

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   OLYMPIC AIRWAYS,                   :

4                   Petitioner                   :

5           v.                                   :   No. 02-1348

6   RUBINA HUSAIN,                   :

7   INDIVIDUALLY, AND AS                   :

8   PERSONAL REPRESENTATIVE OF           :

9   THE ESTATE OF ABID M HANSON,       :

10   DECEASED, ET AL.                   :

11   - - - - -X

12   Washington, D. C.

13   Wednesday, November 12, 2003

14           The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States at  
16 11:04 a.m.

17 APPEARANCES:

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19 the Petitioner.

20 H. BARTOW FARR, III, ESQ., Washington, D. C.; on behalf of  
21 the Respondents.

22 BARBARA B. McDOWELL, ESQ., Assistant to the Solicitor  
23 General, Department of Justice, Washington, D. C.; on  
24 behalf of the United States, as amicus curiae,  
25 supporting the Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 02-1348, Olympic Airways v. Rubina Husain.

5 Mr. Harakas. Am I pronouncing your name  
6 correctly?

7 ORAL ARGUMENT OF ANDREW J. HARAKAS

8 ON BEHALF OF THE PETITIONER

9 MR. HARAKAS: Yes, Your Honor.

10 Mr. Chief Justice, and may it please the Court:

11 Over 70 years ago, the drafters of the Warsaw  
12 Convention created a treaty which set forth the  
13 circumstances under which air carrier liability should be  
14 created in the event of passenger injury or death. The  
15 legal regime they created recognized there's circumstances  
16 where the passenger should be entitled to a cause of  
17 action, but it also expressly recognized the need to limit  
18 that liability and set forth certain conditions when that  
19 limited liability would apply. Article 17 of the Warsaw  
20 Convention creates a presumption of liability but only  
21 when three conditions precedent are satisfied.

22 One, there has to be an accident in which the  
23 passenger suffers a bodily injury or dies and the accident  
24 took place on board the aircraft or during the course of  
25 embarking or disembarking.

1           The issue before the Court here today -- we're  
2 dealing with the accident condition precedent. Was that  
3 satisfied in this case?

4           Of course, the -- the Court in Saks in 1985  
5 specifically addressed the issue of what is an accident,  
6 and the Court defined an accident as an unusual and  
7 unexpected event that's external to the passenger.

8           Of a particular importance to this case is where  
9 the Court declined to extend the accident and encompass an  
10 injury that results from the passenger's own internal  
11 condition and -- and in response to the normal and  
12 expected operations of the aircraft.

13           Thus, until recently, the courts have held that  
14 injuries arising out of the passenger's preexisting  
15 medical conditions do not satisfy the accident condition  
16 precedent even if there were allegations of air carrier  
17 negligence.

18           QUESTION: I take it you don't take the position  
19 that -- that, let's say, any death resulting in part as a  
20 result of one, but not the only, cause of the preexisting  
21 conditions is thereby excluded from the -- the class of  
22 liability.

23           MR. HARAKAS: I think you have -- Justice --

24           QUESTION: Every -- in other words, having a  
25 heart condition does not immunize Olympic Airlines against

1 liability if somebody dies of a heart attack per se.  
2 You're not taking that position.

3 MR. HARAKAS: Our position is that if somebody  
4 is on board an aircraft and they die of a heart attack,  
5 that is -- that is not an -- that's a -- the passenger's  
6 own internal reaction and it just happened to be -- the  
7 passengers happened to be on board the aircraft.

8 QUESTION: Sure, if -- if they're simply sitting  
9 in the seat and nothing unusual happens and they have a  
10 heart attack and die, sure, there's no liability. But if  
11 there are other conditions -- and the argument here is  
12 that there are other conditions -- and the heart attack  
13 was merely a contributing cause -- it was a condition upon  
14 which those other conditions acted -- that does not -- the  
15 existence of the heart condition does not immunize Olympic  
16 Airlines against liability. That's -- I don't think  
17 that's your argument, is it?

18 MR. HARAKAS: Well, no. What the argument is --  
19 and in this case here, you have to look to what is the  
20 injury-producing event? The injury-producing event  
21 here --

22 QUESTION: And -- and they say the injury-  
23 producing event is -- or one of the -- the analysis is the  
24 unexpected refusal of the airline personnel to allow this  
25 individual to get moved into a smoke-free zone. And that

1 unusual and unexpected event, combined with the smoke and  
2 the heart condition, caused the death. But it was the  
3 unexpected refusal to remove from a smoke zone that is the  
4 unexpected event or occurrence that is the accident. What  
5 is your answer to that?

6 MR. HAKAKAS: I respectfully disagree with the  
7 characterization, which was adopted by the court below, in  
8 that in this case you have to -- you -- you can't just  
9 simply look to the fact that you had the flight attendant  
10 saying we're not going to move you. He was assigned a  
11 non-smoking seat. He --

12 QUESTION: He was assigned a non-smoking seat  
13 which happened to be in a zone with smoke.

14 MR. HAKAKAS: Well, in -- on board any aircraft,  
15 when smoking is allowed, you have ambient cigarette smoke  
16 throughout the aircraft, and in this case you have to look  
17 to -- it can't be disputed that this passenger reacted to  
18 the cigarette smoke and the injury-producing event  
19 indirect --

20 QUESTION: But less in -- less in row 15 than in  
21 row 48.

22 MR. HAKAKAS: That's -- that's correct, Justice  
23 Ginsburg. However, when you have -- when you -- in any  
24 aircraft when you -- when they used to allow smoking on  
25 the aircraft, as at this time, you could be 10 rows away

1 and you would still be exposed to that ambient cigarette  
2 smoke.

3 But the point we have to look to is with respect  
4 to the Warsaw Convention is what type of liability did  
5 they want to create. You know, when we get into issues of  
6 straying away from the direct cause -- because when we  
7 look to almost every single Warsaw Convention accident  
8 case, the focus has always been on what is that direct  
9 injury-producing event. When we start inserting common  
10 law concepts of --

11 QUESTION: Well, you say direct, are -- are you  
12 trying to make the -- the act omission distinction?

13 MR. HARAKAS: Well, the act and -- in one  
14 respect, but -- but in the broader sense, you have to look  
15 to is what has always been the event the courts have  
16 looked to, what did the drafters intend the event -- the  
17 -- the cause to be? It's not -- I don't think it's proper  
18 to inject full-blown common law notions of proximate  
19 causation.

20 QUESTION: No -- no one is -- no one is making  
21 the common -- I don't think is making the common law  
22 argument here. They're saying it was unexpected as a  
23 matter of fact that somebody who wanted a -- a smokeless  
24 seat, who found there was smoke in the area of the seat  
25 and who was asked to be moved, would be refused by the

1 airline. That is the unexpected event.

2 MR. HARAKAS: But -- but that's what courts have  
3 done after the Supreme Court's decision here by the Court  
4 in Tseng because at that time, before Tseng, courts used  
5 to find that it didn't matter whether you had allegations  
6 of true negligence because we do have to look to --

7 QUESTION: The -- the point is the allegations  
8 are not of negligence, which is a legal and normative  
9 conclusion.

10 MR. HARAKAS: Yes.

11 QUESTION: The allegation is simply, as a matter  
12 of fact, it is not to be expected that a stewardess would  
13 stand there and say, no, you can't move him. Whether it  
14 was negligent or not negligent, it simply was unexpected  
15 as a matter of fact, and they're saying that satisfies the  
16 unexpected event.

17 MR. HARAKAS: I -- I disagree. I don't think  
18 that satisfies the unexpected event.

19 QUESTION: Well, it could and it is different  
20 from ordinary negligence. I mean, it is conceivable at  
21 least that to have an airline stewardess say no when the  
22 policy of the airline and the standard generally is to the  
23 contrary and to say, no, I will not consider moving you  
24 even though there were seats further away from the smoke  
25 origin.



