HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

BRIAN WILLIAM POVEY APPELLANT

AND

QANTAS AIRWAYS LIMITED & ANOR RESPONDENTS

Povey v Qantas Airways Limited
[2005] HCA 33
23 June 2005
M167/2004

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

J B R Beach QC with B F Quinn for the appellant (instructed by Slater & Gordon)

J L Sher QC with S A O'Meara for the first respondent (instructed by Minter Ellison)

A J Meagher SC and A S Bell for the second respondent (instructed by Ebsworth & Ebsworth)

CATCHWORDS

Povey v Qantas Airways Limited

Aviation – Carriage by Air – Liability of carrier – International Convention imposing liability for damage sustained in the event of bodily injury suffered by a passenger, if the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking – Appellant allegedly contracted deep venous thrombosis while a passenger on long-haul international flight on aircraft operated by the respondents – Whether appellant should have been warned of the risk of deep venous thrombosis – Whether appellant should have been given advice on precautions that would minimise risk of its occurrence – Whether appellant's contracting deep venous thrombosis was an accident that took place on board the aircraft within the meaning of Art 17 Warsaw Convention 1929 as amended by the Hague Protocol 1955 and by Montreal Protocol No 4 1975.

International Law – Treaties – Construction – Requirement of uniform interpretation by contracting states – Under Art 31 Vienna Convention on the Law of Treaties interpretation to be conducted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

Procedure – Summary judgment – Whether appellant's claim revealed an arguable cause of action – Whether claims bound to fail – Whether the pleading should be struck out and the action permanently stayed.

Words and phrases – "accident", "unexpected", "unusual".

Civil Aviation (Carriers' Liability) Act 1959 (Cth).
Convention for the Unification of Certain Rules Relating to International Carriage by Air opened for signature at Warsaw on 12 October 1929 (the Warsaw Convention) as amended by the Protocol to amend the Warsaw Convention opened for signature at The Hague on 28 September 1955 (the Hague Protocol) and by the Protocol done at Montreal on 25 September 1975 (the Montreal Protocol No 4), Art 17.
Convention on the Law of Treaties done at Vienna on 23 May 1969, Art 31.

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. More than 75 years ago, when international air travel was in its infancy, Australia became party to the Convention for the Unification of Certain Rules Relating to International Carriage by Air ("the Warsaw Convention")[1]. Those Rules included rules regulating the liability of carriers to passengers.

2 Since the Warsaw Convention was done on 12 October 1929, several further international agreements have been made to regulate international carriage by air and, among other things, modify the rules regulating carriers' liability. Those further agreements include the Protocol to amend the Warsaw Convention made at The Hague in 1955 ("the Hague Protocol")[2], the Convention, Supplementary to the Warsaw Convention, done at Guadalajara in 1961 ("the Guadalajara Convention")[3], the Protocol done at Montreal on 25 September 1975 and called the Additional Protocol No 3 to Amend the [Warsaw Convention] (which has not come into force), and the Protocol done at Montreal on 25 September 1975 and called the Montreal Protocol No 4 to Amend the [Warsaw Convention] ("the Montreal Protocol No 4")[4].

3 The *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Liability Act") provides that each of the Warsaw Convention[5], the Warsaw Convention as amended by the Hague Protocol[6], the Guadalajara Convention[7], and the Warsaw Convention as modified by the Hague Protocol and the Montreal Protocol No 4[8] has the force of law in Australia in relation to any carriage by air to which the relevant agreement applies, irrespective of the nationality of the aircraft performing the carriage.

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1 [1963] ATS 18; see also *Carriage by Air Act* 1935 (Cth).

2 [1963] ATS 18.

3 [1964] ATS 4.

4 [1998] ATS 10.

5 s 25(1).

6 s 11(1).

7 s 25A.

8 s 25K.

4 This appeal concerns the carriage of the appellant by air by Qantas Airways Limited ("Qantas") from Sydney to London via Bangkok and return by British Airways Plc ("BA") from London to Sydney via Kuala Lumpur. The appeal to this Court, and the proceedings in the Court of Appeal of Victoria have been conducted on the basis that the Warsaw Convention as modified by the Hague Protocol and the Montreal Protocol No 4 applied to the appellant's carriage. It is convenient to refer to the Warsaw Convention, as so modified, as "Montreal No 4".

5 The appellant commenced a proceeding in the Supreme Court of Victoria against the Civil Aviation Safety Authority ("CASA"), Qantas and BA. He alleged that, "[d]uring the course of or following the flights" from Sydney to London and return, he suffered from deep venous thrombosis ("DVT") "caused by the conditions of and procedures relating to passenger travel upon the flights". The "conditions" and "procedures" referred to included what was said to be cramped seating from which it was not easy to move, the discouraging of movement about the cabin, and the offering of alcohol, tea and coffee during the flights. Against CASA, the appellant claimed damages for negligence. Against Qantas and BA ("the carriers"), the appellant claimed damages pursuant to the Carriers' Liability Act and Art 17 of Montreal No 4.

6 The claim against CASA may be put to one side. CASA was not a party to the proceedings in this Court. These proceedings concern only the claims the appellant makes against the carriers under the Carriers' Liability Act.

The issue

7 Does the appellant's claim against the carriers reveal an arguable cause of action? Or, if the allegations of fact made by the appellant were established, would the claim nonetheless fail[9]? In particular, is it arguable that the carriers not warning passengers of precautions they could take to minimise or eliminate the risk of DVT, or the conditions of the flights, or both the absence of warning and the flight conditions could constitute an "accident" within the meaning of Art 17 of Montreal No 4?

8 To explain why the issue is framed in this way, it is necessary to say something shortly about the procedures taken in the courts below and then to

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9 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

consider the relevant provisions of the Carriers' Liability Act and of Montreal No 4.

The proceedings below

9 After obtaining some further particulars of the appellant's claim, Qantas and BA each moved to obtain summary judgment alleging that the claims made against them were bound to fail. Those applications failed at first instance[10]. Each of the carriers appealed to the Court of Appeal of Victoria. That Court allowed the appeal[11] and, by majority (Ormiston and Chernov JJA, Ashley AJA dissenting), ordered that the appellant's pleading against the carriers be struck out and the action against them permanently stayed. The courts below treated the carriers' applications as if they were demurrers to the appellant's pleading. If the facts alleged were proved, would a cause of action be established? By special leave the appellant now appeals to this Court.

Article 17

10 Article 17 of Montreal No 4 provides that a 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". But that liability is subject to an important qualification. The carrier is liable "*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" (emphasis added).

11 The appellant contended that "accident" is to be given no narrow meaning. It was submitted that "accident" extends beyond acts occurring on board an aircraft (or in the course of operations of embarking or disembarking); it was said that it embraces at least some kinds of omissions. In particular, so the appellant contended, "accident" extends to omissions of warning (or the "failure" to warn) of the known dangers of, and precautions to be taken against, the occurrence of DVT, and extends to the flight conditions encountered, or to the combination of the "failure" to warn and the flight conditions. The appellant argued that it was, therefore, arguable that the facts alleged revealed a cause of action against the carriers.

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10 *Povey v Civil Aviation Safety Authority & Ors* [2002] VSC 580.

11 *Qantas Ltd v Povey* [2003] VSCA 227.

12 The appellant's pleading identified his cause of action as arising under both Art 17 and the Carriers' Liability Act. For the purposes of Australian law, however, the appellant's claim against the carriers must be understood as a claim founded only in the Carriers' Liability Act. Because the entry into the international agreement can create no rights in Australian domestic law without there being legislation giving effect to those rights, the source of the right which the appellant seeks to enforce must be found in the Carriers' Liability Act[12]. Nonetheless, it is convenient to articulate the central issue as one about the construction of Art 17 of Montreal No 4. To explain why the issue is framed by reference to Montreal No 4 it is necessary to recognise the ways in which the Carriers' Liability Act and the several conventions referred to in that Act intersect.

The Carriers' Liability Act

13 Part IIIC of the Carriers' Liability Act (ss 25J-25N) deals with carriage to which Montreal No 4 applies. Parts II, III and IIIA deal respectively with carriage to which the Warsaw Convention and the Hague Protocol applies, carriage to which the Warsaw Convention without the Hague Protocol applies, and carriage to which the Guadalajara Convention applies. Part IV of the Act (ss 26-41) deals with other carriage to which the Carriers' Liability Act applies, including carriage by Australian domestic carriers interstate, or between a place in a Territory and another place in that Territory, or a place in Australia.

14 As earlier noted, Pt IIIC (and s 25K in particular) provides that Montreal No 4 has the force of law in Australia in relation to any carriage by air to which the Convention applies. In addition, s 25L provides that certain provisions of Pt IV of the Act (ss 35-39) apply to carriage to which Montreal No 4 applies in the same way as they apply to carriage under Pt IV. For that purpose, a reference in s 37 to Pt IV is taken to be a reference to Pt IIIC and any other reference in ss 35 to 39 to Pt IV "is taken to be a reference to the Convention"[13]. By this means, s 36 of the Carriers' Liability Act (subject to certain presently irrelevant

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12 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-245; *Kioa v West* (1985) 159 CLR 550 at 570; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

13 s 25L.

qualifications found in s 37) applies to provide that the liability of a carrier under Pt IIIC in respect of personal injury suffered by a passenger (not being an injury that has resulted in the death of the passenger) "is in substitution for any civil liability of the carrier under any other law in respect of the injury". The application of ss 35 to 39 to carriage to which Montreal No 4 applies (like the equivalent provision found in Pt II in respect of carriage to which the Warsaw Convention, as modified by the Hague Protocol, applies[14]) treats the provision which gives the relevant international instrument the force of law in Australia[15] as creating the liability of a carrier in respect of death or personal injury and then qualifying the liability in the manner and to the extent specified in ss 35 to 39. In particular, the liability of a carrier in respect of personal injury, when the carriage is subject to Montreal No 4, is in substitution for any civil liability of the carrier *under any other law* in respect of the injury. For present purposes, none of the other provisions of ss 35 to 39 need be noticed.

15 A text of each of the conventions mentioned earlier is set out in the Schedules to the Carriers' Liability Act. Montreal No 4, the convention with which these proceedings are concerned, appears in Sched 5. Section 8 of the Carriers' Liability Act provides that the text of the conventions is taken to be as it is set out in the relevant Schedules. But if there is any inconsistency between the text of a convention as set out in the Schedule and the text that would result if the authentic French texts of the instruments making up the convention were read and interpreted together as one single instrument, it is the latter text that prevails[16]. No party to the present proceedings asserted that there was any such inconsistency.

16 Schedule 5 to the Carriers' Liability Act records that the text in the Schedule contains the operative provisions of the Warsaw Convention as modified by Ch 1 of the Hague Protocol and Ch 1 of the Montreal Protocol No 4, together with the remaining provisions of the Hague Protocol and the Montreal Protocol No 4. Chapter 1 of the resulting text of Montreal No 4, set out in Sched 5, deals with the scope of the Convention and contains certain definitions; Ch II deals with documents of carriage; Ch III regulates the liability of the carriers; Ch IV contains provisions relating to combined carriage (partly by air

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14 s 13.

15 Section 25K with respect to Montreal No 4, and s 11 with respect to the Warsaw Convention as modified by the Hague Protocol.

16 s 8(2).

and partly by another means of carriage); Ch V sets out general and final provisions.

17 It is convenient, at this point, to say something more about the provisions of Montreal No 4, while at the same time noticing some of the questions presented by those provisions.

Montreal No 4

18 In the argument of the present matter, attention was focused almost exclusively upon the provisions of Ch III (Arts 17-30A) of Montreal No 4. Some passing reference, however, was made to Art 1(3), which provides that carriage to be performed by several successive air carriers is deemed, for the purposes of the Convention, "to be one undivided carriage if it has been regarded by the parties as a single operation". Reference was made to this provision in aid of a contention that the appellant's carriage by Qantas and BA from Sydney to London and return (in the space of four days) was to be treated as one undivided carriage. If that contention is right, Art 30 of Montreal No 4 was engaged and (among other things) each carrier accepting the appellant was deemed to be one of the contracting parties to the contract of carriage "in so far as the contract deals with that part of the carriage which is performed under his supervision". In this appeal, however, it is not necessary to consider whether the contention about the operation of Art 1(3) is right.

19 Reference was made to a number of provisions of Ch III of Montreal No 4 as casting light upon the meaning to be given to the text of Art 17. In order to examine those arguments it is convenient to begin by noticing the general structure of Ch III.

20 The first three provisions of the Chapter impose liabilities on a carrier. Article 17 deals with a carrier's liability for death or wounding of or other bodily injury to a passenger; Art 18 concerns liability for destruction or loss of or damage to registered baggage; Art 19 provides for liability for damage occasioned by delay. As already noted, Art 17 requires that "the *accident*" which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Article 18 requires that "the *occurrence*" which caused the damage took place during the carriage by air.

21 The next three provisions limit the liabilities thus created. Article 20 provides that the carrier is not liable "if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures". Article 21 provides for cases where the carrier proves that the damage was caused by or contributed to by the

negligence of the person suffering the damage. Article 22 imposes a cap on the liabilities of the carrier at amounts which are fixed or calculable according to the relevant formula. In the carriage of persons the carrier and the passenger may "by special contract ... agree to a higher limit of liability"[17].

22 Article 23 provides (among other things) that "[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void". Article 24 appears intended to make the liabilities created, and the conditions and limitations of liability imposed, by Montreal No 4 exclusive of at least some other rights. It provides that in the carriage of passengers and baggage "any action for damages, however founded, can only be brought subject to the conditions and limits set out" in the Convention.

23 Of the remaining provisions of Ch III, detailed reference must be made to only one: Art 25. That Article provides for the circumstances in which the limits of liability specified in Art 22 shall not apply. It provides that those limits do not apply if it is proved that the damage resulted from "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". In addition, in the case of such an act or omission of a servant or agent, it must also be proved that the servant or agent was acting within the scope of employment. The appellant pointed to the references in Art 25 to damage resulting from "an act or omission of the carrier, his servants or agents" as demonstrating that the reference in Art 17 to "accident" was not to be understood as confined to events or happenings but as extending to omissions (in this case the omission of advice or warning about DVT).

Principles of construction

24 There was no dispute between the parties about the principles that govern construction of an international agreement like Montreal No 4. The guiding principles of treaty interpretation are found in the Vienna Convention on the Law of Treaties[18]. Article 31 provides that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty. Interpretative assistance may be

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17 Art 22(1).

18 [1974] ATS 2.

gained from extrinsic sources[19] in order to confirm the meaning resulting from the application of Art 31, or to determine the meaning when interpretation according to Art 31 leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable".

25 Importantly, international treaties should be interpreted uniformly by contracting states[20]. But, of course, the ultimate questions are, and must remain: what does the relevant treaty provide, and how is that international obligation carried into effect in Australian municipal law?

Some accepted bases of the parties' arguments

26 In arguing the present matter, the parties accepted certain propositions about the Warsaw Convention which they took to be established by the decisions of other courts. In particular, neither side submitted that the decisions of the Supreme Court of the United States in *Air France v Saks*[21], *El Al Israel Airlines Ltd v Tsui Yuan Tseng*[22] or *Olympic Airways v Husain*[23] or the decision of the House of Lords in *Sidhu v British Airways Plc*[24] (followed in *Tseng*) were wrong.

27 There is no occasion to consider whether, as was held in *Tseng* and in *Sidhu*, in cases where the relevant Convention provides no remedy, no other remedy is available either at common law or otherwise, or to consider whether that conclusion would present any constitutional question. Nor is there any occasion to consider whether any separate or different questions from those argued by the parties to this appeal would be presented by deliberate acts of

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19 Art 32.

20 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159 per Mason and Wilson JJ; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 at 186 [70] per McHugh J, 213 [137] per Kirby J; *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418 at 466-467 [153]-[154] per Kirby J.

