'Keefe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 247.

⁵⁶ As approved in *Moake v Reckitt & Colman (Africa) Ltd* 1968 3 SA 98 (A) 104.

Judge Davis, following the current legal tradition in South African courts, looked not only at the international treaty but also engaged in a comparative exercise by looking at cases in common jurisdictions and in Europe. The cases that stand out are the *Siddhu* House of Lords decision, the US Supreme Court decision⁵⁷ that was decided similarly to *Floyd*, and the French *cour du cassation* decision.⁵⁸ The overwhelming majority of decisions outside of the French decision agreed with the *Siddhu* decision discussed above.⁵⁹ According to this consensus the combined reading of article 17 and article 24 of the *Warsaw Convention* is accepted as excluding harm not linked to the body, and excludes claims under other laws for harm during international carriage by air.⁶⁰

The French decision, deemed to be a lone "wayward" decision by Judge Davis and therefore dismissible, decided that the French wording in article 24, where reference is made to "*en cas*", meant that claims under Convention were available for the specified cases as set out in articles 17 and 18, and this did not exclude the possibility of bringing a case under French law.⁶¹ The facts of this case were similar to those in *Siddhu*, in that the case emanated from an incident of the detention of passengers during the Gulf War. The same set of facts and the application of the same Convention led to a diametrically different result. However, Judge Davies deemed this case an anomaly⁶² and the comparative investigation of jurisdictions outside of South Africa meant that the *Siddhu* interpretation of the Convention was applied,⁶³ and that therefore Mr Pienaar was deemed to not have a claim under the *Warsaw Convention*, and denied a claim under the heading of *actio iniuriarum* under the South African law of delict.

3.3 *Stott*⁶⁴

Mr Stott was a special needs passenger in a wheelchair.⁶⁵ He was travelling with his wife.⁶⁶ A series of unfortunate events occurred on their journey back from holiday. First the airline was unable to give him a seat

⁵⁷ *El Al Israel Airlines Limited v Tsui Yuan Tseng* 525 US 155 (1999).

⁵⁸ *Mohamed v British Airways Plc* (Civil Chamber 97-10268).

⁵⁹ *Potgieter* 3, dealing with the comparative interpretation of the *Warsaw Convention*.

⁶⁰ *Potgieter* 4, dealing with the comparative interpretation of the *Warsaw Convention*.

⁶¹ *Potgieter* 7, dealing with the comparative interpretation of the *Warsaw Convention*.

⁶² *Potgieter* 9, dealing with the comparative interpretation of the *Warsaw Convention*, together with some lower court decisions in the United States and Canada, where the higher courts of law took decisions similar to that in *Siddhu*.

⁶³ *Potgieter* 11, dealing with the comparative interpretation of the *Warsaw Convention*.

⁶⁴ *Stott v Thomas Cook Tour Operators Limited* 2014 UKSC 1

⁶⁵ *Stott* para 7.

⁶⁶ *Stott* para 7.

next to his wife, whose care he required.⁶⁷ He had been told that this could be arranged on the airplane upon embarking.⁶⁸ When they embarked on the plane this had still not been arranged. He then fell out of his wheelchair and the flight attendants, instead of assisting him, asked the other passengers to step over him to get to their seats.⁶⁹ He suffered no bodily injury but was humiliated and suffered indignity. It was acknowledged by all parties to the trial that he had been treated in an undignified manner that humiliated him.⁷⁰

The plaintiff sued his travel agency, Thomas Cook operators. The case went all the way to the House of Lords and the decision is the focus of this contribution. In fact, it is essential to note at this juncture that the court *quo* sympathised with the plaintiff but felt unable to allow for any claims under the UK *Disability Discrimination Act*.⁷¹ With only one dissenting voice, that of Lady Hale, the Lords upheld the traditional view of the *Warsaw* and *Montréal Conventions*.

The argument put forward was interesting in that it referenced the famous 261 EU Regulation dealing with compensation for delays and denied boarding.⁷² Regulation 261/2004 is deemed to provide compensation to passengers who face delays or cancellation.⁷³ The regulation is controversial as it seems to enjoy a status outside of the *Warsaw* and *Montréal Conventions* and allows for claims.⁷⁴

Two distinctions between the interaction of the DDA and the Conventions emerged. One was that though the DDA that the plaintiff relied on merely reflected EU Regulation 1107/2006 it contained no remedies that allowed for claims similar to those in Regulation 261/2004. Second, Regulation 261/2004 dealt with an area not covered by the *Warsaw* and *Montréal Conventions*. The Conventions do not provide any form of remedy in the case of delays or cancellation and up to that point airlines happily excluded any such claims through the contract of carriage. Therefore, in

⁶⁷ *Stott* para 7.