1           MR. HARAKAS: I don't believe in the -- for  
2 purposes of the article 17 accident analysis, you -- you  
3 -- your -- you should or should be allowed or it's proper  
4 to go beyond looking to asking what is that injury-  
5 producing event.

6           In this instance here, we have to remember too  
7 that, yes, there were three requests to be moved.  
8 However, the passenger himself never asked to be moved.  
9 It was always through his wife. He was a doctor. He knew  
10 his own condition. I mean, we can all get into the whole  
11 reasonableness issue, but what happened --

12           QUESTION: Which -- which is a matter of  
13 defense.

14           QUESTION: Yes.

15           MR. HARAKAS: Yes, it's a matter of defense.

16           QUESTION: But Justice O'Connor's question and  
17 my question is -- is the question that goes to whether you  
18 get into court to defend. And you're -- you're giving us  
19 a -- an argument that, in effect, we weren't negligent.

20           MR. HARAKAS: No.

21           QUESTION: But our questions were wasn't it  
22 unexpected in fact that somebody would be in the position  
23 that this passenger was in.

24           MR. HARAKAS: I don't -- well, I think that's  
25 where the courts below and where you get -- where you can

1 cross the lines and confuse the concepts of negligence and  
2 causation in this case because here you could say was it  
3 unusual, unexpected for a -- for a -- when a passenger  
4 makes a request to be moved. In a certain sense, yes, you  
5 could say that it was -- it could unusual, unexpected, but  
6 I think you have to come back to is but is that the  
7 injury-producing event. And that's what the courts look  
8 to.

9 QUESTION: Were there other seats available in  
10 the economy section?

11 MR. HARAKAS: There were other seats available,  
12 Chief Justice.

13 QUESTION: In the economy section?

14 MR. HARAKAS: In the economy seat section. I  
15 think when you -- it was very difficult to determine  
16 because the plane was -- there were approximately 11  
17 seats. Some of those 11 seats were in the smoking  
18 section, but the --

19 QUESTION: And in addition, there were the no-  
20 revenue people who could have been asked to leave.

21 MR. HARAKAS: There were the non-revenue people,  
22 but when you look to the record, the only way you could  
23 determine the non-revenue people -- in fact, we had to  
24 submit post-trial submissions after the trial to -- for  
25 somebody to testify to interpret the codes that were on

1 the passenger manifest to determine who were revenue and  
2 who were non-revenue.

3 QUESTION: This doesn't have anything to do with  
4 the case, does it?

5 MR. HAKAKAS: No, it doesn't, Your Honor. It  
6 doesn't have --

7 QUESTION: So what are we talking about it for?  
8 I mean, it -- it -- the issue before us is not negligence.

9 MR. HAKAKAS: It's not --

10 QUESTION: The issue before us is whether it was  
11 an accident.

12 MR. HAKAKAS: Exactly. It is whether it was an  
13 accident.

14 QUESTION: May I ask this question? I know you  
15 didn't argue about negligence, but you do seem to draw a  
16 distinction between affirmative conduct on the one hand  
17 and failure to act on the other hand. And my question to  
18 you is, supposing that without asking the stewardess, the  
19 passenger had gotten into a -- a non-smoking seat seven or  
20 eight rows ahead of where he was sitting and then was  
21 ordered to return to his seat. Would that have been an  
22 accident?

23 MR. HAKAKAS: Under the circumstances, no, I  
24 don't think under -- for purposes of the Warsaw  
25 Convention, that would have been an accident.

1 QUESTION: That would have been.

2 MR. HAKAKAS: It would not have been an  
3 accident.

4 QUESTION: It would not have been.

5 MR. HAKAKAS: Because again, the injury --

6 QUESTION: So then -- then you don't rely on a  
7 distinction for the action and non-action.

8 MR. HAKAKAS: Well, because -- well, I do rely  
9 on the distinction between action and non-action because  
10 you could have an omission which in and of itself cannot  
11 be an accident. I -- I really gave a lot of thought to  
12 this. I looked at the cases and I could never find a pure  
13 omission being an accident. A omission can result in an  
14 accident.

15 QUESTION: Well, why is this a pure omission?  
16 It seems to me she misrepresented that the plane was full  
17 twice when that wasn't true. That doesn't sound like an  
18 omission to me. She told the wife to sit down. She --  
19 well, how do you treat that she was supposed to report  
20 such incidents to her supervisor and she didn't do that?

21 MR. HAKAKAS: The -- the bottom line of the  
22 allegations here were that the -- the flight attendant  
23 should have taken action to move Mr. -- Dr. Hanson to  
24 another seat, and failure to do so would be --

25 QUESTION: And part of what -- part of what she

1 had --

2 MR. HARAKAS: -- in itself an omission.

3 QUESTION: Part of the picture is things that  
4 she affirmatively did do, and part are things she didn't  
5 do. And I don't understand that the law makes a  
6 distinction between doing what one should not have done or  
7 not doing what one should have done.

8 MR. HARAKAS: Generally in -- under negligence  
9 law -- under negligence law a negligence can be an act or  
10 omission. But here, when you're looking to the treaty of  
11 an accident defined as an unusual, unexpected event or  
12 happening, you basically have a non-event, something that  
13 did not happen. You -- you see that I think in the --

14 QUESTION: Yes, but you -- you say you wouldn't  
15 draw the distinction I suggested. So assume the case was  
16 the other way around, that the stewardess told him to get  
17 back to his seat. Now, why would that not be an accident?

18 MR. HARAKAS: Because at that point, when he got  
19 back to his seat, he would be back to his normal assigned  
20 non-smoking seat. While in close proximity to the smoking  
21 section, again, you have to see that smoke on a smoking  
22 aircraft, a known smoking aircraft, nobody -- you know,  
23 there was no surprise here when he got on board on this  
24 aircraft that there was a -- there was going to be smoke  
25 on this aircraft -- is not an unusual, unexpected event.

1           QUESTION: But I want to be sure I understand  
2 your position. If the stewardess had gone to the captain  
3 of the plane and said, we've got a guy in the back seat  
4 who said he's going to die because he can't stand smoke,  
5 he wants to sit in the front seat, and he's grabbed a seat  
6 up there, should I order him back to the old seat, and the  
7 captain says, yes, send him back, would that be an  
8 accident?

9           MR. HARAKAS: Under the Warsaw Convention, I  
10 don't think it would be an accident, and here's why. It  
11 -- these are extreme examples that -- with respect to that  
12 where -- the passenger in this case -- don't forget too,  
13 the flight attendant did give the option to this passenger  
14 to move. He could have taken self-help to remedy the  
15 situation, but he opted not to. But in those type of  
16 situations, you have instances where they're very extreme  
17 examples, but -- and the convention doesn't necessarily  
18 provide a remedy for all those types of situations.

19           QUESTION: I -- I take it -- I take it you think  
20 -- is it Abramson in the Third Circuit where they -- the  
21 -- the passenger can't lie -- lie down.

22           MR. HARAKAS: Exactly, Justice Kennedy.

23           QUESTION: You take the position that case is  
24 wrong?

25           MR. HARAKAS: No. That -- that position -- that

1 case is -- is 100 percent correct and it's very analogous  
2 to our case because in the Abramson --

3 QUESTION: That's -- that's -- it seems to me  
4 there's an accident in that case.

5 MR. HARAKAS: In that case, the -- the court of  
6 appeals found there was not an accident.

7 QUESTION: I understand, but it seems to me that  
8 there is.

9 MR. HARAKAS: Well, Abramson followed the --  
10 almost the exact criteria set forth by the Court in Saks.  
11 Was it an unusual, unexpected event? And they found that  
12 being seated in an aircraft seat -- you're assigned an  
13 aircraft seat -- is not -- and sustaining an injury due to  
14 your own internal reaction was not an accident because  
15 they, again, focused on what was the precise factual event  
16 that led to the injury.