21 470 US 392 (1985).

22 525 US 155 (1999).

23 540 US 644 (2004).

24 [1997] AC 430.

wrongdoing such as intentional assaults by other passengers[25] or attacks by others from outside the aircraft[26]. Rather, argument was confined to what "accident" means in Art 17.

28 The arguments advanced by the parties began from the premise that a passenger's injury is caused by an accident only if "caused by an unexpected or unusual event or happening that is external to the passenger"[27]. Each side recognised that this definition may require what the Supreme Court of the United States in *Saks*[28] called flexible application, but each side's argument began from the words that have been quoted. Where the arguments diverged was at the point of identifying what is meant by "an unexpected or unusual event or happening that is external to the passenger".

The competing contentions

29 The appellant's argument took three steps. First, it was said that no distinction should be drawn between acts and omissions or between "events" or "happenings" on the one hand and "non-events" or "inaction" on the other. Secondly, it was said that what was "unexpected or unusual" was to be judged from the perspective of a reasonable airline passenger, not according to what may be the particular airline's policies and procedures, or what may be general industry practice. Thirdly, it was said that an "accident" might occur during the whole of a flight. Thus, so the argument proceeded, the conjunction of positive and negative conditions for the duration of a flight, where the reasonable passenger would expect an airline, knowing of a life-threatening risk, to warn passengers of that risk or the measures to avoid it, was an "accident" which took place on board the aircraft.

30 The carriers emphasised the need to identify an "accident" as one that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking". They submitted that the appellant's analysis was conducted at too high a level of abstraction which obscured the need to identify a "happening" or "event" which could be located as taking place on board or in the course of the operations identified. So, the carriers' argument proceeded,

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25 *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628.

26 cf *Air France v Saks* 470 US 392 at 405 (1985).

27 *Saks* 470 US 392 at 405 (1985).

28 470 US 392 at 405 (1985).

although it was neither necessary nor relevant to ask whether the *cause* of the accident was an act or omission or some combination of acts and omissions, there must have been some unintended and unexpected occurrence which produced the hurt or loss by which damage was sustained[29].

31 In this case, the carriers submitted, there was no occurrence. What was alleged to be a "failure to warn" was not an occurrence – it was something that did not happen. And, as the carriers submitted, what were alleged to be the relevant "flight conditions" were not unintended or unexpected – they were the conditions which the appellant's pleading alleged to be "the standard conditions of and procedures relating to passenger travel" on the relevant flights.

An "accident"?

32 As was pointed out in *Saks*[30], the Warsaw Convention was drafted in French by continental jurists. And as an international treaty, it would be wrong to read Montreal No 4 as if it reflected some particular cause of action or body of learning that is derived from, say, the common law[31]. It was said in *Saks*[32] that "the French legal meaning of the term 'accident' differs little from the meaning of the term in Great Britain, Germany, or the United States". Both in French, and in Anglo-American legal discourse (and, we would add, so too in Australian legal discourse) "accident" may be used to refer to the *event* of a person's injury or to the *cause* of injury. By contrast, "accidental" is usually used to describe the cause of an injury rather than the event and is often used as an antonym to "intentional".

33 In Art 17, "accident" is used to refer to the event rather than the cause of injury[33]. And that event is one which Art 17 requires to be located at a place ("on board the aircraft") or otherwise to be fixed by reference to circumstances of time and place ("in the course of any of the operations of embarking or disembarking").

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29 cf *Fenton v J Thorley & Co Ltd* [1903] AC 443 at 453 per Lord Lindley.

30 470 US 392 at 399 (1985).

31 *Great China Metal* (1998) 196 CLR 161 at 171-172 [22] per Gaudron, Gummow and Hayne JJ.

32 470 US 392 at 399 (1985).

33 *Saks* 470 US 392 at 400 (1985).

34 Further, in understanding what is meant by "accident", it is necessary to give proper weight to the way in which Art 17 relates three different concepts. Article 17 refers to "damage", to "the death or wounding of a passenger or any other bodily injury suffered by a passenger", and to "the accident which caused the damage so sustained". The *damage* sustained is treated as being distinct from the *accident* which caused the damage, and both the accident and the damage are treated as distinct from the death, wounding or other personal injury. What that reveals is that the "accident", in the sense of "an unfortunate event, a disaster, a mishap"[34] is not to be read as being sufficiently described as an adverse physiological consequence which the passenger has suffered. It may be accepted that its happening was not intended. In that sense, what is alleged to have happened may be described as "accidental". But suffering DVT is not an accident. Rather, as the parties to this appeal accepted, "accident" is a reference to something external to the passenger.

35 It may also be accepted that an "accident" may happen because of some act or series of acts, or because of some omission or series of omissions; it may happen because of some combination of acts and omissions. If that were not already clear, the reference in Art 25 to damage resulting from "an act or omission of the carrier, his servants or agents" would point in that direction. It by no means follows, however, that asking whether an event was brought about by an act or omission and then classifying the act or omission as "accidental" as distinct from "intentional" is the same as asking whether there has been an "accident" on board an aircraft. In particular, recognising the difficulties in seeking to classify *causes* of an accident as acts or omissions, or as intended or unintended acts or omissions, does not deny the need, under Art 17, to identify that an accident has occurred on board or in the course of the operations of embarking or disembarking. No other provision of Montreal No 4 suggests any contrary construction of Art 17.

36 No doubt as *Saks* indicates[35], the concept of "accident" is not to be overrefined. It is a concept which invites two questions: first, what happened on board (or during embarking or disembarking) that caused the injury of which complaint is made, and secondly, was what happened unusual or unexpected? And as already pointed out, showing only that while on board or in the course of

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34 *The Oxford English Dictionary*, 2nd ed (1989), vol 1 at 74, "accident" meaning I, 1c.

35 470 US 392 at 405 (1985).

embarking or disembarking a passenger sustained some adverse physiological change does not identify the occurrence of an accident.

37 As the facts in *Husain* demonstrate, the course of events surrounding death or injury to an airline passenger may present difficulties in determining whether there has been an accident. *Husain* concerned the death of a passenger on board an aircraft as a result of exposure to cigarette smoke. A flight attendant had refused requests to move the passenger to a seat further away from those who were smoking on board. The difficulties in determining whether that course of events constituted an accident is sufficiently identified by reference to the competing contentions of the petitioner and the respondents in the Supreme Court of the United States and the contention made by the United States as amicus curiae supporting the respondents (the relatives and legal personal representatives of the deceased passenger). The respondents described[36] the question presented in the proceedings in the Supreme Court as being

> "[w]hether the repeated insistence by an airline flight attendant that an asthmatic passenger remain in an assigned seat amidst life-threatening smoke – in direct violation of standard industry practice and the policy of her own airline – is an 'unusual' occurrence and thus, under the principles established in [*Saks*], constitutes an 'accident' for purposes of Article 17 of the Warsaw Convention".

The United States, as amicus curiae, described[37] the question as being "[w]hether an airline's unreasonable refusal to assist a passenger who becomes ill during an international flight, in violation of industry standards and the airline's own policies, constitutes an 'accident' within the meaning of Article 17 of the Warsaw Convention".

38 By contrast, Olympic Airways, the petitioner in the United States Supreme Court described[38] the question as being

> "[w]hether the court below improperly held that the 'accident' condition precedent to air carrier liability for a passenger's death under Article 17 of the Warsaw Convention can be satisfied when a passenger's pre-existing

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36 *Olympic Airways v Husain*, 02-1348, Brief for Respondents at i.

37 *Olympic Airways v Husain*, Brief for the United States as Amicus Curiae supporting Respondents at I.

38 *Olympic Airways v Husain*, Brief of Petitioner, Olympic Airways at i.

medical condition is aggravated by exposure to a normal condition in the aircraft cabin, even if the air carrier's negligent omission may have been in the chain of causation?"

39 These different formulations of the question that arose in *Husain* reveal at least two things. First, unsurprisingly, each sought to emphasise particular aspects of the circumstances surrounding the passenger's death. Secondly, each sought to identify whether something unusual or unexpected had happened on board the aircraft. The United States, as amicus, emphasised the response, or lack of response, to a medical emergency. The respondents emphasised the flight attendant's refusal to move the passenger. The airline sought to say, in effect, that nothing had happened on board that was unusual or unexpected; even if the flight attendant did not react as she should have reacted, there was no accident.

40 As already pointed out, neither side in the present appeal sought to challenge the correctness of what was decided in *Husain*. Moreover, questions of the kind considered in *Husain* do not arise in this case because it is central to the appellant's case that nothing happened on board the aircraft which was in any respect out of the ordinary or unusual. Further, what he alleges to be the relevant flight conditions were not said to be unusual or unexpected in any respect. (Indeed, as against CASA, he alleges in his statement of claim that the conditions were "the standard conditions of and procedures relating to passenger travel" on such flights.) And only by the mechanism of describing the absence of warning as a "failure to warn" did the appellant seek to suggest that the absence of warning was in any respect unusual or unexpected on the flights concerned.

41 References to "failure" to warn in this context are irrelevant and unhelpful. They are irrelevant because they must proceed from unstated premises about the content or origin of some duty to warn. There is no basis for introducing, for example, concepts of the common law of negligence to the construction or application of an international treaty like Montreal No 4. And unless there is resort to some standard of legal behaviour to determine whether what happened was a "failure", the description of what happened as a failure is, in truth, no more than an assertion that there was no warning.

42 The references to failure are unhelpful because they suggest that the only point at which some relevant warning could or should have been given is on board the aircraft. But if some warning was necessary or appropriate, it is not apparent why it should not have been given at a much earlier point of making arrangements to travel by air, rather than on board the aircraft. Further, reference to failure is unhelpful because it diverts attention from what it is that happened on board to what *might* have, *could* have, or perhaps *should* have happened there and why that should be so. If, as earlier indicated, it is appropriate to ask "what

happened on board?" the answer in this case is that the appellant alleges that nothing unexpected or unusual happened there.

43 The allegations which the appellant makes, if proved, would not establish a cause of action against the carriers.

44 That conclusion is consistent with the decisions reached in intermediate courts of appeal in the United States and in England about the application of the Warsaw Convention and subsequent treaties to cases of DVT. In *In re Deep Vein Thrombosis Litigation*[39], the Court of Appeal of England and Wales held that the word "accident" in the Warsaw Convention as modified by the Hague Protocol was to be given a natural and sensible, but flexible and purposive meaning in its context[40] and that for there to be an accident within the meaning of the relevant article, there had to be an event external to the passenger which impacted on the body in a manner which caused death or bodily injury and the event had to be unusual, unexpected or untoward[41]. The Court held[42] that inaction was a non-event which could not properly be described as an accident. Not warning of the risk of DVT and not giving advice on the precautions that would minimise that risk were not events[43]. The conditions in which passengers travelled on flights (with cramped seating and the like) were not capable of amounting to an event that satisfied the first limb of the definition of an accident which "took place on board the aircraft or in the course of any of the operations of embarking or disembarking"[44].

45 In the United States, the Court of Appeals for the 5th Circuit[45] and the Court of Appeals for the 9th Circuit[46] have also held that development of DVT

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39 [2004] QB 234.

40 [2004] QB 234 at 244 [9], 245 [15], 246 [20].

41 [2004] QB 234 at 246-249 [19]-[38].

42 [2004] QB 234 at 248 [29].

43 [2004] QB 234 at 248 [29].

44 [2004] QB 234 at 248 [28].

45 *Blansett v Continental Airlines Inc* 379 F 3d 177 (2004).

46 *Rodriguez v Ansett Australia Ltd* 383 F 3d 914 (2004).

was not, in the circumstances alleged in those cases, an accident within the meaning of the Warsaw Convention. Although the appellant sought to gain some comfort from a statement made in the opinion in *Rodriguez*[47] to the effect that that Court did not need to decide whether an airline's failure to warn of DVT can constitute an accident, that aspect of the Court's opinion is no more than a reflection of the narrowness of the issue tendered for its decision. It is not, as the appellant's argument tended to suggest, to be translated into any positive proposition of law.

46 For these reasons, the appeal to this Court should be dismissed with costs.

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47 383 F 3d 914 at 919 (2004).

47 McHUGH J. The principal question in this appeal is whether there can be an "accident" for the purpose of Art 17 of the Warsaw Convention if a passenger on an aircraft suffers Deep Vein Thrombosis ("DVT") by reason of any of the following matters:

- the flight conditions;
- the failure of the air carrier to warn the passenger of the risk of DVT;
- the failure to advise the passenger of precautions that he should take to minimise the risk of DVT;
- the discouraging of the passenger from moving about the aircraft;
- the encouraging of the passenger to remain in his seat during the flight; or
- the supply of alcohol and caffeine beverages during the flight.

48 In my opinion, there can be an "accident" for the purpose of Art 17 when the employees of an air carrier engage in conduct that causes an injury that is not intended or reasonably foreseeable. As a result, it would be open to a tribunal of fact to find that a passenger's injury is caused by an "accident" when it is the result of the employees of a carrier:

- discouraging the passenger from moving about the aircraft;
- encouraging the passenger to remain seated during the flight; or
- supplying alcoholic or caffeine beverages to the passenger.

Statement of the Case

49 The appellant, Brian William Povey, sued the respondents, Qantas Airways Ltd ("Qantas") and British Airways Plc ("British Airways"), and the Civil Aviation Safety Authority ("CASA") in the Supreme Court of Victoria for damages for personal injury. In his Statement of Claim, he alleged he sustained the injury (DVT) as a result of travelling on the respondents' airlines from Sydney to London and return.

50 Acting under s 23.01 of the Supreme Court (General Civil Procedure) Rules (Vic) ("the Rules"), Qantas and British Airways, but not CASA, applied to the Court for summary judgment or an order staying the proceedings. Acting under s 23.02 of the Rules, they also sought an order striking out Mr Povey's Statement of Claim on the ground that the claims were bound to fail. Bongiorno J dismissed the applications. Qantas and British Airways appealed to the Court of Appeal of Victoria against the orders dismissing their applications. A majority of that Court (Ormiston and Chernov JJA, Ashley AJA dissenting)

allowed the appeal and ordered that the Statement of Claim be struck out and the action against Qantas and British Airways be permanently stayed.

51 This Court gave Mr Povey special leave to appeal against those orders, as a result of which he brings this appeal.

The material facts

52 Travelling in economy class on a Qantas carrier, Mr Povey flew from Sydney to London via Bangkok on 15-16 February 2000. He returned to Sydney via Kuala Lumpur on a British Airways flight on 18-20 February 2000. In his Statement of Claim, he claims that, as a result of the flights, he suffered DVT. The thrombosis caused a stroke, pulmonary and paradoxical embolisms, chronic chest, lung and leg pain, breathing difficulties, impaired mobility, thrombosis of the right leg and shock, anxiety and depression. Paragraph 6 of his Statement of Claim asserts that the DVT was caused "by the conditions of and procedures relating to passenger travel upon the flights", which included:

> "(a) a confined and restricted physical environment in which the [appellant] was immobilised for long periods of time in a seated position;
>
> (b) impediments to [him] getting out of his seat during the flights;
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> (c) the offer and supply of alcoholic beverages, tea and coffee to the [appellant] during the flights;
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> (d) discouraging [him] from moving around the cabin of the aircraft and encouraging [him] to remain seated during the flights;
>
> (e) [the appellant] not being provided with any information or warning about the risk of DVT or information about the measures which [he] could take to reduce such risk."

53 For the purpose of this appeal, these facts have to be accepted as proved.

The law

54 In his Statement of Claim, Mr Povey claims that Qantas and British Airways are liable to pay him compensation in accordance with Art 17 of the Warsaw Convention as Amended by the Hague Protocol of 1955. That Convention has the force of law in Australia by virtue of s 11(1) of the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Act"). The appeals to the Court of Appeal and this Court, however, were conducted by reference to the Convention as Amended by the Hague Protocol of 1955 and the Montreal Protocol No 4 of 1975, which has the force of law in Australia by virtue of s 25K of the Act.