⁶⁸ *Stott* para 7.

⁶⁹ *Stott* para 7.

⁷⁰ *Stott* para 7.

⁷¹ *Disability Discrimination Act*, 1995, referred to as DDA. The consolidated legislative framework on transport and disability is currently set out in Part 12 of the *Equality Act*, 2010. The *Equality Act*, 2010 is based on EU Regulation 1107/2006.

⁷² *Regulation 261/2004/2004 of the European Parliament and of the Council* (2004) is a Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellations, or long delays of flights.

⁷³ Article 2 of the *Regulation 261/2004/2004*.

⁷⁴ Under a 7 of the *Regulation 261/2004/2004*.

disallowing such exclusions on flights to and from the EU Regulation 261/2004 filled a lacuna. The claim for bodily harm, correlated emotional harm and death are covered by the *Montréal* and *Warsaw Conventions* and the EU Regulation 1107/2006 does not regulate on a "new" area. The Stott claim could easily be compared to the *Siddhu* and *Pienaar* claims and therefore dismissed, unlike those brought under Regulation 261/2004.

The incident was evaluated in the light of the *Montréal Convention*, as England had adopted that Convention. However, the operative concepts are no different and therefore the claim was found to be wanting.

The sentiment of the majority decision, though it applied the interpretation in *Siddhu*, can be discerned from the following statement:

The embarrassment and humiliation which Mr Stott suffered were exactly what the EC and United Kingdom Disability Regulation were intended to prevent. I share the *regret*⁷⁵ of the lower courts that damages were not available as recompense for his ill treatment and echo their sympathy, but I agree with the reasoning of their judgement and would dismiss this appeal.⁷⁶

Lady Hale was the sole dissenting Lord acknowledging not only the unfair treatment and indignity suffered but also the lacuna left by the wording of the *Montréal Convention*. She acknowledged that the Disability Regulation provided no ready solution and invoked the *Torture Convention*⁷⁷ as an *ergo omnes* rule,⁷⁸ as which customary international law which could be applied in this regard. This specific rule enforces adherence to the principle of rejecting torture in any form, physical or mental, by all states, with no exception to the rule being allowed. She found that the treatment of the plaintiff would have easily have accorded with the definition of torture, and that compensation for that form of harm should have been ordered.

This judgement has caused some controversy. The majority had continued the tradition of *Siddhu*, and as against *Pienaar*, there was an uneasy dismissal of an EU and United Kingdom Regulation. In her judgement Lady Hale not only illustrated the unfairness that had been acknowledged before, but also created a possible next argument in a new case.

⁷⁵ My emphasis.

⁷⁶ *Stott* para 65.

⁷⁷ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) (*Convention Against Torture*), which entered into force on 26 June 1987.

⁷⁸ A legal term describing obligations owed by states toward the community of states as a whole.

4 Regulation 261/2004/2004

The Regulation is an essential part of this discussion as it may change the course of events for future cases dealing with emotional harm. The reasoning as set out in the Court of Justice of the EU in the *Nelson v Deutsche Lufthansa AG* case⁷⁹ confirmed the *Sturgeon* decision,⁸⁰ setting out the apparent lack of overlap between the *Montréal Convention* and Regulation 261/2004 allowing courts in the EU to be able to compensate affected passengers.

[I]t should be made clear that, like the inconveniences referred to in IATA and ELFAA, a loss of time cannot be categorised as "damage occasioned by delay" within the meaning of Article 19 of the *Montréal Convention*, and, for that reason, it falls outside the scope of Article 29 of that Convention.

Article 19 of the *Montréal Convention* implies, in particular, that the damage arises as a result of a delay, that there is a causal link between the delay and the damage, and that the damage is individual to passengers, depending on the various losses sustained by them.⁸¹

This interpretation of the different meaning of the word delay under the two instruments is fascinating, as up to now the *Montréal* or the *Warsaw* definitions have been read restrictively and the exclusions are read broadly. This is easily discerned from the cases discussed above that dealt with emotional harm. In the reading relating to the issues of delay and cancellation, though the *Montréal Convention* deals with delay, albeit in an oblique manner, the meaning of delay is found to be different and distinct from that in Regulation 261/2004. The Court of Justice of the EU describes the hairline fracture separating the two instruments thus:

The specific obligation to pay compensation, imposed by Regulation No 261/2004, does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation to the time of arrival originally scheduled. In addition, whereas the extent of the delay is normally a factor increasing the likelihood of greater damage, the fixed compensation awarded under that Regulation remains unchanged in that regard, since the duration of the actual delay in excess of three hours is not taken into account in calculating the amount of compensation payable under Article 7 of Regulation No 261/2004.