17 QUESTION: Of course, there it seems to me that  
18 the -- the internal cause is -- is much greater than it --  
19 it is here.

20 Let -- let's -- can we take the case on the  
21 assumption -- I think we must take the case on the  
22 assumption, based on the -- on the findings of the  
23 district court, that if they had moved the passenger, the  
24 event would not have occurred.

25 MR. HARAKAS: We have to --

1 QUESTION: Now --

2 MR. HARAKAS: Yes. We have to take --

3 QUESTION: -- if we take the case on that  
4 assumption, it's -- it seems to me it's got to be an  
5 accident.

6 MR. HARAKAS: I disagree, Justice Kennedy,  
7 because again, I -- I just come back to when I was looking  
8 at all the cases and looking at the treaty and the text of  
9 the convention, you always do have to look to the injury-  
10 producing event because the text of the treaty says an  
11 accident which causes the damage. And I think it does  
12 come down to showing what is the direct event.

13 I think when you look at the Krys case, I think  
14 the Court -- the Eleventh Circuit in Krys clearly set  
15 forth, I think, a very workable standard. They say let's  
16 look at the -- we ask let's look at the precise event. We  
17 look at what were the precise events that caused this  
18 injury, not the actions of the air carrier that they could  
19 have taken to avert that injury.

20 QUESTION: But was it determined here that the  
21 passenger died from smoke exposure?

22 MR. HARAKAS: There was at the -- there was a --  
23 a legal finding that it was the smoke that killed the  
24 passenger even though --

25 QUESTION: And do we take the case on that



1 understanding?

2 MR. HARAKAS: You would have to take the case on  
3 the understanding because we didn't raise the factual  
4 issue that he would have died from the food poisoning.

5 QUESTION: And is it the case that there would  
6 have been seats possibly available more removed from the  
7 smoke so that it wouldn't have been as heavy an exposure  
8 to smoke?

9 MR. HARAKAS: I don't -- I don't think there was  
10 any evidence to establish the concentrations of the  
11 cigarette smoke. There were seats that were further  
12 removed, but then you come down to, again, factual issues  
13 or determinations as to, well, how far do you remove the  
14 passenger. Is three further rows further ahead, five rows  
15 further ahead enough?

16 QUESTION: But here there was a total refusal  
17 to --

18 MR. HARAKAS: There was a -- well, there was  
19 a --

20 QUESTION: -- to provide any help.

21 MR. HARAKAS: There was a refusal to -- there  
22 was a refusal to move him because the flight attendant  
23 believed the flight was full, and it was, other than the  
24 10 seats. But the -- the flight attendant did give this  
25 passenger the option to reseat himself.

1           QUESTION: Well, you -- you say you have to  
2 consider just very precisely what caused the injury. What  
3 is your view here of what caused the injury?

4           MR. HAKAKAS: What caused the injury was his  
5 exposure to the cigarette smoke under the facts of this  
6 case and on the findings. And then we have to determine  
7 was cigarette smoke in that area, ambient cigarette smoke,  
8 unusual, unexpected, and even the lower court found that  
9 cigarette smoke on a smoking aircraft is not an unusual,  
10 unexpected event.

11          QUESTION: When you say the -- the airline gave  
12 the passenger the option to reseat himself, wasn't it the  
13 option to -- to request another passenger to change seats  
14 with him?

15          MR. HAKAKAS: To change seats with him

16          QUESTION: Yes.

17          MR. HAKAKAS: Or he could have -- what the -- or  
18 he could have moved through the cabin to see if he could  
19 locate an empty seat.

20          But mind you, the flight attendant never had any  
21 direct communications with Dr. Hanson. It was always  
22 through his wife. There were two requests made to move on  
23 initial boarding.

24          QUESTION: Well, but does that make -- does that  
25 make any difference in -- in this case, the fact that his

1 wife was speaking for him?

2 MR. HARAKAS: No. I mean, it would have made a  
3 difference in the lower court as to the issue of  
4 reasonableness and things like that, but for purpose of  
5 the legal issue before the Court, no, it doesn't make a  
6 difference because, again, when you look at -- when you  
7 look at all the various cases, when you come through Kryss,  
8 Abramson, and the other pre-Tseng cases -- and I draw that  
9 distinction before Tseng -- the courts universally had  
10 held that a passenger's injury arising out of his own  
11 internal reaction to the conditions on the aircraft is not  
12 an accident.

13 And when you look to the history of the  
14 convention itself, here the lower courts, in effect --  
15 while we say they didn't use negligence, they, in effect,  
16 imported concepts of negligence, reasonableness,  
17 reasonable alternatives, things like that, those types of  
18 concepts.

19 QUESTION: How about other courts? I mean, we  
20 do look to see what our treaty partners do in this area.  
21 The two other courts that were cited in the brief that  
22 addressed this question seem to agree with the decision of  
23 the Ninth Circuit in this case.

24 MR. HARAKAS: Yes. Yes, Justice Ginsburg. The  
25 one court was an Australian court in Povi, a lower court

1 case, which that case has been appealed and argued on  
2 appeal. And that case -- that was in the DVT context. I  
3 think that court suffered from the same fundamental errors  
4 that the courts here below did in viewing what the --

5 QUESTION: What about the court of appeals in  
6 England --

7 MR. HARAKAS: -- that --

8 QUESTION: -- that disagreed on the -- on the --  
9 whatever that --

10 MR. HARAKAS: Yes, the DVT litigation.

11 QUESTION: Disagreed on that, but did say, went  
12 out of its way to say, it thought that this case was the  
13 right way to go about it.

14 MR. HARAKAS: Well, the -- on the DVT litigation  
15 case, the court found that -- he disagreed with the  
16 reasoning of the lower courts, but he said that he could  
17 certainly understand the result. But he was, again,  
18 focusing in on the facts because if you applied the --

19 QUESTION: Well, that's surely dictum anyway. I  
20 mean --

21 MR. HARAKAS: Yes, well --

22 QUESTION: -- the dictum in that case that --  
23 that he thought that this case came out right below. We  
24 would n't even -- we would n't even give dispositive effect  
25 to our own dictum much less to the dictum of a court of

1 appeals in England.

2 MR. HARAKAS: You're -- you're right, Justice  
3 Scalia. It was dicta. And what happened was in that  
4 case, I think he had a misperception of the facts at the  
5 end of the day, and if you applied the rationale that he  
6 used for his opinion in dismissing those cases, the facts  
7 of this case would inevitably lead to the dismissal of  
8 this case and a finding of no accident.

9 QUESTION: I don't think so, having read his  
10 decision and the other members of the court of appeals.

11 QUESTION: What was Lord Phillips'  
12 misperception?

13 MR. HARAKAS: As to the enforced exposure to the  
14 cigarette smoke because -- because the passenger here was  
15 given the option to relocate, and he could have relocated  
16 himself.

17 QUESTION: The option being -- the option being  
18 the one that was mentioned a moment ago. Your husband can  
19 get up and try to get somebody else to move?

20 MR. HARAKAS: Switch or find another -- one of  
21 the available empty seats. Because then you also have to  
22 remember, again, I -- well, I don't want to get into  
23 the --

24 QUESTION: She -- she said positively there are  
25 no empty seats. The -- the option that was given to the

1 wife was that you go ask another passenger to switch  
2 seats.

3 MR. HARAKAS: Sure, because -- because at the  
4 time, you know, there were only 11 empty seats, and she  
5 said that the plane is full. And that -- and that's at  
6 the time of boarding as well, in the middle of boarding.  
7 It's a flight that had been delayed for 3 hours.  
8 Everybody is coming on board the plane.

9 QUESTION: But by the time the second and third  
10 inquiries were asked, it should have been evident that  
11 there were empty seats.