55 Hence, it is to the terms of the Warsaw Convention as amended by these two Protocols that one must look to determine the civil liability of Qantas and British Airways for Mr Povey's personal injury. That is because s 36 of the Act substitutes a carrier's "civil liability ... under any other law in respect of" a passenger's personal injury with liability under the Convention. Section 36 is operative in this case, by virtue of s 25L, because the carriage of Mr Povey on these flights was governed by the Montreal Protocol No 4. And the Convention is applicable to this dispute in accordance with Art 1 of the Convention because the flights involved the "international carriage of persons, baggage or cargo performed by aircraft for reward."

56 Article 17 of the Convention states:

> "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."

57 Article 22 of the Convention limits the carrier's liability to 250,000 francs. But, in accordance with Art 25, that limit does not apply where "the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result".

58 The critical question in the appeal is whether anything took place on board the aircraft that is capable of being described as "the accident which caused the damage". If there is, Mr Povey's Statement of Claim cannot be struck out and the case must go to trial.

The source of Mr Povey's claim

59 Mr Povey's Statement of Claim asserts that his cause of action arose under the Act and Art 17. But it is the Act, not Art 17, which gives him a cause of action, if he has one. Australia's entry into an international agreement does not itself create rights or liabilities or impose duties enforceable under the domestic law of this country[48]. Legislation that gives effect to an international agreement is required before the contents of the agreement have any significance in Australian law. It is Pt IIIC of the Act, and as I have indicated, s 25K in

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48 *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287.

particular, that gives the Montreal Protocol No 4 the force of law in Australia. Nevertheless, the liability of Qantas and British Airways in this case is measured by the terms of Art 17.

60 Article 17 must be construed in the context of an international agreement that constitutes a Code governing the liability of air carriers from many countries. So, although this Court is concerned with rights and liabilities created by an Australian statute, Australian courts should not take an insular approach to the construction of Art 17. Nor should it be interpreted by reference to presumptions and technical rules of interpretation applied in construing domestic statutes or contracts. Instead, an Australian court should apply the rules of interpretation of international treaties that the Vienna Convention on the Law of Treaties[49] has codified[50]. Article 31 of that Treaty declares that a treaty must be interpreted in good faith, in accordance with the ordinary meaning of its terms and their context and in the light of the treaty's object and purpose. Article 32 declares that resort may be had to extrinsic sources to confirm the meaning in certain circumstances. Those sources may be consulted to confirm the meaning that results from applying Art 31. They may also be used to ascertain the meaning where the application of Art 31 results in a meaning that is manifestly absurd, unreasonable, ambiguous or obscure. As I pointed out in *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp, Berhad*[51]:

> "[The] extrinsic sources include the travaux préparatoires and the circumstances of the conclusion and history of the negotiation of the treaty. Primacy must be given, however, to the natural meaning of the words in their context ..."

Article 17: "the accident which caused the damage"

61 In its legal context, the ordinary meaning of an "accident" is an event, happening or occurrence that is unusual, fortuitous, unexpected or unforeseen. Usually, the event or happening causes damage to persons or property or has an effect on a person or on matter, tangible or intangible. In *Fenton v Thorley & Co Ltd*, Lord Lindley said[52]:

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49 *Australian Treaty Series*, (1974) No 2.

50 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp, Berhad* (1998) 196 CLR 161.

51 (1998) 196 CLR 161 at 186 [70].

52 [1903] AC 443 at 453.

> "[A]n accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to denote both the cause and the effect, no attempt being made to discriminate between them."

62 In *Air France v Saks*[53], in an unanimous Opinion, the United States Supreme Court held that this definition of "accident" is a guide to the term "accident" in Art 17. This Court applied Lord Lindley's definition in *Australian Casualty Co Ltd v Federico*[54] in interpreting an insurance policy that contained the definition "bodily injury ... caused by an accident".

63 In Art 17, "accident" does not refer to the hurt or loss suffered. It refers to the cause of the hurt or loss. In Art 17, the term is used to refer to *that* "which caused the damage". The damage must be "sustained *in the event of* the death or wounding of a passenger or any other bodily injury" (emphasis added). Logic dictates, then, that the "accident" must be the cause of "the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger", in which damage was sustained. But although Art 17 makes the causal element of an "accident" the decisive element, there can be no "accident" unless the causal element has an effect. Indeed, causation itself implies an effect. Moreover, the notion of an "accident" that has no consequence or effect is incomprehensible. Consequently, although the definition in Art 17 operates by reference to the act or event that causes the harm – and not the harm itself – the nature and extent of the harm caused are significant factors in determining whether the act or event that caused it has the quality of an "accident".

64 This emphasis on the causal element of an "accident" in Art 17 is consistent with international authority interpreting the term. In *Saks*[55], the United States Supreme Court held that a significant feature of "both the French and the English texts" of the Warsaw Convention is that "the text of Article 17 refers to an accident *which caused* the passenger's injury, and not to an accident which *is* the passenger's injury."[56] To support this interpretation, the Supreme Court cited the comments of the President of the Drafting Committee of the Warsaw Convention in explaining the different wording of the otherwise similar Arts 17

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53 470 US 392 at 398-399 (1985).

54 (1986) 160 CLR 513.

55 470 US 392 (1985).

56 470 US 392 at 398 (1985) (emphasis in original). This interpretation was followed in *Olympic Airways v Husain* 540 US 644 (2004).

and 18 (which concerns damage to baggage). The President said that as "there are entirely different liability cases ... we have deemed that it would be better to begin by setting out *the causes* of liability for persons, then for goods and baggage, and finally liability in the case of delay."[57] Further, in *In re Deep Vein Thrombosis Litigation*[58], the Court of Appeal for England and Wales followed *Saks* and held that "one would normally expect the untoward event *to cause* the death or injury directly."[59]

Categories of causes of "accidents"

65 Common law cases group a wide array of untoward events and happenings under the umbrella concept of "accident". And the experience of those cases throws light on the meaning of the term "accident" in Art 17. The concept of "accident" may be categorised in terms of events involving human actions and in terms of happenings that do not involve human action, eg mechanical or technological operations and "acts of nature". The difference between the categories lies in the divergent reasons that result in happenings being classified as non-deliberate.

66 In the non-deliberate categories are those happenings that are unexpected, unusual or not designed. An example of this category is the factual situation in *Saks*, which concerned the mechanical operation of the jetliner's pressurisation system. The US Supreme Court defined an "accident" for the purpose of Art 17 as "an unexpected or unusual event or happening that is external to the passenger."[60] It held that no "accident" had occurred on Ms Saks' flight, because "the aircraft's pressurization system had operated in the usual manner."[61] Because her injury was not caused by a happening that was unexpected or unusual, there was no "accident".

67 In *Olympic Airways v Husain*[62], the US Supreme Court affirmed the interpretation that it had given to Art 17 in *Saks*. In *Husain*, the US Supreme

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57 Second International Conference on Private Aeronautical Law, 4-12 October, 1929, Warsaw, comments of Mr Giannini, President of the Committee, at 205 (emphasis added), cited 470 US 392 at 402-403 (1985).

58 [2004] QB 234.

59 [2004] QB 234 at 246 [21] per Lord Phillips of Worth Matravers MR (emphasis added).

60 470 US 392 at 405 (1985).

61 470 US 392 at 395 (1985).

62 540 US 644 (2004).

Court noted that "[t]he term 'accident' has at least two plausible yet distinct definitions", being "a happening that is not ... intended" and "an unusual, fortuitous, unexpected, unforeseen, or unlooked for event, happening or occurrence". But the Court concluded that *Saks* authoritatively "discerned the meaning of 'accident' under Article 17 of the Convention as an 'unexpected or unusual event or happening that is external to the passenger'."[63]

68 With great respect to the US Supreme Court, however, the *Saks* definition of "accident" does not exhaustively define the scope of Art 17. At all events, it does not exhaustively define it without explanation. In *Saks*, it would have made no sense for the Court to describe the operation of the pressurisation system as "a happening that is not ... intended". The system operated independently of any actor who could have formed an intention to do an act that had consequences that were not intended or expected. For this reason, the Court relied on authorities that defined "accident" in terms of "an occurrence associated with the operation of an aircraft".[64]

69 But it would be contrary to one of the objects of the Convention to hold that Art 17 must be given only one of two available meanings that the Supreme Court has acknowledged. One of the objects of the Convention is to provide compensation for injured passengers without the need to prove fault on the part of the air carrier. The price that is paid for this benefit is a limitation on the amount of compensation payable and the imposition of a condition that "the accident which caused the damage ... took place on board the aircraft or in the course of any of the operations of embarking or disembarking." The Convention's object of compensating passengers without proof of fault, however, would be undermined by a refusal to give the term "accident" one of the ordinary meanings of which it is capable.

70 The wording of Art 17 makes clear that the "accident" is associated with something that "took place on board the aircraft". This may include, for example, the actions of flight attendants. Those actions fall under the first category of events that are "accidents", that is to say, intended or voluntary acts that have unintended, unexpected or reasonably unforeseeable consequences.

71 The criminal law of Australia is familiar with the notion of an "accident" occurring when a voluntary or intended act has unintended, unexpected or

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63 540 US 644 at 651 n 6 (2004).

64 *DeMarines v KLM Royal Dutch Airlines* 724 F 2d 1383 at 1385 (1984), cited 470 US 392 at 396 (1985).

reasonably unforeseeable consequences[65]. Thus, for the purpose of the *Criminal Code (Q)*, voluntary or intended acts of a person that cause harm to another may constitute an "accident" where the harm was not intended or reasonably foreseeable. In *Kaporonovski v The Queen*, Gibbs J said[66] that "[i]t must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person". Consequently, this category of "accident" covers cases of intentional conduct that has consequences that were not intended or reasonably foreseeable, for example, a punch to the victim's neck that caused a subarachnoid haemorrhage because of the victim's predisposition to such a haemorrhage[67]. In *R v Van Den Bemd*[68], a majority of this Court refused the Crown special leave to appeal against a decision that held that a death occurred "by accident" when the "death was such an unlikely consequence of [the accused's] act an ordinary person could not reasonably have foreseen it."

72 A flight attendant's act of running a food trolley over the foot of a sleeping passenger fits easily within this meaning of "accident" even though the happening is not unusual. It may be an "accident" – depending on the foreseeability issue – because the flight attendant's voluntary or intentional act of wheeling the trolley was not intended to run over the passenger's foot. Similarly, an "accident" occurs when a flight attendant directs a passenger to sit in a seat that collapses. It would be an artificial and narrow view of Art 17 to hold that in such a case it was the collapse of the seat that was the "accident". The direction is as much a part of the "accident" as the collapse of the seat. If the attendant was charged with the offence of doing an act that caused bodily harm to the passenger, no one would doubt that the defence of "accident" would be available to the flight attendant.

73 The US Supreme Court recognises that the direction or conduct of a flight attendant that results in injury can constitute an "accident" at all events if the direction or conduct does not accord with industry standards. In *Olympic Airways*[69] – decided after *Saks* – the Court held that an "accident" had occurred for the purpose of Art 17 when the death of a passenger resulted from a flight

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65 See *Kaporonovski v The Queen* (1973) 133 CLR 209; *R v Van Den Bemd* (1994) 179 CLR 137, appeal from [1995] 1 Qd R 401.

66 (1973) 133 CLR 209 at 231.

67 *R v Van Den Bemd* (1994) 179 CLR 137.

68 (1994) 179 CLR 137 at 141 quoting from Court of Appeal.

69 540 US 644 (2004).

attendant's refusal to move an asthmatic passenger from a seat near a smoking section. The Court rejected Olympic's argument that the injury-producing event was the ambient cigarette smoke which was "normal" at the relevant time. The Court said that Olympic's "'injury producing event' inquiry – which looks to 'the precise factual "event" that caused the injury' – neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury."[70] The Supreme Court also held that the intentional conduct of a flight attendant could constitute an "accident" for the purpose of Art 17.

74 Properly understood, I doubt that the Supreme Court of the United States in *Saks* intended to exclude from the concept of "accident" in Art 17 cases where the injury is the unintended and unforeseeable consequence of the voluntary or intended act of a person other than the plaintiff. It is true that the Court[71] "conclude[d] that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger." It is also true that in *Olympic Airways*[72] the Supreme Court applied the *Saks* definition and found the departure from industry standards and company policy as the "unusual event". But in *Saks* the Court immediately went on to say[73] that its "definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." The Court gave examples of this flexible application of its definition. They included "torts committed by terrorists or fellow passengers."[74]

75 If the Supreme Court's definition of "accident" does exclude cases where the voluntary act of a person other than the plaintiff causes harm to the plaintiff that was not intended nor reasonably foreseeable, the definition went beyond what the Court had to decide. As the Supreme Court noted in *Saks*[75], the issue before it was "whether a loss of hearing proximately caused by normal operation of the aircraft's pressurization system is an 'accident' within the meaning of Article 17". In determining that issue, the Court had to consider the meaning of "accident" but it could not make a binding declaration that gave that term a meaning beyond what was necessary to decide that case. On one view *Saks* decides no more than that, for the purpose of Art 17, no "accident" occurs when

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70 540 US 644 at 653 (2004).

71 470 US 392 at 405 (1985).

72 540 US 644 (2004).

73 470 US 392 at 405 (1985).

74 470 US 392 at 405 (1985).

75 470 US 392 at 395 (1985).

the injury sustained is the result of the "normal operation" of the aircraft. Another and narrower view is that it decides that no "accident" occurs for the purpose of the Article "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft"[76]. Another and wider view is that it decided that it is the cause not the injury that is the accident. No doubt other formulations of the rule for which *Saks* stands can be made. But whatever they may be, they can authoritatively bind only where the alleged "accident" is the result of the normal operation of the aircraft. Of the material facts involved in *Saks*, the normal operation of the aircraft was the decisive fact, and statements in *Saks* must be read with that in mind.

76 Cases are only authority for what they decide. When a court makes a statement that goes beyond the issue it had to decide, the extended statement is *dictum* and binding on no-one. Later courts commonly treat the material facts of a case as standing for a narrower or broader *ratio decidendi* than that expounded by the court that decided the case. As I pointed out in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[77]:

> "If later courts take the view that the rule of a case was different from its stated ratio decidendi, they may dismiss the stated ratio as a mere dictum or qualify it to accord with the rule of the case as now perceived."

77 No one should doubt the importance of the domestic courts of parties to an International Convention achieving uniformity in interpreting and applying the Convention's provisions. But this does not mean that a domestic court of a contracting party must mechanically apply statements made by a court of another contracting party when the precise issue before that court was significantly different from that which confronts the domestic court. To require the courts of other contracting parties to do so would mean that the first curial statement on the subject would be controlling.

78 Where, as here, the statement of the court of another contracting party was made in circumstances vastly different from those that confront this Court, we should not automatically apply it. Of course, the reasoning and the decision of the foreign court must be closely examined and respected. Where the statement is made by a court of the stature of the US Supreme Court, it is especially important that the courts of another contracting party refuse to apply the Supreme Court's interpretation of Convention provisions only after the most careful consideration. Ordinarily, a court of another forum should only refuse to apply it

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76 470 US 392 at 406 (1985).

77 (2004) 216 CLR 515 at 543 [61].

when it is convinced that it is wrong or goes beyond what was necessary for decision or where it is necessary to do justice to a party before the forum court.

