Passengers with Disabilities in Commercial Air Carriers: A Comparative Approach of the Laws and Practices in Malaysia, UK and USA

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Abstract

For years, access to the nation’s air travel system for persons with disabilities was an area of substantial dissatisfaction, with both passengers and the airline industry recognizing the need for major improvement. In 1986, the US Congress passed the Air Carrier Access Act, requiring the Department of Transportation (DOT) to develop new regulations which ensure that persons with disabilities will be treated without discrimination in a way consistent with the safe carriage of all passengers. Although in UK there is no specific statute pertaining to discrimination of passengers in air carriers, however, the Disability Discrimination Act 1995 would be the statute which, provide equal opportunity for disabled passengers to travel in commercial air carriers that are convenient for them to travel. In comparison with these two countries, legislatures in Malaysia on the other hand, have recently proposed a general Bill on the protection and wellbeing of persons with disabilities, the Persons with Disabilities Bill 2007. This paper attempts to discover the law and practices of commercial air carriers in Malaysia in providing services for the disabled passengers in Malaysia. In the absence of comprehensive guidelines in the Persons With Disabilities Bill 2007 pertaining to the services needed to be provided by the air carriers in order to assist disabled passengers, the paper discusses the possibility of adopting the various laws, guidelines and practices in US and UK in order to provide better services to the disabled passengers in commercial air carriers.

Key Words: disabled passengers, commercial air carriers, laws, practices, guidelines.

Introduction

Paralyzed veterans of America members report encountering broken or unavailable wheelchairs, poor boarding assistance, and lack of seating accommodations, making many think twice about future air travel (Mosley, 2005). The number and types of discrimination by air carriers against passengers with disabilities are also evident in Department of Transportation (DOT) enforcement reports. In September 2001, DOT charged Northwest Airlines with several hundred violations of the Air Carriers Act 1986 (amended 2000) including instances of lengthy delays in obtaining wheelchairs, passengers, passengers being stranded aboard aircraft for extended periods, and passengers being left at the wrong gate, resulting sometimes in the passenger missing his or her flight (Mosley, 2005). Indeed, these instances of poor management by air carriers towards disabled passengers obviously are not experienced by disabled passengers in U.S but also in U.K. as well as in Malaysia. The following discussion examines the law and practices of commercial air carriers in Malaysia in providing services for the disabled passengers in Malaysia in comparison with U.K. and U.S.

General Cabin Seat Lay-out in Commercial Airliners

Generally all aircrafts built and sold for the purpose of transportation of passengers have cabin seat lay-out which maximizes the use of space in the cabin and at the same time maintaining sufficient comfort to the passengers. The design and the lay-out of the seat in the aircraft cabin have been done after various studies had been conducted. One of the studies which are relevant in this paper is called “Anthropometry” which means the application of scientific physical measurement methods to human body in order to optimize the interface between humans and machines and other manufactured products (Kantorowitz and Sorkin, 1983). This is due to the fact that the dimensions of human being come in various sizes and shapes; therefore, the designers must try to accommodate the widest range of human physical dimensions possible in their designs. In this way, the number of people who can use the equipment can be maximized.

From the anthropometric designs, the aircraft manufacturers have come up with the cabin seat lay-out standards with stowage compartment and space for moving which can maximize the profits of the airliners and at the same time provides comfort to the passengers. The following figures show the diagram of seat arrangement in aircraft with dimensions of the seat sizes to accommodate an average human being.

From Figure 1, the width of the aisle (walking space between seats), is about 17 inches, while in Figure 2, the width of the aisle is 19 inches. The seat pitch (distance between a seat to the front seat) is normally 32 inches in economy class as shown in Figure 4.

One question that may arise in these lay-outs is whether a disabled person in a wheelchair can access or board an aircraft. The answer to the question is in the affirmative as the wheelchair manufacturers manufacture wheelchairs with flexible designs where the width of the wheelchair ranges from 16 inches to 20 inches (http://www.suportusa.com). If this wheelchair is taken on-board of the aircraft, it should be noted that a 16-inch-wide wheelchair can fit easily in aircraft with 17 inch-wide aisle and an 18-inch-wide wheelchair can fit easily in aircraft with 19 inch-wide aisle with 1 inch clearance between seats.