12 MR. HARAKAS: Well, the -- the second inquiry  
13 was just before -- shortly before takeoff on -- on a  
14 flight delayed for 3 hours, and they're trying to take  
15 off, and she says, I can't help you right now. And one  
16 thing -- and then the third one was shortly after takeoff.

17 QUESTION: Well, but the -- I wouldn't think  
18 they allowed smoking before takeoff.

19 MR. HARAKAS: No, they did not allow smoking  
20 before takeoff. It wasn't until the third incident  
21 shortly after takeoff when smoking was allowed, and then  
22 she said, can you please move my husband now? And the  
23 request was denied.

24 But I think with -- with respect to the whole  
25 accident inquiry issue here, we also have to look to, when

1 you start bringing in the definition of what is an  
2 accident, when you start equating with issues of  
3 negligence and common law, I think we go astray and go  
4 contrary to what the drafters intended as to what the  
5 Court here in Tseng held, that you don't -- accident is  
6 not a common law concept. It's a self-contained --

7           QUESTION: If Tseng had held nothing on this  
8 point, in fact, it -- it said that the Second Circuit's  
9 conclusion that that wasn't an accident was doubtful. In  
10 Tseng, it was an academic question. What barred her from  
11 getting recovery under the treaty was she didn't suffer  
12 from a physical injury or from a psychological injury with  
13 -- with physical manifestations. She didn't die and she  
14 didn't have the kind of injury that would qualify. Tseng  
15 -- I think you are quite wrong in saying that that  
16 decision passed on the concept of accident.

17           MR. HAKAKAS: No. I agree with you, Justice  
18 Ginsburg. I may have misspoke because you're absolutely  
19 right. There was only that one footnote that -- where the  
20 Court did express concern as to whether the court in the  
21 Second Circuit flexibly applied the Tseng decision. But I  
22 was talking about the -- what I meant was the broader  
23 context of Tseng with respect to importation or allowing a  
24 parallel state cause of action in light of the exclusivity  
25 of the convention and the uniformity principles set forth

1 in the convention.

2           And if you start importing concepts of  
3 negligence back into the convention -- because, in effect,  
4 what the courts are doing below is they're saying, fine,  
5 we can't go to State law, but what we'll do is we'll --  
6 we'll define an accident to make it equivalent to a  
7 negligence cause of action. So there's really no  
8 difference. What the courts are doing is nullifying the  
9 exclusivity holding by equating any act of negligence as  
10 an accident.

11           QUESTION: But are -- are you saying here that  
12 the court of appeals really wrote an opinion about -- in  
13 negligence and saying that's an accident?

14           MR. HARAKAS: When you read the -- the language  
15 of the court of appeals, it's -- it's pure negligence  
16 language.

17           QUESTION: But -- but it seems to me whatever  
18 you think about what the flight attendant did, it -- it  
19 can't be classed as negligence here. It was a refusal to  
20 do something.

21           MR. HARAKAS: It was a refusal. It was a -- it  
22 was a -- in my view, it was an omission, and I think at --  
23 when you take omissions and put it in the context of what  
24 is -- is that an unusual, unexpected event, that an  
25 omission cannot in and of itself be the accident.



1           QUESTION: I don't know if we really have to get  
2 into the act versus omission question here because this  
3 was more than that. It was a refusal to take action in  
4 the face of an alleged severe medical problem and in -- in  
5 contravention to the rules of the airline at the time. So  
6 you could characterize this, I think, as some kind of  
7 positive action, in effect.

8           MR. HARAKAS: Well, I -- when I think of an  
9 event, I think of some type of positive action, and in  
10 this instance, when -- when I look at a refusal to do  
11 something, I look at it as -- as an omission.

12           But even if you did look at it as a positive  
13 event here, Justice O'Connor, I think you -- although --  
14 everything leads us back to trying to identify was the  
15 event that caused the injury here unusual, unexpected.  
16 And that -- there's only one injury-producing event. For  
17 example, let's say nobody asked the airline in this case  
18 to move Dr. Hanson. There was no request made, and he  
19 remained in his non-smoking seat.

20           QUESTION: No request made? I thought the wife  
21 made a request.

22           MR. HARAKAS: I'm sorry.

23           QUESTION: Excuse me.

24           MR. HARAKAS: A hypothetical.

25           QUESTION: Oh.

1           MR. HARAKAS: Let's assume no request had been  
2 made, and he would have remained in that same non-smoking  
3 seat and he would have died because of the exposure to the  
4 ambient cigarette smoke, according to plaintiffs' theory.  
5 What would be the injury-producing event there? What  
6 caused that death? His internal reaction to the cigarette  
7 smoke, the normal -- which was normal and expected.

8           Now, the fact that they asked -- somebody asked  
9 for him to be moved doesn't change the injury-producing  
10 event. The injury-producing event is the same. It's the  
11 exposure to the cigarette smoke.

12          QUESTION: Well, but of course, the exposure  
13 might have been substantially reduced if the passenger had  
14 been able to get seated in an area further removed from  
15 the active smokers.

16          MR. HARAKAS: There -- he still would have had  
17 -- there still would have been ambient cigarette smoke  
18 throughout the cabin, as we all well know.

19          QUESTION: Well, suppose there were five rows of  
20 empty seats in front and a -- a stewardess -- and there  
21 are stewardesses like this sometimes that we don't people  
22 wandering around the plane. We're serving food. You must  
23 sit down in your seat. A different case?

24          MR. HARAKAS: No, not a different case because  
25 you are assigned to your assigned seat, and again, it's

1 one of those extreme examples that if I believed there  
2 were five empty rows here, he probably would have gotten  
3 up and found it himself. But in that case, I don't feel  
4 there would be a different case because, again, I -- I  
5 focus in on this injury-producing event here, and the  
6 injury-producing event is the exposure to cigarette smoke  
7 which was normal and expected.

8 QUESTION: So your -- your submission is if the  
9 airline requires you to sit in the no-smoking seat for no  
10 particularly good reason, there's still no accident.

11 MR. HARAKAS: Oh, I -- I disagree on that one  
12 because if they required you to sit in a non-smoking seat  
13 and you had --

14 QUESTION: Well, that was my hypothetical.

15 MR. HARAKAS: Okay. If they -- if you -- if  
16 they require you to sit in a smoking section?

17 QUESTION: No. One -- just one -- one row  
18 ahead.

19 MR. HARAKAS: There would be no difference in  
20 the situation from this -- from our scenario. There still  
21 would not be an accident. He was assigned a non-smoking  
22 seat and you -- again, you look to was his own internal  
23 reaction here to the normal and expected operation of the  
24 aircraft.

25 And I think when -- when you look at the

1 convention, the structure of the convention, and what they  
2 had in mind by the term accident, you have to -- you can  
3 only come back to that one basic conclusion, that you look  
4 to what is that injury-producing event.

5 I'd like just to reserve the remaining -- my  
6 time for rebuttal if there are no further questions.

7 QUESTION: Very well, Mr. Harakas.

8 Mr. Farr, we'll hear from you.

9 ORAL ARGUMENT OF H. BARTOW FARR, III

10 ON BEHALF OF THE RESPONDENTS

11 MR. FARR: Mr. Chief Justice, and may it please  
12 the Court:

13 There are basically two reasons why we think  
14 that article 17 imposes liability when an airline  
15 knowingly leaves a passenger in medical jeopardy without  
16 taking basic measures to alleviate the harm.

17 First, because that kind of action violates  
18 normal industry safety practices and thus, under Saks --

19 QUESTION: Well, that's the question. Is it an  
20 accident? You assume it. You say that kind of accident.  
21 Well, I think that's the issue. Is it an accident?

22 MR. FARR: I'm sorry if I said that kind of -- I  
23 meant to say that kind of action under Saks is contrary to  
24 -- to the normal industry safety practices.