79 In my opinion, the *Saks* definition, if read literally and as intended to be exhaustive, is too widely stated. It excludes cases where the causative conduct of a human actor has unintended and reasonably unforeseeable consequences and which, in ordinary speech, would constitute an "accident". Holding that such conduct can be an "accident" is not inconsistent with Art 17's insistence that the "accident" be the cause of the injury or damage. Indeed, the Supreme Court's decision in *Olympic Airways* can only be understood on this basis. With great respect to the Supreme Court in *Saks*[78], it went too far in insisting that the harm-causing occurrence must always be "caused by an unexpected or unusual event or happening that is external to the passenger." That statement can be readily accepted when the issue concerns happenings that do not involve human action, eg mechanical or technological operations and "acts of nature". But it would place an undue restriction on the scope of Art 17 to hold that it applies to events involving human actions.

80 It follows that, if Mr Povey's Statement of Claim pleads that "an unexpected or unusual event" caused his damage or that a voluntary or intended act caused an unintended and reasonably unforeseeable injury, the Statement of Claim cannot be struck out.

6(a) and (b): The state of the cabin

81 The flight conditions, as pleaded in particulars (a) and (b) of par 6 of the Statement of Claim, do not fall under either category of "accident". The physical environment was not "confined and restricted", and Mr Povey was not impeded from "getting out of his seat during the flights", by virtue of any act or because of any event or happening.

6(c) and (d): Acts done by the flight attendants

82 Both particulars (c) and (d) enumerate acts that were done by the employees of Qantas and British Airways that "took place on board the aircraft". Both particulars may be considered "accidents" if it can be proved that:

- the flight attendants offered Mr Povey "alcoholic beverages, tea and coffee" during the flights and discouraged him "from moving around the cabin of the aircraft"; and

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78 470 US 392 at 405 (1985).

- the acts were not done with the intent or the foresight that Mr Povey's consumption of the beverages or limited movement would cause the onset of DVT.

83 Upon the assumption that those propositions can be proved, particulars (c) and (d) state facts that are capable of constituting an "accident" for the purpose of Art 17. They allege matter that can prove Mr Povey's cause of action. Consequently, they cannot be struck out.

6(e) Failure to warn: Omissions as "accidents"

84 Particular (e) of par 6 pleads an omission. It asserts that the "accident" was Mr Povey "not being provided with any information or warning about the risk of DVT or information about the measures which [he] could take to reduce such risk."

85 A bare omission, ie, an absence of action, does not fit under the umbrella of "accident". The causal element of an "accident" generally requires a happening or occurrence. In my opinion, the Supreme Court was largely correct in *Saks* in recognising that in the context of Art 17 the concept of "accident" requires an external causative event. In some circumstances, however, an omission may constitute an event or occurrence for the purpose of Art 17, as when there is a failure to carry out a duty, practice or expectation. In *Olympic Airways*, the Supreme Court held that the refusal to shift the passenger contrary to industry practice and company policy was an "accident". An omission may also constitute an "accident" when it is part of or associated with an action or statement. Thus, omitting to keep a proper lookout in the course of pushing a food trolley or refusing to do something as in *Olympic Airways* may be an element in an "accident". But a bare omission to do something cannot constitute an "accident". If the omission is unintended in the sense that it is not contemplated, it is not a voluntary act that has unintended and reasonably unforeseeable consequences. If the omission is deliberate in the sense of considering an action and rejecting it, no external event or happening occurs. Furthermore, a bare omission is not something that is unexpected or unusual. A bare omission does not fall into either of the categories of "accident" to which I have referred.

86 Accordingly, the failure of Qantas and British Airways to take steps that would have prevented the injury, as pleaded in particular (e) of par 6 of the Statement of Claim, is not an "accident" within the meaning of Art 17.

Order

87 The appeal should be allowed in respect of particulars (c) and (d) of par 6 of the Statement of Claim but otherwise dismissed. The order of the Court of Appeal of Victoria should be set aside. In its place should be substituted an order

that the appeal to that Court be allowed in respect of particulars (a), (b) and (e) of par 6 of the Statement of Claim but otherwise the appeal to that Court be dismissed. Because Mr Povey has succeeded on the point of principle involved in the case, Qantas and British Airways should pay the costs in this Court and in the Court of Appeal despite Mr Povey being unsuccessful in respect of three particulars of his claim.

88 KIRBY J. Since ancient times, human beings have known of the dangers of flight. The mythologies of Greece, Crete, Persia and other lands include stories of injurious attempts by men and women to soar into the firmament[79]. In his *Metamorphoses*[80], Ovid describes the winged flight of Daedalus and Icarus, brought to an end by the youth's reckless attempt to soar too high. The appellant in this case likewise complains of an injury caused by his air travel. However, whereas Icarus had only his father Daedalus to assist him in his peril, the appellant has the Warsaw Convention[81]. To that Convention he has appealed. But as I shall explain, it is of no greater avail.

The Warsaw Convention and the international rule of law

89 In *SS Pharmaceutical Co Ltd v Qantas Airways Ltd*[82], in relation to a predecessor to the Warsaw Convention applicable in this appeal[83], I observed that "it is essential that … perfectly natural reactions to the predicament of … the passenger or family in the case of death or injury … should be subjected to the dispassionate application of the international instrument, properly construed". If the result of such a construction is deemed unsatisfactory, "it will be an argument for improved international arrangements, enhanced domestic legislation or for securing the protection of private insurance". It does not justify a court of law "adopting a construction … which is different from that intended by, and expressed in, the article".

90 Because of the "disgraceful shambles" of the Warsaw Convention and its later modifications[84], and the conflicting interests, national and economic, that

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79 The Psalmist alludes to flight in Ps 91:12: see *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 268 [4].

80 Ovid, *Metamorphoses*, Book VIII, ll 183-235; see Melville (tr), *Ovid: Metamorphoses*, (1998) at 176-178.

81 Convention for the Unification of Certain Rules Relating to International Carriage by Air, [1963] *Australian Treaty Series* No 18, opened for signature at Warsaw on 12 October 1929, as amended at the Hague, 1955, and by Protocol No 4 of Montreal, 1975 (together referred to in these reasons as "the Warsaw Convention").

82 [1991] 1 Lloyd's Rep 288 at 295 (NSWCA).

83 See *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("Carriers' Liability Act"), s 5, definition of "the Warsaw Convention as amended at the Hague".

84 [1991] 1 Lloyd's Rep 288 at 296. See Lowenfeld and Mendelsohn, "The United States and the Warsaw Convention", (1967) 80 *Harvard Law Review* 497 ("Lowenfeld and Mendelsohn").

have contributed to the present texts, those who have the obligation of construing such provisions "should not be unduly surprised at arriving at an apparently inequitable result"[85]. The international rule of law is not achieved by distorting or stretching beyond snapping point the interpretation of the text of international instruments, however unfair the result required by its text may seem.

91 Mr Brian Povey (the appellant) attempts, in this appeal, to recover for the damage sustained by him by reason of "bodily injury" that he claims to have suffered as a result of an international air carriage on a round trip from Sydney to London. The carriage was conducted by the first respondent, Qantas Airways Limited ("Qantas"), and the second respondent, British Airways Plc ("British Airways"). The "bodily injury" alleged by the appellant is deep venous thrombosis ("DVT"). The appellant claims, and wishes to present a case at trial, that the respondent airlines knew that there was a risk of DVT in the conduct of such long flights to and from Australia but that, at the relevant time, they "deliberately chose not to warn of it"[86].

92 The respondents deny this. However, in advance of a trial, they sought summary relief against the appellant's action[87]. Whilst they failed to secure orders granting judgment or a permanent stay of the proceedings before the primary judge (Bongiorno J)[88], in the Court of Appeal of the Supreme Court of Victoria a majority supported the grant of such relief[89]. In this Court, by special leave, the appellant now contests the judgment against him that followed in the intermediate court.

93 The basis for the provision of relief to the respondents was the conclusion of the majority of the Court of Appeal that, on the facts alleged and particularised in his pleadings (included as amended pursuant to leave granted at first instance by the primary judge)[90], the appellant had not alleged, nor was it reasonably arguable, that the condition of DVT satisfied the relevant test for liability under

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85 [1991] 1 Lloyd's Rep 288 at 297.

86 [2004] HCATrans 490 at 1180.

87 cf *Damon v Air Pacific* unreported, Central District Court of California, 10 September 2003 at [1]-[2]. Summary relief was sought pursuant to the Supreme Court (General Civil Procedure) Rules (Vic), ss 23.01, 23.02. Alternatively, the claim relied upon the inherent powers of the Supreme Court of Victoria.

88 [2002] VSC 580 at [42]-[45].

89 [2003] VSCA 227 at [41] per Ormiston JA, [48] per Chernov JA.

90 [2002] VSC 580 at [45].

Art 17 of the Warsaw Convention, namely that the condition had been caused by an "accident" that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking"[91].

94 One member of the Court of Appeal (Ashley AJA) would have permitted the proceedings to go to trial on a limited basis[92]. His Honour's conclusion gave effect to the view that part, but not all, of the case that the appellant sought to pursue could possibly constitute an "accident", as required. In my opinion, in the manner in which the proceedings have been argued (effectively as a demurrer to the case propounded by the appellant in his pleadings and particulars), the approach of the majority in the Court of Appeal is to be preferred. The appeal should be dismissed.

The facts

95 *The primary facts alleged*: The appellant alleged that between 15 and 16 February 2000 he travelled as a passenger in economy class seats on flights from Sydney to London via Bangkok on an aircraft operated by Qantas. He arrived in London on 16 February 2000. He returned to Sydney via Kuala Lumpur on an aircraft operated by British Airways, also in economy class. The return flight involved departing London on 18 February 2000 and arriving in Sydney on the morning of 20 February 2000.

96 The appellant alleged that during, or immediately following, the foregoing flights he suffered from DVT and, as a consequence, sustained bodily injuries. These included the development of pulmonary embolism, resulting in cerebral damage ("stroke") with consequential impaired mobility and breathing difficulties. The appellant's proceedings were effectively a test case for hundreds of other actions commenced, and pending, in the Supreme Court of Victoria. Those actions have been brought by persons claiming damages from airlines in respect of DVT resulting in injuries of varying degrees of seriousness. They include cases maintained on behalf of the estates and dependants of passengers who have died allegedly as a consequence of the development of DVT. In addition to suing Qantas and British Airways, the appellant pursued a claim in negligence against the Australian Civil Aviation Safety Authority ("CASA")[93]. Those proceedings are in abeyance, pending the outcome of this appeal.

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91 The language of Art 17, the applicable provision of the Warsaw Convention. See Carriers' Liability Act, Sched 5.

92 [2003] VSCA 227 at [217].

93 Established by the *Civil Aviation Act* 1988 (Cth), s 8.

97 As originally pleaded, the appellant alleged that his injury had been "caused by the conditions of and procedures relating to passenger travel upon the flights". These were described as "the flight conditions". They were particularised as including a confined and restricted physical environment involving immobilisation for long periods; impediments to getting out of the seat during the flights; the repeated offer and supply of alcoholic beverages and coffee during the flights; discouragement from moving around the cabin and encouragement to remain seated; and not providing the appellant with any information or warning about the risk of DVT or the measures that could be taken to reduce such risk[94]. The respondent airlines sought further particulars. These elicited the facts that the "accident" was alleged to be comprised of "the flight conditions" and that it had occurred for the duration of the flight to and from the United Kingdom, first symptoms of DVT being experienced on the final leg of the journey between Kuala Lumpur and Sydney[95].

98 The appellant's claim against the airlines was brought in the State of Victoria under the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) ("the Carriers' Liability Act"). That Act gives the force of law to provisions of the Warsaw Convention, as it has been amended from time to time with consequences for claims against carriers brought in Australia[96]. In the Court of Appeal, and in this Court, it was accepted, correctly, that the version of the Warsaw Convention applicable to the appellant's carriage was that of the Convention as amended by the Hague Protocol and by Protocol No 4 of Montreal of 1975[97]. The applicable version was misdescribed before the primary judge. However, nothing turned on this mistake as the provisions of the relevant article (Art 17) were unchanged in the successive versions.

99 *The course of proceedings*: After the respondent airlines filed their defences, denying that the appellant had suffered DVT and consequent injuries and asserting that any such DVT and injuries were not caused by an "accident" within the meaning of Art 17 of the Warsaw Convention, they moved for immediate relief. They sought the entry of summary judgment in their favour and a permanent stay of proceedings[98] or an order striking out those paragraphs of the statement of claim in which claims were pleaded against them[99].

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94 [2003] VSCA 227 at [52].

95 [2003] VSCA 227 at [54].

96 Carriers' Liability Act, s 11(1).

97 Set out in the Carriers' Liability Act, Sched 5.

98 Pursuant to the Supreme Court (General Civil Procedure) Rules (Vic), s 23.01.

99 Pursuant to the Supreme Court (General Civil Procedure) Rules (Vic), s 23.02.

100 The decision of the primary judge upheld the complaint that the appellant's claim, as originally pleaded, disclosed no "accident" within Art 17 of the Warsaw Convention. However, his Honour held that if the alleged "accident" were particularised in a form expressed during argument before him, the claim might disclose an "accident". Hence, the summons for peremptory relief was dismissed. The appellant was given leave to file fresh particulars of the matters relied on as constituting the "accident" alleged in the statement of claim.

101 Qantas and British Airways thereupon sought, and obtained, leave to appeal to the Court of Appeal[100]. Meantime, the appellant duly provided the anticipated further particulars ordered by Bongiorno J[101]. These maintained that the "accident", causing the appellant's bodily injuries, comprised "the flight conditions" previously particularised. However, they added two additional and associated particulars, namely that at the time of the respective flights, Qantas and/or British Airways knew that the flight conditions were capable of causing, or increasing the risk of causing, the passengers on the flight to experience DVT; and that they knew of preventive measures that might have minimised such risk, while the appellant and other passengers had no such knowledge. Accordingly, it was "unexpected or unusual" that the appellant was "subjected to such flight conditions". The particulars further alleged that the appellant and other passengers were not provided with any information or warning about the risk of DVT or measures which they could take to reduce such a risk, despite being entitled to be provided by the carriers with such warnings and information about that risk. Because the provision to passengers of warnings and information about any such risk was "usual, commonplace and expected", the failure of Qantas and British Airways to afford such warnings and information was unexpected and unusual. It was thus an "accident" within Art 17 of the Warsaw Convention.

102 The majority in the Court of Appeal, in separate reasons, accepted (as the primary judge had held) that the claim, as originally pleaded, did not identify an "accident" that was a prerequisite to the bringing of the proceedings. Nor did the majority consider that the additional particulars made any difference. They concluded that, to be an "accident" within the Warsaw Convention, it was necessary that there should have been an "event or happening". The most that was alleged in the case was inactivity (a failure to warn passengers in the circumstances of the flight conditions that were otherwise expected and usual at the time). This could not amount to an "accident", as required[102].

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100 Leave to appeal was granted on 14 March 2003 by Buchanan and Vincent JJA.

101 [2002] VSC 580 at [46].

102 [2003] VSCA 227 at [38]-[39] per Ormiston JA, [46]-[47] per Chernov JA.

103 In coming to this conclusion, the majority applied its understanding of the holding of the Court of Appeal of England and Wales in *In re Deep Vein Thrombosis and Air Travel Group Litigation*[103]. To the extent that there was any disparity between the approach adopted in that Court from that taken in later United States decisions[104], said to relate to "accidents" involving omission to act, the majority preferred the approach of the English Court.