Disability Discrimination in Malaysia: A Constitutional Perspective

The Malaysian Constitution guarantees that “all persons are equal before the law and entitled to the equal protection of the law” (Federal Constitution). The Constitution further reads: “Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion,
The unlawful discrimination might take the form of refusing to provide or deliberately not providing a service to the disabled person which is provided to members of the public; or the discrimination might be in the standard of service provided or the manner in which it is provided; or it might arise from the terms on which the service is provided, (The Code of Practice Rights of Access Goods, Facilities, Services and Premises, 1996).

The DDA gives a list of services which it covers, although the list is not exhaustive. It includes access to and use of, any place which members of the public are permitted to enter; accommodation in a hotel, boarding house or other similar establishment; facilities for entertainment, recreation or refreshment; the services of any profession or trade, or any local or other public authority. The DDA excludes the use of transport from the operation of this part of the Act. Nevertheless other facilities and services provided by transport providers other than the transport itself should be covered, such as access to platforms, ticket offices and waiting areas (Disability Discrimination Act 1995).

Under the DDA, it may be justifiable to provide service to a lower standard, or on different terms, if it is necessary to be able to provide the service at all either to the disabled person or to other members of the public (Disability Discrimination Act 1995). Although the DDA excludes the use of transport from the operation of this part of the Act, it is important to note that the Civil Aviation Authority in U.K. sets guidelines on setting restrictions for disabled passengers on U.K. aircraft in order to ensure safety of the disabled passengers and other passengers as well. Under the guidelines, the exit row seats are restricted and not generally allocated to disabled passengers. The principle reason for not allocating seats adjacent to floor level emergency exits to disabled passengers is that they may impede cabin crew in carrying out

It is interesting to note that although the case of *Beatrice a/p At Fernandez* ([2005] 3 MLJ 681) seems to imply that that a flight stewardess can be discriminated on the ground that she is pregnant where she was terminated from her job due to the collective agreement between the employer and employee, this case must be analysed critically to decide as to the legal position pertaining to the concept of equality under the Federal Constitution. In this case, the learned judge analysed the rationale of the airline in terminating the pregnant stewardess (plaintiff) and concluded that the nature of job of stewardess is not conducive for a pregnant woman. Hence, the interpretation that the prohibition of discrimination in the Federal Constitution only applies to the public authority and does not include the private sectors is seen not free from criticism. Such an approach would be seen contrary to the spirit of the Federal Constitution. However, under the proposed section 27(1) of the Persons With Disabilities Bill 2007, persons with disabilities shall have the right to access to and use of public transport facilities, amenities and services open or provided to the public on equal basis with persons without disabilities. Thus, the Government and the providers of such public transport facilities, amenities and services shall give appropriate consideration and take necessary measures to ensure that such facilities, amenities and services conform to universal design in order to facilitate their access and use by persons with disabilities under section 27(2) of the Bill. However, due to the generality of this provision in the proposed Bill, the application of universal design in aircrafts to facilitate the disabled passengers can be debated.

**Disability Discrimination in Services and Accommodations in Airlines: UK and US Perspectives**

In the U.K., it is unlawful for a provider of services to discriminate against a disabled person in the provision of goods, facilities and services, whether for payment or otherwise under the Disability Discrimination Act 1995 (DDA). It is only those who provide services to the public or a section of the public who owe the duty not to discriminate, so that producers and manufacturers are under no duty in relation to their products, and private membership clubs are also excluded from the operation of the DDA. However, this exclusion does not operate where a private club provides a service to the public.
their emergency duties, including the required actions during an emergency evacuation, or they may obstruct access to emergency equipment. However, the regulations do advise that disabled passengers should be seated as close to emergency exits as the above limitations allow. Disabled passengers are also not allocated to seat rows leading to the self-help exits (http://www.boeing.com).