25 QUESTION: Let me ask about Saks. It's -- it

1 seems to me that the fallacy in the argument that -- that  
2 you -- you run and that the Government runs is that it  
3 accepts the language of Saks as the totality of what is  
4 necessary to be an accident.

5 Now, Saks involved a fellow who had some problem  
6 with his ear which was -- caused him harm because of the  
7 normal depressor -- pressurization of the -- of the  
8 cockpit. And in denying relief under the -- under the  
9 convention, the Court says, no, that wasn't an accident  
10 because the cockpits are pressurized all the time, and if  
11 it -- it has -- to be an accident, it has to be an  
12 unexpected or unusual event or happening. Okay.

13 Saks was not saying that that is a sufficient  
14 condition to be an accident. It was just saying that that  
15 is a necessary condition.

16 Now, let me -- let me give -- give you a  
17 hypothetical and you tell me why -- why this would be an  
18 accident. It seems to me the hypothetical closely  
19 parallels what happened here.

20 A man hurls himself into the sea intending to  
21 commit suicide. There is right nearby to where he hurled  
22 himself into the sea a dock with 30 people on it and 30  
23 life preservers at their feet, and not a single one of  
24 them picks up the life preserver and throws it to the  
25 drowning man. I don't know why. Maybe they're 30

1 libertarians who think people should be able to kill  
2 themselves. Whatever.

3 (Laughter.)

4 QUESTION: Certainly -- certainly an unexpected  
5 and unusual event. Who would imagine that with 30 life  
6 preservers within reach of the man, nobody would throw  
7 one.

8 Now, would anybody in his right mind say that  
9 this man died because of an accident? Of course, not.  
10 Unexpected and unanticipated is a -- a necessary condition  
11 for -- for saying that something was caused by an  
12 accident, but it's surely not a sufficient condition.

13 And it seems to me what happened in this plane  
14 is exactly like that. It is an event after the person was  
15 endangered. I -- I don't think that this person died  
16 because of an accident. It just doesn't make it. And  
17 that's the language of the convention, not Saks.

18 MR. FARR: Well, Justice Scalia, it seems to me  
19 that -- that the point that you're making, which in one  
20 sense I think is a correct one, is that the language of --  
21 of article 17, if one looks at it in purely colloquial  
22 terms, may not exactly correspond with the definition in  
23 Saks. But the language in article 17 isn't used -- the  
24 term accident isn't used purely in the colloquial sense.  
25 What we know from the context of the convention as a whole

1 and the liability system as a whole and from Saks is that  
2 sometimes it actually captures less than the colloquial  
3 sense of the term accident, sometimes it's more.

4 For example, the mere fact that somebody has a  
5 heart attack typically would be, in the colloquial sense,  
6 thought of as an accident. But we've learned from Saks  
7 that it is not itself going to be considered the accident  
8 because of the context of article 17 and the -- the  
9 language about accidents causing death or bodily injury.

10 By the same token, the deliberate refusal to  
11 help somebody, as the Chief Justice pointed out in his --  
12 his earlier question I think, is -- is normally, in  
13 colloquial terms, not thought of as an accident. It's not  
14 inadvertent. It's deliberate. But we know under article  
15 17 that deliberate conduct can, in fact, be an accident.  
16 If a flight attendant strikes a passenger in the face or  
17 throws coffee on the passenger in a fit of rage, that is  
18 an accident for purposes of article 17.

19 QUESTION: I'm willing to say that negligent  
20 conduct such as occurred here can be an accident. Of  
21 course, it can. If -- if the flight attendant spills some  
22 hot liquid on the passenger causing the passenger to be  
23 scalded, of course, that -- that's an accident.

24 MR. FARR: Well, Justice Scalia --

25 QUESTION: That fits the normal -- the normal

1 concept of accident.

2 MR. FARR: Of course, but -- but --

3 QUESTION: What happened here does not fit the  
4 normal description of accident.

5 MR. FARR: But my example is not a -- an  
6 accidental spilling. I'm -- I'm actually talking about it  
7 just to try to get at the colloquial sense, which I think  
8 is what disturbs you, that -- that if -- if in fact the --  
9 the flight attendant purposely throws the coffee on the  
10 passenger, just become irritated with the passenger, that  
11 would not normally be thought of as an accident, if you're  
12 asking people around the coffee shop whether there's been  
13 an accident.

14 But in terms of article 17, it is an accident  
15 because we know article 17 covers instances of willful  
16 misconduct. Article 17 is the gateway by which you get to  
17 any liability, and willful misconduct includes certainly  
18 the kinds of -- of things that I'm talking about,  
19 deliberate conduct.

20 QUESTION: Can this be said to be that kind of  
21 conduct where it's contrary to the policy of the airline?

22 MR. FARR: Yes, it can, Justice O'Connor. I  
23 mean, one of the things that's a little bit curious in --  
24 in tying the two questions together with Justice Scalia's  
25 question, this is a -- this is an incident which in fact



1 is to some extent intentional.

2 QUESTION: Yes.

3 MR. FARR: I mean, the -- it was not inadvertent  
4 that -- that the passenger was left in his seat. For  
5 example, just -- just to take a different, slightly  
6 changed analogy, if in fact the passenger had -- had asked  
7 to be moved in -- out of the vicinity of the smoke, and  
8 the flight attendant had said, let me wait until everybody  
9 is seated, I'll come back and get you in half an hour, and  
10 she forgot to do that, that would actually in colloquial  
11 terms seem more like an accident. Somehow negligently she  
12 forgot to come back. But in fact, in this particular  
13 case, she was asked three times and knowing in fact what  
14 she was doing, she said, no, I'm not going to move you.

15 QUESTION: What if she -- what if she'd been  
16 asked to move him, and she said I'll be back, and then  
17 another passenger gets very ill and she has to take care  
18 of him right away, and then the facts are the same.  
19 Accident there?

20 MR. FARR: The question then I think -- the --  
21 the proper way to answer that, Justice Kennedy, is to look  
22 at what would happen in the normal flight under the normal  
23 circumstances. Obviously, under the circumstances we had  
24 here, it's unusual and unexpected that she didn't move  
25 him. If in fact the reason was that there was some other

1 enormous problem on the plane and all of the flight  
2 attendants had to deal with that particular problem, then  
3 it seems to me the -- the action here would not be unusual  
4 and unexpected.

5 QUESTION: Well, that's --

6 QUESTION: Your -- you stated in your opening  
7 that the airline's conduct here was contrary to industry  
8 policy, and I think Justice O'Connor premised an earlier  
9 question on saying it was against the policy of -- of this  
10 particular airline. Spell that out a little, will you?  
11 What was the policy of -- of the airline and why did this  
12 action violate it?

13 MR. FARR: The policy of the airline and the  
14 policy generally, because I think they're in this case the  
15 same --

16 QUESTION: They're the same.

17 MR. FARR: -- was when a passenger requests a  
18 move for medical reasons, that the policy is to  
19 accommodate that request if it's possible to do so. And  
20 it was possible here because there were empty seats in the  
21 coach cabin, so we don't have to get into the complicated  
22 questions of whether you have to move someone to first  
23 class or to -- to alleviate the problem.

24 QUESTION: Would -- would it have been any more  
25 or less of an accident if that practice had not prevailed

1 in the industry?

2 MR. FARR: I think it's possible that it would.  
3 I mean, I -- our position is not that essentially the  
4 industry can give itself immunity by lowering its  
5 standards so much that -- that acts that -- that clearly  
6 are unusual, but nonetheless within the -- the industry  
7 standard are -- are immune from liability. But I think  
8 the general idea is in trying to evaluate things that  
9 aren't obviously accidents, we have to have some sort of  
10 benchmark to judge whether what's happened is unusual.  
11 The natural place is to look -- is -- is at the industry  
12 practice. And if in fact what they've done is consistent  
13 with industry practice, I would think in the usual case  
14 certainly that would suggest there hasn't been an unusual  
15 event.