104 The minority judge in the Court of Appeal accepted that part of the case as pleaded and particularised by the appellant could not constitute an "accident". That part concerned static conditions of the aircraft (the confined and restricted physical environment) and the alleged failure of the respondents to provide any information or warning about the risk of DVT or the measures that could be taken by passengers to reduce such risk. His Honour held that the appellant should have the opportunity of a trial on the pleaded combination of positive and negative conditions on board the aircraft, alleged to have constituted an "accident", and the pleaded failure to warn passengers. This, in combination with the particularised positive conduct (such as the creation of impediments to getting out of the seat, the offer and supply of alcoholic drinks and coffee and the discouragement from moving around the cabin), could, as a matter of law, if proved, amount to an "accident". The minority opinion thus reflected, to some degree, the approach of the primary judge. This was that, within the language and purpose of the Warsaw Convention as construed by judicial authority, affirmative action on the part of the airlines and their employees could convert "pure omissions" into the type of "event" or "happening" that could amount to an "accident", and thereby attract the operation of the Warsaw Convention.

The issues

105 Before this Court, the appellant argued that all of the judges of the Court of Appeal below had taken a needlessly narrow view of the meaning of "accident" in this context. However, at the least, he submitted that the view foreshadowed by the primary judge and accepted by the minority opinion in the Court of Appeal should be confirmed by this Court.

106 In this way, the issues propounded by the appellant for the decision of this Court were as follows:

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103 [2004] QB 234 ("*DVT Litigation*").

104 Notably *Husain v Olympic Airways* 116 F Supp 2d 1121 (2000); on appeal 316 F 3d 829 (9th Cir 2002). At the time of the Court of Appeal's decision, the Supreme Court of the United States had heard argument and reserved judgment in *Husain*, which was subsequently affirmed: 540 US 644 (2004).

(1) *The failure to warn issue*: Whether the pleaded failure of the respondents to warn passengers of the risk of DVT and to advise them of the precautions that they could take to eliminate such risk is capable of constituting an "accident" within the Warsaw Convention;

(2) *The combination of circumstances issue*: Whether the pleaded combination of positive and negative conditions on board the aircraft of the respondents, that are alleged to have caused the appellant's injuries, is capable of constituting an "accident" within the Warsaw Convention; and

(3) *The continuous circumstances issue*: Whether the pleaded failure to warn or the pleaded combination of circumstances which continued throughout the airline flights, and which did not occur at a single identifiable instant or moment, is capable of constituting an "accident" within the Warsaw Convention.

The applicable legislation and the Warsaw Convention

107 *The applicable legislation*: Under Australian law, the Warsaw Convention is not, of its own force, part of municipal law. However, by s 11 of the Carriers' Liability Act, the provisions of the Warsaw Convention have, subject to that Act, "the force of law in Australia in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage". By ss 12 and 13 of the Carriers' Liability Act, provision is made in relation to liability imposed by the Warsaw Convention on a carrier in respect of the death (s 12) or injury not resulting in death (s 13) of a passenger. By the law of negligence in Australia, failure to warn of risks inherent in specialised activity may, in some circumstances, amount to a breach of a relevant legal duty, giving rise, where damage is caused, to a legal right of recovery[105].

108 Part IIIC of the Carriers' Liability Act governs the present case and applies to it the "Montreal No 4 Convention"[106]. By s 25K of that Act, the Montreal Convention so defined "has the force of law in Australia in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage". By s 25L, certain provisions of Pt IV of

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105 See eg *Rogers v Whitaker* (1992) 175 CLR 479 at 484; *Chappel v Hart* (1998) 195 CLR 232 at 239 [9], 254 [58], 276-278 [95]-[99].

106 Defined in s 5 of the Carriers' Liability Act to mean "the Convention that is, under Article XV of the Montreal Protocol No 4, known as the *Warsaw Convention as amended at The Hague, 1955, and by Protocol No 4 of Montreal, 1975*".

the Carriers' Liability Act apply to carriage to which the Montreal No 4 Convention applies. Such applied provisions include s 36, otherwise found in Pt IV. By that section, subject to immaterial exceptions, "the liability of a carrier under this Part in respect of personal injury suffered by a passenger, not being injury that has resulted in the death of the passenger, is in substitution for any civil liability of the carrier under any other law in respect of the injury".

109 It is in this way that the Carriers' Liability Act imposed liability on the respondent air carriers but exempted them from what would otherwise have been their ordinary liability for negligence at common law. Instead of ordinary liability, the Act substitutes the liability for which it provides, relevantly in terms of the Montreal No 4 Convention variant of the Warsaw Convention[107].

110 *The Montreal No 4 Convention*: The Montreal No 4 Convention[108] contains in Ch III ("Liability of the Carrier") a number of provisions critical for the issues argued in this appeal. In the terms of the English language text, which is Sched 5 to the Carriers' Liability Act, the provisions that need to be noticed are found in Arts 17, 18, 22, 23 and 25. Those Articles read:

"*Article 17*

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.

Article 18

1. The carrier is liable for damages sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.

…

Article 22

1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of

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107 s 16(4).

108 [1998] *Australian Treaty Series* No 10.

> the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> *Article 23*
>
> 1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void[.]
>
> …
>
> *Article 25*
>
> In the carriage of passengers … the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

111 Article 17 is the most important. It contains the requirement for an "accident". That requirement is stated in curious terms, apparently as an assumption that the damage sustained was caused by an "accident". Nevertheless, it was uncontested that only damage so sustained (namely, in an "accident"), would enliven the carrier's liability for which Art 17 provided. No definition of the word "accident" is contained in the Warsaw Convention. Nor is the word defined in the Carriers' Liability Act.

112 Article 18 is included because, by contrast to Art 17, it presupposes an "occurrence" causing the damage that is sustained. There is another reflection of this idea in Art 19 which renders the carrier liable for damage "occasioned" by delay in the carriage.

113 Article 22 is relevant because it identifies the maximum sum that may be recovered from the carrier in respect of its liability "for each passenger". It provides expressly for one element of continuity of municipal law, namely in the case where the law of the forum allows damages to be awarded in the form of periodical payments. There is no express indication that an "accident" within Art 17 may include continuous events.

114 Article 25 is set out because it provides that the cap upon recovery stated in Art 22 (in terms impliedly referring to Art 17) is to be lifted where the "damage" (a word also used in Art 17) results "from an act *or omission* of the

carrier" (emphasis added). According to the appellant, this provision in Art 22 represents an express acknowledgment in the Montreal No 4 Convention that damage "so sustained", that is, in an "accident", can be sustained from an "accident" that is, or includes, an "omission of the carrier" – not just acts of commission.

Matters not in dispute

115 *Factual matters and issues*: In order to focus attention precisely upon the essential issues for decision in this appeal, it is useful to clear away a number of matters that are not relevant, at least at this stage of the proceedings.

116 First, this Court is not concerned with any possible question as to the constitutional validity of the Carriers' Liability Act, in so far as that Act purports to give effect to an international treaty that deprives persons, who may otherwise be so entitled, of the benefit of causes of action against air carriers. No issue was raised that the Act provided for an acquisition of property that must, in a federal law in Australia, be effected "on just terms"[109]. This issue was raised by the Court in the special leave hearing[110]. The approach of the appellant has been to assert an ambit of entitlement under the Warsaw Convention which, if upheld, would arguably involve no breach of the constitutional just terms requirement in his case. On this footing, the constitutional issue may be ignored.

117 Secondly, the appellant's proceedings against CASA are unaffected by the issues in the appeal. The claim in negligence against that authority awaits hearing once the status of the claims against the respondent carriers is known.

118 Thirdly, various factual questions, contested by the defences filed by the carriers, have not been explored, still less determined. Thus, the appellant's claim that he had suffered DVT is not admitted on the pleadings. However, because the respondents' applications for summary relief have been dealt with as on the return of a demurrer, it has been assumed, for the purposes of these proceedings, that the appellant could prove at trial each and every factual assertion that he has made in his pleadings. Thus, it is assumed for present purposes that he suffered DVT and that he could show, by evidence, that the respondents gave no warning about the condition or the means of alleviating its risks, although they well knew about the risks. Many of the cases concerned

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109 Constitution, s 51(xxxi). See *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

110 [2004] HCATrans 345 at 63.

with applications by air carriers for summary judgment have involved such assumptions, that being an approach normal to the peremptory procedure[111].

119 Fourthly (and connected to the last point), it may also be assumed that the appellant could establish a necessary causal link between the alleged acts and defaults of the respondent carriers although, as has been observed, this is a very large assumption to make in the circumstances of such a case[112].

120 Fifthly, the Warsaw Convention, in its manifestation in the Montreal No 4 Convention, provides for four authentic texts, one of which is in the English language. However, in the case of any inconsistency, it is provided that "the text in the French language" shall prevail[113]. A difference in the official translation of Art 17 from that appearing in the Schedule to the Carriers' Liability Act in Australia appears in the official United States version quoted by the Supreme Court of the United States in *Air France v Saks*[114]. Nothing turns on the difference. Although it has not been uncommon for judges, particularly in the United Kingdom, to make reference to the French language text for particular purposes[115], no relevant point of ambiguity in the meaning of Art 17 (and specifically of the word "accident") was suggested. On the contrary, the authorities hold that "accident" has the same meaning in the French language as in the English[116].

121 Sixthly, although the primary judge was led by the approach of the parties to apply an incorrect version of the Warsaw Convention to the facts, it was common ground in the Court of Appeal, as in this Court, that the Montreal No 4

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111 See eg *Blansett v Continental Airlines Inc* 379 F 3d 177 at 179 (5th Cir 2004).

112 *DVT Litigation* [2004] QB 234 at 258 [67].

113 Warsaw Convention, closing paragraph. See Carriers' Liability Act, Sched 5.

114 470 US 392 (1985). The words "Le transporteur est responsable du dommage" are translated in the "official American translation" as "the carrier shall be liable for damage". See *Saks* 470 US 392 at 397 (1985). The English language translation contained in Sched 5 of the Carriers' Liability Act is more literal, namely "the carrier is liable". The same translation is accepted in England: see *DVT Litigation* [2004] QB 234 at 242 [4]. Nothing turns on the difference of translation.

115 eg *Morris v KLM Royal Dutch Airlines* [2002] 2 AC 628 at 633 [3], 634 [7], 636 [13], 654-655 [69], 671 [132].

116 *Saks* 470 US 392 at 399-400 (1985) per O'Connor J (for the Court). See also [2003] VSCA 227 at [5], [19] per Ormiston JA, [90]-[91] per Ashley AJA.

Convention was the applicable one and that nothing turned on the earlier mistake[117].

122 Seventhly, although the ticket upon which the appellant travelled was issued by British Airways and the first symptoms and alleged manifestation of DVT were said to have occurred on a sector of the journey when the appellant was being carried by British Airways, no point of distinction was made, for the purposes of the appeal, between Qantas (which had carried the appellant from Sydney to London) and British Airways[118]. The short turn-around of the appellant's flight from Sydney to London and his return within a total of five days made the case a singularly appropriate one from the point of view of prolonged immobilisation.

123 Under Art 17 of the Warsaw Convention, it is enough that the "accident" took place "on board the aircraft" or otherwise as there provided. The death or wounding or other bodily injury need not happen in those defined places. The respondent carriers were content to make common ground and to be treated, and to treat each other, collectively as "the carrier"[119].

124 *Approach to summary relief*: Similarly, there was no dispute concerning the principles that applied to the respondents' applications for summary disposition[120]. It was accepted that relief of the kind sought should only be extended to the respondents in the clearest case[121]. The appellant urged that the matter should go to trial so that the full facts might be adduced before any attempt was made to apply the law of the Warsaw Convention to them[122].

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117 [2003] VSCA 227 at [1] fn 2, [63]. Some care needs to be taken in considering decisions on the Warsaw Convention because of the fact that different versions of the Warsaw Convention apply. For example, the United States of America was not a party to the Hague Protocol.

118 At one stage it was suggested in argument that the carriage was a "combined carriage" within Art 31 of the Warsaw Convention, although that article appears to deal with issues presented by carriage that involves both air and non-air transport. The reliance on Art 30 (carriage performed by successive carriers) was more to the point. See especially Warsaw Convention, Art 30(2).

119 [2003] VSCA 227 at [50].

120 Reference was made to *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91; *Agar v Hyde* (2000) 201 CLR 552 at 575-576 [57].

121 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 134-135.

122 [2003] VSCA 227 at [80].

125 No reference was made in the Court of Appeal decision to the recent emphasis in England[123] (and in opinions in this country[124]) to the effect that particular care is required "where the legal viability of a cause of action is unclear … or in any way sensitive to the facts". In the present case, the pleadings were closed. The revised particulars were complete. The journeys were clear and concluded within the space of days. A great deal of time of appellate courts has been consumed in legal argument based on factual hypotheses. Not so long ago, in most parts of Australia, the factual issues in a case such as the present would normally have been determined by a civil jury. Many Australian cases await the outcome of this appeal, chosen as a paradigm instance. In such significant litigation, there were arguments for proceeding promptly to a trial of the facts so that appellate conclusions could be based on findings derived from the evidence of witnesses rather than pleadings and particulars drawn by lawyers.

126 Nevertheless, no complaint was made about the approach of the judges below to summary disposition. Indisputably, the right words of caution were uttered[125].

127 *Approach to Warsaw Convention meaning*: There was also no real contest about the approach that should be taken to interpreting Art 17 of the Warsaw Convention.

128 First, the Convention, in its successive manifestations, is an international code governing the liability of air carriers to whom it applies[126]. As such, it is intended to be applied, and interpreted, so as to achieve uniformity of application. The intention of excluding the application of domestic law[127] implies a purpose of excluding purely domestic approaches to the construction of contested words and phrases. If such an international approach were not taken to ascertaining the meaning of the Warsaw Convention, it would undermine the achievement of a consistent application of the text[128].

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123 *E (A Minor) v Dorset County Council* [1995] 2 AC 633 at 694.

124 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 565-566 [137]-[138].

125 See especially [2003] VSCA 227 at [147].

126 *Sidhu v British Airways Plc* [1997] AC 430 at 453.

127 Carriers' Liability Act, s 13.

128 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159; *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 675-676, 687-688; *Great China Metal Industries*

(Footnote continues on next page)

129 Secondly, it must be recognised that the Warsaw Convention, in its successive forms, represents the product of an international compromise. As the relevant historical material[129] discloses, there have, virtually from the start, been contests not only between the interests of carriers and passengers or consignors of cargo but also between States with differing interests, having regard to the worth and expectation of their citizens and the capacity of carriers to meet claims arising out of "accidents"[130].

130 A study of the minutes of the Second International Conference on Private Aeronautical Law that preceded the adoption of the Warsaw Convention in its original form in 1929 bears out the conclusion that the text ultimately endorsed was not so much the product of considerations of principle, justice and equity as of international and domestic politics, business pressures, a consideration of the technical advances in aviation, as well as changing policy judgments and the differing approaches of municipal judges to such claims[131]. These considerations have continued to affect the later revisions of the text.

131 In this respect, the Warsaw Convention is similar to many international treaties that are the products of compromise. The disparate economic interests at stake make it unsafe to approach the meaning from a traditional point of view, reflected in the assumptions of municipal law. Instead, it is important to give the words of such an instrument a broad, purposive construction[132]. High amongst its undoubted purposes was the intention to adopt and maintain a uniform and international regime that gave a common effect to the language in which that regime was expressed[133].

Co Ltd v Malaysian International Shipping Corporation, Berhad (1998) 196 CLR 161 at 176 [38], 186-187 [71], 213-214 [137]-[138]; cf *SS Pharmaceutical* [1991] 1 Lloyd's Rep 288 at 294.

129 See, for example, Horner and Legrez (tr), *Second International Conference on Private Aeronautical Law: Minutes*, (1929).

130 Lowenfeld and Mendelsohn at 546, 596.

131 Lowenfeld and Mendelsohn at 601-602.

132 *James Buchanan & Co v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152.

133 *Morris* [2002] 2 AC 628 at 677-679 [146]-[150] per Lord Hobhouse of Woodborough; see also at 633 [5], 634 [7].