In those circumstances - the loss of time inherent in a flight delay, which constitutes an inconvenience within the meaning of Regulation No 261/2004 - the CJEU puts forward that this cannot be categorised as

⁷⁹ *Nelson v Lufthansa* C 581/10 (also *TUI Travel v Civil Aviation Authority* C 629/10).

⁸⁰ Cases C- 402/07 and C- 432/07, *Sturgeon and Others* 2009 ECR I- 10923.

⁸¹ *Nelson v Lufthansa* C 581/10 paras 49-50.

"damage occasioned by delay" within the meaning of article 19 of the *Montréal Convention*, and it does not fall within the scope of article 29 of that Convention. Consequently, the obligation under Regulation No 261/2004 intended to compensate passengers whose flights are subject to a long delay is compatible with article 29 of the *Montréal Convention*.⁸²

This ability on the part of the CJEU to interpret a regional regulation, separating it from the international Convention and the rules therein, to create *ab initio* a claimable right for passengers demonstrates how the claims for emotional harm may be accommodated at the regional level at the CJEU.

5 Conclusion

In order to link the Conventions, cases and Regulation 261/2004, the following overview is necessary. The Conventions set out restrictions with respect to the amount claimable upon harm to passengers and damage to luggage. There is a specific exclusion for harm that cannot fall within the term "bodily". The exclusion is wide in that it excludes not only claims under the Convention but also any claims under any other law. This has been the interpretation thus far.

Passengers have brought cases which were dismissed but which highlighted this discrepancy and unfairness. Until *Stott*, it seemed that the traditional view as set out in *Siddhu* would prevail until such time as States would sit down and reconfigure the existing Convention or agree to a new Convention with such claims allowed. In *Stott* it is not only the vocal criticism of the minority judgement of Lady Hale (which raises the spectre of an unassailable rule, *ergo omnes*) that gives hope to future plaintiffs but also the majority judgement.

The unfairness of the Convention in first excluding a claim within the legal regime as well as outside of it has become more and more apparent. One has only to read the regret and sympathy that was expressed in the *Stott* judgment to realise that there seems to be a change in sentiment, if not in law.

The right against torture in international law, which is a rule *ergo omnes* that is to be adhered to by all states, is perhaps a viable option to overcome the apparent unfairness inherent in the application of the

⁸² *Nelson v Lufthanza C 581/10* paras 51-56.

Conventions. Torture has a wide definition, and includes the mental anguish associated with bodily harm, but suffering indignity on its own could also be construed to be akin to a form of torture. Though the right not to be tortured is accepted under customary international law as *ergo omnes*, the definition of the term torture is still in dispute. The wider definition is accepted by some, though it is not the definitive definition.⁸³ Plaintiffs would still have to argue and convince a judge that the mental anguish and the indignity they have suffered qualify as torture.⁸⁴ However if the plaintiff is successful in drawing this conclusion, a judge is left with no choice but to find that a right has been violated. Assessing the value to put upon such a violation would be the next interesting part of such a case. There may, however, be an act outside of court that may change the decision-making in this regard.

The possibility exists that the CJEU may also provide a different interpretation of the decision in *Stott*, taking into account the manner in which Regulation 261/2004 as a regional law was found to be providing a separate ground of liability quite differentiated from the Conventions. This may then put the application of Regulation 1107/2006 on a par with Regulation 261/2004, allowing a separate ground for liability on the limited instance of the maltreatment of a person with a disability.

The European Commission may intervene, as it has done with delays and cancellations. The basis of such an intervention would be the interest of the consumers of this service, and the intervention may take the form of laying down a specific minimum level of behaviour and violation of that behaviour to be claimable. That is, the Disability Regulation may be given more weight. This would change one aspect; a judge would not be able to easily dismiss the claim as allowed by the EU Commission. The restricted demarcation of the exclusion by the Regulation would in an indirect manner change the way the Convention is applied in national courts. The traditional view would fail.

⁸³ The definition of the term torture in the Convention is an interesting compromise, especially when read with the reference to exclusion based on lawful sanctions and the linkage required to public officials. "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

⁸⁴ Please read the above comments on the link required to a public official.

The final possibility is that state parties to *Montréal* might renegotiate the Treaty, either by adding a protocol, as was done over time with the *Warsaw Convention*, providing grounds for claims, or through a complete renegotiation. This final possibility is the least likely with an aviation sector under strain and in need of protection due to the worldwide recession. Change is the only constant and will happen even in this specific area.

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List of Abbreviations

CJEU	Court of Justice of the European Union
DDA	Disability Discrimination Act, 1995
IALP	Issues in Aviation Law and Policy
IATA	International Air Transport Association
J Air L & Com	Journal of Air Law and Commerce
Vanderbilt J Transnat'l L	Vanderbilt Journal of Transnational Law