16 QUESTION: Well, but it was unusual here.

17 MR. FARR: Absolutely.

18 QUESTION: So why isn't this an accident in the  
19 same sense that having an attendant throw hot coffee on a  
20 passenger would be?

21 MR. FARR: It is.

22 QUESTION: Supposing the airline's defense to  
23 throwing hot coffee on the passenger said our stewardesses  
24 do that all the time.

25 (Laughter.)

1           QUESTION: There's unexpected about it.

2           MR. FARR: I mean, the -- the fact is as I say,  
3 that I don't think that necessarily having a very low  
4 standard in the company itself or in the industry will, in  
5 fact, give you immunity, although I have to say I think  
6 that in fact that's an unlikely thing to happen because  
7 when we talk about the Warsaw Convention, there's a  
8 natural --

9           QUESTION: Mr. Farr, can I interrupt for a  
10 second? It seems to me that in the question of whether  
11 you move a passenger or not, you could have a situation  
12 which for security reasons, as they have around  
13 Washington, every passenger must remain in his or her --  
14 her seat for 500 miles or 30 minutes or so, and refusal to  
15 move during that period could not possibly be an accident.

16           MR. FARR: That's correct, Justice Stevens. I  
17 think -- but -- but the analysis would be the same. I  
18 mean, one of the instructions that Saks gives, I think  
19 correctly, is that you have to look at all the  
20 circumstances. What is unusual or unexpected under  
21 certain circumstances would not be unusual or expected --  
22 unexpected under other circumstances like the one --

23           QUESTION: What -- what role does fault play?  
24 It -- it seemed to me, as I was reading the Ninth Circuit  
25 opinion in Saks, that negligence is probably not a

1 requisite. I don't know if that makes it necessary for us  
2 to send it back. Suppose we think that's true. Would we  
3 send it back to the court of appeals and say, no, no,  
4 negligence is -- is not the standard, go ahead and find  
5 fault on their -- or whether or not there's an accident  
6 under some other standard?

7 MR. FARR: Justice Kennedy, I -- I don't think  
8 that's necessary. I mean, what the Ninth Circuit  
9 basically said was this is an unusual or unexpected event  
10 under Saks because it violates industry policies, industry  
11 standards, the company policy, and particularly given the  
12 nature of the request. If the Ninth Circuit had stopped  
13 there, it seems to me that their decision would be  
14 absolutely correct.

15 QUESTION: Well, it didn't. It went on and got  
16 a bunch of negligence language in there.

17 MR. FARR: Well, it's the following sentence  
18 that obviously raises at least some questions. And I  
19 should say I'm not sure that -- that language in itself  
20 should be as troubling as it perhaps appears to some  
21 because the -- the situations that -- that the court  
22 describes there very often will be, it seems to me,  
23 unusual or unexpected situations.

24 But nonetheless, it seems to me that -- that  
25 following the adage that the Court sits to review

1 judgments and not opinions, that the Court can simply say,  
2 as we -- we suggest would be sufficient, that you do have  
3 an unusual and unexpected event when you fail to help a  
4 passenger in violation of the standard industry practice.

5 Now, if the standard industry practice would be  
6 not to help a passenger under certain circumstances and  
7 the claim is still made that it's unusual or unexpected,  
8 one would need another benchmark for reference, but the  
9 Court doesn't need to reach that in this case.

10 Now, I would like to -- to also point out that  
11 in -- in -- when we're talking about the language of -- of  
12 article 17, while I think it's -- it's proper to -- to  
13 focus on the language itself and discuss it in -- in the  
14 context of Saks, that it's also I think proper to look at  
15 the context of the convention as a whole and whether, in  
16 fact, competing interpretations of the term accident would  
17 lead to absurd consequences.

18 Here I think if in fact the definition or the  
19 application of the definition that Olympic tries to -- to  
20 urge on the Court is accepted, that one is going to find  
21 that -- that this convention, which is intended to be the  
22 exclusive means of remedy for passengers who suffer death  
23 or bodily injury on an international flight, is -- is  
24 going to have essentially a hole in it where it doesn't  
25 cover situations even, as in this case, whether it's

1 willful misconduct by the airline crew that causes the  
2 injury.

3           And the focus that -- you know, in terms of  
4 whether that is a reasonable understanding to attribute to  
5 the parties to the convention under the circumstances, it  
6 seems to me when you -- when you say a positive act would  
7 be an accident, an omission that would cause an accident  
8 would be -- you know, would -- would involve an accident,  
9 but there's liability whatsoever for situations in which  
10 the -- the conduct itself is the contributing factor, the  
11 failure to do something is the -- is a strong contributing  
12 factor, doesn't really make any reasonable sense as a  
13 construction, and particularly because one of the things  
14 that the -- the parties must have understood is that  
15 during the time that the passenger is -- is covered by  
16 article 17, if you will, from the time of embarkation to  
17 the time of disembarkation, the passenger is largely in  
18 the control of the airline. The airline determines where  
19 the passenger sits. So the passenger's opportunities to  
20 engage in self-help are greatly reduced.

21           And in that situation, the idea that the -- that  
22 the parties thought that airlines could simply say we have  
23 passengers on our plane who need our help for medical  
24 reasons, and we're not going to provide any help  
25 whatsoever and that either causes greater injury -- causes

1 injury in the first place, causes greater injury, or in an  
2 unhappy case like this one, actually causes a death, their  
3 theory would say there's still no liability. And it would  
4 seem to me you would need a very, very clear indication  
5 from the text, which doesn't exist here, to reach that  
6 result.

7 QUESTION: Well, what if someone suffered, say,  
8 a heart attack on the plane and it was 3 hours from its  
9 destination and the doctor there said, you know, you've  
10 really got to -- in -- in order to avoid this guy probably  
11 dying, you're going to have to land somewhere en route?  
12 Now, would an airline be obligated to do that in order to  
13 avoid this sort of accident?

14 MR. FARR: It depends on the circumstances, but  
15 I think the general industry practice would be, in fact,  
16 that an airline would be -- would -- would normally divert  
17 to a nearer airport in fact to -- to save the -- the  
18 passenger from death or from much more severe injury.

19 That in a sense is the Krys case, the Eleventh  
20 Circuit case, that Olympic says is in conflict with the  
21 decision in this case. That was a case in which the  
22 Eleventh Circuit said, well, the -- the failure to divert,  
23 which it -- it was agreed would -- would have made a  
24 significant difference to the passenger's health, was not  
25 unusual because the plane just did the normal thing. It



1 just flew to its regular destination. But the problem  
2 with Krys is that if you look at all the circumstances, as  
3 Saks says, it's not the normal thing just to fly on to  
4 your intended destination when a passenger has had a heart  
5 attack and the medical indication --

6 QUESTION: Well, then -- then you're saying  
7 basically it depends on airline practice whether something  
8 is expected or unexpected and whether it's the normal  
9 practice.

10 MR. FARR: In this context. I mean, obviously,  
11 sometimes it's -- it's -- if -- if the context is the --  
12 the failure to help a passenger in -- in medical distress,  
13 then it seems to me that the usual practice of -- of the  
14 airline or the industry in general is -- is the proper  
15 benchmark, at least initially, for determining whether  
16 something is usual or unusual.

17 Now, obviously, there are other kinds of  
18 accidents, crashes and hijackings and all, where -- where  
19 common knowledge tells you what happened is unusual, but  
20 where common knowledge doesn't necessarily tell you the  
21 answer, then it does seem that reference to industry  
22 standards is a useful benchmark.