132 Thirdly, because the Warsaw Convention is intended to have a uniform operation, in substitution for a multitude of differing outcomes affecting an international industry of ever-growing size and importance, it is imperative that domestic courts should give close attention to relevant rulings made by the courts of treaty partners. No other approach would secure a coherent body of treaty law[134].

133 This does not mean that domestic courts surrender their own constitutional obligations to decide contests, according to law, on the basis of the evidence and arguments placed before them. It simply means that such courts recognise the contestable character of most questions of interpretation, at least once they advance to the higher levels of the court system. This is as true of international treaties as of disputes over the meaning of local statutes or private texts[135]. Perhaps it is more so because international texts are commonly more ambiguous in their language and application. This is because of the often multifarious interests that need to be accommodated; the imperfect attempt to express complex ideas in different languages; and the differing levels of expertise and clear thinking that can influence the drafting process.

134 It is for such reasons that, in a case such as the present, faced with a problem upon which earlier courts of high authority in other treaty States have spoken, an Australian court will be slow to adopt a different view, whilst recognising that all courts are not equal in authority and persuasiveness[136] and that the barrier of language may sometimes prevent practical access to important decisions in languages other than English[137].

135 Because of the significant part played by the aviation industry of the United States of America in world-wide civil aviation and the size and number of contested claims under the Warsaw Convention decided by the courts of that country, it is inevitable that, where such courts have spoken (and particularly the

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134 cf *Husain* 540 US 644 at 658, 662 (2004) per Scalia J.

135 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42]; cf *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1136 [191]; 208 ALR 124 at 173.

136 *Sidhu* [1997] AC 430 cited in *DVT Litigation* [2004] QB 234 at 260 [77]. As well, upon some questions, courts of high authority may have spoken to different effect.

137 Thus in *SS Pharmaceutical* [1991] 1 Lloyd's Rep 288 at 294, 295, reliance was placed upon the decision of the Cour de Cassation of Belgium in *Tondriau v Air India* (1977) RFDA 193. In the present case, reference was made in argument to a decision of a German court: *Volander v Deutsche Lufthansa* unreported, Frankfurt am Main Oberlandesgericht, 29 October 2001.

Supreme Court of the United States), other final courts, such as this, will pay special attention to their reasons because of their significance for international uniformity of the interpretation of the Warsaw Convention, viewed as a practical matter[138].

136 Fourthly, in construing an international treaty, such as the Warsaw Convention applicable to this Australian claim, regard may be had under the Vienna Convention on the Law of Treaties[139] to supplementary sources in determining the meaning of a treaty provision that is ambiguous or obscure. Such sources may include the *travaux préparatoires* on the preparation of the treaty and materials about the circumstances of its conclusion. The availability of such materials is now not contested[140]. Indeed, it is now less likely to be so in Australia, given the developments in legislation[141] and in the common law[142] favouring purposive over purely literal approaches to interpretation.

137 In the present case, the word "accident" is neither defined nor elaborated. So it is important that it should not be given a meaning that is unduly narrow or technical or needlessly defensive of the interests of one side to the contest, notably air carriers. The Warsaw Convention must apply to a myriad of circumstances of almost infinite variety. Whilst the *travaux préparatoires* show the compromises that were struck in adopting the text of the Warsaw Convention, they also indicate that the recovery by passengers of acceptable compensation for damage, consequent upon injury, as defined, was an objective of the Warsaw Convention. As the later history indicates, including at one stage the threatened denunciation of the Warsaw Convention by the United States (on the ground of inadequate provision for compensation)[143], it would be a mistake to read the Warsaw Convention as being wholly unconcerned with justice to injured passengers. If a plaintiff, such as the appellant, could show that airlines with the requisite knowledge deliberately or recklessly withheld essential information from passengers (assuming that to be provable) the imposition of liability for

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138 *Morris* [2002] 2 AC 628 at 633 [5], 634 [7].

139 [1974] *Australian Treaty Series* No 2. See *SS Pharmaceutical* [1991] 1 Lloyd's Rep 288 at 298.

140 *Sidhu* [1997] AC 430 at 442.

141 *Acts Interpretation Act* 1901 (Cth), s 15AA and 15AB.

142 eg *Bropho v Western Australia* (1990) 171 CLR 1 at 20; cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 517-518.

143 Lowenfeld and Mendelsohn at 546-552.

consequent serious damage involving injury or death would not be entirely surprising, given the overall objects of the treaty[144].

138 Fifthly, as many cases illustrate, the ultimate focus of the decision-maker must be upon the words of the Warsaw Convention. It is not upon the language of judges who seek, in their own words, to explain and elaborate the treaty text[145]. As Lord Hobhouse of Woodborough explained in *Morris v KLM*[146]:

> "Whilst it is important to have regard to the international consensus upon the understanding of the provisions of international conventions and hence to what the courts in other jurisdictions have had to say about the provision in question, the relevant point for decision always remains: what do the actual words used mean?"[147]

139 The words of such treaties, being intended to apply to circumstances as they exist from time to time, are always subject to re-examination as later circumstances throw light on their meaning[148]. However, it is a serious mistake to ignore or down-play the language, structure and apparent purpose of the text[149]. Ultimately, whatever help may be given from other sources, interpretation of contested language is a text-based activity[150]. Specifically, judicial exegeses may not replace the language of Art 17. Courts may give guidance. However, they cannot substitute judicial words for the words of the international agreement which, in this case, the Australian Parliament, within powers that are not disputed, has declared to be part of the law of this country[151].

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144 Warsaw Convention, Art 25.

145 *DVT Litigation* [2004] QB 234 at 260 [78] per Judge LJ; cf [2003] VSCA 227 at [170].

146 [2002] 2 AC 628 at 677-678 [147].

147 With reference to *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328; *James Buchanan* [1978] AC 141; *Fothergill v Monarch Airlines Ltd* [1981] AC 251; *Sidhu* [1997] AC 430.

148 *Morris* [2002] 2 AC 628 at 668-669 [122]-[123], 678-679 [149].

149 *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110 at 114.

150 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585 at 602 [87], 606 [105]; 205 ALR 1 at 24, 29.

151 *DVT Litigation* [2004] QB 234 at 261 [85] per Kay LJ.

140 Sixthly, it is inevitable that, in giving meaning to the contested language of an international instrument, drawn in a form and expressed in a language by a drafter who is not of the common law tradition[152], cases will arise that are close to the borderline that distinguishes claims that fall within from those that fall outside the Warsaw Convention's operation[153].

141 This is an inevitable feature of the construction of contested treaty language. It is illustrated in the divided decisions of national final courts. Avoiding differences in every case is impossible, given the nature of the task. Many of the foregoing considerations, like many of the canons of statutory interpretation applied by common law courts, tug the mind in opposite directions. Thus, deference to international comity will sometimes appear to be in conflict with the ultimate judicial duty to give meaning to the words of the treaty. What one judicial observer regards as ambiguous or obscure, mandating an appeal to extrinsic materials, another will see as clear and incontestable, demanding but one outcome based on the text.

142 The most that the foregoing affords is a list of considerations that the decision-maker will keep in mind as the competing factors are weighed, leading to an outcome. The most important of the principles that distinguish this category of construction from most others is the special effort that should be paid to achieving uniformity of approach to the meaning of an international treaty. The price exacted for the building of the international rule of law is a proper attempt on the part of municipal judges, who thereby exercise a kind of international jurisdiction[154], to perform tasks of interpretation, so far as possible, in ways that are compatible with the decisions of respected courts of high authority in other lands, struggling with the same or similar problems[155].

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152 [2003] VSCA 227 at [96].

153 cf *Rosman v Trans World Airlines Inc* 34 NY 2d 385 at 399 (1974), cited in *Morris* [2002] 2 AC 628 at 641 [20]; *DVT Litigation* [2004] QB 234 at 261 [83] per Kay LJ.

154 *Al-Kateb* (2004) 78 ALJR 1099 at 1131 [168]; 208 ALR 124 at 167, citing Brownlie, *Principles of Public International Law*, 5th ed (1998) at 584. See also *Reference re Succession of Québec* [1998] 2 SCR 217 at 234-235 [20]-[22].

155 In this I agree with the comment of Scalia J in *Husain* 540 US 644 at 658, 662 (2004).

143 If the outcome derived by these techniques sometimes appears unjust to local litigants, the injustice may be called to notice by the courts concerned[156]. Sufficient criticisms by courts and others may ultimately enliven the cumbersome process of treaty re-negotiation and amendment or national supplementation of treaty rights. This has happened in the past with the Warsaw Convention, as the several schedules to the Carriers' Liability Act illustrate. What is impermissible is an attempt to manipulate the language of the international treaty to avoid an outcome that seems harsh by contemporary domestic perspectives. Few developments would so undermine the growing development of international law as this.

The meaning of "accident"

144 *Ordinary meanings of the word*: The word "accident", appearing in Art 17, is a common word of everyday speech in the English language. It is not a word with a technical or peculiar legal meaning, at least outside specific statutory contexts. It follows that a court, asked to interpret the word appearing in Art 17, will have regard to the usual sources: its own understandings and experience with language; dictionary definitions; and (where they exist) judicial elaborations appearing in cases that bear some analogy.

145 Ordinary experience teaches that "accident", whether as a noun or adjective ("accidental") can commonly have different meanings, depending on the context. Thus the context will sometimes show that the word is used to mean an unintended event or happening – such as an *accidental*, as distinct from a *deliberate*, event. In other cases, the word will imply that the occurrence has occurred by the operation of chance, as distinct from by design or prior planning. Such distinctions have been noticed in judicial authority, including that referring to Art 17 of the Warsaw Convention[157].

146 Dictionary definitions also confirm this differential use of the word, rendering it essential to have regard to the context in order to establish whether one or both meanings are intended. Thus, the *Macquarie Dictionary*[158] gives as relevant meanings "1. an undesirable or unfortunate happening; casualty; mishap. 2. anything that happens unexpectedly, without design, or by chance. 3. the operation of chance … 4. a non-essential circumstance; occasional

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156 As it was in *SS Pharmaceutical* [1991] 1 Lloyd's Rep 288 at 306-307; cf [2003] VSCA 227 at [27].

157 See *Husain* 540 US 644 at 651 fn 6, 657 (2004).

158 Federation ed, (2001), vol 1 at 11.

characteristic". The *New Shorter Oxford English Dictionary*[159] gives as the primary meaning "[a] thing that happens". The secondary meaning is given as "[c]hance, fortune". Other dictionaries offer definitions making repeated reference to the necessity of an incident, event or mishap[160].

147 The dictionary definitions confirm my own understanding of the meaning of the word. Allowing that it may connote unintended, unplanned or unfortunate happenings, the common thread in the contemporary meanings of the word "accident" in the English language is found in the requirement for a happening, a mishap or events of various kinds. In ordinary parlance, the absence of a happening, mishap or event may be an "occurrence". However, depending on the context, it will not usually qualify as an "accident".

148 *Analogous court opinions*: Reminding myself once again of the primacy of the French language text[161] (but also that no difference is said to exist in the French and English meanings[162]) and remembering the need to avoid parochial judicial analogies, it is confirmatory of the use of the word in everyday speech to notice what senior judges have said about it.

149 Sometimes the context will show that the word "accident" is used to mean an unintentioned event or happening – such as an accidental as distinct from deliberate event. In other cases, the word will imply that the occurrence in question has occurred by the operation of chance, as distinct from by design or planning. Such distinctions have been noticed in judicial authority, including that referring to Art 17 of the Warsaw Convention. Thus, in *Saks*, O'Connor J

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159 (1993), vol 1 at 13; cf *DVT Litigation* [2004] QB 234 at 247 [24].

160 Thus the *Encarta World English Dictionary*, (1999) at 10 gives as the primary definition "the way things happen without any planning, apparent cause or deliberate intent". The secondary definition is "a collision or similar incident involving a moving vehicle, often resulting in injury or death". There are subsidiary definitions referring to events and incidents.

161 The French language text of Art 17 reads: "Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement". See *Saks* 470 US 392 at 397 fn 2 (1985).

162 The *New Shorter Oxford English Dictionary* points out that the English word originated from the identical French word, both words being derived from the Latin *accidere* through the present participle. See also *Encarta World English Dictionary*, (1999) at 10, which states that the word "accident" entered the English language in the fourteenth century.

(writing the opinion of a unanimous Supreme Court[163]) quoted with approval the observation of Lord Lindley in *Fenton v J Thorley and Co*[164]:

> "The word 'accident' is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident."

150 In this Court, in *Australian Casualty Co Ltd v Federico*[165], it became necessary to interpret an insurance policy providing for indemnity for disability defined to mean "bodily injury … caused by an accident". The majority reasons of Wilson, Deane and Dawson JJ cited and applied Lord Lindley's definition in *Fenton*. Their Honours used the word "mishap" as a synonym for "accident"[166]. They gave a number of illustrations involving an injury caused by an "accident". All of the illustrations involved a distinct happening or event. In none of the instances cited in *Federico* was it suggested that an absence of a happening or event could constitute an "accident".

151 These meanings, arising in different contexts, do not, of course, control the construction of the word "accident" appearing in Art 17 of the Warsaw Convention. However, they serve to affirm, as O'Connor J put it in *Saks*, that an "accident" normally connotes a mishap, happening or event.

152 *The Saks definition*: In *Saks*[167], O'Connor J accepted that the word "accident" in Art 17 of the Warsaw Convention should be given a broad definition in keeping with the multifarious cases to which the Convention is bound to apply. However, for various reasons, her Honour concluded (and the Court agreed) that "liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger"[168].

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163 470 US 392 at 398 (1985).

164 [1903] AC 443 at 453.

165 (1986) 160 CLR 513.

166 (1986) 160 CLR 513 at 527, 528.

167 470 US 392 at 404-405 (1985).

168 *Saks* 470 US 392 at 405 (1985).

153 The need for a broad and flexible application of this definition is clear. Thus, its application has to be broad enough to encompass deliberate torts committed on or near an aircraft by terrorists or fellow passengers[169]. To this extent, the word "accident" is certainly expanded beyond one of its meanings in everyday speech, namely that which involves non-deliberate conduct. However, drawing on the language, structure and history of the development of the Warsaw Convention – and authority to that time on its meaning – the decision in *Saks* demands three elements to constitute an "accident" within Art 17. These are (1) a cause separate from the "injury" itself; (2) an "event or happening" that is unexpected or unusual; and (3) an event that is external to the passenger.

154 The reasoning in *Saks* has been applied in many courts since it was decided[170]. The appellant in this case was ambivalent about O'Connor J's definition. He said he could still succeed within it; but he criticised it as unduly restrictive in its insistence on an "event or happening".

155 *The accident and injury are separate*: This Court should follow the definition in *Saks*. It should do so in relation to the first two elements of O'Connor J's definition because they are clearly correct. It should do so in relation to the third specified element, because it has often been applied and the appellant did not contest it.

156 As to the differentiation between the "accident" and the "injury", a simple examination of the text of Art 17 of the Warsaw Convention confirms the deliberate inclusion of this distinction in the definition. Article 17 delineates "accident" and "injury" to the passenger along the conventional lines of *cause* and *effect*. The Article obviously postulates such a differentiation. The "injury" is personal to the passenger. It is consequential upon the "accident". In the text, the two are separate and sequential. It is the duty of courts, giving meaning to the text, to keep them so.

157 *"Accident" involves an event or happening*: Similarly, the reasoning in *Saks* supports the proposition that, used in this context, "accident" connotes an "unexpected or unusual event or happening". Perhaps "unusual" is, as the primary judge in this case suggested, contestable. However, certainly the treatment of "accident" in this context as an "unexpected event, mishap or happening" is fully sustained. As O'Connor J pointed out in *Saks*, the differentiation between the reference to "accident" in Art 17 (dealing with bodily injury suffered by a passenger) and "occurrence" in Art 18 (dealing with

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169 *Saks* 470 US 392 at 405 (1985).