In the U.K., where a physical feature, arising for example from the design of a building or the access to it, makes it impossible or unreasonably difficult for disabled persons to use the access of the platform of the airlines, the service provider has a duty to take what steps are reasonable in the circumstances to remedy the situation. The duty may take the form of removing the feature in question; altering it so that it no longer has the disadvantaging effect on disabled persons; providing a reasonable means of avoiding the feature; or providing a reasonable alternative method of making the service in question available to disabled persons where breach of such obligation would cause the service provider to be liable for damages (Disability Discrimination Act 1995).

This is illustrated in the case of *Ross v Ryanair Limited and Another Future* (2004) EWCA CIV 1751. In this case, the claimant suffered from cerebral palsy and arthritis. He was capable of walking, although not for long distances. He did not own a wheelchair but needed to use one at Stansted Airport (owned and managed by STAL) in order to get from the check-in point to the aircraft. He was a regular customer of the first defendants, Ryanair (the provider of services). In May 2002, he was told by Ryanair's check-out desk that he would have to hire a wheelchair from their agents at the airport, and he had to pay 18 pounds for that service on each occasion. The claimant was aware of Ryanair's policy in relation to wheelchairs, but he did not consider that he should have to pay for hiring one whatever the price of his ticket. The claimant brought proceedings in the county court claiming that he had been unlawfully discriminated against contrary to the DDA.

The court held that the combination of sections 19(2)(a) and 21(2)(d) of the DDA imposed an obligation on both STAL and Ryanair to provide a reasonable alternative method of making the service in question available to disabled passengers, Stansted Airport available to a disabled person (Disability Discrimination Act 1995). Since an auxiliary aid like a wheelchair would facilitate disabled persons' use of that service, it was the duty of both STAL and Ryanair to take such steps as were reasonably necessary for them to have to take in order to provide a wheelchair for them. Ryanair, on their part, provided that service because in giving their passengers a boarding card it provided them with the key which unlocked that access for the purposes of their flight and permitted them to use both on their outward and on their return journeys. The long distance between the check-in desk and the departure gate at Stansted Airport made it unreasonably difficult for disabled persons to make use of the service involved in access to and use of Stansted airside. The judge held that the claimant was entitled to enjoy the service at Stansted airside at no cost, as did those who did not have this particular disability. It followed that both STAL and Ryanair were guilty of unlawful discrimination against the claimant contrary to section 19(1) (b) of the DDA and liable for damages.

Unlike the UK, the US has a specific and comprehensive statute which governs discrimination on the basis of disability in air travel i.e. the Air Carrier Access Act 1986 (ACAA). Under this Act, the airlines may only exclude anyone from a flight if carrying the person would be inimical to the safety of the flight. If a carrier excludes a handicapped person on safety grounds, the carrier must provide the person a written explanation of the decision. (Air Carrier Access Act 1986). In addition, carriers under this Act may not limit the number of handicapped persons on a flight and carriers may not require a person with a disability to travel with an attendant, except in certain limited circumstances specified in the rule. It should be noted that the Act protects the right of the disabled passenger to the extent that if the passenger with disability and the carrier disagree about the need for an attendant, the airline can require the attendant, but cannot charge for the transportation of the attendant.

In order to facilitate the disabled passengers, new aircrafts ordered after April 5, 1990 or delivered after April 5, 1992 which has 100 or more seats must have priority space for storing a passenger's folding wheelchair in the cabin (Mosley, 2005). However, aircraft with more than 60 seats and an accessible lavatory must have an on-board wheelchair, regardless of when the aircraft was ordered or delivered. For flights on aircrafts with more than 60 seats that do not have an accessible lavatory, carriers must place an on-board wheelchair on the flight if a handicapped passenger gives the airline 48 hours' notice that he or she can use an inaccessible lavatory but needs an on-board wheelchair to reach the lavatory.