23 QUESTION: Would you comment on the distinction  
24 between an event and an accident?

25 MR. FARR: Well, the event is under -- under

1 Saks -- I mean, the difference is that an accident has to  
2 be an unusual event, that not every event is an accident.  
3 You have to demonstrate that it's unusual, and -- and much  
4 of what we've talked about this morning, obviously, is --  
5 is why this would be unusual by reference to industry  
6 standards. But an event, if one looks at a dictionary  
7 definition, is simply something that happened on the  
8 plane.

9 QUESTION: I think it would affect the liability  
10 for loss of baggage and so forth. That's triggered by an  
11 event, as I understand it.

12 MR. FARR: That's correct. It is now. It was  
13 at one time triggered by an occurrence, and under the 1999  
14 Montreal Convention it's triggered by an event. Yes.

15 QUESTION: Do you think the Abramson case in the  
16 Third Circuit was properly decided?

17 MR. FARR: I don't -- I am not sure the result  
18 was wrong. I don't think the approach was correct. I  
19 think the court should have asked what the usual industry  
20 practice would have been in that case, and if the usual  
21 industry practice would have been to make an accommodation  
22 along the lines that -- that the passenger requested, then  
23 I think that might have well have been an accident. I  
24 think it's a -- it's a difficult question as to whether  
25 that would have been true because that particular

1 passenger needed to be moved into first class, needed two  
2 first class seats, and in fact part of the solution was he  
3 was perhaps going to introduce self-induced vomiting as a  
4 cure, which obviously would affect other passengers in the  
5 cabin. So, you know, on the facts, one ultimately might  
6 have said -- the -- the judgment that was made there  
7 actually comported with -- with the usual industry  
8 standards. However, we don't know the answer because the  
9 Third Circuit didn't ask the right question.

10 QUESTION: But you do think the Eleventh Circuit  
11 Krys case was wrong in both reasoning and result.

12 MR. FARR: Well, Krys -- we have an additional  
13 piece of information because the court went on to decide  
14 the case. This was pre Tseng. So it actually decided the  
15 case as a common law negligence case, and when it did so,  
16 it found that what the airline had done by not diverting  
17 in that particular case was a violation of industry  
18 standards. So in that case I think what should have  
19 happened in Krys is that the court should have made that  
20 inquiry as part of the Warsaw Convention analysis, and if  
21 it had done so in fact, it would have limited the recovery  
22 in Krys, which was many millions of dollars, to the limits  
23 of the Warsaw Convention, supplemented by the agreements.

24 If the Court has no further questions, thank  
25 you.

1 QUESTION: Thank you, Mr. Farr.

2 Ms. McDowell, we'll hear from you.

3 ORAL ARGUMENT OF BARBARA B. McDOWELL

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

6 MS. McDOWELL: Mr. Chief Justice, and may it  
7 please the Court:

8 A flight attendant's refusal to assist an ill  
9 passenger can amount to an accident within the meaning of  
10 the Warsaw Convention. The analysis focuses on whether  
11 such conduct is, objectively speaking, unusual or  
12 unexpected, taking into account the ordinary practices in  
13 the industry and other indicia of what would be expected  
14 in the circumstances.

15 At a minimum it's reasonable to construe the  
16 convention's term accident, as the United States construes  
17 it, to encompass the aberrant conduct of the flight crew,  
18 and this Court has ordinarily accorded weight to the  
19 United States' reasonable construction of treaties to  
20 which it is a party.

21 Our reading of the term accident comports with  
22 the text structure and purposes of the convention. The  
23 term is a broad and inclusive one. It's not confined to  
24 crashes or explosions or equipment failures. As the Court  
25 recognized in Saks, it can encompass a wide array of

1 unusual and unexpected events external to the passenger  
2 potentially --

3 QUESTION: Ms. McDowell --

4 MS. McDOWELL: Yes.

5 QUESTION: -- assuming that it could have  
6 happened somehow in an airline context, would you say that  
7 Justice Scalia's hypothetical was an accident?

8 MS. McDOWELL: I think that a failure of an  
9 airline employee to come to the assistance of a passenger  
10 can, indeed, be an accident. One must recall that even  
11 under the common law, common carriers such as airlines  
12 have been understood to have special obligations toward  
13 their passengers, not expansive obligations to act as  
14 physicians to them, but to provide reasonable first aid  
15 until they reach the destination. So I think that -- that  
16 this particular context is -- is quite different from the  
17 context when one is dealing with just a bystander.

18 And I think under the common law as well, there  
19 have been other situations that might well be viewed as  
20 accidents that involved omissions when one is under a duty  
21 to act.

22 QUESTION: Okay. Let's say it wasn't a  
23 bystander. Let's say that, you know, they were -- they  
24 were relatives. They're the parents of -- of the person  
25 who jumped. You still wouldn't call that an accident,

1 would you? Does it have anything to do with -- with  
2 whether there's a duty or not? Some States do impose a  
3 duty on -- on bystanders, by the way, and let's assume  
4 that happens in a State where there is a duty.

5 MS. McDOWELL: Well, I think the inquiry here --

6 QUESTION: You still wouldn't call it an  
7 accident, I don't think. I mean, nobody would use the  
8 English language that way.

9 MS. McDOWELL: Well, I think here under the  
10 Warsaw Convention, the term accident has been understood  
11 to refer to an unusual, unexpected event.

12 QUESTION: Okay. But wouldn't you -- Warsaw  
13 Convention or not, wouldn't you call it an accident if the  
14 bystanders had put up an advertisement saying, swim with  
15 us for \$500, and then they stood there?

16 MS. McDOWELL: Yes, that would -- that would  
17 seem to be an accident.

18 QUESTION: That would get a little closer to our  
19 situation, wouldn't it? And that --

20 MS. McDOWELL: Yes, Your Honor.

21 QUESTION: -- and that might well be an  
22 accident.

23 MS. McDOWELL: Other circumstances -- medical  
24 malpractice cases, for example, might be those where an  
25 omission of some sort, because the doctor is under a duty

1 to act, could be viewed as an accident. For example, a  
2 failure to diagnose or to treat a particular medical  
3 condition until it's too late, if that was negligent,  
4 could be an accident.

5 QUESTION: Would -- would you say that we ought  
6 to write the opinion so that if there is negligence, that  
7 is evidence that normal airline practices were not being  
8 followed, and that's an accident? So that negligence is  
9 important to the analysis, not necessary, but it -- it can  
10 be helpful.

11 MS. McDOWELL: We would say that --

12 QUESTION: Or -- or should we write the opinion  
13 without talking about negligence?

14 MS. McDOWELL: We would say that the test is  
15 objective reasonableness which connotes some of the same  
16 concepts as negligence does in the common law.

17 QUESTION: Well, how does -- how does that  
18 differ from -- from the common law at all? If you say  
19 objective reasonableness, you're really just changing  
20 accident into common law negligence, aren't you?

21 MS. McDOWELL: Well, not in all circumstances  
22 because negligence isn't a necessary condition for an  
23 accident to occur. An accident could be an act of God and  
24 an event that did not involve negligence.

25 In this particular case, yes, the inquiry into

1 due care and the inquiry into an -- whether an accident  
2 has occurred are quite similar, but they're still focused  
3 on a different question. The accident inquiry asks  
4 whether something unusual or unexpected has happened, and  
5 the due care inquiry under article 20 asks whether the  
6 airline has acted with due care.

7 QUESTION: Well, negligence is a proxy for the  
8 fact that normal airline operating rules were not being  
9 followed.

10 MS. McDOWELL: Correct. Now, there may be  
11 isolated instances where although ordinary practices were  
12 being followed, those practices were so deficient that,  
13 nonetheless, an accident might be found. Normally,  
14 however, I think that -- that airlines' practices are to  
15 treat passengers reasonably. So I think that asking the  
16 reasonableness question would be the same as -- as seeing  
17 whether there was a deviation from standard policies and  
18 practices.