170 See, for example, *Morris* [2002] 2 AC 628 at 655 [71]; *DVT Litigation* [2004] QB 234 at 244-245 [9].

destruction or loss of baggage or goods) indicates that the distinction is a deliberate one. Otherwise, the more neutral and common word "occurrence" would have been used. The distinction is certainly clear in the French language text. It must therefore be given effect[171].

158 Moreover, in so far as there is an ambiguity, and regard is had to the history of the development of the Warsaw Convention, that history shows that the differentiated insertion of the word "accident" in Art 17 was deliberate. The original draft made no such distinction[172]. It follows that to subsume "accident" with a mere "occurrence" would defy the text. The drafting history as well as the apparent intention of those who adopted Art 17 in its present form confirm this impression.

159 These elements of history, read with later attempts to broaden liability on the ground that the notion of "accident" was too narrow[173] make the present point ever plainer. The word "accident" has survived into the Montreal No 4 Convention as a decision of the relevant States parties to adhere to a deliberately narrow word, imposing a specific and additional requirement on those passengers making a claim for damage caused to them in the defined circumstances. The happening of an "injury" or of "damage" or death to the passenger is not enough. An "accident" must additionally be shown. That connotes a separate, distinct and sequential event or happening, just as *Saks* held. Non-events and non-happenings do not qualify as "accidents" in this context.

160 *Events external to the passenger*: It will be remembered that the third element of the definition of "accident" adopted in *Saks* is that the qualifying event or happening must be "external to the passenger". This remark was a part of the definition necessary to the facts in *Saks*. That case concerned a pathological event that occurred internally to the passenger, Ms Saks. The event was in the nature of a physiological change happening within the mechanisms of her left ear. Allegedly, the change was occasioned by the operation of the aircraft's pressurisation system during its descent in its flight from Paris to Los Angeles. Whatever occurred caused Ms Saks to become permanently deaf in her

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171 See *Saks* 470 US 392 at 397-398 (1985). In the French text of Art 17 the Convention reads, relevantly: "lorsque *l'accident* qui a causé le dommage". In Art 18 the text reads: "lorsque *l'événement* qui a causé le dommage" (emphasis added).

172 *Saks* 470 US 392 at 401 (1985). The original draft made the carrier "liable for damage sustained during carriage".

173 *Saks* 470 US 392 at 403-404 (1985). The reference is to the debates at Guatemala City International Conference on Air Law of 1971.

left ear. Yet could it be said that she suffered an internal "accident" (the pathological change within the ear mechanism) which was both "unexpected", "unusual" and "an event or happening" separate from the consequent "injury" and "damage", namely deafness?

161 The Supreme Court of the United States held that it could not. Clearly, it was influenced in its decision by a series of cases in which courts in the United States found that *internal* physiological changes were not "accidents" within Art 17 of the Warsaw Convention[174]. One of those cases[175], which involved rejection of a claim by a passenger who contended that sitting in the airline seat during a normal flight had aggravated thrombophlebitis, concerned factual circumstances in some ways similar to the claim of the appellant in relation to DVT. The Supreme Court insisted that the "accident" must be external.

162 There is not a lot of textual support in the Warsaw Convention for this conclusion. On the contrary, the text of Art 17 uses the word "accident" as the necessary cause of the "damage so sustained". Thus, arguably, if such "damage" were sustained by an *internal* "accident" (should that be possible) so long as it happened "on board the aircraft" or "in the course of" the specified "operations", that would be enough. In my view, the happening or event in such special and temporal circumstances would be sufficient to attract the liability of the carrier.

163 Such an approach to "internal" accidents is not unknown in the law, at least within Australia. Thus in *Kavanagh v The Commonwealth*[176], an appeal concerning the meaning of the *Commonwealth Employees' Compensation Act* 1930 (Cth), the majority of this Court[177] held that there could be "injury by accident" within s 9(1) of the Act although the injury was not attributable to any external agency, but resulted from some force or pressure exerted from within the worker's own body. The worker in that case, whilst at work, became ill. He vomited and was found to have suffered a ruptured oesophagus as a result. The cause of the vomiting could not be explained. Soon after, he died in hospital from conditions traced to the internal rupture. His widow recovered compensation. This Court held that there had been a "personal injury by

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174 *Saks* 470 US 392 at 405 (1985) and cases there cited.

175 See *Scherer v Pan American World Airways, Inc* 54 App Div 2d 636; 387 NYS 2d 580 (1976), briefly described in *Saks* 470 US 392 at 405 (1985) to hold that "sitting in airline seat during normal flight which aggravated thrombophlebitis not an 'accident'".

176 (1960) 103 CLR 547.

177 Dixon CJ, Fullagar and Menzies JJ; Taylor and Windeyer JJ diss.

accident" arising in the course of the employment. The employer's argument[178], that it was necessary to show some external incident of the employment as a contributing factor to the injury, was not accepted by this Court.

164 Although the Warsaw Convention is far distant from this line of Australian compensation cases, the point of controversy is not so different. The Convention, it is true, postulates the existence of an "accident" whereas, in *Kavanagh* the word appears in the adverbial clause "by accident" which the Court there construed.

165 I will not pursue this issue further. The appellant did not raise it in his arguments in the courts below. Nor, when it was raised during submissions, was it embraced by the appellant[179]. In such a sharply contested case competently presented, I am content to accept the third element of O'Connor J's definition in *Saks*. I am encouraged to do so by the way in which the definition has been assumed by all others who have considered it to be correct and especially because the appellant has been content to proceed on that footing. This is the kind of circumstance where a judge in a national court should sink personal hesitations in deference to a strong trend of past judicial authority.

No "accident" has been pleaded

166 *The start of analysis*: Once the foregoing point has been reached, and the *Saks* definition of "accident" accepted by this Court, the difficulties of stretching the language of Art 17 of the Warsaw Convention to fit the claim of the appellant, as pleaded, are manifest. When it is accepted that the facts of the case pleaded must qualify as an "accident" and that the appellant must show that his injury was caused by an unexpected or unusual event or happening external to his person, none of the facts alleged in the appellant's case, whether taken separately or in combination, constitutes an "accident" of the required kind.

167 The facts pleaded represent a description of the "conditions" existing on the applicable flights. It may be accepted that the appellant did not know about DVT or the protective measures that could minimise the risk of its onset. To that extent, the condition of DVT and its *sequelae* may have been unexpected or unusual so far as the appellant was concerned. However, this is not sufficient to turn such circumstances, essentially passive, into an "event or happening" so as to constitute the "accident" essential to recovery under Art 17.

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178 (1960) 103 CLR 547 at 549-550; cf *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310; *Kennedy Cleaning Services Pty Ltd v Petkoska* (2000) 200 CLR 286.

179 [2004] HCATrans 490 at 14-18, 776-778.

168 Nor were the design of the aircraft seats, the distance between them, the consequential obstruction to movement, the presence of trolleys in the aisles, the regular service of alcoholic beverages and coffee and the announcements to remain seated, whether separately or in conjunction, "an event" or "events". It follows that there was no happening or mishap in this context. Moreover, there was nothing "unexpected" or "unusual" about any of the stated circumstances. It is not alleged that, in any way, any of them departed from the norm of international travel in economy class as it existed at the time of the appellant's carriage. On the contrary, the "flight conditions" of which the appellant now complains, including the alleged failure to warn him and other passengers of the risk of DVT and means of avoiding it, are alleged in the appellant's pleading themselves to have been "standard conditions of and procedures relating to passenger travel on prescribed flights"[180].

169 If it could be proved that Qantas and British Airways had the knowledge and expectations concerning DVT and its effect on passengers, this would not convert their failure to warn and inform about DVT into an "event" or "happening". Still less would such failure be an event or happening that was "unexpected" or "unusual". The combination of circumstances relied upon, and their continuous existence during the flight, do not alter this conclusion. The requirement of the Warsaw Convention that there must be an "accident", being an event or happening existing in space and time separate from the passenger, imposes the obligation to plead and prove more than the existence of circumstances inherent in the ordinary conduct of carriage by aircraft at the time that the damage and injury or death occurred.

170 It follows that the judges of the Supreme Court of Victoria were correct to conclude that the omission of the respondent airlines to warn their passengers of the risk of DVT and to advise them of preventive measures that they could take, even if proved, would not, as such, constitute an "accident" within Art 17. Moreover, the majority of the Court of Appeal was correct to conclude that the pleaded combination of positive and negative conditions on board the relevant aircraft, together with their persistence throughout the flights, could not convert the alleged failure to warn into an "accident" within Art 17.

171 *Criticisms of the conclusion*: The appellant criticised this conclusion on a number of grounds. He adhered to his submission that omissions or "non-events" could in some circumstances constitute an "accident" within Art 17 of the Warsaw Convention.

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180 Statement of Claim, par 11(a). See also Amended Defence, par 8(a).

172 There is no doubt that the metaphysical distinction between acts and omissions can frequently be a disputed one. Viewed from one perspective, a sequence of events might be described as an "act" or an "omission". Thus the failure of a crew member on board an aircraft to engage essential equipment, so as to maintain a proper pressure of oxygen for the duration of a flight, might be classified as an "omission" in one sense. But it would also clearly be capable of classification as a commission or an act, event, happening or mishap. Certainly, this would be so if the engagement of the equipment was an expected or usual event for the flight. Likewise, the omission to stow baggage safely in an overhead container or to ensure that a loaded container was properly closed and stabilised before take-off or landing would be an omission in one sense. But it would also (depending on the circumstances) be capable of constituting an unexpected or unusual event.

173 As was said in *Saks*[181], flexibility is required in the application of the word "accident" to differing facts. Cases have arisen in which courts have held that an "accident" has occurred following conduct that might on one view be described as an omission[182].

174 It is unnecessary for this Court to decide its view on the correctness or otherwise of the decisions in such cases. In many of them, it is possible to explain the conclusion that an "accident" was shown by viewing the impugned conduct on the part of the flight crew as an affirmative event. Where usual or standard procedures at the time required the engagement of particular equipment, or the checking and closure of containers, the failure to act in such ways can readily be viewed as "accidental" and the product of an "accident". However, in every case, it remains necessary to plead and prove facts that rise to the description of an "accident". It is not enough to plead and prove the conditions or circumstances that existed which do not answer to this description, as it has been explained in *Saks*.

175 *Article 25 and self-assessment*: A most telling point made for the appellant was his argument that Art 25 of the Warsaw Convention (as appearing in the Montreal No 4 Convention) specifically contemplates omissions on the part of a carrier, its servants or agents. Thus, it was argued, if such omissions, occurring with intent to cause damage or recklessly and with knowledge that damage would probably result, produced the consequence that the limits on liability of carriers specified in Art 22 (giving effect to Art 17) were lifted, it would be curious if the "accident" of which Art 17 speaks did not also include such "omissions".

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181 470 US 392 at 406 (1985).

182 cf *DVT Litigation* [2004] QB 234 at 253-255 [47]-[55].

176 Yet upon analysis this point melts away. There is no doubt the "events" and "happenings" that may constitute "accidents" within Art 17 can include "omissions" as well as affirmative acts. The instances already cited demonstrate this. But it is still necessary, if recovery is to occur for bodily injury suffered by a passenger, that the facts pleaded and proved should answer the description of an "accident" that has "caused the damage so sustained" at the specified place and within the specified time. Otherwise, an "omission", such as a so-called "pure omission", will not engage Art 17. Article 25 lifts the restriction which Art 22, read with Art 17, imposes on the recovery for damage from a carrier. However, Art 25 does not purport to remove the requirement to plead and prove "the accident" to which Art 17 refers. That requirement remains and, as has been shown, it was deliberately added as a precondition to recovery applicable to a claim in respect of the death or wounding of a passenger or any other bodily injury suffered by a passenger.

177 The appellant challenged what he suggested was the undue deference exhibited by the United States cases towards the determinations by carriers themselves (or their regulatory agency) of the standard to constitute "the usual, normal, and expected operation of the aircraft"[183]. Thus, the appellant suggested that it was a mistake to deny the existence of an "accident" simply because airlines, in adopting the configuration of their seating arrangements, food and beverage services, public announcements and provision of written and oral warnings about DVT, had complied with industry practice at a given time (or even with any requirements of government agencies that then prevailed). The appellant suggested that inherent in this approach was a view that it could be left to the carriers themselves, or their regulatory bodies, to determine their *own* liability for "accidents". This, the appellant said, was incompatible with the imposition of the objective standard of the Warsaw Convention which judged whether an "accident" had occurred objectively and not whether it had occurred according to the views and practices of the relevant carriers, carriers generally or their regulatory agencies. This submission had resonances with the earlier rejection by this Court, in the context of liability for negligence at common law, of the earlier law that exempted medical practitioners from liability in negligence if they conformed to "a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice"[184].

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183 *Saks* 470 US 392 at 406 (1985).

184 *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 at 881 per Lord Scarman, describing the so-called *Bolam* test: see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 586-587; [1957] 2 All ER 118 at 121, disapproved in *Rogers v Whitaker* (1992) 175 CLR 479 at 484.

178 However, this point also collapses under analysis. It is true that, in judging whether an "accident" has occurred, attracting Art 17 of the Warsaw Convention, it could not be left to individual carriers, carriers generally or their regulatory agencies to determine that fact or the existence of an essential ingredient. However, this was not the way that *Saks* or any of the cases that have followed it, have used airline industry practice. Certainly in *Saks*, that use was confined to demonstrating that any event or happening that occurred was not part of "routine travel procedures" at the time, objectively viewed. To qualify as an "accident", the facts and circumstances pleaded and proved had to take the case outside the routine, ordinary, normal procedures of flying. They must render the facts and circumstances "an unexpected or unusual event or happening that is external to the passenger"[185].

179 Approached in this way, there is no offence to the principle that the Warsaw Convention must be construed objectively without permitting a carrier, carriers generally or regulatory agencies to fix in-flight standards. Those standards are not immutable. The history of the expansion of air carriage and of improved passenger and cargo safety over the course of the twentieth century bears witness to the ever-improving standards that have been attained.

180 Today, if a flight crew omitted to provide warnings to passengers about DVT, and failed to follow any settled requirements to make announcements and to display instructive films about the subject in defiance of carrier instructions and regulatory requirements (if any), such refusal or oversight might amount to an "accident". Almost certainly, it would involve the failure of the flight crew to comply with carrier protocols mandating announcements and other warnings. It would be an unexpected or unusual event. This is not what the appellant has pleaded in the present case. His complaint that the courts in the past have shown an undue willingness to allow carriers and others to determine the warnings and information concerning DVT is unpersuasive. The reference to such considerations has been confined to that element which is prerequisite to the existence of an "accident", namely that the event or happening was "unexpected or unusual" at the time the "accident" was alleged to have occurred.

181 *Reliance on Husain*: Much of the appellant's argument in this Court was based on a decision of the Supreme Court of the United States since *Saks*, namely *Olympic Airways v Husain*[186].

182 *Husain* involved a claim arising out of the death of a passenger on a flight from Athens to San Francisco. The passenger suffered from severe asthma. His

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185 *Saks* 470 US 392 at 405 (1985).

186 540 US 644 (2004).

wife, discovering that they had been seated in the economy cabin only three rows in front of the smoking section requested re-seating by a flight attendant. The latter told the wife to "have a seat". The wife persisted with her request and was told, incorrectly, that the cabin was "totally full". She was informed that the attendant was "too busy" to help. The passenger suffered extreme breathing difficulties during the flight, collapsed and died. His widow brought proceedings for damages against the carrier. The carrier asserted that the circumstances did not disclose an "accident" within Art 17 of the Warsaw Convention, as applicable to claims brought in the United States[187]. The United States District Court held that the flight attendant's refusal to re-seat the passenger amounted to an "accident"[188]. The Court of Appeals for the Ninth Circuit affirmed this decision[189]. By majority[190], the Supreme Court of the United States upheld the decision, confirming the claim as within the Convention.