As for the disabled passengers' items stored in the cabin, they must conform to Federal Aviation Authority (FAA) rules on the stowage of a carry-on baggage. Wheelchairs and other assistive devices have priority for in-cabin storage required by the rule, such as hazardous materials packaging for batteries. However, there may charge for optional services such as oxygen. DOT rules require carriers to provide in-cabin stowage for at least one passenger's standard-size folding wheelchair on new aircraft and require carriers to permit the stowage of the passengers' wheelchairs in overhead compartments and under seats if the aircraft has such areas available and stowage can be accomplished in accordance with Federal Aviation Administration safety regulations (Mosley, 2005). DOT’s Office of Aviation Enforcement and Proceedings (Enforcement Office) has advised carriers that a standard-size folding wheelchair measures 13 inches by 36 inches by 42-50 inches when folded. The Enforcement Office launched an investigation of Northwest’s compliance with the requirements for in-cabin stowage of passengers' folding wheelchairs in 2002 after it

Figure 5: Seat rows (bright colour) leading to self-help exits which are prohibited for disabled passengers (Note: the arrows on both sides outside aircraft indicate the emergency exit doors). Source: Boeing 747 at http://www.boeing.com.
learned that the carrier’s practices might not be inconsistent with the ACA rules. As a result DOT found that Northwest violated the ACA and federal regulations by failing to comply with requirements for in-cabin stowage of passengers’ folding wheelchairs and as such the Northwest was subjected to civil penalty of $225,000 (Mosley, 2005).

DOT in its statement on 9 March 2005, through its Office of Aviation Enforcement and Proceedings (Enforcement Office) had made the ruling on the size of a standard dimension of a folded wheelchair (Mosley, 2005). A standard size wheel chair when folded measures 13 inches thick, 36 inches depth and 42 – 50 inches long. Although this ruling gives a standard dimension, most manufacturers have come up with a more compact and light wheelchair design such when folded, it only takes much smaller space than ruled by DOT.

Although in the U.S the ACA provides the clear guidelines that must be followed by the air carriers, however, it should be noted that a complaint to DOT may accomplished the goal of eventually having the airline fined, but it will not reimburse the complainant for his or her loss or opportunity and many individuals may suffer discrimination before action is taken as the ACA does not grant litigants a private right of action and this principle is highlighted in *Love v Delta Air Lines* (310 F.3d 1347 (11th Cir. 2002)). As explained earlier, this is not the situation in the U.K. as there is express provision on right to damages by passengers in the DDA. Indeed, in such a situation, the discrimination against disabled passenger in U.S is left without remedy as illustrated in *Tallarico v Transworld Airlines* (881 F.2d 566 (8th Cir. 1989)). In this case, a fourteen-year-old girl with cerebral palsy was prohibited by Transworld Airlines from traveling alone on the basis of her disability. As a result, her father had to fly to Houston, where she had attempted to board a flight to St Louis for the Thanksgiving holidays, and fly with her, at a cost to him of $ 1,350.

**Conclusion**

Is more regulation the best way forward in providing a better service to disable passengers? The aim of regulation should be to promote fair competition among players or where natural monopolies exist, to ensure fair pricing and service levels. Hence, it is undeniable that without legislation, the rights of disabled passengers would neither be the main concern of the air carrier operators nor the manufacturers. In Malaysia, in the absence of comprehensive regulations as compared to U.K and U.S., the air carrier operators continue to import air planes from foreign manufacturers. In view of the development of the higher criteria in the design of the air carriers in order to cater the disabled passengers in the U.K and the U.S, as mentioned above, the design of air planes that are exported to Malaysia by the foreign manufacturers will also be upgraded to provide better services to the disabled passengers. In the U.S., the rights of the disabled passengers are the concern of the legislators where currently there is legislation pending before Congress to amend the ACA to explicitly provide for a private right of action under the (ACA National Council on Disability, 1979). Hence, in view of such a positive step by the legislators in the U.S., it is recommended that the proposed Persons With Disabilities Bill 2007 be revised to include more comprehensive guidelines as to the responsibilities of public transport provider to secure better services to disabled passengers in Malaysia. Thus, the absence of sanctions and penalties in the proposed Bill makes it a toothless tiger and at this point should be seriously reconsidered by the Malaysian legislature.

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Federal Constitution of Malaysia


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