19 In construing the --

20 QUESTION: You know, I think there may be a  
21 public policy reason for construing accident contrary to  
22 its normal meaning to embrace in this context intentional  
23 acts whether by the airline employees or by pirates or --  
24 or terrorists or anybody else. But I don't -- I -- there  
25 -- there's a problem in my mind about interpreting it to



1 -- to embrace especially negligent omissions. It seems to  
2 me that's so far away from the normal meaning of accident  
3 that I don't -- I don't see the justification for doing it  
4 especially where it converts the convention into  
5 essentially what it was not intended to be, liability for  
6 negligence. That --

7 MS. McDOWELL: Well, of course, in this case we  
8 don't have a mere negligent omission. We have what the  
9 district court found to be willful misconduct. We also  
10 found -- this case also involves a -- a refusal to act, a  
11 series of refusals to act, and -- and provision of  
12 misinformation about whether the flight was completely  
13 full or not. So it's -- it's difficult to characterize  
14 this particular case --

15 QUESTION: No, the misinformation didn't bear  
16 any causality. I mean, the -- the -- what caused the  
17 injury here was -- was not the misrepresentation about the  
18 other seats. It was simply the failure to move the person  
19 to another seat, and that is totally an -- an omission, it  
20 seems to me.

21 MS. McDOWELL: I don't think it's properly  
22 characterized as an omission when there were three  
23 increasingly desperate requests to reseat the passenger  
24 and the flight attendant responded on each occasion --

25 QUESTION: I take it back. Three -- three

1 omissions.

2 MS. McDOWELL: I think that this sort of case  
3 can be contrasted, for example, from a -- a simple failure  
4 to warn case where the question is whether an airline  
5 should have warned about a particular medical condition  
6 that a passenger might have in response to ordinary  
7 flight. This seems to involve much more. Certainly Lord  
8 Phillips in the English court of appeals thought that this  
9 case involved much more than -- than just a failure to  
10 act.

11 The drafters of the Warsaw Convention certainly  
12 didn't intend that airlines would be insurers for any harm  
13 that befell a passenger during flight. They did intend,  
14 however, that airlines would be held liable when their own  
15 fault caused a passenger's death or bodily injury.  
16 Indeed, they eliminated the caps on damages in cases when  
17 that fault rose to the level of willful misconduct. This  
18 would seem doubtful that the drafters intended simply by  
19 their choice of the term accident to exempt airlines  
20 entirely from liability in cases where passengers died or  
21 suffered bodily injury because of the airline's fault,  
22 including willful misconduct in this case.

23 QUESTION: Well, is airline's fault even  
24 required? Supposing that before the plane took off, there  
25 was a big fire in the area and smoke filled the -- filled

1 the aircraft while it was on the runway and then he died  
2 from that smoke, would that be an accident?

3 MS. McDOWELL: It could well be an accident,  
4 Your Honor. It might not be an accident for which  
5 liability would -- would be properly --

6 QUESTION: Why wouldn't it be?

7 QUESTION: There's going to be an accident  
8 within the meaning of the convention is what I'm asking  
9 you.

10 MS. McDOWELL: Yes, it probably would.

11 QUESTION: So then the smoke doesn't have -- the  
12 -- the -- whatever the accidental cause is, it doesn't  
13 have to be fault of the airline.

14 MS. McDOWELL: That's correct because the  
15 airlines have the opportunity under article 20 of the  
16 convention to come back and say that we cannot be held  
17 responsible for this accident because we did not act  
18 negligently.

19 The understanding --

20 QUESTION: I thought they had to show more than  
21 that. I thought they had to show that they did everything  
22 possible to prevent -- to prevent the --

23 MS. McDOWELL: Well, the term in the treaty is  
24 all necessary measures.

25 QUESTION: Yes.

1 MS. McDOWELL: But it's been construed to mean  
2 all reasonable measures. So it's essentially been  
3 understood as a -- a due care defense. And that's  
4 reinforced in the Montreal Convention, the new convention  
5 that has just come into force, that -- that uses the term  
6 negligence in its own words.

7 The understanding that the accident requirement  
8 can be satisfied in cases like this one serves the  
9 convention's purpose of balancing the interests of air  
10 carriers and passengers. Such cases do not pose a threat  
11 of particularly expansive liability to airlines. Cases  
12 such as this one where air carriers do something that is  
13 unusual and unexpected and thereby cause a passenger's  
14 death or bodily injury can be expected to remain  
15 relatively few under the convention, as they are under  
16 U.S. domestic law. Imposing liability, meanwhile, enables  
17 passengers and their families to receive some measure of  
18 compensation for their injuries and provides appropriate  
19 incentives for airline supervision and -- and training of  
20 their personnel.

21 For all of these reasons, we'd ask the judgment  
22 of the court of appeals be affirmed.

23 QUESTION: Thank you, Ms. McDowell.

24 Mr. Harakas, you have 3 minutes remaining.

25 REBUTTAL ARGUMENT OF ANDREW J. HARAKAS

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ON BEHALF OF THE PETITIONER

MR. HARAKAS: Mr. Chief Justice, I think when you -- when you look at the arguments that were made both by the respondents and the Solicitor General, it all comes back to the issue of negligence, wanting to equate an accident with negligence.

The Warsaw Convention wasn't an all-encompassing treaty. There were certain holes left in the convention where there wasn't going to be recovery. For example, if there's no bodily injury, there's no recovery under the Warsaw Convention, as set forth by the Floyd decision, no matter, let's say, how egregious the air carrier's conduct may have been. It set forth certain things, and the convention wanted to define the liability based on the -- by using that term accident not making reference to various common law notions.

I think one of the problems that we're seeing is that confusing what is the accident -- and that's why I always come back to the injury-producing event. In the hijacking situation, for example, the accident there isn't the failure of the airline to conduct proper screening and allowing the hijackers to come on board the aircraft. The accident is those hijackers get on the -- on the airplane and they injure a passenger. And that -- the injury itself is the accident. Just like in the smoke example,

1 if there was a fire someplace and the cabin filled up with  
2 smoke, the smoke itself injuring the passenger is the  
3 accident. Why the smoke got there is completely  
4 irrelevant.

5           So when you -- when you start injecting the  
6 whole concepts of negligence, I think you upset the whole  
7 balance of the convention, and -- and one of the principal  
8 goals of the convention was to have a uniformity and to  
9 limit the liability of the carrier. In fact, the Montreal  
10 Convention of 1999, which just -- which just entered into  
11 force last week here in the United States, retained the  
12 term accident. The issue of whether the carrier should be  
13 liable for the state of the health of the passenger has  
14 always been a very special and unique issue in the context  
15 of the convention's history. Post-ratification conduct  
16 from 1945 all the way through the -- all the way to the --  
17 the Montreal Convention of 1999, the contracting states  
18 were very careful and very reluctant to make the carriers  
19 liable for injuries arising out of their -- out of the  
20 state of health of the passenger.

21           And the -- with respect to the policy arguments  
22 where they say -- where the respondents and Solicitor  
23 General say that the -- there are certainly policy reasons  
24 should be considered in weighing in favor of the  
25 passengers in this instance, I think when you look to --

1 you have to apply the strict terms of the convention. And  
2 each time this Court has been confronted with similar  
3 policy arguments, they have been rejected. In Saks, the  
4 -- the passenger was left without a remedy because they  
5 couldn't -- because the passenger couldn't satisfy the --  
6 the accident condition precedent. The same thing in  
7 Floyd. There they couldn't satisfy the bodily injury  
8 requirement. And in Tseng, where the -- there was no  
9 remedy allowed under State law when they couldn't satisfy  
10 the accident or the bodily injury conditions precedent.

11 Focusing on what the injury-producing event and  
12 whether that event is unusual, unexpected, and external to  
13 the passenger -- thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Harakas.

16 The case is submitted.

17 (Whereupon, at 12:04 p.m., the case in the  
18 above-entitled matter was submitted.)

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