183 It was not in dispute in *Husain* that the definition of "accident" in *Saks* should be applied; that attention should be paid to relevant national and international authority; and that care should be taken, so far as possible, to ensure the uniform application of the Warsaw Convention by the courts of the States parties to it. The majority of the Supreme Court concluded that the case involved "unusual or unexpected" conduct on the part of the carrier. I agree with the submission for Qantas that *Husain* was not a case about mere inaction. The Supreme Court in *Husain* recognised, as *Saks* had done earlier, that "[a]ny injury is the product of a chain of causes"[191]. As the majority explained[192]:

> "Petitioner's focus on the ambient cigarette smoke as the injury producing event is misplaced … [P]etitioner's 'injury producing event' inquiry – which looks to 'the precise factual "event" that caused the injury' – neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury … In *Saks*, the Court recognized that any one of these factual events or happenings may be a link in the chain of causes and – so long as it is unusual or unexpected – could constitute an 'accident' under Article 17."

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187 See *Husain* 540 US 644 at 646 fn 1 (2004).

188 *Husain v Olympic Airways* 116 F Supp 2d 1121 at 1134 (2000).

189 *Husain v Olympic Airways* 316 F 3d 829 at 837 (9th Cir 2002).

190 Thomas J for the Court; Scalia J (with whom O'Connor J agreed as to part) dissenting. Breyer J took no part in the decision.

191 *Husain* 540 US 644 at 652 (2004), citing *Saks* 470 US 392 at 406 (1985).

192 *Husain* 540 US 644 at 653 (2004).

184 For the majority in *Husain*, the flight attendant's refusal to assist on three separate occasions was also a "factual 'event'"[193]. The "rejection of an explicit request for assistance would be an 'event' or 'happening' under the ordinary and usual definitions of these terms"[194].

185 By the time that *Husain* was decided by the Supreme Court of the United States, judicial reasons were available to United States courts in the DVT litigation being conducted in England[195]. The Supreme Court also had the reasons of the Victorian Court of Appeal in this Australian case[196]. The majority in *Husain* did not consider the conclusion in either of those proceedings to be inconsistent with their reasons, itself a significant comment[197]. They pointed to the "substantial factual distinctions between these cases" and cited the express statement to that effect recorded in the English decision. The latter had laid emphasis upon the *refusal* of the flight attendant to provide an alternative seat that formed "a more complex incident" whereby the passenger was exposed to smoke in circumstances properly described as "unusual and unexpected"[198].

186 The dissenting opinion in the Supreme Court was, however, unimpressed by such factual distinctions. Thus, Scalia J interpreted the majority's holding that "mere inaction can constitute an 'accident' within the meaning of the Warsaw Convention"[199]. His Honour (with the support of O'Connor J who had written the Supreme Court's opinion in *Saks*) preferred the approach adopted by Ormiston JA in the Court of Appeal in the present case and by Lord Phillips of Worth Matravers MR in *DVT Litigation*. By these approaches, inaction on the part of the flight crew "is not an event; it is a non-event. Inaction is the antithesis of an accident."[200]

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193 *Husain* 540 US 644 at 653 (2004).

194 *Husain* 540 US 644 at 655 (2004).

195 *Husain* 540 US 644 at 655 fn 9, 659 (2004); see *DVT Litigation* [2004] QB 234.

196 Referred to in *Husain* 540 US 644 at 655 fn 9, 660 (2004); see [2003] VSCA 227.

197 *Husain* 540 US 644 at 655 fn 9 (2004).

198 *DVT Litigation* [2004] QB 234 at 254 [50].

199 *Husain* 540 US 644 at 658 (2004).

200 *DVT Litigation* [2004] QB 234 at 247 [25], cited by Scalia J in *Husain* 540 US 644 at 659-660 (2004).

187 It is unnecessary for this Court to choose between the conflicting opinions expressed in *Husain*. As was predicted in *Saks*, and is self-evident, cases will present that are at the borderline of establishing an "accident" or failing to do so. There were peculiar features of the confrontation between the wife, the passenger and the flight attendant in *Husain* that arguably lifted that case from classification as a "non-event" into classification as an unexpected or unusual happening or event and hence an "accident". Especially is this so because, in *Husain*, the District Court found that the conduct of the flight attendant was in "blatant disregard of industry standards and airline policies" applicable at the time[201].

188 *Conclusion: Husain is distinguishable*: *Husain*, a case about confrontation and refusal, is clearly distinguishable from the present case on the facts pleaded by the appellant. The Supreme Court of the United States was careful to note that the "conclusion" it had reached was "not inconsistent" with the decision in *DVT Litigation*, a formula noticed by the dissentients[202]. Any criticism of the logic of the reasoning of the two opinions in *Husain* is not this Court's business. It is enough to be satisfied, as I am, that there is nothing in *Husain* that indicates a reversal of the influential definition of "accident" adopted by the Supreme Court in *Saks*. On the contrary, that definition was applied. Moreover, even the dissentients recognised the way in which affirmative and unusual action by flight crew could change an omission to act (or "non-event") into an event or happening. They favoured remanding the proceedings to the District Court to consider whether the flight attendant's misrepresentation about the plane being "full", independent of any failure to re-seat the passenger, was an "accident that caused [his] death"[203].

189 In the present case, it is not alleged that there was any similar confrontation between the appellant and either the Qantas or British Airways flight attendants or staff. Nothing is pleaded that was peculiar or special to the appellant. It is not alleged that the conditions on board the aircraft represented, in any way, a departure from those to be expected or normal at the time. On the contrary, the opposite is pleaded.

190 It follows that, in my view, nothing in *Husain* assists the appellant in this appeal. Nothing in the reasoning of the majority suggests the need to correct the conclusion to which the majority of the Court of Appeal came in this case.

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201 116 F Supp 2d 1121 at 1134 (2000).

202 540 US 644 at 661 (2004) per Scalia J.

203 *Husain* 540 US 644 at 667 (2004) per Scalia J.

Consistency with international authority

191 *North American cases*: Accepting that it is highly desirable, and one of the purposes of the Warsaw Convention, that there be uniformity and certainty in the application of the Convention in the courts of different States parties[204], it is instructive also to consider whether the foregoing conclusion, arrived at by my own analysis, would involve any departure from the approach to like claims on the part of courts in other jurisdictions. Far from indicating a departure, consideration of the decisions so far reached in DVT litigation in other countries indicates that the conclusion reached by the majority in the Court of Appeal in this case conforms to the approach of courts of other countries.

192 It is appropriate to begin with cases in the United States because the Supreme Court of that country has now twice, albeit without full consideration, passed upon the issue of DVT claims. It did so (as has been shown) in the comment in *Husain* concerning the conclusion of the English and Australian litigation in DVT claims to that time. But there is more than this.

193 In *Blansett v Continental Airlines Inc*[205], the Court of Appeals for the Fifth Circuit considered the claim of a plaintiff who alleged against a carrier that he had suffered DVT during the course of a flight. Reference was made to the absence from federal flight safety regulations of any requirement that air carriers should warn passengers of the risk of DVT or of the means of avoiding or minimising that risk[206]. The Court of Appeals considered the applicability of the decision in *Husain*. It distinguished that case on the footing that the Supreme Court has held that "some kinds of inaction can constitute an 'accident'"[207]. However, it held that *Husain* was not an instance of "mere inertia" that would represent a "non-event"[208]. It was one that involved "an event both unexpected and unusual". Addressing the case before it, the Court in *Blansett* concluded[209]:

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204 See these reasons at [140]-[143].

205 379 F 3d 177 (5th Cir 2004).

206 379 F 3d 177 at 182 (5th Cir 2004).

207 379 F 3d 177 at 181 (5th Cir 2004).

208 One judge of the Court of Appeals (Judge Dennis) disagreed with the distinction between "mere inertia" and "inertia plus unusual circumstances" but regarded the difference as immaterial. See *Blansett* 379 F 3d 177 at 181 fn 4 (5th Cir 2004).

209 379 F 3d 177 at 182 (5th Cir 2004).

> "[N]o jury may be permitted to find that Continental's failure to warn of DVT constituted an 'accident' under article 17. Continental's policy was far from unique in 2001 and was fully in accord with the expectations of the FAA. Its procedures were neither unexpected nor unusual."

194 Whilst this Court's decision in the present case stood for judgment, the parties informed us that the Supreme Court of the United States had denied *certiorari* to Mr Blansett. Although this does not affirm the reasoning of the Court of Appeals, it suggests an unwillingness on the part of the Supreme Court to question the conclusion reached. Meantime, in other cases in the United States, courts have held that the failure of airlines to warn of the risk of DVT, at a time comparable to that of the appellant's flight, did not constitute an "accident"[210].

195 In Canada, in *McDonald v Korean Air*, a passenger's DVT-based claim was rejected at first instance due to his failure to establish "accident"[211]. The Ontario Court of Appeal (which included Abella J[212]) unanimously dismissed an appeal from that decision, without extended reasons[213]. An application for leave to appeal to the Supreme Court of Canada was refused[214].

196 *English cases*: A similar conclusion was reached, unanimously, by the Court of Appeal of England and Wales in *DVT Litigation*[215]. That Court affirmed the decision at first instance of Nelson J[216] which had held that, on the basis of an agreed "matrix of facts", the claimants did not have an entitlement under Art 17 of the Warsaw Convention for DVT allegedly suffered by them. In particular, Nelson J concluded that the facts did not disclose an "accident" for the purposes of Art 17. The Court of Appeal affirmed that conclusion. It held that an "accident" had to be an event or happening external to the passenger that impacted on the passenger's body in a manner causing death or bodily injury. It upheld the requirement that such an event had to be unusual, unexpected or untoward, although it could be fleeting or might continue for an extended period.

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210 eg *Rodriguez v Ansett Australia Ltd* 383 F 3d 914 (9th Cir 2004). A petition for *certiorari* to the Supreme Court of the United States was subsequently denied.

211 (2002) 26 CCLT (3d) 271. See *DVT Litigation* [2004] QB 234 at 257 [65].

212 Subsequently a Justice of the Supreme Court of Canada.

213 *McDonald v Korean Air* (2003) 171 OAC 368.

214 *McDonald v Korean Air* (2003) 191 OAC 398 (note).

215 [2004] QB 234.

216 [2003] 1 All ER 935.

197 In its reasons, the Court of Appeal rejected the suggestion that inaction, being the operation of allegedly cramped seating and other cabin conditions that were integral and permanent features of the aircraft and carriage throughout the flight at the time it occurred, was capable of amounting to an "event" so as to constitute an "accident". Lord Phillips MR, in the context of the Warsaw Convention, rejected the notion that "inaction itself can ever properly be described as an accident"[217]. He considered that his conclusion was reinforced[218] by the fact that Art 17 postulated that the accident must "take place" at the designated places and within the specified times. Something that does not "take place" cannot amount to the unexpected or unusual event or happening that is necessary to constitute an "accident".

198 The Court of Appeal also accepted the inevitability of borderline cases. Thus, the Master of the Rolls referred to the decisions of the District Court and Court of Appeals in *Husain* (which had not then reached the Supreme Court). He expressed himself as having no difficulty with "the result in this case", although he questioned some of the reasoning[219]. Clearly, he saw the case as one of "refusal to provide an alternative seat" which thus "formed part of a more complex incident"[220]. His Lordship's analysis was persuasive for the majority of the Court of Appeal in the present case. Acknowledging the judgment that is required by the facts pleaded or proved in every case, I too would follow it. As the law stands in England on this subject, it presents a barrier to claims under the Warsaw Convention such as those brought to this Court by the appellant.

199 The House of Lords has granted the plaintiffs in the English DVT litigation leave to appeal from the judgment of the Court of Appeal. The decision of their Lordships is not yet available.

200 *Other decisions*: The respondent airlines drew to notice the decisions of other courts at first instance that have rejected claims similar to those of the appellant as being outside the requirement of "accident" contained in Art 17 of the Warsaw Convention[221]. In none of these cases has the plaintiff succeeded.

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217 *DVT Litigation* [2004] QB 234 at 247 [25].

218 *DVT Litigation* [2004] QB 234 at 248 [26].

219 *DVT Litigation* [2004] QB 234 at 254 [50].

220 *DVT Litigation* [2004] QB 234 at 254 [50].

221 For example, *Van Luin v KLM Airlines t/a KLM Royal Dutch Airlines* (2002) 1 DCLR (NSW) 25; *Rynne v Lauda-Air Luftfahrt AG* [2003] QDC 4; *Louie v British Airways Ltd* unreported, District Court of Alaska, 17 November 2003.

None of the available reports suggests a need to reconsider any of the foregoing reasoning. On the contrary, in the current state of authority, the rejection of the appellant's claim, as pleaded, would conform to the uniform approach of national courts in diverse legal systems applying a generally consistent interpretation of "accident" to exclude claims such as the present.

201 The attempt by the appellant to give his claim the allure of an affirmative "event or happening" by referring to a so-called "pleaded combination of circumstances" and "pleaded continuous circumstances" fails. In the end, the combination and continuous circumstances amount to nothing but aircraft conditions. They do not rise, as pleaded, to an "event" or "happening". Still less do they qualify for description as an event or happening that was "unexpected" or "unusual" in the circumstances of the carriage at that time.

Conclusion and order

202 The result is that the conclusion reached by the majority of the Court of Appeal was correct. The orders made by that Court involve no error. The appeal to this Court should be dismissed with costs.

203 CALLINAN J. No one who has ever endured the discomfort of a long journey by air in the seemingly ever diminishing personal space provided by airlines for economy class passengers, could fail to sympathize with the plight of this appellant. But whether the respondents could and should have done better in this and other respects for him on his long flights the subject of his appeal, is not the question. Rather, it is, as the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ explains, whether on the facts alleged by the appellant, he may be able to make out against the respondents a case of accident within the meaning of "accident" as that word is used in Art 17 of the Warsaw Convention 1929 as modified from time to time. The answer to that question must, I think, be a negative one.

204 The Court of Appeal of England and Wales in *In re Deep Vein Thrombosis Litigation*[222] took the view that such an accident could not be regarded as having happened unless an event of an unusual, unexpected or untoward kind, external to the passenger, which had adversely affected his health or life, had occurred: mere inaction could not constitute an event or an accident. I agree with that view.

205 Some further points may be worth making. As the joint judgment also points out[223], the words and concepts contained in the Convention have from time to time been "flexibly applied". Flexible application may lead to both uncertain, and, on occasions, strained or artificial application, the latter the product of an understandable judicial resistance to the rigidity and harshness of a rule admitting compensation relevantly for an accident only. Why, it may be asked should a carrier by air be exonerated if it has negligently injured a passenger simply because there has not been an accident? Great technological strides rendering air travel much safer and predictable have notoriously been made, even in the 30 years since the last, relevant modification of the Convention. It is at least open to question whether air carriers and their insurers are enjoying, as arguably sea carriers also are, the benefit of an anachronistic approach to the perils of travel as defined by outmoded international instruments, a point that I sought to make with respect to the expression used in the Hague Rules, the "perils of the sea"[224], in *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad*[225]. Perhaps the time has come to revise these

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222 [2004] QB 234 at 246-249 [19]-[38] per Lord Phillips of Worth Matravers MR with whom Judge LJ agreed.

223 See the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ at [28]-[36].

224 The Hague Rules, Arts III and IV.

225 (1998) 196 CLR 161 at 242-244 [225]-[230].

instruments in the light of increased knowledge and improved technology, in the interests both of consumers, and greater certainty of application.

206 I agree with the joint judgment that the appeal should be dismissed with costs.